

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. M129351
(BALLOT MEASURE 37) OF)
Walter M. Fargher Jr., CLAIMANT)

Claimant: Walter M. Fargher Jr. (the Claimant)

Property: Township 1S, Range 13E, Section 34A and C, Tax lot 400, Wasco County
(the property)

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

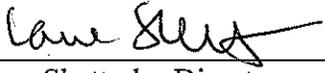
Claimant submitted the Claim to the State of Oregon under ORS 197.352. Under OAR 125-145-0010 *et seq.*, the Department of Administrative Services (DAS) referred the Claim to the Department of Land Conservation and Development (DLCD) as the regulating entity. This order is based on the record herein, 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 denied as to laws administered by DLCD and the Land Conservation and Development Commission (LCDC) for the reasons set forth in the DLCD Report.

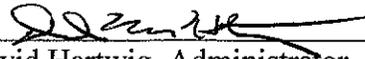
This Order is entered by the Director of the DLCD as a final order of DLCD and the Land Conservation and Development Commission under ORS 197.352, OAR 660-002-0010(8), and OAR chapter 125, division 145, and by the Administrator for the State Services Division of the DAS as a final order of DAS under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

FOR DLCD AND THE LAND
CONSERVATION AND
DEVELOPMENT COMMISSION:



Lane Shetterly, Director
DLCD
Dated this 8th day of November, 2006.

FOR THE DEPARTMENT OF
ADMINISTRATIVE SERVICES:



David Hartwig, Administrator
DAS, State Services Division
Dated this 8th day of November, 2006.

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**

November 8, 2006

STATE CLAIM NUMBER: M129351

NAME OF CLAIMANT: Walter M. Fargher Jr.

MAILING ADDRESS: 3151 Old Dufur Road
The Dalles, Oregon 97058

PROPERTY IDENTIFICATION: Township 1S, Range 13E, Section 34A & C
Tax lot 400
Wasco County

DATE RECEIVED BY DAS: May 18, 2006

180-DAY DEADLINE: November 14, 2006

I. SUMMARY OF CLAIM

The claimant, Walter Fargher Jr., seeks compensation in the amount of \$1.2 million for the reduction in fair market value as a result of land use regulations that are alleged to restrict the use of certain private real property. The claimant desires compensation or the right to divide the 27.75-acre subject property into forty 0.5-acre parcels. The subject property is located at 82970 Dufur Valley Road, near Dufur, in Wasco 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 the claimant's desired use of the subject property was prohibited under the laws in effect when the claimant acquired the property in 1973, 1989 and 2003. (See the complete recommendation in Section VI. of this report.)

III. COMMENTS ON THE CLAIM

Comments Received

On September 19, 2006, pursuant to Oregon Administrative Rule (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 were received in response to the 10-day notice.

The comments do not address whether the claim meets the criteria for relief under ORS 197.352. Comments concerning the effects a use of the subject property may have on surrounding areas are generally not something that the department is able to consider in determining whether to waive a state law. If funds do become available to pay compensation, then such effects may become relevant in determining which claims to pay compensation for instead of waive a state law. (See the comment letters in the department's claim file.)

IV. TIMELINESS OF CLAIM

Requirement

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

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

Findings of Fact

This claim was submitted to DAS on May 18, 2006, for processing under OAR 125, division 145. The claim identifies Senate Bill 100 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 claimant, Walter Fargher Jr., first acquired a portion of the subject property on July 30, 1969 (identified by the county and in the title report provided with the claim as Parcels 1 and 2 of tax lot 400) as reflected by a deed submitted with the claim. However, the claimant conveyed this

portion of the subject property (along with property not subject to this claim) to Ronald M. Somers on September 11, 1973. The claimant subsequently re-acquired that portion of the property on the same date, as reflected by deeds provided by Wasco County. The claimant acquired another portion of the property, identified as Parcel 3 of tax lot 400, on May 2, 1989, and a final portion, identified as Parcel 4 of tax lot 400, on February 16, 2003, as reflected by deeds provided by Wasco County. The Wasco County Assessor's Office confirms the claimant's current ownership of the subject property.

