Oregon
Theodore R. Kulongoski, Governor

Department of Land Conservation and Development
635 Capitol Street NE, Suite 150
Salem, Oregon 97301-2524
Phone: (503) 373-0050
First Floor/Coastal Fax: (503) 378-6033
Second Floor/Director's Office Fax: (503) 378-5518
Third Floor/Measure 37 Fax: (503) 378-5318
Web Address: http://www.oregon.gov/LCD

September 28, 2007

To: Interested Persons

From: Cora R. Parker, Acting Director

Re: Ballot Measure 37 (ORS 197.352) Claim Number M130945

Claimants: Lawrence and Evelyn Davis

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 Lawrence Davis, CLAIMANT	))))	FINAL ORDER A CLAIM NO. M130945

Claimant: Lawrence Davis (the Claimant)

Property: Township 17S, Range 13E, Section 31: tax lot 300
Township 18S, Range 13E, Section 3: tax lot 601
Deschutes 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 Lawrence and Evelyn Davis' division of tax lot 300 into four 5-acre parcels or to their development of a dwelling on each parcel, and to Lawrence Davis' development of a dwelling on tax lot 601: applicable provisions of Goals 3 and 14, ORS 215 and OAR 660-004-0040 and 660, division 33. These laws will not apply to the claimants only to the extent necessary to allow them to use tax lot 300 and will not apply to Lawrence Davis only to the extent necessary to allow him to use tax lot 601 for the use described in this report, and only to the extent that use was permitted when the claimants acquired tax lot 300 on August 19, 1964, and Lawrence Davis acquired tax lot 601 on June 4, 1980.

2. The action by the State of Oregon provides the state's authorization to the claimants to use tax lot 300 for the use described in this report, subject to the standards in effect on August 19, 1964; and to Lawrence Davis to use tax lot 601 for the use described in this report, subject to the standards in effect on June 4, 1980. On June 4, 1980, tax lot 601 was subject to applicable provisions of Goal 3 and ORS 215 then in effect.

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

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

5. Without limiting the generality of the foregoing terms and conditions, in order for the claimants to use tax lot 300 and Lawrence Davis to use tax lot 601, 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 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 Manager of the Measure 37 Services Unit 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:
Cora R. Parker, Acting Director

Michael Morrissey, Manager
DLCD, Measure 37 Division
Dated this 28th day of September, 2007.

FOR the DEPARTMENT OF ADMINISTRATIVE SERVICES:

Carla Ploederer, Manager
DAS, Measure 37 Services Unit
Dated this 28th day of September, 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 Evelyn Davis, CLAIMANT	))))	FINAL ORDER B CLAIM NO. M130945

Claimant: Evelyn Davis (the Claimant)

Property: Township 17S, Range 13E, Section 31, Tax lot 300
Township 18S, Range 13E, Section 3, Tax lot 601
Deschutes 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 for tax lot 601, as to laws administered by DLCD and the Land Conservation and Development Commission (LCDC) for the reasons set forth in the DLCD Report.

The Claim is approved for tax lot300, 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 Lawrence and Evelyn Davis' division of tax lot 300 into four 5-acre parcels or to their development of a dwelling on each parcel, and to Lawrence Davis' development of a dwelling on tax lot 601: applicable provisions of Goals 3 and 14, ORS 215 and OAR 660-004-0040 and 660, division 33. These laws will not apply to the claimants only to the extent necessary to allow them to use tax lot 300 and will not apply to Lawrence Davis only to the extent necessary to allow him to use tax lot 601 for the use described in this report, and only to the extent that use was permitted when the claimants acquired tax lot 300 on August 19, 1964, and Lawrence Davis acquired tax lot 601 on June 4, 1980.

2. The action by the State of Oregon provides the state's authorization to the claimants to use tax lot 300 for the use described in this report, subject to the standards in effect on August 19, 1964; and to Lawrence Davis to use tax lot 601 for the use described in this report, subject to the

standards in effect on June 4, 1980. On June 4, 1980, tax lot 601 was subject to applicable provisions of Goal 3 and ORS 215 then in effect.

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

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

5. Without limiting the generality of the foregoing terms and conditions, in order for the claimants to use tax lot 300 and Lawrence Davis to use tax lot 601, 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 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 Manager of the Measure 37 Services Unit 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:
Cora R. Parker, Acting Director

Michael Morrissey, Manager
DLCD, Measure 37 Division
Dated this 28th day of September, 2007.

FOR the DEPARTMENT OF ADMINISTRATIVE SERVICES:

Carla Ploederer, Manager
DAS, Measure 37 Services Unit
Dated this 28th day of September, 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)

FOR INFORMATION ONLY

The Oregon Department of Justice has advised the Department of Land Conservation and Development that "[i]f the current owner of the real property conveys the property before the new use allowed by the public entity is established, then the entitlement to relief will be lost."

