



# Oregon

Theodore R. Kulongoski, Governor

## Department of Land Conservation and Development

635 Capitol Street NE, Suite 150

Salem, Oregon 97301-2524

Phone: (503) 373-0050

First Floor/Coastal Fax: (503) 378-6033

Second Floor/Director's Office Fax: (503) 378-5518

Third Floor/Measure 37 Fax: (503) 378-5318

Web Address: <http://www.oregon.gov/LCD>

November 1, 2007

To: Interested Persons  
From: Cora R. Parker, Acting Director



*Re: Ballot Measure 37 (ORS 197.352) Claim Number M131276*

*Claimant: Timothy A. Kerns*

---

Enclosed, in regard to the above-referenced claim for compensation under Ballot Measure 37 (ORS 197.352), is the Final Staff Report and Recommendation of the Department of Land Conservation and Development, and the Final Order.

This Final Staff Report and Recommendation and the Final Order constitute the final decision on this claim. No further action will be taken on this matter.



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. M131276  
(BALLOT MEASURE 37) OF )  
Timothy A. Kerns, CLAIMANT )

Claimant: Timothy A. Kerns (the Claimant)

Property: Township 8S, Range 38E, Section 12, Tax lot 2201  
Township 8S, Range 39E, Section 7, Tax lot 2600  
Baker County (the property)

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

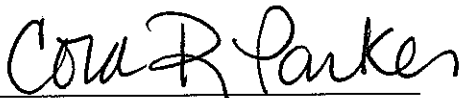
Claimant submitted the Claim to the State of Oregon under ORS 197.352. Under  
OAR 125-145-0010 *et seq.*, the Department of Administrative Services (DAS) referred  
the Claim to the Department of Land Conservation and Development (DLCD) as the  
regulating entity. This order is based on the record herein, including the Findings and  
Conclusions set forth in the Amended 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 Acting 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 Manager for the Measure  
37 Services Unit 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:



Cora R. Parker, Acting Director  
DLCD  
Dated this 1<sup>st</sup> day of November, 2007.

FOR THE DEPARTMENT OF  
ADMINISTRATIVE SERVICES:



Carla Ploederer, Manager  
DAS, Measure 37 Services Unit  
Dated this 1<sup>st</sup> day of November, 2007.

## **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)

**ORS 197.352 (BALLOT MEASURE 37) CLAIM FOR COMPENSATION**

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

November 1, 2007

**STATE CLAIM NUMBER:** M131276

**NAME OF CLAIMANT:** Timothy A. Kerns

**MAILING ADDRESS:** 45306 Schoolhouse Road  
Haines, Oregon 97833

**PROPERTY IDENTIFICATION:** Township 8S, Range 38E, Section 12  
Tax lot 2201

Township 8S, Range 39E, Section 7  
Tax lot 2600  
Baker County

**DATE RECEIVED BY DAS:** November 27, 2006

**DEADLINE FOR FINAL ACTION:<sup>1</sup>** May 20, 2008

**I. SUMMARY OF CLAIM**

The claimant, Timothy Kerns, seeks compensation in the amount of \$1,172,234 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 claimant desires compensation or the right to divide the 354.31-acre subject property<sup>2</sup> into two parcels.<sup>3</sup> The subject property is located at 45306 Schoolhouse Road, near Haines, in Baker County. (See claim.)

---

<sup>1</sup> ORS 197.352, as originally enacted, required that final action on claims made under Measure 37 be made within 180 days of the date the claim was filed. In response to the large volume of claims filed in late 2006, the Oregon legislature passed House Bill 3546, which became effective on May 10, 2007. This legislation increased the amount of time state and local governments have to take final action on Measure 37 claims filed on or after November 1, 2006, by 360 days, to a total of 540 days.

<sup>2</sup> The subject property includes two tax lots. Tax lot 2201 consists of 319.09 acres and tax lot 2600 consists of 35.22 acres.

<sup>3</sup> Under ORS 197.352(8), if a public entity elects to not apply one or more land use regulations to the claimant's use of the property, it may do so only to allow "a use." Further, in order to determine that land use regulations have restricted the claimant's use of the property, the department must base that determination on a use. The department makes every effort to determine what use of the property the claimant seeks to carry out, but in circumstances where the claimant does not provide the information necessary for the department to determine the use sought, the department will conclude that the desired use is to divide each parcel into one additional parcel. On July 24, 2007, department staff attempted to contact the claimant by telephone. On July 26, 2007, department staff sent a letter to the claimant explaining that the department must base a determination on a use and requesting clarification of the claimant's desired use. However, as of September 24, 2007, no response has been received from the claimant. If

## 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 not valid because neither the Land Conservation and Development Commission (the Commission) nor the department has enforced laws that restrict the claimant's use of the subject private real property. (See the complete recommendation in Section VI. of this report.)

## III. COMMENTS ON THE CLAIM

### Comments Received

On July 14, 2007, pursuant to Oregon Administrative Rule (OAR) 125-145-0080, the Oregon Department of Administrative Services (DAS) provided written notice to the owners of surrounding properties. According to DAS, no comments were received in response to the 15-day notice.

