

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. M129837
(BALLOT MEASURE 37) OF)	
Terry Emmert, CLAIMANT)	

Claimant: Terry Emmert (the Claimant)

Property: Township 2S, Range 3E, Tax lot 200 in Section 18;
Township 2S, Range 3E, Tax lot 300 in Sections 17 and 18; and
Township 2S, Range 3E, Tax lot 390 in Sections 19 and 20
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 denied for the prime farm land portion of the subject property 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 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 Terry Emmert's development of a planned unit development containing no more than a proportionate number of the requested dwellings on the non-prime farm land portion of the property together with accessory recreational and commercial uses: applicable provisions of Goals 3 and 14, ORS 215 and OAR 660, division 33, enacted or adopted after August 30, 1974. These land use regulations will not apply to the claimant only to the extent necessary to allow him to use the non-prime farm land portion of the subject property for the use described in this report, and only to the extent that use was permitted when he acquired that property on August 30, 1974.

2. The action by the State of Oregon provides the state's authorization to the claimant to use only the non-prime farm land portion of the subject property for the use described in this report, subject to the standards in effect on August 30, 1974. On that date, that portion of the property was subject to the applicable provisions of ORS 215 then in effect, including the interim planning goals set forth in ORS 215.515 (1973 edition).

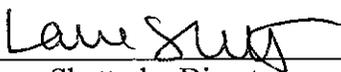
3. To the extent that any law, order, deed, agreement or other legally enforceable public or private requirement provides that the subject property may not be used without a permit, license or other form of authorization or consent, the order will not authorize the use of the property unless the claimant 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 subject property by the claimant 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) (which specifically include Goal 7 and regulations implementing Goal 7).

5. Without limiting the generality of the foregoing terms and conditions, in order for the claimant to use the subject property, it may be necessary for him 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 claimant 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 claimant.

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

FOR DLCD AND THE LAND
CONSERVATION AND
DEVELOPMENT COMMISSION:


Lane Shetterly, Director

DLCD
Dated this 6th day of February, 2007.

FOR the DEPARTMENT OF
ADMINISTRATIVE SERVICES:


David Hartwig, Administrator

DAS, State Services Division
Dated this 6th day of February, 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

February 6, 2007

STATE CLAIM NUMBER: M129837

NAME OF CLAIMANT: Terry Emmert

MAILING ADDRESS: 1181 SE Highway 224
Clackamas, Oregon 97012

PROPERTY IDENTIFICATION: Township 2S, Range 3E,
Tax lot 200 in Section 18;
Tax lot 300 in Sections 17 and 18; and
Tax lot 390 in Sections 19 and 20
Clackamas County

OTHER CONTACT INFORMATION: DJ Bleu
43900 SE Music Camp Road
Sandy, Oregon 97055

OTHER INTEREST IN PROPERTY: Harvest Capital Company
PO Box 579
Canby, Oregon 97013

DATE RECEIVED BY DAS: August 10, 2006

180-DAY DEADLINE: February 6, 2007

I. SUMMARY OF CLAIM

The claimant, Terry Emmert, seeks compensation in the amount of \$13,333,000 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 claimant desires compensation or the right to develop a planned unit development on the 146.45-acre subject property containing up to 205 dwellings together with accessory recreational and commercial uses. The subject property is located at 15350 S. Springwater Road, on the south side of the Clackamas River, near Carver, 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.

The 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 Terry Emmert's development of a planned unit development containing no more than a proportionate number of the requested dwellings on the non-prime farm land portion of the property (approximately 26 acres) together with accessory recreational and commercial uses: applicable provisions of Statewide Planning Goals 3 (Agricultural Lands) and Goal 14 (Urbanization), ORS 215 and Oregon Administrative Rules (OAR) 660, division 33, enacted or adopted after August 30, 1974. These laws will not apply to the claimant only to the extent necessary to allow him to use the non-prime farm land portion of the subject property for the use described in this report, and only to the extent that use was permitted when he acquired the property on August 30, 1974.

For the prime farm land portion of the subject property, the department has determined that the claim is not valid because neither the Land Conservation and Development Commission (the Commission) nor the department has enforced laws that restrict the claimant's use of private real property relative to uses permitted at the time the he acquired the subject property on August 30, 1974. (See the complete recommendation in Section VI. of this report).

