

ORS 197.352 (BALLOT MEASURE 37) CLAIM FOR COMPENSATION

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

July 28, 2006

STATE CLAIM NUMBER: M122659

NAME OF CLAIMANT: Susan G. Eischen

MAILING ADDRESS: 38660 SW Eischen Drive
Cornelius, Oregon 97113

PROPERTY IDENTIFICATION: Township 1S, Range 3W, Section 29
Tax lot 203
Washington County

OTHER CONTACT INFORMATION: David A. Eischen
38660 SW Eischen Drive
Cornelius, Oregon 97113

OTHER INTEREST IN PROPERTY: Eischen Farms Limited Partnership *dba*
Eischen Family Farms¹
John Koehnke²

DATE RECEIVED BY DAS: October 5, 2005

180-DAY DEADLINE: August 20, 2006³

I. SUMMARY OF CLAIM

The claimant, Susan Eischen, seeks compensation in the amount of \$400,000 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 develop a dwelling on the 12.18-acre subject property. The subject property is located on the west side of SW Gnos Road, south of SW Eischen Drive, in Washington County. (See claim.)

¹ Leasehold interest.

² Sublessee to Eischen Family Farms.

³ 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 *MacPherson v. Dept. of Admin. Svcs.*, 340 Or 117 (2006).

II. SUMMARY OF STAFF RECOMMENDATION

Based on the preliminary findings and conclusions set forth below, and subject to the claimant's providing documentation to establish the date the subject property was deeded to her, the Department of Land Conservation and Development (the department) has determined that the claim is valid. Department staff recommends that, in lieu of compensation, the requirements of the following state laws enforced by the Land Conservation and Development Commission (the Commission) or the department not apply to Susan Eischen's development of a dwelling on the 12.18-acre subject property: applicable provisions of Statewide Planning Goal 3 (Agricultural Lands), ORS 215 and Oregon Administrative Rules (OAR) 660, division 33, enacted or adopted after the claimant acquired the property on or around March 26, 1982. These laws will not apply to the claimant only to the extent necessary to allow her to use the subject property for the use described in this report, and only to the extent that use was permitted when she acquired the property on or around March 26, 1982. (See the complete recommendation in Section VI. of this report.)

III. COMMENTS ON THE CLAIM

Comments Received

On October 12, 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.

The 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. (See the 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 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 October 5, 2005, for processing under OAR 125, division 145. The claim identifies ORS 215.213 and 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), 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, Susan Eischen, appears to have acquired the subject property on or around March 26, 1982, as reflected by a trust agreement included with the claim.⁴ The claimant’s parents, David and Vergene Eischen, transferred the subject property to the claimant’s brother, Daniel Eischen as trustee for the claimant on June 28, 1977, according to a deed included with the claim.⁵ Under the terms of a trust agreement, the claimant’s brother was to deed the subject property to the claimant when she turned 18 years of age. However, the claim did not include the deed by which the claimant’s brother transferred the subject property to the claimant. The Washington County Assessor’s Office confirms the claimant’s current ownership of the subject property.

Conclusions

Subject to the claimant’s providing documentation to establish the date the subject property was deeded to her, Susan Eischen became an “owner” of the subject property as that term is defined by ORS 197.352(11)(C) on or around March 26, 1982. The claimant’s brother, Daniel Eischen, is a “family member” as that term is defined in ORS 197.352(11)(A) and acquired the subject property on June 28, 1977.

⁴ Under the terms of the trust agreement, the subject property was to be owned by the claimant’s brother, Daniel Eischen, as trustee, until the claimant attained the age of 18, at which time the trustee was to deed the property to the claimant. According to a June 2, 2006, letter from the claimant’s representative to the department staff, the claimant attained the age of 18 on March 26, 1982 (see letter in claim file). The claim does not include a deed transferring the property from Daniel Eischen, as trustee, to the claimant. The only deed in the claim file conveyed the subject property from the claimant’s parents, David and Vergene Eischen, to Daniel Eischen as trustee on June 28, 1977.

