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

JACKSON COUNTY, a political subdivision
of the State of Oregon,

Petitioner,

v.

All Electors, Freeholders, Taxpayers and
Other Interested Persons,

Respondents.

Case No. 05-2993-E-3(2)

RESPONDENT STATE OF OREGON'S
MEMORANDUM IN SUPPORT OF MOTION
FOR SUMMARY JUDGMENT

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1 INTRODUCTION

2 Section 1 of Jackson County’s Order No. 300-05 (“the Order”) provides that all relief
3 granted under Measure 37 by the Board to a current owner of real property “shall be transferable
4 to subsequent owners,” even if the right has never vested. That provision exceeds the authority
5 granted the county under Measure 37 to “waive” otherwise applicable land use laws. The text,
6 context, and history of Measure 37 all demonstrate that the voters intended that government’s
7 authority to waive otherwise applicable laws would be limited to allowing the *present* owner of
8 real property a use of the property permitted at the time that owner acquired the property. The
9 county’s ordinance would allow all *future* owners of a property to use it for a use permitted at the
10 time a prior owner acquired the property. The voters could have authorized that kind of “waiver”
11 in Measure 37, if that was what they intended, but they did not. Accordingly, this court should
12 declare section 1 of the Order invalid.¹

13 Section 2 of the Order directs county employees to issue permits to owners of real
14 property granted relief under Measure 37 by the county, notwithstanding the failure of the owner
15 to obtain an order from the State under Measure 37 that provides that state laws will not apply to
16 the use the owner seeks to carry out. That provision also exceeds the authority granted the
17 county under Measure 37 to “waive” otherwise applicable land use laws. That authority is
18 limited to the land use laws adopted by the *county*. A local government has no authority to
19 amend, repeal or waive land use laws enacted by the *State*. State laws continue to apply to a
20 proposed use of property as standards and criteria in the absence of relief from the State under
21 Measure 37. Accordingly, section 2 of the Order is contrary to state law and invalid.

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25 ¹ The State’s analysis regarding the relief afforded by Measure 37 was made public soon after
26 2004 Ballot Measure 37 took effect, in a letter of advice from the office of the Attorney General.
Affidavit of Katherine G. Georges, Ex. 2. The State’s views were affirmed by Judge Nielson in
Crook County v. All Electors, Case No 05CV0015. Georges Aff., Ex. 3.

1 **BACKGROUND**

2 **I. Land use planning in Oregon—an overview.**

3 The primary components of Oregon’s land use planning system were created with the
4 passage of Senate Bill 10 in 1969, and Senate Bills 100 and 101 in 1973.² Senate Bill 10
5 required cities and counties to adopt comprehensive land use plans and to enact zoning
6 ordinances to implement those plans. Senate Bill 100 created a state agency—the Land
7 Conservation and Development Commission (LCDC)—to establish and amend statewide land
8 use goals, and to review and “acknowledge” the comprehensive plans and zoning regulations
9 adopted by local governments to ensure that they comply with the goals.³ Senate Bill 100 also
10 adopted interim statewide land use planning goals that applied to land use planning decisions by
11 cities, counties and special districts until LCDC approved the statewide planning goals required
12 by ORS 197.225. ORS 197.175, 197.280 (1973). Local governments—cities, counties, and
13 special districts—were and are responsible for enacting land use regulations to implement their
14 comprehensive plans, and for making land use decisions consistent with the plans, their land use
15 regulations, and any directly-applicable state laws.⁴

16 Thus, for example, under the statewide planning goals, local governments are required to
17 designate lands that meet certain criteria for exclusive farm use (EFU), or for forest uses.⁵
18 Senate Bill 101 altered the requirements for how counties regulate the use of lands zoned for
19 exclusive farm use.⁶ More recent statutes establish more detailed requirements for how lands
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22 ² See 1969 Or. Laws ch. 324; 1973 Or. Laws ch. 80.

23 ³ See ORS 197.040(2); 197.175(2). All 36 counties in Oregon have adopted comprehensive
24 plans that have been “acknowledged” by LCDC.

25 ⁴ ORS 197.175(2)(c)-(e), 197.646(3), 197.835(8), see also *Kenagy v. Benton County*, 115 Or.
26 App. 131, 838 P.2d 1076 (1992).

⁵ LCDC Statewide Land Use Planning Goals 3 (Agricultural Lands) and 4 (Forest Lands).

⁶ 1973 Or. Laws ch. 503.

