

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 122234
(BALLOT MEASURE 37) OF)
Wayne and Kris Braun, CLAIMANTS)

Claimants: Wayne and Kris Braun (the Claimants)

Property: Township 3S, Range 2W, Section 5, Tax lot 4502, Yamhill County
(the property)

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

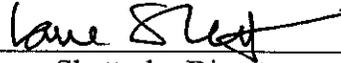
Claimants submitted the Claim to the State of Oregon under ORS 197.352. Under OAR 125-145-0010 *et seq.*, the Department of Administrative Services (DAS) referred the Claim to the Department of Land Conservation and Development (DLCD) as the regulating entity. This order is based on the record herein, 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

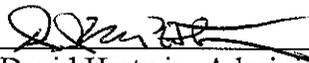
The Claim is denied as to laws administered by DLCD and the Land Conservation and Development Commission (LCDC) for the reasons set forth in the DLCD Report.

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 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 18th day of July, 2006.

FOR the DEPARTMENT OF
ADMINISTRATIVE SERVICES:


David Hartwig, Administrator
DAS, State Services Division
Dated this 18th day of July, 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.

ORS 197.352 (BALLOT MEASURE 37) CLAIM FOR COMPENSATION
OREGON DEPARTMENT OF LAND CONSERVATION AND DEVELOPMENT
Final Staff Report and Recommendation

July 18, 2006

STATE CLAIM NUMBER: M122234

NAMES OF CLAIMANTS: Wayne and Kris Braun

MAILING ADDRESS: PO Box 1012
Newberg, Oregon 97132

PROPERTY IDENTIFICATION: Township 3S, Range 2W, Section 5
Tax lot 4502
Yamhill County

OTHER CONTACT INFORMATION: Michael A. Braun
PO Box 1046
Newberg, Oregon 97132

OTHER INTEREST IN PROPERTY: Harold and Dorothy Medici

DATE RECEIVED BY DAS: September 8, 2005

180-DAY DEADLINE: July 24, 2006¹

I. SUMMARY OF CLAIM

The claimants, Wayne and Kris Braun, seek compensation in the amount of \$600,000 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 10-acre subject property into four 2.5-acre parcels for residential development. The subject property is located at 27895 Northeast Bell Road, near Newberg, 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 not valid because no laws enforced after the claimants acquired the subject property restrict the use of the property and have the effect of reducing its fair market value relative to uses permitted when they acquired the property. (See the complete recommendation in Section VI of this report.)

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).

III. COMMENTS ON THE CLAIM

Comments Received

On October 11, 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, no written comments were received in response to the 10-day notice.

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 September 8, 2005, for processing under OAR 125, division 145. The claim identifies Yamhill County's ordinance adopting the \$80,000 minimum income requirement and 80-acre minimum parcel size requirement and OAR 660-004-0040 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

The claimant, Wayne Braun, acquired the subject property on February 19, 1992, as reflected by a warranty deed included with the claim. Kris Braun acquired her interest in the subject property on February 26, 1996, as reflected by a deed included with the claim.² A title report dated May 24, 2005, confirms the claimants' current ownership of the subject property.

Conclusions

The claimants, Wayne and Kris Braun, are "owners" of the subject property as that term is defined by ORS 197.352(11)(C), as of February 19, 1992, and February 26, 1996, respectively. Wayne Braun is a "family member" of Kris Braun, as that term is defined in ORS 197.352(11)(A).

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 10-acre property into four 2.5-acre parcels for residential development and states that OAR 660-004-0040 prevents the desired use because they are "unable to apply for a zone change [or] subdivision to VLDR 2 ½ because of Goal 14 exception."³

The claim is based generally on Yamhill County's current AF-10 zone and the applicable provisions of state law that require such zoning. The county's AF-10 zone is a rural residential zone consistent with Goal 14, which generally requires that land outside of urban growth boundaries be used for rural uses.

Goal 14 was effective on January 25, 1975, and requires that local comprehensive plans identify and separate urbanizable land from rural land in order to provide for an orderly and efficient transition from rural to urban land use. In 2000, as a result of a 1986 Oregon Supreme Court decision,⁴ the Commission amended Goal 14 and adopted OAR 660-004-

² Wayne Braun acquired the subject property with his then wife Jane Braun on February 19, 1992. On March 27, 1995, Wayne Braun conveyed the subject property to his current wife Kris Braun through a deed creating a tenancy by the entirety. On August 23, 1995, Jane Braun conveyed her interest in the subject property to Wayne Braun. On September 8, 1995, Kris Braun transferred her interest in the subject property to Wayne Braun. Then on February 26, 1996, Wayne Braun transferred the subject property to himself and Kris Braun.

³ The claimants also state that Yamhill County's ordinance adopting the \$80,000 minimum income and 80-acre minimum parcel size requirements, which apply to EFU-zoned property, restrict their use of the subject property. Those rules do not apply to the claimants' property, which is zoned rural residential. The claimants have not established how those rules apply to or restrict their use of the AF-10-zoned property, and therefore, they are not addressed further in this report.

