

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)	FINAL ORDER
COMPENSATION UNDER ORS 197.352)	CLAIM NO. M118389
(BALLOT MEASURE 37) OF)	
Gerald and Elaine Owen, CLAIMANTS)	

Claimants: Gerald and Elaine Owen (the Claimants)

Property: Tax lot 1500, Township 4S, Range 2W, Section 4, Marion County (the Property)

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

Claimants 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:

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 Gerald and Elaine Owens' establishment of a single-family dwelling on the 24.54-acre property: applicable provisions of Statewide Planning Goal 3 (Agricultural Lands), ORS 215 and applicable provisions of OAR 660 division 33, enacted after December 28, 1987. These land use regulations will not apply to the claimants only to the extent necessary to allow Gerald and Elaine Owen to use the property for the use described in this report, to the extent that use was permitted at the time they acquired the property on December 28, 1987.
2. The action by the State of Oregon provides the state's authorization to the claimants to use the property for the use described in this report, subject to the standards in effect on December 28, 1987. On that date, the property was subject to applicable provisions of Statewide Planning Goal 3 (Agricultural Lands), ORS 215 and applicable provisions of OAR 660, division 5 then in effect.¹

¹ The department's decision on this Measure 37 claim does not serve to legalize any partition that was achieved without complying with necessary local requirements, or to otherwise excuse compliance with the any partitioning requirements in effect when the claimants acquired the property.

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 claimants first obtain that permit, license or other form of authorization or consent. Such requirements may include, but are not limited to: a building permit, a land use decision, a permit as defined in ORS 215.402 or 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 claimants under the terms of the order will remain subject to the following laws: (a) those laws not specified in (1) above; (b) any laws enacted or enforced by a public entity other than the Commission or the department; and (c) those laws not subject to ORS 197.352 including, without limitation, those laws exempted under ORS 197.352 (3).

5. Without limiting the generality of the foregoing terms and conditions, in order for the claimants to use the property, it may be necessary for them to obtain a decision under ORS 197.352, from a city and/or county and/or metropolitan service district that enforce land use regulations applicable to the property. Nothing in this order relieves the claimants from the necessity of obtaining a decision under ORS 197.352, from a local public entity that has jurisdiction to enforce a land use regulation applicable to a use of the property by the claimants.

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 3rd 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 Oregon 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: M118389

NAMES OF CLAIMANTS: Gerald and Elaine Owen

MAILING ADDRESS: 8448 Champoeg Road
St. Paul, OR 97137

PROPERTY IDENTIFICATION: Township 4S, Range 2W, Section 4
Tax lot 1500
Marion County

OTHER CONTACT INFORMATION: David Wendell
Kelley, Kelley and Doyle
110 N Second Street
Silverton, OR 97381

DATE RECEIVED BY DAS: May 5, 2005

180-DAY DEADLINE: March 20, 2006¹

I. SUMMARY OF CLAIM

The claimants, Gerald and Elaine Owen, seek compensation in the amount of \$125,000 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 claimants desire compensation or the right to construct one single-family dwelling on the subject 24.54-acre property. The property is located on the east side of State Highway 219, near St. Paul, in Marion 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 Gerald and Elaine Owens development of a single-family dwelling on the subject

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)

property: Statewide Planning Goal 3 (Agricultural Lands), and applicable provisions of ORS 215 and OAR 660 division 33 enacted after December 28, 1987. These laws will not apply to the claimants only to the extent necessary to allow Gerald and Elaine Owen to use the property for the use described in this report, to the extent that use was permitted at the time they acquired the property, on December 28, 1987. (See the complete recommendation in Section VI. of this report.)

III. COMMENTS ON THE CLAIM

Comments Received

On May 31, 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, evidence or information was received in response to the 10-day notice.²

The comment is relevant to whether the restriction of the claimants' use of the property reduces the fair market value of the property. The comment has been considered by the department in preparing this report. (See 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 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 criteria, 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 Statewide Planning Goal 3 as the land use law that restricts 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.)

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).

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.

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, Gerald and Elaine Owen, acquired the subject property on December 28, 1987, as reflected by a Warranty Deed included with the claim. A copy of a Title Report dated March 28, 2005, indicates that Gerald and Elaine Owen are the current owners of the subject property.

