

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

IN THE MATTER OF THE CLAIM FOR) FINAL ORDER
 COMPENSATION UNDER ORS 197.352) CLAIM NO. M124304,
 (BALLOT MEASURE 37) OF) M124305, M124306 and
 Roy Webster Orchards, Inc., CLAIMANT) M124307

Claimant: Roy Webster Orchards, Inc. (the Claimant)

Property: Township 2N, Range 10E, Section 13D, Tax lot 1200
 Township 2N, Range 10E, Section 14, Tax lots 400, 500, 1400 and 1900
 Township 2N, Range 10E, Section 24, Tax lots 1800, 2200 and 2500
 Township 2N, Range 10E, Section 12, Tax lot 3200, Hood River 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 Reports and Recommendation of DLCD (the DLCD Report), and the Department of Transportation (the ODOT Report), attached to and by this reference incorporated into this order.

ORDER

The Claim is denied as to laws administered by the Department of Transportation for the reasons set forth in the ODOT 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 Roy Webster Orchards, Inc.'s use of the subject properties:

Tax Lot:	1200
Desired Use:	Develop a 7.37-acre portion of the 9.97-acre tax lot 1200 into a golf course fairway and green, and divide and develop the remaining portion of the property into approximately 20 commercial buildings or condominiums with a density of eight per acre; or divide and develop

	the 9.97-acre property with commercial buildings and condominiums with a density of eight per acre; or divide the 9.97-acre property into quarter-acre parcels and develop a dwelling on each parcel; and the right to construct accesses to Highway 35 and Van Horn Drive
State Land Use Regulations That Will Not Apply	Applicable provisions of Goal 3, ORS 215 and OAR 660, division 33, that are "land use regulations" and took effect after March 5, 1963.

Tax Lots:	400	500	1400	1900
Desired Use:	Develop 77 acres of the 137.27-acre tract made up of tax lots 400, 500, 1400 and 1900 into residential lots at a density of four lots per acre, and develop the remaining 60 acres into 30 larger lots with an average (but not minimum) lot size of two acres, both with paved streets, curbs and gutters, drainage and underground utilities and electrical service.			
State Land Use Regulations That Will Not Apply	Applicable provisions of Goal 3, ORS 215 and OAR 660, division 33, that are "land use regulations" and took effect after March 12, 1951.			

Tax Lot:	1800	2200	2500
Desired Use:	Develop the 53.02-acre tract made up of tax lots 1800, 2200 and 2500 into residential lots at a density of four lots per acre, with paved streets, curbs and gutters, drainage and underground utilities and electrical service.		
State Land Use Regulations That Will Not Apply	Applicable provisions of Goal 3, ORS 215 and OAR 660, division 33, that are "land use regulations" and took effect after January 21, 1955 (tax lots 1800 and 2200) and after January 21, 1963 (tax lot 2500).		

Tax Lot:	3200
Desired Use:	Continue the existing residential use of the 0.56-acre tax lot 3200 as a conforming use.
State Land Use Regulations That Will Not Apply	Applicable provisions of ORS 215.130 that took effect after December 6, 1962.

These land use regulations will not apply to the claimant's use of the subject properties only to the extent necessary to allow it to use the properties for the use described in this report, and only to the extent that use was permitted when it acquired the properties.

2. The action by the State of Oregon provides the state's authorization to the claimant to use the subject properties for the use described in this report, subject to the standards in effect when the claimant acquired the properties, on the dates shown in the table in Section V.(1) of this report.

3. To the extent that any law, order, deed, agreement or other legally enforceable public or private requirement provides that the subject properties may not be used without a permit, license or other form of authorization or consent, the order will not authorize the use of the

properties 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 properties imposed by private parties.

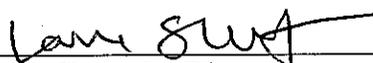
4. Any use of the subject properties by the claimant under the terms of the order will remain subject to the following laws: (a) those laws not specified in (1) above; (b) any laws enacted or enforced by a public entity other than the Commission or the department; and (c) those laws not subject to ORS 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 properties, it may be necessary for it 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 properties. 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 properties by the claimant.

