

**BALLOT MEASURE 37 (CHAPTER 1, OREGON LAWS 2005)  
CLAIM FOR COMPENSATION**

**OREGON DEPARTMENT OF LAND CONSERVATION AND DEVELOPMENT**

**Final Staff Report and Recommendation**

August 12, 2005

**STATE CLAIM NUMBER:** M119869

**NAME OF CLAIMANT:** Hat Brand Land & Livestock, LLC

**MAILING ADDRESS:** P.O. Box 1003  
Baker City, Oregon 97814

**IDENTIFICATION OF PROPERTY:** Township 10S, Range 41E, Section 4  
Tax Lot 1000

Township 10S, Range 41E, Section 5  
Tax Lot 1000

Township 10S, Range 41E, Section 6  
Tax Lot 1300

Township 10S, Range 41E, Section 7  
Tax Lot 900

Township 10S, Range 41E, Section 7  
Tax Lot 1400

Township 10S, Range 41E, Section 8  
Tax Lot 1000

Township 10S, Range 41E, Section 8  
Tax Lots 1500 and 1800

Township 10S, Range 41E, Section 9  
Tax Lot 1000

Township 10S, Range 41E, Section 9  
Tax Lot 1900

Township 10S, Range 41E, Section 16  
Tax Lot 1900

Township 10S, Range 41E, Section 17  
Tax Lot 1400

Township 10S, Range 41E, Section 17  
Tax Lot 3500

Township 10S, Range 41E, Section 18  
Tax Lot 1400

Township 10S, Range 41E, Section 20  
Tax lot 1400

Township 10S, Range 41E, Section 21  
Tax Lot 1400

Township 10S, Range 41E, Section 28  
Tax Lot 1400

Township 10S, Range 41E, Section 29  
Tax Lot 1400

Township 10S, Range 41E, Section 32  
Tax Lot 1400  
All in Baker County

**OTHER CONTACT INFORMATION:**

Brent C. Gyllenberg  
Acting Manager and Registered Agent  
Hat Brand Land & Livestock  
225 H Street  
Baker City, Oregon 97814

Janice E. Gyllenberg and John P. Gyllenberg  
22869 Sumpter Stage HWY  
Baker City, Oregon 97814

**DATE RECEIVED BY DAS:**

February 22, 2005

**180-DAY DEADLINE:**

August 21, 2005

**I. CLAIM**

The claimant, Hat Brand Land & Livestock, LLC, seeks compensation in the amount of \$1,493,880 for the reduction in fair market value as a result of certain 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 property into smaller parcels or lots. The property consists of eight Tax

Lots totaling 4,434.46-acres located southeast of Baker City, on both sides of Interstate Highway 84. (See the 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 state laws enforced by the Land Conservation and Development Commission (the Commission) or the department, not apply to the claimant to allow it to divide the subject property into lots or parcels: the applicable provisions of ORS 215 and OAR 660, division 33 that took effect after May 24, 2004. These laws will not apply to the claimant's use of the property only to the extent necessary to allow Hat Brand Land & Livestock, LLC, a use of the property permitted at the time it acquired the property that is the subject of this claim on May 24, 2004. The department acknowledges that the relief recommended in this report will not allow the claimant to use the property in the manner set forth in the claim. (See the complete recommendation in Section VI. of this report.)

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

### **Comments Received**

On February 10, 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, no written comments, evidence or information were received in response to the 10-day notice.

## **IV. TIMELINESS OF CLAIM**

### **Requirement**

Ballot Measure 37, Section 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 the measure (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 the measure (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 February 22, 2005, for processing under OAR 125, division 145. The claim cites all of ORS 97 and 215, and OAR 660, division 33 (see the claim),

all of which were enacted prior to December 2, 2004, the effective date of Measure 37. (See citations of statutory and administrative rule history of the Oregon Revised Statutes and Oregon Administrative Rules.)

### **Conclusions**

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

## **V. ANALYSIS OF CLAIM**

### **1. Ownership**

Ballot Measure 37 provides for payment of compensation or relief from specific laws for “owners” as that term is defined in the Measure. Ballot Measure 37, Section 11(C) defines “owner” as “the present owner of the property, or any interest therein.”

