

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)
BALLOT MEASURE 37 (CHAPTER)
1, OREGON LAWS 2005) OF)
Janyce Andre, CLAIMANT)

FINAL ORDER
CLAIM NO. M 118338

Claimant: Janyce Andre (the Claimant)

Property: Tax Lots 1700, 1701, 1702, 1707 and 1708, T.3S, R.4E, Section 25, W.M.,
Clackamas County

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 Ballot Measure 37 (2004) (Oregon
Laws 2005, Chapter 1) (hereafter, Measure 37). 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 Measure 37, the State of Oregon will not apply the following
laws to Janyce Andre division and development of the subject property: Statewide Planning
Goals 3, 4, and 14, ORS 215, and OAR 660, division 6, enacted after the claimant acquired each
of the subject tax lots. These land use regulations will not apply to Ms. Andre's use of her
property only to the extent necessary to allow the claimant a use permitted at the time she
acquired each of the subject tax lots, as follows: tax lot 1701 on October 21, 1969; tax lot 3501
on September 19, 1970; tax lot 1702 on June 2, 1975; tax lots 1706, 1707 and 1708 on June 1,
1979; and tax lot 1700 on October 4, 1994.
2. The action by the State of Oregon provides the state's authorization to the claimant to use tax
lots 1701 and 3501 subject to the standards in effect on October 21, 1969, and
September 19, 1970. The action by the State of Oregon also provides the state's authorization to
the claimant to use tax lot 1702 subject to the standards in effect on June 2, 1975, tax lots 1706,
1707 and 1708 subject to the standards in effect on June 1, 1979, and tax lot 1700 subject to the

standards in effect on October 4, 1994. On June 2, 1975, and June 1, 1979, the property was subject to provisions of ORS 215 and Goals 3, 4 and 14 then in effect. On October 4, 1994, the property was subject to the current laws in effect, as described in Section V.(2). The department acknowledges that the relief to which the claimant is entitled under Measure 37 will not allow the claimant to use tax lot 1700 in a manner set forth in her claim. The claimant will also continue to be subject to ORS 215.730 and those provisions of Goal 4 and its implementing rules in OAR 660, division 6, related to siting standards for dwellings for the protection of public health and safety and to any other laws that are exempt under Section 3(B) of Measure 37.

3. To the extent that any law, order, deed, agreement or other legally enforceable public or private requirement provides that the 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 ORS 227.160, other permits or authorizations from local, state or federal agencies, and restrictions on the use of the property imposed by private parties.

4. Any use of the 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 Measure 37 including, without limitation, those laws exempted under section (3) of the Measure.

5. Without limiting the generality of the foregoing terms and conditions, in order for the claimant to use the property, it may be necessary for her to obtain a decision under Measure 37, 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 Measure 37, from a local public entity that has jurisdiction to enforce a land use regulation applicable to a use of the property by the claimant.

This Order is entered by the Deputy Director of the DLCD as a final order of DLCD and the Land Conservation and Development Commission under Measure 37, 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 Measure 37, OAR 125, division 145, and ORS 293.

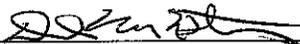
FOR DLCD AND THE LAND CONSERVATION
AND DEVELOPMENT COMMISSION:
Lane Shetterly, Director



George Naughton, Deputy Director
DLCD

Dated this 12th day of October, 2005.

FOR the DEPARTMENT OF ADMINISTRATIVE
SERVICES:



David Hartwig, Administrator
DAS, State Services Division

Dated this 12th day of October, 2005.

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 293.316: Judicial review under ORS 293.316 may be obtained by filing a petition for review within 60 days from the service of this order. Judicial review under ORS 293.316 is pursuant to the provisions of ORS 183.482 to the Court of Appeals.
2. 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 and the Circuit Court in the county in which you reside.
3. A cause of action under Oregon Laws 2005, chapter 1 (Measure 37 (2004)): A present owner of the property, or any interest therein, may file a cause of action in the Circuit Court for the county where the property is located, if a land use regulation continues to apply to the subject property more than 180 days after the present owner made a written demand for compensation.

(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.”

