

BEFORE THE DEPARTMENT OF ADMINISTRATIVE SERVICES AND
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. M124319
(BALLOT MEASURE 37) OF)	
John B. Holt III and)	
Carol Ann Holt, CLAIMANTS)	

Claimants: John B. Holt III and Carol Ann Holt (the Claimants)

Property: Township T2, Range 1E, Section 22A, Tax lot 2000, Clackamas 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 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 the claimants' division of the five-acre subject property into approximately 20 parcels for residential development: the applicable provisions of Goal 14 and OAR 660-004-0040 adopted after each claimant acquired the property. These laws will not apply to the claimants only to the extent necessary to allow them to use the subject property for the use described in this report, and only to the extent that use was permitted when John Holt acquired the property on August 1, 1977, and Carol Ann Holt acquired the property on October 30, 2003. The department acknowledges that the relief to which Carol Ann Holt is entitled under ORS 197.352 will not allow her to use the subject property in the manner set forth in the claim.
2. The action by the State of Oregon provides the state's authorization to the claimants to use the subject property for the use described in this report, subject to the standards in effect when John Holt acquired the property on August 1, 1977, and when Carol Ann Holt acquired the property on October 30, 2003. On August 1, 1977, the property was subject to applicable

provisions of Goal 14 then in effect. On October 30, 2003, the property was subject to the provisions of Goal 14 and OAR 660-004-0040 currently in effect.

3. To the extent that any law, order, deed, agreement or other legally enforceable public or private requirement provides that the subject property 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 the subject property imposed by private parties.

4. Any use of the subject property 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 claimant to use the subject property, 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 the subject property 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 Director 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:

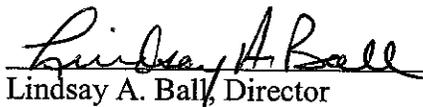
Lane Shetterly, Director



Cora R. Parker, Deputy Director
DLCD

Dated this 5th day of September, 2006.

FOR the DEPARTMENT OF
ADMINISTRATIVE SERVICES:



Lindsay A. Ball, Director
DAS

Dated this 5th day of September, 2006.

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

September 5, 2006

STATE CLAIM NUMBER: M124319

NAMES OF CLAIMANTS: John B. Holt III
Carol Ann Holt

MAILING ADDRESS: 5 North Lake Shore Road
Lake Oswego, Oregon 97034

PROPERTY IDENTIFICATION: Township T2, Range 1E, Section 22A
Tax lot 2000
Clackamas County

DATE RECEIVED BY DAS: March 13, 2006

180-DAY DEADLINE: September 9, 2006

I. SUMMARY OF CLAIM

The claimants, John and Carol Ann Holt, seek compensation in the amount of \$8 million 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 five-acre subject property into approximately 20 parcels for residential development. The subject property is located at 705 Wilda Road, near West Linn, in Clackamas 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. 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 the claimants' division of the five-acre subject property into approximately 20 parcels for residential development: applicable provisions of Statewide Planning Goal 14 (Urbanization) and Oregon Administrative Rule (OAR) 660-004-0040 adopted after each claimant acquired the property. These land use regulations will not apply to the claimants only to the extent necessary to them to use the subject property for the use described in this report, and only to the extent that use was permitted when John Holt acquired the subject property on August 1, 1977, and when Carol Ann Holt acquired the property on October 30, 2003. The department acknowledges that the relief to which Carol Ann Holt is entitled under ORS 197.352

will not allow her to use the subject property in the manner set forth in the claim. (See the complete recommendation in Section VI. of this report.)

III. COMMENTS ON THE CLAIM

Comments Received

On June 15, 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 March 13, 2006, for processing under OAR 125, division 145. The claim identifies the county's RRFF-5 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 John Holt acquired the subject property on August 1, 1977, as reflected by a warranty deed included with the claim. On October 30, 2003, the subject property was transferred to the John B. Holt III Revocable Living Trust and to the Carol Ann Holt Revocable Living Trust, with themselves as trustees, as reflected by a certification and memorandum of trust included with the claim. There was no documentation in the claim to indicate that Carol Ann Holt acquired the subject property prior to its transfer to the trust. The Clackamas County Assessor's Office confirms the claimants' current ownership of the subject property.

Conclusions

The claimant, John Holt, is an owner of the subject property as that term is defined by ORS 197.352(11)(C) as of August 1, 1977, and Carol Ann Holt is an owner as of October 30, 2003. John Holt is a "family member" of Carol Ann Holt as that term is defined by ORS 197.352(11)(A).

