

HARDY MYERS
Attorney General



PETER D. SHEPHERD
Deputy Attorney General

DEPARTMENT OF JUSTICE
TRIAL DIVISION

January 22, 2007

Trial Court Clerk
Yamhill County Courthouse
535 East Fifth
McMinnville, Oregon 97128

Re: *McCallie, Kathryn et al v. State*
Yamhill County Circuit Court No. CV060341

Dear Trial Court Clerk:

Enclosed for filing please find Respondents' Cross Motion for Summary Judgment and Memorandum in Support of Respondents' Cross-Motion for Summary Judgment and Opposition to Petitioners' Motion for Summary Judgment in the referenced matter.

Postcards are enclosed for your use in notifying me of the action taken.

Sincerely,

A handwritten signature in black ink that reads "Erika L. Hadlock".

Erika L. Hadlock
Sr. Assistant Attorney General

TRIQ6666.DOC/ELH/tr1
Enclosures
cc: David B. Smith
Client

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF YAMHILL

KATHRYN McCALLIE, BETTE J.
SUDERMAN, and BARBARA L.
THOMPSON, trustee of the Carkuff
Revocable Living Trust,

Petitioners,

v.

OREGON DEPARTMENT OF LAND
CONSERVATION & DEVELOPMENT, an
Agency of the State of Oregon,

Respondent,

and

OREGON DEPARTMENT OF
ADMINISTRATIVE SERVICES, an Agency
of the State of Oregon

Respondent.

Case No. CV060341

RESPONDENTS' CROSS MOTION FOR
SUMMARY JUDGMENT

(Oral Argument Requested)

Pursuant to ORCP 47, respondents move for summary judgment on the ground that respondents' final order on petitioners' Measure 37 claim concluded correctly that petitioners did not acquire any interest in the subject property until they became successor trustees of the trust in which the property is held. Accordingly, respondents are entitled to judgment as a matter of law. Petitioners already have moved for summary judgment and have requested oral argument and official court-reporting services. Respondents join in those requests.

Counsel for the parties have conferred in good faith about the issues presented by these motions but have been unable to resolve the dispute.

1 This motion is based on the record and file herein and respondents' memorandum in
2 support of motion for summary judgment, with attached exhibits.

3 DATED this 22nd day of January, 2007.

4 Respectfully submitted,

5 HARDY MYERS
6 Attorney General

7 

8 ERIKA L. HADLOCK #91297
9 Sr. Assistant Attorney General
10 Trial Attorney
11 Tel (503) 947-4700
12 Fax (503) 947-4792
13 erika.hadlock@doj.state.or.us
14 Of Attorneys for Respondents

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF YAMHILL

KATHRYN McCALLIE, BETTE J.
SUDERMAN, and BARBARA L.
THOMPSON, trustee of the Carkuff
Revocable Living Trust,

Petitioners,

v.

OREGON DEPARTMENT OF LAND
CONSERVATION & DEVELOPMENT, an
Agency of the State of Oregon,

Respondent,

and

OREGON DEPARTMENT OF
ADMINISTRATIVE SERVICES, an Agency
of the State of Oregon

Respondent.

Case No. CV060341

MEMORANDUM IN SUPPORT OF
RESPONDENTS' CROSS-MOTION FOR
SUMMARY JUDGMENT AND OPPOSITION
TO PETITIONERS' MOTION FOR SUMMARY
JUDGMENT

INTRODUCTION

Petitioners McCallie, Suderman and Thompson filed a Measure 37 claim with respect to real property in Yamhill County. The State issued a final order in which it determined that the claim was valid and elected, instead of paying compensation, to “waive” certain land use regulations, that is, “not to apply * * * land use regulations to allow the owner to use the property for a use permitted at the time the owner acquired the property.” ORS 197.352(8); *see* ORS 197.352(10) (also authorizing waiver). Petitioners challenge the State’s final order, alleging that the State incorrectly determined the date on which they acquired the property and,

1 therefore, granted an inadequate waiver. Petitioners seek reversal or remand of the final order.
2 (Petition ¶ 13).

3 This motion for summary judgment presents a single legal question: On what date did
4 petitioners acquire an interest in the subject property for purposes of Measure 37? The State
5 determined that petitioners first acquired an interest that allowed them to “use” the property – a
6 necessary attribute of Measure 37 ownership – in October 2004, when they became successor
7 trustees of the Carkuff Living Trust, the trust in which the property is held. Petitioners contend
8 that they acquired an interest in the property in January 1983, when they were named as
9 beneficiaries of the trust. As explained in detail below, neither Measure 37 nor Oregon trust law
10 supports petitioners’ theory that their status as trust beneficiaries gave them ownership interests
11 in the trust assets sufficient to support a Measure 37 claim. As a matter of law, petitioners did
12 not acquire such ownership interests in the property until they became successor trustees.
13 Accordingly, the State is entitled to summary judgment in its favor.

14 BACKGROUND

15 A. Measure 37

16 A property owner qualifies for Measure 37 relief if: (1) a public entity enacts or enforces
17 a “land use regulation” after December 2, 2004, that (2) restricts the owner’s use and (3) has the
18 effect of reducing the fair market value of the owner’s property. ORS 197.352(1). Section 3 of
19 Measure 37 provides that certain land use regulations shall not be a basis for a written demand
20 under Section 1, notably regulations in effect when the owner or a family member acquired the
21 property. ORS 197.352(3)(E). Section 11 defines “owner” as the “present owner” of the
22 property, and lists the relationships on which a “family member” finding may be based. ORS
23 197.352(11)(A), (C).

24 For regulations enacted prior to the effective date of Measure 37 (December 2, 2004),
25 Section 5 requires owners to submit written demands by December 2, 2006, or the date on which
26 a land use regulation is applied “as an approval criteria [*sic*]” on a specific land use application,

1 whichever is later. After determining that an owner submitted a timely, valid written demand,
2 the public entity has the option to pay compensation or to “modify, remove, or not to [*sic*] apply”
3 land use regulations to the extent necessary “to allow the owner to use the property for a use
4 permitted at the time the owner acquired the property.” ORS 197.352(8); *see also* ORS
5 197.352(10). In this case, the State determined that petitioners’ Measure 37 claim was valid and
6 granted waiver relief in lieu of compensation.¹

7 **B. Statement of undisputed facts**

8 For purposes of this motion for summary judgment, the following facts are undisputed:

9 1. Petitioners currently have ownership interests in real property in Yamhill County,
10 Oregon, that is the subject of Measure 37 claim number M122647. (Petition ¶¶ 1, 5).²

11 2. The subject property has been an asset of the revocable Carkuff Living Trust (“the
12 trust”) since 1983. (Petition ¶¶ 1, 5).

