

BEFORE THE DEPARTMENT OF ADMINISTRATIVE SERVICES,
THE DEPARTMENT OF LAND CONSERVATION AND DEVELOPMENT, AND
THE DEPARTMENT OF ENVIRONMENTAL QUALITY
OF THE STATE OF OREGON

IN THE MATTER OF THE CLAIM FOR) FINAL ORDER
COMPENSATION UNDER ORS 197.352) CLAIM NO. M118657
(BALLOT MEASURE 37) OF)
Ron and Sandra Briery, CLAIMANTS)

Claimants: Ron and Sandra Briery (the Claimants)

Property: Township 36S, Range 1W, Section 10, Tax lot 1400, Jackson 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), and the Department of Environmental Quality (the DEQ Report), attached to and by this reference incorporated into this order.

ORDER

The Claim is denied as to the laws administered by the Department of Environmental Quality for the reasons set forth in the DEQ Report.

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 Ron and Sandra Briery's division of their approximately 83-acre property into 5-acre 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 August 4, 1976. These land use regulations will not apply to 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 when they acquired the property on August 4, 1976.
2. The action by the State of Oregon provides the state's authorization to the claimants to use the property for the use described in this report, subject to the standards in effect on August 4, 1976. On that date, the property was subject to applicable provisions of Goal 3 and ORS 215 then 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 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 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, and by the Deputy Director of the DEQ as a final order under ORS 197.352, OAR 125, division 145.

FOR DLCD AND THE LAND
CONSERVATION AND DEVELOPMENT
COMMISSION:

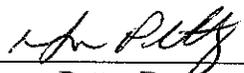
Lane Shetterly, Director



George Naughton, Deputy Director
DLCD

Dated this 4th day of May, 2006.

FOR THE DEPARTMENT OF
ADMINISTRATIVE SERVICES:



Dugan Petty, Deputy Administrator
DAS, State Services Division
Dated this 4th day of May, 2006.

FOR THE FOR DEPARTMENT OF
ENVIRONMENTAL QUALITY

Paul Slyman, Deputy Director
DEQ
Dated this 4th day of May, 2006

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 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, and by the Deputy Director of the DEQ as a final order under ORS 197.352, OAR 125, division 145.

FOR DLCD AND THE LAND
CONSERVATION AND DEVELOPMENT
COMMISSION:
Lane Shetterly, Director

FOR THE DEPARTMENT OF
ADMINISTRATIVE SERVICES:

Dugan Petty, Deputy Administrator
DAS, State Services Division
Dated this 4th day of May, 2006.

George Naughton, Deputy Director
DLCD
Dated this 4th day of May, 2006.

FOR THE FOR DEPARTMENT OF
ENVIRONMENTAL QUALITY



Paul Slyman, Deputy Director
DEQ
Dated this 4th day of May, 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 197.352¹, 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.”

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**

May 4, 2006

STATE CLAIM NUMBER: M118657

NAMES OF CLAIMANTS: Ron and Sandra Briery

MAILING ADDRESS: 1587 Bingham Brown Road
Eagle Point, Oregon 97004

PROPERTY IDENTIFICATION: Township 36S, Range 1W, Section 10
Tax lot 1400
Jackson County

OTHER CONTACT INFORMATION: Mark Bartholomew
717 Murphy Road
Medford, Oregon 97504

DATE RECEIVED BY DAS: June 22, 2005

180-DAY DEADLINE: May 7, 2006¹

I. SUMMARY OF CLAIM

The claimants, Ron and Sandra Briery, seek compensation in the amount of \$2,188,000 for the reduction in the 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 approximately 83-acre property into 5-acre parcels and to develop a dwelling on each parcel. The subject property is located at 1587 Bingham Brown Road, near Eagle Point, in Jackson County. (See claim.)

II. SUMMARY OF STAFF RECOMMENDATION

Based on the findings and conclusions set forth below, the Department of Land Conservation and Development (the department) has determined that the claim is valid. Department staff recommends that, in lieu of compensation, the requirements of the following state laws enforced by the Land Conservation and Development Commission (the Commission) or the department not apply to the claimants' division of the approximately 83-acre property into 5-acre parcels and to their development of a dwelling on each parcel: applicable provisions of Statewide Planning

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. Svcs.*, 340 Or 117 (2006).

