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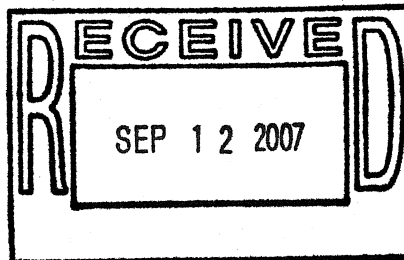
Judge Gary S. Thompson

Judge George W. Neilson
Presiding Judge

Judge Daniel J. Ahern

Twenty-Second Judicial District Trial Courts

September 10, 2007



Mr. Edward P. Fitch
Attorney at Law
P.O. Box 457
Redmond, OR 97756

Ms. Darsee Staley
1209 SW 6th Ave. #305
Portland, OR 97204

Re: Hudspeth v. State of Oregon
Crook Co. Circuit Court Case No. 07-CV-0046

*Please note the correction on
pg 4*

Dear Counsel:

Plaintiff in the case at bar filed an Amended Motion for the issuance of a Preliminary Injunction under ORCP 79. Plaintiff has based her motion upon a claimed violation of her civil rights as alleged in the Sixth Claim for Relief. In particular, Plaintiff seeks alternative orders: 1) "...enjoining the Defendant from limiting the scope of Plaintiff's use as of 1966 or applying statewide Planning Goals 3, 5, 11 and 14 to plaintiff's land use application before the Crook County Development Department...", or...2) [that] "...the court...order defendant to hold a hearing concerning her Measure 37 claim by September 1, 2007, with an amended order to follow within 10 days ...". Amended Motion, pg. 10, line 10-15 This letter expresses the ruling of this court.

FACTS

Plaintiff has continuously owned a 295.18 acre parcel of land in Crook County, Oregon since 1965. Any relevant disputed land use regulations were passed after Plaintiff's date of acquisition.

On April 19, 2006, Plaintiff filed a claim for compensation with the State of Oregon for the parcel she owned. Plaintiff filed a similar claim with Crook County. (Declaration-Carmel Bender- Ex. 202, pgs. 2, 3) On June 12, 2006, a final order was entered by the Department of Land Conservation and Development. (hereinafter DLCD) The order, in part, provides:

“...In lieu of compensation under ORS 197.352, the State of Oregon will not apply the following laws to Shelley Hudspeth’s division of the subject 295.18 acre property into approximately fifty-nine 5 acre parcels or to her development of a dwelling on each parcel: Goal 3, ORS 215, and OAR 660, division 33. These land use regulations will not apply to the claimant only to the extent necessary to allow her to use the property for the use described in this report...”. (Exhibit 6 DLCD Record)

Plaintiff did not request a contested hearing prior to the final order above described. Also, she did not appeal the final order. In the Measure 37 process before the County a similar “waiver” was granted.

Subsequent to procuring the “waivers”, Plaintiff applied to Crook County authorities for the opportunity to create a subdivision. During the time the application has been pending, Plaintiff’s proposed uses have undergone a metamorphosis. The forms of proposed uses have included: 1) 80 lots on 325 acres (Exhibit 106, Gonzales Declaration); 2) 65 lots on 295.18 acres (Exhibit 204, Bender Declaration, pg. 2) and, 3) the present application-a 59 lot planned unit development on 295.18 acres (Fitch affidavit, pg. 2; Exhibit 4; and Proposed Findings of Fact-Exhibit 20 Bender Declaration). The present proposed use would include: 1) lots that vary from 2 acres to 4.37 acres; 2) open spaces, a clubhouse, stables and a community picnic area; and 3) a community water system with two reservoirs.

Other events have occurred during the processing of the land use applicants. On November 15, 2006, Plaintiff filed a second Measure 37 claim on the same parcel wherein she sought to create a 65 lot use on the parcel. The new claim has not been processed despite repeated requests. On August 8, 2007, Plaintiff’s counsel demanded DLCD conduct a due process hearing for Plaintiff. (Pl. Am Motion-Ex 5) On August 15, 2007, DLCD representative, Michael Morrissey, informed Crook County Development by letter that the proposed 59 lot planned unit development was “...inconsistent with the review and resulting authorization made by the department in its waiver ...”. Also, he expressed concern about the application of Goal 11. (Bender Declaration, Ex. 207)

DECISION

ORCP 79 provides authority for this court to issue a preliminary injunction. Subject to the correct application of the appropriate legal standards, the issuance of a preliminary injunction is within the sound discretion of the trial court. State ex rel Keisling v. Norblad, 317 Or 615 (1992)

For the purposes of this case the Court will assume the State is a person under 42 USC § 1983 subject to potential injunctive relief.

