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 COMPENSATION UNDER ORS 197.352 (BALLOT MEASURE 37) OF Billy J. Towery, Johnnie L. Towery, Jeffrey L. Towery, Cynthia Jan Tani Carla Jane McGuire, CLAIMANTS	))))))	FINAL ORDER A CLAIM NO. M118550

Claimants: Billy J. Towery, Johnnie L. Tower,yJeffrey L. Towery, Cynthia Jan Tani, Carla Jane McGuire (the Claimants)

Property: Township 11S, Range 13E, Section 26, Tax lot 600
Township 11S, Range 13E, Section 27, Tax lots 100, 101, 107, 108 and 300
Jefferson 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 Billy Towery's division of tax lots 100, 101, 300 and 600 into lots of approximately one-acre in size or to his development of a dwelling on each lot: applicable provisions of Goal 3, ORS 215 and OAR 660, division 33. These land use regulations will not apply to Billy Towery only to the extent necessary to allow him to use tax lots 100, 101, 300 and 600 for the use described in this report, and only to the extent that use was permitted when he acquired those tax lots in 1965 and 1966.

In lieu of compensation under ORS 197.352, the State of Oregon will not apply the following laws to Billy, Johnnie and Jeffrey Towery, Cynthia Jan Tani and Carla Jane McGuire's division of tax lots 107 and 108 into lots of approximately one-acre in size or to their development of a dwelling on each lot: applicable provisions of Goal 3, ORS 215 and OAR 660, division 33.

These land use regulations will not apply to claimants only to the extent necessary to allow them to use tax lots 107 and 108 for the use described in this report, and only to the extent that use was permitted when they acquired these tax lots on October 15, 1985.

In lieu of compensation under ORS 197.352, the State of Oregon will not apply the following laws to Johnnie and Jeffrey Towery, Cynthia Jan Tani and Carla Jane McGuire's division of tax lot 101 into lots of approximately one-acre in size or to their development of a dwelling on each lot: applicable provisions of Goal 3, ORS 215 and OAR 660, division 33. These land use regulations will not apply to claimants only to the extent necessary to allow them to use tax lots 107 and 108 for the use described in this report, and only to the extent that use was permitted when they acquired these tax lots on October 15, 1985.

In lieu of compensation under ORS 197.352, the State of Oregon will not apply the following laws to Johnnie and Jeffrey Towery, Cynthia Jan Tani and Carla Jane McGuire's division of tax lots 100, 300 and 600 into lots of approximately one-acre in size or to their development of a dwelling on each lot: applicable provisions of Goal 3, ORS 215 and OAR 660, division 33, enacted or adopted after January 3, 2003. The department acknowledges that relief to which Johnnie and Jeffrey Towery, Cynthia Jan Tani and Carla Jane McGuire are entitled under ORS 197.352 will not allow them to use these tax lots in the manner set forth in the claim.

2. The action by the State of Oregon provides the state's authorization to Billy Towery to use tax lots 100, 101, 300 and 600 for the use described in this report, subject to the standards in effect in 1965 and 1966. The action by the State of Oregon also provides the state's authorization to Billy Towery to use tax lots 107 and 108 for the use described in this report, subject to the standards in effect on March 9, 1965, and April 21, 1966. On those dates, these tax lots were subject to the applicable provisions of ORS 215, then in effect.

The action by the State of Oregon provides the state's authorization to Johnnie and Jeffrey Towery, Cynthia Jan Tani and Carla Jane McGuire to use tax lots 101, 107 and 108 for the use described in this report, subject to the standards in effect on October 15, 1985. On that date, these tax lots were subject to compliance with Jefferson County's acknowledged EFU zone, and the applicable provisions of Goal 3, ORS 215 and OAR 660, division 5, then in effect.

The action by the State of Oregon provides the state's authorization to Johnnie and Jeffrey Towery, Cynthia Jan Tani and Carla Jane McGuire to use tax lots 100, 300 and 600 for the use described in this report, subject to the standards in effect on October 15, 1985. On that date, these tax lots were subject to the applicable provisions of Goal 3, ORS 215 and OAR 660, division 33, currently in effect.

3. To the extent that any law, order, deed, agreement or other legally enforceable public or private requirement provides that the subject property may not be used without a permit, license or other form of authorization or consent, the order will not authorize the use of the property unless the claimants first obtain that permit, license or other form of authorization or consent. Such requirements may include, but are not limited to: a building permit, a land use decision, a "permit" as defined in ORS 215.402 or 227.160, other permits or authorizations from local, state or federal agencies and restrictions on the use of the subject property imposed by private parties.

4. Any use of the subject property by the claimants under the terms of the order will remain subject to the following laws: (a) those laws not specified in Condition 1 above; (b) any laws enacted or enforced by a public entity other than the Commission or the department; and (c) those laws not subject to ORS 197.352 including, without limitation, those laws exempted under ORS 197.352(3).

5. Without limiting the generality of the foregoing terms and conditions, in order for the claimants to use the subject property, it may be necessary for them to obtain a decision under ORS 197.352 from a city and/or county and/or metropolitan service district that enforces land use regulations applicable to the property. Nothing in this order relieves the claimants from the necessity of obtaining a decision under ORS 197.352 from a local public entity that has jurisdiction to enforce a land use regulation applicable to a use of the subject property by the claimants.

This Order is entered by the Deputy 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

George Naughton, Deputy Director
DLCD
Dated this 11th day of April, 2006.

FOR the DEPARTMENT OF ADMINISTRATIVE SERVICES:

Dugan Petty, Deputy Administrator
DAS, State Services Division
Dated this 11th day of April, 2006.

NOTICE OF RIGHT TO APPEAL OR OTHER JUDICIAL RELIEF

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

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 197.352[1], 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."

