



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>

October 3, 2007

To: Claimant and Interested Persons

From: Cora R. Parker, Acting Director



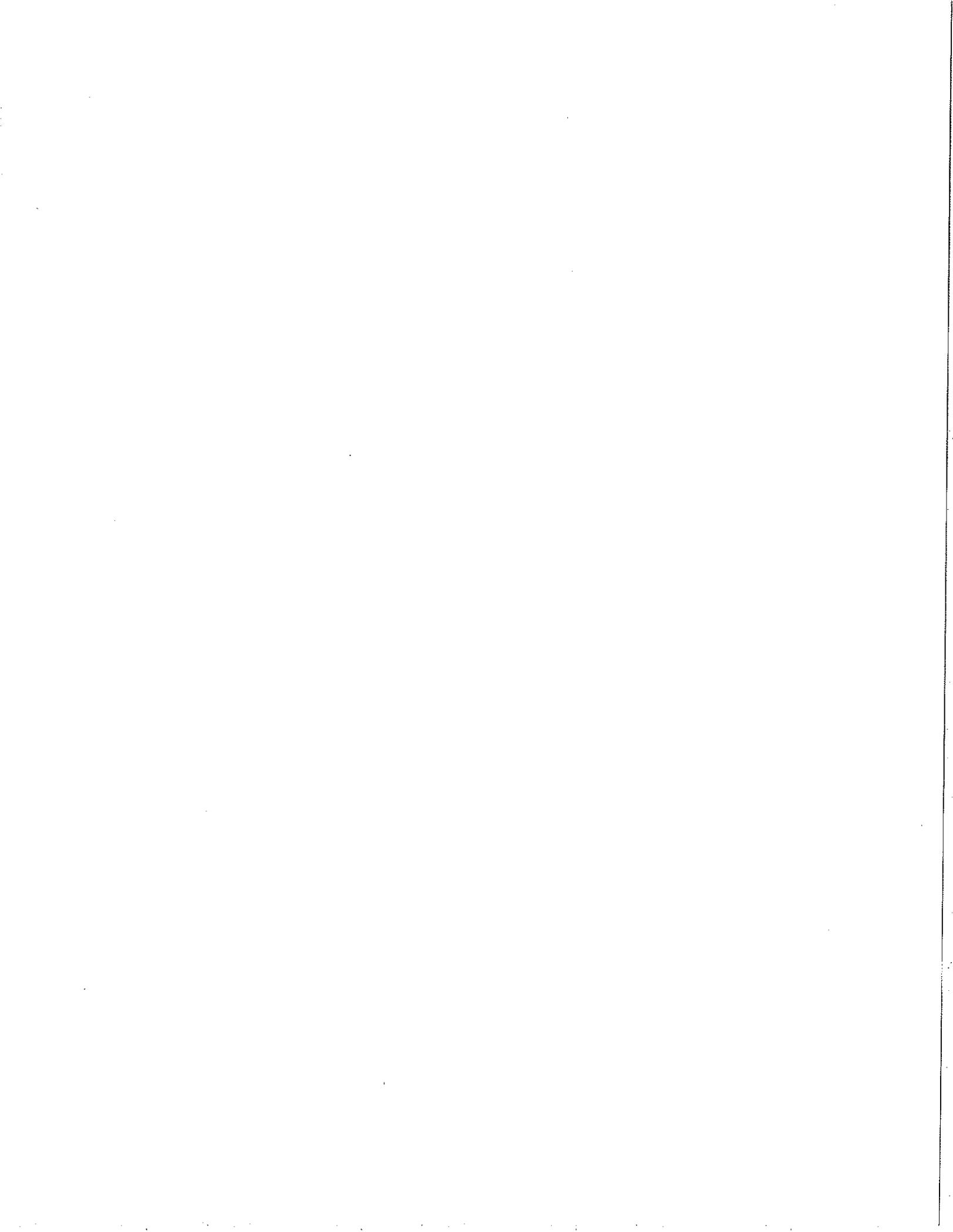
Re: Ballot Measure 37 (ORS 197.352) Claim Number M130913

Claimants: Elbert and Wini Whitaker

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

This Draft Staff Report and Recommendation sets forth the department's evaluation of and recommendation on the claim. Oregon Administrative Rule 125-145-0100(3) provides that the claimant (or the claimant's agent) and any third parties who submitted comments on the claim may submit written comments, evidence, and information in response to any third-party comments contained in the report, and to the staff report and recommendation itself. Such response must be filed no more than 15 calendar days after the date of mailing of this report. Any response from you must be delivered to the Oregon Department of Administrative Services (DAS), 1225 Ferry Street SE, U160, Salem, Oregon 97301, and will be deemed timely filed if either postmarked on the 15th day or actually delivered to DAS by the close of business on the 15th day.

