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5 IN THE CIRCUIT COURT OF THE STATE OF OREGON
6 FOR THE COUNTY OF BENTON

7 NORMAN and DIANE KALDAHL, 8 Plaintiffs, 9 v. 10 OREGON DEPARTMENT OF LAND CONSERVATION AND DEVELOPMENT, 11 and STATE OF OREGON, 12 Defendants.	Case No. 07-10116 STATE'S MOTION FOR SUMMARY JUDGMENT

13
14 Pursuant to ORCP 47, defendants Oregon Department of Land Conservation and
15 Development and the State of Oregon (collectively, "the State") move for summary judgment on
16 the ground that the State's final order on plaintiffs' Measure 37 claim concluded correctly that
17 the plaintiffs are not entitled to relief. Because the State's order is correct, it is entitled to
18 judgment as a matter of law. The State requests oral argument and official court-reporting
19 services, and estimates that one hour will be needed for argument. No hearing date has yet been
20 set.
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1 This motion is based on the record and file herein and the State's memorandum in
2 support of its motion for summary judgment, with attached exhibits.
3 DATED this 19th day of June, 2007.
4 Respectfully submitted,
5 HARDY MYERS
Attorney General
6
7 [signature]
8 ERIKA L. HADLOCK #91297
9 Sr. Assistant Attorney General
Trial Attorney
10 Tel (503) 947-4700
Fax (503) 947-4792
11 erika.hadlock@doj.state.or.us
Of Attorneys for Defendants-Respondents
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6 NORMAN and DIANE KALDAHL, 7 Plaintiffs, 8 v. 9 OREGON DEPARTMENT OF LAND CONSERVATION AND DEVELOPMENT, 10 and STATE OF OREGON, 11 Defendants.	Case No. 07-10116 MEMORANDUM OF LAW IN SUPPORT OF STATE'S MOTION FOR SUMMARY JUDGMENT

12 **INTRODUCTION**

13 In 1969, the Oregon legislature directed the Governor to adopt comprehensive land use
14 plans and zoning regulations for areas of the state that were not yet zoned. Or Laws 1969, ch
15 324, § 1. Those plans and regulations were required to be in accordance with a set of nine state
16 goals, one of which required "conserv[ing] prime farm lands for the production of crops * * *."
17 Or Laws 1969, ch 324, §§ 2(1) and 3(4). Four years later, in the legislation commonly known as
18 SB 100, the legislature replaced that directive to the Governor with a mandate that the newly
19 created Land Conservation and Development Commission ("LCDC") adopt its own state-wide
20 planning goals. Or Laws 1973, ch 80, §§ 9, 11. In the meantime, the legislature required that
21 "cities and counties shall exercise their planning and zoning responsibilities in accordance with *
22 * * [among other things, the same state goals established in 1969] * * *." Or Laws 1973, ch 80,
23 §§ 17, 18. In addition, the legislature directed that those "interim" planning goals "be applied by
24 * * * counties * * * in the implementation of any comprehensive plan." Or Laws 1973, ch 80, §
25 41. As a result, after SB 100 went into effect on October 5, 1973, the requirement to conserve
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1 prime farm land for the production of crops was a legal standard that applied to any county land
2 use decision concerning a non-farm use of prime farm land after that date.
3 The plaintiffs in this Measure 37 case acquired about seven acres of prime farm land on
4 November 15, 1973, after the effective date of Senate Bill 100. Last year, they filed a Measure
5 37 demand requesting compensation for the reduction in property value allegedly associated with
6 their inability to divide the property into as many as seven lots for residential development. The
7 State issued a final order denying the Measure 37 demand on the ground that plaintiffs could not
8 have put the property to that use when they acquired it in November 1973, because the interim
9 statewide land use planning goals then in effect required the conservation of prime farm lands for
10 the production of crops. Plaintiffs' lawsuit is based on the premise that the interim goals did not
11 apply as a legal standard for the use of their property. They ask this Court to set aside the State's
12 final order under the Administrative Procedures Act ("APA"), ORS 183.484, and to require the
13 State to enter a new order not applying the interim goals to their use of the property.
14 This Court should enter judgment in the State's favor on plaintiffs' APA claim because
15 the State correctly determined that the interim goals would have prohibited the plaintiffs from
16 dividing their property in November 1973 and, therefore, plaintiffs do not have a valid Measure
17 37 claim. Accordingly, this Court should enter a judgment affirming the State's final order
18 denying plaintiffs' Measure 37 demand.
19 In addition, this Court should dismiss plaintiffs' alternative claim for monetary
20 compensation on two grounds: (1) this Court lacks jurisdiction over the claim because plaintiffs'
21 sole avenue for relief is their APA challenge to the order; and (2) plaintiffs have no claim for
22 monetary compensation because – should their Measure 37 demand turn out to be valid – the
23 State retains the option of "waiving" land use regulations instead of paying money. Finally, even
24 if plaintiffs have stated a claim for monetary compensation over which this Court has
25 jurisdiction, the Court should enter judgment for the State on the merits for the same reason it
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should affirm the State's order in ruling on plaintiffs' APA challenge. In sum, the State is entitled to summary judgment on both of plaintiffs' claims for relief.

BACKGROUND

A. Measure 37

A property owner qualifies for Measure 37 relief if: (1) a public entity enacts or enforces a "land use regulation" after December 2, 2004; (2) the regulation restricts the owner's use of the property; and (3) the regulation has the effect of reducing the property's fair market value. ORS 197.352(1). Section 3 of Measure 37 provides that certain land use regulations shall not be a basis for a written demand under Section 1, notably regulations in effect when the owner or a family member acquired the property. ORS 197.352(3)(E). Section 11 defines "owner" as the "present owner" of the property, and lists the relationships on which a "family member" finding may be based. ORS 197.352(11)(A) and (C).

