

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 A
COMPENSATION UNDER ORS 197.352)	CLAIM NO. M129412
(BALLOT MEASURE 37) OF)	
Don Smith Tree Farm, Inc. CLAIMANT)	

Claimant: Don Smith Tree Farm, Inc. (the Claimant)

Property: Township 3S, Range 3E, Section 14, Tax lot 900, Clackamas County
(the Property)

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

Claimant 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 Don Smith Tree Farm, Inc.'s division of the 91.85-acre subject property into thirty 2- to 3-acre parcels or to its development of a dwelling on each resulting undeveloped parcel: applicable provisions of Goal 3, ORS 215 and OAR 660 division 33, enacted or adopted after September 4, 1992. These land use regulations will not apply to Don Smith Tree Farm, Inc. only to the extent necessary to allow it to use the subject property for the use described in this report, and only to the extent that use was permitted when it acquired the property on September 4, 1992.
2. The action by the State of Oregon provides the state's authorization to Don Smith Tree Farm, Inc. to use the property for the use described in this report, subject to the standards in effect on September 4, 1992. On that date, the property was subject to compliance with Goal 3 and OAR 660, division 5, as implemented by Clackamas County's acknowledged EFU zone, and the applicable provisions ORS 215 then in effect.

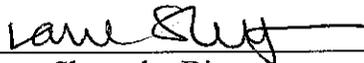
3. To the extent that any law, order, deed, agreement or other legally enforceable public or private requirement provides that the subject property may not be used without a permit, license or other form of authorization or consent, the order will not authorize the use of the property unless the Don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

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

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

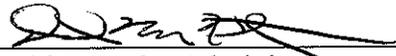
This Order is entered by the Director of the DLCDC as a final order of DLCDC and the Land Conservation and Development Commission under ORS 197.352, OAR 660-002-0010(8), and OAR 125, division 145, and by the Administrator for the State Services Division of the DAS as a final order of DAS under ORS 197.352,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

FOR DLCDC AND THE LAND
CONSERVATION AND
DEVELOPMENT COMMISSION:


Lane Shetterly, Director
DLCDC

Dated this 22nd day of November, 2006.

FOR the DEPARTMENT OF
ADMINISTRATIVE SERVICES:


David Hartwig, Administrator
DAS, State Services Division
Dated this 22nd 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."

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 B
COMPENSATION UNDER ORS 197.352) CLAIM NO. M129412
(BALLOT MEASURE 37) OF)
Donald R. and Martha E. Smith, CLAIMANTS)

Claimants: Donald R. and Martha E. Smith (the Claimants)

Property: Township 3S, Range 3E, Section 14, Tax lot 900
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 reasons set forth in the DLCD Report.

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 chapter 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 chapter 125, division 145, and ORS chapter 293.

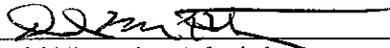
FOR DLCD AND THE LAND
CONSERVATION AND
DEVELOPMENT COMMISSION:



Lane Shetterly, Director
DLCD

Dated this 22nd day of November, 2006.

FOR THE DEPARTMENT OF
ADMINISTRATIVE SERVICES:



David Hartwig, Administrator
DAS, State Services Division
Dated this 22nd day of November, 2006.

NOTICE OF RIGHT TO APPEAL OR OTHER JUDICIAL RELIEF

You are entitled, or may be entitled, to the following judicial remedies:

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)

ORS 197.352 (BALLOT MEASURE 37) CLAIM FOR COMPENSATION

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

November 21, 2006

STATE CLAIM NUMBER: M129412

NAMES OF CLAIMANTS: Don Smith Tree Farm, Inc.
Donald R. and Martha E. Smith

MAILING ADDRESS: 22509 South Stormer Road
Estacada, Oregon 97023

PROPERTY IDENTIFICATION: Township 3S, Range 3E, Section 14
Tax lot 900
Clackamas County

OTHER CONTACT INFORMATION: John A. Rankin, LLC
26715 Southwest Baker Road
Sherwood, Oregon 97140

DATE RECEIVED BY DAS: May 30, 2006

180-DAY DEADLINE: November 26, 2006

I. SUMMARY OF CLAIM

The claimants, Don Smith Tree Farm, Inc. and Donald and Martha Smith, seek compensation in the amount of \$5.3 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 91.85-acre subject property into thirty 2-to 3-acre parcels and to develop a dwelling on each resulting undeveloped parcel. The subject property is located at 22509 South Stormer Road, near Estacada, 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 Don Smith Tree Farm, Inc.'s division of the 91.85-acre subject property into thirty 2- to 3-acre parcels and to its 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 4, 1992. These laws will not apply to Don Smith Tree Farm, Inc. only to the extent necessary to allow it to use the subject property

for the use described in this report, and only to the extent that use was permitted when it acquired the property on September 4, 1992.

