

BEFORE THE DEPARTMENT OF ADMINISTRATIVE SERVICES,
THE DEPARTMENT OF LAND CONSERVATION AND DEVELOPMENT, AND
THE DEPARTMENT OF STATE LANDS
OF THE STATE OF OREGON

IN THE MATTER OF THE CLAIM FOR) FINAL ORDER
COMPENSATION UNDER ORS 197.352) CLAIM NO. M125221
(BALLOT MEASURE 37) OF)
David Lentz, CLAIMANT)

Claimant: David Lentz (the Claimant)

Property: Township 17S, Range 4W, Section 8, Tax lot 1000, Lane 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), and the Oregon Department of State Lands (DSL Report), attached to and by this reference incorporated into this order.

ORDER

The Claim is denied as to laws administered by the Oregon Department of State Lands for the reasons set forth in the DSL Report.

The Claim is approved as to laws administered by DLCD and the Land Conservation and Development Commission (LCDC) for the reasons set forth in the DLCD Report, and 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 David Lentz's division and development of commercial lots suitable for airport-related uses on the northern portion of the 83.48-acre subject property: applicable provisions of Goal 3, ORS 215 and OAR 660, division 33, enacted or adopted after January 30, 1974. These land use regulations will not apply to the claimant only to the extent necessary to allow him to use the subject property for the use described in this report, and only to the extent that use was permitted when he acquired the property on January 30, 1974.
2. The action by the State of Oregon provides the state's authorization to the claimant to use the subject property for the use described in this report, subject to the standards in effect on January 30, 1974. On that date, the property was subject to the applicable provisions of ORS 215 then in effect, including the interim planning goals set forth in ORS 215.515 (1973 edition).

3. To the extent that any law, order, deed, agreement or other legally enforceable public or private requirement provides that the subject property 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.

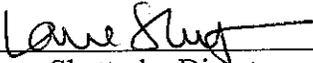
4. Any use of the subject property by the claimant under the terms of the order will remain subject to the following laws: (a) those laws not specified in (1) above; (b) any laws enacted or enforced by a public entity other than the Commission or the department; and (c) those laws not subject to ORS 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 the subject property, it may be necessary for him 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 subject property by the claimant.

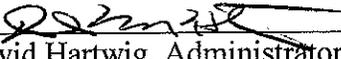
This Order is entered by the Director of the DLCD as a final order of DLCD and the Land Conservation and Development Commission under ORS 197.352, OAR 660-002-0010(8), and OAR 125, division 145, and by the Administrator for the State Services Division of the DAS as a final order of DAS under ORS 197.352, OAR 125, division 145, and ORS 293.

This Order is entered by the Department of State Lands as a final order of the Department under ORS 197.352, OAR 629-001-0057, and OAR Chapter 125, division 145.

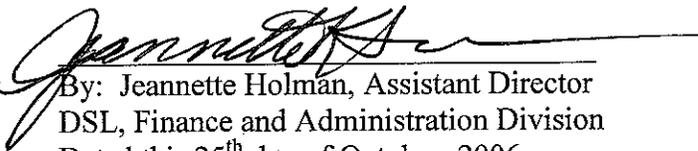
FOR DLCD AND THE LAND
CONSERVATION AND DEVELOPMENT
COMMISSION:


Lane Shetterly, Director
DLCD
Dated this 25th day of October, 2006.

FOR THE DEPARTMENT OF
ADMINISTRATIVE SERVICES:


David Hartwig, Administrator
DAS, State Services Division
Dated this 25th day of October, 2006.

FOR THE DEPARTMENT OF STATE
LANDS:
Louise Solliday, Director


By: Jeannette Holman, Assistant Director
DSL, Finance and Administration Division
Dated this 25th 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)

FOR INFORMATION ONLY

The Oregon Department of Justice has advised the Department of Land Conservation and Development that "[i]f the current owner of the real property conveys the property before the new use allowed by the public entity is established, then the entitlement to relief will be lost."

