

ORS 197.352 (BALLOT MEASURE 37) CLAIM FOR COMPENSATION

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

January 3, 2007

STATE CLAIM NUMBER: M129765
NAME OF CLAIMANT: Dixie D. Blaha
MAILING ADDRESS: PO Box 626
St. Helens, Oregon 97051
PROPERTY IDENTIFICATION: Township 4N, Range 2W
Section 22: tax lot 200
Section 23: tax lots 200 and 201
Columbia County¹
DATE RECEIVED BY DAS: July 28, 2006
180-DAY DEADLINE: January 24, 2007

I. SUMMARY OF CLAIM

The claimant, Dixie Blaha, seeks compensation in the amount of \$5.8 million 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 claimant desires compensation or the right to divide the 100.82-acre subject property into two approximately 45-acre parcels and to develop a dwelling on each resulting undeveloped parcel.² The subject property is located on Church Road, near Warren, in Columbia County. (See claim.)

II. SUMMARY OF STAFF RECOMMENDATION

Based on the preliminary findings and conclusions set forth below, the Department of Land Conservation and Development (the department) has determined that the claim is valid in part.

¹ The subject property includes three tax lots. Tax lot 200 (Section 22) consists of 78.92 acres; tax lot 200 (Section 23) consists of 20.90 acres; and tax lot 201 consists of 1.00 acre.

² The claim also indicates that the claimant desires to sell or transfer the newly created parcels for development. In effect, the claimant requests that a decision of the department to "not apply" (waive) certain laws as set forth in this report be transferable with the property. ORS 197.352 only authorizes a state agency to waive a law in order to allow the current owner a use of the property permitted at the time that owner acquired the property. A determination of transferability is beyond the scope of relief that the department may grant under ORS 197.352. The Oregon Department of Justice has advised the department that "[i]f the current owner of the real property conveys the property before a new use allowed by the public entity is established, then the entitlement to relief will be lost."

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 Dixie Blaha's division of tax lots 200 (Section 22) and 200 (Section 23) into two approximately 45-acre parcels and to her development of a dwelling on each resulting undeveloped parcel: applicable provisions of Statewide Planning Goal 4 (Forest Lands), ORS 215 and Oregon Administrative Rules (OAR) 660, division 6. These laws will not apply to the claimant only to the extent necessary to allow her to use tax lots 200 (Section 22) and 200 (Section 23) for the use described in this report, and only to the extent that use was permitted when the claimant acquired the property in February 1954.

The department has further determined that this claim is not valid as to tax lot 201 because the claimant has not established her ownership of that tax lot. (See the complete recommendation in Section VI of this report.).

III. COMMENTS ON THE CLAIM

Comments Received

On November 17, 2006, 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 July 28, 2006, for processing under OAR 125, division 145. The claim identifies Columbia County's Primary Forest (PF-76) zoning, ORS 215.780, OAR 660, division 6, House Bill 3661 and Goals 4 and 14 (Urbanization) 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

Claimant Dixie Blaha and her husband, Joseph Blaha, acquired the subject property from Joseph’s parents, Jim and Albina Blaha, in February 1954, as reflected by a deed included with the claim. Jim and Albina Blaha acquired tax lots 200 (Section 22) and 200 (Section 23) on September 25, 1943, as reflected by a title search provided by the Department of Administrative Services. Subsequent to the death of Joseph Blaha in 1990, the claimant transferred her late husband’s interest in the property to the Joseph S. Blaha Credit Shelter Trust, an irrevocable trust with herself as trustee, as reflected by an October 14, 1991, statutory bargain and sale deed included with the claim. According to this deed, tax lot 201 is subject to the life estate of Albin Blacklund, which reserves in Albin Blacklund the exclusive right to use that tax lot during the term of that life estate. Dixie Blaha’s interest in tax lot 201 does not provide her with any present right to use tax lot 201 during the term of Albin Blacklund’s life estate.

The Columbia County Assessor’s Office confirms the claimant’s current ownership of the subject property.

Conclusions

The claimant is an “owner” of tax lots 200 (Section 22) and 200 (Section 23) as that term is defined by ORS 197.352(11)(C) as of February 1954. Dixie Blaha has not established that she is an “owner” of tax lot 201 as that term is defined in ORS 197.325(11)(C). Jim and Albina Blaha are “family members” of the claimant as defined by ORS 197.352(11)(A) and acquired tax lots 200 (Section 22) and 200 (Section 23) on September 25, 1943.

