

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

IN THE MATTER OF THE CLAIM FOR)	FINAL ORDER
COMPENSATION UNDER ORS 197.352)	CLAIM NO. M122887
(BALLOT MEASURE 37) OF)	
LaVerne Behrens as co-trustee of the Credit,)	
Shelter Trust of the Behrens Family Trust, and)	
as co-trustee of the Survivor's Trust of the)	
Behrens Family Trust, CLAIMANT)	

Claimant: LaVerne Behrens as co-trustee of the Credit, Shelter Trust of the Behrens Family Trust, and as co-trustee of the Survivor's Trust of the Behrens Family Trust (the Claimants)

Property: Township 9, Range 2E, Section 28, Tax lot 2700¹, Linn 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), the Oregon Department of State Lands (the DSL Report), and by the Department of Environmental Quality (the DEQ Report) as a final order under ORS 197.352, OAR 125, division 145 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 denied as to laws administered by the Department of State Lands for the reasons set forth in the DSL Report.

The Claim is denied as to laws administered by the Department of Environmental Quality for the reasons set forth in the DEQ Report.

¹ In 2005, Linn County approved a property line adjustment for this property that increased the land area of tax lot 2700 from 70.00 acres to 75.18 acres. The property described in this order is only that area of tax lot 2700 that existed prior to the property line adjustment.

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 LaVerne Behrens' division of the 70.00-acre subject property into five parcels or to his development of a dwelling on each parcel: applicable provisions of Goals 3 and 4, ORS 215 and OAR 660, divisions 6, and 33. These land use regulations will not apply to the claimant's use of the subject property only to the extent necessary to allow him to use the property for the uses described in this report, and only to the extent the uses were permitted when he acquired the property on August 28, 1965.
2. The action by the State of Oregon provides the state's authorization to the claimant to use the property for the use described in this report, subject to the standards in effect on August 28, 1965.
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 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.

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.

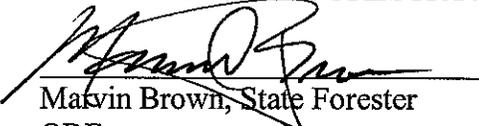
This Order is entered by the Deputy Director of the DEQ as a final order of DEQ under ORS 197.352, and OAR Chapter 125, division 145.

This Order is entered by the Assistant Director of the DSL as a final order of DSL under ORS 197.352, and OAR Chapter 125, division 145.

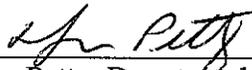
FOR DLCD AND THE LAND
CONSERVATION AND DEVELOPMENT
COMMISSION:
Lane Shetterly, Director


Cora R. Parker, Deputy Director
DLCD
Dated this 29th day of August, 2006.

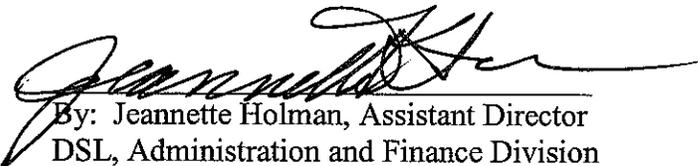
FOR THE OREGON BOARD OF
FORESTRY AND THE OREGON
DEPARTMENT OF FORESTRY:


Marvin Brown, State Forester
ODF
Dated this 29th day of August, 2006

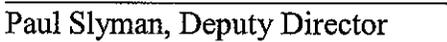
FOR THE DEPARTMENT OF
ADMINISTRATIVE SERVICES:


Dugan Petty, Deputy Administrator
DAS, State Services Division
Dated this 29th day of August, 2006.

FOR THE DEPARTMENT OF STATE
LANDS:
Louise Solliday, Director


By: Jeannette Holman, Assistant Director
DSL, Administration and Finance Division
Dated this 29th day of August, 2006.

FOR THE FOR DEPARTMENT OF
ENVIRONMENTAL QUALITY


Paul Slyman, Deputy Director
DEQ
Dated this 29th 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.

This Order is entered by the Deputy Director of the DEQ as a final order of DEQ under ORS 197.352, and OAR Chapter 125, division 145.

This Order is entered by the Assistant Director of the DSL as a final order of DSL under ORS 197.352, and OAR Chapter 125, division 145.

FOR DLCD AND THE LAND
CONSERVATION AND DEVELOPMENT
COMMISSION:
Lane Shetterly, Director

Cora R. Parker, Deputy Director
DLCD
Dated this 29th day of August, 2006.

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

Marvin Brown, State Forester
ODF
Dated this 29th day of August, 2006

FOR THE FOR DEPARTMENT OF
ENVIRONMENTAL QUALITY



Paul Slyman, Deputy Director
DEQ
Dated this 29th day of August, 2006

FOR THE DEPARTMENT OF
ADMINISTRATIVE SERVICES:

Dugan Petty, Deputy Administrator
DAS, State Services Division
Dated this 29th day of August, 2006.

FOR THE DEPARTMENT OF STATE
LANDS:
Louise Solliday, Director

By: Jeannette Holman, Assistant Director
DSL, Administration and Finance Division
Dated this 29th day of August, 2006.

