

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. M124475
(BALLOT MEASURE 37) OF)	
Gerald A. Richards, CLAIMANT)	

Claimant: Gerald A. Richards (the Claimant)

Property: Township 2S, Range 3E, Section 29, Tax lots 600, 602 and 603
Clackamas 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 Gerald Richards' division of tax lots 600 (5 acres), 602 (17.07 acres) and 603 (22.70 acres) into one-acre parcels and to his development of a dwelling on each parcel: applicable provisions of Goal 3, ORS 215 and OAR 660, division 33, enacted or adopted after October 28, 1993. These land use regulations will not apply to Gerald Richards only to the extent necessary to allow him to use tax lots 600, 602 and 603 for the use described in this report, and only to the extent that use was permitted when he acquired these tax lots on October 28, 1993. The department acknowledges that the relief to which Gerald Richards is entitled under ORS 197.352 may not allow him to use tax lots 600, 602 and 603 in the manner set forth in the claim.
2. The action by the State of Oregon provides the state's authorization to Gerald Richards to use tax lots 600, 602 and 603 for the use described in this report, subject to the standards in effect on October 28, 1993. On that date, the property was subject to compliance with Goal 3 and OAR 660, division 5, as implemented by Clackamas County's acknowledged GAD zone, and the applicable provisions ORS 215 then in effect.

3. To the extent that any law, order, deed, agreement or other legally enforceable public or private requirement provides that tax lots 600, 602 and 603 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 Gerald Richards 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 tax lots 600, 602 and 603 imposed by private parties.

4. Any use of tax lots 600, 602 and 603 by Gerald Richards 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 Gerald Richards to use tax lots 600, 602 and 603, it may be necessary for him 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 Gerald Richards 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 his use of tax lots 600, 602 and 603.

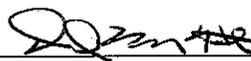
This Order is entered by the Director of the DLCD as a final order of DLCD and the Land Conservation and Development Commission under ORS 197.352, OAR 660-002-0010(8), and OAR 125, division 145, and by the Administrator for the State Services Division of the DAS as a final order of DAS under ORS 197.352,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

FOR DLCD AND THE LAND
CONSERVATION AND
DEVELOPMENT COMMISSION:


Lane Shetterly, Director
DLCD

Dated this 8th day of September, 2006.

FOR the DEPARTMENT OF
ADMINISTRATIVE SERVICES:


David Hartwig, Administrator
DAS, State Services Division
Dated this 8th day of September, 2006.

NOTICE OF RIGHT TO APPEAL OR OTHER JUDICIAL RELIEF

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

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

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. M124475
(BALLOT MEASURE 37) OF)
Gerald A. Richards, CLAIMANT)

Claimant: Gerald A. Richards (the Claimant)

Property: Township 2S, Range 3E, Section 29, Tax lot 601, Clackamas 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 denied as to laws administered by DLCD and the Land Conservation and Development Commission (LCDC) for the reasons set forth in the DLCD Report.

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 chapter 125, division 145, and by the Administrator for the State Services Division of the DAS as a final order of DAS under ORS 197.352, OAR chapter 125, division 145, and ORS chapter 293.

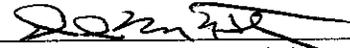
FOR DLCD AND THE LAND
CONSERVATION AND
DEVELOPMENT COMMISSION:



Lane Shetterly, Director
DLCD

Dated this 8th day of September, 2006.

FOR the DEPARTMENT OF
ADMINISTRATIVE SERVICES:



David Hartwig, Administrator
DAS, State Services Division
Dated this 8th day of September, 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 197.352, 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)

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. M124475
(BALLOT MEASURE 37) OF)
Mary A. Richards, CLAIMANT)

Claimant: Mary A. Richards (the Claimant)

Property: Township 2S, Range 3E, Section 29, Tax lots 600, 601, 602 and 603,
Clackamas County (the property)

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

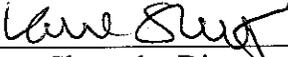
Claimant submitted the Claim to the State of Oregon under ORS 197.352. Under OAR 125-145-0010 *et seq.*, the Department of Administrative Services (DAS) referred the Claim to the Department of Land Conservation and Development (DLCD) as the regulating entity. This order is based on the record herein, 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 denied as to laws administered by DLCD and the Land Conservation and Development Commission (LCDC) for the reasons set forth in the DLCD Report.

