

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

IN THE MATTER OF THE CLAIM FOR	)	FINAL ORDER A
COMPENSATION UNDER ORS 197.352	)	CLAIM NO. M129633
(BALLOT MEASURE 37) OF	)	
Don Johnston and Son, CLAIMANTS	)	

Claimants: Don Johnston and Son (the Claimants)

Property: Township 39S, Range 8E, Section 30: tax lot 1200  
Township 39S, Range 8E, Section 30C: tax lot 100  
Township 39S, Range 8E, Section 31A: tax lot 100  
Township 39S, Range 8E, Section 32C: tax lot 100  
Klamath County (the Property)

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

ORDER

The Claim is 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 ORS 197.352, the State of Oregon will not apply the following laws to Don Johnston and Son's division of tax lots 100 (Section 30C), 100 (Section 31A), 100 (Section 32C) and 1200 into 10,000-square foot or larger parcels for residential development with commercial activities on approximately 59 acres of the property: the applicable provisions of Goal 14 and OAR 660-004-0040 adopted after December 28, 1978. These land use regulations will not apply to Don Johnston and Son only to the extent necessary to allow it to use tax lots 100 (Section 30C), 100 (Section 31A), 100 (Section 32C) and 1200 for the use described in this report, and only to the extent that use was permitted when it acquired them on December

28, 1978. The department acknowledges that the relief to which Don Johnston and Son is entitled under ORS 197.352 may not allow it to use those tax lots in the manner set forth in the claim.

2. The action by the State of Oregon provides the state's authorization to Don Johnston and Son to use tax lots 100 (Section 30C), 100 (Section 31A), 100 (Section 32C) and 1200 for the use described in this report, subject to the standards in effect on December 28, 1978. On that date, these tax lots were subject to the applicable provisions of the statewide planning goals, and in particular, Goal 14 in effect at that time.

3. To the extent that any law, order, deed, agreement or other legally enforceable public or private requirement provides that tax lots 100 (Section 30C), 100 (Section 31A), 100 (Section 32C) and 1200 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 Don Johnston and Son 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 215.402 or 227.160, other permits or authorizations from local, state or federal agencies and restrictions on the use of tax lots 100 (Section 30C), 100 (Section 31A), 100 (Section 32C) and 1200 imposed by private parties.

4. Any use of tax lots 100 (Section 30C), 100 (Section 31A), 100 (Section 32C) and 1200 by Don Johnston and Son 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 ORS 197.352 including, without limitation, those laws exempted under ORS 197.352(3).

5. Without limiting the generality of the foregoing terms and conditions, in order for Don Johnston and Son to use tax lots 100 (Section 30C), 100 (Section 31A), 100 (Section 32C) and 1200, it may be necessary for it to obtain a decision under ORS 197.352 from a city and/or county and/or metropolitan service district that enforces land use regulations applicable to the tax lots. Nothing in this order relieves Don Johnston and Son from the necessity of obtaining a decision under ORS 197.352 from a local public entity that has jurisdiction to enforce a land use regulation applicable to a use of tax lots 100 (Section 30C), 100 (Section 31A), 100 (Section 32C) and 1200 by the claimant.

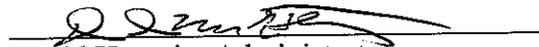
This Order is entered by the Director of the DLCD as a final order of DLCD and the Land Conservation and Development Commission under ORS 197.352, OAR 660-002-0010(8), and OAR 125, division 145, and by the Administrator for the State Services Division of the DAS as a final order of DAS under ORS 197.352, OAR 125, division 145, and ORS 293.

FOR DLCD AND THE LAND  
CONSERVATION AND  
DEVELOPMENT COMMISSION:  
Lane Shetterly, Director



Michael Morrissey, Manager  
DLCD, Measure 37 Services Division  
Dated this 15<sup>th</sup> day of December, 2006.

FOR the DEPARTMENT OF  
ADMINISTRATIVE SERVICES:



David Hartwig, Administrator  
DAS, State Services Division  
Dated this 15<sup>th</sup> day of December, 2006.

