



CIRCUIT COURT OF OREGON

FIFTH JUDICIAL DISTRICT
CLACKAMAS COUNTY COURTHOUSE
OREGON CITY, OREGON 97045

THOMAS J. RASTETTER
JUDGE

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DATE: 6-28-07

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SUBJECT: Burke v. State

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THOMAS J. RASTETTER
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June 22, 2007

Darsee Staley
Senior Asst. Attorney General
1162 Court Street NE
Salem, Oregon 97301-4096

Gary Shepherd
Attorney at Law
0244 SW California Street
Portland, Oregon 97219

Re: Burke and Educative, LLC v State of Oregon; No. CV 06060231

Dear Counsel:

This matter came before the court on June 4, 2007 on the parties' cross motions for summary judgment and defendant's motion to dismiss. At that time the court heard the arguments of counsel and took the matter under advisement. This letter sets forth the court's findings and conclusions.

Background:

This case involves 17.95 acres of real property in Clackamas County. Plaintiff Thomas Burke acquired the property in 1967 by warranty deed. He then sold the property to John Griffin, M.D. under a contract of sale on March 8, 2005. That contract provided that Mr. Burke could retain possession and control of the property until December 31, 2006. On April 11, 2005 Dr. Griffin assigned his vendee's interest in the contract to Educative, LLC.

In June of 2005 plaintiffs submitted a Measure 37 claim for compensation to the state. DLCD's final order denied Measure 37 relief to both plaintiffs on grounds that neither of their property interests are restricted by relevant state land use regulations.

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Jurisdiction:

This court has jurisdiction under ORS 183.484 to review final agency orders other than contested cases. This court's jurisdiction is unaffected by *Corey v. DLCD*, 210 Or App 542 (2007), *adhered to on recon*, 2007 Or App LEXIS 669 (May 9, 2007). *Corey* held that DLCD creates an entitlement to benefits when it accepts a Measure 37 claim as valid, and gives the claimant a protected property interest in the waivers. Accordingly, *Corey* holds that such claims should be handled as contested cases before DLCD, and under ORS 183.482, jurisdiction for judicial review lies with the Court of Appeals, and not the Circuit Court. Because the instant case involves a determination that plaintiffs' claims were not valid, no such property interest arises, and this court has jurisdiction.

Nature of Plaintiffs' Property Interests:

As explained above, Mr. Burke sold the subject property to Dr. Griffin on contract, who in turn assigned his vendee's interest to Educative, LLC. Mr. Burke also retained the right to possession and control of the property until December 31, 2006. Accordingly, Mr. Burke is a contract vendor, and had a tenancy on the property which expired December 31, 2006. Dr. Griffin has no remaining interest. Educative, LLC is a contract vendee.

Defendant's Motion to Dismiss:

Defendant has moved to dismiss on grounds that Mr. Burke's Petition for judicial review is moot, since the tenancy expired on December 31, 2006. The motion will be denied because Mr. Burke still has a contract vendor's interest in the property. Whether that contract vendor's interest in the property qualifies for Measure 37 relief is discussed below.

Defendant's Motions for Summary Judgment:

Defendant has moved for summary judgment on the following three arguments:

1. On the Petition for judicial review, because the agency's decision was correct as a matter of law.
2. On the declaratory judgment and Measure 37 claims for relief, because the Petition for judicial review is the exclusive procedure available to review the validity of final orders.
3. On the Measure 37 claim, because plaintiffs are not entitled to compensation, and because Measure 37 vests discretion in public entities to elect whether to pay compensation or waive the regulations at issue.

These will be discussed in the order presented.

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Petition for Judicial Review:

The essence of defendant's first motion is that summary judgment should be granted because the agency's decision was correct as a matter of law. The state found that while Mr. Burke and Educative, LLC are each owners of an interest in the property, the state's land use regulations do not restrict the use of the plaintiffs' respective interests.

