



Oregon

Theodore R. Kulongoski, Governor

Department of Land Conservation and Development

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September 12, 2007

To: Interested Persons

From: Cora R. Parker, Acting Director

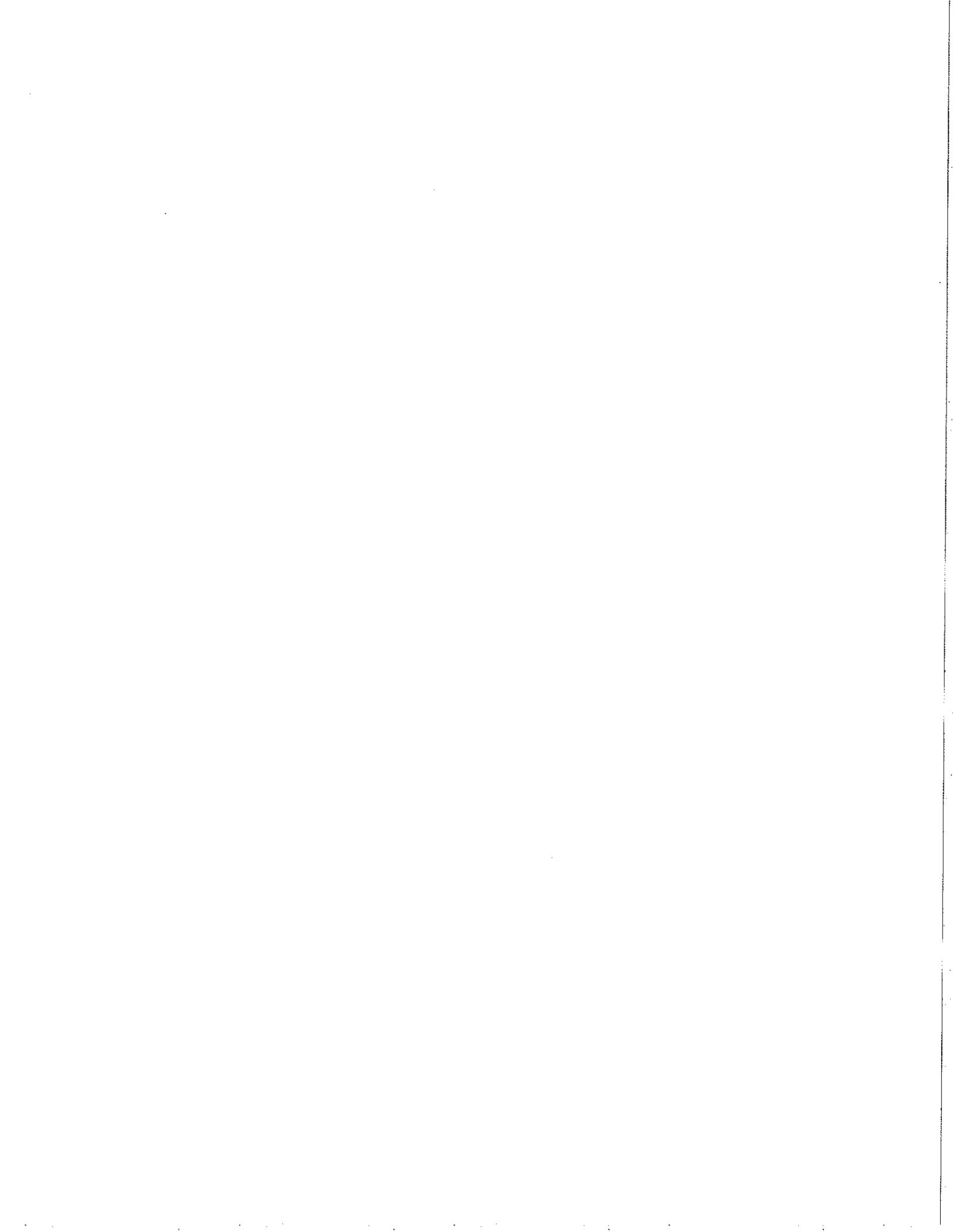


Re: Ballot Measure 37 (ORS 197.352) Claim Number M131020

Claimant: Bryce H. Johnston

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
COMPENSATION UNDER ORS 197.352) CLAIM NO. M131020
(BALLOT MEASURE 37) OF)
Bryce H. Johnston, CLAIMANT)

