

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

July 24, 2006

STATE CLAIM NUMBER: M122530

NAMES OF CLAIMANTS: John G. Crawford Jr., Janet L. Crawford,
Josephine M. Crawford, Jean C. Thomas,
Jane C. Picknell and Jill C. Goodhouse

MAILING ADDRESS: PO Box 8110
Medford, Oregon 97504

PROPERTY IDENTIFICATION: Township 38S Range 2W, Section 3A
Tax lot 2300
Township 38S Range 2W, Section 3
Tax lots 3600 and 3601
Jackson County

OTHER CONTACT INFORMATION: Donald Joe Willis
Schwabe, Williamson and Wyatt
1211 SW 5th Ave., Suite 1900
Portland, Oregon 97204

DATE RECEIVED BY DAS: September 29, 2005

180-DAY DEADLINE: August 14, 2006¹

I. SUMMARY OF CLAIM

The claimants, John G. Crawford Jr., Janet L. Crawford, Josephine M. Crawford, Jean C. Thomas, Jane C. Picknell and Jill C. Goodhouse (hereinafter “the Crawford family”), seek compensation in the amount of \$7,071,700 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 131-acre property (consisting of tax lots 2300, 3600 and 3601) into 40 parcels and to develop a dwelling and accessory structures on each parcel. The subject property is located near South Stage Road, near the City of Medford, in Jackson County. (See claim.)

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).

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 the Crawford family's division of the 131-acre property into 40 parcels and to their development of a dwelling on each parcel: applicable provisions of Statewide Planning Goal 4 (Forest Lands), ORS 215 and Oregon Administrative Rules (OAR) 660, division 6. These laws will not apply to the claimants only to the extent necessary to allow them to use the subject property for the use described in this report, and only to the extent that use was permitted when they acquired the property on March 28, 1972. The claimants' desired use of tax lot 2300 may not have been permitted at the time they acquired it because of a restrictive covenant. (See the complete recommendation in Section VI. of this report.)

III. COMMENTS ON THE CLAIM

Comments Received

On October 13, 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, five written comments were received in response to the 10-day notice.

Several of 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.

Other comments are relevant to whether the laws that are the basis for the claim are exempt under ORS 197.352(3) and have been considered by the department in preparing this report. A number of comments raised concerns about the availability of water for additional residential use in the area. Nothing in this claim seeks relief from state laws that apply to the use of water. Finally, some comments address a restrictive covenant that previously applied to tax lot 2300. Nothing in this proposed decision affects any private covenant that may restrict the use of all or part of the property. Further, to the extent that a covenant restricted the claimants' desired use of the property when they acquired it, it is relevant to the relief that the department is authorized to provide. (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 29, 2005, for processing under OAR 125, division 145. The claim identifies a long list of existing statutes and rules as the basis for the claim.² 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, the Crawford family, acquired the subject property on March 28, 1972, as reflected by warranty deeds included with the claim. The claim states that the claimants’ parents acquired the property in 1971. The Jackson County Assessor’s Office confirms the claimants’ current ownership of the subject property.

Conclusions

The claimants, the Crawford family, are the “owners” of the subject property as that term is defined by ORS 197.352(11)(C), as of March 28, 1972.

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

² This report addresses only laws administered by the department or the Commission. A separate report for this claim was prepared by the Oregon Department of Forestry (ODF).

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 lists certain statutes in ORS 92, 197, 209 and 215, Statewide Planning Goals 1 to 7 and 10 to 14 and certain Commission rules in OAR 660 as preventing the claimants from developing the 131-acre property into 40 parcels and establishing a dwelling and accessory structures on each parcel.³

The claim is based generally on Jackson County's current WR and OSR zones and the applicable provisions of state law that require such zoning. The claimants' property is zoned WR and OSR 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 (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 acquired the subject property on March 28, 1972, prior to the adoption of the statewide planning goals and their implementing statutes and regulations.

