



Oregon

Theodore R. Kulongoski, Governor

Department of Land Conservation and Development

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November 5, 2007

To: and Interested Persons

From: Cora R. Parker, Acting Director



Re: Ballot Measure 37 (ORS 197.352) Claim Number M131265

Claimants: Gary, Anthony and Thelma Morgan

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. M131265
(BALLOT MEASURE 37) OF)	
Gary Morgan, Anthony Morgan and)	
Thelma Morgan, CLAIMANTS)	

Claimants: Gary Morgan, Anthony Morgan and Thelma Morgan (the Claimant)

Property: Township 37S, Range 7W, Section 10A, Tax lot 105
Josephine 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 Gary, Anthony and Thelma Morgan's division of the 10.84-acre subject property into 2.5- to 5-acre parcels or to their development of a dwelling on each resulting undeveloped parcel: applicable provisions of Goal 4, ORS 215 and OAR 660, division 6, enacted or adopted after each claimant 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 Thelma Morgan acquired the property on February 27, 1991, and when Gary and Anthony Morgan acquired the property July 18, 2006. The department acknowledges that the relief to which the claimants are entitled under ORS 197.352 may not allow Thelma Morgan to use the subject property in the manner set forth in the claim and will not allow Gary and Anthony Morgan 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 February 27, 1991, for Thelma Morgan and July 18, 2006, for Gary and Anthony Morgan. On February 27, 1991, the property was subject to compliance with Goal 4 and OAR 660, division 6,

as implemented through Josephine County's acknowledged comprehensive plan and WR zone. On July 18, 2006, the property was subject to applicable provisions of Goal 4, ORS 215 and OAR 660, division 6, currently 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.

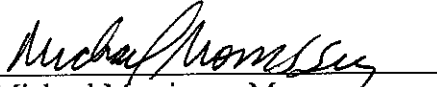
4. Any use of the subject property by the claimants under the terms of the order will remain subject to the following laws: (a) those laws not specified in (1) above; (b) any laws enacted or enforced by a public entity other than the Commission or the department; and (c) those laws not subject to ORS 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.

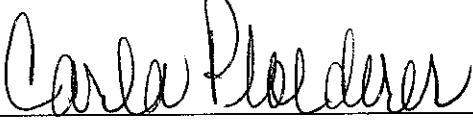
6. Nothing in this report or the state's final order for this claim constitutes any determination of ownership by the State of Oregon as to submerged or submersible lands, or as to public rights to the use of waters of the state.

This Order is entered by the Manager for the Measure 37 Services Division 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 of 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


Michael Morrissey, Manager
DLCD, Measure 37 Services Division
Dated this 5th day of November, 2007.

FOR the DEPARTMENT OF
ADMINISTRATIVE SERVICES:


Carla Ploederer, Manager
DAS, Measure 37 Services Unit
Dated this 5th day of November, 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

November 5, 2007

STATE CLAIM NUMBER: M131265

NAMES OF CLAIMANTS: Gary Morgan
Anthony Morgan
Thelma Morgan

MAILING ADDRESS: Gary Morgan
9844 Redwood Highway
Wilderville, Oregon 97543

Anthony Morgan
1405 SE Cherry Lane
Grants Pass, Oregon 97527

Thelma Morgan
9850 Redwood Highway
Wilderville, Oregon 97543

PROPERTY IDENTIFICATION: Township 37S, Range 7W, Section 10A
Tax lot 105
Josephine County

DATE RECEIVED BY DAS: November 27, 2006

DEADLINE FOR FINAL ACTION:¹ May 20, 2008

I. SUMMARY OF CLAIM

The claimants, Gary, Anthony and Thelma Morgan, seek compensation in the amount of \$594,509 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 10.84-acre subject property into 2.5- to 5-acre parcels and to develop a dwelling on each resulting undeveloped parcel. The subject property is located at 9850 Redwood Highway, near Wilderville, in Josephine 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.

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 not apply to Gary, Anthony and Thelma Morgan's division of the 10.84-acre subject property into 2.5- to 5-acre parcels and to their development of a dwelling on each resulting undeveloped parcel: applicable provisions of Statewide Planning Goal 4 (Forest Lands), ORS 215 and Oregon Administrative Rules (OAR) 660, division 6, enacted or adopted after each claimant 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 Thelma Morgan acquired the property on February 27, 1991, and when Gary and Anthony Morgan acquired the property on July 18, 2006. The department acknowledges that the relief to which the claimants are entitled under ORS 197.352 may not allow Thelma Morgan to use the subject property in the manner set forth in the claim and will not allow Gary and Anthony Morgan 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 July 10, 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, one written comment was received in response to the 15-day notice.

