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 COMPENSATION UNDER ORS 197.352 (BALLOT MEASURE 37) OF James C. Miller III, CLAIMANT	))))	FINAL ORDER CLAIM NO. M129998

Claimant: James C. Miller III (the Claimant)

Property: Township 38S, Range 2E, Section 25: tax lots 900, 901 and 902
Township 38S, Range 2E, Sections 35 and 36: tax lot 7300
Township 38S, Range 3E, Section 31, Tax lots 7000, 7001, 7002, 7003 and 7101
Township 39S, Range 2E, Section 1: tax lots 200 and 300
Township Section 2: tax lots 100 and 101
Jackson 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, as to a 78.73-acre portion of tax lot 200, 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 the remaining properties 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 Miller's division of of tax lots 100, 101, an 80-acre portion of 200, 300, 900, 901, 902, 7000, 7001, 7002, 7003, 7101 and 7300: applicable provisions of Goals 3 and 4, ORS 215 and OAR 660, divisions 6, and 33, enacted or adopted after the claimant acquired each of the subject tax lots. These laws will not apply to the claimant only to the extent necessary to allow him to use tax lots 100, 101, an 80-acre portion of 200, 300, 900, 901, 902, 7000, 7001, 7002, 7003, 7101 and 7300 for the use described in this report, and only to the extent that use was

permitted when he acquired tax lots 100, 101, an 80-acre portion of 200, 300, 900, 901, 902, 7000, 7002, 7003 and 7300 on October 25, 1974; tax lot 7101 on April 14, 1980; and tax lot 7001 on January 8, 1988.

2. The action by the State of Oregon provides the state's authorization to the claimant to use the subject property for the use described in this report, subject to the standards in effect on October 25, 1974, for tax lots tax lots 100, 101, an 80-acre portion of 200, 300, 900, 901, 902, 7000, 7002, 7003 and 7300; April 14, 1980, for tax lot 7101; and January 8, 1988, for tax lot 7001.

On October 25, 1974, tax lots 100, 101, an 80-acre portion of 200, 300, 900, 901, 902, 7000, 7002, 7003 and 7300 were subject to the applicable provisions of ORS 215 then in effect, including the interim planning goals set forth in ORS 215.515 (1973 edition). On April 14, 1980, tax lot 7101 was to compliance with Goal 4. On January 8, 1988, tax lot 7001, was subject to compliance with Goal 4 and OAR 660, division 6, as implemented through Jackson County's acknowledged forest zone.

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).

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 March, 2007.

FOR the DEPARTMENT OF ADMINISTRATIVE SERVICES:

David Hartwig, Administrator
DAS, State Services Division
Dated this 6th day of March, 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

March 6, 2007

STATE CLAIM NUMBER:	M129998
NAME OF CLAIMANT:	James C. Miller III
MAILING ADDRESS:	PO Box 3512 Ashland, Oregon 97520
PROPERTY IDENTIFICATION:	Township 38S, Range 2E Section 25: tax lots 900, 901 and 902 Sections 35 and 36: tax lot 7300 Township 38S, Range 3E, Section 31 Tax lots 7000, 7001, 7002, 7003 and 7101 Township 39S, Range 2E Section 1: tax lots 200 and 300 Section 2: tax lots 100 and 101 Jackson County
DATE RECEIVED BY DAS:	September 8, 2006
180-DAY DEADLINE:	March 7, 2007

I. SUMMARY OF CLAIM

The claimant, James Miller, seeks compensation in the amount of $20,024,400 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 divide the 2,368.68-acre subject property[1] into five- to ten-acre parcels and to develop a dwelling on each parcel.[2] The

[1] The subject property includes 13 contiguous tax lots. Tax lot 100 consists of 40 acres; tax lot 101 consists of 123.14 acres; tax lot 200 consists of 158.73 acres; tax lot 300 consists of 163.67 acres; tax lot 900 consists of 35.97 acres; tax lot 901 consists of 71.7 acres; tax lot 902 consists of 160 acres; tax lot 7000 consists of 232.72 acres; tax lot 7001 consists of 23.4 acres; tax lot 7002 consists of 140.9 acres; tax lot 7003 consists of 8.28 acres; tax lot 7101 consists of 14.94 acres; and tax lot 7300 consists of 1,187.23 acres.

