

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

IN THE MATTER OF THE CLAIM FOR)
COMPENSATION UNDER ORS 197.352) FINAL ORDER A
(BALLOT MEASURE 37) OF) CLAIM NO. M118658
Gerald L. and Roberta G. Curry, CLAIMANTS)

Claimants: Gerald L. and Roberta G. Curry (the Claimants)

Property: Township 3S, Range 4E, Section 33, Tax lots 600, 700, 703 and 790, 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), the Oregon Department of Forestry (the ODF 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 laws administered by the Oregon Department of Forestry or the Oregon Board of Forestry, for the reasons set forth in the ODF Report.

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 Gerald and Roberta Curry's partition of the 98.5-acre property into lots of one or more acres or to their development of a dwelling on each lot: applicable provisions of Goals 3, 4, 11 and 14, ORS 215 and OAR 660, divisions 6, 11, and 33, enacted or adopted after April 11, 1960, as to tax lot 600 and after February 1, 1973, as to tax lots 700, 703 and 790. These land use regulations 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 April 11, 1960, for tax lot 600 and February 1, 1973, for tax lots 700, 703 and 790.

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 April 11, 1960, for tax lot 600 and on February 1, 1973, for tax lots 700, 703 and 790.
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 Condition 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, and by the Deputy Director of the DEQ as a final order under ORS 197.352, OAR 125, division 145.

This Order is entered by the Oregon Board and Department of Forestry as a final order of the Board under ORS 197.352, OAR 629-001-0057, and OAR Chapter 125, division 145.

FOR DLCD AND THE LAND
CONSERVATION AND DEVELOPMENT
COMMISSION:

Lane Shetterly, Director



George Naughton, Deputy Director
DLCD

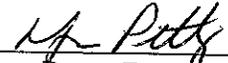
Dated this 4th day of May, 2006.

FOR THE FOR DEPARTMENT OF
ENVIRONMENTAL QUALITY

Paul Slyman, Deputy Director
DEQ

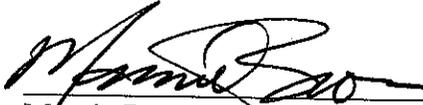
Dated this 4th day of May, 2006

FOR THE DEPARTMENT OF
ADMINISTRATIVE SERVICES:



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

FOR THE OREGON BOARD OF
FORESTRY AND THE OREGON
DEPARTMENT OF FORESTRY:



Marvin Brown, State Forester
ODF

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

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CONSERVATION AND DEVELOPMENT
COMMISSION:

Lane Shetterly, Director

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Paul Slyman, Deputy Director
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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.

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

IN THE MATTER OF THE CLAIM FOR)
COMPENSATION UNDER ORS 197.352) FINAL ORDER B
(BALLOT MEASURE 37) OF) CLAIM NO. M118658
Gerald L. and Roberta G. Curry, CLAIMANTS)

Claimants: Gerald L. and Roberta G. Curry (the Claimants)

Property: Township 3S, Range 4E, Section 32A, Tax lots 2600 and 2601, 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), the Oregon Department of Forestry (the ODF 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 laws administered by the Oregon Department of Forestry or the Oregon Board of Forestry, for the reasons set forth in the ODF Report.

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 Gerald and Roberta Curry's division of the 11.95-acre property into one-acre or larger lots for residential development: applicable provisions of Goals 11 and 14 and OAR 660-004-0040 and 660-011-0060. These land use regulations 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 6, 1968.

2. The action by the State of Oregon provides the state's authorization to the claimants to use the subject property for the use described in this report, subject to the standards in effect on August 6, 1968.

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

This Order is entered by the Oregon Board and Department of Forestry as a final order of the Board under ORS 197.352, OAR 629-001-0057, and OAR Chapter 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 FOR DEPARTMENT OF
ENVIRONMENTAL QUALITY

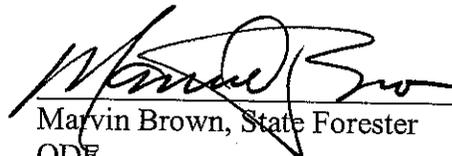
Paul Slyman, Deputy Director
DEQ
Dated this 4th day of May, 2006

FOR THE DEPARTMENT OF
ADMINISTRATIVE SERVICES:



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

FOR THE OREGON BOARD OF
FORESTRY AND THE OREGON
DEPARTMENT OF FORESTRY:



Marvin Brown, State Forester
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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

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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: M118658
Report A¹

NAMES OF CLAIMANTS: Gerald L. and Roberta G. Curry

MAILING ADDRESS: 23250 South Day Hill Road
Estacada, Oregon 97023

PROPERTY IDENTIFICATION: Township 3S, Range 4E, Section 33
Tax lots 600, 700, 703 and 790
Clackamas County

