



Oregon

Theodore R. Kulongoski, Governor

Department of Land Conservation and Development

635 Capitol Street NE, Suite 150

Salem, Oregon 97301-2524

Phone: (503) 373-0050

First Floor/Coastal Fax: (503) 378-6033

Second Floor/Director's Office Fax: (503) 378-5518

Third Floor/Measure 37 Fax: (503) 378-5318

Web Address: <http://www.oregon.gov/LCD>

October 5, 2007

To: Claimant and Interested Persons

From: Cora R. Parker, Acting Director



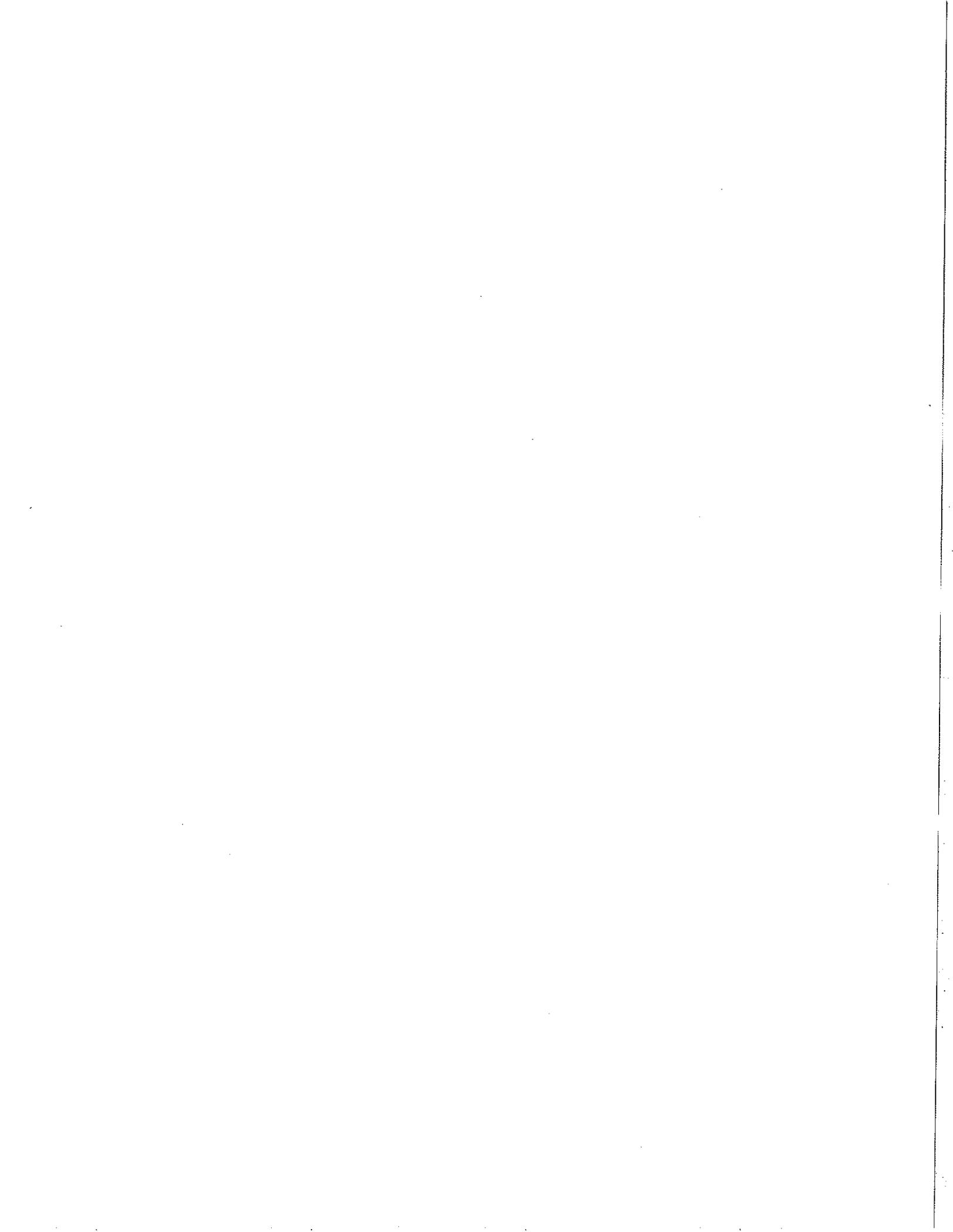
Re: Ballot Measure 37 (ORS 197.352) Claim Number M131493 and M134328

Claimants: Jeffrey P. Petersen, Dorothy C. O'Mohundro, Patsy A. Patterson, Linda L. Clausen

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) CLAIMS FOR COMPENSATION
OREGON DEPARTMENT OF LAND CONSERVATION AND DEVELOPMENT
Draft Staff Report and Recommendation