For regulations enacted before the effective date of Measure 37 (December 2, 2004), Section 5 requires owners to submit written demands by December 2, 2006, or the date on which a land use regulation is applied "as an approval criteria [sic]" on a specific land use application, whichever is later. After determining that an owner submitted a timely, valid written demand, the public entity has the option to pay compensation or to "modify, remove, or not to [*sic*] apply" land use regulations to the extent necessary "to allow the owner to use the property for a use permitted at the time the owner acquired the property." ORS 197.352(8); *see also* ORS 197.352(10). Allowing the owner to use the property in a way that would otherwise be prohibited by land use regulations is commonly referred to as granting a Measure 37 "waiver." The Oregon Department of Land Conservation and Development ("DLCD") can pay compensation only if and when the legislature appropriates funds for that purpose. *See* OAR 660-002-0010(8)(c).

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1 **B. Statement of undisputed facts**

2 The State believes the following facts are undisputed based on plaintiffs' Measure 37
3 demand, the State's final order, plaintiffs' complaint and the State's answer.

4 1. Plaintiffs currently own the land at issue. (Complaint ¶ 1; Answer ¶ 1).

5 2. Plaintiffs acquired the land no earlier than November 15, 1973. (*See Record* § 2
6 at 11 (Measure 37 demand, asserting December 1, 1973, acquisition date); *Record* § 2 at 13 (land
7 sale contract submitted with demand, executed on November 15, 1973); *Record* § 6 at 6.
8 (unchallenged finding in final order that plaintiffs acquired property on November 15, 1973)).

9 3. One hundred percent of the soils on plaintiffs' 7.1-acre property are "prime" soils
10 according to the Natural Resource Conservation Service of the U.S. Department of Agriculture
11 (NRCS). (*Record* § 6 at 7 (unchallenged finding in final order)).

12 4. Plaintiffs submitted a Measure 37 demand in which they requested compensation
13 for a reduction in value allegedly associated with their inability to "subdivide and/or partition the
14 property and create up to seven legal lots with a non-farm, non-forest single family dwelling to
15 be placed on each legal lot." (*Record* § 2 at 5 (plaintiffs' Measure 37 demand); *see* Complaint ¶
16 4; Answer ¶4).

17 5. The State issued a final order denying plaintiffs' Measure 37 demand for the
18 following reason:

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> Based on the findings and conclusions set forth below, the Department of Land Conservation and Development (the department) has determined that the claim is not valid because neither the Land Conservation and Development Commission (the Commission) nor the department has enforced laws that restrict the claimants' use of private real property relative to uses permitted at the time they acquired the subject property on November 15, 1973.

23 (*Record* § 6 at 3; *see* Complaint ¶ 6; Answer ¶6).

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1 **C. Plaintiffs' petition for judicial review and complaint**

2 Plaintiffs bring two claims against the State. First, they seek monetary compensation and
3 attorney fees directly under Measure 37, based on their allegations that the State has violated that
4 statute in the following ways:

5 > (a) Defendants erroneously assume that farmland goals contained in ORS 215.515 (1973) applies [*sic*] to the property as of
6 > November 15, 1973 despite the fact that the property was zoned for residential use.
7
8 > (b) Defendants erroneously applied the 1973 interim goals at ORS 215.515 (1973) stating that these goals prohibit the intended use by Plaintiffs. However, these goals were inapplicable
9 > against Plaintiffs and unenforceable against individual land use applications.
10
11 > (c) Assuming, for argument's sake, the goals in ORS 215.515 (1973) are applicable, and assuming that the property is farmland, Defendants prematurely applied the goals without an
12 > individual land use application before it. * * * Defendants are wrongfully enforcing a statute and regulation against a property
13 > without an actual land use application pending.

14 > (d) Enforcement of these regulations has the effect of reducing the fair market value of the property. Therefore under
15 > ORS 197.352(4) plaintiffs should receive payment of just compensation for the reduction in value from the time their interest
16 > began.

17 (Complaint ¶ 8).

18 Plaintiffs also petition for judicial review of the State's final order under the APA, ORS
19 183.484, based on the same alleged errors. (Complaint ¶¶ 11-12). They seek an order requiring
20 the State "to not apply 1973 interim planning goals under ORS 215.505 (1973) to Plaintiffs'
21 property" or, in the alternative, "requiring that the 1973 interim planning goals be applied only
22 upon a land use application by Plaintiffs for a particular use under Measure 37." (Complaint,
23 prayer).
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1 **D. Standard of review**

2 As the State explains in the last section of this memorandum, this Court lacks jurisdiction
3 over plaintiffs' first claim for relief – the Measure 37 compensation claim – and should dismiss
4 it. That leaves plaintiffs' petition for judicial review as the only viable claim in this case. In that
5 claim, plaintiffs challenge the State's final orders under ORS 183.484, the APA provision that
6 governs judicial review of orders in other than contested cases.[1]

7 The summary-judgment standards that usually apply in civil cases do not apply when a
8 circuit court reviews an agency order in other than a contested case. *Powell v. Bunn,* 185 Or App
9 334 (2002), *rev denied,* 336 Or 60 (2003). The State discusses below the different analysis that
10 applies when a court reviews the facts in summary-judgment proceedings in APA cases. In this
11 case, however, the distinction does not matter, as the material facts outlined in Section B, above,
12 are not disputed and the parties disagree only about those facts' legal significance.

13 The Court of Appeals has explained that "viewing factual disputes in the light most
14 favorable to a nonmoving party" – the usual standard of review in a summary-judgment motion –
15 "[is] not appropriate in the judicial review of an administrative order in a noncontested case
16 proceeding." *Powell,* 185 Or App at 339. Rather, judicial review of the factual findings included
17 in an agency order in other than a contested case is limited to determining whether "the order is
18 supported by substantial evidence." *Ibid.*

19 ______________________

20 [1] In *Corey v. DLCD*, 210 Or App 542, *adhered to on reconsideration*, 212 Or App 536
(2007), the Court of Appeals held that the state-agency order granting waiver relief on a Measure
21 37 claim should have been processed as a contested case, with "notice and a meaningful hearing
before DLCD * * *." From that premise, the Court concluded that the Court of Appeals – not
22 any circuit court – had jurisdiction to review that order. 210 Or App at 552; *see* ORS 183.482.

