

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

IN THE MATTER OF THE CLAIM FOR) FINAL ORDER
COMPENSATION UNDER ORS 197.352) CLAIM NO. M129761
(BALLOT MEASURE 37) OF)
James and Barbara Archibald, CLAIMANTS)

Claimant: James and Barbara Archibald (the Claimant)

Property: Township 35S, Range 1E, Section 4, Tax lot 1000, 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 Reports and Recommendation of DLCD (the DLCD Report), and the Department of Transportation (the ODOT Report), attached to and by this reference incorporated into this order.

ORDER

The Claim is denied as to laws administered by the Department of Transportation for the reasons set forth in the ODOT 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:

In lieu of compensation under ORS 197.352, the State of Oregon will not apply the following laws to James and Barbara Archibald's division of the 80.26-acre subject property into four 20-acre parcels and to their development of a dwelling on each parcel: applicable provisions of Goals 4 and 5, ORS 215 and OAR 660, division 6, enacted or adopted after June 1, 1977. These laws will not apply to the claimants only to the extent necessary to allow them to use the subject property for the use described in this report, and only to the extent that use was permitted when they acquired the property on June 1, 1977.

2. The action by the State of Oregon provides the state's authorization to the claimants to use the subject property for the use described in this report, subject to the standards in effect on June 1, 1977. On that date, the property was subject to compliance with Goals 4 and 5.

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 claimants first obtain 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 claimants 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).

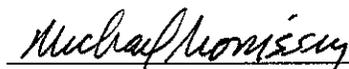
5. Without limiting the generality of the foregoing terms and conditions, in order for the claimants to use the subject property, it may be necessary for them to obtain a decision under ORS 197.352 from a city and/or county and/or metropolitan service district that enforces land use regulations applicable to the property. Nothing in this order relieves the claimants 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 claimants.

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 Transportation as a final order under ORS 197.352 and OAR Chapter 125, division 145.

FOR DLCD AND THE LAND
CONSERVATION AND DEVELOPMENT
COMMISSION:

Lane Shetterly, Director



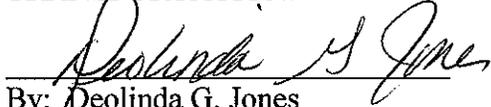
Michael Morrissey, Manager
Measure 37 Services Division DLCD
Dated this 19th day of January, 2007.

FOR THE DEPARTMENT OF
ADMINISTRATIVE SERVICES:



David Hartwig, Administrator
DAS, State Services Division
Dated this 19th day of January, 2007.

FOR THE FOR DEPARTMENT OF
TRANSPORTATION:



By: Deolinda G. Jones
State Right of Way Manager
Oregon Department of Transportation
Dated this 19th day of January, 2007.

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**

January 19, 2007

STATE CLAIM NUMBER: M129761

NAMES OF CLAIMANTS: James and Barbara Archibald

MAILING ADDRESS: PO Box 73
Gold Hill, Oregon 97525

PROPERTY IDENTIFICATION: Township 35S, Range 1E, Section 4
Tax lot 1000
Jackson County

OTHER CONTACT INFORMATION: Mark S. Bartholomew
717 Murphy Road
Medford, Oregon 97504

DATE RECEIVED BY DAS: July 27, 2006

180-DAY DEADLINE: January 23, 2007

I. SUMMARY OF CLAIM

The claimants, James and Barbara Archibald, seek compensation in the amount of \$472,000 for the reduction in fair market value as a result of land use regulations that are alleged to restrict the use of certain private real property. The claimants desire compensation or the right to divide the 80.26-acre subject property into four 20-acre parcels and to develop a dwelling on each parcel. The subject property is located at the geographic coordinates listed above, near Butte Falls, 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 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 James and Barbara Archibald's division of the 80.26-acre subject property into four 20-acre parcels and to their development of a dwelling on each parcel: applicable provisions of Statewide Planning Goals 4 (Forest Lands) and 5 (Natural Resources, Scenic and Historic Areas and Open Spaces), ORS 215 and Oregon Administrative Rules (OAR) 660, division 6, enacted or adopted after June 1, 1977. These laws will not apply to the claimants only to the extent necessary to allow them to use the subject property for the use described in this report, and only

to the extent that use was permitted when they acquired the property on June 1, 1977. (See the complete recommendation in Section VI. of this report.)

