

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: M122432

NAME OF CLAIMANT: Dorothy R. Phelps

MAILING ADDRESS: 60151 E. Sleepy Hollow Drive
Sandy, Oregon 97055

PROPERTY IDENTIFICATION: Township 2S, Range 6E, Section 23CA
Tax lots 1000, 1003, 1004 and 1005
Clackamas County

DATE RECEIVED BY DAS: September 22, 2005

180-DAY DEADLINE: August 7, 2006¹

I. SUMMARY OF CLAIM

The claimant, Dorothy Phelps, seeks compensation in the amount of \$200,000 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 claimant desires compensation or the right to divide the 6.5-acre property, consisting of tax lots 1000, 1003, 1004 and 1005, into three approximately 2-acre parcels for residential development. The subject property is located at 60565 E. Highway 26, near Sandy, 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. 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 Dorothy Phelps' division of the 6.5-acre property into three approximately 2-acre parcels for residential development: applicable provisions of Statewide Planning Goal 14 (Urbanization) and Oregon Administrative Rules (OAR) 660-004-0040, adopted after the claimant acquired each of the tax lots that composes the subject property. These land use regulations will not apply to the claimant only to the extent necessary to allow her to use the subject property for the use described in this report, and only to the extent that use

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).

was permitted when she acquired tax lots 1003 and 1004 on November 4, 1981, tax lot 1005 on May 1, 1985, and tax lot 1000 on August 9, 1990. (See the complete recommendation in Section VI. of this report.)

III. COMMENTS ON THE CLAIM

Comments Received

On October 10, 2005, 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, four written comments were received in response to the 10-day notice.

The comments do 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, then such effects may become relevant in determining which claims to pay compensation for instead of waive a state law. (See the comment letters 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 Clackamas County RRF-5 zone as the basis for the claim. Only laws that were enacted or adopted prior to December 2, 2004, are the basis for this claim.

Conclusions

The claim has been submitted within two years of the effective date of Measure 37 (December 2, 2004), based on land use regulations enacted or adopted prior to December 2, 2004, and is therefore timely filed.

V. ANALYSIS OF CLAIM

1. Ownership

ORS 197.352 provides for payment of compensation or relief from specific laws for “owners” as that term is defined in ORS 197.352. ORS 197.352(11)(C) defines “owner” as “the present owner of the property, or any interest therein.”

Findings of Fact

The claimant, Dorothy Phelps, acquired the subject property on the following dates, as reflected by deeds included with the claim:

Tax lot	Family Ownership Date	Dorothy Phelps' Ownership Date	Acres
1000	May 11, 1938	August 9, 1990	2.70
1003	April 6, 1934	November 4, 1981	1.09
1004	1938	November 4, 1981	0.63
1005	September 25, 1937	May 1, 1985	2.07

As shown above, the claimant’s parents, George and Katherine Dodd, acquired the subject property in the 1930s as evidenced by a warranty deed and other records included with the claim. A May 19, 2005, title report submitted with the claim establishes the claimant’s current ownership of the subject property.

Conclusions

The claimant, Dorothy Phelps, is an “owner” of the subject property as that term is defined by ORS 197.352(11)(C), as of the dates listed in the above table. The claimant’s parents, George and Katherine Dodd, are “family members” as defined by ORS 197.352(11)(A) and acquired the subject property in the 1930s.

2. The Laws That are the Basis for This Claim

In order to establish a valid claim, ORS 197.352(1) requires, in part, that a law must restrict the claimant’s use of private real property in a manner that reduces the fair market value of the property relative to how the property could have been used at the time the claimant or a family member acquired the property.

Findings of Fact

The claim indicates that claimant desires to divide the subject 6.5-acre property into three parcels, each at least two acres in size, for residential development, which is not allowed under the property’s current RRFF-5 zoning.

The claim is based generally on Clackamas County’s current RRFF-5 zone and the applicable provisions of state law that require such zoning. The county’s RRFF-5 zone is a rural residential

zone as required by Goal 14, which generally requires that land outside of urban growth boundaries be used for rural uses.

Goal 14 was effective on January 25, 1975, and requires that local comprehensive plans identify and separate urbanizable land from rural land in order to provide for an orderly and efficient transition from rural to urban land use. In 2000, as a result of a 1986 Oregon Supreme Court decision,² the Commission amended Goal 14 and adopted OAR 660-004-0040 (Application of Goal 14 to Rural Residential Areas), which was effective on October 4, 2000.

OAR 660-004-0040 states that if a county rural residential zone in effect on October 4, 2000, specifies a minimum lot size of two acres or more, the area of any new lot or parcel shall equal or exceed the minimum lot size that is already in effect (OAR 660-004-0040(7)(c)). Some relief from this provision is available for lots or parcels having more than one permanent habitable dwelling pursuant to OAR 660-004-0040(7)(h). The rule also provides that a county's minimum lot size requirement in a rural residential zone shall not be amended to allow a smaller minimum lot size without approval of an exception to Goal 14 (OAR 660-004-0040(6)). Because Clackamas County's RRFF zone was in effect on October 4, 2000, and requires a minimum lot size of five acres, the minimum lot size for any new lot or parcel must equal or exceed five acres.

The claimant's family acquired the subject property in the 1930s, prior to the adoption of the statewide planning goals and their implementing statutes and rules.

Conclusions

The minimum lot size requirements for rural residential lots or parcels established by Goal 14 and OAR 660-004-0040 were adopted since the claimant's family acquired the subject property in the 1930s and do not allow the desired division of 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 \$200,000 as the reduction in the subject property's fair market value due to the regulations that restrict the claimant's desired use of the property. This amount is based on the claimant's assessment of the subject property's value.

