

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. M129821
(BALLOT MEASURE 37) OF)
James and Ella Hasegawa, CLAIMANTS)

Claimants: James and Ella Hasegawa (the Claimants)

Property: Township 2N, Range 10E, Section 9, Tax lots 4000, 4001, 4200 and 4300
Hood River 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 for tax lot 4000 as to laws administered by DLCD and the Land Conservation and Development Commission (LCDC) for the reasons set forth in the DLCD Report.

The Claim is approved for tax lots 4001, 4200 and 4300 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 James and Ella Hasegawa's division and development of the subject property as described in Section I of this report, except for that portion of the desired division and development located within tax lot 4000: applicable provisions of Goals 3 and 14, ORS 215 and OAR 660, division 33, enacted or adopted after the claimants acquired each of the subject tax lots. These 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 tax lots 4200 and 4300 on August 3, 1962; and only to the extent that use was permitted when they acquired tax lot 4001 on December 28, 1973. The department acknowledges that the relief to which the claimants are entitled under ORS 197.352 for tax lot 4001 may not allow them to use this tax lot for their desired use.

2. The action by the State of Oregon provides the state's authorization to the claimants to use tax lots 4001, 4200 and 4300 for the use described in this report, subject to the standards in effect when they acquired tax lots 4200 and 4300 on August 3, 1962; and subject to the standards in effect when they acquired tax lot 4001 on December 28, 1973. On December 28, 1973, tax lot 4001 was subject to the provisions of ORS 215, including the interim planning goals set forth at ORS 215.515.

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.

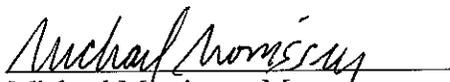
4. Any use of the subject property by the claimants under the terms of the order will remain subject to the following laws: (a) those laws not specified in (1) above; (b) any laws enacted or enforced by a public entity other than the Commission or the department; and (c) those laws not subject to ORS 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 Manager for the Measure 37 Services Division 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



Michael Morrissey, Manager
DLCD, Measure 37 Services Division
Dated this 31st day of January, 2007.

FOR the DEPARTMENT OF
ADMINISTRATIVE SERVICES:



David Hartwig, Administrator
DAS, State Services Division
Dated this 31st day of January, 2007.

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

January 31, 2007

STATE CLAIM NUMBER: M129821

NAMES OF CLAIMANTS: James and Ella Hasegawa

MAILING ADDRESS: 4570 Portland Drive
Hood River, Oregon 97031

PROPERTY IDENTIFICATION: Township 2N, Range 10E, Section 9
Tax lots 4000, 4001, 4200 and 4300
Hood River County

OTHER CONTACT INFORMATION: Steven B. Anderson
PO Box 135
Mosier, Oregon 97040

DATE RECEIVED BY DAS: August 8, 2006

180-DAY DEADLINE: February 4, 2007

I. SUMMARY OF CLAIM

The claimants, James and Ella Hasegawa, seek compensation in the amount of \$11,418,033 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 27.23-acre subject property¹ into approximately 83 parcels consisting of 5.33 acres in 1-acre parcels; one 2-acre parcel; and the remainder in 0.25-acre parcels, and to develop a single- or multi-family dwelling on each resulting undeveloped parcel.² The subject property is located at 4570, 4620 and 4650 Portland Drive and 2986 Shute Road, near Hood River, in Hood River County. (See claim.)

¹ The subject property includes four tax lots. Tax lot 4000 consists of 0.58 acre, tax lot 4001 consists of 7.17 acres, tax lot 4200 consists of 19 acres, and tax lot 4300 consists of 0.48 acre.

² The claim also indicates that the claimants desire to sell or transfer 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."

