Oregon
Theodore R. Kulongoski, Governor

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November 5, 2007

To: Interested Persons

From: Cora R. Parker, Acting Director

Re: Ballot Measure 37 (ORS 197.352) Claim Number M132214

Claimants: A.L. and Marilyn Bruner

Enclosed, in regard to the above-referenced claim for compensation under Ballot Measure 37 (ORS 197.352), is the Final Staff Report and Recommendation of the Department of Land Conservation and Development, and the Final Order.

This Final Staff Report and Recommendation and the Final Order constitute the final decision on this claim. No further action will be taken on this matter.

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. M132214
(BALLOT MEASURE 37) OF	)	
A. L. and Marilyn Bruner, CLAIMANTS	)	

Claimants: A. L. and Marilyn Bruner (the Claimant)

Property: Township 36S, Range 5W, Section 23: tax lot 3100
Township 36S, Range 5W, Section 23A: tax lots 1600, 1700 and 1800
Josephine 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 denied for tax lot 3100 as to laws administered by DLCD and the Land Conservation and Development Commission (LCDC) for the reasons set forth in the DLCD Report.

The Claim is approved for tax lots 1600, 1700 and 1800 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 A. L. and Marilyn Bruner's partition of tax lots 1600, 1700 and 1800 into 32 parcels or to their development of a dwelling on each resulting undeveloped parcel: applicable provisions of Goal 3, ORS 215 and OAR 660, division 33, enacted or adopted after each claimant acquired tax lots 1600, 1700 and 1800. These laws will not apply to the claimants only to the extent necessary to allow them to use tax lots 1600, 1700 and 1800 for the use described in this report, and only to the extent that use was permitted when A. L. Bruner acquired the property on October 16, 1984, and when Marilyn Bruner acquired the property on August 7, 2002. The department acknowledges that the relief to which Marilyn Bruner is entitled under ORS 197.352 will not allow her to use tax lots 1600, 1700 and 1800 in the manner set forth in the claim.

2. The action by the State of Oregon provides the state's authorization to the claimants to use tax lots 1600, 1700 and 1800 for the use described in this report, subject to the standards in effect

on October 16, 1984, for A. L. Bruner, and on August 7, 2002, for Marilyn Bruner. On October 16, 1984, tax lots 1600, 1700 and 1800 were subject to applicable provisions of Goal 3, ORS 215 and OAR 660, division 5, then in effect. On August 7, 2002, tax lots 1600, 1700 and 1800 were subject to applicable provisions of Goal 3, ORS 215 and OAR 660, division 33, currently in effect.

3. To the extent that any law, order, deed, agreement or other legally enforceable public or private requirement provides that tax lots 1600, 1700 and 1800 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 tax lots 1600, 1700 and 1800 imposed by private parties.

4. Any use of tax lots 1600, 1700 and 1800 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 tax lots 1600, 1700 and 1800, 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 tax lots 1600, 1700 and 1800 by the claimants.

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, or as to public rights to the use of waters of the state.

This Order is entered by the Manager for the Measure 37 Services Division 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 Manager of the Measure 37 Services Unit 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:
Cora R. Parker, Acting Director

Michael Morrissey

Michael Morrissey, Manager
DLCD, Measure 37 Services Division
Dated this 5th day of November, 2007.

FOR the DEPARTMENT OF ADMINISTRATIVE SERVICES:

Carla Ploederer

Carla Ploederer, Manager
DAS, Measure 37 Services Unit
Dated this 5th day of November, 2007.

NOTICE OF RIGHT TO APPEAL OR OTHER JUDICIAL RELIEF

You are entitled, or may be entitled, to judicial remedies including the following:

1. Judicial review under ORS 183.484: Judicial review under ORS 183.484 may be obtained by filing a petition for review within 60 days from the service of this order. A petition for judicial review under ORS 183.484 may be filed in the Circuit Court for Marion County or the Circuit Court in the county in which you reside.

