

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. M118412
(BALLOT MEASURE 37) OF)	
Henry and Dana McCullough, CLAIMANTS)	

Claimants: Henry and Dana McCullough, (the Claimants)

Property: Tax lots 193 and 802, T 2N, R2W, S 19, Washington 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 Henry and Dana McCullough's division and development of tax lots 193 and 802: applicable provisions of Statewide Planning Goal 3, ORS 215 and OAR 660 division 33 enacted after May 19, 1972, for tax lot 193 and after May 23, 1978, for tax lot 802. These land use regulations will not apply to Henry and Dana McCullough's use of their property only to the extent necessary to allow them to use the property for the use described in this report, and only to the extent that use was permitted at the time they acquired the property on May 19, 1972 for tax lot 193 and on May 23, 1978 for tax lot 802.
2. The action by the State of Oregon provides the state's authorization to the claimants to use their property for the use described in this report subject to the standards in effect on May 19, 1972, for tax lot 193, and on May 23, 1978, for tax lot 802. On May 19, 1972 tax lot 193 was subject to Washington County's F-1 zone then in effect. On May 23, 1978 tax

lot 802 was subject to Statewide Planning Goal 3 and applicable provisions of ORS 215 (1977 edition) then in effect.

3. To the extent that any law, order, deed, agreement or other legally enforceable public or private requirement provides that the 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 ORS 227.160, other permits or authorizations from local, state or federal agencies, and restrictions on the use of the 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 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 property by the claimants.

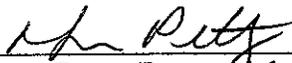
This Order is entered by the Director of the DLCD as a final order of DLCD and the Land Conservation and Development Commission under ORS 197.352, OAR 660-002-0010(8), and OAR 125, division 145, and by the Deputy Administrator for the State Services Division of the DAS as a final order of DAS under ORS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

FOR DLCD AND THE LAND CONSERVATION
AND DEVELOPMENT COMMISSION:



Lane Shetterly, Director
DLCD
Dated this 20th day of March, 2005.

FOR the DEPARTMENT OF ADMINISTRATIVE
SERVICES:



Dugan Petty, Deputy Administrator
DAS, State Services Division
Dated this 20th day of March, 2005.

NOTICE OF RIGHT TO APPEAL OR OTHER JUDICIAL RELIEF

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

1. Judicial review under ORS 293.316: Judicial review under ORS 293.316 may be obtained by filing a petition for review within 60 days from the service of this order. Judicial review under ORS 293.316 is pursuant to the provisions of ORS 183.482 to the Court of Appeals.
2. 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 and the Circuit Court in the county in which you reside.
3. A cause of action under ORS 197.352: A present owner of the property, or any interest therein, may file a cause of action in the Circuit Court for the county where the property is located, if a land use regulation continues to apply to the subject property more than 180 days after the present owner made a written demand for compensation.

(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.”

**BALLOT MEASURE 37 (ORS 197.352)
CLAIM FOR COMPENSATION**

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

March 20, 3006

STATE CLAIM NUMBER: M118412

NAMES OF CLAIMANTS: Henry and Dana McCullough

MAILING ADDRESS: 5385 Northwest Jackson School Road
Hillsboro, Oregon 97124

PROPERTY IDENTIFICATION: Township 2N, Range2W, Section 19
Tax lots 193 and 802
Washington County

OTHER CONTACT INFORMATION: Hal Keever
W & H Pacific
W Barnes Road, Suite 300
Portland, Oregon 97225

DATE RECEIVED BY DAS: May 11, 2005

180-DAY DEADLINE: March 26, 2006¹

I. SUMMARY OF CLAIM

The claimants, Henry and Dana McCullough, seek compensation in the amount of \$2,862,840 for the reduction in fair market value as a result of certain land use regulations that are alleged to restrict the use of certain private real property. The claimants desire compensation or the right to partition the two properties into smaller parcels for residential use.² The properties are located at 5385 NW Jackson School Road, in Washington County. (See claim.)

¹ This date reflects 180 days from the date the claim was submitted as extended by the 139 days enforcement of Measure 37 was suspended during the pendency of the appeal of Macpherson v. Dep't of Admin. Servs., 340 Or ___, 2006 Ore. LEXIS 104 (February 21, 2006).

