



Oregon

Theodore R. Kulongoski, Governor

Department of Land Conservation and Development

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October 24, 2007

To: Interested Persons

From: Cora R. Parker, Acting Director



Re: Ballot Measure 37 (ORS 197.352) Claim Number M131164

Claimants: Daren E. and Terri A. Filosi

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. M131164
(BALLOT MEASURE 37) OF)
Daren E. and Terri. A. Filosi, CLAIMANTS)

Claimants: Daren E. and Terri. A. Filosi (the Claimants)

Property: Township 1N, Range 10W, Section 14, Tax lots 300, 300S1 and 1100
Tillamook 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 Daren and Terri Filosi's division of 13 half-acre parcels from the 133.72-acre subject property, and to their development of a dwelling on each of the half-acre parcels: applicable provisions of Goals 3 and 4, ORS 215, and OAR 660, divisions 6, and 33, enacted or adopted after March 12, 1993. 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 they acquired the property on March 12, 1993. The department acknowledges that the relief to which the claimants are entitled under ORS 197.352 will not allow the claimants 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 on March 12, 1993. At that time, the property was subject to Goals 3 and 4 and OAR 660, divisions 5, and 6, as implemented through Tillamook County's acknowledged F-1 zone and the provisions of ORS 215 then 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 claimants 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.

6. Nothing in this report or the state's final order for this claim constitutes any determination of ownership by the State of Oregon as to submerged or submersible lands, or as to public rights to the use of waters of the state.

This Order is entered by the Acting 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 Manager for the Measure 37 Services Unit 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:



Cora R. Parker, Acting Director
DLCD

Dated this 24th day of October, 2007.

FOR the DEPARTMENT OF
ADMINISTRATIVE SERVICES:



Carla Ploederer, Manager
DAS, Measure 37 Services Unit

Dated this 24th day of October, 2007.

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

October 24, 2007

STATE CLAIM NUMBER: M131164

NAMES OF CLAIMANTS: Daren E. and Terri. A. Filosi

MAILING ADDRESS: 15595 Moss Creek Road
Bay City, Oregon 97107

PROPERTY IDENTIFICATION: Township 1N, Range 10W, Section 14
Tax lots 300, 300S1 and 1100
Tillamook County

OTHER CONTACT INFORMATION: Julie Lafoon, JEL
7480 Trask River Road
Tillamook, Oregon 97141

DATE RECEIVED BY DAS: November 24, 2006

DEADLINE FOR FINAL ACTION:¹ May 17, 2008

I. SUMMARY OF CLAIM

The claimants, Daren and Terri Filosi, seek compensation in the amount of \$650,000 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 13 half-acre parcels from the 133.72-acre subject property and to develop a dwelling on each of the half-acre parcels. The subject property is located at 15500, 15555 and 15595 Moss Creek Road, near Wheeler, in Tillamook 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

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.

not apply to Daren and Terri Filosi's division of 13 half-acre parcels from the 133.72-acre subject property, and to their development of a dwelling on each of the half-acre parcels: applicable provisions of Statewide Planning Goals 3 (Agricultural Lands) and 4 (Forest Lands), ORS 215; and Oregon Administrative Rules (OAR) 660, divisions 6, and 33, enacted or adopted after the claimants acquired the subject 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 they acquired the property on March 12, 1993. The department acknowledges that the relief to which the claimants are entitled under ORS 197.352 will not allow the claimants 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 19, 2007, 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 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 24, 2006, for processing under OAR 125, division 145. The claim identifies Tillamook County's farm and forest 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

The claimants, Daren and Terri Filosi, acquired the subject property from his parents, Eugene and Marilyn Filosi, on March 12, 1993, as reflected by the bargain and sale deed included with the claim. Eugene and Marilyn Filosi acquired tax lots 300 and 300S1 on February 24, 1966, and tax lot 1100 on June 18, 1971, as evidenced by the contracts of sale included with the claim. The Tillamook County Assessor’s Office confirms the claimants’ current ownership of the subject property.²

Conclusions

The claimants, Daren and Terri Filosi, are “owners” of the subject property as that term is defined by ORS 197.352(11)(C), as of March 12, 1993. Eugene and Marilyn Filosi are “family members” as defined by ORS 197.352(11)(A) and acquired tax lots 300 and 300S1 on February 24, 1966, and tax lot 1100 on June 18, 1971.

