

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. M118662
(BALLOT MEASURE 37) OF)	
Helen Garner, CLAIMANT)	

Claimant: Helen Garner (the Claimant)

Property: Township 37S, Range 1W, Section 24, Tax lots 100, 200 and 203, Jackson 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 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 Helen Garner's partition of the 143.7-acre property into 5-acre parcels or to her development of a dwelling on each parcel: applicable provisions of Goals 3, ORS 215 and OAR 660, division 33. These land use regulations will not apply to the claimant only to the extent necessary to allow her to use the subject property for the use described in this report, and only to the extent that use was permitted when she acquired the property on June 12, 1957.
2. The action by the State of Oregon provides the state's authorization to the claimant to use the subject property for the use described in this report, subject to the standards in effect on June 12, 1957.
3. To the extent that any law, order, deed, agreement or other legally enforceable public or private requirement provides that the subject 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 claimant first obtains 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 subject property imposed by private parties.

4. Any use of the subject property by the claimant 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 claimant to use the subject property, it may be necessary for her 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 claimant 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 subject property by the claimant.

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.

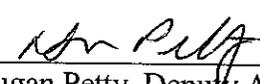
FOR DLCD AND THE LAND CONSERVATION
AND DEVELOPMENT COMMISSION:
Lane Shetterly, Director



George Naughton, Deputy Director
DLCD

Dated this 3rd day of May, 2006.

FOR the DEPARTMENT OF ADMINISTRATIVE
SERVICES:



Dugan Petty, Deputy Administrator
DAS, State Services Division

Dated this 3rd day of May, 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

May 3, 2006

STATE CLAIM NUMBER: M118662

NAME OF CLAIMANT: Helen Garner

MAILING ADDRESS: 6099 Hillcrest Road
Medford, Oregon 97504

PROPERTY IDENTIFICATION: Township 37S, Range 1W, Section 24
Tax lots 100, 200 and 203
Jackson County

CLAIMANT REPRESENTATIVE: Ross Day
PO Box 230637
Tigard, Oregon 97281

DATE RECEIVED BY DAS: June 20, 2005

180-DAY DEADLINE: May 7, 2006¹

I. SUMMARY OF CLAIM

The claimant, Helen Garner, seeks compensation in the amount of \$3,486,340 for the reduction in fair market value of property as a result of land use regulations that are alleged to restrict the use of certain private real property. The claimant desires compensation or the right to divide the 143.7-acre property into 5-acre parcels and to develop a dwelling on each parcel. The subject property is located at 6099 Hillcrest Road, near Medford, in Jackson 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 this claim is valid. Department staff recommends, in lieu of compensation, that the requirements of the following state laws enforced by the Land Conservation and Development Commission (the Commission) or the department not apply to Helen Garner's partition of the 143.7-acre property into 5-acre parcels and to her development of a dwelling on each parcel: applicable provisions of Statewide Planning Goal 3

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).

(Agricultural Lands), ORS 215 and Oregon Administrative Rules (OAR) 660, division 33. These laws will not apply to the claimant only to the extent necessary to allow her to use the subject property for the use described in this report, and only to the extent that use was permitted when she acquired the property on June 12, 1957. (See the complete recommendation in Section VI. of this report.)

III. COMMENTS ON THE CLAIM

Comments Received

On August 8, 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, four written comments were received in response to the written notice. Some of these comments are relevant as to whether the restriction of the claimant's use of the property reduces the fair market value of the property. The comments have been considered by the department in preparing this report. (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
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 June 20, 2005, for processing under OAR 125, division 145. The claim identifies Jackson County's Land Development Ordinance LDO 4.2.2, 4.2.6 and 8.2.1, Statewide Planning Goals 3, 11 and 14, OAR 660, divisions 4, 11, and 33, and ORS 215.283 as the basis for the claim.² Only laws that were enacted or adopted prior to December 2, 2004, are the basis for this claim.

² The claim identifies OAR 660, division 44, and specifically OAR 660-044-0040(8). OAR 660 does not include a division 44. The department concludes that this reference is in error, and the claimant's intent was to cite OAR 660-004-0040(8).

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

The claimant, Helen Garner, acquired the subject property on June 12, 1957, as reflected by a warranty deed included with the claim (see Jackson County Deed Records, Volume 523, Page 463, recorded on April 6, 1962). No documentation was submitted with the claim to demonstrate the claimant’s current ownership of the property. However, on October 19, 2005, Jackson County provided the department with an April 28, 2005, county administrator’s summary of a “compensation claim” for the subject property filed by the claimant with Jackson County. The summary includes a “chain of title report” prepared by the county demonstrating Helen Garner’s current ownership of the property.

