



Oregon

Theodore R. Kulongoski, Governor

Department of Land Conservation and Development

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October 31, 2007

To: Interested Persons
From: Cora R. Parker, Acting Director



Re: Ballot Measure 37 (ORS 197.352) Claim Number M131324

Claimants: Robert Dean Birt, Robert A. and Judy R. Johnson

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. M131324
(BALLOT MEASURE 37) OF)
Robert Dean Birt and Robert A. and Judy R. Johnson, CLAIMANT)

Claimant: Robert Dean Birt and Robert A. and Judy R. Johnson (the Claimant)

Property: Township 14S, Range 1W, Section 3, Tax lots 100, 700 and 800
Linn 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 Amended 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 Acting 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 Manager for the Measure 37 Services Unit 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:



Cora R. Parker, Acting Director
DLCD
Dated this 31st day of October, 2007.

FOR THE DEPARTMENT OF
ADMINISTRATIVE SERVICES:



Carla Ploederer, Manager
DAS, Measure 37 Services Unit
Dated this 31st day of October, 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**

October 31, 2007

STATE CLAIM NUMBER: M131324

NAMES OF CLAIMANTS: Robert Dean Birt
Robert A. and Judy R. Johnson

MAILING ADDRESS: Robert Dean Birt
Trustee of the Rohlin W. Desler Trust
565 NE Union Street, Suite 207
Salem, Oregon 97301

Robert and Judy Johnson
26785 Fern Ridge Road
Sweet Home, Oregon 97386

PROPERTY IDENTIFICATION: Township 14S, Range 1W, Section 3
Tax lots 100, 700 and 800
Linn County

OTHER CONTACT INFORMATION: Frank Walker & Associates
PO Box 7170
Salem, Oregon 97301

DATE RECEIVED BY DAS: November 27, 2006

DEADLINE FOR FINAL ACTION:¹ May 20, 2008

I. SUMMARY OF CLAIM

The claimants, Robert Dean Birt and Robert and Judy Johnson, seek compensation in the amount of \$458,143 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 the 71-acre subject property with a dwelling. The subject property is located on the east side of Fern Ridge Road, near Sweet Home, in Linn County. (See claim.)

¹ ORS 197.352, as originally enacted, required that final action on claims made under Measure 37 be made within 180 days of the date the claim was filed. In response to the large volume of claims filed in late 2006, the Oregon legislature passed House Bill 3546, which became effective on May 10, 2007. This legislation increased the amount of time state and local governments have to take final action on Measure 37 claims filed on or after November 1, 2006, by 360 days, to a total of 540 days.

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 (1) this claim is not valid as to Robert Dean Birt because he is not an owner of the subject property, and (2) this claim is not valid as to Robert and Judy Johnson because their desired use of the subject property was prohibited under the laws in effect when they acquired the property in 2000. (See the complete recommendation in Section VI of this report.)

III. COMMENTS ON THE CLAIM

Comments Received

On July 13, 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, one written comment was received in response to the 15-day notice.

The comment is relevant to whether the claimants are owners. The comment has been considered by the department in preparing this report. (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 criterion 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 criterion, whichever is later.

Findings of Fact

This claim was submitted to DAS on November 27, 2007, for processing under OAR 125, division 145. The claim identifies Statewide Planning Goals 3 (Agricultural Lands) and 4 (Forest Lands), provisions of ORS 197 and 215 and OAR 660-006-0227 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

Claimant Robert Dean Birt asserts that he acquired an interest in the subject property on October 3, 1964; however, he has not submitted any documentation that supports or otherwise establishes his ownership interest. According to the information provided in the claim, Rohlin Desler acquired an interest in the subject property on October 3, 1964, and on February 13, 1991, he transferred the property to a revocable trust, the Rohlin W. Desler Trust, with himself as trustee, as reflected by a quitclaim deed.² Claimant Robert Dean Birt is a successor trustee of the Rohlin W. Desler Trust, and by the terms of the trust, does not become trustee until the death of Rohlin Desler.³ On August 14, 2000, Rohlin Desler conveyed the property to claimants Robert and Judy Johnson, as reflected by a memorandum of contract of sale included with the claim.

The Linn County Assessor’s Office confirms Robert and Judy Johnson’s current ownership of the subject property. Claimant Robert Dean Birt is not an owner of the subject property.

Conclusions

Claimants Robert and Judy Johnson are “owners” of the subject property as that term is defined in ORS 197.352(11)(C) as of August 14, 2000. Claimant Robert Dean Birt has not established that he is an “owner” of the subject property as that 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 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.

² Transfer of property to a revocable trust does not result in a change in ownership for purposes of ORS 197.352.

