

IN THE COURT OF APPEALS OF THE STATE OF OREGON

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HOOD RIVER VALLEY  
RESIDENTS' COMMITTEE, INC., an  
Oregon non-profit corporation, LARRY  
and SARA MARTIN, individually, and  
ERIC and TAMIKO RUHLEN,  
individually,

Appellants,

v.

STATE OF OREGON, by and through  
the DEPARTMENT OF  
ADMINISTRATIVE SERVICES and  
the DEPARTMENT OF LAND  
CONSERVATION AND  
DEVELOPMENT,

Respondent.

Marion County Circuit  
Court No. 06C17267

CA A135490

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RESPONDENT'S BRIEF

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Appeal from the Judgment of the Circuit Court  
for Marion County  
Honorable DON DICKEY, Judge

*Continued...*

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## RESPONDENTS' BRIEF

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### STATEMENT OF THE CASE

With the exception of the basis of appellate jurisdiction, questions presented, and statement of material facts, the respondent state agencies accept petitioners' Statement of the Case as adequate for appellate review.

#### **Basis of Appellate Jurisdiction**

Pursuant to ORS 183.484, review of orders in other than contested cases, petitioners sought review in the Circuit Court for Marion County of the order issued jointly by the Department of Land Conservation and Development ("DLCD") and the Department of Administrative Services ("DAS"). This court has appellate jurisdiction pursuant to ORS 183.500.

Respondent state agencies acknowledge that this court held in *Corey v. DLCD*, 210 Or App 542, 152 P3d 533, *adh'd to on recons*, 212 Or App 536, 159 P3d 327 (2007), that this court – and not the circuit court – has jurisdiction to review orders not applying land use regulations pursuant to Measure 37. Petitioners filed no petition for judicial review in this court, but nonetheless cite ORS 183.480 and ORS 183.482 as the basis for this court's jurisdiction. Petitioners thus appear to invoke this court's jurisdiction to review an order in a contested case. This matter was timely filed in the circuit court, and could therefore have been properly transferred to this court under ORS 14.165(1).

If this court determines that it lacks jurisdiction under ORS 183.500, respondents respectfully suggest that this court adapt the procedure set forth in

ORS 19.270(4), which applies where a circuit court intends to, but does not, enter an appealable judgment. In that event, this court should abate this matter, direct the circuit court to enter an order of transfer, and then proceed to consider the merits. Such a procedure would be appropriate in this case because the issues presented are purely legal, and not factual, and no party has requested a contested case or assigned error to the omission to provide a contested case.

### **Questions Presented**

1. Section (8) of ORS 197.352 provides that “the governing body responsible for enacting the land use regulation” may elect to “modify, remove or not to [*sic*] apply” the regulation to allow the present owner to use property for a use allowed at the time the owner acquired the property in lieu of paying just compensation to the owner. Section (10) provides that “a metropolitan service district, city, county, or state agency” may pay just compensation or “modify, remove or not apply” land use regulations. May a state agency to which the legislature has delegated authority to enforce a statutory land use regulation elect to not apply a statutory land use regulation enacted by the legislature?

2. ORS 197.352 applies where a public entity enforces an existing land use regulation that restricts the use of private property and the land use regulation has the “effect of reducing the fair market value of the property.” In the order challenged in this case, the state determined whether a reduction in fair market value has occurred as a result of the land use regulation by comparing the fair market value of the property, with the regulations in force, with the fair market value it would have without the regulations being enforced either to that property or to other properties

with respect to which the state has granted Measure 37 relief. Is this a permissible method of determining whether the regulations have the effect of reducing the property's fair market value?

3. Where ORS 197.352 applies, it provides that the governmental body may pay "just compensation," as that term is defined in the statute, or "in lieu of payment of just compensation," may elect to "modify, remove or not apply" land use regulations to allow a use allowed when the present owner acquired the property. In the order at issue in this case, the state elected to not apply regulations restricting the use that was the basis of the claim. If government elects to "not apply" land use regulations, must the government "not apply" land use regulations in a way that is "commensurate" to the just compensation that would otherwise be owed, or did the state correctly provide relief by not applying the regulations on which the claim was based?

4. To determine whether the property owners qualified for any sort of Measure 37 relief – whether it be "just compensation" or a non-application, modification or removal of state land use regulations – the state must evaluate whether land use regulations have reduced property's fair market value. In making that decision, is the state required to find that Measure 37 relief "not applying" land use regulations to the owner's use of the property would have no value and, therefore, that those land use regulations have not reduced the property's fair market value? Or was the state correct to consider the reduction in value without reference to the effect of potential relief?

## Summary of Argument

The trial court did not err in concluding that DLCD and DAS had authority to issue a final order not applying state statutes rather than pay compensation.

ORS 197.352(8) – which refers to authority of governing bodies to not apply laws they enact – must be read in conjunction with ORS 197.352(10), which specifically provides that state agencies have authority to modify, remove, or not apply land use regulations, which by definition include state statutes. ORS 197.352(11)(B)(i). As a waiver of sovereign immunity, ORS 197.352 must be strictly construed to avoid liability for the state. The text and context, along with legislative history, demonstrate that the people intended that state agencies always have a choice between paying compensation and not applying state statutes.

The trial court properly concluded that the state agencies' method of determining the reduction in fair market value caused by the land use regulations is permissible. ORS 197.352(2) defines just compensation as “equal to the reduction in the fair market value of the affected property interest resulting from enactment *or enforcement* of the land use regulation as of the date the owner makes written demand for compensation.” Statewide land use planning laws are enforced on a continual basis. The state agencies determined whether ongoing enforcement of the relevant regulations caused such a reduction by comparing the potential fair market value of the property without the regulations in force with the fair market value with the regulation in place as of the date of the demand. This method comports with the plain language of the statute.

Nothing in ORS 197.352 requires that the waiver of land use regulations be commensurate with the value of just compensation that would otherwise be payable. Under the statute, government may pay compensation, or “in lieu of” compensation, may modify, remove, or not apply land use regulations. “In lieu of” means “in place of” or “instead of.” That waiver is an alternative to compensation does not require that the two be equivalent.

Evaluation of a Measure 37 claim has two aspects. First, the state determines whether certain land use regulations have reduced the fair market value of the claimant’s property. If so, the state decides what form of relief to grant. Petitioners argue that, in making the initial determination whether land use regulations have reduced the property’s fair market value, the state must assume that: 1) non-application of land use regulations will not increase the property’s value because that relief applies only to the present owner’s use of the property; and 2) continued application of the land use regulations, therefore, has not reduced the fair market value of the property at all. That argument conflates the initial determination of claim validity with the nature of relief the state may elect to grant on a valid claim. Here, the state properly evaluated whether land use regulations have reduced property’s fair market value – i.e., the effect of the regulation -- *independently* of considering what the market value of “waiver” relief from those regulations might be – i.e., the effect of the relief. And even if the state were required to evaluate the effect of one form of potential relief in determining the claim’s validity, the state was entitled to consider that the potential that the property owner would vest the newly authorized use would

affect the property's fair market value. Finally, petitioners' argument that the state waived "health and safety" regulations exempt from Measure 37 is unpreserved and lacks merit.

### **Introduction: Overview of Measure 37**

Although not the conventional order of presentation, the state begins with an overview of Measure 37 to provide a framework for the Statement of Facts.

