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 COMPENSATION UNDER ORS 197.352 (BALLOT MEASURE 37) OF David and Janice Mihm, CLAIMANTS	))))	FINAL ORDER CLAIM NO. M124431

Claimants: David and Janice Mihm (the Claimants)

Property: Township 2S, Range 4W, Section 26BB, Tax lots 700, 900, 1700, 1701, 1702, 1703 and 1704, Yamhill 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 Final Staff Report and Recommendation of DLCD (the DLCD Report) attached to and by this reference incorporated into this order.

ORDER

The Claim is approved as to laws administered by DLCD and the Land Conservation and Development Commission (LCDC) for the reasons set forth in the DLCD Report, and subject to the following terms:

1. In lieu of compensation under ORS 197.352, the State of Oregon will not apply the following laws to David and Janice Mihm's development of eight dwellings as follows: 1) one dwelling on combined platted lots 6, 7, 8, 9, 10 and 11 (tax lot 700); 2) one dwelling on combined platted lots 198 and 199 (tax lot 700); 3) one dwelling on combined platted lots 200, 201 and 202 (tax lot 700); 4) one dwelling on combined platted lots 203 and 204 (tax lot 700); 5) one dwelling on combined platted lots 193 and 194 (tax lot 900); 6) one dwelling on combined platted lots 236 and 237 (tax lots 1700 and 1701); 7) one dwelling on platted lot 249 (tax lot 1703); and 8) one dwelling on platted lot 248 (tax lot 1704): applicable provisions of Goals 3 and 4, ORS 215 and OAR 660, divisions 6, and 33, enacted or adopted after June 20, 1975. These laws will not apply to the claimants only to the extent necessary to allow them to use tax lots 700, 900, 1700, 1701, 1703 and 1704 for the use described in this report, and only to the extent that use was permitted when they acquired the property on June 20, 1975.

2. The action by the State of Oregon provides the state's authorization to the claimants to use tax lots 700, 900, 1700, 1701, 1703 and 1704 for the use described in this report, subject to the

standards in effect on June 20, 1975. On that date, tax lots 700, 900, 1700, 1701, 1703 and 1704 were subject to the applicable provisions of Goal 3 and 4 and 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 tax lots 700, 900, 1700, 1701, 1703 and 1704 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 tax lots imposed by private parties.

4. Any use of tax lots 700, 900, 1700, 1701, 1703 and 1704 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 tax lots 700, 900, 1700, 1701, 1703 and 1704, 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 tax lots by the claimants.

This Order is entered by the Director of the DLCD as a final order of DLCD and the Land Conservation and Development Commission under ORS 197.352, OAR 660-002-0010(8), and OAR 125, division 145, and by the 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 7th day of September, 2006.

FOR the DEPARTMENT OF ADMINISTRATIVE SERVICES:

David Hartwig, Administrator
DAS, State Services Division
Dated this 7th day of September, 2006.

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."

ORS 197.352 (BALLOT MEASURE 37) CLAIM FOR COMPENSATION

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

September 7, 2006

STATE CLAIM NUMBER:	M124431
NAMES OF CLAIMANTS:	David and Janice Mihm
MAILING ADDRESS:	21700 NE Cove Orchard Road Yamhill, Oregon 97148
PROPERTY IDENTIFICATION:	Township 2S, Range 4W, Section 26BB Tax lots 700, 900, 1700, 1701, 1702, 1703 and 1704 Yamhill County
DATE RECEIVED BY DAS:	March 16, 2006
180-DAY DEADLINE:	September 12, 2006

I. SUMMARY OF CLAIM

The claimants, David and Janice Mihm, seek compensation in the amount of $1,225,000 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 develop: 1) one dwelling on combined platted lots 6, 7, 8, 9, 10 and 11 (tax lot 700); 2) one dwelling on combined platted lots 198 and 199 (tax lot 700); 3) one dwelling on combined platted lots 200, 201 and 202 (tax lot 700); 4) one dwelling on combined platted lots 203 and 204 (tax lot 700); 5) one dwelling on combined platted lots 193 and 194 (tax lot 900); 6) one dwelling on combined platted lots 236 and 237 (tax lots 1700 and 1701); 7) one dwelling on platted lot 238 (tax lot 1702); 8) one dwelling on platted lot 249 (tax lot 1703); and 9) one dwelling on platted lot 248 (tax lot 1704).[1] The subject property is located at the geographic coordinates listed above near Yamhill in Yamhill County. (See claim.)