Goal 3 (Agricultural Lands), ORS 215 and Oregon Administrative Rules (OAR) 660, division 33, enacted or adopted after August 4, 1976. 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 August 4, 1976. (See the complete recommendation in Section VI. of this report.)

III. COMMENTS ON THE CLAIM

Comments Received

On July 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 comment letter was received in response to the 10-day notice.

The comment includes information relevant to whether the restriction of the claimants' use of the property reduces the fair market value of the property. The comment has been considered by the department in preparing this report. (See comment letter in the department's claim file.)

IV. TIMELINESS OF CLAIM

Requirement

ORS 197.352(5) requires that a written demand for compensation be made:

1. For claims arising from land use regulations enacted prior to the effective date of 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 22, 2005, for processing under OAR 125, division 145. The claim identifies Jackson County's Exclusive Farm Use (EFU) zone, Goals 5 (Natural Resources), 11 (Public Facilities) and 14 (Urbanization), ORS 92, 195, 197 and 215, OAR 660, divisions 4, 11, 12, and 33, OAR 340-096-0020 and 340-096-0034² and "any and all laws and regulations that inhibit the property's including in the UGB of Eagle Point and eventual annexation." (A detailed list of cited regulations is provided as Exhibit 4 of the claim.) Only laws that were enacted or adopted prior to December 2, 2004, are the basis for this claim.

² OAR 340-096-0020 and 340-096-0034 are addressed in a separate report by the Oregon Department of Environmental Quality.

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 claimants, Ron and Sandra Briery, acquired the subject property on August 4, 1976, as reflected by a warranty deed included with the claim. The Jackson County Assessor’s Office confirms that Ron and Sandra Briery are the current owners of the subject property.

Conclusions

The claimants, Ron and Sandra Briery, are the “owners” of the subject property, as that term is defined by ORS 197.352(11)(C) as of August 4, 1976.

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 acquired the property.

Findings of Fact

The claim indicates that the claimants desire to divide the 82.72-acre property into 5-acre parcels and develop a dwelling on each parcel, and they are restricted from doing this by Jackson County’s EFU zone; Goals 5, 11 and 14; ORS 92, 195, 197 and 215; OAR 660, divisions 4, 11, 12, and 33; OAR 340, division 96, and “any and all laws and regulations that inhibit the property’s inclusion in the UGB of Eagle Point and eventual annexation.”

The claim cites ORS 92, 195 and 197 as state laws that restrict the claimants’ use of their property compared to uses permitted in 1976. The claimants have not provided any explanation as to how these laws restrict their requested use of the property. On their face, these laws do not restrict the use of the property, and the claimants have not established how they constitute land use regulations that restrict the use of the subject property. Furthermore, except as noted below, these statutes were enacted prior to the acquisition of the property by the claimants in 1976 and are thus exempt under ORS 197.352(3)(E). (See Section V.(4) of this report.) Absent an explanation by the claimants as to how these laws restrict the use of the subject 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 acquired the property, these laws are not discussed further in this report.

The claim also cites Goals 5, 11 and 14 and administrative rules related to exceptions (OAR 660, division 4), public facilities (OAR 660, division 11), transportation (OAR 660, division 12) as limiting the desired division of the subject property into five-acre parcels and the development of a dwelling on each parcel. The claim does not indicate that there are any Goal 5 resources on the subject property.³ The claimants have not provided any explanation as to how these goals or rules restrict their requested use of the property. On their face, these goals and rules do not restrict the claimants' desired use of the property, and the claimants have not established how they constitute land use regulations that restrict the use of the subject property. Absent an explanation by the claimants as to how these rules restrict the use of the subject 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 acquired the property, these rules are not discussed further in this report.

The claim also identifies "any and all laws and regulations that inhibit the property's inclusion in the UGB of Eagle Point and eventual annexation" as an additional basis for the claim. The claimants have not indicated how laws and regulations regarding Urban Growth Boundaries (UGBs) and annexation restrict the use of the property in a manner that reduces the fair market value of the property. The claim does not indicate why inclusion in the UGB is necessary to obtain the desired use.

