

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. M129898
(BALLOT MEASURE 37) OF)
Emmy Miller, CLAIMANT)

Claimant: Emmy Miller (the Claimant)

Property: Township 26S, Range 6W, Section 31, Tax lot 900, Douglas County
(the property)

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

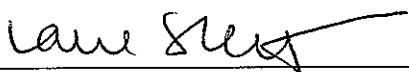
Claimant submitted the Claim to the State of Oregon under ORS 197.352. Under OAR 125-145-0010 *et seq.*, the Department of Administrative Services (DAS) referred the Claim to the Department of Land Conservation and Development (DLCD) as the regulating entity. This order is based on the record herein,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

Dated this 13th day of February, 2007.

FOR THE DEPARTMENT OF
ADMINISTRATIVE SERVICES:



David Hartwig, Administrator
DAS, State Services Division

Dated this 13th day of February, 2007.

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

February 13, 2007

STATE CLAIM NUMBER: M129898

NAME OF CLAIMANT: Emmy Miller

MAILING ADDRESS: 1295 Cleveland Hill Road
Roseburg, Oregon 97470

PROPERTY IDENTIFICATION: Township 26S, Range 6W, Section 31
Tax lot 900
Douglas County

DATE RECEIVED BY DAS: August 21, 2006

180-DAY DEADLINE: February 17, 2007

I. SUMMARY OF CLAIM

The claimant, Emmy Miller, submitted a Measure 37 claim form dated August 16, 2006. The claimant does not make a demand for compensation, does not clearly identify a desired use of the 15.64-acre subject property other than to "subdivide into parcels" and does not identify how any current land use laws restrict her use.¹ The subject property is located at 1295 Cleveland Hill Road, near Roseburg, in Douglas County. (See claim.)

II. SUMMARY OF STAFF RECOMMENDATION

Based on the findings and conclusions set forth below, the Department of Land Conservation and Development (the department) has determined that the claim is not valid. The claimant has not made a demand for compensation, has not described how her desired use of the subject property is restricted by land use regulations enacted or enforced since she acquired the property and has not alleged that any land use laws restrict her use of private real property with the effect of reducing its fair market value relative to how the property could have been used at the time the claimant or a family member acquired the property. (See the complete recommendation in Section VI of this report.)

¹ The Department of Administrative Services sent correspondence to the claimant on November 27, 2006, and department staff made additional attempts to contact the claimant to obtain the information necessary to evaluate her claim. As of January 4, 2007, no response has been received from the claimant.

III. COMMENTS ON THE CLAIM

Comments Received

On December 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, two written comments were received in response to the 10-day notice.

The comments do 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 letters 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 August 21, 2006, for processing under OAR 125, division 145. The claim identifies "5R zone" as the basis for the claim. Only laws that were enacted or adopted prior to December 2, 2004, are the basis for this claim.

Conclusions

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

V. ANALYSIS OF CLAIM

1. Ownership

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

Findings of Fact

The claimant acquired the subject property on July 14, 1964, as reflected by a warranty deed submitted with the claim. The Douglas County Assessor’s Office confirms the claimant’s current ownership of the subject property.

Conclusions

The claimant, Emmy Miller, is an “owner” of the subject property as that term is defined by ORS 197.352(11)(C), as of July 14, 1964.

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(s) must restrict the claimant’s use of private real property in a manner that reduces the fair market value of the property relative to how the property could have been used at the time the claimant or a family member acquired the property.

Findings of Fact

The claim does not include information indicating the claimant’s desired use of the 15.64-acre subject property other than to “subdivide into parcels.” Additionally, the claim does not assert which land use regulations, if any, prohibit the claimant’s desired use.²

The claimant’s property is zoned 5R (Rural Residential) by Douglas County, consistent with Goal 14 (Urbanization) and OAR 660-004-0040, which generally requires that land outside the urban growth boundary be used for rural uses. Goal 14 became effective on January 25, 1975, and requires that local comprehensive plans identify and separate urbanizable land from rural land in order to provide for an orderly and efficient transition from rural to urban land use. In 2000, as a result of a 1986 Oregon Supreme Court decision,³ the Land Conservation and Development Commission (the Commission) amended Goal 14 and adopted OAR 660-004-0040 (Application of Goal 14 to Rural Residential Areas), which was effective on October 4, 2000. The county’s 5R zone was adopted on March 12, 1979, and requires a minimum of five acres for the creation of a new lot or parcel.