III. COMMENTS ON THE CLAIM

Comments Received

On October 27, 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, seven written comments were received in response to the 10-day notice.

Most aspects of the comments do 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.

Two of the comments are relevant to whether state land use regulations that are alleged to restrict the claimant's use of the subject property have the effect of reducing the fair market value of the property. The comments have been considered by the department in preparing this report. (See the comment letters 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 August 10, 2006, for processing under OAR 125, division 145. The claim identifies Goal 3 and Clackamas County's Exclusive Farm Use (EFU) zoning as the basis for the claim. Only laws that were enacted or adopted prior to December 2, 2004, are the basis for this claim.

Conclusions

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

V. ANALYSIS OF CLAIM

1. Ownership

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

Findings of Fact

The claimant, Terry Emmert, acquired an interest in the subject property on August 30, 1974, as reflected by a land sale contract included with the claim. The Clackamas County Assessor's Office confirms the claimant's current ownership of the subject property.

Conclusions

The claimant, Terry Emmert, is an "owner" of the subject property as that term is defined by ORS 197.352(11)(C), as of August 30, 1974.¹

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 claimant's use of private real property in a manner that reduces the fair market value of the

¹ The subject property is adjacent to the Clackamas River. Nothing in this report or the State's order for this claim constitutes any determination of ownership by the State of Oregon as to submerged or submersible lands, or as to public rights to the use of waters of the state.

property relative to how the property could have been used at the time the claimant or a family member acquired the property.

Findings of Fact

The claim indicates that Goal 3 and the county's EFU zone do not permit the claimant's desired use. He also includes "any law or rule applied after August 31, 1974, the date of purchase."

The claim is based generally on the applicable provisions of state law that require EFU zoning and restrict uses on EFU-zoned land. The claimant's property is zoned EFU as required by Goal 3, in accordance with ORS 215 and OAR 660, division 33, because the claimant's property is "agricultural land" as defined by Goal 3.² Goal 3 became effective on January 25, 1975, and required that agricultural land 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 ORS 215.283(1)(f). OAR 660-033-0130(4) (applicable to non-farm dwellings) became effective on August 7, 1993, and was amended to comply with ORS 215.284(4) on March 1, 1994. The Commission subsequently adopted amendments to comply with House Bill 3326 (Chapter 704, Oregon Laws 2001, effective on January 1, 2002), which were effective on May 22, 2002. (See administrative rule history for OAR 660-033-0100, -0130 and -0135.)

The claimant acquired the subject property on August 30, 1974, 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 Clackamas County as R-30, which allowed residential subdivisions with 30,000-square-foot lots and Planned Unit Developments with residential and accessory commercial and recreational uses.

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*

² The claimant's property is "agricultural land" because it contains Natural Resources Conservation Service (NRCS) Class I-IV soils.

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 claimant’s desired use includes subdivision of his land. If the claimant had sought to create that use in 1974, as a matter of law, the use would have been subject to the interim planning goals at ORS 215.515.³

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 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. According to the Clackamas County soil survey, about 82 percent (120 acres) of the soils on the 146.45-acre property are rated as “prime” by the Natural Resource Conservation Service (NRCS).⁴ The non-prime farmland portion of the property is found in the northern wooded portion of the property along the Clackamas River roughly where tax lot 200 is located. The prime farm land portion is between S. Springwater Road and the northern wooded portion of the property roughly where tax lots 300 and 390 are located.⁵

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

For the non-prime farm land portion of the property, no information has been provided establishing whether or to what extent the claimant’s desired division of the subject property for

³ 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).

⁴ NRCS soil survey for Clackamas County.

⁵ The claimant has submitted additional soils information for tax lots 300 and 390 prepared by a soil scientist which purports to show that these tax lots include less soils rated as prime farmland than identified by the NRCS survey for Clackamas County. However, these tax lots still include significant blocks of prime farmland soils. The exact acreage of non-prime farmland soils subject to this waiver can be determined at the time the claimant applies to the county for the uses permitted at the time he acquired the subject property.

residential development complies with the interim planning goals set forth in ORS 215.515 (1973 edition) in effect at the time the claimant acquired the property on August 30, 1974. In particular, it is unclear whether division and development of this portion of the property could satisfy the interim goal requirement to “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”; or “to develop a timely, orderly and efficient arrangement of public facilities and services to serve as a framework for urban and rural development.”

