

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. M118592
(BALLOT MEASURE 37) OF)
Doris Rousett-Shively and)
Gregory Rousett, CLAIMANTS)

Claimants: Doris Rousett-Shively and Gregory Rousett (the Claimants)

Property: Township 3S, Range 2E, Section 27, Tax lots 803, 804, 900, 901, 902 and 990,
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 Doris Rousett-Shively's division of tax lots 804, 900, 901 902 and 990 into 1 to 5-acre parcels or to her development of a dwelling on each parcel: applicable provisions of Goals 3 and 14, ORS 215 and OAR 660, division 33. These land use regulations will not apply to Ms. Rousett-Shively only to the extent necessary to allow her to use tax lots 900, 901, 902 and 990 for the use described in this report, and only to the extent that use was permitted when she acquired these tax lots on October 29, 1968. These land use regulations will not apply to her use of tax lot 804 only to the extent necessary to allow her to use tax lot 804 for the use described in this report, and only to the extent that use was permitted when she acquired it on October 7, 1977.

In lieu of compensation under ORS 197.352, the State of Oregon will not apply the following laws to Gregory Rousett's division of tax lots 804 and 901 or to his development of a dwelling

on each parcel: applicable provisions of Goals 3 and 14, ORS 215 and OAR 660, division 33, enacted or adopted after October 31, 1979, for tax lot 804 and December 2, 1981, for tax lot 901. These land use regulations will not apply to Mr. Rousett only to the extent necessary to allow him to use tax lots 804 and 901 for the use described in this report, and only to the extent that use was permitted when he acquired these tax lots on October 31, 1979, and December 2, 1981, respectively.

2. The action by the State of Oregon provides the state's authorization to Doris Rousett-Shively to use tax lots 900, 901, 902 and 990 for the use described in this report, subject to the standards in effect on October 29, 1968, and to use tax lot 804 for the use described in this report, subject to the standards in effect on October 7, 1977. On October 7, 1977, tax lot 804 was subject to the applicable provisions of Goals 3 and 14 and ORS 215 then in effect.

The action by the State of Oregon provides the state's authorization to Gregory Rousett to use tax lots 804 and 901 for the use described in this report, subject to the standards in effect on October 31, 1979, for tax lot 804 and December 2, 1981, for tax lot 901. On those dates, the tax lots were subject to the applicable provisions of Goals 3 and 14 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 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).

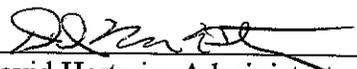
5. Without limiting the generality of the foregoing terms and conditions, in order for the claimants to use the subject property, it may be necessary for them to obtain a decision under ORS 197.352 from a city and/or county and/or metropolitan service district that enforces land use regulations applicable 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 Director of the DLCD as a final order of DLCD and the Land Conservation and Development Commission under ORS 197.352, OAR 660-002-0010(8), and OAR 125, division 145, and by the Administrator for the State Services Division of the DAS as a final order of DAS under ORS 197.352, OAR 125, division 145, and ORS 293.

FOR DLCD AND THE LAND CONSERVATION
AND DEVELOPMENT COMMISSION:


Lane Shetterly, Director
DLCD
Dated this 24th day of April, 2006.

FOR the DEPARTMENT OF ADMINISTRATIVE
SERVICES:


David Hartwig, Administrator
DAS, State Services Division
Dated this 24th 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)

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 24, 2006

STATE CLAIM NUMBER: M118592

NAMES OF CLAIMANTS: Doris Rousett-Shively and Gregory Rousett

MAILING ADDRESS: 15211 and 15357 South Kirk Road
Oregon City, Oregon 97045

PROPERTY IDENTIFICATION: Township 3S, Range 2E, Section 27
Tax lots 803, 804, 900, 901, 902 and 990
Clackamas County

OTHER CONTACT INFORMATION: Aaron Z. Matusick
5909 Southeast Oetkin Road
Milwaukie, Oregon 97267

DATE RECEIVED BY DAS: June 13, 2005

180-DAY DEADLINE: April 28, 2006¹

I. SUMMARY OF CLAIM

The claimants, Doris Rousett-Shively and Gregory Rousett, seek compensation in the amount of \$15 million for the reduction in fair market value as a result of land use regulations that are alleged to restrict the use of certain private real property. The claimants desire compensation or the right to divide the 132.32-acre property into 1 to 5-acre parcels and to develop a dwelling on each parcel. The subject property is located at 15211 and 15357 South Kirk Road, near Oregon City, in Clackamas County. (See claim.)