13 3. Petitioners were designated beneficiaries of the trust on January 10, 1983.
14 (Petition ¶ 5).

15 4. The “REVOCABLE LIVING TRUST AGREEMENT” for the Carkuff Living
16 Trust provides that:

- 17 a. trust property is “vested in the Trustees”;
- 18 b. the trustors “may at any time” revoke the agreement or withdraw property
from the trust;
- 19 c. the trustees “shall have and exercise the exclusive management and
control of the assets comprising the trust estate.”

20 (Trust Agreement at 3 (the agreement is attached to the petition for judicial review; *see* Petition
21 ¶(8)).³

22

23 ¹ Allowing the owner to use the property in a way that would otherwise be prohibited by land
24 use regulations is commonly referred to as granting a Measure 37 “waiver.” DLCD can pay
25 compensation only if and when the legislature appropriates funds for that purpose. *See* OAR
660-002-0010 (8) (c).

26 ² The State has attached the petition for judicial review as Exhibit 1 to this memorandum.

³ The State has attached the trust agreement as Exhibit 2 to this memorandum.

1 5. In its final order on Measure 37 claim number M122647, the State granted
2 petitioners relief in the form of a “waiver” dating back to October 9, 2004, the date on which the
3 State determined that petitioners had become successor trustees of the trust. (Petition ¶ 8).⁴

4 6. Petitioners allege that the State should have granted a waiver dating back to
5 January 10, 1983, when they became beneficiaries of the trust. Petitioners claim that, by virtue
6 of being designated trust beneficiaries, they “had an interest in the subject property that was
7 property of the trust.” (Petition ¶ 10; *see* Petition ¶¶ 8, 9)

8 **C. Standard of review**

9 Petitioners properly have petitioned for judicial review of the State’s final order under
10 ORS 183.484, which is the portion of the Administrative Procedures Act (“APA”) that governs
11 judicial review of orders in other than contested cases. In an ORS 183.484 proceeding, the court
12 determines whether a final order is supported by substantial evidence in the record and whether
13 the agency has correctly applied the law. ORS 183.484(5); *Powell v. Bunn*, 185 Or App 334,
14 339 (2002), *rev den*, 336 Or 60 (2003). The “record,” for purposes of judicial review of an order
15 in other than contested case, is the record developed in circuit court. *Norden v. Water Resources*
16 *Dept.*, 329 Or 641, 649 (2000).

17 All parties now have moved for summary judgment pursuant to ORCP 47. The standards
18 that generally govern a court’s evaluation of the facts and evidence presented with summary-
19 judgment motions do not apply in an ORS 183.484 proceeding, and the State discusses below the
20 different analysis that does apply in APA cases. In this case, however, the distinction does not
21 matter, as the parties agree on the facts and only the law is in dispute.

22 The Court of Appeals has explained that “viewing factual disputes in the light most
23 favorable to a nonmoving party” – the usual standard of review in a summary-judgment motion –
24 “[is] not appropriate in the judicial review of an administrative order in a noncontested case
25

26 ⁴ Petitioners attached the final order to their petition for judicial review, and the State has attached it as Exhibit 3 to this memorandum.

1 proceeding.” *Powell*, 185 Or App at 339. Instead, the circuit court’s charge is to decide whether
2 “the order is supported by substantial evidence” and any subsequent appellate review is limited
3 to determining whether the circuit court correctly made that decision. *Ibid*.

4 “Substantial evidence exists to support a finding of fact when the record, viewed as a
5 whole, would permit a reasonable person to make that finding.” ORS 183.484(5)(c).

6 Consequently, in determining whether substantial evidence supports an agency’s factual
7 findings, the question before a circuit court “is limited to whether the evidence would permit a
8 reasonable person to make the determination that the agency made in the particular case.”

9 *Norden*, 329 Or at 649. If substantial evidence supports the agency’s decision, it does not matter
10 that the record also includes “evidence to the contrary.” *Ibid* See also *G A S P v. Environmental*
11 *Quality Commission*, 198 Or App 182, 194-96 (2005) (“[t]he court’s purpose on review is not to
12 find the facts itself but to decide ‘whether the evidence would permit a reasonable person to
13 make the determination that the agency made’”).

14 Thus, in deciding the cross-motions for summary judgment presently before the court, the
15 only questions presented could be: (1) whether the State’s final order on petitioners’ Measure 37
16 claim is based on an incorrect interpretation or application of the law;⁵ and (2) whether the
17 factual findings in the final order are supported by substantial evidence in the record. As noted
18 above, however, the State does not dispute petitioners’ factual allegations for purposes of the
19 cross-motions for summary judgment. Accordingly, this court need consider only the legal
20 significance of those facts.

21
22
23
24
25

26 ⁵ See ORS 183.484(5)(a) (describing judicial review for incorrect interpretations of law); ORS
183.484(5)(b) (describing judicial review for unlawful exercise of agency discretion).

1 only when land use restrictions reduce the fair market value of the property or any interest
2 therein. *Ibid.* Consequently, the ability to realize market value is essential to a Measure 37
3 claim. A qualifying property owner, therefore, is one who presently owns the property or any
4 interest therein, and has a right to use the property that is restricted by land use regulations that
5 reduce the value of *that property interest*.⁶

6 The term “owner” also is important in sections 8 and 10 of Measure 37, which describe
7 governmental authority to waive land use regulations in lieu of paying just compensation. Those
8 provisions specify that waiver relief is available only to an “owner” and that the scope of the
9 waiver depends on the date on which the owner acquired his or her interest in the property. ORS
10 197.352(8), (10).

11 In sum, the term “owner” as used in ORS 197.352 refers to the present owner of a
12 property interest that is subject to land use regulations that both restrict use and reduce value. If
13 the owner’s property interest gives rise to a Measure 37 claim, the State must then determine
14 when the owner acquired *that interest*, which will govern the scope of any waiver that will be
15 granted. As explained below, application of those principles to this case makes it clear that the
16 petitioners became “owners” of property held in the revocable trust only when they became
17 successor trustees of that trust. Petitioners were not owners of trust assets when their only
18 relationship to the trust was that of beneficiaries.

