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

ERNEST and ARLETTA HANNAN,
Plaintiff,
v.
STATE OF OREGON, by and through the
Oregon Department of Land Conservation and
Development,
Defendant.

Case No. 06CV0401MA
DEFENDANT’S MOTION TO DISMISS AND
MEMORANDUM OF POINTS AND
AUTHORITIES (ORCP 21 A (1) AND A (8))
Oral Argument Requested – 30 minutes

ORAL ARGUMENT REQUESTED

Defendant, the State of Oregon, requests oral argument on these Motions to Dismiss, and estimates that 30 minutes will be required. Official court reporting services are requested.

SUMMARY OF PLAINTIFF’S CLAIM

Plaintiffs are property owners in Deschutes County (Complaint, ¶ 1). They submitted a Measure 37 claim to the State in May 2005, seeking compensation for the reduction in fair market value suffered because of land use regulations that restrict their use of the property (¶ 4). As provided under Measure 37, the State opted to waive certain land use regulations enacted or enforced after plaintiffs’ acquisition of the property in 1986, in lieu of paying compensation to plaintiffs. ORS 197.352 (8). The Department of Land Conservation and Development (DLCD) issued its final agency order to that effect on April 4, 2006.

1 In their Complaint here, plaintiffs assert a claim for compensation under Section 6 of
2 Measure 37, because the agency order did not waive “all amendments to ORS Chapter 215
3 regarding agricultural land, statewide planning goal 3 (agricultural lands) and OAR 660, division
4 33, enacted or adopted after April 25, 1973” (Compl, ¶ 6). Plaintiffs do not seek judicial review
5 under the Administrative Procedures Act (APA), which is the exclusive procedure for
6 determining the correctness of agency orders.

7 MOTIONS TO DISMISS

8 Defendant moves the Court to dismiss plaintiffs’ Complaint on the following grounds:

9 Motion No. 1 (Court lacks subject matter jurisdiction – ORCP 21 A (1))

10 The Complaint asserts one claim—for compensation under Measure 37. The Court lacks
11 subject matter jurisdiction over this claim for two related reasons:

12 1. The APA is the exclusive means to challenge the correctness of state agency orders.
13 ORS 183.480 (2); *Bay River v. Envir. Quality Comm.*, 26 Or App 717, 720 *rev denied*, 276 Or
14 555 (1976). Plaintiffs did not seek judicial review of the State’s Final Order approving their
15 Measure 37 demand. Therefore, as a matter of law, this court lacks subject matter jurisdiction
16 over the Complaint.

17 2. Plaintiffs cannot cure the defect in their pleading. Even if plaintiffs alleged an APA
18 claim, the Court still lacks subject matter jurisdiction because the Complaint was not filed within
19 60 days of the agency’s final order. ORS 183.484 (2). Plaintiffs filed the Complaint on July 28,
20 2006, more than three months after service of the order on April 4, 2006. Therefore, the Court
21 does not have, and cannot obtain, jurisdiction, and the Complaint should be dismissed.

22 Motion No. 2 (Failure to state a claim – ORCP 21 A (8))

23 1. Plaintiffs cannot state a claim for compensation under Measure 37 because, as a
24 matter of law, they cannot allege the property *wrongly* continues to be subject to restrictive state
25 land use regulations 180 days after they submitted a Measure 37 claim to the State (Compl, ¶¶ 5,
26

1 6). Without a modification or amendment of the Final Order, plaintiffs cannot establish that any
2 land use regulations continue to apply to the property *in violation of Measure 37*. Except by
3 judicial review under the APA, plaintiffs cannot establish that DLCD *should have* decided
4 plaintiffs acquired the property in 1973 instead of 1986.

5 2. Plaintiffs cannot state a claim for compensation under Measure 37 because they
6 are not entitled to compensation. Section 8 of the statute permits a public entity,
7 “[n]otwithstanding any other state statute or the availability of funds * * *, in lieu of payment of
8 just compensation * * * not to apply the land use regulation or land use regulations to allow the
9 owner to use the property for a use permitted at the time the owner acquired the property.” ORS
10 197.352 (8). Section 10 of Measure 37 expressly states that the option not to apply land use
11 regulations is within the discretion of the public entity and applies to claims for compensation
12 under Section 6. ORS 197.352 (10). The State elected, in lieu of compensation, to allow
13 plaintiffs a use of the property permitted at the time they acquired it.

14 In support of these motions, the State relies upon ORCP 21 A (1) and A (8), ORS
15 197.352, the APA, the files and record of this case, the following Points and Authorities, and the
16 Declaration of Jon Andrus filed concurrently.