October 5, 2007

STATE CLAIM NUMBER(S): M131493 and M134328

NAMES OF CLAIMANTS: Jeffrey P. Petersen
Dorothy C. O'Mohundro
Patsy A. Patterson
Linda L. Clausen

MAILING ADDRESS: 13634 SW Pleasant Valley Road
Beaverton, Oregon 97007

PROPERTY IDENTIFICATION: Township 6S, Range 38E, Sections 17 & 18
Tax lot 400
Baker County

Township 6S, Range 38E, Section 17
Tax lot 3900
Union County

DATE RECEIVED BY DAS: November 29, 2006

DEADLINE FOR FINAL ACTION:¹ May 22, 2008

I. SUMMARY OF CLAIMS

The claimants, Jeffrey Petersen, Dorothy O'Mohundro, Patsy Patterson and Linda Clausen, seek compensation in the amount of \$150,000 for the reduction in fair market value as a result of land use regulations that are alleged to restrict the use of certain private real property. The claimants desire compensation or the right to develop a dwelling on the 160-acre subject property.² The landlocked subject property is located west of North Powder, with a portion in Baker County and a portion in Union County. (See claim(s).)

¹ ORS 197.352, as originally enacted, required that final action on claims made under Measure 37 be made within 180 days of the date the claim was filed.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

² The subject property includes two tax lots. Tax lot 400 consists of 136.92 acres and tax lot 3900 consists of 23.08 acres.

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 claims are not valid because the claimants have not established that they have legal access to the subject property and therefore, no regulations enforced by the Land Conservation and Development Commission (the Commission) or the department restrict the claimants' desired use of the subject property with the result of reducing the property's fair market value. (See the complete recommendation in Section VI. of this report.)

III. COMMENTS ON THE CLAIMS

Comments Received

On July 25, 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, one written comment, evidence or information was received in response to the 15-day notice.

The comment is relevant to whether the restriction of the claimants' 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. (See the comment letter in the department's claim file.)

IV. TIMELINESS OF CLAIMS

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

The claims were submitted to DAS on November 29, 2006, for processing under OAR 125, division 145. The claims identify Goal 4, ORS 215, OAR 660 and Senate Bill 100 of 1973 as the basis for the claims. Only laws that were enacted or adopted prior to December 2, 2004, are the basis for these claims.

Conclusions

The claims have 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 are therefore timely filed.

V. ANALYSIS OF CLAIMS

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

Claimants Dorothy O’Mohundro, Patsy Patterson and Linda Clausen, acquired their interests in the subject property from their mother, Lula Cantrell, on May 12, 1981, as reflected by a bargain and sale deed included with the claims. Lula Cantrell acquired an interest in the subject property from her father, John Davis, on May 20, 1963, as evidenced by court order in the matter of the Estate of John Davis included with the claims. John Davis acquired the subject property on May 4, 1919, as evidenced by a contract included with the claims.

Claimant Jeffrey Petersen, acquired his interest in the subject property from his father, John Petersen, on September 30, 1994, as reflected by a warranty deed included with the claims. John Petersen acquired an interest in the subject property from his mother, Lula Cantrell, on May 12, 1981, as reflected by bargain and sale deed included with the claims. Lula Cantrell acquired an interest in the subject property from her father, John Davis, on May 20, 1963, as evidenced by court order in the matter of the Estate of John Davis included with the claims.

The Baker County Assessor’s Office and the Union County Assessor’s Office confirms the claimants’ current ownership of the subject property.

Conclusions

Claimants Dorothy O’Mohundro, Patsy Patterson and Linda Clausen are “owners” of the subject property as that term is defined by ORS 197.352(11)(C), as of May 12, 1981. John Davis is a “family member” as defined by ORS 197.352(11)(A) and acquired the subject property on March 4, 1919.

Claimant, Jeffrey Petersen, is an “owner” of the subject property as that term is defined by ORS 197.352(11)(C), as of September 30, 1994. Lula Cantrell is a “family member” as defined by ORS 197.352(11)(A) and acquired the subject property on May 20, 1963.

2. The Laws That are the Basis for These Claims

In order to establish a valid claim, ORS 197.352(1) requires, in part, that a law must restrict the claimants’ 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 claimants or a family member acquired the property.

Findings of Fact

The claims indicate that the claimants desire to develop a dwelling on the 160-acre subject property, and that current land use regulations prevent the desired use.³

For tax lot 3900, the claims are based generally on the applicable provisions of state law that require Exclusive Farm Use (EFU) zoning and restrict uses on EFU-zoned land. Tax lot 3900 is zoned Agricultural Grazing (A2) by Union County as required by Goal 3, in accordance with ORS 215 and OAR 660, division 33, because tax lot 3900 is "agricultural land" as defined by Goal 3.⁴ 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 215.284 and OAR 660, division 33, enacted or adopted pursuant to Goal 3, establish standards for the development of dwellings on existing land.

