

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

IN THE MATTER OF THE CLAIM FOR)
COMPENSATION UNDER ORS 197.352) FINAL ORDER
(BALLOT MEASURE 37) OF) CLAIM NO. M121486
Alice Gruber, CLAIMANT)

Claimant: Alice Gruber (the Claimant)

Property: Township 10S, Range 10W, Section 32D, Tax lots 100 and 1300, Lincoln County
(the Property)

Claim: The demand for compensation and any supporting information received from the
Claimant by the State of Oregon (the Claim).

Claimant 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 Alice Gruber's partition of the 40.56-acre property into 1 to 2-acre parcels for residential development: the applicable provisions of Goal 14 and OAR 660-004-0040, adopted after May 28, 1980. These land use regulations will not apply to the claimant only to the extent necessary to allow her to use the property for the use described in this report, and only to the extent that use was permitted when she acquired the property on May 28, 1980.
2. The action by the State of Oregon provides the state's authorization to the claimant to use the property, subject to the standards in effect on May 28, 1980. On that date, the property was subject to applicable provisions of Goal 14 in effect at that time.
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 claimant first obtains that permit, license or other form of authorization or consent.

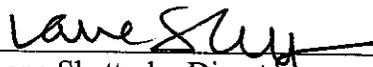
Such requirements may include, but are not limited to: a building permit, a land use decision, a "permit" as defined in ORS 215.402 or 227.160, other permits or authorizations from local, state or federal agencies and restrictions on the use of the subject property imposed by private parties.

4. Any use of the subject property by the claimant 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 claimant to use the subject property, it may be necessary for her 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 claimant 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 claimant.

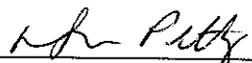
This Order is entered by the Director of the DLCD as a final order of DLCD and the Land Conservation and Development Commission under ORS 197.352, OAR 660-002-0010(8), and OAR 125, division 145, and by the Deputy Administrator for the State Services Division of the DAS as a final order of DAS under ORS 197.352, OAR 125, division 145, and ORS 293.

FOR DLCD AND THE LAND CONSERVATION
AND DEVELOPMENT COMMISSION:



Lane Shetterly, Director
DLCD
Dated this 31st day of May, 2006.

FOR the DEPARTMENT OF ADMINISTRATIVE
SERVICES:



Dugan Petty, Deputy Administrator
DAS, State Services Division
Dated this 31st day of May, 2006.

NOTICE OF RIGHT TO APPEAL OR OTHER JUDICIAL RELIEF

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

1. Judicial review under ORS 183.484: Judicial review under ORS 183.484 may be obtained by filing a petition for review within 60 days from the service of this order. A petition for judicial review under ORS 183.484 may be filed in the Circuit Court for Marion County or the Circuit Court in the county in which you reside.
2. A cause of action under ORS 197.352 (Measure 37 (2004)): If a land use regulation continues to apply to the subject property more than 180 days after the present owner of the property has made written demand for compensation under ORS 197.352¹, the present owner of the property, or any interest therein, shall have a cause of action in the circuit court in which the real property is located.

(Copies of the documents that comprise the record are available for review at the Department's office at 635 Capitol Street NE, Suite 150, Salem, Oregon 97301-2540)

FOR INFORMATION ONLY

The Oregon Department of Justice has advised the Department of Land Conservation and Development that "[i]f the current owner of the real property conveys the property before the new use allowed by the public entity is established, then the entitlement to relief will be lost."

¹ By order of the Marion County Circuit Court, "all time lines under Measure 37 [were] suspended indefinitely" on October 25, 2005. This suspension was lifted on March 13, 2006 by the court. As a result, a period of 139 days (the number of days the time lines were suspended) has been added to the 180-day time period under ORS 197.352(6) for claims that were pending with the state on October 25, 2005.

ORS 197.352 (BALLOT MEASURE 37) CLAIM FOR COMPENSATION
OREGON DEPARTMENT OF LAND CONSERVATION AND DEVELOPMENT
Final Staff Report and Recommendation

May 31, 2006

STATE CLAIM NUMBER: M121486–Report A

NAME OF CLAIMANT: Alice Gruber¹

MAILING ADDRESS: 490 Miller Street SE
Salem, Oregon 97302-4249

PROPERTY IDENTIFICATION: Township 10S, Range 10W, Section 32D
Tax lots 100 and 1300
Lincoln County

OTHER CONTACT INFORMATION: David Hilgemann
530 Center Street NE, Suite 700
Salem, Oregon 97301-3756

DATE RECEIVED BY DAS: July 19, 2005

180-DAY DEADLINE: June 3, 2006²

I. SUMMARY OF CLAIM

The claimant, Alice Gruber, seeks compensation in the amount of \$485,000³ 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 claimant desires compensation or the right to partition the 40.56-acre property (tax lots 100 and 1300 listed as Parcel I in the claim) into 1 to 2-acre parcels for residential development. The subject property is located at the geographic coordinates listed above, near Toledo, in Lincoln County. (See claim.)

