

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. M129625
(BALLOT MEASURE 37) OF)
Wildish Land Co., an Oregon corporation, CLAIMANT)

Claimant: Wildish Land Co., an Oregon corporation (the Claimant)

Property: Township 18S, Range 2W, Section 7, tax lots 100, 200 and 1000;
Section 8, tax lots 601, 700, 801 and 900
Section 9, tax lots 400, 900, 1401 and 1404;
Section 10, tax lots 502 and 503; and
Section 16, tax lot 101

Township 18S, Range 3W, Section 1, Tax lot 3500
Township 18S, Range 3W, Section 11, tax lot 500
Township 18S, Range 3W, Section 12, tax lot 300, 400, 900 and 1000
Lane 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) 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 Wildish Land Co.'s division and development of the approximately 1,400-acre subject property into 300 homesites in a planned development on approximately 690 acres of the property: applicable provisions of Goals 3, 4, 5 and 14; ORS 215.203 to 215.296 and 215.705 to 215.755 and 215.780; and OAR 660-006-0000 to -0050, 660-014-0000 to -0040, 660-015-0000(3), 660-023-0000 to -0250 and 660-033-0010 to -0160. These land use regulations will not apply to the claimant only to the extent necessary to allow it to use the subject properties for the

use described in this order and report, and only to the extent that use was permitted when it acquired the subject properties on the following dates:

- December 31, 1966: tax lots 100 and 200 (T.18S, R.2W, Section 7); tax lot 700 and 801 (T.18S, R.2W, Section 8); tax lot 3500 (T.18S, R.3W, Section 1); tax lot 500 (T.18S, R.3W, Section 11); and tax lots 300, 400, 900 and 1000 (T.18S R.3W, Section 12).
- July 29, 1967: tax lot 1401 (T.18S, R.2W, Section 9)
- November 14, 1968: tax lots 400 and 900 (T.18S, R.2W, Section 9); and tax lots 502 and 503 (T.18S, R.2W, Section 10)
- June 18, 1969: tax lot 1404 (T.18, R.2W, Section 9); and tax lot 101 (T.18S, R.2W, Section 16)
- November 24, 1971: tax lot 1000 (T.18S, R.2W, Section 7)
- June 17, 1976: tax lot 601 (T.18S, R.2W, Section 8)
- December 12, 1983: tax lot 900 (T.18S, R.2W, Section 8)

2. The action by the State of Oregon provides the state's authorization to the claimant to use the subject properties for the use described in this report, subject to the standards in effect on the dates specified for the subject tax lots identified above. When the claimant acquired an interest in tax lot 601 and 900 (18 02 08) they were subject to the Statewide Land Use Planning Goals, including Goal 5, as well as the provisions of ORS chapter 215 then in effect. Tax lot 900 also was subject to OAR 660-016-000 to 020 (effective May 8, 1981) when the claimant acquired an interest in it in 1983.

3. To the extent that any law, order, deed, agreement or other legally enforceable public or private requirement provides that the subject properties may not be used without a permit, license or other form of authorization or consent, the order will not authorize the use of the subject properties 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 properties imposed by private parties.

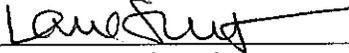
4. Any use of the subject properties by the claimant under the terms of the order will remain subject to the following laws: (a) those laws not specified in (1) above; (b) any laws enacted or enforced by a public entity other than the Commission or the department; and (c) those laws not subject to ORS 197.352 including, without limitation, those laws exempted under ORS 197.352(3). These laws include state laws regulating development in the flood plain and on steep slopes, as well as state laws regulating the removal and fill of material in waters of the state.

5. Without limiting the generality of the foregoing terms and conditions, in order for the claimant to use the subject properties, it may be necessary for the claimant 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 properties. 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 properties by the claimant.

6. Nothing in this report, or the State's final order for this claim constitutes any determination of ownership by the State of Oregon as to submerged or submersible lands in a waterway, or as to public rights to the use of waters of the state.

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

FOR DLCD AND THE LAND
CONSERVATION AND
DEVELOPMENT COMMISSION:


Lane Shetterly, Director
DLCD
Dated this 29th day of December, 2006.

