

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
COMPENSATION UNDER ORS 197.352	)	CLAIM NO. M118428
(BALLOT MEASURE 37) OF	)	
Barbara Sherwood, CLAIMANT	)	

Claimant: Barbara Sherwood (the Claimant)

Property: Tax Lot 100, Township 9S, Range 1E, Section 25 , Linn 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 Barbara Sherwood's division and development of the 132.23-acre property: applicable provisions of Statewide Planning Goal 3 (Agriculture Lands), Goal 4 (Forest Lands), ORS 215 and OAR 660, division 6 enacted after December 28, 1982. These land use regulations will not apply to the claimant's use of her property only to the extent necessary to allow Barbara Sherwood to use the property for the use described in this report, and only to the extent that use was permitted at the time she acquired it on December 28, 1982.
2. The action by the State of Oregon provides the state's authorization to Barbara Sherwood to use her property for the use described in this report, subject to the standards in effect on December 28, 1982. On that date, the property was subject to applicable provisions of Statewide Planning Goal 3, Goal 4, ORS 215 and OAR 660, division 6 then in effect.
3. To the extent that any law, order, deed, agreement or other legally enforceable public or private requirement provides that the 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

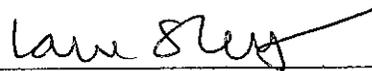
claimant first obtains that permit, license or other form of authorization or consent. Such requirements may include, but are not limited to: a building permit, a land use decision, a permit as defined in ORS 215.402 or ORS 227.160, other permits or authorizations from local, state or federal agencies, and restrictions on the use of the property imposed by private parties.

4. Any use of the property by the claimant 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 claimant to use the property, 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 the claimant 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 property by the claimant.

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 Deputy 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.

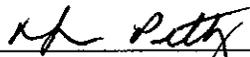
FOR DLCD AND THE LAND CONSERVATION  
AND DEVELOPMENT COMMISSION:



Lane Shetterly, Director  
DLCD

Dated this 22<sup>nd</sup> day of March, 2006.

FOR the DEPARTMENT OF ADMINISTRATIVE  
SERVICES:



Dugan Petty, Deputy Administrator  
DAS, State Services Division

Dated this 22<sup>nd</sup> day of March, 2006.

## **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<sup>1</sup>, 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."

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<sup>1</sup> By order of the Marion County Circuit Court, "all time lines under Measure 37 [were] suspended indefinitely" on October 25, 2005. This suspension was lifted on March 13, 2006 by the court. As a result, a period of 139 days (the number of days the time lines were suspended) has been added to the 180-day time period under ORS 197.352(6) for claims that were pending with the state on October 25, 2005.

**BALLOT MEASURE 37 (ORS 197.352)  
CLAIM FOR COMPENSATION**

**OREGON DEPARTMENT OF LAND CONSERVATION AND DEVELOPMENT  
Final Staff Report and Recommendation**

March 22, 2006

**STATE CLAIM NUMBER:** M118428

**NAME OF CLAIMANT:** Barbara Sherwood

**MAILING ADDRESS:** 11991 Ashley Lane SE  
Sublimity, Oregon 97385

**PROPERTY IDENTIFICATION:** Township 9S, Range 1E, Section 25  
Tax Lot 100  
Linn County

**OTHER CONTACT INFORMATION:** Wallace W. Lien  
1775 32<sup>nd</sup> Place NE, Suite A  
Salem, Oregon 97303-1674

**DATE RECEIVED BY DAS:** May 13, 2005

**180-DAY DEADLINE:** March 28, 2006<sup>1</sup>

**I. SUMMARY OF CLAIM**

The claimant, Barbara Sherwood, seeks compensation in the amount of \$14,252,200 for the reduction in fair market value as a result of certain land use regulations that are alleged to restrict the use of certain private real property. The claimant desires compensation or the right to divide the 132.32-acre property into 25 approximately five-acre parcels for residential use. The property is located at the geographical coordinates listed above, in Linn 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. 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 Barbara Sherwood's division of the property for residential development:

