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. M118457
(BALLOT MEASURE 37) OF	)	
Robert Z. and Marjorie L. Guthrie, CLAIMANTS	)	

Claimants: Robert Z. and Marjorie L. Guthrie (the Claimants)

Property: Tax lot 503, Township 1S, Range 3W, Section 26, Washington 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 Z. and Marjorie L. Guthrie's division of the 37.11-acre property or to their establishment of a single-family dwelling on each parcel created: applicable provisions of Statewide Planning Goal 3, ORS 215, and OAR 660, division 33. These land use regulations will not apply to Robert Z. and Marjorie L. Guthrie's use of their property only to the extent necessary to allow the claimants to use their property for the use described in this report, to the extent that use was permitted at the time they acquired the property on February 27, 1964.

2. The action by the State of Oregon provides the state's authorization to the claimants to use their property for the use described in this report subject to the standards in effect on February 27, 1964.

3. To the extent that any law, order, deed, agreement or other legally enforceable public or private requirement provides that the property may not be used without a permit, license, or other form of authorization or consent, the order will not authorize the use of the property unless the

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

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

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

This Order is entered by the Deputy Director of the DLCD as a final order of DLCD and the Land Conservation and Development Commission under ORS 197.352, OAR 660-002-0010(8), and OAR 125, division 145, and by the Deputy Administrator for the State Services Division of the DAS as a final order of DAS under ORS 197.352, OAR 125, division 145, and ORS 293.

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

George Naughton, Deputy Director
DLCD
Dated this 28th day of March, 2006.

FOR the DEPARTMENT OF ADMINISTRATIVE SERVICES:

Dugan Petty, Deputy Administrator
DAS, State Services Division
Dated this 28th day of March, 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[1], 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."

[1] By order of the Marion County Circuit Court, "all time lines under Measure 37 [were] suspended indefinitely" on October 25, 2005. This suspension was lifted on March 13, 2006 by the court. As a result, a period of 139 days (the number of days the time lines were suspended) has been added to the 180-day time period under ORS 197.352(6) for claims that were pending with the state on October 25, 2005.

BALLOT MEASURE 37 (ORS 197.352)
CLAIM FOR COMPENSATION

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

March 28, 2006

STATE CLAIM NUMBER:	M118457
NAMES OF CLAIMANTS:	Robert Z. and Marjorie L. Guthrie
MAILING ADDRESS:	8946 Southwest Fairview Place Tigard, Oregon 97223
PROPERTY IDENTIFICATION:	Township 1S, Range 3W, Section 26, Tax lot 503 Washington County
OTHER CONTACT INFORMATION:	Ted and Christine Pietras 33503 Southwest Reidwig Road Cornelius, Oregon 97113
DATE RECEIVED BY DAS:	May 19, 2005
180-DAY DEADLINE:	April 3, 2006[1]

I. SUMMARY OF CLAIM

The claimants, Robert Z. and Marjorie L. Guthrie, seek compensation in the amount of $1,000,000 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 claimants desire compensation or the right to divide the 37.11-acre property and to develop a single-family residential dwelling on each parcel. The property is located north of Reidwig Road, in Washington 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 Robert Z. and Marjorie L. Guthries' division of the property and to their

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

development of a dwelling on each parcel: applicable provisions of Statewide Planning Goal 3 (Agricultural Lands), ORS 215, and OAR 660, division 33. These laws will not apply to the claimants only to the extent necessary to allow Robert Z. and Marjorie L. Guthrie to use the property for the use described in this report, to the extent that use was permitted at the time they acquired the property in 1964. (See the complete recommendation in Section VI. of this report.)

III. COMMENTS ON THE CLAIM

Comments Received

On June 20, 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, eight written comments, evidence or information were received in response to the 10-day notice.

Six of the comments do not address whether the claim meets the criteria for relief (compensation or waiver) under ORS 197.352 (Ballot Measure 37). Comments concerning the effects a use of the property may have on surrounding areas generally are not something that the department is able to consider in determining whether to waive a state 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 waiving a state law. (See comment letters in the department's claim file.)