17 **POINTS AND AUTHORITIES**

18 I. Measure 37 Background

19 Oregon voters enacted Ballot Measure 37 through the initiative process in 2004.
20 Codified as part of Chapter 197, where Oregon’s statewide land use planning statues are found,
21 Measure 37 permits owners of private real property to seek compensation for reductions in fair
22 market value caused by certain land use regulations. As an alternative to payment, public
23 entities may “waive,” that is modify, remove, or not apply, certain regulations.

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1 A landowner qualifies for Measure 37 relief if: (1) a public entity enacts or enforces a
2 “land use regulation” that (2) restricts the owner’s use of private real property and (3) has the
3 effect of reducing the fair market value of the private real property. ORS 197.352 (1).
4 Subsection (3) of Measure 37 provides that certain land use regulations shall not be a basis for a
5 claim under Section (1)¹. Subsection (5) requires landowners to assert claims within two years
6 of the effective date of Measure 37 (December 2, 2004) or the date on which a land use
7 regulation is applied “as an approval criteria” on a specific land use application, whichever is
8 later.

9 After determining that an owner submitted a timely, valid claim, the public entity has the
10 option to pay “just compensation”² or to “modify, remove, or not to [sic] apply” land use
11 regulations to the extent necessary “to allow the owner to use the property for a use permitted at
12 the time the owner acquired the property.” ORS 197.352 (8); *see also* ORS 197.352 (10).
13 Allowing the owner to use the property in a way that would otherwise be prohibited is commonly
14 referred to as granting a Measure 37 “waiver.” DLCDC is exercising the waiver option.³

15 Measure 37 does not specify any procedure for claim processing, but permits public
16 entities to adopt procedures. The State’s Department of Administrative Services (DAS) adopted
17 procedural rules, found at OAR 125-145-0010 to 125-145-0105, that set minimum requirements
18 for the content of a Measure 37 claim against the State.

19 When DAS receives a claim, it provides written notice of the claim to neighboring
20 landowners, certain neighborhood or community organizations, and anyone who requests notice.
21 OAR 125-145-0080. This provision is consistent with the notice provisions of ORS 215.416
22 regarding notice of permits. Persons receiving notice, or any other person, may submit
23 comments, evidence and information within ten days. OAR 125-145-0080 (2), (3).

24 _____

25 ¹ None of the exemptions are directly at issue
26 ² Subsection (2) defines “just compensation.” ORS 197.352 (2).
³ DLCDC can pay compensation only if and when the legislature appropriates funds for that purpose. *See* OAR 660-002-0010 (8) (c).

1 DAS forwards Measure 37 claims to the state agency that enacted or enforced a relevant
2 land use regulation, *i.e.* the “regulating entity,” in this case DLCD. OAR 125-145-0090. The
3 regulating entity reviews and analyzes the claim, gathers additional information if necessary and
4 available, and issues a draft report. Draft reports explain the preliminary determination of the
5 statutory criteria for relief, including timeliness of the claim, ownership, the land use regulations
6 that are the basis of the claim, the effect of relevant land use regulations on the property’s fair
7 market value, and applicable exemptions, if any.

8 The draft report is made public on the internet and copies are mailed to the claimant, and
9 any persons who submitted comments or requested notice. OAR 125-145-0100. After a ten-day
10 comment period, and based in part on the comments received, the regulating entity and DAS
11 issue a final report and order. DLCD serves the final report and order on any persons who
12 received copies of the draft report or submitted comments on the draft report. DLCD also makes
13 the final orders public by posting them on the internet.

14 Section 6 of Measure 37 provides that “[i]f a land use regulation continues to apply to the
15 subject property more than 180 days after * * * written demand for compensation * * *, the
16 present owner * * * shall have a cause of action for compensation under this section in the circuit
17 court.” ORS 197.352 (6). This Section essentially imposes a 180 day deadline for public entities
18 to decide claims. In the event a public entity appropriately waives restrictive land use
19 regulations in accordance with Section 8 of Measure 37, no cause of action accrues.

20 II. Plaintiffs’ Administrative Claim

21 Plaintiffs submitted their Measure 37 claim to the state on or about May 26, 2005 (*see*
22 Compl, ¶ 4; Decl of Andrus, Ex 3, p 4). DLCD issued a draft report, received and considered
23 comments from plaintiffs and others, and issued its Final Order and Report on April 4, 2006
24 (Decl of Andrus, Ex 3, p 11 and p 2). DLCD approved plaintiffs’ claim and granted relief under
25 ORS 197.352 (8) (*id.*, p 1).

26

1 DLCD determined that plaintiffs were the present owners of the property and acquired
2 their ownership interest on November 10, 1986 (*id.*, p 6). In their complaint, plaintiffs allege
3 they acquired an ownership interest in the property in 1973, when parents “Alva and Pearl
4 Hannan assigned the vendee’s interest in the Contract of Sale to plaintiff by Earnest Money
5 Agreement” (Compl, ¶ 3 and Ex 3). Plaintiffs offered the same allegation to DLCD, and DLCD
6 found that the evidence supported an ownership interest in the property commencing November
7 10, 1986 and not before (Decl of Andrus, Ex 3, p 6, fn 2; *see also* Compl, Exs 2 and 3).
8 Consequently, DLCD approved plaintiffs’ claim and waived land use regulations to the extent
9 necessary to allow plaintiffs a use of the property permitted at the time they acquired it in 1986.
10 ORS 197.352 (8).

