



Oregon

Theodore R. Kulongoski, Governor

Department of Land Conservation and Development

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August 22, 2007

To: Interested Persons

From: Lane Shetterly, Director



Re: Ballot Measure 37 (ORS 197.352) Claim Number M130898

Claimant: Gerald W. Hibler, Karin Hibler, Charlotte E. Bruno, James R. Hibler, Debra L. Hibler, Phillip Hibler

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. M130898
(BALLOT MEASURE 37) OF)	
Gerald W. Hibler, Karin Hibler, Charlotte E. Bruno,)	
James R. Hibler and Debra L. Hibler, CLAIMANTS)	

Claimants: Gerald W. Hibler, Karin Hibler, Charlotte E. Bruno, James R. Hibler and Debra L. Hibler (the Claimants)

Property: Township 18S, Range 5W, Section 11, Tax lot 600, Lane County (the Property)

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

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

ORDER

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

1. In lieu of compensation under ORS 197.352, the State of Oregon will not apply the following laws to Gerald, Karin, James and Debra Hibler's and Charlotte Bruno-Hibler's division of the 151.32-acre subject property into fifteen 5- to 50-acre parcels or to their 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 each of these claimants acquired the subject property. These laws will not apply to these claimants only to the extent necessary to allow them to use the subject property for the use described in this report, and only to the extent that use was permitted when James and Debra Hibler acquired the subject property on December 10, 1993, and only to the extent that use was permitted when Gerald and Karin Hibler and Charlotte Bruno-Hibler acquired the subject property on May 4, 1998. The department acknowledges that the relief to which James and Debra Hibler are entitled under ORS 197.352 may not allow them to use the subject property in the manner set forth in the claim; and the relief to which Gerald and Karin Hibler and Charlotte Bruno-Hibler are entitled

under ORS 197.352 will not allow them to use the subject property in the manner set forth in the claim.

2. The action by the State of Oregon provides the state's authorization to Gerald, Karin, James and Debra Hibler and Charlotte Bruno-Hibler to use the subject property for the use described in this report, subject to the standards when they each acquired the property. In December 1993, the property was subject to Lane County's acknowledged E-40 zone and the provisions of ORS 215 and OAR 660, division 33, then in effect. In 1998, the property was subject Lane County's acknowledged E-40 zone, and the provisions of Goal 3, ORS 215 and OAR 660, division 33, and Lane County currently in effect.

3. To the extent that any law, order, deed, agreement or other legally enforceable public or private requirement provides that the subject property may not be used without a permit, license or other form of authorization or consent, the order will not authorize the use of the property unless the claimants first obtain that permit, license or other form of authorization or consent. Such requirements may include, but are not limited to: a building permit, a land use decision, a "permit" as defined in ORS 215.402 or 227.160, other permits or authorizations from local, state or federal agencies and restrictions on the use of the subject property imposed by private parties.

4. Any use of the subject property by the claimants under the terms of the order will remain subject to the following laws: (a) those laws not specified in (1) above; (b) any laws enacted or enforced by a public entity other than the Commission or the department; and (c) those laws not subject to ORS 197.352 including, without limitation, those laws exempted under ORS 197.352(3).

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

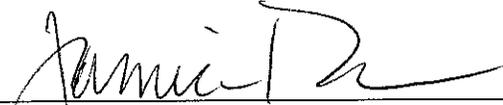
6. Nothing in this report or the state's final order for this claim constitutes any determination of ownership by the State of Oregon as to submerged or submersible lands, or as to public rights to the use of waters of the state.

This Order is entered by the Manager for the Measure 37 Services Division of the 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 22nd day of August, 2007.

FOR the DEPARTMENT OF
ADMINISTRATIVE SERVICES:


Janice Dean, SSD Administrator
DAS, State Services Division
Dated this 22nd 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. M130898
(BALLOT MEASURE 37) OF)
Phillip Hibler, CLAIMANT)

Claimant: Phillip Hibler (the Claimant)

Property: Township 18S, Range 5W, Section 11, Tax lot 600, Lane 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

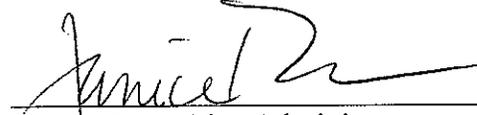
The Claim is denied as to laws administered by DLCD and the Land Conservation and Development Commission (LCDC) for the reasons set forth in the DLCD Report.