23 The State disagrees with *Corey* and soon will file a petition for Supreme Court review.
24 Even if *Corey* stands, however, it should not divest this Court of jurisdiction over this case. As
the State understands *Corey*, it places jurisdiction in the Court of Appeals only in those cases in
25 which the State has determined that a Measure 37 claim is valid and grants waiver relief. *See*
210 Or App at 551-52. Because the State denied plaintiffs' Measure 37 claim altogether, *Corey*
26 should not apply.

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1 Thus, in deciding this motion for summary judgment, the only questions presented could
2 be: (1) whether the final orders are based on incorrect interpretations or applications of the law;[2]
3 and (2) whether the factual findings in the final orders are supported by substantial evidence in
4 the records. The Oregon Supreme Court has explained that judicial review of the latter question
5 is limited in scope. That is, in determining whether substantial evidence supports an agency's
6 factual findings, the question before a circuit court "is limited to whether the evidence would
7 permit a reasonable person to make the determination that the agency made in the particular
8 case." *Norden v Water Resources Dep't.*, 329 Or 641, 649 (2000).
9 Consequently, in deciding a summary judgment motion in a case brought under ORS
10 183.484, a court must apply the substantial-evidence standard of review as explained in *Norden*
11 together with the summary-judgment standard described in *Powell*. The resulting analytic
12 framework requires the court to review the entire record – including any facts admitted into the
13 record on summary judgment – to determine if the record as a whole "would permit" a
14 reasonable person to make the factual findings that the agency made. If so, then the agency is
15 entitled to summary judgment (assuming there also is no legal error). Conversely, if the court
16 determines that the evidence would *not* permit the agency to make the findings it made, then the
17 agency's motion for summary judgment must be denied.
18 As noted above, however, the State believes the material facts in this case are undisputed.
19 Accordingly, this Court need consider only the legal significance of those facts.

20 **ARGUMENT**

21 Real-property owners may be entitled to relief under Measure 37 if land use regulations
22 enacted after they (or a family member) acquired their property have restricted those owners' use
23 of the property, reducing its fair market value. In this case, plaintiffs seek a waiver of land use
24 regulations that prevent them from subdividing their land for residential development; in the
25

[2] *See* ORS 183.484(5)(a) (describing judicial review for incorrect interpretations of law); ORS
26 183.484(5)(b) (describing judicial review for unlawful exercise of agency discretion).

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alternative, they request monetary compensation. But regulations that required the conservation prime farm land for the production of crops, rather than residential development – Senate Bill 100 and the associated interim statewide land use planning goals – already were in place when plaintiffs acquired their property. Accordingly, the State correctly determined that plaintiffs Measure 37 claim is not valid, and this Court should enter judgment in the State's favor.

A. This Court should affirm the State's final order, which details the State's correct determination that plaintiffs do not have a valid Measure 37 claim.

In their APA petition for judicial review, plaintiffs challenge the State's determination that they do not have a valid Measure 37 claim. For the reasons that follow, this Court should enter judgment in the State's favor on the APA petition, which forms the basis of plaintiffs' second claim for relief.

1. Plaintiffs could not have divided or developed their prime farm land when they acquired it in November 1973.

Section 1 of Measure 37 defines the circumstances under which a property owner may have a valid claim for Measure 37 relief:

> If 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, then the owner of the property shall be paid just compensation.

ORS 197.352(1).

Land use regulations that were enacted before the owner or the owner's family member acquired the property cannot be the basis for Measure 37 relief. ORS 197.352(3)(E). Put another way, a property owner may have a valid Measure 37 claim only if land use regulations enacted *after* the owner acquired the property restrict the owner's desired use of the property, reducing its fair market value. If the restrictions already existed when the present owner (or a family member) acquired the property, the owner has no Measure 37 claim. *See MacPherson v.*

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1 *DAS*, 340 Or 117, 122 (2006) ("Measure 37 limits compensation and relief from land use
2 regulations to property owners who acquired their property prior to the enactment of the land use
3 regulations that provide the basis for their claims").

4 It is undisputed in this case that plaintiffs acquired the property no earlier than November
5 15, 1973. And plaintiffs have not challenged the State's determination that their property is
6 comprised entirely of prime farm land. Thus, the pertinent question is whether plaintiffs could
7 have put their land to the desired use – *i.e.*, dividing it for residential development – in
8 November 1973. They could not.

9 In arguing that they could have divided their property for residential use in November
10 1973, plaintiffs rely on the fact that Benton County had zoned the property as Suburban
11 Residential, which allowed dwellings on one-acre parcels under certain circumstances. (*See*
12 *Record* § 2 at 5 (claim); *Record* § 6 at 6 (final order)). In their complaint, plaintiffs assert that
13 the State erred in determining that "the farmland goals contained in ORS 215.515 (1973) applies
14 [sic] to the property as of November 15, 1973 despite the fact that the property was zoned for
15 residential use." (Complaint ¶ 8(a)). Plaintiffs also claim that the interim goals "were
16 inapplicable against Plaintiffs and unenforceable against individual land use applications."
17 (Complaint ¶ 8(b)).

