

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. M124882
(BALLOT MEASURE 37) OF)
Samuel and Jean Lea, CLAIMANTS)

Claimants: Samuel and Jean Lea (the Claimants)

Property: Township 6S, Range 2W, Section 29A, Tax lot 1000
Marion 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 denied for a portion of the subject property, which is subject to the conservation easement. (See Final Report for details.)

The Claim is approved for the Northern 253-foot portion of the subject property, which is not subject to a conservation easement, 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 Lea's development of a dwelling on the northern 253-foot portion of the property not subject to the conservation easement: applicable provisions of Goal 3, ORS 215 and OAR 660, division 33, enacted or adopted after December 26, 1986. These land use regulations will not apply to Jean Lea only to the extent necessary to allow her to use the subject property for the use described in this report, and only to the extent that use was permitted when she acquired the property on December 26, 1986.
2. The action by the State of Oregon provides the state's authorization to Jean Lea to use the subject property for the use described in this report, subject to the standards in effect on December 26, 1986. On that date, the property was subject to compliance with Goal 3 and OAR

660, division 5, as implemented by Marion County's acknowledged EFU zone, and the applicable provisions ORS 215 then in effect.

3. To the extent that any law, order, deed, agreement or other legally enforceable public or private requirement provides that the subject 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 that portion of the property not subject to the conservation easement unless Jean Lea 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 227.160, other permits or authorizations from local, state or federal agencies and restrictions on the use of the subject property imposed by private parties.

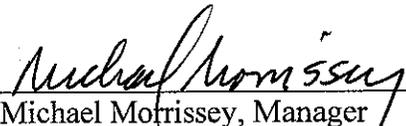
4. Any use of the property by Jean Lea under the terms of the order will remain subject to the following laws: (a) those laws not specified in (1) above; (b) any laws enacted or enforced by a public entity other than the Commission or the department; and (c) those laws not subject to ORS 197.352 including, without limitation, those laws exempted under ORS 197.352(3).

5. Without limiting the generality of the foregoing terms and conditions, in order for Jean Lea to use the portion of the property not subject to the conservation easement, 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 Jean Lea 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 her use of the subject property.

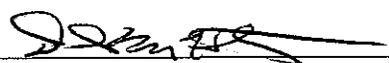
This Order is entered by the Manager for the Measure 37 Services Division of the DLCD as a final order of DLCD and the Land Conservation and Development Commission under ORS 197.352, OAR 660-002-0010(8), and OAR 125, division 145, and by the Administrator for the State Services Division of the DAS as 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


Michael Morrissey, Manager
DLCD, Measure 37 Services Division
Dated this 3rd day of October, 2006.

FOR the DEPARTMENT OF
ADMINISTRATIVE SERVICES:


David Hartwig, Administrator
DAS, State Services Division
Dated this 3rd day of October, 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, 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.”

ORS 197.352 (BALLOT MEASURE 37) CLAIM FOR COMPENSATION
OREGON DEPARTMENT OF LAND CONSERVATION AND DEVELOPMENT
Final Staff Report and Recommendation

October 3, 2006

STATE CLAIM NUMBER: M124882

NAMES OF CLAIMANTS: Samuel and Jean Lea

MAILING ADDRESS: PO Box 357
Gervais, Oregon 97026

PROPERTY IDENTIFICATION: Township 6S, Range 2W, Section 29A
Tax lot 1000
Marion County

OTHER CONTACT INFORMATION: James D. Vick, Attorney at Law
698 12th Street SE, Suite 200
Salem, Oregon 97301

DATE RECEIVED BY DAS: April 12, 2006

180-DAY DEADLINE: October 9, 2006

I. SUMMARY OF CLAIM

The claimants, Samuel and Jean Lea, seek compensation in the amount of \$328,720 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 claimants desire compensation or the right to develop a dwelling on the subject property. The subject property is located south of Lakeside Drive, near Gervais, in Marion 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 partially valid for the northern 253-foot portion of the subject property, which is not subject to a conservation easement, and not valid for the remaining portion of the property, which is subject to the conservation easement. The 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 Jean Lea's development of a dwelling on the northern 253-foot portion of the property not subject to the conservation easement: applicable provisions of Statewide Planning Goal 3 (Agricultural Lands), ORS 215 and Oregon Administrative Rules (OAR) 660, division 33, enacted or adopted after December 26, 1986. These laws will not apply to Jean Lea only to the extent necessary to allow her to use the portion

of the property not subject to the conservation easement for the use described in this report, and only to the extent that use was permitted when she acquired that portion on December 26, 1986.

