



# Oregon

Theodore R. Kulongoski, Governor

## Department of Land Conservation and Development

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October 5, 2007

To: Claimant and Interested Persons

From: Cora R. Parker, Acting Director



*Re: Ballot Measure 37 (ORS 197.352) Claim Number M131524*

*Claimants: Joan M. Silbernagel, The Silbernagel Family Limited Partnership*

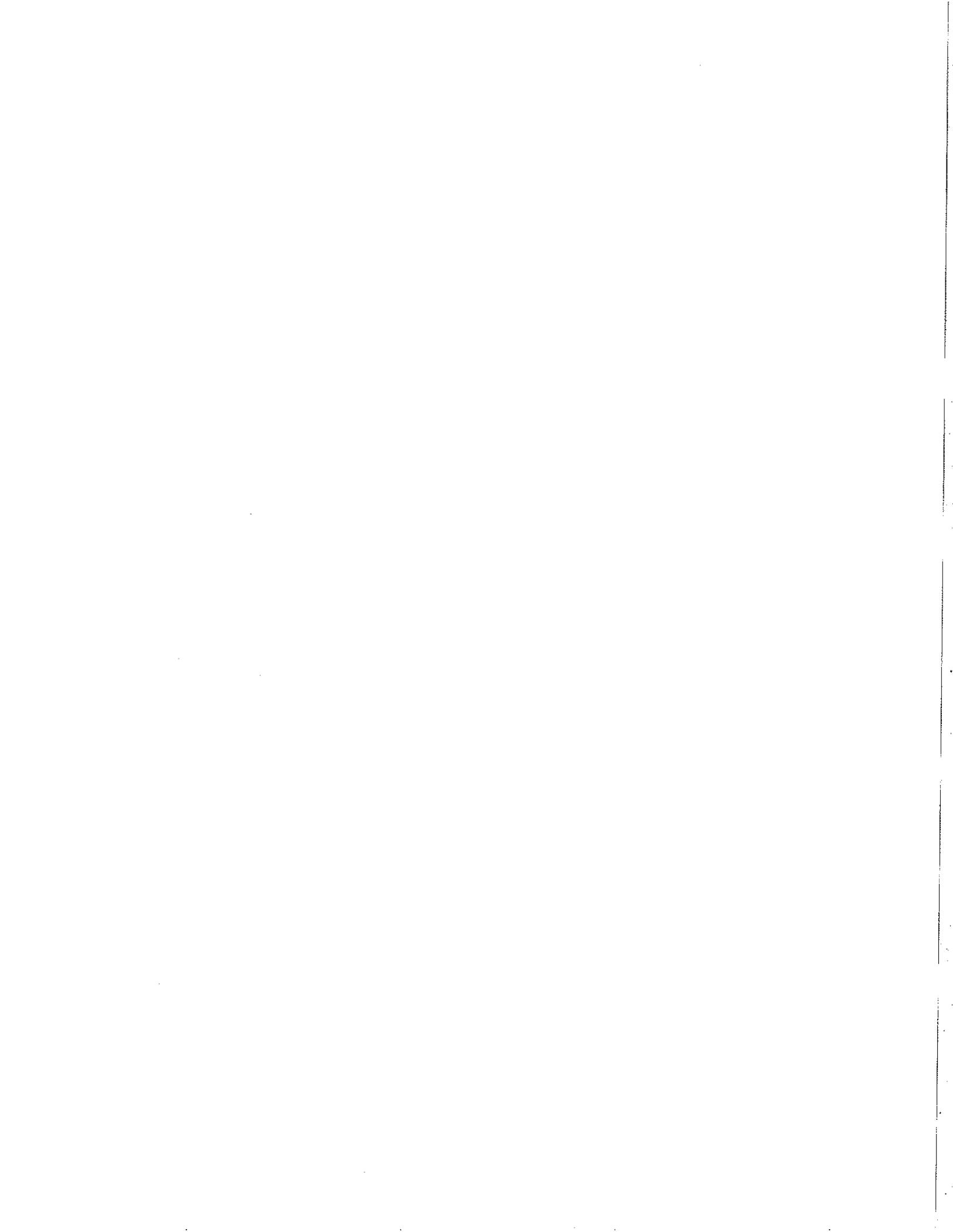
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Enclosed, in regard to the above-referenced claim for compensation under Ballot Measure 37 (ORS 197.352), is the Department of Land Conservation and Development's Draft Staff Report and Recommendation.