For the prime farm land portion of the property, the claim does not establish that the approval of the proposed lots or parcels each for residential use complies with the interim planning goals. To the contrary, and in particular, the desired division and development of the “prime” farm land would not “conserve prime farm lands for the production of crops” as required by the interim goals at the time the claimant acquired the subject property in 1974.

Conclusions

The current zoning requirements, minimum lot size and dwelling standards established by Goals 3 and 14, ORS 215 and OAR 660, division 33, were all enacted or adopted after the claimant acquired the subject property in 1974 and do not allow the desired division or development of the non-prime farm land portion of the property. However, the claim does not establish whether or to what extent the claimant desired use of this portion of the subject property complies with the interim planning goals in effect when he acquired the property on August 30, 1974.

Also, on August 30, 1974, the “interim” land use goals set forth in ORS 215.515 required the conservation of prime farm land for the production of crops. About 82 percent of the claimant’s 146.45-acre property is composed of very limited farm land soils rated as “prime” and thus this portion of the subject property could not be divided for residential use under the “interim” land use goals applicable in 1974.

For the prime farm land portion and based on the facts of this claim, dividing the prime farm land portion of the property into parcels of less than one acre each for residential use does not “conserve prime farm lands for the production of crops,” “preserve the quality of the . . . land resources of the state,” “provide for an orderly and efficient transition from rural to urban land use,” “protect life and property in areas subject to floods” or provide for “a timely, orderly and efficient arrangement of public facilities and services” as required by ORS 215.515 (1973 edition). Thus, the requested use of this portion of the property would not have been permitted under the standards in effect when the claimant acquired the subject property. Therefore, the department determines that the current land use regulations applicable to the subject property do not restrict its use relative to the uses allowed when the claimant acquired the property in 1974.

For the non-prime farm land portion 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 claimant has identified. There may be other laws that currently apply to the claimant’s use of this portion of the subject property, and that may continue to apply to the claimant’s 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 claimant 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 \$13,333,000 as the reduction in the subject property's fair market value due to the regulation(s) that restrict the claimant's desired use of the property. This amount is based on the difference between the purchase price of the land its expected value if developed as proposed by the claimant.

Conclusions

As explained in Section V.(1) of this report, the claimant is Terry Emmert who acquired the subject property on August 30, 1974.

For the non-prime farm land portion of the property under ORS 197.352, the claimant 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 the claimant acquired the subject property restrict the claimant's desired use of the non-prime farm land portion of the property. The claimant estimates that the effect of the regulation(s) on the fair market value of the subject property is a reduction of \$13,333,000.

Without an appraisal or other documentation and without verification of whether or the extent to which the claimant's desired use of the subject property was allowed under the standards in effect when the claimant 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.

For the prime farm land portion of the property and as explained in section V.(2) of this report, current land use regulations do not restrict the use of the subject property relative to the uses allowed when the claimant acquired the property in 1974. Land use regulations enacted or adopted by the state since the claimant acquired the subject property, relating to the desired division and development of this portion of the property, do not have "the effect of reducing the fair market value of this portion of the property, or any interest therein" relative to the uses allowed in 1974 because the claimant could not divide the prime farm land portion of the subject property when it was acquired in 1974. Thus, the claimant is not due compensation under ORS 197.352.

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 Clackamas 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 on August 30, 1974, these state land use regulations were not in effect when the claimant acquired the property.

It appears that tax lot 200 is located within the FEMA flood zone of the Clackamas River, based on information from Clackamas County's GIS website. Goal 7 (Areas Subject to Natural Disasters and Hazards) requires local governments to adopt measures to avoid development in hazard areas. Local regulations that meet the minimum National Flood Insurance Program (NFIP) requirements are deemed to comply with Goal 7. Goal 7 and regulations implementing Goal 7 are exempt under ORS 197.352(3)(B) as regulations restricting or prohibiting activities for the protection of public health and safety.

