

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

IN THE MATTER OF THE CLAIM FOR) FINAL ORDER A
COMPENSATION UNDER ORS 197.352) CLAIM NO. M129549
(BALLOT MEASURE 37) OF)
Avison Lumber Co., an Oregon corporation, CLAIMANT)

Claimant: Avison Lumber Co., an Oregon corporation (the Claimant)

Property: Township 4S, Range 2E, Section 23, Tax lot 1600

Township 4S, Range 2E, Section 24, Tax lot 500

Township 4S, Range 2E, Section 25, Tax lot 600

Township 4S, Range 2E, Section 36, Tax lots 101 and 800

Township 4S, Range 3E, Section 31, Tax lots 601 and 700

Clackamas County (the Property)

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

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

ORDER

The Claim is denied as to laws administered by the Oregon Department of Forestry or the Oregon Board of Forestry, for the reasons set forth in the ODF 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 Avison Lumber Co.'s clearing of portions of the subject property for development, extension of the existing county roads into and through the property, division of the subject property in phases into approximately 55 parcels ranging in size from 2 to 10 acres and development of each lot with a single-family residence and accessory structures: applicable

provisions of Goals 3 and 4, ORS 215 and OAR 660, divisions 6, and 33, enacted or adopted after the dates specified in the below table. These land use regulations will not apply to the claimant only to the extent necessary to allow it to use the subject property for the use described in this report, and only to the extent that use was permitted when it acquired the property on the following dates:

Acquisition Date	Tax Lot
February 25, 1974	601
June 10, 1974	101
June 13, 1974	700
August 15, 1974	500, 600 and 1600
May 24, 1985	800

2. The action by the State of Oregon provides the state's authorization to the claimant to use the subject property for the use described in this report. Except for tax lot 800, the claimant's use of the subject property remains subject to the applicable provisions of ORS 215 in effect when it acquired each tax lot on the dates listed in Section II of this report and the above table, including the interim planning goals set forth in ORS 215.515 (1973 edition). The claimant's use of tax lot 800 remains subject to compliance with Goal 4 and OAR 660, division 6, as implemented through Clackamas County's acknowledged forest zone.

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 claimant first obtains 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 claimant under the terms of the order will remain subject to the following laws: (a) those laws not specified in Condition 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).

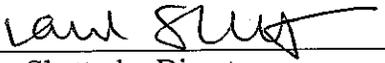
5. Without limiting the generality of the foregoing terms and conditions, in order for the claimant to use the subject property, it may be necessary for it to obtain a decision under ORS 197.352 from a city and/or county and/or metropolitan service district that enforces land use regulations applicable to the property. Nothing in this order relieves the claimant 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 claimant.

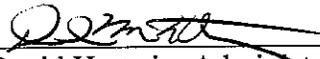
This Order is entered by the Director of the DLCD as a final order of DLCD and the Land Conservation and Development Commission under ORS 197.352, OAR 660-002-0010(8); and OAR 125, division 145, and by the Director of the DAS as a final order of DAS under ORS 197.352, OAR 125, division 145, and ORS 293.

This Order is entered by the Oregon Board and Department of Forestry as a final order of the Board under ORS 197.352, OAR 629-001-0057, and OAR Chapter 125, division 145.

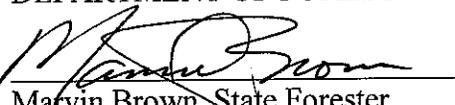
FOR DLCD AND THE LAND
CONSERVATION AND DEVELOPMENT
COMMISSION:

FOR THE DEPARTMENT OF
ADMINISTRATIVE SERVICES:


Lane Shetterly, Director
DLCD
Dated this 15th day of December, 2006.


David Hartwig, Administrator
DAS, State Services Division
Dated this 15th day of December, 2006.

FOR THE OREGON BOARD OF
FORESTRY AND THE OREGON
DEPARTMENT OF FORESTRY:


Marvin Brown, State Forester
ODF
Dated this 15th day of December, 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
Final Staff Report and Recommendation**

December 15, 2006

STATE CLAIM NUMBER: M129549
Report A¹

NAME OF CLAIMANT: Avison Lumber Co., an Oregon corporation

MAILING ADDRESS: PO Box 419
Molalla, Oregon 97038

PROPERTY IDENTIFICATION: Township 4S, Range 2E,
Section 23: tax lot 1600
Section 24: tax lot 500
Section 25: tax lot 600
Section 36: tax lots 101 and 800

Township 4S, Range 3E, Section 31
Tax lots 601 and 700

Clackamas County

OTHER CONTACT INFORMATION: Donald Joe Willis
Schwabe, Williamson & Wyatt
1211 SW 5th Avenue, Suite 1900
Portland, Oregon 97204

DATE RECEIVED BY DAS: June 20, 2006

180-DAY DEADLINE: December 17, 2006

I. SUMMARY OF CLAIM

The claimant, Avison Lumber Co., an Oregon corporation, seeks compensation in the amount of \$20 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 claimant desires compensation or the right to clear portions of the subject property for development, extend the existing county roads into and through the property, divide the subject property in phases into approximately 55 parcels ranging in size from 2 to 10 acres and develop each lot with a single-family residence and accessory structures. The subject property is located at the geographical coordinates listed above, in Clackamas County. (See claim.)

¹ This is one of two reports by the department addressing this claim.

