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

DUANE GRIEB,

Plaintiff,

v.

KLAMATH COUNTY, OREGON and THE
STATE OF OREGON, by and through the
Department of Land Conservation and
Development,

Defendants.

Case No. 0604555CV

STATE DEFENDANT'S MOTION FOR
SUMMARY JUDGMENT

Pursuant to ORCP 47, defendant State of Oregon, by and through its Department of Land Conservation and Development, moves for summary judgment on the ground that the undisputed facts establish that the State is entitled to judgment as a matter of law. The State requests oral argument and official court-reporting services on this motion and estimates that one hour will be required for the hearing.

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

DUANE GRIEB,
Plaintiff,
v.

KLAMATH COUNTY, OREGON and THE
STATE OF OREGON, by and through the
Department of Land Conservation and
Development,
Defendants.

Case No. 0604555CV
MEMORANDUM OF LAW IN SUPPORT OF
STATE'S MOTION FOR SUMMARY
JUDGMENT

INTRODUCTION

In lieu of paying plaintiff monetary compensation on his valid Measure 37 claims, the State and Klamath County issued “waivers” authorizing plaintiff to use his 90.52-acre property “for a use permitted at the time [he] acquired the property” in July 1973. ORS 197.352(8). Plaintiff is not satisfied with having received permission to use his property in a way he could have when he acquired it. Instead, plaintiff wishes to subdivide the property into five-acre residential lots, a use that was *not* allowed in July 1973 because Klamath County already had zoned the property Agricultural-Forestry (“AF”), with a 20-acre minimum. In an effort to overcome the development barrier presented by the AF zoning, after plaintiff obtained his Measure 37 waivers, he asked Klamath County to change the zoning of his property to Rural/R-5, which would allow five-acre residential lots. The County’s decision denying that request is the focus of this lawsuit.

Plaintiff’s complaint includes three compensation claims under Section 6 of Measure 37.

1 The first claim is against both the State and Klamath County, and is based on the County’s denial
2 of plaintiff’s zone-change request and on letters the State sent to Klamath County opposing that
3 request. (Complaint ¶¶ 6-13). The second claim relates only to Klamath County and the State
4 does not address it in this memorandum. Plaintiff’s third claim alleges that the State continues to
5 enforce post-acquisition land use regulations by limiting plaintiff’s ability “to transfer his
6 property to a subsequent purchaser who could then develop the subject property with the rights
7 Plaintiff had,” with the effect of reducing the property’s fair market value. (Complaint ¶ 22; *see*
8 Complaint ¶ 23).

9 Plaintiff’s first compensation claim, related to his zone-change request, fails for three
10 reasons. First, the State has granted plaintiff all the Measure 37 relief for which he is qualified –
11 a waiver that will allow him to use the property for a use that *was permitted* when he acquired
12 his property. *See* ORS 197.352(8). Plaintiff could not have divided the land into five-acre
13 residential lots when he acquired it in 1973, and Measure 37 does not allow him to do that now.
14 Second, the State’s letters to Klamath County do not amount to enforcement of post-acquisition
15 land use regulations in a way that could give rise to a Measure 37 compensation claim; rather,
16 the letters set forth the State’s understanding of Measure 37 itself. Consequently, plaintiff has
17 not stated a claim for relief under Measure 37, which can create liability only when a
18 government continues to apply land use regulations to property 180 days after a Measure 37
19 demand requesting relief from those regulations is filed. Third, even if plaintiff otherwise were
20 entitled to a waiver that allowed him to divide the property into five-acre lots, Klamath County
21 would lack authority to grant that relief by permanently changing the property’s zoning.
22 Measure 37 relief applies only to the present property owner’s use of property, not to the
23 property itself. Changing the zoning of property for plaintiff *and future owners* improperly
24 would go beyond the scope of relief that Measure 37 allows.

25 Plaintiff’s other compensation claim against the State, related to whether Measure 37

26
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JUDGMENT

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1 waivers are transferable, fails because plaintiff has not alleged – much less established – that the
2 State’s *waiver* of post-acquisition land use regulations somehow amounts to continuing
3 *enforcement* of those same regulations. Absent any factual allegation tending to establish that
4 the State is enforcing post-acquisition land use regulations against his use of his property,
5 plaintiff has no claim for Measure 37 relief.

6 **BACKGROUND**

7 **A. Measure 37**

8 A property owner qualifies for Measure 37 relief if: (1) a public entity enacts or enforces
9 a “land use regulation” after December 2, 2004; (2) the regulation restricts the owner’s use of the
10 property; and (3) the regulation has the effect of reducing the property’s fair market value. ORS
11 197.352(1). Section 3 of Measure 37 provides that certain land use regulations shall not be a
12 basis for a written demand under Section 1, notably regulations in effect when the owner or a
13 family member acquired the property. ORS 197.352(3)(E). Section 11 defines “owner” as the
14 “present owner” of the property, and lists the relationships on which a “family member” finding
15 may be based. ORS 197.352(11)(A), (C).

16 For regulations enacted before the effective date of Measure 37 (December 2, 2004),
17 Section 5 requires owners to submit written demands by December 2, 2006, or the date on which
18 a land use regulation is applied “as an approval criteria [*sic*]” to the review of a specific land use
19 application, whichever is later. After determining that an owner submitted a timely, valid written
20 demand, the public entity has the option to pay compensation or to “modify, remove, or not to
21 [*sic*] apply” land use regulations to the extent necessary “to allow the owner to use the property
22 for a use permitted at the time the owner acquired the property.” ORS 197.352(8); *see also* ORS
23 197.352(10). In this case, DAS and DLCD determined that plaintiff’s Measure 37 claim was
24 valid and granted waiver relief in lieu of compensation.¹

25 _____
26 ¹ Allowing the owner to use the property in a way that would otherwise be prohibited by
land use regulations is commonly referred to as granting a Measure 37 “waiver.” An LCDC rule
Page 3 - MEMORANDUM OF LAW IN SUPPORT OF STATE'S MOTION FOR SUMMARY
JUDGMENT

1 **B. The administrative process**

2 When DAS receives a claim, it provides written notice of the claim to neighboring
3 landowners, certain neighborhood or community organizations, and anyone who requests notice.
4 OAR 125-145-0080. DAS forwards the claim to the appropriate state agency, *i e*, the
5 “regulating entity” that appears to have enacted or enforced a relevant land use regulation. OAR
6 125-145-0090. The regulating entity, in this case, DLCD, investigates and analyzes the claim
7 and issues a draft report. OAR 125-145-100(1). The draft report provides the State’s
8 preliminary determination on the necessary elements of the claim, including timeliness of the
9 demand, ownership, the land use regulations that form the basis of the claim, the effect of
10 relevant land use regulations on the property’s fair market value, and applicable exemptions, if
11 any. OAR 125-145-100(2).

12 The draft report is made public on the internet and copies are mailed to the claimant and
13 to any person who submitted comments or requested notice. OAR 125-145-100(1). After a
14 comment period, and based in part on any comments received, DLCD and DAS issue a final
15 report and order. OAR 125-145-100(3)-(6).

16 **C. Statement of undisputed facts**

17 For purposes of these summary-judgment motions, the state defendants believe the
18 following facts are undisputed:

- 19 1. Plaintiff acquired the property at issue on July 3, 1973, before adoption of the
20 statewide land use planning goals and their implementing statutes and regulations. (*Record* § 2
21 at 3; Hadlock Decl, Ex 1 at 4).²
- 22 2. On July 3, 1973, plaintiff’s property was zoned Agricultural-Forestry, with a 20-
23 acre minimum parcel size. (Hadlock Decl, Ex 2 at 1).³

24 provides that DLCD may pay compensation only if and when the legislature appropriates funds
25 for that purpose. *See* OAR 660-002-0010(8)(c).

26 ² Exhibit 1 to the Hadlock Declaration is the State’s final order on plaintiff’s state Measure
37 demand, which is included in the agency *Record* at section 6.

