

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. M118577
(BALLOT MEASURE 37) OF)	
John and Carol Mills, CLAIMANTS)	

Claimants: John and Carol Mills (the Claimants)

Property: Township 3S, Range 4E, Section 23, Tax lots 2000, 2002, 2003 and 2006
Township 3S, Range 4E, Section 24, Tax lot 700
Township 3S, Range 4E, Section 24C, Tax lot 700
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 John and Carol Mills' division of the approximately 70-acre property or to their development of a dwelling on each parcel: applicable provisions of Goals 3 and 4, ORS 215 and OAR 660, divisions 6 and 33, enacted or adopted after the date the claimants acquired each of these tax lots. These land use regulations will not apply to the 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 tax lot 2002 on January 4, 1975, tax lot 2006 on January 4, 1977, tax lots 2003 and 700 (Section 24C) on January 3, 1984, and tax lot 2000 on December 30, 1985.
2. The action by the State of Oregon provides the state's authorization to the claimants to use tax lots 2000, 2002, 2003, 2006 and 700 (Section 24C) for the use described in this report, subject to the standards in effect when they acquired each tax lot. On January 4, 1975, tax lot 2002 was subject to the provisions of ORS 215, including the interim planning goals set forth in ORS 215.515 (1973 edition). On January 4, 1977 (tax lot 2006), January 3, 1984 (tax lots 2003

and 700 (Section 24C)) and December 30, 1985 (tax lot 2000), the subject property was subject to applicable provisions of Goal 3 or 4 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 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 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:

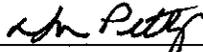
Lane Shetterly, Director



George Naughton, Deputy Director
DLCD

Dated this 18th day of April, 2006.

FOR the DEPARTMENT OF ADMINISTRATIVE
SERVICES:



Dugan Petty, Deputy Administrator
DAS, State Services Division

Dated this 18th 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 197.352¹, 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.

ORS 197.352 (BALLOT MEASURE 37) CLAIM FOR COMPENSATION

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

April 18, 2006

STATE CLAIM NUMBER: M118577

NAMES OF CLAIMANTS: John and Carol Mills

MAILING ADDRESS: 38165 Southeast Coupland Road
Estacada, Oregon 97023

PROPERTY IDENTIFICATION: Township 3S, Range 4E, Section 23
Tax lots 2000, 2002, 2003 and 2006

Township 3S, Range 4E, Section 24
Tax lot 700

Township 3S, Range 4E, Section 24C
Tax lot 700

Clackamas County

OTHER CONTACT INFORMATION: Donald B. Bowerman
PO Box 100
Oregon City, Oregon 97045

DATE RECEIVED BY DAS: June 9, 2005

180-DAY DEADLINE: April 18, 2006¹

I. SUMMARY OF CLAIM

The claimants, John and Carol Mills, seek compensation in the amount of \$4,104,626 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 approximately 90-acre property into 90 parcels and to develop a dwelling on each parcel. The subject property is located at on the north side of SE Coupland Road and east of SE Davis Road in Clackamas County. (See claim.)

¹ This date reflects 180 days from the date the claim was submitted as extended by the 139 days enforcement of 2005 Oregon Laws, Chapter 1 was suspended during the pendency of the appeal of *MacPherson v. DAS. MacPherson v. Dept. of Admin. Svcs.*, 340 Or 117 (2006).

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 in part and invalid in part.

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 John and Carol Mills' division of tax lots 2000, 2002, 2003, 2006 and 700 (Section 24C), consisting of approximately 70 acres, and to their development of a dwelling on each parcel: applicable provisions of Statewide Planning Goals 3 (Agricultural Lands) and 4 (Forest Lands), ORS 215 and Oregon Administrative Rules (OAR) 660, divisions 6 and 33, enacted or adopted after the date the claimants acquired each tax lot. These laws will not apply to the claimants only to the extent necessary to allow them to use these tax lots for the use described in this report, and only to the extent that use was permitted when they acquired tax lot 2002 on January 4, 1975, tax lot 2006 on January 4, 1977, tax lots 2003 and 700 (Section 24C) on January 3, 1984, and tax lot 2000 on December 30, 1985. (See the complete recommendation in Section VI of this report.)

Department staff recommends denial of the claim as to tax lot 700 (T3, R4E, Section 24) because the claimants have not established that they are entitled to relief under ORS 197.352(1) as a result of land use regulations enforced by the Commission or the department. (See the complete recommendation in Section VI of this report.)