II. SUMMARY OF STAFF RECOMMENDATION

Based on the findings and conclusions set forth below, the Department of Land Conservation and Development (the department) has determined that the claim is valid. Department staff recommends that, in lieu of compensation, the requirements of the following state laws enforced by the Land Conservation and Development Commission (the Commission) or the department not apply to Avison Lumber Co.'s clearing of portions of the subject property for development, extension of the existing county roads into and through the property, division of the subject property in phases into approximately 55 parcels ranging in size from 2 to 10 acres and development of each lot with a single-family residence and accessory structures: applicable provisions of Statewide Planning Goals 3 (Agricultural Lands) and 4 (Forest Lands), ORS 215 and Oregon Administrative Rules (OAR) 660, divisions 6, and 33, enacted or adopted after the dates specified herein. These laws will not apply to the claimant only to the extent necessary to allow it to use the subject property for the use described in this report, and only to the extent that use was permitted when it acquired the property on the following dates: (See the complete recommendation in Section VI of this report.)

Acquisition Date	Tax Lot
February 25, 1974	601
June 10, 1974	101
June 13, 1974	700
August 15, 1974	500, 600 and 1600
May 24, 1985	800

III. COMMENTS ON THE CLAIM

Comments Received

On October 16, 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, two written comments were received in response to the 10-day notice.

The comments do 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 letters 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 Fact

This claim was submitted to DAS on June 20, 2006, for processing under OAR 125, division 145. The claim identifies an extensive list of statutes and rules 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 claimant, Avison Lumber Co., acquired the subject property listed in Section II of this report on the specified dates, as reflected by several deeds included with the claim. A March 28, 2006, title report submitted with the claim establishes the claimant’s current ownership of the subject property.

Conclusions

The claimant, Avison Lumber Co., is an “owner” of the subject property as that term is defined by ORS 197.352(11)(C), as of the dates specified in Section II of this report.

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 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 lists many statutes in ORS 92, 197, 215, 526 and 527, along with ORS 209.250(4), but contains no description or documentation that these statutes apply to or restrict the claimant's desired use of the property.² Similarly, the claim lists many rules in OAR 125 to 145 (DAS), 629 (ODF) and 660. Again, the claim includes no information concerning how these land use regulations apply to or restrict the claimant's desired use. As a result, this report addresses only those state land use regulations administered by the department or the Commission that the department is able to determine apply to the claimant's desired use.

The subject property consists of the tax lots identified in Section II of this report. Except for tax lots 601 and 700, the claim is based generally on the applicable provisions of state law that require forest zoning and restrict uses on forest-zoned land. Tax lots 101, 500, 600, 800 and 1600 are zoned by Clackamas County as Timber District (TBR) as required by Goal 4, in accordance with ORS 215 and OAR 660, division 6, because these tax lots are "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.

Together, ORS 215.705 to 215.755 and 215.780 and OAR 660, division 6, enacted or adopted pursuant to Goal 4, prohibit the division of forest land into parcels less than 80 acres and establish standards for development of dwellings on existing or proposed parcels on those lands.

The claimant acquired the subject property on the dates listed in Section II of this report. Except for tax lot 800, acquired in 1985, all of the tax lots were acquired after the adoption of Senate Bill 100 (Chapter 80, Oregon Laws 1973) effective on October 5, 1973, but before the adoption of the statewide planning goals effective on January 25, 1975.

During the period between October 5, 1973, and January 25, 1975, ORS 197.175(1) and 197.280 (1973 editions) required, in addition to any local plan or zoning provisions, that cities and counties exercise their planning responsibilities in accordance with the interim land use planning goals set forth in ORS 215.515 (1973 edition). *Petersen v. Klamath Falls*, 279 Or 249 (1977); see also, *Meeker v. Board of Comm'rs*, 287 Or 665 (1979) (review of a subdivision is an exercise of planning responsibilities requiring application of the goals); *State Housing Council v. Lake Oswego*, 48 Or App. 525 (1981) (noting that while "[l]and use planning responsibility is not defined in ORS ch 197, the Supreme Court has interpreted that term as including annexation approvals, *subdivision approvals* [emphasis added] and partition approvals") citing *Petersen*, *Meeker* and *Alexanderson v. Polk County*, 285 Or 427 (1980). The claimant's desired use includes subdivision of its land. Except for tax lot 800 acquired in 1985, if the claimant had

² This report addresses only state land use regulations administered by the Commission or the department. The state land use regulations listed in the claim include statutes administered by the Oregon Department of Forestry (ODF). These statutes and rules are addressed in a separate report by ODF for this claim.

sought to create that use for the rest of the subject property on the dates listed in Section II, as a matter of law, the use would have been subject to the interim planning goals at ORS 215.515.³

The claimant acquired tax lot 800 on May 24, 1985. At that time, the tax lot was subject to Clackamas County's acknowledged forest zone.⁴ When the claimant acquired tax lot 800, the desired division and development of the property would have been governed by the applicable provisions of Goal 4 and OAR 660, division 6, as implemented through the county's acknowledged forest zone.⁵

Tax lots 601 and 700 are currently zoned for mixed farm/forest use, which has similar restrictions to those imposed under Goal 4. For those tax lots, the claim is based generally on the applicable provisions of state law that require mixed farm-forest zoning and restrict uses on land zoned mixed farm-forest. Tax lots 601 and 700 are zoned by Clackamas County as AG/Forest District (AG/F), which is a mixed agricultural and forest land zone, as required by Goal 4 and the implementing provisions of OAR 660-006-0050 (effective on February 5, 1990), subsequently amended on March 1, 1994, to comply with the provisions of House Bill 3661 (Chapter 792, Oregon Laws 1993).

