

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 A  
COMPENSATION UNDER ORS 197.352 )      CLAIM NO. M129825  
(BALLOT MEASURE 37) OF )  
Robert and Troy Eberle, CLAIMANTS )

Claimants:    Robert and Troy Eberle (the Claimants)

Property:      Township 7S, Range 1E, Section 7D, Tax lots 1100 and 1200, 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 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 Robert and Troy Eberle's division of the 3.57-acre subject property into one 1.84-acre parcel and one 1.73-acre parcel or to their development of a dwelling on each parcel: applicable provisions of Goal 3 and 4, ORS 215 and OAR 660, divisions 6, and 33, enacted or adopted after Robert and Troy Eberle acquired the subject property. These land use regulations will not apply to Robert and Troy Eberle only to the extent necessary to allow them to use the subject property for the use described in this report, and only to the extent that use was permitted when Robert Eberle acquired the property on July 19, 1976, and when Troy Eberle acquired the property on January 15, 1985. The department acknowledges that the relief to which the claimants are entitled under ORS 197.352 may not allow them to use the subject property in the manner set forth in the claim.

2. The action by the State of Oregon provides the state's authorization to Robert and Troy Eberle to use the subject property for the use described in this report, subject to the standards in effect when Robert Eberle acquired the property on July 19, 1976, and when Troy Eberle

acquired the property on January 15, 1985. On July 19, 1976, the property was subject to the applicable provisions of Goals 3 and 4, and ORS 215 then in effect. On January 15, 1985, the property was subject to the applicable provisions of Goals 3 and 4 and OAR 660, divisions 5 and 6, as implemented through Marion County's acknowledged FT zone, and the provisions of 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 property unless Robert or Troy Eberle 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 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 subject property by Robert or Troy Eberle 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).

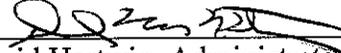
5. Without limiting the generality of the foregoing terms and conditions, in order for Robert or Troy Eberle to use the subject property, it may be necessary for him to obtain a decision under ORS 197.352 from a city and/or county and/or metropolitan service district that enforces land use regulations applicable to the property. Nothing in this order relieves Robert or Troy Eberle 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 his 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 31<sup>st</sup> day of January, 2007.

FOR the DEPARTMENT OF  
ADMINISTRATIVE SERVICES:

  
David Hartwig, Administrator  
DAS, State Services Division  
Dated this 31<sup>st</sup> day of January, 2007.

## **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.”

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 B  
COMPENSATION UNDER ORS 197.352 ) CLAIM NO. M129825  
(BALLOT MEASURE 37) OF )  
Donna Eberle, CLAIMANT )

Claimant: Donna Eberle (the Claimant)

Property: Township 7S, Range 1E, Section 7D, Tax lots 1100 and 1200  
Marion 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

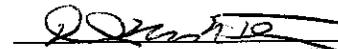
The Claim is denied as to laws administered by DLCD and the Land Conservation and Development Commission (LCDC) for the reasons set forth in the DLCD Report.

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 chapter 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 chapter 125, division 145, and ORS chapter 293.

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

FOR the DEPARTMENT OF  
ADMINISTRATIVE SERVICES:

  
Michael Morrissey, Manager  
DLCD, Measure 37 Services Division  
Dated this 31<sup>st</sup> day of January, 2007.

  
David Hartwig, Administrator  
DAS, State Services Division  
Dated this 31<sup>st</sup> day of January, 2007.

### 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 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)

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

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

January 31, 2007

**STATE CLAIM NUMBER:** M129825

**NAMES OF CLAIMANTS:** Robert, Donna and Troy Eberle

**MAILING ADDRESS:** Robert and Donna Eberle  
3061 Seminole Road NE  
Silverton, Oregon 97381

Troy Eberle  
4081 Mt. View Road NE  
Silverton, Oregon 97381

**PROPERTY IDENTIFICATION:** Township 7S, Range 1E, Section 7D  
Tax lots 1100 and 1200  
Marion County

**OTHER CONTACT INFORMATION:** Roger W. Gracey  
PO Box 565  
Silverton, Oregon 97381

**DATE RECEIVED BY DAS:** August 8, 2006

**180-DAY DEADLINE:** February 4, 2007

**I. SUMMARY OF CLAIM**

The claimants, Robert, Donna and Troy Eberle, seek compensation in the amount of \$307,500 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 divide the 3.57-acre subject property into one 1.84-acre and one 1.73-acre parcel and to develop a dwelling on each parcel. The subject property is located at 3061 Seminole Road NE, near Silverton, 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 valid in part. 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 Robert and Troy Eberle's division of the 3.57-acre subject property into one 1.84-