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 James and Ella Hasegawa's division and development of the subject property as described above except for that portion of the desired division and development located within tax lot 4000: applicable provisions of Statewide Planning Goals 3 (Agricultural Lands) and 14 (Urbanization), ORS 215 and Oregon Administrative Rules (OAR) 660, division 33, enacted or adopted after the claimants acquired each of the subject tax lots. These 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 tax lots 4200 and 4300 on August 3, 1962; and only to the extent that use was permitted when they acquired tax lot 4001 on December 28, 1973. The department acknowledges that the relief to which the claimants are entitled under ORS 197.352 for tax lot 4001 may not allow them to use the tax lot for their desired use.³

The department has further determined that the claim is not valid as to tax lot 4000 because the claimants' desired use of tax lot 4000 was prohibited under the laws in effect when they acquired this tax lot on August 3, 1988, and no laws enforced by the Commission or the department since the claimants acquired tax lot 4000 have had the effect of reducing the fair market value of this tax lot relative to uses permitted when they acquired it. (See the complete recommendation in Section VI. of this report.)

III. COMMENTS ON THE CLAIM

Comments Received

On October 26, 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.)

³ The claimants desire to divide all of the subject property into "a mix of multi- and single-family residential development of homes whereby approximately 2 acres is dedicated to multi-family, 5.33 acres is dedicated to one-acre single family, and the balance of the 27.23 acres is dedicated to quarter acre single-family residential development." However, the claim does not establish which portion of the division and development the claimants desire for any individual tax lot. Because none of the claimants' desired use was allowed when they acquired tax lot 4000 in 1988, that portion of the claim is denied and no division or development is permitted on that tax lot. To the extent the claimants' desired division and development of tax lot 4001 includes parcels less than 7,500 square feet or multi-family residential development, that use was prohibited when the claimants acquired that tax lot in 1973.

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 August 8, 2006, for processing under OAR 125, division 145. The claim identifies ORS chapters 92, 197 and 215; OAR 660 division 33; and Hood River County's zoning ordinances as the basis for the claim. Only laws that were enacted or adopted prior to December 2, 2004, are the basis for this claim.

Conclusions

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

V. ANALYSIS OF CLAIM

1. Ownership

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

Findings of Fact

The claimants, James and Ella Hasegawa, acquired tax lots 4200 and 4300 on August 3, 1962, tax lot 4001 on December 28, 1973, and tax lot 4000 on August 3, 1988, as reflected by real property sales contracts included with the claim. The Hood River County Assessor's Office confirms the claimants' current ownership of the subject property.

Conclusions

The claimant, James and Ella Hasegawa, are "owners" of the subject property as that term is defined by ORS 197.352(11)(C), as of August 3, 1962, for tax lots 4200 and 4300, as of December 28, 1973, for tax lot 4001 and as of August 3, 1988, for tax lot 4000.

2. The Laws That are the Basis for This Claim

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

Findings of Fact

The claim indicates that the claimants desire to divide the 27.23-acre subject property into approximately 83 parcels consisting of 5.33 acres in 1-acre parcels; one 2-acre parcel; and the remainder in 0.25-acre parcels, and to develop a single- or multi-family dwelling on each resulting undeveloped parcel. It indicates that the state and local land use regulations prohibit the desired use.⁴

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 claimants' property is zoned EFU by Hood River County as required by Goal 3, in accordance with ORS 215 and OAR 660, division 33, because the claimants' property is "agricultural land" as defined by Goal 3.⁵ 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 (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

⁴ The claimants summarily cite numerous state land use laws as applicable to this claim, but do not establish how the laws either apply to the claimants' desired use of the subject property or restrict its use with the effect of reducing its fair market value. On their face, most of these regulations either do not apply to the claimants' property or do not restrict the claimants' desired use of the property with the effect of reducing its fair market value. This report addresses only those regulations that the department finds are applicable to and restrict the claimants' desired use of the subject property, based on the claimants' description of their desired use.

⁵ The claimants' property is "agricultural land" because it contains Natural Resources Conservation Service Class I-IV soils.

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.)

