



# Oregon

Theodore R. Kulongoski, Governor

## Department of Land Conservation and Development

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September 12, 2007

To: Interested Persons

From: Cora R. Parker, Acting Director



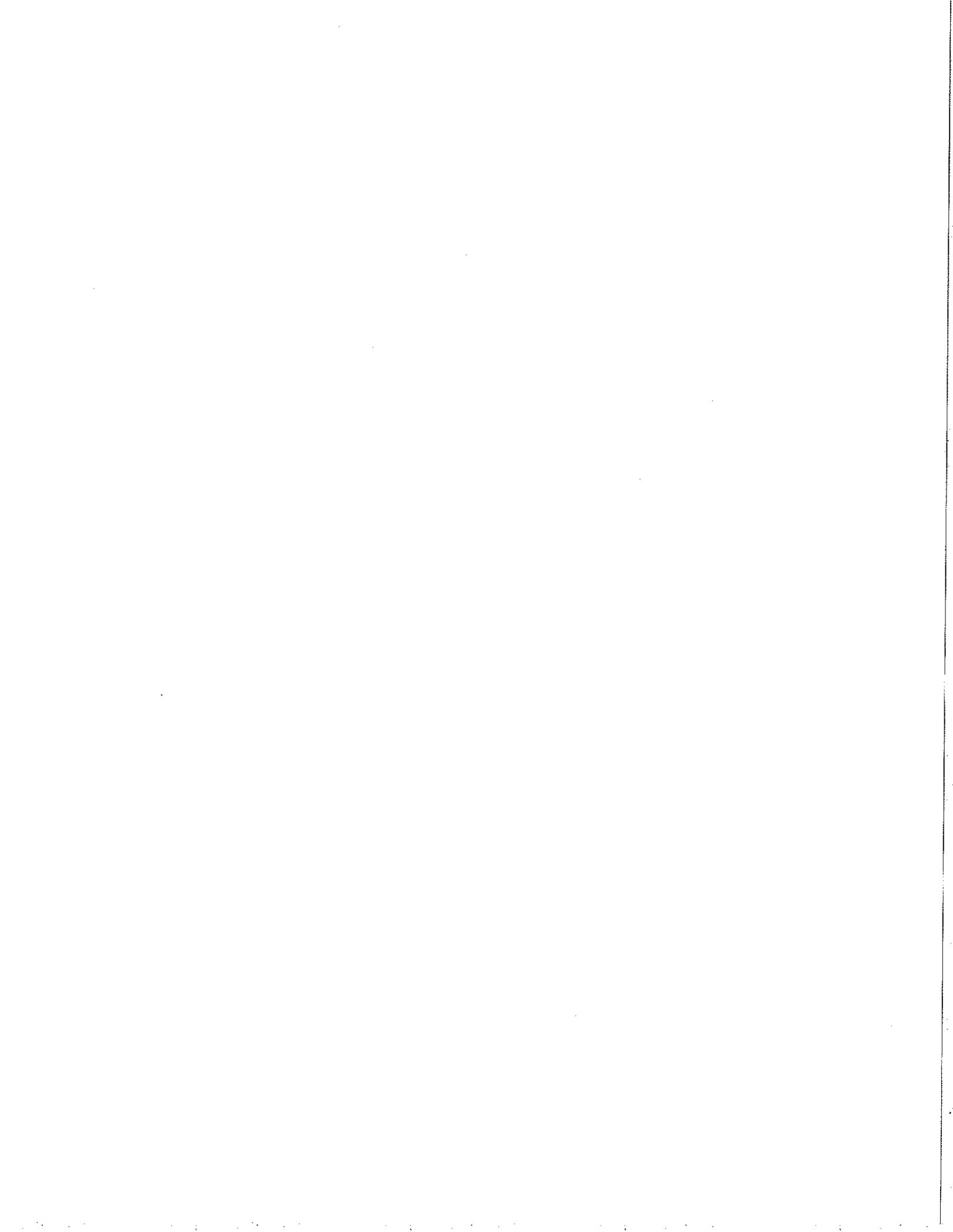
*Re: Ballot Measure 37 (ORS 197.352) Claim Number M130961*

