



# Oregon

Theodore R. Kulongoski, Governor

## Department of Land Conservation and Development

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August 10, 2007

To: Interested Persons

From: Lane Shetterly, Director



*Re: Ballot Measure 37 (ORS 197.352) Claim Number M130760*

*Claimants: Wayne F. Rusk*

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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 OF  
THE STATE OF OREGON

IN THE MATTER OF THE CLAIM FOR	)	FINAL ORDER A
COMPENSATION UNDER ORS 197.352	)	CLAIM NO. M130760
(BALLOT MEASURE 37) OF	)	
Wayne F. Rusk, CLAIMANT	)	

Claimant: Wayne F. Rusk (the Claimant)

Property: Township 39S, Range 8W, Section 29, Tax lots 300, Josephine 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 Wayne Rusk's conversion of one of two existing dwellings on tax lot 300 into a caretaker residence and to his construction of a public hay barn/shop with public parking for a commercial rodeo facility on that tax lot: applicable provisions of Goal 4, ORS 215 and OAR 660, division 6. These land use regulations will not apply to the claimant only to the extent necessary to allow him to use tax lot 300 for the use described in this report, and only to the extent that use was permitted when he acquired that tax lot on January 8, 1971.
2. The action by the State of Oregon provides the state's authorization to the claimant to use tax lot 300 for the use described in this report, subject to the standards in effect on January 8, 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).

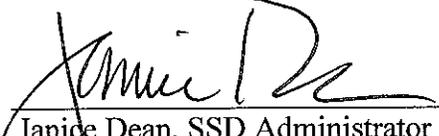
5. Without limiting the generality of the foregoing terms and conditions, in order for the claimant to use the subject property, it may be necessary for him to obtain a decision under ORS 197.352 from a city and/or county and/or metropolitan service district that enforces land use regulations applicable to the property. Nothing in this order relieves the claimant from the necessity of obtaining a decision under ORS 197.352 from a local public entity that has jurisdiction to enforce a land use regulation applicable to a use of the subject property by the claimant.

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

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

  
Michael Morrissey, Manager  
DLCD, Measure 37 Services Division  
Dated this 10<sup>th</sup> day of August, 2007.

FOR the DEPARTMENT OF  
ADMINISTRATIVE SERVICES:

  
Janice Dean, SSD Administrator  
DAS, State Services Division  
Dated this 10<sup>th</sup> day of August, 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. M130760  
(BALLOT MEASURE 37) OF )  
Wayne F. Rusk, CLAIMANT )

Claimant:      Wayne F. Rusk (the Claimant)

Property:      Township 39S, Range 8W, Section 29, Tax lots 400  
                    Josephine 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

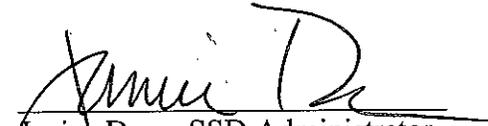
The Claim is denied as to laws administered by DLCD and the Land Conservation and Development Commission (LCDC) for the reasons set forth in the DLCD Report.

This Order is entered by the Manager for the Measure 37 Services Division of the DLCD as a final order of DLCD and the Land Conservation and Development Commission under ORS 197.352, OAR 660-002-0010(8), and OAR 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

  
Michael Morrissey, Manager  
DLCD, Measure 37 Services Division  
Dated this 10<sup>th</sup> day of August, 2007.

FOR the DEPARTMENT OF  
ADMINISTRATIVE SERVICES:

  
Janice Dean, SSD Administrator  
DAS, State Services Division  
Dated this 10<sup>th</sup> day of August, 2007.

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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**  
**Final Staff Report and Recommendation**

August 10, 2007

**STATE CLAIM NUMBER:** M130760

**NAME OF CLAIMANT:** Wayne F. Rusk

**MAILING ADDRESS:** PO Box 270  
Cave Junction, Oregon 97523

**PROPERTY IDENTIFICATION:** Township 39S, Range 8W, Section 29.  
Tax lots 300 and 400  
Josephine County

**OTHER CONTACT INFORMATION:** Michael J. Bird, Attorney at Law  
PO Box 10  
Grants Pass, Oregon 97528

**DATE RECEIVED BY DAS:** November 15, 2006

**DEADLINE FOR FINAL ACTION:<sup>1</sup>** May 8, 2008

**I. SUMMARY OF CLAIM**

The claimant, Wayne Rusk, seeks compensation in the amount of \$800,000 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.<sup>2</sup> The claimant desires compensation or the right to convert one of two existing dwellings on tax lot 300 into a caretaker residence and to construct a public hay barn/shop with public parking for a commercial rodeo facility on that tax lot; and the right to construct commercial indoor and outdoor riding arenas with bleachers and an 18-stall stable for public use with commercial rodeo operations on tax lot 400. The subject property is located at the coordinates listed above, near Cave Junction, in Josephine County. (See claim.)