Goal 14, which became effective on January 25, 1975, would likely apply to the division of the claimant's property into parcels less than two acres. Goal 14 generally requires that land outside of urban growth boundaries be used for rural uses.

The claimants acquired tax lots 4200 and 4300 on August 3, 1962, prior to the adoption of the statewide planning goals and their implementing statutes and regulations.

The claimants acquired tax lot 4001 on December 28, 1973, after the adoption of Senate Bill 100 (Chapter 80, Oregon Laws 1973) effective on October 5, 1973, but before the adoption of the statewide planning goals, effective on January 25, 1975. At that time, it was zoned by Hood River County as A-2, which required a 7,500 square foot minimum lot size for new parcels with access to public sewers and prohibited multi-family residential development.

During the period between October 5, 1973, and January 25, 1975, ORS 197.175(1) and 197.280 (1973 editions) required, in addition to any local plan or zoning provisions, that cities and counties exercise their planning responsibilities in accordance with the interim land use planning goals set forth in ORS 215.515 (1973 edition). *Petersen v. Klamath Falls*, 279 Or 249 (1977); *see also, Meeker v. Board of Comm'rs*, 287 Or 665 (1979) (review of a subdivision is an exercise of planning responsibilities requiring application of the goals); *State Housing Council v. Lake Oswego*, 48 Or App. 525 (1981) (noting that while "[l]and use planning responsibility is not defined in ORS ch 197, the Supreme Court has interpreted that term as including annexation approvals, *subdivision approvals* [emphasis added] and partition approvals") citing *Petersen, Meeker* and *Alexanderson v. Polk County*, 285 Or 427 (1980). The claimants' desired use includes subdivision of tax lot 4001. If the claimants had sought to create that use in 1973, as a matter of law, the use would have been subject to the interim planning goals at ORS 215.515.⁶

The following interim goals are directly applicable to this claim: "To preserve the quality of the air, water and *land* [emphasis added] resources of the state"; "To conserve prime farm lands for the production of crops"; "To provide for the orderly and efficient transition from rural to urban land use"; "To protect life and property in areas subject to floods, landslides and other natural disasters"; "To provide and encourage a safe, convenient and economic transportation system

⁶ The "interim" land use goals are set forth in ORS 215.515(1)(a) to (j) (1973 edition) as follows: (a) "To preserve the quality of the air, water and land resources of the state," (b) "To conserve open space and protect natural and scenic resources," (c) "To provide for the recreational needs of citizens of the state and visitors," (d) "To conserve prime farm lands for the production of crops," (e) "To provide for the orderly and efficient transition from rural to urban land use," (f) "To protect life and property in areas subject to floods, landslides and other natural disasters," (g) "To provide and encourage a safe, convenient and economic transportation system including all modes of transportation: Air, water, rail, highway and mass transit and recognizing differences in the social costs in the various modes of transportation," (h) "To develop a timely, orderly and efficient arrangement of public facilities and services to serve as a framework for urban and rural development," (i) "To diversify and improve the economy of the state" and (j) "To ensure that the development of properties within the state is commensurate with the character and the physical limitations of the land." ORS 215.515 (1973 edition).

including all modes of transportation: Air, water, rail, highway and mass transit and recognizing differences in the social costs in the various modes of transportation"; and "To develop a timely, orderly and efficient arrangement of public facilities and services to serve as a framework for urban and rural development." ORS 215.515 (1973 edition).

One of the interim goals was to "conserve prime farm lands for the production of crops." Soil types are a determinant of prime farm land. Of the soils on 7.17-acre tax lot 4001, 37.9 percent (2.7 acres) are rated as "prime" by the Natural Resource Conservation Service (NRCS).⁷

No information has been provided establishing whether or to what extent the claimants' desired division of tax lot 4001 for residential development complies with the interim planning goals set forth in ORS 215.515 (1973 edition) in effect at the time the claimants acquired that tax lot on December 28, 1973. In particular, it is unclear whether division and development of the prime farm land portion of the property could satisfy the interim goal requirement to "conserve prime farm lands for the production of crops." In addition, to the extent the claimants' desired use of tax lot 4001 includes multi-family residential development, or development on parcels less than 7,500 square feet, that use was prohibited under the local zoning in effect when the claimants acquired tax lot 4001.