Conclusions

For the non-prime farm land portion of the property and without a specific development proposal for the subject property, it is not possible for the department to determine all the laws that may apply to a particular use of the property, or whether those laws may fall under one or more of the exemptions under ORS 197.352. It appears that, with the exception of provisions of ORS 215 in effect on August 30, 1974, the general statutory, goal and rule restrictions on division and development of the claimant's property were not in effect when the claimant acquired this portion of the property. As a result, these laws are not exempt under ORS 197.352(3)(E). Provisions of ORS 215, including the interim statewide planning goals in effect when the claimant acquired the subject property on August 30, 1974, are exempt under ORS 197.352(3)(E) and will continue to apply to the property. In addition, Goal 7 and regulations implementing Goal 7 are regulations that restrict or prohibit activities to protect public health and safety. To the extent that Goal 7 and such regulations restrict or prohibit the use of the subject property, they are exempt under ORS 197.352(B).

Other laws in effect when the claimant acquired the subject property are also exempt under ORS 197.352(3)(E) and will continue to apply to the claimant's use of the property. There may be other laws that continue to apply to the claimant'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 the claimant 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 claimant has 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 claimant should be aware that the less information he has 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 his use of the subject property.

For the prime farm land portion of the property, it appears that the general statutory, goal and rule restrictions on residential development and use of farm land apply to the claimant's use of the subject property and with the exception of applicable provisions of ORS 215 in effect when the claimant acquired the property, these laws are not exempt under ORS 197.352(3)(E). However, as discussed in Section V.(2) of this report, these laws do not restrict the use of the subject property relative to uses permitted when the claimant acquired the property on August 30, 1974, because the claimant's desired use was not allowed under the provisions of ORS 215 in effect on that date.

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

For the prime farm land portions of the property and based on the current record, the claimant, Terry Emmert, is not entitled to relief under ORS 197.352. Department staff recommends that this claim be denied because neither the Commission nor the department has enforced laws enacted or adopted after the claimant acquired the prime farm land portion of the property that restrict the claimant's use of the claimant's private real property relative to uses permitted at the time he acquired the property on August 30, 1974.

For the non-prime farm land portion of the property and based on the findings and conclusions set forth in this report, laws enforced by the Commission or the department restrict the claimant's desired use of this portion of the subject property. The claim asserts that existing land use regulations enforced by the Commission or the department have the effect of reducing the fair market value of the subject property by \$13,333,000. 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 claimant's desired use of the subject property was allowed under the standards in effect when he 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 Terry Emmert to use the non-prime farm land portion of the property for a use permitted at the time he acquired the property on August 30, 1974.

Conclusions

For the non-prime farm land portion of the property and based on the record, the department recommends that the claim be approved for this portion of the property, subject to the following terms:

1. In lieu of compensation under ORS 197.352, the State of Oregon will not apply the following laws to Terry Emmert's development of a planned unit development containing no more than a proportionate number of the requested dwellings on the non-prime farm land portion of the property together with accessory recreational and commercial uses: applicable provisions of Goals 3 and 14, ORS 215 and OAR 660, division 33, enacted or adopted after August 30, 1974. These land use regulations will not apply to the claimant only to the extent necessary to allow him to use the non-prime farm land portion of the subject property for the use described in this report, and only to the extent that use was permitted when he acquired that property on August 30, 1974.
2. The action by the State of Oregon provides the state's authorization to the claimant to use only the non-prime farm land portion of the subject property for the use described in this report, subject to the standards in effect on August 30, 1974. On that date, that portion of the property was subject to the applicable provisions of ORS 215 then in effect, including the interim planning goals set forth in ORS 215.515 (1973 edition).
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 claimant 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 subject property by the claimant 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) (which specifically include Goal 7 and regulations implementing Goal 7).
5. Without limiting the generality of the foregoing terms and conditions, in order for the claimant to use the subject property, it may be necessary for him 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 claimant 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 claimant.

VII. COMMENTS ON THE DRAFT STAFF REPORT

The department issued its draft staff report on this claim on January 16, 2007. OAR 125-145-0100(3), provided an opportunity for the claimant or the claimant's 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.