



Oregon

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June 28, 2007



To: Interested Persons

From: Lane Shetterly, Director

Re: Ballot Measure 37 (ORS 197.352) Claim Number M130677

Claimant: Cone Investment Limited Partnership

Enclosed, in regard to the above-referenced claim for compensation under Ballot Measure 37 (ORS 197.352), is the Final Staff Report and Recommendation of the Department of Land Conservation and Development, and the Final Order.

This Final Staff Report and Recommendation and the Final Order constitute the final decision on this claim. No further action will be taken on this matter.

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. M130677
(BALLOT MEASURE 37) OF)
Cone Investment Limited Partnership, CLAIMANTS)

Claimants: Cone Investment Limited Partnership (the Claimants)

Property: Township 18S, Range 3W, Section 23, Tax lot 100, Lane 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 as to laws administered by DLCD and the Land Conservation and Development Commission (LCDC) for the reasons set forth in the DLCD Report.


This Order is entered by the 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 chapter 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 chapter 125, division 145, and ORS chapter 293.

FOR DLCD AND THE LAND
CONSERVATION AND
DEVELOPMENT COMMISSION:



Lane Shetterly, Director
DLCD
Dated this 28th day of June, 2007.

FOR THE DEPARTMENT OF
ADMINISTRATIVE SERVICES:



David Hartwig, Administrator
DAS, State Services Division
Dated this 28th day of June, 2007.

NOTICE OF RIGHT TO APPEAL OR OTHER JUDICIAL RELIEF

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

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)

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

June 28, 2007

STATE CLAIM NUMBER: M130677

NAME OF CLAIMANT: Cone Investment Limited Partnership

MAILING ADDRESS: R.B. Cone
PO Box 70128
Eugene, Oregon 97401

PROPERTY IDENTIFICATION: Township 18S, Range 3W, Section 23
Tax lot 100
Lane County

OTHER CONTACT INFORMATION: Barry Smith
1011 Harlow Road, Suite 300
Springfield, Oregon 97477

DATE RECEIVED BY DAS: December 1, 2006

DEADLINE FOR FINAL ACTION:¹ May 24, 2008

I. SUMMARY OF CLAIM

The claimant, Cone Investment Limited Partnership, seeks compensation in the amount of \$4,935,000 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 105.36-acre subject property into 6,000-square foot parcels and to develop a dwelling on each parcel. The subject property is located at 85812 Highway 99 South, Eugene, in Lane 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 desired use of the subject property was prohibited under the laws in effect when the claimant

¹ ORS 197.352, as originally enacted, required that final action on claims made under Measure 37 be made within 180 days of the date the claim was filed. In response to the large volume of claims filed in late 2006, the Oregon legislature passed House Bill 3546, which became effective on May 10, 2007. This legislation increased the amount of time state and local governments have to take final action on Measure 37 claims filed on or after November 1, 2006, by 360 days, to a total of 540 days.

acquired the property in 1993, and no laws enforced by Land Conservation and Development Commission (the Commission) or the department since the claimant acquired the property have had the effect of reducing the fair market value of the property relative to uses permitted when it acquired the subject property. (See the complete recommendation in Section VI. of this report.)

III. COMMENTS ON THE CLAIM

Comments Received

On April 2, 2007, 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, one written comment was received in response to the 10-day notice.

The comment does not address whether the claim meets the criteria for relief under ORS 197.352. Comments concerning the effects a use of the subject property may have on surrounding areas are generally not something that the department is able to consider in determining whether to waive a state law. If funds do become available to pay compensation, then such effects may become relevant in determining which claims to pay compensation for instead of waive a state law. (See the comment letter in the department's claim file.)

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 December 1, 2006, for processing under OAR 125, division 145. The claim identifies Senate Bill 100, all statewide planning goals, provisions of ORS 215, 92 and 197 and OAR 660, division 33, as the for the claim. Only laws that were enacted or adopted prior to December 2, 2004, are -the basis for this claim.

Conclusion

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, Cone Investment Limited Partnership,² acquired the subject property on January 14, 1993, as reflected by a bargain and sale deed included with the claim.³ The Lane County Assessor’s Office confirms the claimant’s current ownership of the subject property.

Conclusions

The claimant, Cone Investment Limited Partnership, is an “owner” of the subject property as that term is defined by ORS 197.352(11)(C), as of January 14, 1993.

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 105.36-acre subject property into 6,000-square foot parcels and to develop a dwelling on each parcel, and that the current land use regulations prohibit the desired use.⁴

² Cone Investment Limited Partnership is a domestic limited partnership registered with the Oregon Secretary of State.

³ The claimant asserts that the claimant acquired the property on May 7, 1969. However, that deed was to Cone Lumber Company, a partnership. Cone Lumber Company subsequently changed its name to Cone Investment Company. On January 14, 1993, Cone Investment Company conveyed the subject property to the claimant, Cone Investment Limited Partnership.

⁴ The claimant summarily cites numerous state land use laws as applicable to this claim, but does not establish how the laws either apply to the claimant’s desired use of the subject property or restrict its use with the effect of reducing its fair market value. On their face, most of these regulations either do not apply to the claimant’s property or do not restrict the claimant’s desired use of the property with the effect of reducing its fair market value. This report addresses only those regulations that the department finds are applicable to and restrict the claimant’s desired use of the subject property, based on the claimant’s description of its desired use.