Claimant: Bryce H. Johnston (the Claimant)

Property: Township 17S, Range 12W, Section 22: tax lot 400
Township 17S, Range 12W, Section 23: tax lot 800
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 the portion of tax lot 800 lying west of State Highway 101 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 lot 400 and the portion of tax lot 800 lying east of the westerly line of State Highway 101 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 Bryce Johnston's division of tax lot 400 and the portion of tax lot 800 lying east of the westerly line of State Highway 101 into parcels of at least one acre each and to his development of a dwelling and accessory structures on each parcel: applicable provisions of Goals 4, 11 and 14, ORS 215 and OAR 660, divisions 6, and 11. These land use regulations will not apply to the claimant only to the extent necessary to allow him to use tax lot 400 and the portion of tax lot 800 lying east of the westerly line of State Highway 101 for the use described in this report, and only to the extent that use was permitted when he acquired that tax lot on October 19, 1943. Goal 11 will not apply only to the extent that it prohibits the claimant from establishing an urban level of public facilities and services to serve the development of tax lot 400 and the portion of

tax lot 800 lying east of the westerly line of State Highway 101. Goal 11 will continue to apply to public service providers seeking to extend or establish public facilities to serve tax lot 400 and that portion of tax lot 800.

2. The action by the State of Oregon provides the state's authorization to the claimant to use tax lot 400 and the portion of tax lot 800 lying east of the westerly line of State Highway 101 for the use described in this report, subject to the standards in effect on October 19, 1943.

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 tax lot 400 and the portion of tax lot 800 lying east of the westerly line of State Highway 101 unless the claimant first obtains that permit, license or other form of authorization or consent. Such requirements may include, but are not limited to: a building permit, a land use decision, a "permit" as defined in ORS 215.402 or 227.160, other permits or authorizations from local, state or federal agencies and restrictions on the use of the subject property imposed by private parties.

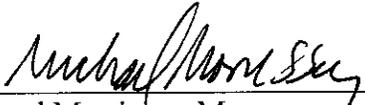
4. Any use of the subject property by the claimant under the terms of the order will remain subject to the following laws: (a) those laws not specified in (1) above; (b) any laws enacted or enforced by a public entity other than the Commission or the department; and (c) those laws not subject to ORS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

5. Without limiting the generality of the foregoing terms and conditions, in order for the claimant to use tax lot 400 and the portion of tax lot 800 lying east of the westerly line of State Highway 101, it may be necessary for him to obtain a decision under ORS 197.352 from a city and/or county and/or metropolitan service district that enforces land use regulations applicable to the property. Nothing in this order relieves the claimant from the necessity of obtaining a decision under ORS 197.352 from a local public entity that has jurisdiction to enforce a land use regulation applicable to a use of tax lot 400 by the claimant.

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

This Order is entered by the Manager for the Measure 37 Services Division of 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 12th day of September, 2007.

FOR the DEPARTMENT OF
ADMINISTRATIVE SERVICES:


Carla Ploederer, Manager
DAS, Measure 37 Services Unit
Dated this 12th day of September, 2007.

