

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. M129956
(BALLOT MEASURE 37) OF)	
FLN, LLC, CLAIMANT)	

Claimant: FLN, LLC (the Claimant)

Property: Township 1N, Range 4W, Section 14, Tax lot 100, Washington 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 Report and Recommendation of DLCD (the DLCD Report) attached to and by this reference incorporated into this order.

ORDER

The Claim is denied for the division of the subject property into one 5-acre parcel and one 74.4-acre parcel 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 the one-acre portion of the subject property 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 approved for the development of an additional dwelling on a 78.4-acre portion of the subject property 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:

1. In lieu of compensation under ORS 197.352, the State of Oregon will not apply the following laws to FLN, LLC's development of a dwelling on the 78.4-acre portion of the subject property: applicable provisions pertaining to dwellings of Goal 3, ORS 215 and OAR 660, division 33, enacted or adopted after January 19, 1996. These land use regulations will not apply to the claimant only to the extent necessary to allow it to use the subject property for the use described in this report, and only to the extent that use was permitted when it acquired the property on January 19, 1996.

2. The action by the State of Oregon provides the state's authorization to the claimant to use the property for the use described in this report, subject to the standards in effect on January 19, 1996. On that date, the property was subject to compliance with Goal 3 and OAR 660, division 33, as implemented by Washington County's acknowledged EFU zone, and the applicable provisions of ORS 215 then in effect.

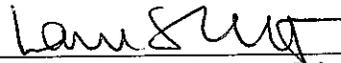
3. To the extent that any law, order, deed, agreement or other legally enforceable public or private requirement provides that the subject property may not be used without a permit, license or other form of authorization or consent, the order will not authorize the use of the property unless the claimant first obtains 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 78.4-acre portion of the subject property by the claimant 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).

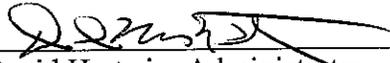
5. Without limiting the generality of the foregoing terms and conditions, in order for the claimant to use the 78.4-acre portion of the property, it may be necessary for it to obtain a decision under ORS 197.352 from a city and/or county and/or metropolitan service district that enforces land use regulations applicable to the property. Nothing in this order relieves the claimant 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 78.4-acre portion of the subject property by the claimant.

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 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.

FOR DLCD AND THE LAND
CONSERVATION AND
DEVELOPMENT COMMISSION:
Lane Shetterly, Director


Cora R. Parker, Deputy Director
DLCD
Dated this 27th day of February, 2007.

FOR the DEPARTMENT OF
ADMINISTRATIVE SERVICES:


David Hartwig, Administrator
DAS, State Services Division
Dated this 27th day of February, 2007.

NOTICE OF RIGHT TO APPEAL OR OTHER JUDICIAL RELIEF

You are entitled, or may be entitled, to judicial remedies including the following:

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**

February 27, 2007

STATE CLAIM NUMBER: M129956

NAME OF CLAIMANT: FLN, LLC

MAILING ADDRESS: 9625 NW Roy Road
Forest Grove, Oregon 97116

PROPERTY IDENTIFICATION: Township 1N, Range 4W, Section 14
Tax lot 100
Washington County

OTHER CONTACT INFORMATION: Larry S. Landauer
9625 NW Roy Road
Forest Grove, Oregon 97116

OTHER INTEREST IN PROPERTY: Henry and Gertrude Landauer
7940 NW Kansas City Road
Forest Grove, Oregon 97116

DATE RECEIVED BY DAS: August 31, 2006

180-DAY DEADLINE: February 27, 2007

I. SUMMARY OF CLAIM

The claimant, FLN, LLC, seeks compensation in the amount of \$375,000 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 79.4-acre subject property into one 5-acre parcel and one 74.4-acre parcel and to develop a dwelling on the 74.4-acre parcel. The subject property is located at 7940 NW Kansas City Road, near Forest Grove, in Washington 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 because the claimant has not established its current ownership of the property. (See the complete recommendation in Section VI. of this report.)

(Agricultural Lands), ORS 215 and Oregon Administrative Rules (OAR) 660, division 33, enacted or adopted after January 19, 1996. These laws will not apply to the claimant only to the extent necessary to allow it to use the subject property for the use described in this report, and only to the extent that use was permitted when it acquired the property on January 19, 1996.

