

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. M118520
(BALLOT MEASURE 37) OF	)	
Virginia Atkinson, CLAIMANT	)	

Claimant: Virginia Atkinson (the Claimant)

Property: Tax lots 200, 700, and 800, Township 1N, Range 1W, Section 25A, Multnomah 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 Virginia Atkinson's development of one additional dwelling on the subject property: the applicable provisions of Goals 4 and 5, ORS 215, and OAR 660 divisions 6 and 16 enacted or adopted after the claimant acquired the subject property. These land use regulations will not apply to the claimant only to the extent necessary to allow her to use the subject property for the use described in this report, and only to the extent that use was permitted when she acquired tax lot 700 in 1955, and when she acquired tax lots 200 and 800 in 1992. The department acknowledges that the relief to which the claimant is entitled under ORS 197.352 may not allow the claimant to use tax lots 200 and 800 in the manner set forth in the claim..
2. The action by the State of Oregon provides the state's authorization to the claimant to use tax lot 700 subject to the standards in effect on September 13, 1955; and provides the state's authorization to the claimant to use tax lots 200 and 800 subject to the standards in effect on May 15, 1992. On May 15, 1992, tax lots 200 and 800 were subject to applicable provisions of Goal 4, ORS 215 and OAR 660, division 6, as implemented through Multnomah County's MUF-19 zone.

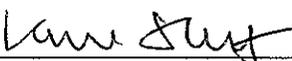
3. To the extent that any law, order, deed, agreement or other legally enforceable public or private requirement provides that the subject property may not be used without a permit, license or other form of authorization or consent, the order will not authorize the use of the property unless the claimant 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 227.160, other permits or authorizations from local, state or federal agencies and restrictions on the use of the subject property imposed by private parties.

4. Any use of the subject property by the claimants 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).

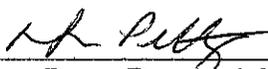
5. Without limiting the generality of the foregoing terms and conditions, in order for the claimant to use the subject property, it may be necessary for her to obtain a decision under ORS 197.352 from a city and/or county and/or metropolitan service district that enforces land use regulations applicable 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 subject 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 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  
DLCD  
Dated this 5<sup>th</sup> day of April, 2006.

FOR the DEPARTMENT OF ADMINISTRATIVE  
SERVICES:

  
\_\_\_\_\_  
Dugan Petty, Deputy Administrator  
DAS, State Services Division  
Dated this 5<sup>th</sup> day of April, 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<sup>1</sup>, 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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<sup>1</sup> 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**

April 5, 2006

**STATE CLAIM NUMBER:** M118520

**NAME OF CLAIMANT:** Virginia Atkinson

**MAILING ADDRESS:** 2950 Northwest 53rd Drive  
Portland Oregon 97210

**PROPERTY IDENTIFICATION:** Township 1N, Range 1W, Section 25A  
Tax lots 200, 700, and 800  
Multnomah County

**OTHER CONTACT INFORMATION:** William Cox  
0244 Southwest California Street  
Portland Oregon 97219

**DATE RECEIVED BY DAS:** May 27, 2005

**180-DAY DEADLINE:** April 11, 2006<sup>1</sup>

**I. SUMMARY OF CLAIM**

The claimant, Virginia Atkinson, seeks compensation in the amount of \$1,100,000 for the reduction in fair market value as a result of land use regulations that are alleged to restrict the use of certain private real property. The claimant desires compensation or the right to develop an additional dwelling on the 10-acre subject property.<sup>2</sup> The subject property is located at 2950 NW 53<sup>rd</sup> Drive, near Portland, in Multnomah 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

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<sup>1</sup> 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).

<sup>2</sup> The claim, as submitted, appeared to indicate that the claimant desired to create and develop an additional nine, one acre parcels. However, according to a July 7, 2005 letter from claimant's agent, the proposed use is not nine, one-acre parcels, but rather one additional dwelling on the 10-acre property.

by the Land Conservation and Development Commission (the Commission) or the department not apply to Virginia Atkinson's development of one additional dwelling on the subject property: applicable provisions of Statewide Planning Goal 4 (Forest Lands) and Goal 5 (Natural Resources, Scenic and Historic Areas and Open Spaces), ORS 215, and OAR 660, divisions 6 and 16. These laws will not apply to the claimant only to the extent necessary to allow her to use the subject property for the use described in the report, and only to the extent that use of tax lot 700 was permitted when she acquired it in 1955, and that use of tax lots 200 and 800 were permitted when she acquired those tax lots in 1992. (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, thirteen written comments, evidence or information were received in response to the 10-day notice.

The majority of comments do not address whether the claim meets the criteria for relief under ORS 197.352 (Ballot Measure 37). Comments concerning the effects a use of the subject 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 waive a state law.

A few comments are relevant to whether a state law restricts the claimant's use of the subject property, whether the restriction of the claimant's use of the subject property reduces the fair market value of the property, and whether the laws that are the basis for the claim are exempt under ORS 197.352(3). The comments have been considered by the department in preparing this report. (See the 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 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 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 criteria, whichever is later.