19 **B. A beneficiary of a revocable trust is not an “owner” of real property held by that**
20 **trust because the beneficiary has no interest in the property that can be restricted**
21 **by land use regulations in a way that reduces the interest’s fair market value.**

22 ⁶ Interpreting the term “owner” in the context of who is may be entitled to relief under Measure
23 37 is consistent with Oregon precedent. Oregon courts repeatedly have declared that the word
24 “owner” lacks a fixed meaning outside the context and purpose of the statute in which it is used.
25 For example, in *Moe v. Beck*, the Supreme Court noted that “[d]ivining the legislative intent in
26 statutes using the word ‘owner’ has been a vexing problem for nearly a century.” 311 Or 499,
504-505 (1991). After considering the lease agreement at issue, and the six places in the Oregon
Safe Employment Act (including a “definition”) that used the word “owner,” the court concluded
that the lessor of a vehicle was an “owner” within the meaning of the statute at issue. *See also*
Pedro v. January, 261 Or 582, 602 (1972) (“When the term ‘owner’ or ‘ownership’ is used in a
statute, the context and purpose of the statute governs what is meant by the use of the terms”).

1 Petitioners contend that they became owners of the trust property, for purposes of
2 Measure 37, when they were named as trust beneficiaries in 1983. (Petioners' Memorandum at
3 4). That theory is unavailing because beneficiaries of a revocable trust do not have any interest
4 in trust property that allows them to use the property in a way that land use regulations could
5 restrict. Rather, as explained below, it is the trustee who is authorized to use trust property and,
6 therefore, owns the property for purposes of Measure 37.

7 In Oregon, a trust is best viewed not as a distinct legal entity but as a means of
8 establishing persons' *relationships* to property in a way that divides legal and equitable interests
9 in the property among those persons:

10 A trust is a method of transferring property, either during life or at
11 death, for the benefit of another, with "strings attached." The
12 person who creates a trust makes a gift of the property to another,
 with instructions on how the property is to be managed and
 distributed for the benefit of a third person.

13 *OSB Administering Trusts in Oregon CLE*, § 1.2 (emphasis added). As the Court of Appeals
14 recently explained, "[a]n express trust is created when a grantor or trustor presently divests
15 himself or herself of full legal and equitable ownership in property, with legal title held by a
16 trustee and equitable ownership resting in a beneficiary." *Brown v. Brown*, 206 Or App 239,
17 249, *rev den*, 341 Or 449 (2006). The trustee administers the trust in the beneficiaries' interest.
18 *See* ORS 130.650; ORS 130.655(1).

19 Thus, petitioners' assertion that they "acquired an equitable interest in the subject
20 property on the date they were designated beneficiaries of the trust" is correct, so far as it goes.
21 (Petioners' Memorandum at 4). But for Measure 37 purposes, the question is not whether the
22 claimant has *any* legal relationship to the subject property. Instead, as explained above, the
23 question is whether the claimant's interest gives the claimant a right to use the property in a way
24 that land use regulations can restrict, reducing the interest's fair market value.

25 In a trust relationship, only the trustee has the right to use trust property in a way that
26 could give rise to a Measure 37 claim. The trustee, not the beneficiary, must "take control of and

1 protect the trust property.” ORS 130.690. Subject to fiduciary obligations to the beneficiaries,
2 the trustee has broad authority over trust property, including the power to sell it, to “partition or
3 otherwise change the character of trust property,” and to “subdivide or develop land, dedicate
4 land to public use or grant public or private easements, and make or vacate plats and adjust
5 boundaries.” ORS 130.725(3), (8); *see* ORS 130.725(2). Trust beneficiaries have *no* such
6 authority.

7 The beneficiaries’ lack of authority to use trust property is particularly clear where, as
8 here, the property is held in a revocable trust. Revocable trusts often are used as will substitutes
9 and the Uniform Trust Code reflects that reality. *See, e.g.*, ORS 130.500 (“A person who has
10 capacity to make a will has capacity to create, amend, revoke or add property to a revocable
11 trust, or to direct the actions of the trustee of a revocable trust”). Just as a testator may alter the
12 terms of a will, the settlor of a revocable trust may amend a trust or revoke it altogether. ORS
13 130.505. If the settlor revokes the trust, “the trustee shall deliver the trust property as the settlor
14 directs.” ORS 130.505(4). Thus, the settlor can remove property from a revocable trust at any
15 time, divesting the beneficiaries of any interest they otherwise had in the property. *See also* ORS
16 130.510(1) (“While the settlor of a revocable trust is alive, rights of the beneficiaries are subject
17 to the control of the settlor, and the duties of the trustee are owed exclusively to the settlor”).

18 In sum, the beneficiaries of a revocable trust have – at best – a contingent future interest
19 in real property held in the trust while the settlor remains alive and legally competent to revoke
20 the trust. The beneficiaries have no right to use the property and, at any time, could lose *all*
21 interest in the property if the settlor chose to remove it from the trust. Consequently, the
22 beneficiaries are not owners of the trust property “or any interest therein,” for purposes of
23 Measure 37, because their equitable interest in the property is not one that a land use regulation
24 can restrict, with “the effect of reducing the fair market value” of that interest. ORS 197.352(1).
25 Trustees, on the other hand, are “owners” of trust property for Measure 37 purposes because they
26 control the property and are authorized to use it.

1 The State applied these general principles of trust law to this case when it determined that
2 petitioners acquired an interest in the real property held in the Carkuff Living Trust only when
3 they became successor trustees, not years earlier, when they were designated as beneficiaries.⁷
4 Indeed, the express terms of that trust confirm that the beneficiaries had no ability to use trust
5 property while the settlors remained alive and competent to serve as trustees. The agreement
6 provides that: the trust property vested in the trustees; the settlors could revoke the agreement or
7 withdraw property from the trust at any time; and that the trustees “shall have and exercise the
8 *exclusive* management and control of the assets comprising the trust estate.” (Trust Agreement
9 at 3; emphasis added). Consequently, the State correctly applied the law when it determined that
10 petitioners became “owners” of the trust property only when they became successor trustees –
11 not when they were named as beneficiaries – and gave petitioners Measure 37 waivers going
12 back only to that acquisition date.

13
14
15
16
17
18
19
20
21
22
23

24 ⁷ The State determined that petitioners became successor trustees in October 2004, following the
25 death of their father, Marvin Carkuff. (Ex 3 at 6). In their motion for summary judgment,
26 petitioners assert that they actually became trustees in April 1995, when Mr. Carkuff became
mentally incapacitated. (Petitioners’ Memorandum at 6 and Ex A). The State agrees with
petitioners that this discrepancy “is not a material fact” with respect to the current motions for
summary judgment.