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, 1994.⁵

For tax lot 400, the claims are based generally on the applicable provisions of state law that require forest zoning and restrict uses on forest-zoned land. Tax lot 400 is zoned Timber-Grazing (TG) by Baker County as required by Goal 4, in accordance with ORS 215 and OAR 660, division 6, because tax lot 400 is "forest land" under Goal 4. Goal 4 became effective on January 25, 1975, and requires that forest land be zoned for forest use.

Current land use regulations, including ORS 215.705 to 215.755 and 215.780 and OAR 660, division 6, enacted or adopted pursuant to Goal 4, generally establish standards for development of dwellings on existing land.

ORS 215.705 to 215.755 establish standards for the creation of new dwellings allowed in forest zones.

³ The claimants summarily list numerous state land use laws as applicable to this claim, but do not establish how the laws either apply to the claimants' 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 claimants' property or do not restrict the claimants' 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 claimants' desired use of the subject property, based on the claimants' description of their desired use.

⁴ The claimants' property is "agricultural land" because it contains Natural Resources Conservation Service Class I-VI soils.

⁵ The Commission subsequently 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.

OAR 660, division 6, became effective on September 1, 1982, to implement Goal 4 and establish standards for development of land zoned for forest use, and was amended on March 1, 1994, to implement ORS 215.705 to 215.755 and 215.780. OAR 660-006-0025 interprets the goal and statutory standard for uses allowed in forest zones. OAR 660-006-0027 and 660-006-0029 interpret the standards for dwellings in forest zones.

Dorothy O'Mohundro, Patsy Patterson and Linda Clausen's grandfather first acquired the subject property in 1919, prior to the adoption of the statewide planning goals and their implementing statutes and regulations. No county zoning applied to the subject property in 1919.

Jeffrey Petersen's grandmother first acquired the subject property in 1963, prior to the adoption of the statewide planning goals and their implementing statutes and regulations. No county zoning applied to the subject property in 1963.

Although these state land use regulations would otherwise restrict the claimants' desired use, in this case, according to the Oregon Department of Fish and Wildlife, the claimants do not have legal access to the subject property.⁶ Without legal access, the claimants did not have a right to use the property for the desired use when they acquired the property and do not have that right now. Therefore, the state land use regulations enacted or adopted after the claimants acquired the property do not restrict a use that the claimants have a right to carry out relative to uses allowed when they acquired the property, with the effect of reducing the property's fair market value.

Conclusions

The current zoning requirements, minimum lot size and dwelling standards established by applicable provisions of Goals 3 and 4, ORS 215 and OAR 660, divisions 6, and 33, were all enacted or adopted after Dorothy O'Mohundro, Patsy Patterson and Linda Clausen's family member acquired the subject property in 1919 and Jeffrey Petersen's family member acquired the subject property in 1963.

However, the claimants have not established that they have legal access to the subject property. Therefore, no laws enforced by the Commission or the department restrict the claimants' use of the subject property with the effect of reducing the fair market value of the property.

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."

As explained in Section V.(2) of this report, the claimants, Jeffrey Petersen, Dorothy O'Mohundro, Patsy Patterson and Linda Clausen, have not established that they had legal access to the property when they acquired it or that they now have legal access to the subject property,

⁶ The department requested evidence of legal access to the subject property from the claimants on September 18, 2007. As of the date of this report, no additional information has been received.

and therefore, no state land use regulations restrict their use of the property with the effect of reducing the fair market value of the subject property.

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.

The claims are 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 Union County has implemented through its current A2 zone for tax lot 3900 and Goal 4, ORS 215 and OAR 660, division 6, which Baker County has implemented through its current TG zone for tax lot 400. Both counties also note that the property is subject to their Big Game Overlay zoning for elk. All of these land use regulations were enacted or adopted after the claimants' family acquired the subject property. However, as explained in Section V.(2), the claimants have not established that they had legal access to the subject property when they acquired it or that they now have legal access to the subject property. Therefore, the issue of whether any laws are exempt from ORS 197.352 is not relevant to these claims.

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, the department finds that these claims are not valid because the claimants have not established they have legal access to the subject property. Therefore, laws enforced by the Commission or the department do not restrict the claimants' desired use of the subject property relative to what was permitted when Dorothy O'Mohundro, Patsy Patterson and Linda Clausen's family member acquired the subject property in 1919 and when Jeffrey Petersen's family member acquired the subject property in 1963, or when the claimants acquired the subject property.

Conclusions

Based on the record and the foregoing findings and conclusions, the claimants have not established that they are entitled to relief under ORS 197.352(1) as a result of land use regulations enforced by the Commission or the department because they have not established that they have legal access to the subject property. Therefore, the department recommends that these claims be denied.

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 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. Such response must be filed no more than 15 calendar days after the date this report is mailed to the claimants and any third parties. Responses to this draft staff report and recommendation will be considered only as comments related to the claims 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.

