

BEFORE THE DEPARTMENT OF ADMINISTRATIVE SERVICES,
THE DEPARTMENT OF LAND CONSERVATION AND DEVELOPMENT,
THE BOARD AND DEPARTMENT OF FORESTRY, AND
THE DEPARTMENT OF ENVIRONMENTAL QUALITY
OF THE STATE OF OREGON

IN THE MATTER OF THE CLAIM FOR) FINAL ORDER
COMPENSATION UNDER ORS 197.352) CLAIM NO. M122514
(BALLOT MEASURE 37) OF)
James R. and Elizabeth L. McGrew, CLAIMANTS)

Claimants: James R. and Elizabeth L. McGrew (the Claimants)

Property: Township 2N, Range 1W, Section 32a, Tax lots 700, 800, 900 and 1000,
Multnomah 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), the Oregon Department of Forestry (the ODF Report), and the Department of Environmental Quality (the DEQ Report) attached to and by this reference incorporated into this order.

ORDER

The Claim is denied as to laws administered by the Oregon Department of Forestry or the Oregon Board of Forestry, for the reasons set forth in the ODF Report.

The Claim is denied as to laws administered by the Department of Environmental Quality for the reasons set forth in the DEQ Report.

The claim as to tax lot 800 is denied as to laws administered by the DLCD and the Land Conservation and Development Commission (LCDC) for the reasons set forth in the DLCD Report.

The Claim is approved as to laws administered by DLCD and the 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 James R. McGrew's division of tax lot 900 into one-acre parcels and to his development of a dwelling on each parcel: applicable provisions of Goals 4 and 14, ORS chapter 215 and OAR 660, division 6, enacted or adopted after July 24, 1974.

In lieu of compensation under ORS 197.352, the State of Oregon will not apply the following laws to Elizabeth L. McGrew's division of tax lot 1000 into one-acre parcels and to her development of a dwelling on each parcel: applicable provisions of Goals 4 and 14, ORS chapter 215 and OAR 660, division 6, enacted or adopted after July 24, 1974.

In lieu of compensation under ORS 197.352, the State of Oregon will not apply the following laws to James R. and Elizabeth L. McGrew's division of tax lot 700 into two-acre parcels and to their development of a dwelling on each parcel: applicable provisions of Goals 4 and 14, ORS chapter 215 and OAR 660, division 6, enacted or adopted after November 2, 1973.

The above 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 James R. McGrew acquired tax lot 900 and Elizabeth L. McGrew acquired tax lot 1000 on July 24, 1974, and they both acquired tax lot 700 on November 2, 1973.

2. The action by the State of Oregon provides the state's authorization to James R. McGrew to use tax lot 900 and Elizabeth L. McGrew to use tax lot 1000 for the use described in this report, subject to the provisions of ORS chapters 92, 197 and 215, including the interim planning goals set forth in ORS 215.515 (1973 edition), in effect on July 24, 1974.

3. The action by the State of Oregon provides the state's authorization to the claimants to use tax lot 700 for the use described in this report, subject to the provisions of ORS chapters 92, 197 and 215, including the interim planning goals set forth in ORS 215.515 (1973 edition), in effect on November 2, 1973.

4. 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.

5. 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 (including, without limitation, Multnomah County ordinances); and (c) those laws not subject to ORS 197.352 including, without limitation, those laws exempted under ORS 197.352(3).

6. Without limiting the generality of the foregoing terms and conditions, in order for the claimants to use the subject property, it may be necessary for them to obtain a decision under ORS 197.352 from a city and/or county and/or metropolitan service district that enforces land use regulations applicable to the property. Nothing in this order relieves the claimants from the necessity of obtaining a decision under ORS 197.352 from a local public entity that has

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

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

This Order is entered by the Oregon Board and Department of Forestry as a final order of the Board under ORS 197.352, OAR 629-001-0057, and OAR Chapter 125, division 145.

