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

IN THE MATTER OF THE CLAIM FOR	)	FINAL ORDER
COMPENSATION UNDER ORS 197.352	)	CLAIM NO. M118691
(BALLOT MEASURE 37) OF	)	
Rogan K. Sapp, CLAIMANT	)	

Claimant: Rogan K. Sapp (the Claimant)

Property: Township 15S, Range 8W, Section 4, Tax lot 200, Benton County (the Property)

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

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

ORDER

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

1. In lieu of compensation under ORS 197.352, the State of Oregon will not apply the following laws to Rogan Sapp's division of the 37.04-acre property into four parcels or to his development of a dwelling on each of the three resulting, undeveloped parcels: applicable provisions of Goal 3, ORS 215 and OAR 660, division 33, enacted or adopted after October 31, 1989. These land use regulations will not apply to the claimant only to the extent necessary to allow him to use the subject property for the use described in this report, and only to the extent that use was permitted when he acquired the property on October 31, 1989.

2. The action by the State of Oregon provides the state's authorization to the claimant to use the property for the use described in this report, subject to the standards in effect on October 31, 1989. On that date, the property was subject to compliance with Benton County's acknowledged MPA zone and the applicable provisions of Goal 3, ORS 215 and OAR 660, division 5, 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 claimant first obtains that permit, license or other form of authorization or consent. Such requirements may include, but are not limited to: a building permit, a land use decision, a "permit" as defined in ORS 215.402 or 227.160, other permits or authorizations from local, state or federal agencies and restrictions on the use of the subject property imposed by private parties.

4. Any use of the property by the claimant under the terms of the order will remain subject to the following laws: (a) those laws not specified in (1) above; (b) any laws enacted or enforced by a public entity other than the Commission or the department; and (c) those laws not subject to ORS 197.352 including, without limitation, those laws exempted under ORS 197.352(3).

5. Without limiting the generality of the foregoing terms and conditions, in order for the claimant to use the subject property, it may be necessary for him to obtain a decision under ORS 197.352 from a city and/or county and/or metropolitan service district that enforces land use regulations applicable to the property. Nothing in this order relieves the claimant from the necessity of obtaining a decision under ORS 197.352 from a local public entity that has jurisdiction to enforce a land use regulation applicable to a use of the subject property by the claimant.

This Order is entered by the Director of the DLCD as a final order of DLCD and the Land Conservation and Development Commission under ORS 197.352, OAR 660-002-0010(8), and OAR 125, division 145, and by the Deputy Administrator for the State Services Division of the DAS as a final order of DAS under ORS 197.352, OAR 125, division 145, and ORS 293.

FOR DLCD AND THE LAND CONSERVATION AND DEVELOPMENT COMMISSION:

Lane Shetterly, Director
DLCD
Dated this 10th day of May, 2006.

FOR the DEPARTMENT OF ADMINISTRATIVE SERVICES:

Dugan Petty, Deputy Administrator
DAS, State Services Division
Dated this 10th day of May, 2006.

NOTICE OF RIGHT TO APPEAL OR OTHER JUDICIAL RELIEF

You are entitled, or may be entitled, to judicial remedies including the following:

1. Judicial review under ORS 183.484: Judicial review under ORS 183.484 may be obtained by filing a petition for review within 60 days from the service of this order. A petition for judicial review under ORS 183.484 may be filed in the Circuit Court for Marion County or the Circuit Court in the county in which you reside.

2. A cause of action under ORS 197.352 (Measure 37 (2004)): If a land use regulation continues to apply to the subject property more than 180 days after the present owner of the property has made written demand for compensation under ORS 197.352[1], the present owner of the property, or any interest therein, shall have a cause of action in the circuit court in which the real property is located.

(Copies of the documents that comprise the record are available for review at the Department's office at 635 Capitol Street NE, Suite 150, Salem, Oregon 97301-2540)

FOR INFORMATION ONLY

The Oregon Department of Justice has advised the Department of Land Conservation and Development that "[i]f the current owner of the real property conveys the property before the new use allowed by the public entity is established, then the entitlement to relief will be lost."

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[1] By order of the Marion County Circuit Court, "all time lines under Measure 37 [were] suspended indefinitely" on October 25, 2005. This suspension was lifted on March 13, 2006 by the court. As a result, a period of 139 days (the number of days the time lines were suspended) has been added to the 180-day time period under ORS 197.352(6) for claims that were pending with the state on October 25, 2005.