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 22nd day of August, 2007.

FOR the DEPARTMENT OF
ADMINISTRATIVE SERVICES:


Janice Dean, SSD Administrator
DAS, State Services Division
Dated this 22nd 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 22, 2007

STATE CLAIM NUMBER: M130898

NAMES OF CLAIMANTS: Gerald W. Hibler
Karin Hibler
Charlotte E. Bruno
James R. Hibler
Debra L. Hibler
Phillip Hibler

MAILING ADDRESS: 27608 Crow Road
Eugene, Oregon 97402

PROPERTY IDENTIFICATION: Township 18S, Range 5W, Section 11
Tax lot 600
Lane County

OTHER CONTACT INFORMATION: Norman Waterbury, LLC
28788 Gimpl Hill Road
Eugene, Oregon 97402

DATE RECEIVED BY DAS: November 20, 2006

DEADLINE FOR FINAL ACTION:¹ May 13, 2008

I. SUMMARY OF CLAIM

The claimants, Gerald, Karin, James, Debra and Phillip Hibler and Charlotte Bruno-Hibler, seek compensation in the amount of \$1.65 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 claimants desire compensation or the right to divide the 151.32-acre subject property into fifteen 5- to 50-acre parcels and to develop a dwelling on each resulting undeveloped parcel. The subject property is located at 27608 Crow Road, near Eugene, in Lane 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.

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 Gerald, Karin, James and Debra Hibler's and Charlotte Bruno-Hibler's division of the 151.32-acre subject property into fifteen 5- to 50-acre parcels and to their 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 each of these claimants acquired the subject property. These laws will not apply to these claimants only to the extent necessary to allow them to use the subject property for the use described in this report, and only to the extent that use was permitted when James and Debra Hibler acquired the subject property on December 10, 1993, and only to the extent that use was permitted when Gerald and Karin Hibler and Charlotte Bruno-Hibler acquired the subject property on May 4, 1998. The department acknowledges that the relief to which James and Debra Hibler are entitled under ORS 197.352 may not allow them to use the subject property in the manner set forth in the claim, and the relief to which Gerald and Karin Hibler and Charlotte Bruno-Hibler are entitled under ORS 197.352 will not allow them to use the subject property in the manner set forth in the claim.

The department has further determined the claim is not valid as to Phillip Hibler because he is not an owner of the subject property. (See the complete recommendation in Section VI. of this report.)

III. COMMENTS ON THE CLAIM

Comments Received

On June 11, 2007, pursuant to OAR 125-145-0080, the Oregon Department of Administrative Services (DAS) provided written notice to the owners of surrounding properties. According to DAS, one written comment was received in response to the 10-day notice.

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

IV. TIMELINESS OF CLAIM

Requirement

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

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

the land use regulation as an approval 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 20, 2006, for processing under OAR 125, division 145. The claim identifies Goal 3, provisions of ORS 215 and OAR 660, division 33, 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 claimants’ family member, Claribel Hibler Corliss, first acquired a portion of the subject property on February 1, 1953, as evidenced by a warranty deed included with the claim and acquired the remainder of the subject property on August 21, 1964, as reflected by a bargain and sale deed included with the claim. Claribel Hibler Corliss transferred the property to the Claribel Corliss Trust on June 4, 1993. At some point on or between June 4 and December 10, 1993, she conveyed the property to her son, James Hibler, as trustee of the Claribel Corliss Trust. The claim does not establish the date he became trustee of the trust.²

On December 10, 1993, claimant James Hibler, as trustee of the Claribel Corliss Trust, conveyed a one-third undivided interest in the subject property to himself and claimants Gerald and Phillip

² Claimant James Hibler asserts an ownership interest on June 4, 1993, the date his mother transferred the property to the Claribel Corliss Trust. The department contacted the claimants’ agent on June 11 and June 12, 2007, to obtain ownership documents to verify James Hibler’s acquisition of the property on that date. However, the documents received did not establish that James Hibler was appointed trustee, and therefore, acquired an ownership interest in the property, on June 4, 1993. Absent documentation from the claimants to establish an earlier acquisition date for James Hibler, the department must rely on the earliest date the claim documentation establishes his ownership of the property.