FOR the DEPARTMENT OF
ADMINISTRATIVE SERVICES:


David Hartwig, Administrator
DAS, State Services Division
Dated this 29th 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 29, 2006

STATE CLAIM NUMBER: M129625

NAME OF CLAIMANT: Wildish Land Co., an Oregon corporation

MAILING ADDRESS: PO Box 7428
Eugene, Oregon 97401

PROPERTY IDENTIFICATION: Township 18S, Range 2W
Section 7, tax lots 100, 200 and 1000;
Section 8, tax lots 601, 700, 801 and 900;
Section 9, tax lots 400, 900, 1401 and 1404;
Section 10, tax lots 502 and 503; and
Section 16, tax lot 101

Township 18S, Range 3W
Section 1, tax lot 3500;
Section 11, tax lot 500; and
Section 12, tax lots 300, 400, 900 and 1000

Lane County

OTHER CONTACT INFORMATION: Steve Cornacchia
Hershner Hunter, LLP
180 E. 11th Avenue
Eugene, Oregon 97401

DATE RECEIVED BY DAS: July 6, 2006

180-DAY DEADLINE: January 2, 2007

I. SUMMARY OF CLAIM

The claimant, Wildish Land Co., an Oregon corporation, seeks compensation in the amount of \$15.4 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 divide and develop the approximately 1,400-acre subject property into 300 homesites in a planned development on approximately 690 acres of the property. The subject property is located south of Eugene and Springfield, near Mt. Pisgah, along the Middle and Coast Forks of the Willamette River, in Lane 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.

The department recommends that the claim be approved and 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 Wildish Land Co.'s division and development of the approximately 1,400-acre subject property into 300 homesites in a planned development on approximately 690 acres of the property: applicable provisions of Statewide Planning Goals 3 (Agricultural Lands), 4 (Forest Lands), 5 (Natural Resources, Scenic and Historic Areas, and Open Spaces) and 14 (Urbanization); ORS 215.203 to 215.296, 215.705 to 215.755 and 215.780; and Oregon Administrative Rules (OAR) 660-006-0000 to -0060, 660-014-0000 to -0040, 660-015-0000(3), 660-023-0000 to -0250 and 660-033-0010 to -0160. These laws will not apply to the claimant only to the extent necessary to allow the claimant to use the subject properties for the use described in this report, and only to the extent that use was permitted when it acquired the subject properties on seven dates between December 31, 1966 and December 12, 1983. (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, three written comments were received in response to the 10-day notice.

Two of 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.

The other comment is relevant to whether certain laws that are the basis for the claim are exempt under ORS 197.352(3). The comment has been considered by the department in preparing this report. (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 July 6, 2006, for processing under OAR 125, division 145. The claim identifies the following as the state land use regulations that restrict the claimant's desired use of the subject property: Goals 3, 4, 5 and 14; ORS 197.175, 197.200, 197.250, 215.203 to 215.296 and 390.310 to 390.368; and OAR 660-004-0040, 660-006-0000 to -0050, 660-014-0000 to -0040, 660-015-0000(3), 660-020-0060 to -0065, 660-023-0000 to -0250 and 660-033-0010 to -0160. 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

There are 20 tax lots encompassed in this claim. The claim contains multiple asserted dates of acquisition and references a series of exhibits as containing supporting information for those dates. The claim did not include *any* of the exhibits referenced in the narrative of the claim. However, in response to the draft staff report, the claimant has provided the missing exhibits, along with other evidence supporting its claimed acquisition dates and ownership. In addition, DAS has obtained title information concerning the properties.

In some cases, the information corroborates the asserted acquisition dates in the claim narrative; in some cases, the title information is contrary to the assertions in the claim; in some cases, the claimant's own assertions are conflicting. The following summarizes the department's findings and conclusions concerning when the claimant acquired each of the 20 tax lots. The summary presents the department's findings concerning each of the tax lots included in the claim.

180207 TL 100: This property was acquired by the claimant on December 31, 1966, by bargain and sale deed (Lane County Deed Records No. 731468).

180207 TL 200: This property was acquired by the claimant on December 31, 1966, by bargain and sale deed (Lane County Deed Records No. 731468).

180312 TL 300: This property was acquired by the claimant on December 31, 1966, by bargain and sale deed (Lane County Deed Records No. 731468).