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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 197.352², 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 29, 2006

STATE CLAIM NUMBER: M122887

NAME OF CLAIMANT: LaVerne Behrens as co-trustee of the Credit Shelter Trust of the Behrens Family Trust, and as co-trustee of the Survivor's Trust of the Behrens Family Trust

MAILING ADDRESS: PO Box 605
Lyons, Oregon 97358

PROPERTY IDENTIFICATION: Township 9, Range 2E, Section 28
Tax lot 2700¹
Linn County

OTHER INTERESTS IN PROPERTY: Behrens Family Trust

DATE RECEIVED BY DAS: October 21, 2005

180-DAY DEADLINE: September 5, 2006²

I. SUMMARY OF CLAIM

The claimant, LaVerne Behrens, seeks compensation in the amount of \$1.5 million for the reduction in fair market value as a result of land use regulations that are alleged to restrict the use of certain private real property. The claimant desires compensation or the right to divide the 70.00-acre subject property into five parcels and to develop a dwelling on each parcel.³ The subject property is located at 40303 Fox Valley Lane, near Lyons, in Linn County. (See claim.)

¹ In 2005, Linn County approved a property line adjustment for this property that increased the land area of tax lot 2700 from 70.00 acres to 75.18 acres. The property described in this report is only that area of tax lot 2700 that existed prior to the property line adjustment. If the claimant wishes to file a claim concerning any newly acquired land, that will need to be done in a separate claim.

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. Svcs.*, 340 Or 117 (2006).

³ In the original claim, the claimant stated that his intended use of the property included a number of uses, one of which was to "subdivide the property into lots (size to be determined by, and at the discretion of, owner(s) for building of residential and/or commercial buildings). On July 10, 2006, department staff contacted the claimant to obtain clarification of the specific use desired by the claimant. The claimant stated that the use he wished to carry out was to divide the property into five lots or parcels and to build a home on each one. In a letter in response to the department's staff report, however, the claimant asserted that the staff report was in error, and that the use he desires is what was stated in the original 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 LaVerne Behrens' division of the 70.00-acre subject property into five parcels and to his development of a dwelling on each parcel: applicable provisions of Statewide Planning Goals 3 (Agricultural Lands) and 4 (Forest Lands), ORS 215 and Oregon Administrative Rules (OAR) 660, divisions 6, and 33. These laws will not apply to the claimant's use of the subject property only to the extent necessary to allow him to use the property for the uses described in this report, and only to the extent the uses were permitted when he acquired the property in 1965. (See the complete recommendation in Section VI. of this report.)

III. COMMENTS ON THE CLAIM

Comments Received

On June 19, 2006, 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.

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.)

Under ORS 197.352, a claim must identify what specific use the claimant believes has been restricted by land use regulations. Specificity is required in order to: (1) determine whether the use has been restricted by state land use regulations; (2) determine whether state land use regulations have had the effect of reducing the value of the property; (3) identify what state land use regulations must be "waived" to allow the claimant to use the property for a use that was permitted at the time he or she acquired it; and (4) in order to provide adequate notice to those entitled to notice.

The description of the desired use in the statement included with the claim form was not clear concerning the type or extent of desired residential or commercial use. The department contacted the claimant to obtain clarification of the desired use (as described above), and relied on that information in reviewing the claim. If the claimant wishes to use the property for some other use, the claimant may file another claim.

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 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 October 21, 2005, for processing under OAR 125, division 145. The claim states, "There were no land use regulations or restrictions on use when the property was acquired." It also identifies ORS 92, 195, 196 227, 321, 454, 526, 527 and 928, OAR 660 and Senate Bill 100 as restricting the claimant's desired use of the property and as the basis for the claim. Only laws that were enacted or adopted prior to December 2, 2004, are the basis for this claim.

Conclusions

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

V. ANALYSIS OF CLAIM

1. Ownership

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

Findings of Fact

The claimant, LaVerne Behrens, acquired the subject property on August 28, 1965, as reflected by the warranty deed included with the claim. The claimant transferred the subject property to a revocable living trust⁴ on September 8, 1995, as identified in the Memorandum of Revocable Living Trust Agreement. The subject property was further conveyed to two revocable sub-trusts;

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

however, LaVerne Behrens is a co-trustee of these sub-trusts. The Linn County Assessor's Office confirms that the claimant owns an interest in the subject property.

Conclusions

The claimant, LaVerne Behrens, as co-trustee of the Credit Shelter Trust of the Behrens Family Trust and as co-trustee of the Survivor's Trust of the Behrens Family Trust, is an "owner" of the subject property as that term is defined by ORS 197.352(11)(C), as of August 28, 1965.

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 claimant desires to divide the 70.00-acre subject property into five parcels and to develop a dwelling on each parcel, and that "the use is not allowed under current land use regulations."⁵ The claimant also desires to "harvest any and all timber on the property without restriction, replanting or reforestation." This report addresses only those state laws that are administered by the department or Commission.⁶

The claim is based generally on the applicable provisions of state law that require Exclusive Farm Use (EFU) zoning and restrict uses on EFU-zoned land. The claimant's property is zoned by Linn County as F/F, which is a mixed agricultural and forest land zone, as required by Goal 4 and the implementing provisions of OAR 660-006-0050 (effective on February 5, 1990), subsequently amended on March 1, 1994, to comply with the provisions of House Bill 3661 (Chapter 792, Oregon Laws 1993).

