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 Moore Orchards, Inc., CLAIMANT	))))	FINAL ORDER CLAIM NO. M124989

Claimant: Moore Orchards, Inc. (the Claimant)

Property: Township 2N, Range 10E, Section 24, Tax lot 3700

Township 2N, Range 10E, Section 25, Tax lots 100 and 200
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 Report and Recommendation of DLCD (the DLCD Report) attached to and by this reference incorporated into this order.

ORDER

The Claim is approved as to laws administered by DLCD and the Land Conservation and Development Commission (LCDC) for the reasons set forth in the DLCD Report, and subject to the following terms:

1. In lieu of compensation under ORS 197.352, the State of Oregon will not apply the following laws to Moore Orchards, Inc.'s division of tax lot 3700 into sixty-four 1/4-acre parcels and its development of a dwelling on each parcel and division of tax lot 100 into two 20-acre parcels: applicable provisions of Goals 3 and 14 ORS 215 and OAR 660, division 33, enacted or adopted after the claimant acquired each of the subject tax lots. These laws will not apply to the claimant only to the extent necessary to allow it to use the subject property for the use described in this report, and only to the extent that use was permitted when it acquired tax lot 3700 on January 4, 1965, and only to the extent that use was permitted when it acquired tax lots 100 and 200 on May 17, 1991.

2. The action by the State of Oregon provides the state's authorization to the claimant to use subject property for the use described in this report, subject to the standards in effect on January 4, 1965, for tax lot 3700 and subject to the standards in effect on May 17, 1991, for tax lots 100 and 200. On May 17, 1991, tax lots 100 and 200 were subject to compliance with Goals 3 and

14 and OAR 660, division 5, as implemented by Hood River County's acknowledged EFU zone, and the applicable provisions ORS 215 then in effect.

3. To the extent that any law, order, deed, agreement or other legally enforceable public or private requirement provides that the subject property may not be used without a permit, license or other form of authorization or consent, the order will not authorize the use of the property unless the claimant first obtains that permit, license or other form of authorization or consent. Such requirements may include, but are not limited to: a building permit, a land use decision, a "permit" as defined in ORS 215.402 or 227.160, other permits or authorizations from local, state or federal agencies and restrictions on the use of the subject property imposed by private parties.

4. Any use of the subject property by the claimant under the terms of the order will remain subject to the following laws: (a) those laws not specified in (1) above; (b) any laws enacted or enforced by a public entity other than the Commission or the department; and (c) those laws not subject to ORS 197.352 including, without limitation, those laws exempted under ORS 197.352(3).

5. Without limiting the generality of the foregoing terms and conditions, in order for the claimant to use the subject property, it may be necessary for 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 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 Manager for the Measure 37 Services Division 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 Director of the DAS as a final order of DAS under ORS 197.352, OAR 125, division 145, and ORS 293.

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

Michael Morrissey, Manager
DLCD, Measure 37 Division
Dated this 10th day of October, 2006.

FOR the DEPARTMENT OF ADMINISTRATIVE SERVICES:

Lindsay A. Ball, Director
DAS
Dated this 10th day of October, 2006.

NOTICE OF RIGHT TO APPEAL OR OTHER JUDICIAL RELIEF

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

1. Judicial review under ORS 183.484: Judicial review under ORS 183.484 may be obtained by filing a petition for review within 60 days from the service of this order. A petition for judicial review under ORS 183.484 may be filed in the Circuit Court for Marion County or the Circuit Court in the county in which you reside.

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

October 10, 2006

STATE CLAIM NUMBER:	M124989
NAME OF CLAIMANT:	Moore Orchards, Inc.
MAILING ADDRESS:	2399 Lacey Road Hood River, Oregon 97031
PROPERTY IDENTIFICATION:	Township 2N, Range 10E, Section 24 Tax lot 3700 Township 2N, Range 10E, Section 25 Tax lots 100 and 200 Hood River County
DATE RECEIVED BY DAS:	April 18, 2006
180-DAY DEADLINE:	October 15, 2006

I. SUMMARY OF CLAIM

The claimant, Moore Orchards, Inc., seeks compensation in the amount of $3,840,000 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 tax lot 3700, consisting of 18.01 acres, into sixty-four 1/4-acre parcels and develop a dwelling on each parcel[1] and divide tax lot 100 into two 20-acre parcels.[2] The subject property is located east of the Mt. Hood Loop Highway, near Hood River, in Hood River County. (See claim.)

