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PETER D. SHEPHERD
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DEPARTMENT OF JUSTICE
TRIAL DIVISION

October 20, 2006

Jackson Circuit Court
100 S. Oakdale
Medford, Oregon 97501


Re: Crystal Springs Packing Co, Inc. v. State
Jackson County Circuit Court No. 06-3049-L2

Dear Circuit Court Clerk:

Enclosed for filing please find Defendants' Reply on Its Motion to Dismiss in the referenced matter.

A postcard is enclosed for your use in notifying me of the action taken.

Sincerely,


Erika L. Hadlock
Sr. Assistant Attorney General

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Enclosures

cc: Joseph Kellerman
Client

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

CRYSTAL SPRINGS PACKING CO. INC.,
an Oregon corporation,

Plaintiff,

v.

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

Defendants.

Case No. 063049L2

DEFENDANTS' REPLY ON ITS MOTION TO
DISMISS

The State has moved to dismiss this Measure 37 compensation claim on two grounds: lack of jurisdiction and failure to state a claim upon which relief can be granted. In this memorandum, the State replies briefly to the arguments plaintiff makes in opposing the dismissal motion. The State agrees with plaintiff, however, that it would be appropriate to abate this case pending final resolution of Case No. 063050Z7, which is based on plaintiff's petition for judicial review of the Measure 37 order at issue, and the parties are filing a stipulated motion to that effect.

A. This court lacks subject-matter jurisdiction.

1. Appellate case law confirms that APA provides the sole means for challenging agency orders, even when another statutory cause of action otherwise would be available.

The main focus of the motion to dismiss is the State's explanation that the Administrative Procedures Act ("APA") provides the exclusive means by which a court may review an agency order that resolves a Measure 37 claim. In arguing to the contrary,

1 plaintiff asserts that the “APA exclusivity” cases upon which the State relies all involved
2 circumstances where no “separate, alternative statutory remedy in addition to the APA
3 remedy” was available. (Plaintiff’s response at 2).

4 Plaintiff misreads the case law. The cases that the State cites *did* involve
5 situations where plaintiffs challenged agency actions pursuant to “separate, alternative
6 statutory” schemes, and the appellate courts ruled that they should, nonetheless, have
7 sought relief under the APA. Those separate statutory schemes are the Oregon Tort
8 Claims Act (“OTCA”) and the Declaratory Judgment Act (“DJA”), which both create a
9 statutory cause of action independent from the APA. *See* ORS 28.010, *et seq.* (DJA);
10 ORS 30.260, *et seq.* (OTCA).

11 Despite the generally broad availability of relief under both the OTCA and the
12 DJA, Oregon courts consistently have held that a person may *not* obtain relief under
13 those Acts when the person challenges the lawfulness of state agency action and could
14 have sought judicial review of the agency’s order under the APA. For example, in
15 *Clarke Electric, Inc. v. State of Oregon*, 93 Or. App. 693 (1988), the plaintiff contractor
16 brought an OTCA claim against the State Highway Division for damages allegedly
17 associated with the Division’s rejection of its bid on a public-works contract. The Court
18 of Appeals held that the Division’s rejection of the plaintiff’s bid was an order in other
19 than a contested case and the plaintiff should have sought judicial review of that order
20 under the APA. The court specifically rejected the plaintiff’s argument that, because it
21 sought damages, it was entitled to proceed under the OTCA:

22 Finally, plaintiff argues that it is seeking damages in tort
23 under the Oregon Tort Claims Act, ORS 30.265, not review
24 of the Division’s order and, therefore, that the time
25 limitations of the APA are not applicable. However,
26 defendant’s alleged liability in tort is premised on a finding
that defendant’s order rejecting the bid was improper. That
order was a final order in other than a contested case, and
the exclusive procedure for review of such an order is
under the APA. Consequently, the trial court did not err in

1 granting Division's motion to dismiss for failure to comply
with the APA time limitations for judicial review.

2 *Clarke Electric*, 93 Or. App. at 697.

3 Just as the plaintiff in *Clarke Electric* could not circumvent APA review of an
4 agency order by seeking monetary damages under the OTCA, plaintiff here may not
5 proceed directly under Measure 37 but must, instead, pursue relief pursuant to its petition
6 for judicial review in Case No. 063050Z7. The DJA cases cited by the state confirm that
7 the availability of APA review prevents plaintiff from seeking relief under ORS 197.352.
8 *See Eppler v. Board of Tax Service Examiners*, 189 Or. App. 216, 222 (2003) (“plaintiffs’
9 sole recourse [in arguing that state licensing requirements were preempted by federal
10 law] was to raise their preemption claim in the contested case proceeding before the
11 board and seek judicial review, under the APA, of any adverse ruling by the board”);
12 *Lake County v. State of Oregon*, 142 Or. App. 162, 165-66 (1996) (DJA relief not
13 available where plaintiffs could have sought judicial review of an agency order under the
14 APA); *Mendieta v. Division of State Lands*, 148 Or. App. 586, 599-600 (1997), *rev*
15 *dismissed*, 328 Or. 331 (1999) (similar); *Bay River, Inc. v. Environmental Quality*
16 *Comm’n*, 26 Or. App. 717, *rev denied*, 276 Or. 555 (1976) (similar).

