

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. M118453
(BALLOT MEASURE 37) OF)	
Grigory and Anna Anfilofieff, CLAIMANTS)	

Claimants: Grigory and Anna Anfilofieff (the Claimants)

Property: Tax lots 2000 and 2001, Township 5S, Range 1E, Section 19, Clackamas 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:

1. In lieu of compensation under ORS 197.352, the State of Oregon will not apply the following laws to Grigory and Anna Anfilofieffs' division of the subject property into six, 2.5-acre parcels or to their development of a dwelling on each parcel: applicable provisions of Goal 3 (Agricultural Lands), ORS 215 and OAR 660, division 33, enacted after the claimants acquired tax lot 2000 in June 1973, and after the claimants acquired tax lot 2001 in October 1973. These land use regulations will not apply to Grigory and Anna Anfilofieffs' use of tax lot 2000 only to the extent necessary to allow them to use that tax lot for the use described in this report, to the extent that use was permitted at the time they acquired tax lot 2000 on June 23, 1973; and will not apply to their use of tax lot 2001 only to the extent necessary to allow them to use that tax lot for the use described in this report, to the extent that use was permitted when they acquired tax lot 2001 on October 19, 1973.
2. The action by the State of Oregon provides the state's authorization to the claimants to use tax lot 2000 subject to the standards in effect in June 1973, and tax lot 2001 subject to the standards in effect in October 1973. In June 1973, tax lot 2000 was subject to applicable provisions of ORS 215 then in effect. In October 1973, tax lot 2001 was subject to the applicable provisions of ORS 215 and interim statewide planning goals 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 Deputy 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.

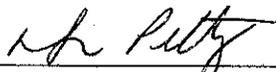
FOR DLCD AND THE LAND CONSERVATION
AND DEVELOPMENT COMMISSION:



Lane Shetterly, Director
DLCD

Dated this 27th day of March, 2006.

FOR the DEPARTMENT OF ADMINISTRATIVE
SERVICES:



Dugan Petty, Deputy Administrator
DAS, State Services Division

Dated this 27th 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 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 or the Circuit Court in the county in which you reside.
2. A cause of action under ORS 197.352 (Measure 37 (2004)): If a land use regulation continues to apply to the subject property more than 180 days after the present owner of the property has made written demand for compensation under ORS 197.352¹, the present owner of the property, or any interest therein, shall have a cause of action in the circuit court in which the real property is located.

(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.”

¹ By order of the Marion County Circuit Court, “all time lines under Measure 37 [were] suspended indefinitely” on October 25, 2005. This suspension was lifted on March 13, 2006 by the court. As a result, a period of 139 days (the number of days the time lines were suspended) has been added to the 180-day time period under ORS 197.352(6) for claims that were pending with the state on October 25, 2005.

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

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

March 27, 2006

STATE CLAIM NUMBER: M118453

NAMES OF CLAIMANTS: Grigory and Anna Anfilofieff

MAILING ADDRESS: 6931 South Gibson Road
Woodburn, Oregon 97071

PROPERTY IDENTIFICATION: Township 5S, Range 1E
Section 19
Tax lots 2000 and 2001
Clackamas County

DATE RECEIVED BY DAS: May 17, 2005

180-DAY DEADLINE: April 1, 2006¹

I. SUMMARY OF CLAIM

The claimants, Grigory and Anna Anfilofieff, seek compensation in the amount of \$1,110,000 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 the 17.69-acre property (16.77 acres in tax lot 2000 and 0.92 acres in tax lot 2001) into six, 2.5-acre parcels and to develop a dwelling on each parcel. The property is located at 6931 South Gibson Road near Woodburn in Clackamas 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 Grigory and Anna Anfilofieff's division of the property into six, 2.5-acre parcels or to their development of a dwelling on each parcel: applicable provisions of Statewide Planning Goal 3 (Agricultural Lands) ORS 215 and OAR 660, division 33 enacted after June 23, 1973, for tax lot 2000 and after October 19, 1973, for tax lot 2001. These laws will not apply to the claimants only to the extent necessary to allow them to use the property for the use described in

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).

this report, and only to the extent that use was permitted at the time they acquired tax lot 2000 in June 1973, and tax lot 2001 in October 1973. (See the complete recommendation in Section VI. of this report.)

