

Department of Land Conservation and Development  
635 Capitol St NE, Suite 150  
Salem, OR 97301

## **CERTIFICATE OF SERVICE**

I certify that I served the attached M129796 HEIN AMENDED  
FINAL ORDERS A and B and AMENDED FINAL STAFF REPORT AND  
RECOMMENDATIONS on:

(See Attached List)

by mailing a full, true and correct copy in a sealed, first-class postage-  
prepaid envelope, addressed to the person(s) listed above, and deposited  
with the United States Postal Service at Salem, Oregon, on the date set forth  
below.

DATED this 26<sup>th</sup> day of June, 2007.

Name: Heather Aulase  
Measure 37 Support Specialist

6/26/2007

**M129796 Hein (2857)**

Lowell and Shirley Hein  
PO Box 501  
Canby, OR 97013

Doug McClain, Planning Director  
Clackamas County Planning Division  
9101 SE Sunnybrook Blvd  
Clackamas, OR 97015

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13425 SW 72nd Avenue  
Tigard, OR 97223

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12090 Rolling Hills Road  
Monmouth, OR 97361

Ginny Gustafson, AAG  
Department of Justice  
1162 Court St. NE  
Salem, OR 97301-4095

Stacy Humphrey  
DLCD - Portland Office  
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Portland OR 97232

Jim Johnson, Land Use Planning Coordinator  
Oregon Dept. of Agriculture  
635 Capitol St. NE, Ste 100  
Salem, OR 97301-2532



# 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/Costal Fax: (503) 378-6033

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

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

June 26, 2007

Lowell and Shirley Hein  
PO Box 501  
Canby, Oregon 97013



*Re: Ballot Measure 37 (ORS 197.352) Claim Number M129796*

*Claimants: Lowell and Shirley Hein*

Dear Mr. and Mrs. Hein:

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

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

Thank you for your courtesies.

Yours very truly,

LANE SHETTERLY  
Director

*Enclosure*



# Oregon

Theodore R. Kulongoski, Governor

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

June 26, 2007

To: Interested Persons

From: Lane Shetterly, Director



*Re: Ballot Measure 37 (ORS 197.352) Claim Number M129796*

*Claimants: Lowell and Shirley Hein*

---

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

This Amended Final Staff Report and Recommendation and the Amended 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 ) AMENDED FINAL ORDER A  
COMPENSATION UNDER ORS 197.352 ) CLAIM NO. M129796  
(BALLOT MEASURE 37) OF )  
Lowell and Shirley Hein, CLAIMANTS )

Claimants: Lowell and Shirley Hein (the Claimants)

Property: Township 4S, Range 1E, Section 13, Tax lot 1401  
Township 4S, Range 2E, Section 19B, Tax lots 1200 and 1500  
Clackamas 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 Amended 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 Amended 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 Lowell and Shirley Hein's division of tax lot 1401 into one-acre parcels or to their development of a dwelling on each parcel: applicable provisions of Goals 3 and 14, ORS 215 and OAR 660, division 33, enacted or adopted after December 20, 1991. These land use regulations will not apply to the claimants only to the extent necessary to allow them to use tax lot 1401 for the use described in this report, and only to the extent that use was permitted when they acquired it on December 20, 1991.
2. In lieu of compensation under ORS 197.352, the State of Oregon will not apply the following laws to Lowell and Shirley Hein's division of tax lots 1200 and 1500 into one-acre parcels or to their development of a dwelling on each parcel: applicable provisions of Goals 3 and 14, ORS 215 and OAR 660, division 33. These land use regulations will not apply to the claimants only to the extent necessary to allow them to use tax lots 1200 and 1500 for the use described in this report, and only to the extent that use was permitted when they acquired them on March 5, 1963.

3. The action by the State of Oregon provides the state's authorization to the claimants to use the three tax lots for the use described in this report, subject to the standards in effect on December 20, 1991 (tax lot 1401) and March 5, 1963 (tax lots 1200 and 1500). On December 20, 1991, use of tax lot 1401 was subject to compliance with Goal 3 and OAR 660, division 5, as implemented by Clackamas County's acknowledged EFU zone, and the applicable provisions of ORS 215 then in effect.

