

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. M121411
(BALLOT MEASURE 37) OF	)	
Barbara Barats, CLAIMANT	)	

Claimant: Barbara Barats (the Claimant)

Property: Township 40, Range 2E, Section 5, Tax lot 1600  
Township 40, Range 2E, Section 5, Tax lot 1601  
Township 40, Range 2E, Section 5, Tax lot 1100  
Jackson 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 Barbara Barats' division of the 115.19-acre subject property into 5-acre parcels or to her development of a dwelling on each parcel: applicable provisions of Goal 3, ORS 215 and OAR 660, division 33; and applicable provisions of Goal 14 and OAR 660-00-0040. These land use regulations will not apply to the claimant only to the extent necessary to allow her to use tax lots 1100, 1600 and 1601 for the use described in this report, and only to the extent that use was permitted when she acquired the property on November 28, 1959.
2. The action by the State of Oregon provides the state's authorization to the claimant to use tax lots 1100, 1600 and 1601 for the use described in this report, subject to the standards in effect on November 28, 1959.

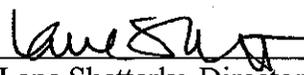
3. To the extent that any law, order, deed, agreement or other legally enforceable public or private requirement provides that the subject property may not be used without a permit, license or other form of authorization or consent, the order will not authorize the use of the property unless the claimant 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 subject 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 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 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 25<sup>th</sup> day of May, 2006.

FOR the DEPARTMENT OF ADMINISTRATIVE  
SERVICES:



Dugan Petty, Deputy Administrator  
DAS, State Services Division

Dated this 25<sup>th</sup> 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<sup>1</sup>, 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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<sup>1</sup> 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 197.52 (BALLOT MEASURE 37) CLAIM FOR COMPENSATION**

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

May 25, 2006

**STATE CLAIM NUMBER:** M121411-Report A<sup>1</sup>

**NAME OF CLAIMANT:** Barbara Barats

**MAILING ADDRESS:** 1136 Old Highway 99 South  
Ashland, Oregon 97520

**PROPERTY IDENTIFICATION:** Township 40, Range 2E, Section 5  
Tax lot 1600  
Jackson County

Township 40, Range 2E, Section 5  
Tax lot 1601  
Jackson County

Township 40, Range 2E, Section 5  
Tax lot 1100  
Jackson County

**OTHER CONTACT INFORMATION:** Kurt Barats, Agent  
606 Stillwell Drive  
Eagle, Idaho 83616

**DATE RECEIVED BY DAS:** July 14, 2005

**180-DAY DEADLINE:** May 29, 2006<sup>2</sup>

**I. SUMMARY OF CLAIM**

The claimant, Barbara Barats, seeks compensation in the amount of \$1,927,673.44<sup>3</sup> for the reduction in fair market value as a result of land use regulations that are alleged to restrict the use

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<sup>1</sup> This report (Report A) is one of three reports associated with this claim. Tax lots 1100 (1.28 acres), 1600 (112.91 acres) and 1601 (1 acre) are addressed in this report. Tax lots 1000 and 1500 are addressed in Report B, and tax lot 800 is addressed in Report C.

<sup>2</sup> 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).

<sup>3</sup> Department staff calculated the amount of compensation sought for this 115.19-acre portion of the entire 149.39-acre property subject to this claim at \$16,734.72 per acre, based on the claimant's estimate of \$2,500,000 for the reduction in fair market value of the entire property.

of certain private real property. The claimant desires compensation or the right to divide the 115.19-acre subject property, composed of tax lots 1100 (1.28 acres), 1600 (112.91 acres) and 1601 (1 acre), into 5-acre parcels and to develop a dwelling on each parcel. Tax lots 1100, 1600 and 1601 have no street addresses and are located near Ashland, in Jackson County, at the coordinates listed above. (See claim.)

## **II. SUMMARY OF STAFF RECOMMENDATION**

Based on the findings and conclusions set forth below, the Department of Land Conservation and Development (the department) has determined that the claim is valid. Department staff recommends that, in lieu of compensation, the requirements of the following state laws enforced by the Land Conservation and Development Commission (the Commission) or the department not apply to Barbara Barats' division of the 115.19-acre subject property into 5-acre parcels and to her development of a dwelling on each parcel: applicable provisions of Statewide Planning Goal 3 (Agricultural Lands), ORS 215 and Oregon Administrative Rules (OAR) 660, division 33; and applicable provisions of Goal 14 (Urbanization) and OAR 660-00-0040. These laws will not apply to the claimant only to the extent necessary to allow her to the subject property for the use described in this report, and only to the extent that use was permitted when she acquired the subject property on November 28, 1959. (See the complete recommendation in Section VI. of this report.)

