

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. M118499
(BALLOT MEASURE 37) OF	)	
Cecilia, John W., Richard , and	)	
Candace Kirsch, CLAIMANTS	)	

Claimants: Cecilia, John W., Richard and Candace Kirsch (the Claimants)

Property: Tax lot 800, Township 4S, Range 4W, Section 3, Yamhill 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 approved as to laws administered by DLCD and the Land Conservation and Development Commission (LCDC) for the reasons set forth in the DLCD Report, and subject to the following terms:

1. In lieu of compensation under ORS 197.352, the State of Oregon will not apply the following laws to the claimants' division of the 67.30-acre property into two parcels: applicable provisions of Goal 3, ORS 215 and OAR 660, division 33, enacted or adopted after each of the claimants acquired an interest in the subject property. These land use regulations will not apply to the Cecilia Kirsch's use of the subject property 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 February 13, 1947. These land use regulations will not apply to John W., Richard and Candace Kirsch's use of the subject property only to the extent necessary to allow them to use the subject property for the use described in this report, and only to the extent that use was permitted when they acquired the property in 1999.

2. The action by the State of Oregon provides the state's authorization to Cecilia Kirsch to use these properties for the use described in this report, subject to the standards in effect on February 13, 1947. The action by the State of Oregon provides the state's authorization to John W., Richard and Candace Kirsch to use the property for the use described in this report, subject to the standards in effect when John W. and Richard acquired the property on June 15, 1999, and when Candace acquired the property on November 1, 1999. In 1999, the

property was subject to the applicable provisions of Goal 3, ORS 215 and OAR 660, division 33, 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 claimants first obtain 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 claimants 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 claimants to use the subject property, it may be necessary for them 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 claimants 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 claimants.

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 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 125, division 145, and ORS 293.

FOR DLCD AND THE LAND CONSERVATION  
AND DEVELOPMENT COMMISSION:



Lane Shetterly, Director  
DLCD

Dated this 6<sup>th</sup> day of April, 2006.

FOR the DEPARTMENT OF ADMINISTRATIVE  
SERVICES:



Dugan Petty, Deputy Administrator  
DAS, State Services Division

Dated this 6<sup>th</sup> day of April, 2006.

## **NOTICE OF RIGHT TO APPEAL OR OTHER JUDICIAL RELIEF**

You are entitled, or may be entitled, to judicial remedies including the following:

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<sup>1</sup>, 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)

### **FOR INFORMATION ONLY**

The Oregon Department of Justice has advised the Department of Land Conservation and Development that "[i]f the current owner of the real property conveys the property before the new use allowed by the public entity is established, then the entitlement to relief will be lost."

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<sup>1</sup> 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.

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

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

April 6, 2006

**STATE CLAIM NUMBER:** M118499

**NAMES OF CLAIMANTS:** Cecilia, John W., Richard and Candace Kirsch

**MAILING ADDRESS:** 6900 NW Poverty Bend Road  
McMinnville, Oregon 97128

**PROPERTY IDENTIFICATION:** Township 4S, Range 4W, Section 3  
Tax lot 800  
Yamhill County

**DATE RECEIVED BY DAS:** May 24, 2005

**180-DAY DEADLINE:** April 8, 2006<sup>1</sup>

**I. SUMMARY OF CLAIM**

The claimants, Richard, Cecilia, John and Candace Kirsch, seek compensation in the amount of \$50,000 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 claimants desire compensation or the right to divide the 67.30-acre property into two parcels, with one parcel containing the existing homesite. The subject property is located at 5300 NW Poverty Bend Road, near McMinnville, in Yamhill 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 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 claimants Cecilia, John W., Richard and Candace Kirsch's division of the 67.30-acre property into two parcels: applicable provisions of Statewide Planning Goal 3 (Agricultural Lands), ORS 215 and Oregon Administrative Rules (OAR) 660, division 33, enacted or adopted after each of the claimants acquired the subject property. These laws will not apply to Cecilia Kirsch's use of the property only to the extent necessary to allow her to use the subject property

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<sup>1</sup> This date reflects 180 days from the date the claim was submitted as extended by the 139 days enforcement of Ballot Measure 37 was suspended during the pendency of the appeal of *MacPherson v. DAS. MacPherson v. Dept. of Admin. Svcs.*, 340 Or \_\_\_, 2006 Ore. LEXIS 104 (Feb. 21, 2006).

for the use described in this report, and only to the extent that use was permitted when she acquired the property on February 13, 1947. These laws will not apply to John W., Richard and Candace Kirsch's use of the property only to the extent necessary to allow them to use the subject property for the use described in this report, and only to the extent that use was permitted when John W. and Richard Kirsch acquired the property on June 25, 1999, and when Candace Kirsch acquired the property on November 1, 1999. (See the complete recommendation in Section VI. of this report.)

