

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

IN THE MATTER OF THE CLAIM FOR) FINAL ORDER
COMPENSATION UNDER ORS 197.352) CLAIM NO. M129788
(BALLOT MEASURE 37) OF)
Irving C. and Jeanette E. Stevens, CLAIMANTS)

Claimants: Irving C. and Jeanette E. Stevens (the Claimants)

Property: Township 5N, Range 10W, Section 30, Tax lot 8500, Clatsop County
(the Property)

Claim: The demand for compensation and any supporting information received from the
Claimants by the State of Oregon (the Claim).

Claimants submitted the Claim to the State of Oregon under ORS 197.352. Under OAR 125-145-0010 *et seq.*, the Department of Administrative Services (DAS) referred the Claim to the Department of Land Conservation and Development (DLCD) as the regulating entity. This order is based on the record herein, including the Findings and Conclusions set forth in the Final Staff Report and Recommendation of DLCD (the DLCD Report), and the Oregon Department of Parks and Recreation (the OPRD 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.

The Claim is denied as to laws administered by the Oregon Department of Parks and Recreation, for the reasons set forth in the OPRD Report.

This Order is entered by the Director of the DLCD as a final order of DLCD and the Land Conservation and Development Commission under ORS 197.352, OAR 660-002-0010(8), and OAR 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 Oregon Board and Department of Parks and Recreation as a final order of the Board under ORS 197.352, OAR 629-001-0057, and OAR Chapter 125, division 145.

FOR DLCD AND THE LAND
CONSERVATION AND DEVELOPMENT
COMMISSION:

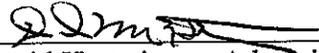
Lane Shetterly, Director



Cora R. Parker, Deputy Director
DLCD

Dated this 26th day of January, 2007.

FOR THE DEPARTMENT OF
ADMINISTRATIVE SERVICES:



David Hartwig Administrator
DAS, State Services Division

Dated this 26th day of January, 2007.

FOR THE OREGON BOARD OF PARKS
AND RECREATION AND THE OREGON
DEPARTMENT OF PARKS AND
RECREATION:



Tim Wood, Director
OPRD

Dated this 26th 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 26, 2007

STATE CLAIM NUMBER: M129788

NAMES OF CLAIMANTS: Irving C. and Jeanette E. Stevens

MAILING ADDRESS: PO Box 515
Cannon Beach, Oregon 97110

PROPERTY IDENTIFICATION: Township 5N, Range 10W, Section 30
Tax lot 8500
Clatsop County

OTHER CONTACT INFORMATION: Richard Stephens
Groen, Stephens & Klinge LLP
11100 NE 8th Street, Suite 750
Bellevue, WA 98004

OTHER INTEREST IN PROPERTY: Ryan and Stephanie Snyder
Surfsand Resort

William G. and Georgiana F. Hay¹

DATE RECEIVED BY DAS: August 1, 2006

180-DAY DEADLINE: January 28, 2007

I. SUMMARY OF CLAIM

The claimants, Irving and Jeanette Stevens, seek compensation in the amount of \$2 million for the reduction in fair market value as a result of land use regulations that are alleged to restrict the use of certain private real property. The claimants desire compensation or “to extend a seawall on front of the property so that it may be used consistent with its current zoning, namely, motel use.” The property is described in the claim as tax lot 8500, containing 0.67 acres, and is located south of Harrison Street on the ocean shore in the City of Cannon Beach, in Clatsop County. (See claim.)

¹ Clatsop County Circuit Court decree No. 27734 (dated June 2, 1971) provides William and Georgiana Hay with five separate perpetual easements for beach access paths across the subject property.

II. SUMMARY OF STAFF RECOMMENDATION

Based on the findings and conclusions set forth below, the Department of Land Conservation and Development (the department) has determined that the claim is not valid as to ORS 196.810 and Statewide Planning Goal 18 (Beaches and Dunes) for several reasons.² First, the claimants do not presently own a property right to carry out their desired use. As a result, no state land use regulation restricts the claimants' desired use of the property or can have the effect of reducing its fair market value. Second, concerning ORS 196.810, that statute no longer applies to the claimants' desired use of the property. Finally, regarding Goal 18, that state land use regulation is exempt from ORS 197.352 because it restricts or prohibits activities in order to protect public health and safety. (See the complete recommendation in Section VI. of this report.)