¹ Alice Gruber along with Dr. Matthew Gruber, Merrick Kriz and Cynthia Condon are listed as claimants in claim M121486. However, materials submitted with the claim indicate that Alice Gruber is the only claimant for the property described in those materials as Parcel I (tax lots 100 and 1300). Parcel I is the subject of this report. Other tax lots included in the claim are addressed in Reports B and C.

² 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).

³ The total amount of compensation for the reduction in fair market value requested in claim M121486 is \$1,820,000. The claim provides an appraisal that estimates the loss in fair market value for each parcel identified, according to ownership. The loss in fair market value for Parcel I, owned by Alice Gruber, is \$485,000.

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 Alice Gruber's partition of the 40.56-acre property into 1 to 2-acre parcels for residential development: applicable provisions of Statewide Planning Goal 14 (Urbanization) and Oregon Administrative Rules (OAR) 660-04-0040, adopted after May 28, 1980. These laws will not apply to the claimant only to the extent necessary to allow her to use the property for the use described in this report, and only to the extent that use was permitted when she acquired the property on May 28, 1980. (See the complete recommendation in Section VI. of this report.)

III. COMMENTS ON THE CLAIM

Comments Received

On September 25, 2005, pursuant to OAR 125-145-0080, the Oregon Department of Administrative Services (DAS) provided written notice to the owners of surrounding properties. According to DAS, two written comments, evidence or information were received in response to the 10-day notice.

The comments are relevant to when the claimant became the present owner of the property. The comments have been considered by the department in preparing this report. (See the comment letter 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 19, 2005, for processing under OAR 125, division 145. The claim identifies Goals 3 (Agricultural Lands) and 4 (Forest Lands), ORS 215, OAR 660 and Lincoln County rural residential and timber-conservation zoning 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 claimant, Alice Gruber, acquired the subject property on May 28, 1980, as reflected by the title report included with the claim. The Lincoln County Assessor’s Office confirms the claimant’s current ownership of the subject property.

Conclusions

The claimant, Alice Gruber, is an “owner” of the subject property as that term is defined by ORS 197.352(11)(C), as of May 28, 1980.

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 claimant’s 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 claimant or a family member acquired the property.

Findings of Fact

The claim indicates that the claimant desires to partition the 40.56-acre property (Parcel I) for residential development, which is not allowed under the property’s current zoning.

The claim is based generally on Lincoln County’s current RR-5 (rural residential five-acre minimum lot size) zone and the applicable provisions of state law that require such zoning. The county’s RR-5 zone is a rural residential zone as required by Goal 14, which generally requires that land outside of urban growth boundaries be used for rural uses.

Goal 14 was effective on January 25, 1975, and requires that local comprehensive plans identify and separate urbanizable land from rural land in order to provide for an orderly and efficient transition from rural to urban land use. In 2000, as a result of a 1986 Oregon Supreme Court

decision,⁴ the Commission amended Goal 14 and adopted OAR 660-004-0040 (Application of Goal 14 to Rural Residential Areas), which was effective on October 4, 2000. The rule states that if a county rural residential zone in effect on October 4, 2000, specifies a minimum lot size of two acres or more, the area of any new lot or parcel shall equal or exceed the minimum lot size that is already in effect (OAR 660-004-0040(7)(c)). Some relief from this provision is available for lots or parcels having more than one permanent habitable dwelling pursuant to OAR 660-004-0040(7)(h). The rule also provides that a county's minimum lot size requirement in a rural residential zone shall not be amended to allow a smaller minimum lot size without approval of an exception to Goal 14 (OAR 660-004-0040(6)). Because Lincoln County's Rural Residential zone was in effect on October 4, 2000, and requires a minimum lot size of five acres, the minimum lot size for any new lot or parcel must equal or exceed five acres.

The claimant acquired the subject property after the adoption of the statewide planning goals, but before the Commission acknowledged Lincoln County's land use regulations to be in compliance with statewide planning goals pursuant to ORS 197.250 and 197.251. Because the Commission had not acknowledged Lincoln County's plan and land use regulations when the claimant acquired the subject property in 1980, the statewide planning goals, including Goal 14, applied directly to the claimant's property when she acquired it.⁵ As interpreted by the Commission (OAR 660-040-0040), Goal 14 generally required a minimum lot size of at least two acres. The claim does not establish whether the claimant's desired use would have been permitted under this standard.

Conclusions

The minimum lot size requirements for rural residential lots or parcels established by Goal 14 and OAR 660-004-0040 were adopted after the claimant acquired the subject property in 1980 and do not allow the desired division of the property. When the claimant acquired the subject property in 1980, the statewide planning goals, and in particular the general requirements of Goal 14, applied directly to the property. The claim does not establish whether or to what extent the claimant's desired use would have been permitted under the laws in effect in 1980 when the claimant acquired the subject property.

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 claimant has identified. There may be other laws that currently apply to the claimant's use of the subject property, and that may continue to apply to the claimant's use of the subject property, that have not been identified in the claim. In some cases, it will not be possible to know which laws apply to a use of subject

⁴ *1000 Friends of Oregon v. LCDC (Curry County)*, 301 Or 447 (1986).

