Oregon
Theodore R. Kulongoski, Governor

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June 12, 2007

To: Interested Persons

From: Lane Shetterly, Director

Re: Ballot Measure 37 (ORS 197.352) Claim Number M130049

Claimants: Bernard and Margaret Bernheim

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

This Proposed Amended Final Staff Report and Recommendation sets forth the department's evaluation of and recommendation on the claim. Oregon Administrative Rule 125-145-0100(3) provides that the claimant (or the claimant's agent) and any third parties who submitted comments on the claim may submit written comments, evidence, and information in response to any third-party comments contained in the report, and to the staff report and recommendation itself. Such response must be filed no more than fifteen calendar days after the date of mailing of this report. Any response from you must be delivered to the Oregon Department of Administrative Services (DAS), 1225 Ferry Street SE, U160, Salem, Oregon 97301, and will be deemed timely filed if either postmarked on the fifteenth day or actually delivered to DAS by the close of business on the fifteenth day.

This department will review any responses submitted, and an Amended Final Order on the claim will be issued after such review.

ORS 197.352 (BALLOT MEASURE 37) CLAIM FOR COMPENSATION

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

June 12, 2007

STATE CLAIM NUMBER:	M130049
NAMES OF CLAIMANTS:	Bernard and Margaret Bernheim
MAILING ADDRESS:	c/o Donald Joe Willis Schwabe, Williamson & Wyatt 1211 SW 5th Avenue, Suite 1900 Portland, Oregon 97204
PROPERTY IDENTIFICATION:	Township 19S, Range 2W Tax lot 101 in sections 16, 17, 20 and 21; Tax lot 100 in sections 8, 16, 17 and 21; and Tax lots 105 and 106 in section 21 Lane County
DATE RECEIVED BY DAS:	September 15, 2006
180-DAY DEADLINE:	March 14, 2007[1]

I. SUMMARY OF CLAIM

The claimants, Bernard and Margaret Bernheim, seek compensation in the amount of $15.7 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 approximately 550-acre subject property[2] into approximately 157 parcels, to develop a dwelling and accessory structures for dwellings on each parcel and to develop public and/or private roads, public and private wet and dry utilities and public and private storm water systems.[3] The subject property is located at the geographic coordinates listed above, near Creswell, in Lane County. (See claim.)

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[1] The final report on this claim was issued on March 12, 2007. On April 6, 2007, in response to the final report, the claimants' attorney submitted a letter along with additional documents notifying the department of an error in the conclusion that the claimants acquired tax lots 105 and 106 on December 1, 2005. Based on further review of the documents in the file and additional documents submitted by the claimant's attorney, the department has determined the date of acquisition for tax lots 105 and 106 is January 13, 1969. This amended final report revises the department's previous determination.

[2] The subject property includes four tax lots. According to Lane County, tax lot 100 consists of 363.24 acres; tax lot 101 consists of 160.28 acres; tax lot 105 consists of 16.82 acres; and tax lot 106 consists of 9.43 acres.

[3] The claim also indicates that the claimants desire to sell or transfer the newly created parcels for development. In effect, the claimants request that a decision of the department to "not apply" (waive) certain laws as set forth in this report be transferable with the property. ORS 197.352 only authorizes a state agency to waive a law in order to allow the current owner a use of the property permitted at the time that owner acquired the property. A

II. SUMMARY OF STAFF RECOMMENDATION

Based on the preliminary 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 Bernard and Margaret Bernheim's division of the approximately 550-acre subject property into approximately 157 parcels, to their development of a dwelling and accessory structures for dwellings on each parcel and to their development of public and/or private roads, public and private wet and dry utilities and public and private storm water systems: applicable provisions of Statewide Planning Goal 3 (Agricultural Lands), ORS 215 and Oregon Administrative Rules (OAR) 660, division 33.[4] These laws 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 they acquired tax lot 100 on April 20, 1966; portions of tax lot 101 on December 16, 1959, March 31, 1971, and November 5, 1980; and tax lots 105 and 106 on January 13, 1969. (See the complete recommendation in Section VI. of this report.)

