

HARDY MYERS
Attorney General



PETER D. SHEPHERD
Deputy Attorney General

DEPARTMENT OF JUSTICE
TRIAL DIVISION

March 22, 2007

Circuit Court Clerk's Office
Josephine County Courthouse
500 N.W. 6th, Room 256
Grants Pass, Oregon 97526

Re: *Perrott, Janice v. Josephine County et al*
Josephine County Circuit Court No. 06-CV-0677

Dear Circuit Court Clerk:

Enclosed for filing is the State Respondents' Motion to Dismiss and Memorandum in Support of State Respondents' Motion to Dismiss.

A postcard is also enclosed for the Court's use in notifying me of the action taken.

Sincerely,

A handwritten signature in black ink that reads "Erika L. Hadlock". The signature is written in a cursive style.

Erika L. Hadlock
Sr. Assistant Attorney General

TRIR2113/ELH/sek
Enclosures

cc: Willard Ransom
Steven Rich

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3 IN THE CIRCUIT COURT OF THE STATE OF OREGON
4 FOR THE COUNTY OF JOSEPHINE

5 JANICE M. PERROTT, Conservator for Edith
6 M. Mendenhall,

7 Petitioner,

8 v.

9 JOSEPHINE COUNTY, OREGON, and
10 STATE OF OREGON, DEPARTMENT OF
11 LAND CONSERVATION AND
12 DEVELOPMENT AND DEPARTMENT OF
ADMINISTRATIVE SERVICES,

Respondents.

Case No. 06-CV-0677

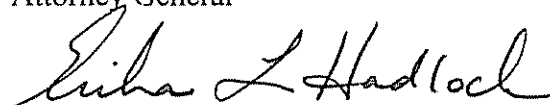
STATE RESPONDENTS' MOTION TO
DISMISS

13 Pursuant to ORCP 21 A(1) and (8), respondents State of Oregon, Department of Land
14 Conservation and Development, and Department of Administrative Services (collectively, "the
15 State") move to dismiss petitioner's second and third claims for relief to the extent they are
16 brought against the State. The court lacks subject matter jurisdiction over those claims and
17 petitioner has not pleaded ultimate facts sufficient to state claims for relief. In support of this
18 motion, the State relies on ORCP 21 A(1) and (8), the Oregon Administrative Procedures Act
19 ("APA"), the files and record of this case, and the supporting memorandum filed concurrently.

20 DATED this 22nd day of March, 2007.

21 Respectfully submitted,

22 HARDY MYERS
23 Attorney General

24 

25 ERIKA L. HADLOCK #91297
26 Sr. Assistant Attorney General
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Of Attorneys for State Respondents

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

JANICE M. PERROTT, Conservator for Edith
M. Mendenhall,

Petitioner,

v.

JOSEPHINE COUNTY, OREGON, and
STATE OF OREGON, DEPARTMENT OF
LAND CONSERVATION AND
DEVELOPMENT AND DEPARTMENT OF
ADMINISTRATIVE SERVICES,

Respondents.

Case No. 06-CV-0677

MEMORANDUM IN SUPPORT OF STATE
RESPONDENTS' MOTION TO DISMISS

INTRODUCTION

After the people enacted Ballot Measure 37 in 2004, the State of Oregon implemented procedures for processing the thousands of claims that have followed. Those procedures, described in detail in the next section of this memorandum, result in a final agency order either denying or approving each Measure 37 claim and, when appropriate, granting relief in the form of a “waiver” of certain land use regulations. Those orders – like other final agency orders – are subject to judicial review under the Oregon Administrative Procedures Act (“APA”) pursuant to ORS 183.484.

In some cases, however, a Measure 37 claimant who is dissatisfied with the agency order chooses to seek monetary compensation in circuit court, either instead of or in addition to filing an APA petition for judicial review. That is the approach petitioner has taken in challenging the State’s decision on Measure 37 claim number M124961. In addition to a petition for judicial review of the final order, the amended petition includes a Declaratory Judgment Act (“DJA”)

1 claim and a claim for monetary compensation under section 6 of Measure 37. The same petition
2 includes writ-of-review, DJA and Measure 37 claims against Josephine County.

3 Josephine County already has moved against the petition and this Court has issued a letter
4 opinion explaining why it agrees with the County's argument that petitioner could not properly
5 bring DJA and Measure 37 claims once she chose to challenge the County's decision on the
6 Measure 37 claim by writ of review. Under this Court's ruling, petitioner can proceed against
7 the County only pursuant to the writ of review.