11 III. The Administrative Procedures Act

12 Plaintiffs allege that this court should accept the argument rejected by DLCD—that
13 plaintiffs acquired the property in 1973 rather than 1986. Therefore, the Complaint is a
14 challenge to the correctness of the Final Order. The APA sets forth the exclusive method for
15 such a challenge. ORS 183.480 (2); *Bay River, supra*, 26 Or App at 720; *Ososke v. DMV*, 320
16 Or 657, 659-60 (1995).

17 Plaintiffs had 60 days from the mailing date of the order to challenge the correctness of
18 DLCD’s decision by filing a petition for judicial review in the circuit court. ORS 183.484 (1)
19 and (2). DLCD mailed the Final Order on April 4, 2006, as demonstrated by the Declaration of
20 Jon Andrus. This Court has jurisdiction to determine whether the agency erred only if plaintiffs
21 filed for judicial review by June 5, 2006.⁴

22 The APA, at ORS 183.484 (2), provides that “[p]etitions for review *shall* be filed within
23 60 days *only* following the date the order is served” (emphasis added). Timely filing of a
24

25 ⁴ The 60 day period expired on Saturday June 3, 2006, so plaintiffs’ petition would have been timely if filed by
26 Monday June 5, 2006.

1 petition for judicial review is a jurisdictional requirement, as the Court of Appeals explained in
2 *G.A.S.P. v. Environmental Quality Commission*, 201 Or App 362, 366 (2005):

3 “ORS 183.484(1) confers on certain circuit courts jurisdiction for
4 judicial review of orders in other than contested cases. ORS
5 183.484(2) then provides that ‘[p]etitions for review shall be filed
6 within 60 days only following the date the order is served.’ The
7 timely filing of a petition for judicial review of agency action is a
8 jurisdictional requirement. *Ososke v. DMV*, 320 Or 657, 659-60,
9 891 P2d 633 (1995). Accordingly, the failure to comply with that
10 requirement is a matter that cannot be waived and may be raised
11 for the first time on appeal. As we held in *Hood River County v.*
12 *Stevenson*, 177 Or App 78, 81, 33 P3d 325 (2001), ‘[a]
13 jurisdictional question need not be preserved by a party, much less
14 raised at a specific point in a proceeding, for a court to consider it.
15 Courts have an obligation to consider jurisdictional issues *sua*
16 *sponte*[.]’”

17 DLCD mailed the Final Order on April 4, 2006. The Complaint in this case was filed on
18 July 28, 2006, well after the 60 day period had expired (OJIN #1). Consequently, the Court
19 lacks jurisdiction and the Complaint should be dismissed.

20 IV. Plaintiffs’ Measure 37 Complaint

21 In their Measure 37 Complaint in this court, plaintiffs allege that DLCD continues to
22 enforce regulations that diminish the value of their property, specifically regulations amended or
23 adopted after April 25, 1973 (Compl, ¶ 6). This allegation can have no other meaning but that
24 DLCD failed to waive regulations that should have been waived. Plainly, plaintiffs contend that
25 DLCD erred by granting a waiver only as to regulations enacted or enforced since 1986.

26 Plaintiffs chose not to challenge the agency order under the APA.⁵ Consequently,
plaintiffs cannot establish that DLCD improperly exercised its waiver option under Measure 37.
Plaintiffs have received the relief to which they are entitled under Measure 37 and cannot state a
claim for more.

⁵ The Final Order included a statement outlining plaintiff’s right to judicial review under ORS 184.484. Decl of
Andrus, Ex 3, p 3; *see also* Order of Dismissal by the Court of Appeals in *Hoff v DLCD*, CA A129414, holding that
the circuit court has jurisdiction of DLCD’s Final Orders in Measure 37 cases as orders in “other than contested
cases” and that the Court of Appeals did not (copy attached as Attachment A).

1 The Oregon Court of Appeals consistently has held that the APA establishes the
2 exclusive method to challenge decisions made by state agencies. *See e.g., Lake County v. State*
3 *of Oregon*, 142 Or App 162, 165 (1996) (“ORS 183.480 (2) and numerous decisions of this court
4 make clear that judicial review of final agency orders shall be solely as provided in the APA”);
5 *Mendieta v. Division of State Lands*, 148 Or App 586, 599-600 (1997) *rev dismissed* 328 Or 331
6 (1999) (where “redress would have been available under ORS 183.484, had plaintiffs timely
7 filed their petition for judicial review[,]” the Court of Appeals, following *Lake County*, held “the
8 trial court erred in granting plaintiffs relief under ORS 183.490 and ORS 28.010”); *FOPPO v.*
9 *County of Marion*, 93 Or App 93, 97 (1988) *rev denied* 307 Or 326 (1989) (“PERS is subject to
10 the APA; therefore, the APA provides the exclusive methods for its actions and for review of
11 those actions”).

