

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. M122888
(BALLOT MEASURE 37) OF	)	
LaVerne Behrens as co-trustee of the	)	
Behrens Family Trust, CLAIMANT	)	

Claimant: LaVerne Behrens as co-trustee of the Behrens Family Trust (the Claimant)

Property: Township 9S, Range 2E, Section 21, Tax lot 600<sup>1</sup>, 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 Environmental Quality (the DEQ Report), and the Oregon Department of State Lands (the DSL Report) attached to and by this reference incorporated into this order.

ORDER

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

The Claim is denied as to laws administered by the Department of Environmental Quality for the reasons set forth in the DEQ 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 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 40.72-acre "flag" portion of the property into fourteen lots or parcels or to the development of a dwelling on each lot or parcel: applicable provisions of

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<sup>1</sup> Tax lot 600 is a flag lot. The "flag" and "pole" portions of the lot were acquired at different times. See section V.2. of the report for more detail.

Goals 3 and 4, ORS 215 and OAR 660, divisions 6 and 33, enacted or adopted after the claimant acquired the property. These land use regulations will not apply to the claimant's use of the "flag" portion of the property only to the extent necessary to allow him to use the subject property for the use described in this report, and only to the extent that use was permitted when he acquired this portion of the property on August 23, 1960.

2. In lieu of compensation under ORS 197.352, the State of Oregon will not apply the following laws to LaVerne Behrens' division of the 0.22-acre "pole" portion of the property: applicable provisions of OAR 660-004-0040 that took effect after the claimant acquired that portion of the property in 1988. These land use regulations will not apply to the claimant's use of the "pole" portion of the property only to the extent necessary to allow him to use the subject property for the use described in this report, and only to the extent that use was permitted when he acquired this portion of the property on December 5, 1988.

3. 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 when Laverne Behrens acquired the property on August 23, 1960, and on December 5, 1988.

4. 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.

5. 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).

6. 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.

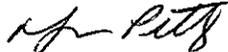
FOR DLCD AND THE LAND  
CONSERVATION AND DEVELOPMENT  
COMMISSION:  
Lane Shetterly, Director

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

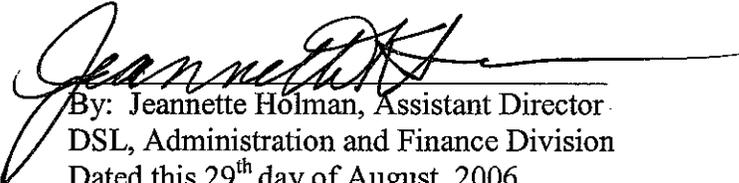
FOR THE OREGON BOARD OF  
FORESTRY AND THE OREGON  
DEPARTMENT OF FORESTRY:

  
Marvin Brown, State Forester  
ODF  
Dated this 29<sup>th</sup> day of August, 2006

FOR THE DEPARTMENT OF  
ADMINISTRATIVE SERVICES:

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

FOR THE FOR DEPARTMENT OF  
ENVIRONMENTAL QUALITY

\_\_\_\_\_  
Paul Slyman, Deputy Director  
DEQ  
Dated this 29<sup>th</sup> day of August, 2006

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

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

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

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.

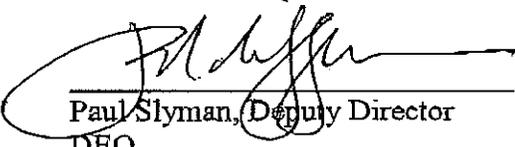
FOR DLCD AND THE LAND  
CONSERVATION AND DEVELOPMENT  
COMMISSION:  
Lane Shetterly, Director

\_\_\_\_\_  
Cora R. Parker, Deputy Director  
DLCD  
Dated this 29<sup>th</sup> day of August, 2006.

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

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Marvin Brown, State Forester  
ODF  
Dated this 29<sup>th</sup> day of August, 2006

FOR THE FOR DEPARTMENT OF  
ENVIRONMENTAL QUALITY

  
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Paul Slyman, Deputy Director  
DEQ  
Dated this 29<sup>th</sup> day of August, 2006

FOR THE DEPARTMENT OF  
ADMINISTRATIVE SERVICES:

\_\_\_\_\_  
Dugan Petty, Deputy Administrator  
DAS, State Services Division  
Dated this 29<sup>th</sup> 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 29<sup>th</sup> day of August, 2006.

