

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. M118635  
(BALLOT MEASURE 37) OF )  
Phyllis Ann Kenagy )  
Michael Sebastian "Seb" Kenagy, and )  
Jesse Wilde Kenagy, CLAIMANTS )

Claimants: Phyllis Ann Kenagy, Michael Sebastian "Seb" Kenagy, and  
Jesse Wilde Kenagy (the Claimants)

Property: Township 4S, Range 1E, Section 31, Tax lots 200, 201, 300, 1000, 1001, 1090,  
1091, 1100, 1114 and 1300; and  
Township 4S, Range 1E, Section 31C, Tax lots 200, 207 and 300  
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 the claimants' partition of that portion of the 302.03-acre property for which they are each a current owner and to their development of a dwelling on each parcel: applicable provisions of Goal 3, ORS 215 and OAR 660, division 33, enacted or adopted after they each acquired their interest in the property.

These land use regulations will not apply to Phyllis Kenagy only to the extent necessary to allow her to use the approximately 258 acres included in tax lots 200, 201, 300, 1000, 1090, 1100 and 1300 in Sec. 31 and tax lot 200 in Sec. 31C for the use described in this report, and only to the extent that use was permitted when she acquired those tax lots on October 5, 1961, December 13, 1963, February 23, 1965, and October 1, 1965.

These land use regulations will not apply to Michael Kenagy only to the extent necessary to allow him to use the approximately 24 acres included in tax lot 1114 in Sec. 31 and tax lots 207 and 300 in Sec. 31C for the use described in this report, and only to the extent that use was permitted when he acquired those tax lots on January 15, 1982, and to allow him to use the approximately 258 acres included in the Phyllis Ann Kenagy Trust for the use described in this report, and only to the extent that use was permitted when he acquired those tax lots as trustee of the Phyllis Ann Kenagy Trust on May 4, 1992.

These land use regulations will not apply to Jesse Kenagy only to the extent necessary to allow him to use the approximately 20 acres included in tax lots 1001 and 1091 in Sec. 31 for the use described in this report, and only to the extent that use was permitted when he acquired those tax lots on April 19, 1989.

2. The action by the State of Oregon provides the state's authorization to each claimant to use that portion of the subject property he or she current owns, subject to the standards in effect when each of the claimants acquired his or her respective portions of the property. Phyllis Kenagy acquired that portion of the property she currently owns prior to the adoption of the statewide planning goals and their implementing statutes and regulations. When Michael Kenagy acquired tax lot 1114 in Sec. 31 and tax lots 207 and 300 in Sec. 31C, the property was subject to the applicable provisions of Goal 3 and ORS 215 then in effect. When Jesse Kenagy acquired tax lots 1001 and 1091 in Sec. 31 and Michael Kenagy acquired the remaining tax lots as trustee of the Phyllis Kenagy Trust, the property was subject to compliance with Clackamas County's acknowledged EFU-20 zone and applicable provisions of Goal 3, ORS 215 and ORS 660, division 5, then in effect.

3. To the extent that any law, order, deed, agreement or other legally enforceable public or private requirement provides that the 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 (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

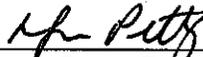
jurisdiction to enforce a land use regulation applicable to a use of the subject property by the claimants.

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 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:

  
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Lane Shetterly, Director  
DLCD  
Dated this 27<sup>th</sup> day of April, 2006.

FOR the DEPARTMENT OF ADMINISTRATIVE  
SERVICES:

  
\_\_\_\_\_  
Dugan Petty, Deputy Administrator  
DAS, State Services Division  
Dated this 27<sup>th</sup> 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<sup>1</sup>, the present owner of

<sup>1</sup> 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.

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."

