

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

IN THE MATTER OF THE CLAIM)	FINAL ORDER
FOR COMPENSATION UNDER)	CLAIM NO. M122836
BALLOT MEASURE 37 (CHAPTER 1,)	
OREGON LAWS 2005) OF)	
Freeman Properties East, LLC,)	
Cynthia Van Lom, and)	
Mark Silversten, CLAIMANTS))	

Claimants: Freeman Properties East, LLC, Cynthia Van Lom, and (the Claimants)

Property: T41S, R13W, Section 23, tax lot 100;
T41S, R13W, Section 23, tax lot 2300; and
T42S, R12W, tax lot 2300,
Curry County
The property is also described in the claim as
Parcel 1 of Partition Plat 2003-13. (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 Ballot Measure 37 (2004) (Oregon Laws 2005, Chapter 1) (hereafter, Measure 37). 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) and the Oregon Department of Forestry (the ODF Report) both attached to and by this reference incorporated into this order.

ORDER

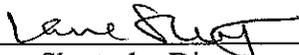
The Claim is denied as to laws administered by DLCD and the Land Conservation and Development Commission (LCDC) for the reasons set forth in the DLCD Report.

The Claim is denied as to laws administered by the Oregon Department of Forestry or the Oregon Board of Forestry, for the reasons set forth in the ODF 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 Measure 37, OAR 660-002-0010(8), and OAR chapter 125, division 145, and by the Deputy Administrator for the State Services Division of the DAS as a final order of DAS under Measure 37, OAR chapter 125, division 145 and ORS chapter 293.

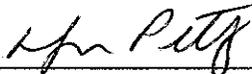
This Order is entered by the Oregon Board and Department of Forestry as a final order of the Board under Measure 37 and OAR Chapter 125, division 145.

FOR DLCD AND THE LAND
CONSERVATION AND DEVELOPMENT
COMMISSION:



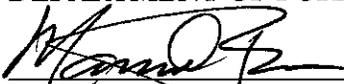
Lane Shetterly, Director
DLCD
Dated this 29th day of August, 2006.

FOR THE DEPARTMENT OF
ADMINISTRATIVE SERVICES:



Dugan Petty, Deputy Administrator
DAS, State Services Division
Dated this 29th day of August, 2006.

FOR THE OREGON BOARD OF
FORESTRY AND THE OREGON
DEPARTMENT OF FORESTRY:



Marvin Brown, State Forester
ODF
Dated this 29th day of August, 2006

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 293.316: Judicial review under ORS 293.316 may be obtained by filing a petition for review within 60 days from the service of this order. Judicial review under ORS 293.316 is pursuant to the provisions of ORS 183.482 to the Court of Appeals.
2. 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 and the Circuit Court in the county in which you reside.
3. A cause of action under Oregon Laws 2005, chapter 1 (Measure 37 (2004)): A present owner of the property, or any interest therein, may file a cause of action in the Circuit Court for the county where the property is located, if a land use regulation continues to apply to the subject property more than 180 days after the present owner made a written demand for compensation.

(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**

August 29, 2006

STATE CLAIM NUMBER: M122836

NAMES OF CLAIMANTS: Freeman Properties East, LLC
Cynthia Van Lom
Mark Silversten

MAILING ADDRESS: PO Box 25744
Portland, Oregon 97298

PROPERTY IDENTIFICATION: T41S, R13W, Section 23, tax lot 100;
T41S, R13W, Section 23, tax lot 2300; and
T42S, R12W, tax lot 2300
Curry County
The property is also described in the claim
as Parcel 1 of Partition Plat 2003-13.

OTHER CONTACT INFORMATION: Cynthia Van Lom
PO Box 25744
Portland, Oregon 97298

DATE RECEIVED BY DAS: October 17, 2005

180-DAY DEADLINE: September 1, 2006¹

I. SUMMARY OF CLAIM

The claimants, Freeman Properties East, LLC, Cynthia Van Lom and Mark Silverstein, seek compensation in the amount of \$19,275,000 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 subject property into 327 parcels of approximately 0.75 acre each and to develop a dwelling on each parcel along with the right to connect each parcel to a public sewer system. The subject property is located at the locational coordinates listed above, near Brookings, in Curry County. (See claim.)

¹ This date reflects 180 days from the date the claim was submitted, as extended by the 139 days that all timelines under Measure 37 were suspended during the pendency of *MacPherson v. Dept. of Admin. Svcs.*, 340 Or 117 (2006).

