

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. M129391
(BALLOT MEASURE 37) OF)
Dale A. and Janice M. Fleming, CLAIMANTS)

Claimants: Dale A. and Janice M. Fleming (the Claimants)

Property: Township 40S, Range 9E, Section 12, Tax lots 200 and 300
Township 40S, Range 9E, Section 14, Tax lots 700, 800, 900, 1000 and 1100
Township 40S, Range 9E, Section 15, Tax lots 200, 300 and 400
Township 40S, Range 9E, Section 16, Tax lots 200 and 400
Township 40S, Range 9E, Section 22, Tax lot 1800
Township 40S, Range 9E, Section 23, Tax lots 1900, 2000, 2100, 2200,2300,
2500, 2600 and 2700
Township 40S, Range 10E, Section 6, Tax lots 300 and 301
All Property in Klamath 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 Dale and Jan Fleming's partition of the 1,876.97-acre subject property into 10-acre or larger parcels and development of a dwelling on each parcel:

Applicable Provisions:	Acquisition Date:	Tax Lots:
Goal 3, ORS 215 and OAR 660, division 33, enacted or adopted after the claimants' acquired each of these tax lots	February 7, 1978	Township 40S, Range 9E, Section 12 200 (65.11 acres) 300 (0.10 acre)
	November 8, 1984	Township 40S, Range 10E, Section 6 300 (77.77 acres)
	May 29, 1986	Township 40S, Range 10E, Section 6 301 (0.23 acre)
	September 9, 1989	Township 40S, Range 9E, Section 14 700 (37.90 acres) 800 (39.04 acres) 900 (38.40 acres) 1000 (36.24 acres) 1100 (158.18 acres) Township 40S, Range 9E, Section 15 200 (184 acres) 300 and 400 (40 acres each)

Applicable Provisions:	Acquisition Date:	Tax Lots:
Goal 4, ORS 215 and OAR 660, division 6, enacted or adopted after the claimants' acquired each of these tax lots	September 9, 1989	Township 40S, Range 9E, Section 16 200 (360 acres) and 400 (160 acres) Township 40S, Range 9E, Section 22 1800 (120 acres) Township 40S, Range 9E, Section 23 1900, 2000, 2100 and 2500 (40 acres each) 2200, 2300 and 2600 (80 acres each) 2700 (120 acres)

The above laws will not apply to the claimants only to the extent necessary to allow them to use the subject property for the use described in this report, and only to the extent that use was permitted when they acquired each of the subject tax lots.

2. The action by the State of Oregon provides the state's authorization to the claimants to use the property for the use described in this report, subject to the standards in effect on February 7, 1978, for tax lots 200 and 300 (T40S, R9E, S12); November 8, 1984, for tax lot 300 (T40S, R10E, S6); May 29, 1986, for tax lot 301 (T40S, R10E, S6); and September 9, 1989, for tax lots 700, 800, 900, 1000 and 1100 (T40S, R9E, S14), 200, 300 and 400 (T40S, R9E, S15), 200 and 400 (T40S, R9E, S16), 1800 (T40S, R9E, S22) and 1900, 2000, 2100, 2200, 2300, 2500, 2600 and 2700 (T40S, R9E, S23). On February 7, 1978, tax lots 200 and 300 (T40S, R9E, S12) were subject to applicable provisions of Goal 3 and ORS 215, then in effect. On November 8, 1984, May 29, 1986, and September 9, 1989, tax lots 300 and 301 (T40S, R10E, S6) and 700, 800, 900, 1000 and 1100 (T40S, R9E, S14) were subject to compliance with Goal 3 and OAR 660,

division 5, as implemented by Klamath County's acknowledged EFU zone, and the applicable provisions of ORS 215 and tax lots 200, 300 and 400 (T40S, R9E, S15), 200 and 400 (T40S, R9E, S16), 1800 (T40S, R9E, S22) and 1900, 2000, 2100, 2200, 2300, 2500, 2600 and 2700 (T40S, R9E, S23) were subject to compliance with Goal 4 and OAR 660, division 6, as implemented through Klamath County's acknowledged FR zone, then in effect

3. To the extent that any law, order, deed, agreement or other legally enforceable public or private requirement provides that the subject property may not be used without a permit, license or other form of authorization or consent, the order will not authorize the use of the property unless the claimants first obtain that permit, license or other form of authorization or consent. Such requirements may include, but are not limited to: a building permit, a land use decision, a "permit" as defined in ORS 215.402 or 227.160, other permits or authorizations from local, state or federal agencies and restrictions on the use of the subject property imposed by private parties.

