

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. M118636
(BALLOT MEASURE 37) OF)	
Dean L. and Valerine B. Reed, CLAIMANTS)	

Claimants: Dean L. and Valerine B. Reed (the Claimants)

Property: Township 3S, Range 2E, Section 12D, Tax lots 100 and 103, 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 Dean and Valerine Reed's division of tax lot 100 into one-acre parcels or to their development of a dwelling on each parcel: applicable provisions of Goals 3 and 4, ORS 215 and OAR 660, divisions 6 and 33, enacted or adopted after December 15, 1977. These land use regulations will not apply to the claimants only to the extent necessary to allow them to use tax lot 100 for the use described in this report, and only to the extent that use was permitted when they acquired that tax lot on December 15, 1977.
2. The action by the State of Oregon provides the state's authorization to the claimants to use tax lot 100 for the use described in this report, subject to the standards in effect on December 15, 1977. On that date, tax lot 100 was subject to applicable provisions of Goal 3 and ORS 215 then in effect.
3. To the extent that any law, order, deed, agreement or other legally enforceable public or private requirement provides that tax lot 100 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 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 tax lot 100 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 tax lot 100, 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 tax lot 100 by the claimants.

This Order is entered by the Deputy 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:

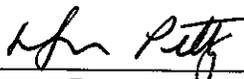
Lane Shetterly, Director



George Naughton, Deputy Director
DLCD

Dated this 28th day of April, 2006.

FOR the DEPARTMENT OF ADMINISTRATIVE
SERVICES:



Dugan Petty, Deputy Administrator
DAS, State Services Division

Dated this 28th 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.

ORS 197.352 (BALLOT MEASURE 37) CLAIM FOR COMPENSATION

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

April 28, 2006

STATE CLAIM NUMBER: M118636

NAMES OF CLAIMANTS: Dean L. and Valerine B. Reed

MAILING ADDRESS: 19508 South Henrici Road
Oregon City, Oregon 97045

PROPERTY IDENTIFICATION: Township 3S, Range 2E, Section 12D
Tax lots 100 and 103
Clackamas County

DATE RECEIVED BY DAS: June 20, 2005

180-DAY DEADLINE: May 5, 2006¹

I. SUMMARY OF CLAIM

The claimants, Dean L. and Valerine B. Reed, seek compensation in the amount of \$1,134,825² for the reduction in fair market value as a result of 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 37.24-acre property into one-acre parcels and to develop a dwelling on each parcel. The property is located at 19508 and 19692 South Henrici Road, near Oregon City, in Clackamas 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 not valid as to tax lot 103 because the claimants are not the current owners of the property.

Based on the preliminary findings and conclusions set forth below, the department has determined that the claim is valid as to tax lot 100. 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 Dean and

¹ This date reflects 180 days from the date the claim was submitted, as extended by the 139 days that all timelines under Measure 37 were suspended during the pendency of *MacPherson v. Dept. of Admin. Svcs.*, 340 Or 117 (2006).

² This is the amount of compensation requested for the alleged reduction in fair market value of both tax lots 100 and 103.

Valerine Reed's division of the 17.69-acre tax lot 100 into one-acre parcels and to the development of a dwelling on each parcel: applicable provisions of Statewide Planning Goals 3 (Agricultural Lands) and 4 (Forest Lands), ORS 215 and OAR 660, divisions 6 and 33, enacted or adopted after December 15, 1977. These laws will not apply to the claimants only to the extent necessary to allow them to use tax lot 100 for the use described in this report, and only to the extent that use was permitted when they acquired that tax lot on December 15, 1977. (See the complete recommendation in Section VI. of this report.)

III. COMMENTS ON THE CLAIM

Comments Received

On August 2, 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, six 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. Comments concerning the effects a use of the property may have on surrounding areas are generally 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 waive a state law. (See the 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), or the date the public entity applies the land use regulation as an approval criterion 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 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 criterion, whichever is later.

