ORS 197.352 (BALLOT MEASURE 37) CLAIM FOR COMPENSATION

OREGON DEPARTMENT OF LAND CONSERVATION AND DEVELOPMENT
Amended Final Staff Report and Recommendation

December 19, 2006

STATE CLAIM NUMBER:	M129515
NAME OF CLAIMANT:	Cathy Millis
MAILING ADDRESS:	18600 NW Sellers Road Banks, Oregon 97106
PROPERTY IDENTIFICATION:	Township 4S, Range 2W, Section 6 Tax lot 100 Township 3S, Range 2W, Section 31 Tax lots 800 and 1000 Marion County
OTHER CONTACT INFORMATION:	Michael G. Gunn, Attorney PO Box 1046 Newberg, Oregon 97132
DATE RECEIVED BY DAS:	June 15, 2006
180-DAY DEADLINE:	December 12, 2006

I. SUMMARY OF CLAIM

The claimant, Cathy Millis, seeks compensation in the amount of $13,550,000 for the reduction in fair market value as a result of land use regulations that are alleged to restrict the use of certain private real property. The claimant desires compensation or the right to divide the 200.16-acre subject property into two-acre parcels and to develop a dwelling on each parcel.[1] The subject property is located at the 3700 block of Ray Bell Road, near St. Paul, in Marion County. (See claim.)

II. SUMMARY OF STAFF RECOMMENDATION

Based on the findings and conclusions set forth below, the Department of Land Conservation and Development (the department) has determined that the claim is not valid because the claimant's

[1] The subject property includes three tax lots. Tax lot 100 consists of 80.16 acres, tax lot 800 consists of 40 acres, and tax lot 1000 consists of 80 acres.

desired use of the subject property was prohibited under the laws in effect when the claimant acquired the property in 2005. (See the complete recommendation in Section VI. of this report.)

III. COMMENTS ON THE CLAIM

Comments Received

On October 16, 2006, pursuant to Oregon Administrative Rule (OAR) 125-145-0080, the Oregon Department of Administrative Services (DAS) provided written notice to the owners of surrounding properties. According to DAS, no written comments were received in response to the 10-day notice.

IV. TIMELINESS OF CLAIM

Requirement

ORS 197.352(5) requires that a written demand for compensation be made:

1. For claims arising from land use regulations enacted prior to the effective date of Measure 37 (December 2, 2004), within two years of that effective date, or the date the public entity applies the land use regulation as an approval criteria to an application submitted by the owner, whichever is later; or

2. For claims arising from land use regulations enacted after the effective date of Measure 37 (December 2, 2004), within two years of the enactment of the land use regulation, or the date the owner of the property submits a land use application in which the land use regulation is an approval criteria, whichever is later.

Findings of Fact

This claim was submitted to DAS on June 15, 2006, for processing under OAR 125, division 145. The claim identifies Marion County's comprehensive plan and zoning ordinances; ORS 215; Goals 3 and 4; and provisions of OAR 660, division 4, as the basis for the claim. Only laws that were enacted or adopted prior to December 2, 2004, are the basis for this claim.

Conclusions

The claim has been submitted within two years of the effective date of Measure 37 (December 2, 2004), based on land use regulations enacted or adopted prior to December 2, 2004, and is therefore timely filed.

V. ANALYSIS OF CLAIM

1. Ownership

ORS 197.352 provides for payment of compensation or relief from specific laws for "owners" as that term is defined in ORS 197.352. ORS 197.352(11)(C) defines "owner" as "the present owner of the property, or any interest therein."

Findings of Fact

The claimant, Cathy Millis, acquired the subject property on May 18, 2005, as reflected by a resignation of trustee dated May 18, 2005, and a certification of successor trustee dated June 14, 2006, both included with the claim.[2] The claimant is the successor trustee under the Robert C. Niehus Trust and the Viola M. Niehus Trust, both established on November 6, 2000.[3] The Marion County Assessor's Office confirms the claimant's current ownership of the subject property.

Conclusions

The claimant, Cathy Millis, is an "owner" of the subject property as that term is defined by ORS 197.352(11)(C), as of May 18, 2005.

2. The Laws That are the Basis for This Claim

In order to establish a valid claim, ORS 197.352(1) requires, in part, that a law must restrict the claimant's use of private real property in a manner that reduces the fair market value of the property relative to how the property could have been used at the time the claimant or a family member acquired the property.

Findings of Fact

The claim indicates that the claimant desires to divide the 200.16-acre subject property into two-acre parcels and to develop a dwelling on each parcel, and that the desired use is not allowed under current land use regulations.

The claim is based generally on the applicable provisions of state law that require Exclusive Farm Use (EFU) zoning and restrict uses on EFU-zoned land. The claimant's property is zoned EFU by Marion County, as required by Goal 3, in accordance with ORS 215 and OAR 660, division 33, because the claimant's property is "agricultural land" as defined by Goal 3.[4] Goal 3

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[2] As stated on the claim form signed and filed by Cathy Millis on June 14, 2006, the claimant is "Cathy Millis, Trustee of the Robert H. Niehus Trsut dated November 6, 2000" and "Cathy Millis, Trustee of the Viola Niehus Trust dated November 6, 2000." The claim does not discuss family ownership and does not assert or establish an family ownership between Cathy Millis and Robert or Viola Niehus. In response to the draft staff report, on November 22, 2006, the claimant's attorney objected to the analysis in the report, asserting that Ms. Millis is not the claimant but rather that the two trusts of which she is trustee are the claimants. The attorney asserts the claims must be evaluated based on the date Robert Niehus and Viola Niehus acquired the property in 1961 and 1978. According to the attorney, Robert Niehus is deceased and Viola Niehus is still living. A trust document cannot own real property. Ms. Millis acquired an interest in the trust property when she became successor trustee of both trusts in 2005. While Ms. Niehus still has an ownership interest in the property of the revocable trust over which she is grantor, she is not listed as a claimant on this claim for compensation and the claim does not otherwise assert that she is a claimant. If Ms. Niehus wishes to make a claim under ORS 197.352, she may do so. However, the department cannot amend a claim at this stage to add a claimant who was not listed in the original claim.