OTHER CONTACT INFORMATION: Mark P. O'Donnell, Esq.
Kristian Roggendorf, Esq.
O'Donnell & Clark, LLP
1706 Norethwest Glisan, Suite 6
Portland, Oregon 97209

DATE RECEIVED BY DAS: June 22, 2005

180-DAY DEADLINE: May 7, 2006²

I. SUMMARY OF CLAIM

The claimants, Gerald L. and Roberta G. Curry, seek compensation in the amount of \$1,450,000³ 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 98.5-acre property⁴ into approximately 99 one-acre parcels and to develop a dwelling on each parcel. The subject property is located at 23250 South Day Hill Road, near Estacada, in Clackamas County. (See claim.)

¹ The department has split its report for this claim into two parts. Report A addresses that portion of the property zoned for farm use. Report B addresses that portion zoned for rural residential use.

² 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).

³ The amount listed for compensation applies to all six tax lots (600, 700, 703, 790, 2600 and 2601) included in the claim; however, this report addresses only four of the tax lots.

⁴ Tax lots 600, 700, 703 and 790 under the Currys' ownership are addressed in this staff report. Tax lots 2600 and 2601 are addressed in Report B.

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 claimants Gerald and Roberta Curry's partition of the 98.5-acre property into lots of one or more acres and to their development of a dwelling on each lot: applicable provisions of Statewide Planning Goals 3 (Agricultural Lands), 4 (Forest Lands), 11 (Public Facilities and Services) and 14 (Urbanization); ORS 215; and Oregon Administrative Rules (OAR) 660, divisions 4, 6, 11, and 33, enacted or adopted after April 11, 1960, for tax lot 600 and after February 1, 1973, for tax lots 700, 703 and 790. 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 April 11, 1960, for tax lot 600 and on February 1, 1973, for tax lots 700, 703 and 790. (See the complete recommendation in Section VI of this report.)

III. COMMENTS ON THE CLAIM

Comments Received

On July 8, 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, ten 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 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 Clackamas County zoning and subdivision ordinances (Sections 1105, 1106, 309 and 407), certain state statutes included in ORS 92, 197, 215, 526, 527 and 454 and certain administrative rules contained in OAR 660, 661, 629 and 340 as the basis for the claim. Only laws that were enacted or adopted prior to December 2, 2004, are the basis for this claim. Only statutes and rules administered by the Commission are addressed in this report.

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, Gerald and Roberta Curry, acquired tax lot 600 on April 11, 1960, and tax lots 700, 703 and 790 on February 1, 1973, as reflected by a real estate contract for tax lots 700, 703 and 790, and a letter and receipt for a land sale contract from the First State Bank of Milwaukie that references a real estate contract for tax lot 600. (The real estate contract and letter and receipt were included with the claim.) A May 26, 2005, chain of title report from Stewart Title submitted with the claim establishes the claimants’ current ownership.

Conclusions

The claimants, Gerald and Roberta Curry, are “owners” of the subject property as that term is defined by ORS 197.352(11)(C), as of April 11, 1960, for tax lot 600 and February 1, 1973, for tax lots 700, 703 and 790.

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 claimants desire to create up to 111 to 115 one-acre lots⁵ (note: 99 lots maximum on tax lots 600, 700, 703 and 790 with 98.5 total acres for this staff report) with individual onsite septic systems or a community sewer system. State statutes including ORS 92, 197, 215, 526 (Forestry), 527 (Forestry) and 454 (DEQ septic system standards) and the administrative rules for ORS 197, 215 and 454 are identified as restricting the claimants' ability to create up to 115 one-acre lots on the combined acreage.⁶ An attachment to the claim lists administrative rules OAR 660, divisions 4, 6, 8, 9, 11, 12, 15, 16, 18, 23, 31, 33, and 45, as rules that limit the claimants' desired division of the property into one-acre residential lots.

The claimants' property is zoned Ag/Forest (AG/F), which is a mixed agricultural and forest land zone adopted by Clackamas County to comply with Goal 4 and the implementing provisions of OAR 660-006-0050 (effective on February 5, 1990), subsequently amended on March 1, 1994, to comply with the provisions of House Bill 3661 (Chapter 792, Oregon Laws 1993).

Under OAR 660-006-0050, all the uses permitted under Goals 3 and 4 are allowed in mixed agriculture and forest zones except that for dwellings, either the Goal 3 or 4 standards are applicable based on the predominant use of the tract on January 1, 1993.⁷ Depending on the predominant use on January 1, 1993, the property is subject to either the requirements for dwellings applicable under exclusive farm use zoning required by Goal 3 and OAR 660, division 33, or forest zone provisions required by Goal 4 and OAR 660, division 6. This includes the dwelling standards asserted by the claimants as restricting the use of the subject property.