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 as to Freeman Properties East, LLC because this claimant's desired use of the subject property was prohibited by state land use regulations that were in effect when it acquired the property in 2003. The department has also determined that this claim is not valid for Cynthia Van Lom and Mark Silversten because they have not established that they own a real property interest in the subject property that has been restricted by a state land use regulation. (See the complete recommendation in Section VI. of this report.)

III. COMMENTS ON THE CLAIM

Comments Received

On June 27, 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, four written comments were received in response to the 10-day notice.

The comments do 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 letters 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 October 17, 2005, for processing under OAR 125, division 145. The claim identifies Senate Bills 10 (1969), 100 and 101 (1973); ORS 92 and 527.630; Statewide Planning Goal 4 (Forest Lands); and OAR 660, division 6, 660-011-0060 and

660-015-0000(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

Claimant Freeman Properties East, LLC² acquired tax lots 2300 and 100 in T41SR13W (Parcel 1 of Partition Plat 2003-13) on August 12, 2003, as reflected by the title report included with the claim and a bargain and sale deed obtained from Curry County. The Curry County Assessor’s Office confirms Freeman Properties East’s current ownership of these tax lots.

Claimants Cynthia Van Lom and Mark Silversten state in the claim that they have an interest in tax lots 2300 and 100 in T41SR13W as of 2003. According to the information provided in the claim, these claimants’ parents, Edward and Mildred Freeman, transferred tax lots 2300 and 100 in T41SR13W to Freeman Properties East on August 12, 2003.

The claim also includes a reference to tax lot 2300 in T41SR12W. According to the county assessor’s maps, this tax lot consists of 30.01 acres and is located several miles from the other tax lots described in the claim. No evidence was provided to show that any of the claimants own tax lot 2300 in T41SR12W.

Conclusions

Claimant Freeman Properties East is an “owner” of tax lots 2300 and 100 in T41SR13W (sections 23 and 14) as that term is defined by ORS 197.352(11)(C), as of August 12, 2003. Claimants Cynthia Van Lom and Mark Silversten have not established that they are “owners” of these tax lots as that term is defined in ORS 197.352(11)(C).³ None of the claimants have established that they own an interest in tax lot 2300 in T41SR12W.

² Freeman Properties East, LLC is a domestic limited liability company registered with the Oregon Secretary of State.

³ Although a corporation can be a “family member” of an owner as that term is defined by ORS 197.352(11)(A), an “owner” that is a corporate entity cannot claim an individual as a “family member,” as defined in ORS 197.352(11)(A). Therefore, none of the individuals who transferred the subject property to Freeman Properties East can be considered a “family member” of Freeman Properties East.

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 subject property into 327 parcels, each consisting of approximately 0.75 acre, and to develop a dwelling on each parcel along with the right to connect each dwelling to a public sewer system. It indicates that current land use regulations prevent the desired use.

The claim is based on the applicable provisions of state law that require forest zoning. The subject property is zoned Forest Grazing (FG) by Curry County as required by Goal 4, in accordance with ORS 215 and OAR 660, division 6, because the property is "forest land" as defined by Goal 4 (Goal 4 is also known as OAR 660-015-0000(4)). Goal 4 became effective on January 25, 1975, and required that forest lands as defined by the Goal be zoned forest pursuant to ORS 215.

OAR 660-011-0060 prohibits the establishment or the extension of a new sewer system. The claimants desire to have a public service provider extend a sewer service to the subject property. The restriction on public service providers in OAR 660-011-0060 is a restriction on those providers, not the claimants. If the claimants desire to establish their own sewer system, then that element of OAR 660-011-0060 may restrict their desired use, but the claimants have not indicated that this is their desired use.

The claimants also cite ORS 92, but provide no evidence that these laws restrict their desired use of the subject property.

As explained in Section V.(1), claimants Cynthia Van Lom and Mark Silversten are not "owners" of the subject property as that term is defined in ORS 197.352(11)(C). Therefore, no laws enforced by the Land Conservation and Development Commission (the Commission) or the department restrict the claimants' use of private real property in a manner that reduces the fair market value of the property.

Conclusions

The current zoning requirements, minimum lot size and dwelling standards established by Goal 4 and provisions applicable to land zoned forest in ORS 215 and OAR 660, division 6, were all enacted or adopted before Freeman Properties East acquired the subject property on August 12, 2003. These land use regulations do not allow the division of the subject property into 327 parcels of approximately 0.75 acre each and the development of a dwelling on each parcel with the right to connect each parcel to a public sewer system. However, these uses were not allowed when Freeman Properties East acquired tax lots 2300 and 100 in T41SR13W (Parcel 1 of Partition Plat 2003-13) in 2003. As a result, these state land use regulations do not restrict

Freeman Properties East's desired use of the subject property relative the land use regulations in effect when it acquired the property in 2003.

