

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 122803
(BALLOT MEASURE 37) OF)
Harry and Alberta Larsen, CLAIMANTS)

Claimants: Harry and Alberta Larsen (the Claimants)

Property: Township 12, Range 12, Section 12, Tax lot 1500, Jefferson 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 Deputy 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.

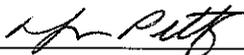
FOR DLCD AND THE LAND
CONSERVATION AND DEVELOPMENT
COMMISSION:


Lane Shetterly, Director

DLCD

Dated this 22nd day of August, 2006.

FOR the DEPARTMENT OF
ADMINISTRATIVE SERVICES:


Dugan Petty, Deputy Administrator

DAS, State Services Division

Dated this 22nd day of August, 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

August 22, 2006

STATE CLAIM NUMBER: M122803

NAMES OF CLAIMANTS: Harry and Alberta Larsen

MAILING ADDRESS: 5222 Southwest Fisch Lane
Culver, Oregon 97734

PROPERTY IDENTIFICATION: Township 12, Range 12, Section 12
Tax lot 1500
Jefferson County

OTHER CONTACT INFORMATION: Edward Fitch
PO Box 457
Redmond, Oregon 97756

DATE RECEIVED BY DAS: October 14, 2005

180-DAY DEADLINE: August 29, 2006¹

I. SUMMARY OF CLAIM

The claimants, Harry and Alberta Larsen, seek compensation in the amount of \$700,000 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 24.99-acre subject property. The subject property is located at 5222 Southwest Fisch Lane, near Culver, in Jefferson 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 neither the Land Conservation and Development Commission (the Commission) nor the department has enforced laws that restrict the claimants' use of private real property relative to uses permitted at the time they acquired the subject property on March 12, 1974. (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 June 12, 2006, pursuant to Oregon Administrative Rules (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 comment was 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 October 14, 2005, for processing under OAR 125, division 145. The claim identifies ORS 215 and the statewide planning goals and guidelines 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 claimants, Harry and Alberta Larsen, acquired the subject property on March 12, 1974, as reflected by the warranty deed included with the claim. The claimants state they acquired the subject property on June 18, 1973, from their participation in an auction during which they assert they made the accepted bid for purchase of the property. The claimants have provided no contract or other instrument establishing that the subject property was conveyed to them on that date. The March 12, 1974, deed is the only documentation provided by the claimants establishing the date they acquired an ownership interest in the property. An October 10, 2005, tax statement submitted with the claim establishes the claimants' current ownership of the subject property.

Conclusions

The claimants, Harry and Alberta Larsen, are "owners" of the subject property as that term is defined by ORS 197.352(11)(C), as of March 12, 1974.

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 acquired the property.

Findings of Fact

The claim indicates that the claimants desire to divide the 25.99-acre subject property and that current land use regulations prevent the desired use.²

The claim is based generally on the applicable provisions of state law that require Exclusive Farm Use (EFU) zoning and restrict uses on EFU-zoned land. The claimants' property is zoned A-1 by Jefferson County. The A-1 zone is an EFU as required by Statewide Planning Goal 3 (Agricultural Lands), in accordance with ORS 215 and OAR 660, division 33, because the claimants' property is "agricultural land" as defined by Goal 3.³ Goal 3 became effective on January 25, 1975, and required agricultural land defined by the Goal to 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 desired division of EFU-zoned land into parcels less than 80 acres.

² The claimants summarily cite numerous state land use laws as applicable to this claim, but do not establish how the laws either apply to the claimants' desired use of the subject property or restrict its use with the effect of reducing its fair market value. On their face, most of these regulations either do not apply to the claimants' property or do not restrict the claimants' desired use of the property with the effect of reducing its fair market value. This report addresses only those regulations that the department finds are applicable to and restrict the claimants' use of the subject property, based on the claimants' asserted desired use.

³ The claimants' property is "agricultural land" because it contains Natural Resources Conservation Service Class I-VI soils.

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.

Land that is zoned EFU and that is “high-value” farm land under Goal 3, ORS 215.710 and OAR 660, division 33, is subject to additional restrictions based on certain provisions of ORS 215 and OAR 660, division 33.

The claimants acquired the subject property on March 12, 1974, after the adoption of Senate Bill 100 (Chapter 80, Oregon Laws 1973) effective on October 5, 1973, but before the adoption of the statewide planning goals, effective on January 25, 1975. At that time, it was zoned A2-20 by Jefferson County, which allowed general farm uses and single-family dwellings on at least 20 acre lots.

During the period between October 5, 1973, and January 25, 1975, ORS 197.175(1) and 197.280 (1973 editions) required, in addition to any local plan or zoning provisions, that cities and counties exercise their planning responsibilities in accordance with the interim land use planning goals set forth in ORS 215.515 (1973 edition). *Petersen v. Klamath Falls*, 279 Or 249 (1977); *see also, Meeker v. Board of Comm’rs*, 287 Or 665 (1979) (review of a subdivision is an exercise of planning responsibilities requiring application of the goals); *State Housing Council v. Lake Oswego*, 48 Or App. 525 (1981) (noting that while “[l]and use planning responsibility is not defined in ORS ch 197, the Supreme Court has interpreted that term as including annexation approvals, *subdivision approvals* [emphasis added] and partition approvals”) citing *Petersen*, *Meeker* and *Alexanderson v. Polk County*, 285 Or 427 (1980). The claimants’ desired use includes subdivision of their land. If the claimants had sought to create that use in 1974, as a matter of law, the use would have been subject to the interim planning goals at ORS 215.515.⁴

The following interim goals are directly applicable to this claim: “To preserve the quality of the air, water and *land* [emphasis added] resources of the state”; “To conserve prime farm lands for the production of crops”; “To provide for the orderly and efficient transition from rural to urban land use”; “To protect life and property in areas subject to floods, landslides and other natural disasters”; “To provide and encourage a safe, convenient and economic transportation system including all modes of transportation: Air, water, rail, highway and mass transit and recognizing differences in the social costs in the various modes of transportation”; and “To develop a timely, orderly and efficient arrangement of public facilities and services to serve as a framework for urban and rural development.” ORS 215.515 (1973 edition).