III. COMMENTS ON THE CLAIM

Comments Received

On August 26, 2005, pursuant to OAR 125-145-0080, the Oregon Department of Administrative Services (DAS) provided written notice to the owners of surrounding properties. According to DAS, one written comment was received in response to the 10-day notice. The 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, or the date the public entity applies the land use regulation as an approval criteria to an application submitted by the owner, whichever is later; or

2. For claims arising from land use regulations enacted after the effective date of Measure 37 (December 2, 2004), within two years of the enactment of the land use regulation, or the date the owner of the property submits a land use application in which the land use regulation is an approval criteria, whichever is later.

Findings of Fact

This claim was submitted to DAS on June 9, 2005, for processing under OAR 125, division 145. The claim identifies Clackamas County’s Agriculture/Forest (AG/F) as the basis for the claim. Only laws that were enacted or adopted prior to December 2, 2004, are the basis for this claim.

Conclusions

The claim has been submitted within two years of the effective date of Measure 37 (December 2, 2004), based on land use regulations enacted or adopted prior to December 2, 2004, and is therefore timely filed.

V. ANALYSIS OF CLAIM

1. Ownership

ORS 197.352 provides for payment of compensation or relief from specific laws for “owners” as that term is defined in ORS 197.352. ORS 197.352(11)(C) defines “owner” as “the present owner of the property, or any interest therein.”

Findings of Fact

The claimants, John and Carol Mills, and their family members acquired the subject property as follows:

Tax Lot	Acreage	Family Member/Acquisition Date	Claimants’ Acquisition Date	County Clerk Records
3 4E 23 2000	21.52	Helen S. Mills/ before 1973	December 30, 1985	86-01643
3 4E 23 2002	20.50	Robert N. & Helen S. Mills/ before 1973	January 4, 1975	75-1520
3 4E 23 2003	23.74	Helen S. Mills/ before 1973	January 3, 1984	84-04494 & 95
3 4E 23 2006	2.00	Robert N. Mills/ before 1973	January 4, 1977	77-1469
3 4E 24 700	20.00	N/A	February 15, 1996	96-041855
3 4E 24C 700	2.25	Helen S. Mills/ before 1973	January 3, 1984	84-04493

Tax statements for July 1, 2004, through June 30, 2005, submitted with the claim, establish the claimants’ current ownership.

Conclusions

The claimants, John and Carol Mills, are the “owners” of the subject property as that term is defined by ORS 197.352(11)(C). The claimants acquired the subject property on January 4, 1975 (tax lot 2002), January 4, 1977 (tax lot 2006), January 3, 1984 (tax lots 700 (Section 24C) and 2003), December 30, 1985 (tax lot 2000) and February 15, 1996 (tax lot 700 (Section 24)). According to information included in the claim, the Mills family has had an ownership interest in tax lots 2000, 2002, 2003, 2006 and 700 (Section 24C) since 1973.

2. The Laws That are the Basis for This Claim

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

Findings of Fact

The claim indicates that the claimants desire to divide the approximately 90-acre property into 90 parcels and to develop a dwelling on each parcel, and states that the desired development is prohibited by “Senate Bill 100 (1973) and all regulatory enactments adopted thereafter including but not limited to ORS Chapter 215 and Rules set forth in Oregon Administrative Rules (OAR) goals and regulatory restrictions” and “ORS 215.705 (effective 11/93); ORS 215.780(1)(c) (effective 11/93); OAR 660-006-0026(1)(a) (effective 3/1/94); and OAR 660-006-0027(1) (effective 3/1/94).”

Except as discussed below, on their face, the statutes and rules cited in the claim do not restrict the use of the subject property. Absent an explanation by the claimants as to how 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.

The claim is based generally on Clackamas County’s current AG/F zone and the applicable provisions of state law that require such zoning. The claimants’ property is zoned AG/F, which is a mixed agricultural and forest land zone as required by Goal 4 and the implementing provisions of OAR 660, division 6 (effective on February 5, 1990), subsequently amended on March 1, 1994, to comply with the provisions of House Bill 3661 (Chapter 792, Oregon Laws 1993).

Under OAR 660-006-0050, all the uses permitted under Goals 3 and 4 are allowed in mixed agriculture and forest zones, except that for dwellings either the Goal 3 or 4 standards are applicable based on the predominant use of the tract on January 1, 1993.² Depending on the predominant use on January 1, 1993, the property is subject to either the requirements for dwellings applicable under Exclusive Farm Use (EFU) zoning required by Goal 3 and OAR 660, division 33, or forest zone provisions required by Goal 4 and OAR 660, division 6.

² No information was provided to the department regarding the predominant use of the subject property on January 1, 1993.

