

BEFORE THE DEPARTMENT OF ADMINISTRATIVE SERVICES,
THE DEPARTMENT OF LAND CONSERVATION AND DEVELOPMENT OF
THE STATE OF OREGON

IN THE MATTER OF THE CLAIM FOR)	FINAL ORDER
COMPENSATION UNDER ORS 197.352)	CLAIM NO. M118396
(BALLOT MEASURE 37) OF)	
Lyle and Ruth McAlexander, CLAIMANTS)	

Claimants: Lyle and Ruth McAlexander (the Claimants)

Property: Tax lots 4500, 4501, and 4502, T 1N, R10E, S 30;
Tax lots 500 and 1200, T 1N, R 10E, S 32, Hood River County (the Property)

Claim: The demand for compensation and any supporting information received from the Claimants by the State of Oregon (the Claim).

Claimants submitted the Claim to the State of Oregon under ORS 197.352. Under OAR 125-145-0010 *et seq.*, the Department of Administrative Services (DAS) referred the Claim to the Department of Land Conservation and Development (DLCD) as the regulating entity. This order is based on the record herein, including the Findings and Conclusions set forth in the Final Staff Report and Recommendation of DLCD (the DLCD Report) attached to and by this reference incorporated into this order.

ORDER

The Claim is approved as to laws administered by DLCD and the Land Conservation and Development Commission (LCDC) for the reasons set forth in the DLCD Report, and subject to the following terms:

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 Lyle and Ruth McAlexander's division of the subject property for residential development: applicable provisions of Statewide Planning Goal 3, ORS 215 and OAR 660, division 33, enacted after the claimants acquired each of the subject tax lots. These land use regulations will not apply to the claimants' use of tax lots 4500, 4501 and 4502 only to the extent necessary to allow them to use the property for the use described in this report, and only to the extent that use was permitted when they acquired those tax lots on June 15, 1974. These land use regulations will not apply to the claimants' use of tax lots 500 and 1200 only to the extent necessary to allow them to use the property for the use described in this report, and only to the extent that use was permitted when they acquired those tax lots on October 26, 1977, and October 22, 1982, respectively.

2. The action by the State of Oregon provides the state's authorization to the claimants to use their property for the use described in this report subject to the standards in effect on

June 15, 1974, for tax lots 4500, 4501 and 4502; on October 26, 1977 for tax lot 500; and on October 2, 1982, for tax lot 1200. On June 15, 1974, the property was subject to applicable provisions of the interim statewide planning goals and ORS 215 then in effect. On October 26, 1977, and October 2, 1982, the property was subject to the applicable provisions of Goal 3, ORS 215 and OAR 660 division 5 then in effect.

3. To the extent that any law, order, deed, agreement or other legally enforceable public or private requirement provides that the 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 ORS 227.160, other permits or authorizations from local, state or federal agencies, and restrictions on the use of the property imposed by private parties.

4. Any use of the 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 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 property by the claimants.

This Order is entered by the Director of the DLCD as a final order of DLCD and the Land Conservation and Development Commission under ORS 197.352, OAR 660-002-0010(8), and OAR 125, division 145, and by the Administrator for the State Services Division of the DAS as a final order of DAS under ORS 197.352, OAR 125, division 145, and ORS 293.

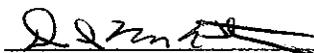
FOR DLCD AND THE LAND CONSERVATION
AND DEVELOPMENT COMMISSION:



Lane Shetterly, Director
DLCD

Dated this 13th day of March, 2006.

FOR the DEPARTMENT OF ADMINISTRATIVE
SERVICES:



David Hartwig, Administrator
DAS, State Services Division

Dated this 13th day of March, 2006.

