

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 ) FINAL ORDER  
COMPENSATION UNDER ORS 197.352 ) CLAIM NO. M 118737  
(BALLOT MEASURE 37) OF )  
Lois Ann Bain, CLAIMANT )

Claimant: Lois Ann Bain (the Claimant)

Property: Township 3S, Range 2E, Section 34, Tax lot 1100 and 900,  
Clackamas County (the property)

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

Claimant submitted the Claim to the State of Oregon under ORS 197.352. Under OAR 125-145-0010 *et seq.*, the Department of Administrative Services (DAS) referred the Claim to the Department of Land Conservation and Development (DLCD) as the regulating entity. This order is based on the record herein, including the Findings and Conclusions set forth in the Final Staff Report and Recommendation of DLCD (the DLCD Report) attached to and by this reference incorporated into this order.

ORDER

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

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

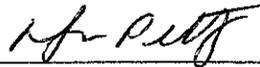
FOR DLCD AND THE LAND  
CONSERVATION AND DEVELOPMENT  
COMMISSION:



Lane Shetterly, Director  
DLCD

Dated this 23<sup>rd</sup> day of May, 2006.

FOR the DEPARTMENT OF  
ADMINISTRATIVE SERVICES:



Dugan Petty, Deputy Administrator  
DAS, State Services Division

Dated this 23<sup>rd</sup> day of May, 2006.

**NOTICE OF RIGHT TO APPEAL OR OTHER JUDICIAL RELIEF**

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

1. Judicial review under ORS 183.484: Judicial review under ORS 183.484 may be obtained by filing a petition for review within 60 days from the service of this order. A petition for judicial review under ORS 183.484 may be filed in the Circuit Court for Marion County or the Circuit Court in the county in which you reside.
2. A cause of action under ORS 197.352 (Measure 37 (2004)): If a land use regulation continues to apply to the subject property more than 180 days after the present owner of the property has made written demand for compensation under ORS 197.352<sup>1</sup>, 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)

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<sup>1</sup> By order of the Marion County Circuit Court, "all time lines under Measure 37 [were] suspended indefinitely" on October 25, 2005. This suspension was lifted on March 13, 2006 by the court. As a result, a period of 139 days (the number of days the time lines were suspended) has been added to the 180-day time period under ORS 197.352(6) for claims that were pending with the state on October 25, 2005.

**ORS 197.352 (BALLOT MEASURE 37) CLAIM FOR COMPENSATION**  
**OREGON DEPARTMENT OF LAND CONSERVATION AND DEVELOPMENT**  
**Final Staff Report and Recommendation**

May 23, 2006

**STATE CLAIM NUMBER:** M118737

**NAME OF CLAIMANT:** Lois Ann Bain

**MAILING ADDRESS:** 14941 South Carus Road  
Oregon City, Oregon 97045

**PROPERTY IDENTIFICATION:** Township 3S, Range 2E, Section 34  
Tax lot 1100 and 900  
Clackamas County

**DATE RECEIVED BY DAS:** July 11, 2005

**180-DAY DEADLINE:** May 26, 2006<sup>1</sup>

**I. SUMMARY OF CLAIM**

The claimant, Lois Bain, seeks compensation in the minimum amount of \$1 million for the reduction in fair market value as a result of land use regulations that are alleged to restrict the use of certain private real property. The claimant desires compensation or the right to divide the approximately 47-acre property into approximately 5-acre parcels and to develop a dwelling on each parcel. The subject property is located at 14941 South Carus Road, near Oregon City, 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 not valid because neither the Land Conservation and Development Commission (the Commission) nor the department has enforced laws that restrict the claimant's use of private real property relative to uses permitted at the time she acquired the subject property on June 11, 1974. (See the complete recommendation in Section VI. of this report.)

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<sup>1</sup> This date reflects 180 days from the date the claim was submitted, as extended by the 139 days that all timelines under Measure 37 were suspended during the pendency of *MacPherson v. Dept. of Admin. Svcs.*, 340 Or 117 (2006).

### **III. COMMENTS ON THE CLAIM**

#### **Comments Received**

On September 15, 2005, pursuant to Oregon Administrative Rules (OAR) 125-145-0080, the Oregon Department of Administrative Services (DAS) provided written notice to the owners of surrounding properties. According to DAS, one written comment was received in response to the 10-day notice. The comment is relevant to whether a state law restricts the claimant's use of the subject property and whether the restriction of the claimant's use of the subject property reduces the fair market value of the property. The comment has been considered by the department in preparing this report.

### **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 July 11, 2005, for processing under OAR 125, division 145. The claim identifies the property's Exclusive Farm Use (EFU) zoning 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, Lois Bain, acquired the subject property on June 11, 1974 as reflected by a contract deed included with the claim. Information from the Clackamas County Assessor's Office confirms the claimant's current ownership of the subject property.

