

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)
OMPENSATION UNDER ORS 197.352)
(BALLOT MEASURE 37) OF)
Virginia Lorenzana and Helen Mercado-Romero,)
CLAIMANTS)

FINAL ORDER
CLAIM NO. M118397

Claimants: (the Claimants)

Property: Tax lot 1400, T 2S, R 1E, S 34BB, Clackamas 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:

1. In lieu of compensation under ORS 197.352, the State of Oregon will not apply the following laws to Virginia Lorenzana and Helen Mercado-Romero's division of the subject property into parcels: Goal 14 and OAR 660-004-0040, enacted after April 13, 2005, and April 10, 2003, respectively. This rule will not apply to the claimants' use of the subject property only to the extent necessary to allow them a use of the property permitted when Virginia Lorenzana acquired the property on April 13, 2005, and when Helen Mercado-Romero acquired the property on April 10, 2003. The department acknowledges that the relief to which the claimants are entitled under ORS 197.352 will not allow the claimants to use the property in the manner set forth in the claim.
2. The action by the State of Oregon provides the state's authorization to the claimants to use the property subject to the standards in effect on the dates they acquired the property. When the claimants acquired the property on April 13, 2005 and April 10, 2003, it was subject to the current regulations on rural residential land divisions, as described in Section V.(2) of this report.

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 Conditions 1 and 2 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 enforces 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.

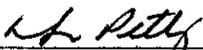
This Order is entered by the Director of the DLCD as a final order of DLCD and the Land Conservation and Development Commission under ORS 197.352, OAR 660-002-0010(8), and OAR 125, division 145, and by the Deputy Administrator for the State Services Division of the DAS as a final order of DAS under ORS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

FOR DLCD AND THE LAND CONSERVATION
AND DEVELOPMENT COMMISSION:



Lane Shetterly, Director
DLCD
Dated this 14th day of March, 2006.

FOR the DEPARTMENT OF ADMINISTRATIVE
SERVICES:



Dugan Petty, Deputy Administrator
DAS, State Services Division
Dated this 14th 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 14, 2006

STATE CLAIM NUMBER: M118397

NAMES OF CLAIMANTS: Virginia Lorenzana
Helen Mercado-Romero

MAILING ADDRESS: 395 Southwest Tualatin Loop
West Linn, Oregon 97068

IDENTIFICATION OF PROPERTY: Township 2S, Range 1E, Section 34BB
Tax lot 1400
Clackamas County

OTHER CONTACT INFORMATION: Dean C. Werst
1785 Willamette Falls Drive
West Linn, Oregon 97068

DATE RECEIVED BY DAS: May 6, 2005

180-DAY DEADLINE: March 21, 2006¹

I. CLAIM

The claimants, Virginia Lorenzana and Helen Mercado-Romero, seek compensation in the amount of \$600,000 for a reduction in fair market value of property 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 divide their 3.5-acre property into approximately one-acre parcels for residential use². The property is located less than one mile from the Portland Metro Urban Growth Boundary, at 395 SW Tualatin Loop, in Clackamas County. (See claim.)

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).

² A subdivision plat map included with the claim indicates the property contains 4.75 acres. The County Assessor's information indicates the lot is 3.5 acres. The difference is not material to the resolution of this 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 this claim is valid. Department staff recommends, in lieu of just compensation, that the requirements of the following laws enforced by the Land Conservation and Development Commission (the Commission) or the department not apply to Virginia Lorenzana and Helen Mercado-Romero's division of the subject property: the applicable provisions of Goal 14 and OAR 660-004-0040. These regulations will not apply to the claimants' use of the subject property only to the extent necessary to allow them a use of the property that was permitted at the time they acquired it on April 13, 2005, and April 10, 2003, respectively. The department acknowledges that the relief, to which the claimants are entitled under ORS 197.352, will not allow them to use the property in the manner set forth in the claim. (See the complete recommendation in Section VI. of this report.)

III. COMMENTS RECEIVED

On May 27, 2005, pursuant to OAR 125-145-0080, the Oregon Department of Administrative Services (DAS) provided written notice to owners of surrounding properties. . According to DAS, five written comments were received in response to the 10-day notice.³

Four of the comments do not address whether the claim meets the criteria for relief (compensation or waiver) under ORS 197.352. Comments concerning the effects that a use of the property may have on surrounding areas generally are not something that the department is able to consider in determining whether to waive a state law.