III. COMMENTS ON THE CLAIM

Comments Received

On October 31, 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, no written comments were received in response to the 10-day notice.

IV. TIMELINESS OF CLAIM

Requirement

ORS 197.352(5) requires that a written demand for compensation be made:

1. For claims arising from land use regulations enacted prior to the effective date of Measure 37 (December 2, 2004), within two years of that effective date, or the date the public entity applies the land use regulation as an approval criteria to an application submitted by the owner, whichever is later; or
2. For claims arising from land use regulations enacted after the effective date of Measure 37 (December 2, 2004), within two years of the enactment of the land use regulation, or the date the owner of the property submits a land use application in which the land use regulation is an approval criteria, whichever is later.

Findings of Fact

This claim was submitted to DAS on July 27, 2006, for processing under OAR 125, division 145. The claim identifies Goals 2 (Land Use Planning), 3 (Agricultural Lands), 4, 5, 6 (Air, Water and Land Resources Quality), 7 (Areas Subject to Natural Disasters and Hazards), 10 (Housing), 11 (Public Facilities and Services) and 14 (Urbanization); ORS 92, 195, 197 and 215; OAR 660-004-0040(7)(e)(A), 660-011-0060(2), 660-012-0065, 660-012-0070, 660-033-0120, 660-033-0130, 660-033-0135, 731 and 734; wetland regulations, winter range and wildlife regulations; Jackson County's OSR zoning; and "relief from all state laws that prohibit or inhibit the division or development of the property enacted after acquisition" as the basis for the claim. Only laws that were enacted or adopted prior to December 2, 2004, are the basis for this claim.

Conclusions

The claim has been submitted within two years of the effective date of Measure 37 (December 2, 2004), based on land use regulations enacted or adopted prior to December 2, 2004, and is therefore timely filed.

V. ANALYSIS OF CLAIM

1. Ownership

ORS 197.352 provides for payment of compensation or relief from specific laws for “owners” as that term is defined in ORS 197.352. ORS 197.352(11)(C) defines “owner” as “the present owner of the property, or any interest therein.”

Findings of Fact

The claimants, James and Barbara Archibald, acquired the subject property on June 1, 1977, as reflected by a warranty deed included with the claim. The Jackson County Assessor’s Office confirms the claimants’ current ownership of the subject property.

Conclusions

The claimants, James and Barbara Archibald, are “owners” of the subject property as that term is defined by ORS 197.352(11)(C), as of June 1, 1977.

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.

Findings of Fact

The claim indicates that the claimants desire to divide the 80.26-acre subject property into four 20-acre parcels and to develop a dwelling on each parcel, and that the desired use is not allowed under current land use regulations.¹

The claim is based generally on the applicable provisions of state law that require forest land to be planned and zoned for forest uses, and restrict uses on forest-zoned land. The claimants’ property is zoned by Jackson County as Open Space Reserve (OSR) as required by Goal 4, in accordance with ORS 215 and OAR 660, division 6, because the claimants’ property is “forest land” under Goal 4. Goal 4 became effective on January 25, 1975, and requires that forest land be zoned for forest use (see statutory and rule history under OAR 660-015-0000(4)). The forest land administrative rules (OAR 660, division 6) became effective on September 1, 1982, and ORS 215.705 to 215.755 and 215.780 became effective on November 4, 1993 (Chapter 792, Oregon Laws 1993). OAR 660-006-0026 and 660-006-0027 were amended on March 1, 1994, to implement those statutes.

¹ The claim lists numerous state land use laws as applicable to this claim, but does 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’ desired use of the property or do not restrict the use of the claimants’ desired use of the 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.