## **Conclusions**

The claimant, Lois Bain, is an "owner" of the subject property as that term is defined by ORS 197.352(11)(C) as of June 11, 1974.

## **2. The Laws That are the Basis for This Claim**

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

## **Findings of Fact**

The claim indicates that the claimant desires to divide the approximately 47-acre property into approximately 5-acre parcels and to develop a dwelling on each parcel, which is not allowed under the property's current zoning.

The claim is based generally on Clackamas County's current EFU zone and the applicable provisions of state law that require such zoning. The claimant's property is zoned EFU as required by Goal 3 in accordance with ORS 215 and OAR 660, division 33, because the claimant's property is "agricultural land" as defined by Goal 3.<sup>2</sup> Goal 3 became effective on January 25, 1975, and required agricultural land defined by the Goal to be zoned EFU pursuant to ORS 215.

Current land use regulations, particularly ORS 215.263, 215.284 and 215.780 and OAR 660, division 33, enacted or adopted pursuant to Goal 3, prohibit the division of EFU-zoned land into parcels less than 80 acres and establish standards for the development of dwellings on existing proposed parcels on that land.

ORS 215.780 establishes an 80-acre minimum size for the creation of new lots or parcels in EFU zones and became effective on November 4, 1993 (Chapter 792, Oregon Laws 1993). ORS 215.263 (2005 edition) establishes standards for the creation of new parcels for non-farm uses and dwellings allowed in an EFU zone.

Land that is zoned EFU and that is "high-value" farm land under Goal 3, ORS 215.710 and OAR 660, division 33, is subject to additional restrictions based on certain provisions of ORS 215 and OAR 660, division 33.

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<sup>2</sup> The claimant's property is "agricultural land" because it contains Natural Resources Conservation Service (NRCS) Class I-IV soils.

OAR 660-033-0135 (applicable to farm dwellings) became effective on March 1, 1994, and interprets the statutory standard for a primary dwelling in an EFU zone under ORS 215.283(1)(f). OAR 660-033-0130(4) (applicable to non-farm dwellings) became effective on August 7, 1993, and was amended to comply with ORS 215.284 on March 1, 1994. The Commission subsequently adopted amendments to comply with House Bill 3326 (Chapter 704, Oregon Laws 2001, effective on January 1, 2002), which were effective on May 22, 2002. (See citations of administrative rule history for OAR 660-033-0100, -0130 and -0135.)

The claimant acquired the subject property on June 11, 1974, after the adoption of Senate Bill 100 (Chapter 80, Oregon Laws 1973, effective on October 5, 1973) but before the adoption of the statewide planning goals, effective on January 25, 1975.

During the period between October 5, 1973, and January 25, 1975, ORS 197.175(1) and 197.280 (1973 editions) required, in addition to any local plan or zoning provisions, that cities and counties exercise their planning responsibilities in accordance with the interim land use planning goals set forth in ORS 215.515 (1973 edition). *Petersen v. Klamath Falls*, 279 Or 249 (1977); see also, *Meeker v. Board of Comm'rs*, 287 Or 665 (1979) (review of a subdivision is an exercise of planning responsibilities requiring application of the goals); *State Housing Council v. Lake Oswego*, 48 Or App. 525 (1981) (noting that while “[l]and use planning responsibility is not defined in ORS 197, the Supreme Court has interpreted that term as including annexation approvals, *subdivision approvals* [emphasis added] and partition approvals”) citing *Petersen*, *Meeker* and *Alexanderson v. Polk County*, 285 Or 427 (1980). The claimant’s desired use includes subdivision of her land. If the claimant had sought to create that use in 1974, as a matter of law, the use would have been subject to the interim planning goals at ORS 215.515.<sup>3</sup>

The following interim goals are directly applicable to this claim: “To preserve the quality of the air, water and *land* [emphasis added] resources of the state”; “To conserve prime farm lands for the production of crops”; “To provide for the orderly and efficient transition from rural to urban land use”; “To protect life and property in areas subject to floods, landslides and other natural disasters”; “To provide and encourage a safe, convenient and economic transportation system including all modes of transportation: Air, water, rail, highway and mass transit and recognizing differences in the social costs in the various modes of transportation”; and “To develop a timely, orderly and efficient arrangement of public facilities and services to serve as a framework for urban and rural development.” ORS 215.515 (1973 edition).