Hibler, as reflected by a warranty deed included with the claim. On that same day, James Hibler conveyed his one-third interest in the subject property to himself and his wife, claimant Debra Hibler, as reflected by a warranty deed included with the claim. Phillip Hibler conveyed his one-third interest in the subject property to himself and his wife, claimant Charlotte Bruno-Hibler, on December 21, 1993, as reflected by a warranty deed included with the claim. On January 4, 1994, Gerald Hibler conveyed his one-third interest in the subject property to himself and his wife, claimant Karin Hibler, as reflected by a warranty deed include with the claim.

On April 15, 1998, Phillip and Charlotte Bruno-Hibler and Gerald and Karin Hibler conveyed their interest in the subject property to James and Debra Hibler, as evidenced by a bargain and sale deed included with the claim. James and Debra Hibler conveyed a one-third interest in the subject property back to Phillip and Charlotte Bruno-Hibler and Gerald and Debra Hibler on May 4, 1998, as evidenced by a bargain and sale deed included with the claim. On April 30, 1999, Phillip Hibler conveyed his entire interest in the property to James Hibler, as evidenced by a quitclaim deed included with the claim.

The Lane County Assessor's Office confirms James, Debra, Gerald and Karin Hibler's and Charlotte Bruno-Hibler's current ownership of the subject property. Claimant Phillip Hibler is not an owner of the subject property.

Conclusions

Claimants Gerald, Karin, James and Debra Hibler and Charlotte Bruno-Hibler are "owners" of the subject property as that term is defined by ORS 197.352(11)(C). James and Karin Hibler have been owners of the subject property since December 10, 1993. Gerald and Karin Hibler and Charlotte Bruno-Hibler have been owners of the subject property since May 4, 1998. Claimant Phillip Hibler is not an "owner" of the subject property as that term is defined in ORS 197.352(11)(C). Claribel Corliss is a "family member" as defined by ORS 197.352(11)(A) and acquired the subject property on February 1, 1953, and August 21, 1964.

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 151.32-acre subject property into fifteen 5- to 50-acre parcels, and to develop a dwelling on each resulting undeveloped parcel, and that current land use regulations prevent the desired use.

The claim is based generally on the applicable provisions of state law that require Exclusive Farm Use (EFU) zoning and restrict uses on EFU-zoned land. The subject property is zoned Exclusive Farm Use (E-40) by Lane 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 3.³ Goal 3 became effective on January 25, 1975, and required that agricultural lands as defined by Goal 3 be zoned EFU pursuant to ORS 215.⁴

Current land use regulations, particularly ORS 215.213, 215.263 and 215.780 and OAR 660, division 33, enacted or adopted pursuant to Goal 3, generally prohibit the division of EFU-zoned land in marginal lands counties into parcels less than 80 acres and establish standards for the development of dwellings on existing or any proposed parcel on that land.

ORS 215.780 generally 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). Under ORS 215.780(2)(a), counties may adopt minimum lot sizes smaller than 80 acres, subject to approval by the Commission. The Commission has approved Lane County’s E-40 zone, which requires a minimum lot size of 40 acres. 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 in a marginal lands county under ORS 215.213. OAR 660-033-0130(4)(e) (applicable to non-farm dwellings in marginal lands counties) became effective on August 7, 1993.⁵

The claimants’ family first acquired the subject property in 1953 and 1964, prior to the adoption of the statewide planning goals and their implementing statutes and regulations. No county zoning applied to the subject property in 1953 and 1964.

Conclusions

The current zoning requirements, minimum lot size and dwelling standards established by applicable provisions of Goal 3, ORS 215 and OAR 660, division 33, were all enacted or adopted after the claimants’ family acquired the subject property. These laws restrict the use of the subject property relative to the uses allowed when the claimants’ family acquired the property.

As explained in Section V.(1), claimant Phillip Hibler is not an “owner” of the subject property. Therefore no laws enforced by the Commission or the department restrict his use of the private or real property, with the effect of reducing the fair market value of the property.

³ The subject property is “agricultural land” because it contains Natural Resources Conservation Service Class I–IV soils.