### **III. COMMENTS ON THE CLAIM**

#### **Comments Received**

On August 16, 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, evidence or information was received in response to the 10-day notice.

The comment is relevant to whether the restriction of the claimants' use of the property reduces the fair market value of the property and whether a state agency has the authority to waive state statutes. The comment has been considered by the department in preparing this report. (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 Ballot 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 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 Ballot 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 criterion, whichever is later.

#### **Findings of Fact**

This claim was submitted to DAS on May 24, 2005, for processing under OAR 125, division 145. The claim identifies Section 403 of the Yamhill County EF-80 zone, an Exclusive Farm Use (EFU) zone under the provisions of ORS, as the basis for the claim.<sup>2</sup> Only laws that were enacted or adopted prior to December 2, 2004, are the basis for this claim.

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<sup>2</sup> Based on the other Kirsch claims (M118497 and M118498), the department concludes that the claimants intended to cite Section 402 of the county zoning code. This is consistent with the Yamhill County staff report dated August 10, 2005.

## **Conclusions**

The claim has been submitted within two years of the effective date of Ballot 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 the ORS 197.352. ORS 197.352 (11)(C) defines “owner” as “the present owner of the property, or any interest therein.”

### **Findings of Fact**

Claimant Cecilia Kirsch acquired an interest in the subject property from her husband, John J. Kirsch, on February 13, 1947, as reflected in a deed included with the claim.<sup>3</sup> On March 15, 1993, John J. and Cecilia Kirsch conveyed the subject property to the Kirsch Joint Living Trust, a revocable trust, with themselves as co-trustees. On June 25, 1999, John W. Kirsch was appointed sole trustee of the Kirsch Joint Living Trust.<sup>4</sup> On that date, as trustee, John W. Kirsch conveyed an undivided one-quarter interest each in the subject property to himself and Richard Kirsch as an individual. On November 1, 1999, John W. Kirsch conveyed all of his interest in the property to himself and Candace Kirsch as trustees of the John W. Kirsch Revocable Living Trust.<sup>5</sup> The Yamhill County staff report dated August 10, 2005, for the claimants’ county Measure 37 claim verifies the claimants’ current ownership of the subject property.<sup>6</sup>

### **Conclusions**

Cecilia Kirsch is an “owner” of the subject property as of February 13, 1947, as that term is defined by ORS 197.352(11)(C). John W. and Richard Kirsch are owners of the subject property as of June 25, 1999. Candace Kirsch is an “owner” of the subject property as of November 1, 1999. In addition to being an “owner,” Cecilia Kirsch is a “family member” to John W., Richard and Candace Kirsch as that term is defined by ORS 197.352(11)(A), as of February 13, 1947.

### **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

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<sup>3</sup> The claim does not indicate when John Kirsch acquired the subject property.

<sup>4</sup> Cecilia Kirsch retained her right to revoke the subject property from the trust.

<sup>5</sup> Transfer of the property to a revocable trust does not constitute a change in ownership for the purposes of ORS 197.352.

<sup>6</sup> Claimants’ current ownership was confirmed by Michael Brandt, Yamhill County planning director, on October 11, 2005.

property relative to how the property could have been used at the time the claimants acquired the property.

### **Findings of Fact**

The claim indicates that the claimants desire to divide the subject property into two parcels, which is precluded by Yamhill County's EF-80 zone.

The claim is based generally on Yamhill County's current EFU zone and the applicable provisions of state law that require such zoning. The claimants' property is zoned EF-80 as required by Goal 3 in accordance with ORS 215 and OAR 660, division 33, because the claimants' property is "agricultural land" as defined by Goal 3.<sup>7</sup> Goal 3 became effective on January 25, 1975, and requires that agricultural lands as defined by the Goal 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 parcels less than 80 acres and establish standards for the 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.

The claimants' family first acquired the subject property on February 13, 1947, prior to the adoption of the statewide planning goals and their implementing statutes and rules. No county zoning applied to the subject property in 1947.

### **Conclusions**

The current zoning requirements and minimum lot size standards established by Goal 3, ORS 215 and OAR 660, division 33, were all enacted or adopted after the claimants' family acquired the property. These laws restrict the use of the subject property relative to the uses allowed when the claimants' family acquired the 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."

