

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 A
COMPENSATION UNDER ORS 197.352)	CLAIM NO. M118424
(BALLOT MEASURE 37) OF)	
Marceil Simpson , CLAIMANT)	

Claimant: Marceil Simpson (the Claimant)

Property: Tax Lot 100, Township 1S, Range 3W, Section 24, Washington 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 Marceil Simpson's division of the property into one approximately two-acre parcel and one approximately 148-acre parcel: applicable provisions of Statewide Planning Goal 3 (Agricultural Lands), ORS 215 and OAR 660, division 33, enacted after January 19, 1977. These land use regulations will not apply to Marceil Simpson's use of her property only to the extent necessary to allow her to use her property for the use described in this report, and only to the extent that use was permitted at the time she acquired the property on January 19, 1977.
2. The action by the State of Oregon provides the state's authorization to Marceil Simpson to use her property for the use described in this report, subject to the standards in effect on January 19, 1977. On January 19, 1977, the property was subject to Statewide Planning Goal 3 and applicable provisions of ORS 215 then in effect.
3. To the extent that any law, order, deed, agreement or other legally enforceable public or private requirement provides that the property may not be used without a permit, license, or other

form of authorization or consent, the order will not authorize the use of the property unless the claimant first obtains that permit, license or other form of authorization or consent. Such requirements may include, but are not limited to: a building permit, a land use decision, a permit as defined in ORS 215.402 or 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 claimant under the terms of the order will remain subject to the following laws: (a) those laws not specified in (1) above; (b) any laws enacted or enforced by a public entity other than the Commission or the department; and (c) those laws not subject to ORS 197.352 including, without limitation, those laws exempted under ORS 197.352(3).

5. Without limiting the generality of the foregoing terms and conditions, in order for the claimant to use the property, it may be necessary for her to obtain a decision under ORS 197.352, from a city and/or county and/or metropolitan service district that enforces land use regulations applicable to the property. Nothing in this order relieves the claimant from the necessity of obtaining a decision under ORS 197.352, from a local public entity that has jurisdiction to enforce a land use regulation applicable to a use of the property by the claimant.

This Order is entered by the Director of the DLCD as a final order of DLCD and the Land Conservation and Development Commission under ORS 197.352, OAR 660-002-0010(8), and OAR 125, division 145, and by the 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 22nd day of March, 2006.

FOR the DEPARTMENT OF ADMINISTRATIVE
SERVICES:


Dugan Petty, Deputy Administrator
DAS, State Services Division
Dated this 22nd day of March, 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 197.352¹, 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."

¹ By order of the Marion County Circuit Court, "all time lines under Measure 37 [were] suspended indefinitely" on October 25, 2005. This suspension was lifted on March 13, 2006 by the court. As a result, a period of 139 days (the number of days the time lines were suspended) has been added to the 180-day time period under ORS 197.352(6) for claims that were pending with the state on October 25, 2005.

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

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

March 22, 2006

STATE CLAIM NUMBER: M118424
Report A

NAME OF CLAIMANT: Marceil Simpson

MAILING ADDRESS: c/o Jill Gelineau
Schwabe, Williamson & Wyatt
1211 Southwest Fifth Avenue, Suite 1900
Portland, Oregon 97204

PROPERTY IDENTIFICATION: Township 1S, Range 3W, Section 24
Tax Lot 100
Washington County

DATE RECEIVED BY DAS: May 13, 2005

180-DAY DEADLINE: March 28, 3006¹

I. SUMMARY OF CLAIM

The claimant, Marceil Simpson, seeks compensation in the amount of \$160,000 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 claimant desires compensation or the right to divide the approximately 150-acre property into two parcels: one of approximately two acres with the existing dwelling; and one of approximately 148 acres without a dwelling. The property is located at 31177 Simpson Road, Cornelius, in Washington County. (See claim.)

II. SUMMARY OF STAFF RECOMMENDATION

Based on the findings and conclusions set forth below, the Department of Land Conservation and Development (the department) has determined that the claim is valid. Department staff recommends that, in lieu of compensation, the requirements of the following state laws enforced by the Land Conservation and Development Commission (the Commission) or the department, not apply to the claimant's division of the property into one approximately two-acre parcel and

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).

one approximately 148-acre parcel: applicable provisions of Statewide Planning Goal 3 (Agricultural Lands), ORS 215 and OAR 660, division 33, enacted after January 19, 1977. These laws will not apply to the claimant only to the extent necessary to allow her to use the property for the use described in this report, and to the extent that use was permitted at the time she acquired the property in 1977. (See the complete recommendation in Section VI. of this report.)

