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 Esther L. Stafford, Carmen Barnhardt, Delores and Terry Drake, CLAIMANTS	)))))	FINAL ORDER CLAIM NO. M129485

Claimants: Esther L. Stafford, Carmen Barnhardt, Delores and Terry Drake (the Claimants)

Property: Township 9S, Range 4E, Section 29DB, Tax lot 300

Township 9S, Range 4E, Section 29DA, Tax lot 1000

Township 9S, Range 4E, Section 29DB: Tax lot 1100

Marion County (the Property)

Claim: The demand for compensation and any supporting information received from the Claimants by the State of Oregon (the Claim).

Claimants 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 the claimants' division of the subject property into one 3.36-acre parcel, one 2.75-acre parcel and one 2.82-acre parcel, and to each claimant's development of a dwelling on the discrete parcel owned by that claimant: applicable provisions of Goal 4, ORS 215 and OAR 660, division 6, enacted or adopted after November 14, 1984. These land use regulations will not apply to the claimants only to the extent necessary to allow them to use the subject property for the use described in this report, and only to the extent that use was permitted when they each acquired a portion of the property on November 14, 1984.[1]

[1] See footnote No. 2 for limitations on the relief provided herein.

2. The action by the State of Oregon provides the state's authorization to the claimants to use the subject property for the use described in this report, subject to the standards in effect on November 14, 1984. On that date, the property was subject to compliance with Goal 4 and OAR 660, division 6, as implemented through Marion County's acknowledged forest zone.

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 claimants first obtain 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 claimants 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 claimants to use the subject property, it may be necessary for them 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 claimants 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 claimants.

This Order is entered by the Manager for the Measure 37 Services Division of the DLCD as a final order of DLCD and the Land Conservation and Development Commission under ORS 197.352, OAR 660-002-0010(8), and OAR 125, division 145, and by the 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.

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

Michael Morrissey, Manager
DLCD, Measure 37 Services Division
Dated this 4th day of December, 2006.

FOR the DEPARTMENT OF ADMINISTRATIVE SERVICES:

David Hartwig, Administrator
DAS, State Services Division
Dated this 4th day of December, 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

December 4, 2006

STATE CLAIM NUMBER:	M129485
NAME OF CLAIMANT:	Esther L. Stafford Carmen Barnhardt Delores and Terry Drake
MAILING ADDRESS:	39770 SE 4th Street Mill City, Oregon 97360
PROPERTY IDENTIFICATION:	Township 9S, Range 4E Section 29DB: Tax lot 300 Section 29DA: Tax lot 1000 Section 29DB: Tax lot 1100 Marion County
OTHER CONTACT INFORMATION:	Frank Walker & Associates PO Box 7170 Salem, Oregon 97303
DATE RECEIVED BY DAS:	June 12, 2006
180-DAY DEADLINE:	December 9, 2006

I. SUMMARY OF CLAIM

The claimants, Esther Stafford, Carmen Barnhardt and Delores and Terry Drake, seek compensation in the amount of $525,000 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 claimants desire compensation or the right to divide the subject property into one 3.36-acre parcel, one 2.75-acre parcel and one 2.82-acre parcel and to develop a dwelling on each parcel.[1] The subject

[1] The subject property is composed of three tax lots that were created by deed on November 14, 1984, without partition approval. Tax lot 300 consists of 3.63 acres and is owned by Esther Stafford. Tax lot 1000 consists of 2.82 acres and is owned by Delores and Terry Drake. Tax lot 1100 consists of 2.75 acres and is owned by Carmen Barnhardt. Although the claim does not request division of the subject property as described herein, the department finds that without the right to divide the subject property consistent with the unauthorized division that occurred by deed in 1984, the individual claimants' desire to develop a dwelling on each tax lot will be hindered. Furthermore, although the acreage of each parcel to be created by division of the subject property is based on existing data for each respective tax lot, the department acknowledges that the actual acreage may vary slightly from that stated herein. It is contemplated that the actual division will be consistent with the actual acreage of each existing tax lot.

property is located at 35940 North Santiam Highway, near Gates, in Marion 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 the claimants' division of the subject property into one 3.36-acre parcel, one 2.75-acre parcel and one 2.82-acre parcel, and to each claimant's development of a dwelling on the discrete parcel owned by that claimant: applicable provisions of Statewide Planning Goal 4 (Forest Lands), ORS 215 and Oregon Administrative Rules (OAR) 660, division 6, enacted or adopted after November 14, 1984. These laws will not apply to the claimants only to the extent necessary to allow them to use the subject property for the use described in this report, and only to the extent that use was permitted when they each acquired a portion of the property on November 14, 1984.[2] (See the complete recommendation in Section VI. of this report.)

III. COMMENTS ON THE CLAIM

Comments Received

On September 14, 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.

