

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 A1
COMPENSATION UNDER ORS 197.352) CLAIM NO. M124529
(BALLOT MEASURE 37) OF)
Gary and Maxine Marlow, and)
Kearney and Patricia Simpson, CLAIMANTS)

Claimants: Gary and Maxine Marlow, and Kearney and Patricia Simpson (the Claimants)

Property: Township 18, Range 1, Section 32, Tax lot 1000, Lane County (the Property)

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

Claimants submitted the Claim to the State of Oregon under ORS 197.352. Under OAR 125-145-0010 *et seq.*, the Department of Administrative Services (DAS) referred the Claim to the Department of Land Conservation and Development (DLCD) as the regulating entity. This order is based on the record herein, including the Findings and Conclusions set forth in the Final Staff Report and Recommendation of DLCD (the DLCD Report) attached to and by this reference incorporated into this order.

ORDER

The Claim is approved as to laws administered by DLCD and the Land Conservation and Development Commission (LCDC) for the reasons set forth in the DLCD Report, and subject to the following terms:

1. In lieu of compensation under ORS 197.352, the State of Oregon will not apply the following laws to Gary and Maxine Marlow and Kearney and Patricia Simpson's division of tax lot 1000 into 2- to 5-acre parcels and to their development of a dwelling on each parcel; Jerry Dilley's division of tax lots 1001 and 1003 and a portion of tax lot 1005 into 2- to 5-acre parcels and his development of a dwelling on each parcel; and Thomas Marlow's division of a portion of tax lot 1005 into 2- to 5-acre parcels and his development of a dwelling on each parcel: applicable provisions of Goal 3, ORS 215 and OAR 660, division 33. These laws will not apply to the claimants only to the extent of their ownership of each of the subject tax lots, and only to the necessary to allow them to use the tax lots that they each own for the use described in this report, and only to the extent that use was permitted when Gary and Maxine Marlow and Kearney and Patricia Simpson acquired tax lot 1000 on March 25, 1963; Thomas Marlow acquired a portion of tax lot 1005 in April 1964; and Jerry Dilley acquired tax lots 1001 and 1003 and a portion of tax lot 1005 on March 27, 1973

2. The action by the State of Oregon provides the state's authorization to Gary and Maxine Marlow and Kearney and Patricia Simpson to use tax lot 1000; to Thomas Marlow to

use a portion of tax lot 1005; and to Jerry Dilley to use tax lots 1001 and 1003 and a portion of tax lot 1005 for the use described in this report, subject to the standards in effect when Gary and Maxine Marlow and Kearney and Patricia Simpson acquired tax lot 1000 on March 25, 1963, when Thomas Marlow acquired a portion of tax lot 1005 in April 1964 and when Jerry Dilley acquired tax lots 1001 and 1003 and a portion of tax lot 1005 on March 27, 1973.

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

4. Any use of the subject property by the claimants under the terms of the order will remain subject to the following laws: (a) those laws not specified in (1) above; (b) any laws enacted or enforced by a public entity other than the Commission or the department; and (c) those laws not subject to ORS 197.352 including, without limitation, those laws exempted under ORS 197.352(3).

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

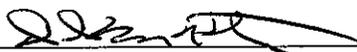
This Order is entered by the Director of the DLCD as a final order of DLCD and the Land Conservation and Development Commission under ORS 197.352, OAR 660-002-0010(8), and OAR 125, division 145, and by the Administrator for the State Services Division of the DAS as a final order of DAS under ORS 197.352,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

FOR DLCD AND THE LAND
CONSERVATION AND
DEVELOPMENT COMMISSION:


Lane Shetterly, Director
DLCD

Dated this 11th day of September, 2006.

FOR the DEPARTMENT OF
ADMINISTRATIVE SERVICES:


David Hartwig, Administrator
DAS, State Services Division
Dated this 11th 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.
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THE STATE OF OREGON

IN THE MATTER OF THE CLAIM FOR) FINAL ORDER A2
COMPENSATION UNDER ORS 197.352) CLAIM NO. M124529
(BALLOT MEASURE 37) OF)
Gary and Maxine Marlow, and)
Kearney and Patricia Simpson, CLAIMANTS)

Claimants: Gary and Maxine Marlow, and Kearney and Patricia Simpson
(the Claimants)

Property: Township 18, Range 1, Section 32, Tax lots 1001, 1003 and 1005,
Lane County (the property)

Claim: The demand for compensation and any supporting information received
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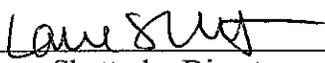
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ORDER

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.

