Oregon
Theodore R. Kulongoski, Governor

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September 26, 2007

To: Interested Persons

From: Cora R. Parker, Acting Director

Re: Ballot Measure 37 (ORS 197.352) Claim Number M131129

Claimants: James F. and Elizabeth A. Crumpacker; Alfred H. and Cleone F. Stoloff

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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 COMPENSATION UNDER ORS 197.352 (BALLOT MEASURE 37) OF James F. and Elizabeth A. Crumpacker and Cleone F. Stoloff, CLAIMANTS	)))))	FINAL ORDER A CLAIM NO. M131129

Claimants: James F. and Elizabeth A. Crumpacker and Cleone F. Stoloff (the Claimants)

Property: Township 16S, Range 11E, Section 22, Tax lot 300, Deschutes County (the Property)

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

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

ORDER

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

1. In lieu of compensation under ORS 197.352, the State of Oregon will not apply the following laws to James and Elizabeth Crumpacker's and Cleone Stoloff's division of the 26.48-acre subject property into five 5-acre parcels or to their development of a dwelling on each resulting undeveloped parcel: applicable provisions of Goal 3, ORS 215 and OAR 660, division 33, enacted or adopted after each claimant acquired the subject property. These land use regulations will not apply to the claimants only to the extent necessary to allow James and Elizabeth Crumpacker and Cleone Stoloff to use the subject property for the use described in this report, and only to the extent that use was permitted when James and Elizabeth Crumpacker acquired the property on August 19, 1974, and when Cleone Stoloff acquired the property on March 15, 1985. The department acknowledges that the relief to which Cleone Stoloff is entitled under ORS 197.352 may not allow her to use the subject property in the manner set forth in the claim.

2. The action by the State of Oregon provides the state's authorization to James and Elizabeth Crumpacker to use the subject property for the use described in this report, subject to the standards in effect on August 19, 1974, and to Cleone Stoloff to use the subject property for the use described in this report, subject to the standards in effect on March 15, 1985. On August 19, 1974, the property was subject to the applicable provisions of ORS 215 then in effect, including

the interim planning goals set forth in ORS 215.515 (1973 edition). On March 15, 1985, the property was subject to compliance with Goal 3 and OAR 660, division 5, as implemented by Deschutes County's acknowledged EFU zone, and the applicable provisions ORS 215 then in effect.

3. To the extent that any law, order, deed, agreement or other legally enforceable public or private requirement provides that 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 James and Elizabeth Crumpacker or Cleone Stoloff 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 James and Elizabeth Crumpacker or Cleone Stoloff 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 James and Elizabeth Crumpacker or Cleone Stoloff to use the subject property, it may be necessary for them to obtain a decision under ORS 197.352 from a city and/or county and/or metropolitan service district that enforces land use regulations applicable to the property. Nothing in this order relieves the claimants from the necessity of obtaining a decision under ORS 197.352 from a local public entity that has jurisdiction to enforce a land use regulation applicable to a use of the subject property by the claimants.

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

This Order is entered by the Manager for the Measure 37 Services Division of 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 26th day of September, 2007.

FOR the DEPARTMENT OF ADMINISTRATIVE SERVICES:

Carla Ploederer, Manager
DAS, Measure 37 Services Unit
Dated this 26th 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 Alfred H. Stoloff, CLAIMANT	))))	FINAL ORDER B CLAIM NO. M131129

Claimant: Alfred H. Stoloff (the Claimant)

Property: Township 16S, Range 11E, Section 22, Tax lot 300, 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 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 26th day of September, 2007.

FOR THE DEPARTMENT OF ADMINISTRATIVE SERVICES:

Carla Ploederer, Manager
DAS, Measure 37 Services Unit
Dated this 26th day of September, 2007.

NOTICE OF RIGHT TO APPEAL OR OTHER JUDICIAL RELIEF

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2. A cause of action under ORS 197.352 (Measure 37 (2004)): If a land use regulation continues to apply to the subject property more than 180 days after the present owner of the property has made written demand for compensation under ORS 197.352, the present owner of the property, or any interest therein, shall have a cause of action in the circuit court in which the real property is located.

