BEFORE THE DEPARTMENT OF ADMINISTRATIVE SERVICES,
THE DEPARTMENT OF LAND CONSERVATION AND DEVELOPMENT, AND
THE DEPARTMENT OF STATE LANDS OF THE STATE OF OREGON

IN THE MATTER OF THE CLAIM FOR COMPENSATION UNDER BALLOT MEASURE 37 (CHAPTER 1 OREGON LAWS 2005) OF Charles Youngman, Maude Youngman, Betty Janzen, and Robert Janzen, CLAIMANTS	))))))	FINAL ORDER CLAIM NO. M121524

Claimants: Charles Youngman, Maude Youngman, Betty Janzen, and Robert Janzen (the Claimants)

Property: Township 2S, Range 5W, Section 26, Tax lot 1400, Yamhill 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 Ballot Measure 37 (2004) (Oregon Laws 2005, Chapter 1) (hereafter, Measure 37). 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) and the Department of State Lands (the DSL Report) both attached to and by this reference incorporated into this order.

ORDER

The Claim is denied as to laws administered by the Department of State Lands, for the reasons set forth in the DSL Report.

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' division of the 58.14-acre property into parcels and 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.

The above referenced laws will not apply to Maude Youngman only to the extent necessary to allow her to use the subject property for the use described in this report, and only to the extent that use was permitted when she acquired an interest in the property on May 1, 1962.

The laws will not apply to Betty Janzen only to the extent necessary to allow her to use the subject property for the use described in this report, and only to the extent that use was permitted when she acquired an interest in the property on October 13, 1975.

The laws will not apply to Robert Janzen only to the extent necessary to allow him to use the subject property for the use described in this report, and only to the extent that use was permitted when he acquired an interest in the property on February 22, 1985.

The laws will not apply to Charles Youngman only to the extent necessary to allow him to use the subject property for the use described in this report, and only to the extent that use was permitted when he acquired an interest in the property on June 1, 2004. The department acknowledges that the relief to which the Charles Youngman is entitled under ORS 197.352 will not allow him to use the subject property in the manner set forth in the claim.

2. The action by the State of Oregon provides the state's authorization to: Maude Youngman to use the property subject to the standards in effect on May 1, 1962; to Betty Janzen to use the property subject to the standards in effect on October 13, 1975; to Robert Janzen to use the property subject to the standards in effect on February 22, 1985; and to Charles Youngman to use the property subject to the standards in effect on June 1, 2004.

On October 13, 1975, the property was subject to the applicable provisions of Goals 3 and 4 and ORS 215 then in effect.

On February 22, 1985, the property was subject to the applicable provisions of Goals 3 and 4, ORS 215 and OAR 660, divisions 5 and 6, then in effect, and Yamhill County's acknowledged AF 20 zone.

On June 1, 2004, the property was subject to applicable provisions of Goals 3 and 4, ORS 215 and OAR 660, divisions 6 and 33, and Yamhill County's acknowledged AF 20 zone, which are currently in effect.

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

4. Any use of the subject property by the claimants under the terms of the order will remain subject to the following laws: (a) those laws not specified in (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.

6. Nothing in this order is intended to modify, remove or not apply state or federal laws relating to burial sites, including Indian burial sites. These laws will continue to apply to the claimants' use of the subject property.

This Order is entered by the Director of the DLCD as a final order of DLCD and the Land Conservation and Development Commission under Measure 37, 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 Measure 37, OAR 125, division 145 and ORS 293.

This Order is entered by the Department of State Lands as a final order of the department under Measure 37 and OAR 125, Division 145.

FOR DLCD AND THE LAND CONSERVATION AND DEVELOPMENT COMMISSION:

Lane Shetterly, Director
DLCD
Dated this 5th day of June, 2006.

FOR the DEPARTMENT OF ADMINISTRATIVE SERVICES:

Dugan Petty, Deputy Administrator
DAS, State Services Division
Dated this 5th day of June, 2006.

FOR THE DEPARTMENT OF STATE LANDS:
Louise Solliday, Director

By: Jeannette Holman, Assistant Director
Department of State Lands
Dated this 5th day of June, 2006.