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IN THE MATTER OF THE CLAIM FOR)	FINAL ORDER B1
COMPENSATION UNDER ORS 197.352)	CLAIM NO. M124529
(BALLOT MEASURE 37) OF)	
Jerry Dilley, CLAIMANT)	

Claimant: Jerry Dilley (the Claimant)

Property: Township 18, Range 1, Section 32. Tax lots 1001, 1003, and a portion of 1005, Lane 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.

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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 Gary and Maxine Marlow and Kearney and Patricia Simpson's division of tax lot 1000 into 2- to 5-acre parcels and to their development of a dwelling on each parcel; Jerry Dilley's division of tax lots 1001 and 1003 and a portion of tax lot 1005 into 2- to 5-acre parcels and his development of a dwelling on each parcel; and Thomas Marlow's division of a portion of tax lot 1005 into 2- to 5-acre parcels and his development of a dwelling on each parcel: applicable provisions of Goal 3, ORS 215 and OAR 660, division 33. These laws will not apply to the claimants only to the extent of their ownership of each of the subject tax lots, and only to the necessary to allow them to use the tax lots that they each own for the use described in this report, and only to the extent that use was permitted when Gary and Maxine Marlow and Kearney and Patricia Simpson acquired tax lot 1000 on March 25, 1963; Thomas Marlow acquired a portion of tax lot 1005 in April 1964; and Jerry Dilley acquired tax lots 1001 and 1003 and a portion of tax lot 1005 on March 27, 1973
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4. Any use of the subject property by the claimants under the terms of the order will remain subject to the following laws: (a) those laws not specified in (1) above; (b) any laws enacted or enforced by a public entity other than the Commission or the department; and (c) those laws not subject to ORS 197.352 including, without limitation, those laws exempted under ORS 197.352(3).

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

This Order is entered by the Director of the DLCDC as a final order of DLCDC 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 DLCDC AND THE LAND
CONSERVATION AND
DEVELOPMENT COMMISSION:



Lane Shetterly, Director
DLCDC

Dated this 11th day of September, 2006.

FOR the DEPARTMENT OF
ADMINISTRATIVE SERVICES:



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COMPENSATION UNDER ORS 197.352) CLAIM NO. M124529
(BALLOT MEASURE 37) OF)
Jerry Dilley, CLAIMANT)

Claimant: Jerry Dilley (the Claimant)

Property: Township 18, Range 1, Section 32. Tax lots 1000 and a portion of 1005,
Lane County (the Property)

Claim: The demand for compensation and any supporting information received
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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.

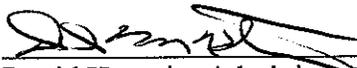
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IN THE MATTER OF THE CLAIM FOR)	FINAL ORDER C1
COMPENSATION UNDER ORS 197.352)	CLAIM NO. M124529
(BALLOT MEASURE 37) OF)	
Thomas Marlow, CLAIMANT)	

Claimant: Thomas Marlow (the Claimant)

Property: Township 18, Range 1, Section 32, Tax lot 1005, Lane County (the Property)

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

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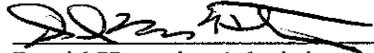
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Thomas Marlow, CLAIMANT)

Claimant: Thomas Marlow (the Claimant)

Property: Township 18, Range 1, Section 32, Tax lots 1000, 1001, 1003, and a
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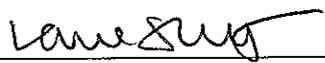
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ORDER

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Development Commission (LCDC) for tax lots 1000, 1001, 1003, and a portion of 1005,
for the reasons set forth in the DLCD Report.