The comment does not address whether the claim meets the criteria for relief under ORS 197.352. Comments concerning the effects a use of the property may have on surrounding areas are generally not something that the department is able to consider in determining whether to waive a state law. If funds do become available to pay compensation, then such effects may become relevant in determining which claims to pay compensation for instead of waive a state law. (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 November 27, 2006, for processing under OAR 125, division 145. The claim identifies Goal 4 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

Claimant Gary Morgan first acquired the subject property on June 3, 1976, as reflected by a memorandum agreement obtained by the department. However, Gary Morgan conveyed all of his interest in the subject property to his family member, claimant Thelma Morgan, on February 27, 1991,² as reflected by a bargain and sale deed obtained by the department. On July 18, 2006, Thelma Morgan conveyed an interest in the subject property to herself and Anthony and Gary Morgan, as reflected by a bargain and sale deed included with the claim. The Josephine County Assessor’s Office confirms the claimants’ current ownership of the subject property.

Conclusions

The claimants, Gary, Anthony and Thelma Morgan, are “owners” of the subject property as that term is defined by ORS 197.352(11)(C). Thelma Morgan has been an owner since February 27, 1991. Gary and Anthony Morgan have been owners since July 18, 2006. The subject property has been owned by a “family member,” as that term is defined by ORS 197.352(11)(A), since June 3, 1976.

² Although this deed from Gary Morgan to Thelma Morgan was executed on February 5, 1991, the department obtained another deed for this claim that indicates that this deed did not become effective until it was recorded on February 27, 1991. In essence, the department obtained two deeds for this claim,: a deed executed on February 4, 1991, in which Gary Morgan conveys all of his interest in tax lot 105 to Thelma Morgan, and a deed executed on February 5, 1991, in which Allen Morgan conveys his interest in tax lot 105 to Gary Morgan. Both deeds were recorded on the same day; however, the February 5, 1991 deed was recorded before the February 4, 1991 deed, indicating that Gary Morgan acquired an additional interest in tax lot 105 from Allen Morgan and then subsequently conveyed all of his interest in the property to Thelma Morgan.

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 10.84-acre subject property into 2.5- to 5-acre 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 forest zoning and restrict uses on forest-zoned land. The claimants' property is zoned Woodlot Resource (WR) by Josephine County as required by Goal 4, in accordance with ORS 215 and OAR 660, division 6, because the claimants' property is "forest land" under Goal 4. Goal 4 became effective on January 25, 1975, and requires that forest land be zoned for forest use.

Current land use regulations, including ORS 215.705 to 215.755 and 215.780 and OAR 660, division 6, enacted or adopted pursuant to Goal 4, generally prohibit the division of forest-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 generally establishes an 80-acre minimum size for the creation of new lots or parcels on forest-zoned land and became effective on November 4, 1993 (Chapter 792, Oregon Laws 1993). ORS 215.705 to 215.755 establish standards for the creation of new parcels and dwellings allowed in forest zones.

OAR 660, division 6, became effective on September 1, 1982, to implement Goal 4 and establish standards for divisions and development of land zoned for forest use, and was amended on March 1, 1994, to implement ORS 215.705 to 215.755 and 215.780. OAR 660-006-0025 interprets the goal and statutory standard for uses allowed in forest zones. OAR 660-006-0026 interprets land division requirements in forest zones, and 660-006-0027 and 660-006-0029 interpret the standards for dwellings in forest zones.

The Morgan family first acquired the subject property in 1976, after the adoption of the statewide planning goals, but before the Commission acknowledged Josephine County's land use regulations to be in compliance with the statewide planning goals pursuant to ORS 197.250 and 197.251.³ Because the Commission had not acknowledged the county's plan and land use regulations when Morgan family first acquired the subject property on June 3, 1976, the applicable statewide planning goals, and Goal 4 in particular, would have applied directly to any development application for the claimants' property.⁴

³ Josephine County's comprehensive plan was acknowledged for compliance with Goal 4 on December 9, 1985.

