

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 A
COMPENSATION UNDER ORS 197.352) CLAIM NO. M129720
(BALLOT MEASURE 37) OF)
Smallwood Logging, Inc., CLAIMANT)

Claimant: Smallwood Logging, Inc. (the Claimant)

Property: Township 14S, Range 9W, Section 00, Tax lot 602, Lincoln 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 Smallwood Logging, Inc.'s division of the 50.86-acre property into fifty-one 1-acre parcels and to its development of a dwelling on each parcel: applicable provisions of Goals 3, 4 and 14, ORS 215 and OAR 660, divisions 6, and 33, enacted or adopted after December 3, 1990. These land use regulations will not apply to Smallwood Logging, Inc. 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 the property on December 3, 1990. The department acknowledges that it is unlikely that the claimants' desired level of development could have satisfied the standards in effect when Smallwood Logging, Inc. acquired the property.
2. The action by the State of Oregon provides the state's authorization to claimant Smallwood Logging, Inc. to use the subject property for the use described in this report, subject to the standards in effect on December 3, 1990. On that date, the property was subject to compliance with Goal 4 and OAR 660, division 6, as implemented through Lincoln County's acknowledged forest zone, and with Goal 3 and OAR 660, division 33, as implemented by Lincoln County's acknowledged EFU zone, and the applicable provisions ORS 215 then in effect.

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 Smallwood Logging, Inc. 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 Smallwood Logging, Inc. 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).

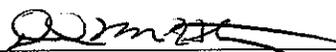
5. Without limiting the generality of the foregoing terms and conditions, in order for Smallwood Logging, Inc. to use the subject property, it may be necessary for it to obtain a decision under ORS 197.352 from a city and/or county and/or metropolitan service district that enforces land use regulations applicable to the property. Nothing in this order relieves Smallwood Logging, Inc. 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 its use of the subject property.

This Order is entered by the Deputy Director of the DLCD as a final order of DLCD and the Land Conservation and Development Commission under 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


Cora R. Parker, Deputy Director
DLCD
Dated this 12th day of January, 2007.

FOR the DEPARTMENT OF
ADMINISTRATIVE SERVICES:


David Hartwig, Administrator
DAS, State Services Division
Dated this 12th day of January, 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."

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 B
COMPENSATION UNDER ORS 197.352) CLAIM NO. M129720
(BALLOT MEASURE 37) OF)
Gerald and Barbara Smallwood, CLAIMANTS)

Claimants: Gerald and Barbara Smallwood (the Claimants)

Property: Township 14S, Range 9W, Section 00, Tax lot 602, Lincoln County
(the property)

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

Claimants 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 Deputy 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 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


Cora R. Parker, Deputy Director
DLCD
Dated this 12th day of January, 2007.

FOR the DEPARTMENT OF
ADMINISTRATIVE SERVICES:


David Hartwig, Administrator
DAS, State Services Division
Dated this 12th day of January, 2007.

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, 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)

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

January 12, 2007

STATE CLAIM NUMBER: M129720

NAMES OF CLAIMANTS: Gerald and Barbara Smallwood
Smallwood Logging, Inc.

MAILING ADDRESS: 582 E. Scott Creek Rd.
Tidewater, Oregon 97390

PROPERTY IDENTIFICATION: Township 14S, Range 9W, Section 00
Tax lot 602
Lincoln County

OTHER CONTACT INFORMATION: Gary C. Hamilton
407 N. Coast Highway
Newport, Oregon 97365

DATE RECEIVED BY DAS: July 21, 2006

180-DAY DEADLINE: January 17, 2007

I. SUMMARY OF CLAIM

The claimants, Gerald and Barbara Smallwood and Smallwood Logging, Inc., seek compensation in the amount of \$3,785,000 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 divide the 50.86-acre subject property into fifty-one 1-acre parcels and to develop a dwelling on each parcel. The subject property is located at 20963 East Alsea Highway, near Tidewater, in Lincoln 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 this claim is valid in part. 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 Smallwood Logging, Inc.'s division of the 50.86-acre subject property into fifty-one 1-acre parcels and to its development of a dwelling on each parcel: applicable provisions of Statewide Planning Goals 3 (Agricultural Lands), 4 (Forest Lands) and 14 (Urbanization), ORS 215 and Oregon Administrative Rules (OAR) 660, divisions 6, and 33, enacted or adopted after December 3, 1990. These laws will not apply to Smallwood Logging,

Inc. 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 the property in 1990. The department acknowledges that it is unlikely that the claimants' desired level of development could have satisfied the standards in effect when Smallwood Logging, Inc. acquired the subject property. (See the complete recommendation in Section VI. of this report.)¹

The department has further determined that the claim is not valid as to claimants Gerald and Barbara Smallwood because they are not present owners of the subject property.