1 3. At some point after plaintiff acquired the property, Klamath County changed its
2 zoning to Exclusive Farm Use (“EFU”), in accordance with Goal 3, ORS chapter 215 and OAR
3 660, division 33, because the property is agricultural land. (Hadlock Decl, Ex 1 at 6). Current
4 state land use regulations prohibit the division of EFU-zoned land into parcels less than 80 acres
5 and establish standards for development of dwellings on existing or proposed parcels. (Hadlock
6 Decl, Ex 1 at 6-7)

7 4. Plaintiff filed a state Measure 37 demand with respect to the subject property in
8 2005, claiming compensation associated with enactment of land use regulations that prevent him
9 from subdividing the property into one-acre residential lots. That claim was assigned number
10 M122137. (See Hadlock Decl, Ex 1 at 4; see generally Record § 2).

11 5. The State’s final order on demand M122137 issued on July 10, 2006 and includes
12 a “waiver” in lieu of just compensation:

13 1. In lieu of compensation under ORS 197.352, the State of
14 Oregon will not apply the following laws to Duane Grieb’s
15 division of the 90.52-acre property into one-acre parcels or to his
16 development of a dwelling on each parcel: applicable provisions
17 of Goals 3 and 14, ORS 215 and OAR 660, division 33. These
land use regulations will not apply to the claimant only to the
extent necessary to allow him to use the subject property for the
use described in this report, and only to the extent that use was
permitted when he acquired the property on July 9, 1973.

18 2. The action by the State of Oregon provides the state’s
19 authorization to the claimant to use the subject property for the use
20 described in this report, subject to the standards in effect on July 9,
1973.

21 (Hadlock Decl, Ex 1 at 1). In the incorporated staff report, DLCDC explained that “[l]aws in
22 effect when [plaintiff] acquired the subject property are exempt under ORS 197.352(3)(E), and
23 will continue to apply to the claimant’s use of the property.” (Hadlock Decl, Ex 1 at 9).

25 ³ Exhibit 2 to the Hadlock Declaration is Klamath County’s final order denying plaintiff’s
26 zone-change request.

1 6. Plaintiff also submitted a Measure 37 demand to Klamath County in 2005. (*See*
2 Hadlock Decl, Ex 5 at 1).

3 7. Klamath County issued Findings and a Final order granting plaintiff Measure 37
4 waiver relief as follows:

5 1. Pursuant to ORS 197.352(8), subject to a decision from the
6 Department of Land Conservation and Development (as
7 applicable), and subject to the county's authority, the [Klamath
8 County Board of Commissioners] will not apply land use laws and
9 regulations imposed after claimant's acquisition of the property,
10 July 9, 1973.

11 2. Claimant may develop the property subject to this Order in
12 accordance with a use permitted at the time claimant acquired an
13 ownership interest in said property.

14 3. Any and all of the exceptions detailed in ORS 197.352(3)
15 may apply to this Order.

16 (Hadlock Decl, Ex 5 at 1).

17 6. After the state and county Measure 37 orders issued, plaintiff submitted an
18 application to Klamath County requesting that the zoning of his property be changed to Rural/R-
19 5. (*See* Hadlock Decl, Ex 2 at 1).

20 7. On September 11, 2006, and October 3, 2006, the State sent letters to Klamath
21 County opposing plaintiff's zone-change application. (Hadlock Decl, Exs 3 and 4).

22 8. Klamath County denied plaintiff's zone-change application in a November 2006
23 order stating, in part:

24 WHEREAS, the Board, in consideration of the entire record, * * *
25 determined the applicant's request for a Plan Map and Zone
26 change to Rural/R-5 is not consistent with the intent of ORS
197.352

27 NOW, THEREFORE, THE BOARD OF COMMISSIONERS OF
28 KLAMATH COUNTY DENIES CLUP/ZC 18-06, A REQUEST
29 BY DUANE GRIEB FOR A COMPREHENSIVE MAP
30 AMENDMENT AND ZONE CHANGE TO RURAL/R-5
31 PREDICATED ON A GRANT OF RELIEF BY KLAMATH
32 COUNTY AND THE STATE OF OREGON UNDER ORS
33 197.352.

1 (Hadlock Decl, Ex 2 at 2).

2 **D. Standard of review**

3 The Oregon Court of Appeals recently summarized the standards that apply to judicial
4 review of summary-judgment motions:

5 Summary judgment is proper if the “pleadings, depositions,
6 affidavits, declarations and admissions on file show that there is no
7 genuine issue as to any material fact.” ORCP 47 C. “No genuine
8 issue as to a material fact exists if, based upon the record before
9 the court viewed in a manner most favorable to the adverse party,
10 no objectively reasonable juror could return a verdict for the
adverse party on the matter that is the subject of the motion for
summary judgment.” *Id.* In reviewing the allowance of summary
judgment, we view the evidence in the light most favorable to the
nonmoving party, * * * drawing all reasonable inferences in his
favor.

11 *Johnson v. Short*, 213 Or App 255, 257 (2007). As noted above, the State believes the material
12 facts in this case are undisputed. Accordingly, this Court need consider only the legal
13 significance of those facts.

14 **ARGUMENT**

15 **A. Introduction**

16 This case raises a fundamental question about the scope of relief landowners may obtain
17 under Measure 37: If a state or other government chooses to “not apply” land use regulations in
18 lieu of paying just compensation on a valid Measure 37 claim, must the waiver allow the
19 property owner to use his property in a way that was *not* permitted under the zoning in effect
20 when he acquired it? As explained in section C of this memorandum, the answer to that question
21 is “no.” Before addressing that substantive issue, however, the State briefly summarizes the
22 reasons it continues to believe this Court should dismiss plaintiff’s claims against the State for
23 lack of jurisdiction and failure to state a claim.

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1 **B. This Court should dismiss plaintiff's Measure 37 compensation claim against the**
2 **State for lack of jurisdiction and failure to state a claim.**

3 Earlier this year, the State unsuccessfully moved to dismiss plaintiff's complaint for lack
4 of jurisdiction and failure to state a claim upon which relief can be granted. The arguments in
5 this section of the State's memorandum reiterate those previously presented arguments in
6 summary form.

7 **1. If plaintiff's compensation claim is based on disagreement with the State's**
8 **final order, the APA provides the sole avenue for judicial review.**

9 In his first claim for relief, plaintiff seeks "just compensation" from the State under ORS
10 197.352(6) based on his contention that – despite its order granting plaintiff Measure 37 waiver
11 relief – the State continues to enforce land use regulations enacted after plaintiff acquired his
12 property. This Court should dismiss that claim for lack of jurisdiction or failure to state a claim
13 for relief. In short, if plaintiff's complaint is based on his disagreement with decisions
14 encompassed in the State's final order, the APA provides the exclusive avenue for judicial
15 review. *See, e.g.*, ORS 183.480(2) ("Judicial review of final orders of agencies shall be *solely* as
16 provided by ORS 183.482, 183.484, 183.490 and 183.500"; emphasis added); *Muller v. Dept. of*
17 *Agriculture*, 164 Or App 11, 15-16 (1999) (plaintiff could not avoid APA review by suing for
18 damages in tort when "his entitlement to damages depend[ed] on the validity of" an agency's
19 denial of a permit application); *Lake County v. State of Oregon*, 142 Or App 162, 165 (1996)
20 ("ORS 183.480(2) and numerous decisions of this court make clear that judicial review of final
21 agency orders shall be solely as provided in the APA"). Because plaintiff has not petitioned for
22 judicial review under the APA, this Court lacks jurisdiction over his first claim for relief against
23 the State to the extent it is premised on any disagreement with the findings or conclusions in the
24 State's final order.

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1 **2. Plaintiff cannot state claims for compensation because the State has**
2 **authority to “not apply” certain land use regulations in lieu of paying him**
3 **monetary compensation.**

4 Even if this Court determines that it has jurisdiction over plaintiff’s just-compensation
5 claims, it should dismiss both of them because the State’s authority to “waive” land use
6 regulations in lieu of paying compensation means that plaintiff has not stated Measure 37 claims
7 for compensation. Measure 37 grants the State, not Measure 37 claimants, the choice whether to
8 pay compensation or to “modify, remove, or not apply” land use regulations. ORS 197.352(8),
9 (10). And Sections 8 and 10 do not identify any point at which the State’s right to elect the
10 waiver remedy disappears. Rather, those provisions give the State the right to elect waiver
11 instead of compensation *at any time*. Thus, if plaintiff ultimately were to prevail on either of his
12 claims against the State, the State could comply with the resulting judgment by issuing a new
13 order either granting a waiver that comports with the court’s substantive rulings, under ORS
14 197.352(8) and (10), or by paying plaintiff compensation under ORS 197.352(6). Because the
15 State always may elect the waiver option, plaintiff cannot state a Section 6 claim for just
16 compensation, and this Court should dismiss his compensation claims against the State.