The claimants assert that Henry Zorn, Gerald Owen’s grandfather, is a family member who initially acquired the subject property on August 25, 1969. There is insufficient documentation in the claim to substantiate this acquisition or the family’s continuous ownership of the property since 1969.³

Conclusions

The claimants, Gerald and Elaine Owen, are “owners” of the subject property as that term is defined by ORS 197.352(11)(C), as of December 28, 1987.

Subject to submission by the claimants of documentation to establish family acquisition and continuous family ownership, it appears that Henry Zorn is a “family member” as that term is defined by ORS 197.352(11)(A) as of August 25, 1969.⁴

³ The claim includes insufficient documentation to demonstrate the date of acquisition by Mr. Zorn. Nor does it substantiate the assertion that Gerald Owens mother and aunt owned the property after Mr. Zorn, and were owners of the property, and maintained continuous family ownership until acquisition by the claimants, in 1987. The approval of this claim based on family ownership as of 1969 is, therefore, conditioned on claimants’ providing documentation to demonstrate that ownership.

⁴ Marion County indicates that the subject parcel was created in Probate Court following the death of Henry Zorn. According to a memo from the County, “the partitioning was not reviewed or approved by the Marion County Planning Division and is not considered a separate, legal parcel for land use purposes.” (See memo from Marion County dated June 20, 2005, included in the department’s claim file.) The department’s decision on this Measure 37 claim does not serve to legalize any partition that was achieved without complying with necessary local requirements, or to otherwise excuse compliance with any partitioning requirements in effect when the claimants acquired the property.

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 states that "My wife and I intend to build a home for our family on the twenty-five acre property and farm on it. This property has not produced in the last two or three of the last five years at least \$80,000 in gross annual income from the sale of farm products nor is it likely to do so in the future."

The claim is based on Marion County's current Exclusive Farm Use (EFU) Zone and the applicable provisions of state law that require such zoning. The County's EFU zoning is required by Goal 3, in accord with OAR 660 division 33 and ORS 215 because the claimants' property is "Agricultural Land" as defined by Goal 3.⁵ Goal 3 requires that agricultural lands as defined by the Goal be zoned for EFU pursuant to ORS 215.

OAR 660-033-0135 (applicable to farm dwellings) became effective on March 1, 1994, and interprets the statutory standard for a primary dwelling in the County's 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 claimants' family appears to have acquired the subject property on August 25, 1969, prior to the establishment of the Statewide Planning Goals and their implementing statutes and rules. No County zoning applied to the subject property in 1969.

Conclusions

The current provisions of ORS 215.284 and OAR 660-033-0130(4)(a) were adopted after the claimants acquired the property in 1987, and do not allow the claimants to develop a farm or non-farm dwelling on the 24.54-acre parcel because the property is predominately composed of high-value soils. When the claimants' family acquired the property in 1969, the state planning goals and the implementing statutes and administrative rules were not in effect. Thus, current

⁵ The claimants' property is "Agricultural Land" because it contains predominately NRCS (Natural Resources Conservation Service) Class II soils (Amity silt loam and Woodburn silt loam). Soil Survey of Marion County Oregon, September 1972.

land use laws restrict the claimants' use of the property relative to how they could have used it when their family acquired it in 1969.

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 use that the claimants have identified. There may be other laws that currently apply to the claimants' use of the property, and that may continue to apply to the claimants' use of the property, that have not been identified in the claim. In some cases, it will not be possible to know what laws apply to a use of property until there is a specific proposal for that use. When the claimants seek a building or development permit to carry out a specific use, it may become evident that other state laws apply to that use.

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 informal estimate of \$125,000 as the reduction in the property's fair market value due to current land use regulations. This amount is based on the claimants' estimate of the market value of one 24.54-acre building site, less the value of the property as currently regulated.

Conclusions

As explained in Section V.(1) of this report, the current owners are Gerald and Elaine Owen whose family appears to have acquired the property in 1969. Under ORS 197.352, Mr. and Ms. Owen are 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, laws adopted since the claimants' family acquired the property restrict division of the subject property. The claimants estimate the reduction in value due to the restrictions to be \$125,000.