For land divisions, OAR 660-006-0055 authorizes the creation of new parcels based on the standards applicable to farm or forest zones that implement the minimum lot size specified in ORS 215.780. Under ORS 215.780(2)(a), the minimum lot size in Clackamas County's AG/F zone is 80 acres. The claimants' property cannot be divided into parcels smaller than 80 acres.

Goal 14, which also became effective on January 25, 1975, would likely apply to the division of the claimants' property into parcels of less than two acres in size. Goal 14 generally requires that land outside urban growth boundaries be used for rural uses.

According to the claimants' authorized agent, the claimants' family acquired the subject property, except tax lot 700 (Section 24), "prior to enactment of Senate Bill 100 *et seq.* in 1973."³ According to a research request conducted by the county and included in the claim, no county zoning applied to the subject property prior to June 18, 1979.

Conclusions

The current zoning requirements, minimum lot size and dwelling standards established under Goal 4 for lands zoned for mixed farm-forest use and the statutory and rule restrictions under applicable provisions of ORS 215 and OAR 660, divisions 6 and 33, were all enacted or adopted after the claimants' family acquired tax lots 2000, 2002, 2003, 2006 and 700 (Section 24C).

The current zoning requirements, minimum lot size and dwelling standards established by Goals 3 and 4 and the provisions applicable to land zoned mixed farm and forest in ORS 215 and OAR 660, division 6, were all enacted or adopted before the claimants acquired tax lot 700 (Section 24) on February 15, 1996. These land use regulations do not allow the desired division and development of this tax lot. Laws enacted or adopted since the claimants acquired this tax lot in 1996 do not restrict the claimants' desired use of this tax lot relative to when the claimants acquired it in 1996.

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.

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."

³ Source: February 27, 2006, letter from Donald B. Bowerman, Bowerman & Boutin, LLP, to the Oregon Department of Administrative Services.

Findings of Fact

The claim includes an estimate of \$4,104,626 as the reduction in the subject property's fair market value due to current regulations. This amount is based on a one-acre value of \$57,000 for tax lot 2006 multiplied by the total land acreage of the claim (approximately 90.02 acres) subtracted by the current real market value of \$1,026,514.

Conclusions

As explained in Section V.1 of this report, the claimants are John and Carol Mills whose family members acquired tax lots 2000, 2002, 2003, 2006 and 700 (Section 24C) prior to the adoption of the statewide planning goals and prior to local zoning. Under ORS 197.352, the claimants are due compensation for land use regulations that restrict the use of these tax lots 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 these tax lots restrict the desired division and development of the property. The claimants estimate the reduction in value due to the restrictions to be \$4,104,626.

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 tax lots 2000, 2002, 2003, 2006 and 700 (Section 24C).

As explained in Section V.1 of this report, the claimants acquired tax lot 700 (Section 24) on February 15, 1996. No laws enacted or adopted since they acquired this tax lot restrict the use of it relative to the uses allowed in 1996. Therefore, the fair market value of this tax lot has not been reduced as a result of land use regulations enforced by the Commission or the department.

4. Exemptions Under ORS 197.352(3)

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

Findings of Fact

The claim is based on state land use regulations that restrict the use of tax lots 2000, 2002, 2003, 2006 and 700 (Section 24C), including applicable provisions of Goals 3 and 4, ORS 215 and OAR 660, divisions 6 or 33, which Clackamas County has implemented through its current AG/F zone. All of these land use regulations were enacted or adopted after the claimants' family acquired tax lots 2000, 2002, 2003 2006 and 700 (Section 24C) prior to 1973.

The claim does not identify any state land use regulation enacted or adopted since the claimants acquired tax lot 700 (Section 24) that restrict the use of this tax lot relative to what would have been allowed when they acquired it on February 15, 1996. As set forth in Section V.2 of this report, the state land use regulations restricting the claimants' desired use of this tax lot were in effect when they acquired it in 1996.

Conclusions

It appears that none of the general statutory, goal and rule restrictions on residential division and development of the subject property were in effect when the claimants' family acquired tax lots 2000, 2002, 2003, 2006 and 700 (Section 24C) prior to 1973. As a result, these laws are not exempt under ORS 197.352(3)(E). Laws in effect when the claimants' family acquired those tax lots are exempt under ORS 197.352(3)(E), and do not provide a basis for compensation. In addition, other land use laws enacted or adopted for a purpose set forth in ORS 197.352(3)(A) to (D) are also exempt, and would not provide a basis for compensation.

All of the state land use regulations that restrict the claimants' desired use of tax lot 700 (Section 24) were in effect when the claimants acquired that tax lot. Therefore, these state land use regulations are exempt under ORS 197.352(3)(E), which exempts laws in effect when the claimants acquired that tax lot.

