



Oregon

Theodore R. Kulongoski, Governor

Department of Land Conservation and Development

635 Capitol Street NE, Suite 150

Salem, Oregon 97301-2524

Phone: (503) 373-0050

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

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

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

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

May 3, 2007



To: Interested Persons

From: Lane Shetterly, Director

Re: Ballot Measure 37 (ORS 197.352) Claim Number M130650

Claimants: John and Jan Wheeler and Kay Ganieany

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. M130650
(BALLOT MEASURE 37) OF)
John and Jan Wheeler, CLAIMANTS)

Claimants: John and Jan Wheeler (the Claimants)

Property: Township 29S, Range 8W, Section 1: tax lot 200, 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 approved to John and Jan Wheeler for tax lot 200 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 the claimants' division of the 89.71-acre subject property into two separate legal tax lots: applicable provisions of Goals 3 and 4, ORS 215 and OAR 660, divisions 6, and 33, enacted or adopted after each claimant acquired each of the subject tax lots. These laws will not apply to the claimants only to the extent necessary to allow them to use the subject property for the use described in this report, and only to the extent that use was permitted when John Wheeler acquired tax lot 200 on March 17, 1981; when Kay Ganieany acquired the tax lot 1800 June 16, 1989; and when Jan Wheeler acquired tax lot 200 on June 24, 1998. The department acknowledges that the relief to which Jan Wheeler is entitled under ORS 197.352 will not allow her to use tax lot 200 in the manner set forth in the claim.

2. The action by the State of Oregon provides the state's authorization to claimants to use the subject property for the use described in this report, subject to the standards in effect on March 17, 1981, when John Wheeler acquired tax lot 200; on June 16, 1989, when Kay Ganieany acquired tax lot 1800; and on June 24, 1998, when Jan Wheeler acquired tax lot 200. On March 17, 1981, tax lot 200 was subject to applicable provisions of Goal 3 or 4 and ORS 215 then in effect. On June 16, 1989, tax lot 1800 was subject to compliance with Goal 3 and OAR 660,

division 5, as implemented by Douglas County's acknowledged EFU zone, and the applicable provisions ORS 215 then in effect. On June 24, 1998, tax lot 200 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 the claimants first obtain that permit, license or other form of authorization or consent. Such requirements may include, but are not limited to: a building permit, a land use decision, a "permit" as defined in ORS 215.402 or 227.160, other permits or authorizations from local, state or federal agencies and restrictions on the use of the subject property imposed by private parties.

4. Any use of the subject property by the claimants under the terms of the order will remain subject to the following laws: (a) those laws not specified in (1) above; (b) any laws enacted or enforced by a public entity other than the Commission or the department; and (c) those laws not subject to ORS 197.352 including, without limitation, those laws exempted under ORS 197.352(3).

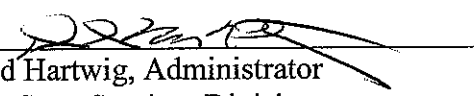
5. Without limiting the generality of the foregoing terms and conditions, in order for the claimants to use the subject property, it may be necessary for them to obtain a decision under ORS 197.352 from a city and/or county and/or metropolitan service district that enforces land use regulations applicable to the property. Nothing in this order relieves the claimants from the necessity of obtaining a decision under ORS 197.352 from a local public entity that has jurisdiction to enforce a land use regulation applicable to a use of the subject property by the claimants.

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 4th day of May, 2007.

