



Oregon

Theodore R. Kulongoski, Governor

Department of Land Conservation and Development

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April 16, 2007

To: Interested Persons

From: Lane Shetterly, Director



Re: Ballot Measure 37 (ORS 197.352) Claim Number M130370

Claimants: Larry L. and Sharon R. Johnston, and Rhyun and Kim Rinnert

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

This Final Staff Report and Recommendation and the Final Order constitute the final decision on this claim. No further action will be taken on this matter.

BEFORE THE DEPARTMENT OF ADMINISTRATIVE SERVICES,
THE DEPARTMENT OF LAND CONSERVATION AND DEVELOPMENT OF
THE STATE OF OREGON

IN THE MATTER OF THE CLAIM FOR) FINAL ORDER A
COMPENSATION UNDER ORS 197.352) CLAIM NO. M130370
(BALLOT MEASURE 37) OF)
Larry L. Johnston, CLAIMANT)

Claimant: Larry L. Johnston (the Claimant)

Property: Township 26S, Range 5W, Section 34, Tax lot 104, 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 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 Larry Johnston's division of the 144.5-acre subject property into one 10-acre parcel and one 134.5-acre parcel or to his development of a dwelling on the undeveloped 134.5-acre parcel: applicable provisions of Goals 3 and 4, ORS 215 and OAR 660, divisions 6, and 33, enacted or adopted after September 2, 2003. These laws will not apply to Larry Johnston only to the extent necessary to allow him to use the subject property for the use described in this report, and only to the extent that use was permitted when he acquired the property on September 2, 2003. The department acknowledges that the relief to which the Larry Johnston is entitled under ORS 197.352 will not allow him to use the subject property in the manner set forth in the claim.
2. The action by the State of Oregon provides the state's authorization to Larry Johnston to use the subject property for the use described in this report, subject to the standards in effect on September 2, 2003. At that time, the property was subject to applicable provisions of Goals 3 and 4, ORS 215 and OAR 660, divisions 6, and 33, currently 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 Larry Johnston 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 Larry Johnston 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 Larry Johnston to use the subject property, it may be necessary for him 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 Larry Johnston from the necessity of obtaining a decision under ORS 197.352 from a local public entity that has jurisdiction to enforce a land use regulation applicable to a use of the subject property by him.

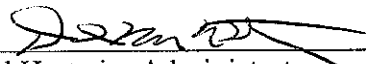
This Order is entered by the Director of the DLCD as a final order of DLCD and the Land Conservation and Development Commission under ORS 197.352, OAR 660-002-0010(8), and OAR 125, division 145, and by the Administrator for the State Services Division of the DAS as a final order of DAS under ORS 197.352,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

FOR DLCD AND THE LAND
CONSERVATION AND
DEVELOPMENT COMMISSION:



Lane Shetterly, Director
DLCD
Dated this 16th day of April, 2007.

FOR the DEPARTMENT OF
ADMINISTRATIVE SERVICES:



David Hartwig, Administrator
DAS, State Services Division
Dated this 16th day of April, 2007.

NOTICE OF RIGHT TO APPEAL OR OTHER JUDICIAL RELIEF

You are entitled, or may be entitled, to judicial remedies including the following:

1. Judicial review under ORS 183.484: Judicial review under ORS 183.484 may be obtained by filing a petition for review within 60 days from the service of this order. A petition for judicial review under ORS 183.484 may be filed in the Circuit Court for Marion County or the Circuit Court in the county in which you reside.
2. A cause of action under ORS 197.352 (Measure 37 (2004)): If a land use regulation continues to apply to the subject property more than 180 days after the present owner of the property has made written demand for compensation under ORS 197.352, the present owner of the property, or any interest therein, shall have a cause of action in the circuit court in which the real property is located.

(Copies of the documents that comprise the record are available for review at the Department's office at 635 Capitol Street NE, Suite 150, Salem, Oregon 97301-2540)

FOR INFORMATION ONLY

The Oregon Department of Justice has advised the Department of Land Conservation and Development that “[i]f the current owner of the real property conveys the property before the new use allowed by the public entity is established, then the entitlement to relief will be lost.”

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. M130370
(BALLOT MEASURE 37) OF)
Sharon R. Johnston and Rhyun and)
Kim Rinnert, CLAIMANTS)

Claimants: Sharon R. Johnston and Rhyun and Kim Rinnert (the Claimants)

Property: Township 26S, Range 5W, Section 34, Tax lot 104, Douglas 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

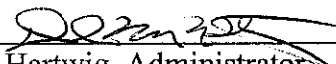
The Claim is denied as to laws administered by DLCD and the Land Conservation and Development Commission (LCDC) for the reasons set forth in the DLCD Report.

