

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) FINAL ORDER
COMPENSATION UNDER ORS 197.352) CLAIM NO. M129363
(BALLOT MEASURE 37) OF)
Bruce C. and Mary Ann Schroeder, CLAIMANTS)

Claimants: Bruce C. and Mary Ann Schroeder (the Claimants)

Property: Township 3S, Range 1E, Section 7A, Tax lot 600, Clackamas County
(the Property)

Claim: The demand for compensation and any supporting information received from the
Claimants by the State of Oregon (the Claim).

Claimants submitted the Claim to the State of Oregon under ORS 197.352. Under OAR 125-145-0010 *et seq.*, the Department of Administrative Services (DAS) referred the Claim to the Department of Land Conservation and Development (DLCD) as the regulating entity. This order is based on the record herein, including the Findings and Conclusions set forth in the Final Staff Report and Recommendation of DLCD (the DLCD Report) attached to and by this reference incorporated into this order.

ORDER

The Claim is denied as to laws administered by DLCD and the Land Conservation and Development Commission (LCDC) for the 1.19-acre portion of the subject property for the reasons set forth in the DLCD Report.

The Claim is approved as to laws administered by DLCD and the Land Conservation and Development Commission (LCDC) for the 12.3-acre portion of the subject property 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 Bruce and Mary Ann Schroeder's partition of the 12.3-acre portion of the subject property into five parcels or to their development of a dwelling on each parcel: applicable provisions of Goal 3, ORS 215 and OAR 660, division 33, enacted or adopted after September 8, 1977. These land use regulations will not apply to the claimants only to the extent necessary to allow them to use the 12.3-acre portion of the subject property for the use described in this report, and only to the extent that use was permitted when they acquired that portion on September 8, 1977.

2. The action by the State of Oregon provides the state's authorization to the claimants to use the 12.3-acre portion of the subject property for the use described in this report, subject to the

standards in effect on September 8, 1977. On that date, the 12.3-acre portion of the subject property was subject to applicable provisions of Goal 3 and ORS 215 then in effect.

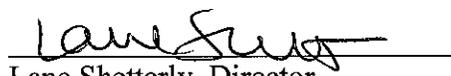
3. To the extent that any law, order, deed, agreement or other legally enforceable public or private requirement provides that the 12.3-acre portion of the subject property may not be used without a permit, license or other form of authorization or consent, the order will not authorize the use of the 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 12.3-acre portion of the subject property imposed by private parties.

4. Any use of the 12.3-acre portion 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 12.3-acre portion of 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 12.3-acre portion of the subject property by the claimants.

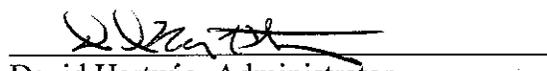
This Order is entered by the Director of the DLCD as a final order of DLCD and the Land Conservation and Development Commission under ORS 197.352, OAR 660-002-0010(8), and OAR 125, division 145, and by the Administrator for the State Services Division of the DAS as a final order of DAS under ORS 197.352, OAR 125, division 145, and ORS 293.

FOR DLCD AND THE LAND
CONSERVATION AND
DEVELOPMENT COMMISSION:


Lane Shetterly, Director
DLCD

Dated this 9th day of November, 2006.

FOR the DEPARTMENT OF
ADMINISTRATIVE SERVICES:


David Hartwig, Administrator
DAS, State Services Division
Dated this 9th day of November, 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**

November 9, 2006

STATE CLAIM NUMBER: M129363

NAMES OF CLAIMANTS: Bruce C. and Mary Ann Schroeder

MAILING ADDRESS: PO Box 3468
Wilsonville, Oregon 97070

PROPERTY IDENTIFICATION: Township 3S, Range 1E, Section 7A
Tax lot 600
Clackamas County

DATE RECEIVED BY DAS: May 19, 2006

180-DAY DEADLINE: November 15, 2006

I. SUMMARY OF CLAIM

The claimants, Bruce and Mary Ann Schroeder, seek compensation in the amount of \$1.3 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 13.49-acre subject property into five parcels and to develop a dwelling on each parcel. The subject property is located at 26525 Southwest 45th Drive, near Wilsonville, in Clackamas County. (See claim.)