II. SUMMARY OF STAFF RECOMMENDATION

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

[1] The subject property consists of seven tax lots totaling 9.61 acres. Each tax lot was created from a previously platted subdivision. Tax lot 700 consists of platted lots 6, 7, 8, 9, 10, 11, 198, 199, 200, 201, 202, 203 and 204 totaling 1.5 acres. Tax lot 900 consists of platted lots 193 and 194 totaling 0.37 acre. Tax lot 1700 consists of platted lot 237 totaling 0.5 acre. Tax lot 1701 consists of platted lot 236 totaling 0.44 acre. Tax lot 1702 consists of platted lot 238 totaling 0.5 acre. Tax lot 1703 consists of platted lot 249 totaling 4.3 acres. Tax lot 1704 consists of platted lot 248 totaling 2.5 acres.

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 David and Janice Mihm's development of eight dwellings as follows: 1) one dwelling on combined platted lots 6, 7, 8, 9, 10 and 11 (tax lot 700); 2) one dwelling on combined platted lots 198 and 199 (tax lot 700); 3) one dwelling on combined platted lots 200, 201 and 202 (tax lot 700); 4) one dwelling on combined platted lots 203 and 204 (tax lot 700); 5) one dwelling on combined platted lots 193 and 194 (tax lot 900); 6) one dwelling on combined platted lots 236 and 237 (tax lots 1700 and 1701); 7) one dwelling on platted lot 249 (tax lot 1703); and 8) one dwelling on platted lot 248 (tax lot 1704): applicable provisions of Statewide Planning Goals 3 (Agricultural Lands) and 4 (Forest Lands), ORS 215 and Oregon Administrative Rules (OAR) 660, divisions 6, and 33, enacted or adopted after June 20, 1975. These laws will not apply to the claimants only to the extent necessary to allow them to use tax lots 700, 900, 1700, 1701, 1703 and 1704 for the use described in this report, and only to the extent that use was permitted when they acquired the property on June 20, 1975.

Based on the preliminary findings and conclusions set forth below, the department has determined that this claim is not valid as to tax lot 1702 because the claimants are not current owners of this tax lot. (See the complete recommendation in Section VI. of this report.)

III. COMMENTS ON THE CLAIM

Comments Received

On June 28, 2006, 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, one written comment was received in response to the 10-day notice.

The 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. (See the comment letter 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 March 16, 2006, for processing under OAR 125, division 145. The claim identifies Senate Bill 100 and Yamhill County's zoning ordinances 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, David and Janice Mihm, acquired the subject property on June 20, 1975, as reflected by a contract and a September 6, 1978, fulfillment warranty deed included with the claim. The claimants conveyed tax lot 1702 to a third party in January 2006, as reflected by a bargain and sale deed provided by the Yamhill County Assessor's Office. The Yamhill County Assessor's Office confirms the claimants' current ownership of tax lots 700, 900, 1700, 1701, 1703 and 1704.

Conclusions

The claimants, David and Janice Mihm, are "owners" of tax lots 700, 900, 1700, 1701, 1703 and 1704 as that term is defined by ORS 197.352(11)(C), as of June 20, 1975.

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 acquired the property.

Findings of Fact

The claim indicates that the claimants desire to develop a total of nine dwellings on the subject property (including one dwelling on the property they conveyed to another individual in January 2006) and that current land use regulations do not allowed the desired use.

The claim is based generally on the applicable provisions of state law that require Exclusive Farm Use (EFU) and mixed farm-forest zoning and restrict uses on land zoned EFU and land zoned mixed farm-forest.

Tax lots 700 and 900 of the subject property are zoned EF-20, 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.[2] Goal 3 became effective on January 25, 1975, and required that agricultural lands as defined by the Goal 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, establish standards for the development of dwellings on existing or proposed parcels on EFU-zoned land.

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.)

Tax lots 1700, 1701, 1703 and 1704 of the subject property are zoned AF-20, which is a mixed agricultural and forest land zone, as required by Goal 4 and the implementing provisions of OAR 660, division 6 (effective on February 5, 1990), subsequently amended on March 1, 1994, to comply with the provisions of House Bill 3661 (Chapter 792, Oregon Laws 1993).

Under OAR 660-006-0050, all the uses permitted under Goals 3 and 4 are allowed in mixed agriculture and forest zones except that for dwellings, either the Goal 3 or 4 standards are applicable based on the predominant use of the tract on January 1, 1993.[3] Depending on the predominant use on January 1, 1993, the property is subject to either the requirements for dwellings applicable under EFU zoning required by Goal 3 and OAR 660, division 33, or forest zone provisions required by Goal 4 and OAR 660, division 6.

The claimants acquired the subject property after the adoption of the statewide planning goals, but before the Commission acknowledged Yamhill County's land use regulations to be in compliance with the statewide planning goals pursuant to ORS 197.250 and 197.251. Because the Commission had not acknowledged the county's plan and land use regulations when the

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[2] Tax lots 700 and 900 are "agricultural land" because they contain Natural Resources Conservation Service Class I–IV soils.