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

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

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

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

### **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."

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

IN THE MATTER OF THE CLAIM FOR ) FINAL ORDER B  
COMPENSATION UNDER ORS 197.352 ) CLAIM NO. M129633  
(BALLOT MEASURE 37) OF )  
Don Johnston and Son, CLAIMANTS )

Claimants: Don Johnston and Son (the Claimants)

Property: Township 39S, Range 8E, Section 29: tax lot 300  
Township 39S, Range 8E, Section 32: tax lot 100  
Klamath County (the property)

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

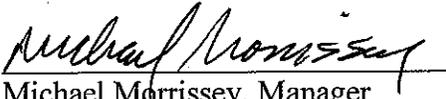
Claimants submitted the Claim to the State of Oregon under ORS 197.352. Under OAR 125-145-0010 *et seq.*, the Department of Administrative Services (DAS) referred the Claim to the Department of Land Conservation and Development (DLCD) as the regulating entity. This order is based on the record herein,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

ORDER

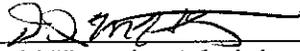
The Claim is denied as to laws administered by DLCD and the Land Conservation and Development Commission (LCDC) for the reasons set forth in the DLCD Report.

This Order is entered by the Director of the DLCD as a final order of DLCD and the Land Conservation and Development Commission under ORS 197.352, OAR 660-002-0010(8), and OAR chapter 125, division 145, and by the Administrator for the State Services Division of the DAS as a final order of DAS under ORS 197.352, OAR chapter 125, division 145, and ORS chapter 293.

FOR DLCD AND THE LAND  
CONSERVATION AND  
DEVELOPMENT COMMISSION:  
Lane Shetterly, Director

  
Michael Morrissey, Manager  
DLCD, Measure 37 Services Division  
Dated this 15<sup>th</sup> day of December, 2006.

FOR THE DEPARTMENT OF  
ADMINISTRATIVE SERVICES:

  
David Hartwig, Administrator  
DAS, State Services Division  
Dated this 15<sup>th</sup> day of December, 2006.

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

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

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

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

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

IN THE MATTER OF THE CLAIM FOR ) FINAL ORDER C  
COMPENSATION UNDER ORS 197.352 ) CLAIM NO. M129633  
(BALLOT MEASURE 37) OF )  
Donald S. Johnston and )  
Gwendolyn J. Johnston, CLAIMANTS )

Claimants: Donald S. Johnston and Gwendolyn J. Johnston (the Claimants)

Property: Township 39S, Range 8E, Section 29: tax lot 300  
Township 39S, Range 8E, Section 30: tax lot 1200  
Township 39S, Range 8E, Section 30C: tax lot 100  
Township 39S, Range 8E, Section 31A: tax lot 100  
Township 39S, Range 8E, Section 32: tax lot 100  
Township 39S, Range 8E, Section 32C: tax lot 100  
Klamath County (the property)

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

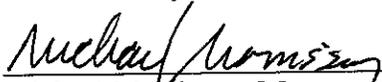
ORDER

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

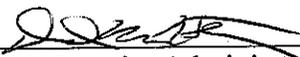
This Order is entered by the Director of the DLCD as a final order of DLCD and the Land Conservation and Development Commission under ORS 197.352, OAR 660-002-0010(8), and OAR chapter 125, division 145, and by the Administrator for the State

Services Division of the DAS as a final order of DAS under ORS 197.352, OAR chapter 125, division 145, and ORS chapter 293.

FOR DLCD AND THE LAND  
CONSERVATION AND  
DEVELOPMENT COMMISSION:  
Lane Shetterly, Director

  
Michael Morrissey, Manager  
DLCD, Measure 37 Services Division  
Dated this 15<sup>th</sup> day of December, 2006.

FOR THE DEPARTMENT OF  
ADMINISTRATIVE SERVICES:

  
David Hartwig, Administrator  
DAS, State Services Division  
Dated this 15<sup>th</sup> day of December, 2006.

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

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

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

December 15, 2006

**STATE CLAIM NUMBER:** M129633

**NAMES OF CLAIMANTS:** Don Johnston and Son  
Donald S. Johnston  
Gwendolyn J. Johnston

**MAILING ADDRESS:** 13619 Highway 66  
Klamath Falls, Oregon 97601

**PROPERTY IDENTIFICATION:** Township 39S, Range 8E  
Section 29: tax lot 300  
Section 30: tax lot 1200  
Section 30C: tax lot 100  
Section 31A: tax lot 100  
Section 32: tax lot 100  
Section 32C: tax lot 100  
Klamath County

**OTHER CONTACT INFORMATION:** Michael L. Spencer  
419 Main Street  
Klamath Falls, Oregon 97601

**DATE RECEIVED BY DAS:** June 19, 2006

**180-DAY DEADLINE:** December 16, 2006

**I. SUMMARY OF CLAIM**

The claimants, Don Johnston and Son and Donald and Gwendolyn Johnston, seek compensation in the amount of \$1 million for the reduction in fair market value as a result of land use regulations that are alleged to restrict the use of certain private real property. The claimants desire compensation or the right to divide the 586.27-acre subject property into 10,000-square foot or larger parcels for residential development with a community water system and commercial activities on approximately 59 acres of the property.<sup>1</sup> The subject property is located at the geographic coordinates listed above, near Klamath Falls, in Klamath County. (See claim.)

