

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. M118687
(BALLOT MEASURE 37) OF)	
Dan L. Forsea and Sons, Inc., CLAIMANTS)	

Claimants: Dan L. Forsea and Sons, Inc. (the Claimants)

Property: Township 09S, Range 45, Section 14C, Tax lot 600
Township 09S, Range 45, Section 15, Tax lots 1000 and 2100
Township 09S, Range 45, Section 23, Tax lot 500
Township 10S, Section 45, Tax lot 3400
Township 11S, Range 45, Tax lots 400, 500, 2100, 2200, 2800, 2900, 3100, 3200,
and 3300
Township 11S, Range 45, Section 36, Tax lots 100
Township 11S, Range 46, Tax lots 900, 1000 and 1100
Township 11S, Range 46, Section 19, Tax lot 600
Township 12S, Range 45, Tax lot 200
Baker 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 Dan L. Forsea and Sons, Inc.'s use of the subject property: Goal 3, ORS 215 and OAR 660, division 33, enacted or adopted after April 19 and June 1, 1977. These laws will not apply to the claimant only to the extent necessary to allow it to use the subject property for the use described in this report, and only to the extent that use was permitted when it acquired the property on April 19 and June 1, 1977.
2. The action by the State of Oregon provides the state's authorization to the claimant to use the property for the use described in this report, subject to the standards in effect on April 19 and

June 1, 1977. On that date, the property was subject to applicable provisions of Goal 3 and 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 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 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 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 subject property, it may be necessary for the claimant 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 subject property by the claimant.

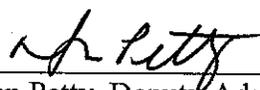
This Order is entered by the Director of the DLCD as a final order of DLCD and the Land Conservation and Development Commission under ORS 197.352, OAR 660-002-0010(8), and OAR 125, division 145, and by the Deputy Administrator for the State Services Division of the DAS as a final order of DAS under ORS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

FOR DLCD AND THE LAND CONSERVATION
AND DEVELOPMENT COMMISSION:



Lane Shetterly, Director
DLCD
Dated this 10th day of May, 2006.

FOR the DEPARTMENT OF ADMINISTRATIVE
SERVICES:



Dugan Petty, Deputy Administrator
DAS, State Services Division
Dated this 10th day of May, 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.

ORS 197.352 (BALLOT MEASURE 37) CLAIM FOR COMPENSATION
OREGON DEPARTMENT OF LAND CONSERVATION AND DEVELOPMENT
Final Staff Report and Recommendation

May 10, 2006

STATE CLAIM NUMBER: M118687
Report A

NAME OF CLAIMANT: Dan L. Forsea and Sons, Inc.

MAILING ADDRESS: 42070 New Bridge Road
Richland, Oregon 97870

PROPERTY IDENTIFICATION:¹

Township 09S, Range 45, Section 14C
Tax lot 600

Township 09S, Range 45, Section 15
Tax lots 1000 and 2100

Township 09S, Range 45, Section 23
Tax lot 500

Township 10S, Section 45
Tax lot 3400

Township 11S, Range 45
Tax lots 400, 500, 2100, 2200, 2800, 2900,
3100, 3200, and 3300

Township 11S, Range 45, Section 36
Tax lots 100

Township 11S, Range 46
Tax lots 900, 1000 and 1100

Township 11S, Range 46, Section 19
Tax lot 600

Township 12S, Range 45
Tax lot 200

Baker County

¹ Numerous tax lots were identified in claim M118687. This staff report only addresses the tax lots identified above. The remaining tax lots are addressed in companion staff Report B.

DATE RECEIVED BY DAS:

June 29, 2005

180-DAY DEADLINE:

May 14, 2006²

I. SUMMARY OF CLAIM

The claimant, Dan L. Forsea and Sons, Inc., seeks compensation in the amount of \$3,560,422 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 have "all land use regulations waived from the date of ownership." The subject property does not have a street address and is located at the locational coordinates listed above in Baker 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 Dan L. Forsea and Sons, Inc.'s use of the subject property: Statewide Planning Goal 3 (Agricultural Lands), ORS 215 and Oregon Administrative Rules (OAR) 660, division 33, enacted or adopted after April 19 and June 1, 1977. These laws will not apply to the claimant only to the extent necessary to allow it to use the subject property for the use described in this report, and only to the extent that use was permitted when it acquired the property on April 19 and June 1, 1977. (See the complete recommendation in Section VI. of this report.)

III. COMMENTS ON THE CLAIM

Comments Received

On September 1, 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.

The comment does 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 letter in the department's claim file.)