This department will review any responses submitted, and a Final Order on the claim will be issued after such review.



ORS 197.352 (BALLOT MEASURE 37) CLAIM FOR COMPENSATION
OREGON DEPARTMENT OF LAND CONSERVATION AND DEVELOPMENT
Draft Staff Report and Recommendation

October 3, 2007

STATE CLAIM NUMBER: M130913

NAMES OF CLAIMANTS: Elbert and Wini Whitaker

MAILING ADDRESS: 2015 NW Helmholtz Way
Redmond, Oregon 97756

PROPERTY IDENTIFICATION: Township 15, Range 13, Section 6
Tax lots 400 and 1100
Deschutes County

OTHER CONTACT INFORMATION: Edward Fitch
PO Box 457
Redmond, Oregon 97756

DATE RECEIVED BY DAS: November 20, 2006

DEADLINE FOR FINAL ACTION:¹ May 13, 2008

I. SUMMARY OF CLAIM

The claimants, Elbert and Wini Whitaker, seek compensation in the amount of \$2.4 million 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 93.63-acre subject property into thirteen parcels and to develop a dwelling on each resulting undeveloped parcel.² The subject property is located at 2015 NW Helmholtz Way, near Redmond, in Deschutes County. (See claim.)

II. SUMMARY OF STAFF RECOMMENDATION

Based on the preliminary findings and conclusions set forth below, the Department of Land Conservation and Development (the department) has determined that the claim is valid.

¹ ORS 197.352, as originally enacted, required that final action on claims made under Measure 37 be made within 180 days of the date the claim was filed. In response to the large volume of claims filed in late 2006, the Oregon legislature passed House Bill 3546, which became effective on May 10, 2007. This legislation increased the amount of time state and local governments have to take final action on Measure 37 claims filed on or after November 1, 2006, by 360 days, to a total of 540 days.

² The subject property includes two tax lots. Tax lot 400 consists of 78 acres and tax lot 1100 consists of 15.63 acres.

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 Elbert and Wini Whitaker's division of the 93.63-acre subject property into thirteen parcels and to their development of a dwelling on each resulting undeveloped parcel: applicable provisions of Statewide Planning Goal 3 (Agricultural Lands), ORS 215 and Oregon Administrative Rules (OAR) 660, division 33, enacted or adopted after each claimant acquired the subject property. 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 Elbert Whitaker acquired tax lot 400 on November 26, 1965, when Elbert and Wini Whitaker acquired tax lot 1100 on November 10, 1972, and when Wini Whitaker acquired tax lot 400 on April 27, 1993. The department acknowledges that the relief to which Wini Whitaker is entitled under ORS 197.352 may not allow her to use tax lot 400 in the manner set forth in the claim. (See the complete recommendation in Section VI. of this report.)

III. COMMENTS ON THE CLAIM

Comments Received

On June 13, 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, two written comments, evidence or information were received in response to the 15-day notice.

One comment does not address whether the claim meets the criteria for relief under ORS 197.352. Comments concerning the effects a use of the subject 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.

One comment is relevant to whether the restriction of the claimants' use of the subject property reduces the fair market value of the property. The comment has been considered by the department in preparing this report. (See the comment letters in the department's claim file.)

IV. TIMELINESS OF CLAIM

Requirement

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

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

owner of the property submits a land use application in which the land use regulation is an approval criteria, whichever is later.

