

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

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

September 15, 2005

**STATE CLAIM NUMBER:** M120340

**NAME OF CLAIMANT:** Johnett Toll

**MAILING ADDRESS:** 35112 Manning Creek Road  
Post Office Box 274  
Durkee, Oregon 97905

**PROPERTY IDENTIFICATION:** Township 10S, Range 40E, Section 23  
Tax Lot 200  
Baker County

**DATE RECEIVED BY DAS:** March 25, 2005

**180-DAY DEADLINE:** September 21, 2005

**I. SUMMARY OF CLAIM**

The claimant, Johnett Toll, seeks compensation in the amount of \$50,000 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 establish a lot of record and build a dwelling on her 9.98-acre property. The property is located at 37850 W. Sutton Creek Road, Baker City, 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 Johnett Toll's residential development: Statewide Planning Goal 3 (Agricultural Lands) and Goal 5 (Natural Resources, Scenic and Historic Areas and Open Spaces), ORS 215.700, 215.705, 215.780, 215.799 and 215.800, and applicable provisions of OAR 660, divisions 16 and 33. These laws will not apply to the claimant only to the extent necessary to allow Johnett Toll a use of the property permitted at the time she acquired it in 1981. (See the complete recommendation in Section VI. of this report.)

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

#### **Comments Received**

On April 11, 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 was received in response to the 10-day notice.

The comments do not address whether the claim meets the criteria for relief (compensation or waiver) under Measure 37. Comments concerning the effects a use of the property may have on surrounding areas generally are 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 waiving a state law. (See comment letter in the department's claim file.)

### **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 March 25, 2005, for processing under OAR 125, division 145. The claim identifies OAR 660-033-0135, and ORS 215.799-800 as laws that restrict the use of the property and are the basis for the claim. Only laws that were enacted prior to December 2, 2004, the effective date of Measure 37, are the basis for this claim. (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 claimant, Johnett Toll, acquired the subject property on June 25, 1981, as reflected by a Bargain and Sale Deed included with the claim. A March 25, 2005, Baker County Tax Record indicates that Johnett Toll is the current owner of the subject property.

John Dobbel, Johnette Toll’s father, acquired the property on May 29, 1970, as reflected by a Warranty Deed provided by the claimant. (See department’s claim file.)

### **Conclusions**

The claimant, Johnett Toll, is an “owner” of the subject property, as that term is defined by Section 11(C) of Ballot Measure 37, as of June 25, 1981. Family ownership began in 1970, when John Dobbel, Johnette Toll’s father acquired the property.

### **2. The Laws that are the Basis for this 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 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 to the State of Oregon does not clearly indicate a desired use for this property. A Baker County staff report prepared for a Measure 37 claim filed by the claimant with the county indicates that Johnett Toll desires to build a house on the subject property.<sup>1</sup> The county’s Exclusive Farm Use (EFU) zoning and a wildlife habitat overlay zone prevent the claimant from building a house on this 9.98-acre property.

The claim is based, in part, on Baker County’s current EFU Zone and the applicable provisions of state law that require such zoning. The claimant’s property is zoned EFU as required by Statewide Planning 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. 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.

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<sup>1</sup> Ms. Toll confirmed this intent during an August 10, 2005, telephone conversation with department staff.

Current land use regulations, particularly ORS 215.700-705, 215.780 and OAR 660, division 33, as applied by Goal 3, establish standards for the development of a farm or non-farm dwelling on the existing parcel.

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. 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.)

Statewide Planning Goal 5 became effective January 25, 1975. The administrative rule implementing Goal 5, OAR 660, division 16 (Requirements and Application Procedures for Complying with Goal 5), became effective May 18, 1981, but did not apply to landowners until local jurisdictions implemented the Goal 5 process.<sup>2</sup> Baker County's Big Game Habitat Overlay Zone was applied to subject property in 1986 and generally requires a minimum parcel size of 40 acres for a non-farm or lot of record dwelling.

The claimant's family has owned the property since 1970, prior to the establishment of the Statewide Planning Goals and their implementing statutes and rules. At that time the property was subject to provisions of ORS 215 then in effect. The County zoning code at that time did not apply a specific zone but allowed a one-acre minimum lot size on Agricultural Land.

