

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. M118420
(BALLOT MEASURE 37) OF	)	
Christine Feibel, CLAIMANT	)	

Claimant: Christine Feibel (the Claimant)

Property: Tax Lot 600, Township 4S, Range 5W, Section 21, Yamhill County  
(the Property)

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

Claimant 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 Christine Feibel's division of the subject property into six parcels or to her development of a residential dwelling each parcel: applicable provisions of Statewide Planning Goal 3, Goal 4, ORS 215, and OAR 660, division 6 enacted after the claimant acquired the subject property. These land use regulations will not apply to Christine Feibel'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 September 26, 1967.
2. The action by the State of Oregon provides the state's authorization to Christine Feibel to use her property for the use described in this report subject to the standards in effect on September 26, 1967.

The claimant will continue to be subject to ORS 215.730 and those provisions of Goal 4 and its implementing rules in OAR 660, division 6, related to siting standards for dwelling for the

protection of public health and safety and to any other laws that are exempt under ORS 197.352(3)(B).

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 claimant 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 (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 claimant to use the 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 the claimant 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 claimant.

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.

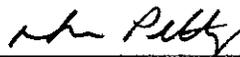
FOR DLCD AND THE LAND CONSERVATION  
AND DEVELOPMENT COMMISSION:



Lane Shetterly, Director  
DLCD

Dated this 21<sup>st</sup> day of March, 2006.

FOR the DEPARTMENT OF ADMINISTRATIVE  
SERVICES:



Dugan Petty, Deputy Administrator  
DAS, State Services Division

Dated this 21<sup>st</sup> 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 21, 2006

**STATE CLAIM NUMBER:** M118420

**NAME OF CLAIMANT:** Christine Feibel

**MAILING ADDRESS:** 19171 Southwest Peavine Road  
McMinnville, Oregon 97128

**PROPERTY IDENTIFICATION:** Township 4S, Range 5W, Section 21  
Tax Lot 600  
Yamhill County

**DATE RECEIVED BY DAS:** May 12, 2005

**180-DAY DEADLINE:** March 27, 2006<sup>1</sup>

**I. SUMMARY OF CLAIM**

The claimant, Christine Feibel, seeks compensation in the amount of \$600,000 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 claimant desires compensation or the right to divide the 91-acre property into six parcels and to develop a residential dwelling on each parcel.<sup>2</sup> The property is located at 19105 SW Peavine 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. Department staff recommends that

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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 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).

<sup>2</sup> In her claim, the claimant does not propose a specific use for the property. However, included in the record for her claim is the Yamhill County Measure 37 Report for the same property. That report waives County land use regulations to allow the claimant to divide her property into six parcels and develop a residential dwelling on each parcel. Based on that document, the department understands that the claimant is requesting such a waiver from the state, in the event the state does not pay compensation.

in lieu of compensation under ORS 197.352, the State of Oregon will not apply the following laws to Christine Feibel's division of the subject property into six parcels or to the establishment of a residential dwelling on each parcel created: applicable provisions of Statewide Planning Goal 3, Goal 4, ORS 215 and OAR 660, division 6 enacted after the claimant acquired the subject property. These land use regulations will not apply to Christine Feibel'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 at the time she acquired the property on September 26, 1967. (See the complete recommendation in Section VI. of this report.)

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

#### **Comments Received**

On March 2, 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.<sup>3</sup>

The comments do 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 the Measure (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 the Measure (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.

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<sup>3</sup> 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 12, 2005, for processing under OAR 125, division 145. The claim identifies Yamhill County's Farm/Forest (F/F) zone as the law that restricts 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, Christine Feibel, acquired the subject property on September 26, 1967, by assignment of a Contract of Sale included with the claim.<sup>4</sup> The Yamhill County Real Property Tax Statement for the last tax year shows that the Christine Feibel Trust currently owns a one-half interest in the subject property. The claimant has informed staff that the trust is a revocable trust.<sup>5</sup> The transfer of an interest in the property to a revocable trust is not a change in ownership for the purposes of ORS 197.352.

## **Conclusions**

The Christine Feibel Trust currently owns the subject property. The claimant, Christine Feibel, is an "owner" of the subject property, as that term is defined by ORS 197.352(11)(C), as of September 26, 1967.

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<sup>4</sup> The record indicates that it is possible that claimant acquired an interest in the property as early as 1957. However, the present record is insufficient to allow that conclusion, and in any case, whether claimant acquired her interest in 1957, or 1967, does not affect the analysis of her claim in this report.

<sup>5</sup> In response to staff inquiry, Christine Feibel advised staff by telephone on March 17, 2006 that the trust is a revocable trust.

## **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 or a family member acquired the property.

### **Findings of Fact**

The claim is based, generally, on a Yamhill County Agricultural/Forest Zoning District (AF-80). The AF-80 zone is a mixed farm-forest zone adopted to comply with Statewide Planning Goal 4 (Forest Lands) and the implementing provisions of OAR 660-006-0050 (effective February 5, 1990,) and subsequently amended on March 1, 1994, to comply with the provisions of HB 3661 (Chapter 792, Oregon Laws 1993).

