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 COMPENSATION UNDER ORS 197.352 (BALLOT MEASURE 37) OF Robert and Karen Perez, CLAIMANTS	))))	FINAL ORDER CLAIM NO. M129747

Claimant(s): Robert and Karen Perez (the Claimants)

Property: Township 5S, Range 3W, Section 5, Tax lot 1501, Yamhill County (the property)

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

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

ORDER

The Claim is denied as to laws administered by DLCD and the Land Conservation and Development Commission (LCDC) for the reasons set forth in the DLCD Report.

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

FOR DLCD AND THE LAND CONSERVATION AND DEVELOPMENT COMMISSION:
Lane Shetterly, Director

Cora R. Parker, Deputy Director
DLCD
Dated this 22nd day of January, 2007.

FOR the DEPARTMENT OF ADMINISTRATIVE SERVICES:

David Hartwig, Administrator
DAS, State Services Division
Dated this 22nd day of January, 2007.

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

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

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

ORS 197.352 (BALLOT MEASURE 37) CLAIM FOR COMPENSATION

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

January 22, 2007

STATE CLAIM NUMBER:	M129747
NAMES OF CLAIMANTS:	Robert and Karen Perez
MAILING ADDRESS:	12603 SE Kimsey Road Dayton, Oregon 97114
PROPERTY IDENTIFICATION:	Township 5S, Range 3W, Section 5 Tax lot 1501 Yamhill County
DATE RECEIVED BY DAS:	July 26, 2006
180-DAY DEADLINE:	January 22, 2007

I. SUMMARY OF CLAIM

The claimants, Robert and Karen Perez, seek compensation in the amount of $960,000 for the reduction in fair market value as a result of land use regulations that are alleged to restrict the use of certain private real property. The claimants desire compensation or the right to divide the 26.75-acre subject property into thirteen approximately 2-acre parcels and to develop a dwelling on each parcel. The subject property is located at 12603 SE Kimsey Road, near Dayton, in Yamhill 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 not valid because neither the Land Conservation and Development Commission (the Commission) nor the department has enforced laws that restrict the claimants' use of private real property relative to uses permitted at the time the they acquired the subject property on December 13, 1973. (See the complete recommendation in Section VI. of this report.)

III. COMMENTS ON THE CLAIM

Comments Received

On November 11, 2006, pursuant to Oregon Administrative Rules (OAR) 125-145-0080, the Oregon Department of Administrative Services (DAS) provided written notice to the owners of

surrounding properties. According to DAS, no written comments were received in response to the 10-day notice.

IV. TIMELINESS OF CLAIM

Requirement

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

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

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

Findings of Fact

This claim was submitted to DAS on July 26, 2006, for processing under OAR 125, division 145. The claim identifies Statewide Planning Goal 3 (Agricultural Lands), ORS 215 and "OAR, division 33 (effective March 1, 1994)" as the basis for the claim. Only laws that were enacted or adopted prior to December 2, 2004, are the basis for this claim.

Conclusions

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

V. ANALYSIS OF CLAIM

1. Ownership

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

Findings of Fact

The claimants, Robert and Karen Perez, acquired the subject property on December 13, 1973, as reflected by a deed included with the claim. On April 14, 2000, the claimants transferred the property to a revocable trust, the Perez Family Trust, as reflected by a bargain and sale deed

included with the claim.[1] The Yamhill County Assessor's Office confirms the claimants' current ownership of the subject property.

Conclusions

The claimants, Robert and Karen Perez, are "owners" of the subject property as that term is defined by ORS 197.352(11)(C), as of December 13, 1973.

2. The Laws That are the Basis for This Claim

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

Findings of Fact

The claim indicates that the claimants desire to divide the 26.75-acre subject property into thirteen approximately 2-acre parcels and to develop a dwelling on each parcel, and that the use is not allowed under current land use regulations.

The claim is based generally on the applicable provisions of state law that require Exclusive Farm Use (EFU) zoning and restrict uses on EFU-zoned land. The claimants' property is zoned by Yamhill County as EF-80 as required by Goal 3, in accordance with ORS 215 and OAR 660, division 33, because the claimants' property is "agricultural land" as defined by Goal 3.[2] The subject property is approximately three miles from McMinnville's urban growth boundary with no nearby or available urban services. The property is surrounded entirely by large parcels zoned EF-80 and currently being used for agriculture.

Goal 3 became effective on January 25, 1975, and required agricultural land defined by the Goal to be zoned EFU pursuant to ORS 215. Current land use regulations, particularly ORS 215.263, 215.284 and 215.780 and OAR 660, division 33, enacted or adopted pursuant to Goal 3, prohibit the desired division of EFU-zoned land into parcels less than 80 acres and establish standards for the development of dwellings on existing proposed parcels on that land.

