

BEFORE THE DEPARTMENT OF ADMINISTRATIVE SERVICES,
THE DEPARTMENT OF LAND CONSERVATION AND DEVELOPMENT OF
THE STATE OF OREGON

IN THE MATTER OF THE CLAIM FOR) FINAL ORDER
COMPENSATION UNDER ORS 197.352) CLAIM NO. M129802
(BALLOT MEASURE 37) OF)
Myron G. Heesacker and Mary H. Heesacker, CLAIMANTS)

Claimants: Myron G. Heesacker and Mary H. Heesacker (the Claimants)

Property: Township 2N, Range 4W, Section 4: tax lots 790, 800, 802 and 803
Township 2N, Range 4W, Section 9: tax lot 100
Washington County (the Property)

Claim: The demand for compensation and any supporting information received from the
Claimants by the State of Oregon (the Claim).

Claimants submitted the Claim to the State of Oregon under ORS 197.352. Under OAR 125-145-0010 *et seq.*, the Department of Administrative Services (DAS) referred the Claim to the Department of Land Conservation and Development (DLCD) as the regulating entity. This order is based on the record herein, including the Findings and Conclusions set forth in the Final Staff Report and Recommendation of DLCD (the DLCD Report) attached to and by this reference incorporated into this order.

ORDER

The Claim is denied for tax lot 790 as to laws administered by DLCD and the Land Conservation and Development Commission (LCDC) for the reasons set forth in the DLCD Report.

The Claim is approved as to laws administered by DLCD and the Land Conservation and Development Commission (LCDC) for the reasons set forth in the DLCD Report, and subject to the following terms:

1. In lieu of compensation under ORS 197.352, the State of Oregon will not apply the following laws to Myron and Mary Heesacker's division of tax lots 100, 800, 802 and 803 into five parcels or to their development of a dwelling on each resulting undeveloped parcel: applicable provisions of Goals 3 and 4, ORS 215 and OAR 660, divisions 6, and 33, enacted or adopted after each claimant acquired this portion of the subject property. These land use regulations will not apply to the claimants only to the extent necessary to allow them to use tax lots 100, 800, 802 and 803 for the use described in this report, and only to the extent that use was permitted when Myron Heesacker acquired them on December 5, 1955, and when Mary Heesacker acquired them on September 18, 1956.
2. The action by the State of Oregon provides the state's authorization to the claimants to use tax lots 100, 800, 802 and 803 for the use described in this report, subject to the standards in

effect on December 5, 1955, for Myron Heesacker and on September 18, 1956, for Mary Heesacker.

3. To the extent that any law, order, deed, agreement or other legally enforceable public or private requirement provides that tax lots 100, 800, 802 and 803 may not be used without a permit, license or other form of authorization or consent, the order will not authorize the use of the property unless the claimants first obtain that permit, license or other form of authorization or consent. Such requirements may include, but are not limited to: a building permit, a land use decision, a "permit" as defined in ORS 215.402 or 227.160, other permits or authorizations from local, state or federal agencies and restrictions on the use of tax lots 100, 800, 802 and 803 imposed by private parties. The department notes that there may not be legal access to tax lot 802. Nothing in this report authorizes such access.

4. Any use of tax lots 100, 800, 802 and 803 by the claimants under the terms of the order will remain subject to the following laws: (a) those laws not specified in (1) above; (b) any laws enacted or enforced by a public entity other than the Commission or the department; and (c) those laws not subject to ORS 197.352 including, without limitation, those laws exempted under ORS 197.352(3).

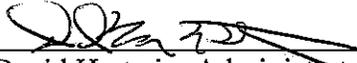
5. Without limiting the generality of the foregoing terms and conditions, in order for the claimants to use tax lots 100, 800, 802 and 803, it may be necessary for them to obtain a decision under ORS 197.352 from a city and/or county and/or metropolitan service district that enforces land use regulations applicable to the property. Nothing in this order relieves the claimants from the necessity of obtaining a decision under ORS 197.352 from a local public entity that has jurisdiction to enforce a land use regulation applicable to a use of tax lots 100, 800, 802 and 803 by the claimants.

This Order is entered by the Deputy Director of the DLCD as a final order of DLCD and the Land Conservation and Development Commission under ORS 197.352, OAR 660-002-0010(8), and OAR 125, division 145, and by the Administrator for the State Services Division of the DAS as a final order of DAS under ORS 197.352, OAR 125, division 145, and ORS 293.

