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 COMPENSATION UNDER ORS 197.352 (BALLOT MEASURE 37) OF Eden F. Axmaker, CLAIMANT	))))	FINAL ORDER CLAIM NO. M118398

Claimants: Eden F. Axmaker (the Claimant)

Property: TL 200, 201 and 202, T 6S, R 2E, S 35, Clackamas 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:

Based on the record, the department recommends that the claim be approved, subject to the following terms.

1. In lieu of compensation under ORS 197.352, the State of Oregon will not apply the following laws to the claimant's division of the 118.14-acre property into three parcels or to the claimant's development of a residential dwelling on each parcel: applicable provisions of Statewide Planning Goal 4, ORS 215 and OAR 660 division 6 enacted after December 14, 1992. These laws will not apply to the claimant only to the extent necessary to allow the claimant to use the property for the use described in this report, and only to the extent that use was permitted at the time the claimant acquired the property on December 14, 1992.

2. The action by the State of Oregon provides the state's authorization to the claimant to use the property subject to the standards in effect on December 14, 1992. On that date, the property was subject to applicable provisions of Statewide Planning Goal 4, ORS 215 and OAR 660, division 6, then in effect.

3. To the extent that any law, order, deed, agreement or other legally enforceable public or private requirement provides that the property may not be used without a permit, license, or other form of authorization or consent, the order will not authorize the use of the property unless the claimant first obtains that permit, license or other form of authorization or consent. Such requirements may include, but are not limited to: a building permit, a land use decision, a permit as defined in ORS 215.402 or ORS 227.160, other permits or authorizations from local, state or federal agencies, and restrictions on the use of the property imposed by private parties.

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

5. Without limiting the generality of the foregoing terms and conditions, in order for the claimant to use the property, it may be necessary for claimant to obtain a decision under ORS 197.352 from a city and/or county and/or metropolitan service district that enforces land use regulations applicable to the property. Nothing in this order relieves the claimant from the necessity of obtaining a decision under ORS 197.352 from a local public entity that has jurisdiction to enforce a land use regulation applicable to a use of the property by the claimant.

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

FOR DLCD AND THE LAND CONSERVATION AND DEVELOPMENT COMMISSION:

Lane Shetterly, Director
DLCD
Dated this 14th day of March, 2006.

FOR the DEPARTMENT OF ADMINISTRATIVE SERVICES:

Dugan Petty, Deputy Administrator
DAS, State Services Division
Dated this 14th day of March, 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 ORS 197.352): 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)

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."

BALLOT MEASURE 37 (ORS 197.352)
CLAIM FOR COMPENSATION

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

March 14, 2006

STATE CLAIM NUMBER:	M118398
NAME OF CLAIMANT:	Eden F. Axmaker
MAILING ADDRESS:	207 Sweigle Avenue Molalla, Oregon 97038
PROPERTY IDENTIFICATION:	Township 6S, Range 2E, Section 35 Tax lots 200, 201 and 202 Clackamas County
DATE RECEIVED BY DAS:	May 6, 2005
180-DAY DEADLINE:	March 21, 2006[1]

I. SUMMARY OF CLAIM

The claimant, Eden F. Axmaker, seeks compensation in the amount of $400,000 for the reduction in fair market value as a result of certain land use regulations that are alleged to restrict the use of certain private real property. The claimant desires compensation or the right to divide the 118.14-acre property into three parcels and to develop a residential dwelling on each parcel. The property is located at 41500 South Sawtell Road, near Molalla in Clackamas 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. 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 claimant's division of the 118.14-acre property into three parcels or to the claimant's development of a residential dwelling on each parcel: applicable provisions of Statewide Planning Goal 4 (Forest Lands), ORS 215, and OAR 660 division 6 enacted after December 14, 1992. These laws will not apply to the claimant only to the extent necessary to allow the claimant to use the property for the use described in this report, and only to the extent

[1] This date reflects 180 days from the date the claim was submitted as extended by the 139 days enforcement of Measure 37 was suspended during the pendency of the appeal of Macpherson v. Dep't of Admin. Servs., 340 Or __, 2006 Ore. LEXIS 104 (February 21, 2006)

that use was permitted at the time the claimant acquired the property in 1992. (See the complete recommendation in Section VI. of this report.)