III. COMMENTS ON THE CLAIM

Comments Received

On June 7, 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, one written comment, evidence or information was received in response to the 10-day notice.²

The comment is relevant to whether the restriction of the claimant's use of the property reduces the fair market value of the property. The comment has been considered by the department in preparing this report. (See the comment letter 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.

Findings of Fact

This claim was submitted to DAS on May 13, 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 land use planning, including all Commission administrative rules, land division statutes (ORS 92), and exclusive farm use zoning (ORS 215) applicable to the property as the basis for the claim (see Section V. (2)). Only laws that were enacted prior to

² 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.

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 claimant’s family first acquired an interest in the subject property on July 30, 1946, when Marceil Simpson’s husband, Frank H. Simpson, Jr. and his brother, Rolfe Simpson, bought the property. On January 19, 1977, Rolfe Simpson conveyed two portions of this property of approximately 118 acres and 39 acres each to his brother, Frank H. Simpson, Jr. On the same date, Frank H. Simpson, Jr. conveyed his interest in these two properties to himself and his wife, Marceil Simpson.³ A title report dated December 30, 2004, indicates that the claimant is the current owner of the property. (See deeds and other documents in the department’s claim file).

Conclusions

The claimant, Marceil Simpson is an “owner” of the subject property as that term is defined by ORS 197.352(11)(C), as of January 19, 1977. The property has been owned by “family members” of Marceil Simpson, as that term is defined by ORS 197.352(11)(A), as of July 30, 1946.

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.

³ The portion of the property retained by Rolfe Simpson is the subject of State Measure 37 claim # 118430.

Findings of Fact

The claim lists a number of statutes and rules as the land use regulations that restrict the use of the property. These include ORS 92, the exclusive farm use provisions of ORS 215, as well as OAR 660, divisions 1, 2, 4, 7, 8, 11, 12, 15, 16, 18, 23, 31, 33, and 45. The claim does not establish how each of these cited regulations restricts the use of the subject property. The department's report is based on those statutes and rules that restrict the use of the subject property as described below.⁴

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 claimant's property is zoned EFU as required by Statewide Planning Goal 3 (Agriculture Lands), in accord with ORS 215 and OAR 660, division 33, because the claimant's 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 215.263, 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.

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.

The claimant's family first acquired the subject property on July 30, 1946, when it was not zoned by Washington County, and before the establishment of the statewide planning goals and their implementing statutes and rules.

Conclusions

The current zoning and lot size requirements 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 claimant's family acquired the subject property in 1946 and do not allow partition of the property into two parcels (one of about two acres with the existing dwelling on the property, and one of about 148 acres without a dwelling) thereby restricting the use of the property relative to the uses allowed when the property was acquired by

⁴ The claimant summarily cites various sections of ORS 92 as restricting the use of the property. That chapter establishes land use procedures for the division of land. The claimant has not established how any provision of that chapter restricts the claimant's use of the subject property in a manner that restricts its fair market value. On its face, ORS 92 does not in itself restrict the use of the subject property. The claimant also summarily cites several divisions of OAR 660 that do not, on their face, appear to restrict the use of the property. In the absence of any explanation by the claimant as to how those regulations restrict the use of the subject property in a manner that restricts the property's fair market value, this report does not address those regulations further.

⁵ The claimant's 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>))

the claimant's family in 1946. In 1946, the property was not subject to state land use regulations or zoning by Washington County.

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 claimant has identified. There may be other laws that currently apply to the claimant's use of the property, and that may continue to apply to the claimant's use of the property, that have not been identified in the claim. In some cases, it will not be possible to know what laws apply to a use of property until there is a specific proposal for that use. When the claimant seeks a building or development permit to carry out a specific use, it may become evident that other state laws apply to that use.

3. Effect of Regulations on Fair Market Value

In order to establish a valid claim, ORS 197.352(1) requires that 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 includes an estimate of \$160,000 as the reduction in fair market value as a result of current land use regulations. The claims states:

"We have, on behalf of Mrs. Simpson, engaged a licensed MAI appraiser to assist in determining the amount of compensation due to her pursuant to Measure 37. The compensation shall be equal to the reduction in the fair market value of the affected property interest resulting from enactment or enforcement of the land use regulations as of the date of written demand for compensation under Measure 37. Based on this preliminary appraisal, the just compensation figure is \$160,000. Mrs. Simpson respectfully demands that this compensation be paid to her pursuant to Measure 37."