[2] The claim also indicates that the claimant desires to sell or transfer the newly created parcels for development. In effect, the claimant requests 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

subject property is located at 11750, 11770, 12658 and 12736 Dead Indian Memorial Road and 2125, 2565 and 3003 Cove Road, near Ashland, in Jackson 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 James Miller's division of tax lots 100, 101, an 80-acre portion of 200, 300, 900, 901, 902, 7000, 7001, 7002, 7003, 7101 and 7300 into five- to ten-acre parcels and to his development of a dwelling on each parcel: applicable provisions of Statewide Planning Goals 3 (Agricultural Lands) and 4 (Forest Lands), ORS 215 and Oregon Administrative Rules (OAR) 660, divisions 6, and 33, enacted or adopted after the claimant acquired each of the subject tax lots. These laws will not apply to the claimant only to the extent necessary to allow him to use tax lots 100, 101, an 80-acre portion of 200, 300, 900, 901, 902, 7000, 7001, 7002, 7003, 7101 and 7300 for the use described in this report, and only to the extent that use was permitted when he acquired tax lots 100, 101, an 80-acre portion of 200, 300, 900, 901, 902, 7000, 7002, 7003 and 7300 on October 25, 1974; tax lot 7101 on April 14, 1980; and tax lot 7001 on January 8, 1988.

The department has further determined that the claim is not valid as to a 78.73-acre portion of tax lot 200 because the claimant's desired use of this tax lot was prohibited under the laws in effect when the claimant acquired a 38.23-acre portion of tax lot 200 on February 25, 1997 and a 40.5-acre portion of it on January 14, 1998 . (See the complete recommendation in Section VI. of this report.)

III. COMMENTS ON THE CLAIM

Comments Received

On December 11, 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.

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conveys the property before a new use allowed by the public entity is established, then the entitlement to relief will be lost."

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 September 8, 2006, for processing under OAR 125, division 145. The claim identifies the statewide planning goals; ORS 197 and 215; OAR 660; and provisions of Jackson County's land development 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 claimant, James Miller, acquired tax lots 100, 101, an 80-acre portion of 200, 300, 900, 901, 902, 7000, 7002, 7003 and 7300 from family member, Ben Gerwick, on October 25, 1974, as reflected by a warranty deed included with the claim.[3] On April 14, 1980, the claimant acquired tax lot 7101 from, J.H. Baxter and Company, as reflected by a warranty deed included with the

[3] In response to the draft staff report dated February 8, 2007, pursuant to OAR 125-145-0080, the claimant submitted a letter dated February 17, 2007, which included additional information regarding the claimant's acquisition of tax lot 200 and included documentation to support the claimant's assertion that he acquired an 80-acre portion of tax lot 200 from his family member, Ben Gerwick, in 1974.

claim. The claimant acquired tax lot 7001 from the Department of Interior, Bureau of Land Management (BLM) on January 8, 1988, as reflected by a quitclaim deed included with the claim. The claimant acquired a 38.23-acre portion of tax lot 200 on February 25, 1997, as reflected by a bargain and sale deed included with the claim, and acquired the remaining 40.5-acre portion of it on January 14, 1998, as reflected by a quitclaim deed included with the claim.

On May 18, 2003, the claimant transferred the subject property to a revocable trust, the James C. Miller III Trust, as reflected by bargain and sale deeds provided by Jackson County's Development Services. Tax lot 200 was then transferred to a revocable trust, the Charity and James Miller Trust, on October 14, 2003, as reflected by a bargain and sale deed included with the claim. The claimant subsequently transferred tax lots 7001, 7002 and 7101 to a revocable trust, the Hargrove and James C. Miller Trust, on November 10, 2003, as reflected by a bargain and sale deed included with the claim. On September 27, 2005, the Hargrove and James C. Miller Trust transferred the property back to the James C. Miller III Trust, as reflected by a bargain and sale deed provided by Jackson County's Development Services.[4]

The claimant's family member Ben Gerwick acquired an 80-acre portion of tax lot 200 and tax lot 300 on November 19, 1942; tax lot 101 on November 28, 1942; tax lots 7000 and 7002 on February 17, 1943; tax lots 100, 900, 902 and 7300 on March 22, 1943; and tax lots 901 and 7003 on February 1, 1944, as reflected by warranty deeds included in the claim. Ben Gerwick originally acquired tax lot 7001 on May 3, 1943; however, he transferred this tax lot to the BLM on February 1, 1965, as reflected by a quitclaim deed provided by Jackson County's Development Services. The Jackson County Assessor's Office confirms the claimant's current ownership of each of the subject tax lots.