² On the claim form, the claimant identifies “5R zone” as the applicable law or rule but states “none” under the question of “how this Land Use Law or Rule restricts the use of this property.”

³ *1000 Friends of Oregon v. LCDC (Curry County)*, 301 Or 447 (1986).

Goal 14 was effective on January 25, 1975, and requires that local comprehensive plans identify and separate urbanizable land from rural land in order to provide for an orderly and efficient transition from rural to urban land use. In 2000, as a result of a 1986 Oregon Supreme Court decision,⁴ the Commission amended Goal 14 and adopted OAR 660-004-0040 (Application of Goal 14 to Rural Residential Areas), which was effective on October 4, 2000

The rule states that if a county rural residential zone in effect on October 4, 2000, specifies a minimum lot size of two acres or more, the area of any new lot or parcel shall equal or exceed the minimum lot size that is already in effect (OAR 660-004-0040(7)(c)). Some relief from this provision is available for lots or parcels having more than one permanent habitable dwelling pursuant to OAR 660-004-0040(7)(h). The rule also provides that a county's minimum lot size requirement in a rural residential zone shall not be amended to allow a smaller minimum lot size without approval of an exception to Goal 14 (OAR 660-004-0040(6)). Because Douglas County's rural residential zone was in effect on October 4, 2000, and requires a minimum lot size of five acres, the minimum lot size for any new lot or parcel must equal or exceed five acres.

The claimant acquired the subject property in 1964, prior to the establishment of the statewide planning goals and their implementing regulations. However, the claimant has not established how any of these regulations restrict her desired use of the subject property with the effect of reducing its fair market value.

Conclusions

The minimum lot size requirements for rural residential lots or parcels established by Goal 14 and OAR 660-004-0040 were adopted after the claimant, Emmy Miller, acquired the subject property on July 14, 1964. However, the claimant has not asserted or established how these land use regulations restrict her desired use of the property to "subdivide into parcels." In fact, under Goal 14 and OAR 660-004-0040, as implemented by the property's current zoning, it appears that the claimant's property can be divided into three parcels. As the claimant has described her desired use, current land use regulations do not restrict that use.

3. Effect of Regulations on Fair Market Value

In order to establish a valid claim, ORS 197.352(1) requires that the land use regulation(s) (described in Section V.(2) of this report) must have "the effect of reducing the fair market value of the property, or any interest therein."

Findings of Fact

The claim does not assert that the property's fair market value has been reduced as a result of land use regulations that restrict the claimant's desired use of the property.

Conclusions

As explained in Section V.(2) of this report, the claimant is Emmy Miller who acquired the subject property on July 14, 1964. The claimant has not alleged that land use regulations enacted

⁴ *1000 Friends of Oregon v. LCDC (Curry County)*, 301 Or 447 (1986).

or adopted since she acquired the property have had the effect of reducing the property's fair market value. ORS 197.352 requires that a claimant make a demand for compensation in order to be entitled to relief. The claimant has made no demand for compensation. Without a demand for compensation based on a reduction in value of the subject property as a result of a land use regulation enacted or adopted after the claimant acquired the subject property, the claimant has not made a valid claim under ORS 197.352(1).

4. Exemptions Under ORS 197.352(3)

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

Findings of Fact

The claim does not identify any state land use regulations enacted or adopted since the claimant acquired the subject property that restrict the use of the subject property relative to what would have been allowed when the claimant acquired it on July 14, 1964.

Conclusions

Without a desired use for the subject property, it is not possible for the department to determine any laws that may apply to that particular use of the property, or whether those laws may fall under one or more of the exemptions under 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 current 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, the claimant has not made a valid claim for compensation under ORS 197.352. The claimant has not established that laws enforced by the Commission or the department restrict the claimant's desired use of the property relative to what was permitted when she acquired it in 1964, and has not asserted that the laws enforced by the Commission or the department reduce the fair market value of the subject property.

Conclusions

Based on the record and the foregoing findings and conclusions, the claimant had 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. Therefore, the department recommends that the claim be denied.

VII. COMMENTS ON THE DRAFT STAFF REPORT

The department issued its draft staff report on this claim on January 22, 2007. 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.