ORS 215.780 establishes an 80-acre minimum size for the creation of new lots or parcels in EFU zones and became effective on November 4, 1993 (Chapter 792, Oregon Laws 1993). ORS 215.263 (2005 edition) establishes standards for the creation of new parcels for non-farm uses and dwellings allowed in an EFU zone.

Land that is zoned EFU and that is "high-value" farm land under Goal 3, ORS 215.710 and OAR 660, division 33, is subject to additional restrictions based on certain provisions of ORS 215 and OAR 660, division 33.

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[1] Transfer of property to a revocable trust does not result in a change in ownership for purposes of ORS 197.352.
[2] The claimants' property is "agricultural land" because it contains Natural Resources Conservation Service (NRCS) Class I–IV soils.

OAR 660-033-0135 (applicable to farm dwellings) became effective on March 1, 1994, and interprets the statutory standard for a primary dwelling in an EFU zone under ORS 215.283(1)(f). OAR 660-033-0130(4) (applicable to non-farm dwellings) became effective on August 7, 1993, and was amended to comply with ORS 215.284 on March 1, 1994. The Commission subsequently adopted amendments to comply with House Bill 3326 (Chapter 704, Oregon Laws 2001, effective on January 1, 2002), which were effective on May 22, 2002. (See administrative rule history for OAR 660-033-0100, -0130 and -0135.)

The claimants acquired the subject property on December 13, 1973, after the adoption of Senate Bill 100 (Chapter 80, Oregon Laws 1973) effective on October 5, 1973, but before the adoption of the statewide planning goals, effective on January 25, 1975. At that time, the subject property was not zoned by Yamhill County.

During the period between October 5, 1973, and January 25, 1975, ORS 197.175(1) and 197.280 (1973 editions) required, in addition to any local plan or zoning provisions, that cities and counties exercise their planning responsibilities in accordance with the interim land use planning goals set forth in ORS 215.515 (1973 edition). *Petersen v. Klamath Falls*, 279 Or 249 (1977); *see also*, *Meeker v. Board of Comm'rs*, 287 Or 665 (1979) (review of a subdivision is an exercise of planning responsibilities requiring application of the goals); *State Housing Council v. Lake Oswego*, 48 Or App. 525 (1981) (noting that while "[l]and use planning responsibility is not defined in ORS ch 197, the Supreme Court has interpreted that term as including annexation approvals, *subdivision approvals* [emphasis added] and partition approvals") citing *Petersen*, *Meeker* and *Alexanderson v. Polk County*, 285 Or 427 (1980). The claimants' desired use includes subdivision of their land. If the claimants had sought to create that use in 1973, as a matter of law, the use would have been subject to the interim planning goals at ORS 215.515.[3] The following interim goals are directly applicable to this claim: "To preserve the quality of the air, water and *land* [emphasis added] resources of the state"; "To conserve prime farm lands for the production of crops"; "To provide for the orderly and efficient transition from rural to urban land use"; "To protect life and property in areas subject to floods, landslides and other natural disasters"; "To provide and encourage a safe, convenient and economic transportation system including all modes of transportation: Air, water, rail, highway and mass transit and recognizing differences in the social costs in the various modes of transportation"; and "To develop a timely, orderly and efficient arrangement of public facilities and services to serve as a framework for urban and rural development." ORS 215.515 (1973 edition).

One of the interim goals was to "conserve prime farm lands for the production of crops." Soil types are a determinant of prime farm land. Ninety-two percent (24.6 acres) of the soils on the

[3] The "interim" land use goals are set forth in ORS 215.515(1)(a) to (j) (1973 edition) as follows: (a) "To preserve the quality of the air, water and land resources of the state," (b) "To conserve open space and protect natural and scenic resources," (c) "To provide for the recreational needs of citizens of the state and visitors," (d) "To conserve prime farm lands for the production of crops," (e) "To provide for the orderly and efficient transition from rural to urban land use," (f) "To protect life and property in areas subject to floods, landslides and other natural disasters," (g) "To provide and encourage a safe, convenient and economic transportation system including all modes of transportation: Air, water, rail, highway and mass transit and recognizing differences in the social costs in the various modes of transportation," (h) "To develop a timely, orderly and efficient arrangement of public facilities and services to serve as a framework for urban and rural development," (i) "To diversify and improve the economy of the state" and (j) "To ensure that the development of properties within the state is commensurate with the character and the physical limitations of the land." ORS 215.515 (1973 edition).