Conclusions

The claimant, James Miller, is an "owner" of the subject property as that term is defined by ORS 197.352(11)(C), as of October 25, 1974, for tax lots 100, 101, an 80-acre portion of 200, 300, 900, 901, 902, 7000, 7002, 7003 and 7300; as of April 14, 1980, for tax lot 7101; as of January 8, 1988, for tax lot 7001; as of January 14, 1998, for a 120.5-acre portion of tax lot 200; and as of May 9, 2003, for a 39.5-acre portion of tax lot 200.

Ben Gerwick is a "family member" as defined by ORS 197.352(11)(A) and acquired an 80-acre portion of tax lot 200 and tax lot 300 on November 19, 1942; tax lot 101 on November 28, 1942; tax lots 7000 and 7002 on February 17, 1943; tax lots 100, 900, 902 and 7300 on March 22, 1943; and tax lots 901 and 7003 on February 1, 1944.

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

[4] Transfer of property to a revocable trust does not result in a change in ownership for purposes of ORS 197.352.

Findings of Fact

The claim indicates that the claimant desires to divide the 2,368.68-acre subject property into five- to ten-acre parcels and to develop a dwelling on each parcel, and that the use is not allowed under current land use regulations.[5]

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

Tax lots 100 and 101; a 120.5-acre portion of tax lot 200; and tax lots 300, 900, 901, 902, 7000, 7002, 7003 and 7300 are zoned EFU by Jackson County as required by Goal 3, in accordance with ORS 215 and OAR 660, division 33, because these are "agricultural land" as defined by Goal 3.[6] 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.)

A 38.23-acre portion of tax lot 200 and tax lots 7001 and 7101 are zoned Forest Resource (FR) by Jackson County as required by Goal 4, in accordance with ORS 215 and OAR 660, division 6, because these are "forest land" under Goal 4. Goal 4 became effective on January 25, 1975, and requires that forest land be zoned for forest use (see statutory and rule history under OAR 660-015-0000(4)). The forest land administrative rules (OAR 660, division 6) became effective on September 1, 1982, and ORS 215.705 to 215.755 and 215.780 became effective on

[5] The claimant summarily cites numerous state land use laws as applicable to this claim, but does not establish how the laws either apply to the claimant's desired use of the subject property or restrict its use with the effect of reducing its fair market value. On their face, most of the regulations either do not apply to the claimant's property or do not restrict the claimant's 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 claimant's use of the subject property, based on the claimant's description of the desired use.

[6] These portions of the subject property are "agricultural land" because they contain Natural Resources Conservation Service (NRCS) Class I–IV soils.

November 4, 1993 (Chapter 792, Oregon Laws 1993). OAR 660-006-0026 and 660-006-0027 were amended on March 1, 1994, to implement those statutes.

The claimant's family first acquired tax lots 100, 101, an 80-acre portion of 200, 300, 900, 901, 902, 7000, 7002, 7003 and 7300 in 1942, 1943 and 1944, prior to the adoption of the statewide planning goals and their implementing statutes and regulations. No county zoning applied to the subject property in 1942, 1943 and 1944.

The claimant acquired tax lot 7101 after the adoption of the statewide planning goals but before the Commission acknowledged the Jackson County's land use regulations to be in compliance with the statewide planning goals pursuant to ORS 197.250 and 197.251. At that time, it was zoned by Jackson County as Exclusive Farm (EF), which relied on the minimum lot size requirements of ORS 215.263, generally establishing a 10-acre minimum lot size for the creation of new lots or parcels. However, because the Commission had not acknowledged the county's plan and land use regulations when the claimant acquired tax lot 7101 on April 14, 1980, the statewide planning goals, and Goal 4 in particular, applied directly to tax lot 7101 when he acquired it.[7]