NOTICE OF RIGHT TO APPEAL OR OTHER JUDICIAL RELIEF

You are entitled, or may be entitled, to the following judicial remedies:

1. Judicial review under ORS 293.316: Judicial review under ORS 293.316 may be obtained by filing a petition for review within 60 days from the service of this order. Judicial review under ORS 293.316 is pursuant to the provisions of ORS 183.482 to the Court of Appeals.
2. Judicial review under ORS 183.484: Judicial review under ORS 183.484 may be obtained by filing a petition for review within 60 days from the service of this order. A petition for judicial review under ORS 183.484 may be filed in the Circuit Court for Marion County and the Circuit Court in the county in which you reside.
3. A cause of action under ORS 197.352): A present owner of the property, or any interest therein, may file a cause of action in the Circuit Court for the county where the property is located, if a land use regulation continues to apply to the subject property more than 180 days after the present owner made a written demand for compensation.

(Copies of the documents that comprise the record are available for review at the Department's office at 635 Capitol Street NE, Suite 150, Salem, Oregon 97301-2540)

FOR INFORMATION ONLY

The Oregon Department of Justice has advised the Department of Land Conservation and Development that “[i]f the current owner of the real property conveys the property before the new use allowed by the public entity is established, then the entitlement to relief will be lost.”

**BALLOT MEASURE 37 (ORS 197.352)
CLAIM FOR COMPENSATION**

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

March 13, 2006

STATE CLAIM NUMBER: M118396

NAMES OF CLAIMANTS: Lyle and Ruth McAlexander

MAILING ADDRESS: 6670 Trout Creek Ridge Road
Parkdale, Oregon 97041

PROPERTY IDENTIFICATION: Township 1N, Range 10E, Section 30
Tax lots 4500, 4501, and 4502

Township 1N, Range 10E, Section 32
Tax lots 500 and 1200
Hood River County

DATE RECEIVED BY DAS: May 5, 2005

180-DAY DEADLINE: March 20, 2006¹

I. SUMMARY OF CLAIM

The claimants, Lyle and Ruth McAlexander, seek compensation in the amount of \$4,730,000 for the reduction in fair market value as a result of certain land use regulations that are alleged to restrict the use of certain private real property. The claimants desire compensation or the right to divide five tax lots containing 91.62 acres into 18, approximately five-acre parcels and another parcel of 1.91-acres and to develop a residential dwelling on each parcel. The properties are located near Parkdale, in Hood River County. (See claim.)

II. SUMMARY OF STAFF RECOMMENDATION

Based on the findings and conclusions set forth below, the Department of Land Conservation and Development (the department) has determined that the claim is valid. Department staff recommends that, in lieu of compensation, the requirements of the following state laws enforced by the Land Conservation and Development Commission (the Commission) or the department not apply to Lyle and Ruth McAlexander's division of the property for residential development: Statewide Planning Goal 3 (Agricultural Land), ORS 215 and OAR 660 division 33. These laws will not apply to the claimants only to the extent necessary to allow Mr. and Ms. McAlexander to

¹ This date reflects 180 days from the date the claim was submitted as extended by the 139 days enforcement of Measure 37 was suspended during the pendency of the appeal of Macpherson v. Dep't of Admin. Servs., 340 Or ___, 2006 Ore. LEXIS 104 (February 21, 2006).

use the properties for the use described in this report, and only to the extent that use was permitted at the time they acquired each respective parcel. (See the complete recommendation in Section VI. of this report.)

III. COMMENTS ON THE CLAIM

Comments Received

On May 26, 2005, 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, two written comments, evidence or information were received in response to the 10-day notice.²

The comments are relevant to whether a state law restricts the claimants' use of the property and whether the restriction of the claimants' use of the property reduces the fair market value of the property. The comments have been considered by the department in preparing this report. (See the comment letters in the department's claim file.)

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 the measure (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 the measure (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 May 5, 2005, for processing under OAR 125 division 145. The claim identifies Hood River County Ordinance #68 and Statewide Planning Goal 3 as laws that restrict the use of the property and are the basis for the claim. Only laws that were enacted prior to December 2, 2004, the effective date of Measure 37, are the basis for this claim. (See citations of statutory and administrative rule history of the Oregon Revised Statutes and Oregon Administrative Rules.)