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<sup>1</sup> This date reflects 180 days from the date the claim was submitted as extended by the 139 days enforcement of Measure 37 was suspended during the pendency of the appeal of *Macpherson v. Dep't of Admin. Servs.*, 340 Or \_\_\_, 2006 Ore. LEXIS 104 (February 21, 2006).

applicable provisions of Statewide Planning Goal 3 (Agricultural Lands), Goal 4 (Forest Lands), ORS 215 and OAR 660, division 6 enacted after December 28, 1982. These laws will not apply to Barbara Sherwood only to the extent necessary to allow her to use her property for the use described in this report, to the extent that was permitted at the time she acquired the property on December 28, 1982. (See the complete recommendation in Section VI. of this report.)

### **III. COMMENTS ON THE CLAIM**

#### **Comments Received**

On June 7, 2005, pursuant to OAR 125-145-0080, the Oregon Department of Administrative Services (DAS) provided written notice to the owners of surrounding properties. In response to the notice, twelve comments were received in response to the 10-day notice.<sup>2</sup>

Two of the comments do not address whether the claim meets the criteria for relief (compensation or waiver) under ORS 197.352. Comments concerning the effects a use of the property may have on surrounding areas generally are 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 waiving a state law.

Ten of the comments are relevant to whether a state law restricts the claimant's use of the property and whether the restriction of the claimant's use of the property reduces the fair market value of the property. The comments have been considered by the department in preparing this report. (See 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 the measure (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 the measure (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.

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<sup>2</sup> The 10-day notice period was suspended for xx days during the pendency of the *Macpherson v. Dep't of Admin. Servs.*, 340 Or \_\_, 2006 Ore. LEXIS 104 (February 21, 2006), which suspended all Measure 37 deadlines.

## **Findings of Fact**

This claim was submitted to DAS on May 13, 2005, for processing under OAR 125, division 145. The claim identifies Linn County's Farm/Forest Zone and state laws that restrict the use of the property as the basis for the claim. Only laws that were enacted prior to December 2, 2004, the effective date of Measure 37, are the basis for this claim. (See citations of statutory and administrative rule history of the Oregon Revised Statutes and Oregon Administrative Rules.)

## **Conclusions**

The claim has been submitted within two years of December 2, 2004; the effective date of Measure 37, based on land use regulations 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**

The claimant, Barbara Sherwood, acquired the subject property on December 28, 1982, through probate of her father's estate. The claim includes a deed showing that the claimant's father acquired the property from his spouse (Thelma Nydegger) on July 16, 1968 (See Decree of Final Distribution and Warranty Deed included in the department's claim file). The claim states, but does not document, that the property has been in the Nydegger family since the 1800s.<sup>3</sup>

An appraisal report included in the claim, dated May 24, 2001, indicates that Frank J. and Barbara Sherwood were the owners of record as of that date. According to Linn County, Barbara Sherwood is the current owner of the subject property.<sup>4</sup> Frank J. Sherwood is not considered a claimant in this ORS 197.352 claim.

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<sup>3</sup> The department understands the claimant to assert that the claimant's family acquired the subject property in the 1800s. However, without verification of the original purchase date, no evaluation of the laws in effect prior to 1968, is possible.

<sup>4</sup> Linn County's Staff Report dated September 14, 2005, Local File M37-079-05/Sherwood, in Measure 37 claim filed by claimant with the County.

## **Conclusions**

The claimant, Barbara Sherwood, is the "owner" of the subject property, as that term is defined by ORS 197.352(11)(C). The claimant acquired the subject property on December 28, 1982.

Based on documentation submitted by the claimant, the claimant's "family members" as that term is defined in ORS 197.352(11)(A), have owned the subject property since July 16, 1968.

## **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 claimant's 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 claimant or a family member acquired the property.