## 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 November 27, 2006, for processing under OAR 125, division 145. The claim identifies Goal 3, ORS 215 and OAR 660, divisions 5, and 33, 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.

---

the claimant desires to make a claim for a different use, the claimant may file a claim for compensation under ORS 197.352.

## 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 claimant, Timothy Kerns, acquired the subject property on July 29, 1993, as reflected by a warranty deed included with the claim.<sup>4</sup> The Baker County Assessor’s Office confirms the claimant’s current ownership of the subject property.

### Conclusions

The claimant, Timothy Kerns, is an “owner” of the subject property as that term is defined by ORS 197.352(11)(C), as of July 29, 1993.

### 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 claimant’s use of private real property in a manner that reduces the fair market value of the property relative to how the property could have been used at the time the claimant or a family member acquired the property.

### Findings of Fact

The claim indicates that the claimant desires to divide the 354.31-acre subject property, and that current land use regulations prevent the desired use.

The claim is based generally on the applicable provisions of state law that require Exclusive Farm Use (EFU) zoning and restrict uses on EFU-zoned land. The claimant’s property is zoned EFU by Baker County as required by Goal 3, in accordance with ORS 215 and OAR 660, division 33, because the claimant’s property is “agricultural land” as defined by Goal 3.<sup>5</sup> Goal 3 became effective on January 25, 1975, and required that agricultural lands as defined by Goal 3 be zoned EFU pursuant to ORS 215.

Current land use regulations, particularly ORS 215.263, 215.284 and 215.780 and OAR 660, division 33, enacted or adopted pursuant to Goal 3, prohibit the division of EFU-zoned land into parcels less than 80 acres. ORS 215.780 establishes an 80-acre minimum size for the creation of

---

<sup>4</sup> The claimant asserts that he acquired the subject property from his parents, Tim and Janice Kerns; however, the claimant did not provide documentation to establish their acquisition date. Without that documentation, the department cannot evaluate the claim for compensation based on the date the claimant’s family acquired the property.

<sup>5</sup> The claimant’s property is “agricultural land” because it contains Natural Resources Conservation Service Class I–VI soils.

new lots or parcels in EFU zones and became effective on November 4, 1993 (Chapter 792, Oregon Laws 1993).

At the time the claimant acquired the subject property, it was subject to Baker County's acknowledged comprehensive plan and EFU zone.<sup>6</sup> That zone established a 20-acre minimum lot size for new lots or parcels. At that time, the claimant's desired use of the property would have been subject to compliance with Goal 3, and OAR 660, division 5, as implemented through the county's acknowledged EFU zone and the applicable provisions of ORS 215 then in effect.<sup>7</sup> In 1989, ORS 215.263 (1989 edition) required that divisions of land in EFU zones be "appropriate for the continuation of the existing commercial agricultural enterprise within the area" or not smaller than the minimum size in the county's acknowledged plan. ORS 215.283(1)(f) (1989 edition) generally allowed farm dwellings "customarily provided in conjunction with farm use."

The claimant has not alleged how a specific land use regulation restricts the desired use of the property with the effect of reducing the fair market value of the property.

### **Conclusions**

The claim does not establish that any state laws currently restrict the claimant's desired use of the property. Based on the record before the department, neither the Commission nor the department enforces any laws that restrict the claimant's desired use of the subject property.

### **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 \$1,173,234 as the reduction in the subject property's fair market value due to the regulations that restrict the claimant's desired use of the property. This amount is based on the claimant's assessment of the subject property's value.

### **Conclusions**

As explained in Section V.(1) of this report, the claimant, Timothy Kerns, has not established that any state land use regulations restrict the use of the subject property. Accordingly, the department cannot determine that any laws enforced by the Commission or the department have had the effect of reducing the fair market value of the subject property.

---

<sup>6</sup> Baker County's EFU zone was acknowledged by the Commission for compliance with Goal 3 on May 16, 1986.

<sup>7</sup> After the county's comprehensive plan and land use regulations were acknowledged by the Commission as complying with the statewide planning goals, the goals and implementing rules no longer applied directly to individual 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, the local provisions must be interpreted consistent with the substance of the goals and implementing rules. *Forster v. Polk County*, 115 Or App 475 (1992) and *Kenagy v. Benton County*, 115 Or App 131 (1992).

#### **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.

As explained in Section V.(2) of this report, the claimant, Timothy Kerns, has not established that any state land use regulations restrict his desired use of the subject property. Accordingly, the department cannot determine that any exemptions under ORS 197.352(3) apply to this claim.

### **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 for this claim, the claimant has not established that any state laws enforced by the Commission or the department restrict the use of the subject property and have the effect of reducing the fair market value of the subject property.

#### **Conclusions**

Based on the record before the department, the claimant, Timothy Kerns, has not established that he is entitled to relief under ORS 197.352(1) as a result of land use regulations enforced by the Commission or the department because no state land use regulations restrict the claimant's desired use of the subject property. Therefore, the department recommends that this claim be denied.

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

The department issued its draft staff report on this claim on September 27, 2007. OAR 125-145-0100(3), provided an opportunity for the claimant or the claimant's 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.