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DEPARTMENT OF JUSTICE  
TRIAL DIVISION

February 27, 2007

Clerk of Circuit Court  
Klamath County Courthouse  
316 Main Street  
Klamath Falls, Oregon 97601

Re: *Peacore et al v. State*  
Klamath County Circuit Court No. 0604354CV

Dear Clerk of the Circuit Court:

Enclosed are *Respondent's Cross Motion for Summary Judgment and Memorandum in Opposition to Petitioners' Motion for Summary Judgment and in Support of State's Motion for Summary Judgment* in the referenced matter.

A postcard is enclosed for the Clerk's use in notifying counsel of the action taken.

Sincerely,

Erika L. Hadlock  
Sr. Assistant Attorney General

TRIQ9950/ELH/sek  
Enclosures  
cc: Justin Throne

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IN THE CIRCUIT COURT OF THE STATE OF OREGON  
FOR THE COUNTY OF KLAMATH

MARALEA PEACORE and DENISE DIANE  
MATHIS, individually and as Trustees of the  
CLYDE DEHLINGER TRUST and  
GEORGIA DEHLINGER TRUST,

Petitioners,

v.

STATE OF OREGON, by and through the  
Department of Land Conservation and  
Development,

Respondent.

Case No. 0604354CV  
RESPONDENT'S CROSS MOTION FOR  
SUMMARY JUDGMENT

Pursuant to ORCP 47, respondent State of Oregon moves for summary judgment on the ground that respondent's final order on petitioners' Measure 37 claim concluded correctly that petitioners did not acquire any interest in the subject property until they became successor trustees of the trust in which the property is held. Accordingly, respondent is entitled to judgment as a matter of law. Petitioners already have moved for summary judgment and have requested oral argument and official court-reporting services. Respondent joins in those requests.

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IN THE CIRCUIT COURT OF THE STATE OF OREGON  
FOR THE COUNTY OF KLAMATH

MARALEA PEACORE and DENISE DIANE  
MATHIS, individually and as Trustees of the  
CLYDE DEHLINGER TRUST and  
GEORGIA DEHLINGER TRUST,

Petitioners,

v.

STATE OF OREGON, by and through the  
Department of Land Conservation and  
Development,

Respondent.

Case No. 0604354CV

MEMORANDUM IN OPPOSITION TO  
PETITIONERS' MOTION FOR SUMMARY  
JUDGMENT AND IN SUPPORT OF STATE'S  
MOTION FOR SUMMARY JUDGMENT

**INTRODUCTION**

In 1960, Georgia and Clyde Dehlinger acquired the real property at issue in this case; in 1986, they deeded the property to two revocable trusts (the Georgia L. Dehlinger Trust and the Clyde L. Dehlinger Trust), naming themselves as trustees. In the year 2000, Clyde Dehlinger died and Georgia Dehlinger became incompetent; at that point, the Dehlingers' daughters, petitioners Peacore and Mathis, became successor trustees of the Trusts.

In 2005, petitioners filed a Measure 37 claim seeking \$1.4 million in compensation for the reduction in fair market value allegedly caused by enforcement of certain land use regulations against the trust property. The State issued a final order in which it determined that the claim was valid and elected, instead of paying compensation, to "waive" certain land use regulations that were enacted or adopted after the date on which petitioners became owners of the property, *i.e.*, the date on which they became successor trustees of the Trusts. Petitioners

1 challenge the State’s final order, alleging that the State incorrectly determined the date on which  
2 they acquired the property and, therefore, granted an inadequate waiver.

3 The cross-motions for summary judgment present a single legal question: On what date  
4 did petitioners acquire an interest in the subject property for purposes of Measure 37? The State  
5 determined that petitioners first acquired an interest in the property when they became successor  
6 trustees. Petitioners do not appear to disagree with the State’s assessment of when *they* acquired  
7 an interest in the property. Instead, they assert that they filed the Measure 37 claim on Georgia  
8 Dehlinger’s behalf and argue that *she* is entitled to a waiver dating back to 1960 because that is  
9 when she acquired the property.