acre parcel and one 1.73-acre parcel and to their development of a dwelling on each parcel: applicable provisions of Statewide Planning Goals 3 (Agricultural Lands) and 4 (Forest Lands), ORS 215 and Oregon Administrative Rules (OAR) 660, divisions 6, and 33, enacted or adopted after they acquired the subject property. These land use regulations will not apply to claimants Robert and Troy Eberle only to the extent necessary to allow them to use the subject property for the use described in this report, and only to the extent that use was permitted when Robert Eberle acquired the property on July 19, 1976 and when Troy Eberle acquired the property on January 21, 1985.

Based on the findings and conclusions set forth below, the department has determined that this claim is not valid with regard to Donna Eberle because the claimants have not established her ownership of the property. (See the complete recommendation in Section VI. of this report.)

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

#### **Comments Received**

On November 22, 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, one written comment was received in response to the 10-day notice.

The comment does not address whether the claim meets the criteria for relief under ORS 197.352. Comments concerning the effects a use of the 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 effects may become relevant in determining which claims to pay compensation for instead of waive a state law. (See the comment letter 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 August 8, 2006, for processing under OAR 125, division 145. The claim identifies Marion County's Farm/Timber zone, ORS 215.263, 215.284

and 215.780 and OAR 660, division 33, 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**

Ownership information submitted with the claim is contradictory, or not substantiated by the Marion County Assessor’s Office.

Claimants Robert and Donna Eberle acquired the subject property on July 19, 1976, as reflected by a contract included with the claim. On January 15, 1985, however, a bargain and sales deed signed in fulfillment of the 1976 purchase contract conveyed the subject property to Robert and his son, Troy Eberle. Therefore, as of January 15, 1985, Troy Eberle acquired an ownership interest in the subject property, and Donna Eberle no longer had ownership interest in it. A title report provided by the claimants confirms Robert and Troy Eberle’s current ownership of the subject property.

### **Conclusions**

Claimants Robert and Troy Eberle are “owners” of the subject property, as that term is defined by ORS 197.352(11)(C). Robert Eberle has been an owner since July 19, 1976. Troy Eberle, has been an owner since January 15, 1985. Claimants Donna and Robert Eberle are “family members” of Troy Eberle, as that term is defined by ORS 197.352(11)(A).

### **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 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 indicates that the claimants desire to divide the 3.57-acre subject property into one 1.84-acre parcel and one 1.73-acre parcel and to develop a dwelling on each parcel and that state and local land use regulations prevent the desired use.

The claim is based generally on the applicable provisions of state law that require mixed farm-forest zoning and restrict uses on land zoned mixed farm-forest. The subject property is zoned by Marion County as Farm/Timber, which is a mixed agricultural and forest land zone, as required by Goal 4 and the implementing provisions of OAR 660, division 6 (effective on February 5, 1990), subsequently amended on March 1, 1994, to comply with the provisions of House Bill 3661 (Chapter 792, Oregon Laws 1993).

Under OAR 660-006-0050, all the uses permitted under Goals 3 and 4 are allowed in mixed agriculture and forest zones except that for dwellings, either the Goal 3 or 4 standards are applicable based on the predominant use of the tract on January 1, 1993.<sup>1</sup> Depending on the predominant use on January 1, 1993, the property is subject to either the requirements for dwellings applicable under Exclusive Farm Use (EFU) zoning required by Goal 3 and OAR 660, division 33, or forest zone provisions required by Goal 4 and OAR 660, division 6.

For land divisions, OAR 660-006-0055 authorizes the creation of new parcels based on the standards applicable to farm or forest zones that implement the minimum lot size specified in ORS 215.780. Under ORS 215.780(2)(a), the minimum lot size in Marion County's Farm/Timber zone is 80 acres. The subject property cannot be divided into parcels smaller than 80 acres.