## **Findings of Fact**

The claim states that ORS 197, ORS 215, OAR 660 and the Statewide Planning Goals "Restricts development and use of agricultural and forest property." Additional information submitted by the claimant's representative states the "[w]hen the claimant's family purchased the property it had no zoning designation, and no restrictions were in place that affected the use of the property. Subsequent to the purchase of the subject property, the state and county zoned it Farm/Forest with a minimum parcel size of 80 acres."

The claimant cites ORS 197 and all Commission administrative rules as restricting the use and reduce the value of the subject property, but does not establish how these regulations restrict the use of her property in a manner that reduces its fair market value. Except as discussed below, these regulations, on their face, do not restrict the use of the subject property. Absent any explanation by the claimant as to how ORS 197 or the majority of the Commission's administrative rules restrict the use of the subject property in a manner that reduces the fair market value, they are not addressed further in this report.

The claimant's property is zoned Linn County's Farm/Forest (F/F) Zone, which is a mixed agricultural and forestland zone, adopted to comply with Statewide Planning Goal 4 (Forest Lands) and the implementing provisions of OAR 660-006-0050 (effective February 5, 1990), and subsequently amended on March 1, 1994, to comply with the provisions of HB 3661 (Chapter 792, Oregon Laws 1993).

Under OAR 660-006-0050, all the uses permitted under Statewide Planning Goal 3 (Agriculture Lands) and Goal 4 (Forest Lands) are allowed except that for dwellings, either the Goal 3 or Goal 4 standards are applicable based on the predominant use of the tract on January 1, 1993. Information provided to the department indicates that the subject 132.32-acre property contains both timber and crop land. Approximately 33-acres of this crop land is available for planting, 15-acres are in Christmas trees and the remaining 84-acres are covered with timber. However, information was not provided in the claim regarding the predominant use of the property on January 1, 1993. Depending on the predominant use on January 1, 1993, the property is subject

to either the requirements for dwellings 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 006. This includes the dwelling standards asserted by the claimant as restricting the use of the property. However, no analysis of whether the property can be approved for a dwelling under the applicable farm or forest provisions has been provided.

For land divisions, OAR 660-006-0055 authorizes the creation of new parcels based on the standards applicable to farm or forest zones which implement the 80-acre minimum lot size specified in ORS 215.780. Under OAR 660-006-055, the claimant's property cannot be divided into parcels smaller than 80 acres as may have been possible under the county zones applied in 1968. However, no analysis of whether the subject property can be divided for non-farm dwellings under ORS 215.263(4)(b) has been provided.

The claimant's family acquired the subject as early as 1968, prior to the establishment of the statewide planning goals and their implementing rules and statutes.

### **Conclusions**

The current provisions applicable to lands zoned Farm/Forest (F/F) under Statewide Planning Goal 3, Goal 4, ORS 215 and OAR 660-006-0050 and -0055 relating to land divisions and dwelling standards adopted since the claimant's family acquired the property as early as 1968, restrict the use of the property relative to uses allowed when claimant's family acquired the property. Under these current provisions, the claimant is restricted from further dividing or developing her property as they could have when the claimant's family acquired it in 1968.

This report addresses only those state laws that are identified in the claim, or that the department is certain apply to the property based on the uses that the claimant has identified. There may be other laws that currently apply to the claimant's use of the property, and that may continue to apply to the claimant's use of the property, that have not been identified in the claim. In some cases, it will not be possible to know what laws apply to a use of property until there is a specific proposal for that use. When the claimant seeks a building or development permit to carry out a specific use, it may become evident that other state laws apply to that use.

### **3. Effect of Regulations on Fair Market Value**

In order to establish a valid claim, ORS 197.352(1) requires that any land use regulation 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 \$14,252,200 for the reduction in the property's fair market value due to current regulations. This amount is based on the claimant's estimate of the market value of the subject 132.32-acre property being divided into 25 approximately five-acre parcels, less the market value of the property in May 2001. The claim states:

“At \$110,000 per acre of land on which residential development is allowed, claimant’s land is worth \$14,544,200 (132.22 acres multiplied by \$110,000 per acre). An appraisal prepared by a certified real estate appraiser, was completed on May 11, 2001, which found the market value of the property to be \$292,000.”

