Oregon
Theodore R. Kulongoski, Governor

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April 17, 2007

To: Interested Persons

From: Lane Shetterly, Director

Re: Ballot Measure 37 (ORS 197.352) Claim Number M130400

Claimant: Doris V. Johnson

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 Doris V. Johnson, CLAIMANT	))))	FINAL ORDER CLAIM NO. M130400

Claimant: Doris V. Johnson (the Claimant)

Property: Township 17S, Range 3W, Section 9, Northern two-thirds of tax lot 800, Lane County (the Property)

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

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

ORDER

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

1. In lieu of compensation under ORS 197.352, the State of Oregon will not apply the following laws to Doris Johnson's division of the approximately 10-acre property into ten 1-acre parcels or to her development of a dwelling on each parcel: applicable provisions of Goals 5 and 14, and OAR 660, divisions 14 and 16. These land use regulations will not apply to the claimant only to the extent necessary to allow her to use the subject property for the use described in this report, and only to the extent that use was permitted when she acquired the property on November 10, 1954.

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 November 10, 1954.

3. To the extent that any law, order, deed, agreement or other legally enforceable public or private requirement provides that the subject property may not be used without a permit, license or other form of authorization or consent, the order will not authorize the use of the property unless the claimant first obtains that permit, license or other form of authorization or consent.

Such requirements may include, but are not limited to: a building permit, a land use decision, a "permit" as defined in ORS 215.402 or 227.160, other permits or authorizations from local, state or federal agencies and restrictions on the use of the subject property imposed by private parties.

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

5. Without limiting the generality of the foregoing terms and conditions, in order for the claimant to use the subject property, it may be necessary for her to obtain a decision under ORS 197.352 from a city and/or county and/or metropolitan service district that enforces land use regulations applicable to the property. Nothing in this order relieves the claimant from the necessity of obtaining a decision under ORS 197.352 from a local public entity that has jurisdiction to enforce a land use regulation applicable to a use of the subject property by the claimant.

This Order is entered by the 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 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
DLCD
Dated this 19th day of April, 2007.

FOR the DEPARTMENT OF ADMINISTRATIVE SERVICES:

David Hartwig, Administrator
DAS, State Services Division
Dated this 19th day of April, 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

April 19, 2007

STATE CLAIM NUMBER:	M130400
NAME OF CLAIMANT:	Doris V. Johnson
MAILING ADDRESS:	89733 Armitage Road Eugene, Oregon 97408
PROPERTY IDENTIFICATION:	Township 17S, Range 3W, Section 9 Northern two-thirds of tax lot 800 Lane County
OTHER CONTACT INFORMATION:	William R. Potter Michael M. Reeder PO Box 1758 Eugene, Oregon 97440
DATE RECEIVED BY DAS:	October 24, 2006
180-DAY DEADLINE:	April 22, 2007

I. SUMMARY OF CLAIM

The claimant, Doris Johnson, seeks compensation in the amount of $1,270,787 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 10-acre subject property into ten 1-acre parcels and develop a dwelling on each resulting parcel.[1] The subject property is located at 3650 County Farm Road, near Eugene, in Lane 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 Doris Johnson's division of the approximately 10-acre subject property into ten 1-acre parcels and to her development of a dwelling on each resulting parcel: applicable

[1] The subject property consists of the northern two-thirds of tax lot 800 (T. 17S, R.3W, Section 9), which is that portion of tax lot 800 that does not lie within the City of Eugene's urban growth boundary.

provisions of Statewide Planning Goal 5 (Natural Resources, Scenic and Historic Areas, and Open Spaces), Goal 14 (Urbanization) and Oregon Administrative Rules (OAR) 660, divisions 14 and 16. These laws will not apply to the claimant only to the extent necessary to allow her to use the subject property for the use described in this report, and only to the extent that use was permitted when she acquired the property on November 10, 1954. (See the complete recommendation in Section VI of this report.)

III. COMMENTS ON THE CLAIM

Comments Received

On March 7, 2007, pursuant to Oregon Administrative Rule (OAR) 125-145-0080, the Oregon Department of Administrative Services (DAS) provided written notice to the owners of surrounding properties. According to DAS, no written comments were received in response to the 10-day notice.