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[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.

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 COMPENSATION UNDER ORS 197.352 (BALLOT MEASURE 37) OF Billy J. Towery, Johnnie L. Towery, Jeffrey L. Towery, Cynthia Jan Tani Carla Jane McGuire, CLAIMANTS	))))))	FINAL ORDER B CLAIM NO. M118550

Claimants: Billy J. Towery, Johnnie L. Towery, Jeffrey L. Towery, Cynthia Jan Tani, Carla Jane McGuire (the Claimants)

Property: Township 11S, Range 13E, Section 22, Tax lot 1600, Jefferson 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 Johnnie and Jeffrey Towery, Cynthia Jan Tani and Carla Jane McGuire's division of the 11-acre property into five approximately 2-acre lots for residential development: the applicable provisions of Goal 14 and OAR 660-004-0040, adopted after November 8, 1995. These land use regulations will not apply to Johnnie and Jeffrey Towery, Cynthia Jan Tani and Carla Jane McGuire's division of the subject property only to the extent necessary to allow them to use the property as described in this report, and only to the extent that the use was permitted when they acquired the property on November 8, 1995.

In lieu of compensation under ORS 197.352, the State of Oregon will not apply the following laws to Billy Towery's division of the 11-acre property into five approximately 2-acre lots for residential development: the applicable provisions of Goal 14 and OAR 660-004-0040, adopted after May 6, 1976.

2. The action by the State of Oregon provides the state's authorization to Johnnie and Jeffrey Towery, Cynthia Jan Tani and Carla Jane McGuire to use the property, subject to the standards in effect on November 8, 1995. The action by the State of Oregon provides the state's authorization to Billy Towery to use the property, subject to the standards in effect on May 6, 1976. In 1976, the property was subject to the applicable provisions of Goal 3 and ORS 215 then in effect.

3. To the extent that any law, order, deed, agreement or other legally enforceable public or private requirement provides that the subject property may not be used without a permit, license or other form of authorization or consent, the order will not authorize the use of the property unless the claimants first obtains that permit, license or other form of authorization or consent. Such requirements may include, but are not limited to: a building permit, a land use decision, a "permit" as defined in ORS 215.402 or 227.160, other permits or authorizations from local, state or federal agencies and restrictions on the use of the subject property imposed by private parties.

4. Any use of the subject property by the claimants under the terms of the order will remain subject to the following laws: (a) those laws not specified in Condition 1 above; (b) any laws enacted or enforced by a public entity other than the Commission or the department; and (c) those laws not subject to ORS 197.352 including, without limitation, those laws exempted under ORS 197.352(3).

5. Without limiting the generality of the foregoing terms and conditions, in order for the claimants to use the subject property, it may be necessary for them to obtain a decision under ORS 197.352 from a city and/or county and/or metropolitan service district that enforces land use regulations applicable to the property. Nothing in this order relieves the claimants from the necessity of obtaining a decision under ORS 197.352 from a local public entity that has jurisdiction to enforce a land use regulation applicable to a use of the subject property by the claimants.

This Order is entered by the Deputy 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

George Naughton, Deputy Director
DLCD
Dated this 11th day of April, 2006.

FOR the DEPARTMENT OF ADMINISTRATIVE SERVICES:

Dugan Petty, Deputy Administrator
DAS, State Services Division
Dated this 11th day of April, 2006.

NOTICE OF RIGHT TO APPEAL OR OTHER JUDICIAL RELIEF

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

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 197.352[1], 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)

[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.

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."

ORS 197.352 (BALLOT MEASURE 37) CLAIM FOR COMPENSATION

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

April 11, 2006

STATE CLAIM NUMBER:	M118550 Report A
NAMES OF CLAIMANTS:	Billy J. Towery Johnnie L. Towery Jeffrey L. Towery Cynthia Jan Tani Carla Jane McGuire
MAILING ADDRESS:	1315 Southwest Dover Lane Madras, Oregon 97741
PROPERTY IDENTIFICATION:	Township 11S, Range 13E, Section 26 Tax lot 600 Township 11S, Range 13E, Section 27 Tax lots 100, 101, 107, 108 and 300 Jefferson County
DATE RECEIVED BY DAS:	June 2, 2005
180-DAY DEADLINE:	April 17, 2006[1]

I. SUMMARY OF CLAIM

The claimants, Billy, Johnnie and Jeffrey Towery, Cynthia Jan Tani and Carla Jane McGuire, trustees of the 6T Living Trust, seek compensation in the amount of $5,356,660 for the reduction in fair market value as a result of land use regulations that are alleged to restrict the use of certain private real property. The claimants desire compensation or the right to divide the 182.06-acre property into 140 approximately one-acre lots and to develop a dwelling on each lot.[2] The subject property is located at 1315 Southwest Dover Lane, near Madras, in Jefferson County. (See claim.)

[1] This date reflects 180 days from the date the claim was submitted, as extended by the 139 days that all timelines under Measure 37 were suspended during the pendency of the *MacPherson v. DAS* appeal.

[2] This report is one of two addressing property owned by the claimants.

