

BEFORE THE DEPARTMENT OF ADMINISTRATIVE SERVICES, THE DEPARTMENT
OF LAND CONSERVATION AND DEVELOPMENT OF THE STATE OF OREGON

IN THE MATTER OF THE CLAIM FOR)
COMPENSATION UNDER ORS 197.352)
(BALLOT MEASURE 37) OF)
JOHN C. BARNARD, CLAIMANT)

FINAL ORDER
CLAIM NO. M118386

Claimant: John C. Barnard (the Claimant)

Property: Tax Lot 1100, Township 8S, Range 6W, Section 26, W.M., Polk County
(the Property)

Claim: The demand for compensation and any supporting information received from the
Claimant by the State of Oregon (the Claim).

Claimant submitted the Claim to the State of Oregon under ORS 197.352. Under OAR 125-145-0010 *et seq.*, the Department of Administrative Services (DAS) referred the Claim to the Department of Land Conservation and Development (DLCD) as the regulating entity. This order is based on the record herein, including the Findings and Conclusions set forth in the Final Staff Report and Recommendation of DLCD (the DLCD Report) attached to and by this reference incorporated into this order.

ORDER

The Claim is approved as to laws administered by DLCD and the Land Conservation and Development Commission (LCDC) for the reasons set forth in the DLCD Report, and 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 John Barnard's division of the 9.62-acre property and residential development on newly created parcels: applicable provisions of Statewide Planning Goal 3 (Agriculture Lands), ORS 215, and OAR 660, division 33, enacted after April 23, 1991. These laws will not apply to the claimant only to the extent necessary to allow John Barnard a use of the property permitted at the time he acquired it on April 23, 1991.
2. The action by the State of Oregon provides the state's authorization to the claimant to use his property subject to the standards in effect on April 23, 1991. On that date, the property was subject to applicable provisions of Statewide Planning Goal 3, ORS 215, and OAR 660 division 5 then in effect. The department acknowledges that the relief recommended in this report will not allow the claimant the use of the subject property set forth in the claim.
3. To the extent that any law, order, deed, agreement or other legally enforceable public or private requirement provides that the 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 ORS 227.160, other permits or authorizations from local, state or federal agencies, and restrictions on the use of the property imposed by private parties.

4. Any use of the 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 property, it may be necessary for him 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 property by the claimant.

This Order is entered by the Director of the DLCD as a final order of DLCD and the Land Conservation and Development Commission under ORS 197.352, OAR 660-002-0010(8), and OAR 125, division 145, and by the Administrator for the State Services Division of the DAS as a final order of DAS under ORS 197.352, OAR 125, division 145, and ORS 293.

FOR DLCD AND THE LAND CONSERVATION
AND DEVELOPMENT COMMISSION:



Lane Shetterly, Director
DLCD

Dated this 30th day of March, 2006.

FOR the DEPARTMENT OF ADMINISTRATIVE
SERVICES:



David Hartwig, Administrator
DAS, State Services Division

Dated this 13th day of March, 2006.

NOTICE OF RIGHT TO APPEAL OR OTHER JUDICIAL RELIEF

You are entitled, or may be entitled, to the following judicial remedies:

1. **Judicial review under ORS 293.316:** Judicial review under ORS 293.316 may be obtained by filing a petition for review within 60 days from the service of this order. Judicial review under ORS 293.316 is pursuant to the provisions of ORS 183.482 to the Court of Appeals.
2. **Judicial review under ORS 183.484:** Judicial review under ORS 183.484 may be obtained by filing a petition for review within 60 days from the service of this order. A petition for judicial review under ORS 183.484 may be filed in the Circuit Court for Marion County and the Circuit Court in the county in which you reside.
3. **A cause of action under ORS 197.352:** A present owner of the property, or any interest therein, may file a cause of action in the Circuit Court for the county where the property is located, if a land use regulation continues to apply to the subject property more than 180 days after the present owner made a written demand for compensation.

(Copies of the documents that comprise the record are available for review at the Department's office at 635 Capitol Street NE, Suite 150, Salem, Oregon 97301-2540)

FOR INFORMATION ONLY

The Oregon Department of Justice has advised the Department of Land Conservation and Development that “[i]f the current owner of the real property conveys the property before the new use allowed by the public entity is established, then the entitlement to relief will be lost.”

**BALLOT MEASURE 37 (ORS 197.352)
CLAIM FOR COMPENSATION**

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

March 13, 2006

STATE CLAIM NUMBER: M118386

NAME OF CLAIMANT: John C. Barnard

MAILING ADDRESS: 837 Southwest Canterbury Court
Dallas, Oregon 97338

PROPERTY IDENTIFICATION: Township 8S, Range 6W, Section 26
Tax Lot 1100
Polk County

DATE RECEIVED BY DAS: May 5, 2005

180-DAY DEADLINE: March 20, 2006¹

I. SUMMARY OF CLAIM

The claimant, John Barnard, seeks compensation in the amount of \$296,850 for the reduction in fair market value as a result of certain 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 approximately 9.62-acre property into five parcels, ranging from 1.24 acres to 3.7 acres each, and to develop each parcel with a residential dwelling. The property is located at 19980 Gardner Road, near Dallas, in Polk County. (See claim.)