The claim is based on the applicable provisions of state law that require Exclusive Farm Use (EFU) zoning and restrict uses on land zoned. The claimant's property is zoned EFU-40 by Lane County as required by Statewide Planning Goal 3 (Agricultural Lands), in accordance with ORS 215 and OAR 660, division 33, because the claimant's property is "agricultural land" as defined by Goal 3. Goal 3 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 215.213, 215.263 and 215.780 and OAR 660, division 33, enacted or adopted pursuant to Goal 3, generally 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 generally 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). Under ORS 215.780(2)(a), a county may adopt a lower minimum lot or parcel size, subject to acknowledgment by the Commission. The Commission has acknowledged Lane County's EFU-40 zone, which requires a minimum lot or parcel size of 40 acres. ORS 215.263 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.)

Cone Investment Limited Partnership acquired the subject property on January 14, 1993. At that time, it was subject to Lane County's acknowledged comprehensive plan and EFU-40 zone.⁵ When the claimant acquired the subject property the desired use would have been governed by the county's acknowledged EFU zone and the applicable provisions of ORS 215 then in effect.⁶ In 1993, ORS 215.263 (1991 edition) required that divisions of land in EFU zones be "appropriate for the continuation of the existing commercial agricultural enterprise within the area" or not smaller than the minimum size in the county's acknowledged plan. ORS 215.283(1)(f) (1991 edition) generally allowed farm dwellings "customarily provided in conjunction with farm use." Non-farm dwellings were allowed under ORS 215.283(3) if they were determined to be compatible with farm use, not interfere seriously with accepted farm practices, not materially alter the stability of the land use pattern in the area and be situated on generally unsuitable land for the production of farm crops and livestock.

⁵ Lane County's EFU zone was acknowledged by the Commission for compliance with Goal 3 on October 3, 1984.

⁶ After the county's comprehensive plan and land use regulations were acknowledged by the Commission as complying with the statewide planning goals, the goals and implementing rules no longer applied directly to individual local land use decisions. *Byrd v. Stringer*, 295 Or 311 (1983). However, statutory requirements continue to apply, and insofar as the state and local provisions are materially the same, the local provisions must be interpreted consistent with the substance of the goals and implementing rules. *Forster v. Polk County*, 115 Or App 475 (1992) and *Kenagy v. Benton County*, 115 Or App 131 (1992).

The claim does not establish that the claimant's desired division and development of the subject property were allowed under the standards in effect when it acquired the property on January 14, 1993. To the contrary, the claimant's desired division and development of the 105.36-acre property into 6,000-square foot lots or parcels were not permitted under Lane County's acknowledged EFU zone and the requirements of ORS 215 in effect in 1993.

Conclusions

The current zoning requirements, minimum lot size and dwelling standards established by applicable provisions of Goal 3, ORS 215 and OAR 660, division 33, were all enacted or adopted after the claimant acquired the subject property in 1993 and do not allow the desired division or residential development of the property. However, the claimant's desired use of the subject property was prohibited under the requirements of Goal 3 and OAR 660, as implemented by the county's acknowledged EFU-40 zone and the requirements of ORS 215 in effect when the claimant acquired the subject property in 1993.

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 \$4,935,000 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 a realtor's assessment of the subject property's value, included with the claim.

Conclusions

As explained in Section V.(1) of this report, the claimant is Cone Investment Limited Partnership, which acquired the subject property on January 14, 1993. Cone Investment Limited Partnership has not established that it is due compensation under ORS 197.352 because the desired use of the subject property was not allowed when the claimant acquired the subject property in 1993, and therefore, no laws enforced by the Commission or the department have the effect of reducing the fair market value of the property relative to uses permitted when the claimant acquired the subject property in 1993.

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 Lane

County has implemented through its current EFU zone. With the exception of amendments enacted or adopted after January 14, 1993, Goal 3, ORS 215 and OAR 660 were in effect when the claimant acquired the subject property. The regulations in effect when the claimant acquired the property prohibit the claimant's desired use of the property.

Conclusions

With the exception of amendments to Goal 3, ORS 215 and OAR 660, 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 in 1993. Provisions of Goal 3, ORS 215 and OAR 660 enacted or adopted after the claimant acquired the property in 1993 are not exempt under ORS 197.352(3)(E). However, laws in effect when the claimant acquired the property prohibit its desired division and development of the 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 the property in 1993 because the claimant's desired division and development of the property were prohibited under the laws in effect when it acquired the property. State land use regulations enacted or adopted after the claimant acquired the property do not restrict the claimant's desired use of the property relative to uses permitted when it acquired the property and do not reduce the property's fair market value.

Conclusions

Based on the records and the foregoing findings and conclusions, the claimant has not established that it is entitled to relief under ORS 197.352(1) as a result of land use regulations enforced by the Commission or the department because the claimant's desired use of the subject property was prohibited under the laws in effect when it acquired the property in 1993.

VII. COMMENTS ON THE DRAFT STAFF REPORT

The department issued its draft staff report on this claim on May 31, 2007. 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.