

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

IN THE MATTER OF THE CLAIM FOR) FINAL ORDER
COMPENSATION UNDER ORS 197.352) CLAIM NO. M129370
(BALLOT MEASURE 37) OF)
John F. and Marybeth Schilling, CLAIMANTS)

Claimants: John F. and Marybeth Schilling (the Claimants)

Property: Township 18S, Range 13E, Section 06, Tax lot 500
Deschutes 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 Department of Transportation (the ODOT Report), attached to and by this reference incorporated into this order.

ORDER

The Claim is denied as to laws administered by the Department of Transportation for the reasons set forth in the ODOT 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 lot size requirements and non-farm dwelling standards contained in the following laws to John and Marybeth Schilling's division of their property into a maximum of 33 one-half acre lots or to their development of a dwelling on each lot: ORS 215.263, 215.284 and 215.780; Goals 3, 11 (only to the extent that Goal 11 restricts the claimants' use of the property as opposed to restricting the actions of service providers) and 14; and OAR 660-033-0100, -0120 and -0130. These state land use regulations will not apply to the claimants only to the extent necessary to allow them to use the subject property for the use described in this report, and only to the extent that use was permitted when they acquired the property on August 7, 1956.
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 on August 7, 1956.

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).

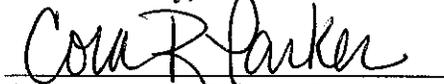
5. Without limiting the generality of the foregoing terms and conditions, in order for the claimants to use the subject property, it may be necessary for them to obtain a decision under ORS 197.352 from a city and/or county and/or metropolitan service district that enforces land use regulations applicable 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.

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

FOR DLCD AND THE LAND
CONSERVATION AND DEVELOPMENT
COMMISSION:

Lane Shetterly, Director



Cora R. Parker, Deputy Director
DLCD

Dated this 16th day of November, 2006.

FOR THE DEPARTMENT OF
ADMINISTRATIVE SERVICES:

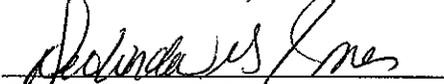


David Hartwig, Administrator
DAS, State Services Division

Dated this 16th day of November, 2006.

FOR THE FOR DEPARTMENT OF
TRANSPORTATION:

Matthew L. Garrett, Director



By: Deolinda G. Jones

State Right of Way Manager

Oregon Department of Transportation

Dated this 16th day of November, 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.”

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

OREGON DEPARTMENT OF TRANSPORTATION

Final Staff Report and Recommendation

November 16, 2006

STATE CLAIM NUMBER: M129370

NAME OF CLAIMANT: John F. Schilling and
Marybeth Schilling

IDENTIFICATION OF PROPERTY: Township 18S, Range 13E, Section 6
Tax lot 500
Deschutes County

OTHER CONTACT INFO: Bruce White, Attorney at Law
PO Box 1278
Bend, OR 97709

DATE RECEIVED BY DAS: May 22, 2006

180-DAY DEADLINE: November 18, 2006

I. CLAIM

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

II. SUMMARY OF STAFF RECOMMENDATION

Based on the findings and conclusions set forth below, the Department of Transportation (ODOT) has determined that the claim is not valid. ODOT has determined that the claim does not identify a state land use regulation that ODOT has enforced since December 2, 2004 in a manner that restricts the claimants' right to divide the property into as many as 33 lots between 0.5 and 1.29 acres each and develop a dwelling on each lot, or that has the effect of reducing the fair market value of the claimants' property, or that is not exempt.

III. COMMENTS ON THE CLAIM

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

IV. TIMELINESS OF CLAIM

Requirement

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

Findings of Fact

The regulations relevant to ODOT identified in the claim are: Oregon Highway Plan mobility standards and policies implemented by mobility standards. It appears that the claim concerns aspects of the Oregon Highway Plan that were adopted prior to December 2, 2004, the effective date of Measure 37.

