

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

IN THE MATTER OF THE CLAIM)	FINAL ORDER
FOR COMPENSATION UNDER)	CLAIM NO. M124760
BALLOT MEASURE 37 (CHAPTER 1,)	
OREGON LAWS 2005) OF)	
Frances Engebretson, CLAIMANT)	

Claimant: Frances Engebretson (the Claimant)

Property: Township 26S, Range 13W, Section 2, Lots 1 to 11, Block 14, Boise Addition
(aka tax lot 4000), Coos 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 Ballot Measure 37 (2004) (Oregon Laws 2005, Chapter 1) (hereafter, Measure 37). 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) and the Oregon Department of State Lands (the DSL Report) both attached to and by this reference incorporated into this order.

ORDER

The Claim is denied as to laws administered by DLCD and the Land Conservation and Development Commission (LCDC) for the reasons set forth in the DLCD Report.

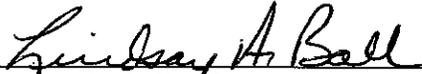
The Claim is denied as to laws administered by Department of State Lands for the reasons set forth in the DSL Report.

This Order is entered by the Deputy Director of the DLCD as a final order of DLCD and the Land Conservation and Development Commission under Measure 37, OAR 660-002-0010(8), and OAR chapter 125, division 145, by the Director of the DAS as a final order of DAS under Measure 37, OAR chapter 125, division 145 and ORS chapter 293, and by the Assistant Director of the DSL as a final order under Measure 37 and OAR 125, division 145.

FOR DLCD AND THE LAND
CONSERVATION AND
DEVELOPMENT COMMISSION:
Lane Shetterly, Director


Cora R. Parker, Deputy Director
DLCD
Dated this 28th day of September, 2006.

FOR the DEPARTMENT OF
ADMINISTRATIVE SERVICES:


Lindsay A. Ball, Director
DAS
Dated this 28th day of September, 2006.

FOR THE DEPARTMENT OF STATE
LANDS:
Louise C. Solliday, Director


By: Jeannette Holman, Assistant Director
DSL
Dated this 28th day of September, 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 Oregon Laws 2005, chapter 1 (Measure 37 (2004)): 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)

ORS 197.352 (BALLOT MEASURE 37) CLAIM FOR COMPENSATION

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

September 25, 2006

STATE CLAIM NUMBER: M124760

NAME OF CLAIMANT: Frances Engebretson

MAILING ADDRESS: 3050 Ash Street
North Bend, Oregon 97459

PROPERTY IDENTIFICATION: Township 26S, Range 13W, Section 2
Lots 1 to 11, Block 14, Boise Addition
(aka tax lot 4000)
Coos County

DATE RECEIVED BY DAS: April 4, 2006

180-DAY DEADLINE: October 1, 2006

I. SUMMARY OF CLAIM

The claimant, Frances Engebretson, seeks compensation in the amount of \$100,000 for the reduction in fair market value as a result of land use regulations that are alleged to restrict the use of certain private real property. The claimant desires compensation or the right to fill in the 0.73-acre subject property and construct five dwellings on it. The subject property is located at the locational coordinates above, near Coos Bay, in Coos County. (See claim.)

II. SUMMARY OF STAFF RECOMMENDATION

Based on the findings and conclusions set forth below, the Department of Land Conservation and Development (the department) has determined that the claim is not valid because the claimant's desired use of the subject property was prohibited under the laws in effect when the claimant, Frances Engebretson, acquired the property in 1978. (See the complete recommendation in Section VI. of this report.)

III. COMMENTS ON THE CLAIM

Comments Received

On July 31, 2006, pursuant to Oregon Administrative Rule (OAR) 125-145-0080, the Oregon Department of Administrative Services (DAS) provided written notice to the owners of surrounding properties. According to DAS, five written comments were received in response to the 10-day notice

The comments are relevant to whether a state law restricts the claimant's use of the subject property, whether the restriction of the claimant's use of the subject property reduces the fair market value of the property and whether the laws that are the basis for the claim are exempt under ORS 197.352(3). The comments have been considered by the department in preparing this report. (See the comment letters in the department's claim file.)

