

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

IN THE MATTER OF THE CLAIM FOR) FINAL ORDER
COMPENSATION UNDER ORS 197.352) CLAIM NO. M129312
(BALLOT MEASURE 37) OF)
Herbert and Liva Keller, CLAIMANTS)

Claimants: Herbert and Liva Keller (the Claimants)

Property: Township 2S, Range 1E, Section 32B, Tax lots 1000, 1002 and 1003
Clackamas 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 Reports and Recommendation of DLCD (the DLCD Report), and the Oregon Water Resources Department (the OWRD Report), attached to and by this reference incorporated into this order.

ORDER

The Claim is denied as to laws administered by the Oregon Water Resources Department for the reasons set forth in the OWRD Report.

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 Herbert and Liva Keller's division of the 15-acre subject property into eight parcels and 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 October 13, 1972. These laws will not apply to the claimants only to the extent necessary to allow them to use the subject property for the use described in this report, and only to the extent that use was permitted when they acquired the property on October 13, 1972.
2. The action by the State of Oregon provides the state's authorization to the claimants to use the property for the use described in this report, subject to the standards in effect on October 13, 1972. On that date, the property was subject to applicable provisions of 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 DLCD; and (c) those laws not subject to ORS 197.352 including, without limitation, those laws exempted under ORS 197.352(3).

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

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

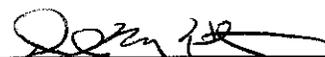
This Order is entered by the Director of the OWRD as a final order of OWRD under ORS 197.352, and OAR Chapter 125, division 145.

FOR DLCD AND THE LAND
CONSERVATION AND DEVELOPMENT
COMMISSION:



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

FOR THE DEPARTMENT OF
ADMINISTRATIVE SERVICES:



David Hartwig, Administrator
DAS, State Services Division
Dated this 31st day of October, 2006.

FOR THE FOR DEPARTMENT OF WATER
RESOURCES:



Phillip C. Ward, Director
OWRD
Dated this 31st day of October, 2006.

NOTICE OF RIGHT TO APPEAL OR OTHER JUDICIAL RELIEF

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

1. Judicial review under ORS 183.484: Judicial review under ORS 183.484 may be obtained by filing a petition for review within 60 days from the service of this order. A petition for judicial review under ORS 183.484 may be filed in the Circuit Court for Marion County or the Circuit Court in the county in which you reside.
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 AND
OREGON DEPARTMENT OF ADMINISTRATIVE SERVICES
Final Staff Report and Recommendation**

October 31, 2006

STATE CLAIM NUMBER: M129312

NAMES OF CLAIMANTS: Herbert and Liva Keller

MAILING ADDRESS: 243 SE Ironwood Avenue
Dallas, Oregon 97338

PROPERTY IDENTIFICATION: Township 2S, Range 1E, Section 32B
Tax lots 1000, 1002 and 1003
Clackamas County

OTHER CONTACT INFORMATION: John A. Rankin, LLC
26715 SW Baker Road
Sherwood, Oregon 97140

DATE RECEIVED BY DAS: May 9, 2006

180-DAY DEADLINE: November 5, 2006

I. SUMMARY OF CLAIM

The claimants, Herbert and Liva Keller, seek compensation in the amount of \$945,000 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 15-acre subject property into eight parcels and to develop a dwelling on each parcel.¹ The subject property is located along Stafford Road, at the geographic coordinates listed above, 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 (DLCD) has determined that the claim is valid. DLCD 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 DLCD not apply to Herbert and Liva Keller's partition of the 15-acre subject property into eight parcels and to their development of a dwelling on each parcel: applicable provisions of Statewide Planning Goal 3

¹ The subject property includes three tax lots. Tax lot 1000 consists of five acres; tax lot 1002 consists of five acres; and tax lot 1003 consists of five acres.

(Agricultural Lands), ORS 215 and Oregon Administrative Rules (OAR) 660, division 33, enacted or adopted after October 13, 1972. These laws will not apply to the claimants only to the extent necessary to allow them to use the subject property for the use described in this report, and only to the extent that use was permitted when they acquired the property on October 13, 1972. (See the complete recommendation in Section VI. of this report.)

III. COMMENTS ON THE CLAIM

Comments Received

On August 21, 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, six written comments were received in response to the 10-day notice.