The claimants acquired tax lot 4000 on August 3, 1988. At that time, it was subject to Hood River County's acknowledged comprehensive plan and EFU zone, which required a minimum of 20 acres for the creation of a new lot or parcel.⁸ When the claimants acquired tax lot 4000, their desired use of that tax lot would have been governed by the county's acknowledged EFU zone and the applicable provisions of ORS 215 then in effect.⁹ In 1988, ORS 215.263 (1987 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. ORS 215.283(1)(f) (1987 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 the claimants' desired division and development of tax lot 4000 were allowed under the standards in effect when they acquired the property on August 3, 1988. To the contrary, none of the claimants' desired division and development of the subject property would have been permitted on tax lot 4000, which consists of 0.58 acre, under Hood River's acknowledged EFU zone and the requirements of ORS 215 in effect in 1988.

⁷ NRCS soil survey for Hood River County.

⁸ Hood River County's EFU zone was acknowledged by the Commission for compliance with Goal 3 on January 11, 1985.

⁹ 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).

Conclusions

The current zoning requirements, minimum lot size and dwelling standards established by applicable provisions of Goals 3 and 14, ORS 215 and OAR 660, division 33, were all enacted or adopted after the claimants acquired the property in 1962, 1973 and 1988, and do not allow the desired division or residential development of the property. However, the claimants' desired use of tax lot 4000 was prohibited under the requirements of Goal 3 and OAR 660, division 5, as implemented by the county's acknowledged EFU zone and the requirements of ORS 215 in effect when the claimants acquired that tax lot in 1988. The claim does not establish whether or to what extent the claimants' desired use of tax lot 4001 complies with the interim planning goals in effect when they acquired it on December 28, 1973, and the local zoning then in effect.

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 the claimants' use of the subject property, and that may continue to apply to the claimants' use of the property, that have not been identified in the claim. In some cases, it will not be possible to know which laws apply to a use of the subject property until there is a specific proposal for that use. When the claimants seek a building or development permit to carry out a specific use, it may become evident that other state laws apply to that use.

3. Effect of Regulations on Fair Market Value

In order to establish a valid claim, ORS 197.352(1) requires that the land use regulation(s) (described in Section V.(2) of this report) must have "the effect of reducing the fair market value of the property, or any interest therein."

Findings of Fact

The claim includes an estimate of \$11,418,033 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 claimants' comparison of similar property sales in the area.

Conclusions

As explained in Section V.(1) of this report, the claimants are James and Ella Hasegawa who acquired tax lots 4200 and 4300 in 1962, tax lot 4001 in 1973 and tax lot 4000 in 1988. The claimants have not established they are due compensation under ORS 197.352 for tax lot 4000 because none of the claimants' desired use of the subject property was allowed on this tax lot when they acquired it in 1988 and, therefore, no laws enforced by the Commission or the department have the effect of reducing the fair market value of the tax lot relative to uses permitted when they acquired it in 1988. Under ORS 197.352, the claimants are due compensation for land use regulations that restrict the use of tax lots 4001, 4200 and 4300 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 tax lots 4001, 4200 and 4300 restrict the claimants' desired use of the property. The claimants estimate that the effect of the regulations on the fair market value of the property is a reduction of \$11,418,033.

Without an appraisal or other documentation, and without verification of whether or the extent to which the claimants' desired use of tax lot 4001 was allowed under the laws in effect when the claimants acquired that tax lot in 1973, it is not possible to substantiate the specific dollar amount by which the land use regulations have reduced the fair market value of the subject property. Nevertheless, based on the evidence in the record for this claim, the department determines that the fair market value of the subject property has been reduced to some extent as a result of land use regulations enforced by the Commission or the department.

