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DEPARTMENT OF JUSTICE
TRIAL DIVISION

February 2, 2007

Clerk of Circuit Court
Klamath County Courthouse
316 Main Street
Klamath Falls, Oregon 97601

Re: *Grieb v. Klamath County et al*
Klamath County Circuit Court No. 0604555CV

Dear Circuit Court Clerk:

Enclosed for filing please find the State's Reply on its Motion to Dismiss in the referenced matter.

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

Sincerely,

Erika L. Hadlock
Sr. Assistant Attorney General

TRIQ7758/ELH/tr1

Enclosure

cc: Michael L. Spencer
William D. Bunch
Client

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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
DEFENDANT STATE OF OREGON'S REPLY
ON ITS MOTION TO DISMISS

The State has moved to dismiss plaintiff's Measure 37 claims against it on two grounds:
lack of jurisdiction and failure to state a claim upon which relief can be granted. In this
memorandum, the State replies briefly to the arguments plaintiff makes in opposing the dismissal
motion.

A. Introduction

Plaintiff filed a Measure 37 claim with the State, which granted him a "waiver" of land
use regulations dating back to 1973. Nonetheless, plaintiff has sued both the State and Klamath
County for monetary compensation under Measure 37. His complaint includes two claims
against the State. First, plaintiff alleges that he is entitled to monetary compensation under
Measure 37 because the State sent a letter to Klamath County opposing plaintiff's request for a
zone change, and the County later denied that request. (Complaint ¶ 7). Second, plaintiff asserts
that the State has limited his ability "to transfer his property to a subsequent purchaser who could
then develop the subject property with the rights Plaintiff had." (Complaint ¶ 22).

1 The basic premise of the State’s dismissal motion is simple. If plaintiff’s claims are
2 premised on an alleged flaw in the State’s final order on his Measure 37 claim, this court could
3 have acquired jurisdiction only if plaintiff had filed an APA petition for judicial review of the
4 final order, which he did not do. And if plaintiff’s claims really are unrelated to the State’s final
5 order, he has failed to state a claim for relief under Measure 37.

6 **B. To the extent plaintiff’s claims are premised on disagreement with some**
7 **determination in the State’s final order, he could seek judicial review only under the**
8 **APA; because he did not, this court lacks subject-matter jurisdiction.**

9 The main focus of the State’s motion to dismiss is the principle that the Administrative
10 Procedures Act (“APA”) provides the exclusive means by which a court may review an agency
11 order that resolves a Measure 37 claim. Plaintiff contends that the APA does not provide the
12 exclusive means for review of a Measure 37 order because that would make ORS 197.352(6)
13 “meaningless.” (Plaintiff’s Response at 2). He is wrong. The requirement that a person
14 dissatisfied with state action seek review under the APA applies only when that dissatisfaction
15 arises from a *final order*. Consequently, if the State took no action with respect to a Measure 37
16 demand, the property owner would have a Section 6 cause of action for compensation once 180
17 days had passed. Thus, ORS 197.352(6) retains meaning even when APA exclusivity principles
18 are applied; those principles merely limit the availability of the Measure 37 cause of action to
19 situations in which the State has not acted on the Measure 37 claim.

20 Plaintiff also asserts that “the cases limiting actions to the proceedings under the APA are
21 for damages resulting from the agency’s order.” (Plaintiff’s Response at 2). He argues that his
22 lawsuit is different because “the remedy sought is not related to whether the State was correct in
23 denying Plaintiff’s [Measure 37] claim,” but instead is based solely on continued application of
24 land use regulations that reduce the fair market value of his property. (Plaintiff’s Response at 2).

25 Plaintiff misreads the case law. In determining whether the APA applies to a plaintiff’s
26 claim against the State, a court does not focus on whether the plaintiff explicitly acknowledges
that he or she is taking issue with a decision encompassed in a final order the State has issued.

1 Instead, the court analyses whether the plaintiff's claim *necessarily* is premised on disagreement
2 with a factual finding or legal conclusion in a final order, even if the plaintiff's complaint does
3 not directly challenge that order.

4 For example, *Muller v. Dept. of Agriculture*, 164 Or App 11, 15-16 (1999), involved a
5 state agency's denial of the plaintiff's request for a field-burning permit. In the year following
6 that denial, the plaintiff concluded that his field had yielded less crop than it would have had he
7 been allowed to burn it, and sued for tort damages in circuit court. *See id.* at 13-14. A jury
8 returned a verdict for the plaintiff. On appeal, the State argued that the circuit court had lacked
9 jurisdiction over the plaintiff's complaint because he could have petitioned for judicial review of
10 the agency's action under the APA. The plaintiff countered that he was "not challenging the
11 validity of an agency order, but rather [was] asking for damages for the consequences of agency
12 action." *Id.* at 15. The Court of Appeals ruled in the State's favor, holding that the APA
13 provided the exclusive means for review of the agency's decision:

14 In this case, plaintiff claims damages resulting from the
15 denial of his application for a burning permit. His entitlement to
16 damages depends on the validity of the denial. He contends that
17 the denial was invalid because the department failed to comply
18 with "statutory provisions and rules in effect at all material times."
19 This case, in other words, is precisely the sort of case that * * * is
20 subject to review exclusively under the APA, because it challenges
21 the validity of an agency action on the ground that it "violated a
22 statute or rule or was otherwise in violation of administrative law."

