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

JOHN C. ARNETT,

Plaintiff,

v.

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

Defendant.

Case No. 07CV0342ST

RESPONSE TO PLAINTIFF'S MOTION FOR
PARTIAL SUMMARY JUDGMENT AND
CROSS-MOTION; MEMORANDUM OF
POINTS AND AUTHORITIES

Oral Argument Requested
October 18, 2007
10:00 a.m.
Courtroom A

ORAL ARGUMENT REQUESTED

Defendant, the State of Oregon, requests oral argument on plaintiff's Motion for Partial Summary Judgment and the State's Cross-Motion for Summary Judgment and estimates that 30 minutes will be required. Official court reporting services are requested. The hearing is scheduled for October 18, 2007 at 10:00 a.m. in Courtroom A.

INTRODUCTION

Measure 37, codified at ORS 197.352, requires a landowner to submit a "written demand for compensation" with the State before initiating any sort of litigation based on the State's alleged failure to grant appropriate Measure 37 relief. Plaintiff submitted a written demand alleging that state land use regulations restricted his right to subdivide the property into smaller parcels for residential development and that the fair market value of the property was reduced because of state regulations that restricted subdivision and development of dwellings. The State determined that the demand was valid and issued a final agency order on June 16, 2005. Section

1 8 of Measure 37, ORS 197.352 (8), expressly authorizes the relief provided by Final Order M
2 119025: that the State will not apply the relevant land use regulations as necessary to allow
3 plaintiff to subdivide the property into “smaller acreage parcels for residential development”
4 which is “a use permitted” when he acquired the property.

5 In August 2006, C Corp Homes submitted an application to the Deschutes County
6 Community Development Department asserting that it is the “contract purchaser” of the
7 property. Originally C Corp sought to subdivide the property into 41 or 42 lots on 64.5 acres,
8 which is an “urban level” of development. Deschutes County provided DLCD with notice of the
9 application. The State submitted a comment letter to the County pointing out that the DLCD’s
10 waiver did not include waiver of Goals 11 and 14 which apply, in addition to the regulations
11 waived by the DLCD’s Measure 37 order, to a proposed use of the property for urban level
12 development.

13 After further proceedings in the local process, plaintiff requested that the County permit
14 modification of the application to “make all parcels a minimum of 2 acres in size each” and
15 “propose on-site septic systems and not a community sewer system.”¹ DLCD did not comment
16 on the modified application. On October 3, 2007, the County approved the application.
17 Attached hereto as Ex 203 are excerpts from the County’s 47-page decision showing that the
18 application is approved. This document is publicly available on the Deschutes County website at
19 <http://lava5.deschutes.org/cdd/m37/m37.cfm>.

20 **PLAINTIFF’S MOTION**

21 The Fourth Amended Complaint asserts a claim for compensation under Measure 37 and
22 claims for declaratory and injunctive relief.² Plaintiff’s Motion for Partial Summary Judgment
23

24 _____
25 ¹ See, Ex 202 attached to the Declaration of Carmel Bender submitted in support of the State’s
26 prior motion to dismiss (OJIN # 28).

² The complaint was served October 9 and the State has not had an opportunity to respond.

1 only seeks resolution on whether the State has “liability on the claim for compensation” under
2 ORS 197.352 (6) (Pl’s MPSJ, p 1).

3 **CROSS-MOTION FOR SUMMARY JUDGMENT**

4 Plaintiff’s Motion fails based on the undisputed facts. Consequently, the State is entitled
5 to judgment as a matter of law on plaintiff’s claim for compensation, and hereby moves for
6 summary judgment. A compensation claim arises only when “a land use regulation continues to
7 apply” in violation of Measure 37.³ As a matter of law, plaintiff cannot prove that Goals 11 and
8 14 “continue to apply” in violation of Measure 37. In addition, all of plaintiff’s claims are moot
9 because the County approved the application.

