



Oregon

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October 18, 2007

To: Claimant and Interested Persons

From: Cora R. Parker, Acting Director



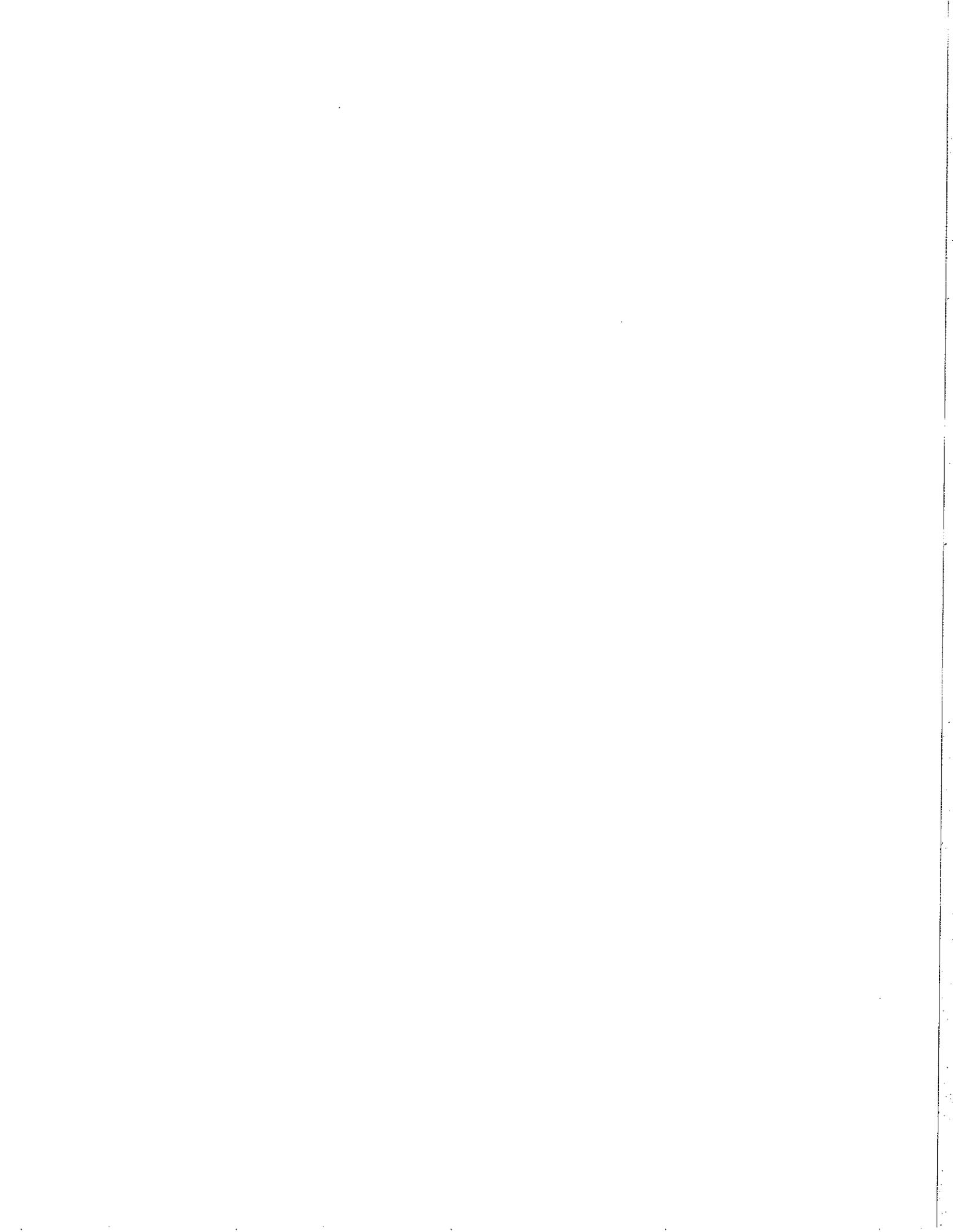
Re: Ballot Measure 37 (ORS 197.352) Claim Number M131070

Claimants: Remi and Rose Coussens; R and R Coussens, Inc.

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 18,, 2007

STATE CLAIM NUMBER: M131070

NAMES OF CLAIMANTS: Remi and Rose Coussens
R & R Coussens, Inc.