The department has further determined that the claim is not valid as to the claimant's desired division of the subject property into one 5-acre parcel and one 74.4-acre parcel because the claimant's desired use of the subject property was prohibited under the laws in effect when the claimant acquired the property in 1996. The claim is also not valid as to the one-acre portion of the subject property because the claimant is not an owner of the one-acre portion. (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 31, 2006, for processing under OAR 125, division 145. The claim identifies Washington County 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 claimant, FLN, LLC, acquired the subject property on January 19, 1996, as reflected by a real estate purchase agreement and deed included with the claim. However, the deed by which it acquired the property expressly reserves an existing residence on the subject property and a one-acre surrounding that residence in a life estate in favor of Henry and Gertrude Landauer. That life estate reserved in Henry and Gertrude Landauer the exclusive right to use the existing dwelling and a one-acre surrounding that residence during their lifetimes. FLN, LLC’s ownership interest in the subject property does not provide it with any present right to use the existing dwelling and a one-acre surrounding that residence during the term of Henry and Gertrude Landauers’ lives. Because FLN, LLC has no present right to the existing dwelling and a one acre surrounding it, no land use regulations restrict its use of that portion of the subject property. The Washington County Assessor’s Office confirms the claimant’s and Henry and Gertrude Landauers’ current ownership of the subject property.

Conclusions

The claimant, FLN, LLC, is an “owner” of approximately 78.4 acres of the subject property as that term is defined by ORS 197.352(11)(C), as of January 19, 1996.¹ The claimant is not an owner of the existing dwelling and a one-acre portion of the subject property, as the term is defined in ORS 197.352(11)(C).

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 79.4-acre subject property into one 5-acre parcel and one 74.4-acre parcel and to develop a dwelling on the 74.4-acre parcel, and that the current zoning prohibits the desired use.

¹ Under ORS 197.352(11)(A), legal entities can be “family members” of individuals who are owners of property under ORS 197.352(11)(C). However, legal entities cannot have family members under the statute. Therefore, Henry and Gertrude Landauer, who transferred property to the FLN, LLC, are not considered family members under the definition of family member in ORS 197.352(11)(A).

The claim is based on the applicable provisions of state law that require EFU zoning and restrict uses on land zoned EFU. The claimant's property is zoned EFU by Washington County, as required by Statewide Planning Goal 3 (Agricultural Lands), in accordance with ORS 215 and OAR 660, division 33, because the claimant's property is "agricultural land," as defined by Goal 3.² 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 215.263, 215.284 and 215.780 and OAR 660, division 33, enacted or adopted pursuant to Goal 3, prohibit the division of EFU-zoned land into parcels less than 80 acres. 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).

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 under ORS 215.283(1)(f). OAR 660-033-0130(4) (applicable to non-farm dwellings) became effective on August 7, 1993, and was amended to comply with ORS 215.284(4) on March 1, 1994. Effective on June 1, 1998, the Commission amended OAR 660-033-0130(4) to interpret ORS 215.284 with respect to the requirement that a dwelling not in conjunction with farm use "not materially alter the stability of the overall land use pattern of the area" consistent with *Sweeten v. Clackamas County*, 17 Or LUBA 1234 and *DLCD v. Crook County*, 26 Or LUBA 478 (1994.)

When the claimant acquired the subject property, it was subject to Washington County's 1995 Code. The 2005 Code was enacted by Washington County after the claimant acquired the subject property. The 2005 Code includes dwelling standards that now require the subject parcel to be an "existing commercial farm operation," which was not required in the 1995 Code. Other standards regarding additional farm dwellings were also revised in the 2005 Code.

At the time the claimant acquired the 78.4-acre portion of the subject property, it was subject to Washington County's acknowledged EFU zone.³ When the claimant acquired the subject property, the claimant's desire to develop a dwelling on that portion of the property would have been governed by the county's acknowledged EFU zone and the applicable provisions of ORS 215 then in effect.⁴ The claim does not establish whether or to what extent the claimant's desired development of the property was allowed under the standards in effect when it acquired the property on January 19, 1996.

² The claimant's property is "agricultural land" because it contains Natural Resources Conservation Service Class I-IV soils.

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

⁴ 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).

Conclusions

Some of the current zoning requirements and dwelling standards established by Goal 3, ORS 215 and OAR 660, division 33, were enacted or adopted after the claimant acquired the 78.4-acre portion of the subject property in 1996 and do not allow the claimant's desired development of that portion of the property. However, the claim does not establish whether or to what extent the claimant's desired use of the 78.4-acre portion of the subject property complies with the standards for development under Washington County's EFU zone and comprehensive plan in effect when the claimant acquired that portion of the property on January 19, 1996.

As explained in Section V.(1), FLN, LLC, is not an "owner" of the one-acre portion as that term is defined in ORS 197.352(11)(C). Therefore, no laws enforced by the Commission or the department restrict the claimant's use of private real property with the effect of reducing the fair market value.