(Copies of the documents that comprise the record are available for review at the Department's office at 635 Capitol Street NE, Suite 150, Salem, Oregon 97301-2540)

ORS 197.352 (BALLOT MEASURE 37) CLAIM FOR COMPENSATION

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

September 26, 2007

STATE CLAIM NUMBER:	M131129
NAMES OF CLAIMANTS:	James F. and Elizabeth A. Crumpacker Alfred H. and Cleone F. Stoloff
MAILING ADDRESS:	James and Elizabeth Crumpacker 02107 SW Greenwood Road Portland, Oregon 97219 Alfred and Cleone Stoloff 11523 SW Breyman Avenue Portland, Oregon 97219
PROPERTY IDENTIFICATION:	Township 16S, Range 11E, Section 22 Tax lot 300 Deschutes County
OTHER CONTACT INFORMATION:	Edward P. Fitch PO Box 457 Redmond, Oregon 97756
DATE RECEIVED BY DAS:	November 22, 2006
DEADLINE FOR FINAL ACTION:[1]	May 15, 2008

I. SUMMARY OF CLAIM

The claimants, James and Elizabeth Crumpacker and Alfred and Cleone Stoloff, seek compensation in the amount of $750,000 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 the 26.48-acre subject property into five 5-acre parcels and to develop a dwelling on each resulting undeveloped parcel.[2] The subject property is located at 65525 Tweed Road, near Tumalo, 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 claim indicates that the claimants desire to "divide and develop the property into smaller parcels for homesites." However, under ORS 197.352(8), if a public entity elects to not apply one or more land use regulations

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 James and Elizabeth Crumpacker's and Cleone Stoloff's division of the 26.48-acre subject property into five 5-acre parcels and to their development of a dwelling on each resulting undeveloped parcel: applicable provisions of Statewide Planning Goal 3 (Agricultural Lands), ORS 215 and Oregon Administrative Rules (OAR) 660, division 33, enacted or adopted after each claimant acquired the subject property. These laws will not apply to James and Elizabeth Crumpacker or to Cleone Stoloff only to the extent necessary to allow them to use the subject property for the use described in this report, and only to the extent that use was permitted when James and Elizabeth Crumpacker acquired the property on August 19, 1974, and when Cleone Stoloff acquired the property on March 15, 1985. The department acknowledges that the relief to which Cleone Stoloff is entitled under ORS 197.352 may not allow her to use the subject property in the manner set forth in the claim.

The department has further determined that the claim is not valid as to Alfred Stoloff because the claimants have not established that he is an owner of the subject property. (See the complete recommendation in Section VI. of this report).

III. COMMENTS ON THE CLAIM

Comments Received

On June 22, 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

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to the claimants' use of the property, it may do so only to allow "a use." Further, in order to determine that land use regulations have restricted the claimants' use of the property, the department must base that determination on a use. The department makes reasonable effort to determine what use of the property the claimant seeks to carry out, but in circumstances where the claimant does not provide the information necessary for the department to determine the use sought, the department will conclude that the desired use is to divide each parcel into one additional parcel. Department staff attempted to contact the claimants' agent by e-mail on July 10, 2007, to obtain more specific information concerning the claimants' desired use; no response was received from the claimants' agent in response to that e-mail. However, in response to the draft staff report, the claimants' attorney submitted a letter clarifying the claimants' desired use. The department acknowledges that the claimants' desired use, as clarified by their agent, is within the scope of the claim as originally submitted.

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 "All statewide goals and guidelines and provisions of ORS 215 since August 1974 restricting the ability of the applicant to divide and develop the land," as the basis for the claim. Only laws that were enacted or adopted prior to December 2, 2004, are the basis for this claim.

Conclusions

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

V. ANALYSIS OF CLAIM

1. Ownership

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

Findings of Fact

Claimants James and Elizabeth Crumpacker acquired the subject property on August 19, 1974, as reflected by a recorded memorandum of contract included with the claim. Claimant Cleone Stoloff acquired an interest in the subject property on March 15, 1985, as reflected by a warranty deed included with the claim. The claimants have not submitted any documentation or evidence to establish that Alfred Stoloff is an owner of the subject property. The Deschutes County Assessor's Office confirms the current ownership of the subject property.

