

BEFORE THE DEPARTMENT OF ADMINISTRATIVE SERVICES,  
THE DEPARTMENT OF LAND CONSERVATION AND DEVELOPMENT OF  
THE STATE OF OREGON

AMENDED  
IN THE MATTER OF THE CLAIM FOR ) FINAL ORDER  
COMPENSATION UNDER ORS 197.352 ) CLAIM NO. M118505  
(BALLOT MEASURE 37) OF )  
Samuel W. and Mildred Y. Eastman, CLAIMANTS )

Claimants: Samuel W. and Mildred Y. Eastman (the Claimants)

Property: Tax lot 3100, Township 3S, Range 3W, Sections 13, 14, 23, and 24,  
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:

1. In lieu of compensation under ORS 197.352, the State of Oregon will not apply the following laws to Samuel and Mildred Eastman's division of their property into approximately two-acre parcels or to their establishment of dwelling on each parcel: applicable provisions of Statewide Planning Goal 3, ORS 215, and OAR 660, division 33. These land use regulations will not apply to the Eastmans' use of their property only to the extent necessary to allow them to use the property for the use described in this report, to the extent that use was permitted at the time they acquired the property in 1971.
2. The action by the State of Oregon provides the state's authorization to the claimants to use their property for the use described in this report, subject to the standards in effect on December 4, 1971.
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

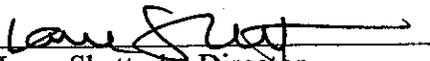
claimants first obtain that permit, license or other form of authorization or consent. Such requirements may include, but are not limited to: a building permit, a land use decision, a permit as defined in ORS 215.402 or ORS 227.160, other permits or authorizations from local, state or federal agencies, and restrictions on the use of the property imposed by private parties.

4. Any use of the property by the claimants 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 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.

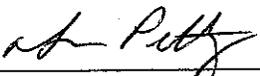
FOR DLCD AND THE LAND CONSERVATION  
AND DEVELOPMENT COMMISSION:

  
Lane Shetterly, Director

DLCD

Dated this 6<sup>th</sup> day of April, 2006.

FOR the DEPARTMENT OF ADMINISTRATIVE  
SERVICES:

  
Dugan Petty, Deputy Administrator

DAS, State Services Division

Dated this 6<sup>th</sup> day of April, 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 197.352<sup>1</sup>, 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."

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<sup>1</sup> 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**

**Amended Final Staff Report and Recommendation**

April 6, 2006

**STATE CLAIM NUMBER:** M118505

**NAMES OF CLAIMANTS:** Samuel W. and Mildred Y. Eastman

**MAILING ADDRESS:** 10650 Youngberg Hill Road  
McMinnville, Oregon 97128

**IDENTIFICATION OF PROPERTY:** Township 3S, Range 3W, Sections 13, 14,  
23, and 24  
Tax lot 3100  
Yamhill County

**OTHER CONTACT INFORMATION:** Michael G. Gunn, Agent  
201-B North Meridian Road  
Newberg, Oregon 97132

**DATE RECEIVED BY DAS:** May 24, 2005

**180-DAY DEADLINE:** April 8, 2006<sup>1</sup>

**I. SUMMARY OF CLAIM**

The claimants, Samuel and Mildred Eastman, seek compensation of \$3,125,000 for the reduction in value as a result of certain land use regulations that alleged to restrict the use of certain private real property. The claimants' desire compensation or the right to divide the 41.9-acre subject property into approximately two-acre parcels, and to develop a dwelling on each parcel created. The property is located in Yamhill County.<sup>2</sup> (See claim.)

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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 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).

<sup>2</sup> The amount of compensation requested is based on the claimant's request for compensation to Yamhill County. Their claim to Yamhill County, a copy of which was submitted to the state, asserts that by not being able to divide a 42-acre parcel into 20 lots, each approximately two acres in size, and place a single-family dwelling on each lot, current regulations have resulted in a loss in their property's value of \$3,125,000. The state claim requests the ability to divide the property into five-acre parcels.

## **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, 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 claimants division of the subject property into approximately two-acre parcels or to their development of a dwelling on each parcel: applicable provisions of Statewide Planning Goal 3, ORS 215, and OAR 660 division 33. These laws will not apply to the claimants only to the extent necessary to allow the Eastmans to use the subject property for the use described in this report, to the extent that use was permitted at the time they acquired the property on December 4, 1971. (See the complete recommendation in Section VI. of this report.)

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

### **Comments Received**

On July 25, 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 were received by DAS 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 statute. 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 files.)

