

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. M129868
(BALLOT MEASURE 37) OF)
S.D.S. Co., LLC, a Washington,)
Limited Liability Company, CLAIMANTS)

Claimants: S.D.S. Co., LLC, a Washington, Limited Liability Company
(the Claimants)

Property: Township 2N, Range 11E, Section 8: tax lot 100 (portion outside of
the Columbia River Gorge National Scenic Area)

Township 2N, Range 11E, Section 17: tax lot 400 (portion outside of
the Columbia River Gorge National Scenic Area)

Hood River County (the property)

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

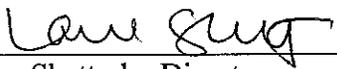
Claimants submitted the Claim to the State of Oregon under ORS 197.352. Under
OAR 125-145-0010 *et seq.*, the Department of Administrative Services (DAS) referred
the Claim to the Department of Land Conservation and Development (DLCD) as the
regulating entity. This order is based on the record herein, 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

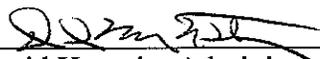
The Claim is denied as to laws administered by DLCD and the Land Conservation and
Development Commission (LCDC) for the reasons set forth in the DLCD Report.

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 7th day of February, 2007.

FOR THE DEPARTMENT OF
ADMINISTRATIVE SERVICES:


David Hartwig, Administrator
DAS, State Services Division
Dated this 7th 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 7, 2007

STATE CLAIM NUMBER: M129868

NAME OF CLAIMANT: S.D.S. Co., LLC, a Washington
Limited Liability Company

MAILING ADDRESS: PO Box 266
Bingen, Washington 98605

PROPERTY IDENTIFICATION: Township 2N, Range 11E,
Section 8: tax lot 100 (portion outside of
the Columbia River Gorge National Scenic
Area)
Section 17: tax lot 400 (portion outside of
the Columbia River Gorge National Scenic
Area)

Hood River County

OTHER CONTACT INFORMATION: James Spadaro
PO Box 266
Bingen, Washington 98605

David J. Petersen
Tonkin Torp, LLP
888 SW Fifth Ave.
Portland, Oregon 97204

DATE RECEIVED BY DAS: August 16, 2006

180-DAY DEADLINE: February 12, 2007

I. SUMMARY OF CLAIM

The claimant, S.D.S. Co., LLC, seeks compensation in the amount of \$19,250,000 for the reduction in fair market value as a result of land use regulations that are alleged to restrict the use of certain private real property. The claimant desires compensation or the right to divide the 744.81-acre subject property into five-acre parcels and to develop a dwelling on each parcel.¹

¹ The claim also indicates that the claimant desires to sell or transfer the subject property or the newly created parcels. In effect, the claimant requests that a decision of the department to "not apply" (waive) certain laws as set

The subject property is located south and west of the intersection of The Dalles-Sandy Wagon Road and Old Dalles Drive in Hood River County. Only the portions of the two tax lots that are *outside* of the Columbia River Gorge National Scenic Area (CRGNSA) are included in this claim. (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 because the claimant's desired use of the subject property was prohibited under the laws in effect when it acquired the subject property on February 1, 1998. (See the complete recommendation in Section VI. of this report.)

III. COMMENTS ON THE CLAIM

Comments Received

On November 22, 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, one written comment was received in response to the 10-day notice.

The comment is relevant to whether a state law restricts the claimant's use of the subject property, and whether the laws that are the basis for the claim are exempt under ORS 197.352(3). In addition, a letter was received from the claimant's attorney concerning the question of the claimant's acquisition date. The letter and comment have been considered by the department in preparing this report. (See the comment and letter in the department's claim file.)

IV. TIMELINESS OF CLAIM

Requirement

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

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

forth in this report be transferable with the property. ORS 197.352 only authorizes a state agency to waive a law in order to allow the current owner a use of the property permitted at the time that owner acquired the property. A determination of transferability is beyond the scope of relief that the department may grant under ORS 197.352. The Oregon Department of Justice has advised the department that "[i]f the current owner of the real property conveys the property before a new use allowed by the public entity is established, then the entitlement to relief will be lost."

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 16, 2006, for processing under OAR 125, division 145. The claim identifies Hood River County Ordinances No. 63 (1976), No. 125 (1984) and No. 236 (2001) as restricting the claimant’s desired use of the subject property. Only laws that were enacted or adopted prior to December 2, 2004, are the basis for this claim.

Conclusions

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

V. ANALYSIS OF CLAIM

1. Ownership

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

Findings of Fact

The claimant, S.D.S. Co., LLC, a Washington Limited Liability Company, acquired the subject property on February 1, 1998, as reflected by the warranty deed included with the claim.² The Hood River County Assessor’s Office confirms the claimant’s current ownership of the subject property.

Conclusions

The claimant, S.D.S. Co., LLC, is an “owner” of the subject property as that term is defined by ORS 197.352(11)(C), as of February 1, 1998.