Conclusions

As explained in Section V.(1) of this report, the claimant's family acquired the property in 1946. Under ORS 197.352, the claimant is due compensation for land use regulations that restrict the use of the subject 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 claimant's family acquired the property restrict the division for residential use of the subject property as requested by the claimant. The claimant estimates the reduction in value due to the restrictions to be \$160,000.

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 is based on state land use regulations that allegedly restrict the use of the property relative to what would have been allowed in 1946, when the property was acquired by the claimant's family. Those provisions that restrict the use of the property primarily include applicable provisions of Statewide Planning Goal 3, ORS 215 and OAR 660, division 33, which Washington County has implemented through its EFU zone. These laws are not exempt under ORS 197.352(3)(E), which exempts laws in effect when the claimant's 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 claimant's use of the property, and these laws are not exempt under ORS 197.352(3)(E).

Laws in effect when the claimant's family acquired the property are exempt under ORS 197.352(3)(E) and will continue to apply to the claimant's use of the property. There may be other laws that continue to apply to the claimant's use of the 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 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. 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 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 she has provided to the department in her claim, the greater the possibility that there may be additional laws that will later be determined to continue to apply to her 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 division of the property into one approximately two-acre parcel and one approximately 148-acre parcel. The claim asserts the laws enforced by the Commission or department reduce the fair market value of the subject property by \$160,000. However, the claim provides insufficient documentation to establish how the specified restrictions reduce the fair market value of the property and, therefore, 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 Marceil Simpson to use the subject property for a use permitted at the time she acquired it on January 19, 1977.

The claimant acquired the property on January 19, 1977, when it was zoned F-1 by Washington County. At that time, the County's comprehensive plan and land use regulations, including the F-1 zone, were not acknowledged by the Commission for compliance with the Statewide Planning Goals pursuant to ORS 197.250 and 197.251.⁶ Since the Commission had not acknowledged Washington County's comprehensive plan and land use regulations when the claimant acquired the property on January 19, 1977, Statewide Planning Goal 3 applied directly to property on the date of acquisition.⁷

In 1977, 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 (1975 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

⁶ 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).

⁷ 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 Washington 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).

(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.⁸ Thus, the opportunity to divide the tax lot when the claimant acquired it in 1977, 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 endnoteⁱ.)

No information has been provided establishing whether the claimant’s request to divide the subject property complies with either of the applicable partition standards under Goal 3 or ORS 215.263 (1975 edition) in effect at the time the claimant acquired the property in 1977.

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 Marceil Simpson’s division of the property into one approximately two-acre parcel and one approximately 148-acre parcel: applicable provisions of Statewide Planning Goal 3 (Agricultural Lands), ORS 215 and OAR 660, division 33, enacted after January 19, 1977. These land use regulations will not apply to Marceil Simpson’s use of her property only to the extent necessary to allow her to use her property for the use described in this report, and only to the extent that use was permitted at the time she acquired the property on January 19, 1977.
2. The action by the State of Oregon provides the state’s authorization to Marceil Simpson to use her property for the use described in this report, subject to the standards in effect on January 19, 1977. On January 19, 1977, the property was subject to Statewide Planning Goal 3 and applicable provisions of ORS 215 then in effect.
3. To the extent that any law, order, deed, agreement or other legally enforceable public or private requirement provides that the property may not be used without a permit, license, or other form of authorization or consent, the order will not authorize the use of the property unless the claimant first obtains that permit, license or other form of authorization or consent. Such requirements may include, but are not limited to: a building permit, a land use decision, a permit as defined in ORS 215.402 or 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 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).

⁸ Compare ORS 215.263 (1975 edition with the current version of ORS 215.263.)

5. Without limiting the generality of the foregoing terms and conditions, in order for the claimant to use the property, it may be necessary for her to obtain a decision under ORS 197.352 from a city and/or county and/or metropolitan service district that enforces land use regulations applicable to the property. Nothing in this order relieves the claimant from the necessity of obtaining a decision under ORS 197.352 from a local public entity that has jurisdiction to enforce a land use regulation applicable to a use of the property by the claimant.

VII. COMMENTS ON THE DRAFT STAFF REPORT

The department issued its draft staff report on this claim on October 19, 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 As noted, Goal 3 "Agricultural Lands" became effective on January 25, 1975, and was applicable to legislative land use decisions and some quasi-judicial land use decisions where site specific goal provisions apply prior to acknowledgement of a jurisdiction's comprehensive plan and land use regulations. After the local plan and land use regulations are acknowledged by the Commission, the statewide planning goals and implementing rules no longer directly apply to such local land use decisions. However, after acknowledgment, interpretation of the local county code provisions must be consistent with the goal and rule standards with which they were acknowledged to be in compliance.