18 The State is entitled to summary judgment on these aspects of plaintiffs' claim.
19 Plaintiffs' argument overlooks the fact that, starting in October 1973, the interim legislative land
20 use planning goals applied regardless of county zoning. As explained below, because state law
21 required counties to exercise their zoning and other land-use planning activities in conformance
22 with the interim legislative goals, and to implement their comprehensive plans in conformance
23 with those same goals, it simply does not matter that Benton County still had an ordinance in
24 place that zoned the subject property for residential development. Once Senate Bill 100 (1973)
25 went into effect, neither the people who then owned the property nor any subsequent owners –
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1 like plaintiffs – could rely on that zoning ordinance as being the only law that controlled how
2 they could use their land.
3 In 1973, – before plaintiffs acquired the property at issue – the legislature made
4 compliance with the interim goals mandatory for state agencies, cities and counties. Or Laws
5 1973, ch 80, § 48. Senate Bill 100, which took effect on October 5, 1973, contemplated stepwise
6 implementation of the legislature's desire to coordinate land use planning throughout the state.
7 First, cities and counties were immediately required to "exercise their planning and zoning
8 responsibilities in accordance with" the interim land use planning goals enacted as part of Senate
9 Bill 100, including the continuing mandate to "conserve prime farm lands for the production of
10 crops." Or Laws 1973, ch 80, §§ 17, 48. Moreover, until LCDC approved new statewide
11 planning goals, counties and other governments were required to apply the interim statutory
12 goals "in the preparation, revision, adoption or implementation of any comprehensive plan." Or
13 Laws 1973, ch 80, § 41. Once the permanent statewide goals were adopted, "each city and
14 county (local government) in Oregon was required to make its land use decisions and to prepare
15 comprehensive land use plans 'in compliance with the goals.'" *1000 Friends v. LCDC (Curry*
16 *County)*, 301 Or 447, 452 (1986). Then, "once LCDC has 'acknowledged' that a local
17 government's plan and land use regulations comply with the goals, the local government must
18 make land use decisions 'in compliance with the acknowledged plan and * * * regulations.'"
19 *Ibid.*
20 In *Peterson v. Klamath Falls*, 279 Or 249 (1977), the Oregon Supreme Court confirmed
21 that the interim planning goals in ORS 215.515 applied as standards for counties in exercising
22 their zoning and planning responsibilities in addition to any local provisions. *Id.*, at 252-253.
23 The planning action at issue in Peterson was a city's decision to annex additional land; however,
24 the court indicated that it read the goals in ORS 215.515 to apply to a broad range of planning
25 activities.
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> In other words, the exercise of "planning and zoning responsibilities" must be read to refer not only to the preparation of comprehensive plans and the enactment of zoning and other ordinances to implement those plans but also to other local planning activities which will have a significant impact on present or future land uses. * * *

Id., at 253-254. The Court extended its holding in *Peterson* to the subdivision of land in *Meeker v. Board of Commissioners*, 287 Or 665, 672 (1979).

Finally, in *Alexanderson v. Polk County Commissioners*, 289 Or 427 (1980), the Oregon Supreme Court confirmed that, before LCDC acknowledged their comprehensive plans, counties were required to apply the statewide goals *directly* in making local land-use decisions, including decisions regarding partitions. *Id.* at 434. Accordingly, the court held, Polk County acted correctly when it denied an application to partition a 25-acre parcel that fell within the statutory definition of "agricultural land" because LCDC's Goal 3 required agricultural land to be preserved for farm use. *See id.* at 429, 434. The county correctly had followed Goal 3 even though its own ordinances otherwise would have allowed the partition, as the petitioner's land was zoned rural residential. *Id.* at 429.

These cases control the outcome of this case. Here, as in *Alexanderson*, the real property at issue was zoned for residential development when the statewide land use planning goals went into effect. And here, as there, the high quality of the soils means that the goals require the land to be conserved for farm use, despite any inconsistent county zoning ordinances. Thus, *Alexanderson* defeats plaintiffs' assertion that the interim goals did not apply to the property on November 15, 1973, because "the property was zoned for residential use." (Complaint ¶ 8(a)). Because *Alexanderson* involved direct application of the goals to an individual land-use application, it also defeats plaintiffs' contention that the interim goals "were inapplicable against Plaintiffs and unenforceable against individual land use applications." (Complaint ¶ 8(b)).

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In sum, plaintiffs could not have divided the property or developed it for residential use when they acquired it in November 1973, because the interim land use planning goals that required conservation of prime farm lands already were in effect. Consequently, no land use regulations enacted after plaintiffs acquired their property restrict its use compared to the use they could have made of it upon acquisition. It follows that plaintiffs are not entitled to Measure 37 relief and the State acted correctly in denying their Measure 37 demand.[3]

2. Plaintiffs identified residential development as their desired use of the property; accordingly, the State properly analyzed whether plaintiffs could have put the property to that use in November 1973 when evaluating plaintiffs' Measure 37 demand.

Plaintiffs also argue that the State should have granted them Measure 37 relief even if the interim goals applied directly to their property in November 1973, because the State "prematurely applied the goals without an individual land use application before it." (Complaint ¶ 8(c)). Plaintiffs take issue with the State's final order on the ground that it inappropriately "assumes that the claimant will be dividing the subject property into seven lots and placing seven dwellings on each lot" when the Measure 37 demand requested "'up to' seven lots and seven dwellings." According to plaintiffs, "[t]he actual number of lots may be as little as none and the number of dwellings as low as one." Plaintiffs conclude that the State's final order is flawed because it "erroneously applies goals and regulations to a use that may or may not be pursued by Plaintiffs." (Complaint ¶ 8(c)).

Plaintiffs' argument implicates those parts of Measure 37 that require claimants to identify a specific use to which they want to put their land. Section 8 permits governments to "modify, remove, or not * * * apply" land use regulations in lieu of paying just compensation on a valid claim; such a waiver operates "to allow the owner to use the property for *a use* permitted

[3] Marion County Circuit Court Judge Jamese Rhoades has ruled in the State's favor in a similar case involving application of the LCDC goals. Her letter opinion in *Marckx v. Oregon*, which presently is on appeal to the Court of Appeals (CA A134530), is attached as Exhibit 1 to this memorandum.

