

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. M129830
(BALLOT MEASURE 37) OF)
Spee Dee Haulers, Inc.,)
an Oregon corporation, CLAIMANTS)

Claimants: Spee Dee Haulers, Inc., an Oregon corporation (the Claimants)

Property: Township 2N, Range 13E, Section 29, Tax lot 100, Wasco 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) attached to and by this reference incorporated into this order.

ORDER

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

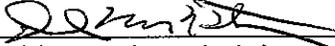
This Order is entered by the Director of the DLCD as a final order of DLCD and the Land Conservation and Development Commission under ORS 197.352, OAR 660-002-0010(8), and OAR chapter 125, division 145, and by the Administrator for the State Services Division of the DAS as a final order of DAS under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

FOR DLCD AND THE LAND
CONSERVATION AND
DEVELOPMENT COMMISSION:


Lane Shetterly, Director
DLCD

Dated this 1st day of February, 2007.

FOR THE DEPARTMENT OF
ADMINISTRATIVE SERVICES:


David Hartwig, Administrator
DAS, State Services Division
Dated this 1st day of February, 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)

ORS 197.352 (BALLOT MEASURE 37) CLAIM FOR COMPENSATION

**OREGON DEPARTMENT OF LAND CONSERVATION AND DEVELOPMENT
Final Staff Report and Recommendation**

February 1, 2007

STATE CLAIM NUMBER: M129830

NAME OF CLAIMANT: Spee Dee Haulers, Inc.,
an Oregon corporation

MAILING ADDRESS: PO Box 35
The Dalles, Oregon 97058

PROPERTY IDENTIFICATION: Township 2N, Range 13E, Section 29
Tax lot 100
Wasco County

OTHER CONTACT INFORMATION: Steven B. Anderson
PO Box 135
Mosier, Oregon 97040

DATE RECEIVED BY DAS: August 10, 2006

180-DAY DEADLINE: February 6, 2007

I. SUMMARY OF CLAIM

The claimant, Spee Dee Haulers, Inc., seeks compensation in the amount of \$7,043,734 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 156-acre subject property into 1) one 27.3-acre parcel for commercial development and 2) divide the remaining approximately 128 acres into multiple parcels ranging from 0.38 acre to 10 acres in size and develop a dwelling on each parcel. The property is located along Highway 30 near The Dalles, in Wasco County. (See claim.)

II. SUMMARY OF STAFF RECOMMENDATION

Based on the findings and conclusions set forth below, the Department of Land Conservation and Development (the department) has determined that the claim is not valid with respect to the 3.7-acre portion of the subject property that lies south of Chenoweth Creek and within the Urban Growth Boundary (UGB) of the City of The Dalles because neither the Land Conservation and Development Commission (the Commission) nor the department has enforced laws that restrict the claimant's use of that portion of the private real property. (See the complete recommendation in Section VI. of this report.)

The department has further determined that the claim is not valid as to the approximately 152-acre portion of the subject property which lies north of Chenoweth Creek and within the Columbia River Gorge National Scenic Area. (See the complete recommendation in Section VI. of this report.)

III. COMMENTS ON THE CLAIM

Comments Received

On November 28, 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.

The comments are relevant to 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.

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 August 10, 2006, for processing under OAR 125, division 145. The claim identifies ORS 196, 197 and 215 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, Spee Dee Haulers, Inc., acquired the subject property on January 10, 1979, as reflected by a land sale contract included with the claim. The Wasco County Assessor’s Office confirms the claimant’s current ownership of the subject property.

Conclusions

The claimant, Spee Dee Haulers, Inc., is an “owner” of the subject property as that term is defined in ORS 197.352(11)(C), as of January 10, 1979.

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 the 156-acre subject property into 1) one 27.3-acre parcel for commercial development and 2) divide the remaining approximately 128 acres into multiple parcels ranging from 0.38 acre to 10 acres in size and develop a dwelling on each parcel. It indicates that the use is not allowed under current land use regulations.¹

The 3.7-acre portion of the subject property is currently zoned by Wasco County as Residential Mobile Home (RMH). The RMH zone has no fixed minimum lot size. The subject property is within the City of The Dalles’ UGB.

In general, the zoning of a particular property within a UGB is determined by the city or county with land use jurisdiction over the property. In some circumstances, the Commission’s rules or state statutes may apply to a local government decision regarding zoning, but usually, within a UGB, state laws require or encourage a higher intensity of development rather than restrict the use of real property. In this case, the claimant has not demonstrated that any specific state land

¹ The claim summarily lists numerous state land use laws as applicable to this claim, but does not establish how the laws either apply to the claimant’s 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 claimant’s property or do not restrict the use of the claimant’s 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 claimant’s use of the subject property, based on the claimant’s asserted desired use.

use regulation restricts the desired use of real property and has the effect of reducing the fair market value of that real property.

Based on the information in the claim, the department is not able to identify any state laws that restrict the claimant's use of the 3.7-acre portion of the subject property that lies within the City of The Dalles' UGB.

The approximately 152-acre portion of the subject property that lies north of Chenoweth Creek is located within the Columbia River Gorge Scenic Area and is currently zoned by Wasco County as Large Scale Agriculture (A-1) 160-acre minimum.

