

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 OAR 197.352	)	CLAIM NO. M118463
(BALLOT MEASURE 37) OF	)	
Harold Kuehne, CLAIMANT	)	

Claimant: Harold Kuehne (the Claimant)

Property: Tax Lot 1000, Township 3S, Range 3W, Section 17, Yamhill 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 OAR 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 OAR 197.352, the State of Oregon will not apply the following laws to Harold Kuehne's division of his 94.2-acre property into 1.5 acre-parcels or to his development of a dwelling on each parcel: applicable provisions of Statewide Planning Goals 3 and 14, ORS 215, and OAR 660, division 33. These land use regulations will not apply to Mr. Kuehne's use of his property only to the extent necessary to allow the claimant to use the property for the use described in this report, as permitted at the time he acquired the property on August 20, 1965.
2. The action by the State of Oregon provides the state's authorization to the claimant to use his property for the use described in this report, subject to the standards in effect on August 20, 1965.
3. To the extent that any law, order, deed, agreement or other legally enforceable public or private requirement provides that the property may not be used without a permit, license, or other form of authorization or consent, the order will not authorize the use of the property unless the

claimant 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 ORS 227.160; other permits or authorizations from local, state or federal agencies; and restrictions on the use of the property imposed by private parties.

4. Any use of the property by the claimant under the terms of the order will remain subject to the following laws: (a) those laws not specified in Condition 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 OAR 197.352 including, without limitation, those laws exempted under OAR 197.352(3).

5. Without limiting the generality of the foregoing terms and conditions, in order for the claimant to use the property, it may be necessary for him to obtain a decision under OAR 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 claimant from the necessity of obtaining a decision under OAR 197.352 from a local public entity that has jurisdiction to enforce a land use regulation applicable to a use of the property by the claimant.

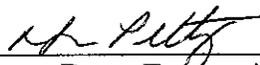
This Order is entered by the Director of the DLCD as a final order of DLCD and the Land Conservation and Development Commission under OAR 197.352, OAR 660-002-0010(8), and OAR 125, division 145, and by the Deputy Administrator for the State Services Division of the DAS as a final order of DAS under OAR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

FOR DLCD AND THE LAND CONSERVATION  
AND DEVELOPMENT COMMISSION:

  
Lane Shetterly, Director  
DLCD

Dated this 27<sup>th</sup> day of March, 2006.

FOR the DEPARTMENT OF ADMINISTRATIVE  
SERVICES:

  
Dugan Petty, Deputy Administrator  
DAS, State Services Division

Dated this 27<sup>th</sup> day of March, 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<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.

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

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

March 27, 2006

**STATE CLAIM NUMBER:** M118463  
**NAME OF CLAIMANT:** Harold Kuehne  
**MAILING ADDRESS:** 13140 Northeast Kuehne Road  
Carlton, Oregon 97111  
**PROPERTY IDENTIFICATION:** Township 3S, Range 3W, Section 17  
Tax Lot 1000  
Yamhill County  
**DATE RECEIVED BY DAS:** May 18, 2005  
**180-DAY DEADLINE:** April 2, 2006<sup>1</sup>

**I. CLAIM**

The claimant, Harold Kuehne, seeks compensation in the amount of \$15,059,375 for a reduction in fair market value as a result of certain land use regulations that are alleged to restrict the use of certain private real property. The claimant desires compensation or the right to divide his 94.2-acre property into 1.5-acre parcels and to develop a dwelling on each parcel. The property is located at 13140 NE Kuehne Road, in Yamhill County. (See claim.)

**II. SUMMARY OF STAFF RECOMMENDATION**

Based on the findings and conclusions set forth below, the Department of Land Conservation and Development (the department) has determined that this claim is valid. Department staff recommends, in lieu of compensation, that the requirements of the following laws enforced by the Land Conservation and Development Commission (the Commission) or the department not apply to the claimant to allow him to divide his 94.2-acre property into 1.5-acre parcels, and to develop each parcel with a residential dwelling: applicable provisions of Statewide Planning Goal 3 (Agricultural Lands) and Statewide Planning Goal 14 (Urbanization), ORS 215, and OAR 660, division 33. These laws will not apply to the claimant's use of the property only to the extent necessary to allow Mr. Kuehne to use the property for the use described in 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 enforcement of Measure 37 was suspended during the pendency of the appeal of *Macpherson v. Dep't of Admin. Servs.*, 340 Or \_\_\_, 2006 Ore. LEXIS 104 (February 21, 2006).

as permitted at the time he acquired the property on August 20, 1965. (See the complete recommendation in Section VI. of this report.)