1 zoned for farm or forest use may be divided, and control when dwellings are allowed on such
2 land.⁷

3 **II. Measure 37.**

4 Measure 37 was approved at the November 2004 election. The measure adds new
5 statutory provisions to be made part of Oregon's land use planning system set forth in ORS
6 chapter 197. Under Measure 37, if a public entity enacts or enforces a new land use regulation,
7 or enforces a land use regulation enacted prior to the effective date of the measure, in a way that
8 applies to and restricts the owner's use of private real property and reduces the fair market value
9 of that property, "then the owner of the property shall be paid just compensation."⁸

10 Under sections 8 and 10 of the measure, in lieu of paying just compensation to the owner,
11 "the governing body responsible for enacting the land use regulation may modify, remove, or not
12 to apply [sic] the land use regulation * * * to allow the owner to use the property for a use
13 permitted at the time the owner acquired the property."⁹ Under section 11 of the measure, the
14 "owner is the present owner of the property, or any interest therein." In addition, under
15 section 10 of the measure, the public entity "* * * shall have discretion to use available funds to
16 pay claims or to modify, remove, or not apply a land use regulation." And, under that same
17 section, if just compensation is not paid within two years, "the owner shall be allowed to use the
18 property as permitted at the time the owner acquired the property."¹⁰ Allowing the owner to use
19 his or her property in a way that would otherwise be prohibited by the land use laws is
20 sometimes referred to as granting a Measure 37 "waiver."

21 It may be helpful to emphasize how Measure 37 fits within the framework of other laws.
22 Despite how some may describe Measure 37, the measure did not repeal existing land use

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24 ⁷ 1993 Or. Laws ch. 792; *codified at* ORS 215.700 to 215.780 (farm and forestland dwellings and
25 minimum lot or parcel sizes).

26 ⁸ Measure 37, section 1; *codified at* ORS 197.352(1).

⁹ Measure 37, section 8; *codified at* ORS 197.352(8).

¹⁰ Measure 37, section 10; *codified at* ORS 197.352(10).

1 regulations. Rather, Measure 37 amends those laws by providing that certain property owners,
2 under certain circumstances, are entitled to relief from a land use regulation. As described
3 above, they are entitled to relief in the form of compensation, or in the alternative, they are
4 entitled to non-monetary relief in the form of a “waiver” of the land use regulation. Where
5 Measure 37 does not otherwise provide, the existing body of land use law remains in effect. *See*
6 *MacPherson v. DAS*, 340 Or. 117, 132 (2006) (finding Measure 37 not to constitute an
7 unconstitutional “suspension” of the law).¹¹

8 **III. The Order.**

9 The order that is at issue in this case was adopted by the Jackson County Board of
10 Commissioners in order to resolve two issues under Measure 37: (1) “Whether relief granted to
11 a current owner of real property [by the Board] under Measure 37, in the form of a decision to
12 modify, remove or not apply land use regulations, can be transferred to a subsequent owner of
13 the property;” and (2) “Whether a property owner ever needs to file a Measure 37 claim with the
14 State of Oregon , and obtain relief in the form of a decision to modify, remove or not apply state
15 land use regulations, in addition to filing a claim with the appropriate local government, before a
16 use may be made of the property that was permitted at the time that the current owner acquired
17 the property.”¹²

18 On the first issue, section 1 of the Order provides that “[a]ll relief granted by the Jackson
19 County Board of Commissioners under Measure 37 shall be transferable to subsequent owners of
20 the property.” On the second issue, section 2 of the Order provides that “[c]ounty employees
21 shall issue such permits as were authorized to owners of property that was the subject of an
22 Order of the Board of Commissioners granting relief under Measure 37, notwithstanding the
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25 ¹¹ *And see*, the first sentence of Measure 37, which provides that “[t]he following provisions are
26 added to and made a part of ORS chapter 197.”

¹² Petition for Judicial Examination, Ex. A at 2-3.

1 failure of such owners or any previous or subsequent owners, to file a claim with the State of
2 Oregon or to obtain relief from the State of Oregon under Measure 37.”

3 The State appears in this proceeding to challenge the above provisions in sections 1 and 2
4 of the Board’s order, which are inconsistent with and pre-empted by state law and therefore
5 invalid.

6 **IV. Standard of review.**

7 Determining whether a Measure 37 “waiver” is transferable to subsequent owners of real
8 property requires the court to interpret Measure 37. Oregon courts apply the same methodology
9 for interpreting statutes adopted through the initiative process that they apply in construing
10 statutes adopted by the Legislative Assembly.¹³ The objective is to discern the intent of those
11 who enacted the law, in this case, the Oregon voters. “The best evidence of the voters’ intent is
12 the text of the provision itself. * * * The context of the language of the ballot measure may also
13 be considered[.]”¹⁴ Context may include relevant case law that “helps to define the parameters
14 of the nature of the rights conferred” by the measure.¹⁵ If “the intent of the voters is not clear
15 from the text and context” of the measure, the court examines the history of the provision.¹⁶

16 The history of an initiated measure consists of “other sources of information that were
17 available to the voters at the time the measure was adopted and that disclose the public’s
18 understanding of the measure.”¹⁷ This includes such things as “the ballot title and arguments for
19 and against the measure included in the voters’ pamphlet, and contemporaneous news reports

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22 ¹³ *Stranahan v. Fred Meyer, Inc.*, 331 Or. 38, 61, 11 P.3d 228 (2000); *PGE v. Bureau of Labor
and Industries*, 317 Or. 606, 612 n.4, 859 P.2d 1143 (1993).