Robert Eberle acquired the subject property in 1976, after the adoption of the statewide planning goals, but before the Commission acknowledged Marion County's land use regulations to be in compliance with the statewide planning goals pursuant to ORS 197.250 and 197.251.<sup>2</sup> Because the Commission had not acknowledged the county's plan and land use regulations when Robert Eberle acquired the subject property on July 19, 1976, the applicable statewide planning goals would have applied directly to any development application for the subject property.<sup>3</sup>

As adopted in 1975, Goal 3 required that agricultural lands be preserved and zoned for EFU pursuant to ORS 215. Goal 4, as adopted in 1975, required that forest lands be designated for

---

<sup>1</sup> No information was provided to the department regarding the predominant use of the subject property on January 1, 1993.

<sup>2</sup> Marion County's comprehensive plan was acknowledged as to Goal 4 on October 19, 1981, and as to Goal 3 on November 16, 1983.

<sup>3</sup> The statewide planning goals became effective on January 25, 1975, and were applicable to legislative land use decisions and some quasi-judicial land use decisions prior to the Commission's acknowledgment of each county's land use regulations. *Perkins v. City of Rajneeshpuram*, 300 Or 1 (1985); *Alexanderson v. Polk County*, 289 Or 427, rev den 290 Or 137 (1980); *Sunnyside Neighborhood Assn. v. Clackamas County*, 280 Or 569 (1977); *Jurgenson v. Union County*, 42 Or App 505 (1979) and *1000 Friends of Oregon v. Benton County*, 32 Or App 413 (1978). After the county's plan and land use regulations were acknowledged by the Commission, the statewide planning goals and implementing rules no longer directly applied to such 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); *Kenagy v. Benton County*, 115 Or App 131 (1992).

forest uses. Depending on the nature of the property, when Robert Eberle acquired it, the property would have been subject to Goal 3 or 4 and either EFU zoning pursuant to ORS 215 or forest zoning adequate to retain forest lands for forest uses.

Under Goal 3, the state standards for a division of land required that the created lots or parcels be of a size "appropriate for the continuation of the existing commercial agricultural enterprise within the area." Further, ORS 215.263 (1975 edition) required that all land divisions subject to EFU zoning comply with the legislative intent in ORS 215.243 (Agricultural Land Use Policy). Thus, under Goal 3, Robert Eberle's opportunity to divide the subject property when he acquired it on July 19, 1976, was limited to new lots or parcels that were (1) appropriate for the continuation of the existing commercial agricultural enterprise in the area, and (2) shown to be consistent with the legislative intent in ORS 215. At that time, under Goal 3, farm dwellings were allowed if they were determined to be "customarily provided in conjunction with farm use" under ORS 215.213(1)(e) (1975 edition),<sup>4</sup> and non-farm dwellings were subject to ORS 215.213(3) (1975 edition).<sup>5</sup> Other uses were authorized and governed by the applicable provisions under Goal 3 and ORS 215.213.

Under Goal 4, the state standards required uses to "conserve forest lands for forest uses." Specifically, Goal 4 only allowed land divisions that would protect commercial forest lands for commercial forest uses. Dwellings in forest zones could only be allowed if found to be "necessary and accessory" to one of the enumerated forest uses listed in Goal 4.<sup>6</sup>

The claim does not establish whether or the extent to which the claimants' desired use of the property satisfies the standards in effect when Robert Eberle acquired it in 1976.

## **Conclusions**

The current zoning requirements, minimum lot size and dwelling standards established under Goal 4 for lands zoned for mixed farm-forest use and the statutory, goal and rule restrictions under applicable provisions of ORS 215 and OAR 660, divisions 6 and 33, were enacted or adopted after Robert Eberle acquired the subject property in 1976, and do not allow the claimants' desired division and development of the property. However, the claim does not

<sup>4</sup> Under ORS 215.213, a farm dwelling could be established on agricultural land only if the farm use to which the dwelling relates exists (*Newcomer v. Clackamas County*, 92 Or App 174, modified 94 Or App 33 (1988) and *Matteo v. Polk County*, 11 Or LUBA 259, 263 (1984), affirmed without opinion 70 Or App 179 (1984)). Guidance on the application of the statutory standards for farm and non-farm dwellings in EFU zones can be found in the Commission rules (OAR 660, division 5, adopted on July 21, 1982, amended on June 7, 1986, and repealed on August 7, 1993).