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2. A cause of action under ORS 197.352 (Measure 37 (2004)): If a land use regulation continues to apply to the subject property more than 180 days after the present owner of the

property has made written demand for compensation under ORS 197.352<sup>2</sup>, the present owner of the property, or any interest therein, shall have a cause of action in the circuit court in which the real property is located.

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

**FOR INFORMATION ONLY**

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

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<sup>2</sup> By order of the Marion County Circuit Court, “all time lines under Measure 37 [were] suspended indefinitely” on October 25, 2005. This suspension was lifted on March 13, 2006 by the court. As a result, a period of 139 days (the number of days the time lines were suspended) has been added to the 180-day time period under ORS 197.352(6) for claims that were pending with the state on October 25, 2005.

**ORS 197.352 (BALLOT MEASURE 37) CLAIM FOR COMPENSATION**  
**OREGON DEPARTMENT OF LAND CONSERVATION AND DEVELOPMENT**  
**Final Staff Report and Recommendation**

August 29, 2006

**STATE CLAIM NUMBER:** M122888

**NAME OF CLAIMANT:** LaVerne Behrens as co-trustee of the  
Behrens Family Trust

**MAILING ADDRESS:** PO Box 605  
Lyons, Oregon 97358

**PROPERTY IDENTIFICATION:** Township 9S, Range 2E, Section 21  
Tax lot 600<sup>1</sup>  
Linn County

**DATE RECEIVED BY DAS:** October 21, 2005

**180-DAY DEADLINE:** September 5, 2006<sup>2</sup>

**I. SUMMARY OF CLAIM**

The claimant, LaVerne Behrens, seeks compensation in the amount of \$3.5 million for the reduction in fair market value as a result of land use regulations that are alleged to restrict his use of certain private real property. The claimant desires compensation or the right to divide the 40.72-acre subject property into fourteen lots or parcels and to develop a dwelling on each lot or parcel.<sup>3</sup> The subject property is located between Lyons and Mill City, in Linn County. (See claim.)

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<sup>1</sup> Tax lot 600 is a flag lot. The "flag" and "pole" portions of the lot were acquired at different times. See section V.2. for more detail.

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

<sup>3</sup> 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 fourteen lots or parcels and to build a home on each one. The draft staff report stated that the desired use involved three parcels; that statement was in error. In a letter in response to the department's staff report, however, the claimant asserted that the use he desires is what was stated in the original claim.

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

## 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 40.72-acre subject property into fourteen lots or parcels and to his development of a dwelling on each lot or 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 only to the extent necessary to allow him to use the subject property for the use described in this report, and only to the extent that use was permitted when he acquired the "flag" portion of the property in 1960 and the "pole" portion of the property in 1988. The department acknowledges that the relief to which LaVerne Behrens is entitled under ORS 197.352, with respect to the "pole" portion of the property, may not allow him to use that portion of the property in the manner set forth in the claim. (See the complete recommendation in Section VI. of this report.)

## III. COMMENTS ON THE CLAIM

### Comments Received

On 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, no written comments were received in response to the 10-day notice.

## 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

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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. Subsequent to the filing of this claim and after notification was provided pursuant to OAR 125-145-0080, the claimant submitted a comment to the draft staff report dated August 15, 2006, requesting to change the intended use of the property. The department cannot accept substantive amendments to previously filed claims.

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 identifies ORS 92, 195, 196, 197, 215, 227, 321, 454, 526, 527 and 928; OAR 660; Senate Bill 100; House Bill 3661; all statewide planning goals; all city, county and state comprehensive plans; the Forest Practices Act; all functional plans, planning goals and objectives; all zoning ordinances, restrictions or requirements; any and all Exclusive Farm Use (EFU); Linn County comprehensive plan; and any and all Linn County zoning ordinances and regulations as the basis for the claim. Only laws that were enacted or adopted prior to December 2, 2004, are the basis for this claim.