Under OAR 660-006-0050, all the uses permitted under Goals 3 and 4 are allowed in mixed agriculture and forest zones except that for dwellings, either the Goal 3 or 4 standards are applicable based on the predominant use of the tract on January 1, 1993.⁷ Depending on the predominant use on that date, the property is subject to either the requirements for dwellings applicable under EFU zoning required by Goal 3 and OAR 660, division 33, or forest zone provisions required by Goal 4 and OAR 660, division 6.

⁵ The claimant summarily cites numerous state land use laws (ORS 92, 195, 196 227, 321, 454, 526, 527 and 928, OAR 660 and Senate Bill 100) as applicable to this claim, but does not establish how the laws either apply to the claimant's desired use of the subject property or restrict its use with the effect of reducing its fair market value. On their face, most of these regulations either do not apply to the claimant's property or do not restrict the use of the claimant's property in a manner that reduces its fair market value. This report addresses only those regulations that the department finds are applicable to and restrict the claimant's use of the subject property, based on the claimant's asserted desired use.

⁶ Separate reports addressing state laws administered by other state agencies will be issued by the Oregon Departments of State Lands (DSL), Environmental Quality (DEQ) and Forestry (ODF).

⁷ No information was provided to the department regarding the predominant use of the property on January 1, 1993.

For land divisions, OAR 660-006-0055 authorizes the creation of new parcels based on the standards applicable to farm or forest zones that implement the 80-acre minimum lot size specified in ORS 215.780. Under ORS 215.780(2)(a), the minimum lot size in Linn County's F/F zone is 80 acres. The claimant's property cannot be divided into parcels smaller than 80 acres.

The claimant acquired the subject property on August 28, 1965, prior to the adoption of statewide planning goals and their implementing statutes and regulations.

Conclusions

The current zoning requirements, minimum lot size and dwelling standards established under Goal 4 for lands zoned for mixed farm-forest use and the statutory and rule restrictions under applicable provisions of ORS 215 and OAR 660, divisions 6, and 33, were enacted or adopted after the claimant acquired the subject property in 1965, and do not allow the desired division and development of 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 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 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 \$1.5 million as the reduction in the subject property's fair market value due to the regulation(s). This amount is based on the claimant's own estimate.

Conclusions

As explained in Section V.(1) of this report, the claimant is LaVerne Behrens who acquired the subject property on August 28, 1965. Under ORS 197.352, the claimant 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 the claimant acquired the subject property restrict the claimant's desired use of the property. The claimant estimates that the effect of the regulations on the fair market value of the subject property is a reduction of \$1.5 million.

Without additional 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 the record for this claim, the department determines 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 Goals 3 and 4, ORS 215 and OAR 660, divisions 6, and 33, which Linn County has implemented through its F/F zone. All of these land use regulations were enacted or adopted after the claimant 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 residential division and development of the subject property were in effect when the claimant acquired it in 1965. As a result, these laws are not exempt under ORS 197.352(3)(E).

Laws in effect when the claimant acquired the subject property are exempt under ORS 197.352(3)(E) and will continue to apply to the claimant's use of the property. In addition, the department notes that ORS 215.730 and OAR 660, division 6, include standards for siting dwellings in forest zones. The provisions include fire protection standards for dwellings and for surrounding forest zones. 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. . . ." To the extent they are applicable to the claimant's property, the 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 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 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. 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 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 the claimant's desired use of the subject property. The claim asserts that existing state land use regulations enforced by the Commission or the department have the effect of reducing the fair market value of the subject property by \$1.5 million. 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. 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 LaVerne Behrens to use the subject property for a use permitted at the time he acquired the property on August 28, 1965.

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 LaVerne Behrens' division of the 70.00-acre subject property into five parcels or to his development of a dwelling on each parcel: applicable provisions of Goals 3 and 4, ORS 215 and OAR 660, divisions 6, and 33. These land use regulations will not apply to the claimant's use of the subject property only to the extent necessary to allow him to use the property for the uses described in this report, and only to the extent the uses were permitted when he acquired the property on August 28, 1965.
2. The action by the State of Oregon provides the state's authorization to the claimant to use the property for the use described in this report, subject to the standards in effect on August 28, 1965.

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 August 15, 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.

ORS 197.352 (BALLOT MEASURE 37) CLAIM FOR COMPENSATION

OREGON DEPARTMENT OF FORESTRY

Final Staff Report and Recommendation

August 29, 2006

STATE CLAIM NUMBER: M122887

NAMES OF CLAIMANT: LaVerne H. Behrens, as co-trustee of the Credit Shelter Trust of the Behrens Family Trust, and as co-trustee of the Survivor's Trust of the Behrens Family Trust

MAILING ADDRESS: PO Box 605
Lyons, Oregon 97358

PROPERTY IDENTIFICATION: Township 9S, Range 2E, Section 128
Tax lot 2700¹
Linn County, aka
40303 Fox Valley Lane
Lyons, Oregon 97358

DATE RECEIVED BY DAS: October 21, 2005

180-DAY DEADLINE: September 5, 2006²

I. SUMMARY OF CLAIM

See Department of Land Conservation and Development (DLCD) and Department of State Lands (DSL) Final Reports.