**BALLOT MEASURE 37 (CHAPTER 1, OREGON LAWS 2005)
CLAIM FOR COMPENSATION**

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

October 12, 2005

STATE CLAIM NUMBER: M118338

NAME OF CLAIMANT: Janyce Andre

MAILING ADDRESS: 38203 SE Porter Road
Estacada, Oregon 97023

PROPERTY IDENTIFICATION: Township 3S, Range 4E, Section 25
Tax lots 1700, 1701, 1702, 1706, 1707 and
1708
38203 and 38377 SE Porter Road

Township 3S, Range 4E, Section 26
Tax lot 3501
33688 SE Drivers Road
Clackamas County

OTHER INTEREST IN PROPERTY: Janyce Andre Trust, Larry R. Andre, and
Larry R. Andre Trust
38203 SE Porter Road
Estacada, Oregon 97023

DATE RECEIVED BY DAS: April 21, 2005

180-DAY DEADLINE: October 18, 2005

I. SUMMARY OF CLAIM

The claimant, Janyce Andre, seeks compensation in the amount of \$2,262,151 for the reduction in fair market value as a result of certain 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 subject 35.82-acre property into approximately 1-acre to 1.5-acre parcels for sale. The subject property is located at 38203 and 38377 SE Porter Road, and 33688 SE Drivers Road, east of Estacada, in Clackamas 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 Janyce Andre's division of the property for residential development: Statewide Planning Goals 3 (Agricultural Lands), 4 (Forest Lands), and 14 (Urbanization), ORS 215, and applicable OAR 660, divisions 6, and 33. These laws will not apply to the claimant only to the extent necessary to allow Ms. Andre a use of each tax lot permitted on the date she acquired each tax lot, as follows: tax lot 1701 on October 21, 1969, tax lot 3501 on September 19, 1970; tax lot 1702 on June 2, 1975, tax lots 1706, 1707 and 1708 on June 1, 1979, and tax lot 1700 on October 10, 1994. The department acknowledges that the relief to which the claimant is entitled under Measure 37, will not allow the claimant to use tax lot 1700 in a manner set forth in her claim. (See the complete recommendation in Section VI. of this report.)

III. COMMENTS ON THE CLAIM

Comments Received

On May 11, 2005, 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

Ballot Measure 37, Section 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 the Measure (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 the Measure (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 21, 2005, for processing under OAR 125, division 145. The claim identifies Clackamas County's zoning (Agricultural and Forest (AG/F) District) and state laws (specifically ORS 215.705 and 215.780(1)(c) and OAR 660-006-0026(1)(a) and 660-006-0027(1)), as laws that restrict the division of the property

and are the basis for the claim. Only laws that were enacted prior to December 2, 2004, the effective date of Measure 37 are the basis for this claim. (See citations of statutory and administrative rule history of the Oregon Revised Statutes and Oregon Administrative Rules.)

Conclusions

The claim has been submitted within two years of December 2, 2004; the effective date of Measure 37, based on land use regulations adopted prior to December 2, 2004, and is therefore timely filed.

V. ANALYSIS OF CLAIM

1. Ownership

Ballot Measure 37 provides for payment of compensation or relief from specific laws for “owners” as that term is defined in the Measure. Ballot Measure 37, Section 11(C) defines “owner” as “the present owner of the property, or any interest therein.”

Findings of Fact

The claimant, Janyce Andre, has the following ownership interest in the seven tax lots that are the subject of this claim:

Janyce Andre acquired Tax lot 1700 by Warranty Deed from her father Kenneth Adamson on October 10, 1994. Transactions related to tax lot 1700 are as follows:

Acquisition Date	Document	Transfer to Current Owners
Oct. 10, 1994	Warranty Deed Doc# 97-023830 (Recorded 4/02/97)	Adamson to Janyce Andre (1/2 interest) and Brett Andre (1/2 interest)
January 14, 2003	Bargain & Sale Deed	Brett Andre to Larry Andre Trust (undivided ¼ interest)
January 14, 2003	Bargain & Sale Deed	Brett Andre to Janyce Andre Trust (undivided ¼ interest)

Tax lot 1701 was acquired by Janyce and Larry Andre on October 21, 1969, by a Bargain and Sale Deed (Doc# 69-22340, Recorded October 23, 1969).

