



Oregon

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Department of Land Conservation and Development

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October 15, 2007

To: Interested Persons
From: Cora R. Parker, Acting Director



Re: Ballot Measure 37 (ORS 197.352) Claim Number M131128

Claimants: William C. and Gail K. Case

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. M131128
(BALLOT MEASURE 37) OF)
William C. and Gail K. Case, CLAIMANTS)

Claimants: William C. and Gail K. Case (the Claimants)

Property: Township 10S, Range 4W, Section 24, Tax lots 103 and 104
Linn County (the property)

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

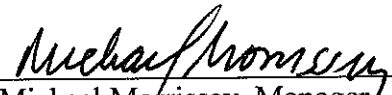
Claimants submitted the Claim to the State of Oregon under ORS 197.352. Under OAR 125-145-0010 *et seq.*, the Department of Administrative Services (DAS) referred the Claim to the Department of Land Conservation and Development (DLCDC) as the regulating entity. This order is based on the record herein, including the Findings and Conclusions set forth in the Final Staff Report and Recommendation of DLCDC (the DLCDC Report) attached to and by this reference incorporated into this order.

ORDER

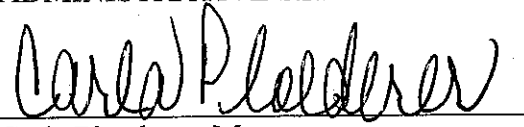
The Claim is denied as to laws administered by DLCDC and the Land Conservation and Development Commission (LCDC) for the reasons set forth in the DLCDC Report.

This Order is entered by the Manager of the Measure 37 Services Division of the DLCDC as a final order of DLCDC 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 Manager of the Measure 37 Services Unit of the DAS as a final order of DAS under ORS 197.352, OAR chapter 125, division 145, and ORS chapter 293.

FOR DLCDC AND THE LAND
CONSERVATION AND
DEVELOPMENT COMMISSION:
Cora R. Parker, Acting Director


Michael Morrissey, Manager
DLCDC, Measure 37 Services Division
Dated this 15th day of October, 2007.

FOR THE DEPARTMENT OF
ADMINISTRATIVE SERVICES:


Carla Ploederer, Manager
DAS, Measure 37 Services Unit
Dated this 15th day of October, 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

October 15, 2007

STATE CLAIM NUMBER: M131128

NAMES OF CLAIMANTS: William C. and Gail K. Case

MAILING ADDRESS: 33010 Dever-Conner Drive
Albany, Oregon 97321

PROPERTY IDENTIFICATION: Township 10S, Range 4W, Section 24
Tax lots 103 and 104
Linn County

OTHER CONTACT INFORMATION: George B. Heilig
PO Box 546
Corvallis, Oregon 97339

DATE RECEIVED BY DAS: November 22, 2006

DEADLINE FOR FINAL ACTION:¹ May 15, 2008

I. SUMMARY OF CLAIM

The claimants, William and Gail Case, seek compensation in the amount of \$290,000 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 82.80-acre subject property into seven parcels and to develop a dwelling on each resulting undeveloped parcel.² The subject property is located at 38501 Conser Road NE, near Albany, in Linn County. (See claim).

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.

² Subsequent to the filing of this claim and after notification was provided pursuant to OAR 125-145-0080, the claimants' attorney submitted a comment to the draft staff report dated September 28, 2007, requesting to change the intended use of the property to allow "a waiver of the application of statutes and administrative rules that might be applied to a future land use application for the 82.80 acres they own. The department cannot accept substantive amendments to previously filed claims.

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 the claimants' desired use of the subject real property relative to uses permitted at the time they acquired the property on May 8, 1974. (See the complete recommendation in Section VI. of this report).

III. COMMENTS ON THE CLAIM

Comments Received

On July 3, 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 15-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 22, 2006, for processing under OAR 125, division 145. The claim identifies Statewide Planning Goal 3 (Agricultural Lands) and 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 claimants, William and Gail Case, acquired the subject property on May 8, 1974, as reflected by a recorded warranty deed included with the claim. The Linn County Assessor’s Office confirms the claimants’ current ownership of the subject property.

