

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. M118510
(BALLOT MEASURE 37) OF)
Gary and Marie DuRette, CLAIMANTS)

Claimants: Gary and Marie DuRette (the Claimants)

Property: Tax lot 500, Township 3S, Range 5W, Section 4, Yamhill 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 Gary and Marie DuRette's division of the property into two parcels, and to their development of a dwelling on the resulting vacant parcel: the applicable provisions of Statewide Planning Goal 4 (Forest Lands), ORS 215, and OAR 660, division 6, enacted after December 27, 1985. These land use regulations will not apply to the claimants' use of their property only to the extent necessary to allow them 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 27, 1985.
2. The action by the State of Oregon provides the state's authorization to Gary and Marie DuRette to use the property for the use described in this report, subject to the laws in effect when they acquired the property on December 27, 1985. On that date the property was subject to the County's acknowledged AF-20 zone, in accord with Goal 4, and to the applicable provisions of ORS 215, as implemented by OAR 660, division 6, then in effect.
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 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.

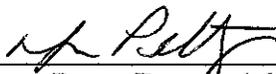
FOR DLCD AND THE LAND CONSERVATION
AND DEVELOPMENT COMMISSION:



Lane Shetterly, Director
DLCD

Dated this 3rd day of April, 2006.

FOR the DEPARTMENT OF ADMINISTRATIVE
SERVICES:



Dugan Petty, Deputy Administrator
DAS, State Services Division

Dated this 3rd day of April, 2006.

NOTICE OF RIGHT TO APPEAL OR OTHER JUDICIAL RELIEF

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

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)

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.”

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 3, 2006

STATE CLAIM NUMBER: M118510

NAMES OF CLAIMANTS: Gary and Marie DuRette

MAILING ADDRESS: 19920 Northwest Fairdale Road
Yamhill, Oregon 97148

PROPERTY IDENTIFICATION: Township 3S, Range 5W, Section 4
Tax lot 500
Yamhill County

OTHER CONTACT INFORMATION: Mona DuRette
825 Morgan Lane
McMinnville, Oregon 97128

DATE RECEIVED BY DAS: May 24, 2005

180-DAY DEADLINE: April 8, 2006¹

I. SUMMARY OF CLAIM

The claimants, Gary and Marie DuRette, seek compensation in the amount of \$200,000 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 divide the 49.58-acre property into two parcels, and to develop a dwelling on the resulting vacant parcel. The property is located at 19920 NW Fairdale Road, near Yamhill, in Yamhill 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 Gary and Marie DuRette's division of the property into two parcels, or to their

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).

development of a dwelling on the resulting vacant parcel: applicable provisions of Statewide Planning Goal 4 (Forest Lands), ORS 215 and OAR 660, division 6 enacted after December 27, 1985. These laws will not apply to the claimants only to the extent necessary to allow Gary and Marie DuRette 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 in 1985. (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, one written comment, evidence or information was received in response to the 10-day notice.

The comment does not address whether the claim meets the criteria for relief (compensation or waiver) under ORS 197.352 (Ballot 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 the 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 Ballot Measure 37 (December 2, 2004), within two years of that effective date or the date the public entity applies the land use regulation as an approval criteria to an application submitted by the owner, whichever is later; or
2. For claims arising from land use regulations enacted after the effective date of Ballot 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 24, 2005, for processing under OAR 125, division 145. The claim identifies Yamhill County Ordinance 401 as the 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 Ballot 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 Ballot 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, Gary and Marie DuRette, acquired the subject property on December 27, 1985, from Gary DuRette’s mother, Mona DuRette, as reflected by a Bargain and Sale Deed included with the claim. Records from the Yamhill County Assessor’s Office indicate that the DuRettes are the current owners of the subject property.

The claimants assert that Mona DuRette acquired the property in 1963. No documentation has been submitted to substantiate this acquisition date.

Conclusions

The claimants, Gary and Marie DuRette, are “owners” of the subject property, as that term is defined by ORS 197.352(11)(C), as of December 27, 1985. The claimants assert that “family members,” as that term is defined by ORS 197.352(11)(A), acquired ownership of the property in 1963. The claimants have provided no documentation to substantiate this acquisition date. The evaluation of this claim based on family ownership as of 1963, is conditioned upon and subject to the claimants’ submission of documentation establishing the date Mona DuRette acquired the subject 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 the current zoning, which requires 80 acres for a dwelling site, restricts the claimants' ability to divide the property and add an additional dwelling. The claim identifies the Yamhill County zoning code, section 401, enacted in 1994, as the regulation that restricts the use and reduces the value of the property, as the basis for the claim.

