

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

IN THE MATTER OF THE CLAIM FOR)	FINAL ORDER
COMPENSATION UNDER ORS 197.352)	CLAIM NO. M121428
(BALLOT MEASURE 37) OF)	
Carl E. Swanson, CLAIMANT)	

Claimant: Carl E. Swanson (the Claimant)

Property: Township 5S, Range 3E, Section 1, Tax lots 100 and 600
Township 4S, Range 3E, Section 1, Tax lot 2400
Clackamas 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), the Oregon Department of Forestry (the ODF Report), attached to and by this reference incorporated into this order.

ORDER

The Claim is denied as to laws administered by the Oregon Department of Forestry or the Oregon Board of Forestry, for the reasons set forth in the ODF Report.

The Claim is 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 Carl Swanson's partition of tax lot 2400 into three parcels or to his development of a dwelling on each parcel: applicable provisions of Goal 4, ORS 215 and OAR 660, division 6. These land use regulations will not apply to the claimant only to the extent necessary to allow him to use tax lot 2400 for the use described in this report, and only to the extent that use was permitted when he acquired the property on December 12, 1961.

In lieu of compensation under ORS 197.352, the State of Oregon will not apply the following laws to Carl Swanson's development of a dwelling on tax lot 100: applicable provisions of Goal 4, ORS 215 and OAR 660, division 6. These land use regulations will not apply to the claimant only to the extent necessary to allow him to use tax lot 100 for the use described in this

report, and only to the extent that use was permitted when he acquired the property on February 6, 1969.

In lieu of compensation under ORS 197.352, the State of Oregon will not apply the following laws to Carl Swanson's development of a dwelling on tax lot 600: applicable provisions of ORS 215 and OAR 660, division 6, enacted or adopted after March 14, 1980. These land use regulations will not apply to the claimant only to the extent necessary to allow him to use tax lot 600 for the use described in this report, and only to the extent that use was permitted when he acquired the property on March 14, 1980.

2. The action by the State of Oregon provides the state's authorization to the claimant to use the subject property for the use described in this report, subject to the standards in effect on the following dates:

Township 4S Range 3E Section 36 tax lot 2400 on December 12, 1961.

Township 5S Range 3E Section 1 tax lot 100 on February 6, 1969.

Township 5S Range 3E Section 1 tax lot 600 on March 14, 1980.

On March 14, 1980, the establishment of a dwelling on tax lot 600 was subject to the provisions of Goal 4 as well as Clackamas County's land use regulations then in effect.

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

4. Any use of the 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 him to obtain a decision under ORS 197.352 from a city and/or county and/or metropolitan service district that enforces land use regulations applicable to the property. Nothing in this order relieves the claimant from the necessity of obtaining a decision under ORS 197.352 from a local public entity that has jurisdiction to enforce a land use regulation applicable to a use of the subject property by the claimant.

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

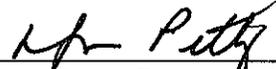
This Order is entered by the Oregon Board and Department of Forestry as a final order of the Board under ORS 197.352, OAR 629-001-0057, and OAR Chapter 125, division 145.

FOR DLCD AND THE LAND
CONSERVATION AND DEVELOPMENT
COMMISSION:



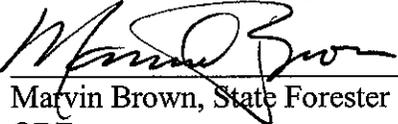
Lane Shetterly, Director
DLCD
Dated this 25th day of May, 2006.

FOR THE DEPARTMENT OF
ADMINISTRATIVE SERVICES:



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

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



Marvin Brown, State Forester
ODF
Dated this 25th 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 197.352¹, the present owner of the property, or any interest therein, shall have a cause of action in the circuit court in which the real property is located.

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

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.

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.”