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 Billy, Johnnie and Jeffrey Towery, Cynthia Jan Tani and Carla Jane McGuire's division of the 182.06-acre property and to their development of a dwelling on each lot: applicable provisions of Statewide Planning Goal 3 (Agricultural Lands), ORS 215 and Oregon Administrative Rules (OAR) 660, division 33. These laws will not apply to Billy Towery only to the extent necessary to allow him to use the subject property for the use described in this report, and only to the extent that use was permitted when he acquired an interest in tax lots 100, 101, 300, and 600 in 1965 and 1966 and tax lots 107 and 108 on October 15, 1985. These laws will also not apply to Johnnie and Jeffrey Towery, Cynthia Jan Tani and Carla Jane McGuire only to the extent necessary to allow them to use the subject property for the use described in this report, and only to the extent that use was permitted when they acquired an interest in tax lots 101, 107 and 108 on October 15, 1985, and tax lots 100, 300 and 600 on January 3, 2003. The department acknowledges that the relief to which Johnnie and Jeffrey Towery, Cynthia Jan Tani and Carla Jane McGuire are entitled as to tax lots 100, 300 and 600 will not allow them to engage in the proposed use of those tax lots. (See the complete recommendation in Section VI of this report.)

III. COMMENTS ON THE CLAIM

Comments Received

On August 15, 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 were received in response to the 10-day notice.

One of the comments does not address whether the claim meets the criteria for relief under ORS 197.352. Comments concerning the effects a use of the subject property may have on surrounding areas are generally 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 waive a state law. (See the comment letter in the department's claim file.)

The other comment is relevant to whether the restriction of the claimants' use of the subject property reduces the fair market value of the property. The comment has been considered by the department in preparing this report.

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, as extended by the 139 days

enforcement of the Measure was suspended during the pendency of the *MacPherson v. DAS* appeal, 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 criterion, whichever is later.

Findings of Fact

This claim was submitted to DAS on June 2, 2005, for processing under OAR 125, division 145. The claim identifies Jefferson County's A-1 zone, an Exclusive Farm Use (EFU) zone, as the basis for the claim. Only laws that were enacted or adopted prior to December 2, 2004, are the basis for this claim.

Conclusions

The claim has been submitted within two years of the effective date of Measure 37 (December 2, 2004), as extended by the 139 days enforcement of the Measure was suspended during the pendency of the *MacPherson v. DAS* appeal, 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

Billy Towery acquired tax lots 100, 101, 300 and 600 in 1965 and 1966, as reflected by a bargain and sale deed and warranty deed included with the claim. His former wife, Donna Towery (now deceased), acquired tax lots 107 and 108 in 1967, as reflected by a warranty deed included with the claim. Billy and Donna transferred their respective interests in tax lots 101, 107 and 108 to the 6T Living Trust, with Billy, Johnnie and Jeffrey Towery, Cynthia Jan Tani, and Carla Jane McGuire as co-trustees on October 15, 1985.[3] Tax lots 100, 300 and 600 were transferred to the 6T Living Trust on January 3, 2003. Tax statements for July 1, 2004, through June 30, 2005, submitted with the claim, establish the claimants' current ownership.

Conclusions

Billy Towery is an "owner" of tax lots 100, 101, 300 and 600, as that term is defined by ORS 197.352(11)(C), as of various dates in 1965 and 1966 and of tax lots 107 and 108 as of

[3] Donna Towery is listed as a co-trustee.

October 15, 1985. Johnnie and Jeffrey Towery, Cynthia Jan Tani and Carla Jane McGuire are "owners" of tax lots 101, 107 and 108 as that term is defined by ORS 197.352(11)(C), as of October 15, 1985, and of tax lots 100, 300 and 600 as of January 3, 2003. All of the claimants are "family members" as that term is defined by ORS 197.352(11)(A).

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 identifies as the basis of the claim, "all goals and guidelines and implemental regulations adopted since April 14, 1966 affecting the division and development of the property into smaller buildable parcels" and "all ordinances or statutes which came into effect after April 14, 1966, which affect dividing or developing the property."

Except as discussed below, none of the goals, rules or statutes, on their face, restrict the use of the subject property. Absent an explanation by the claimants as to how any of these laws restrict the use of the subject property in a manner that reduces its fair market value, they are not discussed further in this report.[4]

The claim is based generally on Jefferson County's current A-1 zone and the applicable provisions of state law that require such zoning. The claimants' property is zoned EFU as required by Goal 3, in accordance with ORS 215 and OAR 660, division 33, because the claimants' property is "agricultural land" as defined by Goal 3.[5] 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 and 215.780 and OAR 660, division 33, enacted or adopted pursuant to Goal 3, prohibit the division of EFU-zoned land into parcels less than 80 acres and establish standards for development of dwellings on existing or proposed parcels on that land.

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

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[4] The department understands that the claimants are also citing ORS 92 as a land use regulation that restricts the use of the claimants' property. The claimants have not established how the requirements of ORS 92, in themselves, restrict the use of the subject property in a manner that reduces its fair market value. In addition, ORS 92, in general, was enacted prior to the claimants' family's acquisition of the subject property and therefore, is exempt under ORS 197.352(3)(E). Absent an explanation how any specific provision of ORS 92 restricts the use of this property in a manner that reduces its fair market value, ORS 92 is not addressed further in this report.

[5] The claimants' property is "agricultural land" because it contains Natural Resources Conservation Service Class I-VI soils.

ORS 215.263 (2005 edition) establishes standards for the creation of new parcels for non-farm uses and dwellings allowed in an EFU zone.

OAR 660-033-0135 (applicable to farm dwellings) became effective on March 1, 1994, and interprets the statutory standard for a primary dwelling in an EFU zone under ORS 215.283(1)(f). OAR 660-033-0130(4) (applicable to non-farm dwellings) became effective on August 7, 1993, and was amended to comply with ORS 215.284(4) on March 1, 1994. The Commission subsequently adopted amendments to comply with House Bill 3326 (Chapter 704, Oregon Laws 2001, effective on January 1, 2002), which were effective on May 22, 2002. (See administrative rule history for OAR 660-033-0100, -0130 and -0135.)