III. COMMENTS ON THE CLAIM

Comments Received

On November 20, 2006, pursuant to Oregon Administrative Rules (OAR) 125-145-0080, the Oregon Department of Administrative Services (DAS) provided written notice to the owners of surrounding properties. According to DAS, three written comments were received in response to the 10-day notice.

Some of the comments are relevant to whether the claimants' desired use of the property would interfere with public rights to use the dry sand area of the beach, and whether the proposed use would pose a threat to public health and safety. These comments have been considered in 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 criteria, whichever is later.

² The claim specifies four state land use regulations: Goal 18, ORS 196.810 and 390 and OAR 736-020. ORS 390 and OAR 736-020 are statutes and rules administered by the Oregon Parks and Recreation Department (OPRD) and are addressed by OPRD in a separate report on this claim.

Findings of Fact

This claim was submitted to DAS on August 1, 2006, for processing under OAR 125, division 145. The claim identifies Goal 18, ORS 196.810 and 390 and OAR 736, division 20, 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, Irving and Jeanette Stevens, acquired the subject property on June 7, 1958, as reflected by a bargain and sale deed included with the claim. However, under *Stevens v. City of Cannon Beach*, 317 Or 131, 854 P2d 449 (1993), the claimants do not own the right to exclusive use of the dry sand portion of the subject property. The department finds, based on the record for this claim and on the findings in the OPRD report for this claim, that the desired use would interfere with the public’s rights to use the dry sand portion of the subject property. As a result, at least as to the dry sand portion of the subject property, the claimants do not own a property right to carry out their desired use.

In addition, according to materials provided with the claim, on July 9, 1979, the claimants entered into a fifty-year ground lease terminating on May 30, 2029 (with an option to extend). Under the terms of that lease, the right to construct improvements on the property has been conveyed to the lessee. As a result, the claimants are not the present owners of an interest in the subject property that has been restricted by a state land use regulation, or an interest in the property that has had its fair market value reduced by a state land use regulation.

Similarly, under Clatsop County Circuit Court decree No. 27734 (dated June 2, 1971), there are five separate perpetual easements for beach access paths across the subject property. It appears that the claimants’ desired use of the property would conflict with the rights granted through those easements.

Conclusions

For the foregoing reasons, the claimants, Irving and Jeanette Stevens, do not own the present right to carry out the use of the subject property that is described in their claim.

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 provides that Goal 18 and ORS 196.810 restrict the rights of the claimants to develop and maintain a seawall structure on the subject property.

The claim states that "ORS 196.810 has been applied to the Stevens proposed sea wall in the past, although they do not propose to fill waters of the state." In *Stevens v. City of Cannon Beach*, 317 Or 131, 134 n 4, 854 P2d 449 (1993), the Supreme Court notes that OPRD findings of facts denying the permit included "they had failed to obtain the permit required by ORS 196.810 for fill removal."

In 1999, the statutory requirements for permits along the ocean shore were amended by Senate Bill 11. Or Laws 1999, ch 373, section 1. As a result of these statutory changes, ORS 196.810 no longer applies to the claimants' desired use.

The subject property is within the City of Cannon Beach. The portion of the subject property located east of the state's statutory Vegetation Line (ORS 390.770) is currently zoned by the City of Cannon Beach as Residential Motel (RM), Oceanfront Management Overlay (OM) and Flood Hazard Overlay (FHO). The portion of the property that is located west of the state's statutory Vegetation Line is also zoned by the city as OM and FHO.

The claimants' property is subject to Goal 18 because it is within a "beach and dune" area as defined by Goal 18. Goal 18 became effective on January 1, 1977, and required that "beach and dune lands," as defined by the Goal, be zoned beach and dune. The city's comprehensive plan Goal 18 element was first acknowledged by the Commission on June 5, 1980. Goal 18 prohibits residential developments and commercial and industrial buildings on beaches, active foredunes, on other foredunes which are conditionally stable and that are subject to ocean undercutting or wave overtopping and on interdune areas (deflation planes) that are subject to ocean flooding. Other development in these areas is permitted only if certain findings can be made. A portion of the claimants' property east of the dry sand area consists of active dunes or conditionally stable dunes that are subject to ocean undercutting or wave overtopping.

The claimants' desired use is to build a seawall in order to allow for residential or commercial development. That particular use is not allowed under Goal 18, although a seawall may be allowed under certain other circumstances.

The subject property is also within an area designated as a "Velocity Zone" in the Federal Emergency Management Agency flood maps for Clatsop County. Such areas are subject to periodic ocean flooding accompanied by wave velocity forces. Properties within areas with that designation are subject to the restrictions prescribed by the City of Cannon Beach's FHO zone.