10 Petitioners’ argument fails for a simple reason: they, not Georgia Dehlinger filed the  
11 Measure 37 claim and they, not Georgia Dehlinger, are the petitioners in this case. Petitioners’  
12 role as trustees does not make them Dehlinger’s guardian, does not make them her conservator,  
13 and does not allow them to pursue claims in her name. Because petitioners filed the Measure 37  
14 claim and this litigation solely in their role as trustees of the Trusts, and not as Dehlinger’s legal  
15 representative, the State acted correctly when it determined that petitioners acquired their interest  
16 in the property only when they became successor trustees, not decades earlier when Dehlinger  
17 first acquired the property. Moreover, if petitioners had been acting on Dehlinger’s behalf, she  
18 would not be entitled to any Measure 37 relief because she is not an “owner” of the property for  
19 purposes of that statute. Accordingly, the State is entitled to summary judgment in its favor.

20 **BACKGROUND**

21 **A. Measure 37**

22 A property owner qualifies for Measure 37 relief if: (1) a public entity enacts or enforces  
23 a “land use regulation” after December 2, 2004, that (2) restricts the owner’s use and (3) has the  
24 effect of reducing the fair market value of the owner’s property. ORS 197.352(1). Section 3 of  
25 Measure 37 provides that certain land use regulations shall not be a basis for a written demand  
26

1 under Section 1, notably regulations in effect when the owner or a family member acquired the  
2 property. ORS 197.352(3)(E). Section 11 defines “owner” as the “present owner” of the  
3 property, and lists the relationships on which a “family member” finding may be based. ORS  
4 197.352(11)(A), (C).

5 For regulations enacted prior to the effective date of Measure 37 (December 2, 2004),  
6 Section 5 requires owners to submit written demands by December 2, 2006, or the date on which  
7 a land use regulation is applied “as an approval criteria [*sic*]” on a specific land use application,  
8 whichever is later. After determining that an owner submitted a timely, valid written demand,  
9 the public entity has the option to pay compensation or to “modify, remove, or not to [*sic*] apply”  
10 land use regulations to the extent necessary “to allow the owner to use the property for a use  
11 permitted at the time the owner acquired the property.” ORS 197.352(8); *see also* ORS  
12 197.352(10). In this case, the State determined that petitioner’s Measure 37 claim was valid and  
13 granted waiver relief in lieu of compensation.<sup>1</sup>

14 **B. Statement of undisputed facts**

15 For purposes of this motion for summary judgment, the State agrees with petitioners that  
16 the following facts are undisputed:

- 17 1. Clyde Dehlinger and Georgia Dehlinger acquired the subject real property on or  
18 before October 24, 1960.
- 19 2. On December 15, 1986, Clyde and Georgia Dehlinger entered into a trust  
20 agreement that established their respective revocable trusts.
- 21 3. The trusts were restated on April 15, 1993.

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25 <sup>1</sup> Allowing the owner to use the property in a way that would otherwise be prohibited by  
26 land use regulations is commonly referred to as granting a Measure 37 “waiver.” DLCDC can pay  
compensation only if and when the legislature appropriates funds for that purpose. *See* OAR  
660-002-0010(8)(c).

1           4.       Clyde Dehlinger died in June 2000, Georgia Dehlinger was declared incompetent  
2 on or before July 12, 2000, and petitioners succeeded Clyde and Georgia Dehlinger as trustees  
3 on that date.<sup>2</sup>

4           5.       Petitioners submitted a written demand under Ballot Measure 37 and on  
5 August 21, 2006, respondent issued the “Final Order A” that is attached to the petition for  
6 judicial review.

7 (See Petitioners’ Motion for Summary Judgment at 2).