NOTICE OF RIGHT TO APPEAL OR OTHER JUDICIAL RELIEF

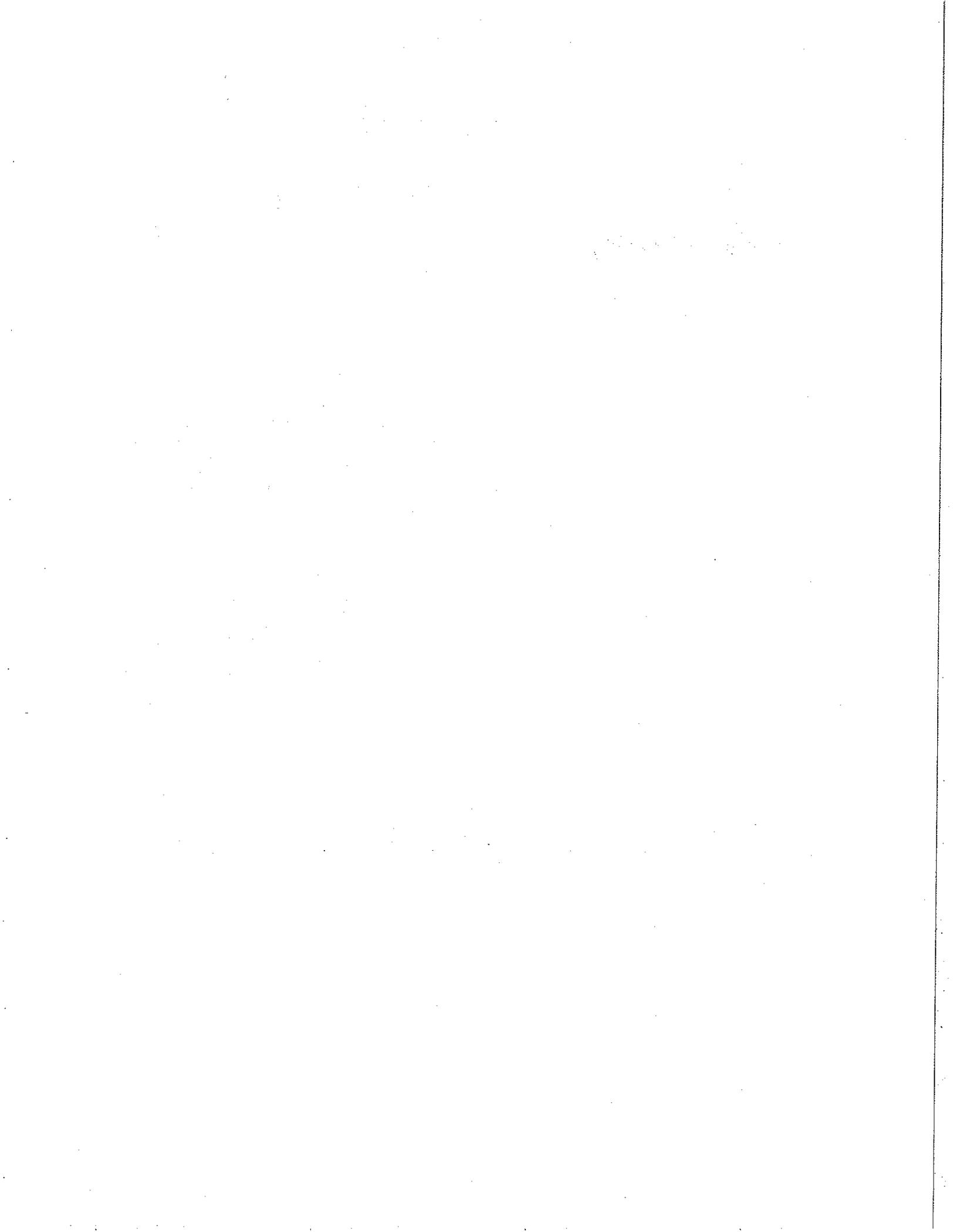
You are entitled, or may be entitled, to judicial remedies including the following:

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."



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

September 12, 2007

STATE CLAIM NUMBER: M131020

NAME OF CLAIMANT: Bryce H. Johnston

MAILING ADDRESS: 3732 North Clarey Street
Eugene, Oregon 97402-8744

PROPERTY IDENTIFICATION: Township 17S, Range 12W
Section 22: tax lot 400
Section 23: tax lot 800
Lane County

OTHER CONTACT INFORMATION: Lee Omlid, Attorney
216 Nopal Street
Florence, Oregon 97439-9660

DATE RECEIVED BY DAS: November 21, 2006

DEADLINE FOR FINAL ACTION:¹ May 14, 2008

I. SUMMARY OF CLAIM

The claimant, Bryce Johnston, seeks compensation in the amount of \$1.07 million for the reduction in fair market value as a result of land use regulations that are alleged to restrict the use of certain private real property. The claimant desires compensation or the right to divide the 122.6-acre subject property² into 61 parcels of at least one acre each and to develop a dwelling and accessory structures on each parcel.³ The subject property is located at 90000 and 90019

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 tax lots. Tax lot 400 consists of 5.41 acres; and tax lot 800 consists of 117.37 acres.