⁵ 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. *Foster v. Polk County*, 115 Or App 475 (1992); *Kenagy v. Benton County*, 115 Or App 131 (1992).

property until there is a specific proposal for that use. When the claimant seeks a building or development permit to carry out a specific use, it may become evident that other state laws apply to that use.

3. Effect of Regulations on Fair Market Value

In order to establish a valid claim, ORS 197.352(1) requires that any land use regulation described in Section V.(2) of this report must have “the effect of reducing the fair market value of the property, or any interest therein.”

Findings of Fact

The claim includes an estimate of \$485,000 as the reduction in the property’s fair market value due to current regulations. This amount is based on an appraisal.

Conclusions

As explained in Section V.(1) of this report, the claimant is Alice Gruber who acquired the subject property on May 28, 1980. Under ORS 197.352, the claimant is due compensation for land use regulations that restrict the use of the subject property in a manner that reduces its fair market value. Based on the findings and conclusions in Section V.(2) of this report, laws adopted since the claimant acquired the subject property may restrict the desired division of the property. The claimant estimates the reduction in value due to the restrictions to be \$485,000.

Without further investigation and documentation, and without verification of whether or to what extent the claimant’s desired use of the property was allowed under the standards in effect when she acquired the property, it is not possible to substantiate the specific dollar amount the claimant demands 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 Goal 14 and OAR 660-004-0040, which Lincoln County has implemented through its RR-5 zone. With the exception of provisions of Goal 14 adopted before the claimant acquired the subject property on May 28, 1980, these state land use regulations were not in effect when the claimant acquired 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 the goal and rule restrictions on residential division of the claimant's property are not exempt under ORS 197.352(3)(E) to the extent they were adopted after the claimant acquired the property. Provisions of Goal 14 in effect when the claimant acquired the subject property in 1980 are exempt under ORS 197.352(3)(E) and will continue to apply to the property.

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

This report addresses only those state laws that are identified in the claim, or that the department is certain apply to the subject property based on the uses that the claimant has 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 claimant should be aware that the less information she has provided to the department in her claim, the greater the possibility that there may be additional laws that will later be determined to continue to apply to her use of the subject property.

VI. FORM OF RELIEF

ORS 197.352(1) provides for payment of compensation to an owner of private real property if the Commission or the department has enforced laws that restrict the use of the 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 claimant's ability to partition the 40.56-acre property into 1 to 2-acre parcels for residential development. The claim asserts that the laws enforced by the Commission or the department reduce the fair market value of the subject property by \$485,000. However, without further investigation and documentation establishing how the specified restrictions reduce the fair market value of the property, and without verification of whether or to what extent the claimant's desired use of the property was allowed under the standards in effect when she acquired the property, a specific amount of compensation cannot be determined.

Nevertheless, based on the record for this claim, the department acknowledges that the laws on which the claim is based likely have reduced the fair market value of the 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 Alice Gruber to use the subject property for a use permitted at the time she acquired the property on May 28, 1980.

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 Alice Gruber's partition of the 40.56-acre property into 1 to 2-acre parcels for residential development: the applicable provisions of Goal 14 and OAR 660-004-0040, adopted after May 28, 1980. These land use regulations will not apply to the claimant only to the extent necessary to allow her to use the property for the use described in this report, and only to the extent that use was permitted when she acquired the property on May 28, 1980.
2. The action by the State of Oregon provides the state's authorization to the claimant to use the property, subject to the standards in effect on May 28, 1980. On that date, the property was subject to applicable provisions of Goal 14 in effect at that time.
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 claimant first obtains that permit, license or other form of authorization or consent. Such requirements may include, but are not limited to: a building permit, a land use decision, a "permit" as defined in ORS 215.402 or 227.160, other permits or authorizations from local, state or federal agencies and restrictions on the use of the subject property imposed by private parties.
4. Any use of the subject property by the claimant 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 claimant to use the subject property, it may be necessary for her 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 claimant 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 claimant.

VII. COMMENTS ON THE DRAFT STAFF REPORT

The department issued its draft staff report on this claim on May 11, 2006. OAR 125-145-0100(3), provided an opportunity for the claimant or the claimant's authorized agent and any third parties who submitted comments under OAR 125-145-0080 to submit written comments, evidence and information in response to the draft staff report and recommendation. Comments received have been taken into account by the department in the issuance of this final report.

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. M121486
(BALLOT MEASURE 37) OF)	
Merrick Kriz and Cynthia Condon, CLAIMANTS)	

Claimants: Merrick Kriz and Cynthia Condon (the Claimants)

Property: Township 10S, Range 10W, Section 32, Tax lot 1403
Township 10S, Range 10W, Section 33, Tax lot 101
Lincoln 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 Merrick Kriz and Cynthia Condon's division of the 26.10-acre subject property into 1 to 2-acre parcels for residential development: the applicable provisions of Goal 14 and OAR 660-004-0040 adopted after December 10, 1996. These land use regulations will not apply to the claimants only to the extent necessary to allow them to use the property for the use described in this report, and only to the extent that the use was permitted when they acquired the property on December 10, 1996.
2. The action by the State of Oregon provides the state's authorization to the claimants to use the property subject to the standards in effect on December 10, 1996. On that date, the property was subject to Lincoln County's acknowledged comprehensive plan and applicable provisions of Goal 14, then in effect.
3. To the extent that any law, order, deed, agreement or other legally enforceable public or private requirement provides that the property may not be used without a permit, license or other

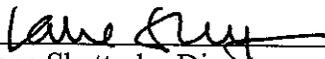
form of authorization or consent, the order will not authorize the use of the property unless the claimants first obtain that permit, license or other form of authorization or consent. Such requirements may include, but are not limited to: a building permit, a land use decision, a "permit" as defined in ORS 215.402 or 227.160, other permits or authorizations from local, state or federal agencies and restrictions on the use of the property imposed by private parties.

