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 Florence B. Erickson and Ardis J. Hughes, CLAIMANTS	)))))	AMENDED FINAL ORDER A CLAIM NO. M118734

Claimants: Florence B. Erickson and Ardis J. Hughes (the Claimants)

Property: Township 1S, Range 4E, Sections 30 and 31, Tax lot 600, 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) 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 Florence Erickson and Ardis Hughes' development of the 13.44-acre property for highway oriented, light industrial or commercial use: applicable provisions of Goal 3, ORS 215 and OAR 660, division 33, enacted or adopted after each claimant acquired the subject property. These laws will not apply to Florence Erickson 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 the property on October 18, 1963. These laws will not apply to Ardis Hughes 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 an interest in the property, as successor trustee of the Credit Shelter Trust of the Erickson Family Trust, on March 15, 1996. The department acknowledges that the relief to which Ardis Hughes is entitled under ORS 197.352 will not allow her to use the subject property in the manner set forth in the claim.

2. The action by the State of Oregon provides the state's authorization to claimant Florence Erickson to use the subject property for the use described in this report, subject to the standards in effect on October 18, 1963, and to claimant Ardis Hughes to use the subject property for a use described in this report, subject to the standards in effect on March 15, 1996. On that date, the

property was subject to the provisions of Goal 3, ORS 215 and OAR 660, division 33, currently in effect.

3. To the extent that any law, order, deed, agreement or other legally enforceable public or private requirement provides that the subject property may not be used without a permit, license or other form of authorization or consent, the order will not authorize the use of the property unless the claimants first obtain that permit, license or other form of authorization or consent. Such requirements may include, but are not limited to: a building permit, a land use decision, a "permit" as defined in ORS 215.402 or 227.160, other permits or authorizations from local, state or federal agencies and restrictions on the use of the subject property imposed by private parties.

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

5. Without limiting the generality of the foregoing terms and conditions, in order for the claimants to use the subject property, it may be necessary for them to obtain a decision under ORS 197.352 from a city and/or county 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 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 23rd day of May, 2006.

FOR the DEPARTMENT OF ADMINISTRATIVE SERVICES:

Dugan Petty, Deputy Administrator
DAS, State Services Division
Dated this 23rd 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."

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

ORS 197.352 (BALLOT MEASURE 37) CLAIM FOR COMPENSATION

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

June 23, 2006

STATE CLAIM NUMBER:	M118734 Report A[1]
NAMES OF CLAIMANTS:	Florence B. Erickson and Ardis J. Hughes
MAILING ADDRESS:	7305 East Shorewood Drive Wasilla, Arkansas 99654
PROPERTY IDENTIFICATION:	Township 1S, Range 4E, Sections 30 and 31 Tax lot 600 Clackamas County
OTHER CONTACT INFORMATION:	Mary W. Johnson, Attorney 500 Abernathy Road, Suite 4 Oregon, City, Oregon 97045
DATE RECEIVED BY DAS:	July, 8, 2005
180-DAY DEADLINE:	May 23, 2006[2]

I. SUMMARY OF CLAIM

The claimants, Florence Erickson and Ardis Hughes, seek compensation in the amount of $1,642,000[3] 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 develop the 13.44-acre property for highway oriented, light industrial or commercial use.[4] The subject property is located on Highway 26 and Halley Road, near Boring, in Clackamas County. (See claim.)

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[1] This claim involves three tax lots: 2900, 2903 and 600. Because of the differences in ownership, only tax lot 600 is addressed in this report (Report A). Tax lots 2900 and 2903 are addressed in companion Report B.

[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. Srvcs.*, 340 Or 117 (2006).

[3] The total amount demanded for compensation by this claim is $6,250,000. The amount included in this report is the portion demanded for tax lot 600. (See Section V.(3) for how this amount was determined.)

[4] The claim form does not specify a specific use that is not permitted by the current land use regulations, however the appraisal submitted bases the reduction in fair market value for the subject property on a highest and best use of highway oriented light industrial or commercial uses.