This Order is entered by the Deputy Director of the DEQ as a final order of DEQ under ORS 197.352, and OAR Chapter 125, division 145.

FOR DLCD AND THE LAND
CONSERVATION AND DEVELOPMENT
COMMISSION:

Lane Shetterly, Director



Cora R. Parker, Deputy Director
DLCD

Dated this 10th day of August, 2006.

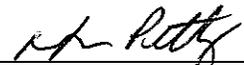
FOR THE OREGON BOARD OF
FORESTRY AND THE OREGON
DEPARTMENT OF FORESTRY:



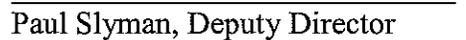
Marvin Brown, State Forester
ODF

Dated this 10th day of August, 2006

FOR THE DEPARTMENT OF
ADMINISTRATIVE SERVICES:


Dugan Petty, Deputy Administrator
DAS, State Services Division
Dated this 10th day of August, 2006.

FOR THE FOR DEPARTMENT OF
ENVIRONMENTAL QUALITY


Paul Slyman, Deputy Director
DEQ
Dated this 10th day of August, 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 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.

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

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

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FOR DLCD AND THE LAND
CONSERVATION AND DEVELOPMENT
COMMISSION:

Lane Shetterly, Director

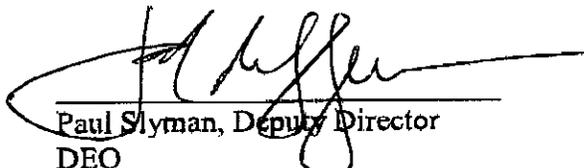
FOR THE DEPARTMENT OF
ADMINISTRATIVE SERVICES:

Dugan Petty, Deputy Administrator
DAS, State Services Division
Dated this 10th day of August, 2006.

Cora R. Parker, Deputy Director
DLCD
Dated this 10th day of August, 2006.

FOR THE FOR DEPARTMENT OF
ENVIRONMENTAL QUALITY

FOR THE OREGON BOARD OF
FORESTRY AND THE OREGON
DEPARTMENT OF FORESTRY:



Paul Slyman, Deputy Director
DEQ
Dated this 10th day of August, 2006

Marvin Brown, State Forester
ODF
Dated this 10th day of August, 2006

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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**

August 10, 2006

STATE CLAIM NUMBER: M122514

NAMES OF CLAIMANTS: James R. and Elizabeth L. McGrew

MAILING ADDRESS: 13154 Northwest McNamee Road
Portland, Oregon 97231

PROPERTY IDENTIFICATION: Township 2N, Range 1W, Section 32a
Tax lots 700, 800, 900 and 1000
Multnomah County

OTHER CONTACT INFORMATION: Mark P. O'Donnell, Esq.
Kristian Roggendorf, Esq.
O'Donnell & Clark, LLP
1650 Northwest Naito Parkway, Suite 302
Portland, Oregon 97209

DATE RECEIVED BY DAS: September 28, 2005

180-DAY DEADLINE: August 13, 2006¹

I. SUMMARY OF CLAIM

The claimants, James R. and Elizabeth L. McGrew, seek compensation in the amount of \$8,097,000 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 tax lot 700 into 27 two-acre parcels and tax lots 800, 900 and 1000 into one-acre parcels and to develop a dwelling on each parcel. The tax lots are located at the geographic coordinates listed above, near NW McNamee Road, near the City of Portland, in Multnomah County. (See claim.)