8 **C.     Standard of review**

9           Petitioners properly have petitioned for judicial review of the State’s final order under  
10 ORS 183.484, which is the portion of the Administrative Procedures Act (“APA”) that governs  
11 judicial review of orders in other than contested cases. In an ORS 183.484 proceeding, the court  
12 determines whether a final order is supported by substantial evidence in the record and whether  
13 the agency has correctly applied the law. ORS 183.484(5); *Powell v. Bunn*, 185 Or App 334,  
14 339 (2002), *rev denied*, 336 Or 60 (2003). The “record,” for purposes of judicial review of an  
15 order in other than contested case, is the record developed in circuit court. *Norden v. Water*  
16 *Resources Dept.*, 329 Or 641, 649 (2000).<sup>3</sup>

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17 <sup>2</sup>       In Final Order A, the State mistakenly concluded that petitioners became successor  
18 trustees in 1986 and gave petitioners a waiver dating back that far. (See Petitioners’ Motion for  
19 Summary Judgment, Ex B at 8). In fact, petitioners did not become successor trustees until July  
20 12, 2000, and that is when they acquired their interest in the property. Consequently, the State  
21 should have issued a waiver of only certain land use regulations enacted or adopted after July 12,  
2000. The State plans to issue an amended final order reflecting the correct 2000 waiver date.  
22 Issuance of that amended order should not affect the issue in this litigation, which is whether  
23 petitioners were entitled to a waiver dating back to Dehlinger’s 1960 acquisition date.

24 <sup>3</sup>       On January 31, 2007, the Court of Appeals issued an opinion in *Corey v DLCD*, Case  
25 No. A129905. The petitioners in that case sought judicial review of a DLCD order opting to  
26 waive enforcement of certain land use regulations in lieu of paying compensation under Measure  
37. The opinion concludes that, “under ORS 183.482, jurisdiction for judicial review lies in this  
court.” Slip op. at 6. That conclusion is not final until the appellate judgment issues. ORS  
19.450; ORAP 14.05. The appellate judgment has not been issued in *Corey*. In an earlier case  
*Hoff v DLCD*, CA A129414, the Court of Appeals dismissed a petition for review, finding that it  
did not have jurisdiction under ORS 183.482 to review DLCD's order waiving certain land use  
regulations in lieu of paying compensation under Measure 37. The opinion in *Corey* does not  
mention the earlier unpublished order in *Hoff*.

1 All parties now have moved for summary judgment pursuant to ORCP 47. The standards  
2 that generally govern a court's evaluation of the facts and evidence presented with summary-  
3 judgment motions do not apply in an ORS 183.484 proceeding, and the State discusses below the  
4 different analysis that does apply in APA cases. In this case, however, the distinction does not  
5 matter, as the parties agree on the facts and only the law is in dispute.

6 The Court of Appeals has explained that "viewing factual disputes in the light most  
7 favorable to a nonmoving party" – the usual standard of review in a summary-judgment motion –  
8 "[is] not appropriate in the judicial review of an administrative order in a noncontested case  
9 proceeding." *Powell*, 185 Or App at 339. Instead, the circuit court's charge is to decide whether  
10 "the order is supported by substantial evidence" and any subsequent appellate review is limited  
11 to determining whether the circuit court correctly made that decision. *Ibid*

12 "Substantial evidence exists to support a finding of fact when the record, viewed as a  
13 whole, would permit a reasonable person to make that finding." ORS 183.484(5)(c).  
14 Consequently, in determining whether substantial evidence supports an agency's factual  
15 findings, the question before a circuit court "is limited to whether the evidence would permit a  
16 reasonable person to make the determination that the agency made in the particular case."  
17 *Norden*, 329 Or at 649. If substantial evidence supports the agency's decision, it does not matter  
18 that the record also includes "evidence to the contrary." *Ibid*. See also *G.A.S.P v. Environmental*  
19 *Quality Commission*, 198 Or App 182, 194-96 (2005) ("[t]he court's purpose on review is not to  
20 find the facts itself but to decide 'whether the evidence would permit a reasonable person to  
21 make the determination that the agency made'")

22 Thus, in deciding the cross-motions for summary judgment presently before the court, the  
23 only questions presented could be: (1) whether the State's final order on petitioners' Measure 37  
24 claim is based on an incorrect interpretation or application of the law;<sup>4</sup> and (2) whether the

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26 <sup>4</sup> See ORS 183.484(5)(a) (describing judicial review for incorrect interpretations of law); ORS  
183.484(5)(b) (describing judicial review for unlawful exercise of agency discretion).

