

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. M122892
(BALLOT MEASURE 37) OF)
Michael O’Gara, CLAIMANT)

Claimant: Michael O’Gara (the Claimant)

Property: Township 37S, Range 15W, Section 13, Tax lots 800 and 900,
Curry 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 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 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 chapter 125, division 145, and by the Deputy 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.

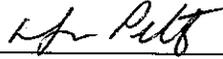
FOR DLCD AND THE LAND
CONSERVATION AND DEVELOPMENT
COMMISSION:
Lane Shetterly, Director



Cora R. Parker, Deputy Director
DLCD

Dated this 29th day of August, 2006.

FOR the DEPARTMENT OF
ADMINISTRATIVE SERVICES:



Dugan Petty, Deputy Administrator
DAS, State Services Division

Dated this 29th day of August, 2006.

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 197.352¹, 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)

¹ By order of the Marion County Circuit Court, "all time lines under Measure 37 [were] suspended indefinitely" on October 25, 2005. This suspension was lifted on March 13, 2006 by the court. As a result, a period of 139 days (the number of days the time lines were suspended) has been added to the 180-day time period under ORS 197.352(6) for claims that were pending with the state on October 25, 2005.

ORS 197.352 (BALLOT MEASURE 37) CLAIM FOR COMPENSATION
OREGON DEPARTMENT OF LAND CONSERVATION AND DEVELOPMENT
Final Staff Report and Recommendation

August 29, 2006

STATE CLAIM NUMBER: M122892

NAME OF CLAIMANT: Michael O’Gara

MAILING ADDRESS: PO Box 1215
Gold Beach, Oregon 97444

PROPERTY IDENTIFICATION: Township 37S, Range 15W, Section 13
Tax lots 800 and 900
Curry County

DATE RECEIVED BY DAS: October 21, 2005

180-DAY DEADLINE: September 5, 2006¹

I. SUMMARY OF CLAIM

The claimant, Michael O’Gara, seeks compensation in the amount of \$1,250,000 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 claimant desires compensation or the right to divide the 30.52-acre subject property, consisting of tax lots 800 and 900, into four parcels of five to six acres each. The subject property is located at the locational coordinates listed above, west of State Highway 101, near Gold Beach, in Curry 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 as to the 22.96-acre western portion of tax lot 800 because the claimant’s desired use of this portion was restricted to a greater degree under the laws in effect when the claimant acquired it in 1977 than it is currently.

In addition, the department has determined that the claim is not valid for the 2.76-acre eastern portion of tax lot 800 because the claimant’s desired use of that portion was prohibited under the laws in effect when the claimant acquired it in 1998.

¹ This date reflects 180 days from the date the claim was submitted, as extended by the 139 days that all timelines under Measure 37 were suspended during the pendency of *MacPherson v. Dept. of Admin. Svcs.*, 340 Or 117 (2006).

Finally, the department has also determined that the claim is not valid as to tax lot 900 because the claimant's desired use of the tax lot was prohibited under the laws in effect when the claimant acquired it in 1977. (See the complete recommendation in Section VI of this report.)

III. COMMENTS ON THE CLAIM

Comments Received

On July 10, 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, one written comment was received in response to the 10-day notice.

The comment does not address whether the claim meets the criteria for relief under ORS 197.352. Comments concerning the effects a use of the subject property may have on surrounding areas are generally not something that the department is able to consider in determining whether to waive a state law. If funds do become available to pay compensation, then such effects may become relevant in determining which claims to pay compensation for instead of waive a state law. (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 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, 2005, for processing under OAR 125, division 145. The claim identifies Curry County's Forest Grazing (FG) 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(1)(C) defines “owner” as “the present owner of the property, or any interest therein.”

Findings of Fact

The claimant, Michael O’Gara, acquired most of the subject property, specifically the 22.96-acre western portion of tax lot 800 and all of tax lot 900, on August 17, 1977, as reflected by a warranty deed included with the claim. The claimant acquired the remainder of tax lot 800, consisting of the 2.76-acre eastern portion of tax lot 800, on February 20, 1998, as reflected by a warranty deed included with the claim. The Curry County Assessor’s Office confirms the claimant’s current ownership of the subject property.

