

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. M122883
(BALLOT MEASURE 37) OF)
Kim D. Ward, LLC, Kim, Sally, Dayna,)
Justin and Jessica Ward, Donna Moore, CLAIMANTS)

Claimants: Kim D. Ward, LLC, Kim, Sally, Dayna, Justin and Jessica Ward, Donna Moore (the Claimants)

Property: Township 18S, Range 13E, Section 4, Tax lots 105, 107 and 108
Also known as Parcels 1, 2 and 3 of Deschutes County Partition Plat No.1992-13, Deschutes 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 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 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



Cora R. Parker, Deputy Director
DLCD

Dated this 29th day of August, 2006.

FOR the DEPARTMENT OF
ADMINISTRATIVE SERVICES:



Dugan Petty, Deputy Administrator
DAS, State Services Division

Dated this 29th 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 29, 2006

STATE CLAIM NUMBER: M122883

NAMES OF CLAIMANTS: Kim D. Ward, LLC
Kim, Sally, Dayna, Justin and Jessica Ward
Donna Moore

MAILING ADDRESS: c/o Donald Joe Willis
Mill View Way Building
549 SW Mill View Way, Suite 100
Bend, Oregon 97702

PROPERTY IDENTIFICATION: Township 18S, Range 13E, Section 4
Tax lots 105, 107 and 108
Also known as Parcels 1, 2 and 3 of
Deschutes County Partition Plat No.
1992-13
Deschutes County

OTHER CONTACT INFORMATION: Donald Joe Willis

DATE RECEIVED BY DAS: October 21, 2005

180-DAY DEADLINE: September 5, 2006¹

I. SUMMARY OF CLAIM

The claimants, Kim D. Ward, LLC and Kim, Sally, Dayna, Justin and Jessica Ward and Donna Moore (hereinafter called "the Ward family"), seek compensation in the amount of \$2 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 claimants desire compensation or the right to divide the 57.98-acre subject property into twenty-three 2.5-acre parcels and to develop a dwelling on each parcel.² The subject property is located east of the City of Bend along State Highway 20 at the geographic coordinates listed above, in Deschutes County. (See claim.)

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 The subject property consists of three tax lots. Tax lot 105 is 18.06 acres, tax lot 107 is 20 acres and tax lot 108 is 19.92 acres.

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 Kim D. Ward, LLC's desired use of the subject property was prohibited under the laws in effect when it acquired the property in 1994, and because the other claimants—the individual members of the Ward Family—have not established that they own an interest in the property that has been restricted by a state land use regulation. (See the complete recommendation in Section VI. of this report.)

III. COMMENTS ON THE CLAIM

Comments Received

On June 13, 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, two written comments were received in response to the 10-day notice.

The comments do not address whether the claim meets the criteria for relief under ORS 197.352. Comments concerning the effects a use of the subject 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), 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 21, 2005, for processing under OAR 125, division 145. The claim identifies provisions of ORS 92, 197 and 215 and OAR 660 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

Claimants Kim and Sally Ward acquired the subject property on August 16, 1977, as reflected by a memorandum of land sale contract included with the claim. Claimants Dayna, Justin and Jessica Ward and Donna Moore also state in the claim that they have an interest the subject property, as members of Kim D. Ward, LLC, as of August 16, 1977. According to the information provided in the claim, on August 27, 1994, Kim and Sally Ward transferred their interest in the subject property to Kim D. Ward, LLC, as reflected by a warranty deed included with the claim.³

An August 31, 2005, preliminary title report submitted with the claim establishes Kim D. Ward, LLC’s current ownership of the subject property.

Conclusions

Claimant Kim D. Ward, LLC is an “owner” of the subject property as that term is defined by ORS 197.352(11)(C), as of August 27, 1994. Claimants Kim, Sally, Dayna, Justin and Jessica Ward and Donna Moore have not established that they are “owners” of the subject property as that term is defined in ORS 197.352(11)(C). Although a corporation can be a “family member” of an owner as that term is defined by ORS 197.352(11)(C), an “owner” that is a corporate entity cannot claim an individual as a “family member,” as defined in ORS 197.352(11)(A). Therefore, none of the individuals who transferred the subject property to Kim D. Ward, LLC can be considered a “family member” of Kim D. Ward, LLC.