² This date reflects 180 days from the date the claim was submitted, as extended by the 139 days that all timelines under Measure 37 were suspended during the pendency of *MacPherson v. Dept. of Admin. Svcs.*, 340 Or 117 (2006).

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 June 29, 2005, for processing under OAR 125, division 145. The claim identifies "all land use regulations from the date of ownership" 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

Map Reference	Tax Lot	Acquisition Date	Document	Owner
11S45	2100	April 19, 1977	Notice of Sale/Assignment	Dan L. Forsea and Sons, Inc.
11S4536	100	April 19, 1977	Notice of Sale/Assignment	Dan L. Forsea and Sons, Inc.
09S4514C	600	June 1, 1977	Warranty Deed	Dan L. Forsea and Sons, Inc.
09S4515	1000	June 1, 1977	Warranty Deed	Dan L. Forsea and Sons, Inc.
09S4515	2100	June 1, 1977	Warranty Deed	Dan L. Forsea and Sons, Inc.

Map Reference	Tax Lot	Acquisition Date	Document	Owner
09S4523	500	June 1, 1977	Warranty Deed	Dan L. Forsea and Sons, Inc.
10S45	3400	June 1, 1977	Warranty Deed	Dan L. Forsea and Sons, Inc.
11S45	400	June 1, 1977	Warranty Deed	Dan L. Forsea and Sons, Inc.
11S45	500	June 1, 1977	Warranty Deed	Dan L. Forsea and Sons, Inc.
11S45	2200	June 1, 1977	Warranty Deed	Dan L. Forsea and Sons, Inc.
11S45	2800	June 1, 1977	Warranty Deed	Dan L. Forsea and Sons, Inc.
11S45	2900	June 1, 1977	Warranty Deed	Dan L. Forsea and Sons, Inc.
11S45	3100	June 1, 1977	Warranty Deed	Dan L. Forsea and Sons, Inc.
11S45	3200	June 1, 1977	Warranty Deed	Dan L. Forsea and Sons, Inc.
11S45	3300	June 1, 1977	Warranty Deed	Dan L. Forsea and Sons, Inc.
11S46	900	June 1, 1977	Warranty Deed	Dan L. Forsea and Sons, Inc.
11S46	1000	June 1, 1977	Warranty Deed	Dan L. Forsea and Sons, Inc.
11S46	1100	June 1, 1977	Warranty Deed	Dan L. Forsea and Sons, Inc.
11S4619	600	June 1, 1977	Warranty Deed	Dan L. Forsea and Sons, Inc.
12S45	200	June 1, 1977	Warranty Deed	Dan L. Forsea and Sons, Inc.

The claimant, Dan L. Forsea and Sons, Inc., acquired the subject property from Dan L. Forsea and Sons, a partnership, as reflected by the documents referenced above, included with the claim. Dan L. Forsea and Sons, Inc. is a domestic business corporation registered with the Oregon Secretary of State. The Baker County Assessor's Office confirms the claimant's current ownership of the subject property.

Conclusions

The claimant, Dan L. Forsea and Sons, Inc., is the "owner" of the subject property as that term is defined by ORS 197.352(11)(C), as of April 19 and June 1, 1977. Although a corporation can be a "family member" of an owner as that term is defined by ORS 197.352(11)(C), an "owner" that is a corporate entity cannot claim an individual as a "family member." Therefore, none of the individuals who transferred the subject property into Dan L. Forsea and Sons, Inc. can be considered a "family member" of Dan L. Forsea and Sons, Inc.

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 acquired the property.

Findings of Fact

The claim indicates the claimant's desire to have "all land use regulations waived from the date of ownership." The claimant has declined to identify any desired use of the property.

The property is currently zoned by Baker County as Exclusive Farm Use (EFU) zone pursuant to the applicable provisions of state law that require such zoning. The claimant's property is zoned EFU as required by Goal 3 in accordance with ORS 215 and OAR 660, division 33, 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.

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 the 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.)

The claimant acquired the subject property after the adoption of the statewide planning goals, but before the Commission acknowledged Baker County's land use regulations to be in compliance with the statewide planning goals pursuant to ORS 197.250 and 197.251. Because the Commission had not acknowledged the county's plan and land use regulations when the claimant acquired the subject property on April 19 and June 1, 1977, the statewide planning goals, and Goal 3 in particular, applied directly to the claimant's property when it acquired the property.⁴

As adopted on January 25, 1975, Goal 3 required that agricultural land be preserved and zoned for EFU pursuant to ORS 215. The Goal 3 standard for land divisions involving property where the local zoning was not acknowledged required that the resulting parcels must be of a size that is "appropriate for the continuation of the existing commercial agricultural enterprise within the area." Further, ORS 215.263 (1973 edition) only authorized the partition of land subject to EFU zoning, and required that all divisions of land subject to EFU zoning comply with the legislative intent set forth in ORS 215.243 (Agricultural Land Use Policy). Thus, the claimant's

³ The claimant's property is "agricultural land" because it contains Natural Resources Conservation Service Class I-VI soils.