III. COMMENTS ON THE CLAIM

Comments Received

On May 27, 2005, pursuant to OAR 125-145-0080, the Oregon Department of Administrative Services (DAS) provided written notice to the owners of surrounding properties. According to DAS, two written comments were received in response to the 10-day notice.[2]

One comment letter is relevant to whether the restriction of the claimant's use of the property reduces the fair market value of the property. This comment has been considered by the department in preparing this report. The second comment letter addresses continued use of and does not address whether the claim meets the criteria for relief (compensation or waiver) under ORS 197.352. (See comment letters in the department's claim file.)

IV. TIMELINESS OF CLAIM

Requirement

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

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

Findings of Fact

This claim was submitted to DAS on May 6, 2005, for processing under OAR 125 division 145. The claim identifies provisions of ORS 215 and OAR 660 division 6 as laws that restrict the use of the property as the 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. (See citations of statutory and administrative rule history of the Oregon Revised Statutes and Oregon Administrative Rules.)

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[2] The 10-day notice period was suspended for 139 days during the pendency of the Macpherson v. Dep't of Admin. Servs., 340 Or __ , 2006 Ore. LEXIS 104 (February 21, 2006), which suspended all Measure 37 deadlines.

Conclusions

The claim has been submitted within two years of December 2, 2004, the effective date of Measure 37, based on land use regulations adopted prior to December 2, 2004, and is therefore timely filed.

V. ANALYSIS OF CLAIM

1. Ownership

ORS 197.352 provides for payment of compensation or relief from specific laws for "owners" as that term is defined in ORS 197.352. ORS 197.352(11)(C) defines "owner" as "the present owner of the property, or any interest therein."

Findings of Fact

The claimant, Eden F. Axmaker, acquired the subject property on December 14, 1992, as reflected by a Bargain and Sale Deed included with the claim. A copy of a Title Report indicates that the claimant is the current owner of the subject property.

Conclusions

The claimant, Eden F. Axmaker, is an "owner" of the subject property, as that term is defined by ORS 197.352(11)(C), as of December 14, 1992.

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 identifies ORS 215.705, ORS 215.780(1)(c), OAR 660-006-0026(1)(a), and OAR 660-006-0027(1) as land use regulations that restrict the use of the property relative to the uses allowed at the time the claimant acquired the property.

The subject property is currently zoned Timber (TBR) by Clackamas County. The county's TBR zone was adopted in 1994, to comply with the Statewide Planning Goal 4 (Forest Lands) and OAR 660, division 6.

Statewide Planning Goal 4 (Forest Lands) and laws applicable to land zoned for forest use under ORS 215, including ORS 215.705 to 215.755 and 215.780 and OAR 660 division 6 restrict the division and residential development of the subject property. Goal 4 became effective on January 25, 1975, and required that forest land, as defined by the Goal, to be zoned for forest

use. (See citations to statutory and rule history under OAR 660-015-0000(4)). The forest land administrative rules (OAR 660 division 6) became effective September 1, 1982, and ORS 215.705 to 215.755 and 215.780 became effective on November 4, 1993 (Chapter 792, Or Laws 1993). OAR 660-006-0026 and 0027 were amended on March 1, 1994 to implement those statutes. (See citations to rule history under OAR 660-015-0000(4)).

Together, ORS 215.705 to 215.755 and 215.780, and OAR 660-006-0026 and 660-006-0027 establish an 80-acre minimum lot size for the creation of a new parcel in a forest zone and also establish the standards for dwellings in forest zones under Statewide Planning Goal 4.

The Land Conservation and Development Commission acknowledged Clackamas County's comprehensive plan and land use regulations to be in compliance with the Statewide Planning Goal 4 by order dated December 31, 1981.[3] The Clackamas County comprehensive plan designates the subject property as forest land in compliance with Statewide Planning Goal 4. Further, the subject tax lots are "forest land" as defined under Statewide Goal 4 because the property is composed of forest soils that are well-suited to the production of harvestable timber.