This Order is entered by the 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 16th day of April, 2007.

FOR THE DEPARTMENT OF
ADMINISTRATIVE SERVICES:


David Hartwig, Administrator
DAS, State Services Division
Dated this 16th day of April, 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**

April 16, 2007

STATE CLAIM NUMBER: M130370

NAMES OF CLAIMANTS: Larry L. and Sharon R. Johnston
Rhyun and Kim Rinnert

MAILING ADDRESS: Larry and Sharon Johnston
3576 Sunshine Road
Roseburg, Oregon 97470

Rhyun and Kim Rinnert
3494 Sunshine Road
Roseburg, Oregon 97470

PROPERTY IDENTIFICATION: Township 26S, Range 5W, Section 34
Tax lot 104
Douglas County

DATE RECEIVED BY DAS: October 23, 2006

180-DAY DEADLINE: April 21, 2007

I. SUMMARY OF CLAIM

The claimants, Larry and Sharon Johnston, and Rhyun and Kim Rinnert, 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 divide the 144.5-acre subject property into one 10-acre parcel and one 134.5-acre undeveloped parcel, and to develop a dwelling on the undeveloped 134.5-acre parcel. The subject property is located west of Sunshine Road, near Roseburg, 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 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 Larry Johnston's division of the 144.5-acre subject property into one 10-acre parcel and one 134.5-acre parcel and to his development of a dwelling on the undeveloped 134.5-acre parcel: applicable provisions of Statewide Planning Goal 3

(Agricultural Lands), ORS 215 and Oregon Administrative Rules (OAR) 660, division 33, enacted or adopted after September 2, 2003. These laws will not apply to Larry Johnston only to the extent necessary to allow him to use the subject property for the use described in this report, and only to the extent that use was permitted when he acquired the property on September 2, 2003. The department acknowledges that the relief to which Larry Johnston is entitled under ORS 197.352 will not allow him to use the subject property in the manner set forth in the claim.

Department staff further recommends that the claim be denied as to claimants Sharon Johnston and Rhyun and Kim Rinnert because their desired use of the subject property was prohibited under the laws in effect when they acquired the property in 2003. (See the complete recommendation in Section VI. of this report.)

III. COMMENTS ON THE CLAIM

Comments Received

On March 6, 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, no written comments were received in response to the 10-day notice.

IV. TIMELINESS OF CLAIM

Requirement

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

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

Findings of Fact

This claim was submitted to DAS on October 23, 2006, for processing under OAR 125, division 145. The claim identifies Douglas County's Farm Forest (FF) and Exclusive Farm Use-Grazing (FG) zoning 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

Larry and Sharon Johnston acquired the subject property on September 2, 2003,¹ from Box “J” Ranch, a partnership that included Larry Johnston, as reflected by a warranty deed included with the claim.² Rhyun and Kim Rinnert acquired the subject property on November 19, 2003, as reflected by a bargain and sale deed included with the claim. Box “J” Ranch acquired the subject property on December 9, 1976, as reflected by a corrected bargain and sale deed included with the claim. The Douglas County Assessor’s Office confirms the claimants’ current ownership of the subject property.

Conclusions

The claimants, Larry and Sharon Johnston, and Rhyun and Kim Rinnert, are “owners” of the subject property as that term is defined by ORS 197.352(11)(C). Larry and Sharon Johnston have been owners since September 2, 2003. Rhyun and Kim Rinnert have been owners since November 19, 2003. Box “J” Ranch is a family member of Larry Johnston as defined by ORS 197.352(11)(A) and acquired the subject property on December 9, 1976.

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.

¹ The claimants assert that Larry Johnston first acquired the subject property as a member of the Box “J” Ranch partnership, as reflected by a December 23, 1976, correction bargain and sale deed. Although claimant Larry Johnston may have had an ownership interest in Box “J” Ranch, Box “J” Ranch was a separate and distinct legal entity from Larry Johnston. Larry Johnston did not have an individual ownership interest in the subject property until Box “J” Ranch conveyed the property to him on September 2, 2003.