Conclusions

The claim has been submitted within two years of December 2, 2004, the effective date of Measure 37, based on aspects of the Oregon Highway Plan 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 findings of the Staff Report of the Department of Land Conservation and Development on this claim regarding ownership are incorporated into this report by this reference.

Conclusions

The conclusions of the Staff Report of the Department of Land Conservation and Development on this claim regarding ownership are incorporated into this report by this reference.

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 “state land use regulation” must restrict the claimant’s 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 states in relevant part:

Claimants seek relief from ... the applicability of the 1999 Oregon Highway Plan, as amended, (OHP) to the extent that the OHP mobility standards would be used as a performance standard for approval of a zone change from EFU to a rural residential zone and/or as a standard of approval of the proposed subdivision (without a zone change). The Claimants seek relief from any mobility standards (and any OHP policies that the mobility standards are intended to implement) set forth in the OHP related to intersections with any transportation facilities under the jurisdiction of ODOT.

Claimants' desired use is the division of the property into up to 33 lots, ranging in size from 0.5 acres to 1.29 acres each, and the placement of a dwelling on each lot.¹

In order for claimants to establish an entitlement to relief under ORS 197.352, there must be a showing of at least the following:

- The claimants' use of the property is restricted by a state "land use regulation";
- The state agency has taken some action, after December 2, 2004, to enforce the land use regulation;
- The enforcement of the land use regulation also reduces the fair market value of the property in question; and
- The law is not one that was adopted to protect public health and safety, or that is otherwise exempt under ORS 197.352(3).

Neither the Oregon Highway Plan nor the mobility standards are state "land use regulations." That term is defined in subsection ORS 197.352(11)(B). The only state administrative rules that are "land use regulations" are rules of the Land Conservation and Development Commission, and administrative rules regulating farming and forest practices. The Highway Plan and mobility standards are not part of those.

Under ORS 197.352, state *statutes* restricting the use of land are "land use regulations", however, the claimants have not cited any statutes administered by ODOT.

The Oregon Highway Plan and mobility standards are not land use regulations² because they generally regulate the use of *state highways*, not the use of private real property.

¹ In the claim cover letter and on the claim form, claimants' attorney uses several different lot size ranges for the proposed subdivision. He alternately describes the upper size limits of the parcels as 1.29 acres, 1.2 acres, and 1 acre. He alternately describes the lower limits of the parcel sizes as 0.53 acre or 0.5 acre. The department here uses the most expansive range that could be put together from among the various descriptions.

² See also Section V.4. Exemptions Under ORS 197.352(3) *infra*.

Finally, ODOT has taken no action since the effective date of ORS 197.352 to enforce any of the listed standards with respect to claimants' property.

Conclusions

The claimants have not established that any "land use regulation" administered by ODOT restricts the claimants' desired use of the property, or that any "land use regulation" administered by ODOT has been enforced to restrict the claimants' use of the property since the effective date of ORS 197.352. Based on the information in the record, ODOT has no basis for determining that any law listed in the claim is a state "land use regulation." Until the claimants seek some particular action from ODOT, ODOT is unable to determine how the cited standards might apply to the property. As a result, the claimants have failed to identify a state land use regulation that has been enforced as to the claimants' use of their property in a manner that restricts its use. Since December 2, 2004, ODOT has not enforced a land use regulation that restricts the claimants' use of their property.

3. Effect of Regulations on Fair Market Value

In order to establish a valid claim, 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 asserts an estimated reduction in value of \$2,500,000.00 resulting from enactment or enforcement of land use regulations.³ The claim does not include an appraisal, nor does it define what portion, if any, of the alleged reduction in value is attributed to the enforcement or enactment of the Oregon Highway Plan mobility standards.

Conclusions

To state a claim under ORS 197.352(1), claimants must allege some reduction in fair market value of their property, allegedly caused by a land use regulation that restricts the use of the property. Based on the record currently before ODOT, ODOT concludes that there are no land use regulations identified in the claim and enforced by ODOT since December 2, 2004 that restrict the use of the subject property or that have the effect of reducing the fair market value.