² The 10-day notice period was suspended for 139 days during the pendency of the *Macpherson v. Dep't of Admin. Servs.*, 340 Or ___, 2006 Ore. LEXIS 104 (February 21, 2006), which suspended all Measure 37 deadlines.

Conclusions

The claim has been submitted within two years of December 2, 2004, the effective date of Measure 37, based on land use regulations 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 claim relates to five separate tax lots: lots 4500, 4501 and 4502 in Section 30 of T1N, R10E and lots 500 and 1200 in Section 32 of T1N, R10E. The claimants, Lyle and Ruth McAlexander, acquired the subject property on the following dates:

Tax lots	Dates of acquisition	Documentation
T1N, R10E, Section 32, TL 4500	June 15, 1974	Sales Contract
T1N, R10E, Section 32, TL 4501	June 15, 1974	Sales Contract
T1N, R10E, Section 32, TL 4502	June 15, 1974	Sales Contract
T1N, R10E, Section 30, TL 500	October 26, 1977	Sales Contract
T1N, R10E, Section 30, TL 1200	October 22, 1982	Sales Contract

Information provided by the Hood River County Assessor and by the Hood River County Planning and Building Services Department indicates that as of September 6, 2005, Lyle and Ruth McAlexander remain the current owners of all five tax lots included in the claim.

Conclusions

The claimants, Lyle and Ruth McAlexander, are “owners” of tax lots 4500, 4501 and 4502, as that term is defined by ORS 197.352(11)(C), as of June 15, 1974. The claimants are “owners” of tax lot 500, as of October 26, 1977, and the claimants are “owners” of tax lot 1200 as of October 22, 1982.

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 states that Hood River County Ordinance #68 permitted five-acre parcels at the time the claimants acquired the parcels. Information from the County indicates that the properties were subject to Ordinance #68 at the time the claimants acquired each of the tax lots, with the exception of lot 1200, which was zoned EFU at the time the McAlexanders acquired that tax lot.

The claim is based on Hood River County's current Exclusive Farm Use (EFU) -- High Value Farm Land (HVFL) Zone and the applicable provisions of state law that require such zoning. The claimants' property is zoned EFU as required by Goal 3, in accord with OAR 660, division 33, and ORS 215 because the claimants' property is "Agricultural Land" as defined by Goal 3. Goal 3 became effective on January 25, 1975, and required that Agricultural Lands as defined by the Goal be zoned EFU pursuant to ORS 215.

Current land use regulations, particularly ORS 215.263, 215.284, 215.780 and OAR 660 division 33 as applied by Goal 3, do not allow the subject property to be divided into parcels smaller than 80 acres and establish standards for allowing the existing or any proposed parcels to have farm or non-farm dwellings on them.

ORS 215.780 established an 80-acre minimum size for the creation of new parcels in EFU zones and became effective November 4, 1993 (Chapter 792, Oregon Laws 1993). ORS 215.263 (2003 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.

Lyle and Ruth McAlexander first acquired tax lots 4500, 4501 and 4502 in 1974. At that time the properties were zoned (A-1) Farm Use by Hood River County. Mr. and Ms. McAlexander acquired tax lots 4500, 4501 and 4502 after the adoption of SB 100 (Chapter 80, Oregon Laws 1973, effective October 5, 1973,) but before the adoption of the Statewide Planning Goals effective January 25, 1975. As such, ORS 197.175(1) and 197.280 (1973 edition) required, in addition to any local plan or zoning provisions, the application of interim land use goals set forth in ORS 215.515 (1973 edition) to the preparation, revision, adoption or implementation of any comprehensive plan prior to the effective date of the Statewide Planning Goals. (See *Petersen v. Klamath Falls*, 279 Or 249 (1977)).³