12 In *Bay River, supra*, the circuit court granted the plaintiff an injunction and declaratory
13 relief under ORS 28.010 with respect to a subsurface sewage disposal system feasibility
14 permit—a matter within the purview of the Department of Environmental Quality. The Court of
15 Appeals reversed and remanded, ordering the circuit court to vacate the judgments and dismiss
16 the complaint. In its opinion, the Court of Appeals explained:

17 “The Oregon Administrative Procedures Act, ORS 183.310 et seq,
18 establishes a comprehensive pattern for the judicial review of
19 administrative decisions. The various APA statutes governing
20 judicial review provide the **sole and exclusive methods of**
obtaining judicial review. *School Dist. No. 48 v. Fair Dis. App.*
Bd., 14 Or App 35, 512 P2d 799 (1973).

21 “This is sufficient answer to Bay River’s contention that since it
22 couched its complaint in equitable terms and sought a declaratory
23 judgment, the circuit court obtained jurisdiction pursuant to ORS
24 28.010. A party cannot ignore the judicial review provisions of the
25 APA in favor of a general equitable or declaratory remedy.” 26 Or
26 App at 720 (emphasis added).⁶

⁶ Also, in *Bay River*, as here, the complaint was untimely. 26 Or App at 722, fn 2.

1 In *Clarke Electric, Inc. v. State Highway Division*, 93 Or App 693 (1988), the plaintiff
2 attempted to assert various tort claims under the Oregon Tort Claims Act, ORS 30.265, arising
3 from the Highway Division’s decision not to award the plaintiff a contract to install traffic
4 signals. The Court rejected the plaintiff’s arguments that the APA did not apply and that another
5 statute conferred jurisdiction. 93 Or App at 695-696. The Court also determined that the order
6 was a final order in other than a contested case with a right to challenge the order under the APA.
7 93 Or App at 696-697. Finally, the Court held that the plaintiff could not proceed directly under
8 the OTCA because the Highway Division’s:

9 “* * * alleged liability in tort is premised on a finding that
10 defendant’s order rejecting the bid was improper. That order was a
11 final order in other than a contested case, and the exclusive
12 procedure for review of such an order is under the APA. ORS
13 183.480(2). See *FOPPO v. County of Marion*, 93 Or App 93, 760
P2d 1363 (1988). Consequently, the trial court did not err in
granting Division's motion to dismiss for failure to comply with
the APA time limitations for judicial review.” 93 Or App at 697.

14 Plaintiffs’ purported cause of action directly under Measure 37 presents the same
15 question. The State’s alleged liability is based on the action of the DLCDD. DLCDD is subject to
16 the APA and its orders may be judicially tested only by a timely petition for APA review.
17 Plaintiffs do not seek that review, and in any event cannot now make a timely petition.

18 V. Election of Relief

19 Plaintiffs cannot assert a claim for Measure 37 compensation because the State chose to
20 provide relief in the form of not applying land use regulations “in lieu of” compensation.
21 Measure 37 provides no right to compensation at the election of the claimant. Instead, the statute
22 grants the public entity the option to determine whether to pay compensation or “modify,
23 remove, or not apply” land use regulations. ORS 197.352 (8) and (10). Consequently, plaintiffs
24 cannot state a claim for compensation.

1 Oregon adopted Measure 37 through a ballot initiative in 2004. Oregon courts apply the
2 same methodology for interpreting statutes adopted through the initiative process that they apply
3 in construing statutes adopted by the Legislative Assembly. *Stranahan v. Fred Meyer, Inc.*, 331
4 Or 38 (2000); *PGE v. Bureau of Labor and Industries*, 317 Or 606, 612 n 4 (1993). The
5 objective is to discern the intent of those who enacted the law, in this case, the Oregon voters.
6 “The best evidence of the voters’ intent is the text of the provision itself. * * * The context of the
7 language of the ballot measure may also be considered[.]” *Stranahan*, 331 Or at 56 (quoting
8 *Roseburg School Dist. v. City of Roseburg*, 316 Or 374, 378 (1993)).

