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

IN THE MATTER OF THE CLAIM FOR COMPENSATION UNDER ORS 197.352 (BALLOT MEASURE 37) OF Gwendelyn Asburry, CLAIMANT	))))	FINAL ORDER CLAIM NO. M118693

Claimant: Gwendelyn Asburry (the Claimant)

Property: Township 4N, Range 2W, Section 1, Tax lots 1800, 3000 and 3100, Columbia 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 denied as to tax lots 3000 and 3100 as to laws administered by DLCD and the Land Conservation and Development Commission (LCDC) for the reasons set forth in the DLCD Report.

The Claim is approved to tax lot 1800 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 Gwendelyn Asburry's partition of tax lot 1800 into two-acre parcels or to her development of a dwelling on each parcel: applicable provisions of Goals 3 and 4, ORS 215 and OAR 660, divisions 6 and 33. These land use regulations will not apply to the claimant only to the extent necessary to allow her to use tax lot 1800 for the use described in this report, and only to the extent that use was permitted when she acquired the property on May 18, 1949.

2. The action by the State of Oregon provides the state's authorization to the claimant to use tax lot 1800 for the use described in this report, subject to the standards in effect on May 18, 1949.

3. To the extent that any law, order, deed, agreement or other legally enforceable public or private requirement provides that tax lot 1800 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 property imposed by private parties.

4. Any use of tax lot 1800 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 tax lot 1800, it may be necessary for her 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 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:	M118693
NAME OF CLAIMANT:	Gwendelyn Asburry
MAILING ADDRESS:	33676 Sykes Road St. Helens, Oregon 97051
PROPERTY IDENTIFICATION:	Township 4N, Range 2W, Section 1 Tax lots 1800, 3000 and 3100 Columbia County
OTHER CONTACT INFORMATION:	Dennis Olson 34671 Smith Road St. Helens, Oregon 97051
DATE RECEIVED BY DAS:	June 29, 2005
180-DAY DEADLINE:	May 13, 2006[1]

I. SUMMARY OF CLAIM

The claimant, Gwendelyn Asburry, seeks compensation in the amount of $2.5 million to $3 million 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 65.05-acre property into two-acre parcels and to develop a dwelling on each parcel. The subject property is located at 33676 Sykes Road (tax lot 3000), 33661 Cater Road (tax lot 1800) and on the west side of Saulser Road (tax lot 3100), near the City of St. Helens, in Columbia 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 for tax lots 3000 and 3100 is not valid because the claimant is not a current owner of these tax lots.

[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).

Based on the preliminary findings and conclusions set forth below, the department has determined that the claim for tax lot 1800 is valid. Department staff recommends that, in lieu of compensation, the following state laws enforced by the Land Conservation and Development Commission (the Commission) or the department not apply to claimant Gwendelyn Asburry's partition of 36.10-acre tax lot 1800 into two-acre parcels and to her development of a dwelling on each parcel: applicable provisions of Statewide Planning Goals 3 (Agricultural Lands) and 4 (Forest Lands), ORS 215 and Oregon Administrative Rules (OAR) 660, divisions 6 and 33. These laws will not apply to the claimant only to the extent necessary to allow her to use the subject property for the use described in this report, and only to the extent that use was permitted when she acquired tax lot 1800 on May 18, 1949. (See the complete recommendation in Section VI. of this report.)

III. COMMENTS ON THE CLAIM

Comments Received

On September 1, 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 was received in response to the 10-day notice.

The comment does not address whether the claim meets the criteria for relief under ORS 197.352. Comments concerning the effects a use of the subject property may have on surrounding areas generally are 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 29, 2005, for processing under OAR 125, division 145. The claim identifies Columbia County's current Forest Agriculture (FA-19) and

previous Residential zones as the basis for the claim. Only laws that were enacted or adopted prior to December 2, 2004, are the basis for this claim.

Conclusions

The claim has been submitted within two years of the effective date of Measure 37 (December 2, 2004), based on land use regulations enacted or adopted prior to December 2, 2004, and is therefore timely filed.

V. ANALYSIS OF CLAIM

1. Ownership

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

Findings of Fact

The claimant, Gwendelyn Asburry, acquired tax lot 1800 with her late husband, Kenneth R. Asburry, on May 18, 1949, as reflected by a warranty deed included with the claim.[2] The Columbia County Assessor's Office confirms the claimant's current ownership of tax lot 1800.

The claimant acquired tax lot 3000 on December 31, 1943, and tax lot 3100 on August 14, 1962, as reflected by warranty deeds included with the claim. On August 14, 1998, the claimant transferred tax lots 3000 and 3001 to Asburry Family, LLC. The Columbia County Assessor's Office confirms that Asburry Family, LLC is the current owner of tax lots 3000 and 3001.

Conclusions

The claimant, Gwendelyn Asburry, is an "owner" of tax lot 1800, as that term is defined by ORS 197.352(11)(C), as of May 18, 1949. The claimant is not an owner of tax lots 3000 and 3001 as that term is defined by ORS 197.352(11)(C) because the claimant's transfer of these two tax lots to a limited liability company created a new ownership of these tax lots as of the date of that conveyance in 1998. Asburry Family, LLC is the current owner of tax lots 3000 and 3001. The limited liability company is not a claimant.

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.

