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

ROBERT M. HOFER AND RACHELLE
LYN HOFER,

 Plaintiffs,

 v.

STATE OF OREGON, BY AND THROUGH
THE DEPARTMENT OF
ADMINISTRATIVE SERVICES,
DEPARTMENT OF LAND
CONSERVATION AND DEVELOPMENT,

 Defendants.

Case No. C061434CV

STATE OF OREGON'S REPLY IN SUPPORT
OF MOTION FOR SUMMARY JUDGMENT

(Oral Argument Requested)

INTRODUCTION

The State moved for summary judgment on plaintiffs' Petition for Judicial Review, and on their claims for declaratory relief and compensation under Measure 37. As of the date of this Reply, no hearing date has been set.

The State's Final Order M 118330 approved the Measure 37 demand submitted by plaintiffs Robert Hofer and Rachelle Hofer. The State determined that Robert Hofer and Rachelle Hofer acquired their relevant ownership interests in the private real property at issue in 1986 and 1996 respectively. In lieu of compensation, the State elected "not to apply" state land use regulations enacted after acquisition to allow Robert Hofer and Rachelle Hofer a use of the property permitted on the date they acquired their present ownership interests.

1 Plaintiffs allege that the State erred and should have determined that the Hofers acquired
2 the property in on the day Mr. Hofer was born. Plaintiffs contend that the relevant interests
3 under Measure 37 are the potential rights of inheritance or of distribution in the event of
4 dissolution of marriage. Plaintiffs' theory is contrary to Oregon law and should be rejected.

5 **REPLY ARGUMENT**

6 The following reply addresses plaintiffs' arguments in the order presented in plaintiffs'
7 Response to Defendants' Motion for Summary Judgment (hereafter "Pls' Resp").

8 **1. The APA standard of review applies to plaintiffs' APA claim.**

9 Plaintiffs wrongly contend that the court should ignore the APA standard of review
10 because the court rejected the State's motions to dismiss based on APA exclusivity (Pls' Resp,
11 pp 2-3). The State has moved for judgment in its favor on plaintiffs' Petition for Judicial Review
12 under the APA (Am Pet, ¶¶ 1-10). The court should apply the correct standard to the State's
13 motion.

14 **2. An issue of jurisdiction may be raised at any time.**

15 The State has moved separately, and succinctly, for judgment on the bases asserted in its
16 motions to dismiss. Plaintiffs offer no authority for their contention that the State's motion is
17 "precluded" as a matter of law (Pls' Resp, pp 3-4). ORCP 47 contains no such limitation, and
18 jurisdiction may be raised at any time. *See, G.A.S.P. v. Environmental Quality Commission, 201*
19 *Or App 362, 366 (2005).*

20 **3. The State's Motion based on "election" should be granted.**

21 Plaintiffs argue that a Measure 37 "waiver must date back to the date the 'any interest'
22 arose" and must be "complete for every interest holder dating back to the date that interest
23 arose." Therefore, plaintiffs contend, the State was required to waive regulations since 1955
24 (Pls' Resp, p 5, lns 6-14). The State granted waivers to plaintiffs from the date they acquired
25

1 their present interest—precisely what Measure 37 requires if a public entity elects waiver “in lieu
2 of compensation.” ORS 197.352 (8), (10). Plaintiffs are not entitled to compensation.

3 **4. Measure 37 does not create new property interests.**

4 Plaintiffs argue that “any interest” in property, as that phrase is used in Measure 37,
5 creates new interests in property because the phrase is “broadly stated and defined” (Pls’ Resp, p
6 5, lns 19-21 and 24-26). In fact, “any interest” is not defined by Measure 37 and the Supreme
7 Court has ruled that Measure 37 does not alter or amend existing law except to the extent a
8 proper waiver “authorizes a governing body to ‘modify, remove, or not * * * apply’ certain such
9 regulations in specific situations.” *MacPherson v. DAS*, 340 Or 117, 132 (2006) (“all laws not
10 amended remain in effect”). Existing Oregon law does not convey an ownership interest in real
11 property to children at birth or to spouses by virtue of marriage.