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 the department has not taken any action to enforce any land use regulation to restrict the claimant's use of the property on or after December 2, 2004, and because none of the laws identified in the claim and administered by the Board or ODF restrict the claimant's right to divide the 70-acre property into parcels or to develop a dwelling or

¹ Linn County approved a property line adjustment for this property in 2005 that would increase the land area of tax lot 2700 from 70.00 acres to 75.18 acres. The property described in this order is only that area of tax lot 2700 existing prior to the property line adjustment. If the claimant wished to file a claim concerning any newly-acquired land, that will need to be done in a separate claim.

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. Svcs.*, 340 Or 117 (2006).

commercial building, including roads, utilities, and other appurtenances, on each parcel. One of the claimant's desired uses is to harvest timber. To the extent that the claimant intends to carry out a "forest operation" (a commercial activity relating to the establishment, management or harvest of forest tree species), claimant has not submitted 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.³ ODF has not enforced an existing state land use regulation with respect to the claimant's use of the property. In addition, ORS 527.730 provides that "[n]othing in the Oregon Forest Practices Act shall prevent the conversion of forestland to any other use." Another of the claimant's desired use of the property is a conversion. (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

Findings of Fact and Conclusions

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

V. ANALYSIS OF CLAIM

1. Ownership

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

2. The Laws That are the Basis for This Claim

In order to establish a valid claim, Section 1 of Ballot Measure 37 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 the claimant desires to harvest any and all timber on the subject property, and to divide the 70-acre subject property into parcels for residential and/or commercial

³ Claimant submitted a comment to the draft staff report filed August 15, 2006, stating "ODF should consider this as notification of my intent to harvest all of the timber on the property." This statement is not a notification. A notification must be filed in compliance with Oregon Administrative Rule 629-605-0150. To file a notification, the claimant needs to complete and file a Notification of Operation form at the local ODF district office. There is an ODF district office located at 22965 North Fork Rd., Lyons, OR 97358; telephone 503-859-2151.

development. The claim lists the following state statutes administered by ODF or the Board as laws that restrict the use of the property as the basis for the claim: ORS 526 and 527 and the Forest Practices Act.⁴ There is no discussion in the claim as to how or why these laws restrict the uses of the property that the claimant seeks to carry out. The property is zoned F/F, a mixed agricultural and forest land zone. The laws listed in the claim include statutes that only apply to forest operations, which is one of the uses the claimant has described in his claim.

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 on or since December 2, 2004, the effective date of Measure 37.

One of the cited laws, ORS 527.730, Conversion of forestland to other uses, states, “Nothing 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.

Conclusions

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 would apply to or restrict the harvest of any and all timber.

In addition, 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 the construction of dwellings or commercial buildings by the claimant.

3. Effect of Regulations on Fair Market Value

In order to establish a valid claim, Section 1 of Ballot Measure 37 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 claimant has not demonstrated that any land use regulations administered by ODF or the Board restrict his use of the subject property or have the effect of reducing its fair market value. The documentation submitted with the claim does not include any information concerning how laws administered by ODF or the Board have had the effect of reducing the fair market value of the property.

⁴ The claim identifies other laws administered by the Oregon Department of Land Conservation and Development (DLCD), Oregon Department of Environmental Quality (DEQ) and Oregon Department of State Lands (DSL). Those laws are addressed in separate reports by each of those agencies.

Until the claimant submits a notification of operation, ODF is unable to determine whether any laws apply to or may restrict the claimant's desired use of the property or reduce its fair market value.

Conclusions

The claimant has not demonstrated that laws enforced or administered by ODF or the Board apply to or restrict his desired use of this property or affect its fair market value.

4. Exemptions Under Section 3 of Measure 37

Ballot Measure 37 does not apply to certain land use regulations. In addition, under Section 3 of the Measure, certain types of laws are exempt from the Measure.

Findings of Fact

ORS 197.352(3) exempts laws that were enacted before a claimant acquired their interest in the property. Claimant LaVerne Behrens acquired an interest in the subject property on August 28, 1965. Most forest practice laws were first enacted in 1971 and July 1, 1972, 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 submitted a notification of operations to conduct commercial forest activities on the subject property.

Some FPA regulations 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 also be exempted under 197.352(3).

Conclusions

ODF concludes that some 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.

Laws in effect when the claimant acquired the subject property are exempt under ORS 197.352(3)(E), and will continue to apply to the claimant's use of the property. There may be other laws that continue to apply to the claimant's use of the subject property that have not been identified in the claim. In some cases, it will not be possible to know which laws apply to a use of property until claimant submits a notification of intent to conduct a commercial forest operation. When the claimant submits a notification, 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 (3)(D).

This report addresses only those state laws that are identified in the claim, or that ODF 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 claimants are not entitled to relief under ORS 197.352 from ODF or the Board. ODF denies any relief for this claim because neither the Board nor ODF has enforced laws that restrict the division of the subject property into parcels or lots, or the use of the property for residential purposes.

VII. COMMENTS ON THE DRAFT REPORT

ODF issued its draft staff report on this claim on August 15, 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.