Findings of Fact

This claim was submitted to DAS on November 20, 2006, for processing under OAR 125, division 145. The claim identifies statewide planning goals, ORS 215 and OAR 660 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 Elbert Whitaker acquired tax lot 400 on November 26, 1965, as reflected by warranty deed included with the claim. The claimants, Elbert and Wini Whitaker, acquired tax lot 1100 on November 10, 1972, as reflected by contract of sale and subsequent fulfillment deed included with the claim. On April 27, 1993, Elbert Whitaker conveyed an interest in tax lot 400 to his wife, Wini Whitaker, as reflected by a bargain and sale deed included with the claim. The Deschutes County Assessor's Office confirms the claimants' current ownership of the subject property.

Conclusions

The claimants, Elbert and Wini Whitaker, are "owners" of the subject property, as that term is defined by ORS 197.352(11)(C). The claimants have been owners of tax lot 1100 since November 10, 1972. Elbert Whitaker has been an owner of tax lot 400 since November 26, 1965, and Wini Whitaker has been an owner of tax lot 400 since April 27, 1993. Elbert Whitaker is a "family member" of Wini Whitaker as that term is defined by ORS 197.352(11)(A), as to tax lot 400.

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 93.63-acre subject property into thirteen parcels and to develop a dwelling on each resulting undeveloped parcel, and that current land use regulations prevent the desired use.³

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. The claimant's property is zoned EFU-TBR (Tumalo/Bend/Redmond) by Deschutes County as required by Goal 3, in accordance with ORS 215 and OAR 660, division 33, because the claimants' property is "agricultural land" as defined by Goal 3.⁴ 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, 1994.⁵

Elbert Whitaker acquired tax lot 400 in 1965, and Elbert and Wini Whitaker acquired tax lot 1100 on November 10, 1972, prior to the adoption of the statewide planning goals and their implementing statutes and regulations.

³ The claimants have summarily cited numerous state land use laws as applicable to this claim, but do not establish how the laws either apply to the claimants' desired use of the subject property or restrict its use with the effect of reducing its fair market value. On their face, most of these regulations either do not apply to the claimants' property or do not restrict the claimants' desired use of the property with the effect of reducing its fair market value. This report addresses only those regulations that the department finds are applicable to and restrict the claimants' desired use of the subject property, based on the claimants' description of that desired use.

⁴ The claimants' property is "agricultural land" because it contains Natural Resources Conservation Service Class I-VI soils.

⁵ The Commission adopted amendments to OAR 660-033-0100, -0130 and -0135 to comply with House Bill 3326 (Chapter 704, Oregon Laws 2001, effective on January 1, 2002), which were effective on May 22, 2002. These amendments clarified but did not further restrict dwelling standards for EFU-zoned land.

Conclusions

The current zoning requirements, minimum lot size and dwelling standards established by applicable provisions of Goal 3, ORS 215 and OAR 660, division 33, were all enacted or adopted after Elbert Whitaker acquired tax lot 400 in 1965, and after the claimants acquired tax lot 1100 in 1972. These laws restrict the use of the subject property relative to the uses allowed when Elbert Whitaker acquired tax lot 400 and when Elbert and Wini Whitaker acquired tax lot 1100.

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. 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

The claim includes an estimate of \$2.4 million 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 the claimants' assessment of the subject property's value.

Conclusions

As explained in Section V.(1) of this report, the claimants are Elbert and Wini Whitaker who acquired tax lot 1100 on November 10, 1972. Elbert Whitaker acquired tax lot 400 on November 26, 1965. Under ORS 197.352, the claimants are due compensation for land use regulations that restrict the use of the subject property and have the effect of reducing its fair market value. Based on the findings and conclusions in Section V.(2) of this report, laws enacted or adopted since Elbert Whitaker acquired tax lot 400 and since the claimants acquired tax lot 1100 restrict the claimants' desired use of the property. The claimants estimate that the effect of the regulations on the fair market value of the property is a reduction of \$2.4 million.

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.

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 Goal 3, ORS 215 and OAR 660, division 33, which Deschutes County has implemented through its current EFU-TBR zone. These land use regulations were enacted or adopted after Elbert Whitaker acquired tax lot 400 in 1965 and the claimants acquired tax lot 1100 in 1972.

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. It appears that none of the general statutory, goal and rule restrictions on division and development of the claimants' property were in effect when Elbert Whitaker acquired tax lot 400 in 1965 and the claimants acquired tax lot 1100 in 1972. As a result, these laws are not exempt under ORS 197.352(3)(E).

