



Oregon

Theodore R. Kulongoski, Governor

Department of Land Conservation and Development

635 Capitol Street NE, Suite 150

Salem, Oregon 97301-2524

Phone: (503) 373-0050

First Floor/Coastal Fax: (503) 378-6033

Second Floor/Director's Office Fax: (503) 378-5518

Third Floor/Measure 37 Fax: (503) 378-5318

Web Address: <http://www.oregon.gov/LCD>

June 29, 2007



To: Interested Persons

From: Lane Shetterly, Director

Re: Ballot Measure 37 (ORS 197.352) Claim Number M130587

*Claimants: Richard C. Kindwall, Trustee for Judy D. Kindwall Living Trust, and
Richard C. Kindwall Living Trust*

Enclosed, in regard to the above-referenced claim for compensation under Ballot Measure 37 (ORS 197.352), is a Revised Staff Report and Recommendation of the Department of Land Conservation and Development, and the Revised Final Orders.

This Revised Final Staff Report and Recommendation and the Revised Final Orders constitute the final decision on this claim. No further action will be taken on this matter.

BEFORE THE DEPARTMENT OF ADMINISTRATIVE SERVICES,
THE DEPARTMENT OF LAND CONSERVATION AND DEVELOPMENT OF
THE STATE OF OREGON

IN THE MATTER OF THE CLAIM FOR) FINAL ORDER A (Revised)
COMPENSATION UNDER ORS 197.352) CLAIM NO. M130587
(BALLOT MEASURE 37) OF)
Richard C. and Judy D. Kindwall, CLAIMANTS)

Claimants: Richard C. and Judy D. Kindwall (the Claimants)

Property: Township 7S, Range 5W, Section 17, Tax lot 702, Polk County, (the Property)

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

Claimants submitted the Claim to the State of Oregon under ORS 197.352. Under OAR 125-145-0010 *et seq.*, the Department of Administrative Services (DAS) referred the Claim to the Department of Land Conservation and Development (DLCD) as the regulating entity. This order is based on the record herein, including the Findings and Conclusions set forth in the Final Staff Report and Recommendation of DLCD (the DLCD Report) attached to and by this reference incorporated into this order.

ORDER

The Claim is approved as to laws administered by DLCD and the Land Conservation and Development Commission (LCDC) for the reasons set forth in the DLCD Report, and subject to the following terms:

1. In lieu of compensation under ORS 197.352, the State of Oregon will not apply the following laws to the claimants' development of a dwelling on tax lot 702: applicable provisions of Goals 3 and 4, ORS 215 and OAR 660, divisions 6, and 33, enacted or adopted after each claimant acquired the property. These land use regulations will not apply to the claimants only to the extent necessary to allow them to use tax lot 702 for the use described in this report, and only to the extent that use was permitted when they acquired tax lot 702 on July 24, 1991.
2. The action by the State of Oregon provides the state's authorization to the claimants to use tax lot 702 for the use described in this report, subject to the standards in effect on July 24, 1991. On July 24, 1991, tax lot 702 was subject to compliance with Goals 3 and 4, and OAR 660, divisions 5, and 6, as implemented through Polk County's acknowledged FF zone and the applicable provisions of ORS 215 then in effect.
3. To the extent that any law, order, deed, agreement or other legally enforceable public or private requirement provides that the subject property may not be used without a permit, license or other form of authorization or consent, the order will not authorize the use of the property unless the 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).

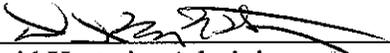
5. Without limiting the generality of the foregoing terms and conditions, in order for the claimants to use the property, it may be necessary for them to obtain a decision under ORS 197.352 from a city and/or county and/or metropolitan service district that enforces land use regulations applicable to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

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

FOR DLCD AND THE LAND
CONSERVATION AND
DEVELOPMENT COMMISSION:
Lane Shetterly, Director


Cora R. Parker, Deputy Director
DLCD
Dated this 28th day of June, 2007.

FOR the DEPARTMENT OF
ADMINISTRATIVE SERVICES:


David Hartwig, Administrator
DAS, State Services Division
Dated this 28th day of June, 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."