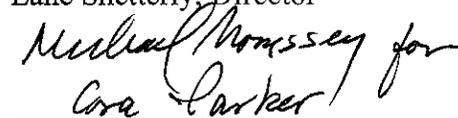
4. Any use of the subject property by the claimants under the terms of the order will remain subject to the following laws: (a) those laws not specified in (1) above; (b) any laws enacted or enforced by a public entity other than the Commission or the department; and (c) those laws not subject to ORS 197.352 including, without limitation, those laws exempted under ORS 197.352(3).

5. Without limiting the generality of the foregoing terms and conditions, in order for the claimants to use the subject property, it may be necessary for them to obtain a decision under ORS 197.352 from a city and/or county and/or metropolitan service district that enforces land use regulations applicable to the property. Nothing in this order relieves the claimants from the necessity of obtaining a decision under ORS 197.352 from a local public entity that has jurisdiction to enforce a land use regulation applicable to a use of the subject property by the claimants.

This Order is entered by the Deputy 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



Cora R. Parker, Deputy Director
DLCD

Dated this 14th day of November, 2006.

FOR the DEPARTMENT OF
ADMINISTRATIVE SERVICES:



David Hartwig, Administrator
DAS, State Services Division

Dated this 14th 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 14, 2006

STATE CLAIM NUMBER: M129391

NAMES OF CLAIMANTS: Dale A. and Janice M. Fleming

MAILING ADDRESS: 4500 O'Connor Road
Klamath Falls, Oregon 97603

PROPERTY IDENTIFICATION: Township 40S, Range 9E
Section 12: tax lots 200 and 300
Section 14: tax lots 700, 800, 900, 1000 and
1100
Section 15: tax lots 200, 300 and 400
Section 16: tax lots 200 and 400
Section 22: tax lot 1800
Section 23: tax lots 1900, 2000, 2100, 2200,
2300, 2500, 2600 and 2700

Township 40S, Range 10E, Section 6
Tax lots 300 and 301

Klamath County

OTHER CONTACT INFORMATION: Michael L. Spencer
419 Main Street
Klamath Falls, Oregon 97601

DATE RECEIVED BY DAS: May 25, 2006

180-DAY DEADLINE: November 21, 2006

I. SUMMARY OF CLAIM

The claimants, Dale and Jan Fleming, seek compensation in the amount of \$100,000 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 divide the 1,876.97-acre subject property into 10-acre or larger parcels and develop a dwelling on each

parcel.¹ The subject property is located at the geographic coordinates listed above, in Klamath 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. 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 Dale and Jan Fleming's partition of the 1,876.97-acre subject property into 10-acre or larger parcels and development of a dwelling on each parcel:

Applicable Provisions:	Acquisition Date:	Tax Lots:
Statewide Planning Goal 3 (Agricultural Lands), ORS 215 and Oregon Administrative Rule (OAR) 660, division 33, enacted or adopted after the claimants' acquired each of these tax lots	February 7, 1978	Township 40S, Range 9E, Section 12 200 (65.11 acres) and 300 (0.10 acre)
	November 8, 1984	Township 40S, Range 10E, Section 6 300 (77.77 acres)
	May 29, 1986	Township 40S, Range 10E, Section 6 301 (0.23 acre)
	September 9, 1989	Township 40S, Range 9E, Section 14 700 (37.90 acres) 800 (39.04 acres) 900 (38.40 acres) 1000 (36.24 acres) 1100 (158.18 acres) Township 40S, Range 9E, Section 15 200 (184 acres) 300 and 400 (40 acres each)