Laws in effect when Elbert Whitaker acquired tax lot 400 and when the claimants acquired tax lot 1100 are exempt under ORS 197.352(3)(E) and do not provide a basis for compensation. In addition, laws enacted or adopted for a purpose set forth in 197.352(3)(A) to (D) are also exempt and would not provide a basis for compensation.

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 laws that restrict the use of the subject 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 subject 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 restrict the claimants' desired use of the subject property. The claim asserts that existing state land use regulations enforced by the Commission or the department have the effect of reducing the fair market value of the subject property by \$2.4 million. 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 the claimants' desired use of the subject property was allowed under the standards in effect when Elbert Whitaker acquired tax lot 400 and when the claimants acquired tax lot 1100. 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 Elbert Whitaker to use tax lot 400 for a use permitted at the time he acquired it on November 26, 1965, to allow Elbert and Wini Whitaker to use tax lot 1100 for a use permitted at the time they acquired it on November 10, 1972, and to allow Wini Whitaker to use tax lot 400 for a use permitted at the time she acquired it on April 27, 1993.

At the time Wini Whitaker acquired an interest in tax lot 400, it was subject to Deschutes County's acknowledged comprehensive plan and EFU-TBR zone. At that time, the claimants' desired use of the property would have been subject to compliance with Goal 3 and OAR 660, division 5, as implemented through the county's acknowledged EFU-TBR zone and the applicable provisions of ORS 215 then in effect.⁶

In 1993, 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. 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 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 the subject property were allowed under the standards in effect when Wini Whitaker acquired the property on April 27, 1993.

In addition to the applicable provisions of Goal 3, ORS 215 and OAR 660 in effect when Wini Whitaker acquired tax lot 400 on April 27, 1993, and other laws in effect when either 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. 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

⁶ 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).

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 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.

Conclusions

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 Elbert and Wini Whitaker's division of the 93.63-acre subject property into thirteen parcels or to their development of a dwelling on each resulting undeveloped parcel: applicable provisions of Goal 3, 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 the subject property for the use described in this report, and only to the extent that use was permitted when Elbert Whitaker acquired tax lot 400 on November 26, 1965, when Elbert and Wini Whitaker acquired tax lot 1100 on November 10, 1972, and when Wini Whitaker acquired tax lot 400 on April 27, 1993. The department acknowledges that the relief to which Wini Whitaker is entitled under ORS 197.352 may not allow her to use tax lot 400 in the manner set forth in the claim.
2. The action by the State of Oregon provides the state's authorization to the claimants to use the subject property for the use described in this report, subject to the standards in effect when Elbert Whitaker acquired tax lot 400 on November 26, 1965, when Elbert and Wini Whitaker acquired tax lot 1100 on November 10, 1972, and when Wini Whitaker acquired an interest in tax lot 400 on April 27, 1993. On April 27, 1993, tax lot 400 was subject to compliance with Goal 3 and OAR 660, division 5, as implemented by Deschutes County's acknowledged EFU-TBR zone, and the applicable provisions ORS 215 then 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.

6. Nothing in this report or the state's final order for this claim constitutes any determination of ownership by the State of Oregon as to submerged or submersible lands, or as to public rights to the use of waters of the state.

VII. NOTICE OF OPPORTUNITY TO COMMENT

This staff report is not a final decision by the department and does not authorize any use of the property that is the subject of this report. OAR 125-145-0100 provides 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. Such response must be filed no more than 15 calendar days after the date this report is mailed to the claimants and any third parties. Responses to this draft staff report and recommendation will be considered only as comments related to the claim described in this report. All responses must be delivered to the Oregon Department of Administrative Services (DAS), Measure 37 Unit, Risk Management-State Services Division, 1225 Ferry Street SE, U160, Salem, Oregon 97301-4292 and will be deemed timely filed if either postmarked on the 15th day, or actually delivered to DAS by the close of business on the 15th day. Note: Please reference the claim number, claimant name and clearly mark your comments as "Draft Staff Report comments." Comments must be submitted in writing only. Those comments submitted electronically or by facsimile will not be accepted.

