

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. M124846
(BALLOT MEASURE 37) OF)
Wesgo, CLAIMANT)

Claimant: Wesgo (the Claimant)

Property: Township 39S, Range 9E, Section 16, Tax lots 500 and 900
Klamath 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

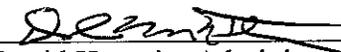
The Claim is denied as to laws administered by DLCD and the Land Conservation and Development Commission (LCDC) for the reasons set forth in the DLCD Report.

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


Michael Morrissey, Manager
DLCD, Measure 37 Services Division
Dated this 3rd day of October, 2006.

FOR THE DEPARTMENT OF
ADMINISTRATIVE SERVICES:


David Hartwig, Administrator
DAS, State Services Division
Dated this 3rd day of October, 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 197.352, 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)

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

October 3, 2006

STATE CLAIM NUMBER: M124846

NAME OF CLAIMANT: Wesgo

MAILING ADDRESS: 5761 Glenridge Way
Klamath Falls, Oregon 97603

PROPERTY IDENTIFICATION: Township 39S, Range 9E, Section 16
Tax lots 500 and 900
Klamath County

OTHER CONTACT INFORMATION: Michael L. Spencer
409 Pine Street, Suite 204
Klamath Falls, Oregon 97601

DATE RECEIVED BY DAS: April 10, 2006

180-DAY DEADLINE: October 7, 2006

I. SUMMARY OF CLAIM

The claimant, Wesgo,¹ seeks compensation in the amount of \$2.5 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 and develop the subject property into residential dwellings, into apartments and for commercial uses.² The subject property is located north of Joe Wright Road and east of Washburn Way, within the Klamath Falls' urban growth boundary but not within the City of Klamath Falls, in Klamath 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

¹ Based on title documents submitted with this claim and claim materials furnished to Klamath County that are in the department's record for this claim, Wesgo is a general partnership, and Melvin Stewart and Ben Menold are general partners of the partnership.

² The subject property includes two lots. Tax lot 500 consists of 40.48 acres, and tax lot 900 consists of 41.40 acres.

enforced laws that restrict the claimant's use of the private real property. (See the complete recommendation in Section VI. of this report.)

III. COMMENTS ON THE CLAIM

Comments Received

On August 4, 2006, pursuant to Oregon Administrative Rule (OAR) 125-145-0080, the Oregon Department of Administrative Services (DAS) provided written notice to the owners of surrounding properties. According to DAS, one written comment was received in response to the 10-day notice.

The comment does 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 letter 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 April 10, 2006, for processing under OAR 125, division 145. The claim identifies Statewide Planning Goals 1, 2 and 9 to 14 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

A number of deeds relating to the subject property were submitted with the claim, and the department also obtained additional title information in its review of the claim. The title documents reflect a gap in the chain of title.

Ernest and Victorine Milani conveyed tax lot 900 to WESGO on December 30, 1972. Ernest and Victorine Milani conveyed tax lot 500 to WESGO on April 1, 1974. WESGO Company conveyed a portion of tax lot 900 to Melvin Stewart and Robert Bogati on August 14, 1998. On December 27, 2000, Melvin Stewart and Robert Bogati conveyed tax lot 500 and the remainder of tax lot 900 to WESGO.

Based on the evidence in the department’s record for this claim, the claimant, Wesgo, acquired the subject property on December 27, 2000, as reflected by the bargain and sale deed included with the claim. The Klamath County Assessor’s Office confirms the claimant’s current ownership of the subject property.

Conclusions

The claimant, Wesgo, is an “owner” of the subject property as that term is defined by ORS 197.352(11)(C), as of December 27, 2000. Although a corporation can be a “family member” as that term is defined by ORS 197.352(11)(A), an “owner” that is a corporate entity cannot claim an individual as a “family member.” Therefore, none of the individuals who transferred the subject property to Wesgo can be considered a “family member” of Wesgo.

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

According to the claim, the claimant desires to develop a residential subdivision including single-family homes, apartments and commercial uses. According to the claim, Goals 1, 2 and 9 to 14 “could be interpreted to limit the ability of Klamath County to rezone this property from industrial to residential or to allow residential and commercial uses if not rezoned.”

The subject property is currently zoned Heavy Industrial (IH) by Klamath County and located within the City of Klamath Falls' urban growth boundary.

Goal 1 (Citizen Involvement) concerns citizen participation in the planning process. The claimant has not established how this goal applies to or restricts the desired use of the subject property. Goal 2 (Land Use Planning) has several components: a land use planning process and policy framework, coordination, an adequate factual base for decisions and exceptions to goals. The claimant has not established how this goal applies to or restricts the desired use of the subject property.