Measure 37, codified at ORS 197.352, was adopted through the initiative process in November 2004. Section 1 provides that a property owner is entitled to relief under Measure 37:

“[i]f a public entity enacts or enforces a new land use regulation or enforces a land use regulation enacted prior to December 2, 2004, that restricts the use of private real property or any interest therein and has the effect of reducing the fair market value of the property, or any interest therein....”

The measure does not apply to regulations adopted after the date the present owner or family member acquired the property. ORS 197.352(3)(E).<sup>1</sup> Accordingly, an owner of an interest in private real property qualifies for relief when each of several criteria is met:

(1) A public entity enforces an existing “land use regulation” or enacts or enforces a new “land use regulation” after the date when a family member of the present owner or the present owner acquired private real property or an interest in the property;

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<sup>1</sup> “Owner” means the “present owner of the property, or any interest therein.” ORS 197.352(11)(C).

(2) The land use regulation or regulations restrict the owner's use of the property or property interest, ORS 197.352(1);

(3) The land use regulation or regulations have the effect of reducing the fair market value of the property or property interest, ORS 197.352(1); and

(4) None of the exceptions included within the statute apply.<sup>2</sup>

Where these criteria are met, the government may elect which of two forms of relief will apply: government may pay just compensation, as defined by the statute, or government may elect to provide non-monetary relief by "modifying, removing or not applying" certain land use regulations, often referred to as a "waiver."

ORS 197.352(8), (10).

Two dates are significant: the earlier of the dates on which the "owner" or an owner's "family member"<sup>3</sup> acquired the property (the "compensation date"); and the date on which the present owner acquired the property (the "waiver date"). This is so because a claim for compensation may not be based on a land use regulation "[e]nacted prior to the date of acquisition of the property by the owner *or a family member of the owner* who owned the subject property prior to acquisition or inheritance by the owner, whichever occurred first." ORS 197.352(3)(E) (emphasis

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<sup>2</sup> Those exceptions are set forth in ORS 197.352(3). Briefly, the statute does not apply where the proposed use would be a public nuisance at common law; where activities are restricted or prohibited to protect public safety; to the extent that the land use regulations are required to comply with federal law; and where the regulations restrict or prohibit pornography or nude dancing, except as constitutionally permitted.

<sup>3</sup> Family member is also defined at ORS 197.352(11)(A).

added). A decision to “not apply” a regulation, on the other hand, is to allow “a use permitted at the time the owner acquired the property.” ORS 197.352(8).

Though a Measure 37 claim can arise only when a regulation is enforced, ORS 197.352(1), section 2 clarifies that the effect of that regulation on property value may be evaluated by looking at the effect either of its enforcement or of its enactment. Just compensation is defined by ORS 197.352(2): “Just compensation shall be equal to the reduction in the fair market value of the affected property interest resulting from enactment or enforcement of the land use regulation as of the date the owner makes written demand for compensation under this section.” Just compensation is due if the land use regulation continues to be enforced 180 days after the owner makes a written demand for compensation. ORS 197.352(4)<sup>4</sup>. If the land use regulation continues to apply more than 180 days after the owner makes such a written demand, the owner has a cause of action for compensation in circuit court. ORS 197.352(6). However, government also has the authority to waive the land use regulation(s):

Notwithstanding any other state statute or the availability of 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 apply [*sic*] the land use regulation or land use regulations to allow the owner to use the property for a use permitted at the time the owner acquired the property.

ORS 197.352(8). ORS 197.352(10) clarifies this authority:

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<sup>4</sup> The legislature has recently amended ORS 197.352 to change this timeline to 540 days for claims filed after November 1, 2006. HB 3546, 74<sup>th</sup> Leg. Assem. Reg. Sess (Or. 2007)

Notwithstanding the availability of funds under this subsection, a metropolitan service district, city, county, or state agency shall have discretion to use available funds to pay claims or to 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.

Thus, ORS 197.352 provides for two mutually exclusive forms of relief:

compensation, based on the reduction in value resulting from land use regulations enacted after the property was acquired by a family member of the present owner; or non-monetary relief, directed at land use regulations enacted after the property was acquired by the present owner. The choice of relief lies solely with the government.

### **The Claims Process**

The Measure 37 claims process begins when a present owner of property files a “written demand for compensation.” ORS 197.352(4).<sup>5</sup> Under DAS rules, such a claim is submitted to DAS (OAR 125-145-0030); DAS then mails notice of the claim to owners of property that is located within specific distances of the claimant’s property, other people who have requested notice, and any community or neighborhood organization whose boundaries include the claimant’s property. OAR 125-145-0080(1). Those who receive notice have 10 days in which to submit comments, evidence, or other materials to DAS. OAR 125-145-0080(2) and (3). DAS then forwards the claim and comments to the “regulating entity,” the “agency

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<sup>5</sup> DAS has adopted revised rules governing claims filed after December 4, 2006, since the requirements for such claims are different. (OAR 125-145-0010 to 0105) The claim at issue here was filed before that date.

that has enacted or enforced, or has authority to remove, modify or not to apply, the Land Use Regulation(s) identified in the Claim.” OAR 125-145-0020(13) (defining the term); OAR 125-145-0090(2) (setting forth process). For claims made against the state, the regulating entity is normally DLCD.

The regulating entity evaluates the claim and issues a draft staff report that addresses the numerous issues implicated by a Measure 37 claim, including “[w]hether any of the Land Use Regulations relied on in the Claim has the effect of reducing the fair market value of the property and the amount of any such reduction.” OAR 125-145-0100(2)(f); *see* OAR 125-145-0100(1). The draft report is forwarded to the claimant and to any commenters; additional evidence and comments are to be submitted within 10 days. OAR 125-145-0100(3). DLCD then prepares a final staff report with a recommendation as to the disposition of the claim, OAR 125-145-0100(4) and (5); the final order is issued jointly by the directors of DAS and DLCD. OAR 125-145-0100(6).

The Land Conservation and Development Commission has delegated authority to approve or deny such claims to the director of DLCD, and has determined that unless and until there is a legislative appropriation for payment of Measure 37 compensation, the agency will “not apply” state law in response to valid claims rather than pay compensation. OAR 660-002-0010(8).<sup>6</sup>

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<sup>6</sup> LCDC has also adopted rules clarifying the requirements of Measure 37 as they apply to other aspects of land use planning laws. OAR 660-041-0000 to 0050.

**Statement of Material Facts**

Petitioners' statement of material facts contains inappropriate legal argument that the state rejects. *See* ORAP 5.40(8). The state accepts petitioners' factual statements with the following supplement:

**The Bayless Claim.**

Claimants William Bayless and Della Bayless submitted their state claim on the form DAS provides for that purpose, seeking compensation for a claimed reduction in value caused by land use regulations restricting their ability to divide the property into 166 one-acre parcels and 66 2.5 acre parcels with a dwelling on each parcel. (Supp. ER 24-28, 74). The information provided showed that the property was acquired in 1946 by the Baylesses' parents and in 1961 by the Baylesses themselves. (Supp. ER 31, 38, 49-50). The Baylesses included title company information with their claim, (Supp. ER 31-33), as well as information about early zoning applicable to the property. (Supp. ER 54-73).