Conclusions

The claimants, William and Gail Case, are “owners” of the subject property as that term is defined by ORS 197.352(11)(C), as of May 8, 1974.

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 acquired the property.

Findings of Fact

The claim indicates that the claimants desire to divide the 82.80-acre subject property into seven parcels and to develop a dwelling on each resulting undeveloped parcel, and that current land use regulations prevent the desired use.

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 EFU by Linn County as required by Goal 3, in accordance with ORS 215 and OAR 660, division 33, because the claimants’ property is “agricultural land” as defined by Goal 3.³ Goal 3 became effective on January 25, 1975, and required that agricultural land 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 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

³ The claimants’ 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. EFU-zoned "high-value" farm land under Goal 3, ORS 215.710 and OAR 660, division 33, is subject to additional restrictions under 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 claimants acquired the subject property on May 8, 1974, 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, the subject property was zoned EFU by Linn County, which allowed dwellings in conjunction with farm use on parcels of at least 40 acres and required new parcels less than 40 acres to conform to the county's definition of farm use, as reviewed and approved by the county.

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 claimants' desired use includes subdivision of their land. If the claimants had sought to create that use in 1974, 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

⁴ The Commission adopted amendments to OAR 660-033-0100, -0130 and -0135 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 dwelling standards under OAR 660, division 33, for EFU-zoned land.

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).

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 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. Ninety-five percent (75 acres) of the soils on the 82.80-acre subject property are rated as “prime” 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). The subject property is about two miles north of the City of Millersburg’s urban growth boundary with no nearby or available urban services.

Another interim goal was “to protect life and property in areas subject to floods, landslides and other natural disasters.” According to the FEMA map of the area (Firm Panel 4101360025B), the entire subject property is located within the flood zone of the Willamette River.

The claim does not establish that the approval of seven lots or parcels for residential use complies with the interim planning goals. To the contrary, and in particular, the desired division and development of 75 acres of predominantly “prime” farm land would not “conserve prime farm lands for the production of crops” as required by the interim goals in effect at the time the claimants acquired the subject property in 1974.

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 claimants acquired the subject property in 1974, and do not allow the desired division of the property into parcels less than 80 acres or the approval of dwellings. However, on May 8, 1974, the “interim” land use goals set forth in ORS 215.515 required the conservation of prime farm land for the production of crops. Ninety-five percent of the claimants’ 82.80-acre property is composed of very limited farm land soils rated as “prime.” The subject property could not be divided for residential use under the “interim” land use goals applicable in 1974.

Based on the facts of this claim, dividing the 82.80-acre subject property into seven 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 claimants’ desired use would not have been permitted under the standards in effect when the claimants 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 claimants acquired the property in 1974.

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 \$290,000 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.(2) of this report, current land use regulations do not restrict the use of the subject property relative to the uses allowed when the claimants acquired the property in 1974. Land use regulations enacted or adopted by the state since the claimants acquired the subject property do not have the effect of reducing the fair market value of the property relative to the uses allowed in 1974 because the claimants' desired use of the property was not allowed under the provisions of ORS 215.515 in effect when they acquired the subject property on May 8, 1974. Thus, the claimants are 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 Linn 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 May 8, 1974, these state land use regulations were not in effect when the claimants 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 claimants' use of the subject property, and with the exception of applicable provisions of ORS 215 in effect when the claimants acquired the property, these laws are not exempt under ORS 197.352(3)(E). However, as discussed in Section V.(2), the desired use of the property was not allowed under the provisions of ORS 215 in effect when the claimants acquired it on May 8, 1974.

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 claimants, William and Gail Case, are not entitled to relief under ORS 197.352 because the claimants' desired use of the subject property was not allowed under the provisions of ORS 215.515 (1973) in effect when the claimants acquired the property.

Department staff recommends that this claim be denied because neither the Commission nor the department has enforced laws enacted or adopted after the claimants acquired the 82.80-acre subject property that restrict the claimants' use of the property relative to uses permitted at the time they acquired the property on May 8, 1974.

VII. COMMENTS ON THE DRAFT STAFF REPORT

The department issued its draft staff report on this claim on September 14, 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. Comments received have been taken into account by the department in the issuance of this final report.