

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

IN THE MATTER OF THE CLAIM FOR                    )       FINAL ORDER  
COMPENSATION UNDER ORS 197.352                )       CLAIM NO. M129478  
(BALLOT MEASURE 37) OF                            )  
Dale M. and Barbara L. Marshall, CLAIMANTS    )

Claimants:     Dale M. and Barbara L. Marshall (the Claimants)

Property:       Township 8N, Range 7W, Section 17, Tax lot 2408, Clatsop 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 (DLCDC) 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 DLCDC (the DLCDC Report) attached to and by this reference incorporated into this order.

ORDER

The Claim is denied as to the rural residential-zoned portion of the subject property as to laws administered by DLCDC and the Land Conservation and Development Commission (LCDC) for the reasons set forth in the DLCDC Report.

The Claim is approved as to laws administered by DLCDC and the Land Conservation and Development Commission (LCDC) for the reasons set forth in the DLCDC 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 Dale and Barbara Marshall's division of the forest-zoned portion of the subject property into one-acre parcels or to their development of a dwelling on each parcel: applicable provisions of Goal 4, ORS 215 and OAR 660, division 6, 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 forest-zoned portion of the subject property for the use described in this report, and only to the extent that use was permitted when Dale Marshall acquired the property on July 23, 1976, and when Barbara Marshall acquired the property on May 19, 1994. The department acknowledges that the relief to which Barbara Marshall is entitled under ORS 197.352 will not allow her to use the forest-zoned portion of the subject property in the manner set forth in the claim.

2. The action by the State of Oregon provides the state's authorization to the claimants to use the forest-zoned portion of the subject property for the use described in this report, subject to the standards in effect when Dale Marshall acquired the property on July 23, 1976, and when Barbara Marshall acquired the property on May 19, 1994. On July 23, 1976, the forest-zoned portion of the property was subject to the applicable provisions of Goals 4. On May 19, 1994, the forest-zoned portion of the subject property was subject to applicable provisions of Goal 4, ORS 215 and OAR 660, division 6, currently 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 Deputy Director of the DLCD as a final order of DLCD and the Land Conservation and Development Commission under ORS 197.352, OAR 660-002-0010(8), and OAR 125, division 145, and by the Administrator for the State Services Division of the DAS as a final order of DAS under ORS 197.352, OAR 125, division 145, and ORS 293.

FOR DLCD AND THE LAND  
CONSERVATION AND  
DEVELOPMENT COMMISSION:  
Lane Shetterly, Director

  
Cora R. Parker, Deputy Director  
DLCD  
Dated this 30<sup>th</sup> day of November, 2006.

FOR the DEPARTMENT OF  
ADMINISTRATIVE SERVICES:

  
David Hartwig, Administrator  
DAS, State Services Division  
Dated this 30<sup>th</sup> day of November, 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**

November 30, 2006

**STATE CLAIM NUMBER:** M129478

**NAMES OF CLAIMANTS:** Dale M. and Barbara L. Marshall

**MAILING ADDRESS:** 93069 Amie Loop  
Astoria, Oregon 97103

**PROPERTY IDENTIFICATION:** Township 8N, Range 7W, Section 17  
Tax lot 2408  
Clatsop County

**DATE RECEIVED BY DAS:** June 8, 2006

**180-DAY DEADLINE:** December 5, 2006

**I. SUMMARY OF CLAIM**

The claimants, Dale and Barbara Marshall, seek compensation in the amount of \$1.11 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 35.15-acre subject property<sup>1</sup> into one-acre parcels and to develop a dwelling on each parcel.<sup>2</sup> The subject property is located at 92858 Donald Marshall Road, near Astoria, in Clatsop County. (See claim.)

**II. SUMMARY OF STAFF RECOMMENDATION**

Based on the findings and conclusions set forth below, the Department of Land Conservation and Development (the department) has determined that the claim is valid in part. Department staff recommends that, in lieu of compensation, the requirements of the following state laws enforced by the Land Conservation and Development Commission (the Commission) or the department not apply to Dale and Barbara Marshall's division of the forest-zoned portion of the subject

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<sup>1</sup> The claim states a property size of 37.91 acres. However, the Clatsop County Assessor's Office indicates that the claimants have partitioned and sold part of the property, reducing the size to 35.15 acres.