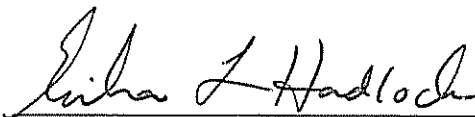
1 **CONCLUSION**

2 As a matter of law, petitioners did not become “owners” of property held in the Carkuff
3 Living Trust until the date on which they became trustees, and the State correctly determined that
4 petitioners were entitled to a Measure 37 waiver dating back only that far. Accordingly,
5 plaintiffs’ motion for summary judgment should be denied and the State’s cross-motion for
6 summary judgment should be granted.

7 DATED this 22nd day of January, 2007.

8 Respectfully submitted,

9 HARDY MYERS
10 Attorney General

11 

12 ERIKA L. HADLOCK #91297
13 Sr. Assistant Attorney General
14 Trial Attorney
15 Tel (503) 947-4700
16 Fax (503) 947-4792
17 erika.hadlock@doj.state.or.us
18 Of Attorneys for Respondents
19
20
21
22
23
24
25
26

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF YAMHILL

KATHRYN McCALLIE,
BETTE J. SUDERMAN, and
BARBARA L. THOMPSON,
trustees of the Carkuff
Revocable Living Trust,

Petitioners,

v.

Oregon Department of Land
Conservation & Development,
an Agency of the State of Oregon,

Respondent,

and

Oregon Department of
Administrative Services,
an Agency of the State of Oregon,

Respondent.

Case No. CV060341

PETITIONER'S
COMPLAINT
(Petition for Judicial
Review Pursuant
to ORS 183.484)

Petitioners, Kathryn McCallie, Bette J. Suderman, and
Barbara L. Thomson, seek judicial review under ORS 183.484 of a

1 final order of the Respondent, Department of Land Conservation
2 and Development (DLCD) and the Land Conservation and Development
3 Commission (LCDC), and of the Respondent, Department of
4 Administrative Services (DAS).

5 1.

6 Petitioners were claimants under Ballot Measure 37 (2004)
7 (ORS 197.352) as beneficiaries and successor trustees, and
8 currently as trustees, of the Carkuff Revocable Living Trust,
9 which has an ownership interest in real property in Yamhill
10 County in Claim No. M 122647, dated August 14, 2006.

11 Petitioners were parties to the administrative proceeding which
12 resulted in the order for which review is sought, and their claim
13 was the subject of the final order issued by DLCD and DAS. The
14 subject property is located outside of the City of Sheridan,
15 County of Yamhill.

16 2.

17 Respondent Department of Land Conservation and Development
18 is an administrative agency of the State of Oregon created
19 pursuant to ORS 197.075. The governing commission of DLCD is the
20 Land Conservation and Development Commission, created pursuant to
21 ORS 197.030, and appointed by the Governor. LCDC also is part of
22 DLCD. ORS 197.075. The LCDC adopted Statewide Land Use Goals and
23 administrative rules regulating the uses of land in the State.
24 ORS 197.040. As used herein, DLCD includes the LCDC.

25 ///

26 ///

PAGE 2 - PETITION FOR JUDICIAL REVIEW OF KATHRYN McCALLIE, et al.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

3.

Respondent Department of Administrative Services is an administrative agency of the State of Oregon created pursuant to ORS 184.305. DAS is governed by a Director, who is appointed by the Governor. ORS 184.315.

4.

The final order of DLCD and DAS was adopted pursuant to OAR 125-145-0100(5) and (6). OAR chapter 125, division 145, was adopted by the DAS to "establish procedures for filing and reviewing Claims against the State of Oregon under Measure 37." OAR 125-145-0010. Under OAR 125-145-0020(13), DLCD is a "Regulating Entity," "an Agency that has enacted or enforced, or has the authority to remove, modify or not to apply, the Land Use Regulation(s) identified in the [Measure 37] Claim." DAS is defined as the "Department." OAR 125-145-0010(5). OAR 125-145-0100(5) authorizes the Regulating Entity, DLCD, to approve or deny a Measure 37 claim and issue a final decision. OAR 125-145-0100(6) requires DLCD to forward the decision to the Department, DAS, and requires the DAS to issue a final order. DLCD and DAS had authority under OAR chapter 125, division 145, to issue the Final Order in Claim No. M 122647, dated August 14, 2006, the order that is the subject of this Petition for Judicial Review.

5.

On May 2, 2005, Petitioners filed with Yamhill County a claim under Measure 37 for 41.6 acres in which they acquired an interest by being designated beneficiaries of the Carkuff Living

1 Trust on January 10, 1983, one asset of the trust being the
2 subject property. They sought to have Yamhill County waive all
3 land use regulations adopted subsequent to the date on which they
4 acquired an interest in the property, and sought to have approved
5 a single family dwelling on the subject property. On September
6 21, 2005, Yamhill County approved Petitioners' claim, allowing
7 the establishment of a single family dwelling on the subject
8 property. Yamhill County found that Petitioners had a continuous
9 ownership interest since January 10, 1983.

10 6.

11 Under OAR 125-145-0030, Petitioner also submitted a claim to
12 DAS on October 6, 2005. DAS, in turn, forwarded the claim to
13 DLCD, the Regulating Entity, under OAR 125-145-0050, and provided
14 notice of the claim, to third parties within 750 feet of the
15 subject property, and allowing submittal of written comments on
16 the claim therefrom. OAR 125-145-0080.

17 7.

18 On July 31, 2006, and under authority of OAR 125-145-0100,
19 DLCD provided a Draft Staff Report and Recommendation, and mailed
20 a copy to Petitioners. Petitioners, in turn, submitted comments,
21 evidence and information to DAS in response to the draft staff
22 report. On August 14, 2006, DAS and DLCD issued the Final Order
23 in Claim No. M 122647 (hereinafter "Order"), together with the
24 Final Staff Report and Recommendation of DLCD (hereinafter "Staff
25 Report"), also dated August 14, 2006.

26 ///

PAGE 4 - PETITION FOR JUDICIAL REVIEW OF KATHRYN McCALLIE, et al.

1 8.

