

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

July 18, 2006

STATE CLAIM NUMBER: M 122435

NAME OF CLAIMANT: Mary Luebke

MAILING ADDRESS: 210 Fielder Creek Road
Rogue River, Oregon 97537

PROPERTY IDENTIFICATION: Township 36, Range 4W, Section 4
Tax lot 1600
Jackson County

OTHER CONTACT INFORMATION: Robert Hart
5126 W. Evans Creek Road
Rogue River, Oregon 97537

DATE RECEIVED BY DAS: September 22, 2005

180-DAY DEADLINE: August 7, 2006¹

I. SUMMARY OF CLAIM

The claimant, Mary Luebke, seeks compensation in the amount of \$2.8 million 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 31.21-acre property into 16 parcels for residential development. The subject property is located at 3215 W. Evans Creek Road, near the city of Rogue River, in Jackson 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 Mary Luebke's division of the 31.21-acre property into 16 parcels for residential development: applicable provisions of Statewide Planning Goals 3 (Agricultural Lands) and 14 (Urbanization), ORS 215 and Oregon Administrative Rules (OAR) 660,

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).

division 33.² These laws 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 was permitted when she acquired the property on May 4, 1961. (See the complete recommendation in Section VI of this report.)

III. COMMENTS ON THE CLAIM

Comments Received

On October 11, 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, three written comments were received in response to the 10-day notice.

The comments are relevant to whether a state law restricts the claimant's use of the subject property and whether the restriction of the claimant's use of the subject property reduces the fair market value of the property. The comments have been considered by the department in preparing this report. (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 ORS 215.263, 215.284, 215.296, 215.705 and 215.780 as the basis for the claim. Only laws that were enacted or adopted prior to December 2, 2004, are the basis for this claim.

² The claim also identifies certain laws administered by the Oregon Department of Forestry (ODF). Those laws are addressed in a separate report issued by ODF 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, Mary Luebke, acquired the subject property on May 4, 1961, as reflected by a warranty deed included with the claim. The Jackson County Assessor’s Office and a July 19, 2005, title report submitted with the claim establish the claimant’s current ownership of the subject property.

Conclusions

The claimant, Mary Luebke, is an “owner” of the subject property as that term is defined by ORS 197.352(11)(C), as of May 4, 1961.

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, “Senate Bill 100 . . . limited the approval of zone changes, restricted lot sizes and established narrow standards for the approval of dwellings.”

The claim is based generally on Jackson County’s current Exclusive Farm Use (EFU) zone and the applicable provisions of state law that require such zoning. The claimant’s property is zoned EFU as required by Goal 3, in accordance with ORS 215 and OAR 660, division 33, because the claimant’s property is “agricultural land” as defined by Goal 3.³ Goal 3 became effective on January 25, 1975, and required that agricultural lands as defined by the goal be zoned EFU pursuant to ORS 215.

³ The claimant’s property is “agricultural land” because it contains Natural Resources Conservation Service Class I-IV soils.

Current land use regulations, particularly ORS 215.263, 215.284 and 215.780 and OAR 660, division 33, enacted or adopted pursuant to Goal 3, prohibit the division of EFU-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 establishes an 80-acre minimum size for the creation of new lots or parcels in EFU zones and became effective on November 4, 1993 (Chapter 792, Oregon Laws 1993). ORS 215.263 (2005 edition) establishes standards for the creation of new parcels for non-farm uses and dwellings allowed in an EFU zone.

OAR 660-033-0135 (applicable to farm dwellings) became effective on March 1, 1994, and interprets the statutory standard for a primary dwelling in an EFU zone under ORS 215.283(1)(f). OAR 660-033-0130(4) (applicable to non-farm dwellings) became effective on August 7, 1993, and was amended to comply with ORS 215.284(4) on March 1, 1994. The Commission subsequently adopted amendments to comply with House Bill 3326 (Chapter 704, Oregon Laws 2001, effective on January 1, 2002), which were effective on May 22, 2002. (See administrative rule history for OAR 660-033-0100, -0130 and -0135.)

Goal 14 would likely apply to the division of the claimant's property into parcels of less than two acres in size. Goal 14 generally requires that land outside of urban growth boundaries be used for rural uses. Goal 14 became effective on January 25, 1975.

The claimant acquired the subject property on May 4, 1961, prior to the adoption of the statewide planning goals and their implementing regulations, as well as most provisions of ORS 215.

The claim also lists the statutes in ORS 92 as restricting the claimant's desired use of the subject property. Most of the statutes in ORS 92 were in effect at the time the claimant acquired the property. In the absence of any more specific information from the claimant concerning how a statute in ORS 92 restricts the use of the property, the department is unable to determine that ORS 92 restricts the claimant's desired use.