16 **C. The State is entitled to judgment on plaintiff’s first compensation claim (zone**
17 **change) because the State granted plaintiff all the Measure 37 relief for which he**
18 **qualifies and is not enforcing post-acquisition land use regulations against plaintiff’s**
19 **use of his property.**

20 **1. Measure 37 authorizes governments to grant waiver relief only to allow a**
21 **landowner to use property in a way that was permitted when he or she**
22 **acquired it.**

23 Section 8 of Measure 37 describes the “waiver” relief that a government may grant in lieu
24 of paying just compensation on a valid Measure 37 demand:

25 Notwithstanding any other state statute or the availability of
26 funds under subsection (10) of this section, in lieu of payment of
 just compensation under this section, the governing body
 responsible for enacting the land use regulation may modify,
 remove, or not to [*sic*] apply the land use regulation or land use

1 regulations to allow the owner to use the property for a use
2 permitted at the time the owner acquired the property.

3 ORS 197.352(8) (emphasis added).

4 Thus, the relief available under Measure 37 plainly extends only to allowing a property
5 owner to use land in a way that was allowed when the property owner acquired it. The AF
6 zoning in place when plaintiff acquired his property in July 1973 did not allow division into
7 parcels smaller than 20 acres. Consequently, Measure 37 does not give plaintiff the right to
8 divide his property into 5-acre lots and Klamath County properly denied his request for a zone
9 change that would allow that level of development. The State is entitled to judgment as a matter
10 of law on plaintiff's first claim for relief, which is premised on the incorrect contention that
11 Measure 37 entitles him to use his property in a way that was *not* permitted when he acquired it.

12 **2. Permanent zone changes are not an appropriate form of waiver relief under**
13 **Measure 37.**

14 Plaintiff's first compensation claim also fails because permanent zone changes *never* are
15 an appropriate form of relief under Measure 37, even if the change would merely restore the
16 zoning of property to what it was when the current owner acquired it.⁴ When a government
17 elects to grant Measure 37 waiver relief, it is authorized only to "modify, remove, or not * * *
18 apply" certain post-acquisition land use regulations "to allow *the owner* to use the property for a
19 use permitted at the time *the owner* acquired the property." ORS 197.352(8) (emphasis added).
20 Thus, a waiver may grant only "the owner" – statutorily defined as "the present owner," ORS
21

22 ⁴ The State uses the term "permanent zone change" to refer to the typical situation in which
23 a zoning change applies not only to the current owner's use of property, but also will govern
24 future owners' use of the property. It is possible that a county could grant Measure 37 relief in
25 the form of a *temporary* zone change that would apply only to the current owner's use of the
26 property, and would expire if ownership were transferred to anybody else. That kind of
temporary zone change – which would benefit only the property's present owner – could be a
valid form of Measure 37 relief under the "modification" or "removal" prongs of ORS
197.352(8). But that is not the type of zoning change that plaintiff requested in this case – he
sought a permanent zone change that would govern future owners' use of the property.

1 197.352(11)(C) – to develop the property in a way that otherwise would be precluded by current
2 land use regulations. The property itself remains subject to all current land use regulations,
3 including the statewide land use planning goals and their implementing statutes and regulations.

4 The State’s waiver order in this case properly provides only that the State will “not
5 apply” “applicable provisions of Goals 3 and 14, ORS 215 and OAR 660, division 33” to
6 plaintiff’s requested subdivision of his property. (Hadlock Decl, Ex 1 at 1). The current zoning
7 of the property – “EFU as required by Goal 3 * * * because the claimant’s property is
8 ‘agricultural land’” – remains in place. (See Hadlock Decl, Ex 1 at 6). Although the State and
9 County will not apply that current zoning to *plaintiff’s* use of his property, the zoning must apply
10 to any *future owners’* uses of the property. The State is entitled to judgment on plaintiff’s first
11 compensation claim because it is based on the incorrect assumption that a zone change that is not
12 limited to the present owner’s use of property *ever* can be an appropriate form of non-monetary
13 relief under Measure 37.

14 **3. The State’s letters opposing plaintiff’s zone-change application did not**
15 **enforce state land use regulations against plaintiff’s desired use of his**
property; they set forth the State’s position on Measure 37.

16 Plaintiff’s first compensation claim against the State also fails to state a claim upon which
17 relief can be granted.⁵ Section 6 of Measure 37 creates a cause of action only when “a [post-
18 acquisition] land use regulation continues to apply to the property more than 180 days after the
19 present owner of the property has made written demand for compensation * * *.” ORS
20 197.352(6). To form the basis of a compensation claim, the regulations that continue to apply to
21 the property also must not be exempt under ORS 197.352(3). Plaintiff alleges that the State’s
22 September 11 and October 3, 2006, letters opposing his zone-change request amount to
23

24 ⁵ In section B of this memorandum, the State reiterated the failure-to-state-a-claim
25 arguments it made in its unsuccessful motion to dismiss. The failure-to-state-a-claim issues the
26 State raises in sections C and D of this memorandum are new and do not duplicate arguments the
State previously has made in this litigation.

1 enforcement of state land use regulations enacted after he acquired the property. (Complaint ¶
2 7). The allegation misconstrues the nature of the State's opposition to his zone-change request.

3 The State acknowledges that letters it sends a county with regard to a land-use application
4 may constitute "enforcement" of state land use regulations in certain circumstances. But for
5 Measure 37 purposes, the question is not whether the State enforced *any* of its land use
6 regulations against the plaintiff's property. What matters is whether the State enforced *non-*
7 *exempt post-acquisition* land use regulations 180 days after plaintiff made written demand for
8 compensation for a restriction on use and reduction in value caused *by those regulations*. ORS
9 197.352(1), (4), (6). Only if the State enforced that kind of land use regulation can the plaintiff
10 state a claim for Measure 37 relief.

11 The State's September 11 and October 3, 2006, letters to Klamath County did not enforce
12 non-exempt post-acquisition land use regulations with respect to plaintiff's use of his property.
13 Rather, the letters informed Klamath County of the State's position on two issues. First, the
14 State explained that permanent zone changes are not an appropriate form of relief under Measure
15 37, because a government's decision to waive land use regulations applies only to the present
16 owner's use of property, and not to the property itself. (*See Hadlock Decl, Ex 3*). Later, the
17 State noted that the requested zone change would allow plaintiff to use the property in a way that
18 was not permitted when he acquired it, which is not authorized under Measure 37:

19 The State's order on the applicant's Measure 37 demand authorizes
20 Mr. Grieb to carry out a use that was allowed under State land use
21 regulations when he acquired the property. The State's order
22 expressly provides that it does not affect other, local, land use
23 regulations that were in effect at that time. The State has no
24 objection to the County authorizing the applicant to carry out a use
25 that he was permitted to carry out when he acquired the property –
26 and that would appear (again, by the applicant's own admission) to
be the division of the property into twenty-acre parcels and the
establishment of a dwelling on each one.

(Hadlock Decl, Ex 4 at 1).

1 Thus, the State's letters merely explained why permanent zone changes are not an
2 appropriate form of Measure 37 relief, either generally or with respect to plaintiff's request for a
3 zone change that would allow him to divide the property into five-acre lots. Those letters do not
4 enforce any post-acquisition land-use regulations with respect to plaintiff's desired use of the
5 property; instead, they explain the State's understanding of the scope of waiver relief available
6 under Measure 37. Indeed, to the extent the State sought to ensure enforcement of any laws
7 other than Measure 37 when it sent these letters, it was Klamath County's 1973 zoning
8 ordinance, which prohibited plaintiff from dividing his land into parcels smaller than 20 acres.
9 Plaintiff is not entitled to Measure 37 relief based on the State's and County's efforts to ensure
10 his continued compliance with land use regulations that already were in place when he acquired
11 his land.