FOR the DEPARTMENT OF
ADMINISTRATIVE SERVICES:


David Hartwig, Administrator
DAS, State Services Division
Dated this 4th day of May, 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. M130650
(BALLOT MEASURE 37) OF)
Kay Ganieany, CLAIMANT)

Claimant: Kay Ganieany (the Claimant)

Property: Township 29S, Range 8W, Section 6: tax lot 1800, 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 to Kay Ganieany for tax lot 1800 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 the claimants' division of the 89.71-acre subject property into two separate legal tax lots: applicable provisions of Goals 3 and 4, ORS 215 and OAR 660, divisions 6, and 33, enacted or adopted after each claimant acquired each of the subject tax lots. These laws will not apply to the claimants only to the extent necessary to allow them to use the subject property for the use described in this report, and only to the extent that use was permitted when John Wheeler acquired tax lot 200 on March 17, 1981; when Kay Ganieany acquired the tax lot 1800 June 16, 1989; and when Jan Wheeler acquired tax lot 200 on June 24, 1998. The department acknowledges that the relief to which Jan Wheeler is entitled under ORS 197.352 will not allow her to use tax lot 200 in the manner set forth in the claim.
2. The action by the State of Oregon provides the state's authorization to claimants to use the subject property for the use described in this report, subject to the standards in effect on March 17, 1981, when John Wheeler acquired tax lot 200; on June 16, 1989, when Kay Ganieany acquired tax lot 1800; and on June 24, 1998, when Jan Wheeler acquired tax lot 200. On March

17, 1981, tax lot 200 was subject to applicable provisions of Goal 3 or 4 and ORS 215 then in effect. On June 16, 1989, tax lot 1800 was subject to compliance with Goal 3 and OAR 660, division 5, as implemented by Douglas County's acknowledged EFU zone, and the applicable provisions ORS 215 then in effect. On June 24, 1998, tax lot 200 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 the claimants first obtain that permit, license or other form of authorization or consent. Such requirements may include, but are not limited to: a building permit, a land use decision, a "permit" as defined in ORS 215.402 or 227.160, other permits or authorizations from local, state or federal agencies and restrictions on the use of the subject property imposed by private parties.

4. Any use of the subject property by the claimants under the terms of the order will remain subject to the following laws: (a) those laws not specified in (1) above; (b) any laws enacted or enforced by a public entity other than the Commission or the department; and (c) those laws not subject to ORS 197.352 including, without limitation, those laws exempted under ORS 197.352(3).

5. Without limiting the generality of the foregoing terms and conditions, in order for the claimants to use the subject property, it may be necessary for them to obtain a decision under ORS 197.352 from a city and/or county and/or metropolitan service district that enforces land use regulations applicable to the property. Nothing in this order relieves the claimants from the necessity of obtaining a decision under ORS 197.352 from a local public entity that has jurisdiction to enforce a land use regulation applicable to a use of the subject property by the claimants.

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:

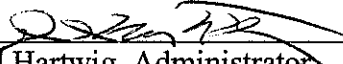
Lane Shetterly, Director



Cora R. Parker, Deputy Director
DLCD

Dated this 4th day of May, 2007.

FOR the DEPARTMENT OF
ADMINISTRATIVE SERVICES:


David Hartwig, Administrator
DAS, State Services Division
Dated this 4th day of May, 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 C
COMPENSATION UNDER ORS 197.352) CLAIM NO. M130650
(BALLOT MEASURE 37) OF)
Kay Ganieany, CLAIMANT)

Claimant: Kay Ganieany (the Claimant)

Property: Township 29S, Range 8W, Section 1: 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

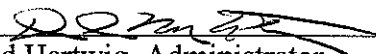
The Claim is denied as to laws administered by DLCD and the Land Conservation and Development Commission (LCDC) for the reasons set forth in the DLCD Report.

This Order is entered by the 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 4th day of May, 2007.

FOR THE DEPARTMENT OF
ADMINISTRATIVE SERVICES:


David Hartwig, Administrator
DAS, State Services Division
Dated this 4th day of May, 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.

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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 D
COMPENSATION UNDER ORS 197.352) CLAIM NO. M130650
(BALLOT MEASURE 37) OF)
John and Jan Wheeler, CLAIMANTS)

Claimants: John and Jan Wheeler (the Claimants)

Property: Township 29S, Range 8W, Section 6: tax lot 1800, 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 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 4th day of May, 2007.