Conclusions

The current zoning requirements, minimum lot size and dwelling standards established by applicable provisions of Goals 3 and 14, ORS 215 and OAR 660, division 33, were all enacted or adopted after the claimant acquired the subject property in 1961 and do not allow the desired division or residential development of the property. These laws restrict the use of the subject property relative to the uses allowed when the claimant acquired the property.

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 claimant has identified. There may be other laws that currently apply to the claimant's use of the subject property, and that may continue to 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 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 state laws apply to that use.

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 \$2.8 million as the reduction in the subject property’s fair market value due to the regulation(s). This amount is based on an opinion of value provided by a realtor and included with the claim.

Conclusions

As explained in Section V.(1) of this report, the claimant is Mary Luebke who acquired the subject property on May 4, 1961. Under ORS 197.352, the claimant is due compensation for land use regulations that restrict the use of the subject 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 claimant 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 \$2.8 million.

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 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 applicable provisions of Goals 3 and 14, ORS 215 and OAR 660, division 33, which Jackson County has implemented through its current EFU zone. All of these land use regulations were enacted or adopted after the claimant acquired the subject property.

Conclusions

Without a specific development proposal for the subject property, it is not possible for the department to determine all the laws that may apply to a particular use of the property, or whether those laws may fall under one or more of the exemptions under ORS 197.352. It appears that none of the general statutory, goal and rule restrictions on division and development of the claimant’s property were in effect when the claimant acquired it in 1961. As a result, these laws are not exempt under ORS 197.352(3)(E).

Laws in effect when the claimant acquired the subject property are exempt under ORS 197.352(3)(E) and will continue to apply to the claimant's use of the property. There may be other laws that continue to apply to the claimant's use of the subject 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 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 state laws apply to that use. In some cases, some of these laws may be exempt under ORS 197.352(3)(A) to (D).

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 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 the 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.

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 laws that restrict the use of the subject 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 subject 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 \$2.8 million. 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 claimant's desired use of the subject property was allowed under the standards in effect 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 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 Mary Luebke to use the subject property for a use permitted at the time she acquired the property on May 4, 1961.

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 Mary Luebke's division of the 31.21-acre property into 16 parcels for residential development: applicable provisions of Goals 3 and 14, ORS 215 and OAR 660, division 33. 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 was permitted when she acquired the property on May 4, 1961.
2. The action by the State of Oregon provides the state's authorization to the claimant to use the subject property for the use described in this report, subject to the standards in effect on May 4, 1961.
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.

ORS 197.352 (BALLOT MEASURE 37) CLAIM FOR COMPENSATION

OREGON DEPARTMENT OF FORESTRY

Draft Staff Report and Recommendation

July 18, 2006

STATE CLAIM NUMBER: M122435

NAME OF CLAIMANT: Mary H. Luebcke

MAILING ADDRESS: 210 Fielder Creek Rd.
Rogue River, Oregon 97537

PROPERTY IDENTIFICATION: Township 36S, Range 4W, Section 4
Tax lot 1600
Jackson County

OTHER CONTACT INFORMATION: Robert Hart
5126 W. Evans Creek Rd.
Rogue River, Oregon 97537

DATE RECEIVED BY DAS: September 22, 2005

180-DAY DEADLINE: August 7, 2006¹

I. SUMMARY OF CLAIM

See Department of Land Conservation and Development (DLCD) Draft Staff Report.

II. SUMMARY OF STAFF RECOMMENDATION

Based on the preliminary findings and conclusions set forth below, the Department of Forestry (ODF) has determined the claim is not valid as to land use regulations administered by ODF or the Oregon Board of Forestry (Board) because none of the laws identified in the claim and administered by the Board or ODF restrict the claimant's right to divide the subject property and develop it for residential use. ORS 527.730 provides that "[n]othing in the Oregon Forest Practices Act shall prevent the conversion of forestland to any other use." The claim submitted by the claimant proposes a conversion. To the extent that the claimant may propose a forest operation in conjunction with a conversion to residential use, the claimant has not submitted a written notification as required by law. Without a notification ODF is unable to determine whether the laws listed in the claim apply to the claimant's use of the

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).

property or restrict her use of the property. As a result, ODF has not enforced an existing state land use regulation with respect to the claimant's use of the property.² (See the complete recommendation in Section VI. of this report.)

III. COMMENTS ON THE CLAIM

Comments Received

See DLCD Draft Staff Report.

IV. TIMELINESS OF CLAIM

See DLCD Draft Staff Report for requirements.