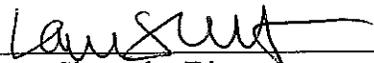
4. To the extent that any law, order, deed, agreement or other legally enforceable public or private requirement provides that tax lots 1401 and 1200 and 1500 may not be used without a permit, license or other form of authorization or consent, the order will not authorize the use of the property unless 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 tax lots 1401 and 1200 and 1500 imposed by private parties.

5. Any use of tax lots 1401 and 1200 and 1500 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).

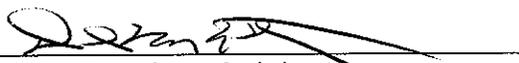
6. Without limiting the generality of the foregoing terms and conditions, in order for the claimants to use tax lots 1401 and 1200 and 1500, it may be necessary for them to obtain a decision under ORS 197.352 from a city and/or county and/or metropolitan service district that enforces land use regulations 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 tax lots 1401 and 1200 and 1500 by the claimants.

This Order is entered by the Deputy Director of the DLCD as an amended 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 26<sup>th</sup> day of June, 2007.

FOR the DEPARTMENT OF  
ADMINISTRATIVE SERVICES:

  
David Hartwig, Administrator  
DAS, State Services Division  
Dated this 26<sup>th</sup> day of June, 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 ) AMENDED FINAL ORDER B  
COMPENSATION UNDER ORS 197.352 ) CLAIM NO. M129796  
(BALLOT MEASURE 37) OF )  
Lowell and Shirley Hein, CLAIMANTS )

Claimants: Lowell and Shirley Hein (the Claimants)

Property: Township 4S, Range 1E, Section 13, Tax lots 800, 890, 900, 1000 and  
1100

Township 4S, Range 2E, Section 18B, Tax lot 600

Township 4S, Range 2E, Section 18C, Tax lots 200, 201, 202 and 500

Township 4S, Range 2E, Section 18D, Tax lots 1400, 1490, 1500 and  
1590

Township 4S, Range 2E, Section 19, Tax lot 400

Clackamas 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 Amended Final Staff Report and Recommendation of DLCD  
(the DLCD Report) attached to and by this reference incorporated into this order.

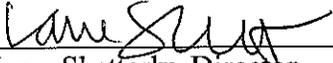
ORDER

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 Amended DLCD  
Report.

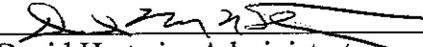
This Order is entered by the Deputy Director of the DLCD as an amended final order of  
DLCD and the Land Conservation and Development Commission under ORS 197.352,  
OAR 660-002-0010(8), and OAR chapter 125, division 145, and by the Administrator for

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 26<sup>th</sup> day of June, 2007.

FOR the DEPARTMENT OF  
ADMINISTRATIVE SERVICES:

  
David Hartwig, Administrator  
DAS, State Services Division  
Dated this 26<sup>th</sup> day of June, 2007.

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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  
Amended Final Staff Report and Recommendation**

June 26, 2007

**STATE CLAIM NUMBER:** M129796

**NAMES OF CLAIMANTS:** Lowell and Shirley Hein

**MAILING ADDRESS:** PO Box 501  
Canby, Oregon 97013

**PROPERTY IDENTIFICATION:** T4S R1E Section 13: tax lots 800, 890,  
900, 1000, 1100 and 1401

T4S R2E Section 18B: tax lot 600

T4S R2E Section 18C: tax lots 200, 201,  
202 and 500

T4S R2E Section 18D: tax lots 1400, 1490  
1500 and 1590

T4S R2E Section 19: tax lot 400

T4S R2E Section 19B: tax lots 1200 and  
1500

Clackamas County

**OTHER CONTACT INFORMATION:** John Shonkwiler  
13425 SW 72nd Avenue  
Tigard, Oregon 97223

**DATE RECEIVED BY DAS:** August 2, 2006

**180-DAY DEADLINE:** January 29, 2007

**I. SUMMARY OF CLAIM**

The claimants, Lowell and Shirley Hein, seek compensation in the amount of \$66,934,371 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 approximately 348.45-acre subject property into 348 parcels and to develop a dwelling on each

parcel. The subject property is located at 12027, 12037, 12047 and 12420 South Macksburg Road, near Mulino, in Clackamas County. (See claim.)

