

ORS 197.352 (BALLOT MEASURE 37) CLAIM FOR COMPENSATION

**OREGON DEPARTMENT OF LAND CONSERVATION AND DEVELOPMENT
Draft Staff Report and Recommendation**

July 25, 2006

STATE CLAIM NUMBER: M122586

NAMES OF CLAIMANTS: Mrs. Dean A. Richards, individually and as trustee of the Dean A. Richards Trust, and William Richards Construction Co.¹

MAILING ADDRESS: 29415 SE Powell Valley Rd.
Gresham, Oregon 97080

PROPERTY IDENTIFICATION: Township 1S, Range 4E, Section 19AB
Tax lot 100
Multnomah County

OTHER CONTACT INFORMATION: Mark P. O'Donnell, Esq.
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Portland, Oregon 97209

DATE RECEIVED BY DAS: September 30, 2005

180-DAY DEADLINE: August 15, 2006²

I. SUMMARY OF CLAIM

The claimants, Mrs. Dean Richards and William Richards Construction Co., seek compensation in the amount of \$915,000 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 18.63-acre property into 20 parcels of 20,000 to 40,000 square feet and to develop a dwelling on each parcel. The subject property is located at 29429 SE Powell Valley Road, near Gresham, in Multnomah County. (See claim.)

¹ The claim is in the name of Mrs. Dean Richards. However, William Richards has signed the claim on behalf of the William Richards Construction Co., and the claim includes information about William Richards' possible interest in the subject property. This issue is discussed in Section V.1. of this report.

² 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 partially 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 Mrs. Dean Richards' division of the 18.63-acre property into 20 parcels of 20,000 to 40,000 square feet and to her development of a dwelling on each parcel: applicable provisions of Statewide Planning Goals 3 (Agricultural Lands) and 14 (Urbanization), ORS 215 and Oregon Administrative Rules (OAR) 660, division 33. These laws will not apply to Mrs. Dean Richards 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 August 31, 1944.

The department has further determined that neither William Richards nor the William Richards Construction Co. is the present owner of the subject property, and the claim as to William Richards or the corporation is not valid. (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, 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, 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 30, 2005, for processing under OAR 125, division 145. The claim lists specific statutes in ORS 92, 197, 215 and 227 and their administrative rules as the basis for the claim.³ 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

Mrs. Dean Richards acquired the subject property on August 31, 1944, as reflected by a warranty deed included with the claim. On December 27, 1994, the property (along with adjoining tax lot 200) was transferred to Mrs. Dean Richards, as trustee of the Trust of Dean A. Richards, via a bargain and sale deed.⁴ The Multnomah County Assessor’s Office confirms the claimant’s current ownership of a portion of the subject property. However, the county’s records appear to indicate that some portion of the property may be owned by Mary E. Richards.⁵ The department is continuing to investigate the current ownership of tax lot 100. If the department confirms that some portion of the property is not owned by Mrs. Dean Richards, the department will alter its conclusions.

The claim also includes information about an agreement between Dean A. Richards’ son William Richards and his parents regarding William Richards’ activities on the subject property. The claim includes a “Supplemental Statement In Support of Time of Acquisition of Real Property by William G. Richards.” This statement contains an assertion that William Richards has

³ The claim also lists statutes in ORS 454 and certain administrative rules of the Environmental Quality Commission. This report addresses only those laws administered by the department. A separate report concerning the statutes in ORS 454, identified in the claim, is being prepared by the Oregon Department of Environmental Quality. This report also is not intended to affect in any way the application of any local ordinance or other local law to the claimant’s use of the subject property.

⁴ Transfer of property to a revocable trust does not result in a change in ownership for the purposes of ORS 197.352.