³ This value is derived by averaging the assessed value of adjacent subdivision lots to arrive at a per acre value, multiplying that by the total number of proposed acres of the parcels claimants wish to create, after which the current assessed value and the estimated costs of development, including constructing a road and the installation of water, utilities and septic systems to each lot are deducted.

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

As explained in Section V.(2) and (3) of this report, the claimants, John F. and Marybeth Schilling, have not established that the Oregon Highway Plan mobility standards restrict the use of the subject property in a manner that reduces the fair market value of the property.

Additionally, even *if* the Oregon Highway Plan were to be considered a land use regulation, its stated purpose is to ensure “Efficient management of the system to increase safety, preserve the system, and extend its capacity.” The mobility standards specifically have as one of their policy objectives the purpose of maintaining highway performance and improving highway safety.⁴ As such, both the Highway Plan generally and the mobility standards specifically were adopted to protect public health and safety.

Conclusions

The Department concludes that the Highway Plan and the mobility standards were adopted to protect public health and safety and therefore are exempt from the requirement of ORS 197.352. The Department concludes that based on the information in its record, the claimants have failed to demonstrate that the mobility standards are state “land use regulations,” that they restrict the claimants’ use of their property, or that they are not exempt under ORS 197.352(3). As a result, the claim must be denied as to laws administered by the Oregon Department of Transportation.

VI. FORM OF RELIEF

ORS 197.352(1) provides for 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. In lieu of compensation, the department may choose to not apply the law to allow the present owner to carry out a use of the property permitted at the time the present owner acquired the property.

Findings of Fact

⁴ The closest state highway is U.S. 20, which is nearly half a mile away. The stated management objective in the *Oregon Highway Plan* for statewide highways is “...to provide safe and efficient, high-speed, continuous-flow operations.”

Based on the findings and conclusions set forth in this report, the Oregon Highway Plan mobility standards: (a) are not state "land use regulations," (b) do not restrict the claimants' use of their property, (c) have not had the effect of reducing the fair market value of the property, and (d) are exempt as laws adopted to protect public health and safety.

Conclusion

Based on the foregoing findings and conclusions, the claimants have not established entitlement to relief under ORS 197.352 as to laws administered by the Department of Transportation. As a result, the department recommends that the claim be DENIED.

VII. NOTICE OF OPPORTUNITY TO COMMENT

The department issued its draft staff report on this claim on October 23, 2006. OAR 125-145-0100(3), provided an opportunity for the claimants or the claimants' authorized agent and any third parties who submitted comments under OAR 125-145-0080 to submit written comments, evidence and information in response to the draft staff report and recommendation. No comments were received.

ORS 197.352 (BALLOT MEASURE 37) CLAIM FOR COMPENSATION

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

November 16, 2006

STATE CLAIM NUMBER: M129370

NAMES OF CLAIMANTS: John F. and Marybeth Schilling

MAILING ADDRESS: 22165 Bear Creek Road
Bend, Oregon 97701

PROPERTY IDENTIFICATION: Township 18S, Range 13E, Section 06
Tax lot 500
Deschutes County

OTHER CONTACT INFORMATION: Bruce White
PO Box 1278
Bend, Oregon 97709

OTHER INTEREST IN PROPERTY: Reuel B. and Francis O'Leary

DATE RECEIVED BY DAS: May 22, 2006

180-DAY DEADLINE: November 18, 2006

I. SUMMARY OF CLAIM

The claimants, John and Marybeth Schilling, seek compensation in the amount of \$2.5 million 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 32.66-acre subject property into a maximum of 33 approximately one-half-acre parcels and to develop a dwelling on each parcel. The subject property is located at 22165 Bear Creek Road, near Bend, in Deschutes 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 State of Oregon will not apply the lot size requirements and non-farm dwelling standards contained in the following laws to John and Marybeth Schilling's division of the 32.66-acre subject property into a maximum of 33 one-half-acre lots or to their development of a dwelling on each lot: Statewide Land Use Planning Goals 3 (Agricultural Lands), 11 (Public Facilities and Services—only to the extent that Goal 11 restricts the claimants' use of the property as opposed to restricting the actions of service

providers) and 14 (Urbanization); ORS 215.263, 215.284 and 215.780; and OAR 660-033-0100, -0120 and -0130. These laws will not apply to the claimants' desired use of the property 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 August 7, 1956. (See the complete recommendation in Section VI. of this report.)