When the claimants' family acquired the subject property in 1965, 1966 and 1967, Goal 3 and the implementing statutes and administrative rules were not in effect, and the property was zoned A–1, Agricultural District, a qualified EFU zone under ORS 215.203 and 215.213. Under the provisions of ORS 215.203 and 215.213 in effect when the claimants' family acquired the subject property, use of the property was limited to "farm use" as defined in ORS 215.203 (1963 and 1965 editions), and non-farm uses allowed under the version of ORS 215.213 then in effect. These statutes allowed a dwelling only upon a showing that the dwelling would customarily be provided in conjunction with farm use of the property in question.

Johnnie and Jeffrey Towery, Cynthia Jan Tani, and Carla Jane McGuire acquired an interest in tax lots 101, 107 and 108 on October 15, 1985. At that time, the property was subject to Jefferson County's EFU zone, which was acknowledged by the Commission for compliance with Goal 3 on September 12, 1985. Billy Towery also acquired an interest in tax lots 107 and 108 on that date. On October 15, 1985, the desired division and development of those tax lots would have been governed by the county's acknowledged EFU zone and the applicable provisions of ORS 215 and OAR 660, division 5, then in effect.

Johnnie and Jeffrey Towery, Cynthia Jan Tani, and Carla Jane McGuire acquired an interest in tax lots 100, 300 and 600 on January 3, 2003. At that time, these tax lots were zoned EFU by Jefferson County and subject to the current lot size and dwelling standards under Goal 3, ORS 215 and OAR 660, division 33, and as described in Section V.2 of this report.

Conclusions

The current zoning requirements, minimum lot size and dwelling standards established by applicable provisions of Goal 3, ORS 215 and OAR 660, division 33, were all enacted or adopted after the claimants' family acquired the subject property in 1965, 1966 and 1967 and do not allow the desired division or residential development of the property. These laws restrict the use of the subject property relative to the uses allowed when Billy Towery acquired the property. The ORS 215 requirements for agricultural lands that were adopted prior to 1965, 1966 and 1967 applied to the claimants' family's use of the property when the family acquired it because the property was zoned A-1, Agricultural District, a qualified EFU zone, by Jefferson County. This report addresses only those state laws that are identified in the claim, or that the department is certain apply to the subject property based on the uses that the claimants have identified. In addition to the applicable provisions of Goal 3, ORS 215, and OAR 660, divisions 5 and 33, in effect when the claimants acquired the subject property and other laws in effect at those times, there may be other laws that currently apply to the claimants' use of the subject property, and

that may continue to apply to the claimants' use of the property, that have not been identified in the claim. In some cases, it will not be possible to know which laws apply to a use of subject property until there is a specific proposal for that use. When the claimants seek a building or development permit to carry out a specific use, it may become evident that other state laws apply to that use.

3. Effect of Regulations on Fair Market Value

In order to establish a valid claim, ORS 197.352(1) requires that 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 $5,356,660 as the reduction in the subject property's fair market value due to current regulations. This amount is based on the current assessed land value of $435,340, and the value of 140 buildable lots at $41,500 each for a total of $5,810,000.[6]

Conclusions

As explained in Section V.1 of this report, the claimants' family acquired an interest in the subject property in 1965, 1966 and 1967. Under ORS 197.352, the claimants 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 enacted or adopted since the claimants' family acquired the subject property restrict the desired division and development of the property. The claimants estimate the reduction in value due to the restrictions to be $5,356,660.

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 the fair market value of the subject property has been reduced to some extent as a result of land use regulations enforced by the Commission or the department since the claimants' family acquired the subject property.

4. Exemptions Under ORS 197.352(3)

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

Findings of Fact

The claim is based on state land use regulations that restrict the use of the subject property, including Goal 3, ORS 215 and OAR 660, division 33, which Jefferson County has implemented through its current EFU zone. With the exception of ORS 215 (1963 and 1965 editions) in effect, all of these land use regulations were enacted or adopted after the claimants' family

[6] The claim indicates that 22 acres were excluded from this estimate as open space and streets.

acquired the subject property in 1965, 1966 and 1967 and are not exempt under ORS 197.352(3)(E). With the exception of the provisions of Goal 3, ORS 215 and OAR 660, division 5, in effect when 6T Living Trust acquired interest in tax lots 101, 107 and 108, these land use regulations are not exempt under ORS 197.352(3)(E). All of these laws were in effect when 6T Living Trust acquired tax lots 100, 300, and 600 on January 3, 2003, and for these tax lots, the laws are exempt under ORS 197.352(3)(E).

Conclusions

Without a specific development proposal for the subject property, it is not possible for the department to determine all the laws that may apply to a particular use of the property, or whether those laws may fall under one or more of the exemptions under ORS 197.352. With the exception of ORS 215 (1963 and 1965 editions), all of these land use regulations were enacted or adopted after claimants' family acquired the subject property in 1965, 1966 and 1967 and are not exempt under ORS 197.352(3)(E). Laws in effect when the claimants' family acquired the subject property are exempt under ORS 197.352(3)(E), and will continue to apply to the claimants' use of the property. There may be other laws that continue to apply to the claimants' use of the subject property that have not been identified in the claim. In some cases, it will not be possible to know which laws apply to a use of subject property until there is a specific proposal for that use. When the claimants seek a building or development permit to carry out a specific use, it may become evident that other state laws apply to that use. In some cases, some of these laws may be exempt under ORS 197.352(3)(A) to (D).

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 laws that restrict the use of the subject 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 subject 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 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 restrict the claimants' family's ability to divide the 182.06-acre property into 140 one-acre lots and to develop a dwelling on each lot. The claim asserts that the laws enforced by the Commission or the department reduce the fair market value of the subject property by $5,356,660. 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 subject 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 subject property to some extent.

