

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

July 26, 2006

STATE CLAIM NUMBER: M122603

NAME OF CLAIMANT: Pendleton Country Club

MAILING ADDRESS: 69772 Highway 395 South
Pendleton, Oregon 97801

PROPERTY IDENTIFICATION: Township 1N, Range 32E, Section 15
Tax lots 1200, 1300 and 1400
Umatilla County

OTHER CONTACT INFORMATION: Douglas E. Hojem
PO Box 218
Pendleton, Oregon 97801

DATE RECEIVED BY DAS: October 3, 2005

180-DAY DEADLINE: August 18, 2006¹

I. SUMMARY OF CLAIM

The claimant, Pendleton Country Club, seeks compensation in the amount of \$2,362,600 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 248.5-acre subject property into parcels ranging from five thousand square feet to one acre *or more*, develop a dwelling on each parcel and expand existing golf course facilities.² The subject property is located at 69772 Highway 395 South, approximately six miles south of the City of Pendleton in Umatilla 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).

² The claim does not indicate the number of parcels or residential dwellings that the claimant desires to create. Under the terms of the claim, the number of dwellings and parcels could range from one to 2,500. According to the claim, the desired residential uses include single-family dwellings, condominiums, multi-family units such as duplexes or fourplexes and the infrastructure to those residential uses. Desired golf course facilities identified in the claim include additional golf holes and practice facilities and accessory uses traditionally associated with golf country clubs such as tennis courts, swimming pools, exercise facilities, restaurants, tourist housing, parking, maintenance shops, cart storage and repair, practice facilities, a clubhouse, restrooms, lockers and showers, a pro shop, a beverage service, banquet facilities, entertainment facilities and the infrastructure required for such uses.

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 Pendleton Country Club's division of the 248.5-acre subject property into parcels ranging from five thousand square feet to one acre *or more*, development of a dwelling on each parcel and expansion of the existing golf course facilities: applicable provisions of Statewide Planning Goal 3 (Agricultural Lands), ORS 215 and Oregon Administrative Rules (OAR) 660, division 33, enacted or adopted after the claimant acquired the subject property. These laws will not apply to the claimant only to the extent necessary to allow it to use the subject property for the use described in this report, and only to the extent that use was permitted when it acquired the property on November 23, 1955. (See the complete recommendation in Section VI of this report.)

III. COMMENTS ON THE CLAIM

Comments Received

On May 24, 2006, pursuant to OAR 125-145-0080, the Oregon Department of Administrative Services (DAS) provided written notice to the owners of surrounding properties. According to DAS, no written comments were received in response to the 10-day notice.

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 October 3, 2005, for processing under OAR 125, division 145. The claim identifies Goals 3, 11 (Public facilities and Services) and 14 (Urbanization); ORS 197 and 215; OAR 660, divisions 11, 14, and 33; and any other applicable laws enacted after 1955 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, Pendleton Country Club, acquired the subject property on November 23, 1955, as reflected by the sales agreement included with the claim. Umatilla County confirms the claimant’s current ownership of the subject property.

Conclusions

The claimant, Pendleton Country Club, is an “owner” of the subject property as that term is defined by ORS 197.352(11)(C), as of November 23, 1955.

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 the claimant desires to divide the 248.5-acre subject property into parcels ranging from five thousand square feet to one acre *or more*, develop a dwelling on each parcel and expand existing golf course facilities. It indicates that Goals 3, 11 and 14; ORS 197 and 215; OAR 660, divisions 11, 14, and 33; and other applicable laws enacted after 1955 restrict the desired use.³

³ The claim identifies statutes in ORS 197 as applicable to the claim, but does not establish how the statutes either apply to the claimant’s desired use of the subject property or restrict its use in a manner that reduces its fair market value. ORS 197 establishes procedures for coordination of comprehensive planning, but as a general matter does not restrict the use of particular property. On their face, these regulations do not apply to or restrict the use of the subject property with the effect of reducing the property’s fair market value. This report addresses only those regulations that the department finds are applicable to and restrict the claimant’s use of the subject property, based on the claimant’s asserted desired use.

The claim is based generally on the applicable provisions of state law that require Exclusive Farm Use (EFU) zoning and restrict uses on EFU-zoned land. 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 3.⁴ 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.

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.)

ORS 215.296 establishes standards for approval of uses listed under ORS 215.283(2), including golf courses (ORS 215.283(2)(f)). OAR 660-033-0130 includes a definition for "golf course" and also regulates golf courses on lands zoned EFU. On lands identified as "high-value farm land" under OAR 660-033-0020(8)(a), only an existing golf course may be expanded consistent with OAR 660-033-0130(5) and (20), but shall not be expanded to contain more than 36 total holes (OAR 660-033-0120 and 0130(18)). On land that is not high-value, a golf course is allowed consistent with OAR 660-033-0130(5) and (20).