## **III. COMMENTS ON THE CLAIM**

### **Comments Received**

On September 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, 16 written comments, evidence or information were received in response to the 10-day notice.

Ten comments do 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 letters in the department's claim file.)

Five comments are relevant to when the claimant became the present owner of the subject property. One comment is relevant to whether the laws that are the basis for the claim are exempt under ORS 197.352(3). The comments have been considered by the department in preparing this report. (See Sections V.(1) and V.(4)).

## 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 14, 2005, for processing under OAR 125, division 145. The claim identifies Goal 3, provisions of ORS 215, OAR implementation of ORS 215 and Jackson County land use regulations 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, Barbara Barats, acquired tax lots 1100, 1600 and 1601 on November 28, 1959, as reflected by a land sale contract in the Jackson County miscellaneous property records, Volume 61, page 357. The claimant and her husband, Adrien Barats, conveyed the property into the Adrien P. Barats and Barbara J. Barats revocable trusts, with themselves as trustees, on May 15, 2001.<sup>4</sup> The Jackson County Assessor’s Office confirms the claimant’s current ownership of the subject property.

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<sup>4</sup> This information is according to a Jackson County staff report dated August 31, 2005.

## **Conclusions**

The claimant, Barbara Barats, is an “owner” of the subject property as that term is defined by ORS 197.352(11)(C) as of November 28, 1959.

## **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 subject 115.19-acre subject property into 5-acre parcels for residential development, which is not allowed under current land use regulations.

The claim is based generally on Jackson County’s current Exclusive Farm Use (EFU) and RR-5 zones and the applicable provisions of state law that require such zoning.

Tax lots 1600 and 1601 of the subject property are zoned EFU as required by Goal 3, in accordance with ORS 215 and OAR 660, division 33, because that portion of the claimant’s property is “agricultural land” as defined by Goal 3.<sup>5</sup> 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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<sup>5</sup> The claimant’s property is “agricultural land” because it contains Natural Resources Conservation Service Class I-IV soils.

Tax lot 1100 of the subject property is zoned RR-5, which is a rural residential zone as required by 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,<sup>6</sup> 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 if a county rural residential zone in effect on October 4, 2000, specifies a minimum lot size of two acres or more, the area of any new lot or parcel shall equal or exceed the minimum lot size that is already in effect (OAR 660-004-0040(7)(c)). Some relief from this provision is available for lots or parcels having more than one permanent habitable dwelling pursuant to OAR 660-004-0040(7)(h). The rule also provides that a county's minimum lot size requirement in a rural residential zone shall not be amended to allow a smaller minimum lot size without approval of an exception to Goal 14 (OAR 660-004-0040(6)). Because Jackson County's rural residential zone was in effect on October 4, 2000, and requires a minimum lot size of five acres, the minimum lot size for any new lot or parcel must equal or exceed five acres.

The claimant acquired the subject property on November 28, 1959, prior to the adoption of the statewide planning goals and their implementing statutes and regulations.

### **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, as applied to tax lots 1600 and 1601, and Goal 14 and OAR 660-004-0040, as applied to tax lot 1100, were all enacted or adopted after the claimant acquired the subject property in 1959 and do not allow the desired division or residential development of the property. These laws restrict the use of the subject property relative to the uses allowed when the claimant 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 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 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."

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<sup>6</sup> *1000 Friends of Oregon v. LCDC (Curry County)*, 301 Or 447 (1986).

## **Findings of Fact**

The claim includes an estimate of \$1,927,673.44 as the reduction in value due to current regulations of tax lots 1100, 1600 and 1601, which compose the 115.19-acre portion of the entire 149.39-acre property subject to this claim. This amount is based on the claimant's own estimate.

## **Conclusions**

As explained in Section V.(1) of this report, the claimant is Barbara Barats who acquired the subject property on November 28, 1959. Under ORS 197.352, the claimant is 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 claimant acquired the subject property restrict the desired division and development of the property. The claimant estimates the reduction in value due to the restrictions to be \$1,927,673.44.