This Order is entered by the Director of the DLCDC as a final order of DLCDC and the Land Conservation and Development Commission under ORS 197.352, OAR 660-002-0010(8), and OAR 125, division 145, and by the 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.

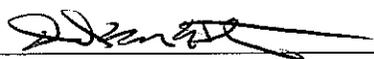
This Order is entered by the Acting State Right of Way Manager of the ODOT as a final order of ODOT under ORS 197.352, and OAR Chapter 125, division 145.

FOR DLCDC AND THE LAND
CONSERVATION AND DEVELOPMENT
COMMISSION:



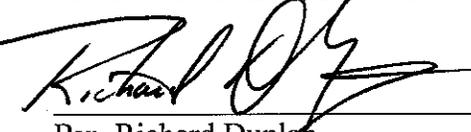
Lane Shetterly, Director
DLCDC
Dated this 5th day of September, 2006.

FOR THE DEPARTMENT OF
ADMINISTRATIVE SERVICES:



David Hartwig, Administrator
DAS, State Services Division
Dated this 5th day of September, 2006.

FOR THE FOR DEPARTMENT OF
TRANSPORTATION
Matthew L. Garrett, Director



By: Richard Dunlap,
Acting State Right of Way Manager
Oregon Department of Transportation
Dated this 5th day of September, 2006

NOTICE OF RIGHT TO APPEAL OR OTHER JUDICIAL RELIEF

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

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

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

September 5, 2006

STATE CLAIM NUMBERS: M124304, M124305, M124306 and
M124307

NAME OF CLAIMANT: Roy Webster Orchards, Inc.

MAILING ADDRESS: c/o Addison K. Webster, President
2900 Van Horn Drive
Hood River, Oregon 97031

PROPERTY IDENTIFICATION:¹

Township 2N, Range 10E, Section 13D
Tax lot 1200

Township 2N, Range 10E, Section 14
Tax lots 400, 500, 1400 and 1900

Township 2N, Range 10E, Section 24
Tax lots 1800, 2200 and 2500

Township 2N, Range 10E, Section 12
Tax lot 3200

Hood River County

OTHER CONTACT INFORMATION: Jason Corey
601 Washington Street
The Dalles, Oregon 97058

DATE RECEIVED BY DAS: March 13, 2006

180-DAY DEADLINE: September 9, 2006

¹ The claimant submitted separate claims for relief under ORS 197.352 for each of the tracts described above. Those claims are all addressed in this report. Tax lot 1200 consists of 9.97 acres; tax lot 400 consists of 63.60 acres; tax lot 500 consists of 11.88 acres; tax lot 1400 consists of 14 acres; tax lot 1900 consists of 47.79 acres; tax lot 1800 consists of 14.50 acres; tax lot 2200 consists of 19.10 acres; tax lot 2500 consists of 19.42 acres; and tax lot 3200 consists of 0.56 acres.

I. SUMMARY OF CLAIM

The claimant, Roy Webster Orchards, Inc., seeks compensation in the amount of \$29,766,124 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 properties. The claimant desires compensation or the right to 1) develop approximately 7.37 acres of the 9.97-acre tax lot 1200 into a golf course fairway and green, and develop the balance of the tax lot into approximately 20 condominium units at a density of eight units per acre, along with accesses to Highway 35 and Van Horn Drive; 2) develop 77 acres of the 137.27-acre tract made up by tax lots 400, 500, 1400 and 1900 into residential lots at a density of four lots per acre, and develop the remaining 60 acres into 30 larger lots with an average (but not minimum) lot size of two acres, both with paved streets, curbs and gutters, drainage and underground utilities and electrical service; 3) develop the 53.02-acre tract made up of tax lots 1800, 2200 and 2500 into residential lots at a density of four lots per acre, with paved streets, curbs and gutters, drainage and underground utilities and electrical service; and 4) continue the existing residential use of the 0.56-acre tax lot 3200 as a conforming use. The subject properties are located at the geographic coordinates listed above, near Hood River, in Hood River County. (See claim.)

