

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  
COMPENSATION UNDER ORS 197.352 ) CLAIM NO. M118713  
(BALLOT MEASURE 37) OF )  
James E. and Marjorie H. Kerns, CLAIMANTS )

Claimants: James E. and Marjorie H. Kerns (the Claimants)

Property: Township 7S, Range 38E, Section 35C, Tax lot 400, Baker 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 James and Marjorie Kerns' development of a dwelling on their 39.09-acre property: applicable provisions of Goal 3, ORS 215 and OAR 660, division 33, enacted or adopted after May 23, 1974. These land use regulations will not apply to the claimants only to the extent necessary to allow them to use the subject property for the use described in this report, and only to the extent that use was permitted when they acquired the property on May 23, 1974.
2. The action by the State of Oregon provides the state's authorization to the claimants to use the subject property for the use described in this report, subject to the provisions of ORS 215 then in effect, including the interim planning goals set forth in ORS 215.515 (1973 edition) in effect on May 23, 1974.
3. To the extent that any law, order, deed, agreement or other legally enforceable public or private requirement provides that the subject 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 227.160, other permits or authorizations from local, state or federal agencies and restrictions on the use of the subject property imposed by private parties.

4. Any use of the subject 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 ORS 197.352 including, without limitation, those laws exempted under ORS 197.352(3).

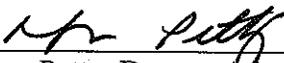
5. Without limiting the generality of the foregoing terms and conditions, in order for the claimants to use the subject property, it may be necessary for them to obtain a decision under ORS 197.352 from a city and/or county and/or metropolitan service district that enforces land use regulations applicable to the property. Nothing in this order relieves the claimants 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 the subject property by the claimants.

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 Deputy 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:

  
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Lane Shetterly, Director  
DLCD  
Dated this 15<sup>th</sup> day of May, 2006.

FOR the DEPARTMENT OF ADMINISTRATIVE  
SERVICES:

  
\_\_\_\_\_  
Dugan Petty, Deputy Administrator  
DAS, State Services Division  
Dated this 15<sup>th</sup> day of May, 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<sup>1</sup>, 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."

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<sup>1</sup> By order of the Marion County Circuit Court, "all time lines under Measure 37 [were] suspended indefinitely" on October 25, 2005. This suspension was lifted on March 13, 2006 by the court. As a result, a period of 139 days (the number of days the time lines were suspended) has been added to the 180-day time period under ORS 197.352(6) for claims that were pending with the state on October 25, 2005.

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

May 15, 2006

**STATE CLAIM NUMBER:** M118713

**NAMES OF CLAIMANTS:** James E. and Marjorie H. Kerns

**MAILING ADDRESS:** 13856 Willow Creek Lane  
Haines, Oregon 97833

**PROPERTY IDENTIFICATION:** Township 7S, Range 38E, Section 35C  
Tax lot 400  
Baker County

**DATE RECEIVED BY DAS:** July 5, 2005

**180-DAY DEADLINE:** May 20, 2006<sup>1</sup>

**I. SUMMARY OF CLAIM**

The claimants James E. and Marjorie H. Kerns, seek compensation for the minimum amount of \$104,000 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 develop a dwelling on the 39.09-acre property. The subject property is located at 13856 Willow Creek Lane, near Haines, in Baker County. (See claim.)

**II. SUMMARY OF STAFF RECOMMENDATION**

Based on the findings and conclusions set forth below, the Department of Land Conservation and Development (the department) has determined that the claim is valid. Department staff recommends that, in lieu of compensation, the requirements of the following state laws enforced by the Land Conservation and Development Commission (the Commission) or the department not apply to James and Marjorie Kerns' development of a dwelling on the 39.09-acre property: applicable provisions of Statewide Planning Goal 3 (Agricultural Lands), ORS 215 and Oregon Administrative Rules (OAR) 660, division 33, enacted or adopted after May 23, 1974. These laws will not apply to the claimants only to the extent necessary to allow them to use the subject property for the use described in this report, and only to the extent that use was permitted when they acquired the property on May 23, 1974. (See the complete recommendation in Section VI. of this report.)

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<sup>1</sup> This date reflects 180 days from the date the claim was submitted, as extended by the 139 days that all timelines under Measure 37 were suspended during the pendency of *MacPherson v. Dept. of Admin. Svcs.*, 340 Or 117 (2006).