23 ¹⁴ *Stranahan*, 331 Or. at 56 (quoting *Roseburg School Dist. v. City of Roseburg*, 316 Or. 374,
24 378, 851 P.2d 595 (1993)).

25 ¹⁵ *Stranahan*, 331 Or. at 62.

26 ¹⁶ *Id.* at 56, quoting *Ecumenical Ministries v. Or. State Lottery Comm’n.*, 318 Or. 551, 559, 871
P.2d 106 (1994).

¹⁷ *Ecumenical Ministries*, 318 Or. at 559 n. 8.

1 and editorial comment on the measure.”¹⁸ The voters’ pamphlet material on Measure 37 is
2 attached as Exhibit 1.¹⁹

3 **ARGUMENT**

4 **I. Measure 37 “waivers” are not transferable under the text of Measure 37.**

5 The text of Measure 37 reveals that the voters did not intend to make a Measure 37
6 “waiver” transferable if the landowner that obtained it does not actually use the land in
7 accordance with the waiver. Section 1 of the measure gives “the owner of the property” a right
8 to receive just compensation. In lieu of compensation, the “waiver” provisions—sections 8 and
9 10—both authorize a public entity to allow the present owner to use the property in a way that
10 was permitted at the time the present owner acquired the property.

11 Section 11(c) of Measure 37 defines “owner” as “the *present* owner of the property, or
12 any interest therein.”²⁰ Thus, the text of Measure 37 demonstrates that the voters intended to
13 direct public entities either to pay just compensation, or to authorize a use of the property for the
14 *present* owner of the property. If the voters had intended to direct public entities to grant relief
15 to future owners of the property in question—or to authorize government to abolish land use
16 regulations altogether as applied to particular property—a contrary intent could have been
17 expressed in the text of the measure.

18 **II. The context of Measure 37 confirms that the voters did not intend to make**
19 **Measure 37 waivers transferable.**

20 Measure 37 must be construed in the context of otherwise applicable state law. The right
21 to use land in accordance with a Measure 37 “waiver” is an exception to the statewide land use
22 planning system described in the introduction to this memorandum. The first clause in
23 Measure 37 states that it is to be codified in ORS chapter 197, one of the primary elements of the
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25 ¹⁸ *Id.*

26 ¹⁹ Georges Aff., Ex. 1.

²⁰ Measure 37, section 11(c) (emphasis added).

1 state land use planning laws. But, other than the “waiver” provisions, nothing in the Measure
2 provides that state or local laws that would otherwise apply to a person’s use of property will not
3 apply to a use that is carried out under Measure 37.

4 The “vested rights” principle in existing Oregon law is also properly considered as part of
5 the context of Measure 37. Oregon courts have recognized that an owner seeking to develop
6 property may “have acquired a ‘vested right’ to continue the development and subsequently to
7 put the use to its intended function.”²¹ Such rights “vest” only through actual use, or actual
8 development “to the extent that [the landowner] has acquired a right to continue the
9 development” under the factors identified in *Polk County v. Martin*.²² The approval of a permit
10 does not by itself confer a “vested right” to carry out the use authorized by the permit. If the use
11 authorized by the permit is abandoned or becomes unlawful, then the authorization of the permit
12 will be lost.²³

13 At the time Measure 37 was adopted, the voters presumably were aware that an
14 authorization to carry out a use of land does not vest solely on the basis of a governmental
15 approval.²⁴ Thus, it is reasonable to conclude that when voters granted a right of just
16 compensation—or a “waiver” in lieu of compensation—to the “present owner” of property under
17 Measure 37, they intended the “waivers” to be treated like any other governmental authorization.
18 Such authorizations “vest” only through actual use or development. The same is true of an
19 authorization for the present owner of property to use property for a use permitted when he or
20 she acquired the property under a Measure 37 waiver.

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22 ²¹ *Clackamas County v. Holmes*, 265 Or. 193, 197, 508 P.2d 190 (1973).

23 ²² *See Polk County v. Martin*, 292 Or. 69, 82, 636 P.2d 952 (1981).