With respect to loss in value, the Baylesses also submitted a report from Steven B. Anderson, a consulting land use planner, regarding "the estimated value of a Measure 37 taking claim," who estimated the compensation due. (Supp. ER 74). Based on the topography of the site, and the area needed to accommodate homes, on-site septic systems, and roads, Anderson recommended a configuration of about 166 one-acre lots and 66 2.5-acre lots; full development might be less. Lots in the area had an expected sale price of approximately \$145,000. (Supp. ER 74). Comparable sales data was also included with the claim. (Supp. ER 75-77).

The state received several comments on the claim, including one from petitioner Hood River Valley Residents Committee (“HRVRC”), which asserted that the claim would negatively affect public safety and water quality, and one from petitioners Eric and Tamiko Ruhlen, who objected that development would negatively affect their property, and create traffic and health hazards. (Supp. ER 84, 93). The state also received comments from 1000 Friends of Oregon and other nearby property owners. (Supp. ER 86-89, 91).

DLCD issued a draft staff report on the claim, which took into account the single comment that was relevant to determining whether state land use regulations reduced the property’s fair market value. (Supp. ER 105). DLCDC concluded that it was “not possible to substantiate the specific dollar amount” of such a reduction, but determined that “it is more likely than not that the fair market value of the subject property has been reduced to some extent” by state regulations. (Supp. ER 105). DLCDC determined that the continued enforcement of existing land use regulations would have the effect of reducing the fair market value of the property. In making that determination, DLCDC concluded that the fair market value of the property with the state regulations enforced as to the Baylesses’ use would be less than the fair market value if the state’s regulations no longer applied to that property “or to any other properties or property interests where DLCDC has determined to not apply the State land use regulations in response to Measure 37 claims.” (Supp. ER 117).

Consistent with LCDC’s rule, rather than pay compensation, DLCDC elected to not apply existing land use regulations that restricted the Baylesses’ use of the

property and had the effect of reducing its fair market value. (Supp. ER 107).

Accordingly, DLCD did not make a precise determination of the amount of compensation that would be due had it elected to pay compensation. (Supp ER 106-07).

The Baylesses objected to the draft staff report. (Supp. ER 109-10). After reviewing that objection, the state issued a final order and final staff report approving the claim. The final order and staff report concluded that “current zoning requirements, minimum lot size and dwelling standards established by Goals 4 and 14 and provisions applicable to land zoned for forest use in ORS 215 and OAR 660, division 6, were all enacted or adopted after the claimants and the claimants’ family acquired the subject property and do not allow the desired division or development of the property.” (ER 32). Accordingly, the order provided that in lieu of compensation, the State would not apply specified land use regulations to allow a use, residential development of approximately 166 one-acre parcels and 66 2.5 acre parcels, which was allowed at the time that the Baylesses acquired the property in 1961. (ER 35).

#### **Proceedings below**

HRVRC and the individual petitioners filed a petition for judicial review under ORS 183.484, raising many of the legal issues presented here (Supp. ER 1-8), as well as arguments that division of land is not a “use” of property and that the final order was not supported by substantial evidence. (Supp. ER 9-10). The parties agreed to file cross-motions for summary judgment and also agreed to defer the issue of whether the state’s final order was supported by substantial evidence in the record, instead consolidating the case with others that presented the same legal issues. Order

Consolidating Cases on “common legal issues,” (Supp. ER 14); Respondents’ Memorandum in Oppositions to Motions for Partial Summary Judgment and in Support of Cross-Motion for Partial Summary Judgment at 7, (Supp. ER 113-14).

As it does in all circuit-court Measure 37 cases, the state filed a formal Record, consisting of six parts: (1) the DAS registry printouts for this claim;<sup>7</sup> (2) the claim submitted to the state; (3) comments, evidence or other information submitted on behalf of claimants or third parties; (4) staff reports, evidence, and information submitted by DAS and DLCD; (5) response and rebuttal submitted by claimants and third parties; and (6) the final decision on the claim, including the final order and final staff report. (Supp. ER 24-112, ER 26-36). The state also relied on the affidavit of Lane Shetterly, director of DLCD, describing the process by which DLCD makes a determination as to whether a land use regulation restricts the claimants’ use of real property and reduces its fair market value, and which had been applied in deciding the Bayless claim. (Supp. ER 115-118).

The trial court issued a lengthy letter opinion, concluding that the state’s final order on the Bayless claim was consistent with the applicable law. (ER 1 *et seq.*). The trial court then entered a limited judgment resolving all of HRVRC’s claims, with the exception of the claim that the final order was not supported by substantial

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<sup>7</sup> DAS has established an electronic registry of Measure 37 claims as a means of providing notice and information to the public. OAR 125-145-0060. Entry of information in the registry begins the comment period for third parties.

evidence. (Supp. ER 119-20).<sup>8</sup> The substantial evidence issues were abated pending the resolution of the issues in this appeal. Order, March 7, 2007, (Supp. ER 120).

### **ANSWER TO FIRST ASSIGNMENT OF ERROR**

DLCD and DAS are authorized to “not apply” state statutes in response to a valid Measure 37 claim.

#### **Preservation of error**

The state agrees that this argument was properly raised below.

#### **Standard of review**

In the First Assignment of Error, as with all of the Assignments of Error, the standard of review is for errors of law. ORS 183.500; ORS 183.484(5)(a). This standard of review bears emphasis, particularly in the Second through Fourth Assignments of Error. In these arguments petitioners appeal to concepts of rationality and fairness and the extent of the state’s “investigation,” criticizing decisionmaking that they consider “arbitrary.” They appear perhaps to be importing into review of state agency decisionmaking under the state Administrative Procedures Act a different kind of review that may apply under federal law. Here, however, the court’s task is to determine whether the state’s decision is consistent with applicable law, ORS 183.484(5)(a) and within the agency’s lawful range of discretion. ORS 183.484(5)(b), and the court interprets that law according to the familiar

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<sup>8</sup> Petitioners’ Excerpt of Record does not include the Limited Judgment; it is included in the Supplemental Excerpt to this brief.

methodology of *PGE v. Bureau of Labor and Industries* (PGE), 317 Or 606, 859 P2d 1143 (1993); *Stranahan v. Fred Meyer Inc.*, 331 Or 38, 57-61, 11 P3d 228 (2000).

### ARGUMENT

Petitioners contend that DLCD and DAS lack authority to “not apply” the “land use regulations” as provided for in the orders at issue in these cases. According to petitioners, state agencies are not authorized under Measure 37 to not apply state statutes. If petitioners are right, then the state may be subject to liability for compensation, including attorney fees and costs, whenever there is a valid Measure 37 claim based on a state statute. ORS 197.352(6).

When interpreting initiated measures, the courts seek a meaning “consistent with common sense and with the overall purpose of the Act.” *State v. Shumway*, 44 Or App 657, 662, 607 P2d 191 (1980), *aff’d* 291 Or 153, 630 P2d 796 (1981). Petitioners’ reading would turn on its head the understanding the people had when they approved Measure 37, believing that governments—including state agencies—would always have the choice between paying compensation and not applying land use regulations. A review of the text, context and history of the measure demonstrates that DLCD, DAS and other state agencies have the authority to not apply state statutes in response to a valid Measure 37 claim.