When the claimant acquired the subject property in 1992 the property was zoned General Timber (GT-40) forty-acre minimum parcel size, which may have allowed the claimant to create 40-acre parcels with additional dwellings on these new parcels.[4]

Conclusions

The minimum lot size and dwelling standards established by Statewide Planning Goal 4 and OAR 660-006-0026 and 660-006-0027, and provisions of ORS 215 were adopted after the claimant acquired an interest in the subject property in 1992 and do not allow the division of the portion of the property into parcels less than 80 acres in size or for the residential development proposed by claimant.

This report addresses only those state laws that are identified in the claim, or that the department is certain apply to the property based on the uses that the claimant has identified. There may be other laws that currently apply to the claimant's use of the property, and that may continue to apply to the claimant's use of the property, that have not been identified in the claim. In some cases it will not be possible to know what laws apply to a use of property until there is a specific proposal for that use. When the claimant seeks a building or development permit to carry out a specific use, it may become evident that other state laws apply to that use.

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[3] See the department's October 23, 1981, Staff Report, pages 26 through 28.

[4] The property was initially zoned GT-40 by the County in 1976.

3. Effect of Regulations on Fair Market Value

In order to establish a valid claim, ORS 197.352(1) requires that any land use regulation 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 informal estimate of $400,000 as the reduction in the property's fair market value due to current regulations. This estimate is based on the claimant's assessment of comparable properties in the area.

Conclusions

As explained in Section V.(1) of this report, the claimant is the current owner of the subject property and acquired the property on December 14, 1992. Under ORS 197.352, the 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. Based on the findings and conclusions in Section V.(2) of this report, laws adopted since the claimant acquired the property restrict division of the subject property. The claimant estimates the reduction in value due to the restrictions to be $400,000.

Without an appraisal or other documentation, it is not possible to substantiate the specific dollar amount the claimant demands for compensation. Nevertheless, based on the submitted information, the department determines that it is more likely than not that there has been some reduction in the fair market value of the subject property as a result of land use regulations enforced by the Commission or the department.

4. Exemptions under ORS 197.352(3)

ORS 197.352 does not apply to certain land use regulations. In addition, under ORS 197.352(3), certain types of laws are exempt from ORS 197.352.

Findings of Fact

The claim is based on state land use regulations that restrict the use of the property relative to what would have been allowed in 1971, when the claimant acquired the property. These provisions include Statewide Planning Goal 4 (Forest Lands) and applicable provisions of ORS 215 and OAR 660 division 6. With the exception of provisions of Goal 4, ORS 215 and OAR 660 in effect on December 14, 1992, these laws do not appear to be exempt under ORS 197.352(3)(E). Provisions of Goal 4, ORS 215, and OAR 660 adopted before December 14, 1992, are exempt under ORS 197.352(3)(E), which exempts land use regulations enacted before the claimants acquired the property.

The department notes that ORS 215.730 and OAR 660 division 6 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 protection of public health and safety, such as fire and building codes...." To the extent they may be applicable under OAR 660-006-0050, the department finds that siting standards for dwellings in forest zones under ORS 215.730 and in Goal 4 and its implementing rules (OAR 660 division 6) are exempt under ORS 197.352(3)(B).

Conclusions

Without a specific development proposal for the property, it is not possible for the department to determine what laws may apply to a particular use of the property, or whether those laws may fall under one or more of the exemptions under ORS 197.352. It does appear that the general statutory, goal and rule restrictions on residential development and use of forest land apply to the claimant's use of the property, and for the most part these laws are not exempt under section 3(E) of ORS 197.352. However, the provisions of Goal 4, ORS 215 and OAR 660 division 6 in effect when the claimant acquired the property in 1992 are exempt under ORS 197.352(3)(E) and will continue to apply to the property.

