

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. M129838
(BALLOT MEASURE 37) OF)
Mary Boye, CLAIMANT)

Claimant: Mary Boye (the Claimant)

Property: Township 21S, Range 11W, Section 20, Tax lot 101
 Township 21 S, Range 11W, Section 21, Tax lot 200
 Douglas County (the Property)

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

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

ORDER

The Claim is denied for tax lot 101 and the 40-acre portion in the SE ¼ of the SW ¼ of section 21 as to laws administered by DLCD and the Land Conservation and Development Commission (LCDC) for the reasons set forth in the DLCD Report.

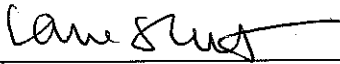
The Claim is approved for tax lot 200, except the 40 acres in the SE ¼ of the SW ¼ of section 21, as to laws administered by DLCD and the Land Conservation and Development Commission (LCDC) for the reasons set forth in the DLCD Report, and subject to the following terms:

1. In lieu of compensation under ORS 197.352, the State of Oregon will not apply the following laws to Mary Boye's division of tax lot 200, except the 40 acres in the SE ¼ of the SW ¼ of section 21, into nine parcels and to her development of a dwelling on each parcel for a family member: applicable provisions of Goals 3, and 4, ORS 215 and OAR 660, divisions 6 and 33. These land use regulations will not apply to Mary Boye only to the extent necessary to allow her to use tax lot 200 for the use described in this report, and only to the extent that use was permitted when she acquired a portion of tax lot 200 on September 9, 1958.

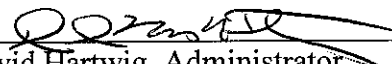
2. The action by the State of Oregon provides the state's authorization to Mary Boye to use a portion of the subject property for the use described in this report, subject to the standards in effect when she acquired a portion of tax lot 200 on September 9, 1958.
3. To the extent that any law, order, deed, agreement or other legally enforceable public or private requirement provides that tax lot 200 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 Mary Boye 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 tax lot 200 by Mary Boye 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) which include (but which are not limited to) Goals 7 and 17 and regulations implementing those goals.
5. Without limiting the generality of the foregoing terms and conditions, in order for Mary Boye to use tax lot 200, 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 Mary Boye 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 tax lot 200 by Mary Boye.

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 2nd day of February, 2007.

FOR the DEPARTMENT OF
ADMINISTRATIVE SERVICES:


David Hartwig, Administrator
DAS, State Services Division
Dated this 2nd day of February, 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. M129838
(BALLOT MEASURE 37) OF)
Nancy Lee, CLAIMANT)

Claimant: Nancy Lee (the Claimant)

Property: Township 21S, Range 11W, Section 20, Tax lot 101
Township 21S, Range 11W, Section 21, Tax lot 200
Douglas County (the property)

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

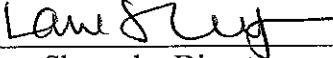
Claimant submitted the Claim to the State of Oregon under ORS 197.352. Under OAR 125-145-0010 *et seq.*, the Department of Administrative Services (DAS) referred the Claim to the Department of Land Conservation and Development (DLCD) as the regulating entity. This order is based on the record herein,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

ORDER

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

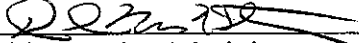
This Order is entered by the Director of the DLCD as a final order of DLCD and the Land Conservation and Development Commission under ORS 197.352, OAR 660-002-0010(8), and OAR chapter 125, division 145, and by the Administrator for the State Services Division of the DAS as a final order of DAS under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

FOR DLCD AND THE LAND
CONSERVATION AND
DEVELOPMENT COMMISSION:



Lane Shetterly, Director
DLCD
Dated this 2nd day of February, 2007.

FOR THE DEPARTMENT OF
ADMINISTRATIVE SERVICES:



David Hartwig, Administrator
DAS, State Services Division
Dated this 2nd day of February, 2007.