[3] No information was provided to the department regarding the predominant use of tax lots 1700, 1701, 1703 and 1704 on January 1, 1993.

claimants acquired the subject property on June 20, 1975, the statewide planning goals, and Goals 3 and 4 in particular, applied directly to the claimants' property when they acquired it.[4]

Under the Goal 3 standards in effect on June 20, 1975, farm dwellings were allowed if they were determined to be "customarily provided in conjunction with farm use" under ORS 215.213(1)(e) (1973 edition). Non-farm dwellings were subject to compliance with ORS 215.213(3) (1973 edition).[5]

Under Goal 4, the state standards required uses to "conserve forest lands for forest uses." Specifically, under Goal 4, dwellings in forest zones could only be allowed if found to be "necessary and accessory" to one of the enumerated forest uses listed in Goal 4.[6]

No information has been presented in the claim to establish that the claimants' desired development of eight dwellings on the subject property satisfies the standards for farm or non-farm dwellings under ORS 215.213 or the requirements of Goals 3 and 4 (1973 edition).

Conclusions

The current zoning requirements and dwelling standards established by Goal 3, ORS 215 and OAR 660, division 33, and under Goal 4 for lands zoned for mixed farm-forest use, do not allow the claimants' desired development of the subject property. However, the claim does not establish whether or the extent to which the claimants' desired use of the property complies with the standards for development under the requirements of Goal 3 and ORS 215 for tax lots 700

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[4] The statewide planning goals became effective on January 25, 1975, and were applicable to legislative land use decisions and some quasi-judicial land use decisions prior to the Commission's acknowledgment of each county's comprehensive plan and implementing regulations. *Perkins v. City of Rajneeshpuram*, 300 Or 1 (1985); *Alexanderson v. Polk County*, 289 Or 427, *rev. den* 290 Or 137 (1980); *Sunnyside Neighborhood Assn. v. Clackamas County*, 280 Or 3 (1977); *Jurgenson v. Union County*, 42 Or App 505 (1979); and *1000 Friends of Oregon v. Benton County*, 32 Or App 413 (1978). After the county's plan and land use regulations were acknowledged by the Commission, the statewide planning goals and implementing rules no longer applied directly to such 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).

[5] Under ORS 215.213, a farm dwelling could be established on agricultural land only if the farm use to which the dwelling relates exists *(Newcomer v. Clackamas County*, 92 Or App 174, *modified* 94 Or App 33 (1988) and *Matteo v. Polk County*, 11 Or LUBA 259, 263 (1984), *affirmed without opinion* 70 Or App 179 (1984)). Guidance on the application of the statutory standards for farm and non-farm dwellings in EFU zones can be found in the Commission rules (OAR 660, division 5, adopted on July 21, 1982, amended on June 7, 1986, and repealed on August 7, 1993). When determining whether land is "generally unsuitable for the production of farm crops and livestock" under ORS 215.213(3), the entire parcel or tract must be evaluated rather than a portion thereof. *Smith v. Clackamas County*, 313 Or 519 (1992).

[6] Goal 4 prohibited uses that were not enumerated by Goal 4 as permissible uses for forest lands as well as those that were not necessary and accessory to an enumerated forest use. *Lamb v. Lane County*, 7 Or LUBA 137 (1983). Dwellings in forest lands were required to be "necessary and accessory" to show that such dwellings complied with the Goal 4 requirement that local land use regulations must "conserve forest lands for forest uses." *1000 Friends v. LCDC (Curry County)*, 301 Or 447 (1986). A dwelling that may "enhance" forest uses is not "necessary and accessory" to a forest use to the extent required by Goal 4. *1000 Friends of Oregon v. LCDC (Lane County)*, 305 Or 384 (1988). For additional guidance, the Goal 4 provisions were interpreted under OAR 660, division 6, effective on September 1, 1982, in *1000 Friends of Oregon v. LCDC (Lane County)* and in *1000 Friends v. LCDC (Curry County)*.

and 900 and under the requirements of Goals 3 and 4 for tax lots 1700, 1701, 1703 and 1704 in effect when the claimants acquired the property on June 20, 1975.

The claimants are not the current owners of tax lot 1702. Therefore, no laws enforced by the Commission or the department restrict the claimants' use of that tax lot with the result of reducing its fair market value.

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

The claim includes an estimate of $1,225,000 as the reduction in the subject property's fair market value due to the regulations that restrict the claimants' desired use of the subject property. This amount is based on the claimants' comparison of the value of the subject property to recent sales of similar properties in the surrounding area.