I agree with defendant's analysis. As to Educative, LLC, it is apparently undisputed that the restrictive regulations were enacted prior to that entity acquiring ownership of the property on April 11, 2005. As to Mr. Burke, the analysis is more complicated. While his tenancy has expired, he still has a contract vendor's interest in the property. Clearly Measure 37 applies not only to present owners of property, but to present owners of "any interest therein". ORS 197.352 (1); ORS 197.352 (11)(C). On the surface, since Mr. Burke still has an interest in the property and Measure 37 applies to present owners of "any interest therein", it would appear that he has a colorable claim. However, the provisions of Section 1 of ORS 197.352 (which require just compensation to be paid for new land use regulations) must be read in conjunction with Section 2, which provides:

(2) Just compensation shall be equal to the reduction in the fair market value of the affected property interest resulting from enactment or enforcement of the land use regulation...." ORS 197.352 (2); emphasis added.

Mr. Burke's present property interest is that of a contract vendor; that is, he has the right to receive payments under the contract.¹ That property interest is unaffected by the land use regulations which have been imposed on the property since he acquired his interest as a contract vendor, since he still has the right to receive the contract payments. While Mr. Burke argues that he should be compensated for the diminution in value caused by restrictive land use regulations imposed since he bought the property in 1967, that would compensate him for his *prior* interest in the property, not his present interest. The term "owner" is defined in ORS 197.352 (11)(C), *supra*, and it is only the owners of a present interest which are entitled to compensation under Measure 37. Since Mr. Burke's present interest is unaffected, summary judgment will be granted to defendant on the Petition for judicial review.

Exclusivity of Petition for Judicial Review:

In addition to a petition for judicial review, plaintiff has brought a claim for declaratory judgment under ORS 28.010 *et seq.* and a Measure 37 claim for compensation. Defendant has argued that a petition for judicial review is the exclusive means of challenging an agency's final order, and that defendant should therefore be granted summary judgment on that claim.

In *League of Oregon Cities v State of Oregon*, 334 Or 645 (2002), the Supreme Court stated that "the

¹ Since the doctrine of equitable conversion transforms a contract vendor's interest in a land sale contract to personal property, it is arguable that such an interest might not qualify as an interest in "real property" as required in ORS 197.352 (1). *Panushka v. Panushka*, 221 Or 145, 149 (1960). Because of my decision on other grounds, I do not need to decide that question.

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trial court should decline to exercise its jurisdiction under 28.010 if some *more appropriate* remedy exists." 334 Or 645 at 652. Italics in original; citing *Brooks v. Dierker*, 275 Or 619, 624 (1976). Because I find that the petition for judicial review and the Measure 37 claim for compensation are more appropriate remedies for the redress plaintiff seeks, I will decline to exercise jurisdiction over the petition for a declaratory judgment.

Summary judgment will be denied as to the Measure 37 claim since I do not believe that the petition for judicial review is the exclusive remedy for challenging agency orders in a Measure 37 context. While defendant has cited authority supporting its argument, that position ignores the clear statutory process in ORS 137.352 (6) authorizing a claim for compensation in Circuit Court.

Measure 37 Claim:

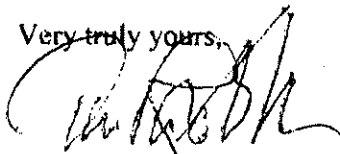
Defendant has moved for summary judgment on the Measure 37 claim because, it argues, plaintiff is not entitled to compensation, and because Measure 37 vests discretion in public entities to elect whether to pay compensation or waive the regulations at issue. Summary judgment will be granted to defendant because, as explained above, I find that the nature of plaintiffs' present interests in the property is such that they are not entitled to compensation under Measure 37. Because of this ruling I do not need to address the "election" argument raised by defendants.

Plaintiffs' Motion for Partial Summary Judgment:

Plaintiffs have moved for partial summary judgment on their Measure 37 claim. For the reasons explained above, I find that the nature of plaintiffs' interests are such that they are not entitled to compensation under Measure 37. Accordingly, plaintiffs' motion for partial summary judgment will be denied.

Thank you both for your briefs on these interesting issues. I would ask that Ms. Staley submit a form of judgment.

Very truly yours,



Thomas J. Rastetter
Circuit Court Judge