

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. M118399
(BALLOT MEASURE 37) OF)	
Matthew E. and Mollie Dunckel CLAIMANTS)	

Claimants: Matthew E. and Mollie Dunckel (the Claimants)

Property: Tax lot 1800, Township 4S, Range 5W, Section 9, 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:

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 Matthew and Mollie Dunckels' division of the approximately 35-acre property or to the establishment of a dwelling on each parcel created: applicable provisions of Statewide Planning Goal 3; ORS 215.263, 215.284 and 215.780; and OAR 660, division 33, enacted they acquired their respective interests in the property. These land use regulations will not apply to Matthew Dunckel's use of the property only to the extent necessary to allow him to use the property for the use described in this report, and only to the extent that use was permitted when he acquired the property on March 21, 1973; and will not apply to Mollie Dunckel's use of the property only to the extent necessary to allow her to use the property for the use described in this report, and only to the extent that use was permitted when she acquired the property on January 10, 1985.

2. The action by the State of Oregon provides the state's authorization to Matthew Dunckel to use the property for the use described in this report, subject to the standards in effect on

March 21, 1973, and to Mollie Dunckel to use the property for the use described in this report, subject to the standards in effect on January 10, 1985. In 1985, the property was subject to the County's acknowledged EF-40 and AF-20 zones.

3. To the extent that any law, order, deed, agreement or other legally enforceable public or private requirement provides that the 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 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 ORS 227.160, other permits or authorizations from local, state or federal agencies, and restrictions on the use of the property imposed by private parties.

4. Any use of the property by the claimant under the terms of the order will remain subject to the following laws: (a) those laws not specified in Condition 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 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 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.

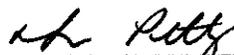
FOR DLCD AND THE LAND CONSERVATION
AND DEVELOPMENT COMMISSION:



Lane Shetterly, Director
DLCD

Dated this 17th day of March, 2006.

FOR the DEPARTMENT OF ADMINISTRATIVE
SERVICES:



Dugan Petty, Deputy Administrator
DAS, State Services Division

Dated this 17th day of March, 2006.

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 293.316: Judicial review under ORS 293.316 may be obtained by filing a petition for review within 60 days from the service of this order. Judicial review under ORS 293.316 is pursuant to the provisions of ORS 183.482 to the Court of Appeals.
2. 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 and the Circuit Court in the county in which you reside.
3. A cause of action under ORS 197.352: A present owner of the property, or any interest therein, may file a cause of action in the Circuit Court for the county where the property is located, if a land use regulation continues to apply to the subject property more than 180 days after the present owner made a written demand for compensation.

(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."

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

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

March 17, 2006

STATE CLAIM NUMBER: M118399

NAMES OF CLAIMANTS: Matthew E. and Mollie Dunckel

MAILING ADDRESS: 19010 Baker Creek Road
McMinnville, Oregon 97128

PROPERTY IDENTIFICATION: Township 4S, Range 5W, Section 9
Tax lot 1800
Yamhill County

19010 Baker Creek Road
McMinnville, Oregon 97128

DATE RECEIVED BY DAS: May 9, 2005

180-DAY DEADLINE: March 24, 2006¹

I. SUMMARY OF CLAIM

The claimants, Matthew E. and Mollie Dunckel, seek compensation in the amount of \$225,000 for the reduction in fair market value as a result of certain 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 approximately 35-acre property and to develop a dwelling on each parcel. The property is located at 19010 Baker Creek 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 Matthew E. and Mollie Dunckel's division of the property for residential development: applicable provisions of Statewide Planning Goal 3 (Agricultural Lands);

¹ This date reflects 180 days from the date the claim was submitted as extended by the 139 days enforcement of Measure 37 was suspended during the pendency of the appeal of Macpherson v. Dep't of Admin. Servs., 340 Or ___, 2006 Ore. LEXIS 104 (February 21, 2006).