**A. The text and context of ORS 197.352 demonstrate that state agencies were intended to have authority to “not apply” state statutes.**

Section 8 of Measure 37, as codified at ORS 197.352(8), states that “[n]otwithstanding any other state statute or the availability of 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 regulations to allow the owner to use the property for a use permitted at the time the owner acquired the property.”<sup>9</sup>

Section 10 of Measure 37, as codified at ORS 197.352(10), states in part that:

[c]laims made under this section shall be paid from funds, if any, specifically allocated by the legislature, city, county, or metropolitan service district for payment of claims under this section.

Notwithstanding the availability of funds under this subsection, a metropolitan service district, city, county, or state agency shall have discretion to use available funds to pay claims or to modify, remove, or not apply a land use regulation or land use regulations pursuant to subsection (6) of this section.

Also relevant is the definition of “land use regulation,” which specifically includes:

“[a]ny *statute* regulating the use of land or any interest therein.”

ORS 197.352(11)(B)(i) (emphasis added).

Ignoring the remaining text of the statute, petitioners rest their theory on a portion of the text of ORS 197.352(8), which authorizes “*the governing body responsible for enacting the land use regulation*” to provide non-monetary relief. Petitioners argue that, with respect to state statutes, DLCD is not “the governing body responsible” for their enactment. Under this reading, only the Oregon legislature could “not apply” state statutes.

ORS 197.352(8), however, is not the only text that addresses the authority to “modify, remove, or not apply” a land use regulation in response to a claim. Section 10 also addresses that authority, and specifically provides authority to *state agencies*

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<sup>9</sup> The state uses the word “section” to refer to the various parts of  
Footnote continued...

to do so: “Notwithstanding the availability of funds under this subsection, a metropolitan service district, city, county, or *state agency shall have discretion to use available funds to pay claims or to modify, remove, or not apply a land use regulation or land use regulations pursuant to subsection (6) of this section.*” ORS 197.352(10) (emphasis added).<sup>10</sup>

In addition to section 10, other portions of the text and context of ORS 197.352 support the conclusion that state agencies are authorized to “not apply” state statutes,

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(...continued)

ORS 197.352 consistent with common parlance.

<sup>10</sup> The reference to “subsection (6)” bears discussion because it creates ambiguity. Subsection 6 creates a cause of action in court for compensation if certain conditions are met, and “pursuant to” means “in carrying out” or “in conformity with.” *Webster’s Third New Int’l Dictionary* 1848 (unabridged ed. 1993). The sentence therefore would appear to mean that “\*\*\*a metropolitan service district, city, county, or state agency shall have discretion to use available funds to pay claims or to modify, remove, or not apply a land use regulation” in carrying out -- or in conformity with -- the section of this act providing a cause of action for compensation. This sentence concerns two alternative actions a public entity may take: to pay a claim or to modify, remove or not apply a land use regulation. Yet one would not normally expect either action to be taken “pursuant to” a provision that authorizes suit when the regulation still applies. Nor does section 6 establish requirements for how government pays claims. To give meaning to that reference, it could be understood to mean once either form of relief is provided by government, a cause of action for compensation no longer exists.

Below, the state speculated that the reference could be a typographical error intended to refer to section (8), which is also possible. The reference to section 6 could relate to the payment of claims, and the act of modifying, removing or not applying a land use regulation impliedly takes place “pursuant to section 8”, the other part of the statute addressing the terms of the government option to provide non-monetary relief. In either case, sections 8 and 10 must be read together and either of these readings is consistent with a reading under which state agencies have authority to waive state statutes.

because they demonstrate that state agencies are intended to be subject to and process claims.

First, the text of the measure specifies those “public entities” that are potentially subject to a claim under ORS 197.352(1) because they enact or enforce land use regulations. “Public entity” is defined in section 11(D) to include “*the state*, a metropolitan service district, a city, or a county.” (Emphasis added) Moreover, as noted above, the definition of “land use regulation,” which forms the basis for claims, includes state statutes. ORS 197.352(7) then provides for the possibility of “state agency” procedures for processing of claims.

Thus, ORS 197.352 contemplates that state statutes on their own could serve as the basis for a claim under the measure, and that “the state”—the “public entity” that enacted the statute—is subject to a potential claim for just compensation if a public entity “enforces” an existing statute or “enacts” or “enforces” a new one. Under petitioners’ reading, in the case of state statutes, this process would lead invariably to state monetary liability, without any state agency option to avoid that liability through alternative relief. Petitioners’ reading is inconsistent with the structure of the statute as a whole. If the intent of the measure were to require state agencies to pay and process claims and to foreclose the agencies from exercising the “waiver” alternative to paying claims, one would expect the measure to say so clearly. It does not.

Moreover, if the legislature were the only state entity with authority to “not apply” state statutes, the timelines of Measure 37 would not work. As enacted, sections 4 and 6 provided claimants a cause of action for compensation if a land use

regulation continues to apply 180 days after a claim is filed. The Oregon Constitution provides for biennial legislative sessions. Or Const, Art IV, § 10. Accordingly, if the legislature were the only entity authorized to waive state statutes, even the legislature would be foreclosed from avoiding liability as to numerous claims: those claims filed such that the timeline – 180 days in some cases, and 540 days in others -- already will have run before the legislature goes into session. It would be a radical result to conclude that the measure impliedly required continual special legislative sessions to respond to Measure 37 claims.

Indeed, if petitioners' theory were correct, the term "not apply" in sections 8 and 10 would have no application at all in the case of state statutes. That is so because, irrespective of Measure 37, the state legislature already has authority to amend or repeal ("modify" or "remove") state law. Unlike a state agency, the legislature needs no additional authority to "not apply" state laws. This context also suggests that petitioners' reading is wrong.

Finally, it is significant that Measure 37 was expressly placed in chapter 197.<sup>11</sup> The people surely intended to authorize DLCD, the state agency responsible for formulating and implementing a statewide land use planning program, which includes ORS chapter 197, to "not apply" the laws that it is charged with implementing.<sup>12</sup>

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<sup>11</sup> Measure 37, as enacted, provided: "[t]he following provisions are added to and made a part of ORS chapter 197."

<sup>12</sup> These laws also include Chapters 215 (counties) and 227 (cities). *Lane County v. LCDC*, 325 Or 569, 583, 942 P2d 278 (1997).

**B. The term “governing body” in Section 8 refers to local governments.**

The reference to “governing body” in section 8 is best understood as a reference to local governments, not as a reference to one branch of state government. Thus, contrary to petitioners’ argument, section 8 does not suggest that because only the state legislature is “responsible” for enacting state statutes, state agencies lack authority to “not apply” state law. Section 1 of Measure 37—the provision setting forth the requirements that trigger the right to compensation—uses the phrase “public entity” to describe the body that “enacts” or enforces land use regulations. Section 11(D) defines “public entity” as “the state, a metropolitan service district, a city, or a county.” The measure could have used the phrase “public entity” instead of “governing body” in section 8, but it did not. The language in section 8 also differs from the language used in section 10, which refers to “a metropolitan service district, city, county, or state agency.” Thus, “governing body” must mean something different from the terms in section 11(D) and section 10.