Conclusions

The current requirements of Goal 18 would restrict the claimants' desired use of the property if the claimants held an interest in the property that included the right to carry out 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."

As explained in Section V.(2) of this report, the claimants, Irving and Jeanette Stevens, have not established that ORS 196.810 or Goal 18 apply to or restrict an interest in the subject property that they own. Accordingly, the department finds that these regulations have not had any effect on an interest in the property that the claimants own.

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 Goal 18, which the City of Cannon Beach has implemented through provisions of its OM zone. Goal 18 is, in pertinent part:

To conserve, protect, where appropriate develop, and where appropriate restore the resources and benefits of coastal beach and dune areas; and

To reduce the hazard to human life and property from natural or man-induced actions associated with these areas.

Because Goal 18 is a state land use regulation "restricting or prohibiting 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," it is exempt under ORS 197.352(3)(B) even if the claimants did own an interest in the property that included the right to carry out their desired use.

Conclusions

This claim must be denied on the basis that Goal 18 is exempt under ORS 197.352(3) because it restricts or prohibits activities in order to protect public health and safety by avoiding development subject to coastal hazards and that exacerbates hazards to nearby properties.

This report addresses only those state laws that are identified in the claim and that are administered by the department. 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 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 the use of the property.

VI. RELIEF

ORS 197.352(1) provides for payment of compensation to an owner of private real property if the Commission or the department has enforced one or more laws that restrict the use of the property in a manner that reduces its fair market value. In lieu of compensation, the department may choose to not apply the law in order to allow the present owner to carry out a use of the property permitted at the time the present owner acquired the property. The Commission, by rule, has directed that if the department determines a claim is valid, the Director of the department must provide only non-monetary relief unless and until funds are appropriated by the legislature to pay claims.

Findings of Fact

Based on the record for this claim, the claimants have not established that they own an interest in the property that has been restricted by ORS 196.810 or Goal 18, nor that the fair market value of an interest in the property that they own has been reduced by ORS 196.810 or Goal 18. ORS 196.810 does not apply to the claimants' desired use of the property, and Goal 18 is exempt under ORS 197.352(3)(B).

Conclusions

Based on the record before the department, the claimants, Irving and Jeanette Stevens, have not established that they are entitled to relief under ORS 197.352 as a result of state 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 January 5, 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.

ORS 197.352 (BALLOT MEASURE 37) CLAIM FOR COMPENSATION

**OREGON DEPARTMENT OF PARKS AND RECREATION
Final Staff Report and Recommendation**

January 26, 2007

STATE CLAIM NUMBER: M129788

NAMES OF CLAIMANTS: Irving C. and Jeanette E. Stevens

MAILING ADDRESS: 1164 Ecola Court
P.O. Box 515
Cannon Beach , Oregon 97110

PROPERTY IDENTIFICATION: Township 5N, Range 10W, Section 30
Tax lot 8500
Clatsop County

OTHER CONTACT INFORMATION: Richard Stephens
Groen, Stephens & Klinge LLP
1100 NE 8th St. Suite 750
Bellevue, WA 98004

OTHER INTEREST IN PROPERTY: Ryan and Stephanie Snyder
Surfsand Resort

William G. and Georgiana F. Hay¹

DATE RECEIVED BY DAS: August 1, 2006

180-DAY DEADLINE: January 28, 2007

I. SUMMARY OF CLAIM

The claimants, Irving and Jeanette Stevens, seek compensation in the amount of \$2,000,000 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 "to extend a seawall on front of the property so that it may be used consistent with its current zoning, namely, motel use." The property is described in the claim as tax lot 8500, containing 0.67 acres, and is located south of Harrison Street on the ocean shore in the City of Cannon Beach, in Clatsop County. (See claim.)

¹ Clatsop County Circuit Court June 2, 1971 decree No. 27734, providing William and Georgiana Hay with five separate perpetual easements for beach access paths across the subject property.