II. SUMMARY OF STAFF RECOMMENDATION

Based on the findings and conclusions set forth below, the Department of Land Conservation and Development (the department) has determined that the claim is valid except as to tax lot 800. Department staff recommends that, in lieu of compensation, the requirements of the following

¹ This date reflects 180 days from the date the claim was submitted, as extended by the 139 days that all timelines under Measure 37 were suspended during the pendency of *MacPherson v. Dept. of Admin. Svcs.*, 340 Or 117 (2006).

state laws enforced by the Land Conservation and Development Commission (the Commission) or the department not apply to 1) James R. and Elizabeth L. McGrew's division of tax lot 700 into 27 two-acre parcels and their development of a dwelling on each parcel, 2) James R. McGrew's division of tax lot 900 into one-acre parcels and his development of a dwelling on each parcel and 3) Elizabeth L. McGrew's division of tax lot 1000 into one-acre parcels and to her development of a dwelling on each parcel: applicable provisions of Statewide Planning Goals 4 (Forest Lands) and 14 (Urbanization), ORS chapter 215 and Oregon Administrative Rules (OAR) 660, division 6, enacted or adopted after the claimants acquired each of the tax lots that composes the subject property (tax lots 700, 900 and 1000). 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 James R. McGrew acquired tax lot 900 and Elizabeth L. McGrew acquired tax lot 1000 on July 24, 1974, and when they both acquired tax lot 700 on November 2, 1973.

The department has further determined that the claim as to tax lot 800 is not valid because the claimants are not owners of an interest in this tax lot that has been restricted by a land use regulation administered by the department. (See the complete recommendation in Section VI. of this report.)

III. COMMENTS ON THE CLAIM

Comments Received

On October 11, 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, no written comments were received in response to the 10-day notice. A supplemental statement concerning ownership of tax lot 800 was received from the claimants' attorney on June 22, 2006, and was considered in preparing this report.

IV. TIMELINESS OF CLAIM

Requirement

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

1. For claims arising from land use regulations enacted prior to the effective date of Measure 37 (December 2, 2004), within two years of that effective date, or the date the public entity applies the land use regulation as an approval criteria to an application submitted by the owner, whichever is later; or
2. For claims arising from land use regulations enacted after the effective date of Measure 37 (December 2, 2004), within two years of the enactment of the land use regulation, or the date the owner of the property submits a land use application in which the land use regulation is an approval criteria, whichever is later.

Findings of Fact

This claim was submitted to DAS on September 28, 2005, for processing under OAR 125, division 145. The claim identifies numerous Multnomah County ordinances and state laws as the basis for the claim.² 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, James R. and Elizabeth L. McGrew, acquired tax lots 800, 900 and 1000 on July 24, 1974, as reflected by a contract included with the claim.³ James McGrew is the current owner of tax lot 900. Elizabeth L. McGrew is the current owner of tax lot 1000.

The claimants acquired an interest (an undivided half interest by a warranty deed from Chester P. McGrew) in tax lot 700 on November 2, 1973. The claimants acquired the remaining

² This report addresses only those state statutes and rules administered by the department. Statutes and rules administered by the Oregon Department of Forestry and the Oregon Department of Environmental Quality are addressed in reports by those agencies.

³ At the time the claimants acquired tax lots 800, 900 and 1000 by land sale contract, that property was a single parcel consisting of approximately 10.76 acres. In 1975, the claimants entered into an assignment of their interests, conveying the rights to tax lot 800 to Elizabeth J. McGrew, the rights to tax lot 900 to James R. McGrew and the rights to tax lot 1000 to Elizabeth L. McGrew. That assignment was then followed by three fulfillment deeds in 1986, conveying legal title as described. On February 12, 1997, Elizabeth J. McGrew conveyed tax lot 800 to Kyle D. and Robbie M. Preedy by warranty deed. Multnomah County has determined that these three tax lots are not legal lots of record under its ordinances; however, this does not alter who owns the tax lots. In addition, the claimants have submitted a “Statement in Support of Ownership of Lot of Record” asserting that James R. McGrew and Elizabeth L. McGrew were and are the owners of all right and title interest in and to tax lot 800. The evidence in the department’s file for this claim, however, shows that the 1997 warranty deed was made without reservation, and the county’s records show that tax lot 800 is owned by Kyle D. and Robbie M. Preedy. This evidence includes the fact that it was Elizabeth J. McGrew who applied for a land use application (along with James R. McGrew) in 1993 for tax lots 800, 900 and 1000. Therefore, it is determined that the claimants do not own an interest in tax lot 800 for the purposes of ORS 197.352 (that is, an interest that includes rights to develop the subject property that have been restricted by a state land use regulation). For the purposes of ORS 197.352, claimant James R. McGrew is the current owner of tax lot 900 (and acquired an interest on July 24, 1976), and claimant Elizabeth L. McGrew is the current owner of tax lot 1000 (and acquired an interest on July 24, 1976).