The department has determined that the claim is not valid as to Samuel Lea because he is not an owner of the subject property. The department has further determined that the claim is not valid for the portion of the property that is subject to the conservation easement because neither the Commission nor the department has enforced laws that restrict Jean Lea's use of that portion of the private real property with the effect of reducing the property's fair market value. (See the complete recommendation in Section VI of this report.)

III. COMMENTS ON THE CLAIM

Comments Received

On August 10, 2006, 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, no written comments were received in response to the 10-day notice.

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 12, 2006, for processing under OAR 125, division 145. The claim asserts all statutes, rules and other land use restrictions, enacted after the claimants acquired the property, 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 claimants, Samuel and Jean Lea, acquired the subject property on December 26, 1986, as reflected by a contract included with the claim. On April 1, 1998, Samuel Lea transferred all of his interest in the subject property to Jean Lea, as reflected by a deed included with the claim. On February 13, 2002, the claimants conveyed a conservation easement for all but the roughly northern 253-foot portion of the subject property to Wetlands America Trust, Inc. A 2005–06 tax statement submitted with the claim establishes Jean Lea’s current ownership of the subject property.

Conclusions

The claimant, Jean Lea, is an “owner” of the subject property as that term is defined by ORS 197.352(11)(C), as of December 26, 1986. Samuel Lea is not an “owner” of the subject property as that term is defined by ORS 197.352(11)(C).

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 claimants desire to develop a dwelling on the subject property, and that current land use regulations prevent the desired use.¹

The claim is based generally on the applicable provisions of state law that require Exclusive Farm Use (EFU) zoning and restrict uses on EFU-zoned land. The subject property is zoned EFU by Marion County, as required by Goal 3, in accordance with ORS 215 and OAR 660,

¹ The claimants referred to state and local land use laws in general as applicable to this claim, but did not establish how any particular state land use regulation applies to the claimants’ desired use of the subject property or restricts its use with the effect of reducing its fair market value. On their face, most state land use regulations enacted or adopted after Jean Lea acquired the subject property either do not apply to the property or do not restrict the claimants’ desired use of the property with the effect of reducing its fair market value. This report addresses only those regulations that the department finds are applicable to and restrict Jean Lea’s use of the subject property, based on the claimants’ asserted desired use.

division 33, because the property is “agricultural land” as defined by Goal 3.² Goal 3 became effective on January 25, 1975, and required that agricultural lands as defined by Goal 3 be zoned EFU pursuant to ORS 215.

Current land use regulations, particularly ORS 215.284 and OAR 660, division 33, enacted or adopted pursuant to Goal 3, establish standards for development of dwellings on existing or proposed parcels on EFU-zoned land.

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. The Commission subsequently adopted amendments to comply with House Bill 3326 (Chapter 704, Oregon Laws 2001, effective on January 1, 2002), which were effective on May 22, 2002. (See administrative rule history for OAR 660-033-0100, -0130 and -0135.)

At the time the claimants acquired the subject property in 1986, it was subject to Marion County’s acknowledged EFU zone.³ At that time, the claimants’ desired use of the subject property would have been governed by the county’s acknowledged EFU zone and the applicable provisions of ORS 215 then in effect.⁴ ORS 215.283(1)(f) (1985 edition) generally allowed farm dwellings “customarily provided in conjunction with farm use.” Non-farm dwellings were allowed under ORS 215.283(3) if they were determined to be compatible with farm use, not interfere seriously with accepted farm practices, not materially alter the stability of the land use pattern in the area and be situated on generally unsuitable land for the production of farm crops and livestock.

Claimant Samuel Lea transferred his ownership of the subject property to Jean Lea in 1998 and is not a present owner of the subject property.

As noted in Section V.(1), on February 13, 2002, the claimants conveyed a conservation easement for all but the northern 253-foot portion of the subject property to Wetlands America Trust, Inc. The purpose of the conservation easement is to “assure that the Protected Property will be retained in perpetuity in its natural, scenic, and open condition.” The easement prohibits any “agricultural, commercial or industrial activity”; subdivision; the “construction or placing of buildings, docks, bridges, or other structures including but not limited to, transmission, or receiving towers, energy facilities, or water tanks. . .”; or “mobile homes, house trailers, temporary shelter or vehicles of any sort providing living quarters on the Protected Property” (Easement Sections 1.1, 4.1, 4.2 and 4.3).

