



Oregon

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August 2, 2007

To: Interested Persons
From: Lane Shetterly, Director



Re: Ballot Measure 37 (ORS 197.352) Claim Number M130724

Claimant: Clive W. Cook Jr.

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. M130724
(BALLOT MEASURE 37) OF)
Clive W. Cook Jr., CLAIMANT)

Claimant: Clive W. Cook Jr. (the Claimant)

Property: Township 4S, Range 1E, Section 17, Tax lot 601, Clackamas County
(the property)

Claim: The demand for compensation and any supporting information received
from the Claimant by the State of Oregon (the Claim).

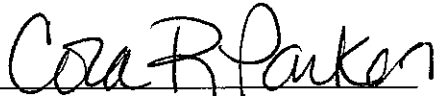
Claimant submitted the Claim to the State of Oregon under ORS 197.352. Under OAR 125-145-0010 *et seq.*, the Department of Administrative Services (DAS) referred the Claim to the Department of Land Conservation and Development (DLCD) as the regulating entity. This order is based on the record herein, 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

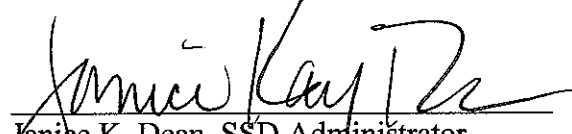
The Claim is denied as to laws administered by DLCD and the Land Conservation and Development Commission (LCDC) for the reasons set forth in the DLCD Report.

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 2nd day of August, 2007.

FOR THE DEPARTMENT OF
ADMINISTRATIVE SERVICES:


Janice K. Dean, SSD Administrator
DAS, State Services Division
Dated this 2nd day of August, 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

August 2, 2007

STATE CLAIM NUMBER: M130724

NAME OF CLAIMANT: Clive W. Cook Jr.

MAILING ADDRESS: 26310 S. Barlow Road
Canby, Oregon 97013

PROPERTY IDENTIFICATION: Township 4S, Range 1E, Section 17
Tax lot 601
Clackamas County

DATE RECEIVED BY DAS: November 14, 2006

DEADLINE FOR FINAL ACTION:¹ May 7, 2008

I. SUMMARY OF CLAIM

The claimant, Clive Cook Jr., seeks compensation in the amount of \$283,250 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 3.54-acre subject property into four parcels and to develop a dwelling on each parcel. The subject property is located at 26308 South Barlow Road, near Canby, 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 not valid because neither the Land Conservation and Development Commission (the Commission) nor the department has enforced laws that restrict Clive Cook Jr.'s use of private real property relative to uses permitted at the time he acquired the subject property on October 26, 1973. (See the complete recommendation in Section VI. of this report.)

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

III. COMMENTS ON THE CLAIM

Comments Received

On May 17, 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 November 14, 2006, for processing under OAR 125, division 145. The claim identifies provisions of ORS 215 and OAR 660, division 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 claimant, Clive Cook Jr., first acquired the subject property from his parents on February 23, 1968, as reflected by a deed included with the claim. However, the deed by which he acquired the property was subject to a life estate in favor of Clive W. Cook Sr. and Beatrice Cook, which reserved in them the exclusive right to use the property during their lifetimes. On October 26, 1973, Clive W. Cook Sr. and Beatrice Cook terminated their life estate in the property and conveyed the subject property to Clive Cook Jr., as reflected by a bargain and sale deed included with the claim.² The Clackamas County Assessor's Office confirms the claimant's current ownership of the subject property.

Conclusions

The claimant, Clive Cook Jr., is an "owner" of the subject property as that term is defined by ORS 197.352(11)(C), as of October 26, 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 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 acquired the property.

Findings of Fact

The claim indicates that the claimant desires to divide the 3.54-acre subject property into four parcels and to develop a dwelling on each parcel, and that the desired use is not allowed under the current state land use regulations.