one-half interest in tax lot 700 on February 20, 1984, by land sale contract from Kenneth and Dorothy McGrew, William Sanders and Helen Yeager.

The Multnomah County Assessor's Office confirms the claimants' current ownership of tax lots 700, 900 and 1000. The claimants are no longer the current owners of tax lot 800 for the purposes of ORS 197.352.

Conclusions

Claimant James R. McGrew is the owner of tax lot 900 as of July 24, 1974. Claimant Elizabeth L. McGrew is the owner of tax lot 1000 as of July 24, 1974. Both claimants are the current owners of tax lot 700 as of November 2, 1973. The claimants are not owners of tax lot 800 for the purposes of ORS 197.352.

2. The Laws That are the Basis for This Claim

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

Findings of Fact

The claim indicates that the claimants desire to divide tax lot 700 into 27 two-acre parcels and to divide tax lots 900 and 1000 into one-acre parcels and to develop a dwelling on each parcel. The claim identifies provisions of Multnomah County zoning ordinances, ORS chapters 92, 197, 215 and 227 and many provisions of OAR chapter 660 (including Statewide Planning Goals 1 to 14 (except Goal 7) as restricting the claimants' desired use.⁴

The claim is based generally on Multnomah County's current Commercial Forest Use (CFU-2) zone and the applicable provisions of state law that require such zoning. The claimants' property is zoned CFU-2 as required by Goal 4, in accordance with ORS chapter 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.

⁴ The claim lists ORS chapters 92, 197 and 227, as well as many specific statutes within these chapters, as restricting the use of the subject property, but does not establish how each of these regulations applies to and restricts the claimants' desired use of the property in a manner that reduces the property's fair market value. On their face, most of the laws listed in the claim either do not apply to the desired use of the subject property or do affect its value. In the absence of some explanation by the claimants as to how the particular regulations restrict the use of the subject property in a manner that reduces its fair market value, this report addresses only those regulations that the department finds are applicable to and restrict the claimants' use of the subject property, based on the claimants' desired use.

Goal 4 went into effect on January 25, 1975, "to conserve forest lands for forest uses" and required, "Lands suitable for forest uses shall be inventoried and designated as forest lands. Existing forest land uses shall be protected unless proposed changes are in conformance with the comprehensive plan." Those forest uses were defined as follows: "(1) the production of trees and the processing of forest products; (2) open space, buffers from noise, and visual separation of conflicting uses; (3) watershed protection and wildlife and fisheries habitat; (4) soil protection from wind and water; (5) maintenance of clean air and water; (6) outdoor recreational activities and related support services and wilderness values compatible with these uses; and (7) grazing land for livestock."

Goal 14 also went into effect on January 25, 1975. Goal 14 generally prohibits urban uses of land outside of an acknowledged urban growth boundary. Under Goal 14, residential development at a density of greater than two acres has generally been prohibited.

Together, ORS 215.705 to 215.755 and 215.780 and OAR 660, division 6, prohibit the division of forest land into parcels less than 80 acres and establish standards for development of dwellings on existing or proposed parcels on those lands.

The claimants acquired tax lots 900 and 1000 on July 24, 1974, after the adoption of Senate Bill 100 (Chapter 80, Oregon Laws 1973) effective on October 5, 1973, but before the adoption of the statewide planning goals effective on January 25, 1975.

