



Oregon

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October 15, 2007

To: Claimant and Interested Persons

From: Cora R. Parker, Acting Director



Re: Ballot Measure 37 (ORS 197.352) Claim Number M131328

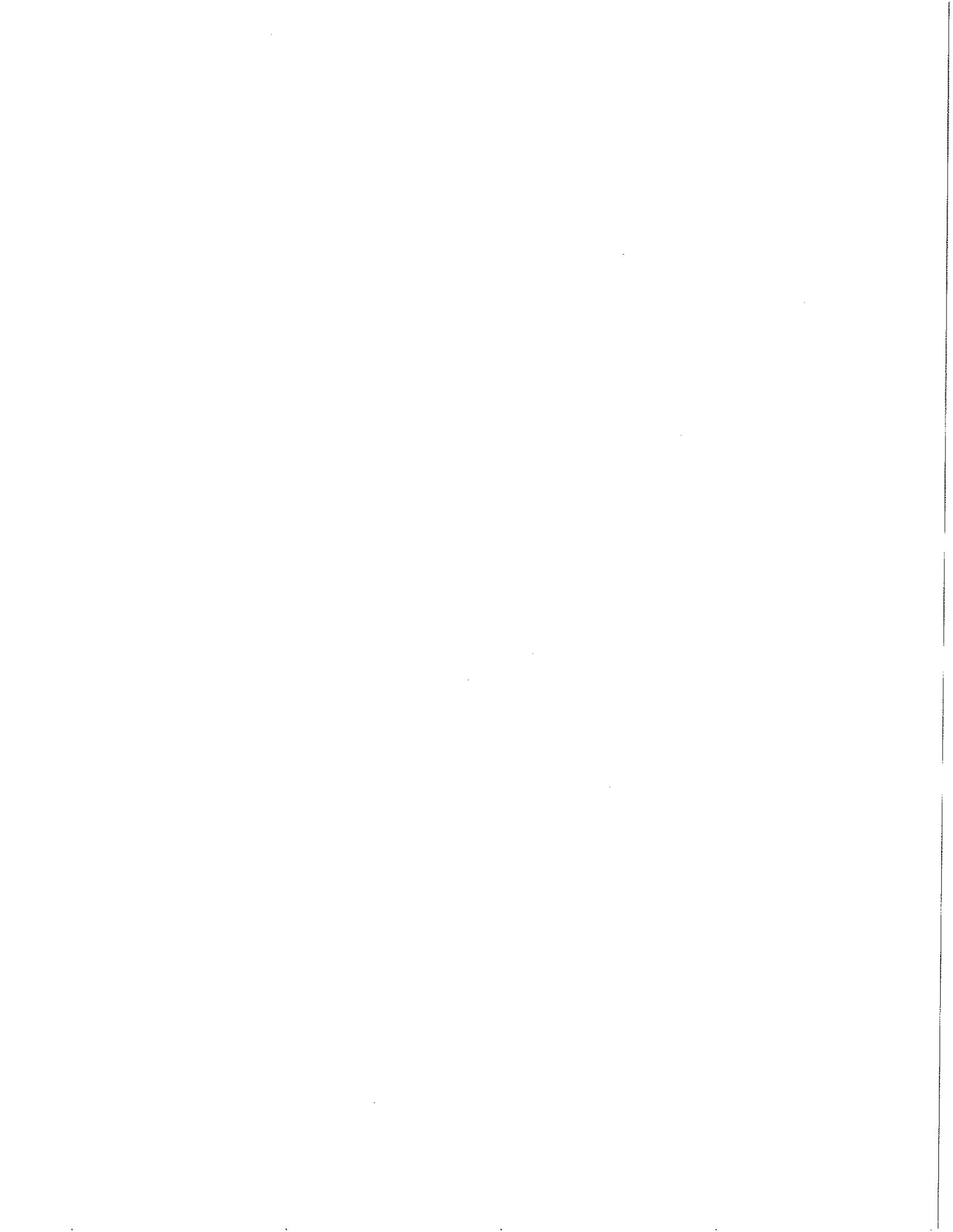
Claimants: Robert Jenkins Jr. and S. Jeanette Jenkins