2 The final order, which incorporated the final staff report
3 of DLCDD by reference, provided that "the State of Oregon will not
4 apply the following laws to the claimants' development of a
5 dwelling on the 41.6-acre property: applicable provisions of Goal
6 3, ORS 215 and OAR 660, division 33, enacted or adopted after
7 October 9, 2004." Order at 1. The final staff report stated that
8 "The claimants . . . acquired the subject property on October 9,
9 2004, following the death of their father, Marvin Carkuff. The
10 claimants' parents, Marvin and Margaret Carkuff, transferred the
11 subject property to a revocable living trust on January 10, 1983,
12 with themselves as trustees.² The claimants were identified in
13 the trust and a 1990 amendment to the trust as successor trustees
14 upon the parents' death. . . . However, they were not appointed
15 successor trustees, and therefore did not acquire the subject
16 property until their father's death." Staff Report at 3. The
17 report, at note 2, added "A copy of the trust agreement is
18 included in the claim." *Id.* at n.2. Attached to this petition is
19 a copy of the order from which the judicial review is sought, and
20 a copy of the trust agreement included in the claim..

21 9.

22 Petitioners were adversely affected by the Final Order
23 because the order, even though it approved their claim, denied
24 them the ability to establish a single family dwelling on the
25 41.6-acre parcel in Yamhill County, determined by the county to
26 have been acquired by them in January, 1983. Petitioners stated

PAGE 5 - PETITION FOR JUDICIAL REVIEW OF KATHRYN McCALLIE, et al.

1 the inability to establish that dwelling on the parcel had
2 resulted in a loss of value of \$100,000.

3 **9.**

4 This Court has jurisdiction over this matter pursuant to ORS
5 183.484(1).

6 **10.**

7 The order is erroneous and should be reversed or remanded
8 for the following reason: DLCD and DAS erroneously interpreted
9 provisions of the revocable living trust agreement by failing to
10 recognize the claimants were beneficiaries under the trust
11 agreement, had been so continuously since 1983, and as
12 beneficiaries had an interest in the subject property that was
13 property of the trust.

14 **11.**

15 No request was made to DAS or DLCD for any stay to the
16 challenged order. OAR chapter 125, division 145 does not
17 authorize claimants to seek a stay from either the Department or
18 the Regulating Entity.

19 **12.**

20 Pursuant to ORS 183.497, Petitioner is entitled to its
21 reasonable attorney fees and costs in this matter.

22 **13.**

23 Wherefore, Petitioner prays for the following relief:

24 (a) That the Order be reversed or remanded;

25 ///

26 ///

PAGE 6 - PETITION FOR JUDICIAL REVIEW OF KATHRYN McCALLIE, et al.

1 (b) That Petitioner be awarded his reasonable attorney fees and
2 costs in this matter; and

3 (c) That Petitioner be granted such other relief as the Court
4 deems appropriate.

5

6 DATED this 11th day of October, 2006.

7

Respectfully submitted,

8



9

10

David B. Smith, OSB #88315
6950 S.W. Hampton, Suite 232
Tigard, OR 97223-8331
(503) 624-9351
FAX (503) 598-3028
attyd_smith@hotmail.com
Attorney for Petitioners,
Kathryn McCallie, Bette J.
Suderman, and Barbara L.
Thompson

11

12

13

14

15

0618-002.pet

16

17

18

19

20

21

22

23

24

25

26

REVOCABLE LIVING TRUST AGREEMENT

This Agreement is entered into between MARVIN P. CARKUFF and MARGARET E. CARKUFF, as Trustors, and MARVIN P. CARKUFF and MARGARET E. CARKUFF, as Trustees, for the purpose of establishing a trust and directing that the trust estate be held, managed, and distributed on the following terms and conditions:

ARTICLE I

The Trustors have transferred and delivered to the Trustees the property described in Schedule A attached hereto, which property and any interest therein as the Trustees have received or may hereinafter acquire shall constitute the trust estate and be vested in the Trustees. The Trustors or any other person may give or devise to the Trustees any additional property, real or personal, including life insurance policies, at any time, which upon acceptance thereof by the Trustees shall become a part of the trust estate subject to all the terms of this Agreement.

ARTICLE II

The Trustors may at any time, by written instrument executed by the Trustors and filed with the Trustees, revoke this Agreement, withdraw from the trust estate, discharged of the trust, the whole or any part of the principal and accumulated income, or alter or amend the terms of this Agreement. The rights of revocation, withdrawal, alteration, and amendment reserved by the Trustors must be exercised personally by them and may not be exercised by any other person, including any agent, guardian, conservator, or Successor Trustee.

ARTICLE III

In the event of the death, incapacity, unwillingness, or inability of either Trustee to serve or perform his or her responsibilities hereunder, the surviving or remaining Trustee shall be entitled and authorized to act as the sole Trustee hereunder. In the event that both Trustees at any time should become incapacitated, or be unable or unwilling to serve for any reason, or in the event of their decease, the Trustors hereby name their

daughter, Bette Joan West, as sole Successor Trustee, but should she be unable or unwilling to serve, then the Trustors name their daughter, Barbara Lee Holthusen, as Successor Trustee, and should she be unable or unwilling to serve, then the Trustors name their daughter, Kathryn Irene McCallie, as Successor Trustee. Any power or authority conferred upon the Trustees under this Trust Agreement may also be exercised by a Successor Trustee.

ARTICLE IV

During the lifetime of the Trustors, or the survivor, the Trustees shall distribute to or for the benefit of the Trustors, or the survivor, income and principal from the trust estate in such amounts and at such times as determined by the Trustees to be necessary for the health, maintenance, and support of the Trustors, or the survivor, to enable them to maintain the standard of living to which they are accustomed, taking into account other funds available for that purpose to which the Trustees have actual knowledge, so long as a Trustor lives, or until income and principal have been exhausted.

ARTICLE V

Upon the death of either Trustor, the Trustees may in his or her discretion pay out of the trust estate the deceased Trustor's just debts and claims, expenses of last illness and funeral, and any other costs and expenses incurred or necessary to administer and settle the deceased Trustor's probate or non-probate estate. In addition, the Trustees may pay all or any part of any federal estate or state inheritance taxes which may be due and owing upon the death of either Trustor. If a Trustor dies leaving an estate subject to probate of which a Personal Representative shall be appointed, the Trustees may pay directly to or through the Personal Representative any of the above obligations and liabilities.

ARTICLE VI

Upon the death of the surviving Trustor, and the payment of any outstanding or remaining obligations or expenses, estate or inheritance taxes, or other liabilities as set forth above, the remaining trust assets, principal and accrued income, shall be held, administered, and distributed as follows:

- A. Ten percent (10%) thereof to be divided equally between the following

charitable organizations: Bethel Baptist Church of McMinnville, Oregon; and the Conservative Baptist Foreign Mission Society of Wheaton, Illinois;

B. Ninety percent (90%) thereof to be distributed equally among the Trustees' children, BETTY JOAN WEST, BARBARA LEE HOLTHUSAN, and KATHRYN IRENE MCCALLIE, share and share alike for their own use and benefit forever.