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<sup>1</sup> 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.

<sup>2</sup> The claimant submitted two separate claim forms for the two adjacent tax lots that are the subject of this claim, which were combined under this review. The claimant demands compensation in the amount of \$300,000 for tax lot 300 and \$500,000 for tax lot 400.

## II. SUMMARY OF STAFF RECOMMENDATION

Based on the findings and conclusions set forth below, the Department of Land Conservation and Development (the department) has determined that the claim is valid in part. Department staff recommends that, in lieu of compensation, the requirements of the following state laws enforced by the Land Conservation and Development Commission (the Commission) or the department not apply to Wayne Rusk's conversion of one of two existing dwellings on tax lot 300 into a caretaker residence and to his construction of a public hay barn/shop with public parking for a commercial rodeo facility on that tax lot: applicable provisions of Statewide Planning Goal 4 (Forest Lands), ORS 215 and Oregon Administrative Rules (OAR) 660, division 6. These laws will not apply to the claimant only to the extent necessary to allow him to use tax lot 300 for the use described in this report, and only to the extent that use was permitted when he acquired that tax lot in 1971. (See the complete recommendation in Section VI. of this report.)

The department has further determined that the claim is not valid for tax lot 400 because the claimant's desired use of tax lot 400 was prohibited under the laws in effect when the claimant acquired that tax lot in 1975. (See the complete recommendation in Section VI. of this report.)

## III. COMMENTS ON THE CLAIM

### Comments Received

On May 24, 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, two 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 15, 2006, for processing under OAR 125, division 145. The claim identifies Goals 3 (Agricultural Lands) and 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**

The claimant, Wayne Rusk, acquired tax lot 300 on January 8, 1971, as reflected by a warranty deed included with the claim. He acquired tax lot 400 on September 23, 1975, as reflected by a contract of sale reflected on a deed card included with the claim. The Josephine County Assessor’s Office confirms the claimant’s current ownership of the subject property.

### **Conclusions**

The claimant, Wayne Rusk, is an “owner” of the subject property as that term is defined by ORS 197.352(11)(C), as of January 8, 1971, for tax lot 300 and as of September 23, 1975, for tax lot 400.

### **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 convert one of two existing dwellings on tax lot 300 into a caretaker residence and to construct a public hay barn/shop with public parking for a commercial rodeo facility on that tax lot; and the right to construct commercial indoor and

outdoor riding arenas with bleachers and an 18-stall stable for public use with commercial rodeo operations on tax lot 400, and Goals 3 and 4 prevent the desired uses.<sup>3</sup>

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 Woodlot Resource (WR) by Josephine 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, generally 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 that land. These regulations also prohibit the conversion of an existing second dwelling on the parcel to a caretaker residence and development of a parking lot as a farm use allowed in a forest zone on tax lot 300; and prohibit the construction of a commercial indoor and outdoor riding arena with bleachers and an 18-stall stable for public use with commercial rodeo operations on tax lot 400.<sup>4</sup>

The claimant acquired tax lot 300 on January 8, 1971, prior to the adoption of the statewide planning goals and their implementing statutes and regulations.

The claimant acquired tax lot 400 after the adoption of the statewide planning goals, but before the Commission acknowledged the Josephine County's land use regulations to be in compliance with the statewide planning goals pursuant to ORS 197.250 and 197.251. At that time, tax lot 300 was zoned Suburban Residential (SR) by the county. The county's SR zone allowed residential development on five-acre lots or parcels.<sup>5</sup> However, because the Commission had not acknowledged the county's plan and land use regulations when the claimant acquired tax lot 400 on September 23, 1975, the statewide planning goals, and Goal 4 in particular, applied directly to the claimant's property when he acquired it.<sup>6</sup>

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<sup>3</sup> The claimant cites Goal 3 as restricting his desired use of tax lot 300. However, the claim does not establish how that Goal applies to the claimant's property. Both tax lots 300 and 400 are zoned WR, which is a forest zone, subject to compliance with Goal 4, as discussed in this report. 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 that desired use.