II. SUMMARY OF STAFF RECOMMENDATION

Based on the findings and conclusions set forth below, the Department of Land Conservation and Development (the department) has determined that the claim is valid in part and not valid 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)

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 *MacPherson v. Dept. of Admin. Svcs.*, 340 Or 117 (2006).

or the department not apply to Doris Rousett-Shively's division of tax lots 804, 900, 901, 902 and 990 into 1 to 5-acre parcels and her development of a dwelling on each parcel: applicable provisions of Statewide Planning Goal 3 (Agricultural Lands), ORS 215 and Oregon Administrative Rules (OAR) 660, division 33, enacted or adopted after she acquired each tax lot. These laws will not apply to her use of tax lots 900, 901, 902 and 990 for the use described in this report and only to the extent these laws were enacted or adopted after October 29, 1968. These laws will also not apply to her use of tax lot 804 for the use described in this report and only to the extent these laws were enacted or adopted after October 7, 1977.

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 Gregory Rousett's division of tax lots 804 and 901 into 1 to 5-acre parcels and his development of a dwelling on each parcel: applicable provisions of Goal 3, ORS 215 and OAR 660, division 33, enacted or adopted after he acquired tax lot 804 on October 31, 1979, and after he acquired tax lot 901 on December 21, 1981. These laws will not apply to Gary Rousett 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 tax lot 804 on October 31, 1979, and tax lot 901 on December 2, 1981.

Department Staff has determined that neither the Commission nor the department has enforced laws that restrict Doris Rousett-Shively's use of tax lot 803 relative to uses permitted at the time she acquired this tax lot on March 26, 1974. Therefore, department staff recommends that Doris Rousett-Shively's claim as to tax lot 803 be denied.

Department staff has determined that Gregory Rousett is not an owner of tax lots 803, 900, 902 and 990. Therefore, department staff recommends that Gregory Rousett's claim as to these tax lots be denied. (See the complete recommendation in Section VI of this report.)

III. COMMENTS ON THE CLAIM

Comments Received

On July 27, 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, seven written comments were received in response to the 10-day notice.

Six of the comments do 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 letters in the department's claim file.)

One 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 criterion, whichever is later.

Findings of Fact

This claim was submitted to DAS on June 13, 2005, for processing under OAR 125, division 145. The claim identifies Clackamas County's 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), 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, Doris Rousett-Shively and Gregory Rousett, acquired interest in the subject property as follows:

Tax Lot	Acreage	Family Member/Acquisition Date	Current Owner/Acquisition Date
3 2E 27 803	23.76		Doris Rousett-Shively/03/26/74 Deed 74 7269
3 2E 27 804	9.07	Doris Rousett-Shively/10/07/77	Gregory Rousett, trustee/10/31/79 Deed 79 48692

3 2E 27 900	67.64		Doris Rousett-Shively/10/29/68 Deed 68 22087 ²
3 2E 27 901	4.95	Doris Rousett-Shively/10/29/68	Gregory Rousett, trustee/12/02/81 Deed 81-41199
3 2E 27 902	9.41		Doris Rousett-Shively/10/29/68 Deed 68 22087
3 2E 27 990	17.49		Doris Rousett-Shively/10/29/68 Deed 68 22087

Subsequent to her acquisition of tax lots 804 and 901, Doris Rousett-Shively transferred her interest in these tax lots to a revocable trust.³ Tax statements for July 1, 2004, through June 30, 2005, submitted with the claim, establish Doris Rousett-Shively's current ownership of each of the six tax lots and Gregory Rousett's current ownership of tax lots 804 and 901.

Conclusions

The claimants, Doris Rousett-Shively and Gregory Rousett, are the "owners" of the subject property as that term is defined by ORS 197.352(11)(C). Doris Rousett-Shively acquired tax lots 900, 902 and 990 on October 29, 1968, tax lot 803 on March 26, 1974, and tax lot 804 on October 7, 1977. Gregory Rousett acquired an interest in tax lot 804 on October 31, 1979, and tax lot 901 on December 2, 1981, as a trustee. Doris Rousett-Shively is a "family member," of Gregory Rousett as defined in ORS 197.352(11)(A) as of 1968 for tax lot 901 and as of 1977 for tax lot 804.

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 acquired the property.

Findings of Fact

The claim states, "zoning regulations (EFU-20 & EFU-80) and all other regulations and restrictions" effective on June 18, 1978, and in November 1993, prevent the claimants from developing the property with "custom homes on separate 1-5 acre lots."

The claim is based generally on Clackamas County's current EFU zone and the applicable provisions of state law that require such zoning. The claimants' property is zoned EFU as required by Goal 3 in accordance with ORS 215 and OAR 660, division 33, because the claimants' property is "agricultural land" as defined by Goal 3.⁴ 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.