⁵ The claim does not include the date the claimant’s parents acquired the subject property. Accordingly, June 28, 1977, the date the claimant’s brother acquired the property, is the date upon which the department must rely for purposes of evaluating the claim for compensation based on family ownership.

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 indicates that the claimant desires to develop a single-family dwelling on the 12.18-acre subject property, which is not allowed under current land use regulations.

The claim is based generally on the applicable provisions of state law that require Exclusive Farm Use (EFU) zoning and restrict uses on EFU-zoned land. The claimant's property is located in Washington County's AF-20 zone, an EFU zone as required by Goal 3, in accordance with ORS 215 and OAR 660, division 33, because the claimant's property is "agricultural land" as defined by Goal 3.⁶ Goal 3 became effective on January 25, 1975, and required that agricultural lands as defined by the Goal be zoned EFU pursuant to ORS 215.

Current land use regulations, particularly ORS 215.213 and OAR 660, division 33, enacted or adopted pursuant to Goal 3, establish standards for the development of dwellings on existing parcels on EFU-zoned land in marginal lands counties.

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 in a marginal lands county under ORS 215.213. OAR 660-033-0130(4)(e) (applicable to non-farm dwellings in marginal lands counties) became effective on August 7, 1993. 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's family and the claimant both acquired the subject property after the adoption of the statewide planning goals, but before the Commission acknowledged Washington County's land use regulations to be in compliance with the statewide planning goals pursuant to ORS 197.250 and 197.251.⁷ Because the Commission had not acknowledged the county's plan and land use regulations when the claimant's family acquired the subject property on June 28, 1977, and when the claimant acquired the subject property on March 26, 1982, the statewide planning goals, and Goal 3 in particular, applied directly to the property when the claimant's family and the claimant acquired it.⁸

⁶ The claimant's property is "agricultural land" because it contains Natural Resources Conservation Service Class I-IV soils and is "high-value farm land" as defined in ORS 215.710.

⁷ Washington County's EFU zone was acknowledged for compliance with Goal 3 on July 30, 1984.

⁸ The statewide planning goals became effective on January 25, 1975, and were applicable to legislative land use decisions and some quasi-judicial land use decisions prior to the Commission's acknowledgment of each county's comprehensive plan and implementing regulations. *Perkins v. City of Rajneeshpuram*, 300 Or 1 (1985); *Alexanderson v. Polk County*, 289 Or 427, rev. den 290 Or 137 (1980); *Sunnyside Neighborhood Assn. v. Clackamas County*, 280 Or 3 (1977); *Jurgenson v. Union County*, 42 Or App 505 (1979); and *1000 Friends of Oregon v. Benton County*, 32 Or App 413 (1978). After the county's plan and land use regulations were acknowledged by the

As adopted on January 25, 1975, Goal 3 required that agricultural land be preserved and zoned for EFU pursuant to ORS 215. Under the Goal 3 standards in effect on March 26, 1982, farm dwellings were allowed if they were determined to be "customarily provided in conjunction with farm use" under ORS 215.213(1)(e) (1981 edition). Non-farm dwellings were subject to compliance with ORS 215.213(3) (1981 edition).

No information has been presented in the claim to establish that the claimant's desired development of the subject property with a single-family dwelling satisfies the standards for farm or non-farm dwellings under ORS 215.213 (1981 edition) in effect when the claimant and her family acquired the subject property.

Conclusions

The current zoning and dwelling standards established by Goal 3, ORS 215 and OAR 660, division 33, do not allow the claimant's desired development of the subject property. However, the claim does not establish whether or the extent to which the claimant's desired use of the subject property complies with the standards for residential development under the requirements of Goal 3 and ORS 215 in effect when the claimant's family acquired the property on June 28, 1977, and when the claimant acquired the property on March 26, 1982.