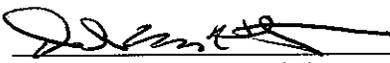
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ORS 197.352 (BALLOT MEASURE 37) CLAIM FOR COMPENSATION

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

September 11, 2006

STATE CLAIM NUMBER: M124529

NAMES OF CLAIMANTS: Gary and Maxine Marlow
Kearney and Patricia Simpson
Jerry Dilley
Thomas Marlow

MAILING ADDRESS: Gary and Maxine Marlow
38817 Place Road
Fall Creek, Oregon 97438

Kearney and Patricia Simpson
39297 Place Road
Fall Creek, Oregon 97438

Jerry Dilley
85065 Renegade Lane
Fall Creek, Oregon 97438

Thomas Marlow
1932 Woodson Loop
Eugene, Oregon 97405

PROPERTY IDENTIFICATION: Township 18, Range 1, Section 32
Tax lots 1000, 1001, 1003 and 1005
Lane County

OTHER CONTACT INFORMATION: Steve Cornacchia
Hershner Hunter, LLP
180 East 11th Avenue
Eugene, Oregon 97401

DATE RECEIVED BY DAS: March 21, 2006

180-DAY DEADLINE: September 17, 2006

I. SUMMARY OF CLAIM

The claimants, Gary, Maxine and Thomas Marlow, Kearney and Patricia Simpson and Jerry Dilley, seek compensation in the amount of \$3,550,000 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 the 65-acre subject property into 2- to 5-acre parcels and to develop a dwelling on each parcel. The subject property is located on Jasper-Lowell Road, near Pleasant Hill, in Lane County. (See claim.)

II. SUMMARY OF STAFF RECOMMENDATION

Based on the findings and conclusions set forth below, the Department of Land Conservation and Development (the department) has determined that the claim is valid. Department staff recommends that, in lieu of compensation, the requirements of the following state laws enforced by the Land Conservation and Development Commission (the Commission) or the department not apply to Gary and Maxine Marlow and Kearney and Patricia Simpson's division of tax lot 1000 into 2- to 5-acre parcels and to their development of a dwelling on each parcel; Jerry Dilley's division of tax lots 1001, 1003 and a portion of tax lot 1005 into 2- to 5-acre parcels and his development of a dwelling on each parcel; and Thomas Marlow's division of a portion of tax lot 1005 into 2- to 5-acre parcels and 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. These laws will not apply to the claimants only to the extent of their ownership of each of the subject tax lots, and only to the necessary to allow them to use the tax lots that they each own for the use described in this report, and only to the extent that use was permitted when Gary and Maxine Marlow and Kearney and Patricia Simpson acquired tax lot 1000 on March 25, 1963; Thomas Marlow acquired a portion of tax lot 1005 in April, 1964; and Jerry Dilley acquired tax lots 1001, 1003 and a portion of tax lot 1005 on March 27, 1973.

This claim is denied as to Gary and Maxine Marlow and Kearney and Patricia Simpson with regard to tax lots 1001, 1003 and 1005 because they are not current owners of these tax lots; is denied as to Thomas Marlow with regard to tax lots 1000, 1001, 1003 and a portion of tax lot 1005 because he is not a current owner of these tax lots; and is denied as to Jerry Dilley with regard to tax lot 1000 and a portion of tax lot 1005 because he is not a current owner these tax lots. (See the complete recommendation in Section VI. of this report.)

III. COMMENTS ON THE CLAIM

Comments Received

On August 8, 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 21, 2006, for processing under OAR 125, division 145. The claim identifies Goals 4 and 14; OAR 660-006-0000 to 660-006-0060, 660-014-0000 to 660-014-0040 and 660-015-0000(4) and (14); and ORS 147.175, 147.200 and 147.250 as the basis for the claim.¹ 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

Claimants Gary and Maxine Marlow and Kearney and Patricia Simpson acquired the subject property on March 25, 1963, as reflected by a warranty deed included with the claim. Claimants Gary and Maxine Marlow and Kearney and Patricia Simpson conveyed a portion of tax lot 1005 to Thomas Marlow in April 1964 and all of their interest in tax lots 1001 and 1003 and the remainder of their interest in tax lot 1005 to Jerry Dilley on March 27, 1973, as reflected by deeds and a contract included with the claim. The Lane County Assessor’s Office confirms the claimants’ current ownership of each of the subject tax lots.