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 100.82-acre subject property in two approximately 45-acre parcels and to develop a dwelling on each resulting undeveloped parcel. It indicates that the use is not allowed under current land use regulations.³

The claim is based generally on the applicable provisions of state law that require forest zoning and restrict uses on forest-zoned land. Tax lots 200 (Section 22) and 200 (Section 23) are zoned by Columbia County as PF-76 as required by Goal 4, in accordance with ORS 215 and OAR 660, division 6, because the claimant's property is "forest land" under Goal 4. Goal 4 became effective on January 25, 1975, and requires that forest land be zoned for forest use (see statutory and rule history under OAR 660-015-0000(4)). The forest land administrative rules (OAR 660, division 6) became effective on September 1, 1982, and ORS 215.705 to 215.755 and 215.780 became effective on November 4, 1993 (Chapter 792, Oregon Laws 1993). OAR 660-006-0026 and 660-006-0027 were amended on March 1, 1994, to implement those statutes.

Together, ORS 215.705 to 215.755 and 215.780 and OAR 660, division 6, enacted or adopted pursuant to Goal 4, prohibit the division of forest land into parcels less than 80 acres and establish standards for development of dwellings on existing or proposed parcels on those lands.

The claimant's family first acquired tax lots 200 (Section 22) and 200 (Section 23) in 1943, and the claimant acquired tax lots 200 (Section 22) and 200 (Section 23) in 1954, prior to the adoption of the statewide planning goals and their implementing statutes and regulations. No county zoning applied to the subject property in 1943 and 1954.

Conclusions

The current zoning requirements, minimum lot size and dwelling standards established by Goal 4 and provisions applicable to land zoned for forest use in ORS 215 and OAR 660, division 6, were all enacted or adopted after the claimant's family and the claimant acquired the subject property in 1943 and 1954, and do not allow the desired division or development of the subject property. These laws restrict the use of the property relative to the uses allowed when the claimant and her family acquired the property.

As explained in Section V.(1), the claimant, Dixie Blaha, is not an "owner" of tax lot 201 as that term is defined in ORS 197.352(11)(C). Therefore, no laws enforced by the Commission or the department restrict the claimant's use of that tax lot 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

³ The claimant summarily cites numerous state land use laws as applicable to this claim, but does not establish how the laws either apply to the claimant's desired use of the subject property or restrict its use with the effect of reducing its fair market value. In particular, the claimant generally cites Goal 14. However, she has not established how this regulation applies to or restricts her desired use of the property. This report addresses only those regulations that the department finds are applicable to and restrict the claimant's desired use of the subject property, based on the claimant's description of her desired use.

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 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 the land use regulations (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 \$5.8 million as the reduction in the subject property's fair market value due to the regulations that restrict the claimant's desired use of the property. This amount is based on a realtor's comparative market analysis included with the claim.

Conclusions

As explained in Section V.(1) of this report, the claimant is Dixie Blaha who acquired tax lots 200 (Section 22) and 200 (Section 23) in 1954 and whose family acquired tax lots 200 (Section 22) and 200 (Section 23) in 1943. As explained in Section V.(1) of this report, the claimant, Dixie Blaha, is not an "owner" of tax lot 201 as that term is defined in ORS 197.352(11)(C). Therefore, she is not entitled to compensation under ORS 197.352 as to tax lot 201 because no laws restrict her use of that tax lot with the effect of reducing its fair market value. Under ORS 197.352, the claimant is due compensation for land use regulations that restrict the use of tax lots 200 (Section 22) and 200 (Section 23) and have the effect of reducing its fair market value. Based on the findings and conclusions in Section V.(2) of this report, laws enacted or adopted since the claimant and her family acquired tax lots 200 (Section 22) and 200 (Section 23) restrict the claimant's desired use of those tax lots. The claimant estimates that the effect of the regulations on the subject property's fair market value is a reduction of \$5.8 million.

Without an appraisal or other documentation, it is not possible to substantiate the specific dollar amount by which the land use regulations have reduced the fair market value of the subject property. Nevertheless, based on the evidence in the record for this claim, the department determines that the fair market value of tax lots 200 (Section 22) and 200 (Section 23) has been reduced to some extent 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 state land use regulations that restrict the use of the subject property relative to the uses permitted when the claimant and her family acquired tax lots 200 (Section 22)

and 200 (Section 23), including applicable provisions of Goal 4, ORS 215 and OAR 660, division 6, which Columbia County has implemented through its current PF-76 zone. All of these land use regulations were enacted or adopted after the claimant and her family acquired tax lots 200 (Section 22) and 200 (Section 23).