⁴ The statewide planning goals became effective on January 25, 1975, and were applicable to legislative land use decisions and some quasi-judicial land use decisions prior to the Commission's acknowledgment of each county's comprehensive plan and implementing regulations. *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); and *1000 Friends of Oregon v. Benton County*, 32 Or App 413 (1978). After the county's plan and land use regulations were acknowledged by the Commission, the statewide planning goals and implementing rules no longer applied directly 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, 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).

opportunity to divide the subject property when it acquired the property in 1977 was limited to land divisions that were consistent with Goal 3, which required that the resulting parcels 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.

Under the Goal 3 standards in effect on April 19 and June 1, 1977, farm dwellings were allowed if they were determined to be “customarily provided in conjunction with farm use” under ORS 215.213(1)(e) (1973 edition). Non-farm dwellings were subject to compliance with ORS 215.213(3) (1973 edition).

The claimant has not identified a desired use of the subject property, and therefore, the claimant has not established whether any future desired divisions of the property would comply with the “commercial” standard for farm parcels under Goal 3 or the standards for non-farm parcels under ORS 215.263 (1973 edition), nor can the claimant establish whether any future desired development on the subject property would satisfy the standards for farm or non-farm dwellings under ORS 215.213.

Conclusions

The current zoning requirements, minimum lot size and dwelling standards established by Goal 3, ORS 215 and OAR 660, division 33, may restrict the claimant’s desired use of the subject property, depending on the nature of that desired use. Because the claimant does not identify a desired use, the claim does not establish whether, or to what extent the claimant’s desired use of the subject property complies with the standards under the requirements of Goal 3, ORS 215 and OAR 660, division 33, in effect when the claimant acquired the subject property on April and June 1, 1977.

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 a claimant has identified. There may be other laws that currently apply to the claimant’s use of the subject 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 which laws apply to a use of the subject 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 \$3,560,422⁵ as the reduction in the subject property's fair market value due to current regulations. This amount is based on the claimant's estimate of fair market value of the property without regulations.

Conclusions

As explained in Section V.(1) of this report, the claimant is Dan L. Forsea and Sons, Inc. who acquired the subject property on April and June 1, 1977. Under ORS 197.352, the claimant is due compensation for land use regulations that restrict the use of the property in a manner that reduces its fair market value. Based on the findings and conclusions in Section V.(2) of this report, laws enacted or adopted since the claimant acquired the subject property may restrict the desired division and development of the property. The claimant estimates the reduction in value due to the restrictions to be \$3,560,422.

Without an appraisal or other documentation and without verification of whether or the extent to which the claimant's desired use of the subject property may be allowed under the standards in effect when it acquired the property, 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 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 statewide planning goals, ORS and OAR, which Baker County has implemented through its current EFU zone. With the exception of provisions of Goal 3 and ORS 215 in effect when the claimant acquired the subject property on April 19 and June 1, 1977, these land use regulations were enacted or adopted after the claimant acquired the 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 Goal 3 and ORS 215 in effect in 1977, the statutory, goal and rule restrictions of the claimant's property were not in effect when the

⁵ This amount represents total compensation sought for all 23 tax lots subject to this claim. This report addresses 20 of those tax lots. The other three tax lots are addressed in Report B.

claimant acquired it, and therefore, these laws are not exempt under ORS 197.352(3)(E). Provisions of Goals 3 and ORS 215 in effect when the claimant acquired the subject property in 1977 are exempt under ORS 197.352(3)(E) and will continue to apply to the property.

Other laws in effect when the claimant acquired the subject property are also 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 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 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. 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 a 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 it has 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 its 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 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 current 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 claimant's use of the subject property. The claim asserts that the laws enforced by the Commission or the department reduce the fair market value of the subject property by \$3,560,422. However, because the claim does not provide an appraisal or other specific documentation establishing how the specified restrictions reduce the fair market value of the subject property, and without verification of whether or the extent to which the claimant's desired use of the property may be allowed under the standards in effect when it acquired 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 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 Dan L. Forsea and Sons, Inc. to use the subject property for a use permitted at the time it acquired the property on April 19 and June 1, 1977.