12 **D. The State is entitled to judgment on plaintiff's second compensation claim because**
13 **plaintiff has not alleged or established any way in which the State "continues to**
14 **enforce" post-acquisition land use regulations by limiting plaintiff's ability to**
15 **transfer his property to a subsequent purchaser.**

16 Plaintiff's second compensation claim against the State may relate to the "transferability"
17 issue, that is, whether a Measure 37 waiver granted to the present owner of property "runs with
18 the land" so that future owners of the property also will be entitled to the waiver's benefits.
19 Plaintiff alleges:

20 22.

21 Defendant State of Oregon continues to enforce all State
22 land use regulations enacted subsequent to July 9, 1973, by
23 limiting the ability of Plaintiff to transfer his property to a
24 subsequent purchaser who could then develop the subject property
25 with the rights Plaintiff had.

26 23.

27 The effect of the continued enforcement of State land use
28 regulations as alleged herein is to reduce the fair market value of
29 the Plaintiff's real property by limiting the marketability of the
30 subject property.

1 * * *

2 26.

3 Pursuant to ORS 197.352(2), Plaintiff is entitled to just
4 compensation for the reduction in the fair market value of the
5 subject property resulting from the enforcement of land use
6 regulations enacted subsequent to July 9, 1973 in the amount of
7 \$3,800,000.00.

8 (Complaint).

9 The State is entitled to judgment on this claim because plaintiff has not alleged any way
10 in which the State “continues to enforce” post-acquisition land use regulations or any way in
11 which the State has limited plaintiff’s ability to transfer his property. And it is difficult to see
12 how plaintiff could establish that the State “continues to enforce” post-acquisition land use
13 regulations, as the State’s final order on plaintiff’s Measure 37 demand does precisely the
14 opposite: it says the State “will not apply” certain post-acquisition land use regulations to
15 plaintiff’s division of the property and specifically authorizes plaintiff “to use the subject
16 property” for residential development on one-acre lots, “subject to the standards in effect on July
17 9, 1973.” (Hadlock Decl, Ex 1 at 1). The existence of that waiver – which plaintiff cannot
18 dispute – contradicts his assertion that the State improperly “continues to enforce” state land use
19 regulations in a way that restricts plaintiff’s use of his property, reducing its fair market value.
20 The State is entitled to summary judgment on this claim in the absence of any contrary evidence.

21 **E. With respect to both compensation claims, the State is entitled to a ruling that – if
22 plaintiff establishes that he qualifies for additional Measure 37 relief – the State may
23 elect to grant that relief in the form of an amended waiver.**

24 As the State explained in its original motion to dismiss and reiterates in section B.2 of
25 this argument, the State *always* may elect what form of relief to grant on a valid Measure 37
26 demand: a waiver or “just compensation.” Thus, even if this Court holds that plaintiff qualifies
for Measure 37 relief beyond the waiver he already has received, the Court should remand the
final order to the State so it may decide whether to pay “just compensation” or – in all likelihood

1 – to issue an amended waiver. At this point in the litigation, the State is entitled to summary
2 judgment on the point that it always retains the option of granting a waiver in lieu of just
3 compensation.

4 **CONCLUSION**

5 This Court should dismiss both compensation claims against the State for lack of
6 jurisdiction and failure to state a claim for relief. If this Court does reach the merits of plaintiff's
7 claims, it should enter judgment in the State's favor, as the State's final order on plaintiff's
8 Measure 37 demand gives him all the relief for which he qualifies and the State does not
9 continue to enforce post-acquisition land use regulations to restrict plaintiff's use of his property.

10 Even if the Court denies the motion to dismiss and the motion for summary judgment on
11 the merits, it should grant the State summary judgment on the point that the State retains the
12 option of granting plaintiff a waiver of land use regulations in lieu of just compensation if he
13 prevails on either of his claims against the State.

14 DATED this 2nd day of August, 2007.

15 Respectfully submitted,

16 HARDY MYERS
17 Attorney General

18 

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

DUANE GRIEB,
Plaintiff,
v.
KLAMATH COUNTY, OREGON and THE
STATE OF OREGON, by and through the
Department of Land Conservation and
Development,
Defendants.

Case No. 0604555CV
DECLARATION OF ERIKA HADLOCK IN
SUPPORT OF STATE DEFENDANT'S MOTION
FOR SUMMARY JUDGMENT

I, Erika L. Hadlock, do declare and say:

I am a Senior Assistant Attorney General at the Oregon Department of Justice, attorneys
for defendant State of Oregon in the above-captioned matter. I make this declaration based on
my personal knowledge and in support of the State's Motion for Summary Judgment, hereby
stating that the attached Exhibits are true and correct copies of:

Exhibit 1: State's July 10, 2006, final order on plaintiff's Measure 37 demand number
M122137 (section 6 of the agency *Record*).

Exhibit 2: Klamath County Board of Commissioner's final order on file number
CLUP/ZC 18-06 (*Grieb*).


Exhibit 3: September 11, 2006, letter from DLCD Director Lane Shetterly to Alwin
Turiel, Klamath County Planning Director.

Exhibit 4: October 3, 2006, letter from DLCD Director Lane Shetterly to Alwin Turiel,
Klamath County Planning Director.

1 Exhibit 5: Klamath County Board of Commissioner's final order on file number M37 46-
2 05.

3 I HEREBY DECLARE THAT THE ABOVE STATEMENT IS TRUE TO THE BEST
4 OF MY KNOWLEDGE AND BELIEF, AND THAT I UNDERSTAND IT IS MADE FOR USE
5 AS EVIDENCE IN COURT AND IS SUBJECT TO PENALTY FOR PERJURY.

6 DATED this 2nd day of August, 2007.

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9 ERIKA L. HADLOCK
10 Senior Assistant Attorney General
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BEFORE THE DEPARTMENT OF ADMINISTRATIVE SERVICES AND
THE DEPARTMENT OF LAND CONSERVATION AND DEVELOPMENT OF
THE STATE OF OREGON

IN THE MATTER OF THE CLAIM FOR) FINAL ORDER
COMPENSATION UNDER ORS 197 352) CLAIM NO M122137
(BALLOT MEASURE 37) OF)
Duane Grieb, CLAIMANT)

Claimant: Duane Grieb (the Claimant)

Property: Township 40S, Range 9E, Section 13, Tax lot 300, Klamath County
(the Property)

Claim: The demand for compensation and any supporting information received from the
Claimant by the State of Oregon (the Claim).

Claimant submitted the Claim to the State of Oregon under ORS 197.352 Under OAR 125-145-0010 *et seq* , the Department of Administrative Services (DAS) referred the Claim to the Department of Land Conservation and Development (DLCD) as the regulating entity. This order is based on the record herein, including the Findings and Conclusions set forth in the Final Staff Report and Recommendation of DLCD (the DLCD Report) attached to and by this reference incorporated into this order.

ORDER

The Claim is approved as to laws administered by DLCD and the Land Conservation and Development Commission (LCDC) for the reasons set forth in the DLCD Report, and subject to the following terms:

- 1 In lieu of compensation under ORS 197 352, the State of Oregon will not apply the following laws to Duane Grieb's division of the 90 52-acre property into one-acre parcels or to his development of a dwelling on each parcel: applicable provisions of Goals 3 and 14, ORS 215 and OAR 660, division 33. These land use regulations will not apply to the claimant only to the extent necessary to allow him to use the subject property for the use described in this report, and only to the extent that use was permitted when he acquired the property on July 9, 1973
- 2 The action by the State of Oregon provides the state's authorization to the claimant to use the subject property for the use described in this report, subject to the standards in effect on July 9, 1973
- 3 To the extent that any law, order, deed, agreement or other legally enforceable public or private requirement provides that the subject property may not be used without a permit, license or other form of authorization or consent, the order will not authorize the use of the property unless the claimant first obtains that permit, license or other form of authorization or consent

FINAL ORDER

Page 1 of 3

Such requirements may include, but are not limited to: a building permit, a land use decision, a "permit" as defined in ORS 215.402 or 227.160, other permits or authorizations from local, state or federal agencies and restrictions on the use of the subject property imposed by private parties.

