

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

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

March 30, 2006

STATE CLAIM NUMBER: M118469

NAME OF CLAIMANT: Leslie W. Lingscheit

MAILING ADDRESS: Post Office Box 429
Medford, Oregon 97504

PROPERTY IDENTIFICATION: Township 37, Range 1W, Section 25
Tax Lot 600
Jackson County

OTHER CONTACT INFORMATION: Alan D. B. Harper
Hornecker, Cowling, Hassen, and Heysell, LLP
717 Murphy Road
Medford, Oregon 97504

OTHER INTEREST IN PROPERTY: Sonja Johnson¹

Thomas N. and Beverly J. Hanson

DATE RECEIVED BY DAS: May 19, 2005

180-DAY DEADLINE: April 3, 2006²

I. SUMMARY OF CLAIM

The claimant, Leslie W. Lingscheit, seeks compensation in the amount of \$4,272,000 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 80.70 acre property into five-acre lots and to develop a dwelling on each lot. The property does not have a street address and is located at the locational coordinates listed above, east of the City of Medford, in Jackson County. (See claim.)

¹ Sonja Johnson is Trustee for The Leslie W. Lingscheit Trust U.T.A.D., February 10, 1997.

² This date reflects 180 days from the date the claim was submitted as extended by the 139 days enforcement of Ballot 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).

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 Leslie Lingscheit's division of the property into 5-acre lots or to his development of a dwelling on each lot: applicable provisions of Statewide Planning Goal 3 (Agricultural Lands) and Goal 5 (Open Spaces, Scenic and Historic Areas, and Natural Resources), ORS 215, and OAR 660 division 33. These laws will not apply to the claimant only to the extent necessary to allow Leslie Lingscheit to use the property for the use described in this report, to the extent that use was permitted at the time he acquired the property in 1956. (See the complete recommendation in Section VI. of this report.)

III. COMMENTS ON THE CLAIM

Comments Received

On June 22, 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, four written comments, evidence or information were received in response to the 10-day notice.

The comments do not address whether the claim meets the criteria for relief (compensation or waiver) under ORS 197.352 (Ballot Measure 37). 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 Ballot 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 Ballot 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 May 19, 2005, for processing under OAR 125, division 145. The claim summarily cites a list of state statutes and administrative rules as laws that restrict the use of the property as the basis for the claim. (See Section V.(2) of this report.) Only laws that were enacted prior to December 2, 2004, the effective date of Ballot 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 Ballot 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 “owner” 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, Leslie Lingscheit, acquired the subject property on April 26, 1956, as reflected by a Warranty Deed included with the claim. On February 10, 1997, Leslie Lingscheit transferred the property to the Leslie W. Lingscheit Trust U.T.A.D, a revocable trust. Transfer of property to a revocable trust does not constitute a change in ownership for purposes of ORS 197.352.

The Jackson County Assessor’s “Official Record of Descriptions of Real Properties” shows Leslie Lingscheit has had a continuous interest in this property since he acquired it in 1956.

Conclusions

The claimant, Leslie W. Lingscheit, is an “owner” of the subject property, as that term is defined by ORS 197.352(11)(C), as of April 25, 1956.

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 states: "These land regulations which have caused the diminution value include, but are not limited to, all state land use Planning Goals, specifically Goals 3, 5, 11, and 14; ORS 92 (except as existing prior to the date of acquisition, April 25, 1956); ORS 195, ORS 197, ORS 215, OAR 660-004-0040; OAR 660-011-0060; OAR 660-012-0065; OAR 660-012-0070; all provisions found in OAR 660-033-0120; all provisions of OAR 660-033-0130; OAR 660-033-0135; OAR 340-096-0020; [and] OAR 340-096-0034. All the aforementioned regulations adopted subsequent to Claimant's acquisition of the property in 1956, have directly or partially contributed to the demonstrated loss of value. While we anticipate that the aforementioned regulations specifically relate to the diminution in value as supported by the attached CMA's, there may be other provisions specifically relating to setbacks, overlay restrictions (such as view shed or wildlife or destination resorts) access or the expiration of any home site approvals, all of which the Claimant also seeks relief."