### **Conclusions**

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

## **V. ANALYSIS OF CLAIM**

### **1. Ownership**

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

### **Findings of Fact**

The claimant, LaVerne Behrens, acquired the 40.50-acre “flag” portion of the subject property on August 23, 1960, and the 0.22-acre “pole” portion of the property on December 5, 1988, as reflected by deeds included with the claim. The Linn County Assessor’s Office confirms that the claimant, as co-trustee of the Behrens Family Trust, is a current owner of the subject property.

### **Conclusions**

The claimant, LaVerne Behrens, as co-trustee of the Behrens Family Trust, is an “owner” of the subject property as that term is defined by ORS 197.352(11)(C). Laverne Behrens has been an owner of the “flag” portion of the subject property since August 23, 1960. Laverne Behrens has been an owner of the “pole” portion since December 5, 1988.

### **2. The Laws That are the Basis for This Claim**

In order to establish a valid claim, ORS 197.352(1) requires, in part, that a law must restrict the claimant’s use of private real property in a manner that reduces the fair market value of the

property relative to how the property could have been used at the time the claimant or a family member acquired the property.

### **Findings of Fact**

The claim indicates that the following state laws administered by the department restrict the claimant's desired use of the subject property: ORS 92, 195, 196, 197, 215, 227, 321, 454, 526, 527 and 928; OAR 660; Senate Bill 100; House Bill 3661; all statewide planning goals; all city, county and state comprehensive plans; the Forest Practices Act; all functional plans, planning goals and objectives; all zoning ordinances, restrictions or requirements; any and all EFUs; and any and all Linn County land use regulations. This report addresses only those state laws that are administered by the department or the Commission.<sup>4</sup>

According to the claim, these laws, rules and regulations prevent the claimant from: harvesting timber, mining rock, creating lakes, subdividing and developing structures, installing other infrastructure, utilities and buildings and selling and/or leasing lots.

The aspects of the claimant's desired use of the subject property that involve state laws administered by the department or Commission are:

(2) [To] mine; crush, store, transport to or from, ready for sale, and sell any and all rock on the property. Perform all other functions and activities related to the above necessary to perform the above.

...

(4) In addition (and subsequent), or in the alternative, to any or all of the above, 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.

(5) 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.

(6) If determined legal under Measure 37, sell and/or lease the subdivided lots, buildings, and the rights to perform any of the uses described above.

The claimant subsequently clarified that the desired use of the subject property involving laws administered by the department is to divide the property into fourteen lots or parcels and to develop a residence on each lot or parcel.

The claim is based generally on the applicable provisions of state law that require mixed farm-forest zoning and rural residential zoning. The "flag" portion of the subject property is zoned by

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<sup>4</sup> Separate reports for this claim will be issued by the Departments of State Lands (DSL), Forestry (ODF) and Environmental Quality (DEQ) for laws that these agencies administer. The State of Oregon does not enforce Linn County ordinances. ORS 321 concerns property taxation and is not a state "land use regulation." ORS 928 does not exist.

Linn County as Farm/Forest (FF), and the "pole" portion of the property is zoned by Linn County as Rural Residential (RR 2.5).

The county's FF zone 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.<sup>5</sup> Depending on the predominant use on that date, the "flag" portion of 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.

For land divisions, OAR 660-006-0055 authorizes the creation of new three 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 FF zone is 80 acres. The "flag" portion of the claimant's property cannot be divided into parcels smaller than 80 acres.

The claimant, LaVerne Behrens, acquired the 40.50-acre "flag" portion of the subject property on August 23, 1960, prior to the adoption of statewide planning goals and their implementing statutes and regulations. The 0.22-acre "pole" portion of the subject property was acquired by the claimant after the adoption of statewide planning goals and their implementing statutes and regulations.

The claim for the 0.22-acre "pole" portion of the subject property is zoned by Linn County as RR 2.5, consistent with Goal 14, which generally requires that land outside of urban growth boundaries be used for rural uses.

Goal 14 was effective on January 25, 1975, and requires that local comprehensive plans identify and separate urbanizable land from rural land in order to provide for an orderly and efficient transition from rural to urban land use. In 2000, as a result of a 1986 Oregon Supreme Court decision,<sup>6</sup> the Commission amended Goal 14 and adopted OAR 660-004-0040 (Application of Goal 14 to Rural Residential Areas), which was effective on October 4, 2000. OAR 660-004-0040 generally prohibits the creation of a new lot or parcel less than two acres.