NOTICE OF RIGHT TO APPEAL OR OTHER JUDICIAL RELIEF

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

1. Judicial review under ORS 293.316: Judicial review under ORS 293.316 may be obtained by filing a petition for review within 60 days from the service of this order. Judicial review under ORS 293.316 is pursuant to the provisions of ORS 183.482 to the Court of Appeals.

2. 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 and the Circuit Court in the county in which you reside.

3. A cause of action under Oregon Laws 2005, chapter 1 (Measure 37 (2004)): A present owner of the property, or any interest therein, may file a cause of action in the Circuit Court for the county where the property is located, if a land use regulation continues to apply to the subject property more than 180 days after the present owner made a written demand for compensation.

(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

June 5, 2006

STATE CLAIM NUMBER:	M121524
NAMES OF CLAIMANTS:	Charles Youngman Maude Youngman Betty Janzen Robert Janzen
MAILING ADDRESS:	Charles Youngman 4336 Lone Oak Road SE Salem, Oregon 97302 Maude Youngman Betty Janzen Robert Janzen 20555 Southeast Webfoot Road Dayton, Oregon 97114
PROPERTY IDENTIFICATION:	Township 2S, Range 5W, Section 26 Tax lot 1400 Yamhill County
DATE RECEIVED BY DAS:	July 22, 2005
180-DAY DEADLINE:	June 6, 2006[1]

I. SUMMARY OF CLAIM

The claimants, Charles and Maude Youngman and Betty and Robert Janzen, seek compensation in the amount of $1.2 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 58.14-acre property into parcels and to develop a dwelling on each parcel. The subject property is located at the geographic coordinates listed above, near Yamhill, in Yamhill County. (See claim.)

[1] This date reflects 180 days from the date the claim was submitted, as extended by the 139 days that all timelines under Measure 37 were suspended during the pendency of *MacPherson v. Dept. of Admin. Srvcs.*, 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. 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' division of the 58.14-acre property into parcels 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.

The above referenced laws will not apply to Maude Youngman only to the extent necessary to allow her to use the subject property for the use described in this report, and only to the extent that use was permitted when she acquired an interest in the property on May 1, 1962.

The laws will not apply to Betty Janzen only to the extent necessary to allow her to use the subject property for the use described in this report, and only to the extent that use was permitted when she acquired an interest in the property on October 13, 1975.

The laws will not apply to Robert Janzen only to the extent necessary to allow him to use the subject property for the use described in this report, and only to the extent that use was permitted when he acquired an interest in the property on February 22, 1985.

The laws will not apply to Charles Youngman only to the extent necessary to allow him to use the subject property for the use described in this report, and only to the extent that use was permitted when he acquired an interest in the property on June 1, 2004. The department acknowledges that the relief to which Charles Youngman is entitled under ORS 197.352 will not allow him to use the subject property in the manner set forth in the claim.

(See the complete recommendation in Section VI. of this report.)

III. COMMENTS ON THE CLAIM

Comments Received

On September 20, 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, 10 written comments, evidence or information were received in response to the 10-day notice.

Generally, 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 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.

Several of the comments are relevant to whether the laws that are the basis for the claim are exempt under ORS 197.352(3). Two of the comments indicate that a burial site may exist on the subject property. The comments have been considered by the department in preparing this report. (See the comment letters in the department's claim file.)

IV. TIMELINESS OF CLAIM

Requirement

ORS 197.352(5) requires that a written demand for compensation be made:

1. For claims arising from land use regulations enacted prior to the effective date of 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 July 22, 2005, for processing under OAR 125, division 145. The claim identifies Goals 2, 3, 4 and 14; ORS 91, 92, 136, 138, 196, 197 and 215; and OAR 660, divisions 4, 6, 14, 15, and 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

Maude Youngman acquired the subject property on May 1, 1962, as reflected by a warranty deed included with the claim. She continues to own an interest in the property as a co-trustee of the Youngman Family Trust. Betty Janzen acquired an interest in the subject property from Maude Youngman on October 13, 1975, as reflected by a warranty deed included with the

claim.[2] Robert Janzen acquired an interest in the subject property from Betty Janzen on February 22, 1985, as reflected by a warranty deed included with the claim. Charles Youngman, as co-trustee of the of the Youngman Family Trust, acquired an interest in the subject property on June 1, 2004, as reflected by a Certification of Trust included with the claim. A May 25, 2005, Status of Record title report submitted with the claim establishes the claimants' current ownership interests.

