Oregon
Theodore R. Kulongoski, Governor

Department of Land Conservation and Development
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August 7, 2007

To: Interested Persons

From: Lane Shetterly, Director

Re: Ballot Measure 37 (ORS 197.352) Claim Number M130832

Claimants: Lawrence T., Jeanette T. and Gary J. Epping

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 COMPENSATION UNDER ORS 197.352 (BALLOT MEASURE 37) OF Gary J. Epping, CLAIMANT	))))	FINAL ORDER A CLAIM NO. M130832

Claimant: Gary J. Epping (the Claimant)

Property: Township 7S, Range 5W, Section 1, Tax lots 501 and 602
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 Gary Epping's division of tax lots 501 and 602 into three parcels or to his development of a dwelling on each resulting undeveloped parcel: applicable provisions of Goal 3, ORS 215 and OAR 660, division 33, enacted or adopted after he acquired these two tax lots. These land use regulations will not apply to Gary Epping only to the extent necessary to allow him to use tax lots 501 and 602 for the use described in this report, and only to the extent that use was permitted when he acquired tax lot 602 on December 18, 1990, and tax lot 501 on December 31, 1990.

2. The action by the State of Oregon provides the state's authorization to Gary Epping to use tax lots 501 and 602 for the use described in this report, subject to the standards in effect when he acquired tax lot 602 on December 18, 1990, and when he acquired tax lot 501 on December 31, 1990. On those dates, tax lots 501 and 602 were subject to compliance with Goal 3 and OAR 660, division 5, as implemented by Polk County's acknowledged EFU zone, and the applicable provisions 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 tax lots 501 and 602 may not be used without a permit, license or other form of authorization or consent, the order will not authorize the use of the tax lots unless Gary Epping 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 tax lots 501 and 602 imposed by private parties.

4. Any use of the property by Gary Epping 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 Gary Epping to use tax lots 501 and 602, 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 tax lots. Nothing in this order relieves Gary Epping 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 his use of tax lots 501 and 602.

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

FOR DLCD AND THE LAND CONSERVATION AND DEVELOPMENT COMMISSION:

Lane Shetterly, Director
DLCD
Dated this 7th day of August, 2007.

FOR the DEPARTMENT OF ADMINISTRATIVE SERVICES:

Janice K. Dean, SSD Administrator
DAS, State Services Division
Dated this 7th 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 COMPENSATION UNDER ORS 197.352 (BALLOT MEASURE 37) OF Gary J. Epping, CLAIMANT	))))	FINAL ORDER B CLAIM NO. M130832

Claimant: Gary J. Epping (the Claimant)

Property: Township 7S, Range 5W, Section 1, Tax lots 400 and 604
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 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 7th day of August, 2007.

FOR THE DEPARTMENT OF ADMINISTRATIVE SERVICES:

Janice K. Dean, SSD Administrator
DAS, State Services Division
Dated this 7th day of August, 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
COMPENSATION UNDER ORS 197.352	)CLAIM NO. M130832
(BALLOT MEASURE 37) OF	)
Lawrence T. Epping and Jeanette T. Epping, CLAIMANTS	)

Claimants: Lawrence T. Epping and Jeanette T. Epping (the Claimants)

Property: Township 7S, Range 5W, Section 1, Tax lots 400, 501, 602 and 604 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 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 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 7th day of August, 2007.

FOR THE DEPARTMENT OF ADMINISTRATIVE SERVICES:

Janice K. Dean, SSD Administrator
DAS, State Services Division
Dated this 7th 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)

ORS 197.352 (BALLOT MEASURE 37) CLAIM FOR COMPENSATION

OREGON DEPARTMENT OF LAND CONSERVATION AND DEVELOPMENT
Final Staff Report and Recommendation

August 7, 2007

STATE CLAIM NUMBER:	M130832
NAMES OF CLAIMANTS:	Lawrence T. Epping Jeanette T. Epping Gary J. Epping
MAILING ADDRESS:	2485 Lancaster Drive NE Salem, Oregon 97305
PROPERTY IDENTIFICATION:	Township 7S, Range 5W, Section 1 Tax lots 400, 501, 602 and 604 Polk County
OTHER CONTACT INFORMATION:	Wallace W. Lien, PC 1775 32nd Place NE, Suite A Salem, Oregon 97301
OTHER INTEREST IN PROPERTY:	Granada Land Co.
DATE RECEIVED BY DAS:	November 17, 2006
DEADLINE FOR FINAL ACTION:[1]	May 10, 2008

I. SUMMARY OF CLAIM

The claimants, Lawrence, Jeannette and Gary Epping, seek compensation in the amount of $1,102,089 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 the 183.44-acre subject property[2] into nine parcels and to develop a dwelling on each resulting undeveloped parcel. The subject property is located along Smithfield Road, approximately five miles northeast of Dallas in Polk County. (See claim).

