Oregon
Theodore R. Kulongoski, Governor

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November 2, 2007

To: Interested Persons

From: Cora R. Parker, Acting Director

Re: Ballot Measure 37 (ORS 197.352) Claim Number M131213 and M131214

Claimants: Gertrude Wickett, Joanne Culp

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 Gertrude Wickett and Joanne Culp, CLAIMANTS	))))	FINAL ORDER CLAIM NO. M131213 and M131214

Claimants: Gertrude Wickett and Joanne Culp (the Claimants)

Property: Township 25S, Range 12W, Section 6C: tax lot 100
Township 25S, Range 12W, Section 7: tax lots 700 and 799
Township 25S, Range 13W, Section 1D: tax lot 400
Township 25S, Range 13W, Section 12A: tax lots 100 and 200
Coos 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 Gertrude Wickett and Joanne Culp's division of the 171.07-acre subject property into 0.5-acre parcels or to their development of a dwelling on each resulting undeveloped parcel: applicable provisions of Goals 3, 4, 8, 14 and 17, ORS 215 and OAR 660-004-0040 and 660, divisions 6, and 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 them to use the subject property for the use described in this report, and only to the extent that use was permitted when Gertrude Wickett acquired tax lots 100 (Section 6C) and 200 on August 21, 1964, and tax lots 100 (Section 12A), 400, 700 and 799 on April 16, 1975, and when Joanne Culp acquired the subject property on October 18, 1984. The department acknowledges that the relief to which Joanne Culp 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 the claimants to use the subject property for the use described in this report, subject to the standards in effect when Gertrude Wickett acquired tax lots 100 (Section 6C) and 200 on August 21, 1964, and tax lots 100 (Section 12A), 400, 700 and 799 on April 16, 1975, and when Joanne Culp acquired the property on October 18, 1984. On April 16, 1975, tax lot 700 was subject to compliance with Goal 4. On October 18, 1984, the property was subject to compliance with the applicable statewide planning goals, including Goal 3, 4, 14 and 17, and provisions of ORS 215 and OAR 660 then in effect.

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

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

5. Without limiting the generality of the foregoing terms and conditions, in order for the claimants to use 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 Acting Director of the DLCD as a final order of DLCD and the Land Conservation and Development Commission under ORS 197.352, OAR 660-002-0010(8), and OAR 125, division 145, and by the Manager for 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

Cora R. Parker, Acting Director
DLCD
Dated this 2nd day of November, 2007.

FOR the DEPARTMENT OF ADMINISTRATIVE SERVICES:

Carla Ploederer

Carla Ploederer, Manager
DAS, Measure 37 Services Unit
Dated this 2nd day of November, 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

November 2, 2007

STATE CLAIM NUMBER:	M131213 and M131214[1]
NAMES OF CLAIMANTS:	Gertrude Wickett Joanne Culp
MAILING ADDRESS:	Gertrude Wickett 94506 Golf Course Lane North Bend, Oregon 97459 Joanne Culp 94533 Golf Course Lane North Bend, Oregon 97459
PROPERTY IDENTIFICATION:	Township 25S, Range 12W Section 6C: tax lot 100 Section 7: tax lots 700 and 799 Township 25S, Range 13W Section 1D: tax lot 400 Section 12A: tax lots 100 and 200 Coos County
OTHER CONTACT INFORMATION:	Emmett McIntosh 33711 Oak Flat Road Agness, Oregon 97406
DATE RECEIVED BY DAS:	November 24, 2006
DEADLINE FOR FINAL ACTION:[2]	May 17, 2008

[1] The claimants submitted two separate claims for relief under ORS 197.352 for the subject property. Those claims are consolidated for this review.

[2] 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.