FOR DLCD AND THE LAND
CONSERVATION AND
DEVELOPMENT COMMISSION:
Lane Shetterly, Director


Cora R. Parker, Deputy Director
DLCD
Dated this 25th day of January, 2007.

FOR the DEPARTMENT OF
ADMINISTRATIVE SERVICES:


David Hartwig, Administrator
DAS, State Services Division
Dated this 25th day of January, 2007.

NOTICE OF RIGHT TO APPEAL OR OTHER JUDICIAL RELIEF

You are entitled, or may be entitled, to judicial remedies including the following:

1. Judicial review under ORS 183.484: Judicial review under ORS 183.484 may be obtained by filing a petition for review within 60 days from the service of this order. A petition for judicial review under ORS 183.484 may be filed in the Circuit Court for Marion County or the Circuit Court in the county in which you reside.
2. A cause of action under ORS 197.352 (Measure 37 (2004)): If a land use regulation continues to apply to the subject property more than 180 days after the present owner of the property has made written demand for compensation under ORS 197.352, the present owner of the property, or any interest therein, shall have a cause of action in the circuit court in which the real property is located.

(Copies of the documents that comprise the record are available for review at the Department's office at 635 Capitol Street NE, Suite 150, Salem, Oregon 97301-2540)

FOR INFORMATION ONLY

The Oregon Department of Justice has advised the Department of Land Conservation and Development that "[i]f the current owner of the real property conveys the property before the new use allowed by the public entity is established, then the entitlement to relief will be lost."

ORS 197.352 (BALLOT MEASURE 37) CLAIM FOR COMPENSATION
OREGON DEPARTMENT OF LAND CONSERVATION AND DEVELOPMENT
Final Staff Report and Recommendation

January 25, 2007

STATE CLAIM NUMBER: M129802

NAMES OF CLAIMANTS: Myron G. Heesacker
Mary H. Heesacker

MAILING ADDRESS: 48951 NW Pongratz Road
Banks, Oregon 97106

PROPERTY IDENTIFICATION: Township 2N, Range 4W
Section 4: tax lots 790, 800, 802 and 803
Section 9: tax lot 100
Washington County

DATE RECEIVED BY DAS: August 3, 2006

180-DAY DEADLINE: January 30, 2007

I. SUMMARY OF CLAIM

The claimants, Myron and Mary Heesacker, seek compensation in the amount of \$800,000 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 claimants desire compensation or the right to divide the 65.01-acre subject property into five parcels and to develop a dwelling on each resulting undeveloped parcel.¹ The subject property is located on both sides of NW Pongratz Road approximately 1,550 feet west of the intersection with NW Tolke Road, near Banks, in Washington 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 valid in part. Department staff recommends that, in lieu of compensation, the requirements of the following state laws enforced by the Land Conservation and Development Commission (the Commission) or the department not apply to Myron and Mary Heesacker's division of tax lots 100, 800, 802 and 803 into five parcels and to their development of a dwelling on each resulting undeveloped parcel: applicable provisions of Statewide Planning Goals 3 (Agricultural Lands) and 4 (Forest Lands), ORS 215 and Oregon Administrative Rules (OAR) 660, divisions 6, and 33, enacted or adopted after each

¹ The subject property includes five tax lots. Tax lot 100 consists of 38.6 acres; tax lot 790 consists of 0.28 acre; tax lot 800 consists of 13.13 acres; tax lot 802 consists of 4.94 acres; and tax lot 803 consists of 8.06 acres.

claimant acquired this portion of the subject property. These laws will not apply to the claimants only to the extent necessary to allow them to use tax lots 100, 800, 802 and 803 for the use described in this report, and only to the extent that use was permitted when Myron Heesacker acquired them on December 5, 1955, and when Mary Heesacker acquired them on September 18, 1956.

The department has further determined that the claim is not valid as to tax lot 790 because the claimants' desired use of tax lot 790 was prohibited under the laws in effect when the claimants acquired it in 1996. (See the complete recommendation in Section VI. of this report.)

