

ORS 197.352 (2004 BALLOT MEASURE 37) CLAIM FOR COMPENSATION

**OREGON DEPARTMENT OF ENVIRONMENTAL QUALITY
Final Staff Report and Recommendation**

March 29, 2006

STATE CLAIM NUMBER: M118469

NAME OF CLAIMANT: The Leslie W. Lingscheit Trust

MAILING ADDRESS: P.O. Box 429
Medford, OR 9504

OTHER CONTACT INFORMATION: **Alan D.B. Harper**
Hornecker, Cowling, Hassaen & Heysell, LLP
717 Murphy Road
Medford, OR 97504

IDENTIFICATION OF PROPERTY: Tax Lot 600, Jackson County
Township 37S, Range 1W, section 25

DATE RECEIVED BY DAS: **May 19, 2005**

180-DAY DEADLINE: **April 3, 2006¹**

I. SUMMARY OF CLAIM

See Department of Land Conservation and Development (DLCD) staff report.

II. SUMMARY OF STAFF RECOMMENDATION

Based on the preliminary findings and conclusions set forth below, the Department of Environmental Quality (Department) has determined that this claim is not valid with regard to laws administered by the Department and identified in the claim for the following reasons: (1) the laws administered by the Department and identified in the claim are not land use regulations; (2) the laws administered by the Department and identified in the claim do not restrict the use of the property the claimant seeks to carry out; (3) the Department has not enforced such laws with regard to claimant's use of the property; and (4) even if the laws administered by the Department and identified in the claim are land use regulations, they are exempt under ORS 197.352(3). The claimant has not registered or filed applications with the Department to carry out composting actions on the property, and the Department has taken no action to enforce the cited composting

¹ In *MacPherson v. DAS*, the Marion County trial court entered an order suspending all timelines under ORS 197.352. This order was in effect for a period of 139 days, extending the 180-day period under ORS 197.352(6) by that same number of days.

rule with respect to the claimant or the property. (See the complete recommendation in Section VI. of this report.)

III. COMMENTS ON THE CLAIM

See DLCD staff report.

IV. TIMELINESS OF CLAIM

See DLCD staff report.

V. ANALYSIS OF CLAIM

1. Ownership

The findings of the Draft Staff Report of DLCD on this claim regarding ownership are incorporated into this report by this reference. Those findings establish that the claimant is an owner of the property, and that the claimant acquired the property on April 25, 1956.

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 claimant wishes to subdivide the 80.70 acre property into five-acre lots and to develop a residential dwelling on each lot. The claim lists two rules from OAR Chapter 340, Division 96, as "inhibiting regulations." One of the cited rules, OAR 340-96-0034, does not exist. The other rule, OAR 340-96-0020, pertains to composting facilities. This rule does not restrict the division of land into residential lots or the development of residential dwellings, the use described by the claimant as being restricted.

The cited regulation, OAR 340-96-0020, requires registration with or an application to the Department before carrying out certain composting actions. The claimant has not submitted registrations or filed applications to carry out composting actions on the property. Under ORS 197.352(7), property owners are not required to file an application for a permit with a local government prior to seeking relief under ORS 197.352, but there is no corresponding exemption from state permit requirements.

Under ORS 197.352(1), existing laws may be the basis for relief only if a public entity enforces existing laws. The Department has taken no action to enforce the cited rule with respect to the

claimant or the property. Until the Department takes some specific action with respect to the property, there is no basis for relief under ORS 197.352.

In addition, ORS 197.352(11) defines the term “land use regulation” as including certain specified state administrative rules. The rules contained in OAR chapter 340, including the two specific rules cited by the claimant, are not included within the definition of “land use regulation” under ORS 197.352. As a result, the Department is not authorized to grant any relief to the claimant based on these rules.

Finally, and in the alternative, if OAR 340-096-0020 or OAR 340-096-0034 are “land use regulations,” under ORS 197.352, they are exempt from that statute under ORS 197.352(3)(A), (B), and (C), the exemptions for public nuisances, public health and safety, and regulations required by federal law.

Conclusions

Nothing in the rules cited by claimant restrict the division of the property into residential lots or the development of residential dwellings. DEQ has not enforced a state land use regulation to restrict claimant’s desired use of the property. Furthermore, ORS 197.352 does not exempt claimant or the Department from following the legal requirements to register or apply for composting permits prior to carrying out composting actions. Until the Department has acted to deny such a registration or permit, there is no basis for a claim for relief. The rules identified are not land use regulations under ORS 197.352, and if they were they would be exempt under ORS 197.352(3). In sum: (1) the laws administered by the Department and identified in the claim are not land use regulations; (2) the laws administered by the Department and identified in the claim do not restrict the use of the property the claimant seeks to carry out; (3) the Department has not enforced such laws with regard to claimant’s use of the property; and (4) even if the laws administered by the Department and identified in the claim are land use regulations, they are exempt under ORS 197.352(3). For each of these reasons, the Department is not authorized to grant any relief to the claimant based on the laws administered by the Department that are identified in the claim.

3. Effect of Regulations on Fair Market Value

In order to establish a valid claim, ORS 197.352(1) requires that any land use regulation 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 claimant has not demonstrated that any land use regulations administered by the Department restrict his desired use of the subject property.

Conclusions

The claimant has not demonstrated that the cited regulations administered by the Oregon Department of Environmental Quality restrict his use of the property and thus has not demonstrated that the regulations reduce 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. These include regulations restricting or prohibiting activities based on the protection of public health and safety, including solid waste and pollution control regulations.

Findings of Fact and Conclusions

See section V.2, above.

VI. FORM OF RELIEF

Based on the current record, the claimant is not entitled to relief under ORS 197.352 as to the cited regulations administered by the Department. Department staff recommend this claim be denied because: (1) the laws administered by the Department and identified in the claim are not land use regulations; (2) the laws administered by the Department and identified in the claim do not restrict the use of the property the claimant seeks to carry out; (3) the Department has not enforced such laws with regard to claimant's use of the property; and (4) even if the laws administered by the Department and identified in the claim are land use regulations, they are exempt under ORS 197.352(3).

VII. COMMENTS ON THE DRAFT STAFF REPORT

The department issued its draft staff report on this claim on March 13, 2006. Under OAR 125-145-0100(3), there was 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. No comments were received during the period provided.