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[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 subject property includes four tax lots. Tax lot 400 consists of 99.15 acres; tax lot 501 consists of 0.24 acre; tax lot 602 consists of 66.40 acres; and tax lot 604 consists of 17.95 acres.

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 Gary Epping's division of tax lots 501 and 602 into three parcels and to his development of a dwelling on each resulting undeveloped parcel: applicable provisions of Statewide Planning Goal 3 (Agricultural Lands), ORS 215 and Oregon Administrative Rules (OAR) 660, division 33, enacted or adopted after he acquired these two tax lots. These laws will not apply to Gary Epping only to the extent necessary to allow him to use tax lots 501 and 602 for the use described in this report, and only to the extent that use was permitted when he acquired tax lot 602 on December 18, 1990, and tax lot 501 on December 31, 1990.

The department has determined that the claim is not valid as to Gary Epping for tax lots 400 and 604 because he has not established his ownership of these tax lots; and is not valid as to Lawrence and Jeanette Epping because these claimants have not established their ownership of the subject property. (See the complete recommendation in Section VI. of this report).

III. COMMENTS ON THE CLAIM

Comments Received

On May 31, 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 is relevant to when the claimant became the present owner of the subject property. The comment has been considered by the department in preparing this report. (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 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 17, 2006, for processing under OAR 125, division 145. The claim identifies the statewide planning goals, ORS 197 and 215, OAR 660 and Polk County's Exclusive Farm Use (EFU) zoning as the basis for the claim. Only laws that were enacted or adopted prior to December 2, 2004, are the basis for this claim.

Conclusions

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

V. ANALYSIS OF CLAIM

1. Ownership

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

Findings of Fact

Claimants Lawrence and Jeanette Epping assert they acquired tax lot 400 on December 4, 1989, and tax lot 604 on May 21, 1990, as owners of C.A.W.S., Inc. On those dates, C.A.W.S., Inc. acquired tax lots 400 and 604, as evidenced by warranty deeds included with the claim. However, there is no indication in the claim that Lawrence and Jeanette Epping acquired any individual ownership interest in those tax lots on those dates. Further, C.A.W.S., Inc. conveyed tax lots 400 and 604 to Granada Land Co., also owned by Lawrence and Jeanette Epping, on April 27, 2000, as reflected by a warranty deed included with the claim. However, there is also no indication in the claim that Lawrence and Jeanette Epping acquired any individual ownership interest in those tax lots on that date. Lawrence and Jeanette Epping do not assert any present ownership interest in tax lots 501 and 602.

Lawrence and Jeanette Epping acquired tax lot 602 on December 12, 1990, as reflected by a bargain and sale deed included with the claim. They conveyed their entire interest in that tax lot to their family member, claimant Gary Epping, on December 18, 1990, as reflected by a bargain and sale deed included with the claim. On December 31, 1990, Gary Epping acquired tax lot 501, as reflected by a deed included with the claim. Claimant Gary Epping does not assert any present ownership interest in tax lots 400 and 604.

The Polk County Assessor's Office confirms Gary Epping's current ownership of tax lots 501 and 602.

Conclusions

Claimant Gary Epping is an "owner" of tax lots 501 and 602, as that term is defined by ORS 197.352(11)(C), as of December 18, 1990, for tax lot 602 and as of December 31, 1990, for tax

lot 501. Gary Epping is not an "owner" of tax lots 400 and 604 and Lawrence and Jeanette Epping are not "owners" of the subject property, as that term is defined by ORS 197.352(11)(C). Lawrence and Jeanette Epping are "family members" of Gary Epping as defined by ORS 197.352(11)(A) for tax lot 602, as of December 12, 1990.

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 the 183.44-acre subject property into nine parcels and to develop a dwelling on each resulting undeveloped parcel, and that the use is not allowed under current land use regulations.[3]

The claim is based generally on the applicable provisions of state law that require EFU zoning and restrict uses on EFU-zoned land. The subject property is zoned EFU by Polk County as required by Goal 3, in accordance with ORS 215 and OAR 660, division 33, because the property is "agricultural land" as defined by Goal 3.[4] Goal 3 became effective on January 25, 1975, and required that agricultural lands as defined by Goal 3 be zoned EFU pursuant to ORS 215.

Current land use regulations, particularly ORS 215.263, 215.284 and 215.780 and OAR 660, division 33, enacted or adopted pursuant to Goal 3, prohibit the division of EFU-zoned land into parcels less than 80 acres and establish standards for development of dwellings on existing or proposed parcels on that land.