I. SUMMARY OF CLAIM

The claimants, Gertrude Wickett and Joanne Culp, seek compensation in the amount of $3,073,103[3] 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 171.07-acre subject property into 0.5-acre parcels and to develop a dwelling on each resulting undeveloped parcel.[4] The subject property is located at Golf Course Lane, near North Bend, in Coos 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. 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 Gertrude Wickett and Joanne Culp's division of the 171.07-acre subject property into 0.5-acre parcels and to their development of a dwelling on each resulting undeveloped parcel: applicable provisions of Statewide Planning Goals 3 (Agricultural Lands), 4 (Forest Lands), 8 (Recreational Needs), 14 (Urbanization) and 17 (Coastal Shorelands), ORS 215 and Oregon Administrative Rules (OAR) 660-004-0040 and 660, divisions 6, and 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 them to use the subject property for the use described in this report, and only to the extent that use was permitted when Gertrude Wickett acquired tax lots 100 (Section 6C) and 200 on August 21, 1964, and tax lots 100 (Section 12A), 400, 700 and 799 on April 16, 1975, and when Joanne Culp acquired the subject property on October 18, 1984. The department acknowledges that the relief to which Joanne Culp is entitled under ORS 197.352 may not allow her to use the subject property in the manner set forth in the claim. (See the complete recommendation in Section VI. of this report.)

III. COMMENTS ON THE CLAIM

Comments Received

On July 9, 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, four written comments were received in response to the 15-day notice.

The comments do 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 letters in the department's claim file.)

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[3] This amount represents the total compensation sought for all tax lots subject to claims M131213 and M131214.
[4] The subject property includes six tax lots. Tax lot 100 (Section 6C) consists of 95.53 acres, tax lot 100 (Section 12A) consists of 35.05 acres, tax lot 200 consists of 19.65 acres, tax lot 400 consists of 17.04 acres, tax lot 700 consists of 1 acre and tax lot 799 consists of 2.8 acres.

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 24, 2006, for processing under OAR 125, division 145. The claim identifies Coos County's zoning and land development ordinances 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 Gertrude Wickett acquired tax lots 100 (Section 6C) and 200 on August 21, 1964, as reflected by a warranty deed included with the claim, and tax lots 100 (Section 12A), 400, 700 and 799 on April 16, 1975, as reflected by a deed included with the claim. On October 18, 1984, Gertrude Wickett transferred the property to a revocable trust, the Wallace and Gertrude Wickett Trust, as reflected by a bargain and sale deed included with the claim.[5] Gertrude and Wallace Wickett conveyed an ownership interest in the property to their daughter, claimant Joanne Culp, on October 18, 1984, as trustee of the Wallace and Gertrude Wickett Trust, as reflected by a

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

bargain and sale deed included with the claim. The Coos County Assessor's Office confirms the claimants' current ownership of the subject property.

Conclusions

The claimants, Gertrude Wickett and Joanne Culp, are "owners" of the subject property as that term is defined by ORS 197.352(11)(C). Gertrude Wickett has been an owner of tax lots 100 (Section 6C) and 200 since August 21, 1964, and of tax lots 100 (Section 12A), 400, 700 and 799 since April 16, 1975. Joanne Culp has been an owner of the subject property since October 18, 1984. Gertrude Wickett is a "family member" of Joanne Culp as that term is defined by ORS 197.352(11)(A).

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 171.07-acre subject property into 0.5-acre parcels and to develop a dwelling on each resulting undeveloped parcel, and that the property's current zoning prevents the desired use.

The claim is based generally on the applicable provisions of state law that require or permit Exclusive Farm Use (EFU), forest, rural residential, recreational and coastal shoreland zoning and restrict uses on land zoned EFU, forest, rural residential, recreational and coastal shoreland.

A portion of tax lots 100 (Section 6C) and 200 are zoned EFU by Coos 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.[6] Goal 3 became effective on January 25, 1975, and required that agricultural lands as defined by Goal 3 be zoned EFU pursuant to ORS 215.

Current land use regulations, particularly ORS 215.263, 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.

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

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.[7]

Tax lot 700 and a portion of tax lot 100 (Section 6C) are zoned Forest (F) by Coos County as required by Goal 4, in accordance with ORS 215 and OAR 660, division 6, because the claimants' 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 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.

A portion of tax lot 200 is zoned RR-2, which is a rural residential zone, in accordance with Goal 14, which prohibits urban use of rural lands. The county's RR-2 zone requires two acres for the creation of any new lot or parcel and was in effect and applied to the subject property on or before October 4, 2000.

Goal 14 became effective on January 25, 1975, and requires that local comprehensive plans identify and separate urbanizable land from rural land in order to provide for an orderly and efficient transition from rural to urban land use. In 2000, as a result of a 1986 Oregon Supreme Court decision,[8] the Commission amended Goal 14 and adopted OAR 660-004-0040 (Application of Goal 14 to Rural Residential Areas), which was effective on October 4, 2000.