*Claimants: Magdalene Erpelding, Leonard Erpelding, Erpelding Construction*

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

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



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

IN THE MATTER OF THE CLAIM FOR	)	FINAL ORDER A
COMPENSATION UNDER ORS 197.352	)	CLAIM NO. M130961
(BALLOT MEASURE 37) OF	)	
Magdalene Erpelding, CLAIMANT	)	

Claimant: Magdalene Erpelding (the Claimant)

Property: Township 9S, Range 1E, Section 17: tax lot 400  
Township 9S, Range 1E, Section 21: tax lot 100  
Marion 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 Magdalene Erpelding's (1) division of tax lot 100 into one 100-acre parcel and eight approximately 10-acre parcels; and to her development of a dwelling on each resulting 10-acre parcel and an aggregate mine on the resulting 100-acre parcel; and (2) division of tax lot 400 into three approximately 5-acre parcels and twenty approximately 10-acre parcels or to her development of a dwelling on each resulting undeveloped parcel: applicable provisions of Goal 3, ORS 215 and OAR 660, division 33, enacted or adopted after April 25, 1974. These laws will not apply Magdalene Erpelding 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 Magdalene Erpelding acquired the property on April 25, 1974. The department acknowledges that the relief to which Magdalene Erpelding is entitled under ORS 197.352 will not allow her to use tax lot 100 for aggregate mining as set forth in the claim.

2. The action by the State of Oregon provides the state's authorization to Magdalene Erpelding to use the subject property for the use described in this report, subject to the standards in effect

on April 25, 1974. At that time, the property was subject to the applicable provisions of ORS 215 then in effect, including the interim planning goals set forth in ORS 215.515 (1973 edition).

3. To the extent that any law, order, deed, agreement or other legally enforceable public or private requirement provides that the subject 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 Magdalene Erpelding 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 subject property imposed by private parties.

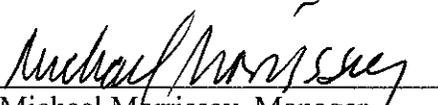
4. Any use of the subject property by Magdalene Erpelding under the terms of the order will remain subject to the following laws: (a) those laws not specified in (1) above; (b) any laws enacted or enforced by a public entity other than the Commission or the department; and (c) those laws not subject 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 Magdalene Erpelding to use the subject 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 Magdalene Erpelding 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 a use of the subject property by her.

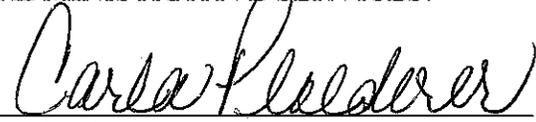
6. Nothing in this report or the state's final order for this claim constitutes any determination of ownership by the State of Oregon as to submerged or submersible lands, or as to public rights to the use of waters of the state.

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 Manager of the Measure 37 Services Unit 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:  
Cora R. Parker, Acting Director

  
Michael Morrissey, Manager  
DLCD, Measure 37 Division  
Dated this 12<sup>th</sup> day of September, 2007.

FOR the DEPARTMENT OF  
ADMINISTRATIVE SERVICES:

  
Carla Ploederer, Manager  
DAS, Measure 37 Services Unit  
Dated this 12<sup>th</sup> day of September, 2007.