BEFORE THE DEPARTMENT OF ADMINISTRATIVE SERVICES,
THE DEPARTMENT OF LAND CONSERVATION AND DEVELOPMENT OF
THE STATE OF OREGON

IN THE MATTER OF THE CLAIM FOR) FINAL ORDER B
COMPENSATION UNDER ORS 197.352) CLAIM NO. M130587
(BALLOT MEASURE 37) OF)
Richard C. Kindwall, CLAIMANT)

Claimant: Richard C. Kindwall (the Claimant)

Property: Township 7S, Range 5W, Section 17, Tax lot 603, Polk 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 laws administered by DLCD and the Land Conservation and Development Commission (LCDC) for the reasons set forth in the DLCD Report.

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

FOR DLCDC AND THE LAND
CONSERVATION AND
DEVELOPMENT COMMISSION:


Lane Shetterly, Director
DLCDC
Dated this 28th day of June, 2007.

FOR THE DEPARTMENT OF
ADMINISTRATIVE SERVICES:


David Hartwig, Administrator
DAS, State Services Division
Dated this 28th day of June, 2007.

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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)

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 C (REVISED)
COMPENSATION UNDER ORS 197.352) CLAIM NO. M130587
(BALLOT MEASURE 37) OF)
Judy D. Kindwall, CLAIMANT)

Claimant: Judy D. Kindwall (the Claimant)

Property: Township 7S, Range 5W, Section 17, Tax lot 603, Polk County
(the property)

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

Claimant submitted the Claim to the State of Oregon under ORS 197.352. Under OAR 125-145-0010 *et seq.*, the Department of Administrative Services (DAS) referred the Claim to the Department of Land Conservation and Development (DLCD) as the regulating entity. This order is based on the record herein, including the Findings and Conclusions set forth in the Final Staff Report and Recommendation of DLCD (the DLCD Report) attached to and by this reference incorporated into this order.

ORDER

The Claim is approved as to laws administered by DLCD and the Land Conservation and Development Commission (LCDC) for the reasons set forth in the DLCD Report, and subject to the following terms:

1. In lieu of compensation under ORS 197.352, the State of Oregon will not apply the following laws to the claimant's division of tax lot 603 into two approximately 5.5-acre parcels or to her development of a dwelling on each resulting parcel: applicable provisions of Goals 3 and 4, ORS 215 and OAR 660, divisions 6, and 33, enacted or adopted the claimant acquired the property. These land use regulations will not apply to the claimant only to the extent necessary to allow her to use tax lot 603 for the use described in this report, and only to the extent that use was permitted when she acquired tax lot 603 on April 7, 1997. The department acknowledges that the relief to which Judy Kindwall is entitled under ORS 197.352 will not allow her to use tax lot 603 in the manner set forth in the claim.
2. The action by the State of Oregon provides the state's authorization to the claimant to use tax lot 603 for the use described in this report, subject to the standards in effect on April 7, 1997. On April 7, 1997, tax lot 603 was subject to the applicable provisions of

Goals 3 and 4, and OAR 660, divisions 6, and 33, as implemented through Polk County's acknowledged FF zone and the provisions of ORS 215 currently in effect.

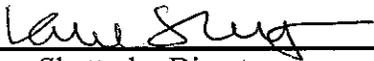
3. To the extent that any law, order, deed, agreement or other legally enforceable public or private requirement provides that the subject property may not be used without a permit, license or other form of authorization or consent, the order will not authorize the use of the property unless the claimant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

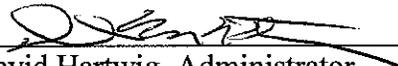
5. Without limiting the generality of the foregoing terms and conditions, in order for the claimant to use the property, it may be necessary for her to obtain a decision under ORS 197.352 from a city and/or county and/or metropolitan service district that enforces land use regulations applicable to the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

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

FOR DLCD AND THE LAND
CONSERVATION AND
DEVELOPMENT COMMISSION:


Lane Shetterly, Director
DLCD
Dated this 28th day of June, 2007.

FOR THE DEPARTMENT OF
ADMINISTRATIVE SERVICES:


David Hartwig, Administrator
DAS, State Services Division
Dated this 28th day of June, 2007.