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

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

April 27, 2006

**STATE CLAIM NUMBER:** M118635

**NAMES OF CLAIMANTS:** Phyllis Ann Kenagy  
Michael Sebastian "Seb" Kenagy  
Jesse Wilde Kenagy

**MAILING ADDRESS:** 29851 South Kenagy Lane  
Hubbard, Oregon 97032

**PROPERTY IDENTIFICATION:** Township 4S, Range 1E, Section 31  
Tax lots 200, 201, 300, 1000, 1001, 1090,  
1091, 1100, 1114 and 1300; and  
  
Township 4S, Range 1E, Section 31C  
Tax lots 200, 207 and 300  
Clackamas County

**DATE RECEIVED BY DAS:** June 17, 2005

**180-DAY DEADLINE:** May 2, 2006<sup>1</sup>

**I. SUMMARY OF CLAIM**

The claimants, Phyllis, Michael and Jesse Kenagy, seek compensation 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 302.03-acre property and to develop a dwelling on each parcel. The subject property is located at 29851 South Kenagy Lane, near Hubbard, in Clackamas County. (See claim.)

**II. SUMMARY OF STAFF RECOMMENDATION**

Based on the findings and conclusions set forth below, the Department of Land Conservation and Development (the department) has determined that the claim is valid. Department staff recommends that, in lieu of compensation, the requirements of the following state laws enforced by the Land Conservation and Development Commission (the Commission) or the department not apply to the claimants' partition of the 302.03-acre property and to their development of a

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<sup>1</sup> 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).

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 each claimant acquired his or her respective interest in the subject property. These laws will not apply to Phyllis Kenagy only to the extent necessary to allow her to use the approximately 258-acre portion of the subject property she currently owns for the use described in this report, and only to the extent that use was permitted when she acquired that portion on October 5, 1961, December 13, 1963, February 23, 1965, and October 1, 1965. These laws will not apply to Michael Kenagy only to the extent necessary to allow him to use the approximately 282-acre portion of the subject property he currently owns for the use described in this report, and only to the extent that use was permitted when he acquired the approximately 24-acre portion of the property on January 15, 1982, and approximately 258-acre portion of the property on May 4, 1992. These laws will not apply to Jesse Kenagy only to the extent necessary to allow him to use the approximately 20-acre portion of the subject property he currently owns for the use described in this report, and only to the extent that use was permitted when he acquired that portion of the property on April 19, 1989. (See the complete recommendation in Section VI. of this report.)

### **III. COMMENTS ON THE CLAIM**

#### **Comments Received**

On July 22, 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, three written comments, evidence or information were received in response to the 10-day notice.

The comments are relevant to whether the restriction of the claimants' use of the subject property reduces the fair market value of the property. The comments have 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 17, 2005, for processing under OAR 125, division 145. The claim identifies provisions of ORS 215 and OAR 660, division 33, 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 claim includes 13 tax lots totaling approximately 302 acres: tax lots 200, 201, 300, 1000, 1001, 1090, 1091, 1100, 1114 and 1300 in Township 4S, Range 1E, Section 31 of Clackamas County (Sec. 31) and tax lots 200, 207 and 300 in Township 4S, Range 1E, Section 31C of Clackamas County (Sec. 31C). Claimant Phyllis Kenagy initially acquired the subject property with her husband Milo Kenagy on four separate dates: October 5, 1961, December 13, 1963, February 23, 1965, and October 1, 1965. The four transactions are reflected in one bargain and sale deed and three warranty deeds included with the claim.<sup>2</sup> As described below, she subsequently conveyed five of the tax lots to her sons Michael and Jesse Kenagy. She currently owns approximately 258 acres of the subject property.

Claimant Michael Kenagy acquired tax lot 1114 in Sec. 31 and tax lots 207 and 300 in Sec. 31C from Milo and Phyllis Kenagy on January 15, 1982, as evidenced by a warranty deed provided by Clackamas County. Those tax lots include approximately 24 acres in his own name in addition to the 258 acres in which he has an interest as trustee of the Phyllis Ann Kenagy Trust (see below).

Claimant Jesse Kenagy acquired tax lots 1001 and 1091 in Sec. 31 from Milo and Phyllis Kenagy on April 19, 1989, as evidenced by a warranty deed provided by Clackamas County. Those tax lots include approximately 20 acres.

