



Oregon

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October 12, 2007

To: Claimant and Interested Persons

From: Cora R. Parker, Acting Director



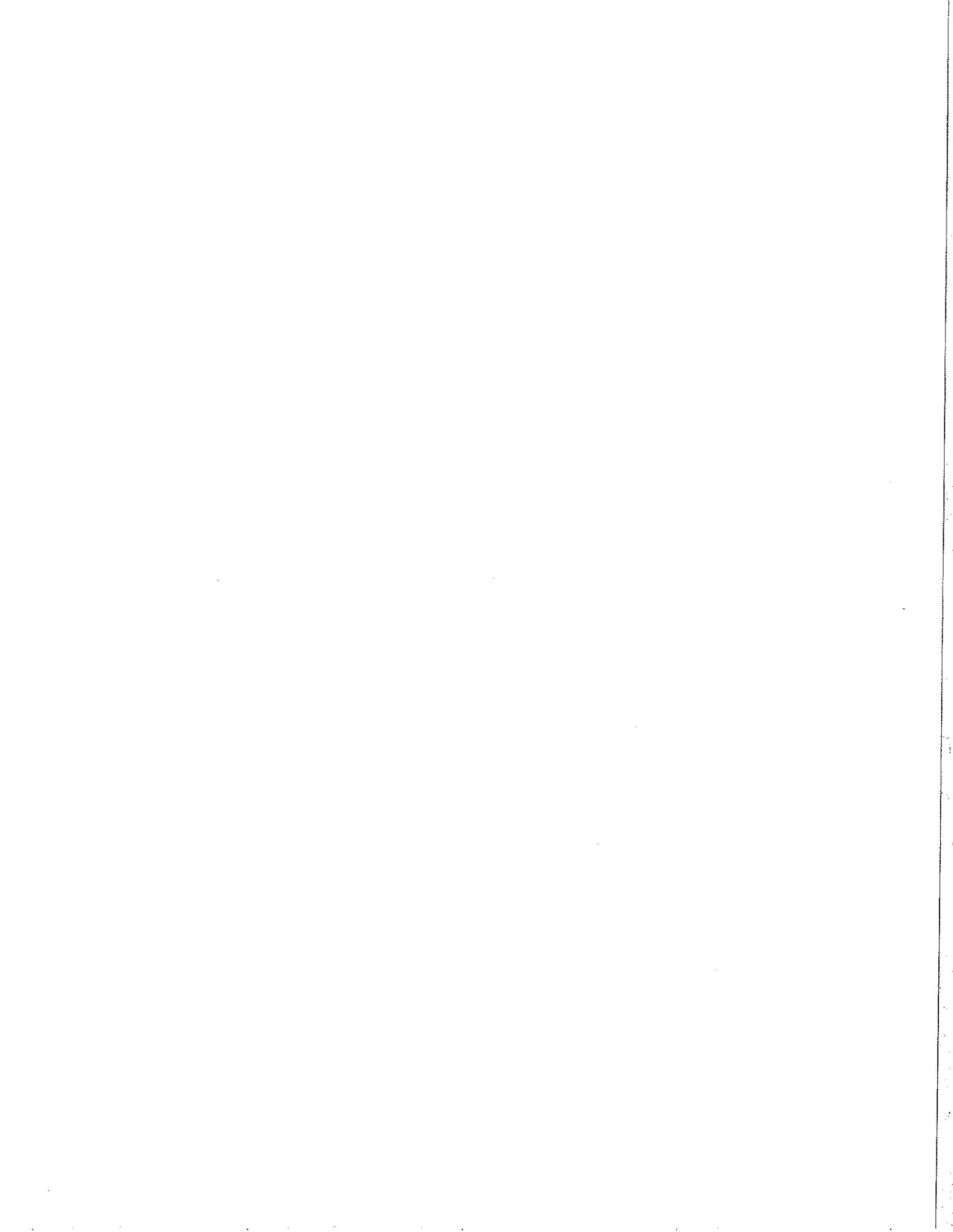
Re: Ballot Measure 37 (ORS 197.352) Claim Number M131189

Claimants: James P. and Bonnie B. Pynch

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 Draft Staff Report and Recommendation.

This Draft 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 15 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 15th day or actually delivered to DAS by the close of business on the 15th day.