Without an appraisal or other documentation, it is not possible to substantiate the specific dollar amount that the claimants demand 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.

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 property relative to what would have been allowed in 1969, when the claimants' family acquired the property. These provisions include Statewide Planning Goal 3 (Agricultural Lands) and applicable provisions of ORS 215 and OAR 660, division 33, which Marion County has implemented through its EFU zone. None of these laws appear to be exempt under ORS 197.352(3)(E), which exempts laws in effect when the claimants' 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 does appear that the general statutory, goal and rule restrictions on residential development and use of farm land apply to the claimants' use of the property, and for the most part these laws are not exempt under ORS 197.352(3)(E).

Laws in effect when the claimants' family acquired the property are exempt under ORS 197.352(3)(E) and will continue to apply to the claimants' use of the property. There may be other laws that continue to apply to the claimants' use of the property that have not been identified in the claim. In some cases, it will not be possible to know what laws apply to a use of property until there is a specific proposal for that use. When the claimants seek a building or development permit to carry out a specific use, it may become evident that other state laws apply to that use. 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 use that the claimants have identified. Similarly, this report only addresses the exemptions provided for under ORS 197.352(3) that are clearly applicable given the information provided to the department in the claim. The claimants should be aware that the less information they have provided to the department in their claim, the greater the possibility that there may be additional laws that will later be determined to continue to apply to their use of the 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 claimants' ability to establish a single-family dwelling on the subject property. The claim asserts that the laws enforced by the Commission or department reduce the fair market value of the subject property by \$125,000. 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 Mr. and Ms. Owen to use the subject property for a use permitted at the time they acquired the property on December 28, 1987.

When the claimants acquired the subject property on December 28, 1987, the statutory provisions for EFU zoning under ORS 215 (1987 edition) and Marion County's acknowledged EFU zoning applied to the use of the property. The applicable statutory standard for approval of a farm or non-farm dwelling in effect when the claimants acquired the property in 1987, was found in ORS 215.283(3) (1987 edition). It is not clear whether an application to construct a residential dwelling would have been approved under the more general provisions applicable to land zoned EFU in ORS 215 and OAR 660 division 5 (1986 edition), and the Marion County regulations that were in effect on December 28, 1987, when the claimants acquired the subject property.

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 Gerald and Elaine Owens' establishment of a single-family dwelling on the 24.54-acre property: applicable provisions of Statewide Planning Goal 3 (Agricultural Lands), ORS 215 and applicable provisions of OAR 660 division 33, enacted after December 28, 1987. These land use regulations will not apply to the claimants only to the extent necessary to allow Gerald and Elaine Owen to use the property for the use described in this report, to the extent that use was permitted at the time they acquired the property on December 28, 1987.
2. The action by the State of Oregon provides the state's authorization to the claimants to use the property for the use described in this report, subject to the standards in effect on December 28, 1987. On that date, the property was subject to applicable provisions of Statewide

Planning Goal 3 (Agricultural Lands), ORS 215 and applicable provisions of OAR 660, division 5 then in effect.⁶

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 claimants first obtain that permit, license or other form of authorization or consent. Such requirements may include, but are not limited to: a building permit, a land use decision, a permit as defined in ORS 215.402 or 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 claimants under the terms of the order will remain subject to the following laws: (a) those laws not specified in (1) above; (b) any laws enacted or enforced by a public entity other than the Commission or the department; and (c) those laws not subject to ORS 197.352 including, without limitation, those laws exempted under ORS 197.352 (3).

5. Without limiting the generality of the foregoing terms and conditions, in order for the claimants to use the property, it may be necessary for them to obtain a decision under ORS 197.352, from a city and/or county and/or metropolitan service district that enforce land use regulations applicable to the property. Nothing in this order relieves the claimants from the necessity of obtaining a decision under ORS 197.352, from a local public entity that has jurisdiction to enforce a land use regulation applicable to a use of the property by the claimants.

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.

⁶ The department's decision on this Measure 37 claim does not serve to legalize any partition that was achieved without complying with necessary local requirements, or to otherwise excuse compliance with the any partitioning requirements in effect when the claimants acquired the property.