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 15, 2007

STATE CLAIM NUMBER: M131328

NAMES OF CLAIMANTS: Robert Jenkins Jr.
S. Jeanette Jenkins

MAILING ADDRESS: Robert Jenkins Jr.
8509 Canterbury Drive
Annandale, Virginia 22003

S. Jeanette Jenkins
PO Box 340
Myrtle Creek, Oregon 97457

PROPERTY IDENTIFICATION: Township 34S, Range 6W, Section 5
Tax lot 315
Josephine County

OTHER CONTACT INFORMATION: Frank Walker & Associates
PO Box 7170
Salem, Oregon 97301

DATE RECEIVED BY DAS: November 27, 2006

DEADLINE FOR FINAL ACTION:¹ May 20, 2008

I. SUMMARY OF CLAIM

The claimants, Robert Jenkins Jr. and S. Jeanette Jenkins, seek compensation in the amount of \$282,805 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 5.98-acre subject property into two parcels and to develop a dwelling on each parcel. The subject property is located at NE Corner of Leland Road and Flume Road, in Josephine County. (See claim.)

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.

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. 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 Robert Jenkins Jr.'s division of the 5.98-acre subject property into two parcels and to his development of a dwelling on each parcel: applicable provisions of Statewide Planning Goal 4 (Forest Lands), ORS 215 and Oregon Administrative Rules (OAR) 660, division 6, enacted or adopted after September 26, 2002. These laws will not apply to Robert Jenkins Jr. only to the extent necessary to allow him to use the subject property for the use described in this report, and only to the extent that use was permitted when he acquired the property on September 26, 2002. The department acknowledges that the relief to which Robert Jenkins Jr. is entitled under ORS 197.352 will not allow him to use the subject property in the manner set forth in the claim.

The department has further determined that the claim is not valid as to S. Jeannette Jenkins because the claimants have not established that she is an owner of the subject property. (See the complete recommendation in Section VI. of this report.)

III. COMMENTS ON THE CLAIM

Comments Received

On July 12, 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 were received in response to the 15-day notice.

The comments do not address whether the claim meets the criteria for relief under ORS 197.352. Comments concerning the effects a use of the property may have on surrounding areas are generally not something that the department is able to consider in determining whether to waive a state law. If funds do become available to pay compensation, then such effects may become relevant in determining which claims to pay compensation for instead of waive a state law. (See the comment 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 27, 2006, for processing under OAR 125, division 145. The claim identifies Goal 4, provisions of ORS 197 and 215.515 and OAR 660, division 6, 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(1)(C) defines “owner” as “the present owner of the property, or any interest therein.”

Findings of Fact

Claimant Robert Jenkins Jr. acquired the subject property from his father, Robert Jenkins Sr., on September 26, 2002, as reflected by a trust agreement and a bargain and sale deed provided by DAS.² Robert Jenkins Sr. acquired the subject property on June 14, 1961, as evidenced by a quitclaim deed included with the claim. The claim includes no documentation to establish that S. Jeanette Jenkins is an owner of the subject property.

The Josephine County Assessor’s Office confirms Robert Jenkins Jr.’s current ownership of the subject property.

² Claimant Robert Jenkins Jr. asserts he acquired a one-half interest in the subject property from his father, Robert Jenkins Sr., on February 14, 1967. The claimants included a September 26, 2002, bargain and sale deed from Robert Jenkins Jr., as trustee of the Robert C. Jenkins Living Trust, as grantor to himself, individually, as grantee, which purportedly memorializes an apparently oral agreement between Robert Jenkins Sr. and Robert Jenkins Jr. That 2002 bargain and sale deed is not sufficient to establish a 1967 conveyance to the claimant. Claimant Robert Jenkins Jr. also asserts that the deed by which his father unambiguously conveyed an interest in the property to the claimant and his children in 1978 was with his “agreement” but that he already had an interest in the property at that time it was deeded to him. He also submitted a handwritten, unsigned document dated February, 1967, that could be construed to indicate a partnership between Robert Jenkins Jr. and Robert Jenkins Sr., and which includes what apparently purports to be payment or financial terms that relate to the subject property. However, this document does not purport to convey the property.