² Claim includes a deed signed on November 20, 1968, correcting the October 29, 1968, deed.

³ Transfer to a revocable trust is not a change of ownership for the purposes of ORS 197.352.

⁴ The claimants' property is "agricultural land" because it contains Natural Resources Conservation Service (NRCS) Class I-IV soils.

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 the development of dwellings on existing or proposed parcels on that land.

ORS 215.780 generally 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). ORS 215.780(5) recognizes zones with minimum lot sizes less than 80 acres that have been acknowledged by the Commission. 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.)

Doris Rousett-Shively acquired tax lots 900, 901, 902 and 990 on October 29, 1968, prior to the adoption of the statewide planning goals and their implementing statutes and regulations.

Doris Rousett-Shively acquired tax lot 803 on March 26, 1974, after the adoption of Senate Bill 100 (Chapter 80, Oregon Laws 1973, effective on October 5, 1973) but before the adoption of the statewide planning goals, effective on January 25, 1975. At that time, it was zoned Residential Agriculture (RA-1) by Clackamas County, which allowed one-acre parcels. The RA-1 zone was never acknowledged as complying with the statewide planning goals.

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 Doris Rousett-Shively had sought to create that use in 1974, as a matter of law, the use would have been subject to the interim planning goals at ORS 215.515.⁵

⁵ 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,"

The following interim goals are directly applicable to this claim: "To preserve the quality of the air, water and *land* [emphasis added] resources of the state"; "To conserve prime farm lands for the production of crops"; "To provide for the orderly and efficient transition from rural to urban land use"; "To protect life and property in areas subject to floods, landslides and other natural disasters"; "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"; and "To develop a timely, orderly and efficient arrangement of public facilities and services to serve as a framework for urban and rural development." ORS 215.515 (1973 edition).

One of the interim goals was to "conserve prime farm lands for the production of crops." Soil types are a determinant of prime farm land. All of the soils on the 23.76-acre tax lot 803 (Jory silty clay loam) are rated as "prime" by the Natural Resource Conservation Service. According to the Oregon Department of Agriculture, Oregon has only a limited supply of soils rated "prime" (eight percent of all agricultural land).⁶

No information has been provided establishing that the claimants' desired division of tax lot 803 for residential development complies with the interim planning goals set forth in ORS 215.515 (1973 edition) in effect at the time Doris Rousett-Shively acquired this tax lot on March 26, 1974. Rather, the desired division and development of the 23.76 acres of "prime," Class 2 high-value farm land would not "conserve prime farm lands for the production of crops" as required by the interim goals in effect at the time she acquired tax lot 803 in 1974.

Doris Rousett-Shively acquired tax lot 804 on October 7, 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 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 on October 7, 1977, the statewide planning goals, and Goal 3 in particular, applied directly to the property when Doris Rousett-Shively acquired it.⁷

(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).

⁶ According to the Oregon Department of Agriculture, based on data from the NRCS, there are 15.5 million acres of agricultural land zoned for EFU in Oregon. Oregon has 1.2 million acres of soils rated as "prime."

⁷ 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 acknowledgement of each county's comprehensive plan and implementing regulations. *Perkins v. City of Rajneeshpuram*, 300 Or 1 (1985); *Anderson v. Polk County*, 289 Or 427, rev den, 290 Or 137 (1980); *Sunnyside Neighborhood Assn. v. Clackamas County*, 280 Or 3 (1977); *Jurgensons 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 applied directly 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

As adopted on January 25, 1975, Goal 3 required that agricultural land be preserved and zoned for 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 (1973 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 tax lot 804 when they acquired it in 1977 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.

Under the Goal 3 standards in effect on October 7, 1977, farm dwellings were allowed if they were determined to be "customarily provided in conjunction with farm use" under ORS 215.213(1)(e) (1973 edition). Non-farm dwellings were subject to compliance with ORS 215.213(3) (1973 edition)."

No information has been presented in the claim to establish that the claimants' desired division of tax lot 804 into 1 to 5-acre parcels complies with the "commercial" standard for farm parcels under Goal 3 or the standards for non-farm parcels under ORS 215.263 (1973 edition), nor is there any information to establish that the claimants' desired division of tax lot 804 satisfies the standards for farm or non-farm dwellings under ORS 215.213 (1973 edition).

Goal 14 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 of urban growth boundaries be used for rural uses. Goal 14 became effective on January 25, 1975.