² Under ORS 197.352(11)(A), legal entities can be “family members” of individuals who are owners of property under ORS 197.352(11)(C). However, legal entities cannot have family members under the statute. Therefore, individuals who transferred property to the Box “J” Ranch partnership are not considered family members under the definition of family member in ORS 197.352(11)(A).

Findings of Fact

The claim indicates that the claimants desire to divide the 144.5-acre subject property into one 10-acre parcel and one 134.5-acre parcel, and to develop a dwelling on the undeveloped 134.5-acre parcel, and that current land use regulations prohibit the desired use.

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

An approximately 30-acre portion of the claimants' property is zoned by Douglas County as FG, as required by Goal 3, in accordance with ORS 215 and OAR 660, division 33, because that portion of the claimants' 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 the Goal 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.

An approximately 115-acre portion of the claimants' property is zoned by Douglas County as 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, 1993.⁴ Depending on the predominant use on that date, the property is subject to either the requirements for dwellings applicable under EFU 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 approximately 115-acre portion of the claimants' property cannot be divided into parcels smaller than 80 acres.

³ The claimants' property is "agricultural land" because it contains Natural Resources Conservation Service Class I-IV soils.

⁴ No information was provided to the department regarding the predominant use of the property on January 1, 1993.

Larry Johnston's family acquired the subject property after the adoption of the statewide planning goals, but before the Commission acknowledged Douglas County's land use regulations to be in compliance with the statewide planning goals pursuant to ORS 197.250 and 197.251.⁵ At that time, the subject property was zoned by Douglas County as General Agriculture, which did not require a minimum acreage for the creation of a new parcel. Because the Commission had not acknowledged the county's plan and land use regulations when Larry Johnston's family acquired the subject property on December 9, 1976, the statewide planning goals applied directly to the property when Larry Johnston's family acquired it.⁶

As adopted on January 25, 1975, Goal 3 required that agricultural land be preserved and zoned for EFU pursuant to ORS 215. The Goal 3 standard for land divisions involving property where the local zoning was not acknowledged required that the resulting parcels must be of a size that is "appropriate for the continuation of the existing commercial agricultural enterprise within the area." Further, ORS 215.263 (1973 edition) only authorized the partition of land subject to EFU zoning, and required that all divisions of land subject to EFU zoning comply with the legislative intent set forth in ORS 215.243 (Agricultural Land Use Policy). Thus, Larry Johnston's family's opportunity to divide the portion of the property zoned EFU when it acquired the property in 1976 was limited to land divisions that were consistent with Goal 3, which required that the resulting parcels be (1) appropriate for the continuation of the existing commercial agricultural enterprise in the area and (2) shown to comply with the legislative intent set forth in ORS 215.

Under the Goal 3 standards in effect on December 9, 1976, farm dwellings were allowed if they were determined to be "customarily provided in conjunction with farm use" under ORS 215.213(1)(e) (1973 edition). Non-farm dwellings were subject to compliance with ORS 215.213(3) (1973 edition).

Goal 4, as adopted in 1975, required that forest lands be designated for forest uses. Depending on the nature of the property when Larry Johnston's family acquired it, the portion of the property zoned FF would have been subject to Goal 3 or 4 and either EFU zoning pursuant to ORS 215 or forest zoning adequate to retain forest lands for forest uses.

Under Goal 4, the state standards required uses to "conserve forest lands for forest uses." Specifically, Goal 4 only allowed land divisions that would protect commercial forest lands for

⁵ Douglas County's comprehensive plan and land use regulations were acknowledged by the Commission for compliance with Goal 3 on December 24, 1985, and with Goal 4 on January 18, 1983.

⁶ The statewide planning goals became effective on January 25, 1975, and were applicable to legislative land use decisions and some quasi-judicial land use decisions prior to the Commission's acknowledgment of each county's comprehensive plan and implementing regulations. *Perkins v. City of Rajneeshpuram*, 300 Or 1 (1985); *Alexanderson v. Polk County*, 289 Or 427, rev. den 290 Or 137 (1980); *Sunnyside Neighborhood Assn. v. Clackamas County*, 280 Or 3 (1977); *Jurgenson v. Union County*, 42 Or App 505 (1979); and *1000 Friends of Oregon v. Benton County*, 32 Or App 413 (1978). After the county's plan and land use regulations were acknowledged by the Commission, the statewide planning goals and implementing rules no longer applied directly to such 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).

commercial forest uses. Dwellings in forest zones could only be allowed if found to be “necessary and accessory” to one of the enumerated forest uses listed in Goal 4.⁷

No information has been presented in the claim to establish that Larry Johnston’s desired division of the subject property into two parcels complies with the Goal 3 “commercial” standard or the standards for farm or non-farm parcels under ORS 215.263 (1973 edition), nor is there any information to establish that his desired development of one dwelling on the subject property satisfies the standards for farm or non-farm dwellings under ORS 215.213 (1973 edition).