If, at the time of such division and distribution of the trust estate, any of the above named individual beneficiaries shall be deceased leaving any lineal descendants surviving, then the share so distributable to said beneficiary shall be distributed among the surviving lineal descendants of said beneficiary by representation and in the event that any said beneficiary shall die without any lineal descendants surviving, the share of said beneficiary shall be distributed among the remaining beneficiaries and the lineal descendants of any beneficiary dying leaving descendants surviving.

ARTICLE VII

The Trustees shall have and exercise the exclusive management and control of the assets comprising the trust estate. In addition to all powers conferred upon Trustees by law, the Trustees shall have the right and power to manage, sell, reinvest, and to do anything else which an outright owner of property could do, subject only to the express terms of this Agreement. The Trustees shall not be subject to any legal or other restrictions as to investments, including those otherwise applicable to Trustees. The Trustees shall invest the trust funds in a manner calculated, in their sole judgment, to maximize the income therefrom consistent with the reasonable safety of the principal. The Trustees may also at their discretion retain any property in the trust estate which may be unproductive but have other non-financial benefit or worth.

ARTICLE VIII

No Successor Trustee hereunder shall be under any duty to examine, verify, question, or audit the books, records, accounts, or transactions of any preceding Trustee, and no Successor Trustee shall be liable or responsible in any way for any acts or defaults of any predecessor Trustee, nor for any loss or expense from or occasioned by anything done or neglected to be done by any predecessor Trustee. A Successor Trustee shall only be liable for her own willful defaults and deliberate wrongdoing, and shall

not be liable to any person for any loss or damage which may occur in the faithful execution of her duties under this Trust Agreement, including any loss or depletion which may arise from any investment made in accordance with the Trust Agreement, or any other loss which may be occasioned by the exercise of any discretionary power authorized herein, without her willful default or deliberate wrongdoing, or unless such loss or damage be occasioned by the willful violation of any express provision hereof. The Successor Trustee shall not be liable for any error made in good faith, and no bond or other undertaking shall be required of the Successor Trustee in any jurisdiction.

ARTICLE IX

Neither the principal nor the income of the trust estate shall be liable for the debts of any beneficiary hereunder, nor shall the same be subject to seizure by any creditor of any beneficiary under any lien or proceeding at law or in equity, and no beneficiary hereunder shall have power to sell, assign, transfer, encumber, or in any other manner to anticipate or dispose of her interest in the trust estate or the income produced thereby prior to its actual distribution by the Trustee to the beneficiary.

ARTICLE X

The laws of the State of Oregon shall govern with respect to the validity and interpretation of this Agreement and with respect to all questions relating to the administration and distribution of the trust estate.

This Agreement shall be binding upon the heirs, executors, administrators, and successors in interest of the parties.

If any provision of this trust shall be determined to be invalid or unenforceable, the remaining provisions thereof shall continue to be fully effective.

IN WITNESS WHEREOF, the parties hereto have set their hands and executed this document in McMinnville, Yamhill County, Oregon, on this _____ day of January, 1983.

Trustor

Trustee

Trustor

Trustee

SCHEDULE A

ASSETS OF REVOCABLE LIVING TRUST AGREEMENT

MARVIN PURL CARKUFF and MARGARET EMMA CARKUFF, Trustors
MARVIN PURL CARKUFF and MARGARET EMMA CARKUFF, Trustees

1. Real property and residence located at Route 2, Box 289, Sheridan, Yamhill County, Oregon.
2. Real property located in Mountrail County, North Dakota.
3. Jersey Central Power & Light Company, Arkansas Power & Light Company, and Portland General Electric Company bonds.
4. Money Market funds held by First Federal Savings & Loan of McMinnville, Oregon.
5. U.S. Treasury certificate.
6. Checking and saving accounts held at First Federal Savings & Loan of McMinnville, Oregon and First National Bank of McMinnville, Oregon.
7. Motor vehicles.
8. Household goods and furnishings, and jewelry.
9. Livestock, farming tools and equipment.
10. New York Life, Standard Insurance Company, and Mutual of New York life insurance policies.

APPROVED:

Trustor

Trustee

Trustor

Trustee

FIRST AMENDMENT TO REVOCABLE LIVING TRUST AGREEMENT

MARVIN P. CARKUFF and MARGARET EMMA CARKUFF, being the Trustors under an Agreement dated the 10th day of January, 1983, wherein MARVIN P. CARKUFF and MARGARET EMMA CARKUFF are designated as Trustees, hereby amend said Revocable Living Trust Agreement as follows:

A. Article III thereof is hereby deleted and in its place is substituted the following new paragraph:

ARTICLE III

In the event of the death, incapacity, unwillingness, or inability of either Trustee to serve or perform his or her responsibilities hereunder, the surviving or remaining Trustee shall be entitled and authorized to act as the sole Trustee hereunder. In the event that both Trustees or a surviving Trustee at any time should become incapacitated, or be unable or unwilling to serve for any reason, or in the event of their death, the Trustors hereby name their children, BETTY JOAN SUDERMAN, BARBARA LEE HOLTHUSEN, and KATHRYN IRENE McCALLIE, as Successor Trustees. In the event that one of them should be unable or unwilling to serve, then the remaining Successor Trustees shall be entitled and authorized to act. All decisions required to be made by the Successor Trustees shall be unanimous. Any power or authority conferred upon the Trustees under this Trust Agreement may also be exercised by the Successor Trustees, and all right, title, and interest in the trust property shall vest in the Successor Trustees.

B. In all other respects the said Trust Agreement dated

*msc
mle*

January 10, 1983, is hereby ratified and confirmed as executed.

IN WITNESS WHEREOF, the said MARVIN P. CARKUFF and MARGARET EMMA CARKUFF, as Trustors, and MARVIN P. CARKUFF and MARGARET EMMA CARKUFF, as Trustees, have set their hands and executed this First Amendment to Revocable Living Trust Agreement in McMinnville, Oregon, on the 30 day of August, 1990.