Without an appraisal or other documentation, 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 Jackson County has implemented through its current EFU zone, and applicable provisions of Goal 14 and OAR 660-00-0040. All of the land use regulations cited in the claim or in submitted comments were enacted or adopted after the claimant acquired the subject property in 1959.

## **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 claimant acquired the subject property in 1959. As a result, these laws are not exempt under ORS 197.352(3)(E).

Laws in effect when the claimant acquired the subject property are 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 uses 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 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 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 the 115.19-acre subject property into 5-acre parcels and to develop a dwelling on each parcel. The claim asserts that the laws enforced by the Commission or the department reduce the fair market value of the subject property by \$1,927,673.44. 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.

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 Barbara Barats to use the subject property for a use permitted at the time she acquired the property on November 28, 1959.

### **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 Barbara Barats' division of the 115.19-acre subject property into 5-acre parcels or to her

development of a dwelling on each parcel: applicable provisions of Goal 3, ORS 215 and OAR 660, division 33; and applicable provisions of Goal 14 and OAR 660-00-0040. These land use regulations will not apply to the claimant only to the extent necessary to allow her to use tax lots 1100, 1600 and 1601 for the use described in this report, and only to the extent that use was permitted when she acquired the property on November 28, 1959.

2. The action by the State of Oregon provides the state's authorization to the claimant to use tax lots 1100, 1600 and 1601 for the use described in this report, subject to the standards in effect on November 28, 1959.

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 subject 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 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 subject property by the claimant.

## **VII. COMMENTS ON THE DRAFT STAFF REPORT**

The department issued its draft staff report on this claim on May 8, 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.

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. M121411
(BALLOT MEASURE 37) OF	)	
Barbara Barats, CLAIMANT	)	

Claimant: Barbara Barats (the Claimant)

Property: Township 40, Range 2E, Section 5, Tax lot 1000  
Township 39, Range 2E, Section 32, Tax lot 1500  
Jackson 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 Barbara Barats' division of the 9.54-acre subject property into 5-acre parcels or to her development of a dwelling on each parcel: applicable provisions of Goal 3, ORS 215 and OAR 660, division 33, enacted or adopted after October 20, 2003. The department acknowledges that the relief to which the claimant is entitled under ORS 197.352 will not allow the claimant to use tax lots 1000 and 1500 in the manner set forth in the claim.
2. The action by the State of Oregon provides the state's authorization to the claimant to use tax lots 1000 and 1500, subject to the standards in effect on October 20, 2003. At that time, the property was subject to applicable provisions of Goal 3, ORS 215 and ORS 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

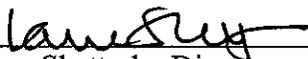
unless the claimant first obtains that permit, license or other form of authorization or consent. Such requirements may include, but are not limited to: a building permit, a land use decision, a "permit" as defined in ORS 215.402 or 227.160, other permits or authorizations from local, state or federal agencies and restrictions on the use of the subject property imposed by private parties.

4. Any use of the subject 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).

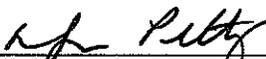
5. Without limiting the generality of the foregoing terms and conditions, in order for the claimant to use the subject property, it may be necessary for her to obtain a decision under ORS 197.352 from a city and/or county and/or metropolitan service district that enforces land use regulations applicable 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 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 25<sup>th</sup> day of May, 2006.

FOR the DEPARTMENT OF ADMINISTRATIVE  
SERVICES:

  
\_\_\_\_\_  
Dugan Petty, Deputy Administrator  
DAS, State Services Division  
Dated this 25<sup>th</sup> 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<sup>1</sup>, 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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<sup>1</sup> 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 25, 2006