Two comments are relevant to whether the restriction of the claimants' use of the property reduces the fair market value of the property. Those comments have been considered by the department in preparing this report. (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 Ballot Measure 37 (December 2, 2004), within two years of that effective date or the date the public entity applies the land use regulation as an approval criterion to an application submitted by the owner, whichever is later; or

2. For claims arising from land use regulations enacted after the effective date of Ballot Measure 37(December 2, 2004), within two years of the enactment of the land use regulation, or the date the owner of the property submits a land use application in which the land use regulation is an approval criterion, whichever is later.

Findings of Fact

This claim was submitted to DAS on May 19, 2005, for processing under OAR 125, division 145. The claim identifies ORS 215.213 and 215.705 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 Ballot Measure 37 are the basis for this claim. (See citations of statutory and administrative rule history of the Oregon Revised Statutes and Oregon Administrative Rules.)

Conclusions

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

V. ANALYSIS OF CLAIM

1. Ownership

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

Findings of Fact

Robert Z. and Marjorie L. Guthrie acquired the subject property on February 27, 1964. (See deed in department claim file.) One comment letter questions whether the claimants have continuously owned the subject property since 1964.[2] (See claim file). The letter does not provide any evidence to substantiate the allegation. A preliminary title report dated April 28, 2005, demonstrates that Robert Z. and Marjorie L. Guthrie are the current owners of the subject property. (See claim).

Conclusion

The claimants, Robert Z. and Marjorie L. Guthrie, are "owners" of the subject property, as that term is defined by ORS 197.352(11)(C), as of February 27, 1964.

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[2] The comment letter asserts the following: "At one time, applicants owned what is now the adjacent tax lot (TL 400 T1SR3W S26). A home was built on tax lot 400 during the 1960's. That home has changed ownership one or more times since. It is unclear whether tax lot 503 was created as a subdivision of tax lot 400 during that time, or whether it was indeed a lot of record in 1964. There is a "Notice of Default" on a land contract, listing the Guthries as one of the contract parties, dated 1991, on file with Washington County. Title to tax lot 503 may have passed to somebody else, then back to the Guthries, sometime during the period. Alternatively, tax lot 503 may have been encumbered by other transactions related to tax lot 400."

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 is based, generally, on Washington County's current Agriculture-Forestry (AF-20) zone and the applicable provisions of state law that require such zoning. The claimants' property is zoned AF-20 as required by Goal 3, in accord with ORS 215 and OAR 660, division 33 because the claimants' property is "agricultural land" as defined by Goal 3.[3] Goal 3 became effective on January 25, 1975, and required that agricultural lands as defined by the Goal to be zoned for agricultural uses pursuant to ORS chapter 215.

Current land use regulations, particularly ORS 215.213, 215.263, 215.780 and OAR 660 division 33 as applied by Goal 3, do not allow the subject property to be divided into parcels of less than 80 acres and establish standards for allowing the existing or any proposed parcels to have farm or non-farm dwellings on them.

ORS 215.780 established an 80-acre minimum size for the creation of new lots or parcels in EFU zones and became effective November 4, 1993 (Chapter 792, Oregon Laws 1993). ORS 215.263 (2003 edition) establishes standards for the creation of new parcels for non-farm uses and dwellings allowed in an EFU zone.

OAR 660-033-0135 (applicable to farm dwellings) became effective on March 1, 1994, and interprets the statutory standard for a primary dwelling in an EFU zone under ORS 215.283.

OAR 660-033-0130(4)(e) (applicable to non-farm dwellings in marginal lands counties) became effective on August 7, 1993.

The claimants acquired the subject property in 1964, prior to the adoption of the Statewide Planning Goal 3 and their implementing statutes and administrative rules. In 1964, Washington County had not zoned the property.

Conclusions

The zoning requirements, minimum lot size and dwelling standards established by Statewide Planning Goal 3 (Agricultural Lands), provisions applicable to land zoned for agricultural uses in ORS chapter 215 and OAR 660, division 33, were all enacted after Robert Z. and Marjorie L. Guthrie acquired ownership of the subject property in February 1964, and do not allow the

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[3] The claimant's property is "agricultural land" because it contains Natural Resources Conservation Service (NRCS) Class I-IV soils.

division of the property, thereby restricting the use of the property relative to the uses allowed when the property was acquired.