MAILING ADDRESS: 8200 NW Glencoe Road
Hillsboro, Oregon 97124

PROPERTY IDENTIFICATION: Township 1N, Range 3W, Section 2 and
Township 2N, Range 3W, Section 35
Tax lot 500
Washington County

OTHER CONTACT INFORMATION: Paul Coussens
PO Box 760
Banks, Oregon 97106

DATE RECEIVED BY DAS: November 22, 2006

DEADLINE FOR FINAL ACTION:¹ May 15, 2008

I. SUMMARY OF CLAIM

The claimants, Remi and Rose Coussens and R & R Coussens, Inc., seek compensation in the amount of \$1,287,825 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 78.05-acre subject property into five-acre parcels and to develop a dwelling on each resulting undeveloped parcel. The subject property is located at 11870 Dersham Road, near North Plains, in Washington 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 in part.

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.

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 R & R Coussens, Inc.'s division of the southern approximately 73 acres of the 78.05-acre subject property into five-acre parcels and to its 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 R & R Coussens, Inc. acquired the southern approximately 73 acres of the subject property. These land use regulations will not apply to R & R Coussens, Inc. only to the extent necessary to allow it to use the southern approximately 73 acres of the subject property for the use described in this report, and only to the extent that use was permitted when R & R Coussens, Inc. acquired that portion of the property on July 21, 1993. The department acknowledges that the relief to which R & R Coussens, Inc. is entitled under ORS 197.352 may not allow it to use the southern approximately 73 acres of the subject property in the manner set forth in the claim.

The department has further determined that this claim is not valid as to Remi and Rose Coussens because they are not owners of the subject property and is not valid as to R & R Coussens, Inc. as to the northern approximately five acres of the subject property because it has not established its ownership of that portion of the property. (See the complete recommendation in Section VI. of this report).

III. COMMENTS ON THE CLAIM

Comments Received

On July 30, 2007, pursuant to OAR 125-145-0080, the Oregon Department of Administrative Services (DAS) provided written notice to the owners of surrounding properties. According to DAS, no written comments were received in response to the 15-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 November 22, 2006, for processing under OAR 125, division 145. The claim identifies “all state land use regulations adopted after April 29, 1959” 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

Claimants Remi and Rose Coussens acquired the southern approximately 73 acres of the subject property on April 22, 1959, as reflected by a warranty deed included with the claim. However, Remi and Rose Coussens conveyed that portion of the property to R & R Coussens, Inc., an Oregon corporation, on July 21, 1993, as evidenced by a bargain and sale deed included with the claim.

Claimants Remi and Rose Coussens assert they also acquired the northern approximately five acres of the subject property on April 22, 1959, and claimant R & R Coussens, Inc. asserts it acquired that portion of the property from Remi and Rose Coussens on July 21, 1993. However, the northern approximately five-acre portion of the subject property is not included in the legal descriptions of the subject property in either of the deeds included with the claim. The Department of Administrative Services (DAS) attempted to obtain additional information to support the claimants’ acquisitions of the northern approximately five-acre portion of the property; however, DAS was unable to locate any additional information that would establish the claimants’ ownership of that portion of the property.

The Washington County Assessor’s Office confirms R & R Coussens, Inc.’s current ownership of the southern approximately 73 acres of the subject property.

Conclusions

Claimant R & R Coussens, Inc. is an “owner” of the southern approximately 73 acres of the subject property as that term is defined by ORS 197.352(11)(C), as of July 21, 1993. Claimants Remi and Rose Coussens are not “owners” of the subject property and claimant R & R Coussens, Inc. has not established its ownership of the northern five acres of the subject property.

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 78.05-acre subject property into five-acre parcels and to develop a dwelling on each resulting undeveloped parcel, and that current land use regulations prevent the desired use.²

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 claimants' property is zoned EFU by Washington 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 3.³ Goal 3 became effective on January 25, 1975, and required that agricultural lands as defined by Goal 3 be zoned EFU pursuant to ORS 215.

Current land use regulations, particularly ORS 215.213, 215.263 and 215.780 and OAR 660, division 33, enacted or adopted pursuant to Goal 3, prohibit the division of EFU-zoned land in marginal lands counties 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 in a marginal lands county under ORS 215.213. OAR 660-033-0130(4)(e) (applicable to non-farm dwellings in marginal lands counties) became effective on August 7, 1993.⁴

² The claimants summarily refer to all land use laws as applicable to this claim, but do not establish how any particular land use law either applies to the claimants' desired use of the subject property or restricts its use with the effect of reducing its fair market value. On their face, most of the 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 their desired use.