NOTICE OF RIGHT TO APPEAL OR OTHER JUDICIAL RELIEF

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

1. Judicial review under ORS 183.484: Judicial review under ORS 183.484 may be obtained by filing a petition for review within 60 days from the service of this order. A petition for judicial review under ORS 183.484 may be filed in the Circuit Court for Marion County or the Circuit Court in the county in which you reside.
2. A cause of action under ORS 197.352 (Measure 37 (2004)): If a land use regulation continues to apply to the subject property more than 180 days after the present owner of the property has made written demand for compensation under ORS 197.352, the present owner of the property, or any interest therein, shall have a cause of action in the circuit court in which the real property is located.

(Copies of the documents that comprise the record are available for review at the Department's office at 635 Capitol Street NE, Suite 150, Salem, Oregon 97301-2540)

ORS 197.352 (BALLOT MEASURE 37) CLAIM FOR COMPENSATION
OREGON DEPARTMENT OF LAND CONSERVATION AND DEVELOPMENT
Revised Final Staff Report and Recommendation

June 28, 2007

STATE CLAIM NUMBER: M130587¹

NAMES OF CLAIMANTS: Richard C. and Judy D. Kindwall

MAILING ADDRESS: 14550 Orchard Knob Road
Dallas, Oregon 97338

PROPERTY IDENTIFICATION: Township 7S, Range 5W, Section 17
Tax lots 603 and 702
Polk County

OTHER CONTACT INFORMATION: Stephen F. Mannenbach
PO Box 220
Dallas, Oregon 97338

DATE RECEIVED BY DAS: November 6, 2006

180-DAY DEADLINE: May 5, 2007

I. SUMMARY OF CLAIM

The claimants, Richard and Judy Kindwall, seek compensation in the amount of \$260,000 for the reduction in fair market value as a result of land use regulations that are alleged to restrict the use of certain private real property. The claimants desire compensation or the right to divide 11.39-acre tax lot 603 into two approximately 5.5-acre parcels and to develop a dwelling on each resulting parcel, and to develop a dwelling on 6.3-acre tax lot 702. The subject property is located on James Howe Road, near Dallas, in Polk 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 for tax lot 702, and valid for Judy Kindwall as to tax lot 603. Department staff recommends that, in lieu of compensation,

¹ The Final Report and Orders for this claim were issued on May 2, 2007. Subsequently, the claimants' attorney provide the Department of Justice with compelling evidence that the November 1, 1973 deed for tax lot 603 included an incorrect legal description of that parcel. From this new evidence, the department determined that the Kindwall family, via Richard Kindwall, acquired all of tax lot 603, not just a portion of it, on November 1, 1973, and when Richard Kindwall transferred tax lot 603 to his wife, Judy Kindwall, in 1997, she acquired family ownership in the entire parcel, not just a portion of it. This required amending both the final report and final orders regarding the claim for tax lot 603.

the requirements of the following state laws enforced by the Land Conservation and Development Commission (the Commission) or the department not apply to Richard and Judy Kindwall's development of a dwelling on tax lot 702, and to Judy Kindwall's division of tax lot 603 into two approximately 5.5-acre parcels and her development of a dwelling on each resulting 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 claimants acquired tax lot 702 on July 24, 1991, and after Judy Kindwall acquired tax lot 603 on April 7, 1997. These land use regulations will not apply to the claimants only to the extent necessary to allow them to use the subject property for the uses described in this report, and only to the extent those uses were permitted when they acquired tax lot 702 on July 24, 1991, and when Judy Kindwall acquired tax lot 603 on April 7, 1997. The department acknowledges that the relief to which Judy Kindwall is entitled under ORS 197.352 will not allow her to use tax lot 603 in the manner set forth in the claim.

The department has also determined that the claim is not valid as to Richard Kindwall for tax lot 603 because he is not an owner of that tax lot. (See the complete recommendation in Section VI of this report.)

III. COMMENTS ON THE CLAIM

Comments Received

On March 22, 2007, pursuant to OAR 125-145-0080, the Oregon Department of Administrative Services (DAS) provided written notice to the owners of surrounding properties. According to DAS, one written comment was received in response to the 10-day notice.