II. SUMMARY OF STAFF RECOMMENDATION

Based on the findings and conclusions set forth below, the Department of Land Conservation and Development (the department) has determined that the claim is valid. Department staff recommends that, in lieu of compensation, the requirements of the following state laws enforced by the Land Conservation and Development Commission (the Commission) or the department not apply to Roy Webster Orchards, Inc.'s desired use of the properties (as specified below): applicable provisions of Statewide Planning Goals 3 (Agricultural Lands) and 14 (Urbanization), ORS 215 and Oregon Administrative Rules (OAR) 660, division 33.

Tax Lot:	1200
Desired Use:	Develop approximately 7.37 acres of the 9.97-acre tax lot 1200 into a golf course fairway and green, and develop the balance of the tax lot into approximately 20 condominium units at a density of eight units per acre, along with necessary accesses to Highway 35 and Van Horn Drive.

Tax Lot:	400	500	1400	1900
Desired Use:	Develop 77 acres of the 137.27-acre tract made up of tax lots 400, 500, 1400 and 1900 into residential lots at a density of four lots per acre, and develop the remaining 60 acres into 30 larger lots with an average (but not minimum) lot size of two acres, both with paved streets, curbs and gutters, drainage and underground utilities and electrical service.			

Tax Lot:	1800	2200	2500
Desired Use:	Develop the 53.02-acre tract made up of tax lots 1800, 2200 and 2500 into residential lots at a density of four lots per acre, with paved streets, curbs and		

	gutters, drainage and underground utilities and electrical service.
Tax Lot:	3200
Desired Use:	Continue the existing residential use of the 0.56-acre tax lot 3200 as a conforming use.

These laws will not apply to the claimant's use of the tax lots listed above only to the extent necessary to allow it to use each of the subject properties for the use described in the table above, and only to the extent that each use was permitted when the claimant acquired each property. (See the complete recommendation in Section VI. of this report.)

III. COMMENTS ON THE CLAIM

Comments Received

On May 22, 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
2. For claims arising from land use regulations enacted after the effective date of Measure 37 (December 2, 2004), within two years of the enactment of the land use regulation, or the date the owner of the property submits a land use application in which the land use regulation is an approval criteria, whichever is later.

Findings of Fact

This claim was submitted to DAS on March 13, 2006, for processing under OAR 125, division 145. The claim identifies numerous provisions of Hood River County zoning ordinances and ORS 215 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, Roy Webster Orchards, Inc., is an active Oregon corporation. The corporation was originally named “Roy Webster Orchards.” The name was changed to “Webster Orchards, Inc.” in 1997 and then to its current form in 2005. A separate business entity, Roy Webster Orchards, a co-partnership, also appears in the title information provided by the claimant. According to the “plant service report” provided by AmeriTitle with the claim, the claimant is not the present owner of all of the properties. Four properties (2N-10-14-400, 2N-10-14-500, 2N-10-14-1400 and 2N-10-1900) are shown in that report as being owned by Roy Webster Orchards, a co-partnership. However, in response to the draft staff report, the claimant has identified other information in the department’s record for this claim that shows that Roy Webster Orchards, Inc. is the present owner of these four tax lots (as well as the rest of the property). The present ownership and acquisition date for each of the subject properties are presented in the table below, based on documents included with the claim, and the correspondence from the claimant’s attorney dated August 21, 2006.