Conclusions

Claimants Gary and Maxine Marlow and Kearney and Patricia Simpson are “owners” of tax lot 1000, as that term is defined by ORS 197.352(11)(C), as of March 25, 1963. Claimant

¹ ORS 147 addresses Victims of Crime and Acts of Mass Destruction. That chapter includes no state land use regulations for the purposes of ORS 197.352. It is not addressed in this report.

Thomas Marlow is an owner of a portion of tax lot 1005 as of April, 1964. Claimant Jerry Dilley is an owner of tax lots 1001 and 1003 and a portion of tax lot 1005 as of March 27, 1973.

Claimants Gary and Maxine Marlow and Kearney and Patricia Simpson are not owners of tax lot 1001, 1003 or 1005. Claimant Thomas Marlow is not an owner of tax lot 1000, 1001 or 1003 or a portion of tax lot 1005. Claimant Jerry Dilley is not an owner of tax lot 1000 or a portion of tax lot 1005.

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 that the claimants desire to divide the 65-acre subject property into 2- to 5-acre parcels and to develop a dwelling on each parcel. It indicates that Goals 4 and 14; OAR 660-006-0000 to 660-006-0060, 660-014-0000 to 660-014-0040 and 660-015-0000(4) and (14); and ORS 147.175, 147.200 and 147.250 prevent their desired use.²

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 (40) by Lane County, 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 3.³ 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 215.213, 215.263 and 215.780 and OAR 660, division 33, enacted or adopted pursuant to Goal 3, prohibit the division of EFU-zoned land in marginal lands counties into parcels less than 80 acres and establish standards for development of dwellings on existing or proposed parcels on that land.

ORS 215.780 establishes an 80-acre minimum size for the creation of new lots or parcels in EFU zones and became effective on November 4, 1993 (Chapter 792, Oregon Laws 1993). ORS 215.780(2) allows the Commission to approve smaller minimums. ORS 215.263 (2005 edition) establishes standards for the creation of new parcels for non-farm uses and dwellings allowed in an EFU zone.

² In addition to their reliance on provisions of ORS 147, which does not involve any state land use regulations, the claimants summarily cited numerous state land use laws as applicable to this claim, but did not establish how the laws either apply to the claimants' desired use of the subject property or restrict its use with the effect of reducing its fair market value. On their face, most of these regulations either do not apply to the claimants' property or do not restrict the claimants' desired use of the property with the effect of reducing 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' asserted desired use.

³ The claimants' property is "agricultural land" because it contains Natural 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 in a marginal lands county under ORS 215.213. OAR 660-033-0130(4)(e) (applicable to non-farm dwellings in marginal lands counties) became effective on August 7, 1993. The Commission subsequently adopted amendments to comply with House Bill 3326 (Chapter 704, Oregon Laws 2001, effective on January 1, 2002), which were effective on May 22, 2002. (See administrative rule history for OAR 660-033-0100, -0130 and -0135.)

Claimants Gary and Maxine Marlow and Kearney and Patricia Simpson acquired tax lot 1000 on March 25, 1963; Thomas Marlow acquired a portion of tax lot 1005 in April 1964; and Jerry Dilley acquired tax lots 1001 and 1003 and a portion of tax lot 1005 on March 27, 1973, all prior to the adoption of the statewide planning goals and their implementing statutes and regulations.

Conclusions

The current zoning requirements, minimum lot size and dwelling standards established by applicable provisions of Goal 3, ORS 215 and OAR 660, division 33, were all enacted or adopted after Gary and Maxine Marlow and Kearney and Patricia Simpson acquired tax lot 1000, after Thomas Marlow acquired a portion of tax lot 1005 and after Jerry Dilley acquired tax lots 1001 and 1003 and a portion of tax lot 1005, and do not allow the desired division or residential development of the property. These laws restrict the use of the subject property relative to the uses allowed when the claimants acquired each of the subject tax lots.