Other laws in effect when the claimant acquired the property are also exempt under Section 3(E) of ORS 197.352, and will continue to apply to the claimant's use of the property. The restrictions in ORS 215.730 and provisions of OAR 660 divisions 6 that establish fire protection standards for dwellings in forest zones are also exempt under ORS 197.352(3)(B), and will also continue to apply to the subject property. There may be other laws that continue to apply to the claimant's use of the property that have not been identified in the claim. In some cases it will not be possible to know what laws apply to a use of property until there is a specific proposal for that use. When the claimant seeks a building or development permit to carry out a specific use, it may become evident that other state laws apply to that use. And, in some cases, some of these laws may be exempt under ORS 197.352(3)(A) to (D). For example, the siting requirements of ORS 215.730, Goal 4 and its implementing rules related to dwelling siting standards based on health and safety are exempt under ORS 197.352(3)(B) and will also continue to apply to the subject property.

This report addresses only those state laws that are identified in the claim, or that the department is certain apply to the property based on the uses that the claimant has identified. Similarly, this report only addresses the exemptions provided for under ORS 197.352(3) that are clearly applicable given the information provided to the department in the claim. The claimant should be aware that the less information claimant has 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 to claimant's use of the property.

VI. FORM OF RELIEF

ORS 197.352(1) provides for payment of compensation to an owner of private real property if the Commission or the department has enforced a law that restricts the use of the property in a manner that reduces its fair market value. In lieu of compensation, the department may choose to not apply the law in order to allow the present owner to carry out a use of the property permitted at the time the current owner acquired the property. The Commission, by rule, has

directed that if the department determines a claim is valid, the Director must provide only non-monetary relief unless and until funds are appropriated by the legislature to pay claims.

Findings of Fact

Based on the findings and conclusions set forth in this report laws enforced by the Commission or the department restrict the claimant's ability to the desired lots out of the subject property, or develop those lots for residential use. The claim asserts that the laws enforced by the Commission or department reduce the fair market value of the subject property by $400,000. However, because the claim does not provide an appraisal or other specific documentation for how the specified restrictions reduce the fair market value of the property, a specific amount of compensation cannot be determined. Nevertheless, based on the record for this claim, the department acknowledges that the laws on which the claim is based likely have reduced the fair market value of the property to some extent.

No funds have been appropriated at this time for the payment of claims. In lieu of payment of compensation, ORS 197.352 authorizes the department to modify, remove or not apply all or parts of certain land use regulations to allow the claimant to use the subject property for a use permitted at the time the claimant acquired the property on December 14, 1992.

Conclusion

Based on the record, the department recommends that the claim be approved, subject to the following terms:

1. In lieu of compensation under ORS 197.352, the State of Oregon will not apply the following laws to the claimant's division of the 118.14-acre property into three parcels or to the claimant's development of a residential dwelling on each parcel: applicable provisions of Statewide Planning Goal 4, ORS 215 and OAR 660 division 6 enacted after December 14, 1992. These laws will not apply to the claimant only to the extent necessary to allow the claimant to use the property for the use described in this report, and only to the extent that use was permitted at the time the claimant acquired the property on December 14, 1992.

2. The action by the State of Oregon provides the state's authorization to the claimant to use the property subject to the standards in effect on December 14, 1992. On that date, the property was subject to applicable provisions of Statewide Planning Goal 4, ORS 215 and OAR 660, division 6, then in effect.

3. To the extent that any law, order, deed, agreement or other legally enforceable public or private requirement provides that the property may not be used without a permit, license, or other form of authorization or consent, the order will not authorize the use of the property unless the claimant first obtains that permit, license or other form of authorization or consent. Such requirements may include, but are not limited to: a building permit, a land use decision, a permit as defined in ORS 215.402 or ORS 227.160, other permits or authorizations from local, state or federal agencies, and restrictions on the use of the property imposed by private parties.

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

5. Without limiting the generality of the foregoing terms and conditions, in order for the claimant to use the property, it may be necessary for claimant to obtain a decision under ORS 197.352 from a city and/or county and/or metropolitan service district that enforces land use regulations applicable to the property. Nothing in this order relieves the claimant from the necessity of obtaining a decision under ORS 197.352 from a local public entity that has jurisdiction to enforce a land use regulation applicable to a use of the property by the claimant.

VII. COMMENTS ON THE DRAFT STAFF REPORT

The department issued its draft staff report on this claim on October 7, 2005. 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.