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 approximately 90-acre property into one-acre parcels and to develop a dwelling on each parcel. The claim asserts that the laws enforced by the Commission or the department reduce the fair market value of the subject property by \$4,104,626. 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, 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 tax lots 2000, 2002, 2003, 2006 and 700 (Section 24C) to some extent.

Based on the findings and conclusions set forth in this report, laws enforced by the Commission or the department do not restrict the claimants' desired use of tax lot 700 (Section 24) relative to what was permitted when they acquired it in 1996 and do not reduce the fair market value of this tax lot. All state laws restricting the use of this tax lot are exempt under ORS 197.352(3)(E).

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 John and Carol Mills to use the subject property for a use permitted at the time they acquired tax lot 2002 on January 4, 1975; tax lot 2006 on

January 4, 1977; tax lots 700 (Section 24C) and 2003 on January 3, 1984; and tax lot 2000 on December 30, 1985.

With regard to tax lot 2002, which the claimants acquired on January 4, 1975, during the period between October 5, 1973, and January 25, 1975, ORS 197.175(1) and 197.280 (1973 editions) required, in addition to any local plan or zoning provisions, that cities and counties exercise their planning responsibilities in accordance with the interim land use planning goals set forth in ORS 215.515 (1973 edition). *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 Or App. 525 (1981) (noting that while “[l]and use planning responsibility is not defined in ORS ch 197, the Supreme Court has interpreted that term as including annexation approvals, *subdivision approvals* [emphasis added] and partition approvals.”) citing *Petersen*, *Meeker* and *Alexanderson v. Polk County*, 285 Or 427 (1980). The claimants’ desired use includes subdivision of their land. If the claimants had sought to create that use when they acquired tax lot 2002 on January 4, 1975, as a matter of law, the use would have been subject to the interim planning goals at ORS 215.515.⁴

The claimants acquired tax lot 2006 on January 4, 1977, after the adoption of the statewide planning goals, but before the Commission acknowledged Clackamas County’s land use regulations to be in compliance with the Goal 4 pursuant to ORS 197.250 and 197.251.⁵ Because the Commission had not acknowledged the county’s plan and land use regulations when the claimants acquired tax lot 2006 on January 4, 1977, the applicable statewide planning goals would have applied directly to any development application for the claimants’ tax lot 2006.⁶

⁴ The “interim” land use goals are set forth in ORS 215.515(1)(a) to (j) (1973 edition) 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 the development of properties within the state is commensurate with the character and the physical limitations of the land.” ORS 215.515 (1973 edition).

⁵ Clackamas County’s Comprehensive Plan was acknowledged as complying with Goal 4 on December 31, 1981.

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 569 (1977); *Jurgenson v. Union County*, 42 Or App 505 (1979) and *1000 Friends of Oregon v. Benton County*, 32 Or App 413 (1978). After the county’s plan and land use regulations were acknowledged by the Commission, the statewide planning goals and implementing rules no longer directly applied to such local land use decisions. *Byrd v. Stringer*, 295 Or 311 (1983). However, statutory requirements continue to apply, and insofar as the state and local provisions are materially the same, the local provisions must be interpreted consistent with the substance of the goals and implementing rules. *Forster v. Polk County*, 115 Or App 475 (1992); *Kenagy v. Benton County*, 115 Or App 131 (1992).

As adopted in 1975, Goal 3 required that agricultural lands be preserved and zoned for EFU pursuant to ORS 215. Goal 4, as adopted in 1975, required that forest lands be designated for forest uses. Depending on whether the property would have been subject to Goal 3 or 4 when acquired, it would have been subject to either EFU zoning pursuant to ORS 215 or forest zoning adequate to retain forest lands for forest uses.

If subject to Goal 3, the state standards for a division of land required that the created lots or parcels be of a size "appropriate for the continuation of the existing commercial agricultural enterprise within the area." (See Goal 3.) Further, ORS 215.263 (1975 edition) required that all land divisions subject to EFU zoning comply with the legislative intent in ORS 215.243 (Agricultural Land Use Policy). Thus, under Goal 3, the opportunity to divide tax lot 2006 when acquired by the claimants on January 4, 1977, was limited to new lots or parcels that were (1) appropriate for the continuation of the existing commercial agricultural enterprise in the area, and (2) shown to be consistent with the legislative intent in ORS 215. At that time, under Goal 3, farm dwellings were allowed if they were determined to be "customarily provided in conjunction with farm use" under ORS 215.213(1)(e) (1975 edition),⁷ and non-farm dwellings were subject to ORS 215.213(3) (1975 edition).⁸ Other uses were authorized and governed by the applicable provisions under Goal 3 and ORS 215.213.