Under the terms of the deeds to Michael O’Gara, his ownership is subject to access limitations to Highway 101 and to the rights of the public and the state in the ocean shore and dry sands area.

Conclusions

The claimant, Michael O’Gara, is an “owner” of all of tax lot 900 and most of tax lot 800 as of August 17, 1977, and is an “owner” of the remaining eastern portion of tax lot 800 as of February 20, 1998.

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 claimant’s 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 claimant or a family member acquired the property.

Findings of Fact

The claim indicates that the claimant desires to divide the subject property into four parcels of five to six acres each, and that the county’s FG zoning prevents him from dividing the property.

The claimant’s property is zoned FG by Curry County, as required by Statewide Planning Goal 4 (Forest Lands), in accordance with ORS 215 and OAR 660, division 6, because the claimant’s property is “forest land” under Goal 4. Goal 4 became effective on January 25, 1975, and requires that forest land be zoned for forest uses (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 claimant acquired the subject property (except the 2.76-acre eastern portion of tax lot 800) after the adoption of the statewide planning goals but before the Commission acknowledged the Curry County's land use regulations to be in compliance with the statewide planning goals pursuant to ORS 197.250 and 197.251. Because the Commission had not acknowledged the county's plan and land use regulations when the claimant acquired most of the subject property on August 17, 1977, the statewide planning goals, and Goal 4 in particular, applied directly to the claimant's use of the property when he acquired it.²

Goal 4 went into effect on January 25, 1975, "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."

No information has been presented in the claim to establish that the claimant's desired division of most of the subject property, consisting of the 22.96-acre western portion of tax lot 800 and 4.8-acre tax lot 900, into four parcels complies with the Goal 4 standards in effect when the claimant acquired them in 1977.

All of the subject property is within the area defined as "coastal shoreland" under Goal 17 (Coastal Shorelands). Goal 17 became effective on June 7, 1977, and required that coastal resources within the shoreland area be inventoried and protected.³ Further, upon its adoption in 1977, Goal 17 provided that:

"[s]horelands in rural areas . . . shall be used as appropriate for:

- (a) farm uses as provided in ORS Chapter 215;
- (b) propagation and harvesting of forest products consistent with the Oregon Forest Practices Act;
- (c) private and public water-dependent recreation developments;
- (d) aquaculture;

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 17 was adopted in 1976 and became effective on June 7, 1977. The Goal 17 Inventory Requirements defined the shoreland planning wherein the subject property is located. The Goal 17 Comprehensive Plan requirements prescribed Coastal Shoreland Uses for the different types of coastal shorelands, as noted in the text of this report.

(e) water-dependent commercial and industrial uses and water-related uses only upon a finding by the governing body of the county that such uses satisfy a need which cannot be reasonably accommodated on shorelands in urban and urbanizable areas;

(f) *subdivisions*, major and minor partitions and other uses *only upon a finding by the governing body of the county that such uses satisfy a need which cannot be accommodated at other upland locations or in urban or urbanizable areas and are compatible with the objectives of this goal to protect riparian vegetation and wildlife habitat* [emphasis added]; and

(g) a single family residence on existing lots, parcels or units of land when compatible with the objectives and implementation standards of this goal.

The current version of Goal 17 contains similar restrictions, generally allowing uses that are not dependent on or related to water only upon a showing that the use will not commit shorelands to more intensive uses or cause a permanent or long-term change in the features of shorelands, except upon a showing of public need that cannot be met in other areas. No showing that the claimant's desired use would comply with this standard has been made.

The 4.8-acre tax lot 900 is in the ocean shore area and is therefore subject to the applicable provisions of Goal 18 (Beaches and Dunes). Goal 18 became effective on June 7, 1977, and generally prohibits development on the dry sand portion of the ocean shore.

Conclusions

The use standards under Goals 17 and 18 in effect when the claimant acquired most of the subject property in 1977 prohibited the claimant's desired use of the property.