ORS 197.352 (BALLOT MEASURE 37) CLAIM FOR COMPENSATION

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

September 28, 2007

STATE CLAIM NUMBER:	M130945
NAMES OF CLAIMANTS:	Lawrence and Evelyn Davis
MAILING ADDRESS:	22225 Neff Road Bend, Oregon 97701
PROPERTY IDENTIFICATION:	Township 17S, Range 13E Section 31: tax lot 300 Township 18S, Range 13E Section 3: tax lot 601 Deschutes County
OTHER CONTACT INFORMATION:	Helen L. Eastwood PO Box 1151 Bend, Oregon 97709
DATE RECEIVED BY DAS:	November 20, 2006
DEADLINE FOR FINAL ACTION:[1]	May 13, 2008

I. SUMMARY OF CLAIM

The claimants, Lawrence and Evelyn Davis, seek compensation in the amount of $1,257,000 for the reduction in fair market value as a result of land use regulations that are alleged to restrict the use of certain private real property. The claimants desire compensation or the right to divide tax lot 300 into four 5-acre parcels, and to develop a dwelling on each resulting undeveloped parcel and to develop a dwelling on tax lot 601.[2] Tax lot 300 is located at 22225 Neff Road and tax lot 601 is located on Ten Barr Road, near Bend, in Deschutes 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 two, non-contiguous tax lots. Tax lot 300 consists of 20.08 acres and tax lot 601 consists of 20 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 Lawrence and Evelyn Davis' division of tax lot 300 into four 5-acre parcels and to their development of a dwelling on each resulting undeveloped parcel, and to Lawrence Davis' development of a dwelling on tax lot 601: applicable provisions of Statewide Planning Goals 3 (Agricultural Lands) and 14 (Urbanization), ORS 215 and Oregon Administrative Rule (OAR) 660-004-0040 and OAR 660, division 33. These laws will not apply to the claimants only to the extent necessary to allow them to use tax lot 300 and will not apply to Lawrence Davis only to the extent necessary to allow him to use tax lot 601 for the use described in this report, and only to the extent that use was permitted when the claimants acquired tax lot 300 on August 19, 1964, and Lawrence Davis acquired tax lot 601 on June 4, 1980.

The department has further determined that the claim for Evelyn Davis as to tax lot 601 is not valid because the claimants have not established her ownership of that tax lot. (See the complete recommendation in Section VI. of this report.)

III. COMMENTS ON THE CLAIM

Comments Received

On June 21, 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, no written comments were received in response to the 15-day notice.

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, ORS 215 and Deschutes County's zoning code 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, Lawrence and Evelyn Davis, acquired tax lot 300 on August 19, 1964, as reflected by a warranty deed included with the claim. Lawrence Davis acquired tax lot 601 on June 4, 1980, as reflected by a special warranty deed included with the claim. The claimants assert that Evelyn Davis acquired tax lot 601 on June 4, 1980, but the claim does not include any documentation to establish that she is an owner of tax lot 601. The Deschutes County Assessor's Office confirms the claimants' current ownership of tax lot 300 and Lawrence Davis' current ownership of tax lot 601.

Conclusions

The claimants, Lawrence and Evelyn Davis, are "owners" of tax lot 300 as that term is defined by ORS 197.352(11)(C), as of August 19, 1964. Claimant Lawrence Davis is an owner of tax lot 601 as of June 4, 1980. Claimant Evelyn Davis has not established that she is an "owner" of tax lot 601 as that term is defined in ORS 197.352(11)(C).

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 tax lot 300 into four 5-acre parcels and to develop a dwelling on each resulting undeveloped parcel, and to develop a dwelling on tax lot 601. The claim indicates that current land use regulations prevent the desired use.

The claim is based on the provisions of state law that regulate rural residential and Exclusive Farm Use (EFU) zoning and restrict uses on rural residential and EFU-zoned land.

Tax lot 300 is zoned Multiple Use Agriculture (MUA-10) by Deschutes County. The MUA-10 zone is a rural residential zone, in accordance with Goal 14, which prohibits urban use of rural lands. The county's MUA-10 zone requires ten acres for the creation of any new lot or parcel and was in effect and applied to the subject property on or before October 4, 2000.

Goal 14 became effective on January 25, 1975, and requires that local comprehensive plans identify and separate urbanizable land from rural land in order to provide for an orderly and efficient transition from rural to urban land use. In 2000, as a result of a 1986 Oregon Supreme Court decision,[3] the Commission amended Goal 14 and adopted OAR 660-004-0040 (Application of Goal 14 to Rural Residential Areas), which was effective on October 4, 2000.

