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 Arthur and Lois Endresen, CLAIMANTS	))))	FINAL ORDER CLAIM NO. M129375

Claimants: Arthur and Lois Endresen (the Claimants)

Property: Township 7S, Range 1W, Section 15, Tax lots 300, 400, 1400 and 2000

Township 7S, Range 1W, Section 10, Tax lot 1000

Marion County (the Property)

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

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

ORDER

The Claim is approved as to laws administered by DLCD and the Land Conservation and Development Commission (LCDC) for the reasons set forth in the DLCD Report, and subject to the following terms:

1. In lieu of compensation under ORS 197.352, the State of Oregon will not apply the following laws to Arthur and Lois Endresen's division of the 205.73-acre subject property into nine parcels between 1.95 and 39.00 acres and to their development of a dwelling on each parcel: applicable provisions of Goals 3 and 14, ORS 215 and OAR 660, division 33, enacted or adopted after the claimants acquired each of the tax lots that composes the subject property. These laws will not apply to the claimants only to the extent necessary to allow them to use the subject property for the use described in this report, and only to the extent that use was permitted when they acquired tax lot 300 on July 22, 1954, tax lot 400 on June 12, 1958, tax lot 1000 on March 13, 1965, tax lot 2000 on March 31, 1967, and tax lot 1400 on January 7, 1985.

2. The action by the State of Oregon provides the state's authorization to the claimants to use the property for the use described in this report, subject to the standards in effect on July 22, 1954 (tax lot 300), June 12, 1958 (tax lot 400), March 13, 1965 (tax lot 1000), March 31, 1967

(tax lot 2000) and January 7, 1985 (tax lot 1400). On January 7, 1985, the property was subject to compliance with Goal 3 and OAR 660, division 5, as implemented by Marion County's acknowledged EFU zone, and the applicable provisions 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 subject property may not be used without a permit, license or other form of authorization or consent, the order will not authorize the use of the property unless the claimants first obtain that permit, license or other form of authorization or consent. Such requirements may include, but are not limited to: a building permit, a land use decision, a "permit" as defined in ORS 215.402 or 227.160, other permits or authorizations from local, state or federal agencies and restrictions on the use of the subject property imposed by private parties.

4. Any use of the subject property by the claimants under the terms of the order will remain subject to the following laws: (a) those laws not specified in (1) above; (b) any laws enacted or enforced by a public entity other than the Commission or the department; and (c) those laws not subject to ORS 197.352 including, without limitation, those laws exempted under ORS 197.352(3).

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

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 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 125, division 145, and ORS 293.

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

Michael Mamsey for Cora Parker

Cora R. Parker, Deputy Director
DLCD
Dated this 13th day of November, 2006.

FOR the DEPARTMENT OF ADMINISTRATIVE SERVICES:

David Hartwig, Administrator
DAS, State Services Division
Dated this 13th day of November, 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 197.352, the present owner of the property, or any interest therein, shall have a cause of action in the circuit court in which the real property is located.

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

FOR INFORMATION ONLY

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

ORS 197.352 (BALLOT MEASURE 37) CLAIM FOR COMPENSATION

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

November 13, 2006

STATE CLAIM NUMBER:	M129375
NAMES OF CLAIMANTS:	Arthur and Lois Endresen
MAILING ADDRESS:	2505 Endresen Lane NE Silverton, Oregon 97381
PROPERTY IDENTIFICATION:	Township 7S, Range 1W, Section 15 Tax lots 300, 400, 1400 and 2000 Township 7S, Range 1W, Section 10 Tax lot 1000 Marion County
DATE RECEIVED BY DAS:	May 22, 2006
180-DAY DEADLINE:	November 18, 2006

I. SUMMARY OF CLAIM

The claimants, Arthur and Lois Endresen, seek compensation in the amount of $1.1 million for the reduction in fair market value as a result of land use regulations that are alleged to restrict the use of certain private real property. The claimants desire compensation or the right to divide the 205.73-acre subject property into nine parcels between 1.95 and 39.00 acres and to develop a dwelling on each parcel.[1] The subject property is located at and near 2505 Endresen Lane NE, near Silverton, in Marion 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 Arthur and Lois Endresen's division of the 205.73-acre subject property into nine parcels between 1.95 and 39.00 acres and to their development of a dwelling on each parcel:

[1] The subject property consists of five tax lots. Tax lot 300 consists of 70.90 acres, tax lot 400 consists of 63.62 acres, tax lot 1000 consists of 58.81 acres, tax lot 1400 consists of 10.45 acres and tax lot 2000 consists of 1.95 acres.

applicable provisions of Statewide Planning Goals 3 (Agricultural Lands) and 14 (Urbanization), ORS 215 and Oregon Administrative Rules (OAR) 660, division 33, enacted or adopted after the claimants acquired each of the tax lots that composes the subject property. These laws will not apply to the claimants only to the extent necessary to allow them to use the subject property for the use described in this report, and only to the extent that use was permitted when they acquired the property in 1954, 1958, 1965, 1967 and 1985. (See the complete recommendation in Section VI. of this report.)