⁴ The statewide planning goals became effective on January 25, 1975, and were applicable to legislative land use decisions and some quasi-judicial land use decisions prior to the Commission's acknowledgment of each county's land use regulations. *Perkins v. City of Rajneeshpuram*, 300 Or 1 (1985); *Alexanderson v. Polk County*, 289 Or 427,

As adopted in 1975, Goal 4 was intended to “conserve forest lands for forest uses” and required that lands suitable for forest uses “be inventoried and designated as forest lands” and that existing forest land uses “be protected unless proposed changes are in conformance with the comprehensive plan.” Those forest uses were defined as: “(1) the production of trees and the processing of forest products; (2) open space, buffers from noise and visual separation of conflicting uses; (3) watershed protection and wildlife and fisheries habitat; (4) soil protection from wind and water; (5) maintenance of clean air and water; (6) outdoor recreational activities and related support services and wilderness values compatible with these uses; and (7) grazing land for livestock.” Specifically, Goal 4 only allowed land divisions that would protect commercial forest lands for commercial forest uses. Dwellings in forest zones could only be allowed if found to be “necessary and accessory” to one of the enumerated forest uses listed in Goal 4.⁵

The claim does not establish whether or to what extent the claimants’ desired division and development of the subject property were allowed under the standards in effect when the Morgan family first acquired the property on June 3, 1976.

Conclusions

The current zoning requirements, minimum lot size and dwelling standards established by Goal 4 ORS 215 and OAR 660, division 6, for forest-zoned land were all enacted or adopted after the Morgan family first acquired the subject property in 1976 and do not allow the claimants’ desired division or development of the property. However, the claim does not establish whether or to what extent the claimants’ desired use of the subject property complies with the standards for land divisions and development under Goal 4 in effect when the Morgan family first acquired the property on June 3, 1976.

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.”

rev den 290 Or 137 (1980); Sunnyside Neighborhood Assn. v. Clackamas County, 280 Or 569 (1977); Jurgenson v. Union County, 42 Or App 505 (1979) and 1000 Friends of Oregon v. Benton County, 32 Or App 413 (1978). After the county’s plan and land use regulations were acknowledged by the Commission, the statewide planning goals and implementing rules no longer directly applied to such 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); Kenagy v. Benton County, 115 Or App 131 (1992).*

⁵ Goal 4 prohibited uses that were not enumerated by Goal 4 as permissible uses for forest lands as well as those that were not necessary and accessory to an enumerated forest use. *Lamb v. Lane County, 7 Or LUBA 137 (1983).* Dwellings in forest lands were required to be “necessary and accessory” to show that such dwellings complied with the Goal 4 requirement that local land use regulations must “conserve forest lands for forest uses.” *1000 Friends v. LCDC (Curry County), 301 Or 447 (1986).* A dwelling that may “enhance” forest uses is not “necessary and accessory” to a forest use to the extent required by Goal 4. *1000 Friends of Oregon v. LCDC (Lane County), 305 Or 384 (1988).* For additional guidance, the Goal 4 provisions were interpreted under OAR 660, division 6, effective on September 1, 1982, in *1000 Friends of Oregon v. LCDC (Lane County)* and in *1000 Friends v. LCDC (Curry County)*.

Findings of Fact

The claim includes an estimate of \$594,509 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.(1) of this report, the claimants are Gary, Anthony and Thelma Morgan whose family acquired the subject property in 1976. 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 Morgan family first 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 \$594,509.

Without an appraisal or other documentation and without verification of whether or the extent to which the claimants' desired use of the subject property was allowed under the standards in effect when the Morgan family acquired the property, 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 Morgan family first 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 Goal 4, ORS 215 and OAR 660, division 6, which Josephine County has implemented through its current WR zone. With the exception of provisions of Goal 4 in effect on June 3, 1976, all of these land use regulations were enacted or adopted after the Morgan family first acquired the subject property.

Conclusions

It appears that the general statutory, goal and rule restrictions on residential division and development of the subject property are not exempt under ORS 197.352(3)(E) only to the extent they were enacted or adopted after the Morgan family first acquired the property on June 3, 1976. Applicable provisions of Goal 4 in effect when the Morgan family first 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 \$594,509. 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 the Morgan family first 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 Thelma Morgan to use the subject property for a use permitted at the time she acquired the property on February 27, 1991, and to allow Gary and Anthony Morgan to use the subject property for a use permitted at the time they acquired the property on July 18, 2006.

When Thelma Morgan acquired the subject property on February 27, 1991, the property was subject to Josephine County's acknowledged comprehensive plan and WR zone.⁶ That zone required an 80-acre minimum lot size and permitted the development of dwellings. At that time, Thelma Morgan's desired use of the property would have been subject to compliance with Goal 4, and OAR 660, division 6, as implemented through the county's acknowledged comprehensive plan and WR zone.⁷ The claim does not establish whether or to what extent Thelma Morgan's

⁶ Josephine County's WR zone was acknowledged by the Commission for compliance with Goal 4 on December 9, 1985.

⁷ 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, 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).