Tax lot 1702 was acquired by Janyce and Larry Andre on June 2, 1975, by a Warranty Deed (Doc# 75-13976, Recorded June 2, 1975). The claim states they began purchasing the property in February 1971, with the deed being transferred to them in June 1975. However, no documentation was included in the claim to verify their having an interest in tax lot 1702 before June 1975.

Tax lots 1706, 1707 and 1708 were acquired by Janyce and Larry Andre on June 1, 1979, by Warranty Deed (Doc# 79-22795, Recorded June 4, 1979). The claim states they began

purchasing the property in May 1973, with the deed being transferred to them in June 1979. However, no documentation was included in the claim to verify their having an interest in these tax lots before June 1979.

Janyce Andre acquired tax lot 3501 on September 19, 1970. Transactions related to tax lot 3501 are as follows:

Acquisition Date	Document	Transfer to Current Owner
September 19, 1970 (Recorded October 30, 1970)	Warranty Deed Doc # 70-24536	Hughes to Janyce and Larry Andre
June 8, 1993	Bargain and Sale Deed Doc # 93-40820	Larry and Janyce Andre to Janyce Andre (1/2 interest)
June 8, 1993	Bargain and Sale Deed Doc # 93-40822	Janyce and Larry Andre to Larry Andre (1/2 interest)
June 8, 1993	Bargain and Sale Deed Doc # 93-40821	Janyce Andre to Janyce Andre Trust (1/2 interest)
June 8, 1993	Bargain and Sale Deed Doc # 93-40823	Larry Andre to Larry Andre Trust (1/2 interest)

Janyce Andre's father, Kenneth Adamson, acquired tax lots 1700, 1701, 1702, 1706, 1707 and 1708 (along with the land now described as tax lots 1703 and 1704 and 1705 not included in this claim) on April 24, 1952, from the State of Oregon by a Bargain and Sale Deed (Doc # 5151, Recorded April 28, 1952).¹

Recent Clackamas County Tax Records document that the claimant, Janyce Andre, is the current owner of tax lot 1700, that Janyce Andre Trustee is the current owner of tax lots 1701, 1702, 1706, 1707, and 1708.

The Clackamas County's Assessor's Official Record of Description of Real Property shows that the claimant, Janyce Andre, has had a continuous ownership interest in tax lot 1700 since 1994; that the claimant and Larry Andre have had a continuous ownership interest in tax lot 1701 since 1969, and in tax lot 1702 since 1975; that the claimant and Larry Andre have had a continuous ownership interest in tax lots 1706, 1707 and 1708 since 1979; and that the claimant and Larry Andre have had a continuous ownership interest in tax lot 3501 since 1970.

In 1993, Janyce and Larry Andre transferred interests in tax lot 1700 to the Janyce Andre Trust and to the Larry Andre Trust. In 1993, Janyce and Larry Andre transferred interests in tax lot 3501 to the Janyce Andre Trust and to the Larry Andre Trust. The trust documents provided by the claimant certify that the Janyce Andre Trust and Larry Andre Trust are revocable trusts. The transfers of property into revocable trusts do not constitute a change in ownership for purposes of Measure 37. Ms. Andre retains an ownership interest in the subject properties.

¹ The claim states the family began purchasing the property in 1941. However, there is no information in the claim to verify the earlier date. This is not relevant to the disposition of this claim because there was no zoning in effect in 1941, or in 1952.

The claimant's husband, Larry Andre, acquired interest in the subject properties the same time as the claimant and retains interest in several of the properties. However, there is nothing in the record to indicate that he is a claimant for purposes of this Measure 37 claim.

Conclusions

The claimant, Janyce Andre, is an "owner" of the subject properties, as that term is defined by Section 11(C) of Ballot Measure 37. Janyce Andre, acquired interest in tax lot 1700 on October 10, 1994; tax lot 1701 on October 21, 1969; tax lot 1702 on June 2, 1975; tax lots 1706, 1707, and 1708 on June 1, 1979; and tax lot 3501 on September 19, 1970.