8 The State now moves this court for an order dismissing petitioner's DJA and Measure 37
9 claims to the extent they are brought against the State. As explained below, the APA provides
10 the exclusive means by which a court may review an agency decision that is encompassed in a
11 final agency order. Thus, out of the three claims against the State that are included in the
12 petition, only one – the ORS 183.484 petition for judicial review – may be proper, and the DJA
13 and Measure 37 claims should be dismissed. After that is accomplished, only two claims will
14 remain in the petition: the ORS 183.484 claim against the State and the writ-of-review claim
15 against the County. The State believes that those two claims properly may be litigated in the
16 same action, with the understanding that bifurcation may become necessary at some point, if the
17 issues related to the two claims diverge.

18 **BACKGROUND**

19 **A. Measure 37**

20 Oregon voters enacted Ballot Measure 37 through the initiative process in 2004.
21 Codified as part of Chapter 197, where Oregon's statewide land use planning statutes are found,
22 Measure 37 permits owners of private real property to seek compensation for reductions in fair
23 market value caused by certain land use regulations.

24 A property owner qualifies for Measure 37 relief if: (1) a public entity enacts or enforces
25 a "land use regulation" after December 2, 2004, that (2) restricts the owner's use and (3) has the
26 effect of reducing the fair market value of the owner's property. ORS 197.352(1). Section 3 of

1 Measure 37 provides that certain land use regulations shall not be a basis for a written demand
2 under Section 1, notably regulations in effect when the owner or a family member acquired the
3 property. ORS 197.352(3)(E). Section 11 defines “owner” as the “present owner” of the
4 property, and lists the relationships on which a “family member” finding may be based. ORS
5 197.352(11)(A), (C).

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

14 **B. The claims process**

15 Measure 37 permits public entities to adopt procedures for processing claims. ORS
16 197.352 (7). The Department of Administrative Services (“DAS”) has adopted procedural rules,
17 found at OAR 125-145-0010 to 125-145-0105. These rules cover issues like minimum
18 requirements for a claim against the State, notice and third party participation, and the contents
19 of the administrative record.

20 When DAS receives a claim, it provides written notice of the claim to neighboring
21 landowners, certain neighborhood or community organizations, and anyone who requests notice.
22 OAR 125-145-0080. This provision is consistent with the notice provisions of ORS 215.416

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

1 regarding notice of permits. Persons receiving notice, or any other person, may submit
2 comments, evidence and information within ten days. OAR 125-145-0080(2), (3).

3 DAS initially reviews Measure 37 claims and forwards them to the appropriate state
4 agency, *i.e.* the “regulating entity” that appears to have enacted or enforced a relevant land use
5 regulation. OAR 125-145-0090. The regulating entity, in this case DLCD, investigates and
6 analyzes the claim and issues a draft report. OAR 125-145-100(1). The draft report provides the
7 State’s preliminary determination on the necessary elements of the claim, including timeliness of
8 the demand, ownership, the land use regulations that are the basis of the claim, the effect of
9 relevant land use regulations on the property’s fair market value, and applicable exemptions, if
10 any. OAR 125-145-100(2).

11 The draft report is made public on the internet and copies are mailed to the claimant, and
12 any persons who submitted comments or requested notice. OAR 125-145-100(1). After a ten-
13 day comment period, and based in part on the comments received, DLCD and DAS issue a final
14 report and order. OAR 125-145-100. The final orders are served on any persons who received
15 copies of the draft report or submitted comments on the draft report. DLCD also makes its final
16 orders public by posting them on its website:

17 (<http://www.oregon.gov/LCD/MEASURE37/index.shtml>)

18 **C. Petitioner’s Measure 37 claims and the State’s final order**

19 Petitioner owns real property in Josephine County. (Petition ¶ 1, Ex 2 at 3).² She
20 submitted a Measure 37 claim to the State, seeking compensation for the reduction in fair market
21 value allegedly caused by land use regulations that restrict her use of the property. (Petition ¶ 7;
22 *see* Petition Ex 2 at 3). DLCD issued final orders and reports on petitioner’s claim in October
23 2006. (Petition ¶ 9, Ex 2). DLCD approved petitioner’s claim and granted relief from certain
24 land use regulations dating back to the date in 1985 on which DLCD determined that petitioner

25 _____
26 ² The State refers to Edith Mendenhall, who owns the property, as the petitioner in this action,
even though a conservator has filed the litigation on her behalf.