Conclusions

The current zoning requirements, minimum lot size and dwelling standards established by Goal 3, ORS 215 and OAR 660, division 33, were all enacted or adopted after Doris Rousett-Shively acquired tax lots 900, 901, 902 and 990 in 1968, tax lot 803 in 1974 and tax lot 804 in 1977. These laws restrict the use of tax lots 804, 900, 901, 902 and 990 relative to the uses allowed when the claimants' family acquired them. However, when Doris Rousett-Shively acquired tax lot 803 on March 26, 1974, the "interim" land use goals set forth in ORS 215.515 required the conservation of prime farm land for the productions of crops. All 23.76 acres of tax lot 803 are composed of very limited farm land soils rated as "prime" and rated Class II. Tax lot 803 could not be divided for residential use under the "interim" land use goals applicable in 1974.

Based on the facts of this claim, dividing the 23.76-acre tax lot 803 into 1 to 5-acre parcels, each for residential use, does not "conserve prime farm lands for the production of crops," "preserve the quality of the . . . land resources of the state," "provide for an orderly and efficient transition from rural to urban land use," "protect life and property in areas subject to floods" or provide for

substance of the goals and implementing rules. *Forster v. Polk County*, 115 Or App 475 (1992) and *Kenagy v. Benton County*, 115 Or App 131 (1992).

“a timely, orderly and efficient arrangement of public facilities and services” as required by ORS 215.515 (1973 edition). Thus, the requested use would not have been permitted under the standards in effect when Doris Rousett-Shively acquired tax lot 803. Therefore, the department determines that the current land use regulations applicable to tax lot 803 do not restrict its use relative to the uses allowed when the Ms. Rousett-Shively acquired this tax lot in 1974.

The claim also does not establish whether or the extent to which the claimants’ desired use of tax lot 804 complies with the standards for land divisions and development under the requirements of Goal 3 and ORS 215 in effect when Doris Rousett-Shively acquired the subject property on October 7, 1977.

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 \$15 million as the reduction in the subject property’s fair market value due to current regulations. This amount is based on real estate comparables for a 2.16-acre parcel located on S. Kirk Road, near the claimants’ property and a 4.8-acre parcel in Tualatin.

Conclusions

As explained in Section V.1 of this report, Doris Rousett-Shively acquired tax lots 803, 804, 900, 901, 902 and 990 in 1968, 1974 and 1977. 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 acquired tax lots 804, 900, 901, 902 and 990 may restrict the desired division and development of the property. The claimants estimate the reduction in value due to the restrictions to be \$15 million.

Without an appraisal or other documentation and without verification of whether or the extent to which the claimants’ desired use of the subject property was allowed under the standards in effect when Doris Rousett-Shively acquired the property, 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.

As explained in section V.2 of this report, current land use regulations do not restrict the use of tax lot 803 relative to the uses allowed when Doris Rousett-Shively acquired this tax lot in 1974. Land use regulations enacted or adopted by the state since Doris Rousett-Shively acquired tax lot 803, relating to the desired division and development of the property, do not have “the effect of reducing the fair market value of the property, or any interest therein” relative to the uses

allowed in 1974 because Doris Rousett-Shively could not divide this tax lot when she acquired it in 1974. Thus, regarding tax lot 803, the claimants are not due compensation under ORS 197.352.

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 the statute.

Findings of Fact

The claim is based on state land use regulations that restrict the use of the subject property, including applicable provisions of Goal 3, ORS 215 and OAR 660, division 33, which Clackamas County has implemented through its current EFU zone. All of these land use regulations were enacted or adopted after Doris Rousett-Shively acquired tax lots 900, 901, 902 and 990 in 1968.

As to tax lot 803, with the exception of applicable provisions of ORS 215, including the interim statewide planning goals in effect on March 26, 1974, these state land use laws were not in effect when Doris Rousett-Shively acquired that tax lot.

As to tax lot 804, with the exception of provisions of Goals 3 and 14 and ORS 215 in effect on October 7, 1977, these land use regulations were not in effect when Doris Rousett-Shively acquired that tax lot.

Conclusions

It appears that none of the general statutory, goal and rule restrictions on residential division and development were in effect when Doris Rousett-Shively acquired tax lots 900, 901, 902 and 990 in 1968. As a result, with respect to these tax lots these laws are not exempt under ORS 197.352(3)(E) and would not provide a basis for compensation. In addition, other land use laws enacted or adopted for the purpose set forth in 197.352(3)(A) to (D) are also exempt and would not provide a basis for compensation.