180208 TL 601: The claimant acquired an interest in this property on June 17, 1976, by a quitclaim deed from the State of Oregon (Lane County Deed Records No. 7631005). The nature of the claimant's interest in this property is unclear.

180208 TL 700: This property was acquired by the claimant on December 31, 1966, by bargain and sale deed (Lane County Deed Records No. 731468).

180208 TL 900: The claimant acquired an interest in this property on December 12, 1983, by a quitclaim deed from the State of Oregon (Lane County Deed Records No. 8400536). The nature of the claimant's interest in this property is unclear.

180208 TL 801: This property was acquired by the claimant on December 31, 1966, by bargain and sale deed (Lane County Deed Records No. 2779).

180209 TL 1401: This property was acquired by the claimant on July 29, 1967, by bargain and sale deed (Lane County Deed Records No. 95624).

180209 TL 400: This property was acquired by the claimant on November 14, 1968, by warranty deed (Lane County Deed Records No. 45172).

180209 TL 900: This property was acquired by the claimant on November 14, 1968, and on May 20, 1970, by a warranty deed and a bargain and sale deed, respectively (Lane County Deed Records Nos. 6845172 and 7504588).

180210 TL 502: This property was acquired by the claimant on November 14, 1968, by warranty deed (Lane County Deed Records No. 45172).

180210 TL 503: This property was acquired by the claimant on November 14, 1968, by warranty deed (Lane County Deed Records No. 45172).

180209 TL 1404: This property was acquired by the claimant on June 18, 1969, by two deeds (Lane County Deed Records Nos. 7603179 and 7603180).

180216 TL 101: This property was acquired by the claimant on June 18, 1969, by two deeds (Lane County Deed Records Nos. 7603179 and 7603180).

180207 TL 1000: This property was acquired by the claimant on November 24, 1971, by warranty deed (Lane County Deed Records No. 75306).

The five remaining tax lots included in the claim (180301 TL 3500, 180311 TL 500, 180312 TL 900, 180312 TL 1000, and 180312 TL 400) were acquired over time by T.C. Wildish Co., an Oregon partnership. On December 31, 1966, the partners of T.C. Wildish Co. entered into a stock subscription agreement under the terms of which they agreed to convey certain real property to the claimant upon the call of the claimant's Board (in return for certain shares of common stock in the claimant). The minutes of the organizational meeting of the claimant's Board show that a call was made on December 31, 1966. Although there is conflicting evidence, based on all of the evidence in the record, the department finds that on December 31, 1966, T.C. Wildish Co. and the claimant had a binding agreement to sell real property that included the five remaining tax lots listed above. The evidence the department relies upon includes the Schedule of Properties included with the Stock Subscription Agreement and the affidavit of James A Wildish. The descriptions of the properties in the Stock Subscription Agreement are less than definitive; however, the department finds that it is possible to discern the intent of the parties that these five properties be included in the conveyance to the new corporation based on other evidence in the record.

Nothing in this report, or the State's final order constitutes any determination of ownership by the State of Oregon as to submerged or submersible lands in a waterway, or as to public rights to the use of waters of the state.

Conclusions

The claimant, Wildish Land Co., is an "owner" of the subject properties or an interest in the subject properties. It acquired the subject properties on seven different dates between 1966 and 1983, as listed above.

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 states that the claimant's intended use is to create buildable lots that are smaller than the sizes allowed by the current Lane County Code and to establish residential or commercial uses on the subject property. Under ORS 197.352(8) and (10), and OAR 660-002-0010(8), the department is authorized only to "not apply" one or more state land use regulations to allow a claimant to carry out a use of the property that was permitted when the claimant acquired the property. The department is not authorized to allow a claimant to use property for *all* or *any* uses that were allowed when the claimant acquired the property. The department attempted,

unsuccessfully, to have the claimant clarify what specific use of the property the claimant was asserting is restricted by state land use regulations. In response to the department's request, the claimant and the claimant's agent have provided three different and conflicting descriptions of the claimant's desired use in addition to the ambiguous description in the claim. On November 10, 2006, the claimant's agent wrote that the claimant desired to create more parcels than are currently allowed.... That could be as many as 200 parcels...." On December 18, 2006, the claimant's agent stated that the claimant "is willing to accept a 'waiver' that will allow '503 parcels as small as one acre and development of a dwelling or commercial use on each parcel.'" Also on December 18, 2006, the Vice President and General Counsel of the claimant wrote that "we intend to develop the subject Measure 37 property, approximately 1400 acres, into 503 residential lots ranging in size from a minimum of one acre to a maximum of 40 acres." The latter two letters reference a preliminary development plan for the property that was not included with the original claim.