Tax Lot:	Present Owner	Acquisition Date:	Document:
2N-10-13D-1200	Roy Webster Orchards, Inc.	March 5, 1963	Warranty Deed
2N-10-14-400	Roy Webster Orchards, Inc.	March 12, 1951	Bargain and Sale
2N-10-14-500	Roy Webster Orchards, Inc.	March 12, 1951	Bargain and Sale Deed
2N-10-14-1400	Roy Webster Orchards, Inc.	March 12, 1951	Bargain and Sale Deed
2N-10-14-1900	Roy Webster Orchards, Inc.	March 12, 1951	Bargain and Sale Deed
2N-10-24-1800	Roy Webster Orchards, Inc.	January 21, 1955	Warranty Deed
2N-10-24-2200	Roy Webster Orchards, Inc.	January 21, 1955	Warranty Deed
2N-10-24-2500	Roy Webster Orchards, Inc.	January 21, 1963	Warranty Deed
2N-10-12-3200	Roy Webster Orchards, Inc.	December 6, 1962	Warranty Deed

In summary, the claimant, Roy Webster Orchards, Inc., is a domestic business corporation that owns tax lots 400, 500, 1200, 1400 1800, 1900, 2200, 2402 and 2500 and 3200.

Conclusions

The claimant, Roy Webster Orchards, Inc. is an “owner” of the subject properties as that term is defined by ORS 197.352(11)(C), as of particular dates, both as shown in the table above.

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 claimant desires to 1) develop approximately 7.37 acres of the 9.97-acre tax lot 1200 into a golf course fairway and green, and develop the balance of the tax lot into approximately 20 condominium units at a density of eight units per acre, along with accesses to Highway 35 and Van Horn Drive; 2) develop 77 acres of the 137.27-acre tract made up of tax lots 400, 500, 1400 and 1900 into residential lots at a density of four lots per acre, and develop the remaining 60 acres into 30 larger lots with an average (but not minimum) lot size of two acres, both with paved streets, curbs and gutters, drainage and underground utilities and electrical service; 3) develop the 53.02-acre tract made up of tax lots 1800, 2200 and 2500 into residential lots at a density of four lots per acre, with paved streets, curbs and gutters, drainage and underground utilities and electrical service; and 4) continue the existing residential use of the 0.56-acre tax lot 3200 as a conforming use.²

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 properties are zoned EFU by Hood River County, as required by Goal 3, in accordance with ORS 215 and OAR 660, division 33, because the claimant's properties are "agricultural land" as defined by Goal 3.³ Goal 3 became effective on January 25, 1975, and required that agricultural lands as defined by the Goal be zoned EFU pursuant to ORS 215.

Current land use regulations, particularly ORS 215.263, 215.284 and 215.780 and OAR 660, division 33, enacted or adopted pursuant to Goal 3, prohibit the division of EFU-zoned land into parcels less than 80 acres and establish standards for development of dwellings on existing or proposed parcels on that land.

ORS 215.780 establishes an 80-acre minimum size for the creation of new lots or parcels in EFU zones and became effective on November 4, 1993 (Chapter 792, Oregon Laws 1993). ORS 215.263 (2005 edition) establishes standards for the creation of new parcels for non-farm uses and dwellings allowed in an EFU zone.

OAR 660-033-0135 (applicable to farm dwellings) became effective on March 1, 1994, and interprets the statutory standard for a primary dwelling in an EFU zone under ORS 215.283(1)(f). OAR 660-033-0130(4) (applicable to non-farm dwellings) became effective on August 7, 1993, and was amended to comply with ORS 215.284(4) on March 1, 1994. The Commission subsequently adopted amendments to comply with House Bill 3326 (Chapter 704, Oregon Laws 2001, effective on January 1, 2002), which were effective on May 22, 2002. (See administrative rule history for OAR 660-033-0100, -0130 and -0135.)

² This report addresses only those state statutes and rules administered by the department. Statutes and rules administered by the Oregon Department of Transportation are addressed in a report by that agency.

³ The claimant's properties are "agricultural land" because they contain Natural Resources Conservation Service Class I-IV soils.

Goal 14 would apply to the division of the claimant's properties into parcels of less than two acres. Goal 14 generally requires that land outside of urban growth boundaries be used for rural uses. Goal 14 became effective on January 25, 1975.

ORS 215.130, concerning the right to continue non-conforming uses, was in effect when the claimant acquired tax lot 3200. The claimant has not demonstrated how state law concerning non-conforming uses restricts the claimant's desired use of this property.