1 acquired her interest in the property. (Petition ¶ 8, Ex 2). DLCD based that determination on the
2 date in 1985 on which the property was deeded to petitioner. (See Ex A at 8, 10).³

3 ARGUMENT

4 A. Introduction

5 Petitioner has petitioned for judicial review of the State’s final order, seeking reversal or
6 remand of the order under ORS 183.484. (Petition ¶¶ 22-27 (fourth claim for relief)). She
7 contends that the final order is flawed because the State “failed to acknowledge petitioner’s
8 interests in the properties which accrued in 1969 when petitioner first acquired the property.”
9 (Petition ¶ 23). That petition for judicial review is the appropriate method for challenging the
10 State’s final order and the State anticipates that the parties will litigate the issues raised in the
11 ORS 183.484 petition in the normal course.

12 However, petitioner also seeks compensation under section 6 of Measure 37 (second
13 claim) and declaratory relief (third claim). These two claims necessarily are based on
14 petitioner’s theory that she acquired an interest in the property, for purposes of Measure 37, in
15 1969. In other words, the claims are based on an allegation that the State’s final order includes
16 an incorrect determination of petitioner’s acquisition date and that the final order incorrectly
17 does not “waive” land use regulations back to 1969.

18 Thus, petitioner’s Measure 37 and DJA claims challenge the correctness of findings made
19 in the State’s final order. As explained below, however, the APA sets forth the exclusive method
20 for such a challenge. ORS 183.480(2) (“Judicial review of final orders of agencies shall be
21 *solely* as provided by ORS 183.482, 183.484, 183.490 and 183.500”; emphasis added).
22 Consequently, the Measure 37 and DJA claims against the State should be dismissed. This Court

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25 ³ Petitioner attached the final order at issue to her petition. (Petition Ex 2). However, she did
26 not include the final DLCD staff report and recommendations that are incorporated into that
order. The State has attached the complete final order, including the staff report and
recommendations, as Exhibit A to this memorandum.

1 already has stricken the Measure 37 and DJA claims against the County for similar reasons,
2 based on the exclusivity of the writ-of-review procedure for challenging county orders.

3 **B. The APA provides the exclusive means for challenging final orders issued by state**
4 **agencies.**

5 The Oregon Court of Appeals consistently has held that the APA establishes the
6 exclusive method to challenge decisions made by state agencies. *See e.g., Eppler v. Board of*
7 *Tax Service Examiners*, 189 Or App 216, 220 (2003); *Lake County v. State of Oregon*, 142 Or
8 App 162, 165 (1996) (“ORS 183.480 (2) and numerous decisions of this court make clear that
9 judicial review of final agency orders shall be solely as provided in the APA”); *Mendieta v.*
10 *Division of State Lands*, 148 Or App 586, 599-600 (1997), *rev dismissed*, 328 Or 331 (1999)
11 (where “redress would have been available under ORS 183.484, had plaintiffs timely filed their
12 petition for judicial review[,]” the Court of Appeals held, “the trial court erred in granting
13 plaintiffs relief under ORS 183.490 and ORS 28.010”); *FOPPO v. County of Marion*, 193 Or
14 App 93, 97 (1988), *rev denied*, 307 Or 326 (1989) (“PERS is subject to the APA; therefore, the
15 APA provides the exclusive methods for its actions and for review of those actions”); *Bay River,*
16 *Inc. v. Environmental Quality Comm’n*, 26 Or App 717, 720, *rev denied*, 276 Or 555 (1976).

17 The exclusive nature of the APA remedy applies even where plaintiffs attempt to use
18 other statutory causes of action to get relief from an agency decision. For example, in *Bay River*,
19 the Court of Appeals rejected an argument that the Declaratory Judgment Act, ORS 28.010 *et*
20 *seq.*, provides a remedy with respect to agency orders in addition to the remedies provided under
21 the APA. The circuit court in that case had granted the plaintiff an injunction and declaratory
22 relief with respect to its application for a subsurface sewage disposal system feasibility permit –
23 a matter within the Department of Environmental Quality’s purview. The Court of Appeals
24 reversed and remanded, ordering the circuit court to vacate the judgment and dismiss the
25 complaint. The appellate court explained that Bay River could not circumvent APA review
26 merely by raising its complaint about agency actions in the context of another statute:

1 The Oregon Administrative Procedures Act, ORS 183.310 et seq,
2 establishes a comprehensive pattern for the judicial review of
3 administrative decisions. The various APA statutes governing
4 judicial review provide the *sole and exclusive methods of obtaining*
5 *judicial review*.

