

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

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

September 27, 2005

**STATE CLAIM NUMBER:** M120517

**NAMES OF CLAIMANTS:** Betsy I. Wilson  
Mary P. Basche  
Nancy H. Basche  
Suzanne M. McCrone

**MAILING ADDRESSES:** Betsy I. Wilson  
425 Highway 7 South  
Baker City, Oregon 97814

Mary P. Basche  
3450 8<sup>th</sup> Drive  
Baker City, Oregon 97814

Nancy H. Basche  
1038 Walnut  
Baker City, Oregon 97814

Suzanne M. McCrone  
84991 Larson  
Eugene, Oregon 97405

**PROPERTY IDENTIFICATION:** Township 9S, Range 39E, Section 8  
Tax lot 600  
Baker County

**DATE RECEIVED BY DAS:** April 8, 2005

**180-DAY DEADLINE:** October 5, 2005

**I. SUMMARY OF CLAIM**

The claimants, Betsy I. Wilson, Mary P. Basche, Nancy H. Basche and Suzanne B. McCrone, seek compensation in the amount of \$60,920, 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 claimants desire compensation or the right to develop the 5.09-acre property with a single-

family dwelling. The property is located at 42161 Salmon Creek Road, northwest of 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 as to Betsy I. Wilson, Nancy H. Basche and Suzanne M. McCrone and not valid as to Mary P. Basche because she no longer owns the property. 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 development of a dwelling on the property by Betsy I. Wilson, Nancy H. Basche and Suzanne M. McCrone: Statewide Planning Goals 3 (Agricultural Lands), 4 (Forest Lands), and 5 (Natural Resources), and applicable provisions of ORS 215 and OAR 660, divisions 6, 16, 23, and 33 enacted after January 2004. These laws will not apply to Betsy I. Wilson, Nancy H. Basche and Suzanne M. McCrone only to the extent necessary to allow them a use of the property permitted at the time they acquired their interest in it in January 2004. The department acknowledges that the relief to which these claimants are entitled under Measure 37 will not allow Betsy I. Wilson, Nancy H. Basche and Suzanne M. McCrone to use the property in the manner set forth in this claim. (See the complete recommendation in Section VI. of this report.)

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

### **Comments Received**

On March 2, 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. This comment does not address whether the claim meets the criteria for relief (compensation or waiver) under Measure 37. (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 April 8, 2005, for processing under OAR 125, division 145. The claim identifies ORS 215.800 and OAR 660-033-0135 as laws that restrict the use of the property as 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 claimants, Betsy I. Wilson, Nancy H. Basche and Suzanne M. McCrone, each acquired an undivided 1/3 interest in the subject property by Bargain and Sale Deed from their mother, claimant Mary P. Basche, on January 12, 2004. Mary P. Basche and her late husband, Paul C. Basche, acquired the subject property by Deed on February 8, 1973.

### **Conclusions**

The claimants, Betsy I. Wilson, Nancy H. Basche and Suzanne M. McCrone, are “owners” of the subject property, as that term is defined by Section 11(C) of Ballot Measure 37, as of January 12, 2004. Claimant Mary P. Basche is not an “owner” of the property as that term is defined by Section 11(C) of Ballot Measure 37, because she conveyed all of her interest in the property to the other claimants on January 12, 2004. Mary P. Basche is a “family member” as to Betsy I. Wilson, Nancy H. Basche and Suzanne M. McCrone, as that term is defined by Section 11(A) of Ballot Measure 37, as of February 8, 1973.

### **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 cites OAR 660-033-013, regarding minimum parcel size, as a law that restricts the use of the subject property.<sup>1</sup>

The claim is based, generally, on Baker County's current Mineral Extraction (ME) zone and the applicable provisions of state law that require such zoning. The claimants' property is zoned ME, as authorized by Goal 5 (Natural Resources, Scenic and Historic Areas, and Open Spaces) in accordance with OAR 660, divisions 16 and 23, and ORS 215, because the claimants' property contains "mineral and aggregate resources" as defined by Goal 5.<sup>2</sup> Goal 5 became effective on January 25, 1975. Goal 5 requires that identified mineral and aggregate resource sites be planned for interim, transitional, and "second use" utilization as well as for the primary extraction use. OAR 660, divisions 16 and 23, which established procedures and requirements for complying with Goal 5; were effective June 29, 1981, and September 1, 1996, respectively.

Baker County has planned the subject property for farm or forest use, as the use secondary to mineral extraction. In the County's ME zone, a single-family dwelling is allowed with a conditional use permit if "necessary and accessory to mining."<sup>3</sup> Goals 3 (Agricultural Lands) and 4 (Forest Lands) and implementing statutes and regulations in ORS 215 and OAR 660, divisions 6 and 33 establish minimum lot sizes and farm and non-farm dwelling standards for farm and forest lands.

The claimants' family acquired the subject property on February 8, 1973, prior to the establishment of the Statewide Planning Goals and their implementing statutes and rules, and prior to Baker County zoning of the subject property.<sup>4</sup>

### **Conclusions**

The zoning requirements and allowed uses, minimum lot size and dwelling standards established by Statewide Planning Goals 3 (Agricultural Lands), 4 (Forest Lands) and 5 (Natural Resources), and applicable provisions of ORS 215 and OAR 660, divisions 6, 16, 23 and 33 were all enacted after the Basche family acquired ownership of the subject property in February 1973, and do not

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<sup>1</sup> The claimants also cite ORS 215.800, the state policy for Wildlife Habitat Conservation Planning in ORS 215.799-215.990. The Oregon Department of Fish and Wildlife will prepare a separate staff report and recommendation on this aspect of the claim.