The department has further determined that this claim is not valid as to Donald and Martha Smith because these claimants have not established their ownership of the subject property. (See the complete recommendation in Section VI. of this report.)

III. COMMENTS ON THE CLAIM

Comments Received

On October 10, 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 30, 2006, for processing under OAR 125, division 145. The claim identifies the following as the basis for the claim: ORS 90, 91, 92, 93, 94, 95, 96, 97, 100, 105, 183, 184, 185, 195, 197, 209, 215, 276, 307, 308, 309A, 369, 477, 537, 540, 541, 547, 548, 561 and 566 and OAR 123, 125, 137, 141, 150, 161, 170, 198, 330, 340, 471, 603, 629, 635, 660, 661, 690, 731, 734, 736, 738, 812, 860 and 863.¹ Only laws that were enacted or adopted prior to December 2, 2004, are the basis for this claim.

¹ The claim does not establish how these laws restrict the claimants' desired use of the property. In this report, the department addresses only those state land use regulations that the department has determined restrict the claimants' desired use of the property. Those are statutes in ORS 215, Goal 3 and Commission rules in OAR 660, division 33, that apply to the division of the property into thirty 2- to 3-acre parcels and the establishment of a dwelling on each parcel.

Conclusions

The claim has been submitted within two years of the effective date of Measure 37 (December 2, 2004), based on land use regulations enacted or adopted prior to December 2, 2004, and is therefore timely filed.

V. ANALYSIS OF CLAIM

1. Ownership

ORS 197.352 provides for payment of compensation or relief from specific laws for “owners” as that term is defined in ORS 197.352. ORS 197.352(11)(C) defines “owner” as “the present owner of the property, or any interest therein.”

Findings of Fact

Claimants Donald and Martha Smith first acquired the subject property on October 31, 1945, as reflected by a warranty deed included with the claim. On September 4, 1992, these claimants transferred the subject property to claimant Don Smith Tree Farm, Inc.,² as reflected by a bargain and sale deed included with the claim.

The Clackamas County Assessor’s Office confirms Don Smith Tree Farm, Inc.’s current ownership of the subject property. Claimants Donald and Martha Smith no longer own the subject property.

Conclusions

Claimant Don Smith Tree Farm, Inc. is an “owner” of the subject property as that term is defined by ORS 197.352(11)(C), as of September 4, 1992.³ Claimants Donald and Martha Smith have not established that they are “owners” of the subject property as that term is defined in ORS 197.352(11)(C).

2. The Laws That are the Basis for This Claim

In order to establish a valid claim, ORS 197.352(1) requires, in part, that a law must restrict the claimants’ use of private real property in a manner that reduces the fair market value of the property relative to how the property could have been used at the time the claimants or a family member acquired the property.

² Don Smith Tree Farm, Inc. is a domestic business corporation registered with the Oregon Secretary of State.

³ Under ORS 197.352(11)(A), legal entities can be “family members” of individuals who are owners of property under ORS 197.352(11)(C). However, legal entities cannot have family members under the statute. Therefore, individuals who transferred property to the Inc. are not considered family members under the definition of family member in ORS 197.352(11)(A).

Findings of Fact

The claim indicates that the claimants desire to divide the 91.85-acre subject property into thirty 2- to 3-acre parcels and to develop a dwelling on each resulting undeveloped parcel, and the 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) zoning and restrict uses on EFU-zoned land. 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 3.⁴ 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 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 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.)

At the time Don Smith Tree Farm, Inc. acquired the subject property, the property was subject to Clackamas County's acknowledged EFU zone.⁵ The desired use of the property would have been governed by the county's acknowledged EFU zone and the applicable provisions of ORS 215, then in effect.⁶ In 1992, ORS 215.263 (1991 edition) required that divisions of land in EFU zones be "appropriate for the continuation of the existing commercial agricultural enterprise within the area" or not smaller than the minimum size in the county's acknowledged plan.