Kenneth Adamson, Ms. Andre's father, is a "family member" as that term is defined by Section 11(A) of Measure 37 as of April 28, 1952, when he acquired tax lots 1700, 1701, 1702, 1706, 1707 and 1708.

2. The Laws that are the Basis for this Claim

In order to establish a valid claim, Section 1 of Ballot Measure 37 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 states that state statutes and administrative rules "restrict the use of this property because they limit land division, lot size and number of dwellings allowed."

The claim is based, in part, on Clackamas County's current Agriculture/Forest (AG/F) District and the applicable provisions of state law that require such zoning. The claimant's property is zoned AG/F, which is a mixed agricultural and forest zone, as required by Statewide Planning Goal 4 (Forest Lands), and the implementing provisions of OAR 660-006-0050 (effective February 5, 1990,) and subsequently amended on March 1, 1994, to comply with the provisions of HB 3661 (chapter 792, Oregon laws 1993).

Under OAR 660-006-0050, all the uses permitted under Statewide Goals 3 and 4 are allowed except that for dwellings, either the Goal 3 or 4 standards are applicable based on the predominant use of the tract on January 1, 1993. No information was provided in the claim showing the predominant use of the subject property on January 1, 1993. Soils information show the property being suitable for both farm and forest uses.² Depending on the predominate use of

² The subject property is composed of Alspaugh silt loam (2B) and Cottrell silty clay loam (24B) soils (NRCS Capability Class III) with a site index for Douglas-fir that ranges from 143 to 159 (site index of 150) and from 155 to 170 (site index of 160), respectively. For 2B soils, the vegetation in areas not cultivated is mainly Douglas-fir, red alder, salal, brackenfern, and swordfern. For 24B soils, the native vegetation in areas not cultivated is mainly Douglas-fir, red alder, western red cedar, salal, Oregon-grape, and blackberry (Soil Survey of Clackamas County, November 1981, shows property located on Sheet #30. The information on 2B and 24B soils is found on pages 17, 18 and 43).

the property on January 1, 1993, the property is subject to either the requirements for dwellings under exclusive farm use zoning required by Statewide planning Goal 3 and OAR 660, division 33, or the forest zone provisions required Goal 4 and OAR 660, division 6. This includes the land division and dwelling standards asserted by the claimant as restricting the use of the subject property. However, no analysis of whether any of the tax lots can be further divided or approved for dwellings under the applicable farm or forest provisions has been provided.

For land divisions, OAR 660-006-0055 authorizes the creation of new parcels based on the standards applicable to farm or forest zones, which implement the 80-acre minimum lot size specified in ORS 215.780. Under OAR 660-006-0055, the claimant's property cannot be divided into parcels smaller than 80 acres as may have been possible when the claimant's family acquired tax lots 1700, 1701, 1702, 1706, 1707 and 1708 in 1952, or when the claimant acquired tax lot 3501 in 1970. However, no analysis of whether any of these tax lots can be divided under ORS 215.263(4) has been provided.

Statewide Planning Goal 14 would also likely apply to the division of the claimant's property into parcels of less than 2 acres in size. Goal 14 generally requires that land outside of urban growth boundaries be used for rural uses. Goal 14 became effective on January 25, 1975.

The claimant's family acquired tax lots 1700, 1701, 1702, 1706, 1707 and 1708 in 1952, and the claimant acquired tax lot 3501 in 1970. At those times, the Statewide Planning Goals and implementing statutes and rules had not been adopted.

Conclusions

The zoning requirements, minimum lot size and dwelling standards established by Statewide Planning Goals 4 (Forest Lands) and 14 (Urbanization) and provisions applicable to land zoned for mixed agricultural and forest use under the County's AG/F Zone as required by OAR 660-006-0050 and 0055 relating to land divisions and dwellings adopted since the claimant's family acquired tax lots 1700, 1701, 1702, 1706, 1707 and 1708 in 1952, and since the claimant acquired tax lot 3501 in 1970, restrict the use of these tax lots relative to uses allowed when the claimant's family acquired tax lots 1700, 1701, 1702, 1706, 1707 and 1708 in 1952, and when the claimant acquired tax lot 3501 in 1970.

