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

6 NORMAN and DIANE KALDAHL,

7 Plaintiffs,

8 v.

9 OREGON DEPARTMENT OF LAND
10 CONSERVATION AND DEVELOPMENT,
and STATE OF OREGON,

11 Defendants.

Case No. 07-10116

MEMORANDUM OF LAW IN OPPOSITION TO
PLAINTIFFS' MOTION FOR SUMMARY
JUDGMENT

12 INTRODUCTION

13 Plaintiffs acquired their property after the October 5, 1973, effective date of Senate Bill
14 100 and related laws that mandate comprehensive statewide land use planning. Because all of
15 plaintiffs' property has high-quality soils that make it prime farmland, two provisions of the
16 1973 legislation would have prevented plaintiffs from subdividing the property for residential
17 use: (1) the requirement that counties make land use decisions in compliance with the statewide
18 land use planning goals, which then included a mandate to "conserve prime farm lands for the
19 production of crops"¹; and (2) the requirement that counties make decisions in keeping with the
20 legislative intent that "preservation of a *maximum* amount of the limited supply of agricultural
21 land is necessary to the conservation of the state's economic resources and the preservation of
22 such land in large blocks is necessary in maintaining the agricultural economy of the state * *

23 *."² Plaintiffs' argument that they would have been able to subdivide their land when they
24

25 ¹ Or Laws 1973, ch 80, §§ 17, 48, *codified at* ORS 215.515(1)(d) (1973).

26 ² ORS 215.243(2) (1973) (emphasis added); *see* ORS 215.263(3) (1973).

1 acquired it asks this Court to overlook both of those statutory provisions. Because plaintiffs
2 could not have divided their land when they acquired it, they do not qualify for Measure 37
3 relief. This Court should deny plaintiffs' motion for summary judgment and enter judgment in
4 favor of the State.

5 ARGUMENT

6 The primary dispute in this Measure 37 case is whether plaintiffs could have subdivided
7 their farmland for residential use when they acquired it in late 1973, after the effective date of
8 Senate Bill 100 (1973). Plaintiffs contend they could have divided the property into seven one-
9 acre residential lots in accordance with Benton County zoning and, therefore, qualify for
10 Measure 37 relief. The State contends that plaintiffs could not have made that use of the
11 property because application of the interim statewide land use planning goals would have
12 prevented the County from approving any proposed subdivision of the land, the entirety of which
13 has high-quality agricultural soils. In particular, residential development of plaintiffs' property
14 would have conflicted with the legislative mandate to conserve prime farm lands for the
15 production of crops. ORS 215.515(1)(d) (1973).

16 **A. After October 5, 1973, Benton County was required to apply both its own zoning**
17 **ordinances and the interim statewide land use planning goals in deciding land use**
18 **applications.**

19 When plaintiffs acquired their property in late 1973, it was zoned for suburban residential
20 use under the Benton County ordinances then in effect, although the property had not been (and
21 still has not been) developed for that use. Plaintiffs contend that Benton County could have
22 approved an application to subdivide the property, had plaintiffs filed one, because only the
23 county ordinances – and not the interim land use planning goals – applied to the property at that
24 time. (Pls' MSJ Memo at 7). Plaintiffs contend that “the interim farm goals were vague and not
25 meant to casually replace existing land use regulations” that counties already had enacted,
26 including zoning ordinances. (Pls' MSJ Memo at 7).

1 The State agrees with only one facet of this argument: that the interim goals did not
2 “casually” replace existing land use regulations. To the contrary, the legislature’s decision to
3 create statewide land use planning goals was quite deliberate, as was its decision that those new
4 state laws would supplement existing local regulations. As the State explained in its opening
5 memorandum, Senate Bill 100 required cities and counties to immediately start “exercis[ing]
6 their planning and zoning responsibilities in accordance with” the interim goals, including the
7 mandate to “conserve prime farm lands for the production of crops,” and to apply the interim
8 goals in implementing any comprehensive plan. Or Laws 1973, ch 80, §§ 17, 41, 48. The
9 Supreme Court soon confirmed that counties were required to apply the interim goals *in addition*
10 *to* existing local regulations in conducting their zoning and planning responsibilities. *See*
11 *Peterson v. Klamath Falls*, 279 Or 249, 252-54 (1977); *see also 1000 Friends v. LCDC*, 292 Or
12 735, 748 (1982) (“The interim statutory goals reflect a legislative intention that land use
13 decisions, even during the transitional period, be based upon consideration of a full range of
14 environmental, conservation, recreational, agricultural, economic and other substantive
15 legislative concerns”); *id.* at 750 (noting that 1973 legislature “establish[ed] interim goals to
16 avoid damage to the state’s resources during the planning process” contemplated by Senate Bill
17 100). These cases defeat plaintiffs’ argument that the interim land use planning goals would not
18 have applied to any subdivision or partition application submitted to the county when they
19 acquired their property in November or December 1973. (See Pls’ MSJ Memo at 7-8 & n 3).
20 Both the interim goals and Benton County’s existing zoning would have governed the County’s
21 decision on any such application.

