



Oregon

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March 26, 2007

To: Interested Persons

From: Lane Shetterly, Director



Re: Ballot Measure 37 (ORS 197.352) Claim Numbers M130171

Claimants: Gregory Gerding and Thomas Gerding

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. M130171
(BALLOT MEASURE 37) OF)
Gregory Gerding and Thomas Gerding, CLAIMANTS)

Claimants: Gregory Gerding and Thomas Gerding (the Claimants)

Property: Township 12S, Range 6W, Section 22, Tax lot 600, Benton County
(the property)

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

Claimants submitted the Claim to the State of Oregon under ORS 197.352. Under OAR 125-145-0010 *et seq.*, the Department of Administrative Services (DAS) referred the Claim to the Department of Land Conservation and Development (DLCD) as the regulating entity. This order is based on the record herein, including the Findings and Conclusions set forth in the Final Staff Report and Recommendation of DLCD (the DLCD Report) attached to and by this reference incorporated into this order.

ORDER

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

This Order is entered by the Director of the DLCD as a final order of DLCD and the Land Conservation and Development Commission under ORS 197.352, OAR 660-002-0010(8), and OAR chapter 125, division 145, and by the Administrator for the State Services Division of the DAS as a final order of DAS under ORS 197.352, OAR chapter 125, division 145, and ORS chapter 293.

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


Cora R. Parker, Deputy Director
DLCD
Dated this 26th day of March, 2007.

FOR THE DEPARTMENT OF
ADMINISTRATIVE SERVICES:


David Hartwig, Administrator
DAS, State Services Division
Dated this 26th 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 26, 2007

STATE CLAIM NUMBER: M130171

NAMES OF CLAIMANTS: Gregory Gerding
Thomas Gerding

MAILING ADDRESSES: Gregory Gerding
23780 Ervin Road
Philomath, Oregon 97310

Thomas Gerding
24065 Evergreen Road
Philomath, Oregon 97370

PROPERTY IDENTIFICATION: Township 12S, Range 6W, Section 22
Tax lot 600
Benton County

OTHER CONTACT INFORMATION: George Heilig
PO Box 546
Corvallis, Oregon 97339

DATE RECEIVED BY DAS: October 2, 2006

180-DAY DEADLINE: March 31, 2007

I. SUMMARY OF CLAIM

The claimants, Gregory and Thomas Gerding, seek compensation in the amount of \$60,000 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 develop a dwelling on the 40-acre subject property. The subject property is located west of Evergreen Road and north of Gerding Lane, near Philomath, in Benton 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 land use laws enforced by the Land Conservation and Development Commission (the Commission) do not restrict the claimants' use of the private real property relative to uses permitted when they

acquired the property, with the effect of reducing the property's fair market value. (See the complete recommendation in Section VI. of this report.)

III. COMMENTS ON THE CLAIM

Comments Received

On January 25, 2007, 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 October 21, 2006, for processing under OAR 125, division 145. The claim identifies provisions of ORS 215 and OAR 660, division 6, 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, Gregory and Thomas Gerding, acquired the subject property on July 1, 1983, as reflected by a warranty deed included with the claim. The claimants' acquisition of the property was subject to a restrictive covenant that was executed by Francis, Carroll, Henry and Delores Gerding on May 20, 1981. That private restrictive covenant runs with the land and prohibits the claimants from developing any residential, commercial or industrial buildings on the subject property. The Benton County Assessor's Office confirms the claimants' current ownership of the subject property.

Conclusions

The claimants, Gregory and Thomas Gerding, are "owners" of the subject property as that term is defined in ORS 197.352(11)(C), as of July 1, 1983.

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 develop a dwelling on the 40-acre subject property and that the use is not allowed under current land use regulations.¹

The claim is based generally on the applicable provisions of state law that require forest zoning and restrict uses on forest-zoned land. The claimants' property is zoned Forest Conservation (FC) by Benton County as required by Goal 4, in accordance with ORS 215 and OAR 660, division 6, because the claimants' property is "forest land" under Goal 4. Goal 4 became effective on January 25, 1975, and requires that forest land be zoned for forest use (see statutory and rule history under OAR 660-015-0000(4)). The forest land administrative rules (OAR 660, division 6) became effective on September 1, 1982, and ORS 215.705 to 215.755 and 215.780 became effective on November 4, 1993 (Chapter 792, Oregon Laws 1993). OAR 660-006-0026 and 660-006-0027 were amended on March 1, 1994, to implement those statutes.

The claimants acquired the subject property after the adoption of the statewide planning goals but before the Commission acknowledged Benton County's land use regulations to be in compliance with the statewide planning goals pursuant to ORS 197.250 and 197.251. Because

¹ The claimants summarily list numerous state land use laws as applicable to this claim, but do not establish how the laws either apply to the claimants' desired use of the subject property or restrict its use with the effect of reducing its fair market value. On their face, most of the regulations either do not apply to the claimants' property or do not restrict the use of the claimants' property with the effect of reducing its fair market value. Without any explanation of how these land use regulations apply to the claimants' desired use of the property, the department cannot evaluate how or whether they apply. This report addresses only those regulations that the department finds are applicable to and restrict the claimants' desired use of the subject property, based on the claimants' description of their desired use.

the Commission had not acknowledged the county's plan and land use regulations when the claimants acquired the subject property on July 1, 1983, the statewide planning goals, and Goal 4 in particular, applied directly to the claimants' property when they acquired it.²