### III. COMMENTS RECEIVED

On August 18, 2005, pursuant to OAR 125-145-0080, the Oregon Department of Administrative Services (DAS) provided written notice to owners of surrounding properties. According to DAS, written comments, evidence or information were received in response to the 10-day notice.<sup>2</sup>

Most of the comments do not address whether the claim meets the criteria for relief (compensation or waiver) under OAR 197.352. Comments concerning the effects a use of the property may have on surrounding areas generally are not something that the department is able to consider in determining whether to waive a state law. If funds do become available to pay compensation, then such effects may become relevant in determining which claims to pay compensation for instead of waiving a state law. (See comment letters in the department's claim file.)

One comment is relevant to the criteria and has been considered by the department in preparing this report.

### IV. TIMELINESS OF CLAIM

#### Requirement

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

#### Findings of Fact

This claim was submitted to DAS on May 18, 2005, for processing under OAR 125, division 145. The claim identifies ORS Chapter 197, ORS Chapter 215, ORS Chapters 92, 94, 105, 183, 195, and 227, and OAR Divisions 660 and 661 in their entirety as state laws that restrict the use of the property and are the basis for the claim. Only laws that were enacted prior to December 2, 2004, the effective date of Measure 37, are the basis for this claim. (See citations

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<sup>2</sup> The 10-day notice period was suspended for 139 days during the pendency of the *Macpherson v. Dep't of Admin. Servs.*, 340 Or \_\_\_, 2006 Ore. LEXIS 104 (February 21, 2006), which suspended all Measure 37 deadlines.

of statutory and administrative rule history of the Oregon Revised Statutes and Oregon Administrative Rules.)

### **Conclusions**

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

## **V. ANALYSIS OF CLAIM**

### **1. Ownership**

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

### **Findings of Fact**

The claimant, Harold Kuehne, acquired an interest in the subject property on August 20, 1965, by deed from his mother, Evelien Kuehne. (See deed, dated August 20, 1965, in department’s claim file.) The claimant has since transferred the property to the Kuehne Family Trust. The claimant has submitted documentation establishing that the trust is revocable. Transfer to a revocable trust does not constitute a new ownership for the purposes of OAR 197.352(11)(C).

The claimant’s parents, Evelien Kuehne and Harry R. Kuehne, acquired the property as four separate parcels, over a period between 1935 and 1943. (See deeds in department’s claim file.)

The current tax statement for the property lists Harold Kuehne, Trustee for the Kuehne Family Trust as the “owner.”

### **Conclusions**

The claimant, Harold Kuehne, is an “owner” of the subject property as that term is defined in OAR 197.352(11)(C), as of August 20, 1965.

The claimant’s parents are “family members”, as that term is defined by OAR 197.352(11)(A) and they acquired the subject property as four parcels between 1935 and 1943.

### **2. The Laws that are the Basis for the Claim**

In order to establish a valid claim, OAR 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 lists numerous state laws as restricting the claimant's use of the property, including: ORS Chapter 197, ORS Chapter 215, ORS Chapters 92, 94, 105, 183, 195, and 227, and OAR 660 and 661 in their entirety. The claim does not establish how these statutes restrict the use of the claimant's property in a manner that restricts the fair market value of the property. On their face, most of these statutes and rules either are not applicable to the subject property or do not appear to restrict the use of the claimant's property. Absent an explanation by the claimant regarding how these statutes and rules restrict the use of the claimant's property in a manner that restricts the property's fair market value, this report addresses only those statutes that the department is reasonable certain restrict the claimant's ability to divide his 94.2-acre property into 1.5-acre parcels and to develop each of those parcels with a residential dwelling, as requested in the claim.

The claim is based, generally, on Yamhill County's current EF-80 zone, and the requirements of state law that require that zoning. The EF-80 zone is an exclusive farm use (EFU) zone with an 80-acre minimum lot size. The claimant's property is zoned EFU as required by Goal 3, in accord with OAR 660, division 33, and ORS 215 because the claimant's property is "agricultural land" as defined by Goal 3.<sup>3</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 state land use regulations, particularly ORS 215.263, 215.284, 215.780 and OAR 660, division 33, as applied by Goal 3, do not allow the subject property to be divided into parcels less than 80 acres and establish standards for allowing the existing or any proposed parcels to have farm or non-farm dwellings on them.