⁵ This information is from a report from the county assessor’s office, showing that Mary E. Richards is the current owner of a part or all of tax lot 100.

continuously used a portion of tax lot 100 since 1973, under an oral agreement between William Richards and Mrs. Dean Richards. No documentation is provided in the claim to show that any interest William Richards may have in tax lot 100 has been restricted by state land use regulations. At most, the claim provides some evidence that William Richards may have had contractual rights to grow nursery stock on tax lot 100. Even as to these possible rights, it is unclear if they would be rights of William Richards or the William Richards Construction Co. Only the latter signed the claim. For these reasons, the department recommends that the claim be denied as to William Richards and the William Richards Construction Co.

Conclusions

Mrs. Dean Richards is an "owner" of the subject property as that term is defined by ORS 197.352(11)(C), as of August 31, 1944. To the extent that William Richards and the William Richards Construction Co. may be claimants, they have not established that they are present owners of a real property interest in tax lot 100 that has been restricted.

The remainder of this report addresses only the claim of Mrs. Dean Richards.

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 specific statutes in ORS 92, 197, 215 and 227 and their associated rules⁶ have prevented the claimant from dividing the subject property into 20 parcels of 20,000 to 40,000 square feet each and developing a dwelling on each parcel.

The claim is based generally on the applicable provisions of state law that require Exclusive Farm Use (EFU) 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 3.⁷ 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.

⁶ The claim lists statewide planning goals 1 to 14, many statutes in ORS 92, 197 and 227 and Commission rules but does not establish how these state land use regulations apply to the claimant's desired use of the subject property. On their face, except for those laws addressed in this report, these regulations either do not apply to the claimant's 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, based on the claimant's desired use of the property. Except for the regulations addressed in this report, absent an explanation by the claimant as to how these land use regulations restrict the use of the claimant's property in a manner that reduces the property's fair market value, they are not addressed further in this report.

⁷ 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 20,000 to 40,000 square feet and to the development of a dwelling on each parcel because those are "urban" uses of land, and the property is located outside of an acknowledged urban growth boundary. Goal 14 generally requires that land outside urban growth boundaries be used for rural uses. Goal 14 became effective on January 25, 1975, after the claimant acquired the property.

The claimant acquired the subject property on August 31, 1944, 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 Goals 3 and 14, ORS 215 and OAR 660, division 33, were all enacted or adopted after the claimant acquired the subject property in 1944 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 use 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 \$915,000 as the reduction in the subject property’s fair market value due to the regulations. This amount is based on an estimate provide by the claimant.

Conclusions

As explained in Section V.(1) of this report, the claimant is Mrs. Dean Richards who acquired the subject property on August 31, 1944. 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 regulations on the fair market value of the subject property is a reduction of \$915,000.

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 applicable provisions of Goals 3 and 14, ORS 215 and OAR 660, division 33, which Multnomah 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 1944. 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 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

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 claimant's 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 \$915,000. 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 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 Mrs. Dean Richards to use the subject property for a use permitted at the time she acquired the property on August 31, 1944.

William Richards does not own a real property interest in the subject property that has been restricted by a state land use regulation, and the department recommends that the claim as to him be denied.