The claim is based on Yamhill County's current Forest Use (F-80) and the provisions of state law that require such zoning. The claimants' property is zoned for forest use as required by Goal 4 (Forest Land), in accord with OAR 660, division 6 and ORS 215, because the claimants' property is "forest land" under Goal 4. Goal 4 became effective on January 25, 1975, and required that forest land, as defined by the Goal, be zoned for forest use.

The forest land administrative rule (OAR 660, division 6) became effective September 1, 1982, and ORS 215.705 to 215.755 and 215.780 became effective on November 4, 1993 (Chapter 792, Or Laws 1993), and were adopted into OAR 660-006-0026 and 0027 on March 1, 1994. (See citations to rule history under OAR 660-015-0000(4).)

Together, ORS 215.705 to 215.755 and 215.780 and OAR 660-006-0026 and 0027 establish an 80-acre minimum lot size for the creation of a new parcel in a forest zone, and also establish the standards for dwellings in forest zones under Statewide Planning Goal 4.

It appears that the claimants' family acquired the property in 1963, prior to the adoption of the statewide planning goals and their implementing statutes and regulations. No County zoning applied to the property at that time.

Conclusions

The minimum lot size and dwelling standards established by Statewide Planning Goal 4 and OAR 660-006-0026 and 0027, and by provisions of ORS 215 were all adopted after the family of Gary and Marie DuRette acquired the property in 1963, and do not allow the division of the property into two parcels less than 80 acres in size. Laws adopted since the family acquired the property in 1963 restrict the use of the property relative to how it could have been used then.

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 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 \$200,000 as the reduction in the property’s fair market value, due to current regulations. This amount is based on the claimants’ estimate of similar properties in the area.

The claim also includes Yamhill County Assessor’s information indicating the current real market value of the subject property (in an undivided state) with improvements, is approximately \$426,000.

Conclusions

As explained in Section V.(1) of this report, the current owners are Gary and Marie DuRette, whose family acquired the property in 1963. Under ORS 197.352, Gary and Marie DuRette 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 \$200,000.

Without an appraisal or other documentation, it is not possible to substantiate the specific dollar amount 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 Yamhill County’s F-80 zone and the related provisions of state law that have restricted the use of the subject property and reduced its fair market value relative to uses allowed in 1963, when the claimants’ family appears to have acquired the property. These laws include applicable provisions of Statewide Planning Goal 4 (Forest Lands), ORS 215, OAR 660, division 6. None of these laws are exempt under ORS 197.352(3)(E), which exempts laws in effect when the claimants’ family acquired the property.

The department notes that ORS 215.730 and OAR 660, division 6 include standards for siting dwellings in forest zones. This provision includes fire protection standards for dwellings and for surrounding forest lands. ORS 197.352(3)(B) specifically exempts regulations “restricting or prohibiting activities for the protection of public health and safety, such as fire and building codes...” To the extent that they may be applicable under OAR 660-006-0050, the department finds that siting standards for dwellings in forest zones in ORS 215.730 and in Goal 4 and its implementing rules (OAR 660, division 6) are exempt under ORS 197.352(3)(B).

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 the residential development and use of forest 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. In addition, the siting requirements of ORS 215.730 and its implementing rules related to dwelling siting standards based on public health and safety are exempt under ORS 197.352(3)(B) and will also continue to apply to 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).

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’ division of the subject property into two parcels, and their development of a dwelling on the resulting vacant parcel. The claim asserts that the laws enforced by the Commission or department reduce the fair market value of the subject property by \$200,000. 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 Gary and Marie DuRette to use the subject property for a use permitted at the time they acquired the property on December 27, 1985.

When the claimants acquired the subject property on December 27, 1985, it was subject to Yamhill County's acknowledged Agriculture Forestry (AF-20), which had a minimum lot size of 20 acres, as well as the provisions of ORS 215, as implemented by OAR 660, division 6, then in effect.

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. 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.

Conclusion

Based on the record, and to the extent the claimants desire to rely on the family's acquisition of the property for evaluation of this claim, subject to the claimants' submission of documentation to establish the date of family acquisition prior to the issuance of the final report and order on this claim, 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 Gary and Marie DuRette's division of the property into two parcels, and to their development of a dwelling on the resulting vacant parcel: the applicable provisions of Statewide Planning Goal 4 (Forest Lands), ORS 215, and OAR 660, division 6, enacted after December 27, 1985. These land use regulations will not apply to the claimants' use of their property only to the extent necessary to allow them 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 27, 1985.
2. The action by the State of Oregon provides the state's authorization to Gary and Marie DuRette to use the property for the use described in this report, subject to the laws in effect when they acquired the property on December 27, 1985. On that date the property was subject to the County's acknowledged AF-20 zone, in accord with Goal 4, and to the applicable provisions of ORS 215, as implemented by OAR 660, division 6, then in effect.

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 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 March 13, 2006. 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.