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 5, 2007

**STATE CLAIM NUMBER:** M131524

**NAMES OF CLAIMANTS:** Joan M. Silbernagel  
The Silbernagel Family Limited Partnership

**MAILING ADDRESS:** 1494 N Sixth Street  
Stayton, Oregon 97383

**PROPERTY IDENTIFICATION:** Township 10S, Range 1E, Section 14  
Tax lots 103 and 601  
Linn County

**OTHER CONTACT INFORMATION:** Donald M. Kelley  
Kelley Kelley Doyle  
110 N Second Street  
Silverton, Oregon 97381

**DATE RECEIVED BY DAS:** November 29, 2006

**DEADLINE FOR FINAL ACTION:<sup>1</sup>** May 22, 2008

**I. SUMMARY OF CLAIM**

The claimants, Joan Silbernagel and The Silbernagel Family Limited Partnership, seek compensation in the amount of \$1 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 and develop the 107.77-acre subject property.<sup>2</sup> The subject property is located at 44255 Camp Morrison Drive, near Scio, in Linn County. (See claim.)

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<sup>1</sup> 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.

<sup>2</sup> Under ORS 197.352(8), if a public entity elects to not apply one or more land use regulations to the claimants' use of the property, it may do so only to allow "a use." Further, in order to determine that land use regulations have restricted the claimants' use of the property, the department must base that determination on a use. The department makes every effort to determine what use of the property the claimants seek to carry out, but in circumstances where the claimants do not provide the information necessary for the department to determine the use sought, the department is unable to evaluate whether land use regulations restrict a claimants' desired use. On July 31, 2007, department staff sent a letter to the claimants and the claimants' agent explaining this and requesting clarification of

## 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 not valid as to Joan Silbernagel because she is not an owner of the subject property. The department has further determined that the claim is not valid as to The Silbernagel Family Limited Partnership because the state land use laws that regulate the claimant's use of the property were in effect when The Silbernagel Family Limited Partnership acquired it in 1995, and the claimant has not established that any laws enacted or adopted after the claimant acquired the property in 1995 restrict its desired use of the subject property with the effect of reducing the property's fair market value. (See the complete recommendation in Section VI. of this report.)

## III. COMMENTS ON THE CLAIM

### Comments Received

On July 25, 2007, pursuant to Oregon Administrative Rule (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 29, 2006, for processing under OAR 125, division 145. The claim identifies Senate Bill 100 as the basis for the claim. Only laws that were enacted or adopted prior to December 2, 2004, are the basis for this claim.

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the claimants' desired use. However as of September 28, 2007, no response was received from the claimants' agent. Accordingly, even if land use regulations that could potentially restrict the Silbernagel Family Limited Partnership's use of the property, the department could not evaluate the claim grant relief to this claimant because the claimant has failed to identify its desired use of the property.

## **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 Joan Silbernagel first acquired an interest in the subject property on March 24, 1958, as reflected by a deed included with the claim. On May 17, 1995, Joan Silbernagel conveyed the subject property to The Silbernagel Family Limited Partnership, as reflected by bargain and sale deeds included with the claim.<sup>3</sup> The Linn County Assessor’s Office confirms The Silbernagel Family Limited Partnership’s current ownership of the subject property.

### **Conclusions**

Claimant The Silbernagel Family Limited Partnership is an “owner” of the subject property as that term is defined by ORS 197.352(11)(C), as of May 17, 1995.<sup>4</sup> Claimant Joan Silbernagel is not an “owner” of the subject property as that term is defined by ORS 197.352(11)(C).

### **2. The Laws That are the Basis for This Claim**

In order to establish a valid claim, ORS 197.352(1) requires, in part, that a law must restrict the claimants’ use of private real property in a manner that reduces the fair market value of the property relative to how the property could have been used at the time the claimants or a family member acquired the property.

### **Findings of Fact**

The claim indicates that the claimants desire to divide and develop the 107.77-acre subject property, and that current land use regulations prevent the desired use.

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<sup>3</sup> The Silbernagel Family Limited Partnership is a domestic limited partnership registered with the Oregon Secretary of State.