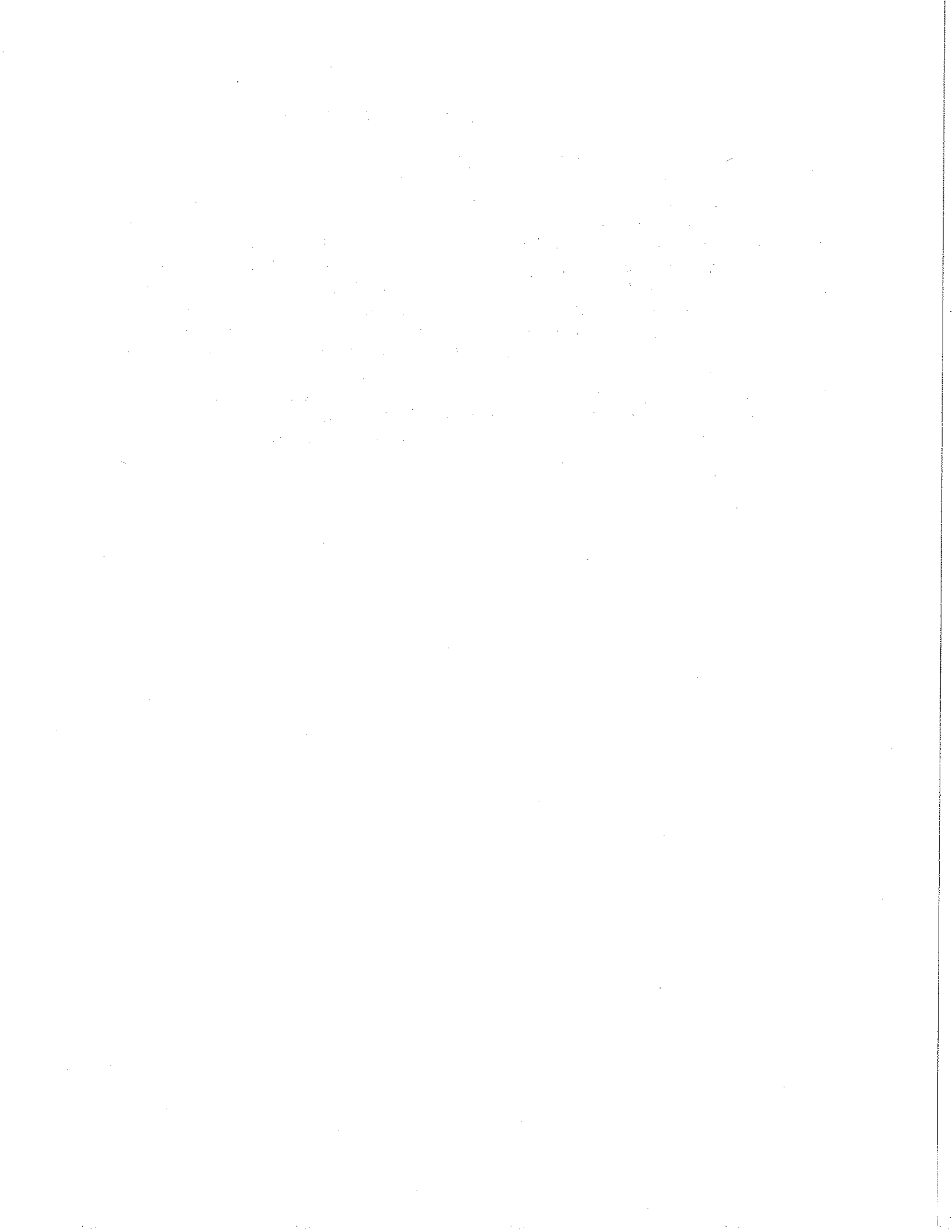
Conclusions

Based on the record, the department recommends that the claim as to Mrs. Dean Richards 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 Mrs. Dean Richards' division of the 18.63-acre property into 20 parcels of 20,000 to 40,000 square feet each or to her development of a dwelling on each parcel: applicable provisions of Goals 3 and 14, ORS 215 and OAR 660, division 33. These land use regulations will not apply to Mrs. Dean Richards 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 August 31, 1944.
2. The action by the State of Oregon provides the state's authorization to Mrs. Dean Richards to use the subject property for the use described in this report, subject to the standards in effect on August 31, 1944.
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 Mrs. Dean Richards 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 Mrs. Dean Richards 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 Mrs. Dean Richards 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 Mrs. Dean Richards 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 her use of the subject property.
6. To the extent that William Richards or the William Richards Construction Co. are claimants for this claim, the claim is denied as to them for the reasons set forth in this report.