II. SUMMARY OF STAFF RECOMMENDATION

Based on the findings and conclusions set forth below, the Department of Land Conservation and Development (the department) has determined that 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 Bruce and Mary Ann Schroeder's partition of a 12.3-acre portion of the subject property into five parcels and to their development of a dwelling on each parcel: applicable provisions of Statewide Planning Goal 3 (Agricultural Lands), ORS 215 and Oregon Administrative Rules (OAR) 660, division 33, enacted or adopted after September 8, 1977. These laws will not apply to the claimants only to the extent necessary to allow them to use the 12.3-acre portion of the subject property for the use described in this report, and only to the extent that use was permitted when they acquired that portion on September 8, 1977.

The department has further determined that the claim is not valid as to a 1.19-acre portion of the subject property because the claimants' desired use of the subject property was prohibited under

the laws in effect when the claimants acquired that portion in 2000. (See the complete recommendation in Section VI. of this report.)

III. COMMENTS ON THE CLAIM

Comments Received

On September 20, 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, no written comments were received in response to the 10-day notice.

IV. TIMELINESS OF CLAIM

Requirement

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

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

Findings of Fact

This claim was submitted to DAS on May 19, 2006, for processing under OAR 125, division 145. The claim identifies Clackamas County's EFU-20 zoning 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, Bruce and Mary Ann Schroeder, acquired a 12.3-acre portion of the subject property on September 8, 1977, as reflected by a land sale contract and an October 22, 1987, fulfillment warranty deed included with the claim. On August 25, 2000, the claimants acquired a 1.19-acre portion of the subject property through a property line adjustment, as reflected by a warranty deed provided by Clackamas County's Planning Department.¹ The Clackamas County Assessor's Office confirms the claimants' current ownership of the subject property.

Conclusions

The claimants, Bruce and Mary Ann Schroeder, are "owners" of the subject property as that term is defined by ORS 197.352(11)(C), as of September 8, 1977, for the 12.3-acre portion and as of August 25, 2000, for the 1.19-acre portion.

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 divide the 13.49-acre subject property into five parcels and to develop a dwelling on each parcel, and that the current zoning prohibits the desired use.

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

The 12.3-acre portion of the subject property is zoned EFU by Clackamas County, as required by Goal 3, in accordance with ORS 215 and OAR 660, division 33, because the property is "agricultural land" as defined by Goal 3.² 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 the development of dwellings on existing or proposed parcels on that land.

¹ According to information provided by Clackamas County's Planning Department, Mary Ann Schroeder, as trustee of the Joseph W. Utermohlen and Katheryn E. Utermohlen Trust, may have been an owner of the 1.19-acre portion of the subject property since March 27, 1996. However, absent documentation from the claimants to establish the March 27, 1996, acquisition date or an earlier date, the department must rely on the available documentation to establish the acquisition date.

² The 12.3-acre portion is "agricultural land" because it contains Natural Resources Conservation Service Class I-IV soils.

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

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

The claimants acquired the 12.3-acre portion of the subject property after the adoption of the statewide planning goals, but before the Commission acknowledged Clackamas 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 claimants acquired the 12.3-acre portion of the subject property on September 8, 1977, the statewide planning goals, and Goal 3 in particular, applied directly to that portion when they acquired it.³

As adopted on January 25, 1975, Goal 3 required that agricultural land be preserved and zoned for EFU pursuant to ORS 215. The Goal 3 standard for land divisions involving property where the local zoning was not acknowledged required that the resulting parcels must be of a size that is "appropriate for the continuation of the existing commercial agricultural enterprise within the area." Further, ORS 215.263 (1973 edition) only authorized the partition of land subject to EFU zoning, and required that all divisions of land subject to EFU zoning comply with the legislative intent set forth in ORS 215.243 (Agricultural Land Use Policy). Thus, the claimants' opportunity to divide the 12.3-acre portion of the subject property when they acquired it in 1977 was limited to land divisions that were consistent with Goal 3, which required that the resulting parcels be (1) appropriate for the continuation of the existing commercial agricultural enterprise in the area and (2) shown to comply with the legislative intent set forth in ORS 215.

Under the Goal 3 standards in effect on September 8, 1977, 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).

³ 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).

No information has been presented in the claim to establish that the claimants' desired division of the 12.3-acre portion of the subject property into five parcels complies with the "commercial" standard for farm parcels under Goal 3 or the standards for non-farm parcels under ORS 215.263 (1973 edition), nor is there any information to establish that the claimants' desired development of dwellings on the 12.3-acre portion of the subject property satisfies the standards for farm or non-farm dwellings under ORS 215.213 (1973 edition).