The claim is based generally on Jackson 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 proposed parcels 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

³ The claimants have also listed OAR 340, division 96, as a state rule that restricts the claimants' use of their property. These rules are not enforced by the department or the Commission.

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

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 after the adoption of the statewide planning goals, but before the Commission acknowledged Jackson County's land use regulations to be in compliance with the statewide planning goals pursuant to ORS 197.250 and 197.251. Because the Commission had not acknowledged the county's plan and land use regulations when the claimants acquired the subject property on August 4, 1976, the statewide planning goals, and Goal 3 in particular, applied directly to the claimants' property when they acquired it.⁵

As adopted on January 25, 1975, Goal 3 required that agricultural land be preserved and zoned for EFU pursuant to ORS 215. The Goal 3 standard for land divisions involving property where the local zoning was not acknowledged required that the resulting parcels must be of a size that is "appropriate for the continuation of the existing commercial agricultural enterprise within the area." Further, ORS 215.263 (1973 edition) required that all divisions of land subject to EFU zoning comply with the legislative intent set forth in ORS 215.243 (Agricultural Land Use Policy). Thus, the claimants' opportunity to divide the subject property when they acquired it in 1976 was limited to land divisions that were consistent with Goal 3, which required that the resulting parcels be (1) appropriate for the continuation of the existing commercial agricultural enterprise in the area and (2) shown to comply with the legislative intent set forth in ORS 215.

Under the Goal 3 standards in effect on August 4, 1976, farm dwellings were allowed if they were determined to be "customarily provided in conjunction with farm use" under ORS 215.213(1)(e) (1973 edition). Non-farm dwellings were subject to compliance with ORS 215.213(3) (1973 edition).

No information has been presented in the claim to establish that the claimants' desired division of the subject property into five-acre parcels complies with the "commercial" standard for farm parcels under Goal 3 or the standards for non-farm parcels under ORS 215.263 (1973 edition), nor is there any information to establish that the claimants' desired development of dwellings on the subject property satisfies the standards for farm or non-farm dwellings under ORS 215.213 (1973 edition).

⁵ The statewide planning goals became effective on January 25, 1975, and were applicable to legislative land use decisions and some quasi-judicial land use decisions prior to the Commission's acknowledgment of each county's comprehensive plan and implementing regulations. *Perkins v. City of Rajneeshpuram*, 300 Or 1 (1985); *Alexanderson v. Polk County*, 289 Or 427, rev. den 290 Or 137 (1980); *Sunnyside Neighborhood Assn. v. Clackamas County*, 280 Or 3 (1977); *Jurgenson v. Union County*, 42 Or App 505 (1979); and *1000 Friends of Oregon v. Benton County*, 32 Or App 413 (1978). After the county's plan and land use regulations were acknowledged by the Commission, the statewide planning goals and implementing rules no longer applied directly to such local land use decisions. *Byrd v. Stringer*, 295 Or 311 (1983). However, statutory requirements continue to apply, and insofar as the state and local provisions are materially the same, the local provisions must be interpreted consistent with the substance of the goals and implementing rules. *Forster v. Polk County*, 115 Or App 475 (1992) and *Kenagy v. Benton County*, 115 Or App 131 (1992).

Conclusions

The current zoning requirements, minimum lot size and dwelling standards established by Goal 3, ORS 215 and OAR 660, division 33, were all enacted or adopted after the claimants acquired the subject property in 1976 and do not allow the claimants' desired division or development of the subject property. However, the claim does not establish whether or the extent to which the claimants' desired use of the subject property complies with the standards for land divisions and development in effect when the claimants' acquired the subject property in 1976.

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. There may be other laws that currently apply to the claimants' use of the subject property, and that may continue to 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.

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 \$2,188,000 as the reduction in the subject property's fair market value due to current regulations. This amount is based on the claimants' estimate of the market value of the approximately 83-acre property if it were divided into buildable 5-acre parcels. The claim includes real estate comparisons to support the estimate.

Conclusions

As explained in Section V.(1) of this report, the claimants are Ron and Sandra Briery who acquired the subject property on August 4, 1976. 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 claimants acquired the subject property may restrict the desired division and development of the property. The claimants estimate the reduction in value due to the restrictions to be \$2,188,000.