ORS 215.780 established an 80-acre minimum size for the creation of new lots or parcels in EFU zones and became effective November 4, 1993 (chapter 792, Oregon Laws 1993). ORS 215.263 (2003 edition) establishes standards for the creation of new parcels for non-farm uses and dwellings allowed in an EFU zone.

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

OAR 660-033-0130(4) (applicable to non-farm dwellings) became effective on August 7, 1993, and was amended to comply with ORS 215.284(4) on March 1, 1994. Subsequent amendments to comply with HB 3326, (chapter 704, Oregon Laws 2001, and effective January 1, 2002,) were adopted by the Commission effective May 22, 2002. (See citations of administrative rule history for OAR 660-033-0100, 0130 and 0135.)

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<sup>4</sup> The claimant's property is "agricultural land" and high value farmland because it contains NRCS (Natural Resources Conservation Service) Soils, Chehalem silty clay loam, 3-12% slopes, Class IIIe; Carlton silt loam, 0-7% slopes, Class IIe; Carlton silt loam, 7-12% slopes, Class IIIe; Carlton silt loam, 12-20% slopes, Class IVe; Panther silt loam, 4-20% slopes, Class VIw; Wapato silty clay loam, Class IIIw; Willakenzie silty clay loam, 12-20% slopes, Class IIIe; Willakenzie silty clay loam, 20-30% slopes, Class IVe; and Willakenzie silty clay loam, moderately shallow, 7-20% slopes, Class IVe.

Statewide Planning Goal 14 would likely apply to the division of the claimant's property into parcels less than two-acres in size. Goal 14 also became effective on January 25, 1975, and generally requires land outside urban growth boundaries to be used for rural uses. Goal 14 has been held to prohibit division of rural lands into parcels of less than 2 acres.

The claimant's family acquired the subject property between 1935 and 1943, prior to the establishment of the statewide planning goals and their implementing statutes and rules.

### **Conclusions**

Lot size and dwelling standards established in Goals 3 and 14, ORS 215, and OAR 660, division 33, enacted or adopted since the claimant's family acquired the property between 1935 and 1943, do not allow the division of the property into parcels less than 80 acres or allow the approval of dwellings as would be possible when the family acquired the property.

This report addresses only those state laws that are identified in the claim, or that the department is certain apply to the property based on the uses that the claimant has identified. There may be other laws that currently apply to the claimant's use of the property, and that may continue to apply to the claimant's use of the property, that have not been identified in the claim. In some cases, it will not be possible to know what laws apply to a use of property until there is a specific proposal for that use. When the claimant seeks a building or development permit to carry out a specific use, it may become evident that other state laws apply to that use.

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

In order to establish a valid claim, OAR 197.352(1) requires that any laws described in Section V.(2) of this report must have "the effect of reducing the fair market value of the property, or any interest therein."

### **Findings of Fact**

The claim states that the fair market value for the subject property has been reduced by \$15,059,375.00 as a result of land use laws enacted after the claimant's family acquired the property between 1935 and 1943.<sup>4</sup> This estimate is based on "real estate values." The claim does not include an appraisal or other substantiating documentation.

### **Conclusions**

As explained in section V.(1) of this report, Harold Kuehne is the current owner of the subject property, whose family acquired the property between 1935 and 1943. Under OAR 197.352,

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<sup>4</sup> The claimant alleged a loss of fair market value of \$15,059,375.00 in the claimant's Measure 37 claim for this property filed with Yamhill County. The state claim included a figure of \$159,865.98. In response to a department request for a clarification of this apparent discrepancy, the claimant confirmed that the county claim figure is correct and the loss of fair market value is \$15,059,375.00, not \$159,865.98, as shown on the state claim form.

Mr. Kuehne is due compensation for land use laws that restrict the use of the subject property in a manner that reduces its fair market value. Based on the findings and conclusions in section V.(2) of this report, laws adopted since the claimant's family acquired the property restrict division of the subject property and the alleged loss of fair market value as result is \$15,059,375.00.

However, without an appraisal or other documentation, it is not possible to substantiate the specific dollar amount the claimant demands for compensation. Nevertheless, based on the submitted information, the department determines that it is more likely than not that there has been some reduction in the fair market value of the subject property as a result of land use regulations enforced by the Commission or the department.