ORS 215.780 establishes an 80-acre minimum size for the creation of new lots or parcels in EFU zones and became effective on November 4, 1993 (Chapter 792, Oregon Laws 1993). ORS 215.263 (2005 edition) establishes standards for the creation of new parcels for non-farm uses and dwellings allowed in an EFU zone.

OAR 660-033-0135 (applicable to farm dwellings) became effective on March 1, 1994, and interprets the statutory standard for a primary dwelling in an EFU zone under

[3] The claimants summarily list numerous state land use laws as applicable to this claim, but do not establish how the laws either apply to the claimants' 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 subject property or do not restrict the claimants' desired use of the property with the effect of reducing its fair market value. This report addresses only those regulations that the department finds are applicable to and restrict the claimants' desired use of the subject property, based on the claimants' description of their desired use.

[4] The subject property is "agricultural land" because it contains Natural Resources Conservation Service Class I–IV soils.

ORS 215.283(1)(f). OAR 660-033-0130(4) (applicable to non-farm dwellings) became effective on August 7, 1993, and was amended to comply with ORS 215.284(4) on March 1, 1994.[5]

At the time Gary Epping and his family acquired tax lot 602 and Gary Epping acquired tax lot 501, these tax lots were subject to Polk County's acknowledged EFU zone.[6] When Gary Epping and his family acquired tax lots 602 and when he acquired tax lot 501, his desired use of these tax lots would have been governed by the county's acknowledged EFU zone and the applicable provisions of ORS 215 then in effect.[7] In 1990, ORS 215.263 (1989 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) (1989 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.

The claim does not establish whether or to what extent Gary Epping's desired division and development of tax lots 501 and 602 were allowed under the standards in effect when he and his family acquired tax lot 602 on December 12 and 18, 1990, and when he acquired tax lot 501 on December 31, 1990.

Conclusions

The current zoning requirements, minimum lot size and dwelling standards established by Goal 3, ORS 215 and OAR 660, division 33, were all enacted or adopted after Gary Epping and his family acquired tax lot 602 and when he acquired tax lot 501 in 1990, and do not allow his desired division or development of the property. However, the claim does not establish whether or the extent to which Gary Epping's desired use of tax lots 602 and 501 complies with the standards for land divisions and development under Goal 3 and OAR 660, as implemented through Polk County's comprehensive plan and EFU zone and applicable provisions of ORS 215, in effect when his family acquired tax lot 602 on December 12, 1990, and when he acquired it on December 18, 1990, and when he acquired tax lot 501 on December 31, 1990.

As explained in Section V.(1) above, Lawrence and Jeanette Epping are not "owners" of any of the subject property and Gary Epping is not an owner of tax lots 400 and 604, as that term is defined in ORS 197.352(11)(C). Therefore, no laws enforced by the Commission or the department restrict Lawrence and Jeanette Epping's use of the subject property or Gary Epping's use of tax lots 400 and 604 with the effect of reducing the fair market value.

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[5] The Commission subsequently adopted amendments to comply with House Bill 3326 (Chapter 704, Oregon Laws 2001, effective on January 1, 2002), which were effective on May 22, 2002. These amendments clarified but did not further restrict dwelling standards under OAR 660, division 33, for EFU-zoned land.

[6] Polk County's EFU zone was acknowledged by the Commission for compliance with Goal 3 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 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).

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 claimants have identified. There may be other laws that currently apply to Gary Epping's use of tax lots 501 and 602, and that may continue to apply to his use of these tax lots 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 tax lots 501 and 602 until there is a specific proposal for that use. When Gary Epping seeks a building or development permit to carry out a specific use, it may become evident that other state laws apply to that use.

3. Effect of Regulations on Fair Market Value

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

Findings of Fact

The claim includes an estimate of $1,102,089 as the reduction in the subject property's fair market value due to the regulations that restrict the claimants' desired use of the property. This amount is based on the claimants' assessment of the subject property's value.

Conclusions

As explained in Section V.(1) of this report, the claimants are Lawrence, Jeanette and Gary Epping. Gary Epping's family acquired tax lot 602 on December 12, 1990. Gary Epping acquired tax lot 602 on December 18, 1990, and tax lot 501 on December 31, 1990. As explained in Section V.(1) of this report, Lawrence and Jeanette Epping are not owners of the subject property and Gary Epping is not an owner of tax lots 400 and 604, as that term is defined in ORS 197.352(11)(C). Therefore, no laws restrict Lawrence and Jeanette Epping's use of the subject property or Gary Epping's use of tax lots 400 and 604 with the effect of reducing the fair market value.