19 * * * * *

20 Plaintiff insists that APA review is inadequate, because the
21 remedy he seeks – damages – is not available under the APA.
22 Indeed, plaintiff argues that precluding him from seeking damages
23 in this action unconstitutionally deprives him of a remedy.
24 Plaintiff's argument amounts to mere question begging, however.
25 If he is entitled to a remedy, he must establish the invalidity of the
26 agency action in the first place. We merely hold that the exclusive
mechanism for establishing the invalidity of the agency action is
provided in the APA. We therefore conclude that the trial court
erred in denying the department's motion to dismiss.

Id. at 16-17 (citation omitted).

1 *Muller* controls this case. Here, as in *Muller*, plaintiff seeks monetary and other relief
2 based on an allegation that he was damaged by state-agency action. And here, as in *Muller*,
3 plaintiff could prevail only if he established that the agency action was unlawful – in this case,
4 because the waiver the agency granted allegedly was inadequate, with the result that certain land
5 use regulations wrongly continue to apply to plaintiff’s property. Consequently, to the extent
6 that plaintiff’s claims take issue with the scope of waiver he received, he could seek judicial
7 review only under the APA. Because he did not, his claims against the State must be dismissed.

8 The decision in *Premier Technology*, 136 Or App 124 (1995), upon which plaintiff relies,
9 does not support his argument. In that breach-of-contract case, the plaintiff sued a state agency
10 for terminating a contract. Because the plaintiff was “not claiming that the agency action
11 violated a statute or rule or was otherwise in violation of administrative law,” the Court of
12 Appeals rejected the State’s argument that the plaintiff should have sought relief under the APA.
13 *Id.* at 132. Here, to the contrary, plaintiff’s claim is based on an argument that the State violated
14 a statute – Measure 37 – by not granting him all relief he sought in his Measure 37 claim. That
15 distinction is significant because the APA generally provides relief only where agency action
16 violates a constitutional, statutory or regulatory provision – not where the agency’s alleged
17 liability is based *solely* on a contractual or tort theory. *See Muller*, 164 Or App at 15-16
18 (distinguishing case from *Premier Technology*). Because plaintiff alleges that the State
19 defendants violated Measure 37, APA exclusivity principles require that plaintiff’s claims
20 against the State be dismissed.

21 **C. To the extent that plaintiff’s claims are not based on disagreement with the State’s**
22 **final order, he has failed to state a claim for compensation.**

23 This court should dismiss plaintiff’s claims against the State even if he is correct that
24 those claims are *not* premised on disagreement with the State’s final order. In each of his claims,
25 plaintiff seeks monetary compensation directly under Measure 37. As the State explained in its
26 opening memorandum, Measure 37 creates a cause of action for compensation only when “a

1 *land use regulation* continues to apply to the subject property more than 180 days after the
2 present owner of the property has made written demand for compensation * * *.” ORS
3 197.352(6) (emphasis added). In other words, the filing of a Measure 37 claim related to a
4 *particular* land use regulation is a prerequisite to the landowner’s later ability to file a complaint
5 seeking damages under Measure 37 on the ground that the same land use regulation unlawfully
6 continues to apply to his property, reducing its fair market value.

7 Each of plaintiff’s claims is a just-compensation claim based solely on Section 6 and,
8 therefore, must be premised on plaintiff having made a related “written demand” for
9 compensation. But the state actions about which plaintiff complains (the letter opposing
10 plaintiff’s zone-change request and alleged interference with transferability of the waiver)
11 occurred *after* plaintiff filed his Measure 37 claim in August 2005. Moreover, plaintiff did not
12 assert in that claim, as he does now, either that he was entitled not to have the State oppose his
13 efforts to rezone his property under the zoning criteria that existed in 1973 or that he was entitled
14 to compensation based on the State’s alleged interference with the waiver’s transferability.
15 Because plaintiff has not alleged – and could not allege – that he filed a written Measure 37
16 claim related to the rezoning request or the State’s alleged interference with the waiver’s
17 transferability, plaintiff has not stated ORS 197.352(6) claims for just compensation against the
18 State. Consequently, those claims should be dismissed.

19 **D. Plaintiff cannot state a claim for just compensation under Measure 37 because the**
20 **State already has elected the waiver remedy.**

21 As explained in the State’s opening memorandum, plaintiff has not stated a claim for
22 compensation under Measure 37 because the State has elected to not apply certain land use
23 regulations in lieu of paying just compensation. In response, plaintiff suggests that, if the State’s
24 initial determination regarding the appropriate scope of waiver is incorrect, the State is forever
25 barred from electing waiver as the appropriate means of relief for a Measure 37 claimant. That is
26 not correct. Sections 8 and 10 do not identify any point in the administrative process – or in

1 litigation – during which the State’s right to elect the waiver remedy disappears. Rather, those
2 provisions give the State the right to elect waiver instead of compensation *at any time*. Thus, had
3 plaintiff filed a timely petition for judicial review and ultimately prevailed, the State presumably
4 would have complied with the resulting judgment by issuing a new order either granting a
5 broader waiver, under ORS 197.352(8) and (10), or paying plaintiff compensation under ORS
6 197.352(6). As before, that choice between remedies would remain the State’s to make.


7 **CONCLUSION**

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

12 DATED this 2 day of February, 2007.

13 Respectfully submitted,

14 HARDY MYERS
15 Attorney General

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CERTIFICATE OF SERVICE

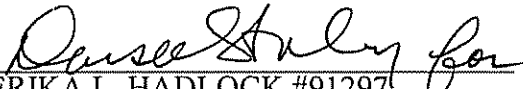
I certify that on February 2, 2007, I served the foregoing Defendant State of Oregon's Reply On Its Motion to Dismiss upon the parties hereto by the method indicated below, and addressed to the following:

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