No funds have been appropriated at this time for the payment of claims. In lieu of payment of compensation, ORS 197.352 authorizes the department to modify, remove or not apply all or

parts of certain land use regulations to allow Billy Towery and 6T Living Trust to use the subject property for a use permitted at the time they acquired the property on March 9, 1965, April 21, 1966, October 15, 1985, and January 3, 2003.

At the time Billy, Johnnie and Jeffrey L. Towery, Cynthia Jan Tani and Carla Jane McGuire acquired an interest in tax lots 107 and 108 in 1985, those tax lots were zoned EFU by Jefferson County and were subject to then applicable provisions of Goal 3, ORS 215 and OAR 660, division 33.

At the time Johnnie and Jeffrey Towery, Cynthia Jan Tani and Carla Jane McGuire acquired an interest in tax lot 101 in 1985, tax lot 101 was zoned EFU by Jefferson County and was subject to then applicable provisions of Goal 3, ORS 215 and OAR 660, division 33.

At the time Johnnie and Jeffrey Towery, Cynthia Jan Tani and Carla Jane McGuire acquired an interest in tax lots 100, 300 and 600 in 2003, those tax lots were zoned EFU by Jefferson County and were subject to the current lot size and dwelling standards under Goal 3, ORS 215 and OAR 660, division 33, as described above in Section V.(2) of this report.

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

Conclusions

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 Billy Towery's division of tax lots 100, 101, 300 and 600 into lots of approximately one-acre in size or to his development of a dwelling on each lot: applicable provisions of Goal 3, ORS 215 and OAR 660, division 33. These land use regulations will not apply to Billy Towery only to the extent necessary to allow him to use tax lots 100, 101, 300 and 600 for the use described in this report, and only to the extent that use was permitted when he acquired those tax lots in 1965 and 1966.

In lieu of compensation under ORS 197.352, the State of Oregon will not apply the following laws to Billy, Johnnie and Jeffrey Towery, Cynthia Jan Tani and Carla Jane McGuire's division of tax lots 107 and 108 into lots of approximately one-acre in size or to their development of a dwelling on each lot: applicable provisions of Goal 3, ORS 215 and OAR 660, division 33. These land use regulations will not apply to claimants only to the extent necessary to allow them to use tax lots 107 and 108 for the use described in this report, and only to the extent that use was permitted when they acquired these tax lots on October 15, 1985.

In lieu of compensation under ORS 197.352, the State of Oregon will not apply the following laws to Johnnie and Jeffrey Towery, Cynthia Jan Tani and Carla Jane McGuire's division of tax lot 101 into lots of approximately one-acre in size or to their development of a dwelling on each lot: applicable provisions of Goal 3, ORS 215 and OAR 660, division 33. These land use regulations will not apply to claimants only to the extent necessary to allow them to use tax lots 107 and 108 for the use described in this report, and only to the extent that use was permitted when they acquired these tax lots on October 15, 1985.

In lieu of compensation under ORS 197.352, the State of Oregon will not apply the following laws to Johnnie and Jeffrey Towery, Cynthia Jan Tani and Carla Jane McGuire's division of tax lots 100, 300 and 600 into lots of approximately one-acre in size or to their development of a dwelling on each lot: applicable provisions of Goal 3, ORS 215 and OAR 660, division 33, enacted or adopted after January 3, 2003. The department acknowledges that relief to which Johnnie and Jeffrey Towery, Cynthia Jan Tani and Carla Jane McGuire are entitled under ORS 197.352 will not allow them to use these tax lots in the manner set forth in the claim.

2. The action by the State of Oregon provides the state's authorization to Billy Towery to use tax lots 100, 101, 300 and 600 for the use described in this report, subject to the standards in effect in 1965 and 1966. The action by the State of Oregon also provides the state's authorization to Billy Towery to use tax lots 107 and 108 for the use described in this report, subject to the standards in effect on March 9, 1965, and April 21, 1966. On those dates, these tax lots were subject to the applicable provisions of ORS 215, then in effect.

The action by the State of Oregon provides the state's authorization to Johnnie and Jeffrey Towery, Cynthia Jan Tani and Carla Jane McGuire to use tax lots 101, 107 and 108 for the use described in this report, subject to the standards in effect on October 15, 1985. On that date, these tax lots were subject to compliance with Jefferson County's acknowledged EFU zone, and the applicable provisions of Goal 3, ORS 215 and OAR 660, division 5, then in effect.

The action by the State of Oregon provides the state's authorization to Johnnie and Jeffrey Towery, Cynthia Jan Tani and Carla Jane McGuire to use tax lots 100, 300 and 600 for the use described in this report, subject to the standards in effect on October 15, 1985. On that date, these tax lots were subject to the applicable provisions of Goal 3, ORS 215 and OAR 660, division 33, currently in effect.

3. To the extent that any law, order, deed, agreement or other legally enforceable public or private requirement provides that the subject property may not be used without a permit, license or other form of authorization or consent, the order will not authorize the use of the property unless the claimants first obtain that permit, license or other form of authorization or consent. Such requirements may include, but are not limited to: a building permit, a land use decision, a "permit" as defined in ORS 215.402 or 227.160, other permits or authorizations from local, state or federal agencies and restrictions on the use of the subject property imposed by private parties.

4. Any use of the subject property by the claimants under the terms of the order will remain subject to the following laws: (a) those laws not specified in Condition 1 above; (b) any laws enacted or enforced by a public entity other than the Commission or the department; and (c) those laws not subject to ORS 197.352 including, without limitation, those laws exempted under ORS 197.352(3).