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<sup>2</sup> Conversation with Michael Kenagy indicates that Michael and Jesse’s grandparents, William and Emma Kenagy, owned the property since the 1920s. There is no information in the record to substantiate that date, although deed records do indicate that William and Emma Kenagy owned at least a portion of the property, which was subsequently transferred to Phyllis and Milo Kenagy, in 1963.

Deed records from Clackamas County also indicate that Phyllis Kenagy's remaining interest in the property was transferred to the Phyllis Ann Kenagy Trust on May 4, 1992, as evidenced by a bargain and sale deed. Conversation with claimant Michael Kenagy indicates that the Phyllis Ann Kenagy Trust is a revocable trust with Michael Kenagy named as the sole trustee.<sup>3</sup>

The Clackamas County Assessor's Office confirms: Phyllis Kenagy's current ownership of tax lot 200 in Sec. 31C and all of the subject tax lots except tax lots 1001, 1090 and 1114 in Sec. 31; Michael Kenagy's current ownership of tax lot 1114 in Sec. 31 and tax lots 207 and 300 in Sec. 31C; and Jesse Kenagy's current ownership of tax lots 1001 and 1091 in Sec. 31.

### **Conclusions**

The claimants, Phyllis, Michael and Jesse Kenagy are the "owners" of the subject property as that term is defined by ORS 197.352(11)(C).

Phyllis Kenagy is an "owner" of tax lots 200, 201, 300, 1000, 1090, 1100 and 1300 in Sec. 31 and tax lot 200 in Sec. 31C as of October 5, 1961, December 13, 1963, February 23, 1965, and October 1, 1965. Phyllis Kenagy is also a "family member" of claimants Michael and Jesse Kenagy, as defined in ORS 197.352(11)(A).

Michael Kenagy is an owner of tax lot 1114 in Sec. 31 and tax lots 207 and 300 in Sec. 31C, as of January 15, 1982, and is an owner, as trustee of the Phyllis Ann Kenagy Trust, of the remaining tax lots in Sec. 31 except tax lots 1001 and 1091, as of May 4, 1992. Jesse Kenagy is an owner of tax lots 1001 and 1091 in Sec. 31, as of April 19, 1989.

Claimant Phyllis Kenagy is not a current owner of tax lots 1001, 1091 and 1114 in Sec. 31 and tax lots 207 and 300 in Sec. 31C. Michael Kenagy is not an owner of tax lots 1001 and 1091 in Sec. 31. Jesse Kenagy is not an owner of any of the subject property except for tax lots 1001 and 1091 in Sec. 31.

### **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 their property and to establish a dwelling on the resulting parcels, and that ORS 215 and OAR 660, division 33, restrict that desired use.

The claim is based generally on Clackamas County's current EFU-20 zone (20-acre minimum) and the applicable provisions of state law that require such zoning. The claimants' property is zoned EFU-20 as required by Goal 3 in accordance with ORS 215 and OAR 660, division 33,

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<sup>3</sup> Transfer to a revocable trust does not constitute a change in ownership as to Phyllis Kenagy for the purposes of ORS 197.352.

because the claimants' property is "agricultural land" as defined by Goal 3.<sup>4</sup> Goal 3 became effective on January 25, 1975, and required that agricultural lands as defined by the Goal be zoned Exclusive Farm Use (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 the development of dwellings on existing or any proposed parcel 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).

ORS 215.780(2) allows counties to adopt a low minimum lot or parcel size under specified circumstances set forth in ORS 215.780(2)(a) and (b). 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 became effective on May 22, 2002. (See administrative rule history for OAR 660-033-0100, -0130 and -0135.)

Claimant Phyllis Kenagy first acquired the subject property in 1961, 1963 and 1965, prior to the adoption of the statewide planning goals and their implementing statutes and rules. No county zoning applied to the subject property in 1961, 1963 or 1965.

### **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 Phyllis Kenagy acquired the subject property. These laws restrict the use of the subject property relative to the uses allowed when she acquired the property.

### **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."

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<sup>4</sup> The claimants' property is "agricultural land" because it contains National Resources Conservation Service Class I-IV soils.

