



Oregon

Theodore R. Kulongoski, Governor

Department of Land Conservation and Development

635 Capitol Street NE, Suite 150

Salem, Oregon 97301-2524

Phone: (503) 373-0050

First Floor/Coastal Fax: (503) 378-6033

Second Floor/Director's Office Fax: (503) 378-5518

Third Floor/Measure 37 Fax: (503) 378-5318

Web Address: <http://www.oregon.gov/LCD>

October 18, 2007

To: Claimant and Interested Persons

From: Cora R. Parker, Acting Director



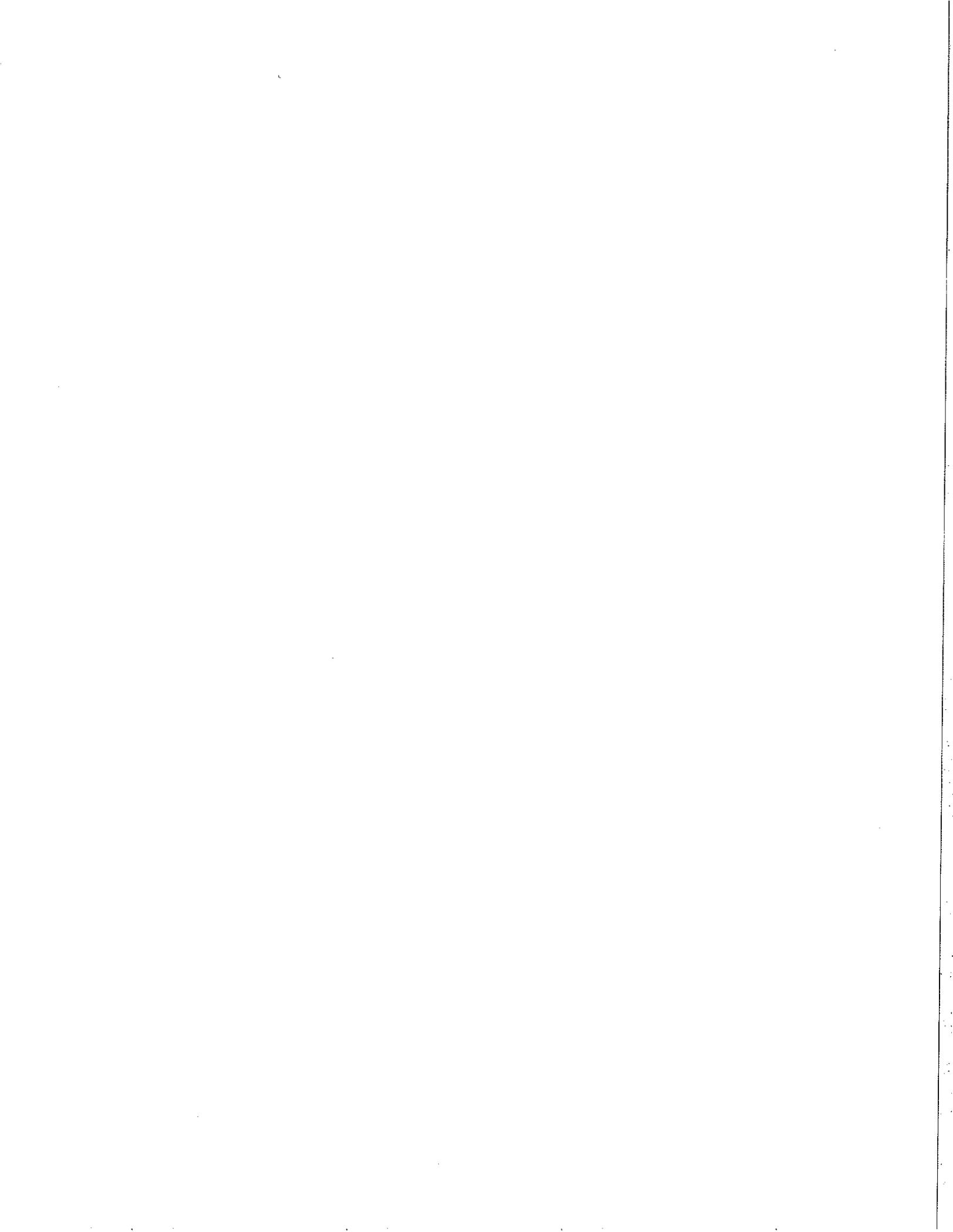
Re: Ballot Measure 37 (ORS 197.352) Claim Number M131346