⁴ *1000 Friends of Oregon v. LCDC (Curry County)*, 301 Or 447 (1986).

0040 (Application of Goal 14 to Rural Residential Areas), which was effective on October 4, 2000. The rule states that if a county rural residential zone in effect on October 4, 2000 specifies a minimum lot size of two acres or more, the area of any new lot or parcel shall equal or exceed the minimum lot size that is already in effect (OAR 660-004-0040(7)(c)). The rule also provides that a county's minimum lot size requirement in a rural residential zone shall not be amended to allow a smaller minimum lot size without approval of an exception to Goal 14 (OAR 660-004-0040(6)). Because Yamhill County's AF-10 zone was in effect on October 4, 2000, and requires a minimum lot size of 10 acres, the minimum lot size for any new lot or parcel must equal or exceed 10 acres.⁵

Claimant Wayne Braun acquired the 10-acre subject property on February 19, 1992. At that time, the property was subject to the Yamhill County's acknowledged AF-10 zone,⁶ which required a 10-acre minimum lot or parcel size. When Wayne Braun acquired the subject property, his desired use of the property would have been governed by the county's AF-10 zone.

Conclusions

The minimum lot size requirements for rural residential lots or parcels established by amendments to Goal 14 and OAR 660-004-0040 were adopted, in part, after claimant Wayne Braun acquired the subject property in 1992. However, these regulations do not restrict the claimants' use of the property relative to uses permitted when Wayne Braun acquired it in 1992. The subject property was zoned AF-10, requiring a 10-acre minimum lot or parcel size when Wayne Braun acquired it. Today, the AF-10 zone also requires a 10-acre minimum lot or parcel size. The requirements of Goal 14 and OAR 660-004-0040 do not further restrict the use of the subject property relative to the uses permitted under the AF-10 zone requirements when Wayne Braun acquired the property. The OAR 660-004-0040 requirement that the creation of any lot or parcel smaller than the county's minimum lot size standard requires a Goal 14 exception does not restrict the claimants' use of the subject property relative to uses permitted when Wayne Braun acquired it. Had Wayne Braun sought to create a parcel size less than 10 acres on his AF-10-zoned property, a Goal 14 exception would have been required under the laws in effect in 1992.

3. Effect of Regulations on Fair Market Value

In order to establish a valid claim, ORS 197.352(1) requires that the land use regulation(s) (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."

⁵ In response to correspondence from the claimants' representative prior to their filing this claim for relief (included with the claim), the Yamhill County Planning Director explained to the claimants that "this property has been zoned AF-10 since 1976. Based upon the February 23, 1996 acquisition date by your clients [*sic*] the AF-10 minimum lot size requirements would remain in effect even if a [county] Measure 37 claim is filed."

⁶ Yamhill County's AF-10 zone was acknowledged by the Commission for compliance with Goal 14 on June 12, 1980.

Findings of Fact

The claim includes an estimate of \$600,000 as the reduction in the subject property's fair market value due to the regulation(s). This amount is based on the claimants' assessment of the "difference in value of 4 parcels and 1 parcel."

Conclusions

As explained in Section V.(1) of this report, the claimants are Wayne Braun who acquired the subject property on February 19, 1992, and his wife Kris Braun who acquired it on February 22, 1996. As further explained in Section V.(2) of this report, no laws enforced since Wayne Braun acquired the subject property in 1992 restrict the use of the property relative to uses permitted when he acquired the property. Therefore, no laws enforced since Wayne Braun acquired the subject property restrict its use and have the effect of reducing its fair market value.

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 Goal 14 and OAR 660-004-0040, which Yamhill County has implemented through its AF-10 zone. With the exception of amendments to Goal 14 and OAR 660-004-0040, these laws have been in effect since Wayne Braun acquired the subject property in 1992.

Conclusions

It appears that the goal and rule restrictions on residential development apply to the claimants' use of the subject property are not exempt under ORS 197.352(3)(E) only to the extent they were adopted after Wayne Braun acquired the property in 1992. Provisions of Goal 14 in effect when the claimants acquired the subject property in 1992, including those that currently restrict the desired use of the property, are exempt under ORS 197.352(3)(E) and continue to apply to 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 one or more 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 present 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, no laws enforced by the Commission or the department restrict the claimants' desired use of the subject property and have the effect of reducing its fair market value relative to uses permitted when Wayne Braun acquired the property.

Conclusions

Based on the record and the foregoing findings and conclusions, the claimants have not established that they are entitled to relief under ORS 197.352(1) as a result of land use regulations enforced by the Commission or the department because no laws enforced since the claimants acquired the subject property restrict the claimants' use of their property and have the effect of reducing its fair market value relative to uses permitted when they acquired the property. Therefore, the department recommends that this claim be denied.

VII. COMMENTS ON THE DRAFT STAFF REPORT

The department issued its draft staff report on this claim on July 3, 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.