Conclusions

As explained in Section V.(1) of this report, the claimants are David and Janice Mihm who acquired the subject property on June 20, 1975. The claimants conveyed tax lot 1702 in January 2006. Because they are not owners of tax lot 1702, they are not entitled to compensation for this tax lot under ORS 197.352. Under ORS 197.352, the claimants are due compensation for land use regulations that restrict the use of tax lots 700, 900, 1700, 1701, 1703 and 1704 and have the effect of reducing the fair market value of these tax lots. Based on the findings and conclusions in Section V.(2) of this report, laws enacted or adopted since the claimants acquired tax lots 700, 900, 1700, 1701, 1703 and 1704 restrict the claimants' desired use of these tax lots. The claimants estimate that the effect of the regulations on the fair market value of the subject property is a reduction of $1,225,000.

Without an appraisal or other documentation and without verification of whether or the extent to which the claimants' desired use of the tax lots they currently own 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 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 Goals 3 and 4, ORS 215 and OAR 660, divisions 6, and 33, which Yamhill County has implemented through its current EF-20 and AF-20 zones. With the exception of provisions of Goals 3 and 4 and ORS 215 in effect when the claimants acquired tax lots 700, 900, 1700, 1701, 1703 and 1704 on June 20, 1975, these land use regulations were enacted or adopted after the claimants acquired the 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 with the exception of provisions of Goals 3 and 4 and ORS 215 in effect in 1975, the statutory, goal and rule restrictions on development of the claimants' property were not in effect when the claimants acquired it, and therefore, these laws are not exempt under ORS 197.352(3)(E). Provisions of Goals 3 and 4 and ORS 215 in effect when the claimants acquired the property in 1975 are exempt under ORS 197.352(3)(E) and will continue to apply to the property.

Other laws in effect when the claimants acquired the property are also exempt under ORS 197.352(3)(E) and will continue to apply to the claimants' use of the property. In addition, the department notes that ORS 215.730 and OAR 660, division 6, include standards for siting dwellings in forest zones. The provisions include fire protection standards for dwellings and for surrounding 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. . . ." To the extent they are applicable to the claimants' property, the siting standards for dwellings in forest zones in ORS 215.730 and OAR 660, division 6, are exempt under ORS 197.352(3)(B).

There may be other laws that 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 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 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 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 for this claim, the claimants are not the owners of tax lot 1702 and therefore, are not entitled to relief for this tax lot under ORS 197.352.

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 property. The claim asserts that existing land use regulations enforced by the Commission or the department have the effect of reducing the fair market value of the subject property by $1,225,000. 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 a fair market of the 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 tax lots they currently own was allowed under the standards in effect when they 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 David and Janice Mihm to use tax lots 700, 900, 1700, 1701, 1703 and 1704 for a use permitted at the time they acquired the property on June 20, 1975.

Conclusions

Based on the record, the department recommends that the claim be denied as to tax lot 1702 because the claimants are not owners of the property. The department further recommends that the claim be approved as to tax lots 700, 900, 1700, 1701, 1703 and 1704, 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 David and Janice Mihm's development of eight dwellings as follows: 1) one dwelling on combined platted lots 6, 7, 8, 9, 10 and 11 (tax lot 700); 2) one dwelling on combined platted lots

198 and 199 (tax lot 700); 3) one dwelling on combined platted lots 200, 201 and 202 (tax lot 700); 4) one dwelling on combined platted lots 203 and 204 (tax lot 700); 5) one dwelling on combined platted lots 193 and 194 (tax lot 900); 6) one dwelling on combined platted lots 236 and 237 (tax lots 1700 and 1701); 7) one dwelling on platted lot 249 (tax lot 1703); and 8) one dwelling on platted lot 248 (tax lot 1704): applicable provisions of Goals 3 and 4, ORS 215 and OAR 660, divisions 6, and 33, enacted or adopted after June 20, 1975. These laws will not apply to the claimants only to the extent necessary to allow them to use tax lots 700, 900, 1700, 1701, 1703 and 1704 for the use described in this report, and only to the extent that use was permitted when they acquired the property on June 20, 1975.

2. The action by the State of Oregon provides the state's authorization to the claimants to use tax lots 700, 900, 1700, 1701, 1703 and 1704 for the use described in this report, subject to the standards in effect on June 20, 1975. On that date, tax lots 700, 900, 1700, 1701, 1703 and 1704 were subject to the applicable provisions of Goal 3 and 4 and 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 tax lots 700, 900, 1700, 1701, 1703 and 1704 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 tax lots imposed by private parties.

4. Any use of tax lots 700, 900, 1700, 1701, 1703 and 1704 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 tax lots 700, 900, 1700, 1701, 1703 and 1704, 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 tax lots by the claimants.

VII. COMMENTS ON THE DRAFT STAFF REPORT

The department issued its draft staff report on this claim on August 22, 2006. 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. Comments received have been taken into account by the department in the issuance of this final report.