⁴ The subject property is "agricultural land" because it contains Natural Resources Conservation Service Class I-IV soils.

⁵ Clackamas County's EFU zone was acknowledged by the Commission for compliance with Goal 3 on December 31, 1981. The property was zoned EFU-20, which established a 20-acre minimum lot size for new lots or parcels.

⁶ After the county's comprehensive plan and land use regulations were acknowledged by the Commission as complying with the statewide planning goals, the goals and implementing rules no longer applied directly to individual local land use decisions. *Byrd v. Stringer*, 295 Or 311 (1983). However, statutory requirements continue to apply, and insofar as the state and local provisions are materially the same, the local provisions must be interpreted consistent with the substance of the goals and implementing rules. *Forster v. Polk County*, 115 Or App 475 (1992) and *Kenagy v. Benton County*, 115 Or App 131 (1992).

ORS 215.283(1)(f) (1991 edition) generally allowed farm dwellings “customarily provided in conjunction with farm use.” Non-farm dwellings were allowed under ORS 215.283(3) if they were determined to be compatible with farm use, not interfere seriously with accepted farm practices, not materially alter the stability of the land use pattern in the area and be situated on generally unsuitable land for the production of farm crops and livestock.

The claim does not establish whether or to what extent Don Smith Tree Farm, Inc.’s desired division and development of the subject property were allowed under the standards in effect when it acquired the property on September 4, 1992.

Conclusions

The current zoning requirements, minimum lot size and dwelling standards established by Goal 3, ORS 215 and OAR 660, division 33, were all enacted or adopted after Don Smith Tree Farm, Inc. acquired the subject property in 1992 and do not allow the claimants’ desired division or development of the property. However, the claim does not establish whether or to what extent the claimants’ desired use of the subject property complies with the standards for land divisions and development under Goal 3 and OAR 660, as implemented through Clackamas County’s comprehensive plan and EFU zone and applicable provisions of ORS 215, in effect when Don Smith Tree Farm, Inc. acquired the property on September 4, 1992.

As explained in Section V.(1), claimants Donald and Martha Smith are not “owners” of the subject property as that term is defined in ORS 197.352(11)(C). Therefore, no laws enforced by the Commission or the department restrict their use of private real property in a manner that reduces the fair market value of the property.

This report addresses only those state laws that are identified in the claim, or that the department is certain apply to the subject property based on the uses that the claimants have identified. There may be other laws that currently apply to Don Smith Tree Farm, Inc.’s use of the subject property, and that may continue to apply to its 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 Don Smith Tree Farm, Inc. seeks a building or development permit to carry out a specific use, it may become evident that other state laws apply to that use.

3. Effect of Regulations on Fair Market Value

In order to establish a valid claim, ORS 197.352(1) requires that the land use 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 \$5.3 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 an appraisal included with the claim.

Conclusions

As explained in Section V.(1) of this report, the claimants are Don Smith Tree Farm, Inc., which acquired the subject property on September 4, 1992, and Donald and Martha Smith. Claimant Donald and Martha Smith are not "owners" of the subject property as that term is defined in ORS 197.352(11)(C). Therefore, no laws restrict their use of the subject property in a manner that reduces the fair market value of the subject property. Under ORS 197.352, Don Smith Tree Farm, Inc. is 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 Don Smith Tree Farm, Inc. acquired the subject property restricts its 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 \$5.3 million.

Without additional evidence and documentation establishing whether and how the land use regulations that restrict Don Smith Tree Farm, Inc.'s desired use of the property have the effect of reducing the property's fair market value, and without verification of whether or the extent to which its desired use of the property was allowed under the standards in effect in 1992, 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 since Don Smith Tree Farm, Inc. acquired the property.

4. Exemptions Under ORS 197.352(3)

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

Findings of Fact

The claim is based on state land use regulations that restrict the use of the subject property, including applicable provisions of Goal 3, ORS 215 and OAR 660, division 33, which Clackamas County has implemented through its current EFU zone. With the exception of amendments enacted or adopted after September 4, 1992, Goal 3, ORS 215 and OAR 660 were in effect when Don Smith Tree Farm, Inc. 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 division and development of the subject property are not exempt under ORS 197.352(3)(E) only to the extent they were enacted or adopted after Don Smith Tree Farm, Inc. acquired the property on September 4, 1992. Provisions of Goal 3, ORS 215 and OAR 660 in effect when Don Smith Tree Farm, Inc. acquired the subject property in 1992 are exempt under ORS 197.352(3)(E) and will continue to apply to the property.

