

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. M 118506
(BALLOT MEASURE 37) OF)
David Holland, CLAIMANT)

Claimant: David Holland (the Claimant)

Property: Tax lot 905, Township 5N, Range 10W, Section 30DD,
 City of Cannon Beach, Clatsop County (the property)

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

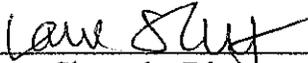
Claimant submitted the Claim to the State of Oregon under ORS 197.352. Under OAR 125-145-0010 *et seq.*, the Department of Administrative Services (DAS) referred the Claim to the Department of Land Conservation and Development (DLCD) as the regulating entity. This order is based on the record herein, 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 denied as to laws administered by DLCD and the Land Conservation and Development Commission (LCDC) for the reasons set forth in the DLCD Report.

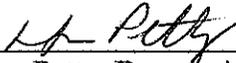
This Order is entered by the Director of the DLCD as a final order of DLCD and the Land Conservation and Development Commission under ORS 197.352, OAR 660-002-0010(8), and OAR chapter 125, division 145, and by the Deputy Administrator for the State Services Division of the DAS as a final order of DAS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

FOR DLCD AND THE LAND
CONSERVATION AND DEVELOPMENT
COMMISSION:



Lane Shetterly, Director
DLCD
Dated this 5th day of April, 2006.

FOR the DEPARTMENT OF
ADMINISTRATIVE SERVICES:



Dugan Petty, Deputy Administrator
DAS, State Services Division
Dated this 5th day of April, 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 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 or the Circuit Court in the county in which you reside.
2. A cause of action under ORS 197.352 (Measure 37 (2004)): If a land use regulation continues to apply to the subject property more than 180 days after the present owner of the property has made written demand for compensation under ORS 197.352¹, the present owner of the property, or any interest therein, shall have a cause of action in the circuit court in which the real property is located.

(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)

¹ By order of the Marion County Circuit Court, "all time lines under Measure 37 [were] suspended indefinitely" on October 25, 2005. This suspension was lifted on March 13, 2006 by the court. As a result, a period of 139 days (the number of days the time lines were suspended) has been added to the 180-day time period under ORS 197.352(6) for claims that were pending with the state on October 25, 2005.

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

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

April 5, 2006

STATE CLAIM NUMBER: M118506

NAME OF CLAIMANT: David Holland

MAILING ADDRESS: Not provided

PROPERTY IDENTIFICATION: Township 5N, Range 10W, Section 30DD
Tax lot 905
City of Cannon Beach
Clatsop County

OTHER CONTACT INFORMATION: Donald Joe Willis
Scwabe, Williamson & Wyatt,
Attorneys at Law
Pacwest Center
1211 Southwest 5th Ave., Suite 1900
Portland, Oregon 97204

DATE RECEIVED BY DAS: May 24, 2005

180-DAY DEADLINE: April 8, 2006¹

I. SUMMARY OF CLAIM

The claimant, David Holland, seeks compensation in the amount of \$3,120,000 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 claimant desires compensation or the right to subdivide and develop the 4.01-acre property into approximately 20 residential lots. The subject property does not have a street address and is located at the coordinates listed above, in Cannon Beach, Clatsop County. (See claim.)

¹ This date reflects 180 days from the date the claim was submitted as extended by the 139 days enforcement of Ballot 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).

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 neither the department nor the Land Conservation and Development Commission (the Commission) have enacted or enforced laws that restrict Mr. Holland's division of the property for residential development. (See the complete recommendation in Section VI. of this report.)

III. COMMENTS ON THE CLAIM

Comments Received

On July 14, 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, thirteen (13) written comments, evidence or information were received in response to the 10-day notice.

The comments do not address whether the claim meets the criteria for relief (compensation or waiver) under ORS 197.352 (Measure 37). Comments concerning the effects 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. If funds do become available to pay compensation, then such effects may become relevant in determining which claims to pay compensation for instead of waiving a state law. (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 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 24, 2005, for processing under OAR 125 division 145. The claim identifies ORS chapters 92 and 227, and OAR chapter 660 (Department of Land Conservation and Development) as the laws and land use regulations 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.

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, David Holland, acquired an interest in the subject property on September 15, 1973, as reflected by a Real Estate Contract and Lot Purchase Agreement included with the claim. Documentation from Pacific Title Company dated October 5, 2005, provides 2004-2005 tax information indicating that David Holland is a current owner of the subject property. (See department’s claim file for documentation of ownership.)

Conclusions

The claimant, David Holland, is an “owner” of the subject property as that term is defined by ORS 197.352(11)(C), as of September 15, 1973.