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<sup>1</sup> The subject property includes six tax lots. Tax lot 300 consists of 104.52 acres; tax lot 1200 consists of 160 acres; tax lot 100 (Section 30C) consists of 40 acres; tax lot 100 (Section 31A) consists of 120 acres; tax lot 100 (Section 32) consists of 159.93 acres; and tax lot 100 (Section 32C) consists of 1.82 acres.

## 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 in part. 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 Don Johnston and Son's division of tax lots 100 (Section 30C), 100 (Section 31A), 100 (Section 32C) and 1200 into 10,000-square foot or larger parcels for residential development with commercial activities on approximately 59 acres of the property: applicable provisions of Statewide Planning Goal 14 (Urbanization) and Oregon Administrative Rule (OAR) 660-004-0040. These land use regulations will not apply to Don Johnston and Son only to the extent necessary to allow it to use tax lots 100 (Section 30C), 100 (Section 31A), 100 (Section 32C) and 1200 for the use described in this report, and only to the extent that use was permitted when it acquired them on December 28, 1978. The department acknowledges that the relief to which Don Johnston and Son is entitled under ORS 197.352 may not allow it to use those tax lots in the manner set forth in the claim.

The department has further determined that: Don Johnston and Son's claim for tax lots 100 (Section 32) and 300 and Donald and Gwendolyn Johnston's claim for tax lots 100 (Section 30C), 100 (Section 31A), 100 (Section 32C) and 1200 is not valid because they have not established their ownership of these tax lots; and Donald and Gwendolyn Johnston's claim for tax lots 100 (Section 32) and 300 is not valid because their desired use of these tax lots was prohibited under the laws in effect when they acquired them in 2006. (See the complete recommendation in Section VI. of this report.)

## III. COMMENTS ON THE CLAIM

### Comments Received

On August 11, 2006, 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, four written comments were received in response to the 10-day notice.

Two of the comments do not address whether the claim meets the criteria for relief under ORS 197.352. Comments concerning the effects a use of the subject property may have on surrounding areas are generally not something that the department is able to consider in determining whether to waive a state law. If funds do become available to pay compensation, then such effects may become relevant in determining which claims to pay compensation for instead of waive a state law.

Two of the comments are relevant to whether the claimants are owners of the subject property. These comments have been considered by the department in preparing this report. (See the comment letters in the department's claim file.)

## IV. TIMELINESS OF CLAIM

### Requirement

ORS 197.352(5) requires that a written demand for compensation be made:

1. For claims arising from land use regulations enacted prior to the effective date of Measure 37 (December 2, 2004), within two years of that effective date, or the date the public entity applies the land use regulation as an approval criteria to an application submitted by the owner, whichever is later; or
2. For claims arising from land use regulations enacted after the effective date of Measure 37 (December 2, 2004), within two years of the enactment of the land use regulation, or the date the owner of the property submits a land use application in which the land use regulation is an approval criteria, whichever is later.

### Findings of Fact

This claim was submitted to DAS on June 19, 2006, for processing under OAR 125, division 145. The claim identifies Goals 3, 4, 12 and 14 and provisions of ORS 215 as the basis for the claim. Only laws that were enacted or adopted prior to December 2, 2004, are the basis for this claim.

### Conclusions

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

## V. ANALYSIS OF CLAIM

### 1. Ownership

ORS 197.352 provides for payment of compensation or relief from specific laws for "owners" as that term is defined in ORS 197.352. ORS 197.352(11)(C) defines "owner" as "the present owner of the property, or any interest therein."