4 Any use of the subject property by the claimant under the terms of the order will remain subject to the following laws: (a) those laws not specified in (1) above; (b) any laws enacted or enforced by a public entity other than the Commission or the department; and (c) those laws not subject to ORS 197.352 including, without limitation, those laws exempted under ORS 197.352(3)

5 Without limiting the generality of the foregoing terms and conditions, in order for the claimant to use the subject property, it may be necessary for him to obtain a decision under ORS 197.352 from a city and/or county and/or metropolitan service district that enforces land use regulations applicable to the property. Nothing in this order relieves the claimant from the necessity of obtaining a decision under ORS 197.352 from a local public entity that has jurisdiction to enforce a land use regulation applicable to a use of the subject property by the claimant.

This Order is entered by the Deputy Director of the DLCD as a final order of DLCD and the Land Conservation and Development Commission under ORS 197.352, OAR 660-002-0010(8), and OAR 125, division 145, and by the Administrator for the State Services Division of the DAS as a final order of DAS under ORS 197.352, OAR 125, division 145, and ORS 293

FOR DLCD AND THE LAND CONSERVATION
AND DEVELOPMENT COMMISSION:

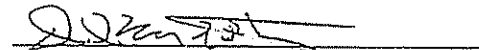
Lane Shetterly, Director



Cora R. Parker, Deputy Director
DLCD

Dated this 10th day of July, 2006

FOR the DEPARTMENT OF ADMINISTRATIVE
SERVICES:



David Hartwig, Administrator
DAS, State Services Division

Dated this 10th day of July, 2006

NOTICE OF RIGHT TO APPEAL OR OTHER JUDICIAL RELIEF

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

1. Judicial review under ORS 183.484: Judicial review under ORS 183.484 may be obtained by filing a petition for review within 60 days from the service of this order. A petition for judicial review under ORS 183.484 may be filed in the Circuit Court for Marion County or the Circuit Court in the county in which you reside.

2. A cause of action under ORS 197.352 (Measure 37 (2004)): If a land use regulation continues to apply to the subject property more than 180 days after the present owner of the property has made written demand for compensation under ORS 197.352¹, the present owner of the property, or any interest therein, shall have a cause of action in the circuit court in which the real property is located.

(Copies of the documents that comprise the record are available for review at the Department's office at 635 Capitol Street NE, Suite 150, Salem, Oregon 97301-2540)

FOR INFORMATION ONLY

The Oregon Department of Justice has advised the Department of Land Conservation and Development that "[i]f the current owner of the real property conveys the property before the new use allowed by the public entity is established, then the entitlement to relief will be lost."

¹ By order of the Marion County Circuit Court, "all time lines under Measure 37 [were] suspended indefinitely" on October 25, 2005. This suspension was lifted on March 13, 2006 by the court. As a result, a period of 139 days (the number of days the time lines were suspended) has been added to the 180-day time period under ORS 197.352(6) for claims that were pending with the state on October 25, 2005.

ORS 197.352 (BALLOT MEASURE 37) CLAIM FOR COMPENSATION

OREGON DEPARTMENT OF LAND CONSERVATION AND DEVELOPMENT
Final Staff Report and Recommendation

July 10, 2006

STATE CLAIM NUMBER: M122137
NAME OF CLAIMANT: Duane Grieb
MAILING ADDRESS: 6061 O'Conner Road
Klamath Falls, Oregon 97603
PROPERTY IDENTIFICATION: Township 40S, Range 9E, Section 13
Tax lot 300
Klamath County
OTHER CONTACT INFORMATION: Michael Spencer
419 Main Street
Klamath Falls, Oregon 97601
DATE RECEIVED BY DAS: August 30, 2005
180-DAY DEADLINE: July 15, 2006¹

I. SUMMARY OF CLAIM

The claimant, Duane Grieb, seeks compensation in the amount of \$750,000 for the reduction in fair market value as a result of land use regulations that are alleged to restrict the use of certain private real property. The claimant desires compensation or the right to divide the 90.52-acre property into one-acre parcels and to develop a dwelling on each parcel. The subject property is located at 6061 O'Conner Road, near Klamath Falls, in Klamath County. (See claim.)

II. SUMMARY OF STAFF RECOMMENDATION

Based on the findings and conclusions set forth below, the Department of Land Conservation and Development (the department) has determined that the claim is valid. Department staff recommends that, in lieu of compensation, the requirements of the following state laws enforced by the Land Conservation and Development Commission (the Commission) or the department not apply to Duane Grieb's division of the 90.52-acre property into one-acre parcels and to his development of a dwelling on each parcel: applicable provisions of Statewide Planning Goals 3

¹ This date reflects 180 days from the date the claim was submitted, as extended by the 139 days that all timelines under Measure 37 were suspended during the pendency of *MacPherson v Dept of Administrative Services*, 340 Or 117 (2006).

(Agricultural Lands) and 14 (Urbanization), ORS 215 and Oregon Administrative Rules (OAR) 660, division 33. These laws will not apply to the claimant only to the extent necessary to allow him to use the subject property for the use described in this report, and only to the extent that use was permitted when he acquired the property on July 9, 1973 (See the complete recommendation in Section VI of this report.)

III. COMMENTS ON THE CLAIM

Comments Received

On October 5, 2005, pursuant to OAR 125-145-0080, the Oregon Department of Administrative Services (DAS) provided written notice to the owners of surrounding properties. According to DAS, no written comments were received in response to the 10-day notice.

IV. TIMELINESS OF CLAIM

Requirement

ORS 197.352(5) requires that a written demand for compensation be made:

1. For claims arising from land use regulations enacted prior to the effective date of Ballot Measure 37 (December 2, 2004), within two years of that effective date or the date the public entity applies the land use regulation as an approval criteria to an application submitted by the owner, whichever is later; or
2. For claims arising from land use regulations enacted after the effective date of Ballot Measure 37 (December 2, 2004), within two years of the enactment of the land use regulation, or the date the owner of the property submits a land use application in which the land use regulation is an approval criteria, whichever is later.

Findings of Fact

This claim was submitted to DAS on August 30, 2005, for processing under OAR 125, division 145. The claim identifies numerous provisions of ORS 215 and OAR 660, and all of the statewide planning goals as the basis for the claim. Only laws that were enacted or adopted prior to December 2, 2004, are the basis for this claim.

Conclusions

The claim has been submitted within two years of the effective date of Ballot Measure 37 (December 2, 2004), based on land use regulations enacted or adopted prior to December 2, 2004, and is therefore timely filed.

V. ANALYSIS OF CLAIM

1. Ownership

ORS 197 352 provides for payment of compensation or relief from specific laws for “owners” as that term is defined in ORS 197 352 ORS 197 352(11)(C) defines “owner” as “the present owner of the property, or any interest therein ”

Findings of Fact

The claimant, Duane Grieb, acquired the subject property on July 9, 1973, as reflected by warranty deed included with the claim A June 30, 2005, tax statement submitted with the claim establishes the claimant’s current ownership

Conclusions

The claimant, Duane Grieb, is an “owner” of the subject property as that term is defined by ORS 197 352(11)(C), as of July 9, 1973.

2. The Laws That are the Basis for This Claim

In order to establish a valid claim, ORS 197.352(1) requires, in part, that a law must restrict the claimant’s use of private real property in a manner that reduces the fair market value of the property relative to how the property could have been used at the time the claimant or a family member acquired the property

Findings of Fact

The claim indicates that the claimant desires to divide the 90.52-acre subject property into one-acre parcels and to develop a dwelling on each parcel, and that numerous state land use regulations prevent that desired use ²

The claim is based generally on Klamath County’s current Exclusive Farm Use (EFU) zone and the applicable provisions of state law that require such zoning The claimant’s property is zoned EFU as required by Goal 3, in accordance with ORS 215 and OAR 660, division 33, because the claimant’s property is “agricultural land” as defined by Goal 3.³ Goal 3 became effective on January 25, 1975, and required that agricultural lands as defined by the Goal be zoned EFU pursuant to ORS 215

² The claimant has summarily cited numerous state land use laws as applicable to this claim, but does not establish how they either apply to the claimant’s desired use of the subject property or restrict its use in a manner that reduces its fair market value On their face, most of these regulations either do not apply to the claimant’s property or do not restrict the use of the claimant’s property in a manner that reduces its fair market value This report addresses only those regulations that the department finds are applicable to and restrict the claimant’s use of the subject property, based on the claimant’s asserted desired use

³ The claimant’s property is “Agricultural Land” because it contains Natural Resources Conservation Service Class I-IV soils