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

⁴ 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 under OAR 660, division 33, for EFU-zoned land.

At the time R & R Coussens, Inc. acquired the subject property, it was subject to Washington County's acknowledged comprehensive plan and EFU zone.⁵ That zone generally required 76 acres for the creation of a new farm parcel and allowed for both farm dwellings and nonfarm parcels and dwellings. 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 zone, and the applicable provisions of ORS 215 then in effect.⁶ In July, 1993, ORS 215.213 (1993 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) (1993 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 R & R Coussens, Inc. acquired the property on July 21, 1993.

Conclusions

The current zoning requirements, minimum lot size and dwelling standards established by Goal 3, ORS 215 and OAR 660, division 33, were all enacted or adopted after R & R Coussens, Inc. acquired the southern approximately 73 acres of the subject property in 1993 and do not allow the claimants' desired division or development of that portion of the property. However, the claim does not establish whether or to what extent the claimants' desired use of the southern approximately 73 acres of the subject property complies with the standards for land divisions and development under Goal 3 and OAR 660, division 5, as implemented through Washington County's comprehensive plan and EFU zone, and applicable provisions of ORS 215 in effect when R & R Coussens, Inc. acquired the southern approximately 73 acres of the property on July 21, 1993.

As explained in Section V.(1), claimants Remi and Rose Coussens are not "owners" of the subject property, and claimant R & R Coussens, Inc. has not established that it is an "owner" of the northern approximately five acres of the property as that term is defined in ORS 197.352(11)(C). Therefore, no laws enforced by the Commission or the department restrict Remi and Rose Coussens' use of the subject property and the department cannot determine whether any laws enforced by the Commission or the department restrict R & R Coussens, Inc.'s use of the northern approximately five acres of the property with the effect of reducing the fair market value of the property.

⁵ Washington County's EFU zone was acknowledged by the Commission for compliance with Goal 3 on July 30, 1984.

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).

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 R & R Coussens, Inc.'s use of the southern approximately 73 acres of the subject property, and that may continue to apply to R & R Coussens, Inc.'s use of the southern approximately 73 acres 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 southern approximately 73 acres of the subject property until there is a specific proposal for that use. When R & R Coussens, Inc. 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 the land use regulations (described in Section V.(2) of this report) must have "the effect of reducing the fair market value of the property, or any interest therein."

Findings of Fact

The claim includes an estimate of \$1,287,825 as the reduction in the subject property's fair market value due to the regulations that restrict the claimants' desired use of the property. This amount is based on a real estate agent's assessment of the subject property's value.

Conclusions

As explained in Section V.(1) of this report, the claimants are R & R Coussens, Inc., which acquired the southern approximately 73 acres of the subject property on July 21, 1993, and Remi and Rose Coussens who are not "owners" of the subject property. R & R Coussens, Inc. has not established its ownership of the northern approximately five acres of the property. Therefore, no laws restrict Remi and Rose Coussens' use of the subject property and the department cannot determine that any laws restrict R & R Coussens, Inc.'s use of the northern approximately five acres of the subject property with the effect of reducing the fair market value of the property.

Under ORS 197.352, R & R Coussens, Inc. is due compensation for land use regulations that restrict the use of the southern approximately 73 acres 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 R & R Coussens, Inc. acquired the southern approximately 73 acres of the subject property restrict R & R Coussens, Inc.'s desired use of the property. The claimants estimate that the effect of the regulations on the fair market value of the subject property is a reduction of \$1,287,825.

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 R & R Coussens, Inc. acquired the southern approximately 73 acres of 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 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 Washington County has implemented through its current EFU zone. With the exception of amendments enacted or adopted after July 21, 1993, Goal 3, ORS 215 and OAR 660 were in effect when R & R Coussens, Inc. acquired the southern approximately 73 acres of the subject property.

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 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 R & R Coussens, Inc. acquired the southern approximately 73 acres of the property on July 21, 1993. Provisions of Goal 3, ORS 215 and OAR 660 in effect when R & R Coussens, Inc. acquired the southern approximately 73 acres of the subject property in July 1993 are exempt under ORS 197.352(3)(E) and will continue to apply to the property.