## **Conclusions**

Lot size and dwelling standards established by amendments to Statewide Planning Goal 3, amendments to ORS 215, and OAR 660, division 33, adopted since the claimant's family acquired the property in 1970, do not allow the approval of dwellings as may have been possible in 1970. Laws adopted since 1970, including those implemented by Baker County's Big Game Habitat Overlay Zone, adopted in 1986 to comply with Statewide Planning Goal 5, restrict the use of the property from what could have been done when the property was acquired by the claimant's family in 1970.

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 that the claimant has identified. There may be other laws that currently apply to the claimant's use of the 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 what 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.

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<sup>2</sup> OAR division 23, Procedures and Requirements for Complying with Goal 5, and including Section 0110, Wildlife Habitat, became effective September 1, 1996.

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

In order to establish a valid claim, Section 1 of Ballot Measure 37 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 informal estimate of \$50,000 as the reduction in the property’s fair market value, as a result of current regulations. No basis was stated for the estimated reduction in fair market value.

#### **Conclusions**

As explained in Section V. (1) of this report, Johnett Toll is a current owner, who acquired the property on June 25, 1981. Ms. Toll’s family acquired the property in 1970. Under Ballot Measure 37, Johnett Toll 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 1970 restrict the claimant’s ability to site a dwelling on the subject property.

Without an appraisal or other documentation, 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 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 land use regulations. In addition, under Section 3 of the Measure, certain types of laws are exempt from the Measure.

#### **Findings of Fact**

The claim includes reference to state land use regulations that restrict the use of the property relative to what would have been allowed in 1970, when the property was acquired by the claimant’s family. These provisions include Statewide Planning Goal 3 (Agricultural Lands) and applicable provisions of ORS 215 and OAR 660, division 33, which Baker County has implemented through its EFU zone. With the exception of provisions of ORS 215 in effect in 1970, none of these laws appear to be exempt under Section 3(E) of Ballot Measure 37. Provisions of what is now ORS 215 are exempt under Section 3(E) of the Measure.

## **Conclusions**

Without a specific development proposal for the property, it is not possible for the department to determine what laws 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, goal and rule restrictions on residential development and use of farm land apply to the claimant's use of the property, and for the most part these laws are not exempt under Section 3(E) of Measure 37. Provisions of ORS 215 in effect when the claimant's family acquired the property in 1970, are exempt under Section 3(E) of the Measure and will continue to apply to the property.

Other laws in effect when the claimant acquired the property are also 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 that have not been identified in the claim. In some cases it will not be possible to know what 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. 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 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. The claimant should be aware that the less information she has provided to the department in her claim, the greater the possibility that there may be additional laws that will later be determined to continue to apply to her 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 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 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 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 use of the property for residential purposes. The claim asserts that laws enforced by the Commission or department reduce the fair market value of the subject property by \$50,000. However, because the claim does not provide an appraisal or other specific explanation 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 likely 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 allow Johnett Toll to use the subject property for a use permitted at the time she acquired the property on June 25, 1981.

When Johnett Toll acquired the property on June 25, 1981, it was zoned A-1 Transition by Baker County. The A-1 Transition zone required a five-acre minimum parcel size for the creation of new lots or parcels. However, the County's A-1 Transition zone that applied to the property at that time was not acknowledged by the Commission under the standards for state approval of local comprehensive plans and land use regulations pursuant to ORS 197.250 and 197.251. On April 24, 1986, the Commission acknowledged the Baker County Comprehensive Plan and land use regulations as complying with the Statewide Planning Goals. Since the Commission had not acknowledged Baker County's comprehensive plan and land use regulations, including the A-1 Transition zone, when the claimant acquired the property on June 25, 1981, Statewide Planning Goal 3 applied directly to property on the date of acquisition.<sup>3</sup>

Under the Goal 3 standards in effect when Johnett Toll acquired the property in 1981, farm dwellings were allowed if determined to be "customarily provided in conjunction with farm use" under ORS 215.213(1)(e) (1975 edition). Before a farm dwelling could be established on Agricultural Land, the farm use to which the dwelling relates must "be existing."<sup>4</sup> Further, approval of a farm dwelling required that the dwelling be situated on a parcel wholly devoted to farm use.

