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

IN THE MATTER OF THE CLAIM FOR COMPENSATION UNDER ORS 197.352 (BALLOT MEASURE 37) OF Marie Cunningham and Roger and Patricia Cunningham, CLAIMANTS	)))))	FINAL ORDER CLAIM NO. M125027

Claimants: Marie Cunningham and Roger and Patricia Cunningham (the Claimants)

Property: Township 13S, Range 13E, Section 18A, Tax lot 400
Jefferson 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 the claimants' division of the 28.86-acre subject property into 5- to 10-acre parcels or to their development of a dwelling on each parcel: applicable provisions of Goal 3, ORS 215 and OAR 660, division 33, enacted or adopted after each claimant acquired the subject property. 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 Marie Cunningham acquired her one-third interest in the property on April 20, 1961, and when Roger and Patricia Cunningham acquired their one-third interest in the property on January 23, 1978. Because Marie Cunningham has not established when she acquired her present interest in the one-third undivided interest conveyed to the Vern Cunningham Trust in 1994, she has not provided sufficient information to establish that land use regulations enacted or adopted after she acquired her present interest in that one-third undivided interest have restricted her present use of the property with the effect of reducing the property's fair market value and therefore, has not established her entitlement to a waiver of regulations as to that one-third interest.

2. The action by the State of Oregon provides the state's authorization to the claimants to use the subject property for the use described in this report, subject to the standards in effect when Maria Cunningham acquired her undivided one-third interest in the property on April 20, 1961, and when Roger and Patricia Cunningham acquired their one-third interest in the property on January 24, 1978. On January 23, 1978, the property was subject to the applicable provisions of Goal 3 and 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 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 Manager for the Measure 37 Services Division 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 Director 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

Michael Morrissey, Manager
DLCD, Measure 37 Division
Dated this 12th day of October, 2006.

FOR the DEPARTMENT OF ADMINISTRATIVE SERVICES:

Lindsay A. Ball, Director
DAS
Dated this 12th day of October, 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."

ORS 197.352 (BALLOT MEASURE 37) CLAIM FOR COMPENSATION

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

October 12, 2006

STATE CLAIM NUMBER:	M125027
NAMES OF CLAIMANTS:	Marie Cunningham Roger and Patricia Cunningham
MAILING ADDRESS:	4250 Norris Lane Culver, Oregon 97734
PROPERTY IDENTIFICATION:	Township 13S, Range 13E, Section 18A Tax lot 400 Jefferson County
OTHER CONTACT INFORMATION:	Bob Harris 380 SW 5th Street #122 Madras, Oregon 97741
DATE RECEIVED BY DAS:	April 20, 2006
180-DAY DEADLINE:	October 17, 2006

I. SUMMARY OF CLAIM

The claimants, Marie, Roger and Patricia Cunningham, seek compensation in the amount of $500,000 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 28.86-acre subject property into 5- to 10-acre parcels and to develop a dwelling on each parcel. The subject property is located south of Norris Lane and west of the North Unit Irrigation Canal, in Jefferson 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 the claimants' division of the 28.86-acre subject property into 5- to 10-acre parcels and to their 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 each claimant acquired the subject property. 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 Marie Cunningham acquired an undivided one-third interest in the property on April 20, 1961, and when Roger and Patricia Cunningham acquired an undivided one-third interest in the property on January 23, 1978. Because Marie Cunningham has not established when she acquired her present interest in the one-third undivided interest conveyed to the Vern Cunningham Trust in 1994, the claimant has not established her entitlement to relief under ORS 197.352 as to that one-third undivided interest in the property. (See the complete recommendation in Section VI. of this report.)

III. COMMENTS ON THE CLAIM

Comments Received

On August 18, 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 April 20, 2006, for processing under OAR 125, division 145. The claim identifies land use regulations, generally, 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

Claimant Marie Cunningham acquired the subject property on April 20, 1961, as reflected by a warranty deed included with the claim. On January 23, 1978, she conveyed a one-third interest in the subject property to Roger and Patricia Cunningham, as reflected by a memorandum of contract included with the claim.[1]

On January 21, 1994, Marie and Vern Cunningham each conveyed a one-third interest in the subject property to their respective revocable trusts. Marie Cunningham was a trustee of her trust. However, the claim does not establish whether Marie Cunningham was a trustee of Vern Cunningham's trust. The claim does establish that as of October 31, 2001, Marie Cunningham was the trustee of her trust and the successor trustee of the Vern Cunningham Trust. If Marie Cunningham was made a trustee of the Vern Cunningham Trust in 1994, she would have had a continuing interest in all of the two-thirds undivided interest that she retained through the 1978 contract. Conversely, if she was not made a trustee at that time, and instead became a successor trustee at a later date, she would have relinquished her ownership of that undivided one-third interest in 1994 when she transferred a one-third interest to the Vern Cunningham Trust. She would have then re-established an interest in that one-third interest when she became a successor trustee in 2001.

