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4 IN THE CIRCUIT COURT OF THE STATE OF OREGON  
5 FOR THE COUNTY OF WASHINGTON

6 EUGENE BRAUKMAN, NANCY  
7 BRAUKMAN, FARREN KOHLER, and  
8 LOIS VERBOORT-KOHLER,

9 Plaintiffs,

10 v.

11 STATE OF OREGON, BY AND THROUGH  
12 THE DEPARTMENT OF  
13 ADMINISTRATIVE SERVICES,  
14 DEPARTMENT OF LAND  
15 CONSERVATION AND DEVELOPMENT,

16 Defendants.

Case No. C061530CV

STATE'S REPLY TO RESPONSE TO MOTION  
TO DISMISS

17 Defendant, State of Oregon, moved to dismiss this case because plaintiffs did not file  
18 their petition for judicial review within 60 days of the date on which the Final Order they  
19 challenge was served, as the Administrative Procedures Act requires. Plaintiffs make two  
20 arguments in response. First, they contend, the 60-day APA deadline does not apply to their  
21 claims, and alternatively they argue that they met the deadline. For the reasons set forth below,  
22 neither of plaintiffs' arguments can overcome the jurisdictional defect created by their failure to  
23 timely file.

24 **1. The APA provides the only means by which claimants can challenge the state  
25 agencies' decision on their Measure 37 demand.**

26 In the Final Order, the state agencies opted "not to apply" certain land use regulations  
enacted after the date on which plaintiffs acquired their respective ownership interests in the  
property (Motion to Dismiss, Ex 3 at 1). Measure 37 expressly grants public entities this option

1 of “waiver,” in lieu of paying compensation. ORS 197.352 (8). Therefore, so long as the waiver  
2 is legally correct, no compensation is due.

3 The State’s Order determines plaintiffs’ rights and entitlement to relief under Measure 37  
4 unless and until the Order is set aside, modified or remanded by a court upon judicial review.  
5 The APA is the exclusive process for this purpose. ORS 183.480 (2) (“Judicial review of final  
6 orders of agencies shall be solely as provided by ORS \* \* 183.484 \* \* \*”). The appellate courts  
7 consistently hold that the exclusivity provision of the APA means what it says.

8 **2. All of plaintiffs’ claims deny the validity of the Final Order.**

9 In each of their claims, plaintiffs allege specifically that the Order was wrong because it  
10 “improperly construes and applies Measure 37, is not supported by substantial evidence in the  
11 record, and *denies plaintiffs relief and rights they are entitled to pursuant to Measure 37*”  
12 (Petition, ¶¶ 9, 12, 14, 16, and 19; emphasis added). Thus, plaintiffs’ claims arise entirely from  
13 their disagreement with the relief provided to them by the State under Measure 37. This court  
14 has jurisdiction to determine whether plaintiffs’ allegations have merit *only* in the context of an  
15 APA challenge to the Final Order. *See Mendieta v. Division of State Lands*, 148 Or App 586,  
16 599-600 (1997) (where the gravamen of a complaint is that an agency order violates rights  
17 created by another law, the exclusive avenue for relief is by an appropriate challenge to the order  
18 under the APA).

19 **3. Plaintiffs may not circumvent the 60-day deadline for challenging an agency**  
20 **order by framing a claim as one for declaratory relief.**

21 Plaintiffs’ claim for declaratory relief essentially seeks a declaration that plaintiffs are  
22 entitled to the relief available under the APA (Pet, ¶ 14). The cases are clear that APA review is  
23 exclusive, and ORS Chap 28 does not apply, in cases challenging a state agency order. *Bay*  
24 *River v. Envir. Quality Comm.*, 26 Or App 717, 720 *rev denied*, 276 Or 555 (1976) (“[a] party  
25 cannot ignore the judicial review provisions of the APA in favor of a general equitable or  
26

1 declaratory remedy”); *Mendieta supra* at 599; and cases cited in the State motion.<sup>1</sup> As long as  
2 state agency action comes in the form of an order the APA remedy is exclusive. In *Mendieta*, for  
3 example, the court allowed a breach-of-contract claim to go forward where the “plaintiffs’  
4 requested relief in no way depends on the validity or invalidity of an agency order” and was  
5 “predicated exclusively on principles of contract law that are brought to bear as a consequence of  
6 the parties’ conduct, regardless of the validity of the orders themselves.” 148 Or App at 604.