**STATE CLAIM NUMBER:** M121411-Report B<sup>1</sup>

**NAME OF CLAIMANT:** Barbara Barats

**MAILING ADDRESS:** 1136 Old Highway 99 South  
Ashland, Oregon 97520

**PROPERTY IDENTIFICATION:** Township 40, Range 2E, Section 5  
Tax lot 1000  
Jackson County

Township 39, Range 2E, Section 32  
Tax lot 1500  
Jackson County

**OTHER CONTACT INFORMATION:** Kurt Barats, Agent  
606 Stillwell Drive  
Eagle, Idaho 83616

**DATE RECEIVED BY DAS:** July 14, 2005

**180-DAY DEADLINE:** May 29, 2006<sup>2</sup>

**I. SUMMARY OF CLAIM**

The claimant, Barbara Barats, seeks compensation in the amount of \$159,649.20<sup>3</sup> 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 9.54-acre subject property, composed of tax lots 1000 (0.84 acre) and 1500 (8.70 acres) into 5-acre parcels and to develop a dwelling on each parcel. Tax lots 1000 and 1500 have no street

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<sup>1</sup> This report (Report B) is one of three reports associated with this claim. Tax lots 1000 (0.84 acre) and 1500 (8.70 acres) are addressed in this report. Tax lots 1100, 1600 and 1601 are addressed in Report A, and tax lot 800 is addressed in Report C.

<sup>2</sup> 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).

<sup>3</sup> Department staff calculated the amount of compensation sought for this 9.54-acre portion of the entire 149.39-acre property subject to this claim at \$16,734.72 per acre, based on the claimant's estimate of \$2,500,000 for the reduction in fair market value of the entire property.

addresses and are located near Ashland, in Jackson County, at the coordinates listed above. (See claim.)

## **II. SUMMARY OF STAFF RECOMMENDATION**

Based on the findings and conclusions set forth below, the Department of Land Conservation and Development (the department) has determined that the claim is valid. Department staff recommends that, in lieu of compensation, the requirements of the following state laws enforced by the Land Conservation and Development Commission (the Commission) or the department not apply to Barbara Barats' division of the 9.54-acre subject property into 5-acre parcels and to her development of a dwelling on each parcel: applicable provisions of Statewide Planning Goal 3 (Agricultural Lands), ORS 215 and Oregon Administrative Rules (OAR) 660, division 33, enacted or adopted after October 20, 2003. 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 the property. The department acknowledges that the relief to which the claimant is entitled under ORS 197.352 will not allow the claimant to use tax lots 1000 and 1500 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 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, 16 written comments, evidence or information were received in response to the 10-day notice.

Ten comments do 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 letters in the department's claim file.)

Five comments are relevant to when the claimant became the present owner of the subject property. One comment is relevant to whether the laws that are the basis for the claim are exempt under ORS 197.352(3). The comments have been considered by the department in preparing this report. (See Sections V.(1) and V.(4)).

## **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 14, 2005, for processing under OAR 125, division 145. The claim identifies Goal 3, provisions of ORS 215, OAR implementation of ORS 215 and Jackson County land use regulations 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, Barbara Barats, most recently acquired tax lots 1000 and 1500 on October 20, 2003, as reflected by a bargain and sale deed for each tax lot, recorded by Jackson County. The claimant and her husband, Adrien Barats, first acquired tax lots 1000 and 1500 on November 28, 1959, as reflected by a land sales contract in the Jackson County miscellaneous property records, Volume 61, page 357.<sup>4</sup> Multiple conveyances of these tax lots occurred before the claimant most recently acquired the subject tax lots from her daughters, Melinda Tippetts and Tracy Barats, on October 20, 2003.<sup>5</sup> The Jackson County Assessor’s Office confirms the claimant’s current ownership of tax lots 1000 and 1500.

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<sup>4</sup> This information is according to a Jackson County staff report dated August 31, 2005.

<sup>5</sup> The claimant and her husband conveyed all interest in tax lots 1000 and 1500 to the claimant’s daughters, Melinda Tippetts and Tracy Barats, on December 15, 1992, as reflected by a bargain and sale deed for each tax lot, recorded by Jackson County. Melinda Tippetts and Tracy Barats conveyed these tax lots to the claimant and her husband on February 12, 1998, as reflected by a deed for each tax lot, recorded by Jackson County. The claimant and her husband again conveyed all interest in the subject tax lots to Melinda Tippetts and Tracy Barats on November 4, 1998, as reflected by a bargain and sale deed for each tax lot, recorded by Jackson County.

## **Conclusions**

The claimant, Barbara Barats, is an “owner” of the subject property as that term is defined by ORS 197.352(11)(C) as of October 20, 2003. The claimant, her husband Adrien Barats and her children Melinda Tippetts and Tracy Barats are “family members” as that term is defined by ORS 197.352(11)(A) and first acquired the property on November 28, 1959.