<sup>2</sup> The claim indicates that the claimants may desire to sell or transfer the property for development. The department notes that ORS 197.352 only authorizes a state agency to waive a law in order to allow the current owner a use of the property permitted at the time that owner acquired the property. A determination of whether newly created parcels are "transferable" is beyond the scope of relief that the department may grant under ORS 197.352. 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." Therefore, the relief granted in this report cannot and does not create a transferable waiver.

property into one-acre parcels and to their development of a dwelling on each parcel: applicable provisions of Statewide Planning Goal 4 (Forest Lands), ORS 215 and Oregon Administrative Rules (OAR) 660, division 6, 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 forest-zoned portion of the subject property for the use described in this report, and only to the extent that use was permitted when Dale Marshall acquired the property on July 23, 1976, and when Barbara Marshall acquired the property on May 19, 1994. The department acknowledges that the relief to which Barbara Marshall is entitled under ORS 197.352 will not allow her to use the forest-zoned portion of the subject property in the manner set forth in the claim. (See the complete recommendation in Section VI. of this report.)

The department has further determined that the claim is not valid as to the rural residential-zoned portion of the subject property because the claimants have not established that either the Commission or the department has enforced laws that restrict the claimants' desired use of that portion of the property.

### **III. COMMENTS ON THE CLAIM**

#### **Comments Received**

On October 2, 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 June 8, 2006, for processing under OAR 125, division 145. The claim identifies Clatsop County's zoning 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 Dale Marshall acquired the subject property on July 23, 1976, as reflected by a deed included with the claim. On May 19, 1994, Dale Marshall transferred the subject property to the Dale M. Marshall and Barbara L. Marshall Revocable Living Trust, with the claimants as trustees, as reflected by a bargain and sale deed included with the claim.<sup>3</sup> The Clatsop County Assessor’s Office confirms the claimants’ current ownership of the subject property.

### **Conclusions**

The claimants, Dale and Barbara Marshall, are “owners” of the subject property as that term is defined by ORS 197.352(11)(C). Dale Marshall has been an owner since July 23, 1976. Barbara Marshall has been an owner since May 19, 1994. Dale Marshall is a “family member” of Barbara Marshall as that term is defined by ORS 197.352(11)(A)..

### **2. The Laws That are the Basis for This Claim**

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

### **Findings of Fact**

The claim indicates that the claimants desire to divide the 35.15-acre subject property into one-acre parcels and to develop a dwelling on each parcel. It indicates that the current zoning prohibits the desired use.

The claim is based generally on the applicable provisions of state law that require forest and rural residential zoning and restrict uses on forest- and rural residential-zoned land.

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<sup>3</sup> Transfer of property to a revocable trust does not result in a change in ownership for purposes of ORS 197.352.

The northern portion of the claimants' property is zoned by Clatsop County as Agriculture-Forest (AF) as required by Goal 4, in accordance with ORS 215 and OAR 660, division 6, because the claimants' property is "forest land" under Goal 4. Goal 4 became effective on January 25, 1975, and requires that forest land be zoned for forest use (see statutory and rule history under OAR 660-015-0000(4)). The forest land administrative rules (OAR 660, division 6) became effective on September 1, 1982, and ORS 215.705 to 215.755 and 215.780 became effective on November 4, 1993 (Chapter 792, Oregon Laws 1993). OAR 660-006-0026 and 660-006-0027 were amended on March 1, 1994, to implement those statutes.

The southern portion of the claimants' property is zoned by Clatsop County as Knappa and Svensen Rural Community Residential Zone (KS-RCR). The KS-RCR zone is consistent with Goal 14, which generally requires that land outside of urban growth boundaries be used for rural uses. The county's KS-RCR zone was adopted on October 10, 2003, pursuant to a Goal 2 exception to Goal 14, and requires a minimum of 7,500 square feet for property with access to a public sewer system and a minimum of one acre for property without public sewer system access for the creation of a new lot or parcel.