When claimant Sharon Johnston acquired the property on September 2, 2003, and when claimants Rhyun and Kim Rinnert acquired the property on November 19, 2003, it was subject to the current laws in effect, as described above.

Conclusions

The current zoning requirements, minimum lot size and dwelling standards established by Goals 3 and 4 and provisions applicable to land zoned EFU and mixed farm-forest in ORS 215 and OAR 660, divisions 6, and 33, do not allow the claimants’ desired division or development of the subject property. However, the claim does not establish whether or to what extent Larry Johnston’s desired use of the subject property complies with the standards for land division and development under Goal 3 or 4 applicable and in effect when his family member acquired the property on December 9, 1976.

Laws in effect when Sharon Johnston and Rhyun and Kim Rinnert acquired the subject property in 2003 prohibited the claimants’ desired use of the property. Laws enacted or adopted since Sharon Johnston and Rhyun and Kim Rinnert acquired the subject property do not restrict their desired use of the property relative to when they acquired it in 2003.

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 \$150,000 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 comparative market analysis included with the claim.

⁷ Goal 4 prohibited uses that were not enumerated by Goal 4 as permissible uses for forest lands as well as those that were not necessary and accessory to an enumerated forest use. *Lamb v. Lane County*, 7 Or LUBA 137 (1983). Dwellings in forest lands were required to be “necessary and accessory” to show that such dwellings complied with the Goal 4 requirement that local land use regulations must “conserve forest lands for forest uses.” *1000 Friends v. LCDC (Curry County)*, 301 Or 447 (1986). A dwelling that may “enhance” forest uses is not “necessary and accessory” to a forest use to the extent required by Goal 4. *1000 Friends of Oregon v. LCDC (Lane County)*, 305 Or 384 (1988). For additional guidance, the Goal 4 provisions were interpreted under OAR 660, division 6, effective on September 1, 1982, in *1000 Friends of Oregon v. LCDC (Lane County)* and in *1000 Friends v. LCDC (Curry County)*.

Conclusions

As explained in Section V.(1) of this report, the claimants are Larry and Sharon Johnston, and Rhyun and Kim Rinnert. Larry Johnston's family acquired the property in 1976. Sharon Johnston acquired the subject property on September 2, 2003, and Rhyun and Kim Rinnert acquired the subject property on November 19, 2003. No state laws enacted or adopted since Sharon Johnston and Rhyun and Kim Rinnert acquired the subject property restrict the use of the property relative to the uses allowed in 2003. Therefore, as to Sharon Johnston and Rhyun and Kim Rinnert, the fair market value of the subject property has not been reduced as a result of land use regulations enforced by the Commission or the department.

Under ORS 197.352, Larry Johnston 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 Larry Johnston's family acquired the subject property restrict his desired use of the property. The claimants estimate that the effect of the regulations on the fair market value of the subject property is a reduction of \$150,000.

Without an appraisal or other documentation, and without verification of whether or to what extent the claimants' desired use of the property was permitted under the laws in effect when Larry Johnston's family acquired it, 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 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 Larry Johnston's family acquired the 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.

Findings of Fact

The claim is based on state land use regulations that restrict the use of the subject property, including applicable provisions of Goals 3 and 4, ORS 215 and OAR 660, divisions 6, and 33, which Douglas County has implemented through its FG and FF zones. With the exception of provisions of Goals 3 and 4 and ORS 215 in effect on December 9, 1976, when Larry Johnston's family acquired the subject property, these land use regulations were enacted or adopted after Larry Johnston's family acquired the subject property.

As set forth in Section V.(2) of this report, the state land use regulations restricting the claimants' desired use of the subject property were in effect when Sharon Johnston acquired the subject property on September 2, 2003, and when Rhyun and Kim Rinnert acquired the subject property on November 19, 2003.