<sup>5</sup> When determining whether land is "generally unsuitable for the production of farm crops and livestock" under ORS 215.213(3), the entire parcel or tract must be evaluated rather than a portion thereof. *Smith v. Clackamas County*, 313 Or 519 (1992).

<sup>6</sup> Goal 4 prohibited uses that were not enumerated by Goal 4 as permissible uses for forest lands as well as those that were not necessary and accessory to an enumerated forest use. *Lamb v. Lane County*, 7 Or LUBA 137 (1983). Dwellings in forest lands were required to be "necessary and accessory" to show that such dwellings complied with the Goal 4 requirement that local land use regulations must "conserve forest lands for forest uses." *1000 Friends v. LCDC (Curry County)*, 301 Or 447 (1986). A dwelling that may "enhance" forest uses is not "necessary and accessory" to a forest use to the extent required by Goal 4. *1000 Friends of Oregon v. LCDC (Lane County)*, 305 Or 384 (1988). For additional guidance, the Goal 4 provisions were interpreted under OAR 660, division 6, effective on September 1, 1982, in *1000 Friends of Oregon v. LCDC (Lane County)* and in *1000 Friends v. LCDC (Curry County)*.

establish whether or to what extent the claimants' desired use of the subject property complies with the standards for land division and development under Goal 3 or 4 applicable and in effect when Robert Eberle acquired the property on July 19, 1976.

As explained in Section V.(1), claimant Donna Eberle is not an owner of the subject property, that term is defined in ORS 197.352(11)(C). Therefore, no laws enforced by the Commission or the department restrict her use of the subject private real property with the effect of reducing the property's fair market value.

### **3. Effect of Regulations on Fair Market Value**

In order to establish a valid claim, ORS 197.352(1) requires that the land use regulations (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 \$307,500 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 a comparative market analysis prepared by the claimants' real estate broker and submitted with the claim.

### **Conclusions**

As explained in Section V.(1) of this report, the claimants are Robert, Donna and Troy Eberle. Robert Eberle acquired the subject property in 1976 and his son, Troy Eberle, acquired the subject property in 1985. Donna Eberle is not a present ownership interest in the subject property and, therefore, is not entitled to compensation under ORS 197.352. Under ORS 197.352, Robert and Troy Eberle are due compensation for land use regulations that restrict the use of the 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 Robert Eberle acquired the subject property restrict the claimants' desired use of the property. The claimants estimate that the effect of the regulations on the fair market value of the subject property is a reduction of \$307,500.

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 Robert Eberle 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 subject 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 Goals 3 and 4, ORS 215 and OAR 660, divisions 6, and 33, which Marion County has implemented through its current Farm/Timber zone. With the exception of Goals 3 and 4 and ORS 215 in effect on July 19, 1976, these land use regulations were enacted or adopted after Robert Eberle 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. With the exception of Goals 3 and 4 and ORS 215 in effect on July 19, 1976, it appears that the general statutory, goal and rule restrictions on residential division and development of the subject property were not in effect when Robert Eberle acquired the property on July 19, 1976. As a result, these laws are not exempt under ORS 197.352. Provisions of Goals 3 and 4 and ORS 215 in effect when Robert Eberle acquired the subject property in 1976 are exempt under ORS 197.352(3)(E) and do not provide a basis for compensation. In addition, other laws enacted or adopted for a purpose set forth in ORS 197.352(3)(A) to (D) are also exempt and do not provide a basis for compensation.

As explained in Section V.(1) of this report, Donna is not a present owner of the subject property as that term is defined in ORS 197.352(11)(C). Therefore, the issue of whether any laws are exempt is not relevant to her claim.

## **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, claimant Donna Eberle is not a current owner of the property. Accordingly, no laws enforced by the Commission or the department restrict her desired use of the subject property with the effect of reducing its fair market value.

Based further on the findings and conclusions of this report, laws enforced by the Commission or the department restrict Robert and Troy Eberle's desired use of the subject property. 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 \$307,500. 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 compensation due for this claim, it would also be necessary to verify whether or the extent to which Robert and Troy Eberle's desired use of the subject property was allowed under the standards in effect when Robert Eberle 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 Robert Eberle to use the subject property for a use permitted when he acquired the property on July 19, 1976 and to allow Troy Eberle to use the property for a use permitted when he acquired the property on January 15, 1985.