The claim does not identify a desired use of the property. Rather, the claimant states his desire to have "all land use regulations waived from the date of ownership." ORS 197.352 does not provide the department authorization to provide the relief the claimant seeks. ORS 197.352(8) states that "in lieu of payment of just compensation under this section, the governing body responsible for enacting the land use regulation may modify, remove, or not to apply [*sic*] the land use regulation or land use regulations to allow the owner the use the property for a use permitted at the time the owner acquired the property." This section does not allow the department to "waive" regulations independent of a "use" that was permitted when the owner acquired the property but that is now restricted because of those regulations. Rather, the statute requires that regulations that are modified, removed or not applied ("waived") must be those necessary in order to allow the owner to use the property for *a use* that was permitted when the owner acquired the property. Accordingly, in this claim, the department is authorized to waive only those regulations necessary to allow the claimant a use that was permitted when it acquired the property in 1977. Depending on the nature of any use desired by the claimant in the future, an additional claim under ORS 197.352 may be required in order for the claimant to obtain waivers of regulations necessary to allow that use.

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 Dan L. Forsea and Sons, Inc.'s use of the subject property: Goal 3, ORS 215 and OAR 660, division 33, enacted or adopted after April 19 and June 1, 1977. These laws will not apply to the claimant only to the extent necessary to allow it to use the subject property for the use described in this report, and only to the extent that use was permitted when it acquired the property on April 19 and June 1, 1977.
2. The action by the State of Oregon provides the state's authorization to the claimant to use the property for the use described in this report, subject to the standards in effect on April 19 and June 1, 1977. On that date, the property was subject to applicable provisions of Goal 3 and 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 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 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 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 subject property, it may be necessary for the claimant 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 subject property by the claimant.

VII. COMMENTS ON THE DRAFT STAFF REPORT

The department issued its draft staff report on this claim on April 21, 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. Comments received have been taken into account by the department in the issuance of this final report.

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 B
COMPENSATION UNDER ORS 197.352) CLAIM NO. M 118687
(BALLOT MEASURE 37) OF)
Dan L. Forsea and Sons, Inc, CLAIMANT)

Claimant: Dan L. Forsea and Sons, Inc (the Claimant)

Property: Township 09S, Range 45, Section 23BD, Tax lot 200
 Township 09S, Range 45, Tax lot 3601
 Township 11S, Range 45, Tax lot 1501
 Baker 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 Deputy 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 10th day of May, 2006.

FOR the DEPARTMENT OF
ADMINISTRATIVE SERVICES:



Dugan Petty, Deputy Administrator
DAS, State Services Division

Dated this 10th day of May, 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 197.352¹, 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)

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.

ORS 197.352 (BALLOT MEASURE 37) CLAIM FOR COMPENSATION
OREGON DEPARTMENT OF LAND CONSERVATION AND DEVELOPMENT
Final Staff Report and Recommendation

May 10, 2006

STATE CLAIM NUMBER: M118687
Report B

NAME OF CLAIMANT: Dan L. Forsea and Sons, Inc.

MAILING ADDRESS: 42070 New Bridge Road
Richland, Oregon 97870

PROPERTY IDENTIFICATION:¹ Township 09S, Range 45, Section 23BD
Tax lot 200

Township 09S, Range 45
Tax lot 3601

Township 11S, Range 45
Tax lot 1501

Baker County

DATE RECEIVED BY DAS: June 29, 2005

180-DAY DEADLINE: May 14, 2006²

I. SUMMARY OF CLAIM

The claimant, Dan L. Forsea and Sons, Inc., seeks compensation in the amount of \$3,560,422 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 have “all land use regulations waived from the date of ownership.” The subject property does not have a street address and is located at the locational coordinates listed above in Baker County. (See claim.)

¹ Numerous tax lots were identified in claim M118687. This staff report only addresses the tax lots identified above. The remaining tax lots are addressed in companion staff Report A.

² This date reflects 180 days from the date the claim was submitted, as extended by the 139 days that all timelines under Measure 37 were suspended during the pendency of *MacPherson v. Dept. of Admin. Svcs.*, 340 Or 117 (2006).

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 for tax lots 200, 3601 and 1501 because no laws have been enacted or adopted since the claimant acquired the subject property in 1997 and 1998 that restrict the claimant's use of the property relative to the uses allowed when the claimant acquired it in 1997 and 1998. (See the complete recommendation in Section VI. of this report.)

III. COMMENTS ON THE CLAIM

Comments Received

On September 1, 2005, 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, one written comment, evidence or information was received in response to the 10-day notice.