The rule states that if a county rural residential zone in effect on October 4, 2000, specifies a minimum lot size of two acres or more, the area of any new lot or parcel shall equal or exceed the minimum lot size then in effect (OAR 660-004-0040(7)(c)).[9] Because Coos County's rural

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[7] 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.

[8] *1000 Friends of Oregon v. LCDC (Curry County)*, 301 Or 447 (1986).

[9] Some relief from this provision is available for lots or parcels having more than one permanent habitable dwelling pursuant to OAR 660-004-0040(7)(h). The rule also provides that a county's minimum lot size requirement in a

residential zone was in effect on October 4, 2000, and requires a minimum lot size of two acres, the minimum lot size for all new lots or parcels must equal or exceed two acres.

Tax lots 400, 799 and a portion of tax lot 100 (Section 12A) are zoned Recreation, consistent with Goal 8. Goal 8 generally provides for the siting of recreational facilities. The county's Recreation zone, which became effective in 1986, applies only to publicly-owned property and to private property that is presently developed as a golf course. This portion of the property is developed as a golf course.

A portion of tax lot 100 (Section 12A) is zoned Coos Bay Estuary Management Plan (CBEMP). That area is defined as "coastal shoreland" under Goal 17. Goal 17 became effective on June 7, 1977, and required that coastal resources within the shoreland area be inventoried and protected. As adopted in 1977, Goal 17 provided that: "[s]horelands in rural areas . . . shall be used as appropriate for: (a) farm uses as provided in ORS Chapter 215; (b) propagation and harvesting of forest products consistent with the Oregon Forest Practices Act; (c) private and public water-dependent recreation developments; (d) aquaculture; (e) water-dependent commercial and industrial uses and water-related uses only upon a finding by the governing body of the county that such uses satisfy a need which cannot be reasonably accommodated on shorelands in urban and urbanizable areas; (f) *subdivisions*, major and minor partitions and other uses *only upon a finding by the governing body of the county that such uses satisfy a need which cannot be accommodated at other upland locations or in urban or urbanizable areas and are compatible with the objectives of this goal to protect riparian vegetation and wildlife habitat* [emphasis added]; and (g) a single family residence on existing lots, parcels or units of land when compatible with the objectives and implementation standards of this goal."

The current version of Goal 17 is substantially similar, and generally allows uses that are not dependent on or related to water only upon a showing that the use would not commit shorelands to more intensive uses or cause a permanent or long-term change in the features of shorelands, except upon a showing of public need that cannot be met in other areas.

Gertrude Wickett acquired tax lots 100 (Section 6C) and 200 in 1964, prior to the adoption of the statewide planning goals and their implementing statutes and regulations. No county zoning applied to tax lots 100 (Section 6C) and 200 in 1964.

Gertrude Wickett acquired tax lots 100 (Section 12A), 400, 700 and 799 prior to the adoption of Goal 17, and after the adoption of Goals 4 and 8, but before the Commission acknowledged Coos County's land use regulations to be in compliance with the statewide planning goals pursuant to ORS 197.250 and 197.251.[10] Because the Commission had not acknowledged the county's plan and land use regulations when Gertrude Wickett acquired tax lot 700 on April 16, 1975, the applicable statewide planning goals, and Goal 4 in particular, would have applied directly to any development application for her property.[11] Goal 8 was in effect, but did not require any

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rural residential zone shall not be amended to allow a smaller minimum lot size without approval of an exception to Goal 14 (OAR 660-004-0040(6)).

[10] Coos County's comprehensive plan and land use regulations were acknowledged for compliance with Goals 3, 4, 8 and 17 on August 29, 1985.

[11] The statewide planning goals became effective on January 25, 1975, and were applicable to legislative land use decisions and some quasi-judicial land use decisions prior to the Commission's acknowledgment of each county's land use regulations. *Perkins v. City of Rajneeshpuram*, 300 Or 1 (1985); *Alexanderson v. Polk County*, 289 Or 427,

inventory and did not apply directly to provide Goal 8 protections to individual properties prior to its adoption through local plans and zoning.