9 If the text and context of the statute reveal the clear intent of the voters, “further inquiry
10 is unnecessary.” *PGE*, 317 or at 611; *see also Stranahan*, 331 Or at 56.⁷ The language and
11 structure of Measure 37 clearly show that the voters intended to give public entities, and not the
12 claimants, the choice between paying compensation and not applying land use regulations. The
13 statute provides:

14 (8) Notwithstanding any other state statute or the availability of funds
15 under subsection (10) of this section, in lieu of payment of just compensation
16 under this section, the governing body responsible for enacting the land use
17 regulation may modify, remove, or not to apply the land use regulation or land use
18 regulations to allow the owner to use the property for a use permitted at the time
19 the owner acquired the property.

20 * * * * *

21 (10) Claims made under this section shall be paid from funds, if any,
22 specifically allocated by the legislature, city, county, or metropolitan service
23 district for payment of claims under this section. Notwithstanding the availability
24 of funds under this subsection, a metropolitan service district, city, county, or
25 state agency shall have discretion to use available funds to pay claims or to
26 modify, remove, or not apply a land use regulation or land use regulations
pursuant to subsection (6) of this section. If a claim has not been paid within two
years from the date on which it accrues, the owner shall be allowed to use the
property as permitted at the time the owner acquired the property.

23 ⁷ The second level of analysis involves review of the legislative history. The history of ballot initiatives includes the
24 explanatory statement in the Voter’s Pamphlet. Measure 37’s explanatory statement supports a plain reading of the
25 statute: “If a property owner proves that a land use regulation restricts the use of the owner’s property, and reduces
26 its value then *the government responsible for the regulation will have a choice*: pay the owner of the property an
amount equal to the reduction in value or modify, change or not apply the regulation to the owner’s property.”
www.oregon.gov/LCD/MEASURE37/legal_information.shtml#Information_About_the_Election (emphasis added).

1 DLCD exercised its discretion to provide relief from regulations in lieu of compensation to
2 plaintiffs. The Complaint should be dismissed.

3

4 DATED this 22 day of September, 2006.

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Respectfully submitted,

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HARDY MYERS

7

Attorney General

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9

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Of Attorneys for Defendants

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COPY

IN THE COURT OF APPEALS OF THE STATE OF OREGON

CHARLES HOFF,

Petitioner,

v.

DEPARTMENT OF LAND CONSERVATION
AND DEVELOPMENT,

Respondent.

Agency No. M 119114

CA A129414

ORDER OF DISMISSAL

Before Wollheim, P.J., Brewer, C.J., and Schuman, J.

Petitioner has petitioned for judicial review of a joint order of the Department of Administrative Services (DAS) and the Department of Land Conservation and Development (DLCD) determining not to apply certain land use regulations to petitioner's parcel of land in lieu of paying compensation under Ballot Measure 37. Respondent has moved for a determination of whether the court has jurisdiction of the order on the ground that the order is an order in other than a contested case and, therefore, jurisdiction lies in the circuit court, not the Court of Appeals. Respondent further requests that, if the court determines that the court does not have jurisdiction of the order, the judicial review be dismissed. Lastly, respondent requests a determination whether the circuit court of Washington County or of Clackamas County has jurisdiction to review the order.

The motion for a determination of jurisdiction is granted. The court determines that the order is an order in other than a contested case, that the circuit court has jurisdiction of judicial review of the order, and that this court does not. On that ground, the court dismisses the judicial review in this court.

The parties have not briefed the question of which circuit court has jurisdiction of a petition for judicial review of a joint DAS/DLCD order in other than a contested case relating to property apparently located in Clackamas County. Moreover, petitioner already has filed actions in the circuit courts of both Washington County and Clackamas County relating to the order; therefore, there is no need for this court to transfer the judicial review to a circuit court under ORS 14.165. Respondent's request to determine which circuit court has jurisdiction of the judicial review of the joint DAS/DLCD order is denied.

Judicial review dismissed.

JAN 17 2006

Date

Robert Wollheim, Presiding Judge

APPELLATE JUDGMENT

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ATTACHMENT

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APPELLATE
SALE

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

6 ERNEST and ARLETTA HANNAN,

7 Plaintiff,

8 v.

9 STATE OF OREGON, by and through the
10 Oregon Department of Land Conservation and
Development,

11 Defendant.

Case No. 06CV0401MA

DECLARATION OF JON ANDRUS

12 I, Jon Andrus, do declare and say:

- 13 1. I am employed by the State of Oregon in the Department of Land Conservation and
14 Development (DLCD), providing administrative support to the Measure 37 Division. I
15 have held this position since December 12, 2005. I make this declaration based on my
16 personal knowledge and in support of the Defendant's Motion to Dismiss in the above-
17 captioned case.
- 18 2. On April 4, 2006, I was responsible for mailing the Final Order and Final Staff Report
19 and Recommendation for Measure 37 claim number M118516.
- 20 3. Attached hereto are true and correct copies of the Certificate of Mailing that I prepared
21 (identified as Exhibit 1), the list of persons and addresses to which the mailing was sent
22 (Exhibit 2), and the Final Order and Final Staff Report and Recommendation (Exhibit 3).
- 23 4. At the request of Darsee Staley, Senior Assistant Attorney General, I reviewed the
24 originals of the attached Exhibits in the DLCD's files on September 18, 2006. The
25 Certificate of Mailing (Ex 1) is incomplete because it does not state that the Final Order
26 was mailed along with the Final Staff Report and Recommendation.