Conclusions

Without a specific development proposal for the property, it is not possible for the department to determine all the laws that 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 division and development of tax lots 200 (Section 22) and 200 (Section 23) were in effect when her family acquired those tax lots on September 25, 1943, or when the claimant acquired those tax lots in February 1954. As a result, these laws are not exempt under ORS 197.352(3)(E).

As explained in Section V.(1) of this report, the claimant, Dixie Blaha, is not an "owner" of tax lot 201 as that term is defined in ORS 197.352(11)(C). Therefore, the issue of whether any laws are exempt from ORS 197.352 is not relevant as to tax lot 201.

Laws in effect when the claimant and her family acquired tax lots 200 (Section 22) and 200 (Section 23) are exempt under ORS 197.352(3)(E) and will continue to apply to the claimant's use of the property. In addition, the department notes that ORS 215.730 and OAR 660, division 6, particularly OAR 660-006-0029, include standards for siting dwellings in forest zones. Those provisions include fire protection standards for dwellings. 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...." Accordingly, siting standards for dwellings in forest zones in ORS 215.730 and OAR 660, division 6, are exempt under ORS 197.352(3)(B).

There may be other laws that continue to apply to the claimant's use of tax lots 200 (Section 22) and 200 (Section 23) 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 those tax lots 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 tax lots 200 (Section 22) and 200 (Section 23) based on the uses that the claimant has 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 claimant should be aware that the less information she has 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 subject 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 record, the department finds that the claim is not valid as to tax lot 201 because the claimant is not an owner of that tax lot. The department further finds laws enforced by the Commission or the department restrict the claimant's desired use of tax lots 200 (Section 22) and 200 (Section 23). The claim asserts that existing state land use regulations enforced by the Commission or the department have the effect of reducing the fair market value of the subject property by \$5.8 million. However, because the claim does not provide an appraisal or other relevant evidence demonstrating that the land use regulations described in Section V.(2) reduce the fair market value of tax lots 200 (Section 22) and 200 (Section 23), a specific amount of compensation cannot be determined. In order to determine a specific amount of compensation due for this claim, it would also be necessary to verify whether or the extent to which to claimant's desired use of tax lots 200 (Section 22) and 200 (Section 23) was allowed under the standards in effect when the claimant and her family acquired the subject property. Nevertheless, based on the record for this claim, the department acknowledges that the laws in which the claim is based have reduced the fair market value of tax lots 200 (Section 22) and 200 (Section 23) 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 Dixie Blaha to use tax lots 200 (Section 22) and 200 (Section 23) for a use permitted at the time she acquired them in February 1954.

Conclusions

Based on the record before the department, the claimant, Dixie Blaha, has not established that she is entitled to relief under ORS 197.325(1) as a result of land use regulations enforced by the Commission or the department as to tax lot 201. Therefore, the department recommends that this claim be denied as to tax lot 201. The department further 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 Dixie Blaha's division of tax lots 200 (Section 22) and 200 (Section 23) into two approximately 45-acre parcels or to her development of a dwelling on each resulting undeveloped parcel: applicable provisions of Goal 4, ORS 215 and OAR 660, division 6. These land use regulations will not apply to the claimant only to the extent necessary to allow her to use tax lots 200 (Section 22) and 200 (Section 23) for the use described in this report, and only to the extent that use was permitted when she acquired those tax lots in February 1954.

2. The action by the State of Oregon provides the state's authorization to the claimant to use tax lots 200 (Section 22) and 200 (Section 23) for the use described in this report, subject to the standards in effect when Dixie Blaha acquired those tax lots in February 1954.

3. To the extent that any law, order, deed, agreement or other legally enforceable public or private requirement provides that tax lots 200 (Section 22) and 200 (Section 23) 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 tax lots 200 (Section 22) and 200 (Section 23) 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 tax lots 200 (Section 22) and 200 (Section 23), 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 property by the claimant.

VII. NOTICE OF OPPORTUNITY TO COMMENT

This staff report is not a final decision by the department and does not authorize any use of the property that is the subject of this report. OAR 125-145-0100 provides 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. Such response must be filed no more than 10 calendar days after the date this report is mailed to the claimant and any third parties. Responses to this draft staff report and recommendation will be considered only as comments related to the claim described in this report. All responses must be delivered to the Oregon Department of Administrative Services (DAS), Measure 37 Unit, Risk Management-State Services Division, 1225 Ferry Street SE, U160, Salem, Oregon 97301-4292 and will be deemed timely filed if either postmarked on the tenth day, or actually delivered to DAS by the close of business on the tenth day. Note: Please reference the claim number, claimant name and clearly mark your comments as "Draft Staff Report comments." Comments must be submitted in writing only. Those comments submitted electronically or by facsimile will not be accepted.