Conclusions

Maude Youngman, as co-trustee of the Youngman Family Trust, is an "owner" of an interest in the subject property as that term is defined by ORS 197.352(11)(C), as of May 1, 1962. Betty Janzen is an owner as of October 13, 1975. Robert Janzen is an owner as of February 22, 1985. Charles Youngman, as co-trustee of the Youngman Family Trust, is an owner as of June 1, 2004. Maude Youngman is a "family member" of the other claimants, as that term is defined by ORS 197.352(11)(A).

2. The Laws That are the Basis for This Claim

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

Findings of Fact

The claim indicates that the claimants desire to "subdivide this property" and develop a dwelling on each parcel. It lists numerous state laws asserted to restrict that use. The claim cites Goals 2, 3, 4 and 14; ORS 91, 92, 136, 138, 196, 197 and 215; OAR 660, divisions 4, 6, 14, 15, and 33; and "any other law or rule that restricts the use of my property after date of purchase on 5/1/1962."

ORS 91, 136, 138 and 196 are not enforced by the department or the Commission, and the claimants have not established how they constitute land use regulations that restrict the use of the subject property.[3] ORS 92 establishes procedures for partitioning and subdividing property. ORS 197 authorizes statewide land use planning but does not contain restrictions on the use of real property. The claim does not establish how these laws or the identified statewide planning goals and implementing rules restrict the use of the property. None of these statutes or rules, on their face, restrict the claimants stated desired use of the property. Absent further explanation by the claimants as to how these laws restrict their desired use of the subject property in a manner that reduces its fair market value, these laws are not discussed further in this report. The remainder of this report addresses land use regulations that the department has determined restrict the claimants' stated desire to divide the property and build homesites.

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[2] After that transfer, Maude Youngman transferred her remaining interest in the property to a revocable trust. Transfer to a revocable trust is not a change in ownership for the purposes of ORS 197.352.

[3] ORS 196 is administered by the Oregon Department of State Lands and is addressed in a separate report by that agency.

The claim is based generally on Yamhill County's current AF-40 zone and the applicable provisions of state law that require such zoning. The claimants' property is zoned AF-40, which is a mixed agricultural and forest land zone adopted to comply with Goal 4 and the implementing provisions of OAR 660-006-0050 (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.[4] 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.

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 80-acre minimum lot size specified in ORS 215.780. Under ORS 215.780(2)(a), the minimum lot size in Yamhill County's AF-40 zone is 40 acres. The claimants' property cannot be divided into parcels smaller than 40 acres.

Claimant and family member Maude Youngman acquired the subject property on May 1, 1962, prior to the adoption of statewide planning goals and their implementing statutes and regulations.

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 enacted or adopted after Maude Youngman acquired the subject property in 1962, and do not allow the desired division and development of 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."

Findings of Fact

The claim includes an estimate of $1.2 million as the reduction in the subject property's fair market value due to current regulations. No evidence was presented as to how this estimate was determined.

[4] No information was provided to the department regarding the predominant use of the property on January 1, 1993.

Conclusions

As explained in Section V. (1) of this report, claimant and family member Maude Youngman acquired the subject property in 1962. Under ORS 197.352, the claimants are due compensation for land use regulations that restrict the use of the subject property in a manner that reduces its fair market value. Based on the findings and conclusions in Section V. (2) of this report, laws enacted or adopted since the claimants' family acquired the subject property restrict the desired division and development of the property. The claimants estimate the reduction in value due to the restrictions to be $1.2 million.

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.

4. Exemptions Under ORS 197.352(3)

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

Findings of Fact

The claim is based on state land use regulations that restrict the use of the subject property, including applicable provisions of Goals 3 and 4, ORS 215 and OAR 660, divisions 6, and 33, which Yamhill County has implemented through its AF-40 zone. All of these land use regulations were enacted or adopted after the claimants' family acquired the subject property.

Comments on the claim assert that there is or may be a burial site on the property. One comment states that there is an Indian burial site on the property. If this is the case, federal and corresponding state laws prohibit any disturbance of such sites except under specified conditions. These laws are not identified in the claim, are not subject to ORS 197.352 and will continue to apply to the claimants' use of the 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. It appears that none of the general statutory, goal and rule restrictions on division and development of the subject property were in effect when the claimants' family acquired it in 1962. As a result, these laws are not exempt under ORS 197.352(3)(E).