The comments have been considered by DLCD to the extent that they address the criteria for relief under ORS 197.352. Comments concerning the effects a use of the subject property may have on surrounding areas are generally not something that DLCD is able to consider in determining whether to waive a state law. If funds do become available to pay compensation, then such effects may become relevant in determining which claims to pay compensation for instead of waive a state law. (See the comment letters in DLCD's claim file.)

IV. TIMELINESS OF CLAIM

Requirement

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

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

Findings of Fact

This claim was submitted to DAS on May 9, 2006, for processing under OAR 125, division 145. The claim identifies numerous chapters of ORS as the basis for the claim. Only laws that were enacted or adopted prior to December 2, 2004, are the basis for this claim.

Conclusions

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

V. ANALYSIS OF CLAIM

1. Ownership

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

Findings of Fact

The claimants, Herbert and Liva Keller, acquired title to a larger tract of land including the subject property on March 16, 1966. However, the claimants’ right to use the property was subject to a life estate in favor of Daniel Keller, Herbert Keller’s father. Based on the record before the department, the claimants did not have the right to develop the property as a result of the life estate. However, on October 13, 1972, claimants sold the portion of the larger tract containing the home that Daniel Keller lived in to Herbert Keller’s brother. Based on information submitted by the claimants and their attorney, the department finds that the sale extinguished the life estate with respect to the portion of the property retained by the claimants (which is also the subject property). As a result, the claimants acquired the right to carry out their desired use of the property on October 13, 1972. Later conveyances involving Western Evangelical Seminary did not affect claimants’ rights in the subject property. The property was transferred to the Herbert and Liva Keller Revocable Living Trust with Herbert and Liva Keller as trustees on February 12, 1998, as reflected by a warranty deed included with the claim.² The Clackamas County Assessor’s Office confirms the claimants’ current ownership of the subject property.

Conclusions

The claimants, Herbert and Liva Keller, are “owners” of the subject property as that term is defined by ORS 197.352(11)(C). The Kellers’ acquisition date, for purposes of ORS 197.352(8), is October 13, 1972.

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 acquired the property.

Findings of Fact

The claim indicates that the claimants desire to divide the 15-acre subject property into eight parcels and to develop a dwelling on each parcel. It indicates that the use is not allowed under current land use regulations. The claim lists numerous state statutes and rules but contains no documentation or explanation of how particular statutes or rules apply to or restrict the

² Transfer of property to a revocable trust does not result in a change in ownership for purposes of ORS 197.352.

claimants' desired use of their property. Many of the listed statutes concern matters that have no apparent relation to the desired use, including statutes related to taxation, administrative procedures and state contracting. Similarly, many of the listed rules concern unrelated matters such as the State Employment Department, the Economic Development Department, the Construction Contractors Board and the Department of Aviation. Without any documentation or explanation concerning how specific statutes or rules apply to or restrict the claimants' desired use of their property, DAS is unable to determine that most of the listed state laws apply to or restrict the claimants' desired use of the property.³ The only exceptions are the state land use regulations addressed below by DLCD, and those addressed in a separate report on this claim by the Oregon Water Resources Department.

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 by Clackamas 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 3.⁴ 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 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 215.263 (2005 edition) establishes standards for the creation of new parcels for non-farm uses and dwellings allowed in an EFU zone.

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.)

The claimants acquired the subject property before the adoption of the statewide planning goals and most of the statutory provisions in ORS chapter 215. .

³ DAS also notes that most of the listed state agency rules are not "land use regulations," as that term is defined in ORS 197.352(11).

⁴ The claimants' property is "agricultural land" because it contains Natural Resources Conservation Service Class I-IV soils.

Conclusions

The current zoning requirements, minimum lot size and dwelling standards established by Goal 3, ORS 215 and OAR 660, division 33, do not allow the claimants' desired division or development of the subject property. At the time the claimants' acquired the property (October 13, 1972), their use of the property was not subject to Goal 3, OAR 660-033 or to most statutory provisions in ORS chapter 215.

This report addresses only those state laws that are identified in the claim, or that DLCDC 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 \$945,000 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 an appraisal report completed on January 10, 2005, included with the claim. The appraisal report establishes the value of the property with and without EFU zoning applying to its use. As noted above, however, some of the EFU zoning laws applied to the use of the property at the time the claimants' acquired the right to carry out their desired use. While the assumptions underlying the report are, therefore, partially incorrect, the report nevertheless provides some evidence that the land use regulations have had the effect of reducing the fair market value of the property.