The claimants acquired the subject property after the adoption of the statewide planning goals but before the Commission acknowledged Jackson County's land use regulations to be in compliance with the statewide planning goals pursuant to ORS 197.250 and 197.251. Because the Commission had not acknowledged the county's plan and land use regulations when the claimants acquired the subject property on June 1, 1977, the statewide planning goals, and Goals 4 and 5 in particular, applied directly to the claimants' property when they acquired it.²

Goal 4 went into effect on January 25, 1975, and was intended to "conserve forest lands for forest uses" and required, "Lands suitable for forest uses shall be inventoried and designated as forest lands. Existing forest land uses shall be protected unless proposed changes are in conformance with the comprehensive plan." Those forest uses were defined as follows: "(1) the production of trees and the processing of forest products; (2) open space, buffers from noise, and visual separation of conflicting uses; (3) watershed protection and wildlife and fisheries habitat; (4) soil protection from wind and water; (5) maintenance of clean air and water; (6) outdoor recreational activities and related support services and wilderness values compatible with these uses; and (7) grazing land for livestock." Specifically, Goal 4 only allowed land divisions that would protect commercial forest lands for commercial forest uses. Dwellings in forest zones could only be allowed if found to be "necessary and accessory" to one of the enumerated forest uses listed in Goal 4.³

Goal 5 also became effective January 25, 1975. The administrative rule implementing Goal 5, OAR 660, division 16 (Requirements and Application Procedures for Complying with Statewide Goal 5), became effective May 18, 1981, but did not apply to landowners until local jurisdictions implemented the Goal 5 process. Jackson County's Big Game Habitat overlay zone was applied to subject property in 1986 and generally requires a minimum parcel size of 40 acres for a non-farm or lot of record dwelling.⁴

² The statewide planning goals became effective on January 25, 1975, and were applicable to legislative land use decisions and some quasi-judicial land use decisions prior to the Commission's acknowledgment of each county's land use regulations. *Perkins v. City of Rajneeshpuram*, 300 Or 1 (1985); *Alexanderson v. Polk County*, 289 Or 427, rev den 290 Or 137 (1980); *Sunnyside Neighborhood Assn. v. Clackamas County*, 280 Or 3 (1977); *Jurgenson v. Union County*, 42 Or App 505 (1979); and *1000 Friends of Oregon v. Benton County*, 32 Or App 413 (1978). After the county's plan and land use regulations were acknowledged by the Commission, the statewide planning goals and implementing rules no longer directly applied to such local land use decisions. *Byrd v. Stringer*, 295 Or 311 (1983). However, statutory requirements continue to apply, and insofar as the state and local provisions are materially the same, the local provisions must be interpreted consistent with the substance of the goals and implementing rules. *Foster v. Polk County*, 115 Or App 475 (1992); *Kenagy v. Benton County*, 115 Or App 131 (1992).

³ Goal 4 prohibited uses that were not enumerated by Goal 4 as permissible uses for forest lands as well as those that were not necessary and accessory to an enumerated forest use. *Lamb v. Lane County*, 7 Or LUBA 137 (1983). Dwellings in forest lands were required to be "necessary and accessory" to show that such dwellings complied with the Goal 4 requirement that local land use regulations must "conserve forest lands for forest uses." *1000 Friends v. LCDC (Curry County)*, 301 Or 447 (1986). A dwelling that may "enhance" forest uses is not "necessary and accessory" to a forest use to the extent required by Goal 4. *1000 Friends of Oregon v. LCDC (Lane County)*, 305 Or 384 (1988). For additional guidance, the Goal 4 provisions were interpreted under OAR 660, division 6, effective on September 1, 1982, in *1000 Friends of Oregon v. LCDC (Lane County)* and in *1000 Friends v. LCDC (Curry County)*.

⁴ OAR 660, division 23 (Procedures and Requirements for Complying with Goal 5), including 660-023-0110 (Wildlife Habitat) became effective September 1, 1996.

No information has been presented in the claim to establish that the claimants' desired division of the 80.26-acre subject property into four 20-acre parcels and to their development of a dwelling on each parcel comply with the Goal 4 and 5 standards in effect when the claimants acquired the subject property in 1977.

Conclusions

The current zoning requirements, minimum lot size and dwelling standards established pursuant to Goals 4 and 5, ORS 215.705 to 215.755 and 215.780 and OAR 660-006-0026 and 660-006-0027 were all enacted or adopted after the claimants acquired the subject property in 1977 and do not allow the claimants' desired division or development of the property. However, the claim does not establish whether or to what extent the claimants' desired use of the subject property complies with the standards for land divisions and development under Goals 4 and 5 in effect when the claimants acquired the property on June 1, 1977.