If subject to Goal 4, the state standards required uses to "conserve forest lands for forest uses." Specifically, Goal 4 only allowed land divisions that would protect commercial forest lands for commercial forest uses. Dwellings in forest zones could only be allowed if found to be "necessary and accessory" to one of the enumerated forest uses listed in Goal 4.⁹

The claimants acquired tax lots 2003 and 700 (Section 24C) on January 3, 1984, and tax lot 2000 on December 30, 1985. At those times, the property was subject to Clackamas County's acknowledged Transitional Timber (TT-20) zone. When the claimants acquired these tax lots, the desired division and development would have been governed by the county's TT-20 zone and the applicable provisions of ORS 215, then in effect.

⁷ Under ORS 215.213, a farm dwelling could be established on agricultural land only if the farm use to which the dwelling relates exists (*Newcomer v. Clackamas County*, 92 Or App 174, modified 94 Or App 33 (1988) and *Matteo v. Polk County*, 11 Or LUBA 259, 263 (1984), affirmed without opinion 70 Or App 179 (1984)). Guidance on the application of the statutory standards for farm and non-farm dwellings in EFU zones can be found in the Commission rules (OAR 660, division 5, adopted on July 21, 1982, amended on June 7, 1986, and repealed on August 7, 1993).

⁸ 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. *Smith v. Clackamas County*, 313 Or 519 (1992).

⁹ Goal 4 prohibited uses that were not enumerated by Goal 4 as permissible uses for forest lands as well as those that were not necessary and accessory to an enumerated forest use. *Lamb v. Lane County*, 7 Or LUBA 137 (1983). Dwellings in forest lands were required to be "necessary and accessory" to show that such dwellings complied with the Goal 4 requirement that local land use regulations must "conserve forest lands for forest uses." *1000 Friends v. LCDC (Curry County)*, 301 Or 447 (1986). A dwelling that may "enhance" forest uses is not "necessary and accessory" to a forest use to the extent required by Goal 4. *1000 Friends of Oregon v. LCDC (Lane County)*, 305 Or 384 (1988). For additional guidance, the Goal 4 provisions were interpreted under OAR 660, division 6, effective on September 1, 1982, in *1000 Friends of Oregon v. LCDC (Lane County)* and in *1000 Friends v. LCDC (Curry County)*.

In addition to the laws cited above in effect when the claimants acquired each of tax lots 2000, 2002, 2003, 2006 and 700 (Section 24C), other laws in effect when the claimants acquired these tax lots are also exempt under ORS 197.352(3)(E), and will continue to apply to the claimants' use of the property. In addition, the department notes that ORS 215.730 and OAR 660, division 6, include standards for siting dwellings in forest zones. These provisions include fire protection standards for dwellings and for surrounding forest lands. ORS 197.352(3)(B) specifically exempts regulations "restricting or prohibiting activities for the protection of public health and safety, such as fire and building codes. . . ." To the extent they are applicable to the claimants property, the siting standards for dwellings in forest zones in ORS 215.730 and OAR 660, division 6, are exempt under ORS 197.352(3). 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).

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 and the foregoing findings and conclusions with respect to tax lot 700 (Section 24), the claimants have not established that they are entitled to relief under ORS 197.352(1), as a result of land use regulations enforced by the Commission or the department. Therefore, as it applies to tax lot 700 (Section 24), this claim is denied.

Based on the record, the department recommends that the claim be approved for tax lots 2000, 2002, 2003, 2006 and 700 (Section 24C), 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 John and Carol Mills' division of the approximately 70-acre property or to their development of a dwelling on each parcel: applicable provisions of Goals 3 and 4, ORS 215 and OAR 660, divisions 6 and 33, enacted or adopted after the date the claimants acquired each of these tax lots. These land use regulations will not apply to the 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 tax lot 2002 on January 4, 1975, tax lot 2006 on January 4, 1977, tax lots 2003 and 700 (Section 24C) on January 3, 1984, and tax lot 2000 on December 30, 1985.
2. The action by the State of Oregon provides the state's authorization to the claimants to use tax lots 2000, 2002, 2003, 2006 and 700 (Section 24C) for the use described in this report, subject to the standards in effect when they acquired each tax lot. On January 4, 1975, tax lot 2002 was subject to the provisions of ORS 215, including the interim planning goals set forth in

ORS 215.515 (1973 edition). On January 4, 1977 (tax lot 2006), January 3, 1984 (tax lots 2003 and 700 (Section 24C)) and December 30, 1985 (tax lot 2000), the subject property was subject to applicable provisions of Goal 3 or 4 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 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 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 30, 2006. 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.