For land divisions, OAR 660-006-0055 authorizes the creation of new parcels based on the standards applicable to farm or forest zones that implement the 80-acre minimum lot size specified in ORS 215.780. Under ORS 215.780(2)(a), the minimum lot size in Clackamas County's AG/F zone is 80 acres. The claimants' property cannot be divided into parcels smaller than 80 acres.

The claimants also listed Goal 11 and OAR 660, division 11 (Public Facilities Planning). OAR 660-011-0060 implements Goal 11, which generally prohibits urban levels of public facilities and services on lands that are outside an urban growth boundary. OAR 660-011-0060 specifically prohibits a local government from allowing: (a) new sewer systems outside urban growth boundaries or unincorporated community boundaries and (b) extensions of sewer lines or systems to these lands. This rule became effective in July 1998.

Goal 11 has two aspects. The first aspect of the Goal restricts an owner's use of land outside of an urban growth boundary by prohibiting the owner from utilizing urban levels of public services or facilities. The second aspect of Goal 11 and its implementing rules restrict local government rather than the owner. OAR 660-011-0060 implements this second aspect of Goal 11 (a

⁵ The claim indicates that a maximum of 111 to 115 one-acre lots may be possible on the total acreage with a community sewage disposal system instead of individual onsite septic systems.

⁶ ORS 526 and 527, regarding Forest Practices, are addressed separately in a staff report written by the Oregon Department of Forestry. ORS 454, regarding Sewer Disposal Standards, is addressed in a staff report written by the Oregon Department of Environmental Quality.

⁷ No information was provided to the department regarding the predominant use of the property on January 1, 1993.

restriction on local government). As a result, it is not a land use regulation that restricts the claimants' use of the property under ORS 197.352(1).

Goal 14 generally requires that land outside of urban growth boundaries be used for rural uses and also became effective on January 25, 1975. Goal 14 would likely prohibit the lot size the claimants desire.

The claimants summarily cite various statutes in ORS 92, 197 and 215 as restricting the use of the property. ORS 92 establishes procedures for subdivisions and partitions. The claimants cite this statute, but do not assert how this statute limits use of the property in a manner that reduces its fair market value. In addition, to the extent ORS 92 could be construed to restrict the use of the property, most operative provisions of these statutes were enacted prior to the claimants' acquisition of the property and therefore, has not restricted the use of the property and is exempt under ORS 197.352(3)(E). The statutes in ORS 197 generally do not restrict an owner's use of property. Some of the statutes in ORS 215 do restrict the use of property. Some of these statutes were in effect at the time the claimants acquired the property. Absent any evidence from the claimants as to how these statutes restrict the use of the property resulting in a reduction in its fair market value, these statutes are not addressed further in this report.

The claimants acquired the subject property on April 11, 1960, for tax lot 600 and February 1, 1973, for tax lots 700, 703 and 790, prior to the adoption of statewide planning goals and their implementing statutes and regulations.

Conclusions

Most of the current zoning requirements, minimum lot size and dwelling standards established under Goal 4 for lands zoned for mixed farm-forest use, Goals 11 and 14, and the statutory and rule restrictions under applicable provisions of ORS 215 and OAR 660, divisions 6, 11, and 33, were enacted or adopted after the claimants acquired the subject property in 1960 for tax lot 600 and 1973 for tax lots 700, 703 and 790, and do not allow the desired division and development of the property.

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 \$1,450,000 as the reduction in the subject property's fair market value due to current regulations. The claim materials state that this should be considered as a minimum, and the figure would be considerably more for a maximum of 115 lots and a community sewer system. The amount listed as a minimum is based on the claimants' projections of the value of approximately 73 one-acre lots with individual onsite septic systems for all six tax lots 2600, 2601, 600, 700, 703 and 790.

Conclusions

As explained in Section V.1 of this report, the claimants are Gerald and Roberta Curry who acquired the subject property on April 11, 1960, for tax lot 600 and February 1, 1973, for tax lots 700, 703 and 790. Under ORS 197.352, the claimants are due compensation for land use regulations that restrict the use of the subject property in a manner that reduces its fair market value. Based on the findings and conclusions in Section V.2 of this report, laws enacted or adopted since the claimants 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 \$1,450,000.

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 the statute.