Gary and Maxine Marlow and Kearney and Patricia Simpson do not own tax lot 1001, 1003, or 1005. Thomas Marlow does not own tax lot 1000, 1001 or 1003 or a portion of tax lot 1005, and Jerry Dilley does not own tax lot 1000 or a portion of tax lot 1005. Therefore, no state land use regulations restrict their use of those tax lots with the effect of reducing their fair market value.

This report addresses only those state laws that are identified in the claim, or that the department is certain apply to the subject property based on the use that the claimants have identified. 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 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.

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 \$3,550,000 as the reduction in the subject property's fair market value due to the regulations that restrict the use of the property. This amount is based on an appraisal.

Conclusions

As explained in Section V.(1) of this report, the claimants are Gary, Maxine and Thomas Marlow, Kearney and Patricia Simpson and Jerry Dilley. Gary and Maxine Marlow, and Kearney and Patricia Simpson acquired tax lot 1000 on March 25, 1963; Thomas Marlow acquired a portion of tax lot 1005 in April 1964; and Jerry Dilley acquired tax lots 1001, 1003, and a portion of tax lot 1005, on March 27, 1973.

Gary and Maxine Marlow and Kearney and Patricia Simpson are not owners of tax lot 1001, 1003, or 1005; Thomas Marlow is not an owner of tax lot 1000, 1001, or 1003 or a portion of tax lot 1005; and Jerry Dilley is not an owner of tax lot 1000 or a portion of tax lot 1005. As a result, they are not entitled to compensation under ORS 197.352 for those tax lots for which they are not owners. Under ORS 197.352, the claimants are due compensation for land use regulations that restrict the use of the tax lots they own and have the effect of reducing the fair market value of those tax lots. Based on the findings and conclusions in Section V.(2) of this report, laws enacted or adopted since each of the claimants acquired a portion of the subject property restrict the claimants' desired use of the property. The claimants estimate that the effect of the regulations on the fair market value of the entire subject property is a reduction of \$3,550,000.

Without further documentation of how the land use regulations restrict the claimants' use of those tax lots they each own with the effect of reducing their fair market value, 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 Goal 3, ORS 215 and OAR 660, division 33, which Lane County has implemented through its current EFU (40) zone. All of these land use regulations were enacted or adopted after each of the claimants acquired a portion of the subject property.

Conclusions

Without a specific development proposal for the subject property, it is not possible for the department to determine all the laws that may apply to a particular use of the property, or whether those laws may fall under one or more of the exemptions under ORS 197.352. It appears that none of the general statutory, goal and rule restrictions on division and development of the claimants' property were in effect when the claimants each acquired a portion of the subject property. As a result, these laws are not exempt under ORS 197.352(3)(E).

Laws in effect when each of the claimants acquired a portion of subject property are exempt under ORS 197.352(3)(E) and will continue to apply to the claimants' use of the property. 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 use that the claimants have identified. Similarly, this report only addresses the exemptions provided for under ORS 197.352(3) that are clearly applicable, given the information provided to the department in the claim. The claimants should be aware that the less information they have provided to the department in the claim, the greater the possibility that there may be additional laws that will later be determined to continue to apply to their use of the subject property.

VI. FORM OF RELIEF

ORS 197.352(1) provides for payment of compensation to an owner of private real property if the Commission or the department has enforced laws that restrict the use of the subject 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 subject 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, the claim for tax lots 1001, 1003 and 1005 is not valid for Gary and Maxine Marlow and Kearney and Patricia Simpson, the claim for tax lots 1000, 1001 and 1003 and a portion of tax lot 1005 is not valid for Thomas Marlow and the claim for tax lot 1000 and a portion of tax lot 1005 is not valid for Jerry Dilley because these claimants are not owners of these tax lots.

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 each of the tax lots for which they are owners. The claim asserts that existing land use regulations enforced by the Commission or the

department have the effect of reducing the fair market value of the subject property by \$3,550,000. However, without additional 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 each of the tax lots they own. 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 Gary and Maxine Marlow and Kearney and Patricia Simpson to use tax lot 1000 for a use permitted when they acquired this tax lot on March 25, 1963; to allow Thomas Marlow to use a portion of tax lot 1005 for a use permitted when he acquired this portion of tax lot 1005 in April 1964; and to allow Jerry Dilley to use tax lots 1001 and 1003 and a portion of tax lot 1005 for a use permitted at the time he acquired these tax lots on March 27, 1973.