³ The claim also indicates that the claimant desires to sell or transfer the newly created parcels for development. In effect, the claimant requests that a decision of the department to "not apply" (waive) certain laws as set forth in this report be transferable with the property. ORS 197.352 only authorizes a state agency to waive a law in order to allow the current owner a use of the property permitted at the time that owner acquired the property. A determination of transferability is beyond the scope of relief that the department may grant under ORS 197.352. The Oregon Department of Justice has advised the department that "[i]f the current owner of the real property

Oregon Coast US Highway 101, north of the intersection of Highway 101 and Sutton Lake Road, near Florence, in Lane County. (See claim.)

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 Bryce Johnston's division of tax lot 400 and the portion of tax lot 800 lying east of the westerly line of State Highway 101 into parcels of at least one acre each and to his development of a dwelling and accessory structures on each parcel: applicable provisions of Statewide Planning Goals 4 (Forest Lands), 11 (Public Facilities) and 14 (Urbanization), ORS 215 and Oregon Administrative Rules (OAR) 660, divisions 6, and 11. These laws will not apply to the claimant only to the extent necessary to allow him to use tax lot 400 and the portion of tax lot 800 lying east of the westerly line of State Highway 101 for the use described in this report, and only to the extent that use was permitted when he acquired that tax lot on October 19, 1943.

The department has further determined that this claim is not valid as to the portion of tax lot 800 lying west of State Highway 101 because the claimant is not an owner of that portion. (See the complete recommendation in Section VI. of this report.)

III. COMMENTS ON THE CLAIM

Comments Received

On June 12, 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

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

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 21, 2006, for processing under OAR 125, division 145. The claim identifies all the statewide planning goals, including 3, 4, 5, 11, 12 and 14 to 19; “interim land use goals”; provisions of ORS 197 and 215; provisions of OAR 660, including divisions 6, 4, 11, 12, 15, 16, 21 to 24, 26, and 33; and provisions of Lane County zoning code, including F-2, “Beach, Dune and Natural Resource Conservation zones” and Coastal Combining Code overlays as the basis for the claim. Only laws that were enacted or adopted prior to December 2, 2004, are the basis for this claim.

Conclusions

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

V. ANALYSIS OF CLAIM

1. Ownership

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

Findings of Fact

The claimant, Bryce Johnston, first acquired the subject property on October 19, 1943, from his wife, Thelma M. Johnston, as reflected by a bargain and sale deed included with the claim.⁴ On October 4, 1991, the claimant transferred the property to a revocable trust, the Bryce H. and Thelma M. Johnston Trust, with himself as trustee, as evidenced by a quitclaim deed included with the claim.⁵ On December 13, 2006, the claimant conveyed the portion of tax lot 800 lying west of State Highway 101 to a third party, as reflected by a warranty deed included with the claim, and is no longer an owner of that portion of tax lot 800.⁶ The Lane County Assessor’s Office confirms the claimant’s current ownership of tax lot 400 and the portion of tax lot 800 lying east of the westerly line of State Highway 101.

⁴ Although the claimant first acquired the subject property from his wife, Thelma M. Johnston, the claimant has not provided any evidence or documentation to establish when the claimant’s family member acquired the property. Absent evidence to establish the date of family acquisition, the department cannot evaluate the claim for compensation based on the date of family ownership.

⁵ Transfer of property to a revocable trust does not result in a change in ownership for purposes of ORS 197.352.

⁶ In response to the draft staff report dated July 23, 2007, the claimant’s attorney submitted a letter dated July 30, 2007, that included a warranty deed establishing the claimant’s continuous ownership of the portion of tax lot 800 lying east of the westerly line of State Highway 101.

Conclusions

The claimant, Bryce Johnston, is an "owner" of tax lot 400 and the portion of tax lot 800 lying east of westerly line of State Highway 101 as that term is defined by ORS 197.352(11)(C), as of October 19, 1943. The claimant is not an owner of the portion tax lot 800 lying west of State Highway 101.