Applicable Provisions:	Acquisition Date:	Tax Lots:
Goal 4 (Forest Lands), ORS 215 and OAR 660, division 6, enacted or adopted after the claimants' acquired each of these tax lots	September 9, 1989	Township 40S, Range 9E, Section 16 200 (360 acres) and 400 (160 acres) Township 40S, Range 9E, Section 22 1800 (120 acres) Township 40S, Range 9E, Section 23 1900, 2000, 2100 and 2500 (40 acres each) 2200, 2300 and 2600 (80 acres each) 2700 (120 acres)

The above laws will not apply to the claimants only to the extent necessary to allow them to use the subject property for the use described in this report, and only to the extent that use was

¹ The claim also indicates that the claimants desire to sell the newly created parcels for development. In effect, the claimants request that a decision of the department to "not apply" (waive) certain laws as set forth in this report be transferable with the property. ORS 197.352 only authorizes a state agency to waive a law in order to allow the current owner a use of the property permitted at the time that owner acquired the property. A determination of transferability is beyond the scope of relief that the department may grant under ORS 197.352. The Oregon Department of Justice has advised the department that "[i]f the current owner of the real property conveys the property before a new use allowed by the public entity is established, then the entitlement to relief will be lost." Therefore, the relief granted in this report cannot and does not create a transferable waiver.

permitted when they acquired each of the subject tax lots. (See the complete recommendation in Section VI. of this report.)

III. COMMENTS ON THE CLAIM

Comments Received

On September 14, 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 May 25, 2006, for processing under OAR 125, division 145. The claim identifies ORS 215.263, 215.283, 215.284 and 215.780 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, Dale and Jan Fleming, acquired each of the tax lots that constitutes the subject property as follows:

Date of Acquisition:	Tax Lots:	Document:
February 7, 1978	Township 40S, Range 9E, Section 12 200 and 300	Personal Representative’s Deed
March 6, 1985	Township 40S, Range 10E, Section 6 300	Bargain and Sale Deed
May 29, 1986	Township 40S, Range 10E, Section 6 301	Quitclaim Deed
September 9, 1989	Township 40S, Range 9E, Section 14 700, 800, 900, 1000 and 1100 Township 40S, Range 9E, Section 15 200, 300 and 400 Township 40S, Range 9E, Section 16 200 and 400 Township 40S, Range 9E, Section 22 1800 Township 40S, Range 9E, Section 23 1900, 2000, 2100, 2200, 2300, 2500, 2600 and 2700	Warranty Deed

The claimants first acquired an interest in tax lot 301 (T40S, R10E, S6) on November 8, 1984, as reflected by a bargain and sale deed included with the claim. However, the deed by which the claimants acquired tax lot 301 expressly reserved a life estate for Dorathie Fleming. The life estate gave Dorathie Fleming the exclusive right to use tax lot 301 during her lifetime. On May 29, 1986, Dorathie Fleming terminated her life estate and conveyed all of her remaining interest in tax lot 301 to the claimants. The Klamath County Assessor’s Office confirms the claimants’ current ownership of the subject property.

Conclusions

The claimants, Dale and Jan Fleming, are “owners” of the subject property as that term is defined by ORS 197.352(11)(C), as of February 7, 1978, for tax lots 200 and 300 (T40S, R9E, S12); as of March 6, 1985, for tax lot 300 (T40S, R10E, S6); as of May 29, 1986, for tax lot 301 (T40S, R10E, S6); and as of September 9, 1989, for tax lots 200, 300 and 400 (T40S, R9E, S15), 200 and 400 (T40S, R9E, S16), 700, 800, 900, 1000 and 1100 (T40S, R9E, S14), 1800 (T40S, R9E, S22) and 1900, 2000, 2100, 2200, 2300, 2500, 2600 and 2700 (T40S, R9E, S23).

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 1,876.97-acre subject property into 10-acre or larger parcels and develop a dwelling on each parcel. It indicates that the desired use is not allowed under current land use regulations.

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

Tax lots 300 and 301 (T40S, R10E, S6), 200 and 300 (T40S, R9E, S12) and 700, 800, 900, 1000 and 1100 (T40S, R9E, S14) are zoned by Klamath County as EFU and EFU-C as required by Goal 3, in accordance with ORS 215 and OAR 660, division 33, because these tax lots are "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.

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.)