This department will review any responses submitted, and a 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
Draft Staff Report and Recommendation**

October 12, 2007

STATE CLAIM NUMBER: M131189

NAMES OF CLAIMANTS: James P. Pynch
Bonnie B. Pynch

MAILING ADDRESS: 17758 Dixonville Road
Roseburg, Oregon 97470

PROPERTY IDENTIFICATION: Township 27S, Range 5W
Section 25: tax lots 502 and 600
Section 26: tax lot 100
Douglas County

OTHER INTEREST IN PROPERTY: James W. Pynch (Co-owner)
Heidi C. Pynch (Co-owner)
18080 Dixonville Road
Roseburg, Oregon 97470

DATE RECEIVED BY DAS: November 24, 2006

DEADLINE FOR FINAL ACTION:¹ May 17, 2008

I. SUMMARY OF CLAIM

The claimants, James and Bonnie Pynch, seek compensation in the amount of \$2,262,500 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 120.51-acre subject property into three parcels of at least 10 acres each and to develop a dwelling on the resulting undeveloped parcels. The subject property is located at 17758 and 18080 Dixonville Road, near Roseburg, in Douglas County.² (See claim.)

¹ ORS 197.352, as originally enacted, required that final action on claims made under Measure 37 be made within 180 days of the date the claim was filed.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

² The subject property includes three tax lots. Tax lot 100 (Section 26) consists of 91.5 acres, tax lot 502 consists of 1.3 acres and tax lot 600 consists of 27.71 acres.

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 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 Bonnie Pynch's division of tax lot 100 and the western portion of tax lot 600 into three parcels of at least 10 acres each and to their development of a dwelling on the resulting undeveloped parcels: applicable provisions of Statewide Planning Goals 3 (Agricultural Lands) and 4 (Forest Lands), ORS 215 and Oregon Administrative Rules (OAR) 660, divisions 6, and 33. These laws will not apply to the claimants only to the extent necessary to allow them to use tax lot 100 and the western portion of tax lot 600 for the use described in this report, and only to the extent that use was permitted when they acquired the property on May 21, 1971.

The department has further determined that the claim for tax lot 502 and the eastern portion of tax lot 600 is not valid because the claimants' desired use of that portion of the property was prohibited under the laws in effect when the claimants acquired tax lot 502 and the eastern portion of tax lot 600 in 2005. (See the complete recommendation in Section VI. of this report.)

III. COMMENTS ON THE CLAIM

Comments Received

On July 5, 2007, pursuant to OAR 125-145-0080, the Oregon Department of Administrative Services (DAS) provided written notice to the owners of surrounding properties. According to DAS, no written comments were received in response to the 15-day notice

IV. TIMELINESS OF CLAIM

Requirement

ORS 197.352(5) requires that a written demand for compensation be made:

1. For claims arising from land use regulations enacted prior to the effective date of Measure 37 (December 2, 2004), within two years of that effective date, or the date the public entity applies the land use regulation as an approval criteria to an application submitted by the owner, whichever is later; or
2. For claims arising from land use regulations enacted after the effective date of Measure 37 (December 2, 2004), within two years of the enactment of the land use regulation, or the date the 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 Goals 3 and 4, ORS 215, "administrative rules related to

dwelling and division” and Douglas County’s zoning 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, James and Bonnie Pynch, acquired tax lot 100 and the western portion of tax lot 600 on May 21, 1971, as reflected by a memorandum of contract and by a warranty deed included with the claim. The claimants acquired tax lot 502 and the eastern portion of tax lot 600 on April 22, 2005, as evidenced by a bargain and sale deed provided by a title search.³ The Douglas County Assessor’s Office confirms the claimants’ current ownership of the subject property.

Conclusions

The claimants, James and Bonnie Pynch, are “owners” of the subject property as that term is defined by ORS 197.352(11)(C), as of May 21, 1971, for tax lot 100 and the western portion of tax lot 600 and as of April 22, 2005, for tax lot 502 and the eastern portion of tax lot 600.

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.

³ The claimants assert acquisition of an ownership interest in tax lot 502 and the eastern portion of tax lot 600 on May 21, 1971, based on the memorandum of contract and warranty deed dated May 21, 1971, included with the claim. However, the legal descriptions in the memorandum of contract and in the warranty deed do not include tax lot 502 and the eastern portion of tax lot 600. The earliest documentation the department obtained through its own title search establishes that the claimants did not acquire this portion of the property until April 22, 2005. Absent documentation from the claimants to establish an earlier acquisition date for tax lot 502 and the eastern portion of tax lot 600, the department must rely on the available documentation to establish the date of acquisition.

Findings of Fact

The claim indicates that the claimants desire to divide the 120.51-acre property into three parcels of at least 10 acres each and to develop a dwelling on the resulting undeveloped parcels, and that current land use regulations prevent the desired use.

The claim is based generally on the applicable provisions of state law that require Exclusive Farm Use (EFU) and mixed agriculture-forest zoning and restrict uses on land zoned EFU and mixed agriculture-forest.