1 factual findings in the final order are supported by substantial evidence in the record. As noted  
2 above, however, the State does not dispute petitioners' factual allegations for purposes of the  
3 parties' motions for summary judgment. Accordingly, this court need consider only the legal  
4 significance of those facts.

## 5 ARGUMENT

### 6 A. Georgia Dehlinger did not file the Measure 37 claim.

7 It is undisputed that petitioners filed the Measure 37 claim as "Trustees of the Georgia C.  
8 Dehlinger Trust and the Clyde L. Dehlinger Trust." (Petitioners' Motion for Summary  
9 Judgment, Ex A at 1). As trustees, petitioners are "owners" of property held in the Trusts for  
10 purposes of Measure 37, as explained in the next section of this brief. But petitioners' role as  
11 trustees does *not* make them Georgia Dehlinger's legal representative. Nothing in the record  
12 suggests that either petitioner has been appointed as a conservator or guardian for Dehlinger, or  
13 has her power of attorney. Moreover, even if one of the petitioners *could have* acted as  
14 Dehlinger's legal representative in filing a Measure 37 claim, that did not happen. Petitioners  
15 filed the claim as trustees of the Trusts. They simply did not purport to file the claim on  
16 Dehlinger's behalf. Consequently, once the State determined that petitioners are owners of the  
17 property and otherwise meet the requirements for Measure 37 relief, the State correctly based its  
18 waiver of land use regulations on "the time the owner [petitioners] acquired the property," not on  
19 the date that Dehlinger acquired it. ORS 197.352(8).

20

### 21 B. Dehlinger is not a current owner of the trust property and, therefore, could not properly have filed a Measure 37 claim.

22 Even if this court determines that petitioners were acting on Dehlinger's behalf when  
23 they filed the Measure 37 claim and this litigation, it still should enter judgment in the State's  
24 favor. As explained below, Dehlinger is not a current owner of the trust property and, therefore,  
25 is not entitled to any relief under Measure 37.

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1           **1.     Ownership and Measure 37**

2           Several aspects of Measure 37 center on the word “owner,” which is important both to  
3 determining who has a valid Measure 37 claim and the scope of relief to which a claimant is  
4 entitled. The word is first used in section 1 of Measure 37, which describes when a claim for  
5 compensation arises:

6                           (1) If a public entity enacts or enforces a new land use  
7 regulation or enforces a land use regulation enacted prior to  
8 December 2, 2004, that restricts the use of private real property or  
9 any interest therein and has the effect of reducing the fair market  
value of the property, or any interest therein, then the *owner* of the  
property shall be paid just compensation.

10          ORS 197.352 (emphasis added). “Owner” is defined as “the present owner of the property, *or*  
11 *any interest therein.*” ORS 197.352(11)(C) (emphasis added).

12          These provisions establish that, to be an “owner” for purposes of Measure 37, a person  
13 must have a present interest in the property. But the definition of “owner,” standing alone,  
14 provides little help in determining what kind of ownership interest may be the basis for a  
15 Measure 37 claim. The court must look to the rest of the statute in order to understand the  
16 meaning of “the present owner of the property, or any interest therein.”

17          Under section 1, a claimant qualifies for Measure 37 relief only if, among other things,  
18 the claimant has an interest in private real property *and* a land use regulation restricts the use of  
19 that property. ORS 197.352(1). Thus, an “owner” must be a person who would have a present  
20 right to use the property in the regulation’s absence. Moreover, Measure 37 provides a remedy  
21 only when land use restrictions reduce the fair market value of the property or any interest  
22 therein. *Ibid.* Consequently, the ability to realize market value is essential to a Measure 37  
23 claim. A qualifying property owner, therefore, is one who presently owns the property or any  
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1 interest therein, and has a right to use the property that is restricted by land use regulations that  
2 reduce the value of *that property interest*.<sup>5</sup>

3 The term “owner” also is important in sections 8 and 10 of Measure 37, which describe  
4 governmental authority to waive land use regulations in lieu of paying just compensation. Those  
5 provisions specify that waiver relief is available only to an “owner” and that the scope of the  
6 waiver depends on the date on which the owner acquired his or her interest in the property. ORS  
7 197.352(8), (10).