Claimants: Jay and Judy Short

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 18, 2007

STATE CLAIM NUMBER: M131346

NAMES OF CLAIMANTS: Jay and Judy Short

MAILING ADDRESS: PO Box 3790
Salem, Oregon 97302

PROPERTY IDENTIFICATION: Township 8S, Range 3W, Section 8C
Tax lots 400, 500, 700 and 800
Marion County

OTHER CONTACT INFORMATION: Frank Walker & Associates
PO Box 7171
Salem, Oregon 97302

DATE RECEIVED BY DAS: November 28, 2006

DEADLINE FOR FINAL ACTION:¹ May 21, 2008

I. SUMMARY OF CLAIM

The claimants, Jay and Judy Short, seek compensation in the amount of \$226,404 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 westernmost 1.6 acres from the 4.39-acre subject property for residential development on the resulting 1.6-acre parcel.² The subject property is located at near the intersection of SW Viewcrest Road and Inland Drive S, near Salem, in Marion County. (See claim.)

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.

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 claimants described the subject property as a "tract" that includes four contiguous tax lots. Tax lot 400 consists of 0.14 acre, tax lot 500 consists of 1.63 acres, tax lot 700 consists of 0.18 acre and tax lot 800 consists of 2.44 acres.

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 Jay and Judy Short's division of the westernmost 1.6 acres from the 4.39-acre subject property for their residential development of that 1.6-acre parcel: applicable provisions of Statewide Planning Goal 14 (Urbanization) and Oregon Administrative Rule (OAR) 660-004-0040, adopted after each of the claimants acquired the subject property. These land use regulations will not apply to the claimants only to the extent necessary to allow Jay Short to use the subject property and to allow Judy Short to use tax lots 500, 700 and 800 for the use described in this report, and only to the extent that use was permitted when they acquired tax lot 500 on June 18, 1976, and tax lots 700 and 800 on June 30, 1976, and when Jay Short acquired tax lot 400 on September 23, 1977.

The department has further determined that this claim is not valid as to Judy Short for tax lot 400 because the claimants have not established her ownership of that tax lot. (See the complete recommendation in Section VI. of this report.)

III. COMMENTS ON THE CLAIM

Comments Received

On July 12, 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 28, 2006 for processing under OAR 125, division 145. The claim identifies provisions of OAR 660-004-0040 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, Jay and Judy Short, acquired tax lot 500 on June 18, 1976, as reflected by a warranty deed included with the claim, and tax lots 700 and 800 on June 30, 1976, as reflected by a deed included with the claim. Jay Short acquired tax lot 400 on September 23, 1977, as reflected by a warranty deed included with the claim. The claim includes no deed or other documentation to establish Judy Short's ownership of tax lot 400.

The Marion County Assessor's Office confirms the claimants' current ownership of tax lots 500, 700 and 800 and Jay Short's current ownership of tax lot 400.

Conclusions

The claimants, Jay and Judy Short, are "owners" of tax lots 500, 700 and 800, and Jay Short is an "owner" of tax lot 400, as that term is defined by ORS 197.352(11)(C). The claimants have owned tax lot 500 since June 18, 1976, and tax lots 700 and 800 since June 30, 1976. Jay Short has owned tax lot 400 since September 23, 1977. The claimants have not established that Judy Short is an "owner" of tax lot 400.

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 westernmost 1.6-acres from the 4.39-acre subject property for their residential development of that 1.6-acre parcel, and that current land use regulations prevent the desired use.