2. The Laws That are the Basis for This Claim

In order to establish a valid claim, ORS 197.352(1) requires, in part, that a law must restrict the claimant's use of private real property in a manner that reduces the fair market value of the property relative to how the property could have been used at the time the claimant or a family member acquired the property.

Findings of Fact

The claim indicates that the claimant desires to divide the 122.6-acre subject property into 61 parcels of at least one acre and to develop a dwelling and accessory structures on each parcel, and that current land use regulations prevent the desired use.⁷

The claim is based generally on the applicable provisions of state law that require forest zoning and restrict uses on forest-zoned land. The claimant's property is zoned Impacted Forest (F-2) by Lane County as required by Goal 4, in accordance with ORS 215 and OAR 660, division 6, because the claimant's property is "forest land" under Goal 4. Goal 4 became effective on January 25, 1975, and requires that forest land be zoned for forest use.

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

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

OAR 660, division 6, became effective on September 1, 1982, to implement Goal 4 and establish standards for divisions and development of land zoned for forest use, and was amended on March 1, 1994, to implement ORS 215.705 to 215.755 and 215.780. OAR 660-006-0025

⁷ The claimant summarily lists numerous state land use laws as applicable to this claim, but does not establish how the laws either apply to the claimant's desired use of the subject property or restrict its use with the effect of reducing its fair market value. On their face, most of the regulations either do not apply to the claimant's property or do not restrict the use of the claimant's property with the effect of reducing its fair market value. In particular, although the area is dune (as is this entire region), it is not beach or foredune subject to ocean flooding or erosion, which would implicate Goal 18 (Beaches and Dunes), nor is it located adjacent to other coastal water body, which would implicate Goal 17 (Coastal Shorelands). There also does not appear to be any significant wetlands or habitat. This report addresses only those regulations that the department finds are applicable to and restrict the claimant's desired use of the subject property, based on the claimant's description of his desired use.

interprets the goal and statutory standard for uses allowed in forest zones. OAR 660-006-0026 interprets land division requirements in forest zones, and 660-006-0027 and 660-006-0029 interpret the standards for dwellings in forest zones.

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

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

The claimant acquired tax lot 400 and the portion of tax lot 800 lying east of the westerly line of State Highway 101 on October 19, 1943, prior to the adoption of the statewide planning goals and their implementing statutes and regulations. At that time, that tax lot was not subject to county zoning.

Conclusions

The current zoning requirements, minimum lot size and dwelling standards established by Goals 4, 11 and 14, ORS 215 and OAR 660, divisions 6, and 11, for forest-zoned land were all enacted or adopted after the claimant acquired tax lot 400 and the portion of tax lot 800 lying east of the westerly line of State Highway 101 in 1943 and do not allow the claimant's desired division or development of the property. These laws restrict the use of the property relative to the uses allowed when the claimant acquired the property. Those elements of Goal 11 that prohibit a public service provider from extending or establishing public facilities or services outside of an urban growth boundary restrict the actions of local government rather than the claimant's use of the property. That component of Goal 11 is not subject to ORS 197.352 and will continue to apply to those service providers. Only the general prohibition under Goal 11 on the claimant's establishment of an urban level of public facilities and services is subject to ORS 197.352 and restricts the claimant's desired use of tax lot 400 and the portion of tax lot 800 lying east of the westerly line of State Highway 101.

As explained in Section V.(1) of this report, the claimant, Bryce Johnston, is not an "owner" of the portion of tax lot 800 lying west of State Highway 101 as that term is defined in ORS 197.352(11)(C). Therefore, no laws restrict the claimant's use of that portion tax lot 800 with the effect of reducing its fair market value.

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

continue to apply to the claimant's use of the property, that have not been identified in the claim. In some cases, it will not be possible to know which laws apply to a use of the subject property until there is a specific proposal for that use. When the claimant seeks a building or development permit to carry out a specific use, it may become evident that other state laws apply to that use.

3. Effect of Regulations on Fair Market Value

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

Findings of Fact

The claim includes an estimate of \$1.07 million as the reduction in the subject property's fair market value due to the regulations that restrict the claimant's desired use of the property. This amount is based on a comparative market analysis included with the claim.