## **Findings of Fact**

This claim was submitted to DAS on May 27, 2005, for processing under OAR 125, division 145. The claim identifies all statewide planning goals, and Goals 3, 4 5 and 14 in particular, as well as ORS chapters 197 and 215 as the basis for the claim. Only laws that were enacted or adopted prior to December 2, 2004, are the basis for this claim.

## **Conclusions**

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

## **V. ANALYSIS OF CLAIM**

### **1. Ownership**

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

## **Findings of Fact**

The subject property consists of three tax lots, which the claimant’s mother-in-law, Lenora Atkinson, acquired on November 30, 1942, as reflected by a warranty deed included with the claim. The claimant, Virginia Atkinson, and her husband, Robert Atkinson, acquired Tax lot 700 from his mother on September 13, 1955, as reflected by a bargain and sale Deed included with the claim. Robert Atkinson acquired tax lots 200 and 800 on September 12, 1969 after his mothers death, as reflected by a closing order for the estate of Lenora Atkinson included with the claim. Virginia Atkinson acquired tax lots 200 and 800 after Robert died on May 15, 1992, as reflected by a death certificate and last will and testament included in the claim.<sup>3</sup> On July 22, 1997, Virginia Atkinson conveyed the subject properties to herself as trustee of the Atkinson Living Trust, a revocable living trust.<sup>4</sup> A copy of a May 23, 2005 title report indicates that Virginia Atkinson, Trustee for the Atkinson Living Trust, is the current owner of the subject property.

## **Conclusions**

The claimant, Ms. Virginia, is an “owner” of the subject property, as that term is defined by ORS 197.352(11)(C), as of September 13, 1955 for tax lot 700, and as of May 15, 1992 for tax lots 200 and 800. The subject property has been in family ownership since November 30, 1942.

<sup>3</sup> On November 24, 1983, Robert Atkinson attempted to sell tax lots 200 and 800 but that sale was rescinded after Multnomah County determined it would have resulted in the reduction of the area of an already substandard lot, in violation of Multnomah County code 11.15.2182(C).

<sup>4</sup> A transfer to a revocable trust does not result in a change in ownership for purposes of ORS 197.352.

## **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 and additional information submitted by the claimant indicates the claimant desires to develop one additional dwelling on the subject 10-acre property, and is unable to do so as a result of state land use regulations.<sup>5</sup>

The claim is based generally on Multnomah County's current Commercial Forest Use (CFU-2) zone and a Significant Environmental Concern – Habitat (SEC-h) overlay, and the applicable provisions of state law that require such zoning. The claimant's property is zoned CFU-2 as required by Goal 4 in accordance with ORS 215 and OAR 660, division 6, because the claimant's property is "forest land" under Goal 4. Goal 4 became effective on January 25, 1975, and requires that forest land be zoned for forest use (see 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, Oregon Laws 1993). OAR 660-006-0026 and 660-006-0027 were amended on March 1, 1994, to implement those statutes.

Goal 5 became effective January 25, 1975. The administrative rule implementing Goal 5, OAR 660, division 16 (Requirements and Application Procedures for Complying with Goal 5), became effective May 18, 1981, but did not apply to landowners until local jurisdictions implemented the Goal 5 process.<sup>6</sup> Multnomah County's SEC-h overlay zone was applied to subject property in 1994 and generally requires a permit subject to development standards and wildlife conservation plans.

The family acquired the subject property on November 30, 1942, before the establishment of the Statewide Planning Goals and their implementing statutes and rules.

### **Conclusions**

The current zoning requirements and dwelling standards established by Goal 4 and provisions applicable to land zoned for forest use in ORS 215 and OAR 660, division 6, and requirements of Goal 5, were all enacted or adopted after the claimant's family acquired the subject property in 1942 and do not allow the desired development of the property.

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<sup>5</sup> The claimant summarily cites all statewide planning goals, and Goals 3, 4, 5 and 14 in particular, and all of ORS chapters 197 and 215 as restricting the use of the subject property. Most of the laws cited by the claimant do not, on their face either apply to the subject property or restrict its use in a manner that reduces its fair market value. Absent an explanation by the claimant as to how each of these laws is applicable to this claim, this report addresses only those laws that the department has determined apply to the subject property.

<sup>6</sup> OAR 660 division 23, Procedures and Requirements for Complying with Goal 5, and including Section 0110, Wildlife Habitat, became effective on September 1, 1996.

### **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 \$1,100,000 as the reduction in the subject property’s fair market value due to current regulations. This amount is based on the claimant’s estimate of the market value of similar properties in the area.

#### **Conclusions**

As explained in Section V.(1) of this report, the claimant’s family acquired the property on November 30, 1942. 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 enacted or adopted since the claimant’s family acquired the subject property restrict the desired division and development of the property. The claimant estimates the reduction in value due to the restrictions to be \$1,100,000.

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 the fair market value of the subject property has been reduced to some extent as a result of land use regulations enforced by the Commission or the department since the claimant’s family acquired the property.