² The claim indicates that claimants intend to obtain a waiver for both properties and then sell the properties to a developer for division and development. In effect, the claimants request that a decision of the department to not apply (waive) certain laws as set forth in this report be transferable with the property. Under OAR 660-002-0010(8), the Department only may "not apply" a statute, rule or goal that is the basis for a claim. Measure 37 only authorizes a state agency to not apply a law to allow the owner a use of the property permitted at the time the owner acquired the property. 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." This report therefore addresses whether claimants could divide and develop the property. *The report cannot and does not create a transferable waiver.*

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 the claimants' partition and development of the property: applicable provisions of Statewide Planning Goal 3 (Agricultural Lands), ORS 215 and OAR 660 division 33 enacted after May 19, 1972, as to tax lot 802, and after May 23, 1978, as to tax lot 193. These laws will not apply to the claimants only to the extent necessary to allow them to use the property for the use described in this report, and only to the extent that use was permitted at the time they acquired the property in 1972, and 1978. (See the complete recommendation in Section VI. of this report.)

III. COMMENTS ON THE CLAIM

Comments Received

On June 3, 2005, pursuant to OAR 125-145-0080, the Oregon Department of Administrative Services (DAS) provided written notice to the owners of surrounding properties. According to DAS, two written comments, evidence or information were received in response to the 10-day notice.³

One of the comments is relevant to whether the restriction of the claimants' use of the property reduces the fair market value of the property; and one of the comments requests a complete copy of the claim file. All comments have been considered by the department in preparing this report. (See 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 the Measure (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 the Measure (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.

³ The 10-day notice period was suspended for 139 days during the pendency of the *Macpherson v. Dep't of Admin. Servs.*, 340 Or __, 2006 Ore. LEXIS 104 (February 21, 2006), which suspended all Measure 37 deadlines.

Findings of Fact

This claim was submitted to DAS on May 11, 2005, for processing under OAR 125 division 145. The claim lists a number of statutes administrative rules and county land use provisions with respect to Excusive Farm Use zoning applicable to the property as the basis for the claim (see Section V.(2)). Only laws that were enacted prior to December 2, 2004, the effective date of Measure 37, are the basis for this claim. (See citations of statutory and administrative rule history of the Oregon Revised Statutes and Oregon Administrative Rules.)

Conclusions

The claim has been submitted within two years of December 2, 2004, the effective date of Measure 37, based on land use regulations 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 claim involves two tax lots. The claimants, Henry and Dana McCullough, husband and wife, acquired tax lots 193 and 802 from Dana’s parents (Norman and Radah Ralston) on May 19, 1972, (tax lot 802) and May 23, 1978, (tax lot 193).⁴ Norman and Radah Ralston acquired the subject properties on January 23, 1967, (tax lot 193) and on January 5, 1970, (tax lot 802). A title report dated March 21, 2005, indicates that the claimants remain the current owners of the property. (See deeds and other information in claim file.)

Conclusions

The claimants, Henry and Dana McCullough, are “owners” of the subject property as that term is defined by ORS 197.352(11)(C), as of May 19, 1972, (tax lot 802) and May 23, 1978, (tax lot 193) respectively. Dana McCullough’s parents, Norman and Radah Ralston, are “family members” as that term is defined by ORS 197.352(11)(A) as of January 23, 1967, (tax lot 193) and on January 5, 1970, (tax lot 802).

⁴ The claimants assert that they acquired tax lot 802 on January 5, 1978, based on an earnest money receipt noting full payment was made for the subject tax lot on that date. However, the tax lot was not deeded to the claimants until May 23, 1978. In any event, the later date does not affect the disposition of their claim. (See documents in the department’s claim file.)

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 lists both state and local exclusive farm use provisions as the land use regulations that restrict the use of the property.

The claim is based, generally, on Washington County's current Exclusive Farm Use (EFU) zone and the applicable provisions of state law that require such zoning. The claimants' property is zoned EFU as required by Statewide Planning Goal 3, in accord with OAR 660 division 33 and ORS 215 because the claimants' property is "agricultural land" as defined by Goal 3.⁵ Goal 3 became effective on January 25, 1975, and required that agricultural lands as defined by the Goal be zoned EFU pursuant to ORS 215.

Current land use regulations, particularly ORS 215.213, 215.263, 215.780 and OAR 660 division 33, as applied by Goal 3, do not allow the subject property to be divided into parcels less than 80 acres and establish standards for allowing the existing or any proposed parcels to have farm or non-farm dwellings on them.

ORS 215.780 established an 80-acre minimum size for the creation of new lots or parcels in EFU zones and became effective November 4, 1993 (Chapter 792, Oregon Laws 1993). ORS 215.263 (2003 edition) establishes standards for the creation of new parcels for non-farm uses and dwellings allowed in an EFU zone.