Laws in effect when the claimants' family acquired the subject property are exempt under ORS 197.352(3)(E) and will continue to apply to the claimants' use of the property. In addition, the department notes that ORS 215.730 and OAR 660, division 6, include standards for siting dwellings in forest zones. The provisions include fire protection standards for dwellings and for surrounding forest zones. 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 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. In some cases, some of these laws may be exempt under ORS 197.352(3)(A) to (D).

VI. FORM OF RELIEF

ORS 197.352(1) provides for payment of compensation to an owner of private real property if the Commission or the department has enforced one or more laws that restrict the use of the property in a manner that reduces its fair market value. In lieu of compensation, the department may choose to not apply the law in order to allow the present owner to carry out a use of the property permitted at the time the current owner acquired the property. The Commission, by rule, has directed that if the department determines a claim is valid, the Director of the department must provide only non-monetary relief unless and until funds are appropriated by the legislature to pay claims.

Findings of Fact

Based on the findings and conclusions set forth in this report, laws enforced by the Commission or the department restrict the claimants' ability to divide the 58.14-acre property into parcels and to develop a dwelling on each parcel. The claim asserts that laws enforced by the Commission or the department reduce the fair market value of the subject property by $1.2 million. However, because the claim does not provide an appraisal or other specific documentation for how the specified restrictions reduce the fair market value of the subject property, a specific amount of compensation cannot be determined. Nevertheless, based on the record for this claim, the department acknowledges that the laws on which the claim is based likely have reduced the fair market value of the subject property to some extent.

No funds have been appropriated at this time for the payment of claims. In lieu of payment of compensation, ORS 197.352 authorizes the department to modify, remove or not apply all or parts of certain land use regulations to allow Maude Youngman to use the subject property for a use permitted at the time she acquired an interest in the property on May 1, 1962.

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 Betty Janzen to use the subject property for a use permitted at the time she acquired an interest in the property on October 13, 1975.

Betty Janzen acquired an interest in the subject property after the adoption of the statewide planning goals, but before the Commission acknowledged Yamhill County's land use regulations

to be in compliance with the statewide planning goals pursuant to ORS 197.250 and 197.251.[5] Because the Commission had not acknowledged the county's plan and land use regulations when Betty Janzen acquired an interest in the subject property on October 13, 1975, the applicable statewide planning goals would have applied directly to any development application for the property.[6]

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 the subject property when Betty Janzen acquired an interest in the property on October 13, 1975, 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

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[5] Yamhill County's comprehensive plan was acknowledged on June 8, 1980.

[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).

[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).

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]

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 Robert Janzen to use the subject property for a use permitted at the time he acquired an interest in the property on February 22, 1985.

At the time Robert Janzen acquired an interest in the property, it was subject to the Yamhill County's AF-20 zone, which was acknowledged by the Commission for compliance with Goals 3 and 4 on June 12, 1980. When Robert Janzen acquired an interest in the subject property, the desired division and development of the property would have been governed by the county's AF-20 zone and the applicable provisions of ORS 215 and OAR 660, divisions 5 and 6, then in effect.

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 Charles Youngman to use the subject property for a use permitted at the time he acquired an interest in the property on June 1, 2004.

At the time Charles Youngman acquired an interest in the subject property, it was zoned AF-40 by Yamhill County and subject to the current lot size and dwelling standards under Goal 4 and the implementing provisions of OAR 660-006-0050 as described in Section V.(2) of this report.

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

Conclusions

Based on the record, the department recommends that the claim be approved, subject to the following terms:

1. In lieu of compensation under ORS 197.352, the State of Oregon will not apply the following laws to the claimants' division of the 58.14-acre property into parcels and to their development

[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)*.

of a dwelling on each parcel: applicable provisions of Goals 3 and 4, ORS 215 and OAR 660, divisions 6 and 33.

The above referenced laws will not apply to Maude Youngman only to the extent necessary to allow her to use the subject property for the use described in this report, and only to the extent that use was permitted when she acquired an interest in the property on May 1, 1962.

The laws will not apply to Betty Janzen only to the extent necessary to allow her to use the subject property for the use described in this report, and only to the extent that use was permitted when she acquired an interest in the property on October 13, 1975.