Findings of Fact

The claim is based on state land use regulations that restrict the use of the subject property, including applicable provisions of Goals 3, 4, 11 and 14, ORS 215 and OAR 660, divisions 6, and 33, which Clackamas County has implemented through its AG/F zone. All of these land use regulations, with the exception of certain statutes in ORS 215, were enacted or adopted after the claimants acquired the subject 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 none of the general statutory, goal and rule restrictions on residential development were in effect when the claimants acquired the subject property in 1960 for tax lot 600 and 1973 for tax lots 700, 703 and 790. 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 will continue to apply to the claimants' use of the property. In addition, the department notes that ORS 215.730 and OAR 660, division 6, include standards for siting dwellings in forest zones. The provisions include fire protection standards for dwellings and for surrounding forest zones. ORS 197.352(3)(B) specifically exempts regulations "restricting or prohibiting activities for the protection of public health and safety, such as fire and building codes. . . ." To the extent they are applicable to the claimants property, siting standards for dwellings in forest zones in ORS 215.730 and OAR 660, division 6, are exempt under ORS 197.352(3)(B).

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 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. 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 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 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 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 98.5-acre property into lots of one or more acres and to develop a dwelling on each lot. The claim asserts that the laws enforced by the Commission or the department reduce the fair market value of the subject property by \$1,450,000.⁸ 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

⁸ The compensation amount of \$1,450,000 is for the entire claim, not for just the 98.5 acres of agricultural/forest land addressed in this staff report.

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.

The decision on this claim will mean that Goal 11 and its implementing rules do not apply to the claimants and allow them to establish a community water and/or sewer system on the property. However, the department's action does not remove the prohibition in Goal 11 and OAR 660, division 11, on a provider of sewage disposal service extending or establishing a system to serve this property.⁹

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 Gerald and Roberta Curry to use the subject property for a use permitted at the time they acquired the property on April 11, 1960, for tax lot 600 and February 1, 1973, for tax lots 700, 703 and 790.

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 Gerald and Roberta Curry's partition of the 98.5-acre property into lots of one or more acres or to their development of a dwelling on each lot: applicable provisions of Goals 3, 4, 11 and 14, ORS 215 and OAR 660, divisions 6, 11, and 33, enacted or adopted after April 11, 1960, as to tax lot 600 and after February 1, 1973, as to tax lots 700, 703 and 790. These land use regulations 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 April 11, 1960, for tax lot 600 and February 1, 1973, for tax lots 700, 703 and 790.
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 April 11, 1960, for tax lot 600 and on February 1, 1973, for tax lots 700, 703 and 790.
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 Condition 1 above; (b) any laws enacted or enforced by a public entity other than the Commission or the department; and

⁹ The owner may utilize an existing system if the provider of that system is permitted under the statewide planning goals and other relevant provisions of law to allow the connection.

(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 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) CLAIM FOR COMPENSATION
OREGON DEPARTMENT OF LAND CONSERVATION AND DEVELOPMENT
Final Staff Report and Recommendation

May 4, 2006

STATE CLAIM NUMBER: M118658
Report B¹

NAMES OF CLAIMANTS: Gerald L. and Roberta G. Curry

MAILING ADDRESS: 23250 South Day Hill Road
Estacada, Oregon 97023

PROPERTY IDENTIFICATION: Township 3S, Range 4E, Section 32A
Tax lots 2600 and 2601
Clackamas County

OTHER CONTACT INFORMATION: Mark P. O'Donnell, Esq.
Kristian Roggendorf, Esq.
O'Donnell & Clark, LLP
1706 Northwest Glisan, Suite 6
Portland, Oregon 97209

DATE RECEIVED BY DAS: June 22, 2005

180-DAY DEADLINE: May 7, 2006²

I. SUMMARY OF CLAIM

The claimants, Gerald L. and Roberta G. Curry, seek compensation in the amount of \$1,450,000³ 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 11.95-acre property⁴ into a maximum of 12 one-acre parcels for residential development. The subject property is located at 23250 South Day Hill Road, near Estacada, in Clackamas County. (See claim.)

¹ The department has split its report for this claim into two parts. Report A addresses that portion of the property zoned for farm use. Report B addresses that portion zoned for rural residential use.

² 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).

³ The amount listed for compensation applies to all six tax lots (600, 700, 703, 790, 2600 and 2601) included in the claim; however, this report addresses only two of the tax lots.

⁴ Tax lots 2600 and 2601, under the Currys' ownership, are addressed in this staff report. Tax lots 600, 700, 703 and 790 are addressed in Report A.

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 claimants Gerald and Roberta Curry's partition of the 11.95-acre property into lots of one or more acres for residential development: applicable provisions of Statewide Planning Goals 11 (Public Facilities and Services) and 14 (Urbanization) and Oregon Administrative Rules (OAR) 660-004-0040. These land use regulations 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 in 1968. (See the complete recommendation in Section VI of this report.)

III. COMMENTS ON THE CLAIM

Comments Received

On July 8, 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, ten 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 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 Clackamas County zoning and subdivision ordinances (Sections 1105, 1106, 309 and 407), state statutes, including ORS 92, 197, 215, 526, 527 and 454, and administrative rules for ORS 197, 215 and 454 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 claimants, Gerald and Roberta Curry, acquired the subject property on August 6, 1968, as reflected by a real estate contract included with the claim. A May 26, 2005, chain of title report from Stewart Title submitted with the claim establishes the claimants’ current ownership.