FOR THE DEPARTMENT OF
ADMINISTRATIVE SERVICES:


David Hartwig, Administrator
DAS, State Services Division
Dated this 4th day of May, 2007.

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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

May 4, 2007

STATE CLAIM NUMBER: M130650

NAMES OF CLAIMANTS: John and Jan Wheeler
Kay Ganieany

MAILING ADDRESSES: John and Jan Wheeler
PO Box 135
Camas Valley, Oregon 97416

Kay Ganieany
480 Wheeler Lane
Camas Valley, Oregon 97416

PROPERTY IDENTIFICATION: Township 29S, Range 8W
Section 1: tax lot 200
Section 6: tax lot 1800
Douglas County

DATE RECEIVED BY DAS: November 9, 2006

180-DAY DEADLINE: May 8, 2007

I. SUMMARY OF CLAIM

The claimants, John and Jan Wheeler and Kay Ganieany, seek compensation in the amount of \$300,000 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 89.71-acre subject property into two separate legal tax lots.¹ The subject property is located at 120 and 505 Wheeler Lane, near Camas Valley, 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 the claimants' division of the 89.71-acre subject property into two separate legal tax

¹ The subject property includes two tax lots. Tax lot 200 consists of 45 acres, and tax lot 1800 consists of 44.71 acres.

lots: applicable provisions of Statewide Planning Goals 3 (Agricultural Lands) and 4 (Forest Lands), ORS 215 and Oregon Administrative Rules (OAR) 660, divisions 6, and 33, enacted or adopted after each claimant acquired each of the subject tax lots. These laws will not apply to the claimants only to the extent necessary to allow them to use the subject property for the use described in this report, and only to the extent that use was permitted when John Wheeler acquired tax lot 200 on March 17, 1981; when Kay Ganieany acquired tax lot 1800 on June 16, 1989; and when Jan Wheeler acquired tax lot 200 on June 24, 1998. The department acknowledges that the relief to which Jan Wheeler is entitled under ORS 197.352 will not allow her to use tax lot 200 in the manner set forth in the claim.

The department has further determined that the claim is not valid as to John and Jan Wheeler for tax lot 1800 and as to Kay Ganieany for tax lot 200 because the claimants are not owners of those tax lots. (See the complete recommendation in Section VI. of this report.)

III. COMMENTS ON THE CLAIM

Comments Received

On March 23, 2007, pursuant to OAR 125-145-0080, the Oregon Department of Administrative Services (DAS) provided written notice to the owners of surrounding properties. According to DAS, one written comment 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 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.

Findings of Fact

This claim was submitted to DAS on November 9, 2006, for processing under OAR 125, division 145. The claim identifies Douglas County's Farm/Forest (FF) and Exclusive Farm Use (EFU)-Grazing (FG) zones 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 John Wheeler acquired an ownership interest in tax lot 200 on March 17, 1981, and acquired an ownership interest in tax lot 1800 on March 5, 1984, as reflected by warranty deeds included with the claim. In 1984, John Wheeler conveyed a one-half interest in the subject property to Robert and Delphia Wheeler, as reflected by a warranty deed provided by Douglas County. Claimant Kay Ganieany acquired a one-half interest in the subject property on June 16, 1989, as reflected by a bargain and sale deed included with the claim. John Wheeler conveyed his one-half interest in tax lot 1800 to Kay Ganieany on January 9, 1998, as reflected by a bargain and sale deed provided by Douglas County. Kay Ganieany conveyed her one-half interest in tax lot 200 to John Wheeler on January 9, 1998, as reflected by a bargain and sale deed provided by Douglas County. On June 24, 1998, John Wheeler transferred tax lot 200 to the Wheeler Loving Trust, with himself and his wife, claimant Jan Wheeler, as trustees, as reflected by the trust document included with the claim. On May 21, 2003, Kay Ganieany transferred tax lot 1800 to the Kay E. Ganieany Family Trust, with herself as trustee, as reflected by a trust document included with the claim.² Robert and Delphia Wheeler, the claimants' parents, acquired the subject property on January 8, 1944, as evidenced by an indenture included with the claim. The Douglas County Assessor's Office confirms John and Jan Wheeler's current ownership of tax lot 200 and Kay Ganieany's current ownership of tax lot 1800.

