



Oregon

Theodore R. Kulongoski, Governor

Department of Land Conservation and Development

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August 21, 2007

To: Interested Persons

From: Lane Shetterly, Director



Re: Ballot Measure 37 (ORS 197.352) Claim Number M130704

Claimants: Suzanne E. James

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

This Final Staff Report and Recommendation and the Final Order 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, AND
THE BOARD AND DEPARTMENT OF FORESTRY
OF THE STATE OF OREGON

IN THE MATTER OF THE CLAIM FOR) FINAL ORDER
COMPENSATION UNDER ORS 197.352) CLAIM NO. M130704
(BALLOT MEASURE 37) OF)
Suzanne E. James, CLAIMANT)

Claimant: Suzanne E. James (the Claimant)

Property: Township 3S, Range 3E, Section 20, Tax lot 100, Clackamas County
(the Property)

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

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

ORDER

The Claim is denied as to laws administered by the Oregon Department of Forestry or the Oregon Board of Forestry, for the reasons set forth in the ODF Report.

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

1. In lieu of compensation under ORS 197.352, the State of Oregon will not apply the following laws to Suzanne James' division of the 177.54-acre subject property into approximately 88 one- to ten-acre parcels, development of a dwelling and accessory structures on each resulting undeveloped parcel, extension of "existing adjacent county roads into the property" or extension of "public and private utilities into the property": applicable provisions of Goals 4, 11 and 14, ORS 215 and OAR 660, divisions 6, and 11. These land use regulations will not apply to the claimant only to the extent necessary to allow her to use the subject property for the use described in this report, and only to the extent that use was permitted when she acquired the property on August 16, 1971. Goal 11 will not apply only to the extent that it prohibits the claimant from establishing an urban level of public facilities and services to serve the development of the property. Goal 11 will continue to apply to public service providers seeking to extend or establish public facilities to serve the subject property.

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 August 16, 1971.

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 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 the claimant.

6. Nothing in this report or the state's final order for this claim constitutes any determination of ownership by the State of Oregon as to submerged or submersible lands, or as to public rights to the use of waters of the state.

This Order is entered by the Manager for the Measure 37 Services Division of the DLCDC as a final order of DLCDC and the Land Conservation and Development Commission under ORS 197.352, OAR 660-002-0010(8), and OAR 125, division 145, and by the Administrator for the State Services Division of the DAS as a final order of DAS under ORS 197.352, OAR 125, division 145, and ORS 293.

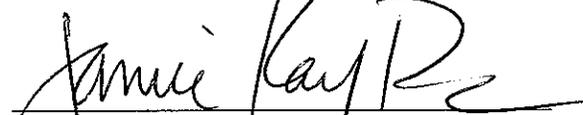
This Order is entered by the Oregon Board and Department of Forestry as a final order of the Board under ORS 197.352, OAR 629-001-0057, and OAR Chapter 125, division 145.

FOR DLCD AND THE LAND
CONSERVATION AND DEVELOPMENT
COMMISSION:

Lane Shetterly, Director


Michael Morrissey, Manager
Measure 37 Services Division, DLCD
Dated this 21st day of August, 2007.

FOR THE DEPARTMENT OF
ADMINISTRATIVE SERVICES:


Janice K. Dean, SSD Administrator
DAS, State Services Division
Dated this 21st day of August, 2007.

FOR THE OREGON BOARD OF
FORESTRY AND THE OREGON
DEPARTMENT OF FORESTRY:


Marvin Brown, State Forester
ODF
Dated this 21st day of August, 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)

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 FORESTRY

Final Staff Report and Decision

August 21, 2007

STATE CLAIM NUMBER: M130704

NAME OF CLAIMANT: Suzanne E. James

MAILING ADDRESS: c/o Donald J. Willis
Schwabe, Williamson and Wyatt
1211 SW 5th Avenue
Portland, Oregon 97204

PROPERTY IDENTIFICATION: Township 3 South, Range 3 East Section 20
Tax lot 100
Clackamas County

OTHER INTEREST IN PROPERTY: None

DATE RECEIVED BY DAS: November 13, 2006

DEADLINE FOR FINAL ACTION:¹ May 6, 2008

I. SUMMARY OF CLAIM

See Department of Land Conservation and Development (DLCD) Final Staff Report.