The 1.19-acre portion of the subject property is zoned RRFF-5 by Clackamas County, consistent with Goal 14, which generally requires that land outside of urban growth boundaries be used for rural uses. The county's RRFF-5 zone was adopted on August 23, 1979, and requires a minimum of five acres for the creation of a new lot or parcel.

Goal 14 was effective on January 25, 1975, and requires that local comprehensive plans identify and separate urbanizable land from rural land in order to provide for an orderly and efficient transition from rural to urban land use. In 2000, as a result of a 1986 Oregon Supreme Court decision,⁴ the Commission amended Goal 14 and adopted OAR 660-004-0040 (Application of Goal 14 to Rural Residential Areas), which was effective on October 4, 2000.

The rule states that if a county rural residential zone in effect on October 4, 2000, specifies a minimum lot size of two acres or more, the area of any new lot or parcel shall equal or exceed the minimum lot size that is already in effect (OAR 660-004-0040(7)(c)). Some relief from this provision is available for lots or parcels having more than one permanent habitable dwelling pursuant to OAR 660-004-0040(7)(h). The rule also provides that a county's minimum lot size requirement in a rural residential zone shall not be amended to allow a smaller minimum lot size without approval of an exception to Goal 14 (OAR 660-004-0040(6)). Because Clackamas County's rural residential zone was in effect on October 4, 2000, and requires a minimum lot size of five acres, the minimum lot size for any new lot or parcel must equal or exceed five acres.

When the claimants acquired the 1.19-acre portion of the subject property on August 25, 2000, it was subject to Clackamas County's acknowledged RRFF-5 and the provisions of Goal 14 as implemented through that zone. When the claimants acquired that portion of the subject property, division of the property would have subject to the requirements of the RRFF-5 zone, which requires a minimum of five acres for the creation of any new lot or parcel.

Conclusions

The current zoning requirements, minimum lot size and dwelling standards established by Goal 3, ORS 215 and OAR 660, division 33, do not allow the claimants' desired division or development of the 12.3-acre portion of the subject property. However, the claim does not establish whether or the extent to which the claimants' desired use of the 12.3-acre portion of the subject property complies with the standards for land divisions and development under the requirements of Goal 3 and ORS 215 in effect when the claimants acquired that portion on September 8, 1977.

The minimum lot size requirements for rural residential lots or parcels established by amendments to Goal 14 and OAR 660-004-0040 were adopted after the claimants acquired the

⁴ *1000 Friends of Oregon v. LCDC (Curry County)*, 301 Or 447 (1986).

1.19-acre portion of the subject property on August 25, 2000. However, when the claimants acquired that portion, the requirements of Goal 14, as implemented through Clackamas County's RRFF-5 zone, would not have allowed any division of that 1.19-acre portion. Laws enacted or adopted since the claimants acquired the 1.19-acre portion of the subject property in 2000 do not restrict the claimants' desired use of the property relative to when the claimants acquired that portion in 2000.

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 12.3-acre portion 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 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 \$1.3 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' comparison of similar properties in the surrounding area.

Conclusions

As explained in Section V.(1) of this report, the claimants are Bruce and Mary Ann Schroeder who acquired the 12.3-acre portion of the subject property on September 8, 1977, and the 1.19-acre portion of the property in August 2000. The claimants are not entitled to compensation under ORS 197.352 for the 1.19-acre portion of the property because the fair market value of the 1.19-acre portion has not been reduced as a result of land use regulations enforced by the Commission or the department. No state laws enacted or adopted since the claimants acquired the 1.19-acre portion of the subject property restrict the use of the property relative to the uses allowed in 2000.

Under ORS 197.352, the claimants are due compensation for land use regulations that restrict the use of the 12.3-acre portion 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 the claimants acquired the 12.3-acre portion of the subject property restrict the claimants' 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 \$1.3 million.

Without an appraisal or other documentation and without verification of whether or the extent to which the claimants' desired use of the 12.3-acre portion of the subject property was allowed

under the standards in effect when they acquired that portion, 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 12.3-acre portion 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 12.3-acre portion of the subject property, including applicable provisions of Goal 3, ORS 215 and OAR 660, division 33, which Clackamas County has implemented through its current EFU zone. With the exception of provisions of Goal 3 and ORS 215 in effect when the claimants acquired the 12.3-acre portion of the subject property on September 8, 1977, these land use regulations were enacted or adopted after the claimants acquired that portion.

