

BEFORE THE DEPARTMENT OF ADMINISTRATIVE SERVICES,  
THE DEPARTMENT OF LAND CONSERVATION AND DEVELOPMENT OF  
THE STATE OF OREGON

IN THE MATTER OF THE CLAIM	)	FINAL ORDER
FOR COMPENSATION UNDER	)	CLAIM NO. M118353
BALLOT MEASURE 37 (CHAPTER 1,	)	
OREGON LAWS 2005) OF	)	
Michael and Sharon Toren, CLAIMANTS	)	

Claimants: Michael and Sharon Toren (the Claimants)

Property: Tax Lots 901, 902 and 903, T.2N, R.2 and 3 W, Section 30, W.M., Washington County

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 Ballot Measure 37 (2004) (Oregon Laws 2005, Chapter 1) (hereafter, Measure 37). 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 Measure 37, the State of Oregon will not apply the following laws to the claimants' division and development of the subject property: the applicable provisions of Statewide Planning Goal 3, ORS 215 and OAR 660, division 33, enacted after December 29, 1980. These land use regulations will not apply to the claimants' use of their property only to the extent necessary to allow them to a use permitted at the time they acquired the property.
2. The action by the State of Oregon provides the State's authorization to the claimants to use their property subject to the standards in effect on December 29, 1980. On that date, the property was subject to Statewide Goal 3 and the applicable provisions of ORS 215 (1979 edition).

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 the claimants 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 claimants to use the property it may be necessary for them 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 claimants 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 claimants.

This Order is entered by the Deputy Director of the DLCD as a final order of DLCD and the Land Conservation and Development Commission under Measure 37, OAR 660-002-0010(8), and OAR 125, division 145, and by the Administrator for the State Services Division of the DAS as a final order of DAS under Measure 37, OAR 125, division 145, and ORS 293.

FOR DLCD AND THE LAND CONSERVATION  
AND DEVELOPMENT COMMISSION:

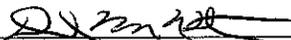
Lane Shetterly, Director



George Naughton, Deputy Director  
DLCD

Dated this 14<sup>th</sup> day of October, 2005.

FOR the DEPARTMENT OF ADMINISTRATIVE  
SERVICES:



David Hartwig, Administrator  
DAS, State Services Division

Dated this 14<sup>th</sup> day of October, 2005.

## **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 293.316: Judicial review under ORS 293.316 may be obtained by filing a petition for review within 60 days from the service of this order. Judicial review under ORS 293.316 is pursuant to the provisions of ORS 183.482 to the Court of Appeals.
2. 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 and the Circuit Court in the county in which you reside.
3. A cause of action under Oregon Laws 2005, chapter 1 (Measure 37 (2004)): A present owner of the property, or any interest therein, may file a cause of action in the Circuit Court for the county where the property is located, if a land use regulation continues to apply to the subject property more than 180 days after the present owner made a written demand for compensation.

(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.”

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

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

October 14, 2005

**STATE CLAIM NUMBER:** MI18353

**NAMES OF CLAIMANTS:** Michael and Sharon Toren

**MAILING ADDRESS:** 14050 NW Pumpkin Ridge Road  
North Plains, Oregon 97133

**PROPERTY IDENTIFICATION:** Township 2N, Range 2 and 3W, Section 30  
Tax Lots 901, 902, 903  
Washington County

**OTHER CONTACT INFORMATION:** William Cox, Attorney at Law  
0244 SW California Street  
Portland, Oregon 97219

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

**180-DAY DEADLINE:** October 22, 2005

**I. SUMMARY OF CLAIM**

The claimants, Michael and Sharon Toren, seek compensation in the amount of \$6,600,000 for a reduction in fair market value as a result of certain land use regulations that are alleged to restrict the use of private real property. The claimants desire compensation or the right to divide and develop the 76-acre property into at least seven, ten-acre parcels for residential use. The property is located at 14050 NW Pumpkin Ridge Road, 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 this claim is valid. Department staff recommends, in lieu of compensation, that the requirements of the following laws enforced by the Land Conservation and Development Commission (the Commission) or the department not apply to the claimants to allow them to develop their property for residential use: the applicable

provisions of Statewide Planning Goal 3, ORS 215, and OAR 660, division 33, enacted after December 29, 1980. These laws will not apply to the claimants' use of the property only to the extent necessary to allow the claimants a use of the subject property permitted when they acquired it on December 29, 1980. (See the complete recommendation in Section VI. of this report.)