## **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 subject 9.54-acre subject property into 5-acre parcels for residential development, which is not allowed under current land use regulations.

The claim is based generally on Jackson County’s current 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.<sup>6</sup> Goal 3 became effective on January 25, 1975, and required that agricultural lands as defined by the Goal be zoned EFU pursuant to ORS 215.

Current land use regulations, particularly ORS 215.263, 215.284 and 215.780 and OAR 660, division 33, enacted or adopted pursuant to Goal 3, prohibit the division of EFU-zoned land into parcels less than 80 acres and establish standards for the development of dwellings on existing or any proposed parcel 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 became effective on May 22, 2002. (See administrative rule history for OAR 660-033-0100, -0130 and -0135.)

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<sup>6</sup> The claimant’s property is “agricultural land” because it contains National Resources Conservation Service Class I-IV soils.

The claimant's family first acquired the subject property in 1959, prior to the adoption of the statewide planning goals and their implementing statutes and rules. No county zoning applied to the subject property in 1959.

### **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 the claimant's family acquired the subject property. These laws restrict the use of the subject property relative to the uses allowed when the claimant's family acquired the property.

### **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 \$159,649.20 as the reduction in the fair market value due to current regulations of tax lots 1000 and 1500, which compose the 9.54-acre portion of the entire 149.39-acre property subject to this claim. This amount is based on the claimant's own estimate.

### **Conclusions**

As explained in Section V.(1) of this report, the claimant is Barbara Barats whose family acquired the subject property in 1959. 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's family acquired the subject property restrict the desired division and development of the property. The claimant estimates the reduction in value due to the restrictions to be \$159,649.20.

Without an appraisal or other documentation, 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 since the claimant's family 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 relative to the uses permitted when the claimant's family acquired the property, including applicable provisions of Goal 3, ORS 215 and OAR 660, division 33, which Jackson County has implemented through its current EFU zone. All of the land use regulations cited in the claim or in submitted comments were enacted or adopted after the claimant's family acquired the subject property in 1959.

## **Conclusions**

It appears that none of the general statutory, goal and rule restrictions on residential division and development of the subject property were in effect when the claimant's family acquired the property on November 28, 1959. As a result, these laws are not exempt under ORS 197.352(3)(E). Laws in effect when the claimant's family acquired the subject property are exempt under ORS 197.352(3)(E) and do not provide a basis for compensation. In addition, other land use laws enacted or adopted for a purpose set forth in ORS 197.352(3)(A) to (D) are also exempt and would not provide a basis for compensation.

## **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 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 9.54-acre subject property into 5-acre parcels and to develop a dwelling on each parcel. The claim asserts that the laws enforced by the Commission or the department reduce the fair market value of the subject property by \$159,649.20. 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.

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 Barbara Barats to use tax lots 1000 and 1500 for a use permitted at the time she acquired the property on October 20, 2003.

At the time the claimant acquired her current interest in tax lots 1000 and 1500, they were zoned EFU by Jackson County and subject to the current lot size and dwelling standards under Goal 3, ORS 215 and OAR 660, division 33, and as described in Section V.(2) of this report.

In addition to the applicable provisions of Goal 3 and ORS 215 in effect on October 20, 2003, and other laws in effect when the claimant acquired the subject property, there may be other laws that 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 and, depending on when they were enacted or adopted, may continue to apply to the claimant's property. In addition, some of these laws may be exempt under ORS 197.352(3)(A) to (D) and will continue to apply to the subject property on that basis.

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 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 her claim, the greater the possibility that there may be additional laws that will later be determined to continue to apply to her use of the subject property.

### 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 Barbara Barats' division of the 9.54-acre subject property into 5-acre parcels or to her development of a dwelling on each parcel: applicable provisions of Goal 3, ORS 215 and OAR 660, division 33, enacted or adopted after October 20, 2003. The department acknowledges that the relief to which the claimant is entitled under ORS 197.352 will not allow the claimant to use tax lots 1000 and 1500 in the manner set forth in the claim.
2. The action by the State of Oregon provides the state's authorization to the claimant to use tax lots 1000 and 1500, subject to the standards in effect on October 20, 2003. At that time, the property was subject to applicable provisions of Goal 3, ORS 215 and ORS 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 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 subject 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 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 subject property by the claimant.