10 In opposition to plaintiff’s motion and in support of its cross-motion, the State relies upon
11 ORCP 21A (1), 21A (8), and 47, ORS 197.352, the files and record of this case, including the
12 State’s memoranda and declarations in support of its prior motion to dismiss, documents publicly
13 available on the Deschutes County Planning Division website, the Record lodged with the Court
14 on July 12, 2007, and the following points and authorities.

15 **POINTS AND AUTHORITIES**

16 Plaintiff filed a timely and valid Measure 37 written demand for compensation. He
17 claimed, and the State agreed, that state land use regulations enacted after plaintiff acquired the
18 property in Deschutes County restricted him from dividing the property into smaller acreage lots
19 or parcels for residential development. Plaintiff claimed, and the State agreed, that these
20 restrictions on his use effected a reduction in the fair market value of his property.

21 The State issued Final Order M 119025 granting plaintiff a waiver of the relevant
22 restrictive regulations: applicable provisions of Goal 3, ORS 215.780, and OAR 660, division 33.

23 _____
24 ³ The State contends that, because the APA provides the exclusive remedy for any erroneous
25 interpretations of law in Final Order M 119025, the court lacks jurisdiction to decide a Section 6
26 claim for compensation. This court has rejected that argument on the State’s Motions to
Dismiss. The arguments presented in the State’s Motions for Summary Judgment are alternative
grounds for judgment for the State.

1 The Order expressly allows plaintiff to use the property for the use on which his demand was
2 based, which is “a use permitted” under state law at the time he acquired the property. Plaintiff
3 received the relief to which he was entitled under Measure 37. The State is entitled to judgment
4 as a matter of law.

5 **A. Plaintiff’s Complaint is Moot.**

6 Plaintiff’s compensation claim is not justiciable because it is moot. Plaintiff’s sole
7 allegation is that the State’s post-waiver “enforcement” of Goals 11 and 14 denied plaintiff the
8 ability “to develop the property as contemplated and within the scope of his claim” (4th Am
9 Compl, ¶ 8). There is no present controversy concerning the subdivision application which was
10 approved on October 3, 2007. The record shows, without dispute, that plaintiff has the present
11 ability to do just that, *i.e.*, develop the property in the manner that his Measure 37 demand
12 contemplated, notwithstanding the fact that the State’s waiver did not cover Goals 11 and 14.⁴

13 The court lacks subject matter jurisdiction over the Fourth Amended Complaint because
14 of the lack of a present controversy. Oregon courts are empowered to consider disputes that
15 involve present facts and adverse parties, but “judicial power does not include the authority to
16 adjudicate cases in which there is no existing controversy.” *Yancy v. Shatzer*, 337 Or 345, 347
17 (2004); *Brown v. Oregon State Bar*, 293 Or 446 (1982). Justiciability is a threshold requirement
18 for jurisdiction, encompassing related issues of standing, ripeness and mootness. *Yancy*, 337 Or
19 at 349.

20 **B. Final Order M 119025 is Correct.**

21 The central issue in this case is whether, based on the plaintiff’s written Measure 37
22 demand,⁵ the State was required to waive Goals 11 and 14 in order to comply with ORS 197.352

23 ⁴ In fact, plaintiff previously indicated to the State that with the amendment of the application to
24 conform to the State’s waiver, the case would be dismissed on approval of the application.

25 ⁵ The State lodged the agency *Record* of its decision in Final Order M 119025 in response to
26 plaintiff’s discovery request. The demand is in the *Record* at Section 2. Additional information,
if any, supplied by the claimant is in Section 3. Responses, if any, to the State’s preliminary
findings and conclusions are in Section 5.

1 (8) which permits a waiver in lieu of compensation to allow “a use permitted” under State law at
2 the time plaintiff acquired the property. The State contends, based on the text and context of
3 ORS 197.352, that the State was not required or permitted to waive Goals 11 and 14 because
4 public entities may only waive land use regulations that restrict the use identified in claimants’
5 demand for the purpose of allowing “a use permitted.”