6 This is sufficient answer to Bay River's contention that since it
7 couched its complaint in equitable terms and sought a declaratory
8 judgment, the circuit court obtained jurisdiction pursuant to ORS
9 28.010. A party cannot ignore the judicial review provisions of the
10 APA in favor of a general equitable or declaratory remedy.

11 *Bay River*, 26 Or App at 720 (emphasis added; citation omitted). *See also Eppler*, 189 Or App at
12 222 ("plaintiffs' sole recourse [in arguing that state licensing requirements were preempted by
13 federal law] was to raise their preemption claim in the contested case proceeding before the
14 board and seek judicial review, under the APA, of any adverse ruling by the board"); *Lake*
15 *County*, 142 Or App at 165-66 (1996) (declaratory relief not available where plaintiffs could
16 have sought judicial review of an agency order under the APA).

17 The Court of Appeals also has rejected the argument that the Oregon Tort Claims Act
18 ("OTCA"), ORS 30.265 et seq., provides a remedy with respect to agency orders that is
19 cumulative to the APA remedy. In *Clarke Electric, Inc. v. State Highway Division*, 93 Or App
20 693 (1988), the plaintiff contractor sued under the OTCA for harm allegedly arising from the
21 Highway Division's rejection of the plaintiff's bid on a contract. The Court of Appeals held that
22 the Division's rejection of the plaintiff's bid was a final order in other than a contested case and,
23 therefore, that the plaintiff should have sought judicial review under the APA. *Id.*, 93 Or App at
24 696-97. The court specifically rejected the plaintiff's argument that, because it sought damages,
25 it was entitled to proceed directly under the OTCA:

26 Finally, plaintiff argues that it is seeking damages in tort under the
Oregon Tort Claims Act, ORS 30.265, not review of the Division's
order and, therefore, that the time limitations of the APA are not
applicable. However, defendant's alleged liability in tort is
premised on a finding that defendant's order rejecting the bid was
improper. That order was a final order in other than a contested
case, and the exclusive procedure for review of such an order is
under the APA. Consequently, the trial court did not err in granting

1 Division's motion to dismiss for failure to comply with the APA
time limitations for judicial review.

2 *Id.* at 697 (citations omitted).⁴

3 Thus, the plaintiff in *Clarke Electric* could not circumvent APA review of an agency
4 order by seeking monetary damages under the OTCA, just as the plaintiffs in the DJA cases cited
5 above could not avoid APA review merely by seeking declaratory relief with respect to agency
6 actions. The same principle applies to section 6 of Measure 37 – although it, too, creates a
7 statutory cause of action, people who contest the legality of an agency order on a Measure 37
8 claim must seek judicial review under the APA. Accordingly, this court lacks jurisdiction over
9 petitioner's DJA and Measure 37 claims against the State and should dismiss them, while
10 allowing petitioner to proceed on her APA claim.

11 **C. Petitioner has not stated a Measure 37 compensation claim.**

12 For the same reason that this court lacks jurisdiction over the Measure 37 claim against
13 the State, petitioner has failed to state a Measure 37 claim upon which relief can be granted.
14 Petitioner could have a Measure 37 compensation claim only if the State *wrongfully* continued to
15 apply land use regulations to the subject property more than 180 days after the demand for
16 compensation was made. In other words, petitioner must establish that the State erred by
17 "waiving" regulations only back to 1985, not back to the earlier date on which petitioner alleges
18 she acquired her interest in the property. And that decision can be made only by judicial review
19 of the final order under the APA. Because petitioner cannot properly assert outside the context
20 of an APA claim that the State's final order includes an incorrect waiver date, she has not stated
21 a Measure 37 claim upon which relief can be granted. For that reason, too, petitioner's second
22 claim for relief should be dismissed.

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25 _____
26 ⁴ See also *Muller v Dept. of Agriculture*, 164 Or App 11, 15-16 (1999) (plaintiff could not
avoid APA review by suing for damages in tort when "his entitlement to damages depend[ed] on
the validity of" an agency's denial of a permit application).