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1 at the time the owner acquired the property." ORS 197.352(8) (emphasis added). Similarly, if
2 the government elects to pay compensation, it must determine the amount by which the owner's
3 interest in the property has been reduced by the land use regulations that prevent a particular use.
4 *See* ORS 197.352(1), (2). That cannot be done without having a use to evaluate.
5 Consequently, in determining whether a Measure 37 demand is valid, the State must
6 analyze "a use." Here, plaintiffs based their demand on a stated desire to "subdivide and/or
7 partition the property and create up to seven legal lots with a non-farm, non-forest single family
8 dwelling to be placed on each legal lot." (*Record* § 2 at 5 (plaintiffs' Measure 37 demand); *see*
9 Complaint ¶ 4; Answer ¶4). In their request for monetary compensation, plaintiffs assert they are
10 entitled to over one million dollars in compensation for the reduction in value allegedly
11 associated with not being able to create seven residential lots. (*Record* § 2 at 8).
12 Faced with this request, the State did the only thing it could do under Measure 37; it
13 determined whether plaintiffs had a valid Measure 37 claim with respect to dividing the property
14 into seven lots for residential development – the only specific use that plaintiffs identified.
15 Plaintiffs now assert that they may not actually divide the property into that many lots, and
16 suggest the State should have done something different in analyzing their claim. But the State is
17 not required, when presented with a claim that asserts a right to develop property "up to" a
18 certain density, to review each possible less-dense development to see whether it would have
19 been permissible when the property owner acquired the property. If that were the case, the State
20 would have to analyze an infinite number of hypothetical developments. For example, should
21 the State have determined whether plaintiffs in this case could have partitioned the land into
22 three parcels when they acquired it in November 1973? Into only two parcels? Should the State
23 also have determined whether plaintiffs could have constructed a dwelling on the 7.1-acre
24 property without first dividing it, and under what specific circumstances? Surely Measure 37
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does not require the State to engage in such speculation on each of the thousands of demands it has received.

Moreover, if plaintiffs do not intend to divide the property into seven residential lots, it is not clear why they believe they are harmed by the State's final order, which denies Measure 37 relief with respect only to that specific use. If plaintiffs really want only to construct a dwelling on the existing 7.1-acre parcel, they may submit a Measure 37 demand based on that desired use, with a correspondingly lower request for monetary compensation, and the State will assess the validity of that demand in due course. The State has not, as plaintiffs argue, inappropriately "applied the goals without an individual land use application before it." Rather, the State properly evaluated the validity of plaintiffs' Measure 37 demand based on the single desired use they specified. Accordingly, the State is entitled to summary judgment on this aspect of plaintiffs' second claim for relief.

B. This Court should dismiss the Measure 37 compensation claim both because it lacks jurisdiction over the claim and because plaintiffs have failed to state a claim for monetary relief.

Plaintiffs bring their first claim for relief directly under Measure 37, asserting that they are entitled monetary compensation because the State continues to enforce land use regulations that prevent them from developing the property. (Complaint ¶ 8). As with their APA claim, the compensation claim is based on the plaintiffs' dissatisfaction with the final order that the State issued on their Measure 37 demand. They allege that the State erred in applying interim Goal 3 to their property and to their demand for Measure 37 relief. (Complaint ¶ 8).

Thus, in seeking monetary compensation, plaintiffs ask this Court to accept the argument that DLCD rejected when it issued the final order: that plaintiffs are entitled to Measure 37 relief because the interim goals did not apply to their property when they acquired it in November 1973. As explained below, however, the APA sets forth the exclusive method for such a challenge. ORS 183.480(2) ("Judicial review of final orders of agencies shall be *solely* as

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1 provided by ORS 183.482, 183.484, 183.490 and 183.500"; emphasis added). Because
2 plaintiffs' first claim for relief is not brought under the APA, this Court should dismiss it.
3 The Oregon Court of Appeals consistently has held that the APA establishes the
4 exclusive method to challenge decisions made by state agencies. *See e.g.*, *Eppler v. Board of*
5 *Tax Service Examiners*, 189 Or App 216, 220 (2003); *Lake County v. State of Oregon*, 142 Or
6 App 162, 165 (1996) ("ORS 183.480(2) and numerous decisions of this court make clear that
7 judicial review of final agency orders shall be solely as provided in the APA"); *Mendieta v.*
8 *Division of State Lands*, 148 Or App 586, 599-600 (1997), *rev dismissed*, 328 Or 331 (1999)
9 (where "redress would have been available under ORS 183.484, had plaintiffs timely filed their
10 petition for judicial review[,]" the Court of Appeals held, "the trial court erred in granting
11 plaintiffs relief under ORS 183.490 and ORS 28.010"); *FOPPO v. County of Marion,* 193 Or
12 App 93, 97 (1988), *rev denied*, 307 Or 326 (1989) ("PERS is subject to the APA; therefore, the
13 APA provides the exclusive methods for its actions and for review of those actions"); *Bay River*
14 *v. Envir. Quality Comm.*, 26 Or App 717, 720, *rev denied*, 276 Or 555 (1976).
15 The exclusive nature of the APA remedy applies even where plaintiffs attempt to use
16 other statutory causes of action to get relief from an agency decision. For example, in *Bay River*,
17 the Court of Appeals rejected an argument that the Declaratory Judgment Act, ORS 28.010 *et*
18 *seq* , provides a remedy with respect to agency orders in addition to the remedies provided under
19 the APA. The circuit court in that case had granted the plaintiff an injunction and declaratory
20 relief with respect to its application for a subsurface sewage disposal system feasibility permit –
21 a matter within the Department of Environmental Quality's purview. The Court of Appeals
22 reversed and remanded, ordering the circuit court to vacate the judgment and dismiss the
23 complaint. The appellate court explained that Bay River could not circumvent APA review
24 merely by raising its complaint about agency actions in the context of another statute:
25 The Oregon Administrative Procedures Act, ORS 183.310
et seq, establishes a comprehensive pattern for the judicial review
26

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> of administrative decisions. The various APA statutes governing judicial review provide the *sole and exclusive methods of obtaining judicial review*.
>
> This is sufficient answer to Bay River's contention that since it couched its complaint in equitable terms and sought a declaratory judgment, the circuit court obtained jurisdiction pursuant to ORS 28.010. A party cannot ignore the judicial review provisions of the APA in favor of a general equitable or declaratory remedy.

Bay River, 26 Or App at 720 (emphasis added; citation omitted). *See also Eppler*, 189 Or App at 222 ("plaintiffs' sole recourse [in arguing that state licensing requirements were preempted by federal law] was to raise their preemption claim in the contested case proceeding before the board and seek judicial review, under the APA, of any adverse ruling by the board"); *Lake County*, 142 Or App at 165-66 (1996) (declaratory relief not available where plaintiffs could have sought judicial review of an agency order under the APA).