5. Without limiting the generality of the foregoing terms and conditions, in order for the claimants to use the subject property, it may be necessary for them to obtain a decision under ORS 197.352 from a city and/or county and/or metropolitan service district that enforces land use regulations applicable to the property. Nothing in this order relieves the claimants from the necessity of obtaining a decision under ORS 197.352 from a local public entity that has jurisdiction to enforce a land use regulation applicable to a use of the subject property by the claimants.

VII. COMMENTS ON THE DRAFT STAFF REPORT

The department issued its draft staff report on this claim on March 22, 2006. 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.

ORS 197.352 (BALLOT MEASURE 37) CLAIM FOR COMPENSATION

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

April 11, 2006

STATE CLAIM NUMBER:	M118550 Report B
NAMES OF CLAIMANTS:	Billy J. Towery Johnnie L. Towery Jeffrey L. Towery Cynthia Jan Tani Carla Jane McGuire
MAILING ADDRESS:	1315 Southwest Dover Lane Madras, Oregon 97741
PROPERTY IDENTIFICATION:	Township 11S, Range 13E, Section 22 Tax lot 1600 Jefferson County
DATE RECEIVED BY DAS:	June 2, 2005
180-DAY DEADLINE:	April 17, 2006[1]

I. SUMMARY OF CLAIM

The claimants, Billy, Johnnie and Jeffrey Towery, Cynthia Jan Tani and Carla Jane McGuire, trustees of the 6T Living Trust, seek compensation in the amount of $234,000 for the reduction in fair market value as a result of land use regulations that are alleged to restrict the use of certain private real property. The claimants desire compensation or the right to divide the 11-acre property into five approximately 2-acre lots for residential development.[2] The subject property is located at 1315 Southwest Dover Lane, near Madras, in Jefferson 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 as to claimants Johnnie and Jeffrey Towery, Cynthia Jan Tani and Carla Jane McGuire. Department staff recommends that, in lieu of compensation, the requirements of the following state laws enforced by the Land

[1] This date reflects 180 days from the date the claim was submitted, as extended by the 139 days that all timelines under Measure 37 were suspended during the pendency of the *MacPherson v. DAS* appeal.

[2] This report is one of two addressing property owned by the claimants.

Conservation and Development Commission (the Commission) or the department not apply to Johnnie and Jeffrey Towery, Cynthia Jan Tani and Carla Jane McGuire's division of the 11-acre property into five approximately 2-acre lots for residential development: applicable provisions of Statewide Planning Goal 14 (Urbanization) and Oregon Administrative Rules (OAR) 660-004-0040, adopted after November 8, 1995. These land use regulations will not apply to those claimants only to the extent necessary to allow them to use the subject property for the use described in this report, and only to the extent that use was permitted when they acquired the property in 1995.

Department staff has also determined that the claim is valid as to Billy Towery. Department staff recommends that, in lieu of compensation, the requirements of the following state laws enforced by the Commission or the department not apply to Billy Towery's division of the 11-acre property into five approximately 2-acre lots for residential development: applicable provisions of Goal 14 and OAR 660-004-0040 adopted after May 6, 1976. These land use regulations will not apply to Billy Towery only to the extent necessary to allow him to use the subject property for the use described in this report, and only to the extent that use was permitted when he acquired the property in 1976. (See the complete recommendation in Section VI of this report.)

III. COMMENTS ON THE CLAIM

Comments Received

On August 15, 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 comments were received in response to the 10-day notice.

One of the comments does not address whether the claim meets the criteria for relief under ORS 197.352. Comments concerning the effects a use of the subject property may have on surrounding areas are generally 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 waive a state law. (See the comment letter in the department's claim file.)

The other comment is relevant to whether the restriction of the claimants' use of the subject property reduces the fair market value of the property. The comment has been considered by the department in preparing this report.

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, as extended by the 139 days enforcement of the Measure was suspended during the pendency of the *MacPherson v. DAS*

appeal, 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 criterion, whichever is later.

Findings of Fact

This claim was submitted to DAS on June 2, 2005, for processing under OAR 125, division 145. The claim identifies Jefferson County's Rural Residential (RR-5) zone as the basis for the claim. Only laws that were enacted or adopted prior to December 2, 2004, are the basis for this claim.

Conclusions

The claim has been submitted within two years of the effective date of Measure 37 (December 2, 2004), as extended by the 139 days enforcement of the Measure was suspended during the pendency of the *MacPherson v. DAS* appeal, 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

Billy Towery acquired the subject property on May 6, 1976, as reflected by a land sales contract included with the claim. Billy transferred his ownership to the 6T Living Trust, with Billy, Johnnie and Jeffrey Towery, Cynthia Jan Tani and Carla Jane McGuire as trustees, on November 8, 1995.[3] A transfer of ownership to a revocable trust is not a change of ownership under ORS 197.352. Johnnie, Cynthia, Jeffrey and Carla are all trustees and beneficiaries. A tax statement for July 1, 2004, through June 30, 2005, submitted with the claim, establishes the claimants' current ownership.

Conclusions

Billy Towery is an "owner" of the subject property as that term is defined by ORS 197.352(11)(C) as of May 6, 1976. Johnnie and Jeffrey Towery, Cynthia Jan Tani and Carla Jane McGuire are "owners" of the subject property as that term is defined by ORS 197.352(11)(C) as of November 8, 1995. All of the claimants and Donna Towery are "family members" as that term is defined by ORS 197.352(11)(A).

[3] Donna Towery, Billy Towery's wife, is also a co-trustee, but she is not a claimant for the purposes of this Measure 37 claim.

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 identifies as the basis of the claim: "all goals & guidelines and implemental regulations enacted since 1976 affecting the division and development of the property into smaller buildable parcels," and "all ordinances or statutes which came into effect after May 6, 1976 which affect dividing or developing the property."

