

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. M122829
(BALLOT MEASURE 37) OF)
Phillip Lyche, CLAIMANT)

Claimant: Phillip Lyche (the Claimant)

Property: Township 2N, Range 1W, Section 30, Tax lot 1800, Multnomah 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.

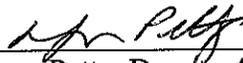
FOR DLCD AND THE LAND CONSERVATION
AND DEVELOPMENT COMMISSION:
Lane Shetterly, Director



Cora R. Parker, Deputy Director
DLCD

Dated this 25th day of August, 2006.

FOR the DEPARTMENT OF ADMINISTRATIVE
SERVICES:



Dugan Petty, Deputy Administrator
DAS, State Services Division

Dated this 25th 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 25, 2006

STATE CLAIM NUMBER: M122829

NAME OF CLAIMANT: Phillip Lyche

MAILING ADDRESS: PO Box 7214
Aloha, Oregon 97007

PROPERTY IDENTIFICATION: Township 2N, Range 1W, Section 30
Tax lot 1800
Multnomah County

OTHER INTEREST IN PROPERTY: Alerie Lyche
PO Box 7214
Aloha, Oregon 97007

DATE RECEIVED BY DAS: October 17, 2005

180-DAY DEADLINE: September 1, 2006¹

I. SUMMARY OF CLAIM

The claimant, Phillip Lyche, seeks compensation in the amount of \$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 4.4-acre subject property into five or fewer parcels for residential development. The subject property is located at 13910 Northwest Cornelius Pass Road, near Portland, in Multnomah County.² (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 because the claimant's desired use of the subject property was prohibited under the laws in effect when the claimant acquired the property in 1994. (See the complete recommendation in Section VI. of this report.)

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).

² The subject property is located approximately 1.5 miles from the Metro urban growth boundary, according to Metro staff.

III. COMMENTS ON THE CLAIM

Comments Received

On July 17, 2006, pursuant to Oregon Administrative Rule (OAR) 125-145-0080, the Oregon Department of Administrative Services (DAS) provided written notice to the owners of surrounding properties. According to DAS, one written comment was received in response to the 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 17, 2005, for processing under OAR 125, division 145. The claim identifies several county regulations as the basis for the claim. Only laws that were enacted or adopted prior to December 2, 2004, are the basis for this claim.

Conclusions

The claim has been submitted within two years of the effective date of Measure 37 (December 2, 2004), based on land use regulations enacted or adopted prior to December 2, 2004, and is therefore timely filed.

V. ANALYSIS OF CLAIM

1. Ownership

ORS 197.352 provides for payment of compensation or relief from specific laws for “owners” as that term is defined in ORS 197.352. ORS 197.352(11)(C) defines “owner” as “the present owner of the property, or any interest therein.”

Findings of Fact

The claimant, Phillip Lyche, acquired the subject property on September 28, 1994, as reflected by a deed obtained from a title company. A 2005–06 tax statement submitted with the claim establishes the claimant’s current ownership of the subject property.³

Conclusions

The claimant, Phillip Lyche, is an “owner” of the subject property as that term is defined by ORS 197.352(11)(C) as of September 28, 1994.

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 acquired the property.

Findings of Fact

The claimant desires the right to create up to five parcels and to develop a residence on each parcel. According to the claimant, the desired use was possible through a conditional use/planned unit development process that was in place when the claimant acquired the subject property but that has since been prohibited.

The claim is based on the applicable provisions of state law that regulate rural residential zoning and restrict uses on land zoned rural residential. The claimant’s property is zoned Rural Residential (RR) by Multnomah County, consistent with Goal 14 and OAR 660-004-0040. The county’s RR zone has a minimum lot size of five acres. Under OAR 660-004-0040, adopted after the claimant acquired the property in 1994, the county may not allow any new lot or parcel less than two acres, and the county may not amend its current minimum lot size of five acres.

Conclusions

OAR 660-004-0040 was adopted after the claimant, Phillip Lyche, acquired the subject property on September 28, 1994. This land use regulation does not allow the use the claimant desires to

³ The claim identifies the claimant’s wife, Alerie Lyche, as an owner of the subject property. However, she is identified on the claim as having only an interest in the subject property. She is not identified as a claimant and did not sign the claim form.

carry out. State land use regulations enacted or adopted since the claimant acquired the subject property in 1994 restrict the claimant's desired use of the property.

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 \$250,000 as the reduction in the property's fair market value due to the regulation(s). This amount appears to be based on the claimant's evaluation of comparable nearby properties.

The claim is based on the claimant's assertion that the subject property could be divided in 1994 (via a conditional-use planned development, pursuant to "MCC .6200 to .6226"). However, Multnomah County has informed the department that while the planned development provisions in the county's RR zone permitted parcels smaller than five acres, they did not allow any increase in density.⁴ As a result, the 4.4-acre subject property could not have been divided and developed via a planned unit development when the claimant acquired it in 1994. Given that the use the claimant desires to carry out was prohibited in 1994, there is no relevant evidence that the adoption of OAR 660-004-0040 has had any effect in reducing the fair market value of the subject property.

Conclusions

As explained in Section V.(1) of this report, Phillip Lyche is the claimant. He acquired the subject property on September 28, 1994. While a Land Use Conservation and Development Commission (the Commission) rule adopted since the claimant acquired the subject property restricts the claimant's desired use of the property, that use was already prohibited in 1994. The claimant has not provided any evidence that the adoption of OAR 660-004-0040 has had any effect on the fair market value of the subject property. As a result, the department concludes that the fair market value of the subject property has not been reduced as a result of land use regulations enforced by the Commission or the department.

4. Exemptions Under ORS 197.352

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

As set forth in Section V.(2) of this report, OAR 660-004-0040 restricts the claimant's desired use of the subject property. None of the exemptions under ORS 197.352(3) appear to apply to

⁴ E-mail from Multnomah County Planning Division staff dated August 3, 2006.

OAR 660-004-0040 as it applies to the claimant's desired use. Goal 14 was in effect when the claimant acquired the subject property, and therefore, it is exempt under ORS 197.353(3)(E).

Conclusions

OAR 660-004-0040 is not exempt as it applies to the claimant's desired use of the property. Goal 14 is exempt under ORS 197.352(3)(E).

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 either do not restrict the claimant's desired use of the subject property relative to what was permitted when the claimant acquired it in 1994, or have not had the effect of reducing the fair market value of the property.

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. Therefore, the department recommends that this claim be denied.

VII. COMMENTS ON THE DRAFT STAFF REPORT

The department issued its draft staff report on this claim on August 10, 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.