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. M118585
(BALLOT MEASURE 37) OF	)	
Patricia Gonterman and	)	
Merrill Gonterman II, CLAIMANTS	)	

Claimants: Patricia Gonterman and Merrill Gonterman II (the Claimants)

Property: Township 4S, Range 1E, Section 27, Tax lot 505, Clackamas County (the Property)

Claim: The demand for compensation and any supporting information received from the Claimants by the State of Oregon (the Claim).

Claimants submitted the Claim to the State of Oregon under ORS 197.352. Under OAR 125-145-0010 *et seq.*, the Department of Administrative Services (DAS) referred the Claim to the Department of Land Conservation and Development (DLCD) as the regulating entity. This order is based on the record herein, including the Findings and Conclusions set forth in the Final Staff Report and Recommendation of DLCD (the DLCD Report) attached to and by this reference incorporated into this order.

ORDER

The Claim is approved as to laws administered by DLCD and the Land Conservation and Development Commission (LCDC) for the reasons set forth in the DLCD Report, and subject to the following terms:

1. In lieu of compensation under ORS 197.352, the State of Oregon will not apply the following laws to the claimants' division of the 24.26-acre property into 24 parcels or to their development of a dwelling on each parcel: applicable provisions of Goal 3, ORS 215 and OAR 660, division 33, enacted or adopted after the claimants each acquired the subject property. These laws will not apply to: 1) Patricia Gonterman 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 the property on November 18, 1970, and 2) Merrill Gonterman II only to the extent necessary to allow him to use the subject property for the use described in this report, and only to the extent that use was permitted when he acquired the property on March 11, 2004. The department acknowledges that the relief to which Merill Gonterman II is entitled under ORS 197.352 will not allow him to use the subject property in the manner set forth in the claim.

2. The action by the State of Oregon provides the state's authorization to Patricia Gonterman to use the property subject to the standards in effect on November 18, 1970, and to Merrill Gonterman II to use the property subject to the standards in effect on March 11, 2004.

On March 11, 2004, the property was subject to applicable provisions of Goal 3, ORS 215 and ORS 660, division 33, currently in effect.

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 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 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, 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 subject 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 subject property by the claimants.

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 20th day of April, 2006.

FOR the DEPARTMENT OF ADMINISTRATIVE SERVICES:

Dugan Petty, Deputy Administrator
DAS, State Services Division
Dated this 20th 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[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.

ORS 197.352 (BALLOT MEASURE 37) CLAIM FOR COMPENSATION

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

April 20, 2006

STATE CLAIM NUMBER:	M118585
NAMES OF CLAIMANTS:	Patricia Gonterman and Merrill Gonterman II
MAILING ADDRESS:	28390 South Highway 170 Canby, Oregon 97013
PROPERTY IDENTIFICATION:	Township 4S, Range 1E, Section 27 Tax lot 505 Clackamas County
OTHER CONTACT INFORMATION:	Kirk Gonterman 4125 Delightful Lane Silverton, Oregon 97381
DATE RECEIVED BY DAS:	June 10, 2005
180-DAY DEADLINE:	April 25, 2006[1]

I. SUMMARY OF CLAIM

The claimants, Patricia Gonterman and Merrill Gonterman II, seek compensation in the amount of $2,052,260 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 claimants desire compensation or the right to divide the 24.26-acre property into 24 parcels and to develop a dwelling on each parcel.[2] The subject property is located at 28390 South Highway 170, near Canby, in Clackamas County. (See claim.)

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[1] This date reflects 180 days from the date the claim was submitted as extended by the 139 days enforcement of 2005 Oregon Laws, Chapter 1 was suspended during the pendency of the appeal of *MacPherson v. DAS. MacPherson v. Dept. of Admin. Srvcs.*, 340 Or 117 (2006).