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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

February 2, 2007

STATE CLAIM NUMBER: M129838

NAMES OF CLAIMANTS: Mary Boye
Nancy Lee

MAILING ADDRESS: PO Box 211
Reedsport, Oregon 97467

PROPERTY IDENTIFICATION: Township 21S, Range 11W
Section 20: tax lot 101
Section 21: tax lot 200
Douglas County¹

DATE RECEIVED BY DAS: August 11, 2006

180-DAY DEADLINE: February 2, 2007

I. SUMMARY OF CLAIM

The claimants, Mary Boye and Nancy Lee, seek compensation in the amount of \$725,000 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 166.77-acre subject property into nine parcels and to develop a dwelling on each parcel for family members.² The subject property is located at the geographic coordinates listed above, near Reedsport, in Douglas 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 in part. Department staff

¹ The subject property includes two tax lots. Tax lot 101 consists of 4.21 acres and tax lot 200 consists of 162.56 acres.

² The claim also indicates that the claimants may desire to 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."

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 Mary Boye's division of tax lot 200, except the 40 acres in the SE ¼ of the SW ¼ of section 21, into nine parcels and to her development of a dwelling on each parcel for a family member: applicable provisions of Statewide Planning Goals 3 (Agricultural Lands), 4 (Forest Lands) and ORS 215 and Oregon Administrative Rules (OAR) 660, divisions 6, and 33. These land use regulations will not apply to Mary Boye only to the extent necessary to allow her to use tax lot 200 (except the 40 acres in the SE ¼ of the SW ¼ of section 21) for the use described in this report, and only to the extent that use was permitted when Mary Boye acquired that portion of the subject property on September 9, 1958.

The department has determined that the claim is not valid as to Mary Boye's desired use of the 40-acre portion of tax lot 200 in the SE ¼ of the SW ¼ of section 21, because the claim does not include evidence regarding whether or when Mary Boye acquired that portion of the subject property. The 1958 deed conveying the remainder of the subject property did not include the 40 acres in the SE ¼ of the SW ¼ of section 21.

The department has determined that the claim is not valid as to Mary Boye's desired use of tax lot 101 because the use was prohibited under the laws in effect when she acquired that portion of the subject property in 1994.

The department has further determined that the claim is not valid as to Nancy Lee because the claim does not establish that she has an ownership interest in the subject property. (See the complete recommendation in Section VI. of this report.)

III. COMMENTS ON THE CLAIM

Comments Received

On October 30, 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, two written comments were received in response to the 10-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 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

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 August 11, 2006, for processing under OAR 125, division 145. The claim identifies Goals 3, 4 and 17 (Coastal Shorelands) 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

Claimant Mary Boye acquired part of tax lot 200 from her parents, Frankie and Elizabeth Boye, on September 9, 1958, as reflected by a warranty included with the claim. The description in that deed does not include the 40 acres in the SE ¼ of the SW ¼ of section 21 (T21 S R 11W), and there is no conveyancing instrument in the department’s record for this claim conveying that portion of the subject property to Mary Boye. Frankie and Elizabeth Boye acquired tax lot 200 on August 1, 1924, as evidenced by a warranty deed submitted with the claim. Mary Boye acquired tax lot 101 on February 9, 1994, as reflected by a bargain and sale deed included with the claim. On November 26, 1996, Mary Boye attempted to transfer the subject property to the Mary Viola Boye Living Trust, a revocable trust with herself as trustee, as reflected by a warranty deed included with the claim.³ The Douglas County Assessor’s Office confirms Mary Boye’s current ownership of the subject property.

³ Transfer of property to a revocable trust does not result in a change in ownership for purposes of ORS 197.352.

Although claimant Nancy Lee is identified as a claimant on the claim form, the claimants have not submitted any documentation to demonstrate her ownership of the subject property.⁴

Conclusions

Claimant Mary Boye is an "owner" of a portion of the subject property as that term is defined by ORS 197.352(11)(C). Mary Boye has been an owner of tax lot 200 (except the 40 acres in the SE ¼ of the SW ¼ of section 21) since September 9, 1958, and of tax lot 101 since February 9, 1994. Frankie and Elizabeth Boye are "family members" of Mary Boye, as that term is defined by ORS 197.352(11)(A), as to a portion of tax lot 200, since August 1, 1924.⁵ Claimant Nancy Lee has not established that she is an "owner" of the subject property as that term is defined by ORS 197.352(11)(C).

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 or a family member acquired the property.

Findings of Fact

The claim indicates that the claimants desire to divide the 162.56-acre subject property into nine parcels and to develop a dwelling on each parcel, and that the desired use is not allowed under current land use regulations.

The claim is based generally on the applicable provisions of state law that require mixed farm-forest and coastal shoreland zoning and restrict uses on lands in such zones.