III. COMMENTS ON THE CLAIM

Comments Received

On December 28, 2006, 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, 36 written comments were received in response to the 10-day notice.

Some of 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 subject 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.

Many of the comments are relevant to whether the claimants are owners and whether state law restricts the claimants' use of the subject property. The comments have been considered by the department in preparing this report. (See the comment letters in the department's claim file.)

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determination of transferability is beyond the scope of relief that the department may grant under ORS 197.352. The Oregon Department of Justice has advised the department that "[i]f the current owner of the real property conveys the property before a new use allowed by the public entity is established, then the entitlement to relief will be lost."

[4] The claimants were previously granted a waiver under ORS 197.352 for division of the subject property into 157 parcels and to their development of a dwelling on each parcel. (See claim M122854.) The claimants state that the purpose of this second claim is to clarify their intended use of the subject property, and specifically, that the intended use includes the development of accessory structures for dwellings, public and/or private roads, public and private wet and dry utilities and public and private storm water systems.

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 September 15, 2006, for processing under OAR 125, division 145. The claim identifies provisions of ORS chapters 92, 197 and 215, OAR chapter 125, division 145 and OAR chapter 660, divisions 1, 2, 4, 6, 11, 12, 15, 16, 18, 21, 22, 23, 31, 33, and 45, as the basis for the claim. Only laws that were enacted or adopted prior to December 2, 2004, are the basis for this claim.

Conclusions

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

V. ANALYSIS OF CLAIM

1. Ownership

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

Findings of Fact

The claimants, Bernard and Margaret Bernheim, acquired tax lot 100 on April 20, 1966, and tax lots 105 and 106 on January 13, 1969, as reflected by a bargain and sale deed and warranty deed included with the claim. The claimants acquired portions of tax lot 101 on December 16, 1959, March 31, 1971, and November 5, 1980, as reflected by a bargain and sale deed and warranty deeds included with the claim. The claimants have entered into an option agreement to sell the property, but as of the date of this report, the department has no evidence that the option has been exercised. As a result, the claimants continue to own an interest in the subject property that includes the right to carry out their desired use of the property.

Conclusions

The claimants, Bernard and Margaret Bernheim, are "owners" of an interest in the subject property as that term is defined by ORS 197.352(11)(C), as of April 20, 1966, for tax lot 100; as of December 16, 1959, March 31, 1971, and November 5, 1980, for portions of tax lot 101; and as of January 13, 1969, for tax lots 105 and 106.

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 approximately 550-acre subject property into approximately 157 parcels, to develop a dwelling and accessory structures for dwellings on each parcel and to develop public and/or private roads, public and private wet and dry utilities and public and private storm water systems. It indicates that the use is not allowed under current land use regulations.[5]

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 EF-40 by Lane 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 215.213, 215.263 and 215.780 and OAR 660, division 33, enacted or adopted pursuant to Goal 3, prohibit the division of EFU-zoned land in marginal lands counties into parcels smaller 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 in EFU zones and became effective on November 4, 1993 (Chapter 792, Oregon Laws 1993). ORS 215.780(2) allows counties to adopt minimum lot sizes less than 80 acres, subject to acknowledgment by the Commission. The Commission has acknowledged Lane County's EF-40 zone, which requires a minimum lot or parcel size of 40 acres. ORS 215.263 (2005 edition)

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[5] 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 the regulations either do not apply to the claimants' property or do not restrict the use of the claimants' property in a manner that reduces 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.

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

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 in marginal lands counties under ORS 215.213. OAR 660-033-0130(4)(e) (applicable to non-farm dwellings in marginal lands counties) became effective on August 7, 1993. The Commission subsequently adopted amendments to comply with House Bill 3326 (Chapter 704, Oregon Laws 2001, effective on January 1, 2002), which were effective on May 22, 2002. (See administrative rule history for OAR 660-033-0100, -0130 and -0135.)