The department does not and cannot permit claims to be amended once they are filed. The claimant has attempted to amend this claim in multiple respects including changing the nature of the use that the claimant asserts is restricted and that the claimant desires to carry out, as well as by attempting to include additional state land use regulations in the claim.

As to the use that the claim is based on, the department finds that the use that the claim is based on is described by the original description in the claim, as clarified by the claimant's appraisal. The claimant's appraisal establishes that the claimant's written demand for compensation is based on the following use: to divide and develop the approximately 1,400-acre subject property into 300 homesites in a planned development on approximately 690 acres of the property.¹ If the claimant believes that some other use of the property has been restricted by state land use regulations, the claimant is free to submit another written demand. 1000 Friends of Oregon, in their comments on the draft staff report, provide information concerning whether particular tax lots are buildable and assert that the department must determine what properties are and are not buildable. As noted above, the claimant's desired use is to develop approximately 690 acres of the subject properties. This is the portion of the subject properties that is described in the appraisal report as being buildable. The information provided by 1000 Friends of Oregon suggests that there are only approximately 608 acres of buildable land. The department finds that there is sufficient evidence in the claim, including the appraisal report, to show that the claimant's desired use (development of approximately 690 acres) is feasible. Nothing in the department's report or final order alters the application of laws concerning flooding, steep slopes, wetlands or other development constraints that may ultimately mean that less of the property can be developed.

As to the state land use regulations that the claim is for, the claim identified: Goals 3, 4, 5 and 14; ORS 197.175, 197.200, 197.250, 215.203 to 215.296 and 390.310 to 390.368; and OAR 660-

¹ The claim also indicates some intent to transfer the subject property, or the parcels created through a division thereof, after the claim is granted relief under ORS 197.352. In effect, the claimant requests that a decision of the department to "not apply" (waive) certain laws as set forth in this report be transferable with the property. ORS 197.352 only authorizes a state agency to waive a law in order to allow the current owner a use of the property permitted at the time that owner acquired the property. A determination of transferability is beyond the scope of relief that the department may grant under ORS 197.352. The Oregon Department of Justice has advised the department that "[i]f the current owner of the real property conveys the property before a new use allowed by the public entity is established, then the entitlement to relief will be lost."

004-0040, 660-006-0000 to -0050, 660-014-0000 to -0040, 660-015-0000(3), 660-020-0060 to -0065, 660-023-0000 to -0250 and 660-033-0010 to -0160. The claimant's agent subsequently sent a letter on July 24, 2006, indicating that he intended to include ORS 215.705 to 215.755 and 215.780. The department will accept that clarification because it is consistent with its practice with regard to claims involving farm or forest land. However, on October 18, 2006, the claimant's agent attempted to amend the claim to include Goal 11 (Public Facilities and Services) and OAR 660-011-0000 to -0065. The department has not addressed these state land use regulations because they were not included with the original claim. Further, the claimant has not demonstrated that these state land use regulations apply to the claimant's desired use of the property. Again, if the claimant wishes to demand relief based on these state land use regulations the claimant may file another written demand.

In sum, the claim is based on the desired use described in the original claim materials, as clarified by the appraisal submitted by the claimant in support of its written demand for compensation. The claim is based on the state land use regulations identified in the original claim. However, consistent with its practice, the department will also address ORS 215.705 to 215.755 and 215.780.

