Oregon
Theodore R. Kulongoski, Governor

Department of Land Conservation and Development
635 Capitol Street NE, Suite 150
Salem, Oregon 97301-2524
Phone: (503) 373-0050
First Floor/Coastal Fax: (503) 378-6033
Second Floor/Director's Office Fax: (503) 378-5518
Third Floor/Measure 37 Fax: (503) 378-5318
Web Address: http://www.oregon.gov/LCD

September 27, 2007

To: Interested Persons

From: Cora R. Parker, Acting Director

Re: Ballot Measure 37 (ORS 197.352) Claim Number M131294

Claimants: Eischen Farms Ltd.; David, Vergene, Susan, and Daniel Eischen; Danita Lovelady; Loretta Porter

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

This Final Staff Report and Recommendation and the Final Order constitute the final decision on this claim. No further action will be taken on this matter.

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 COMPENSATION UNDER ORS 197.352 (BALLOT MEASURE 37) OF Eischen Farms Ltd., David and Vergene Eischen, Daniel Eischen, Susan Eischen, Danita Lovelady and Loretta Porter, CLAIMANTS	))))))	FINAL ORDER CLAIM NO. M131294

Claimants: Eischen Farms Ltd., David and Vergene Eischen, Daniel Eischen, Susan Eischen, Danita Lovelady and Loretta Porter (the Claimants)

Property: Township 1S, Range 3W, Section 29, Tax lot 200, Washington County (the property)

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

Claimants submitted the Claim to the State of Oregon under ORS 197.352. Under OAR 125-145-0010 *et seq.*, the Department of Administrative Services (DAS) referred the Claim to the Department of Land Conservation and Development (DLCD) as the regulating entity. This order is based on the record herein, including the Findings and Conclusions set forth in the Final Staff Report and Recommendation of DLCD (the DLCD Report) attached to and by this reference incorporated into this order.

ORDER

The Claim is denied as to laws administered by DLCD and the Land Conservation and Development Commission (LCDC) for the reasons set forth in the DLCD Report.

This Order is entered by the Manager of the Measure 37 Services Division of the DLCD as a final order of DLCD and the Land Conservation and Development Commission under ORS 197.352, OAR 660-002-0010(8), and OAR chapter 125, division 145, and by the Manager of the Measure 37 Services Unit of the DAS as a final order of DAS under ORS 197.352, OAR chapter 125, division 145, and ORS chapter 293.

FOR DLCD AND THE LAND CONSERVATION AND DEVELOPMENT COMMISSION:

Cora R Parker

Cora R. Parker, Acting Director
DLCD
Dated this 27th day of September, 2007.

FOR THE DEPARTMENT OF ADMINISTRATIVE SERVICES:

Carla Ploederer

Carla Ploederer, Manager
DAS, Measure 37 Services Unit
Dated this 27th day of September, 2007.

NOTICE OF RIGHT TO APPEAL OR OTHER JUDICIAL RELIEF

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

1. Judicial review under ORS 183.484: Judicial review under ORS 183.484 may be obtained by filing a petition for review within 60 days from the service of this order. A petition for judicial review under ORS 183.484 may be filed in the Circuit Court for Marion County or the Circuit Court in the county in which you reside.

2. A cause of action under ORS 197.352 (Measure 37 (2004)): If a land use regulation continues to apply to the subject property more than 180 days after the present owner of the property has made written demand for compensation under ORS 197.352, the present owner of the property, or any interest therein, shall have a cause of action in the circuit court in which the real property is located.

(Copies of the documents that comprise the record are available for review at the Department's office at 635 Capitol Street NE, Suite 150, Salem, Oregon 97301-2540)

ORS 197.352 (BALLOT MEASURE 37) CLAIM FOR COMPENSATION

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

September 27, 2007

STATE CLAIM NUMBER:	M131294
NAMES OF CLAIMANTS:	Eischen Farms Ltd. David and Vergene Eischen Daniel Eischen Susan Eischen Danita Lovelady Loretta Porter
MAILING ADDRESS:	Eischen Farms Ltd. David and Vergene Eischen Susan Eischen 38660 SW Eischen Drive Cornelius, Oregon 97113 Daniel Eischen 39200 SW Eischen Drive Cornelius, Oregon 97113 Danita Lovelady 5093 Persille Drive Taylorsville, Utah 84118 Loretta Porter 97 Salmon Street St. Helens, Oregon 97051
PROPERTY IDENTIFICATION:	Township 1S, Range 3W, Section 29 Tax lot 200 Washington County
DATE RECEIVED BY DAS:	November 27, 2006
DEADLINE FOR FINAL ACTION:[1]	May 20, 2008

[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.