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<sup>7</sup> The claimants' property is "agricultural land" because it contains Natural Resources Conservation Service Class I-IV soils.

### **Findings of Fact**

The claim includes an estimate of \$50,000 as the reduction in the subject property's fair market value due to current regulations. This amount is based on the claimants' estimate of the market value of the property if the property were to be divided into two parcels, with one parcel containing the existing homesite. Copies of tax statements for other properties have been provided but without any explanation of how they were used to determine the claimed reduction in fair market value.

### **Conclusions**

As explained in Section V.(1) of this report, the claimants are Cecilia, John W., Richard and Candace Kirsch. Cecilia Kirsch acquired the subject property on February 13, 1947. Under ORS 197.352, the claimants are due compensation for land use regulations that restrict the use of the property in a manner that reduces its fair market value. Based on the findings and conclusions in Section V.(2) of this report, laws enacted or adopted since the claimants' family acquired the subject property may restrict the desired division and development of the property. The claimants estimate the reduction in value due to the restrictions to be \$50,000.

Without an appraisal or other documentation, it is not possible to substantiate the specific dollar amount the claimants demand for compensation. Nevertheless, based on the submitted information, the department determines that it is more likely than not 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 since the claimants' family acquired 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 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 Yamhill County has implemented through its current EF-80 zone. All of these laws were enacted or adopted after Cecilia Kirsch acquired the subject property in 1947.

### **Conclusions**

Without a specific development proposal for the subject property, it is not possible for the department to determine which laws 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 none of the general statutory, goal and rule restrictions on the use of the subject property were in effect when Cecilia Kirsch acquired the property on February 13, 1947. As a result, these laws are not exempt under ORS 197.352(3)(E).

Laws in effect when Cecilia Kirsch acquired the subject property are 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 her 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).

## **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 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 claimants' ability to divide the 67.30-acre property into two parcels, with one parcel containing the existing homesite. The claim asserts that the laws enforced by the Commission or the department reduce the fair market value of the subject property by \$50,000. However, because the claim does not provide an appraisal or other specific documentation for how the specified restrictions reduce the fair market value of the subject property, a specific amount of compensation cannot be determined. Nevertheless, based on the record for this claim, the department acknowledges that the laws on which the claim is based likely 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 each of the claimants to use the subject property for a use permitted at the time each acquired the property.

As discussed above, Cecilia Kirsch acquired the subject property on February 13, 1947, prior to the adoption of the statewide planning goals and their implementing statutes and rules.

When John W., Richard and Candace Kirsch acquired an interest in the subject property in 1999, it was zoned EFU by Yamhill County and subject to the lot size and dwelling standards established by the versions of Goal 3, ORS 215 and OAR 660, division 33, in effect and as described in Section V.(2) of this report.

In addition to the applicable provisions of Goal 3, ORS 215 and OAR 660, division 33, in effect in 1999 and other laws in effect when John W., Richard and Candace Kirsch acquired the subject property, there may be other laws that continue to apply to the claimants' 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 subject property until there is a specific proposal for that use. When the claimants seek 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 claimants have 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 claimants should be aware that the less information they have 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 their use of the subject property.

### **Conclusions**

Based on the record, the department recommends that the claim be approved, subject to the following terms:

1. In lieu of compensation under ORS 197.352, the State of Oregon will not apply the following laws to the claimants' division of the 67.30-acre property into two parcels: applicable provisions of Goal 3, ORS 215 and OAR 660, division 33, enacted or adopted after each of the claimants acquired an interest in the subject property. These land use regulations will not apply to the Cecilia Kirsch's use of the subject property 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 February 13, 1947. These land use regulations will not apply to John W., Richard and Candace Kirsch's use of the subject property only to the extent necessary to allow them to use the subject property for the use described in this report, and only to the extent that use was permitted when they acquired the property in 1999.
2. The action by the State of Oregon provides the state's authorization to Cecilia Kirsch to use these properties for the use described in this report, subject to the standards in effect on February 13, 1947. The action by the State of Oregon provides the state's authorization to John W., Richard and Candace Kirsch to use the property for the use described in this report, subject to the standards in effect when John W. and Richard acquired the property on June 15, 1999, and when Candace acquired the property on November 1, 1999. In 1999, the property was subject to the applicable provisions of Goal 3, ORS 215 and OAR 660, division 33, 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 claimants first obtain 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 claimants 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 claimants to use the subject property, it may be necessary for them 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 claimants 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 claimants.

## **VII. COMMENTS ON THE DRAFT STAFF REPORT**

The department issued its draft staff report on this claim on March 16, 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.