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

On May 16, 2005, pursuant to OAR 125-145-0080, the Oregon Department of Administrative Services (DAS) provided written notice to owners of surrounding properties. According to DAS, four written comments, evidence or information were received in response to the 10-day notice.

Three of 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 letters in the department's claim).

One of the comments is relevant to whether the restriction of the claimants' use of the property reduces the fair market value of the property and whether the laws that are the basis for the claim are exempt under Section 3 of Measure 37. The comments have been considered by the department in preparing this report.

### **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 25, 2005, for processing under OAR 125, division 145. The claim lists all statewide planning goals, rules and statutes as well as Statewide Planning Goal 3 and OAR 660, division 33 as the state 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 regulation 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 of 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 assert they acquired the property (currently shown on a tax map as lots 901, 902, and 903) by contract on December 29, 1980. No copy of the contract was submitted with the claim. A special warranty deed, dated May 24, 1982, references a Contract of Sale dated December 29, 1980, states that there was an agreement to convey a tract of land to claimants, and warrants that a certain portion (currently shown on a tax map as lot 902) of that tract is free of encumbrances. In addition, on December 30, 1983, Michael Toren conveyed an undivided one-half interest in a portion (currently shown on a tax map as lot 903) of the subject property to Sharon Toren for the purpose of creating a tax lot. And on October 31, 2002, and for the apparent purpose of evidencing that claimants had satisfied a mortgage, a third party issued to claimants a special warranty deed that warranted that a portion of the property (currently shown on a tax map as lots 901 and 903) is free of encumbrances created by the third party. A title report dated April 18, 2005, finds that the last deed of record runs to the claimants. (See the department’s claim file).

### **Conclusions**

Based on the foregoing evidence, the department concludes that the claimants, Michael and Sharon Toren, acquired the entire 76-acre property on December 29, 1980, and that the claimants are “owners” of the subject property as that term is defined in Section 11(C) of Ballot Measure 37, as of December 29, 1980.

## **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 claimants' 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 claimants or a family member acquired the property.

### **Findings of Fact**

The claimants seek to divide the 76-acre property into at least seven ten-acre parcels for residential use. The claim lists all statewide planning goals, rules, and statutes—including Statewide Planning Goal 3 (Agricultural Lands) and Goal 5 (Open Spaces, Scenic and Historic Areas and Natural Resources), and OAR 660, divisions 14, 16, 23, and 33—as the state laws that restrict the use of the property as the basis for the claim.<sup>1</sup>

The claim is based, generally, on Washington County's current Exclusive Farm Use (EFU) Zone and the applicable provisions of state law that require such zoning. The claimants' property is zoned EFU as required by Statewide Planning Goal 3, in accord with OAR 660, division 33, and ORS 215, because the claimants' property is "Agricultural Land" as defined by Goal 3.<sup>2</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 215.213, 215.263, 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 parcels to have farm or non-farm dwellings on them.

ORS 215.780 established an 80-acre minimum size for the creation of new lots or parcels in EFU zones 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 interprets the statutory standard for a primary dwelling in an EFU zone under ORS 215.213 on high-value farmland.<sup>3</sup>

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<sup>1</sup> Although the claim lists numerous land use laws, the claimant does not establish how each of these laws restrict the use of the claimants' property for purposes of Measure 37. Except as discussed in this report, none of these statutes or regulations, on their face, restrict the use of the subject property. Absent an explanation by the claimants as to how any of these laws restrict the use of the subject property that results in a reduction in the property's its fair market value, they are not discussed further in this report.

<sup>2</sup> The claimants' property is "Agricultural Land because it contains NRCS (Natural Resources Conservation Service) Capability Class I – IV Soils (see NRCS Web Soil Survey: [www.websoilsurvey.nrcs.usda.gov](http://www.websoilsurvey.nrcs.usda.gov)

<sup>3</sup> The subject property is composed of "high-value farmland" soils: [www.websoilsurvey.nrcs.usda.gov](http://www.websoilsurvey.nrcs.usda.gov)

OAR 660-033-0130(4)(e) (applicable to non-farm dwellings in marginal lands counties) became effective on August 7, 1993.

Although Statewide Planning Goal 5 and OAR 660, divisions 16 and 23 are listed on the claim, the claimants' representative acknowledges that the claimants are not aware of resources located on the site that have been designated Goal 5 resources. Thus, based on the claimants' representations and the record, there is no indication that Goal 5 restricts the claimants' use of the subject property.