## **VII. COMMENTS ON THE DRAFT STAFF REPORT**

The department issued its draft staff report on this claim on May 8, 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.

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. M 121411
(BALLOT MEASURE 37) OF	)	
Barbara Barats, CLAIMANT	)	

Claimant: Barbara Barats (the Claimant)

Property: Township 40, Range 2E, Section 6, Tax lot 800, Jackson 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 laws administered by DLCD and the Land Conservation and Development Commission (LCDC) for the reasons set forth in the DLCD Report.

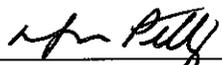
This Order is entered by the Director of the DLCD as a final order of DLCD and the Land Conservation and Development Commission under ORS 197.352, OAR 660-002-0010(8), and OAR chapter 125, division 145, and by the Deputy Administrator for the State Services Division of the DAS as a final order of DAS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

FOR DLCD AND THE LAND  
CONSERVATION AND DEVELOPMENT  
COMMISSION:

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Lane Shetterly, Director  
DLCD  
Dated this 25<sup>th</sup> day of May, 2006.

FOR the DEPARTMENT OF  
ADMINISTRATIVE SERVICES:



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Dugan Petty, Deputy Administrator  
DAS, State Services Division  
Dated this 25<sup>th</sup> day of May, 2006.

**NOTICE OF RIGHT TO APPEAL OR OTHER JUDICIAL RELIEF**

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

1. Judicial review under ORS 183.484: Judicial review under ORS 183.484 may be obtained by filing a petition for review within 60 days from the service of this order. A petition for judicial review under ORS 183.484 may be filed in the Circuit Court for Marion County or the Circuit Court in the county in which you reside.
2. A cause of action under ORS 197.352 (Measure 37 (2004)): If a land use regulation continues to apply to the subject property more than 180 days after the present owner of the property has made written demand for compensation under ORS 197.352<sup>1</sup>, 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)

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<sup>1</sup> 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 25, 2006

**STATE CLAIM NUMBER:** M121411-Report C<sup>1</sup>

**NAME OF CLAIMANT:** Barbara Barats

**MAILING ADDRESS:** 1136 Old Highway 99 South  
Ashland, Oregon 97520

**PROPERTY IDENTIFICATION:** Township 40, Range 2E, Section 6  
Tax lot 800  
Jackson County

**OTHER CONTACT INFORMATION:** Kurt Barats, Agent  
606 Stillwell Drive  
Eagle, Idaho 83616

**DATE RECEIVED BY DAS:** July 14, 2005

**180-DAY DEADLINE:** May 29, 2006<sup>2</sup>

**I. SUMMARY OF CLAIM**

The claimant, Barbara Barats, seeks compensation in the amount of \$345,739.30<sup>3</sup> 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 20.66-acre subject property, tax lot 800, into 5-acre parcels and to develop a dwelling on each parcel. Tax lot 800 has no street address and is located near Ashland, in Jackson County, at the coordinates listed above. (See claim.)

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<sup>1</sup> This report (Report C) is one of three reports associated with this claim. Tax lot 800 (20.66 acres) is addressed in this report. Tax lots 1100, 1600 and 1601 are addressed in Report A, and tax lots 1000 and 1500 are addressed in Report B.

<sup>2</sup> 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).

<sup>3</sup> Department staff calculated the amount of compensation sought for this 20.66-acre portion of the entire 149.39-acre property subject to this claim at \$16,734.72 per acre, based on the claimant's estimate of \$2,500,000 for the reduction in fair market value of the entire property.

## 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 not valid because the claimant's desired use of the subject property was prohibited under the laws in effect when the claimant acquired tax lot 800 on August 12, 1994. (See the complete recommendation in Section VI. of this report.)

## III. COMMENTS ON THE CLAIM

### Comments Received

On September 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, 16 written comments, evidence or information were received in response to the 10-day notice.

Ten comments do 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 letters in the department's claim file.)

Five comments are relevant to when the claimant became the present owner of the subject property. One comment is relevant to whether the laws that are the basis for the claim are exempt under ORS 197.352(3). The comments have been considered by the department in preparing this report. (See Section V.(1) and Section V.(4)).

