

ORS 197.352 (BALLOT MEASURE 37) CLAIM FOR COMPENSATION

**OREGON DEPARTMENT OF LAND CONSERVATION AND DEVELOPMENT
Draft Staff Report and Recommendation**

February 21, 2007

STATE CLAIM NUMBER: M130066

NAMES OF CLAIMANTS: Mabel Wassom
Philip Wassom
Carolyn Batsch
Dennis Batsch

MAILING ADDRESS: Mabel and Philip Wassom
133 SE Miller Avenue
Roseburg, Oregon 97470

Carolyn and Dennis Batsch
2355 N. 11th Street
Springfield, Oregon 97477

PROPERTY IDENTIFICATION: Township 26S, Range 5W,
Section 19: tax lot 200
Section 18: tax lot 300
Douglas County

DATE RECEIVED BY DAS: September 19, 2006

180-DAY DEADLINE: March 18, 2007

I. SUMMARY OF CLAIM

The claimants, Mabel and Phillip Wassom and Carolyn and Dennis Batsch, seek compensation in the amount of \$800,000 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 divide nine 1-acre parcels from the 252.05-acre subject property and to develop a dwelling on each 1-acre parcel. The subject property is located near the North Umpqua River, north of Roseburg and east of I-5, in Douglas County. (See claim.)

II. SUMMARY OF STAFF RECOMMENDATION

Based on the preliminary 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 Mabel and Phillip Wassom and Carolyn Batsch's division of nine

1-acre parcels from the 252.05-acre subject property and to their development of a dwelling on each 1-acre parcel: applicable provisions of Planning Goals 3 (Agricultural Lands), 4 (Forest Lands) and 14 (Urbanization) ORS 215 and Oregon Administrative Rules (OAR) 660, divisions 6, and 33, enacted or adopted after each of these claimants acquired the subject property. These land use regulations will not apply to these claimants only to the extent necessary to allow them to use the subject property for the use described in this report, and only to the extent that use was permitted when Mabel Wassom acquired the property on April 1, 1949, and when Phillip Wassom and Carolyn Batsch acquired the property on December 9, 1976.

The department has also determined that claimant Dennis Batsch's claim is not valid because the claimants have not established his ownership of the subject property. (See the complete recommendation in Section VI. of this report.)

III. COMMENTS ON THE CLAIM

Comments Received

On December 18, 2006, 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 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 September 19, 2006, for processing under OAR 125, division 145. The claim identifies Douglas County's Farm Forest (FF) 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

Claimant Mabel Wassom acquired the subject property on April 1, 1949, as reflected by a deed included with the claim. Mabel Wassom conveyed an interest in the property to her children, claimants Phillip Wassom and Carolyn Batsch, on December 9, 1976, as evidenced by a warranty deed included with the claim.

The claim does not state when claimant Dennis Batsch acquired the subject property and does not include copies of any deeds or otherwise establish that Dennis Batsch is an owner of the subject property.¹

The Douglas County Assessor’s Office confirms Mabel Wassom’s, Phillip Wassom’s and Carolyn Batsch’s current ownership of the subject property.

Conclusions

Claimants Mabel and Phillip Wassom and Carolyn Batsch are “owners” of the subject property as that term is defined by ORS 197.352(11)(C). Mabel Wassom has been an owner since April 1, 1949. Phillip Wassom and Carolyn Batsch have been owners since December 9, 1976. Mabel Wassom is a “family member” of Phillip Wassom and Carolyn Batsch as that term is defined by ORS 197.352(11)(A). Claimant Dennis Batsch 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.

¹ On January 25, 2007, department staff phoned the claimants and requested a deed or other documentation establishing Dennis Batsch’s ownership of the subject property. No documentation has been received to date.

Findings of Fact

The claim indicates that the claimants desire to divide nine 1-acre parcels from the 252.05-acre subject property and to develop a dwelling on each 1-acre parcel and that current land use laws prohibit the desired use.

The claim is based generally on the applicable provisions of state law that require mixed farm-forest zoning and restrict uses on land zoned mixed farm-forest. The subject property is zoned by Douglas County as FF, which is a mixed agricultural and forest land zone, as required by Goal 4 and the implementing provisions of OAR 660-006-0050 (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 applicable based on the predominant use of the tract on January 1, 1993.² Depending on the predominant use on that date, the property is subject to either the requirements for dwellings applicable under Exclusive Farm Use (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 80-acre minimum lot size specified in ORS 215.780. Under ORS 215.780(2)(a), the minimum lot size in Douglas County's FF zone is 80 acres. The subject property cannot be divided into parcels smaller than 80 acres.

Goal 14, which also became effective on January 25, 1975, would likely apply to the division of the subject property into parcels less than two acres. Goal 14 generally requires that land outside of urban growth boundaries be used for rural uses.

Claimant Mabel Wassom acquired the subject property in 1949, prior to the adoption of the statewide planning goals and their implementing statutes and regulations. No county zoning applied to the subject property in 1949.