Current land use regulations, particularly ORS 215 263, 215.284 and 215 780 and OAR 660, division 33, enacted or adopted pursuant to Goal 3, prohibit the division of EFU-zoned land into parcels less than 80 acres and establish standards for development of dwellings on existing or proposed parcels on that land

ORS 215 780 establishes an 80-acre minimum size for the creation of new lots or parcels in EFU zones and became effective on November 4, 1993 (Chapter 792, Oregon Laws 1993)
ORS 215 263 (2005 edition) establishes standards for the creation of new parcels for non-farm uses and dwellings allowed in an EFU zone

OAR 660-033-0135 (applicable to farm dwellings) became effective on March 1, 1994, and interprets the statutory standard for a primary dwelling in an EFU zone under ORS 215 283(1)(f) OAR 660-033-0130(4) (applicable to non-farm dwellings) became effective on August 7, 1993, and was amended to comply with ORS 215 284(4) on March 1, 1994 The Commission subsequently adopted amendments to comply with House Bill 3326 (Chapter 704, Oregon Laws 2001, effective on January 1, 2002), which were effective on May 22, 2002 (See administrative rule history for OAR 660-033-0100, -0130 and -0135)

Statewide Planning Goal 14, which also became effect on January 25, 1975, would likely apply to the division of the claimant's property into parcels smaller than two acres Goal 14 generally requires that land outside of urban growth boundaries be used for rural uses

The claimant acquired the subject property on July 9, 1973, prior to the adoption of the statewide planning goals and their implementing statutes and regulations

Conclusions

The current zoning requirements, minimum lot size and dwelling standards established by applicable provisions of Goal 3, ORS 215 and OAR 660, division 33, were all enacted or adopted after the claimant acquired the subject property in 1973 and do not allow the desired division or residential development of the property These laws restrict the use of the subject property relative to the uses allowed when the claimant acquired the property

This report addresses only those state laws that are identified in the claim, or that the department is certain apply to the subject property based on the use that the claimant has identified There may be other laws that currently apply to the claimant's use of the subject property, and that may continue to apply to the claimant's use of the property, that have not been identified in the claim. In some cases, it will not be possible to know which laws apply to a use of subject property until there is a specific proposal for that use When the claimant seeks a building or development permit to carry out a specific use, it may become evident that other state laws apply to that use

3. Effect of Regulations on Fair Market Value

In order to establish a valid claim, ORS 197 352(1) requires that the land use regulation(s) (described in Section V (2) of this report) must have "the effect of reducing the fair market value of the property, or any interest therein "

Findings of Fact

The claim includes an estimate of \$750,000 as the reduction in the subject property's fair market value due to the regulation(s). This amount is based on the claimant's assessment of the property's fair market value.

Conclusions

As explained in Section V (1) of this report, the claimant is Duane Grieb who acquired the subject property on July 9, 1973. Under ORS 197.352, the claimant is due compensation for land use regulations that restrict the use of the subject property and have the effect of reducing its fair market value. Based on the findings and conclusions in Section V (2) of this report, laws enacted or adopted since the claimant acquired the subject property restrict the claimant's desired use of the property. The claimant estimates that the effect of the regulation(s) on the fair market value of the property is a reduction of \$750,000.

Without an appraisal or other documentation and without verification of whether or the extent to which the claimant's desired use of the subject property was allowed under the standards in effect when the claimant acquired the property, it is not possible to substantiate the specific dollar amount by which the land use regulations have reduced the fair market value of the property. Nevertheless, based on the evidence in the record for this claim, the department determines that the fair market value of the subject property has been reduced to some extent as a result of land use regulations enforced by the Commission or the department.

4. Exemptions Under ORS 197.352(3)

ORS 197.352 does not apply to certain land use regulations. In addition, under ORS 197.352(3), certain types of laws are exempt from ORS 197.352.

Findings of Fact

The claim is based on state land use regulations that restrict the use of the subject property, including applicable provisions of Goals 3 and 14, ORS 215 and OAR 660, division 33, which Klamath County has implemented through its current EFU zone. All of these land use regulations were enacted or adopted after the claimant acquired the subject property.

Conclusions

Without a specific development proposal for the subject property, it is not possible for the department to determine all the laws that may apply to a particular use of the property, or whether those laws may fall under one or more of the exemptions under ORS 197.352. It appears that none of the general statutory, goal and rule restrictions on division and development of the claimant's property were in effect when the claimant acquired it in 1973. As a result, these laws are not exempt under ORS 197.352(3)(E).

Laws in effect when the claimant acquired the subject property are exempt under ORS 197 352(3)(E), and will continue to apply to the claimant's use of the property. There may be other laws that continue to apply to the claimant's use of the subject property that have not been identified in the claim. In some cases, it will not be possible to know which laws apply to a use of subject property until there is a specific proposal for that use. When the claimant seeks a building or development permit to carry out a specific use, it may become evident that other state laws apply to that use. In some cases, some of these laws may be exempt under ORS 197 352(3)(A) to (D).

This report addresses only those state laws that are identified in the claim, or that the department is certain apply to the subject property based on the use that the claimant has identified. Similarly, this report only addresses the exemptions provided for under ORS 197.352(3) that are clearly applicable, given the information provided to the department in the claim. The claimant should be aware that the less information he has provided to the department in the claim, the greater the possibility that there may be additional laws that will later be determined to continue to apply to his use of the subject property.

VI. FORM OF RELIEF

ORS 197.352(1) provides for payment of compensation to an owner of private real property if the Commission or the department has enforced laws that restrict the use of the subject property in a manner that reduces its fair market value. In lieu of compensation, the department may choose to not apply the law in order to allow the present owner to carry out a use of the subject property permitted at the time the present owner acquired the property. The Commission, by rule, has directed that if the department determines a claim is valid, the Director of the department must provide only non-monetary relief unless and until funds are appropriated by the legislature to pay claims.

Findings of Fact

Based on the findings and conclusions set forth in this report, laws enforced by the Commission or the department restrict the claimant's desired use of the subject property. The claim asserts that existing state land use regulations enforced by the Commission or the department have the effect of reducing the fair market value of the subject property by \$750,000. However, because the claim does not provide an appraisal or other relevant evidence demonstrating that the land use regulations described in Section V (2) reduce the fair market value of the subject property, a specific amount of compensation cannot be determined. In order to determine a specific amount of compensation due for this claim, it would also be necessary to verify whether or the extent to which the claimant's desired use of the property was allowed under the standards in effect when he acquired the property. Nevertheless, based on the record for this claim, the department has determined that the laws on which the claim is based likely have reduced the fair market value of the subject property to some extent.

No funds have been appropriated at this time for the payment of claims. In lieu of payment of compensation, ORS 197 352 authorizes the department to modify, remove or not apply all or parts of certain land use regulations to allow Duane Grieb to use the subject property for a use permitted at the time he acquired the property on July 9, 1973.

Conclusions

Based on the record, the department recommends that the claim be approved, subject to the following terms:

1 In lieu of compensation under ORS 197.352, the State of Oregon will not apply the following laws to Duane Grieb's division of the 90.52-acre property into one-acre parcels or to his development of a dwelling on each parcel: applicable provisions of Goals 3 and 14, ORS 215 and OAR 660, division 33. These land use regulations will not apply to the claimant only to the extent necessary to allow him to use the subject property for the use described in this report, and only to the extent that use was permitted when he acquired the property on July 9, 1973.

2 The action by the State of Oregon provides the state's authorization to the claimant to use the subject property for the use described in this report, subject to the standards in effect on July 9, 1973.

3 To the extent that any law, order, deed, agreement or other legally enforceable public or private requirement provides that the subject property may not be used without a permit, license or other form of authorization or consent, the order will not authorize the use of the property unless the claimant first obtains that permit, license or other form of authorization or consent. Such requirements may include, but are not limited to: a building permit, a land use decision, a "permit" as defined in ORS 215.402 or 227.160, other permits or authorizations from local, state or federal agencies and restrictions on the use of the subject property imposed by private parties.

4 Any use of the subject property by the claimant under the terms of the order will remain subject to the following laws: (a) those laws not specified in (1) above; (b) any laws enacted or enforced by a public entity other than the Commission or the department; and (c) those laws not subject to ORS 197.352 including, without limitation, those laws exempted under ORS 197.352(3).