III. COMMENTS ON THE CLAIM

Comments Received

On September 12, 2006, 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, seven 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 22, 2006, for processing under OAR 125, division 145. The claim identifies the property's Exclusive Farm Use (EFU) zoning 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, Arthur and Lois Endresen, acquired tax lot 300 on July 22, 1954, tax lot 400 on June 12, 1958, tax lot 1000 on March 13, 1965, and tax lot 2000 on March 31, 1967, as reflected by warranty deeds included with the claim. The claimants acquired tax lot 1400 on January 7, 1985, as reflected by a sheriff's deed included with the claim. On January 17, 1992, the claimants transferred the subject property to the Arthur and Lois Endresen Family Trust with themselves as trustees, as reflected by a bargain and sale deed included with the claim.[2] The Marion County Assessor's Office confirms the claimants' current ownership of the subject property.

Conclusions

The claimants, Arthur and Lois Endresen, are "owners" of the subject property as that term is defined by ORS 197.352(11)(C). They have owned tax lot 300 since July 22, 1954, tax lot 400 since June 12, 1958, tax lot 1000 since March 13, 1965, tax lot 2000 since March 31, 1967, and tax lot 1400 since January 7, 1985.

2. The Laws That are the Basis for This Claim

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

Findings of Fact

The claim indicates that the claimants desire to divide the 205.73-acre subject property into nine parcels between 1.95 and 39.00 acres and to develop a dwelling on each parcel. It indicates that the desired use is not allowed under the property's current zoning.

[2] Transfer of property to a revocable trust does not result in a change in ownership for purposes of ORS 197.352.

The claim is based generally on the applicable provisions of state law that require EFU zoning and restrict uses on EFU-zoned land. The claimants' property is zoned EFU by Marion County, as required by Goal 3, in accordance with ORS 215 and OAR 660, division 33, because the claimants' property is "agricultural land" as defined by Goal 3.[3] Goal 3 became effective on January 25, 1975, and required that agricultural lands as defined by Goal 3 be zoned EFU pursuant to ORS 215.

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

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

OAR 660-033-0135 (applicable to farm dwellings) became effective on March 1, 1994, and interprets the statutory standard for a primary dwelling in an EFU zone under ORS 215.283(1)(f). OAR 660-033-0130(4) (applicable to non-farm dwellings) became effective on August 7, 1993, and was amended to comply with ORS 215.284(4) on March 1, 1994. 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.)

Goal 14, which also became effective on January 25, 1975, would likely apply to the division of the claimants' property into parcels less than two acres. Goal 14 generally requires that land outside of urban growth boundaries be used for rural uses.

The claimants acquired tax lots 300, 400, 1000 and 2000 prior to the adoption of the statewide planning goals and their implementing statutes and regulations.

At the time the claimants acquired tax lot 1400, it was subject to Marion County's acknowledged EFU zone.[4] When the claimants acquired tax lot 1400, the claimants' desired use of the property would have been governed by the county's acknowledged EFU zone and the applicable provisions of ORS 215 then in effect.[5]

In January 1985, ORS 215.263 (1983 edition) required that divisions of land in EFU zones be "appropriate for the continuation of the existing commercial agricultural enterprise within the

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

[4] Marion County's EFU zone was acknowledged by the Commission for compliance with Goal 3 on June 10, 1982.

[5] 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).

area" or not smaller than the minimum size in the county's acknowledged plan. ORS 215.283(1)(f) (1985 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 claim does not establish whether or to what extent the claimants' desired division and development of tax lot 1400 were allowed under the standards in effect when they acquired this tax lot on January 7, 1985.

Conclusions

The current zoning requirements, minimum lot size and dwelling standards established by applicable provisions of Goals 3 and 14, ORS 215 and OAR 660, division 33, were all enacted or adopted after the claimants acquired the subject property and do not allow the desired division or residential development of the property. These laws restrict the use of tax lots 300, 400, 1000 and 2000 relative to the uses allowed when the claimants acquired these tax lots. The claim does not establish whether or to what extent the claimants' desired use of tax lot 1400 complies with the standards for land divisions and development under Marion County's acknowledged EFU zone and the provisions of ORS 215 in effect when the claimants acquired this tax lot on January 7, 1985.

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

3. Effect of Regulations on Fair Market Value

In order to establish a valid claim, ORS 197.352(1) requires that the land use 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 $1.1 million as the reduction in the subject property's fair market value due to the regulations that restrict the claimants' desired use of the property. This amount is based on a market analysis included with the claim.

Conclusions

As explained in Section V.(1) of this report, the claimants are Arthur and Lois Endersen who acquired tax lot 300 on July 22, 1954, tax lot 400 on June 12, 1958, tax lot 1000 on March 13, 1965, tax lot 2000 on March 31, 1967, and tax lot 1400 on January 7, 1985. Under ORS

197.352, the claimants are due compensation for land use regulations that restrict the use of the subject property and have the effect of reducing its fair market value. Based on the findings and conclusions in Section V.(2) of this report, laws enacted or adopted since the claimants acquired the subject property restrict the claimants' desired use of the property. The claimants estimate that the effect of the regulations on the fair market value of the property is a reduction of $1.1 million.