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

October 25, 2006

STATE CLAIM NUMBER: M125221

NAME OF CLAIMANT: David Lentz

MAILING ADDRESS: PO Box 1117
Mill City, Oregon 97360

PROPERTY IDENTIFICATION: Township 17S, Range 4W, Section 8
Tax lot 1000
Lane County

OTHER CONTACT INFORMATION: Jill Gelineau
Schwabe, Williamson & Wyatt
1211 SW 5th Avenue, Suite 1900
Portland, Oregon 97204

DATE RECEIVED BY DAS: May 2, 2006

180-DAY DEADLINE: October 29, 2006

I. SUMMARY OF CLAIM

The claimant, David Lentz, seeks compensation in the amount of \$660,000 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 claimant desires compensation or the right to divide and develop commercial lots suitable for airport-related uses on the 10-acre northern portion of the property that was zoned AV when he acquired it. The subject property is 83.48 acres in all. The subject property is located near Clear Lake Road, in Lane 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 valid. 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 David Lentz's division and development of commercial lots suitable for airport-related uses on the 10-acre northern portion of the 83.48-acre subject property: applicable provisions of Statewide Planning Goal 3 (Agricultural Lands), ORS 215 and Oregon Administrative Rules (OAR) 660, division 33, enacted or adopted after January 30, 1974. These laws will not apply to the claimant only to the extent necessary to allow him to use the subject

property for the use described in this report, and only to the extent that use was permitted when he acquired the property on January 30, 1974. (See the complete recommendation in Section VI of this report.)

III. COMMENTS ON THE CLAIM

Comments Received

On August 18, 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, 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 May 2, 2006, for processing under OAR 125, division 145. The claim identifies OAR 125, division 145; provisions of OAR 660; and provisions of ORS 92, 196, 209 and 215 as restricting the claimant's desired use of the subject property. 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, David Lentz, acquired the subject property on January 30, 1974, as reflected by a deed included with the claim. The Lane County Assessor’s Office confirms the claimant’s current ownership of the subject property.

Conclusions

The claimant, David Lentz, is an “owner” of the subject property as that term is defined by ORS 197.352(11)(C), as of January 30, 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 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 and develop commercial lots suitable for airport related uses on the northern portion of the property that was zoned AV when it was acquired,” and that state law prevents the desired use.¹

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 claimant’s property is zoned EF-40 by Lane County, as required by Goal 3, in accordance with ORS 215 and OAR 660, division 33, because the claimant’s property is “agricultural land” as defined by Goal 3.² Goal 3

¹ The claim lists a number of other state laws, but does not establish how the laws either apply to or restrict the claimant’s desired use of the property. Without additional information concerning the claimant’s desired use, the department is unable to determine that any of the Commission’s rules divisions or statewide land use planning goals, other than Goal 3 and OAR 660, division 33, apply to or restrict the claimant’s desired use of the property. Similarly, with respect to the statutes in ORS 92 and 209 listed in the claim, the department is unable to determine that the statutes apply to or restrict the claimant’s desired use on this record. This report addresses only those state land use regulations that the department finds are applicable to and restrict the claimant’s use of the subject property, based on the claimant’s asserted desired use. The claimant also list OAR 141 and 196. This report addresses only those laws that are administered by the department. The Oregon Department of State Lands is issuing a separate report addressing laws that it administers.

² The claimant’s property is “agricultural land” because it contains Natural Resources Conservation Service (NRCS) Class I–IV soils.

became effective on January 25, 1975, and required that agricultural land as defined by Goal 3 be zoned EFU pursuant to ORS 215.

Current land use regulations, particularly ORS 215.213, 215.263 and 215.780 and OAR 660, division 33, enacted or adopted pursuant to Goal 3, prohibit the division of EFU-zoned land in a marginal lands county 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 (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. ORS 215.780(5) recognized minimum lots less than 80 acres that had been acknowledged by the Commission. The Commission has acknowledged the 40-acre minimum parcel size in Lane County's EF-40 zone.

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 in a marginal lands county under ORS 215.213. OAR 660-033-0130(4)(e) (applicable to non-farm dwellings in marginal lands counties) became effective on August 7, 1993. The Commission subsequently adopted amendments to comply with House Bill 3326 (Chapter 704, Oregon Laws 2001, effective on January 1, 2002), which were effective on May 22, 2002. (See administrative rule history for OAR 660-033-0100, -0130 and -0135.)