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 claimant's property is zoned EFU by Clackamas County as required by Statewide Planning Goal 3 (Agricultural Lands), in accordance with ORS 215 and OAR 660, division 33, because the claimant's property is "agricultural land" as defined by Goal 3.³ Goal 3 became effective on January 25, 1975, and required agricultural land defined by Goal 3 to 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 desired division of EFU-zoned land into parcels less than 80 acres and establish standards for the development of dwellings on existing 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

² In response to the draft staff report dated June 22, 2007, pursuant to OAR 125-145-0080 on July 2, 2007, the claimant submitted a letter. The department has considered the comment.

³ The claimant's property is "agricultural land" because it contains Natural Resources Conservation Service (NRCS) Class I-IV soils.

215.263 (2005 edition) establishes standards for the creation of new parcels for non-farm uses and dwellings allowed in an EFU zone.

Land that is zoned EFU and that is "high-value" farm land under Goal 3, ORS 215.710 and OAR 660, division 33, is subject to additional restrictions based on certain provisions of ORS 215 and OAR 660, division 33.

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 on March 1, 1994.⁴

The claimant acquired the subject property on October 26, 1973, after the adoption of Senate Bill 100 (Chapter 80, Oregon Laws 1973) effective on October 5, 1973, but before the adoption of the statewide planning goals, effective on January 25, 1975. At that time, it was zoned GU by Clackamas County, which allowed a one-acre minimum lot size and permitted dwellings as an outright use. However, during the period between October 5, 1973, and January 25, 1975, ORS 197.175(1) and 197.280 (1973 editions) required, in addition to any local plan or zoning provisions, that cities and counties exercise their planning responsibilities in accordance with the interim land use planning goals set forth in ORS 215.515 (1973 edition). *Petersen v. Klamath Falls*, 279 Or 249 (1977); *see also, Meeker v. Board of Comm'rs*, 287 Or 665 (1979) (review of a subdivision is an exercise of planning responsibilities requiring application of the goals); *State Housing Council v. Lake Oswego*, 48 Or App. 525 (1981) (noting that while "[l]and use planning responsibility is not defined in ORS ch 197, the Supreme Court has interpreted that term as including annexation approvals, *subdivision approvals* [emphasis added] and partition approvals") citing *Petersen*, *Meeker* and *Alexanderson v. Polk County*, 285 Or 427 (1980). The claimant's desired use includes subdivision of his land. If the claimant had sought to create that use in 1973, as a matter of law, the use would have been subject to the interim planning goals at ORS 215.515.⁵

The following interim goals are directly applicable to this claim: "To preserve the quality of the air, water and *land* [emphasis added] resources of the state"; "To conserve prime farm lands for the production of crops"; "To provide for the orderly and efficient transition from rural to urban land use"; "To protect life and property in areas subject to floods, landslides and other natural disasters"; "To provide and encourage a safe, convenient and economic transportation system including all modes of transportation: Air, water, rail, highway and mass transit and recognizing

⁴ The Commission adopted amendments to OAR 660-033-0130 et seq. to comply with House Bill 3326 (Chapter 704, Oregon Laws 2001, effective on January 1, 2002), which were effective on May 22, 2002. These amendments clarified but did not further restrict the OAR 660, division 33, development standards.

⁵ The "interim" land use goals are set forth in ORS 215.515(1)(a) to (j) (1973 edition) as follows: (a) "To preserve the quality of the air, water and land resources of the state," (b) "To conserve open space and protect natural and scenic resources," (c) "To provide for the recreational needs of citizens of the state and visitors," (d) "To conserve prime farm lands for the production of crops," (e) "To provide for the orderly and efficient transition from rural to urban land use," (f) "To protect life and property in areas subject to floods, landslides and other natural disasters," (g) "To provide and encourage a safe, convenient and economic transportation system including all modes of transportation: Air, water, rail, highway and mass transit and recognizing differences in the social costs in the various modes of transportation," (h) "To develop a timely, orderly and efficient arrangement of public facilities and services to serve as a framework for urban and rural development," (i) "To diversify and improve the economy of the state" and (j) "To ensure that the development of properties within the state is commensurate with the character and the physical limitations of the land." ORS 215.515 (1973 edition).

differences in the social costs in the various modes of transportation"; and "To develop a timely, orderly and efficient arrangement of public facilities and services to serve as a framework for urban and rural development." ORS 215.515 (1973 edition).