At the time Troy Eberle acquired an interest in the subject property, it was subject to Marion County's acknowledged FT zone.<sup>7</sup> When Troy Eberle acquired the subject property, the claimants' desired use of the property would have been governed by Goals 3 and 4, and OAR 660, divisions 5, and 6, as implemented through the county's acknowledged FT zone and the applicable provisions of ORS 215 then in effect.<sup>8</sup>

The claim does not establish whether or to what extent the claimants' desired division and development of the subject property was allowed under the standards in effect when Troy Eberle acquired the property on January 15, 1985.

In addition to the applicable provisions of Goals 3 and 4, ORS 215 and OAR 660, divisions 6 and 5 in effect when Troy Eberle acquired the property on January 15, 1985, and other laws in effect when the claimants acquired the subject property, there may be other laws that apply to the claimants' use of the property. The department notes that ORS 215.730 and OAR 660, division 6, specifically OAR 660-006-0029, include standards for siting dwellings in forest zones. These provisions include fire protection standards for dwellings and for surrounding forest lands. ORS 197.352(3)(B) specifically exempts regulations "restricting or prohibiting activities for the

---

<sup>7</sup> Marion County's FT zone was acknowledged by the Commission for compliance with Goal 3 on June 10, 1982, and 4 on October 19, 1981.

<sup>8</sup> 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).

In January, 1985, ORS 215.263 (1983 edition) required that divisions of land in EFU zones be "appropriate for the continuation of the existing commercial agricultural enterprise within the area" or not smaller than the minimum size in the county's acknowledged plan. ORS 215.283(1)(f) (1983 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.

protection of public health and safety, such as fire and building codes. . . .” To the extent they are applicable to the claimants’ property, the siting standards for dwellings in forest zones in ORS 215.730 and OAR 660, division 6, are exempt under ORS 197.352(3)(B).

There may be other laws that continue to apply to Robert and Troy Eberle’s 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 subject property until there is a specific proposal for that use. When the claimants 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 subject property, based on the use that the claimants have 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 claimants should be aware that the less information they have provided to the department in the claim, the greater the possibility that there may be additional laws that will later be determined to continue to apply their use of the subject property.

### **Conclusions**

Based on the record before the department, claimants Donna Eberle 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 because Donna Eberle is not a present owner of the subject property. Therefore, the department recommends that this claim be denied with regard to Donna Eberle. The department otherwise recommends that the claim be approved for Robert and Troy Eberle, 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 Robert and Troy Eberle’s division of the 3.57-acre subject property into one 1.84-acre parcel and one 1.73-acre parcel or to their development of a dwelling on each parcel: applicable provisions of Goal 3 and 4, ORS 215 and OAR 660, divisions 6, and 33, enacted or adopted after Robert and Troy Eberle acquired the subject property. These land use regulations will not apply to Robert and Troy Eberle only to the extent necessary to allow them to use the subject property for the use described in this report, and only to the extent that use was permitted when Robert Eberle acquired the property on July 19, 1976, and when Troy Eberle acquired the property on January 15, 1985. The department acknowledges that the relief to which the claimants are entitled under ORS 197.352 may not allow them to use the subject property in the manner set forth in the claim.
2. The action by the State of Oregon provides the state’s authorization to Robert and Troy Eberle to use the subject property for the use described in this report, subject to the standards in effect when Robert Eberle acquired the property on July 19, 1976, and when Troy Eberle acquired the property on January 15, 1985. On July 19, 1976, the property was subject to the applicable provisions of Goals 3 and 4, and ORS 215 then in effect. On January 15, 1985, the property was subject to the applicable provisions of Goals 3 and 4 and OAR 660, divisions 5 and

6, as implemented through Marion County's acknowledged FT zone, and the provisions of 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 property unless Robert or Troy Eberle 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 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 subject property by Robert or Troy Eberle 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 Robert or Troy Eberle to use the subject property, it may be necessary for him to obtain a decision under ORS 197.352 from a city and/or county and/or metropolitan service district that enforces land use regulations applicable to the property. Nothing in this order relieves Robert or Troy Eberle 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 his use of the subject property.

## **VII. COMMENTS ON THE DRAFT STAFF REPORT**

The department issued its draft staff report on this claim on January 9, 2007. 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.