III. COMMENTS ON THE CLAIM

Comments Received

On August 29, 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, one written comment was received in response to the 10-day notice.

The comment does not address whether the claim meets 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 the department 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 letter in the department'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 Facts

This claim was submitted to DAS on May 22, 2006, for processing under OAR 125, division 145. The claim identifies the following as the basis of the claim: Goals 3, 11, 12 (Transportation) and 14; a number of specific statutes in ORS 215; a number of specific Commission rules; Oregon Highway Plan mobility standards; and "any other non-exempt provision of state law."¹ Only laws that were enacted or adopted prior to December 2, 2004, are the basis for this claim.

¹ The mobility standards of the Oregon Highway Plan are addressed in a separate report for this claim by the Oregon Department of Transportation.

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, John and Marybeth Schilling, acquired the subject property on August 7, 1956, as reflected by a contract of sale and a fulfillment warranty deed included with the claim. The Deschutes County Assessor’s Office confirms the claimants’ current ownership of the subject property.

Conclusions

The claimants, John and Marybeth Schilling, are “owners” of the subject property as that term is defined by ORS 197.352(11)(C), as of August 7, 1956.

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 the claimants’ desire to divide the 32.66-acre subject property into 33 lots as small as one-half-acre and to develop a dwelling on each lot. It indicates that the desired use is not allowed under current land use regulations.²

² The claim indicates that the owners may wish to use any relief granted by the department as the basis for a zone change. The claimants should be aware that the department believes that any decision it makes to “not apply” state land use regulations only authorizes the present owners to carry out a use that was permitted when they acquired the property. Whether, or under what circumstances, a subsequent owner may use the property for a particular use is beyond the scope of this report, but may depend on whether that use is first established by the current owner. The Oregon Department of Justice has advised the department that “[i]f the current owner of the real property conveys the property before a new use allowed by the public entity is established, then the entitlement to relief will be lost.” If the claimants have questions about the transfer of any rights that may be authorized by an order based on this report, the claimants should confer with their attorney.

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 Exclusive Farm Use-Tumalo, Redmond and Bend (EFU-TRB) by Deschutes 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 Goals 3, prohibit the division of EFU-zoned land 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 215.263 (2005 edition) establishes standards for the creation of new parcels for non-farm uses and dwellings allowed in an EFU zone.

The claim also identifies ORS 215.236, 215.283, 215.293, 215.296, 215.705 and 215.710 as statutes that restrict the claimants' desired use. ORS 215.236 requires that if property has been receiving special assessment, additional taxes be paid before final approval of non-farm dwellings. This statute relates to ad valorem taxation, and any decision by the department to "not apply" state land use regulations does not and cannot affect the application of this statute.

ORS 215.283 authorizes certain uses in areas zoned for EFU. The statute does not relate to land divisions for non-farm dwellings or to the approval of non-farm dwellings. As a result, the claim does not establish that this statute applies to or restricts the claimants' desired use of the property.

ORS 215.293 requires, as a condition of approval of a single-family dwelling in a farm or forest zone, that the landowner for the dwelling sign and record in the deed records for the county, a document binding the landowner and the landowner's successors in interest, prohibiting them from pursuing a claim for relief or cause of action alleging injury from farming or forest practices for which no action or claim is allowed under ORS 30.936 or 30.937. The claimants' desired use of the property is to divide the property into lots and establish single-family dwellings on the property. The claim states that this statute restricts the desired use by requiring "signature of a non-remonstrance covenant." The claim does not establish how ORS 215.293 restricts the claimants' desired use of the property or how it has had the effect of reducing the fair market value of the property.

