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

IN THE MATTER OF THE CLAIM FOR COMPENSATION UNDER ORS 197.352 (BALLOT MEASURE 37) OF Erin Bay, CLAIMANT	))))	FINAL ORDER CLAIM NO. 124350

Claimant: Erin Bay (the Claimant)

Property: Township 1S, Range 3W, Section 26, Tax lot 1203, Washington 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) attached to and by this reference incorporated into this order.

ORDER

The Claim is denied as to laws administered by DLCD and the Land Conservation and Development Commission (LCDC) for the reasons set forth in the DLCD Report.

This Order is entered by the Director of the DLCD as a final order of DLCD and the Land Conservation and Development Commission under ORS 197.352, OAR 660-002-0010(8), and OAR chapter 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 chapter 125, division 145, and ORS chapter 293.

FOR DLCD AND THE LAND CONSERVATION AND DEVELOPMENT COMMISSION:

Lane Shetterly, Director
DLCD
Dated this 6th day of September, 2006.

FOR the DEPARTMENT OF ADMINISTRATIVE SERVICES:

David Hartwig, Administrator
DAS, State Services Division
Dated this 6th 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)

ORS 197.352 (BALLOT MEASURE 37) CLAIM FOR COMPENSATION

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

September 6, 2006

STATE CLAIM NUMBER:	M124350
NAME OF CLAIMANT:	Erin Bay
MAILING ADDRESS:	32665 SW Unger Road Cornelius, Oregon 97113
PROPERTY IDENTIFICATION:	Township 1S, Range 3W, Section 26 Tax lot 1203 Washington County
DATE RECEIVED BY DAS:	March 14, 2006
180-DAY DEADLINE:	September 10, 2006

I. SUMMARY OF CLAIM

The claimant, Erin Bay, seeks compensation in the amount of $1.5 million for the reduction in fair market value as a result of land use regulations that are alleged to restrict the use of certain private real property. The claimant desires compensation or the right to divide the 7.07-acre subject property (tax lot 1203), in conjunction with tax lot 1200 (4.85 acres under separate ownership and the subject of claim M124349), into 19 contiguous lots for residential development. The subject property is located at 32665 SW Unger Road, near Cornelius, in Washington 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 not valid because the claimant's desired use of the subject property was prohibited under the laws in effect when the claimant acquired the property in 2004. (See the complete recommendation in Section VI. of this report.)

III. COMMENTS ON THE CLAIM

Comments Received

On June 19, 2006, pursuant to Oregon Administrative Rules (OAR) 125-145-0080, the Oregon Department of Administrative Services (DAS) provided written notice to the owners of surrounding properties. According to DAS, two written comments were received in response to the 10-day notice.

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

One of the comments is relevant to when the claimant became the present owner of the subject property. The comment has been considered by the department in preparing this report. (See the comment letters in the department's claim file.)

IV. TIMELINESS OF CLAIM

Requirement

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

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

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

Findings of Fact

This claim was submitted to DAS on March 14, 2006, for processing under OAR 125, division 145. The claim identifies provisions of the Washington County Development Code 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, Erin Bay, acquired the subject property (tax lot 1203) on November 29, 2004, as reflected by a warranty deed included with the claim. The Washington County Assessor's Office confirms the claimant's current ownership of the subject property.

Conclusions

The claimant, Erin Bay, is an "owner" of the subject property as that term is defined by ORS 197.352(11)(C), as of November 29, 2004.

2. The Laws That are the Basis for This Claim

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

Findings of Fact

The claim indicates that claimant desires to divide the subject property (in conjunction with tax lot 1200, which is not owned by the claimant) into 19 contiguous parcels. It indicates the desired use is not allowed under the property's current zoning.

The claim is based generally the applicable provisions of state law that require rural residential zoning. The subject property is zoned AF-10 by Washington County. The AF-10 zone is a rural residential zone 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,[1] 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. The rule states that the area of any new lots or parcels in a rural residential zone in effect on October 4, 2000, must be at least two acres. If a county rural residential zone specifies a minimum lot or parcel size smaller than two acres, the area of any new lot or parcel shall equal or exceed two acres (OAR 660-004-0040(5)(b) and (7)(d)). The creation of any new lot or parcel smaller than two acres in a rural residential zone is considered an urban use, and may be created only if an exception to Goal 14 is taken (OAR 660-004-0040(7)(a)). Some relief from these provisions is available for lots or parcels having more than one permanent habitable dwelling pursuant to OAR 660-004-0040(7)(h). Because Washington County's rural residential zone was in effect on October 4, 2000, and allows a lot or parcel size of 10 acres, OAR 660-004-0040 requires that all new lots or parcels have a minimum lot or parcel size of 10 acres or more, unless an exception to Goal 14 is taken.

[1] *1000 Friends of Oregon v. LCDC (Curry County)*, 301 Or 447 (1986).

Conclusions

The current zoning requirements, minimum lot size and dwelling standards established by Goal 14 and provisions applicable to land zoned rural residential in OAR 660-004-0040 were adopted before Erin Bay acquired the subject property on November 29, 2004. These land use regulations do not allow the claimant to divide the subject property (in conjunction with tax lot 1200) into 19 contiguous parcels. Laws adopted since the claimant acquired the subject property in 2004 do not restrict the claimant's desired use of the property relative to when the claimant acquired it in 2004.

3. Effect of Regulations on Fair Market Value

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

Findings of Fact

The claim includes an estimate of $1.5 million as the reduction in the subject property's fair market value due to the regulations that restrict the claimant's desired use of the property. This amount is based on the claimant's own assessment of the subject property's value.

Conclusions

As explained in Section V.(1) of this report, the claimant, Erin Bay, acquired the subject property on November 29, 2004. No state laws enacted or adopted since the claimant acquired the subject property restrict the use of the property relative to the uses allowed in 2004. Therefore, the fair market value of the subject property has not been reduced as a result of land use regulations enforced by the Land Use Conservation and Development Commission (the Commission) or the department since the claimant acquired the property.

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 does not identify any state land use regulations enacted or adopted since the claimant acquired the subject property that restrict the use of the property relative to what would have been allowed when the claimant acquired it on November 29, 2004. As set forth in Section V.(2) of this report, the state land use regulations restricting the claimant's desired use of the subject property were in effect when the claimant acquired the property in 2004.

Conclusions

All of the state land use regulations that restrict the claimant's desired use of the subject property were in effect when the claimant acquired the property. Therefore, these state land use regulations are exempt under ORS 197.352(3)(E), which exempts laws in effect when the claimant acquired the subject property.

VI. FORM OF RELIEF

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

Findings of Fact

Based on the findings and conclusions set forth in this report, laws enforced by the Commission or the department do not restrict the claimant's desired use of the subject property relative to what was permitted when the claimant acquired it in 2004 and do not reduce the fair market value of the property. All state laws restricting the use of the subject property are exempt under ORS 197.352(3)(E).

Conclusions

Based on the record and the foregoing findings and conclusions, the claimant has not established that she is entitled to relief under ORS 197.352(1) as a result of land use regulations enforced by the Commission or the department. Therefore, the department recommends that this claim be denied.

VII. COMMENTS ON THE DRAFT STAFF REPORT

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