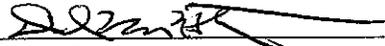
This Order is entered by the Director of the DLCD as a final order of DLCD and the Land Conservation and Development Commission under ORS 197.352, OAR 660-002-0010(8), and OAR chapter 125, division 145, and by the Administrator for the State Services Division of the DAS as a final order of DAS under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

FOR DLCD AND THE LAND
CONSERVATION AND
DEVELOPMENT COMMISSION:



Lane Shetterly, Director
DLCD
Dated this 8th day of September, 2006.

FOR the DEPARTMENT OF
ADMINISTRATIVE SERVICES:



David Hartwig, Administrator
DAS, State Services Division
Dated this 8th day of September, 2006.

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

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

September 8, 2006

STATE CLAIM NUMBER: M124475

NAMES OF CLAIMANTS: Gerald A. Richards and Mary A. Richards

MAILING ADDRESS: 16430 South Springwater Road
Oregon City, Oregon 97045

PROPERTY IDENTIFICATION: Township 2S, Range 3E, Section 29
Tax lots 600, 601, 602 and 603
Clackamas County

OTHER CONTACT INFORMATION: John W. Shonkwiler
13425 Southwest 72nd Avenue
Tigard, Oregon 97223

DATE RECEIVED BY DAS: March 17, 2006

180-DAY DEADLINE: September 13, 2006

I. SUMMARY OF CLAIM

The claimants, Gerald and Mary Richards, seek compensation in the amount of \$11,857,714 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 61.92-acre subject property into 62 approximately one-acre parcels and to develop a dwelling on each parcel. The subject property consists of tax lots 600, 601, 602 and 603 and is located at 16430 South Springwater Road, near Oregon City, in Clackamas County. (See claim.)

II. SUMMARY OF STAFF RECOMMENDATION

Based on the findings and conclusions set forth below, the Department of Land Conservation and Development (the department) has determined that the claim is valid in part. 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 Gerald Richards' division of tax lots 600 (5 acres), 602 (17.07 acres) and 603 (22.70 acres) into one-acre parcels and to his development of a dwelling on each parcel: applicable provisions of Statewide Planning Goal 3 (Agricultural Lands), ORS 215 and Oregon Administrative Rules (OAR) 660, division 33, enacted or adopted after October 28, 1993. These land use regulations will not apply to Gerald Richards only to the extent necessary to allow him to use tax lots 600, 602 and 603 for the use described in this report, and only to the extent that

use was permitted when he acquired them on October 28, 1993. The department acknowledges that the relief to which Gerald Richards is entitled under ORS 197.352 may not allow him to use tax lots 600, 602 and 603 in the manner set forth in the claim.

Based on the preliminary findings and conclusions set forth below, the department has determined that Gerald Richards' claim as to tax lot 601 is not valid because his desired use of this tax lot was prohibited under the laws in effect when he acquired it in 2002.

The department also has determined that Mary Richards' claim is not valid because the claimants have not established her ownership of the subject property. (See the complete recommendation in Section VI. of this report.)

III. COMMENTS ON THE CLAIM

Comments Received

On July 10, 2006, 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.

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 March 17, 2006, for processing under OAR 125, division 145. The claim identifies provisions of ORS 215 and OAR 660 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

According to information provided by Clackamas County’s Planning Department, the following tables outline the ownership history of each tax lot subject to this claim.

Tax Lot 600

Acquisition Date:	Party:	Transaction:	Document:
February 28, 1964	Glenn A. and Mary Richards	First acquired tax lot 600	Warranty Deed
October 28, 1993	Glenn A. and Mary Richards	Transfers tax lot 600 to Gerald Richards	Memorandum of Contract

Tax Lot 601

Acquisition Date:	Party:	Transaction:	Document:
December 22, 1976	Glenn A. and Mary Richards	Creates tax lot 601 from tax lot 600 and transfers to Gerald Richards	Warranty Deed
December 11, 2001	Gerald Richards	Transfers tax lot 601 to Mary Elizabeth Powelson	Warranty Deed
July 12, 2002	Mary Elizabeth Powelson	Transfers tax lot 601 to Gerald Richards	Quitclaim Deed

Tax Lot 602

Acquisition Date:	Party:	Transaction:	Document:
March 28, 1977	Glenn A. and Mary Richards	Creates tax lot 602 from tax lot 600 and transfers to Richards Farms, Inc.	Warranty Deed
September 1, 1993	Richards Farms, Inc.	Transfers property to Glenn A. and Mary Richards	Bargain and Sale Deed
October 28, 1993	Glenn A. and Mary Richards	Transfers tax lot 600 to Gerald Richards	Memorandum of Contract