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 \$19,275,000 as the reduction in the subject property's fair market value due to the regulation(s). This amount is based on the claimants' estimate.

Conclusions

As explained in Section V.(1) of this report, Freeman Properties East is the only claimant that has an ownership interest in tax lots 2300 and 100. It acquired these tax lots on August 12, 2003. The state land use regulations identified in the claim do not restrict the use of the subject property relative to the uses allowed in 2003. Therefore, the fair market value of the subject property has not been reduced as a result of land use regulations enforced or adopted by the Commission or the department.

As explained in Section V.(1) of this report, claimants Cynthia Van Lom and Mark Silversten are not "owners" of the subject property as that term is defined in ORS 197.352(11)(C). Therefore, no laws enforced by the Commission or the department restrict their use of private real property in a manner that reduces the fair market value of the subject property.

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 does not identify any state land use regulations enacted or adopted since claimant Freeman Properties East acquired the subject property that restrict the use of the property relative to what would have been allowed when it acquired the property on August 12, 2003. As set forth in Section V.(2) of this report, the state land use regulations restricting Freeman Properties East's desired use of the subject property were in effect when it acquired the property in 2003. As a result, they are exempt under ORS 197.352(3)(E).

As explained in Section V.(1), claimants Cynthia Van Lom and Mark Silversten are not "owners" of the subject property as that term is defined in ORS 197.352(11)(C). Therefore, the issue of whether any laws are exempt from ORS 197.352 is not relevant.

Conclusions

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

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 the subject property relative to what was permitted when Freeman Properties East acquired it in 2003 and do not reduce its fair market value. 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 claimants, Freeman Properties East, LLC, Cynthia Van Lom and Mark Silverstein, have not established that they are 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 August 10, 2006. 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. Comments received have been taken into account by the department in the issuance of this final report.

ORS 197.352 (BALLOT MEASURE 37) CLAIM FOR COMPENSATION

OREGON DEPARTMENT OF FORESTRY

Final Staff Report and Decision

August 29, 2006

STATE CLAIM NUMBER: M 122836

NAMES OF CLAIMANTS: **Freeman Properties East, LLC**
Cynthia Van Lom
Mark Silversten

MAILING ADDRESS: P.O. Box 25744
Portland, Oregon 97298

IDENTIFICATION OF PROPERTY: Township 41S, Range 12W, Section 00, Tax Lot 2300
Township 41S, Range 13W, Section 00, Tax Lot 2300-00
Township 41S, Range 13W, Section 23, Tax Lot 00100
Curry County
The property is also described in the claim as Parcel 1 of Partition Plat 2003-13

OTHER CONTACT INFO: Cynthia Van Lom (Daughter) Co-Trustee
P.O. Box 25744
Portland, OR 97298

Mark Silversten (Son) Co-Trustee
P.O. Box 28
Olympia, WA 98507

DATE RECEIVED BY DAS: October 17, 2005

180-DAY DEADLINE: September 1, 2006

I. SUMMARY OF CLAIM

See Department of Land Conservation and Development (DLCD) Final Staff Report.

II. SUMMARY OF STAFF RECOMMENDATION

Based on the findings and conclusions set forth below, the Department of Forestry (ODF) has determined the claim is not valid as to land use regulations administered by ODF or the

Oregon Board of Forestry (Board) because none of the laws identified in the claim and administered by the Board or ODF restrict the claimants' right to divide or develop the property for residential use. ORS 527.730 provides that "[n]othing in the Oregon Forest Practices Act shall prevent the conversion of forestland to any other use." The claim submitted by the claimants proposes subdividing the property into residential lots. To the extent that the claimants may propose a forest operation in conjunction with the conversion, claimants have not submitted a written notification as required by law. Without a notification ODF is unable to determine whether the law listed in the claim applies to the claimants' use of the property or restricts their use of the property. As a result, ODF has not enforced an existing state land use regulation with respect to the claimants' use of the property. (See the complete recommendation in Section VI. of this report.)

III. COMMENTS ON THE CLAIM

Comments Received

See DLCD Final Staff Report.

IV. TIMELINESS OF CLAIM

See DLCD Final Staff Report for requirements.