[2] Although the department's determination not to apply certain laws to the claimants' division of the subject property as described above applies to all claimants, the department's determination not to apply certain laws to the development of a dwelling on each tax lot, as discussed in more detail below, applies only to each claimant individually as to said claimant's respective tax lot. (See footnote No. 1.)

Findings of Fact

This claim was submitted to DAS on June 12, 2006, for processing under OAR 125, division 145. The claim identifies Marion County's zoning ordinance; ORS 197.175(1) and 280; Goal 4 and OAR 660-006-0027 and -0029 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."[3]

Findings of Fact

Claimant Esther Stafford acquired a 3.36-acre portion of the subject property (now known as tax lot 300) on November 14, 1984, as reflected by a warranty deed included with the claim. Claimants Carmen Barnhardt acquired a 2.75-acre portion of the subject property (now known as tax lot 1100) on November 14, 1984, as reflected by a warranty deed included with the claim. Claimants Delores and Terry Drake acquired a 2.82-acre portion of the subject property (now known as tax lot 1000) on November 14, 1984, as reflected by a warranty deed included with the claim. The Marion County Assessor's Office confirms the claimants' current ownership of the respective tax lots.

Conclusions

The claimants, Esther Stafford, Carmen Barnhardt and Delores and Terry Drake are each "owners" of a discrete portion of the subject property as that term is defined by ORS 197.352(11)(C), as of November 14, 1984.

---

[3] "The department acknowledges receipt of the claimants' comments to the Draft Staff Report dated November 13, 2006. In the comment, the claimants take exception with the department's determination of the claimants' date of acquisition of the subject property as November 14, 1984, as set forth above. The claimants' comment suggests that the department should determine the claimants' date of acquisition to be December 20, 1983, the date of death of Eda A. Stafford. The record before the department is insufficient to support a determination that title to the subject property vested in any of the claimants as of the date of death of Eda A. Stafford under ORS 114.215. Ester L. Stafford is not the heir or issue of Eda A. Stafford under ORS 114.215 and ORS 112.045. The remaining claimants have failed to demonstrate that they are the heir or issue of Eda A. Stafford under ORS 114.215 and ORS 112.045."

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 claimants' 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 claimants or a family member acquired the property.

Findings of Fact

The claim indicates that claimants desire to jointly divide the subject property into three parcels, a 3.36-acre parcel, a 2.75-acre parcel and a 2.82-acre parcel and to individually develop a dwelling on each parcel, and that state and county land use laws prevent the desired use.[4]

The claim is based generally on the applicable provisions of state law that require forest zoning and restrict uses on forest-zoned land. The claimants' property is zoned by Marion County as Timber Conservation (TC) as required by Goal 4, in accordance with ORS 215 and OAR 660, division 6, because the claimants' property is "forest land" under Goal 4. Goal 4 became effective on January 25, 1975, and requires that forest land be zoned for forest use (see statutory and rule history under OAR 660-015-0000(4)). The forest land administrative rules (OAR 660, division 6) became effective on September 1, 1982, and ORS 215.705 to 215.755 and 215.780 became effective on November 4, 1993 (Chapter 792, Oregon Laws 1993). OAR 660-006-0026 and 660-006-0027 were amended on March 1, 1994, to implement those statutes.

The claimants acquired the subject property on November 14, 1984. At that time, the property was subject to Marion County's acknowledged forest zone.[5] When the claimants acquired the subject property, the desired division and development of the property would have been governed by the applicable provisions of Goal 4 and OAR 660, division 6, as implemented through the county's acknowledged forest zone.[6]

Conclusions

The current zoning requirements, minimum lot size and dwelling standards established by Goal 4, ORS 215.705 to 215.755 and 215.780 and OAR 660-006-0026 and 660-006-0027 were all enacted or adopted after the claimants acquired the subject property in 1984 and do not allow the claimants' desired division or development of the property. However, the claim does not

---

[4] The claimants summarily cite numerous state land use laws as applicable to this claim, but do not establish how the laws either apply to the claimants' desired use of the subject property or restrict its use with the effect of reducing its fair market value. On their face, most of these regulations either do not apply to the claimants' property or do not restrict the claimants' desired use of the property with the effect of reducing its fair market value. This report addresses only those regulations that the department finds are applicable to and restrict the claimants' use of the subject property, based on the claimants' asserted desired use.

[5] Marion County's forest zone was acknowledged by the Commission for compliance with Goal 4 on December 29, 1983.

[6] 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, insofar as the state and local provisions implement the requirements of the goals and rules, 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).

establish whether or to what extent the claimants' desired use of the subject property complies with the standards for land divisions and development in Marion County's acknowledged forest zone and Comprehensive Plan in effect when the claimants acquired the property on November 14, 1984.