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: M121428

NAME OF CLAIMANT: Carl E. Swanson

MAILING ADDRESS: 29696 South Gordon Road
Colton, Oregon 97017

PROPERTY IDENTIFICATION: Township 5S, Range 3E, Section 1
Tax lots 100 and 600
Township 4S, Range 3E, Section 1
Tax lot 2400
Clackamas County

OTHER CONTACT INFORMATION: Mary Johnson
500 Abernethy Road, Suite 4
Oregon City, Oregon 97045

DATE RECEIVED BY DAS: July 15, 2005

180-DAY DEADLINE: May 30, 2006¹

I. SUMMARY OF CLAIM

The claimant, Carl Swanson, seeks compensation in the amount of \$446,374 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 establish one dwelling each on tax lots 100 and 600 (T5SR3E, section 1), and to partition tax lot 2400 (T4SR3E, section 36) into three parcels and develop a dwelling on each parcel. The subject tax lots are located near Gordon Road, near Colton, in Clackamas County. (See claim.)

II. SUMMARY OF STAFF RECOMMENDATION

Based on the findings and conclusions set forth below, the Department of Land Conservation and Development (the department) has determined that the claim is valid. Department staff recommends that, in lieu of compensation, the requirements of the following state laws enforced by the Land Conservation and Development Commission (the Commission) or the department not apply to Carl Swanson's partition of tax lot 2400 into three parcels and to his development of a dwelling on each parcel: applicable provisions of Statewide Planning Goal 4 (Forest Lands),

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

ORS 215 and Oregon Administrative Rules (OAR) 660, division 6. These laws will not apply to the claimant only to the extent necessary to allow him to use tax lot 2400 for the use described in this report, and only to the extent that use was permitted when he acquired tax lot 2400 on December 12, 1961. (See the complete recommendation in Section VI. of this report.)

Department staff recommends that, in lieu of compensation, the requirements of the following state laws enforced by the Commission or the department not apply to Carl Swanson's development of a dwelling on tax lot 100: applicable provisions of Goal 4, ORS 215 and OAR 660, division 6. These laws will not apply to the claimant only to the extent necessary to allow him to use tax lot 100 for the use described in this report, and only to the extent that use was permitted when he acquired tax lot 100 on February 6, 1969. (See the complete recommendation in Section VI. of this report.)

Department staff recommends that, in lieu of compensation, the requirements of the following state laws enforced by the Commission or the department not apply to Carl Swanson's development of a dwelling on tax lot 600: applicable provisions of Goal 4, ORS 215, OAR 660, division 6, enacted or adopted after March 14, 1980. These laws will not apply to the claimant only to the extent necessary to allow him to use tax lot 600 for the use described in this report, and only to the extent that use was permitted when he acquired tax lot 600 on March 14, 1980. (See the complete recommendation in Section VI. of this report.)

III. COMMENTS ON THE CLAIM

Comments Received

On July 26, 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.

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

IV. TIMELINESS OF CLAIM

Requirement

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

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

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

Findings of Fact

This claim was submitted to DAS on July 15, 2005, for processing under OAR 125, division 145. The claim identifies ORS 92, 197, 215, 526 and 527, Goal 4 and OAR 660 as the basis for the claim.² 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

This claim covers three separate tax lots owned by the claimant, Carl Swanson. Tax lot 2400 was acquired by the claimant on December 12, 1961, as reflected by a warranty deed included with the claim. A title report and 2005 tax statement submitted with the claim establish the claimant’s current ownership of this tax lot.

Tax lot 100 was acquired on February 6, 1969, as reflected by a Sheriff’s Sale and Certificate of Sale included with the claim. A title report and 2005 tax statement submitted with the claim establish the claimant’s current ownership of this tax lot.

The claimant acquired an interest in tax lot 600 on March 14, 1980, by a real estate contract. A title report and 2005 tax statement submitted with the claim establish the claimant’s current ownership of this tax lot.

Each of these tax lots may have been purchased from a “family member” as defined by ORS 197.352(11)(A). However, no information was provided nor was any assertion made regarding family ownership or establishing the dates on which a “family member” may have purchased any of the tax lots.