As recited above, the claim summarily cites several statewide planning goals, state statutes and administrative rules that either do not apply to the subject property or do not, on their face, appear to restrict the use of the property. The claimant does not establish how any of these laws restrict the use of the property in a manner that restricts the fair market value of the property. With the exception of laws discussed below, in the absence of any explanation by the claimant as to how those laws restrict the use of the property, this report does not address those laws.

The claim is based, generally, on Jackson County's current Exclusive Farm Use (EFU) zone and the applicable provisions of state law that require such zoning. The claimant's property is zoned EFU as required by Statewide Planning Goal 3, in accord with ORS 215 and OAR 660, division 33 because the claimant's 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 the Goal be zoned EFU pursuant to ORS 215.

Current land use regulations, particularly ORS 215.263, 215.284, 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 lots or parcels in EFU zones and became effective November 4, 1993 (Chapter 792, Oregon Laws 1993). ORS 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. 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.)

Jackson County has determined that there are wetlands, riparian corridors, and very sensitive wildlife habitat on this property. These are all resources protected by Goal 5. Jackson County's adoption of resource protections under Goal 5 may restrict the use of the property.

The claimant acquired this property April 25, 1956, prior to the establishment of the statewide planning goals and their implementing statutes and regulations. The property was not zoned by that county at that time.

Conclusions

The zoning requirements, minimum lot size and dwelling standards established by Statewide Planning Goals 3 (Agricultural Lands) and 5 (Natural Resources, Scenic and Historic Areas, and Open Spaces) and provisions applicable to land zoned EFU in ORS 215, and OAR 660, division 33, were all enacted after Leslie Lingscheit acquired the subject property in April 25, 1956, and do not allow the division or development of the property as requested,, thereby restricting the use of the property relative to the uses allowed when the property was acquired by the claimant in 1956.

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 \$4,272,000 as the reduction in the property's fair market value due to current regulations. This estimate is based on two Comparative Market Analysis reports included in the claim. No appraisal or other documentation of the estimate was included in the claim.

Conclusions

As explained in Section V.(1) of this report, the current owner is Leslie W. Lingscheit, who acquired the property on April 25, 1956. 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 \$4,272,000.

Based on the documentation submitted, 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 state land use regulations that restrict the use of the property relative to what would have been allowed in 1956, when the property was acquired by Leslie Lingscheit. These provisions include applicable provisions of Statewide Planning Goals 3 (Agricultural Lands) and 5 (Natural Resources, Scenic and Historic Areas, and Open Spaces), ORS 215, and OAR 660, division 33. None of these laws are exempt under ORS 197.352(3)(E), which exempts laws in effect when the claimant 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 does appear that the general statutory, goal and rule restrictions on residential development and use of farm land apply to the claimant's use of the property, and for the most part these laws are not exempt under ORS 197.352(3)(E).

Other laws in effect when the claimant acquired the property are also 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 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. 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 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 he has provided to the department in his claim, the greater the possibility that there may be additional laws that will later be determined to continue to apply to his 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 subject property into lots of five-acres, or develop a dwelling on each of those lots. The claim asserts the laws enforced by the Commission or department reduce the fair market value of the subject property by \$4,272,000. 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 Leslie Lingscheit to use the subject property for a use permitted at the time he acquired the property on April 25, 1956.

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 Leslie Lingscheit's division of the 80.70 acre property into lots of 5-acres, or to his establishment of a single family dwelling on each lot created: applicable provisions of Statewide Planning Goals 3 and 5, ORS 215, and OAR 660 division 33. These laws will not apply to Leslie Lingscheit's use of his property only to the extent necessary to allow the claimant to use the property for the use described in this report, to the extent that use was permitted at the time he acquired the property on April 25, 1956.

2. The action by the State of Oregon provides the state's authorization to the claimant to use his property for the use described in this report, subject to the standards in effect on April 25, 1956.
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 him 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 March 13, 2006. 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.