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.

³ Kim D. Ward, LLC is a domestic limited liability company registered with the Oregon Secretary of State.

Findings of Fact

The claim indicates that the claimants desire to divide the 57.98-acre subject property into twenty-three 2.5-acre parcels and to develop a dwelling on each parcel. It indicates that the use is not allowed under current land use regulations.⁴

The claim is based 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 EFU by Deschutes County, 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. Goal 3 became effective on January 25, 1975, and required that agricultural lands as defined by the Goal 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. 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. At the time Kim D. Ward, LLC acquired the subject property, these state land use regulations applied to its use of the property and prohibited the desired use.

Conclusions

The zoning requirements, minimum lot size and dwelling standards established by Goal 3 and provisions applicable to land zoned agricultural lands in ORS 215 and OAR 660, division 33, were in effect when claimant Kim D. Ward, LLC acquired the subject property on August 27, 1994. These land use regulations do not allow Kim D. Ward, LLC's desired use of the subject property. Laws enacted or adopted since Kim D. Ward, LLC acquired the subject property in 1994 do not restrict the desired use of the property relative to when it acquired the property in 1994. As explained in Section V.(1), the individual claimants of the Ward Family are not "owners" of the subject property, and therefore, no laws enforced by Land Conservation and Development Commission (the Commission) or the department restrict their use of the subject property in a manner that reduces the fair market value of the property.

⁴ 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 the regulations either do not apply to the claimants' property or do not restrict the use of the claimants' property in a manner that reduces 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. 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 \$2 million 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 subject property’s value.

Conclusions

As explained in Section V.(1) of this report, Kim D. Ward, LLC acquired the subject property on August 27, 1994. No state laws enacted or adopted since Kim D. Ward, LLC acquired the subject property restrict the use of the property relative to the uses allowed in 1994. Therefore, the fair market value of the subject property has not been reduced 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 does not identify any state land use regulations enacted or adopted since Kim D. Ward, LLC acquired the subject property that restrict the use of the property relative to what would have been allowed when it acquired the property on August 27, 1994. As set forth in Section V.(2) of this report, the state land use regulations restricting Kim D. Ward, LLC’s desired use of the subject property were in effect when it acquired the property in 1994.

Conclusions

All of the state land use regulations that restrict Kim D. Ward, LLC’s desired use of the subject property were in effect when it acquired the property. Therefore, these state land use regulations are exempt under ORS 197.352(3)(E), which exempts laws in effect when Kim D. Ward, LLC acquired the subject property. As explained in Section V.(1), the Ward Family are not “owners” of the subject property, and therefore, the issue of whether any laws are exempt from ORS 197.352 is not relevant.

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, laws enforced by the Commission or the department do not restrict Kim D. Ward, LLC's desired use of the subject property relative to what was permitted when it acquired it in 1994 and do not reduce the fair market value of the property. All state laws restricting the use of the subject property are exempt under ORS 197.352(3)(E).

Conclusions

Based on the record and the foregoing findings and conclusions, Kim D. Ward, LLC has not established that it is entitled to relief under ORS 197.352(1) as a result of land use regulations enforced by the Commission or the department. Therefore, the department recommends that this claim be denied for Kim D. Ward, LLC. The department further recommends that the claim be denied for the Ward Family because the claimants are not owners of the subject property.

VII. COMMENTS ON THE DRAFT STAFF REPORT

The department issued its draft staff report on this claim on August 15, 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.

The claimants' attorney submitted a letter in response to the draft staff report. That letter asserts that the draft staff report treats Kim D. Ward, LLC as the only claimant. That is not correct. The claim is made on behalf of the LLC and certain individuals, as set forth in the draft staff report. Only the LLC, however, is a present owner of an interest in the real property.

Other comments received also have been taken into account by the department in the issuance of this final report.