The laws will not apply to Robert Janzen only to the extent necessary to allow him to use the subject property for the use described in this report, and only to the extent that use was permitted when he acquired an interest in the property on February 22, 1985.

The laws will not apply to Charles Youngman only to the extent necessary to allow him to use the subject property for the use described in this report, and only to the extent that use was permitted when he acquired an interest in the property on June 1, 2004. The department acknowledges that the relief to which the Charles Youngman is entitled under ORS 197.352 will not allow him to use the subject property in the manner set forth in the claim.

2. The action by the State of Oregon provides the state's authorization to: Maude Youngman to use the property subject to the standards in effect on May 1, 1962; to Betty Janzen to use the property subject to the standards in effect on October 13, 1975; to Robert Janzen to use the property subject to the standards in effect on February 22, 1985; and to Charles Youngman to use the property subject to the standards in effect on June 1, 2004.

On October 13, 1975, the property was subject to the applicable provisions of Goals 3 and 4 and ORS 215 then in effect.

On February 22, 1985, the property was subject to the applicable provisions of Goals 3 and 4, ORS 215 and OAR 660, divisions 5 and 6, then in effect, and Yamhill County's acknowledged AF 20 zone.

On June 1, 2004, the property was subject to applicable provisions of Goals 3 and 4, ORS 215 and OAR 660, divisions 6 and 33, and Yamhill County's acknowledged AF 20 zone, which are currently in effect.

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

4. Any use of the subject property by the claimants under the terms of the order will remain subject to the following laws: (a) those laws not specified in (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.

6. Nothing in this order is intended to modify, remove or not apply state or federal laws relating to burial sites, including Indian burial sites. These laws will continue to apply to the claimants' use of the subject property.

VII. COMMENTS ON THE DRAFT STAFF REPORT

The department issued its draft staff report on this claim on May 16, 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.

ORS 197.352 (BALLOT MEASURE 37) CLAIM FOR COMPENSATION

OREGON DEPARTMENT OF STATE LANDS

Final Staff Report and Recommendation
June 5, 2006

OREGON CLAIM NUMBER:	**M121524**
NAME OF CLAIMANT(S):	**Charles Youngman** **Maude Youngman** **Betty Jantzen** **Robert Jantzen**
MAILING ADDRESSES:	**Charles Youngman** **4336 Lone Oak Road SE** **Salem, Oregon 97302** **Maude Youngman** **20555 SW Webfoot Road** **Dayton, Oregon 97114** **Betty Janzen** **20555 SE Webfoot Road** **Dayton, Oregon 97114** **Robert Janzen** **20555 SE Webfoot Road** **Dayton, Oregon 97114**
IDENTIFICATION OF PROPERTY:	**Township 2S, Range 5W, Section 26** **Tax Lot 1400** **Yamhill County**
DATE RECEIVED BY DAS:	**July 22, 2005**
180—DAY DEADLINE:	**June 6, 2006**[1]

I. SUMMARY OF CLAIM

Charles Youngman, Maude Youngman, Betty Janzen and Robert Janzen are the claimants. The claimants seek compensation in the amount of $1,200,000 for the

[1] In Macpherson v. Dep't of Admin. Servs., 340 Or __, 2006 Ore. LEXIS 104 (February 21, 2006), the Marion County trial court entered an order suspending all timelines under ORS 197.352. This order was in effect for a period of 139 days, extending the 180-day deadline under ORS 197.352(6) by that same period.

reduction in the fair market value of the property they allege has resulted from the enforcement of certain land use regulations to restrict their use of the property. The state land use regulation that is administered by the Department of State Lands (DSL) and that is the basis for the claim is the Removal-Fill Law (ORS 196.800 to 196.990) relating to the removal or fill of material in wetlands or other waters of the state. The claimants also cited the Oregon Wetlands Mitigation Bank Act of 1987 (ORS 196.660 to 196.665) relating to the establishment of wetland mitigation banks but these provisions are not regulatory in nature. The use the claimants desire to carry out that is alleged to be prohibited, limited or otherwise restricted by a state land use regulation is to subdivide the 58.14-acre property and to develop a dwelling on each parcel.