Tax Lot 603

Acquisition Date:	Party:	Transaction:	Document:
June 17, 1979	Richards Farms, Inc.	Creates tax lot 603 from 602	
July 23, 1981	Richards Farms, Inc.	Transfers property to Glenn A. Richards	Bargain and Sale Deed
February 26, 1982	Glenn A. Richards	Transfers property to Mary Richards and Glenn T. Richards	Warranty Deed
October 9, 1984	Glenn T. Richards	Transfers property to Glenn A. and Mary Richards	Warranty Deed
October 28, 1993	Glenn A. and Mary Richards	Transfers tax lot 600 to Gerald Richards	Memorandum of Contract

Claimant Mary Richards asserts ownership of tax lots 600, 602 and 603 since February 28, 1964. However, on October 28, 1993, tax lots 600, 602 and 603 were transferred on contract to Gerald

Richards.¹ The Clackamas County Assessor's Office confirms Gerald Richards' current ownership of tax lots 600, 602 and 603.

Conclusions

Claimant Gerald Richards is an "owner" of the subject property as that term is defined by ORS 197.352(11)(C) as of October 28, 1993, for tax lots 600, 602 and 603 and as of July 12, 2002, for tax lot 601. Claimant Mary Richards has not established that she is an "owner" of the subject property as that term is defined in ORS 197.352(11)(C). Glenn A. and Mary Richards are "family members" of Gerald Richards as of February 28, 1964, for tax lot 600 and Richards Farms, Inc. is a "family member" of Gerald Richards as of March 28, 1977, for tax lots 602 and 603, as that term is defined by ORS 197.352(11)(A).

2. The Laws That are the Basis for This Claim

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

Findings of Fact

The claim indicates that the claimants desire to divide the 61.92-acre subject property into 62 approximately one-acre parcels and to develop a dwelling on each parcel, and that the use is not allowed under current land use regulations.

The claim is based generally on the applicable provisions of state law that require Exclusive Farm Use (EFU) zoning and restrict uses on EFU-zoned land. The claimants' property is zoned EFU as required by Goal 3, in accordance with ORS 215 and OAR 660, division 33, because the claimants' property is "agricultural land" as defined by Goal 3.² Goal 3 became effective on January 25, 1975, and required that agricultural lands as defined by the Goal be zoned EFU pursuant to ORS 215.

Current land use regulations, particularly ORS 215.263, 215.284 and 215.780 and OAR 660, division 33, enacted or adopted pursuant to Goal 3, prohibit the division of EFU-zoned land into parcels less than 80 acres and establish standards for the development of dwellings on existing or any proposed parcel on that land.

ORS 215.780 establishes an 80-acre minimum size for the creation of new lots or parcels in EFU zones and became effective on November 4, 1993 (Chapter 792, Oregon Laws 1993). ORS 215.263 (2005 edition) establishes standards for the creation of new parcels for non-farm uses and dwellings allowed in an EFU zone.

¹ Mary Richards transferred all of her right, title and interest in the subject property to Gerald Richards. Therefore, Mary Richards is no longer an owner of tax lots 600, 602 and 603.

² The claimants' property is "agricultural land" because it contains National Resources Conservation Service Class I-IV soils.

OAR 660-033-0135 (applicable to farm dwellings) became effective on March 1, 1994, and interprets the statutory standard for a primary dwelling in an EFU zone under ORS 215.283(1)(f). OAR 660-033-0130(4) (applicable to non-farm dwellings) became effective on August 7, 1993, and was amended to comply with ORS 215.284(4) on March 1, 1994. The Commission subsequently adopted amendments to comply with House Bill 3326 (Chapter 704, Oregon Laws 2001, effective on January 1, 2002), which became effective on May 22, 2002. (See administrative rule history for OAR 660-033-0100, -0130 and -0135.)

Gerald Richards' family acquired tax lot 600 in 1964, prior to the adoption of the statewide planning goals and their implementing statutes and regulations. No county zoning applied to the subject property in 1964.