The comment does not address whether the claim meets the criteria for relief under ORS 197.352. Comments concerning the effects a use of the subject property may have on surrounding areas are generally not something that the department is able to consider in determining whether to waive a state law. If funds do become available to pay compensation, then such effects may become relevant in determining which claims to pay compensation for instead of waive a state law. (See the comment letter in the department's claim file.)

IV. TIMELINESS OF CLAIM

Requirement

ORS 197.352(5) requires that a written demand for compensation be made:

1. For claims arising from land use regulations enacted prior to the effective date of Measure 37 (December 2, 2004), within two years of that effective date, or the date the public entity applies the land use regulation as an approval criterion 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 criterion, whichever is later.

Findings of Fact

This claim was submitted to DAS on November 6, 2006, for processing under OAR 125, division 145. The claim identifies OAR 660-015-0000(3) and 660-015-0000(4) 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

Claimant Richard Kindwall acquired tax lot 603 on November 1, 1973, as reflected by a deed included with the claim. On April 7, 1997, Richard Kindwall conveyed all of tax lot 603 to his wife, Judy Kindwall, as reflected by a deed included with the claim. On January 4, 2000, Judy Kindwall transferred tax lot 603 to the Judy D. Kindwall Living Trust, a revocable trust, as reflected by a deed included with the claim.² The Polk County Assessor’s Office confirms Judy Kindwall’s current ownership of tax lot 603.

The claimants acquired tax lot 702 on July 24, 1991, as reflected by a deed included with the claim. On January 4, 2000, the claimants each transferred an undivided one-half interest in tax lot 702 to revocable trusts, the Richard C. Kindwall Living Trust and the Judy D. Kindwall Living Trust.³ The Polk County Assessor’s Office confirms the claimants’ current ownership of tax lot 702.

Conclusions

The claimants, Richard and Judy Kindwall, are “owners” of tax lot 702 as that term is defined by ORS 197.352(11)(C), as of July 24, 1991. Claimant Judy Kindwall is an “owner” of tax lot 603 as that term is defined by ORS 197.352(11)(C), as of April 7, 1997. Richard Kindwall is a “family member” as that term is defined by ORS 197.352(11)(A) as to tax lot 603, and he acquired that property on November 1, 1973.

² Transfer of property to a revocable trust does not result in a change in ownership for purposes of ORS 197.352.

³ Transfer of property to a revocable trust does not result in a change in ownership for purposes of ORS 197.352.

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 11.39-acre tax lot 603 into two approximately 5.5-acre parcels and to develop a dwelling on each resulting parcel, and to develop 6.3-acre tax lot 702 with a dwelling, and that current state land use regulations prevent the desired use.

The claim is based generally on the applicable provisions of state law that require mixed farm-forest zoning and restrict uses on land zoned mixed farm-forest. The claimants' property is zoned by Polk County as Farm/Forest (FF), which is a mixed agricultural and forest land zone, as provided for by Goal 4 and the implementing provisions of OAR 660, division 6 (effective on February 5, 1990), subsequently amended on March 1, 1994, to comply with the provisions of House Bill 3661 (Chapter 792, Oregon Laws 1993).

Under OAR 660-006-0050, all the uses permitted under Goals 3 and 4 are allowed in mixed agriculture and forest zones except that for dwellings, either the Goal 3 or 4 standards are applicable based on the predominant use of the tract on January 1, 1993.⁴ Depending on the predominant use on January 1, 1993, the property is subject to either the requirements for dwellings applicable under EFU zoning required by Goal 3 and OAR 660, division 33, or forest zone provisions required by Goal 4 and OAR 660, division 6.

For land divisions, OAR 660-006-0055 authorizes the creation of new parcels based on the standards applicable to farm or forest zones that implement the minimum lot size specified in ORS 215.780. ORS 215.780(2)(a) authorizes counties to adopt minimum lot or parcel sizes smaller than 80 acres, subject to acknowledgement by the Commission. Under ORS 215.780(2)(a), the minimum lot size in Polk County's FF zone is 40 acres. The claimants' property cannot be divided into parcels smaller than 40 acres.