Other laws in effect when R & R Coussens, Inc. acquired the southern approximately 73 acres of the subject property are also exempt under ORS 197.352(3)(E) and will continue to apply to R & R Coussens, Inc.'s use of the southern approximately 73 acres of the property. There may be other laws that continue to apply to R & R Coussens, Inc.'s use of the southern approximately 73 acres 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 R & R Coussens, Inc. seeks a building or development permit to carry out a specific use, it may become evident that other state laws apply to that use. In some cases, some of these laws may be exempt under ORS 197.352(3)(A) to (D).

As explained in Section V.(1) of this report, claimants Remi and Rose Coussens are not "owners" of the subject property and claimant R & R Coussens, Inc. has not established its ownership of the northern approximately five acres of the property. Therefore, the issue of whether any laws are exempt from ORS 197.352 for Remi and Rose Coussens is not relevant to this claim, and the department cannot determine that any laws are exempt as to R & R Coussens, Inc. for the northern approximately five acres of the subject property.

This report addresses only those state laws that are identified in the claim, or that the department is certain apply to the subject property, based on the uses that the claimants have identified. Similarly, this report only addresses the exemptions provided for under ORS 197.352(3) that are clearly applicable, given the information provided to the department in the claim. The claimants should be aware that the less information they have provided to the department in the claim, the

greater the possibility that there may be additional laws that will later be determined to continue to apply to R & R Coussens, Inc.'s 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 findings and conclusions set forth in this report, laws enforced by the Commission or the department do not restrict Remi and Rose Coussens' desired use of the subject property because they are not owners of the subject property; and the department cannot determine that any laws enforced by the Commission or the department restrict R & R Coussens, Inc.'s desired use of the northern approximately five acres of the property because the claimants have not establish its ownership of that portion of the property. The department otherwise finds that laws enforced by the Commission or the department restrict R & R Coussens, Inc.'s desired use of the southern approximately 73 acres 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 \$1,287,825. 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 the 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 R & R Coussens, Inc. acquired the southern approximately 73 acres of the property. Nevertheless, based on the record for this claim, the department has determined that the laws on which the claim is based have reduced the fair market value of the subject property to some extent.

No funds have been appropriated at this time for the payment of claims. In lieu of payment of compensation, ORS 197.352 authorizes the department to modify, remove or not apply all or parts of certain land use regulations to allow R & R Coussens, Inc. to use the southern approximately 73 acres of the subject property for a use permitted at the time it acquired that portion of the property on July 21, 1993.

Conclusions

Based on the record before the department, claimants Remi and Rose Coussens have not established that they are entitled to relief under ORS 197.352(1) as a result of land use regulations enforced by the Commission or the department because they are not owners of the subject property, and claimant R & R Coussens, Inc. has not established that it is entitled to relief

under ORS 197.352(1) for the northern approximately five acres of the subject property because it has not established that it is an owner of that portion of the property. Therefore, the department recommends that the claim for Remi and Rose Coussens be denied, and that R & R Coussens, Inc.'s claim be denied for the northern approximately five acres of the subject property.

The department otherwise 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 R & R Coussens, Inc.'s division of the southern approximately 73 acres of the 78.05-acre subject property into five-acre parcels or to its development of a dwelling on each resulting undeveloped parcel: applicable provisions of Goal 3, ORS 215 and OAR 660, division 33, enacted or adopted after July 21, 1993. These land use regulations will not apply to R & R Coussens, Inc. only to the extent necessary to allow it to use the southern approximately 73 acres of the subject property for the use described in this report, and only to the extent that use was permitted when it acquired the southern approximately 73 acres of the property on July 21, 1993. The department acknowledges that the relief to which R & R Coussens, Inc. is entitled under ORS 197.352 may not allow it to use the southern approximately 73 acres of the subject property in the manner set forth in the claim.
2. The action by the State of Oregon provides the state's authorization to R & R Coussens, Inc. to use the southern approximately 73 acres of the property for the use described in this report, subject to the standards in effect on July 21, 1993. On that date, the property was subject to compliance with Goal 3 and OAR 660, division 5, as implemented by Washington County's acknowledged EFU 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 R & R Coussens, Inc. first obtains that permit, license or other form of authorization or consent. Such requirements may include, but are not limited to: a building permit, a land use decision, a "permit" as defined in ORS 215.402 or 227.160, other permits or authorizations from local, state or federal agencies and restrictions on the use of the subject property imposed by private parties.
4. Any use of the property by R & R Coussens, Inc. 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 R & R Coussens, Inc. to use the subject property, it may be necessary for it 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 R & R Coussens, Inc. 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 R & R Coussens, Inc.

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.