

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. M130026
(BALLOT MEASURE 37) OF)
Ann S. Fairclo, CLAIMANT)

Claimant: Ann S. Fairclo (the Claimant)

Property: Township 39S, Range 10E, Section 12, Tax lots 200, 1400 and 1500
Klamath County (the property)

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

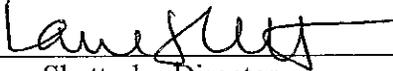
Claimant submitted the Claim to the State of Oregon under ORS 197.352. Under OAR 125-145-0010 *et seq.*, the Department of Administrative Services (DAS) referred the Claim to the Department of Land Conservation and Development (DLCD) as the regulating entity. This order is based on the record herein,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

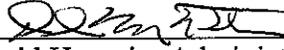
The Claim is denied as to laws administered by DLCD and the Land Conservation and Development Commission (LCDC) for the reasons set forth in the DLCD Report.

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 March, 2007.

FOR THE DEPARTMENT OF
ADMINISTRATIVE SERVICES:


David Hartwig, Administrator
DAS, State Services Division
Dated this 7 day of March, 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

March 7, 2007

STATE CLAIM NUMBER: M130026

NAME OF CLAIMANT: Ann S. Fairclo

MAILING ADDRESS: 15555 Highway 140 East
Klamath Falls, Oregon 97603

PROPERTY IDENTIFICATION: Township 39S, Range 10E, Section 12
Tax lots 200, 1400 and 1500
Klamath County

OTHER CONTACT INFORMATION: Michael L. Spencer
409 Pine Street, Suite 204
Klamath Falls, Oregon 97601

DATE RECEIVED BY DAS: September 13, 2006

180-DAY DEADLINE: March 12, 2007

I. SUMMARY OF CLAIM

The claimant, Ann Fairclo, seeks compensation in the amount of \$600,000 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 131.66-acre subject property into a "1 acre residential subdivision with a zone change to R-2, community water and sewer system" and "with some commercial uses intermixed."¹ The subject property is

¹ The claim also indicates that the claimant desires to sell or transfer the newly created parcels for development. In effect, the claimant requests that a decision of the department to "not apply" (waive) certain laws as set 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 claimant also requests that the department remove the subject property's exclusive farm use zoning and reinstate the property's unregulated status as of the date the claimant asserts she acquired the property in 1973. In addition, the claimant requests that the property's prior unregulated status be made the property's new legal zoning so that she can sell the new parcels without their being subject to land use regulations. ORS 197.352 does not authorize the department to consider the claimant's requests. 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." The Commission, by rule, has authorized the Department to only waive regulations in order to implement the statute's authorization to

located along Highway 140 East at its intersection with North Poe Valley Road, near Olene, in Klamath 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's desired use of the subject property was prohibited under the laws in effect when the claimant acquired the property on July 21, 2006. (See the complete recommendation in Section VI. of this report.)

III. COMMENTS ON THE CLAIM

Comments Received

On December 18, 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 does not address whether the claim meets the criteria for relief under ORS 197.352. Comments concerning the effects a use of the subject property may have on surrounding areas are generally not something that the department is able to consider in determining whether to waive a state law. If funds do become available to pay compensation, then such effects may become relevant in determining which claims to pay compensation for instead of waive a state law. (See the comment 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 owner of the property submits a land use application in which the land use regulation is an approval criteria, whichever is later.

allow "a use" that was permitted at the time the claimant acquired the property. In this claim, even if land use regulations had restricted the claimant's use of the property since the time she became an owner of the property, the claimant has failed to articulate "a use" that she desires for the subject property. Numerous, generally described possible uses do not provide the department adequate information in order to allow a review of whether any state land use regulation has restricted that use with the effect of reducing the property's fair market value.

Findings of Fact

This claim was submitted to DAS on September 13, 2006, for processing under OAR 125, division 145. The claimant summarily lists Statewide Planning Goals 2 (Land Use Planning), 3 (Agricultural Lands), 4 (Forest Lands), 5 (Natural Resources, Scenic and Historic Areas, and Open Spaces), 11 (Public Facilities and Services), 12 (Transportation) and 14 (Urbanization), OAR 660, divisions 4, 6, 12, 18 and 33, and ORS 197.250, 197.335, 215.130, 215.185, 215.203, 215.206, 215.213, 215.236, 215.262, 215.263, 215.283, 215.284, 215.293, 215.416 and 215.431 as restricting the claimant's desired use(s) of the subject property. The claim also states that the list is "illustrative only and not intended to be an all inclusive listing." The claimant seeks relief from "all land use regulations adopted, enacted or enforced" after the claimant's acquisition date for "any use that she may choose." 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, Ann Fairclo, asserts that she acquired an interest in the subject property by a warranty deed dated December 31, 1973 (M73-16667 and 16668), and by a quitclaim deed in lieu of foreclosure dated July 21, 2006 (15006), both of which are included with the claim. Although the claimant did acquire an interest in the subject property through the warranty deed dated December 31, 1973, the claimant sold that interest through a land sale contract in 1993.