² This report addresses only those laws that are administered by the department or the Commission. The Oregon Department of Forestry will prepare a separate report for this claim addressing ORS 526 and 527.610 et seq.

Conclusions

The claimant, Carl Swanson, is an "owner" of tax lot 2400 (in T4S R3E, section 36) and tax lots 100 and 600 (in T5S R3E, section 1) as that term is defined by ORS 197.352(11)(C). Dates of ownership for the tax lots are as follows:

Township 4S Range 3E Section 36 tax lot 2400 on December 12, 1961.

Township 5S Range 3E Section 1 tax lot 100 on February 6, 1969.

Township 5S Range 3E Section 1 tax lot 600 on March 14, 1980.

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 ORS 92, 197 and 215, OAR 660, Goal 4 and local planning and zoning prevent the claimant from putting a dwelling on each of the two tax lots (100 and 600), and partitioning a third tax lot (2400) into two additional parcels and establishing a dwelling on each.

The claim does not establish how ORS 92 or 197 restricts the claimant's desired use of the property. None of these statutes, on their face, restrict the use of the property. Absent an explanation by the claimant as to how these laws restrict the use of the subject property in a manner that reduces the fair market value of the property, these laws are not discussed further in this report.

The claim is based generally on Clackamas County's current TBR zone and the applicable provisions of state law that require such zoning. The claimant's property is zoned TBR as required by Goal 4 in accordance with ORS 215 and OAR 660, division 6, because the claimant's property is "forest land" under Goal 4. Goal 4 became effective on January 25, 1975, and requires that forest land be zoned for forest use (see statutory and rule history under OAR 660-015-0000(4)). 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.

The claimant acquired tax lot 2400 on December 12, 1961, and tax lot 100 on February 6, 1969, prior to the adoption of the applicable provisions of ORS 215 and the statewide planning goals and their implementing regulations.

The claimant acquired tax lot 600 on March 14, 1980. This was after adoption of the statewide planning goals (including Goal 4) but before the Commission acknowledged Clackamas County's comprehensive plan and land use regulations to be in compliance with the statewide planning goals pursuant to ORS 197.250 and 197.251. Because the Commission had not acknowledged the county's plan and land use regulation when the claimant acquired tax lot 600 on March 14, 1980, the statewide planning goals, and Goal 4 in particular, applied directly to the claimant's property when he acquired it.³

Goal 4 went into effect on January 25, 1975, "to conserve forest lands for forest uses" and required that "lands suitable for forest uses shall be inventoried and designated as forest lands. Existing forest land uses shall be protected unless proposed changes are in conformance with the comprehensive plan." Those forest uses were defined as follows: "(1) the production of trees and the processing of forest products; (2) open space, buffers from noise, and visual separation of conflicting uses; (3) watershed protection and wildlife and fisheries habitat; (4) soil protections from wind and water; (5) maintenance of clean air and water; (6) outdoor recreational activities and related support services and wilderness values compatible with these uses; and (7) grazing land for livestock."

No information has been presented in the claim to establish that the claimant's desired establishment of a dwelling on tax lot 600 complies with the Goal 4 standard in place when tax lot 600 was acquired in 1980. Goal 4 required then (and requires now) that forest dwellings be "accessory to" and "necessary for" a forest use specified in Goal 4, and that non-forest dwellings be located on land unsuitable for forest use.

Conclusions

The current zoning requirements, minimum lot size and dwelling standards established by Goal 4 and provisions applicable to land zoned for forest use in ORS 215 and OAR 660, division 6, were all enacted or adopted after the claimant acquired tax lots 100 and 2400 in 1969 and 1961, respectively, and do not allow the claimant's desired use of these two tax lots. These laws restrict the use of the property relative to the uses allowed when the claimant acquired the property.

The current zoning requirements and dwelling standards established by provisions applicable to land zoned for forest use in ORS 215 and OAR 660, division 6, were enacted or adopted after the claimant acquired tax lot 600 in 1980. These laws restrict the use of the property relative to the uses allowed when the claimant acquired the property.