ORS 197.352 (BALLOT MEASURE 37) CLAIM FOR COMPENSATION

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

May 10, 2006

STATE CLAIM NUMBER:	M118691
NAME OF CLAIMANT:	Rogan K. Sapp
MAILING ADDRESS:	16740 Lobster Valley Road Alsea, Oregon 97324
PROPERTY IDENTIFICATION:	Township 15S, Range 8W, Section 4 Tax lot 200 Benton County
OTHER CONTACT INFORMATION:	George F. Stovall 825 Northeast Lawndale Place Corvallis, Oregon 97330
DATE RECEIVED BY DAS:	June 28, 2005
180-DAY DEADLINE:	May 13, 2006[1]

I. SUMMARY OF CLAIM

The claimant, Rogan K. Sapp, seeks compensation in the amount of $400,000 for the reduction in fair market value as a result of land use regulations that are alleged to restrict the use of certain private real property. The claimant desires compensation or the right to divide the 37.04-acre property into four parcels and to develop a dwelling on each of the three resulting, undeveloped parcels.[2] The subject property is located on Hazel Glen Road, near Alsea, in Benton 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

[1] This date reflects 180 days from the date the claim was submitted, as extended by the 139 days that all timelines under Measure 37 were suspended during the pendency of *MacPherson v. Dept. of Admin. Srvcs.*, 340 Or 117 (2006).

[2] A diagram included with the claim indicates that the claimant desires to divide the property into two approximately 7-acre parcels and two approximately 12-acre parcels.

not apply to claimant Rogan Sapp's division of the 37.04-acre property into four parcels and to his development of a dwelling on each of the three resulting, undeveloped parcels: applicable provisions of Statewide Planning Goal 3 (Agricultural Lands), ORS 215 and Oregon Administrative Rules (OAR) 660, division 33, enacted or adopted after October 31, 1989. These laws will not apply to the claimant only to the extent necessary to allow him to use the subject property for the use described in this report, and only to the extent that use was permitted when he acquired the property on October 31, 1989. (See the complete recommendation in Section VI. of this report.)

III. COMMENTS ON THE CLAIM

Comments Received

On September 19, 2005, pursuant to OAR 125-145-0080, the Oregon Department of Administrative Services (DAS) provided written notice to the owners of surrounding properties. According to DAS, one written comment, evidence or information was received in response to the 10-day notice

The comment does not address whether the claim meets the criteria for relief under ORS 197.352. Comments concerning the effects a use of the property may have on surrounding areas are generally not something that the department is able to consider in determining whether to waive a state law. If funds do become available to pay compensation, then such effects may become relevant in determining which claims to pay compensation for instead of waive a state law. (See the comment letter in the department's claim file.)

IV. TIMELINESS OF CLAIM

Requirement

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

1. For claims arising from land use regulations enacted prior to the effective date of Measure 37 (December 2, 2004), within two years of that effective date, or the date the public entity applies the land use regulation as an approval criterion to an application submitted by the owner, whichever is later; or

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

Findings of Fact

This claim was submitted to DAS on June 28, 2005, for processing under OAR 125, division 145. The claim identifies ORS 92, 105, 197 and 215 and OAR 660 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.

1. Ownership

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

Findings of Fact

The claimant, Rogan Sapp, acquired the subject property on October 31, 1989, as reflected by a personal representative's deed included with the claim.[3] The Benton County Assessor's Office confirms the claimant's current ownership of the subject property.

Conclusions

The claimant, Rogan Sapp, is an "owner" of the subject property as that term is defined by ORS 197.352(11)(C) as of October 31, 1989.

2. The Laws That are the Basis for This Claim

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

Findings of Fact

The claim indicates that the claimant desires to divide the property into four parcels to develop a dwelling on each of the three resulting, undeveloped parcels, and several state laws preclude his desired use.[4]

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[3] The claim alleges that family ownership extends back to May 3, 1948, when Norman Sapp and Raymond, Claude and Lloyd Hendrix, a partnership doing business as Alsea Lumber Company, acquired the property by warranty deed. However, there is a gap in the chain of title between the 1948 partnership acquisition and claimant's acquisition in 1989, which appears to include the interim ownership of Naomi Sapp. Other interim ownerships are also possible, but there is no evidence in the claim of their existence. The record contains no information on family relationships between Norman Sapp or the other Alsea Lumber Company partners, Naomi Sapp (from whose estate claimant acquired ownership) and the claimant.