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 State of Oregon will not apply the following laws to Florence Erickson and Ardis Hughes' development of the 13.44-acre property for highway oriented, light industrial or commercial use: applicable provisions of Statewide Planning Goal 3 (Agricultural Lands), ORS 215 and Oregon Administrative Rules (OAR) 660, division 33, enacted or adopted after each claimant acquired the subject property. These laws will not apply to Florence Erickson 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 the property on October 18, 1963. These laws will not apply to Ardis Hughes 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 an interest in the property, as successor trustee of the Credit Shelter Trust of the Erickson Family Trust, on March 15, 1996. The department acknowledges that the relief to which Ardis Hughes is entitled under ORS 197.352 will not allow her to use the subject property in the manner set forth in the claim. (See the complete recommendation in Section VI. of this report.)

III. COMMENTS ON THE CLAIM

Comments Received

On September 13 and October 3, 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, three written comments, evidence or information were received in response to the 10-day notice.

Two of 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.

One of the comments is relevant to whether the restriction of the claimants' use of the subject property reduces the fair market value of the property and whether a state agency may waive a state statute. The comment has been considered by the department in preparing this report. (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 July 8, 2005, for processing under OAR 125, division 145. The claim identifies county rural and Exclusive Farm Use (EFU) zoning, the statewide planning goals, ORS 215.283 and "all related OARs" 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

Claimant Florence Erickson acquired the subject property on October 18, 1963, as reflected by a deed and title reports included with the claim. Since then, she has transferred the property to the Erickson Family Trust, with herself as trustee.[5] Florence Erickson's daughter Ardis Hughes acquired her interest in the subject property on March 15, 1996, as successor trustee of the Credit Shelter Trust of the Erickson Family Trust. A 2004-05 tax statement and July 5, 2005, title report submitted with the claim establish the claimants' current ownership.

Conclusions

The claimants, Florence Erickson and Ardis Hughes, are "owners" of the subject property as that term is defined by ORS 197.352(11)(C) as of October 18, 1963, and March 15, 1996. Florence Erickson is a "family member" of Ardis Hughes as that term is defined by ORS 197.352(11)(A).

[5] Transfer of property to a revocable trust does not constitute a change in ownership for the purposes of ORS 197.352.

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 develop the 13.44-acre subject property for highway oriented, light industrial or commercial use, which the claim asserts is not allowed by all previous zoning and current EFU zoning, the statewide planning goals, ORS 215.283 and "all related OARs."[6]

The claim is based generally on Clackamas County's current EFU zone and the applicable provisions of state law that require such zoning. The claimants' property is zoned EFU as required by Goal 3, in accordance with ORS 215 and OAR 660, division 33, because the claimants' property is "agricultural land" as defined by Goal 3.[7] Goal 3 became effective on January 25, 1975, and required that agricultural lands as defined by the Goal be zoned EFU pursuant to ORS 215.

Current land use regulations, particularly ORS 215.263, 215.284 and 215.780 and OAR 660, division 33, enacted or adopted pursuant to Goal 3, prohibit the division of EFU-zoned land into parcels less than 80 acres and establish standards for development of dwellings on existing or proposed parcels on that land.

ORS 215.780 establishes an 80-acre minimum size for the creation of new lots or parcels in EFU zones and became effective on November 4, 1993 (Chapter 792, Oregon Laws 1993).
ORS 215.263 (2005 edition) establishes standards for the creation of new parcels for non-farm uses and dwellings allowed in an EFU zone.

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

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[6] The claim lists all of the statewide planning goals and "all related OARs" as restricting the use of the property, but does not establish how each of these regulations restricts the use of the subject property in a manner that reduces the fair market value of the property. On their face, most of the regulations generally cited in the claim either do not apply to the subject property or do not restrict the use of the subject property. In the absence of any explanation by the claimants as to how these regulations restrict the use of the subject property in a manner that reduces the property's fair market value, this report addresses only those regulations that the department finds are applicable to and restrict the claimants' use of the subject property, based on the claimants' asserted desired use.

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

Florence Erickson acquired the subject property on October 18, 1963, prior to the adoption of the statewide planning goals and their implementing statutes and regulations. No county zoning applied to the property in 1963.