Conclusions

Claimants John and Jan Wheeler are "owners" of tax lot 200 and claimant Kay Ganieany is an owner of tax lot 1800, as that term is defined by ORS 197.352(11)(C). John Wheeler has owned tax lot 200 since March 17, 1981. Jan Wheeler has owned tax lot 200 since June 24, 1998. Kay

² Transfer of property to a revocable trust does not result in a change in ownership for purposes of ORS 197.352.

Ganieany has owned tax lot 1800 since June 16, 1989. The claimants' parents are "family members" as defined by ORS 197.352(11)(A) and acquired the subject property on January 8, 1944. John and Jan Wheeler are not "owners" of tax lot 1800 and Kay Ganieany is not an "owner" of tax lot 200, 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 89.71-acre subject property into two separate legal tax lots, and that the current zoning prohibits the desired use.

The claim is based generally on the applicable provisions of state law that require EFU and mixed farm-forest zoning and restrict uses on EFU-zoned and mixed farm-forest-zoned lands.

Tax lot 1800 is zoned FG by Douglas County as required by Goal 3, in accordance with ORS 215 and OAR 660, division 33, because the 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.

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.

Tax lot 200 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 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.

³ Tax lot 1800 is "agricultural land" because it contains National 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.

Under ORS 215.780(2)(a), the minimum lot size in Douglas County's FF zone is 80 acres. Tax lot 200 cannot be divided into parcels smaller than 80 acres.

The claimants' family first acquired the subject property in 1944, prior to the adoption of the statewide planning goals and their implementing statutes and regulations. No county zoning applied to the subject property in 1944.

Conclusions

The current zoning requirements and minimum lot size standards established by applicable provisions of Goals 3 and 4, ORS 215 and OAR 660, divisions 6, and 33, were all enacted or adopted after the claimants' family acquired the subject property. These laws restrict the use of the subject property relative to the uses allowed when the claimants' family acquired the property.

As explained in Section V.(1) of this report, John and Jan Wheeler are not "owners" of tax lot 1800 and Kay Ganieany is not an "owner" of tax lot 200, as that term is defined in ORS 197.352(11)(C). Therefore, no laws enforced by the Commission or the department restrict John and Jan Wheeler's use of tax lot 1800 with the effect of reducing its fair market, or restrict Kay Ganieany's use of tax lot 200 with the effect of reducing its fair market value.

3. Effect of Regulations on Fair Market Value

In order to establish a valid claim, ORS 197.352(1) requires that the land use regulation(s) (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 \$300,000 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 real estate broker's assessment of the property, included with the claim.

Conclusions

As explained in Section V.(1) of this report, the claimants are John and Jan Wheeler and Kay Ganieany, whose family members acquired the subject property in 1944. As explained in Section V.(1) of this report, John and Jan Wheeler are not "owners" of tax lot 1800 and Kay Ganieany is not an "owner" of tax lot 200. Therefore, no laws restrict their use of those tax lots with the effect of reducing the fair market value.

Under ORS 197.352, claimants are otherwise due compensation for land use regulations that restrict the use of property and have the effect of reducing its fair market value. Based on the findings and conclusions in Section V.(2) of this report, laws enacted or adopted since the claimants' family acquired the subject property restrict the claimants' 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 \$300,000.

Without an appraisal or other documentation, it is not possible to substantiate the specific dollar amount by which the land use regulations have reduced the fair market value of the subject property. Nevertheless, based on the evidence in the record for this claim, the department determines that the fair market value of the subject property has been reduced to some extent as a result of land use regulations enforced by the Commission or the department since the claimants' 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 current FG and FF zones. All of these land use regulations were enacted or adopted after the claimants' family acquired the subject property.