[4] The claimant summarily cites ORS 92, 105 and 197 as applicable to the claim, but does not establish how these statutes apply to and restrict the use of the property in a manner that reduces its fair market value. On their face, these statutes either do not apply to or do not restrict the use of the subject property in a manner that reduces its fair market value. Absent an explanation by the claimant as to their applicability, this report addresses only those state land use regulations that the claimant has established or that the department has otherwise determined apply to and restrict the use of the subject property in a manner that reduces its fair market value, based on the claimant's asserted desired use.

The claim is based generally on Benton County's current Multi-Purpose Agriculture (MPA) zone, an Exclusive Farm Use (EFU) zone, and the applicable provisions of state law that require such zoning. The claimant's property is zoned EFU as required by Goal 3 in accordance with ORS 215 and OAR 660, division 33, because the claimant's property is "agricultural land" as defined by Goal 3.[5] 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, generally prohibit the division of EFU-zoned land into parcels smaller than 80 acres and establish standards for the development of dwellings on existing or any 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 215.780(2)(a) and OAR 660-033-0100(2) to (6) permit a county to adopt a smaller minimum parcel size in specified situations.[6] In this case, Benton County's acknowledged MPA zone has a minimum parcel size of 20 acres. ORS 215.263 (2005 edition) establishes standards for the creation of new parcels for non-farm uses and dwellings allowed in an EFU zone.

OAR 660-033-0135 (applicable to farm dwellings) became effective on March 1, 1994, and interprets the statutory standard for a primary dwelling in an EFU zone under ORS 215.283(1)(f). OAR 660-033-0130(4) (applicable to non-farm dwellings) became effective on August 7, 1993, and was amended to comply with ORS 215.284(4) on March 1, 1994. The Commission subsequently adopted amendments to comply with House Bill 3326 (Chapter 704, Oregon Laws 2001, effective January 1, 2002), which became effective on May 22, 2002. (See administrative rule history for OAR 660-033-0100, -0130 and -0135.)

The claimant acquired the subject property on October 31, 1989. At that time, the property was subject to Benton County's acknowledged MPA zone. When the claimant acquired the subject property, the desired division and development of the property would have been governed by the county's MPA zone and applicable provisions of Goal 3, ORS 215 and OAR 660, division 5, then in effect.

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 claimant acquired the subject property in 1989 and do not allow the claimant's desired division or development of the property. However, the claim does not establish whether or to what extent the claimant's desired use of the subject property complies with the standards for land division

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

[6] OAR 660-033-0100(2) to (6) permit a county to adopt a smaller minimum parcel size if the county demonstrates to the Commission that (1) it can do so while continuing to meet the requirements of ORS 215.243 and (2) the smaller parcel sizes are appropriate to maintain the existing commercial agricultural enterprise within an area. Benton County's MPA zone has a minimum parcel size of 20 acres, which was acknowledged by the Commission in 1984 for specific areas of the Alsea and Lobster Valley that include the subject property.

and development under Benton County's MPA zone in effect when the claimant acquired the property on October 31, 1989.

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 claimant has identified. There may be other laws that currently apply to the claimant's use of the subject property, and that may continue to apply to the claimant's use of the property, that have not been identified in the claim. In some cases, it will not be possible to know which laws apply to a use of the subject property until there is a specific proposal for that use. When the claimant seeks a building or development permit to carry out a specific use, it may become evident that other state laws apply to that use.

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 $400,000 as the reduction in the subject property's fair market value due to current regulations. This amount is based on an estimate provided by the claimant's representative.

Conclusions

As explained in Section V.(1) of this report, the claimant is Rogan Sapp who acquired the subject property on October 31, 1989. Under ORS 197.352, the claimant is 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 claimant acquired the subject property may restrict the desired division and development of the property. The claimant estimates the reduction in value due to the restrictions to be $400,000.