² According to the claim, the subject property was originally acquired by S.D.S. Co., a Washington general partnership, on October 12, 1972. The claim alleges that on January 8, 1998, the partnership was “converted” to a Washington limited liability company, the claimant, S.D.S. Co., LLC, and the partnership ceased to exist. The claim also asserts that the deed from the partnership to the limited liability company, dated February 1, 1998, “has no substantive effect on title to the property” and that the conversion of the partnership into a limited liability company does not constitute a change in ownership such that, for purposes of this claim, S.D.S. Co., LLC., should be deemed to have “owned the property continuously since October 12, 1972.” Whether by deed or by operation of law as a result of the conversion from the partnership to the limited liability company, title to the subject property was transferred to and vested in S.D.S. Co., LLC, a legal entity distinct from the general partnership. As a result, for purposes of ORS 197.352, the claimant acquired the subject property on February 1, 1998.

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 that the claimant desires to divide the 744.81-acre subject property into five-acre parcels and to develop a dwelling on each parcel, and that state and local land use regulations restrict the claimant's desired use.

The claim is based on the applicable provisions of state law that require forest zoning and restrict uses on land zoned for forest use. The subject property, portions of the claimant's property located outside the Columbia river Gorge National Scenic Area (approximately 276 acres), is zoned Primary Forest (F-2) by Hood River County, as required by Statewide Planning Goal 4 (Forest Lands) in accordance with ORS 215 and OAR 660, division 6, because the subject property is "forest land" as defined by Goal 4.

Goal 4 became effective on January 25, 1975, and requires that forest lands be zoned for forest uses (see statutory and rule history under OAR 660-015-000(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.

Together ORS 215.705 to 215.755 and 215.780 and OAR 660, division 6, enacted or adopted pursuant to Goal 4, prohibit the division of forest land into parcels less than 80 acres and establish standards for development of dwellings on existing or proposed parcels on those lands. These land use regulations all were in effect when the claimant acquired the subject property on February 1, 1998.

Conclusions

The current zoning requirements, minimum lot size and dwelling standards established by Goal 4 and provisions applicable to land zoned for forest use in ORS 215 and OAR 660, division 6, were all enacted or adopted before the claimant, S.D.S. Co., LLC, acquired the subject property on February 1, 1998. These land use regulations do not allow the claimant's desired use of the subject property. Laws enacted or adopted since the claimant acquired the subject property in 1998 do not apply to or restrict the claimant's desired use of the property relative to when the claimant acquired it in 1998.

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 \$19,250,000 as the reduction in the subject property’s fair market value due to the regulations that restrict the claimant’s desired use of the property. This amount is based on the claimant’s comparison of the fair market value of the property under the county’s “original” Farm Zone A-1 that was in effect when S.D.S. Co., a Washington general partnership, acquired the subject property in 1972 and the fair market value of the subject property today. The claimant’s comparison does not reflect the effect of either the enactment or the enforcement of state land use regulations on the fair market value of the subject property. To the extent that the claim is based on the effect on value of the enactment of land use regulations, it must document the effect on fair market value of regulations enacted or adopted *after* February 1, 1998, the date when the claimant acquired the property. Similarly, to the extent that the claim is based on the effect of enforcement on the fair market value of the subject property, the claim does not establish how evidence of the value in 1972 is relevant to the effect of enforcement of land use regulations enacted or adopted after 1998.

Conclusions

As explained in Section V.(1) of this report, S.D.S. Co., LLC, is the claimant. It acquired the subject property on February 1, 1998. No state land use regulations enacted or adopted since the claimant acquired the subject property apply to or restrict the use of the subject property relative to the uses allowed in 1998. Therefore, the fair market value of the subject property has not been reduced as a result of land use regulations enforced by the Land Use Conservation and Development Commission (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 does not identify any state land use regulations enacted or adopted since the claimant acquired the subject property that restrict the use of the property relative to what would have been allowed when it acquired the property on February 1, 1998. As set forth in Section V.(2) of this report, the state land use regulations restricting the claimant’s desired use of the subject property, those portions of the claimant’s property located outside the Columbia river Gorge National Scenic Area, were in effect when the claimant acquired the subject property in 1998. As a result, they are exempt under ORS 197.352(3).

Conclusions

Any state land use regulations that apply to or restrict the claimant's desired use of the subject property were in effect when the claimant acquired it in 1998. Therefore, these state land use regulations are exempt under ORS 197.352(3)(E), which exempts laws in effect when the claimant acquired 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 do not restrict the claimant's desired use of the subject property relative to what was permitted when the claimant acquired it in 1998, and do not reduce the fair market value of the property. All state laws restricting the use of the subject property are exempt under ORS 197.352(3)(E).

The subject property only includes the portions of tax lots 100 and 400 located outside of the CRGNSA. As a result, the department is not addressing land use regulations or exemptions that may apply to the claimant's desired use of the portions located inside the CRGNSA in this report.

Conclusions

Based on the record and the foregoing findings and conclusions, the claimant 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. Laws enforced by the Commission or department do not restrict the claimant's desired use of the subject property relative to what was permitted when the claimant acquired it in 1998 and do not reduce the fair market value of the property, and all laws restricting the use of subject property are exempt under ORS 197.352(3)(E). 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 18, 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.