Conclusions

The current zoning requirements, minimum lot size and dwelling standards established by applicable provisions of Goal 3, ORS 215 and OAR 660, division 33, were all enacted or adopted after Florence Erickson acquired the subject property in 1963 and do not allow the desired division or development of the property. These laws restrict the use of the subject property relative to the uses allowed when Florence Erickson acquired 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 use 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 $6,250,000 as the reduction in the fair market value of the entire subject property (tax lots 2900, 2903 and 600) due to current regulations. The estimate for the reduction in the fair market value for tax lot 600 is $1,642,000. Both amounts are based on a June 13, 2005, appraisal for the entire property, submitted with the claim. The appraisal includes the per acre fair market value with and without the current land use regulations and allows for an estimate of the reduction in the fair market value of tax lot 600.

Conclusions

As explained in Section V.(1) of this report, the claimants are Florence Erickson who acquired the subject property on October 18, 1963, and her daughter Ardis Hughes. 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 Florence Erickson acquired the subject property restrict the desired division and development of the property. The claimants estimate the reduction in value due to the restrictions for tax lot 600 to be $1,642,000.

Without further investigation and 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 since Florence Erickson acquired the property.

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 Clackamas County has implemented through its current EFU zone. All of these land use regulations were enacted or adopted after Florence Erickson 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 division and development of the claimants' property were in effect when Florence Erickson acquired it in 1963. As a result, these laws are not exempt under ORS 197.352(3)(E).

Laws in effect when Florence Erickson acquired the subject property are exempt under ORS 197.352(3)(E) and will continue to apply to her use of the property. There may be other laws that continue to apply to her 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 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).

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 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 claimants' ability to develop the 13.44-acre property for highway oriented, light industrial use. The claim asserts that the laws enforced by the Commission or the

department reduce the fair market value of the subject property by $1,642,000. However, without further investigation and documentation, 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 Florence Erickson and Ardis Hughes to use the subject property for a use permitted at the time Florence Erickson acquired the property on October 18, 1963, and Ardis Hughes acquired her interest in the property on March 15, 1996.

When Ardis Hughes acquired her interest in the subject property on March 15, 1996, it was zoned EFU by Clackamas County and subject to the provisions of Goal 3, ORS 215 and OAR 660, division 33, currently in effect and as described in Section V.(2) of this report.

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 Florence Erickson and Ardis Hughes' development of the 13.44-acre property for highway oriented, light industrial or commercial use: applicable provisions of Goal 3, ORS 215 and OAR 660, division 33, enacted or adopted after each claimant acquired the subject property. These laws will not apply to Florence Erickson 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 the property on October 18, 1963. These laws will not apply to Ardis Hughes 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 an interest in the property, as successor trustee of the Credit Shelter Trust of the Erickson Family Trust, on March 15, 1996. The department acknowledges that the relief to which Ardis Hughes is entitled under ORS 197.352 will not allow her to use the subject property in the manner set forth in the claim.

2. The action by the State of Oregon provides the state's authorization to claimant Florence Erickson to use the subject property for the use described in this report, subject to the standards in effect on October 18, 1963, and to claimant Ardis Hughes to use the subject property for a use described in this report, subject to the standards in effect on March 15, 1996. On that date, the property was subject to the provisions of Goal 3, ORS 215 and OAR 660, division 33, currently in effect.

3. To the extent that any law, order, deed, agreement or other legally enforceable public or private requirement provides that the subject property may not be used without a permit, license or other form of authorization or consent, the order will not authorize the use of the property unless the claimants first obtain that permit, license or other form of authorization or consent. Such requirements may include, but are not limited to: a building permit, a land use decision, a

"permit" as defined in ORS 215.402 or 227.160, other permits or authorizations from local, state or federal agencies and restrictions on the use of the subject property imposed by private parties.

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

5. Without limiting the generality of the foregoing terms and conditions, in order for the claimants to use the subject property, it may be necessary for them to obtain a decision under ORS 197.352 from a city and/or county 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 May 2, 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.