24 ²³ *Lemke v. Lane County*, 57 Or. App. 55, 643 P.2d 1306 (1983); *Twin Rocks Watseco v. Sheets*,
15 Or. App. 445, 516 P.2d 472 (1973); *see also Fountain Village v. Multnomah County*, 176 Or.
25 App. 213, 31 P.3d 458 (2001) (vested right to complete a use may be abandoned); *K.R.A.M.*
26 *Corp. v. City of Vernonia*, 95 Or. App. 534, 770 P.2d 77 (1989) (sewer connection permits do not
create contract rights and may be revoked by city).

²⁴ *See Fountain Village*, 176 Or. App. at 221.

1 **III. The history of Measure 37 does not demonstrate a contrary intent.**

2 The voters' pamphlet materials on Measure 37 shed little light on the transferability issue.
3 The issue is not mentioned in the ballot title or explanatory statement. There were forty
4 "arguments in favor" of Measure 37 in the voters' pamphlet, but none directly addressed the
5 transferability issue. The "arguments in opposition" to the measure do not address the issue
6 either.

7 The chief petitioners of the measure submitted an argument in favor. They expressly
8 state that if an owner entitled to Measure 37 relief conveys his or her property, the sale of the
9 property will establish a new "date of acquisition" for purposes of determining what laws may
10 give rise to a Measure 37 claim. If the current owner is eligible for relief, but sells the property,
11 then only laws adopted *after* the new owner acquired the property create a right to relief in the
12 new owner.²⁵ Thus, in the view of the chief petitioners of Measure 37, Measure 37 relief granted
13 to an owner continues to apply only so long as the owner retains an interest in the property. The
14 waiver is personal to the owner; it does not "run with the land."

15 **IV. Section 1 of the Order violates Measure 37 and is therefore invalid.**

16 Section 1 of the Order allows a landowner to transfer a Measure 37 waiver to a
17 subsequent landowner. That is contrary to the voters' intent in adopting Measure 37, as revealed
18 by the text and context of the measure. Merely obtaining a governmental authorization to use
19 property in a way that is contrary to existing land use regulations is not sufficient under existing
20 Oregon law to give the landowner a "vested" right that can be transferred to subsequent owners.

21
22 ²⁵ The argument in the Voters' Pamphlet states:

23 *"If the current owner sells an interest in her property, so long as the current owner*
24 *still has a current possessory interest, or a reversionary interest in the property,*
25 *the provisions of Ballot Measure 37 apply using the date the current owner*
acquired the property. Only if a current owner sells all of her interest in a piece of
property does the date of acquisition change for purposes of determining what
regulations are subject to Ballot Measure 37 protections."

26 Voters' Pamphlet at 23, Ex. 1. Arguments in Favor Furnished by Dorothy English, Barbara Price and Eugene Price.

1 Of course, in some circumstances, a landowner may obtain a “vested” right to continue
2 an existing use or complete a use that has been partially developed. Whether the landowner’s
3 right has “vested” will be determined on a case-by-case basis under the test established in *Polk*
4 *County v. Martin*.²⁶ But the mere fact of obtaining a Measure 37 “waiver”—standing alone—is
5 insufficient to give the landowner a “vested” right that “runs with the land.” Thus, section 1 of
6 the Order exceeds the authorization to public entities provided by Measure 37. And a local
7 ordinance or resolution that permits actions that are prohibited by state law is not enforceable.²⁷

8 **V. Section 2 of the Order violates state law and is therefore invalid.**

9 Section 2 of Jackson County Order No. 300-05 provides that

10 “County employees shall issue such permits as were authorized to
11 owners of property that was the subject of an Order of the Board of
12 Commissioners granting relief under Measure 37, notwithstanding
13 the failure of such owners or any previous or subsequent owners,
14 to file a claim with the State of Oregon or to obtain relief from the
15 State of Oregon under Measure 37. To protect the interest of
owners and previous and subsequent owners of the property, the
Orders of the Board of Commissioners, and all permits issued
pursuant to such Orders, shall advise of the position taken on this
issue by the Department of Land Conservation and Development.”

16 Section 2, Jackson County Order No. 300-05. Based on this order, Jackson County is acting on
17 permits for development where the owner of the property had received relief authorizing the use
18 from Jackson County, but where no relief had been granted by the State of Oregon.²⁸ The State
19 submits that where state laws apply to the use such actions violate state law, and that section 2 of
20 Order No. 300-05 is contrary to state law.

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22 ²⁶ *Polk County v. Martin*, 292 Or. at 82.

23 ²⁷ *State v. Tyler*, 168 Or. App. 600, 604, 7 P.3d 624 (2000) (“When a statute * * * prohibits
24 actions that an ordinance permits, the legislature has preempted the ordinance.”); *Marquam*
25 *Farms Corp. v. Multnomah County*, 147 Or. App. 368, 380, 936 P.2d 990 (1997) (“Although
26 counties may adopt certain legislation that refines or amplifies the statutory provisions, county
legislation must be consistent with the state statute.”) (citation omitted).