II. SUMMARY OF STAFF RECOMMENDATION

Based on the findings and conclusions set forth below, the Department of State Lands (DSL) has determined that this claim does not meet the requirements for relief under ORS 197.352 as to laws administered by DSL. As a result, DSL staff recommend that the claim be denied as to state land use regulations administered by DSL.

III. COMMENTS

On September 20, 2005, pursuant to OAR 125-145-0080, the Department of Administrative Services (DAS) sent notices of this claim to owners of surrounding properties and other interested parties. According to DAS, ten written comments were received in response to the 10-day notice. The department has considered the comments in preparing this report.

IV. TIMELINESS OF THE 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 December 2, 2004, written demand for compensation must be made on or before December 2, 2006, or the date the public entity applies the land use regulation as an approval criteria to an application submitted by the owner of the property, whichever is later.

2. For claims arising from land use regulations enacted after December 2, 2004, written demand for compensation must be made 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 July 22, 2005, for processing under OAR Chapter 125. The claim identifies the following laws administered by DSL as a basis for the claim: Oregon Revised Statutes chapter 196. ORS chapter 196 includes laws pertaining to removal and fill of material within wetlands. Only laws that were enacted prior to December 2, 2004, the effective date of Measure 37, are the basis for this claim.

Conclusions

The claim has been submitted on or before December 2, 2006. The claim is directed at land use regulations enacted before December 2, 2004. As a result, the claim is timely.

V. ANALYSIS OF THE CLAIM

1. Present Owner(s) of the Property

Requirement

ORS 197.352 provides a right to compensation to the *present* owner of the property, under certain circumstances. As a result, the first question that must be answered is whether the claimant is a present owner of the property.

Findings of Fact

DSL incorporates by reference the findings of the Department of Land Conservation and Development (DLCD) for this claim.

Conclusions

Based on the findings of DLCD in its report on this claim, the claimants, Charles Youngman as co-trusteee of the Youngman Family Trust, Maude Youngman as co-strustee of the Youngman Family Trust, Betty Janzen and Robert Janzen are owners of the subject property.

2. Date of Acquisition

Requirement

Under ORS 197.352, a claim may be made only for laws that took effect after the present owner or family member of the present owner acquired the property. Under ORS 197.352, the right to compensation is dependent on the date when the present owner or a family member of the present owner acquired the property. A family member is defined as the wife, husband, son, daughter, mother, father, brother, brother-in-law, sister, sister-in-law, son-in-law, daughter-in-law, mother-in-law, father-in-law, aunt, uncle, niece,

nephew, stepparent, stepchild, grandparent, or grandchild of the present owner of the property, an estate of any of the foregoing family members, or a legal entity owned by any one or combination of these family member or the present owner of the property.

Establishing the date of acquisition is key to determining what state laws are involved, and therefore whether the claimants' use of the property has been restricted and the fair market value of the property has been reduced.

Findings of Fact

Maude Youngman acquired an interest in the subject property on May 1, 1962, as reflected by a warranty deed included with the claim. Maude Youngman, as co-trustee of the Youngman Family Trust, continues to own an interest in the property as reflected in the Certification of Trust included with the claim. Betty Janzen acquired an interest in the subject property from Maude Youngman on October 13, 1975, as reflected by the warranty deed included with the claim.[2] Robert Janzen acquired an interest in the subject property from Betty Janzen on February 22, 1985, as reflected by a warranty deed included with the claim. Charles Youngman, as co-trustee of the Youngman Family Trust, acquired an interest in the subject property on June 1, 2004, as reflected by a Certification of Trust included with the claim.

Conclusions

Maude Youngman, as co-trustee of the Youngman Family Trust, is an "owner" of the subject property as that term is defined by ORS 197.352(11)(C) as of May 1, 1962. Betty Janzen is an owner as of October 13, 1975. Robert Janzen is an owner as of February 22, 1985. Charles Youngman, as co-trustee of the Youngman Family Trust, is an owner as of June 1, 2004. Maude Youngman is a "family member" of the last three claimants, as defined by ORS 197.352(11)(A).

3. The Desired Use of the Property

The claim indicates the desired use of the property is to subdivide the 58.14-acre property into parcels and to develop a dwelling on each parcel.