Both parties point this Court to federal case law and assert the law will assist this Court in the application of ORCP 79. These recognized principles require a moving party to demonstrate that irreparable harm will be suffered by the party if no preliminary relief is granted and that the “balance of hardships” favors the relief. Sammartano v First Judicial District Court, 303 F2d 959 (9th Cir. 2002) Sammartano goes on to inform this court that if the moving party is 100% right upon the merits, then no balancing of the hardships is necessary. However, if the chance of success declines, then the demonstration of irreparable harm and balancing of hardships must correspondingly increase. Sammartano, supra at 972.-73

Plaintiff initially asks this Court to “enjoin” DLCD from “limiting the scope of Plaintiff’s use” and to prohibit it from applying statewide planning goals to Plaintiff’s land use application. To enter such an order would be sweeping in its scope and application.

The only land-use regulations which are subject to “waiver” are those adopted: 1) after the property interest holder’s date of acquisition; 2) which have the effect restricting the use of the property; and 3) the restricted use reduces the fair market value of the property interest. ORS 197.352 (1) and (3) As noted in the findings of fact, the particular form of Plaintiff’s use has undergone some significant changes during the application process. While the development goal has remained residential (and at this time does not include additional land); it includes such components as stables and a community water system. On the record before this court I am unable to conclude that the application land use regulations, such as Goal 11, would impair the fair market value of the property or that other land use regulations such as those allowed under ORS 197.352 (3) (B) should not be applied. This prong of the preliminary injunction is denied because the issues presented by the merits are subject to substantial dispute and the harm that may occur upon the possible passage of an upcoming ballot measure is a matter of speculation.

The second prong of the preliminary injunction request seeks an order of this Court requiring: 1) DLCD to conduct a hearing (the court understands the request “to seek a “contested case hearing”) upon Plaintiff’s claim for compensation; and 2) to issue an order upon the hearing within 10 days.

This request appears to have its genesis in a series of events. Corey v. Department of Land Conservation and Development 210 Or App 542 (2007) was decided. The Oregon Court of Appeals held landowners have a property interest in “waivers” when DLCD determines land use regulations impact the owners’ ability to use the property and, therefore, reduce the fair market value of the subject property. Consequently, the Court opined the DLCD should have conducted a contested case hearing to allow the landowners to be heard. In the context of the case at bar Corey was decided after the DLCD had granted a “waiver” to the Plaintiff. Unlike the landowner in Corey, Plaintiff in this case did not seek a contested case hearing before the final order was entered (DLCD Record), nor did she appeal the final order to Circuit Court or the

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Court of Appeals. Plaintiff seeks to have the holding in Corey applied to this case through her counsel's August 8, 2007 demand for the hearing.

As noted before, after Plaintiff secured the original "waiver" she sought to expand the intensity of the residential use, even to the extent of filing another claim for compensation. (Pl. Ex. 11) The November 15, 2006, demand for compensation has yet to have been acted upon by DLCDC and, therefore, any controversy concerning the right to a hearing is not yet justiciable.

This finding leaves the court with the original claim for compensation and its relationship to the August 8, 2007, demand letter. The procedure in place at the time of the original application was followed. No contested case hearing was conducted prior to the final order and none was requested. No appeal was taken from the ~~trial hearing~~ because Plaintiff received the relief she requested. *final order*

While it is clear Plaintiff has proposed a variety of uses, the present proposal before the Crook County authorities conforms to the original final order in general use (residential), number of lots (59), and in parcel size (295.18) acres. Even though the original final order authorized "approximately fifty-nine 5 acre parcels and dwellings thereon, DLCDC issued a letter to Crook County officials that Plaintiff's present application is "...inconsistent with the ... authorization made by the department...". While it would seem to this Court that the most recent application of Plaintiff would be an opportunity for conversation not litigation, such does not appear to be the interest of the parties.

Plaintiff secured the relief she sought in her original claim. This Court declines to exercise its discretion to re-open that proceeding 13 months after the final order was entered and, thereby, allow Plaintiff to seek relief other than was originally requested. In addition, Plaintiff's purported hardship depends upon the outcome of the vote on Measure 49. That outcome is a matter of speculation and the hardship, if any, is likewise speculative. The request for the preliminary injunction is denied.

Ms. Staley, please prepare the proper order.

Very truly yours,



George W. Neilson
Circuit Court Judge

GWN/lb