Tax lots 200, 300, 400 (T40S, R9E, S15), 200 and 400 (T40S, R9E, S16), T40S, R9E, S22) and 1900, 2000, 2100, 2200, 2300, 2500, 2600 and 2700 (T40S, R9E, S23) are zoned by Klamath County as Forestry Range (FR) as required by Goal 4, in accordance with ORS 215 and OAR 660, division 6, because these tax lots are "forest land" under Goal 4. Goal 4 became effective on January 25, 1975, and requires that forest land be zoned for forest use (see statutory

² These tax lots are "agricultural land" because they contain Natural Resources Conservation Service Class I-VI soils.

and rule history under OAR 660-015-0000(4)). The forest land administrative rules (OAR 660, division 6) became effective on September 1, 1982, and ORS 215.705 to 215.755 and 215.780 became effective on November 4, 1993 (Chapter 792, Oregon Laws 1993). OAR 660-006-0026 and 660-006-0027 were amended on March 1, 1994, to implement those statutes.

The claimants acquired tax lots 200 and 300 (T40S, R9E, S12) after the adoption of the statewide planning goals, but before the Commission acknowledged Klamath 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 tax lots 200 and 300 (T40S, R9E, S12) on February 7, 1978, the statewide planning goals, and Goal 3 in particular, applied directly to these tax lots when the claimants acquired them.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 tax lots 200 and 300 (T40S, R9E, S12) when they acquired them in 1978 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 February 7, 1978, 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).

At the time the claimants acquired tax lots 300 and 301 (T40S, R10E, S6) and 700, 800, 900, 1000 and 1100 (T40S, R9E, S14) (EFU-zoned tax lots) and tax lots 200, 300, 400 (T40S, R9E, S15) 200 and 400 (T40S, R9E, S16) and tax lots 1900, 2000, 2100, 2200, 2300, 2500, 2600 and 2700 (T40S, R9E, S23) (FR-zoned tax lots), they were subject to Klamath County's acknowledged comprehensive plan and zoning regulations.⁴ When the claimants acquired these tax lots, the claimants' desired use of the EFU-zoned tax lots would have been governed by the

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).

⁴ Klamath County's EFU zone was acknowledged by the Commission for compliance with Goal 3 on August 6, 1984.

county's acknowledged EFU zone and the applicable provisions of ORS 215 then in effect, and the claimants' desired use of the FR-zoned tax lots would have been governed by the applicable provisions of Goal 4 and OAR 660, division 6, as implemented through the county's comprehensive plan and FR zone.⁵

In 1984, 1986 and 1989, ORS 215.263 (1983, 1985 and 1987 editions) required that divisions of land in EFU zones be "appropriate for the continuation of the existing commercial agricultural enterprise within the area" or not smaller than the minimum size in the county's acknowledged plan. ORS 215.283(1)(f) (1983, 1985 and 1987 editions) generally allowed farm dwellings "customarily provided in conjunction with farm use." Non-farm dwellings were allowed under ORS 215.283(3) if they were determined to be compatible with farm use, not interfere seriously with accepted farm practices, not materially alter the stability of the land use pattern in the area and be situated on generally unsuitable land for the production of farm crops and livestock.

No information has been presented in the claim to establish that the claimants' desired division and development of each of the subject tax lots comply with the Goal and statutory standards in effect when the claimants acquired each of the tax lots that constitutes the subject property.

Conclusions

The current zoning requirements, minimum lot size and dwelling standards established by Goals 3 and 4, ORS 215 and OAR 660, divisions 6, and 33, do not allow the claimants' desired division or development of the subject property. However, the claim does not establish whether or the extent to which the claimants' desired use 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 tax lots 200 and 300 (T40S, R9E, S12) on February 7, 1978; under the requirements of Goal 3 and OAR 660, division 5, as implemented through Klamath County's comprehensive plan and EFU zone and applicable provisions of ORS 215 in effect when the claimants acquired tax lot 300 (T40S, R10E, S6) on November 8, 1984, tax lot 301 (T40S, R10E, S6) on May 29, 1986, and tax lots 700, 800, 900, 1000 and 1100 (T40S, R9E, S14) on September 9, 1989; and under the requirements of Goal 4 and OAR 660, division 6, as implemented through Klamath County's comprehensive plan and FR zone in effect when the claimants acquired tax lots 200, 300 and 400 (T40S, R9E, S15), 200 and 400 (T40S, R9E, S16), 1800 (T40S, R9E, S22), and 1900, 2000, 2100, 2200, 2300, 2500, 2600 and 2700 (T40S, R9E, S23) on September 9, 1989.