Conclusions

Claimant Robert Jenkins Jr. is an "owner" of the subject property as that term is defined by ORS 197.352(11)(C), as of September 26, 2002. Robert Jenkins Sr. is a "family member" as defined by ORS 197.352(11)(A) and acquired the subject property on June 14, 1961. The claimants have not established S. Jeanette Jenkins's ownership 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 5.98-acre subject property into two parcels and to develop a dwelling on each 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 forest zoning and restrict uses on forest-zoned land. The claimants' property is zoned Woodland Resource (WR) by Josephine County as required by Goal 4, in accordance with ORS 215 and OAR 660, division 6, because the claimants' property is "forest land" under Goal 4. Goal 4 became effective on January 25, 1975, and requires that forest land be zoned for forest use.

Current land use regulations, including ORS 215.705 to 215.755 and 215.780 and OAR 660, division 6, enacted or adopted pursuant to Goal 4, generally prohibit the division of forest-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 generally establishes an 80-acre minimum size for the creation of new lots or parcels on forest-zoned land and became effective on November 4, 1993 (Chapter 792, Oregon Laws 1993). ORS 215.705 to 215.755 establish standards for the creation of new parcels and dwellings allowed in forest zones.

OAR 660, division 6, became effective on September 1, 1982, to implement Goal 4 and establish standards for divisions and development of land zoned for forest use, and was amended on March 1, 1994, to implement ORS 215.705 to 215.755 and 215.780. OAR 660-006-0025 interprets the goal and statutory standard for uses allowed in forest zones. OAR 660-006-0026 interprets land division requirements in forest zones, and 660-006-0027 and 660-006-0029 interpret the standards for dwellings in forest zones.

³ The claimants summarily cite 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.

Robert Jenkins Jr.'s family first acquired the subject property in 1961, prior to the adoption of the statewide planning goals and their implementing statutes and regulations. No county zoning applied to the subject property in 1961.

Conclusions

The current zoning requirements, minimum lot size and dwelling standards established by applicable provisions of Goal 4, ORS 215 and OAR 660, division 6, for forest-zoned land were all enacted or adopted after Robert Jenkins Jr.'s family acquired the subject property. These laws restrict the use of the subject property relative to the uses allowed when Robert Jenkins Jr.'s family acquired the property.

As explained in Section V.(1) above, the claimants have not established that S. Jeannette Jenkins is an "owner" of the subject property as that term is defined in ORS 197.352(11)(C). Without such demonstration, it is not possible to determine that any laws enforced by the Commission or the department restrict S. Jeannette Jenkins's desired use of the subject property with the effect of reducing the fair market value of the property.

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 \$282,805 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 Robert Jenkins Jr., whose family acquired the subject property in 1961, and his wife, S. Jeanette Jenkins. As explained in Section V.(1) of this report, the claimants have not established S. Jeannette Jenkins's ownership of the subject property. Without such demonstration, the department can make no determination on the effect of any land use regulations on the fair market value of the subject property.

Under ORS 197.352, the Robert Jenkins Jr. is due compensation for land use regulations that restrict the use of the 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 Robert Jenkins Jr.'s family acquired the subject property restrict his 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 \$282,805.

Without an appraisal or other documentation, it is not possible to substantiate the specific dollar amount by which the land use regulations have reduced the fair market value of the subject property. Nevertheless, based on the evidence in the record for this claim, the department

determines that the fair market value of the subject property has been reduced to some extent as a result of land use regulations enforced by the Commission or the department since Robert Jenkins Jr.'s family acquired the property.

4. Exemptions Under ORS 197.352(3)

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

Findings of Fact

The claim is based on state land use regulations that restrict the use of the subject property, including applicable provisions of Goal 4, ORS 215 and OAR 660, division 6, which Josephine County has implemented through its current WR zone. All of these regulations were enacted or adopted after Robert Jenkins Jr.'s family acquired the subject property.