## **Conclusions**

As explained in Section V.(1) of this report, the current owner is Barbara Sherwood whose family acquired the property in 1968. Under ORS 197.352, Barbara Sherwood is due compensation for land use regulations that restrict the use of the subject property in a manner that reduces its fair market value. Based on the findings and conclusions in Section V.(2) of this report, laws adopted since the claimant’s family acquired the property restrict division of the subject property for residential use. The claimant estimates the reduction in value due to the restrictions to be \$14,252,200.

The documentation in the claim does not adequately substantiate the specific dollar amount the claimant demands for compensation. Nevertheless, based on the submitted information, the department determines that it is more likely than not that there has been some reduction in the fair market value of the subject property as a result of land use regulations enforced by the Commission or the department.

## **4. Exemptions under ORS 197.352(3)**

ORS 197.352 does not apply to certain land use regulations. In addition, under ORS 197.352(3), certain types of laws are exempt from ORS 197.352.

## **Findings of Fact**

The claim is based on state land use regulations that restrict the use of the property relative to what would have been allowed in 1968, when the property was acquired by the claimant’s family. These provisions include Statewide Planning Goal 3 (Agricultural Lands) and Goal 4 (Forest Lands) and applicable provisions of ORS 215 and OAR 660, division 6, which Linn County has implemented through its Farm/Forest (F/F) zone. None of these laws are exempt under ORS 197.352(3)(E), which exempts laws in effect when the claimant’s family acquired the property.

The department notes that ORS 215.730 and OAR 660, division 6, include standards for the siting of dwellings in agricultural/forest zones. This provision includes fire protection standards for dwelling and surrounding forest lands.<sup>5</sup> 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...” Siting standards for dwellings in agricultural/forest zones in

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<sup>5</sup> Although it has not been determined whether the provisions of Statewide Planning Goal 3 or Goal 4 apply to the use of the subject property, the applied AG/F District requires that all dwellings meet the County’s fire-safety siting standards (AG/F District, Section 407.09.B and Section 406.09).

ORS 215.730 and in Goal 4 and its implementing rules (OAR 660, division 6) are exempt under ORS 197.352(3).

### **Conclusions**

Although a development proposal was provided with the claim, it is not possible for the department to determine what laws 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 does appear that the general statutory, goal and rule restrictions on residential development and use of mixed farm and forest land apply to the claimant's use of the property, and for the most part these laws are not exempt under ORS 197.352(3)(E).

Laws in effect when the claimant acquired the property are exempt under ORS 197.352(3)(E) and will continue to apply to the claimant's use of the property. In addition, the siting standards for dwellings in agricultural/forest zones are exempt under ORS 197.352(3)(B) and will also continue to apply to the claimant's use of the property. There may be other laws that continue to apply to the claimant's use of the property that have not been identified in the claim. In some cases, it will not be possible to know what laws apply to a use of property until there is a specific proposal for that use. When the claimant seeks a building or development permit to carry out a specific use, it may become evident that other state laws apply to that use. And, 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 property based on the uses that the claimant has identified. Similarly, this report only addresses the exemptions provided for under ORS 197.352(3), that are clearly applicable given the information provided to the department in the claim. The claimant should be aware that the less information she has provided to the department in her claim, the greater the possibility that there may be additional laws that will later be determined to continue to apply to her use of the 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 a law that restricts 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 current owner acquired the property. The Commission, by rule, has directed that if the department determines a claim is valid, the Director 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 restrict the claimant's ability to divide the property into the desired 25 approximately five-acre parcels, or develop those parcels for residential use. The claim asserts the laws enforced by the Commission or department reduce the fair market value of the subject

property by \$14,252,200. However, because the claim does not adequately substantiate how the specified restrictions reduce the fair market value of the property, a specific amount of compensation cannot be determined. Nevertheless, based on the record for this claim, the department acknowledges that the laws on which the claim is based likely have reduced the fair market value of the 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 Barbara Sherwood to use the subject property for a use permitted at the time she acquired the property on December 28, 1982.