II. SUMMARY OF STAFF RECOMMENDATION

Based on the findings and conclusions set forth below, the Department of Forestry (ODF) has determined the claim is not valid as to land use regulations administered by ODF or the Oregon Board of Forestry (Board) because claimant has not demonstrated how any of the state land use regulations identified in the claim and administered by the Board or ODF have been enforced in a manner that restricts the claimant's desired uses of the subject property. The claimant wishes to clear portions of the land, and to divide the 177-acre property into 88 parcels ranging in size from 1 acre to 10 acres and develop a single family residence on each parcel. In fact, ORS

¹ ORS 197.352, as originally enacted, required that final action on claims made under Measure 37 be made within 180 days of the date the claim was filed. In response to the large volume of claims filed in late 2006, the Oregon legislature passed House Bill 3546, which became effective on May 10, 2007. This legislation increased the amount of time state and local governments have to take final action on Measure 37 claims filed on or after November 1, 2006, by 360 days, to a total of 540 days.

527.730 provides that “[n]othing in the Oregon Forest Practices Act shall prevent the conversion of forestland to any other use.” (See the complete recommendation in Section VI. of this report.)

III. COMMENTS ON THE CLAIM

Comments Received

See DLCD Final Staff Report.

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 November 12, 2006, for processing under OAR 125, division 145. The claim identifies a list of statutes and rules, which includes ORS 526 and 527, and OAR 629, 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

ODF adopts the findings of fact and conclusions of law regarding ownership contained in the DLCD Final Staff Report for this claim.

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 state land use regulation must restrict the claimant's desired use of private real property, and that the enactment or enforcement of the regulation has had the effect of reducing the fair market value of the property.

Findings of Fact

The claimant desires compensation of \$13,200,000 or "a removal of the land use regulations currently in effect." The claim lists the following state statutes and rules administered by ODF or the Board² as laws that restrict the use of the property as the basis for the claim: ORS 526 and 527; and OAR 629.

The property is zoned for forest use (Timber District (TBR)) by Clackamas County. Nothing in ORS chapter 526, chapter 527 or OAR chapter 629 relates to the division of land, or to the development of residential uses. The state laws listed in the claim that are administered by ODF only apply to forest operations.

The claim states broadly that land use regulations in ORS 526 and ORS 527 restrict clearing of the land for development, extension of roads and utilities into the property, division of the property, and construction of dwellings on the new lots. However, ORS 527.730, conversion of forestland to other uses, states, "Nothing in the Oregon Forest Practices Act shall prevent the conversion of forestland to any other use." No laws enforced by the Board or ODF restrict land clearing for residential development, the division of property, or the establishment of dwellings. The claim does not indicate how the statutes or rules administered by ODF or the Board and related to this activity restricted the claimant's use of the subject property or had the effect of reducing its fair market value.

In addition, ODF has not enforced any existing "land use regulations" with regard to the claimant's desired use of the property since the effective date of Measure 37 (ORS 197.352). ODF is unable to determine whether or how existing "land use regulations" administered by ODF or the Board may apply to the claimant's desired use of the property until the claimant submits a written notification that gives a specific description of the forest operation that the claimant desires to conduct.

Conclusions

ODF is unable to determine, based on the information in this claim, that a state "land use regulation" administered by ODF or the Board applies to or restricts the claimant's desired use of the property. ODF has not enforced any existing "land use regulation" with regard to the claimant's use of the property since the effective date of Measure 37. As a result, ODF has no basis upon which it may determine that the claimant is entitled to relief under ORS 197.352.