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 ENVIRONMENTAL QUALITY
Draft Staff Report and Recommendation**

July 25, 2006

STATE CLAIM NUMBER: M122586

NAMES OF CLAIMANTS: Mrs. Dean A. Richards,
individually and as trustee of the
Dean A. Richards Trust, and
William Richards Construction Co.¹

MAILING ADDRESS: 29415 SE Powell Valley Rd.
Gresham, Oregon 97080

PROPERTY IDENTIFICATION: Township 1S, Range 4E, Section 19AB
Tax lot 100
Multnomah County

OTHER CONTACT INFORMATION: Mark P. O'Donnell, Esq. and
Kristian Roggendorf, Esq.
1650 NW Naito Parkway
Portland, Oregon 97209

OTHER INTEREST IN PROPERTY: William Richards Construction Inc.

DATE RECEIVED BY DAS: September 30, 2005

180-DAY DEADLINE: August 15, 2006²

I. SUMMARY OF CLAIM

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

¹ The claim is in the name of Mrs. Dean A. Richards. However William G. Richards has signed the claim on behalf of William Richards Construction Co., and the claim includes information about William Richards' possible interest in the subject property. This is dealt with in Section V.1. of this report.

² 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 Environmental Quality (the department) has determined that the claim is not valid as to laws administered by the department. The rules listed in the claim pertaining to the department or the Environmental Quality Commission (Commission) are not "land use regulations," have not been enforced as to this property, and are likely exempt under ORS 197.352(3). (See the complete recommendation in Section VI. of this report.)

III. COMMENTS ON THE CLAIM

See DLCD staff report.

IV. TIMELINESS OF CLAIM

See DLCD staff report.

V. ANALYSIS OF CLAIM

1. Ownership

The findings of the Draft Staff Report of the Department of Land Conservation and Development on this claim regarding ownership are incorporated into this report by this reference.

2. The Laws that Are the Basis for the 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 claimants wish to divide the 18.63-acre subject property into 20 parcels of between 20,000 and 40,000 square feet, and to develop a dwelling on each parcel. The claim lists numerous statutes and rules administered by the department and Commission, but contains no explanation of why or how these laws restrict the claimants' use of the property or have reduced the value of the property. Nothing in the rules or statutes listed restrict the division of land into residential lots as proposed by claimants. The claim states that the property is suitable for septic systems on parcels of the size proposed. As a result, the department determines that the laws listed in the claim do not restrict the claimant's desired use of the property.

In addition, nothing in the claim indicates that the listed statutes or rule administered by the department have been enforced with respect to claimant's desired use of the property. The claimant has not sought approval of septic systems for the desired residential dwellings. As a result, the department has not enforced the listed laws with respect to the claimant's desired use of this property, and there is therefore no basis for providing relief under ORS 197.352.

Finally, under ORS 197.352(11) "land use regulations" do not include administrative rules of the Oregon Environmental Quality Commission. As a result, no relief may be authorized with regard to the Commission's rules.

Conclusions

Nothing in the statutes or rules listed in the claim restricts the division of the property into residential lots. The claimant asserts that septic systems would be allowed under the listed statutes and rules. As a result, the listed statutes and rules do not restrict the claimant's desired use of the property. The listed statutes and rules have not been enforced with respect to the claimant's desired use of the property, and therefore no relief is authorized under ORS 197.352. The listed statutes and rules are likely exempt under ORS 197.352(3) as regulations to protect public health and safety. Finally, the listed administrative rules are not state "land use regulations" under ORS 197.352. For all of these reasons, the department recommends that this claim be denied with respect to laws administered by the department or commission.

3. Effect of Regulations on Fair Market Value

In order to establish a valid claim, Section 1 of Ballot Measure 37 requires the current land use regulation(s) described in Section V. (2). of this report to 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 the listed statutes or rules have had any effect on the value of the subject property.

Conclusions

The claimants have not demonstrated that the listed rule administered by the Department or Commission restricts the desired use of the property and thus, have not demonstrated that the rule reduces the fair market value of the subject property.

4. Exemptions under section 3 of Measure 37

Ballot Measure 37 (2004) does not apply to certain land use regulations. The type of land use regulations not subject to a claim for compensation under Ballot Measure 37 are set forth in section 3 of the measure. These include laws restricting or prohibiting activities for the protection of public health and safety