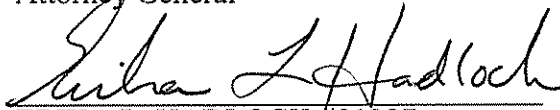
1 **CONCLUSION**

2 The gravamen of petitioner's DJA and Measure 37 compensation claims is that DLCD's
3 determination of her acquisition date was wrong. Because the APA provides the exclusive
4 procedure for petitioner to dispute DLCD's waiver-date determination, this court lacks
5 jurisdiction over petitioner's DJA and Measure 37 claims, and should dismiss them.

6 DATED this 22nd day of March, 2007.

7 Respectfully submitted,

8 HARDY MYERS
9 Attorney General

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11 ERIKA L. HADLOCK #91297
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17 Of Attorneys for State Respondents
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BEFORE THE DEPARTMENT OF ADMINISTRATIVE SERVICES,
THE DEPARTMENT OF LAND CONSERVATION AND DEVELOPMENT OF
THE STATE OF OREGON

IN THE MATTER OF THE CLAIM FOR) FINAL ORDER B
COMPENSATION UNDER ORS 197.352) CLAIM NO. M124961
(BALLOT MEASURE 37) OF)
Janice M. Perrott, CLAIMANT)

Claimant: Janice M. Perrott (the Claimant)

Property: Township 36 Range 06, Section 25, Tax lot 1200
Josephine 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 Final Staff Report and Recommendation of DLCD (the DLCD Report) attached to and by this reference incorporated into this order.


ORDER

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

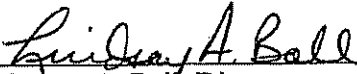
This Order is entered by the Director of the DLCD as a final order of DLCD and the Land Conservation and Development Commission under ORS 197.352, OAR 660-002-0010(8), and OAR chapter 125, division 145, and by the Director for the State Services Division of the DAS as a final order of DAS under ORS 197.352,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

Exhibit A
1 of 13

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


Michael Morrissey, Manager
DLCD, Measure 37 Services Division
Dated this 9th day of October, 2006.

FOR THE DEPARTMENT OF
ADMINISTRATIVE SERVICES:


Lindsay A. Ball, Director
DAS, State Services Division
Dated this 9th day of October, 2006.

NOTICE OF RIGHT TO APPEAL OR OTHER JUDICIAL RELIEF

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

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

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

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

IN THE MATTER OF THE CLAIM FOR) FINAL ORDER A
COMPENSATION UNDER ORS 197.352) CLAIM NO. M124961
(BALLOT MEASURE 37) OF)
Edith M. Mendenhall, CLAIMANT)

Claimant: Edith M. Mendenhall (the Claimant)

Property: Township 36 Range 06, Section 25, Tax lot 1200
Josephine 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 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 Edith Mendenhall's division of the 4.4-acre subject property into 1/4- to 1/2-acre parcels for residential development: applicable provisions of Goal 14 and OAR 660-004-0040 adopted after December 30, 1985. These land use regulations will not apply to Edith Mendenhall only to the extent necessary to allow her to use the property for the use described in this report, and only to the extent that the use was permitted when she acquired the property on December 30, 1985.
2. The action by the State of Oregon provides the state's authorization to Edith Mendenhall to use the subject property for the use described in this report, subject to the standards in effect on December 30, 1985. On that date, the property was subject to applicable provisions of Goal 14, as implemented by Josephine County's acknowledged comprehensive plan, then in effect.
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 Edith Mendenhall first obtains that permit, license or other form of authorization or consent. Such

Exhibit A
3 of 13

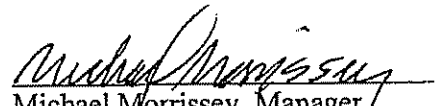
requirements may include, but are not limited to: a building permit, a land use decision, a "permit" as defined in ORS 215.402 or 227.160, other permits or authorizations from local, state or federal agencies and restrictions on the use of the property imposed by private parties.

4. Any use of the property by Edith Mendenhall 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).

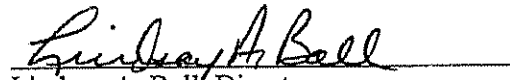
5. Without limiting the generality of the foregoing terms and conditions, in order for Edith Mendenhall to use the property, it may be necessary for her to obtain a decision under ORS 197.352 from a city and/or county and/or metropolitan service district that enforces land use regulations applicable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

This Order is entered by the Manager for the Measure 37 Services Division 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 Director of the DAS as a final order of DAS under ORS 197.352, OAR 125, division 145, and ORS 293.

