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. M129576
(BALLOT MEASURE 37) OF	)	
John and Pamela Thennes, CLAIMANTS	)	

Claimants: John and Pamela Thennes (the Claimants)

Property: Township 25S, Range 7W, Section 8, Tax lot 102, Douglas County (the Property)

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

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

ORDER

The Claim is approved as to laws administered by DLCD and the Land Conservation and Development Commission (LCDC) for the reasons set forth in the DLCD Report, and subject to the following terms:

1. In lieu of compensation under ORS 197.352, the State of Oregon will not apply the following laws to John and Pamela Thennes' division of the 80-acre subject property into one 2-acre parcel and two approximately 39-acre parcels, and to their development of a dwelling on each of the 39-acre parcels: applicable provisions of Goals 3 and 4, ORS 215 and OAR 660, divisions 6, and 33, enacted or adopted after September 10, 1988. These land use regulations will not apply to the claimants only to the extent necessary to allow them to use the subject property for the use described in this report, and only to the extent that use was permitted when they acquired the property on September 10, 1988.

2. The action by the State of Oregon provides the state's authorization to the claimants to use the property for the use described in this report, subject to the standards in effect on September 10, 1988. On that date, the property was subject to applicable provisions of Goals 3 and 4 and OAR 660, divisions 5, and 6, as implemented by Douglas County's acknowledged plan, and the applicable provisions of ORS 215 then in effect.

3. To the extent that any law, order, deed, agreement or other legally enforceable public or private requirement provides that the subject property may not be used without a permit, license

or other form of authorization or consent, the order will not authorize the use of the property unless the claimants first obtain that permit, license or other form of authorization or consent. Such requirements may include, but are not limited to: a building permit, a land use decision, a "permit" as defined in ORS 215.402 or 227.160, other permits or authorizations from local, state or federal agencies and restrictions on the use of the subject property imposed by private parties.

4. Any use of the 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 21st day of December, 2006.

FOR the DEPARTMENT OF ADMINISTRATIVE SERVICES:

David Hartwig, Administrator
DAS, State Services Division
Dated this 21st day of December, 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

December 21, 2006

STATE CLAIM NUMBER:	M129576
NAMES OF CLAIMANTS:	John and Pamela Thennes
MAILING ADDRESS:	8757 Tyee Road Umpqua, Oregon 97486
PROPERTY IDENTIFICATION:	Township 25S, Range 7W, Section 8 Tax lot 102 Douglas County
DATE RECEIVED BY DAS:	June 26, 2006
180-DAY DEADLINE:	December 23, 2006

I. SUMMARY OF CLAIM

The claimants, John and Pamela Thennes, seek compensation in the amount of $269,421 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 80-acre subject property into one 2-acre parcel and two approximately 39-acre parcels, and to develop a dwelling on each of the 39-acre parcels. The subject property is located at 8757 Tyee Road, near Umpqua, in Douglas County. (See claim.)

II. SUMMARY OF STAFF RECOMMENDATION

Based on the findings and conclusions set forth below, the Department of Land Conservation and Development (the department) has determined that the claim is valid. Department staff recommends that, in lieu of compensation, the requirements of the following state laws enforced by the Land Conservation and Development Commission (the Commission) or the department not apply to John and Pamela Thennes' division of the 80-acre subject property into one 2-acre parcel and two approximately 39-acre parcels, and to their development of a dwelling on each of the 39-acre parcels: 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 September 10, 1988. These laws will not apply to the claimants only to the extent necessary to allow them to use the subject property for the use described in this report, and only to the extent that use was permitted when they acquired the property in 1988. (See the complete recommendation in Section VI. of this report.)

III. COMMENTS ON THE CLAIM

Comments Received

On October 18, 2006, pursuant to OAR 125-145-0080, the Oregon Department of Administrative Services (DAS) provided written notice to the owners of surrounding properties. According to DAS, no written comments were received in response to the 10-day notice.

IV. TIMELINESS OF CLAIM

Requirement

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

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

2. For claims arising from land use regulations enacted after the effective date of Measure 37 (December 2, 2004), within two years of the enactment of the land use regulation, or the date the owner of the property submits a land use application in which the land use regulation is an approval criteria, whichever is later.

Findings of Fact

This claim was submitted to DAS on June 26, 2006, for processing under OAR 125, division 145. The claim identifies the 80-acre minimum parcel size, farm-forest zoning and other local land use ordinances as the basis for the claim. Only laws that were enacted or adopted prior to December 2, 2004, are the basis for this claim.

Conclusions

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

V. ANALYSIS OF CLAIM

1. Ownership

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

Findings of Fact

The claimants, John and Pamela Thennes, acquired the subject property from John Thennes' mother, Myrtle Thennes, on September 10, 1988, as reflected by a warranty deed and a November 13, 1989, correction deed included with the claim.[1] John Thennes' parents, Myrtle and John Thennes, acquired the property on August 19, 1947. The Douglas County Assessor's Office confirms the claimants' current ownership of the subject property.