Conclusions

As explained in Section V.(1) of this report, the claimant is Bryce Johnston who acquired tax lot 400 and the portion of tax lot 800 lying east of the westerly line of State Highway 101 on October 19, 1943. The claimant is not an "owner" of the portion of tax lot 800 lying west of State Highway 101, as that term is defined in ORS 197.352(11)(C). Therefore, no laws restrict his use of that portion of tax lot 800 with the effect of reducing its fair market value. Under ORS 197.352, the claimant is due compensation for land use regulations that restrict the use of tax lot 400 and the portion of tax lot 800 lying east of the westerly line of State Highway 101 and have the effect of reducing its fair market value. Based on the findings and conclusions in Section V.(2) of this report, laws enacted or adopted since the claimant acquired tax lot 400 and that portion of tax lot 800 restrict the claimant's desired use of the property. The claimant estimates that the effect of the regulations on the fair market value of the subject property is a reduction of \$1.07 million.

Without an appraisal or other documentation, it is not possible to substantiate the specific dollar amount by which the land use regulations have reduced the fair market value of the subject property. Nevertheless, based on the evidence in the record for this claim, the department determines that the fair market value of tax lot 400 and the portion of tax lot 800 lying east of the westerly line of State Highway 101 has been reduced to some extent as a result of land use regulations enforced by the Commission or the department.

4. Exemptions Under ORS 197.352(3)

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

Findings of Fact

The claim is based on state land use regulations that restrict the use of the subject property, including applicable provisions of Goals 4, 11 and 14, ORS 215 and OAR 660, divisions 6, and

11, which Lane County has implemented through its current F-2 zone. All of these land use regulations were enacted or adopted after the claimant acquired tax lot 400 and the portion of tax lot 800 lying east of the westerly line of State Highway 101.

Conclusions

Without a specific development proposal for the subject property, it is not possible for the department to determine all the laws that may apply to a particular use of the property, or whether those laws may fall under one or more of the exemptions under ORS 197.352. It appears that none of the general statutory, goal and rule restrictions on residential division and development of the subject property were in effect when the claimant acquired tax lot 400 and the portion of tax lot 800 lying east of the westerly line of State Highway 101 in 1943. As a result, these laws are not exempt under ORS 197.352(3)(E).

As explained in Section V.(1) of this report, the claimant is not an "owner" of the portion of tax lot 800 lying west of State Highway 101 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 that portion of tax lot 800.

Laws in effect when the claimant acquired tax lot 400 and the portion of tax lot 800 lying east of the westerly line of State Highway 101 are exempt under ORS 197.352(3)(E) and will also continue to apply to the claimant's use of the property. In addition, the department notes that ORS 215.730 and OAR 660, division 6, particularly OAR 660-006-0027, -0029 and -0035, include fire protection standards for dwellings and structures in forest zones. ORS 197.352 (3)(B) specifically exempts regulations "restricting or prohibiting activities for the protection of public health and safety, such as fire and building codes. . . ." Accordingly, the siting standards for dwellings and structures in forest zones in ORS 215.730 and OAR 660, division 6, are exempt under ORS 197.352(3)(B). In addition, Lane County notes that portions of the subject property contain wetlands. 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 wetland 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 claimant's use of tax lot 400 and the portion of tax lot 800 lying east of the westerly line of State Highway 101 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 that lot 400 and that portion of tax lot 800 until there is a specific proposal for that use. When the claimant seeks a building or development permit to carry out a specific use, it may become evident that other state laws apply to that use. In some cases, some of these laws may be exempt under ORS 197.352(3)(A) to (D).

This report addresses only those state laws that are identified in the claim, or that the department is certain apply to the subject property based on the uses that the claimant has identified. Similarly, this report only addresses the exemptions provided for under ORS 197.352(3) that are clearly applicable, given the information provided to the department in the claim. The claimant should be aware that the less information he has provided to the department in the claim, the greater the possibility that there may be additional laws that will later be determined to continue

to apply to his use of tax lot 400 and the portion of tax lot 800 lying east of the westerly line of State Highway 101.

