



# Oregon

Theodore R. Kulongoski, Governor

## Department of Land Conservation and Development

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October 10, 2007

To: Claimant and Interested Persons

From: Cora R. Parker, Acting Director



*Re: Ballot Measure 37 (ORS 197.352) Claim Number M131121*

*Claimant: Elk Farms, Inc.*

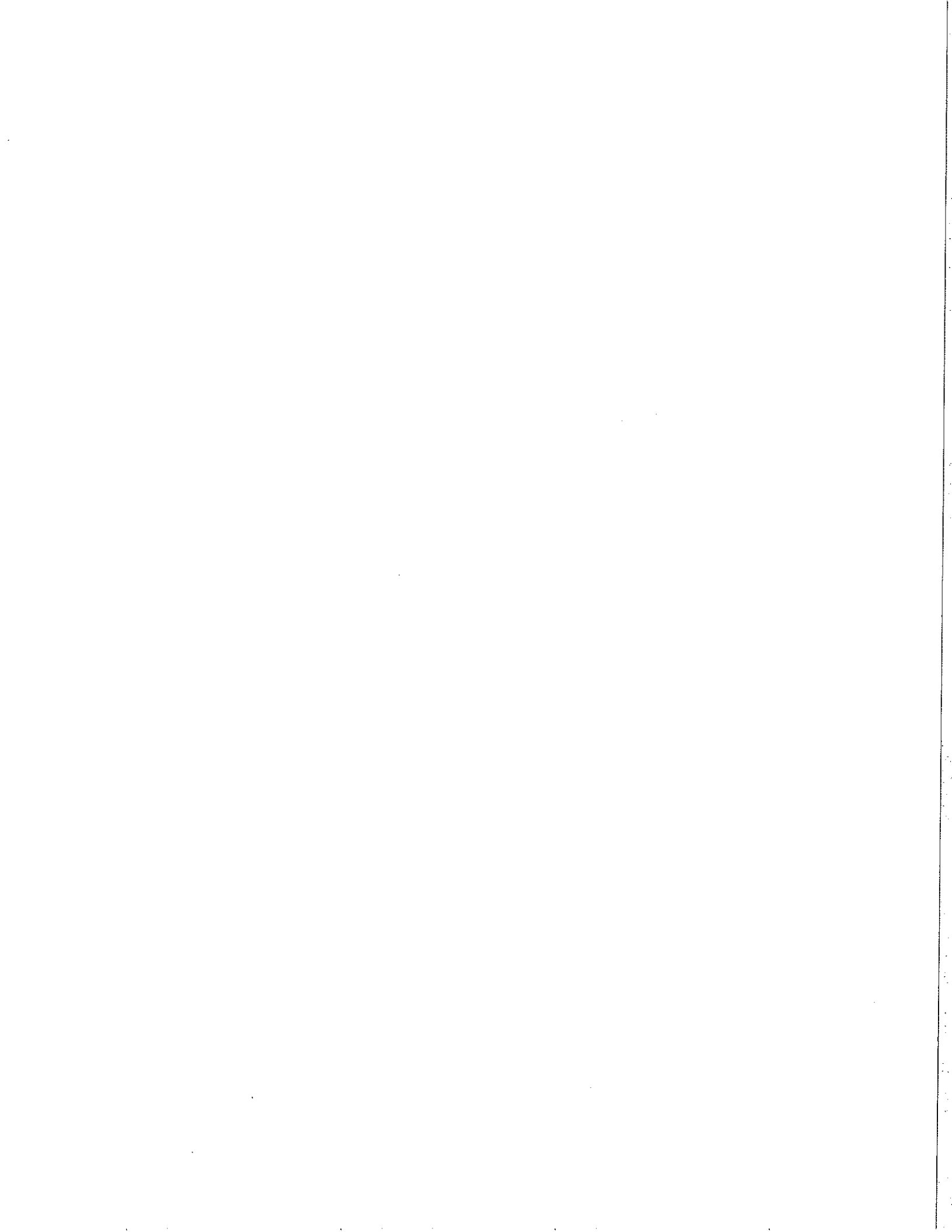
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Enclosed, in regard to the above-referenced claim for compensation under Ballot Measure 37 (ORS 197.352), is the Department of Land Conservation and Development's Draft Staff Report and Recommendation.

This Draft Staff Report and Recommendation sets forth the department's evaluation of and recommendation on the claim. Oregon Administrative Rule 125-145-0100(3) provides that the claimant (or the claimant's agent) and any third parties who submitted comments on the claim may submit written comments, evidence, and information in response to any third-party comments contained in the report, and to the staff report and recommendation itself. Such response must be filed no more than 15 calendar days after the date of mailing of this report. Any response from you must be delivered to the Oregon Department of Administrative Services (DAS), 1225 Ferry Street SE, U160, Salem, Oregon 97301, and will be deemed timely filed if either postmarked on the 15th day or actually delivered to DAS by the close of business on the 15th day.