A previous claim filed by the claimant for the same property (M118509) included a copy of a Memorandum of Contract of Sale from the claimant to John Q. House and Rose House dated December 15, 1993, and recorded December 16, 1993. The prior claim also included a copy of an assignment of the land sale contract from John Q. House and Rose House to John Q. House and Susan Fairclo House. The claimant acquired a new ownership interest in the subject property on July 21, 2006, when John Q. House and Susan F. House quitclaimed the subject property to the claimant in lieu of foreclosure under the land sale contract.

The department has not confirmed the claimant's current ownership interest in the subject property. It appears that the Klamath County Assessor's Office has not updated its records since the quitclaim dated July 21, 2006, was executed and recorded.

Conclusions

The claimant, Ann Fairclo, is an "owner" of the subject property as that term is defined by ORS 197.352(11)(C), as of July 21, 2006.

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 the claimant desires to divide the 131.66-acre subject property into a "1 acre residential subdivision with a zone change to R-2, community water and sewer system" and "with some commercial uses intermixed." The claim also generally indicates that many state land use regulations may prevent the claimant's desired use.²

The claim is based on the applicable provisions of state law that require Exclusive Farm Use (EFU) zoning and restrict uses on land zoned EFU. The claimant's property is zoned by Klamath County as Exclusive Farm Use-Cropland/Grazing (EFU-CG) as required by Goal 3 in accordance with ORS 215 and OAR 660, division 33, because the claimant's property is "agricultural land" as defined by Goal 3. Goal 3 became effective on January 25, 1975, and required that agricultural lands as defined by the Goal be zoned EFU pursuant to ORS 215. A Geothermal Resource Overlay (GR) zone is also applied to a portion of the subject property. The purpose of the GR overlay is to "efficiently use and maximize significant geothermal resources of Klamath County for industrial and commercial purposes."³

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 and establish standards for the 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 under ORS 215.283(1)(f). OAR 660-033-0130(4) (applicable to non-farm dwellings) became effective

² The claimant has not established how any particular land use law restricts her desired use of the property. As explained above, ORS 197.352 does not authorize the department to waive regulations to allow the claimant "any use that she may choose." This report addresses only those land use laws that the department finds are applicable to and restrict the claimant's use of the property, based on the claimant's generalized description of her desired use.

³ See Klamath County Land Development Ordinance, Article 59.4.

on August 7, 1993, and was amended to comply with ORS 215.284(4) on March 1, 1994. 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.)

The claimant acquired the property on July 21, 2006, after the enactment or adoption of all of these land use regulations.⁴

Conclusions

The current zoning requirements, minimum lot size and dwelling standards established by Goal 3 and provisions applicable to land zoned EFU in ORS 215 and OAR 660, division 33, were all enacted or adopted before the claimant, Ann Fairclo, acquired the subject property on July 21, 2006. These land use regulations do not allow the desired use on the subject property. Laws enacted or adopted since the claimant acquired the subject property in 2006 do not restrict the claimant's desired use of the property relative to when she acquired it in 2006.

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 \$600,000 as the reduction in the subject property's fair market value due to the regulations that restrict the claimant's use of the property. This estimate is based on the claimant's assessment of the property's value.

Conclusions

As explained in Section V.(1) of this report, Ann Fairclo is the claimant, who acquired the subject property on July 21, 2006. The claimant is not entitled to compensation under ORS 197.352 because no state land use regulations laws enacted or adopted since the claimant acquired the subject property restrict the use of it relative to the uses permitted when she acquired the property in 2006. 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.

⁴ The claimant has generally alleged the applicability of numerous other land use regulations. However, none of those regulations were enacted or adopted after the claimant acquired the subject property on July 21, 2006 and, therefore, do not restrict her desired use of the subject property relative to when she acquired it, with the effect of reducing the property's fair market value.

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 Klamath County has implemented through its EFU-CG. 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 were in effect when the claimant acquired the property on July 21, 2006.

Conclusions

All of the state land use regulations that restrict the claimant's desired use of the subject property were in effect when the claimant acquired the property. 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 2006 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).

Conclusions

Based on the record and the foregoing findings and conclusions, the claimant has not established that she is entitled to relief under ORS 197.352(1) as a result of land use regulations enforced by the Commission or the department because the claimant's desired use of the subject property was prohibited under the laws in effect when she acquired the property on July 21, 2006. 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 February 15, 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.