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).

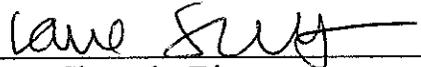
form of authorization or consent, the order will not authorize the use of the property unless the claimant first obtains that permit, license or other form of authorization or consent. Such requirements may include, but are not limited to: a building permit, a land use decision, a permit as defined in ORS 215.402 or 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 claimant under the terms of the order will remain subject to the following laws: (a) those laws not specified in (1) above; (b) any laws enacted or enforced by a public entity other than the Commission or the department; and (c) those laws not subject to ORS 197.352 including, without limitation, those laws exempted under ORS 197.352(3).

5. Without limiting the generality of the foregoing terms and conditions, in order for the claimant to use the property, it may be necessary for her to obtain a decision under ORS 197.352, from a city and/or county and/or metropolitan service district that enforces land use regulations applicable to the property. Nothing in this order relieves the claimant from the necessity of obtaining a decision under ORS 197.352, from a local public entity that has jurisdiction to enforce a land use regulation applicable to a use of the property by the claimant.

This Order is entered by the Director of the DLCD as a final order of DLCD and the Land Conservation and Development Commission under ORS 197.352, OAR 660-002-0010(8), and OAR 125, division 145, and by the 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 22nd day of March, 2006.

FOR the DEPARTMENT OF ADMINISTRATIVE
SERVICES:



Dugan Petty, Deputy Administrator
DAS, State Services Division

Dated this 22nd day of March, 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 197.352¹, 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."

¹ By order of the Marion County Circuit Court, "all time lines under Measure 37 [were] suspended indefinitely" on October 25, 2005. This suspension was lifted on March 13, 2006 by the court. As a result, a period of 139 days (the number of days the time lines were suspended) has been added to the 180-day time period under ORS 197.352(6) for claims that were pending with the state on October 25, 2005.

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

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

March 22, 2006

STATE CLAIM NUMBER: M118424
Report B

NAME OF CLAIMANT: Marceil Simpson

MAILING ADDRESS: c/o Jill Gelineau
Schwabe, Williamson & Wyatt
1211 Southwest Fifth Avenue, Suite 1900
Portland, Oregon 97204

PROPERTY IDENTIFICATION: Township 1S, Range 3W, Section 24
Tax Lot 601
Washington County

DATE RECEIVED BY DAS: May 13, 2005

180-DAY DEADLINE: March 28, 2006¹

I. SUMMARY OF CLAIM

The claimant, Marceil Simpson, seeks compensation in the amount of \$200,000 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 claimant desires compensation or the right to site a dwelling and accessory structures on the subject property. The 11.15-acre property does not have a street address and is located at the locational coordinates listed above, in Washington County. (See claim.)

II. SUMMARY OF STAFF RECOMMENDATION

Based on the findings and conclusions set forth below, the Department of Land Conservation and Development (the department) has determined that the claim is valid. Department staff recommends that, in lieu of compensation, the requirements of the following state laws enforced by the Land Conservation and Development Commission (the Commission) or the department, not apply to the claimant's development of a dwelling and accessory structures on the property:

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. DAS Dep't of Admin. Servs.*, 340 Or ___, 2006 Ore. LEXIS 104 (February 21, 2006).

Statewide Planning Goal 3 (Agricultural Lands), ORS 215 and the applicable provisions of OAR 660, division 33, enacted after May 17, 1978. These laws will not apply to Marceil Simpson only to the extent necessary to allow her to use the property for the use described in this report, to the extent that use was permitted at the time she acquired the property on May 17, 1978. (See the complete recommendation in Section VI. of this report.)

III. COMMENTS ON THE CLAIM

Comments Received

On June 7, 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, one written comment, evidence or information was received in response to the 10-day notice.²

The comment is relevant to whether the restriction of the claimant's use of the property reduces the fair market value of the property. The comment has been considered by the department in preparing this report. (See the comment letter 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.

Findings of Fact

This claim was submitted to DAS on May 13, 2005, for processing under OAR 125, division 145. The claim list OAR 660-33-135(7) as the law that is the basis for the claim. Only laws that were enacted prior to December 2, 2004, the effective date of ORS 197.352, are the basis for this claim. (See citations of statutory and administrative rule history of the Oregon Revised Statutes and Oregon Administrative Rules.)