The Kindwall family first acquired tax lot 603 on November 1, 1973, after 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, tax lot 603 was zoned by Polk County as Acreage Residential 5 (AR-5), which allowed subdivisions of 5-acre parcels with one single-family dwelling per parcel.

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

⁴ No information was provided to the department regarding the predominant use of the subject property on January 1, 1993.

goals set forth in ORS 215.515 (1973 edition). *Petersen v. Klamath Falls*, 279 Or 249 (1977); see also, *Meeker v. Board of Commissioners*, 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 “[I]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 for tax lot 603 includes subdivision of their land. 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.

The “interim” land use goals were 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).⁵

No information has been provided establishing whether or to what extent the claimants’ 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 that the Kindwall family first acquired tax lot 603 on November 1, 1973.

The claimants acquired tax lot 702 on July 24, 1991. At that time, tax lot 702 was subject to Polk County’s acknowledged FF zone.⁶ When the claimants acquired tax lot 702, the claimants’ desired use of the property would have been governed by Goals 3 and 4, and OAR 660, divisions 5, and 6, as implemented through the county’s acknowledged FF zone and the applicable provisions of ORS 215 then in effect.⁷

⁵ Goal 4 replaced the interim goals with regard to forest resource land, and went into effect on January 25, 1975, “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.

⁶ Polk County’s FF zone was acknowledged by the Commission for compliance with Goals 3 and 4 on April 22, 1988.

⁷ 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

The claim does not establish whether or to what extent the claimants' desired development of tax lot 702 was allowed under the standards in effect when they acquired that tax lot on July 24, 1991.

Conclusions

The current zoning requirements, minimum lot size and dwelling standards established under Goal 4 for lands zoned for mixed farm-forest use and the statutory and rule restrictions under applicable provisions of ORS 215 and OAR 660, divisions 6, and 33, were all enacted or adopted after the Kindwall family first acquired tax lot 603 in 1973 and after the claimants acquired tax lot 702 in 1991, and do not allow the desired division or development of the property. However, the claim does not establish whether or to what extent the desired use of the subject property complies with the interim planning goals in effect when the Kindwall family acquired tax lot 603 on November 1, 1973, and with the standards for development under Goals 3 and 4 and OAR 660, divisions 5, and 6, as implemented through Polk County's acknowledged comprehensive plan and zoning regulations and the applicable provisions of ORS 215 in effect when the claimants acquired tax lot 702 on July 24, 1991.

The current zoning requirements, minimum lot size and dwelling standards established by Goals 3 and 4 and provisions applicable to land zoned for mixed farm-forest use in ORS 215 and OAR 660, divisions 6, and 33, were all enacted or adopted before Judy Kindwall acquired tax lot 603 on April 7, 1997. These land use regulations do not allow the division and development of the subject property. Laws enacted or adopted since Judy Kindwall acquired the subject property in 1997 do not restrict her desired use of tax lot 603 relative to when she acquired it in 1997.

As explained in Section V.(1) above, claimant Richard Kindwall is not an "owner" of tax lot 603 as that term is defined in ORS 197.352(11)(C). Therefore, no laws enforced by the Commission or the department restrict his use of tax lot 603 with the effect of reducing the fair market value of that tax lot.

3. Effect of Regulations on Fair Market Value

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

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).

In 1973, ORS 215.263 (1973 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) (1973 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.

Findings of Fact

The claim includes an estimate of \$260,000 as the reduction in the subject property's fair market value due to the regulations that restrict claimants' desired use of the property. This amount is based on the claimants' assessment of property value.

Conclusions

As explained in Section V.(1) of this report, the claimants are Richard and Judy Kindwall. The claimants acquired tax lot 702 on July 24, 1991. Judy Kindwall's family acquired tax lot 603 on November 1, 1973, and Judy Kindwall acquired tax lot 603 on April 7, 1997. No state laws enacted or adopted since Judy Kindwall acquired tax lot 603 restrict the use of the property relative to the uses allowed in 1997. Therefore, the fair market value of tax lot 603 has not been reduced as a result of land use regulations enforced by the Commission or the department.