III. COMMENTS ON THE CLAIM

Comments Received

On December 11, 2006, pursuant to 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 August 3, 2006, for processing under OAR 125, division 145. The claim identifies Washington County's zoning 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

Claimant Myron Heesacker acquired tax lots 100, 800, 802 and 803 on December 5, 1955, as reflected by a warranty deed included with the claim. Claimant Mary Heesacker acquired tax lots 100, 800, 802 and 803 on September 18, 1956, as reflected by a warranty deed included with the claim. On May 2, 1996, the claimants acquired tax lot 790, as reflected by a quitclaim deed included with the claim. The Washington County Assessor’s Office confirms the claimants’ current ownership of the subject property.

Conclusions

The claimants, Myron and Mary Heesacker, are “owners” of the subject property as that term is defined by ORS 197.352(11)(C). Myron Heesacker has been an “owner” of tax lots 100, 800, 802 and 803 since December 5, 1955, and of tax lot 790 since May 2, 1996. Mary Heesacker has been an “owner” of tax lots 100, 800, 802 and 803 since September 18, 1956, and of tax lot 790 since May 2, 1996.

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 claimants’ 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 claimants or a family member acquired the property.

Findings of Fact

The claim indicates that the claimants desire to divide the 65.01-acre subject property into five parcels and to develop a dwelling on each resulting undeveloped parcel, and that the current zoning prohibits the desired use.

The claim is based generally on the applicable provisions of state law that require Exclusive Farm Use (EFU) and forest zoning and restrict uses on EFU- and forest-zoned lands.

Tax lots 100, 790, 800 and 803 are zoned Agriculture and Forest (AF-20) by Washington County as required by Goal 3, in accordance with ORS 215 and OAR 660, division 33, because this portion of the claimants’ property is “agricultural land” as defined by Goal 3.² Goal 3 became

² This portion of the claimants’ property is “agricultural land” because it contains Natural Resources Conservation Service Class I-IV soils.

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 215.213, 215.263 and 215.780 and OAR 660, division 33, enacted or adopted pursuant to Goal 3, prohibit the division of EFU-zoned land in marginal lands counties 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 in a marginal lands county under ORS 215.213. OAR 660-033-0130(4)(e) (applicable to non-farm dwellings in marginal lands counties) became effective on August 7, 1993. 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.)

Tax lot 802 is zoned Exclusive Forest and Conservation (EFC) by Washington County as required by Goal 4, in accordance with ORS 215 and OAR 660, division 6, because this portion of the claimants' property is "forest land" under Goal 4. Goal 4 became effective on January 25, 1975, and requires that forest land be zoned for forest use (see statutory and rule history under OAR 660-015-0000(4)). The forest land administrative rules (OAR 660, division 6) became effective on September 1, 1982, and ORS 215.705 to 215.755 and 215.780 became effective on November 4, 1993 (Chapter 792, Oregon Laws 1993). OAR 660-006-0026 and 660-006-0027 were amended on March 1, 1994, to implement those statutes.

Together, ORS 215.705 to 215.755 and 215.780 and OAR 660, division 6, enacted or adopted pursuant to Goal 4, prohibit the division of forest land into parcels less than 80 acres and establish standards for development of dwellings on existing or proposed parcels on those lands.

Myron Heesacker acquired tax lots 100, 800, 802 and 803 on December 5, 1955, and Mary Heesacker acquired tax lots 100, 800, 802 and 803 on September 18, 1956, prior to the adoption of the statewide planning goals and their implementing statutes and regulations.

Myron and Mary Heesacker acquired tax lot 790 on May 2, 1996, after the state land use regulations identified above were adopted or enacted.

Conclusions

The current zoning requirements, minimum lot size and dwelling standards established by applicable provisions of Goals 3 and 4, ORS 215 and OAR 660, divisions 6, and 33, were all enacted or adopted after the claimants acquired tax lots 100, 800, 802 and 803 in 1955 and 1956, and do not allow the desired division or residential development of this portion of the property. These laws restrict the use of this portion of the subject property relative to the uses allowed

when the claimants acquired it. Laws enacted or adopted since the claimants acquired tax lot 790 in 1996 do not restrict the claimants' desired use of the property relative to when the claimants acquired it in 1996.

This report addresses only those state laws that are identified in the claim, or that the department is certain apply to the subject property based on the use that the claimants have identified. There may be other laws that currently apply to the claimants' use of the subject property, and that may continue to apply to the claimants' use of the property, that have not been identified in the claim. In some cases, it will not be possible to know which laws apply to a use of the subject property until there is a specific proposal for that use. When the claimants seek a building or development permit to carry out a specific use, it may become evident that other state laws apply to that use.