This department will review any responses submitted, and a Final Order on the claim will be issued after such review.





**ORS 197.352 (BALLOT MEASURE 37) CLAIM FOR COMPENSATION**

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

October 10, 2007

**STATE CLAIM NUMBER:** M131121

**NAME OF CLAIMANT:** Elk Farms, Inc.

**MAILING ADDRESS:** c/o Bill Winton, Vice President  
4575 SW Natchez Court  
Tualatin, Oregon 97602

**PROPERTY IDENTIFICATION:** Township 37S, Range 2W  
Section 14: tax lot 501  
Section 15: tax lots 200, 300, 400, 1400 & 1600  
Jackson County

**OTHER CONTACT INFORMATION:** Mark S. Bartholomew  
Hornecker, Cowling, et al.  
717 Murphy Road  
Medford, Oregon 97504

**DATE RECEIVED BY DAS:** November 22, 2006

**DEADLINE FOR FINAL ACTION:<sup>1</sup>** May 15, 2008

**I. SUMMARY OF CLAIM**

The claimant, Elk Farms, Inc., seeks compensation in the amount of \$28,438,800 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 314.12-acre subject property<sup>2</sup> into 157 two-acre parcels, and to develop a dwelling on each parcel.<sup>3</sup> The subject property is located at 2157 Beall Lane and 2600 Hanley Road, near Central Point, in Jackson County. (See claim.)

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<sup>1</sup> 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.

<sup>2</sup> The subject property includes six tax lots. Tax lot 501 consists of 11.14 acres, tax lot 200 consists of 48.81 acres, tax lot 300 consists of 34.36 acres, tax lot 400 consists of 113.16 acres, tax lot 1400 consists of 42.15 acres and tax lot 1600 consists of 64.5 acres.

<sup>3</sup> The claimant's expressed desire to divide property into 157 two-acre parcels encompasses the entire 314 acre property. However, in addition to, or perhaps as an alternative to, the desired residential subdivision, on which the

## II. SUMMARY OF STAFF RECOMMENDATION

Based on the preliminary 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 Elk Farms, Inc.'s division of the 314.12-acre subject property into 157 two-acre parcels, and to its development of a dwelling on each parcel: applicable provisions of Statewide Planning Goals 3 (Agricultural Lands) and 11 (Public Facilities and Services), ORS 215 and Oregon Administrative Rules (OAR) 660, divisions 11, and 33. These laws 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 lots 501 and 1400 on March 18, 1968, and tax lots 200, 300, 400 and 1600 on March 29, 1968. (See the complete recommendation in Section VI. of this report.)

## III. COMMENTS ON THE CLAIM

### Comments Received

On June 18, 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, five 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

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claimant's market analysis is based, in a cover letter the claimant's attorney, indicates that the claimant also seeks to develop the property "commercially." The claimant does not explain the nature or extent of that use, which appears to conflict with the claimant's expressly stated desire to divide the 314 acres into 157, two-acre parcels for residential development. The department is authorized under ORS 197.352 to waive regulations to allow a use that was permitted at the time the claimant acquired the property. The use that is sufficiently articulated in this claim to allow evaluation is the use specified in Section 6, and on which the claimant's purported reduction in value is based, namely "subdivide into 157 two-acre lots and construct dwellings on each." Accordingly, that is the use on which this claim is evaluated.

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 22, 2006, for processing under OAR 125, division 145. The claim attaches a summary list of numerous state and local land use regulations 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, Elk Farms, Inc., acquired tax lots 501 and 1400 on March 18, 1968, and acquired tax lots 200, 300, 400 and 1600 on March 29, 1968, as reflected by warranty deeds included with the claim. The Jackson County Assessor’s Office confirms the claimant’s current ownership of the subject property.

### **Conclusions**

The claimant, Elk Farms, Inc., is an “owner” as that term is defined by ORS 197.352(11)(C) as of March 18, 1968, for tax lots 501 and 1400 and as of March 29, 1968, for tax lots 200, 300, 400 and 1600.

### **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 that the claimant desires to divide the 314.12-acre subject property into 157 two-acre parcels, and to develop a dwelling on each parcel, and that current land use regulations prevent the desired use.<sup>4</sup>

The claim is based generally on the applicable provisions of state law that require Exclusive Farm Use (EFU) zoning and restrict uses on EFU-zoned land. The claimant's property is zoned EFU by Jackson County 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>5</sup> Goal 3 became effective on January 25, 1975, and required that agricultural lands as defined by Goal 3 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 development of dwellings on existing or 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.