IV. TIMELINESS OF CLAIM

Requirement

ORS 197.352(5) requires that a written demand for compensation be made:

1. For claims arising from land use regulations enacted prior to the effective date of Measure 37 (December 2, 2004), within two years of that effective date, or the date the public entity applies the land use regulation as an approval criteria to an application submitted by the owner, whichever is later; or

2. For claims arising from land use regulations enacted after the effective date of Measure 37 (December 2, 2004), within two years of the enactment of the land use regulation, or the date the owner of the property submits a land use application in which the land use regulation is an approval criteria, whichever is later.

Findings of Fact

This claim was submitted to DAS on October 24, 2006, for processing under OAR 125, division 145. The claim identifies Statewide Planning Goals 5 (Natural Resources, Scenic and Historic Areas and Open Spaces) and 14 (Urbanization); ORS 197.175, 197.200, 197.250 and 227.110; and OAR 660-14-0000 to 660-14-0070, 660-15-0000(5) and (14) and 660-16-0000 to 660-16-0030, as restricting the claimant's desired use of the property. 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, Doris Johnson, acquired the subject property on November 10, 1954, as reflected by the warranty deed included in the claim. The claimant transferred the subject property to the Doris V. Johnson Revocable Living Trust, with herself as trustee, on April 16, 2003, as reflected by the certification of trust included with the claim.[2] The Lane County Assessor's Office confirms the claimant's current ownership of the subject property.

Conclusions

The claimant, Doris Johnson, is an "owner" of the subject property as that term is defined by ORS 197.352(11)(C), as of November 10, 1954.

2. The Laws That are the Basis for This Claim

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

Findings of Fact

The claim indicates the claimant's desire to divide the subject property into 10 one-acre buildable residential parcels. The claim identifies the following state land use regulations as restricting that use of the property: Goals 5 and 14; ORS 197.175, 197.200, 197.250 and 227.110; and OAR 660-14-0000 to 660-14-0070, 660-15-0000(5) and (14) and 660-16-0000 to 660-16-0030. The claim includes the following statements regarding the effect these state land use regulations on the desired use of the property:

1. **Goal 5 and OAR 660, division 16:**

   "Requires the County to inventory and protect significant Goal 5 mineral aggregate resources."

2. **Goal 14 and OAR 660, division 14:**

   "Restricts urban level development, including 1 acre residential parcels, in areas outside urban growth boundaries."

[2] Transfer of the property to a revocable trust does not result in a change of ownership for purposes of ORS 197.352.

3. **ORS 227.110:**

"Requires city approval prior to recording subdivision plats within (6) miles of city limits."

4. **ORS 197.175, 197.200 and 197.250:**

"The ability of a local government to adopting planning restrictions and classifications, such as Lane County's Rural Comprehensive Plan may limit use of the subject property."

The claimant first acquired interest in the subject property in 1954. At that time, the subject property was zoned by Lane County as Agricultural, Grazing, Timber Raising District (AGT), which generally had a one-acre minimum parcel size for the creation of new lots or parcels.

Goal 5 became effective on January 25, 1975, and establishes procedures and criteria for inventorying and evaluating Goal 5 resources and for development land use programs to conserve and protect significant Goal 5 resources. Aggregate and mineral resources are resources that are subject to the provisions of Goal 5 and the Goal 5 administrative rule (OAR 660-023-0180). In 1981, the Land Conservation and Development Commission (the Commission) adopted OAR 660, division 16, establishing the process for applying Goal 5 to significant sites. OAR 660-016-0030. In 1996, the Commission adopted OAR 660, division 23, replacing OAR 660, division 16, with a new process for inventories, evaluating, and designating significant aggregate sites under Goal 5. The rule was later amended in 2004. The intent of Goal 5 and its implementing regulations is to identify and protect significant resources, including mineral and aggregate sites, to allow their use. The rule also protects significant resources (including aggregate sites) from conflicting uses associated with uses on neighboring properties.