Goal 11 (Public Facilities and Services), which also became effective on January 25, 1975, generally prohibits certain public facilities and services on lands that are outside an Urban Growth Boundary (UGB). Goal 11 and its implementing rules have two components: one that prohibits an owner from utilizing urban-level facilities or services to serve the property, and another that prohibits service providers from extending their facilities to serve property outside a UGB. The former can restrict a claimant's use of property. The latter is a restriction on service providers. Goal 11 and OAR 660, division 11, apply to the claimants' use of the property only to the extent that they would restrict the claimants' development of urban-level public or community sewer, storm water or water facilities on the subject property. It is unclear from the claim whether the desired public and private wet and dry utilities and public and private storm water systems would be urban or rural under Goal 11. As a result, the claim does not establish that the desired sewer, storm water or water services would be urban or otherwise of a nature that would be restricted by Goal 11 or OAR 660, division 11.

Goal 12 (Transportation), which also took effect on January 25, 1975, generally prohibits certain transportation facilities on land that are outside of a UGB. According to the claim, the claimants' desired use includes establishing public and/or private roads to serve the intended residential development. OAR 660-012-0065 generally limits transportation facilities on rural lands to those necessary to support rural land uses identified in the acknowledged comprehensive plan. It is unclear from the claim whether the intended use will be rural under the county's acknowledged comprehensive plan. As a result, the claim does not establish that the desired transportation improvements associated with the claimants' intended use would be restricted by Goal 12 or OAR 660-012-0065.

The claimants acquired tax lot 100 on April 20, 1966, portions of tax lot 101 on December 16, 1959, and March 31, 1971, and tax lots 105 and 106 on January 13, 1969, all prior to the adoption of the statewide planning goals and their implementing statutes and regulations.

The claimants acquired a portion of tax lot 101 after the adoption of the statewide planning goals, but before the Commission acknowledged Lane County's land use regulations to be in compliance with the statewide planning goals pursuant to ORS 197.250 and 197.251. Because the Commission had not acknowledged the county's plan and land use regulations when the claimants acquired that portion of tax lot 101 on November 5, 1980, the statewide planning goals, and Goal 3 in particular, applied directly to that portion when they acquired it.[7]

[7] 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

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) 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). Thus, the claimants' opportunity to divide the portion of tax lot 101 acquired in 1980 was limited to land divisions that were consistent with Goal 3, 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 November 5, 1980, farm dwellings were allowed if they were determined to be "customarily provided in conjunction with farm use" under ORS 215.213(1)(e) (1973 edition). Non-farm dwellings were subject to compliance with ORS 215.213(3) (1973 edition).

No information has been presented in the claim to establish that the claimants' desired division of the portion of tax lot 101 acquired in 1980 complies with the "commercial" standard for farm parcels under Goal 3 or the standards for non-farm parcels under ORS 215.263 (1973 edition), nor is there any information to establish that the claimants' desired development dwellings on that portion of tax lot 101 satisfies the standards for farm or non-farm dwellings under ORS 215.213 (1973 edition).

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 the claimants acquired the subject property in 1959, 1966, 1969, 1971 and 1980 and do not allow the desired division or residential development of the property. However, the claim does not establish whether or the extent to which the claimants' desired use of the portion of tax lot 101 acquired in 1980 complies with the standards for land divisions and development under the requirements of Goal 3 and ORS 215 in effect when the claimants acquired that portion on November 5, 1980. These laws restrict the use of the subject property relative to the uses allowed when the claimants acquired 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

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comprehensive plan and implementing regulations. *Perkins v. City of Rajneeshpuram*, 300 Or 1 (1985); *Alexanderson v. Polk County*, 289 Or 427, *rev. den* 290 Or 137 (1980); *Sunnyside Neighborhood Assn. v. Clackamas County*, 280 Or 3 (1977); *Jurgenson v. Union County*, 42 Or App 505 (1979); and *1000 Friends of Oregon v. Benton County*, 32 Or App 413 (1978). After the county's plan and land use regulations were acknowledged by the Commission, the statewide planning goals and implementing rules no longer applied directly to such local land use decisions. *Byrd v. Stringer*, 295 Or 311 (1983). However, statutory requirements continue to apply, and insofar as the state and local provisions are materially the same, the local provisions must be interpreted consistent with the substance of the goals and implementing rules. *Forster v. Polk County*, 115 Or App 475 (1992) and *Kenagy v. Benton County*, 115 Or App 131 (1992).

