



Oregon

Theodore R. Kulongoski, Governor

Department of Land Conservation and Development

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March 27, 2007

To: Interested Persons

From: Lane Shetterly, Director



Re: *Ballot Measure 37 (ORS 197.352) Claim Numbers M130184*

Claimants: Harold A. and Evelyn G. Reed

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. M130184
(BALLOT MEASURE 37) OF)
Harold A. Reed and Evelyn G. Reed, CLAIMANTS)

Claimants: Harold A. Reed and Evelyn G. Reed (the Claimants)

Property: Township 34S, Range 9E, Section 19, Tax lot 500
Klamath 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

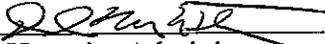
The Claim is denied as to laws administered by DLCD and the Land Conservation and Development Commission (LCDC) for the reasons set forth in the DLCD Report.

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


Cora R. Parker, Deputy Director
DLCD
Dated this 28th day of March, 2007.

FOR THE DEPARTMENT OF
ADMINISTRATIVE SERVICES:


David Hartwig, Administrator
DAS, State Services Division
Dated this 28th 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 28, 2007

STATE CLAIM NUMBER: M130184

NAMES OF CLAIMANTS: Harold A. Reed
Evelyn G. Reed

MAILING ADDRESS: 1155 Waverly Heights Drive
Thousand Oaks, California 91360

PROPERTY IDENTIFICATION: Township 34S, Range 9E, Section 19
Tax lot 500
Klamath County

OTHER CONTACT INFORMATION: Michael L. Spencer, Attorney
409 Pine Street, Suite 204
Klamath Falls, Oregon 97601

DATE RECEIVED BY DAS: October 3, 2006

180-DAY DEADLINE: April 1, 2007

I. SUMMARY OF CLAIM

The claimants, Harold and Evelyn Reed, seek compensation in the amount of \$300,000 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 10-acre subject property into two-acre parcels and to develop a dwelling on each resulting parcel.¹

¹ The claim also indicates that the claimants desire to sell or transfer the newly created parcels for development. In effect, the claimants request that a decision of the department to "not apply" (waive) certain laws as set forth in this report be transferable with the property. ORS 197.352 only authorizes a state agency to waive a law in order to allow the current owner a use of the property permitted at the time that owner acquired the property. A determination of transferability is beyond the scope of relief that the department may grant under ORS 197.352. The Oregon Department of Justice has advised the department that "[i]f the current owner of the real property conveys the property before a new use allowed by the public entity is established, then the entitlement to relief will be lost."

The claimants also request that the department remove the subject property's exclusive farm use zoning and change the zoning to "R-2," Klamath County's Rural Residential zone, which requires two acres for the creation of a new parcel. ORS 197.352 does not allow what the claimants request. By its terms, ORS 197.352 does not remove zoning or eliminate land use regulations. Rather, it provides that "the governing body responsible for enacting the land use regulation may modify, remove, or not to apply [*sic*] the land use regulation or land use regulations to allow the owner to use the property for a use permitted at the time the owner acquired the property."

The landlocked subject property is located southeast of Williamson River Road and north of the Sprague River, near Chiloquin, in Klamath 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 claimants have not established that they have legal access to the subject property. (See the complete recommendation in Section VI. of this report.)

III. COMMENTS ON THE CLAIM

Comments Received

On January 30, 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, 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 October 3, 2006, for processing under OAR 125, division 145. The claim identifies Statewide Planning Goals 2 (Land Use Planning), 3 (Agricultural Lands), 11 (Public Facilities and Services), 12 (Transportation) and 14 (Urbanization), ORS 197 and 215 and provisions of OAR 660, divisions 4, 6, 33, 12, 18, and 33, 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 claimants, Harold and Evelyn Reed, acquired the subject property on January 30, 1973, as reflected by a warranty deed included with the claim. The Klamath County Assessor’s Office confirms the claimants’ current ownership of the subject property.

Conclusions

The claimants, Harold and Evelyn Reed, are “owners” of the subject property as that term is defined by ORS 197.352(11)(C), as of January 30, 1973.