Conclusions

It appears that none of the general statutory, goal and rule restrictions on residential division of the subject property were in effect when the claimants' family acquired the property on January 8, 1944. As a result, these laws are not exempt under ORS 197.352(3)(E). Laws in effect when the claimants' 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.

As explained in Section V.(1) of this report, John and Jan Wheeler are not "owners" of tax lot 1800 and Kay Ganieany is not an "owner" of tax lot 200, 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 to John and Jan Wheeler for tax lot 1800 and to Kay Ganieany for tax lot 200.

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 John and Jan Wheeler's desired use of tax lot 1800 and Kay Ganieany's desired use of tax lot 200 because they are not owners of those tax lots. The department has further determined that laws enforced by the Commission or the department restrict John and Jan Wheeler's desired use of tax lot 200 and Kay Ganieany's desired use of tax lot 1800. 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 \$300,000. 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 John and Jan Wheeler's desired use of tax lot 200 and Kay Ganieany's desired use of tax lot 1800 were allowed under the standards in effect when the claimants' family 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 John and Jan Wheeler to use tax lot 200 for a use permitted at the time John Wheeler acquired that tax lot on March 17, 1981, and at the time Jan Wheeler acquired that tax lot on June 24, 1998; and to allow Kay Ganieany to use tax lot 1800 for a use permitted at the time she acquired that tax lot on June 16, 1989.

Claimant John Wheeler acquired tax lot 200 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 Because the Commission had not acknowledged the county's plan and land use regulations when John Wheeler acquired tax lot 200 on March 17, 1981, the applicable statewide planning goals would have applied directly to any development application for that tax lot.⁶

As adopted in 1975, Goal 3 required that agricultural lands be preserved and zoned for EFU pursuant to ORS 215. Goal 4, as adopted in 1975, required that forest lands be designated for forest uses. Depending on the nature of the property, when John Wheeler acquired it, the

⁵ Douglas County's comprehensive plan was acknowledged on December 24, 1985.

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 land use 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 569 (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 directly applied 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); *Kenagy v. Benton County*, 115 Or App 131 (1992).

property 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 3, the state standards for a division of land required that the created lots or parcels be of a size “appropriate for the continuation of the existing commercial agricultural enterprise within the area.” Further, ORS 215.263 (1975 edition) required that all land divisions subject to EFU zoning comply with the legislative intent in ORS 215.243 (Agricultural Land Use Policy). Thus, under Goal 3, the opportunity to divide tax lot 200 when John Wheeler acquired it on March 17, 1981, was limited to new lots or parcels that were (1) appropriate for the continuation of the existing commercial agricultural enterprise in the area, and (2) shown to be consistent with the legislative intent in ORS 215.

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 commercial forest uses.

At the time Kay Ganieany acquired tax lot 1800, it was subject to Douglas County’s acknowledged EFU zone.⁷ When Kay Ganieany acquired tax lot 1800, her desired use of the property would have been governed by the county’s acknowledged EFU zone and the applicable provisions of ORS 215 then in effect. In 1987, ORS 215.263 (1987 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.

The claim does not establish whether or to what extent Kay Ganieany’s desired division of tax lot 1800 was allowed under the standards in effect when she acquired the property on June 16, 1989.

At the time Jan Wheeler acquired an interest in tax lot 200, it was zoned FF by Douglas County and subject to the current lot size 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 applicable provisions of Goals 3 and 4 and ORS 215 in effect when John Wheeler acquired tax lot 200; the applicable provisions of Goal 3, ORS 215 and OAR 660 in effect when Kay Ganieany’s acquired tax lot 1800; and the applicable provisions of Goals 3 and 4, ORS 215 and OAR 660, divisions 6, and 33, in effect when Jan Wheeler acquired tax lot 200, and other laws in effect when any of the claimants acquired the subject property, there may be other laws that apply to the claimants’ 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 tax

⁷ Douglas County’s EFU zone was acknowledged by the Commission for compliance with Goal 3 on December 24, 1985.

lot 200, 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 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 claimants seek a building or development permit to carry out a specific use, it may become evident that other state laws apply to that use, and depending on when they were enacted or adopted, may continue to apply to the claimants' property. In addition, some of these laws may be exempt under ORS 197.352(3)(A) to (D) and will continue to apply to the subject property on that basis.