The claim also lists Goal 14 (Urbanization) as restricting the claimant's desired use of the property. Goal 14 also became effective on January 25, 1975, and generally requires that land outside urban growth boundaries be used for rural uses. Goal 14 would apply to and restrict the claimant's desired use of the subject property if that use is "urban" in nature, as that term is used in Goal 14. The claim indicates that the desired use involves commercial airport-related uses. The department is unable to determine if this use is "urban" without additional information. Specifically, the claim describes the use as involving "commercial lots suitable for airport related uses." Such uses may or may not be urban depending on what the claimant ultimately develops.³ As a result, the department is unable to determine that Goal 14 restricts the claimant's desired use.

The claimant acquired the subject property on January 30, 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 AV and AGT-5 by Lane County.

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*

³ See *DLCD v. Umatilla County*, LUBA No. 2000-097 (4/30/2001) (noting that whether Goal 14 and OAR 660-014 apply will depend on the specifics of what is proposed).

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 claimant’s desired use includes subdivision of his land. If the claimant had sought to create that use in 1974, 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* resources of the state” [emphasis added]; “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).

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 60 percent (about 50 acres) of the soils on the 83.48-acre subject property are rated as “prime” by the Natural Resource Conservation Service (NRCS).⁵ It is unclear whether division and development of the subject property would comply with the interim goals.

No information has been provided establishing whether or to what extent the claimant’s desired division or use of the subject property complies with the interim planning goals set forth in ORS 215.515 (1973 edition) in effect at the time the claimant acquired the property on January 30, 1974.

Conclusions

The current zoning requirements, minimum lot size and development standards established by Goal 3, ORS 215 and OAR 660, division 33, were all enacted or adopted after the claimant acquired the subject property in 1974 and do not allow the desired division or development of the property. However, the claim does not establish whether or to what extent the claimant’s desired use of the subject property complies with the interim planning goals in effect when he acquired the property on January 30, 1974.

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).

⁵ NRCS soil survey for Lane County.

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 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 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 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 \$660,000 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 an appraiser's estimation that the reduction caused by EFU zoning, at \$66,000 per acre for the portion of the property zoned AV upon acquisition, and estimation that there are up to 10 acres within the area of the historic AV zone.

Conclusions

As explained in Section V.(1) of this report, the claimant is David Lentz who acquired the subject property on January 30, 1974. Under ORS 197.352, the claimant is due compensation for land use regulations that restrict the use of the subject property 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 acquired the subject property restrict the claimant's desired use of the property. The claimant estimates that the effect of the regulations on the fair market value of the property is a reduction of \$660,000.

Without an appraisal or other documentation and without verification of whether or the extent to which the claimant's desired use of the subject property was allowed under the standards in effect when the claimant acquired the property, it is not possible to substantiate the specific dollar amount by which the land use regulations have reduced the fair market value of the property. Nevertheless, based on the evidence in the record for this claim, the department determines that the fair market value of the subject property 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, including applicable provisions of Goal 3, ORS 215 and OAR 660, division 33, which Lane County has implemented through its current EF-40 zone. With the exception of applicable provisions of ORS 215, including the interim land use planning goals, in effect on January 30, 1974, these state land use regulations were not in effect when the claimant acquired the property.

Conclusions

Without a specific development proposal for the subject 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, with the exception of provisions of ORS 215 in effect on January 30, 1974, the general statutory, goal and rule restrictions on division and development of the claimant's property were not in effect when the claimant acquired the property. As a result, these laws are not exempt under ORS 197.352(3)(E). Provisions of ORS 215, including the interim statewide planning goals in effect when the claimant acquired the subject property on January 30, 1974, are exempt under ORS 197.352(3)(E) and will continue to apply to the property.