**ORS 197.352 (BALLOT MEASURE 37) CLAIM
FOR COMPENSATION**

OREGON DEPARTMENT OF STATE LANDS

**Final Staff Report and Recommendation
August 29, 2006**

OREGON CLAIM NUMBER: M122887

NAME OF CLAIMANT (S): LaVerne Behrens, as co-trustee of the
Credit Shelter Trust of the Behrens
Family Trust, and as co-trustee of the
Survivor's Trust of the Behrens Family
Trust

MAILING ADDRESSES: LaVerne Behrens
PO Box 605
Lyons OR 97358

IDENTIFICATION OF PROPERTY: Township 9S, Range 2E, Section 28
Tax Lot 2700¹
Linn County

OTHER INTERESTS IN PROPERTY: Survivor's Trust of the Behrens Family
Trust
PO Box 605
Lyons, Oregon 97358

Credit Shelter Trust of the Behrens
Family Trust
PO Box 605
Lyons, Oregon 97358

DATE RECEIVED BY DAS: October 21, 2005

180—DAY DEADLINE: September 5, 2006²

¹ Linn County approved a property line adjustment for this property in 2005 that would increase the land area of tax lot 2700 from 70.00 acres to 75.18 acres. The property described in this order is only that area of tax lot 2700 existing prior to the property line adjustment. If the claimant wishes to file a claim concerning any newly-acquired land, that will need to be done in a separate claim.

² In *Macpherson v. Dep't of Admin. Servs.*, 340 Or __, 2006 Ore. LEXIS 104 (February 21, 2006), the Marion County trial court entered an order suspending all timelines under ORS 197.352. This order was in effect for a period of 139 days, extending the 180-day deadline under ORS 197.352(6) by that same period.

I. SUMMARY OF CLAIM

LaVerne Behrens is the claimant. The claimant seeks compensation in the amount of \$1,500,000 for the reduction in the fair market value of the property he alleges has resulted from the enforcement of certain land use regulations to restrict the use of the property. The state land use regulation that is administered by the Department of State Lands (DSL) and that is the basis for the claim is the Removal-Fill Law (ORS 196.800 to 196.990) relating to the removal or fill of material in waters of the state. The use the claimant desires to carry out that is alleged to be prohibited, limited or otherwise restricted by a state land use regulation is to subdivide the 70.00-acre property for development and the construction of residential or commercial buildings.

II. SUMMARY OF STAFF RECOMMENDATION

Based on the findings and conclusions set forth below, the Department of State Lands (DSL) has determined that this claim does not meet the requirements for relief under ORS 197.352 as to laws administered by DSL. As a result, DSL staff recommends that the claim be denied as to state land use regulations administered by DSL.

III. COMMENTS

On June 19, 2006, pursuant to OAR 125-145-0080, the Department of Administrative Services (DAS) sent notices of this claim to owners of surrounding properties and other interested parties. According to DAS, two written comments were received in response to the 10-day notice. The department has reviewed the comments in preparing this report.

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 effect may become relevant in determining which claims to pay compensation for rather than waiving a state law.

IV. TIMELINESS OF THE 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 December 2, 2004, written demand for compensation must be made on or before December 2, 2006,

or the date the public entity applies the land use regulation as an approval criteria to an application submitted by the owner of the property, whichever is later.

2. For claims arising from land use regulations enacted after December 2, 2004, written demand for compensation must be made 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 October 21, 2005, for processing under OAR Chapter 125. The claim identifies the following laws administered by DSL as a basis for the claim: Oregon Revised Statutes chapter 196. ORS chapter 196 includes laws pertaining to removal and fill of material within waters of the state. Only laws that were enacted prior to December 2, 2004, the effective date of Measure 37, are the basis for this claim.

Conclusions

The claim has been submitted on or before December 2, 2006. The claim is directed at land use regulations enacted before December 2, 2004. As a result, the claim is timely.

V. ANALYSIS OF THE CLAIM

1. Present Owner(s) of the Property

Requirement

ORS 197.352 provides a right to compensation to the *present* owner of the property, under certain circumstances. As a result, the first question that must be answered is whether the claimant is a present owner of the property.

Findings of Fact

The property that is identified in this claim is **T9SR2E, Section 28, Tax Lot 2700, located in Linn County**. The claimant's status as a present owner is as co-trustee for the Credit Shelter Trust of the Behrens Family Trust and as co-trustee for the Survivor's Trust of the Behrens Family Trust. A co-trustee, Terry R. Behrens submitted an authorization to LaVerne Behrens to act in his behalf on a Linn County Measure 37 claim, but there is no authorization for the state claim, and therefore the state claim is only on behalf of LaVerne H. Behrens. LaVerne H. Behrens and Wahneta K. Behrens acquired the property by Warranty Deed on August 28, 1965. On September 8, 1995, LaVerne H. Behrens and Wahneta K. Behrens conveyed the property to LaVerne H. Behrens and Wahneta K. Behrens as Trustees of the Behrens Family Trust, a revocable

living trust established on September 8, 1995. After the death of Wahnetta K. Behrens on February 1, 2002, LaVerne H. Behrens became sole trustee of the Behrens Family Trust on October 17, 2002. The latest deed for the property indicates that on February 27, 2004, LaVerne H. Behrens transferred an undivided one-half interest in the property to LaVerne H. Behrens and Terrance R. Behrens as trustees of the revocable Credit Shelter Trust of the Behrens Family Trust, and an undivided one-half interest in the property to LaVerne H. Behrens and Terrance R. Behrens as trustees of the revocable Survivor's Trust of the Behrens Family Trust.

