



Oregon

Theodore R. Kulongoski, Governor

Department of Land Conservation and Development

635 Capitol Street NE, Suite 150

Salem, Oregon 97301-2524

Phone: (503) 373-0050

First Floor/Costal Fax: (503) 378-6033

Second Floor/Director's Office: (503) 378-5518

Web Address: <http://www.oregon.gov/LCD>

March 16, 2007

To: Interested Persons

From: Lane Shetterly, Director



Re: Ballot Measure 37 (ORS 197.352) Claim Number M130090

Claimant: S.D.S. Co., LLC, a Washington Limited Liability Company

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. M130090
(BALLOT MEASURE 37) OF)
S.D.S. Co., LLC,)
a Washington limited liability company, CLAIMANTS)

Claimants: S.D.S. Co., LLC, a Washington limited liability company (the Claimants)

Property: Township 2N, Range 11E, Tax lots 100 and 300 (Sec. 16)
Township 2N, Range 11E, Tax lot 400 (Sec. 17)
Township 2N, Range 11E, Section 4: tax lot 400
Township 2N, Range 11E, Section 8: tax lot 100
Township 2N, Range 11E, Section 9: tax lot 100
Hood River 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 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 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


Cora R. Parker, Deputy Director
DLCD
Dated this 16th day of March, 2007.

FOR the DEPARTMENT OF
ADMINISTRATIVE SERVICES:


David Hartwig, Administrator
DAS, State Services Division
Dated this 16th day of March, 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

March 16, 2007

STATE CLAIM NUMBER: M130090

NAME OF CLAIMANT: S.D.S. Co., LLC,
a Washington limited liability company

MAILING ADDRESS: PO Box 266
Bingen, WA 98605

PROPERTY IDENTIFICATION: Township 2N, Range 11E,
Tax lots 100 and 300 (Sec. 16)
Tax lot 400 (Sec. 17)
Section 4: tax lot 400
Section 8: tax lot 100
Section 9: tax lot 100
Hood River County¹

OTHER CONTACT INFORMATION: James Spadaro
PO Box 266
Bingen, WA 98605

David J. Petersen
Tonkin Torp, LLP
888 SW Fifth Ave.
Portland, OR 97204

DATE RECEIVED BY DAS: September 22, 2006

180-DAY DEADLINE: March 21, 2007

I. SUMMARY OF CLAIM

The claimant, S.D.S. Co., LLC, seeks compensation in the amount of \$101.5 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 claimant desires compensation or the right to divide the portions of the tax lots identified above that are located within the boundaries of the Columbia River Gorge National Scenic Area into five-acre parcels and to develop a dwelling on each

¹ This claim includes only to those portions of the subject tax lots that are located within the Columbia River Gorge National Scenic Area.

parcel. The subject property is located along Old Dalles Drive in Hood River 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 it acquired the subject property on February 1, 1998; because the use the claimant desires to carry out is not restricted by state land use regulations identified in the claim; and because the use is prohibited by Hood River County's land use regulations and the Columbia River Gorge Commission. (See the complete recommendation in Section VI. of this report.)

III. COMMENTS ON THE CLAIM

Comments Received

On January 16, 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 is relevant to whether a state law restricts the claimant's use of the subject property and whether the laws that are the basis for the claim are exempt under ORS 197.352(3). The comment has been considered by the department in preparing this report. (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 September 22, 2006, for processing under OAR 125, division 145. The claim identifies Hood River County Ordinances No. 63 (1976), No. 125 (1984) and No. 195 (1994) as the basis for the claim. Only laws that were enacted or adopted prior to December 2, 2004, are the basis for this claim.

Conclusions

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

V. ANALYSIS OF CLAIM

1. Ownership

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

Findings of Fact

The claimant, S.D.S. Co., LLC, a Washington limited liability company, acquired the subject property on February 1, 1998, as reflected by the warranty deed included with the claim.² The Hood River County Assessor’s Office confirms the claimant’s current ownership of the subject property.

Conclusions

The claimant, S.D.S. Co., LLC, is an “owner” of the subject property as that term is defined by ORS 197.352(11)(C), as of February 1, 1998.