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

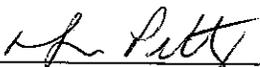
5. Without limiting the generality of the foregoing terms and conditions, in order for the claimants to use the property, it may be necessary for them to obtain a decision under ORS 197.352 from a city and/or county and/or metropolitan service district that enforces land use regulations applicable to 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 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:


Lane Shetterly, Director
DLCD
Dated this 31st day of May, 2006.

FOR the DEPARTMENT OF ADMINISTRATIVE
SERVICES:


Dugan Petty, Deputy Administrator
DAS, State Services Division
Dated this 31st day of May, 2006.

NOTICE OF RIGHT TO APPEAL OR OTHER JUDICIAL RELIEF

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

1. Judicial review under ORS 183.484: Judicial review under ORS 183.484 may be obtained by filing a petition for review within 60 days from the service of this order. A petition for judicial review under ORS 183.484 may be filed in the Circuit Court for Marion County or the Circuit Court in the county in which you reside.
2. A cause of action under ORS 197.352 (Measure 37 (2004)): If a land use regulation continues to apply to the subject property more than 180 days after the present owner of the property has made written demand for compensation under ORS 197.352¹, the present owner of the property, or any interest therein, shall have a cause of action in the circuit court in which the real property is located.

(Copies of the documents that comprise the record are available for review at the Department's office at 635 Capitol Street NE, Suite 150, Salem, Oregon 97301-2540)

FOR INFORMATION ONLY

The Oregon Department of Justice has advised the Department of Land Conservation and Development that "[i]f the current owner of the real property conveys the property before the new use allowed by the public entity is established, then the entitlement to relief will be lost."

¹ By order of the Marion County Circuit Court, "all time lines under Measure 37 [were] suspended indefinitely" on October 25, 2005. This suspension was lifted on March 13, 2006 by the court. As a result, a period of 139 days (the number of days the time lines were suspended) has been added to the 180-day time period under ORS 197.352(6) for claims that were pending with the state on October 25, 2005.

ORS 197.352 (BALLOT MEASURE 37) CLAIM FOR COMPENSATION
OREGON DEPARTMENT OF LAND CONSERVATION AND DEVELOPMENT
Final Staff Report and Recommendation

May 31, 2006

STATE CLAIM NUMBER: M121486-Report B

NAMES OF CLAIMANTS: Merrick Kriz and Cynthia Condon¹

MAILING ADDRESS: 490 Miller Street SE
Salem, Oregon 97302-4249

PROPERTY IDENTIFICATION: Township 10S, Range 10W, Section 32
Tax lot 1403
Township 10S, Range 10W, Section 33
Tax lot 101
Lincoln County

OTHER CONTACT INFORMATION: David Hilgemann
530 Center Street NE, Suite 700
Salem, Oregon 97301-3756

DATE RECEIVED BY DAS: July 19, 2005

180-DAY DEADLINE: June 3, 2006²

I. SUMMARY OF CLAIM

The claimants, Merrick Kriz and Cynthia Condon, seek compensation in the amount of \$305,000³ 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 partition the 26.10-acre property (tax lots 101 and 1403 listed as Parcel II in the claim) into 1 to 2-acre parcels for residential development. The subject property is located at the geographic coordinates listed above, near Toledo, in Lincoln County. (See claim.)

¹ Merrick Kriz and Cynthia Condon along with Matthew and Alice Gruber are listed as claimants in claim M121486. However, materials submitted with the claim indicate that Merrick Kriz and Cynthia Condon are the only claimants for the property described in those materials as Parcel II (tax lots 101 and 1403). Parcel II is the subject of this report. Other tax lots included in the claim are addressed in Reports A and C.

² 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).

³ The total amount of compensation for the reduction in fair market value requested in claim M121486 is \$1,820,000. The claim provides an appraisal that estimates the loss in fair market value for each parcel identified, according to ownership. The loss in fair market value for Parcel II, owned by Ms. Kriz and Ms. Condon, is \$305,000.

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 Merrick Kriz and Cynthia Condon's partition of the 26.10-acre property into 1 to 2-acre parcels for residential development: applicable provisions of Statewide Planning Goal 14 (Urbanization) and Oregon Administrative Rules (OAR) 660-004-0040, adopted after December 10, 1996. These land use regulations will not apply to the claimants only to the extent necessary to allow them to use the property for the use described in this report, and only to the extent that use was permitted when they acquired the property on December 10, 1996. (See the complete recommendation in Section VI. of this report.)