IV. TIMELINESS OF CLAIM

Requirement

ORS 197.352(5) requires that a written demand for compensation be made:

1. For claims arising from land use regulations enacted prior to the effective date of Measure 37 (December 2, 2004), within two years of that effective date, or the date the public entity applies the land use regulation as an approval criteria to an application submitted by the owner, whichever is later; or
2. For claims arising from land use regulations enacted after the effective date of Measure 37 (December 2, 2004), within two years of the enactment of the land use regulation, or the date the owner of the property submits a land use application in which the land use regulation is an approval criteria, whichever is later.

Findings of Fact

This claim was submitted to DAS on April 4, 2006, for processing under OAR 125, division 145. The claim identifies Coos County Estuary Zoning under the Coos Bay Estuary Management Plan as the basis for the claim. Only laws that were enacted or adopted prior to December 2, 2004, are the basis for this claim.

Conclusions

The claim has been submitted within two years of the effective date of Measure 37 (December 2, 2004), based on land use regulations enacted or 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, Frances Engebretson, acquired her interest in the subject property on November 14, 1978, as reflected by warranty deeds included with the claim. The Coos County Assessor's Office confirms that the claimant is a current owner of the subject property.

Conclusions

The claimant, Frances Engebretson, is an “owner” of the subject property as that term is defined by ORS 197.352(11)(C), as of November 14, 1978.

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 indicates that the claimant desires to fill the 0.73-acre subject property and construct five dwellings on it. It indicates that the Coos County Estuary Zoning, under the Coos Bay Estuary Management Plan, prevents her from doing so.

Statewide Planning Goal 16 (Estuaries) and OAR 660, division 17 (1977) required Coos County to adopt comprehensive plan and land use regulations restricting the use of the subject property in order to protect the Coos Bay estuary. The state claim is based on the applicable provisions of state law that require estuary zoning and restrict uses on land zoned as estuarine resources. The claimant’s property is zoned “natural aquatic,” as required by Goal 16, because the claimant’s property is located within a natural management unit of an “estuary” as defined by Goal 16¹. Goal 16 became effective on June 7, 1977, and required that “estuarine resources,” as defined by Goal 16, be zoned for estuarine uses.

Goal 16 requires that priorities for use of each of the management units be designated to maintain, promote, encourage or enhance uses and activities compatible with the requirements of Goal 16, the capabilities of the resources and the objectives of the classification.² Goal 16

¹ Goal 16, Estuarine Resources:

To recognize and protect the unique environmental, economic and social values of each estuary and associated wetlands; and

To protect, maintain, where appropriate develop, and where appropriate restore the long-term environmental, economic, and social values, diversity and benefit of Oregon’s estuaries.

Comprehensive management programs to achieve these objectives shall be developed by appropriate local, state, and federal agencies for all estuaries.

To assure diversity among the estuaries for the State, by June 15, 1977, LCDC with the cooperation and participation of local governments, special districts, and state and federal agencies shall classify the Oregon estuaries to specify the most intensive level of development or alteration which may be allowed to occur within each estuary. After completion for all estuaries of the inventories and initial planning effort, including identification of needs and potential conflicts among needs and goals and upon request of any coastal jurisdiction, the Commission will review the overall Oregon Estuary Classification.

² While the priorities may vary between individual management units consistent with these requirements, the general priorities (from highest to lowest) for use of estuarine resources and for designating different estuarine management units shall be:

- (1) Uses which maintain the integrity of the estuarine ecosystem;

implementation requirements include standards that state agencies and local governments need to apply in making land use decisions within estuaries.³ OAR 660-017-0025 (effective on October 7, 1977) prohibits all but a few limited uses within a natural management unit, and did not allow the fill or residential development that the claimant desires.

Conclusions

The implementation requirements established by Goal 16 and OAR 660, division 17, prohibit the claimant's desired use and were in effect before the claimant acquired the subject property on November 14, 1978. These land use regulations do not allow fill and development on the subject property. Laws enacted or adopted since the claimant acquired the subject property in 1978 do not restrict the claimant's desired use of the property relative to when the claimant acquired it in 1978.