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

#### **Comments Received**

On August 29, 2005, pursuant to OAR 125-145-0080, the Oregon Department of Administrative Services (DAS) provided written notice to the owners of surrounding properties. According to DAS, one written comment was received in response to the 10-day notice.

The comment does 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. (See the comment letter 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 July 5, 2005, for processing under OAR 125, division 145. The claim identifies OAR 660-033-0135 and House Bill 3661 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**

The claimants, James and Marjorie Kerns, acquired the subject property on May 23, 1974, as reflected by a warranty deed included with the claim. The Baker County Assessor’s Office confirms the claimants’ current ownership of the subject property.

### **Conclusions**

The claimants, James and Marjorie Kerns, are “owners” of the subject property as that term is defined by ORS 197.352(11)(C) as of May 23, 1974.

### **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 develop the subject property with a single-family dwelling, which is not allowed under the property’s current zoning.

The claim is based generally on Baker 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 Goal 3 in accordance with ORS 215 and OAR 660, division 33, because the claimants’ property is “agricultural land” as defined by Goal 3.<sup>2</sup> Goal 3 became effective on January 25, 1975, and requires that agricultural land as defined by the Goal be zoned EFU pursuant to ORS 215.

Current land use regulations, particularly ORS 215.263, 215.284 and OAR 660, division 33, enacted or adopted pursuant to Goal 3, establish standards for development of dwellings on existing or proposed parcels on that land.

OAR 660-033-0135 (applicable to farm dwellings) became effective on March 1, 1994, and interprets the statutory standard for a primary dwelling in an EFU zone under ORS 215.283(1)(f). OAR 660-033-0130(4) (applicable to non-farm dwellings) became effective

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<sup>2</sup> The claimants’ property is “agricultural land” because it contains Natural Resources Conservation Service Class I-VI soils.

on August 7, 1993, and was amended to comply with ORS 215.284(4) on March 1, 1994. The Commission subsequently adopted amendments to comply with House Bill 3326 (Chapter 704, Oregon Laws 2001, effective on January 1, 2002), which were effective on May 22, 2002. (See administrative rule history for OAR 660-033-0100, -0130 and -0135.)

The claimants acquired the subject property on May 23, 1974, after the adoption of Senate Bill 100 (Chapter 80, Oregon Laws 1973, effective on October 5, 1973) but before the adoption of the statewide planning goals, effective on January 25, 1975. At that time, the subject property was not zoned by Baker County.

During the period between October 5, 1973, and January 25, 1975, ORS 197.175(1) and 197.280 (1973 editions) required, in addition to any local plan or zoning provisions, that cities and counties exercise their planning responsibilities in accordance with the interim land use planning goals set forth in ORS 215.515 (1973 edition).<sup>3</sup>

The following interim goals are directly applicable to this claim: "To preserve the quality of the air, water and *land* [emphasis added] resources of the state"; "To conserve prime farm lands for the production of crops"; "To provide for the orderly and efficient transition from rural to urban land use"; "To protect life and property in areas subject to floods, landslides and other natural disasters"; "To provide and encourage a safe, convenient and economic transportation system including all modes of transportation: Air, water, rail, highway and mass transit and recognizing differences in the social costs in the various modes of transportation"; and "To develop a timely, orderly and efficient arrangement of public facilities and services to serve as a framework for urban and rural development." ORS 215.515 (1973 edition).

One of the interim goals was to "conserve prime farm lands for the production of crops." Soil types are a determinant of prime farm land. None of the soils on the 39.09-acre property are rated as "prime" by the Natural Resource Conservation Service (NRCS), and none of the soils on the subject property are rated Class 1 by NRCS.

No information has been provided establishing whether or to what extent the claimants' desired development of a dwelling on the subject property complies with the interim planning goals set forth in ORS 215.515 (1973 edition) in effect at the time the claimants acquired the property on May 23, 1974.

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<sup>3</sup> The "interim" land use goals are set forth in ORS 215.515(1)(a) to (j) (1973 edition) as follows: (a) "To preserve the quality of the air, water and land resources of the state," (b) "To conserve open space and protect natural and scenic resources," (c) "To provide for the recreational needs of citizens of the state and visitors," (d) "To conserve prime farm lands for the production of crops," (e) "To provide for the orderly and efficient transition from rural to urban land use," (f) "To protect life and property in areas subject to floods, landslides and other natural disasters," (g) "To provide and encourage a safe, convenient and economic transportation system including all modes of transportation: Air, water, rail, highway and mass transit and recognizing differences in the social costs in the various modes of transportation," (h) "To develop a timely, orderly and efficient arrangement of public facilities and services to serve as a framework for urban and rural development," (i) "To diversify and improve the economy of the state" and (j) "To ensure that the development of properties within the state is commensurate with the character and the physical limitations of the land." ORS 215.515 (1973 edition).