⁴ Riparian habitat restrictions contained in the county’s land use regulations may be required by Goal 5 (Natural Resources), which became effective on January 25, 1975. The administrative rule implementing Goal 5, OAR 660, division 16 (Requirements and Application Procedures for Complying with Goal 5), became effective May 18, 1981, but did not apply to landowners until local jurisdictions implemented the Goal 5 process. Lane County’s Riparian Overlay zone was applied to subject property in 1993, and generally requires a minimum parcel size of 40 acres for a non-farm or lot of record dwelling.

⁵ The Commission subsequently adopted amendments to OAR 660-033-0100, -0130 and -0135 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 for EFU-zoned land.

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 \$1.65 million 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 an appraisal included with the claim.

Conclusions

As explained in Section V.(1) of this report, the claimants are Gerald, Karin, James, Debra and Phillip Hibler and Charlotte Bruno-Hibler whose family member acquired the subject property in 1953 and 1964. Claimant Phillip Hibler is not an “owner” of the subject property as that term is defined in ORS 197.352(11)(C). Therefore, no laws restrict his use of the subject property with the effect of reducing the fair market value of the subject property.

Under ORS 197.352, Gerald, Karin, James and Debra Hibler and Charlotte Bruno-Hibler are due compensation for land use regulations that restrict the use of the 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 claimants’ family acquired the subject property restrict the claimants’ desired use of the property. The claimants estimate that the effect of the regulations on the fair market value of the subject property is a reduction of \$1.65 million.

Without additional documentation and verification of whether or the extent to which the claimants’ desired use of the property would have been allowed when their family acquired it, 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 since the claimants’ family acquired the property.

4. Exemptions Under ORS 197.352(3)

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

Findings of Fact

The claim is based on state land use regulations that restrict the use of the subject property, including applicable provisions of Goal 3, ORS 215 and OAR 660, division 33, which Lane County has implemented through its current E-40 zone. All of these land use regulations were enacted or adopted after the claimants’ family acquired the subject property.

Conclusions

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 claimants' family acquired the property on February 1, 1953 and on August 21, 1964. As a result, these laws are not exempt under ORS 197.352(3)(E). Laws in effect when the claimants' family acquired the subject property are exempt under ORS 197.352(3)(E) and do not provide a basis for compensation. In addition, other land use laws enacted or adopted for a purpose set forth in ORS 197.352(3)(A) to (D) are also exempt and would not provide a basis for compensation.

As explained in Section V.(1) of this report, claimant Phillip Hibler is not an "owner" of the subject property 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 Phillip Hibler.

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, the department finds that claimant Phillip Hibler is not an owner of the subject property and, therefore, is not entitled to compensation under ORS 197.352. The department further finds laws enforced by the Commission or the department restrict Gerald, Karin, James and Debra Hibler's and Charlotte Bruno-Hibler'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 \$1.65 million. However, without further documentation and 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 Gerald, Karin, James and Debra Hibler's and Charlotte Bruno-Hibler's desired use of the subject property was allowed under the standards in effect when their family 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 James and Debra Hibler to use the subject property for a use permitted at the time they acquired the property on December 10, 1993, and to allow

Gerald and Karin Hibler and Charlotte Bruno-Hibler to use the subject property for a use permitted at the time they acquired the property on May 4, 1998.

At the time James and Debra Hibler acquired the subject property, it was subject to Lane County's acknowledged comprehensive plan and E-40 zone and the provisions of ORS 215 (1993 edition).⁶ At that time, James and Debra Hibler's use of the property would have been subject to compliance with Goal 3, as implemented through the county's acknowledged E-40 zone, and the applicable provisions of OAR 660-033-0130(4) and ORS 215 then in effect.⁷ In 1993, ORS 215.263 (1993 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 215.213 (1993 edition) generally allowed farm dwellings "customarily provided in conjunction with farm use." Non-farm dwellings were allowed under ORS 215.213 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.

At the time Gerald and Karin Hibler and Charlotte Bruno-Hibler acquired the subject property, it was zoned E-40 by Lane County and subject to the current lot size and dwelling standards under Goal 3, ORS 215 and OAR 660, division 33, and as described in Section V.(2) of this report.

The claim does not establish whether or to what extent James and Debra Hibler's desired division and development of the subject property were allowed under the standards in effect when they acquired the property on December 10, 1993. The department acknowledges that Gerald and Karin Hibler and Charlotte Bruno-Hibler's desired use was not permitted when they acquired the property in 1998.