Conclusions

As explained in Section V.(1) of this report, the claimants are Herbert and Liva Keller who acquired the right to use the subject property for their desired use on October 13, 1972. Under ORS 197.352, the claimants are due compensation for land use regulations that restrict the use of the subject property and have the effect of reducing its fair market value. Based on the findings and conclusions in Section V.(2) of this report, laws enacted or adopted since the claimants acquired the subject property restrict the claimants' desired use of the property. The claimants estimate that the effect of the regulations on the fair market value of the subject property is a reduction of \$945,000.

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, DLCDC 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 DLCD.

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 Clackamas County has implemented through its current EFU zone. With the exception of provisions of ORS 215 in effect when the claimants acquired the right to use the subject property for their desired use on October 13, 1972, these land use regulations were enacted or adopted after the claimants acquired the property.

Conclusions

Without a specific development proposal for the subject property, it is not possible for DLCD 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 with the exception of provisions of ORS 215 in effect in 1972, the statutory, goal and rule restrictions on division and development of the claimants' property were not in effect when the claimants acquired it, and therefore, these laws are not exempt under ORS 197.352(3)(E). Provisions of ORS 215 in effect when the claimants acquired the subject property in 1972 are exempt under ORS 197.352(3)(E) and will continue to apply to the property.

Other laws in effect when the claimants acquired the subject property are also 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 DLCD 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 DLCD in the claim. The claimants should be aware that the less information they have provided to DLCD 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 DLCD 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, DLCD 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 DLCD determines a claim is valid, the Director of DLCD 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 DLCD restrict the claimants' desired use of the subject property. The claim asserts that existing state land use regulations enforced by the Commission or DLCD have the effect of reducing the fair market value of the subject property by \$945,000. However, a specific amount of compensation cannot be determined. Nevertheless, based on the record for this claim, DLCD 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 DLCD to modify, remove or not apply all or parts of certain land use regulations to allow Herbert and Liva Keller to use the subject property for a use permitted at the time they acquired the right to use the property for their desired use on October 13, 1972.

Conclusions

Based on the record, DLCD 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 Herbert and Liva Keller's division of the 15-acre subject property into eight parcels and 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 October 13, 1972. These laws will not apply to the claimants only to the extent necessary to allow them to use the subject property for the use described in this report, and only to the extent that use was permitted when they acquired the property on October 13, 1972.
2. The action by the State of Oregon provides the state's authorization to the claimants to use the property for the use described in this report, subject to the standards in effect on October 13, 1972. On that date, the property was subject to applicable provisions of 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 DLCD; 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 October 10, 2006. OAR 125-145-0100(3), provided an opportunity for the claimants or the claimants' authorized agent and any third parties who submitted comments under OAR 125-145-0080 to submit written comments, evidence and information in response to the draft staff report and recommendation. Comments received have been taken into account by the department in the issuance of this final report.

**ORS 197.352 (2004 OREGON BALLOT MEASURE 37)
CLAIM FOR COMPENSATION**

OREGON WATER RESOURCES DEPARTMENT

Final Staff Report and Recommendation

October 31, 2006

STATE CLAIM NUMBER: M129312

NAME OF CLAIMANT: Herbert and Liva Keller

PROPERTY IDENTIFICATION: T2S, R1E, section 32B WM,
tax lots 1000, 1002, 1003
Clackamas County

OTHER CONTACT INFORMATION: John A. Rankin, LLC
26715 SW Baker Road
Sherwood, Oregon 97140

DATE RECEIVED BY DAS: May 9, 2006

180-DAY DEADLINE: November 11, 2006

I. SUMMARY OF CLAIM

The claimants, Herbert and Liva Keller ("claimants") seek compensation in the amount of \$945,000 for the reduction in fair market value of the Property as a result of land use regulations that are alleged to restrict their use of the Property. The claimants desire compensation or the right to divide the property into eight parcels and develop each parcel with a single family residence and accessory structures, with one or more wells for each residence. The subject property is located in Clackamas County and is described as T2S, R1E, section 32B WM, tax lots 1000, 1002 and 1003. (See claim.).