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 \$800,000 as the reduction in the subject property's fair market value due to the regulations that restrict the claimants' desired use of the property. This amount is based on the claimants' assessment of the county's records for fair market values of similar properties in the surrounding area.

Conclusions

As explained in Section V.(1) of this report, the claimants are Myron Heesacker who acquired tax lots 100, 800, 802 and 803 on December 5, 1955, and tax lot 790 on May 2, 1996, and Mary Heesacker who acquired tax lots 100, 800, 802 and 803 on September 18, 1956, and tax lot 790 on May 2, 1996. No state laws enacted or adopted since the claimants acquired tax lot 790 restrict the use of the property relative to the uses allowed in 1996. Therefore, the fair market value of tax lot 790 has not been reduced as a result of land use regulations enforced by the Commission or the department. Under ORS 197.352, the claimants are due compensation for land use regulations that restrict the use of tax lots 100, 800, 802 and 803 and have the effect of reducing their fair market value. Based on the findings and conclusions in Section V.(2) of this report, laws enacted or adopted since the claimants acquired tax lots 100, 800, 802 and 803 restrict the claimants' desired use of this portion of the subject property. The claimants estimate that the effect of the regulations on the fair market value of the subject property is a reduction of \$800,000.

Without an appraisal or other documentation, it is not possible to substantiate the specific dollar amount by which the land use regulations have reduced the fair market value of the subject property. Nevertheless, based on the evidence in the record for this claim, the department determines that the fair market value of tax lots 100, 800, 802 and 803 has been reduced to some extent as a result of land use regulations enforced by 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 Goals 3 and 4, ORS 215 and OAR 660, divisions 6, and 33, which Washington County has implemented through its current AF-20 and EFC zones. All of these land use regulations were enacted or adopted after the claimants acquired tax lots 100, 800, 802 and 803.

The claim does not identify any state land use regulations enacted or adopted since the claimants acquired tax lot 790 that restrict the use of the property relative to what would have been allowed when they acquired it on May 2, 1996. As set forth in Section V.(2) of this report, the state land use regulations restricting the claimants' desired use of tax lot 790 were in effect when the claimants acquired it in 1996.

It appears that portions of the subject property are within the 100-year floodplain. Nothing in this report alters the application of state land use regulations restricting uses within a floodplain, including but not limited to, Goal 7 (Areas Subject to Natural Disasters and Hazards).

Conclusions

Without a specific development proposal for the subject property, it is not possible for the department to determine all the laws that may apply to a particular use of the property, or whether those laws may fall under one or more of the exemptions under ORS 197.352. It appears that none of the general statutory, goal and rule restrictions on division and development of tax lots 100, 800, 802 and 803 were in effect when the claimants acquired this portion of the subject property in 1955 and 1956. As a result, these laws are not exempt under ORS 197.352(3)(E). All of the state land use regulations that restrict the claimants' desired use of tax lot 790 were in effect when the claimants acquired it in 1996. Therefore, these state land use regulations are exempt under ORS 197.352(3)(E), which exempts laws in effect when the claimants acquired tax lot 790.

Laws in effect when the claimants acquired tax lots 100, 800, 802 and 803 are exempt under ORS 197.352(3)(E) and will continue to apply to the claimants' use of this portion of the subject property. There may be other laws that continue to apply to the claimants' use of tax lots 100, 800, 802 and 803 that have not been identified in the claim. In some cases, it will not be possible to know which laws apply to a use of tax lots 100, 800, 802 and 803 until there is a specific proposal for that use. When the claimants seek a building or development permit to carry out a specific use, it may become evident that other state laws apply to that use. In some cases, some of these laws may be exempt under ORS 197.352(3)(A) to (D).