Other laws in effect when the claimant acquired the subject property are also exempt under ORS 197.352(3)(E) and will continue to apply to the claimant's use of the property. There may be other laws that continue to apply to the claimant's use of the subject 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. 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 the subject property 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 he 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 his 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 findings and conclusions set forth in this report, laws enforced by the Commission or the department restrict the claimant's desired use of the subject property. 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 \$660,000. 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 the subject property, 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 the claimant's desired use of the subject property was allowed under the standards in effect when he acquired the property. Nevertheless, based on the record for this claim, the department has determined that the laws on which the claim is based have reduced the fair market value of the subject property 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 David Lentz to use the subject property for a use permitted at the time he acquired the property on January 30, 1974.

Conclusions

Based on the record, the department 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 David Lentz's division and development of commercial lots suitable for airport-related uses on the northern portion of the 83.48-acre subject property: applicable provisions of Goal 3, ORS 215 and OAR 660, division 33, enacted or adopted after January 30, 1974. These land use regulations will not apply to the claimant only to the extent necessary to allow him to use the subject property for the use described in this report, and only to the extent that use was permitted when he acquired the property on January 30, 1974.
2. The action by the State of Oregon provides the state's authorization to the claimant to use the subject property for the use described in this report, subject to the standards in effect on January 30, 1974. On that date, the property was subject to the applicable provisions of ORS 215 then in effect, including the interim planning goals set forth in ORS 215.515 (1973 edition).
3. To the extent that any law, order, deed, agreement or other legally enforceable public or private requirement provides that the subject property 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 the subject property 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 the subject property, it may be necessary for him 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 subject property by the claimant.

VII. COMMENTS ON THE DRAFT STAFF REPORT

The department issued its draft staff report on this claim on October 6, 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.

**ORS 197.352 (BALLOT MEASURE 37) CLAIM
FOR COMPENSATION**

OREGON DEPARTMENT OF STATE LANDS

**Final Staff Report and Recommendation
October 25, 2006**

OREGON CLAIM NUMBER: M118542

NAME OF CLAIMANT(S): David Lentz

MAILING ADDRESS: c/o Jill Gelineau
1211 SW Fifth Avenue, Suite 1900
Portland, Oregon 97204

IDENTIFICATION OF PROPERTY: Township 17S, Range 4W, Section 8
Tax Lot 1000
Lane County
(South of Airport Access Road)

**OTHER OWNERS AND INTEREST
HOLDERS:** None

DATE RECEIVED BY DAS: May 2, 2006

180—DAY DEADLINE: October 29, 2006

I. SUMMARY OF CLAIM

David Lentz is the claimant. The claimant seeks compensation in the amount of \$660,000 for the reduction in the fair market value of the property he alleges has resulted from the enforcement of certain land use regulations to restrict his use of the property. The use the claimant desires to carry out that is alleged to be prohibited, limited or otherwise restricted by a state land use regulation is "to divide and develop commercial lots suitable for airport related uses on the northern portion of the property that was zoned AV when it was acquired."

II. SUMMARY OF STAFF RECOMMENDATION

Based on the findings and conclusions set forth below, the Department of State Lands (DSL) has determined that this claim does not meet the requirements for relief under ORS 197.352 as to laws administered by DSL. As a result, DSL staff recommend that the claim be denied as to state land use regulations administered by DSL.

III. COMMENTS

On August 18, 2006, pursuant to OAR 125-145-0080, the Department of Administrative Services (DAS) sent notices of this claim to owners of surrounding properties and other interested parties. According to DAS, one comment was received in response to the 10-day notice. To the extent the comments pertain to whether the claim meets the criteria for relief, the department has considered the comments in preparing this report.

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 effect may become relevant in determining which claims to pay compensation for rather than waiving a state law.

IV. TIMELINESS OF THE 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 December 2, 2004, written demand for compensation must be made on or before December 2, 2006, or the date the public entity applies the land use regulation as an approval criteria to an application submitted by the owner of the property, whichever is later.
2. For claims arising from land use regulations enacted after December 2, 2004, written demand for compensation must be made 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 May 2, 2006, for processing under OAR Chapter 125. The claim identifies Oregon Revised Statutes and Oregon Administrative Rules pertaining to removal and fill of material, statewide land use planning, subdivisions and partitions as amended since 1974, and county planning and zoning as the basis for the claim. Only laws that were enacted prior to December 2, 2004, the effective date of Measure 37, are the basis for this claim.