³ The "interim" land use goals are set forth in ORS 215.515(a) to (j) as follows: (a) "To preserve the quality of the air, water and land resources of the state," (b) "To conserve open space and protect natural and scenic resources," (c) "To provide for the recreational needs of citizens of the state and visitors," (d) "To conserve prime farm lands for the production of crops," (e) "To provide for the orderly and efficient transition from rural to urban land use," (f) "To protect life and property in areas subject to floods, landslides and other natural disasters," (g) "To provide and encourage a safe, convenient and economic transportation system including all modes of transportation: Air, water, rail, highway and mass transit and recognizing differences in the social costs in the various modes of transportation," (h) "To develop a timely, orderly and efficient arrangement of public facilities and services to serve as a framework for urban and rural development," (i) "To diversify and improve the economy of the state," and (j) "To ensure that development of properties within the state is commensurate with the character and the physical limitations of the land." (ORS 215.515, 1973 edition).

No information has been provided showing that the claimants' request regarding tax lots 4500, 4501, and 4502 complies with the interim goals.

The claimants first acquired tax lot 500 in 1977, and first acquired tax lot 1200 in 1982. On those dates the properties were zoned for A-1 Farm Use and Exclusive Farm Use (EFU), respectively, by Hood River County. When the claimants acquired lots 500 and 1200, Hood River County's comprehensive plan had not yet been acknowledged by the Commission. Until the County's plan was acknowledged by the Commission in late 1984, the Statewide Planning Goals, and specifically, Goal 3, applied directly to the property on a site-specific basis.⁴

In 1977, and in 1982, the State standards for a land division involving property where the local zoning was not acknowledged were that the resulting parcels must be of a size that are "appropriate for the continuation of the existing Commercial Agricultural Enterprise in the area" (Statewide Planning Goal 3). Further, ORS 215.263 (1975 edition) required that all divisions of land subject to the provisions for EFU zoning comply with the legislative intent set forth in ORS 215.243 (Agricultural Land Use Policy). Thus, the opportunity to divide the properties when the McAlexanders acquired them in 1977 and 1982 was limited to land divisions consistent with Goal 3, which required the resulting farm or non-farm parcels to 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 215.243.

As for dwellings allowed under EFU zoning as required by Goal 3 on those dates, farm dwellings were allowed if determined to be "customarily provided in conjunction with farm use" under ORS 215.213(1)(e) (1975 edition). Before a farm dwelling could be established on "Agricultural Land," the farm use to which the dwelling related must "be existing."⁵ Further, approval of a farm dwelling required that the dwelling be situated on a parcel wholly devoted to farm use. ORS 215.213(3) (1975 edition) authorized a non-farm dwelling only where the dwelling was compatible with farm uses, consistent with the intent of ORS 215.243, did not interfere seriously with accepted farming practices on adjacent lands, did not materially alter the stability of the land use pattern for the area, and was situated on land generally unsuitable for production of farm crops and livestock. (ORS 215.213(3) (1975 edition))

No information has been provided showing that the claimants' request regarding tax lots 500 and 1200 complies with Goal 3 or the standards for new parcels under ORS 215.263 (1975 Edition). Nor has any information been provided concerning whether additional dwellings comply with

⁴ Statewide Planning Goal 3 became effective on January 25, 1975, and was applicable to legislative land use decisions and some quasi-judicial land use prior to the Commission's acknowledgment of the County's Goal 3 program on April 30, 1981 (*Sunnyside Neighborhood Assn. v. Clackamas County*, 280 Or 3 (1977), *1000 Friends of Oregon v. Benton County*, 32 Or App 413 (1978), *Jurgenson v. Union County*, 42 Or App 505 (1979), *Alexanderson v. Polk County*, 289 Or 427, *rev den*, 290 Or 137 (1980) and *Perkins v. City of Rajneeshpuram*, 300 Or 1 (1985)). After the County's plan and land use regulations were acknowledged by 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 in substance, the applicable rules must be interpreted and applied by the County in making its decision. (*Forster v. Polk County*, 115 Or App 475 (1992) and *Kenagy v. Benton County*, 115 Or App 131 (1992))

⁵ *Matteo v. Polk County*, 11 Or LUBA 259, 263 (1984) *affirmed without opinion*, 70 Or App 179 (September 14, 1984,) and *Newcomer v. Clackamas County*, 92 Or App 174, *modified* 94 Or App 33 (November 23, 1988).

the approval standards for dwellings under ORS 215 in effect at the time that Lyle and Ruth McAlexander acquired the property in 1977 and 1982.