Under OAR 660-006-0050, all the uses permitted under Goals 3 and 4 are allowed in mixed agriculture and forest zones except that for dwellings, either the Goal 3 or 4 standards are applicable based on the predominant use of the tract on January 1, 1993.⁶ Depending on the predominant use on that date, tax lots 601 and 700 are subject to either the requirements for dwellings applicable under Exclusive Farm Use zoning required by Goal 3 and OAR 660, division 33, or forest zone provisions required by Goal 4 and OAR 660, division 6.

For land divisions, OAR 660-006-0055 authorizes the creation of new parcels based on the standards applicable to farm or forest zones that implement the 80-acre minimum lot size specified in ORS 215.780. Tax lots 601 and 700 cannot be divided into parcels smaller than 80 acres.

³ The "interim" land use goals are set forth in ORS 215.515(1)(a) to (j) (1973 edition) as follows: (a) "To preserve the quality of the air, water and land resources of the state," (b) "To conserve open space and protect natural and scenic resources," (c) "To provide for the recreational needs of citizens of the state and visitors," (d) "To conserve prime farm lands for the production of crops," (e) "To provide for the orderly and efficient transition from rural to urban land use," (f) "To protect life and property in areas subject to floods, landslides and other natural disasters," (g) "To provide and encourage a safe, convenient and economic transportation system including all modes of transportation: Air, water, rail, highway and mass transit and recognizing differences in the social costs in the various modes of transportation," (h) "To develop a timely, orderly and efficient arrangement of public facilities and services to serve as a framework for urban and rural development," (i) "To diversify and improve the economy of the state" and (j) "To ensure that the development of properties within the state is commensurate with the character and the physical limitations of the land." ORS 215.515 (1973 edition).

⁴ Clackamas County's forest zone was acknowledged by the Commission for compliance with Goal 4 on December 31, 1984.

⁵ After the county's comprehensive plan and land use regulations were acknowledged by the Commission as complying with the statewide planning goals, the goals and implementing rules no longer applied directly to individual local land use decisions. *Byrd v. Stringer*, 295 Or 311 (1983). However, insofar as the state and local provisions implement the requirements of the goals and rules, the local provisions must be interpreted consistent with the substance of the goals and implementing rules. *Forster v. Polk County*, 115 Or App 475 (1992) and *Kenagy v. Benton County*, 115 Or App 131 (1992).

⁶ No information was provided to the department regarding the predominant use of tax lots 601 and 700 on January 1, 1993.

No information has been provided establishing whether or to what extent the claimant's desired division of the subject property for residential development complies with either the interim planning goals set forth in ORS 215.515 (1973 edition) or Clackamas County's acknowledged forest zone, whichever is applicable, in effect at the time the claimant first acquired the property. In particular, it is unclear whether division and development of the subject property, together with the property addressed in Report B for this claim, can satisfy the interim goal requirements "to provide for the orderly and efficient transition from rural to urban land use" or "to develop a timely, orderly and efficient arrangement of public facilities and services to serve as a framework for urban and rural development."

Conclusions

The current zoning requirements, minimum lot size and dwelling standards established by Goal 4 for lands zoned TBR or AG/F, and the statutory and rule restrictions under applicable provisions of ORS 215 (with the exception of Senate Bill 100) and OAR 660, divisions 6, and 33, were all enacted or adopted after the claimant, Avison Lumber Co., acquired the subject property on the dates listed in Section II of this report and do not allow the desired division or development of the property. However, the claim does not establish whether or to what extent the claimant's desired use of the subject property complies with the interim planning goals under Senate Bill 100, or for tax lot 800, the county's acknowledged forest zone and provisions of Goal 4 and OAR 660, division 6, in effect when the claimant acquired tax lot 800.

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 claimant has identified. There may be other laws that currently apply to the claimant's use of the subject property, and that may continue to apply to the claimant's 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 claimant seeks 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 \$20 million as the reduction in the subject property's fair market value due to the regulations that restrict the claimant's desired use of the property. This amount is not substantiated by any information but is an estimate provided by the claimant. The claimant will provide an appraisal if the state decides to compensate rather than waive regulations.

Conclusions

As explained in Section V.(1) of this report, the claimant is Avison Lumber Co. which acquired the subject property on the dates listed in Section II of this report. Under ORS 197.352, the

claimant is 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 claimant acquired the subject property restrict the claimant's desired use of the property. The claimant estimates that the effect of the regulations on the fair market value of the subject property is a reduction of \$20 million.

Without an appraisal or other documentation, and without verification of whether or the extent to which the claimant's desired use of the subject property was allowed under the standards in effect when it acquired each tax lot on the dates listed in Section II of this report, 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 Goals 3 and 4, ORS 215 and OAR 660, divisions 6, and 33, which Clackamas County has implemented through its current TBR and AG/F zones. All of these land use regulations, with the exception of the interim planning goals under Senate Bill 100, were enacted or adopted after the claimant acquired the subject property, except for tax lot 800. For tax lot 800, with the exception of amendments adopted after May 24, 1985, Goal 4 and OAR 660, division 6, were in effect when the claimant acquired this tax lot.

Conclusions

Without a specific development proposal for the subject property, it is not possible for the department to determine all the laws that may apply to a particular use of the property, or whether those laws may fall under one or more of the exemptions under ORS 197.352. It appears that the general statutory, goal and rule restrictions on residential division and development of the subject property are not exempt under ORS 197.352(3)(E) to the extent they were enacted or adopted after the claimant acquired the property. Provisions of ORS 215, including the interim statewide planning goals under Senate Bill 100 in effect when the claimant acquired the subject property (except for tax lot 800) are exempt under ORS 197.352(3)(E) and will continue to apply. Provisions of Goal 4 and OAR 660, division 6, in effect when the claimant acquired tax lot 800 in 1985 are exempt under ORS 197.352(3)(E) and will continue to apply to the tax lot.