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 the claim is not valid for the portion of tax lot 800 lying west of State Highway 101 because the claimant is not an owner of that portion of tax lot 800. The department further finds that laws enforced by the Commission or the department restrict the claimant's desired use of tax lot 400 and the portion of tax lot 800 lying east of the westerly line of State Highway 101. 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 \$1.07 million. However, because the claim does not provide an appraisal or other relevant evidence demonstrating that the land use regulations described in Section V.(2) reduce the fair market value of tax lot 400, a specific amount of compensation cannot be determined. In order to determine a specific amount of compensation due for this claim, it would also be necessary to verify whether or the extent to which the claimant's desired use of tax lot 400 and the portion of tax lot 800 lying east of the westerly line of State Highway 101 was allowed under the standards in effect when he acquired that tax lot. Nevertheless, based on the record for this claim, the department has determined that the laws on which the claim is based have reduced the fair market value of tax lot 400 and that portion of tax lot 800 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 Bryce Johnston to use tax lot 400 and the portion of tax lot 800 lying east of the westerly line of State Highway 101 for a use permitted at the time he acquired it on October 19, 1943.

Conclusions

Based on the record before the department, the claimant, Bryce Johnston, has not established that he is entitled to relief as to the portion of tax lot 800 lying west of State Highway 101 under ORS 197.352(1) as a result of land use regulations enforced by the Commission or the department because the claimant is not an owner of that tax lot. Therefore, the department recommends that this claim be denied as to the portion of tax lot 800 lying west of State Highway 101.

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 Bryce Johnston's division of tax lot 400 and the portion of tax lot 800 lying east of the westerly line of State Highway 101 into parcels of at least one acre each and to his development of a dwelling and accessory structures on each parcel: applicable provisions of Goals 4, 11 and 14, ORS 215 and OAR 660, divisions 6, and 11. These land use regulations will not apply to the claimant only to the extent necessary to allow him to use tax lot 400 and the portion of tax lot 800 lying east of the westerly line of State Highway 101 for the use described in this report, and only to the extent that use was permitted when he acquired that tax lot on October 19, 1943. Goal 11 will not apply only to the extent that it prohibits the claimant from establishing an urban level of public facilities and services to serve the development of tax lot 400 and the portion of tax lot 800 lying east of the westerly line of State Highway 101. Goal 11 will continue to apply to public service providers seeking to extend or establish public facilities to serve tax lot 400 and that portion of tax lot 800.
2. The action by the State of Oregon provides the state's authorization to the claimant to use tax lot 400 and the portion of tax lot 800 lying east of the westerly line of State Highway 101 for the use described in this report, subject to the standards in effect on October 19, 1943.
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 tax lot 400 and the portion of tax lot 800 lying east of the westerly line of State Highway 101 unless the claimant first obtains that permit, license or other form of authorization or consent. Such requirements may include, but are not limited to: a building permit, a land use decision, a "permit" as defined in ORS 215.402 or 227.160, other permits or authorizations from local, state or federal agencies and restrictions on the use of the subject property imposed by private parties.
4. Any use of the subject property by the claimant under the terms of the order will remain subject to the following laws: (a) those laws not specified in (1) above; (b) any laws enacted or enforced by a public entity other than the Commission or the department; and (c) those laws not subject to ORS 197.352 including, without limitation, those laws exempted under ORS 197.352(3).
5. Without limiting the generality of the foregoing terms and conditions, in order for the claimant to use tax lot 400 and the portion of tax lot 800 lying east of the westerly line of State Highway 101, it may be necessary for him to obtain a decision under ORS 197.352 from a city and/or county and/or metropolitan service district that enforces land use regulations applicable to the property. Nothing in this order relieves the claimant from the necessity of obtaining a decision under ORS 197.352 from a local public entity that has jurisdiction to enforce a land use regulation applicable to a use of tax lot 400 by the claimant.
6. Nothing in this report or the state's final order for this claim constitutes any determination of ownership by the State of Oregon as to submerged or submersible lands, or as to public rights to the use of waters of the state.

VII. COMMENTS ON THE DRAFT STAFF REPORT

The department issued its draft staff report on this claim on July 23, 2007. OAR 125-145-0100(3), provided an opportunity for the claimant or the claimant's authorized agent and any third parties who submitted comments under OAR 125-145-0080 to submit written comments, evidence and information in response to the draft staff report and recommendation.