

ORS 197.352 (BALLOT MEASURE 37) CLAIM FOR COMPENSATION
OREGON DEPARTMENT OF LAND CONSERVATION AND DEVELOPMENT
Draft Staff Report and Recommendation

July 17, 2006

STATE CLAIM NUMBER: M122430

NAMES OF CLAIMANTS: Carolyn W. Block
Chester B. Barker
Ethel Mae Dygert
Bertha E. Streaun
Margie A. Weihemuller
Loyd John Barker

MAILING ADDRESS:

Carolyn W. Block
25519 S. Elwood Road
Colton, Oregon 97017

Chester B. Barker
1420 Tull Drive
Walla Walla, Washington 99362

Ethel Mae Dygert
1451 Field Brook Road
McKinleyville, California 95519

Bertha E. Streaun
#7 Dove Street
Longview, Washington 98632

Margie A. Weihemuller
24297 Cox Road
Rainier, Oregon 97048

Loyd John Barker
72954 Gordon Creek Road
Elgin, Oregon 97827

PROPERTY IDENTIFICATION: Township 04S, Range 04E, Section 20
Tax lots 600 and 690
Clackamas County

DATE RECEIVED BY DAS: September 22, 2005

180-DAY DEADLINE:

August 7, 2006¹

I. SUMMARY OF CLAIM

The claimants, Carolyn Block, Chester Barker, Ethel Dygert, Bertha Streat, Margie Weihemuller and Loyd Barker, seek compensation in the amount of \$3,450,000 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 subject property, consisting of tax lots 600 and 690 totaling 83.4 acres, and to develop a dwelling on each parcel. The subject property is located at the geographic coordinates listed above, near Colton, in Clackamas County. (See claim.)

II. SUMMARY OF STAFF RECOMMENDATION

Based on the preliminary findings and conclusions set forth below, the Department of Land Conservation and Development (the department) has determined that the claim is valid in part. 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 the claimants' division of tax lot 600, consisting of 78.4 acres, or to their development of a dwelling on each parcel: applicable provisions of Statewide Planning Goal 3 (Agricultural Lands), ORS 215 and Oregon Administrative Rules (OAR) 660, division 33, enacted or adopted after January 1999. These laws will not apply to the claimants only to the extent necessary to allow them to use tax lot 600 for the use described in this report, and only to the extent that use was permitted when they acquired the tax lot in January 1999. The department acknowledges that the relief to which the claimants are entitled under ORS 197.352 will not allow the claimants to use the property in the manner set forth in the claim.

The department has further determined that the claim for tax lot 690 is not valid because the claimants' desired use of the property was prohibited under the laws in effect when the claimants acquired that tax lot in 1994. (See the complete recommendation in Section VI. of this report.)

III. COMMENTS ON THE CLAIM

Comments Received

On May 9, 2006, 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 10-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 subject 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,

¹ This date reflects 180 days from the date the claim was submitted, as extended by the 139 days that all timelines under Measure 37 were suspended during the pendency of *MacPherson v. Dept. of Admin. Svcs.*, 340 Or 117 (2006).

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 September 22, 2005, for processing under OAR 125, division 145. The claim identifies ORS 215.705 and 215.780(1)(c) and OAR 660-006-0026(1)(a) and 660-006-0027(1) 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, Carolyn Block, Chester Barker, Ethel Dygert, Bertha Strean, Margie Weihemuller and Loyd Barker, acquired a future remainder interest in tax lot 600 on June 11, 1975, when their parents, Otho and Nora Barker, transferred the subject property to the claimants, subject to the parents' reservation of a life estate. Under the terms of the life estate, the parents retained the right to live on and use the subject property during each of their lifetimes. Otho Barker passed

away on January 27, 1981, and Nora Baker passed away in January 1999. Thus, the claimants acquired the remainder fee title and the right to use tax lot 600 in January 1999.

On November 15, 1994, through a boundary line agreement, Nora Barker transferred her life estate interest, and each claimant transferred his or her remainder interest in a one-acre portion of tax lot 600 to Port Blakeley Tree Farms, LLC. In exchange, the six claimants acquired a five-acre parcel that is now tax lot 690.

The Clackamas County Assessor's Office confirms the claimants' current ownership of both tax lots 600 and 690.

Conclusions

The claimants, Carolyn Block, Chester Barker, Ethel Dygert, Bertha Streaun, Margie Weihemuller and Loyd Barker, are "owners" of the subject property as that term is defined by ORS 197.352(11)(C). The claimants acquired tax lot 600 in January 1999 and tax lot 690 on November 15, 1994. The claimants' parents are "family members" as to tax lot 600, as defined by ORS 197.352(11)(A), and acquired this tax lot on July 6, 1951.

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 subject 83.4-acre property and to develop a dwelling on each parcel. It indicates the desired use is not allowed under current land use regulations.

The claim is based generally on Clackamas County's current Timber District (TBR) zone and the applicable provisions of state law that require such zoning. The claimants' property is zoned TBR as required by Goal 4, in accordance with ORS 215 and OAR 660, division 6, because the claimants' property is "forest land" as defined by Goal 4. Goal 4 became effective on January 25, 1975, and requires that forest land be zoned for forest use (see statutory and rule history under OAR 660-015-0000(4)). The forest land administrative rules (OAR 660, division 6) became effective on September 1, 1982, and ORS 215.705 to 215.755 and 215.780 became effective on November 4, 1993 (Chapter 792, Oregon Laws 1993). OAR 660-006-0026 and 660-006-0027 were amended on March 1, 1994, to implement those statutes.