Other laws in effect when the claimant acquired the subject property are exempt under ORS 197.352(3)(E) and will also continue to apply to the claimant's use of the property. In addition, the department notes that ORS 215.730 and OAR 660, division 6, include standards for siting dwellings in forest zones. Those provisions include fire protection standards for

dwellings. 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 claimant’s 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 claimant seeks 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 claimant has 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 claimant should be aware that the less information it has 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 its use of the subject property.

VI. FORM OF RELIEF

ORS 197.352(1) provides for payment of compensation to an owner of private real property if the Commission or the department has enforced one or more laws that restrict the use of the property in a manner that reduces its fair market value. In lieu of compensation, the department may choose to not apply the law in order to allow the present owner to carry out a use of the property permitted at the time the present owner acquired the property. The Commission, by rule, has directed that if the department determines a claim is valid, the director of the department must provide only non-monetary relief unless and until funds are appropriated by the legislature to pay claims.

Findings of Fact

Based on the findings and conclusions set forth in this report, laws enforced by the Commission or the department restrict the claimant’s 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 \$20 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 claimant’s desired use of the subject property was allowed under the standards in effect when it 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 Avison Lumber Co. to use the subject property for a use permitted at the time it acquired the property on the dates listed in Section II of this report.

Conclusions

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

1. In lieu of compensation under ORS 197.352, the State of Oregon will not apply the following laws to Avison Lumber Co.'s clearing of portions of the subject property for development, extension of the existing county roads into and through the property, division of the subject property in phases into approximately 55 parcels ranging in size from 2 to 10 acres and development of each lot with a single-family residence and accessory structures: applicable provisions of Goals 3 and 4, ORS 215 and OAR 660, divisions 6, and 33, enacted or adopted after the dates specified in the below table. These land use regulations will not apply to the claimant only to the extent necessary to allow it to use the subject property for the use described in this report, and only to the extent that use was permitted when it acquired the property on the following dates:

Acquisition Date	Tax Lot
February 25, 1974	601
June 10, 1974	101
June 13, 1974	700
August 15, 1974	500, 600 and 1600
May 24, 1985	800

2. The action by the State of Oregon provides the state's authorization to the claimant to use the subject property for the use described in this report. Except for tax lot 800, the claimant's use of the subject property remains subject to the applicable provisions of ORS 215 in effect when it acquired each tax lot on the dates listed in Section II of this report and the above table, including the interim planning goals set forth in ORS 215.515 (1973 edition). The claimant's use of tax lot 800 remains subject to compliance with Goal 4 and OAR 660, division 6, as implemented through Clackamas County's acknowledged forest zone.

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 claimant first obtains 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 claimant under the terms of the order will remain subject to the following laws: (a) those laws not specified in Condition 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 claimant to use the subject property, it may be necessary for it 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 claimant 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 claimant.

VII. COMMENTS ON THE DRAFT STAFF REPORT

The department issued its draft staff report on this claim on November 28, 2006. OAR 125-145-0100(3), provided an opportunity for the claimant or the claimant's 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.

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

IN THE MATTER OF THE CLAIM FOR) FINAL ORDER B
COMPENSATION UNDER ORS 197.352) CLAIM NO. M129549
(BALLOT MEASURE 37) OF)
Avison Lumber Co., an Oregon corporation, CLAIMANT)

Claimant: Avison Lumber Co., an Oregon corporation (the Claimant)

Property: Township 4S, Range 2E, Section 25, Tax lot 500
Clackamas County (the Property)

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

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

ORDER

The Claim is denied as to laws administered by the Oregon Department of Forestry or the Oregon Board of Forestry, for the reasons set forth in the ODF 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 Avison Lumber Co.'s clearing of portions of the subject property for development, extension of the existing county roads into and through the property, division of the subject property in phases into approximately 55 parcels ranging in size from 2 to 10 acres and development of each lot with a single-family residence and accessory structures: applicable provisions of Goal 3, ORS 215 and OAR 660, division 33, enacted or adopted after August 15, 1974. These land use regulations will not apply to the claimant only to the extent necessary to allow it to use the subject property for the use described in this report, and only to the extent that use was permitted when it acquired the property on August 15, 1974.
2. The action by the State of Oregon provides the state's authorization to the claimant to use the subject property for the use described in this report, subject to the standards in effect on August 15, 1974. On that date, the property was subject to the applicable provisions of ORS 215 then in effect, including the interim planning goals set forth in ORS 215.515 (1973 edition).

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 claimant first obtains 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.

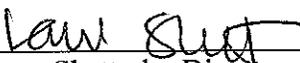
4. Any use of the subject property by the claimant under the terms of the order will remain subject to the following laws: (a) those laws not specified in (1) above; (b) any laws enacted or enforced by a public entity other than the Commission or the department; and (c) those laws not subject to ORS 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 claimant to use the subject property, it may be necessary for it 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 claimant 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 claimant.

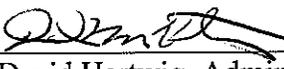
This Order is entered by the Director of the DLCD as a final order of DLCD and the Land Conservation and Development Commission under ORS 197.352, OAR 660-002-0010(8), and OAR 125, division 145, and by the Director of the DAS as a final order of DAS under ORS 197.352, OAR 125, division 145, and ORS 293.

