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

IN THE MATTER OF THE CLAIM FOR COMPENSATION UNDER ORS 197.352 (BALLOT MEASURE 37) OF Robin S. Ballantyne and Gail P. Ballantyne, CLAIMANTS	)))))	FINAL ORDER CLAIM NO. M121747

Claimants: Robin S. Ballantyne and Gail P. Ballantyne (the Claimants)

Property: Township 35S, Range 06W, Section 36, Tax lots 100 and 101, Josephine County (the Property)

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

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

ORDER

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

1. In lieu of compensation under ORS 197.352, the State of Oregon will not apply the following laws to Robin and Gail Ballantyne's division of the 162.73-acre property into sixteen 5-acre parcels and eight 10-acre parcels or to their development of a dwelling on each parcel: applicable provisions of Goal 4, ORS 215 and OAR 660, division 6, enacted or adopted after each claimant acquired the subject property. These laws will not apply to the claimants only to the extent necessary to allow Robin Ballantyne to use the subject property for the use described in this report, and only to the extent that use was permitted when he acquired the property on October 31, 1977, and to allow Gail Ballantyne to use the subject property for the use described in this report, and only to the extent that use was permitted when she acquired the property on January 13, 1981.

2. The action by the State of Oregon provides the state's authorization to Robin Ballantyne to use the property for the use described in this report, subject to the standards in effect on October 31, 1977, and to Gail Ballantyne to use the property for the use described in this report, subject to the standards in effect on January 13, 1981. On those dates, the property was subject to compliance with Goal 4.

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

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

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

This Order is entered by the Deputy 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

Cora R. Parker, Deputy Director
DLCD
Dated this 13th day of June, 2006.

FOR the DEPARTMENT OF ADMINISTRATIVE SERVICES:

Dugan Petty, Deputy Administrator
DAS, State Services Division
Dated this 13th day of June, 2006.

NOTICE OF RIGHT TO APPEAL OR OTHER JUDICIAL RELIEF

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

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

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

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

FOR INFORMATION ONLY

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

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

ORS 197.352 (BALLOT MEASURE 37) CLAIM FOR COMPENSATION

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

June 13, 2006

STATE CLAIM NUMBER:	M121747
NAMES OF CLAIMANTS:	Robin S. Ballantyne Gail P. Ballantyne
MAILING ADDRESS:	Robin S. Ballantyne c/o 4282 Ross Drive Reno, Nevada 89509-2943 Gail P. Ballantyne PO Box 4388 Sunriver, Oregon 97707-1388
PROPERTY IDENTIFICATION:	Township 35S, Range 06W, Section 36 Tax lots 100 and 101 Josephine County
OTHER CONTACT INFORMATION:	James W. Spickerman PO Box 1147 Eugene, Oregon 97440-1147
DATE RECEIVED BY DAS:	August 5, 2005
180-DAY DEADLINE:	June 20, 2006[1]

I. SUMMARY OF CLAIM

The claimants, Robin and Gail Ballantyne, seek compensation in the amount of $1,575,000 for the reduction in fair market value as a result of land use regulations that are alleged to restrict the use of certain private real property. The claimants desire compensation or the right to divide the 162.73-acre property into sixteen 5-acre parcels and eight 10-acre parcels and to develop a dwelling on each parcel. The subject property is located at the locational coordinates listed above in Josephine County. (See claim.)

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

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 Robin and Gail Ballantyne's division of the 162.73-acre property into sixteen 5-acre parcels and eight 10-acre parcels and to their development of a dwelling on each parcel: applicable provisions of Statewide Planning Goal 4 (Forest Lands), ORS 215 and Oregon Administrative Rules (OAR) 660, division 6, enacted or adopted after each claimant acquired the subject property. These laws will not apply to the claimants only to the extent necessary to allow Robin Ballantyne to use the subject property for the use described in this report, and only to the extent that use was permitted when he acquired the property on October 31, 1977, and to allow Gail Ballantyne to use the subject property for the use described in this report, and only to the extent that use was permitted when she acquired the property on January 13, 1981. (See the complete recommendation in Section VI of this report.)

III. COMMENTS ON THE CLAIM

Comments Received

On August 25, 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, 14 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 August 5, 2005, for processing under OAR 125, division 145. The claim identifies provisions of ORS 197 and OAR 660, division 6, as the basis for the claim. Only laws that were enacted or adopted prior to December 2, 2004, are the basis for this claim.