### **Findings of Fact**

The claim states that the property was acquired October 31, 1966, and includes a Warranty Deed for the October 31, 1966 sale by John and Pauline Dougharity to John P. Gyllenberg and Janice E. Gyllenberg of described parcels in Sections 7, 8, 9, 16, 17, 18, 20, 21, 28, 29, and 32, Township 10 South, Range 41 East, of the Willamette Meridian (plus other land in Township 10 South, Range 40 East that is not included in this claim). On May 24, 2004, the Gyllenbergs conveyed this property to Hat Brand Land & Livestock, LLC.<sup>1</sup> Janice Gyllenberg is a member of the limited liability company.<sup>2</sup>

### **Conclusions**

Hat Brand Land & Livestock, LLC is an “owner” of the land totaling approximately 4,434.46-acres that is the subject of this claim, as that term is defined under Section 11(C) of Ballot Measure 37. Janice E. Gyllenberg is a “family member” as that term is defined under Section 11(A) of Ballot Measure 37, because she is an owner of Hat Brand Land and Livestock, LLC.

### **2. The Laws that Are the Basis for the Claim**

In order to establish a valid claim, Section 1 of Ballot Measure 37 requires, in part, that a law must restrict the claimant’s use of private real property in a manner that reduces the fair market

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<sup>1</sup> Secretary of State Corporation Division records show that the claimant has been registered in Oregon as an active limited liability company since May 26, 2004.

<sup>2</sup> See copy of June 1, 2005, Baker County Final Planning Report in the department’s claim file.

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 cites “all land use regulations” generally, and ORS 97<sup>3</sup> and 215 and OAR 660 effective October 31, 1966, as the land use regulations that make the property “not available for sale in parcels less than 320 acres.”

The claim is based, in part, on Baker County’s current Exclusive Farm Use (EFU) Zone and the applicable provisions of state law that require such zoning. The claimant’s property is zoned EFU as required by Goal 3 in accord with OAR 660, division 33, and ORS 215 because the claimant’s property is “Agricultural Land” as defined by Goal 3.<sup>4</sup> 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, 215.780, and OAR 660, division 33, as applied by Goal 3, do not allow the subject property to be divided into parcels less than 80-acres and establish standards for allowing the existing or any proposed parcel(s) to have farm or non-farm dwellings on them.

ORS 215.780 established an 80-acre or 160-acre minimum size for the creation of new lots or parcels in EFU zones (160 acres if designated rangeland) and became effective November 4, 1993 (chapter 792, Oregon Laws 1993). ORS 215.263 (2003 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 implements 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. Subsequent amendments to comply with HB 3326, (chapter 704, Oregon Laws 2001, and effective January 1, 2002) were adopted by the Commission effective May 22, 2002. (See citations of administrative rule history for OAR 660 033 0100, 0130 and 0135.)

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<sup>3</sup> ORS 97 addresses Rights and Duties Relating to Cemeteries, Human Bodies and Anatomical Gifts, and so does not appear to apply to this claim. Claimant may have intended to cite ORS 197: Comprehensive Land Use Planning Coordination. While 197 does address land use, it generally does not contain regulations that restrict the use of the claimant’s real property, and so it also does not apply to this claim.

<sup>4</sup> The claimant’s property is “Agricultural Land” as defined under Statewide Planning Goal 3 because it is composed predominately of NRCS Class III, IV, and VII soils. (See June 1997 Soil Survey of Baker County Area, Oregon, property located on sheet # 61, 71 and 80, and Table 5; OAR 660-033-0020.)

The property was acquired by a "family member" of the present owner in 1966. At that time, Statewide Planning Goal 3 and administrative rules were not in effect. Provisions of ORS 215 were adopted in 1963, but did not directly limit the use of the subject property.