ORS 215.296 contains standards for approval of uses authorized under ORS 215.283(2). As noted above, this statute does not apply to or restrict the claimants' desired use of the property.

ORS 215.705 contains standards for "lot-of-record" dwellings on land zoned for farm or forest use. ORS 215.710 defines what lands are classified as "high value farmland" for purposes of

³ The claimants' property is "agricultural land" because it contains Natural Resources Conservation Service Class I-VI soils.

ORS 215.705. The claimants' desired use of the property is not to establish a "lot-of-record" dwelling, and as a result, the claim does not establish that these statutes apply to or restrict the claimants' desired use of the property.

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 claim also identifies OAR 660-033-0100, -0120, -0135 and -0140 as restricting the claimants' desired use.

OAR 660-033-0100 establishes minimum parcel sizes for lands zoned EFU. The rule prevents the claimants from dividing their property into lots as small as one-half-acre.

OAR 660-033-0120 specifies uses allowed on agricultural land along with OAR 660-033-0130. The rule contains standards restricting non-farm dwellings on lands zoned EFU.

OAR 660-033-0135 contains standards for dwellings in conjunction with farm use. The claimants' desired use is for non-farm dwellings. As a result, this rule does not apply to or restrict the claimants' desired use of their property.

OAR 660-033-0140 contains expiration dates for "permits" for certain development on farm or forest land. This rule may apply to the claimants' desired use of their property, but claimants have not established that the rule restricts their desired use or that the rule has had the effect of reducing the fair market value of their property.

Goal 11, which became effective on January 25, 1975, generally prohibits urban levels of public facilities and services on lands that are outside an urban growth boundary. Goal 11 has two components. The first component restricts an owner's use of land outside of an urban growth boundary by prohibiting the owner from utilizing urban levels of services or facilities. The second component restricts providers from extending urban facilities to serve property outside an urban growth boundary.⁴ The claim also identifies OAR 660-011-0065 as restricting the claimants' desired use of the property by precluding the hook up of new dwellings to a public water system. The rule prohibits the extension or establishment of sewer systems but does not directly address water systems.

The claim also lists OAR 660-012-0045(2), -0060 and -0065, along with Goal 12, as restricting the claimants' desired use of the property by potentially restricting construction of roads to serve internal lots within the property, and because "in combination with excessive Oregon Highway Plan mobility standards, and in combination with the county's subdivision requirements, could result in capping the number of trips coming from property and thus limiting total number of proposed lots, could preclude a change in zoning to a non-farm zone in a manner that would facilitate transfer of platted lots free of EFU zoning restrictions."

⁴ The claim states that Goal 11 and OAR 660-011-0065 "arguably precludes hooking up to public water system" but does not show how these state regulations restrict the use of the property in a manner that reduces the fair market value of the property. Goal 11 applies to both the use of property and to any action of a district proposing to serve the subject property. ORS 197.250.

OAR 660-012-0045(2) requires local governments to adopt regulations to protect transportation facilities, corridors and sites for their intended functions. In general, these regulations regulate the use of (and protect) public transportation facilities, corridors and sites, rather than restricting the use of private real property. This claim does not establish that this rule restricts the claimants' desired use of the real property.

OAR 660-012-0060 establishes requirements for local government comprehensive plan and land use regulation amendments. As a result, the rule does not apply to the claimants' desired use of the property, which is to divide the property and establish a dwelling on each lot.

OAR 660-012-0065 identifies transportation facilities, services and improvements, which may be permitted on rural lands consistent with Goals 3, 4, 11 and 14 without a goal exception. The rule does not authorize the internal roadways identified in the claim, and as a result, a goal exception would be required if Goal 3 or 14 were to apply to the claimants' desired use. However, as this report determines that Goals 3 and 14 should not apply to the claimants' desired use, this rule would no longer apply to or restrict the claimants' desired use, including the internal roads shown on the tentative plan included with the claim.