III. COMMENTS ON THE CLAIM

Comments Received

On September 15, 2005, pursuant to OAR 125-145-0080, the Oregon Department of Administrative Services (DAS) provided written notice to the owners of surrounding properties. According to DAS, two written comments, evidence or information were received in response to the 10-day notice.

The comments are relevant to when the claimants became the present owners of the property. The comments have been considered by the department in preparing this report. (See 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 19, 2005, for processing under OAR 125, division 145. The claim identifies Goals 3 (Agricultural Lands) and 4 (Forest Lands), ORS 215, OAR 660 and

Lincoln County rural residential and timber-conservation zoning as the basis for the claim. Only laws that were enacted or adopted prior to December 2, 2004, are the basis for this claim.

Conclusions

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

V. ANALYSIS OF CLAIM

1. Ownership

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

Findings of Fact

The claimants, Merrick Kriz and Cynthia Condon, acquired the subject property on December 10, 1996, from their mother Alice Gruber, as reflected by a title report obtained from a title company.⁴ Alice Gruber obtained the property from a corporation on October 21, 1986. The Lincoln County Assessor’s Office confirms the claimants’ current ownership of the subject property.

Conclusions

The claimants, Merrick Kriz and Cynthia Condon, are “owners” of the subject property as that term is defined by ORS 197.352(11)(C), as of December 10, 1996. The claimants’ mother, Alice Gruber, is a “family member” as defined by ORS 197.352(11)(A) and acquired the subject property on October 21, 1986.

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.

⁴ The claim alleges that the claimants’ parents acquired the subject property in the 1960s. However, the title report also documents a transfer of the property to a corporation prior to Alice Gruber’s acquisition in 1986. Transfer of the property to a corporation resulted in a transfer of ownership from the family for the purposes of ORS 197.352.

Findings of Fact

The claim indicates that the claimants desire to partition the 26.10-acre property (Parcel II) into 1 to 2-acre parcels for residential development, which is not allowed under the property's current zoning.⁵

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

Goal 14 was effective on January 25, 1975, and requires that local comprehensive plans identify and separate urbanizable land from rural land in order to provide for an orderly and efficient transition from rural to urban land use. In 2000, as a result of a 1986 Oregon Supreme Court decision,⁶ the Commission amended Goal 14 and adopted OAR 660-004-0040 (Application of Goal 14 to Rural Residential Areas), which was effective on October 4, 2000. The rule states that if a county rural residential zone in effect on October 4, 2000, specifies a minimum lot size of two acres or more, the area of any new lot or parcel shall equal or exceed the minimum lot size that is already in effect (OAR 660-004-0040(7)(c)). Some relief from this provision is available for lots or parcels having more than one permanent habitable dwelling pursuant to OAR 660-004-0040(7)(h). The rule also provides that a county's minimum lot size requirement in a rural residential zone shall not be amended to allow a smaller minimum lot size without approval of an exception to Goal 14 (OAR 660-004-0040(6)). Because Lincoln County's Rural Residential zone was in effect on October 4, 2000, and requires a minimum lot size of five acres, the minimum lot size for any new lot or parcel must equal or exceed five acres.

When the claimants' family acquired the property on October 21, 1986, it was subject to Lincoln County's acknowledged comprehensive plan. Residential development of the subject property at that time would have been subject to the provisions of the county's comprehensive plan and land use ordinances, including provisions of Goal 14 implemented by those regulations.

Conclusions

The minimum lot size requirements for rural residential lots or parcels established by amendments to Goal 14 and OAR 660-004-0040 were adopted after the claimants acquired the subject property in 1996, and do not allow the desired division of the property. However, the claim does not establish whether or to what extent the claimants' desired use would have been permitted under the laws in effect in 1986 when the claimants' family acquired the property.

⁵ The claim cites Goals 3 and 4 as applicable to this claim. However, the subject property is zoned for rural residential development, which is not implemented by either of those goals. Neither Goal 3 nor 4 appears to be applicable to this claim and is not addressed further in this report.

⁶ *1000 Friends of Oregon v. LCDC (Curry County)*, 301 Or 447 (1986).

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 \$305,000 as the reduction in the subject's property's fair market value due to current regulations. This amount is based on an appraisal.

Conclusions

As explained in Section V.(1) of this report, the claimants are Merrick Kriz and Cynthia Condon whose family member acquired the subject property on October 21, 1986. Under ORS 197.352, the claimants are due compensation for land use regulations that restrict the use of the subject property in a manner that reduces its fair market value. Based on the findings and conclusions in Section V.(2) of this report, laws adopted since the claimants' family acquired the property restrict the desired division of the subject property. The claimants estimate the reduction in value due to the restrictions to be \$305,000.

Without further investigation and documentation, it is not possible to substantiate the specific dollar amount the claimants demand for compensation. Nevertheless, based on the submitted information, the department determines that it is more likely than not the fair market value of the subject property has been reduced to some extent as a result of land use regulations enforced by the Commission or the department.

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 claimants' property, including Goal 14 and OAR 660-004-0040, which Lincoln County has implemented through its RR-5 zone. With the exception of provisions of Goal 14 in effect when the claimants' family acquired the property on October 21, 1986, these land use regulations were not in effect when the claimants' family acquired the property.

