

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. M118490
(BALLOT MEASURE 37) OF)	
Jean Opheim, CLAIMANT)	

Claimant: Jean Opheim (the Claimant)

Property: Tax lot 1000, Township 4S, Range 3W, Section 31, 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 Jean Opheim's establishment of a residential dwelling on the subject property: applicable provisions of Statewide Planning Goal 3, ORS 215, and OAR 660 division 33. These land use laws will not apply to Ms. Opheim's use of her 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 she acquired the property in 1967.
2. The action by the State of Oregon provides the state's authorization to the claimant to use her property for the use described in this report, subject to the standards in effect on April 11, 1967.
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

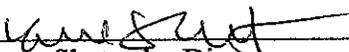
as defined in ORS 215.402 or ORS 227.160; other permits or authorizations from local, state or federal agencies; and restrictions on the use of the property imposed by private parties.

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 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 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.

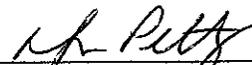
This Order is entered by the Director of the DLCD as a final order of DLCD and the Land Conservation and Development Commission under ORS 197.352, OAR 660-002-0010(8), and OAR 125, division 145, and by the Deputy Administrator for the State Services Division of the DAS as a final order of DAS under ORS 197.352, OAR 125, division 145, and ORS 293.

FOR DLCD AND THE LAND CONSERVATION
AND DEVELOPMENT COMMISSION:



Lane Shetterly, Director
DLCD
Dated this 31st day of March, 2006.

FOR the DEPARTMENT OF ADMINISTRATIVE
SERVICES:



Dugan Petty, Deputy Administrator
DAS, State Services Division
Dated this 31st day of March, 2006.

NOTICE OF RIGHT TO APPEAL OR OTHER JUDICIAL RELIEF

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

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 197.352¹, 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)

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."

¹ By order of the Marion County Circuit Court, "all time lines under Measure 37 [were] suspended indefinitely" on October 25, 2005. This suspension was lifted on March 13, 2006 by the court. As a result, a period of 139 days (the number of days the time lines were suspended) has been added to the 180-day time period under ORS 197.352(6) for claims that were pending with the state on October 25, 2005.

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

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

March 31, 2006

STATE CLAIM NUMBER: M118490

NAME OF CLAIMANT: Jean Opheim

MAILING ADDRESS: 14401 Northwest Willis Road
McMinnville, Oregon 97128

PROPERTY IDENTIFICATION: Township 4S, Range 3W, Section 31
Tax lot 1000
Yamhill County

DATE RECEIVED BY DAS: May 23, 2005

180-DAY DEADLINE: April 7, 2006¹

I. SUMMARY OF CLAIM

The claimant, Jean Opheim, seeks compensation in the amount of \$100,000 for a 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 develop her approximately 37-acre property with a dwelling. The property is located south of Dayton and west of Lafayette Highway, 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 this claim is valid. Department staff recommends, in lieu of compensation, that the requirements of the following laws enforced by the Land Conservation and Development Commission (the Commission) or the department not apply to the claimant's development of a dwelling on the subject property: applicable provisions of Statewide Planning Goal 3 (Agricultural Lands), ORS 215, and OAR 660 division 33. These laws will not apply to the claimant's use of the property only to the extent necessary to allow Ms. Opheim 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 April 11, 1967. (See the complete recommendation in Section VI. of this report.)

¹ 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).

III. COMMENTS RECEIVED

On June 28, 2005, pursuant to OAR 125-145-0080, the Oregon Department of Administrative Services (DAS) provided written notice to owners of surrounding properties. According to DAS, 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 criterion to an application submitted by the owner, whichever is later; or
2. For claims arising from land use regulations enacted after the effective date of 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 criterion, whichever is later.

Findings of Fact

This claim was submitted to DAS on May 23, 2005, for processing under OAR 125 division 145. The claim identifies local zoning provisions as the laws that restrict the use of the property and are the basis for the claim. Only laws that were enacted prior to December 2, 2004, the effective date of Ballot Measure 37, are the basis for this claim. (See 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 regulation 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 of 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, Jean Opheim, acquired the subject property on April 11, 1967. (See deed in the department’s claim file.)

Yamhill County’s staff report and final decision, on the claimant’s county ORS 197.352 claim, states that Jean Opheim is the current owner of the subject property. (See the department’s claim file.)