The subject properties are planned and zoned by Lane County as Exclusive Farm Use (EFU) (E-25 and E-30), Nonimpacted Forest Lands (F-1) and Impacted Forest Lands (F-2), and Sand, Gravel and Rock Products (SG). The current zoning of the subject properties is summarized below, based on Lane County's report for the Measure 37 claim to the county (there appear to be multiple errors in the zoning information contained in the claim):

180301 TL 3500 SG
180311 TL 500 SG
180312 TL 300 SG
180312 TL 400 SG
180312 TL 900 SG
180312 TL 1000 E-25
180207 TL 100 F-1, F-2
180207 TL 200 E-30
180207 TL 1000 E-30
180208 TL 601 SG
180208 TL 700 F-1
180208 TL 801 E-25 and SG
180208 TL 900 SG
180209 TL 1401 SG
180209 TL 400 SG
180209 TL 900 SG
180209 TL 1404 E-25 and SG
180210 TL 503 E-25
180210 TL 502 E-25
180216 TL 101 SG

The claim is based generally on the applicable provisions of state law that require these plan and zoning designations, and that restrict uses on EFU-zoned and forest-zoned lands. As described above, a portion of the subject property is zoned E-25 and E-30 as required by Goal 3, in accordance with ORS 215 and OAR 660, division 33, because a portion is "agricultural land" as defined by Goal 3.³ Goal 3 became effective on January 25, 1975, and required that agricultural lands as defined by Goal 3 be zoned EFU pursuant to ORS 215.

Current land use regulations, particularly ORS 215.263 and 215.284, 215.705 to 215.755 and 215.780, and OAR 660, division 33, along with 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 land in EFU zones in marginal lands counties.

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 in a marginal lands county under ORS 215.213. OAR 660-033-0130(4)(e) (applicable to non-farm dwellings in marginal lands counties) became effective on August 7, 1993. 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.)

As described above, a portion of the subject property is zoned F-1 and F-2 as required by Goal 4, in accordance with ORS 215 and OAR 660, division 6, because a portion is "forest land" under Goal 4. Goal 4 became effective on January 25, 1975, and requires that forest land be zoned for forest use (see statutory and rule history under OAR 660-015-0000(4)). The forest land administrative rules (OAR 660, division 6) became effective on September 1, 1982, and ORS 215.705 to 215.755 and 215.780 became effective on November 4, 1993 (Chapter 792, Oregon Laws 1993). OAR 660-006-0026 and 660-006-0027 were amended on March 1, 1994, to implement those statutes.

OAR 660, division 6, adopted pursuant to Goal 4, prohibits the division of forest land into parcels less than 80 acres and establishes standards for development of dwellings on existing or proposed parcels on those lands.

The remaining portion of the subject property is zoned SG as required by Goal 5, in accordance with OAR 660-023-0180, because this portion is a significant aggregate resource site under Goal 5. Goal 5 also became effective on January 25, 1975, and requires that significant sites be inventoried and land use regulations be developed and applied to achieve the goal. The Goal 5 administrative rules (OAR 660, division 23) became effective on September 1, 1996. OAR 660-023-0180 was amended on June 25, 2004.

The claim also identifies Goal 14 and OAR 660, division 14, as restricting the claimant's desired use of the subject property. These laws also became effective on January 25, 1975. Goal 14

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

would likely apply to the division of the claimant's property into smaller parcels (and the accompanying residential development) and to the development of some of the newly created parcels for commercial uses to the extent those uses are "urban" in nature. Goal 14 generally requires that land outside urban growth boundaries be used for rural uses.

The claim also lists OAR 660-004-0040, 660-015-0000(3) and 660-020-0060 to -0065. The listing of OAR 660-015-0000(3) appears to mean Goal 3, which is addressed above. OAR 660-004-0040 applies to "lands that are not within an urban growth boundary, that are planned and zoned primarily for residential uses, and for which an exception to Statewide Planning Goal 3, (*Agricultural Lands*), Goal 4 (*Forest Lands*), or both has been taken." OAR 660-004-0040(2)(a). As a result, this rule does not apply to the subject properties.

The listing of OAR 660-020-0060 to -0065 appears to refer to Commission rules adopting segments of the Willamette Greenway Plan approved by the Oregon Parks & Recreation Department. The Willamette Greenway Plan is not a land use regulation under ORS 197.352, and the claim does not establish why these rules apply to or restrict the claimant's desired use of the subject properties.

The claim also lists OAR 390.310 to 390.368. These statutes direct the Oregon Parks & Recreation Department to develop the Willamette Greenway Plan. The claim does not establish why these statutes apply to or restrict the claimant's desired use of the subject properties.