Conclusions

It appears that the general goal and rule restrictions on residential division of the claimants' property are not exempt under ORS 197.352(3)(E) to the extent they were adopted after the claimants' family acquired the property. Provisions of Goal 14 in effect when the claimants' family acquired the property in 1986 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

Based on the findings and conclusions set forth in this report, laws enforced by the Commission or the department restrict the claimants' ability to partition the subject 26.10-acre property into 1 to 2-acre parcels for residential use. The claim asserts that the laws enforced by the Commission or the department reduce the fair market value of the subject property by \$305,000. However, without further investigation and documentation establishing how the specified restrictions reduce the fair market value of the property, a specific amount of compensation cannot be determined. Nevertheless, based on the record for this claim, the department acknowledges that the laws on which the claim is based likely have reduced the fair market value of the 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 Merrick Kriz and Cynthia Condon to use the subject property for a use permitted at the time they acquired the property on December 10, 1996. At that time, the property was subject to Lincoln County's acknowledged comprehensive plan. Residential development of the subject property at that time would have been subject to the provisions of the county's comprehensive plan and land use ordinances, including provisions of Goal 14 implemented by those regulations.

In addition to the applicable provisions of Goal 14 in effect on December 10, 1996, there may be other laws that apply to the claimants' use of the property that have not been identified in the claim. In some cases, it will not be possible to know which laws apply to a use of the subject property until there is a specific proposal for that use. When the claimants seek a building or development permit to carry out a specific use, it may become evident that other state laws apply to that use, and depending on when they were enacted or adopted, may continue to apply to that use of 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 property based on the use 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 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 Merrick Kriz and Cynthia Condon's division of the 26.10-acre subject property into 1 to

2-acre parcels for residential development: the applicable provisions of Goal 14 and OAR 660-004-0040 adopted after December 10, 1996. These land use regulations will not apply to the claimants only to the extent necessary to allow them to use the property for the use described in this report, and only to the extent that the use was permitted when they acquired the property on December 10, 1996.

2. The action by the State of Oregon provides the state's authorization to the claimants to use the property subject to the standards in effect on December 10, 1996. On that date, the property was subject to Lincoln County's acknowledged comprehensive plan and applicable provisions of Goal 14, then in effect.

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

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

VII. COMMENTS ON THE DRAFT STAFF REPORT

The department issued its draft staff report on this claim on May 11, 2006. OAR 125-145-0100(3), provided an opportunity for the claimant or the claimant's authorized agent and any third parties who submitted comments under OAR 125-145-0080 to submit written comments, evidence and information in response to the draft staff report and recommendation. Comments received have been taken into account by the department in the issuance of this final report.

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. M121486
(BALLOT MEASURE 37) OF)
Dr. Matthew Gruber and Alice Gruber, CLAIMANTS)

Claimants: Dr. Matthew Gruber and Alice Gruber (the Claimants)

Property: Township 10S, Range 10W, Section 32, Tax lots 1411 and 1412
Township 10S, Range 10W, Section 33, Tax lots 105 and 106
Lincoln 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 Matthew and Alice Gruber partition of the 61-acre property into 1 to 2-acre parcels or to their development of a dwelling on each parcel: applicable provisions of Goal 4, ORS 215 and OAR 660, division 6, enacted or adopted after April 18, 2000. These land use regulations will not apply to the claimants only to the extent necessary to allow them to use the subject property for the use described in this report, and only to the extent that use was permitted when they acquired the property on April 18, 2000. The department acknowledges that the relief to which the claimants are entitled under ORS 197.352 will not allow the claimants 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 the claimants to use the subject property for the use described in this report, subject to the standards in effect on April 18, 2000. On that date, the property was subject to compliance with Lincoln County's acknowledged forest zone and the applicable provisions of Goal 4, ORS 215 and OAR 600, division 6, 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.

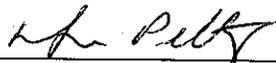
This Order is entered by the Director of the DLCD as a final order of DLCD and the Land Conservation and Development Commission under ORS 197.352, OAR 660-002-0010(8), and OAR 125, division 145, and by the Deputy Administrator for the State Services Division of the DAS as a final order of DAS under ORS 197.352, OAR 125, division 145, and ORS 293.

FOR DLCD AND THE LAND CONSERVATION
AND DEVELOPMENT COMMISSION:



Lane Shetterly, Director
DLCD
Dated this 31st day of May, 2006.

FOR the DEPARTMENT OF ADMINISTRATIVE
SERVICES:



Dugan Petty, Deputy Administrator
DAS, State Services Division
Dated this 31st day of May, 2006.

NOTICE OF RIGHT TO APPEAL OR OTHER JUDICIAL RELIEF

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

1. Judicial review under ORS 183.484: Judicial review under ORS 183.484 may be obtained by filing a petition for review within 60 days from the service of this order. A petition for judicial review under ORS 183.484 may be filed in the Circuit Court for Marion County or the Circuit Court in the county in which you reside.
2. A cause of action under ORS 197.352 (Measure 37 (2004)): If a land use regulation continues to apply to the subject property more than 180 days after the present owner of the property has made written demand for compensation under ORS 197.352¹, the present owner of the property, or any interest therein, shall have a cause of action in the circuit court in which the real property is located.