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


Michael Morrissey, Manager
DLCD, Measure 37 Division
Dated this 9th day of October, 2006.

FOR the DEPARTMENT OF
ADMINISTRATIVE SERVICES:


Lindsay A. Ball, Director
DAS

Dated this 9th day of October, 2006.

NOTICE OF RIGHT TO APPEAL OR OTHER JUDICIAL RELIEF

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

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

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

FOR INFORMATION ONLY

The Oregon Department of Justice has advised the Department of Land Conservation and Development that "[i]f the current owner of the real property conveys the property before the new use allowed by the public entity is established, then the entitlement to relief will be lost."

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

October 9, 2006

STATE CLAIM NUMBER: M124961

NAMES OF CLAIMANTS: Edith M. Mendenhall
Janice M. Perrott

MAILING ADDRESS: PO Box 779
Loleta, California 95551

PROPERTY IDENTIFICATION: Township 36 Range 06, Section 25
Tax lot 1200
Josephine County

OTHER CONTACT INFORMATION: Willard L. Ransom
Cauble, Dole & Sorenson
PO Box 398
Grants Pass, Oregon 97528

DATE RECEIVED BY DAS: April 17, 2006

180-DAY DEADLINE: October 14, 2006

I. SUMMARY OF CLAIM

The claimants, Edith Mendenhall and Janice Perrott, seek compensation in the amount of \$1,404,744 for the reduction in fair market value as a result of land use regulations that are alleged to restrict the use of certain private real property. The claimants desire compensation or the right to divide the 4.4-acre subject property into 1/4- to 1/2-acre parcels for residential development. The subject property is located at 1191 West Harbeck Road, near Grants Pass, in Josephine County.

II. SUMMARY OF STAFF RECOMMENDATION

Based on the findings and conclusions set forth below, the Department of Land Conservation and Development (the department) has determined that the claim is valid in part. Department staff recommends that, in lieu of compensation, the requirements of the following state laws enforced by the Land Conservation and Development Commission (the Commission) or the department not apply to Edith Mendenhall's division of the 4.4-acre subject property into 1/4- to 1/2-acre parcels for residential development: applicable provisions of Statewide Planning Goal 14 (Urbanization) and Oregon Administrative Rule (OAR) 660-004-0040 adopted after December 30, 1985. These land use regulations will not apply to Edith Mendenhall only to the extent

necessary to allow her to use the subject property for the use described in this report, and only to the extent that use was permitted when she acquired the property on December 30, 1985.

The department has further determined that Janice Perrott's claim is not valid because the claimants have not established her ownership of the property. (See the complete recommendation in Section VI. of this report.)

III. COMMENTS ON THE CLAIM

Comments Received

On August 10, 2006, pursuant to OAR 125-145-0080, the Oregon Department of Administrative Services (DAS) provided written notice to the owners of surrounding properties. According to DAS, no written comments were received in response to the 10-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 April 17, 2006, for processing under OAR 125, division 145. The claim identifies Goal 4 (Forest Lands) and Josephine County zoning as the basis for the claim. Only laws that were enacted or adopted prior to December 2, 2004, are the basis for this claim.

Conclusions

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

V. ANALYSIS OF CLAIM

1. Ownership

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

Findings of Fact

Claimant Edith Mendenhall acquired the subject property on February 17, 1969, as reflected by a bargain and sale deed included with the claim. On June 21, 1983, Edith Mendenhall conveyed the subject property to her grandson, John Perrott, as reflected by a bargain and sale deed included with the claim. On December 30, 1985, John Perrott transferred the subject property back to Edith Mendenhall, as reflected by a bargain and sale included with the claim. The Josephine County Assessor’s Office confirms Edith Mendenhall’s current ownership of the subject property.

Although Janice Perrott is identified as a claimant on the claim form, the claimants have not submitted any documentation to demonstrate her current ownership of the subject property.¹

Conclusions

Claimant Edith Mendenhall is an “owner” of the subject property as that term is defined by ORS 197.352(11)(C), as of December 30, 1985. Claimant Janice Perrott has not established that she is an “owner” of the subject property as that term is defined by ORS 197.352(11)(C).