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 subject property until there is a specific proposal for that use. When the claimants seek a building or development permit to carry out a specific use, it may become evident that other state laws apply to that use.

3. Effect of Regulations on Fair Market Value

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

Findings of Fact

The claim includes an estimate of $15.7 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 the claimants' attorney's assessment of the subject property's value.

Conclusions

As explained in Section V.(1) of this report, the claimants are Bernard and Margaret Bernheim who acquired the subject property in 1959, 1966, 1969, 1971 and 1980. Under ORS 197.352, the claimants 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 the claimants 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 $15.7 million.

Without an appraisal or other documentation, it is not possible to substantiate the specific dollar amount by which the land use regulations have reduced the fair market value of the subject property. Nevertheless, based on the evidence in the record for this claim, the department determines that the fair market value of 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 Lane County has implemented through its current EF-40 zone. With the exception of provisions of Goal 3 and ORS 215 in effect when the claimants acquired a portion of tax lot 101 on November 5, 1980, all of these land use regulations were enacted or adopted after the 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. With the exception of provisions of Goal 3 and ORS 215 in effect when the claimants acquired a portion of tax lot 101 in 1980, it appears that none of the general statutory, goal and rule restrictions on division and development of the claimants' property were in effect when the claimants acquired the subject property in 1959, 1966, 1969 and 1971. As a result, these laws are not exempt under ORS 197.352(3)(E).

Laws in effect when the claimants acquired the subject property are 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 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 laws that restrict the use of the subject property in a manner that reduces its fair market value. In lieu of compensation, the department may choose to not apply the law in order to allow the present owner to carry out a use of the subject property permitted at the time the present owner acquired the property. The Commission, by rule, has directed that if the department determines a claim is valid, the Director of the department must provide only non-monetary relief unless and until funds are appropriated by the legislature to pay claims.

Findings of Fact

Based on the 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 $15.7 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 the claimants' desired use of the subject property was allowed under the standards in effect when they 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 Bernard and Margaret Bernheim to use the subject property for a use permitted at the time they acquired tax lot 100 on April 20, 1966; portions of tax lot 101 on December 16, 1959, March 31, 1971, and November 5, 1980; and tax lots 105 and 106 on January 13, 1969.

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 Bernard and Margaret Bernheim's division of the approximately 550-acre subject property into approximately 157 parcels, to their development of a dwelling and accessory structures to the dwellings on each parcel and to their development of public and/or private roads, public and private wet and dry utilities and public and private storm water systems: applicable provisions of Goal 3, ORS 215 and OAR 660, division 33. These laws 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 they acquired tax lot 100 on April 20, 1966; portions of tax lot 101 on December 16, 1959, March 31, 1971, and November 5, 1980; and tax lots 105 and 106 on January 13, 1969.

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 on April 20, 1966, for tax lot 100; on December 16, 1959, March 31, 1971, and November 5, 1980, for portions of tax lot 101; and on January 13, 1969, for tax lots 105 and 106. On November 5, 1980, a portion of tax lot 101 was subject to the applicable provisions of Goal 3, and ORS 215 then in effect.

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

4. Any use of the subject property by the claimants under the terms of the order will remain subject to the following laws: (a) those laws not specified in (1) above; (b) any laws enacted or enforced by a public entity other than the Commission or the department; and (c) those laws not

subject to ORS 197.352 including, without limitation, those laws exempted under ORS 197.352(3).

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

VII. NOTICE OF OPPORTUNITY TO COMMENT

The department issued its draft staff report on this claim on February 16, 2007. OAR 125-145-0100(3), provided an opportunity for the claimant or the claimant's authorized agent and any third parties who submitted comments under OAR 125-145-0080 to submit written comments, evidence and information in response to the draft staff report and recommendation. Comments received have been taken into account by the department in the issuance of this final report.