

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. M129935
(BALLOT MEASURE 37) OF)
Barbara E. Gates and Jewell L. Gates, CLAIMANTS)

Claimants: Barbara E. Gates and Jewell L. Gates (the Claimants)

Property: Township 1N, Range 3W, Section 26, Tax lot 501
Washington 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.

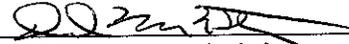
This Order is entered by the Deputy Director of the DLCD as a final order of DLCD and the Land Conservation and Development Commission under ORS 197.352, OAR 660-002-0010(8), and OAR chapter 125, division 145, and by the Administrator for the State Services Division of the DAS as a final order of DAS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



CoFa R. Parker, Deputy Director
DLCD
Dated this 22nd day of February, 2007.

FOR the DEPARTMENT OF
ADMINISTRATIVE SERVICES:



David Hartwig, Administrator
DAS, State Services Division
Dated this 22nd 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 22, 2007

STATE CLAIM NUMBER: M129935

NAMES OF CLAIMANTS: Barbara E. Gates
Jewell L. Gates

MAILING ADDRESS: Barbara E. Gates
4 Coleman Court
Chico, California 95926

Jewell L. Gates
586 River Bend Road
Roseburg, Oregon 97470

PROPERTY IDENTIFICATION: Township 1N, Range 3W, Section 26
Tax lot 501
Washington County

OTHER CONTACT INFORMATION: Steve Tuchscherer, CPA
1122 Garden Valley Boulevard, Suite 100
Roseburg, Oregon 97470

DATE RECEIVED BY DAS: August 28, 2006

180-DAY DEADLINE: February 24, 2007

I. SUMMARY OF CLAIM

The claimants, Barbara and Jewell Gates, seek compensation in the amount of \$10,875,000 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 29.25-acre subject property into approximately 145 parcels (five units per acre) and to develop a dwelling on each parcel.¹ The subject property is located west of Padgett Road and east of Dairy Creek, near Hillsboro, in Washington County. (See claim.)

¹ The claimants desire to "subdivide the property into R-5 buildable units." Washington County's R-5 zone is an urban zone that allows for the development of five dwelling units per acre. To the extent the claimants desire a zone change from the property's existing Exclusive Farm Use (EFU) zoning to an urban level R-5 zone, ORS 197.352 does not allow what the claimants request. By its terms, ORS 197.352 does not remove zoning or eliminate land use regulations. Rather, it provides that "the governing body responsible for enacting the land use regulation may modify, remove, or not to apply [*sic*] the land use regulation or land use regulations to allow the owner to use the property for a use permitted at the time the owner acquired the 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 because the claimants' desired use of the property was prohibited under the state land use laws in effect when claimant Barbara Gates acquired the property in 1984. (See the complete recommendation in Section VI. of this report.)

III. COMMENTS ON THE CLAIM

Comments Received

On December 12, 2006, pursuant to Oregon Administrative Rule (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 August 28, 2006, for processing under OAR 125, division 145. The claim identifies ORS 215 and Washington County's EFU zoning 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 claim indicates that the claimants both acquired the subject property on November 5, 1998. However, claimant Barbara Gates acquired the subject property on September 20, 1984, as a trustee of the Roland W. and Alice M. Gates Family Trust, a revocable trust, as reflected by a warranty deed included with the claim.² Claimant Jewell Gates acquired the subject property on November 5, 1998, as trustee of the Gates Family Trust, a revocable trust, as reflected by a bargain and sale deed included with the claim. On the same day, Barbara Gates transferred an interest in the subject property to the Barbara Gates Trust, a revocable trust with herself as trustee, as evidenced by a bargain and sale deed included with the claim.³ The Washington County Assessor’s Office confirms the claimants’ current ownership of the subject property.

Conclusions

The claimants, Jewell and Barbara Gates, are “owners” of the subject property as that term is defined by ORS 197.352(11)(C). Barbara Gates has been an owner since September 20, 1984. Jewell Gates has been an owner since November 5, 1998. Barbara Gates is a “family member” of Jewell Gates as that term is defined by ORS 197.352(11)(A).

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 29.25-acre subject property into 145 parcels (five units per acre under the county’s urban R-5 zone) and to develop a dwelling on each parcel, and that current land use regulations prohibit the desired use.

The claim is based generally on the applicable provisions of state law that require EFU zoning and restrict uses on EFU-zoned land. The claimants’ property is zoned by Washington County as EFU as required by Goal 3, in accordance with ORS 215 and OAR 660, division 33, because

² The claimants have not asserted that Barbara Gates acquired the property from a family member nor have they provided any evidence or documentation to establish when any family member may have acquired the property.

³ Transfer of property to a revocable trust does not result in a change in ownership for purposes of ORS 197.352.

the claimants' property is "agricultural land" as defined by Goal 3.⁴ Goal 3 became effective on January 25, 1975, and required that agricultural lands as defined by Goal 3 be zoned EFU pursuant to ORS 215.

Current land use regulations, particularly ORS 215.213, 215.263 and 215.780 and OAR 660, division 33, enacted or adopted pursuant to Goal 3, prohibit the division of EFU-zoned land in marginal lands counties into parcels less than 80 acres and establish standards for development of dwellings on existing or proposed parcels on that land.