One of the interim goals was to "conserve prime farm lands for the production of crops." Soil types are a determinant of prime farm land. One hundred percent (3.54 acres) of the soils on the 3.54-acre subject property are rated as "prime" Class 1 by the Natural Resource Conservation Service (NRCS). According to the Oregon Department of Agriculture, Oregon has only a limited supply of soils rated "prime" (8.0 percent of all agricultural land), and a very limited supply of soils rated Class 1 (0.9 percent of all agricultural land).

The claim does not establish that the approval of four lots or parcels for residential use complies with the interim planning goals. To the contrary, and in particular, the desired division and development of 3.54 acres of predominantly "prime," Class 1 high-value farm land would not "conserve prime farm lands for the production of crops" as required by the interim goals at the time the claimant acquired the subject property in 1973.

Conclusions

The current zoning requirements, minimum lot size and dwelling standards established by Goal 3, ORS 215 and OAR 660, division 33, were all enacted or adopted since the claimant acquired the subject property in 1973, and do not allow the desired division of the property into parcels less than 80 acres in size or allow the approval of dwellings. However, on October 26, 1973, the "interim" land use goals set forth in ORS 215.515 required the conservation of prime farm land for the production of crops. One hundred percent of the claimant's 3.54-acre subject property is composed of very limited farm land soils rated as "prime," and 100 percent of the subject property is rated Class 1. The subject property could not be divided for residential use under the "interim" land use goals applicable in 1973.

Based on the facts of this claim, dividing the 3.54-acre subject property into four parcels for residential use does not "conserve prime farm lands for the production of crops," "preserve the quality of the . . . land resources of the state," "provide for an orderly and efficient transition from rural to urban land use," "protect life and property in areas subject to floods" or provide for "a timely, orderly and efficient arrangement of public facilities and services" as required by ORS 215.515 (1973 edition). Thus, the requested use would not have been permitted under the standards in effect when the claimant acquired the subject property. Therefore, the department determines that the current land use regulations applicable to the subject property do not restrict its use relative to the uses allowed when the claimant acquired the property in 1973.

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 \$283,250 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 the claimant's assessment of the subject property's value.

Conclusions

As explained in Section V.(1) of this report, the claimant is Clive Cook Jr. who acquired the subject property on October 26, 1973. As explained in section V.(2) of this report, the claimant's desired use of the subject property was prohibited when he acquired it. Therefore, current land use regulations do not restrict the use of the subject property relative to the uses allowed when the claimant acquired the property in 1973, and therefore, land use regulations enacted or adopted by the state since the claimant acquired the subject property do not have the effect of reducing the fair market value of the property relative to the uses allowed in 1973. Thus, the claimant is not due compensation under ORS 197.352.

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 3, ORS 215 and OAR 660, division 33, which Clackamas County has implemented through its current EFU zone. With the exception of applicable provisions of ORS 215, including the interim land use planning goals in effect on October 26, 1973, these state land use regulations were not in effect when the claimant acquired the property.

Conclusions

It appears that the general statutory, goal and rule restrictions on residential development and use of farm land apply to the claimant's use of the subject property and with the exception of applicable provisions of ORS 215 in effect when the claimant acquired the property, these laws are not exempt under ORS 197.352(3)(E). However, as discussed in Section V.(2) of this report, these laws do not restrict the use of the subject property relative to uses permitted when the claimant acquired the property on October 26, 1973, because the claimant's desired use was not allowed under the provisions of ORS 215 in effect on that date.

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 current record, the claimant, Clive Cook Jr., is not entitled to relief under ORS 197.352. Department staff recommends that this claim be denied because neither the Commission nor the department has enforced laws enacted or adopted after the claimant acquired the 3.54-acre property that restrict the claimant's use of the claimant's private real property relative to uses permitted at the time he acquired the property on October 26, 1973.

VII. COMMENTS ON THE DRAFT STAFF REPORT

The department issued its draft staff report on this claim on June 22, 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.