The claim is based on the provisions of state law that regulate rural residential zoning. The claimants' property is zoned Acreage Residential (AR) by Marion County. The AR zone is a

rural residential zone, in accordance with Goal 14, which prohibits urban use of rural lands. The county's AR 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,³ 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)).⁴ Because Marion County's rural 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.

The claimants acquired tax lots 500, 700 and 800 and Jay Short acquired tax lot 400 after the adoption of the statewide planning goals, but before the Commission acknowledged Marion County's land use regulations to be in compliance with statewide planning goals pursuant to ORS 197.250 and 197.251. Because the Commission had not acknowledged Marion County's plan and land use regulations when the claimants acquired the property, the subject property was recognized as resource land when the claimants acquired tax lots 500, 700 and 800 in 1976 and when Jay Short acquired tax lot 400 in 1977. Therefore, the statewide planning goals, and particularly Goals 3 (Agricultural Lands) and 4 (Forest Lands), in addition to Goal 14, would have applied directly to the claimants' property had they sought the desired use at the time they acquired the property.⁵ Alternatively, the claimants would have been required to establish a basis for an exception to compliance with those goals pursuant to the Goal 2 (Land Use Planning) exceptions process. However, through the county's acknowledgement process, the subject property was ultimately acknowledged as exceptions land pursuant to Goal 2, and zoned by the county for rural residential use. Therefore, while the county could now require that the property be evaluated as resource land, as would have been required in 1976 and 1977, because of the property's ultimate designation as rural residential exceptions land, the county could also require that the claimants' desired use be subject to compliance directly with Goal 14.

³ *1000 Friends of Oregon v. LCDC (Curry County)*, 301 Or 447 (1986).

⁴ 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 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)).

⁵ 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, 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. *Foster v. Polk County*, 115 Or App 475 (1992); *Kenagy v. Benton County*, 115 Or App 131 (1992).

The claim does not establish whether the claimants' desired division of a 1.6-acre parcel from the 4.39-acre subject property could have satisfied this standard.⁶

Conclusions

The current minimum lot size requirements for rural residential lots or parcels established by Goal 14 and OAR 660-004-0040 were adopted after the claimants acquired tax lots 500, 700 and 800 in 1976 and Jay Short acquired tax lot 400 in 1977 and do not allow the desired division of the property. However, when the claimants acquired tax lots 500, 700 and 800 in 1976 and Jay Short acquired tax lot 400 in 1977, the statewide planning goals, and in particular, the general requirements of Goal 14, applied directly to the property. The claim does not establish whether or to what extent the claimants' desired division of the property would have been permitted under the laws in effect in 1976 and 1977 when the claimants acquired it.

As explained in Section V.(1), the claimants have not established that Judy Short is an "owner" of tax lot 400 as that term is defined in ORS 197.352(11)(C). Therefore, the department cannot determine that laws enforced by the Commission or the department restrict her use of tax lot 400 with the effect of reducing the fair market value of the property.

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

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 \$226,404 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 Jay and Judy Short who acquired tax lot 500 on June 18, 1976, and tax lots 700 and 800 on June 30, 1976. Jay Short acquired tax lot 400 on September 23, 1977. As explained in Section V.(1) of this report, the claimants have

⁶ When Marion County's plan was acknowledged for compliance with Goal 14 on June 10, 1982, the subject property was zoned RA, which allowed a minimum 6,000 square foot parcel for new lots or parcels and dwellings.

not establish that Judy Short is an "owner" of tax lot 400 as that term is defined in ORS 197.352(11)(C). Therefore, the claimants have not established that she is entitled to relief under ORS 197.352 as to that tax lot.

Under ORS 197.352, the claimants are otherwise 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 adopted since the claimants acquired tax lots 500, 700 and 800 and since Jay Short acquired tax lot 400 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 \$226,404.

Without an appraisal or other documentation, and without verification of whether or the extent to which the claimants' desired use of the property was allowed under the standards in effect when they acquired tax lots 500, 700 and 800 and Jay Short acquired tax lot 400, it is not possible to substantiate the specific dollar amount by which the land use regulations have reduced the fair market value of the property. Nevertheless, based on the evidence in the record for this claim, the department determines that the fair market value of the subject property has been reduced to some extent as a result of land use regulations enforced by the Commission or the department.