8 In sum, the term “owner” as used in ORS 197.352 refers to the present owner of a  
9 property interest that is subject to land use regulations that both restrict use and reduce value. If  
10 the owner’s property interest gives rise to a Measure 37 claim, the State must then determine  
11 when the owner acquired *that interest*, which will govern the scope of any waiver that will be  
12 granted. As explained below, application of those principles to this case makes it clear that  
13 Dehlinger has not been an “owner” of the property since she was declared incompetent and  
14 petitioners succeeded her as trustees of the Trusts.

## 15 2. Ownership of land held in trust

16 In Oregon, a trust is best viewed not as a distinct legal entity but as a means of  
17 establishing persons’ *relationships* to property in a way that divides legal and equitable interests  
18 in the property among those persons:

19 A trust is a method of transferring property, either during life or at  
20 death, for the benefit of another, with “strings attached.” The

21 <sup>5</sup> Interpreting the term “owner” in the context of who is may be entitled to relief under  
22 Measure 37 is consistent with Oregon precedent. Oregon courts repeatedly have declared that  
23 the word “owner” lacks a fixed meaning outside the context and purpose of the statute in which  
24 it is used. For example, in *Moe v. Beck*, the Supreme Court noted that “[d]ivining the legislative  
25 intent in statutes using the word ‘owner’ has been a vexing problem for nearly a century.” 311  
26 Or 499, 504-505 (1991). After considering the lease agreement at issue, and the six places in the  
Oregon Safe Employment Act (including a “definition”) that used the word “owner,” the court  
concluded that the lessor of a vehicle was an “owner” within the meaning of the statute at issue.  
*See also Pedro v. January*, 261 Or 582, 602 (1972) (“When the term ‘owner’ or ‘ownership’ is  
used in a statute, the context and purpose of the statute governs what is meant by the use of the  
terms”).

1 person who creates a trust makes a gift of the property to another,  
2 with instructions on how the property is to be managed and  
distributed for the benefit of a third person.

3 *OSB Administering Trusts in Oregon CLE*, § 1.2 (emphasis added). As the Court of Appeals  
4 recently explained, “[a]n express trust is created when a grantor or trustor presently divests  
5 himself or herself of full legal and equitable ownership in property, with legal title held by a  
6 trustee and equitable ownership resting in a beneficiary.” *Brown v. Brown*, 206 Or App 239,  
7 249, *rev denied*, 341 Or 449 (2006). The trustee administers the trust in the beneficiaries’  
8 interest. *See* ORS 130.650; ORS 130.655(1).

9 In a typical trust relationship, only the trustee has the right to use trust property in a way  
10 that could give rise to a Measure 37 claim. The trustee, not the beneficiary, must “take control of  
11 and protect the trust property.” ORS 130.690. Subject to fiduciary obligations to the  
12 beneficiaries, the trustee has broad authority over trust property, including the power to sell it, to  
13 “partition or otherwise change the character of trust property,” and to “subdivide or develop land,  
14 dedicate land to public use or grant public or private easements, and make or vacate plats and  
15 adjust boundaries.” ORS 130.725(3), (8); *see* ORS 130.725(2). Trust beneficiaries have *no* such  
16 authority; nor do grantors, who have divested themselves of their legal and equitable interests in  
17 the property. Thus, trustees have the exclusive right and obligation to control, manage and use  
18 trust property, and are the only “owners” of property for purposes of Measure 37.