17 These cases hold that, despite the fact that the DJA itself creates a statutory cause
18 of action, people may seek relief *only* under the APA when the premise of their complaint
19 is that an agency order is (or will be, when issued) unlawful. The same principle applies
20 to Section 6 of Measure 37 – although it, too, creates a statutory cause of action, people
21 who contest the legality of an agency order on a Measure 37 claim must seek judicial
22 review under the APA.

23 **2. The notice of appeal rights in the Final Order does not create a**
24 **right to proceed directly under Measure 37.**

25 In arguing against the exclusivity of the APA remedy, plaintiff also points out that
26 the Final Order in this case includes a notice of appeal rights stating:

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

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

- 4 1. Judicial review under ORS 183.484 * * *.
- 5 2. A cause of action under ORS 197.352 (Measure 37 (2004)): If a land
6 use regulation continues to apply to the subject property more than 180
7 days after the present owner of the property has made written demand for
8 compensation under ORS 197.352, the present owner of the property, or
9 any interest therein, shall have a cause of action in the circuit court in
10 which the real property is located.

11 (Footnote omitted).

12 That notice simply informs claimants that they “may” be entitled to one or more
13 of the listed remedies, and the second part of the notice merely provides claimants with a
14 slightly abbreviated version of the text of Section 6. The State’s choice to put claimants
15 on notice of the remedies they *might* be able to pursue – depending on the particular
16 circumstances of their cases and upon eventual judicial rulings on the jurisdictional issues
17 – does not itself create a remedy in any given case. Rather, the right to a legal remedy is
18 created by law. Although, as explained above, Oregon law clearly provides that the APA
19 remedy is exclusive in other contexts, the appellate courts have not yet confirmed that the
20 same rule applies with respect to orders on Measure 37 claims. Accordingly, the State
21 has chosen to notify claimants that they “may” be entitled to direct relief under ORS
22 197.352(6), in the event the courts eventually determine that APA relief is not exclusive
23 in the Measure 37 context.

24 **B. Plaintiff has failed to state a claim for compensation.**

25 As explained in the State’s opening memorandum, plaintiff has not stated – and
26 cannot state – a claim for compensation under Measure 37 because the State has elected
27 to not apply certain land use regulations in lieu of paying just compensation. In response,
28 plaintiff contends that the State seeks to be “absolved from liability” merely because it
29 has waived some land use regulations, though not all regulations that plaintiff thinks the

1 State should have waived. (Plaintiff's response at 3). That is not correct. If plaintiff
2 ultimately prevails on its petition for judicial review and obtains a final judgment holding
3 that the State was required to waive land use regulations to a date earlier than 1986, the
4 State presumably will comply with that judgment and issue a new order in which it either
5 will grant the broader waiver, under ORS 197.352(8) and (10), or pay plaintiff just
6 compensation under ORS 197.352(6). As before, that election of remedies will be the
7 state's to make.

8 In short, if plaintiff's APA claim succeeds, plaintiff should receive all the relief to
9 which it is entitled under Measure 37. For that reason, plaintiff cannot currently state a
10 Section 6 claim for compensation.

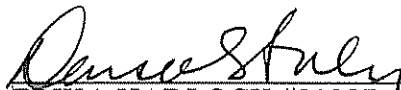
11 CONCLUSION

12 For the reasons stated above and in the memorandum supporting the State's
13 motion to dismiss, this court lacks jurisdiction over plaintiff's Measure 37 claim and
14 plaintiff has failed to state ultimate facts constituting a claim upon which relief can be
15 granted. This court should dismiss the complaint with prejudice.

16 DATED this 20th day of October, 2006.

17 Respectfully submitted,

18 HARDY MYERS
19 Attorney General

20 

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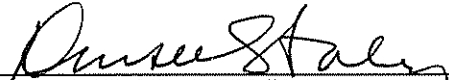
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CERTIFICATE OF SERVICE

I certify that on October 20, 2006, I served the foregoing Defendants' Reply on Its Motion to Dismiss upon the parties hereto by the method indicated below, and addressed to the following:

Joseph E. Kellerman
Hornecker et al
717 Murphy Road
Medford, OR 97504
Attorney for Plaintiff

- HAND DELIVERY
- MAIL DELIVERY
- OVERNIGHT MAIL
- TELECOPY (FAX)



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