II. SUMMARY OF STAFF RECOMMENDATION

Based on the findings and conclusions set forth below, the Water Resources Department (OWRD) has determined that the claim is not valid as to state laws administered by OWRD. OWRD staff recommends that the claim be denied as to laws administered by OWRD. (See the complete recommendation in Section VI of this report.)

III. COMMENTS ON THE CLAIM

OWRD incorporates by reference section III of the DLCDC report on this claim.

IV. TIMELINESS OF CLAIM

OWRD incorporates by reference the findings and conclusions of DLCD concerning the timeliness of the claim.

V. ANALYSIS OF CLAIM

1. Ownership

OWRD incorporates by reference the findings and conclusions of DLCD concerning the present owners of the property, and when they and any family member acquired an interest in the subject real property.

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 claimant or a family member acquired the property.

Findings of Fact

The claim identifies ORS chapters 537, 540 and 541, as well as OAR chapter 690 as state laws administered by OWRD that restrict the use of the Property. There is no documentation or description presented in the claim concerning how or why these laws are "land use regulations" that restrict the use of the property the claimants wish to carry out.

The claimants have not asserted that OWRD has denied an application for a permit, or limited the use of water under an existing water right with respect to the claimants' use of the Property for the development of up to eight homes with one or more wells. The information in WRD's water right information system does not contain a record of an application by a Herbert or Liva Keller for a permit to use water on the Property that was denied.

The Oregon Water Code was enacted in 1909. Under this authority (ORS 536), the Water Resources Commission is obligated to adopt rules and standards to allow the orderly development of waters of the State and to protect senior water right holders. The Commission is further instructed to progressively formulate an integrated, coordinated program for the use and control of all the water resources of this state. Ground water is specifically managed under the 1955 Ground Water Act (ORS 537.505). The claimants have no right to use water except as provided under the terms of Oregon law. OWRD has not taken any action to enforce any law that restricts any right claimants may have to use water on the Property.

Finally, under ORS 197.352(11), "land use regulations" do not include the rules of the Oregon Water Resources Commission. As a result, OWRD is not authorized to provide relief for this claim.

Conclusions

The OWRD has not denied an application filed by the claimants for a water right for use of water on the Property. The Oregon Water Code and the 1955 Ground Water Act predate the claimants' date of acquisition. OWRD has not taken any action since December 2, 2004 to enforce an existing state law that restricts the claimants' right to use the Property for any purpose. Further, OWRD's administrative rules are not "land use regulations" under ORS 197.352(11). For all of these reasons, there is no basis upon which OWRD may approve this claim under ORS 197.352.

3. Effect of Regulations on Fair Market Value

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

Findings of Fact

The claim includes an estimate of \$945,000 as the reduction in the subject property's fair market value due to current regulations.

Conclusions

The claim provides no evidence that OWRD has enforced a "land use regulation" in a manner that restricts claimants' use of the property or has reduced its fair market value. As a result there is no evidence in the record for this claim that the fair market value of the property has been reduced by a law that OWRD has enforced since December 2, 2004 (the effective date of ORS 197.352).

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. OWRD has not analyzed whether any of the exemptions may apply to this claim, because it has determined that there is no restriction on use, and no reduction in value.

VI. FORM OF RELIEF

ORS 197.352(1) requires payment of compensation to an owner of private real property if the department has enacted or enforced a law that restricts the use of the property in a manner that reduces its fair market value. Because of the lack of evidence that an existing law has been enforced since December 2, 2004, in a manner that has restricted the claimants' use of the property and has reduced the fair market value of the property, OWRD did not make further evaluations or determination on the merits or substance of the claim.

Conclusions

No showing has been made that OWRD has enforced an existing law since December 2, 2004 to restrict an existing right of the claimants. As a result, OWRD recommends that this claim be denied as to laws administered by OWRD.

VII. COMMENTS ON THE DRAFT STAFF REPORT

OWRD's draft staff report on this claim was issued on October 10, 2006. Under OAR 125-145-0100(3), OWRD provided an opportunity for comments on the draft report to the claimants and any third party who had earlier submitted comments on the claim. The attorney for the claimants, and Andree Devine and Scott Kraker submitted comments on the draft report that WRD has considered in this final report.