

CAROL E. JONES  
CIRCUIT JUDGE



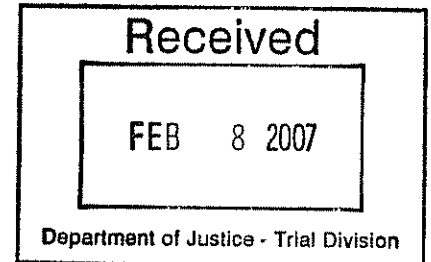
YAMHILL COUNTY COURTHOUSE  
535 NE 5<sup>TH</sup> STREET  
MCMINNVILLE, OREGON 97128

503-434-7486  
FAX: 503-472-5805

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Michael G. Gunn  
Attorney at Law  
P.O. Box 1046  
Newberg, OR 97132

Darsee Staley  
Senior Assistant Attorney General  
1162 Court St., NE  
Salem, OR 97301



Re: Smith v State of Oregon, et al CV060239

Dear Counsel:

This matter came before the Court on November 17, 2006, upon Petitioner's Petition For Judicial Review and Measure 37 Compensation Claim, and I took the matter under advisement. My ruling follows.

**Issue of ownership**

Petitioner argues that it is the trust which is the owner, not himself personally, that he filed the claim in his capacity as Trustee for the Trust, and thus, there was no change in ownership when Mary Smith passed away on April 1, 2000. The Record reflects that the Trust was a revocable trust. Earl and Mary Smith were the grantors and trustees, and could have, at any time during their lifetimes, revoked or modified the Trust, received any income derived from the property, sold the property and distributed the property in any way they deemed appropriate, and changed beneficiaries. When the last surviving grantor/trustee, Mary Smith died on April 1, 2000, Randy Smith acquired the property as successor trustee. Prior to that date, Randy Smith had no legal ownership or control of the property. All of the legal and equitable interest by Mary Smith was extinguished on that date, and it passed to Randy Smith.

There is substantial evidence in the record to support the finding that Randy Smith is the present owner of the subject property.

**Acquisition date when government opts to "waive" rather than compensate**

Petitioner urges this court to find that the agency's Final Order is in error in only waiving

those regulations enacted or applied after Petitioner's own acquisition of the property, rather than acquisition by his parents, Earl and Mary Smith; and that ORS 197.352 ("Measure 37") is ambiguous on this point in that it provides for *compensation* of property owners for regulations resulting in reduction in property value enacted after acquisition by a *family member* of the present owner, thus requiring the court to look to other historical sources of the measure to discern its meaning.

As required by *PGE v. BOLI*, 317 Or 606 (1993), if the intent of the voters is clear from the text and context of the statute, other sources need not be considered. Only when the text and context are unclear does the court go on to discern intent from other sources. *Ecumenical Ministries of Oregon v. Oregon State Lottery Commission*, 318 Or 551 (1994); *Stranahan v. Fred Meyer, Inc.*, 331 Or 38 (2000). I find that the intent is clear on the face of the statute, and that it clearly provides that when the government opts to modify, remove or not apply ("waive") regulations, the option applies only to regulations which have come into effect since the present owner's date of acquisition. Nowhere does the statute require or even authorize waiver of regulations dating back to when the present owner's family member acquired the property.<sup>1</sup> This court cannot presume oversight or error on the part of the drafters of Measure 37. Had they wished to provide the date of acquisition by a family member as the relevant date for the waiver option, they surely would have done so. As the measure is written, it gives property owners one of two possible remedies, at the government's option, each with its own effective date.<sup>2</sup> The real question, though, is not what the measure's proponents intended but what the voters intended; and where, as here, the language is clear, the court need go no further in an attempt to discern the voters' intent. The context of the statute as a whole lends further support to this conclusion. §10 provides that the government may choose compensation or waiver, despite the availability of funds. It goes on to provide that where a claim is not paid within 2 years, the owner may use the property "as permitted at the time the owner acquired the property." Thus, in any event, the owner is never allowed to use the property contrary to regulations imposed prior to the present owner's acquisition.<sup>3</sup>

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<sup>1</sup> The statute does not *explicitly* even provide that compensation, when opted for, be paid for reduction in property value dating back to the acquisition by a family member. The only reference to "family member," other than its definition in §11, is in §3, which lists regulations which are excepted from compensation provided for in §1. In other words, §3 lists regulations for which the government is *not authorized* to compensate, and the list includes regulations which were in effect prior to acquisition by the present owner or a family member of the present owner. In contrast, when waiver is the option, the statute explicitly provides that the relevant date is that of acquisition by the present owner.

<sup>2</sup> There are other rules which apply to one, but not the other, remedy. For example, it does not appear that anything contained in the list of exemptions in §3 would apply to the waiver remedy.