The claimant acquired all of the subject properties on the dates shown in the preceding table, all of which were acquired prior to the adoption of the statewide planning goals and their implementing statutes and regulations.

Conclusions

The current zoning requirements, minimum lot size and dwelling standards established by applicable provisions of Goals 3 and 14, ORS 215 (with the exception of ORS 215.130) and OAR 660, division 33, were all enacted or adopted after the claimant acquired the subject properties and do not allow the desired division or residential development of the properties. These laws restrict the use of the subject properties relative to the uses allowed when the claimant acquired the properties.

This report addresses only those state laws that are identified in the claim, or that the department is certain apply to the subject properties based on the use that the claimant has identified. There may be other laws that currently apply to the claimant's use of the subject properties, and that may continue to apply to the claimant's use of the properties, that have not been identified in the claim. In some cases, it will not be possible to know which laws apply to a use of subject properties 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 \$29,766,124⁴ as the reduction in the subject properties' fair market value due to the regulation(s) that restrict the claimant's desired use of the properties. This amount is based on the difference of the properties' assessed value and a market analysis of the estimated development value and assumes that the claimant is a present owner of all of the properties addressed in this report.

⁴ This figure represents a total of each amount submitted with the four claims.

Conclusions

As explained in Section V.(1) of this report, the claimant is Roy Webster Orchards, Inc., which acquired some of the properties included with these claims at different dates, as shown in the table in Section V.(1). of this report. Under ORS 197.352, the claimant is due compensation for land use regulations that restrict the use of the properties that the claimant owns, where those regulations have had the effect of reducing the properties' 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 properties restrict the claimant's desired use of the properties. The claimant estimates that the effect of the regulation(s) on the fair market value of the properties is a reduction of \$29,766,124.

Without an appraisal or other documentation and without verification of whether or the extent to which the claimant's desired use of the subject properties was allowed under the standards in effect when the claimant acquired the properties, it is not possible to substantiate the specific dollar amount by which the land use regulations have reduced the fair market value of the properties. Nevertheless, based on the evidence in the record for this claim, the department determines that the fair market value of the subject properties 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 properties, including applicable provisions of Goals 3 and 14, ORS 215 and OAR 660, division 33, which Hood River County has implemented through its current EFU zone. Most of these land use regulations were enacted or adopted after the claimant acquired the subject properties, with the exception of certain provisions of ORS 215, including ORS 215.130.

Conclusions

Without a specific development proposal for the subject properties, it is not possible for the department to determine all the laws that may apply to a particular use of the properties, or whether those laws may fall under one or more of the exemptions under ORS 197.352. It appears that most of the general statutory, goal and rule restrictions on division and development of the claimant's properties took effect after the claimant acquired the properties. As a result, these laws are not exempt under ORS 197.352(3)(E).

Laws in effect when the claimant acquired the subject properties are exempt under ORS 197.352(3)(E) and will continue to apply to the claimant's use of the properties. There may be other laws that continue to apply to the claimant's use of the subject properties 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 properties 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 properties based on the use 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 it 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 its use of the subject properties.

VI. FORM OF RELIEF

ORS 197.352(1) provides for payment of compensation to an owner of private real property if the Commission or the department has enforced laws that restrict the use of the subject property in a manner that reduces its fair market value. In lieu of compensation, the department may choose to not apply the law in order to allow the present owner to carry out a use of the subject property permitted at the time the present owner acquired the property. The Commission, by rule, has directed that if the department determines a claim is valid, the Director of the department must provide only non-monetary relief unless and until funds are appropriated by the legislature to pay claims.

Findings of Fact

Based on the findings and conclusions set forth in this report, laws enforced by the Commission or the department restrict the claimant's desired use of the subject properties. 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 properties by \$29,766,124. 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 properties, 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 properties was allowed under the standards in effect when it acquired the properties. 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 properties 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 Roy Webster Orchards, Inc. to use the subject properties for a use permitted at the time it acquired the properties.