Conclusions

The claimants, Gerald and Roberta Curry, are “owners” of the subject property as that term is defined by ORS 197.352(11)(C) as of August 6, 1968.

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 claimants desire to create up to 111 to 115 one-acre lots⁵ (note: 12 lots maximum on rural residential tax lots 2600 and 2601 with 11.95 total acres for this report) with individual onsite septic systems on each lot or a community sewer system.

⁵ The claim indicates that a maximum of 111 to 115 one-acre lots may be possible on the total acreage with a community sewage disposal system instead of individual onsite septic systems.

Clackamas County zoning and subdivision ordinances, Sections 1105 and 1106 (subdivision and partition), 309 (RRFF-5 zone) and 407 (AG/Forest zone) and state statutes, including ORS 92, 197, 215, 526 (Forestry), 527 (Forestry) and 454 (Sewage disposal standards), and the administrative rules for ORS 197, 215 and 454 are identified as restricting the claimants' desired use of the property.⁶ An attachment to the claim lists administrative rules OAR 660, divisions 4, 6, 8, 9, 11, 12, 15, 16, 18, 23, 31, 33, and 45, as rules that limit the claimants' desired division of the property into one-acre residential lots.

The claim addressed in this staff report is based generally on Clackamas County's current Rural Residential Farm-Forest 5-Acre (RRFF-5) zone and the applicable provisions of state law that require such zoning. The county's RRFF-5 zone is a rural residential zone consistent with Goal 14, which generally requires that land outside of urban growth boundaries be used for rural uses.

Goal 14 was effective on January 25, 1975, and requires that local comprehensive plans identify and separate urbanizable land from rural land in order to provide for an orderly and efficient transition from rural to urban land use. In 2000, as a result of a 1986 Oregon Supreme Court decision,⁷ the Commission amended Goal 14 and adopted OAR 660-004-0040 (Application of Goal 14 to Rural Residential Areas), which was effective on October 4, 2000. The rule states that the creation of a new lot or parcel smaller than two acres in a rural residential area is considered an urban use and provides that after October 4, 2000, an exception to Goal 14 is required to create a lot or parcel in a rural residential zone that is smaller than two acres or smaller than the county's minimum lot size standard if greater than two acres. Because the claimants desire to create lots smaller than two acres in size, the 11.95-acre property cannot be divided as desired by the claimants without a Goal 14 exception.

The claimants also listed Goal 11 (Public Facilities and Services) and OAR 660, division 11 (Public Facilities Planning). OAR 660-011-0060 implements Goal 11, which generally prohibits urban levels of public facilities and services on lands that are outside an urban growth boundary. OAR 660-011-0060 specifically prohibits a local government from allowing: (a) new sewer systems outside urban growth boundaries or unincorporated community boundaries and (b) extensions of sewer lines or systems to these lands. This rule became effective in July 1998.

Goal 11 has two aspects. The first aspect of the Goal restricts an owner's use of land outside of an urban growth boundary by prohibiting the owner from utilizing urban levels of public services or facilities. The second aspect of Goal 11 and its implementing rules restrict local government rather than the owner. OAR 660-011-0060 implements this second aspect of Goal 11 (a restriction on local government). As a result, it is not a land use regulation that restricts the claimants' use of the property under ORS 197.352(1).

The claimants summarily cite various statutes in ORS 92, 197 and 215 as restricting the use of the property. ORS 92 establishes procedures for subdivisions and partitions. The claimants cite this statute, but do not assert how this statute limits use of the property in a manner that reduces

⁶ ORS 526 and 527, regarding Forest Practices, are addressed separately in a staff report written by the Oregon Department of Forestry. ORS 454, regarding Sewer Disposal Standards, is addressed in a staff report written by the Oregon Department of Environmental Quality.

⁷ *1000 Friends of Oregon v. LCDC (Curry County)*, 301 Or 447 (1986).

its fair market value. In addition, to the extent ORS 92 could be construed to restrict the use of the property, most operative provisions of these statutes were enacted prior to the claimants' acquisition of the property and therefore, has not restricted the use of the property and is exempt under ORS 197.352(3)(E). The statutes in ORS 197 and 215 generally do not restrict an owner's use of property zoned for rural residential use. Some of the statutes in ORS 92 and 215 were in effect at the time the claimants acquired the property. Absent any evidence from the claimants as to how these statutes restrict the use of the property resulting in a reduction in its fair market value, these statutes are not addressed further in this report.

The claimants acquired the subject property in 1968, prior to the adoption of the statewide planning goals and their implementing statutes and rules. At that time, it was not zoned by the county.

