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 NOs. M122511
(BALLOT MEASURE 37) OF	)	and M122512[1]
Robert P. and Julia W. Kidder, CLAIMANTS	)	

Claimants: Robert P. and Julia W. Kidder (the Claimants)

Property: Township 26S, Range 04W, Section 16A, Tax lot 1800
Township 26S, Range 04W, Section 16, Tax lot 300
Douglas 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 Julia Kidder's 1) development of a dwelling on a portion of tax lot 1800 and to her partition of the remainder of this tax lot into 18 parcels and 2) division of tax lot 300 into two-acre parcels and to her development of a dwelling on each parcel: applicable provisions of Goal 3, ORS 215 and OAR 660, division 33. These land use regulations will not apply to Julia Kidder only to the extent necessary to allow her to use the subject property for the use described in this report, and only to the extent that use was permitted when she acquired tax lot 1800 on July 14, 1947, and tax lot 300 on September 11, 1962.

2. The action by the State of Oregon provides the state's authorization to Julia Kidder to use the subject property for the use described in this report, subject to the standards in effect on July 14, 1947, for tax lot 1800 and September 11, 1962, for tax lot 300.

[1] These two claims were consolidated for this review. Claim M122511 demands relief under ORS 197.352 for tax lot 1800, and claim M122512 demands relief for tax lot 300.

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 Julia Kidder 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 Julia Kidder 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 Julia Kidder 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 Julia Kidder 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 Julia Kidder.

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 8th day of August, 2006.

FOR the DEPARTMENT OF ADMINISTRATIVE SERVICES:

Dugan Petty, Deputy Administrator
DAS, State Services Division
Dated this 8th day of August, 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[2], 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."

[2] 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

August 8, 2006

STATE CLAIM NUMBERS:	M122511 and M122512[1]
NAMES OF CLAIMANTS:	Robert P. and Julia W. Kidder
MAILING ADDRESS:	c/o Nancy Kidder West 341 Cabot Court Granite Bay, California 95746
PROPERTY IDENTIFICATION:	Township 26S, Range 04W, Section 16A Tax lot 1800 Township 26S, Range 04W, Section 16 Tax lot 300 Douglas County
DATE RECEIVED BY DAS:	September 28, 2005
180-DAY DEADLINE:	August 13, 2006[2]

I. SUMMARY OF CLAIM

The claimants, Robert and Julia Kidder, seek compensation in the total amount of $8,638,520 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.[3] The subject property consists of tax lots 300 and 1800. The claimants desire compensation or the right to 1) develop a dwelling on a portion of 39.09-acre tax lot 1800 and to partition the remainder of this tax lot into 18 parcels and 2) divide 156.42-acre tax lot 300 into two-acre parcels and to develop a dwelling on each parcel. The contiguous tax lots are located at 0 Whistlers Lane and at 0 North Umpqua Highway, near Roseburg, in Douglas County. (See claim.)

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[1] These two claims were consolidated for this review. Claim M122511 demands relief under ORS 197.352 for tax lot 1800, and claim M122512 demands relief for tax lot 300.

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

[3] The amount of compensation is the combined amount demanded for these two consolidated claims. The claimants demand $1,766,970 for the asserted reduction in value of tax lot 1800 and $6,871,550 for the asserted reduction in value of tax lot 300.

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 in part. 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 Julia Kidder's 1) development of a dwelling on a portion of tax lot 1800 and to her partition of the remainder of this tax lot into 18 parcels and 2) division of tax lot 300 into two-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. These laws will not apply to the claimant only to the extent necessary to allow her to use the subject property for the use described in this report, and only to the extent that use was permitted when she acquired tax lot 1800 on July 14, 1947, and tax lot 300 on September 11, 1962.

The department has further determined that Robert Kidder's claim is not valid because he is deceased. (See the complete recommendation in Section VI of this report.)

III. COMMENTS ON THE CLAIM

Comments Received

On month day, 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, two written comments were received in response to the 10-day notice.

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

One comment is relevant to when the claimants acquired an ownership interest and whether state laws restrict the claimants' use of the subject property. The comment has been considered by the department in preparing this report. (See the comment letters in the department's claim file.)

IV. TIMELINESS OF CLAIM

Requirement

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

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

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

Findings of Fact

This claim was submitted to DAS on September 28, 2005, for processing under OAR 125, division 145. The claim identifies Douglas County's FF-10 and Exclusive Farm Use-Grazing zone 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 claimants, Robert and Julia Kidder, acquired tax lot 1800 on July 14, 1947, and tax lot 300 on September 11, 1962, as reflected by warranty deeds included with the claims. On January 3, 1990, the claimants transferred both tax lots to the Kidder Family Trust, with themselves as trustees, as reflected by a bargain and sale deed included with the claim.[4] Robert Kidder passed away on May 22, 1995, as reflected by a death certificate included with the claim. An August 25, 2005, title report submitted with the claims establishes Julia Kidder's current ownership of the subject tax lots.

Conclusions

Claimant Julia Kidder is an "owner" of the subject property as that term is defined by ORS 197.352(11)(C), as of July 14, 1947, for tax lot 1800 and as of September 11, 1962, for tax lot 300. Robert Kidder does not have an ownership interest of the subject property under ORS 197.352(11)(C).

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

2. The Laws That are the Basis for This Claim

In order to establish a valid claim, ORS 197.352(1) requires, in part, that a law must restrict a 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 a claimant or a family member acquired the property.