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, “Mr. Holland’s plan for the property is to subdivide and develop it into about 20 residential lots. We have identified OAR 660-015-0010 and other State of Oregon land use regulations currently in effect which did not apply to the property when it was acquired by Mr. Holland, and which restrict the use and reduce the value of the property.... The applicable land use regulations in effect in 1973, contain no prohibition against the proposed subdivision.”

Specifically, the claim cites specific statutes within ORS chapters 92 (Subdivisions and Partitions) and 227 (City Planning and Zoning) as land use regulations that restrict the claimant's use of his property. The claim also lists certain Statewide Land Use Planning Goals, and certain state administrative rules that implement the Goals (See "Exhibit B" included in department's claim file.) The claim further states, "To the extent that the regulations listed in Exhibit B do not fully capture all land use regulations preventing Mr. Holland from enjoying all uses available at the time of acquisition, Mr. Holland reserves the right to seek relief from, or base his compensation claim on, additional applicable land use regulations."

The property is zoned RL (Lower Density Residential) by the City of Cannon Beach. When Mr. Holland acquired the property in 1973, it was zoned R-1 (Low Density Residential).² Zoning allocations, including minimum lot sizes, for properties within a city are determined by that city.

Statewide Land Use Planning Goals and Implementing Rules

The claim listed the following Goals and rules, with no description of why they restrict the subdivision of the property into about 20 residential lots: OAR 660-001-0000, 660-002-0005, 660-004-000, 660-015-0000 (and, specifically, Goal 7), 660-015-0010 (and, specifically, Goals 16, 17 and 18), 660-016-0000, and 660-023-0000. In comments on the Draft Staff Report, the claimant provided some description of why he believes the listed laws restrict the subdivision of the property into about 20 residential lots. The following portion of this report responds to the claimant's comments.

According to information in the record for this claim, the property is crossed by two streams, has an average slope of 37 degrees, and is identified by the city as being within a potential geologic hazard area.

OAR 660-001-0000 requires the Department to give notice prior to the adoption, amendment or repeal of any permanent rule. The claimant's comments state that the regulation concerns appeals by the state of a local land use decision. That is not correct. Further, to the extent that the claimant is asserting that the State could not appeal the subdivision of the property in 1973, that is not correct.

OAR 660-002-0005 is a statement of purpose for Commission rules delegating authority to the Director of the Department. The claimant's comments state that the rule gives the Director authority to enforce Commission rules. That is not correct. The rule is not a source of enforcement authority for the Director.

OAR 660-004-0000 is a statement of purpose for Commission rules interpreting the process for exceptions to Statewide Planning Goals. The claimant's comments state that the rule "* * *

² The R-1 zone required a 5,000 square foot minimum lot size where sewer was available, which it was. The minimum lot size for the current RL zone is 10,000 square feet. Additionally, the city has a slope/density standard which it applies to subdivision; the steeper the slope, the larger the required lot size. The city has determined that the subject property has an average slope which exceeds 35%, in which case the required minimum lot size is 40,000 square feet (Email correspondence with Rainmar Bartl, City Planner, City of Cannon Beach, October 6, 2005.)

requires an extraordinarily expensive goal exception process for the exclusion of the Holland property from the requirements of one or more applicable Statewide goals, in particular the coastal goals.” The cited rule is a statement of purpose. It does not restrict the claimant’s subdivision of the property.

OAR 660-015-0000 Statewide Planning Goals and Guidelines #1 through #14. The claimant’s comments list these Statewide Planning Goals but, with the exception of Goal 7 (see next paragraph), contain *no* description of how the goals restrict the claimant’s subdivision of the property. Without any information from the claimant concerning how a particular law restricts the subdivision of the property into approximately 20 lots, the Department is unable to determine that these laws restrict the use of the property.

With respect to Goal 7, the comments state “[t]his regulation underlies the local regulation restricting the number of lots that can be developed. This reduces the number of lots down to four, thereby reducing the value of the property.” Statewide Planning Goal 7 requires local governments to adopt or amend their comprehensive plans or land use regulations to avoid development in hazard areas where the risk to people and property cannot be mitigated. Based on information in the record for this claim, the property is in an inventoried geologic hazard area. As a result, Goal 7 applies to the claimant’s desired use of the property, and restricts that use by requiring that development avoid the hazard area. Goal 7 is further addressed in Section V.4. of this Final Report.

