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 Darwin and Maxine Lee, as individuals and as trustees of the Darwin and Maxine Lee Joint Living Trust, CLAIMANTS	))))))	AMENDED FINAL ORDER CLAIM NO. M118650

Claimants: Darwin and Maxine Lee, as individuals and as trustees of the Darwin and Maxine Lee Joint Living Trust (the Claimants)

Property: Township 26S, Range 6W, Section 33A, Tax lot 1100, Douglas 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 Darwin and Maxine Lee's division of the subject property into two parcels or to their development of a dwelling on one of the parcels: applicable provisions of Goal 3, ORS 215 and OAR 660, division 33, enacted or adopted after March 13, 1951 (for the east half) and March 29, 1965 (for the west half).

2. The action by the State of Oregon provides the state's authorization to claimants Darwin and Maxine Lee to use the property subject to the standards in effect on March 13, 1951 and March 29, 1965.

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 including, without limitation, those laws exempted under ORS 197.352(3).

5. Without limiting the generality of the foregoing terms and conditions, in order for the claimants to use the 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 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

Cora R. Parker

Cora R. Parker, Deputy Director
DLCD
Dated this 16th day of June, 2006.

FOR the DEPARTMENT OF ADMINISTRATIVE SERVICES:

Dugan Petty

Dugan Petty, Deputy Administrator
DAS, State Services Division
Dated this 16th day of June, 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
Amended Final Staff Report and Recommendation

June 16, 2006

STATE CLAIM NUMBER:	M118650
NAMES OF CLAIMANTS:	Darwin and Maxine Lee, as individuals and as trustees of the Darwin and Maxine Lee Joint Living Trust
MAILING ADDRESS:	493 Quail Lane Roseburg, Oregon 97470
PROPERTY IDENTIFICATION:	Township 26S, Range 6W, Section 33A Tax lot 1100 Douglas County
OTHER CONTACT INFORMATION:	Harlan and Debra Lee 548 West Elm Street Roseburg, Oregon 97470
DATE RECEIVED BY DAS:	June 21, 2005
180-DAY DEADLINE:	May 6, 2006[1]

I. SUMMARY OF CLAIM

The claimants, Darwin and Maxine Lee, trustees of the Darwin and Maxine Lee Joint Living Trust, seek compensation in the amount of $125,000 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 claimants desire compensation or the right to divide the 14.14-acre subject property into one approximately 1-acre parcel and one approximately 13-acre parcel and to develop a dwelling on the smaller parcel.[2] The subject property is located at 493 Quail Lane, near Roseburg, in Douglas 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 that all timelines under Measure 37 were suspended during the pendency of *MacPherson v. Dept. of Admin. Srvcs.*, 340 Or 117 (2006).

[2] The claim does not state the size of the desired parcels. However, a September 2, 2005, Douglas County decision on a Measure 37 claim for the subject property refers to a request "to create two parcels being 1 +/- acres and 13+ acres, and the approval for one single-family dwelling on the vacant 1 +/- acre parcel created." See a copy of the Douglas County decision in the department's claim file.

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 Darwin and Maxine Lee's, as trustees of the Darwin and Maxine Lee Joint Living Trust, division of the subject property into two parcels and to their development of a dwelling on one parcel: applicable provisions of Statewide Planning Goal 3 (Agricultural Lands), ORS 215 and Oregon Administrative Rules (OAR) 660, division 33, enacted or adopted after March 13, 1951 (for the east half of the property) and March 29, 1965 (for the west half of the property). These laws will not apply to the claimants only to the extent necessary to allow them to use the subject property for the use described in this report, and only to the extent that use was permitted when they acquired the property on March 13, 1951 and March 29, 1965. (See the complete recommendation in Section VI. of this report.)

The department further recommends that this claim be denied as to Darwin and Maxine Lee as individuals because, as individuals, these claimants are not owners of the subject property. (See the complete recommendation in Section VI. of this report.)

III. COMMENTS ON THE CLAIM

Comments Received

On September 7, 2005, pursuant to Oregon Administrative Rules (OAR) 125-145-0080, the Oregon Department of Administrative Services (DAS) provided written notice to the owners of surrounding properties. According to DAS, three written comments, evidence or information were received in response to the 10-day notice.

The comments do 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 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 Measure 37 (December 2, 2004), within two years of that effective date, or the date the public entity applies

the land use regulation as an approval criterion to an application submitted by the owner, whichever is later; or

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

Findings of Fact

This claim was submitted to DAS on June 21, 2005, for processing under OAR 125, division 145. The claim identifies Douglas County's Exclusive Farm Use-Cropland (FC) 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

On March 13, 1951, Roger Lee, claimant Darwin Lee's father, and Roger Lee's wife, Ruth Lee, transferred the subject property to Darwin Lee, as reflected by a warranty deed included with the claim. On August 15, 1952, claimants Darwin and Maxine Lee transferred the west half of the subject property to Roger Lee, as reflected by a warranty deed included with the claim. On May 29, 1959, claimant Darwin Lee transferred his undivided one-half interest in the east half of the subject property to his wife, claimant Maxine Lee, as reflected by a deed creating estate in entirety included with the claim. On March 29, 1965, Ruth Lee[3] transferred the west half of the subject property to claimants Darwin and Maxine Lee, as reflected by a bargain and sale deed included with the claim. On February 26, 1999, the claimants transferred the subject property to