5 Without limiting the generality of the foregoing terms and conditions, in order for the claimant to use the subject property, it may be necessary for him to obtain a decision under ORS 197.352 from a city and/or county and/or metropolitan service district that enforces land use regulations applicable to the property. Nothing in this order relieves the claimant from the necessity of obtaining a decision under ORS 197.352 from a local public entity that has jurisdiction to enforce a land use regulation applicable to a use of the subject property by the claimant.

VII. COMMENTS ON THE DRAFT STAFF REPORT

The department issued its draft staff report on this claim on June 22, 2006. OAR 125-145-0100(3), provided an opportunity for the claimant or the claimant's authorized agent and any third parties who submitted comments under OAR 125-145-0080 to submit written comments, evidence and information in response to the draft staff report and recommendation. Comments received have been taken into account by the department in the issuance of this final report.

BEFORE THE BOARD OF COMMISSIONERS
COUNTY OF KLAMATH

IN THE MATTER OF FILE NUMBER CLUP/ZC 18-06 (Grieb) FINAL ORDER

WHEREAS, Duane Grieb, through his agent Michael Spencer, requested approval of a COMPREHENSIVE LAND USE PLAN MAP ("Plan Map") and ZONE MAP amendment from Agricultural/EFU-C to Rural/R-5 for a tract of land described as Township 40S, Range 09E, Section 13, Tax Lot 300, which totals approximately 90.5 acres; and

WHEREAS, the Klamath County Planning Department provided proper notice, as evidenced in the Staff Report dated 26 September 2006, of a joint Klamath County Planning Commission ("Planning Commission") and Board of County Commissioners ("the Board") public hearing on 26 September 2006 to hear testimony and make a decision on the matter; and

WHEREAS, upon examination and discussion of Exhibits A through S and consideration of oral testimony offered at the hearing, the Planning Commission deliberated to a decision; and

WHEREAS, the Planning Commission found the existing Agricultural/EFU-C map designation of the property is inconsistent with uses allowed at the time of Duane Grieb's acquisition on 9 July 1973 when the property was zoned Agricultural-Forestry (AF), and

WHEREAS, Mr. Grieb received a grant of relief under ORS 197.352 from both Klamath County and the State of Oregon prior to his application for a Plan Map amendment and Zone change; and

WHEREAS, the intent and purpose of ORS 197.352 is to restore land development rights to the fullest extent possible to the owner of a property who files a valid claim of relief, and that those rights include the right to transfer property with development rights intact to a third party; and

WHEREAS, the Planning Commission found the most closely analogous existing Plan Map/Zone designation to the Agricultural-Forestry (AF) designation in effect in 1973 is Non-Resource/NR, which also provides for a 20 acre minimum residential lot size; and

WHEREAS, in consideration of the entire record established during their hearing the Planning Commission by motion and vote recommended to the Board that the property totaling approximately 90.5 acre and described as Township 40S, Range 09E, Section 13, Tax Lot 300 be redesignated Nonresource/NR; and

Exhibit "F"

WHEREAS, the Board at the request of the Department of Land Conservation and Development continued their public hearing on the matter to 16 October 2006 to provide an opportunity for submittal of additional evidence, testimony and subsequent rebuttal by the applicant; and

WHEREAS, additional evidence and testimony was submitted by affected parties prior to the continued hearing date, as evidenced in Exhibits T through X of the record of proceedings; and

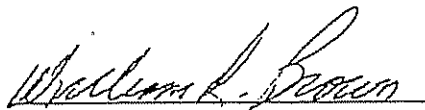
WHEREAS, the Board closed the oral and written record on 16 October 2006, deliberating to a decision at that time; and


WHEREAS, the Board, in consideration of the entire record, including oral testimony offered at the continued hearing on 16 October 2006 and specifically Exhibits P, R, T, W and X, determined the applicant's request for a Plan Map and Zone change to Rural/R-5 is not consistent with the intent of ORS 197.352

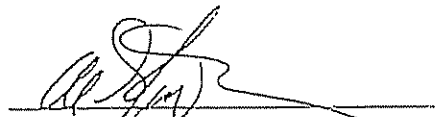
NOW, THEREFORE, THE BOARD OF COMMISSIONERS OF KLAMATH COUNTY DENIES CLUP/ZC 18-06, A REQUEST BY DUANE GRIEB FOR A COMPREHENSIVE PLAN MAP AMENDMENT AND ZONE CHANGE TO RURAL/R-5 PREDICATED ON A GRANT OF RELIEF BY KLAMATH COUNTY AND THE STATE OF OREGON UNDER ORS 197.352

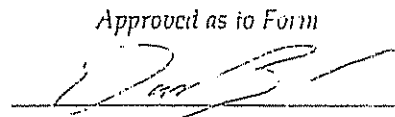
Dated this 7th day of November, 2006

FOR THE BOARD OF COMMISSIONERS


Chairman


Commissioner


Commissioner

Approved as to Form

County Counsel

NOTICE OF APPEAL RIGHTS

This decision may be appealed to the Oregon Land Use Board of Appeals (LUBA) within 21 days following the date of mailing of this order. Contact LUBA (503 373 1265) for information about how to file an appeal. Failure to do so in a timely manner may affect your rights.

CLUP/ZC 18-06

Michael Spencer, Attorney
419 Main Street
Klamath Falls, OR 97601

Duane Grieb
6061 O Connor Road
Klamath Falls, OR 97601

DLCD
Jon Jinning
888 NW Hill Street, Ste 3
Bend, OR 97701

Vern Church
District 17, Watermaster
5170 Summers Lane
Klamath Falls, OR 97603

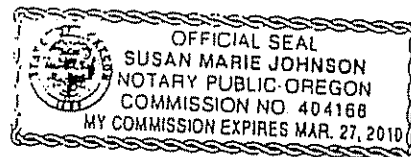
Filed with the county clerk and mailed to the above
this 8 day of Nov, 2006

Alyssa Boles
Alyssa Boles

Subscribed and sworn to before me this

8 day of Nov, 2006

Susan Marie Johnson
Notary Public for Oregon





Oregon

Department of Land Conservation and Development

September 11, 2006

Department of Land Conservation and Development
625 Capitol Street, N.E. Suite 150
Salem, Oregon 97301-2524
Phone: (503) 378-0050
First Floor Coastal Fax: (503) 378-6033
Second Floor Director's Office: (503) 378-5518
Web Address: <http://www.oregon.gov/LCD>

Alwin Turiel, Planning Director
305 Main Street
Klamath Falls, Oregon 97601

By Facsimile (541) 885-3644
& First-Class Mail



RE CLUP ZC 18-06

Dear Ms. Turiel:

The Department of Land Conservation and Development (the "Department") received the notice and request for comments for the above application to redesignate the subject property from Agriculture to Rural on the plan map, and to rezone the property from Exclusive Farm Use to Rural (Residential) - 5.

This application indicates that the proposed plan and zone amendment is based only on State and County decisions to not apply certain land use regulations previously granted pursuant to ORS 197.352 (Ballot Measure 37). The Department believes the proposed plan and zone amendment must be denied as it would violate state law, as outlined below. Please consider the following comments and concerns regarding this proposal and include this letter in the record in this matter:

Application of ORS 197.352

Any decision to authorize development or any other action pursuant to a State or County decision to "not apply" one or more land use regulations under ORS 197.352, must be consistent with the terms of the decision.

The Department's order providing that certain state "land use regulations" will not apply to the claimant's division of the property into one-acre parcels or to his development of a dwelling on each parcel does not mean that the property is no longer "agricultural land" under statewide land use planning Goal 3. Similarly, the County's decision to not apply its plan and zone designations to the claimant's desired division and residential development does not remove the plan and zone designations for the property - it means *only* what it says - that these laws will not apply to a particular use of the property by the claimant. As a result, neither the State's order on claim No. M122137 nor the County's corresponding decision can be the basis for a comprehensive plan or zone change.

The Department's order expressly states that the "applicable provisions of Goals 3 and 14, ORS 215 and OAR 660, division 33* * * will not apply to the *claimant* only to the extent necessary to allow *him* to use the subject property for the use described in this report * * *" (*emphasis added*). A copy of this order and final report is enclosed for inclusion in the County's record for this matter.