Tax lots 502 and 600 and the eastern portion of tax lot 100 are zoned Exclusive Farm Use-Grazing (FG) by Douglas 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 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 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

The western portion of tax lot 100 is zoned Farm Forest (FF) by Douglas County. The FF zone is a mixed agricultural and forest land zone, in accordance with Goals 3 and 4, as implemented by OAR 660-006-0050. Goals 3 and 4 became effective on January 25, 1975, and required that agricultural lands as defined by Goal 3 be zoned for farm uses and that forest lands under Goal 4 be zoned for forest uses. OAR 660-006-0050 authorizes local governing bodies to establish mixed agriculture-forest zones in accordance with both Goals 3 and 4 and OAR 660, divisions 6, and 33.

Under OAR 660-006-0050(2), effective on February 5, 1990, and subsequently amended on March 1, 1994, to comply with the provisions of House Bill 3661 (Chapter 792, Oregon Laws

⁴ The claimants' property is "agricultural land" because it contains Natural Resources Conservation Service Class I-IV 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 for EFU-zoned land.

1993), uses allowed in EFU zones under Goal 3 and forest zones under Goal 4 are allowed in mixed agriculture-forest zones.

For land divisions, OAR 660-006-0055 requires local governing bodies to apply the standards of OAR 660-006-0026 and 660-033-0100, which implement the minimum lot size requirements in ORS 215.780. ORS 215.780(1) establishes an 80-acre minimum for the creation of new lots or parcels in EFU and forest zones and became effective on November 4, 1993 (Chapter 792, Oregon Laws 1993).

For the approval and siting of dwellings, under OAR 660-006-0050(2) and (3), counties must apply either the OAR 660, division 6, or 33, standards based on the predominant use of the tract on January 1, 1993.⁶ The provisions of OAR 660-006-0027 and 660-006-0029 apply to dwelling approval and siting where the predominant use of the tract on that date was forest, and the provisions of OAR 660-033-0030 and 660-033-0035 apply where the predominant use of the tract on that date was agriculture.

The claimants acquired tax lot 100 and the western portion of tax lot 600 on May 21, 1971, prior to the adoption of statewide planning goals and their implementing statutes and regulations. At that time, the subject property was zoned Agriculture, Grazing, Timber-Raising District (AGT) by Douglas County, which established a 10-acre minimum lot size for the creation of new lots or parcels.

The claimants acquired tax lot 502 and the eastern portion of tax lot 600 on April 22, 2005, after the adoption of statewide planning goals and their implementing statutes and regulations, as identified above.

Conclusions

The current zoning requirements, minimum lot size and dwelling standards established under Goals 3 and 4, ORS 215 and OAR 660, divisions 6, and 33, were enacted or adopted after the claimants acquired tax lot 100 and the western portion of tax lot 600 in 1971, and do not allow the desired division and development of the property. These laws restrict the use of tax lot 100 and the western portion of tax lot 600 relative to the uses allowed when the claimants acquired the property. Laws enacted or adopted since the claimants acquired tax lot 502 and the eastern portion of tax lot 600 in 2005 do not restrict their desired use of the property relative to when they acquired it in 2005.

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.

⁶ The claim does not include information regarding the predominant use of the property on January 1, 1993.

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 \$2,262,500 as the reduction in the subject property’s fair market value due to the regulations that restrict the claimants’ desired use of the property. This amount is based on a real estate professional’s assessment of the subject property’s value.

Conclusions

As explained in Section V.(1) of this report, the claimants are James and Bonnie Pynch who acquired tax lot 100 and the western portion of tax lot 600 on May 21, 1971, and tax lot 502 and the eastern portion of tax lot 600 on April 22, 2005. No state laws enacted or adopted since the claimants acquired tax lot 502 and the eastern portion of tax lot 600 restrict the use of the property relative to the uses allowed in 2005. Therefore, the fair market value of those tax lots has not been reduced as a result of land use regulations enforced by the Commission or the department.

Under ORS 197.352, the claimants are due compensation for land use regulations that restrict the use of tax lot 100 and the western portion of tax lot 600 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 tax lot 100 and the western portion of tax lot 600 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 \$2,262,500.

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 the fair market value of tax lot 100 and the western portion of tax lot 600 has been reduced to some extent as a result of land use regulations enforced by the Commission or the department.

4. Exemptions Under ORS 197.352(3)

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

Findings of Fact

The claim is based on state land use regulations that restrict the use of the subject property, including applicable provisions of Goals 3 and 4, ORS 215 and OAR 660, divisions 6, and 33, which Douglas County has implemented through its FG and FF zones. All of these land use regulations were enacted or adopted after the claimants acquired tax lot 100 and the western

portion of tax lot 600 and before they acquired tax lot 502 and the eastern portion of tax lot 600 in 2005.

Conclusions

Without a specific development proposal for the subject property, it is not possible for the department to determine all the laws that may apply to a particular use of the property, or whether those laws may fall under one or more of the exemptions under ORS 197.352. It appears that none of the general statutory, goal and rule restrictions on residential division and development of tax lot 100 and the western portion of tax lot 600 were in effect when the claimants acquired that portion of the property in 1971. As a result, these laws are not exempt under ORS 197.352(3)(E).