Under ORS 197.352, the claimants are due compensation for land use regulations that restrict the use of tax lot 702, and Judy Kindwall is due compensation for land use regulations that restrict tax lot 603 and have the effect of reducing the fair market value of those portions of the property. Based on the findings and conclusions in Section V.(2) of this report, laws enacted or adopted since the claimants acquired tax lot 702 and since Judy Kindwall's family acquired tax lot 603 restrict the claimants' desired use of that parcel. The claimants estimate that the effect of the regulations on the fair market value of the entire subject property is a reduction of \$260,000.

Without an appraisal or other documentation and without verification of whether or the extent to which the claimants' desired use of the subject property was allowed under the standards in effect when they acquired tax lot 702 and when Judy Kindwall's family acquired tax lot 603, 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 702 and 603 have been reduced to some extent as a result of land use regulations enforced by the Commission or the department.

As explained in Section V.(1) of this report, Richard Kindwall is not an "owner" of tax lot 603 as that term is defined in ORS 197.352(11)(C). Therefore, no laws restrict his use of tax lot 603 with the effect of reducing the fair market value of the subject property.

4. Exemptions Under ORS 197.352(3)

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

Findings of Fact

The claim is based on state land use regulations that restrict the use of the subject property, including applicable provisions of Goals 3 and 4, ORS 215 and OAR 660, divisions 6, and 33, which Polk County has implemented through its current FF zone. With the exception of amendments enacted or adopted after July 24, 1991, for tax lot 702, these state land use regulations were in effect before the claimants acquired tax lot 702. With the exception of the

interim planning goals in effect when the Kindwall family first acquired tax lot 603 on November 1, 1973, these land use regulations were enacted or adopted after Judy Kindwall's family acquired the west portion of tax lot 603. All of these land use regulations were in effect when Judy Kindwall acquired tax lot 603 in 1997.

Conclusions

Without a specific development proposal for the subject property, it is not possible for the department to determine all the laws that may apply to a particular use of the property, or whether those laws may fall under one or more of the exemptions under ORS 197.352. It appears that the general statutory, goal and rule restrictions on division and development of tax lots 603 and 702 are not exempt under ORS 197.352(3)(E) only to the extent they were enacted or adopted after the Kindwall family acquired tax lot 603 on November 1, 1973, and after the claimants acquired tax lot 702 on July 24, 1991. Provisions of ORS 215, including interim statewide planning goals in effect when the Kindwall family acquired tax lot 603 on November 1, 1973, and provisions of Goals 3 and 4, ORS 215, and OAR 660 in effect when the claimants acquired tax lot 702 on July 24, 1991, are exempt under ORS 197.352(3)(E) and will continue to apply to the property.

All of the state land use regulations that restrict Judy Kindwall's desired use of tax lot 603 were in effect when she acquired it. Therefore, these state land use regulations are exempt under ORS 197.352(3)(E), which exempts laws in effect when the claimant acquired the subject property.

As explained in Section V.(1) of this report, Richard Kindwall is not an "owner" of tax lot 603 as that term is defined in ORS 197.352(11)(C). Therefore, the issue of whether any laws are exempt from ORS 197.352 is not relevant as to him for tax lot 603.

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 current 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 record, the department finds that the claim is not valid as to Richard Kindwall as to tax lot 603 because he is not an "owner" of that tax lot. In addition, laws enforced by the Commission or the department do not restrict claimant Judy Kindwall's desired use of tax lot 603 relative to what was permitted when she acquired it in 1997 and do not reduce the fair market value of that portion of the property. All state laws restricting the use of tax lot 603 are exempt under ORS 197.352(3)(E).

Based on the findings and conclusions set forth in this report, laws enforced by the Commission or the department restrict the claimants' desired use of tax lot 702 and Judy Kindwall's desired use of tax lot 603. 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 \$260,000. 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 the compensation due for this claim, it would also be necessary to verify whether or the extent to which the claimants' desired use of tax lots 702 and 603 was allowed under the standards in effect when the claimants acquired tax lot 702 and when Judy Kindwall's family acquired tax lot 603. 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 702 and 603 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 Richard and Judy Kimball to use tax lot 702 for a use permitted at the time they acquired it on July 24, 1991, and to allow Judy Kimball to use tax lot 603 for a use permitted at the time she acquired it on April 7, 1997.