Conclusions

The claimant, Walter Fargher Jr., is an "owner" of the subject property as that term is defined by ORS 197.352(11)(C). He has been an owner of Parcels 1 and 2 since September 11, 1973; Parcel 3 since May 2, 1989; and Parcel 4 since February 16, 2003.

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 indicates that the claimant desires to divide the 27.75-acre subject property into forty 0.5-acre parcels and to develop a dwelling on each parcel. It indicates that House Bill 100 prevents the desired use.

The claim is based on the applicable provisions of state law that require Exclusive Farmland Use (EFU) zoning and restrict uses on land zoned EFU. The claimant's property is zoned "A-1 160," as required by Statewide Planning Goal 3 (Agricultural Lands), in accordance with ORS 215 and OAR 660, division 33, because the claimant's property is "agricultural land" as defined by Goal 3.¹ Goal 3 became effective on January 25, 1975, and required that agricultural lands as defined by Goal 3 be zoned EFU pursuant to ORS 215.

Current land use regulations, particularly ORS 215.263, 215.284 and 215.780 and OAR 660, division 33, enacted or adopted pursuant to Goal 3, prohibit the division of EFU-zoned land into parcels less than 80 acres and establish standards for development of dwellings on existing or proposed parcels on that land.

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

¹ The claimant's property is "agricultural land" because it contains Natural Resources Conservation Service Class I-VI 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(4) 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 claimant acquired Parcels 1 and 2 of tax lot 400 on September 11, 1973, prior to the adoption of the statewide planning goals and their implementing statutes and regulations. However, at the time of acquisition, the property was zoned "A-1 Exclusive Agricultural Zone," which was a qualified farm zone pursuant to the provisions of ORS 215 (1971 edition). As a qualified farm zone under ORS 215, the A-1 zone required a minimum lot or parcel size of 20 acres and did not allow any dwellings except "as required to carry out a use specified in Section 3.210(1)(a)." The uses specified in Section 2.210(1)(a) were all exclusively agriculture related.

The claimant acquired Parcel 3 of tax lot 400 on May 2, 1989. At that time, the property was subject to Wasco County's acknowledged EFU zone.² When the claimant acquired Parcel 3, the claimant's desired use of the property would have been governed by the county's acknowledged A-1 zone, and the applicable provisions of ORS 215 then in effect.³ In 1989, ORS 215.263 (1987 edition) required that divisions of land in EFU zones be "appropriate for the continuation of the existing commercial agricultural enterprise within the area" or not smaller than the minimum size in the county's acknowledged plan. ORS 215.283(1)(f) (1987 edition) generally allowed farm dwellings "customarily provided in conjunction with farm use." Non-farm dwellings were allowed under ORS 215.283(3) if they were determined to be compatible with farm use, not interfere seriously with accepted farm practices, not materially alter the stability of the land use pattern in the area and be situated on generally unsuitable land for the production of farm crops and livestock.

The claimant acquired Parcel 4 of tax lot 400 on February 16, 2003. At that time, the property was subject to the current laws in effect, as described above.

Conclusions

The current zoning requirements, minimum lot size and dwelling standards established by applicable provisions of Goal 3, ORS 215 and OAR 660, division 33, were all enacted or adopted after the claimant acquired Parcels 1 and 2 in 1973 and do not allow the desired division or residential development of the property. However, laws in effect when the claimant acquired Parcels 1 and 2 prohibited the claimant's desired use of the property. Therefore, laws enacted or

² Wasco County's EFU zone was acknowledged by the Commission for compliance with Goal 3 on August 23, 1983.

³ After the county's comprehensive plan and land use regulations were acknowledged by the Commission as complying with the statewide planning goals, the goals and implementing rules no longer applied directly to individual local land use decisions. *Byrd v. Stringer*, 295 Or 311 (1983). However, statutory requirements continue to apply, and insofar as the state and local provisions are materially the same, the local provisions must be interpreted consistent with the substance of the goals and implementing rules. *Forster v. Polk County*, 115 Or App 475 (1992) and *Kenagy v. Benton County*, 115 Or App 131 (1992).

adopted since the claimant acquired Parcels 1 and 2 in 1973 do not restrict the claimant's desired use of the parcels relative to when the claimant acquired them in 1973.

