

BEFORE THE DEPARTMENT OF ADMINISTRATIVE SERVICES,
THE DEPARTMENT OF LAND CONSERVATION AND DEVELOPMENT OF
THE STATE OF OREGON

IN THE MATTER OF THE CLAIM FOR) FINAL ORDER
COMPENSATION UNDER ORS 197.352) CLAIM NO. M129590
(BALLOT MEASURE 37) OF)
Helen M. Kappler, as trustee of the Kappler)
Living Trust dated July 15, 1992, CLAIMANT)

Claimant: Helen M. Kappler, as trustee of the Kappler Living Trust dated
 July 15, 1992 (the Claimant)

Property: Township 4S, Range 2E, Section 29, Tax lot 100, Clackamas County
 (the property)

Claim: The demand for compensation and any supporting information received
 from the Claimant by the State of Oregon (the Claim).

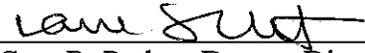
Claimant submitted the Claim to the State of Oregon under ORS 197.352. Under OAR 125-145-0010 *et seq.*, the Department of Administrative Services (DAS) referred the Claim to the Department of Land Conservation and Development (DLCD) as the regulating entity. This order is based on the record herein, 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

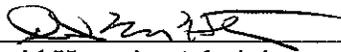
The Claim is denied as to laws administered by DLCD and the Land Conservation and Development Commission (LCDC) for the reasons set forth in the DLCD Report.

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 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 21st day of December, 2006.

FOR the DEPARTMENT OF
ADMINISTRATIVE SERVICES:


David Hartwig, Administrator
DAS, State Services Division
Dated this 21st day of December, 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 197.352, 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)

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

December 21, 2006

STATE CLAIM NUMBER: M129590

NAME OF CLAIMANT: Helen M. Kappler, as trustee of the Kappler Living Trust dated July 15, 1992

MAILING ADDRESS: 28330 S. Highway 213
Mulino, Oregon 97042

PROPERTY IDENTIFICATION: Township 4S, Range 2E, Section 29
Tax lot 100
Clackamas County

OTHER CONTACT INFORMATION: Michael R. McMMain
Jan L. McMMain
PO Box 1017
Mulino, Oregon 97042

DATE RECEIVED BY DAS: June 27, 2006

180-DAY DEADLINE: December 24, 2006

I. SUMMARY OF CLAIM

The claimant, Helen Kappler, trustee of the Kappler Living Trust dated July 15, 1992, seeks compensation in the amount of \$100,000 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 10.75-acre subject property into three parcels for residential use. The subject property is located at 13435 South Macksburg Road, near Canby, in Clackamas County. (See claim.)

II. SUMMARY OF STAFF RECOMMENDATION

Based on the findings and conclusions set forth below, the Department of Land Conservation and Development (the department) has determined that this claim is not valid because the claimant has not established that she owns an interest in the subject property that includes the legal right to carry out her desired use. (See the complete recommendation in Section VI of this report.)

III. COMMENTS ON THE CLAIM

Comments Received

On October 19, 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, no written comments were received in response to the 10-day notice.

IV. TIMELINESS OF CLAIM

Requirement

ORS 197.352(5) requires that a written demand for compensation be made:

1. For claims arising from land use regulations enacted prior to the effective date of Measure 37 (December 2, 2004), within two years of that effective date, or the date the public entity applies the land use regulation as an approval criteria to an application submitted by the owner, whichever is later; or
2. For claims arising from land use regulations enacted after the effective date of Measure 37 (December 2, 2004), within two years of the enactment of the land use regulation, or the date the owner of the property submits a land use application in which the land use regulation is an approval criterion, whichever is later.

Findings of Fact

This claim was submitted to DAS on June 27, 2006, for processing under OAR 125, division 145. The claim identifies the following as the basis for the claim: Clackamas County's EFU zoning and comprehensive plan; ORS 92, 94, 197, 215, 536, 541 and 561; provisions of OAR 660; "all LCDC rules and Goals"; and "all rules separately or in conjunction with other rules, which regulate, delay, or otherwise impair division for residential development."¹ 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.

¹ The claim contains no description or evidence that ORS 92, 94, 197, 536, 541 or 561 applies to or restricts the claimant's desired use of the subject property. As a result, these state laws are not addressed in this report.

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, Helen Kappler, first acquired the subject property with her husband, Gilbert Kappler, on March 23, 1964, as reflected by a warranty deed included with the claim. On July 15, 1992, Gilbert and Helen Kappler conveyed the subject property to a revocable trust. The conveyance to a revocable trust did not eliminate Helen Kappler’s rights to use the property for her desired use. However, on August 7, 1997, the claimant conveyed the property to Michael and Jan McMMain by a land sale contract included with the claim. There is no evidence that Helen Kappler continues to have a legal right to use the property for the use she desires to carry out.

The Clackamas County Assessor’s Office confirms that Michael and Jan McMMain, as contract purchasers, are current owners of the subject property. The claimant, Helen Kappler, no longer owns an interest in the subject property that includes the legal right to carry out the use she desires. As a result, this claim must be denied.

Conclusions

The claimant, Helen Kappler, is not an “owner” of an interest in the subject property that includes the legal right to carry out her desired use. As a result, this claim must be denied.

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.

As explained in Section V.(1), the claimant, Helen Kappler, is not an “owner” of an interest in the subject property that includes the legal right to carry out her desired use. Therefore, no laws enforced by the Land Conservation and Development Commission (the Commission) or the department restrict the claimant’s use of private real property in a manner that reduces the fair market value 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.”

As explained in Section V.(1) of this report, the claimant, Helen Kappler, is not an “owner” of an interest in the subject property that includes the legal right to carry out her desired use. Therefore, no laws restrict her use of the subject property in a manner that reduces the fair market value of the subject property.

4. Exemptions Under ORS 197.352(3)

ORS 197.352 does not apply to certain land use regulations. In addition, under ORS 197.352(3), certain types of laws are exempt from ORS 197.352.

As explained in Section V.(1) of this report, the claimant, Helen Kappler, is not an “owner” of an interest in the subject property that includes the legal right to carry out her desired use. Therefore, the department does not reach the issue of whether any state land use regulations that may apply to the claimant’s desired use are exempt from ORS 197.352.

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 record, the department finds that the claim is not valid because the claimant is not an owner of an interest in the subject property that includes the legal right to carry out her desired use.

Conclusions

Based on the record before the department, the claimant, Helen Kappler, has not established that she is entitled to relief under ORS 197.352(1) as a result of land use regulations enforced by the Commission or the department because she is not a present owner of an interest in the subject property that includes the legal right to carry out her desired use. 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 November 29, 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.