The subject property is zoned by Douglas County as Farm Forest (FF), which is a mixed agricultural and forest land zone, as required by Goal 4 and the implementing provisions of OAR 660-006-0050 (effective on February 5, 1990), subsequently amended on March 1, 1994, to comply with the provisions of House Bill 3661 (Chapter 792, Oregon Laws 1993).

Under OAR 660-006-0050, all the uses permitted under Goals 3 and 4 are allowed in mixed agriculture and forest zones except that for dwellings, either the Goal 3 or 4 standards are applicable based on the predominant use of the tract on January 1, 1993.⁶ Depending on the predominant use on that date, the property is subject to either the requirements for dwellings

⁴ The claimants assert that Nancy Lee acquired an interest in the subject property when Mary Boye transferred the subject property to the Mary Viola Boye Living Trust on November 26, 1996. That attempted transfer does not appear valid because the grantee listed on the deed is Mary Viola Boye Living Trust rather than the trustee(s) of the trust. For the transfer to be valid, Mary Boye would have needed to transfer her property to a named trustee of the trust rather than to the trust itself.

⁵ The subject property is adjacent to Otter Slough. 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.

⁶ No information was provided to the department regarding the predominant use of the property on January 1, 1993.

applicable under exclusive farm use zoning required by Goal 3 and OAR 660, division 33, or forest zone provisions required by Goal 4 and OAR 660, division 6.

For land divisions, OAR 660-006-0055 authorizes the creation of new parcels based on the standards applicable to farm or forest zones that implement the 80-acre minimum lot size specified in ORS 215.780. Under ORS 215.780(2)(a), the minimum lot size in Douglas County's FF zone is 80 acres. The claimant's property cannot be divided into parcels smaller than 80 acres.

Additionally, the property is subject to a Conservation Shoreland (CS) zone. The subject property is zoned by Douglas County as CS as required by Goal 17 because the property is within the "coastal shoreland" planning area as defined by Goal 17. Goal 17 became effective on June 7, 1977, and required that lands within the coastal shoreland boundary be zoned as shoreland, and local jurisdictions develop comprehensive plans to identify and inventory specific coastal resources within the shoreland area, prepare plans that protect those resources and provide for specific uses.⁷ Further, upon its adoption in 1977, Goal 17 provided that:

[s]horelands in rural areas . . . shall be used as appropriate for:

- (a) farm uses as provided in ORS Chapter 215;
- (b) propagation and harvesting of forest products consistent with the Oregon Forest Practices Act;
- (c) private and public water-dependent recreation developments;
- (d) aquaculture;
- (e) water-dependent commercial and industrial uses and water-related uses only upon a finding by the governing body of the county that such uses satisfy a need which cannot be reasonably accommodated on shorelands in urban and urbanizable areas;
- (f) *subdivisions, major and minor partitions and other uses only upon a finding by the governing body of the county that such uses satisfy a need which cannot be accommodated at other upland locations or in urban or urbanizable areas and are compatible with the objectives of this goal to protect riparian vegetation and wildlife habitat* [emphasis added]; and
- (g) a single family residence on existing lots, parcels or units of land when compatible with the objectives and implementation standards of this goal.

The current version of Goal 17 contains similar restrictions, generally allowing uses that are not dependent on or related to water, only upon a showing that the use would not commit shorelands to more intensive uses or cause a permanent or long term change in the features of shorelands, except upon a showing of public need that cannot be met in other areas. No showing has been made that the claimants' desired use would comply with this standard.

The county also has applied a floodplain overlay zone (FP) to a portion of the subject property. The flood hazard zone is required under Goal 7 (Areas Subject to Natural Hazards) to implement Federal Emergency Management Administration (FEMA) and National Flood Insurance Program (NFIP) requirements.

⁷ Goal 17 was adopted in 1976 and became effective on June 7, 1977. The Goal 17 inventory requirements defined the shoreland planning wherein the subject property is located. The Goal 17 comprehensive plan requirements prescribed coastal shoreland uses for the different types of coastal shorelands, as noted in the text of this report.

The Boye family first acquired tax lot 200 in 1924 and claimant Mary Boye acquired a portion of it in 1958, prior to the adoption of the statewide planning goals and their implementing statutes and regulations. No county zoning applied to tax lot 200 in 1924 and 1958.