This report addresses only those state laws that are identified in the claim, or that the department is certain apply to the subject property based on the use that the claimants have identified. Similarly, this report only addresses the exemptions provided for under ORS 197.352(3) that are

clearly applicable, given the information provided to the department in the claim. The claimants should be aware that the less information they have provided to the department in the claim, the greater the possibility that there may be additional laws that will later be determined to continue to apply to their use of 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 laws that restrict the use of the subject 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 subject 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 claimants' desired use of tax lot 790 relative to what was permitted when the claimants acquired it in 1996 and do not reduce its fair market value. All state laws restricting the use of tax lot 790 are exempt under ORS 197.352(3)(E). The department further finds that laws enforced by the Commission or the department restrict the claimants' desired use of tax lots 100, 800, 802 and 803. The claim asserts that existing state land use regulations enforced by the Commission or the department have the effect of reducing the fair market value of the subject property by \$800,000. However, because the claim does not provide an appraisal or other relevant evidence demonstrating that the land use regulations described in Section V.(2) reduce the fair market value of the subject property, a specific amount of compensation cannot be determined. In order to determine a specific amount of compensation due for this claim, it would also be necessary to verify whether or the extent to which the claimants' desired use of tax lots 100, 800, 802 and 803 was allowed under the standards in effect when they acquired this portion of the subject property. Nevertheless, based on the record for this claim, the department has determined that the laws on which the claim is based have reduced the fair market value of tax lots 100, 800, 802 and 803 to some extent.

No funds have been appropriated at this time for the payment of claims. In lieu of payment of compensation, ORS 197.352 authorizes the department to modify, remove or not apply all or parts of certain land use regulations to allow Myron and Mary Heesacker to use tax lots 100, 800, 802 and 803 for a use permitted at the time they each acquired them on December 5, 1955, for Myron Heesacker and on September 18, 1956, for Mary Heesacker.

Conclusions

Based on the record and the foregoing findings and conclusions, the claimants have not established that they are entitled to relief under ORS 197.352(1) for tax lot 790 as a result of land use regulations enforced by the Commission or the department. Therefore, the department

recommends that this claim be denied as to tax lot 790. The department further recommends that the claim be approved, subject to the following terms:

1. In lieu of compensation under ORS 197.352, the State of Oregon will not apply the following laws to Myron and Mary Heesacker's division of tax lots 100, 800, 802 and 803 into five parcels or to their development of a dwelling on each resulting undeveloped parcel: applicable provisions of Goals 3 and 4, ORS 215 and OAR 660, divisions 6, and 33, enacted or adopted after each claimant acquired this portion of the subject property. These land use regulations will not apply to the claimants only to the extent necessary to allow them to use tax lots 100, 800, 802 and 803 for the use described in this report, and only to the extent that use was permitted when Myron Heesacker acquired them on December 5, 1955, and when Mary Heesacker acquired them on September 18, 1956.
2. The action by the State of Oregon provides the state's authorization to the claimants to use tax lots 100, 800, 802 and 803 for the use described in this report, subject to the standards in effect on December 5, 1955, for Myron Heesacker and on September 18, 1956, for Mary Heesacker.
3. To the extent that any law, order, deed, agreement or other legally enforceable public or private requirement provides that tax lots 100, 800, 802 and 803 may not be used without a permit, license or other form of authorization or consent, the order will not authorize the use of the property unless the claimants first obtain that permit, license or other form of authorization or consent. Such requirements may include, but are not limited to: a building permit, a land use decision, a "permit" as defined in ORS 215.402 or 227.160, other permits or authorizations from local, state or federal agencies and restrictions on the use of tax lots 100, 800, 802 and 803 imposed by private parties. The department notes that there may not be legal access to tax lot 802. Nothing in this report authorizes such access.
4. Any use of tax lots 100, 800, 802 and 803 by the claimants under the terms of the order will remain subject to the following laws: (a) those laws not specified in (1) above; (b) any laws enacted or enforced by a public entity other than the Commission or the department; and (c) those laws not subject to ORS 197.352 including, without limitation, those laws exempted under ORS 197.352(3).
5. Without limiting the generality of the foregoing terms and conditions, in order for the claimants to use tax lots 100, 800, 802 and 803, it may be necessary for them to obtain a decision under ORS 197.352 from a city and/or county and/or metropolitan service district that enforces land use regulations applicable to the property. Nothing in this order relieves the claimants from the necessity of obtaining a decision under ORS 197.352 from a local public entity that has jurisdiction to enforce a land use regulation applicable to a use of tax lots 100, 800, 802 and 803 by the claimants.

VII. COMMENTS ON THE DRAFT STAFF REPORT

The department issued its draft staff report on this claim on January 4, 2007. OAR 125-145 0100(3), provided an opportunity for the claimants or the claimants' 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.