The current development standards established by Goals 17 and 18 for coastal shorelands and beach and dune areas were all enacted or adopted before claimant acquired most of tax lot 800 and tax lot 900 on August 17, 1977. These land use regulations do not allow the desired division of tax lots 800 and 900. Laws enacted or adopted since the claimant acquired most of the subject property in 1977 do not restrict the claimant's desired use of the property relative to when the claimant acquired it in 1977.⁴

In addition to Goal 17, the current zoning requirements, minimum lot size and dwelling standards established by Goal 4 and provisions applicable to land zoned forest in ORS 215 and OAR 660, division 6, were all enacted or adopted before Michael O'Gara acquired the 2.76-acre eastern portion of tax lot 800 on February 20, 1998. These land use regulations do not allow the division of the subject property. Laws enacted or adopted since the claimant acquired this portion of the subject property in 1998 do not restrict the claimant's desired use relative to when the claimant acquired this portion in 1998.

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 claimant has identified. There may be other laws that currently apply to the claimant's use of the subject property, and that may continue to apply to the claimant's use of the property, that have not been identified in the claim.

⁴ Tax lot 900 is located within the delineated boundary designated as the state ocean shore recreation area by ORS 390 and is subject to the jurisdiction of the state.

In some cases, it will not be possible to know which laws apply to a use of subject property until there is a specific proposal for 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 \$1,250,000 as the reduction in the subject property’s fair market value due to the regulation(s). This amount is based on the claimant’s estimate.

Conclusions

As explained in Section V.(1) of this report, the claimant is Michael O’Gara who acquired the subject property on August 17, 1977, and February 20, 1998. Under ORS 197.352, the claimant is due compensation for land use regulations that restrict the use 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 in effect when the claimant acquired the subject property either prohibited the claimant’s desired use or have been succeeded by regulations that are not more restrictive than those in effect when the claimant acquired the property. Therefore, the claimant has failed to establish that state land use regulations have had the effect of reducing the fair market value of 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 does not identify any state land use regulations enacted or adopted since the claimant acquired the subject property that restrict the use of the property relative to what would have been allowed when he acquired it on August 17, 1977, and February 29, 1998. As set forth in Section V.(2) of this report, the state land use regulations restricting the claimant’s desired use of the subject property were in effect when the claimant acquired it in 1977 and 1998.

In addition, the claim does not identify any state land use regulations enacted or adopted since the claimant acquired portions of the subject property that include tax lot 900 and the 2.76-acre easterly portion of tax lot 800, that restrict the use of these portions of the property relative to what would have been allowed when the claimant acquired them on August 17, 1977, and February 20, 1998, respectively. As set forth in Section V.(2) of this report, the state land use regulations restricting the claimant’s desired use of the subject property were in effect when the claimant acquired those portions of the property in 1977 and 1998.

Conclusions

Goals 4, 17 and 18 were in effect when the claimant acquired the subject property. ORS 215.780 and OAR 660, division 6, were also in effect when the claimant acquired the eastern portion of tax lot 800. Therefore, these state land use regulations are exempt under ORS 197.352(3)(E).

Other laws in effect when the claimant acquired the subject property are also exempt under ORS 197.352(3)(E) and will continue to apply to the claimant's use of the property. There may be other laws that continue to apply to the claimant's use of the subject property that have not been identified in the claim. 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 claimant has 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.

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 claimant's desired use of the subject property relative to what was permitted when the claimant acquired it and do not have the effect of reducing the fair market value of the property. In addition, these state land use regulations (Goals 4, 17 and 18) are exempt under ORS 197.352(3).

Conclusions

Based on the record and the foregoing findings and conclusions, the claimant 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 as they apply to the subject property. Therefore, the department recommends that the claim be denied.

VII. COMMENTS ON THE DRAFT STAFF REPORT

The department issued its draft staff report on this claim on August 15, 2006. OAR 125-145-0100(3), provided an opportunity for the claimant or the claimant's 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.