27 ²⁸ See, e.g., Letter to David Gilmore, Chair, Jackson County Board of Commissioners from Lane
28 Shetterly, Director, DLCD, opposing approval of Lee Subdivision because owner failed to obtain
a waiver of applicable state laws from the State. *Georges Aff.*, Ex. 4.

1 **A. A county has no authority to "waive" laws that another government entity**
2 **enacts, including state laws.**

3 Under subsection (8) of Measure 37, “* * * in lieu of payment of just compensation
4 under this section, *the governing body responsible for enacting the land use regulation* may
5 modify, remove, or not apply the land use regulation or land use regulations to allow the owner
6 to use the property for a use permitted at the time the owner acquired the property.” *Id.*
7 (emphasis added). As a result, when a property owner files a written demand for compensation
8 with a county under Measure 37, and a county elects to “modify, remove, or not apply the land
9 use regulation or land use regulations” (hereafter, a decision to not apply, or a “waiver”) the
10 governing body of the county may do so, but *only* with regard to a “land use regulation” that the
11 county’s governing body was “responsible for enacting.”

12 Under ORS 197.175, a county is responsible for enacting comprehensive land use plans
13 in compliance with the statewide land use planning goals approved by the Land Conservation
14 and Development Commission (LCDC). ORS 197.175(2)(a); 215.050. Similarly, a county is
15 required to enact land use regulations to implement its comprehensive plans. ORS
16 197.175(2)(b), 215.050. Thus, the types of “land use regulations” that a county may elect “not to
17 apply” under subsection (8) of Measure 37 are the provision(s) of the county’s comprehensive
18 plan and the county’s land use regulations that it adopted to comply with ORS 197.175(2) and
19 215.050, and that a property owner has demonstrated are the basis for a valid demand for
20 compensation under Measure 37. As a result, when a county takes action under the “waiver”
21 authorization in subsections (8) and (10), it elects “not to apply” certain provisions of that
22 county’s comprehensive land use plan and land use regulations that its governing body has
23 enacted. Under subsections (8) and (10), the county may elect “not to apply” such provisions in
24 order to allow the present owner of the property a use of the property permitted when the present
25 owner of the property acquired it.

1 **B. State laws may still apply to a proposed use of real property following a**
2 **"waiver" by a county, and a county has no authority to approve a proposed**
3 **use of property when doing so would violate state laws that still apply.**

4 **1. Requirements to obtain a permit or other authorization.**

5 Measure 37 says nothing about how public entities are to authorize particular uses of
6 private real property following the "waiver" of applicable county ordinances. That is controlled
7 by other laws that have not been altered by the Measure. When a property owner seeks to carry
8 out the use of property authorized by a county "waiver" of one or more ordinance provisions
9 under subsections (8) and (10), some form of authorization nevertheless still will be required
10 from the county. The reasons for this are twofold. First, most counties, including Jackson
11 County, are not including within the scope of their "waivers" ordinance provisions that require
12 property owners to obtain permits. This is because such laws normally are exempt under
13 subsection (3)(B) of the Measure (building codes), because such laws normally will not have the
14 effect of reducing the fair market value of real property (most purchasers will insist on a there
15 being a permit authorizing a use before they purchase the property). Second, *state* laws,
16 independent of any county ordinance, comprehensive land use plan, or land use regulation,
17 require a permit or land division approval before a use may be carried out, and these *state* laws
18 have not been and cannot be "waived" by a county under subsections (8) or (10) of
19 Measure 37.²⁹

20 _____
21 ²⁹ The State of Oregon, the Association of Oregon Counties (AOC), and the League of Oregon
22 Cities (LOC) issued a statement shortly after Measure 37 took effect stating that "[l]ocal
23 governments should instruct claimants who file claims at the local level that they should also file
24 a claim with the state if the claim appears to involve a state land use regulation." Letter dated
25 December 23, 2004 from Lane Shetterly, Mike McArthur and Ken Strobeck to All Interested
26 Parties, Georges Aff., Ex. 5. Similarly, Oregonians in Action (OIA), counsel for Jackson County
in this case, has advised, and continues to advise, property owners that they should file claims
with both local government and the state. OIA states:

27 "If you are challenging a local ordinance, then you should file your claim with the
28 local government responsible for enacting or enforcing the ordinance. We also
29 believe that Measure 37 claimants who are challenging local ordinances should also
30 file a Measure 37 claim with the State of Oregon (see below and Question 10).

