



# Oregon

Theodore R. Kulongoski, Governor

## Department of Land Conservation and Development

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September 28, 2007

To: Interested Persons  
From: Cora R. Parker, Acting Director



*Re: Ballot Measure 37 (ORS 197.352) Claim Number M131120*

*Claimants: Wayne M. Johnston, M. Daryl and Donna J. Johnston*

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Enclosed, in regard to the above-referenced claim for compensation under Ballot Measure 37 (ORS 197.352), is the Final Staff Report and Recommendation of the Department of Land Conservation and Development, and the Final Order.

This Final Staff Report and Recommendation and the Final Order constitute the final decision on this claim. No further action will be taken on this matter.

BEFORE THE DEPARTMENT OF ADMINISTRATIVE SERVICES,  
THE DEPARTMENT OF LAND CONSERVATION AND DEVELOPMENT OF  
THE STATE OF OREGON

IN THE MATTER OF THE CLAIM FOR )      FINAL ORDER A  
COMPENSATION UNDER ORS 197.352 )      CLAIM NO. M131120  
(BALLOT MEASURE 37) OF )  
Wayne M. Johnston, CLAIMANT )

Claimant:      Wayne M. Johnston (the Claimant)

Property:      Township 3N, Range 10W, Section 26: tax lot 800  
                  Township 3N, Range 10W, Section 36: tax lot 1502  
                  Tillamook 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 the northern portion of tax lot 800, 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 1502 and the southern portion of tax lot 800, as to laws administered by DLCD and the Land Conservation and Development Commission (LCDC) for the reasons set forth in the DLCD Report, and subject to the following terms:

1. In lieu of compensation under ORS 197.352, the State of Oregon will not apply the following laws to Wayne Johnston's division of tax lot 1502 and the southern portion of tax lot 800 into 0.5-acre parcels or to his development of a dwelling on each resulting undeveloped parcel: applicable provisions of Goal 3, ORS 215 and OAR 660, division 33, enacted or adopted after May 1, 1999. These land use regulations will not apply to Wayne Johnston only to the extent necessary to allow him to use tax lot 1502 and the southern portion of tax lot 800 for the use described in this report, and only to the extent that use was permitted when he acquired that portion of the property on May 1, 1999. The department acknowledges that the relief to which the claimant is entitled under ORS 197.352 may not allow the claimant to use tax lot 1502 and the southern portion of tax lot 800 in the manner set forth in the claim.

2. The action by the State of Oregon provides the state's authorization to Wayne Johnston to use tax lot 1502 and the southern portion of tax lot 800 for the use described in this report,

subject to the standards in effect on May 1, 1999. At that time, the property was subject to applicable provisions of Goal 3, ORS 215 and OAR 660, division 33, currently in effect.

3. To the extent that any law, order, deed, agreement or other legally enforceable public or private requirement provides that tax lot 1502 and the southern portion of tax lot 800 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 Wayne Johnston 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 tax lot 1502 and the southern portion of tax lot 800 by Wayne Johnston 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 Wayne Johnston to use tax lot 1502 and the southern portion of tax lot 800, 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 Wayne Johnston 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 Wayne Johnston.

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

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

FOR the DEPARTMENT OF  
ADMINISTRATIVE SERVICES:

  
\_\_\_\_\_  
Carla Ploederer, Manager  
DAS, Measure 37 Services Unit  
Dated this 28<sup>th</sup> 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 ) FINAL ORDER B  
COMPENSATION UNDER ORS 197.352 ) CLAIM NO. M131120  
(BALLOT MEASURE 37) OF )  
M. Daryl and Donna J. Johnston, CLAIMANTS )

Claimants: M. Daryl and Donna J. Johnston (the Claimants)

Property: Township 3N, Range 10W, Section 26: tax lot 800  
Township 3N, Range 10W, Section 36: tax lot 1502  
Tillamook County (the property)

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

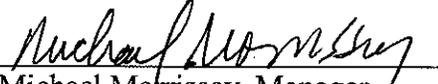
Claimants submitted the Claim to the State of Oregon under ORS 197.352. Under OAR 125-145-0010 *et seq.*, the Department of Administrative Services (DAS) referred the Claim to the Department of Land Conservation and Development (DLCD) as the regulating entity. This order is based on the record herein,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

ORDER

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

This Order is entered by the Manager of 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 Manager of the Measure 37 Services Unit 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:  
Cora R. Parker, Acting Director

  
Michael Morrissey, Manager  
DLCD, Measure 37 Services Division  
Dated this 28<sup>th</sup> day of September, 2007.