[3] There is a gap in the chain of title as provided in the claim. Some time between August 15, 1952, and March 29, 1965, ownership of the west half of the property was transferred from Roger Lee to his wife Ruth Lee, presumably by deed or inheritance. It is not known whether there were any non-family owners during that period. See the department's claim file.

the Darwin and Maxine Lee Joint Living Trust, as reflected by a bargain and sale deed included with the claim.[4]

The Douglas County Assessor's Office confirms that Darwin and Maxine Lee, trustees of the Darwin and Maxine Lee Joint Living Trust, are the current owners of the subject property.[5]

Conclusions

The claimants, Darwin and Maxine Lee, are "owners" of the subject property as that term is defined by ORS 197.352 (11)(C), as of March 31, 1951 (the east half) and March 22, 1965 (the west half). .

2. The Laws That are the Basis for This Claim

In order to establish a valid claim, ORS 197.352(1) requires, in part, that a law must restrict the claimants' use of private real property in a manner that reduces the fair market value of the property relative to how the property could have been used at the time the claimants or a family member acquired the property.

Findings of Fact

The claim indicates that the 14.14-acre subject property is currently developed with one single-family dwelling. The claimants desire to divide the subject property into two parcels and develop a second single-family dwelling on the vacant parcel. The claim identifies Douglas County's FC-1 zoning, which has a 20-acre minimum parcel size, and restrictions on non-farm dwellings, as preventing the claimants from establishing that desired use.

The claim is based on Douglas County's current FC-1 zone and the applicable provisions of state law that require such zoning. The property is also subject to Douglas County's Floodplain Overlay zoning district. The claimants' property is zoned Exclusive Farm Use (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.[6] 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 smaller than 80 acres and establish standards for the development of dwellings on existing or proposed parcels on that land.

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[4] The trust is, by its terms, revocable. Transfer to a revocable trust is not a change in ownership for the purposes of ORS 197.352. See copy of the trust agreement in the department's claim file.

[5] See notes of department staff phone call to Douglas County Assessor's Office on January 17, 2006, in the department's claim file.

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

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 were effective on May 22, 2002. (See administrative rule history for OAR 660-033-0100, -0130 and -0135.)

The claimants acquired the subject property in 1951 and 1965, prior to the adoption of the statewide planning goals and their implementing statutes and rules. No county zoning applied to the subject property in 1951 and 1965.

Conclusions

The current zoning requirements, minimum lot size and dwelling standards established by Goal 3 and provisions applicable to land zoned EFU in ORS 215 and OAR 660, division 33, were all enacted or adopted after the claimants acquired the subject property. These laws restrict the use of the subject property relative to the uses allowed when the claimants 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 $125,000 as the reduction in the subject's property's fair market value due to current regulations. This amount is based on a realtor's comparative market analysis, which was included with the claim.

Conclusions

As explained in Section V.(1) of this report, the claimants are Darwin Lee and Maxine Lee, both as trustees of the Darwin and Maxine Lee Joint Living Trust and in their individual capacity. The claimants acquired the subject property in 1951 and 1965. Under ORS 197.352, as the current owners, Darwin Lee and Maxine Lee 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 claimants acquired the subject property restrict the desired division and development of the property. The claimants estimate the reduction in value to be $125,000.

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.

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 claimants acquired the property, including applicable provisions of Goal 3, ORS 215 and OAR 660, division 33, which Douglas County has implemented through its current FC zone. All of these regulations were enacted or adopted after the claimants 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 the claimants acquired the property in 1951 and 1965. As a result, these laws are not exempt under ORS 197.352(3)(E). Laws in effect when the claimants 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 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 claimants' ability to divide the subject property into two parcels and to develop a dwelling on one of those parcels. The claim asserts that the laws enforced by the Commission or the department reduce the fair market value of the subject property by

$125,000. 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 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 Darwin and Maxine Lee to use the property for a use permitted at the time they acquired the property on March 13, 1951 (the east half) and March 29, 1965 (the west half).

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(3)(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 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 and the foregoing findings and conclusions, claimants Darwin Lee and Maxine Lee have established that they are entitled to relief under ORS 197.352(1) as a result of land use regulations enforced by the Commission or the department, and 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 Darwin and Maxine Lee's division of the subject property into two parcels or to their development of a dwelling on one of the parcels: applicable provisions of Goal 3, ORS 215 and OAR 660, division 33, enacted or adopted after March 13, 1951 (for the east half) and March 29, 1965 (for the west half).

2. The action by the State of Oregon provides the state's authorization to claimants Darwin and Maxine Lee to use the property subject to the standards in effect on March 13, 1951 and March 29, 1965.

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 including, without limitation, those laws exempted under ORS 197.352(3).

5. Without limiting the generality of the foregoing terms and conditions, in order for the claimants to use the 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 13, 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.