### **4. Exemptions Under ORS 197.352(3)**

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

#### **Findings of Fact**

The claim is based on state land use regulations that restrict the use of the subject property, including applicable provisions of Goals 4 and 5, ORS 215 and OAR 660, divisions 6 and 23, which Multnomah County has implemented through its current CFU-2 zone and SEC-h overlay. All of these land use regulations were enacted or adopted after the claimant’s family acquired the subject property in 1942.

#### **Conclusions**

Without a specific development proposal for the subject property, it is not possible for the department to determine all the laws that may apply to a particular use of the property, or whether those laws may fall under one or more of the exemptions under ORS 197.352. It appears that none of the general statutory, goal and rule restrictions on residential division and

development of the subject property were in effect when the claimant's family acquired the property in 1942. As a result, these laws are not exempt under ORS 197.352(3)(E).

Laws in effect when the claimant's family acquired the subject property are exempt under ORS 197.352(3)(E), and do not provide a basis for compensation. In addition, the department notes that ORS 215.730 and OAR 660, division 6, include standards for siting dwellings in forest zones. Those provisions include fire protection standards for dwellings. 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..." Accordingly, siting standards for dwellings in forest zones in ORS 215.730 and OAR 660, division 6, are exempt under ORS 197.352(3)(B). Other land use laws enacted or adopted for a purpose set forth in ORS 197.352(3)(A) to (D) are also exempt, and would not provide a basis for compensation.

## **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 laws that restrict the use of the property in a manner that reduces its fair market value. In lieu of compensation, the department may choose to not apply the law in order to allow the present owner to carry out a use of the property permitted at the time the current owner acquired the property. The Commission, by rule, has directed that if the department determines a claim is valid, the Director of the department must provide only non-monetary relief unless and until funds are appropriated by the legislature to pay claims.

### **Findings of Fact**

Based on the findings and conclusions set forth in this report, laws enforced by the Commission or the department restrict the claimant's ability to develop an additional dwelling on the 10-acre property. The claim asserts that the laws enforced by the Commission or the department reduce the fair market value of the subject property by \$1,100,000. However, because the claim does not provide an appraisal or other specific documentation establishing how the specified restrictions reduce the fair market value of the subject 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 subject property to some extent.

No funds have been appropriated at this time for the payment of claims. In lieu of payment of compensation, ORS 197.352 authorizes the department to modify, remove or not apply all or parts of certain land use regulations to allow Virginia Atkinson to use tax lot 700 for a use permitted when she acquired it on September 13, 1955, and to use tax lots 200 and 800 for a use permitted when she acquired them on May 15, 1992.

The claimant acquired tax lot 700 on March 15, 1955, prior to the establishment of the statewide planning goals and their implementing statutes and rules.

The claimant acquired tax lots 200 and 800 on May 15, 1992, after the establishment of the statewide planning goals and their implementing statutes and rules, and after the county's land use regulations were acknowledged for compliance with the goals. At that time, the county's

acknowledged MUF-19 (multiple use forest district, 10-acre minimum with one residential dwelling) zone applied to the subject property.<sup>7</sup>

There may be other laws that apply to the claimant's use of the subject property that have not been identified in the claim. In some cases it will not be possible to know which laws apply to a use of subject property until there is a specific proposal for that use. When the 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. In some cases, some of these laws may be exempt under ORS 197.352(3)(A) to (D).

This report addresses only those state laws that are identified in the claim, or that the department is certain apply to the subject property, based on the use that the claimant has identified. There may be other laws that currently apply to the claimant's use of the subject 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 which laws apply to a use of the subject 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.

### **Conclusions**

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 Virginia Atkinson's development of one additional dwelling on the subject property: the applicable provisions of Goals 4 and 5, ORS 215, and OAR 660 divisions 6 and 16 enacted or adopted after the claimant acquired the subject property. These land use regulations will not apply to the claimant only to the extent necessary to allow her to use the subject property for the use described in this report, and only to the extent that use was permitted when she acquired tax lot 700 in 1955, and when she acquired tax lots 200 and 800 in 1992. The department acknowledges that the relief to which the claimant is entitled under ORS 197.352 may not allow the claimant to use tax lots 200 and 800 in the manner set forth in the claim..
2. The action by the State of Oregon provides the state's authorization to the claimant to use tax lot 700 subject to the standards in effect on September 13, 1955; and provides the state's authorization to the claimant to use tax lots 200 and 800 subject to the standards in effect on May 15, 1992. On May 15, 1992, tax lots 200 and 800 were subject to applicable provisions of Goal 4, ORS 215 and OAR 660, division 6, as implemented through Multnomah County's MUF-19 zone.
3. To the extent that any law, order, deed, agreement or other legally enforceable public or private requirement provides that the subject property may not be used without a permit, license or other form of authorization or consent, the order will not authorize the use of the property unless 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

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<sup>7</sup> Multnomah County Code 11.15.2170

“permit” as defined in ORS 215.402 or 227.160, other permits or authorizations from local, state or federal agencies and restrictions on the use of the subject property imposed by private parties.

4. Any use of the subject property by the claimants 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 subject 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 subject property by the claimant.

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

The department issued its draft staff report on this claim on March 14, 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.