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 10-acre subject property into two-acre parcels and to develop a dwelling on each resulting parcel and that current land use regulations prohibit the desired use.²

The claim is based generally on the applicable provisions of state law that require Exclusive Farm Use (EFU) zoning and restrict uses on EFU-zoned land. The claimants’ property is zoned by Klamath County as Exclusive Farm Use-Cropland (EFU-C) as required by Goal 3, in accordance with ORS 215 and OAR 660, division 33, because the claimants’ property is

² The claimants summarily cite numerous state land use laws as applicable to this claim, but do not establish how the laws either apply to the claimants’ 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 claimants’ property or do not restrict the claimants’ 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 claimants’ desired use of the subject property, based on the claimants’ description of that desired use.

“agricultural land” as defined by Goal 3.³ 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 215.263, 215.284 and 215.780 and OAR 660, division 33, enacted or adopted pursuant to Goal 3, prohibit the division of EFU-zoned land into parcels less than 80 acres and establish standards for development of dwellings on existing or proposed parcels on that land.

ORS 215.780 establishes an 80-acre minimum size for the creation of new lots or parcels in EFU zones and became effective on November 4, 1993 (Chapter 792, Oregon Laws 1993). ORS 215.263 (2005 edition) establishes standards for the creation of new parcels for non-farm uses and dwellings allowed in an EFU zone.

OAR 660-033-0135 (applicable to farm dwellings) became effective on March 1, 1994, and interprets the statutory standard for a primary dwelling in an EFU zone under ORS 215.283(1)(f). OAR 660-033-0130(4) (applicable to non-farm dwellings) became effective on August 7, 1993, and was amended to comply with ORS 215.284(4) on March 1, 1994. The Land Conservation and Development Commission (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.)

The claimants acquired the subject property on January 30, 1973, prior to the adoption of the statewide planning goals and their implementing statutes and regulations. At that time, the property was zoned by Klamath County as Forestry Zone (F), which required a one-acre minimum for the creation of a new parcel.

Although these state land use regulations would otherwise restrict the claimants’ desired use, in this case, according to title records and information included in the claim, the claimants do not have legal access to the subject property.⁴ Without legal access, the claimants did not have a right to use the property for the desired use when they acquired the property and do not have that right now. Therefore, the state land use regulations enacted or adopted after the claimants acquired the property do not restrict a use that the claimants have a right to carry out relative to uses allowed when they acquired the property, with the effect of reducing the property’s fair market value.

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 claimants acquired the subject property in 1973. However, the claimants have not established that they have legal access to the subject property. Therefore, no laws enforced

³ The claimants’ property is “agricultural land” because it contains Natural Resources Conservation Service Class I–VI soils.

⁴ The department requested evidence of legal access to the subject property from the claimants’ agent on February 20, 2007. As of the date of this report, no additional information has been received.

by the Commission or the department restrict the claimants use of private real property with the effect of reducing the fair market value of the 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 regulations (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.”

As explained in Section V.(2) of this report, the claimants, Harold and Evelyn Reed, have not established that they had legal access to the property when they acquired it or that they now have legal access to the subject property, and therefore, no state land use regulations restrict their use of the subject property with the effect of reducing 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.

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 Klamath County has implemented through its current EFU-C zone. All of these land use regulations were enacted or adopted after the claimants acquired the subject property. However, as explained in Section V.(2), the claimants have not established that they had legal access to the subject property when they acquired it or that they now have legal access to the subject property. Therefore, the issue of whether any laws are exempt from ORS 197.352 is not relevant to this claim.

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, the department finds that the claim is not valid because the claimants have not established they have legal access to the subject property. Therefore, 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 the claimants acquired it in 1973 and do not reduce the fair market value of the property.

Conclusions

Based on the record and the foregoing findings and conclusions, the claimants 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 because they have not established that they have legal access to the subject property. 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 March 7, 2007. OAR 125-145-0100(3), provided an opportunity for the claimants or the claimants' authorized agent and any third parties who submitted comments under OAR 125-145-0080 to submit written comments, evidence and information in response to the draft staff report and recommendation.