2. A cause of action under ORS 197.352 (Measure 37 (2004)): If a land use regulation continues to apply to the subject property more than 180 days after the present owner of the property has made written demand for compensation under ORS 197.352, the present owner of the property, or any interest therein, shall have a cause of action in the circuit court in which the real property is located.

(Copies of the documents that comprise the record are available for review at the Department's office at 635 Capitol Street NE, Suite 150, Salem, Oregon 97301-2540)

FOR INFORMATION ONLY

The Oregon Department of Justice has advised the Department of Land Conservation and Development that "[i]f the current owner of the real property conveys the property before the new use allowed by the public entity is established, then the entitlement to relief will be lost."

ORS 197.352 (BALLOT MEASURE 37) CLAIM FOR COMPENSATION

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

November 5, 2007

STATE CLAIM NUMBER:	M132214
NAMES OF CLAIMANTS:	A. L. and Marilyn Bruner
MAILING ADDRESS:	607 Avenue De Teresa Grants Pass, Oregon 97526
PROPERTY IDENTIFICATION:	Township 36S, Range 5W Section 23: tax lot 3100 Section 23A: tax lots 1600, 1700 and 1800 Josephine County
OTHER CONTACT INFORMATION:	Bob Hart 5126 W Evans Creek Road Rogue River, Oregon 97537
DATE RECEIVED BY DAS:	November 24, 2006
DEADLINE FOR FINAL ACTION:[1]	May 17, 2008

I. SUMMARY OF CLAIM

The claimants, A. L. and Marilyn Bruner, seek compensation in the amount of $4.5 million for the reduction in fair market value as a result of land use regulations that are alleged to restrict the use of certain private real property. The claimants desire compensation or the right to divide the 40.11-acre subject property into 32 parcels and to develop a dwelling on each resulting undeveloped parcel.[2] The subject property is located at 607 Avenue De Teresa, near Grants Pass, in Josephine County. (See claim.)

II. SUMMARY OF STAFF RECOMMENDATION

Based on the findings and conclusions set forth below, the Department of Land Conservation and Development (the department) has determined that the claim is valid in part. Department staff

[1] ORS 197.352, as originally enacted, required that final action on claims made under Measure 37 be made within 180 days of the date the claim was filed. In response to the large volume of claims filed in late 2006, the Oregon legislature passed House Bill 3546, which became effective on May 10, 2007. This legislation increased the amount of time state and local governments have to take final action on Measure 37 claims filed on or after November 1, 2006, by 360 days, to a total of 540 days.

[2] The subject property includes four tax lots. Tax lot 1600 consists of 13.59 acres, tax lot 1700 consists of 12.6 acres, tax lot 1800 consists of 11.91 acres and tax lot 3100 consists of 2.01 acres.

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 A. L. and Marilyn Bruner's partition of tax lots 1600, 1700 and 1800 into 32 parcels and to their development of a dwelling on each resulting undeveloped parcel: applicable provisions of Statewide Planning Goals 3 (Agricultural Lands), ORS 215 and Oregon Administrative Rules (OAR) 660, division 33, enacted or adopted after each claimant acquired tax lots 1600, 1700 and 1800. These laws will not apply to the claimants only to the extent necessary to allow them to use tax lots 1600, 1700 and 1800 for the use described in this report, and only to the extent that use was permitted when A. L. Bruner acquired the property on October 16, 1984, and when Marilyn Bruner acquired the property on August 7, 2002. The department acknowledges that the relief to which Marilyn Bruner is entitled under ORS 197.352 will not allow her to use tax lots 1600, 1700 and 1800 in the manner set forth in the claim.

The department has further determined that the claim is not valid for tax lot 3100 because the claimants desired use of tax lot 3100 was prohibited under the laws in effect when A.L. Bruner acquired that tax lot in 1997 and when Marilyn Bruner acquired that tax lot in 2002. (See the complete recommendation in Section VI. of this report.)