4. Current State Laws that Restrict the Desired Use of the Property

Requirement

In order for a person to have a right to compensation for an existing state law under ORS 197.352, the law must be a state "land use regulation" that is being enforced, and the law must restrict the claimants' desired use of the property. Not all laws are "land use regulations." Under ORS 197.352 a state land use regulation is: (a) a Statewide Land Use Planning Goal of LCDC; (b) a rule of LCDC; (c) statutes and rules that regulate

[2] After that transfer, Maude Youngman transferred her remaining interest in the property to a revocable trust. Transfer to a revocable trust is not a change in ownership for the purposes of ORS 197.352.

farming and forest practices; and (d) any statute regulating the use of land or any interest therein.

Findings of Fact

The claim lists statutes administered by DSL, "ORS 196.660 to 196.990" and the "Oregon Wetlands Mitigation Bank Act" (short title for ORS 196.600 to 196.655). ORS 196.660 to 196.990 comprise Oregon's Removal-Fill Law, which generally require a permit for the removal or fill of material in waters of the state, including wetlands. The statutes require DSL to include in such permits conditions designed to mitigate for impacts to wetlands.

The State Removal-Fill Law has regulated fill and removal within waters of the state since 1979. The Department of State Lands has not made a wetland determination and no wetland delineation has been completed for this parcel. The National Wetlands Inventory shows only the North Yamhill River on this property. DSL has no other information regarding whether wetlands are located on the property, or might be affected by the claimants' desired use in a manner that would require authorization. The claimants have not applied for a removal-fill permit from the state under ORS 196.800 to 196.990, and DSL has not enforced any land use regulation with regard to the property since Measure 37 took effect on December 2, 2004.

Conclusions

The statutes listed in the claim are state land use regulations under ORS 197.352. DSL has not enforced the listed statutes with regard to this property since December 2, 2004, and the claimants have not applied for a state permit to remove or fill within wetlands on the property. Until the claimants submit an application for a removal-fill permit, DSL has no means of determining whether the listed statutes restrict the claimants' desired use of the property (subdivision). The Removal-Fill Law regulates fill and removal of material within "waters of the state," not subdivision or partition of property.

5. Laws in Effect When the Present Owners Acquired the Property

Requirement

ORS 197.352 requires the state to compensate the present owners of the property if a current state law restricts the use of the property. If the state is paying compensation, then the amount of compensation is determined by the difference in fair market value of the property with the current state land use regulations in place and the fair market value of the property if it were subject to whatever state land use regulations applied to the property when it was acquired by the present owners or a family member of the present owners (whichever occurred first). If the state elects not to pay compensation, however, it may only allow the present owners to use the property for a use permitted when they acquired the property (not when it was acquired by a family member).

As a result, in this section the report summarizes both the laws that were in effect when the present owners acquired the property, and the laws in effect when a family member of the owners acquired the property (if a family member conveyed the property to the present owners).

Findings of Fact

Since 1979, the Removal-Fill Law has required a permit for removal or fill within wetlands, and required DSL to include in such permits conditions designed to mitigate for impacts to wetlands. When the claimant and family member Maude Youngman acquired the property in 1962, there was no such requirement in state law. When the claimant Betty Janzen acquired the property in 1975, there was no such requirement in state law. When claimant Robert Janzen acquired his interest in the property in 1985, the Removal-Fill Law was in effect. When claimant Charles Youngman acquired his interest in the property in 2004, the Removal Fill Law was in effect.

The use that the claimants state in their claim is to subdivide the property and develop a residence on each parcel. If the development of the property will affect a jurisdictional wetland, then state statutes administered by the DSL may require a permit for filling and/or removing more than 50 cubic yards of material within any such wetland.

Until the claimants submit an application for a removal-fill permit, however, DSL is unable to determine whether state land use regulations administered by DSL restrict the use of the property. In addition, under ORS 197.352(1), DSL is authorized to provide relief to claimants only when it has enforced an existing state law through some action taken after December 2, 2004. In this case DSL has not taken any action to enforce the state Removal-Fill Law as to this property after December 2, 2004.

Conclusions

The claimants Maude Youngman and Betty Janzen acquired the property before the Removal-Fill Law began regulating fill and removal within wetlands in 1979. However, DSL has not taken any action to enforce the state Removal-Fill Law as to this property after December 2, 2004.