## **II. SUMMARY OF STAFF RECOMMENDATION**

Based on the findings and conclusions set forth below, the Department of Land Conservation and Development (the department) has determined that this claim is not valid as to all of the subject property, except for three tax lots, because the claimants have not established their ownership of all of the subject property. (See the complete recommendation in Section VI of this report.)

As to tax lot 1401 in T4S R1E Section 13, based on the findings and conclusions set forth below, 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 Lowell and Shirley Hein's division of the 7.82-acre property into seven parcels and to their development of a dwelling on each parcel: applicable provisions of Statewide Planning Goals 3 (Agricultural Lands) and 14 (Urbanization), ORS 215 and Oregon Administrative Rules (OAR) 660, division 33, enacted or adopted after December 20, 1991. These laws will not apply to the claimants only to the extent necessary to allow them to use the tax lot 1401 for the use described in this report, and only to the extent that use was permitted when they acquired it on December 20, 1991. (See the complete recommendation in Section VI. of this report.)

As to tax lots 1200 and 1500 in T4S R2E Section 19B, based on the preliminary findings and conclusions set forth below, the department has also determined that the claim is valid. Department staff recommends that, in lieu of compensation, the requirements of the following state laws enforced by the Commission or the department not apply to Lowell and Shirley Hein's division of the 31.49-acre property into 30 parcels and to their development of a dwelling on each parcel: applicable provisions of Goals 3 and 14, ORS 215 and OAR 660, division 33. These laws will not apply to the claimants only to the extent necessary to allow them to use tax lots 1200 and 1500 for the use described in this report, and only to the extent that use was permitted when they acquired them on March 5, 1963. (See the complete recommendation in Section VI. of this report.)

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

### **Comments Received**

On November 6, 2006, pursuant to Oregon Administrative Rule (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 August 2, 2006, for processing under OAR 125, division 145. The claim identifies ORS 215.213, 215.263, 215.283 and 215.780; OAR 660-04-040 and sections of OAR 660, division 33, 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

The claimants, Lowell and Shirley Hein, acquired the subject property between 1958 and 1991. However, from the outset, the Hein's owned a fractional interest in many of the parcels and beginning in 1993, conveyed fractional portions of their interests in most of the parcels to members of their family. There were multiple conveyances of fractional interests over this period. The deeds included statutorily required language warning that the use of the property may be restricted. In 1999, the claimants conveyed their remaining interest in all of the subject property except for three tax lots to Riverside Investments, LLC, an Oregon limited liability company. The limited liability company was formed in 1998, and its registered agent was Dean

Fitzwater. The department has some evidence that Riverside Investments, LLC operated a farming operation on the subject property in 2002, 2003, 2004 and 2005.

In 2006, claimants filed a complaint for rescission of their prior conveyances to Riverside Investments, LLC and certain members of their family. The primary basis for rescission was an alleged mutual mistake "in that the 348.45 acres of the property could not be subdivided into residential lots and could not be subdivided to provide a substantial profit to plaintiffs. As a result, plaintiffs were induced by this mistaken belief to transfer ownership of portions of their property and to form a limited liability company for purposes of investment-development of the property." Complaint at 4. The complaint also alleges intentional and innocent misrepresentation as a basis for rescission. None of the defendants entered an appearance, and a default judgment was entered ordering that the multiple conveyances between 1993 and 1999 be rescinded.

