Oregon
Theodore R. Kulongoski, Governor

Department of Land Conservation and Development
635 Capitol Street NE, Suite 150
Salem, Oregon 97301-2524
Phone: (503) 373-0050
First Floor/Coastal Fax: (503) 378-6033
Second Floor/Director's Office Fax: (503) 378-5518
Third Floor/Measure 37 Fax: (503) 378-5318
Web Address: http://www.oregon.gov/LCD

August 23, 2007

To: Interested Persons

From: Lane Shetterly, Director

Re: Ballot Measure 37 (ORS 197.352) Claim Number M130988

Claimant: O.K. Enterprises

Enclosed, in regard to the above-referenced claim for compensation under Ballot Measure 37 (ORS 197.352), is the Final Staff Report and Recommendation of the Department of Land Conservation and Development, and the Final Order.

This Final Staff Report and Recommendation and the Final Order constitute the final decision on this claim. No further action will be taken on this matter.

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 O.K. Enterprises, CLAIMANT	))))	FINAL ORDER CLAIM NO. M130988

Claimant: O.K. Enterprises (the Claimant)

Property: Township 1S, Range 2E, Section 21CB: tax lot 4800
Township 1S, Range 2E, Section 21CC: tax lot 2100
City of Portland (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 O.K. Enterprises' 1) development of tax lot 2100 with several large manufacturing structures, multiple large retail structures, a retail strip or an industrial park and signage; and 2) division of tax lot 4800 into three parcels and development of a dwelling on each resulting undeveloped parcel: applicable provisions of Goal 5 and OAR 660, divisions 16, and 23, adopted after the claimant acquired each subject tax lot. These land use regulations 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 2100 on April 1, 1978, and tax lot 4800 on June 28, 1983.

2. The action by the State of Oregon provides the state's authorization to the claimant to use the subject property for the use described in this report, subject to the standards in effect on April 1, 1978, for tax lot 2100 and on June 28, 1983, for tax lot 4800. In 1978, the property was subject

to applicable provisions of Goal 5, and in 1983, the property was subject to the applicable provisions of Goal 5 and OAR 660, division 16, 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 subject 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 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 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.

6. Nothing in this report or the state's final order for this claim constitutes any determination of ownership by the State of Oregon as to submerged or submersible lands, or as to public rights to the use of waters of the state.

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 23rd day of August, 2007.

FOR the DEPARTMENT OF ADMINISTRATIVE SERVICES:

Janice Dean, SSD Administrator
DAS, State Services Division
Dated this 23rd day of August, 2007.

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

August 23, 2007

STATE CLAIM NUMBER:	M130988
NAME OF CLAIMANT:	O.K. Enterprises
MAILING ADDRESS:	8205 SE Harney Street, Unit 1 Portland, Oregon 97266
PROPERTY IDENTIFICATION:	Township 1S, Range 2E Section 21CB: tax lot 4800 Section 21CC: tax lot 2100 City of Portland
OTHER CONTACT INFORMATION:	Kristian Roggendorf O'Donnell and Clark, LLP 1650 NW Naito Parkway, Suite 302 Portland, Oregon 97209
DATE RECEIVED BY DAS:	November 21, 2006
DEADLINE FOR FINAL ACTION:[1]	May 14, 2008

I. SUMMARY OF CLAIM

The claimant, O.K. Enterprises, seeks compensation in the amount of $3,470,000 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 1) develop tax lot 2100 with several large manufacturing structures, multiple large retail structures, a retail strip or an industrial park and signage; and 2) divide tax lot 4800 into three parcels and develop a dwelling on each resulting undeveloped parcel. The subject property is located near Harney Street, Crystal Springs Boulevard and 82nd Avenue, in the City of Portland, in Multnomah County. (See claim.)

[1] ORS 197.352, as originally enacted, required that final action on claims made under Measure 37 be made within 180 days of the date the claim was filed. In response to the large volume of claims filed in late 2006, the Oregon legislature passed House Bill 3546, which became effective on May 10, 2007. This legislation increased the amount of time state and local governments have to take final action on Measure 37 claims filed on or after November 1, 2006, by 360 days, to a total of 540 days.