This report addresses only those state laws that are identified in the claim, or that the department is certain apply to the property based on the uses that the claimant has identified. There may be other laws that currently apply to the claimant's use of the 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 what 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.

3. Effect of Regulations on Fair Market Value

In order to establish a valid claim, Section 1 of Ballot Measure 37 requires that any land use regulation 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 \$2,262,151 as the reduction in the property’s fair market value due to current regulations.³ This estimate is based on the real market value of approximately 1- to 1.5-acre lots in the Garfield area of Estacada according to the County Assessor’s office, the average size of those lots applied to the subject property, multiplied by the average value of the sampled lots, and minus the value of the property under current restrictions.

Conclusions

As explained in section V.(1) of this report, the claimant’s father, Kenneth Adamson, acquired tax lots 1700, 1701, 1702, 1706, 1707 and 1708 in 1952, and the claimant, Janyce Andre, acquired tax lot 3501 in 1970. Under Ballot Measure 37, Janyce Andre is due compensation for land use regulations that restrict the use of the subject property in a manner that reduces its fair market value. Based on the findings and conclusions in section V.(2) of this report, laws adopted since the claimant or claimant’s family acquired the property restrict division of the subject property. The claimant estimates the reduction in value due to the restrictions to be \$2,262,151.

Without an appraisal other documentation, it is not possible to substantiate the specific dollar amount the claimant demands for compensation. Nevertheless, based on the submitted information, the department determines that it is more likely than not that there has been some reduction in the fair market value of the subject property as a result of land use regulations enforced by the Commission or the department.

4. Exemptions under Section 3 of Measure 37

Ballot Measure 37 does not apply to certain land use regulations. In addition, under Section 3 of the Measure, certain types of laws are exempt from the Measure.

Findings of Fact

The claim is based on state land use regulations that restrict the use of the property relative to what would have been allowed when the claimant’s family acquired most of the property in 1952, and when Janyce Andre acquired tax lot 3501 in 1970. These provisions include Statewide Planning Goal 3 (Agricultural Lands), Goal 4 (Forest Lands), and applicable provisions of ORS 215 and OAR 660, division 6, which Clackamas County has implemented through its

³ For tax lot 3501, consisting of 11.36 acres, the claimant estimates that under current restrictions the reduction in the fair market value is \$754,946. For the other tax lots, consisting of 24.46 acres, the claimant estimates that the reduction in the fair market value is \$1,507,205.

AG/F District. None of these laws appear to be exempt under Section 3(E) of Ballot Measure 37, which exempts laws in effect when the claimant or claimant's family acquired the property.

The department notes that ORS 215.730 and OAR 660, division 6, include standards for the siting of dwellings in forest zones. This provision includes fire protection standards for dwelling and surrounding forest lands.⁴ Section 3(B) of Measure 37, specifically, exempts regulations "restricting or prohibiting activities for the protection of public health and safety, such as fire and building codes..." Siting standards for dwellings in forest zones in ORS 215.730 and in Goal 4 and its implementing rules (OAR 660, division 6) are exempt under Section (3) of Measure 37.

Conclusions

Without a specific development proposal for the property, it is not possible for the department to determine what laws may apply to a particular use of the property, or whether those laws may fall under one or more of the exemptions under Measure 37. It does appear that the general statutory, goal and rule restrictions on residential development and use of land zoned for mixed farm and forest uses apply to the claimant's use of the property, and for the most part these laws are not exempt under section 3(E) of Measure 37.

Laws in effect when the claimant's family and the claimant acquired the property are exempt under Section 3(E) of Measure 37, and will continue to apply to the claimant's use of the property. In addition, the siting standards for dwellings in forest zones are exempt under Section 3(B) of Measure 37, and will also continue to apply to the claimant's use of the property. 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 what 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. And, in some cases, some of these laws may be exempt under subsections 3(A) to 3(D) of Measure 37.