This Order is entered by the Oregon Board and Department of Forestry as a final order of the Board under ORS 197.352, OAR 629-001-0057, and OAR Chapter 125, division 145.

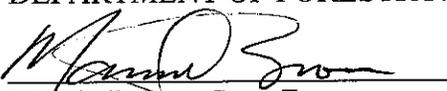
FOR DLCD AND THE LAND
CONSERVATION AND DEVELOPMENT
COMMISSION:


Lane Shetterly, Director
DLCD
Dated this 15th day of December, 2006.

FOR THE DEPARTMENT OF
ADMINISTRATIVE SERVICES:


David Hartwig, Administrator
DAS, State Services Division
Dated this 15th day of December, 2006.

FOR THE OREGON BOARD OF
FORESTRY AND THE OREGON
DEPARTMENT OF FORESTRY:


Marvin Brown, State Forester
ODF
Dated this 15th day of December, 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
Final Staff Report and Recommendation**

December 15, 2006

STATE CLAIM NUMBER: M129549
Report B¹

NAME OF CLAIMANT: Avison Lumber Co., an Oregon corporation

MAILING ADDRESS: PO Box 419
Molalla, Oregon 97038

PROPERTY IDENTIFICATION: Township 4S, Range 2E, Section 25
Tax lot 500
Clackamas County

OTHER CONTACT INFORMATION: Donald Joe Willis
Schwabe, Williamson & Wyatt
1211 SW 5th Avenue, Suite 1900
Portland, Oregon 97204

DATE RECEIVED BY DAS: June 20, 2006

180-DAY DEADLINE: December 17, 2006

I. SUMMARY OF CLAIM

The claimant, Avison Lumber Co., an Oregon corporation, seeks compensation in the amount of \$20 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 claimant desires compensation or the right to clear portions of the subject property for development, extend the existing county roads into and through the property, divide the subject property in phases into approximately 55 parcels ranging in size from 2 to 10 acres and develop each lot with a single-family residence and accessory structures. The subject property is located at the geographical 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 (the department) has determined that the claim is valid. Department staff recommends that, in lieu of compensation, the requirements of the following state laws enforced by the Land Conservation and Development Commission (the Commission) or the department

¹ This is one of two reports by the department addressing this claim.

not apply to Avison Lumber Co.'s clearing of portions of the subject property for development, extension of the existing county roads into and through the property, division of the subject property in phases into approximately 55 parcels ranging in size from 2 to 10 acres and development of each lot with a single-family residence and accessory structures: applicable provisions of Statewide Planning Goal 3 (Agricultural Lands), ORS 215 and Oregon Administrative Rules (OAR) 660, division 33, enacted or adopted after August 15, 1974. These laws will not apply to the claimant only to the extent necessary to allow it to use the subject property for the use described in this report, and only to the extent that use was permitted when it acquired the property on August 15, 1974. (See the complete recommendation in Section VI of this report.)

III. COMMENTS ON THE CLAIM

Comments Received

On October 16, 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, two written comments were received in response to the 10-day notice.

The comments do 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 letters 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 Fact

This claim was submitted to DAS on June 20, 2006, for processing under OAR 125, division 145. The claim identifies an extensive list of statutes and rules 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 claimant, Avison Lumber Co., acquired the subject property on August 15, 1974, as reflected by a deed included with the claim. A March 28, 2006, title report submitted with the claim establishes the claimant’s current ownership of the subject property.

Conclusions

The claimant, Avison Lumber Co., is an “owner” of the subject property as that term is defined by ORS 197.352(11)(C), as of August 15, 1974.

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 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 lists many statutes in ORS 92, 197, 215, 526 and 527, along with ORS 209.250(4), but contains no description or documentation that these statutes apply to or restrict the claimant’s desired use of the property.² Similarly, the claim lists many rules in OAR 125 to 145 (DAS), 629 (ODF) and 660. Again, the claim includes no information concerning how these land use regulations apply to or restrict the claimant’s desired use. As a result, this report addresses only those state land use regulations administered by the department or the Commission that the department is able to determine apply to the claimant’s desired use.

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 claimant’s property is zoned by Clackamas County as EFU as required by Goal 3, in accordance with ORS 215 and OAR 660,

² This report addresses only state land use regulations administered by the Commission or the department. The state land use regulations listed in the claim include statutes administered by the Oregon Department of Forestry (ODF). These statutes and rules are addressed in a separate report by ODF for this claim.

division 33, because the claimant's property is "agricultural land" as defined by Goal 3.³ Goal 3 became effective on January 25, 1975, and required that agricultural land 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 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 claimant acquired the subject property on August 15, 1974, after the adoption of Senate Bill 100 (Chapter 80, Oregon Laws 1973) effective on October 5, 1973, but before the adoption of the statewide planning goals, effective on January 25, 1975. At that time, the subject property was not zoned by Clackamas County.