³ The statewide planning goals became effective on January 25, 1975, and were applicable to legislative land use decisions and some quasi-judicial decisions prior to the Commission's acknowledgement of each county's land use regulations. *Perkins v. City of Rajneeshpuram*, 300 Or 1 (1985); *Alexanderson v. Polk County*, 289 Or 427, rev den 290 Or 137 (1980); *Sunnyside Neighborhood Assn v. Clackamas County*, 280 Or 3 (1977); *Jurgenson v. Union County*, 42 Or App 505 (1979); and *1000 Friends of Oregon v. Benton County*, 32 Or App 413 (1978). After the county's plan and land use regulations were acknowledged by the commission, the statewide planning goals and implementing rules no longer directly applied to such local land use decisions. *Byrd v. Stringer*, 295 Or 311 (1983). However, statutory requirements continue to apply, and insofar as the state and local provisions are materially the same, the local provisions must be interpreted consistent with the goals and implementing rules. *Foster v. Polk County*, 115 Or App 475 (1992); *Kenagy v. Benton County*, 115 Or App 131 (1992).

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

3. Effect of Regulations on Fair Market Value

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

Findings of Fact

The claim includes an estimate of \$446,374 as the reduction in the subject property's fair market value due to current regulations. This amount is based on market analyses submitted with the claim.

Conclusions

As explained in Section V.(1) of this report, the claimant is Carl Swanson who acquired the subject tax lots in 1961, 1969 and 1980. 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 \$446,374.

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 4, ORS 215 and OAR 660, division 6, which Clackamas County has implemented through its current TBR zone. All of these land use regulations were enacted or adopted after the claimant acquired tax lots 100 and 2400 in 1969 and 1961,

respectively. All of these regulations, except for Goal 4, were enacted or adopted after the claimant acquired tax lot 600 in 1980.

The department notes that ORS 215.730 and OAR 660, division 6, include standards for siting dwellings in forest zones. Those provisions include fire protection standards for dwellings. ORS 197.352(3)(B) specifically exempts regulations "restricting or prohibiting activities for the protection of public health and safety, such as fire and building codes...." Accordingly, siting standards for dwellings in forest zones in ORS 215.730 and OAR 660, division 6, are exempt under ORS 197.352(3)(B).

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 division and development of the subject property were in effect when the claimant acquired tax lots 100 and 2400 in 1969 and 1961, respectively. As a result, these laws are not exempt under ORS 197.352(3)(E) for these tax lots. Goal 4 did apply to tax lot 600 when the claimant acquired tax lot 600 in 1980, and as a result, it is exempt.

Other laws in effect when the claimant acquired the subject property are exempt under ORS 197.352(3)(E) and will also continue to apply to the claimant's use of the property. In addition, restrictions in ORS 215.730 and provisions of OAR 660, division 6, that establish fire protection standards for dwellings in forest zones, are also exempt under ORS 197.352(3)(B) and will also continue to apply to the subject 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 he has provided to the department in the claim, the greater the possibility that there may be additional laws that will later be determined to continue to apply to his use of the subject property.

VI. FORM OF RELIEF

ORS 197.352(1) provides for payment of compensation to an owner of private real property if the Commission or the department has enforced one or more laws that restrict the use of the property in a manner that reduces its fair market value. In lieu of compensation, the department may choose to not apply the law in order to allow the present owner to carry out a use of the property permitted at the time the current owner acquired the property. The Commission, by rule, has directed that if the department determines a claim is valid, the Director of the

department must provide only non-monetary relief unless and until funds are appropriated by the legislature to pay claims.