### **Conclusions**

The current zoning requirements, minimum lot size and dwelling standards established under Goals 3 and 4, applicable provisions of ORS 215 and OAR 660, divisions 6, and 33, restrict the claimant's desired use of the "flag" portion of the subject property (40.50 acres) relative to the laws in effect when the claimant acquired this portion of the property.

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<sup>5</sup> No information was provided to the department regarding the predominant use of the property on January 1, 1993.

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

The current minimum lot size standards established under OAR 660-004-0040 restrict the claimant's desired use of the "pole" portion of the subject property (0.22 acres) relative to the laws in effect when the claimant acquired this portion 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 claimant's desired use of the subject property. 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 \$3.5 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 estimated value of timber and rock harvested from the property, and the value of developed residential lots.

### **Conclusions**

As explained in Section V.(1) of this report, claimant LaVerne Behrens acquired the subject property on August 23, 1960, and on December 5, 1988. Under ORS 197.352, the claimant is due compensation for land use regulations that restrict the claimant's desired 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 \$3.5 million.

Without additional documentation, it is not possible to substantiate the specific dollar amount by which state land use regulations administered by the department or Commission 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, 4 and 14, ORS 215 and OAR 660, divisions 6 and 33, which Linn County has implemented through its FF and RR zones. With the exception of regulations in place when the claimant acquired a portion of the subject property in 1988, 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 Laverne Behrens acquired it in 1960. As a result, with the exception of Goal 14 as it applies to the "pole" portion of the property, these laws are not exempt under ORS 197.352(3)(E).

Laws in effect when LaVerne Behrens 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. These 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).

## **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 \$3.5 million. However, because the claim does not provide 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 the claimant's desired use of the subject property was allowed under the standards in effect when he 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 LaVerne Behrens to use the subject property for a use permitted at the time he acquired the "flag" portion of the property on August 23, 1960, and the "pole" portion on December 5, 1988.

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.

### **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 40.72-acre "flag" portion of the property into fourteen lots or parcels or to the development of a dwelling on each lot or parcel: applicable provisions of Goals 3 and 4, ORS 215 and OAR 660, divisions 6 and 33, enacted or adopted after the claimant acquired the property. These land use regulations will not apply to the claimant's use of the "flag" portion of the property only to the extent necessary to allow him to use the subject property for the use described in this report, and only to the extent that use was permitted when he acquired this portion of the property on August 23, 1960.
2. In lieu of compensation under ORS 197.352, the State of Oregon will not apply the following laws to LaVerne Behrens' division of the 0.22-acre "pole" portion of the property: applicable provisions of OAR 660-004-0040 that took effect after the claimant acquired that portion of the property in 1988. These land use regulations will not apply to the claimant's use of the "pole" portion of the property only to the extent necessary to allow him to use the subject property for the use described in this report, and only to the extent that use was permitted when he acquired this portion of the property on December 5, 1988.

3. 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 when Laverne Behrens acquired the property on August 23, 1960, and on December 5, 1988.

4. 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.

5. 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).

6. 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:** M122888

**NAMES OF CLAIMANT:** LaVerne H. Behrens, as co-trustee of the  
Behrens Family Trust

**MAILING ADDRESSES:** LaVerne H. Behrens  
PO Box 605  
Lyons, Oregon 97358

**PROPERTY IDENTIFICATION:** Township 9S, Range 2E, Section 21  
Tax lot 600<sup>1</sup>  
Linn County

**DATE RECEIVED BY DAS:** October 21, 2005

**180-DAY DEADLINE:** September 5, 2006<sup>2</sup>

**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 operate a rock pit, to make lakes from the rock pits, or to divide the 40.72-acre property into parcels and to develop a dwelling or commercial building, including roads, utilities, and other appurtenances, on each parcel. One of the claimant's desired uses is to

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<sup>1</sup> Tax Lot 600 is a flag lot. The "flag" and "pole" portions of the lot were acquired at different times. Section section V.2. for more detail.