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 five-acre subject property into approximately 20 parcels for residential development and that the property's current zoning prohibits the desired use.

The claim is based generally on the applicable provisions of state law that require rural residential zoning. The subject property is zoned RRFF-5 by Clackamas County. The RRFF-5 zone is a rural residential zone with a five-acre minimum lot or parcel size, consistent with Goal 14, which generally requires that land outside of urban growth boundaries be used for rural uses.

Goal 14 was effective on January 25, 1975, and requires that local comprehensive plans identify and separate urbanizable land from rural land in order to provide for an orderly and efficient transition from rural to urban land use. In 2000, as a result of a 1986 Oregon Supreme Court decision,¹ the Commission amended Goal 14 and adopted OAR 660-004-0040 (Application of Goal 14 to Rural Residential Areas), which was effective on October 4, 2000.

The rule states that if a county rural residential zone in effect on October 4, 2000, specifies a minimum lot size of two acres or more, the area of any new lot or parcel shall equal or exceed the minimum lot size that is already in effect (OAR 660-004-0040(7)(c)). Some relief from this provision is available for lots or parcels having more than one permanent habitable dwelling

¹ *1000 Friends of Oregon v. LCDC (Curry County)*, 301 Or 447 (1986).

pursuant to OAR 660-004-0040(7)(h). The rule also provides that a county's minimum lot size requirement in a rural residential zone shall not be amended to allow a smaller minimum lot size without approval of an exception to Goal 14 (OAR 660-004-0040(6)). Because Clackamas County's rural residential zone was in effect on October 4, 2000, and requires a minimum lot size of five acres, the minimum lot size for any new lot or parcel must equal or exceed five acres.

Claimant John Holt acquired the subject property after the adoption of the statewide planning goals, but before the Commission acknowledged Clackamas County's land use regulations to be in compliance with statewide planning goals pursuant to ORS 197.250 and 197.251. When John Holt acquired the subject property, it was considered to be resource land under the statewide planning goals because of the property's soils.² Because the Commission had not acknowledged Clackamas County's plan and land use regulations when John Holt acquired the subject property in 1977, the statewide planning goals, and particularly Goals 3 and 4, applied directly to the subject property when he acquired it.³ At that time, John Holt would have had the option of establishing a basis for an exception to compliance with Goals 3 and 4 pursuant to the Goal 2 (Land Use Planning) exceptions process. However, through the county's acknowledgement process, the property was ultimately acknowledged as exceptions land pursuant to Goal 2 and zoned by the county for rural residential use. Therefore, in recognition of the subject property's ultimate designation as rural residential exceptions land, the claimants' desired use of the property is appropriately subject to compliance with Goal 14 and not Goals 3 and 4. The claim does not establish whether the claimants' desired use would have been permitted under this standard.

Conclusions

The minimum lot size requirements for rural residential lots or parcels established by Goal 14 and OAR 660-004-0040 were adopted after John Holt acquired the subject property in 1977, and do not allow the desired division of the property. When the John Holt acquired the subject property in 1977, the statewide planning goals, and in particular, the general requirements of Goal 14 applied directly to the property. The claim does not establish whether or to what extent the claimants' desired use of the subject property complies with the provisions of Goal 14 in effect when John Holt acquired the property on August 1, 1977.

² The soil on the subject property consists of approximately 3 percent Cottrell silty clay loam, 50 percent Jory silty clay loam, 40 percent Jory stony silt loam and 7 percent Jory stony silt loam. This soil is rated by the Natural Resources Conservation Service (NRCS) as Class II, III and IV agricultural land, and it carries an average forest site index of 119. Approximately 53 percent (10.1 acres) of the soils on the 19.75-acre subject property are rated as "prime" by the NRCS. In 1978, Goal 3 defined "agricultural land" as parcels predominantly composed of Class I to IV soils, and the definition of "forest land" in Goal 4 included lands suitable for commercial forest uses and forested lands in agricultural areas.

³ The statewide planning goals became effective on January 25, 1975, and were applicable to legislative land use decisions and some quasi-judicial land use decisions prior to the Commission's acknowledgment of each county's land use regulations. *Perkins v. City of Rajneeshpuram*, 300 Or 1 (1985); *Alexanderson v. Polk County*, 289 Or 427, rev den 290 Or 137 (1980); *Sunnyside Neighborhood Assn. v. Clackamas County*, 280 Or 569 (1977); *Jurgenson v. Union County*, 42 Or App 505 (1979); and *1000 Friends of Oregon v. Benton County*, 32 Or App 413 (1978). After the county's plan and land use regulations were acknowledged by the Commission, the statewide planning goals and implementing rules no longer directly applied to such 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. *Foster v. Polk County*, 115 Or App 475 (1992); *Kenagy v. Benton County*, 115 Or App 131 (1992).