Goal 14, which also became effective on January 25, 1975, would likely apply to the division of the claimants' property into parcels less than two acres. Goal 14 generally requires that land outside of urban growth boundaries be used for rural uses. In addition to Goal 14, the claim also lists OAR 660-004-0040. This rule does not apply to or restrict the use of lands zoned EFU; it applies only to rural residential lands.

The claimants acquired the subject property on August 7, 1956, prior to the adoption of the statutes and statewide planning goals and their implementing regulations, identified above, that restrict the claimants' desired use of the property.

Conclusions

The lot size requirements and non-farm dwelling standards contained in the following state land use regulations restrict the claimants' desired use of their property: ORS 215.263, 215.284 and 215.780; Goals 3, 11 (only to the extent that Goal 11 restricts the claimants' use of the property as opposed to restricting the actions of service providers) and 14; and OAR 660-033-0100, -0120 and -0130. These requirements were all enacted or adopted after the claimants acquired the subject property in 1956 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 the property.

This report addresses only those state laws that are identified in the claim, or that the department is certain apply to the subject property based on the uses that the claimants have identified. There may be other laws that currently apply to the claimants' use of the subject property, and that may continue to apply to the claimants' use of the property, that have not been identified in the claim. In some cases, it will not be possible to know which laws apply to a use of 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 regulations (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 \$2.5 million 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’ analysis of the current value of the property compared its value if it were divided into 33 parcels for the development of a dwelling on each parcel.

Conclusions

As explained in Section V.(1) of this report, the claimants are John and Marybeth Schilling who acquired the subject property on August 7, 1956. 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 property is a reduction of \$2.5 million.

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.

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 Deschutes County has implemented through its current EFU-TBR zone. All of these land use regulations were enacted or adopted after the claimants acquired the subject property.

Conclusions

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 acquired it in 1956. As a result, these laws are not exempt under ORS 197.352(3)(E).

Laws in effect when the claimants acquired the 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. When the claimants seek a building or development permit to carry out a specific use, it may become evident that other state laws apply to that use. In some cases, some of these laws may be exempt under ORS 197.352(3)(A) to (D).

This report addresses only those state laws that are identified in the claim, or that the department is certain apply to the subject property based on the uses that the claimants have identified. Similarly, this report only addresses the exemptions provided for under ORS 197.352(3) that are clearly applicable, given the information provided to the department in the claim.

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 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 \$2.5 million. However, because the claim does not provide an appraisal or other relevant evidence demonstrating that the land use regulations described in Section V.(2) reduce the fair market value of the subject property, a specific amount of compensation cannot be determined. In order to determine a specific amount of compensation due for this claim, it would also be necessary to verify whether or the extent to which the claimants' desired use of the subject property was allowed under the standards in effect when they acquired the property. Nevertheless, based on the record for this claim, the department has determined that the laws on which the claim is based have reduced the fair market value of the subject property to some extent.

No funds have been appropriated at this time for the payment of claims. In lieu of payment of compensation, ORS 197.352 authorizes the department to modify, remove or not apply all or parts of certain land use regulations to allow John and Marybeth Schilling to use the subject property for a use permitted at the time they acquired the property on August 7, 1956.

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 lot size requirements and non-farm dwelling standards contained in the following laws to John and Marybeth Schilling's division of their property into a maximum of 33 one-half acre lots or to their development of a dwelling on each lot: ORS 215.263, 215.284 and 215.780; Goals 3, 11 (only to the extent that Goal 11 restricts the claimants' use of the property as opposed to restricting the actions of service providers) and 14; and OAR 660-033-0100, -0120 and -0130. These state land use regulations will not apply to the claimants only to the extent necessary to allow them to use the subject property for the use described in this report, and only to the extent that use was permitted when they acquired the property on August 7, 1956.
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 on August 7, 1956.
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 October 23, 2006. OAR 125-145-0100(3), provided an opportunity for the claimants or the claimants' authorized agent and any third parties who submitted comments under OAR 125-145-0080 to submit written comments, evidence and information in response to the draft staff report and recommendation. No comments were received.