The rule states that if a county rural residential zone in effect on October 4, 2000, specifies a minimum lot size of two acres or more, the area of any new lot or parcel shall equal or exceed the minimum lot size then in effect (OAR 660-004-0040(7)(c)).[4] Because Deschutes County's rural residential zone was in effect on October 4, 2000, and requires a minimum lot size of ten acres, the minimum lot size for all new lots or parcels must equal or exceed ten acres.

The claimants acquired tax lot 300 in 1964, prior to the adoption of the statewide planning goals and their implementing statutes and rules. No county zoning regulations applied to the subject property in 1964.

Tax lot 601 is zoned EFU by Deschutes County as required by Goal 3, in accordance with ORS 215 and OAR 660, division 33, because tax lot 601 is "agricultural land" as defined by Goal 3.[5] 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 215.284 and OAR 660, division 33, enacted or adopted pursuant to Goal 3, establish standards for development of dwellings on existing or proposed parcels on EFU-zoned land.

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 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.[6]

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[3] *1000 Friends of Oregon v. LCDC (Curry County)*, 301 Or 447 (1986).

[4] Some relief from this provision is available for lots or parcels having more than one permanent habitable dwelling pursuant to OAR 660-004-0040(7)(h). The rule also provides that a county's minimum lot size requirement in a rural residential zone shall not be amended to allow a smaller minimum lot size without approval of an exception to Goal 14 (OAR 660-004-0040(6)).

[5] The claimants' property is "agricultural land" because it contains Natural Resources Conservation Service Class I–VI soils.

[6] The Commission 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 under OAR 660, division 33, for EFU-zoned land.

Lawrence Davis acquired tax lot 601 after the adoption of the statewide planning goals, but before the Commission acknowledged Deschutes County's land use regulations to be in compliance with the statewide planning goals pursuant to ORS 197.250 and 197.251.[7] At that time, tax lot 601 was zoned EFU-20 by Klamath County. However, because the Commission had not acknowledged the county's plan and land use regulations when Lawrence Davis acquired tax lot 601 on June 4, 1980, the statewide planning goals, and Goal 3 in particular, applied directly to tax lot 601 when he acquired it.[8]

Under the Goal 3 standards in effect on June 4, 1980, farm dwellings were allowed if they were determined to be "customarily provided in conjunction with farm use" under ORS 215.213(1)(e) (1973 edition). Non-farm dwellings were subject to compliance with ORS 215.213(3) (1973 edition).

The claim does not establish whether or to what extent Lawrence Davis' desired development of tax lot 601 was allowed under the standards in effect when he acquired that tax lot on June 4, 1980.

Conclusions

The current zoning requirements, minimum lot size and dwelling standards established by Goals 3 and 14, ORS 215 and OAR 660-004-0040 and 660, division 33, were enacted or adopted since the claimants acquired tax lot 300 in 1964 and Lawrence Davis acquired tax lot 601 in 1980 and do not allow the desired division and development of the property. However, the claim does not establish whether or the extent to which Lawrence Davis' desired use of tax lot 601 complies with the standards for land development under the requirements of Goal 3 and ORS 215 in effect when he acquired tax lot 601 on June 4, 1980.

As explained in Section V.(1) above, Evelyn Davis has not established that she is an "owner" of tax lot 601 as that term is defined in ORS 197.352(11)(C). Without such demonstration, it is not possible to determine that any laws enforced by the Commission or the department restrict Evelyn Davis' desired use of tax lot 601 with the effect of reducing the fair market value of that tax lot relative to how it could have been used at the time she or a family member may have acquired tax lot 601.

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[7] Deschutes County's comprehensive plan and land use regulations were acknowledged by the Commission for compliance with Goal 3 on May 11, 1981.

[8] 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 comprehensive plan and implementing 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 3 (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 applied directly to such 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 uses that the claimants have identified. There may be other laws that currently apply to the claimants' use of the subject property, and that may continue to apply to the claimants' use of the property, that have not been identified in the claim. In some cases, it will not be possible to know which laws apply to a use of the subject property until there is a specific proposal for that use. When the 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.

3. Effect of Regulations on Fair Market Value

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

Findings of Fact

The claim includes an estimate of $1,257,000 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 a market analysis included with the claim.

Conclusions

As explained in Section V.(1) of this report, the claimants are Lawrence and Evelyn Davis, who acquired tax lot 300 on August 19, 1964. Lawrence Davis acquired tax lot 601 on June 4, 1980. As explained in Section V.(1) of this report, Evelyn Davis has not established her ownership of tax lot 601. Without such demonstration, the department can make no determination on the effect of any land use regulations on the fair market value of tax lot 601 as to Evelyn Davis.

Under ORS 197.352, the claimants are due compensation for land use regulations that restrict the use of tax lot 300 and Lawrence Davis is due compensation for land use regulations that restrict his use of tax lot 601 and have the effect of reducing the property's fair market value. Based on the findings and conclusions in Section V.(2) of this report, laws enacted or adopted since the claimants acquired tax lot 300 and Lawrence Davis acquired tax lot 601 restrict the claimants' desired use of those tax lots. The claimants estimate that the effect of the regulations on the fair market value of the subject property is a reduction of $1,257,000.