Moreover, the term “governing body” or “governing bodies” is used throughout ORS chapter 197 to refer to the governing bodies of local governments.<sup>13</sup> Thus, interpreting the use of “governing body” in section 8 to refer only to local governments gives effect to the differences in language used in sections 1, 8 and 10. Section 1 “public entities”—local governments and the state—are subject to claims

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<sup>13</sup> ORS 197.015, 197.065, 197.160, 197.195, 197.299, 197.365, 197.370, 197.395, 197.430, 197.445, 197.480, 197.540, 197.615, 197.719, 197.763, and 197.815. There is one exception in the chapter’s general policy statement, ORS 197.010.

for compensation, section 8 allows the “governing body responsible for enacting” the land use regulation (county, city, or metro) at the local level to waive application of a regulation it enacted, and section 10 refers to a broader waiver authority that includes a state agency’s authority to not apply a land use regulation and also addresses the source of funding to pay claims.

Petitioners attempt to counter this reading by noting that ORS 197.352(9) excepts section 8 decisions by “governing bodies” from the category of “land use decisions” appealable to the Land Use Board of Appeals. Thus, petitioners argue, the exclusion of state agencies from the “governing bodies” to which section 8 applies results in state agency decisions, unlike local-government decisions, being subject to appeal to the Oregon Land Use Board of Appeals (LUBA). Petitioners conclude that this result can be avoided only by interpreting section 8 “governing bodies” to include state agencies. That argument fails, because state agency decisions are already excluded – independently of ORS 197.352 – from the category of “land use decisions” appealable to LUBA. That is because the definition of “land use decision” in ORS 197.015 already excludes decisions of LCDC and DLCD.<sup>14</sup> Accordingly, the text of section 9 is not inconsistent with the state’s reading of section 8.

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<sup>14</sup> The term “land use decision” is defined in ORS 197.015(11)(a)(B) with regard to state agencies as: “A final decision or determinations of a state agency other than [LCDC] with respect to which the agency is required to apply the [statewide land use planning goals]\* \* \*”

### C. Petitioners' Textual Arguments Fail

Reading section 8 and 10 with other portions of the text demonstrates that state agencies have authority to “not apply” state statutes. Petitioners offer several arguments about the text of context of ORS 197.352, none of which provides a reason for rejecting the state’s analysis of the statute as a whole. First, petitioners argue that if section 10 is the source of state agency waiver authority, then section 8 is superfluous. Although the two sections could doubtless be more elegantly drafted, the state’s construction gives meaning to all the sections. ORS 174.010. Petitioners also contend that Section 8 limits the state’s authority, and that section 10 simply refers back to that limitation. (Appellant’s Brief, hereinafter App Br 20-22). If that were true, however, Section 10’s explicit reference to “state agencies” would make no sense.

Under petitioners’ reading, section 10’s reference to “state agencies” only provides state agencies with authority to “not apply” the land use regulations that state agencies enact, which are goals and rules. There are at least two flaws in this interpretation. First, if the governmental entities listed in section 10 were identical to the “governing bodies” referred to in section 8, there would be no reason for sections 8 and 10 to use different terms.<sup>15</sup> Second, petitioners’ argument ignores the text of the statute as a whole. If state agencies could not apply land use planning goals and rules but did not have the choice to not apply associated statutes, claimants would not

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<sup>15</sup> In interpreting the measure, differences in terms should be treated as having significance. *See Armatta v. Kitzhaber*, 327 Or 250, 262, 959 P2d 49 (1998).

obtain the relief they are seeking – because statutes restricting the same use of property would still apply despite state agency non-application of goals and rules implementing those statutes. The authority to not apply goals and rules would have no meaning. In the Bayless claim, for example, claimants sought relief to allow residential development. If DLCD were not authorized to not apply the statutes it implements, then the order could lawfully only have not applied Goals 4 (forest land) and 14 (urbanization) and Oregon Administrative Rules Chapter 660, division 6, all restricting the ability to subdivide property, but could not have not applied ORS chapter 215. If the statute stated plainly that state agencies could only waive goals and rules, that would be one thing. But it does not.

Although petitioners' argument is not entirely clear, they also seem to contend that if Section 10 authorizes state agencies to waive state statutes, then limitations in Section 8 on which land use regulations other governments could waive would not apply. (App Br 21). Under section 8, local governments are only authorized to waive land use regulations they are "responsible for enacting"; so they cannot waive state law. But Section 10 does not change that limitation in section 8; rather section 10 provides supplemental authority for state agencies to not apply state law.<sup>16</sup>

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<sup>16</sup> Petitioners contend that the Oregon Supreme court's decision in *MacPherson v. DAS*, 340 Or 117, 134-135 (2006) says otherwise. (App Br. 21) However, the quotation from that case supports the state's view. The court was not addressing the question presented here. And although the court specifically referenced Section 8 in discussing waiver authority as not concentrating legislative authority in the executive branch, the court goes on to suggest that a *state agency* may choose between compensation and waiver.

**D. As a waiver of the state's sovereign immunity, ORS 197.352 must be strictly construed.**

At the textual level of statutory analysis, the court considers judicial rules of construction. *PGE*, 317 Or at 611. Particularly relevant here is the rule that waivers of sovereign immunity are to be strictly construed. *See e.g., Schrader v. Veatch*, 216 Or 105, 107, 337 P2d 814 (1959). By providing a cause of action against the state in compensation, in ORS 197.352 the people waived the state's sovereign immunity. *MacPherson v. DAS*, 340 Or at 138 (holding the waiver of sovereign immunity to be constitutional). If petitioners' reading were correct, state agencies would have no choice in response to claims based on state statutes but to incur monetary liability. The court should not read the statute to limit the state's options in such a way, when an alternative reading provides the state with the ability to avoid a cause of action for money. The state's reading gives effect to the requirement to strictly construe waivers of sovereign immunity.

**E. The history of ORS 197.352 confirms that state agencies were intended to have authority to "not apply" state statutes.**

A review of the history of ORS 197.352 also demonstrates that the people intended state agencies to have authority to "not apply" state statutes. The ballot title caption for Measure 37 stated: "Governments must pay owners, or forgo enforcement, when certain land use restrictions reduce property value." (ER 10). The ballot title summary elaborated: "when state, city, county, metropolitan service district enacts or enforces land use regulation that restricts use of private real property or interest thereon, government must pay owner reduction in fair market value of affected property interest, or forgo enforcement. Governments may repeal, change, or

not apply restrictions in lieu of payment.” (ER 10). The explanatory statement indicates that “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.” (ER 10). There is no hint that the option to forgo enforcement would not be available to state agencies.

Moreover, the voters’ pamphlet arguments assumed that state agencies would be able to choose not to apply state statutes. For example, the Argument in Favor submitted by the Taxpayer Association of Oregon stated: “When state or local governments pass new regulations that lower property values, everyone loses. . . . On the other hand, when *state or local governments give property owners freedom to use their property, everyone wins.*” (ER 24; emphasis added). Such statements indicate that voters assumed state agencies would always be able to “give property owners freedom to use their property” by “not applying” land use regulations. (ER 24). *See also* Argument in Favor, State Legislators, “By allowing *state and* local government to return the property rights they have taken from Oregonians instead of paying compensation....” (ER 14; emphasis added). The people are not likely to have believed legislation was needed to give the legislature, but not state agencies, the authority to change state law.

In sum, the state’s reading – which recognizes that state agencies may choose to not apply state statutes rather than to pay compensation – fits the statutory text and is consistent with the measure’s structure and the evidence of the people’s intent. Unlike petitioners’ reading, the state’s reading harmonizes the text of the statute,

including provisions that clearly: authorize claims based on state statutes; provide that state agencies may “not apply” land use regulations; and locate the measure within the statutory chapter containing the statutes governing the statewide land use planning program.