During the period between October 5, 1973, and January 25, 1975, ORS 197.175(1) and 197.280 (1973 editions) required, in addition to any local plan or zoning provisions, that cities and counties exercise their planning responsibilities in accordance with the interim land use planning goals set forth in ORS 215.515 (1973 edition). *Petersen v. Klamath Falls*, 279 Or 249 (1977); *see also, Meeker v. Board of Comm'rs*, 287 Or 665 (1979) (review of a subdivision is an exercise of planning responsibilities requiring application of the goals); *State Housing Council v. Lake Oswego*, 48 Or App. 525 (1981) (noting that while "[I]and use planning responsibility is not defined in ORS ch 197, the Supreme Court has interpreted that term as including annexation approvals, *subdivision approvals* [emphasis added] and partition approvals") citing *Petersen*, *Meeker* and *Alexanderson v. Polk County*, 285 Or 427 (1980). The claimants' desired use includes subdivision of their land. If the claimants had sought to create that use in 1974, as a matter of law, the use would have been subject to the interim planning goals at ORS 215.515, as well as subject to any county ordinances then in effect.⁵

⁵ The "interim" land use goals are set forth in ORS 215.515(1)(a) to (j) (1973 edition) as follows: (a) "To preserve the quality of the air, water and land resources of the state," (b) "To conserve open space and protect natural and scenic resources," (c) "To provide for the recreational needs of citizens of the state and visitors," (d) "To conserve prime farm lands for the production of crops," (e) "To provide for the orderly and efficient transition from rural to urban land use," (f) "To protect life and property in areas subject to floods, landslides and other natural disasters," (g) "To provide and encourage a safe, convenient and economic transportation system including all modes of transportation: Air, water, rail, highway and mass transit and recognizing differences in the social costs in the various modes of transportation," (h) "To develop a timely, orderly and efficient arrangement of public facilities and services to serve as a framework for urban and rural development," (i) "To diversify and improve the economy of the state" and (j) "To ensure that the development of properties within the state is commensurate with the character and the physical limitations of the land" ORS 215.515 (1973 edition). The department's record for this claim includes a copy of a land use decision by Multnomah County (CU 1-93 and CU 2-93).

No information has been provided establishing whether or to what extent the claimants' desired division of the subject property for residential development complies with the interim planning goals set forth in ORS 215.515 (1973 edition) in effect at the time the claimants first acquired tax lots 900 and 1000 on July 24, 1974 and tax lot 700 on November 2, 1973.

At the time the claimants acquired tax lot 700 on November 2, 1973, it also was subject to the Multnomah County's suburban residential (SR) zone and the county's land division ordinance. When the claimants acquired the property, the desired division and development of the property would have been governed by the county's ordinances and the applicable provisions of ORS chapters 92, 197, and 215 then in effect.

Conclusions

The current zoning requirements, minimum lot size and dwelling standards established by Goals 4 and 14, ORS 215.705 to 215.755 and 215.780, and OAR 660-006-0026 and OAR 660-006-0027, were all enacted or adopted after the claimants acquired tax lots 900 and 1000 in 1974 and tax lot 700 in 1973, and do not allow the desired division or development of the property. However, the claim does not establish whether or to what extent the claimants' desired use of the subject property complies with the interim planning goals in effect when they acquired tax lots 900 and 1000 on July 24, 1974, and tax lot 700 on November 2, 1973.

This report addresses only those state laws that are identified in the claim, or that the department is certain apply to the subject property based on the uses that the claimants have identified. There may be other laws that currently apply to the claimants' use of the subject property, and that may continue to apply to the claimants' use of the property, that have not been identified in the claim. In some cases, it will not be possible to know which laws apply to a use of subject property until there is a specific proposal for that use. When the claimants seek a building or development permit to carry out a specific use, it may become evident that other state laws apply to that use.