### Findings of Fact

Claimant Don Johnston and Son, a partnership, acquired the subject property from Donald, Gwendolyn and Danny Johnston on December 28, 1978, as reflected by a quitclaim deed included with the claim.<sup>2</sup> On April 20, 2006, Don Johnston and Son conveyed to Donald, Gwendolyn and Danny Johnston, each a one-third interest in tax lots 100 (Section 32) and 300,

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<sup>2</sup> Although a partnership can be a "family member" of an owner as that term is defined by ORS 197.352(11)(C), an "owner" that is a partnership cannot claim an individual as a "family member," as defined in ORS 197.352(11)(A). Therefore, the individuals who transferred the subject property to Don Johnston and Son cannot be considered its "family members."

as reflected by a bargain and sale deed provided by Klamath County's Planning Department. The Klamath County Assessor's Office confirms Don Johnston and Son's current ownership of tax lots 100 (Section 30C), 100 (Section 31A), 100 (Section 32C) and 1200 and Donald and Gwendolyn Johnston's current ownership of tax lots 100 (Section 32) and 300.

Don Johnston and Son is not an owner of tax lots 100 (Section 32) and 300, and Donald and Gwendolyn Johnston are not owners of tax lots 100 (Section 30C), 100 (Section 31A), 100 (Section 32C) and 1200.

### **Conclusions**

Claimant Don Johnston and Son is an "owner" of tax lots 100 (Section 30C), 100 (Section 31A), 100 (Section 32C) and 1200, as that term is defined by ORS 197.352(11)(C), as of December 28, 1978. Donald and Gwendolyn Johnston are owners of tax lots 100 (Section 32) and 300, as that term is defined by ORS 197.352(11)(C), as of April 20, 2006.

Don Johnston and Son has not established that it is an "owner" of tax lots 100 (Section 32) and 300, and Donald and Gwendolyn Johnston have not established that they are "owners" of tax lots 100 (Section 30C), 100 (Section 31A), 100 (Section 32C) and 1200.

### **2. The Laws That are the Basis for This Claim**

In order to establish a valid claim, ORS 197.352(1) requires, in part, that a law must restrict the 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 claim indicates that the claimants desire to divide the 586.27-acre subject property into 10,000-square foot or larger parcels for residential development with commercial activities on approximately 59 acres of the property. It indicates that the use is not allowed under current land use regulations.<sup>3</sup>

The claim is based on the provisions of state law that regulate rural residential zoning. Tax lots 100 (Section 30C), 100 (Section 31A), 100 (Section 32), 300 and 1200 are zoned Non-Resource (NR) by Klamath County. The NR zone implements the non-resource land use designation of

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<sup>3</sup> The claimants summarily cite numerous state land use laws as applicable to this claim, but do not establish how the laws either apply to the claimants' desired use of the subject property or restrict its use with the effect of reducing its fair market value. On their face, most of the regulations either do not apply to the claimants' desired use of the property or do not restrict the claimants' desired use of the property with the effect of reducing its fair market value. The claimants generally list Goals 3, 4 and 12 but make no attempt to establish how these goals apply to and restrict the desired use of the property. They also generally state they wish to have a "community water system" but do not assert any laws that restrict that use, and do not provide sufficient information regarding that use to allow an evaluation of which state land use regulations may restrict that desired use. This report addresses only those regulations that the department finds are applicable to and restrict the claimants' desired use of the subject property, based on the claimants' description of their desired use.

Klamath County's comprehensive plan.<sup>4</sup> Non-resource lands are designated rural lands that are not subject to Goal 3 or 4. The NR zone establishes a 20-acre minimum for new parcels and allows single-family dwellings. As rural lands available for residential use, they are subject to Goal 14.

Tax lot 100 (Section 32C) is zoned R2 by Klamath County, consistent with Goal 14, which generally requires that land outside of urban growth boundaries be used for rural uses. The county's R2 zone was adopted in 1979 and requires a minimum of two acres for the creation of a new lot or parcel.

Goal 14 was effective on January 25, 1975, and requires that local comprehensive plans identify and separate urbanizable land from rural land in order to provide for an orderly and efficient transition from rural to urban land use. In 2000, as a result of a 1986 Oregon Supreme Court decision,<sup>5</sup> the Commission amended Goal 14 and adopted OAR 660-004-0040 (Application of Goal 14 to Rural Residential Areas), which was effective on October 4, 2000.