During the period between October 5, 1973, and January 25, 1975, ORS 197.175(1) and 197.280 (1973 editions) required, in addition to any local plan or zoning provisions, that cities and counties exercise their planning responsibilities in accordance with the interim land use planning goals set forth in ORS 215.515 (1973 edition). *Petersen v. Klamath Falls*, 279 Or 249 (1977); *see also, Meeker v. Board of Comm'rs*, 287 Or 665 (1979) (review of a subdivision is an exercise of planning responsibilities requiring application of the goals); *State Housing Council v. Lake Oswego*, 48 Or App. 525 (1981) (noting that while "[l]and use planning responsibility is not defined in ORS ch 197, the Supreme Court has interpreted that term as including annexation approvals, *subdivision approvals* [emphasis added] and partition approvals") citing *Petersen*, *Meeker* and *Alexanderson v. Polk County*, 285 Or 427 (1980). The claimant's desired use includes subdivision of its land. If the claimant had sought to create that use in 1974, as a matter of law, the use would have been subject to the interim planning goals at ORS 215.515.⁴

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

⁴ The "interim" land use goals are set forth in ORS 215.515(1)(a) to (j) (1973 edition) as follows: (a) "To preserve the quality of the air, water and land resources of the state," (b) "To conserve open space and protect natural and scenic resources," (c) "To provide for the recreational needs of citizens of the state and visitors," (d) "To conserve prime farm lands for the production of crops," (e) "To provide for the orderly and efficient transition from rural to urban land use," (f) "To protect life and property in areas subject to floods, landslides and other natural disasters," (g) "To provide and encourage a safe, convenient and economic transportation system including all modes of transportation: Air, water, rail, highway and mass transit and recognizing differences in the social costs in the

The following interim goals are directly applicable to this claim: "To preserve the quality of the air, water and *land* [emphasis added] resources of the state"; "To conserve prime farm lands for the production of crops"; "To provide for the orderly and efficient transition from rural to urban land use"; "To protect life and property in areas subject to floods, landslides and other natural disasters"; "To provide and encourage a safe, convenient and economic transportation system including all modes of transportation: Air, water, rail, highway and mass transit and recognizing differences in the social costs in the various modes of transportation"; and "To develop a timely, orderly and efficient arrangement of public facilities and services to serve as a framework for urban and rural development." ORS 215.515 (1973 edition).

No information has been provided establishing whether or to what extent the claimant's desired division of the subject property for residential development complies with the interim planning goals set forth in ORS 215.515 (1973 edition) in effect at the time the claimant acquired the property on August 15, 1974. In particular, it is unclear whether division and development of this portion of the property together with the remainder of the property could satisfy the interim goal requirements "to conserve prime farm lands for the production of crops," "to provide for the orderly and efficient transition from rural to urban land use" or "to develop a timely, orderly and efficient arrangement of public facilities and services to serve as a framework for urban and rural development."

Conclusions

The current zoning requirements, minimum lot size and dwelling standards established by Goal 3, ORS 215 and OAR 660, division 33, were all enacted or adopted after the claimant acquired the subject property in 1974 and do not allow the desired division or development of the property. However, the claim does not establish whether or to what extent the claimant's desired use of the subject property complies with the interim planning goals in effect when it acquired the property on August 15, 1974.

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 claimant has identified. There may be other laws that currently apply to the claimant's use of the subject property, and that may continue to apply to the claimant's 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 claimant seeks 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."

various modes of transportation," (h) "To develop a timely, orderly and efficient arrangement of public facilities and services to serve as a framework for urban and rural development," (i) "To diversify and improve the economy of the state" and (j) "To ensure that the development of properties within the state is commensurate with the character and the physical limitations of the land." ORS 215.515 (1973 edition).

Findings of Fact

The claim includes an estimate of \$20 million as the reduction in the subject property's fair market value due to the regulations that restrict the claimant's desired use of the property. This amount is not substantiated by any information but is an estimate provided by the claimant. The claimant will provide an appraisal if the state decides to compensate rather than waive regulations.

Conclusions

As explained in Section V.(1) of this report, the claimant is Avison Lumber Co. which acquired the subject property on August 15, 1974. Under ORS 197.352, the claimant is 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 claimant acquired the subject property restrict the claimant's desired use of the property. The claimant estimates that the effect of the regulations on the fair market value of the subject property is a reduction of \$20 million.

Without an appraisal or other documentation, and without verification of whether or the extent to which the claimant's desired use of the subject property was allowed under the standards in effect when the claimant 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 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 Clackamas County has implemented through its current EFU zone. All of these land use regulations were enacted or adopted after the claimant acquired the subject property.

Conclusions

Without a specific development proposal for the subject property, it is not possible for the department to determine all the laws that may apply to a particular use of the property, or whether those laws may fall under one or more of the exemptions under ORS 197.352. It appears that none of the general statutory, goal and rule restrictions on residential division and development of the subject property were in effect when the claimant acquired the property on August 15, 1974. As a result, these laws are not exempt under ORS 197.352(3)(E).

Laws in effect when the claimant acquired the subject property are exempt under ORS 197.352(3)(E) and will continue to apply to the claimant's use of the property. There may be other laws that continue to apply to the claimant's 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 claimant seeks a building or development permit to carry out a specific use, it may become evident that other state laws apply to that use. In some cases, some of these laws may be exempt under ORS 197.352(3)(A) to (D).

This report addresses only those state laws that are identified in the claim, or that the department is certain apply to the subject property based on the use that the claimant has 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 claimant should be aware that the less information it has 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 its use of the subject property.

VI. FORM OF RELIEF

ORS 197.352(1) provides for payment of compensation to an owner of private real property if the Commission or the department has enforced one or more laws that restrict the use of the property in a manner that reduces its fair market value. In lieu of compensation, the department may choose to not apply the law in order to allow the present owner to carry out a use of the property permitted at the time the present owner acquired the property. The Commission, by rule, has directed that if the department determines a claim is valid, the director of the department must provide only non-monetary relief unless and until funds are appropriated by the legislature to pay claims.

Findings of Fact

Based on the findings and conclusions set forth in this report, laws enforced by the Commission or the department restrict the claimant's desired use 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 \$20 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 claimant's desired use of the subject property was allowed under the standards in effect when it 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 Avison Lumber Co. to use the subject property for a use permitted at the time it acquired the property on August 15, 1974.