Conclusions

LaVerne H. Behrens, as Co-Trustee for the Credit Shelter Trust of the Behrens Family Trust, and as Co-Trustee for the Survivor's Trust of the Behrens Family Trust, is a present owner of an interest in the property for purposes of ORS 197.352.

2. Date of Acquisition

Requirement

Under ORS 197.352, a claim may be made only for laws that took effect after the present owner or a family member of the present owner acquired the property. Under ORS 197.352, the right to compensation is dependent on the date when the present owner or a family member of the present owner acquired the property. A family member is defined as the wife, husband, son, daughter, mother, father, brother, brother-in-law, sister, sister-in-law, son-in-law, daughter-in-law, mother-in-law, father-in-law, aunt, uncle, niece, nephew, stepparent, stepchild, grandparent, or grandchild of the present owner of the property, an estate of any of the foregoing family members, or a legal entity owned by any one or combination of these family member or the present owner of the property.

Establishing the date of acquisition is key to determining what state laws are involved, and therefore whether the claimant's use of the property has been restricted and the fair market value of the property has been reduced.

Findings of Fact

LaVerne Behrens acquired an interest in the subject property on August 28, 1965, as reflected by a warranty deed included with the claim. LaVerne Behrens, as co-trustee of the Credit Shelter Trust of the Behrens Family Trust, and as co-trustee of the Survivor's Trust of the Behrens Family Trust, continues to own an interest in the property as reflected in trust documents in DSL's record for this claim.

Conclusions

LaVerne Behrens, as co-trustee of the Credit Shelter Trust of the Behrens Family Trust and as co-trustee of the Survivor's Trust of the Behrens Family Trust, is an "owner" of

the subject property as that term is defined by ORS 197.352(11)(C) as of August 28, 1965.

3. The Desired Use of the Property

The claim indicates the desired use of the property is to:

1. Harvest any and all timber on the property without restriction, replanting, and/or reforestation.
2. In addition, or in the alternative, subdivide the property into lots (size to be determined by, and at the discretion of, owner(s)) for building of residential and/or commercial buildings.
3. In addition to the former, build and/or have built, residential and/or commercial buildings with roads, utilities, sewage/septic systems, and any and all other appurtenances to such buildings typical, necessary, and/or desired.
4. If determined legal under Measure 37, sell and/or lease the subdivided lots, buildings, and the right to perform any of the uses described above.
5. Each of the proposed uses above is to be considered separately and exclusively of the others.

4. Current State Laws that Restrict the Desired Use of the Property

Requirement

In order for a person to have a right to compensation for an existing state law under ORS 197.352, the law must be a state "land use regulation" that is being enforced, and the law must restrict the claimant's desired use of the property. Not all laws are "land use regulations." Under ORS 197.352 a state land use regulation is: (a) a Statewide Land Use Planning Goal of LCDC; (b) a rule of LCDC; (c) statutes and rules that regulate farming and forest practices; and (d) any statute regulating the use of land or any interest therein.

Findings of Fact

Of the desired uses listed in the claim, the only uses that could involve a state land use regulation administered by DSL is the 3rd set of uses: to build and/or have built, residential and/or commercial buildings with roads, utilities, sewage/septic systems, and any and all other appurtenances to such buildings typical, necessary, and/or desired. The claim lists as regulations that restrict the desired use of the property statutes administered by DSL, "ORS Chapter 196." ORS Chapter 196 includes ORS 196.660 to 196.990, Oregon's Removal-Fill Law, which generally requires a permit for the removal or fill of material in waters of the state, including wetlands. The State Removal-Fill Law was initially enacted in 1967. Amendments to the statutes in 1979 require DSL to include in such permits conditions designed to mitigate for impacts to wetlands. These laws do not apply to forest operations, which are governed by laws administered by the Oregon

Department of Forestry, or to land divisions, which are governed by laws administered by the county and by the Department of Land Conservation and Development.³

The Department of State Lands has not made a wetland determination and no wetland delineation has been completed for this parcel. The National Wetlands Inventory shows an intermittent stream flowing across the parcel and a narrow wetland swale on the parcel. DSL has no other information regarding whether wetlands are located on the property, or might be affected by the claimant's desired use in a manner that would require authorization. The claimant has not applied for a removal-fill permit from the state under ORS 196.800 to 196.990, and DSL has not enforced any land use regulation with regard to the property since Measure 37 took effect on December 2, 2004.

Conclusions

The statutes listed in the claim are state land use regulations under ORS 197.352. However, DSL has not enforced the listed statutes with regard to the claimant's use of this property since December 2, 2004, and the claimant has not applied for a state permit to remove or fill within wetlands on the property. Until the claimant submits an application for a removal-fill permit, DSL has no means of determining whether the listed statutes restrict the claimant's desired use of the property (subdivision). In addition, as to the other uses desired by claimant, the Removal-Fill Law regulates fill and removal of material within "waters of the state," not subdivision or partition of property or forest operations governed by the Oregon Forest Practices Act.