The claimants acquired the property on December 29, 1980, when it was zoned Agriculture/Forest (AF-10). The AF-10 zone allowed the creation of ten-acre parcels for residential use. However, the County's AF-10 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. The Commission acknowledged Washington County's Comprehensive Plan and land use regulations as complying with the Statewide Planning Goals on July 30, 1984 (Acknowledgment Order 84-ACK-103). Since the Commission had not acknowledged the County's comprehensive plan and land use regulations, including the AF-10 zone, when the claimants acquired the property on December 29, 1980, Statewide Planning Goal 3 applied directly to property on the date of acquisition.<sup>4</sup>

In 1980, state standards for a land division involving agricultural land where the local zoning was not acknowledged were that the resulting parcels must be of a size that are "appropriate for the continuation of the existing commercial agricultural enterprise in the area" (Statewide Planning Goal 3). Further, ORS 215.263 (1979 edition) required that all divisions of land subject to the provisions for EFU zoning comply with the legislative intent set forth in ORS 215.243 (Agricultural Land Use Policy). In 1980, ORS 215.263 did not provide for the creation of a small parcel for a non farm dwelling separate from the provisions just noted.<sup>5</sup>

Thus, the opportunity to divide the property when the claimants acquired it in 1980 was limited to land divisions done consistent with Goal 3, that required the resulting farm or non-farm parcels to 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 215.243. (See endnote<sup>1</sup>)

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<sup>4</sup> Statewide Planning Goal 3 was applicable to legislative land use decisions and some quasi-judicial land use decisions prior to the Commission's acknowledgment of the County's Goal 3 program on July 30, 1984. *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); *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 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); *Kenagy v. Benton County*, 115 Or App 131 (1992).

<sup>5</sup> Compare ORS 2125.263 (1979 edition) with the current version of ORS 215.263.

As for dwellings allowed in an EFU zone, in 1980, ORS 215 and EFU zoning required by Goal 3, allowed farm dwellings if determined to be “customarily provided in conjunction with farm use” under ORS 215.213(1)(e) (1979 edition). Before a farm dwelling could be established on Agricultural Land, the farm use to which the dwelling relates must “be existing.”<sup>6</sup> Further, approval of a farm dwelling required that the dwelling be situated on a parcel wholly devoted to farm use and if on existing parcel, the dwelling had to be on a parcel “appropriate for the continuation of the existing commercial agricultural enterprise within the area under Goal 3. 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 land use pattern for the area, and was situated on land generally unsuitable for production of farm crops and livestock. ORS 215.213 (3) (1979 edition).<sup>7</sup>

No information has been provided showing that the claimants’ request to divide the property complies with either of the applicable partition or dwelling standards under Goal 3 and ORS 215.213 (1979 edition) in effect at the time the claimants acquired the property in 1980.

### **Conclusions**

Lot size and dwelling standards established by amendments to Statewide Planning Goal 3, ORS 215.213, 215.263, 215.284, 215.780 and OAR 660, division 33, adopted since the claimants acquired the property in 1980, do not allow the division or approval of a dwelling as may have been possible in 1980. Thus, state land use laws adopted since 1980 restrict the use of the property from what may have been permitted when the property was acquired by the claimants in 1980.

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.

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<sup>6</sup> *Newcomer v. Clackamas County*, 92 Or App 174, mod 94 Or App 33 (1988); *Matteo v. Polk County*, 11 Or LUBA 259, 263 (1984), *aff’d without opinion* 70 Or App 179 (1984).

<sup>7</sup> When determining whether land is “generally unsuitable for the production of farm crops and livestock” under ORS 215.213(3), the entire parcel or tract must be evaluated rather than a portion thereof. *Smith v. Clackamas County*, 313 Or 519 (1992).

### **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 states that the fair market value of the subject property has been reduced by \$6,600,000 as a result of land use laws enacted after the claimants acquired the property in 1980. The claim states that at the time of purchase “the property could have been divided into as many as 7 lots (one of the lots contains claimants home).” The reduction in fair market value is based on an assertion that each acre of the claimants’ property is worth \$100,000 if zoned as it was in 1980. The claimants did not submit an appraisal but note the estimated reduction in value could be supported by an appraisal, if necessary. The claim states that “it is applicant’s opinion however, that the appraisal is only relevant if the county and/or state decide to enforce the current use restrictions. The values used are consistent with recent sales of similar properties in the vicinity.” None of the information about recent sales of similar properties or other information was submitted with the claim.

#### **Conclusions**

As explained in Section V.(1) of this report, the claimants are the current owners of the subject property as of December 29, 1980. Thus, under Ballot Measure 37, the claimants are due compensation for land use laws 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 claimants acquired the property do not allow the division of the subject property for residential use. The claim asserts the reduction in value due to the restrictions to be \$6,600,000. However, 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.