The property had no zoning at the time of family acquisition in 1966. Baker County zoned the property Exclusive Farm Use (EFU), the current zone, in 1985. In accordance with Goal 3, ORS 215, and OAR 660, division 33, this zone requires a minimum parcel or lot size of 80-acres for irrigated land and 160-acres for non-irrigated land, and limits the development of farm and non-farm dwellings.<sup>5</sup>

### **Conclusion**

The zoning requirements and minimum lot size and dwelling standards established by ORS 215 and OAR 660, division 33, were all adopted after the claimant's family acquired the property that is the subject of this claim and therefore restrict the zoning, use and division of the subject property. Therefore, laws enforced since 1966 restrict the use of the property relative to the uses allowed when the property was acquired in 1966.

### **3. Effect of Regulations on Fair Market Value**

In order to establish a valid claim, Section 1 of Ballot Measure 37 requires that any laws 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 alleges a fair market value reduction of \$1,493,880 due to land use regulations, based on "Baker County sales of 5, 40-acres January 1, 2003 – February 9, 2005." The claim includes excerpts from a "Smith appraisal," which estimates a current valuation of \$450,070 with land use restrictions, a value of \$1,943,950 without land use restrictions, and a "cost of land use law" value of \$1,493,880 as the difference between the two values. Because the "Smith appraisal" documents are not complete, it is not clear whether the claim includes a certified appraisal of the property that supports the claimed amounts. In addition, the current market value estimate in the purported appraisal is significantly lower than the County Assessor's estimate<sup>6</sup>, which leads to a value reduction of \$1,194,350 instead of the claimed \$1,493,880, assuming that claimant's estimated market value without land use regulations is correct.

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<sup>5</sup> See Baker County Zoning Ordinance sections 301.01 D, N & O; 301.02 N; 301.03B 2); and 301.05 A, B, C 1); & E, in the department's claim file.

<sup>6</sup> The Baker County Assessor estimates the total current market value of the eight tax lots as \$749,600: \$640 for tax lot 900, \$53,550 for Tax lot 1900, \$125,520 for tax lot 1000, 49,660 for Tax lot 1300, 465,040 for Tax lot 1400, \$16,210 for Tax lot 1500, \$15,850 for tax lot 1800, and \$23,130 for Tax lot 3500.

## **Conclusions**

As explained in section V.(1) of this report, the current owner of the subject properties is Hat Brand Land & Livestock, LLC. Janice Gyllenberg is a member (owner) of the limited liability company, and thus a family member of the LLC under Measure 37. Janice Gyllenberg acquired an interest in the subject property in 1966. Thus, under Ballot Measure 37, Hat Brand Land & Livestock, LLC is due compensation for land use regulations that restrict the use of the subject property in a manner that reduces its fair market value.

Based on the findings and conclusions in section V. (2) of this report, laws adopted since the property was acquired in 1966 restrict division of the subject property. The claim asserts the reduction in value due to these restrictions to be \$1,493,880. However, without an appraisal or other documentation, it is not possible to substantiate the specific dollar amount the claimant demand for compensation. Nevertheless, based on the submitted information, the department determines that it is more likely than not that there has been some reduction in the fair market value of the subject property as a result of land use regulations enforced by the Commission or the department.

## **4. Exemptions Under Section 3 of Measure 37**

Ballot Measure 37 does not apply to certain laws. In addition, under Section 3 of the Measure, certain types of laws are exempt from the Measure.

## **Findings of Fact**

The claim cites all regulations of ORS 97<sup>7</sup> and 215, and OAR 660 that were effective October 31, 1966. (See the claim.) Provisions of ORS 215 and OAR 660, qualify as “land use regulations” under the Measure, and, except for some provisions of ORS 215, were adopted after the claimant’s family member acquired the subject property in 1966.

## **Conclusions**

Without a complete list, it is impossible for the department to determine all of 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 Measure 37. It does appear that the general statutory and rule restrictions on minimum lot size, residential development and use of Agricultural Land apply to the owner’s anticipated use of the property, and for the most part these laws became effective after a family member of the claimant acquired the property. The laws addressed in this report that became effective after 1966 are not exempt under subsection 3(E) of Measure 37. Certain provisions of ORS 215 that were enacted prior to 1966 are exempt.