Conclusions

The current zoning requirements, minimum lot size and dwelling standards established under Goal 4 for lands zoned for mixed farm-forest use and the goal, statutory and rule restrictions under applicable provisions of Goal 14, ORS 215 and OAR 660, divisions 6, and 33, were enacted or adopted after Mabel Wassom acquired the subject property. These laws restrict the use of the subject property relative to the uses allowed when Mabel Wassom acquired the property.

As explained in Section V.(1) above, the claimants have not established that claimant Dennis Batsch is an "owner" of the subject property as that term is defined in ORS 197.352(11)(C). Without such demonstration, the department cannot determine that any laws enforced by the

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

Commission or the department restrict his use of private real property with the effect of reducing the fair market value of the property relative to how the property could have been used at the time he acquired the property.

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 uses 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 \$800,000 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 a real estate broker's comparative market analysis included with the claim.

Conclusions

As explained in Section V.(1) of this report, claimant Dennis Batsch has not established his ownership of the subject property. Without such demonstration, the department can make no determination on the effect of any land use regulations on the fair market value of the subject property as to Dennis Batsch's claim.

As explained in Section V.(1) of this report, the claimants are Mabel Wassom who acquired the subject property in 1949 and son, daughter and son-in-law, Phillip Wassom and Carolyn and Dennis Batsch. Dennis Batsch has not established his entitlement to compensation under ORS 197.352 because the claimants have not established his ownership of the subject property. Under ORS 197.352, claimants Mabel and Phillip Wassom and Carolyn Batsch are due compensation for land use regulations that restrict their use of the 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 Mabel Wassom acquired the subject property restrict the claimants' desired use of the property. The claimants estimate that the effect of the regulations on the fair market value of the subject property is a reduction of \$800,000.

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 subject property. Nevertheless, based on the evidence in the record for this claim, the department determines that the fair market value of the subject property has been reduced to some extent as a

result of land use regulations enforced by the Commission or the department since Mabel Wassom acquired the subject property.

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, 4 and 14, ORS 215 and OAR 660, divisions 6, and 33, which Douglas County has implemented through its current FF zone. All of these land use regulations were enacted or adopted after Mabel Wassom acquired the subject property.

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 and development of the subject property were in effect when Mabel Wassom acquired the subject property in 1949. As a result, these laws are not exempt under ORS 197.352. Laws in effect when Mabel Wassom acquired the subject property are exempt under ORS 197.352(3)(E) and do not provide a basis for compensation. In addition, laws enacted or adopted for a purpose set forth in ORS 197.352(3)(A) to (D) are also exempt and would not provide a basis for compensation.

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, claimant Dennis Batsch has not established his ownership of the subject property and therefore, has not established his entitlement to compensation under ORS 197.352. However, laws enforced by the Commission or the department restrict the remaining claimants' desired use 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 \$800,000. 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 subject property was allowed under the standards in effect when Mabel Wassom acquired the 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 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 allow Mabel Wassom to use the subject property for a use permitted at the time she acquired the property on April 1, 1949, and to allow Phillip Wassom and Carolyn Batsch to use the subject property for a use permitted at the time they acquired the property on December 9, 1976.

Claimants Phillip Wassom and Carolyn Batsch each acquired an interest in the subject property after the adoption of the statewide planning goals, but before the Commission acknowledged Douglas County's land use regulations to be in compliance with the statewide planning goals pursuant to ORS 197.250 and 197.251.³ Because the Commission had not acknowledged the county's plan and land use regulations when Phillip Wassom and Carolyn Batsch acquired the subject property on December 9, 1976, the applicable statewide planning goals would have applied directly to any development application for the subject property.⁴

As adopted in 1975, Goal 3 required that agricultural lands be preserved and zoned for EFU pursuant to ORS 215. Goal 4, as adopted in 1975, required that forest lands be designated for forest uses. Depending on the nature of the property, when Philip Wassom and Carolyn Batsch acquired it, the property would have been subject to Goal 3 or 4 and either EFU zoning pursuant to ORS 215 or forest zoning adequate to retain forest lands for forest uses.

Under Goal 3, the state standards for a division of land required that the created lots or parcels be of a size "appropriate for the continuation of the existing commercial agricultural enterprise within the area." Further, ORS 215.263 (1975 edition) required that all land divisions subject to EFU zoning comply with the legislative intent in ORS 215.243 (Agricultural Land Use Policy). Thus, under Goal 3, the opportunity to divide the subject property when acquired by Phillip Wassom and Carolyn Batsch on December 9, 1976, was limited to new lots or parcels that were (1) appropriate for the continuation of the existing commercial agricultural enterprise in the area, and (2) shown to be consistent with the legislative intent in ORS 215. At that time, under Goal 3, farm dwellings were allowed if they were determined to be "customarily provided in

³ Douglas County's comprehensive plan was acknowledged on July 25, 1989.