OAR 660-033-135(7) (applicable to farm dwellings on high-value farmland) became effective on March 1, 1994, and interprets the statutory standard for a primary dwelling on high-value farmland in an EFU zone in a marginal lands county under ORS 215.213.⁶ ORS 215.213(3) became effective on October 5, 1973, (SB 101, Chapter 503, Or Laws 1973,) and was amended to limit non-farm dwellings on NRCS Class I-III soils in 1983 (Chapter 826 Or Laws 1983,) effective October 15, 1983. OAR 660-033-0130(4)(e) (applicable to non-farm dwellings in marginal lands counties) became effective on August 7, 1993. (See citations of Oregon revised statutes and administrative rule history.)

⁵ The claimants' property is "agricultural land" because it is predominantly composed of NRCS (Natural Resources Conservation Service) Class I-IV Soils (see NRCS Web Soil Survey (<http://websoilsurvey.nrcs.usda.gov>)).

⁶ The claimants' property is "high-value farmland" as defined under ORS 215.710 (see NRCS Web Soil Survey (<http://websoilsurvey.nrcs.usda.gov>)).

The claimants' family first acquired the subject property on January 23, 1967 and January 5, 1970 prior to the establishment of the statewide planning goals and their implementing statutes and rules. On those dates, it was zoned F-1 by Washington County.

Conclusions

The current zoning requirements, lot size and dwelling standards established by Statewide Planning Goal 3 (Agricultural Lands) and provisions applicable to land zoned EFU in ORS 215 and OAR 660 division 33 were all enacted after the claimants' parents acquired ownership of the subject property in 1967 and 1970, and do not allow the partition of either the five-acre tax lot 193 or 20-acre tax lot 802 into additional parcels for residential use, thereby restricting the use of the property relative to the uses allowed when the property was acquired by the claimants' parents in 1967 and 1970. In 1967 and 1970 both tax lots were not subject to state land use regulations.

This report addresses only those state laws that are identified in the claim, or that the department is certain apply to the property based on the uses that the claimants have identified. There may be other laws that currently apply to the claimants' use of the 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 what laws apply to a use of 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 any land use regulation described in Section V.(2) of this report must have "the effect of reducing the fair market value of the property, or any interest therein."

Findings of Fact

The claim is for a total of \$2,862,840 (\$807,040 (tax lot 193) and \$1,955,800 (tax lot 802)) for the reduction in fair market value as a result of current land use regulations. Both claims are based on a "Letter of Intent to acquire" the two tax lots from Renaissance Development Corporation for specified amounts.⁷

Conclusions

As explained in Section V.(1) of this report, the owners of the subject property are Henry and Dana McCullough, whose family acquired the property in 1967, and 1970. Under ORS 197.352, the claimants are due compensation for land use regulations that restrict the use of the subject

⁷ The basis for the amounts offered for the respective properties by Renaissance Development Corporation has not been submitted. The reduction in fair market value is the difference between the amounts offered by Renaissance Development Corporation and the current fair market value specified by the County Assessor's office. As noted earlier in this report, this report does not and cannot create a transferable waiver.

property in a manner that reduces its fair market value. Based on the findings and conclusions in Section V.(2) of this report, laws adopted since the claimants' family acquired the property restrict the division for residential use of the subject property. The claimants estimate the reduction in value due to the restrictions to be \$2,862,840.

Without an appraisal or other documentation, it is not possible to substantiate the specific dollar amount the claimants demand for compensation. Nevertheless, based on the submitted information, the department determines that it is more likely than not that there has been some reduction in the fair market value of the subject property as a result of land use regulations enforced by the Commission or the department.

4. Exemptions under ORS 197.352(3)

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

Findings of Fact

The claim references state and local land use regulations that allegedly restrict the use of the property relative to what would have been allowed in 1967, and 1970, when the property was acquired by the claimants' parents. Those provisions that restrict the use of the property primarily include the county's EFU zone and applicable provisions of ORS 215 and OAR 660 division 33, which Washington County has implemented through its EFU zone. None of these laws appear to be exempt under ORS 197.352(3)(E), which exempts laws in effect at the time the claimants or the claimants' family acquired the property.

Conclusions

Without a specific development proposal for the property, it is not possible for the department to determine what laws 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 does appear that the general statutory, goal and rule restrictions on residential development and use of farm land apply to the claimants' use of the property, and for the most part these laws are not exempt under ORS 197.352(3)(E).

Laws in effect when the claimants' family acquired the property in 1967 and 1970 are exempt under ORS 197.352(3)(E) and will continue to apply to the claimants' use of the property. There may be other laws that 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 what laws apply to a use of 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. And, 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 property based on the uses that the claimants have identified. Similarly,

this report only addresses the exemptions provided for under ORS 197.352(3) that are clearly applicable given the information provided to the department in the claim. The claimants should be aware that the less information they have provided to the department in 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 property.