FOR THE DEPARTMENT OF  
ADMINISTRATIVE SERVICES:

  
Carla Ploederer, Manager  
DAS, Measure 37 Services Unit  
Dated this 28<sup>th</sup> day of September, 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**

September 28, 2007

**STATE CLAIM NUMBER:** M131120

**NAMES OF CLAIMANTS:** Wayne M. Johnston  
M. Daryl and Donna J. Johnston

**MAILING ADDRESS:** Wayne Johnston  
16335 Old Mohler Road  
Nehalem, Oregon 97131

M. Daryl and Donna J. Johnston  
16115 Old Mohler Road  
Nehalem, Oregon 97131

**PROPERTY IDENTIFICATION:** Township 3N, Range 10W  
Section 26: tax lot 800<sup>1</sup>  
Section 36: tax lot 1502  
Tillamook County

**OTHER CONTACT INFORMATION:** Julia Lafoon  
7480 Trask River Road  
Tillamook, Oregon 97141

**DATE RECEIVED BY DAS:** November 22, 2006

**DEADLINE FOR FINAL ACTION:<sup>2</sup>** May 15, 2008

**I. SUMMARY OF CLAIM**

The claimants, Wayne Johnston, M. Daryl and Donna Johnston, seek compensation in the amount of \$10 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 151.13-acre subject property<sup>3</sup> into 200 approximately 0.5-acre parcels and to develop a dwelling on each resulting undeveloped parcel. The subject

<sup>1</sup> Tax lot 800 is physically located in both Sections 25 and 26; however, it is shown on the map for only Section 26.

<sup>2</sup> ORS 197.352, as originally enacted, required that final action on claims made under Measure 37 be made within 180 days of the date the claim was filed. In response to the large volume of claims filed in late 2006, the Oregon legislature passed House Bill 3546, which became effective on May 10, 2007. This legislation increased the amount of time state and local governments have to take final action on Measure 37 claims filed on or after November 1, 2006, by 360 days, to a total of 540 days.

<sup>3</sup> The subject property includes two tax lots. Tax lot 800 is 89.71 acres and tax lot 1502 is 61.42 acres.

property is located at 16335 Old Mohler Road, near Nehalem, in Tillamook 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 Wayne Johnston's division of tax lot 1502 and the southern portion of tax lot 800 into 0.5-acre parcels and to his development of a dwelling on each resulting undeveloped parcel: applicable provisions of Statewide Planning Goal 3 (Agricultural Lands), ORS 215 and Oregon Administrative Rules (OAR) 660, division 33, enacted or adopted after the claimant acquired tax lot 1502 and the southern portion of tax lot 800. These laws will not apply to Wayne Johnston only to the extent necessary to allow him to use tax lot 1502 and the southern portion of tax lot 800 for the use described in this report, and only to the extent that use was permitted when he acquired those portions of the subject property on May 1, 1999. The department acknowledges that the relief to which Wayne Johnston is entitled under ORS 197.352 may not allow him to use tax lot 1502 and the southern portion of tax lot 800 in the manner set forth in the claim.

The department has further determined that the claim is not valid in part as to Wayne Johnston for the northern portion of tax lot 800 because laws enforced by the Commission or the department do not restrict his desired use of that portion of the subject property relative to what was permitted when he acquired it in 1998 and do not reduce the fair market value of the property.

The department has further determined that the claim is not valid as to M. Daryl and Donna Johnston because they are not owners of the subject property. (See the complete recommendation in Section VI. of this report.)

## III. COMMENTS ON THE CLAIM

### Comments Received

On July 2, 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 15-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 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 22, 2006, for processing under OAR 125, division 145. The claim identifies Goals 3 and 14 (Urbanization); provisions of ORS 215; and OAR 660, division 5, and 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

Claimant Wayne Johnston, acquired the northern portion of tax lot 800 on November 4, 1998, as reflected by a warranty deed included with the claim. Wayne Johnston acquired tax lot 1502 and the southern portion of tax lot 800 from his parents, claimants M. Daryl and Donna Johnston, on May 1, 1999, as reflected by a memorandum of contract included with the claim. Wayne Johnston's parents acquired tax lot 1502 and the southern portion of tax lot 800 from Wayne Johnston's grandparents, Marshall and Berdell Johnston, on September 8, 1982, as evidenced by a bargain and sale deed included with the claim. Marshall and Berdell Johnston, acquired tax lot 1502 and the southern portion of tax lot 800 on December 29, 1944, as reflected by a warranty

deed included in the claim. The Tillamook County Assessor's Office confirms Wayne Johnston's current ownership of the subject property.

Claimants M. Daryl and Donna Johnston assert an ownership interest in the subject property. However, on May 1, 1999, M. Daryl and Donna Johnston conveyed all of their interest in tax lot 1502 and the southern portion of tax lot 800 to Wayne Johnston, as reflected by a memorandum of contract included with the claim. M. Daryl and Donna J. Johnston are not current owners of the subject property.

