



Oregon

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October 11, 2007

To: Claimant and Interested Persons

From: Cora R. Parker, Acting Director



Re: Ballot Measure 37 (ORS 197.352) Claim Number M131271

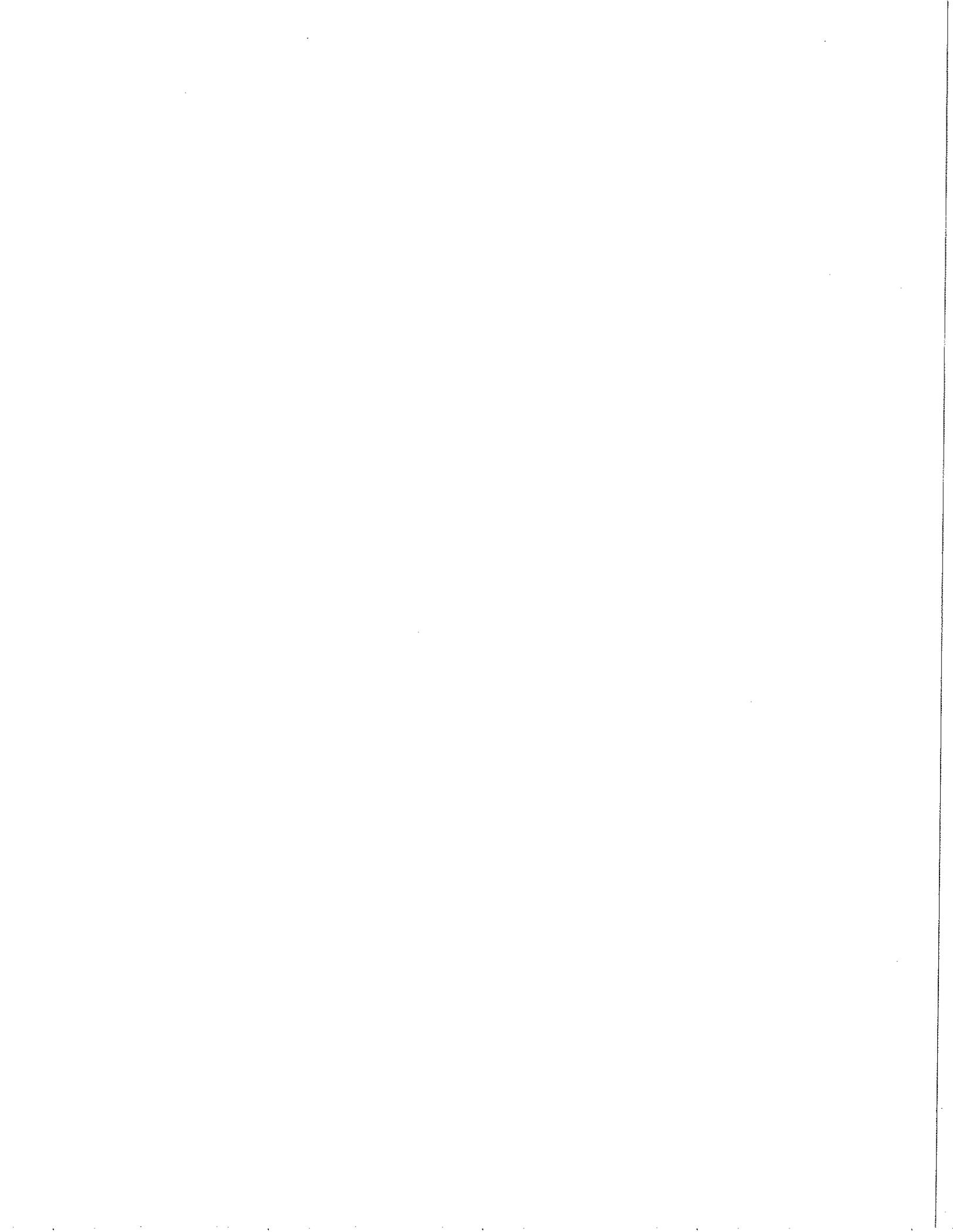
Claimants: Rubye Gilkerson, Gilkerson Orchards, Inc.

Enclosed, in regard to the above-referenced claim for compensation under Ballot Measure 37 (ORS 197.352), is the Department of Land Conservation and Development's Draft Staff Report and Recommendation.

This Draft Staff Report and Recommendation sets forth the department's evaluation of and recommendation on the claim. Oregon Administrative Rule 125-145-0100(3) provides that the claimant (or the claimant's agent) and any third parties who submitted comments on the claim may submit written comments, evidence, and information in response to any third-party comments contained in the report, and to the staff report and recommendation itself. Such response must be filed no more than 15 calendar days after the date of mailing of this report. Any response from you must be delivered to the Oregon Department of Administrative Services (DAS), 1225 Ferry Street SE, U160, Salem, Oregon 97301, and will be deemed timely filed if either postmarked on the 15th day or actually delivered to DAS by the close of business on the 15th day.