As adopted in 1975, Goal 4 was intended to "conserve forest lands for forest uses" and required that lands suitable for forest uses "be inventoried and designated as forest lands" and that existing forest land uses "be protected unless proposed changes are in conformance with the comprehensive plan." Those forest uses were defined as: "(1) the production of trees and the processing of forest products; (2) open space, buffers from noise, and visual separation of conflicting uses; (3) watershed protection and wildlife and fisheries habitat; (4) soil protection from wind and water; (5) maintenance of clean air and water; (6) outdoor recreational activities and related support services and wilderness values compatible with these uses; and (7) grazing land for livestock." Specifically, Goal 4 only allowed land divisions that would protect commercial forest lands for commercial forest uses. Dwellings in forest zones could only be allowed if found to be "necessary and accessory" to one of the enumerated forest uses listed in Goal 4.[12]

The claim does not establish whether or to what extent Gertrude Wickett's desired division and development of tax lot 700 was allowed under the Goal 4 standards in effect when she acquired the property on April 16, 1975.

Conclusions

The current zoning requirements, minimum lot size and dwelling standards established by applicable provisions of Goals 3, 4, 8, 14 and 17, ORS 215 and OAR 660-004-004 and 660, divisions 6, and 33, were enacted or adopted after Gertrude Wickett acquired tax lots 100 (Section 6C) and 200 in 1964 and tax lots 100 (Section 12A), 400, 700 and 799 in 1975. These laws restrict the use of the subject property relative to the uses allowed when Gertrude Wickett acquired the property. However, the claim does not establish whether or to what extent Gertrude Wickett's desired use of tax lot 700 complies with the standards for land divisions and development under Goal 4 in effect when she acquired tax lot 700 on April 16, 1975.

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.

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rev den 290 Or 137 (1980); *Sunnyside Neighborhood Assn. v. Clackamas County*, 280 Or 569 (1977); *Jurgenson v. Union County*, 42 Or App 505 (1979) and *1000 Friends of Oregon v. Benton County*, 32 Or App 413 (1978). After the county's plan and land use regulations were acknowledged by the Commission, the statewide planning goals and implementing rules no longer directly applied to such local land use decisions. *Byrd v. Stringer*, 295 Or 311 (1983). However, statutory requirements continue to apply, and insofar as the state and local provisions are materially the same, the local provisions must be interpreted consistent with the substance of the goals and implementing rules. *Forster v. Polk County*, 115 Or App 475 (1992); *Kenagy v. Benton County*, 115 Or App 131 (1992).

[12] Goal 4 prohibited uses that were not enumerated by Goal 4 as permissible uses for forest lands as well as those that were not necessary and accessory to an enumerated forest use. *Lamb v. Lane County*, 7 Or LUBA 137 (1983). Dwellings in forest lands were required to be "necessary and accessory" to show that such dwellings complied with the Goal 4 requirement that local land use regulations must "conserve forest lands for forest uses." *1000 Friends v. LCDC (Curry County)*, 301 Or 447 (1986). A dwelling that may "enhance" forest uses is not "necessary and accessory" to a forest use to the extent required by Goal 4. *1000 Friends of Oregon v. LCDC (Lane County)*, 305 Or 384 (1988). For additional guidance, the Goal 4 provisions were interpreted under OAR 660, division 6, effective on September 1, 1982, in *1000 Friends of Oregon v. LCDC (Lane County)* and in *1000 Friends v. LCDC (Curry County)*.

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

3. Effect of Regulations on Fair Market Value

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

Findings of Fact

The claim includes an estimate of $3,073,103 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 Gertrude Wickett who acquired tax lots 100 (Section 6C) and 200 in 1964 and tax lots 100 (Section 12A), 400, 700 and 799 in 1975 and her daughter, Joanne Culp. Under ORS 197.352, the claimants are due compensation for land use regulations that restrict the use of the property and have the effect of reducing its fair market value. Based on the findings and conclusions in Section V.(2) of this report, laws enacted or adopted since Gertrude Wickett acquired the subject property restrict the claimants' desired use of the property. The claimants estimate that the effect of the regulations on the fair market value of the subject property is a reduction of $3,073,103.

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 Gertrude Wickett 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 subject property. Nevertheless, based on the evidence in the record for this claim, the department determines that the fair market value of the subject property has been reduced to some extent as a result of land use regulations enforced by the Commission or the department since Gertrude Wickett acquired the property.