All of the statewide planning goals listed in the claim were in effect when the claimants acquired the subject property. The claim does not establish that the Goal 5 implementing rules restrict the claimants' desired use of the subject property. Similarly, OAR 660-004-0040(7)(e)(A) does not apply to or restrict the claimants' desired use of the property because that rule applies only to land planned and zoned for rural residential uses. OAR 660-011-0060(2) does not apply to or restrict the claimants' desired use of the property, because that use does not involve the establishment or extension of a sewer system. The claim does not establish that OAR 660-012-0060, 660-012-0065 or 660-012-0070 apply to or restrict the claimants' desired use of the property, because no plan amendment is proposed, and because no transportation improvement has been proposed. OAR 660-033-0120, 660-033-0130 and 660-033-0135 do not apply to or restrict the claimants' desired use of the property because those rules apply to agricultural land, not forest land. Finally OAR 731 and 734 concern the Oregon Department of Transportation in general, and the Highway Division of that Department. The claimants have not identified any aspect of their desired use that is restricted by these rules, and the closest local road to the property (which is accessed via a private easement) is not a state highway.

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 use that the claimants have identified. There may be other laws that currently apply to the claimants' use of the subject property, and that may continue to apply to the claimants' 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 the subject property until there is a specific proposal for that use. When the claimants seek 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 \$472,000 as the reduction in the subject property's fair market value due to the regulations that restrict the claimants' desired use of the property. This amount is based on a comparative market analysis included with the claim.

Conclusions

As explained in Section V.(1) of this report, the claimants are James and Barbara Archibald who acquired the subject property on June 1, 1977. Under ORS 197.352, the claimants are 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 claimants acquired the subject property restrict the claimants' desired use of the property. The claimants estimate that the effect of the land use regulations on the fair market value of the subject property is a reduction of \$472,000.

Without an appraisal or other documentation, and without verification of whether or the extent to which the claimants' desired use of the subject property was allowed under the standards in effect when they 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 Goals 4 and 5, ORS 215 and OAR 660, division 6, which Jackson County has implemented through its current OSR zone. With the exception of provisions of Goals 4 and 5 adopted before the claimants acquired the subject property on June 1, 1977, these state land use regulations were not in effect when the claimants 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 the general statutory, goal and rule restrictions on residential division and development of the subject property are not exempt under ORS 197.352(3)(E) only to the extent they were enacted or adopted after the claimants acquired the property. Provisions of Goals 4 and 5 in effect when the claimants acquired the subject property in 1977 are exempt under ORS 197.352(3)(E) and will continue to apply to the property.

Other laws in effect when the claimants acquired the subject property are exempt under ORS 197.352(3)(E) and will also continue to apply to the claimants' use of the property. In addition, the department notes that ORS 215.730 and OAR 660, division 6, include standards for siting dwellings in forest zones. These provisions include fire protection standards for dwellings and for surrounding forest lands. ORS 197.352(3)(B) specifically exempts regulations "restricting or prohibiting activities for the protection of public health and safety, such as fire and building codes. . . ." Accordingly, siting standards for dwellings in forest zones in ORS 215.730 and OAR 660, division 6, are exempt under ORS 197.352(3)(B). These standards include OAR 660-006-0029.

There may be other laws that continue to apply to the claimants' 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 claimants seek a building or development permit to carry out a specific use, it may become evident that other state laws currently apply to that use and may continue to 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 use that the claimants have 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 claimants should be aware that the less information they have 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 their 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 claimants' desired use of the subject property. The claim asserts that existing land use regulations enforced by the Commission or the department have the effect of reducing the fair market value of the subject property by \$472,000. 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 claimants' desired use of the property was allowed under the standards in effect when they 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 James and Barbara Archibald to use the subject property for a use permitted at the time they acquired the property on June 1, 1977.