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[1] As an alternative to residential division and development of tax lot 3700, the claimant's representative summarily indicated that "industrial uses could be developed" on this tax lot. The claim did not indicate the nature of that possible "industrial" use. Under ORS 197.352(8), if a public entity elects to not apply one or more land use regulations to the claimant's use of the property, it may do so only to allow "a use," and not a range of possible uses that potentially could have been allowed. In addition, in order to determine whether or to what extent current land use regulations restrict a claimant's desired use of the property, the claim must be based on "a use" that the claimant desires but is unable to achieve due to those land use regulations. It appears that the claimant's primary desired use of tax lot 3700 is to divide it into one-quarter-acre parcels and to develop a dwelling on each parcel. To the extent the claimant desires industrial use of tax lot 3700, the claimant may file another claim establishing how land use regulations enacted or adopted after the claimant acquired the property restrict that desired use with the effect of reducing the property's fair market value.

[2] The claimant also indicated a desire to adjust the boundary between tax lot 100 and tax lot 200, to move the remaining approximately 12 acres of tax lot 100 to tax lot 200. Tax lot 100 currently consists of 52 acres, and tax lot

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 Moore Orchards, Inc.'s division of tax lot 3700 into sixty-four 1/4-acre parcels and its development of a dwelling on each parcel and division of tax lot 100 into two 20-acre parcels: applicable provisions of Statewide Planning Goals 3 (Agricultural Lands) and 14 (Urbanization), ORS 215 and Oregon Administrative Rules (OAR) 660, division 33, enacted or adopted after the claimant acquired each of the subject tax lots. These laws will not apply to the claimant only to the extent necessary to allow it to use the subject property for the use described in this report, and only to the extent that use was permitted when it acquired tax lot 3700 on January 4, 1965, and tax lots 100 and 200 on May 17, 1991. (See the complete recommendation in Section VI of this report.)

III. COMMENTS ON THE CLAIM

Comments Received

On August 18, 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 April 18, 2006, for processing under OAR 125, division 145. The claim identifies Hood River County zoning ordinances, Exclusive Farm Use

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200 consists of five acres. Although the claim identifies tax lot 200 as subject to the claim, the claim does not indicate any desired use of tax lot 200.

(EFU) zoning, ORS 215 and 197 and OAR 660, 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, Moore Orchards, Inc., acquired tax lot 3700 on January 4, 1965, and tax lots 100 and 200 on May 17, 1991, as reflected by warranty deeds included with the claim.[3] The Hood River County Assessor's Office confirms the claimant's current ownership of the subject property.

Conclusions

The claimant, Moore Orchards, Inc., is an "owner" of the subject property as that term is defined by ORS 197.352(11)(C). The claimant acquired tax lot 3700 on January 4, 1965, and tax lots 100 and 200 on May 17, 1991.

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: divide tax lot 3700 into sixty-four 1/4-acre parcels and develop a dwelling on each parcel and divide tax lot 100 into two 20-acre parcels (and adjust the boundary to move the remaining 12 acres of tax lot 100 to tax lot 200). It indicates that state and county land use laws prevent the desired use.[4]

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[3] Moore Orchards, Inc. is a domestic business corporation registered with the Oregon Secretary of State.

[4] The claimant summarily cited numerous state land use laws as applicable to this claim, but did not establish how the laws either apply to the claimant's desired use of the subject property or restrict its use with the effect of reducing its fair market value. On their face, most of the regulations either do not apply to the claimant's property

The claim is based generally on the applicable provisions of state law that require EFU zoning and restrict uses on EFU-zoned land. The claimant's property is 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 property is "agricultural land" as defined by Goal 3.[5] Goal 3 became effective on January 25, 1975, and required that agricultural lands as defined by Goal 3 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.)

Goal 14, which also became effective on January 25, 1975, would likely apply to the division of tax lot 3700 into parcels of less than two acres. Goal 14 generally requires that land outside of urban growth boundaries be used for rural uses.

The claimant acquired tax lot 3700 on January 4, 1965, prior to the adoption of the statewide planning goals and their implementing statutes and regulations.