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 Roy Webster Orchards, Inc.'s use of the subject properties:

Tax Lot:	1200
Desired Use:	Develop a 7.37-acre portion of the 9.97-acre tax lot 1200 into a golf course fairway and green, and divide and develop the remaining portion of the property into approximately 20 commercial buildings or condominiums with a density of eight per acre; or divide and develop the 9.97-acre property with commercial buildings and condominiums with a density of eight per acre; or divide the 9.97-acre property into quarter-acre parcels and develop a dwelling on each parcel; and the right to construct accesses to Highway 35 and Van Horn Drive
State Land Use Regulations That Will Not Apply	Applicable provisions of Goal 3, ORS 215 and OAR 660, division 33, that are "land use regulations" and took effect after March 5, 1963.

Tax Lots:	400	500	1400	1900
Desired Use:	Develop 77 acres of the 137.27-acre tract made up of tax lots 400, 500, 1400 and 1900 into residential lots at a density of four lots per acre, and develop the remaining 60 acres into 30 larger lots with an average (but not minimum) lot size of two acres, both with paved streets, curbs and gutters, drainage and underground utilities and electrical service.			
State Land Use Regulations That Will Not Apply	Applicable provisions of Goal 3, ORS 215 and OAR 660, division 33, that are "land use regulations" and took effect after March 12, 1951.			

Tax Lot:	1800	2200	2500
Desired Use:	Develop the 53.02-acre tract made up of tax lots 1800, 2200 and 2500 into residential lots at a density of four lots per acre, with paved streets, curbs and gutters, drainage and underground utilities and electrical service.		
State Land Use Regulations That Will Not Apply	Applicable provisions of Goal 3, ORS 215 and OAR 660, division 33, that are "land use regulations" and took effect after January 21, 1955 (tax lots 1800 and 2200) and after January 21, 1963 (tax lot 2500).		

Tax Lot:	3200
Desired Use:	Continue the existing residential use of the 0.56-acre tax lot 3200 as a conforming use.
State Land Use Regulations That Will Not Apply	Applicable provisions of ORS 215.130 that took effect after December 6, 1962.

These land use regulations will not apply to the claimant's use of the subject properties only to the extent necessary to allow it to use the properties for the use described in this report, and only to the extent that use was permitted when it acquired the properties.

2. The action by the State of Oregon provides the state's authorization to the claimant to use the subject properties for the use described in this report, subject to the standards in effect when the claimant acquired the properties, on the dates shown in the table in Section V.(1) of this report.

3. To the extent that any law, order, deed, agreement or other legally enforceable public or private requirement provides that the subject properties may not be used without a permit, license or other form of authorization or consent, the order will not authorize the use of the properties 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 properties imposed by private parties.

4. Any use of the subject properties 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 properties, it may be necessary for it 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 properties. 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 properties by the claimant.

VII. COMMENTS ON THE DRAFT STAFF REPORT

The department issued its draft staff report on this claim on August 17, 2006. OAR 125-145-0100(3), provided an opportunity for the claimant or the claimant's authorized agent and any third parties who submitted comments under OAR 125-145-0080 to submit written comments, evidence and information in response to the draft staff report and recommendation. Comments received have been taken into account by the department in the issuance of this final report.

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

OREGON DEPARTMENT OF TRANSPORTATION

Final Staff Report and Recommendation

September 5, 2006

STATE CLAIM NUMBER: M124304

NAME OF CLAIMANT: Roy Webster Orchards, Inc.

IDENTIFICATION OF PROPERTY: Township 2N, Range 10E, Section 13D
Tax lot 1200

Hood River County

OTHER CONTACT INFO: Jason R. Corey
Attorney at Law
601 Washington Street
The Dalles, OR 97058

DATE RECEIVED BY DAS: March 13, 2006

180-DAY DEADLINE: September 9, 2006

I. CLAIM

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

II. SUMMARY OF STAFF RECOMMENDATION

Based on the findings and conclusions set forth below, the Department of Transportation (the department) has determined that the claim is not valid. The department has determined that the claim does not identify a state land use regulation that the department has enforced since December 2, 2004 in a manner that restricts the claimant's right to develop an approximately 7 acre portion of the subject property into a golf course fairway and green, and develop the remainder of the property for condominiums at a density of eight condominiums units per acre, or that has the effect of reducing the fair market value of the claimant's property.