<sup>3</sup> Even if I were to find ambiguity in the statute with respect to this issue, and determine the voters' intent by a review of the history of Measure 37, I would reach the same conclusion; i.e. that the voters intended that when the governmental entity opts to waive regulations rather than compensate the owner for reduction in value, the waiver only applies to regulations enacted or applied after the present owner acquired the property. Petitioner attached as exhibits to his Memorandum of Points and Authorities the Ballot Title, Text of Measure, Explanatory Statement, and

### Petitioner's claim for compensation

Petitioner further claims that, even though Respondent has elected to waive land use regulations, he is still due compensation, pursuant to §6 and §12, because the government has continued to apply land use regulations for more than 180 days after written demand for compensation. I find that the statute is also clear and unambiguous and that Petitioner's interpretation of it is incorrect. Specifically, the statute clearly gives the governmental entity the option to choose waiver or compensation. Waiver is "in lieu" of the compensation otherwise provided for by the statute. §1 and §6 clearly provide for compensation, but a subsequent section, §8 clearly gives the government the choice to waive, rather than compensate. Petitioner's position that the government first may choose to waive, but then is required to compensate for any remaining regulations not waived is not supported by a plain reading of the

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supporting and opposing Arguments which were contained in the 2004 Oregon Voter's Pamphlet. All of these sources are appropriate sources for the court to consider when attempting to resolve ambiguity in the case of a voter-passed ballot initiative. In summary:

A) The Ballot Title appears to inform voters that there is a single acquisition date common to both the compensation remedy and the waiver remedy; that of an owner or family member. It states: "Applies to restrictions enacted after "family member" (defined) acquired property."

B) The Text of Measure sets forth separate acquisition dates depending upon whether the government chooses to compensate or waive regulations. §3 exempts governmental entities from compensating property owners for reduction in property value attributable to regulations enacted or applied since a "family member" acquired the property; while §8 allows the government, in lieu of compensation, to "modify, remove or not apply" regulations enacted or applied after the present owner acquired the property.

C) The Explanatory Statement does not specify which acquisition date applies when the government chooses to waive regulations. It does specify that the acquisition date by the owner or a family member is the pertinent date, when the owner is compensated.

D) Out of 43 arguments in favor of the Measure, *none* argue that compensation *or* waiver should apply to regulations pre-dating the present owner's acquisition of the property, or mention that the measure would require the government to do that. 30 of these arguments focus upon the unfairness to landowners when the rules change after they themselves acquired the property, thus depriving them of the expectations they had when they purchased it. Most of these arguments are by description of the circumstances of actual landowners. The other 13 arguments in favor do not address the issue of acquisition date. Three of the 40 arguments in opposition to the measure suggest that the effective date for both compensation and waiver is that of acquisition by a family member; the remaining do not address the issue. Notably, the Chief Petitioners predicted that courts might be faced with the task of interpretation: "This statement is provided in order to instruct and aid the Oregon courts in determining the legislative intent behind Ballot Measure 37, and avoid misinterpretation of the intent of this law, as Oregon courts are known to do. \* \* \* Voters are being told that the definition of "owner" is ambiguous. The term "owner" includes the current owners of the property \* \* \* [t]he provisions of Ballot Measure 37 apply using the date the current owner acquired the property \* \* \* Again, any land use regulation . . . enacted after a property owner acquired the property that has the effect of reducing the fair market value of your home will trigger Ballot Measure 37's protections." [Arguments in Favor #'s 27 and 32, furnished by Dorothy English, Barbara Prete and Eugene Prete]. As the Chief Petitioners, providing advance guidance to the courts as to the correct interpretation of the measure, their arguments would have stood out to readers of the Voters' Pamphlet as astute. In sum, for a voter relying upon the arguments in the Voter's Pamphlet, the vast majority of the arguments which do address the issue would likely lead a voter to the conclusion that Measure 37 would apply only to regulations enacted or enforced since the present owner's date of acquisition.

statute. More specifically, the government can choose to waive regulations which have become effective since the present owners' acquisition of the property, or compensate for reduction in value due to regulations which have become effective since the present owner or a family members' acquisition of the property.

Finally, Petitioner argues that §12 of the statute must be interpreted to allow compensation even when the government has elected waiver; that compensation is a remedy that is not excluded by the grant of any other remedy. If there are remedies available to Petitioner in addition to what is provided for in ORS 197.352; certainly this subsection provides that Petitioner is not excluded from availing himself of them. "The remedy" referred to in §12, however, is whichever remedy is elected by the government, i.e. compensation or waiver. The statute provides for but one remedy; either compensation or waiver. The election to waive, then, necessarily excludes the remedy of compensation. The Final Order waives regulations since the present owner's acquisition; therefore, the remedy of compensation is not available to Petitioner.

Respondent's Final Order is supported by substantial evidence in the record, and correctly applies the law. The Final Order is therefore affirmed.

Yours truly,



Carol E. Jones  
Circuit Judge