Without an appraisal or other documentation and without verification of whether or the extent to which Lawrence Davis' desired use of tax lot 601 was allowed under the standards in effect when he acquired that tax lot, it is not possible to substantiate the specific dollar amount by which the land use regulations have reduced the fair market value of the subject property. Nevertheless, based on the evidence in the record for this claim, the department determines that the fair market value of the subject property has been reduced to some extent as a result of land use regulations enforced by the Commission or the department.

4. Exemptions Under ORS 197.352(3)

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

Findings of Fact

The claim is based on state land use regulations that restrict the use of the subject property, including applicable provisions of Goals 3 and 14 and OAR 660-004-0040 and 660, division 33, which Deschutes County has implemented through its current MUA-10 and EFU zones. With the exception of provisions of Goal 3 and ORS 215 in effect when Lawrence Davis acquired tax lot 601 on June 4, 1980, these land use regulations were enacted or adopted after the claimants acquired tax lot 300 and Lawrence Davis acquired tax lot 601.

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 3 and ORS 215 in effect in 1980 when Lawrence Davis acquired tax lot 601, the statutory, goal and rule restrictions on division and development of the claimants' property were not in effect when the claimants acquired tax lot 300 and Lawrence Davis acquired tax lot 601, and therefore, these laws are not exempt under ORS 197.352(3)(E). Provisions of Goal 3 and ORS 215 in effect when Lawrence Davis acquired tax lot 601 in 1980 are exempt under ORS 197.352(3)(E) and will continue to apply to that tax lot.

As explained in Section V.(1) of this report, Evelyn Davis has not established that she is an "owner" of tax lot 601 as that term is defined in ORS 197.352(11)(C). Without such demonstration, the department can make no determination as to whether any land use laws are exempt from ORS 197.352.

Other laws in effect when the claimants acquired tax lot 300 and Lawrence Davis acquired tax lot 601 are also exempt under ORS 197.352(3)(E) and will continue to apply to the claimants' use of the property. There may be other laws that continue to apply to the claimants' use of tax lot 300 and Lawrence Davis' use of tax lot 601 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 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 the 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.

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 laws that restrict the use of the subject 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 subject 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 Evelyn Davis for tax lot 601 because the claimants have not demonstrated her ownership of that tax lot or established the date she acquired tax lot 601. The department further finds laws enforced by the Commission or the department restrict the claimants' desired use of tax lot 300 and Lawrence Davis' use of tax lot 601. 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 $1,257,000. 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 claimants' desired use of the subject property was allowed under the standards in effect when the claimants acquired tax lot 300 and Lawrence Davis acquired tax lot 601. 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 Lawrence and Evelyn Davis to use tax lot 300 for a use permitted at the time they acquired tax lot 300 on August 19, 1964, and to allow Lawrence Davis to use tax lot 601 for a use permitted at the time he acquired tax lot 601 on June 4, 1980.

Conclusions

Based on the record before the department, Evelyn Davis has not established that she is entitled to relief under ORS 197.352(1) for tax lot 601 as a result of land use regulations enforced by the Commission or the department because the claimants have not established that she is an owner of tax lot 601. Therefore, the department recommends that this claim be denied as to Evelyn Davis for tax lot 601.
The department otherwise recommends that the claim be approved as to Lawrence and Evelyn Davis for tax lot 300 and as to Lawrence Davis for tax lot 601, 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 Lawrence and Evelyn Davis' division of tax lot 300 into four 5-acre parcels or to their

development of a dwelling on each parcel, and to Lawrence Davis' development of a dwelling on tax lot 601: applicable provisions of Goals 3 and 14, ORS 215 and OAR 660-004-0040 and 660, division 33. These laws will not apply to the claimants only to the extent necessary to allow them to use tax lot 300 and will not apply to Lawrence Davis only to the extent necessary to allow him to use tax lot 601 for the use described in this report, and only to the extent that use was permitted when the claimants acquired tax lot 300 on August 19, 1964, and Lawrence Davis acquired tax lot 601 on June 4, 1980.

2. The action by the State of Oregon provides the state's authorization to the claimants to use tax lot 300 for the use described in this report, subject to the standards in effect on August 19, 1964; and to Lawrence Davis to use tax lot 601 for the use described in this report, subject to the standards in effect on June 4, 1980. On June 4, 1980, tax lot 601 was subject to applicable provisions of Goal 3 and ORS 215 then in effect.

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

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

5. Without limiting the generality of the foregoing terms and conditions, in order for the claimants to use tax lot 300 and Lawrence Davis to use tax lot 601, 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 August 29, 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. Comments received have been taken into account by the department in the issuance of this final report.