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. The claimants should be aware that the less information they have provided to the department in their claim, the greater the possibility that there may be additional laws that will later be determined to continue to apply to John and Jan Wheeler's use of tax lot 200 and Kay Ganieany's use of tax lot 1800.

Conclusions

Based on the record and the foregoing findings and conclusions, John and Jan Wheeler 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, as to tax lot 1800; and Kay Ganieany has not established that she is entitled to relief under ORS 197.352(1), as a result of land use regulations enforced by the Commission or the department, as to tax lot 200 because John and Jan Wheeler are not owners of tax lot 1800 and Kay Ganieany is not an owner of tax lot 200. Therefore, the department recommends that the claim be denied as to John and Jan Wheeler for tax lot 1800 and as to Kay Ganieany for tax lot 200.

The department otherwise recommends that the claim be approved as to John and Jan Wheeler for tax lot 200 and as to Kay Ganieany for tax lot 1800, 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 the claimants' division of the 89.71-acre subject property into two separate legal tax lots: applicable provisions of Goals 3 and 4, ORS 215 and OAR 660, divisions 6, and 33, enacted or adopted after each claimant acquired each of the subject tax lots. These laws will not apply to the claimants only to the extent necessary to allow them to use the subject property for the use described in this report, and only to the extent that use was permitted when John Wheeler acquired tax lot 200 on March 17, 1981; when Kay Ganieany acquired the tax lot 1800 June 16, 1989; and when Jan Wheeler acquired tax lot 200 on June 24, 1998. The department acknowledges that the relief to which Jan Wheeler is entitled under ORS 197.352 will not allow her to use tax lot 200 in the manner set forth in the claim.
2. The action by the State of Oregon provides the state's authorization to claimants to use the subject property for the use described in this report, subject to the standards in effect on March 17, 1981, when John Wheeler acquired tax lot 200; on June 16, 1989, when Kay Ganieany acquired tax lot 1800; and on June 24, 1998, when Jan Wheeler acquired tax lot 200. On March 17, 1981, tax lot 200 was subject to applicable provisions of Goal 3 or 4 and ORS 215 then in

effect. On June 16, 1989, tax lot 1800 was subject to compliance with Goal 3 and OAR 660, division 5, as implemented by Douglas County's acknowledged EFU zone, and the applicable provisions ORS 215 then in effect. On June 24, 1998, tax lot 200 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 the claimants first obtain that permit, license or other form of authorization or consent. Such requirements may include, but are not limited to: a building permit, a land use decision, a "permit" as defined in ORS 215.402 or 227.160, other permits or authorizations from local, state or federal agencies and restrictions on the use of the subject property imposed by private parties.

4. Any use of the subject property by the claimants under the terms of the order will remain subject to the following laws: (a) those laws not specified in (1) above; (b) any laws enacted or enforced by a public entity other than the Commission or the department; and (c) those laws not subject to ORS 197.352 including, without limitation, those laws exempted under ORS 197.352(3).

5. Without limiting the generality of the foregoing terms and conditions, in order for the claimants to use the subject property, it may be necessary for them to obtain a decision under ORS 197.352 from a city and/or county and/or metropolitan service district that enforces land use regulations applicable to the property. Nothing in this order relieves the claimants from the necessity of obtaining a decision under ORS 197.352 from a local public entity that has jurisdiction to enforce a land use regulation applicable to a use of the subject property by the claimants.

VII. COMMENTS ON THE DRAFT STAFF REPORT

The department issued its draft staff report on this claim on April 12, 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.