VI. FORM OF RELIEF

ORS 197.352(1) provides for payment of compensation to an owner of private real property if the Commission or the department has enforced a law that restricts 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 current owner acquired the property. The Commission, by rule, has directed that if the department determines a claim is valid, the Director 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 partition of the two tax lots into smaller parcels for residential use. The claim asserts the laws enforced by the Commission or department reduce the fair market value of the subject property by \$2,862,840. However, because the claim does not provide an appraisal or other specific documentation to establish how the specified restrictions reduce the fair market value of the property, a specific amount of compensation cannot be determined. Nevertheless, based on the record for this claim, the department acknowledges that the laws on which the claim is based likely have reduced the fair market value of the 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 the claimants to use the subject property for a use permitted at the time they acquired tax lot 193 on May 19, 1972, and tax lot 802 on May 23, 1978.

The claimants acquired tax lot 193 on May 19, 1972 prior to the establishment of the statewide planning goals and their implementing statutes and regulations. At that time it was zoned F-1 by Washington County.

The claimants acquired tax lot 802 on May 23, 1978 when it was zoned GFU-38 by Washington County. At that time, the County's GFU-38 zone that applied to the property was not acknowledged by the Commission under the standards for state approval of local comprehensive plans and land use regulations pursuant to ORS 197.250 and 197.251. The Commission acknowledged the Washington County Comprehensive Plan, and land use regulations as complying with the statewide planning goals on July 30, 1984 (Acknowledgment Order 84-ACK-103). Since the Commission had not acknowledged Washington County's Comprehensive Plan and land use regulations, including the GFU-38 zone, when the claimants

acquired the property on May 23, 1978, Statewide Planning Goal 3 applied directly to property on the date of acquisition.⁸

In 1978, the State standards for a land division involving property where the local zoning was not acknowledged were that the resulting parcels must be of a size that are “appropriate for the continuation of the existing Commercial Agricultural Enterprise in the area” (Statewide Planning Goal 3). Further, ORS 215.263 (1977 edition) required that all divisions of land subject to the provisions for EFU zoning comply with the legislative intent set forth in ORS 215.243 (Agricultural Land Use Policy). In 1977, ORS 215.263 did not provide for the creation of a small parcel for a non-farm dwelling separate from the provisions just noted.⁹

Thus the opportunity to divide the tax lot 802 when the McCullough’s acquired it in 1978, was limited to land divisions done consistent with Goal 3, that required the resulting farm or non-farm parcels to 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 215.243. (See endnote¹.)

As for dwellings allowed in an EFU zone, in 1978, ORS 215 and EFU zoning required by Goal 3, allowed farm dwellings if determined to be “customarily provided in conjunction with farm use” under ORS 215.213(1)(e) (1977 edition).¹⁰ Before a farm dwelling could be established on agricultural land, the farm use to which the dwelling relates must “be existing.”¹¹ Further, approval of a farm dwelling required that the dwelling be situated on a parcel wholly devoted to farm use. ORS 215.213(3) (1977 edition) authorized a non-farm dwelling only where the dwelling was compatible with farm uses, consistent with the intent of ORS 215.243, did not interfere seriously with accepted farming practices on adjacent lands, did not materially alter the

⁸ Statewide Planning Goal 3 was applicable to legislative land use decisions and some quasi-judicial land use decisions prior to the Commission’s acknowledgment of the County’s Goal 3 program on July 30, 1984. (*Sunnyside Neighborhood Assn. v. Clackamas County*, 280 Or 3 (1977), *1000 Friends of Oregon v. Benton County*, 32 Or App 413 (1978), *Jurgenson v. Union County*, 42 Or App 505 (1979), *Alexanderson v. Polk County*, 289 Or 427, *rev den* 290 Or 137 (1980) and *Perkins v. City of Rajneeshpuram*, 300 Or 1 (1985)). After the county’s plan and land use regulations were acknowledged by Commission, the statewide planning goals and implementing rules no longer directly applied to such local land use decisions, (*Byrd v. Stringer*, 295 Or 311 (1983)). However, statutory requirements continue to apply, and insofar as the state and local provisions are materially the same in substance, the applicable rules must be interpreted and applied by the County in making its decision. *Forster v. Polk County*, 115 Or App 475 (1992) and *Kenagy v. Benton County*, 115 Or App 131 (1992).

⁹ Compare ORS 215.263 (1977 edition with the current version of ORS 215.263).