Conclusions

The claim has been submitted on or before December 2, 2006. The claim is directed at land use regulations enacted before December 2, 2004. As a result, the claim is timely.

V. ANALYSIS OF THE CLAIM

1. Present Owner(s) of the Property

Requirement

ORS 197.352 provides a right to compensation to the *present* owner of the property, under certain circumstances. As a result, the first question that must be answered is whether the claimant is a present owner of the property.

Findings of Fact

The property that is identified in this claim is stated in as **T17S, R4W, Sec. 8, Tax Lot 1000, Lane County, Oregon**. The claimant's status as present owner of the property is substantiated by a title report dated May 26, 2005 showing David Lentz as the current owner of property at that township, range and section, and a copy of a deed dated January 30, 1974, vesting title of such property in David Lentz.

Conclusions

Based on the above findings, and those of the Department of Land Conservation and Development in its report on this claim, David Lentz is the present owner of an interest in the property for purposes of ORS 197.352.

2. Date of Acquisition

Requirement

Under ORS 197.352, a claim may be made only for laws that took effect after the present owner or family member of the present owner acquired the property. Under ORS 197.352, the right to compensation is dependent on the date when the present owner or a family member of the present owner acquired the property. A family member is defined as the wife, husband, son, daughter, mother, father, brother, brother-in-law, sister, sister-in-law, son-in-law, daughter-in-law, mother-in-law, father-in-law, aunt, uncle, niece, nephew, stepparent, stepchild, grandparent, or grandchild of the present owner of the property, an estate of any of the foregoing family members, or a legal entity owned by any one or combination of these family member or the present owner of the property.

Establishing the date of acquisition is key to determining what state laws are involved, and therefore whether the claimants' use of the property has been restricted and the fair market value of the property has been reduced.

Findings of Fact

The claim alleges that David Lentz has owned the property identified as tax lot 1000 in Section 8, Township 17 South, Range 4 West since 1974. The claim includes a deed and a title report to substantiate this. The deed shows that the claimant acquired the property from John O. Chatt and Darrel C. Smith on January 30, 1974. The title report confirms ownership of that parcel.

Conclusions

The claimant, David Lentz, is an "owner" of the subject property as that term is defined by ORS 197.352(11)(C) as of January 30, 1974.

3. The Desired Use of the Property

The claim indicates the desired use of the property is "to divide and develop commercial lots suitable for airport related uses on the northern portion of the property that was zoned AV when it was acquired."

4. Current State Laws that Restrict the Desired Use of the Property

Requirement

In order for a person to have a right to compensation for an existing state law under ORS 197.352, the law must be a state "land use regulation" that is being enforced, and the law must apply to and restrict the claimants' desired use of the property. Not all laws are "land use regulations." Under ORS 197.352 a state land use regulation is: (a) a Statewide Land Use Planning Goal of LCDC; (b) a rule of LCDC; (c) statutes and rules that regulate farming and forest practices; and (d) any statute regulating the use of land or any interest therein.

Findings of Fact

The Department of State Lands administers ORS 196.660 to 196.990, Oregon's Removal-Fill Law, which generally requires a permit for the removal or fill of material in waters of the state, including wetlands. The State Removal-Fill Law first was enacted in 1967.¹ Amendments to the statutes in 1979 require DSL to include in such permits conditions designed to mitigate for impacts to wetlands and estuaries.

The Department of State Lands has not made a wetland determination, a Local Wetland Inventory does not exist, and no wetland delineation has been completed for this parcel. The National Wetland Inventory shows a fairly large, horseshoe-shaped forested and emergent wetland and two much smaller wetlands on the parcel. The large wetland corresponds to the mapped hydric soil area. Based upon the maps, it is likely that jurisdictional wetland affects about 1/5 of the parcel. The parcel does not appear to

¹ DSL's Staff Report and Recommendations for the claimant's prior claim regarding the subject property, M118542, stated erroneously that "the State Removal-Fill Law has regulated fill and removal within waters of the state since 1979."

contain "waters of the state" other than the wetlands that may exist based on the National Wetland Inventory, although a flood control easement was granted by the claimant to the Junction City Water Control District that may affect other portions of the property.