4. Exemptions Under ORS 197.352(3)

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

Findings of Fact

The claim is based on state land use regulations that restrict the use of the subject property, including applicable provisions of Goals 3, 4, 8, 14 and 17, ORS 215 and OAR 660-004-0040 and 660, divisions 6, and 33, which Coos County has implemented through its current EFU, F,

RR-2, Recreation and CBEMP zones. With the exception of provisions of Goal 4 in effect on April 16, 1975, all of these land use regulations were enacted or adopted after Gertrude Wickett acquired the subject 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. With the exception of provisions of Goal 4 in effect when Gertrude Wickett acquired tax lot 700 on April 16, 1975, it appears that the general statutory, goal and rule restrictions on residential division and development of the subject property were not in effect when Gertrude Wickett acquired the property on August 21, 1964, and April 16, 1975. As a result, these laws are not exempt under ORS 197.352. Laws in effect when Gertrude Wickett acquired the subject property are exempt under ORS 197.352(3)(E) and do not provide a basis for compensation. In addition, 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.

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 restrict the 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 $3,073,103. 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 Gertrude Wickett 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 Gertrude Wickett to use tax lots 100 (Section 6C) and 200 for a use permitted at the time she acquired the property on August 21, 1964; to allow Gertrude Wickett to use tax lots 100 (Section 12A), 400, 700 and 799 for a use permitted at the

time she acquired the property on April 16, 1975; and to allow Joanne Culp to use the property for a use permitted at the time she acquired the property on October 18, 1984.

Claimant Joanne Culp acquired tax lots 100 (Section 6C), 100 (Section 12A), 400, 700 and 799 after the adoption of the statewide planning goals, but before the Commission acknowledged Coos County's land use regulations to be in compliance with the statewide planning goals pursuant to ORS 197.250 and 197.251. At that time, tax lots 100 (Section 6C), 100 (Section 12A), 400, 700 and 799 were zoned AG-20 by Coos County, which allowed a 20-acre minimum lot size and permitted dwellings as an outright use. However, because the Commission had not acknowledged the county's plan and land use regulations when Joanne Culp acquired tax lots 100 (Section 6C), 100 (Section 12A), 400, 700 and 799 on October 18, 1984, the statewide planning goals, and Goal 3 in particular, applied directly to her property when she acquired it.

As adopted on January 25, 1975, Goal 3 required that agricultural land be preserved and zoned for EFU pursuant to ORS 215. The Goal 3 standard for land divisions involving property where the local zoning was not acknowledged required that the resulting parcels must be of a size that is "appropriate for the continuation of the existing commercial agricultural enterprise within the area." Further, ORS 215.263 (1973 edition) and OAR 660, division 5, adopted in 1982, only authorized the partition of land subject to EFU zoning, and required that all divisions of land subject to EFU zoning comply with the legislative intent set forth in ORS 215.243 (Agricultural Land Use Policy), as further interpreted through OAR 660, division 5. Thus, Joanne Culp's opportunity to divide tax lots 100 (Section 6C), 100 (Section 12A), 400, 700 and 799 when she acquired it in 1984 was limited to land divisions that were consistent with Goal 3 and OAR 660, division 5, which required that the resulting parcels be (1) appropriate for the continuation of the existing commercial agricultural enterprise in the area and (2) shown to comply with the legislative intent set forth in ORS 215.

Under the Goal 3 standards in effect on October 18, 1984, farm dwellings were allowed if they were determined to be "customarily provided in conjunction with farm use" under ORS 215.213(1)(e) (1973 edition). Non-farm dwellings were subject to compliance with ORS 215.213(3) (1973 edition). OAR 660, division 5, further interpreted the dwelling standards for farm and non-farm dwellings at that time.

A portion of tax lot 100 (Section 12A) would also have been subject to direct compliance with Goal 17 as "coastal shoreland" when Joanne Culp acquired it. As described above Goal 17, as adopted in 1977, required that coastal resources within the shoreland area be inventoried and protected. Goal 17 provided that: "[s]horelands in rural areas . . . shall be used as appropriate for: (a) farm uses as provided in ORS Chapter 215; (b) propagation and harvesting of forest products consistent with the Oregon Forest Practices Act; (c) private and public water-dependent recreation developments; (d) aquaculture; (e) water-dependent commercial and industrial uses and water-related uses only upon a finding by the governing body of the county that such uses satisfy a need which cannot be reasonably accommodated on shorelands in urban and urbanizable areas; (f) *subdivisions*, major and minor partitions and other uses *only upon a finding by the governing body of the county that such uses satisfy a need which cannot be accommodated at other upland locations or in urban or urbanizable areas and are compatible with the objectives of this goal to protect riparian vegetation and wildlife habitat* [emphasis added]; and (g) a single family residence on existing lots, parcels or units of land when compatible with the objectives and implementation standards of this goal."