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

⁵ After the county's comprehensive plan and land use regulations were acknowledged by the Commission as complying with the statewide planning goals, the goals and implementing rules no longer applied directly to individual local land use decisions. *Byrd v. Stringer*, 295 Or 311 (1983). However, statutory requirements continue to apply, and insofar as the state and local provisions are materially the same, the local provisions must be interpreted consistent with the substance of the goals and implementing rules. *Forster v. Polk County*, 115 Or App 475 (1992) and *Kenagy v. Benton County*, 115 Or App 131 (1992).

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 \$100,000 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 Dale and Jan Fleming who acquired the subject property on February 7, 1978; November 8, 1984; May 29, 1986; and September 9, 1989. Under ORS 197.352, the claimants are due compensation for land use regulations that restrict the use of the subject property and have the effect of reducing its fair market value. Based on the findings and conclusions in Section V.(2) of this report, laws enacted or adopted since the claimants acquired 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 \$100,000.

Without an appraisal or other documentation and without verification of whether or the extent to which the claimants’ desired use of the subject property was allowed under the standards in effect when 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 Klamath County has implemented through its current EFU, EFU-C and FR zones. With the exception of provisions of Goal 3 and ORS 215 in effect on February 7, 1978, and provisions of Goals 3 and 4, ORS 215 and OAR 660, divisions 6, and 33, in effect on November 8, 1984, May 29, 1986, and September 9, 1989, these land use regulations were enacted or adopted after the claimants acquired the subject property.

Conclusions

Without a specific development proposal for the subject property, it is not possible for the department to determine all the laws that may apply to a particular use of the property, or whether those laws may fall under one or more of the exemptions under ORS 197.352. It appears that the general statutory, goal and rule restrictions on residential division and development of the subject property are exempt only to the extent they were enacted or adopted after the claimants acquired each of the tax lots that constitutes the subject property. Provisions of Goal 3 and ORS 215 in effect in 1978, and provisions of Goals 3 and 4, ORS 215 and OAR 660 in effect in 1984, 1986 and 1989 are exempt under ORS 197.352(3)(E) and will continue to apply to the subject 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 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 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.

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 restrict the claimants' desired use of the subject property. The claim asserts that existing state land use regulations enforced by the Commission or the department have the effect of reducing the fair market value of the subject property by \$100,000. 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 the fair market value of the subject property, a

specific amount of compensation cannot be determined. In order to determine a specific amount of compensation due for this claim, it would also be necessary to verify whether or the extent to which the claimants' desired use of the subject property was allowed under the standards in effect when 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 Dale and Jan Fleming to use the subject property for a use permitted at the time they acquired tax lots 200 and 300 (T40S, R9E, S12) on February 7, 1978; tax lot 300 (T40S, R10E, S6) on November 8, 1984; tax lot 301 (T40S, R10E, S6) on May 29, 1986; and tax lots 700, 800, 900, 1000 and 1100 (T40S, R9E, S14), 200, 300 and 400 (T40S, R9E, S15), 200 and 400 (T40S, R9E, S16), 1800 (T40S, R9E, S22) and 1900, 2000, 2100, 2200, 2300, 2500, 2600 and 2700 (T40S, R9E, S23) on September 9, 1989.