² 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.

Conclusions

The claim has been submitted within two years of December 2, 2004; the effective date of ORS 197.352, 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 claimant’s family first acquired an interest in the property on November 2, 1908, when Marceil Simpson’s father-in law, Frank H. Simpson, Sr., acquired the property. In 1946, Frank H. Simpson, Sr.’s property was acquired by his sons, Rolfe Simpson and Frank H. Simpson, Jr. On May 17, 1978, Frank H. Simpson, Jr. and his brother Rolfe Simpson conveyed this property to Frank H. Simpson, Jr. and his wife, Marceil Simpson. (See deeds and other documents in the department’s claim file).

Conclusions

The claimant, Marceil Simpson, is an “owner” of the subject property, as that term is defined by ORS 197.352(11)(C), as of May 17, 1978. The property has been owned by “family member” of Marceil Simpson, as that term is defined by ORS 197.352(11)(A), as of November 2, 1908.

2. The Laws that are the Basis for this Claim

In order to establish a valid claim, ORS 197.352(1) requires, in part, that a law must restrict the claimant’s use of private real property in a manner that reduces the fair market value of the property relative to how the property could have been used at the time the claimant or a family member acquired the property.

Findings of Fact

The claim lists OAR 660-33-135(7), the gross farm income standard, as the land use regulation that restricts the approval of a dwelling on the property.

The claim is based, generally, on Washington County’s current AF-20 Exclusive Farm Use (EFU) zone and the applicable provisions of state law that require such zoning. The claimant’s property is zoned EFU as required by Statewide Planning Goal 3 (Agriculture Lands), in accord with ORS 215 and OAR 660, division 33, ORS 215 because the claimant’s property is

“agricultural land” as defined by Goal 3.³ Goal 3 became effective on January 25, 1975, and required that agricultural lands as defined by the Goal be zoned EFU pursuant to ORS 215.

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 215.213.⁴ ORS 215.213(3) became effective on October 5, 1973, (SB 101, Chapter 503, Oregon Laws 1973) and was amended to limit non-farm dwellings on NRCS Class I-III soils in 1983, (Chapter 826 Oregon 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.)

The claimant’s family first acquired the subject property on November 2, 1908, when it was not zoned by Washington County and before the establishment of the statewide planning goals and their implementing statutes and rules.

Conclusions

The current dwelling standards established by Statewide Planning Goal 3 (Agricultural Lands) ORS 215 and OAR 660, division 33 were all enacted after the claimant’s family acquired ownership of the subject property in 1908, and do not allow for the approval of a dwelling on the property, thereby restricting the use of the property relative to the uses allowed when the property was acquired by the claimant’s family. In 1908, the property was not subject to state land use regulations or zoning by Washington County.

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 use that the claimant has identified. There may be other laws that currently apply to the claimant’s use of the property, and that may continue to apply to the claimant’s use of the property, that have not been identified in the claim. In some cases, it will not be possible to know what laws apply to a use of property until there is a specific proposal for that use. When the claimant seeks a building or development permit to carry out a specific use, it may become evident that other state laws apply to that use.

3. Effect of Regulations on Fair Market Value

In order to establish a valid claim, ORS 197.352(1) requires that 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.”

³ The claimant’s 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>))

⁴ The claimant’s property is “high-value farmland” as defined under ORS 215.710 (see NRCS Web Soil Survey (<http://websoilsurvey.nrcs.usda.gov>)).

Findings of Fact

The claim includes an estimate of \$200,000 as the reduction in fair market value as a result of current land use regulations. The claim states:

“The compensation shall be equal to the reduction in the fair market value of the affected property interest resulting from enactment or enforcement of the land use regulations as of the date of written demand for compensation under Measure 37. Based on the estimated investment in farm equipment required to meet the farm income test, the just compensation figure is \$200,000. Mrs. Simpson respectfully demands that this compensation be paid to her pursuant to Measure 37.”

No appraisal or other estimate of the value of the property was submitted with the claim.

Conclusions

As explained in Section V.(1) of this report, the claimant’s family acquired the property in 1908. Under ORS 197.352, the claimant is due compensation for land use regulations that restrict the use of the subject 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 claimant’s family acquired the property restrict the residential use of the subject property as requested by the claimant. The claimant estimates the reduction in value due to the restrictions to be \$200,000.

