

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. M129555
(BALLOT MEASURE 37) OF)
John J. Atkins Jr., CLAIMANT)

Claimant: John J. Atkins Jr. (the Claimant)

Property: Township 38S, Range 4W, Section 5: Tax lot 200
Township 38S, Range 4W, Section 32: Tax lot 1800
Jackson 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.

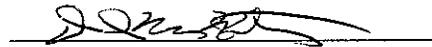
This Order is entered by the Manager for the Measure 37 Services Division of the DLCD as a final order of DLCD and the Land Conservation and Development Commission under ORS 197.352, OAR 660-002-0010(8), and OAR chapter 125, division 145, and by the Administrator for the State Services Division of the 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

FOR the DEPARTMENT OF
ADMINISTRATIVE SERVICES:



Michael Morrissey, Manager
DLCD, Measure 37 Services Division
Dated this 15th day of December, 2006.



David Hartwig, Administrator
DAS, State Services Division
Dated this 15th day of December, 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

December 15, 2006

STATE CLAIM NUMBER: M129555

NAMES OF CLAIMANT: John J. Atkins Jr.

MAILING ADDRESS: 5376 W Griffin Creek Road
Medford, Oregon 97501

PROPERTY IDENTIFICATION: Township 38S, Range 4W
Section 5: Tax lot 200
Section 32: Tax lot 1800
Jackson County

DATE RECEIVED BY DAS: June 21, 2006

180-DAY DEADLINE: December 18, 2006

I. SUMMARY OF CLAIM

The claimant, John Atkins Jr, seeks compensation in the amount of \$3.13 million for the reduction in fair market value as a result of land use regulations that are alleged to restrict the use of certain private real property. The claimant desires compensation or the right to divide the 60.66-acre subject property into twelve 5-acre parcels.¹ The subject property is located at 755 Slagle Creek Road, near Applegate, in Jackson 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 this claim is not valid because the claimant has not established his present ownership interest in the subject property for purposes of ORS 197.352. (See the complete recommendation in Section VI of this report.)

III. COMMENTS ON THE CLAIM

Comments Received

On September 22, 2006, pursuant to Oregon Administrative Rule (OAR) 125-145-0080, the Oregon Department of Administrative Services (DAS) provided written notice to the owners of

¹ The subject property includes two tax lots. Tax lot 200 consists of 45.05 acres and tax lot 1800 consists of 15.61 acres.

surrounding properties. According to DAS, six written letters were received in response to the 10-day notice.

Four of 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 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.

Two of the comments are relevant to when the claimant became the present owner of the subject property and whether the laws that are the basis for the claim are exempt under ORS 197.352(3). The comments have been considered by the department in preparing this report. (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 criterion, whichever is later.

Findings of Fact

This claim was submitted to DAS on June 21, 2006, for processing under OAR 125, division 145. The claim identifies Senate Bill 100 and "related ORS and LCDC" regulations, and Jackson County's land use regulations 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 claimant, John Atkins Jr, acquired an interest in the property from his mother, Eleanor Atkins, on October 12, 1981, as reflected by a deed included in the claim. However, on October 29, 1998, Eleanor Atkins was awarded a life estate in the subject property as reflected by a Judgment of Dissolution of Marriage and Judgment in Suit in Intervention included with the claim.² Under the terms of the life estate, Eleanor Atkins retains the exclusive right to use the subject property during her lifetime. That conveyance continues to be subject to Eleanor Atkins's life estate. John Atkins Jr's interest in the subject property is subject to Eleanor Atkins' life estate; he does not have any present right to use the property during the term of Eleanor Atkins' life estate. The Jackson County Assessor's Office confirms the claimant's current interest in the subject property.

Conclusions

The claimant, John Atkins Jr, is not an "owner" of the subject property as that term is defined in ORS 197.352(11)(C) because he does not have any present right to use the property that can be restricted by land use regulations.

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.

² In response to the draft staff report, the claimant's attorney asserts that the department has erroneously assumed that Eleanor Atkins' life estate encompasses the entire subject property. He cites the Judgment in Suit in Intervention included with the claim (Jackson County Circuit Court Case No. 97-3724-D-3) as evidence that said life estate encompasses "about one acre of the subject property." Claimant's attorney is incorrect. The Judgment states at page 8, "Plaintiff Eleanor Atkins is further granted a life estate in that portion of the property described as Tax Lots 200 and 1800, a more particular description of which is attached hereto as Exhibit 3, and which encompasses the house that Plaintiff resides in, the land immediately around the house that has historically been used by her, and the road that provides access to her house. Said life estate specifically excludes the right to use the barn." While the Judgment notes that the residence, land immediately around the residence, and road are encompassed within the life estate, it clearly states that Eleanor Atkins is "granted a life estate in that portion of the property described as Tax Lots 200 and 1800" and specifies "a more particular description of which is attached hereto as Exhibit 3[.]" Exhibit 3, however, does not describe the extent of Eleanor Atkins' life estate. Rather, it contains a legal description of tax lot 202 in Section 5. Therefore, based on the information in the record, the Judgment grants Eleanor Atkins a life estate in tax lots 200 and 1800.

John Atkins Jr's future ownership interest in the subject property does not provide him with any present right to use the subject property during the term of Eleanor Atkins' continuing life estate. Therefore, no laws enforced by the Land Conservation and Development Commission (the Commission) or the department restrict the claimant's use of the subject property with the effect of reducing the property's fair market value.

3. Effect of Regulations on Fair Market Value

In order to establish a valid claim, ORS 197.352(1) requires that the land use regulations (described in Section V.(2) of this report) must have "the effect of reducing the fair market value of the property, or any interest therein."

John Atkins Jr's future ownership interest in the subject property does not provide him with any present right to use the subject property during the term of Eleanor Atkins' continuing life estate. Therefore, no laws restrict the claimant's use of the subject property with the effect of reducing the property's fair market value.

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.

John Atkins Jr's future ownership interest does not provide him with any present right to use the subject property during the term of Eleanor Atkins' continuing life estate. 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 record, the department finds that the claim is not valid because the claimant's interest in the subject property does not provide him any present right to use the property that can be restricted by current land use regulations.

Conclusions

Based on the record before the department, the claimant, John Atkins Jr, has not established that he 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 November 21, 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.