III. COMMENTS ON THE CLAIM

Comments Received

On June 28, 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, one written comment was received in response to the 10-day notice.²

The comment does not address whether the claim meets the criteria for relief (compensation or waiver) under ORS 197.352. Comments concerning the effects a use of the property may have on surrounding areas generally are not something that the department is able to consider in determining whether to waive a state law. If funds do become available to pay compensation, then such effects may become relevant in determining which claims to pay compensation for instead of waiving a state law. (See comment letter 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 17, 2005, for processing under OAR 125, division 145. The claim identifies provisions of Clackamas County's Exclusive Farm Use (EFU) zone and related state laws as laws that restrict the use of the property as 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 claimants, Grigory and Anna Anfilofieff, acquired tax lot 2000, consisting of 16.77 acres of the 17.69-acre subject property on June 23, 1973, according to a sale agreement submitted October 26, 2005 by the claimant’s attorney in response to the draft staff report mailed to the claimant for review. A Warranty Deed, dated June 9, 1978, for tax lot 2000 was submitted with the claim. They acquired tax lot 2001, consisting of 0.92 acres, October 19, 1973. (See Warranty Deed included with the claim.) A copy of a recent Property Tax Statement and confirmation by the Clackamas County Assessor’s Office indicate that Grigory and Anna Anfilofieff are the current owners of both tax lots that constitute the subject property.

Conclusions

The claimants, Grigory and Anna Anfilofieff, are “owners” of the subject property as that term is defined by ORS 197.352(11)(C), as of June 23, 1973 for tax lot 2000 and October 19, 1973 for tax lot 2001.

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 refers to EFU zone and state regulations pertaining to agricultural land as laws that restrict them from dividing their 17.69-acre property into 2.5-acre parcels, and from developing a dwelling on each of those parcels.

The claim is based, generally, on Clackamas County’s current Exclusive Farm Use (EFU) 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 less 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 lots or 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(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. Subsequent amendments to comply with HB 3326, (Chapter 704, Oregon Laws 2001, and effective January 1, 2002,) were adopted by the Commission effective May 22, 2002. (See citations of administrative rule history for OAR 660-033-0100, 0130 and 0135.)

The claimants acquired tax lot 2000, consisting of 16.77 acres of the 17.69-acre property, on June 23, 1973. At the time the claimants acquired this portion of the subject property it was zoned EFU-20 by Clackamas County. However, at that time, the County's comprehensive plan and land use ordinances had not been acknowledged by the Commission for compliance with the statewide planning goals pursuant to ORS 197.250 and 197.251. Since the Commission had not acknowledged Clackamas County's comprehensive plan and land use regulations when the claimants acquired tax lot 2000 on June 9, 1978, the Statewide Planning Goals, including Goal 3, applied directly to the property on the date the claimants acquired that tax lot.³

In 1978, 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 (1973 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

³ Statewide Planning Goal 3 was applicable to legislative land use decisions and some quasi-judicial land use decisions prior to the Commission's acknowledgment of the County's Goal 3 program on July 30, 1984. *Perkins v. City of Rajneeshpuram*, 300 Or 1 (1985); *Alexanderson v. Polk County*, 289 Or 427, rev den 290 Or 137 (1980); *Sunnyside Neighborhood Assn. v. Clackamas County*, 280 Or 3 (1977); *Jurgenson v. Union County*, 42 Or App 505 (1979); *1000 Friends of Oregon v. Benton County*, 32 Or App 413 (1978). 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); *Kenagy v. Benton County*, 115 Or App 131 (1992).

(Agricultural Land Use Policy). ORS 215.263 did not provide for the creation of a small parcel for a non-farm dwelling separate from the provisions just noted.⁴ Thus, the opportunity to divide the property when the claimants acquired it in 1978 was limited to land divisions done 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. (See endnote¹.)

As for dwellings allowed in an unacknowledged EFU zone in 1978, ORS 215 and EFU zoning required by Goal 3 allowed farm dwellings if determined to be "customarily provided in conjunction with farm use" under ORS 215.213(1)(e) (1973 edition). Before a farm dwelling could be established on agricultural land, the farm use to which the dwelling relates 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) (1973 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) (1973 edition).)⁶

No information has been provided establishing whether or to what extent the claimants' requested use of the property complies with either of the applicable division or dwelling standards under Goal 3 or ORS 215.213 (1973 edition) in effect at the time they acquired the property in 1978.