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 O.K. Enterprises' 1) development of tax lot 2100 with several large manufacturing structures, multiple large retail structures, a retail strip or an industrial park and signage; and 2) division of tax lot 4800 into three parcels and development of a dwelling on each resulting undeveloped parcel: applicable provisions of Statewide Planning Goal 5 (Open Spaces, Scenic and Historic Areas and Natural Resources) and OAR 660, divisions 16, and 23, adopted after the claimant acquired each subject tax lot. These land use regulations 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 2100 on April 1, 1978, and tax lot 4800 on June 28, 1983. (See the complete recommendation in Section VI. of this report.)

III. COMMENTS ON THE CLAIM

Comments Received

On June 12, 2007, 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, three written comments were received in response to the 15-day notice.

The comments do not address whether the claim meets the criteria for relief under ORS 197.352. Comments concerning the effects a use of the subject 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. (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 November 21, 2006, for processing under OAR 125, division 145. The claim identifies provisions of the City of Portland's environmental regulations and zoning, ORS 92, 197, 215 and 227 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, O.K. Enterprises,[2] acquired tax lot 2100 on April 1, 1978, and acquired tax lot 4800 on June 28, 1983, as reflected by contracts included with the claim.[3] The Multnomah County Assessor's Office confirms the claimant's current ownership of the subject property.

Conclusions

The claimant, O.K. Enterprises, is an "owner" of the subject property as that term is defined by ORS 197.352(11)(C), as of April 1, 1978, for tax lot 2100 and as of June 28, 1983, for tax lot 4800.

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' 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.

---

[2] O.K. Enterprises is an assumed business name registered with the Oregon Secretary of State.

[3] The claimant asserts that it acquired tax lot 2100 on March 15, 1978, the date of the contract included with the claim; however, the terms of that contract state that the claimant was not entitled to possession of tax lot 2100 until April 1, 1978.

Findings of Fact

The claim indicates that the claimant desires to 1) develop tax lot 2100 with several large manufacturing structures, multiple large retail structures, a retail strip or an industrial park and signage; and 2) divide tax lot 4800 into three parcels and develop a dwelling on each resulting undeveloped parcel. The claim indicates that the current zoning prohibits the desired use.[4]

The subject property is within the City of Portland. The subject property is currently zoned Employment General (EG2) with an Environmental Conservation and Protection overlay. The EG2 zone is generally for areas of the city that are reserved for industrial uses and for areas that have a mix of uses with a strong industrial orientation.

In general, the zoning of a particular property within an urban growth boundary (UGB) is determined by the city or county with land use jurisdiction over the property. In this case, however, the subject property is subject to the City of Portland's Environmental Conservation and Protection overlay zone as implemented through the Johnson Creek Protection Plan, which was applied to the property in 1991 and acknowledged to implement Goal 5.[5] Under Goal 5, as adopted and effective on January 25, 1975, local governments were required to inventory land and adopt programs to protect natural resources and to conserve scenic, historic and open space resources. Prior to adoption of local government programs, the requirements of Goal 5 were directly applicable to individual properties through the land use application process. Specifically, Goal 5 required applicants to establish how the natural resources, scenic and historic areas and open space resources on individual properties would be protected through the proposed development. Under OAR 660, division 16, requirements and application procedures for complying with Goal 5 became effective on June 29, 1981. OAR 660, division 23, established additional procedures and requirements for complying with Goal 5, and became effective on September 1, 1996.

The claim does not establish whether or the extent to which the claimant's desired development of the subject property complies with the standards of Goal 5 in effect when it acquired tax lot 2100 in 1978, and the standards of Goal 5 and OAR 660, division 16, in effect when it acquired tax lot 4800 in 1983. The claim also does not establish the extent to which Goal 5 and OAR 660, divisions 16, and 23, restrictions or procedures implemented after the claimant acquired the property restrict the claimant's desired development of the property.

Conclusions

The current zoning requirements established by amendments to Goal 5 and OAR 660, divisions 16, and 23, were adopted after O.K. Enterprises acquired the subject property and do not allow the desired division of the property. These regulations may restrict the use of the subject

---

[4] The claimant summarily lists numerous state land use laws as applicable to this claim, but does 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 or do not restrict the use of the claimant's 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 claimant's desired use of the subject property, based on the claimant's description of its desired use.