The department was not a party to the proceeding leading to a default judgment. The department has carefully considered all of the evidence in its record, including the evidence contained within the complaint and related pleadings leading to a default judgment, as well as the deeds and documents relating to the formation of the limited liability company, and information concerning who is listed as the owner of the property for property taxation purposes. Based on a preponderance of the evidence in its record, the department finds that there was no mutual mistake and no intentional or innocent misrepresentation supporting rescission. As a result, the department finds that the owners are those shown on the Clackamas County deed cards for each of the tax lots that is the subject of this claim. Those deed cards are summarized below:

T4S R1E Section 13: tax lots

- 800 claimants not owners – conveyed remaining interest on 1/13/1999
- 890 claimants not owners – conveyed remaining interest on 1/13/1999
- 900 claimants not owners – conveyed remaining interest on 1/13/1999
- 1000 claimants not owners – conveyed remaining interest on 1/13/1999
- 1100 claimants not owners – conveyed remaining interest on 1/13/1999
- 1401 claimants are owners – acquired 12/20/1991, 7.82 acres

T4S R2E Section 18B: tax lot

- 600 claimants not owners – conveyed remaining interest on 1/13/1999

T4S R2E Section 18C: tax lots

- 200 claimants not owners – conveyed remaining interest on 1/13/1999
- 201 claimants not owners – conveyed remaining interest on 1/13/1999
- 202 claimants not owners – conveyed remaining interest on 1/13/1999
- 500 claimants not owners – conveyed remaining interest on 1/13/1999

T4S R2E Section 18D: tax lots

- 1400 claimants not owners – conveyed remaining interest on 1/13/1999
- 1490 claimants not owners – conveyed remaining interest on 1/13/1999
- 1500 claimants not owners – conveyed remaining interest on 1/13/1999
- 1590 claimants not owners – conveyed remaining interest on 1/13/1999

T4S R2E Section 19: tax lot

400 claimants not owners – conveyed remaining interest on 1/13/1999

T4S R2E Section 19B: tax lots

1500 claimants are owners – acquired 3/5/1963 by bargain and sale deed, 1.5 acres

1200 claimants are owners – acquired 3/5/1963 by bargain and sale deed, 29.99 acres

The Clackamas County Assessor's Office records confirm that the claimants are not the current owners of most of the parcels included in this claim.

### **Conclusions**

The claimants, Lowell and Shirley Hein, have not established that they are "owners" of the subject property as that term is defined in ORS 197.352(11)(C), except for tax lots 1401, 1200, and 1500, as described above.

### **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 the claimants' desire to divide their approximately 348-acre subject property into 1-acre parcels and develop a dwelling on each parcel, and the claimants are restricted from doing so by Goals 3 and 14 and associated state regulation.

As explained in Section V.(1), the claimants, Lowell and Shirley Hein, are not "owners" of most of the subject property as that term is defined in ORS 197.352(11)(C). Therefore, with the exception of tax lots 1401, 1200 and 1500 described above, no laws enforced by the Commission or the department restrict the claimants' rights to use the private real property that is the subject of this claim in a manner that reduces the fair market value of the property.

Tax lot 1401

As to tax lot 1401 (T4S R1E Section 13), this portion of the property contains 7.82 acres of land zoned for farm use. This portion of the property was acquired by the claimants on December 20, 1991. The claim indicates that the claimants desire to divide it into one-acre lots and to develop a dwelling on each. The claimants identify ORS 215.263, 215.283, 215.705 and 215.780, along with OAR 660-004-0040, 660-006-0026 and 660-006-0027 and 660-033-0100, -0120, -0130 and -0135 as the state land use regulations that restrict their desired use of the property. OAR 660-004-0040 does not apply to this property because it is not planned and zoned primarily for rural residential uses. OAR 660, division 6, also does not apply to tax lot 1401 because it is planned and zoned for farm use rather than forest 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. Tax lot 1401 is zoned EFU 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.<sup>1</sup> Goal 3 became effective on January 25, 1975, and required that agricultural lands as defined by Goal 3 be zoned EFU pursuant to ORS 215.

Current land use regulations, particularly ORS 215.263, 215.284 and 215.780 and OAR 660, division 33, enacted or adopted pursuant to Goal 3, prohibit the division of EFU-zoned land into parcels less than 80 acres and establish standards for development of dwellings on existing or proposed parcels on that land.

ORS 215.780 establishes an 80-acre minimum size for the creation of new lots or parcels in EFU zones and became effective on November 4, 1993 (Chapter 792, Oregon Laws 1993). ORS 215.263 (2005 edition) establishes standards for the creation of new parcels for non-farm uses and dwellings allowed in an EFU zone.