1 The primary examples of the types of permits or other authorizations required under state
2 law include building and grading permits required by the State Building Code (UBC), and
3 partition and subdivision approvals required under the State's subdivision and partition laws.
4 Under ORS 455.450 and the Oregon State Building Code (UBC), section 106.1 “* * * no
5 building or structure regulated by this code [with very limited exceptions] shall be erected,
6 constructed, enlarged, altered, repaired, moved, improved or converted unless a separate permit
7 for each building or structure has first been obtained from the building official.” Similarly,
8 under UBC section 109.1 “[n]o building or structure shall be use or occupied, and no change in
9 the existing occupancy classification of a building or structure or portion thereof shall be made
10 until the building official has issued a certificate of occupancy therefore as provided herein.”
11 And, under UBC section 3306 “* * * no person shall do any grading [again, with certain very
12 limited exceptions] without first having obtained a grading permit from the building official.”³⁰
13 Finally, as with authorizations for physical changes to real property, ORS 92.0012, 92.016 and
14 92.025 prohibit the sale of land without prior approval of a subdivision or partition approving the
15 creation of the lot or parcel being sold.

16 For counties, the discretionary approval of a proposed “development” of land is a
17 “permit.” ORS 215.402(4). *Doughton v. Douglas County*, 88 Or. App. 198, 744 P.2d 1299
18 (1987) (application for a building permit for a farm dwelling is a “permit” under ORS 215.402);

19
20 If you are challenging a state law or a state regulation, you should file your claim
with the State of Oregon (see address below).

21 Because of Oregon's unique and complex planning system, the only one of its kind
22 (for good reason) in the United States, there will be many situations in which both
23 state and local land use regulations take away the rights you had to use your land
when you purchased or inherited it. For example, most county land use regulations
are the result of statutes and administrative rules passed by the state legislature and
state agencies.”

24 Oregonians in Action Measure 37 web site, last visited on September 28, 2006, at:
25 <http://measure37.com/measure%2037/faq.htm#q2>.

26 ³⁰ The State notes that the State Building Code is expressly exempt from Measure 37 under
section 3(B) of the statute. This is another reason why the requirement to obtain a permit is
unaffected by a county “waiver.”

1 *Frymark v. Tillamook County*, 45 Or. LUBA 486 (2003) (a building permit may be a “permit”
2 under ORS 215.402, and thus require notice and an opportunity for hearing before taking action
3 on that permit, where approval or denial of the permit requires a discretionary determination
4 regarding whether the proposed use is allowed or not allowed). Even if a use is a permitted use,
5 it is not exempt from state and local laws requiring a permit. *Josephine County v. Garnier*, 163
6 Or. App. 333, 987 P.2d 1263 (1999).

7 In sum, state laws requiring property owners to obtain a permit in order to carry out the
8 use authorized by a county under Measure 37 will continue to apply even after the county’s
9 “waiver” decision. Again, that is because (under subsections (8) and (10) of the Measure) the
10 county is authorized only to “not apply” “land use regulations” that the county’s governing body
11 enacted.

12 **2. The laws that apply to a county permit or land division approval**
13 **following the “waiver” of county ordinances.**

14 When an owner who has received a “waiver” from a county under Measure 37 seeks a
15 building permit, a grading permit, an occupancy permit, a land division approval, or some other
16 form of approval from the county, what standards and criteria will apply to *that* approval? The
17 answer to this question also answers the question of why Jackson County’s Order No. 300-05
18 violates state law.

19 Much confusion stems from the fact that once a county’s comprehensive plan and land
20 use regulations are acknowledged by LCDC as complying with the statewide land use planning
21 goals,³¹ a county must make land use decisions in compliance with its acknowledged plan and

22 _____
23 ³¹ As described above, “acknowledgement” means that LCDC has determined that a county or a
24 city’s comprehensive plan and land use regulations comply with the statewide land use planning
25 goals adopted by LCDC. ORS 197.250 to 197.254. All cities and counties in Oregon have had
26 their comprehensive plans and land use regulations acknowledged by LCDC. Prior to
acknowledgement, both the local comprehensive plan and land use regulations, *and* the LCDC
goals applied as the standards and criteria for local land use decisions and permits. ORS
197.175(2)(c). Following acknowledgment, the statewide land use planning goals generally do
not apply to local land use decisions. *See also, Columbia Hills Dev. Co. v. LCDC*, 50 Or. App.
483, 624 P.2d 157, *rev den*, 291 Or. 9, 631 P.2d 340 (1981).