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

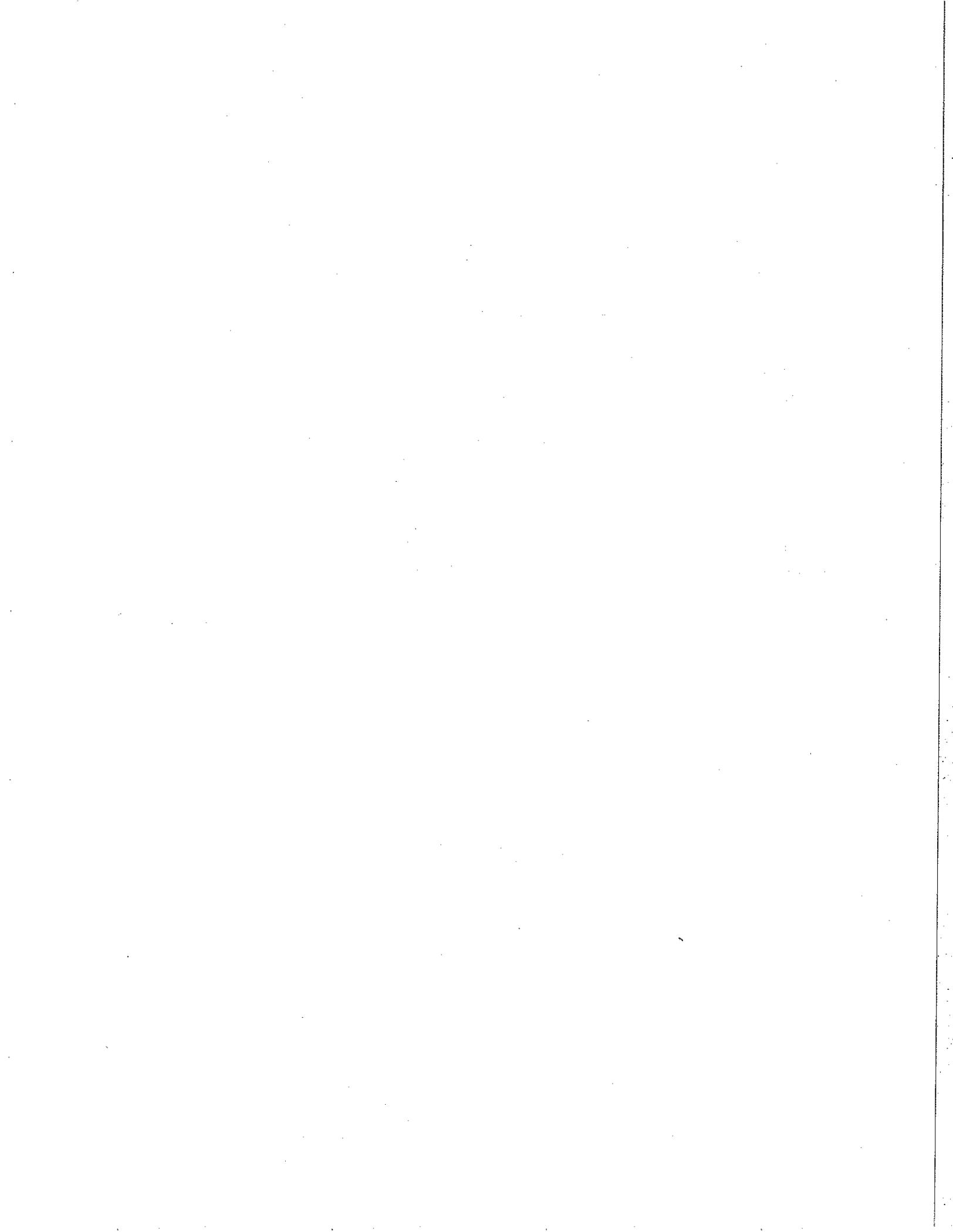
You are entitled, or may be entitled, to judicial remedies including the following:

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."



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. M130961  
(BALLOT MEASURE 37) OF )  
Leonard Erpelding and Erpelding Construction, CLAIMANTS)

Claimants: Leonard Erpelding and Erpelding Construction (the Claimants)

Property: Township 9S, Range 1E, Section 17: tax lot 400  
Township 9S, Range 1E, Section 21: tax lot 100  
Marion 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 of 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 Manager of the Measure 37 Services Unit of the DAS as a final order of DAS under ORS 197.352, OAR chapter 125, division 145, and ORS chapter 293.

FOR DLCD AND THE LAND  
CONSERVATION AND  
DEVELOPMENT COMMISSION:  
Cora R. Parker, Acting Director

  
\_\_\_\_\_  
Michael Morrissey, Manager  
DLCD, Measure 37 Services Division  
Dated this 12<sup>th</sup> day of September, 2007.