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 claimants have identified. There may be other laws that currently apply to the claimants' use of the property, and that may continue to apply to the claimants' use of the property, that have not been identified in the claim. In some cases, it will not be possible to know what laws apply to a use of property until there is a specific proposal for that use. When a 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.

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 $1,000,000 as the reduction in the property's fair market value caused by current regulations. This estimate is based on the difference between the price established in a purchase option agreement and the property's recent assessed value. (See claim).

Conclusions

As explained in section V.(1) of this report, the current owners are Robert Z. and Marjorie L. Guthrie who acquired the property on February 27, 1964. Under ORS 197.352, Robert Z. and Marjorie L. Guthrie are due compensation for land use regulations that restrict the use of the subject property in a manner that reduces its fair market value. The claimants estimate that the value of their property has been reduced by $1,000,000 as a result of restrictions enforced after they acquired their property.

Without an appraisal or other documentation, it is not possible to substantiate the specific dollar amount the claimants demand for compensation. Nevertheless, based on the submitted information, the department determines that it is more likely than not that there has been some reduction in the fair market value of the subject property as a result of land use regulations enacted or 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 1964, when the property was acquired by Robert Z. and Marjorie L. Guthrie. These provisions include Goal 3, and applicable provisions of ORS 215 and OAR 660, division 33, which Washington County has implemented through its AF-20 zone. None of those laws are exempt under ORS 197.352(3)(E), which exempts laws in effect when the claimants acquired the property.

Conclusions

Without a specific development proposal for the property, it is not possible for the department to determine what laws may apply to a particular use of the property, or whether those laws may fall under one or more of the exemptions under ORS 197.352. It does appear that the general statutory, goal and rule restrictions on residential development and use of farm land apply to the claimants' use of the property, and for the most part these laws are not exempt under ORS 197.352(3)(E).

Laws in effect when the claimants acquired the property are exempt under ORS 197.352(3)(E), and will continue to apply to the claimants' use of the property. There may be other laws that continue to apply to the claimants' use of the property that have not been identified in the claim. In some cases, it will not be possible to know what laws apply to a use of property until there is a specific proposal for that use. When the claimants seek a building or development permit to carry out a specific use, it may become evident 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).

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 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. Claimants should be aware that the less information they have provided to the department in their claim, the greater the possibility that there may be additional laws that will later be determined to continue to apply to their use of the property.

VI. FORM OF RELIEF

ORS 197.352(1) provides for payment of compensation to an owner of private real property if the Commission or the department has enforced a law that restricts the use of the property in a manner that reduces its fair market value. In lieu of compensation, the department may choose to not apply 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 division of the subject property and the development of a residence on each parcel. The claim asserts the laws enforced by the Commission or department reduce the fair market value of the subject property by $1,000,000. However, because the claim does not provide an appraisal or other specific explanation 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 Robert Z. and Marjorie L. Guthrie to use the subject property for a use permitted at the time they acquired the property on February 27, 1964.

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 Robert Z. and Marjorie L. Guthrie's division of the 37.11-acre property or to their establishment of a single-family dwelling on each parcel created: applicable provisions of Statewide Planning Goal 3, ORS 215, and OAR 660, division 33. These land use regulations will not apply to Robert Z. and Marjorie L. Guthrie's use of their property only to the extent necessary to allow the claimants to use their property for the use described in this report, to the extent that use was permitted at the time they acquired the property on February 27, 1964.

2. The action by the State of Oregon provides the state's authorization to the claimants to use their property for the use described in this report subject to the standards in effect on February 27, 1964.

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

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

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

VII. COMMENTS ON THE DRAFT STAFF REPORT

The department issued its draft staff report on this claim on March 13, 2006. OAR 125-145-0100(3), provided an opportunity for the claimant or the claimant's authorized agent and any third parties who submitted comments under OAR 125-145-0080 to submit written comments, evidence and information in response to the draft staff report and recommendation. Comments received have been taken into account by the department in the issuance of this final report.