1 land use regulations; and the statewide land use planning goals (and LCDC rules implementing
2 those goals) normally do not apply directly to a county's post-acknowledgment land use
3 decisions. ORS 197.175(2).³² Some have assumed that this means that *only* the county's
4 acknowledged plan and land use regulations apply to its decisions. In the context of Measure 37,
5 they would then assume that once a county "waives" its applicable local land use regulations,
6 and an owner applies for a permit to carry out the use authorized by the "waiver," the county
7 would have already acted to "not apply" any and all "land use regulations" that would otherwise
8 prohibit or restrict the owner's desired use. They would assume that the county could then
9 lawfully issue its permit or other authorization and the owner could lawfully carry out his desired
10 use.³³

11 However, the assumption that *only* a county's comprehensive plan and land use
12 regulations apply to its decisions to approve or deny a permit or other authorization of a use is
13 wrong. ORS 197.175(2) does mean that the statewide land use planning goals and LCDC's rules
14 implementing those goals normally would not apply to a county's post-acknowledgment decision
15 on a permit or other authorization.³⁴ But ORS 197.175(2) does nothing to affect the application
16 of other state laws to such decisions, and neither does the county's "waiver" because that can
17 affect only "land use regulations" enacted by the county. When a county waives its
18

19 ³² *But see*, ORS 197.646. New or amended provisions of the statewide land use planning goals,
20 and LCDC rules implementing those provisions, apply directly to land use decisions if a city or
21 county fails to adopt amendments to its comprehensive plan and land use regulations to carry out
22 those changes in state law.

23 ³³ However, because subsection (8) of Measure 37 limits government's "waiver" authority to a
24 use permitted at the time the owner acquired the property, the statewide land use planning goals
25 will apply if the owner acquired the property on a date after the particular statewide goal took
26 effect and before the county's comprehensive plan and land use regulations were acknowledged.
In general, this occurs with owners who acquired their property after January 1, 1975 and before
the mid 1980s. The dates of acknowledgement vary from county to county, and in many cases
different parts of a county's ordinances were acknowledged at different times.

³⁴ Again, however, the State cautions that under ORS 197.646, where a county has not
incorporated new or amended provisions of a statewide land use planning goal or an LCDC rule
into its local land use regulations, those state land use regulations also will apply directly to the
county's land use decisions.

1 comprehensive plan and local land use regulations, it does not, and cannot, waive any statewide
2 planning goals and rules implementing those goals that apply directly to claimant's use of the
3 property.

4 For lands that are zoned for exclusive farm use or for forest use, which make up most of
5 the lands in Jackson County, these other state laws include a comprehensive set of state statutes
6 that specify what uses are allowed on such lands and how they may be divided. The principal
7 state statutes that govern such uses in Jackson County are ORS 215.203 (uses allowed as a farm
8 use), 215.236 (certain non-farm dwellings), 215.263 (land divisions in farm zones), 215.283
9 (uses permitted in farm zones), 215.284 (lot of record dwellings in farm zones), 215.296
10 (standards for non-farm uses in farm zones), 215.298 (aggregate mining in farm zones), 215.705
11 (dwelling in farm or forest zones), 215.720 (forestland dwellings), 215.730 (additional criteria
12 for forestland dwellings), 215.740 and 750 (other forestland dwellings), 215.755 (other forest
13 land dwelling criteria), and 215.780 (minimum lot or parcel sizes for farm zones and for forest
14 zones). As is indicated by this long list, the legislature has enacted a comprehensive set of state
15 land use regulations governing uses of land zoned for farm or forest use, and these land use
16 regulations are unaffected by any action of a county under ORS 197.352, or by the
17 acknowledgment of a county's comprehensive plan and land use regulations under ORS
18 197.175(2).

19 When a property owner has received a "waiver" from a county under ORS 197.352 and
20 then applies for a building permit, occupancy permit, land division, or other authorization for
21 land zoned for exclusive farm use or for forest use to carry out the use, the county is required to
22 apply these state statutes as standards and criteria in determining whether the requested
23 authorization is lawful. In *Smith v. Clackamas County*, 313 Or. 519 (1992), the Court stated that
24 *in addition to the county's acknowledged ordinances*, the county was required to apply the
25 statutes in ORS chapter 215 in determining whether to issue a building permit for a dwelling on
26 land zoned for exclusive farm use.

1 “We do note that sitings of nonfarm dwellings in EFU zones,
2 where that requires a division or partitioning of farm land,
3 currently appears to remain subject to certain statutes bearing
4 directly on that issue. ORS 215.263(4) permits county approval of
5 such a division of land only if the dwelling has been approved
6 under ORS 215.213(3) or 215.283(3). Moreover, ORS 215.288
7 provides that the county *must* apply certain statutory provisions to
8 land which has been zoned for exclusive farm use (EFU), when
9 considering whether and where to permit certain dwellings.”

10 *Id.*, at 523, n 5. Similarly, in *Foland v. Jackson County*, 311 Or. 167, 180 n 10, 807 P.2d 801
11 (1991) (involving a comprehensive plan amendment for a destination resort), the Court noted
12 that “[t]he local government’s decision must, of course, also comply with any relevant statutes,”
13 in addition to the county’s acknowledged ordinances.