The proposed plan and zone amendment is based on the assumption that state land use regulations and the County's comprehensive plan and zoning regulations no longer apply to the *property*. ORS 197.352(8) only authorizes relief for the claimant. The proposed action in CLUP/ZC 08-06 would authorize persons other than Duane Grieb to use the property in a manner that is inconsistent with State land use regulations and would authorize other uses of the property not allowed under the Department's

Exhibit 'G'

order. The *only* use of the property authorized by the state's order is for Duane Grieb to divide the property into one-acre parcels and to develop a dwelling on each parcel. Goals 3 and 14, ORS 215 and OAR 660, division 33 continue to apply to all other uses by Duane Grieb, and to all other uses by any other person of this property.


Accordingly, a Measure 37 waiver may not be the basis for a plan or zone change.

Conclusion

The proposed plan and zone amendment is inconsistent with state land use regulations and the terms of the state's order on the claim by Duane Grieb (M122137), as well as the County's comprehensive plan and land use regulations, under which this property remains planned and zoned for exclusive farm use. The Department recommends that the property must retain its current plan and zoning designation and that the County should consider authorization of the uses specified in Mr. Grieb's Measure 37 waiver through issuance of permits consistent with the attached waiver.

Please enter this letter and the attachments into the record for this decision and notify us of the County's decision, on the matter any scheduled public hearing and any subsequent land use application or decision regarding this waiver. If you would like to discuss this further, feel free to contact me at (503) 373-0050 ext 223, or Jeannine Rustad at (503) 373-0050 ext 279.

Yours very truly,


LANE SHETTERLY
Director

Enclosures

cc: Michael Spencer, attorney for the applicant
Richard Whitman, DOJ (by email)
Jon Jinings, Regional Representative (by email)
Cora Parker, DLCD (by email)
Michael Morrissey, DLCD (by email)
Jeannine Rustad, DLCD (by email)
Mara Ulloa, DLCD (by email)

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Oregon

David B. Lankford, Governor

Department of Land Conservation and Development

535 Capitol Street, N.E. Suite 150

Salem, Oregon 97301-2524

Phone: (503) 378-0050

First Floor Coastal Fax: (503) 378-6033

Second Floor Director's Office Fax: (503) 378-5518

Third Floor Measure 37 Fax: (503) 378-5318

Web Address: <http://www.oregon.gov/LCD>

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only 3001 060

October 3, 2006

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OCT 3 2006

KLAMATH COUNTY
PLANNING DEPARTMENT

By Facsimile (541) 885-3644
& First-Class Mail

Alwin Turiel, Planning Director
305 Main Street
Klamath Falls, OR 97601



RE CLUP/ZC 18-06

Dear Mr. Turiel:

The following is the response of the Department of Land Conservation and Development (the "Department") to the Applicant's September 26, 2006 submission

In his most recent submission, the applicant argues that "waivers" granted pursuant to ORS 197.352 (Measure 37) allow a claimant to "do with" his property what he could have done when he acquired it," including changing the zoning. In the State's view, that is not correct. Mr. Grieb is asking the County to approve a zone change to allow him to carry out *a use of his property that was not permitted when he acquired it*. By the applicant's attorney's own admission "[w]hen the applicant acquired the property is [sic] was zoned AF, which had a 20 acre minimum lot size." Letter from Michael L. Spencer to Klamath County Planning Commission, dated September 26, 2006. ORS 197.352(8) authorizes government to "modify, remove, or not to [sic] apply" land use regulations to allow the present owner of property to carry out a use of the property that was permitted when he or she acquired the property. Under Mr. Spencer's reasoning, the fact that when an owner acquired the property he could have applied for a zone change to rezone the property to allow him to build and operate a factory means that this use must be allowed. Measure 37 does not authorize owners to carry out uses that were not allowed when they acquired the property, and the fallacy of Mr. Spencer's argument is self-evident.

The State's order on the applicant's Measure 37 demand authorizes Mr. Grieb to carry out a use that was allowed under State land use regulations when he acquired the property. The State's order expressly provides that it does not affect other, local, land use regulations that were in effect at that time. The State has no objection to the County authorizing the applicant to carry out a use that he was permitted to carry out when he acquired the property - and that would appear (again, by the applicant's own admission) to be the division of the property into twenty-acre parcels and the establishment of a dwelling on each one.

The applicant's argument that the State and County waivers allow him to "put his property to the ultimate 'use' that any owner can, namely to sell the property for the highest possible price based upon the best possible use of the property" goes beyond the order granted by the State, and as a result, is subject to and must demonstrate compliance with applicable state laws including ORS 215.203, 215.283, 215.263 and 215.705 to 780, as well as Goal 3 and Goal 14 and OAR 660-033. The applicant has failed

Exhibit "H"

EXHIBIT 10
FILE # CLUP/ZC 18-06

to submit any evidence to show that the proposed zone change complies with these laws

We ask that you enter this into the record for this decision and notify us of your decision with regard to proceeding on the matter, any scheduled public hearing and any subsequent land use decision on the application. If you would like to discuss this further, feel free to contact me at (503) 373-0050 x 223, or Jeannine Rustad at (503) 373-0050 ext 279

Yours very truly,



LANE SHETTERLY
Director

cc: Michael Spencer, attorney for the applicant
Richard Whitman, DOJ (by email)
Jon Jinings, Regional Representative (by email)
Cora Parker, DLCD (by email)
Michael Morrissey, DLCD (by email)
Jeannine Rustad, DLCD (by email)
Mara Ulloa, DLCD (by email)

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Before the Board of Commissioners
Of Klamath County

In the Matter of File Number M37 46-05
Findings and Final Order

FINDINGS

At a public hearing conducted on July 11, 2006, the Klamath County Board of Commissioners (BOCC) reviewed documentary evidence, considered the staff report of the Planning Department, heard testimony regarding this claim, and made the following findings:

1. On August 29, 2005, the claimant, Duane Grieb, properly submitted a claim pursuant to ORS 197.352 (Ballot Measure 37).
2. The claimant acquired the subject property on July 9, 1973.
3. For purposes of evaluating compensation, the relevant date would be the same.
4. After the compensation date referenced above, land use laws had been enacted that restricted the use of this property and that reduced its fair market value.
5. Rather than establish an exact amount of compensation and in lieu of such compensation that may have otherwise been due claimant, the BOCC, pursuant to ORS 197.352(8), determined that it was appropriate to modify, remove or not apply land use regulations restricting the use of claimant's property.

ORDER

1. Pursuant to ORS 197.352(8), subject to a decision from the Department of Land Conservation and Development (as applicable), and subject to the county's authority, the BOCC will not apply land use laws and regulations imposed after claimant's acquisition of the subject property, July 9, 1973.
2. Claimant may develop the property subject to this Order in accordance with a use permitted at the time claimant acquired an ownership interest in said property.
3. Any and all of the exceptions detailed in ORS 197.352(3) may apply to this Order.

Exhibit "A"

NOTICE OF RIGHT TO APPEAL OR OTHER JUDICIAL RELIEF

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

Dated this 18th day of July 2006.

William H. Brown
Chair

John Elliott
Commissioner

Out of Office
Commissioner

APPROVED AS TO FORM:

[Signature]
County Counsel

1 **CERTIFICATE OF SERVICE**


2 I certify that on August 2nd, 2007, I served the foregoing STATE DEFENDANT'S
3 MOTION FOR SUMMARY JUDGMENT, MEMORANDUM OF LAW IN SUPPORT OF
4 STATE'S MOTION FOR SUMMARY JUDGMENT, and DECLARATION OF ERIKA
5 HADLOCK IN SUPPORT OF STATE DEFENDANT'S MOTION FOR SUMMARY
6 JUDGMENT upon the parties hereto by the method indicated below, and addressed to the
7 following:

8
9 Michael L. Spencer
10 Attorney at Law
11 409 Pine St., Suite 204
Klamath Falls, OR 97601
Attorney for Plaintiff

HAND DELIVERY
 MAIL DELIVERY
 OVERNIGHT MAIL
 TELECOPY (FAX)

12 William D. Bunch
13 Klamath Co. Counsel's Ofc
14 305 Main St 2nd Flr
Klamath Falls, OR 97601
Attorney for Klamath County

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 MAIL DELIVERY
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