3. Effect of Regulations on Fair Market Value

In order to establish a valid claim, ORS 197.352(1) requires that the land use regulation(s) (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 \$100,000 as the reduction in the subject property's fair market value due to the regulations that restrict the claimant's desired use of the property. This amount is based on the claimant's estimate.

Because the use the claimant desires to carry out was subject to Goal 16 and OAR 660, division 17, at the time she acquired the property, the claimant has not established how these laws have reduced the fair market value of the subject property.

Conclusions

As explained in Section V.(1) of this report, Frances Engebretson is the claimant. She acquired the subject property on November 14, 1978. No state laws enacted or adopted since the claimant acquired the subject property restrict the use of the property relative to the uses allowed in 1978.

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- (2) Water-dependent uses requiring estuarine location, as consistent with the overall Oregon Estuarine Classification;
 - (3) Water-related uses which do not degrade or reduce the natural estuarine resources and values; and
 - (4) Non-dependent, non-related uses which do not alter, reduce or degrade the estuarine resources and values.

³ The specific implementation requirements that would apply to the subject property include:

(1) Unless fully addressed during the development and adoption of comprehensive plans, actions which would potentially alter the integrity of the estuarine ecosystem shall be preceded by a clear presentation of the impacts of the proposed alteration, and a demonstration of the public's need and gain which warrant such modification or loss.

(4) When dredge or fill activities are permitted in inter-tidal or tidal marsh areas, their effects shall be mitigated by creation or restoration of another area of similar potential to ensure that the integrity of the estuarine ecosystem is maintained.

Therefore, the fair market value of the subject property has not been reduced as a result of Goal 16 or OAR 660, division 17.

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 does not identify any state land use regulations enacted or adopted since the claimant acquired the subject property that restrict the use of the property relative to what would have been allowed when she acquired it on November 14, 1978. As set forth in Section V.(2) of this report, Goal 16 and OAR 660, division 17, were in effect when the claimant acquired the property in 1978. As a result, they are exempt under ORS 197.352(3)(E).

Conclusions

All of the state land use regulations that restrict the claimant's desired use of the subject property were in effect when the claimant acquired the property. Therefore, these state land use regulations are exempt under ORS 197.352(3)(E), which exempts laws in effect when the claimant acquired the subject 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 one or more laws that restrict 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 present owner acquired the property. The Commission, by rule, has directed that if the department determines a claim is valid, the Director of the department 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, Goal 16 and OAR 660, division 17, do not restrict the claimant's desired use of the subject property relative to what was permitted when the claimant acquired it in 1978, and do not reduce the fair market value of the property. These state laws are exempt under ORS 197.352(3)(E).

Conclusions

Based on the record and the foregoing findings and conclusions, the claimant has not established that she is entitled to relief under ORS 197.352(1) as a result of land use regulations enforced by the Commission or the department. Therefore, the department recommends that this claim be denied.

VII. COMMENTS ON THE DRAFT STAFF REPORT

The department issued its draft staff report on this claim on September 8, 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.

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

OREGON DEPARTMENT OF STATE LANDS

**Final Staff Report and Recommendation
September 26, 2006**

OREGON CLAIM NUMBER: M124760

NAME OF CLAIMANT (S): Frances Engebretson

MAILING ADDRESSES: Frances Engebretson
3050 Ash St
North Bend OR 97459

IDENTIFICATION OF PROPERTY: Township 26S, Range 13W, Section 2BA
Lots 1-11, Block 14, Boise Addition
(aka Tax Lot 4000)
City of Coos Bay in Coos County

OTHER INTERESTS IN PROPERTY: Patricia Barnes

DATE RECEIVED BY DAS: April 4, 2006

180—DAY DEADLINE: October 1, 2006

I. SUMMARY OF CLAIM

Frances Engebretson is the claimant. The claimant seeks compensation in the amount of \$100,000 for the reduction in the fair market value of the property she alleges has resulted from the enforcement of certain land use regulations to restrict the use of the property. The use the claimant desires to carry out that is alleged to be prohibited, limited or otherwise restricted by a state land use regulation is to fill the property and build five house on it.