### **ANSWER TO SECOND ASSIGNMENT OF ERROR**

The method the state used to determine that land use regulations have had the effect of reducing fair market value of property is permissible under ORS 197.352.

#### **Preservation of error**

The state agrees that appellants preserved their argument that the state erred in determining that land use regulations reduced the fair market value of the Bayless property.

#### **Standard of review**

This court reviews *de novo* for errors of law.

### **ARGUMENT**

William Bayless and Della Bayless have owned over 300 acres of forest land near Hood River, Oregon, since the early 1960s. There is no dispute that state land use regulations prevent the Baylesses from dividing that forest land into 1.0- and 2.5-acre lots for residential development. After analyzing the Bayless claim, including the plan for 166 residential lots and the comparable-sales evidence regarding the price for which those lots might be expected to sell, the state determined that land use regulations that prohibit the development “more likely than not have reduced the fair market value of the subject property to some extent.” (ER 33). The question presented by the second through fourth assignments of error is whether the state erred

as a matter of law in reaching that conclusion and in determining what regulations to “not apply” in lieu of monetary compensation.

**A. Introduction: the Measure 37 valuation issues**

Two parts of Measure 37 involve consideration of real property’s fair market value. First, a property owner may have a valid Measure 37 claim if certain land use regulations have restricted the owner’s use of the property, with “the effect of reducing the fair market value of the property \* \* \*.” ORS 197.352(1). Second, if the government responsible for the restrictive land use regulation chooses to pay “just compensation” instead of not applying, modifying or removing the regulation, it must determine “the reduction in the fair market value \* \* \* resulting from enactment or enforcement of the land use regulation” and pay that sum to the claimant.

ORS 197.352(2).

Petitioners argued below, and seem to argue again here in conjunction with their third assignment of error, that the state always must determine a specific amount by which a land use regulation has reduced the property’s fair market value. Thus, petitioners contend, the state was required to determine whether its land use regulations have reduced the fair market value of the Bayless property by nearly \$30 million, as the Baylesses claim, or by some different amount, rather than determining whether there has been *some* reduction in value. The state explains in Section B below why that is not the case. The focus of petitioners’ second assignment of error is their more general argument that as a matter of law the state used an incorrect method to determine whether the relevant regulations reduced the Bayless property’s

fair market value. The state responds to that contention in sections C through E below.

**B. The state need determine only whether property's fair market value has been reduced; it need not calculate the amount of that reduction.**

To date, the state has not chosen to pay just compensation on a valid Measure 37 claim; instead, it always has elected to "not apply" regulations to claimants' use of the property, as sections 8 and 10 allow.<sup>17</sup> Accordingly, the state has not had occasion to determine "*the* reduction in fair market value" associated with a regulation's enactment or enforcement, which would be required if the state were going to pay monetary compensation. ORS 197.352(2) (emphasis added). Instead, the only valuation analysis the state has needed to undertake is associated with determining whether a Measure 37 claim is valid because land use regulations have had "the effect of reducing the fair market value of the property." ORS 197.352(1). A regulation has that effect if it reduces a property's value by any amount; thus, a Measure 37 claim may be valid if land use regulations have caused *any* reduction in property's fair market value. Accordingly, the state's evaluation of the Bayless claim involved analyzing only whether some reduction in property value has occurred, not the magnitude of that reduction. The state first determined that land use regulations that prevent the Baylesses from dividing their property into residential lots have the effect of reducing the property's fair market value "to some extent." (ER 33). The state then decided to "not apply" those regulations to the Baylesses' use of the property

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<sup>17</sup> As noted above, in the case of claims involving LCDC regulations, LCDC has adopted a rule choosing that alternative. OAR 660-002-0010(8).

instead of paying just compensation; accordingly, it did not engage in the pointless exercise of calculating the amount of “just compensation” it would have had to pay the Baylesses if it had chosen that form of relief.

**C. Public entities may evaluate the fiscal effect either of a regulation’s enactment *or* of the regulation’s enforcement in analyzing whether a Measure 37 claim is valid.**

Petitioners contend that the state incorrectly evaluated the effect that land use regulations have had on the fair market value of the Bayless property. The state’s practice in evaluating Measure 37 claims, which the state followed in this case, is to compare the current value of the property -- with the land use regulations enforced -- with the value the property would have if the relevant regulations no longer applied to that property and to other properties with respect to which the state has granted Measure 37 waivers. As Director Shetterly’s affidavit explained:

In determining that relief under Measure 37 would be appropriate on [the Measure 37] claims, DLCDC determined that continued enforcement of existing land use regulations would have the effect of reducing the fair market value of each claimant’s property interest. In making that determination, DLCDC concluded that the fair market value of the claimant’s property interest *with the State land use regulations continuing to apply* would be less than what the fair market value of the claimant’s property interest would be *if the State’s land use regulations no longer applied* to the claimant’s property interest or to any other properties or property interests where DLCDC has determined to not apply the State land use regulations in response to Measure 37 claims.

(Supp. ER 117; emphasis added). In other words, the state considers how the ongoing enforcement of state land use regulations affects a property’s fair market value.<sup>18</sup>

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<sup>18</sup> In section D of this argument, the state discusses how it enforces state land use regulations on an ongoing and continual basis, not only when it takes specific enforcement actions with respect to particular properties.

Petitioners contend that the state erred as a matter of law by following this practice in evaluating the Bayless claim. Their criticism focuses on the state's decision to consider whether current *enforcement* of land use regulations reduced the property's fair market value. Instead, petitioners argue, the state was required to consider whether the property's value decreased immediately following the *enactment* of the relevant regulations:

A rational and informed assessment of the fair market value means that the State Agencies must determine the value of the property before and after the change, discounted for what is personal to the owner and then appropriately translated into today's dollars.

(App Br 31).<sup>19</sup>

In the state's view, Measure 37 gives governments discretion to consider the effect either of a regulation's enforcement or of the regulation's enactment in evaluating whether a reduction in value has occurred. Section 1 of the statute – which describes when a Measure 37 claimant may be entitled to relief – provides that a claimant must establish that a public entity has enforced a “land use regulation \* \* \* that \* \* \* has the effect of reducing the fair market value of the property.”

ORS 197.352(1). Although section 1 refers to enforcement as a condition precedent to relief, section 1 does not state that “enforcement” must cause the reduction in value, instead it provides that “the land use regulation” must do so. Section 1 does not further explain how to determine whether a land use regulation has reduced a

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<sup>19</sup> See also App Br 28 (“A formula that looks at market transactions to measure a ‘reduction in fair market value’ at the time the land use laws went into  
*Footnote continued...*”)

property's fair market value; however, it does state that such a reduction in value gives rise to a claim for "just compensation." Section 2 then defines that term as follows:

Just compensation shall be equal to *the reduction in the fair market value of the affected property interest resulting from enactment or enforcement of the land use regulation* as of the date the owner makes written demand for compensation under this section.

ORS 197.352(2) (emphasis added). Thus, even though a Measure 37 claim can arise only when a regulation is enforced, ORS 197.352(1), section 2 clarifies that the effect of that regulation may be evaluated by looking at the effect either of its enforcement or of its enactment.