² The subject property is “agricultural land” because it contains Natural Resources Conservation Service Class I–IV soils.

³ Marion County’s EFU zone was acknowledged by the Commission for compliance with Goal 3 on June 12, 1982.

⁴ After the county’s comprehensive plan and land use regulations were acknowledged by the Commission as complying with the statewide planning goals, the goals and implementing rules no longer applied directly to individual local land use decisions. *Byrd v. Stringer*, 295 Or 311 (1983). However, statutory requirements continue to apply, and insofar as the state and local provisions are materially the same, the local provisions must be interpreted consistent with the substance of the goals and implementing rules. *Forster v. Polk County*, 115 Or App 475 (1992) and *Kenagy v. Benton County*, 115 Or App 131 (1992).

Based on the information in the claim, the department has not identified any state laws that restrict Jean Lea's use of that portion of the property subject to the conservation easement.

The claim further does not establish whether or to what extent Jean Lea's desired development of the portion of the property not subject to the conservation easement was allowed under the standards in effect when she acquired the property on December 26, 1986.

Conclusions

For that portion of the subject property subject to the conservation easement acquired by Wetlands America Trust, Inc., the claim does not establish that any state laws currently restrict the use of the property. Because the property is subject to the conservation easement, neither the Commission nor the department enforces any laws that restrict Jean Lea's use of the property. Based on the record before the department, neither the Commission nor the department enforces any laws that restrict the use of that portion of the subject property.

For the northern 253-foot portion of the subject property not subject to the conservation easement, the current zoning requirements and dwelling standards established by Goal 3, ORS 215 and OAR 660, division 33, were enacted or adopted after Jean Lea acquired the subject property in 1986 and do not allow her desired development of the property. However, the claim does not establish whether or to what extent Jean Lea's desired use of the subject property complies with the standards for land development under Marion County's EFU zone and comprehensive plan in effect when she acquired the property on December 26, 1986.

Samuel Lea is not a present owner of the subject property. Therefore, no land use laws enforced by the Commission or the department restrict his use of the subject property with the effect of reducing its fair market value.

This report addresses only those state laws that are identified in the claim, or that the department is certain apply to the subject property based on the use that the claimants have identified. There may be other laws that currently apply to Jean Lea's use of the subject property, and that may continue to apply to her use of the property, that have not been identified in the claim. In some cases, it will not be possible to know which laws apply to a use of the subject property until there is a specific proposal for that use. When Jean Lea 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 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 \$328,720 as the reduction in the subject property's fair market value due to the regulations that restrict the claimants' desired use of the property. This amount is based on the claimants' assessment of the difference in value of the property between its value subject to the conservation easement and if developed with a dwelling.

Conclusions

As explained in Section V.(1) of this report, the claimants are Jean Lea who acquired the subject property on December 26, 1986, and her husband Samuel Lea who is not a present owner of the property. Under ORS 197.352, Samuel Lea is not entitled to compensation.

For that portion of the property subject to a conservation easement acquired by Wetlands America Trust, Inc., no state laws enacted or adopted since Jean Lea acquired the subject property restrict the use of this portion of the property relative to the uses allowed in 1986. Therefore, the fair market value of that portion of the subject property has not been reduced as a result of land use regulations enforced by the Commission or the department.

For the northern 253-foot portion of the property, which is not subject to the conservation easement, under ORS 197.352, Jean Lea is due compensation for land use regulations that restrict the use of the subject property and have the effect of reducing its fair market value. Based on the findings and conclusions in Section V.(2) of this report, laws enacted or adopted since she acquired the subject property restrict her desired use of the portion of the property not subject to the conservation easement. The claimants estimate that the effect of the regulations on the fair market value of the subject property is a reduction of \$328,720.