12 **5. Measure 37 requires a present owner/claimant to have “acquired” the property.**

13 Plaintiffs argue that “any interest” under Measure 37 includes interests arising “by
14 operation of law” (Pls’ Resp, pp 6-7). While plaintiffs acknowledge that qualifying interests
15 must be “current” (*id.*, p 6, lns 7-8), they ignore the statutory requirement that an interest be
16 “acquired.” No Oregon law transfers property to infants at birth; therefore, no interest is
17 acquired. Similarly, no “marital interest” in property arises under Oregon law unless and until a
18 petition for dissolution is filed; consequently, Mrs. Hofer never acquired an interest in the
19 property by virtue of marriage.¹

20 Even assuming for purposes of argument that plaintiffs’ alleged birth or marital interests
21 might have been created by operation of law, there is no dispute that neither the alleged birth
22 interest nor the alleged marital interest is a present interest. Each plaintiff owns the property by

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24 ¹ In any event, no land use regulation restricts a spouse’s potential right to one day be
25 compensated in a dissolution judgment. Plaintiffs offer no authority under Oregon law that
26 purports to grant a spouse a present right to use, encumber, or convey property owned by the
other spouse. Moreover, whatever potential marital interest Mrs. Hofer may have had is not the
interest for which she submitted a Measure 37 demand.

1 transfer of title through a deed. Mr. Hofer did not acquire his current interest by being born, or
2 by operation of law upon the death of his parent. Mrs. Hofer did not acquire her current interest
3 under ORS 107.105, which applies only “[w]henver the court renders a judgment of marital
4 annulment, dissolution or separation.” No such judgment has been rendered.²

5 **6. Each plaintiff received a waiver based on their present ownership interest.**

6 Plaintiffs argue that Measure 37 authorizes relief to the current owner of any interest if
7 either the property or the interest is restricted and reduced in value (Pls’ Resp, pp 7-8). While
8 the State disagrees with this interpretation, it has no bearing on the present case. As plaintiffs
9 concede, “any interest” refers to current interests, *i.e.* interests on which a Measure 37 demand
10 may be based (*id.*, p 7, ln 26 – p 8, ln 1; “the only express limitation is that it [the interest]
11 currently be held by the claimant”). Plaintiffs currently own the property and have all the
12 relevant attributes of ownership.

13 Plaintiffs concede that they are not entitled to relief unless they are current owners of the
14 property, but argue that owning a current interest is not relevant to the relief to be granted (Pls’
15 Resp, p 8, lns 5-13). Instead, plaintiffs take the phrase “any interest” out of context and, in
16 addition to assuming an interest which never existed, contend that Measure 37 was intended to
17 grant relief to owners who acquired a present interest based on the date they acquired a potential
18 interest that never could have been the basis of a claim. Nothing in Measure 37 supports
19 plaintiffs’ argument.

20 **CONCLUSION**

21 Oregon law supports the conclusions set forth in Final Order M 118330. Plaintiffs
22 acquired their present ownership interests in the subject property in 1986 and 1996, respectively.
23 The State’s Order properly granted plaintiffs the relief to which they were entitled under
24


25 ² The same statute provides that “[s]ubsequent to the filing of a petition for annulment or
26 dissolution of marriage or separation, the rights of the parties in the marital assets shall be
considered a species of coownership.” No petition is in evidence.

1 Measure 37. The State is entitled to judgment on plaintiffs' Petition for Judicial Review and
2 their claims for compensation and declaratory relief should be dismissed.

3 DATED this 5 day of April, 2007.

4 Respectfully submitted,

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CERTIFICATE OF SERVICE

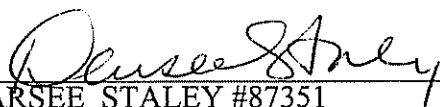
I certify that on April 5, 2007, I served the foregoing *State's Reply in Support of Summary Judgment* upon the parties hereto by the method indicated below, and addressed to the following:

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