Conclusions

It appears that none of the general statutory, goal and rule restrictions on residential division and development of the subject property were in effect when Robert Jenkins Jr.'s family acquired the property on June 14, 1961. As a result, these laws are not exempt under ORS 197.352(3)(E). Laws in effect when Robert Jenkins Jr.'s family acquired the subject property are exempt under ORS 197.352(3)(E) and do not provide a basis for compensation. In addition, other land use laws enacted or adopted for a purpose set forth in ORS 197.352(3)(A) to (D) are also exempt and would not provide a basis for compensation.

As explained in Section V.(1) of this report, the claimants have not established that Jeannette Jenkins is an "owner" of the subject property as that term is defined in ORS 197.352(11)(C). Without such demonstration, the department can make no determination as to whether any land use laws are exempt from ORS 197.352.

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 S. Jeannette Jenkins's desired use of the subject property because the claimants have not demonstrated her ownership of the subject property. The department has further determined laws enforced by the Commission or the department restrict

Robert Jenkins Jr.'s 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 \$282,805. 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 Robert Jenkins Jr.'s desired use of the subject property was allowed under the standards in effect when his family acquired the property. Nevertheless, based on the record for this claim, the department has determined that the laws on which the claim is based have reduced the fair market value of the subject property to some extent.

No funds have been appropriated at this time for the payment of claims. In lieu of payment of compensation, ORS 197.352 authorizes the department to modify, remove or not apply all or parts of certain land use regulations to allow Robert Jenkins Jr. to use the subject property for a use permitted at the time he acquired the property on September 26, 2002.

At the time Robert Jenkins Jr. acquired an interest in the subject property, it was zoned WR by Josephine County and subject to the current lot size and dwelling standards under Goal 4, ORS 215 and OAR 660, division 6, and as described in Section V.(2) of this report.

In addition to the provisions of Goal 4, ORS 215 and OAR 660, division 6, in effect when Robert Jenkins Jr. acquired the property, there may be other laws that continue to apply to his use of the property that have not been identified in the claim. The department also notes that ORS 215.730 and OAR 660, division 6, particularly OAR 660-006-0027, -0029 and -0035, include fire protection standards for dwellings and structures in forest zones. ORS 197.352 (3)(B) specifically exempts regulations "restricting or prohibiting activities for the protection of public health and safety, such as fire and building codes. . . ." Accordingly, the siting standards for dwellings and structures in forest zones in ORS 215.730 and OAR 660, division 6, are exempt under ORS 197.352(3)(B).

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 their use of the subject property.

Conclusions

Based on the record and foregoing findings and conclusions, S. Jeannette Jenkins has not established that she is entitled to relief under ORS 197.352(1) as a result of land use regulations enforced by the Commission or the department because the claimants have not established that she is an owner of the subject property. Therefore the department recommends the claim be denied as to S. Jeannette Jenkins.

The department otherwise recommends that the claim be approved as to Robert Jenkins Jr., 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 Robert Jenkins Jr.'s division of the 5.98-acre subject property into two parcels or to his development of a dwelling on each parcel: applicable provisions of Goal 4, ORS 215 and OAR 660, division 6, enacted or adopted after September 26, 2002. These laws will not apply to Robert Jenkins Jr. only to the extent necessary to allow him to use the subject property for the use described in this report, and only to the extent that use was permitted when he acquired the property on September 26, 2002. The department acknowledges that the relief to which Robert Jenkins Jr. is entitled under ORS 197.352 will not allow him to use 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 Robert Jenkins Jr. to use the subject property for the use described in this report, subject to the standards in effect on September 26, 2002. At that time, the property was subject to applicable provisions of Goal 4, ORS 215 and OAR 660, division 6, currently in effect.
3. To the extent that any law, order, deed, agreement or other legally enforceable public or private requirement provides that the subject property may not be used without a permit, license or other form of authorization or consent, the order will not authorize the use of the property unless Robert Jenkins Jr. 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 subject property by Robert Jenkins Jr. 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 Robert Jenkins Jr. to use the subject property, it may be necessary for him 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 Robert Jenkins Jr. 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 Robert Jenkins Jr.
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.