Goal 4 went into effect on January 25, 1975, and was intended to "conserve forest lands for forest uses" and required, "Lands suitable for forest uses shall be inventoried and designated as forest lands. Existing forest land uses shall be protected unless proposed changes are in conformance with the comprehensive plan." Those forest uses were defined as follows: "(1) the production of trees and the processing of forest products; (2) open space, buffers from noise, and visual separation of conflicting uses; (3) watershed protection and wildlife and fisheries habitat; (4) soil protection from wind and water; (5) maintenance of clean air and water; (6) outdoor recreational activities and related support services and wilderness values compatible with these uses; and (7) grazing land for livestock." Specifically, Goal 4 only allowed land divisions that would protect commercial forest lands for commercial forest uses. Dwellings in forest zones could only be allowed if found to be "necessary and accessory" to one of the enumerated forest uses listed in Goal 4.[8]

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[7] The statewide planning goals became effective on January 25, 1975, and were applicable to legislative land use decisions and some quasi-judicial land use decisions prior to the Commission's acknowledgment of each county's land use regulations. *Perkins v. City of Rajneeshpuram*, 300 Or 1 (1985); *Alexanderson v. Polk County*, 289 Or 427, *rev den* 290 Or 137 (1980); *Sunnyside Neighborhood Assn. v. Clackamas County*, 280 Or 3 (1977); *Jurgenson v. Union County*, 42 Or App 505 (1979); and *1000 Friends of Oregon v. Benton County*, 32 Or App 413 (1978). After the county's plan and land use regulations were acknowledged by the Commission, the statewide planning goals and implementing rules no longer directly applied to such local land use decisions. *Byrd v. Stringer*, 295 Or 311 (1983). However, statutory requirements continue to apply, and insofar as the state and local provisions are materially the same, the local provisions must be interpreted consistent with the substance of the goals and implementing rules. *Foster v. Polk County*, 115 Or App 475 (1992); *Kenagy v. Benton County*, 115 Or App 131 (1992).

[8] Goal 4 prohibited uses that were not enumerated by Goal 4 as permissible uses for forest lands as well as those that were not necessary and accessory to an enumerated forest use. *Lamb v. Lane County*, 7 Or LUBA 137 (1983). Dwellings in forest lands were required to be "necessary and accessory" to show that such dwellings complied with the Goal 4 requirement that local land use regulations must "conserve forest lands for forest uses." *1000 Friends v. LCDC (Curry County)*, 301 Or 447 (1986). A dwelling that may "enhance" forest uses is not "necessary and accessory" to a forest use to the extent required by Goal 4. *1000 Friends of Oregon v. LCDC (Lane County)*, 305 Or 384 (1988). For additional guidance, the Goal 4 provisions were interpreted under OAR 660, division 6, effective on September 1, 1982, in *1000 Friends of Oregon v. LCDC (Lane County)* and in *1000 Friends v. LCDC (Curry County)*.

No information has been presented in the claim to establish that the claimant's desired division and development of tax lot 7101 comply with the Goal 4 standards in effect when the claimant acquired it in 1980.

The claimant acquired tax lot 7001 on January 8, 1988. At that time, that tax lot was subject to Jackson County's acknowledged forest zone.[9] When the claimant acquired tax lot 7001, the desired division and development of the property would have been governed by the applicable provisions of Goal 4 and OAR 660, division 6, as implemented through the county's acknowledged forest zone.[10]

When the claimant acquired a 38.23-acre portion of tax lot 200 on February 25, 1997 and a 40.5-acre portion on January 14, 1998, the property was subject to the state land use regulations currently in effect, as described above.

Conclusions

The current zoning requirements, minimum lot size and dwelling standards established by Goals 3 and 4, ORS 215 and OAR 660, divisions 6, and 33, were all enacted or adopted after the claimant's family acquired tax lots 100, 101, an 80-acre portion of 200, 300, 900, 901, 902, 7000, 7002, 7003 and 7300 in 1942, 1943 and 1944; and after the claimant acquired tax lot 7101 in 1980 and tax lot 7001 in 1988, and do not allow the desired division or development of the property. However, the claim does not establish whether or to what extent the claimant's desired use of tax lot 7101 complies with the standards for land divisions and development under Goal 4 in effect when the claimant acquired tax lot 7101 on April 14, 1980, nor does the claim establish whether or to what extent the claimant's desired use of tax lot 7001 complies with the standards for land divisions and development in Jackson County's acknowledged forest zone and comprehensive plan in effect when the claimant acquired tax lot 7001 on January 8, 1988.