III. COMMENTS ON THE CLAIM

Comments Received

On October 26, 2006, 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 was received in response to the 10-day notice.

The comment does 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 letter 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 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.

¹ The claim also indicates that the claimants desire to sell or transfer the newly created parcels for development. In effect, the claimants request that a decision of the department to "not apply" (waive) certain laws as set forth in this report be transferable with the property. ORS 197.352 only authorizes a state agency to waive a law in order to allow the current owner a use of the property permitted at the time that owner acquired the property. A determination of transferability is beyond the scope of relief that the department may grant under ORS 197.352. The Oregon Department of Justice has advised the department that "[i]f the current owner of the real property conveys the property before a new use allowed by the public entity is established, then the entitlement to relief will be lost."

Findings of Fact

This claim was submitted to DAS on July 21, 2006, for processing under OAR 125, division 145. The claim identifies the following as the basis for the claim: Senate Bill 100; Goals 3 and 4; and all statewide planning goals, administrative rules and statutes adopted and enforced since the claimants' purchase 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

Claimants Gerald and Barbara Smallwood assert in the claim that they acquired the subject property on July 1, 1972, and now have an interest as owners in the property. However, as evidenced by a bargain and sale deed included with the claim, on December 3, 1990, Gerald and Barbara Smallwood conveyed all of their interest in the property to claimant Smallwood Logging, Inc. The Lincoln County Assessor's Office confirms Smallwood Logging, Inc.'s current ownership of the subject property.

Conclusions

Claimant Smallwood Logging, Inc. is an "owner" of the subject property, as that term is defined by ORS 197.352(11)(C), as of December 3, 1990. Claimants Gerald and Barbara Smallwood are not "owners" of the subject property.²

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 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 acquired the property.

² Under the definition of "family member" in ORS 197.352(11)(A), legal entities can be "family members" of individuals but cannot have "family members." Therefore, the individuals who conveyed the subject property to Smallwood Logging, Inc. are not considered family members, as that term is defined in ORS 197.352.

Findings of Fact

The claim indicates that the claimants desire to divide the 50.86-acre subject property into fifty-one 1-acre parcels and to develop a dwelling on each parcel, and that the use is not allowed under current land use regulations.

The claim is based generally on the applicable provisions of state law that require forest zoning and Exclusive Farm Use (EFU) zoning, and restrict uses on forest-zoned and EFU-zoned lands.

A portion of the subject property is zoned Timber Conservation (TC) by Lincoln County, as required by Goal 4, in accordance with ORS 215 and OAR 660, division 6, because it is "forest land" under Goal 4. Goal 4 became effective on January 25, 1975, and requires that forest land be zoned for forest use (see statutory and rule history under OAR 660-015-0000(4)). The forest land administrative rules (OAR 660, division 6) became effective on September 1, 1982, and ORS 215.705 to 215.755 and 215.780 became effective on November 4, 1993 (Chapter 792, Oregon Laws 1993). OAR 660-006-0026 and 660-006-0027 were amended on March 1, 1994, to implement those statutes.

The remainder of the property is zoned Agricultural Conservation (AC) by Lincoln County. The AC zone is an EFU zone as required by Goal 3, in accordance with ORS 215 and OAR 660, division 33, because this portion of the subject property is "agricultural land," as defined by Goal 3.³ 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. 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 administrative rule history for OAR 660-033-0100, -0130 and -0135.)

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

³ This portion of the subject property is "agricultural land" because it contains Natural Resources Conservation Service Class I-IV soils.