FOR THE DEPARTMENT OF  
ADMINISTRATIVE SERVICES:

  
\_\_\_\_\_  
Carla Ploederer, Manager  
DAS, Measure 37 Services Unit  
Dated this 12<sup>th</sup> day of September, 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**

September 12, 2007

**STATE CLAIM NUMBER:** M130961

**NAMES OF CLAIMANTS:** Magdalene Erpelding  
Leonard Erpelding  
Erpelding Construction

**MAILING ADDRESS:** PO Box 12307  
Salem, Oregon 97309

**PROPERTY IDENTIFICATION:** Township 9S, Range 1E  
Section 17: tax lot 400  
Section 21: tax lot 100  
Marion County

**OTHER CONTACT INFORMATION:** Wallace Lien, P.C.  
1775 32nd Place NE, Suite A  
Salem, Oregon 97301

**DATE RECEIVED BY DAS:** November 20, 2006

**DEADLINE FOR FINAL ACTION:<sup>1</sup>** May 13, 2008

**I. SUMMARY OF CLAIM**

The claimants, Magdalene and Leonard Erpelding and Erpelding Construction, seek compensation in the amount of \$7,151,885 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 (1) to divide tax lot 100 into one 100-acre parcel and eight approximately 10-acre parcels, and to develop a dwelling on each resulting 10-acre parcel and an aggregate mine on the resulting 100-acre parcel; and (2) to divide tax lot 400 into three approximately 5-acre parcels and twenty approximately 10-acre parcels and to develop a dwelling on each resulting undeveloped parcel. The subject property is located at 17294 N Santiam Highway, near Stayton, in Marion County. (See claim.)

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

## 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 Magdalene Erpelding's (1) division of tax lot 100 into one 100-acre parcel and eight approximately 10-acre parcels and to her development of a dwelling on each resulting 10-acre parcel and an aggregate mine on the resulting 100-acre parcel; and (2) division of tax lot 400 into three approximately 5-acre parcels and twenty approximately 10-acre parcels and to her development of a dwelling on each resulting undeveloped parcel: applicable provisions of Statewide Planning Goal 3 (Agricultural Lands), ORS 215 and Oregon Administrative Rules (OAR) 660, division 33, enacted or adopted after April 25, 1974. These laws will not apply to Magdalene Erpelding 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 Magdalene Erpelding acquired the property on April 25, 1974. The department acknowledges that the relief to which Magdalene Erpelding is entitled under ORS 197.352 will not allow her to use tax lot 100 for aggregate mining as set forth in the claim.

The department has further determined that the claim is not valid as to as to Leonard Erpelding because he is not an owner of the subject property, and is not valid as to Erpelding Construction because its desired use was prohibited under the laws in effect when it acquired the subject property. (See the complete recommendation in Section VI. of this report.)

## III. COMMENTS ON THE CLAIM

### Comments Received

On June 21, 2007, 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 15-day notice.

## IV. TIMELINESS OF CLAIM

### Requirement

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

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

## **Findings of Fact**

This claim was submitted to DAS on November 20, 2006, for processing under OAR 125, division 145. The claim identifies the statewide planning goals, ORS 197 and 215 and OAR 660, division 33, as the basis for the claim. Only laws that were enacted or adopted prior to December 2, 2004, are the basis for this claim.

## **Conclusions**

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

## **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**

Claimants Leonard and Magdalene Erpelding acquired an ownership interest in the subject property from their mother, Louise Erpelding, on November 12, 1973, as reflected by a deed included with the claim. However, the deed by which the claimants acquired the property was subject to a life estate in favor of Louise Erpelding. That life estate reserved in Louise Erpelding the exclusive right to use the property during her lifetime. Leonard and Magdalene Erpeldings’ interest did not provide them with any present right to use the subject property during the term of Louise Erpelding’s life. Leonard and Magdalene Erpelding acquired a right to use the subject property on April 25, 1974, upon the death of Louise Erpelding. A.P. and Louise Erpelding, the claimants’ parents, acquired the subject property on December 30, 1929, as reflected by a deed included with the claim.

