

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. M129694  
(BALLOT MEASURE 37) OF )  
Forever Green Forests, LLC, CLAIMANT )

Claimant: Forever Green Forests, LLC (the Claimant)

Property: Township 3N, Range 5W, Section 33, Tax lot 6300;<sup>1</sup> and  
Township 3N, Range 5W, Section 32, Tax lot 100  
Washington County (the property)

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

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

ORDER

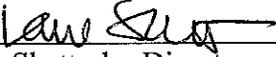
The Claim is denied as to laws administered by DLCD and the Land Conservation and Development Commission (LCDC) for the reasons set forth in the DLCD Report.

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.

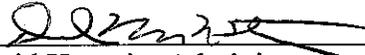
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<sup>1</sup> The claim identifies a portion of the subject property as Township 3N, Range 5W, Section 33, tax lot 6400. However, based on maps and a preliminary title report submitted with the claim, the claim appears to be for tax lot 6300.

FOR DLCD AND THE LAND  
CONSERVATION AND  
DEVELOPMENT COMMISSION:

  
\_\_\_\_\_  
Lane Shetterly, Director  
DLCD  
Dated this 8<sup>th</sup> day of January, 2007.

FOR THE DEPARTMENT OF  
ADMINISTRATIVE SERVICES:

  
\_\_\_\_\_  
David Hartwig, Administrator  
DAS, State Services Division  
Dated this 8<sup>th</sup> day of January, 2007.

**NOTICE OF RIGHT TO APPEAL OR OTHER JUDICIAL RELIEF**

You are entitled, or may be entitled, to the following judicial remedies:

1. Judicial review under ORS 183.484: Judicial review under ORS 183.484 may be obtained by filing a petition for review within 60 days from the service of this order. A petition for judicial review under ORS 183.484 may be filed in the Circuit Court for Marion County or the Circuit Court in the county in which you reside.
2. A cause of action under ORS 197.352 (Measure 37 (2004)): If a land use regulation continues to apply to the subject property more than 180 days after the present owner of the property has made written demand for compensation under ORS 197.352, the present owner of the property, or any interest therein, shall have a cause of action in the circuit court in which the real property is located.

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

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

January 8, 2007

**STATE CLAIM NUMBER:** M129694

**NAME OF CLAIMANT:** Forever Green Forests, LLC

**MAILING ADDRESS:** 696 Country Club Road  
Eugene, Oregon 97401

**PROPERTY IDENTIFICATION:** Township 3N, Range 5W, Section 33  
Tax lot 6300;<sup>1</sup> and  
Township 3N, Range 5W, Section 32  
Tax lot 100  
Washington County

**OTHER CONTACT INFORMATION:** Robert Smejkal  
PO Box 654  
Eugene, Oregon 97440

**DATE RECEIVED BY DAS:** July 17, 2006

**180-DAY DEADLINE:** January 13, 2007

**I. SUMMARY OF CLAIM**

The claimant, Forever Green Forests, LLC, seeks compensation in the amount of \$1,598,000 for the reduction in fair market value as a result of land use regulations that are alleged to restrict the use of certain private real property. The claimant desires compensation or the right to divide the 49.33-acre subject property into 33 parcels and establish a dwelling on each new parcel.<sup>2</sup> The subject property is located near Timber, in Washington County. (See claim.)

**II. SUMMARY OF STAFF RECOMMENDATION**

Based on the findings and conclusions set forth below, the Department of Land Conservation and Development (the department) has determined that the claim is not valid because the claimant's

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<sup>1</sup> The claim identifies a portion of the subject property as Township 3N, Range 5W, Section 33, tax lot 6400. However, based on maps and a preliminary title report submitted with the claim, the claim appears to be for tax lot 6300.

<sup>2</sup> The subject property includes two tax lots. Tax lot 6300 consists of approximately nine acres. Tax lot 100 consists of 40.33 acres.

desired use of the subject property was prohibited under the laws in effect when the claimant acquired the property in 1999. (See the complete recommendation in Section VI. of this report.)