Goal 14 was effective on January 25, 1975, and requires that local comprehensive plans identify and separate urbanizable land from rural land in order to provide for an orderly and efficient transition from rural to urban land use. In 2000, as a result of a 1986 Oregon Supreme Court decision,<sup>4</sup> the Commission amended Goal 14 and adopted OAR 660-004-0040 (Application of Goal 14 to Rural Residential Areas), which was effective on October 4, 2000.

The rule states that for rural residential areas designated after October 4, 2000, the county shall either require that any new lot or parcel have an area of at least 10 acres, or establish a minimum lot size of at least two acres in accordance with the requirements for an exception to Goal 14 (OAR 660-004-0040(7)(i)). The minimum lot size adopted by the county must be consistent with OAR 660-004-0018 (Planning and Zoning for Exception Areas.) In accordance with OAR 660-004-0018, Clatsop County satisfied the requirements for an exception to Goal 14 and, in September, 2003, through its periodic review process, adopted a rural residential zone that required a two-acre minimum. In October 2003, also in accordance with the exceptions requirements, the county revised that zone and adopted the KS-RCR zone, which requires a 7,500-square-foot minimum for land with access to public sewer and a one-acre minimum for land without access to public sewer.

Dale Marshall acquired the subject property after the adoption of the statewide planning goals but before the Commission acknowledged Clatsop County's land use regulations to be in compliance with the statewide planning goals pursuant to ORS 197.250 and 197.251. All of the subject property was recognized as resource land when Dale Marshall acquired it in 1976, and because the Commission had not acknowledged Clatsop County's plan and land use regulations when Dale Marshall acquired the property, the statewide planning goals, and particularly Goal 4 (Forest Lands), in addition to Goal 14, would have applied directly to the claimants' property had he sought the desired use at the time he acquired the property.<sup>5</sup> Alternatively, he would have

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<sup>4</sup> *1000 Friends of Oregon v. LCDC (Curry County)*, 301 Or 447 (1986).

<sup>5</sup> 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 land use regulations. *Perkins v. City of Rajneeshpuram*, 300 Or 1 (1985); *Alexanderson v. Polk County*, 289 Or 427,

been required to establish a basis for an exception to compliance with those goals pursuant to the Goal 2 (Land Use Planning) exceptions process. However, through the county's acknowledgement process, the southern portion subject property was ultimately acknowledged as exceptions land pursuant to Goal 2, and zoned by the county for rural residential use. Therefore, while the county could now require that the property be evaluated as resource land, as would have been required in 1976, because of the property's ultimate designation as rural residential exceptions land, the county could also require that the claimants' desired use be subject to compliance directly with Goal 14.<sup>6</sup>

With regard to the forest-zoned portion of the property, Goal 4 went into effect on January 25, 1975, and was intended to "conserve forest lands for forest uses" and required, "Lands suitable for forest uses shall be inventoried and designated as forest lands. Existing forest land uses shall be protected unless proposed changes are in conformance with the comprehensive plan." Those forest uses were defined as follows: "(1) the production of trees and the processing of forest products; (2) open space, buffers from noise, and visual separation of conflicting uses; (3) watershed protection and wildlife and fisheries habitat; (4) soil protection from wind and water; (5) maintenance of clean air and water; (6) outdoor recreational activities and related support services and wilderness values compatible with these uses; and (7) grazing land for livestock." Specifically, Goal 4 only allowed land divisions that would protect commercial forest lands for commercial forest uses. Dwellings in forest zones could only be allowed if found to be "necessary and accessory" to one of the enumerated forest uses listed in Goal 4.<sup>7</sup>

No information has been presented in the claim to establish that the claimants' desired division and development of the northern portion of the subject property complies with the Goal 4 standards in effect when Dale Marshall acquired that portion of the subject property in 1976. With regard to the southern portion of the property, the property's current zoning does not restrict the claimants' desired use of the property relative to uses allowed when Dale Marshall acquired it and, in fact, appears to be less restrictive than when Dale Marshall acquired the property. The claimants' have not established that their desired division of the property into one-acre parcels is restricted by Goal 14 or 660-004-0040 as implemented through the property's current zoning.