On May 2, 1984, Leonard Erpelding conveyed his interest in the subject property to Leonard Spring Creek, an Oregon Business Trust, as evidenced by a warranty deed included with the claim. Leonard Spring Creek conveyed the subject property to Erpelding Construction, an Oregon Corporation, on April 7, 1993, as evidenced by a bargain and sale deed included with the claim.<sup>2</sup>

The County Assessor’s Office confirms Magdalene Erpelding’s and Erpelding Construction’s current ownership of the subject property. Claimant Leonard Erpelding does not own the subject property.

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<sup>2</sup> Erpelding Construction is a domestic business corporation registered with the Oregon Secretary of State.

## **Conclusions**

The claimants, Magdalene Erpelding and Erpelding Construction, are “owners” of the subject property as that term is defined by ORS 197.352(11)(C). Magdalene Erpelding has been an owner since April 25, 1974, and Erpelding Construction has been an owner since April 7, 1993. A.P. and Louise Erpelding are “family members” of Magdalene Erpelding as defined by ORS 197.352(11)(A) and acquired the subject property on December 30, 1929.<sup>3</sup> Leonard Erpelding 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 (1) to divide tax lot 100 into one 100-acre parcel and eight approximately 10-acre parcels and to develop a dwelling on each resulting 10-acre parcel and an aggregate mine on the resulting 100-acre parcel; and (2) to divide tax lot 400 into three approximately 5-acre parcels and twenty approximately 10-acre parcels and to develop a dwelling on each resulting undeveloped parcel. The claim indicates that current land use regulations prevent the desired use.<sup>4</sup>

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

Together, ORS 215.263, 215.284 and 215.780 and OAR 660, division 33, enacted or adopted pursuant to Goal 3, prohibit the division of EFU-zoned land into parcels less than 80 acres and establish standards for the development of dwellings on existing or any proposed parcel on that land; and establish standards for development of aggregate mining operations.

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<sup>3</sup> Under ORS 197.352(11)(A), legal entities can be “family members” of individuals who are owners of property under ORS 197.352(11)(C). However, legal entities cannot have family members under the statute. Therefore, individuals who transferred property to Erpelding Construction are not considered family members under the definition of family member in ORS 197.352(11)(A).

<sup>4</sup> The claimants summarily list numerous state land use laws as applicable to this claim, but do not establish how the laws either apply to the claimants’ desired use of the subject property or restrict its use with the effect of reducing its fair market value. On their face, most of the regulations either do not apply to the claimants’ property or do not restrict the claimants’ desired use of the property with the effect of reducing its fair market value. This report addresses only those regulations that the department finds are applicable to and restrict the claimants’ desired use of the subject property, based on the claimants’ description of their desired use.

<sup>5</sup> The claimants’ property is “agricultural land” because it contains Natural Resources Conservation Service Class I-IV soils.

ORS 215.780 establishes an 80-acre minimum size for the creation of new lots or parcels in EFU zones and became effective on November 4, 1993 (Chapter 792, Oregon Laws 1993). ORS 215.263 (2005 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.<sup>6</sup>

ORS 215.283(2)(b)(B) also allows “mining, crushing or stockpiling of aggregate and other mineral and other subsurface resources subject to ORS 215.298.” In addition, all uses allowed under ORS 215.283(2) are also subject to compliance with ORS 215.296.<sup>7</sup> ORS 215.298 requires a local land use permit for mining more than 1,000 cubic yards of material or excavation preparatory to mining of a surface area of more than one mile, and allows permits only on proposed mining or aggregate site that are included on an acknowledged inventory.

Magdalene Erpelding’s family first acquired the subject property in 1929, prior to the adoption of the statewide planning goals and their implementing statutes and regulations. No county zoning applied to the subject property in 1929.

Erpelding Construction acquired the subject property on April 7, 1993. At the time Erpelding Construction acquired the property, it was subject to Marion County’s acknowledged comprehensive plan and EFU zone, and the state land use regulations currently in effect, as described above.