Laws in effect when the claimant acquired the property are exempt under Section 3(E) of Measure 37, 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 property because they were not identified in the claim. In some cases it will not be possible to know what laws apply to a use of property

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<sup>7</sup> ORS 97 does not apply to this claim. See earlier footnote.

until there is a specific proposal for that use. When an owner of property seeks a building or development permit to carry out a specific use, it may become evident that other state laws apply to that use. And, in some cases, some of these laws may be exempt under subsections 3(A) to 3(D) of Measure 37.

This report addresses only those state laws that are identified in the claim, or that the department is certain apply to the property based on the use(s) that the claimant has identified. Similarly, this report only addresses the exemptions provided for under section (3) of Measure 37 that are clearly applicable given the information provided to the department in the claim. Claimant should be aware that the less information they provide to the department in their 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 property.

## **VI. FORM OF RELIEF**

Section 1 of Measure 37 provides for payment of compensation to an owner of private real property if the Commission or the department has enacted or enforced a law that restricts 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 a law 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, that the Director 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 conclusion set forth in this report, laws enforced by the Commission or the department, specifically, ORS 215 and OAR 660, division 33, restrict the division of the subject property into smaller lots or parcels. The laws enforced by the Commission or department reduce the fair market value of the 4,434.4-acre property to some extent. The claim asserts this amount to be \$1,493,880. However, because the claim does not appear to provide an appraisal for how the specified restrictions reduce the fair market value of 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 more likely than not have reduced the fair market value of the property to some extent.

No funds have been appropriated at this time for the payment of claims. In lieu of payment of compensation, Ballot Measure 37 authorizes the department to modify, remove or not apply all or parts of certain land use regulations to the extent necessary to allow Hat Brand Land & Livestock, LLC, to use the subject property for a use permitted at the time it acquired the property on May 24, 2004.

## **Conclusion**

Based on the record, the department recommends that the claim be approved, subject to the following terms:

1. In lieu of compensation under Measure 37, the State of Oregon will not apply the following laws to Hat Brand Land & Livestock, LLC's division of its property: applicable provisions of ORS 215.780 and OAR 660, division 33 enacted after May 24, 2004. These laws will not apply to the claimant's use of the property only to the extent necessary to allow the claimant a use of the property permitted at the time the claimant acquired it on May 24, 2004. The department acknowledges that the relief recommended in this report will not allow the claimant to use the property in the manner set forth in the claim.
2. The action by the State of Oregon in its final order provides the state's authorization to the claimant to use its property subject to the standards in effect on May 24, 2004. On that date, the property was subject to provisions of ORS 92 and 215 and OAR 660, division 33, that are applicable to the use and division of Agricultural Land. These laws generally prohibit the division of the subject property into lots or parcels smaller than 80 acres (160 acres if designated as rangeland).
3. To the extent that any law, order, deed, agreement, or other legally enforceable public or private requirement provides that the property may not be used without a permit, license, or other form of authorization or consent, the final 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 215.412 or ORS 227.160; other permits or authorizations from local, state or federal agencies; and restrictions on the use of property imposed by private parties.
4. Any use of the property by the claimant under the terms of the final 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 Measure 37 including, without limitation, those laws exempted under section (3) of the Measure.
5. Without limiting the generality of the foregoing terms and conditions, in order for the claimant to use the property it may be necessary for them to obtain a decision under Measure 37 from Baker County and any other jurisdiction that enforces land use regulations applicable to use of the property. Nothing in the final order for this claim will relieve the claimant from the necessity of obtaining a decision under Measure 37 from Baker County or other jurisdiction.

## **VII. COMMENTS ON THE DRAFT STAFF REPORT**

The department issued its draft staff report on this claim on July 20, 2005. OAR 125-145-0100(3), provided an opportunity for the claimant or the claimant's authorized agent and any third parties who submitted comments under OAR 125-145-0080 to submit written comments, evidence and information in response to the draft staff report and recommendation. Comments received have been taken into account by the department in the issuance of this final report.