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 a 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 a claimant or a family member acquired the property.

Findings of Fact

The claim indicates that the claimants desire to divide the 4.4-acre subject property into 1/4- to 1/2-acre parcels for residential development and that the desired use is not allowed under current land use regulations.

The claim is based on the provisions of state law that regulate rural residential zoning. The subject property is zoned Rural Residential (RR5) by Josephine County, consistent with Goal 14,

¹ Janice Perrott submitted documentation to establish that she is the conservator for Edith Mendenhall as of April 19, 1996, but has not provided documentation with the claim to establish that she is an owner of the subject property.

which generally requires that land outside of urban growth boundaries be used for rural uses. The county's RR5 zone requires a minimum of five acres for the creation of a new lot or parcel.

Goal 14 was effective on January 25, 1975, and requires that local comprehensive plans identify and separate urbanizable land from rural land in order to provide for an orderly and efficient transition from rural to urban land use. In 2000, as a result of a 1986 Oregon Supreme Court decision,² the Commission amended Goal 14 and adopted OAR 660-004-0040 (Application of Goal 14 to Rural Residential Areas), which was effective on October 4, 2000.

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

When claimant Edith Mendenhall acquired the property on December 30, 1985, it was subject to Josephine County's acknowledged comprehensive plan. Residential development of the subject property at that time would have been subject to the provisions of the county's comprehensive plan and land use ordinances, including the provision of Goal 14 implemented by those regulations.

Conclusions

The minimum lot size requirements for rural residential lots or parcels established by amendments to Goal 14 and OAR 660-004-0040 were adopted after Edith Mendenhall acquired the subject property in 1985, and do not allow the desired division of the property. However, the claim does not establish whether or to what extent her desired level of development would have been permitted under the laws in effect in 1985 when she acquired the property.

Claimant Janice Perrott has not established her ownership of the subject property. Therefore, the department cannot determine that any laws enforced by the Commission or the department restrict her use of the subject property with the effect of reducing its fair market value.

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 use that the claimants have identified. There may be other laws that currently apply to Edith Mendenhall's use of the property, and that may continue to apply to her 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 property until there is a specific proposal for that use. When Edith Mendenhall seeks a building or development permit to carry out a specific use, it may become evident that other state laws apply to that use.

² *1000 Friends of Oregon v. LCDC (Curry County)*, 301 Or 447 (1986).

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 \$1,404,744 as the reduction in the property's fair market value due to the regulations that restrict the claimants' desired use of the property. This amount is based on a comparative market analysis submitted with the claim.

Conclusions

As explained in Section V.(1) of this report, the claimants are Edith Mendenhall who acquired the subject property on December 30, 1985, and Janice Perrott. Janice Perrott has not established her ownership of the subject property and therefore, is not entitled to compensation under ORS 197.352. Under ORS 197.352, Edith Mendenhall is due compensation for land use regulations that restrict the use of the subject property and have the effect of reducing its fair market value. Based on the findings and conclusions in Section V.(2) of this report, laws adopted since Edith Mendenhall acquired the subject property restrict her desired use of the property. The claimants estimate that the effect of the regulations on the fair market value of the subject property is a reduction of \$1,404,744.

Without an appraisal or other documentation, and without verification of whether or the extent to which Edith Mendenhall's desired use of the subject property was allowed under the standards in effect when she acquired the property, it is not possible to substantiate the specific dollar amount by which the land use regulations have reduced the fair market value of the property. Nevertheless, based on the evidence in the record for this claim, the department determines 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 since Edith Mendenhall acquired the property.

4. Exemptions Under ORS 197.352

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

Findings of Fact

The claim is based on state land use regulations that restrict the use of the subject property, including Goal 14 and OAR 660-004-0040, which Josephine County has implemented through its RR5 zone. With the exception of provisions of Goal 14 in effect when Edith Mendenhall acquired the subject property on December 30, 1985, these land use regulations were adopted after she acquired the property.

Conclusions

Without a specific development proposal for the 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 goal and rule restrictions on residential division of the subject property are not exempt under ORS 197.352(3)(E) only to the extent they were adopted after Edith Mendenhall acquired the property. Provisions of Goal 14 in effect when she acquired the property in 1985 are exempt under ORS 197.352(3)(E) and will continue to apply to the property.