The Court of Appeals also has rejected the argument that the Oregon Tort Claims Act ("OTCA"), ORS 30.265 *et seq.*, provides a remedy with respect to agency orders that is cumulative to the APA remedy. In *Clarke Electric, Inc. v. State Highway Division*, 93 Or App 693 (1988), the plaintiff contractor sued under the OTCA for harm allegedly arising from the Highway Division's rejection of the plaintiff's bid on a contract. The Court of Appeals held that the Division's rejection of the plaintiff's bid was a final order in other than a contested case and, therefore, that the plaintiff should have sought judicial review under the APA. *Id.*, 93 Or App at 696-97. The court specifically rejected the plaintiff's argument that, because it sought damages, it was entitled to proceed directly under the OTCA:

> Finally, plaintiff argues that it is seeking damages in tort under the Oregon Tort Claims Act, ORS 30.265, not review of the Division's order and, therefore, that the time limitations of the APA are not applicable. However, defendant's alleged liability in tort is premised on a finding that defendant's order rejecting the bid was improper. That order was a final order in other than a contested case, and the exclusive procedure for review of such an order is under the APA. Consequently, the trial court did not err in granting Division's motion to dismiss for failure to comply with the APA time limitations for judicial review.

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Id. at 697 (citations omitted).[4]

Thus, the plaintiff in *Clarke Electric* could not circumvent APA review of an agency order by seeking monetary damages under the OTCA, just as the plaintiffs in the Declaratory Judgment Act cases cited above could not avoid APA review merely by seeking declaratory relief with respect to agency actions. The same principle applies to section 6 of Measure 37 – although it, too, creates a statutory cause of action, people who contest the legality of an agency order on a Measure 37 claim must seek judicial review under the APA. Because plaintiffs' second claim for relief is not based on the APA, this Court should dismiss it.

For the same reason that this Court lacks jurisdiction over the second claim for relief, plaintiffs have failed to state a claim upon which relief can be granted. Plaintiffs can have a Measure 37 compensation claim only if the State *wrongfully* continued to apply land use regulations to the subject property more than 180 days after the demand for compensation was made. In other words, plaintiffs must establish that the State erred by denying them relief on the ground that they could not have divided their property for residential use when they acquired it in November 1973. And that decision can be made only by judicial review of the final order under the APA, not by suing for compensation directly under Measure 37.

Moreover, even if this Court ultimately determines that plaintiffs are entitled to *some* form of relief under Measure 37, the State retains the authority to elect to grant waiver relief in accordance with the Court's order, instead of granting monetary compensation. Measure 37 contains no time limits on the State's ability to choose to grant a waiver instead of paying compensation. For these reasons, too, plaintiffs' first claim for relief should be dismissed.

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[4] *See also Muller v. Dept. of Agriculture*, 164 Or App 11, 15-16 (1999) (plaintiff could not avoid APA review by suing for damages in tort when "his entitlement to damages depend[ed] on the validity of" an agency's denial of a permit application).

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1162 Court Street NE
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(503) 947-4700 / Fax: (503) 947-4792

Finally, even if this Court has jurisdiction over the Measure 37 compensation claim, the State is entitled for summary judgment on the merits for the same reasons it is entitled to judgment on plaintiffs' APA claim.

CONCLUSION

The State correctly determined that plaintiffs are not entitled to Measure 37 relief because land use regulations that prevent them from dividing their property already were in place when they acquired the property in November 1973. Accordingly, the State is entitled to summary judgment on plaintiffs' second claim for relief, the APA petition for judicial review.

This Court should dismiss the plaintiffs' first claim, brought directly under Measure 37, for lack of jurisdiction and because plaintiffs have failed to state a claim. If this Court reaches the merits of that claim, it should enter judgment in the State's favor because plaintiffs have no right to Measure 37 relief.

DATED this 19th day of June, 2007.

Respectfully submitted,

HARDY MYERS
Attorney General

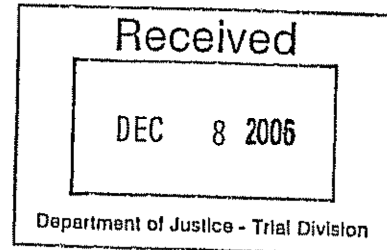
ERIKA L. HADLOCK #91297
Sr. Assistant Attorney General
Trial Attorney
Tel (503) 947-4700
Fax (503) 947-4792
erika.hadlock@doj.state.or.us
Of Attorneys for Defendants-Respondents

Department of Justice
1162 Court Street NE
Salem, OR 97301-4096
(503) 947-4700 / Fax: (503) 947-4792

CIRCUIT COURT OF OREGON
THIRD JUDICIAL DISTRICT
MARION COUNTY COURTS
P.O Box 12869
SALEM, OREGON 97309-0869

JAMESE RHOADES
Circuit Court Judge
(503) 588-7950

December 6, 2006



Wallace Lien
Attorney at Law
1775 32ND PLACE NE
SALEM OR 97303

Darsee Staley
Assistant Attorney General
1162 COURT ST NE
SALEM OR 97301

Re: Marckx v. State of Oregon, et al, Case No. 05C19654

Dear Counsel:

This matter came before the Court on October 25, 2006, for trial. Plaintiffs appeared through counsel, Wallace Lien, and Defendants appeared through counsel, Darsee Staley. The matter, being fully submitted, was taken under advisement on that date.

Issue

Whether this court should affirm the order of the Department of Land Conservation and Development (DLCD) approving plaintiffs' Measure 37 demand but determining that State-Wide Planning Goal 3 applied to plaintiffs' property at the time they acquired it?