II. SUMMARY OF STAFF RECOMMENDATION

Based on the findings and conclusions set forth below, the Oregon Parks and Recreation Department (OPRD) has determined that the claim is not valid as to ORS 390 or as to OAR 736-020 for several reasons.² First, the claimants do not presently own a property right to carry out their desired use. As a result, no state land use regulation restricts the claimants' desired use of the property or can have the effect of reducing its fair market value. Second, concerning OAR 736-020, those rules are not state land use regulations under ORS 197.352. Third, OPRD has not enforced the requirement for a permit for a structure under ORS chapter 390 since the effective date of ORS 197.352. Claimants have not sought, and OPRD has not acted on an application for a permit. As a result, the written demand of claimants does not meet the requirement of ORS 197.352(1) that the claimant show that the public entity enforces an existing state land use regulation. Finally, the requirement to obtain a permit for a structure on the ocean shore under ORS 390 does not restrict any real property right that the claimants own, and the requirement for a permit is a regulation restricting an activity to protect public health and safety and is therefore exempt under ORS 197.352(3). (See the complete recommendation in Section VI. of this report.)

III. COMMENTS ON THE CLAIM

Comments Received

On November 20, 2006, pursuant to Oregon Administrative Rules (OAR) 125-145-0080, the Oregon Department of Administrative Services (DAS) provided written notice to the owners of surrounding properties. According to DAS, three written comments, evidence or information were received in response to the 10-day notice. These comments were considered in preparing this report.

IV. TIMELINESS OF CLAIM

OPRD adopts by reference the findings and conclusions of the DLCDC report on this claim for this section.

V. ANALYSIS OF CLAIM

1. Ownership

OPRD adopts by reference the findings and conclusions of the DLCDC report on this claim for this section.

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

² The claim specifies four state land use regulations: ORS 390, OAR 736-20, LCDC Goal 18, and ORS 196.810. ORS 196.810 and Goal 18 are addressed in a separate report on this claim by the Department of Land Conservation and Development (DLCD).

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 asserts that the requirements to obtain a permit to construct a structure on the ocean shore under OAR 736-20 and ORS 390 restrict the claimants' rights to build a seawall in order to develop a motel.

As a preliminary matter, OAR 736-020 is not a state "land use regulation" under ORS 197.352. That statute contains a specific definition of what laws are a "land use regulation" subject to the statute. The definition includes certain state agency regulations, but does not include regulations of the Oregon Parks and Recreation Commission.

In addition, under ORS 197.352(1), a person has a valid claim only if the public entity enforces the pertinent "land use regulation" after the effective date of Measure 37. ORS applies to existing laws, but only to the extent that enforcement occurs *after* December 2, 2004. In this case, claimants have not sought a permit to construct a structure from OPRD, and as a result any claim with respect to these land use regulations is premature. ORS 197.352(7) does authorize claims to be filed prior to filing a land use applications with a local government, but there is no corresponding provision with regard to state agencies. As a result, this claim must be denied.

In *Thornton v. Hay*, 254 Or 584, 462 P2d 671 (1969), the Oregon Supreme Court considered public and private rights on the "dry-sand area" of the beach (land lying between the line of mean high tide and the vegetation line). 254 Or at 586. The court determined that the state could enjoin owners of beachfront property from constructing fences enclosing the dry-sand area, even though their record title included that area. The court reasoned that, under the doctrine of custom, the public had a right to use the dry-sand area of the ocean shore, and a private upland owner could not interfere with the public right to use that area.

"The dry-sand area in Oregon has been enjoyed by the general public as a recreational adjunct of the wet-sand or foreshore area since the beginning of the state's political history. * * * From the time of the earliest settlement to the present day, the general public has assumed that the dry-sand area was a part of the public beach, and the public has used the dry-sand area for picnics, gathering wood, building warming fires, and generally as a headquarters from which to supervise children or to range out over the foreshore as the tides advance and recede." 254 Or at 588.

Thus, while the state generally owned the foreshore, and the record title holder owned the uplands, neither the state nor the record-title holder could be said to "'own' the full bundle of rights normally connoted by the term 'estate in fee simple.'" *Id.* at 591-92. Application of the doctrine of custom to the dry-sand area, said the court, "takes from no man anything which he has had a legitimate reason to regard as exclusively his." *Id.* at 599.

The Oregon Supreme Court reaffirmed this view in a case concerning claimants' property. *Stevens v. City of Cannon Beach*, 317 Or 131, 854 P2d 449 (1993), *cert denied* 510 U.S. 1207, 114 S Ct 1332, 127 L Ed2d 679 (1994). The court rejected Claimants' claim that their property had been "taken" under the Oregon or federal Constitutions under the standard established in

Lucas v. South Carolina Coastal Council, 505 US 1003, 112 S Ct 2886, 120 L Ed2d 798 (1992). The court explained that its decision in *Thornton* had not announced a new rule regarding property rights, but rather had recognized a preexisting public right, thus enunciating one of Oregon's "background principles of * * * the law of property." 317 Or at 143. Accordingly, Claimants had never had the property interests they claimed were taken. *Id.* See also *Hay v. Bruno*, 344 F Supp 286, 289 (D Or 1972) (*Thornton* did not make a sudden retroactive change in the law effecting a taking).