The current zoning requirements, minimum lot size and dwelling standards established by Goals 3, 4, 7 and 17, including provisions applicable to land zoned FF and CS, and ORS 215 and OAR 660, divisions 6, and 33, were all enacted or adopted after Mary Boye acquired a portion of tax lot 200 on September 9, 1958. These land use regulations do not allow the division and development of the portion of tax lot 200 that Mary Boye owns.

Conclusions

The current zoning requirements, minimum lot size and dwelling standards established under Goals 3, 4, 7 and 17 for lands zoned for mixed farm-forest use and for coastal shoreland uses, and the statutory and rule restrictions under applicable provisions of ORS 215 and OAR 660, divisions 6, and 33, were enacted or adopted after the Boye family acquired tax lot 200 in 1924 and claimant Mary Boye acquired tax lot 200 in 1958.

The development restrictions established by the FP overlay zone, under the provisions of Goal 7 and FEMA and NFIP requirements, were also adopted after the claimant acquired tax lot 200 in 1958, and restrict the desired use of the property.

This report addresses only those state laws that are identified in the claim, or that the department is certain apply to tax lot 200, based on the uses that the claimants have identified. There may be other laws that currently apply to Mary Boye's use of tax lot 200 and that may continue to apply to her 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 property until there is a specific proposal for that use. When Mary Boye seeks a building or development permit to carry out a specific use, it may become evident that other state laws apply to that use.

As explained in Section V.(1) of this report, claimant Mary Boye acquired tax lot 101 on February 2, 1994. No state laws enacted or adopted since she acquired tax lot 101 restrict the use of the property relative to the uses allowed in 1994. Therefore, the fair market value of the property has not been reduced as a result of land use regulations enforced by the Land Use Conservation and Development Commission (the Commission) or the department.

Additionally, as explained in Section V.(1) of this report, claimant Nancy Lee has not established her ownership of the subject property. Therefore, the department cannot determine that any laws enforced by the Commission or the department restrict her use of the subject property with the effect of reducing its fair value.

3. Effect of Regulations on Fair Market Value

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 includes an estimate of \$725,000 as the reduction in the subject property's fair market value due to the regulations that restrict the claimants' desired use of tax lot 200. This amount is based on a comparative market analysis included with the claim.

The claim does not identify any state land use regulations enacted or adopted since Mary Boye acquired tax lot 101 that restrict the use of the property relative to what would have been allowed when she acquired it on February 2, 1994. As set forth in Section V.(2) of this report, the state land use regulations restricting Mary Boye's desired use of tax lot 101 were in effect when she acquired the property in 1994.

Conclusions

As explained in Section V.(1) of this report, the claimants are Mary Boye whose family acquired tax lot 200 in 1924 and Mary Boye who acquired tax lot 101 on February 9, 1994, and her daughter, Nancy Lee. Nancy Lee has not established her ownership of the subject property and therefore, is not entitled to compensation under ORS 197.352. All of the state land use regulations that restrict Mary Boye's desired use of tax lot 101 were in effect when she acquired the property. Therefore, these state land use regulations are exempt under ORS 197.352(3)(E), which exempts laws in effect when Mary Boye acquired tax lot 101.

Under ORS 197.352, Mary Boye is due compensation for land use regulations that restrict the use of the portion of tax lot 200 that she owns 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 Boye family and Mary Boye acquired tax lot 200 (except the 40 acres in the SE ¼ of the SW ¼ of section 21) restrict her desired use of the property. The claimants estimate that the effect of the regulations on the fair market value of the property is a reduction of \$725,000.

Without an appraisal or other documentation for 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 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 since Mary Boye acquired a portion of tax lot 200.

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 property, including applicable provisions of Goals 3 and 4, ORS 215 and OAR 660, divisions 6, and 33, which Douglas County has implemented through its FF and CS zones. All of these land use regulations were enacted or adopted after the Boye family and Mary Boye acquired tax lot 200.

Without a specific development proposal for the 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 subject property were in effect when the Boye family and Mary Boye acquired tax lot 200 in 1924 and 1958. As a result, these laws are not exempt under ORS 197.352(3)(E).