Conclusions

The claimant, Jean Opheim, is the “owner” of the subject property as that term is defined in ORS 197.352(11)(C).

2. The Laws that are the Basis for the 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 on Ordinance #565, Section 402 of the Yamhill County Zoning Ordinance (YCZO); Ordinance #310, Section 402 of the YCZO; and Ordinance #83, Section 402 of the YCZO. The claim states that these laws place “restrictions on building” and that “prior to 1976, we could have built [a] house.”

The identified ordinances and code sections are successive versions of the Yamhill County’s EFU zone. The County EFU zoning and income requirements for farm dwellings are based on applicable provisions of state law that require such zoning. The claimant’s property is zoned EFU as required by Goal 3, in accord with OAR 660 division 33 and ORS 215 because the claimant’s property is “agricultural land” as defined by Goal 3. The property is also “high value farmland” because the soils are predominantly Class II.² Goal 3 became effective on

¹ The claimant’s property is “agricultural land” and high-value farmland because it contains Natural Resources Conservation Service (NRCS) soils: Woodburn silt loam, 0–7% slopes, Class IIw; Amity silt loam, 0–2% slopes, Class IIw; and Terrace Escarpments, Class VIe.

January 25, 1975, and required that agricultural lands as defined by Goal 3 be zoned EFU pursuant to ORS 215.

Current state land use regulations, particularly ORS 215.283 and OAR 660 division 33 as applied by Goal 3, do not allow the subject property to have a farm or non-farm dwelling on it.

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.)

The claimant acquired the subject property on April 11, 1967, prior to the establishment of the statewide planning goals and their implementing statutes and rules. According to the County staff report, the County first zoned the property on February 11, 1976.

Conclusions

Lot size and dwelling standards established Statewide Planning Goal 3, ORS 215 and OAR 660 division 33 adopted since the claimant acquired the property in 1967, do not allow construction of a new dwelling on the subject property, thereby restricting the use of the property from what could have been done when the property was acquired by the claimant 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 laws 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 states that the fair market value for the subject property has been reduced by \$100,000 as a result of land use laws enacted after the claimant acquired the property in 1967. The

claimant stated that the information regarding the value of the property and loss of fair market value is based on the fact that prior to 1976, she could have built a house on the property.

The Yamhill County ORS 197.352 claim decision states that the County Assessor determined that a building site would increase the value of the property by approximately \$100,000. (See the department's claim file.)

Conclusions

As explained in Section V.(1) of this report, Jean Opheim is the current owner of the subject property as of April 11, 1967. Under ORS 197.352, Ms. Opheim is due compensation for land use laws 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 development of a dwelling. The claim asserts the reduction in value to be \$100,000.

Without an appraisal or 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 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 EFU (EF-80) zone and the related provisions of state law that have restricted use of the property and reduced its fair market value relative to uses permitted when the claimant acquired the property in 1967. These laws include Goal 3 and applicable provisions of ORS 215 and OAR 660 division 33. None of these laws are exempt under ORS 197.352(3)(E), which exempts laws in effect at the time 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 construction of residential dwellings and use of farm land apply to the claimant's use of the property, and these laws are not exempt under ORS 197.352(3)(E).

Laws in effect when the claimant 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 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 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 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 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 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 in this report, laws enforced by the Commission or the department prohibit the establishment of a residential dwelling on the parcel. The claim asserts that these restrictions reduce the fair market value of the subject property by \$100,000. Without an appraisal or other substantiating documentation, it is not possible to determine the specific dollar amount the claimant demands for compensation. Nevertheless, the department acknowledges that state land use laws 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 just compensation, ORS 197.352 authorizes the department to modify, remove, or not apply all or parts of certain state land use regulations to allow Jean Opheim to use the subject property for a use permitted at the time she acquired the property on April 11, 1967.

Conclusions

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 Jean Opheim's establishment of a residential dwelling on the subject property: applicable provisions of Statewide Planning Goal 3, ORS 215, and OAR 660 division 33. These land use laws will not apply to Ms. Opheim's use of her 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 she acquired the property in 1967.
2. The action by the State of Oregon provides the state's authorization to the claimant to use her property for the use described in this report, subject to the standards in effect on April 11, 1967.
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 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 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 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.