



CIRCUIT COURT OF OREGON

FIFTH JUDICIAL DISTRICT
CLACKAMAS COUNTY COURTHOUSE
807 MAIN STREET, ROOM 304
OREGON CITY, OREGON 97045

THOMAS J. RASTETTER
CIRCUIT COURT JUDGE

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October 4, 2007

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Re: Erickson v. DLCD et al; No. CV 06080638

Dear Counsel:

This matter came before the court on the parties' cross motions for summary judgment. Having read the memoranda and declarations of the parties, and having heard the arguments of counsel, my ruling is as follows:

1. Motions Applicable to all Tax Lots. The state has moved for summary judgment against the Measure 37 claims on grounds that the Administrative Procedures Act ("the APA") is the exclusive method of challenging a state agency's final order. That motion will be denied. The state has also moved for summary judgment on grounds that the state has the authority to waive land use regulations, and because of that plaintiffs cannot state a Measure 37 claim. That motion will be denied as well. The state's motion to dismiss the Department of Environmental Quality and Forestry will be denied.

2. Petition for Judicial Review. Plaintiffs' Fourth Claim for Relief is directed at Tax Lot 600, and is for judicial review under ORS 183.484. As to that tax lot the agency order accepted the claim, but limited the development of the property to highway-oriented, light industrial or commercial use. Plaintiffs argue that these limitations are impermissible.

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A threshold issue to consider is whether this court has jurisdiction over the petition for judicial review because of the holding in *Corey v. DLCD*, 210 Or App 542 (2007), *adhered to on recon*, 212 Or App 536 (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.

The state has argued that *Corey* is not binding on this court since there is not yet a final appellate judgment in that case. However, ORS 14.165 (1) provides that if an action against a public body is filed in Circuit Court, and the Circuit Court determines it does not have jurisdiction, or has doubts about its jurisdiction, the Circuit Court shall transfer the case to the appropriate tribunal or refer the question to the Court of Appeals. Because of the holding in *Corey*, I will transfer the petition for judicial review to the Court of Appeals.

3. Remaining Claims Regarding Tax Lot 600. This court does have jurisdiction over the remaining claims concerning Tax Lot 600, stated in the Second and Third Claims for Relief. Those claims are for compensation under Measure 37 and for a declaratory judgment on the issue of transferability. It is my decision to abate these claims pending a resolution of the petition for judicial review by the Court of Appeals. I believe this is necessary for the reasons explained below.

First, if the petition for judicial review is handled in the Court of Appeals and the compensation claim is contemporaneously processed in Circuit Court, there could be inconsistent results. It is possible that the Court of Appeals could decide that DLCD's decision was correct in imposing the limitations on Tax Lot 600, while a Circuit Court jury could award compensation under the Measure 37 claim. Conversely, the Court of Appeals could decide that the agency's decision was incorrect and a jury could deny compensation under Measure 37.

This problem arises because, in my view, there are at least two apparent legal avenues for challenging an agency's Measure 37 decision, and plaintiffs have understandably chosen to pursue both. First, the law clearly authorizes a petition for judicial review to be brought from a final agency decision under ORS 183.480 *et seq.* Under that procedure an aggrieved applicant may file a petition for judicial review to challenge the agency's final order on the application. The court then reviews the agency's order and may affirm, reverse or remand the order. ORS 183.482 (8)(a); 183.484 (5)(a). On the other hand, the statute which codified Measure 37, ORS 197.352, is equally clear that if post-ownership restrictive land use regulations continue to apply to the subject property more than 180 days after demand for compensation has been made, the owner then has a claim for compensation in Circuit Court.

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Both of these avenues of legal redress essentially deal with the same fundamental question, viz, whether the agency's decision was correct. But because plaintiffs have chosen to challenge the agency's order by the petition for judicial review, we do not yet know the final outcome on the agency's final order. In effect, plaintiffs's petition for judicial review has taken away the "finality" of the agency's final order; it is still subject to change. The petition for judicial review could result in DLCD's final order being affirmed, reversed or remanded. If that review results in a waiver and a removal of the offending restrictions, plaintiffs have no compensation claim to pursue

Certainly plaintiffs have the right to file a claim for compensation since 180 days have run since the demand for compensation was made and the regulations continue to apply to the property. They have done so and their rights under Measure 37 have been preserved. However, because they have also chosen to challenge the agency's final order through a petition for review, the outcome of which will determine whether any of the regulations will continue to apply to the property, the Measure 37 claim must be abated

The declaratory judgment action also concerns Tax Lot 600 only, and seeks a judicial determination that any Measure 37 rights applied to that property are transferable to other persons. Because review of the APA claim on Tax Lot 600 is being sent to the Court of Appeals for a determination of the propriety of the agency's decision, we do not yet have a justiciable controversy. Accordingly, the declaratory judgment will be abated as well.

4. Tax Lots 2900 and 2903. Both parties have moved for summary judgment on the First Claim for Relief, which concerns Tax Lots 2900 and 2903. The Ericksons deeded Tax Lot 2900 to Erickson Farms, Inc. in 1981 in exchange for shares of stock in that corporation. In 1992 the Ericksons sold Tax Lot 2903 to the corporation on a real property sales contract, which remains executory. Mrs. Erickson remains the majority shareholder of that corporation. She, along with her husband before his death, retained control over the farm properties, continued to manage the farm, and continued to live on the properties.

As to Tax Lot 2900, Mrs. Erickson's interest in the property is that of a shareholder of a corporation which owns the property. Plaintiff in her individual capacity, who has only a shareholder's interest in the corporation and not in the real property itself, is not within the class of persons entitled to bring a Measure 37 claim.

The analysis as to Tax Lot 2903 is more complex. Mrs. Erickson is not only a shareholder in the corporation which owns that property, but is she is also a contract vendor. As stated above regarding Tax Lot 2900, her shareholder's interest in the corporation does not entitle her to bring a Measure 37 case. The remaining issue, then, is whether a contract vendor can bring a Measure 37 claim.

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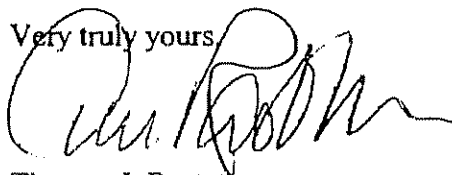
Clearly Measure 37 applies not only to present owners of property, but to present owners of "any interest therein". ORS 197.352 (1); ORS 197.352 (11)(C). On the surface, since Mrs. Erickson still has an interest in the property and Measure 37 applies to present owners of "any interest therein", it would appear that she 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.

Mrs. Erickson's present property interest is that of a contract vendor; that is, she 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 she acquired her interest as a contract vendor, since she still has the right to receive the contract payments. While Mrs. Erickson could argue that she should be compensated for the diminution in value caused by restrictive land use regulations imposed since she bought the property, that would compensate her for her *prior* interest in the property, not her 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 Mrs. Erickson's present interest is unaffected, the state is entitled to summary judgment.

For the reasons stated above, plaintiff's motion for partial summary judgment as to Tax Lots 2900 and 2903 will be denied, and the state's motion for summary judgment will be granted.

I would ask that Ms. Hadlock submit a form of order transferring the petition for judicial review to the Court of Appeals, and abating the appropriate claims, and an order and judgment for the summary judgment matter.

Very truly yours

Thomas J. Rastetter
Circuit Court Judge

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.