One comment letter contains relevant comments. These comments raise concerns about whether the claim provides: (1) adequate justification that there has been a reduction in value, (2) the applicability of the Statewide Planning Goals after adoption (exemption under ORS 197.352(3)), (3) the transferability of waivers, and (4) whether state agencies can waive state statutes. This comment has been considered by the department in preparing this report. Comments (3) and (4) are subject of current litigation before various Oregon courts. (See comment letters 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

³ 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.

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 May 6, 2005, for processing under OAR 125 division 145. The claim identifies Clackamas County's Rural Residential Farm Forest – 5 acre (RRFF-5) zoning, ORS 197.015(1) and OAR 660-004-0040(7)(a) and (8)(c) 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 regulation 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 of 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

Claimant Virginia Lorenzana, and her husband William (now deceased), acquired the subject property on November 15, 1972, as reflected by a Bargain and Sale Deed included with the claim.⁴ Claimant Helen Mercado-Romero (Ms. Lorenzana's daughter) acquired an interest in the property on April 10, 2003, when Virginia Lorenzana transferred the property by deed to Virginia Lorenzana and Helen Mercado-Romero, not as tenants in common, but with right of survivorship.

Ms. Lorenzana maintained an ownership interest in the property until June 25, 2004, when she and Helen Mercado-Romero deeded the subject property to Helen and Froylan Mercado-Romero.

Claimant Helen Mercado-Romero and her husband Froylan Mercado-Romero subsequently transferred Froylan Mercado-Romero's interest in the property to Virginia Lorenzana and Helen

⁴ William Lorenzana originally acquired the property on September 1, 1955, but there was a gap in ownership for three days in November 1972.

Mercado-Romero by Quitclaim Deed of April 13, 2005. The deed copy included with the claim does not indicate that it was recorded with Clackamas County. The Clackamas County tax statement for 2004-05 provided with the claim shows Froylan and Helen Mercado-Romero as owners of the subject property.

Conclusions

The claimants, Virginia Lorenzana and Helen Mercado Romero, are “owners” of the subject property as that term is defined in ORS 197.352(11)(C). Family ownership began when Virginia Lorenzana acquired an interest in the property on November 15, 1972. Virginia Lorenzana’s continuous interest in the property dates to April 13, 2005. Helen Mercado-Romero’s interest in the property began on April 10, 2003.

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 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 cites Clackamas County zoning, ORS 197.015(11) and OAR 660-004-0040(7)(a) and (8)(c) as the laws that restrict the use of the property relative to the regulations in effect when Virginia Lorenzana and her husband initially acquired the property.⁵ The claimants desire to divide the subject 3.5-acre parcel into approximately 1-acre parcels for residential development.

The property is currently zoned RRFF-5, which is a rural residential designation under the Clackamas County Comprehensive Plan, in accord with Statewide Planning Goal 14 (Urbanization). The RRFF-5 zone requires a minimum of five acres for the creation of new parcels (Clackamas County Zoning Ordinance, Section 310.07.B). The subject property cannot be divided under the RRFF-5 zone.

Goal 14 became effective on January 25, 1975, and required local comprehensive plans to provide for an orderly and efficient transition from rural to urban land use. The courts have found that Goal 14 generally prohibits residential development at urban densities on rural lands. Rural lands are lands outside of an urban growth boundary (UGB). As interpreted by the courts and the Commission, Goal 14 generally prohibits residential development outside of an urban growth boundary where lot or parcel sizes are less than 2 acres. (*See, e.g. 1000 Friends of Oregon v. LCDC (Curry County)*, 301 Or 447 (1986); *DLCD v. Klamath County*, 38 Or LUBA 769 (2000).) As a result of the 1986 *Curry County* Oregon Supreme Court decision, the Commission amended Statewide Planning Goal 14 (Urbanization) and adopted

⁵ The claimants cite to ORS 197.015(11), but do not establish how that statute restricts the use of the subject property in a manner that reduces its fair market value. On its face, that statute does not restrict the use of the property. Absent an assertion by the claimants how in this instance that statute restricts the use of the property, that statute is not addressed further in this report. The department believes that the correct citation for the regulation cited as OAR 660-004-0040(8)(c) is OAR 660-004-0040(8)(e).