6 The undisputed facts show that the County approved a land use application allowing a
7 use permitted, subject only to exempt land use regulations (primarily health and safety). Thus,
8 whether or not the State “should have waived” Goals 11 and 14 is a moot issue. As a matter of
9 interpretation, the question presented with whether the State is required to waive every law that
10 might apply to every conceivable use of a claimant’s property. Unless and until plaintiff submits
11 a written demand based on a use of the property that would require waiver of Goals 11 and 14,
12 Measure 37 does not permit either the State to grant a waiver of either of those Goals. The State
13 simply does not have the authority to bypass the requirements of Measure 37.

14 If, as here, the State elects to waive in lieu of paying compensation, its order must
15 “modify, remove or not to [*sic*] apply the land use regulation or land use regulations to allow the
16 owner to use the property for *a use* permitted at the time the owner acquired the property.” ORS
17 197.352 (8) (emphasis added). Here, the State analyzed the laws that applied to plaintiff’s
18 desired use for the property, as stated in the demand (*Record* § 2, p 3, 4). Final Order M 119025
19 granted plaintiff the relief authorized by Measure 37, allowing plaintiff “a use permitted” at the
20 time he acquired the property and a use that qualified for relief under the terms of Measure 37
21 (restricted by land use regulations with the effect of a reduction in value) (*Record*, § 6). And, the
22 County’s approval confirms that the “a use permitted” may go forward (Ex 203).

23 As a matter of fact, DLCD did not “ask[] the County to deny the application” (Pl’s MPSJ,
24 p 3; 4th Am Compl ¶ 8).⁶ DLCD’s comment letter asks the County to permit DLCD to comment,
25

26 ⁶ The letter in question is attached to the Affidavit of John Arnett as Ex 3 (OJIN # 37)

1 and asks that compliance with Goals 11 and 14 be analyzed because those Goals are not waived.
2 As a matter of law, DLCDC's comment cannot give rise to a claim for compensation.

3 The Oregon Supreme Court has ruled that Measure 37 does not alter or amend existing
4 law except to the extent a proper waiver "authorizes a governing body to 'modify, remove, or not
5 * * * apply' certain such regulations in specific situations." *MacPherson v DAS*, 340 Or 117,
6 132 (2006) ("all laws not amended remain in effect"). Where Measure 37 does not apply—to a
7 particular present owner and for a qualifying use—the land use laws remain in
8 effect. Accordingly, unless and until a waiver for a new use is granted, the State believes it is
9 obligated to require local government planning to comply with the non-waived statewide goals.
10 *See, e.g.*, ORS 197.090, 197.175 and 197.180.

11 The Court of Appeals "recognized in *Fish and Wildlife Department v. LCDC*, 288 Or
12 203, 212-13, 603 P2d 1371 (1979), that 'LCDC is not in the position of an appellate court whose
13 primary duty is deciding competing interests of litigants but, rather, it is an agency of
14 government charged with monitoring land use decisions of other governmental bodies to make
15 sure established standards are met.'" *1000 Friends of Oregon v. LCDC (Curry Co)*, 301 Or 447,
16 513 (1986). One of the LCDC's duties is requiring local government planning to comply with
17 the statewide goals pursuant to ORS 197.175. *Id.* Thus, far from violating Measure 37,
18 the *Record* establishes that the State has acted appropriately in all regards.

19 CONCLUSION


20 The Fourth Amended Complaint does not allege a present controversy based on DLCDC's
21 comment on the land use application recently approved by Deschutes County. The State is
22 entitled to judgment on all claims because any dispute over the proper scope of the waiver
23 provided in Final Order M 119025 is moot. Additionally, plaintiff's motion for partial summary
24 judgment on the compensation claim fails, and the State is entitled to judgment, because there is
25

1 no dispute that Final Order M 119025 provided plaintiff with the relief to which he was entitled
2 under Measure 37 as confirmed by the approval of the subdivision application.