It appears that the general statutory, goal and rule restrictions on residential development and use of tax lot 803 are exempt under ORS 197.352(3)(E) to the extent they were enacted or adopted after Doris Rousett-Shively acquired that tax lot in 1974. However, as discussed in Section V.2 of this report, these laws do not restrict the use of tax lot 803 relative to the uses permitted when she acquired it on March 26, 1974, because the desired use was not allowed under the provision of ORS 215 in effect at that time.

It appears that the general statutory, goal and rule restrictions on residential development and use of tax lots 804 and 901 are not exempt under ORS 197.352(3)(E) to the extent they were enacted or adopted after Doris Rousett-Shively acquired tax lot 804 on October 7, 1977. Provisions of Goals 3 and 14 and ORS 215 in effect when she acquired these tax lots in 1977 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 the purpose set forth in ORS 197.352 (3)(A) to (D) are also exempt, and would not provide a basis for compensation.

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 tax lots 804, 900, 901, 902 and 990 into 1 to 5-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 \$15 million. 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 these tax lots, a specific amount of compensation cannot be determined. Nevertheless, based on the record for this claim, the department acknowledges that the laws on which the claim is based likely have reduced the fair market value of the 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 Doris Rousett-Shively to use tax lots 804, 900, 901, 902 and 990 for a use permitted on the dates she acquired these tax lots (as discussed in Section V.2 of this report), and to allow Gregory Rousett to use tax lots 804 and 901 for a use permitted on the dates he acquired these tax lots.

Gregory Rousett acquired an interest in tax lots 804 and 901, 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 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 Mr. Rousett acquired an interest in tax lot 804 on October 31, 1979, and tax lot 901 on December 2, 1981, the statewide planning goals, and Goal 3 in particular, applied directly to these tax lots when he acquired them, and is subject to the laws applicable to the claimants' family's use of tax lot 804, as discussed in Section V. (2) of this report.

In addition to the applicable laws described in this report as applying to the subject tax lots when the claimants acquired them, there may be other laws that 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 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. 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 current record, with regard to tax lot 803, the claimants are not entitled to relief under ORS 197.352. Department staff recommends that the claim for tax lot 803 be denied because neither the Commission nor the department has enforced laws that were enacted or adopted after Doris Rousett-Shively acquired tax lot 803 that restrict the use of this tax lot relative to the uses permitted at the time she acquired it on March 26, 1974. Also based on the current record, Gregory Rousett is not entitled to relief as to tax lots 803, 900, 902 and 990 because he is not an owner of these tax lots. Department staff therefore recommends that Gregory Rousett's claim be denied as to these tax lots.

Based on the record, the department recommends that the claim be approved as to the remaining tax lots, 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 Doris Rousett-Shively's division of tax lots 804, 900, 901 902 and 990 into 1 to 5-acre parcels or to her development of a dwelling on each parcel: applicable provisions of Goals 3 and 14, ORS 215 and OAR 660, division 33. These land use regulations will not apply to Ms. Rousett-Shively only to the extent necessary to allow her to use tax lots 900, 901, 902 and 990 for the use described in this report, and only to the extent that use was permitted when she acquired these tax lots on October 29, 1968. These land use regulations will not apply to her use of tax lot 804 only to the extent necessary to allow her to use tax lot 804 for the use described in this report, and only to the extent that use was permitted when she acquired it on October 7, 1977.

In lieu of compensation under ORS 197.352, the State of Oregon will not apply the following laws to Gregory Rousett's division of tax lots 804 and 901 or to his development of a dwelling on each parcel: applicable provisions of Goals 3 and 14, ORS 215 and OAR 660, division 33, enacted or adopted after October 31, 1979, for tax lot 804 and December 2, 1981, for tax lot 901. These land use regulations will not apply to Mr. Rousett only to the extent necessary to allow him to use tax lots 804 and 901 for the use described in this report, and only to the extent that use

was permitted when he acquired these tax lots on October 31, 1979, and December 2, 1981, respectively.

2. The action by the State of Oregon provides the state's authorization to Doris Rousett-Shively to use tax lots 900, 901, 902 and 990 for the use described in this report, subject to the standards in effect on October 29, 1968, and to use tax lot 804 for the use described in this report, subject to the standards in effect on October 7, 1977. On October 7, 1977, tax lot 804 was subject to the applicable provisions of Goals 3 and 14 and ORS 215 then in effect.

The action by the State of Oregon provides the state's authorization to Gregory Rousett to use tax lots 804 and 901 for the use described in this report, subject to the standards in effect on October 31, 1979, for tax lot 804 and December 2, 1981, for tax lot 901. On those dates, the tax lots were subject to the applicable provisions of Goals 3 and 14 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 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 April 4, 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.