Conclusions

The minimum lot size requirements for rural residential lots or parcels established by Goal 14 and OAR 660-004-0040 were adopted since the claimants acquired the subject property in 1968 and do not allow the desired division of the property. Goal 11 and OAR 660-011-0060 may limit the claimants' ability to provide sewer service to the property.

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 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 \$1,450,000 as the reduction in the subject property's fair market value due to current regulations. The claim materials state that this should be considered as a minimum, and the figure would be considerably more for a maximum of 111 to 115 lots and a community sewer system. The amount listed as a minimum is based on the claimants' projections of the value of approximately 73 one-acre lots with individual onsite septic systems for all six tax lots 2600, 2601, 600, 700, 703 and 790.⁸

⁸ The claim states that a maximum of 111 to 115 one-acre lots may be possible with a community sewage disposal system instead of individual onsite septic systems.

Conclusions

As explained in Section V.1 of this report, the claimants are Gerald and Roberta Curry who acquired the subject property on August 6, 1968. Under ORS 197.352, the claimants are due compensation for land use regulations that restrict the use of the subject property in a manner that reduces its fair market value. Based on the findings and conclusions in Section V.2 of this report, laws enacted or adopted since the claimants acquired the subject property restrict the desired division of the property. The claimants estimate the reduction in value due to the restrictions to be \$1,450,000.

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 the statute.

Findings of Fact

The claim is based on state land use regulations that restrict the use of the subject property, including Goals 11 and 14 and OAR 660-004-0040 and 660-011-0060, which Clackamas County has implemented through its RRRFF-5 zone. Both of these land use regulations were adopted after the claimants acquired the subject 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 none of the general statutory, goal and rule restrictions on divisions of rural residential land were in effect when the claimants acquired the subject property in 1968. 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 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 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.

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 subject property into one-acre or larger lots for residential use. The claim asserts that the laws enforced by the Commission or the department reduce the fair market value of the subject property by \$1,450,000.⁹ 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.

The decision on this claim will mean that Goal 11 and its implementing rules do not apply to the claimants and allow them to establish a community water and/or sewer system on the property. However, the department's action does not remove the prohibition in Goal 11 and OAR 660, division 11, on a provider of sewage disposal service extending or establishing a system to serve this property.¹⁰

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 Gerald and Roberta Curry to use the subject property for a use permitted at the time they acquired the property on August 6, 1968.

⁹ The compensation amount of \$1,450,000 is for the entire claim, not for just the 11.95 acres of rural residential land addressed in this staff report. Nevertheless, the estimate of reduction in value is evidence that the value of particular parts of the overall property has been reduced.

¹⁰ The owner may utilize an existing system if the provider of that system is permitted under the statewide planning goals and other relevant provisions of law to allow the connection.

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 Gerald and Roberta Curry's division of the 11.95-acre property into one-acre or larger lots for residential development: applicable provisions of Goals 11 and 14 and OAR 660-004-0040 and 660-011-0060. These land use regulations 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 6, 1968.
2. The action by the State of Oregon provides the state's authorization to the claimants to use the subject property for the use described in this report, subject to the standards in effect on August 6, 1968.
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 Condition 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 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) CLAIM FOR COMPENSATION

OREGON DEPARTMENT OF FORESTRY

Final Staff Report and Recommendation

May 4, 2006

STATE CLAIM NUMBER: M118658

NAMES OF CLAIMANTS: Gerald and Roberta Curry

MAILING ADDRESS: 23250 S Day Hill Road
Estacada, Oregon 97023

PROPERTY IDENTIFICATION: Township 3S, Range 4E, Section 32A
Tax lots 2600 and 2601
Township 3S, Range 4E, Section 33
Tax lots 600, 700, 703 & 790
Clackamas County

OTHER CONTACT INFORMATION: Mark P. O'Donnell, Esq.
Kristian Roggendorf, Esq.
O'Donnell & Clark LLP
1706 NW Glisan, Suite 6
Portland, Oregon 97209

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 Forestry (ODF) has determined the claim is not valid as to land use regulations administered by ODF or the Oregon Board of Forestry (Board) because none of the laws identified in the claim and administered by the Board or ODF restrict the claimants' right to divide the property and develop it for residential use. ORS 527.730 provides that "[n]othing in the Oregon Forest Practices Act shall prevent the conversion of forestland to any other use." The claim submitted by the claimants proposes a conversion. To the extent that the claimants may

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).

propose a forest operation in conjunction with the conversion, claimants have not submitted a written notification as required by law. Without a notification ODF is unable to determine whether the laws listed in the claim apply to the claimant's use of the property or restrict her use of the property. As a result, ODF has not enforced an existing state land use regulation with respect to the claimant's use of the property. (See the complete recommendation in Section VI. of this report.)