OAR 660-033-0135 (applicable to farm dwellings) became effective on March 1, 1994, and interprets the statutory standard for a primary dwelling in an EFU zone under ORS 215.283(1)(f). OAR 660-033-0130(4) (applicable to non-farm dwellings) became effective on August 7, 1993, and was amended to comply with ORS 215.284(4) on March 1, 1994. The Commission subsequently adopted amendments to comply with House Bill 3326 (Chapter 704, Oregon Laws 2001, effective on January 1, 2002), which were effective on May 22, 2002. (See administrative rule history for OAR 660-033-0100, -0130 and -0135.)

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

At the time the claimants acquired tax lot 1401, it was subject to Clackamas County's acknowledged EFU-20 zone.<sup>2</sup> When the claimants acquired tax lot 1401, the claimants' 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.<sup>3</sup> In 1991, ORS 215.263 (1991 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 minimum lot size in the EFU-20 zone was 20 acres. ORS 215.283(1)(f) (1991 edition) generally allowed farm dwellings "customarily provided in conjunction with farm use." Non-farm dwellings were allowed under ORS 215.283(3) if they were determined to be compatible with farm use, not interfere seriously with accepted farm

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<sup>1</sup> The property is "agricultural land" because it contains Natural Resources Conservation Service Class I-IV soils.

<sup>2</sup> Clackamas County's EFU-20 zone was acknowledged by the Commission for compliance with Goal 3 prior to 1991.

<sup>3</sup> After the county's comprehensive plan and land use regulations were acknowledged by the Commission as complying with the statewide planning goals, the goals and implementing rules no longer applied directly to individual local land use decisions. *Byrd v. Stringer*, 295 Or 311 (1983). However, statutory requirements continue to apply, and insofar as the state and local provisions are materially the same, the local provisions must be interpreted consistent with the substance of the goals and implementing rules. *Forster v. Polk County*, 115 Or App 475 (1992) and *Kenagy v. Benton County*, 115 Or App 131 (1992).

practices, not materially alter the stability of the land use pattern in the area and be situated on generally unsuitable land for the production of farm crops and livestock.

The claim does not establish whether or to what extent the claimants' desired division and development of tax lot 1401 were allowed under the standards in effect when they acquired this portion of the property on December 20, 1991.

#### Tax lots 1200 and 1500

As to tax lots 1200 and 1500 (T4S R2E Section 19B), this portion of the property contains 31.49 acres of land zoned EFU. This portion of the property was acquired on March 5, 1963. At that time, no statute in ORS 215 restricted the claimants' desired use of these tax lots, and the statewide planning goals and their implementing rules were not yet in effect. The tax lots were not zoned by Clackamas County in 1963. The same state land use regulations that are described above (under tax lot 1401) also restrict the claimants' desired use of these two tax lots: divide the property into one-acre lots and establish a dwelling on each lot.

#### **Conclusions**

The current zoning requirements, minimum lot size and dwelling standards established by Goals 3 and 14, ORS 215 and OAR 660, division 33, were all enacted or adopted after the claimants acquired tax lots 1200 and 1500 in 1963 and do not allow the claimants' desired division or development of these tax lots. Some of the minimum lot size and dwelling standards established by Goals 3 and 14, ORS 215 and OAR 660, division 33, were enacted or adopted after the claimants acquired tax lot 1401 and do not allow the claimants' desired division or development of the property. However, the claim does not establish whether or to what extent the claimants' desired use of tax lot 1401 complies with the standards for land divisions and development under Goal 3 and OAR 660, as implemented through Clackamas County's comprehensive plan and EFU zone and applicable provisions of ORS 215, in effect when the claimants acquired tax lot 1401 on December 20, 1991.

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 use that the claimants have identified. There may be other laws that currently apply to the claimants' use of the subject property, and that may continue to apply to the claimants' use of the property, that have not been identified in the claim. In some cases, it will not be possible to know which laws apply to a use of the subject property until there is a specific proposal for that use. When the 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.