Marvin P. Carkuff
Trustor

Marvin P. Carkuff
Trustee

Margaret E. Carkuff
Trustor

Margaret E. Carkuff
Trustee

BEFORE THE DEPARTMENT OF ADMINISTRATIVE SERVICES AND
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 M122647
(BALLOT MEASURE 37) OF)
Katherine J McCallie, Bette J Suderman, and)
Barbara L Thompson, CLAIMANTS)

Claimants: Katherine J McCallie, Bette J Suderman, and Barbara L Thompson
(the Claimants)

Property: Township 5S, Range 6W, Section 13, Tax lot 700, Yamhill 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 approved as to laws administered by DLCD and the Land Conservation and Development Commission (LCDC) for the reasons set forth in the DLCD Report, and 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 the claimants' development of a dwelling on the 41.6-acre subject property: applicable provisions of Goal 3, ORS 215 and OAR 660, division 33, enacted or adopted after October 9, 2004 The department acknowledges that the relief to which the claimants are entitled under ORS 197 352 will not allow the claimants to use the subject property in the manner set forth in the claim

2 The action by the State of Oregon provides the state's authorization to the claimants to use the subject property for the use described in this report, subject to the standards in effect on October 9, 2004 At that time, the property was subject to applicable provisions of Goal 3, ORS 215 and OAR 660, division 33, currently 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 the claimants 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 the claimants 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 the claimants 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 the 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 the claimants

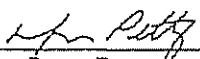
This Order is entered by the Deputy Director of the DLCD as a final order of DLCD and the Land Conservation and Development Commission under ORS 197.352, OAR. 660-002-0010(8), and OAR 125, division 145, and by the Deputy Administrator for the State Services Division of the DAS as a final order of DAS under ORS 197 352, OAR 125, division 145, and ORS 293

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



Cora R. Parker, Deputy Director
DLCD
Dated this 14th day of August, 2006

FOR the DEPARTMENT OF ADMINISTRATIVE SERVICES:



Dugan Petty, Deputy Administrator
DAS, State Services Division
Dated this 14th day of August, 2006

NOTICE OF RIGHT TO APPEAL OR OTHER JUDICIAL RELIEF

You are entitled, or may be entitled, to judicial remedies including the following:

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)

FOR INFORMATION ONLY

The Oregon Department of Justice has advised the Department of Land Conservation and Development that "[i]f the current owner of the real property conveys the property before the new use allowed by the public entity is established, then the entitlement to relief will be lost."

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 14, 2006

STATE CLAIM NUMBER: M122647

NAMES OF CLAIMANTS: Katherine J McCallie
Bette J Suderman
Barbara L Thompson

MAILING ADDRESS: Katherine J McCallie
14275 Southwest Peavine Road
McMinnville, Oregon 97128

Bette J Suderman
1335 Southeast Barberry Street
Dallas, Oregon 97338

Barbara L Thompson
35576 Dow Lane
Astoria, Oregon 97103

PROPERTY IDENTIFICATION: Township 5S, Range 6W, Section 13
Tax lot 700
Yamhill County

DATE RECEIVED BY DAS: October 6, 2005

180-DAY DEADLINE: August 21, 2006¹

I. SUMMARY OF CLAIM

The claimants, Katherine McCallie, Bette Suderman, and Barbara Thompson, seek compensation in the amount of \$105,000 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 41.6-acre subject property. The subject property is located on the southwest side of Gopher Valley Road, approximately three thousand feet northwest of the intersection with Gopher Valley Road and Grauer Road, near Sheridan, in Yamhill County (See claim.)

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)

M122647 - McCallie

]

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 valid. 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 the claimants' development of a dwelling on the 41.6-acre subject property: applicable provisions of Statewide Planning Goal 3 (Agricultural Lands), ORS 215 and Oregon Administrative Rules (OAR) 660, division 33, enacted or adopted after October 9, 2004. These laws will not apply to the 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 they acquired the property on October 9, 2004. The department acknowledges that the relief to which the claimants are entitled under ORS 197.352 will not allow the claimants to use the subject property in the manner set forth in the claim. (See the complete recommendation in Section VI of this report.)

III. COMMENTS ON THE CLAIM

Comments Received

On June 8, 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 is relevant to whether the laws that are the basis for the claim, regarding flood plain zoning, are exempt under ORS 197.352(3). 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 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 6, 2005, for processing under OAR 125, division 145. The claim identifies House Bill 3662 and Yamhill County Zoning Ordinance 310

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 claimants, Katherine McCallie, Bette Suderman and Barbara Thompson, acquired the subject property on October 9, 2004, following the death of their father, Marvin Carkuff The claimants' parents, Marvin and Margaret Calkuff, transferred the subject property to a revocable living trust on January 10, 1983, with themselves as trustees ² The claimants were identified in the trust and a 1990 amendment to the trust as successor trustees upon the parents' death, incapacitation or other determination to appoint a successor However, they were not appointed successor trustees, and therefore did not acquire the subject property until their father's death

Conclusions

The claimants, Katherine McCallie, Bette Suderman and Barbara Thompson, are "owners" of the subject property as that term is defined by ORS 197 352(1)(C), as of October 9, 2004 The claimants' parents are "family members" as defined by ORS 197 352(1)(A) The documentation in the claim establishes the parents' ownership of the subject property as of January 10, 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

² A copy of the trust agreement is included in the claim Transfer of property to a revocable trust does not result in a change in ownership for the purposes of ORS 197 352 However, in this claim, while the claimants assert their parents acquired the property in 1946, they have not provided any documentation to support that acquisition date The earliest acquisition date documented in this claim is the parents' transfer of the subject property to the trust in 1983 Consequently, for the purposes of the claimants' claim for compensation, the 1983 date is the date upon which the claimants' family acquisition of the property must be based

Findings of Fact

The claim indicates that the claimants desire to develop a dwelling on the 41.6-acre property, and that current land use regulations prohibit that desired use.

The claim is based generally on the applicable provisions of state law that require Exclusive Farm Use (EFU) zoning and restrict uses on EFU-zoned land. The subject property is zoned by Yamhill County as EF-80 as required by Goal 3, in accordance with ORS 215 and OAR 660, division 33, because the claimants' property is "agricultural land" as defined by Goal 3.³ Goal 3 became effective on January 25, 1975, and required that agricultural lands as defined by the Goal be zoned EFU pursuant to ORS 215.

Current land use regulations, particularly ORS 215.284 and OAR 660, division 33, enacted or adopted pursuant to Goal 3, establish standards for the development of dwellings on existing or any proposed parcel on EFU-zoned land.