The rule states that if a county rural residential zone in effect on October 4, 2000, specifies a minimum lot size of two acres or more, the area of any new lot or parcel shall equal or exceed the minimum lot size that is already in effect (OAR 660-004-0040(7)(c)). Some relief from this provision is available for lots or parcels having more than one permanent habitable dwelling pursuant to OAR 660-004-0040(7)(h). The rule also provides that a county's minimum lot size requirement in a rural residential zone shall not be amended to allow a smaller minimum lot size without approval of an exception to Goal 14 (OAR 660-004-0040(6)). Because Klamath County's rural residential zone was in effect on October 4, 2000, and requires a minimum lot size of two acres, the minimum lot size for any new lot or parcel must equal or exceed two acres.

Don Johnston and Son acquired tax lots 100 (Section 30C), 100 (Section 31A), 100 (Section 32C) and 1200, after the adoption of the statewide planning goals, but before the Commission acknowledged Klamath County's land use regulations to be in compliance with statewide planning goals pursuant to ORS 197.250 and 197.251.

Tax lot 100 (Section 32C) was recognized as resource land when Don Johnston and Son acquired it in 1978, and because the Commission had not acknowledged Klamath County's plan and land use regulations when Don Johnston and Son acquired the property, the statewide planning goals, and particularly Goals 3 (Agricultural Lands) and 4 (Forest Lands), in addition to Goal 14, would have applied directly to the property had it sought the desired use at the time it acquired the property.<sup>6</sup> Alternatively, Don Johnston and Son would have been required to establish a basis

<sup>4</sup> These are lands that have been found to have a low forest site class value, are predominantly SCS soil capability class VII and VIII, are not identified as important fish and wildlife habitat, are not necessary for watershed protection or recreational use, are not irrigated or irrigable or are not necessary to permit farm or forest practices to be undertaken on adjacent or nearby lands.

<sup>5</sup> *1000 Friends of Oregon v. LCDC (Curry County)*, 301 Or 447 (1986).

<sup>6</sup> The statewide planning goals became effective on January 25, 1975, and were applicable to legislative land use decisions and some quasi-judicial land use decisions prior to the Commission's acknowledgment of each county's land use regulations. *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 569 (1977); *Jurgenson v. Union County*, 42 Or App 505 (1979); and *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).

for an exception to compliance with those goals pursuant to the Goal 2 (Land Use Planning) exceptions process. However, through the county's acknowledgement process, the property was ultimately acknowledged as exceptions land pursuant to Goal 2, and zoned by the county for rural residential use. Therefore, while the county could now require that the property be evaluated as resource land, as would have been required in 1978, because of the property's ultimate designation as rural residential exceptions land, the county could also require that Don Johnston and Son's desired use be subject to compliance directly with Goal 14.

The claim does not establish whether Don Johnston and Son's desired division of tax lots 100 (Section 30C), 100 (Section 31A), 100 (Section 32C) and 1200 to create 10,000-square foot parcels could have satisfied this standard under Goal 14.<sup>7</sup>

### **Conclusions**

The minimum lot size requirements for rural residential lots or parcels established by Goal 14 and OAR 660-004-0040 were adopted after Don Johnston and Son acquired tax lots 100 (Section 30C), 100 (Section 31A), 100 (Section 32C) and 1200 in 1978, but before Donald and Gwendolyn Johnston acquired tax lots 100 (Section 32) and 300 and do not allow the desired division of the tax lots. However, when Don Johnston and Son acquired tax lots 100 (Section 30C), 100 (Section 31A), 100 (Section 32C) and 1200 in 1978, the statewide planning goals, and in particular, the general requirements of Goal 14, applied directly to the tax lots. The claim does not establish whether or to what extent Don Johnston and Son's desired level of development would have been permitted under the laws in effect in 1978 when it acquired tax lots 100 (Section 30C), 100 (Section 31A), 100 (Section 32C) and 1200. Laws adopted since Donald and Gwendolyn Johnston acquired tax lots 100 (Section 32) and 300 in 2006 do not restrict their desired use of these tax lots relative to when they acquired them in 2006.

As explained in Section V.(1), Don Johnston and Son is not an "owner" of tax lots 100 (Section 32) and 300, and Donald and Gwendolyn Johnston are not "owners" of tax lots 100 (Section 30C), 100 (Section 31A), 100 (Section 32C) and 1200, as that term is defined in ORS 197.352(11)(C). Therefore, no laws enforced by the Commission or the department restrict their use of private real property with the effect of reducing the fair market value of the property.