5. Laws in Effect When the Present Owners Acquired the Property

Requirement

ORS 197.352 requires the state to compensate the present owners of the property if a current state law restricts the use of the property. If the state is paying compensation, then the amount of compensation is determined by the difference in fair market value of the property with the current state land use regulations in place and the fair market value of the property if it were subject to whatever state land use regulations applied to the property when it was acquired by the present owners or a family member of the present owners (whichever occurred first). If the state elects not to pay compensation, however, it may only allow the present owners to use the property for a use permitted when they acquired the property (not when it was acquired by a family member).

As a result, in this section the report summarizes both the laws that were in effect when the present owners acquired the property, and the laws in effect when a family member of the owners acquired the property (if a family member conveyed the property to the present owners).

³ ODF, DLCDC and the Oregon Department of Environmental Quality (DEQ) are preparing separate reports on this claim, addressing state laws that they administer.

Findings of Fact

The Removal-Fill Law requires a permit for removal or fill within waters of the state, including wetlands, and requires DSL to include in such permits conditions designed to mitigate for impacts to wetlands. When the claimant acquired the property in 1965, there was no such requirement in state law.

The use that the claimant states in the claim is to subdivide the property into parcels and develop residential and/or commercial buildings on each parcel. If the development of the property will affect a jurisdictional wetland or waters of the state, then state statutes administered by the DSL may require a permit for filling and/or removing more than 50 cubic yards of material within any such waters of the state.

Until the claimant submits an application for a removal-fill permit, however, DSL is unable to determine whether state land use regulations administered by DSL restrict the use of the property. In addition, under ORS 197.352(1), DSL is authorized to provide relief to claimant only when it has enforced an existing state law through some action taken after December 2, 2004. In this case DSL has not taken any action to enforce the state Removal-Fill Law as to this property after December 2, 2004.

Conclusions

The claimant LaVerne Behrens acquired the property before the Removal-Fill Law was enacted in 1967. However, DSL has not taken any action to enforce the state Removal-Fill Law as to this property after December 2, 2004, and based on the record for this claim DSL is unable to determine that state land use regulations that it administers have restricted the claimant's desired use of the property.

6. Effect on Fair Market Value

Requirement

There is a right to compensation from the state under ORS 197.352 only if the state enforces an existing land use regulation, and that results in a reduction in the fair market value of the property.

Findings of Fact

The claim includes an estimate of \$1,500,000 as the reduction in the subject property's fair market value due to current regulations. This amount is based on a complete appraisal of real property summary report submitted as an attachment to the claim on October 21, 2005.

Conclusions

As explained in Section V. (2) of this report, claimant and family member LaVerne Behrens acquired the subject property in 1965. Under ORS 197.352, 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.

Although a real estate appraisal was included with the claim, the appraisal does not appear to be based on state land use regulations that are administered by DSL and that have been enforced since December 2, 2004. As a result, DSL is unable to determine that there is any restriction on the claimant's desired uses of the property or any reduction of the fair market value of the property.

7. Exemptions

Requirement

ORS 197.352 does not apply to state land use regulations that:

- Restrict or prohibit activities commonly and historically recognized as public nuisances under common law;
- Restrict or prohibit activities for the protection of public health and safety, such as fire and building codes, health and sanitation regulations, solid or hazardous waste regulations, and pollution control regulations;
- To the extent the land use regulation is require to comply with federal law;
- Restrict or prohibit the use of a property for the purpose of selling pornography or performing nude dancing; or that were
- Enacted prior to the date of acquisition of the property by the owner or a family member of the owner who owned the subject property prior to acquisition or inheritance by the owner, whichever occurred first.

Findings of Fact

The claim is based apparently on the provisions of the state Removal-Fill Law (ORS 196.800 to 196.990), which were initially enacted in 1967. Claimant Laverne Behrens acquired the subject property in 1965. As a result, the state Removal-Fill Law does not appear to be specifically exempt under ORS 197.352(3)(E). Other exemptions may apply to the Removal-Fill Law.

The claimant should be aware that depending on the nature of the use of the property that is finally proposed, one or more of the exemptions in ORS 197.352(3)(A)-(D) may apply. However, until the claimant applies for a removal-fill permit, DSL is unable to determine what laws and what exemptions may apply.

Conclusions

This report addresses only those state laws that are identified in the claim, or that DSL is

certain apply to the property based on the use(s) 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 DSL in the claim. The State Removal-Fill Law does not appear to come under the exemption in ORS 197.352(3)(E). However, other exemptions may apply to the Removal-Fill Law. Claimant should be aware that the less information they provides to DSL in the claim, the greater the possibility that there may be additional laws administered by DSL that will later be determined to continue to apply to their use of the property.

VI. FORM OF RELIEF

1. Is the Present Owner Entitled to Relief

Requirement

A claimant is entitled to relief if:

- The claimant is a present owner of the property, or an interest in the property;
- A state land use regulation enacted before December 2, 2004 is being enforced against the claimant's use of the property;
- The state land use regulation that is being enforced restricts the claimant's use of the property; and
- The restriction reduces the fair market value of the property, relative to how the property could be used when the present owners or a family member of the present owners acquired the property.

The state may either pay compensation, or not apply the state land use regulation(s) in question.

Findings of fact

Based on the information currently in its record, the claim does not provide sufficient facts to qualify for relief under ORS 197.352.