Findings of Fact

Based on the findings and conclusions set forth in this report, laws enforced by the Commission or the department restrict the claimant's desired use of the three tax lots. The claim asserts that the laws enforced by the Commission or the department reduce the fair market value of the subject property by \$446,374. However, because the claim does not provide an appraisal or other specific documentation establishing how the specified restrictions reduce the fair market value of the subject property, 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 have had the effect of reducing 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 Carl Swanson to use the subject property for a use permitted at the time he acquired the property:

Township 4S Range 3E Section 36 tax lot 2400 on December 12, 1961.
Township 5S Range 3E Section 1 tax lot 100 on February 6, 1969.
Township 5S Range 3E Section 1 tax lot 600 on March 14, 1980.

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 Carl Swanson's partition of tax lot 2400 into three parcels or to his development of a dwelling on each parcel: applicable provisions of Goal 4, ORS 215 and OAR 660, division 6. These land use regulations will not apply to the claimant only to the extent necessary to allow him to use tax lot 2400 for the use described in this report, and only to the extent that use was permitted when he acquired the property on December 12, 1961.

In lieu of compensation under ORS 197.352, the State of Oregon will not apply the following laws to Carl Swanson's development of a dwelling on tax lot 100: applicable provisions of Goal 4, ORS 215 and OAR 660, division 6. These land use regulations will not apply to the claimant only to the extent necessary to allow him to use tax lot 100 for the use described in this report, and only to the extent that use was permitted when he acquired the property on February 6, 1969.

In lieu of compensation under ORS 197.352, the State of Oregon will not apply the following laws to Carl Swanson's development of a dwelling on tax lot 600: applicable provisions of ORS 215 and OAR 660, division 6, enacted or adopted after March 14, 1980. These land use regulations will not apply to the claimant only to the extent necessary to allow him to use tax

lot 600 for the use described in this report, and only to the extent that use was permitted when he acquired the property on March 14, 1980.

2. The action by the State of Oregon provides the state's authorization to the claimant to use the subject property for the use described in this report, subject to the standards in effect on the following dates:

Township 4S Range 3E Section 36 tax lot 2400 on December 12, 1961.

Township 5S Range 3E Section 1 tax lot 100 on February 6, 1969.

Township 5S Range 3E Section 1 tax lot 600 on March 14, 1980.

On March 14, 1980, the establishment of a dwelling on tax lot 600 was subject to the provisions of Goal 4 as well as Clackamas County's land use regulations then in effect.

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

4. Any use of the 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 him to obtain a decision under ORS 197.352 from a city and/or county and/or metropolitan service district that enforces land use regulations applicable to the property. Nothing in this order relieves the claimant from the necessity of obtaining a decision under ORS 197.352 from a local public entity that has jurisdiction to enforce a land use regulation applicable to a use of the subject property by the claimant.

VII. COMMENTS ON THE DRAFT STAFF REPORT

The department issued its draft staff report on this claim on May 9, 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.

ORS 197.352 (BALLOT MEASURE 37) CLAIM FOR COMPENSATION

OREGON DEPARTMENT OF FORESTRY

Final Staff Report and Recommendation

May 25, 2006

STATE CLAIM NUMBER: M121428

NAME OF CLAIMANT: Carl E. Swanson

MAILING ADDRESS: 29696 S. Gordon Rd.
Colton, Oregon 97017

PROPERTY IDENTIFICATION: Township 5S, Range 3E, Section 1
Tax lots 100 and 600
Township 4S, Range 3E, Section 1
Tax lot 2400
Clackamas County

OTHER CONTACT INFORMATION: Mary Johnson
500 Abernethy Rd. Ste. 4
Oregon City, Oregon 97045

DATE RECEIVED BY DAS: July 15, 2005

180-DAY DEADLINE: May 30, 2006¹

I. SUMMARY OF CLAIM

See Department of Land Conservation and Development (DLCD) Final Report.