## IV. TIMELINESS OF CLAIM

### Requirement

ORS 107.352 (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 14, 2005, for processing under OAR 125, division 145. The claim identifies Goal 3, provisions of ORS 215, and implementation of ORS 215 and Jackson County land use regulations 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, Barbara Barats, acquired tax lot 800 on August 12, 1994, as reflected by Jackson County property records.<sup>4</sup> The Jackson County Assessor’s Office confirms the claimant’s current ownership of the subject property.

### **Conclusions**

The claimant, Barbara Barats, is an “owner” of the subject property as that term is defined by ORS 197.352(11)(C) as of August 12, 1994.

### **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 20.66-acre subject property into 5-acre parcels for residential development, which is not allowed under current land use regulations.

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<sup>4</sup> This information is available through the “Front Counter” online application from the Jackson County Assessor’s Office.

The claim is based generally on Jackson County's current Forest Resource (FR) and Woodland Resource (WR) zones and the applicable provisions of state law that require such zoning. The property is zoned FR and WR, as required by Statewide Planning Goal 4 (Forest Lands), in accordance with ORS 215 and OAR 660, division 6, because the claimant's property is "forest land" as defined by Goal 4.

Goal 4 became effective on January 25, 1975, and requires that forest lands as defined by the Goal be zoned forest pursuant to ORS 215. The forest land administrative rules (OAR 660, division 6) became effective on September 1, 1982, and ORS 215.705 to 215.755 and 215.780 became effective on November 4, 1993 (Chapter 792, Oregon Laws 1993). OAR 660-006-0026 and 660-006-0027 were amended on March 1, 1994, to implement those statutes.

Together, ORS 215.705 to 215.755 and 215.780 and OAR 660, division 6, enacted or adopted pursuant to Goal 4, prohibit the division of forest land into parcels less than 80 acres and establish standards for development of dwellings on existing or proposed parcels on those lands.

When the claimant acquired the subject property on August 12, 1994, it was subject to the county's current acknowledged FR and WR zoning and the state regulations currently in effect.

### **Conclusions**

The current zoning requirements, minimum lot size and dwelling standards established by Goal 4 and provisions applicable to land zoned forest in ORS 215 and OAR 660, division 6, were all enacted or adopted before claimant acquired the subject property on August 12, 1994. These land use regulations do not allow the division and development of the subject property into 5-acre parcels for residential use. Laws enacted or adopted since the claimant acquired the subject property on August 12, 1994, do not restrict the claimant's desired use of the property relative to when the claimant acquired it on August 12, 1994. As a result, state land use regulations do not restrict Barbara Barats' use of the subject property relative to how the property could have been used at the time the claimant acquired the property.

### **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 \$345,739.30 as the reduction due to current regulations of tax lot 800, which composes the 20.66-acre portion of the entire 149.39-acre property subject to this claim. This amount is based on the claimant's own estimate.

### **Conclusions**

As explained in Section V.(1) of this report, the claimant is Barbara Barats who acquired the subject property on August 12, 1994. No state laws enacted or adopted since the claimant acquired the subject property restrict the use of the property relative to the uses allowed on

August 12, 1994. Therefore, the fair market value of the subject property has not been reduced 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 does not identify any state land use regulations enacted or adopted since the claimant acquired the subject property that restrict the use of the property relative to what would have been allowed when she acquired it on August 12, 1994. As set forth in Section V.(2) of this report, the state land use regulations restricting the claimant's desired use of the subject property were in effect when the claimant acquired the property on August 12, 1994.

#### **Conclusions**

All of the state land use regulations that restrict the claimant's desired use of the subject property were in effect when the claimant acquired the property. Therefore, these state land use regulations are exempt under ORS 197.352(3)(E), which exempts laws in effect when the claimant acquired 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 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 do not restrict the desired division and development of tax lot 800 relative to what was permitted when the claimant acquired the subject property on August 12, 1994. The laws enforced by the Commission or the department do not reduce the fair market value of the subject property. The state laws restricting the use of the subject property are exempt under ORS 197.352(3)(E).

#### **Conclusions**

Based on the record and the foregoing findings and conclusions, the claimant has not established that she is entitled to relief under ORS 197.352(1) as a result of land use regulations enforced by

the Commission or the department. Therefore, the department recommends that this claim, relating to tax lot 800, be denied.

## **VII. COMMENTS ON THE DRAFT STAFF REPORT**

The department issued its draft staff report on this claim on May 8, 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.