Conclusions

Current zoning requirements, minimum parcel size and dwelling standards established by Statewide Planning Goal 3 (Agricultural Lands) and provisions applicable to land zoned EFU in ORS 215 and OAR 660 division 33 were enacted after Lyle and Ruth McAlexander first acquired ownership of tax lots 4500, 4501 and 4502 on June 15, 1974, and do not allow the division of the property into five-acre parcels with a dwelling on each parcel, thereby restricting the use of the property relative to uses allowed when the property was acquired. Provisions of ORS 215 and OAR 660 division 33 enacted after the claimants acquired tax lot 500 (1977) and tax lot 1200 (1982), also restrict the claimants' ability to divide the property and develop residential dwellings on it. However, the claim does not establish, and it is not clear whether or to what extent the claimants' requested level of development would have been permitted at the time the claimants acquired each of the subject tax lots.

This report addresses only those state laws that are identified in the claim, or that the department is certain apply to the property based on the uses that the claimants have identified. There may be other laws that currently apply to the claimants' use of the 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 what laws apply to a use of 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 any land use regulation 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 \$4,730,000 as the reduction in the property's fair market value, due to current regulations. This amount is based on the claimants' estimate of the market value of 18 approximately five-acre parcels and one 1.91-acre parcel upon which residential development is permitted. The claim estimates the reduction in value for each parcel as follows:

Tax lot	# of lots	Estimated Reduction in value
T1N, R10E, Section 30, TL 500	5	\$2,000,000
T1N, R10E, Section 30, TL 1200	1	\$230,000
T1N, R10E, Section 32, TL 4500, 4501, 4502	4	\$2,500,000

Conclusions

As explained in Section V.(1) of this report, the current owners are Lyle and Ruth McAlexander who acquired the respective properties on June 15, 1974, October 26, 1977, and

October 22, 1982. Under ORS 197.352, Lyle and Ruth McAlexander are due compensation for land use regulations that restrict the use of the subject property in a manner that reduces its fair market value. Based on the findings and conclusions in Section V.(2) of this report, laws adopted since the claimants acquired the property restrict division and development of the subject property. The claimants estimate the reduction in value due to the restrictions to be \$4,730,000

Without an appraisal or other documentation, and without verification as to whether or the extent to which the claimants' requested use would have been permitted when they acquired each of the subject tax lots, it is not possible to substantiate the specific dollar amount the claimants demand for compensation. Nevertheless, based on the submitted information, the department determines that it is more likely than not that there has been some reduction in the fair market value of the subject property 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 property relative to what would have been allowed in 1974, 1977, and 1982, when the claimants acquired the subject properties. These provisions include Statewide Planning Goal 3 (Agricultural Land) and applicable provisions of ORS 215 and OAR 660 division 33 which Hood River County has implemented through its EFU zone. These laws are not exempt under ORS 197.352(3)(E) to the extent they were enacted or adopted after the claimants acquired each of the subject tax lots. ORS 197.352(3)(E) exempts laws in effect when the claimants acquired the property. Accordingly, the state's interim land use goals and ORS 215 in effect on June 15, 1974, as to tax lots 4500, 4501 and 4502, and applicable provisions of Statewide Planning Goal 3, ORS 215 and OAR 660, division 5, in effect on October 26, 1977, (for tax lot 500), and on October 22, 1982 (for tax lot 1200), are exempt under ORS 197.352(3)(E).