This report addresses only those state laws that are identified in the claim, or that the department is certain apply to the property based on the uses that the claimant has identified. Similarly, this report only addresses the exemptions provided for under Section (3) of Measure 37 that are clearly applicable given the information provided to the department in the claim. The claimant should be aware that the less information she 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 her use of the property.

VI. FORM OF RELIEF

⁴ It is noted that although it has not been determined whether the provisions of Goal 3 or Goal 4 apply to the use of the subject property, the applied AG/F District requires that all dwellings meet the County's fire-safety siting standards (AG/F District, Section 407.09.B and Section 406.09).

Section 1 of Measure 37 provides for payment of compensation to an owner of private real property if the Commission or the department has enforced a law that restricts the use of the property in a manner that reduces its fair market value. In lieu of compensation, the department may choose to not apply the law in order to allow the present owner to carry out a use of the property permitted at the time the current owner acquired the property. The Commission, by rule, has directed that if the department determines a claim is valid, the Director 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 ability to divide and develop the property for residential use. The claim asserts the laws enforced by the Commission or department reduce the fair market value of the subject property by \$2,262,151. However, because the claim does not provide an appraisal or other specific documentation for how the specified restrictions reduce the fair market value of the property, a specific amount of compensation cannot be determined. Nevertheless, based on the record for this claim, the department acknowledges that the laws on which the claim is based likely have reduced the fair market value of the property to some extent.

No funds have been appropriated at this time for the payment of claims. In lieu of payment of compensation, Ballot Measure 37 authorizes the department to modify, remove or not apply all or parts of certain land use regulations to allow Janyce Andre to use the subject property for a use permitted at the time she acquired an interest in tax lot 1700 on October 10, 1994; tax lot 1701 on October 21, 1969; tax lot 1702 on June 2, 1975; tax lots 1706, 1707 and 1708 on June 1, 1979; and tax lot 3501 on September 19, 1970.

The claimant acquired tax lots 1701 and 3501 prior to the establishment of the Statewide Planning Goals and their implementing statutes and rules. On the acquisition dates of October 21, 1969, and September 19, 1970, there was no County zoning that applied to tax lots 1701 and 3501.

When the claimant acquired an interest in tax lots 1702 on June 2, 1975, and tax lots 1706, 1707 and 1708 on June 1, 1979, these tax lots were not zoned by the county. They were first zoned on August 23, 1979, as Transitional Timber (TT-20), and then rezoned to AG/F on August 25, 1994 to meet the provisions of HB 3661.⁵ Clackamas County's TT-20 District was not acknowledged by the Commission until 1981. Until the Commission acknowledged the County's land use regulations, the use of these tax lots was subject to any applicable County's ordinances and the statewide planning goals.⁶ The laws that define what the claimant was permitted to do at the time she acquired tax lot 1702 on June 2, 1975, and tax lots 1706, 1707 and 1708 on

⁵ Source: Clackamas County Staff Report on the Andre claim, dated August 10, 2005, County File # ZC087-05.

⁶ Commission Continuance Order, issued December 31, 1981 and department Staff Report, dated October 23, 1981.

June 1, 1979, include the provisions of Goals 3 or 4 and ORS 215 applicable at the time the lots were acquired.⁷

Statewide Planning Goals 3 and 4 became applicable to the claimant's use of tax lots 1702, 1706, 1707, and 1708 on January 25, 1975, and applied to legislative land use decisions and some quasi-judicial land use decisions, on a site-specific basis, before the Commission acknowledged local plans.⁸ Goal 3, as adopted in 1975, required that agricultural lands be "preserved and zoned for EFU pursuant to ORS 215." Goal 4, as adopted in 1975, required that forest lands be designated for forest uses. Depending on whether tax lots 1702, 1706, 1707 and 1708 would have been subject to Goal 3 or to Goal 4 when acquired, it would have been subject to either EFU zoning pursuant to ORS 215 or forest zoning adequate to retain forest lands for forest uses.