II. SUMMARY OF STAFF RECOMMENDATION

Based on the 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 John Barnard's division and development of the property: Statewide Planning Goal 3 (Agricultural Lands), ORS 215, and applicable provisions of OAR 660, division 33. These laws will not apply to the claimant only to the extent necessary to allow John Barnard a use of the subject property permitted at the time he acquired the property on April 23, 1991. The department acknowledges that the relief recommended in this report will not allow the claimant to use the property in the manner set forth in the claim. (See the complete recommendation in

¹ This date reflects 180 days from the date the claim was submitted as extended by the 139 days enforcement of Measure 37 was suspended during the pendency of the appeal of Macpherson v. Dep't of Admin. Servs., 340 Or ___, 2006 Ore. LEXIS 104 (February 21, 2006).

Section VI of this report.)

III. COMMENTS ON THE CLAIM

Comments Received

On May 25, 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, no written comments, evidence or information were received in response to the 10-day notice.²

IV. TIMELINESS OF CLAIM

Requirement

Ballot Measure 37, Section 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 the measure (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 the measure (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 criterion, whichever is later.

Findings of Fact

This claim was submitted to DAS on May 5, 2005, for processing under OAR 125 division 145. The claim identifies Polk County zoning; Statewide Planning Goals 2 and 3; ORS 92, 197, and 215; and OAR 660 as laws that restrict the use of the property as the basis for the claim. Only laws that were enacted prior to December 2, 2004, the effective date of Measure 37 are the basis for this claim. (See citations of statutory and administrative rule history of the Oregon Revised Statutes and Oregon Administrative Rules.)

Conclusions

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

² The 10-day notice period was suspended for 139 days during the pendency of the *Macpherson v. Dep't of Admin. Servs.*, 340 Or ___, 2006 Ore. LEXIS 104 (February 21, 2006), which suspended all Measure 37 deadlines.

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, John Barnard, acquired the subject property on April 23, 1991, from Grant Barnard, as reflected by a recorded deed included with the claim.

Grant L. Barnard acquired the subject property on May 23, 1942, by Warranty Deed. Grant L. Barnard is a “family member” as to the claimant, as that term is defined in ORS 197.352(11)(A). (See documents in the department’s claim file.)

A copy of the current year tax assessment statement from Polk County indicates that John Barnard is the current owner of the subject property. (See claim file.)

Conclusions

Based on information included in the state claim file, the claimant, John Barnard, is an “owner” of the subject property, as that term is defined by ORS 197.352(11)(C), as of April 23, 1991. A “family member” of the claimant, as defined in ORS 197.352(11)(A), acquired an interest in the property in 1942.

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 states that the current Polk County EFU zoning with its 80-acre minimum lot size prevents further division of the property. The claim also identifies Statewide Planning Goals 2 (Land Use Planning) and 3 (Agriculture Lands), ORS 92, 197, and 215; and OAR 660 as laws that restrict the use of the property as the basis for the claim.³ It appears from the claim and the materials submitted with it that the claimant requests the right to divide the property into five parcels and to develop a single-family dwelling on each resulting parcel.

³ The claimant does not explain how Goal 2 or ORS 92 and 197 restrict the use of the subject property. On their face, these laws do not restrict the use of the subject property in a manner that reduces its fair market value. Absent any explanation from the claimant as to how these statutes restrict the use of the property, resulting in a reduction in its fair market value, these laws are not addressed further in this report.

The claim is based generally on Polk County's current Exclusive Farm Use (EFU) Zone, which requires an 80-acre minimum lot size, and the applicable provisions of state law that require such zoning. The claimant's property is zoned EFU as required by Statewide Planning Goal 3, in accord with OAR 660 division 33 and ORS 215 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 state land use regulations, particularly ORS 215.263, 215.284, 215.780 and OAR 660 division 33, as applied by Goal 3, do not allow the subject property to be divided into parcels less than 80 acres and establish standards for allowing the existing or any proposed parcels to have farm or non-farm dwellings on them.

ORS 215.780 established an 80-acre minimum size for the creation of new lots or parcels in EFU zones and became effective November 4, 1993 (Chapter 792, Oregon Laws 1993). ORS 215.263 (2003 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. Subsequent amendments to comply with HB 3326 (chapter 704, Oregon Laws 2001, and effective January 1, 2002,) were adopted by the Commission effective May 22, 2002. (See citations of administrative rule history for OAR 660-033-0100, 0130 and 0135.)

The claimant's family acquired the subject property on May 23, 1942, prior to the adoption of the statewide planning goals and their implementing statutes and regulations.

Conclusions

Minimum lot size and dwelling standards established under the applicable provisions of Statewide Planning Goal 3, OAR 660 division 33 and ORS 215 were adopted after the claimant's family acquired the property. No state land use laws were in effect when the claimant's family acquired the property in 1942.