Under ORS 197.352, Gary Epping is due compensation for land use regulations that restrict the use of tax lots 501 and 602 and have the effect of reducing their fair market value. Based on the findings and conclusions in Section V.(2) of this report, laws enacted or adopted since Gary Epping's family acquired tax lot 602 and he acquired tax lot 501 restrict his desired use of tax lots 501 and 602. The claimants estimate that the effect of the regulations on the fair market value of the entire subject property is a reduction of $1,102,089.

Without an appraisal or other documentation and without verification of whether or the extent to which the Gary Epping's desired use of tax lots 501 and 602 was allowed under the standards in effect when he and his family acquired tax lot 602 and when he acquired tax lot 501, it is not possible to substantiate the specific dollar amount by which the land use regulations have reduced the fair market value of those two tax lots. Nevertheless, based on the evidence in the record for this claim, the department determines that the fair market value of tax lots 501 and 602 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 3, ORS 215 and OAR 660, division 33, which Polk County has implemented through its current EFU zone. With the exception of amendments adopted after December 1990, these laws were in effect when Gary Epping and his family acquired tax lot 602 and when he acquired tax lot 501.

Conclusions

Without a specific development proposal for tax lots 501 and 602, 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 the subject property are not exempt under ORS 197.352(3)(E) only to the extent they were enacted or adopted after Gary Epping and his family acquired tax lot 602 on December 12 and 18, 1990, and after he acquired tax lot 501 on December 31, 1990. Provisions of Goal 3, ORS 215 and OAR 660 in effect when Gary Epping and his family acquired tax lot 602 and when he acquired tax lot 501 in 1990 are exempt under ORS 197.352(3)(E) and will continue to apply to these tax lots.

As explained in Section V.(1) of this report, Lawrence and Jeanette Epping are not "owners" of the subject property and Gary Epping is not an owner of tax lots 400 and 604, 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 to Lawrence and Jeannette Epping for the subject property and is not relevant to Gary Epping for tax lots 400 and 600.

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 record, the department finds that the claim is not valid as to Lawrence and Jeanette Epping for the subject property and is not valid as to Gary Epping for tax lots 400 and 604

because Lawrence and Jeanette Epping are not owners of the subject property and Gary Epping is not an owner of tax lots 400 and 604.

The department further finds laws enforced by the Commission or the department restrict Gary Epping's desired use of tax lots 501 and 602. 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 entire subject property by $1,102,089. 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 Gary Epping's desired use of tax lots 501 and 602 was allowed under the standards in effect when he and his family acquired tax lot 602 and he acquired tax lot 501. 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 501 and 602 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 Gary Epping to use tax lots 501 and 602 for a use permitted at the time he acquired tax lot 602 on December 18, 1990, and tax lot 501 on December 31, 1990.

Conclusions

Based on the record, the department recommends that the claim be denied as to Lawrence and Jeanette Epping because they are not owners of the subject property, and denied as to Gary Epping for tax lots 400 and 604 because he is not an owner of those tax lots. The department recommends that Gary Epping's claim be approved for tax lots 501 and 602, 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 Gary Epping's division of tax lots 501 and 602 into three parcels or to his development of a dwelling on each resulting undeveloped parcel: applicable provisions of Goal 3, ORS 215 and OAR 660, division 33, enacted or adopted after he acquired these two tax lots. These land use regulations will not apply to Gary Epping only to the extent necessary to allow him to use tax lots 501 and 602 for the use described in this report, and only to the extent that use was permitted when he acquired tax lot 602 on December 18, 1990, and tax lot 501 on December 31, 1990.

2. The action by the State of Oregon provides the state's authorization to Gary Epping to use tax lots 501 and 602 for the use described in this report, subject to the standards in effect when he acquired tax lot 602 on December 18, 1990, and when he acquired tax lot 501 on December 31, 1990. On those dates, tax lots 501 and 602 were subject to compliance with Goal 3 and OAR 660, division 5, as implemented by Polk County's acknowledged EFU zone, and the applicable provisions 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 tax lots 501 and 602 may not be used without a permit, license or other form of authorization or consent, the order will not authorize the use of the tax lots

unless Gary Epping 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 tax lots 501 and 602 imposed by private parties.

4. Any use of the property by Gary Epping 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 Gary Epping to use tax lots 501 and 602, 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 tax lots. Nothing in this order relieves Gary Epping 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 his use of tax lots 501 and 602.

VII. COMMENTS ON THE DRAFT STAFF REPORT

The department issued its draft staff report on this claim on June 21, 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.