The claimants have not provided sufficient information from which the department can conclude that Marie Cunningham has had a continuing, uninterrupted interest in the one-third undivided interest transferred to the Vern Cunningham Trust in 1994, or the date she became trustee if, in fact, she was not made a trustee in 1994. Without that information, the department can determine only that, with the newly acquired ownership information, it appears that Marie Cunningham is a current owner of a two-thirds interest in the property, but that she has established her continuous ownership only as to a one-third interest in the property.

The Jefferson County Assessor's Office confirms the claimants' current ownership of the subject property.

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[1] A memorandum of contract submitted by the claimants appears to convey all of Maria Cunningham's interest in the subject property to Roger and Patricia Cunningham on January 23, 1978. However, in response to the draft staff report for claims M124375, M124376, M124377 and M124378, the claimants' agent submitted a response, objecting to the department's reliance on the memorandum of contract submitted by the claimants. As the agent explained, the documentation submitted by the claimants "was only a memorandum of contract without spelling out the details." The agent submitted a bargain and sale deed dated October 31, 2001, which appears to be a deed in fulfillment of a January 24, 1978, contract. That deed reflects that as of 2001 and in fulfillment of the 1978 contract, title to the property is held as tenants in common. This deed indirectly reflects that the language of the memorandum of contract that the claimants submitted to the department was incorrect, and notwithstanding that memorandum language, through the 1978 contract, Vern and Marie Cunningham conveyed only a one-third interest in the property to Roger and Patricia Cunningham.

Conclusions

The claimants, Marie, Roger and Patricia Cunningham, are "owners" of the subject property as that term is defined by ORS 197.352(11)(C). Roger and Patricia Cunningham acquired a one-third interest in the subject property on January 23, 1978. Marie Cunningham acquired a one-third interest in the subject property on April 20, 1961. Marie Cunningham has not established when she acquired her present interest in the one-third interest conveyed to the Vern Cunningham Trust in 1994. Marie Cunningham is a "family member" as 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 28.86-acre subject property into 5- to 10-acre parcels and to develop a dwelling on each parcel. It indicates that the use is not allowed under current land use regulations.[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 Rangeland by Jefferson 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 Goal 3 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(1)(b) establishes a 160-acre minimum size for the creation of new lots or parcels in EFU zones that are designated rangeland 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.

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[2] 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 the regulations either do not apply to the claimants' property or do not restrict the use of the claimants' 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' asserted desired use.

[3] The claimants' property is "agricultural land" because it contains National Resources Conservation Service Class I–VI 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 were effective on May 22, 2002. (See administrative rule history for OAR 660-033-0100, -0130 and -0135.)

Marie Cunningham initially acquired the subject property in 1961, prior to the adoption of the statewide planning goals and their implementing statutes and regulations. No county zoning applied to the subject property in 1961.

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 Marie Cunningham initially acquired the subject property. These laws restrict the use of the subject property relative to the uses allowed when Marie Cunningham initially acquired 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 $500,000 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 claimants' assessment of the subject property's value.

Conclusions

As explained in Section V.(1) of this report, the claimants are Marie Cunningham who initially acquired the subject property on April 20, 1961, and her son and daughter-in-law Roger and Patricia Cunningham. Under ORS 197.352, the claimants are due compensation for land use regulations that restrict the use of the 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 Marie Cunningham initially acquired 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 subject property is a reduction of $500,000.

Without an appraisal or other documentation, it is not possible to substantiate the specific dollar amount by which the land use regulations have reduced the fair market value of the subject 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 since the claimants' family acquired the property.

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 relative to the uses permitted when Marie Cunningham initially acquired the property, including applicable provisions of Goal 3, ORS 215 and OAR 660, division 33, which Jefferson County has implemented through its current Rangeland zone. All of these land use regulations were enacted or adopted after Marie Cunningham initially acquired the subject property.