[2] The claim submitted by the claimants to the State of Oregon does not specify claimants' desired use of the subject property. However, according to the Clackamas County Assessor's Office, in the Measure 37 claim the claimants filed with the county, the claimants sought compensation or the right to divide the subject property into one-acre parcels. For the purposes of this report, we conclude that claimants seek the same right to use the property with their state claim as they do with their county 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 Patricia Gonterman and Merrill Gonterman II's division of the 24.26-acre property into 24 parcels and to their development of a dwelling on each parcel: applicable provisions of Statewide Planning Goal 3 (Agricultural Lands), ORS 215 and Oregon Administrative Rules (OAR) 660, division 33, enacted or adopted after November 18, 1970, for Patricia Gonterman, and enacted or adopted after March 11, 2004, for Merrill Gonterman II. These laws will not apply to the claimants only to the extent necessary to allow 1) Patricia Gonterman to use the subject property for the use described in this report, and only to the extent that use was permitted when she acquired the property on November 18, 1970, and 2) Merrill Gonterman II to use the property for the use described in this report, and only to the extent that use was permitted when he acquired the property on March 11, 2004. The department acknowledges that the relief to which the claimants are entitled under ORS 197.352 will not allow Merrill Gonterman II to use the subject property in the manner set forth in the claim. (See the complete recommendation in Section VI. of this report.)

III. COMMENTS ON THE CLAIM

Comments Received

On August 25, 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.

The comment does not address whether the claim meets the criteria for relief under ORS 197.352. Comments concerning the effects a use of the subject property may have on surrounding areas are generally 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. (See the 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 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 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 June 10, 2005, for processing under OAR 125, division 145. The claim identifies the property's Exclusive Farm Use (EFU) zoning 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 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 claimant, Patricia Gonterman, acquired the subject property on November 18, 1970, as reflected by a warranty deed included with the claim. On March 11, 2004, Patricia Gonterman deeded her interest in the subject property to her son Merrill Gonterman II, as trustee of the Merrill Gonterman II Trust and to herself, as trustee of the Patricia Gonterman Trust, a revocable trust.[3] A June 13, 2005, title report submitted with the claim establishes the claimants' current ownership.

Conclusions

Claimant Patricia Gonterman is an "owner" of the subject property, as that term is defined by ORS 197.352(11)(C), as of November 18, 1970. Claimant Merrill Gonterman II is an owner of the subject property, as of March 11, 2004. Patricia Gonterman is a "family member" of Merrill Gonterman II, as defined by 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 claimants' use of private real property in a manner that reduces the fair market value of the

[3] Transfer to a revocable trust does not constitute a change of ownership for the purposes of ORS 197.352.

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 indicates that the claimants desire to divide the 24.26-acre property into 24 parcels and to develop a dwelling on each parcel, which is not allowed under the property's current EFU zoning.

The claim is based generally on Clackamas County's current EFU zone and the applicable provisions of state law that require such zoning. The claimants' property is zoned EFU as required by Goal 3 in accordance with ORS 215 and OAR 660, division 33, because the claimants' property is "agricultural land" as defined by Goal 3.[4] Goal 3 became effective on January 25, 1975, and required that agricultural lands as defined by the Goal be zoned EFU pursuant to ORS 215.

Current land use regulations, particularly ORS 215.263, 215.284 and 215.780 and OAR 660, division 33, enacted or adopted pursuant to Goal 3, prohibit the division of EFU-zoned land into parcels less than 80 acres and establish standards for the development of dwellings on existing or any proposed parcel on that land.

ORS 215.780 establishes an 80-acre minimum size for the creation of new lots or parcels in EFU zones and became effective on November 4, 1993 (Chapter 792, Oregon Laws 1993). ORS 215.263 (2005 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(1)(f). OAR 660-033-0130(4) (applicable to non-farm dwellings) became effective on August 7, 1993, and was amended to comply with ORS 215.284(4) on March 1, 1994. The Commission subsequently adopted amendments to comply with House Bill 3326 (Chapter 704, Oregon Laws 2001, effective on January 1, 2002), which became effective on May 22, 2002. (See administrative rule history for OAR 660-033-0100, -0130 and -0135.)

Goal 14 (Urbanization) would likely apply to the division of the claimants' property into parcels less than two acres in size. Goal 14 generally requires that land outside of urban growth boundaries be used for rural uses. Goal 14 became effective on January 25, 1975.

Patricia Gonterman first acquired the subject property in 1970, prior to the adoption of the statewide planning goals and their implementing statutes and rules. No county zoning applied to the subject property in 1970.

