

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)
COMPENSATION UNDER ORS 197.352)
(BALLOT MEASURE 37) OF)
Lourdes Lee, CLAIMANT)

FINAL ORDER
CLAIM NO. M 118385

Claimant: Lourdes Lee (the Claimant)

Property: Tax Lot 2600, T.36S, R.6W, Section 29D, W.M., Josephine County (the Property)

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

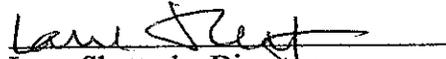
Claimant submitted the Claim to the State of Oregon under ORS 197.352. Under OAR 125-145-0010 *et seq.*, the Department of Administrative Services (DAS) referred the Claim to the Department of Land Conservation and Development (DLCD) as the regulating entity. This order is based on the record herein,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

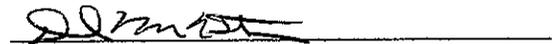
This Order is entered by the Director of the DLCD as a final order of DLCD and the Land Conservation and Development Commission under ORS 197.352, OAR 660-002-0010(8), and OAR chapter 125, division 145, and by the Administrator for the State Services Division of the DAS as a final order of DAS under 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 March, 2006.

FOR the DEPARTMENT OF
ADMINISTRATIVE SERVICES:


David Hartwig, Administrator
DAS, State Services Division
Dated this 13th day of March, 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 293.316: Judicial review under ORS 293.316 may be obtained by filing a petition for review within 60 days from the service of this order. Judicial review under ORS 293.316 is pursuant to the provisions of ORS 183.482 to the Court of Appeals.
2. 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 and the Circuit Court in the county in which you reside.
3. A cause of action under ORS 197.352: A present owner of the property, or any interest therein, may file a cause of action in the Circuit Court for the county where the property is located, if a land use regulation continues to apply to the subject property more than 180 days after the present owner made a written demand for compensation.

(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)

**BALLOT MEASURE 37 (ORS 197.352)
CLAIM FOR COMPENSATION**

**OREGON DEPARTMENT OF LAND CONSERVATION AND DEVELOPMENT
Final Staff Report and Recommendation**

March 13, 2006

STATE CLAIM NUMBER: M118385

NAME OF CLAIMANT: Lourdes Lee¹

MAILING ADDRESS: Post Office Box 2655
Grants Pass, Oregon 97528

PROPERTY IDENTIFICATION: Township 36S, Range 6W, Section 29D
Tax Lot 2600
Josephine County

OTHER CONTACT INFORMATION: Rick Riker
Planning and Research Services
560 Northeast F Street, PMB 224
Grants Pass, Oregon 97526

DATE RECEIVED BY DAS: May 4, 2005

180-DAY DEADLINE: March 19, 2006²

I. SUMMARY OF CLAIM

The claimant, Lourdes Lee, seeks compensation in the amount of \$125,000 for the reduction in fair market value as a result of certain 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 5.03-acre property into two parcels of approximately 2.5 acres each and to develop a dwelling on the parcel without the existing dwelling. The property is located at 5205 Redwood Avenue, southwest of the City of Grants Pass, in Josephine County. (See the claim.)

¹ Also known as Lourdes Nagle.

² This date reflects 180 days from the date the claim was submitted as extended by the 139 days enforcement of Measure 37 was suspended during the pendency of the appeal of Macpherson v. Dep't of Admin. Servs., 340 Or ___, 2006 Ore. LEXIS 104 (February 21, 2006).

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 neither the Land Conservation and Development Commission (the Commission) nor the department have enforced laws that restrict the claimant's use of private real property relative to uses permitted when the claimant acquired the property on October 28, 1992. (See the complete recommendation in Section VI. of this report.)

III. COMMENTS ON THE CLAIM

Comments Received

On May 27, 2005, 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.³ The comment does not address whether the claim meets the criteria for relief (compensation or waiver) under ORS 197.352.

The comment addresses the following legal issues related to ORS 197.352: evidence required for substantiation of reduction in value, application of the Interim Planning Goals before acknowledgment, transferability of ORS 197.352 "waivers," and authority of the State to waive statutes. (See 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 the Measure (December 2, 2004), within two years of that effective date or the date the public entity applies the land use regulation as an approval criterion 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 the Measure (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 May 4, 2005, for processing under OAR 125, division 145. The claim is based on Josephine County's Rural Residential 5-Acre (RR5) zoning that restricts

³ The 10-day notice period was suspended for 139 days during the pendency of the *Macpherson v. Dep't of Admin. Servs.*, 340 Or ____ , 2006 Ore. LEXIS 104 (February 21, 2006), which suspended all Measure 37 deadlines

the partitioning of the parcel into 2.5-acre lots as the basis for the claim. Only laws that were enacted prior to December 2, 2004, the effective date of Measure 37, are the basis for this claim. (See citations of statutory and administrative rule history of the Oregon Revised Statutes and Oregon Administrative Rules.)