Findings of Fact

This claim was submitted to DAS on June 20, 2005, for processing under OAR 125, division 145. The claim identifies Clackamas County's Agriculture Forest (AG/F) zone as the basis for the claim. Only laws that were enacted or adopted prior to December 2, 2004, are the basis for this claim.

Conclusions

The claim has been submitted within two years of the effective date of Measure 37 (December 2, 2004), based on land use regulations enacted or 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

Tax lot 100 (17.69 acres)

The claimants, Dean and Valerine Reed, acquired tax lot 100 from Valerine Reed’s parents, Clarence J. and Virgil D. Wollertz, on December 15, 1977, as reflected by a real estate contract included with the claim. Valerine Reed’s parents acquired tax lot 100 on November 3, 1954, as reflected by a copy of a warranty deed included with the claim. On September 23, 1998, the claimants conveyed tax lot 100 to the Dean and Valerine Reed Trust. The trust is a revocable living trust with the claimants as trustees, as reflected by a copy of a warranty deed included with the claim.³ The Clackamas County Assessor’s Office confirms that Dean and Valerine Reed are the current owners of tax lot 100.

Tax lot 103 (19.55 acres)

Claimant Valerine Reed’s parents, Clarence J. and Virgil D. Wollertz, acquired tax lot 103 on November 3, 1954, as reflected by a copy of a warranty deed included with the claim. On January 27, 1994, Valerine Reed acquired the property as trustee of her parents’ trust, as reflected by a warranty deed included with the claim. On September 23, 1998, Valerine Reed conveyed tax lot 103 to the Dean and Valerine Reed Trust, a revocable living trust with the claimants as trustees, as reflected by a copy of a warranty deed included with the claim. On May 11, 2000, Dean and Valerine Reed, as trustees conveyed tax lot 103 to Dean-Val Reed Properties, LLC, an Oregon limited liability company, which is not a claimant for purposes of this ORS 197.352 claim. The Clackamas County Assessor’s Office confirms that Dean-Val Reed Properties, LLC is the current owner of tax lot 103.

Conclusions

The claimants, Dean and Valerine Reed, are “owners” of tax lot 100 as that term is defined by ORS 197.352(11)(C), as of December 15, 1977. Valerine Reed’s parents are “family members,” as defined by ORS 197.352(11)(A), as of November 3, 1954.

³ Transfer of property to a revocable trust does not change ownership of the property for purposes of ORS 197.352.

The claimants, Dean and Valerie Reed, are not "owners" of tax lot 103, as that term is defined by ORS 197.352(11)(C). Transfer of tax lot 103 to Dean-Val Reed Properties, LLC created a new ownership under ORS 197.352, as of May 11, 2000.

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 indicates that the claimants desire to divide the property into one-acre parcels and develop each parcel with a single-family dwelling, and current mixed farm forest zoning prevents the desired division of the property.

The claim is based generally on Clackamas County's AG/F zone and the applicable provisions of state law that require such zoning. The claimants' property is zoned AG/F, which is a mixed agricultural and forest land zone, as required by Goal 4 and the implementing provisions of OAR 660, division 6 (effective on February 5, 1990) and subsequently amended on March 1, 1994, to comply with the provisions of House Bill 3661 (Chapter 792, Oregon Laws 1993).

Under OAR 660-006-0050, all the uses permitted under Goals 3 and 4 are allowed in mixed agriculture and forest zones except that for dwellings either the Goal 3 or 4 standards are applicable based on the predominant use of the tract on January 1, 1993.⁴ Depending on the predominant use on January 1, 1993, the property is subject to either the requirements for dwellings applicable under Exclusive Farm Use (EFU) zoning required by Goal 3 and OAR 660, division 33, or forest zone provisions required by Goal 4 and OAR 660, division 6. This includes the dwelling standards asserted by the claimants as restricting the use of the property.