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 13 half-acre parcels from the 133.72-acre subject property and to develop a dwelling on each of the half-acre parcels, and that current land use regulations prevent the desired use.

The claim is based generally on the applicable provisions of state law that allow mixed agriculture-forest zoning and restrict uses on land zoned mixed agriculture-forest. The claimants’ property is zoned Farm Use (F-1) by Tillamook County. The county’s F-1 zone is a mixed agricultural and forest land zone, in accordance with Goals 3 and 4, as implemented by OAR 660-006-0050. Goals 3 and 4 became effective on January 25, 1975, and required that agricultural lands as defined by Goal 3 be zoned for farm uses and that forest lands under Goal 4

² The claimants assert family acquisition of the subject property by Daren Filosi’s grandfather as of 1942. However, the claimants have not provided any documentation to substantiate the grandfather’s acquisition date. The department must rely on the documentation available to it, which substantiates family acquisition dates of 1966 and 1971.

be zoned for forest uses. OAR 660-006-0050 authorizes local governing bodies to establish mixed agriculture-forest zones in accordance with both Goals 3 and 4 and OAR 660, divisions 6, and 33.

Under OAR 660-006-0050(2), effective on February 5, 1990, and subsequently amended on March 1, 1994, to comply with the provisions of House Bill 3661 (Chapter 792, Oregon Laws 1993), uses allowed in Exclusive Farm Use (EFU) zones under Goal 3 and forest zones under Goal 4 are allowed in mixed agriculture-forest zones.

For land divisions, OAR 660-006-0055 requires local governing bodies to apply the standards of OAR 660-006-0026 and 660-033-0100, which implement the minimum lot size requirements in ORS 215.780. ORS 215.780(1) establishes an 80-acre minimum for the creation of new lots or parcels in EFU and forest zones and became effective on November 4, 1993 (Chapter 792, Oregon Laws 1993).

For the approval and siting of dwellings, under OAR 660-006-0050(2) and (3), counties must apply either the OAR 660, division 6, or 33, standards based on the predominant use of the tract on January 1, 1993.³ The provisions of OAR 660-006-0027 and 660-006-0029 apply to dwelling approval and siting where the predominant use of the tract on that date was forest, and the provisions of OAR 660-033-0030 and 660-033-0035 apply where the predominant use of the tract on that date was agriculture.

The claimants' family first acquired the subject property in 1966 and 1971, prior to the adoption of the statewide planning goals and their implementing statutes and regulations. In 1966 and 1971, the subject property was zoned by Tillamook County as Farm Use.

Conclusions

The current zoning requirements, minimum lot size and dwelling standards established under Goals 3 and 4, ORS 215, and OAR 660, divisions 6, and 33, for land zoned for mixed agriculture-forest use, were all enacted or adopted after the claimants' family acquired the subject property. These laws restrict the use of the subject property relative to the uses allowed when the claimants' family acquired 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 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 \$650,000 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 property's value.

³ The claim does not include information regarding the predominant use of the property on January 1, 1993.

Conclusions

As explained in Section V.(1) of this report, the claimants are Daren and Terri Filosi, whose family members acquired tax lots 300 and 300S1 in 1966 and tax lot 1100 in 1971. Under ORS 197.352, the claimants are due compensation for land use regulations that restrict the use of the 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 enacted or adopted since the claimants' family acquired the subject property restrict the claimants' 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 \$650,000.

Without an appraisal or other documentation, it is not possible to substantiate the specific dollar amount by which the land use regulations have reduced the fair market value of the subject 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 the claimants' family 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 applicable provisions of Goals 3 and 4, ORS 215, and OAR 660, divisions 6, and 33, which Tillamook County has implemented through its current F-1 zone. These land use regulations were enacted or adopted after the claimants' family acquired the subject property.