3. Effect of Regulations on Fair Market Value

In order to establish a valid claim, ORS 197.352(1) requires that the land use regulation(s) (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 \$8,097,000 as the reduction in the subject property's fair market value due to the regulation(s). This amount is based on the claimants' comparisons of limited review appraisals and land sales.

Conclusions

As explained in Section V.(1) of this report, the claimants are James R. and Elizabeth L. McGrew who acquired tax lots 900 and 1000 on July 24, 1974, and tax lot 700 on November 2, 1973. Under ORS 197.352, the claimants are due compensation for land use regulations that restrict the use of the subject property and have the effect of reducing its fair

market value. Based on the findings and conclusions in Section V.(2) of this report, laws enacted or adopted since the claimants acquired the subject property restrict the claimants' desired use of the property. The claimants estimate that the effect of the regulations(s) on the fair market value of the subject property is a reduction of \$8,097,000.

Without an appraisal or other documentation and without verification of whether or the extent to which the claimants' desired use of the subject property was allowed under the standards in effect when they acquired the property, it is not possible to substantiate the specific dollar amount by which the land use regulations have reduced the fair market value of the property. Nevertheless, based on the evidence in the record for this claim, the department determines 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 4 and 14, ORS chapter 215 and OAR 660, division 6, which Multnomah County has implemented through its current CFU-2 zone. With the exception of provisions of ORS chapter 215, including the interim statewide planning goals, in effect on July 24, 1974, for tax lots 700, 900, and 1000, these state land use regulations were not in effect when the claimants 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 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 acquired the property. Provisions of ORS 92, 197, and 215, including interim statewide planning goals in effect when the claimants acquired tax lots 700 on November 2, 1973, and tax lots 900 and 1000 on July 24, 1974, are exempt under ORS 197.352(3)(E) and will continue to apply to the property.

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. Those 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, the siting standards for dwellings in forest zones in ORS 215.730 and OAR 660, division 6, are exempt under ORS 197.352(3)(B).

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).

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.

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 present 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' desired use of the subject property. The claim asserts that existing state land use regulations enforced by the Commission or the department have the effect of reducing the fair market value of the subject property by \$8,097,000. However, because the claim does not provide an appraisal or other relevant evidence demonstrating that the land use regulations described in Section V.(2) reduce the fair market value of the subject property, a specific amount of compensation cannot be determined. In order to determine a specific amount of compensation due for this claim, it would also be necessary to verify whether or the extent to which the claimants' desired use of the subject property was allowed under the standards in effect when they acquired the property. Nevertheless, based on the record for this claim, the department has determined that the laws on which the claim is based 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 James R. and Elizabeth L. McGrew to use the subject property for a use permitted at the time they acquired the property on July 24, 1974, and February 20, 1986.

Conclusions

Based on the record, the department recommends that the claim as to tax lot 800 be denied because the claimants are not owners of this tax lot. The department further recommends that the claim otherwise 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 James R. McGrew's division of tax lot 900 into one-acre parcels and to his development of a dwelling on each parcel: applicable provisions of Goals 4 and 14, ORS chapter 215 and OAR 660, division 6, enacted or adopted after July 24, 1974.

In lieu of compensation under ORS 197.352, the State of Oregon will not apply the following laws to Elizabeth L. McGrew's division of tax lot 1000 into one-acre parcels and to her development of a dwelling on each parcel: applicable provisions of Goals 4 and 14, ORS chapter 215 and OAR 660, division 6, enacted or adopted after July 24, 1974.

In lieu of compensation under ORS 197.352, the State of Oregon will not apply the following laws to James R. and Elizabeth L. McGrew's division of tax lot 700 into two-acre parcels and to their development of a dwelling on each parcel: applicable provisions of Goals 4 and 14, ORS chapter 215 and OAR 660, division 6, enacted or adopted after November 2, 1973.