III. COMMENTS ON THE CLAIM

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

IV. TIMELINESS OF CLAIM

Requirement

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

Findings of Fact

The claim submitted March 13, 2006 does not identify a “land use regulation” administered by the Oregon Department of Transportation. There is no description in the claim concerning how any “land use regulation” has been enforced since December 2, 2004, or how any “land use regulation” administered by the department restricts the use of the property that the claimant wishes to carry out. The claim form describes how the claimant wishes to use the property, and states that the desired use of the property includes “* * * necessary accesses from Highway 35 and Van Horn Drive.” No specific state laws administered by the department are identified in the claim.

Conclusions

The claim has been submitted within two years of December 2, 2004, the effective date of Measure 37. The department is unable to determine what laws that are administered by the department may apply to the claimant’s desired use of the property. However, as the claim is submitted before December 2, 2004 it 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 findings of the Staff Report of the Department of Land Conservation and Development on this claim regarding ownership are incorporated into this report by this reference.¹

Conclusions

The conclusions of the Staff Report of the Department of Land Conservation and Development on this claim regarding ownership are incorporated into this report by this reference.

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 “state land use regulation” 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 states in relevant part that:

“Claimant intends to develop approximately 7.37 acres...into a golf course fairway and green as part of an overall larger golf course development in the area, with the balance of the property being developed into either commercial or high density luxury condominium use of 8 units per acre...”

The claim further states that:

“In the event that the golf course fairway and green are not developed, claimant intends to develop the site into commercial or residential use or a combination of both. The commercial site use would include expansion of claimant’s existing commercial fruit sales operation already in the general area, and...add commercial retail space, food services, lodging, and other tourist destination businesses, as well as necessary accesses from Highway 35...”

In the claim submitted to DAS, the claimant cites several Hood River County Ordinances and, by reference, sections of Oregon Revised Statutes, none of which are administered by the Oregon Department of Transportation. The only inference that might involve the Oregon Department of Transportation is contained in the paragraph quoted immediately above, “...as well as necessary accesses from Highway 35...”.

¹ The DLCD report addresses properties other than tax lot 1200. Only that portion of the DLCD report concerning tax lot 1200 is incorporated. Only the claim concerning tax lot 1200 describes a use that laws that the department administers may apply to (access to a State Highway).

In order for a claimant to establish an entitlement to relief under ORS 197.352, there must be a showing of at least the following:

- The claimant's use of the property is restricted by a state "land use regulation";
- The state agency has taken some action, after December 2, 2004, to enforce the land use regulation;
- The enforcement of the land use regulation reduces the fair market value of the property in question; and
- The law is not one that was adopted to protect public health and safety, or that is otherwise exempt under ORS 197.352(3).

The claim does not identify any "land use regulation" that is administered by the department as that term is defined in subsection ORS 197.352(11)(B). Certain laws may apply to the construction or use of accesses to State Highway 35, but there is not sufficient information in the claim to determine whether that is the case and, if there are laws that apply, whether such laws restrict the claimant's desired use of the property.

The department has taken no action since the effective date of ORS 197.352 to enforce any land use regulation with respect to claimant or claimant's property.

Conclusions

The claimant has not established that any "land use regulation" administered by the department apply to or restrict the claimant's desired use of the property, or that any "land use regulation" administered by the department has been enforced to restrict the claimant's use of the property since the effective date of ORS 197.352. Based on the information in the record, since December 2, 2004, the claimant has failed to identify a state land use regulation that has been enforced as to the claimant's desired use of the property in a manner that restricts its use.