Under OAR 660-006-0050, related to mixed farm-forest zones, all the uses permitted under Statewide Planning Goal 3 and Goal 4 are allowed except that for dwellings, either the Goal 3 or the Goal 4 standards are applicable based on the predominant use of the tract on January 1, 1993. No information was provided to the department regarding the predominant use of the property on January 1, 1993. Depending on the predominant use on January 1, 1993, the property will be subject to either the requirements for dwellings under exclusive farm use zoning required by Statewide Planning Goal 3 and OAR 660, division 33 or forest zone provisions required by Statewide Planning Goal 4 and OAR 660, division 6. However, no analysis of whether the property can be divided or developed under the applicable farm or forest provisions has been provided.

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. 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 administrative rule history for OAR 660-033-0100, 660-033-0130 and 660-033-0135.)

For land divisions, OAR 660-006-0055 authorizes the creation of new parcels based on the standards applicable to farm or forest zones which implement the 80-acre minimum lot size specified in ORS 215.780. Under OAR 660-006-055, the claimant's property cannot be divided into parcels smaller than 80 acres, as may have been possible in 1967, when Christine Feibel first acquired the property. However, no analysis of whether any of the tax lots can be divided for non-farm dwellings under ORS 215.263(4)(b) has been provided.

The claimant acquired her interest in the subject property on September 26, 1967, 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**

Lot size and dwelling standards established by Statewide Planning Goal 4, ORS 215 and OAR 660, division 6 adopted since Christine Feibel acquired the property in 1967, do not allow the division of the property into parcels smaller than 80-acres or allow the approval of dwellings as may have been possible in 1967. Land use laws adopted since 1967, restrict the use of the property relative to the uses allowed at the time claimant acquired her interest in the property in 1967.

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 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.

### **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 estimate of \$600,000 as the reduction in the property's fair market value due to current regulations. No basis for this estimate is provided in the claim. (See the department's claim file.)

## **Conclusions**

As explained in Section V.(1) of this report, the current owner is Christine Feibel who acquired the property on September 26, 1967. Under ORS 197.352, the claimant is due compensation for land use regulations that restrict the use of the subject property in a manner that reduces its fair market value. Based on the findings and conclusions in Section V.(2) of this report, laws adopted since the claimant acquired the property restrict division of the subject property. The claimant estimates the reduction in value due to the restrictions to be \$600,000.

Without an appraisal or other documentation it is not possible to substantiate the specific dollar amount the claimant demands 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 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 Yamhill County's AF-80 zone and the related provisions of state law that have restricted use of the property and reduced its fair market value. These laws include Statewide Planning Goal 3 (Agricultural Lands), Statewide Planning Goal 4 (Forest Lands), and applicable provisions of ORS 215 and OAR 660, divisions 6 and 33. The County's AF-80 zone and state laws requiring such zoning were enacted after Christine Feibel acquired the property in 1967, and do restrict the use of the property in a manner that likely reduces its fair market value. With the exception of applicable provisions ORS 215 in effect when the claimant acquired the property, none of those laws appears to be exempt under ORS 197.352(3)(E), which exempts laws in effect when the claimant or the claimant's family members acquired the property.

The department notes that ORS 215.730 and OAR 660, division 6 include standards for siting dwellings in forest zones. These provisions include fire protection standards for dwellings and for surrounding forest lands. 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..." The department finds that siting standards for dwellings in forest zones in ORS 215.730 and in Goal 4 and its implementing rules (OAR 660, division 6) are exempt under ORS 197.352(3).

#### **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 does appear that the general statutory, goal and rule restrictions on the division, residential development and use of agricultural and forest lands apply to the claimant's use of the property, and that those laws are not exempt under ORS 197.352(3)(E).

Laws in effect when Christine Feibel acquired the property are exempt under ORS 197.352(3)(E) and will continue to apply to the claimant's use of the property. In addition, the siting standards for dwellings in forest zones under ORS 215.730 and in Goal 4 and its implementing rules, OAR 660, division 6, are exempt under ORS 197.352(3)(B). There may be laws that 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 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 the 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 claimant has 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 claimant should be aware that the less information she has provided to the department in her claim, the greater the possibility that there may be additional laws that will later be determined to continue to apply to her 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 claimant's ability to divide the property into six parcels or to develop a residential dwelling on each parcel. The claim asserts the laws enforced by the Commission or department reduce the fair market value of the subject property by \$600,000. 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, and provided the claimant establishes the revocability of the trust to which she has transferred her property, ORS 197.352 authorizes the department to modify, remove or not apply all or parts of certain land use regulations to allow Christine Feibel to use the subject property for a use permitted at the time she acquired the property on September 26, 1967.

### **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 Christine Feibel's division of the subject property into six parcels or to her development of a residential dwelling each parcel: applicable provisions of Statewide Planning Goal 3, Goal 4, ORS 215, and OAR 660, division 6 enacted after the claimant acquired the subject property. These land use regulations will not apply to Christine Feibel'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 September 26, 1967.

2. The action by the State of Oregon provides the state's authorization to Christine Feibel to use her property for the use described in this report subject to the standards in effect on September 26, 1967.

The claimant will continue to be subject to ORS 215.730 and those provisions of Goal 4 and its implementing rules in OAR 660, division 6, related to siting standards for dwelling for the protection of public health and safety and to any other laws that are exempt under ORS 197.352(3)(B).

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 claimant 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 (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 claimant to use the 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 the claimant 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 claimant.

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

The department issued its draft staff report on this claim on October 18, 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.