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 James and Barbara Archibald's division of the 80.26-acre subject property into four 20-acre parcels and to their development of a dwelling on each parcel: applicable provisions of Goals 4 and 5, ORS 215 and OAR 660, division 6, enacted or adopted after June 1, 1977. These laws will not apply to the claimants only to the extent necessary to allow them to use the subject property for the use described in this report, and only to the extent that use was permitted when they acquired the property on June 1, 1977.
2. The action by the State of Oregon provides the state's authorization to the claimants to use the subject property for the use described in this report, subject to the standards in effect on June 1, 1977. On that date, the property was subject to compliance with Goals 4 and 5.
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 claimants first obtain 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 claimants 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 claimants to use the subject property, it may be necessary for them 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 claimants 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 claimants.

VII. COMMENTS ON THE DRAFT STAFF REPORT

The department issued its draft staff report on this claim on January 3, 2007. 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.

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

OREGON DEPARTMENT OF TRANSPORTATION

Final Staff Report and Recommendation

January 19, 2007

STATE CLAIM NUMBER: M 129761

NAME OF CLAIMANT: James & Barbara Archibald

IDENTIFICATION OF PROPERTY: Township 35, Range 1E:
Section 4, Tax Lot 1000;
Jackson County

OTHER CONTACT INFORMATION: Mark S. Bartholomew
Attorney at Law
717 Murphy Road
Medford, OR 97504

DATE RECEIVED BY DAS: July 27, 2006

180-DAY DEADLINE: January 23, 2007

I. CLAIM

See Department of Land Conservation and Development (DLCD) Staff Report.

II. SUMMARY OF STAFF RECOMMENDATION

Based on the findings and conclusions set forth below, the Department of Transportation (the department) has determined that the claim is not valid. The department has determined that the claim does not identify a state land use regulation that the department has enforced since December 2, 2004 in a manner that restricts the claimants' right to divide the property into four 20-acre lots, or that has the effect of reducing the fair market value of the claimants' property.

Additionally, the Oregon Administrative Rules cited in the claim which relate to the department are exempt pursuant to ORS 197.352(3).

III. COMMENTS ON THE CLAIM

See Department of Land Conservation and Development (DLCD) Staff Report.

IV. TIMELINESS OF CLAIM

Requirement

See Department of Land Conservation and Development (DLCD) Staff Report.

Findings of Fact

Exhibit 4 to the claim submitted July 27, 2006, identifies specific regulations as applying to the claimants' ability to use the land by subdividing the property into four 20-acre lots. The regulations identified in the claim include Oregon Administrative Rules, chapter 731 and chapter 734. Only laws that were enacted prior to December 2, 2004, the effective date of ORS 197.350 are the basis for this claim. (See citations of administrative rule history of the Oregon Administrative Rules.)

Conclusions

The claim has been submitted within two years of December 2, 2004, the effective date of ORS 197.350, based on land use regulations adopted prior to December 2, 2004, and is therefore timely filed.

V. ANALYSIS OF CLAIM

1. Ownership

ORS 197.350 provides for payment of compensation or relief from specific laws for "owners" as that term is defined in ORS 197.352. ORS 197.350(11)(C) defines "owner" as "the present owner of the property, or any interest therein."

Findings of Fact

The findings of the Staff Report of the Department of Land Conservation and Development on this claim regarding ownership are incorporated into this report by this reference.

Conclusions

The conclusions of the Staff Report of the Department of Land Conservation and Development on this claim regarding ownership are incorporated into this report by this reference.

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 “state land use regulation” 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 claimants or a family member acquired the property.

Findings of Fact

The claim states in relevant part that:

“Applicants wish to subdivide their property into marketable lots of 20 acres each, or to the maximum extent allowable at the time of acquisition for future home sites.”

The claim further states that:

“Applicants are requesting relief from any and all limitations on residential use (20-acre home sites). Numerous regulations enacted after Applicants’ acquisition strictly forbid such contemplated development, with no recourse.”

In the claim submitted to DAS, the claimants cite several sections of Oregon Administrative Rules and Oregon Revised Statutes, including OAR 731 and OAR 734.

In order for a claimant to establish an entitlement to relief under Measure 37, there must be a showing of at least the following:

- The claimants’ use of the property is restricted by a state “land use regulation”;
- The state agency has taken some action, after December 2, 2004, to enforce the land use regulation;
- The enforcement of the land use regulation also reduces the fair market value of the property in question; and
- The law is not one that was adopted to protect public health and safety, or that is otherwise exempt under ORS 197.352(3).