22 **B. The interim goals would have precluded Benton County from approving division of**
23 **plaintiffs’ property.**

24 Plaintiffs also argue that, even if the interim goals applied to their use of the property in
25 late 1973, those goals would not have prevented them from dividing the property for residential
26 use. Plaintiffs concede that their property “contains high value farmland” based on soil-survey

1 data. (Pls' MSJ Memo at 2; *see* State's MSJ Memo at 4 (making same point)). Nonetheless,
2 they contend that the interim goal to "conserve prime farm lands for the production of crops"³
3 would not have prevented them from putting a subdivision on the property.

4 Plaintiffs' main argument is that the presence of high-quality soils cannot make their
5 property "prime farm land" that must be conserved because that "would mean extending the farm
6 goals to nearly all industrial, commercial, residential, and non-farm zoning located in Benton
7 County's valley floors." (Pls' MSJ Memo at 5). Plaintiffs insinuate that application of the
8 interim goal to all land with high-quality soils would lead to absurd results, such as requiring
9 land within the City of Corvallis to be used exclusively for farming.

10 The State does not advocate that result and the State's argument does not lead to it.
11 When the legislature enacted the interim land use planning goals, it explained that its primary
12 objective was to preserve the limited supply of Oregon farmland that had not yet been put to
13 non-farm uses:

14 (1) *Open land* used for agricultural use is an efficient
15 means of conserving natural resources that constitute an important
16 social, aesthetic and economic asset to all of the people of this
17 state, whether living in rural, urban or metropolitan areas of the
18 state.

18 (2) *The preservation of a maximum amount of the limited*
19 *supply of agricultural land is necessary* to the conservation of the
20 state's economic resources and the preservation of such land in
21 large blocks is necessary in maintaining the agricultural economy
22 of the state and for the assurance of adequate, healthful and
23 nutritious food for the people of this state and nation.

22 ORS 215.243 (1973) (emphasis added). "Preservation" of the "limited supply" of open
23 agricultural land did not then – and does not now – mean taking land that already has been
24 developed for urban purposes and requiring that it suddenly be rezoned for farm use.

25 _____
26 ³ Or Laws 1973, ch 80, §§ 17, 48, *codified at* ORS 215.515(1)(d) (1973).

1 “Preservation” of a “limited supply” means ensuring that remaining undeveloped land that is
2 suitable for agriculture is reserved for that purpose and not converted to other uses.

3 Plaintiffs also argue that the State erred by considering only the farmland-preservation
4 goal when it determined that plaintiffs could not have divided their property when they acquired
5 it, “while ignoring the nine other competing goals.” (Pls’ MSJ Memo at 6). But the final order
6 shows that the State *did* consider all of the interim goals in assessing whether plaintiffs could
7 have divided their property in 1973, as it lists all of those goals and notes that several of them
8 apply directly to plaintiffs’ property, including the transportation-system and public-facilities-
9 and-services goals. (*Record* § 6 at 6-8 & n 3). The State’s consideration of all those goals,
10 including the farmland-preservation goal, led it to conclude that plaintiffs could not have
11 subdivided their property when they acquired it in 1973. Indeed, the Final Order explicitly states
12 that the State did *not* rely only the interim farmland goal in reaching that conclusion:

13 Based on the facts of this claim, dividing the 7.10-acre property
14 into seven parcels of one acre each for residential use does not
15 “conserve prime farm lands for the production of crops,”
16 “preserve the quality of the . . . land resources of the state,”
17 “provide for an orderly and efficient transition from rural to urban
18 land use,” “protect life and property in areas subject to floods” or
19 provide for “a timely, orderly and efficient arrangement of public
 facilities and services” as required by ORS 215.515 (1973
 edition). Thus, the requested use would not have been permitted
 under the standards in effect when the claimants acquired the
 subject property.

20 (*Record* § 6 at 6).

21 To the extent that the final order focuses more on the farmland-preservation goal than it
22 does on some of the other interim goals, that emphasis is consistent with the legislature’s
23 overriding concern of preserving the “maximum” amount of agricultural land possible. ORS
24 215.243(2) (1973); *see Lane County v. LCDC*, 325 Or 569, (1997) (the legislature has mandated
25 that LCDC “protect agricultural lands generally, and high value farmland in particular”). And
26 that aspiration does not “compete” with other interim goals like improving the State’s economy

1 or providing for “an orderly and efficient transition from rural to urban land use.” ORS 215.515
2 (1973). Rather, as the legislature found, preserving farmland is necessary to maintaining the
3 state’s economy, and the expansion of urban development into rural areas is “concerning”
4 because of “conflicts between farm and urban activities.” ORS 215.243(2), (3). Thus, all of the
5 interim goals work in concert to protect the State from development that would harm its
6 economy and environment. The State’s focus on the farmland goal does not, therefore, reflect a
7 disregard of the other goals. Instead, it implicitly acknowledges that preservation of farmland is
8 necessary to accomplish all the legislative goals associated with implementation of a
9 comprehensive, coordinated land use system.⁴