Finally, the claim also lists ORS 197.175, 197.200 and 197.250. ORS 197.175 contains requirements for cities and counties in carrying out their planning and zoning responsibilities. ORS 197.200 authorizes local governments to adopt refinement plans for land within an urban growth boundary. ORS 197.250 requires local government comprehensive plans and land use regulations to comply with the statewide planning goals. The claim does not establish why these statutes apply to or restrict the claimant's desired use of the subject properties.

The claimant acquired most of the subject properties on December 31, 1966; June 29, 1967; November 14, 1968; June 18, 1969; and November 24, 1971, prior to the adoption of the statewide planning goals and the statutes and regulations identified in the claim. For two properties (180208 TL 601 and 180208 TL 900, both zoned SG) the claimant acquired an undetermined interest *after* the adoption of Goal 5. As a result, only those aspects of Goal 5 and the Goal 5 implementing rules adopted after June 17, 1976, (180208 TL 601) and December 12, 1983, (180208 TL 900) restrict the claimant's desired use as to these two properties.

Conclusions

The current zoning requirements, minimum lot size and dwelling and use standards established by applicable provisions of Goals 3, 4, 5 and 14; ORS 215.203 to 215.296 and ORS 215.705 to 215.755 and 215.780; and OAR 660-006-0000 to -0050, 660-014-0000 to -0040, 660-015-0000(3), 660-023-0000 to -0250 and 660-033-0010 to -0160 were all enacted or adopted after the claimant acquired all of the subject properties (except tax lots 180208 TL 601 and 180208 TL 900) and restrict the claimant's desired use of the subject properties relative to the uses allowed when the claimant acquired them. When the claimant acquired an interest in 180208 TL 601 and 180208 TL 900, Goal 5 was in effect, requiring significant aggregate resources to be protected

from conflicting uses. More recent aspects of Goal 5 and ORS 215 were adopted or enacted after the claimant acquired these two tax lots.

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. There may be other laws that currently apply to the claimant's use of the subject properties, and that may continue to apply to the claimant's use that have not been identified in the claim. In some cases, it will not be possible to know which laws apply to a use 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." Under ORS 197.352(2), just compensation is measured by the effect on fair market value of the enactment or enforcement of the land use regulations.

Findings of Fact

The claim includes an estimate of \$15.4 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 based on an appraisal that found that the total fair market value of the subject property with continuing enforcement of the challenged land use regulations is \$5.6 million, and that the fair market value of the subject properties without continuing enforcement is \$21 million.

1000 Friends of Oregon has submitted comments asserting that the *only* lawful method of determining whether the fair market value of the property has been reduced is to evaluate the fair market value of the property before and after the land use regulations in question were enacted. The department concurs that this is one basis for evaluating whether land use regulations have had the effect of reducing the fair market value of the property under ORS 197.352. However, under ORS 197.352, claimants also may demonstrate that the fair market value of the property has been reduced by the enforcement of one or more land use regulations. The appraisal report submitted by the claimant provides a preponderance of evidence in the record as a whole that the enforcement of state land use regulations identified in the claim has had the effect of reducing the fair market value of the subject properties. The comments submitted by 1000 Friends of Oregon show that the enactment of the land use regulations may not have reduced the fair market value of the property, but that is only one of two possible bases for a claim, and is not the basis relied upon by the claimant.

Conclusions

As explained in Section V.(1) of this report, the claimant is Wildish Land Co., which acquired the subject property on December 31, 1966; June 29, 1967; November 14, 1968; June 18, 1969; November 24, 1971; June 17, 1976 and December 12, 1983. 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 subject properties. The claimant estimates, based on an appraisal, that the effect of the continuing enforcement of these regulations on the fair market value of the subject property is a reduction of \$15.4 million.

Based on the evidence in the record for this claim, the department determines that the fair market value of the subject properties has been reduced to some extent as a result of the continuing enforcement of state land use regulations 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, 4, 5 and 14, ORS 215.203 to 215.296 and 215.705 to 215.755 and 215.780; and OAR 660-006-0000 to -0050, 660-014-0000 to -0040, 660-015-0000(3), 660-023-0000 to -0250 and 660-033-0010 to -0160, which Lane County has implemented through its current E-25, E-30, F-1, F-2 and SG zones. The claimant acquired most of the subject properties before these land use regulations were enacted or adopted. As a result, they are not exempt under ORS 197.352(3)(E).