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(4) on March 1, 1994.<sup>6</sup>

Goal 11, which became effective on January 25, 1975, generally prohibits urban levels of public facilities and services on lands that are outside an Urban Growth Boundary (UGB). Goal 11 and its implementing rules have two components: one that prohibits an owner from utilizing urban-level facilities or services to serve the property, and another that prohibits service providers from extending their facilities to serve property outside a UGB. The former can restrict a claimant's use of property. The latter is a restriction on service providers. Goal 11 and OAR 660, division 11, apply to the claimant's use of the property only to the extent that they would restrict the claimant's development of urban-level public or community sewer or water facilities on the

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<sup>4</sup> The claimant includes with the claim form a separate attachment that 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 claimant's desired use of the property with the effect of reducing its fair market value. This report addresses only those regulations that the department finds are applicable to and restrict the claimant's desired use of the subject property, based on the claimant's description of its desired use.

<sup>5</sup> The claimant's property is "agricultural land" because it contains Natural Resources Conservation Service Class I-IV soils.

<sup>6</sup> The Commission adopted amendments to OAR 660-033-0100, -0130 and -0135 to comply with House Bill 3326 (Chapter 704, Oregon Laws 2001, effective on January 1, 2002), which were effective on May 22, 2002. These amendments clarified but did not further restrict dwelling standards for EFU-zoned land.

subject property. The claim does not establish whether or the extent to which Goal 11 or its implementing regulations restrict the claimant's desired use of the property.

The claimant acquired tax lots 501 and 1400 on March 18, 1968, and tax lots 200, 300, 400 and 1600 on March 29, 1968, prior to the adoption of the statewide planning goals and their implementing statutes and regulations.

### **Conclusions**

The current zoning requirements, minimum lot size and dwelling standards established by applicable provisions of Goals 3 and 11, ORS 215 and OAR 660, divisions 11, and 33, were all enacted or adopted after the claimant acquired the subject property in 1968 and do not allow the claimant's desired division or development of the property. These laws restrict the use of the subject property relative to the uses allowed when the claimant acquired the property.

Those elements of Goal 11 that prohibit a public service provider from extending or establishing public facilities or services outside of a UGB restrict the actions of local government rather than the claimant's use of the property. That component of Goal 11 is not subject to ORS 197.352 and will continue to apply to those service providers. Only the general prohibition under Goal 11 on the claimant's establishment of an urban level of public facilities and services is subject to ORS 197.352 and restricts the claimant's desired use of its 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 uses 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 regulations (described in Section V.(2) of this report) must have "the effect of reducing the fair market value of the property, or any interest therein."

### **Findings of Fact**

The claim includes an estimate of \$28,438,800 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.

### **Conclusions**

As explained in Section V.(1) of this report, the claimant is Elk Farms, Inc. which acquired tax lots 501 and 1400 on March 18, 1968, and tax lots 200, 300, 400 and 1600 on March 29, 1968. 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 \$28,438,800.

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 applicable provisions of Goals 3 and 11, ORS 215 and OAR 660, divisions 11, and 33, which Jackson County has implemented through its current EFU 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 1968. 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 it 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 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 laws that restrict the use of the subject 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 subject 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 \$28,438,800. 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 Elk Farms, Inc. to use the subject property for a use permitted at the time it acquired tax lots 501 and 1400 on March 18, 1968, and tax lots 200, 300, 400 and 1600 on March 29, 1968.

### **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 Elk Farms, Inc.'s division of the 314.12-acre subject property into 157 two-acre parcels, or to its development of a dwelling on each parcel: applicable provisions of Goals 3 and 11, ORS 215 and OAR 660, divisions 11, and 33. 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 lots 501 and 1400 on March 18, 1968, and tax lots 200, 300, 400 and 1600 on March 29, 1968.

Goal 11 will not apply only to the extent that it prohibits the claimant from establishing an urban level of public facilities and services to serve the development of the property. Goal 11 will

continue to apply to public service providers seeking to extend or establish public facilities to serve the subject property.

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 March 18, 1968, for tax lots 501 and 1400 and on March 29, 1968, for tax lots 200, 300, 400 and 1600.
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 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. NOTICE OF OPPORTUNITY TO COMMENT**

This staff report is not a final decision by the department and does not authorize any use of the property that is the subject of this report. OAR 125-145-0100 provides 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. Such response must be filed no more than 15 calendar days after the date this report is mailed to the claimant and any third parties. Responses to this draft staff report and recommendation will be considered only as comments related to the claim described in this report. All responses must be delivered to the Oregon Department of Administrative Services (DAS), Measure 37 Unit, Risk Management-State Services Division, 1225 Ferry Street SE, U160, Salem, Oregon 97301-4292 and will be deemed timely filed if either postmarked on the 15th day, or actually delivered to DAS by the close of business on the 15th day. Note: Please reference the claim number, claimant name and clearly mark your

comments as "Draft Staff Report comments." Comments must be submitted in writing only. Those comments submitted electronically or by facsimile will not be accepted.