Conclusions

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

V. ANALYSIS OF CLAIM

1. Ownership

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

Findings of Fact

Claimant Robin Ballantyne acquired the subject property on October 31, 1977, as reflected by a land sale contract included with the claim. Claimant Gail Ballantyne acquired an interest in the subject property when her then husband, Robin Ballantyne, conveyed the property to the Robin S. Ballantyne and Gail P. Ballantyne Revocable Trust on January 13, 1981, with themselves as trustees.[2] On December 9, 1986, the claimants transferred the property from the trust back to themselves as tenants in common. Robin Ballantyne has subsequently transferred his interest in the subject property to the Robin Ballantyne Family Trust, a revocable trust. The claimants are no longer married to each other.

An August 1, 2005, title insurance report submitted with the claim establishes the claimants' current ownership of the subject property.

Conclusions

Claimant Robin Ballantyne is an "owner" of the subject property as that term is defined by ORS 197.352(11)(C), as of October 31, 1977. Claimant Gail Ballantyne is an owner as of January 13, 1981. Ex-spouses are not "family members" as defined in ORS 197.352(11)(A), and therefore, Robin Ballantyne is not a family member of Gail Ballantyne.

[2] Transfer of property to or from a revocable trust does not result in a change of ownership for the purposes of ORS 197.352.

2. The Laws That are the Basis for This Claim

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

Findings of Fact

The claim indicates the claimants desire to divide the 162.73-acre property into sixteen 5-acre parcels and eight 10-acre parcels and to develop a dwelling on each parcel. The claim identifies provisions of ORS 197 and OAR 660, division 6, as restricting parcel size and residential development.[3]

The claim is based generally on Josephine County's current Woodland Resource (WR) zone and the applicable provisions of state law that require such zoning. The claimants' property is zoned WR as required by Goal 4, in accordance with ORS 215 and OAR 660, division 6, because the claimants' 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.

When Robin and Gail Ballantyne acquired the subject property on October 31, 1977, and January 13, 1981, respectively, a portion of the subject property, tax lot 100 totaling 100.95 acres, was zoned Suburban Residential 5 Acres (SR-5) by Josephine County, which limited the size of new lots or parcels to a five-acre minimum. The other portion of the subject property, tax lot 101 totaling 61.78-acres, was zoned Forest Resource (FR) by Josephine County, which limited the size of new lots or parcels to a 10-acre minimum. The claimants acquired the subject property after the adoption of the statewide planning goals but before the Commission acknowledged Josephine County's 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 regulations when the claimants acquired the subject property on October 31, 1977, and January 13, 1981, the statewide planning goals, and Goal 4 in particular, applied directly to the claimants' property when they acquired it.[4]

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[3] The claimants cite provisions of ORS 197 as limiting the use of the property but do not establish how that statute applies to and restricts the use of the subject property. On its face, ORS 197 does not restrict the claimants' use of the subject property in a manner that reduces its fair market value. Absent evidence from the claimants as to how the statute restricts the use of the property resulting in a reduction in its fair market value, ORS 197 is not addressed further in this report.

[4] The statewide planning goals became effective on January 25, 1975, and were applicable to legislative land use decisions and some quasi-judicial land use decisions prior to the Commission's acknowledgment 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).

Goal 4 went into effect on January 25, 1975, "to conserve forest lands for forest uses" and required, "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 protection 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."

The claim does not establish whether the claimants' desired division of the 162.73-acre property into sixteen 5-acre parcels and eight 10-acre parcels complies with the Goal 4 standards in effect when the claimants acquired the property in 1977 and 1981.

Conclusions

The current zoning requirements, minimum lot size and dwelling standards established by Goal 4, ORS 215.705 to 215.755 and 215.780 and OAR 660-006-0026 and 660-006-0027 were all enacted or adopted after the claimants acquired the subject property in 1977 and 1981 and do not allow the claimants' desired division or development of the property. However, the claim does not establish whether or to what extent the claimants' desired use of the subject property complies with the standards for land divisions and development under Goal 4 in effect when the claimants acquired the property on October 31, 1977, and January 13, 1981.

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

3. Effect of Regulations on Fair Market Value

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

Findings of Fact

The claim includes an estimate of $1,575,000 as the reduction in the subject property's fair market value due to current regulations. This amount is based on the claimants' assessment of the value of the property divided as desired by the claimants.