1 5. The Final Order and Final Staff Report and Recommendation (Ex 3) were both mailed,
2 by me, on April 4, 2006, to the list of addressees (Ex 2).

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

7 DATED this 17 day of September, 2006.

8

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Jon Andrus
JON ANDRUS

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Department of Land Conservation and Development
635 Capitol St NE, Suite 150
Salem, OR 97301

CERTIFICATE OF MAILING

I certify that I served M118516 Hanna Final Staff Report
and Recommendations and Final Report on:
See Attached List

by following indicated method or methods:

by **mailing** a full, true and correct copy in a sealed, first-class postage-prepaid envelope, addressed to the person(s) listed above, and deposited with the United States Postal Service at Salem, Oregon on the date set forth below.

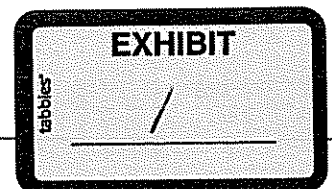
by **hand delivering** a full, true and correct copy to the person(s) listed above, on the date set forth below.

by **faxing** a full, true and correct copy to the person(s) at the fax number(s) shown above, on the date set forth below.

DATED this 4th day of April, 2006.

Name: JD

Title: Measure 37 Support Specialist



3/29/2006

V118516 HANNAN (1063)

~~Tom Anderson, Community Development Director~~
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Jim Johnson, Land Use Planning Coordinator
Oregon Dept. of Agriculture
635 Capitol St. NE, Ste 100
Salem OR 97301-2532



BEFORE THE DEPARTMENT OF ADMINISTRATIVE SERVICES,
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. M118516
(BALLOT MEASURE 37) OF)
Ernest and Arletta Hannan, CLAIMANTS)

Claimants: Ernest and Arletta Hannan (the Claimants)

Property: Tax Lot 900, Township 15S, Range 12E, Section 25, Deschutes County
(the Property)

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

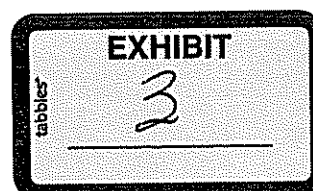
Claimants submitted the Claim to the State of Oregon under ORS 197.352. Under OAR 125-145-0010 *et seq.*, the Department of Administrative Services (DAS) referred the Claim to the Department of Land Conservation and Development (DLCD) as the regulating entity. This order is based on the record herein, 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 Ernest and Arletta Hannan's division of the 17.53-acre property into three parcels or to their development of a dwelling on each parcel: applicable provisions of Goal 3, ORS 215 and OAR 660, division 33, enacted or adopted after November 10, 1986. These land use regulations will not apply to the claimants only to the extent necessary to allow them to use the subject property for the use described in this report, and only to the extent that use was permitted when they acquired the property on November 10, 1986.
2. The action by the State of Oregon provides the state's authorization to the claimants to use the subject property for the use described in this report, subject to the standards in effect on November 10, 1986. On that date, the property was subject to applicable provisions of Goal 3, ORS 215 and OAR 660, division 5.
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

FINAL ORDER




unless the claimants first obtain 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 claimants under the terms of the order will remain subject to the following laws: (a) those laws not specified in Condition 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 claimants to use the subject property, it may be necessary for them 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 claimants 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 claimants.

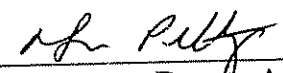
This Order is entered by the Deputy Director of the DLCD as a final order of DLCD and the Land Conservation and Development Commission under ORS 197.352, OAR 660-002-0010(8), and OAR 125, division 145, and by the Deputy Administrator for the State Services Division of the DAS as a final order of DAS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

FOR DLCD AND THE LAND CONSERVATION
AND DEVELOPMENT COMMISSION.
Lane Shetterly, Director



George Naughton, Deputy Director
DLCD
Dated this 4th day of April, 2006.

FOR the DEPARTMENT OF ADMINISTRATIVE
SERVICES:



Dugan Petty, Deputy Administrator
DAS, State Services Division
Dated this 4th day of April, 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.