## **Conclusions**

The current zoning requirements and dwelling standards established by applicable provisions Goal 3, ORS 215 and OAR 660, division 33, were all enacted or adopted after the claimants acquired the subject property in 1974 and do not allow the desired development of a dwelling on the subject property. However, the claim does not establish whether or to what extent the claimants' desired use of the subject property complies with the interim planning goals in effect when they acquired the property on May 23, 1974.

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 use that the claimants have identified. There may be other laws that currently apply to the claimants' use of the subject 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 which laws apply to a use of subject 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 currently apply to that use and may continue to apply to that use.

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

In order to establish a valid claim, ORS 197.352(1) 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 a minimum estimate of \$104,000 as the reduction in the subject property's fair market value due to current regulations. This amount is based on the claimants' own estimate of the value of the property without current regulations.

### **Conclusions**

As explained in Section V.(1) of this report, the claimants are James and Marjorie Kerns who acquired the subject property on May 23, 1974. Under ORS 197.352, the claimants 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 or adopted since the claimants acquired the subject property may restrict the desired development of a dwelling on the property. The claimants estimate the reduction in value due to the restrictions to be at least \$104,000.

Without an appraisal or other documentation and without verification of whether or to what extent the claimants' desired use of the subject property was allowed under the standards in effect when the claimants acquired the property, 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 the fair market value of the subject property 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 applicable provisions of Goal 3, ORS 215 and OAR 660, division 33, which Baker County has implemented through its current EFU zone. With the exception of applicable provisions of ORS 215, including the interim land use planning goals in effect on May 23, 1974, these state land use laws were not in effect when the claimants acquired the subject property.

#### **Conclusions**

Without a specific development proposal for the subject property, 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 general statutory, goal and rule restrictions on residential development and use of farm land apply to the claimants' use of the subject property, and these laws are not exempt under ORS 197.352(3)(E) to the extent they were enacted or adopted after the claimants acquired the property in 1974. Provisions of ORS 215, including the interim statewide planning goals in effect when the claimants acquired the subject property in 1974, are exempt under ORS 197.352(3)(E) and will continue to apply to the property.

Other laws in effect when the claimants acquired the subject property are also exempt under ORS 197.352(3)(E) 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 subject property 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 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. 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 the 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 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 current 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 findings and conclusions set forth in this report, laws enforced by the Commission or the department restrict the claimants' ability to develop a dwelling on their 39.09-acre property. The claim asserts that the laws enforced by the Commission or the department reduce the fair market value of the subject property by at least \$104,000. However, because the claim does not provide an appraisal or other specific documentation for how the specified restrictions reduce the fair market value of the subject property, and without verification of whether or to what extent the claimants' desired use of the property was allowed under the standards in effect when they acquired 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 subject property 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 James and Marjorie Kerns to use the subject property for a use permitted at the time they acquired the property on May 23, 1974.

### **Conclusions**

Based on the record, the department 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 James and Marjorie Kerns' development of a dwelling on their 39.09-acre property: applicable provisions of Goal 3, ORS 215 and OAR 660, division 33, enacted or adopted after May 23, 1974. These land use regulations will not apply to the claimants only to the extent necessary to allow them to use the subject property for the use described in this report, and only to the extent that use was permitted when they acquired the property on May 23, 1974.
2. The action by the State of Oregon provides the state's authorization to the claimants to use the subject property for the use described in this report, subject to the provisions of ORS 215 then in effect, including the interim planning goals set forth in ORS 215.515 (1973 edition) in effect on May 23, 1974.
3. To the extent that any law, order, deed, agreement or other legally enforceable public or private requirement provides that the subject 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 227.160, other permits or authorizations from local, state or federal agencies and restrictions on the use of the subject property imposed by private parties.

4. Any use of the subject 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 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 the claimants to use the subject property, it may be necessary for them 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 property. Nothing in this order relieves the claimants 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 the subject property by the claimants.

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

The department issued its draft staff report on this claim on April 26, 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. Comments received have been taken into account by the department in the issuance of this final report.