<sup>4</sup> 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.

<sup>5</sup> When tax lot 400 was acknowledged by the Commission for compliance with Goal 4 in 1980, it was zoned WR.

<sup>6</sup> The statewide planning goals became effective on January 25, 1975, and were applicable to legislative land use decisions and some quasi-judicial land use decisions prior to the Commission's acknowledgment of each county's land use regulations. *Perkins v. City of Rajneeshpuram*, 300 Or 1 (1985); *Alexanderson v. Polk County*, 289 Or 427, rev den 290 Or 137 (1980); *Sunnyside Neighborhood Assn. v. Clackamas County*, 280 Or 569 (1977); *Jurgenson v. Union County*, 42 Or App 505 (1979) and *1000 Friends of Oregon v. Benton County*, 32 Or App 413 (1978). After the county's plan and land use regulations were acknowledged by the Commission, the statewide planning goals and implementing rules no longer directly applied to such local land use decisions. *Byrd v. Stringer*, 295 Or 311 (1983).

Goal 4 went into effect on January 25, 1975, and was intended to “conserve forest lands for forest uses” and required, “Lands suitable for forest uses shall be inventoried and designated as forest lands. Existing forest land uses shall be protected unless proposed changes are in conformance with the comprehensive plan.” Those forest uses were defined as follows: “(1) the production of trees and the processing of forest products; (2) open space, buffers from noise, and visual separation of conflicting uses; (3) watershed protection and wildlife and fisheries habitat; (4) soil protection from wind and water; (5) maintenance of clean air and water; (6) outdoor recreational activities and related support services and wilderness values compatible with these uses; and (7) grazing land for livestock.” Specifically, Goal 4 only allowed land divisions that would protect commercial forest lands for commercial forest uses. Dwellings in forest zones could only be allowed if found to be “necessary and accessory” to one of the enumerated forest uses listed in Goal 4.<sup>7</sup> Goal 4 also allowed uses enumerated as farm uses in ORS 215.203.

The claim does not establish that the claimant’s desired use of tax lot 400, to construct commercial indoor and outdoor riding arenas with bleachers and an 18-stall stable for public use with commercial rodeo operations, complies with the Goal 4 standards in effect when the claimant acquired that tax lot in 1975. To the contrary, the claimant’s desired use of tax lot 400 would not have been permitted under either the county zoning or the provisions of Goal 4 in effect when the claimant acquired that tax lot on September 23, 1975.

### Conclusions

The current zoning requirements, minimum lot size and dwelling standards established by Goal 4 ORS 215 and OAR 660, division 6, for forest-zoned land were all enacted or adopted after the claimant acquired tax lot 300 in 1971 and tax lot 400 in 1975, and do not allow the claimant’s desired use of the subject property. However, the regulations in effect when the claimant acquired tax lot 400 also did not allow the claimant’s desired construction of commercial indoor and outdoor riding arenas with bleachers and an 18-stall stable for public use with commercial rodeo operations. Laws enacted or adopted since the claimant acquired tax lot 400 in 1975 do not restrict the claimant’s desired use of that tax lot relative to when the claimant acquired it in 1975.

This report addresses only those state laws that are identified in the claim, or that the department is certain apply to the subject property, based on the use that the claimant has identified. There may be other laws that currently apply to claimant’s desired use of tax lot 300, and that may continue to apply to the claimant’s use of tax lot 300, 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

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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); *Kenagy v. Benton County*, 115 Or App 131 (1992).

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

until there is a specific proposal for that use. When the claimant seeks a building or development permit to carry out a specific use for tax lot 300, it may become evident that other state laws apply to that use.

### **3. Effect of Regulations on Fair Market Value**

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

#### **Findings of Fact**

The claim includes an estimate of \$800,000 as the reduction in the subject property’s fair market value due to the regulations that restrict the claimant’s desired use of the property. This amount is based on a market analysis included with the claim.

#### **Conclusions**

As explained in Section V.(1) of this report, the claimant is Wayne Rusk who acquired tax lot 300 on January 8, 1971, and tax lot 400 on September 23, 1975. The claimant has not established his entitlement to relief for tax lot 400 because the claimant’s desired use of that tax lot was prohibited under the regulations in effect when he acquired that tax lot and state laws enacted or adopted since the claimant acquired tax lot 400 do not restrict the use of that tax lot relative to the uses allowed in 1975 with the effect of reducing the fair market value of that tax lot.