The claim is further based on state land use regulations that restrict the use of the 1.19-acre portion of the subject property, including applicable provisions of Goal 14 and OAR 660-004-0040, which Clackamas County has implemented through its RRFF-5 zone. With the exception amendments to Goal 14 and the provisions of OAR 660-004-0040 adopted in October 2000, these regulations were in effect when the claimants acquired that portion in 2000.

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 Goal 3 and ORS 215 in effect in 1977, the statutory, goal and rule restrictions on division and development of the 12.3-acre portion of the 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 Goal 3 and ORS 215 in effect when the claimants acquired the 12.3-acre portion of the subject property in 1977 are exempt under ORS 197.352(3)(E), which exempts laws in effect when the claimants acquired the subject property.

With the exception of amendments to Goal 14 and the provisions of OAR 660-004-0040 adopted in October 2000, the regulations that restrict the claimants' desired use of the 1.19-acre portion of the subject property were in effect when the claimants acquired that portion of the property. Therefore, these laws are exempt under ORS 197.352(3)(E) and will continue to apply to the property. These exempt laws prohibit the claimants' desired use of the 1.19-acre portion of the property.

Other laws in effect when the claimants acquired the subject property are also exempt under ORS 197.352(3)(E) and will continue to apply to the claimants' use of the property. There may

be other laws that continue to apply to the claimants' use of the subject property that have not been identified in the claim. In some cases, it will not be possible to know which laws apply to a use of the subject property until there is a specific proposal for that use. When the claimants seek a building or development permit to carry out a specific use for the 12.3-acre portion of the subject property, it may become evident that other state laws apply to that use. In some cases, some of these laws may be exempt under ORS 197.352(3)(A) to (D).

This report addresses only those state laws that are identified in the claim, or that the department is certain apply to the subject property based on the use that the claimants have identified. Similarly, this report only addresses the exemptions provided for under ORS 197.352(3) that are clearly applicable, given the information provided to the department in the claim. The claimants should be aware that the less information they have provided to the department in the claim, the greater the possibility that there may be additional laws that will later be determined to continue to apply to their use of the subject property.

VI. FORM OF RELIEF

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

Findings of Fact

Based on the findings and conclusions set forth in this report, the department finds that the claimants are not entitled to compensation for the 1.19-acre portion of the subject property they acquired in August 2000 because the claimants' desired use of that portion was prohibited under the laws in effect when they acquired it. The department further finds that laws enforced by the Commission or the department restrict the claimants' desired use of the 12.3-acre portion 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 \$1.3 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 12.3-acre portion of the subject property was allowed under the standards in effect when they acquired that portion. 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 Bruce and Mary Ann Schroeder to use the 12.3-acre

portion of the subject property for a use permitted at the time they acquired that portion on September 8, 1977.

Conclusions

Based on the record, the department concludes that the claimants' 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 laws in effect at the time they acquired that portion of the property prohibit the claimants' desired use of that portion. Therefore, the department recommends that this claim be denied as to the 1.19-acre portion of the subject property.

The department otherwise recommends that the claim be approved as to the 12.3-acre portion of the subject property, 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 Bruce and Mary Ann Schroeder's partition of the 12.3-acre portion of the subject property into five parcels or to their development of a dwelling on each parcel: applicable provisions of Goal 3, ORS 215 and OAR 660, division 33, enacted or adopted after September 8, 1977. These land use regulations will not apply to the claimants only to the extent necessary to allow them to use the 12.3-acre portion of the subject property for the use described in this report, and only to the extent that use was permitted when they acquired that portion on September 8, 1977.
2. The action by the State of Oregon provides the state's authorization to the claimants to use the 12.3-acre portion of the subject property for the use described in this report, subject to the standards in effect on September 8, 1977. On that date, the 12.3-acre portion of the subject property was subject to applicable provisions of Goal 3 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 the 12.3-acre portion of 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 12.3-acre portion of the subject property imposed by private parties.
4. Any use of the 12.3-acre portion 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 12.3-acre portion of 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 12.3-acre portion of the subject property by the claimants.

VII. COMMENTS ON THE DRAFT STAFF REPORT

The department issued its draft staff report on this claim on October 20, 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.