The Attorney General's formal opinion concerning 2000 Ballot Measure 7 summarized the relevant decisions as follows:

"These decisions establish that (1) the public has the right to recreational use of the dry-sand area, (2) an upland property owner's property interests do not include the right to interfere with that public use, and (3) therefore, any government regulation that prevents private property owners from interfering with that public use is not a 'taking' of private property." 49 Op Atty Gen 284, 399 (2001).

The Measure 7 Opinion concludes:

"To the extent that the Beach Bill and implementing regulations restrict uses that could not be exercised without infringing on property rights that belong to the public under *Thornton v. Hay*, those regulations are not restrictions on the use of private real property. * * * For example, ORS 390.640 requires a permit for any 'improvement,' as defined in ORS 390.605(1), within the ocean shore. Requiring a permit for the construction of a fence, wall or any other structure that blocks or otherwise interferes with public recreational use of the ocean shore does not restrict a use of private property to which the owner has a right. Additionally, the safety standards adopted under the Beach Bill provide that any improvements "shall minimize obstructions to pedestrians or vehicles going onto or along the ocean shore area." OAR 736-020-0025. If a permit to build a boardwalk were denied on the ground that it failed this standard, Measure 7 would not be implicated." *Id.* at 399.

Claimants state "ORS 390 requires a permit for a structure west of the coordinate line." Claim form at 7. The OPRD denial of claimants' request for a permit to build a seawall within the dry sand area of the beach that formed a basis for their complaint for inverse condemnation at issue in *Stevens*, included findings of fact that: "that the seawall would remove 12,500 feet of dry sand area used extensively for public recreation; that recreational access would be impaired;" and "that the seawall would present an escape route obstacle to beach users (particularly to senior citizens and others whose mobility is impaired[.]" *Stevens*, 317 Or at 134 n 4. Based on the foregoing, claimants never had a right to use the property in the manner described in their claim; therefore ORS chapter 390 does not restrict the use of claimants' interest in the property.

Conclusions

OAR 736-020 is not a state land use regulation under ORS 197.352. OPRD has not enforced either OAR 736-020 or ORS 390 with respect to claimants' desired use of the property since the effective date of ORS 197.352, and as a result the claim is premature. Finally, because the

claimants do not own a property right to build their desired sea wall to enable development of a motel, because that use would interfere with the public rights to the use of the ocean shore, the identified state land use regulations do not restrict the claimants' rights to use the property. For all of these reasons, OPRD staff recommend that the claim be denied.

3. Effect of Regulations on Fair Market Value

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

As explained in Section V.(2) of this report, the claimants, Irving and Jeanette Stevens, have not established that OAR 736-020 or ORS 390 restrict an interest in the subject property that they own. Accordingly, the department finds that these regulations have not had any effect on an interest in the property that the claimants own.

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 and Conclusions

The claim is based on ORS 390 and OAR 736-020. These laws were enacted and adopted to restrict activities in order to protect public safety. ORS 390.640 provides that: "In order to promote the public health, safety and welfare, to protect the state recreation areas recognized and declared by ORS 390.610 and 390.615, *to protect the safety of the public using such areas*, and to preserve values adjacent to and adjoining such areas, the natural beauty of the ocean shore and the public recreational benefit derived therefrom, it is necessary to control and regulate improvements on the ocean shore." (emphasis added). As a result the requirements to obtain an ocean shores permit under ORS 390 and OAR 736-020 are exempt under ORS 197.352(3)(B).

Conclusions

This claim must be denied on the alternate bases described in this report. The claimants have: (1) failed to show that OPRD has enforced a state land use regulation that restricts their desired use of the property since the effective date of Measure 37; (2) failed to establish that they own an interest in the property that includes the right to carry out their desired use; (3) failed to establish that the requirements in OAR 736-020 or ORS 390 to obtain a permit restrict a right that they own; (4) failed to establish that these laws have had an effect on the fair market value of their interest in the property; and failed to establish that OAR 736-020 and ORS 390 are not exempt under ORS 197.352(3). For these reasons, OPRD staff recommend that this claim be denied.

VI. RELIEF

Based on the record for this claim and the foregoing findings of fact and conclusions of law, the claimants have not established that they are entitled to relief under ORS 197.352. 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 January 5, 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.