<sup>4</sup> Under ORS 197.352(11)(A), legal entities can be “family members” of individuals who are owners of property under ORS 197.352(11)(C). However, legal entities cannot have family members under the statute. Therefore, individuals who transferred property to The Silbernagel Family Limited Partnership are not considered family members under the definition of family member in ORS 197.352(11)(A).

The claim appears to be based generally on the applicable provisions of state law that allow mixed agriculture-forest zoning and restrict uses on land zoned mixed agriculture-forest. The claimants' property is zoned Farm/Forest (F/F) by Linn County. The county's F/F 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 1993), uses allowed in Exclusive Farm Use (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.<sup>5</sup> 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 Silbernagel Family Limited Partnership acquired the subject property on May 17, 1995. At that time, the property was subject to the current laws in effect, as described 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, for land zoned for mixed agriculture-forest use, were all enacted or adopted before The Silbernagel Family Limited Partnership acquired the subject property on May 17, 1995. These land use regulations do not further restrict the Silbernagel Family Limited Partnership's use of the property relative to uses permitted when it acquired the property. The claimant has not established that it desires a use of the property that is restricted relative to uses permitted when The Silbernagel Family Limited Partnership acquired it in 1995.

As explained in Section V.(1), the claimant, Joan Silbernagel, is not an "owner" of the subject property as that term is defined in ORS 197.352(11)(C). Therefore, no laws enforced by the Land Conservation and Development Commission (the Commission) or the department restrict

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<sup>5</sup> The claim does not include information regarding the predominant use of the property on January 1, 1993.

Joan Silbernagel's use of the subject real property with the effect of reducing the fair market value of the property.

### **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 \$1 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 a real estate agent's assessment of the subject property's value.

#### **Conclusions**

As explained in Section V.(1) of this report, the claimants are Joan Silbernagel and The Silbernagel Family Limited Partnership. Joan Silbernagel is not an "owner" of the subject property as that term is defined in ORS 197.352(11)(C). Therefore, no laws restrict Joan Silbernagel's use of the subject property with the effect of reducing the fair market value.

The Silbernagel Family Limited Partnership acquired the subject property on May 17, 1995. No state laws enacted or adopted since The Silbernagel Family Limited Partnership acquired the subject property restrict the use of the property relative to the uses allowed in 1995. Therefore, the fair market value of the subject property has not been reduced 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 the applicable provisions of Goals 3 and 4, ORS 215 and OAR 660, divisions 6, and 33, which Linn County has implemented through its current F/F zone. As set forth in Section V.(2) of this report, all of the state land use regulations that restrict The Silbernagel Family Limited Partnership's desired use of the subject property were in effect when it acquired the property in 1995.

#### **Conclusions**

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

All of the state land use regulations that restrict The Silbernagel Family Limited Partnership's use of the subject property were in effect when it acquired the property. Therefore, these state land use regulations are exempt under ORS 197.352(3)(E), which exempts laws in effect when the The Silbernagel Family Limited Partnership acquired the subject property.

## **VI. FORM OF RELIEF**

ORS 197.352(1) provides for payment of compensation to an owner of private real property if the Commission or the department has enforced one or more laws that restrict the use of the property in a manner that reduces its fair market value. In lieu of compensation, the department may choose to not apply the law in order to allow the present owner to carry out a use of the property permitted at the time the present owner acquired the property. The Commission, by rule, has directed that if the department determines a claim is valid, the Director of the department must provide only non-monetary relief unless and until funds are appropriated by the legislature to pay claims.

### **Findings of Fact**

Based on the findings and conclusions set forth in this report, laws enforced by the Commission or the department do not restrict the claimants' desired use of the subject property relative to what was permitted when The Silbernagel Family Limited Partnership acquired the property in 1995, and do not reduce the fair market value of the property. All state laws restricting the use of the subject property are exempt under ORS 197.352(3)(E).

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

### **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) as a result of land use regulations enforced by the Commission or the department because Joan Silbernagel is not an owner of the subject property; and because no state land use regulations restrict The Silbernagel Family Limited Partnership's use of the property relative to uses permitted when it acquired the property, with the effect of reducing the property's fair market value. Therefore, the department recommends that this claim be denied.

## **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.