The claimant acquired the subject property on December 28, 1982. Linn County's Farm/Forest (F/F) Zone was not acknowledged until July 18, 1985. Until the Commission acknowledged Linn County's land use regulations, the use of the subject property was subject to both the County's ordinances and the applicable Statewide Planning Goals.<sup>6</sup>

Statewide Planning Goal 3 and Goal 4 became applicable to the claimant's use of the property on January 25, 1975, and applied to legislative land use decisions and some quasi-judicial land use decisions, on a site-specific basis, before the Commission acknowledged local plans.<sup>7</sup> Goal 3, as adopted in 1975, required that agricultural lands be "preserved and zoned for Exclusive Farm Use (EFU) pursuant to ORS 215." Goal 4, as adopted in 1975, required that forest lands be designated for forest uses. Depending on whether the subject property would have been subject to either Goal 3 or Goal 4 when acquired, it would have been subject to either EFU zoning pursuant to ORS 215 or forest zoning adequate to retain forest lands for forest uses.

If subject to Goal 3, the state standards for a division of land without acknowledgment of the local zoning required that the created lots or parcels be of a size "appropriate for the continuation of the existing commercial agricultural enterprise in the area" (see Statewide Planning Goal 3). Further, ORS 215.263 (1981 edition) required that all land divisions subject to EFU zoning comply with the legislative intent in ORS 215.243 (Agricultural Land Use Policy). Thus, the opportunity to divide the subject property when acquired by the claimants in 1982, was limited

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<sup>6</sup> Linn County's Farm/Forest (F/F) was not acknowledged by the Commission until they excluded dwellings, non-farm and non-forest uses and land divisions from their variance procedures (See the Commission's Compliance Acknowledgment Order 85-ACK-120, signed July 18, 1985, and the Department's June 6, 1985, Staff Report, Response to Requirement 3, pp. 8-9).

<sup>7</sup> See *Sunnyside Neighborhood Association v. Clackamas County*, 280 Or 569 (1977); *1000 Friends of Oregon v. Benton County*, 32 Or App 413 (1978); *Jurgenson v. Union County*, 42 Or App 505 (1979); *Alexanderson v. Polk County*, 289 Or 427, rev den 290 Or 137 (1980); and *Perkins v. City of Rajneeshpuram*, 300 Or 1 (1985). After the Commission acknowledged the county's plan and land use regulations, the statewide planning goals and implementing rules no longer directly applied to local land use decisions (see *Byrd v. Stringer*, 295 Or 311 (1983)). However, insofar as state and local provisions are materially the same in substance, the applicable statutes and rules must be interpreted and applied by the county in making its decision (*Forster v. Polk County*, 115 Or App 475 (1992) and *Kenagy v. Benton County*, 115 Or App 131 (1992)). In addition, state statutes continue to apply to the use of property in the county directly, even after acknowledgment.

by Goal 3 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 ORS 215.243 legislative intent.

At the time of claimant’s acquisition in 1982, farm dwellings were allowed if they were determined to be “customarily provided in conjunction with farm use” under ORS 215.213(1)(e) (1981 edition)<sup>8</sup>, and non-farm dwellings were subject to ORS 215.213(3) (1981 edition).<sup>9</sup> Other uses were authorized and governed by the applicable provisions under Goal 3 and ORS 215.213.