The claimant has not applied for a removal-fill permit from the state under ORS 196.800 to 196.990 and DSL has not taken any action to enforce the State Removal-Fill Law with respect to the claimant's use of this property since December 2, 2004. In comments on the draft staff report, the claimant's attorney asserts that there is "no requirement that a claimant first apply for a state permit in order to submit a claim based on a state statute that restricts the use of private real property." That assertion is wrong. ORS 197.352 does provide that no application for a land use permit to a local government is required, but the statute contains no parallel provision relating to state permits. This, combined with the requirement in ORS 197.352(1) that a public entity enforce an existing land use regulation in order for there to be a claim, means that DSL is not authorized to grant relief based on the record for this claim because the agency has not received an application for a permit or otherwise "enforced" a state "land use regulation" with respect to this property.

The claim lists both statutes and rules administered by the DSL: ORS 196.795 to 196.990, and OAR 141-085. The rules listed in the claim are a portion of the administrative rules governing the removal or fill of material in waters of the state, including wetlands. The rules are not "state land use regulations" as that term is defined in ORS 197.352.

Conclusions

The statutes listed in the claim are state land use regulations under ORS 197.352. The rules listed in the claim are not state land use regulations under ORS 197.352. DSL has not enforced ORS 196.800 to 196.990 with regard to the claimant's use of this property since December 2, 2004, and the claimant has not applied for a state permit to remove or fill within wetlands or waters of the state on the property. Until the claimant submits an application for a removal-fill permit and DSL acts on that application, DSL has no means of determining whether the listed statutes apply to or restrict the claimant's desired use of the property. In addition, as to the other uses desired by the claimant, the Removal-Fill Law regulates fill and removal of material within "waters of the state," not subdivision or partition of property.

5. Laws in Effect When the Present Owners Acquired the Property

Requirement

ORS 197.352 requires the state to compensate the present owners of the property if a current state law restricts the use of the property. If the state is paying compensation, then the amount of compensation is determined by the difference in fair market value of the property with the current state land use regulations in place and the fair market value

of the property if it were subject to whatever state land use regulations applied to the property when it was acquired by the present owners or a family member of the present owners (whichever occurred first). If the state elects not to pay compensation, however, it may only allow the present owners to use the property for a use permitted when they acquired the property (not when it was acquired by a family member).

As a result, in this section the report summarizes both the laws that were in effect when the present owners acquired the property, and the laws in effect when a family member of the owners acquired the property (if a family member conveyed the property to the present owners).

Findings of Fact

The Removal-Fill Law requires a permit for removal or fill within waters of the state, including wetlands and estuaries, and requires DSL to include in such permits conditions designed to mitigate for impacts to wetlands and estuaries. When the claimant acquired the property in 1974, the Removal-Fill Law was in effect. The claimant's attorney, in comments on the draft staff report, asserts that the current Removal-Fill Law is more restrictive than the law in effect in 1974, but fails to describe or otherwise establish why this is the case with respect to the claimant's desired use of the property.

The use that the claimant states in his claim is "to divide and develop commercial lots suitable for airport related uses on the northern portion of the property that was zoned AV when it was acquired." A portion of the subject property may be a wetland, based on the National Wetland Inventory. If the development of the property will affect a jurisdictional wetland or other waters of the state, then state statutes administered by the DSL may require a permit for filling and/or removing more than 50 cubic yards of material within any such waters of the state.

Until the claimant submits an application for a removal-fill permit, however, DSL is unable to determine whether state land use regulations administered by DSL restrict the use of the property. In addition, under ORS 197.352(1), DSL is authorized to provide relief to claimants only when it has enforced an existing state law through some action taken after December 2, 2004. In this case DSL has not taken any action to enforce the state Removal-Fill Law as to this property after December 2, 2004.

Conclusions

The claimant acquired the property after the Removal-Fill Law was enacted in 1967. However, DSL has not taken any action to enforce the state Removal-Fill Law as to this property after December 2, 2004.

6. Effect on Fair Market Value

Requirement

There is a right to compensation under ORS 197.352 from the state only if the state enforces an existing land use regulation, and that results in a reduction in the fair market value of the property.