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[2] The claimant became sole owner of the subject property upon her husband's death in 1995. In 1996, she transferred the property to the Kenneth R. Asburry Family Trust, a revocable trust, with herself as trustee. A transfer to a revocable trust does not result in a change of ownership for the purposes of ORS 197.352.

Findings of Fact

The claim indicates that the claimant desires to divide the subject property into two-acre parcels and to develop a dwelling on each parcel, and Columbia County's zoning prohibits the desired use.[3]

The claim is based generally on Columbia County's current FA-19 zone and the applicable provisions of state law that require such zoning. Tax lot 1800 is zoned FA-19, which is a mixed agricultural and forest land zone, as required by 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.[4] 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.

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 minimum lot size specified in ORS 215.780. Under ORS 215.780(2)(a), the minimum lot size in Columbia County's FA-19 zone is 19 acres. The claimant's property cannot be divided into parcels smaller than 19 acres.

The claimant acquired tax lot 1800 on May 18, 1949, prior to the adoption of statewide planning goals and their implementing statutes and regulations.

Conclusions

The current zoning requirements, minimum lot size and dwelling standards established under Goal 4 for lands zoned for mixed farm-forest use and the statutory and rule restrictions under applicable provisions of ORS 215 and OAR 660, divisions 6 and 33, were enacted or adopted after the claimant acquired tax lot 1800 in 1949 and do not allow the desired division and development of this 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 use that the 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.

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[3] Because the claimant is not an "owner" of tax lots 3000 and 3100 as that term is defined in ORS 197.352(11)(C), no laws enforced by the Commission of the department restrict her use of these tax lots. The remainder of the analysis in this report is limited to tax lot 1800, which is the only tax lot subject to this claim for which the claimant is a current owner.

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

3. Effect of Regulations on Fair Market Value

In order to establish a valid claim, ORS 197.352(1) requires that any land use regulation described in Section V.(2) of this report must have "the effect of reducing the fair market value of the property, or any interest therein."

Findings of Fact

The claim includes an estimate of $2.5 million to $3 million as the reduction in the subject property's fair market value due to current regulations. This amount is based on a May 9, 2005, appraisal of the current market value of all three tax lots subject to this claim, as reflected by a copy of the appraisal report included with the claim.

Conclusions

As explained in Section V.(1) of this report, the claimant is Gwendelyn Asburry who acquired tax lot 1800 on May 18, 1949. Under ORS 197.352, the claimant is due compensation for land use regulations that restrict the use of tax lot 1800 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 tax lot 1800 restrict the desired division and development of the tax lot. The claimant estimates the reduction in value of tax lots 1800, 3000 and 3001 due to the restrictions to be $2.5 million to $3 million.

Without further documentation and verification, and without any analysis regarding the estimated reduction in value of tax lot 1800 specifically, 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 tax lot 1800 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 Goals 3 and 4, ORS 215 and OAR 660, divisions 6 and 33, which Columbia County has implemented through its current FA-19 zone. All of these land use regulations were enacted or adopted after the claimant acquired tax lot 1800 on May 18, 1949.

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(3). It appears that none of the general statutory, goal and rule restrictions on residential development

were in effect when the claimant acquired tax lot 1800 in 1949. As a result, these laws are not exempt under ORS 197.352(3)(E).

Laws in effect when the claimant acquired the tax lot 1800 are exempt under ORS 197.352(3)(E) and will continue to apply to the claimant's 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 claimant's 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 claimant's use of tax lot 1800 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 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 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 she 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 her use of tax lot 1800.

VI. FORM OF RELIEF

ORS 197.352(1) provides for payment of compensation to an owner of private real property if the Commission or the department has enforced laws that restrict the use of the subject 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 subject 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 36.10-acre tax lot 1800 into two-acre parcels and to develop a dwelling on each parcel. The claim asserts that the laws enforced by the Commission or the department reduce the fair market value of the entire property, consisting of tax lots 3000, 3001 and 1800, by $2.5 million to $3 million. However, without further documentation and verification, and because the claim does not provide any analysis establishing how the specified restrictions reduce the fair market value of tax lot 1800 specifically, 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 tax lot 1800 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 Gwendelyn Asburry to use tax lot 1800 for a use permitted at the time she acquired the property on May 18, 1949.

Conclusions

Based on the record, the claimant, Gwendelyn Asburry, has not established that she is entitled to relief under ORS 197.352(1) as to tax lots 3000 and 3100 because she is not a current owner of these tax lots. Therefore, the department recommends that this claim be denied as to tax lots 3000 and 3100.

Based on the record, the department recommends that the claim be approved as to tax lot 1800, 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 Gwendelyn Asburry's partition of tax lot 1800 into two-acre parcels or to her development of a dwelling on each parcel: applicable provisions of Goals 3 and 4, ORS 215 and OAR 660, divisions 6 and 33. These land use regulations will not apply to the claimant only to the extent necessary to allow her to use tax lot 1800 for the use described in this report, and only to the extent that use was permitted when she acquired the property on May 18, 1949.

2. The action by the State of Oregon provides the state's authorization to the claimant to use tax lot 1800 for the use described in this report, subject to the standards in effect on May 18, 1949.

3. To the extent that any law, order, deed, agreement or other legally enforceable public or private requirement provides that tax lot 1800 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 property imposed by private parties.

4. Any use of tax lot 1800 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 tax lot 1800, it may be necessary for her 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 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.