All of the state land use regulations that restrict the claimants' desired use of tax lot 502 and the eastern portion of tax lot 600 were in effect when the claimants acquired that portion of the property. Therefore, these state land use regulations are exempt under ORS 197.352(3)(E), which exempts laws in effect when the claimants acquired the subject property.

Laws in effect when the claimants acquired tax lot 100 and the western portion of tax lot 600 are exempt under ORS 197.352(3)(E) and will continue to apply to the claimants' use of the property. In addition, the department notes that ORS 215.730 and OAR 660, division 6, particularly OAR 660-006-0027, -0029 and -0035, include fire protection standards for dwellings and structures in forest and mixed agriculture-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 in forest and mixed agriculture-forest zones in OAR 660, division 6, are exempt under ORS 197.352(3)(B).

There may be other laws that continue to apply to the claimants' use of tax lot 100 and the western portion of tax lot 600 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 tax lot 100 and the western portion of tax lot 600.

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 the claimants' desired use of tax lot 502 and the eastern portion of tax lot 600 relative to what was permitted when the claimants acquired those tax lots in 2005 and do not reduce the fair market value of the property. All state laws restricting the use of tax lot 502 and the eastern portion of tax lot 600 are exempt under ORS 197.352(3)(E).

The department otherwise finds laws enforced by the Commission or the department restrict the claimants' desired use of tax lots 100 and the western portion of tax lot 600. 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 \$2,262,500. However, because the claim does not provide an appraisal or other relevant evidence demonstrating that the land use regulations described in Section V.(2) reduce the fair market value of tax lot 100 and the western portion of tax lot 600, 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 tax lot 100 and the western portion of tax lot 600 was allowed under the standards in effect when they acquired that portion of the property. Nevertheless, based on the record for this claim, the department has determined that the laws on which the claim is based have reduced the fair market value of tax lot 100 and the western portion of tax lot 600 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 Bonnie Pynch to use tax lot 100 and the western portion of tax lot 600 for a use permitted at the time they acquired the property on May 21, 1971.

Conclusions

Based on the record and the foregoing findings and conclusions, the claimants have not established that they are entitled to relief under ORS 197.352(1) for tax lot 502 and the eastern portion of tax lot 600 as a result of land use regulations enforced by the Commission or the department because no state land use regulations restrict the claimants' desired use of that portion of the property relative to uses permitted when they acquired it, with the effect of reducing the property's fair market value. Therefore, the department recommends that this claim be denied as to tax lot 502 and the eastern portion of tax lot 600.

The department otherwise recommends that the claim be approved for tax lot 100 and the western portion of tax lot 600, 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 Bonnie Pynch's division of tax lot 100 and the western portion of tax lot 600 into three parcels of at least 10 acres each or to their development of a dwelling on the resulting undeveloped parcels: applicable provisions of Goals 3 and 4, ORS 215 and OAR 660, divisions 6, and 33. These land use regulations will not apply to the claimants only to the extent necessary to allow them to use tax lot 100 and the western portion of tax lot 600 for the use described in this report, and only to the extent that use was permitted when they acquired the property on May 21, 1971.

2. The action by the State of Oregon provides the state's authorization to the claimants to use tax lot 100 and the western portion of tax lot 600 for the use described in this report, subject to the standards in effect on May 21, 1971.

3. To the extent that any law, order, deed, agreement or other legally enforceable public or private requirement provides that tax lot 100 and the western portion of tax lot 600 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 tax lot 100 and the western portion of tax lot 600 imposed by private parties.

4. Any use of tax lot 100 and the western portion of tax lot 600 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 tax lot 100 and the western portion of tax lot 600, 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 tax lot 100 and the western portion of tax lot 600 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. NOTICE OF OPPORTUNITY TO COMMENT

This staff report is not a final decision by the department and does not authorize any use of the property that is the subject of this report. OAR 125-145-0100 provides 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. Such response must be filed no more than 15 calendar days after the date this report is mailed to the claimants and any third parties. Responses to this draft staff report and recommendation will be considered only as comments related to the claim described in this report. All responses must be delivered to the Oregon Department of Administrative Services (DAS), Measure 37 Unit, Risk Management–State Services Division, 1225 Ferry Street SE, U160, Salem, Oregon 97301-4292 and will be deemed timely filed if either postmarked on the 15th day, or actually delivered to DAS by the close of business on the 15th day. Note: Please reference the claim number, claimant name and clearly mark your comments as “Draft Staff Report comments.” Comments must be submitted in writing only. Those comments submitted electronically or by facsimile will not be accepted.