(Copies of the documents that comprise the record are available for review at the Department's office at 635 Capitol Street NE, Suite 150, Salem, Oregon 97301-2540)

FOR INFORMATION ONLY

The Oregon Department of Justice has advised the Department of Land Conservation and Development that "[i]f the current owner of the real property conveys the property before the new use allowed by the public entity is established, then the entitlement to relief will be lost."

¹ By order of the Marion County Circuit Court, "all time lines under Measure 37 [were] suspended indefinitely" on October 25, 2005. This suspension was lifted on March 13, 2006 by the court. As a result, a period of 139 days (the number of days the time lines were suspended) has been added to the 180-day time period under ORS 197.352(6) for claims that were pending with the state on October 25, 2005.

ORS 197.352 (BALLOT MEASURE 37) CLAIM FOR COMPENSATION

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

May 31, 2006

STATE CLAIM NUMBER: M121486-Report C

NAMES OF CLAIMANTS: Dr. Matthew Gruber and Alice Gruber¹

MAILING ADDRESS: 490 Miller Street SE
Salem, Oregon 97302-4249

PROPERTY IDENTIFICATION: Township 10S, Range 10W, Section 32
Tax lots 1411 and 1412
Township 10S, Range 10W, Section 33
Tax lots 105 and 106
Lincoln County

OTHER CONTACT INFORMATION: David Hilgemann
530 Center Street NE, Suite 700
Salem, Oregon 97301-3756

DATE RECEIVED BY DAS: July 19, 2005

180-DAY DEADLINE: June 3, 2006²

I. SUMMARY OF CLAIM

The claimants, Matthew and Alice Gruber, seek compensation in the amount of \$1,030,000³ 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 61-acre property (tax lots 1411, 1412, 105 and 106 listed as Parcel III) into 1 to 2-acre parcels and to develop a dwelling on each parcel. The subject property is located at the geographic coordinates listed above, near Toledo, in Lincoln County. (See claim.)

¹ Matthew and Alice Gruber along with Merrick Kriz and Cynthia Condon are listed as claimants in claim M121486. However, materials submitted with the claim indicate that Matthew and Alice Gruber are the only claimants for the property described in those materials as Parcel III (tax lots 1411, 1412, 105 and 106). Parcel III is the subject of this report. Other tax lots included in the claim are addressed in Reports A and B.

² 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).

³ The total amount of compensation for the reduction in fair market value requested in claim M121486 is \$1,820,000. The claim provides an appraisal that estimates the loss in fair market value for each parcel identified, according to ownership. The loss in fair market value for Parcel III, owned by Matthew and Alice Gruber, is \$1,030,000.

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 Matthew and Alice Gruber's division of the 61-acre property into 1 to 2 acre parcels and to their development of a dwelling on each parcel: applicable provisions of Statewide Planning Goal 4 (Forest Lands), ORS 215 and Oregon Administrative Rules (OAR) 660, division 6, enacted or adopted after April 18, 2000. These laws will not apply to the claimants only to the extent necessary to allow them to use the subject property for the use described in this report, and only to the extent that use was permitted when they acquired the property in 2000. The department acknowledges that the relief to which the claimants are entitled under ORS 197.352 will not allow the claimants 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 27, 2005, pursuant to OAR 125-145-0080, the Oregon Department of Administrative Services (DAS) provided written notice to the owners of surrounding properties. According to DAS, two written comments, evidence or information were received in response to the 10-day notice.

The comments are relevant to when the claimants became the present owners of the subject property and 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. (See 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 19, 2005, for processing under OAR 125, division 145. The claim identifies Goals 3 (Agricultural Lands) and 4, ORS 215, OAR 660 and Lincoln County rural residential and timber-conservation zoning as the basis for the claim. Only laws that were enacted or adopted prior to December 2, 2004, are the basis for this claim.

Conclusions

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

V. ANALYSIS OF CLAIM

1. Ownership

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

Findings of Fact

The claimants, Matthew and Alice Gruber, acquired the subject property from their daughters Merrick Kriz and Cynthia Condon on April 18, 2000, as reflected by the title report included with the claim.⁴ Merrick Kriz and Cynthia Condon acquired the property from their mother Alice Gruber who acquired the property from a corporation on October 21, 1986. The Lincoln County Assessor’s Office confirms the claimants’ current ownership of the subject property.

Conclusions

The claimants, Matthew and Alice Gruber, are “owners” of the subject property as that term is defined by ORS 197.352(11)(C), as of April 18, 2000. The claimants’ daughters and Alice Gruber are “family members” as defined by ORS 197.352(11)(A). The claimants’ family acquired the subject property on October 21, 1986.

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.

⁴ The claim alleges that the claimants acquired the subject property in the 1960s. However, the title report also documents a transfer of the property to a corporation prior to Alice Gruber’s acquisition in 1986. Transfer of the property to a corporation resulted in a transfer of ownership from the family for the purposes of ORS 197.352.