#### **4. Exemptions under OAR 197.352(3)**

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

#### **Findings of Fact**

The claim is based on land use laws that have restricted use of the property and reduced its fair market value relative to uses permitted when the claimant's family acquired the property between 1935 and 1943. These provisions include Statewide Planning Goal 3 (Agricultural Lands) and Goal 14 (Urbanization), and applicable provisions of ORS 215 and OAR 660, division 33, which Yamhill County has implemented through its EFU (EF-80) zone. None of these laws are exempt under OAR 197.352(3), which exempts laws in effect when the claimant's family acquired the property.

#### **Conclusions**

Without a specific development proposal for the property, it is not possible for the department to determine what laws may apply to a particular use of the property, or whether those laws may fall under one or more of the exemptions under OAR 197.352. It does appear that the general statutory, goal and rule restrictions on residential development and use of farm land apply to the claimant's use of the property, and these laws are not exempt under OAR 197.352(3)(E).

Laws in effect when the claimant's family acquired the property are exempt under OAR 197.352(3)(E) and will continue to apply to the claimant's use of the property. There may be other laws that continue to apply to the claimant's use of the property that have not been identified in the claim. In some cases, it will not be possible to know what laws apply to a use of property until there is a specific proposal for that use. When the claimant 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 OAR 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 property based on the uses that the claimant has identified. Similarly, this report only addresses the exemptions provided for under OAR 197.352(3) that are clearly

applicable given the information provided to the department in the claim. The claimant should be aware that the less information he has provided to the department in his claim, the greater the possibility that there may be additional laws that will later be determined to continue to apply to his use of the property.

## **VI. FORM OF RELIEF**

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

### **Findings of Fact**

Based on the findings and conclusions in this report, laws enforced by the Commission or the department prohibit the division of the subject 94.2-acre property into 1.5-acre parcels and the development of a dwelling on each parcel. The claim asserts these restrictions reduce the fair market value of the subject property by \$15,059,375.00. Without an appraisal or other substantiating documentation, it is not possible to substantiate the specific dollar amount the claimants demand for compensation. Nevertheless, the department acknowledges that state land use laws have reduced the fair market value of the property to some extent.

No funds have been appropriated at this time for the payment of claims. In lieu of payment of just compensation, OAR 197.352 authorizes the department to modify, remove, or not apply all or parts of certain state land use regulations to allow Harold Kuehne to use the subject property for a use permitted at the time he acquired the property on August 20, 1965.

The claimant acquired the subject property on August 20, 1965, prior to the establishment of the Statewide Planning Goals and their implementing statutes and rules. At that time, the property was not zoned by Yamhill County.

### **Conclusions**

Based on the record, the department recommends that the claim be approved, subject to the following terms.

1. In lieu of compensation under OAR 197.352, the State of Oregon will not apply the following laws to Harold Kuehne's division of his 94.2-acre property into 1.5 acre-parcels or to his development of a dwelling on each parcel: applicable provisions of Statewide Planning Goals 3 and 14, ORS 215, and OAR 660, division 33. These land use regulations will not apply to Mr. Kuehne's use of his property only to the extent necessary to allow the claimant to use the property for the use described in this report, as permitted at the time he acquired the property on August 20, 1965.

2. The action by the State of Oregon provides the state's authorization to the claimant to use his property for the use described in this report, subject to the standards in effect on August 20, 1965.

3. To the extent that any law, order, deed, agreement or other legally enforceable public or private requirement provides that the property may not be used without a permit, license, or other form of authorization or consent, the order will not authorize the use of the property unless the claimant 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 ORS 227.160; other permits or authorizations from local, state or federal agencies; and restrictions on the use of the property imposed by private parties.

4. Any use of the property by the claimant under the terms of the order will remain subject to the following laws: (a) those laws not specified in Condition 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 OAR 197.352 including, without limitation, those laws exempted under OAR 197.352(3).

5. Without limiting the generality of the foregoing terms and conditions, in order for the claimant to use the property, it may be necessary for him to obtain a decision under OAR 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 claimant from the necessity of obtaining a decision under OAR 197.352 from a local public entity that has jurisdiction to enforce a land use regulation applicable to a use of the property by the claimant.

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

The department issued its draft staff report on this claim on October 24, 2005. 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.