Conclusions

It appears that none of the general statutory, goal and rule restrictions on residential division and development of the subject property were in effect when Marie Cunningham initially acquired the property on April 20, 1961. As a result, these laws are not exempt under ORS 197.352(3)(E). Laws in effect when Marie Cunningham initially acquired the subject property are exempt under ORS 197.352(3)(E) and do not provide a basis for compensation. In addition, other land use laws enacted or adopted for a purpose set forth in ORS 197.352(3)(A) to (D) are also exempt and would not provide a basis for compensation.

VI. FORM OF RELIEF

ORS 197.352(1) provides for payment of compensation to an owner of private real property if the Commission or the department has enforced one or more laws that restrict the use of the property in a manner that reduces its fair market value. In lieu of compensation, the department may choose to not apply the law in order to allow the present owner to carry out a use of the property permitted at the time the 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 $500,000. 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 the claimants' family 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 Marie Cunningham to use the subject property for a use permitted at the time she acquired her continuing one-third interest in the property on April 20, 1961, and to allow Roger and Patricia Cunningham to use the subject property for a use permitted at the time they acquired the subject property on January 23, 1978. Because Marie Cunningham has not established when she acquired her present interest in the one-third undivided interest conveyed to the Vern Cunningham Trust in 1994, she has not provided sufficient information to establish that land use regulations enacted or adopted after she acquired her present interest in that one-third undivided interest have restricted her present use of the property with the effect of reducing the property's fair market value, which is necessary to entitle her to a waiver of regulations under ORS 197.352 as to that one-third undivided interest.

Roger and Patricia Cunningham acquired the subject property after the adoption of the statewide planning goals, but before the Commission acknowledged Jefferson 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, the property was zoned by Jefferson County as EFU A-1, which established a 40-acre minimum lot size for new lots or parcels and conditionally allowed dwellings not in conjunction with farm use. Because the Commission had not acknowledged the county's plan and land use regulations when Roger and Patricia Cunningham acquired the subject property on January 23, 1978, the statewide planning goals, and Goal 3 in particular, applied directly to Roger and Patricia Cunningham's property when they acquired it.[4]

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, Roger and Patricia Cunningham's opportunity to divide the subject property when they acquired it in 1978 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.

[4] 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).

Under the Goal 3 standards in effect on January 23, 1978, 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).

No information has been presented in the claim to establish that Roger and Patricia Cunningham's desired division of the subject property into 5- to 10-acre parcels 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 their desired development of dwellings on the subject property satisfies the standards for farm or non-farm dwellings under ORS 215.213 (1973 edition).

In addition to the applicable provisions of Goal 3 and ORS 215 in effect when Roger and Patricia Cunningham acquired the property on January 23, 1978, there may be other laws that apply to these claimants' use of their two-thirds undivided interest in the property that have not been identified in the claim. In some cases, it will not be possible to know which laws apply to a use of the subject property until there is a specific proposal for that use. When the claimants seek a building or development permit to carry out a specific use, it may become evident that other state laws apply to that use, and depending on when they were enacted or adopted, may continue to apply to the claimants' property. In addition, some of these laws may be exempt under ORS 197.352(3)(A) to (D) and will continue to apply to the subject property on that basis.

This report addresses only those state laws that are identified in the claim, or that the department is certain apply to the 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 their claim, the greater the possibility that there may be additional laws that will later be determined to continue to apply to their use of the subject property.

Conclusions

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

1. In lieu of compensation under ORS 197.352, the State of Oregon will not apply the following laws to the claimants' division of the 28.86-acre subject property into 5- to 10-acre parcels or to their development of a dwelling on each parcel: applicable provisions of Goal 3, ORS 215 and OAR 660, division 33, enacted or adopted after each claimant acquired the subject property. 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 Marie Cunningham acquired her one-third interest in the property on April 20, 1961, and when Roger and Patricia Cunningham acquired their one-third interest in the property on January 23, 1978. Because Marie Cunningham has not established when she acquired her present interest in the one-third undivided interest conveyed to the Vern Cunningham Trust in 1994, she has not provided sufficient information to establish that land use regulations enacted or adopted after she acquired her present interest in that one-third undivided interest have restricted her present use of

the property with the effect of reducing the property's fair market value and therefore, has not established her entitlement to a waiver of regulations as to that one-third interest.

2. The action by the State of Oregon provides the state's authorization to the claimants to use the subject property for the use described in this report, subject to the standards in effect when Maria Cunningham acquired her undivided one-third interest in the property on April 20, 1961, and when Roger and Patricia Cunningham acquired their one-third interest in the property on January 24, 1978. On January 23, 1978, the property was subject to the applicable provisions of Goal 3 and 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 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 September 26, 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.