<sup>2</sup> The subject property consists of Class II, IV, and VI soils. (See Soil Survey of Baker County Area, Oregon, USDA Natural Resources Conservation Service, June 1997, Sheet #39, Table 5, and pp. 59-60, 114-115.)

<sup>3</sup> Baker County Zoning Ordinance, Section 307.02 A.

<sup>4</sup> According to Baker County Planning Department, per phone call by department staff on August 1, 2005.

allow development of the property with a single-family non-farm or forest dwelling, thereby restricting the use of the property relative to the uses allowed when the property was acquired.

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 claimants have identified. There may be other laws that currently apply to the claimants' use of the property, and that may continue to apply to the claimants' use of the property, that have not been identified in the claim. In some cases, it will not be possible to know what laws apply to a use of property until there is a specific proposal for that use. When the claimants seek a building or development permit to carry out a specific use, it may become evident that other state laws apply to that use.

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

In order to establish a valid claim, 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 \$60,920, as the reduction in the property's fair market value due to current regulations. This estimate is based on “sales analysis of comparable properties in this area”.<sup>5</sup> The claim includes no appraisal to substantiate the amount demanded for compensation.

#### **Conclusions**

As explained in Section V.(1) of this report, the current owners are Betsy I. Wilson, Nancy H. Basche and Suzanne M. McCrone, whose family acquired the property on February 8, 1973. Under Ballot Measure 37, Betsy I. Wilson, Nancy H. Basche and Suzanne M. McCrone are 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 enacted since 1973 restrict the ability of the claimants to site a dwelling on the property. The claimants estimate the loss in property value due to the restrictions to be \$60,920.

Without an appraisal or other documentation, it is not possible to substantiate the specific dollar amount the claimants 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 land use regulations. In addition, under Section 3 of the Measure, certain types of laws are exempt from the Measure.

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<sup>5</sup> Baker County Assessor records show a current real market value for the subject property of \$23,710 for the 5.09-acre property with a Class 1 single family dwelling built in 1950. (See claim file.)

## **Findings of Fact**

The claim is based on state land use regulations that restrict the use of the property relative to what would have been allowed in 1973, when the property was acquired by the Basche family. These provisions include Statewide Planning Goals 3, 4, and 5, and applicable provisions of ORS 215 and OAR 660, divisions 6, 16, 23 and 33, which Baker County has implemented through its ME zone. None of these laws appear to be exempt under Section 3(E) of Ballot Measure 37, which exempts laws in effect when the claimants' family acquired the property.

## **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 or forest land with a mineral extraction overlay zone apply to the claimants' use of the property, and for the most part these laws are not exempt under Section 3(E) of Measure 37.

Laws in effect when the claimants acquired the property are exempt under Section 3(E) of Measure 37, and will continue to apply to the claimants' use of the property. There may be other laws that continue to apply to the claimants' use of the 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 claimants seek a building or development permit to carry out a specific use, it may become evident that other state laws apply to that use. 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 claimants have 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 claimants should be aware that the less information they have provided 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 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 development of the subject property with a single-family, non-farm or non-forest dwelling. The claim asserts the laws enforced by the Commission or department reduce the fair market value of the subject property by \$60,920. However, because the claim does not provide an appraisal or other documentation to establish 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 Betsy I. Wilson, Nancy H. Basche and Suzanne M. McCrone to use the subject property for a use permitted at the time they acquired the property on February 12, 2004. At that time, the property was subject to the applicable provisions of Statewide Planning Goals 3, 4, and 5, ORS 215 and OAR 660, divisions 6, 16, 23 and 33 currently in effect, as described in Section V.(2) of this report.

## **Conclusion**

Based on the record, the department recommends that the claim be denied as to Mary P. Basche, on the basis that she is not an owner of the subject property. The department recommends that the claim be approved as to Betsy Wilson, Nancy Basche, and Suzanne McCrone, subject to the following terms:

1. In lieu of compensation under Measure 37, the State of Oregon will not apply the following land use laws to development of the 5.09-acre property by Betsy I. Wilson, Nancy H. Basche and Suzanne M. McCrone: applicable provisions of Statewide Planning Goals 3, 4, and 5, and applicable provisions of ORS 215 and OAR 660, divisions 6, 16, 23 and 33 enacted after February 12, 2004. These land use regulations will not apply to these claimants' use of their property only to the extent necessary to allow these claimants a use permitted at the time they acquired the property on February 12, 2004. The department acknowledges that the relief to which these claimants are entitled under Measure 37 will not allow Betsy I. Wilson, Nancy H. Basche and Suzanne M. McCrone to use the property in the manner set forth in this claim.
2. The action by the State of Oregon provides the state's authorization to Betsy I. Wilson, Nancy H. Basche and Suzanne M. McCrone to use their property subject to the standards in effect on February 12, 2004. On that date, the property was subject to applicable provisions of Goals 3, 4, and 5, and applicable provisions of ORS 215 and OAR 660, divisions 6, 16, 23 and 33 currently in effect.
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

claimants first obtain that permit, license or other form of authorization or consent. Such requirements may include, but are not limited to: a building permit, a land use decision, a permit as defined in ORS 215.402 or 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 Betsy I. Wilson, Nancy H. Basche and Suzanne M. McCrone 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 Betsy I. Wilson, Nancy H. Basche and Suzanne M. McCrone to use the property, it may be necessary for them to obtain a decision under Measure 37 from Baker County or other jurisdiction that enforces land use regulations applicable to the property. Nothing in this order relieves Betsy I. Wilson, Nancy H. Basche and Suzanne M. McCrone 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 them.

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

The department issued its draft staff report on this claim on September 14, 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.