Conclusions

Based on the record, claimants Gary and Maxine Marlow and Kearney and Patricia Simpson are not entitled to relief under ORS 197.352 for tax lots 1001, 1003 and 1005; Thomas Marlow is not entitled to relief under ORS 197.352 for tax lots 1000, 1001, 1003, and a portion of tax lot 1005; and Jerry Dilley is not entitled to relief under ORS 197.352 for tax lot 1000 and a portion of tax lot 1005 because these claimants are not owners of these tax lots. Therefore, the department recommends the claim be denied as to these claimants for the identified tax lots. The department otherwise recommends that the claim be approved, subject to the following terms:

1. In lieu of compensation under ORS 197.352, the State of Oregon will not apply the following laws to Gary and Maxine Marlow and Kearney and Patricia Simpson's division of tax lot 1000 into 2- to 5-acre parcels and to their development of a dwelling on each parcel; Jerry Dilley's division of tax lots 1001 and 1003 and a portion of tax lot 1005 into 2- to 5-acre parcels and his development of a dwelling on each parcel; and Thomas Marlow's division of a portion of tax lot 1005 into 2- to 5-acre parcels and his development of a dwelling on each parcel: applicable provisions of Goal 3, ORS 215 and OAR 660, division 33. These laws will not apply to the claimants only to the extent of their ownership of each of the subject tax lots, and only to the necessary to allow them to use the tax lots that they each own for the use described in this report, and only to the extent that use was permitted when Gary and Maxine Marlow and Kearney and Patricia Simpson acquired tax lot 1000 on March 25, 1963; Thomas Marlow acquired a portion of tax lot 1005 in April 1964; and Jerry Dilley acquired tax lots 1001 and 1003 and a portion of tax lot 1005 on March 27, 1973

2. The action by the State of Oregon provides the state's authorization to Gary and Maxine Marlow and Kearney and Patricia Simpson to use tax lot 1000; to Thomas Marlow to use a portion of tax lot 1005; and to Jerry Dilley to use tax lots 1001 and 1003 and a portion of tax lot 1005 for the use described in this report, subject to the standards in effect when Gary and Maxine Marlow and Kearney and Patricia Simpson acquired tax lot 1000 on March 25, 1963, when

Thomas Marlow acquired a portion of tax lot 1005 in April 1964 and when Jerry Dilley acquired tax lots 1001 and 1003 and a portion of tax lot 1005 on March 27, 1973.

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

4. Any use of the subject property by the claimants under the terms of the order will remain subject to the following laws: (a) those laws not specified in (1) above; (b) any laws enacted or enforced by a public entity other than the Commission or the department; and (c) those laws not subject to ORS 197.352 including, without limitation, those laws exempted under ORS 197.352(3).

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

VII. COMMENTS ON THE DRAFT STAFF REPORT

The department issued its draft staff report on this claim on August 25, 2006. OAR 125-145-0100(3), provided an opportunity for the claimants or the claimants' authorized agent and any third parties who submitted comments under OAR 125-145-0080 to submit written comments, evidence 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.

The claimants' attorney submitted a letter in response to the draft staff report, objecting to the department's failure to adequately explain its conclusion that claimants' Gary and Maxine Marlow and Kearney and Patricia Simpson conveyed portions of the property to Thomas Marlow and Jerry Dilley in 1973, as described in Section V.(1). As the claimants' attorney reiterates, "following purchase of the subject property, the applicants were advised to convey the legal interest in two of the parcels to trusted individuals for the purpose of avoiding a merger of the four parcels into one parcel by Lane County or operation of law." The instruments by which the claimants conveyed the property does not retain in the Marlows or the Simpsons any continuing ownership of those tax lots. Regardless of the claimants' motives for conveying the property, the claimants conveyed the title to those tax lots. A resulting "equitable" interest in the property as between the claimants, and as described by the claimants' attorney, does not give those who transferred all of their ownership interest in the property any continuing ownership interest in it.