



Oregon

Theodore R. Kulongoski, Governor

Department of Land Conservation and Development

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March 16, 2007

To: Interested Persons

From: Lane Shetterly, Director



Re: Ballot Measure 37 (ORS 197.352) Claim Number M130104

Claimants: Allan and Yvonne Cosand

Enclosed, in regard to the above-referenced claim for compensation under Ballot Measure 37 (ORS 197.352), is the Final Staff Report and Recommendation of the Department of Land Conservation and Development, and the Final Order.

This Final Staff Report and Recommendation and the Final Order constitute the final decision on this claim. No further action will be taken on this matter.

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. M130104
(BALLOT MEASURE 37) OF)
Allan and Yvonne Cosand, CLAIMANTS)

Claimants: Allan and Yvonne Cosand (the Claimants)

Property: Township 40S, Range 10E, Section 34, Tax lot 1300, Klamath 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 the northern 5.86-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 70.81-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 Allan and Yvonne Cosand's division of the 70.81-acre portion of the subject property into five-acre parcels: applicable provisions of Goal 3, ORS 215 and OAR 660, division 33. These land use regulations will not apply to the claimants only to the extent necessary to allow them to use the 70.81-acre portion of the subject property for the use described in this report, and only to the extent that use was permitted when they acquired this portion of the property on July 28, 1972.
2. The action by the State of Oregon provides the state's authorization to the claimants to use the 70.81-acre portion of the subject property for the use described in this report, subject to the standards in effect on July 28, 1972.

3. To the extent that any law, order, deed, agreement or other legally enforceable public or private requirement provides that the 70.81-acre portion of 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 claimants first obtain 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 70.81-acre portion of the subject property by the claimants 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).

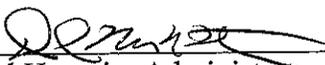
5. Without limiting the generality of the foregoing terms and conditions, in order for the claimants to use the 70.81-acre portion of the subject property, it may be necessary for them to obtain a decision under ORS 197.352 from a city and/or county and/or metropolitan service district that enforces land use regulations applicable to the property. Nothing in this order relieves the claimants 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 70.81-acre portion of the subject property by the claimants.

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 16th day of March, 2007.

FOR the DEPARTMENT OF
ADMINISTRATIVE SERVICES:


David Hartwig, Administrator
DAS, State Services Division
Dated this 16th day of March, 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

March 16, 2007

STATE CLAIM NUMBER: M130104

NAMES OF CLAIMANTS: Allan and Yvonne Cosand

MAILING ADDRESS: 20180 Merrill Pit Road
Klamath Falls, Oregon 97603

PROPERTY IDENTIFICATION: Township 40S, Range 10E, Section 34
Tax lot 1300
Klamath County

DATE RECEIVED BY DAS: September 22, 2006

180-DAY DEADLINE: March 21, 2007

I. SUMMARY OF CLAIM

The claimants, Allan and Yvonne Cosand, seek compensation in the amount of \$1.25 million 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 76.67-acre subject property into five-acre parcels.¹ The subject property is located at 20180 Merrill Pit Road, near Klamath Falls, 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 valid in part. Department staff recommends that, in lieu of compensation, the requirements of the following state laws enforced by the Land Conservation and Development Commission (the Commission) or the department not apply to Allan and Yvonne Cosand's division of the 70.81-acre portion of the subject property into five-acre parcels: applicable provisions of Statewide Planning Goal 3 (Agricultural Lands), ORS 215 and Oregon Administrative Rules (OAR) 660, division 33. These laws will not

¹ The claim also indicates that the claimants desire to sell or transfer the newly created parcels for development. In effect, the claimants request 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 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."

apply to the claimants only to the extent necessary to allow them to use the 70.81-acre portion of the subject property for the use described in this report, and only to the extent that use was permitted when they acquired this portion of the property on July 28, 1972.

The department has further determined that the claim is not valid as to the northern 5.86-acre portion of the subject property because the claimants' desired use of this portion was prohibited under the laws in effect when the claimants acquired it on September 19, 2001. (See the complete recommendation in Section VI. of this report.)

III. COMMENTS ON THE CLAIM

Comments Received

On January 8, 2007, pursuant to OAR 125-145-0080, the Oregon Department of Administrative Services (DAS) provided written notice to the owners of surrounding properties. According to DAS, no 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 September 22, 2006, for processing under OAR 125, division 145. The claim identifies Klamath County's "80 acre minimum" 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 claimants, Allan and Yvonne Cosand, acquired the 70.81-acre portion of the subject property on July 28, 1972, as reflected by a warranty deed included with the claim. The claimants acquired the northern 5.86-acre portion of the subject property on September 19, 2001, as reflected by a court order included with the claim. The Klamath County Assessor’s Office confirms the claimants’ current ownership of the subject property.

Conclusions

The claimants, Allan and Yvonne Cosand, are “owners” of the subject property as that term is defined by ORS 197.352(11)(C), as of July 28, 1972, for the 70.81-acre portion and as of September 19, 2001, for the northern 5.86-acre portion.

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 76.67-acre subject property into five-acre parcels, and that the current zoning prohibits the desired use.

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

² The claimants’ property is “agricultural land” because it contains Natural Resources Conservation Service Class I-IV soils.

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.

The claimants acquired the 70.81-acre portion of the subject property on July 28, 1972, prior to the adoption of the statewide planning goals and their implementing statutes and regulations.