Conclusions

Based on the record, the department recommends that the claim be approved, subject to the following terms:

1. In lieu of compensation under ORS 197.352, the State of Oregon will not apply the following laws to Dale and Jan Fleming's partition of the 1,876.97-acre subject property into 10-acre or larger parcels and development of a dwelling on each parcel:

Applicable Provisions:	Acquisition Date:	Tax Lots:
Goal 3, ORS 215 and OAR 660, division 33, enacted or adopted after the claimants' acquired each of these tax lots	February 7, 1978	Township 40S, Range 9E, Section 12 200 (65.11 acres) 300 (0.10 acre)
	November 8, 1984	Township 40S, Range 10E, Section 6 300 (77.77 acres)
	May 29, 1986	Township 40S, Range 10E, Section 6 301 (0.23 acre)
	September 9, 1989	Township 40S, Range 9E, Section 14 700 (37.90 acres) 800 (39.04 acres) 900 (38.40 acres) 1000 (36.24 acres) 1100 (158.18 acres)
		Township 40S, Range 9E, Section 15 200 (184 acres) 300 and 400 (40 acres each)

Applicable Provisions:	Acquisition Date:	Tax Lots:
Goal 4, ORS 215 and OAR 660, division 6, enacted or adopted after the claimants' acquired each of these tax lots	September 9, 1989	Township 40S, Range 9E, Section 16 200 (360 acres) and 400 (160 acres) Township 40S, Range 9E, Section 22 1800 (120 acres) Township 40S, Range 9E, Section 23 1900, 2000, 2100 and 2500 (40 acres each) 2200, 2300 and 2600 (80 acres each) 2700 (120 acres)

The above laws will not apply to the claimants only to the extent necessary to allow them to use the subject property for the use described in this report, and only to the extent that use was permitted when they acquired each of the subject tax lots.

2. The action by the State of Oregon provides the state's authorization to the claimants to use the property for the use described in this report, subject to the standards in effect on February 7, 1978, for tax lots 200 and 300 (T40S, R9E, S12); November 8, 1984, for tax lot 300 (T40S, R10E, S6); May 29, 1986, for tax lot 301 (T40S, R10E, S6); and September 9, 1989, for tax lots 700, 800, 900, 1000 and 1100 (T40S, R9E, S14), 200, 300 and 400 (T40S, R9E, S15), 200 and 400 (T40S, R9E, S16), 1800 (T40S, R9E, S22) and 1900, 2000, 2100, 2200, 2300, 2500, 2600 and 2700 (T40S, R9E, S23). On February 7, 1978, tax lots 200 and 300 (T40S, R9E, S12) were subject to applicable provisions of Goal 3 and ORS 215, then in effect. On November 8, 1984, May 29, 1986, and September 9, 1989, tax lots 300 and 301 (T40S, R10E, S6) and 700, 800, 900, 1000 and 1100 (T40S, R9E, S14) were subject to compliance with Goal 3 and OAR 660, division 5, as implemented by Klamath County's acknowledged EFU zone, and the applicable provisions of ORS 215 and tax lots 200, 300 and 400 (T40S, R9E, S15), 200 and 400 (T40S, R9E, S16), 1800 (T40S, R9E, S22) and 1900, 2000, 2100, 2200, 2300, 2500, 2600 and 2700 (T40S, R9E, S23) were subject to compliance with Goal 4 and OAR 660, division 6, as implemented through Klamath County's acknowledged FR zone, then in effect

3. To the extent that any law, order, deed, agreement or other legally enforceable public or private requirement provides that the subject property may not be used without a permit, license or other form of authorization or consent, the order will not authorize the use of the property unless the claimants first obtain that permit, license or other form of authorization or consent. Such requirements may include, but are not limited to: a building permit, a land use decision, a "permit" as defined in ORS 215.402 or 227.160, other permits or authorizations from local, state or federal agencies and restrictions on the use of the subject property imposed by private parties.

4. Any use of the subject property by the claimants under the terms of the order will remain subject to the following laws: (a) those laws not specified in (1) above; (b) any laws enacted or enforced by a public entity other than the Commission or the department; and (c) those laws not subject to ORS 197.352 including, without limitation, those laws exempted under ORS 197.352(3).

5. Without limiting the generality of the foregoing terms and conditions, in order for the claimants to use the subject property, it may be necessary for them to obtain a decision under ORS 197.352 from a city and/or county and/or metropolitan service district that enforces land

use regulations applicable to the property. Nothing in this order relieves the claimants from the necessity of obtaining a decision under ORS 197.352 from a local public entity that has jurisdiction to enforce a land use regulation applicable to a use of the subject property by the claimants.

VII. COMMENTS ON THE DRAFT STAFF REPORT

The department issued its draft staff report on this claim on October 26, 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. No comments were received.