Conclusions

The claimant, Helen Garner, is an “owner” of the subject property, as that term is defined in ORS 197.352(11)(C) as of June 12, 1957.

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 indicates that the claimant desires to divide the subject property into 5-acre parcels and to develop a dwelling on each parcel. The claim identifies Goals 3, 11 and 14, ORS 215.283, OAR 660, division 11, and OAR 660-033-0200, 660-033-0120, 660-033-0130, 660-033-0135 and 660-004-0040(8) as laws that restrict her use of the property.³

³ The claimant’s representative identifies Goal 14 and OAR 660-004-0040(8) as restricting the desired use. The claim does not assert how Goal 14 restricts the claimant’s intended use of the property and asserts that OAR 660-004-0040(8) “restricts uses and parcel sizes on the urban fringe.” Goal 14 would likely apply to a division of the

The claim is based generally on Jackson County's current Exclusive Farm Use (EFU) zone and the applicable provisions of state law that require such zoning. The claimant's property is zoned EFU as required by Goal 3, in accordance with ORS 215 and OAR 660, division 33, because the claimant's property is "agricultural land" as defined by Goal 3.⁴ Goal 3 became effective on January 25, 1975, and required that agricultural lands as defined by the Goal must be zoned EFU pursuant to ORS 215.

Current land use regulations, particularly ORS 215.263, 215.284 and 215.780 and OAR 660, division 33, enacted or adopted pursuant to Goal 3, prohibit the division of EFU-zoned land into parcels less than 80 acres and establish standards for development of dwellings on existing or proposed parcels on that land.

ORS 215.780 establishes an 80-acre minimum size for the creation of new lots or parcels in EFU zones and became effective on November 4, 1993 (Chapter 792, Oregon Laws 1993). ORS 215.263 (2005 edition) establishes standards for the creation of new parcels for non-farm uses and dwellings allowed in an EFU zone.

OAR 660-033-0135 (applicable to farm dwellings) became effective on March 1, 1994, and interprets the statutory standard for a primary dwelling in an EFU zone under ORS 215.283(1)(f). OAR 660-033-0130(4) (applicable to non-farm dwellings) became effective on August 7, 1993, and was amended to comply with ORS 215.284(4) on March 1, 1994. The Commission subsequently adopted amendments to comply with House Bill 3326, (Chapter 704, Oregon Laws 2001, effective on January 1, 2002), which were effective on May 22, 2002. (See administrative rule history for OAR 660-033-0100, -0130 and -0135.)

The claimant also cites Goal 11 (Public Facilities and Services) and administrative rules related to public facilities (OAR 660, division 11) as limiting her desired division and development of the subject property. Goal 11, which also became effective on January 25, 1975, generally prohibits urban levels of public facilities and services on lands that are outside an urban growth boundary. Goal 14 and its implementing rules have two components: one that prohibits an owner from utilizing urban-level facilities or services to serve the property, and another that prohibits service providers from extending their facilities to serve property outside an urban growth boundary. The former can restrict a claimant's use of property. The latter is a restriction on service providers.

Goal 11 and OAR 660, division 11, would apply to the claimant's use of her property only to the extent that they would restrict the claimant's development of urban-level

property into parcels of two acres or less. Given that the claimants desire to divide the property into 5-acre parcels, Goal 14 does not appear to restrict the claimant's desired use. OAR 660-004-0040(8) addresses division of rural residential land within one mile of the urban growth boundary for specified cities and urban areas. It appears that the claimant's property may be within one mile of the City of Medford. However, the property is not designated for rural residential development, and therefore, OAR 660-004-0040(8) does not appear to apply to the subject property. Absent further explanation from the claimant establishing how these regulations apply to the subject property and restrict the claimant's use of the property in a manner that reduces its fair market value, these regulations are not addressed further in this report.

⁴ The claimant's property is "agricultural land" because it contains Natural Resources Conservation Service Class I-IV soils.

public or community sewer or water facilities on the subject property. The claim has not provided any explanation as to how these rules restrict the claimant's desired use of the property except to state that because of the Goal and rules, the claimant is "unable to construct a viable environmentally safe sewer/water system to support development of the subject property." Generally, urban sewer and water service are not incidental to rural residential development on five-acre parcels.