The above 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 James R. McGrew acquired tax lot 900 and Elizabeth L. McGrew acquired tax lot 1000 on July 24, 1974, and they both acquired tax lot 700 on November 2, 1973.

2. The action by the State of Oregon provides the state's authorization to James R. McGrew to use tax lot 900 and Elizabeth L. McGrew to use tax lot 1000 for the use described in this report, subject to the provisions of ORS chapters 92, 197 and 215, including the interim planning goals set forth in ORS 215.515 (1973 edition), in effect on July 24, 1974.

3. The action by the State of Oregon provides the state's authorization to the claimants to use tax lot 700 for the use described in this report, subject to the provisions of ORS chapters 92, 197 and 215, including the interim planning goals set forth in ORS 215.515 (1973 edition), in effect on November 2, 1973.

4. 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.

5. 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 (including, without

limitation, Multnomah County ordinances); and (c) those laws not subject to ORS 197.352 including, without limitation, those laws exempted under ORS 197.352(3).

6. 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 July 21, 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 FORESTRY

Final Staff Report and Decision

August 10, 2006

STATE CLAIM NUMBER: M 122514

NAMES OF CLAIMANTS: **James R. McGrew and
Elizabeth L. McGrew**

MAILING ADDRESS: 13154 NW McNamee Rd.
Portland, Oregon 97231

IDENTIFICATION OF PROPERTY: Township 2N, Range 1W
Section 32A,
Tax Lots 700, 800, 900,1000
Multnomah County

OTHER CONTACT INFO: Mark P. O'Donnell, Esq.
Kristian Roggendorf, Esq.
O'Donnell & Clark LLP
1650 NW Naito Parkway, Suite 302
Portland, OR 97209

DATE RECEIVED BY DAS: September 28, 2005

180-DAY DEADLINE: August 13, 2006¹

I. SUMMARY OF CLAIM

See Department of Land Conservation and Development (DLCD) Final Staff Report.

II. SUMMARY OF DECISION

Based on the findings and conclusions set forth below, the Department of Forestry (ODF) has determined the claim is not valid as to land use regulations administered by ODF or the Oregon Board of Forestry (Board) because none of the laws identified in the claim and administered by the Board or ODF restrict the claimants' right to divide or develop the property for residential use. ORS 527.730 provides that "[n]othing in the Oregon Forest Practices Act shall prevent the conversion of forestland to any other use." The claim submitted by the claimants proposes subdividing the property into residential lots. To the extent that the claimants may propose a forest operation in conjunction with the conversion, claimants have not submitted a written notification as required by law. Without a notification ODF is unable to determine whether the laws listed in the claim apply to the

claimants' use of the property or restrict their use of the property. As a result, ODF has not enforced an existing state land use regulation with respect to the claimants' use of the property. (See the complete decision in Section VI. of this report.)

III. COMMENTS ON THE CLAIM

Comments Received

See DLCD Final Staff Report.

IV. TIMELINESS OF CLAIM

See DLCD Final Staff Report for requirements.

Findings of Fact

The claim identifies certain specific laws as applying to the claimants' desired use of the land by subdividing it and developing a site on it for residential use. The regulations identified in the claim include portions of Oregon Revised Statute chapter 526, 527, and Oregon Administrative Rules chapter 629. Only laws that were enacted prior to December 2, 2004, the effective date of ORS 197.352, are the basis for the claim. (See citations of statutory and administrative rule history of the Oregon Revised Statutes and Oregon Administrative Rules.)

Conclusions

The Claim has been submitted within two years of December 2, 2004, the effective date of ORS 197.352, based on land use regulations enacted prior to December 2, 2004, and is therefore timely filed.

V. ANALYSIS OF CLAIM

1. Ownership

ODF adopts the findings of fact and conclusions of law regarding ownership contained in the DLCD Final Staff Report for this claim.