ORS 215 and OAR 660 division 33 enacted after they acquired their interests in the property. These laws will not apply to the claimants only to the extent necessary to allow Matthew Dunckel to use the property for the use described in this report, to the extent that use was permitted when he acquired the property in 1973; and to allow Mollie Dunckel to use the property for the use described in this report, to the extent that use was permitted when she acquired the property in 1985. (See the complete recommendation in Section VI. of this report.)

III. COMMENTS ON THE CLAIM

Comments Received

On May 31, 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, two written comments, evidence or information were received in response to the 10-day notice.²

One comment is relevant to whether the claimants are the owners and whether a state law restricts the claimants' use of the property. These comments have been considered by the department in preparing this report.

A second comment received does not address whether the claim meets the criteria for relief (compensation or waiver) under ORS 197.352. Comments concerning the effects a use of the property may have on surrounding areas generally are 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 waiving a state law. (See comment letters 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.

² The 10-day notice period was suspended for 139 days during the pendency of the *Macpherson v. Dep't of Admin. Servs.*, 340 Or ___, 2006 Ore. LEXIS 104 (February 21, 2006), which suspended all Measure 37 deadlines.

Findings of Fact

This claim was submitted to DAS on May 9, 2005, for processing under OAR 125, division 145. The claim identifies Yamhill County zoning ordinance chapters as laws that restrict the use of the property as the basis for the claim. Only laws that were enacted prior to December 2, 2004, the effective date of Measure 37 are the basis for this claim. (See citations of statutory and administrative rule history of the Oregon Revised Statutes and Oregon Administrative Rules.)

Conclusions

The claim has been submitted within two years of December 2, 2004; the effective date of Measure 37, based on land use regulations 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, Matthew E. Dunckel, acquired the subject property on March 21, 1973, as reflected by a recorded purchase agreement included with the claim. On January 10, 1985, Matthew Dunckel transferred an interest in the property to his wife, Molly Dunckel. A copy of a title report dated April 20, 2005, indicates that Matthew and Mollie Dunckel are now the current owners of the subject property.

Conclusions

The claimants, Matthew E. Dunckel and Mollie Dunckel, are "owners" of the subject property, as that term is defined by ORS 197.352(11)(C). Matthew Dunckel has been an owner since April 20, 1973, and Mollie Dunckel has been an owner since January 10, 1985. Matthew Dunckel is a "family member," as that term is defined by ORS 197.352(11)(A), as to Mollie Dunckel.

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 claimant or a family member acquired the property.

Findings of Fact

The claim cites Yamhill County ordinances that “prevent me from dividing my property” as the basis for the claim.

The claim is based, generally, on Yamhill County’s current EF-40 Exclusive Farm Use (EFU) zone and the applicable provisions of state law that require such zoning. The claimants’ property is zoned EFU as required by Goal 3, in accord with OAR 660 division 33 and ORS 215 because the claimants’ 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 the Goal to 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 as applied by Goal 3, do not allow the subject property to be divided into parcels less than 80 acres and establish standards for allowing the existing or any proposed parcels to have farm or non-farm dwellings on them.

ORS 215.780 established an 80-acre minimum size for the creation of new parcels in EFU zones and became effective November 4, 1993 (Chapter 792, Oregon Laws 1993). ORS 215.263 (2003 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.

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. Subsequent amendments to comply with HB 3326 (Chapter 704, Oregon Laws 2001, and effective January 1, 2002,) were adopted by the Commission effective May 22, 2002. (See citations of administrative rule history for OAR 660-033-0100, 0130 and 0135.)

The claimant, Matthew Dunckel, acquired the subject property on March 21, 1973, prior to the establishment of the statewide planning goals and their implementing statutes and rules. At that time, the property was not zoned by Yamhill County.

Conclusions

The zoning requirements, minimum lot size 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 after Matthew E. Dunckel acquired the subject property on March 21, 1973, and do not allow the division of the property, thereby restricting the use of the property relative to the uses allowed when the property was acquired.

³ The claimants’ property is “agricultural land” because it contains Natural Resources Conservation Service (NRCS) Class I-IV soils.