10 Plaintiffs’ argument also fails to the extent they contend that, if the State properly applied
11 all the interim goals, it would have concluded that plaintiffs could have divided their agricultural
12 land for residential development in late 1973. (*See* Pls’ MSJ Memo at 6). The State’s contrary
13 conclusion is consistent with decisions of the Oregon appellate courts, which have held that
14 residential development generally is not consistent with the goal of preserving farmland. *See,*
15 *e.g., Alexanderson v. Polk County Commissioners*, 289 Or 427, 429, 434 (1980) (Goal 3
16 prevented division of a 25-acre parcel of agricultural land into three lots, even though the land
17 was zoned rural residential); *Jurgenson v. Union County*, 42 Or App 505, 512-13 (1979) (Goal 3
18 prevented division of 34-acre parcel of agricultural land into three residential lots). The State did
19 not err by concluding that residential development of plaintiffs’ land would not have been
20 compatible with preserving the maximum amount of land possible for the production of crops.

21 Nor would ORS 215.263 (1973) have allowed Benton County to approve division of
22 plaintiffs’ property for residential use, as plaintiffs contend. (*See* Pls’ MSJ Memo at 9-10).
23 Plaintiffs rely on the portion of that statute that allowed counties to approve or disapprove
24

25 ⁴ However, if this Court agrees with plaintiffs that the State did not adequately consider all
26 of those goals, the appropriate remedy is remand so the agencies may reconsider their decision
under the proper standard.

1 division of farmland into parcels less than 10 acres in size under certain circumstances. ORS
2 215.263(2) (1973). The next section of the statute, which plaintiffs do not cite, says a county
3 “shall not approve any proposed division of land unless it finds that the proposed division of land
4 is in conformity with the legislative intent set forth in ORS 215.243.” ORS 215.263(3). And
5 that statute expresses the legislature’s intent that preserving “a maximum amount” of agricultural
6 land is “necessary” to the State’s economy. ORS 215.243. The State correctly determined that
7 any division of plaintiffs’ land would have conflicted with that intent and, therefore, would not
8 have been permissible under ORS 215.263.

9 Finally, plaintiffs assert that the State’s decision is based on the fact that their property
10 was rezoned to Exclusive Farm Use in 1979. (Pls’ MSJ Memo at 8). That is not correct. As the
11 final order plainly states, laws already enacted when plaintiffs acquired their property in 1973,
12 including the interim goals, would have prevented them from dividing it; the State did not apply
13 1979 laws in making that decision. (*See Record* § 6 at 6-8).

14

15 **C. The State was entitled to view plaintiffs’ Measure 37 demand as being based on the
16 use of dividing the property into seven lots for residential development.**

17 As the State anticipated in its opening summary-judgment memorandum, plaintiffs argue
18 that the State improperly analyzed only whether the property could have been divided into seven
19 lots when plaintiffs acquired it, and did not take into account any lesser development that could
20 be encompassed within plaintiffs’ stated desire “to place ‘up to’ seven homes on seven lots.”
21 (Pls’ MSJ Memo at 9). Plaintiffs contend that the State was required to “address the other
22 options” implicitly presented in their Measure 37 demand. (Pls’ MSJ Memo at 9). The State’s
23 opening memorandum adequately addresses this point. (*See State’s MSJ Memo* at 12-14). In
24 short, Measure 37 requires claimants to identify “a use permitted at the time the owner acquired
25 the property,” ORS 197.352(8) (emphasis added), and defines “just compensation” as the amount
26 by which the owner’s property interest has been reduced by the land use regulations that prevent

26

1 that particular use. See ORS 197.352(1), (2). In this case, the only specific use identified in
2 plaintiffs' Measure 37 demand is division of the property into seven residential lots. The State
3 properly analyzed whether plaintiffs qualified for Measure 37 relief based on that desired use;
4 the State was not required also to analyze whether 1973 laws would have permitted each of the
5 less-dense uses that theoretically could be made of the property.

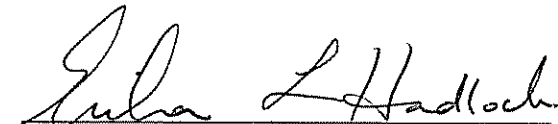
6 **CONCLUSION**

7 The State correctly determined that plaintiffs are not entitled to Measure 37 relief because
8 land use regulations that prevent them from dividing their property already were in place when
9 they acquired the property in November 1973. Accordingly, this Court should deny plaintiffs'
10 motion for summary judgment and enter judgment in favor of the State.

11 DATED this 20th day of July, 2007.

12 Respectfully submitted,

13 HARDY MYERS
14 Attorney General

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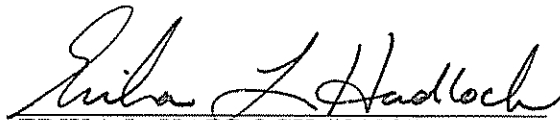
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1 **CERTIFICATE OF SERVICE**

2 I certify that on July 20th, 2007, I served the foregoing MEMORANDUM OF LAW IN
3 OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT upon the parties
4 hereto by the method indicated below, and addressed to the following:

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