Without an appraisal or other documentation, and without verification of whether or the extent to which the claimants' desired use of the subject property was allowed under the standards in effect when they acquired the property, 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, including applicable provisions of Goal 3, ORS 215 and OAR 660, division 33, which Jackson County has implemented through its current EFU zone. With the exception of provisions of Goal 3 and ORS 215 in effect when the claimants acquired the subject property on August 4, 1976, these land use regulations were enacted or adopted after the claimants acquired the property.

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 with the exception of provisions of Goal 3 and ORS 215 in effect in 1976, the general statutory, goal and rule restrictions on division and development of the claimants' property were not in effect when the claimants acquired it, and therefore, these laws are not exempt under ORS 197.352(3)(E). Provisions of Goals 3 and ORS 215 in effect when the claimants acquired the subject property in 1976 are exempt under ORS 197.352(3)(E) and will continue to apply to the property.

Other laws in effect when the claimants acquired the subject property are also exempt under ORS 197.352(3)(E) and will continue to apply to the claimants' use of the property. There may be other laws that continue to apply to the claimants' 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 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. 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 claimants have identified. Similarly, this report only addresses the exemptions provided for under ORS 197.352 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 the 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.

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 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 approximately 83-acre property into 5-acre 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 \$2,188,000. However, without an appraisal or other specific documentation and because the claim does not provide verification of whether or the extent to which the claimants' desired use of the property was allowed under the standards in effect when they acquired the property, a specific amount of compensation cannot be determined. Nevertheless, based on the record for this claim, the department acknowledges that the laws on which the claim is based likely have reduced the fair market value of the 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 Ron and Sandra Briery to use the subject property for a use permitted at the time they acquired the property on August 4, 1976.

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 Ron and Sandra Briery's division of their approximately 83-acre property into 5-acre 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 August 4, 1976. These land use regulations will not apply to 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 when they acquired the property on August 4, 1976.
2. The action by the State of Oregon provides the state's authorization to the claimants to use the property for the use described in this report, subject to the standards in effect on August 4, 1976. On that date, the property was subject to applicable provisions of Goal 3 and ORS 215 then 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 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 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 14, 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.

**ORS 197.352 (BALLOT MEASURE 37 (2004))
CLAIM FOR COMPENSATION**

**OREGON DEPARTMENT OF ENVIRONMENTAL QUALITY
Final Staff Report and Recommendation
May 4, 2006**

STATE CLAIM NUMBER: M118657

NAMES OF CLAIMANTS: Ron and Sandra Briery

MAILING ADDRESS: 1587 Bingham Brown Road
Eagle Point, Oregon 97004

PROPERTY IDENTIFICATION: Township 36S, Range 1W,
Section 10
Tax lot 1400
Jackson County

OTHER CONTACT INFORMATION: Mark Bartholomew
Hoernecker, Cowling, Hassaen &
Heysell, LLP
717 Murphy Road
Medford, Oregon 97504

DATE RECEIVED BY DAS: June 22, 2005

180-DAY DEADLINE: May 7, 2006¹

I. SUMMARY OF CLAIM

See Department of Land Conservation and Development (DLCD) staff report.

II. SUMMARY OF STAFF RECOMMENDATION

Based on the findings and conclusions set forth below, the Department of Environmental Quality (Department) has determined that the claim is not valid as to laws administered by the Department and identified in the claim for the following reasons: (1) the laws administered by the Department and identified in the claim are not land use regulations; (2) the laws administered by the Department and identified in the claim do not restrict the use

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. Svcs.*, 340 Or 117 (2006).

of the property the claimants seek to carry out; (3) the Department has not enforced such laws with regard to claimants' use of the property; and (4) even if the laws administered by the Department and identified in the claim are land use regulations, they are exempt under ORS 197.352(3). The claimants have not registered or filed applications with the Department to carry out composting actions on the property, and the Department has taken no action to enforce the cited composting rule with respect to the claimants or the property. (See the complete recommendation in Section VI. of this report.)

III. COMMENTS ON THE CLAIM

See DLCD Final Staff Report.

IV. TIMELINESS OF CLAIM

See DLCD Final Staff Report.

V. ANALYSIS OF CLAIM

1. Ownership

The Department adopts the findings of fact and conclusions of law regarding ownership contained in the DLCD Final Staff Report for this claim.