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 John Holt's use of the subject property, and that may continue to apply to his use of the subject 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 subject property until there is a specific proposal for that use. When John Holt seeks 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 \$8 million 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 subject property's value.

Conclusions

As explained in Section V.(1) of this report, the claimants are John Holt who acquired the subject property on August 1, 1977, and his wife Carol Ann Holt. Under ORS 197.352, the claimants are due compensation for land use regulations that restrict the use of the subject property and have the effect of reducing its fair market value. Based on the findings and conclusions in Section V.(2) of this report, laws adopted since John Holt acquired the subject property restrict the desired use of the property. The claimants estimate that the effect of the regulations on the fair market value of the subject property is a reduction of \$8 million.

Without an appraisal or other documentation and without verification of whether or the extent to which the claimants' desired use of the subject property was allowed under the standards in effect when John Holt acquired the property, it is not possible to substantiate the specific dollar amount by which the land use regulations have reduced the fair market value of the property. Nevertheless, based on the evidence in the record for this claim, the department determines that the fair market value of the subject property has been reduced to some extent as a result of land use regulations enforced by the Commission or the department since John Holt acquired the 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 is based on state land use regulations that restrict the use of the subject property, including Goal 14 and OAR 660-004-0040, which Clackamas County has implemented through

its RRF-5 zone. With the exception of provisions of Goal 14, adopted before claimant John Holt acquired the subject property on August 1, 1977, these state land use regulations were not in effect when he acquired the property.

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 the goal and rule restrictions on division of the subject property are not exempt under ORS 197.352(3)(E) to the extent they were adopted after John Holt acquired the property. Provisions of Goal 14 in effect when he acquired the subject property on August 1, 1977, are exempt under ORS 197.352(3)(E) and will continue to apply to the property.

Other laws in effect when John Holt acquired the subject property are also exempt under ORS 197.352(3)(E) and will continue to apply to the claimants' use of the property. There may be other laws that continue to apply to the claimants' use of the subject 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 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. In some cases, some of these laws may be exempt under ORS 197.352(3)(A) to (D).

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 restrict the claimants' desired use of the subject property. 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 \$8 million. 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, it would also be necessary to verify whether or to the extent to which the claimants' desired use of the subject property was allowed under the standards in effect when John Holt acquired the property. Nevertheless, based on the record for this claim, the department determines that the laws on which the claim is based have reduced the fair market value of the subject property 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 John Holt to use the subject property for a use permitted at the time he acquired the property on August 1, 1977, and to allow Carol Ann Holt to use the subject property for a use permitted at the time she acquired the property on October 30, 2003.

At the time Carol Ann Holt acquired an interest in the property in 2003, it was zoned RRFF-5 by Clackamas County, and subject to the current laws in effect, as described in Section V.(2) of this report. In addition to the applicable provisions of Goal 14 and OAR 660-004-0040 in effect when Carol Holt acquired the property, there may be other laws that apply to her use of the property that have not been identified in the claim.

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 their 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.

Conclusions

Based on the record, the department 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 the claimants' division of the five-acre subject property into approximately 20 parcels for residential development: the applicable provisions of Goal 14 and OAR 660-004-0040 adopted after each claimant acquired the property. These laws will not apply to the claimants only to the extent necessary to allow them to use the subject property for the use described in this report, and only to the extent that use was permitted when John Holt acquired the property on August 1, 1977, and Carol Ann Holt acquired the property on October 30, 2003. The department acknowledges that the relief to which Carol Ann Holt is entitled under ORS 197.352 will not allow her to use the subject property in the manner set forth in the claim.
2. The action by the State of Oregon provides the state's authorization to the claimants to use the subject property for the use described in this report, subject to the standards in effect when John Holt acquired the property on August 1, 1977, and when Carol Ann Holt acquired the property on October 30, 2003. On August 1, 1977, the property was subject to applicable provisions of Goal 14 then in effect. On October 30, 2003, the property was subject to the provisions of Goal 14 and OAR 660-004-0040 currently in effect.
3. To the extent that any law, order, deed, agreement or other legally enforceable public or private requirement provides that the subject property 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 the subject property imposed by private parties.

4. Any use of the subject property 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 claimant to use the subject property, 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 the subject property by the claimants.

VII. COMMENTS ON THE DRAFT STAFF REPORT

The department issued its draft staff report on this claim on August 17, 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.