II. SUMMARY OF STAFF RECOMMENDATION

Based on the findings and conclusions set forth below, the Department of Forestry (ODF) has determined the claim is not valid as to land use regulations administered by ODF or the Oregon Board of Forestry (Board) because none of the laws identified in the claim and administered by the Board or ODF restrict the claimant's right to divide the subject property and develop it for residential use. ORS 527.730 provides that "[n]othing in the Oregon Forest Practices Act shall prevent the conversion of forestland to any other use." The claim submitted by the claimant proposes a conversion. To the extent that the claimant may propose a forest operation in conjunction with the conversion, the claimant has not submitted

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

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

III. COMMENTS ON THE CLAIM

Comments Received

See DLCD Final Report.

IV. TIMELINESS OF CLAIM

See DLCD Final Report for requirements.

Findings of Fact

The claim identifies certain specific land use regulations as applying to the claimant's ability to use the land by dividing the property and developing it for residential use. The regulations identified in the claim include portions of Oregon Revised Statute chapters 526 and 527.610 et seq. This claim was submitted to DAS on July 15, 2005, for processing under OAR 125, division 145. Only laws that were enacted prior to December 2, 2004, the effective date of ORS 197.352, are the basis for the claim. (See citations of statutory and administrative rule history of the Oregon Revised Statutes and Oregon Administrative Rules.)

Conclusions

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

V. ANALYSIS OF CLAIM

1. Ownership

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

2. The Laws that are the Basis for this Claim

In order to establish a valid claim, ORS 197.352(1) requires, in part, that a law must restrict the 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 claimant indicates that state law prevents him from putting a dwelling on each of two lots (tax lots 100 and 600), and dividing and developing a third lot (tax lot 2400), in Clackamas County. The claim lists ORS 526 and ORS 527.610 et seq as state statutes that restrict the use of the property and the basis for the claim. The only discussion in the claim as to how or why these laws restrict the use of the property that the claimant seeks to carry out is the following statement: "Prohibits any further dwelling or land division."

One of the cited laws, ORS 527.730, Conversion of forestland to other uses, states, "[n]othing in the Oregon Forest Practices Act shall prevent the conversion of forestland to any other use." No laws enforced by the Board or ODF restrict the division of the property or the establishment of dwellings.

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

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

Conclusions

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

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

3. Effect of Regulations on Fair Market Value

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

Findings of Fact

The claimant has not demonstrated that any land use regulations administered by ODF or the Board restricts his use of the subject property or reduces its fair market value.

Conclusions

The claimant has not demonstrated that laws enforced or administered by ODF or the Board restrict his use of this property and thus has not demonstrated that those laws reduce the fair market value of the subject property.

4. Exemptions under ORS 197.352(3)

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

Findings of Fact

ORS 197.352(3) exempts laws that were enacted before a claimant acquired their interest in the property. Carl E. Swanson acquired an interest in the three properties on December 12, 1961, February 6, 1969, and March 14, 1980. Most forest practice laws were enacted in 1971 and 1973, although some date back to 1941. ODF is unable to determine whether 197.352(3)(E) or other exemptions in 197.352(3) may apply because the claimant has not proposed a use that is subject to these laws.

Some FPA regulations, now in OAR 629, divisions 625, 630, 635, and 640 were enacted to control water pollution resulting from forest operations. ORS 197.352(3)(B) specifically exempts regulations "restricting or prohibiting activities for the protection of public health and safety..., including pollution control." Such regulations may apply to the property, depending upon the activities the claimant may wish to undertake.

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

Conclusions

ODF concludes that many of the listed land use regulations are likely exempt under ORS 197.352(3). Until there is a notification of an operation, however, a final determination of the applicability of the listed laws to a particular forest operation on the property cannot be made.

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 he has provided to the department in the claim, the greater the possibility that there may be additional laws that will later be determined to continue to apply to his use of the subject property.

VI. FORM OF RELIEF

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

VII. COMMENTS ON THE DRAFT REPORT

ODF issued its draft staff report on this claim on May 9, 2006. OAR 125-145-0100(3), provides an opportunity for the claimant or the claimant's authorized agent and any third parties who submitted comments under OAR 125-145-0080 to submit written comments, evidence and information in response to the draft staff report and recommendation. Comments received have been taken into account by the department in the issuance of this final report.