² This report addresses only state land use regulations administered by ODF or the Board of Forestry. The state land use regulations listed in the claim include statutes administered by the Oregon Department of Land Conservation and Development (DLCD). These statutes and rules are addressed in a separate report for this claim, by DLCD.

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.”

Findings of Fact

The claimant provided an estimated amount of loss in fair market value of \$13,200,000. The estimate is based primarily on the value of proposed residential development of the subject property. The claim does not demonstrate that any other land use regulations administered by ODF or the Board have restricted her use of the subject property or have had the effect of reducing its fair market value compared to the uses allowed when she acquired the property. As a result, there is no relevant evidence in the record for this claim relating to the effect of laws administered by ODF or the Board on the fair market value of the subject property.

Conclusions

The claimant has not demonstrated that laws enforced or administered by ODF or the Board restrict her desired use of this property or affect its fair market value.

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

ORS 197.352(3) exempts laws that were enacted before a claimant acquired their interest in the property. Based on the findings and conclusions in the DLCD report on this claim, Claimant acquired the property on August 16, 1971.

The FPA was first enacted in 1971 and, along with the first forest practice rules to administer the FPA, became effective on July 1, 1972. They have been amended at various times since then. Some forest practice regulations date back to 1941 in the form of the Oregon Forest Conservation Act (FCA) and related rules, which were amended at various times and were in effect when the claimant acquired interest in the subject properties. .

Some FPA regulations were enacted to control water pollution resulting from forest operations. One of the stated purposes of ORS 527.610 et seq and OAR 629-630 is to protect water quality. ORS 197.352(3)(B) specifically exempts regulations “restricting or prohibiting activities for the protection of public health and safety..., including pollution control.”

Other FPA regulations listed in the claim may be exempt under 197.352(3).

Conclusions

ODF concludes that some of the listed land use regulations are likely exempt under ORS 197.352(3).

Laws in effect when the claimant acquired the subject properties are exempt under ORS 197.352(3)(E), and will continue to apply to the claimant's use of the property. There may be other laws that continue to apply to the claimant's use of the subject property that have not been identified in the claim. When the claimant submits notifications of forest operations, it may become evident that other state laws apply to that use. In some cases, some of these laws may be exempt under ORS 197.352(3)(A) to (3)(D).

This report addresses only those state laws that are identified in the claim, or that the department is certain apply to the subject properties 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 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 its use of the subject property.

VI. FORM OF RELIEF

The claim fails to establish that state land use regulations administered by ODF or the Board apply to or restrict the claimant's desired use of the property. Since the FPA cannot restrict a change in land use, the claimant has not established that any of the listed statutes or rules administered by ODF or the Board has had the effect of reducing the fair market value of the property. As a result, the claimant is not entitled to relief under ORS 197.352 from ODF or the Board. Therefore, ODF denies this claim.

VII. NOTICE OF OPPORTUNITY TO COMMENT

ODF issued its draft staff report on this claim on July 12, 2007. OAR 125-145-0100(3), provides 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. Comments received have been taken into account by the department in the issuance of this final report.

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

August 21, 2007

STATE CLAIM NUMBER: M130704

NAME OF CLAIMANT: Suzanne E. James

MAILING ADDRESS: c/o Donald J. Willis, Attorney
Schwabe, Williamson and Wyatt
1211 SW 5th Avenue
Portland, Oregon 97204

PROPERTY IDENTIFICATION: Township 3S, Range 3E, Section 20
Tax lot 100
Clackamas County

DATE RECEIVED BY DAS: November 13, 2006

DEADLINE FOR FINAL ACTION:¹ May 9, 2008

I. SUMMARY OF CLAIM

The claimant, Suzanne James, seeks compensation in the amount of \$13.2 million for the reduction in fair market value as a result of land use regulations that are alleged to restrict the use of certain private real property. The claimant desires compensation or the right to divide the 177.54-acre subject property into approximately 88 one- to ten-acre parcels, to develop a dwelling and accessory structures on each resulting undeveloped parcel, to “extend existing adjacent county roads into the property” and to “extend public and private utilities into the property.”² The subject property is located at 19548 South Lyons Road, near Oregon City, in Clackamas County. (See claim.)