The claimant acquired the 152-acre portion of the subject property after the adoption of the statewide planning goals, but before the Commission acknowledged Wasco 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 claimant acquired the subject property on January 10, 1979, the statewide planning goals, and Goal 3 in particular, applied directly to the claimant's property when it acquired it.²

As adopted on January 25, 1975, Goal 3 required that agricultural land be preserved and zoned for EFU pursuant to ORS 215. The Goal 3 standard for land divisions involving property where the local zoning was not acknowledged required that the resulting parcels must be of a size that is "appropriate for the continuation of the existing commercial agricultural enterprise within the area." Further, ORS 215.263 (1973 edition) only authorized the partition of land subject to EFU zoning, and required that all divisions of land subject to EFU zoning comply with the legislative intent set forth in ORS 215.243 (Agricultural Land Use Policy). Thus, the claimant's opportunity to divide the subject property when it acquired it in 1979 was limited to land divisions that were consistent with Goal 3, which required that the resulting parcels be (1) appropriate for the continuation of the existing commercial agricultural enterprise in the area and (2) shown to comply with the legislative intent set forth in ORS 215.

Under the Goal 3 standards in effect on January 10, 1979, farm dwellings were allowed if they were determined to be "customarily provided in conjunction with farm use" under ORS 215.213(1)(e) (1973 edition). Non-farm dwellings were subject to compliance with ORS 215.213(3) (1973 edition).

The portion of the subject property located within the Columbia River Gorge National Scenic Area is subject to additional development restrictions, which are required to comply with federal

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 comprehensive plan and implementing 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 applied directly 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. *Forster v. Polk County*, 115 Or App 475 (1992) and *Kenagy v. Benton County*, 115 Or App 131 (1992).

law and which prohibit the desired division and development. The plan and zoning designations for this portion of the property implement the federal Columbia River Gorge National Scenic Area Act and the Columbia River Gorge Commission's Management Plan, as well as ORS 196.105 to 196.165.

Conclusions

The claim does not establish that any state land use regulations restrict the use of the 3.7-acre portion of the claimant's property that lies within the City of The Dalles' UGB. Because the subject property is located within the City of The Dalles' UGB, neither the Commission nor the department enforces laws that require specific zoning of the property. Based on the record before the department, neither the Commission nor the department enforces any laws that restrict the use of that portion of the claimant's real property.

The approximately 152-acre portion of the subject property located within the Columbia River Gorge National Scenic Area is subject to development restrictions as a result of the Scenic Area Act and the Gorge Commission's Management Plan, as well as ORS 196.105 to 196.165.

3. Effect of Regulations on Fair Market Value

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

As explained in Section V.(2) of this report, the claimant, Spee Dee Haulers, Inc., has not established that any state land use regulations restrict the use of the subject property. To the extent that ORS 196.105 to 196.165 apply to the claimant's desired use of the portion of the property outside of the UGB of the City of The Dalles, the claimant has not demonstrated how these state statutes have an effect on the fair market value of the property.

4. Exemptions Under ORS 197.352(3)

ORS 197.352 does not apply to certain land use regulations. In addition, under ORS 197.352(3), certain types of laws are exempt from ORS 197.352.

As explained in Section V.(2) of this report, the claimant, Spee Dee Haulers, Inc., has not established that any state land use regulations restrict the use of the portion of the subject property within the UGB of the City of The Dalles. As to the remainder of the subject property, which is entirely located within the scenic area of the Columbia River Gorge, the use of the property is governed by the Gorge Commission's Management Plan and the county ordinances that implement the Management Plan. Any state or local land use regulations that may apply to the claimant's desired use of the property are regulations that are required to comply with federal law and exempt under ORS 197.352(3)(E), as determined by the Hood River County Circuit Court in *Columbia River Gorge Comm. v. Hood River County et al.* (Cir. Court No. 050051). ORS 197.352(3)(C) specifically exempts land use regulations that are required to comply with federal law. As a result, the claimant's desired use of the 152-acre portion of the subject property within the Columbia River Gorge National Scenic Area is prohibited.

VI. FORM OF RELIEF

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

Findings of Fact

Based on the record for this claim, the claimant has not established that any state laws enforced by the Commission or the department restrict the claimant's desired use of the subject property or have the effect of reducing the fair market value of the subject property. Because one part of the subject property is located within the City of The Dalles' UGB and the other part is located within the scenic area of the Columbia River Gorge, neither the Commission nor the department enforces laws that require specific zoning of the property. For the approximately 152-acre portion of the subject property within the Columbia River Gorge National Scenic Area, land use regulations that are required to comply with federal law prohibit the claimant's desired use. As a result, the claim must be denied with respect to that portion of the subject property.

Conclusions

Based on the record before the department, the claimant, Spee Dee Haulers, Inc., has not established that it is entitled to relief under ORS 197.352(1), as a result of land use regulations enforced by the Commission or the department. Therefore, the department recommends that this claim be denied.

VII. COMMENTS ON THE DRAFT STAFF REPORT

The department issued its draft staff report on this claim on January 16, 2007. 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.