Without an appraisal or other documentation, and without verification of whether or the extent to which the claimants' desired use of the subject property was allowed under the standards in effect when they acquired the property, it is not possible to substantiate the specific dollar amount by which the land use regulations have reduced the fair market value of the subject property. Nevertheless, based on the evidence in the record for this claim, the department determines that the fair market value of the subject property has been reduced to some extent 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 restrict the use of the subject property, including applicable provisions of Goals 3 and 14, ORS 215 and OAR 660, division 33, which Marion County has implemented through its current EFU zone. With the exception of provisions of Goals 3 and 14, ORS 215 and OAR 660 in effect when the claimants acquired tax lot 1400, all of these land use regulations were enacted or adopted after the claimants acquired the subject property.

Conclusions

Without a specific development proposal for the subject property, it is not possible for the department to determine all the laws that may apply to a particular use of the property, or whether those laws may fall under one or more of the exemptions under ORS 197.352. It appears that with the exception of provisions of Goals 3 and 14, ORS 215 and OAR 660 in effect when the claimants acquired tax lot 1400, none of the general statutory, goal and rule restrictions on division and development of the claimants' property were in effect when the claimant acquired the subject property. To the extent they were enacted or adopted after the claimants acquired the subject property, these laws are not exempt under ORS 197.352(3)(E).

Laws in effect when the claimants acquired the subject property are exempt under ORS 197.352(3)(E) and will continue to apply to the claimants' use of the property. There may be other laws that continue to apply to the claimants' use of the subject property that have not been identified in the claim. In some cases, it will not be possible to know which laws apply to a use of the subject property until there is a specific proposal for that use. When the claimants seek a building or development permit to carry out a specific use, it may become evident that other state laws apply to that use. 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 subject property based on the use that the claimants have identified. Similarly, this report only addresses the exemptions provided for under ORS 197.352(3) that are clearly applicable, given the information provided to the department in the claim. The claimants should be aware that the less information they have provided to the department in the claim, the greater the possibility that there may be additional laws that will later be determined to continue to apply to their use of the subject property.

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 laws that restrict the use of the subject 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 subject 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 restrict the claimants' desired use of the subject property. The claim asserts that existing state land use regulations enforced by the Commission or the department have the effect of reducing the fair market value of the subject property by $1.1 million. However, because the claim does not provide an appraisal or other relevant evidence demonstrating that the land use regulations described in Section V.(2) reduce the fair market value of the subject property, a specific amount of compensation cannot be determined. In order to determine a specific amount of compensation due for this claim, it would also be necessary to verify whether or the extent to which the claimants' desired use of the subject property was allowed under the standards in effect when they acquired the property. Nevertheless, based on the record for this claim, the department has determined that the laws on which the claim is based have reduced the fair market value of the subject 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 Arthur and Lois Endresen to use the subject property for a use permitted at the time they acquired tax lot 300 on July 22, 1954, tax lot 400 on June 12, 1958, tax lot 1000 on March 13, 1965, tax lot 2000 on March 31, 1967, and tax lot 1400 on January 7, 1985.

Conclusions

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 Arthur and Lois Endresen's division of the 205.73-acre subject property into nine parcels obetween 1.95 and 39.00 acres and to their development of a dwelling on each parcel: applicable provisions of Goals 3 and 14, ORS 215 and OAR 660, division 33, enacted or adopted after the claimants acquired each of the tax lots that composes the subject property. These laws will not apply to the claimants only to the extent necessary to allow them to use the subject property for the use described in this report, and only to the extent that use was permitted when they acquired tax lot 300 on July 22, 1954, tax lot 400 on June 12, 1958, tax lot 1000 on March 13, 1965, tax lot 2000 on March 31, 1967, and tax lot 1400 on January 7, 1985.

2. The action by the State of Oregon provides the state's authorization to the claimants to use the property for the use described in this report, subject to the standards in effect on July 22, 1954 (tax lot 300), June 12, 1958 (tax lot 400), March 13, 1965 (tax lot 1000), March 31, 1967 (tax lot 2000) and January 7, 1985 (tax lot 1400). On January 7, 1985, the property was subject to compliance with Goal 3 and OAR 660, division 5, as implemented by Marion County's acknowledged EFU zone, and the applicable provisions 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 subject property may not be used without a permit, license or other form of authorization or consent, the order will not authorize the use of the property unless the claimants first obtain that permit, license or other form of authorization or consent. Such requirements may include, but are not limited to: a building permit, a land use decision, a "permit" as defined in ORS 215.402 or 227.160, other permits or authorizations from local, state or federal agencies and restrictions on the use of the subject property imposed by private parties.

4. Any use of the subject property by the claimants under the terms of the order will remain subject to the following laws: (a) those laws not specified in (1) above; (b) any laws enacted or enforced by a public entity other than the Commission or the department; and (c) those laws not subject to ORS 197.352 including, without limitation, those laws exempted under ORS 197.352(3).

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

VII. COMMENTS ON THE DRAFT STAFF REPORT

The department issued its draft staff report on this claim on October 23, 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. No comments were received.