### **Conclusions**

The current zoning requirements, minimum lot size and dwelling standards established by applicable provisions of Goal 3, ORS 215 and OAR 660, division 33, were all enacted or adopted after Magdalene Erpelding’s family acquired the subject property and before Erpelding Construction acquired the property in 1993. These laws restrict the use of the subject property relative to the uses allowed when Magdalene Erpelding’s family acquired the property. However, the claimants’ desired use of the subject property was prohibited by the laws in effect when Erpelding Construction acquired the property in 1993. The claim does not establish that state laws enforced by the Commission or the department restrict the claimants’ desired use of the subject property relative to the uses permitted when Erpelding Construction acquired the property in 1993.

As explained in Section V.(1) above, claimant Leonard Erpelding is not an “owner” of the subject property as that term is defined in ORS 197.352(11)(C). Therefore, no laws enforced by

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<sup>6</sup> The Commission subsequently adopted amendments to OAR 660-033-0100, -0130 and -0135 to comply with House Bill 3326 (Chapter 704, Oregon Laws 2001, effective on January 1, 2002), which were effective on May 22, 2002. These amendments clarified but did not further restrict dwelling standards for EFU-zoned land.

<sup>7</sup> ORS 215.296 allows uses permitted under ORS 215.283(2) to be approved only when the local governing body or designate determines that “the use will not: (a) force a significant change in accepted farm or forest practices on surrounding lands devoted to farm or forest use; or (b) significantly increase the cost of accepted farm or forest practices on surrounding lands devoted to farm or forest use.”

the Commission or the Department restrict Leonard Erpelding'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."

#### **Findings of Fact**

The claim includes an estimate of \$7,151,885 as the reduction in the subject property's fair market value due to the regulations that restrict the claimants' desired use of the property. This amount is based on the claimants' attorney's assessment of the subject property's value, included with the claim.

#### **Conclusions**

As explained in Section V.(1) of this report, the claimants are Magdalene and Leonard Erpelding and Erpelding Construction. Magdalene Erpelding's family acquired the subject property on December 30, 1929. Erpelding Construction acquired the subject property on April 7, 1993. Leonard Erpelding is not an "owner" of the subject property as that term is defined in ORS 197.352(11)(C). Therefore, no laws restrict Leonard Erpelding's use of the subject property with the effect of reducing the fair market value of the subject property.

Erpelding Construction's desired use of the property was prohibited by the zoning in effect at the time it acquired the property. Therefore, land use regulations enforced by the Commission or the department since Erpelding Construction acquired the property in 1993 do not have the effect of reducing the fair market value of the property relative to uses allowed when it acquired the property.

Under ORS 197.352, Magdalene Erpelding is due compensation for land use regulations that restrict the use of the 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 enacted or adopted since Magdalene Erpelding's family 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 \$7,151,885.

Without an appraisal or other documentation, it is not possible to substantiate the specific dollar amount by which the land use regulations have reduced the fair market value of the subject 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 Magdalene Erpelding's family acquired the 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.

#### **Findings of Fact**

The claim is based on state land use regulations that restrict the use of the subject property, including applicable provisions of Goal 3, ORS 215 and OAR 660, division 33, which Marion County has implemented through its current EFU zone. All of these land use regulations were enacted or adopted after Magdalene Erpelding's family acquired the subject property and before Erpelding Construction acquired the subject property.

#### **Conclusions**

It appears that the general statutory, goal and rule restrictions on residential division and development of the subject property are not exempt under ORS 197.352(3)(E) as to Magdalene Erpelding only to the extent they were enacted or adopted after her family acquired the property on December 30, 1929. Laws in effect when Magdalene Erpelding's family acquired the subject property are exempt under ORS 197.352(3)(E) and do not provide a basis for compensation. In addition, laws enacted or adopted for a purpose set forth in ORS 197.352(3)(A) to (D) are also exempt and do not provide a basis for compensation.

All of the state land use regulations that restrict the claimants' desired use of the subject property were in effect when Erpelding Construction acquired the property in 1993. Therefore, these state land use regulations are exempt under ORS 197.352(3)(E), which exempts laws in effect when the claimants acquired the subject property.

As explained in Section V.(1) of this report, claimant Leonard Erpelding 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 as to Leonard Erpelding.