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

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.<sup>3</sup> As a result, 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 uses 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; to mine, crush, store, transport to or from, ready for sale, and to sell any and all rock on the property; to create man-made lakes from the rock pits; and to divide the property into parcels for

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<sup>3</sup> 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.

residential and/or commercial 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.<sup>4</sup> 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. Most of the property (the “flag” portion) 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. Similarly, the operation of rock pits and quarries may be regulated under the Forest Practices Act if they are done in connection with a forest management activity. However, until a notification of intent to conduct a forest operation is submitted, ODF is unable 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 operation of rock pits and quarries that are not part of forest management activities, nor do they restrict division of the property or the establishment of dwellings and commercial buildings.

### **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 of operations is submitted. ODF is unable to determine whether laws it or the Board administers apply to or restrict the claimant’s desired use of his property.

### **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 their 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.

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

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

### **Conclusions**

The claimant has not demonstrated that laws enforced or administered by ODF or the Board 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 "flag" portion of the subject property on August 23, 1960, and the "pole" portion in 1988. 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 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:** M122888

**NAME OF CLAIMANT(S):** LaVerne H. Behrens, as co-trustee of the  
Behrens Family Trust

**MAILING ADDRESS:** PO Box 605  
Lyons OR 97358

**IDENTIFICATION OF PROPERTY:** Township 9S, Range 2E, Section 21  
Tax Lot 600<sup>1</sup>  
Linn County

**OTHER INTERESTS IN PROPERTY:** Behrens Family Trust  
PO Box 605  
Lyons OR 97358

Anthony A. Behrens  
40303 Fox Valley Ln  
Lyons OR 97358

Michelle Behrens Webb  
PO Box 333  
Hammond OR 98614

Terry Behrens  
33025 NW Peaceful Ln  
North Plains OR 97113

**DATE RECEIVED BY DAS:** October 21, 2005

**180—DAY DEADLINE:** September 5, 2006<sup>2</sup>

<sup>1</sup> Tax Lot 600 is a flag lot. The “flag” and pole portions of the lot were acquired at different times. See section V.2. for more detail.

<sup>2</sup> 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 \$3,500,000 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 harvest timber on the 40.72 acre property, mine and remove rock on the 40.72 acre property; and subdivide the 40.72-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 recommend 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, no written comments were received in response to the 10-day notice.

## 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**

LaVerne Behrens acquired a *portion* of tax lot 600 on August 23, 1960, and a portion on December 5, 1988. The portion LaVerne acquired in 1988 is the "pole" portion of this flag lot, approximately 300 feet by 30 feet, and is zoned rural residential. The portion LaVerne acquired in 1960 is the "flag" portion of this flag lot, and is zoned Farm/Forest. LaVerne Behrens conveyed both portions of the property to a revocable trust, the Behrens Family Trust, on September 8, 1995. LaVerne Behrens is a co-trustee of that trust. On February 28, 2004, LaVerne Behrens conveyed an undivided one-half interest in both parts of the property to Michelle Webb, Terrence Behrens, and Anthony Behrens.

#### **Conclusions**

Based on the findings of DLCD in its report on this claim, the claimant, LaVerne Behrens, as trustee of the Behrens Family Trust, is an owner of an interest in the subject property.

## **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 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 "flag" portion of the subject property on August 23, 1960, as reflected by a warranty deed included with the claim, and an interest in the "pole" portion on December 5, 1988. LaVerne Behrens, as co-trustee of the Behrens Family Trust, continues to own a one-half interest in the entire property as reflected in the Certification of Trust included with the claim. On February 27, 2004, LaVerne Behrens conveyed an undivided one-half interest in the property to Anthony Behrens, Michelle Webb Behrens and Terry Behrens, as reflected by the warranty deed obtained from Linn County.

### **Conclusions**

LaVerne Behrens, as co-trustee of the Behrens Trust, is an "owner" of the "flag" portion of the subject property as of August 23, 1960, and of the "pole" portion of the subject property as of December 5, 1988.

## **3. The Desired Use of the Property**

The claim indicates the desired use of the property is:

- (1) Harvest any and all timber on the property without replanting and/or reforestation.
- (2) In addition, or in the alternative, to the former, mine; crush, store, transport to or from, ready for sale, and sell any and all rock on the property. Perform all other functions and activities related to the above necessary to perform the above.