Claimant Smallwood Logging, Inc. acquired the subject property on December 3, 1990. At that time, the property was subject to Lincoln County's acknowledged forest and EFU zones.⁴ When Smallwood Logging, Inc. acquired the subject property, the desired division and development of the forest-zoned portion of the subject property would have been governed by the applicable provisions of Goal 4 and OAR 660, division 6, as implemented through the county's acknowledged forest zone, and the EFU-zoned portion of the subject property would have been governed by the county's acknowledged EFU zone and the applicable provisions of ORS 215 then in effect.⁵

In 1990, ORS 215.263 (1989 edition) required that divisions of land in EFU zones be "appropriate for the continuation of the existing commercial agricultural enterprise within the area" or not smaller than the minimum size in the county's acknowledged plan. ORS 215.283(1)(f) (1989 edition) generally allowed farm dwellings "customarily provided in conjunction with farm use." Non-farm dwellings were allowed under ORS 215.283(3) if they were determined to be compatible with farm use, not interfere seriously with accepted farm practices, not materially alter the stability of the land use pattern in the area and be situated on generally unsuitable land for the production of farm crops and livestock.

The claim does not establish whether or to what extent Smallwood Logging, Inc.'s desired division and development of the subject property were allowed under the standards in effect when it acquired the property on December 3, 1990. The department acknowledges that it is unlikely that the claimants' desired level of development could have satisfied the standards in effect when Smallwood Logging, Inc. acquired the property.

Conclusions

The current zoning requirements, minimum lot size and dwelling standards established pursuant to Goals 3, 4 and 14, ORS 215 and OAR 660, divisions 6, and 33, were enacted or adopted after claimant Smallwood Logging, Inc. acquired the subject property in 1990 and do not allow its desired division or development of the property. However, the claim does not establish whether or to what extent Smallwood Logging, Inc.'s desired use of the subject property complies with the standards for land divisions and development under Goals 3 and 4 and OAR 660, as implemented through Lincoln County's acknowledged forest and EFU zones and comprehensive plan and provisions of ORS 215, in effect when it acquired the property on December 3, 1990.

As explained in Section V.(1), claimants Gerald and Barbara Smallwood are not "owners" of the subject property, as that term is defined in ORS 197.352(11)(C). Therefore, no laws enforced by the Commission or the department restrict Gerald and Barbara Smallwood's use of private real property with the effect of reducing the fair market value of the property.

⁴ Lincoln County's forest and EFU zones were acknowledged by the Commission for compliance with Goals 3 and 4 on January 18, 1983.

⁵ After the county's comprehensive plan and land use regulations were acknowledged by the Commission as complying with the statewide planning goals, the goals and implementing rules no longer applied directly to individual local land use decisions. *Byrd v. Stringer*, 295 Or 311 (1983). However, statutory requirements continue to apply, and insofar as the state and local provisions are materially the same, the local provisions must be interpreted consistent with the substance of the goals and implementing rules. *Forster v. Polk County*, 115 Or App 475 (1992) and *Kenagy v. Benton County*, 115 Or App 131 (1992).

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 claimants have identified. There may be other laws that currently apply to Smallwood Logging, Inc.'s use of the subject property, and that may continue to apply to its 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 Smallwood Logging, Inc. 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 \$3,785,000 as the reduction in the subject property's fair market value due to the regulations that restrict the claimants' desired use of the property. This amount is based on a market analysis of the value of the property included in the claim.

Conclusions

As explained in Section V.(1) of this report, the claimants are Smallwood Logging, Inc., which acquired the subject property on December 3, 1990, and Gerald and Barbara Smallwood. Claimants Gerald and Barbara Smallwood are not present owners of the subject property and therefore, are not entitled to compensation under ORS 197.352. Under ORS 197.352, Smallwood Logging, Inc. 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 Smallwood Logging, Inc. acquired the subject property restrict its desired use of the property. The claimants estimate that the effect of the land use regulations on the fair market value of the subject property is a reduction of \$3,785,000.