Except as discussed below, none of the goals, rules or statutes, on their face, restrict Billy, Johnnie and Jeffrey Towery, Cynthia Jan Tani and Carla Jane McGuire's use of the subject property. Absent an explanation as to how any of these laws restrict the use of the subject property in a manner that reduces its fair market value, they are not discussed further in this report.[4]

The claim is based generally on Jefferson County's RR-5 zone and the applicable provisions of state law that require such zoning. The county's RR-5 zone is a rural residential zone as required by Goal 14, which generally requires that land outside of urban growth boundaries be used for rural uses.

Goal 14 was effective on January 25, 1975, and requires that local comprehensive plans identify and separate urbanizable land from rural land in order to provide for an orderly and efficient transition from rural to urban land use. In 2000, as a result of a 1986 Oregon Supreme Court decision,[5] the Commission amended Goal 14 and adopted OAR 660-004-0040 (Application of Goal 14 to Rural Residential Areas), which was effective on October 4, 2000. The rule states that the creation of a new lot or parcel smaller than two acres in a rural residential area is considered an urban use and provides that after October 4, 2000, an exception to Goal 14 is required to create a lot or parcel in a rural residential zone that is smaller than two acres or smaller than the county's minimum lot size standard if greater than two acres. Because Jefferson County's RR-5 zone requires a minimum lot size of five acres, the subject 11-acre property cannot be divided as desired by the claimants without a Goal 14 exception.

When the claimants' family acquired the subject property on May 6, 1976, the property was zoned A-1, Agricultural District, by Jefferson County. The claimants' family acquired the subject property after the adoption of the statewide planning goals, but before the Commission

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[4] The department understands that the claimants are also citing ORS 92 as a land use regulation that restricts the use of the claimants' property. The claimants have not established how the requirements of ORS 92, in themselves, restrict the use of the subject property in a manner that reduces its fair market value. In addition, ORS 92, in general, was enacted prior to the claimants' acquisition of the subject property and therefore, is exempt under ORS 197.352(3)(E). Absent an explanation how any specific provision of ORS 92 restricts the use of this property in a manner that reduces its fair market value, ORS 92 is not addressed further in this report.

[5] *1000 Friends of Oregon v. LCDC (Curry County)*, 301 Or 447 (1986).

acknowledged Jefferson County's land use regulations to be in compliance with the statewide planning goals pursuant to ORS 197.250 and 197.251. Because the Commission had not acknowledged the county's plan and land use regulations when the claimants' family acquired the subject property, the statewide planning goals, and Goal 3 (Agricultural Lands) in particular, applied directly to the subject property when he acquired it.[6]

As adopted on January 25, 1975, Goal 3 required that agricultural land be preserved and zoned for Exclusive Farm Use (EFU) pursuant to ORS 215. The Goal 3 standard for land divisions involving property where the local zoning was not acknowledged required that the resulting parcels must be of a size that is "appropriate for the continuation of the existing commercial agricultural enterprise within the area." Further, ORS 215.263 (1975 edition) required that all divisions of land subject to EFU zoning comply with the legislative intent set forth in ORS 215.243 (Agricultural Land Use Policy). Thus, the claimants' family's opportunity to divide the subject property when the family acquired it in 1976 was limited to land divisions that were consistent with Goal 3, which required that the resulting parcels 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.

At the time Johnnie and Jeffrey Towery, Cynthia Jan Tani and Carla Jane McGuire acquired an interest in the subject property on November 8, 1995, it was zoned RR-5 by Jefferson County which established a 2-acre minimum lot size for the creation of new lots or parcels. This zoning was acknowledged pursuant to post-acknowledgment plan amendment procedures under ORS 197.625(1).[7]

Conclusions

The minimum lot size requirements for rural residential lots or parcels established by Goal 14 and OAR 660-004-0040 were adopted after claimants' family acquired the subject property in 1976 and do not allow the desired division of the property. As interpreted by the Commission (OAR 660-040-0040), Goal 14 generally required a minimum lot size of at least two acres.

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[6] The statewide planning goals became effective on January 25, 1975, and were applicable to legislative land use decisions and some quasi-judicial land use decisions prior to the Commission's acknowledgment of each county's land use regulations. *Perkins v. City of Rajneeshpuram*, 300 Or 1 (1985); *Alexanderson v. Polk County*, 289 Or 427, *rev den*, 290 Or 137 (1980); *Sunnyside Neighborhood Assn. v. Clackamas County*, 280 Or 3 (1977); *Jurgenson v. Union County*, 42 Or App 505 (1979); and *1000 Friends of Oregon v. Benton County*, 32 Or App 413 (1978). After the county's plan and land use regulations were acknowledged by the Commission, the statewide planning goals and implementing rules no longer directly applied to such local land use decisions. *Byrd v. Stringer*, 295 Or 311 (1983). However, statutory requirements continue to apply, and insofar as the state and local provisions are materially the same, the local provisions must be interpreted consistent with the substance of the goals and implementing rules. *Foster v. Polk County*, 115 Or App 475 (1992); *Kenagy v. Benton County*, 115 Or App 131 (1992).

[7] ORS 197.625(1) provides that if a notice of intent to appeal a post-acknowledgment plan amendment is not filed within the 21-day period set out in ORS 197.830(9), the amendment is considered acknowledged upon the expiration of the 21-day period.

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 $234,000 as the reduction in the subject property's fair market value due to current regulations. This amount is based on the value of the subject property as irrigated farm land (approximately $2,500/acre) at $30,000 compared to the value of the property, if zoned for 2-acre lots (approximately $22,000/acre) at $264,000.