This report addresses only those state laws that are identified in the claim, or that the department is certain apply to the subject property based on the uses that the claimants have identified. There may be other laws that currently apply to Don Johnston and Son's use of tax lots 100 (Section 30C), 100 (Section 31A), 100 (Section 32C) and 1200 and that may continue to apply to its use of these tax lots, that have not been identified in the claim. In some cases, it will not be possible to know which laws apply to a use of the subject property until there is a specific proposal for that use. When Don Johnston and Son 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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However, statutory requirements continue to apply, and insofar as the state and local provisions are materially the same, the local provisions must be interpreted consistent with the substance of the goals and implementing rules. *Foster v. Polk County*, 115 Or App 475 (1992); *Kenagy v. Benton County*, 115 Or App 131 (1992).

<sup>7</sup> When Klamath County's plan was acknowledged for compliance with Goal 14 in November 1985, the subject property was zoned AF-20, which allowed a 20-acre minimum lot size for new lots or parcels.

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

In order to establish a valid claim, ORS 197.352(1) requires that the land use regulation(s) (described in Section V.(2) of this report) must have “the effect of reducing the fair market value of the property, or any interest therein.”

#### **Findings of Fact**

The claim includes an estimate of \$1 million as the reduction in the subject property’s fair market value due to the regulations that restrict the claimants’ desired use of the property. This amount is based on the claimants’ assessment of the subject property’s value.

#### **Conclusions**

As explained in Section V.(1) of this report, the claimants are Don Johnston and Son who acquired tax lots 100 (Section 30C), 100 (Section 31A), 100 (Section 32C) and 1200 on December 28, 1978, and Donald and Gwendolyn Johnston who acquired tax lots 100 (Section 32) and 300 on April 20, 2006. No state laws adopted since Donald and Gwendolyn Johnston acquired tax lots 100 (Section 32) and 300 restrict the use of the property relative to the uses allowed in 2006. Therefore, the fair market value of tax lots 100 (Section 32) and 300 has not been reduced as a result of land use regulations enforced by the Commission or the department.

As explained in Section V.(1) of this report, Don Johnston and Son is not an “owner” of tax lots 100 (Section 32) and 300, and Donald and Gwendolyn Johnston are not “owners” of tax lots 100 (Section 30C), 100 (Section 31A), 100 (Section 32C) and 1200, as that term is defined in ORS 197.352(11)(C). Therefore, no laws restrict their use of those tax lots with the effect of reducing the fair market value of the tax lots.

Under ORS 197.352, the Don Johnston and Son is due compensation for land use regulations that restrict the use of tax lots 100 (Section 30C), 100 (Section 31A), 100 (Section 32C) and 1200 and have the effect of reducing the fair market value. Based on the findings and conclusions in Section V.(2) of this report, laws adopted since the Don Johnston and Son acquired tax lots 100 (Section 30C), 100 (Section 31A), 100 (Section 32C) and 1200 restrict its desired use of these tax lots. The claimants estimate that the effect of the regulations on the fair market value of the subject property is a reduction of \$1 million.

Without an appraisal or other documentation, and without verification of whether or the extent to which Don Johnston and Son’s desired use of tax lots 100 (Section 30C), 100 (Section 31A), 100 (Section 32C) and 1200 was allowed under the standards in effect when it acquired the tax lots, it is not possible to substantiate the specific dollar amount by which the land use regulations have reduced the fair market value of the tax lots. Nevertheless, based on the evidence in the record for this claim, the department determines that the fair market value of tax lots 100 (Section 30C), 100 (Section 31A), 100 (Section 32C) and 1200 has been reduced to some extent as a result of land use regulations enforced by the Commission or the department.

#### **4. Exemptions Under ORS 197.352(3)**

ORS 197.352 does not apply to certain land use regulations. In addition, under ORS 197.352(3), certain types of laws are exempt from ORS 197.352.

#### **Findings of Fact**

The claim is based on state land use regulations that restrict the use of the subject property, including Goal 14 and OAR 660-004-0040, which Klamath County has implemented through its NR and R2 zones. With the exception of provisions of Goal 14, adopted before Don Johnston and Son acquired tax lots 100 (Section 30C), 100 (Section 31A), 100 (Section 32C) and 1200 on December 28, 1978, these state land use regulations were not in effect when it acquired the tax lots. The claim does not identify any state land use regulations enacted or adopted since Donald and Gwendolyn Johnston acquired tax lots 100 (Section 32) and 300 that restrict the use of the tax lots relative to what would have been allowed when they acquired them on April 20, 2006. As set forth in Section V.(2) of this report, state land use regulations restricting Donald and Gwendolyn Johnston's desired use of tax lots 100 (Section 32) and 300 were in effect when they acquired these tax lots in 2006.