7 **4. Measure 37 orders are not exempt from the APA.**

8 There is no dispute that Measure 37 allows the State to waive certain regulations in lieu  
9 of paying compensation. In fact, plaintiffs acknowledge that the cause of action under ORS  
10 197.352 (6) arises only if a public entity fails either to “pay or waive” (Resp at 7). But, plaintiffs  
11 mischaracterize the State’s argument by asserting that it “denies plaintiffs the right to exercise a  
12 clearly expressed statutory remedy” (Resp at 6). The State approved plaintiffs’ demand, granted  
13 a waiver, and issued a Final Order. The Order is valid and binding unless a court, with  
14 jurisdiction for review under the APA, holds otherwise.

15 Therefore, plaintiffs’ argument that APA exclusivity does not apply because ORS  
16 197.352 lacks a reference to the APA asks the wrong question (Resp at 9). The issue is not  
17 whether Measure 37 directs APA review of agency action, but whether the agency action  
18 resulted in a final order. The APA defines the jurisdiction it confers, and *exclusive* APA  
19 jurisdiction extends to all final state agency orders. ORS 183.480 (2).

20 Plaintiffs’ reliance on *Boise Cascade Corp. v. Board of Forestry*<sup>2</sup> illustrates the flaw in  
21 their analysis (Resp at 8). *Boise* involved Boise Cascade’s claim that the Board of Forestry  
22 committed an unconstitutional taking without just compensation when it issued an order  
23 prohibiting the company from logging timber around a spotted owl nesting site. Boise Cascade  
24 could seek relief under the constitution without APA judicial review because the claim did not

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26 <sup>1</sup> Consequently, plaintiffs’ arguments concerning concurrent jurisdiction are inapposite (Resp at 10-11)

<sup>2</sup> 131 Or App 538 (1994), *aff’d and rev’d in part*, 325 Or 185 (1997)

1 depend on the validity of the agency order. Even if the Board of Forestry’s order prohibiting  
2 logging was perfectly valid under state and federal law, Boise Cascade argued, the company still  
3 was entitled to just compensation for the unconstitutional taking caused by that order.

4 **5. The *MacPherson* decision did not toll the 60-day timeline for challenging**  
5 **agency orders related to Measure 37.**

6 Plaintiffs also contend that their petition for judicial review was in fact timely because the  
7 60 day period set forth in the APA was tolled by the Marion County Circuit Court’s order  
8 denying a motion to stay the judgment pending appeal in *MacPherson v. DAS* (Resp at 3-4).  
9 This argument is not supported by the language of the order, or by any authority, and should be  
10 rejected. The *MacPherson* order expressly states that “all time lines under Measure 37 are  
11 suspended indefinitely.”<sup>3</sup> The APA 60-day requirement for challenging orders in other than  
12 contested cases is not one of the “time lines under Measure 37.”

13 In any event, the trial court in *MacPherson* had no authority to suspend the 60-day period  
14 under the APA. A court has jurisdiction under the APA only to the extent provided by statute,  
15 and the requirement to file the petition within 60 days is jurisdictional. See *Ososke v. DMV*, 320  
16 Or 657, 661 (1995) (“the untimely filing of a petition for judicial review of a final order of DMV  
17 is a jurisdictional defect”). The APA includes no provision that would permit a court to extend  
18 that deadline. Consequently, the order in *MacPherson* could not, as a matter of law, toll the  
19 filing deadline under the APA. See *G.A.S.P. v. Environmental Quality Commission*, 201 Or App  
20 362, 366 (2005) (finding “doubtful” the proposition that a circuit court could extend the deadline  
21 for filing a petition for judicial review of the agency order).