Gerald Richards' family acquired tax lots 602 and 603 after the adoption of the statewide planning goals, but before the Commission acknowledged Clackamas County's land use regulations to be in compliance with the statewide planning goals pursuant to ORS 197.250 and 197.251. At that time, tax lots 602 and 603 were zoned by Clackamas County as General Agriculture (GAD), which established a one-acre minimum lot or parcel without access to public water. Because the Commission had not acknowledged the county's plan and land use regulations when Gerald Richards' family acquired tax lots 602 and 603 on March 28, 1977, the statewide planning goals, and Goal 3 in particular, applied directly to Gerald Richards' property when his family acquired it.³

As adopted on January 25, 1975, Goal 3 required that agricultural land be preserved and zoned for EFU pursuant to ORS 215. The Goal 3 standard for land divisions involving property where the local zoning was not acknowledged required that the resulting parcels must be of a size that is "appropriate for the continuation of the existing commercial agricultural enterprise within the area." Further, ORS 215.263 (1973 edition) only authorized the partition of land subject to EFU zoning, and required that all divisions of land subject to EFU zoning comply with the legislative intent set forth in ORS 215.243 (Agricultural Land Use Policy). Thus, Gerald Richards' opportunity to divide tax lots 602 and 603 when his family acquired them in 1977 was limited to land divisions that were consistent with Goal 3, which required that the resulting parcels be (1) appropriate for the continuation of the existing commercial agricultural enterprise in the area and (2) shown to comply with the legislative intent set forth in ORS 215.

Under the Goal 3 standards in effect on March 28, 1977, farm dwellings were allowed if they were determined to be "customarily provided in conjunction with farm use" under ORS 215.213(1)(e) (1973 edition). Non-farm dwellings were subject to compliance with ORS 215.213(3) (1973 edition).

³ The statewide planning goals became effective on January 25, 1975, and were applicable to legislative land use decisions and some quasi-judicial land use decisions prior to the Commission's acknowledgment of each county's comprehensive plan and implementing regulations. *Perkins v. City of Rajneeshpuram*, 300 Or 1 (1985); *Alexanderson v. Polk County*, 289 Or 427, rev. den 290 Or 137 (1980); *Sunnyside Neighborhood Assn. v. Clackamas County*, 280 Or 3 (1977); *Jurgenson v. Union County*, 42 Or App 505 (1979); and *1000 Friends of Oregon v. Benton County*, 32 Or App 413 (1978). After the county's plan and land use regulations were acknowledged by the Commission, the statewide planning goals and implementing rules no longer applied directly to such local land use decisions. *Byrd v. Stringer*, 295 Or 311 (1983). However, statutory requirements continue to apply, and insofar as the state and local provisions are materially the same, the local provisions must be interpreted consistent with the substance of the goals and implementing rules. *Forster v. Polk County*, 115 Or App 475 (1992) and *Kenagy v. Benton County*, 115 Or App 131 (1992).

No information has been presented in the claim to establish that Gerald Richards' desired division of tax lots 602 and 603 complies with the "commercial" standard for farm parcels under Goal 3 or the standards for non-farm parcels under ORS 215.263 (1973 edition), nor is there any information to establish that Gerald Richards' desired development of dwellings on tax lots 602 and 603 satisfies the standards for farm or non-farm dwellings under ORS 215.213 (1973 edition).

At the time Gerald Richards acquired tax lot 601 on July 12, 2002, it was zoned EFU by Clackamas County and subject to the current lot size and dwelling standards under Goal 3, ORS 215 and OAR 660, division 33.

Conclusions

The current zoning requirements, minimum lot size and dwelling standards established by applicable provisions of Goal 3, ORS 215 and OAR 660, division 33, were enacted or adopted after Gerald Richards' family acquired tax lots 600, 602 and 603. These laws restrict the use of tax lots 600, 602 and 603 relative to the uses allowed when his family acquired the property. However, the claim does not establish whether or the extent to which Gerald Richards' desired use of tax lots 602 and 603 complies with the standards for land divisions and development under the requirements of Goal 3 and ORS 215 in effect when his family acquired tax lots 602 and 603 on March 28, 1977.

The current zoning requirements, minimum lot size and dwelling standards established by applicable provisions of Goal 3, ORS 215 and OAR 660, division 33, were all enacted or adopted before Gerald Richards acquired tax lot 601 on July 12, 2002. These land use regulations do not allow the desired division and development of tax lot 601. Laws enacted or adopted since Gerald Richards acquired tax lot 601 in 2002 do not restrict his desired use of the property relative to when he acquired it in 2002.

As explained in Section V.(1), claimant Mary Richards is not an "owner" of the subject property. Therefore, no laws enforced by the Commission or the department restrict Mary Richards' use of private real property in a manner that reduces the fair market value of the property.

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 \$11,857,714 as the reduction in the subject property's fair market value due to the regulations that restrict the claimants' desired use of the property. This amount is based on the difference between the property's current fair market value of \$542,286 and the claimants' assessment that the value of one-acre properties in Clackamas County is \$200,000 per parcel.