This report addresses only those state laws that are identified in the claim, or that the department is certain apply to the subject property based on the use that the claimant has identified. There may be other laws that currently apply to the claimant's use of the subject property, and that may continue to apply to the claimant's use of the property, that have not been identified in the claim. In some cases, it will not be possible to know which laws apply to a use of the subject property until there is a specific proposal for that use. When the claimant seeks a building or development permit to carry out a specific use, it may become evident that other state laws apply to 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 includes an estimate of \$400,000 as the reduction in the subject property's fair market value due to the regulations that restrict the claimant's desired use of the property. This amount is based on claimant's estimate of the values of buildable lots in the area and the value of the view offered by the subject property.

Commission, the statewide planning goals and implementing rules no longer applied directly to such local land use decisions. *Byrd v. Stringer*, 295 Or 311 (1983). However, statutory requirements continue to apply, and insofar as the state and local provisions are materially the same, the local provisions must be interpreted consistent with the substance of the goals and implementing rules. *Forster v. Polk County*, 115 Or App 475 (1992) and *Kenagy v. Benton County*, 115 Or App 131 (1992).

Conclusions

As explained in Section V.(1) of this report, the claimant is Susan Eischen whose family acquired the subject property on June 28, 1977, and who acquired the property on March 26, 1982. Under ORS 197.352, the claimant is due compensation for land use regulations that restrict the use of the subject property and have the effect of reducing its fair market value. Based on the findings and conclusions in Section V.(2) of this report, laws enacted or adopted since the claimant and her family acquired the subject property restrict the claimant's desired use of the property. The claimant estimates that the effect of the regulations on the fair market value of the subject property is a reduction of \$400,000.

Without an appraisal or other documentation, and without verification of whether or the extent to which the claimant's desired use of the subject property was allowed under the standards in effect when the claimant and her family acquired the property, it is not possible to substantiate the specific dollar amount by which the land use regulations have reduced the fair market value of the property. Nevertheless, based on the evidence in the record for this claim, the department determines that the fair market value of the subject property has been reduced to some extent as a result of land use regulations enforced by the Commission or the department.

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 subject property, including applicable provisions of Goal 3, ORS 215 and OAR 660, division 33, which Washington County has implemented through its current AF-20 zone. With the exception of provisions of Goal 3 and ORS 215 in effect when the claimant and her family acquired the subject property, these land use regulations were enacted or adopted after the claimant and her family acquired the property.

Conclusions

Without a specific development proposal for the subject property, it is not possible for the department to determine all the laws that may apply to a particular use of the property, or whether those laws may fall under one or more of the exemptions under ORS 197.352. It appears that with the exception of provisions of Goal 3 and ORS 215 in effect in 1977 and 1982, the statutory, goal and rule restrictions on development of the claimant's property were not in effect when the claimant and her family acquired it, and therefore, these laws are not exempt under ORS 197.352(3)(E). Provisions of Goal 3 and ORS 215 in effect when the claimant acquired the subject property in 1982 are exempt under ORS 197.352(3)(E) and will continue to apply to the property.

Other laws in effect when the claimant and her family acquired the subject property are also exempt under ORS 197.352(3)(E) and will continue to apply to the claimant's use of the property. There may be other laws that continue to apply to the claimant's use of the subject

property that have not been identified in the claim. In some cases, it will not be possible to know which laws apply to a use of property until there is a specific proposal for that use. When the claimant seeks a building or development permit to carry out a specific use, it may become evident that other state laws apply to that use. In some cases, some of these laws may be exempt under ORS 197.352(3)(A) to (D).

This report addresses only those state laws that are identified in the claim, or that the department is certain apply to the subject property based on the use that the claimant has identified. Similarly, this report only addresses the exemptions provided for under ORS 197.352(3) that are clearly applicable, given the information provided to the department in the claim. The claimant should be aware that the less information she has provided to the department in the claim, the greater the possibility that there may be additional laws that will later be determined to continue to apply to her use of the subject property.