This report addresses only those state laws that are identified in the claim, or that the department is certain apply to the subject property, based on the uses that the claimants have identified. There may be other laws that currently apply to the claimants' use of the subject property, and that may continue to apply to the claimants' 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 claimants seek building or development permits 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 $525,000 as the reduction in the subject property's fair market value due to the regulations that restrict the claimants' desired use of the property. This amount is based on the claimants' analysis of the combined value of the tax lots were development of a dwelling on each tax lot permitted as described herein.

Conclusions

As explained in Section V.(1) of this report, the claimants are Esther Stafford, Carmen Barnhardt and Delores and Terry Drake who each acquired a discrete portion of the subject property on November 14, 1984. Under ORS 197.352, the claimants are 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 claimants acquired the subject property restrict the claimants' desired use of the property. The claimants estimate that the effect of the land use regulations on the fair market value of the subject property is a reduction of $525,000.

Without an appraisal or other documentation, and without verification of whether or the extent to which the claimants' desired use of the subject property was allowed under the standards in effect when they acquired the property, it is not possible to substantiate the specific dollar amount by which the land use regulations have reduced the fair market value of the 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 Goal 4, ORS 215 and OAR 660, division 6, which Marion County has implemented through its current TC zone. With the exception of amendments adopted after November 14, 1984, Goal 4 and OAR 660, division 6, were in effect when the claimants acquired the subject property.

Conclusions

Without a specific development proposal for the subject property, it is not possible for the department to determine all the laws that may apply to a particular use of the property, or whether those laws may fall under one or more of the exemptions under ORS 197.352. It appears that the general statutory, goal and rule restrictions on residential division and development of the subject property are not exempt under ORS 197.352(3)(E) only to the extent they were enacted or adopted after the claimants acquired the property. Provisions of Goal 4 and OAR 660, division 6, in effect when the claimants acquired the subject property in 1984 are exempt under ORS 197.352(3)(E) and will continue to apply to the property.

Other laws in effect when the claimants acquired the subject property are exempt under ORS 197.352(3)(E) and will also continue to apply to the claimants' use of the property. In addition, the department notes that ORS 215.730 and OAR 660, division 6, including OAR 660-006-0029, include standards for siting dwellings in forest zones. These provisions include fire protection standards for dwellings and for surrounding forest lands. ORS 197.352(3)(B) specifically exempts regulations "restricting or prohibiting activities for the protection of public health and safety, such as fire and building codes. . . ." Accordingly, siting standards for dwellings in forest zones in ORS 215.730 and OAR 660, division 6, are exempt under ORS 197.352(3)(B).

There may be other laws that continue to apply to the claimants' 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 claimants seek a building or development permit to carry out a specific use, it may become evident that other state laws currently apply to that use and may continue to apply to that use. In some cases, some of these laws may be exempt under ORS 197.352(3)(A) to (D).

This report addresses only those state laws that are identified in the claim, or that the department is certain apply to the subject property based on the uses that the claimants have 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 claimants should be aware that the less information they have 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 their use of the subject property.

VI. FORM OF RELIEF

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

Findings of Fact

Based on the findings and conclusions set forth in this report, laws enforced by the Commission or the department restrict the claimants' 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 $525,000. 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 claimants' desired use of the property was allowed under the standards in effect when they 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 Esther Stafford, Carmen Barnhardt and Delores and Terry Drake to use the subject property for a use permitted at the time they acquired the property on November 14, 1984.

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 the claimants' division of the subject property into one 3.36-acre parcel, one 2.75-acre parcel and one 2.82-acre parcel, and to each claimant's development of a dwelling on the discrete parcel owned by that claimant: applicable provisions of Goal 4, ORS 215 and OAR 660, division 6, enacted or adopted after November 14, 1984. These land use regulations will not apply to the claimants only to the extent necessary to allow them to use the subject property for the use described in this report, and only to the extent that use was permitted when they each acquired a portion of the property on November 14, 1984.[7]

[7] See footnote No. 2 for limitations on the relief provided herein.

2. The action by the State of Oregon provides the state's authorization to the claimants to use the subject property for the use described in this report, subject to the standards in effect on November 14, 1984. On that date, the property was subject to compliance with Goal 4 and OAR 660, division 6, as implemented through Marion County's acknowledged forest zone.

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 claimants first obtain 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 claimants 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 claimants to use the subject property, it may be necessary for them 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 claimants 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 claimants.

VII. COMMENTS ON THE DRAFT STAFF REPORT

The department issued its draft staff report on this claim on November 13, 2006. OAR 125-145-0100(3), provided an opportunity for the claimants or the claimants' authorized agent and any third parties who submitted comments under OAR 125-145-0080 to submit written comments, evidence and information in response to the draft staff report and recommendation. No comments were received.