Conclusions

The claimants, John and Pamela Thennes, are "owners" of the subject property as that term is defined by ORS 197.352(11)(C), as of September 10, 1988. John Thennes' parents, Myrtle and John Thennes, are "family members" as defined by ORS 197.352(11)(A) and acquired the subject property on August 19, 1947.

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 80-acre subject property into one 2-acre parcel and two approximately 39-acre parcels and to develop a dwelling on each of the 39-acre parcels. It also indicates that the property's current zoning prevents the desired use.

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. The claimants' property is zoned by Douglas County as Farm-Forest, which is a mixed agricultural and forest land zone, as required by Goal 4 and the implementing provisions of OAR 660, division 6 (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.[2] Depending on the

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[1] The claim asserts that the claimants became owners of the subject property on March 4, 1987. However, the documents submitted with the claim do not substantiate that acquisition date. The documentation submitted by the claimants indicates that on March 4, 1987, the claimants became trustees of the Myrtle Thennes Trust. However, the claim includes no indication that the subject property was ever transferred to that trust. In addition, the language of the trust itself requires that "the mention of transfer of any asset to Trustee shall not be deemed to be evidence of such transfer. On receipt of each asset, Trustee shall execute an acknowledgement thereof, attach a copy hereto, and send a copy to Trustor or her survivor, as of which time such asset will be considered to be part of the corpus of this trust and subject to its terms." The claim includes no evidence of such transfer or acknowledgement.

[2] No information was provided to the department regarding the predominant use of the subject property on January 1, 1993.

predominant use on January 1, 1993, the property is 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 minimum lot size specified in ORS 215.780. Under ORS 215.780(2)(a), the minimum lot size in Douglas County's Farm-Forest zone is 80 acres. ORS 215.780 became effective on November 4, 1993 (Chapter 792, Oregon Laws 1993).

The claimants' parents acquired the subject property on August 19, 1947, prior to the adoption of the statewide planning goals and their implementing regulations.

Conclusions

The current zoning requirements, minimum lot size and dwelling standards established under Goal 4 for lands zoned for mixed farm-forest use and the statutory and rule restrictions under applicable provisions of ORS 215 and OAR 660, divisions 6, and 33, were enacted or adopted after the claimants' parents acquired the subject property in 1947. These laws restrict the use of the subject property relative to uses allowed when the claimants' parents acquired it.

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 $269,421 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 comparisons with similar properties in the area.

Conclusions

As explained in Section V.(1) of this report, the claimants are John and Pamela Thennes whose parents acquired the subject property on August 19, 1947. Under ORS 197.352, the claimants are due compensation for land use regulations that restrict the use of the subject property and have the effect of reducing its fair market value. Based on the findings and conclusions in Section V.(2) of this report, laws enacted or adopted since the claimants' parents acquired the subject property restrict the claimants' desired use of the property. The claimants estimate that the effect of the regulations on the fair market value of the subject property is a reduction of $269,421.

Without an appraisal or other documentation it is not possible to substantiate the specific dollar amount by which the land use regulations have reduced the fair market value of the property. Nevertheless, based on the evidence in the record for this claim, the department determines that the fair market value of the subject property has been reduced to some extent as a result of land

use regulations enforced by the Commission or the department since the claimants' parents acquired the property.

4. Exemptions Under ORS 197.352(3)

ORS 197.352 does not apply to certain land use regulations. In addition, under ORS 197.352(3), certain types of laws are exempt from ORS 197.352.

Findings of Fact

The claim is based on state land use regulations that restrict the use of the subject property, including applicable provisions of Goals 3 and 4, ORS 215 and OAR 660, divisions 6, and 33, which Douglas County has implemented through its current Farm-Forest zone. All of these land use regulations were enacted or adopted after the claimants' parents acquired the subject property.

Conclusions

It appears that none of the statutory, goal and rule restrictions on residential division and development of the subject property were in effect when the claimants' parents acquired the subject property in 1947. As a result, these laws are not exempt under ORS 197.352(3)(E). Laws in effect when the claimants' parents acquired the property are exempt under ORS 19.352(3)(E) and do not provide a basis for compensation. In addition, other land use laws enacted or adopted for a purpose set forth in ORS 197.352(3)(A) to (D) are also exempt and would not provide a basis for compensation.