## **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 24, 2005, for processing under OAR 125, division 145. The claim identifies Yamhill County Comprehensive Plan and ordinances related to farm use zoning as 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 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 “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 claimants, Samuel and Mildred Eastman, acquired the subject property on December 4, 1971. (See copy of Land Sales Contract in the department’s claim file.) A letter from the Yamhill County Title Unit confirms the Eastmans are the current owners of the subject property.

### **Conclusions**

The claimants, Samuel and Mildred Eastman are “owners” of the subject property as that term is defined under ORS 197.352(11)(C), as of December 4, 1971.

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

### **Findings of Fact**

The claim lists several Yamhill County ordinances as laws that restrict the use of the property. These relate to agricultural land zoning and the \$80,000 income test for a farm dwelling and the 80-acre minimum lot size required for land divisions in land zoned for farm use.

The claim is based on Yamhill County's current EF-20 (Exclusive Farm – 20-acre minimum lot size) zone and the applicable provisions of state law that require such zoning. The EF-20 zoning is 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. Goal 3 became effective on January 25, 1975, and required that agricultural lands as defined by the Goal be zoned 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 of less than 80 acres and establish standards for allowing the existing or any proposed parcel(s) to have farm or non-farm dwellings on them. Specifically, ORS 215.780(1) establishes an 80-acre minimum lot size for the creation of new parcels or lots in an Exclusive Farm Use (EFU) zone and became effective on November 4, 1993. ORS 215.263 establishes standards for the creation of new parcels for non-farm uses and dwellings 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.)

The claimants acquired the subject property in 1971, prior to the establishment of the statewide planning goals and their implementing statutes and rules.

### **Conclusion**

Minimum lot size and dwelling standards established by Statewide Planning Goal 3, ORS 215, and OAR 660, division 33, adopted since the claimants acquired the property in 1971, do not allow the division of the property into parcels less than 80 acres in size or allow the approval of dwellings as may have been possible when the claimants acquired the property on December 4, 1971.

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 the claimants have identified. There may be other laws that currently apply to the claimants' use of the property, and may 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.

### **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 claimants' ORS 197.352 claim to Yamhill County for the subject property, which they included in their claim to the state, includes an estimate of \$3,125,000 as the reduction in fair market value as a result of current land use regulations. This estimate is based on their request to the county to divide the property into 20, approximately two-acre parcels. The claimants' initial request to the state was to divide the property into approximately five-acre parcels.<sup>3</sup>

No other documentation of estimated values or reductions is included in the claim.

#### **Conclusions**

As explained in Section V.(1) of this report, the current owners of the subject property are Samuel and Mildred Eastman, who acquired the subject property on December 4, 1971. Thus, under ORS 197.352, the Eastmans are 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 documentation submitted, it is not possible to substantiate the 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 laws. 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 uses permitted when the claimants acquired the property on December 4, 1971. These laws include applicable provisions of Statewide Planning Goal 3 (Agricultural Lands), ORS 215 and OAR 660, division 33. These laws are not exempt under ORS 197.352(3)(E), which exempts laws in effect when the claimants 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 that the general

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<sup>3</sup> Based on correspondence received from claimants' attorney on October 3, 2005.

statutory, goal and rule restrictions on residential development and use of agricultural land apply to the claimants' use of the property, and these laws do not appear to be exempt under ORS 197.352(3)(E).

Laws in effect with the claimants acquired the property are exempt under ORS 197.352(3)(E), and will continue to apply to the claimants' 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 what 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 use that the claimants have identified. Similarly, the 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 their claim, the greater the possibility that there may be additional laws that will later be determined to continue to apply to their 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 a law to allow the present owners to carry out a use of the property permitted at the time the present owners acquired the property. The Commission, by rule, has directed that if the department determines a claim is valid, that 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 prohibit the division of the subject property into approximately two-acre parcels with a dwelling on each parcel created. The claim asserts that the laws enforced by the Commission or department reduce the fair market value of the subject property by \$3,125,000. Based on the documentation a specific amount of compensation cannot be substantiated. Nevertheless, the department acknowledges that state land use 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 state land use regulations to allow Samuel and Mildred Eastman to use the subject property for a use permitted at the time they acquired the property in 1971.

## **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 Samuel and Mildred Eastman's division of their property into approximately two-acre parcels or to their establishment of dwelling on each parcel: applicable provisions of Statewide Planning Goal 3, ORS 215, and OAR 660, division 33. These land use regulations will not apply to the Eastmans' use of their property only to the extent necessary to allow them to use the property for the use described in this report, to the extent that use was permitted at the time they acquired the property in 1971.
2. The action by the State of Oregon provides the state's authorization to the claimants to use their property for the use described in this report, subject to the standards in effect on December 4, 1971.
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 obtain 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 claimants 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 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 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.