Conclusions

Claimants James and Elizabeth Crumpacker are "owners" of the subject property as that term is defined by ORS 197.352(11)(C), as of August 19, 1974. Claimant Cleone Stoloff is an "owner" of the subject property as that term is defined by ORS 197.352(11)(C), as of March 15, 1985. Claimant Alfred Stoloff is not an "owner" of the subject property as that term is defined by 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 the 26.48-acre subject property into five 5-acre parcels and to develop a dwelling on each resulting undeveloped parcel, and that current land use regulations prevent the desired use.[3]

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

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

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

OAR 660-033-0135 (applicable to farm dwellings) became effective on March 1, 1994, and interprets the statutory standard for a primary dwelling in an EFU zone under ORS 215.283(1)(f). OAR 660-033-0130(4) (applicable to non-farm dwellings) became effective on August 7, 1993, and was amended to comply with ORS 215.284(4) on March 1, 1994.[5]

Claimants James and Elizabeth Crumpacker acquired the subject property on August 19, 1974, after the adoption of Senate Bill 100 (Chapter 80, Oregon Laws 1973) effective on October 5,

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[3] The claimants summarily cite 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 these regulations either do not apply to the claimants' property or do not restrict the claimants' desired use of the property with the effect of reducing its fair market value. This report addresses only those regulations that the department finds are applicable to and restrict the claimants' desired use of the subject property, based on the claimants' description of that desired use.

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

[5] 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.

1973, but before the adoption of the statewide planning goals, effective on January 25, 1975. At that time, it was zoned by Deschutes County as Exclusive Agriculture (A-1), which required new parcels to be a minimum of 5-acres and allowed a dwelling as an outright use.

During the period between October 5, 1973, and January 25, 1975, ORS 197.175(1) and 197.280 (1973 editions) required, in addition to any local plan or zoning provisions, that cities and counties exercise their planning responsibilities in accordance with the interim land use planning goals set forth in ORS 215.515 (1973 edition). *Petersen v. Klamath Falls*, 279 Or 249 (1977); *see also*, *Meeker v. Board of Comm'rs*, 287 Or 665 (1979) (review of a subdivision is an exercise of planning responsibilities requiring application of the goals); *State Housing Council v. Lake Oswego*, 48 Or App. 525 (1981) (noting that while "[l]and use planning responsibility is not defined in ORS ch 197, the Supreme Court has interpreted that term as including annexation approvals, *subdivision approvals* [emphasis added] and partition approvals") citing *Petersen*, *Meeker* and *Alexanderson v. Polk County*, 285 Or 427 (1980). The claimants' desired use includes subdivision of their land. If James and Elizabeth Crumpacker had sought to create that use in 1974, as a matter of law, the use would have been subject to the interim planning goals at ORS 215.515.[6]

The following interim goals are directly applicable to this claim: "To preserve the quality of the air, water and *land* [emphasis added] resources of the state"; "To conserve prime farm lands for the production of crops"; "To provide for the orderly and efficient transition from rural to urban land use"; "To protect life and property in areas subject to floods, landslides and other natural disasters"; "To provide and encourage a safe, convenient and economic transportation system including all modes of transportation: Air, water, rail, highway and mass transit and recognizing differences in the social costs in the various modes of transportation"; and "To develop a timely, orderly and efficient arrangement of public facilities and services to serve as a framework for urban and rural development." ORS 215.515 (1973 edition).

No information has been provided establishing whether or to what extent James and Elizabeth Crumpacker's desired division of the subject property for residential development complies with the interim planning goals set forth in ORS 215.515 (1973 edition) in effect at the time they acquired the property on August 19, 1974.

At the time Cleone Stoloff acquired an interest in the subject property, it was subject to Deschutes County's acknowledged comprehensive plan and EFU-20 zone.[7] That zone required a minimum lot size of 20 acres for new parcels and allowed a dwelling in conjunction with farm

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[6] The "interim" land use goals are set forth in ORS 215.515(1)(a) to (j) (1973 edition) as follows: (a) "To preserve the quality of the air, water and land resources of the state," (b) "To conserve open space and protect natural and scenic resources," (c) "To provide for the recreational needs of citizens of the state and visitors," (d) "To conserve prime farm lands for the production of crops," (e) "To provide for the orderly and efficient transition from rural to urban land use," (f) "To protect life and property in areas subject to floods, landslides and other natural disasters," (g) "To provide and encourage a safe, convenient and economic transportation system including all modes of transportation: Air, water, rail, highway and mass transit and recognizing differences in the social costs in the various modes of transportation," (h) "To develop a timely, orderly and efficient arrangement of public facilities and services to serve as a framework for urban and rural development," (i) "To diversify and improve the economy of the state" and (j) "To ensure that the development of properties within the state is commensurate with the character and the physical limitations of the land." ORS 215.515 (1973 edition).