Conclusions

It appears that, with the exception of Goals 3 and 4, and ORS 215 in effect in 1976, none of the general statutory, goal and rule restrictions on residential division and development of the subject property were in effect when Larry Johnston's family acquired the property on December 9, 1976, and therefore are not exempt under ORS 197.352(3)(E). Laws in effect when Larry Johnston's family acquired the subject property are exempt under ORS 197.352(3)(E) and do not provide a basis for compensation. In addition, other land use laws enacted or adopted for a purpose set forth in ORS 197.352(3)(A) to (D) are also exempt and would not provide a basis for compensation.

All of the state land use regulations that restrict Sharon Johnston's and Rhyun and Kim Rinnert's desired use of the subject property were in effect when they acquired the property. Therefore, as to Sharon Johnston and Rhyun and Kim Rinnert, these state land use regulations are exempt under ORS 197.352(3)(E), which exempts laws in effect when the claimants acquired 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 Sharon Johnston's and Rhyun and Kim Rinnert's desired use of the subject property relative to what was permitted when they acquired the property in 2003 and do not reduce the fair market value of the property. All state laws restricting the use of the subject property are exempt under ORS 197.352(3)(E).

Based on the findings and conclusions set forth in this report, laws enforced by the Commission or the department restrict Larry Johnston'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 \$150,000. 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 Larry Johnston's desired use of the subject property was allowed under the standards in effect when he 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 Larry Johnston to use the subject property for a use permitted at the time he acquired the property on September 2, 2003.

At the time Larry Johnston acquired an interest in the subject property, it was zoned FG and FF by Douglas County and subject to the current lot size and dwelling standards under Goals 3 and 4, ORS 215 and OAR 660, divisions 6, and 33, and as described in Section V.(2) of this report.

In addition to the provisions of Goals 3 and 4, ORS 215 and OAR 660, divisions 6, and 33, in effect when Larry Johnston acquired the property, there may be other laws that continue to apply to his use of the property that have not been identified in the claim. 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. . . .” To the extent they are applicable to the claimants’ 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).

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

This report addresses only those state laws that are identified in the claim, or that the department is certain apply to the subject property based on the uses that the claimants have 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. Larry Johnston should be aware that the less information he has provided to the department in the claim, the greater the possibility that there may be additional laws that will later be determined to continue to apply to his use of the subject property.

Conclusions

Based on the record and the foregoing findings and conclusions, claimants Sharon Johnston and Rhyun and Kim Rinnert 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 their desired use of the subject property was prohibited under the laws in effect when they acquired the property in 2003. Therefore, the department recommends that their claim be denied.

The department further recommends that Larry Johnston's claim be approved, subject to the following terms:

1. In lieu of compensation under ORS 197.352, the State of Oregon will not apply the following laws to Larry Johnston's division of the 144.5-acre subject property into one 10-acre parcel and one 134.5-acre parcel or to his development of a dwelling on the undeveloped 134.5-acre parcel: applicable provisions of Goals 3 and 4, ORS 215 and OAR 660, divisions 6, and 33, enacted or adopted after September 2, 2003. These laws will not apply to Larry Johnston only to the extent necessary to allow him to use the subject property for the use described in this report, and only to the extent that use was permitted when he acquired the property on September 2, 2003. The department acknowledges that the relief to which the Larry Johnston is entitled under ORS 197.352 will not allow him to use the subject property in the manner set forth in the claim.
2. The action by the State of Oregon provides the state's authorization to Larry Johnston to use the subject property for the use described in this report, subject to the standards in effect on September 2, 2003. At that time, the property was subject to applicable provisions of Goals 3 and 4, ORS 215 and OAR 660, divisions 6, and 33, currently 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 Larry Johnston 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 Larry Johnston 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 Larry Johnston to use the subject property, it may be necessary for him 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 Larry Johnston from the necessity of obtaining a decision under ORS 197.352 from a local public entity that has jurisdiction to enforce a land use regulation applicable to a use of the subject property by him.

VII. COMMENTS ON THE DRAFT STAFF REPORT

The department issued its draft staff report on this claim on March 23, 2007. Subsequent to the filing of this claim and after notification was provided pursuant to OAR 125-145-0080, the claimants submitted a comment to the draft staff report dated March 30, 2007, requesting to add an additional tax lot to the claim. The department cannot substantively amend a claim at this stage. If the claimants desire to submit a new claim with a different subject property than set forth in their original claim, they may file a new demand for compensation in accordance with the requirements of ORS 197.352. The department further acknowledges receipt of the

claimants' correspondence, relative to the department's finding as to one claimant's date of acquisition of the subject property. The department has considered the comment and finds that the record before the department supports the department's initial determination of the claimant's date of acquisition.