³ The department received a comment letter indicating that Rohlin Desler is now deceased; however, the date of his death is unknown. In any event, Robert Dean Birt does not have an ownership interest in the subject property because Rohlin Desler conveyed the subject property to Robert and Judy Johnson before he died, and thus, before Robert Dean Birt became trustee of the Rohlin W. Desler Trust.

Findings of Fact

The claim indicates that the claimants desire to develop the 71-acre subject property with a dwelling, and that current land use regulations prevent the desired use.

The claim is based generally on the applicable provisions of state law that allow mixed agriculture-forest zoning and restrict uses on land zoned mixed agriculture-forest. The subject property is zoned Farm/Forest (F/F) by Linn County. The county's F/F zone is a mixed agricultural and forest land zone, in accordance with Goals 3 and 4, as implemented by OAR 660-006-0050. Goals 3 and 4 became effective on January 25, 1975, and required that agricultural lands as defined by Goal 3 be zoned for farm uses and that forest lands under Goal 4 be zoned for forest uses. OAR 660-006-0050 authorizes local governing bodies to establish mixed agriculture-forest zones in accordance with both Goals 3 and 4 and OAR 660, divisions 6, and 33.

Under OAR 660-006-0050(2), effective on February 5, 1990, and subsequently amended on March 1, 1994, to comply with the provisions of House Bill 3661 (Chapter 792, Oregon Laws 1993), uses allowed in Exclusive Farm Use (EFU) zones under Goal 3 and forest zones under Goal 4 are allowed in mixed agriculture-forest zones.

For the approval and siting of dwellings, under OAR 660-006-0050(2) and (3), counties must apply either the OAR 660, division 6, or 33, standards based on the predominant use of the tract on January 1, 1993.⁴ The provisions of OAR 660-006-0027 and 660-006-0029 apply to dwelling approval and siting where the predominant use of the tract on that date was forest, and the provisions of OAR 660-033-0030 and 660-033-0035 apply where the predominant use of the tract on that date was agriculture.

At the time claimants Robert and Judy Johnson acquired the subject property on August 14, 2000, it was zoned F/F by Linn County and subject to the current dwelling standards under Goals 3 and 4, ORS 215 and OAR 660, divisions 6, and 33.

Conclusions

The current zoning requirements and dwelling standards established by Goals 3 and 4 and provisions applicable to land zoned for mixed agriculture-forest use, in ORS 215.780 and OAR 660, divisions 6, and 33, were all enacted or adopted before Robert and Judy Johnson acquired the subject property on August 14, 2000. These land use regulations do not allow the claimants' desired use of the subject property. Laws enacted or adopted since the claimants acquired the subject property in 2000 do not restrict the claimants' desired use of the property relative to when the claimants acquired it in 2000.

As explained in Section V.(1), claimant Robert Dean Birt is not an "owner" of the subject property as that term is defined in ORS 197.352(11)(C). Therefore, no laws enforced by the Land Conservation and Development Commission (the Commission) or the department restrict his use of the subject real property with the effect of reducing the fair market value of the property.

⁴ The claim does not include information regarding the predominant use of the property on January 1, 1993.

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 \$458,143 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’ comparison of sales data.

Conclusions

As explained in Section V.(1) of this report, the claimants are Robert and Judy Johnson who acquired the subject property on August 14, 2000, and Robert Dean Birt. As explained in Section V.(1) of this report, claimant Robert Dean Birt is not an “owner” of the subject property as that term is defined in ORS 197.352(11)(C). Therefore, no laws restrict his use of the subject property with the effect of reducing the fair market value of the subject property. No state laws enacted or adopted since Robert and Judy Johnson acquired the subject property restrict the use of the property relative to the uses allowed in 2000. Therefore, the fair market value of the subject property has not been reduced 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 the 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 the state land use regulations that restrict claimants Robert and Judy Johnson’s desired use of the subject property were in effect when they acquired the property in 2000.

Conclusions

All of the state land use regulations that restrict claimants Robert and Judy Johnson’s desired use of the subject property were in effect when they 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.

As explained in Section V.(1) of this report, claimant Robert Dean Birt is not an “owner of the subject property 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 to his 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 findings and conclusions set forth in this report, the department finds that laws enforced by the Commission or the department do not restrict claimants Robert and Judy Johnson's desired use of the subject property relative to what was permitted when they acquired it in 2000 and do not reduce the fair market value of the property. All state laws restricting their use of the subject property are exempt under ORS 197.352(3)(E). The department further finds that the claim is not valid as to Robert Dean Birt because he is not an owner of the subject property,.

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 because (1) no state land use regulations restrict Robert and Judy Johnson's desired use of the property relative to uses permitted when they acquired the property, with the effect of reducing the property's fair market value, and (2) Robert Dean Birt is not an owner of the subject property. 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 September 24, 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. Comments received have been taken into account by the department in the issuance of this final report.