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 restrict the claimant's desired use of the subject property. The claim asserts that existing land use regulations enforced by the Commission or the department have the effect of reducing the fair market value of the subject property by \$400,000. However, because the claim does not provide an appraisal or other relevant evidence demonstrating that the land use regulations described in Section V.(2) reduce a fair market of the subject property, a specific amount of compensation cannot be determined. In order to determine a specific amount of compensation due for this claim, it would also be necessary to verify whether or the extent to which the claimant's desired use of the subject property was allowed under the standards in effect when the claimant and her family acquired the property. Nevertheless, based on the record for this claim, the department has determined that the laws on which the claim is based have reduced the fair market value of the subject property to some extent.

No funds have been appropriated at this time for the payment of claims. In lieu of payment of compensation, ORS 197.352 authorizes the department to modify, remove or not apply all or parts of certain land use regulations to allow Susan Eischen to use the subject property for a use permitted at the time she acquired the property on March 26, 1982.

Conclusions

Based on the record, and subject to the claimant's providing documentation to establish the date the subject property was deeded to her prior to the issuance of the final report on this claim, the department recommends that the claim be approved, subject to the following terms:⁹

1. In lieu of compensation under ORS 197.352, the State of Oregon will not apply the following laws to Susan Eischen's development of a single-family dwelling on the 12.18-acre subject property: applicable provisions of Goal 3, ORS 215 and OAR 660, division 33, enacted or adopted after March 26, 1982. These land use regulations will not apply to the claimant only to the extent necessary to allow her to use the subject property for the use described in this report, and only to the extent that use was permitted when she acquired the property on or around March 26, 1982.
2. The action by the State of Oregon provides the state's authorization to the claimant to use the property for the use described in this report, subject to the standards in effect when she acquired the property. On March 26, 1982, the property was subject to applicable provisions of Goal 3 and ORS 215 then in effect.
3. To the extent that any law, order, deed, agreement or other legally enforceable public or private requirement provides that the subject property may not be used without a permit, license or other form of authorization or consent, the order will not authorize the use of the property unless the claimant first obtains that permit, license or other form of authorization or consent. Such requirements may include, but are not limited to: a building permit, a land use decision, a "permit" as defined in ORS 215.402 or 227.160, other permits or authorizations from local, state or federal agencies and restrictions on the use of the subject property imposed by private parties.
4. Any use of the subject property by the claimant under the terms of the order will remain subject to the following laws: (a) those laws not specified in (1) above; (b) any laws enacted or enforced by a public entity other than the Commission or the department; and (c) those laws not subject to ORS 197.352 including, without limitation, those laws exempted under ORS 197.352(3).
5. Without limiting the generality of the foregoing terms and conditions, in order for the claimant to use the subject property, it may be necessary for her to obtain a decision under ORS 197.352 from a city and/or county and/or metropolitan service district that enforces land use regulations applicable to the property. Nothing in this order relieves the claimant from the necessity of obtaining a decision under ORS 197.352 from a local public entity that has jurisdiction to enforce a land use regulation applicable to a use of the subject property by the claimant.

⁹ The findings of this report are conditioned upon the claimant's providing documentation to establish the date the subject property was deeded to the claimant, prior to the department's issuance of the final report on this claim. Without such documentation establishing the date the claimant acquired the subject property, the department cannot grant relief under ORS 197.352.

VII. NOTICE OF OPPORTUNITY TO COMMENT

This staff report is not a final decision by the department and does not authorize any use of the property that is the subject of this report. OAR 125-145-0100 provides 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. Such response must be filed no more than 10 calendar days after the date this report is mailed to the claimant and any third parties. Responses to this draft staff report and recommendation will be considered only as comments related to the claim described in this report. All responses must be delivered to the Oregon Department of Administrative Services (DAS), Measure 37 Unit, Risk Management-State Services Division, 1225 Ferry Street SE, U160, Salem, Oregon 97301-4292 and will be deemed timely filed if either postmarked on the tenth day, or actually delivered to DAS by the close of business on the tenth day. Note: Please reference the claim number, claimant name and clearly mark your comments as "Draft Staff Report comments." Comments must be submitted in writing only. Those comments submitted electronically or by facsimile will not be accepted.