Conclusions

As explained in Section V.(1) of this report, the claimants are Gerald Richards whose family acquired tax lot 600 in 1964 and tax lots 602 and 603 in 1977, and Mary Richards. Mary Richards is not a present owner of any of the subject tax lots and therefore, is not entitled to compensation under ORS 197.352. Laws in effect when Gerald Richards acquired tax lot 601 prohibit his desired use of this tax lot. Laws enacted or adopted after he acquired tax lot 601 do not restrict his use of the tax lot with the effect of reducing its fair market value. Therefore, Gerald Richards is not entitled to compensation for tax lot 601 under ORS 197.352.

Under ORS 197.352, Gerald Richards is due compensation for land use regulations that restrict the use of tax lots 600, 602 and 603 and have the effect of reducing the fair market value. Based on the findings and conclusions in Section V.(2) of this report, laws enacted or adopted since his family acquired tax lots 600, 602 and 603 restrict his desired use of the tax lots. The claimants estimate that the effect of the regulations on the fair market value of the subject property is a reduction of \$11,857,714.

Without an appraisal or other documentation, and without verification of whether or the extent to which Gerald Richards' desired use of tax lots 600, 602 and 603 was allowed under the standards in effect when his family acquired them, it is not possible to substantiate the specific dollar amount by which the land use regulations have reduced the fair market value of the tax lots. Nevertheless, based on the evidence in the record for this claim, the department determines that the fair market value of tax lots 600, 602 and 603 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 tax lots 600, 602 and 603 relative to the uses permitted when Gerald Richards' family acquired these tax lots, including applicable provisions of Goal 3, ORS 215 and OAR 660, division 33, which Clackamas County has implemented through its current EFU zone. With the exception of Goal 3 and ORS 215 in effect when his family acquired tax lots 602 and 603, these land use regulations were enacted or adopted after his family acquired tax lots 600, 602 and 603.

The claim does not identify any state land use regulations enacted or adopted since Gerald Richards acquired tax lot 601 that restrict the use of the property relative to what would have been allowed when he acquired it on July 12, 2002. As set forth in Section V.(2) of this report, the state land use regulations restricting Gerald Richards' desired use of tax lot 601 were in effect when he acquired the property in 2002.

Conclusions

With the exception of Goal 3 and ORS 215 in effect for tax lots 602 and 603, it appears that the general statutory, goal and rule restrictions on residential division and development of tax lots 600, 602 and 603 were not in effect when Gerald Richards' family acquired the property, and therefore, these laws are not exempt under ORS 197.352. Laws in effect when his family acquired tax lots 600, 602 and 603 are exempt under ORS 197.35.2(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.

All of the state land use regulations that restrict Gerald Richards' desired use of tax lot 601 were in effect when he acquired the property. Therefore, these state land use regulations are exempt under ORS 197.352(3)(E), which exempts laws in effect when he acquired tax lot 601.

As explained in Section V.(1) of this report, claimant Mary Richards is not an owner of the subject property. Therefore, the issue of whether any laws are exempt from ORS 197.352 is not relevant.

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 record, Mary Richards is not an owner of the subject property and therefore, is not entitled to compensation under ORS 197.352. In addition, state land use regulations that restrict Gerald Richards' desired use of tax lot 601 were in effect when he acquired the property and prohibit his desired use of the subject property. Therefore, Gerald Richards is not entitled to compensation for tax lot 601 under ORS 197.352.

Based on the findings and conclusions set forth in this report, laws enforced by the Commission or the department restrict Gerald Richards' desired use of tax lots 600, 602 and 603. 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 tax lots 600, 602 and 603 by \$11,857,714. 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 tax lot 600, 602 and 603, 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 Gerald Richards' desired use of tax lots 600, 602 and 603 was allowed under the standards in effect when his family acquired them.

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 tax lots 600, 602 and 603 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 Gerald Richards to use tax lots 600, 602 and 603 for a use permitted at the time he acquired them on October 28, 1993.