III. COMMENTS ON THE CLAIM

Comments Received

On August 3, 2007, 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, four written comments were received in response to the 15-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 November 24, 2006, for processing under OAR 125, division 145. The claim identifies provisions of ORS 215 and OAR 660, division 33, as the basis for the claim. Only laws that were enacted or adopted prior to December 2, 2004, are the basis for this claim.

Conclusions

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

V. ANALYSIS OF CLAIM

1. Ownership

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

Findings of Fact

Claimant A. L. Bruner acquired tax lots 1600, 1700 and 1800 on October 16, 1984, as reflected by a warranty deed included with the claim and tax lot 3100 on August 13, 1997, as reflected by a warranty deed provided by the agent.[3] A. L. Bruner conveyed an interest in tax lots 1600, 1700, 1800 and 3100 to his wife, claimant Marilyn Bruner, on August 7, 2002, as reflected by a bargain and sale deed included with the claim. The Josephine County Assessor's Office confirms the claimants' current ownership of the subject property.

Conclusions

The claimants, A. L. and Marilyn Bruner, are "owners" of the subject property as that term is defined by ORS 197.352(11)(C). A. L. Bruner has been an owner of tax lots 1600, 1700 and 1800 since October 16, 1984, and of tax lot 3100 since August 13, 1997. Marilyn Bruner has been an owner of the subject property since August 7, 2002. A. L. Bruner is a "family member" of Marilyn Bruner as that term is defined by ORS 197.352(11)(A), as to tax lots 1600, 1700 and 1800.

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 acquired the property.

[3] In response to the draft staff report dated September 26, 2007, pursuant to OAR 125-145-0080, the claimants' agent submitted a bargain and sale deed documenting A.L. Bruner's acquisition of tax lot 3100 on August 13, 1997.

Findings of Fact

The claim indicates that the claimants desire to divide the 40.11-acre subject property into 32 parcels and to develop a dwelling on each resulting undeveloped parcel, and that current land use regulations prevent the 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 claimants' property is zoned Farm Resource (FR) by Josephine County as required by Goal 3, in accordance with ORS 215 and OAR 660, division 33, because the claimants' property is "agricultural land" as defined by Goal 3.[4] Goal 3 became effective on January 25, 1975, and required that agricultural lands as defined by Goal 3 be zoned EFU pursuant to ORS 215.

Current land use regulations, particularly ORS 215.263, 215.284 and 215.780 and OAR 660, division 33, enacted or adopted pursuant to 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.[5]

A. L. Bruner acquired tax lots 1600, 1700 and 1800 after the adoption of the statewide planning goals, but before the Commission acknowledged Josephine County's land use regulations to be in compliance with the statewide planning goals pursuant to ORS 197.250 and 197.251.[6] At that time, the property was zoned Rural Residential (RR-1) by Josephine County, which established a one-acre minimum lot size for the creation of a new parcel and for residential development. However, because the Commission had not acknowledged the county's plan and land use regulations when A. L. Bruner acquired tax lots 1600, 1700 and 1800 on October 16, 1984, the statewide planning goals, and Goal 3 in particular, applied directly to the claimants' property when he acquired it.[7]

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[4] The claimants' property is "agricultural land" because it contains Natural Resources Conservation Service Class I–IV soils.

[5] The Commission adopted amendments to OAR 660-033-0100, -0130 and -0135 to comply with House Bill 3326 (Chapter 704, Oregon Laws 2001, effective on January 1, 2002), which were effective on May 22, 2002. These amendments clarified but did not further restrict dwelling standards under OAR 660, division 33, for EFU-zoned land.

[6] Josephine County's comprehensive plan and land use regulations were acknowledged by the Commission for compliance with Goal 3 on December 9, 1985.