The claim identifies OAR 660-015-0010 as a land use regulation that restricts the claimant’s use of this property. This citation is to Statewide Planning Goals 16 through 19. Goal 16 concerns estuarine resources. There is no evidence in the record for this claim that Goal 16 applies to the claimant’s desired use of this property. Goal 17 concerns coastal shorelands. This property does appear to be within the planning area for coastal shorelands. According to the claimant’s comments, item 6 of Goal 17 requires a showing of public need for the claimant’s desired subdivision of the property. Goal 17 requires a showing of public need only for uses that are: (a) non water-dependent; (b) non water-related; and (c) that cause a permanent or long-term change in the features of coastal shorelands. This property is planned and zoned for residential uses within the City of Cannon Beach. As a result, absent some amendment of the city’s comprehensive plan or zoning in relation to this property, or some aspect of the city’s regulation of the use of this property that implicates Goal 17, Goal 17 does not apply to the subdivision of the property. The claimant’s comments also identify the requirement in Goal 17 that exceptional aesthetic resources be protected. This requirement applies only to land inventoried by a local government as an exceptional aesthetic resource. There is no evidence in the record for this claim that the property is inventoried in this manner. As a result, this aspect of Goal 17 does not apply to the subdivision of the property by the claimant. Goal 18 concerns beaches and dunes. There is no evidence in the record for this claim that this property is in an identified beach and dune area. Goal 19 concerns ocean resources. There is no evidence in the record for this claim that this property is within the territorial sea.

OAR 660-016-0000 established the inventory process for Statewide Planning Goal 5 (Open Space, Scenic and Historic Areas, and Natural Resources). This rule is no longer in effect, except with regard to cultural resources and certain local government actions. Based on the

information in the record for this claim, this rule does not apply to the claimant's desired subdivision of the property into approximately twenty lots.

OAR 660-023-0000 is a statement of purpose for the current rules implementing Statewide Planning Goal 5. Nothing in the statement of purpose restricts the claimant's subdivision of this property into approximately twenty lots.

State Statutes

The claimant also alleges that ORS 227.215 and 227.350 restrict the claimant's use of the property. ORS 227.215 authorizes cities to regulate the development of land and to require that development be undertaken only in compliance with a development permit. At the time the claimant acquired this property (in 1973), ORS chapter 227 authorized cities to regulate the development of land and to place restrictions on development. The claimant has not explained how, to the extent that these two statutes currently restrict the claimant's use of the property, they are more restrictive than the law in effect when the claimant acquired the property.

The claimant also alleges that ORS 92.012, 92.040, 92.044, 92.046, 92.090 and 92.100 are land use regulations that restrict the claimant's use of the property. The claimant asserts that these land use regulations either were not in effect when the claimant acquired the property, or that they were in effect, but in a "much simpler" form.

ORS 92.012 currently provides that no land may be subdivided or partitioned except in accordance with ORS 92.010 to 92.190. This statute simply requires compliance with other specified statutes. It does not add any independent restriction on the use of the claimant's property.

ORS 92.040 currently requires that any person proposing to divide property must apply to the city or county with jurisdiction over land divisions for approval in accordance with the applicable city or county ordinance. Subsections (2) and (3), which were enacted more recently, *limit* local government's authority in the review and conditioning of land divisions. In September of 1973, ORS 92.040 required persons proposing to divide property to apply to the city or county with jurisdiction over land divisions for approval. The claimant has not established how the current version of ORS 92.040 restricts the claimant's use of the property relative to the version in effect in September of 1973.

ORS 92.044 and 92.046 currently authorize counties and cities to adopt standards for land divisions, to charge fees to defray the costs of reviewing applications, and requires that the standards must comply with the city or county comprehensive plan. In September of 1973, ORS 92.044 and 92.046 authorized counties and cities to adopt standards for land divisions where "* * * necessary to carry out development patterns or plans and to promote the public health, safety or general welfare." The statutes also included a list of subjects that the standards could include. The authority granted cities and counties in 1973 was at least as broad as the current authority. The claimant has not established how the versions of ORS 92.044 and 92.046 currently in effect restrict the claimant's use of the property relative to the versions in place in September of 1973.

ORS 92.090 currently requires that the name of a subdivision plat are subject to approval of the county surveyor, along with requirements concern the numbering of lots and blocks. The statute also contains requirements concerning the layout, and dedication of streets, concerning water supply, and concerning sewage disposal systems. The requirements concerning naming and numbering, and streets appear to be the same as those in place in September of 1973. The requirements concerning water service and sewer service are express in current law. There were provisions in ORS 92.044 and 92.046, in effect in September of 1973, which expressly authorized the city to consider water supply and sewerage in approving or disapproving a proposed partition or subdivision. The claimant has not established how the versions of ORS 92.044 and 92.046 currently in effect restrict the claimant's use of the property relative to the laws in place in September of 1973.