At the time Gerald Richards acquired tax lots 600, 602 and 603, the tax lots were subject to Clackamas County's acknowledged General Agriculture (GAD) zone.⁴ When Gerald Richards acquired tax lots 600, 602 and 603, his desired use of these tax lots would have been governed by the county's acknowledged GAD zone and the applicable provisions of ORS 215 then in effect.⁵ In 1993, ORS 215.263 (1991 edition) required that divisions of land in EFU zones be "appropriate for the continuation of the existing commercial agricultural enterprise within the area" or not smaller than the minimum size in the county's acknowledged plan. ORS 215.283(1)(f) (1991 edition) generally allowed farm dwellings "customarily provided in conjunction with farm use." Non-farm dwellings were allowed under ORS 215.283(3) if they were determined to be compatible with farm use, not interfere seriously with accepted farm practices, not materially alter the stability of the land use pattern in the area and be situated on generally unsuitable land for the production of farm crops and livestock.

The claim does not establish whether or to what extent Gerald Richards' desired division and development of tax lots 600, 602 and 603 were allowed under the standards in effect when he acquired them on October 28, 1993.

In addition to the applicable provisions of ORS 215 in effect when Gerald Richards acquired tax lots 600, 602 and 603 on October 28, 1993, and other laws in effect when he acquired them, there may be other laws that apply to his use of the tax lots 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 tax lots 600, 602 and 603 until there is a specific proposal for that use. When Gerald Richards seeks 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 his use of the tax lots. In addition, some of these laws may be exempt under ORS 197.352(3)(A) to (D) and will continue to apply to the property on that basis.

This report addresses only those state laws that are identified in the claim, or that the department is certain apply to the subject property based on the use that Gerald Richards has identified. Similarly, this report only addresses the exemptions provided for under ORS 197.352(3) that are

⁴ Clackamas County's GAD zone was acknowledged by the Commission for compliance with Goal 3 on December 31, 1981, which established a 40-acre minimum lot size for new lots and parcels and allowed dwellings in conjunction with farm use.

⁵ After the county's comprehensive plan and land use regulations were acknowledged by the Commission as complying with the statewide planning goals, the goals and implementing rules no longer applied directly to individual local land use decisions. *Byrd v. Stringer*, 295 Or 311 (1983). However, statutory requirements continue to apply, and insofar as the state and local provisions are materially the same, the local provisions must be interpreted consistent with the substance of the goals and implementing rules. *Forster v. Polk County*, 115 Or App 475 (1992) and *Kenagy v. Benton County*, 115 Or App 131 (1992).

clearly applicable given the information provided to the department in the claim. Gerald Richards should be aware that the less information he has 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 his use of the property.

Conclusions

Based on the record and the foregoing findings and conclusions, claimant Gerald Richards has not established that he is entitled to relief for tax lot 601 under ORS 197.352(1) because laws enforced by the Commission or the department do not restrict his desired use of tax lot 601 relative to what was permitted when he acquired it in 2002 and do not reduce the fair market value of the property. Claimant Mary Richards has not established that she is entitled to relief under ORS 197.352(1) because she is not an owner of any of the subject tax lots. Therefore, the department recommends that Gerald Richards' claim for tax lot 601 and Mary Richards' claim for the subject property be denied.

Based on the record, the department further recommends that Gerald Richards' claim be approved for tax lots 600, 602 and 603, 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 Gerald Richards' division of tax lots 600 (5 acres), 602 (17.07 acres) and 603 (22.70 acres) into one-acre parcels and to his development of a dwelling on each parcel: applicable provisions of Goal 3, ORS 215 and OAR 660, division 33, enacted or adopted after October 28, 1993. These land use regulations will not apply to Gerald Richards only to the extent necessary to allow him to use tax lots 600, 602 and 603 for the use described in this report, and only to the extent that use was permitted when he acquired these tax lots on October 28, 1993. The department acknowledges that the relief to which Gerald Richards is entitled under ORS 197.352 may not allow him to use tax lots 600, 602 and 603 in the manner set forth in the claim.
2. The action by the State of Oregon provides the state's authorization to Gerald Richards to use tax lots 600, 602 and 603 for the use described in this report, subject to the standards in effect on October 28, 1993. On that date, the property was subject to compliance with Goal 3 and OAR 660, division 5, as implemented by Clackamas County's acknowledged GAD zone, and the applicable provisions ORS 215 then in effect.
3. To the extent that any law, order, deed, agreement or other legally enforceable public or private requirement provides that tax lots 600, 602 and 603 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 Gerald Richards 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 tax lots 600, 602 and 603 imposed by private parties.
4. Any use of tax lots 600, 602 and 603 by Gerald Richards 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 Gerald Richards to use tax lots 600, 602 and 603, it may be necessary for him 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 Gerald Richards 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 his use of tax lots 600, 602 and 603.

VII. COMMENTS ON THE DRAFT STAFF REPORT

The department issued its draft staff report on this claim on August 23, 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.