Information provided by the Hood River County Planning Department indicates that a portion of tax lot 4502 is also subject to the County's Flood Plain Overlay zone (FP) and to the County's Stream Protection overlay Zone (SPO). To the extent that the subject property is regulated to protect public health and safety, including local compliance with Statewide Planning Goal 7, or under provisions required by federal law, those regulations are exempt under ORS 197.352(3), and will continue to apply to the property.⁶

⁶ Statewide Planning Goal 7 requires local governments to identify areas of natural hazards and to adopt ordinances to protect people and property from such hazards. Local ordinances adopted to comply with Goal 7 may be exempt under ORS 197.352(3)(B).

Conclusions

Without a specific development proposal for the property, it is not possible for the department to determine what laws 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 does appear that the general statutory, goal and rule restrictions on residential development and use of farm land apply to the claimants' use of the property, and these laws are not exempt under ORS 197.352(3)(E) to the extent they were enacted or adopted after the claimants acquired the subject property. Provisions of the state's interim land use goals and Statewide Planning Goal 3 (Agricultural Land) and applicable provisions of ORS 215 and OAR 660, division 5, in effect when the claimants acquired each respective parcel are exempt under ORS 197.352(3)(E) and will continue to apply to the property.

Other laws in effect when the claimants acquired the property are also exempt under ORS 197.352(3)(E), and will continue to apply to the claimants' use of the property. In addition, provisions of the County's floodplain overlay zone adopted to protect public health and safety may also be exempt under ORS 197.3523(B). There may be other laws that 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 what laws apply to a use of 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. And, 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 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 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 a law that restricts 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 current owner acquired the property. The Commission, by rule, has directed that if the department determines a claim is valid, the Director 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' ability to create the desired five-acre parcels out of the subject property, or develop those parcels for residential use. The claim asserts that laws enforced by the Commission or department reduce the fair market value of the subject property

by \$4,730,000. However, because the claim does not provide an appraisal or other specific documentation for how the specified restrictions reduce the fair market value of the property, and without verification as to whether or the extent to which the claimants' requested use would have been permitted when they acquired each of the subject tax lots, a specific amount of compensation cannot be determined. Nevertheless, based on the record for this claim, the department acknowledges that the laws on which the claim is based likely have reduced the fair market value of the 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 Mr. and Ms. McAlexander to use the subject properties for a use permitted at the time they acquired an interest in each respective property on June 15, 1974, on October 26, 1977, and on October 22, 1982.

Conclusion

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 Lyle and Ruth McAlexander's division of the subject property for residential development: applicable provisions of Statewide Planning Goal 3, ORS 215 and OAR 660, division 33, enacted after the claimants acquired each of the subject tax lots. These land use regulations will not apply to the claimants' use of tax lots 4500, 4501 and 4502 only to the extent necessary to allow them to use the property for the use described in this report, and only to the extent that use was permitted when they acquired those tax lots on June 15, 1974. These land use regulations will not apply to the claimants' use of tax lots 500 and 1200 only to the extent necessary to allow them to use the property for the use described in this report, and only to the extent that use was permitted when they acquired those tax lots on October 26, 1977, and October 22, 1982, respectively.
2. The action by the State of Oregon provides the state's authorization to the claimants to use their property for the use described in this report subject to the standards in effect on June 15, 1974, for tax lots 4500, 4501 and 4502; on October 26, 1977 for tax lot 500; and on October 2, 1982, for tax lot 1200. On June 15, 1974, the property was subject to applicable provisions of the interim statewide planning goals and ORS 215 then in effect. On October 26, 1977, and October 2, 1982, the property was subject to the applicable provisions of Goal 3, ORS 215 and OAR 660 division 5 then in effect.
3. To the extent that any law, order, deed, agreement or other legally enforceable public or private requirement provides that the 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 ORS 227.160, other permits or authorizations from local, state or federal agencies, and restrictions on the use of the property imposed by private parties.

4. Any use of the 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 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 property by the claimants.

VII. COMMENTS ON THE DRAFT STAFF REPORT

The department issued its draft staff report on this claim on October 11, 2005. 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.