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*rev den 290 Or 137 (1980); Sunnyside Neighborhood Assn. v. Clackamas County, 280 Or 569 (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 directly applied 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. *Foster v. Polk County, 115 Or App 475 (1992); Kenagy v. Benton County, 115 Or App 131 (1992).*

<sup>6</sup> When Clatsop County's plan was acknowledged for compliance with Goal 14 on January 31, 1985, the subject property was zoned RA-1, which allowed 1-acre lots.

<sup>7</sup> Goal 4 prohibited uses that were not enumerated by Goal 4 as permissible uses for forest lands as well as those that were not necessary and accessory to an enumerated forest use. *Lamb v. Lane County, 7 Or LUBA 137 (1983).* Dwellings in forest lands were required to be "necessary and accessory" to show that such dwellings complied with the Goal 4 requirement that local land use regulations must "conserve forest lands for forest uses." *1000 Friends v. LCDC (Curry County), 301 Or 447 (1986).* A dwelling that may "enhance" forest uses is not "necessary and accessory" to a forest use to the extent required by Goal 4. *1000 Friends of Oregon v. LCDC (Lane County), 305 Or 384 (1988).* For additional guidance, the Goal 4 provisions were interpreted under OAR 660, division 6, effective on September 1, 1982, in *1000 Friends of Oregon v. LCDC (Lane County)* and in *1000 Friends v. LCDC (Curry County).*

## **Conclusions**

The current zoning requirements, minimum lot size and dwelling standards established by Goal 4, ORS 215.705 to 215.755 and 215.780 and OAR 660, division 6 and 660-006-0027 were all enacted or adopted after Dale Marshall acquired the subject property in 1976 and do not allow the claimants' desired division or development of the northern, forest-zoned portion of the subject property. However, the claim does not establish whether or to what extent the claimants' desired use of the subject property complies with the standards for land divisions and development under Goals 4 in effect when Dale Marshall acquired the property on July 23, 1976.

The current zoning requirements and minimum lot size standards established by Goal 14 and OAR 660-004-0040, as implemented through the county's KS-RCR zone, do not restrict the claimants' desired division of the rural residential-zoned portion of the subject property into one-acre parcels relative to uses permitted on that portion of the property when Dale Marshall acquired it in 1976. As implemented through the county's KS-RCR zone, the claimants have not established that Goal 14 and OAR 660-004-0040 restrict their desired division of that portion of 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 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 \$1.11 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' assessment of the subject property's value.

## **Conclusions**

As explained in Section V.(1) of this report, the claimants are Dale Marshall, who acquired the subject property on July 23, 1976, and his wife, Barbara Marshall. 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 Dale Marshall acquired the subject property restrict the claimants' desired use of the forest-zoned portion of the property.

The claimants estimate that the effect of the land use regulations on the fair market value of the subject property is a reduction of \$1.11 million.

Without an appraisal or other documentation, and without verification of whether or the extent to which the claimants' desired use of the forest-zoned portion of the subject property was allowed under the standards in effect when Dale Marshall acquired the property, it is not possible to substantiate the specific dollar amount by which the land use regulations have reduced the fair market value of the property. Nevertheless, based on the evidence in the record for this claim, the department determines that the fair market value of the forest-zoned portion 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 Dale Marshall acquired the property.

The department further determines that the claimants have not established that any state land use laws restrict the claimants' desired use of the rural residential-zoned portion of the subject property relative to uses permitted when Dale Marshall acquired the property. Therefore, the claimants have not established that the fair market value of the rural residential-zoned portion of the subject property has been reduced 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 4, ORS 215 and OAR 660, division 6, which Clatsop County has implemented through its current AF zone. With the exception of provisions of Goal 4 adopted before Dale Marshall acquired the subject property on July 23, 1976, these state land use regulations were not in effect when Dale Marshall acquired the property. No state laws restrict the claimants' desired use of the rural residential-zoned portion of the subject property.