The zoning requirements, minimum lot size and dwelling standards established by Wasco County's acknowledged A-1 zone were enacted or adopted before the claimant acquired Parcel 3 on May 2, 1989, and Parcel 4 on February 16, 2003. These land use regulations do not allow the claimant's desired use of Parcels 3 and 4. Laws enacted or adopted since the claimant acquired Parcel 3 in 1989 and Parcel 4 in 2003 do not restrict the claimant's desired use of these parcels relative to when the claimant acquired them in 1989.

3. Effect of Regulations on Fair Market Value

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

Findings of Fact

The claim includes an estimate of \$1.2 million as the reduction in the subject property's fair market value due to the regulations that restrict the claimant's desired use of the property. This amount is based on a real estate agent's opinion submitted with the claim.

Conclusions

As explained in Section V.(1) of this report, the claimant, Walter Fargher Jr., acquired Parcels 1 and 2 on September 11, 1973, Parcel 3 on May 2, 1989, and Parcel 4 on February 16, 2003. The claimant's desired use of the subject property was prohibited when he acquired the property in 1973, 1989 and 2003. No state laws enacted or adopted since the claimant acquired the subject property restrict the claimant's desired use of the property relative to the uses allowed when he acquired it in 1973, 1989 and 2003. Therefore, the fair market value of the subject property has not been reduced as a result of land use regulations enforced by the Land Use Conservation and Development Commission (the Commission) or the department.

4. Exemptions Under ORS 197.352(3)

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

Findings of Fact

The claim is based on state land use regulations that restrict the use of the subject property, including applicable provisions of Goal 3, ORS 215 and OAS 660, division 33, which Wasco County has implemented through its current A-1 zone. With the exception of provisions of ORS 215 in effect in 1973, these laws were enacted or adopted after the claimant acquired Parcels 1 and 2. With the exception of amendments adopted after the claimant acquired Parcel 3 in 1989, these laws were all in effect when the claimant acquired Parcels 3 and 4.

Conclusions

With the exception of provisions of ORS 215 in effect when the claimant acquired Parcels 1 and 2, the state land use regulations that restrict the claimant's desired use of the subject property were enacted or adopted after the claimant acquired Parcels 1 and 2 and therefore, are not exempt under ORS 197.352(3). With the exception of amendments adopted after the claimant acquired Parcel 3 in 1989, the state land use laws that restrict the claimant's desired use of the property were enacted or adopted before the claimant acquired Parcels 3 and 4 and therefore, are exempt under ORS 197.352(3)(E), which exempts laws in effect when the claimant acquired the subject property. Laws that are exempt under ORS 197.352(3)(E) prohibit the claimant's desired 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 one or more laws that restrict the use of the property in a manner that reduces its fair market value. In lieu of compensation, the department may choose to not apply the law in order to allow the present owner to carry out a use of the property permitted at the time the present owner acquired the property. The Commission, by rule, has directed that if the department determines a claim is valid, the Director of the department must provide only non-monetary relief unless and until funds are appropriated by the legislature to pay claims.

Findings of Fact

Based on the findings and conclusions set forth in this report, laws enforced by the Commission or the department do not restrict the claimant's desired use of the subject property relative to what was permitted when the claimant acquired it in 1973, 1989 and 2003 and do not have the effect of reducing the fair market value of the property. Laws in effect when the claimant acquired Parcels 1 and 2 in 1973, Parcel 3 in 1989 and Parcel 4 in 2003 all prohibit the claimant's desired use of the property.

Conclusions

Based on the record and the foregoing findings and conclusions, the claimant has not established that he is entitled to relief under ORS 197.352(1) as a result of land use regulations enforced by the Commission or the department because laws in effect when he acquired the property in 1973, 1989 and 2003 prohibit the claimant's desired use of the property. Therefore, the department recommends that this claim be denied.

VII. COMMENTS ON THE DRAFT STAFF REPORT

The department issued its draft staff report on this claim on October 19, 2006. 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.