⁴ The “interim” land use goals are set forth in ORS 215.515(1)(a) to (j) (1973 edition) as follows: (a) “To preserve the quality of the air, water and land resources of the state,” (b) “To conserve open space and protect natural and scenic resources,” (c) “To provide for the recreational needs of citizens of the state and visitors,” (d) “To conserve prime farm lands for the production of crops,” (e) “To provide for the orderly and efficient transition from rural to urban land use,” (f) “To protect life and property in areas subject to floods, landslides and other natural disasters,” (g) “To provide and encourage a safe, convenient and economic transportation system including all modes of transportation: Air, water, rail, highway and mass transit and recognizing differences in the social costs in the various modes of transportation,” (h) “To develop a timely, orderly and efficient arrangement of public facilities and services to serve as a framework for urban and rural development,” (i) “To diversify and improve the economy of the state” and (j) “To ensure that the development of properties within the state is commensurate with the character and the physical limitations of the land.” ORS 215.515 (1973 edition).

One of the interim goals was to “conserve prime farm lands for the production of crops.” Soil types are a determinant of prime farm land. Approximately 98 percent (24.5 acres) of the soils on the 24.99-acre property are rated as “prime if irrigated” by the Natural Resource Conservation Service. The subject property is within, and has water rights to, the North Unit Irrigation District based on documents submitted by the claimants. The claimants further state that in 1973, at their request, an irrigation pond was built on the subject property by the North Unit Irrigation District.

The claim does not establish that the desired division of the 24.99-acre subject property complies with the interim planning goals. To the contrary, and in particular, the desired division of 24.99 acres of predominantly “prime” farm land would not “conserve prime farm lands for the production of crops” as required by the interim goals at the time the claimants acquired the subject property in 1974.

Conclusions

The current zoning requirements and minimum lot size established by Goal 3, ORS 215 and OAR 660, division 33, were all enacted or adopted since the claimants acquired the subject property in 1974, and do not allow the desired division of the property into parcels less than 80 acres or allow the approval of dwellings. However, on March 12, 1974, the interim land use goals set forth in ORS 215.515 required the conservation of prime farm land for the production of crops. Approximately 98 percent of the claimants’ 24.99-acre property is composed of farm land soils rated as “prime.” The subject property could not be divided under the “interim” land use goals applicable in 1974.

Based on the facts of this claim, dividing the 24.99-acre subject property does not “conserve prime farm lands for the production of crops,” “preserve the quality of the . . . land resources of the state,” “provide for an orderly and efficient transition from rural to urban land use,” “protect life and property in areas subject to floods” or provide for “a timely, orderly and efficient arrangement of public facilities and services” as required by ORS 215.515 (1973 edition). Thus, the requested use would not have been permitted under the standards in effect when the claimants acquired the subject property. Therefore, the department determines that the current land use regulations applicable to the subject property do not restrict its use relative to the uses allowed when the claimants acquired the property on March 12, 1974.

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.”

Findings of Fact

The claim includes an estimate of \$700,000 as the reduction in the subject property’s fair market value due to the regulation(s). This amount is based on the owners’ assessment of the subject property’s value.

Conclusions

As explained in section V.(2) of this report, current land use regulations do not restrict the use of the subject property relative to the uses allowed when the claimants acquired the property in 1974. Land use regulations enacted or adopted by the state since the claimants acquired the subject property, relating to the desired division of the property, do not have “the effect of reducing the fair market value of the property, or any interest therein” relative to the uses allowed in 1974 because the claimants could not divide the subject property when it was acquired in 1974. Thus, the claimants are not due compensation under ORS 197.352.

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 3, ORS 215 and OAR 660, division 33, which Jefferson County has implemented through its current A-1 zone. With the exception of applicable provisions of ORS 215, including the interim land use planning goals in effect on March 12, 1974, these state land use regulations were not in effect when the claimants acquired the property.

Conclusions

It appears that the general statutory, goal and rule restrictions on the use of farm land apply to the claimants’ use of the subject property, and with the exception of applicable provisions of ORS 215 in effect when the claimants acquired the property, these laws are not exempt under ORS 197.352(3)(E). However, as discussed in Section V.(2) of this report, these laws do not restrict the use of the subject property relative to uses permitted when the claimants acquired the property on March 12, 1974, because the claimants’ desired use was not allowed under the provisions of ORS 215 in effect on that date.

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.

Based on the current record, the claimants, Harry and Alberta Larsen, are not entitled to relief under ORS 197.352 because neither the Commission nor the department has enforced laws that restrict the claimants’ use of their private real property relative to uses permitted at the time they

acquired the property on March 12, 1974. Therefore, the department staff recommends that this claim be denied.

VII. COMMENTS ON THE DRAFT STAFF REPORT

The department issued its draft staff report on this claim on August 8, 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.