Findings of Fact

The claim indicates that the claimants desire to partition the 61-acre property into 1 to 2-acre parcels and to develop a dwelling on each parcel, which is not allowed under the property's current zoning.

The claim is based on Lincoln County's current TC (Timber Conservation) zone and the applicable provisions of state law that require such zoning. The claimants' property is zoned TC as required by Goal 4 in accordance with ORS 215 and OAR 660, division 6, because the claimants' property is "forest land" under Goal 4. Goal 4 became effective on January 25, 1975, and requires that forest land be zoned for forest use (see statutory and rule history under OAR 660-015-0000(4)). The forest land administrative rules (OAR 660, division 6) became effective on September 1, 1982, and ORS 215.705 to 215.755 and 215.780 became effective on November 4, 1993 (Chapter 792, Oregon Laws 1993). OAR 660-006-0026 and 660-006-0027 were amended on March 1, 1994, to implement those statutes.

The claimants' family acquired the subject property on October 21, 1986. At that time, the property was subject to Lincoln County's acknowledged forest zone.⁵ When the claimants' family acquired the subject property, the desired division and development of the property would have been governed by the county's forest zone and the applicable provisions of Goal 4, ORS 215 and OAR 660, division 6, then in effect.

Conclusions

The current zoning requirements, minimum lot size and dwelling standards established by Goal 4, ORS 215.705 to 215.755 and 215.780 and OAR 660-006-0026 and 660-006-0027 were all enacted or adopted after the claimants' family acquired the subject property in 1986 and may restrict the use of the property relative to the uses permitted when the claimants' family 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."

Findings of Fact

The claim includes an estimate of \$1,030,000 as the reduction in the subject's property's fair market value due to current regulations. This amount is based on an appraisal.

Conclusions

As explained in Section V.(1) of this report, the claimants are Matthew and Alice Gruber whose family acquired the subject property on October 21, 1986. Under ORS 197.352, the claimants

⁵ Lincoln County's forest zone was acknowledged by the Commission for compliance with Goal 4 on January 18, 1983.

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 \$1,030,000.

Without further investigation and 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 Goal 4, ORS 215 and OAR 660, division 6, which Lincoln County has implemented through its current TC zone. With the exception of provisions Goal 4, ORS 215 and OAR 660, division 6, in effect in 1986, these land use regulations were not in effect when the claimants' family acquired the subject property.

Conclusions

It appears that the general statutory, goal and rule restrictions on residential division and development of the subject property are not exempt under ORS 197.352(3)(E) to the extent they were enacted or adopted after the claimants' family acquired the property. Provisions of Goal 4, ORS 215 and OAR 660, division 6, in effect when the claimants' family acquired the subject property in 1986 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 61-acre property into 1 to 2-acre parcels and to develop a dwelling on each parcel. The claim asserts that the laws enforced by the Commission or the department reduce the fair market value of the subject property by \$1,030,000. However, without further investigation and documentation establishing how the specified restrictions reduce the fair market value of the subject property, a specific amount of compensation cannot be determined. Nevertheless, based on the record for this claim, the department acknowledges that the laws on which the claim is based likely have reduced the fair market value of 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 Matthew and Alice Gruber to use the subject property for a use permitted at the time they acquired the property on April 18, 2000. At that time, the property was subject to applicable provisions of Goal 4, ORS 215 and OAR 660, division 6, currently in effect.

Other laws in effect when the claimants acquired the subject property are exempt under ORS 197.352(3)(E), and will also continue to apply to the claimants' use of the property. In addition, the department notes that ORS 215.730 and OAR 660, division 6, include standards for siting dwellings in forest zones. These provisions include fire protection standards for dwellings and for surrounding forest lands. ORS 197.352(3)(B) specifically exempts regulations "restricting or prohibiting activities for the protection of public health and safety, such as fire and building codes. . . ." Accordingly, siting standards for dwellings in forest zones in ORS 215.730 and OAR 660, division 6, are exempt under ORS 197.352(3)(B).

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 use 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 Matthew and Alice Gruber partition of the 61-acre property into 1 to 2-acre parcels or to their development of a dwelling on each parcel: applicable provisions of Goal 4, ORS 215 and OAR 660, division 6, enacted or adopted after April 18, 2000. These land use regulations will not apply to the claimants only to the extent necessary to allow them to use the subject property for the use described in this report, and only to the extent that use was permitted when they acquired the property on April 18, 2000. The department acknowledges that the relief to which

the claimants are entitled under ORS 197.352 will not allow the claimants 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 the claimants to use the subject property for the use described in this report, subject to the standards in effect on April 18, 2000. On that date, the property was subject to compliance with Lincoln County's acknowledged forest zone and the applicable provisions of Goal 4, ORS 215 and OAR 600, division 6, 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.

VII. COMMENTS ON THE DRAFT STAFF REPORT

The department issued its draft staff report on this claim on May 11, 2006. OAR 125-145-0100(3), provided an opportunity for the claimant or the claimant's authorized agent and any third parties who submitted comments under OAR 125-145-0080 to submit written comments, evidence and information in response to the draft staff report and recommendation. Comments received have been taken into account by the department in the issuance of this final report.