Conclusions

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

1. In lieu of compensation under ORS 197.352, the State of Oregon will not apply the following laws to Avison Lumber Co.'s clearing of portions of the subject property for development, extension of the existing county roads into and through the property, division of the subject property in phases into approximately 55 parcels ranging in size from 2 to 10 acres and development of each lot with a single-family residence and accessory structures: applicable provisions of Goal 3, ORS 215 and OAR 660, division 33, enacted or adopted after August 15, 1974. These land use regulations will not apply to the claimant only to the extent necessary to allow it to use the subject property for the use described in this report, and only to the extent that use was permitted when it acquired the property on August 15, 1974.
2. The action by the State of Oregon provides the state's authorization to the claimant to use the subject property for the use described in this report, subject to the standards in effect on August 15, 1974. On that date, the property was subject to the applicable provisions of ORS 215 then in effect, including the interim planning goals set forth in ORS 215.515 (1973 edition).
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 claimant first obtains 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 claimant 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 claimant to use the subject property, it may be necessary for it 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 claimant 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 claimant.

VII. COMMENTS ON THE DRAFT STAFF REPORT

The department issued its draft staff report on this claim on November 28, 2006. OAR 125-145-0100(3), provided an opportunity for the claimant or the claimant's 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.

ORS 197.352 (BALLOT MEASURE 37) CLAIM FOR COMPENSATION

OREGON DEPARTMENT OF FORESTRY

Final Staff Report and Recommendation

December 15, 2006

STATE CLAIM NUMBER: M129549

NAMES OF CLAIMANT: Avison Lumber Co., an Oregon corporation

MAILING ADDRESS: PO Box 419
Molalla, Oregon 97038

PROPERTY IDENTIFICATION: Township 4S, Range 2E, Section 23
Tax lot 1600
Township 4S, Range 2E, Section 24
Tax lot 500
Township 4S, Range 2E, Section 25
Tax lots 500 and 600
Township 4S, Range 2E, Section 36
Tax lot 101 and 800

Township 4S, Range 3E, Section 31
Tax lots 601 and 700
Clackamas County

OTHER CONTACT INFORMATION: Donald Joe Willis
Schwabe, Williamson & Wyatt
1211 SW 5th Ave, Suite 1900
Portland, Oregon 97204

DATE RECEIVED BY DAS: June 20, 2006

180-DAY DEADLINE: December 17, 2006

I. SUMMARY OF CLAIM

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

II. SUMMARY OF STAFF RECOMMENDATION

Based on the findings and conclusions set forth below, the Department of Forestry (ODF) has determined the claim is not valid as to land use regulations administered by ODF or the Oregon Board of Forestry (Board) because claimant has not demonstrated how any of the state land use regulations listed in the claim and administered by the Board or ODF apply to or restrict the claimant's desired use of the property, namely clearing portions of the subject property for

development, extending the existing county roads into and through the property, dividing the subject property in phases into approximately 55 parcels ranging in size from 2 acres to 10 acres, and developing each lot with a single-family residence and accessory structures. ORS 527.730 provides that “[n]othing in the Oregon Forest Practices Act shall prevent the conversion of forestland to any other use.” The claimant’s desired use of the property is a conversion. Since the FPA cannot restrict a change in land use, and since all evidence of value presented in the claim is based on the land use change, claimant has offered no relevant information on how applying forest practice regulations lowers the market value of the subject properties. To the extent that the claimant intends to carry out a “forest operation” (a commercial activity relating to the establishment, management or harvest of forest tree species) in conjunction with its residential development, claimant has not submitted a written notification with sufficient detail for ODF to be able to determine whether the statutes or rules listed in the claim apply to or restrict the claimant’s desired use of the property. (See the complete recommendation in Section VI. of this report.)

III. COMMENTS ON THE CLAIM

Comments Received

See DLCD Final Staff Report.

IV. TIMELINESS OF CLAIM

Findings of Fact

This claim was submitted to DAS on June 20, 2006, for processing under OAR 125, division 145. The claim identifies a list of statutes and rules, which includes ORS 526 and 527, and OAR 629, 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

ODF adopts the findings of fact and conclusions of law regarding ownership contained in the DLCD Final Staff Report for this claim.

2. The Laws That are the Basis for This Claim

In order to establish a valid claim, Section 1 of Ballot Measure 37 requires, in part, that a state land use regulation must restrict the claimant’s desired use of private real property, and that the

enactment or enforcement of the regulation has had the effect of reducing the fair market value of the property.

Findings of Fact

The claimant desires compensation or to clear the land for residential development, extend the existing adjacent county roads into and through the property, and divide the 765-acre property in phases into 250 parcels ranging in size from 2 to 10 acres and develop a single-family dwelling and accessory structures on each parcel. The claim lists the following state statutes and rules administered by ODF or the Board as laws that restrict the use of the property as the basis for the claim: ORS 526.016; 526.031, 526.166, 526.168, 526.194, 526.305 to 370, 526.425, 526.490, 526.500 to 515, 526.900, 526.905, 527.610 et seq., 527.665, 527.680 to 687, 527.690, 527.721 and 722, 527.730, 527.245, 527.760, 527.990 and 527.992. The claim also lists the following rules of the Board: OAR 629-001-0000 to 0057, 629-020, 629-020-0010, 629-620-0020-0000 to 0070, 629-045-0005 to 0010, 629-605-0100 to 0500, 629-610-0000 to 0090, 629-630-0000 to 0800 and 629-680-0000 to 0430. The claim states, "Currently, the State land use regulations in OAR 660, ORS 92, ORS 197, ORS 215, ORS 526 and ORS 527 restrict clearing of the land for development, extension of roads into the property, and both the division of the property and the construction of single family dwellings on the existing and new lots."

