



Oregon

Theodore R. Kulongoski, Governor

Department of Land Conservation and Development

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April 23, 2007

To: Interested Persons

From: Lane Shetterly, Director



Re: Ballot Measure 37 (ORS 197.352) Claim Number M130484

*Claimants: David J. Hickey, Gay M. Hickey and David and
Gay Hickey Family, LLC*

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. M130484
(BALLOT MEASURE 37) OF)
David J. Hickey, Gay M. Hickey, and)
David and Gay Hickey Family LLC, CLAIMANTS)

Claimants: David J. Hickey, Gay M. Hickey, and
David and Gay Hickey Family LLC (the Claimants)

Property: Township 12S, Range 1W, Section 21, Tax lot 105, Linn County
(the Property)

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

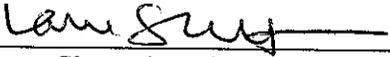
Claimants submitted the Claim to the State of Oregon under ORS 197.352. Under OAR 125-145-0010 *et seq.*, the Department of Administrative Services (DAS) referred the Claim to the Department of Land Conservation and Development (DLCD) as the regulating entity. This order is based on the record herein, 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
DLCD
Dated this 23rd day of April, 2007.

FOR THE DEPARTMENT OF
ADMINISTRATIVE SERVICES:


David Hartwig, Administrator
DAS, State Services Division
Dated this 23rd day of April, 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

April 23, 2007

STATE CLAIM NUMBER: M130484

NAMES OF CLAIMANTS: David J. Hickey
Gay M. Hickey
David and Gay Hickey Family LLC

MAILING ADDRESS: 36939 Gore Drive
Lebanon, Oregon 97355

PROPERTY IDENTIFICATION: Township 12S, Range 1W, Section 21
Tax lot 105
Linn County

OTHER CONTACT INFORMATION: Edward F. Schultz
Weatherford, Thompson,
Cowgill, Black & Schultz, PC
PO Box 667
Albany, Oregon 97321

DATE RECEIVED BY DAS: October 30, 2006

180-DAY DEADLINE: April 28, 2007

I. SUMMARY OF CLAIM

The claimants, David and Gay Hickey and David and Gay Hickey Family LLC, seek compensation in the amount of \$327,180 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 21.85-acre subject property into four 5-acre parcels and to develop a dwelling on each parcel. The subject property is located near the intersection of Waterloo Road and Berlin Road, near Waterloo, in Linn 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 claimants' desired use of the subject property was prohibited under the laws in effect when they acquired the property on or after December 9, 1996. (See the complete recommendation in Section VI of this report.)

III. COMMENTS ON THE CLAIM

Comments Received

On March 14, 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 30, 2006, for processing under OAR 125, division 145. The claim identifies Linn County's Farm/Forest (F/F) zone 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

Claimants David and Gay Hickey assert that they acquired the subject property on May 24, 1976, as reflected by a real estate contract included with the claim. However, they conveyed their entire interest in the property to David and Gay Hickey Family LLC, an Oregon Corporation, on December 9, 1996, as reflected by a warranty deed included with the claim. According to the claimants, on December 26, 1996, David and Gay Hickey Family LLC transferred some interest in the subject property to the David J. Hickey Revocable Trust and Gay M. Hickey Revocable Trust of which the claimants assert they are the trustees. However, the claimants have not provided any documentation to support that acquisition date.¹ The Linn County Assessor's Office confirms the claimants' current ownership of the subject property.

Conclusions

Claimant David and Gay Hickey Family LLC, an Oregon Corporation, is an "owner" of the subject property as that term is defined by ORS 197.352(11)(C), as of December 9, 1996. Claimants David and Gay Hickey acquired their present individual ownership interest in the property on or about December 26, 1996.

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 21.85-acre subject property into four 5-acre parcels and to develop a dwelling on each resulting parcel and that the current zoning prevents that desired use.