19  
20 **3. Dehlinger was an “owner” of the property only until she was declared  
incompetent in 2000.**

21 Dehlinger acquired the property in 1960. She remained an “owner” of the property when  
22 she placed it in the revocable trust of which she was a trustee. But when Dehlinger was declared  
23 incompetent in 2000, her role as trustee terminated and petitioners succeeded her as trustees. At  
24 that point, petitioners became owners of the property and Dehlinger lost her ownership interest.

1 In arguing otherwise, petitioners contend that Dehlinger retains ownership interests in the  
2 Trust property both as the grantor and as a trust beneficiary. As explained above, a grantor  
3 generally divests herself of all legal and equitable interest in property when she places it in trust.  
4 When a trust is revocable, the grantor does have the power to revoke the trust and regain control  
5 of the property. But when, as here, the grantor becomes incapacitated, she loses that personal  
6 power of revocation. Thus, after Dehlinger became incapacitated in 2000, the trust became  
7 irrevocable. Since then, Dehlinger's status as grantor has given her no interest in the property,  
8 much less an interest that would allow her to "use" the property, as is necessary to be an "owner"  
9 under Measure 37. And even though this specific trust agreement does allow the grantor to  
10 direct the trustee's management of Trust property in some respects (Peacore Aff, Ex C at 2), the  
11 trustee could not properly follow any instructions from Dehlinger once she was declared  
12 incompetent. *See Cloud v. U.S. National Bank*, 280 Or 83, 92 (1977). Consequently,  
13 Dehlinger's status as grantor gives her *no* interest in the trust property and no ability to use it in a  
14 way that land use regulations could restrict. In other words, grantor status does not make  
15 Dehlinger an owner of the property for purposes of Measure 37.

16 Nor is Dehlinger an owner of the property merely because she is a beneficiary of the  
17 Trusts. As explained above, only the trustees, not the beneficiaries, have the right to use trust  
18 property. Trustees do have fiduciary obligations to trust beneficiaries, but those obligations do  
19 not give the beneficiary any right to control property held in trust; rather, a beneficiary who is  
20 dissatisfied with a trustee's performance may sue to compel *the trustee* to act differently. Even  
21 in those circumstances, the beneficiary has no right to control the property directly.  
22 Consequently, Dehlinger is not an owner of the trust property "or any interest therein," for  
23 purposes of Measure 37, because her equitable interest in the property is not one that a land use  
24 regulation can restrict, with "the effect of reducing the fair market value" of that interest. ORS  
25 197.352(1).


1 **CONCLUSION**

2 Neither Georgia Dehlinger nor anybody acting on her behalf filed the Measure 37 claim  
3 in this matter. Because Dehlinger did not file a Measure 37 claim, she is not entitled to any relief  
4 under that statute. And even if Dehlinger or somebody acting on her behalf had filed the claim,  
5 she still would not be entitled to relief because she no longer is an "owner" of the real property  
6 for purposes of Measure 37. Accordingly, this court should deny petitioners' motion for  
7 summary judgment and grant summary judgment in the State's favor.

8 DATED this 28<sup>th</sup> day of February, 2007.

9 Respectfully submitted,

10 HARDY MYERS  
11 Attorney General

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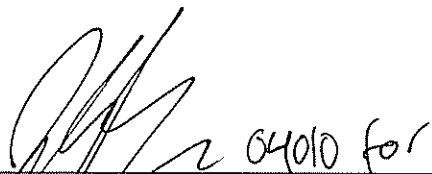
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**CERTIFICATE OF SERVICE**

I certify that on February 28<sup>th</sup>, 2007, I served the foregoing RESPONDENT'S CROSS MOTION FOR SUMMARY JUDGMENT and MEMORANDUM IN OPPOSITION TO PETITIONERS' MOTION FOR SUMMARY JUDGMENT AND IN SUPPORT OF STATE'S MOTION FOR SUMMARY JUDGMENT upon the parties hereto by the method indicated below, and addressed to the following:

Justin Throne  
Attorney at Law  
280 Main St  
Klamath Falls OR 97601  
Attorney for Petitioners

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