Goal 9 (Economic Development) concerns adequate opportunities for a variety of economic activities. It requires local governments to provide an adequate supply of sites of suitable size, type, location and service levels for a variety of industrial and commercial uses. OAR 660-009-0010(4) implements this aspect of Goal 9 by requiring local governments that change a plan designation of lands in excess of two acres to or from commercial or industrial use through a post-acknowledgement plan amendment to meet certain requirements designed to ensure that the community maintains an adequate supply of industrial and commercial lands. Goal 9 and OAR 660-009-0010 apply to the claimant's desired use, but there is insufficient information in the record to demonstrate that they restrict the desired use because it may be that there is still an adequate supply of industrial sites even if the desired use of the subject property is carried out.

Goal 10 (Housing) requires local governments to encourage the availability of adequate numbers of needed housing units at price ranges and rent levels, which are commensurate with the financial capabilities of Oregon households and allow for flexibility of housing location, type and density. The claimant has not demonstrated that this goal applies to or restricts the desired use of the subject property. Goal 11 (Public Facilities and Services) requires public facility planning. The claimant has not demonstrated that this goal applies to or restricts the desired use of the subject property. Goal 12 (Transportation) concerns a safe, convenient and economic transportation system. The claimant has not demonstrated that this goal applies to or restricts the desired use of the property. Goal 13 (Energy Conservation) concerns energy conservation. The claimant has not demonstrated that this goal applies to or restricts the desired use of the subject property. Goal 14 provides that urbanizable lands, such as the subject property, shall be considered available over time for urban uses. The claimant has not demonstrated that this goal applies to or restricts the desired use of the subject property.

Conclusions

Goal 9 and OAR 660-009-0010 apply to the claimant's desired use of the subject property, but the claim does not demonstrate that these state land use regulations restrict the desired use of the property. Based on the record before the department, none of the state land use regulations identified in the claim restrict the claimant's desired use of the subject property.

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."

As explained in Section V.(2) of this report, the claimant, Wesgo, has not established that any state laws restrict the use of the subject property. Accordingly, the department cannot determine that any laws enforced by the Commission or the department have had the effect of reducing the fair market value of the subject property.

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. Under ORS 197.352(3)(E), state land use regulations enacted or adopted after the date the claimant acquired the property are exempt. None of the state land use regulations identified in the claim were adopted before December 2000. As a result, all of the laws identified are exempt.

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 for this claim, the claimant has not established that any state laws enforced by the Commission or the department restrict the use of the subject property and have the effect of reducing the fair market value of the property. In addition, all of the state land use regulations identified in the claim are exempt under ORS 197.352(3)(E).

Conclusions

Based on the record before the department, the claimant, Wesgo, 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.

VII. COMMENTS ON THE DRAFT STAFF REPORT

The department issued its draft staff report on this claim on September 14, 2006. OAR 125-145-0100(3), provided 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. Comments received have been taken into account by the department in the issuance of this final report. The claimant's attorney submitted a letter in response to the department's draft staff report. The letter states that:

“the partners of Wesco continued to utilize the property jointly as part of their partnership regardless of the name that title was held [in]. The error in the deeds will not support a conclusion that there was a new acquisition date. Again, Oregon law is clear that partnership property may be held in the name of the individual partners rather than the name of the partnership.”

The claimant’s attorney appears to be arguing that the owners of the property are the individual [general] partners in Wesco. The problem with that argument is that the individual partners are not claimants. The claim was made by Wesgo.³ And, as determined in the draft staff report, Wesgo acquired the property in 2000. If the claimant’s attorney wishes to file on behalf of one of more of the partners of Wesgo, he will need to file a new claim correctly identifying the claimant.⁴

The claimant’s attorney also notes that the department submitted a letter concerning a pending zone change application, as evidence that Goal 9 restricts the claimant’s desired use of the property. The department agrees, this is why the draft staff report addressed Goal 9 and LCDC’s Goal 9 rule.

Finally, the claimant’s attorney asserts that Goals 10 through 13 restrict the claimant’s desired use of the property because they may apply to that use, and showing that they do not apply will require substantial expenditure on the claimant’s part. The determination the department must make is whether these goals apply to the claimant’s desired use, not whether they may apply. Without additional information from the claimant concerning the specifics of the desired use and how these goals apply to that use, the department is unable to determine that the goals apply to or restrict the claimant’s desired use, or that they have had the effect of reducing the fair market value of the property.

³ The claimant’s attorney consistently refers to the partnership as Wesco. The claimant (in his affidavit) refers to the partnership as Wesgo. The deeds submitted with the claim state the name of the partnership as WESGO COMPANY, a partnership or as WESGO, a partnership. The claim was submitted for Wesgo, and that is the name the department uses in this report.

⁴ The claimant’s attorney also argues that the property was owned by the partners of WESGO, based on an affidavit and ORS 67.065. Under ORS 67.065, property is partnership property if acquired in the name of the partnership. In this case, the property was transferred to the partnership in 1974. As a result, the property was owned by the partnership from 1974 to 1998, when (based on the claimant’s affidavit) the entire property was conveyed to Melvin L. Steward and Robert J. Bogatay. The property was then acquired by WESGO in 2000. Finally, under ORS 197.352, a former owner of real property has no right to compensation.