

CIRCUIT COURT OF OREGON

FIFTH JUDICIAL DISTRICT
CLACKAMAS COUNTY COURTHOUSE
OREGON CITY, OREGON 97045

DOUGLAS V. VAN DYK
COURT JUDGE

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April 20, 2007

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Re: Kennedy v Clackamas County, et al Clackamas County Case No. CV060030012

Dear Counsel:

After the following summary of stipulated facts, this letter sets forth the court's analysis of the law and conclusions in response to the parties' respective summary judgment motions.

Background and Stipulated Facts

This Measure 37 case involves two separate parcels of land. Each parcel has a separate owner. Each owner is a plaintiff and Measure 37 claimant. The parties refer to the parcels as "the Farm" and "the Gayleen Property".

The Farm and the Gayleen Property were first acquired by B. E. Weiler and Lois Weiler (the "Weilers") on May 11, 1960.

On December 14, 1973, the Weilers conveyed both the Farm and the Gayleen Property to their son, John B. Weiler. On December 30, 1975, John B. Weiler reconveyed the Farm to the Weilers. He kept the Gayleen Property.

On May 19, 1994, the Weilers transferred the Farm to the revocable Weiler Living Trust, naming themselves as Trustees.

On March 1, 1999 Gayleen Weiler acquired the Gayleen Property from John B. Weiler.

In 2002, B. E. Weiler died. As required by the terms of the Weiler Living Trust, following his death, the assets of the Weiler Living Trust were divided between the Decedent's Trust Fund and the Surviving Trustor's Trust Fund. The Decedent's Trust Fund was further divided into the Exemption Equivalent Trust ("B. E. Weiler Exemption Trust") and the Marital Deduction/Generation Skipping Tax Exemption Trust.

In August 2003, Lois L. Weiler resigned as trustee of the various trusts and appointed her daughter, Janice W. Kennedy, as the successor trustee.

As successor trustee, Janice W. Kennedy then allocated the assets of the Weiler Living Trust between the Decedent's Trust Fund and the Surviving Trustor's Trust Fund. The Farm was allocated to the Decedent's Trust Fund. Ms. Kennedy then conveyed it to the B. E. Weiler Exemption Trust, of which Lois L. Weiler is the primary beneficiary.

On March 10, 2005, Gayleen Weiler and Ms. Kennedy (as successor trustee of the B. E. Weiler Exemption Trust) filed their respective Measure 37 claims with both Clackamas County and the State of Oregon, acting through its Department of Land Conservation and Development ("DLCDD"). Ms. Weiler seeks compensation for her property in the amount of \$1,953,000; Ms. Kennedy as trustee seeks compensation for the Farm in the amount of \$5,175, 000.

On March 24, 2006, John B. Weiler and Ms. Kennedy as trustee stipulated to a judgment rescinding the transfer of the Farm in 1973.

Analysis and Conclusions

Under section (1) of Measure 37:

"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).

Section (2) describes the point at which “just compensation” is determined:

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

ORS 197.352(2) (emphasis added).

Instead of paying compensation, the governing body may decide not to apply the land use provision at issue:

“[I]n lieu of payment of just compensation under this section, the governing body responsible for enacting the land use regulation may modify, remove, or not to (*sic*) apply the land use regulation . . . to allow the owner to use the property for a use permitted *at the time the owner acquired the property.*”

ORS 197.352(8) (emphasis added). The parties use the term “waiver” to describe a governing body’s decision not to apply land use regulations. This opinion also uses the term.

The statute makes a clear distinction between the date used to calculate compensation – “*the date the owner makes written demand*” – and the date used to determine when the waiver must be effective for the governing body to avoid paying compensation – “*the time the owner acquired the property.*”

Plaintiffs Kennedy (as trustee) and Gayleen Weiler each contend that, in order to avoid paying compensation, the County and DLCDC would have had to extend the waivers to 1960, when the Weilers first acquired the properties.

A. The Farm

As to the Farm, the County waived applicable land use regulations dating back to December 30, 1975, the date John B. Weiler reconveyed the Farm to his parents.

For its part, DLCDC extended the waiver only to August 2, 2004, the date when Janice Kennedy as trustee transferred the Farm into the B.E. Weiler Exemption Trust. According to

DLCD, on that date the trustee “assumed control over disposition of the Farm by putting it into the Exemption Trust.” (State’s Mot. at 11, lines 19-20). DLCDC also argues that the Weilers themselves did not make a claim, only the trustee made a claim, therefore the year 1960 cannot be the date of the acquisition under section (8) of Measure 37, since the trust did not exist and the trustee had no interest in the property in 1960. (State’s Mot. at 6, lines 18-20).