One of the interim goals was to “conserve prime farm lands for the production of crops.” Soil types are a determinant of prime farm land. One hundred percent (47 acres) of the soils on the

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<sup>3</sup> The “interim” land use goals are set forth in ORS 215.515(1)(a) to (j) (1973 edition) as follows: (a) “To preserve the quality of the air, water and land resources of the state,” (b) “To conserve open space and protect natural and scenic resources,” (c) “To provide for the recreational needs of citizens of the state and visitors,” (d) “To conserve prime farm lands for the production of crops,” (e) “To provide for the orderly and efficient transition from rural to urban land use,” (f) “To protect life and property in areas subject to floods, landslides and other natural disasters,” (g) “To provide and encourage a safe, convenient and economic transportation system including all modes of transportation: Air, water, rail, highway and mass transit and recognizing differences in the social costs in the various modes of transportation,” (h) “To develop a timely, orderly and efficient arrangement of public facilities and services to serve as a framework for urban and rural development,” (i) “To diversify and improve the economy of the state” and (j) “To ensure that the development of properties within the state is commensurate with the character and the physical limitations of the land.” ORS 215.515 (1973 edition).

47-acre property are rated as "prime" by the Natural Resource Conservation Service (NRCS). According to the Oregon Department of Agriculture, Oregon has only a limited supply of soils rated "prime" (8.0 percent of all agricultural land) and a very limited supply of soils rated Class 1 (0.9 percent of all agricultural land). The property appears to be at least five miles from an urban growth boundary, with out the availability of urban level services nearby.

The claim does not establish that the approval of nine lots or parcels of five acres each for residential use complies with the interim planning goals. To the contrary, and in particular, the desired division and development of 47 acres of predominantly "prime," farm land would not "conserve prime farm lands for the production of crops" as required by the interim goals at the time the claimant acquired the subject property in 1974.

### **Conclusions**

The current zoning requirements, minimum lot size and dwelling standards established by Goal 3, ORS 215 and OAR 660, division 33, were all enacted or adopted since the claimant acquired the subject property in 1974, and do not allow the desired division of the property into parcels less than 80 acres in size or allow the approval of dwellings. However, on June 11, 1974, the "interim" land use goals set forth in ORS 215.515 required the conservation of prime farm land for the production of crops. One hundred percent of the claimant's 47-acre property is composed of very limited farm land soils rated as "prime." The subject property could not be divided for residential use under the "interim" land use goals applicable in 1974.

Based on the facts of this claim, dividing the approximately 47-acre property into approximately nine parcels of five acres each for residential use does not "conserve prime farm lands for the production of crops," "preserve the quality of the . . . land resources of the state," "provide for an orderly and efficient transition from rural to urban land use," "protect life and property in areas subject to floods" or provide for "a timely, orderly and efficient arrangement of public facilities and services" as required by ORS 215.515 (1973 edition). Thus, the requested use would not have been permitted under the standards in effect when the claimant acquired the subject property. Therefore, the department determines that the current land use regulations applicable to the subject property do not restrict its use relative to the uses allowed when the claimant acquired the property in 1974.

### **3. Effect of Regulations on Fair Market Value**

In order to establish a valid claim, ORS 197.352(1) 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 \$1 million as the reduction in the subject property's fair market value due to current regulations. This amount is based on the claimant's estimate of nine 5-acre homesites.

## **Conclusions**

As explained in section V.(2) of this report, current land use regulations do not restrict the use of the subject property relative to the uses allowed when the claimant acquired the property in 1974. Land use regulations enacted or adopted by the state since the claimant acquired the subject property relating to the desired division and development of the property do not have “the effect of reducing the fair market value of the property, or any interest therein” relative to the uses allowed in 1974 because the claimant could not divide the subject property when it was acquired in 1974. Thus, the claimant is not due compensation under ORS 197.352.

### **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 3, ORS 215 and OAR 660, division 33, which Clackamas County has implemented through its current EFU zone. With the exception of provisions of ORS 215, including the interim planning goals set forth at ORS 215.515 in effect when the claimant acquired the subject property on June 11, 1974, these land use regulations were not in effect when the claimant acquired the subject property.

## **Conclusions**

It appears that the general statutory, goal and rule restrictions on residential development and use of farm land apply to the claimant’s use of the subject property and with the exception of applicable provisions of ORS 215 in effect when the claimant acquired the property, these laws are not exempt under ORS 197.352(3)(E). However, as discussed in Section V.(2) of this report, these laws do not restrict the use of the subject property relative to uses permitted when the claimant acquired the property on June 11, 1974, because the claimant’s desired use was not allowed under the provisions of ORS 215 in effect on that date.

## **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 current 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.

Based on the current record, the claimant Lois Ann Bain is not entitled to relief under ORS 197.352. Department staff recommends that this claim be denied because neither the Commission nor the department has enforced laws that were enacted or adopted after the

claimant acquired the 47-acre property that restrict the claimant's use of private real property relative to the uses permitted at the time she acquired the property on June 11, 1974.

## **VII. COMMENTS ON THE DRAFT STAFF REPORT**

The department issued its draft staff report on this claim on May 3, 2006. OAR 125-145-0100(3), provided an opportunity for the claimant or the claimant's authorized agent and any third parties who submitted comments under OAR 125-145-0080 to submit written comments, evidence and information in response to the draft staff report and recommendation. Comments received have been taken into account by the department in the issuance of this final report.