The claimants acquired tax lot 2001 on October 1973, 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, 1975.⁷

During the period between October 5, 1973, when SB 100 became effective, and January 25, 1975, when the statewide planning goals became effective, ORS 197.175(1) and 197.280 (1973

⁴ Compare ORS 215.263 (1973 edition) with the current version of ORS 215.263.

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

⁶ When determining whether land is "generally unsuitable for the production of farm crops and livestock" under ORS 215.213(3), the entire parcel or tract must be evaluated rather than a portion thereof. See *Smith v. Clackamas County*, 313 Or 519 (1992).

⁷ 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).

edition) required, in addition to any local plan or zoning provisions, that cities and counties exercise their planning responsibilities (including implementation of their comprehensive plan) in accordance with the "interim" land use goals set forth in ORS 215.515 (1973 edition).⁸

The use proposed here is to divide the property. As a result, if the claimants had sought to create that use in 1973, as a matter of law the use would have been subject to the interim planning goals at ORS 215.515. One of the interim goals was to "conserve prime farm lands for the production of crops..." Soil types are a determinant of prime farm land. The subject 0.92-acre property (tax lot 2001) is composed of soils rated as "prime" by the Natural Resource Conservation Service (NRCS). According to the Oregon Department of Agriculture, Oregon only has a limited supply of soils rated "prime" (8% of all agricultural land).

No information has been provided establishing whether or to what extent the use of the 0.92 acres of tax lot 2001 for residential use complies with the interim planning goals set forth in ORS 215.515 (1973 edition). In particular, it is not apparent how the inclusion of the 0.92 acres of prime, Class 2 high-value farmland in the division and development of the subject property would "conserve prime farm lands for the production of crops" as required by the interim goals at the time the claimants acquired the property in 1973.

Conclusions

The zoning requirements established by Statewide Planning Goal 3 (Agricultural Lands) were enacted after Grigory and Anna Anfilofieff acquired ownership of the subject property on June 23, 1973. Minimum lot size and dwelling standards and provisions applicable to land zoned EFU in ORS 215 and OAR 660, division 33 were enacted after the claimants acquired the two tax lots and do not allow the division of the property, which may restrict the use of the property relative to the uses allowed when the property was acquired by Grigory and Anna Anfilofieff in 1973. In 1973, tax lot 2000 was subject to the requirements of the County's EFU-20 zone, which were adopted pursuant to the provisions of ORS 215 and Goal 3 then in effect. In 1973, tax lot 2001 was subject to the "interim" land use goals set forth in ORS 215.515 required, in part, the conservation of prime farm land for the production of crops. It is not whether or to what extent the claimants' proposed use of the property complies with the standards applicable to tax lot 2000 in 1978, or tax lot 2001 in 1973.

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.

⁸ *Petersen v. Klamath Falls*, 279 Or 249 (1977); see also, *Meeker v. Board of Comm'rs*, 287 Or 665 (1979) (review of a subdivision is an exercise of planning responsibilities requiring application of the goals); *State Housing Council v. Lake Oswego*, 48 Ore. App. 525 (1981) ("Land use planning responsibility is not defined in ORS ch 197. The Supreme Court has interpreted that term as including annexation approvals, subdivision approvals and partition approvals.") (Emphasis added).

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 \$1,110,000 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 six 2.5-acre lots.

Conclusions

As explained in Section V.(1) of this report, the current owners of the property are Grigory and Anna Anfilofieff who acquired .92 acres of the property (tax lot 2001) October 19, 1973, and 16.77 acres of the property (tax lot 2000) on June 23, 1973. Under ORS 197.352, Grigory and Anna Anfilofieff 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 of the subject property. The claimants estimate the reduction in value due to the restrictions to be \$1,110,000.

Without an appraisal or other documentation, 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 1973 when the claimants acquired the property. These provisions include Statewide Planning Goal 3 (Agricultural Lands), and applicable provisions of ORS 215 and OAR 660, division 33, which Clackamas County has implemented through its EFU zone. These laws are not exempt to the extent they were enacted or adopted after June 23, 1973, with respect to tax lot 2000, and after October 19, 1973, with respect to tax lot 2001. Provisions of ORS 215, including the Interim Statewide Planning Goals in effect on October 19, 1973, when the claimants acquired tax lot 2001, are exempt under ORS 197.352(3)(E), which exempts laws in effect when the claimants acquired the property.