II. SUMMARY OF STAFF RECOMMENDATION

Based on the findings and conclusions set forth below, the Department of State Lands (DSL) has determined that this claim does not meet the requirements for relief under ORS 197.352 as to laws administered by DSL. As a result, DSL staff recommends that the claim be denied as to state land use regulations administered by DSL.

III. COMMENTS

On July 31, 2006, pursuant to OAR 125-145-0080, the Department of Administrative Services (DAS) sent notices of this claim to owners of surrounding properties and other interested parties. According to DAS, five comments were received in response to the 10-day notice. The department has reviewed the comments in preparing this report.

The comments do not address whether the claim meets the criteria for relief under ORS 197.352. Comments concerning the effects a use of the subject property may have on surrounding areas are generally 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 effect may become relevant in determining which claims to pay compensation for rather than waiving a state law.

IV. TIMELINESS OF THE 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 December 2, 2004, written demand for compensation must be made on or before December 2, 2006, or the date the public entity applies the land use regulation as an approval criteria to an application submitted by the owner of the property, whichever is later.
2. For claims arising from land use regulations enacted after December 2, 2004, written demand for compensation must be made 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 April 4, 2006, for processing under OAR Chapter 125. The claim identifies "Coos Bay Estuary Marine Plan" as a 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.

Conclusions

The claim has been submitted on or before December 2, 2006. The claim is directed at land use regulations enacted before December 2, 2004. As a result, the claim is timely.

V. ANALYSIS OF THE CLAIM

1. Present Owner(s) of the Property

Requirement

ORS 197.352 provides a right to compensation to the *present* owner of the property, under certain circumstances. As a result, the first question that must be answered is whether the claimant is a present owner of the property.

Findings of Fact

The property that is identified in this claim is **T26SR13W, Section 2BA, Tax Lot 4000, located in Coos Bay in Coos County**. The claimant, Frances Engebretson, acquired an interest in the subject property on November 14, 1978, as reflected by a warranty deed included with the claim. On October 5, 1994, Frances Engebretson conveyed interest in the subject property to Frances Engebretson and Patricia Barnes, as joint tenants with right of survivorship interest, as reflected by another warranty deed included with the claim.

Conclusions

Based on the above findings, and those of the Department of Land Conservation and Development in its report on this claim, Frances Engebretson is a present owner of an interest in the property for purposes of ORS 197.352.

2. Date of Acquisition

Requirement

Under ORS 197.352, a claim may be made only for laws that took effect after the present owner or a family member of the present owner acquired the property. Under ORS 197.352, the right to compensation is dependent on the date when the present owner or a family member of the present owner acquired the property. A family member is defined as the wife, husband, son, daughter, mother, father, brother, brother-in-law, sister, sister-in-law, son-in-law, daughter-in-law, mother-in-law, father-in-law, aunt, uncle, niece, nephew, stepparent, stepchild, grandparent, or grandchild of the present owner of the property, an estate of any of the foregoing family members, or a legal entity owned by any one or combination of these family member or the present owner of the property.

Establishing the date of acquisition is key to determining what state laws are involved, and therefore whether the claimant's use of the property has been restricted and the fair market value of the property has been reduced.

Findings of Fact

Frances Engebretson acquired an interest in the subject property on November 14, 1978, as reflected by a warranty deed included with the claim.

Conclusions

Frances Engebretson is an "owner" of the subject property as that term is defined by ORS 197.352(11)(C) as of November 14, 1978.

3. The Desired Use of the Property

The claim indicates that the desired use of the property is to fill the land and build five homes on it. The claimant states that land use laws or rules restrict the use of the property in that she "cannot fill, build or develop."

4. Current State Laws that Restrict the Desired Use of the Property

Requirement

In order for a person to have a right to compensation for an existing state law under ORS 197.352, the claim must identify a state "land use regulation" that is being enforced, and the law must restrict the claimant's desired use of the property. Not all laws are "land use regulations." Under ORS 197.352 a state land use regulation is: (a) a Statewide Land Use Planning Goal of LCDC; (b) a rule of LCDC; (c) statutes and rules that regulate farming and forest practices; and (d) any statute regulating the use of land or any interest therein.