#### **Conclusions**

Without a specific development proposal for tax lots 100 (Section 30C), 100 (Section 31A), 100 (Section 32C) and 1200, it is not possible for the department to determine all 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 ORS 197.352. It appears that the goal and rule restrictions on residential division of Don Johnston and Son's property are not exempt under ORS 197.352(3)(E) only to the extent they were adopted after it acquired the property. Provisions of Goal 14 in effect when Don Johnston and Son acquired tax lots 100 (Section 30C), 100 (Section 31A), 100 (Section 32C) and 1200 in 1978 are exempt under ORS 197.352(3)(E) and will continue to apply to the tax lots. All of the state land use regulations that restrict Donald and Gwendolyn Johnston's desired use of tax lots 100 (Section 32) and 300 were in effect when they acquired the tax lots. Therefore, these state land use regulations are exempt under ORS 197.352(3)(E), which exempts laws in effect when Donald and Gwendolyn Johnston acquired tax lots 100 (Section 32) and 300.

As explained in Section V.(1) of this report, Don Johnston and Son is not an "owner" of tax lots 100 and 300, and Donald and Gwendolyn Johnston are not "owners" of tax lots 100 (Section 30C), 100 (Section 31A), 100 (Section 32C) and 1200, as that term is defined in ORS 197.352(11)(C). Therefore, the issue of whether any laws are exempt from ORS 197.352 is not relevant as to those tax lots.

Other laws in effect when Don Johnston and Son acquired tax lots 100 (Section 30C), 100 (Section 31A), 100 (Section 32C) and 1200, including direct application of the applicable provisions of the statewide planning goals, are also exempt under ORS 197.352(3)(E) and will continue to apply to the its use of the tax lots. There may be other laws that continue to apply to Don Johnston and Son's use of tax lots 100 (Section 30C), 100 (Section 31A), 100 (Section 32C) and 1200 that have not been identified in the claim. In some cases, it will not be possible to know which laws apply to a use of tax lots 100 (Section 30C), 100 (Section 31A), 100 (Section 32C) and 1200 until there is a specific proposal for that use. When Don Johnston and Son seeks

a building or development permit to carry out a specific use, it may become evident that other state laws apply to that use. In some cases, some of these laws may be exempt under ORS 197.352(3)(A) to (D).

This report addresses only those state laws that are identified in the claim, or that the department is certain apply to the subject property based on the uses that the claimants have identified. Similarly, this report only addresses the exemptions provided for under ORS 197.352(3) 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 subject property.

## **VI. FORM OF RELIEF**

ORS 197.352(1) provides for payment of compensation to an owner of private real property if the Commission or the department has enforced one or more laws that restrict the use of the property in a manner that reduces its fair market value. In lieu of compensation, the department may choose to not apply the law in order to allow the present owner to carry out a use of the property permitted at the time the present owner acquired the property. The Commission, by rule, has directed that if the department determines a claim is valid, the Director of the department must provide only non-monetary relief unless and until funds are appropriated by the legislature to pay claims.

### **Findings of Fact**

Based on the record, the department finds that the claim is not valid as to Don Johnston and Son for tax lots 100 (Section 32) and 300 and as to Donald and Gwendolyn Johnston for tax lots 100 (Section 30C), 100 (Section 31A), 100 (Section 32C) and 1200 because they are not owners of these tax lots. Laws enforced by the Commission or the department do not restrict Donald and Gwendolyn Johnston's desired use of tax lots 100 (Section 32) and 300 relative to what was permitted when they acquired them in 2006 and do not reduce the fair market value of the tax lots. All state laws restricting the use of tax lots 100 (Section 32) and 300 are exempt under ORS 197.352(3)(E).

The department further finds laws enforced by the Commission or the department restrict Don Johnston and Son's desired use of tax lots 100 (Section 30C), 100 (Section 31A), 100 (Section 32C) and 1200. The claim asserts that existing state land use regulations enforced by the Commission or the department have the effect of reducing the fair market value by \$1 million. However, because the claim does not provide an appraisal or other relevant evidence demonstrating that the land use regulations described in Section V.(2) reduce the fair market value of the subject property, a specific amount of compensation cannot be determined. In order to determine a specific amount of compensation due for this claim, it would also be necessary to verify whether or the extent to which Don Johnston and Son's desired use of the property was allowed under the standards in effect when it acquired the property. Nevertheless, based on the record for this claim, the department has determined that the laws on which the claim is based have reduced the fair market value of tax lots 100 (Section 30C), 100 (Section 31A), 100 (Section 32C) and 1200 to some extent.