### **VI. FORM OF RELIEF**

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

#### **Findings of Fact**

Based on the record, the department has determined that Leonard Erpelding and Erpelding Construction are not entitled to relief under ORS 197.352(1) as a result of land use regulations enforced by the Commissioner or the department because Leonard Erpelding is not an owner of

the subject property and because laws enforced by the Commission or the department do not restrict Erpelding Construction's desired use of the subject property relative to what was permitted when it acquired the property in 1993 and do not reduce the fair market value of the property. All state laws restricting the use of the subject property are exempt under ORS 197.352(3)(E) as to Erpelding Construction.

The department has further determined that the laws enforced by the Commission or the department restrict Magdalene Erpelding'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 \$7,151,885. 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 subject 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 Magdalene Erpelding's desired use of the subject property was allowed under the standards in effect when Magdalene Erpelding's family 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 Magdalene Erpelding to use the subject property for a use permitted at the time she acquired the subject property on April 25, 1974.

Magdalene Erpelding acquired the subject property on April 25, 1974, after the adoption of Senate Bill 100 (Chapter 80, Oregon Laws 1973) effective on October 5, 1973, but before the adoption of the statewide planning goals, effective on January 25, 1975. At that time, it was zoned by Marion County as Residential Agriculture (RA), which generally required a minimum lot size of 6,000 square feet with an approved sewer system for the creation of new lots or parcels and prohibited the mining of aggregate.

During the period between October 5, 1973, and January 25, 1975, ORS 197.175(1) and 197.280 (1973 editions) required, in addition to any local plan or zoning provisions, that cities and counties exercise their planning responsibilities in accordance with the interim land use planning goals set forth in ORS 215.515 (1973 edition). *Petersen v. Klamath Falls*, 279 Or 249 (1977); *see also, Meeker v. Board of Comm'rs*, 287 Or 665 (1979) (review of a subdivision is an exercise of planning responsibilities requiring application of the goals); *State Housing Council v. Lake Oswego*, 48 Or App. 525 (1981) (noting that while "[l]and use planning responsibility is not defined in ORS ch 197, the Supreme Court has interpreted that term as including annexation approvals, *subdivision approvals* [emphasis added] and partition approvals") citing *Petersen*, *Meeker* and *Alexanderson v. Polk County*, 285 Or 427 (1980). The claimants' desired use includes subdivision of the land. If Magdalene Erpelding had sought to create that use in 1974, as a matter of law, the use would have been subject to the interim planning goals at ORS 215.515.<sup>8</sup>

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<sup>8</sup> The "interim" land use goals are set forth in ORS 215.515(1)(a) to (j) (1973 edition) as follows: (a) "To preserve the quality of the air, water and land resources of the state," (b) "To conserve open space and protect natural and

The following interim goals are directly applicable to this claim: "To preserve the quality of the air, water and *land* [emphasis added] resources of the state"; "To conserve prime farm lands for the production of crops"; "To provide for the orderly and efficient transition from rural to urban land use"; "To protect life and property in areas subject to floods, landslides and other natural disasters"; "To provide and encourage a safe, convenient and economic transportation system including all modes of transportation: Air, water, rail, highway and mass transit and recognizing differences in the social costs in the various modes of transportation"; and "To develop a timely, orderly and efficient arrangement of public facilities and services to serve as a framework for urban and rural development." ORS 215.515 (1973 edition).

One of the interim goals was to "conserve prime farm lands for the production of crops." Soil types are a determinant of prime farm land. Eighty-five percent (342 acres) of the soils on the 408-acre subject property are rated as "prime" by the Natural Resource Conservation Service (NRCS).<sup>9</sup>

Magdalene Erpelding's desired aggregate mining operation was prohibited under the local zoning in effect when Magdalene Erpelding acquired the property. Otherwise, no information has been provided establishing whether or to what extent Magdalene Erpelding's desired residential use complies with the interim planning goals set forth in ORS 215.515 (1973 edition) in effect at the time she acquired the property on April 25, 1974. In particular, it is unclear whether any division or development of the prime farm land portion of the property could satisfy the interim goal requirement to "conserve prime farm lands for the production of crops."