Without an appraisal or other documentation, and without verification of whether or to what extent to which the claimant's desired use of the subject property was allowed under the standards in effect when he acquired the property, it is not possible to substantiate the specific dollar amount the claimant demands for compensation. Nevertheless, based on the submitted information, the department determines that it is more likely than not that the fair market value of the subject property has been reduced to some extent as a result of land use regulations enforced by the Commission or the department.

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 Benton County has implemented through its current MPA zone. With the exception of provisions of Goal 3 and ORS 215 in effect when the claimant acquired the subject property on October 31, 1989, these land use regulations were not in effect when the claimant acquired the subject property.

Conclusions

Without a specific development proposal for the subject property, it is not possible for the department to determine al 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 the general statutory, goal and rule restrictions on residential division and development of the subject property are not exempt under ORS 197.352(3)(E) to the extent they were enacted or adopted after the claimant acquired the property on October 31, 1989. Provisions of Goal 3, ORS 215 and OAR 660, division 5, in effect when the claimant acquired the subject property on October 31, 1989, are exempt under ORS 197.352(3)(E) and will continue to apply to the property.

Other laws in effect when the claimant acquired the subject property are also exempt under ORS 197.352(3)(E) and will continue to apply to the claimant's use of the property. There may be other laws that continue to apply to the claimant's use of the subject property that have not been identified in the claim. In some cases, it will not be possible to know which laws apply to a use of subject property until there is a specific proposal for that use. When the claimant seeks a building or development permit to carry out a specific use, it may become evident that other state laws apply to that use. In some cases, some of these laws may be exempt under ORS 197.352(3)(A) to (D).

This report addresses only those state laws that are identified in the claim, or that the department is certain apply to the subject property, based on the use that the claimant has identified. 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 claimant should be aware that the less information he has 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 his 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 claimant's ability to divide the 37.04-acre property into four parcels and to develop a dwelling on each of the three resulting, undeveloped parcels. The claim asserts that the laws enforced by the Commission or the department reduce the fair market value of the subject property by $400,000. However, because the claim does not provide an appraisal or other specific documentation establishing how the specified restrictions reduce the fair market value of the subject property, and without verification of whether or the extent to which the claimant's desired use of the property was allowed under the standards in effect when he 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 Rogan Sapp to use the subject property for a use permitted at the time he acquired the property on October 31, 1989.

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 Rogan Sapp's division of the 37.04-acre property into four parcels or to his development of a dwelling on each of the three resulting, undeveloped parcels: applicable provisions of Goal 3, ORS 215 and OAR 660, division 33, enacted or adopted after October 31, 1989. These land use regulations will not apply to the claimant only to the extent necessary to allow him to use the subject property for the use described in this report, and only to the extent that use was permitted when he acquired the property on October 31, 1989.

2. The action by the State of Oregon provides the state's authorization to the claimant to use the property for the use described in this report, subject to the standards in effect on October 31, 1989. On that date, the property was subject to compliance with Benton County's acknowledged MPA zone and the applicable provisions of Goal 3, ORS 215 and OAR 660, division 5, 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 claimant first obtains that permit, license or other form of authorization or consent. Such requirements may include, but are not limited to: a building permit, a land use decision, a "permit" as defined in ORS 215.402 or 227.160, other permits or authorizations from local, state or federal agencies and restrictions on the use of the subject property imposed by private parties.

4. Any use of the property by the claimant under the terms of the order will remain subject to the following laws: (a) those laws not specified in (1) above; (b) any laws enacted or enforced by a public entity other than the Commission or the department; and (c) those laws not subject to ORS 197.352 including, without limitation, those laws exempted under ORS 197.352(3).

5. Without limiting the generality of the foregoing terms and conditions, in order for the claimant to use the subject property, it may be necessary for him to obtain a decision under ORS 197.352 from a city and/or county and/or metropolitan service district that enforces land use regulations applicable to the property. Nothing in this order relieves the claimant from the necessity of obtaining a decision under ORS 197.352 from a local public entity that has jurisdiction to enforce a land use regulation applicable to a use of the subject property by the claimant.

VII. COMMENTS ON THE DRAFT STAFF REPORT

The department issued its draft staff report on this claim on April 20, 2006. OAR 125-145-0100(3), provided an opportunity for the claimant or the claimant's authorized agent and any third parties who submitted comments under OAR 125-145-0080 to submit written comments, evidence and information in response to the draft staff report and recommendation. Comments received have been taken into account by the department in the issuance of this final report.