3 DATED this 12 day of October, 2007.

4 Respectfully submitted,

5 HARDY MYERS
6 Attorney General

7 
8 DARSEE STALEY #87351
9 Senior Assistant Attorney General
10 Trial Attorney
11 Tel (503) 947-4700
12 Fax (503) 947-4792
13 darsee.staley@doj.state.or.us
14 Of Attorneys for Defendant

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REVIEWED
JK
LEGAL COUNSEL

For Recording Stamp Only

DECISION OF DESCHUTES COUNTY BOARD OF COUNTY COMMISSIONERS

FILE NUMBERS: TP-06-977, MA-06-21, MA-07-10 and A-07-1

APPLICANT: C Corp Homes
P.O. Box 638
Redmond, Oregon 97756

PROPERTY OWNER: John Arnett
5792 N E 5th
Redmond, Oregon 97756

APPLICANT'S ENGINEER: Hal Keever, PLA, ASLA
W & H Pacific
9755 S.W. Barnes Road, Suite 300
Portland, Oregon 97225

APPLICANT'S ATTORNEY: Edward P. Fitch
Bryant Emerson & Fitch, LLP
P.O. Box 457
Redmond, Oregon 97756

OTHER ATTORNEYS: Carl W. Hopp, Jr.
168 N.W. Greenwood
Bend, Oregon 97701
Attorney for R L Freeborn

REQUEST: After the Board of County Commissioners' withdrawal of the decision from the Land Use Board of Appeals for reconsideration and in light of the filed modification of application, the applicant requests tentative plan approval to establish a 39-lot subdivision on a 108-acre parcel zoned EFU-TE and located east of Highway 97 between Redmond and Terrebonne. This application follows Deschutes County and State of Oregon waivers pursuant to Measure 37

STAFF REVIEWER: Paul Blikstad, Senior Planner



IV. DECISION:

Based on the foregoing Findings of Fact and Conclusions of Law, the Board hereby **APPROVES** the applicant's proposed 39-lot subdivision **SUBJECT TO THE FOLLOWING CONDITIONS OF APPROVAL:**

1. Approval is based on the revised tentative plan dated August 20 21, 2007, the applicant's burden of proof and supporting materials, and the applicant's written and oral testimony. Any substantial change to the approved plan will require a new land use application and approval.

PRIOR TO SUBMITTING FOR APPROVAL THE FINAL PLAT FOR THE FIRST SUBDIVISION PHASE:

2. The applicant/owner shall obtain an approved site evaluation for all subdivision lots from the Deschutes County Environmental Health Division.
3. The applicant/owner shall execute and record with the Deschutes County Clerk a document binding the landowner, and the landowner's successors in interest, prohibiting them from pursuing a claim for relief or cause of action alleging injury from farming or forest practices for which no action or claim is allowed under ORS 93.396 or 30.397.
4. The applicant/owner shall obtain approval from the Deschutes County surveyor for the proposed subdivision name "Arnett Ranch."
5. The applicant/owner shall obtain from the Deschutes County Property Address Coordinator approval of all new subdivision road names.
6. The applicant/owner shall obtain and provide to the Deschutes County Planning Division written documentation from affected utilities identifying what, if any, utility easements exist or will be required on the subject property.
7. The applicant/owner shall determine if the areas on the subject property included on the National Wetland Inventory maps are designated wetlands, and shall submit to the Planning Division written documentation from the Oregon Division of State Lands concerning the status of these inventoried wetlands. If the Division of State Lands determines there are designated wetlands on the subject property, the applicant/owner shall either: (a) obtain a permit from the Division of State Lands and a conditional use permit from Deschutes County conducting any development that will impact the designated wetlands, or (b) obtain a waiver under Measure 37 to state and county wetland regulations.
8. The applicant/owner shall submit to the Deschutes County Engineer for his review and approval final grading and drainage plans for the subdivision.

