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. M118460
(BALLOT MEASURE 37) OF	)	
Darrell Andrews, Trustee	)	
Ada Andrews Living Trust , CLAIMANT	)	

Claimant: Andrews Living Trust (the Claimant)

Property: Tax lot 1400, Township 36, Range 3W, Section 15D, Jackson 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 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 the claimant's division of the 1.06-acre property: applicable provisions of Statewide Planning Goal 14, and OAR 660, division 4, enacted after July 18, 2001. These land use regulations will not apply to the claimants' use of the property only to the extent necessary to allow the claimant a use permitted at the time he acquired the property as Successor Trustee of the Ada Andrews Trust on July 18, 2001. The department acknowledges that the relief to which Mr. Andrews is entitled under ORS 197.352 will not allow him to use the property in the manner set forth in his claim.

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 July 18, 2001. On that date, the property was subject to applicable provisions of Goal 14, and OAR 660, division 4 currently 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 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 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 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 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[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."

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[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:	M118460
NAME OF CLAIMANT:	Darrell Andrews, Trustee Ada Andrews Living Trust
MAILING ADDRESS:	305 Southeast 28th Portland, Oregon 97214
PROPERTY IDENTIFICATION:	Township 36, Range 3W, Section 15D Tax lot 1400 Jackson County
OTHER CONTACT INFORMATION:	Matthew G. Fawcett 916 West 10th Medford, Oregon 97501
DATE RECEIVED BY DAS:	May 19, 2005
180-DAY DEADLINE:	April 3, 2006[1]

I. SUMMARY OF CLAIM

The claimant, Darrell Andrews, Trustee of the Ada Andrews Living Trust, seeks compensation in the amount of $97,000 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 1.06-acre property into two parcels and to develop a dwelling on the resulting vacant parcel. The property is located at 626 Upper River Road, near Gold Hill, in Jackson 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

[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).

not apply to Darrell Andrews' division of the property for residential development: applicable provisions of Statewide Planning Goal 14 (Urbanization), and OAR 660, division 4, enacted after July 18, 2001. These laws will not apply to the claimant only to the extent necessary to allow Darrell Andrews a use of the property permitted at the time he acquired it as Successor Trustee to the Ada Andrews Living Trust on July 18, 2001. (See the complete recommendation in Section VI. of this report.) The department acknowledges that the relief to which Mr. Andrews is entitled under ORS 197.352 will not allow him to use the property in the manner set forth in this claim.

III. COMMENTS ON THE CLAIM

Comments Received

On June 21, 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, one written comment, evidence or information was received in response to the 10-day notice.[2]

The comment does not address whether the claim meets the criteria for relief (compensation or waiver) under ORS 197.352. 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 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 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 19, 2005, for processing under OAR 125, division 145. The claim seeks to waive state goals guidelines and land use regulations adopted

[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.

after 1953, 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.)

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, Darrell Andrews, Successor Trustee of the Ada Andrews Trust, acquired the subject property on July 18, 2001, as reflected by information provided by the Jackson County Assessor's Office. On July 18, 2001, Ada Andrews, the Trustor of the Ada Andrews Living Trust, died and the claimant became successor Trustee of the Trust. Ms. Andrews acquired the subject property in 1953, as reflected in a copy of a Jackson County deed ledger. Jackson County records indicate that the Ada Andrews Living Trust is a current owner of the subject property.

Conclusions

The claimant, Darrell Andrews, Successor Trustee for the Ada Andrews Living Trust, is an "owner" of the subject property, as that term is defined by ORS 197.352(11)(C), as of July 18, 2001. The property was acquired in 1953 by the claimant's "family members," as that term is defined in 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 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

Information submitted by the claimant's representative indicates that state laws have restricted the property so that it cannot be divided into two parcels for residential development.

The property is currently zoned RR-5, which is a rural residential designation under the Jackson County Comprehensive Plan, in accord with Statewide Planning Goal 14. The RR-5 zone requires a minimum of five acres for the creation of new lots or parcels. The subject property is 1.06 acres and cannot be divided under the RR-5 zone.