This department will review any responses submitted, and a Final Order on the claim will be issued after such review.





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

October 11, 2007

STATE CLAIM NUMBER: M131271

NAMES OF CLAIMANTS: Rubye Gilkerson
Gilkerson Orchards, Inc.

MAILING ADDRESS: 2120 Gilkerson Road
Hood River, Oregon 97031

PROPERTY IDENTIFICATION: Township 2N, Range 10E, Section 14
Tax lot 3600
Hood River County

DATE RECEIVED BY DAS: November 27, 2006

DEADLINE FOR FINAL ACTION:¹ May 20, 2008

I. SUMMARY OF CLAIM

The claimants, Rubye Gilkerson and Gilkerson Orchards, Inc., seek compensation in the amount of \$11,799,059 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 45.3-acre subject property into up to 100 quarter-acre parcels and to develop a dwelling on each parcel. The subject property is located at 2120 Gilkerson Road, near Hood River, in Hood River 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 claimant Gilkerson Orchards, Inc.'s desired use of the subject property was prohibited by the local zoning and state land use regulations in effect when it acquired the property and, therefore, laws enforced by the Land Conservation and Development Commission (the Commission) or the department do not restrict Gilkerson Orchards, Inc.'s desired use of the private real property relative to the uses permitted when Gilkerson Orchards, Inc. acquired the

¹ ORS 197.352, as originally enacted, required that final action on claims made under Measure 37 be made within 180 days of the date the claim was filed. In response to the large volume of claims filed in late 2006, the Oregon legislature passed House Bill 3546, which became effective on May 10, 2007. This legislation increased the amount of time state and local governments have to take final action on Measure 37 claims filed on or after November 1, 2006, by 360 days, to a total of 540 days.

subject property with the effect of reducing the fair market value of the property. The department has further determined that this claim is not valid as to Rubye Gilkerson because she 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 July 10, 2007, 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 15-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 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 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 November 27, 2006, for processing under OAR 125, division 145. The claim identifies county zoning and land division regulations 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 Gilkerson Orchards, Inc. acquired the subject property from claimant Rubye Gilkerson on December 30, 1978, as reflected by warranty deed included with the claim. The Hood River County Assessor's Office confirms Gilkerson Orchards, Inc.'s current ownership of the subject property. Rubye Gilkerson is no longer an owner of the subject property.

Conclusions

Claimant Gilkerson Orchards, Inc. is an "owner" of the subject property as that term is defined by ORS 197.352(11)(C), as of December 30, 1978. Claimant Rubye Gilkerson is not an "owner" of the subject property as that term is defined by ORS 197.352(11)(C).²

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 acquired the property.

Findings of Fact

The claim indicates that the claimants desire to divide the 45.3-acre subject property into 100 quarter-acre parcels and to develop a dwelling on each parcel, and that current land use regulations prevent the desired use.

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 subject property is zoned EFU by Hood River County as required by Goal 3, in accordance with ORS 215 and OAR 660, division 33, because the property is "agricultural land" as defined by Goal 3.³ 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 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

² The claimant appears to assert that Rubye Gilkerson is also a "family member" of Gilkerson Orchards, Inc. However, under ORS 197.352(11)(A), while legal entities can be "family members" of individuals who are current owners of property under ORS 197.352(11)(C), legal entities cannot have family members under the statute. Therefore, individuals who transferred property to a corporation are not "family members" under ORS 197.352(11)(A).

³ The claimant's property is "agricultural land" because it contains Natural Resources Conservation Service Class I-IV soils.

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, 1994.⁴

Gilkerson Orchards, Inc. acquired the subject property after the adoption of the statewide planning goals, but before the Commission acknowledged Hood River County's land use regulations to be in compliance with the statewide planning goals pursuant to ORS 197.250 and 197.251.⁵ At that time, the property was zoned A-1 by Hood River County. The County's A-1 zone was a qualified farm zone under ORS 215, which established a 5-acre minimum size for the creation of new lots or parcels, and allowed only dwellings in conjunction with farm use on those parcels. In addition, because the Commission had not acknowledged the county's plan and land use regulations when the claimant acquired the subject property on December 30, 1978, the statewide planning goals, and Goal 3 in particular, applied directly to the claimant's property when it acquired it.⁶

As adopted on January 25, 1975, Goal 3 required that agricultural land be preserved and zoned for EFU pursuant to ORS 215. The Goal 3 standard for land divisions involving property where the local zoning was not acknowledged required that the resulting parcels must be of a size that is "appropriate for the continuation of the existing commercial agricultural enterprise within the area." Further, ORS 215.263 (1973 edition) only authorized the partition of land subject to EFU zoning, and required that all divisions of land subject to EFU zoning comply with the legislative intent set forth in ORS 215.243 (Agricultural Land Use Policy). Thus, Gilkerson Orchards, Inc.'s opportunity to divide the subject property when it acquired it in 1978 was limited to land divisions that were consistent with Goal 3, which required that the resulting parcels be (1) appropriate for the continuation of the existing commercial agricultural enterprise in the area and (2) shown to comply with the legislative intent set forth in ORS 215.