¹⁰ Review and approval of a “dwelling customarily provided in conjunction with farm use” under ORS 215 is a land use decision that requires notice and an opportunity for a public hearing regardless of the terms of a local ordinance (see *Doughton v. Douglas County* 88 Or App 198 (1987)).

¹¹ *Matteo v. Polk County*, 11 Or LUBA 259, 263 (1984) *affirmed without opinion*, 70 Or App 179 (1984) and *Newcomer v. Clackamas County*, 92 Or App 174, *modified* 94 Or App 33 (1988).

stability of the land use pattern for the area, and was situated on land generally unsuitable for production of farm crops and livestock.¹²

No information has been provided showing that the claimants' request to divide this tax lot for residential use complies with either of the applicable partition or dwelling standards under Goal 3 or ORS 215.213 (1977 edition) in effect at the time the claimants purchased the property in 1978.

Conclusion

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 Henry and Dana McCullough's division and development of tax lots 193 and 802: applicable provisions of Statewide Planning Goal 3, ORS 215 and OAR 660 division 33 enacted after May 19, 1972, for tax lot 193 and after May 23, 1978, for tax lot 802. These land use regulations will not apply to Henry and Dana McCullough's use of their property only to the extent necessary to allow them to use the property for the use described in this report, and only to the extent that use was permitted at the time they acquired the property on May 19, 1972 for tax lot 193 and on May 23, 1978 for tax lot 802.
2. The action by the State of Oregon provides the state's authorization to the claimants to use their property for the use described in this report subject to the standards in effect on May 19, 1972, for tax lot 193, and on May 23, 1978, for tax lot 802. On May 19, 1972 tax lot 193 was subject to Washington County's F-1 zone then in effect. On May 23, 1978 tax lot 802 was subject to Statewide Planning Goal 3 and applicable provisions of ORS 215 (1977 edition) then in effect.
3. To the extent that any law, order, deed, agreement or other legally enforceable public or private requirement provides that the 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 ORS 227.160, other permits or authorizations from local, state or federal agencies, and restrictions on the use of the 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).

¹² When determining whether land is "generally unsuitable for the production of farm crops and livestock" under ORS 215.213(3), the entire parcel or tract must be evaluated rather than a portion thereof. See *Smith v. Clackamas County*, 313 Or 519 (1992).

5. Without limiting the generality of the foregoing terms and conditions, in order for the claimants to use the 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 property by the claimants.

VII. COMMENTS ON THE DRAFT STAFF REPORT

The department issued its draft staff report on this claim on October 17, 2005. OAR 125-145-0100(3), provided an opportunity for the claimant or the claimant's authorized agent and any third parties who submitted comments under OAR 125-145-0080 to submit written comments, evidence and information in response to the draft staff report and recommendation. Comments received have been taken into account by the department in the issuance of this final report.

ⁱ The Goal 3 standard for the review of land divisions or the establishment of a minimum lot size states:

“Such minimum lot sizes as are utilized for any farm use zones shall be appropriate for the continuation of the existing Commercial Agricultural Enterprise within the area.”

On August 20, 1977, the Commission distributed a policy paper explaining the meaning of the Goal 3 minimum lots size standard (see “Common Questions about Goal #3; Agricultural Lands,” August 30, 1977, as revised and added to July 12, 1979). Further interpretation of the Goal 3 minimum lot size standard can be found in *Meeker v. Clatsop County*, 287 Or 665 (1979), *Jurgenson v. Union County*, 42 Or App 505 (1979), *Alexanderson v. Polk County*, 289 Or 427, *rev den* 290 Or 137 (1980) and *Thede v. Polk County*, 3 Or LUBA 336 (1981).

In 1982, the policy paper and court decisions were incorporated into an administrative rule to guide the interpretation and application of the Goal 3 minimum lot size standard (see OAR 660, division 5, specifically rules 15 and 20 effective July 21, 1982).

For further guidance on the interpretation and application of this standard and rule see *Kenagy v. Benton County*, 6 Or LUBA 93 (1982); *Goracke v. Benton County*, 8 Or LUBA 128 (1983); 68 Or App 83 (1984); 12 Or LUBA 128 (1984); 13 Or LUBA 146 (1985); 74 Or App 453 (1985), *rev den* 300 Or 322 (1985); and OAR 660-05-015 and 020 as amended effective June 7, 1986 (repealed effective August 7, 1993).

The 1982 administrative rule (OAR 660-05-015 and 020) was further amended to incorporate the holdings of these cases (effective June 7, 1986, and repealed effective August 7, 1993).