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 acquired the subject property in 1972 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 claimants 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 use that the claimants have identified. There may be other laws that currently apply to the claimants' use of the subject property, and that may continue to apply to the claimants' 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

³ As noted, the claim lists many statewide planning goals, certain statutes in ORS 92, 197 and 209 and certain Commission rules, but does not establish how these state land use regulations apply to the claimants' desired use of the subject property. On their face, most of these regulations either do not apply to the claimants' desired use of the property or do not restrict the use of the subject property in a manner that reduces the fair market value of the property. Except for the regulations addressed in this report, absent an explanation by the claimants as to how the listed land use regulations restrict the use of the claimants' property in a manner that reduces the property's fair market value, they are not addressed further in this report.

there is a specific proposal for that use. When the claimants seek 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 \$7,071,700 as the reduction in the subject property’s fair market value due to the regulation(s). This amount is based on an estimate provided by the claimants.

Conclusions

As explained in Section V.(1) of this report, the claimants are the Crawford family who acquired the subject property on March 28, 1972. Under ORS 197.352, the claimants are due compensation for land use regulations that restrict the use of the subject property and have the effect of reducing the fair market value. Based on the findings and conclusions in Section V.(2) of this report, laws enacted or adopted since the claimants acquired the subject property restrict the claimants’ desired use of the property. The claimants estimate that the effect of the regulation(s) on the fair market value of the subject property is a reduction of \$7,071,700.

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 applicable provisions of Goal 4, ORS 215 and OAR 660, division 6, which Jackson County has implemented through its current WR and OSR zones. All of these land use regulations were enacted or adopted after the claimants 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 claimants' property were in effect when the claimants acquired it in 1972. As a result, these laws are not exempt under ORS 197.352(3)(E).

Laws in effect when the claimants acquired the subject property are exempt under ORS 197.352(3)(E) and will also continue to apply to the claimants' use of the property. In addition, the department notes that ORS 215.730 and OAR 660, division 6, include standards for siting dwellings in forest zones. Those provisions include fire protection standards for dwellings. ORS 197.352(3)(B) specifically exempts regulations "restricting or prohibiting activities for the protection of public health and safety, such as fire and building codes. . . ." Accordingly, siting standards for dwellings in forest zones in ORS 215.730 and OAR 660, division 6, relating to fire safety, are exempt under ORS 197.352(3)(B).

There may be other laws that continue to apply to the claimants' 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 claimants seek 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 use that the claimants have identified. Similarly, this report only addresses the exemptions provided for under ORS 197.352(3) that are clearly applicable, given the information provided to the department in the claim. The claimants should be aware that the less information they have provided to the department in the claim, the greater the possibility that there may be additional laws that will later be determined to continue to apply to their use of the subject property.

ORS 197.352(3)(B) states that a public entity may enforce regulations "restricting or prohibiting activities for the protection of public health and safety. . . ." The department believes that this provision can be appropriately applied to proposed developments that are likely to significantly affect the private water supply of existing water users. The county is within its rights in applying more stringent density standards where the failure to apply such standards will not protect the water supplies of nearby users and may result in significant risk to public health and safety.

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 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 claimants' desired use of the subject property. The claim asserts that the laws enforced by the Commission or the department have the effect of reducing the fair market value of the subject property by \$7,071,700. 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 they 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 the Crawford family to use the subject property for a use permitted at the time they acquired the property on March 28, 1972.

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 the Crawford family's division of the 131-acre property into 40 parcels or to their development of a dwelling on each parcel: applicable provisions of Goal 4, ORS 215 and OAR 660, division 6. These land use regulations will not apply to the claimants only to the extent necessary to allow them to use the subject property for the use described in this report, and only to the extent that use was permitted when they acquired the property on March 28, 1972. The claimants' desired use of tax lot 2300 may not have been permitted at the time they acquired it because of a restrictive covenant.
2. The action by the State of Oregon provides the state's authorization to the claimants to use the subject property for the use described in this report, subject to the standards in effect on March 28, 1972.
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.

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 10 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.