## **Findings of Fact**

The claim asserts that the restrictions on the use of the property have reduced the value of the property, but does not include an estimate of the reduction in the subject property's fair market value due to current regulations.<sup>5</sup>

## **Conclusions**

As explained in Section V.(1) of this report, the claimants are Phyllis Kenagy, who initially acquired the subject property between 1961 and 1965, and her sons Michael and Jesse Kenagy. Under ORS 197.352, the claimants are due compensation for land use regulations that restrict the use of the 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 Kenagy family acquired the subject property restrict the desired division and development of the property. Claimants assert these regulations reduce the value of the property but do not provide an estimate of the reduction in value.

Without an appraisal or any documentation, it is not possible to establish a specific dollar amount of compensation due to the claimants. Nonetheless, 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 Kenagy 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 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 the Kenagy family acquired the subject property.

## **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(3). 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 Kenagy family acquired the

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<sup>5</sup> Department staff contacted claimants by phone and was unable obtain an estimate of the reduction in the value of the subject property.

property on October 5, 1961, December 13, 1963, February 23, 1965, and October 1, 1965. As a result, these laws are not exempt under ORS 197.352(3)(E).

Laws in effect when the Kenagy family acquired the subject property 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.

## **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 302.03-acre property 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. However, because the claim does not provide an appraisal or other documentation for how the specified restrictions reduce the fair market value of the subject property, an 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: Phyllis Kenagy to use that portion of the subject property that she currently owns for a use permitted at the time she acquired it on October 5, 1961, December 13, 1963, February 23, 1965, and October 1, 1965; to allow Michael Kenagy to use that portion of the property he currently owns for a use permitted at the time he acquired tax lot 1114 in Sec. 31 and tax lots 207 and 300 in Sec. 31C on January 15, 1982, and at the time he acquired his interest in the remaining tax lots in Sec. 31, except tax lots 1001 and 1091, as trustee on May 4, 1992; and to allow Jesse Kenagy to use tax lots 1001 and 1091 in Sec. 31 for a use permitted at the time he acquired those tax lots on April 19, 1989.

Claimant Phyllis Kenagy is not a current owner of tax lots 1001, 1091 and 1114 in Sec. 31 and tax lots 207 and 300 in Sec. 31C. Michael Kenagy is not an owner of tax lots 1001 and 1091 in Sec 31. Jesse Kenagy is not any owner of any of the subject property except tax lots 1001 and 1091 in Sec. 31. The claimants are not entitled to any relief under ORS 197.352 for those tax lots included in the subject property for which they are not a current owner.

Michael Kenagy acquired tax lot 1114 in Sec. 31 and tax lots 207 and 300 in Sec. 31C after the adoption of the statewide planning goals but before the Commission acknowledged Clackamas County's EFU-20 zone,<sup>6</sup> 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 Michael Kenagy acquired those tax lots on January 15, 1982, the statewide planning goals, and Goal 3 in particular, applied directly to that portion of the property when he acquired it.<sup>7</sup>

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) only authorized the partition of land subject to EFU zoning, and 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, Michael Kenagy's opportunity to divide tax lot 1114 in Sec. 31 and tax lots 207 and 300 in Sec. 31C when he acquired them in 1982 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 January 15, 1982, 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 Michael Kenagy's desired division of the subject property 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 Michael Kenagy's desired development of the subject property satisfies the standards for farm or non-farm dwellings under ORS 215.213 (1973 edition).

When Michael Kenagy acquired the remaining tax lots, except tax lots 1001 and 1091 in Sec. 31, as trustee of the Phyllis Kenagy Trust on May 4, 1992, it was subject to Clackamas County's acknowledged EFU-20 zone.<sup>8</sup> When Michael Kenagy acquired that interest, the desired division

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<sup>6</sup> Clackamas County's EFU-20 zone was acknowledged by the Commission on August 3, 1984.

<sup>7</sup> 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 comprehensive plan and implementing 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 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 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).