The claim does not identify any “land use regulation” that is administered by the department as that term is defined in subsection ORS 197.352(11)(B). Neither Chapters 731 nor 734 of the Oregon Administrative Rules are state “land use regulations.” The only state administrative rules that are “land use regulations” are rules of the Land Conservation and Development Commission, and administrative rules regulating farming and forest practices. None of the state administrative rules in OAR Chapters 731 or 734 are rules of LCDC or regulate farm or forest practices.

Additionally, to the extent that OAR 734 is applicable it is not a land use regulation because it generally regulates the use of *state highways*, not the use of private real property.¹

The department has taken no action since the effective date of ORS 197.352 with respect to claimants or claimants' property concerning the provisions of the administrative rules listed in the claim.

Conclusions

The laws cited in the claim and administered by the department are not state "land use regulations." Until the claimants seek some particular action from the department, the department is unable to determine which of the laws in the cited administrative rules may apply to the property. As a result, the claimants have failed to identify a state land use regulation that has been enforced as to the claimants' use of their property in a manner that restricts its use. Since December 2, 2004, the department has not enforced a land use regulation that restricts the subdividing the property into four 20-acre lots.

3. Effect of Regulations on Fair Market Value

In order to establish a valid claim, ORS 197.352(1) requires that any laws 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 asserts an estimated reduction in value of \$472,000.00 resulting from enactment or enforcement of land use regulations.² The claim does not include an appraisal, nor does it define what portion, if any, of the alleged reduction in value is attributed to the department's regulations as opposed to other land use regulation.

Conclusions

To state a claim under ORS 197.352(1), claimants must allege some reduction in fair market value of their property, allegedly caused by a land use regulation which restricts the use of the property. Based on the record currently before the department, the department concludes that there are no land use regulations identified in the claim and enforced by the department since December 2, 2004 that restrict the use of the subject property or that have the effect of reducing the fair market value.

¹ The property neither abuts nor has direct access to a state highway.

² This value is apparently derived from a "comparative market analysis" which, using lots that were between 40 and 200 acres in size, and also between 10 and 40 acres in size, averaged listings from a multiple listing service. It does not appear to account for the cost of providing water or sewer/septic, etc. to the newly created lots.

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.

Findings of Fact

Laws regulating access to state highways are laws “restricting or prohibiting activities for the protection of public health and safety * * *.” ORS 197.352(3)(B). The expressed purpose of the laws is “to provide a safe and efficient transportation system through the preservation of public safety, the improvement and development of transportation facilities, the protection of highway traffic from the hazards of unrestricted and unregulated entry from adjacent property, and the elimination of hazards due to highway grade intersections.”³

Under ORS 197.352(3)(A), laws “restricting or prohibiting activities commonly and historically recognized as public nuisances under common law” are exempt. Under common law, narrowly construed, obstructing public thoroughfares is a public nuisance. Laws that restrict or prohibit activities to prevent the obstruction of public streets are exempt under ORS 197.352(3)(A).

Conclusions

The Department concludes that based on the information in its record, the claimants have failed to identify a state law that restricts the use of their property and that is not exempt under ORS 197.352. As a result, the claim must be denied as to laws administered by the Oregon Department of Transportation.

VI. FORM OF RELIEF

ORS 197.352(1) provides for payment of compensation to an owner of private real property if the department has enacted or enforced a law that restricts 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 to allow the present owner to carry out a use of the property permitted at the time the present owner acquired the property.

Findings of Fact

Based on the findings and conclusions set forth in this report, no state land use regulations enforced by the department restrict the claimant’s use of the property in a

³ OAR 734-051-0020.

manner that reduces the fair market value of the property and that involve a law that is not exempt.

Conclusion

Based on the foregoing findings and conclusions, the claimants have not established entitlement to relief under ORS 197.352(1) as to laws administered by the Department of Transportation. As a result, the department recommends that the claim be DENIED.

VII. NOTICE OF OPPORTUNITY TO COMMENT

The department issued its draft staff report on this claim on January 3, 2007. 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. No comments were received.