At the time the claimant acquired tax lots 100 and 200 on May 17, 1991, the tax lots were subject to Hood River County's acknowledged EFU zone.[6] When the claimant acquired tax lots 100 and 200, the claimant's desired use of the tax lots would have been governed by the county's acknowledged EFU zone and the applicable provisions of ORS 215 then in effect.[7] In 1991,

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or do not restrict the use of the claimant's property in a manner that reduces its fair market value. This report addresses only those regulations that the department finds are applicable to and restrict the claimant's use of the subject property, based on the claimant's asserted desired use.

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

[6] Hood River County's EFU zone was acknowledged by the Commission for compliance with Goal 3 on January 11, 1985.

[7] After the county's comprehensive plan and land use regulations were acknowledged by the Commission as complying with the statewide planning goals, the goals and implementing rules no longer applied directly to individual local land use decisions. *Byrd v. Stringer*, 295 Or 311 (1983). However, statutory requirements continue to apply, and insofar as the state and local provisions are materially the same, the local provisions must be interpreted consistent with the substance of the goals and implementing rules. *Forster v. Polk County*, 115 Or App 475 (1992) and *Kenagy v. Benton County*, 115 Or App 131 (1992).

ORS 215.263 (1989 edition) required that divisions of land in EFU zones be "appropriate for the continuation of the existing commercial agricultural enterprise within the area" or not smaller than the minimum size in the county's acknowledged plan.

The claim does not establish whether or to what extent the claimant's desired division of tax lots 100 and 200 was allowed under the standards in effect when it acquired the property on May 17, 1991.

Conclusions

The current zoning requirements, minimum lot size and dwelling standards established pursuant to applicable provisions of Goals 3 and 14, ORS 215 and OAR 660, division 33, were all enacted or adopted after the claimant acquired tax lot 3700 in 1965 and tax lots 100 and 200 in 1991, and do not allow the desired division or residential development of the property. These laws restrict the use of tax lot 3700 relative to the uses allowed when the claimant acquired the property. However, the claim does not establish whether or to what extent the claimant's desired use of tax lot 100 complies with the standards for land divisions under Hood River County's EFU zone and comprehensive plan in effect when the claimant acquired tax lots 100 and 200 on May 17, 1991.

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 use that the claimant has identified. There may be other laws that currently apply to the claimant's use of the subject property, and that may continue to apply to the claimant's use of the property, that have not been identified in the claim. In some cases, it will not be possible to know which laws apply to a use of the subject property until there is a specific proposal for that use. When the claimant seeks a building or development permit to carry out a specific use, it may become evident that other state laws apply to that use.

3. Effect of Regulations on Fair Market Value

In order to establish a valid claim, ORS 197.352(1) requires that the land use regulations (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 $3,840,000 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 a land use consultant's analysis of the current value of the subject property compared to its value if divided and developed as desired by the claimant.

Conclusions

As explained in Section V.(1) of this report, the claimant is Moore Orchards, Inc. who acquired tax lot 3700 on January 4, 1965, and tax lots 100 and 200 on May 17, 1991. Under ORS 197.352, the claimant is due compensation for land use regulations that restrict the use of the subject property and have the effect of reducing its fair market value. Based on the findings and conclusions in Section V.(2) of this report, laws enacted or adopted since the claimant acquired the subject property restrict the claimant's desired use of the property. The claimant estimates

that the effect of the regulations on the fair market value of the subject property is a reduction of $3,840,000.

Without an appraisal or other documentation, it is not possible to substantiate the specific dollar amount by which the land use regulations have reduced the fair market value of the subject property. Nevertheless, based on the evidence in the record for this claim, the department determines that the fair market value of the subject property has been reduced to some extent as a result of land use regulations enforced by the Commission or the department.

4. Exemptions Under ORS 197.352(3)

ORS 197.352 does not apply to certain land use regulations. In addition, under ORS 197.352(3), certain types of laws are exempt from ORS 197.352.

Findings of Fact

The claim is based on state land use regulations that restrict the use of the subject property, including applicable provisions of Goals 3 and 14, ORS 215 and OAR 660, division 33, which Hood River County has implemented through its current EFU zone. All of these land use regulations were enacted or adopted after the claimant acquired tax lot 3700. With the exception of amendments enacted or adopted after May 17, 1991, these laws were in effect when the claimant acquired tax lots 100 and 200.