This report addresses only those state laws that are identified in the claim, or that the department is certain apply to the property based on the uses that the claimant has identified. There may be other laws that currently apply to the claimant's use of the 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 what laws apply to a use of 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.

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."

Findings of Fact

The claim includes an informal estimate of \$250,000 as the property's fair market value, in the absence of current regulations. This estimate is based on the claimant's estimate of the market value of adding three additional buildings on the property.

Conclusions

As explained in Section V.(1) of this report, the current owners of the subject property are Matthew and Mollie Dunckel, who acquired the subject property on March 21, 1973, and January 10, 1985. Under ORS 197.352, the claimants are due compensation for land use regulations that restrict the use of the subject property in a manner that reduces its fair market value.

Without an appraisal based on 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 there has been some reduction in the fair market value of the subject property as a result of land use regulations enacted or 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 land use regulations that restrict the use of the property relative to what would have been allowed in 1973, when the property was acquired by Matthew E. Dunckel. These provisions include Goal 3 and applicable provisions of ORS 215 and OAR 660 division 33, which Yamhill County has implemented through its EF-40 zone. None of these laws are

exempt under ORS 197.352(3)(E), which exempts laws in effect when the claimant or claimant's family acquired the property.

Conclusions

Without a specific development proposal for the property, it is not possible for the department to determine what 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 the general statutory, goal and rule restrictions on residential development and use of farmland apply to the claimants' use of the property, and for the most part these laws are not exempt under ORS 197.352(3)(E).

Laws in effect when Matthew Dunckel acquired the 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 the claimants' use of the property that have not been identified in the claim. In some cases it will not be possible to know what laws apply to a use of 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. And, 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 property based on the uses 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 this claim, the greater the possibility that there may be additional laws that will later be determined to continue to apply to this use of the 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 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 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 division of the 35-acre subject property or the development of dwellings on the resulting parcels. The claim asserts the laws enforced by the Commission or department reduce the fair market value of the subject property by \$225,000. 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 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 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 Matthew E. Dunckel to use the subject property for a use permitted at the time he acquired the property on March 21 1973, and to allow Mollie Dunckel a use of the property permitted when she acquired it on January 10, 1985.

When Mollie Dunckel acquired the property on January 10, 1985, the northern portion of the property was zoned EF-40 (Exclusive Farm Use, 40-acre minimum) and the southern portion of the property was zoned AF-20 (Agriculture/Forestry, 20-acre minimum) under Yamhill County's acknowledged comprehensive plan and zoning ordinances. Both zones required the minimum lot size as stated, or "that size appropriate for the continuation of the existing commercial agricultural enterprise in the area."

Conclusion

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 Matthew and Mollie Dunckels' division of the approximately 35-acre property or to the establishment of a dwelling on each parcel created: applicable provisions of Statewide Planning Goal 3; ORS 215.263, 215.284 and 215.780; and OAR 660, division 33, enacted they acquired their respective interests in the property. These land use regulations will not apply to Matthew Dunckel's use of the property only to the extent necessary to allow him to use the property for the use described in this report, and only to the extent that use was permitted when he acquired the property on March 21, 1973; and will not apply to Mollie Dunckel's use of the property only to the extent necessary to allow her to use the property for the use described in this report, and only to the extent that use was permitted when she acquired the property on January 10, 1985.
2. The action by the State of Oregon provides the state's authorization to Matthew Dunckel to use the property for the use described in this report, subject to the standards in effect on March 21, 1973, and to Mollie Dunckel to use the property for the use described in this report, subject to the standards in effect on January 10, 1985. In 1985, the property was subject to the County's acknowledged EF-40 and AF-20 zones.
3. To the extent that any law, order, deed, agreement or other legally enforceable public or private requirement provides that the 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 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 ORS 227.160, other permits or authorizations from local, state or federal agencies, and restrictions on the use of the property imposed by private parties.

4. Any use of the property by the claimant under the terms of the order will remain subject to the following laws: (a) those laws not specified in Condition 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 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 property by the claimants.

VII. COMMENTS ON THE DRAFT STAFF REPORT

The department issued its draft staff report on this claim on October 14, 2005. 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.