

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. M 118525
(BALLOT MEASURE 37) OF)
David McClements, CLAIMANT)

Claimant: David McClements (the Claimant)

Property: Township 38S, Range 9E: Section 21, tax lots 700 and 800;
 Section 21DD, tax lot 200; Section 28, tax lots 100, 200, 400 and 500;
 Section 28AB, tax lots 200 and 400; Section 28AC, tax lots 300 and 600;
 and Section 28AD, tax lots 300 and 700, Klamath 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:

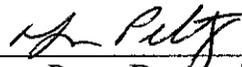
Lane Shetterly, Director



George Naughton, Deputy Director
DLCD

Dated this 10th day of April, 2006.

FOR the DEPARTMENT OF
ADMINISTRATIVE SERVICES:



Dugan Petty, Deputy Administrator
DAS, State Services Division

Dated this 10th day of April, 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

April 10, 2006

STATE CLAIM NUMBER: M118525

NAMES OF CLAIMANTS: David McClements

MAILING ADDRESS: 5316 153rd Avenue SE
Bellevue, Washington 98006

PROPERTY IDENTIFICATION: Township 38S, Range 9E:
Section 21, tax lots 700 and 800;
Section 21DD, tax lot 200;
Section 28, tax lots 100, 200, 400 and 500;
Section 28AB, tax lots 200 and 400;
Section 28AC, tax lots 300 and 600; and
Section 28AD, tax lots 300 and 700
Klamath County

OTHER CONTACT INFORMATION: Michael L. Spencer
419 Main Street
Klamath Falls, Oregon 97601

OTHER INTEREST IN PROPERTY: Thomas and Jenise Bocchi

DATE RECEIVED BY DAS: May 31, 2005

180-DAY DEADLINE: April 15, 2006¹

I. SUMMARY OF CLAIM

The claimant, David McClements, seeks compensation in the amount of \$453,830 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 partition the 281.46-acre property into parcels of one acre or less and establish a dwelling on each parcel. The subject property is located northeast of the City of Klamath Falls, east of Summit Street and northwest of Old Fort Klamath Road, in Klamath County. (See claim.)

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 the *MacPherson v. DAS* appeal.

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 his ownership of the subject property. (See the complete recommendation in Section VI of this report.)

III. COMMENTS ON THE CLAIM

Comments Received

On August 24, 2005, pursuant to Oregon Administrative Rules (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, evidence or information 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, as extended by the 139 days enforcement of the Measure was suspended during the pendency of the *MacPherson v. DAS* appeal, 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 May 31, 2005, for processing under OAR 125, division 145. The claim identifies all of the statewide planning goals, OAR 660-006-0015, -0025, -0026, -0027, -0029, -0055 and -0057 and all provisions of OAR 660, division 33, 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), as extended by the 139 days enforcement of the Measure was suspended during the pendency of the *MacPherson v. DAS* appeal, 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 the statute. ORS 197.352(11)(C) defines “owner” as “the present owner of the property, or any interest therein.”

Findings of Fact

The claimant, David McClements, states in the claim that he acquired the subject property on October 23, 1967, and now has an interest as a lien holder of the property. According to the information provided in the claim, on April 9, 2002, the claimant transferred the subject property to Thomas and Jenise Bocchi. The warranty deed through which he transferred the subject property does not include any language that could be construed as reserving in favor of claimant any interest in the property. Subsequently, on April 18, 2002, Thomas and Janise Bocchi executed a trust deed through which they transferred the subject property, in trust, to a trustee (Aspen Title and Escrow Co.) with the claimant, David McClements, as lien holder.² The claimant has retained only the right to payment under the trust deed. He no longer owns the subject property.

Conclusions

The claimant, David McClements, has not established that he is an “owner” of the subject property as that term is defined in ORS 197.352(11)(C).

2. The Laws That are the Basis for This Claim

In order to establish a valid claim, ORS 197.352(1), 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 above, claimant David McClements is not an “owner” of the subject property as that term is defined in ORS 197.352(11)(C). Therefore, no laws enforced by 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 subject property.

² The stated purpose of the trust deed is for “securing performance of agreement and ... payment owned by Grantor.” Claimant argues that he retained an interest in the subject property through the trust deed. The interest of a lien holder under a trust deed is not an ownership interest. Even if an argument could be made that it is, the claimant would have acquired that interest on April 18, 2002, and the claim would have been denied on the basis that no laws enacted or enforced after that date restrict the use of the subject property.

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.”

As explained in Section V.1 of this report, the claimant, David McClements, is not an owner of the subject property, as that term is defined in ORS 197.352(11)(C). Therefore, no laws restrict his use of the subject property in a manner that reduces 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 the statute.

As explained in Section V.1 of this report, the claimant, David McClements, is not an “owner” of the subject property as that term is defined in ORS 197.352(11)(C). Therefore, the issue of whether any laws are exempt from ORS 197.352 is not relevant.

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 record, the department finds that the claim is not valid because the claimant is not an owner of the subject property.

Conclusions

Based on the record before the department, the claimant, David McClements, 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, this claim is denied.

VII. COMMENTS ON THE DRAFT STAFF REPORT

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