Conclusions

Without a specific development proposal for the subject property, it is not possible for the department to determine all the laws that may apply to a particular use of the property, or whether those laws may fall under one or more of the exemptions under ORS 197.352. It appears that none of the general statutory, goal and rule restrictions on division and development of tax lot 3700 were in effect when the claimant acquired it in 1965. As a result, these laws are not exempt under ORS 197.352(3)(E). It also appears that the general statutory, goal and rule restrictions on division and development of tax lots 100 and 200 are not exempt under ORS 197.352(3)(E) only to the extent they were enacted or adopted after the claimant acquired them on May 17, 1991. Provisions of Goals 3 and 14, ORS 215 and OAR 660 in effect when the claimant acquired tax lots 100 and 200 in 1991 are exempt under ORS 197.352(3)(E) and will continue to apply to the property.

Other laws in effect when the claimant acquired the subject property are exempt under ORS 197.352(3)(E) and will continue to apply to the claimant's use of the property. In addition, Hood River County notes that a portion of tax lot 3700 is located in a flood plain zone and portions of tax lots 3700 and 100 are in a stream protection zone. ORS 197.352(3)(B) specifically exempts regulations "restricting or prohibiting activities for the protection of public health and safety. . . ." To the extent the county's flood plain regulations are based on state law, these regulations would be exempt under ORS 197.352(3)(B).

There may be other laws that continue to apply to the claimant's use of the subject property that have not been identified in the claim. In some cases, it will not be possible to know which laws apply to a use of the subject property until there is a specific proposal for that use. When the

claimant seeks a building or development permit to carry out a specific use, it may become evident that other state laws apply to that use. In some cases, some of these laws may be exempt under ORS 197.352(3)(A) to (D).

This report addresses only those state laws that are identified in the claim, or that the department is certain apply to the subject property based on the 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 property.

VI. FORM OF RELIEF

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

Findings of Fact

Based on the findings and conclusions set forth in this report, laws enforced by the Commission or the department restrict 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 $3,840,000. However, because the claim does not provide an appraisal or other relevant evidence demonstrating that the land use regulations described in Section V.(2) reduce the fair market value of the subject property, a specific amount of compensation cannot be determined. In order to determine a specific amount of compensation due for this claim, it would also be necessary to verify whether or the extent to which the claimant's desired use of the subject property was allowed under the standards in effect when it 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 Moore Orchards, Inc. to use the subject property for a use permitted at the time it acquired tax lot 3700 on January 4, 1965, and tax lots 100 and 200 on May 17, 1991.

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 Moore Orchards, Inc.'s division of tax lot 3700 into sixty-four 1/4-acre parcels and its development of a dwelling on each parcel and division of tax lot 100 into two 20-acre parcels: applicable provisions of Goals 3 and 14 ORS 215 and OAR 660, division 33, enacted or adopted after the claimant acquired each of the subject tax lots. These laws will not apply to the claimant only to the extent necessary to allow it to use the subject property for the use described in this report, and only to the extent that use was permitted when it acquired tax lot 3700 on January 4, 1965, and only to the extent that use was permitted when it acquired tax lots 100 and 200 on May 17, 1991.

2. The action by the State of Oregon provides the state's authorization to the claimant to use subject property for the use described in this report, subject to the standards in effect on January 4, 1965, for tax lot 3700 and subject to the standards in effect on May 17, 1991, for tax lots 100 and 200. On May 17, 1991, tax lots 100 and 200 were subject to compliance with Goals 3 and 14 and OAR 660, division 5, as implemented by Hood River County's acknowledged EFU zone, and the applicable provisions ORS 215 then in effect.

3. To the extent that any law, order, deed, agreement or other legally enforceable public or private requirement provides that the subject property may not be used without a permit, license or other form of authorization or consent, the order will not authorize the use of the property unless the claimant first obtains that permit, license or other form of authorization or consent. Such requirements may include, but are not limited to: a building permit, a land use decision, a "permit" as defined in ORS 215.402 or 227.160, other permits or authorizations from local, state or federal agencies and restrictions on the use of the subject property imposed by private parties.

4. Any use of the subject property by the claimant under the terms of the order will remain subject to the following laws: (a) those laws not specified in (1) above; (b) any laws enacted or enforced by a public entity other than the Commission or the department; and (c) those laws not subject to ORS 197.352 including, without limitation, those laws exempted under ORS 197.352(3).

5. Without limiting the generality of the foregoing terms and conditions, in order for the claimant to use the subject property, it may be necessary for 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 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 September 22, 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.