[7] The statewide planning goals became effective on January 25, 1975, and were applicable to legislative land use decisions and some quasi-judicial land use decisions prior to the Commission's acknowledgment of each county's

As adopted on January 25, 1975, Goal 3 required that agricultural land be preserved and zoned for EFU pursuant to ORS 215. The Goal 3 standard for land divisions involving property where the local zoning was not acknowledged required that the resulting parcels must be of a size that is "appropriate for the continuation of the existing commercial agricultural enterprise within the area." Further, ORS 215.263 (1983 edition) and OAR 660, division 5, adopted in 1982, only authorized the partition of land subject to EFU zoning, and required that all divisions of land subject to EFU zoning comply with the legislative intent set forth in ORS 215.243 (Agricultural Land Use Policy), as further interpreted through OAR 660, division 5. Thus, A. L. Bruner's opportunity to divide the subject property when he acquired tax lots 1600, 1700 and 1800 in 1984 was limited to land divisions that were consistent with Goal 3 and OAR 660, division 5, which required that the resulting parcels be (1) appropriate for the continuation of the existing commercial agricultural enterprise in the area and (2) shown to comply with the legislative intent set forth in ORS 215.

Under the Goal 3 standards in effect on October 16, 1984, farm dwellings were allowed if they were determined to be "customarily provided in conjunction with farm use" under ORS 215.213(1)(e) (1983 edition). Non-farm dwellings were subject to compliance with ORS 215.213(3) (1983 edition). OAR 660, division 5, further interpreted the dwelling standards for farm and non-farm dwellings at that time.

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 A. L. Bruner acquired tax lots 1600, 1700 and 1800 on October 16, 1984.

Claimant A. L. Brunner acquired tax lot 3100 on August 13, 1997, and claimant Marilyn Brunner acquired tax lot 3100 on August 7, 2002, both acquisition dates are after the adoption of the statewide planning goals and their implementing statutes and regulations, as described above.

Conclusions

The current zoning requirements, minimum lot size and dwelling standards established by Goal 3, ORS 215 and OAR 660, division 33, do not allow the claimants' desired division or development of the subject property. However, the claim does not establish whether or the extent to which the claimants' desired use of the subject property complies with the standards for land divisions and development under the requirements of Goal 3, ORS 215 and OAR 660, division 5, in effect when A. L. Bruner acquired tax lots 1600, 1700 and 1800 on October 16, 1984. Laws enacted or adopted since A.L. Bruner acquired tax lot 3100 in 1997 do not restrict

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comprehensive plan and implementing regulations. *Perkins v. City of Rajneeshpuram*, 300 Or 1 (1985); *Alexanderson v. Polk County*, 289 Or 427, *rev. den* 290 Or 137 (1980); *Sunnyside Neighborhood Assn. v. Clackamas County*, 280 Or 3 (1977); *Jurgenson v. Union County*, 42 Or App 505 (1979); and *1000 Friends of Oregon v. Benton County*, 32 Or App 413 (1978). After the county's plan and land use regulations were acknowledged by the Commission, the statewide planning goals and implementing rules no longer applied directly to such local land use decisions. *Byrd v. Stringer*, 295 Or 311 (1983). However, statutory requirements continue to apply, and insofar as the state and local provisions are materially the same, the local provisions must be interpreted consistent with the substance of the goals and implementing rules. *Forster v. Polk County*, 115 Or App 475 (1992) and *Kenagy v. Benton County*, 115 Or App 131 (1992).

the claimants' desired use of tax lot 3100 relative to when the claimants acquired it in 1997 and 2002.

This report addresses only those state laws that are identified in the claim, or that the department is certain apply to the subject property based on the uses that the claimants have identified. There may be other laws that currently apply to the claimants' use of the subject property, and that may continue to apply to the claimants' use of the property, that have not been identified in the claim. In some cases, it will not be possible to know which laws apply to a use of the subject property until there is a specific proposal for that use. When the claimants seek a building or development permit to carry out a specific use, it may become evident that other state laws apply to that use.

3. Effect of Regulations on Fair Market Value

In order to establish a valid claim, ORS 197.352(1) requires that the land use regulations (described in Section V.(2) of this report) must have "the effect of reducing the fair market value of the property, or any interest therein."