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 \$375,000 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 assessment of the subject property's value included in the claim.

Conclusions

As explained in Section V.(1) of this report, the claimant is FLN, LLC who acquired a 78.4-acre portion of the subject property on January 19, 1996. As explained in Section V.(1) of this report, FLN, LLC is not an "owner" of the one-acre portion as that term is defined in ORS 197.352(11)(C). Therefore, no laws restrict its use of the one-acre portion with the effect of reducing the fair market value. Under ORS 197.352, the claimant is 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 claimant acquired the subject property restrict the claimant's desired use of the property. The claimant estimates that the effect of the regulations on the fair market value of the subject property is a reduction of \$375,000

Without an appraisal or other documentation and without verification of whether or the extent to which the claimant's desired use of the subject property was allowed under the standards in effect when it 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 Goal 3, ORS 215 and OAR 660, division 33, which Washington County has implemented through its current EFU zone. With the exception of applicable provisions of ORS 215 and OAR 660, division 33, in effect when the claimant acquired the 78.4-acre portion of the subject property on January 19, 1996, these state land use regulations were enacted or adopted after the claimant acquired that portion 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 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 claimant acquired the 78.4-acre portion of the subject property on January 19, 1996. Provisions of ORS 215 and OAR 660, division 33, in effect when the claimant acquired the 78.4-acre portion of the subject property in 1996 are exempt under ORS 197.352(3)(E) and will continue to apply to the property.

As explained in Section V.(1) of this report, FLN, LLC is not an “owner” of the one-acre portion as that term is defined in ORS 197.352(11)(C). Therefore, the issue of whether any laws are exempt from ORS 197.352 is not relevant.

Other laws in effect when the claimant acquired the 78.4-acre portion of the subject property are also exempt under ORS 197.352(3)(E) and will continue to apply to the claimant’s use of the property. In addition, Washington County notes that the subject property is located in a flood plain zone. ORS 197.352(3)(B) specifically exempts regulations “restricting or prohibiting activities for the protection of public health and safety. . . .” To the extent the county’s flood plain regulations are based on state law, these regulations would be exempt under ORS 197.352(3)(B). 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 subject property until there is a specific proposal for that use. When the claimant seeks a building or development permit to carry out a specific use, it may become evident that other state laws 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 claimant has 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 claimant should be aware that the less information it has 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 its 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, the department finds that the claim is not valid as to the existing dwelling and a one-acre portion because the claimant is not an owner. The department further finds laws enforced by the Commission or the department restrict the claimant's desired use of the 78.4-acre portion of the subject property. The claim asserts that existing state land use regulations enforced by the Commission or the department have the effect of reducing the fair market value of the subject property by \$375,000. 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 the compensation due for this claim, it would also be necessary to verify whether or the extent to which the claimant's desired use of the 78.4-acre portion of the subject property was allowed under the standards in effect when it acquired that portion. 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 78.4-acre portion 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 FLN, LLC to use the 78.4-acre portion of the subject property for a use permitted at the time it acquired that portion on January 19, 1996.

Conclusions

Based on the record and the foregoing findings and conclusions, FLN, LLC has not established that it is entitled to relief under ORS 197.352(1) for the one-acre portion as a result of land use regulations enforced by the Commission or the department because the claimant is not owner of that portion. Therefore, the department recommends that this claim be denied as to the one-acre portion. The department otherwise 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 FLN, LLC's development of a dwelling on the 78.4-acre portion of the subject property: applicable provisions pertaining to dwellings of Goal 3, ORS 215 and OAR 660, division 33,

enacted or adopted after January 19, 1996. These land use regulations will not apply to the claimant only to the extent necessary to allow it to use the subject property for the use described in this report, and only to the extent that use was permitted when it acquired the property on January 19, 1996.

2. The action by the State of Oregon provides the state's authorization to the claimant to use the property for the use described in this report, subject to the standards in effect on January 19, 1996. On that date, the property was subject to compliance with Goal 3 and OAR 660, division 33, as implemented by Washington County's acknowledged EFU zone, and the applicable provisions of ORS 215 then in effect.

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 claimant first obtains 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 78.4-acre portion of the subject property by the claimant 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 claimant to use the 78.4-acre portion of the property, it may be necessary for it 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 claimant 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 78.4-acre portion of the subject property by the claimant.

VII. COMMENTS ON THE DRAFT STAFF REPORT

The department issued its draft staff report on this claim on February 1, 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. Comments received have been taken into account by the department in the issuance of the final report.