The department received a comment letter expressing concern about the effect of the claimant's desired use on water supplies. Nothing in this report authorizes a use of water by the claimant, or exempts the claimant from complying with pollution control laws.

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 only two of the properties were acquired after the general statutory, goal and rule restrictions on division and development of the claimant's property were first enacted or adopted. As a result, for most of the subject properties, the state land use regulations 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. In addition, the department notes that OAR 660, division 6, specifically OAR 660-006-0029, includes 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 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 properties 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 properties 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 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 properties.

VI. FORM OF RELIEF

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

Findings of Fact

Based on the findings and conclusions set forth in this report, laws enforced by the Commission or the department restrict the claimant's desired use of the subject properties. 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 \$15.4 million. Based on the record for this claim, the department has determined that the laws on which the claim is based have had the effect of reducing the fair market value of the subject properties 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 Wildish Land Co. to use the subject properties for a use permitted at the time it acquired them or an interest in them on December 31, 1966; June 29, 1967; November 14, 1968; June 18, 1969; November 24, 1971, June 17, 1976 and December 12, 1983.

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 Wildish Land Co.'s division and development of the approximately 1,400-acre subject property into 300 homesites in a planned development on approximately 690 acres of the

property: applicable provisions of Goals 3, 4, 5 and 14; ORS 215.203 to 215.296 and 215.705 to 215.755 and 215.780; and OAR 660-006-0000 to -0050, 660-014-0000 to -0040, 660-015-0000(3), 660-023-0000 to -0250 and 660-033-0010 to -0160. These land use regulations will not apply to the claimant only to the extent necessary to allow it to use the subject properties for the use described in this report, and only to the extent that use was permitted when it acquired the subject properties on the following dates:

- December 31, 1966: 180207 TL 100, 180207 TL 200, 180208 TL 700, 180208 TL 801, 180301 TL 3500, 180311 TL 500, 180312 TL 300, 180312 TL 400, 180312 TL 900 and 180312 TL 1000.
- July 29, 1967: 180209 TL 1401.
- November 14, 1968: 180209 TL 400, 180209 TL 900, 180210 TL 502 and 180210 TL 503.
- June 18, 1969: 180209 TL 1404 and 180216 TL 101.
- November 24, 1971: 180207 TL 1000.
- June 17, 1976: 180208 TL 601.
- December 12, 1983: 180208 TL 900.

2. The action by the State of Oregon provides the state's authorization to the claimant to use the subject properties for the use described in this report, subject to the standards in effect on the dates specified for the subject tax lots identified above. When the claimant acquired an interest in 180208 TL 601 and 180208 TL 900, those properties were subject to the Statewide Planning Goals, including Goal 5, as well as the provisions of ORS 215 then in effect. 180208 TL 900 was subject to OAR 660-05-000 to 030 (effective May 8, 1981) when the claimant acquired an interest in that property in 1983.

3. To the extent that any law, order, deed, agreement or other legally enforceable public or private requirement provides that the subject properties may not be used without a permit, license or other form of authorization or consent, the order will not authorize the use of the subject properties 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 properties imposed by private parties.

4. Any use of the subject properties 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). These laws include state laws regulating development in flood plains and on steep slopes, as well as state laws regulating the removal and fill of material in waters of the state.

5. Without limiting the generality of the foregoing terms and conditions, in order for the claimant to use the subject properties, it may be necessary for the claimant 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 properties. 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 properties by the claimant.

6. Nothing in this report, or the state's final order for this claim, constitutes any determination of ownership by the State of Oregon as to submerged or submersible lands in waterways or as to public rights to the use of waters of the state.

VII. COMMENTS ON THE DRAFT STAFF REPORT

The department issued its draft staff report on this claim on December 11, 2006. Under OAR 125-145 0100(3), DAS and DLCD 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. The claimant submitted extensive evidence and comments in response to the draft staff report, which were considered by the department in this final report. Extensive comments and evidence also were submitted by 1000 Friends of Oregon in response to the draft staff report. These comments and evidence have been considered by the department in this final report.