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 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 claimants wish to subdivide the subject property into five-acre lots. The claim lists two rules from OAR Chapter 340, Division 96, as "inhibiting regulations." One of the cited rules, OAR 340-96-0034, does not exist. The other rule, OAR 340-96-0020, pertains to composting facilities. This rule does not restrict the division of land into residential lots or the development of residential dwellings, the use described by the claimant as being restricted.

The cited regulation, OAR 340-96-0020, requires registration with or an application to the Department before carrying out certain composting actions. The claimants have not submitted registrations or filed applications to carry out composting actions on the property. Under ORS 197.352(7), property owners are not required to file an application for a permit with a local government prior to seeking relief under ORS 197.352, but there is no corresponding exemption from state permit requirements.

Under ORS 197.352(1), existing laws may be the basis for relief only if a public entity enforces existing laws. The Department has taken no action to enforce the cited rule with respect to the claimants or the property. Until the Department takes some specific action with respect to the property, there is no basis for relief under ORS 197.352.

In addition, ORS 197.352(11) defines the term “land use regulation” as including certain specified state administrative rules. The rules contained in OAR chapter 340, including the two specific rules cited by claimants, are not included within the definition of “land use regulation” under ORS 197.352. As a result, the Department is not authorized to grant any relief to the claimants based on these rules.

Finally, and in the alternative, if OAR 340-096-0020 or OAR 340-096-0034 are “land use regulations,” under ORS 197.352, they are exempt from that statute under ORS 197.352(3)(A), (B), and (C), the exemptions for public nuisances, public health and safety, and regulations required by federal law.

Conclusions

Nothing in the rules cited by claimants restricts the division of the property into residential lots or the development of residential dwellings. DEQ has not enforced a state land use regulation to restrict claimants’ desired use of the property. Furthermore, ORS 197.352 does not exempt claimants or the Department from following the legal requirements to register or apply for composting permits prior to carrying out composting actions. Until the Department has acted to deny such a registration or permit, there is no basis for a claim for relief. The rules identified are not land use regulations under ORS 197.352, and if they were they would be exempt under ORS 197.352(3). In sum: (1) the laws administered by the Department and identified in the claim are not land use regulations; (2) the laws administered by the Department and identified in the claim do not restrict the use of the property the claimants seek to carry out; (3) the Department has not enforced such laws with regard to claimants’ use of the property; and (4) even if the laws administered by the Department and identified in the claim are land use regulations, they are exempt under ORS 197.352(3). For each of these reasons, the Department is not authorized to grant any relief to the claimants based on the laws administered by the Department that are identified in the claim.

3. Effect of Regulations on Fair Market Value

In order to establish a valid claim, Section 1 of Ballot Measure 37 requires the current land use regulation(s) described in Section V. (2). of this report to have “the effect of reducing the fair market value of the property, or any interest therein.”

Findings of Fact

The claimants have not demonstrated that any land use regulations administered by the Department restrict their desired use of the property.

Conclusions

The claimants have not demonstrated that cited regulations administered by the Department restrict their use of the property and thus have not demonstrated that the regulations reduce the fair market value of the subject property.

4. Exemptions under section 3 of Measure 37

ORS 197.352 does not apply to certain land use regulations. In addition, under ORS 197.352(3), certain types of laws are exempt. These include regulations restricting or prohibiting activities based on the protection of public health and safety, including solid waste and pollution control regulations.

Findings of Fact and Conclusions

See section V.2, above.

VI. FORM OF RELIEF

Based on the current record, the claimants are not entitled to relief under ORS 197.352 as to the cited regulations administered by the Department. Department staff recommend this claim be denied because: (1) the laws administered by the Department and identified in the claim are not land use regulations; (2) the laws administered by the Department and identified in the claim do not restrict the use of the property the claimants seek to carry out; (3) the Department has not enforced such laws with regard to claimants' use of the property; and (4) even if the laws administered by the Department and identified in the claim are land use regulations, they are exempt under ORS 197.352(3).

VII. COMMENTS ON THE DRAFT STAFF REPORT

The Department issued its draft staff report on this claim on March 13, 2006. Under OAR 125-145-0100(3), there was 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. No comments were received during the period provided.