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

The claimant summarily cites ORS 197.175, 197.200, 197.250 and 227.110 and OAR 660, division 14, as applicable to this claim but does not establish that the regulations either apply to the subject property or restrict its use with the effect of reducing its fair market value. On their face, they 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 applicable to and restrict the claimant's desired use of the property, based on the claimant's description of her desired use.

The claimant's property is zoned Sand & Gravel (SG) by Lane County as required by Goal 5 and OAR 660, division 23, because the claimant's property was inventoried by the county as a significant aggregate resource site under Goal 5. The desired use of the subject property, to divide and develop it for residential use, is not allowed under the SG zone.

Conclusions

The current zoning requirements, minimum lot size and dwelling standards established by applicable provisions of Goals 5 and 14, and OAR 660, divisions 14 and 16, were all enacted or adopted after the claimant acquired the subject property in 1954 and do not allow the desired

division or residential development of the property. These laws restrict the use of the subject property relative to the uses allowed when the claimant acquired 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 $1,270,787 as the reduction in the subject property's fair market value due to the regulations that restrict the claimant's desired use of the property. This amount is based on a comparative market analysis submitted with the claim. The comparative market analysis determined that the highest and best use of the property is residential, rather than for sand and gravel removal followed by residential use, and that the parcel is too small for a sand and gravel operation.

Conclusions

As explained in Section V.(1) of this report, the claimant is Doris Johnson, who acquired the subject property on November 10, 1954. Under ORS 197.352, the claimant is due compensation for land use regulations that restrict the use of the subject property and have the effect of reducing its fair market value. Based on the findings and conclusions in Section V.(2) of this report, laws enacted or adopted since the claimant acquired the subject property restrict the claimant's desired use of the property. The claimant estimates that the effect of the regulations on the fair market value of the property is a reduction of $1,270,787.

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

4. Exemptions Under ORS 197.352(3)

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

Findings of Fact

The claim is based on state land use regulations that restrict the use of the subject property, including Goals 5 and 14 and OAR 660, divisions 14 and 16, which Lane County has implemented through its SG zone. All of these land use regulations were enacted or adopted after 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 none of the general statutory, goal and rule restrictions on division and development of the claimant's' property were in effect when the claimant acquired it in 1954. As a result, these laws are not exempt under ORS 197.352(3)(E).

Laws in effect when the claimant acquired the subject property are exempt under ORS 197.352(3)(E) and will continue to apply to the claimant's use of the property. There may be other laws that continue to apply to the claimant's use of the subject property that have not been identified in the claim. In some cases, it will not be possible to know which laws apply to a use of the subject property until there is a specific proposal for that use. When the claimant seeks a building or development permit to carry out a specific use, it may become evident that other state laws apply to that use. In some cases, some of these laws may be exempt under ORS 197.352(3)(A) to (D).

This report addresses only those state laws that are identified in the claim, or that the department is certain apply to the subject property based on the uses 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 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 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 $1,270,787. 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 she 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 Doris Johnson to use the subject property for a use permitted at the time she acquired the property on November 10, 1954.

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 Doris Johnson's division of the approximately 10-acre property into ten 1-acre parcels or to her development of a dwelling on each parcel: applicable provisions of Goals 5 and 14, and OAR 660, divisions 14 and 16. These land use regulations will not apply to the claimant only to the extent necessary to allow her to use the subject property for the use described in this report, and only to the extent that use was permitted when she acquired the property on November 10, 1954.

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 November 10, 1954.

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

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

5. Without limiting the generality of the foregoing terms and conditions, in order for the claimant to use the subject property, it may be necessary for her to obtain a decision under ORS 197.352 from a city and/or county and/or metropolitan service district that enforces land use regulations applicable to the property. Nothing in this order relieves the claimant from the necessity of obtaining a decision under ORS 197.352 from a local public entity that has jurisdiction to enforce a land use regulation applicable to a use of the subject property by the claimant.

VII. COMMENTS ON THE DRAFT STAFF REPORT

The department issued its draft staff report on this claim on March 27, 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..