Without an appraisal or other documentation and without verification of whether or the extent to which the claimants' desired use of the subject property was allowed under the standards in effect when Jean Lea acquired the property, it is not possible to substantiate the specific dollar amount by which the land use regulations have reduced the fair market value of the property. Nevertheless, based on the evidence in the record for this claim, the department determines that the fair market value of the subject property has been reduced to some extent 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 subject property, including applicable provisions of Goal 3, ORS 215 and OAR 660, division 33, which Marion County has implemented through its current EFU zone. With the exception of amendments enacted or adopted after December 26, 1986, Goal 3, ORS 215 and OAR 660 were in effect when Jean Lea acquired the subject property.

Conclusions

Without a specific development proposal for the subject property, it is not possible for the department to determine all the laws that 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 statutory, goal and rule restrictions on development of the subject property are not exempt under ORS 197.352(3)(E) only to the extent they were enacted or

adopted after Jean Lea acquired the property on December 26, 1986. Provisions of Goal 3, ORS 215 and OAR 660 in effect when Jean Lea acquired this portion of the subject property in 1986 are exempt under ORS 197.352(3)(E) and will continue to apply to the property.

Other laws in effect when Jean Lea acquired the subject property are also exempt under ORS 197.352(3)(E) and will continue to apply to her use of the property. There may be other laws that continue to apply to her use of the subject property that have not been identified in the claim. In some cases, it will not be possible to know which laws apply to a use of the subject property until there is a specific proposal for that use. When Jean Lea 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).

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, laws enforced by the Commission or the department do not restrict Samuel Lea's desired use because he is not a present owner of the property. In addition, laws enforced by the Commission or the department do not restrict Jean Lea's desired use of the portion of the property subject to the conservation easement, relative to what was permitted when she acquired the property in 1986, and do not reduce the fair market value of the property.

Based on the findings and conclusions set forth in this report, laws enforced by the Commission or the department restrict Jean Lea's desired use of the northern 253-foot portion of the property not subject to the conservation easement. The claim asserts that existing state land use regulations enforced by the Commission or the department have the effect of reducing the fair market value of the subject property by \$328,720.

However, because the claim does not provide an appraisal or other relevant evidence demonstrating that the land use regulations described in Section V.(2) reduce the fair market value of the subject property, a specific amount of compensation cannot be determined. In order to determine a specific amount of the compensation due for this claim, it would also be necessary to verify whether or the extent to which the claimants' desired use of the subject property was allowed under the standards in effect when Jean Lea acquired the property. Nevertheless, based on the record for this claim, the department has determined that the laws on which the claim is based have reduced the fair market value of the subject 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 Jean Lea to use that portion of the property not subject to the conservation easement for a use permitted at the time she acquired that portion on December 26, 1986.

Conclusions

Based on the record and the foregoing findings and conclusions, the department has determined Samuel Lea is not entitled to relief under ORS 197.352 because he is not a present owner of the subject property. Jean Lea is not entitled to relief under ORS 197.352 for the portion of the property subject to the conservation easement because laws enforced by the Commission or the department do not restrict her use of that portion of the subject property with the effect of reducing its fair market value. Therefore, the department recommends that this claim be denied as to Samuel Lea and be denied for that portion of the property subject to the conservation easement.

Based on the record, the department further recommends that the claim be approved as to Jean Lea For the remaining northern 253-foot portion of the property not subject to the conservation easement, 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 Lea's development of a dwelling on the northern 253-foot portion of the property not subject to the conservation easement: applicable provisions of Goal 3, ORS 215 and OAR 660, division 33, enacted or adopted after December 26, 1986. These land use regulations will not apply to Jean Lea only to the extent necessary to allow her to use the subject property for the use described in this report, and only to the extent that use was permitted when she acquired the property on December 26, 1986.
2. The action by the State of Oregon provides the state's authorization to Jean Lea to use the subject property for the use described in this report, subject to the standards in effect on December 26, 1986. On that date, the property was subject to compliance with Goal 3 and OAR 660, division 5, as implemented by Marion County's acknowledged EFU zone, and the applicable provisions ORS 215 then in effect.
3. To the extent that any law, order, deed, agreement or other legally enforceable public or private requirement provides that the subject 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 that portion of the property not subject to the conservation easement unless Jean Lea 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 227.160, other permits or authorizations from local, state or federal agencies and restrictions on the use of the subject property imposed by private parties.
4. Any use of the property by Jean Lea 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 Jean Lea to use the portion of the property not subject to the conservation easement, 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 Jean Lea 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 her use of the subject property.

VII. COMMENTS ON THE DRAFT STAFF REPORT

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