

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. M125048
(BALLOT MEASURE 37) OF)
Myrtle Schar, CLAIMANT)

Claimants: Myrtle Schar (the Claimants)

Property: Township 7S, Range 1W, Section 7, Tax lot 2000
Marion County (the property)

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

Claimants 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

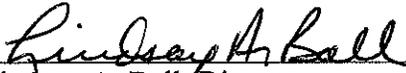
The Claim is denied as to laws administered by DLCD and the Land Conservation and Development Commission (LCDC) for the reasons set forth in the DLCD Report.

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 Director 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


Michael Morrissey, Manager
DLCD, Measure 37 Services Division
Dated this 12th day of October, 2006.

FOR THE DEPARTMENT OF
ADMINISTRATIVE SERVICES:


Lindsay A. Ball, Director
DAS, State Services Division
Dated this 12th day of October, 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

October 12, 2006

STATE CLAIM NUMBER: M125048

NAME OF CLAIMANT: Myrtle Schar

MAILING ADDRESS: 4017 SE Vineyard Road, Apt. 229
Milwaukie, Oegon 97267-4850

PROPERTY IDENTIFICATION: Township 7S, Range 1W, Section 7
Tax lot 2000
Marion County

OTHER CONTACT INFORMATION: Wallace W. Lien, P.C.
1775 32nd Place NE, Suite A
Salem, Oregon 97303-1674

DATE RECEIVED BY DAS: April 20, 2006

180-DAY DEADLINE: October 17, 2006

I. SUMMARY OF CLAIM

The claimant, Myrtle Schar, seeks compensation in the amount of \$1,050,378 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 26.74-acre property into 11 parcels and to develop a dwelling on each parcel. The subject property is located at 9962 Selah Springs Road NE, near Silverton, in Marion County. (See claim.)

II. SUMMARY OF STAFF RECOMMENDATION

Based on the preliminary 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 has enforced laws that restrict the claimant's use of the private real property. (See the complete recommendation in Section VI. of this report.)

III. COMMENTS ON THE CLAIM

Comments Received

On August 9, 2006, 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, five 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 April 20, 2006, for processing under OAR 125, division 145. The claim identifies ORS 197 and 215, OAR 660 and the statewide planning goals 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, Myrtle Schar, acquired an undivided one-half interest in the subject property on February 13, 1969, from her husband, Fred Schar, as reflected by a bargain and sale deed included with the claim. Information provided with the claim shows that the subject property was included in the Revocable Living Trust of Fred J. Schar and Myrtle E. Schar on December 21, 1995.¹ The Marion County database shows that Myrtle Schar, as trustee of the revocable trust, is a current owner of subject property.

Conclusions

The claimant, Myrtle Schar, is an “owner” of the subject property as that term is defined by ORS 197.352(11)(C). For purposes of ORS 197.352(8), the claimant acquired the subject property on February 13, 1969.

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 claimants or a family member acquired the property.

Findings of Fact

The claim indicates that the claimant desires to divide the 26.74-acre subject property into 11 parcels and to establish a dwelling on each parcel. A preliminary subdivision plan is included with the claim. Current planning and zoning laws do not allow the creation of small parcels or the establishment of dwellings on the property.

The claim is based generally on the applicable provisions of state law that require Exclusive Farm Use (EFU) zoning and restrict residential uses on EFU-zoned land. The claimant’s property is zoned EFU by Marion County, as required by Goal 3, in accordance with ORS 215 and OAR 660, division 33. Goal 3 became effective on January 25, 1975, and required that agricultural lands as defined by Goal 3 be zoned EFU pursuant to ORS 215.

Current land use regulations, particularly ORS 215.263, 215.284 and 215.780 and OAR 660, division 33, enacted or adopted pursuant to Goal 3, prohibit the division of EFU-zoned land into

¹ Transfer of property to a revocable trust does not result in a change of ownership for the purposes of ORS 197.352.

parcels less than 80 acres and establish standards for development of dwellings on existing or proposed parcels on that land.

ORS 215.780 establishes an 80-acre minimum size for the creation of new lots or parcels in EFU zones and became effective on November 4, 1993 (Chapter 792, Oregon Laws 1993). ORS 215.263 (2005 edition) establishes standards for the creation of new parcels for non-farm uses and dwellings allowed in an EFU zone.

OAR 660-033-0135 (applicable to farm dwellings) became effective on March 1, 1994, and interprets the statutory standard for a primary dwelling in an EFU zone under ORS 215.283(1)(f). OAR 660-033-0130(4) (applicable to non-farm dwellings) became effective on August 7, 1993, and was amended to comply with ORS 215.284(4) on March 1, 1994. The Commission subsequently adopted amendments to comply with House Bill 3326 (Chapter 704, Oregon Laws 2001, effective on January 1, 2002), which were effective on May 22, 2002. (See administrative rule history for OAR 660-033-0100, -0130 and -0135.)

The claimant acquired the subject property on February 13, 1969. According to information in the claim, at the time the property was acquired, it was zoned EFU-20. The EFU-20 zone does not allow a dwelling on any parcel less than 20 acres. Further, Section 8A.00 of the zone states: "it is the intent of this zone classification to provide the automatic farm use valuation for farms which qualify under the provisions of Oregon Revised Statute 308." Automatic farm assessment under ORS 308 could only be granted to land in qualified exclusive farm use zones consistent with the provisions of ORS 215 (ORS Chapter 308, 1967 edition). Between September 13, 1967 and August 22, 1969, ORS 215 did not permit single-family dwellings (ORS 215.213 1967 edition).

Conclusions

The current zoning requirements, minimum lot size and dwelling standards established by applicable provisions of Goal 3, ORS 215 and OAR 660, division 33, were all enacted or adopted after the claimant acquired the subject property in 1969 and do not allow the desired division or residential development of the property. However, the claim does not establish that any state laws currently restrict the use of the claimant's property because the subject property could not be divided as desired by the claimant when it was acquired on February 13, 1969 and ORS 215 did not permit any dwellings on it at that time. Based on the record before the department, neither the Commission nor the department enforce any laws that restrict the use of the claimant's real 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."

The claim includes an estimate of \$1,050,378 as the reduction in the subject property's fair market value due to the regulation(s) that restrict the claimant's desired use of the property. This amount is based on the compared values of other properties.

However, as explained in Section V.(2) of this report, the claimant, Myrtle Schar, has not established that any state laws restrict the use of the subject property. Accordingly, the department cannot determine that any laws enforced by the Commission or the department have had the effect of reducing 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.(2) of this report, the claimant, Myrtle Schar, has not established that any state laws restrict the use of the subject property. Accordingly, the department cannot determine that any exemptions under ORS 197.352(3) apply 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 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 for this claim, the claimant has not established that any state laws enforced by the Commission or the department restrict the use of the subject property, and have the effect of reducing the fair market value of the subject property because when the subject property was acquired by the claimant on February 13, 1969 it could not be divided into 11 parcels as desired or were any dwellings permitted under ORS 215 (1967 edition).

Conclusions

Based on the record before the department, the claimant, Myrtle Schar, 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. 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 September 26, 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.