When construing a law adopted by the voters:

“[T]he court’s task is to determine the intent of the voters. . . . We therefore examine both the text and context of the statute. . . . If the intent is clear from an examination of the text and context of the statute, we need make no further inquiry.”

State v. Root, 202 Or App 491, 495, 123 P2d 281 (2005) (citations and footnotes omitted).

The question presented in this case requires the court to consider the meaning of “owner” as the term is defined in Measure 37. As defined, the term means “the present owner of the property or *any interest* therein.” ORS 197.352(11) (C) (emphasis added). As recently described by the Oregon Court of Appeals, the term “interest” is inherently broad:

“In ordinary parlance, an ‘interest’ refers to a ‘right, title or legal share in something’ or ‘something in which one has a share of ownership or control.’ *Webster’s Third New Int’l Dictionary* 1178 (unabridged ed 2002). Similarly, *Black’s Law Dictionary* 729 (5th ed 1979) defines ‘interest’ as ‘[t]he most general term that can be employed to denote a right, claim, title, or legal share in something.’ As the term is ordinarily used, therefore, an ‘interest’ is inherently broad, denoting not merely an ownership relationship but any legal share or right of control.”

Tualatin Valley Housing v. Truck Ins. Exchange, 208 Or App 155, 160, 144 P3d 991 (2006). Since it includes persons with “any interest” in the property, the term “owner” is certainly broad enough to encompass a trustee’s claim, since a trustee has a “legal share” of the trust property. A more difficult question is whether the breadth given to the term “owner” under Measure 37 also allows the trustee to obtain a waiver that dates to the time when the holder of the beneficial interest in the trust – in this case Lois Weiler – acquired her interest in the property. In other words, may the holder of legal title obtain relief on behalf of the holder of an equitable interest in the property?

Under section (8) of Measure 37, the governing body may choose not to apply a land use regulation “to allow the owner to use the property” for a use permitted at the time “the owner” acquired it. Since Measure 37 broadly defines the term “owner” – so broadly that in ordinary parlance it includes even the holder of “any legal share” of the property – both the trustee and

the beneficiary fit within the class of persons defined as “owners” under Measure 37. This court therefore concludes that the text of the statute allows a trustee to obtain a waiver dating to when the trust beneficiary obtained her interest.

The “context” is consistent with this result. Context includes other provisions within the initiative itself. *PGE v. BOLI*, 317 Or 606, 610-11, 859 P2d 1143 (1993). With a few exceptions, section (1) of Measure 37 creates a remedy for holders of *any* interest in the property when governing bodies place *any* restrictions on the property. Section (1) makes evident the voters’ intent to expand individual rights while imposing significant limitations on the power of government. In a context in which voters have thus sought to “relieve[] landowners of some of the financial burdens of land use regulations”, *MacPherson v. DAS*, 340 Or 117, 141, 130 P3d 308 (2006), it would be inconsistent to read the statute in a way that limits a trustee’s ability to obtain a relief on behalf of a *cestui que trust*. Any other reading would narrow the meaning of the term “owner” when the voters’ intent is expressed in the broadest terms.¹

Moreover, a trust is a relationship “in which one person is the holder of title to property subject to an equitable obligation to keep and use the property for the benefit of another.” George T. Bogert, *Trusts* § 1 (6th ed. 1987). Although Measure 37 does not plainly recite that one person with a present interest in the property may obtain relief on behalf of another person with a present interest in the property (i.e., a trustee on behalf of a beneficiary), allowing the decision in this case to turn on the historical distinction between a legal and equitable interest seems to this court inconsistent with “a modern sense” of what a trust represents:

“The trust in its modern sense is conceived to be the *relationship or status* in which are concerned certain property and persons, and incidental to which are certain rights and duties. The *whole bundle of property, persons, rights, and duties makes up the trust*. It is often said that a trustee holds the trust property ‘subject to a trust,’ but it would seem to be more accurate to state that he holds it subject to the duties of a trustee.”

Id. at note 1 (emphasis added).² In seeking relief under Measure 37, the trustee in this case is acting as the representative of just such a “whole bundle” of relationships and interests that comprise the trust. Absent any expressions or evidence of the voters’ intent to separate all of the things the bundle represents, this court will not imply such intent and thereby impair or limit the

¹ Whether such a result represents good policy is beyond the purview of this court. The office of the judge “is simply to ascertain and declare what is, in terms or in substance, contained [in the statute], not to insert what has been omitted, or to omit what has been inserted.” ORS 174.010

² See also John H. Langbein, *The Contractarian Basis of the Law of Trusts*, 105 Yale L. J. 625, 627 (1995) (“The distinguishing feature of the trust is not the background event, not the transfer of property to the trustee, but the trust deal that defines the powers and responsibilities of the trustee in managing the property.”)

trustee's power to act on behalf of that "whole bundle" of interests.