26.75-acre subject property are rated as "prime" by the Natural Resource Conservation Service (NRCS). According to the Oregon Department of Agriculture, Oregon has only a limited supply of soils rated "prime" (8.0 percent of all agricultural land).[4]

The claim does not establish that the approval of thirteen lots or parcels of 2 acres each for residential use complies with the interim planning goals. To the contrary, the claimants' desired division and development of 26.75 acres of predominantly "prime" farm land would not "conserve prime farm lands for the production of crops" as required by the interim goals at the time the claimants acquired the subject property in 1973.

Conclusions

The current zoning requirements, minimum lot size and dwelling standards established by Goal 3, ORS 215 and OAR 660, division 33, were all enacted or adopted since the claimants acquired the subject property in 1973, and do not allow the desired division of the property into parcels less than 80 acres in size or allow the approval of dwellings. However, on December 13, 1973, the "interim" land use goals set forth in ORS 215.515 required the conservation of prime farm land for the production of crops. Ninety-two percent (24.6 acres) of the claimants' 26.75-acre subject property is composed of very limited farm land soils rated as "prime." The subject property could not be divided for residential use under the "interim" land use goals applicable in 1973.

Based on the facts of this claim, dividing the 26.75-acre subject property into thirteen approximately 2-acre parcels for residential use does not "conserve prime farm lands for the production of crops," "preserve the quality of the . . . land resources of the state," "provide for an orderly and efficient transition from rural to urban land use," "protect life and property in areas subject to floods" or provide for "a timely, orderly and efficient arrangement of public facilities and services" as required by ORS 215.515 (1973 edition). Thus, the requested use would not have been permitted under the standards in effect when the claimants acquired the subject property. Therefore, the department determines that the current land use regulations applicable to the subject property do not restrict its use relative to the uses allowed when the claimants acquired the property in 1973.

3. Effect of Regulations on Fair Market Value

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

[4] According to the Oregon Department of Agriculture, based on data from the NRCS, there are 15.5 million acres of agricultural land zoned for EFU in Oregon. Oregon has 1.2 million acres of soils rated as "prime," with only approximately 108,000 acres in Yamhill County. Furthermore, some of the "prime farmland" soils are found inside urban growth boundaries and are not available for farm use.

Findings of Fact

The claim includes an estimate of $960,000 as the reduction in the subject property's fair market value due to the regulations that restrict the claimants' desired use of the property. This amount is based on the claimants' assessment of market values submitted with the claim.

Conclusions

As explained in section V.(2) of this report, current land use regulations do not restrict the use of the subject property relative to the uses allowed when the claimants acquired the property in 1973. Land use regulations enacted or adopted by the state since the claimants acquired the subject property, relating to the desired division and development of the property, do not have "the effect of reducing the fair market value of the property, or any interest therein" relative to the uses allowed in 1973 because the claimants could not divide the subject property when they acquired it in 1973. Thus, the claimants are not due compensation under ORS 197.352.

4. Exemptions Under ORS 197.352(3)

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

Findings of Fact

The claim is based on state land use regulations that restrict the use of the subject property including Goal 3, ORS 215 and OAR 660, division 33, which Yamhill County has implemented through its current EF-80 zone. With the exception of applicable provisions of ORS 215, including the interim land use planning goals in effect on December 13, 1973, these state land use regulations were not in effect when the claimants acquired the property.

Conclusions

It appears that the general statutory, goal and rule restrictions on residential development and use of farm land apply to the claimants' use of the subject property and with the exception of applicable provisions of ORS 215 in effect when the claimants acquired the property, these laws are not exempt under ORS 197.352(3)(E). However, as discussed in Section V.(2) of this report, these laws do not restrict the use of the subject property relative to uses permitted when the claimants acquired the property on December 13, 1973, because the claimants' desired use was not allowed under the provisions of ORS 215 in effect on that date.

VI. FORM OF RELIEF

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

department must provide only non-monetary relief unless and until funds are appropriated by the legislature to pay claims.

Based on the current record, Robert and Karen Perez are not entitled to relief under ORS 197.352. Department staff recommends that this claim be denied because neither the Commission nor the department has enforced laws enacted or adopted after the claimants acquired the 26.75-acre subject property that restrict the claimants' use of the claimants' private real property relative to uses permitted at the time they acquired the property on December 13, 1973.

VII. COMMENTS ON THE DRAFT STAFF REPORT

The department issued its draft staff report on this claim on December 28, 2006. OAR 125-145 0100(3), provided an opportunity for the claimants or the claimants' authorized agent and any third parties who submitted comments under OAR 125-145-0080 to submit written comments, evidence and information in response to the draft staff report and recommendation.