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

6 Florence Erickson,

7 Plaintiff,

8 v.

9 The DEPARTMENT OF LAND
10 CONSERVATION AND DEVELOPMENT,
11 an agency of the State of Oregon; LAND
12 CONSERVATION AND DEVELOPMENT
13 COMMISSION, an agency of the State of
14 Oregon; DEPARTMENT OF
15 ENVIRONMENTAL QUALITY, an agency
16 of the State of Oregon; DEPARTMENT OF
17 FORESTRY, an agency of the State of
18 Oregon; and DEPARTMENT OF
19 ADMINISTRATIVE SERVICES, an agency
20 of the State of Oregon,

21 Defendantss.

Case No. CV06080638

STATE'S RESPONSE TO PLAINTIFF'S
SUPPLEMENTAL BRIEF ON CROSS-
MOTIONS FOR SUMMARY JUDGMENT

22 INTRODUCTION

23 Plaintiff's supplemental brief reveals the fundamental flaw in her argument that the
24 State's final order on her Measure 37 demand is inadequate: she insists she asked for, and is
25 entitled to, "the right to *any* use of her land." (Pl's Supp Brief at 4; emphasis in original). But
26 Measure 37 does not authorize the State to waive land use regulations to allow "*any*" use of
property; it allows the State to issue waiver relief only to allow the owner to put the property to
"a use" that was permitted when the owner acquired it. ORS 197.352(8). In this case, the
Measure 37 demand that plaintiff submitted to the State was based on an appraisal that identified
highway-oriented light-industrial and commercial use as the highest and best use of the property.

1 Accordingly, the State issued a final order waiving land use regulations to allow *that use*.
2 Plaintiff's claim that she is entitled to more has no basis in Measure 37 or in the circumstances of
3 this case.

4 ARGUMENT

5 **A. Plaintiff's desire for a waiver of all post-acquisition land use regulations that restrict**
6 **any use of property conflicts with Measure 37, which does not allow governments to**
7 **issue such "blanket waivers."**

8 Plaintiff's current assertion that she wants a waiver granting her "the right to *any* use of
9 her land" echoes the comments she made on the Department of Land Conservation and
10 Development's ("DLCD's") draft staff report: that she "is entitled, pursuant to Measure 37, to
11 develop the property for *any* lawful use * * *" and that her demand was for "*any* residential,
12 commercial or industrial development."¹ Plaintiff's desire for a waiver that allows her *any* use
13 of the property is based on a misunderstanding of Measure 37, which allows the State and other
14 governments to issue waiver relief only "to allow the owner to use the property for *a use*
15 permitted at the time the owner acquired the property." ORS 197.352(8) (emphasis added). This
16 point is explored in section E of the State's opening memorandum supporting its summary-
17 judgment motion, section D of the State's memorandum opposing plaintiff's summary-judgment
18 motion, and in section A of the State's reply memorandum. The fundamental point is that
19 plaintiff is not entitled to the "blanket" waiver of all land use regulations that she seeks, but only
20 to a waiver that allows her to undertake the specific use upon which her Measure 37 demand was
21 based.
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25 ¹ Pl's Supp Brief at 4 (emphasis in original); *Record* § 5 at 1 (emphasis in original) (attached as
26 Exhibit 1 to the Second Declaration of Erika Hadlock, submitted with this memorandum).

1 **B. Because plaintiff did not explicitly identify “a use” to which she wants to put the**
2 **property, the State properly relied on the appraisal that formed the basis of her**
3 **demand for approximately \$6 million; that appraisal identified highway-oriented**
4 **light-industrial or commercial use as the highest and best use of the property.**

5 To qualify for Measure 37 relief, a claimant must establish, among other things, that a
6 post-acquisition land use regulation restricts the use of her property, with the effect of reducing
7 its fair market value. ORS 197.352(1). The “just compensation” that is owed on a qualifying
8 claim equals “the reduction in the fair market value of the affected property interest resulting
9 from enactment or enforcement of *the* land use regulation.” ORS 197.352(2) (emphasis added).
10 Thus, to successfully pursue a Measure 37 claim, a property owner must identify the land use
11 regulation or regulations that prevent her from putting the property to a specific use, so the State
12 may determine whether the property’s fair market value has been reduced by her inability to
13 make that use of the property.

14 Here, plaintiff did not explicitly identify her desired use of the property in her Measure
15 37 demand. She did, however, assert that restrictive land use regulations had reduced the fair
16 market value of her property by approximately \$6 million (Second Hadlock Decl, Ex 3 at 5).
17 Plaintiff supported that assertion with an appraisal opining that the property’s fair market value
18 had been reduced by \$6.25 million by regulations that prevent plaintiff from undertaking
19 highway-oriented light-industrial or commercial use of the property. (*See* Second Hadlock Decl,
20 Ex 2). It necessarily follows that plaintiff’s Measure 37 demand was based on a claim that she
21 is entitled to relief from the land use regulations that prevent *that use*. *See* ORS 197.352(1), (2),
22 (8). And those are the land use regulations that the state waived in the final order it issued on
23 plaintiff’s Measure 37 demand. The State gave plaintiff precisely the relief for which she
24 qualifies.
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1 **C. The State did not – and could not – waive laws that prevent plaintiff from dividing**
2 **the property, as she did not request waiver of those land use regulations.**

3 In addition to arguing generally that she is entitled to a blanket waiver allowing her any
4 use of the property, plaintiff contends that the State’s waiver order allows her to divide the
5 property. (Pl’s Supp Brief at 3-4). She is wrong.