ORS 215.780 establishes an 80-acre minimum size for the creation of new lots or parcels in EFU zones and became effective on November 4, 1993 (Chapter 792, Oregon Laws 1993). ORS 215.263 (2005 edition) establishes standards for the creation of new parcels for non-farm uses and dwellings allowed in an EFU zone.

OAR 660-033-0135 (applicable to farm dwellings) became effective on March 1, 1994, and interprets the statutory standard for a primary dwelling in an EFU zone in a marginal lands county under ORS 215.213. OAR 660-033-0130(4)(e) (applicable to non-farm dwellings in marginal lands counties) became effective on August 7, 1993. The Commission subsequently adopted amendments to comply with House Bill 3326 (Chapter 704, Oregon Laws 2001, effective on January 1, 2002), which were effective on May 22, 2002. (See administrative rule history for OAR 660-033-0100, -0130 and -0135.)

At the time Barbara Gates acquired the subject property, it was subject to Washington County's acknowledged EFU zone.⁵ At that time, the subject property was zoned by Washington County as EFU, which required a minimum 76-acre lot size for the creation of new lots and parcels. When Barbara Gates acquired the subject property, the claimants' desired use of the property would have been governed by the county's acknowledged EFU zone and the applicable provisions of ORS 215 then in effect.⁶ In 1984, ORS 215.263 (1983 edition) required that divisions of land in EFU zones be "appropriate for the continuation of the existing commercial agricultural enterprise within the area" or not smaller than the minimum size in the county's acknowledged plan. ORS 215.283(1)(f) (1983 edition) generally allowed farm dwellings "customarily provided in conjunction with farm use." Non-farm dwellings were allowed under ORS 215.283(3) if they were determined to be compatible with farm use, not interfere seriously with accepted farm practices, not materially alter the stability of the land use pattern in the area and be situated on generally unsuitable land for the production of farm crops and livestock.

The claimants' desired urban level of development of the 29.25-acre subject property into approximately 145 units (five units per acre) does not satisfy the requirements of ORS 215, or

⁴ The claimants' property is "agricultural land" because it contains Natural Resources Conservation Service Class I-IV soils.

⁵ Washington County's EFU zone was acknowledged by the Commission for compliance with Goal 3 on July 30, 1984.

⁶ After the county's comprehensive plan and land use regulations were acknowledged by the Commission as complying with the statewide planning goals, the goals and implementing rules no longer applied directly to individual 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).

Goal 3 and OAR 660, division 5, as implemented through the county's acknowledged EFU zone in effect when Barbara Gates acquired an interest in the property on September 20, 1984.

Conclusions

The current zoning requirements, minimum lot size and dwelling standards established by Goal 3, ORS 215 and OAR 660, division 33, were all enacted or adopted after Barbara Gates acquired the subject property in 1984 and do not allow the claimants' desired division or development of the property. However, the claimants' desired urban-level division and development of the subject property was prohibited under the standards for land divisions and development under Goal 3 and OAR 660, as implemented through Washington County's comprehensive plan and EFU zone and applicable provisions of ORS 215, in effect when Barbara Gates acquired the property on September 20, 1984.

3. Effect of Regulations on Fair Market Value

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

Findings of Fact

The claim includes an estimate of \$10,875,000 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 the claimants' assessment of the subject property's value.

Conclusions

As explained in Section V.(1) of this report, the claimants are Barbara Gates, who acquired the subject property in 1984 and her family member, Jewell Gates. Under ORS 197.352, the claimants are not due compensation because the claimants' desired use of the property was prohibited under the laws in effect when Barbara Gates acquired the property. Laws enacted or adopted since Barbara Gates acquired the subject property do not restrict the claimants' desired use of the property relative to uses allowed when she acquired 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.

Findings of Fact

The claim is based on state land use regulations that restrict the use of the subject property, including applicable provisions of Goal 3, ORS 215 and OAR 660, division 33, which Washington County has implemented through its current EFU zone. With the exception of amendments enacted or adopted after September 20, 1984, Goal 3, ORS 215 and OAR 660 were in effect when Barbara Gates acquired the subject property and prohibit the claimants' desired urban-level division and development of 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 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 Barbara Gates acquired the property on September 20, 1984. Provisions of Goal 3, ORS 215 and OAR 660 in effect when Barbara Gates acquired the subject property in 1984 are exempt under ORS 197.352(3)(E) and prohibit the claimants' desired urban-level division and development 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, the claimants' desired division of the 29.25-acre subject property into approximately 145 parcels (five units per acre under the county's urban R-5 zoning standards) was prohibited when claimant Barbara Gates acquired the property in 1984. Laws enforced by the Commission or the department do not restrict the claimants' desired use of the subject property relative to uses permitted when Barbara Gates acquired the property in 1984.

At the time Jewell Gates acquired an interest in the subject property, it was zoned by Washington County as EFU and subject to the current lot size and dwelling standards under Goal 3, ORS 215 and OAR 660, division 33, and as described in Section V.(2) of this report, which continue to prohibit the claimants' desired urban-level division and development of the subject property.

Conclusions

Based on the record, the claimants have not established their entitlement to relief under ORS 197.352 because the claimants' desired use of the property was prohibited under the laws in effect when they acquired the property. 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 29, 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.