### **Conclusions**

Claimant Wayne Johnston is an "owner" of the subject property as that term is defined by ORS 197.352(11)(C), as of November 4, 1998, for the northern portion of tax lot 800, and as of May 1, 1999, for tax lot 1502 and the southern portion of tax lot 800. Claimants M. Daryl and Donna Johnston are not "owners" of the subject property as that term is defined in ORS 197.352(11)(C). Marshall and Berdell Johnston are "family members" of Wayne Johnston as defined by ORS 197.352(11)(A) and acquired tax lot 1502 and the southern portion of tax lot 800 on December 29, 1944.

### **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 151.13-acre subject property into 0.5-acre parcels and to develop a dwelling on each resulting undeveloped parcel, and that current land use regulations prevent the desired use.<sup>4</sup>

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. Wayne Johnston's property is zoned Farm (F-1) by Tillamook County as required by Goal 3, in accordance with ORS 215 and OAR 660, division 33, because Wayne Johnston's property is "agricultural land" as defined by Goal 3.<sup>5</sup> 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.

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<sup>4</sup> The claimants summarily list numerous state land use laws as applicable to this claim, but do not establish how the laws either apply to the claimants' desired use of the subject property or restrict its use with the effect of reducing its fair market value. On their face, most of the regulations either do not apply to Wayne Johnston's property or do not restrict the use of his property with the effect of reducing its fair market value. This report addresses only those regulations that the department finds are applicable to and restrict the claimants' desired use of the subject property, based on the claimants' description of their desired use.

<sup>5</sup> The subject property is "agricultural land" because it contains Natural Resources Conservation Service Class I-IV soils.

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

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

OAR 660-033-0135 (applicable to farm dwellings) became effective on March 1, 1994, and interprets the statutory standard for a primary dwelling in an EFU zone under 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.<sup>6</sup>

Wayne Johnston acquired the northern portion of tax lot 800 on November 4, 1998. At that time, his property was zoned F-1 by Tillamook County, which required a minimum size of 80 acres for new parcels and dwellings, and was subject to the state land use regulations currently in effect, as described above.

Wayne Johnston's family first acquired tax lot 1502 and the southern portion of tax lot 800 in 1944, prior to the adoption of the statewide planning goals and their implementing statutes and regulations. No county zoning applied to tax lot 1502 and the southern portion of tax lot 800 in 1944.

### **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 Wayne Johnston's family acquired tax lot 1502 and the southern portion of tax lot 800. These laws restrict the use of tax lot 1502 and the southern portion of tax lot 800 relative to the uses allowed when Wayne Johnston's family acquired that portion of the property.

Laws enacted or adopted since Wayne Johnston acquired the northern portion of tax lot 800 in 1998 do not restrict his use of that portion of the property relative to when he acquired it in 1998. Therefore, no laws enforced by the Commission or the department restrict his use of the northern portion of tax lot 800 with the effect of reducing its fair market value.

As explained in Section V.(1) of this report M. Daryl and Donna Johnston are not "owners" of the subject property as that term is defined in ORS 197.352(11)(C). Therefore, no laws enforced by the Commission or the department restrict their use of the subject property with the effect of reducing its fair market value

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<sup>6</sup> 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 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 \$10 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 a land use consultant’s assessment of the subject property’s value, included with the claim.

#### **Conclusions**

As explained in Section V.(1) of this report, the claimants are Wayne Johnston, who acquired the northern portion of tax lot 800 in 1998, and whose family members acquired tax lot 1502 and the southern portion of tax lot 800 in 1944, and M. Daryl and Donna Johnston. M. Daryl and Donna Johnston are not owners of the subject property and, therefore, no laws restrict their use of the subject property with the effect of reducing the fair market value of the property.

As explained in Section V.(2) of this report, Wayne Johnston’s desired use of the northern portion of tax lot 800 was prohibited by the zoning in effect at the time he acquired it. Therefore, land use regulations enforced by the Commission or the department since Wayne Johnston acquired the northern portion of tax lot 800 in 1998 do not have the effect of reducing the fair market value of that portion of tax lot 800 relative to uses allowed when Wayne Johnston acquired it.

Under ORS 197.352, Wayne Johnston is due compensation for land use regulations that restrict the use of tax lot 1502 and the southern portion of tax lot 800 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 Wayne Johnston’s family acquired tax lot 1502 and the southern portion of tax lot 800 restrict Wayne Johnston’s desired use of that portion 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 \$10 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 tax lot 1502 and the southern portion of tax lot 800. Nevertheless, based on the evidence in the record for this claim, the department determines that the fair market value of tax lot 1502 and the southern portion of tax lot 800 has been reduced to some extent as a result of land use regulations enforced by the Commission or the department since Wayne Johnston’s family acquired that portion of 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 Tillamook County has implemented through its current F-1 zone. All of these land use regulations were enacted or adopted after Wayne Johnston's family acquired tax lot 1502 and the southern portion of tax lot 800. All of these regulations were in effect when Wayne Johnston acquired the northern portion of tax lot 800 in 1998.