Without an appraisal or other documentation, and without verification of whether or the extent to which the claimants' desired use of the subject property was allowed under the standards in effect when Smallwood Logging, Inc. acquired the property, it is not possible to substantiate the specific dollar amount by which the land use regulations have reduced the fair market value of the 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, 4 and 14, ORS 215 and OAR 660, divisions 6, and 33, which Lincoln County has implemented through its current TC and AC zones. With the exception of amendments adopted after December 3, 1990, Goals 3 and 4, ORS 215 and OAR 660 were in effect when Smallwood Logging, Inc. 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 the general statutory, goal and rule restrictions on residential division and development of the subject property are not exempt under ORS 197.352(3)(E) only to the extent they were enacted or adopted after Smallwood Logging, Inc. acquired the property. Provisions of Goals 3 and 4, ORS 215 and OAR 660 in effect when Smallwood Logging, Inc. acquired the subject property in 1990 are exempt under ORS 197.352(3)(E) and will continue to apply to the property.

Other laws in effect when Smallwood Logging, Inc. acquired the subject property are exempt under ORS 197.352(3)(E) and will also continue to apply to its use of the property. In addition, the department notes that ORS 215.730 and OAR 660, division 6, particularly OAR 660-006-0029, include standards for siting dwellings in forest zones. These provisions include fire protection standards for dwellings and for surrounding forest lands. ORS 197.352(3)(B) specifically exempts regulations “restricting or prohibiting activities for the protection of public health and safety, such as fire and building codes. . . .” Accordingly, siting standards for dwellings in forest zones in ORS 215.730 and OAR 660, division 6, are exempt under ORS 197.352(3)(B).

There may be other laws that continue to apply to Smallwood Logging, Inc.’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 Smallwood Logging, Inc. seeks a building or development permit to carry out a specific use, it may become evident that other state laws currently apply to that use and may continue to apply to that use. In some cases, some of these laws may be exempt under ORS 197.352(3)(A) to (D).

As explained in Section V.(1) of this report, claimants Gerald and Barbara Smallwood are not “owners” of the subject property, as that term is defined in ORS 197.352(11)(C). Therefore, the issue of whether any laws are exempt from ORS 197.352 is not relevant as to them.

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 Smallwood Logging, Inc. 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 claimants should be aware that the less information they have 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 Smallwood Logging, Inc.'s 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 do not restrict Gerald and Barbara Smallwood's desired use of the property because they are not present owners of the property. Laws enforced by the Commission or the department restrict Smallwood Logging, Inc.'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 \$3,785,000. 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 Smallwood Logging, Inc.'s desired use of the 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 claimant Smallwood Logging, Inc. to use the subject property for a use permitted at the time it acquired the property on December 3, 1990.

Conclusions

Based on the record before the department, claimants Gerald and Barbara Smallwood 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 are not present owners of the subject property. Therefore, the department recommends that their claim be denied.

Based on the record, the department further recommends that the claim for Smallwood Logging, Inc. 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 Smallwood Logging, Inc.'s division of the 50.86-acre property into fifty-one 1-acre

parcels and to its development of a dwelling on each parcel: applicable provisions of Goals 3, 4 and 14, ORS 215 and OAR 660, divisions 6, and 33, enacted or adopted after December 3, 1990. These land use regulations will not apply to Smallwood Logging, Inc. 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 the property on December 3, 1990. The department acknowledges that it is unlikely that the claimants' desired level of development could have satisfied the standards in effect when Smallwood Logging, Inc. acquired the property.

2. The action by the State of Oregon provides the state's authorization to claimant Smallwood Logging, Inc. to use the subject property for the use described in this report, subject to the standards in effect on December 3, 1990. On that date, the property was subject to compliance with Goal 4 and OAR 660, division 6, as implemented through Lincoln County's acknowledged forest zone, and with Goal 3 and OAR 660, division 33, as implemented by Lincoln County's acknowledged EFU zone, and the applicable provisions ORS 215 then in effect.

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 Smallwood Logging, Inc. 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 Smallwood Logging, Inc. 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 Smallwood Logging, Inc. 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 Smallwood Logging, Inc. 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 its use of the subject property.

VII. COMMENTS ON THE DRAFT STAFF REPORT

The department issued its draft staff report on this claim on December 21, 2006. OAR 125-145 0100(3), provided an opportunity for the claimants or the claimants' authorized agent and any third parties who submitted comments under OAR 125-145-0080 to submit written comments, evidence and information in response to the draft staff report and recommendation.