If subject to Goal 3, the state standards for a division of land without acknowledgment of the local zoning required that the created lots or parcels be of a size "appropriate for the continuation of the existing commercial agricultural enterprise in the area" (see Statewide Planning Goal 3). Further, ORS 215.263 (1977 edition) required that all land divisions subject to EFU zoning comply with the legislative intent in ORS 215.243 (Agricultural Land Use Policy). Thus, the opportunity to divide tax lots 1702, 1706, 1707 and 1708 when acquired by the claimant on June 2, 1975, and June 1, 1979, was limited by Goal 3 to new lots or parcels that were (1) "appropriate for the continuation of the existing commercial agricultural enterprise in the area," and (2) shown to be consistent with the ORS 215.243 legislative intent.

At the time of claimant's acquisition of tax lot 1702 on June 2, 1975, and tax lots 1706, 1707 and 1708 on June 1, 1979, farm dwellings were allowed if they were determined to be "customarily provided in conjunction with farm use" under ORS 215.213(1)(e) (1973 and 1977 editions),⁹ and

⁷ Except for OAR 660-006-015(3) (effective September 1, 1982), prior to 1993, there was no requirement for determining whether the provisions of Goal 3 or Goal 4 applied to this tax lot at the time of acquisition. To determine whether Goal 3 or Goal 4 applied to uses or divisions of this tax lot the provision of OAR 660-006-0050 could be used as guidance.

⁸ See *Sunnyside Neighborhood Association v. Clackamas County*, 280 Or 569 (1977); *1000 Friends of Oregon v. Benton County*, 32 Or App 413 (1978); *Jurgenson v. Union County*, 42 Or App 505 (1979); *Alexanderson v. Polk County*, 289 Or 427, *rev denied*, 290 Or 137 (1980); and *Perkins v. City of Rajneeshpuram*, 300 Or 1 (1985). After the Commission acknowledged the county's plan and land use regulations, the Statewide Planning Goals and implementing rules no longer directly applied to local land use decisions (see *Byrd v. Stringer*, 295 Or 311 (1983)). However, insofar as state and local provisions are materially the same in substance, the applicable statutes and rules must be interpreted and applied by the county in making its decision (*Forster v. Polk County*, 115 Or App 475 (1992) and *Kenagy v. Benton County*, 115 Or App 131 (1992)). In addition, state statutes continue to apply to the use of property in the county directly, even after acknowledgment.

⁹ Under ORS 215.213, a farm dwelling may be established on agricultural land only if the farm use to which the dwelling relates exists (*Matteo v. Polk County*, 11 Or LUBA 259, 263 (1984), *affirmed without opinion* 70 Or App 179 (1984), and *Newcomer v. Clackamas County*, 92 Or App 174, *modified* 94 Or App 33 (1988)). Guidance on the application of the statutory standards for farm and non-farm dwellings in EFU zones can be found in Commission rules (OAR 660, Division 5 adopted July 21, 1982, amended June 7, 1986, and repealed August 7, 1993).

non-farm dwellings were subject to ORS 215.213(3) (1973 and 1977 editions).¹⁰ Other uses were authorized and governed by the applicable provisions under Goal 3 and ORS 215.213.

If subject to Goal 4, the state standards required local land use regulations to “conserve forest lands for forest uses.” Specifically, Goal 4 only allowed land divisions that would protect commercial forest lands for commercial forest uses. Dwellings in forest zones can only be allowed if found to be “necessary and accessory” to one of the enumerated forest uses as defined in Goal 4.¹¹

The opportunity to divide tax lots 1702, 1706, 1707 and 1708 and to place residential dwellings on the property when the claimant acquired these tax lots on June 2, 1975, and on June 1, 1979, was limited to land divisions that were consistent with Statewide Planning Goal 4.¹²

No information has been provided showing that the division or placement of dwellings desired by the claimant complies with the minimum lot size standard for new parcels or standards for dwellings under either Goals 3 or 4 in effect at the time the claimant acquired her interest in tax lot 1702 on June 2, 1975, and tax lots 1706, 1707 and 1708 on June 1, 1979.

The claimant acquired tax lot 1700 on October 10, 1994, after the effective date of the statutory provisions that restrict the creation of new parcels in the Willamette Valley under ORS 215.263, and the restriction in the Willamette Valley on the approval of dwellings under ORS 215.284 (Chapter 797, Oregon Laws 1993 (HB 3661)). These provisions are described in Section V.(2) of this report. The department acknowledges that the relief to which the claimant is entitled under Measure 37, will not allow the claimant to use tax lot 1700 in a manner set forth in her claim.