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 14, ORS 215 and OAR 660, division 33, which Hood River County has implemented through its current EFU zone. With the exception of applicable provisions of ORS 215, including the interim land use planning goals in effect when the claimants acquired tax lot 4001 on December 28, 1973, and provisions of Goal 3, ORS 215 and OAR 660 in effect when the claimants acquired tax lot 4000 on August 3, 1988, these 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. With the exception of applicable provisions of ORS 215, including interim land use planning goals in effect when the claimants acquired tax lot 4001 in 1973; and the provisions of Goal 3, ORS 215 and OAR 660 in effect in 1988 when the claimants acquired tax lot 4000, the general statutory, goal and rule restrictions on division and development of the claimants' property were enacted or adopted after the claimants acquired the subject property. Accordingly, these laws are not exempt under ORS 197.352(3)(E) to the extent they were not in effect when the claimants acquired the property. Provisions of ORS 215 in effect when the claimants acquired tax lot 4001 in 1973, and the provisions of Goal 3, ORS 215 and OAR 660 in effect when the claimants acquired tax lot 4000 in 1988 are exempt and will continue to apply to the subject property. As discussed in Section V.(2) of this report, the claimants' desired use of tax lot 4000 was prohibited by the laws in effect when they acquired tax 4000 in 1988.

Laws in effect when the claimants acquired the subject property are 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 property that have not been identified in the claim. In some cases, it will not be possible to know which laws apply to a use of the subject property until there is a specific proposal for that use. When the claimants seek a building or development permit to carry out a specific use, it may become evident that other state laws apply to that use. 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 laws that restrict the use of the subject 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 subject 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, neither the Commission nor the department has enforced laws enacted or adopted after the claimants acquired tax lot 4000 that restrict the claimants' use of tax lot 4000 relative to uses permitted when they acquired that it. Therefore, no laws enforced by the Commission or the department have the effect of reducing the fair market value of tax lot 4000. The department further finds laws enforced by the Commission or the department restrict the claimants' desired use of tax lots 4001, 4200 and 4300. 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 \$11,418,033. 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 tax lots 4001, 4200 and 4300 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 James and Ella Hasegawa to use the subject property for a use permitted at the time they acquired tax lots 4200 and 4300 on August 3, 1962, and tax lot 4001 on December 28, 1973.

Conclusions

Based on the record before the department, the department recommends that the claim for tax lot 4000 be denied because the claimants have not established that they are entitled to relief under ORS 197.352(1) as to tax lot 4000 as a result of land use regulations enforced by the Commission or the department because the claimants' desired use was prohibited on tax lot 4000 when the claimants acquired it in 1988.

Based on the record, the department further recommends that the claim be approved as to tax lots 4001, 4200 and 4300, 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 James and Ella Hasegawa's division and development of the subject property as described in Section I of this report, except for that portion of the desired division and development located within tax lot 4000: applicable provisions of Goals 3 and 14, ORS 215 and OAR 660, division 33, enacted or adopted after the claimants acquired each of the subject tax lots. These 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 tax lots 4200 and 4300 on August 3, 1962; and only to the extent that use was permitted when they acquired tax lot 4001 on December 28, 1973. The department acknowledges that the relief to which the claimants are entitled under ORS 197.352 for tax lot 4001 may not allow them to use this tax lot for their desired use.

2. The action by the State of Oregon provides the state's authorization to the claimants to use tax lots 4001, 4200 and 4300 for the use described in this report, subject to the standards in effect when they acquired tax lots 4200 and 4300 on August 3, 1962; and subject to the standards in effect when they acquired tax lot 4001 on December 28, 1973. On December 28, 1973, tax lot 4001 was subject to the provisions of ORS 215, including the interim planning goals set forth at ORS 215.515.

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 January 9, 2007. 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.