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[4] The claimants' property is "agricultural land" because it contains National Resources Conservation Service Class I-IV soils.

Conclusions

The current zoning requirements, minimum lot size and dwelling standards established by applicable provisions of Goal 3, ORS 215 and OAR 660, division 33, were all enacted or adopted after the Gonterman family acquired the subject property. These laws restrict the use of the subject property relative to the uses allowed when the Gonterman family acquired the property.

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 $2,052,260 as the reduction in the subject property's fair market value due to current regulations. This amount is based on the claimants' analysis of Clackamas County tax assessor data.

Conclusions

As explained in Section V. (1) of this report, the claimants are Patricia Gonterman and Merrill Gonterman II. Patricia Gonterman acquired the subject property in 1970. Under ORS 197.352, the claimants are due compensation for land use regulations that restrict the use of the 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 Gonterman family acquired the subject property restrict the desired division and development of the property. The claimants estimate the reduction in value due to the restrictions to be $2,052,260.

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 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 Gonterman 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 relative to the uses permitted when the Gonterman family acquired the property, including applicable provisions of Goal 3, ORS 215 and OAR 660, division 33, which Clackamas County

has implemented through its current EFU zone. All of these land use regulations were enacted or adopted after the Gonterman family acquired the subject property.

Conclusions

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 Patricia Gonterman acquired the property on November 18, 1970. As a result, these laws are not exempt under ORS 197.352(3)(E). Laws in effect when the Gonterman family acquired the subject property are exempt under ORS 197.352(3)(E), and do not provide a basis for compensation. In addition, other land use laws enacted 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 one or more 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 claimants' ability to divide the 24.26-acre property into 24 parcels and to develop a dwelling on each parcel. The claim asserts that the laws enforced by the Commission or the department reduce the fair market value of the subject property by $2,052,260. 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 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 the claimants to use the subject property for a use permitted at the time they each acquired the property.

As discussed above, Patricia Gonterman acquired the subject property on November 18, 1970, prior to the adoption of the statewide planning goals and their implementing statutes and rules. No county zoning applied to the subject property in 1970.

At the time Merrill Gonterman II acquired an interest in the subject property on March 11, 2004, it was zoned EFU by Clackamas County and subject to the current lot size and dwelling

standards under Goal 3, ORS 215 and OAR 660, division 33, and as described in Section V.(2) of this report.

In addition to laws in effect at the time Patricia Gonterman acquired the property on November 18, 1970, and the applicable provisions of Goal 3 and ORS 215 in effect when Merrill Gonterman II acquired the property on March 11, 2004, there may be other laws that 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 which laws apply to a use of the subject 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 depending on when they were enacted or adopted, may continue to apply to the claimants' property. In addition, some of these laws may be exempt under ORS 197.352(A) to (D), and will continue to apply to the subject property on that basis.

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 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. The 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 subject property.

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 the claimants' division of the 24.26-acre property into 24 parcels or to their development of a dwelling on each parcel: applicable provisions of Goal 3, ORS 215 and OAR 660, division 33, enacted or adopted after the claimants each acquired the subject property. These laws will not apply to: 1) Patricia Gonterman 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 the property on November 18, 1970, and 2) Merrill Gonterman II only to the extent necessary to allow him to use the subject property for the use described in this report, and only to the extent that use was permitted when he acquired the property on March 11, 2004. The department acknowledges that the relief to which Merill Gonterman II is entitled under ORS 197.352 will not allow him to use the subject property in the manner set forth in the claim.

2. The action by the State of Oregon provides the state's authorization to Patricia Gonterman to use the property subject to the standards in effect on November 18, 1970, and to Merrill Gonterman II to use the property subject to the standards in effect on March 11, 2004. On March 11, 2004, the property was subject to applicable provisions of Goal 3, ORS 215 and ORS 660, division 33, currently in effect.

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 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 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, 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 subject 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 subject property by the claimants.

VII. COMMENTS ON THE DRAFT STAFF REPORT

The department issued its draft staff report on this claim on April 4, 2006. OAR 125-145-0100(3), provided an opportunity for the claimants or the claimants' 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.