Conclusions

As explained in Section V.1 of this report, the claimants' family acquired the subject property in 1976. Under ORS 197.352, the claimants 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' family acquired the subject property restrict the desired division of the property. The claimants estimate the reduction in value due to the restrictions to be $234,000.

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 the fair market value of the subject property has been reduced to some extent as a result of land use regulations enforced by the Commission or the department since the claimants' family acquired the property.

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 relative to the uses permitted when the claimants' family acquired the property, including applicable provisions of Goal 14 and OAR 660-004-0040, which Jefferson County has implemented through its current RR-5 zone. When the claimants' family acquired the property, it was subject to provisions of Goal 3, ORS 215 and OAR 660, division 33, applicable to the property when the claimants' family acquired it in 1976. These land use regulations are exempt under ORS 197.352(3)(E). Goal 14 and OAR 660-004-0040 are not exempt under ORS 197.352(3)(E).

Conclusions

Without a specific development proposal for the subject property, it is not possible for the department to determine all the laws that may apply to a particular use of the property, or whether those laws may fall under one or more of the exemptions under ORS 197.352. It

appears that the general statutory, goal and rule restrictions on residential development apply to the claimants' family's use of the subject property, and these laws are not exempt under ORS 197.352(3)(E) to the extent they were enacted after the claimants' family acquired the property in 1976. Provisions of Goal 3, ORS 215 and OAR 660, division 33, in effect when the claimants' family acquired the subject property in 1976 are exempt under ORS 197.352(E) and will continue to apply to the property.

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

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 current 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 restrict the claimants' ability to divide the 11-acre property into five approximately 2-acre lots for residential use. The claim asserts that the laws enforced by the Commission or the department reduce the fair market value of the subject property by $234,000. However, because the claim does not provide an appraisal or other specific documentation establishing how the specified restrictions reduce the fair market value of the subject property, and without verification of whether or the extent to which the claimants' desired use of the property was allowed under the standards in effect when they acquired 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 subject property to some extent.

No funds have been appropriated at this time for the payment of claims. In lieu of payment of compensation, ORS 197.352 authorizes the department to modify, remove or not apply all or parts of certain land use regulations to allow Billy Towery to use the subject property for a use permitted at the time he acquired the property in 1976.

At the time Johnnie and Jeffrey Towery, Cynthia Jan Tani and Carla Jane McGuire acquired an interest in the subject property on November 8, 1995, it was zoned RR-5 by Jefferson County

and subject to the applicable provisions of Goal 14 and OAR 660-004-0040 as described in Section V.(2) of this report.

In addition to the applicable provisions of Goal 14 in effect on November 8, 1995, and other laws in effect when Johnnie and Jeffrey Towery, Cynthia Jan Tani and Carla Jane McGuire acquired the subject property, there may be other laws that apply to their use of the property that have not been identified in the claim. In some cases, it will not be possible to know which laws apply to a use of the subject property until there is a specific proposal for that use. When the claimants seek a building or development permit to carry out a specific use, it may become evident that other state laws apply to that use and, depending on when they were enacted or adopted, may continue to apply to the claimants' property. In addition, some of these laws may be exempt under ORS 197.352(3)(A) to (D), and will continue to apply to the subject property on that basis.

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

Conclusions

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 Johnnie and Jeffrey Towery, Cynthia Jan Tani and Carla Jane McGuire's division of the 11-acre property into five approximately 2-acre lots for residential development: the applicable provisions of Goal 14 and OAR 660-004-0040, adopted after November 8, 1995. These land use regulations will not apply to Johnnie and Jeffrey Towery, Cynthia Jan Tani and Carla Jane McGuire's division of the subject property only to the extent necessary to allow them to use the property as described in this report, and only to the extent that the use was permitted when they acquired the property on November 8, 1995.

In lieu of compensation under ORS 197.352, the State of Oregon will not apply the following laws to Billy Towery's division of the 11-acre property into five approximately 2-acre lots for residential development: the applicable provisions of Goal 14 and OAR 660-004-0040, adopted after May 6, 1976.

2. The action by the State of Oregon provides the state's authorization to Johnnie and Jeffrey Towery, Cynthia Jan Tani and Carla Jane McGuire to use the property, subject to the standards in effect on November 8, 1995. The action by the State of Oregon provides the state's authorization to Billy Towery to use the property, subject to the standards in effect on May 6, 1976. In 1976, the property was subject to the applicable provisions of Goal 3 and ORS 215 then in effect.

3. To the extent that any law, order, deed, agreement or other legally enforceable public or private requirement provides that the subject property may not be used without a permit, license or other form of authorization or consent, the order will not authorize the use of the property unless the claimants first obtains that permit, license or other form of authorization or consent. Such requirements may include, but are not limited to: a building permit, a land use decision, a "permit" as defined in ORS 215.402 or 227.160, other permits or authorizations from local, state or federal agencies and restrictions on the use of the subject property imposed by private parties.

4. Any use of the subject property by the claimants under the terms of the order will remain subject to the following laws: (a) those laws not specified in Condition 1 above; (b) any laws enacted or enforced by a public entity other than the Commission or the department; and (c) those laws not subject to ORS 197.352 including, without limitation, those laws exempted under ORS 197.352(3).

5. Without limiting the generality of the foregoing terms and conditions, in order for the claimants to use the subject property, it may be necessary for them to obtain a decision under ORS 197.352 from a city and/or county and/or metropolitan service district that enforces land use regulations applicable to the property. Nothing in this order relieves the claimants from the necessity of obtaining a decision under ORS 197.352 from a local public entity that has jurisdiction to enforce a land use regulation applicable to a use of the subject property by the claimants.

VII. COMMENTS ON THE DRAFT STAFF REPORT

The department issued its draft staff report on this claim on March 22, 2006. 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.