ORS 215.213(3) (1979 edition) authorized a non-farm dwelling only where the dwelling was compatible with farm uses, consistent with the intent of ORS 215.243, did not interfere seriously with accepted farming practices on adjacent lands, did not materially alter the stability of the

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<sup>3</sup> Statewide Planning Goal 3 became effective on January 25, 1975, and was applicable to legislative land use decisions and some quasi-judicial land use decisions where site specific goal provisions applied prior to the Commission's acknowledgment of the County's Goal 3 program on February 9, 1979 (*Sunnyside Neighborhood Assn. v. Clackamas County*, 280 Or 3 (1977), *1000 Friends of Oregon v. Benton County*, 32 Or App 413 (1978), *Jurgenson v. Union County*, 42 Or App 505 (1979), *Alexanderson v. Polk County*, 289 Or 427, *rev den* 290 Or 137 (1980) and *Perkins v. City of Rajneeshpuram*, 300 Or 1 (1985)). After the County's plan and land use regulations were acknowledged by Commission, the Statewide Planning Goals and implementing rules no longer directly applied 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 in substance, the applicable rules must be interpreted and applied by the County in making its decision. *Forster v. Polk County*, 115 Or App 475 (1992) and *Kenagy v. Benton County*, 115 Or App 131 (1992).

<sup>4</sup> *Matteo v. Polk County*, 11 Or LUBA 259, 263 (1984) *affirmed without opinion*, 70 Or App 179 (September 14, 1984) and *Newcomer v. Clackamas County*, 92 Or App 174, *modified* 94 Or App 33, (November 23, 1988).

land use pattern for the area, and was situated on land that was generally unsuitable for production of farm crops and livestock. ORS 215.213(3) (1975 edition).<sup>5</sup>

No information has been provided concerning whether the requested dwelling complies with the approval standards for dwellings under ORS 215.213 in effect at the time the Johnett Toll acquired the property in 1981.

Johnett Toll acquired the property after Statewide Planning Goal 5 was adopted in 1975, but before the enactment of the current implementing statutes and rules. The administrative rule implementing Goal 5, OAR 660, division 16 (Requirements and Application Procedures for Complying with Goal 5), became effective May 18, 1981. However, these rules applied to local jurisdictions, not directly to land owners. The rules did not apply to land owners until the local jurisdiction performed the steps in the Goal 5 process set forth in the rule. In Ms. Toll's case, her land was not directly subject to restriction related to wildlife habitat until 1986, when the Commission acknowledged Baker County's Goal 5 element of its Comprehensive Plan.

### **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 Johnett Toll's establishment of a single-family dwelling on her 9.98-acre property: applicable provisions of Statewide Planning Goal 3, ORS 215.700-215.705, and 215.780, and OAR 660, division 33 enacted after June 25, 1981, and provisions of Statewide Planning Goal 5 ORS 215.799-215.800, and OAR 660 division 16. These land use regulations will not apply to Ms. Toll's use of the property only to the extent necessary to allow her a use permitted at the time she acquired the property on June 25, 1981.
2. The action by the State of Oregon provides the state's authorization to the claimant to use her property subject to the standards in effect on June 25, 1981. On that date, the property was subject to applicable provisions of Statewide Planning Goal 3 and ORS 215 then in effect as described in section V.(2) above.
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 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

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<sup>5</sup> When determining whether land is "generally unsuitable for the production of farm crops and livestock" under ORS 215.213(3) or 215.283(3) the entire parcel or tract must be evaluated rather than a portion thereof. *Smith v. Clackamas County* 313 Or 519 (1992).

requirements may include, but are not limited to: a building permit, a land use decision, a permit as defined in ORS 215.402 or ORS 227.160, other permits or authorizations from local, state or federal agencies, and restrictions on the use of the property imposed by private parties.

4. Any use of the 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 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 her to obtain a decision under Measure 37 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 Measure 37 from a local public entity that has jurisdiction to enforce a land use regulation applicable to a use of the property by the claimant.

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

The department issued its draft staff report on this claim on August 26, 2005. 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.