ORS 92.100 currently requires approval of the county surveyor before recording of a final plat. The same requirement was in effect in September of 1973. The claim asserts that the current version of the statute requires "*** compliance with an array of local ordinances, including local land use regulations that limit the number of lots on the property." ORS 92.100(2) (1971) required, among other things, that "[b]efore approving the plat as required by this section, *** the county surveyor *** shall check the subdivision site and the plan and shall take such measurements and make such computations as are necessary to determine that the plat complies with the provisions of ORS 92.050 [survey requirements] and with the subdivision requirements in effect in the area." In addition, as noted above, ORS 92.044 and 92.046 (1971) also required compliance with local ordinances. Claimant has not demonstrated that ORS 92.100 restricts his use of the property relative to the laws in effect in September 1973.

Conclusions

The statewide planning goals and their implementing rules did not apply when the claimant acquired the subject property on September 15, 1973. However, with the exception of Goal 7, the claimant has not identified any Statewide Planning Goal or implementing rule that restricts the claimant's desired use of the property relative to what was permitted when the claimant acquired the property. The claimant has not established that state statutes identified in the claim restrict the claimant's desired use of the property relative to the statutes in effect when the claimant acquired the property. City zoning is the responsibility of the local governing jurisdiction, in this case, Cannon Beach. Neither the Commission nor the department enforces laws that require specific zoning of the subject property.

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 \$3,120,000 as the reduction in fair market value of the "affected property interest resulting from the enactment or enforcement" of current land use regulations. This estimate is based on a preliminary appraisal conducted by a licensed MAI appraiser engaged by the claimant's representative. A copy of the appraiser's report is not included in the claim. The claim also includes a title report estimating the current real market value of the subject property with improvements to be approximately \$474,091.

Conclusions

As explained in Section V.(1) of this report, the current owner is David Holland who acquired the property on September 15, 1973. Under ORS 197.352, David Holland 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 in Section V.(2) of this report, land use regulations adopted since the claimant acquired the property in 1973 restrict his ability to subdivide the property into approximately twenty lots. The claim estimates the reduction in property value due to land use restrictions to be \$3,100,000.

Without an 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 enacted or 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 enacted after the claimant acquired the property. However, with the exception of Statewide Planning Goal 7, the claimant has not demonstrated that any of the listed laws restrict the use of the property relative to what would have been allowed in 1973, when David Holland acquired the property.

With respect to Goal 7, the claimant's comments state "[t]his regulation underlies the local regulation restricting the number of lots that can be developed. This reduces the number of lots down to four, thereby reducing the value of the property." Statewide Planning Goal 7 requires local governments to adopt or amend their comprehensive plans or land use regulations to avoid development in hazard areas where the risk to people and property cannot be mitigated. Based on information in the record for this claim, the property is in an inventoried geologic hazard area. As a result, Goal 7 applies to the claimant's desired use of the property, and restricts that use by requiring that development avoid the hazard area.

Goal 7 protects people and property from natural hazards. Under ORS 197.352(3)(B), ORS 197.352 does not apply to laws “restricting or prohibiting activities for the protection of public health and safety, such as fire and building codes, health and sanitation regulations, solid or hazardous waste regulations, and pollution control regulations.” Statewide Planning Goal 7 restricts activities in order to protect public health and safety. As a result, ORS 197.352 does not apply to Goal 7. Other exemptions under ORS 197.352(3) may apply to Goal 7, or to other laws that apply to the claimant’s use of the property, depending on the details of how the claimant desires to subdivide the property for residential use.

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 Statewide Planning Goal 7 restricts the claimant’s use of the property. However, this law is exempt under section 3(B) of ORS 197.352.

Laws in effect when the claimant acquired the property are exempt under ORS 197.352(3)(E) and will continue to apply to the claimant’s use of the property as described in the above findings. 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).

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 record for this claim, the claimant has not established that any state laws enforced by the Commission or the department restrict the use of or reduce the value of the subject property with the exception of Statewide Planning Goal 7. ORS 197.352 does not apply to Goal 7, however, because it restricts activities in order to protect public health and safety, and is therefore exempt under ORS 197.352(3)(B).

Conclusion

Based on the record before the department, the claimant, David Holland, has not established that he is entitled to relief under ORS 197.352(1) as a result state land use regulations that have reduced the value of his property. Therefore, this claim is denied.

VII. COMMENTS ON THE DRAFT STAFF REPORT

The department issued its draft staff report on this claim on March 13, 2006. OAR 125-145-0100(3), provided 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. Comments received have been taken into account by the department in the issuance of this final report.