In addition to the applicable provisions of Goal 3, ORS 215 and OAR 660, division 33, in effect when James and Debra Hibler acquired the property in 1993, and when Gerald and Karin Hibler and Charlotte Bruno-Hibler acquired the subject property in 1998, there may be other laws that continue to apply to the subject property that have not been identified in the claim. In addition, Lane County notes that a portion of the property is located in a flood plain zone. ORS 197.352(3)(B) specifically exempts regulations "restricting or prohibiting activities for the protection of public health and safety. . . ." To the extent the county's flood plain regulations are based on state law, these regulations would be exempt under ORS 197.352(3)(B).

There may be other laws that continue to apply to the claimants' 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

⁶ Lane County's EFU zone was acknowledged by the Commission for compliance with Goal 3 on October 3, 1984.

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). In addition, until local governments amended their comprehensive plans and land use ordinances to implement the rules interpreting the requirements of ORS 215 (1993 edition) (House Bill 3661), those rules were directly applicable to the local land use applications. With the exception of OAR 660-033-0130(4) (applicable to non-farm dwellings in marginal lands counties), the OAR 660, division 33, rules implementing House Bill 3661 became effective on March 1, 1994.

apply to a use of property until there is a specific proposal for that use. When the claimants seek a building or development permit to carry out a specific use, it may become evident that other state laws apply to that use. 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 claimants have identified. Similarly, this report only addresses the exemptions provided for under ORS 197.352(3) that are clearly applicable given the information provided to the department in the claim. The claimants should be aware that the less information they have provided to the department in their claim, the greater the possibility that there may be additional laws that will later be determined to continue to apply to their use of the subject property.

Conclusions

Based on the record and the foregoing findings and conclusions, claimant Phillip Hibler has not established that he is entitled to relief under ORS 197.352(1) because he is not an owner of the subject property. Therefore, the department recommends that the claim for Phillip Hibler be denied. The department otherwise recommends that the claim be approved, subject to the following terms:

1. In lieu of compensation under ORS 197.352, the State of Oregon will not apply the following laws to Gerald, Karin, James and Debra Hibler's and Charlotte Bruno-Hibler's division of the 151.32-acre subject property into fifteen 5- to 50-acre parcels or to their 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 each of these claimants acquired the subject property. These laws will not apply to these claimants only to the extent necessary to allow them to use the subject property for the use described in this report, and only to the extent that use was permitted when James and Debra Hibler acquired the subject property on December 10, 1993, and only to the extent that use was permitted when Gerald and Karin Hibler and Charlotte Bruno-Hibler acquired the subject property on May 4, 1998. The department acknowledges that the relief to which James and Debra Hibler are entitled under ORS 197.352 may not allow them to use the subject property in the manner set forth in the claim; and the relief to which Gerald and Karin Hibler and Charlotte Bruno-Hibler are entitled under ORS 197.352 will not allow them to use the subject property in the manner set forth in the claim.
2. The action by the State of Oregon provides the state's authorization to Gerald, Karin, James and Debra Hibler and Charlotte Bruno-Hibler to use the subject property for the use described in this report, subject to the standards when they each acquired the property. In December 1993, the property was subject to Lane County's acknowledged E-40 zone and the provisions of ORS 215 and OAR 660, division 33, then in effect. In 1998, the property was subject Lane County's acknowledged E-40 zone, and the provisions of Goal 3, ORS 215 and OAR 660, division 33, and Lane County currently in effect.
3. To the extent that any law, order, deed, agreement or other legally enforceable public or private requirement provides that the subject property may not be used without a permit, license or other form of authorization or consent, the order will not authorize the use of the property unless the claimants first obtain that permit, license or other form of authorization or consent.

Such requirements may include, but are not limited to: a building permit, a land use decision, a "permit" as defined in ORS 215.402 or 227.160, other permits or authorizations from local, state or federal agencies and restrictions on the use of the subject property imposed by private parties.

4. Any use of the subject property by the claimants under the terms of the order will remain subject to the following laws: (a) those laws not specified in (1) above; (b) any laws enacted or enforced by a public entity other than the Commission or the department; and (c) those laws not subject to ORS 197.352 including, without limitation, those laws exempted under ORS 197.352(3).

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

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 9, 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.