This report addresses only those state laws that are identified in the claim, or that the department is certain apply to the 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 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 what laws apply to a use of property until there is a specific

⁴ The claimant's property is "Agricultural Land" because it contains Natural Resources Conservation Service (NRCS) Class I-IV soils: Abiqua silty clay loam, 3 to 5 percent slopes, Class IIe; Coburg silty clay loam, Class IIw; both prime farmland.

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 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 claim includes an estimate of \$296,850 as the reduction in the property’s fair market value, because of current regulations that prevent division and development of the property. This amount is based on the claimant’s estimate of the fair market value of each of the five parcels resulting from the division proposed by the claimant (ranging from \$82,400 to \$111,000), with the current assessed real market value of the property (\$153,350) deducted from the combined estimated value of the requested parcels (\$450,200) to yield the loss in fair market value. (See claim file.)

No formal appraisal has been submitted with the claim.

Conclusions

As explained in Section V.(1) of this report, the claimant, John C. Barnard is a current owner of the property, whose family acquired the property in May, 1942. Under ORS 197.352, John C. Barnard is due compensation for land use regulations that restrict the use of the subject property in a manner that reduces its fair market value. Based on the findings and conclusions in Section V.(2) of this report, land use laws adopted since the family member first acquired the property in 1942 restrict the use of the subject property. The claimant estimates the reduction in fair market value due to land use restrictions to be \$296,850.

Without a certified appraisal or other documentation, it is not possible to substantiate the specific dollar amount the claimant demands for compensation. Nevertheless, based on the submitted information, the department determines that it is more likely than not that there has been some reduction in the fair market value of the subject property as a result of land use regulations enforced by the Commission or the department since the claimant’s family acquired the property.

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 Polk County’s EFU zone and the related provisions of state law that have restricted use of the property and reduced its fair market value. Those include Statewide Planning Goal 3 (Agricultural Lands), and applicable provisions of ORS 215, and OAR 660 division 33. These land use regulations were enacted after the claimant’s family acquired the

property in 1942, and, therefore, none of these laws is exempt under ORS 197.352(3)(E), which exempts laws in effect when the claimant's family acquired the property.

Conclusions

Without a specific development proposal for the property, it is not possible for the department to determine what laws 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 the general statutory, goal and rule restrictions on dividing the subject property and developing it for residential purposes apply to the claimant's use of the property and that none of these laws were in effect when the claimant's family acquired the property in 1942. As a result, these laws are not exempt under ORS 197.352(3)(E).

There may be other laws that 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 what laws apply to a use of 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. And, 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 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 he has provided to the department in his claim, the greater the possibility that there may be additional laws that will later be determined to continue to apply to his use of the 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 a law that restricts 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 current owner acquired the property. The Commission, by rule, has directed that if the department determines a claim is valid, the Director 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 division of the subject property into five parcels ranging in size from 1.24 acres to 3.7 acres and the development of a dwelling on each parcel. The claim asserts the laws enforced by the Commission or department reduce the fair market value of the subject property by \$296,850. However, because the claim does not provide an appraisal or other specific documentation for how the specified restrictions reduce the fair market value of the property, a specific amount of compensation cannot be determined. Nevertheless, based on the

record for this claim, the department acknowledges that the laws on which the claim is based likely have reduced the fair market value of the 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 John Barnard to use the subject property for a use permitted at the time he acquired the property on April 23, 1991.

When the claimant acquired the property on April 23, 1991, it was subject to Polk County's acknowledged EFU zone.⁵ At that time, Polk County's EFU zone included a "sliding" minimum lot size for creation of new parcels for farm use, with approvals of land divisions dependent upon several factors. The zone did not permit creation of new farm parcels smaller than 20 acres under any circumstances. The zone also provided for creation of new parcels for non-farm dwellings based on a set of discretionary criteria.

Conclusion

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 John Barnard's division of the 9.62-acre property and residential development on newly created parcels: applicable provisions of Statewide Planning Goal 3 (Agriculture Lands), ORS 215, and OAR 660, division 33, enacted after April 23, 1991. These laws will not apply to the claimant only to the extent necessary to allow John Barnard a use of the property permitted at the time he acquired it on April 23, 1991.
2. The action by the State of Oregon provides the state's authorization to the claimant to use his property subject to the standards in effect on April 23, 1991. On that date, the property was subject to applicable provisions of Statewide Planning Goal 3, ORS 215, and OAR 660 division 5 then in effect. The department acknowledges that the relief recommended in this report will not allow the claimant the use of the subject property set forth in the claim.
3. To the extent that any law, order, deed, agreement or other legally enforceable public or private requirement provides that the 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 ORS 227.160, other permits or authorizations from local, state or federal agencies, and restrictions on the use of the property imposed by private parties.
4. Any use of the 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 Polk County's EFU zone was acknowledged for compliance with Statewide Planning Goal 3 (Agriculture Lands) and OAR 660, division 5 in 1988. LCDC Order 88-ACK-347

5. Without limiting the generality of the foregoing terms and conditions, in order for the claimant to use the property, it may be necessary for him 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 property by the claimant.

VII. COMMENTS ON THE DRAFT STAFF REPORT

The department issued its draft staff report on this claim on October 11, 2005. OAR 125-145-0100(3), provided 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. Comments received have been taken into account by the department in the issuance of this final report.