¹ ORS 197.352, as originally enacted, required that final action on claims made under Measure 37 be made within 180 days of the date the claim was filed. In response to the large volume of claims filed in late 2006, the Oregon legislature passed House Bill 3546, which became effective on May 10, 2007. This legislation increased the amount of time state and local governments have to take final action on Measure 37 claims filed on or after November 1, 2006, by 360 days, to a total of 540 days.

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

II. SUMMARY OF STAFF RECOMMENDATION

Based on the findings and conclusions set forth below, the Department of Land Conservation and Development (the department) has determined that the claim is valid. 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 Suzanne James' division of the 177.54-acre subject property into approximately 88 one- to ten-acre parcels, development of a dwelling and accessory structures on each resulting undeveloped parcel, extension of "existing adjacent county roads into the property" or extension of "public and private utilities into the property": applicable provisions of Statewide Planning Goals 4 (Forest Lands), 11 (Public Facilities and Services) and 14 (Urbanization), ORS 215 and Oregon Administrative Rules (OAR) 660, divisions 6, and 11. These laws will not apply to the claimant only to the extent necessary to allow her to use the subject property for the use described in this report, and only to the extent that use was permitted when she acquired the property in 1971. (See the complete recommendation in Section VI. of this report.)

III. COMMENTS ON THE CLAIM

Comments Received

On April 4, 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, three written comments were received in response to the 10-day notice.

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

IV. TIMELINESS OF CLAIM

Requirement

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

1. For claims arising from land use regulations enacted prior to the effective date of Measure 37 (December 2, 2004), within two years of that effective date, or the date the public entity applies the land use regulation as an approval criteria to an application submitted by the owner, whichever is later; or
2. For claims arising from land use regulations enacted after the effective date of Measure 37 (December 2, 2004), within two years of the enactment of the land use regulation, or the date the owner of the property submits a land use application in which the land use regulation is an approval criteria, whichever is later.

Findings of Fact

This claim was submitted to DAS on November 13, 2006, for processing under OAR 125, division 145. The claim identifies provisions of ORS 92, 197, 209.250(4), 526 and 527 and provisions of OAR 125 to 145 and OAR 660 as the basis for the claim. Only laws that were enacted or adopted prior to December 2, 2004, are the basis for this claim.³

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, Suzanne James, acquired the subject property on August 16, 1971, as reflected by a warranty deed included with the claim. The Clackamas County Assessor’s Office confirms the claimant’s current ownership of the subject property.

Conclusions

The claimant, Suzanne James, is an “owner” of the subject property as that term is defined by ORS 197.352(11)(C), as of August 16, 1971.

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.

Findings of Fact

The claim indicates that the claimant desires to divide the 177.54-acre subject property into approximately 88 one- to ten-acre parcels, develop a dwelling and accessory structures on each resulting undeveloped parcel, “extend existing adjacent county roads into the property” and

³ The Department of Forestry, which administers ORS chapters 526 and 527, has prepared a separate report on this claim. This report addresses only those land use regulations that the Department of Land Conservation and Development administers and finds applicable to and restrict the claimant’s desired use of the subject property.

“extend public and private utilities into the property.” It indicates that current land use regulations prohibit the desired use.⁴

The claim is based generally on the applicable provisions of state law that require forest zoning and restrict uses on forest-zoned land. The claimant’s property is zoned Timber District (TBR) by Clackamas County as required by Goal 4, in accordance with ORS 215 and OAR 660, division 6, because the claimant’s property is “forest land” under Goal 4. Goal 4 became effective on January 25, 1975, and requires that forest land be zoned for forest use.