Without an appraisal or other documentation, it is not possible to substantiate the specific dollar amount the claimant demands 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 is based on state land use regulations that allegedly restrict the use of the property relative to what would have been allowed in 1908, when the property was acquired by the claimant’s family. Those provisions that restrict the use of the property primarily include the Statewide Planning Goal 3 and OAR 660, division 33, which Washington County has implemented through its AF-20 zone. These laws are not exempt under ORS 197.352(3)(E), which exempts laws in effect when the claimant’s 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 claimant's use of the property, and these laws are not exempt under ORS 197.352(3)(E).

Laws in effect when the claimant acquired the property are exempt under ORS 197.352(3)(E), and will continue to apply to the claimant's use of the property. There may be other laws that continue to apply to the claimant's use of the 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 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. 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 use that the claimant has identified. Similarly, this report only addresses the exemptions provided for under ORS 197.352(3) that are clearly applicable given the information provided to the department in the claim. The claimant should be aware that the less information she has provided to the department in her claim, the greater the possibility that there may be additional laws that will later be determined to continue to apply to her 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 development of a dwelling and accessory structures on the subject property. The claim asserts that the laws enforced by the Commission or department reduce the fair market value of the subject property by \$200,000. However, the claim provides insufficient 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 Marceil Simpson to use the subject property for a use permitted at the time she acquired it on May 17, 1978.

The claimant acquired the property on May 17, 1978, when it was zoned AF-10 by Washington County. At that time, the County's comprehensive plan and land use regulations, including the AF-10 zone, were not acknowledged by the Commission for compliance with the Statewide Planning Goals, pursuant to ORS 197.250 and 197.251.⁵ Since the Commission had not acknowledged Washington County's comprehensive plan and land use regulations, including the AF-10 zone, when the claimant acquired the property on May 17, 1978, Statewide Planning Goal 3 applied directly to the property on the date of acquisition.⁶

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). Before a farm dwelling could be established on Agricultural Land, the farm use to which the dwelling relates must "be existing."⁷ Further, approval of a farm dwelling required that the dwelling be situated on a parcel wholly devoted to farm use and if on an existing parcel, the dwelling had to be on a parcel appropriate for the continuation of the existing commercial agricultural enterprise within the area.⁸ 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 stability of the land use pattern in the area, and was situated on land generally unsuitable for production of farm crops and livestock.⁹

⁵ 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).

⁶ 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. *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); *1000 Friends of Oregon v. Benton County*, 32 Or App 413 (1978). 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); *Kenagy v. Benton County*, 115 Or App 131 (1992).

⁷ *Newcomer v. Clackamas County*, 92 Or App 174, modified 94 Or App 33 (1988); *Matteo v. Polk County*, 11 Or LUBA 259, 263 (1984), affirmed without opinion 70 Or App 179 (1984).

⁸ OAR 660-05-025.

⁹ 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. *Smith v. Clackamas County*, 313 Or 519 (1992).

No information has been provided establishing whether the claimant's request to place a dwelling on the property complies with either the applicable standards for dwellings under Statewide Planning Goal 3 or ORS 215.213 (1977 edition) in effect at the time the claimant acquired 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 Marceil Simpson's development of a dwelling and accessory structures on the subject property: applicable provisions of Statewide Planning Goal 3, ORS 215 and OAR 660, division 33, enacted after May 17, 1978. These land use regulations will not apply to Marceil Simpson's use of her property only to the extent necessary to allow the claimant to use her property for the use described in this report, and to the extent that use was permitted at the time she acquired the property on May 17, 1978.
2. The action by the State of Oregon provides the state's authorization to Marceil Simpson to use her property for the use described in this report, subject to the standards in effect on May 17, 1978. On May 17, 1978, the property was subject to Statewide Planning Goal 3 (Agricultural Lands) and the then 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 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 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 claimant under the terms of the order will remain subject to the following laws: (a) those laws not specified in (1) above; (b) any laws enacted or enforced by a public entity other than the Commission or the department; and (c) those laws not subject to ORS 197.352 including, without limitation, those laws exempted under ORS 197.352(3).
5. Without limiting the generality of the foregoing terms and conditions, in order for the claimant to use the property, it may be necessary for her to obtain a decision under ORS 197.352 from a city and/or county and/or metropolitan service district that enforces land use regulations applicable to the property. Nothing in this order relieves the claimant from the necessity of obtaining a decision under ORS 197.352 from a local public entity that has jurisdiction to enforce a land use regulation applicable to a use of the property by the claimant.

VII. COMMENTS ON THE DRAFT STAFF REPORT

The department issued its draft staff report on this claim on October 19, 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.