Other laws in effect when Edith Mendenhall acquired the property are also exempt under ORS 197.352(3)(E) and will continue to apply to her use of the property. There may be other laws that continue to apply to her 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 the subject property until there is a specific proposal for that use. When Edith Mendenhall seeks a building or development permit to carry out a specific use, it may become evident that other state laws apply to that use. In some cases, some of these laws may be exempt under ORS 197.352(3)(A) to (D).

As explained in Section V.(1) of this report, the claimants have not established Janice Perrott's ownership of the subject property. Therefore, the issue of whether any laws are exempt from ORS 197.352 is not relevant to her.

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 use 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 property.

VI. FORM OF RELIEF

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

Findings of Fact

Based on the findings and conclusions set forth in this report, the department has determined that Janice Perrott is not entitled to relief under ORS 197.352 because she has not established her ownership of the subject property. The department has further determined that laws enforced by the Commission or the department restrict Edith Mendenhall's desired use of the subject property. The claim asserts that existing state land use regulations enforced by the Commission

or the department have the effect of reducing the fair market value of the subject property by \$1,404,744. However, because the claim does not provide an appraisal or other relevant evidence demonstrating that the land use regulations described in Section V.(2) reduce the fair market value of the property, a specific amount of compensation cannot be determined. In order to determine a specific amount of compensation due for this claim, it would also be necessary to verify whether or the extent to which Edith Mendenhall's desired use of the property was allowed under the standards in effect when she acquired the property. Nevertheless, based on the record for this claim, the department has determined that the laws on which the claim is based have reduced the fair market value of 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 Edith Mendenhall to use the subject property for a use permitted at the time she acquired the property on December 30, 1985.

Conclusions

Based on the record, the department has determined that Janice Perrott is not entitled to relief under ORS 197.352 as a result of land use regulations enforced by the Commission or the department because the claimants have not established her ownership of the property. Therefore, the department recommends that Janice Perrott's claim be denied.

The department further recommends that Edith Mendenhall's 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 Edith Mendenhall's division of the 4.4-acre subject property into 1/4- to 1/2-acre parcels for residential development: applicable provisions of Goal 14 and OAR 660-004-0040 adopted after December 30, 1985. These land use regulations will not apply to Edith Mendenhall only to the extent necessary to allow her to use the property for the use described in this report, and only to the extent that the use was permitted when she acquired the property on December 30, 1985.
2. The action by the State of Oregon provides the state's authorization to Edith Mendenhall to use the subject property for the use described in this report, subject to the standards in effect on December 30, 1985. On that date, the property was subject to applicable provisions of Goal 14, as implemented by Josephine County's acknowledged comprehensive plan, then in effect.
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 Edith Mendenhall first obtains that permit, license or other form of authorization or consent. Such requirements may include, but are not limited to: a building permit, a land use decision, a "permit" as defined in ORS 215.402 or 227.160, other permits or authorizations from local, state or federal agencies and restrictions on the use of the property imposed by private parties.
4. Any use of the property by Edith Mendenhall 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 Edith Mendenhall to use the property, it may be necessary for her 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 Edith Mendenhall 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 her use of the property.

VII. COMMENTS ON THE DRAFT STAFF REPORT

The department issued its draft staff report on this claim on September 21, 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.

Exhibit A
13 of 13

1 **CERTIFICATE OF SERVICE**

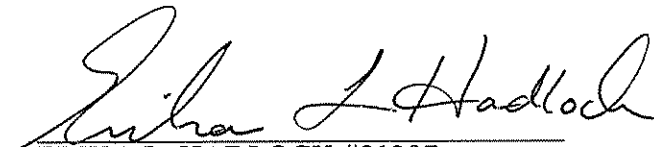
2 I certify that on March 22nd, 2007, I served the foregoing *State Respondents' Motion to*
3 *Dismiss and Memorandum in Support of State Respondents' Motion to Dismiss* upon the parties
4 hereto by the method indicated below, and addressed to the following:

5
6 Christopher Cauble
7 Willard Ransom
8 PO Box 398
9 Grants Pass, OR 97528
10 Attorneys for Petitioner

HAND DELIVERY
 MAIL DELIVERY
 OVERNIGHT MAIL
 TELECOPY (FAX)

11 Steven E. Rich
12 Josephine County Legal Counsel
13 Rm 152 Courthouse
14 500 NW 6th St
15 Grants Pass, OR 97526
16 Attorney for Josephine County

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