Findings of Fact

The claim identifies "Coos Bay Estuary Marine Plan" as the law or rule that allegedly restricts the use of this property. The claimant describes how this law or rule restricts the use of the property as "cannot fill, build or develop."

The Department of State Lands administrates ORS 196.660 to 196.990, Oregon's Removal-Fill Law, which generally requires a permit for the removal or fill of material in waters of the state, including wetlands and estuaries. The State Removal-Fill Law was initially enacted in 1967. Amendments to the statutes in 1979 require DSL to include in such permits conditions designed to mitigate for impacts to wetlands and estuaries.

The Department of State Lands has not made a wetland determination and no wetland delineation has been completed for this parcel. The property is included in the National Wetlands Inventory. The department has no other information regarding whether wetlands are located on the property, or might be affected by the claimant's desired use in a manner that would require authorization. The claimant has not applied for a removal-fill permit from the state under ORS 196.800 to 196.990, and DSL has not enforced any land use regulation with regard to the property since Measure 37 took effect on December 2, 2004.

Conclusions

The claim lacks sufficient information to determine which state land use regulations are the basis for the claim. The claim indicates the claimant seeks to fill, develop and build on the subject property.

However, DSL has not enforced ORS 196.800 to 196.990 with regard to the claimant's use of this property since December 2, 2004, and the claimant has not applied for a state permit to remove or fill within waters of the state on the property. Until the claimant submits an application for a removal-fill permit, DSL has no means of determining whether the listed statutes restrict the claimant's desired use of the property. In addition, as to the other uses desired by claimant, the Removal-Fill Law regulates fill and removal of material within "waters of the state," not subdivision or partition of property.

5. Laws in Effect When the Present Owners Acquired the Property

Requirement

ORS 197.352 requires the state to compensate the present owners of the property if a current state law restricts the use of the property. If the state is paying compensation, then the amount of compensation is determined by the difference in fair market value of the property with the current state land use regulations in place and the fair market value of the property if it were subject to whatever state land use regulations applied to the property when it was acquired by the present owners or a family member of the present owners (whichever occurred first). If the state elects not to pay compensation, however, it may only allow the present owners to use the property for a use permitted when they acquired the property (not when it was acquired by a family member).

As a result, in this section the report summarizes both the laws that were in effect when the present owners acquired the property, and the laws in effect when a family member of the owners acquired the property (if a family member conveyed the property to the present owners).

Findings of Fact

The Removal-Fill Law requires a permit for removal or fill within waters of the state, including wetlands and estuaries, and requires DSL to include in such permits conditions designed to mitigate for impacts to wetlands and estuaries. When the claimant acquired the property in 1978, the Removal-Fill Law was in effect.

The use that the claimant states in the claim is to "fill, build or develop" the property. If the development of the property will affect a jurisdictional wetland or waters of the state, then state statutes administered by the DSL may require a permit for filling and/or removing more than 50 cubic yards of material within any such waters of the state.

Until the claimant submits an application for a removal-fill permit, however, DSL is unable to determine whether state land use regulations administered by DSL restrict the use of the property. In addition, under ORS 197.352(1), DSL is authorized to provide relief to claimant only when it has enforced an existing state law through some action taken after December 2, 2004. In this case DSL has not taken any action to enforce the state Removal-Fill Law as to this property after December 2, 2004.

Conclusions

The claimant Frances Engebretson acquired the property after the Removal-Fill Law was enacted in 1967. DSL has not taken any action to enforce the state Removal-Fill Law as to this property after December 2, 2004, and based on the record for this claim DSL is unable to determine that state land use regulations that it administers have restricted the claimant's desired use of the property.

6. Effect on Fair Market Value

Requirement

There is a right to compensation from the state under ORS 197.352 only if the state enforces an existing land use regulation, and that results in a reduction in the fair market value of the property.

Findings of Fact

The claim includes an estimate of \$100,000 as the reduction in the subject property's fair market value due to current regulations. The claimant does not provide any documentation concerning reduction in value for the property.

Conclusions

As explained in Section V. (2) of this report, claimant Frances Engebretson acquired the subject property in 1978. Under ORS 197.352, 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.