Conclusions

As explained in Section V.(1) of this report, the claimant is Dorothy Phelps whose family acquired the subject property in the 1930s. Under ORS 197.352, the claimant is due compensation for land use regulations that restrict the use of the subject property and have the

² *1000 Friends of Oregon v. LCDC (Curry County)*, 301 Or 447 (1986).

effect of reducing its fair market value. Based on the findings and conclusions in Section V.(2) of this report, laws adopted since the claimant's family acquired the subject property restrict the claimant's desired use of the property. The claimant estimates that the effect of the regulation(s) on the fair market value of the subject property is a reduction of \$200,000.

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.

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 14 and OAR 660-004-0040, which Clackamas County has implemented through its RRF-5 zone. These regulations were not in effect when the claimant's family acquired the subject property in the 1930s.

Conclusions

It appears that none of the general goal and rule restrictions on residential division of the claimant's property were in effect when the claimant's family acquired the property during the 1930s. As a result, these laws are not exempt under ORS 197.352(3)(E). Laws in effect when the claimant's family acquired the 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 claimant's 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 \$200,000. However, because the claim does not provide an appraisal or other relevant evidence demonstrating that the land use 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 claimant's desired use of the subject property was allowed when she acquired the property. Nevertheless, based on the record for this claim, the department has determined that the laws on which the claim is based 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 Dorothy Phelps to use the subject property for a use permitted when she acquired the property between 1981 and 1990, as listed in the table in Section V.(1).

The claimant acquired tax lots 1003 and 1004 on November 4, 1981, after the adoption of the statewide planning goals, but before the Commission acknowledged Clackamas County's land use regulations to be in compliance with statewide planning goals pursuant to ORS 197.250 and 197.251. The subject property was recognized as resource land when the claimant acquired it, and because the Commission had not acknowledged Clackamas County's plan and land use regulations when the claimant acquired tax lots 1003 and 1004 in 1981, the statewide planning goals, and particularly Goals 3 (Agricultural Lands) and 4 (Forest Lands), in addition to Goal 14, applied directly to the claimant's property when they acquired the tax lots.³

Goal 3 became effective on January 25, 1975. As adopted on January 25, 1975, Goal 3 required that agricultural land be preserved. The Goal 3 standard for land divisions involving property where the local zoning was not acknowledged required that the resulting parcels must be of a size that is "appropriate for the continuation of the existing commercial agricultural enterprise within the area." The claimant's opportunity to divide the subject property when they acquired it in 1981 was limited to land divisions that were consistent with Goal 3, which required that the resulting parcels be (1) appropriate for the continuation of the existing commercial agricultural enterprise in the area and (2) shown to comply with the legislative intent set forth in ORS 215.

Goal 4 went into effect on January 25, 1975, "to conserve forest lands for forest uses" and required, "Lands suitable for forest uses shall be inventoried and designated as forest lands. Existing forest land uses shall be protected unless proposed changes are in conformance with the

³ 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, 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. *Foster v. Polk County*, 115 Or App 475 (1992); *Kenagy v. Benton County*, 115 Or App 131 (1992).

comprehensive plan.” Those forest uses were defined as follows: “(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.”

The claim does not establish whether the claimant’s desired use would have been permitted under the standards of Goals 3, 4 and 14, in effect and applicable to the subject property at the time the claimant acquired tax lots 1003 and 1004 in 1981.

When the claimant acquired tax lot 1005 in 1985 and tax lot 1000 in 1990, they tax lots were subject to Clackamas County’s plan for rural residential areas in the Mount Hood Corridor, which was acknowledged by the Commission’s action on February 11, 1983, and required a five-acre minimum lot or parcel size. Any division of tax lots 1000 and 1005 must be consistent with Clackamas County’s acknowledged plan in effect at the time.

In addition to the laws identified above, in effect when the claimant acquired each of the subject tax lots, there may be other that apply to the claimant’s use of the property that have not been identified in the claim. In some cases, it will not be possible to know which laws apply to a use of the subject property until there is a specific proposal for that use. When the claimant seeks a building or development permit to carry out a specific use, it may become evident that other estate laws apply to that use, and depending on when they were enacted or adopted, may continue to apply to the claimant’s property. In addition, some of these laws may be exempt under ORS 197.352(3)(A) to (D) and will continue to apply to the subject property on that basis.

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 use that the claimant has 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 claimant should be aware that the less information she has provided to the department in her claim, the greater the possibility that there may be additional laws that will later be determined to continue to apply to her 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 Dorothy Phelps’ division of the 6.5-acre property into three approximately 2-acre parcels for residential development: the applicable provisions of Goal 14 and OAR 660-004-0040, adopted after the claimant acquired each of the tax lots that composes the subject property. These land use regulations will not apply to the claimant’s division of the subject property only to the extent necessary to allow her to use the property as described in this report, and only to the extent that the use was permitted when she acquired tax lots 1003 and 1004 on November 4, 1981, tax lot 1005 on May 1, 1985, and tax lot 1000 on August 9, 1990.

2. The action by the State of Oregon provides the state's authorization to the claimant to use the subject property, subject to the standards in effect when the claimant acquired the property. When the claimant acquired tax lots 1003 and 1004, it was subject to compliance with the statewide planning goals, and in particular, Goals 3, 4 and 14. When the claimant acquired tax lots 1000 and 1005 in 1985 and 1990, the property was subject to the acknowledged provisions of Clackamas County's plan and the provisions of Goal 14 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 claimant first obtains 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 claimant 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 claimant to use the subject property, it may be necessary for her 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 claimant 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 claimant.

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 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. Such response must be filed no more than 10 calendar days after the date this report is mailed to the claimant 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.