The claim identifies Goal 14 and OAR 660, division 14, as restricting the claimant's desired use of the subject property. These laws would likely apply to the division of the claimant's property into parcels less than two acres (and accompanying residential development) and to the development of the property for multi-family dwellings, as these uses are generally "urban" in nature. Goal 14 generally requires that land outside urban growth boundaries be used for rural uses. Goal 14 became effective on January 25, 1975. However, the use the claimant desires to carry out is not clearly "urban" under Goal 14. Specifically, the claimant describes the use as involving residences on parcels ranging from five thousand square feet to one acre *or more*. Similarly, the claimant's description of desired golfing-facility uses include uses that may or may not be urban, depending on what the claimant ends up proposing. *See DLCD v. Umatilla County*, LUBA No. 2000-097 (4/30/2001) (noting that whether Goal 14 and OAR 660-014 apply will depend on the specifics of what is proposed). If the parcels are larger than two acres, the use

⁴ The claimant's property is "agricultural land" because it contains Natural Resources Conservation Service Class I-VI soils.

may not be “urban” under Goal 14. As a result, the department is unable to determine that Goal 14 or OAR 660, division 14, applies to or restricts the claimant’s desired use.

The claimant also identifies Goal 11, relating to public facilities and services, and OAR 660, division 11, administrative rules relating to public facilities and services, as restricting its desired use. Goal 11, which became effective on January 25, 1975, generally prohibits urban levels of public facilities and services on lands that are outside an urban growth boundary. Goal 11 has two elements. The first element of the goal restricts an owner’s use of land outside of an urban growth boundary by prohibiting the owner from utilizing urban levels of public facilities and services. The second element restricts service providers from extending urban facilities to serve property outside an urban growth boundary. The former can restrict a claimant’s use of property. The latter is a restriction on the service provider.

The claim does not provide information to establish that Goal 11 and OAR 660, division 11, apply to and restrict the claimant’s desired use. The claim states that the claimant seeks a waiver to “Goal 11 and OAR Chapter 660, Division 11, that may prohibit, limit or condition the development of facilities or infrastructures on or to the Pendleton Country Club property, or that may require an exception to Goal 11.” However, for the reasons described above (with regard to Goal 14 and OAR 660, division 11), no information has been provided establishing that the claimant’s desired division and residential and golf course development will require urban levels of service that would be restricted by Goal 11. The claimant has described such a broad range of uses that the department is unable to determine that either Goal 11 or 14, or its corresponding administrative rules, restrict or apply to the claimant’s desired use of the subject property.

Conclusions

The current zoning requirements, minimum lot size and dwelling and use standards established by applicable provisions of Goals 3, ORS 215 and OAR 660, division 33, were all enacted or adopted after the claimant acquired the subject property in 1955 and do not allow the desired division or residential development of the property. They also restrict or limit the development of the subject property for a golf course facility. These laws restrict the use of the subject property relative to the uses allowed when the claimant acquired the property.

The claimant has not established whether Goal 11 or 14 restricts the desired use of the subject property. The claimant’s desired use of the subject property is so ambiguous that the department cannot determine that Goal 11 or 14, or its corresponding rules, apply to or restrict the use.

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 \$2,362,600 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 value of the subject property, if converted for residential use, with a value of \$20,000 per acre (\$2,460,000 total) less the value of the property as EFU ground (\$97,400).

Conclusions

As explained in Section V.(1) of this report, the claimant is the Pendleton Country Club, which acquired the subject property on November 23, 1955. 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 land use regulations on the fair market value of the subject property is a reduction of \$2,362,600.

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 3, ORS 215 and OAR 660, division 33, which Umatilla 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 1955. 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 it 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 its 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 the laws enforced by the Commission or the department reduce the fair market value of the subject property by \$2,362,600. 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 property was allowed under the standards in effect when it 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 claimant to use the subject property for a use permitted at the time it acquired the property on November 23, 1955.

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 Pendleton Country Club's division of the 248.5-acre subject property into parcels ranging from five thousand square feet to one acre *or more*, development of a dwelling on each parcel and expansion of the existing golf course facilities: applicable provisions of Goal 3, ORS 215 and OAR 660, division 33. These land use regulations will not apply to the claimant only to the extent necessary to allow it to use the subject property for the use described in this report, and only to the extent that use was permitted when it acquired the property on November 23, 1955.
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 November 23, 1955.
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 the claimant 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.