The claimants acquired the northern 5.86-acre portion of the subject property on September 19, 2001. At that time, the property was subject to the current state land use regulations in effect, as identified above.

Conclusions

The current zoning requirements and minimum lot size established by applicable provisions of Goal 3, ORS 215 and OAR 660, division 33, were all enacted or adopted after the claimants acquired the 70.81-acre portion of the subject property in 1972 and before the claimants acquired the northern 5.86-acre portion of the property in 2001, and do not allow the desired division of the northern 5.86-acre portion. These laws restrict the use of the 70.81-acre portion of the subject property relative to the uses allowed when the claimants acquired it. Laws enacted or adopted since the claimants acquired the northern 5.86-acre portion of the subject property do not restrict the claimants' desired use of that portion of the property relative to when the claimants acquired it in 2001.

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 claimants have identified. There may be other laws that currently apply to the claimants' use of the subject property, and that may continue to apply to the claimants' use of the 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 the subject property until there is a specific proposal for that use. When the claimants seek a building or development permit to carry out a specific use, it may become evident that other state laws apply to that use.

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 \$1.25 million 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 Allan and Yvonne Cosand who acquired the 70.81-acre portion of the subject property on July 28, 1972, and the northern 5.86-

acre portion of the subject property on September 19, 2001. No state laws enacted or adopted since the claimants acquired the 5.86-acre portion of the subject property restrict its use relative to the uses allowed in 2001. Therefore, the fair market value of the 5.86-acre portion of the subject property has not been reduced as a result of land use regulations enforced by the Commission or the department. Under ORS 197.352, the claimants are due compensation for land use regulations that restrict the use of the 70.81-acre portion 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 claimants acquired the 70.81-acre portion of the subject property restrict the claimants' desired use of this portion of the subject property. The claimants estimate that the effect of the regulations on the fair market value of the property is a reduction of \$1.25 million.

Without an appraisal or other documentation, it is not possible to substantiate the specific dollar amount by which the land use regulations have reduced the fair market value of the 70.81-acre portion of the subject property. Nevertheless, based on the evidence in the record for this claim, the department determines that the fair market value of 70.81-acre 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 Klamath County has implemented through its current EFU-C zone. All of these land use regulations were enacted or adopted after the claimants acquired the 70.81-acre portion of the subject property on July 28, 1972, and before the claimants acquired the northern 5.86-acre portion of the property on September 19, 2001.

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 none of the general statutory, goal and rule restrictions on division of the 70.81-acre portion of the subject property were in effect when the claimants acquired this portion of the subject property in 1972. As a result, these laws are not exempt under ORS 197.352(3)(E). All of the state land use regulations that restrict the claimants' desired use of the northern 5.86-acre portion of the subject property were in effect when the claimants acquired it in 2001. Therefore, these state land use regulations are exempt under ORS 197.352(3)(E), which exempts laws in effect when the claimants acquired the subject property.

Laws in effect when the claimants acquired the 70.81-acre portion of the subject property are exempt under ORS 197.352(3)(E) and will continue to apply to the claimants' use of this portion of the subject property. There may be other laws that continue to apply to the claimants' use of

this portion 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 the subject property until there is a specific proposal for that use. When the claimants seek 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 claimants have 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 claimants should be aware that the less information they 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 their use of the 70.81-acre portion 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 a law that restricts the use of the subject 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 subject 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 claimants' desired use of the northern 5.86-acre portion of the subject property relative to what was permitted when the claimants acquired it in 2001 and do not reduce its fair market value. All state laws restricting the use of the northern 5.86-acre portion of the subject property are exempt under ORS 197.352(3)(E). The department further finds that laws enforced by the Commission or the department restrict the claimants' desired use of the 70.81-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 \$1.25 million. 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 compensation due for this claim, it would also be necessary to verify whether or the extent to which the claimants' desired use of the 70.81-acre portion of the subject property was allowed under the standards in effect when they acquired this portion of the subject property. 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 70.81-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 Allan and Yvonne Cosand to use the 70.81-acre portion of the subject property for a use permitted at the time they acquired this portion of the property on July 28, 1972.

Conclusions

Based on the record and foregoing findings and conclusions, for the northern 5.86-acre portion of the subject property, the claimants, Allan and Yvonne Cosand, have not established that they are 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 as to the northern 5.86-acre portion of the subject property. The department further recommends that the claim be otherwise 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 Allan and Yvonne Cosand's division of the 70.81-acre portion of the subject property into five-acre parcels: applicable provisions of Goal 3, ORS 215 and OAR 660, division 33. These land use regulations will not apply to the claimants only to the extent necessary to allow them to use the 70.81-acre portion of the subject property for the use described in this report, and only to the extent that use was permitted when they acquired this portion of the property on July 28, 1972.
2. The action by the State of Oregon provides the state's authorization to the claimants to use the 70.81-acre portion of the subject property for the use described in this report, subject to the standards in effect on July 28, 1972.
3. To the extent that any law, order, deed, agreement or other legally enforceable public or private requirement provides that the 70.81-acre portion of 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 claimants first obtain 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 70.81-acre portion of the subject property by the claimants 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 claimants to use the 70.81-acre portion of the subject property, it may be necessary for them 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 claimants 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 70.81-acre portion of the subject property by the claimants.

VII. COMMENTS ON THE DRAFT STAFF REPORT

The department issued its draft staff report on this claim on February 23, 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.