Conclusion

Based on the record, the department recommends that the claim be approved, subject to the following terms:

¹⁰ When determining whether land is “generally unsuitable for the production of farm crops and livestock” under ORS 215.213(3), the entire parcel or tract must be evaluated rather than a portion thereof. *Smith v. Clackamas County* 313 Or 519 (1992).

¹¹ Goal 4 prohibited uses that were neither enumerated by Goal 4 as permissible uses for forest lands as well as those that were not necessary and accessory to an enumerated forest use, *Lamb v. Lane County*, 7 Or LUBA 137 (1983). Dwellings in forestlands were required to be “necessary and accessory” to show that such dwellings comply with the Goal 4 requirement that local land use regulations must “conserve forest lands for forest uses 1000 *Friends v. LCDC/Curry County*, 301 Or 447 (1986). A dwelling that may “enhance” forest uses is not “necessary and accessory” to a forest use to the extent required by Goal 4, *1000 Friends of Oregon v. LCDC/Lane County*, (1988).

¹² For guidance, the Goal 4 provisions were interpreted under OAR 660, division 6, effective September 1, 1982, and in *Lamb v. Lane County*, 7 Or LUBA 137 (1983), *1000 Friends v. LCDC/Curry County*, 301 Or 447 (1986), and *1000 Friends of Oregon v. LCDC/Lane County*, (1988).

1. In lieu of compensation under Measure 37, the State of Oregon will not apply the following laws to Janyce Andre division and development of the subject property: Statewide Planning Goals 3, 4, and 14, ORS 215, and OAR 660, division 6, enacted after the claimant acquired each of the subject tax lots. These land use regulations will not apply to Ms. Andre's use of her property only to the extent necessary to allow the claimant a use permitted at the time she acquired each of the subject tax lots, as follows: tax lot 1701 on October 21, 1969; tax lot 3501 on September 19, 1970; tax lot 1702 on June 2, 1975; tax lots 1706, 1707 and 1708 on June 1, 1979; and tax lot 1700 on October 4, 1994.

2. The action by the State of Oregon provides the state's authorization to the claimant to use tax lots 1701 and 3501 subject to the standards in effect on October 21, 1969, and September 19, 1970. The action by the State of Oregon also provides the state's authorization to the claimant to use tax lot 1702 subject to the standards in effect on June 2, 1975, tax lots 1706, 1707 and 1708 subject to the standards in effect on June 1, 1979, and tax lot 1700 subject to the standards in effect on October 4, 1994. On June 2, 1975, and June 1, 1979, the property was subject to provisions of ORS 215 and Goals 3, 4 and 14 then in effect. On October 4, 1994, the property was subject to the current laws in effect, as described in Section V.(2). The department acknowledges that the relief to which the claimant is entitled under Measure 37 will not allow the claimant to use tax lot 1700 in a manner set forth in her claim. The claimant will also continue to be subject to ORS 215.730 and those provisions of Goal 4 and its implementing rules in OAR 660, division 6, related to siting standards for dwellings for the protection of public health and safety and to any other laws that are exempt under Section 3(B) of Measure 37.

3. To the extent that any law, order, deed, agreement or other legally enforceable public or private requirement provides that the 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 ORS 227.160, other permits or authorizations from local, state or federal agencies, and restrictions on the use of the property imposed by private parties.

4. Any use of the 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 Measure 37 including, without limitation, those laws exempted under section (3) of the Measure.

5. Without limiting the generality of the foregoing terms and conditions, in order for the claimant to use the property, it may be necessary for her to obtain a decision under Measure 37, 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 Measure 37, from a local public entity that has jurisdiction to enforce a land use regulation applicable to a use of the property by the claimant.

VII. COMMENTS ON THE DRAFT STAFF REPORT

The department issued its draft staff report on this claim on September 27, 2005. 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. Comments received have been taken into account by the department in the issuance of this final report.