14 The Court of Appeals has been more direct. In *Forster v. Polk County*, 115 Or. App.
15 475, 478, 839 P.2d 241 (1992) that court held that ORS 215.283(1)(f) applied to a county’s
16 decision on a permit for a farm dwelling in addition to the county ordinance. In *Kenagy v.*
17 *Benton County*, 115 Or. App. 131, 134-135, 838 P.2d 1076 (1992), the court determined that
18 ORS 215.283(1)(e) applies directly to a county’s decision on a permit for a dwelling for a
19 relative of a farm operator. And in *Friends of the Metolius v. Jefferson County*, the court again
20 noted that even once the statewide planning goals no longer apply to county decisions, state
21 statutes do. 125 Or. App. 122, 125, n 2, 866 P.2d 463 (1993). The Court of Appeals continues
22 to review local decisions concerning uses of land zoned for exclusive farm use or forest use for
23 compliance with applicable statutes in ORS chapter 215. See, e.g., *Friends of the Creek v.*
24 *Jackson County*, 165 Or. App. 138, 141, n 1, 995 P.2d 1204 (2000) (utility facilities on EFU-
25 zoned land); *Marquam Farms Corp. v. Multnomah County*, 147 Or. App. 368, 380 (1997) (dog
26 kennels on EFU-zoned land), and *Friends of Neabeack Hill v. City of Philomath*, 139 Or. App.
27 39, 911 P.2d 350, *rev den*, 323 Or. 136, 916 P.2d 311 (1996) (subdivision approval).

28 Like the Court of Appeals, the Oregon Land Use Board of Appeals (LUBA) also
29 consistently has determined that the state statutes in ORS chapter 215 apply directly to county
30 decisions on a variety of types of authorizations. In *Ramsay v. Linn County*, 30 Or. LUBA 283,

1 289 (1996), LUBA held that ORS 215.283(1)(f) applies directly to a county's decision on a
2 permit for a farm dwelling. In *Mission Bottom Assoc. Inc., v. Marion County*, 29 Or. LUBA 281,
3 295 (1995), LUBA held that ORS 215.296 applies directly to a county's decision on a plan
4 amendment and permit for aggregate mining. And in *City of Sandy v. Clackamas County*, 28 Or.
5 LUBA 316, 319-320 (1994), LUBA decided that ORS 215.213(2)(c) and 215.283(2)(a) apply
6 directly to a county decision on a permit for a commercial use in conjunction with a farm use.

7 In short, state statutes continue to apply to uses that a county authorizes under
8 Measure 37. Until action is taken to make these statutes and any other state laws that otherwise
9 would apply "not apply" to these uses, a county will be prevented by state law from lawfully
10 issuing a permit or other authorization for the use.

11 Section 2 of Jackson County Order 300-05 purports to direct county employees to "issue
12 such permits as were authorized to owners of property that was the subject of an Order of the
13 Board of Commissioners granting relief under Measure 37, notwithstanding the failure of such
14 owners or any previous or subsequent owners, to file a claim with the State of Oregon or to
15 obtain relief from the State of Oregon under Measure 37." At least with regard to any property
16 that is subject to the statutory provisions of ORS chapter 215 (e.g., land zoned for exclusive farm
17 use and forest land) and any provisions of new or amended LCDC goals or rules that apply under
18 ORS 197.646, that portion of the order directs county employees to violate state law for the
19 reasons set forth above, and is therefore invalid.

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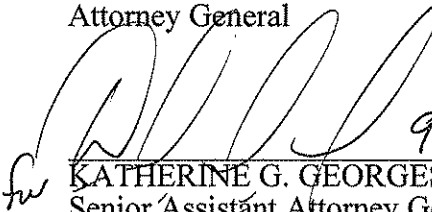
1 **CONCLUSION**

2 For all the foregoing reasons, the provisions set forth in sections 1 and 2 of the Order are
3 contrary to Measure 37 and state law. This court should, therefore, grant summary judgment to
4 the State and declare sections 1 and 2 invalid.

5 DATED this 6 day of October, 2006.

6 Respectfully submitted,

7 **HARDY MYERS**
8 **Attorney General**

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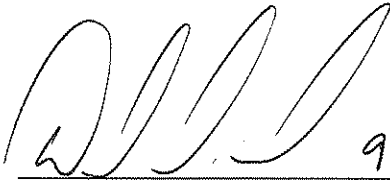
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CERTIFICATE OF SERVICE

I certify that on October 6, 2006, I served the foregoing RESPONDENT STATE OF OREGON'S MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT upon the parties hereto by the method indicated below, and addressed to the following:

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