

**ORS 197.352 (BALLOT MEASURE 37) CLAIM FOR COMPENSATION**  
**OREGON DEPARTMENT OF LAND CONSERVATION AND DEVELOPMENT**  
**Draft Staff Report and Recommendation**

February 21, 2007

**STATE CLAIM NUMBER:** M130059

**NAMES OF CLAIMANTS:** Janet D. Gordon  
Mark D. Chesier

**MAILING ADDRESS:** 33630 Ford Mill Road  
Lebanon, Oregon 97355

**PROPERTY IDENTIFICATION:** Township 11S, Range 1E, Section 31  
Tax lot 1400  
Linn County

**DATE RECEIVED BY DAS:** September 18, 2006

**180-DAY DEADLINE:** March 17, 2007

**I. SUMMARY OF CLAIM**

The claimants, Janet Gordon and Mark Chesier, seek compensation in the amount of \$820,000 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 four 5-acre parcels from the 59.97-acre subject property and to develop a dwelling on each 5-acre parcel. The subject property is located at 33630 Ford Mill Road, near Lebanon, in Linn 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 valid in part. 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 Janet Gordon's division of four 5-acre parcels from the 59.97-acre subject property and to her development of a dwelling on each 5-acre parcel: applicable provisions of Statewide Planning Goals 3 (Agricultural Lands) and 4 (Forest Lands), ORS 215 and Oregon Administrative Rules (OAR) 660, divisions 6, and 33. These laws will not apply to Janet Gordon 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 October 4, 1965.

The department has further determined that this claim is not valid as to claimant Mark Chesier because he is not an owner of the subject property. (See the complete recommendation in Section VI. of this report.)

### III. COMMENTS ON THE CLAIM

#### Comments Received

On December 28, 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, no written comments 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, 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 September 18, 2006, for processing under OAR 125, division 145. The claim identifies Linn County Farm/Forest 80-acre zoning ("FF80") 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**

Claimant Janet Gordon acquired the subject property on October 4, 1965, as reflected by a warranty deed provided by the Linn County Planning Department. On November 7, 2003, Janet Gordon conveyed the subject property to herself and her son, claimant Mark Chesier, as reflected in a warranty deed included with the claim. However, based on the information provided in the claim and by the Linn County Planning Department, Janet Gordon and Mark Chesier conveyed the property to only Janet Gordon on November 14, 2003. The Linn County Assessor's Office confirms Janet Gordon's current ownership of the subject property. Mark Chesier no longer owns the subject property.

## **Conclusions**

Janet Gordon is an "owner" of the subject property as that term is defined by ORS 197.352(11)(C), as of October 4, 1965. Mark Chesier is not 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) 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 four 5-acre parcels from the 59.97-acre subject property, and to develop a dwelling on each 5-acre parcel, and that the property's current zoning prohibits the desired use.

The claim is based generally on the applicable provisions of state law that require mixed farm-forest zoning and restrict uses on land zoned mixed farm-forest. The subject property is zoned Farm/Forest District (F/F) by Linn County. The county's F/F zone is a mixed agricultural and forest land zone, as required by Goal 4 and the implementing provisions of OAR 660-006-0050 (effective on February 5, 1990), subsequently amended on March 1, 1994, to comply with the provisions of House Bill 3661 (Chapter 792, Oregon Laws 1993).

Under OAR 660-006-0050, all the uses permitted under Goals 3 and 4 are allowed in mixed agriculture and forest zones except that for dwellings, either the Goal 3 or 4 standards are applicable based on the predominant use of the tract on January 1, 1993.<sup>1</sup> Depending on the predominant use on that date, the property is subject to either the requirements for dwellings applicable under exclusive farm use zoning required by Goal 3 and OAR 660, division 33, or forest zone provisions required by Goal 4 and OAR 660, division 6.

For land divisions, OAR 660-006-0055 authorizes the creation of new parcels based on the standards applicable to farm or forest zones that implement the 80-acre minimum lot size

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<sup>1</sup> No information was provided to the department regarding the predominant use of the property on January 1, 1993.

specified in ORS 215.780. Under ORS 215.780(2)(a), the minimum lot size in Linn County's F/F zone is 80 acres. The subject property cannot be divided into parcels smaller than 80 acres.