I. SUMMARY OF CLAIM

The claimants, Eischen Farms Ltd., David, Vergene, Daniel and Susan Eischen, Danita Lovelady and Loretta Porter, seek compensation in the amount of $500,000 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 develop a dwelling on the 30.49-acre subject property. The subject property is located at SW Gnos Road, near Cornelius, in Washington 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 (1) the claim is not valid as to Eischen Farms Ltd. because its desired use of the subject property was prohibited under the laws in effect when it acquired the property in 1998; and (2) the claim is not valid as to David, Vergene, Daniel and Susan Eischen, Danita Lovelady and Loretta Porter because they are not owners of the subject property. (See the complete recommendation in Section VI. of this report.)

III. COMMENTS ON THE CLAIM

Comments Received

On July 12, 2007, pursuant to Oregon Administrative Rule (OAR) 125-145-0080, the Oregon Department of Administrative Services (DAS) provided written notice to the owners of surrounding properties. According to DAS, 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 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 November 27, 2006, for processing under OAR 125, division 145. The claim identifies OAR 215.213, OAR 660, division 33, and "any law or rule

applied after 1953" 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

Claimants David, Vergene and Susan Eischen, Danita Lovelady and Loretta Porter assert an ownership interest in the subject property. However, while the claim includes documentation to establish that some of these claimants had an ownership interest in the property prior to January 7, 1998, the claim also establishes that they conveyed the subject property to claimant Eischen Farms Ltd., on January 7, 1998, as reflected by a bargain and sale deed included with the claim, Neither David, Vergene and Susan Eischen, Danita Lovelady nor Loretta Porter has any present ownership interest in the subject property. Claimant Daniel Eischen asserts an ownership interest in the subject property; however, the claim does not include any evidence to substantiate that assertion.

The Washington County Assessor's Office confirms Eischen Farms Ltd.'s current ownership of the subject property.

Conclusions

The claimant, Eischen Farms Ltd., is an "owner" of the subject property as that term is defined by ORS 197.352(11)(C), as of January 7, 1998.[2] David, Vergene, Daniel and Susan Eischen, Danita Lovelady and Loretta Porter are not "owners" 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

[2] Under ORS 197.352(11)(A), legal entities can be "family members" of individuals who are owners of property under ORS 197.352(11)(C). However, legal entities cannot have family members under the statute. Therefore, individuals who transferred property to Eischen Farms Ltd. are not considered family members under the definition of family member in ORS 197.352(11)(A).

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 develop a dwelling on the 30.49-acre subject property, and that current land use regulations prevent the desired use.[3]

The claim is based on the applicable provisions of state law that require Exclusive Farm Use (EFU) zoning and restrict uses on land zoned EFU. The claimants' property is zoned Agriculture and Forest (AF-20) by Washington County as required by Statewide Planning Goal 3 (Agricultural Lands), in accordance with ORS 215 and OAR 660, division 33, because the claimants' property is "agricultural land" as defined by Goal 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 215.213 and OAR 660, division 33, enacted or adopted pursuant to Goal 3, establish standards for development of dwellings on existing or proposed 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 marginal lands counties 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, and was amended to comply with ORS 215.284(4) on March 1, 1994.[4]

Eischen Farms Ltd. acquired the subject property on January 7, 1998. At that time, Eischen Farms Ltd.'s property was zoned AF-20 by Washington County. The AF-20 zone allowed single-family dwelling related to farm use.