3. Effect of Regulations on Fair Market Value

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

Findings of Fact

The claim asserts an estimated reduction in value of \$2,724,576.00 under one development scenario, and a range between \$773,791.00 to \$8,324,178.00 under another, resulting from enactment or enforcement of land use regulations.² The claim does not

² These values are derived by comparing residential property values in Sunriver, and by a realtor's estimate of the selling price of residential lots, or by averaging the real market value of commercial property as shown by the assessor's records, to arrive at a per acre value, multiplying that by the total number of

include an appraisal, nor does it define what portion, if any, of the alleged reduction in value is attributed to "land use regulations" administered by the department as opposed to other land use regulations.

Conclusions

To state a claim under ORS 197.352(1), claimant must allege some reduction in fair market value of their property, allegedly caused by a land use regulation which restricts the use of the property. Based on the record currently before the department, the department concludes that there are no land use regulations identified in the claim and enforced by the department since December 2, 2004 that restrict the use of the subject property or that have the effect of reducing the fair market value.

4. Exemptions under ORS 197.352(3)

Under ORS 197.352(3), certain types of laws are exempt from ORS 197.352.

Findings of Fact

ORS 197.352(3)(E) states that the act shall not apply to land use regulations enacted prior to the date of acquisition of the property by the owner. Many of the state laws concerning highway access were in effect when the claimant acquired tax lot 1200. However, as noted above, the department is unable to determine whether any particular laws apply to the claimant's desired use because of the general nature of the claim.

Additionally, many laws regulating access to state highways are laws "restricting or prohibiting activities for the protection of public health and safety * * *." ORS 197.352(3)(B).³ The expressed purpose of the laws is "to provide a safe and efficient transportation system through the preservation of public safety, the improvement and development of transportation facilities, the protection of highway traffic from the hazards of unrestricted and unregulated entry from adjacent property, and the elimination of hazards due to highway grade intersections."⁴

Under ORS 197.352(3)(A), laws "restricting or prohibiting activities commonly and historically recognized as public nuisances under common law" are exempt. Under common law, narrowly construed, obstructing public thoroughfares is a public nuisance. Laws that restrict or prohibit activities to prevent the obstruction of public streets are exempt under ORS 197.352(3)(A).

proposed acres, after which the current assessed value and the estimated costs of development, including the development of a "package sewage treatment system" are deducted.

³ The purpose of the statutes relating to the Department of Transportation's control of access to public highways is to protect the traveling public from the hazards of unrestricted and unregulated entries from adjacent property and to insure that such entries onto public highways are constructed so as to insure the highest degree of safety. *Spaght v. Department of Transportation*, 29 Or App 681, 685 (1977).

⁴ OAR 734-051-0020.

Conclusions

The department concludes that based on the information in its record the claimant has failed to identify a state land use regulation that is administered by the department and that restricts the claimant's use of their property and that is not exempt under ORS 197.352. As a result, the claim must be denied as to laws administered by the Oregon Department of Transportation.

VI. FORM OF RELIEF

ORS 197.352(1) provides for payment of compensation to an owner of private real property if the department has enacted or enforced a law that restricts 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 to allow the present owner to carry out a use of the property permitted at the time the present owner acquired the property.

Findings of Fact

Based on the findings and conclusions set forth in this report, no state land use regulations enforced by the department restrict the claimant's use of the property in a manner that reduces the fair market value of the property and that involve a law that is not exempt.

Conclusion

Based on the foregoing findings and conclusions, the claimant has not established entitlement to relief under ORS 197.352(1), as to laws administered by the Department of Transportation. As a result, the department recommends that the claim be DENIED.

VII. NOTICE OF OPPORTUNITY TO COMMENT

The department issued its draft staff report on this claim on August 17, 2006. OAR 125-145-0100(3), provided an opportunity for the claimant or the claimant's authorized agent and any third parties who submitted comments under OAR 125-145-0080 to submit written comments, evidence and information in response to the draft staff report and recommendation. Comments received have been taken into account by the department in the issuance of this final report.