As explained in Section V.(1) of this report, claimants Donald and Martha Smith are not “owners” of the subject property as that term is defined in ORS 197.352(11)(C). Therefore, the issue of whether any laws are exempt from ORS 197.352 is not relevant as to these claimants.

Other laws in effect when Don Smith Tree Farm, Inc. acquired the subject property are also exempt under ORS 197.352(3)(E) and will continue to apply to its use of the property. There may be other laws that continue to apply to Don Smith Tree Farm, Inc.’s 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 Don Smith Tree Farm, Inc. seeks a building or development permit to carry out a specific use, it may become evident that other state laws apply to that use. In some cases, some of these laws may be exempt under ORS 197.352(3)(A) to (D).

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 Don Smith Tree Farm, Inc.’s use of the subject property.

VI. FORM OF RELIEF

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

Findings of Fact

Based on the findings and conclusions set forth in this report, the department finds that the claim is not valid as to Donald and Martha Smith because these claimants are not owners of the subject property. The department further finds that laws enforced by the Commission or the department restrict Don Smith Tree Farm, Inc.’s desired use of the subject property. The claim asserts that existing state land use regulations enforced by the Commission or the department have the effect of reducing the fair market value of the subject property by \$5.3 million. However, without additional relevant evidence demonstrating that the land use regulations described in Section V.(2) reduce the fair market value of the subject property, a specific amount of compensation cannot be determined. In order to determine a specific amount of the compensation due for this claim, it would also be necessary to verify whether or the extent to which Don Smith Tree Farm, Inc.’s desired use of the subject property was allowed under the standards in effect when it 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 Don Smith Tree Farm, Inc. to use the subject property for a use permitted at the time it acquired the property on September 4, 1992.

Conclusions

Based on the record before the department, claimants Donald and Martha Smith 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. Therefore, the department recommends that this claim be denied as to Donald and Martha Smith. The department otherwise recommends that the claim be approved as to Don Smith Tree Farm, Inc., 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 Don Smith Tree Farm, Inc.'s division of the 91.85-acre subject property into thirty 2- to 3-acre parcels or to its development of a dwelling on each resulting undeveloped parcel: applicable provisions of Goal 3, ORS 215 and OAR 660 division 33, enacted or adopted after September 4, 1992. These land use regulations will not apply to Don Smith Tree Farm, Inc. only to the extent necessary to allow it to use the subject property for the use described in this report, and only to the extent that use was permitted when it acquired the property on September 4, 1992.
2. The action by the State of Oregon provides the state's authorization to Don Smith Tree Farm, Inc. to use the property for the use described in this report, subject to the standards in effect on September 4, 1992. On that date, the property was subject to compliance with Goal 3 and OAR 660, division 5, as implemented by Clackamas County's acknowledged EFU zone, and the applicable provisions ORS 215 then in effect.
3. To the extent that any law, order, deed, agreement or other legally enforceable public or private requirement provides that the subject property may not be used without a permit, license or other form of authorization or consent, the order will not authorize the use of the property unless the Don Smith Tree Farm, Inc. first obtains that permit, license or other form of authorization or consent. Such requirements may include, but are not limited to: a building permit, a land use decision, a "permit" as defined in ORS 215.402 or 227.160, other permits or authorizations from local, state or federal agencies and restrictions on the use of the subject property imposed by private parties.
4. Any use of the property by Don Smith Tree Farm, Inc. under the terms of the order will remain subject to the following laws: (a) those laws not specified in (1) above; (b) any laws enacted or enforced by a public entity other than the Commission or the department; and (c) those laws not subject to ORS 197.352 including, without limitation, those laws exempted under ORS 197.352(3).
5. Without limiting the generality of the foregoing terms and conditions, in order for Don Smith Tree Farm, Inc. to use the subject property, it may be necessary for it to obtain a decision under ORS 197.352 from a city and/or county and/or metropolitan service district that enforces land use regulations applicable to the property. Nothing in this order relieves Don Smith Tree Farm,

Inc. from the necessity of obtaining a decision under ORS 197.352 from a local public entity that has jurisdiction to enforce a land use regulation applicable to its use of the subject property.

VII. COMMENTS ON THE DRAFT STAFF REPORT

The department issued its draft staff report on this claim on October 30, 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