

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

IN THE MATTER OF THE CLAIM FOR ) FINAL ORDER  
COMPENSATION UNDER ORS 197.352 ) CLAIM NO. M129880  
(BALLOT MEASURE 37) OF )  
Jay DeHaven and Frances Tkach, CLAIMANTS )

Claimants: Jay DeHaven and Frances Tkach (the Claimants)

Property: Township 40S, Range 9W, Section 25A, Tax lot 1601, Josephine County  
(the property)

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

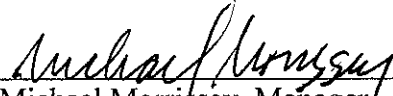
Claimants submitted the Claim to the State of Oregon under ORS 197.352. Under OAR 125-145-0010 *et seq.*, the Department of Administrative Services (DAS) referred the Claim to the Department of Land Conservation and Development (DLCD) as the regulating entity. This order is based on the record herein, including the Findings and Conclusions set forth in the Final Staff Report and Recommendation of DLCD (the DLCD Report) attached to and by this reference incorporated into this order.

ORDER

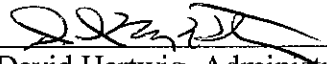
The Claim is denied as to laws administered by DLCD and the Land Conservation and Development Commission (LCDC) for the reasons set forth in the DLCD Report.

This Order is entered by the Manager for the Measure 37 Services Division 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 Administrator 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.

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

  
Michael Morrissey, Manager  
DLCD, Measure 37 Services Division  
Dated this 9<sup>th</sup> day of February, 2007.

FOR the DEPARTMENT OF  
ADMINISTRATIVE SERVICES:

  
David Hartwig, Administrator  
DAS, State Services Division  
Dated this 9<sup>th</sup> day of February, 2007.

**NOTICE OF RIGHT TO APPEAL OR OTHER JUDICIAL RELIEF**

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

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

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

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

February 9, 2007

**STATE CLAIM NUMBER:** M129880

**NAMES OF CLAIMANTS:** Jay DeHaven  
Frances Tkach

**MAILING ADDRESS:** PO Box 4074  
Dana Point, California 92629

**PROPERTY IDENTIFICATION:** Township 40S, Range 9W, Section 25A  
Tax lot 1601  
Josephine County

**DATE RECEIVED BY DAS:** August 18, 2006

**180-DAY DEADLINE:** February 14, 2007

**I. SUMMARY OF CLAIM**

The claimants, Jay DeHaven and Frances Tkach, seek compensation in the amount of \$1.5 million 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 6.08-acre subject property into six 1-acre parcels and to develop a dwelling on each resulting undeveloped parcel. The property is located at 33224 Redwood Highway, near O'Brien, in Josephine County. (See claim.)

**II. SUMMARY OF STAFF RECOMMENDATION**

Based on the findings and conclusions set forth below, the Department of Land Conservation and Development (the department) has determined that the claim is not valid because neither the Land Conservation and Development Commission (the Commission) nor the department has enforced laws that restrict Frances Tkach's desired use of the subject property. The department has further determined that the claim is not valid as to Jay DeHaven because he is not an owner of the subject property. (See the complete recommendation in Section VI. of this report.)

**III. COMMENTS ON THE CLAIM**

**Comments Received**

On November 27, 2006, pursuant to Oregon Administrative Rule (OAR) 125-145-0080, the Oregon Department of Administrative Services (DAS) provided written notice to the owners of

surrounding properties. According to DAS, three written comments were received in response to the 10-day notice.

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

#### **IV. TIMELINESS OF CLAIM**

##### **Requirement**

ORS 197.352(5) requires that a written demand for compensation be made:

1. For claims arising from land use regulations enacted prior to the effective date of Measure 37 (December 2, 2004), within two years of that effective date, or the date the public entity applies the land use regulation as an approval criteria to an application submitted by the owner, whichever is later; or
2. For claims arising from land use regulations enacted after the effective date of Measure 37 (December 2, 2004), within two years of the enactment of the land use regulation, or the date the owner of the property submits a land use application in which the land use regulation is an approval criteria, whichever is later.