- (3) In addition to (2) above, create manmade lakes from the rock pits.
- (4) In addition (and subsequent), or in the alternative, to any or all of the above, 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.
- (5) 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.
- (6) If determined legal under Measure 37, sell and/or lease the subdivided lots, buildings, and the rights to perform any of the uses described above.
- (7) 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 has been enforced to 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 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> sets of uses involving construction or other forms of land disturbance. The claim lists statutes administered by DSL, "ORS 196." ORS 196.660 to 196.990 comprise Oregon's Removal-Fill Law, which generally require 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. These laws do not apply to forest operations, which are governed by laws administered by the Oregon Department of Forestry, to land divisions, which are governed by laws administered by the county and by the Department of Land Conservation and Development, or to land sales.<sup>3</sup>

The Department of State Lands has not made a wetland determination and no wetland delineation has been completed for this property. The National Wetlands Inventory shows the property abuts the North Santiam River. DSL has no other information regarding whether wetlands are located on the property, or might be affected by the

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

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 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 waters of the state on the property. Until the claimant submits an application for a removal-fill permit, DSL has no means of determining whether the listed statutes apply to or restrict the claimant's desired use of the property. In addition, 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 Forest Practices Act or the sale of property.

### **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 owner 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).

#### **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 "flag" portion of the property in 1960, there was no such requirement in state law. When the claimant acquired the "pole" portion of the property in 1988, the Removal-Fill laws were in effect. As a result, the claimant has not demonstrated that there is any restriction of his desired use of the property with respect to the "pole" portion of the property.

The use that the claimant states is desired in the claim is to create manmade lakes from rock pits, subdivide the property into lots and building residential and/or commercial buildings, build residential or commercial buildings with roads, utilities, sewage/septic systems, and sell or lease the subdivided lots, buildings and the right to perform any of the uses described above. 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 or removing more than 50 cubic yards of material within any such waters of the state. DSL is unable to determine if the Removal-Fill law applies to the claimant's desired use of the property because the claimant has not specified what uses are to be carried out on what portions of the property.

Until the claimant submits an application for a removal-fill permit 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 part of the property before the Removal-Fill Law was in effect. However, DSL has not taken any action to enforce the state Removal-Fill Law as to this property after December 2, 2004. In addition, because the claimant has not identified what the claimant wants to do on what portions of the property, DSL is unable to determine if any laws that it administers apply to or restrict the claimant's desired use of the property.

## **6. Effect on Fair Market Value**

### **Requirement**

There is a right to compensation under ORS 197.352 from the state 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 \$3,500,000 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 acquired the "flag" portion of the subject property in 1960. Under ORS 197.352, a 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 required 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 was initially enacted in 1967. Claimant acquired the "flag" portion of the subject property in 1960 and the "pole" portion in 1988. As a result, the state Removal-Fill Law does not appear to be specifically exempt under ORS 197.352(3)(E) with respect to the "flag" portion of the property; it is exempt with respect to the "pole" portion. 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 he 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 his 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 claimants are present owners of the property, or an interest in the property;
- A state land use regulation enacted before December 2, 2004 is being enforced against the claimants' use of the property;
- The state land use regulation that is being enforced restricts the claimants' 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 use of this property since December 2, 2004. In addition, the claimant has not identified how the Removal-Fill Law 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 and reduce its fair market value.

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

DSL issued its draft staff report on April 25, 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:** M122888

**NAMES OF CLAIMANTS:** LaVerne Behrens, as co-trustee of  
the Behrens Family Trust

**MAILING ADDRESS:** PO Box 605  
Lyons, Oregon 97358

**PROPERTY IDENTIFICATION:** Township 9S, Range 2E, Section 21  
Tax lot 600<sup>1</sup>  
Linn County

**DATE RECEIVED BY DAS:** October 21, 2005

**180-DAY DEADLINE:** September 5, 2006<sup>2</sup>

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

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<sup>1</sup> Tax Lot 600 is a flag lot. The "flag" and "pole" portions of the lots were acquired at different times. See section V.2. for more detail.

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

### 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 on this claim 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 40.72-acre property and develop residential or commercial uses on each parcel. The subject property is located between Lyons and Mill City, in Linn County.** 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 have had any effect on 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 and rules listed in the claim likely are exempt as laws enacted to protect the public health and safety. Without some evidence from the claimants 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.