Findings of Fact

On his claim form, the claimant listed \$660,000 as the reduction in the subject property's fair market value due to current regulations.

The claim states that "Mr. Lentz's appraiser estimates the reduction in value caused by the EFU zoning at \$66,000 per acre for the portion of the property that was zoned AV upon acquisition, and we estimate there are up to 10 acres included within the area of the historic AV zone, for a total claim value of \$660,000." The claimant did not provide any documentation to support the assertion of value.

Conclusions

The claim includes some evidence of reduction in value, but the owner's statement does not appear to be based on state land use regulations that are administered by DSL and that have been enforced since December 2, 2004. As a result, DSL is unable to determine that there is any restriction on the claimant's desired uses of the property or any reduction of the fair market value of the property.

7. Exemptions

Requirement

ORS 197.352 does not apply to state land use regulations that:

- Restrict or prohibit activities commonly and historically recognized as public nuisances under common law;
- Restrict or prohibit activities for the protection of public health and safety, such as fire and building codes, health and sanitation regulations, solid or hazardous waste regulations, and pollution control regulations;
- To the extent the land use regulation is required to comply with federal law;
- Restrict or prohibit the use of a property for the purpose of selling pornography or performing nude dancing; or that were
- Enacted prior to the date of acquisition of the property by the owner or a family member of the owner who owned the subject property prior to acquisition or inheritance by the owner, whichever occurred first.

Findings of Fact

The claim is based apparently on the provisions of the state Removal-Fill Law (ORS 196.800 to 196.990), which were initially enacted in 1967. The claimant David Lentz acquired the subject property in 1974. As a result, there are no laws that have been enacted after the date the claimant acquired his interest, and any laws that took effect

prior to that date are exempt under ORS 197.352(3)(E). Other exemptions may apply to the Removal-Fill Law.

The claimant should be aware that depending on the nature of the use of the property that is finally proposed, one or more of the exemptions in ORS 197.352(3)(A)-(D) may apply. However, until the claimant applies for a removal-fill permit, DSL is unable to determine what laws and what exemptions may apply.

Conclusions

Laws in effect when the claimant acquired an interest in the property are exempt under ORS 197.352(3)(E), and will continue to apply to the claimant's use of the property. The Removal-Fill Law was in effect when the claimant acquired his interest in the property.

This report addresses only those state laws that are identified in the claim, or that DSL is certain apply to the property based on the use(s) 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 DSL in the claim. Claimant should be aware that the less information provided to DSL in the claim, the greater the possibility that there may be additional laws administered by DSL that will later be determined to continue to apply to the claimant's use of the property.

VI. FORM OF RELIEF

1. Is the Present Owner Entitled to Relief

Requirement

A claimant is entitled to relief if:

- The claimant is a present owner of the property, or of an interest in the property; The claim identifies a state land use regulation enacted before December 2, 2004 that is being enforced in a manner that restricts the claimant's desired use of the property; and
- The enforcement or enactment of the land use regulation has the effect of reducing the fair market value of the property.

The state may either pay compensation, or not apply the state land use regulation(s) in question.

Findings of fact

Based on the information currently in its record, the claim does not provide sufficient facts to show that the claimant qualifies for relief under ORS 197.352 as to state land use regulations administered by DSL.

Conclusions

DSL staff denies this claim as to state land use regulations administered by DSL because the Removal-Fill Law (the state land use regulation identified by claimant) has not been enforced by DSL as to the claimant's desired use of this property since December 2, 2004. In addition, the Removal-Fill Law does not prohibit development of a wetland area. Rather, that law simply requires a permit for removal or filling of more than 50 cubic yards of material within a wetland. Until claimant applies for a permit and DSL has acted on the permit application, DSL has not enforced the Oregon Removal-Fill Law and it is not possible to determine whether that law would restrict use of this property or reduce its fair market value.

VII. COMMENTS ON THE DRAFT STAFF REPORT

DSL issued its draft staff report on October 6, 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 or information in response to the draft staff report and recommendation. Comments were received from the claimant's representative and have been taken into account by the DSL in the issuance of the final report.