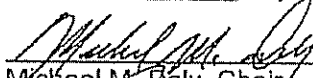
- d. a statement of water rights and the signature of an authorized representative of the Central Oregon Irrigation District;
 - e. all easements of record, including all easements for facilities of the Central Oregon Irrigation District;
 - f. a 50-foot setback along the rear yards of Lots 8 through 25; and
 - g. a statement prohibiting direct access to N.E. 5th Street from any lot.
21. The applicant/owner shall submit to the Planning Division written documentation from the Redmond Fire Department and/or the Deschutes Rural Fire Protection District No. 1 that all fire department and fire code requirements have been met

DURATION OF APPROVAL:

22. The applicant/owner shall record with the Deschutes County Clerk the final plat for Phase 1 of the subdivision within two years of the date this decision becomes final. The applicant/owner shall record the final plats for all phases of the subdivision within three years of the date the final plat for Phase 1 is recorded

Dated this 18th day of October, 2007.

Mailed this 2nd day of October, 2007.



Michael M. Daly, Chair

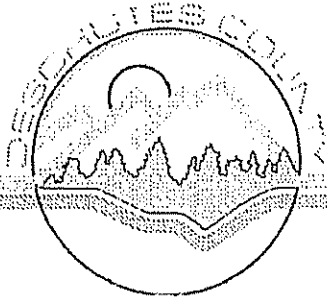


Dennis R. Luke, Vice-Chair



Tammy Baney, Commissioner

THIS DECISION BECOMES FINAL TWELVE DAYS AFTER THE DATE OF MAILING UNLESS TIMELY APPEALED.



Community Development Department

Planning Division Building Safety Division Environmental Health Division

117 NW Lafayette Avenue Bend Oregon 97701-1925
(541)388-6575 FAX (541)385-1764
<http://www.co.deschutes.or.us/cdd/>

CERTIFICATE OF MAILING

FILE NUMBER: TP-06-977/MA-06-21/MA-07-10/A-07-1

DOCUMENT(s) MAILED: Board of County Commissioner's Decision

TAX LOT NUMBER(s): 14-13-27, 300

I certify that on the 3rd day of October, 2007, the attached Board of County Commissioners' Decision, dated October 3rd, 2007, was mailed by first class mail, postage prepaid, to the person(s) and address(es) set forth on the attached list.

Dated this 3rd day of October, 2007.

COMMUNITY DEVELOPMENT DEPARTMENT

By: Bend Mailing Services

C Corp Homes P O. Box 638 Redmond, OR 97756	John Arnett 5792 NE 5 th Street Redmond, OR 97756
Ed Fitch Bryant, Emerson & Fitch, LLP P.O. Box 457 Redmond, OR 97756-0103	Hal Keever W & H Pacific 9755 SW Barnes Road, Suite 300 Portland, OR 97225
Loyal and Blanche Kloes 6535 NE 11 th Street Redmond, OR 97756	R.L. Freeborn 755 SW 7 th Redmond, OR 97756
Carl W. Hopp, Jr. Attorney at Law, LLC 168 NW Greenwood Bend, OR 97701	Newton Consultants Inc. David J. Newton 521 SW 6 th Street, Suite 100 Redmond, OR 97756
Mike Baron 6220 NE 11 th Street Redmond, OR 97756	Oregon DLCD Carmel Bender - Measure 37 Division 635 Capitol Street NE, Suite 150 Salem, OR 97301


1 **CERTIFICATE OF SERVICE**

2 I certify that on October 12, 2007, I served the foregoing proposed *Response to*
3 *Plaintiff's Motion for Partial Summary Judgment and Cross-Motion; Memorandum of Points*
4 *and Authorities* upon the parties hereto by the method indicated below, and addressed to the
5 following:

6 Edward P. Fitch
7 Bryant Emerson & Fitch, LLP
8 PO Box 457
Redmond, OR 97756

HAND DELIVERY
 MAIL DELIVERY
 OVERNIGHT MAIL
 TELECOPY (FAX)

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DARSEE STALEY #87351
Senior Assistant Attorney General
Trial Attorney
Tel (503) 947-4700
Fax (503) 947-4792
Darsee.Staley@doj.state.or.us
Of Attorneys for Defendant