For land divisions, OAR 660-006-0055 authorizes the creation of new parcels based on the standards applicable to farm or forest zones that implement the minimum lot size specified in ORS 215.780. Under ORS 215.780(2)(a), the minimum lot size in Clackamas County's acknowledged AG/F zone is 80 acres. Under OAR 660-006-0055, the claimants' property cannot be divided into parcels smaller than 80 acres.

Goal 14 would likely apply to the division of the claimants' property into parcels of less than two acres in size. Goal 14 generally requires that land outside of urban growth boundaries be used for rural uses. Goal 14 became effective on January 25, 1975.

The claimants' family acquired tax lot 100 on November 3, 1954, prior to the adoption of the statewide planning goals and their implementing statutes and regulations and before application of zoning by Clackamas County.

⁴ No information was provided to the department regarding the predominant use of the subject property on January 1, 1993.

Conclusions

The current zoning requirements, minimum lot size and dwelling standards established under Goal 4 for lands zoned for mixed farm forest use and the statutory and rule restrictions under applicable provisions of ORS 215 and OAR 660, divisions 6 and 33, were enacted or adopted after family members of the claimants acquired the property on November 3, 1954, and do not allow the claimants' desired division and development of tax lot 100.

As explained in Section V.(1), the claimants, Dean and Valerie Reed, are not "owners" of tax lot 103 as that term is defined in ORS 197.352(11)(C). Therefore, no laws enforced by the Commission or the department restrict the claimants' use of private real property in a manner that reduces the fair market value of tax lot 103.

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 \$1,134,825⁵ as the reduction in the property's fair market value due to current regulations. This amount is based on comparable sales in the vicinity.

Conclusions

As explained in Section V.(1) of this report, the claimants' family acquired tax lot 100 on November 3, 1954. Under ORS 197.352, the claimants are due compensation for land use regulations that restrict the use of tax lot 100 in a manner that reduces its fair market value. Based on the findings and conclusions in Section V.(2) of this report, laws enacted or adopted since family members of the claimants acquired the tax lot 100 restrict the desired division and development of the property. The claimants estimate the reduction in value of tax lots 100 and 103 due to the restrictions to be \$1,134,825.

Without an appraisal or other documentation for tax lot 100, and without verification of whether or to what extent the claimants' use of tax lot 100 was allowed under the standards in effect when they acquired that tax lot, 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 the fair market value of tax lot 100 has been reduced to some extent as a result of land use regulations enforced by the Commission or the department.

As explained in Section V.(1), the claimants, Dean and Valerie Reed, are not "owners" of tax lot 103 as that term is defined in ORS 197.352(11)(C). Therefore, no laws restrict their use of tax lot 103 in a manner that reduces the fair market value of the property.

⁵ This is the amount of compensation requested in the claim for the reduction in fair market value for both tax lots 100 and 103.

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 subject property, including applicable provisions of Goals 3 and 4, ORS 215 and OAR 660, divisions 6 or 33. All of these land use regulations were enacted or adopted after the claimants' family acquired tax lot 100.

Conclusions

It appears that none of the general statutory, goal and rule restrictions on residential division and development of the subject property were in effect when the claimants' family acquired tax lot 100 on November 3, 1954. As a result, these laws are not exempt under ORS 197.352(3)(E).

Laws in effect when the claimants' family acquired tax lot 100 are exempt under ORS 197.352(3)(E) and do not provide a basis for compensation. In addition, the department notes that ORS 215.730 and OAR 660, division 6, include standards for siting dwellings in forest zones. The provisions include fire protection standards for dwellings and for surrounding forest zones. 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. . . ." Other land use laws enacted or adopted for a purpose set forth in ORS 197.352 (3)(A) to (D) are also exempt and would not provide a basis for compensation.

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 laws that restrict 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 of the department 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 divide the 17.69-acre tax lot 100 into one-acre parcels and to develop a dwelling on each parcel. The claim asserts that the laws enforced by the Commission or the department reduce the fair market value of the subject property by \$1,134,825. However, because the claim does not provide an appraisal or other specific documentation for how the specified restrictions reduce the fair market value of tax lot 100, and without verification of whether or to what extent the claimants' desired use of tax lot 100 was allowed under the standards in effect when the claimants' family acquired 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 Dean and Valerie Reed to use the 17.69-acre tax lot 100 for a use permitted at the time they acquired the property on December 15, 1977.