Under ORS 197.352, the claimant is due compensation for land use regulations that restrict the use of tax lot 300 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 tax lot 300 restrict the claimant’s desired use of that tax lot. The claimant estimates that the effect of the regulations on the fair market value of tax lot 300 is a reduction of \$300,000.

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 tax lot 300. Nevertheless, based on the evidence in the record for this claim, the department determines that the fair market value of tax lot 300 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 Goal 4, ORS 215 and OAR 660, division 6, which Josephine County has implemented through its current WR zone. With the exception of provisions of Goal

4 in effect when the claimant acquired tax lot 400 in 1975, 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 with the exception of provisions of Goal 4 in effect when the claimant acquired tax lot 400 in 1975, the general statutory, goal and rule restrictions on the claimant's desired use of the subject property were not in effect when the claimant acquired the subject property. As a result, these laws are not exempt under ORS 197.352(3)(E). However, the claimant's desired use of tax lot 400 was prohibited under the regulations in effect when he acquired that tax lot in 1975.

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. Those provisions include fire protection standards for dwellings. 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 tax lot 300 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 use that the claimant has identified. Similarly, this report only addresses the exemptions provided for under ORS 197.352(3) that are clearly applicable, given the information provided to the department in the claim. The claimant should be aware that the less information he has provided to the department in the claim, the greater the possibility that there may be additional laws that will later be determined to continue to apply to his use of the subject property.

### **VI. FORM OF RELIEF**

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

department must provide only non-monetary relief unless and until funds are appropriated by the legislature to pay claims.

### **Findings of Fact**

Based on the findings and conclusions set forth in this report, laws enforced by the Commission or the department do not restrict the claimant's desired use of tax lot 400 because the claimant's desired use of that tax lot was prohibited under the laws in effect when he acquired it in 1975. Land use regulations enacted or adopted after the claimant acquired tax lot 400 do not restrict the claimant's use of that tax lot relative to the uses permitted when he acquired it. However, laws enforced by the Commission or the department do restrict the claimant's desired use of tax lot 300. 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 tax lot 300 by \$300,000. However, because the claim does not provide an appraisal or other relevant evidence demonstrating that the land use regulations described in Section V.(2) reduce the fair market value of the subject property, a specific amount of compensation cannot be determined. In order to determine a specific amount of compensation due for this claim, it would also be necessary to verify whether or the extent to which the claimant's desired use of tax lot 300 was allowed under the standards in effect when he acquired that tax lot. Nevertheless, based on the record for this claim, the department has determined that the laws on which the claim for tax lot 300 is based have reduced the fair market value of the tax lot 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 Wayne Rusk to use tax lot 300 for a use permitted at the time he acquired that tax lot on January 8, 1971.

### **Conclusions**

Based on the record and the foregoing findings and conclusions, for tax lot 400, the claimant has not established that he is entitled to relief under ORS 197.352(1) as a result of land use regulations enforced by the Commission or the department because the claimant's desired use of that tax lot was prohibited under the laws in effect when he acquired that tax lot. Therefore, laws enacted or adopted after the claimant acquired tax lot 400 do not restrict his use of that tax lot relative to uses permitted when he acquired it in 1975. Therefore, the department recommends that this claim be denied as to tax lot 400.

The department further recommends that the claim be approved for tax lot 300, 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 Wayne Rusk's conversion of one of two existing dwellings on tax lot 300 into a caretaker residence and to his construction of a public hay barn/shop with public parking for a commercial rodeo facility on that tax lot: applicable provisions of Goal 4, ORS 215 and OAR 660, division 6. These land use regulations will not apply to the claimant only to the extent necessary to allow him to use tax lot 300 for the use described in this report, and only to the extent that use was permitted when he acquired that tax lot on January 8, 1971.

2. The action by the State of Oregon provides the state's authorization to the claimant to use tax lot 300 for the use described in this report, subject to the standards in effect on January 8, 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 him to obtain a decision under ORS 197.352 from a city and/or county and/or metropolitan service district that enforces land use regulations applicable to the property. Nothing in this order relieves the claimant from the necessity of obtaining a decision under ORS 197.352 from a local public entity that has jurisdiction to enforce a land use regulation applicable to a use of the subject property by the claimant.

## **VII. COMMENTS ON THE DRAFT STAFF REPORT**

The department issued its draft staff report on this claim on July 9, 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.