III. COMMENTS ON THE CLAIM

Comments Received

See DLCDC Final Staff Report.

IV. TIMELINESS OF CLAIM

See DLCDC Final Staff Report for requirements.

Findings of Fact and Conclusions

ODF adopts the findings of fact and conclusions of law regarding ownership contained in the DLCDC Final Staff Report for this claim.

V. ANALYSIS OF CLAIM

1. Ownership

ODF adopts the findings of fact and conclusions of law regarding ownership contained in the DLCDC Final Staff Report for this claim.

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 claimants desire compensation or the right to divide the 110.45-acre property into as many as 111 to 115 parcels and to develop a dwelling on each parcel. The claim lists the following state statutes and rules administered by ODF or the Board as laws that restrict the use of the property as the basis for the claim: ORS 526.016; 526.031, 526.166, 526.168, 526.194, 526.305 to 370, 526.425, 526.490, 526.500 to 515, 526.900, 526.905, 527.610 to 770, 527.990 and 527.992. The claim also lists the following rules of the Board: OAR 629-001-0000 to 0055, 629-020-0000 to 0070, 629-045-0005 to 0010, 629-605-0100 to 0500, 629-610-0000 to 0090, and 629-625-0000 to 0700. The only discussion in the claim as to

how or why these laws restrict the use of the property that the claimants seek to carry out is the following statement: "State forestry statutes limit the development and division of land zoned for forestry." The property in tax lots 600, 700, 703 and 790 is zoned Ag/Forest; the property in tax lots 2600 and 2601 is zoned Rural Residential Farm-Forest 5. The laws listed in the claim only apply to forest operations, which is not the use the claimants have described in their claim.

One of the cited laws, ORS 527.730, Conversion of forestland to other uses, states, "Nothing in the Oregon Forest Practices Act shall prevent the conversion of forestland to any other use." No laws enforced by the Board or ODF restrict the division of the property or the establishment of dwellings.

The subject property does appear to include trees. Certain uses of property are forest "operations" that are regulated under the Forest Practices Act. If trees are harvested for commercial use, some laws listed in the claim will apply to the operation.

A notification of intent to conduct a forest operation is required in order for ODF to determine whether laws it or the Board may enforce apply to the claimants' intended use of the subject property in a way that restricts the use of the subject property, and reduces its fair market value. No notification has been made.

The claim lists additional state statutes and regulations that are administered by the Departments of Land Conservation and Development and Environmental Quality. These statutes and regulations are not administered or enforced by the Board or ODF and are not addressed in this report.

Conclusions

Nothing in the laws that are listed in the claim and enforced or administered by ODF or the Board applies to or restricts the division of the property or residential development of this property by the claimants.

Persons proposing to conduct a forest operation are required to submit a notification of the operation to ODF. Nothing in ORS 197.352 relieves an operator or landowner from this obligation, and until a notification is submitted, ODF is unable to determine whether laws it or the Board administers apply to the claimants' use of the property.

3. Effect of Regulations on Fair Market Value

In order to establish a valid claim, ORS 197.352(1) requires that any laws 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 claimants have not demonstrated that any land use regulations administered by ODF or the Board restrict their use of the subject property or reduce its fair market value.

Conclusions

The claimants have not demonstrated that laws enforced or administered by ODF or the Board restrict their use of this property and thus, have not demonstrated that those laws reduce the fair market value of the subject property.

4. Exemptions under ORS 197.352(3)

ORS 197.352 does not apply to certain land use regulations. These exemptions are set forth in ORS 197.352(3).

Findings of Fact

ORS 197.352(3) exempts laws that were enacted before a claimant acquired their interest in the property. Claimants acquired an interest in tax lot 600 on April 11, 1960, in tax lots 2600 and 2601 on August 6, 1968, and in tax lots 700, 703, and 790 on February 1, 1973. Most forest practice laws were first enacted in 1971 and July 1, 1972, although some date back to 1941. ODF is unable to determine whether 197.352(3)(E) or other exemptions in 197.352(3) may apply because the claimants have not proposed a use that is subject to these laws.

Some FPA regulations, now in OAR 629, divisions 625, were enacted to control water pollution resulting from forest operations. ORS 197.352(3)(B) specifically exempts regulations "restricting or prohibiting activities for the protection of public health and safety..., including pollution control." Such regulations may apply to the property, depending upon the activities the claimants may wish to undertake.

Other FPA regulations cited by the claimants may be exempted under 197.352(3).

Conclusions

ODF concludes that some of the listed land use regulations may be exempt under ORS 197.352(3) as they apply to tax lots 600, 2600, and 2601, and that many of the regulations are likely exempt as they apply to tax lots 700, 703, and 790. Until there is a notification of an operation, however, a final determination of the applicability of the listed laws to a particular forest operation on the property cannot be made.