⁴ 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 569 (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. *Forster v. Polk County*, 115 Or App 475 (1992); *Kenagy v. Benton County*, 115 Or App 131 (1992).

conjunction with farm use” under ORS 215.213(1)(e) (1975 edition),⁵ and non-farm dwellings were subject to ORS 215.213(3) (1975 edition).⁶ Other uses were authorized and governed by the applicable provisions under Goal 3 and ORS 215.213.

Under Goal 4, the state standards required uses to “conserve forest lands for forest uses.” Specifically, Goal 4 only allowed land divisions that would protect commercial forest lands for commercial forest uses. Dwellings in forest zones could only be allowed if found to be “necessary and accessory” to one of the enumerated forest uses listed in Goal 4.⁷

The claim does not establish whether or to what extent the claimants’ desired use of the subject property complies with the standards for land division and development under Goal 3 or 4 applicable and in effect when Philip Wassom and Carolyn Batsch acquired the property on December 9, 1976.

In addition to the applicable provisions of Goals 3, 4 and 14 and ORS 215 in effect when Phillip Wassom and Carolyn Batsch acquired the property on December 9, 1976, and other laws in effect when each claimant acquired the subject property, there may be other laws that apply to Mabel and Phillip Wassom and Carolyn Batsch’s 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 these 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, and depending on when they were enacted or adopted, may continue to apply to the subject property. In addition, some of these laws may be exempt under ORS 197.352(3)(A) to (D) and will continue to apply to the subject property on that basis.

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 uses 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 have provided to the department in their 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 subject property.

⁵ Under ORS 215.213, a farm dwelling could be established on agricultural land only if the farm use to which the dwelling relates exists (*Newcomer v. Clackamas County*, 92 Or App 174, modified 94 Or App 33 (1988) and *Matteo v. Polk County*, 11 Or LUBA 259, 263 (1984), affirmed without opinion 70 Or App 179 (1984)). Guidance on the application of the statutory standards for farm and non-farm dwellings in EFU zones can be found in the Commission rules (OAR 660, division 5, adopted on July 21, 1982, amended on June 7, 1986, and repealed on August 7, 1993).

⁶ When determining whether land is “generally unsuitable for the production of farm crops and livestock” under ORS 215.213(3), the entire parcel or tract must be evaluated rather than a portion thereof. *Smith v. Clackamas County*, 313 Or 519 (1992).

⁷ 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)*.

Conclusions

Based on the record before the department, claimant Dennis Batsch has not established that he 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 claimants not established his ownership of the subject property. Therefore, the department recommends that his claim be denied. The department otherwise recommends that the claim be 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 Mabel and Phillip Wassom and Carolyn Batsch's division of nine 1-acre parcels from the 252.05-acre subject property or to their development of a dwelling on each parcel: applicable provisions of Goals 3, 4 and 14, ORS 215 and OAR 660, divisions 6, and 33, enacted or adopted after each of these claimants acquired the subject property. These land use regulations will not apply to these claimants only to the extent necessary to allow them to use the subject property for the use described in this report, and only to the extent that use was permitted when Mabel Wassom acquired the property on April 1, 1949, and when Phillip Wassom and Carolyn Batsch acquired the property on December 9, 1976.
2. The action by the State of Oregon provides the state's authorization to Mabel and Phillip Wassom and Carolyn Batsch to use the subject property for the use described in this report, subject to the standards in effect when Mabel Wassom acquired the property on April 1, 1949, and when Phillip Wassom and Carolyn Batsch acquired the property on December 9, 1976. On December 9, 1976, the property was subject to the applicable provisions of Goals 3, 4 and 14 and ORS 215 then in effect.
3. To the extent that any law, order, deed, agreement or other legally enforceable public or private requirement provides that 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 Mabel and Phillip Wassom and Carolyn Batsch 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 subject property by Mabel and Phillip Wassom and Carolyn Batsch 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 Mabel and Phillip Wassom and Carolyn Batsch to use 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 these 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 subject property by these claimants.

VII. NOTICE OF OPPORTUNITY TO COMMENT

This staff report is not a final decision by the department and does not authorize any use of the property that is the subject of this report. OAR 125-145-0100 provides 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. Such response must be filed no more than 10 calendar days after the date this report is mailed to the claimants and any third parties.

Responses to this draft staff report and recommendation will be considered only as comments related to the claim described in this report. All responses must be delivered to the Oregon Department of Administrative Services (DAS), Measure 37 Unit, Risk Management–State Services Division, 1225 Ferry Street SE, U160, Salem, Oregon 97301-4292 and will be deemed timely filed if either postmarked on the tenth day, or actually delivered to DAS by the close of business on the tenth day. Note: Please reference the claim number, claimant name and clearly mark your comments as "Draft Staff Report comments." Comments must be submitted in writing only. Those comments submitted electronically or by facsimile will not be accepted.