Goal 14 became effective on January 25, 1975, and required local comprehensive plans to provide for an orderly and efficient transition from rural to urban land use. The courts have found that Goal 14 generally prohibits residential development at urban densities on rural lands. Rural lands are lands outside of an urban growth boundary (UGB). As interpreted by the courts and the Commission, Goal 14 generally prohibits residential development outside of an urban growth boundary where lot or parcel sizes are less than two acres. (*See, e.g. 1000 Friends of Oregon v. LCDC (Curry County)*, 301 Or 447 (1986); *DLCD v. Klamath County,* 38 Or LUBA 769 (2000).) As a result of the1986 *Curry County* Oregon Supreme Court decision, the Commission amended Statewide Planning Goal 14 (Urbanization) and adopted OAR 660-004-0040, establishing rules for rural residential development outside urban growth boundaries, which became effective on October 4, 2000. The rule provides that if, on October 4, 2000, a rural residential zone specifies a minimum lot size of two acres or more, the area of any new lot or parcel shall equal or exceed the minimum lot size which is already in effect (OAR 660-004-0040(7)(c)).

The claimant's family acquired the subject property in 1953, prior to the establishment of the statewide planning goals and their implementing statutes and rules.

Conclusions

The zoning requirements, minimum lot size and dwelling standards for rural residential lots or parcels established by Statewide Planning Goal 14 and OAR 660-004-0040 were enacted after the claimant's family acquired the subject property in 1953, and do not allow the division of the property, thereby restricting the use of the property relative to the uses allowed when the property was acquired by the claimant's family in 1953.

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.

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 estimate of $97,000 as the reduction in the property's fair market value due to current regulations. This amount is based on the claimant's estimate of the value of comparable properties in the area.

Conclusions

As explained in Section V.(1) of this report, the current owner is Darrell Andrews, whose family acquired the property in 1953. Under ORS 197.352, Darrell Andrews, Sucessor Trustee of the Ada Andrews Living Trust, 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's family acquired the property in 1953 restrict division of the subject property. The claimant estimates the reduction in value due to the restrictions to be $97,000.

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 land use regulations that restrict the use of the property relative to what would have been allowed in 1953, when the property was acquired by the claimant's family. These provisions include Statewide Planning Goal 14 (Urbanization) and applicable provisions of OAR 660, division 4, which Jackson County has implemented through its rural residential zone. None of these laws appear to be exempt under ORS 197.352(3)(E), which exempts laws in effect when the claimant's family 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 goal and rule restrictions on land divisions in a rural residential zone apply to the claimant's 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 claimant's family acquired the property are exempt under ORS 197.352(3)(E) and will continue to apply to the claimant's use of the 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).

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 he has provided to the department in his claim, the greater the possibility that there may be additional laws that will later be determined to continue to apply to his 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 since the claimant's family acquired the property in 1953, restrict the claimant from dividing the subject property. The claim asserts the laws enforced by the Commission or department reduce the fair market value of the subject property by $97,000. 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 Darrell Andrews, to use the subject property for a use permitted at the time he acquired an interest in the property on July 18, 2001.

When Darrel Andrews acquired his interest in the property in 2001, as Successor Trustee of the Ada Andrews Trust, the property was subject to Statewide Planning Goal 14 (Urbanization), ORS 215, and OAR 660, division 4. At that time, those laws did not allow the proposed division or development of the subject property.

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 1.06-acre property: applicable provisions of Statewide Planning Goal 14, and OAR 660, division 4, enacted after July 18, 2001. These land use regulations will not apply to the claimants' use of the property only to the extent necessary to allow the claimant a use permitted at the time he acquired the property as Successor Trustee of the Ada Andrews Trust on July 18, 2001. The department acknowledges that the relief to which Mr. Andrews is entitled under ORS 197.352 will not allow him to use the property in the manner set forth in his claim.

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 July 18, 2001. On that date, the property was subject to applicable provisions of Goal 14, and OAR 660, division 4 currently 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 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 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 21, 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.