The claim is based generally on the applicable provisions of state law that require Exclusive Farm Use (EFU) and forest land zoning. The subject property is zoned F/F by Linn County. The F/F zone is a mixed agricultural and forest land zone, as provided for by Goal 4 and the implementing provisions of OAR 660, division 6 (effective on February 5, 1990), subsequently amended on March 1, 1994, to comply with the provisions of House Bill 3661 (Chapter 792, Oregon Laws 1993).

Under OAR 660-006-0050, all the uses permitted under Goals 3 and 4 are allowed in mixed agriculture and forest zones except that for dwellings, either the Goal 3 or 4 standards are

¹ A request for documentation to support the claimants' assertion was sent to the claimants on March 13, 2007. To date, claimants David and Gay Hickey have not provided any evidence to substantiate their current ownership. However, because the documentation in the claim establishes that they conveyed all of their individual ownership interest in the property to the LLC on December 9, 1996, they necessarily acquired their present ownership interest after December 9, 1996.

applicable based on the predominant use of the tract on January 1, 1993.² Depending on the predominant use on January 1, 1993, the property is subject to either the requirements for dwellings applicable under EFU zoning required by Goal 3 and OAR 660, division 33, or forest zone provisions required by Goal 4 and OAR 660, division 6.

For land divisions, OAR 660-006-0055 authorizes the creation of new parcels based on the standards applicable to farm or forest zones that implement the minimum lot size specified in ORS 215.780. Under ORS 215.780(2)(a), the minimum lot size in Linn County's F/F zone is 80 acres. ORS 215.780 became effective on November 4, 1993 (Chapter 792, Oregon Laws 1993).

Claimant David and Gay Hickey Family LLC acquired the subject property on December 9, 1996, and claimants David and Gay Hickey acquired individual ownership interest in the property after that date. At that time, the claimants' property was subject to Linn County's acknowledged F/F zone and the zoning requirements, minimum lot size and dwelling standards under Goals 3 and 4, ORS 215 and OAR 660, divisions 6, and 33, currently in effect, as described above.

Conclusions

The current zoning requirements, minimum lot size and dwelling standards established by Goal 4 and provisions applicable to land zoned mixed farm-forest in ORS 215 and OAR 660, division 6, were all enacted or adopted before the claimants, David and Gay Hickey and David and Gay Hickey Family LLC, acquired the subject property on or after December 9, 1996. These land use regulations do not allow the division of the 21.85-acre subject property into four 5-acre parcels or the development of a dwelling on each resulting parcel. Laws enacted or adopted since the claimants acquired the subject property in 1996 do not restrict the claimants' desired use of the property relative to when the claimants acquired it in 1996.

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 \$327,180 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 property's value.

Conclusions

As explained in Section V.(1) of this report, the claimants are David and Gay Hickey Family LLC, which acquired the subject property on December 9, 1996, and David and Gay Hickey, who acquired the property on or about December 26, 1996. No state laws enacted or adopted

² No information was provided to the department regarding the predominant use of the subject property on January 1, 1993.

since the claimants acquired the subject property restrict the use of the property relative to the uses allowed in 1996. 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.

Findings of Fact

The claim is based on state land use regulations that restrict the use of the subject property, including applicable provisions of Goals 3 and 4, ORS 215 and OAR 660, divisions 6, and 33, which Linn County has implemented through its current F/F zone. As set forth in Section V.(2) of this report, all of these state land use regulations restricting the claimants' desired use of the subject property were in effect when the claimants acquired the property in 1996. The claim does not identify any state land use regulations enacted or adopted since the claimants acquired the subject property that restrict the use of the property relative to what would have been allowed when they acquired it on December 9, 1996.

Conclusions

All of the state land use regulations that restrict the claimants' desired use of the subject property were in effect when the claimants acquired the property. 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.

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 claimants' desired use of the subject property relative to what was permitted when the claimants acquired it in 1996 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 claimants 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 30, 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.