

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. M129435
(BALLOT MEASURE 37) OF)
Kevin and Catherine Cochran, CLAIMANTS)

Claimants: Kevin and Catherine Cochran (the Claimants)

Property: Township 17S, Range 6W, Section 11, Tax lot 2600
Lane County (the property)

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

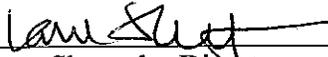
Claimants submitted the Claim to the State of Oregon under ORS 197.352. Under OAR 125-145-0010 *et seq.*, the Department of Administrative Services (DAS) referred the Claim to the Department of Land Conservation and Development (DLCD) as the regulating entity. This order is based on the record herein, 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 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 22nd day of November, 2006.

FOR THE DEPARTMENT OF
ADMINISTRATIVE SERVICES:



David Hartwig, Administrator
DAS, State Services Division
Dated this 22nd day of November, 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

November 22, 2006

STATE CLAIM NUMBER: M129435

NAMES OF CLAIMANTS: Kevin and Catherine Cochran

MAILING ADDRESS: 90136 Baker Road
Elmira, Oregon 97437-9711

PROPERTY IDENTIFICATION: Township 17S, Range 6W, Section 11
Tax lot 2600
Lane County

OTHER CONTACT INFORMATION: Michael Reeder
PO Box 1758
Eugene, Oregon 97440-1758

DATE RECEIVED BY DAS: June 1, 2006

180-DAY DEADLINE: November 28, 2006

I. SUMMARY OF CLAIM

The claimants, Kevin and Catherine Cochran, seek compensation in the amount of \$112,900 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 claimants desire compensation or the right to divide the 11.39-acre subject property into two parcels and develop a dwelling on each parcel.¹ The subject property is located at 90136 Baker Road, near Elmira, in Lane 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 because the claimants' desired use of the subject property was prohibited under the laws in effect when the claimants acquired the property on July 26, 1994. (See the complete recommendation in Section VI. of this report.)

¹ In response to the draft staff report dated November 1, 2006, pursuant to OAR 125-145-0080, the claimants attorney submitted a letter dated November 8, 2006, and asserts that under Measure 37 a regulation that does not apply to the subject property can nonetheless "indirectly" apply and reduce the property's fair market value. However, OAR 660-004-0040 does not apply to the subject property and does not restrict the claimants' use of the property.

III. COMMENTS ON THE CLAIM

Comments Received

On August 28, 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, three written comments were received in response to the 10-day notice.

One comment does 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.

Two of the comments are relevant to whether a state law restricts the claimants' use of the subject property. The comment has been considered by the department in preparing this report. (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 June 1, 2006, for processing under OAR 125, division 145. The claim identifies OAR 660-004-0040(7)(i) 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 claimants, Kevin and Catherine Cochran, acquired the subject property on July 26, 1994, as reflected by a warranty deed included with the claim. On April 15, 2003, the claimants transferred the property to the Cochran Family Revocable Trust, with themselves as trustees, as reflected by a warranty deed included with the claim.² The Lane County Assessor’s Office confirms the claimants’ current ownership of the subject property.

Conclusions

The claimants, Kevin and Catherine Cochran, are “owners” of the subject property as that term is defined by ORS 197.352(11)(C), as of July 26, 1994.

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 claimants’ 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 claimants desire to divide the 11.39-acre subject property into two parcels and develop a dwelling on each parcel, and that their desired use is not allowed under OAR 660-004-0040.

The claim identifies OAR 660-004-0040 as restricting the claimants’ desired use of the property. However, that rule applies only to land zoned for rural residential use. The claimants’ property is zoned by Lane County as Impacted Forest Lands (F-2) and was zoned F-2 when they acquired it. The rules regulating use of lands zoned for rural residential use do not apply to and do not restrict the claimants’ use of their property.³

² Transfer of property to a revocable trust does not result in a change in ownership for purposes of ORS 197.352.