Petitioners ask this court to ignore the word "enforcement" as it is used in section 2 of the statute, and insist that the only fair valuation method is one based on the reduction in value that occurred when a land use regulation was enacted. (*See, e.g., App Br 30-31*). But this court may not overlook certain words in a statute to reach a result that some people view as more equitable than what the statute actually says. Nor can petitioners' contention that the voters did not intend governments to consider the fiscal effect of enforcement override inclusion of the word "enforcement" in section 2. *See* ORS 174.010 (in construing a statute, a court must not "omit what has been inserted"); *State v. Jansen*, 198 Or App 260, 265 n 3, 108 P3d 92 (2005) ("When confronted with a conflict between what the legislative history

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(...continued)

effect is faithful to the text of the statute"); App Br 30 (petitioners describe their valuation method as "updat[ing] the past reduction in value").

indicates the drafters intended and what they actually wrote, we are bound to disregard their stated but unrealized intention”).

Petitioners also complain that the state impermissibly relied on “hypothetical” and “speculative” assessments of what the value of the Bayless property currently would be if land use regulations did not apply. (App Br 29-32). But some level of uncertainty is associated with any method of determining whether a land use regulation has reduced the fair market value of a property. In considering the effect of a regulation’s enforcement on property value, the state evaluates an event that has not happened and may never happen – a sale following the non-application of regulations to the claimant’s use of property; petitioners’ alternative method would require evaluation of something that could have happened in the past, but did not – a sale of the claimant’s property immediately before and after the regulations were enacted. Neither analysis can provide absolute certainty about how regulations have affected property’s fair market value. But the state’s consideration of the effect of ongoing enforcement allowed it to make the only valuation determination that Measure 37 requires for government to “not apply” a land use regulation: that regulations preventing the Baylesses from subdividing their property for residential development have reduced the property’s value to *some* extent.

Petitioners’ view is also undermined by the fact that all governments evaluating Measure 37 claims, including *amicus curiae* Metro, have decided to consider the effect of regulations’ enforcement, at least so far as the state is aware. In its *amicus* brief, Metro details the enforcement-based analyses it has used and

explains that because enforcement occurs over time, there may be different points in time at which reduction in value properly can be measured, depending on the nature both of the regulation and of the enforcement at issue. (Metro Br 7-9). The state agrees and believes Metro has acted within its discretion in choosing sometimes to measure the effect of enforcement in a way similar to the state, comparing current property values to what those values would be if the regulations were repealed,<sup>20</sup> and sometimes to measure the effect that enforcement had at some time in the past, such as just after enactment. In this respect, the state and Metro both disagree with the analysis in the circuit court's letter opinion, which states that a public entity "is *required* to consider whether the value of the property without the applicable regulation would be different from the value of the property with the regulation." (ER 4; emphasis added).

The state and Metro do disagree on one narrow point. The state reads section 2 *also* to permit governments to consider the effect of a regulation's enactment in deciding whether a Measure 37 claim is valid, *i.e.*, gives rise to a claim for just compensation, because it establishes how the amount of just compensation is measured: "the reduction in the fair market value of the affected property interest

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<sup>20</sup> Metro describes this method as comparing "today's fair market value of the property with the regulation in place to today's fair market value with the regulation repealed, removed from *all properties* as if it had never been enacted." (Metro Br 9; emphasis in original). The state's practice is the same, except that the comparator is today's market value with the regulation applied neither to the claimant's property nor to "any other properties or property interests where DLCDC has determined to not apply the State land use regulations in response to Measure 37 claims." Affidavit of Lane Shetterly. (Supp. ER 117).

resulting from enactment or enforcement of the land use regulation.”

ORS 197.352(2). Metro contends that the word “enactment” in that definition applies only when a government considers the effect of land use regulations enacted after December 2, 2004. The state disagrees. Section 1 distinguishes between pre- and post-December 2004 regulations only in specifying the event that may trigger a Measure 37 claim: enforcement in the case of existing regulations; enactment in the case of new regulations. The state does not believe that distinction also applies to evaluation of the regulation’s effect; section 2 – which explains how a government determines whether a reduction in value has occurred – includes no such limitation.

**D. The state may consider the fiscal effect of its ongoing enforcement in determining whether land use regulations have reduced the fair market value of affected property.**

Although petitioners do acknowledge that the state’s post-enactment enforcement of land use regulations may have some significance in certain circumstances, they contend that no enforcement of state regulations occurred in this case. In their view, therefore, the state could not consider whether the regulations’ enforcement reduced the fair market value of the Bayless property.

According to petitioners, enforcement occurs only when the state denies a permit or initiates an ORS 197.320 “enforcement action” against a local government that is not complying with the statewide goals or its own acknowledged plan provisions. (*See* App Br 25-27). Petitioners’ argument overlooks the broad meaning of the term “enforce” that is reflected in the text of Measure 37 and the context of ORS chapter 197. Measure 37 does not include a definition of that word, so analysis may begin with Webster’s definition: “to put in force: cause to take effect.”

*Webster's Third New Int'l Dictionary* 751 (unabridged ed. 1993). "Enforce refers to requiring operation, observance or protection of laws, orders, contracts, and agreements by authority, often that of a whole government or of its executive or legal branches." *Id.* Thus, the ordinary meaning of the verb "enforce" is to "put into force" or to "require observance of" something.

The state "enforces" land use planning laws in that somewhat generalized way, by generally "requiring observance of" the laws. It is true that the state and other public entities sometimes "enforce" land use regulations directly against specific property, as when requiring compliance with a regulation through direct judicial or administrative action<sup>21</sup>, or when denying an application for a land-use permit. But "enforcement," in the statewide land use planning context, is not limited to property-specific government actions to compel compliance. Rather, the state also "requires observance" of land use regulations, like statewide planning goals and provisions of ORS chapter 215, by, for example: 1) conducting periodic review to ensure that county and city comprehensive plans and land use regulations implement state law (ORS 197.628 *et seq.*); 2) filing Land Use Board of Appeals ("LUBA") appeals when local governments do not fulfill their obligations (ORS 197.610 to 197.625 and 197.805 *et seq.*); and 3) taking other actions to carry out the statewide land-use program (*see, e.g.,* ORS 197.319 *et seq.* re: LCDC enforcement order authority).

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<sup>21</sup> *See, e.g., Clackamas County v. Marson*, 128 Or App 18, 22, 874 P2d 110, *rev den*, 319 Or 572 (1994) (ORS 197.825(3)(a) enables local governments and the public to compel compliance with local land use regulation through an action in circuit court).

These efforts by the state result in the continual enforcement of land use regulations against real property throughout Oregon.<sup>22</sup>

This case illustrates how enforcement occurs in the land use context. As explained in the final order on the Bayless claim, Hood River County has zoned the Bayless' property "F-1," as required by Goal 4 and its implementing statutes and regulations, which require that forest land be zoned for forest use. (ER 32).<sup>23</sup> The state has enforced those laws ever since they were enacted by ensuring that Hood

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<sup>22</sup> This kind of enforcement applies to enforcement by LCDC and DLCD of statewide land use planning laws like those at issue in the Bayless claim. Enforcement of other "land use regulations" such as Oregon's Removal-Fill law, ORS 196.795-196.990, may require the type of specific action that petitioners describe.