Findings of Fact

The claim includes an estimate of $4.5 million as the reduction in the subject property's fair market value due to the regulations that restrict the claimants' desired use of the property. This amount is based on the claimants' assessment of the subject property's value.

Conclusions

As explained in Section V.(1) of this report, the claimants are A. L Bruner, who acquired tax lots 1600, 1700 and 1800 on October 16, 1984, and tax lot 3100 on August 13, 1997 and his wife, Marilyn Bruner. No state laws enacted or adopted since the claimants acquired tax lot 3100 restrict the use of the property relative to the uses allowed in 1997. Therefore, the fair market value of tax lot 3100 has not been reduced as a result of land use regulations enforced by the Commission or the department. Under ORS 197.352, the claimants are due compensation for land use regulations that restrict the use of tax lots 1600, 1700 and 1800 and have the effect of reducing their fair market value. Based on the findings and conclusions in Section V.(2) of this report, laws enacted or adopted since A. L. Bruner acquired tax lots 1600, 1700 and 1800 on October 16, 1984, 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 $4.5 million.

Without an appraisal or other documentation and without verification of whether or the extent to which the claimants' desired use of tax lots 1600, 1700 and 1800 was allowed under the standards in effect when A. L. Bruner acquired those tax lots on October 16, 1984, 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 tax lots 1600, 1700 and 1800 has been reduced to some extent as a result of land use regulations enforced by the Commission or the department since A. L. Bruner acquired those tax lots.

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 Josephine County has implemented through its current FR zone. With the exception of provisions of Goal 3, ORS 215 and OAR 660, division 5, in effect when A. L. Bruner acquired tax lots 1600, 1700 and 1800 on October 16, 1984, these land use regulations were enacted or adopted after A. L. Bruner acquired tax lots 1600, 1700 and 1800. As set forth in Section V.(2) of this report, all of the state land use regulations that restrict the claimants' desired use of tax lot 3100 were in effect when the claimants acquired that tax lot in 1997 and 2002.

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 tax lots 1600, 1700 and 1800, or whether those laws may fall under one or more of the exemptions under ORS 197.352. It appears that with the exception of provisions of Goal 3, ORS 215 and OAR 660 in effect on October 16, 1984, when A. L. Bruner acquired tax lots 1600, 1700 and 1800, the statutory, goal and rule restrictions on division and development of those tax lots were not in effect when he acquired the property, and therefore, these laws are not exempt under ORS 197.352(3) (E). Provisions of Goal 3, ORS 215 and OAR 660, division 5, in effect when A. L. Bruner acquired tax lots 1600, 1700 and 1800 on October 16, 1984, are exempt under ORS 197.352(3)(E) and will continue to apply to tax lots 1600, 1700 and 1800. In addition, 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.

All of the state land use regulations that restrict the claimants' desired use of tax lot 3100 were in effect when the claimants acquired tax lot 3100. Therefore, these state land use regulations are exempt under ORS 197.352(3)(E), which exempts laws in effect when the claimants acquired tax lot 3100.

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 do not restrict the claimants' desired use of tax lot 3100 relative to what was permitted when the claimants acquired it in 1997 and 2002 and do not reduce the fair market value of tax lot 3100. All state laws restricting the use of tax lot 3100 are exempt under ORS 197.352(3)(E).

The department further finds laws enforced by the Commission or the department restrict the claimants' desired use of tax lots 1600, 1700 and 1800. 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 tax lots 1600, 1700 and 1800 by $4.5 million. However, because the claim does not provide an appraisal or other relevant evidence demonstrating that the land use regulations described in Section V.(2) reduce the fair market value of the subject property, a specific amount of compensation cannot be determined. In order to determine a specific amount of compensation due for this claim, it would also be necessary to verify whether or the extent to which the claimants' desired use of tax lots 1600, 1700 and 1800 was allowed under the standards in effect when A. L. Bruner acquired the property on October 16, 1984. 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 tax lots 1600, 1700 and 1800 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 A. L. Bruner to use tax lots 1600, 1700 and 1800 for a use permitted at the time he acquired the property on October 16, 1984, and to allow Marilyn Bruner to use tax lots 1600, 1700 and 1800 for a use permitted at the time she acquired the property on August 7, 2002.