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 that the claimant desires to divide portions of the tax located within the boundaries of the Columbia River Gorge National Scenic Area into five-acre parcels and to

² According to the claim, the subject property was originally acquired by S.D.S. Co., a Washington general partnership, on October 12, 1972. The claim alleges that on January 8, 1998, the partnership was “converted” to a Washington limited liability company, the claimant, S.D.S. Co., LLC, and the partnership ceased to exist. The claim also asserts that the deed from the partnership to the limited liability company dated February 1, 1998, “has no substantive effect on title to the property” and that the conversion of the partnership into a limited liability company does not constitute a change in ownership such that, for purposes of this claim, S.D.S. Co., LLC., should be deemed to have “owned the property continuously since October 12, 1972.” Whether by deed or by operation of law as a result of the conversion from the partnership to the limited liability company, title to the subject property was transferred to and vested in S.D.S. Co., LLC, a legal entity distinct from the general partnership. As a result, for purposes of ORS 197.352, the claimant acquired the subject property on February 1, 1998.

develop a dwelling on each parcel, and that state and local land use regulations restrict the claimant's desired use.

The current plan and zone designation for the subject property is Commercial Forest (F-1).³ Under the county's zoning ordinance, which has been approved by the Columbia River Gorge Commission as implementing the Gorge Commission's Management Plan, the claimant's desired use of the property is not allowed because it does not meet the dwelling standards in the county's zoning code. Hood River County Zoning Ordinance, Sections 5.30 to 5.46. As a result, the claimant's desired use is prohibited by county land use regulations, and these land use regulations are exempt from ORS 197.352 as regulations that are required by federal law. *Columbia River Gorge Comm'n v. Hood River County*, 2007 Or App LEXIS 2 (2006). Further, Statewide Planning Goal 4 (Forest Lands) and the statutory and rule provisions implementing the goal do not apply to or restrict the claimant's desired use of the subject property as a result of ORS 196.105 to 196.155, which provide that the Management Plan and implementing ordinance act in place of the statewide planning goals. As a result, the department has no authority to approve the claim for the desired use of the subject property.

Conclusions

The current plan and zoning provisions of Hood River County and the Columbia River Gorge Commission, which are not subject to Measure 37, prohibit the claimant's desired use of the property. The state land use regulations identified in the claim do not apply to the claimant's desired use of the property, and do not restrict that use (both because they do not apply and because even if they did apply, the use is already prohibited by county and Gorge Commission laws). As a result, the department recommends that the claim be denied as to this property.

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 \$101.5 million 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 market analysis included with the claim.

Conclusion

As explained in Section V.(1) of this report, the claimant is S.D.S. Co., LLC, which acquired the property on February 1, 1998. No state laws enacted or adopted since the claimant acquired the

³ The subject property is located in the Columbia River Gorge National Scenic Area. The federal Columbia River Gorge National Scenic Area Act (Public Law 99-663) was passed by the U.S. Congress in 1986 and signed into law by President Reagan on November 17, 1986. The first Columbia River Gorge National Scenic Area Management Plan was adopted by the Columbia River Gorge Commission on October 15, 1991, and concurred by the U.S. Secretary of Agriculture on February 13, 1992. The F-1 zoning was adopted by Hood River County as part of the county's plan and zoning to comply with the federally approved management plan for the scenic area.

property restrict the use of the property relative to the uses allowed in 1998. In addition, the county land use regulations that restrict the claimant's use of the property are exempt under both ORS 197.352(3)(C) and (E). Therefore, the fair market value of the subject property has not been reduced as a result of land use regulations enforced by the Land Use Conservation and Development Commission (Commission) or the department.

4. Exemptions Under ORS 197.352(3)

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

Findings of Fact

The claim is based on state land use regulations that restrict the use of the subject property, including applicable provisions of Goal 4, ORS 215, OAR 660, division 6, and the Columbia River Gorge Commission's Management Plan, which Hood River County has implemented through its current F-1 zone. All these land use regulations were in effect when the claimant acquired the property in 1998. In addition, implementation of the Columbia River Gorge Commission's Management Plan is required to comply with federal law.

Conclusions

All of the state land use regulations that restrict the claimant's desired use of the subject property were in effect when the claimant acquired the property in 1998 or are required to implement federal law. Therefore, these state land use regulations are exempt under ORS 197.352(3)(E) which exempts laws in effect when the claimant acquired the property and ORS 197.352(3)(C), which exempts laws required to comply with federal law.

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 finds and conclusions set forth in this report, laws enforced by the Commission or the department do not apply to or restrict the claimant's desired use of the subject property relative to what was permitted when the claimant acquired it in 1998 and do not reduce the fair market value of the property.

Conclusions

Based on the record 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. 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 February 23, 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.