OAR 660-004-0040, establishing rules for rural residential development outside urban growth boundaries, which became effective on October 4, 2000. The rule provides among other things that after October 4, 2000, any lot or parcel to be divided that is less than one mile from the urban growth boundary for the Portland metropolitan area and is in a Rural Residential area must have a the minimum size of 20 acres (OAR 660-004-0040(8)(e)).⁶

The subject property is located within one-mile of the urban growth boundary for the Portland metropolitan area and is subject to the 20-acre minimum lot size standard under OAR 660-004-0040(8)(e), applicable to rural residential areas located within one-mile of the urban growth boundary.⁷

When Virginia Lorenzana first acquired the property in 1972, the zoning of the property was Rural (Agricultural) single-family residential (RA-1) zone applied on December 14, 1967, by Clackamas County. The RA-1 zone established a one-acre minimum size for the creation of new lots or parcels.

Conclusions

The zoning requirements and minimum lot size standards for rural residential parcels established by OAR 660-004-0040 were enacted after the claimants' family acquired the subject property in 1972, and do not allow the division of the property, thereby restricting the use of the property relative to the uses allowed when the property was acquired. In 1972, the property was subject to the provisions of the County RA-1 zone.

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 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 laws 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."

⁶ The Portland metropolitan service area does not have an urban reserve area acknowledged to comply with OAR 660, division 21. Therefore, the provisions under OAR 660-004-0040(d) exempting lots or parcels from the 20-acre standard do not apply.

⁷ In 2002, the Metro UGB was expanded southeasterly from its previous location to include Carver and lands further east to SE Tong Road and south to the Clackamas River. That action resulted in the subject property being located approximately 2,000 feet south of the UGB. (Source: Metro UGB Map, December 2002; City Boundaries in the Damascus/Boring Concept Study Area, Clackamas County; and Assessor Maps 2 3E 17, 2 3E 18 and 2 3E 9).

Findings of Fact

The claim states that there has been a reduction in the fair market value of the property of \$600,000 as a result of current regulations. The claim includes the current tax statement for the subject property, but no other information to substantiate the estimated reduction. No appraisal or other documentation was provided regarding the reduction in the fair market value.

Conclusions

As explained in Section V.(1) of this report, the current owners are Virginia Lorenzana and Helen Mercado-Romero, whose family acquired the property on November 15, 1972. Under ORS 197.352, the claimants 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 \$600,000.

Without an appraisal 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.

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 land use regulations that that restrict the use of the subject property relative to uses permitted when the claimants' family acquired the property, including Goal 14 and OAR 660-004-0040, which set forth the requirements for the creation of new parcels in rural residential areas. These regulations were adopted after the claimants' family acquired the property and, therefore, are not 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 goal and rule restrictions on rural residential development apply to the claimants' use of the property, and these laws are not exempt under ORS 197.352(3)(E).

Laws in effect when the claimants 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 uses 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. 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 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 to allow the present owner to carry out a use of the property allowed at the time the present owner acquired the property. The Commission has by rule 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 division of the subject 3.5-acre property into approximately one-acre parcels. The claim asserts that the laws enforced by the Commission or department reduce the fair market value of the subject property by \$600,000. However, because the claim does not provide an appraisal or other specific explanation 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 Virginia Lorenzana and Helen Mercado-Romero to use the subject property for a use permitted at the time they acquired the property on April 13, 2005, April 10, 2003, respectively. On the dates the claimants acquired the property, the property was subject to the current regulations on rural residential land divisions, as described in Section V. (2) of this report.

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 Virginia Lorenzana and Helen Mercado-Romero's division of the subject property into parcels: Goal 14 and OAR 660-004-0040, enacted after April 13, 2005, and April 10, 2003, respectively. This rule will not apply to the claimants' use of the subject property only to the extent necessary to allow them a use of the property permitted when Virginia Lorenzana acquired the property on April 13, 2005, and when Helen Mercado-Romero acquired the property on April 10, 2003. The department acknowledges that the relief to which the claimants are entitled under ORS 197.352 will not allow the claimants to use the property in the manner set forth in the claim.

2. The action by the State of Oregon provides the state's authorization to the claimants to use the property subject to the standards in effect on the dates they acquired the property. When the claimants acquired the property on April 13, 2005 and April 10, 2003, it was subject to the current regulations on rural residential land divisions, as described in Section V.(2) of this report.

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 Conditions 1 and 2 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 enforces 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 12, 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.