#### **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**

As explained in Section V.(1) of this report, the claimants, Lowell and Shirley Hein, are not "owners" of all of the tax lots included with the claim except for tax lots 1401, 1200 and 1500. There can be no effect of state land use regulations on the fair market value of their interest in the property when they do not own an interest. As to tax lots 1401, 1200 and 1500, the claim includes an estimate of \$66,934,371 as the reduction in the fair market value of the entire property due to the regulation(s) that restrict the claimants' desired use of the property. This amount is based on comparable sales information included with the claim. Although the claimants have not established that they own the entire property, this constitutes evidence that the fair market value of tax lots 1401, 1200 and 1500 has been reduced to some extent by the enactment or enforcement of state land use regulations.

## **Conclusions**

As explained in Section V.(1) of this report, the claimants are Lowell and Shirley Hein. The claimants have established that they are the present owners of three of the eighteen tax lots on which the claim is based. Under ORS 197.352, the claimants are due compensation for land use regulations that restrict the use of tax lots 1401 and 1200 and 1500, and have the effect of reducing their fair market value. Based on the findings and conclusions in Section V.(2) of this report, laws enacted or adopted since the claimants acquired the subject property restrict the claimants' desired use of the property. The claimants estimate that the effect of the regulation(s) on the fair market value of the entire property is a reduction of \$66,934,371. This evidence shows that the fair market value of tax lots 1401, 1200 and 1500 have been reduced to some extent.

Without an appraisal or other documentation and without verification of whether or the extent to which the claimants' desired use of the subject property was allowed under the standards in effect when they acquired the property, it is not possible to substantiate the specific dollar amount by which the land use regulations have reduced the fair market value of the property. Nevertheless, based on the evidence in the record for this claim, the department determines that the fair market value of tax lots 1401, 1200 and 1500 has been reduced to some extent as a result of land use regulations enforced by the Commission or the department.

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

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

As explained in Section V.(1) of this report, the claimants, Lowell and Shirley Hein, are not "owners" of most of the subject property as that term is defined in ORS 197.352(11)(C). Therefore, the issue of whether any laws are exempt from ORS 197.352 is not relevant except with regard to tax lots 1401, 1200 and 1500.

## **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 14, ORS 215 and OAR 660, division 33, which

Clackamas County has implemented through its current EFU zone. With the exception of amendments enacted or adopted after December 20, 1991 (tax lot 1401), Goals 3 and 14, ORS 215 and OAR 660 were in effect when the claimants acquired tax lot 1401. Those portions of these state laws that were in effect on or before December 20, 1991, are exempt under ORS 197.352(3) with respect to tax lot 1401. Some statutes in ORS 215 were in effect when the claimants acquired tax lots 1200 and 1500 in 1963. These statutes also are exempt under ORS 197.352(3).

### **Conclusions**

Without a specific development proposal for the subject property, it is not possible for the department to determine all the laws that may apply to a particular use of the property, or whether those laws may fall under one or more of the exemptions under ORS 197.352. The general statutory, goal and rule restrictions on division and development of the subject property are not exempt under ORS 197.352(3)(E) only to the extent they were enacted or adopted after the claimants acquired tax lot 1401 in 1991, and tax lots 1200 and 1500 in 1963. Provisions of Goals 3, ORS 215 and OAR 660 in effect when the claimants acquired these tax lots are exempt under ORS 197.352(3)(E) and will continue to apply to the claimants' use of the property.

Other laws in effect when the claimants acquired the subject property are also exempt under ORS 197.352(3)(E) and will continue to apply to their use of the property. There may be other laws that continue to apply to their 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 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. 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 use 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 the claim, the greater the possibility that there may be additional laws that will later be determined to continue to apply to their use of the subject property.

### **VI. FORM OF RELIEF**

ORS 197.352(1) provides for payment of compensation to an owner of private real property if the Commission or the department has enforced one or more laws that restrict the use of the property in a manner that reduces its fair market value. In lieu of compensation, the department may choose to not apply the law in order to allow the present owner to carry out a use of the property permitted at the time the present owner acquired the property. The Commission, by rule, has directed that if the department determines a claim is valid, the Director of the department must provide only non-monetary relief unless and until funds are appropriated by the legislature to pay claims.