Findings of Fact

The claim identifies certain specific regulations as applying to the claimant's ability to use the land by dividing the property and developing it for residential use. The regulations identified in the claim include portions of Oregon Revised Statute chapters 526 and 527 and OAR chapter 629. This claim was submitted to DAS on September 22, 2005, for processing under OAR 125, division 145. Only laws that were enacted prior to December 2, 2004, the effective date of ORS 197.352, are the basis for the claim. (See citations of statutory and administrative rule history of the Oregon Revised Statutes and Oregon Administrative Rules.)

Conclusions

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

V. ANALYSIS OF CLAIM

1. Ownership

ODF adopts the findings of fact and conclusions of law regarding ownership contained in the DLCD Draft Staff Report for this claim.

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.

² The claim also identifies certain laws administered by the Oregon Department of Land Conservation and Development (DLCD). Those laws are addressed in a separate report being issued by DLCD.

Findings of Fact

The claimant indicates that state law prevents her from dividing her property into 16 parcels for residential development in Jackson County. The claim lists ORS 526 and ORS 527 as the state statutes and OAR chapter 629 rules administered by ODF or the Board that restrict the use of the property and the basis for the claim. The only discussion in the claim as to how or why these laws and rules restrict the use of the property that the claimant seeks to carry out is the following excerpt from a statement: “. . . my property interest has also been affected by various statutes and regulations enacted after I acquired my property, including ORS Chapters . . . 526 and 527, . . . as well as Oregon Administrative Rules found in Chapters 629”

One of the cited laws, ORS 527.730, Conversion of forestland to other uses, states, “[n]othing in the Oregon Forest Practices Act shall prevent the conversion of forestland to any other use.” No laws enforced by the Board or ODF restrict the division of the property or the establishment of dwellings.

The subject property may include trees. Certain uses of property are forest “operations” that are regulated under the Forest Practices Act. If trees are harvested for commercial use, some laws listed in the claim will apply to the operation.

A notification of intent to conduct a forest operation is required in order for ODF to determine whether laws it or the Board may enforce apply to the claimant’s intended use of the subject property in a way that restricts the use of the subject property, and reduces its fair market value. No notification has been made.

Conclusions

Nothing in the laws and rules that are listed in the claim and enforced or administered by ODF or the Board applies to or restricts the division of the property or residential development of this property by the claimant.

Persons proposing to conduct a forest operation are required to submit a notification of the operation to ODF. Nothing in ORS 197.352 relieves an operator or landowner from this obligation, and until a notification is submitted, ODF is unable to determine whether laws it or the Board administers apply to the claimant’s use of the property.

3. Effect of Regulations on Fair Market Value

In order to establish a valid claim, ORS 197.352(1) requires that any laws 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 claimant has not demonstrated that any land use regulations administered by ODF or the Board restrict her use of the subject property or reduce its fair market value.

Conclusions

The claimant has not demonstrated that laws enforced or administered by ODF or the Board restrict her use of this property and thus has not demonstrated that those laws reduce the fair market value of the subject property.

4. Exemptions under ORS 197.352(3)

ORS 197.352 does not apply to certain land use regulations. These exemptions are set forth in ORS 197.352(3).

Findings of Fact

ORS 197.352(3) exempts laws that were enacted before a claimant acquired their interest in the property. Mary H. Luebcke acquired an interest in the property in May, 1961. Most forest practice laws were enacted in 1971 and 1973, although some date back to 1941. ODF is unable to determine whether 197.352(3)(E) or other exemptions in 197.352(3) may apply because the claimant has not proposed a use that is subject to these forest practice laws.

Some FPA regulations, now in OAR 629, divisions 625, 630, 635, and 640 were enacted to control water pollution resulting from forest operations. ORS 197.352(3)(B) specifically exempts regulations "restricting or prohibiting activities for the protection of public health and safety..., including pollution control." Such regulations may apply to the property, depending upon the activities the claimant may wish to undertake.

Other FPA regulations cited by the claimant may be exempted under 197.352(3).

Conclusions

ODF concludes that many of the listed land use regulations are likely exempt under ORS 197.352(3). Until there is a notification of an operation, however, a final determination of the applicability of the listed laws to a particular forest operation on the property cannot be made.

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 the 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.

VI. FORM OF RELIEF

Based on the current record, the claimant is not entitled to relief under ORS 197.352 from ODF or the Board. Department staff recommends this claim be denied because neither the Board nor the Department has enforced laws that restrict the division of the subject property into parcels or lots, and the use of the property for residential purposes.

VII. NOTICE OF OPPORTUNITY TO COMMENT

This staff report is not a final decision by ODF 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 shall 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 shall be submitted in writing only. Those comments submitted electronically or by facsimile will not be accepted.