The claimant acquired the subject property on June 12, 1957, prior to the adoption of the statewide planning goals and their implementing statutes and rules. At that time, the property was not zoned by the county.

Conclusions

The current zoning requirements, minimum lot size and dwelling standards established by applicable provisions of Goal 3, ORS 215 and OAR 660, division 33, were all enacted or adopted after the claimant acquired the subject property in 1957 and do not allow the desired division or residential development of the property. These laws restrict the use of the property relative to the uses allowed when the claimant acquired the property.

The claimant has not established that Goal 11 and OAR 660, division 11, apply to and restrict the establishment of urban level facilities and services or restrict the claimant's desire to divide the subject property into five-acre parcels for a rural level of residential development. On their face, Goal 11 and OAR 660, division 11, do not apply to or restrict the use of the property in a manner that reduces its fair market value.

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 claimant has identified. There may be other laws that currently apply to the claimant's use of the subject property, and that may 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 the subject 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.

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 \$3,486,340 as the reduction in the property's fair market value due to current regulations. The claimant states that this amount is based on per-acre value of residential land on the claimant's property if the property were divided into two-acre lots.⁵ The

⁵ A Jackson County report on the claimant's county Measure 37 compensation claim for the subject property indicates the claimant requested that the county grant the right to divide the subject property into "two (2) acre lots"

claimant bases this value on a uniform residential appraisal report dated October 8, 2004, included with the claim.⁶

Conclusions

As explained in Section V.(1) of this report, the claimant is Helen Garner who acquired the property on June 12, 1957. Under ORS 197.352, Helen Garner 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 and conclusions in Section V.(2) of this report, laws enacted or adopted since the claimant acquired the property restrict her desired division and development of the subject property. The claimant estimates the reduction in value due to the restrictions to be \$3,486,340.

Without further documentation and verification, 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

As stated in Section V.2 of this report, the claim is based on state land use regulations that restrict the use of the property, including applicable provisions of Goal 3, ORS 215 and OAR 660, division 33, which Jackson County has implemented through its EFU zone. All of these land use regulations were enacted or adopted after the claimant acquired the subject 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 appears that none of the general statutory, goal and rule restrictions on residential development were in effect when the claimant acquired the subject property in 1957. As a result, these laws are not exempt under ORS 197.352(3)(E).

(see file). However, the claim filed with the state, upon which this report is based, requests the right to divide the property into five-acre parcels.

⁶ The appraisal estimates a current value of the 143.7-acre portion of the claimant's property as \$555,000 under the current county zoning. The claimant maintains that this appraisal demonstrates a per-acre value of \$26,000 for the entire 143.7 acres owned by the claimant if the property were to be divided into residential lots.

Laws in effect when the claimant acquired the subject property are exempt under ORS 197.352(3)(E) and will continue to apply to the claimant's use of the property. 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 which 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. 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 claimant has identified. Similarly, this report only addresses the exemptions provided for under ORS 197.352 that are clearly applicable given the information provided to the department in the claim. The claimant should be aware that the less information provided to the department in the claim, the greater the possibility that there may be additional laws that will later be determined to continue to apply to her use of the property.

VI. FORM OF RELIEF

ORS 197.352(1) provides for payment of compensation to an owner of private real property if the Commission or the department has enforced 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 claimant's ability to divide the 143.7-acre property into 5-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 \$3,486,340. However, without further documentation and verification establishing how the specified restrictions reduce the fair market value of the entire 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 Helen Garner to use the subject property for a use permitted at the time she acquired the property on June 12, 1957.

Conclusions

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 Helen Garner's partition of the 143.7-acre property into 5-acre parcels or to her development of a dwelling on each parcel: applicable provisions of Goals 3, ORS 215 and OAR 660, division 33. These land use regulations will not apply to the claimant only to the extent necessary to allow her to use the subject property for the use described in this report, and only to the extent that use was permitted when she acquired the property on June 12, 1957.
2. The action by the State of Oregon provides the state's authorization to the claimant to use the subject property for the use described in this report, subject to the standards in effect on June 12, 1957.
3. To the extent that any law, order, deed, agreement or other legally enforceable public or private requirement provides that the subject 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 claimant first obtains 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 subject property imposed by private parties.
4. Any use of the subject property by the claimant 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 claimant to use the subject property, it may be necessary for her 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 claimant 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 subject property by the claimant.

VII. COMMENTS ON THE DRAFT STAFF REPORT

The department issued its draft staff report on this claim on April 14, 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.