

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: M122605

NAMES OF CLAIMANTS: Carl and Carolyn Yaeger

MAILING ADDRESS: 18399 Corral Del Cielo Rd.
Salinas, California 93908

PROPERTY IDENTIFICATION: Township 9S, Range 11W, Section 29
Tax lot 401
Lincoln County

OTHER CONTACT INFORMATION: Kurt Carstens
407 N. Coast Hwy.
Newport, Oregon 97365

DATE RECEIVED BY DAS: October 3, 2005

180-DAY DEADLINE: August 18, 2006¹

I. SUMMARY OF CLAIM

The claimants, Carl and Carolyn Yaeger, seek compensation in the amount of \$3,420,000 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 27.35-acre property into 34 parcels for residential development. The subject property is located at the geographic coordinates listed above, south of Depoe Bay, near Otter Rock, in Lincoln 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 not valid because the claimants' desired use of the subject property was restricted to a greater degree under the laws in effect when the claimants acquired the property in 1979 than it is currently. (See the complete recommendation in Section VI of this report.)

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).

III. COMMENTS ON THE CLAIM

Comments Received

On June 8, 2006, pursuant to Oregon Administrative Rule (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 5 (Natural Resources) and 17 (Coastal Shorelands) and OAR 660, divisions 16, 23, and 37, 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 claimants, Carl and Carolyn Yaeger, acquired the subject property on December 28, 1979, as reflected by a contract of sale included with the claim. The Lincoln County Assessor's Office confirms the claimants' current ownership of the subject property.

Conclusions

The claimants, Carl and Carolyn Yaeger, are "owners" of the subject property as that term is defined by ORS 197.352(11)(C), as of December 28, 1979.

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 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 indicates that "it is the intent of the claimants to utilize the property for a 34 lot subdivision," and the Lincoln County Coastal Shoreland and Open Spaces Scenic and Historic Area policies and zoning prevent them from doing so.²

The claim is based on the applicable provisions of state law that require Lincoln County's Coastal Shoreland (CS) overlay zone and restrict the claimants' desired use of the property. The claimants' property is zoned CS as required by Goal 17 because the claimants' property is within the "coastal shoreland" planning area as defined by Goal 17. Goal 17 became effective on June 7, 1977, and required that lands within the coastal shoreland boundary be zoned as shoreland, and local jurisdictions develop comprehensive plans to identify and inventory specific coastal resources within the shoreland area, prepare plans that protect those resources and provide for specific uses.³ Further, upon its adoption in 1977, Goal 17 provided that:

[s]horelands in rural areas . . . shall be used as appropriate for:

- (a) farm uses as provided in ORS Chapter 215;
- (b) propagation and harvesting of forest products consistent with the Oregon Forest Practices Act;

² The claim also identifies Goal 5 and OAR 660, division 16, and OAR 660, divisions 23, and 37, as state land use regulations that restrict the claimants' desired use of the property. The state laws that restrict the claimants' desired use of the property, cited by the claimant, are the inventory and implementation requirements of Goal 17. Goal 5 and its implementing rules do not apply to the claimants' desired use of the property because Lincoln County has not inventoried resources on the property under Goal 5 or Goal 5 rules. OAR 660, division 37, applies only to the implementation requirements of Goal 17 that pertain to estuarine shorelands and water-dependent uses. It does not apply to the subject property, which is not located on an estuary and has no shoreland water-dependent zoning.

³ Goal 17 was adopted in 1976 and became effective on June 7, 1977. The Goal 17 inventory requirements defined the shoreland planning wherein the subject property is located. The Goal 17 comprehensive plan requirements prescribed coastal shoreland uses for the different types of coastal shorelands, as noted in the text of this report.

- (c) private and public water-dependent recreation developments;
- (d) aquaculture;
- (e) water-dependent commercial and industrial uses and water-related uses only upon a finding by the governing body of the county that such uses satisfy a need which cannot be reasonably accommodated on shorelands in urban and urbanizable areas;
- (f) *subdivisions*, major and minor partitions and other uses *only upon a finding by the governing body of the county that such uses satisfy a need which cannot be accommodated at other upland locations or in urban or urbanizable areas and are compatible with the objectives of this goal to protect riparian vegetation and wildlife habitat* [emphasis added]; and
- (g) a single family residence on existing lots, parcels or units of land when compatible with the objectives and implementation standards of this goal.

The current version of Goal 17 contains similar restrictions, generally allowing uses that are not dependent on or related to water, only upon a showing that the use would not commit shorelands to more intensive uses or cause a permanent or long term change in the features of shorelands, except upon a showing of public need.

Conclusions

The state land use regulations established by Goal 17 and provisions applicable to land zoned coastal shorelands were all enacted or adopted before claimants, Carl and Carolyn Yaeger, acquired the subject property on December 28, 1979. These land use regulations apply to the subdivision and development of residential land on the subject property. Laws enacted or adopted since the claimants acquired the subject property in 1979 do not restrict the claimants' desired use of the property relative to when the claimants acquired it in 1979.

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 \$3,420,000 as the reduction in the subject property's fair market value due to the regulations. This amount is based on the claimants' estimate.

Conclusions

As explained in Section V.(1) of this report, Carl and Carolyn Yaeger are the claimants. They acquired the subject property on December 28, 1979. No state laws enacted or adopted since the claimants acquired the subject property restrict the claimants' desired use of the property relative to the uses allowed in 1979. The claimants' estimate was premised on the assumption that their desired use was lawful in 1979. That premise is not correct. As a result, the department concludes that the fair market value of the subject property has not been reduced as a result of land use regulations enforced by the Land Conservation and Development Commission (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 does not identify any state land use regulations enacted or adopted since the claimants acquired the subject property that restrict the use of the property relative to what would have been allowed when they acquired it on December 28, 1979. As set forth in Section V.(2) of this report, the state land use regulations restricting the claimants' desired use of the subject property were in effect when the claimants acquired the property in 1979.

Conclusions

All of the state land use regulations that restrict the claimants' desired use of the subject property were in effect when the claimants acquired the property. Therefore, these state land use regulations are exempt under ORS 197.352(3)(E), which exempts laws in effect when the claimants acquired 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 property in a manner that reduces its fair market value. In lieu of compensation, the department may choose to not apply the law in order to allow the present owner to carry out a use of the property permitted at the time the present owner acquired the property. The Commission, by rule, has directed that if the department determines a claim is valid, the Director of the department must provide only non-monetary relief unless and until funds are appropriated by the legislature to pay claims.

Findings of Fact

Based on the findings and conclusions set forth in this report, laws enforced by the Commission or the department do not restrict the claimants' desired use of the subject property relative to what was permitted when the claimants acquired it in 1979 and do not reduce the fair market value of the property. In addition, the state land use regulations that restrict the use of the subject property are exempt under ORS 197.352(3)(E).

Conclusions

Based on the record and the foregoing findings and conclusions, the claimants have not established that they are entitled to relief under ORS 197.352(1) as a result of land use regulations enforced by the Commission or the department. Therefore, the department recommends that this claim be denied.

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.