Laws in effect when Mary Boye acquired tax lot 200 are exempt under ORS 197.352(3)(E) and will continue to apply to her use of tax lot 200. In addition, the department notes that ORS 215.730 and OAR 660, division 6, particularly 660-006-0029, include standards for siting dwellings in forest zones. The provisions include fire protection standards for dwellings and for surrounding forest zones. 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. . . .” To the extent they are applicable to Mary Boye’s property, the siting standards for dwellings in forest zones in ORS 215.730 and OAR 660, division 6, are exempt under ORS 197.352(3)(B).

In addition, Goals 7 and 17, and the CS and FP overlay zoning that applies to a portion of the subject property is exempt under ORS 197.352(3)(B), which exempts regulations that restrict or prohibit activities for the protection of public health and safety and ORS 197.352(3)(C), which exempts regulations to the extent they are required to comply with federal law. Both Goals 7 and 17, by their own terms, restrict activities to protect human life and property. As a result, these goals, their implementing rules, and the county’s overlay zone regulations are exempt.

There may be other laws that continue to apply to Mary Boye’s use of the portion of tax lot 200 that she owns 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 property until there is a specific proposal for that use. When Mary Boye 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).

As explained in Section V.(1) of this report, the claimants have not established Nancy Lee’s ownership of the subject property. Therefore, the issue of whether any laws are exempt from ORS 197.352 is not relevant as to Nancy Lee’s claim.

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 has determined that Nancy Lee is not entitled to relief under ORS 197.352 because the claimants have not established her ownership of the subject property. The department has further determined that the laws enforced by the Commission or the department do not restrict Mary Boye's desired use of the tax lot 101 relative to what was permitted when she acquired it in 1994 and does not reduce the fair market value of the property

As to tax lot 200, the department has determined first that Mary Boye has not established that she owns the 40-acre portion of the tax lot located in the SE $\frac{1}{4}$ of the SW $\frac{1}{4}$ of section 21. The 1958 deed included with the claim does not include that 40-acre portion of tax lot 200 in the property description. As to the remainder of tax lot 200, the department has determined that laws enforced by the Commission or the department restrict Mary Boye's desired use of the 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 property by \$725,000. 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 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 Mary Boye's desired use of property was allowed under the standards in effect when the Boye family acquired tax lot 200. 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 Mary Boye to use tax lot 200 for a use permitted at the time she acquired tax lot 200 on September 9, 1958.

Conclusions

Based on the findings and conclusions set forth in this report, the department has determined that Nancy Lee is not entitled to relief under ORS 197.352 as a result of land use regulations enforced by the Commission or the department because the claim does not establish Nancy Lee's ownership of the subject property. The department recommends that the claim be denied as to Nancy Lee. The department has further determined that based on the record and the foregoing findings and conclusions, Mary Boye has not established that she is entitled to relief under ORS 197.352 as to tax lot 101 or as to the 40-acre portion of tax lot 200 in the SE $\frac{1}{4}$ of the SW $\frac{1}{4}$ of section 21. Therefore, the department recommends that the claim be denied as to Mary Boye for that portion of the subject property.

The department has otherwise determined that Mary Boye's claim be approved, subject to the following:

1. In lieu of compensation under ORS 197.352, the State of Oregon will not apply the following laws to Mary Boye's division of tax lot 200, except the 40 acres in the SE $\frac{1}{4}$ of the SW $\frac{1}{4}$ of section 21, into nine parcels and to her development of a dwelling on each parcel for a family

member: applicable provisions of Goals 3, and 4, ORS 215 and OAR 660, divisions 6 and 33. These land use regulations will not apply to Mary Boye only to the extent necessary to allow her to use tax lot 200 for the use described in this report, and only to the extent that use was permitted when she acquired a portion of tax lot 200 on September 9, 1958.

2. The action by the State of Oregon provides the state's authorization to Mary Boye to use a portion of the subject property for the use described in this report, subject to the standards in effect when she acquired a portion of tax lot 200 on September 9, 1958.

3. To the extent that any law, order, deed, agreement or other legally enforceable public or private requirement provides that tax lot 200 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 Mary Boye 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 tax lot 200 by Mary Boye 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) which include (but which are not limited to) Goals 7 and 17 and regulations implementing those goals.

5. Without limiting the generality of the foregoing terms and conditions, in order for Mary Boye to use tax lot 200, 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 Mary Boye 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 tax lot 200 by Mary Boye.

VII. COMMENTS ON THE DRAFT STAFF REPORT

The department issued its draft staff report on this claim on January 16, 2007. 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.