<sup>23</sup> The final order provides, in pertinent part:

The claim is based generally on Hood River County's current F-1 zone and the applicable provisions of state law that require such zoning. The claimants' property is zoned F-1 as required by Goal 4, in accordance, with ORS 215 and OAR 660, division 6, because the claimants' property is "forest land" under Goal 4. Goal 4 became effective on January 25, 1975, and requires that forest land be zoned for forest use \* \* \*. The forest land administrative rules (OAR 660, division 6) became effective on September 1, 1982, and ORS 215.705 to 215.715 and 215.780 became effective on November 4, 1993 \* \* \*. OAR 660-006-0026 and 660-006-0027 were amended on March 1, 1994, to implement those statutes.

Together, ORS 215.705 to 215.755 and OAR 660, division 6, enacted or adopted pursuant to Goal 4, prohibit the division of forest land into parcels less than 80 acres and establish standards for development of dwellings on existing or proposed parcels on those lands.

Goal 14 also became effective on January 25, 1975, and would likely apply to the division of the claimants' property into parcels of less

*Footnote continued...*

River County properly zoned properties, by periodically reviewing the county's comprehensive plan for compliance with state law, and by standing ready to take action if the county allowed the Baylesses to divide their property or otherwise put it to other than forest uses.

The text of Measure 37 is consistent with the term "enforcement" in this broader sense. In explaining when just compensation is due, the statute equates the phrases "land use regulation continues *to apply* to the subject property" and "land use regulation continues *to be enforced* against the property," ORS 197.352(6), (4) (emphases added). Thus, a land use regulation is enforced against a property when it continues to apply to the property. Just as "continues to apply" suggests the possibility of ongoing application of the regulation, so "continues to be enforced" suggests the possibility of ongoing enforcement. With respect to the statewide land use planning goals, that application and enforcement continue so long as the state maintains its statewide land-use planning efforts.

Section 7 provides additional support for this interpretation:

[N]or shall the failure of an owner of property to file an application for a land use permit with the local government serve as grounds for dismissal, abatement, or delay of a compensation claim under subsection (6) of this section.

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(...continued)

than two acres in size. Goal 14 generally requires that land outside of urban growth boundaries be used for rural uses.

(ER 32).

ORS 197.352(7). This clause explicitly contemplates that a valid Measure 37 claim may exist even when the owner has not applied for a land-use permit and the local government has not, therefore, taken any property-specific measures to enforce the law that requires that permit. And because a Measure 37 claim can exist only when land use regulations are “enforced” against an owner’s use of property, ORS 197.352(1), it necessarily follows that “enforcement” may occur in the absence of any government action taken specifically with respect to a particular property. In other words, enforcement that happens in the absence of a land-use application may give rise to a valid Measure 37 claim.

Petitioners argue for a much narrower definition of “enforcement” to further their contention that the state has incorrectly evaluated whether land use regulations have reduced the fair market value of real property. But the implications of their argument reach much farther. Section 1 of Measure 37 provides that a property owner may have a valid claim based on an existing land use regulation *only* if the state “enforces [that] land use regulation” in a way that restricts the owner’s use of the property. ORS 197.352(1). If petitioners are correct that “enforcement” of statewide land use planning laws does not occur on a continual basis, but occurs only when the state takes specific enforcement actions, then there is no basis for many of the thousands of Measure 37 claims that have been submitted to the state, seeking relief from ongoing enforcement of the statewide land use planning laws. The voters who approved Measure 37 cannot have contemplated that Measure 37 would be so limited.

**E. Petitioners' reliance on constitutional takings jurisprudence is misplaced.**

Petitioners rely far more heavily on constitutional-takings cases than they do on Measure 37's text. (*See e.g.*, App Br 25). The cases petitioners cite are inapposite for two reasons. First, they are based on a judicially-developed doctrine regarding the compensation that the constitutions require governments to pay when they physically take property or otherwise prevent the property owner of making any economically viable use of it. Measure 37 does not arise from constitutional takings principles. To the contrary, it creates a statutory cause of action for monetary compensation in precisely those circumstances in which the government's regulation of land does *not* rise to the level at which compensation would be constitutionally required. *See* ORS 197.352(12). Because constitutionally-recognized injuries differ from those that may give rise to Measure 37 claims, it is unsurprising that the statutory remedies also differ from those required by the constitutions. Second, Measure 37's explicit definition of "just compensation" should dispel any temptation to rely on cases that might otherwise be helpful if the statute did not define that term.

**ANSWER TO THIRD ASSIGNMENT OF ERROR**

The state is not authorized or required to limit the scope of waiver relief based on the amount of compensation that would otherwise be paid.

**Preservation of error**

The state agrees that appellants preserved their argument that the state erred in the scope of relief provided.

**Standard of review**

This court reviews *de novo* for errors of law.

## ARGUMENT

Petitioners claim that the trial court erred in concluding “that a waiver granted pursuant to ORS 197.352 does not need to be proportional to the compensation due to a claimant under the statute.” (App Br 6). In particular, petitioners contend that “the State Agencies have issued an order that provides for the waiver of land use laws without any investigation into whether the waiver is commensurate with the just compensation due to the claimants.” As framed on appeal, this argument seems to have two parts: first, that the waiver should be proportional to the compensation that would otherwise be due; second, that the state has failed to adequately “investigate.”

With respect to the second part, petitioners base much of their argument on the premise that the state has issued waiver orders without determining that there has been an actual loss in value. (App Br 38-41). That is simply not the case. In fact, before the state waives any regulation, the state must first find that the claim is valid. This determination entails a finding that a reduction in value was caused by enforcement or enactment of the regulation. Accordingly, in the order at issue here, DLCDC reviewed the evidence submitted in support of the claim, and concluded that although “it was not possible to substantiate the specific dollar amount” of the reduction in value caused by the regulations restricting the claimants’ ability to subdivide the property, “it is more likely than not that the fair market value of the subject property has been reduced to some extent.” (ER 33). Petitioners may quarrel with the way in which DLCDC made that determination, which is addressed above in response to the Second Assignment of Error, but it is simply not true to say the determination was not made at all.

Petitioners' argument may be based on the "more likely than not" language in the order. If so, petitioners confuse the *burden of proving a loss* in value with the *existence of a finding of loss* in value. As with any factfinder's conclusions, the state's findings are based on a certain weight of evidence. The state considered whether evidence of loss of value met the preponderance of evidence standard -- "more likely than not" -- the appropriate standard for findings in administrative proceedings. That is not the same as making no finding of loss of value.

The remainder of petitioners' argument appears to be that the state did not relate the regulation "not applied" to the *amount* of value lost. Petitioners' argument is not entirely clear. Below, petitioners argued that, when government elects to "not apply" a land regulation rather than pay compensation, Measure 37 requires the State to not apply regulations to permit some use that is proportionate to the loss in value of the claimant's property rather than the use on which the claim is based. According to this view, the state would have the right to determine what use to allow when granting relief. On appeal, petitioners deny that they contend that "the state must choose a use that is contrary to the claimant's request." They go on to say: "however, the State Agencies cannot approve a request that exceeds the just compensation due to the Claimants. The burden is on the Claimant to [identify] with a supporting evidence of valuation that a proposed request to the State to not apply land use regulations is commensurate with the just compensation due to them." (App Br 41, n 10). Thus petitioners appear to contend that the state is not authorized to not apply the regulations complained of, but instead is to waive regulations in some other —