The claim does not establish that a state land use regulation has restricted use of claimant's property resulting in reduction of fair market value. Until the owner applies for a permit to fill or remove material from wetlands or the agency takes some other action DSL has not enforced any state land use regulation, and DSL is unable to determine that there is any restriction on the claimant's desired uses of the property that would result in reduction of the property value.

7. Exemptions

Requirement

ORS 197.352 does not apply to state land use regulations that:

- Restrict or prohibit activities commonly and historically recognized as public nuisances under common law;
- Restrict or prohibit activities for the protection of public health and safety, such as fire and building codes, health and sanitation regulations, solid or hazardous waste regulations, and pollution control regulations;
- To the extent the land use regulation is require to comply with federal law;
- Restrict or prohibit the use of a property for the purpose of selling pornography or performing nude dancing; or that were
- Enacted prior to the date of acquisition of the property by the owner or a family member of the owner who owned the subject property prior to acquisition or inheritance by the owner, whichever occurred first.

Findings of Fact

The claim is based apparently on the provisions of the state Removal-Fill Law (ORS 196.800 to 196.990), which were initially enacted in 1967. Claimant Frances Engebretson acquired the subject property in 1978. As a result, there are no laws that have been enacted after the date the claimant acquired her interest, and any laws that took effect prior to that date are exempt under ORS 197.352(3)(E). Other exemptions may apply to the Removal-Fill Law.

The claimant should be aware that depending on the nature of the use of the property that is finally proposed, one or more of the exemptions in ORS 197.352(3)(A)-(D) may apply. However, until the claimant applies for a removal-fill permit, DSL is unable to determine what laws and what exemptions may apply.

Conclusions

Laws in effect when the claimant acquired an interest in the property are exempt under ORS 197.352(3)(E), and will continue to apply to the claimant's use of the property. The Removal-Fill Law was in effect when the claimant acquired her interest in the property.

This report addresses only those state laws that are identified in the claim, or that DSL is certain apply to the property based on the use(s) 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 DSL in the claim. Claimant should be aware that the less information provided to DSL in the claim, the greater the possibility that there may be additional laws administered by DSL that will later be determined to continue to apply to the claimant's use of the property.

VI. FORM OF RELIEF

1. Is the Present Owner Entitled to Relief

Requirement

A claimant is entitled to relief if:

- The claimant is a present owner of the property, or an interest in the property;
- A state land use regulation enacted before December 2, 2004 is being enforced against the claimant's use of the property;
- The state land use regulation that is being enforced restricts the claimant's use of the property; and
- The restriction reduces the fair market value of the property, relative to how the property could be used when the present owners or a family member of the present owners acquired the property.

The state may either pay compensation, or not apply the state land use regulation(s) in question.

Findings of fact

Based on the information currently in its record, the claim does not provide sufficient facts to qualify for relief under ORS 197.352.

Conclusions

DSL staff recommends denying this claim as to state land use regulations administered by DSL because the Removal-Fill Law has not been enforced by DSL as to the claimant's desired use of this property since December 2, 2004. In addition, the claimant has not identified whether the Removal-Fill Law applies to or restricts her desired use of the property. The Removal-Fill Law does not prohibit development in waters of the state; rather, it simply requires a permit for removal or filling of more than 50 cubic yards of material within a wetland or waterway. Until the claimant applies for a permit and DSL has acted on the permit application, DSL has not enforced the Oregon Removal-Fill Law and it is not possible to determine whether that law would restrict use of this property or reduce its fair market value.

VII. COMMENTS ON THE DRAFT STAFF REPORT

DSL issued its draft staff report on September 8, 2006. OAR 125-145-0100(3) provided an opportunity for the claimants or the claimants' authorized agent and any third parties who submitted comments under OAR 125-145-0080 to submit written comments, evidence or information in response to the draft staff report and recommendation. Comments were received from the claimant's representative. The comments indicate the claimant intends to apply to DSL for a removal-fill permit. DSL has not received a

removal-fill permit application for the subject property. If DSL receives a removal fill-permit application, DSL will not be able to determine whether the Removal-Fill Law applies to or restricts the claimant's desired use until final action is taken on the permit application.