##### **Findings of Fact**

This claim was submitted to DAS on August 18, 2006, for processing under OAR 125, division 145. The claim identifies Josephine County's RLDC 62.020.E.2 and 62.050.B.1 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 Jay DeHaven acquired the subject property on February 14, 1992, as reflected by a warranty deed included with the claim. Jay DeHaven transferred all of his interest in the subject property to his wife Frances Tkach on May 6, 1999, as reflected by a bargain and sale deed included with the claim. The Josephine County Assessor's Office confirms Frances Tkach's current ownership of the subject property.

### **Conclusions**

Frances Tkach, is an "owner" of the subject property as that term is defined in ORS 197.352(11)(C), as of May 6, 1999. Jay DeHaven is not 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 the claimants' use of private real property in a manner that reduces the fair market value of the property relative to how the property could have been used at the time the claimants or a family member acquired the property.

### **Findings of Fact**

The claim indicates that the claimants desire to divide the 6.08-acre subject property into six 1-acre parcels and to develop a dwelling on each resulting undeveloped parcel, and that the current zoning prohibits the desired use.

The subject property is currently zoned Rural Commercial (RC) by Josephine County. The RC zone requires a minimum lot size of one acre in conjunction with an authorized commercial use. In this case, the claimants have not alleged how a specific state land use regulation restricts the claimants' desired use of the subject property with the effect of reducing the fair market value of that real property. Based on the information in the claim, the department has not identified any state laws that restrict the claimants' desired development of the subject property.

### **Conclusions**

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

As explained in Section V.(1) of this report, Jay DeHaven is not an "owner" of the subject property as that term is defined in ORS 197.352(11)(C). Therefore, no laws enforced by the Commission or the department restrict Jay DeHaven's use of private real property with the effect of reducing the fair market value of the subject property.

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

In order to establish a valid claim, ORS 197.352(1) requires that the land use regulation(s) (described in Section V.(2) of this report) must have “the effect of reducing the fair market value of the property, or any interest therein.”

As explained in Section V.(2) of this report, Frances Tkach has not established that any state land use regulations restrict the use of the subject property. Accordingly, the department cannot determine that any laws enforced by the Commission or the department have had the effect of reducing the fair market value of the subject property.

As explained in Section V.(1) of this report, Jay DeHaven is not an “owner” of the subject property as that term is defined in ORS 197.352(11)(C). Therefore, no laws enforced by the Commission or the department restrict his use of private real property with the effect of reducing the fair market value of the subject property.

### **4. Exemptions Under ORS 197.352(3)**

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

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

As explained in Section V.(1) of this report, Jay DeHaven is not an “owner” of the subject property as that term is defined in ORS 197.352(11)(C). Therefore, the issue of whether any laws are exempt from ORS 197.352 is not relevant to his claim.

## **VI. FORM OF RELIEF**

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

### **Findings of Fact**

Based on findings and conclusions set forth in this report, laws enforced by the Commission or the department do not restrict Frances Tkach’s desired use of the subject property; the laws also do not restrict Jay DeHaven’s use of the subject property because he is not an owner of the subject property.

## **Conclusions**

Based on the record before the department, France Tkach has not established that she is entitled to relief under ORS 197.352(1) as a result of land use regulations enforced by the Commission or the department. In addition, Jay DeHaven has not established that he is entitled to relief for the subject property under ORS 197.352(1) as a result of land use regulations enforced by the Commission or the department because he is not an owner of the subject property. Therefore, the department recommends that this claim be denied.

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

The department issued its draft staff report on this claim on January 19, 2007. 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.<sup>1</sup>

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<sup>1</sup> In response to the draft staff report dated January 19, 2007, pursuant to OAR 125-145-0080 on January 28, 2007, the claimant submitted a letter, the department has considered the comment.