OAR 660-033-0135 (applicable to farm dwellings) became effective on March 1, 1994, and interprets the statutory standard for a primary dwelling in an EFU zone under ORS 215.283(1)(f). OAR 660-033-0130(4) (applicable to non-farm dwellings) became effective on August 7, 1993, and was amended to comply with ORS 215.284(4) on March 1, 1994. The Commission subsequently adopted amendments to comply with House Bill 3326 (Chapter 704, Oregon Laws 2001, effective on January 1, 2002), which were effective on May 22, 2002. (See administrative rule history for OAR 660-033-0100, -0130 and -0135.)

At the time the claimants' family acquired the subject property in 1983, it was subject to Yamhill County's acknowledged EFU zone.⁴ When the claimants' family acquired the subject property, the claimants' desired use of the property would have been governed by the county's acknowledged EFU zone and the applicable provisions of ORS 215 then in effect.⁵ On January 10, 1983, ORS 215.283(1)(f) (1983 edition) generally allowed farm dwellings "customarily provided in conjunction with farm use." Non-farm dwellings were allowed under ORS 215.283(3) if they were determined to be compatible with farm use, not interfere seriously with accepted farm practices, not materially alter the stability of the land use pattern in the area and be situated on generally unsuitable land for the production of farm crops and livestock.

The claim does not establish whether or to what extent the claimants' desired development of the subject property was allowed under the standards in effect when the claimants' family acquired the property on January 10, 1983.

³ The claimants' property is "agricultural land" because it contains National Resources Conservation Service Class I-IV soils.

⁴ Yamhill County's EFU zone was acknowledged by the Commission for compliance with Goal 3 on June 12, 1980.

⁵ After the county's comprehensive plan and land use regulations were acknowledged by the Commission as complying with the statewide planning goals, the goals and implementing rules no longer applied directly to individual 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) and *Kenagy v Benton County*, 115 Or App 131 (1992).

Conclusions

The current zoning requirements and dwelling standards established by applicable provisions of Goal 3, ORS 215 and OAR 660, division 33, were all enacted or adopted after the claimants' family acquired the subject property. These laws restrict the use of the subject property relative to the uses allowed when the claimants' family acquired the property. However, the claim does not establish whether or to what extent the claimants' desired use of the subject property complies with the standards for land development under Yamhill County's EFU zone and comprehensive plan in effect when the claimants' family acquired the property on January 10, 1983.

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 \$105,000 as the reduction in the subject property's fair market value due to the regulation(s). This amount is based on limited restricted appraisal included with the claim.

Conclusions

As explained in Section V (1) of this report, the claimants are Katherine McCallie, Bette Suderman, and Barbara Thompson, whose family acquired the subject property in 1983. Under ORS 197 352, the claimants are due compensation for land use regulations that restrict the 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 the claimants' family acquired the subject property restrict the claimants' desired use of the property. The claimants estimate that the effect of the regulations(s) on the fair market value of the subject property is a reduction of \$105,000.

Without a complete appraisal or other documentation, and without verification of whether or the extent to which the claimants' desired use of the subject property was allowed under the standards in effect when the claimants' family acquired the property, it is not possible to substantiate the specific dollar amount by which the land use regulations have reduced the fair market value of the 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 the claimants' family acquired the 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 relative to the uses permitted when the claimants' family acquired the property, including applicable provisions of Goal 3, ORS 215 and OAR 660, division 33. With the exception of amendments enacted or adopted after 1983, these laws were in effect when the claimants' family acquired the property.

Conclusions

It appears that, with the exception of amendments to Goal 3, ORS 215 and OAR 660, the general statutory, goal and rule restrictions on residential development of the subject property were in effect when the claimants' family acquired the property on January 10, 1983. As a result, these laws are not exempt under ORS 197 352(3)(E) only to the extent they were enacted or adopted after January 10, 1983.

Laws in effect when the claimants' family acquired the subject property are exempt under ORS 197 352(3)(E) and do not provide a basis for compensation. Other land use 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. In addition, Yamhill County notes that the subject property is located in a flood plain zone. ORS 197 352(3)(B) specifically exempts regulations "restricting or prohibiting activities for the protection of public health and safety." To the extent the county's flood plain regulations are based on state law, these regulations would be exempt under ORS 197 352(3)(B).

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 restrict the 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 \$105,000. 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 their family 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 Katherine McCallie, Bette Suderman, and Barbara Thompson to use the subject property for a use permitted at the time they acquired the property on October 9, 2004

At the time the claimants acquired the subject property it was zoned EF-80 by Yamhill County and subject to the current lot size and dwelling standards under Goal 3, ORS 215 and OAR 660, division 33, and as described in Section V (2) of this report

In addition to the applicable provisions of Goal 3 and ORS 215 and OAR 660, division 33, in effect on October 9, 2004, and other laws in effect when the claimants acquired the subject property, there may be other laws that apply to the claimants' use of the 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 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

Conclusions

Based on the record, the department 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 the claimants' development of a dwelling on the 41.6-acre subject property: applicable provisions of Goal 3, ORS 215 and OAR 660, division 33, enacted or adopted after October 9, 2004. The department acknowledges that the relief to which the claimants are entitled under ORS 197 352 will not allow the claimants to use the subject property in the manner set forth in the claim

2. The action by the State of Oregon provides the state's authorization to the claimants to use the subject property for the use described in this report, subject to the standards in effect on October 9, 2004. At that time, the property was subject to applicable provisions of Goal 3, ORS 215 and OAR 660, division 33, currently 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 the claimants 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 the claimants 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 the claimants 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 the 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 the claimants.

VII. COMMENTS ON THE DRAFT STAFF REPORT

The department issued its draft staff report on this claim on July 31, 2006. 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.

1 **CERTIFICATE OF SERVICE**

2 I certify that on January 22nd, 2007, I served the foregoing Respondents' Cross Motion for
3 Summary Judgment and Memorandum in Support of Respondents' Cross-Motion for Summary
4 Judgment and Opposition to Petitioners' Motion for Summary Judgment upon the parties hereto
5 by the method indicated below, and addressed to the following:

6
7 David B. Smith
8 Attorney at Law
9 6950 SW Hampton St #232
10 Tigard, OR 97223
11 Attorney for Petitioners

___ HAND DELIVERY
 MAIL DELIVERY
___ OVERNIGHT MAIL
___ TELECOPY (FAX)

11
12 

13 ERIKA L. HADLOCK #91297
14 Sr. Assistant Attorney General
15 Trial Attorney
16 Tel (503) 947-4700
17 Fax (503) 947-4792
18 erika.hadlock@doj.state.or.us
19 Of Attorneys for Respondents
20
21
22
23
24
25
26