### **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 Wayne Johnston's family acquired tax lot 1502 and the southern portion of tax lot 800 on December 29, 1944. As a result, these laws are not exempt under ORS 197.352(3)(E). Laws in effect when Wayne Johnston's family acquired tax lot 1502 and the southern portion of tax lot 800 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.

All of the state land use regulations that restrict Wayne Johnston's desired use of the northern portion of tax lot 800 were in effect when he acquired the northern portion of tax lot 800. Therefore, these state land use regulations are exempt under ORS 197.352(3)(E), which exempts laws in effect when Wayne Johnston acquired the subject property.

As explained in Section V.(1) of this report, M. Daryl and Donna Johnston are not "owners" 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 as to M. Daryl and Donna Johnston.

## **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 laws enforced by the Commission or the department do not restrict M. Daryl and Donna Johnston's desired use of the subject property because they are not owners. The department further finds that laws enforced by the Commission or the department do not restrict Wayne Johnston's

desired use of the northern portion of tax lot 800 because his desired use of that portion was prohibited under the zoning in effect when he acquired it in 1998.

The department further finds that laws enforced by the Commission or the department restrict Wayne Johnston's desired use of tax lot 1502 and the southern portion of tax lot 800. 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 \$10 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 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 Wayne Johnston's desired use of tax lot 1502 and the southern portion of tax lot 800 was allowed under the standards in effect when Wayne Johnston's 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 tax lot 1502 and the southern 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 Wayne Johnston to use tax lot 1502 and the southern portion of tax lot 800 for a use permitted at the time he acquired tax lot 1502 and the southern portion of tax lot 800 on May 1, 1999.

At the time Wayne Johnston acquired tax lot 1502 and the southern portion of tax lot 800, it was zoned F-1 by Tillamook 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.

In addition to the applicable provisions of Goal 3, ORS 215 and OAR 660, division 33, in effect on May 1, 1999, and other laws in effect when Wayne Johnston acquired tax lot 1502 and the southern portion of tax lot 800, there may be other laws that apply to Wayne Johnston's use of the property that have not been identified in the claim. 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 claimant 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 Wayne Johnston's use of the subject property.

### **Conclusions**

Based on the record before the department, M. Daryl and Donna Johnston have not established that they are entitled to relief under ORS 197.352(1) as a result of land use regulations enforced by the Commission or the department because they are not owners of the subject property; and Wayne Johnston has not established that he is entitled to relief as to the northern portion of tax lot 800 because laws enforced by the Commission or the department do not restrict his desired use of that portion of tax lot 800 relative to when he acquired it in 1998. Therefore, the

department recommends that this claim be denied as to M. Daryl and Donna Johnston for the entire property, and as to Wayne Johnston for the northern portion of tax lot 800..

The department otherwise recommends that the claim be approved as to Wayne Johnston for tax lot 1502 and the southern portion of tax lot 800, subject to the following terms:

1. In lieu of compensation under ORS 197.352, the State of Oregon will not apply the following laws to Wayne Johnston's division of tax lot 1502 and the southern portion of tax lot 800 into 0.5-acre parcels or to his development of a dwelling on each resulting undeveloped parcel: applicable provisions of Goal 3, ORS 215 and OAR 660, division 33, enacted or adopted after May 1, 1999. These land use regulations will not apply to Wayne Johnston only to the extent necessary to allow him to use tax lot 1502 and the southern portion of tax lot 800 for the use described in this report, and only to the extent that use was permitted when he acquired that portion of the property on May 1, 1999. The department acknowledges that the relief to which the claimant is entitled under ORS 197.352 may not allow the claimant to use tax lot 1502 and the southern portion of tax lot 800 in the manner set forth in the claim.
2. The action by the State of Oregon provides the state's authorization to Wayne Johnston to use tax lot 1502 and the southern portion of tax lot 800 for the use described in this report, subject to the standards in effect on May 1, 1999. At that time, the property was subject to applicable provisions of Goal 3, ORS 215 and OAR 660, division 33, currently in effect.
3. To the extent that any law, order, deed, agreement or other legally enforceable public or private requirement provides that tax lot 1502 and the southern portion of tax lot 800 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 Wayne Johnston 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 tax lot 1502 and the southern portion of tax lot 800 by Wayne Johnston 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 Wayne Johnston to use tax lot 1502 and the southern portion of tax lot 800, 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 Wayne Johnston 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 Wayne Johnston.
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 28, 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.