Findings of Fact

The claim identifies certain specific laws as applying to the claimants' desired use of the land by subdividing it and developing a site on it for residential use. The regulations identified in the claim include a portion of Oregon Revised Statute chapter 527. Only laws that were enacted prior to December 2, 2004, the effective date of ORS 197.352, are the basis for the claim. (See citations of statutory and administrative rule history of the Oregon Revised Statutes and Oregon Administrative Rules.)

Conclusions

The Claim has been submitted within two years of December 2, 2004, the effective date of ORS 197.352, based on land use regulations enacted prior to December 2, 2004, and is therefore timely filed.

V. ANALYSIS OF CLAIM

1. Ownership

ODF adopts the findings of fact and conclusions of law regarding ownership contained in the DLCD Final Staff Report for this claim.

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 claimants desire compensation or the right to divide the listed tax lots into 327 parcels of approximately 0.75 acres each, and to develop a dwelling on each parcel. The claim refers to the following state statutes and administrative rules administered by ODF or the Board as laws that restrict the use of the property as the basis for the claim: ORS 527.630, the Policy section of the Oregon Forest Practices Act. There is no discussion in the claim as to how or why this law restricts the use of the property that the claimant seeks to carry out. The property is zoned Forest Grazing, which allows forest uses. However, the law listed in the claim only applies to forest operations (which is not the use the claimants have described in their claim).

A provision of the cited law, ORS 527.730, *Conversion of forestland to other uses*, states, "Nothing in the Oregon Forest Practices Act shall prevent the conversion of forestland to any other use." No laws enforced by the Board or ODF restrict the division of the property or the establishment of dwellings.

The subject property apparently includes trees. Certain uses of property are forest "operations" that are regulated under the Forest Practices Act. If trees are harvested for commercial use, some laws and rules listed in the claim will apply to the operation.

A notification of intent to conduct a forest operation is required in order for ODF to determine whether laws it or the Board may enforce apply to the claimants' intended use of the subject property. Only then can ODF determine whether there are restrictions that apply to the use of the subject property, and reduce its fair market value. No notification has been made.

Conclusions

Nothing in the laws that are listed in the claim and enforced or administered by ODF or the Board applies to or restricts the division of the property or residential development of this property by the claimants.

Persons proposing to conduct a forest operation are required to submit a notification of the operation to ODF. Nothing in ORS 197.352 relieves an operator or landowner from this obligation, and until a notification is submitted, ODF is unable to determine whether laws it or the Board administers apply to the claimants' use of the property.

3. Effect of Regulations on Fair Market Value

In order to establish a valid claim, ORS 197.352(1) requires that any laws 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 claimants have not demonstrated that any land use regulations administered by ODF or the Board restricts their use of the subject property or reduces its fair market value.

Conclusions

The claimants have not demonstrated that laws enforced or administered by ODF or the Board restrict their use of this property and thus, have not demonstrated that those laws reduce the fair market value of the subject property.

4. Exemptions under ORS 197.352(3)

ORS 197.352 does not apply to certain land use regulations. These exemptions are set forth in ORS 197.352(3).

Findings of Fact

ORS 197.352(3) exempts laws that were enacted before claimants acquired their interest in the property. Freeman Properties East LLC acquired an interest in the listed tax lots on August 12, 2003. The other two claimants are not present owners of the listed tax lots. Most forest practice laws were enacted initially in 1971 and 1972, although some date back to 1941. ODF is unable to determine whether 197.352(3)(E) or other exemptions in 197.352(3) may apply because the claimant has not proposed a use that is subject to these laws.

Some FPA regulations, now in OAR 629, divisions 625, 630, 635, and 640, were enacted to control water pollution resulting from forest operations. ORS 197.352(3)(B) specifically exempts regulations “restricting or prohibiting activities for the protection of public health and safety..., including pollution control.” Such regulations may apply to the property, depending upon the forest practices the claimant may wish to undertake.

Other FPA regulations cited by the claimant may be exempted under 197.352(3).

Conclusions

ODF concludes that some of the listed land use regulations may be exempt under ORS 197.352(3). Until there is a notification of an operation, however, a final determination of the applicability of the listed laws to a particular forest practice on the property cannot be made.

VI. FORM OF RELIEF

Based on the current record, the claimants are not entitled to relief under ORS 197.352 from ODF or the Board. ODF denies this claim because neither the Board nor the Department has enforced laws that restrict the use of the property for residential purposes.

VII. NOTICE OF OPPORTUNITY TO COMMENT

ODF issued its draft staff report on this claim on August 10, 2006. OAR 125-145-0100(3), provides 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. Comments received have been taken into account by the department in the issuance of this final report.