Conclusions

It appears that none of the general statutory, goal and rule restrictions on residential division and development of the subject property were in effect when the claimants' family acquired tax lots 300 and 300S1 on February 24, 1966, and tax lot 1100 on June 18, 1971. As a result, these laws are not exempt under ORS 197.352(3)(E). Laws in effect when the claimants' family acquired the subject property are exempt under ORS 197.352(3)(E) and do not provide a basis for compensation. In addition, other land use laws enacted or adopted for a purpose set forth in ORS 197.352(3)(A) to (D) are also exempt and would not provide a basis for compensation.

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 \$650,000. 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 due for this claim, it would also be necessary to verify whether or the extent to which the claimants' desired use of the subject property was allowed under the standards in effect when their family acquired the property. Nevertheless, based on the record for this claim, the department has determined 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 Daren and Terri Filosi to use the subject property for a use permitted at the time they acquired the property on March 12, 1993.

When Daren and Terri Filosi acquired the subject property on March 12, 1993, the claimants' property was subject to Tillamook County's acknowledged comprehensive plan and F-1 zone.⁴ The F-1 zone allowed the partition of parcels smaller than 40 acres for single family residential development that is customarily provided in conjunction with farm use on a contiguous ownership that is smaller than 40 acres, based on findings that the certain criteria are satisfied. Those criteria include that the use of the property supports farm uses, will not limit or reduce farm uses and is consistent with ORS 215.243.

At that time, the claimants' desired use of the property would have been subject to compliance with Goal 3 or 4, and OAR 660, division 5, or 6, as implemented through the county's acknowledged F-1 zone, and the applicable provisions of ORS 215 then in effect.⁵

⁴ Tillamook County's F-1 zone was acknowledged by the Commission for compliance with Goals 3 and 4 on January 6, 1983.

⁵ After the county's comprehensive plan and land use regulations were acknowledged by the Commission as complying with the statewide planning goals, the goals and implementing rules no longer applied directly to individual 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. *Forster v. Polk County*, 115 Or App 475 (1992) and *Kenagy v. Benton County*, 115 Or App 131 (1992).

On March 12, 1993, ORS 215.263 (1991 edition) required that divisions of land in EFU zones be "appropriate for the continuation of the existing commercial agricultural enterprise within the area" or not smaller than the minimum size in the county's acknowledged plan. ORS 215.283(1)(f) (1991 edition) generally allowed farm dwellings "customarily provided in conjunction with farm use." Non-farm dwellings were allowed under ORS 215.283(3) if they were determined to be compatible with farm use, not interfere seriously with accepted farm practices, not

The department acknowledges that the claimants' desired division and development of the subject property was not allowed under the standards in effect when they acquired the property on March 12, 1993.

In addition to the provisions of Goals 3 and 4 ORS 215, and OAR 660, divisions 6, and 33, in effect when the claimants acquired the property, there may be other laws that continue to apply to the claimants' 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 uses 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 the 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 Daren and Terri Filosi's division of 13 half-acre parcels from the 133.72-acre subject property, and to their development of a dwelling on each of the half-acre parcels: applicable provisions of Goals 3 and 4, ORS 215, and OAR 660, divisions 6, and 33, enacted or adopted after March 12, 1993. 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 they acquired the property on March 12, 1993. The department acknowledges that the relief to which the claimants are entitled under ORS 197.352 will not allow the claimants 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 on March 12, 1993. At that time, the property was subject to Goals 3 and 4 and OAR 660, divisions 5, and 6, as implemented through Tillamook County's acknowledged F-1 zone and the provisions of ORS 215 then 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.

materially alter the stability of the land use pattern in the area and be situated on generally unsuitable land for the production of farm crops and livestock.

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 claimants 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.

6. Nothing in this report or the state's final order for this claim constitutes any determination of ownership by the State of Oregon as to submerged or submersible lands, or as to public rights to the use of waters of the state.

VII. COMMENTS ON THE DRAFT STAFF REPORT

The department issued its draft staff report on this claim on September 17, 2005. 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.