At the time Judy Kindwall acquired tax lot 603, it was zoned FF by Polk County and subject to the current lot size and dwelling standards under Goals 3 and 4, ORS 215 and OAR 660, divisions 6, and 33, as described in Section V.(2) of this report.

In addition to the applicable provisions of ORS 215 in effect when the claimants acquired tax lot 702 on July 24, 1991, and the applicable provisions of Goals 3 and 4, ORS 215 and OAR 660, division 6, and 33, in effect when Judy Kindwall acquired tax lot 603 on April 7, 1997, and other laws in effect when either of the claimants acquired the subject property, there may be other laws that apply to the claimants' use of the property that have not been identified in the claim. The department notes that ORS 215.730 and OAR 660, division 6, particularly OAR 660-006-0029, include 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 building codes. . . ." To the extent they are applicable to the claimants' property, the siting standards for dwellings in forest zones in ORS 215.730 and OAR 660, division 6, are exempt under ORS 197.352(3)(B).

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, and depending on when they were enacted or adopted, may continue to apply to the claimants' 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 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 their 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.

Conclusions

Based on the record before the department, claimant Richard Kindwall has not established that he is entitled to relief under ORS 197.352(1) for tax lot 603 as a result of land use regulations enforced by the Commission or the department because he is not an owner of tax lot 603. Therefore, the department recommends that this claim be denied as to Richard Kindwall for tax lot 603.

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 the claimants' development of a dwelling on tax lot 702 and to Judy Kindwall's division of tax lot 603 into two approximately 5.5-acre parcels or to her development of a dwelling on each resulting parcel: applicable provisions of Goals 3 and 4, ORS 215 and OAR 660, divisions 6, and 33, enacted or adopted after each claimant acquired the property. These land use regulations will not apply to the claimants only to the extent necessary to allow them to use tax lot 702 for the use described in this report, and only to the extent that use was permitted when they acquired tax lot 702 on July 24, 1991, and to allow Judy Kindwall to use tax lot 603 for the use described in this report, and only to the extent that use was permitted when she tax lot 603 on April 7, 1997. The department acknowledges that the relief to which Judy Kindwall is entitled under ORS 197.352 will not allow her to use tax lot 603 in the manner set forth in the claim.
2. The action by the State of Oregon provides the state's authorization to the claimants to use tax lot 702 for the use described in this report, subject to the standards in effect on July 24, 1991; and to Judy Kindwall to use tax lot 603 for the use described in this report, subject to the standards in effect on April 7, 1997. On July 24, 1991, tax lot 702 was subject to compliance with Goals 3 and 4, and OAR 660, divisions 5, and 6, as implemented through Polk County's acknowledged FF zone and the applicable provisions of ORS 215 then in effect. On April 7, 1997, tax lot 603 was subject to the applicable provisions of Goals 3 and 4, and OAR 660, divisions 6, and 33, as implemented through Polk County's acknowledged FF zone and the provisions of ORS 215 currently in effect.
3. To the extent that any law, order, deed, agreement or other legally enforceable public or private requirement provides that the subject property may not be used without a permit, license or other form of authorization or consent, the order will not authorize the use of the property unless the claimants first obtain that permit, license or other form of authorization or consent. Such requirements may include, but are not limited to: a building permit, a land use decision, a "permit" as defined in ORS 215.402 or 227.160, other permits or authorizations from local, state or federal agencies and restrictions on the use of the subject property imposed by private parties.
4. Any use of the subject property by the claimants under the terms of the order will remain subject to the following laws: (a) those laws not specified in (1) above; (b) any laws enacted or enforced by a public entity other than the Commission or the department; and (c) those laws not

subject to ORS 197.352 including, without limitation, those laws exempted under ORS 197.352(3).

5. Without limiting the generality of the foregoing terms and conditions, in order for the claimants to use the 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 them.

VII. COMMENTS ON THE DRAFT STAFF REPORT

The department issued its draft staff report on this claim on April 10, 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.