Janet Gordon acquired the subject property on October 4, 1965, prior to the adoption of statewide planning goals and their implementing statutes and regulations.

### **Conclusions**

The current zoning requirements, minimum lot size and dwelling standards established under Goal 4 for lands zoned for mixed farm-forest use and the statutory and rule restrictions under applicable provisions of ORS 215 and OAR 660, divisions 6, and 33, were enacted or adopted after Janet Gordon acquired the subject property in 1965, and do not allow the desired division and development of the property. These laws restrict the use of the subject property relative to the uses allowed when Janet Gordon acquired the property.

As explained in Section V.(1), Mark Chesier 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 Mark Chesier's use of private real property with the effect of reducing the fair market value of the property.

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. There may be other laws that currently apply to Janet Gordon's use of the subject property, and that may continue to apply to her 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 Janet Gordon 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 regulations (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 \$820,000 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 the claimants' assessment of the subject property's value.

### **Conclusions**

As explained in Section V.(1) of this report, the claimants are Janet Gordon, who acquired the subject property on October 4, 1965, and her son, Mark Chesier. Mark Chesier is not an owner of the subject property and therefore, is not entitled to compensation under ORS 197.352. Under ORS 197.352, Janet Gordon 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 Janet Gordon

acquired the subject property restrict the claimants' desired use of the property. The claimants estimate that the effect of the regulations on the fair market value of the subject property is a reduction of \$820,000

Without an appraisal or other documentation, it is not possible to substantiate the specific dollar amount by which the land use regulations have reduced the fair market value of the subject property. Nevertheless, based on the evidence in the record for this claim, the department determines 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 Goals 3 and 4, ORS 215 and OAR 660, divisions 6, and 33, which Linn County has implemented through its F/F zone. All of these land use regulations were enacted or adopted after Janet Gordon acquired the subject 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 none of the general statutory, goal and rule restrictions on residential division and development of the subject property were in effect when Janet Gordon acquired it in 1965. As a result, these laws are not exempt under ORS 197.352(3)(E).

As explained in Section V.(1) of this report, Mark Chesier 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 as to Mark Chesier.

Laws in effect when Janet Gordon acquired the subject property are exempt under ORS 197.352(3)(E) and will continue to apply to her use of the property. In addition, the department notes that ORS 215.730 and OAR 660, division 6, particularly OAR 660-006-0029, include standards for siting dwellings in forest zones. The provisions include fire protection standards for dwellings and for surrounding forest zones. ORS 197.352 (3)(B) specifically exempts regulations "restricting or prohibiting activities for the protection of public health and safety, such as fire and building codes. . . ." To the extent they are applicable to the subject property, the siting standards for dwellings in forest zones in ORS 215.730 and OAR 660, division 6, are exempt under ORS 197.352(3)(B).

There may be other laws that continue to apply to Janet Gordon'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 the subject property until there is a specific proposal for that use. When Janet

Gordon 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 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 Janet Gordon's 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 findings and conclusions set forth in this report, the claim is not valid as to Mark Chesier because he is not an owner of the subject property. However, laws enforced by the Commission or the department restrict Janet Gordon's desired use of the subject property. The claim asserts that existing state land use regulations enforced by the Commission or the department have the effect of reducing the fair market value of the subject property by \$820,000. 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 the fair market value 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 claimants' desired use of the subject property was allowed under the standards in effect when Janet Gordon 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 Janet Gordon to use the subject property for a use permitted at the time she acquired the property on October 4, 1965.

### **Conclusions**

Based on the record before the department, claimant Mark Chesier 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 because he is not an owner of the subject property. Therefore, the department recommends that this claim be denied as to Mark Chesier.

The department recommends that the claim be approved as to claimant Janet Gordon, 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 Janet Gordon's division of four 5-acre parcels from the 59.97-acre subject property or to her development of a dwelling on each 5-acre parcel: applicable provisions of Goals 3 and 4, ORS 215 and OAR 660, divisions 6, and 33. These land use regulations will not apply to Janet Gordon 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 October 4, 1965.

2. The action by the State of Oregon provides the state's authorization to Janet Gordon to use the property for the use described in this report, subject to the standards in effect on October 4, 1965.

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 Janet Gordon 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 Janet Gordon 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 Janet Gordon 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 Janet Gordon 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 her use of the subject property.

## 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 claimants or the claimants' 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 claimants 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.