Conclusions

The claim has been submitted within two years of December 2, 2004, the effective date of Measure 37, based on land use regulations 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, Lourdes Lee, acquired the subject property by Deed on October 28, 1992. Josephine County Assessor records show Lourdes Lee as the current owner of the subject property.

Conclusions

The claimant, Lourdes Lee, is an “owner” of the subject property, as that term is defined by ORS 197.352(11)(C), as of October 28, 1992.

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 claim states that “property zone 5 acre” and “DLCD 5 ac min...prohibits partitioning parcel into 2-5 ac lots.” The claim also states: “State rulings have effectively made the RR-2.5 acre zone change no longer attainable, as it requires an exception to Goal 14.”⁴ The subject property is 5.03 acres and has been developed with one dwelling. The lot cannot be further divided in the RR5 zone.

⁴ See September 7, 2005, memorandum from the claimant’s representative Rick Riker to department staff, located in the department’s claim file.

In accordance with Statewide Planning Goal 14 (Urbanization), the subject property is zoned Rural Residential 5-Acre (RR5) by Josephine County, which has a five-acre minimum lot size and permits one single-family dwelling per lot or parcel.⁵

Statewide Planning Goal 14 (Urbanization) was effective January 25, 1975, and required 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. Rural residential lands are rural lands, and Goal 14 prohibits urban use of rural lands (OAR 660-004-0040(4)).

Prior to 2000, Goal 14 was held to prohibit residential development outside urban growth boundaries (UGBs) at densities of one to four acres per lot or parcel (see *DLCD v. Klamath County*, 38 Or LUBA 769 (2000)). In 2000, as a result of a 1986 Oregon Supreme Court decision⁶, the Commission amended Goal 14 and adopted OAR 660-004-0040, *Application of Goal 14 (Urbanization) to Rural Residential Areas*, which was effective October 4, 2000. The rule provides that after October 4, 2000, an exception to Goal 14 is required to create a lot or parcel in a rural residential zone that is smaller than the county's minimum lot size standard. This standard does not allow the subject 5.03-acre property to be divided without a Goal 14 exception. (See OAR 660-004-0040(7).)

When the claimant acquired the subject property on October 28, 1992, the property had the current Josephine County zoning of Rural Residential 5 Acre (RR5). At that time, the County's RR5 zone permitted one single-family dwelling on a lot or parcel at least five acres in size,⁷ and Goal 14 was held to prohibit 2.5-acre lots outside UGBs. Current state law allows 2.5-acre parcels in the RR5 zone if the County approves an exception to Goal 14. Therefore, the applicable law when claimant acquired the subject property was at least as restrictive as it is today.

Conclusions

The claim does not identify any state law that restricts the use of the claimant's property in a manner that reduces the fair market value of the property relative to how the property could have been used when the claimant acquired it in 1992. Based on the record, neither the Commission nor the department has enforced any laws that restrict the use of the claimant's real property relative to uses permitted when she acquired the property.

⁵ May 2005 Josephine County Zoning Ordinance, Sections 61.020 I. and 61.060 B.

⁶ *1000 Friends of Oregon v. LCDC (Curry County)*, 301 Or 447 (1986).

⁷ August 20, 1991, Josephine County Zoning Ordinance, Section 8.020 and Section 8.040, subsection 2.c.

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 claim includes an estimate of \$125,000 as the reduction in the property’s fair market value due to current regulations. According to the claim, this amount is based on an estimate of the market value of 2.5-acre parcels at \$125,000 each.

Conclusions

As determined in Section V.(2) above, the claimant has not identified any laws that have restricted the use of the subject property relative to uses permitted when the claimant acquired the property in 1992. Accordingly, the claimant has not established that land use regulations enacted after she acquired the property have had the effect of reducing the fair market value of 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 refers to Josephine County’s Rural Residential-5 Acre (RR5) Zone. Based on the record, the claim does not identify state laws enforced by the Commission or the department that restrict the use of the subject property relative to uses permitted when the claimant acquired the property.

Conclusions

Because there are no state laws that restrict the claimant’s use of the subject property, the exemption provisions of ORS 197.352(3) are not applicable to this claim.

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 a law that restricts 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 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 for this claim, the claimant has not established that any state laws enforced by the Commission or the department restrict the use of her 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 in 1992. Josephine County's acknowledged RR5 zone was in effect in 1992 when the claimant acquired the property and did not allow the claimant to divide the subject property or place an additional dwelling on the property as requested in the claim.

Conclusion

Based on the record before the department, the claimant, Lourdes Lee, has not established that she is entitled to relief under ORS 197.352(1). Therefore, this claim is denied.

VII. COMMENTS ON THE DRAFT STAFF REPORT

The department issued its draft staff report on this claim on October 6, 2005. 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.