### **III. COMMENTS ON THE CLAIM**

#### **Comments Received**

On October 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, one written comment 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 July 17, 2006, for processing under OAR 125, division 145. The claim identifies Senate Bill 100, Statewide Planning Goal 4 (Forest Lands), provisions of ORS 197 and 215 and provisions of OAR 660, divisions 6, and 15, 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, Forever Green Forests, LLC,<sup>3</sup> acquired the subject property on August 17, 1999, as reflected by a statutory warranty deed included with the claim. The Washington County Assessor’s Office confirms the claimant’s current ownership of the subject property.

### Conclusions

The claimant, Forever Green Forests, LLC, is an “owner” of the subject property as that term is defined by ORS 197.352(11)(C), as of August 17, 1999.<sup>4</sup>

### 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 49.33-acre subject property into 33 parcels and to develop a dwelling on each parcel, and that state and local land use regulations prevent the desired use.<sup>5</sup>

The claim is based on the applicable provisions of state law that require forest zoning and restrict uses on land zoned for exclusive forest use. The claimant’s property is zoned EFC as required by Goal 4, in accordance with ORS 215 and OAR 660, division 6, because the claimant’s property is “forest land” as defined by Goal 4. Goal 4 became effective on January 25, 1975,

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<sup>3</sup> Forever Green Forests, LLC is a domestic limited liability company registered with the Oregon Secretary of State.

<sup>4</sup> The claim indicates that James A. Smejkal, who conveyed the property to the claimant in 1999 and who is presently a member of the LLC, acquired the property in 1959. Under ORS 197.352(11)(A), legal entities can be “family members” of individuals who are owners of property under ORS 197.352(11)(C). However, legal entities cannot have family members under the statute. Therefore, the individual who transferred property to the LLC is not considered a family member under the definition of family member in ORS 197.352(11)(A).

<sup>5</sup> The claimant summarily cites numerous state land use laws as applicable to this claim, but does not establish how the laws either apply to the claimant’s desired use of the subject property or restrict its use with the effect of reducing its fair market value. On their face, most of the regulations either do not apply to the claimant’s property or do not restrict the claimant’s desired use of the property in a manner that reduces its fair market value. This report addresses only those regulations that the department finds are applicable to and restrict the claimant’s use of the subject property, based on the claimant’s description of his desired use.

and requires that forest land be zoned for forest use (see statutory and rule history under OAR 660-015-0000(4)). The forest land administrative rules (OAR 660, division 6) became effective on September 1, 1982, and ORS 215.705 to 215.755 and 215.780 became effective on November 4, 1993 (Chapter 792, Oregon Laws 1993). OAR 660-006-0026 and 660-006-0027 were amended on March 1, 1994, to implement those statutes.

Together, ORS 215.705 to 215.755 and 215.780 and OAR 660, division 6, enacted or adopted pursuant to Goal 4, prohibit the division of forest land into parcels less than 80 acres and establish standards for development of dwellings on existing or proposed parcels on those lands.

The claimant acquired the subject property on August 17, 1999. At that time, it was subject to the current laws in effect, as described above.

### **Conclusions**

The current zoning requirements, minimum lot size and dwelling standards established by Goal 4 and provisions applicable to land zoned for forest use in ORS 215 and OAR 660, division 6, were all enacted or adopted before claimant, Forever Green Forests, LLC, acquired the subject property on August 17, 1999. These land use regulations prohibit the claimant's desired use of the subject property. Laws enacted or adopted since the claimant acquired the subject property in 1999 do not restrict the claimant's desired use of the property relative to uses allowed when the claimant acquired it in 1999.

### **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 \$1,598,000 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 the claimant's assessment of the property's value.

### **Conclusions**

As explained in Section V.(1) of this report, the claimant is Forever Green Forests, LLC, which acquired the subject property on August 17, 1999. The claimant has not established that it is entitled to compensation under ORS 197.352 because 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 1999. 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 claimant's desired use of the subject property, including applicable provisions of Goal 4, ORS 215 and OAR 660, division 6, which Washington County has implemented through its EFC zone. All of these regulations were enacted or adopted before the claimant acquired the property on August 17, 1999.

#### **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 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 1999 and do not reduce the fair market value of the property. All state laws restricting the use of the subject property 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 are entitled to relief under ORS 197.352(1) as a result of land use regulations enforced by the Commission or the department because the claimant's desired use of the property was prohibited when it acquired the subject property on August 17, 1999. 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 December 18, 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.