Conclusions

The current zoning requirements and dwelling standards established by Goal 3 and provisions applicable to land zoned EFU in ORS 215 and OAR 660, division 33, were all enacted or adopted before Eischen Farms Ltd. acquired the subject property on January 7, 1998. These land use regulations do not allow Eischen Farms Ltd.'s desired use of the subject property. Laws enacted or adopted since Eischen Farms Ltd. acquired the subject property in 1998 do not restrict its use of the property relative to when it acquired it in 1998.

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[3] The claimants summarily lists numerous state land use laws as applicable to this claim, but do not establish how the laws either apply to the claimants' desired use of the subject property or restrict its use with the effect of reducing its fair market value. On their face, most of the regulations either do not apply to the claimants' property or do not restrict the use of the claimants' property with the effect of reducing its fair market value. This report addresses only those regulations that the department finds are applicable to and restrict the claimants' desired use of the subject property, based on the claimants' description of his desired use.

[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 for EFU-zoned land.

As explained in Section V.(1) above, David, Vergene, Daniel and Susan Eischen, Danita Lovelady and Loretta Porter are not "owners" of the subject property as that term is defined in ORS 197.352(11)(C).

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 $500,000 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 Eischen Farms Ltd., which acquired the subject property on January 7, 1998, and David, Vergene, Daniel and Susan Eischen, Danita Lovelady and Loretta Porter, who are not "owners" of the subject property as that term is defined by ORS 197.352(11)(C). Because they are not owners of the property, no laws restrict David, Vergene, Daniel and Susan Eischen, Danita Lovelady and Loretta Porter's use of the subject property with the effect of reducing the fair market value. No state laws enacted or adopted since Eischen Farms Ltd. acquired the subject property restrict the use of the property relative to the uses allowed in 1998. Therefore, the fair market value of the subject property has not been reduced as a result of land use regulations enforced by the Land Conservation and Development Commission (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 the applicable provisions of Goal 3, ORS 215 and OAR 660, division 33, which Washington County has implemented through its current AF-20 zone. As set forth in Section V.(2) of this report, all of the state land use regulations that restrict Eischen Farms Ltd.'s desired use of the subject property were in effect when it acquired the property in 1998.

Conclusions

All of the state land use regulations that restrict Eischen Farms Ltd.'s desired use of the subject property were in effect when it acquired the property. Therefore, these state land use regulations are exempt under ORS 197.352(3)(E), which exempts laws in effect when Eischen Farms Ltd. acquired the subject property.

As explained in Section V.(1) of this report, claimants David, Vergene, Daniel and Susan Eischen, Danita Lovelady and Loretta Porter are not "owners" 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 to David, Vergene, Daniel and Susan Eischen, Danita Lovelady and Loretta Porter.

VI. FORM OF RELIEF

ORS 197.352(1) provides for payment of compensation to an owner of private real property if the Commission or the department has enforced one or more laws that restrict the use of the property in a manner that reduces its fair market value. In lieu of compensation, the department may choose to not apply the law in order to allow the present owner to carry out a use of the property permitted at the time the present owner acquired the property. The Commission, by rule, has directed that if the department determines a claim is valid, the Director of the department must provide only non-monetary relief unless and until funds are appropriated by the legislature to pay claims.

Findings of Fact

Based on the findings and conclusions set forth in this report, laws enforced by the Commission or the department do not restrict Eischen Farms Ltd.'s desired use of the subject property relative to what was permitted when it acquired it in 1998 and do not reduce the fair market value of the property. All state laws restricting Eischen Farm Ltd.'s use of the subject property are exempt under ORS 197.352(3)(E). The laws also do not restrict David, Vergene, Daniel and Susan Eischen, Danita Lovelady and Loretta Porter's use of the subject property because they are not owners of the subject property.

Conclusions

Based on the record and the foregoing findings and conclusions, the claimants 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 because (1) no state land use regulations restrict Eischen Farms Ltd.'s desired use of the property relative to uses permitted when it acquired the property; and (2) David, Vergene, Daniel and Susan Eischen, Danita Lovelady and Loretta Porter are not owners of the subject property. Therefore, the department recommends that this claim be denied.

VII. COMMENTS ON THE DRAFT STAFF REPORT

The department issued its draft staff report on this claim on August 31, 2007. OAR 125-145-0100(3), provided 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. Comments received have been taken into account by the department in the issuance of this final report.