Findings of Fact

The claim indicates that claimant Julia Kidder desires to 1) develop a dwelling on 39.09-acre tax lot 1800 and to partition the remainder of this tax lot into 18 parcels and 2) divide 156.42-acre tax lot 300 into two-acre parcels and to develop a dwelling on each parcel. It indicates the desired uses are not allowed under the property's current zoning.

The claim is based generally on Douglas County's current Exclusive Farm Use-Grazing (FG) zone and the applicable provisions of state law that require such zoning. The subject property is zoned FG as required by Goal 3, in accordance with ORS 215 and OAR 660, division 33, because the property is "agricultural land" as defined by Goal 3.[5] Goal 3 became effective on January 25, 1975, and required that agricultural lands as defined by the Goal be zoned Exclusive Farm Use (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.)

Claimant Julia Kidder acquired the subject property on July 14, 1947, and September 11, 1962, prior to the adoption of the statewide planning goals and their implementing statutes and regulations.

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[5] The subject property is "agricultural land" because it contains Natural Resources Conservation Service Class I–IV soils.

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 Julia Kidder acquired the subject property in 1947 and 1962 and do not allow her desired use of the property. These laws restrict the use of the subject property relative to the uses allowed when Julia Kidder 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 uses that Julia Kidder has identified. There may be other laws that currently apply to Julia Kidder's use of the subject property, and that may continue to apply to her 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 Julia Kidder 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 the land use regulation(s) (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 $8,638,520 as the reduction in the subject property's fair market value due to the regulations that restrict Julia Kidder's use of the property. This amount is based on Julia Kidder's comparison of six parcels sold in Douglas County in 2005 with an average of $98,165 per parcel.

Conclusions

As explained in Section V.(1) of this report, claimant Julia Kidder acquired the subject property on July 14, 1947, and September 11, 1962. Under ORS 197.352, Julia Kidder is due compensation for land use regulations that restrict the use of the subject property and have the effect of reducing its fair market value. Based on the findings and conclusions in Section V.(2) of this report, laws enacted or adopted since she acquired the subject property restrict her desired use of the property. Julia Kidder estimates that the effect of the regulations on the fair market value of the subject property is a reduction of $8,638,520.

Without an appraisal or other documentation, it is not possible to substantiate the specific dollar amount by which the land use regulations have reduced the fair market value of the subject property. Nevertheless, based on the evidence in record for this claim, the department determines 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 Douglas County has implemented through its current FG zone. All of these land use regulations were enacted or adopted after Julia Kidder acquired the subject property.

Conclusions

Without a specific development proposal for the subject property, it is not possible for the department to determine all the laws that may apply to a particular use of the property, or whether those laws may fall under one or more of the exemptions under ORS 197.352. It appears that none of the general statutory, goal and rule restrictions on division and development of the subject property were in effect when Julia Kidder acquired it in 1947 and 1962. As a result, these laws are not exempt under ORS 197.352(3)(E).

Laws in effect when Julia Kidder acquired the subject property are exempt under ORS 197.352(3)(E) and will continue to apply to her use of the property. There may be other laws that continue to apply to her use of the subject property that have not been identified in the claim. In some cases, it will not be possible to know which laws apply to a use of subject property until there is a specific proposal for that use. When Julia Kidder 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 Julia Kidder 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. Julia Kidder 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 present 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 Julia Kidder's desired use of the subject property. The claim asserts that existing land use regulations enforced by the Commission or the department have the effect of reducing the fair market value of the subject property by $8,638,520. However, because the claim does not provide an appraisal or other relevant evidence demonstrating that the land use regulations described in Section V.(2) reduce the fair market value of the subject property, a specific amount of compensation cannot be determined. In order to determine a specific amount of compensation due for this claim, it would also be necessary to verify whether or the extent to which Julia Kidder's desired use of the subject property was allowed under the standards in effect when she acquired the property. Nevertheless, based on the record for this claim, the department has determined that the laws on which the claim is based 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 Julia Kidder to use the subject property for a use permitted at the time she acquired tax lot 1800 on July 14, 1947, and tax lot 300 on September 11, 1962.

Conclusions

Based on the record, the department finds that Robert Kidder is not entitled to relief under ORS 197.352 because he is not a present owner of the subject property. Therefore, the department recommends that the claim be denied for Robert Kidder. The department otherwise recommends that the claim be approved for Julia Kidder, 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 Julia Kidder's 1) development of a dwelling on a portion of tax lot 1800 and to her partition of the remainder of this tax lot into 18 parcels and 2) division of tax lot 300 into two-acre parcels and to her development of a dwelling on each parcel: applicable provisions of Goal 3, ORS 215 and OAR 660, division 33. These land use regulations will not apply to Julia Kidder only to the extent necessary to allow her to use the subject property for the use described in this report, and only to the extent that use was permitted when she acquired tax lot 1800 on July 14, 1947, and tax lot 300 on September 11, 1962.

2. The action by the State of Oregon provides the state's authorization to Julia Kidder to use the subject property for the use described in this report, subject to the standards in effect on July 14, 1947, for tax lot 1800 and September 11, 1962, for tax lot 300.

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 Julia Kidder 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 Julia Kidder 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 Julia Kidder 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 Julia Kidder 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 Julia Kidder.

VII. COMMENTS ON THE DRAFT STAFF REPORT

The department issued its draft staff report on this claim on July 18, 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.