The claimants acquired tax lot 100 on December 15, 1977, after the adoption of the statewide planning goals, but before the Commission acknowledged Clackamas County's land use regulations to be in compliance with the statewide planning goals pursuant to ORS 197.250 and 197.251. On December 15, 1977, tax lot 100 was zoned Rural Area Single-Family Residential District by Clackamas County.⁶

Because the Commission had not acknowledged the county's plan and land use regulations when the claimants acquired tax lot 100 on December 15, 1977, the applicable statewide planning goals would have applied directly to any development application for tax lot 100 of the claimants' property.⁷ The claim does not establish whether or to what extent the claimants' desired use of the property complies with the standards for land division and development under the statewide planning goals applicable and in effect when the claimants acquired the property on December 15, 1977.

In addition to the applicable provisions of Goal 3 and ORS 215 in effect on December 15, 1977, and other laws in effect when the claimants acquired the subject property, there may be other laws that 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 which laws apply to a use of the subject 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 depending on when they were enacted or adopted, may continue to apply to the claimants' property. In addition, some of these laws may be exempt under ORS 197.352(3)(A) to (D) and will continue to apply to the subject property on that basis.

This report addresses only those state laws that are identified in the claim, or that the department is certain apply to the subject 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

⁶ Clackamas County's non-resource districts were acknowledged for goal compliance on August 10, 1989.

⁷ The statewide planning goals became effective on January 25, 1975 and were applicable to legislative land use decisions and some quasi-judicial land use decisions prior to the Commission's acknowledgment of each county's land use regulations. *Perkins v. City of Rajneeshpuram*, 300 Or 1 (1985); *Alexanderson v. Polk County*, 289 Or 427, rev den 290 Or 137 (1980); *Sunnyside Neighborhood Assn. v. Clackamas County*, 280 Or 569 (1977); *Jurgenson v. Union County*, 42 Or App 505 (1979) and *1000 Friends of Oregon v. Benton County*, 32 Or App 413 (1978). After the county's plan and land use regulations were acknowledged by the Commission, the statewide planning goals and implementing rules no longer directly applied to such local land use decisions. *Byrd v. Stringer*, 295 Or 311 (1983). However, statutory requirements continue to apply, and insofar as the state and local provisions are materially the same, the local provisions must be interpreted consistent with the substance of the goals and implementing rules. *Forster v. Polk County*, 115 Or App 475 (1992); *Kenagy v. Benton County*, 115 Or App 131 (1992).

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 subject property.

Conclusions

Based on the record, the department recommends that the claim be denied as to tax lot 103 because the claimants are not the current owners of that tax lot.

Based on the record, the department recommends that the claim be approved as to tax lot 100, 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 Dean and Valerine Reed's division of tax lot 100 into one-acre parcels or to their development of a dwelling on each parcel: applicable provisions of Goals 3 and 4, ORS 215 and OAR 660, divisions 6 and 33, enacted or adopted after December 15, 1977. These land use regulations will not apply to the claimants only to the extent necessary to allow them to use tax lot 100 for the use described in this report, and only to the extent that use was permitted when they acquired that tax lot on December 15, 1977.
2. The action by the State of Oregon provides the state's authorization to the claimants to use tax lot 100 for the use described in this report, subject to the standards in effect on December 15, 1977. On that date, tax lot 100 was subject to applicable provisions of Goal 3 and ORS 215 then in effect.
3. To the extent that any law, order, deed, agreement or other legally enforceable public or private requirement provides that tax lot 100 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 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 tax lot 100 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 tax lot 100, 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 tax lot 100 by the claimants.

VII. COMMENTS ON THE DRAFT STAFF REPORT

The department issued its draft staff report on this claim on April 11, 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.