Laws in effect when the claimant acquired a 78.73-acre portion of tax lot 200 in 1997 and 1998 prohibited the claimant's desired division and development of it. Laws enacted or adopted since the claimant acquired a 78.73-acre portion tax lot 200 in 1997 and 1998 do not restrict the claimant's desired use of the property relative to when the claimant acquired the 38.23-acre portion in 1997 and the 40.5-acre portion in 1998.

This report addresses only those state laws that are identified in the claim, or that the department is certain apply to the subject property, based on the use that the claimant has identified. There may be other laws that currently apply to the claimant's use 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

[9] Jackson County's farm and forest zones were acknowledged by the Commission for compliance with Goals 3 and 4 on May 16, 1993.

[10] 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, insofar as the state and local provisions implement the requirements of the goals and rules, the local provisions must be interpreted consistent with the substance of the goals and implementing rules. *Forster v. Polk County*, 115 Or App 475 (1992) and *Kenagy v. Benton County*, 115 Or App 131 (1992).

until there is a specific proposal for that use. When the 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 $20,024,400 as the reduction in the subject property's fair market value due to the regulations that restrict the claimant's desired use of the property. This amount is based on a comparative market analysis included with the claim.

Conclusions

As explained in Section V.(1) of this report, the claimant is James Miller whose family acquired tax lots 100, 101, an 80-acre portion of 200, 300, 900, 901, 902, 7000, 7002, 7003 and 7300 in 1942, 1943 and 1944; and who acquired tax lot 7101 in 1980, tax lot 7001 in 1988, a 120.5-acre portion of tax lot 200 in 1998 and a 39.5-acre portion of tax lot 200 in 2003. No state laws enacted or adopted since the claimant acquired a 78.73-acre portion of tax lot 200 restrict the use of the property relative to the uses allowed in 1997 and 1998. Therefore, the fair market value of a 78.73-acre portion of tax lot 200 has not been reduced as a result of land use regulations enforced by the Commission or the department.

Under ORS 197.352, the claimant is due compensation for land use regulations that restrict the use of tax lots 100, 101, an 80-acre portion of 200, 300, 900, 901, 902, 7000, 7001, 7002, 7003, 7101 and 7300 and have the effect of reducing their fair market value. Based on the findings and conclusions in Section V.(2) of this report, laws enacted or adopted since the claimant's family acquired tax lots 100, 101, an 80-acre portion of 200, 300, 900, 901, 902, 7000, 7002, 7003 and 7300 and since the claimant acquired tax lots 7001 and 7101 restrict the claimant's desired use of the property. The claimant estimates that the effect of the regulations on the fair market value of the subject property is a reduction of $20,024,400.

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 property was acquired, 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 tax lots 100, 101, an 80-acre portion of 200, 300, 900, 901, 902, 7000, 7001, 7002, 7003, 7101 and 7300 has been reduced to some extent as a result of land use regulations enforced by the Commission or the department.

4. Exemptions Under ORS 197.352(3)

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

Findings of Fact

The claim is based on state land use regulations that restrict the use of the subject property, including applicable provisions of Goals 3 and 4, ORS 215 and OAR 660, divisions 6, and 33, which Jackson County has implemented through its current EFU and FR zones. These state land use regulations were not in effect when the claimant's family acquired tax lots 100, 101, an 80-acre portion of 200, 300, 900, 901, 902, 7000, 7002, 7003 and 7300. With the exception of provisions of Goal 4 adopted before the claimant acquired tax lot 7101 on April 14, 1980, and provisions of Goal 4 and OAR 660, division 6, adopted before the claimant acquired tax lot 7001 on January 8, 1988, these state land use regulations were not in effect when the claimant acquired tax lots 7001 and 7101. As set forth in Section V.(2) of this report, all of the state land use regulations restricting the claimant's desired use of a 78.73-acre portion of tax lot 200 were in effect when the claimant acquired the 38.23-acre portion in 1997 and the 40.5-acre portion in 1998.