Together, ORS 215.705 to 215.755 and 215.780 and OAR 660, division 6, enacted or adopted pursuant to Goal 4, prohibit the division of forest land into parcels less than 80 acres and establish standards for development of dwellings on existing or proposed parcels on those lands.

The claimants' family acquired tax lot 600 in 1951, prior to the adoption of the statewide planning goals and their implementing statutes and regulations. No county zoning applied to the tax lot in 1951.

At the time the claimants acquired tax lot 690 on November 15, 1994, it was subject to the current regulations described above.

Conclusions

The current zoning requirements, minimum lot size and dwelling standards established by applicable provisions of Goal 4, ORS 215 and OAR 660, division 6, were all enacted or adopted after the claimants' family acquired tax lot 600. These laws restrict the use of the tax lot 600 relative to the uses allowed when the claimants' family acquired it. However, these laws were all enacted or adopted before the claimants acquired tax lot 690, and therefore the laws do not restrict the use of tax lot 690 relative to uses allowed when the claimants acquired the tax lot.

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 \$3,450,000 as the reduction in the subject property's fair market value due to the regulations that restrict the claimants' desired use of the subject property. This amount is based on the claimants' comparison of the subject property to sales of properties in the surrounding area.

Conclusions

As explained in Section V.(1) of this report, the claimants are Carolyn Block, Chester Barker, Ethel Dygert, Bertha Streen, Margie Weihemuller and Loyd Barker whose family members acquired tax lot 600 in 1951 and who acquired tax lot 690 in 1994. Under ORS 197.352, the claimants are due compensation for land use regulations that restrict the use of tax lot 600 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 tax lot 600 restrict the claimants' desired use of the property. The claimants estimate that the effect of the regulations on the fair market value of the entire subject property is a reduction of \$3,450,000.

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 tax lot 600. Nevertheless, based on the evidence in the record for this claim, the department determines that the fair market value of tax lot 600 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 tax lot 600.

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 property relative to the uses permitted when the claimants' family acquired tax lot 600, including applicable provisions of Goal 4, ORS 215 and OAR 660, division 6, which Clackamas County has implemented through its current TBR zone. All of these land use regulations were enacted or adopted after the claimants' family acquired tax lot 600 in 1951 but before the claimants acquired tax lot 690 in 1994.

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 lot 600 on July 6, 1951. As a result, these laws are not exempt under ORS 197.352(3)(E). Laws in effect when the claimants' family acquired tax lot 600 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.

All of the state land use regulations that restrict the claimants' desired use of tax lot 690 were in effect when the claimants acquired this tax lot. Therefore, these state land use regulations are exempt under ORS 197.352(3)(E) as to the claimants' use of tax lot 690.

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 do not restrict the claimants' desired use of tax lot 690 relative to the uses permitted when the claimants acquired this tax lot in 1994 and do not reduce the fair market value of the tax lot. All state laws restricting the use of tax lot 690 are exempt under ORS 197.352(3)(E).

Based on these findings and conclusions, laws enforced by the Commission or the department restrict the claimants' desired use of tax lot 600. 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 entire subject property by \$3,450,000. 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 tax lot 600, 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 tax lot 600 was allowed under the standards in effect when the claimants' family acquired the tax lot. 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 tax lot 600 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 Carolyn Block, Chester Barker, Ethel Dygert, Bertha Strean, Margie Weihemuller and Loyd Barker to use tax lot 600 for a use permitted at the time they acquired the property in January 1999.

At the time the claimants acquired an interest in tax lot 600 it was zoned TBR by Clackamas County and subject to the current lot size and dwelling standards under Goal 4, ORS 215 and OAR 660, division 6, and as described in Section V.(2) of this report.

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 their 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 finds that for tax lot 690, the claimants are not entitled to relief under ORS 197.352 because laws enforced by the Commission or the department do not restrict the claimants' desired use of the tax lot relative to what was permitted when the claimants' acquired it in 1994 and do not reduce the fair market value of the property. All state laws restricting the use of tax lot 690 are exempt under ORS 197.352(3)(E). Therefore, the department recommends that the claim be denied for tax lot 690.

The department further recommends that the claim be approved for tax lot 600, 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 the claimants' division of tax lot 600 and to their development of a dwelling on each parcel: applicable provisions of Goal 4, ORS 215 and OAR 660, division 6, enacted or adopted after January 1999. 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 tax lot 600 to the standards in effect in January 1999. At that time, 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 tax lot 600 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 tax lot 600 imposed by private parties.

4. Any use of tax lot 600 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 tax lot 600, 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 tax lot 600 by the claimants.

VII. NOTICE OF OPPORTUNITY TO COMMENT

This staff report is not a final decision by the department and does not authorize any use of the property that is the subject of this report. OAR 125-145-0100 provides 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. Such response must be filed no more than ten calendar days after the date this report is mailed to the claimants and any third parties. Responses to this draft staff report and recommendation will be considered only as comments related to the claim described in this report. All responses must be delivered to the Oregon Department of Administrative Services (DAS), Measure 37 Unit, Risk Management-State Services Division, 1225 Ferry Street SE, U160, Salem, Oregon 97301-4292 and will be deemed timely filed if either postmarked on the tenth day, or actually delivered to DAS by the close of business on the tenth day. Note: Please reference the claim number, claimant name and clearly mark your comments as "Draft Staff Report comments." Comments must be submitted in writing only. Those comments submitted electronically or by facsimile will not be accepted.