³ The claim indicates that the claimants intend to apply to Lane County for a comprehensive plan amendment from Forest to Non-Resource and a zone change from F-2 to Rural Residential (RR-5). The claimants appear to seek a waiver of the RR-5 regulations that were not applicable to the property when they acquired it, but were adopted after the claimants acquired the property. ORS 197.352 does not authorize or allow the department to waive regulations that implement Goal 14 that were adopted, but not applicable to or enforced upon the claimants’ property, subsequent to their acquisition of the property. ORS 197.352 authorizes the department to compensate or waive regulations to allow a use that was permitted at the time the claimants acquired the property. The subject property

The zoning of the claimants' property is based on the applicable provisions of state law that require forest zoning and restrict uses on forest-zoned land. The claimants' property is zoned by Lane County as F-2 as required by Statewide Planning Goal 4 (Forest Lands), in accordance with ORS 215 and OAR 660, division 6, because the claimants' property is "forest land" as defined by Goal 4. Goal 4 became effective on January 25, 1975, and required that forest lands as defined by Goal 4 be zoned for forest use (see statutory and rule history under OAR 660-015-0000(4)). The forest land administrative rules (OAR 660, division 6) became effective on September 1, 1982, and ORS 215.705 to 215.755 and 215.780 became effective on November 4, 1993 (Chapter 792, Oregon Laws 1993). OAR 660-006-0026 and 660-006-0027 were amended on March 1, 1994, to implement those statutes.

Conclusions

The claimants' desired division and development of the subject property were not permitted under the laws in effect and applicable to the claimants' property when they acquired the property in 1994. No state land use regulation enacted since that time has restricted their desired use of the property relative to uses permitted when they acquired it.

This report addresses only those state laws that are identified in the claim, or that the department is certain apply to the property based on the use that the claimants have identified. There may be other laws that currently apply to the claimants' use of the property, and that may continue to apply to the claimants' use of the property, that have not been identified in the claim.

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 includes an estimate of \$112,900 as the reduction in the subject property's fair market value due to the regulations that restrict the claimants' desired use of the property. This amount is based on an April 12, 2006, comparative market analysis included with the claim, which compares the value of the property divided into two parcels to its current value. The analysis assumes that the claimants had the right to divide the subject property into two parcels in 1994 when they acquired it. As described above, when the claimants acquired the subject property it was zoned F-2 and did not permit the claimants' desired division and development. The claim does not establish that any state land use regulations have been applied to or enforced against the property in a manner that restricts the claimants' desired use of the property relative to uses permitted when they acquired it, with the effect of reducing the property's fair market value.

was zoned for forest use (F-2) when the claimants acquired it and, therefore, ORS 197.352 authorizes only compensation or waiver to allow a use that was authorized in the F-2 zone when the claimants acquired the property.

Conclusions

As explained in Section V.(1) of this report, the claimants are Kevin and Catherine Cochran who acquired the subject property on July 26, 1994. Under ORS 197.352, the claimants are not due compensation because no state land use regulations restrict the claimants' desired use of the subject property with the effect of reducing its fair market value relative to uses allowed on the property when they acquired it.

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 is based on state land use regulations that restrict the use of the claimants' property, including Goal 4, ORS 215 and OAR 660, division 6, which Lane County has implemented through its F-2 zone. These regulations were in effect when the claimants acquired the subject property.

Conclusions

The provisions of Goal 4, ORS 215 and OAR 660, division 6, were all enacted or adopted and in effect before the claimants acquired the subject property. Therefore, all of these regulations that restrict the claimants' use of the property and prohibit the claimants' desired use, are exempt under ORS 197.352(3)(E).

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 findings and conclusions set forth in this report, laws enforced by the Commission or the department do not restrict the claimants' desired use of the subject property, and have not had the effect of reducing the fair market value of the subject property.

Conclusions

Based on the record and the foregoing findings and conclusions, the claimants are not entitled to relief under ORS 197.352 because the claimants' desired use of the subject property was

prohibited under the laws in effect when they acquired the property. 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 1, 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. No comments were received.