**BALLOT MEASURE 37 (ORS 197.352)
CLAIM FOR COMPENSATION**

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

April 4, 2006

STATE CLAIM NUMBER: M118516

NAMES OF CLAIMANTS: Ernest and Arletta Hannan

MAILING ADDRESS: 4178 Southwest 58th Street
Redmond Oregon 97756

PROPERTY IDENTIFICATION: Township 15S, Range 12E, Section 25
Tax Lot 900
Deschutes County

DATE RECEIVED BY DAS: May 26, 2005

180-DAY DEADLINE: April 13, 2006¹

I. SUMMARY OF CLAIM

The claimants, Ernest and Arletta Hannan, seek compensation in the amount of \$225,000 for the reduction in fair market value as a result of certain land use regulations that are alleged to restrict the use of certain private real property. The claimants desire compensation or the right to divide the 17.53-acre property into three parcels, and to develop a dwelling on each parcel. The subject property is located at 4178 SW 58th Street, near Redmond, in Deschutes 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 Ernest and Arletta Hannan's division of the 17.53-acre property into three parcels and to their development of a dwelling on each parcel: applicable provisions of Statewide Planning Goal 3 (Agricultural Lands), ORS 215 and Oregon Administrative Rules (OAR) 660, division 33, enacted or adopted after November 10, 1986. These laws will not apply to the claimants only to the extent necessary to allow them to use the subject property for the use

¹ This date reflects 180 days from the date the claim was submitted as extended by the 139 days enforcement of Ballot Measure 37 was suspended during the pendency of the appeal of *MacPherson v. DAS*. *MacPherson v. Dept. of Admin. Svcs.*, 340 Or ___, 2006 Ore. Lexis 104 (Feb. 21, 2006).

described in this report, and only to the extent that use was permitted they acquired the property on November 10, 1986. (See the complete recommendation in Section VI of this report.)

III. COMMENTS ON THE CLAIM

Comments Received

On August 24, 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, one written comment was received in response to the 10-day notice. The comment is relevant to whether the restriction of the claimants' use of the subject property reduces the fair market value of the property. The comment has been considered by the department in preparing this report.

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 criterion 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 criterion, whichever is later

Findings of Fact

This claim was submitted to DAS on May 26, 2005, for processing under OAR 125, division 145. The claim identifies "all statewide regulations and ordinances restricting the ability of the applicant to divide the land" 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 claimants, Ernest and Arletta Hannan, acquired the subject property on November 10, 1986, as reflected by a special warranty deed included with the claim. A 2005 Deschutes County tax statement submitted with the claim establishes the claimants’ current ownership.

The claim includes an unsigned contract of sale, indicating that Earnest Hannan’s parents, Alva and Pearl Hannan may have acquired an interest in the subject property on October 11, 1971. The claim also includes a 1973 earnest money receipt indicating the claimants’ intent to purchase the subject property. Neither an unsigned contract nor an earnest money receipt is sufficient to establish ownership for the purposes of ORS 197.352.²

Conclusions

The claimants, Ernest and Arletta Hannan, are “owners” of the subject property, as that term is defined by ORS 197.352(11)(C), as of November 10, 1986.

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 claimants’ 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 claimants or a family member acquired the property.

Findings of Fact

The claim states, “All statewide land use regulations and ordinances restricting the ability of the applicant to divide the land . . . [restrict] ability of applicant to divide and develop land.” Conversation with the claimants indicates that state laws have restricted the property so that it cannot be divided into two 5-acre parcels and one 7.53-acre parcel for residential development.

The claim is based generally on Deschutes County’s current Exclusive Farm Use (EFU) zone and the applicable provisions of state law that require such zoning. The claimants’ property is zoned EFU as required by Goal 3 in accordance with ORS 215 and OAR 660, division 33,

² Department staff has made several attempts to obtain additional ownership information from the claimants. However, claimants have not produced additional information documenting family ownership as of 1971 or claimants’ ownership as of 1973.

because the claimants' property is "agricultural land" as defined by Goal 3.³ Goal 3 became effective on January 25, 1975, and required that agricultural land as defined by the goal be zoned EFU pursuant to ORS 215.

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.)

The claimants acquired the subject property on November 10, 1986. At that time, the property was subject to Deschutes County's EFU zone, which was acknowledged by the Commission for compliance with Goal 3 on May 11, 1981. When the claimants acquired the subject property, the desired division and development of the property would have been governed by the county's EFU zone and the applicable provisions of ORS 215 and OAR, division 5, then in effect.

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 claimants acquired the subject property in 1986 and do not allow the desired division or residential development of the property. However, the claim does not establish whether or to what extent the claimants' desired use of the subject property complies with the standards for land divisions and development, as provided in the Deschutes County's EFU zone and comprehensive plan, in effect when the claimants acquired the subject property on November 10, 1986.

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 uses that the claimants have identified. There may be other laws that currently apply to the claimants' use of the subject property, and that may continue to apply to the claimants' 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 claimants seek a building or

³ The claimants' property is "agricultural land" because it contains Natural Resources Conservation Service Class I-IV soils.