⁴ The Commission adopted amendments to OAR 660-033-0100, -0130 and -0135 to comply with House Bill 3326 (Chapter 704, Oregon Laws 2001, effective on January 1, 2002), which were effective on May 22, 2002. These amendments clarified but did not further restrict dwelling standards under OAR 660, division 33, for EFU-zoned land.

⁵ Hood River County's comprehensive plan and land use regulations were acknowledged by the Commission for compliance with Goal 3 on November 11, 1985.

⁶ 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 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).

Under the Goal 3 standards in effect on December 30, 1978, farm dwellings were allowed if they were determined to be "customarily provided in conjunction with farm use" under ORS 215.213(1)(e) (1973 edition). Non-farm dwellings were subject to compliance with ORS 215.213(3) (1973 edition).

The claim does not establish whether or to what extent the claimant's desired division and development of the subject property were allowed under the standards in effect when it acquired the property on December 30, 1978. To the contrary, the claimants' desired division of the property into quarter-acre parcels would not have satisfied the local zoning in effect when Gilkerson Orchards, Inc. acquired the property in 1978, and would not have satisfied the Goal 3 and ORS 215 standards for divisions and dwellings then in effect.

Conclusions

The current zoning requirements, minimum lot size and dwelling standards established by Goal 3, ORS 215 and OAR 660, division 33, do not allow the claimant's desired division or development of the subject property. However, based on the record before the department, the claimants' desired use of the subject property was also prohibited by the local zoning, goal and statutory requirements in effect when Gilkerson Orchards, Inc. acquired the property in 1978. The claim does not establish that state laws enforced by the Commission or the department restrict the claimants' desired use of the subject property relative to the uses permitted when Gilkerson Orchards, Inc. acquired the property in 1978 with the effect of reducing the property's fair market value.

In addition, as explained in Section V.(1), claimant Rubye Gilkerson 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 Rubye Gilkerson's use of the subject real property with the effect of reducing the fair market value of the 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."

Findings of Fact

The claim includes an estimate of \$11,799,059 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 claimants' assessment of the property's value.

Conclusions

As explained in Section V.(1) of this report, the claimants are Gilkerson Orchards, Inc., which acquired the subject property on December 30, 1978, and Rubye Gilkerson, who is not an owner of the subject property. Because Rubye Gilkerson is not an owner, no laws restrict Rubye Gilkerson's use of the subject property with the effect of reducing the fair market value of the subject property. In addition, as explained in Section V.(2) of this report, Gilkerson Orchards,

Inc.'s desired use of the property was prohibited by the state and local laws in effect at the time it acquired the property. Therefore, land use regulations enforced by the Commission or the department since Gilkerson Orchards, Inc. acquired the property in 1978 do not have the effect of reducing the fair market value of the property relative to uses allowed when Gilkerson Orchards, Inc. 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 Hood River County has implemented through its current EFU zone. With the exception of provisions of Goal 3 and ORS 215 in effect when Gilkerson Orchards, Inc. acquired the subject property on December 30, 1978, these land use regulations were enacted or adopted after it acquired the property.

Conclusions

It appears that, with the exception of provisions of Goal 3 and ORS 215 in effect in 1978, the statutory, goal and rule restrictions on division and development of the claimants' property were not in effect when Gilkerson Orchards, Inc. acquired it, and therefore, these laws are not exempt under ORS 197.352(3)(E). However, as discussed in Section V.(2) of this report, Gilkerson Orchards, Inc.'s desired use was prohibited by the state and local regulations in effect when it acquired the property.

As explained in Section V.(1) of this report, claimant Rubye Gilkerson 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 her.

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.

Conclusions

Based on the record before the department, the claimants, Gilkerson Orchards, Inc. and Rubye Gilkerson, have not established that they are entitled to relief under ORS 197.352(1) as a result

of land use regulations enforced by the Commission or the department. The department recommends that this claim be denied because claimant Rubye Gilkerson is not an owner of the subject property, and because claimant Gilkerson Orchards, Inc's desired use of the subject property was prohibited under state and local land use regulations in effect when it acquired the property in 1978. Neither the Commission nor the department has enforced laws that restrict the claimants' desired use of the subject property relative to the uses permitted when Gilkerson Orchards, Inc. acquired the property, and therefore, no laws enforced by the Commission or the department have the effect of reducing the property's fair market value.

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 15 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 15th day, or actually delivered to DAS by the close of business on the 15th 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.