4. Exemptions Under ORS 197.352(3)

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

Findings of Fact

The claim is based on state land use regulations that restrict the use of the subject property, including Goal 14 and OAR 660-004-0040, which Marion County has implemented through its AR zone. With the exception of provisions of Goal 14, adopted before the claimants acquired tax lot 500 on June 18, 1976, and tax lots 700 and 800 on June 30, 1976, and Jay Short acquired tax lot 400 on September 23, 1977, these state land use regulations were not in effect when 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. It appears that the goal and rule restrictions on residential division of the claimants' property are not exempt under ORS 197.352(3)(E) to the extent they were adopted after the claimants acquired the property. Provisions of Goal 14 in effect when the claimants acquired tax lots 500, 700 and 800 in 1976 and Jay Short acquired tax lot 400 in 1977 are exempt under ORS 197.352(3)(E) and will continue to apply to the property.

As explained in Section V.(1) of this report, the claimants have not establish Judy Short's ownership of tax lot 400. Therefore, the department cannot determine that any laws are not exempt from ORS 197.352 as to that portion of the claim.

Other laws in effect when the claimants acquired the property, including direct application of the applicable provisions of the statewide planning goals, are also exempt under ORS 197.352(3)(E) and will continue to apply to the claimants' use of the property. There may be other laws that continue to apply to the claimants' use of the subject property that have not been identified in the claim. In some cases, it will not be possible to know which laws apply to a use of the subject property until there is a specific proposal for that use. When the claimants seek a building or development permit to carry out a specific use, it may become evident that other state laws apply to that use. In some cases, some of these laws may be exempt under ORS 197.352(3)(A) to (D).

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

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 record, the department finds that the claim is not valid as to Judy Short for tax lot 400 because the claimants have not established her ownership of that tax lot. The department otherwise finds laws enforced by the Commission or the department restrict the claimants' desired use of tax lots 500, 700 and 800 and Jay Short's desired use of tax lot 400. 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 \$226,404. 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 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 Jay and Judy Short to use tax lots 500, 700 and 800 for a use permitted at the time they acquired tax lot 500 on June 18, 1976, and tax lots 700 and

800 on June 30, 1976, and to allow Jay Short to use tax lot 400 for a use permitted at the time he acquired tax lot 400 on September 23, 1977.

Conclusions

Based on the record before the department, Judy Short has not established that she is entitled to relief under ORS 197.352(1) for tax lot 400 as a result of land use regulations enforced by the Commission or the department because the claimants have not established her ownership of tax lot 400. Therefore, the department recommends that this claim be denied as to Judy Short for tax lot 400.

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

1. In lieu of compensation under ORS 197.352, the State of Oregon will not apply the following laws to Jay and Judy Short's division of the westernmost 1.6 acres from the 4.39-acre subject property for their residential development on that 1.6-acre parcel: applicable provisions of Goal 14 and OAR 660-004-0040, adopted after the claimants acquired each tax lot. These land use regulations will not apply to the claimants only to the extent necessary to allow Jay Short to use the subject property and to allow Judy Short to use tax lots 500, 700 and 800 for the use described in this report, and only to the extent that use was permitted when they acquired tax lot 500 on June 18, 1976, and tax lots 700 and 800 on June 30, 1976, and when Jay Short acquired tax lot 400 on September 23, 1977.
2. The action by the State of Oregon provides the state's authorization to the claimants to use the property for the use described in this report, subject to the standards in effect when Jay and Judy Short acquired tax lot 500 on June 18, 1976, and tax lots 700 and 800 on June 30, 1976, and when Jay Short acquired tax lot 400 on September 23, 1977. On those dates, the property was subject to the applicable provisions of the statewide planning goals, and in particular, Goal 14 in effect at that time.
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. 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, claimants 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.