[7] Deschutes County's EFU zone was acknowledged by the Commission for compliance with Goal 3 on May 11, 1981.

use. At that time, Cleone Stoloff's desired use of the property would have been subject to compliance with Goal 3, and OAR 660, division 5, as implemented through the county's acknowledged EFU-20 zone, and the applicable provisions of ORS 215 then in effect.[8] In 1985, ORS 215.263 (1983 edition) required that divisions of land in EFU zones be "appropriate for the continuation of the existing commercial agricultural enterprise within the area" or not smaller than the minimum size in the county's acknowledged plan. ORS 215.283(1)(f) (1983 edition) generally allowed farm dwellings "customarily provided in conjunction with farm use." Non-farm dwellings were allowed under ORS 215.283(3) if they were determined to be compatible with farm use, not interfere seriously with accepted farm practices, not materially alter the stability of the land use pattern in the area and be situated on generally unsuitable land for the production of farm crops and livestock.

The claim does not establish whether or to what extent Cleone Stoloff's desired division and development of the subject property were allowed under the standards in effect when she acquired the property on March 15, 1985.

Conclusions

The current zoning requirements, minimum lot size and dwelling standards established by Goal 3, ORS 215 and OAR 660, division 33, were all enacted or adopted after the claimants acquired the subject property in 1974 and 1985 and do not allow the desired division or development of the property. However, the claim does not establish whether or to what extent James and Elizabeth Crumpacker's desired use of the subject property complies with the interim planning goals in effect when they acquired the property on August 19, 1974, or whether or to what extent Cleone Stoloff's desired use of the subject property complies with the standards for land divisions and development under Goal 3 and OAR 660, division 5, as implemented through Deschutes County's comprehensive plan and EFU zone and applicable provisions of ORS 215, in effect when she acquired the property on March 15, 1985.

As explained in Section V.(1), Albert Stoloff is not an owner 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 his use of the subject real property with the effect of reducing the fair market value of the property.

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.

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[8] After the county's comprehensive plan and land use regulations were acknowledged by the Commission as complying with the statewide planning goals, the goals and implementing rules no longer applied directly to individual local land use decisions. *Byrd v. Stringer*, 295 Or 311 (1983). However, statutory requirements continue to apply, and insofar as the state and local provisions are materially the same, the local provisions must be interpreted consistent with the substance of the goals and implementing rules. *Forster v. Polk County*, 115 Or App 475 (1992) and *Kenagy v. Benton County*, 115 Or App 131 (1992).

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 $750,000 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 the claimants' assessment of the subject property's value.

Conclusions

As explained in Section V.(1) of this report, the claimants are James and Elizabeth Crumpacker who acquired the subject property on August 19, 1974, Cleone Stoloff who acquired the subject property on March 15, 1985, and Alfred Stoloff who is not an owner of the subject property. Because he is not an owner of the subject property, Alfred Stoloff is not entitled to relief under ORS 197.352. Under ORS 197.352, claimants James and Elizabeth Crumpacker and Cleone Stoloff are due compensation for land use regulations that restrict the use of the subject property and have the effect of reducing its fair market value. Based on the findings and conclusions in Section V.(2) of this report, laws enacted or adopted since James and Elizabeth Crumpacker and Cleone Stoloff acquired the subject property restrict their desired use of the property. The claimants estimate that the effect of the regulations on the fair market value of the subject property is a reduction of $750,000.

Without an appraisal or other documentation and without verification of whether or the extent to which the claimants' desired use of the subject property was allowed under the standards in effect when each claimant acquired the property, it is not possible to substantiate the specific dollar amount by which the land use regulations have reduced the fair market value of the 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 Goal 3, ORS 215 and OAR 660, division 33, which Deschutes County has implemented through its current EFU/TRB zone. With the exception of applicable provisions of ORS 215, including the interim land use planning goals, in effect on August 19, 1974, when James and Elizabeth Crumpacker acquired the property, and with the exception of applicable provisions of Goal 3, ORS 215 and OAR 660 in effect on March 15, 1985, when

Cleone Stoloff acquired the property, these state land use regulations were not in effect when these claimants acquired the property.