6. Effect on Fair Market Value

Requirement

There is a right to compensation under ORS 197.352 from the state only if the state enforces an existing land use regulation, and that results in a reduction in the fair market value of the property.

Findings of Fact

The claim includes an estimate of $1,200,000 as the reduction in the subject property's fair market value due to current regulations. No evidence is presented as to how this estimate was determined.

Conclusions

As explained in Section V.(2) of this report, claimant and family member Maude Youngman acquired the subject property in 1962. Under ORS 197.352, the claimants are due compensation for land use regulations that restrict the use of the subject property in a manner that reduces its fair market value.

Without an appraisal or other documentation, it is not possible to substantiate the specific dollar amount the claimants demand for compensation based on state land use regulations that are administered by DSL and that have been enforced since December 2, 2004. As a result, DSL is unable to determine that there is any restriction on the claimants' desired uses of the property or any reduction of the fair market value of the property.

7. Exemptions

Requirement

ORS 197.352 does not apply to state land use regulations that:

- Restrict or prohibit activities commonly and historically recognized as public nuisances under common law;
- Restrict or prohibit activities for the protection of public health and safety, such as fire and building codes, health and sanitation regulations, solid or hazardous waste regulations, and pollution control regulations;
- To the extent the land use regulation is require to comply with federal law;
- Restrict or prohibit the use of a property for the purpose of selling pornography or performing nude dancing; or that were
- Enacted prior to the date of acquisition of the property by the owner or a family member of the owner who owned the subject property prior to acquisition or inheritance by the owner, whichever occurred first.

Findings of Fact

The claim is based apparently on the provisions of the state Removal-Fill Law (ORS 196.800 to 196.990) that were enacted in 1979 and the requirements of ORS 196.668 to 196.684 related to the creation of wetland conservation plans, enacted in 1989. Claimant and family member Maude Youngman acquired the subject property in 1962. Claimant Betty Janzen acquired an interest in the subject property in 1975. As a result, the state Removal-Fill Law does not appear to be specifically exempt under ORS 197.352(3)(E). Other exemptions may apply to the Removal-Fill Law.

The claimants should be aware that depending on the nature of the use of the property that is finally proposed, one or more of the exemptions in ORS 197.352(3)(A)-(D) may

apply. However, until the claimants apply for a removal-fill permit, DSL is unable to determine what laws and what exemptions may apply.

Conclusions

This report addresses only those state laws that are identified in the claim, or that DSL is certain apply to the property based on the use(s) 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 DSL in the claim. The State Removal-Fill Law does not appear to come under the exemption in ORS 197.352(3)(E). However, other exemptions may apply to the Removal-Fill Law. Claimants should be aware that the less information they provide to DSL in their claim, the greater the possibility that there may be additional laws administered by DSL that will later be determined to continue to apply to their use of the property.

VI. FORM OF RELIEF

1. Is the Present Owner Entitled to Relief

Requirement

A claimant is entitled to relief if:

- The claimants are present owners of the property, or an interest in the property;
- A state land use regulation enacted before December 2, 2004 is being enforced against the claimants' use of the property;
- The state land use regulation that is being enforced restricts the claimants' use of the property; and
- The restriction reduces the fair market value of the property, relative to how the property could be used when the present owners or a family member of the present owners acquired the property.

The state may either pay compensation, or not apply the state land use regulation(s) in question.

Findings of fact

Based on the information currently in its record, the claim does not provide sufficient facts to qualify for relief under ORS 197.352.

Conclusions

DSL staff denies this claim as to state land use regulations administered by DSL because the Removal-Fill Law and Wetlands Mitigation Bank Act (the state land use regulation identified by claimants) have not been enforced by DSL as to the claimants' use of this property since December 2, 2004. In addition, the claimants have not identified how the

Removal-Fill Law restricts their desired use of the property. The Removal-Fill Law does not prohibit development in a wetland, rather, it simply requires a permit for removal or filling of more than 50 cubic yards of material within a wetland. Until the claimants apply for a permit and DSL has acted on the permit application, DSL has not enforced the Oregon Removal-Fill Law and it is not possible to determine whether that law would restrict use of this property and reduce its fair market value.

VII. COMMENTS ON THE DRAFT STAFF REPORT

DSL issued its draft staff report on April 25, 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 or information in response to the draft staff report and recommendation. No comments were received.