6 The operative part of the final order – the portion that states what land use regulations the
7 State is waiving – provides, in pertinent part:

8 1. In lieu of compensation under ORS 197.352, the State of
9 Oregon will not apply the following laws to [plaintiff’s or co-
10 applicant’s] development of the 13.44-acre property for highway
11 oriented, light industrial or commercial use: applicable provisions
12 of Goal 3, ORS 215 and OAR 660, division 33, enacted or adopted
13 after each claimant acquired the subject property. These laws will
not apply to Florence Erickson only to the extent necessary to
allow her to use the subject property for the use described in this
report, and only to the extent that use was permitted when she
acquired the property on October 18, 1963.

14 (*Record* § 6 at 1; attached as Exhibit 1 to the first Hadlock Declaration). Thus, plaintiff may
15 develop the property for light-industrial or commercial purposes, but the order does not waive
16 the land use regulations that prevent plaintiff from partitioning the property to carry out that
17 development.

18 Plaintiff is correct that portions of the staff report could be read to suggest that plaintiff
19 *also* had requested the use of partitioning the property, in addition to developing it for light-
20 industrial or commercial purposes. (*See Record* § 6 at 7-8). But those statements are not
21 included in the portion of the order that describes what land use regulations the State is waiving.
22 Moreover, it appears that those portions of the staff report result from the use of boilerplate
23 language that DLCD sometimes employed in drafting orders on the many demands that specified
24 both division and development as the desired use of property. (*See Morrissey Affidavit* ¶ 3).

1 The agency’s mistaken use of that language in this order does not give plaintiff the right to use
2 her property in a way that Measure 37 does not allow.

3 And that is the fundamental point. Plaintiff’s Measure 37 demand did not specify
4 division of the property as part of the use plaintiff wished to make of it. Consequently, the State
5 could not properly grant plaintiff a waiver that allows partition, and its final order should not be
6 construed in a way that leads to that impermissible result.

7 **D. The State did not – and could not – waive laws that prevent plaintiff from**
8 **undertaking residential development, as that use did not form the basis of her**
9 **Measure 37 demand.**

9 Plaintiff also complains that the final order does not allow her to develop the property for
10 residential use. But plaintiff based her Measure 37 demand on a claim that land use regulations
11 preventing her from putting the property to light-industrial or commercial uses had reduced its
12 fair market value; the State agreed and waived those land use regulations. Plaintiff is not entitled
13 to waiver of regulations that did not form the basis of her claim that the fair market value of her
14 property had suffered.

15 Nonetheless, plaintiff argues that she is entitled to waiver of regulations that prevent
16 residential development because neighboring landowners received a notice stating that plaintiff
17 wished “any industrial, commercial or residential use.” (Pl’s Supp Brief at 5). Plaintiff asks
18 how the State can “seriously contend” that plaintiff “didn’t seek residential uses” in light of that
19 notice. Easily. As Michael Morrissey, manager of DLCD’s Compensation Claims Division,
20 explains in the affidavit submitted with this memorandum, the notice that the Department of
21 Administrative Services (“DAS”) sends to neighbors of Measure 37 claimants is *not* based on
22 DLCD’s later evaluation of precisely what use the claimant has requested. Rather, the DAS
23 notices are based on that agency’s preliminary – and broad – assessment of what use or uses the
24 claimants may be seeking, so that neighbors are aware of what may be at stake. Those quick
25 decisions by DAS, necessarily made early in the claim-evaluation process, do not constitute the

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1 State’s final decisions about what uses form the basis of each of the thousands of Measure 37
2 demands that have been made. (Morrissey Affidavit ¶ 4).

3 **E. The State did not – and could not – waive Goal 14 because plaintiff did not request a**
4 **use that requires a Goal 14 waiver: highway-oriented light-industrial or**
5 **commercial uses can be rural in nature; they are not necessarily urban.**

6 Finally, plaintiff argues that the appraisal on which she based her Measure 37 demand
7 was based on urban development of the property. (Pl’s Supp Brief at 5). It was not. The
8 appraisal was based simply on what the property would be worth if it were used for highway-
9 oriented light-industrial or commercial development. (Second Hadlock Decl, Ex 2). The
10 appraisal did not specify that the development would need to be “urban” in nature. And, as
11 DLCD explained during the deposition of its designee, Rob Hallyburton, there are many ways in
12 which light-industrial or commercial development may be undertaken in rural areas without the
13 need for a Goal 14 waiver – in other words, there is such a thing as “rural” industrial and
14 commercial development. (See Second Hadlock Decl, Ex 4). Because plaintiff’s Measure 37
15 demand was not based on a desire to undertake an urban level of industrial or commercial
16 development, the State properly did not include Goal 14 among the land use regulations it
17 waived.

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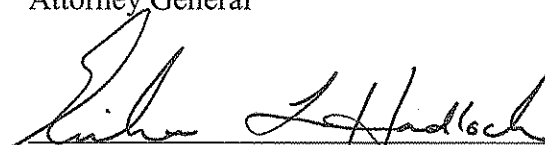
1 **CONCLUSION**

2 For the reasons set forth above and in the State's earlier memoranda in support of its
3 summary-judgment motion and in opposition to plaintiff's summary-judgment motion, this Court
4 should deny plaintiff's motion for summary judgment and enter judgment for the State on each
5 of plaintiff's claims for relief.

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7 DATED this 27th day of September, 2007.

8 Respectfully submitted,

9 HARDY MYERS
10 Attorney General

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1 **CERTIFICATE OF SERVICE**

2 I certify that on September 27th, 2007, I served the foregoing *State's Response to*
3 *Plaintiff's Supplemental Brief on Cross-Motions for Summary Judgment* upon the parties hereto
4 by the method indicated below, and addressed to the following:

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