Facts

This case came before this court on a stipulated facts trial. The following facts are uncontested:

Plaintiffs acquired the property at issue, a 65-acre tract in Marion County, on November 6, 1975, and have owned it since that time. At the time they acquired the property, it was zoned AR-5, which would have permitted five-acre residential lots. Pursuant to that zoning designation, the property could have been divided into thirteen parcels, with one single-family home on each.

State-Wide Planning Goal 3 was enacted on January 25, 1975, prior to the time plaintiffs acquired the property In 1979, the zoning for plaintiffs' property was changed to Exclusive Farm Use (EFU).

To: Wallace Lien and Darsee Staley
Re: Marckx v. State, Case No. 05C19654
Date: December 6, 2006
Page: 2

Plaintiffs timely filed a claim for compensation pursuant to Ballot Measure 37 (2004), codified at 197.352.[1] On August 16, 2005, defendant Department of Land Conservation and Development (DLCD) issued a final order on plaintiffs' claim, determining that plaintiffs had a valid claim. In lieu of compensation, DLCD chose not to apply land use regulations that were enacted subsequent to plaintiffs' acquisition of the property. DLCD found, however, that Goal 3 would apply to plaintiffs' use of the property.[2]

On October 11, 2006, plaintiffs filed a timely petition for judicial review of DLCD's order, as well as a claim for compensation under ORS 197.352(6).

DLCD filed a motion to dismiss or, in the alternative, for judgment on the pleadings. In addition to defending its order, DLCD contends that this court does not have jurisdiction to consider plaintiffs' ORS 197.352 compensation claim because the APA provides the exclusive procedure for review of DLCD actions. The parties agreed to proceed with a stipulated facts trial.

Discussion

As noted, Goal 3 was adopted before plaintiffs acquired the property. The "goal" set forth in Goal 3 was, in part:

> To preserve and maintain agricultural lands.
>
> Agriculture lands shall be preserved and maintained for farm use, consistent with existing and future needs for agricultural products, forest and open space. These lands shall be inventoried and preserved by adopting exclusive farm use zones pursuant to ORS Chapter 215. Such minimum lot sizes as are utilized for any farm use zones shall be appropriate for the continuation of the existing agricultural enterprise within the area.

Goal 3 also set forth factors to assess if agricultural land was ever sought to be converted to

---

[1]The only difference between the measure as presented to the voters and as codified are found in sections 1 and 5. The measure refers to land use regulations enacted prior to or after "the effective date" of the measure, while the statute provides the relevant date, December 2, 2004. Therefore, the remainder of this opinion will cite to the codification.

This court notes that the measure withstood a challenge to its constitutionality. *See MacPherson v. DAS*, 340 Or 117, 130 P3d 308 (2006). That decision did not address any of the issues currently before this court.

[2]Plaintiffs provide evidence that Marion County did not directly apply Goal 3 to land use applications until January of 1978.

urbanizable land, definitions for "Agricultural Land" and "Farm Use," and guidelines for implementing Goal 3 in land use plans (Respondent's Trial Memorandum, Attachment C, pp 7-8).

Marion County's comprehensive plan was acknowledged by the Land Conservation and Development Commission (LCDC) in May of 1982, after plaintiffs acquired the property (Respondent's Trial Memorandum, Attachment D). As noted, the zoning for plaintiffs' property was changed to EFU in 1979, after they had acquired the property.

Accordingly, this court must determine whether the provisions of Goal 3 applied directly to individual land use decisions made after the goal was enacted, or only via the comprehensive plans and zoning regulations enacted as a result of the comprehensive plan.

In one of the first cases to consider this issue, the Supreme Court observed that an amendment to the comprehensive plan must comply with the state-wide planning goals, and determined that the LCDC goals applied to decisions concerning the individual piece of property at issue in the case. *Sunnyside Neighborhood v Clackamas Co Comm*, 280 Or 3, 16-18, 569 P2d 1063 (1977). Despite that conclusion, the court stated that LCDC goals "are directed primarily to the overall planning process. With some few exceptions, they are not designed to guide decisions about the permissible uses or particular pieces of property. The comprehensive plan is expected to provide that guidance." *Id.* at 15. This language may be explained by the fact that, as expressed by the Court of Appeals, the legislature did not expect that it would take longer than one year for local governments to enact comprehensive plans that complied with the goals. *See Willamette University v LCDC*, 45 Or App 355, 369-70, 608 P2d 1178 (1980).

A later case considered the legislative intent in more depth, finding that the legislature had implied that the state-wide planning goals applied to individual land use decisions when it directed that the goals be enacted. *See Alexanderson v. Polk County Commissioners*, 289 Or 427, 433-34, 616 P2d 459, *reh'g den*, 290 Or 137 (1980).[3] The court reached this conclusion by noting that LCDC was authorized to review actions that were alleged to conflict with the state-wide goals. *See id* at 434; ORS 197.300(1)(b) (1975). The court further relied on the fact that ORS 197.275(2) (1977), which provided that, after a comprehensive plan had been acknowledged, the state-wide goals would apply to individual decisions regarding specific properties "only through the acknowledged comprehensive plan and implementing ordinances." The court concluded that this language implied that, prior to acknowledgment, the state-wide goals applied directly to those

---

[3]It is important to note that, in arriving at its decision, the court was addressing the question of whether the legislature intended counties to superimpose state-wide goals on their existing ordinances, rather than basing its decision on the county's policy of applying the state-wide planning goals to the land use request at issue. *See Alexanderson*, 289 Or at 431-32.

actions. *See Alexanderson*, 289 Or at 434.[4]