Laws in effect when claimants Gerald and Roberta Curry acquired the subject property are 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 claimants submit a notification of intent to

conduct a commercial forest operation. When the claimants submit a notification, 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 (3)(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 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 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

Based on the current record, the claimants are not entitled to relief under ORS 197.352 from ODF or the Board. ODF denies any relief for this claim because neither the Board nor the Department has enforced laws that restrict the division of the subject property into parcels or lots, or the use of the property for residential purposes.

VII. COMMENTS ON THE DRAFT REPORT

ODF issued its draft staff report on this claim on April 14, 2006. OAR 125-145-0100(3), provides an opportunity for the claimant or the claimant's authorized agent and any third parties who submitted comments under OAR 125-145-0080 to submit written comments, evidence and information in response to the draft staff report and recommendation. Comments received have been taken into account by the department in the issuance of this final report.

**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: M118658

NAMES OF CLAIMANTS: Gerald and Roberta Curry

MAILING ADDRESS: 23250 S Day Hill Road
Estacada, Oregon 97023

PROPERTY IDENTIFICATION: Township 3S, Range 4E,
Section 32A
Tax lots 2600 and 2601
Township 3S, Range 4E, Section 33
Tax lots 600, 700, 703 & 790
Clackamas County

OTHER CONTACT INFORMATION: Mark P. O'Donnell, Esq.
Kristian Roggendorf, Esq.
O'Donnell & Clark LLP
1706 NW Glisan, Suite 6
Portland, Oregon 97209

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 the claim is not valid because none of the laws identified in the claim as administered by the Department or the Environmental Quality

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).

Commission (Commission) have been enforced, and there is no evidence that the laws restrict claimant's ability to divide the property or establish a residence on each parcel. In addition, the claimants have not filed applications with the Department, or Clackamas County, which has been delegated authority by the Department to administer the on-site sewage disposal system within the County, to construct on-site sewage disposal systems on the property, and the Department has taken no action to enforce the on-site sewage disposal statutes or implementing rules 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 for requirements.

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 lots of one acre or larger. The claim lists a number of specific statutes and rules from ORS chapters 454 and OAR chapter 340, Division 071. Nothing in the rules or statutes listed restrict the division of land into residential lots as proposed by claimants.

The cited statutes and regulations require an application to the Department, or a local government that has been delegated authority by the Department to administer the on-site sewage disposal program, before construction of an on-site sewage disposal system. The claimants have not filed an application to construct an on-site sewage disposal system or systems on the property. Under ORS 197.352(7), property owners are not required to file a land use application with a local government prior to seeking relief under the Measure, 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 on-site sewage disposal statutes or implementing rules 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.

Under ORS 197.352(11) "land use regulations" do not include administrative rules of the Oregon Environmental Quality Commission. As a result, no relief may be authorized with regard to the Commission's rules.

Conclusions

Nothing in the laws and rules cited by claimants restricts the division of the property into residential lots. The claim includes no evidence demonstrating how the listed statutes and rules restrict the use of the property. The Department has not enforced a state land use regulation to restrict claimants' use of their property. Furthermore, Measure 37 does not exempt claimants or the Department from following the legal requirements to apply for an on-site sewage disposal permit prior to construction. Until the Department has acted on such a permit application, there is no basis for a claim for relief. Finally, the Commission rules listed in an exhibit to the claim are not state "land use regulations" under ORS 197.352(11).

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 the listed statutes or rules have had any effect on the value of the subject property.

Conclusions

The claimants have not demonstrated that laws and regulations administered by the Department or Commission restrict the desired use of the property and thus, have not demonstrated that those laws and regulations reduce the fair market value of the subject property.

4. Exemptions under section 3 of Measure 37

Ballot Measure 37 (2004) does not apply to certain land use regulations. The type of land use regulations not subject to a claim for compensation under Ballot Measure 37 are set

forth in section 3 of the measure. These include laws restricting or prohibiting activities for the protection of public health and safety such as sanitary regulations.

Findings of Fact

The statutes and rules listed in the claim likely are exempt as laws enacted to protect the public health and safety. Without some evidence from the claimants as to how and why the listed law restricts the use of the property, however, the Department is unable to determine whether this or other exemptions under ORS 197.352 (3) apply. (See section V.2, above.)

VI. FORM OF RELIEF

Based on the current record, the claimants are not entitled to relief under ballot Measure 37 as to the statutes and rules listed in the claim that are administered by the Department. Department staff recommend this claim be denied because neither the Department nor the Commission has enforced laws that restrict the division of the subject property, or the use of the property for residential purposes.

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) provides 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. The Department received no comments on the draft staff report.