Conclusions

Without a specific development proposal for the subject property, it is not possible for the department to determine all the laws that may apply to a particular use of the property, or whether those laws may fall under one or more of the exemptions under ORS 197.352. It appears that, with the exception of provisions of Goal 4 in effect when the claimant acquired tax lot 7101 in 1980, and the provisions of Goal 4 and OAR 660, division 6, in effect when the claimant acquired tax lot 7001 in 1988, the general statutory, goal and rule restrictions on residential division and development of the subject property were not in effect when the claimant's family acquired tax lots 100, 101, an 80-acre portion of tax lot 200, 300, 900, 901, 902, 7000, 7002, 7003 and 7300 in 1942, 1943 and 1944, and when the claimant acquired tax lot 7101 in 1980 and tax lot 7001 in 1988. As a result, these laws are not exempt under ORS 197.352(3)(E) to the extent they were enacted or adopted after the claimant or his family acquired each of these tax lots. Provisions of Goal 4 in effect when the claimant acquired tax lot 7101 in 1980 and provisions of Goal 4 and OAR, division 6, in effect when the claimant acquired tax lot 7001 in 1988 are exempt under ORS 197.352(3) (E) and will continue to apply to the property. Laws in effect when the claimant's family acquired tax lots 100, 101, an 80-acre portion of 200, 300, 900, 901, 902, 7000, 7002, 7003 and 7300 are exempt under ORS 197.352(3)(E) and do not provide a basis for compensation. In addition, other land use laws enacted or adopted for a purpose set forth in ORS 197.352(3)(A) to (D) are also exempt and would not provide a basis for compensation.

All of the state land use regulations that restrict the claimant's desired use of a 78.73-acre portion of tax lot 200 were in effect when the claimant acquired the 38.23-acre portion in 1997 and the 40.5-acre portion in 1998. Therefore, these state land use regulations are exempt under ORS 197.352(3)(E), which exempts laws in effect when the claimant acquired those portions of tax lot 200.

VI. FORM OF RELIEF

ORS 197.352(1) provides for payment of compensation to an owner of private real property if the Commission or the department has enforced one or more laws that restrict the use of the

property in a manner that reduces its fair market value. In lieu of compensation, the department may choose to not apply the law in order to allow the present owner to carry out a use of the property permitted at the time the present owner acquired the property. The Commission, by rule, has directed that if the department determines a claim is valid, the Director of the department must provide only non-monetary relief unless and until funds are appropriated by the legislature to pay claims.

Findings of Fact

Based on the findings and conclusions set forth in this report, laws enforced by the Commission or the department do not restrict the claimant's desired use of a 78.73-acre portion of tax lot 200 relative to what was permitted when the claimant that portion in 1997 and 1998 and do not reduce the fair market value of the property. All state laws restricting the use of a 78.73-acre portion of tax lot 200 are exempt under ORS 197.352(3)(E).

The department further finds laws enforced by the Commission or the department restrict the claimant's desired use of tax lots 100, 101, an 80-acre portion of 200, 300, 900, 901, 902, 7000, 7001, 7002, 7003, 7101 and 7300. 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 $20,024,400. 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 the claimant's family acquired tax lots 100, 101, an 80-acre portion of 200, 300, 900, 901, 902, 7000, 7002, 7003 and 7300 and when the claimant acquired tax lots 7001 and 7101. 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 100, 101, an 80-acre portion of 200, 300, 900, 901, 902, 7000, 7001, 7002, 7003, 7101 and 7300 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 Miller to use tax lots 100, 101, an 80-acre portion of 200, 300, 900, 901, 902, 7000, 7001, 7002, 7003, 7101 and 7300 for a use permitted at the time he acquired tax lots 100, 101, 300, 900, 901, 902, 7000, 7002, 7003 and 7300 on October 25, 1974; tax lot 7101 on April 14, 1980; and tax lot 7001 on January 8, 1988.

The claimant acquired tax lots 100, 101, an 80-acre portion of 200, 300, 900, 901, 902, 7000, 7002, 7003 and 7300 on October 25, 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 Jackson County as Exclusive Farm (EF), which relied on the minimum lot size requirements of ORS 215.263, generally establishing a 10-acre minimum lot size for the creation of new lots or parcels.