The comment does 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 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 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 June 29, 2005, for processing under OAR 125, division 145. The claim identifies "all land use regulations from the date of ownership" 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

Map Reference	Tax Lot	Acquisition Date	Document	Owner
09S4523BD	200	July 14, 1997	Warranty Deed	Dan L. Forsea and Sons, Inc.
09S45	3601	April 29, 1998	Bargain and Sale Deed	Dan L. Forsea and Sons, Inc.
11S45	1501	August 5, 1998	Warranty Deed	Dan L. Forsea and Sons, Inc.

The claimant, Dan L. Forsea and Sons, Inc., acquired the subject tax lots in 1997 and 1998, as reflected by the documents referenced above, included with the claim. Dan L. Forsea and Sons, Inc. is a domestic business corporation registered with the Oregon Secretary of State. The Baker County Assessor’s Office confirms the claimant’s the current ownership of the subject property.

Conclusions

The claimant, Dan L. Forsea and Sons, Inc., is an “owner” of the subject property as that term is defined by ORS 197.352(11)(C), as of July 14, 1997, April 29, 1998, and August 5, 1998. Although a corporation can be a “family member” of an owner as that term is defined by ORS 197.352(11)(A), an “owner” that is a corporate entity cannot claim an individual as a “family member.” Therefore, none of the individuals who transferred the subject property to Dan L. Forsea and Sons, Inc. can be considered a “family member” of Dan L. Forsea and Sons, Inc.

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 the claimant's desire to have "all land use regulations waived from the date of ownership." The claimant has declined to identify any desired use of the property.

The property is currently zoned by Baker County as Exclusive Farm Use (EFU) zone pursuant to the applicable provisions of state law that require such zoning. The claimant's property is zoned EFU as required by Goal 3 in accordance with ORS 215 and OAR 660, division 33, 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.

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 the 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.)

When the claimant acquired the subject tax lots in 1997 and 1998, the property was subject to all of the regulations currently in effect, as described above.

Conclusions

The current zoning requirements established by Goal 3 and provisions applicable to land zoned agricultural in ORS 215 and OAR 660, division 33, were all enacted or adopted before the claimant, Dan L. Forsea and Sons, Inc., acquired the subject tax lots in 1997 and 1998. Regardless of any future use the claimant may desire, no laws have been enacted or adopted since the claimant acquired the subject tax lots in 1997 and 1998 that restrict the claimant's use of the property relative to the uses allowed when the claimant acquired the subject tax lots in 1997 and 1998.

³ The claimant's property is "agricultural land" because it contains Natural Resources Conservation Service Class I-VI soils.

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 \$3,560,422⁴ as the reduction in the subject property’s fair market value due to current regulations. This amount is based on the claimant’s estimate of fair market value of the property without regulations.

Conclusions

As explained in Section V.(1) of this report, Dan L. Forsea and Sons, Inc. is the claimant. It acquired the subject property 1997 and 1998. No state laws enacted or adopted since the claimant acquired the subject property restrict the use of the property relative to the uses allowed in 1997 and 1998. Therefore, the fair market value of the subject property has not been reduced 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 does not identify any state land use regulations enacted or adopted since the claimant acquired the subject tax lots that restrict the use of the property relative to what would have been allowed when the claimant acquired the subject tax lots in 1997 and 1998. As set forth in Section V.(2) of this report, the state land use regulations restricting the claimant’s desired use of the subject property were in effect when the claimant acquired the property in 1997 and 1998.

Conclusions

All of the state land use regulations that restrict the claimant’s desired use of the subject property were in effect when the claimant acquired the property. Therefore, these state land use regulations are exempt under ORS 197.352(3)(E), which exempts laws in effect when the claimant acquired 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 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

⁴ This amount represents the total compensation sought for all 23 tax lots subject to this claim. This report addresses three of those tax lots. The other 20 tax lots are addressed in Report A.

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 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 use of the subject property relative to what was permitted when the claimant acquired it in 1997 and 1998 and do not reduce the fair market value of the property. All state laws restricting the use of the subject property were in effect when the claimant acquired the property and are exempt under ORS 197.352(3)(E).

Conclusions

Based on the record and the foregoing findings and conclusions, the claimant has not established that it is entitled to relief under ORS 197.352(1) as a result of land use regulations enforced by the Commission or the department because no laws have been enacted or adopted since the claimant acquired the subject property in 1997 and 1998 that restrict the claimant's use of the property relative to the uses allowed when the claimant acquired it in 1997 and 1998. Therefore, the department staff recommends that this claim be denied.

VII. COMMENTS ON THE DRAFT STAFF REPORT

The department issued its draft staff report on this claim on April 21, 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. Comments received have been taken into account by the department in the issuance of this final report.