[5] The City of Portland's Environmental Conservation and Protection overlay zone was acknowledged by the Commission for compliance with Goal 5 on June 25, 1993.

property zoned relative to uses permitted when the claimant acquired the property. However, the claim does not establish whether or to what extent the claimant's desired use of the subject property complies with the standards for development under Goal 5, applicable and in effect when the claimant acquired tax lot 2100 on April 1, 1978, or under Goal 5 and OAR 660, division 16, applicable and in effect when the claimant acquired tax lot 4800 on June 28, 1983. Nor does the claim establish whether or the extent to which the requirements or procedures of Goal 5 and OAR 660, divisions 16, and 23, adopted after the claimant acquired the property restrict the claimant's desired use of the property.

This report addresses only those state laws that are identified in the claim, or that the department is certain apply to the 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 regulation(s) (described in Section V.(2) of this report) must have "the effect of reducing the fair market value of the property, or any interest therein."

Findings of Fact

The claim includes an estimate of $3,470,000 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 the claimant's assessment of the subject property's value.

Conclusions

As explained in Section V.(1) of this report, the claimant is O.K. Enterprises, which acquired tax lot 2100 on April 1, 1978, and tax lot 4800 on June 28, 1983. 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 the 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 may restrict its 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 $3,470,000.

Without an appraisal or other documentation, and without verification of whether or the extent to which the claimant's desired use of the subject property has been restricted by land use regulations enacted or adopted after it 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 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 Goal 5 and OAR 660, divisions 16, and 23, which the City of Portland has implemented through its Environmental Conservation and Protection overlay zone. With the exception of amendments adopted after 1978 and 1983, these land use regulations were in effect when the claimant acquired the subject property.

Conclusions

Without a specific development proposal for the subject property, it is not possible for the department to determine all the laws that may apply to a particular use of the property, or whether those laws may fall under one or more of the exemptions under ORS 197.352. It appears that the statutory, goal and rule restrictions on residential 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 claimant acquired tax lot 2100 on April 1, 1978, and tax lot 4800 on June 28, 1983. Provisions of Goal 5 and OAR 660, division 16, in effect when the claimant acquired the subject property in 1978 and 1983 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 its use of the property. In addition, ORS 197.352(3)(B) specifically exempts regulations "restricting or prohibiting activities for the protection of public health and safety. . . ." To the extent that provisions of the City of Portland's Environmental Conservation and Protection overlay zone are necessary to comply with the standards of Goal 5 for public health and safety, those provisions 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 property that have not been identified in the claim. In some cases, it will not be possible to know which laws apply to a use of property until 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 its 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 one or more laws that restrict the use of the property in a manner that reduces its fair market value. In lieu of compensation, the department may choose to not apply the law in order to allow the present owner to carry out a use of the property permitted at the time the present owner acquired the property. The Commission, by rule, has directed that if the department determines a claim is valid, the Director of the department must provide only non-monetary relief unless and until funds are appropriated by the legislature to pay claims.

Findings of Fact

Based on the findings and conclusions set forth in this report, laws enforced by the Commission or the department restrict the claimant's desired use of the subject property. The claim asserts that existing state land use regulations enforced by the Commission or the department have the effect of reducing the fair market value of the subject property by $3,470,000. 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 O.K. Enterprises to use the subject property for a use permitted at the time it acquired tax lot 2100 on April 1, 1978, and tax lot 4800 on June 28, 1983.

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 O.K. Enterprises' 1) development of tax lot 2100 with several large manufacturing structures, multiple large retail structures, a retail strip or an industrial park and signage; and 2) division of tax lot 4800 into three parcels and development of a dwelling on each resulting undeveloped parcel: applicable provisions of Goal 5 and OAR 660, divisions 16, and 23, adopted after the claimant acquired each subject tax lot. These land use regulations 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 2100 on April 1, 1978, and tax lot 4800 on June 28, 1983.

2. The action by the State of Oregon provides the state's authorization to the claimant to use the subject property for the use described in this report, subject to the standards in effect on April 1, 1978, for tax lot 2100 and on June 28, 1983, for tax lot 4800. In 1978, the property was subject to applicable provisions of Goal 5, and in 1983, the property was subject to the applicable provisions of Goal 5 and OAR 660, division 16, 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 subject 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 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 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.

6. Nothing in this report or the state's final order for this claim constitutes any determination of ownership by the State of Oregon as to submerged or submersible lands, or as to public rights to the use of waters of the state.

VII. COMMENTS ON THE DRAFT STAFF REPORT

The department issued its draft staff report on this claim on July 18, 2007. 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.