## **Findings of Fact**

Based on the record and the preceding findings and conclusions, the department finds that the claim is not valid as to the following tax lots because the claimants are not owners of the subject property:

T4S R1E Section 13: tax lots 800, 890, 900, 1000, and 1100;  
T4S R2E Section 18B: tax lot 600;  
T4S R2E Section 18C: tax lots 200, 201, 202 and 500;  
T4S R2E Section 18D: tax lots 1400, 1490, 1500 and 1590; and  
T4S R2E Section 19: tax lot 400.

Based on the record and the preceding findings and conclusions, state land use regulations enforced by the Commission or the department restrict the claimants' desired use of tax lots 1401, 1200 and 1500. 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 \$66,934,371. 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 three tax lots, a specific amount of compensation cannot be determined. In order to determine a specific amount of the compensation due for this claim, it would also be necessary to verify whether or the extent to which the claimants' desired use of tax lots 1401, 1200 and 1500 was allowed under the standards in effect when they acquired these tax lots. 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 three tax lots 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 Lowell and Shirley Hein to use the subject property for a use permitted at the time they acquired the property on March 5, 1963 (tax lots 1200 and 1500) and December 20, 1991 (tax lot 1401).

## **Conclusions**

Based on the record and the preceding findings and conclusions, the department recommends that the claim be denied as to the following tax lots:

T4S R1E Section 13: tax lots 800, 890, 900, 1000 and 1100;  
T4S R2E Section 18B: tax lot 600;  
T4S R2E Section 18C: tax lots 200, 201, 202 and 500;  
T4S R2E Section 18D: tax lots 1400, 1490, 1500 and 1590; and  
T4S R2E Section 19: tax lot 400.

Based on the record and the preceding findings and conclusions, the department further recommends that the claim be approved as to the following tax lots, subject to the following terms:

T4S R1E Section 13: tax lot 1401; and  
T4S R2E Section 19B: tax lots 1200 and 1500.

1. In lieu of compensation under ORS 197.352, the State of Oregon will not apply the following laws to Lowell and Shirley Hein's division of tax lot 1401 into one-acre parcels or to their development of a dwelling on each parcel: applicable provisions of Goals 3 and 14, ORS 215 and OAR 660, division 33, enacted or adopted after December 20, 1991. These land use regulations will not apply to the claimants only to the extent necessary to allow them to use tax lot 1401 for the use described in this report, and only to the extent that use was permitted when they acquired it on December 20, 1991.
2. In lieu of compensation under ORS 197.352, the State of Oregon will not apply the following laws to Lowell and Shirley Hein's division of tax lots 1200 and 1500 into one-acre parcels or to their development of a dwelling on each parcel: applicable provisions of Goals 3 and 14, ORS 215 and OAR 660, division 33. These land use regulations will not apply to the claimants only to the extent necessary to allow them to use tax lots 1200 and 1500 for the use described in this report, and only to the extent that use was permitted when they acquired them on March 5, 1963.
3. The action by the State of Oregon provides the state's authorization to the claimants to use the three tax lots for the use described in this report, subject to the standards in effect on December 20, 1991 (tax lot 1401) and March 5, 1963 (tax lots 1200 and 1500). On December 20, 1991, use of tax lot 1401 was subject to compliance with Goal 3 and OAR 660, division 5, as implemented by Clackamas County's acknowledged EFU zone, and the applicable provisions of ORS 215 then in effect.
4. To the extent that any law, order, deed, agreement or other legally enforceable public or private requirement provides that tax lots 1401 and 1200 and 1500 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 tax lots 1401 and 1200 and 1500 imposed by private parties.
5. Any use of tax lots 1401 and 1200 and 1500 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).
6. Without limiting the generality of the foregoing terms and conditions, in order for the claimants to use tax lots 1401 and 1200 and 1500, 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 tax lots 1401 and 1200 and 1500 by the claimants.

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

The department issued its draft staff report on this claim on January 4, 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.