VI. FORM OF RELIEF

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

Findings of Fact

Based on the findings and conclusions set forth in this report, laws enforced by the Commission or the department restrict the claimants' desired use of the subject property. The claim asserts that existing state land use regulations enforced by the Commission or the department have the effect of reducing the fair market value of the subject property by $269,421. However, because the claim does not provide an appraisal or other relevant evidence demonstrating that the land use regulations described in Section V.(2) reduce the fair market value of the subject property, a specific amount of compensation cannot be determined. In order to determine a specific amount of compensation due for this claim, it would also be necessary to verify whether or the extent to which the claimants' desired use of the property was allowed under the standards in effect when

their parents acquired the property. Nevertheless, based on the record for this claim, the department has determined that the laws on which the claim is based have reduced the fair market value of the subject property to some extent.

No funds have been appropriated at this time for the payment of claims. In lieu of payment of compensation, ORS 197.352 authorizes the department to modify, remove or not apply all or parts of certain land use regulations to allow John and Pamela Thennes to use the subject property for a use permitted at the time they acquired the property on September 10, 1988.

The claimants acquired the subject property on September 10, 1988. At that time, the claimants' property was subject to Douglas County's acknowledged Farm-Forest zone.[3] When the claimants acquired the subject property, their desired use of the property would have been governed by Goals 3 and 4, and OAR 660, divisions 5, and 6, as implemented through the county's acknowledged Farm-Forest zone and the applicable provisions of ORS 215 then in effect.[4]

The claim does not establish whether or to what extent the claimants' desired division and development of the subject property were allowed under the standards in effect when they acquired the property on September 10, 1988.

In addition to the applicable provisions of Goals 3 and 4, ORS 215 and OAR 660 divisions 5, and 6, in effect on September 10, 1988, and other laws in effect when 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. In some cases, it will not be possible to know which laws apply to a use of subject property until there is a specific proposal for that use. When the claimants seek a building or development permit to carry out a specific use, it may become evident that other state laws apply to that use. In some cases, some of these laws may be exempt under ORS 197.352(3)(A) to (D). In addition, the department notes that ORS 215.730 and OAR 660, division 6, in particular OAR 660-006-0029, 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. . . ." To the extent they are applicable to the claimants' property, the siting standards for

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[3] Douglas County's Farm-Forest zone was acknowledged by the Commission for compliance with Goal 3 and 4 on October 8, 1982.

[4] 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, statutory requirements continue to apply, and insofar as the state and local provisions are materially the same, the local provisions must be interpreted consistent with the substance of the goals and implementing rules. *Forster v. Polk County*, 115 Or App 475 (1992) and *Kenagy v. Benton County*, 115 Or App 131 (1992).

In 1988, ORS 215.263 (1987 edition) required that divisions of land in EFU zones be "appropriate for the continuation of the existing commercial agricultural enterprise within the area" or not smaller than the minimum size in the county's acknowledged plan. ORS 215.283(1)(f) (1987 edition) generally allowed farm dwellings "customarily provided in conjunction with farm use." Non-farm dwellings were allowed under ORS 215.283(3) if they were determined to be compatible with farm use, not interfere seriously with accepted farm practices, not materially alter the stability of the land use pattern in the area and be situated on generally unsuitable land for the production of farm crops and livestock.

dwellings in forest zones in ORS 215.730 and OAR 660, division 6, are exempt under ORS 197.352(3)(B).

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 identified. Similarly, this report only addresses the exemptions provided for under ORS 197.352(3) that are clearly applicable given the information provided to the department in the claim. The claimants should be aware that the less information they have provided to the department in their claim, the greater the possibility that there may be additional laws that will later be determined to continue to apply to their use of the subject property.

Conclusions

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

1. In lieu of compensation under ORS 197.352, the State of Oregon will not apply the following laws to John and Pamela Thennes' division of the 80-acre subject property into one 2-acre parcel and two approximately 39-acre parcels, and to their development of a dwelling on each of the 39-acre parcels: applicable provisions of Goals 3 and 4, ORS 215 and OAR 660, divisions 6, and 33, enacted or adopted after September 10, 1988. These land use regulations will not apply to the claimants only to the extent necessary to allow them to use the subject property for the use described in this report, and only to the extent that use was permitted when they acquired the property on September 10, 1988.

2. The action by the State of Oregon provides the state's authorization to the claimants to use the property for the use described in this report, subject to the standards in effect on September 10, 1988. On that date, the property was subject to applicable provisions of Goals 3 and 4 and OAR 660, divisions 5, and 6, as implemented by Douglas County's acknowledged plan, and the applicable provisions of ORS 215 then in effect.

3. To the extent that any law, order, deed, agreement or other legally enforceable public or private requirement provides that the subject property may not be used without a permit, license or other form of authorization or consent, the order will not authorize the use of the property unless the claimants first obtain that permit, license or other form of authorization or consent. Such requirements may include, but are not limited to: a building permit, a land use decision, a "permit" as defined in ORS 215.402 or 227.160, other permits or authorizations from local, state or federal agencies and restrictions on the use of the subject property imposed by private parties.

4. Any use of the 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 28, 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.