#### **Findings of Fact**

The claim is based on Washington County’s EFU zone and the related provisions of state law that have restricted use of the property and reduced its fair market value, including Statewide Planning Goal 3 (Agricultural Lands) and applicable provisions of ORS 215 and OAR 660, division 33. Provisions of ORS 215 and Goal 3 enacted before 1980, are exempt under

Section 3(E) of Measure 37, which exempts laws in effect when the claimants acquired the property, and will continue to apply to 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 land apply to the claimants' use of the property and, to the extent they were enacted after the claimants acquired the property, these laws are not exempt under Section 3(E) of Measure 37. Provisions of Goal 3 and ORS 215 in effect when the claimants acquired the property in 1980 are exempt under Section 3 (E) of the Measure and will continue to apply to the property.

Other laws in effect when the claimants acquired the property are also 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 claimants' 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 Sections 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 present 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 in this report, laws enforced by the Commission or the department prohibit the division of the property into at least seven, ten-acre parcels for residential use. The claim asserts these restrictions reduce the fair market value of the subject property by \$6,600,000. Without an appraisal or other documentation and without verification of the level of development that would be allowed under the laws in effect in 1980 when the claimants acquired the property, it is not possible to substantiate the specific dollar amount the claimants demand for compensation. Nevertheless, the department acknowledges that state land use laws 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 just compensation, Measure 37 authorizes the department to modify, remove, or not apply all or parts of certain state land use regulations to allow the claimants as the current owners to use the subject property for a use permitted at the time they acquired the property on December 29, 1980.

## **Conclusions**

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 the claimants' division and development of the subject property: the applicable provisions of Statewide Planning Goal 3, ORS 215 and OAR 660, division 33, enacted after December 29, 1980. These land use regulations will not apply to the claimants' use of their property only to the extent necessary to allow them to a use permitted at the time they acquired the property.
2. The action by the State of Oregon provides the State's authorization to the claimants to use their property subject to the standards in effect on December 29, 1980. On that date, the property was subject to Statewide Goal 3 and the applicable provisions of ORS 215 (1979 edition).
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 the claimants 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 claimants to use the property it may be necessary for them 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 claimants 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 claimants.

## VII. COMMENTS ON THE DRAFT STAFF REPORT

The department issued its draft staff report on this claim on September 30, 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.

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<sup>1</sup> As noted, Goal 3 "Agricultural Lands" 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 apply prior to acknowledgement of a jurisdiction's comprehensive plan and land use regulations. After the local plan and land use regulations are acknowledged by the Commission, the statewide planning goals and implementing rules no longer directly apply to such local land use decisions. However, after acknowledgment, interpretation of the local county code provisions must be consistent with the goal and rule standards with which they were acknowledged to be in compliance.

The Goal 3 standard for the review of land divisions or the establishment of a minimum lot size states:

"Such minimum lot sizes as are utilized for any farm use zones shall be appropriate for the continuation of the existing commercial agricultural enterprise within the area."

On August 20, 1977, the Commission distributed a policy paper explaining the meaning of the Goal 3 minimum lot size standard (see "Common Questions about Goal #3; Agricultural Lands", August 30, 1977, as revised and added to July 12, 1979). Further interpretation of the Goal 3 minimum lot size standard can be found in *Meeker v. Clatsop County*, 287 Or 665 (1979); *Jurgenson v. Union County*, 42 Or App 505 (1979); *Alexanderson v. Polk County*, 289 Or 427, *rev den* 290 Or 137 (1980); and *Thede v. Polk County*, 3 Or LUBA 336 (1981).

In 1982, the policy paper and court decisions were incorporated into an administrative rule to guide the interpretation and application of the Goal 3 minimum lot size standard (see OAR 660, division 5, specifically rules 15 and 20, effective July 21, 1982).

For further guidance on the interpretation and application of this standard and rule see *Kenagy v. Benton County*, 6 Or LUBA 93 (1982); *Goracke v. Benton County*, 8 Or LUBA 128 (1983), *rev'd and remanded*, 68 Or App 83 (1984), *on remand*, 12 Or LUBA 128 (1984); *Goracke v. Benton County*, 13 Or LUBA 146 (1985), *aff'd*, 74 Or App 453 (1985), *rev den*, 300 Or 322 (1985); and OAR 660-05-015 and -020, as amended, effective June 7, 1986 (repealed effective August 7, 1993).

The 1982 administrative rule (OAR 660-05-015 and -020) was further amended to incorporate the holdings of these cases (effective June 7, 1986, and repealed effective August 7, 1993).