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 substance of the goals and implementing rules. *Foster v. Polk County*, 115 Or App 475 (1992); *Kenagy v. Benton County*, 115 Or App 131 (1992).

Conclusions

As explained in Section V.1 of this report, the claimants are Robin and Gail Ballantyne who acquired the subject property on October 31, 1977, and January 13, 1981, respectively. Under ORS 197.352, the claimants are due compensation for land use regulations that restrict the use of the subject property in a manner that reduces its fair market value. Based on the findings and conclusions in Section V.2 of this report, laws enacted or adopted since the claimants acquired the subject property restrict the desired division and development of the property. The claimants estimate the reduction in value due to the restrictions to be $1,575,000.

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

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 Josephine County has implemented through its current WR zone. With the exception of provisions of Goal 4 adopted before the claimants acquired the subject property on October 31, 1977, and January 13, 1981, these state land use regulations were not in effect when the claimants acquired the property.

Conclusions

Without a specific development proposal for the subject property, it is not possible for the department to determine all the laws that may apply to a particular use of the property, or whether those laws may fall under one or more of the exemptions under ORS 197.352. It appears that the general statutory, goal and rule restrictions on residential division and development of the subject property are not exempt under ORS 197.352(3)(E) to the extent they were enacted or adopted after the claimants acquired the property. Provisions of Goal 4 in effect when the claimants acquired the subject property in 1977 and 1981 are exempt under ORS 197.352(3)(E) and will continue to apply to the property.

Other laws in effect when the claimants acquired the subject property are exempt under ORS 197.352(3)(E) and will also continue to apply to the claimants' use of the property. In addition, the department notes that ORS 215.730 and OAR 660, division 6, include standards for siting dwellings in forest zones. These provisions include fire protection standards for dwellings and for surrounding forest lands. 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).

There may be other laws that continue to apply to the claimants' 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 the subject property until there is a specific proposal for that use. When the claimants seek a building or development permit to carry out a specific use, it may become evident that other state laws currently apply to that use and may continue to 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 claimants have 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 claimants should be aware that the less information they have 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 their 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 claimants' ability to divide the 162.73-acre property into sixteen 5-acre parcels and eight 10-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 $1,575,000. However, because the claim does not provide an appraisal or other specific documentation establishing how the specified restrictions reduce the fair market value of the subject property, and without verification of whether or the extent to which the claimants' desired use of the property was allowed under the standards in effect when they acquired the property, a specific amount of compensation cannot be determined. Nevertheless, based on the record for this claim, the department acknowledges that the laws on which the claim is based likely have reduced the fair market value of the subject property to some extent.

No funds have been appropriated at this time for the payment of claims. In lieu of payment of compensation, ORS 197.352 authorizes the department to modify, remove or not apply all or parts of certain land use regulations to allow Robin Ballantyne to use the subject property for a

use permitted at the time he acquired the property on October 31, 1977, and to allow Gail Ballantyne to use the subject property for a use permitted at the time she acquired the subject property on January 13, 1981.

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 Robin and Gail Ballantyne's division of the 162.73-acre property into sixteen 5-acre parcels and eight 10-acre parcels or to their development of a dwelling on each parcel: applicable provisions of Goal 4, ORS 215 and OAR 660, division 6, enacted or adopted after each claimant acquired the subject property. These laws will not apply to the claimants only to the extent necessary to allow Robin Ballantyne to use the subject property for the use described in this report, and only to the extent that use was permitted when he acquired the property on October 31, 1977, and to allow Gail Ballantyne to use the subject property for the use described in this report, and only to the extent that use was permitted when she acquired the property on January 13, 1981.

2. The action by the State of Oregon provides the state's authorization to Robin Ballantyne to use the property for the use described in this report, subject to the standards in effect on October 31, 1977, and to Gail Ballantyne to use the property for the use described in this report, subject to the standards in effect on January 13, 1981. On those dates, the property was subject to compliance with Goal 4.

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

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

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

VII. COMMENTS ON THE DRAFT STAFF REPORT

The department issued its draft staff report on this claim on May 30, 2006. OAR 125-145-0100(3), provided an opportunity for the claimants or the claimants' authorized agent and any third parties who submitted comments under OAR 125-145-0080 to submit written comments, evidence and information in response to the draft staff report and recommendation. Comments received have been taken into account by the department in the issuance of this final report.