Joanne Culp also acquired tax lot 200 after the adoption of the statewide planning goals, but before the Commission acknowledged Coos County's land use regulations to be in compliance with the statewide planning goals pursuant to ORS 197.250 and 197.251. At that time, tax lot 200 was zoned F-84 by Coos County. However, because the Commission had not acknowledged the county's plan and land use regulations when Joanne Culp acquired tax lot 200 on October 18, 1984, the applicable statewide planning goals, and Goal 4 and OAR 660, division 6, in particular, would have applied directly to any development application for the her property.

As adopted in 1975, Goal 4 was intended to "conserve forest lands for forest uses" and required that lands suitable for forest uses "be inventoried and designated as forest lands" and that existing forest land uses "be protected unless proposed changes are in conformance with the comprehensive plan." Those forest uses were defined as: "(1) the production of trees and the processing of forest products; (2) open space, buffers from noise, and visual separation of conflicting uses; (3) watershed protection and wildlife and fisheries habitat; (4) soil protection from wind and water; (5) maintenance of clean air and water; (6) outdoor recreational activities and related support services and wilderness values compatible with these uses; and (7) grazing land for livestock." Specifically, Goal 4 only allowed land divisions that would protect commercial forest lands for commercial forest uses. Dwellings in forest zones could only be allowed if found to be "necessary and accessory" to one of the enumerated forest uses listed in Goal 4. OAR 660, division 6, effective on September 1, 1982, interpreted and implemented the Goal 4 standards for identifying and inventorying lands suitable for forest uses.

The claim does not establish whether or to what extent Joanne Culp's desired division and development of the subject property were allowed under the standards in effect when she acquired the property on October 18, 1984.

In addition to the applicable provisions of Goals 3, 4, 14 and 17, ORS 215 and OAR 660, divisions 5, and 6, in effect when Joanne Culp acquired the property on October 18, 1984, and other laws in effect when either of the claimants acquired the subject property, there may be other laws that 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. 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). Coos County also notes that a portion of the parcel is located in a flood plain zone. ORS 197.352(3)(B) specifically exempts regulations "restricting or prohibiting activities for the protection of public health and safety. . . ." To the extent the county's flood plain regulations are based on state law, these regulations would be exempt under ORS 197.352(3)(B).

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, and depending on when they were enacted or adopted, may continue to apply to the claimants' property. In addition, some of these laws may be exempt under ORS 197.352(3)(A) to (D) and will continue to apply to the subject property on that basis.

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

Conclusions

Based on the record, the department 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 Gertrude Wickett and Joanne Culp's division of the 171.07-acre subject property into 0.5-acre parcels or to their development of a dwelling on each resulting undeveloped parcel: applicable provisions of Goals 3, 4, 8, 14 and 17, ORS 215 and OAR 660-004-0040 and 660, divisions 6, and 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 them to use the subject property for the use described in this report, and only to the extent that use was permitted when Gertrude Wickett acquired tax lots 100 (Section 6C) and 200 on August 21, 1964, and tax lots 100 (Section 12A), 400, 700 and 799 on April 16, 1975, and when Joanne Culp acquired the subject property on October 18, 1984. The department acknowledges that the relief to which Joanne Culp 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 the claimants to use the subject property for the use described in this report, subject to the standards in effect when Gertrude Wickett acquired tax lots 100 (Section 6C) and 200 on August 21, 1964, and tax lots 100 (Section 12A), 400, 700 and 799 on April 16, 1975, and when Joanne Culp acquired the property on October 18, 1984. On April 16, 1975, tax lot 700 was subject to compliance with Goal 4. On October 18, 1984, the property was subject to compliance with the applicable statewide planning goals, including Goal 3, 4, 14 and 17, and provisions of ORS 215 and OAR 660 then in effect.

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

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

5. Without limiting the generality of the foregoing terms and conditions, in order for the claimants to use 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 September 26, 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.