Conclusions

DSL staff denies this claim as to state land use regulations administered by DSL because the Removal-Fill Law has not been enforced by DSL as to the claimant's desired use of this property since December 2, 2004. In addition, the claimant has not identified whether the Removal-Fill Law applies to or restricts his desired use of the property. The Removal-Fill Law does not prohibit development in waters of the state; rather, it simply requires a permit for removal or filling of more than 50 cubic yards of material within a wetland or waterway. Until the claimant applies for a permit and DSL has acted on the permit application, DSL has not enforced the Oregon Removal-Fill Law and it is not possible to determine whether that law would restrict use of this property or reduce its fair market value.

VII. COMMENTS ON THE DRAFT STAFF REPORT

DSL issued its draft staff report on August 15, 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 or information in response to the draft staff report and recommendation. Comments were received from the claimant and have been taken into account by the DSL in the issuance of the final report.

ORS 197.352 (BALLOT MEASURE 37) CLAIM FOR COMPENSATION

**OREGON DEPARTMENT OF ENVIRONMENTAL QUALITY
Final Staff Report and Recommendation**

August 29, 2006

STATE CLAIM NUMBER: M122887

NAME OF CLAIMANT: LaVerne H. Behrens, as co-trustee of the
Credit Shelter Trust of the
Behrens Family Trust, and as co-trustee of the Survivor's Trust of the Behrens Family
Trust

MAILING ADDRESS: PO Box 605
Lyons, Oregon 97358

PROPERTY IDENTIFICATION: Township 9S, Range 2E, Section 128
Tax lot 2700¹
Linn County, aka
40303 Fox Valley Lane
Lyons, Oregon 97358

DATE RECEIVED BY DAS: October 21, 2005

180-DAY DEADLINE: September 5, 2006²

I. SUMMARY OF CLAIM

See Department of Land Conservation and Development (DLCD) and Department of State Lands (DSL) Staff Reports.

II. SUMMARY OF STAFF RECOMMENDATION

Based on the findings and conclusions set forth below, the Department of Environmental Quality (the department) has determined that the claim is not valid as to laws administered by the department. The statutes listed in the claim pertaining to the

¹ Linn County approved a property line adjustment for this property in 2005 that would increase the land area of tax lot 2700 from 70.00 to 75.18 acres. The property described in this order is only that area of tax lot 2700 existing prior to the property line adjustment. If the claimant wishes to file a claim concerning any newly-acquired land, that will need to be done in a separate claim.

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. Svcs.*, 340 Or 117 (2006).

department or the Environmental Quality Commission (Commission) have not been enforced as to this property, and are likely exempt under ORS 197.352(3). (See the complete recommendation in Section VI. of this report.)

III. COMMENTS ON THE CLAIM

See DLCD staff report.

IV. TIMELINESS OF CLAIM

See DLCD staff report.

V. ANALYSIS OF CLAIM

1. Ownership

The findings of the Staff Report of DSL regarding ownership are incorporated into this report by this reference.

2. The Laws that Are the Basis for the 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 wishes to divide the 70-acre subject property and to develop dwellings or commercial buildings, including roads, utilities, and other appurtenances, on each parcel. The claim lists ORS 454, and indicates that the claimant desires to provide sewage or septic service to one or more uses, but contains no explanation of why or how these statutes restrict the claimant's use of the property or have reduced the value of the property. Nothing in the statutes listed restrict the division of land or the uses desired by claimant, except by requiring approval of certain septic systems. The claimant has not identified what form of sewage or septic system he desires to construct. As a result, the department is unable to determine whether ORS 454 applies to the claimant's desired use of the property, or restricts that use.

In addition, the department has not enforced ORS 454 with respect to claimant's desired use of the property. The claimant has not sought approval of septic systems for the desired development. As a result, there is no basis for providing relief under ORS 197.352.

Conclusions

Nothing in the statutes listed in the claim restricts the division of the property. Approval may be required for a septic system, but the department is unable to determine whether that is the case based on the information provided in the claim. The listed statutes have not been enforced with respect to the claimant's desired use of the property. For all of these reasons, no relief is authorized under ORS 197.352.

3. Effect of Regulations on Fair Market Value

In order to establish a valid claim, Section 1 of Ballot Measure 37 requires the current land use regulation(s) described in Section V. (2). of this report to 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 the listed statutes have had any effect on the value of the subject property. No evidence is contained in the claim concerning the effect of ORS 454 on the fair market value of the property.

Conclusions

The claimant has not demonstrated that the listed statutes administered by the department or Commission reduce the fair market value of the subject property.

4. Exemptions under section 3 of Measure 37

Ballot Measure 37 (2004) does not apply to certain land use regulations. The type of land use regulations not subject to a claim for compensation under Ballot Measure 37 are set forth in section 3 of the measure. These include laws restricting or prohibiting activities for the protection of public health and safety

Findings of Fact

The statutes listed in the claim likely are exempt as laws enacted to protect the public health and safety. Without some evidence from the claimant as to how and why the listed law restricts the use of the property, however, the department is unable to determine whether this or other exemptions under ORS 197.352 (3) apply. (See section V.2, above.)

VI. FORM OF RELIEF

Based on the current record, the claimant is not entitled to relief under ballot Measure 37 as to the statutes listed in the claim that are administered by the department or the Commission. Department staff recommends this claim be denied.

VII. COMMENTS ON THE DRAFT STAFF REPORT

The department issued its draft staff report on this claim on August 15, 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.