Cases decided after *Alexanderson* provide support for the conclusion that the state-wide goals apply to any individual land-use decisions made subsequent to the adoption of the goals but prior to the acknowledgment of comprehensive plans adopted pursuant to the goals. *See 1000 Friends v. Benton County*, 32 Or App 413, 430, 575 P2d 651, *rev den*, 284 Or 41 (1978) (the County's failure to address whether subdivision plans complied with state-wide goals required reversal, even though plans complied with zoning regulations); *Jurgenson v. Union County Court*, 42 Or App 505, 509, 600 P2d 1241 (1979) ("one basic thrust of ORS ch. 197 is that specific land-use decisions [including partition decisions] during this transition period must be consistent with the goals" (citing ORS 197.300(1)(b) and *Sunnyside Neighborhood*, 280 Or 3)); *see also Dodd v. Hood River County*, 317 Or 172, 185, 855 P2d 608 (1993) (noting, in analyzing whether a post-purchase zoning change resulted in petitioners' property being taken without just compensation, that "where local unacknowledged land use regulations * * * conflicted with the goals, land use decisions were to be made in compliance with LCDC goals"); *1000 Friends of Oregon v. LCDC*, 301 Or 447, 724 P2d 268 (1986) ("Once the goals were adopted, each city and county (local government) in Oregon was required to make its land use decisions and to prepare comprehensive land use plans 'in compliance with the goals'" (quoting ORS 197.175(2))); *Perkins v. City of Rajneeshpuram*, 300 Or 1, 4-6, 10, 706 P2d 949 (1985) (stating that a city must continue to comply with Goal 3 until its comprehensive plan was acknowledged); *Willamette University v. LCDC*, 45 Or App at 365 (noting that local land use decisions "must comply with the statewide planning goals unless and until the local comprehensive plan is acknowledged by LCDC to be in compliance with the statewide planning goals").

In light of the foregoing, it is clear to this court that Goal 3 would have applied to individual land use decisions made after it was enacted but prior to recognition of the comprehensive plan.

---

[4]This portion of ORS 197.275 was not in effect at the time plaintiffs acquired their property. Because this law was only part of the grounds on which the court's argument rested, however, the fact that it had not yet been enacted does not undermine the court's conclusion as it applies to plaintiffs' case.

In any event, ORS 197.275 (1975) directed that, although existing zoning and other ordinances and regulations would continue in effect until they were revised, "existing planning efforts and activities shall continue and * * * be utilized in achieving the purposes of ORS 197.005 to 197.430 * * *." ORS 197.040(2)(a) provided for the establishment of state-wide planning goals (which, of course, included Goal 3). Accordingly, the law in effect at the time plaintiffs acquired their property also indicated that the state-wide planning goals were to be directly applied to individual land-use decisions.

The three-judge dissent in *Alexanderson* opined that the state-wide goals were not applicable to individual decisions, as shown by the fact that LCDC had only the *authority* to require that a particular action comply with the goals, and was not required to exercise that authority. *See id.* at 438 (Tongue, J., dissenting).

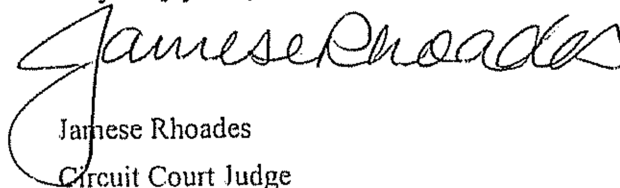
This includes decisions that, even if not required to be approved by the county pursuant to its own rules and procedures, would have been required to be approved pursuant to Goal 3. Thus, despite the fact that it may not have been Marion County's practice to apply Goal 3 to individual land use decisions – or even that the county was not required to approve a minor partition – at the time plaintiffs acquired the property, the legislature intended that the county apply Goal 3 to these types of decisions[5] This is because LCDC had authority to require that a particular action comply with the goals. *See* ORS 197.300(1) (1975). Had the legislature not intended that local governments consider and comply with these goals prior to the time their comprehensive plans were implemented, the legislature would not have provided LCDC with this authority. This is also consistent with the provision in ORS 197.275 (1975), that existing planning efforts and activities achieve the purposes of the state-wide planning goals. Therefore, at the time plaintiffs acquired their property, counties were required to consider not only the zoning rules and ordinances in effect, but also Goal 3, in determining whether specific uses were permitted. Consequently, plaintiffs use of their property remains subject to Goal 3.

Because this court's determination on plaintiffs' claim under the APA renders moot their claim for compensation pursuant to ORS 197.352(6), this court will not address that claim.[6]

Conclusion

This court affirms DLCD's August 16, 2005 Order. Ms. Staley will kindly prepare the appropriate General Judgment of Dismissal.

Very truly yours,



Jamese Rhoades
Circuit Court Judge

JLR:nl

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[5]Furthermore, even if it would have been possible to partition the property without the county's involvement, the county would have been required to approve any buildings sought to be built on the property

[6]Plaintiffs' attorney acknowledged that, if this court determined that Goal 3 applied in this case, plaintiffs' ORS 197.352(6) claim would lack merit

1 **CERTIFICATE OF SERVICE**

2 I certify that on June 19th, 2007, I served the foregoing STATE'S MOTION FOR

3 SUMMARY JUDGMENT and MEMORANDUM OF LAW IN SUPPORT OF STATE'S

4 MOTION FOR SUMMARY JUDGMENT upon the parties hereto by the method indicated

5 below, and addressed to the following:

6

7 Joel D. Kalberer
Weatherford, Thompson, Cowgill et al
8 130 W. First Avenue
PO Box 667
9 Albany, OR 97321

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

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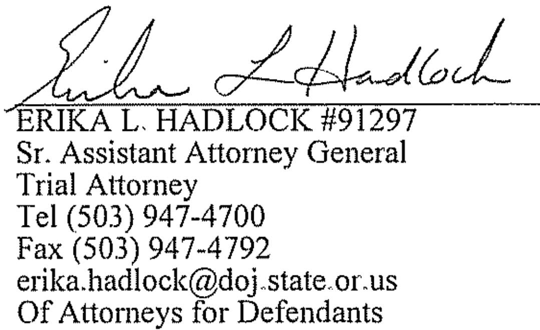

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ERIKA L. HADLOCK #91297
13 Sr. Assistant Attorney General
Trial Attorney
14 Tel (503) 947-4700
Fax (503) 947-4792
15 erika.hadlock@doj.state.or.us
Of Attorneys for Defendants

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23

24

25

26

Department of Justice
1162 Court Street NE
Salem, OR 97301-4096
(503) 947-4700 / Fax: (503) 947-4792