<sup>8</sup> Clackamas County's EFU-20 zone was acknowledged by the Commission for compliance with Goal 3 on August 3, 1984.

and development of the property would have been governed by the county's EFU zone and the applicable provisions of ORS 215 and OAR 660, division 6, then in effect.

When Jesse Kenagy acquired tax lots 1001 and 1091 in Sec. 31 on April 19, 1989, the property was also subject to Clackamas County's acknowledged EFU-20 zone. When Jesse Kenagy acquired that portion of the subject property, the desired division and development of the property would also have been governed by the county's EFU zone and the applicable provisions of ORS 215 and OAR 660, division 5, then in effect.

In addition to the applicable provisions of Goal 3 and ORS 215 in effect when the claimants acquired their respective portions of the subject property, 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 proposal for that use. When the claimants seek a building or development permit to carry out a 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 their claim, the greater the possibility that there may be additional laws that will later be determined to continue to apply to their use of the subject property.

### **Conclusions**

Based on the record, the department recommends that the claim be: denied as to claimant Phyllis Kenagy as to tax lots 1001, 1091 and 1114 in Sec. 31 and tax lots 207 and 300 in Sec. 31C; denied as to claimant Michael Kenagy as to tax lots 1001 and 1091 in Sec 31; and denied as to claimant Jesse Kenagy as to all of the subject property except tax lots 1001 and 1091 in Sec. 31 on the basis that the claimants are not current owners of those specified tax lots. The claimants are not entitled to any relief under ORS 197.352 for those tax lots included in the subject property for which they are not a current owner.

Based on the record, the department recommends that the claim be otherwise 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 the claimants' division of that portion of the 302.03-acre property for which they are each a current owner and to their development of a dwelling on each parcel: applicable provisions of Goal 3, ORS 215 and OAR 660, division 33, enacted or adopted after they each acquired their interest in the property.

These land use regulations will not apply to Phyllis Kenagy only to the extent necessary to allow her to use the approximately 258 acres included in tax lots 200, 201, 300, 1000, 1090, 1100 and

1300 in Sec. 31 and tax lot 200 in Sec. 31C for the use described in this report, and only to the extent that use was permitted when she acquired those tax lots on October 5, 1961, December 13, 1963, February 23, 1965, and October 1, 1965.

These land use regulations will not apply to Michael Kenagy only to the extent necessary to allow him to use the approximately 24 acres included in tax lot 1114 in Sec. 31 and tax lots 207 and 300 in Sec. 31C for the use described in this report, and only to the extent that use was permitted when he acquired those tax lots on January 15, 1982, and to allow him to use the approximately 258 acres included in the Phyllis Ann Kenagy Trust for the use described in this report, and only to the extent that use was permitted when he acquired those tax lots as trustee of the Phyllis Ann Kenagy Trust on May 4, 1992.

These land use regulations will not apply to Jesse Kenagy only to the extent necessary to allow him to use the approximately 20 acres included in tax lots 1001 and 1091 in Sec. 31 for the use described in this report, and only to the extent that use was permitted when he acquired those tax lots on April 19, 1989.

2. The action by the State of Oregon provides the state's authorization to each claimant to use that portion of the subject property he or she current owns, subject to the standards in effect when each of the claimants acquired his or her respective portions of the property. Phyllis Kenagy acquired that portion of the property she currently owns prior to the adoption of the statewide planning goals and their implementing statutes and regulations. When Michael Kenagy acquired tax lot 1114 in Sec. 31 and tax lots 207 and 300 in Sec. 31C, the property was subject to the applicable provisions of Goal 3 and ORS 215 then in effect. When Jesse Kenagy acquired tax lots 1001 and 1091 in Sec. 31 and Michael Kenagy acquired the remaining tax lots as trustee of the Phyllis Kenagy Trust, the property was subject to compliance with Clackamas County's acknowledged EFU-20 zone and applicable provisions of Goal 3, ORS 215 and ORS 660, division 5, then in effect.
3. To the extent that any law, order, deed, agreement or other legally enforceable public or private requirement provides that the 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 (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 11, 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.