Current land use regulations, including ORS 215.705 to 215.755 and 215.780 and OAR 660, division 6, enacted or adopted pursuant to Goal 4, prohibit the division of forest-zoned land into parcels less than 80 acres and establish standards for development of dwellings on existing or proposed parcels on those lands.

ORS 215.780 generally establishes an 80-acre minimum size for the creation of new lots or parcels on forest-zoned land and became effective on November 4, 1993 (Chapter 792, Oregon Laws 1993). ORS 215.705 to 215.755 establish standards for the creation of new parcels and dwellings allowed in forest zones.

OAR 660, division 6, became effective on September 1, 1982, to implement Goal 4 and establish standards for divisions and development of land zoned for forest use, and was amended on March 1, 1994, to implement ORS 215.705 to 215.755 and 215.780. OAR 660-006-0025 interprets the goal and statutory standard for uses allowed in forest zones. OAR 660-006-0026 interprets land division requirements in forest zones, and 660-006-0027 and 660-006-0029 interpret the standards for dwellings in forest zones.

Goal 11, which became effective on January 25, 1975, generally prohibits urban levels of public facilities and services on lands that are outside an Urban Growth Boundary (UGB). Goal 11 and its implementing rules have two components: one that prohibits an owner from utilizing urban-level facilities or services to serve the property, and another that prohibits service providers from extending their facilities to serve property outside a UGB. The former can restrict a claimant’s use of property. The latter is a restriction on service providers. Goal 11 and OAR 660, division 11, apply to the claimant’s use of the property only to the extent that they would restrict the claimant’s development of urban-level public or community sewer or water facilities on the subject property.

⁴ The claimant summarily lists 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 use of the claimant’s property with the effect of reducing its fair market value. Specifically, the claimant cites Goal 12, which generally prohibits certain transportation facilities on land outside of a UGB. According to the claim, the claimant’s desired use includes establishing public and/or private roads to serve the intended residential development. OAR 660-012-0065 generally limits transportation facilities on rural lands to those necessary to support rural land uses identified in the acknowledged comprehensive plan. However, the claimant has not identified how Goal 12 or OAR 660-012-0065 either applies to the subject property or restricts the desired use 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 desired use of the subject property, based on the claimant’s description of her desired use.

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

The claimant acquired the subject property on August 16, 1971, prior to the adoption of the statewide planning goals and their implementing statutes and regulations.

Conclusions

The current zoning requirements, minimum lot size and dwelling standards established by Goals 4, 11 and 14 and provisions applicable to land zoned for forest use in ORS 215 and OAR 660, divisions 6, and 11, were all enacted or adopted after the claimant acquired the subject property in 1971 and do not allow the desired division or development of the property. These laws restrict the use of the property relative to the uses allowed when the claimant acquired the property.

Those elements of Goal 11 that prohibit a public service provider from extending or establishing public facilities or services outside of a UGB restrict the actions of local government rather than the claimant's use of the property. That component of Goal 11 is not subject to ORS 197.352 and will continue to apply to those service providers. Only the general prohibition under Goal 11 on the claimant's establishment of an urban level of public facilities and services is subject to ORS 197.352 and restricts the claimant's desired use of her property.

This report addresses only those state laws that are identified in the claim, or that the department is certain apply to the subject property, based on the uses that the claimant has identified. There may be other laws that currently apply to the claimant's use of the subject property, and that may continue to apply to the claimant's use of the property, that have not been identified in the claim. In some cases, it will not be possible to know which laws apply to a use of the subject property until there is a specific proposal for that use. When the claimant seeks a building or development permit to carry out a specific use, it may become evident that other state laws apply to that use.

3. Effect of Regulations on Fair Market Value

In order to establish a valid claim, ORS 197.352(1) requires that the land use 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."

Findings of Fact

The claim includes an estimate of \$13.2 million 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 the claimant's assessment of the subject property's value.