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 any land use regulation 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 \$225,000 as the reduction in the subject property’s fair market value due to current regulations. This amount is based on the claimants’ estimate of the market value of five-acre parcels recently sold on a neighboring property. The claimants estimate the value of the property under current regulations to be approximately \$375,000, yielding an estimated reduction in value of \$225,000.

Conclusions

As explained in Section V.1 of this report, the claimants are Ernest and Arletta Hannan who acquired the subject property on November 10, 1986. Under ORS 197.352, the claimants are due compensation for land use regulations that restrict the use of the subject property in a manner that reduces its fair market value. Based on the findings and conclusions in Section V.2 of this report, laws enacted or adopted since the claimants acquired the subject property may restrict the desired division and development of the property. The claimants estimate the reduction in value due to the restrictions to be \$225,000.

Without an appraisal or other documentation, and without verification of whether or the extent to which the claimants’ desired use of the property was allowed under the standards in effect when they acquired it in 1986, it is not possible to substantiate the specific dollar amount the claimants demand for compensation. Nevertheless, based on the submitted information, the department determines that it is more likely than not 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 since the claimants acquired the property.

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 Goal 3, ORS 215 and OAR 660, division 33, which Deschutes County has implemented through its current EFU zone. OAR 660, division 33, was adopted after the claimants acquired the property. Goal 3 and ORS 215 were in effect when the claimants acquired the 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 the general statutory, goal and rule restrictions on residential development and use of farm land apply to the claimants' use of the subject property, and these laws are not exempt under ORS 197.352(3)(E) to the extent they were enacted or adopted after the claimants acquired the property on November 10, 1986. Provisions of Goal 3 and ORS 215 in effect when the claimants acquired the subject property in 1986 are exempt under ORS 197.352(E) and will continue to apply to the subject property.

Other laws in effect when the claimants acquired the subject property are also exempt under ORS 197.352(3)(E), and will continue to apply to the claimants' use of the property. There may be other laws that continue to apply to the claimants' 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 the subject property until there is a specific proposal for that use. When the claimants seek 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 uses that the claimants have 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 claimants should be aware that the less information they have 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 their 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 one or more laws that restrict the use of the 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 property permitted at the time the current 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 claimants' ability to divide the 17.53-acre property into three parcels and to develop a dwelling on each parcel. The claim asserts that the laws enforced by the Commission or the department reduce the fair market value of the subject property by \$225,000. However, because the claim does not provide an appraisal or other specific documentation establishing how the specified restrictions reduce the fair market value of the subject property,

and without verification of whether or the extent to which the claimants' desired use of the property was allowed under the standards in effect when they acquired the property, a specific amount of compensation cannot be determined. Nevertheless, based on the record for this claim, the department acknowledges 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 Ernest and Arletta Hannan to use the subject property for a use permitted at the time they acquired the property on November 10, 1986.

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 Ernest and Arletta Hannan's division of the 17.53-acre property into three parcels or to their development of a dwelling on each parcel: applicable provisions of Goal 3, ORS 215 and OAR 660, division 33, enacted or adopted after November 10, 1986. These land use regulations will not apply to the claimants only to the extent necessary to allow them to use the subject property for the use described in this report, and only to the extent that use was permitted when they acquired the property on November 10, 1986.
2. The action by the State of Oregon provides the state's authorization to the claimants to use the subject property for the use described in this report, subject to the standards in effect on November 10, 1986. On that date, the property was subject to applicable provisions of Goal 3, ORS 215 and OAR 660, division 5.
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 claimants first obtain 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 claimants under the terms of the order will remain subject to the following laws: (a) those laws not specified in Condition 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 claimants to use the subject property, it may be necessary for them 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 claimants 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 claimants.

VII. COMMENTS ON THE DRAFT STAFF REPORT

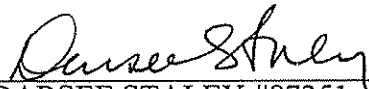
The department issued its draft staff report on this claim on March 20, 2006. OAR 125-145-0100(3), provided an opportunity for the claimant or the claimant's authorized agent and any third parties who submitted comments under OAR 125-145-0080 to submit written comments, evidence and information in response to the draft staff report and recommendation. Comments received have been taken into account by the department in the issuance of this final report.

1 **CERTIFICATE OF SERVICE**

2 I certify that on September 22, 2006, I served the foregoing *Defendant's Motion to*
3 *Dismiss and Memorandum of Points and Authorities* upon the parties hereto by the method
4 indicated below, and addressed to the following:

5
6 Michael R. McLane
7 Bryant, Emerson & Fitch, LLP
8 888 SW Evergreen Avenue
9 PO Box 457
10 Redmond, OR 97756-0103

- ___ HAND DELIVERY
- MAIL DELIVERY
- ___ OVERNIGHT MAIL
- ___ TELECOPY (FAX)

11 
12 _____
13 DARSEE STALEY #87351
14 ERIKA HADLOCK #91297
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