No funds have been appropriated at this time for the payment of claims. In lieu of payment of compensation, ORS 197.352 authorizes the department to modify, remove or not apply all or parts of certain land use regulations to allow Don Johnston and Son to use tax lots 100 (Section 30C), 100 (Section 31A), 100 (Section 32C) and 1200 for a use permitted at the time it acquired the tax lots on December 28, 1978.

### **Conclusions**

Based on the record before the department, Don Johnston and Son has not established that it is entitled to relief for tax lots 100 (Section 32) and 300, and Donald and Gwendolyn Johnston have not established that they are entitled to relief for tax lots 100 (Section 30C), 100 (Section 31A), 100 (Section 32C) and 1200 under ORS 197.352(1) as a result of land use regulations enforced by the Commission or the department because they are not owners of these tax lots. Donald and Gwendolyn Johnston have not established that they are entitled to relief for tax lots 100 (Section 32) and 300 under ORS 197.352(1) as a result of land use regulations enforced by the Commission or the department because the land use regulations that restrict their use of these tax lots were in effect when they acquired them in 2006. Therefore, the department recommends that Don Johnston and Son's claim for tax lots 100 (Section 32) and 300, and Donald and Gwendolyn Johnston's claim for tax lots 100 (Section 30C), 100 (Section 31A), 100 (Section 32), 100 (Section 32C), 300 and 1200 be denied. The department otherwise recommends that the claim be approved, subject to the following terms:

1. In lieu of compensation under ORS 197.352, the State of Oregon will not apply the following laws to Don Johnston and Son's division of tax lots 100 (Section 30C), 100 (Section 31A), 100 (Section 32C) and 1200 into 10,000-square foot or larger parcels for residential development with commercial activities on approximately 59 acres of the property: the applicable provisions of Goal 14 and OAR 660-004-0040 adopted after December 28, 1978. These land use regulations will not apply to Don Johnston and Son only to the extent necessary to allow it to use tax lots 100 (Section 30C), 100 (Section 31A), 100 (Section 32C) and 1200 for the use described in this report, and only to the extent that use was permitted when it acquired them on December 28, 1978. The department acknowledges that the relief to which Don Johnston and Son is entitled under ORS 197.352 may not allow it to use those tax lots in the manner set forth in the claim.
2. The action by the State of Oregon provides the state's authorization to Don Johnston and Son to use tax lots 100 (Section 30C), 100 (Section 31A), 100 (Section 32C) and 1200 for the use described in this report, subject to the standards in effect on December 28, 1978. On that date, these tax lots were subject to the applicable provisions of the statewide planning goals, and in particular, Goal 14 in effect at that time.
3. To the extent that any law, order, deed, agreement or other legally enforceable public or private requirement provides that tax lots 100 (Section 30C), 100 (Section 31A), 100 (Section 32C) and 1200 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 Don Johnston and Son 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 215.402 or 227.160, other permits or authorizations from local, state or federal agencies

and restrictions on the use of tax lots 100 (Section 30C), 100 (Section 31A), 100 (Section 32C) and 1200 imposed by private parties.

4. Any use of tax lots 100 (Section 30C), 100 (Section 31A), 100 (Section 32C) and 1200 by Don Johnston and Son 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 ORS 197.352 including, without limitation, those laws exempted under ORS 197.352(3).

5. Without limiting the generality of the foregoing terms and conditions, in order for Don Johnston and Son to use tax lots 100 (Section 30C), 100 (Section 31A), 100 (Section 32C) and 1200, it may be necessary for it to obtain a decision under ORS 197.352 from a city and/or county and/or metropolitan service district that enforces land use regulations applicable to the tax lots. Nothing in this order relieves Don Johnston and Son from the necessity of obtaining a decision under ORS 197.352 from a local public entity that has jurisdiction to enforce a land use regulation applicable to a use of tax lots 100 (Section 30C), 100 (Section 31A), 100 (Section 32C) and 1200 by the claimant.

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

The department issued its draft staff report on this claim on November 20, 2006. 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.