Conclusions

As explained in Section V.(1) of this report, the claimant is Suzanne James who acquired the subject property on August 16, 1971. Under ORS 197.352, the claimant is due compensation for land use regulations that restrict the use of the subject property and have the effect of reducing its fair market value. Based on the findings and conclusions in Section V.(2) of this report, laws

enacted or adopted since the claimant acquired the subject property restrict the claimant's desired use of the property. The claimant estimates that the effect of the regulations on the fair market value of the subject property is a reduction of \$13.2 million.

Without an appraisal or other documentation, it is not possible to substantiate the specific dollar amount by which the land use regulations have reduced the fair market value of the subject property. Nevertheless, based on the evidence in the record for this claim, the department determines that the fair market value of the subject property has been reduced to some extent as a result of land use regulations enforced by the Commission or the department.

4. Exemptions Under ORS 197.352(3)

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

Findings of Fact

The claim is based on state land use regulations that restrict the use of the subject property, including applicable provisions of Goals 4, 11 and 14, ORS 215 and OAR 660, divisions 6, and 11, which Clackamas County has implemented through its current TBR zone. All of these land use regulations were enacted or adopted after the claimant acquired the subject property.

Conclusions

Without a specific development proposal for the subject property, it is not possible for the department to determine all the laws that may apply to a particular use of the property, or whether those laws may fall under one or more of the exemptions under ORS 197.352. It appears that none of the general statutory, goal and rule restrictions on residential division and development of the subject property were in effect when the claimant acquired the property in 1971. As a result, these laws are not exempt under ORS 197.352(3)(E).

Laws in effect when the claimant acquired the subject property are exempt under ORS 197.352(3)(E) and will also continue to apply to the claimant's use of the property. In addition, 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. 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...." 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. In some cases, some of these laws may be exempt under ORS 197.352(3)(A) to (D).

This report addresses only those state laws that are identified in the claim, or that the department is certain apply to the subject property based on the uses that the claimant has identified.

Similarly, this report only addresses the exemptions provided for under ORS 197.352(3) that are clearly applicable, given the information provided to the department in the claim. The claimant should be aware that the less information she 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 her use of the subject property.

VI. FORM OF RELIEF

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

Findings of Fact

Based on the findings and conclusions set forth in this report, laws enforced by the Commission or the department restrict the claimant's desired use of the subject property. The claim asserts that existing state land use regulations enforced by the Commission or the department have the effect of reducing the fair market value of the subject property by \$13.2 million. 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 she acquired the property. Nevertheless, based on the record for this claim, the department has determined that the laws on which the claim is based have reduced the fair market value of the subject property to some extent.

No funds have been appropriated at this time for the payment of claims. In lieu of payment of compensation, ORS 197.352 authorizes the department to modify, remove or not apply all or parts of certain land use regulations to allow Suzanne James to use the subject property for a use permitted at the time she acquired the property on August 16, 1971.

Conclusions

Based on the record, the department 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 Suzanne James' division of the 177.54-acre subject property into approximately 88 one-to-ten-acre parcels, development of a dwelling and accessory structures on each resulting undeveloped parcel, extension of "existing adjacent county roads into the property" or extension of "public and private utilities into the property": applicable provisions of Goals 4, 11 and 14, ORS 215 and OAR 660, divisions 6, and 11. These land use regulations will not apply to the

claimant only to the extent necessary to allow her to use the subject property for the use described in this report, and only to the extent that use was permitted when she acquired the property on August 16, 1971. Goal 11 will not apply only to the extent that it prohibits the claimant from establishing an urban level of public facilities and services to serve the development of the property. Goal 11 will continue to apply to public service providers seeking to extend or establish public facilities to serve the subject property.

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 August 16, 1971.

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 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 the claimant.

6. Nothing in this report or the state's final order for this claim constitutes any determination of ownership by the State of Oregon as to submerged or submersible lands, or as to public rights to the use of waters of the state.

VII. COMMENTS ON THE DRAFT STAFF REPORT

The department issued its draft staff report on this claim on July 12, 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.