If subject to Goal 4, the state standards required local land use regulations to “conserve forestlands for forest uses.” Specifically, Goal 4 only allowed land divisions that would protect commercial forestlands for commercial forest uses. Dwellings in forest zones can only be allowed if found to be “necessary and accessory” to one of the enumerated forest uses as defined in Goal 4.<sup>10</sup>

The opportunity to divide the property and to place residential dwellings on the property when the claimant acquired it in 1982, was limited to land divisions that were consistent with Statewide Planning Goal 3 or Goal 4.

No information has been provided showing that the division or placement of dwellings desired by the claimants complies with the minimum lot size standard for new parcels or standards for dwellings under either Goal 3 or Goal 4 in effect at the time the claimant’s acquired their interest in the property in 1982.

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<sup>8</sup> Under ORS 215.213, a farm dwelling may be established on agricultural land only if the farm use to which the dwelling relates exists (*Matteo v. Polk County*, 11 Or LUBA 259, 263 (1984), *affirmed without opinion* 70 Or App 179 (1984), and *Newcomer v. Clackamas County*, 92 Or App 174, *modified* 94 Or App 33 (1988)). Guidance on the application of the statutory standards for farm and non-farm dwellings in EFU zones can be found in the Commission rules (OAR 660, division 5 adopted July 21, 1982, amended June 7, 1986, and repealed August 7, 1993).

<sup>9</sup> When determining whether land is “generally unsuitable for the production of farm crops and livestock” under ORS 215.213(3), the entire parcel or tract must be evaluated rather than a portion thereof. *Smith v. Clackamas County*, 313 Or 519 (1992).

<sup>10</sup> Statewide Planning Goal 4 prohibited uses that were neither 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 forestlands were required to be “necessary and accessory” to show that such dwellings comply with the Goal 4 requirement that local land use regulations must “conserve forest lands for forest uses” *1000 Friends v. LCD/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. LCD/C/Lane County*, 83 Or App 278, 281-283, 731 P2d 457, *aff’d on reconsideration*, 85 Or App 619 (1987), *aff’d*, 305 Or 384 (1988)

For guidance, the Goal 4 provisions were interpreted under OAR 660, division 6, effective September 1, 1982, and in *Lamb v. Lane County*, 7 Or LUBA 137 (1983), *1000 Friends v. LCD/C/Curry County*, 301 Or 447 (1986), and *1000 Friends of Oregon v. LCD/C/Lane County*, *supra*. Another indication of the appropriate standards that applied to the property in 1982, are the land division and dwelling standards in Linn County’s acknowledged Farm/Forest (F/F) zone acknowledged by the Commission on July 18, 1985.

## **Conclusion**

Based on the record, the department recommends that the 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 Barbara Sherwood's division and development of the 132.23-acre property: applicable provisions of Statewide Planning Goal 3 (Agriculture Lands), Goal 4 (Forest Lands), ORS 215 and OAR 660, division 6 enacted after December 28, 1982. These land use regulations will not apply to the claimant's use of her property only to the extent necessary to allow Barbara Sherwood to use the property for the use described in this report, and only to the extent that use was permitted at the time she acquired it on December 28, 1982.
2. The action by the State of Oregon provides the state's authorization to Barbara Sherwood to use her property for the use described in this report, subject to the standards in effect on December 28, 1982. On that date, the property was subject to applicable provisions of Statewide Planning Goal 3, Goal 4, ORS 215 and OAR 660, division 6 then in effect.
3. To the extent that any law, order, deed, agreement or other legally enforceable public or private requirement provides that the 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 claimant 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 ORS 227.160, other permits or authorizations from local, state or federal agencies, and restrictions on the use of the property imposed by private parties.
4. Any use of the property by the claimant 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 claimant to use the property, 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 the claimant 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 property by the claimant.

## **VII. COMMENTS ON THE DRAFT STAFF REPORT**

The department issued its draft staff report on this claim on October 19, 2005. OAR 125-145-0100(3), provided an opportunity for the claimant or the claimant's 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. Comments received have been taken into account by the department in the issuance of this final report.