#### **Conclusions**

Without a specific development proposal for the subject property, it is not possible for the department to determine all the laws that may apply to a particular use of the forest-zoned portion of the property, or whether those laws may fall under one or more of the exemptions under ORS 197.352. It appears that the general statutory, goal and rule restrictions on residential division and development of the forest-zoned portion of the subject property are not exempt under ORS 197.352(3)(E) to the extent they were enacted or adopted after Dale Marshall acquired the property. Provisions of Goal 4 in effect when Dale Marshall acquired the forest-zoned portion of the subject property in 1976 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.

As explained in Section V.(2) of this report, the claimants have not established that any state land use regulations restrict the claimants' desired use of the rural residential-zoned portion of the property. Therefore, the department cannot determine that any exemptions under ORS 197.352(3) apply to that portion of 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 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, the department determines that the claimants have not established that any laws enforced by the Commission or the department restrict the claimants' desired use of the rural residential-zoned portion of the property. The department further determines that laws enforced by the Commission or the department restrict the claimants' desired use of the forest-zoned portion of the subject property. The claim asserts that existing land use regulations enforced by the Commission or the department have the effect of reducing the fair market value of the subject property by \$1.11 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 forest-zoned portion 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 forest-zoned portion of the property was allowed under the standards in effect when Dale Marshall 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 forest-zoned portion 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 Dale and Barbara Marshall to use the forest-zoned portion of the subject property for a use permitted when Dale Marshall acquired the property on July 23, 1976, and when Barbara Marshall acquired the property on May 19, 1994.

At the time the Barbara Marshall acquired an interest in the subject property the northern portion was zoned by Clatsop County as F-38 and subject to the current lot size and dwelling standards under Goal 4, ORS 215 and OAR 660, division 6, and as described in Section V.(2) of this report.

In addition to the applicable provisions of Goal 4, ORS 215 and OAR 660 in effect when Barbara Marshall acquired the property on May 19, 1994, and other laws in effect when either of

the claimants acquired the subject property, there may be other laws that apply to the claimants' use of the property that have not been identified in the claim. The department notes that ORS 215.730 and OAR 660, division 6, include standards for siting dwellings in forest zones. These provisions include fire protection standards for dwellings and for surrounding forest lands. ORS 197.352(3)(B) specifically exempts regulations "restricting or prohibiting activities for the protection of public health and safety, such as fire and building codes. . . ." Accordingly, siting standards for dwellings in forest zones in ORS 215.730 and OAR 660, division 6, are exempt under ORS 197.352(3)(B).

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 currently apply to that use and may continue to 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. The claimants should be aware that the less information they have provided to the department in the claim, the greater the possibility that there may be additional laws that will later be determined to continue to apply to their use of the subject property.

### **Conclusions**

Based on the record, the department determines that the claim is not valid for the rural residential-zoned portion of the subject property because the claimants have not established that any state land use regulations restrict the claimants' desired use of that portion of the property relative to uses permitted when they acquired it. Therefore, the department recommends that the claim be denied for the rural residential-zoned portion of the property. The department otherwise recommends that the claim be approved, subject to the following terms:

1. In lieu of compensation under ORS 197.352, the State of Oregon will not apply the following laws to Dale and Barbara Marshall's division of the forest-zoned portion of the subject property into one-acre parcels or to their development of a dwelling on each parcel: applicable provisions of Goal 4, ORS 215 and OAR 660, division 6, 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 forest-zoned portion of the subject property for the use described in this report, and only to the extent that use was permitted when Dale Marshall acquired the property on July 23, 1976, and when Barbara Marshall acquired the property on May 19, 1994. The department acknowledges that the relief to which Barbara Marshall is entitled under ORS 197.352 will not allow her to use the forest-zoned portion of the subject property in the manner set forth in the claim.

2. The action by the State of Oregon provides the state's authorization to the claimants to use the forest-zoned portion of the subject property for the use described in this report, subject to the standards in effect when Dale Marshall acquired the property on July 23, 1976, and when

Barbara Marshall acquired the property on May 19, 1994. On July 23, 1976, the forest-zoned portion of the property was subject to the applicable provisions of Goals 4. On May 19, 1994, the forest-zoned portion of the subject property was subject to applicable provisions of Goal 4, ORS 215 and OAR 660, division 6, currently 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 November 9, 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.