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 ORS 215 in effect on August 19, 1974, when James and Elizabeth Crumpacker acquired the property, and with the exception of the provisions of Goal 3, ORS 215 and OAR 660 in effect when Cleone Stoloff acquired the property in 1985, the general statutory, goal and rule restrictions on division and development of the claimants' property were enacted or adopted after these claimants acquired the subject property. As a result, these laws are not exempt under ORS 197.352(3)(E), to the extent they were not in effect when each claimant acquired the property. Provisions of ORS 215, including the interim statewide planning goals in effect when James and Elizabeth Crumpacker acquired the subject property on August 19, 1974, and provisions of Goal 3, ORS 215 and OAR 660, division 5, in effect when Cleone Stoloff acquired the property on March 15, 1985, are exempt under ORS 197.352(3)(E) and will continue to apply to their use of the property.

As explained in Section V.(1) of this report, Albert Stoloff is not an owner of the subject property as that term is defined in ORS 197.352(11)(C). Therefore, the issue of whether any laws are exempt from ORS 197.352 is not relevant to as to him.

Other laws in effect when each claimant acquired the subject property 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 the subject 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. 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 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, laws enforced by the Commission or the department do not restrict Albert Stoloff's desired use of the property because he is not an owner of the property. Laws enforced by the Commission or the department do restrict the other claimants' desired use of the subject property. The claim asserts that existing state land use regulations enforced by the Commission or the department have the effect of reducing the fair market value of the subject property by $750,000. 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 each claimant acquired the property. Nevertheless, based on the record for this claim, the department has determined that the laws on which the claim is based have reduced the fair market value of the subject property to some extent.

No funds have been appropriated at this time for the payment of claims. In lieu of payment of compensation, ORS 197.352 authorizes the department to modify, remove or not apply all or parts of certain land use regulations to allow James and Elizabeth Crumpacker to use the subject property for a use permitted at the time they acquired the property on August 19, 1974, and to allow Cleone Stoloff to use the subject property for a use permitted at the time she acquired the property on March 15, 1985.

Conclusions

Based on the record before the department, Alfred Stoloff is not entitled to relief under ORS 197.352(1) as a result of land use regulations enforced by the Commission or the department because the claimants have not established that he is an owner of the subject property. Therefore, the department recommends that the claim from Alfred Stoloff be denied.

The department otherwise recommends that the claim be approved, subject to the following terms:

1. In lieu of compensation under ORS 197.352, the State of Oregon will not apply the following laws to James and Elizabeth Crumpacker's and Cleone Stoloff's division of the 26.48-acre subject property into five 5-acre parcels or to their development of a dwelling on each resulting undeveloped parcel: applicable provisions of Goal 3, ORS 215 and OAR 660, division 33, enacted or adopted after each claimant acquired the subject property. These land use regulations will not apply to the claimants only to the extent necessary to allow James and Elizabeth Crumpacker and Cleone Stoloff to use the subject property for the use described in this report, and only to the extent that use was permitted when James and Elizabeth Crumpacker acquired the property on August 19, 1974, and when Cleone Stoloff acquired the property on March 15,

1985. The department acknowledges that the relief to which Cleone Stoloff is entitled under ORS 197.352 may not allow her to use the subject property in the manner set forth in the claim.

2. The action by the State of Oregon provides the state's authorization to James and Elizabeth Crumpacker to use the subject property for the use described in this report, subject to the standards in effect on August 19, 1974, and to Cleone Stoloff to use the subject property for the use described in this report, subject to the standards in effect on March 15, 1985. On August 19, 1974, the property was subject to the applicable provisions of ORS 215 then in effect, including the interim planning goals set forth in ORS 215.515 (1973 edition). On March 15, 1985, the property was subject to compliance with Goal 3 and OAR 660, division 5, as implemented by Deschutes County's acknowledged EFU zone, and the applicable provisions ORS 215 then in effect.

3. To the extent that any law, order, deed, agreement or other legally enforceable public or private requirement provides that 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 James and Elizabeth Crumpacker or Cleone Stoloff 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 James and Elizabeth Crumpacker or Cleone Stoloff 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 James and Elizabeth Crumpacker or Cleone Stoloff to use the subject property, it may be necessary for them to obtain a decision under ORS 197.352 from a city and/or county and/or metropolitan service district that enforces land use regulations applicable to the property. Nothing in this order relieves the claimants from the necessity of obtaining a decision under ORS 197.352 from a local public entity that has jurisdiction to enforce a land use regulation applicable to a use of the subject property by the claimants.

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

VII. COMMENTS ON THE DRAFT STAFF REPORT

The department issued its draft staff report on this claim on 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.