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 Donna Weber, CLAIMANT	))))	FINAL ORDER CLAIM NO. M118461

Claimant: Donna Weber (the Claimant)

Property: Tax lots 205 and 206, Township 2S, Range 7E, Section 30, Clackamas 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 Donna Weber's division of the 2.73-acre property into two parcels: the applicable provisions of Statewide Planning Goal 4 (Forest Lands), ORS 215, and OAR 660, division 6. These land use regulations will not apply to Ms. Weber's use of her property only to the extent necessary to allow her to use the property for the use described in this report, to the extent that use was permitted at the time she acquired the property on August 3, 1990.

2. The action by the State of Oregon provides the state's authorization to the claimant to use her property for the use described in this report, subject to the standards in effect on August 3, 1990. On that date, the property was subject to applicable provisions of Statewide Planning Goal 4 (Forest Lands), 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 her to obtain a decision under ORS 197.352, from a city and/or county and/or metropolitan service district that enforces land use regulations applicable to the property. Nothing in this order relieves 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 ORS 197.35237, 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
DLCD
Dated this 27th day of March, 2006.

FOR the DEPARTMENT OF ADMINISTRATIVE SERVICES:

Dugan Petty, Deputy Administrator
DAS, State Services Division
Dated this 27th 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 27, 2006

STATE CLAIM NUMBER:	M118461
NAME OF CLAIMANT:	Donna Weber
MAILING ADDRESS:	65353 East Barlow Trail Road Rhododendron, Oregon 97049
PROPERTY IDENTIFICATION:	Township 2S, Range 7E, Section 30 Tax lots 205 and 206 Clackamas County
DATE RECEIVED BY DAS:	May 18, 2005
180-DAY DEADLINE:	April 2, 2006[1]

I. SUMMARY OF CLAIM

The claimant, Donna Weber, seeks compensation in the amount of $225,000 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 2.73-acre property into two parcels.[2] The property is located at 65353 and 65365 E. Barlow Trail Rd., Rhododendron, 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. The Department staff recommends that, in lieu of compensation, the requirements of the following state laws enforced by the Land Conservation and Development Commission (the Commission) or the department not apply to Ms. Weber's division of the property into two parcels: applicable provisions of Statewide Planning Goal 4 (Forest Lands), ORS 215 and OAR 660, division 6, enacted after August 3, 1990. These laws will not apply to the claimant only to the extent necessary to allow

[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).

[2] According to information from Clackamas County, the subject property consists of two tax lots for assessment purposes, but only one legal lot of record.

Ms. Weber the use of the property for the use described in this report, to the extent that use was permitted at the time she acquired the property in August 1990. (See the complete recommendation in Section VI. of this report.)

III. COMMENTS ON THE CLAIM

Comments Received

On June 29, 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, evidence or information were received in response to the 10-day notice.[3]

The comments are relevant to whether the law(s) that are the basis for the claim are exempt under ORS 197.352(3) of Measure 37. The 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 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 18, 2005, for processing under OAR 125, division 145. The claim identifies Clackamas County's "forest zoning regulations changed by state Legislature in 1993" as the law that restricts 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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[3] 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, Donna Weber, acquired the subject property on August 3, 1990, as reflected by a 1993 Bargain and Sale Deed included with the claim that references an August 3, 1990, Land Sales Contract. A copy of a March 10, 2005, preliminary title report indicates that Donna Weber is the current owner of the subject property.

Conclusions

The claimant, Donna Weber, is an "owner" of the subject property, as that term is defined by ORS 197.352(11)(C), as of August 3, 1990.

2. The Laws that Are the Basis for the 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 Clackamas County "forest zoning regulations changed by state Legislature in 1993" as laws that restrict the use and reduce the value of the property. The claimant seeks to divide the 2.73-acre property into two parcels.[4]

[4] According to information from Clackamas County, when the claimant purchased the subject property in August 1990, the parcel included two tax lot, for purposes of county property tax assessment. In 1990, Clackamas County approved a permit for the claimant to place a manufactured home on tax lot 206 and a septic system on tax lot 205. In 1993, the county mistakenly approved a permit to place a manufactured home on tax lot 205, contrary to the county's Zoning and Development Ordinance. (See Clackamas County staff report in claim file.)

Current Clackamas County zoning for subject property is TBR-Timber District. The County's TBR zone was adopted in 1994, to comply with the provisions of HB 3661 and Statewide Planning Goal 4 (Forest Lands) and OAR 660, division 6.

Goal 4 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 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 rule (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), and were adopted into OAR 660-006-0026 and 0027 on March 1, 1994. (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 0027 currently 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.

Clackamas County's acknowledged TT-20 Transitional Timber zoning applied to the property at the time Donna Weber acquired the property in August 1990. The TT-20 zone limited minimum lot size to two acres for a land division.[5]

Conclusions

The minimum lot size established by Statewide Planning Goal 4, OAR 660-006-0026 and 0027, and by provisions of ORS 215, that were adopted after Donna Weber acquired the property in 1990, do not allow the division of the property into two parcels.

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 use 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."

[5] The Clackamas County staff report for Ms. Weber's M37 claim with the County states that it may be possible for the claimant to achieve her objective under those standards. (See the department's claim file for a copy of the County staff report.)

Findings of Fact

The claim includes an estimate of $225,000 as the reduction in the property's fair market value due to current regulations. This estimate is based on a comparative market analysis prepared by a realtor.

Conclusions

As explained in Section V.(1) of this report, the current owner is Donna Weber, who acquired the property on August 3, 1990. Under ORS 197.352, Donna Weber is due compensation for state 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 August 1990, when the claimant acquired the property, restrict division of the subject property. The claimant estimates the reduction in value due to the restrictions to be $225,000.

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 laws 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 Clackamas County's TBR zone and the related provisions of state law that have restricted the use of the subject property and reduced its fair market value, including Statewide Planning Goal 4 (Forest Lands), and relevant provisions of ORS 215, OAR 660, division 6. Provisions of those laws that were adopted after August 1990, when Donna Weber acquired the property, are not exempt under ORS 197.352(3)(E). Applicable provisions of those laws that were in effect on August 1990 are exempt, under ORS 197.352(3), which exempts laws in effect when the claimant 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 division and development of forest land apply to the claimant's use of the property. Provisions of those laws that were adopted after August 1990, when Donna Weber acquired the property, are not exempt under ORS 197.352(3)(E). Provisions

of Goal 4, ORS 215 and OAR 660, division 6, in effect when the claimant acquired the property in 1990, 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 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 use 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 she has provided to the department in her claim, the greater the possibility that there may be additional laws that will later be determined to continue to apply to her 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 into two parcels. The claim asserts the laws enforced by the Commission or department reduce the fair market value of the subject property by $225,000. 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.

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 Donna Weber to use the subject property for a use permitted at the time she acquired the property on August 3, 1990.

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 Donna Weber's division of the 2.73-acre property into two parcels: the applicable provisions of Statewide Planning Goal 4 (Forest Lands), ORS 215, and OAR 660, division 6. These land use regulations will not apply to Ms. Weber's use of her property only to the extent necessary to allow her to use the property for the use described in this report, to the extent that use was permitted at the time she acquired the property on August 3, 1990.

2. The action by the State of Oregon provides the state's authorization to the claimant to use her property for the use described in this report, subject to the standards in effect on August 3, 1990. On that date, the property was subject to applicable provisions of Statewide Planning Goal 4 (Forest Lands), 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 her to obtain a decision under ORS 197.352, from a city and/or county and/or metropolitan service district that enforces land use regulations applicable to the property. Nothing in this order relieves 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 24, 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.