Goal 4 went into effect on January 25, 1975, and was intended to "conserve forest lands for forest uses" and required, "Lands suitable for forest uses shall be inventoried and designated as forest lands. Existing forest land uses shall be protected unless proposed changes are in conformance with the comprehensive plan." Those forest uses were defined as follows: "(1) the production of trees and the processing of forest products; (2) open space, buffers from noise, and visual separation of conflicting uses; (3) watershed protection and wildlife and fisheries habitat; (4) soil protection from wind and water; (5) maintenance of clean air and water; (6) outdoor recreational activities and related support services and wilderness values compatible with these uses; and (7) grazing land for livestock." Specifically, Goal 4 only allowed dwellings in forest zones if they could be found to be "necessary and accessory" to one of the enumerated forest uses listed in Goal 4.³

No information has been presented in the claim to establish that the claimants' desired development of a dwelling on the subject property complies with the Goal 4 standards in effect when the claimants acquired the subject property in 1983. At the time the claimants acquired the subject property, Benton County allowed one dwelling on parcels with a minimum lot size of 40 acres. However, in this case, when the claimants acquired the subject property, the property was, and continues to be, encumbered by a restrictive covenant, which prohibits the claimants from developing any residential, commercial or industrial buildings on the subject property.

Conclusions

The current zoning requirements and dwelling standards established pursuant to Goal 4, ORS 215.705 to 215.755 and 215.780 and OAR 660-006-0026 and 660-006-0027 were all enacted or adopted after the claimants acquired the subject property in 1983 and do not allow the claimants' desired development of the property. However, when the claimants acquired the

² The statewide planning goals became effective on January 25, 1975, and were applicable to legislative land use decisions and some quasi-judicial land use decisions prior to the Commission's acknowledgment of each county's land use regulations. *Perkins v. City of Rajneeshpuram*, 300 Or 1 (1985); *Alexanderson v. Polk County*, 289 Or 427, rev den 290 Or 137 (1980); *Sunnyside Neighborhood Assn. v. Clackamas County*, 280 Or 3 (1977); *Jurgenson v. Union County*, 42 Or App 505 (1979); and *1000 Friends of Oregon v. Benton County*, 32 Or App 413 (1978). After the county's plan and land use regulations were acknowledged by the Commission, the statewide planning goals and implementing rules no longer directly applied to such 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. *Foster v. Polk County*, 115 Or App 475 (1992); *Kenagy v. Benton County*, 115 Or App 131 (1992).

³ Goal 4 prohibited uses that were not enumerated by Goal 4 as permissible uses for forest lands as well as those that were not necessary and accessory to an enumerated forest use. *Lamb v. Lane County*, 7 Or LUBA 137 (1983). Dwellings in forest lands were required to be "necessary and accessory" to show that such dwellings complied with the Goal 4 requirement that local land use regulations must "conserve forest lands for forest uses." *1000 Friends v. LCDC (Curry County)*, 301 Or 447 (1986). A dwelling that may "enhance" forest uses is not "necessary and accessory" to a forest use to the extent required by Goal 4. *1000 Friends of Oregon v. LCDC (Lane County)*, 305 Or 384 (1988). For additional guidance, the Goal 4 provisions were interpreted under OAR 660, division 6, effective on September 1, 1982, in *1000 Friends of Oregon v. LCDC (Lane County)* and in *1000 Friends v. LCDC (Curry County)*.

property, it was subject to a restrictive covenant that prohibited the claimants' desired development of a dwelling on the subject property. Accordingly, no state land use regulations enforced after the claimants acquired the property restrict the claimants' desired use of the property relative to uses permitted when they acquired it, with the effect of reducing the property's 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 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."

As explained in Section V.(2) of this report, the claimants, Gregory and Thomas Gerding, acquired the subject property in 1983. When they acquired the property, it was subject to a restrictive covenant that prohibits the development of dwellings on the subject property. Therefore, the claimants have not established that land use regulations enforced by the Commission or the department have restricted the claimants' desired use of the property relative to uses permitted when they acquired it, with the effect of reducing the property's fair market value.

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.

The claim is based on state land use regulations that restrict the use of the subject property, including applicable provisions of Goal 4, ORS 215 and OAR 660, division 6, which Benton County has implemented through its current FC zone. With the exception of provisions of Goal 4 adopted before the claimants acquired the subject property on July 1, 1983, these state land use laws were not in effect when the claimants acquired the subject property. However, a restrictive covenant that prohibits the claimants' desired development of the property encumbered the property when the claimants acquired it and continues to prohibit the claimants' desired development of a dwelling on the subject property.

Conclusions

It appears that, with the exception of provisions of Goal 4 in effect on July 1, 1983, the general statutory, goal and rule restrictions on residential development of the subject property were not in effect when the claimants acquired the property. However, a restrictive covenant, which encumbered the property when the claimants acquired it and continues to encumber the property, prohibits the claimants' desired use of the property. Therefore, the issue of whether any laws are exempt under ORS 197.352(3) is not relevant to this claim.

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 record for this claim, claimants' desired use is prohibited by a restrictive covenant that prohibits the development of a dwelling on the subject property. Therefore, the claimants have not established that any state laws enforced by the Commission or the department that restrict the use of the subject property and have had the effect of reducing the fair market value of the subject property.

Conclusions

Based on the record before the department, the claimants, Gregory and Thomas Gerding, 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.

VII. COMMENTS ON THE DRAFT STAFF REPORT

The department issued its draft staff report on this claim on March 6, 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.