[3] The claimant has not asserted that she acquired the property from a family member or provided documentation to establish a family relationship. Absent evidence to establish that the claimant acquired the property from a family member, the department cannot evaluate the claim for compensation based on family ownership.

[4] The claimant's property is "agricultural land" because it contains Natural Resources Conservation Service Class I–IV soils.

became effective on January 25, 1975, and required that agricultural lands as defined by Goal 3 be zoned EFU pursuant to ORS 215.

Current land use regulations, particularly ORS 215.263, 215.284 and 215.780 and OAR 660, division 33, enacted or adopted pursuant to Goal 3, prohibit the division of EFU-zoned land into parcels less than 80 acres and establish standards for development of dwellings on existing or proposed parcels on that land.

ORS 215.780 establishes an 80-acre minimum size for the creation of new lots or parcels in EFU zones and became effective on November 4, 1993 (Chapter 792, Oregon Laws 1993). ORS 215.263 (2005 edition) establishes standards for the creation of new parcels for non-farm uses and dwellings allowed in an EFU zone.

OAR 660-033-0135 (applicable to farm dwellings) became effective on March 1, 1994, and interprets the statutory standard for a primary dwelling in an EFU zone under ORS 215.283(1)(f). OAR 660-033-0130(4) (applicable to non-farm dwellings) became effective on August 7, 1993, and was amended to comply with ORS 215.284(4) on March 1, 1994. The Commission subsequently adopted amendments to comply with House Bill 3326 (Chapter 704, Oregon Laws 2001, effective on January 1, 2002), which were effective on May 22, 2002. (See administrative rule history for OAR 660-033-0100, -0130 and -0135.)

Conclusions

The current zoning requirements, minimum lot size and dwelling standards established by Goal 3 and provisions applicable to land zoned EFU in ORS 215 and OAR 660, division 33, were all enacted or adopted before claimant, Cathy Millis, acquired the subject property on May 18, 2005. These land use regulations do not allow the claimant's desired division and development of the subject property. Laws enacted or adopted since the claimant acquired the subject property in 2005 do not restrict the claimant's desired use of the property relative to when the claimant acquired it in 2005.

3. Effect of Regulations on Fair Market Value

In order to establish a valid claim, ORS 197.352(1) requires that the land use regulation(s) (described in Section V.(2) of this report) must have "the effect of reducing the fair market value of the property, or any interest therein."

Findings of Fact

The claim includes an estimate of $13,550,000 as the reduction in the subject property's fair market value due to the regulations that restrict the claimant's desired use of the property. This amount is based on the claimant's assessment of the subject property's value.

Conclusions

As explained in Section V.(1) of this report, the claimant is Cathy Millis who acquired the subject property on May 18, 2005. No state laws enacted or adopted since the claimant acquired the subject property restrict the use of the property relative to the uses allowed in 2005.

Therefore, the fair market value of the subject property has not been reduced as a result of land use regulations enforced by the Land Use Conservation and Development Commission (the Commission) or the department.

4. Exemptions Under ORS 197.352(3)

ORS 197.352 does not apply to certain land use regulations. In addition, under ORS 197.352(3), certain types of laws are exempt from ORS 197.352.

Findings of Fact

The claim is based on state land use regulations that restrict the use of the subject property, including applicable provisions of Goal 3, ORS 215 and OAR 660, division 33, which Marion County has implemented through its EFU zone. As set forth in Section V.(2) of this report, the state land use regulations restricting the claimant's desired use of the subject property were in effect when the claimant acquired the property in 2005.

Conclusions

All of the state land use regulations that restrict the claimant's desired use of the subject property were in effect when the claimant acquired the property. Therefore, these state land use regulations are exempt under ORS 197.352(3)(E), which exempts laws in effect when the claimant acquired the subject property.

VI. FORM OF RELIEF

ORS 197.352(1) provides for payment of compensation to an owner of private real property if the Commission or the department has enforced one or more laws that restrict the use of the property in a manner that reduces its fair market value. In lieu of compensation, the department may choose to not apply the law in order to allow the present owner to carry out a use of the property permitted at the time the present owner acquired the property. The Commission, by rule, has directed that if the department determines a claim is valid, the Director of the department must provide only non-monetary relief unless and until funds are appropriated by the legislature to pay claims.

Findings of Fact

Based on the findings and conclusions set forth in this report, laws enforced by the Commission or the department do not restrict the claimant's desired use of the subject property relative to what was permitted when the claimant acquired it in 2005 and do not reduce the fair market value of the property. All state laws restricting the use of the subject property are exempt under ORS 197.352(3)(E).

Conclusions

Based on the record and the foregoing findings and conclusions, the claimant has not established that she is entitled to relief under ORS 197.352(1) as a result of land use regulations enforced by

the Commission or the department. Therefore, the department recommends that this claim be denied.

VII. COMMENTS ON THE DRAFT STAFF REPORT

The department issued its draft staff report on this claim on November 16, 2006. OAR 125-145-0100(3), provided an opportunity for the claimant or the claimant's authorized agent and any third parties who submitted comments under OAR 125-145-0080 to submit written comments, evidence and information in response to the draft staff report and recommendation.