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 claimants desire compensation or the right to divide tax lot 700 into two-acre parcels, tax lots 900 and 1000 into one-acre parcels, and to develop a dwelling on each parcel. The claim refers to the following state statutes and administrative rules administered by ODF or the Board as laws that restrict the use of the property as the basis for the claim: ORS 526, ORS 527, and OAR chapter 629. The only explanation of how or why these laws restrict the use of the property is the incorrect statement that: "State forestry statutes limit the development and division of land zoned for forestry." The property is zoned to allow forest uses. However, the forest laws listed in the claim only apply to forest operations (which is not the use the claimants have described in their claim).

One of the cited laws, ORS 527.730, Conversion of forestland to other uses, states, "Nothing in the Oregon Forest Practices Act shall prevent the conversion of forestland to any other use." No laws enforced by the Board or ODF restrict the division of the property or the establishment of dwellings.

The subject property apparently includes trees. Certain uses of property are forest "operations" that are regulated under the Forest Practices Act. If trees are harvested for commercial use, some laws and rules listed in the claim will apply to the operation.

A notification of intent to conduct a forest operation is required in order for ODF to determine whether laws it or the Board may enforce apply to the claimants' intended use of the subject property. Only then can ODF determine whether there are restrictions that apply to the use of the subject property, and reduce its fair market value. No notification has been made.

The claim lists additional zoning ordinances that are administered by Multnomah County. These ordinances are not administered or enforced by the Board and ODF and are not addressed in this report.

Conclusions

Nothing in the laws that are listed in the claim and enforced or administered by ODF or the Board applies to or restricts the division of the property or residential development of this property by the claimants.

Persons proposing to conduct a forest operation are required to submit a notification of the operation to ODF. Nothing in ORS 197.352 relieves an operator or landowner of this obligation, and until a notification is submitted, ODF is unable to determine whether laws it or the Board administers apply to the claimants' use 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 laws 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 claimants have not demonstrated that any land use regulations administered by ODF or the Board restrict their use of the subject property or reduce its fair market value.

Conclusions

The claimants have not demonstrated that laws enforced or administered by ODF or the Board restrict their use of this property and thus, have not demonstrated that those laws reduce the fair market value of the subject property.

4. Exemptions under ORS 197.352(3)

ORS 197.352 does not apply to certain land use regulations. These exemptions are set forth in ORS 197.352(3).

Findings of Fact

ORS 197.352(3) exempts laws that were enacted before a claimant acquired their interest in the property. James R. and Elizabeth L. McGrew acquired an interest in tax lots 900 and 1000 on July 24, 1974, and an interest in tax lot 700 in 1973. Most forest practice laws were enacted initially in 1971 and 1972, although some date back to 1941. ODF is unable to determine whether 197.352(3)(E) or other exemptions in 197.352(3) may apply because the claimants have not proposed a use that is subject to these laws.

Some FPA regulations, now in OAR 629, divisions 625, 630, 635, and 640, were enacted to control water pollution resulting from forest operations. ORS 197.352(3)(B) specifically exempts regulations “restricting or prohibiting activities for the protection of public health and safety..., including pollution control.” Such regulations may apply to the property, depending upon the activities the claimants may wish to undertake.

Other FPA regulations cited by the claimants may be exempted under 197.352(3).

Conclusions

ODF concludes that some of the listed land use regulations may be exempt under ORS 197.352(3). Until there is a notification of an operation, however, a final determination of the applicability of the listed laws to a particular forest operation on the property cannot be made.

VI. FORM OF RELIEF

Based on the current record, the claimants are not entitled to relief under ORS 197.352 from ODF or the Board. ODF denies this claim because neither the Board nor the Department has enforced laws that restrict the use of the property for residential purposes.

VII. NOTICE OF OPPORTUNITY TO COMMENT

ODF issued its draft staff report on this claim on July 21, 2006. OAR 125-145-0100(3), provides 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.