At the time Marilyn Bruner acquired tax lots 1600, 1700 and 1800 on August 7, 2002, they were zoned FR by Josephine County and subject to the current lot size and dwelling standards under Goal 3, ORS 215 and OAR 660, division 33, and as described in Section V.(2) of this report.

In addition to the provisions of Goal 3, ORS 215 and OAR 660, division 33, in effect when Marilyn Bruner acquired tax lots 1600, 1700 and 1800, and other laws in effect when either of the claimants acquired the subject property, there may be other laws that apply to the claimants' use of the property that have not been identified in the claim. In addition, maps for the parcel on Josephine County's website indicate that a portion of the parcel is located in a flood plain zone. ORS 197.352(3)(B) specifically exempts regulations "restricting or prohibiting activities for the protection of public health and safety. . . ." To the extent the county's flood plain regulations are based on state law, these regulations would be exempt under ORS 197.352(3)(B).

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 A. L. Bruner seeks a building or development permit to carry out a specific use, it may become evident that other state laws apply to that use, and depending on when they were enacted or adopted, may continue to apply to the property. In addition, some of these laws may be exempt under ORS 197.352(3)(A) to (D) and will continue to apply to the subject property on that basis.

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

Conclusions

Based on the record and the foregoing findings and conclusions, the claimants have not established that they are entitled to relief under ORS 197.352(1) for tax lot 3100 as a result of land use regulations enforced by the Commission or the department because no state land use regulations restrict the claimants' desired use of tax lot 3100 relative to uses permitted when they acquired it, with the effect of reducing its fair market value. Therefore, the department recommends that the claim be denied as to tax lot 3100.

The department otherwise recommends that the claim be approved as to tax lots 1600, 1700 and 1800, 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 A. L. and Marilyn Bruner's partition of tax lots 1600, 1700 and 1800 into 32 parcels or to their development of a dwelling on each resulting undeveloped parcel: applicable provisions of Goal 3, ORS 215 and OAR 660, division 33, enacted or adopted after each claimant acquired tax lots 1600, 1700 and 1800. These laws will not apply to the claimants only to the extent necessary to allow them to use tax lots 1600, 1700 and 1800 for the use described in this report, and only to the extent that use was permitted when A. L. Bruner acquired the property on October 16, 1984, and when Marilyn Bruner acquired the property on August 7, 2002. The department acknowledges that the relief to which Marilyn Bruner is entitled under ORS 197.352 will not allow her to use tax lots 1600, 1700 and 1800 in the manner set forth in the claim.

2. The action by the State of Oregon provides the state's authorization to the claimants to use tax lots 1600, 1700 and 1800 for the use described in this report, subject to the standards in effect on October 16, 1984, for A. L. Bruner, and on August 7, 2002, for Marilyn Bruner. On October 16, 1984, tax lots 1600, 1700 and 1800 were subject to applicable provisions of Goal 3, ORS 215 and OAR 660, division 5, then in effect. On August 7, 2002, tax lots 1600, 1700 and 1800 were subject to applicable provisions of Goal 3, ORS 215 and OAR 660, division 33, currently in effect.

3. To the extent that any law, order, deed, agreement or other legally enforceable public or private requirement provides that tax lots 1600, 1700 and 1800 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 tax lots 1600, 1700 and 1800 imposed by private parties.

4. Any use of tax lots 1600, 1700 and 1800 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 tax lots 1600, 1700 and 1800, 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 tax lots 1600, 1700 and 1800 by the claimants.

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, 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 September 26, 2007. 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. Comments received have been taken into account by the department in the issuance of this final report.