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 property. Provisions of ORS 215 and Statewide Planning Goal 3 in effect when the claimants acquired tax lot 2000 in 1978, and provisions of ORS 215, including the Interim Statewide Planning Goals in effect when the claimants acquired tax lot 2001 in 1973, 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. 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 divide the subject property into six 2.5-acre parcels or develop a dwelling on each of resulting parcel. The claim asserts the laws enforced by the Commission or department reduce the fair market value of the subject property by \$1,110,000. 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, 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 Grigory and Anna Anfilofieff to use the subject property for a use permitted at the time they acquired the tax lot 2000 on June 23, 1973, and tax lot 2001 on October 19, 1973.

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 Grigory and Anna Anfilofieffs' division of the subject property into six, 2.5-acre parcels or to their development of a dwelling on each parcel: applicable provisions of Goal 3 (Agricultural Lands), ORS 215 and OAR 660, division 33, enacted after the claimants acquired tax lot 2000 in June 1973, and after the claimants acquired tax lot 2001 in October 1973. These land use regulations will not apply to Grigory and Anna Anfilofieffs' use of tax lot 2000 only to the extent necessary to allow them to use that tax lot for the use described in this report, to the extent that use was permitted at the time they acquired tax lot 2000 on June 23, 1973; and will not apply to their use of tax lot 2001 only to the extent necessary to allow them to use that tax lot for the use described in this report, to the extent that use was permitted when they acquired tax lot 2001 on October 19, 1973.
2. The action by the State of Oregon provides the state's authorization to the claimants to use tax lot 2000 subject to the standards in effect in June 1973, and tax lot 2001 subject to the standards in effect in October 1973. In June 1973, tax lot 2000 was subject to applicable provisions of ORS 215 then in effect. In October 1973, tax lot 2001 was subject to the applicable provisions of ORS 215 and interim statewide planning goals 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 21, 2005. OAR 125-145-0100(3), provided 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. Comments received have been taken into account by the department in the issuance of this final report.

¹ As noted, Goal 3 (Agricultural Lands) became effective on January 25, 1975, and was applicable to legislative land use decisions and some quasi-judicial land use decisions where site specific goal provisions apply prior to acknowledgement of a jurisdiction's comprehensive plan and land use regulations. After the local plan and land use regulations are acknowledged by the Commission, the statewide planning goals and implementing rules no longer directly apply to such local land use decisions. However, after acknowledgment, interpretation of the local county code provisions must be consistent with the goal and rule standards with which they were acknowledged to be in compliance.

The Goal 3 standard for the review of land divisions or the establishment of a minimum lot size states:

"Such minimum lot sizes as are utilized for any farm use zones shall be appropriate for the continuation of the existing commercial agricultural enterprise within the area."

On August 20, 1977, the Commission distributed a policy paper explaining the meaning of the Goal 3 minimum lot size standard (see "Common Questions about Goal #3; Agricultural Lands", August 30, 1977, as revised and added to July 12, 1979). Further interpretation of the Goal 3 minimum lot size standard can be found in *Meeker v. Clatsop County*, 287 Or 665 (1979), *Jurgenson v. Union County*, 42 Or App 505 (1979), *Alexanderson v. Polk County*, 289 Or 427, *rev den* 290 Or 137 (1980), and *Thede v. Polk County*, 3 Or LUBA 336 (1981).

In 1982, the policy paper and court decisions were incorporated into an administrative rule to guide the interpretation and application of the Goal 3 minimum lot size standard (see OAR 660, division 5, specifically rules 15 and 20 effective July 21, 1982).

For further guidance on the interpretation and application of this standard and rule see *Kenagy v. Benton County*, 6 Or LUBA 93 (1982); *Goracke v. Benton County*, 8 Or LUBA 128 (1983); 68 Or App 83 (1984); 12 Or LUBA 128 (1984); 13 Or LUBA 146 (1985); 74 Or App 453 (1985), *rev den* 300 Or 322 (1985); and OAR 660-05-015 and 020 as amended effective June 7, 1986 (repealed effective August 7, 1993).

The 1982 administrative rule (OAR 660-05-015 and 020) was further amended to incorporate the holdings of these cases (effective June 7, 1986, and repealed effective August 7, 1993).