22 Plaintiffs also argue that they were not bound to file their Measure 37 claim within 60  
23 days of the Final Order because that action would have been “futile” and “would have been  
24 dismissed for lack of a justiciable controversy” during the time Measure 37 was unconstitutional  
25 and unenforceable (Resp at 4-5). This argument entirely misses the point. The State does not

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<sup>3</sup> A copy of the Marion County Circuit Court Order is attached to this Reply for the court’s convenience

1 contend that a claim under Measure 37 must be filed within 60 days of the Final Order, but that a  
2 claim under Measure 37 cannot arise if a petition for judicial review of the Order is not timely  
3 filed.


4 **6. Leave to amend should be denied.**

5 Plaintiffs cannot cure their failure to timely file by amending the allegations. The request  
6 for leave to amend should be denied.

7 DATED this <sup>th</sup>27 day of July, 2006.

8 Respectfully submitted,

9 HARDY MYERS  
10 Attorney General

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STATE OF OREGON  
Marion County Circuit Courts  
OCT 24 2005  
ENTERED

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

HECTOR MACPHERSON;  
BANNOCKBURN FARMS, INC.;  
CLACKAMAS COUNTY FARM  
BUREAU; LINN COUNTY FARM  
BUREAU; WASHINGTON COUNTY  
FARM BUREAU; MARION COUNTY  
FARM BUREAU; YAMHILL COUNTY  
FARM BUREAU; DAVID T. ADAMS;  
MARK TIPPERMAN; JAMES D.  
GILBERT; NORTHWOODS NURSERY,  
INC.; DAVID A. VANASCHE; KEITH  
FISHBACK; FISHBACK NURSERY,  
INC.; JACK CHAPIN and 1000  
FRIENDS OF OREGON,

Plaintiffs,

v.

DEPARTMENT OF ADMINISTRATIVE  
SERVICES, Risk Management Division,  
by and through Laurie Warner, its Acting  
Director; LAND CONSERVATION AND  
DEVELOPMENT COMMISSION,  
Department of Land Conservation and  
Development, by and through Lane  
Shetterly, its Director; THE STATE OF  
OREGON DEPARTMENT OF JUSTICE,  
by and through its Attorney General;  
Hardy Myers; CLACKAMAS COUNTY;  
MARION COUNTY and WASHINGTON  
COUNTY,

Defendants.

Case No. 05C10444

ORDER

I.

Based on the Opinion and Order on Motions for Summary Judgment entered  
in this matter on October 14, 2005, which disposed of all claims, affirmative

1 defenses and counterclaims asserted in this matter, the Court HEREBY FURTHER  
2 ORDERS:

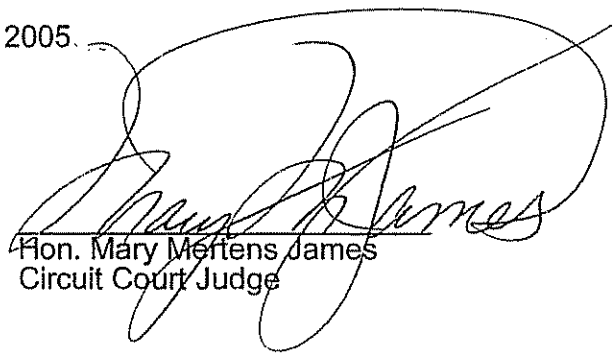
3 By operation of law – and as the express intent of the court – all time lines  
4 under Measure 37 are suspended indefinitely.

5 Defendants are hereby ordered not to accept any claims under  
6 Measure 37. Defendants further are ordered not to grant, deny, or  
7 otherwise rule on any claims under Measure 37.

8 II.

9 The Court having considered Defendants' Motion to Stay Judgment Pending  
10 Appeal and Plaintiffs' Opposition, and being fully advised, denies the Motion to Stay  
11 Judgment Pending Appeal.

12  
13 DATED this 24<sup>th</sup> day of October, 2005.


14  
15  
16   
17 Hon. Mary Mertens James  
18 Circuit Court Judge

1 **CERTIFICATE OF SERVICE**

2 I certify that on July 27, 2006, I served the foregoing *State's Reply to Response to*  
3 *Motion to Dismiss* upon the parties hereto by the method indicated below, and addressed to the  
4 following:

5  
6 William C. Cox  
7 Attorney at Law  
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