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 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.[11] 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).

No information has been provided establishing whether or to what extent the claimant's desired division of the subject property for residential development complies with the interim planning goals set forth in ORS 215.515 (1973 edition) in effect at the time the claimant acquired tax lots 100, 101, an 80-acre portion of 200, 300, 900, 901, 902, 7000, 7002, 7003 and 7300 on October 25, 1974.

In addition to the applicable provisions of ORS 215 then in effect, including the interim planning goals set forth in ORS 215.515 (1973 edition) in effect when the claimant acquired tax lots 100, 101, an 80-acre portion of 200, 300, 900, 901, 902, 7000, 7002, 7003 and 7300 on October 25, 1974, and other laws in effect when the claimant acquired the property, there may be other laws that apply to the claimant's use of the property.[12] In addition, the department notes that ORS 215.730 and OAR 660, division 6, particularly including OAR 660-006-0029, specify standards for siting dwellings in forest zones. These provisions include fire protection standards for dwellings and for surrounding forest lands. ORS 197.352(3)(B) specifically exempts regulations "restricting or prohibiting activities for the protection of public health and safety, such as fire and

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[11] 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).

[12] The department notes that several lot adjustments were approved by Jackson County in 2003 for tax lots 7000, 7001 and 7300. If the lot line adjustment increased the size of the tax lots, those new acres would be subject to the provisions of state laws and regulations in effect at that time.

building codes. . . ." Accordingly, siting standards for dwellings in forest zones in ORS 215.730 and OAR 660, division 6, are exempt under ORS 197.352(3)(B).

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, and depending on when they were enacted or adopted, may continue to apply to the claimant's property. In addition, some of these laws may be exempt under ORS 197.352(3)(A) to (D) and will continue to apply to the subject property on that basis.

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.

Conclusions

Based on the record and the foregoing findings and conclusions, the claimant has not established that he is entitled to relief under ORS 197.352(1) for a 78.73-acre portion of tax lot 200 as a result of land use regulations enforced by the Commission or the department because the claimant's desired use of that portion of tax lot 200 was prohibited under the laws in effect when he acquired it. Therefore, the department recommends that this claim be denied as to a 78.73-acre portion of tax lot 200. The department otherwise recommends that the claim be approved, subject to the following terms:

1. In lieu of compensation under ORS 197.352, the State of Oregon will not apply the following laws to James Miller's division of of tax lots 100, 101, an 80-acre portion of 200, 300, 900, 901, 902, 7000, 7001, 7002, 7003, 7101 and 7300: applicable provisions of Goals 3 and 4, ORS 215 and OAR 660, divisions 6, and 33, enacted or adopted after the claimant acquired each of the subject tax lots. These laws will not apply to the claimant only to the extent necessary to allow him to use tax lots 100, 101, an 80-acre portion of 200, 300, 900, 901, 902, 7000, 7001, 7002, 7003, 7101 and 7300 for the use described in this report, and only to the extent that use was permitted when he acquired tax lots 100, 101, an 80-acre portion of 200, 300, 900, 901, 902, 7000, 7002, 7003 and 7300 on October 25, 1974; tax lot 7101 on April 14, 1980; and tax lot 7001 on January 8, 1988.

2. The action by the State of Oregon provides the state's authorization to the claimant to use the subject property for the use described in this report, subject to the standards in effect on October 25, 1974, for tax lots tax lots 100, 101, an 80-acre portion of 200, 300, 900, 901, 902, 7000, 7002, 7003 and 7300; April 14, 1980, for tax lot 7101; and January 8, 1988, for tax lot 7001.

On October 25, 1974, tax lots 100, 101, an 80-acre portion of 200, 300, 900, 901, 902, 7000, 7002, 7003 and 7300 were subject to the applicable provisions of ORS 215 then in effect,

including the interim planning goals set forth in ORS 215.515 (1973 edition). On April 14, 1980, tax lot 7101 was to compliance with Goal 4. On January 8, 1988, tax lot 7001, was subject to compliance with Goal 4 and OAR 660, division 6, as implemented through Jackson County's acknowledged forest zone.

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).

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 February 8, 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.