In addition to the applicable provisions of ORS 215, including the interim planning goals in effect on April 25, 1974, and other laws in effect when Magdalene Erpelding acquired the subject property, there may be other laws that apply to her use of the property that have not been identified in the claim. Marion County also notes that a portion of the property is located in a flood plain zone. ORS 197.352(3)(B) specifically exempts regulations "restricting or prohibiting activities for the protection of public health and safety. . . ." To the extent the county's flood plain regulations are based on state law, these regulations would be exempt under ORS 197.352(3)(B).

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 Magdalene Erpelding seeks a building or development permit to carry out a specific use, it may become evident that other state laws apply to that use, and depending on when they were enacted or adopted, may continue to apply to the property. In addition, some of these laws may be exempt under ORS 197.352(3)(A) to (D) and will continue to apply to the subject property on that basis.

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scenic resources," (c) "To provide for the recreational needs of citizens of the state and visitors," (d) "To conserve prime farm lands for the production of crops," (e) "To provide for the orderly and efficient transition from rural to urban land use," (f) "To protect life and property in areas subject to floods, landslides and other natural disasters," (g) "To provide and encourage a safe, convenient and economic transportation system including all modes of transportation: Air, water, rail, highway and mass transit and recognizing differences in the social costs in the various modes of transportation," (h) "To develop a timely, orderly and efficient arrangement of public facilities and services to serve as a framework for urban and rural development," (i) "To diversify and improve the economy of the state" and (j) "To ensure that the development of properties within the state is commensurate with the character and the physical limitations of the land." ORS 215.515 (1973 edition).

<sup>9</sup> NRCS soil survey for Marion County.

This report addresses only those state laws that are identified in the claim, or that the department is certain apply to the subject property based on the uses 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 their claim, the greater the possibility that there may be additional laws that will later be determined to continue to apply to the use of the subject property.

### **Conclusions**

Based on the record before the department, claimants Leonard Erpelding and Erpelding Construction have not established that they are entitled to relief under ORS 197.352(1) as a result of land use regulations enforced by the Commission or the department because Leonard Erpelding is not an owner of the subject property, and because neither the Commission nor the department has enforced laws that restrict Erpelding Construction's desired use of the subject property relative to the uses permitted when it acquired the property, and therefore, no laws enforced by the Commission or the department have the effect of reducing the property's fair market value relative to when Erpelding Construction acquired it. Therefore, the department recommends that this claim be denied as to Leonard Erpelding and Erpelding Construction.

The department otherwise recommends that the claim be approved as to Magdalene Erpelding, 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 Magdalene Erpelding's (1) division of tax lot 100 into one 100-acre parcel and eight approximately 10-acre parcels; and to her development of a dwelling on each resulting 10-acre parcel and an aggregate mine on the resulting 100-acre parcel; and (2) division of tax lot 400 into three approximately 5-acre parcels and twenty approximately 10-acre parcels or to her development of a dwelling on each resulting undeveloped parcel: applicable provisions of Goal 3, ORS 215 and OAR 660, division 33, enacted or adopted after April 25, 1974. These laws will not apply Magdalene Erpelding 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 Magdalene Erpelding acquired the property on April 25, 1974. The department acknowledges that the relief to which Magdalene Erpelding is entitled under ORS 197.352 will not allow her to use tax lot 100 for aggregate mining as set forth in the claim.
2. The action by the State of Oregon provides the state's authorization to Magdalene Erpelding to use the subject property for the use described in this report, subject to the standards in effect on April 25, 1974. At that time, the property was subject to the applicable provisions of ORS 215 then in effect, including the interim planning goals set forth in ORS 215.515 (1973 edition).
3. To the extent that any law, order, deed, agreement or other legally enforceable public or private requirement provides that the subject 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 Magdalene Erpelding 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 subject property imposed by private parties.

4. Any use of the subject property by Magdalene Erpelding 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 Magdalene Erpelding to use the subject 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 Magdalene Erpelding 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 a use of the subject property by her.

6. Nothing in this report or the state's final order for this claim constitutes any determination of ownership by the State of Oregon as to submerged or submersible lands, or as to public rights to the use of waters of the state.

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

The department issued its draft staff report on this claim on August 7, 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.