ORS 197.352 (BALLOT MEASURE 37) CLAIM FOR COMPENSATION

OREGON DEPARTMENT OF FORESTRY

Draft Staff Report and Recommendation

July 24 2006

STATE CLAIM NUMBER: M122530

NAMES OF CLAIMANTS: John G. Crawford, Jr., Janet L. Crawford,
Josephine M. Crawford, Jean C. Thomas,
Jane C. Picknell, Jill C. Goodhouse

MAILING ADDRESS: PO Box 8110
Medford, Oregon 97504

PROPERTY IDENTIFICATION: Township 38S, Range 2W, Section 3A
Tax lot 2300
Township 38S, Range 2W, Section 3
Tax lots 3600 and 3601
Jackson County

OTHER CONTACT INFORMATION: Donald Joe Willis
Schwabe, Williamson & Wyatt
1211 SW Fifth Ave. Ste 1900
Portland, OR 97204

DATE RECEIVED BY DAS: September 29, 2005

180-DAY DEADLINE: August 14, 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 claimants' right to divide the 131-acre property into 40 parcels and develop a dwelling on each parcel. ORS 527.730 provides that "[n]othing in the Oregon Forest Practices Act shall prevent the conversion of forestland to any other use." 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).

claimants' desired use of the property is a conversion. To the extent that the claimants may intend to carry out a "forest operation" (a commercial activity relating to the establishment, management or harvest of forest tree species) in conjunction with their division of the property for residential development, claimants have 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 claimants' use of the property or restrict their use of the property. As a result, ODF has not enforced an existing state land use regulation with respect to the claimants' use of the property. (See the complete recommendation in Section VI. of this report.)

III. COMMENTS ON THE CLAIM

Comments Received

See DLCDC Draft Staff Report.

IV. TIMELINESS OF CLAIM

Findings of Fact and Conclusions

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

V. ANALYSIS OF CLAIM

1. Ownership

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

2. The Laws That are the Basis for This Claim

In order to establish a valid claim, Section 1 of Ballot Measure 37 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 claimants desire compensation or the right to divide the 131-acre property into 40 parcels and to develop a dwelling on each parcel. The claim lists the following state statutes and rules administered by ODF or the Board as laws that restrict the use of the property as the basis for the claim: ORS 526.016; 526.031, 526.166, 526.168, 526.194, 526.305 to 370, 526.425, 526.490, 526.500 to 515, 526.900, 526.905, 527.610 et seq., 527.665, 527.680, 527.690, 527.721 and 722, 527.730, 527.245, 527.760, 527.990 and 527.992. The claim also lists the following rules of the Board: OAR 629-001-0000 to 0057, 629-020-0000 to 0070, 629-045-0005 to 0010, 629-605-0100 to 0500, 629-610-0000 to 0090, 629-630-0000 to 0800 and 629-680-0000 to 0430. There is no discussion in the claim as to how or why these laws restrict the use of the property that the

claimants seek to carry out except the conclusory statement that they cause “the restriction of use and reduction in value for the property. . . .” The property is zoned Woodland Resource and Open Space Reserve because the property is considered forestland under Goal 4. The laws listed in the claim include statutes and rules that only apply to forest operations, which is not the use the claimants have described in their claim.

One of the cited laws, ORS 527.730, Conversion of forestland to other uses, states, “Nothing 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 does appear to 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 claimants’ 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.

The claim lists additional state statutes and regulations that are administered by the Department of Land Conservation and Development. These statutes and regulations are not administered or enforced by the Board and ODF and are not addressed in this report.

Conclusions

Nothing in the laws 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 the construction of dwellings by the claimants.

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 claimants’ use of the property.

3. Effect of Regulations on Fair Market Value

In order to establish a valid claim, Section 1 of Ballot Measure 37 requires that any land use regulation 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 claimants have not demonstrated that any land use regulations administered by ODF or the Board restrict their use of the subject property or have the effect of reducing its fair market value. The documentation submitted with the claim does not include any information concerning how laws administered by ODF or the Board have had the effect of reducing the fair market value of the property.