Many of the listed statutes and rules, including those in ORS 526 and OAR 629-001, and 629-020 are not land use regulations, as defined by ORS 197.352(11). Others, such as ORS 527.610, 527.665, 527.680, 527.721, 527.722, 527.730, 527.990, and 527.992, either do not apply at this time to the claimant's desired use, or do not restrict the claimant's desired use of the property.

The properties are planned and zoned primarily for forest or mixed farm/forest use. . Nothing in ORS chapters 526 or 527, or OAR chapter 629 relates to the division of land, or to the development of residential uses. The state laws listed in the claim that are administered by ODF only apply to forest operations, which is not the desired use the claimant has described in its claim.

One of the cited laws, ORS 527.730, Conversion of forestland to other uses, states, "Nothing in the Oregon Forest Practices Act shall prevent the conversion of forestland to any other use." No laws enforced by the Board or ODF restrict the division of property or the establishment of dwellings.

The subject property does include trees and claimant has indicated its intent to clear portions of the land for development. Claimant has submitted a notification of intent to conduct harvest activities and build roads (Notification No. 06-47522). However, the notification and map of "concept plan" filed with the department are too vague for ODF to be able to determine whether statutes or rules it or the Board may enforce apply to the claimant's intended use of the subject property in a way that restricts the use of the subject property, and reduces its fair market value.

Conclusions

Nothing in the laws that are listed in the claim and enforced or administered by ODF or the Board applies to or restricts the use of the property described in the claim. As a result, ODF has no basis upon which it may determine that the claimant is entitled to relief under ORS 197.352.

3. Effect of Regulations on Fair Market Value

In order to establish a valid claim, Section 1 of Ballot Measure 37 requires that any land use regulation 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 claimant provided an estimated amount of loss in fair market value of \$20,000,000, based on proposed residential development of the subject properties. The estimate is based only on the value of proposed residential development. The claimant has not demonstrated that any land use regulations administered by ODF or the Board restrict its use of the subject property or have the effect of reducing its fair market value. The information in the claim is based on laws not administered by ODF or the Board. As a result, there is no relevant evidence in the record for this claim relating to the effect of laws administered by ODF or the Board on the fair market value of the subject property.

Conclusions

The claimant has not demonstrated that laws enforced or administered by ODF or the Board restrict its desired use of this property or affect its fair market value.

4. Exemptions Under Section 3 of Measure 37

Ballot Measure 37 does not apply to certain land use regulations. In addition, under Section 3 of the Measure, certain types of laws are exempt from the Measure.

Findings of Fact

ORS 197.352(3) exempts laws that were enacted before a claimant acquired its interest in the property. Based on the findings and conclusions in the DLCD reports on this claim, Claimant acquired the properties on the following dates:

- | | |
|---------------------------|--|
| February 25, 1974: | Township 4S, Range 3E, Section 31, Tax Lot 601 |
| June 10, 1974: | Township 4S, Range 2E, Section 36, Tax Lot 101 |
| June 13, 1974: | Township 4S, Range 3E, Section 31, Tax Lot 700 |
| August 15, 1974: | Township 4S, Range 2E, Section 23, Tax Lot 1600
Township 4S, Range 2E, Section 24, Tax Lot 500
Township 4S, Range 2E, Section 25, Tax Lots 500 and 600 |
| May 24, 1985: | Township 4S, Range 2E, Section 36, Tax Lot 800 |

The FPA was first enacted in 1971 and the first forest practice rules to administer the FPA became effective on July 1, 1972. The FPA and rules have been amended at various times since

then. ODF is unable to determine whether 197.352(3)(E) or other exemptions in 197.352(3) may apply because the claimant has not proposed a use that is subject to these laws.

Some FPA regulations, like many in OAR 629-630 *et seq.* were enacted to control water pollution resulting from forest operations. ORS 197.352(3)(B) specifically exempts regulations “restricting or prohibiting activities for the protection of public health and safety..., including pollution control.” Such regulations may apply to the property, depending upon the activities the claimant may wish to undertake.

Other FPA regulations cited by the claimant may be exempted under 197.352(3).

Conclusions

ODF concludes that some of the listed land use regulations are likely exempt under ORS 197.352(3). Until there is a notification of an operation, however, a final determination of the applicability of the listed laws to a particular forest operation on the property cannot be made.

Laws in effect when the claimant acquired the subject properties are exempt under ORS 197.352(3)(E), and will continue to apply to the claimant’s use of the property. There may be other laws that continue to apply to the claimant’s use of the subject property that have not been identified in the claim. When the claimant submits an acceptable notification, 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 (3)(D).

This report addresses only those state laws that are identified in the claim, or that the department is certain apply to the subject properties based on the uses that the claimant has 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 claimant should be aware that the less information it has 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 its use of the subject property.

VI. FORM OF RELIEF

Based on the current record, the claimants are not entitled to relief under ORS 197.352 from ODF or the Board. ODF denies any relief for this claim because neither the Board nor ODF has enforced laws that restrict the division of the subject property into parcels or lots, or the use of the property for residential purposes.

VII. COMMENTS ON THE DRAFT REPORT

ODF issued its draft staff report on this claim on July 21, 2006. OAR 125-145-0100(3), provides an opportunity for the claimant or the claimant’s 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.