Since the trustee is making the Measure 37 claim on behalf of Lois Weiler as beneficiary of the trust, the waiver must extend to the date when Lois Weiler acquired her interest in the Farm.

The question thus becomes, as to the Farm, whether the date of acquisition is 1960 or 1975. The question requires this court to consider the effect of the Weilers' conveyance of the Farm to son John B. Weiler in 1973, the reconveyance in 1975, and the legal significance of the stipulated "General Judgment for Rescission and Declaratory Relief" entered March 24, 2006. (Stip. Facts Ex. A at 1-2) (hereafter "Judgment").

The Stipulated Order accompanying the Judgment explains that the rescission was made to correct a mistake. Neither the State nor Clackamas County introduced any evidence to suggest otherwise. The State relies only on its *res judicata* arguments: specifically, that the General Judgment cannot bind it because it was not a party to the friendly lawsuit that produced it. (State's Reply to Resp. to Mot. SJ at 3). As to such issue preclusion, the State is correct, both because the General Judgment was entered in an action in which the fact disputed here was not actually litigated, and because neither the State nor the County was a party to the action. The General Judgment therefore has no preclusive effect.

However, the General Judgment and Stipulated Order represent the only evidence in the record on these motions regarding whether the 1973 deed was a mistake. It is evidence this court considers sufficient to meet plaintiff Kennedy's burden of showing that the 1973 and 1975 transfers in fact corrected a mistake. The burden of producing contrary evidence shifted to the State and County and neither party produced any such evidence. ORCP 47D ("adverse party may not rest upon the mere allegations or denials of that party's pleading").

Thus, on the record before this court, there is no genuine issue of fact. The record reveals only that the reconveyance in 1975 corrected a mistake. Therefore, Lois Weiler's ownership of the Farm was continuous from 1960 to the date of her demand for compensation. To be effective to defeat the trustee's Measure 37 claim, the State and County were required to waive land use regulations affecting the Farm after 1960.

B. The Gayleen Property

With regard to the Gayleen Property, no one disputes its acquisition date (March 1, 1999). Plaintiffs contend the waiver should extend to 1960 because, since that time, the property remained in "continuous family ownership." (Pl. Mot. for SJ at 2; lines 15-16). Section (8) of Measure 37 does not condition its operation on whether the waiver extends to when a family member first purchased the property. To avoid paying compensation, the plain terms only require that "the governing body . . . not . . . apply the land use regulation . . . to allow the owner

to use the property for a use permitted at the time *the owner* acquired the property.” In the case at bar, that date is March 1, 1999.

C. The APA

Finally, in its “Motion No. 1”, the State of Oregon contends that the Administrative Procedures Act (“APA”) provides the exclusive means of review of DLCD’s decision and, since plaintiffs failed to seek review of DLCD’s decision, this court lacks jurisdiction to decide the Measure 37 claim.

Section (6) of Measure 37 provides:

“If a land use regulation continues to apply to the subject property more than 180 days after the present owner of the property has made written demand for compensation under this section, the present owner of the property, or any interest therein, shall have a cause of action for compensation under this section in the circuit court in which the real property is located

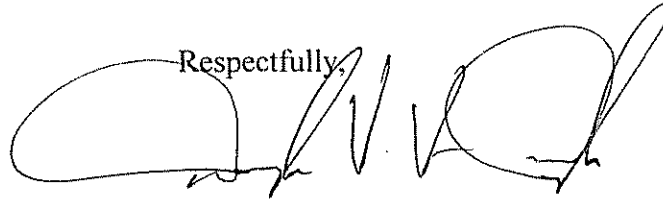
ORS 197.352(6). Under section (6), the right to pursue a claim in circuit court depends only upon the passing of 180 days after written demand is made. No other condition to obtaining relief in the circuit court is described. Section (7) allows an agency to adopt procedures for processing claims; it does not impose as a condition of recovery a requirement that a complainant first exhaust an administrative remedy.

Accordingly, the court makes the following rulings:

1. Clackamas County’s Motion for Summary Judgment on the ground that plaintiffs are not entitled to compensation is denied as to plaintiff Trustee Janice W. Kennedy; the Motion is granted as to plaintiff Gayleen D. Weiler.
2. The State of Oregon’s Motion No. 1 for Summary Judgment on the ground that the Circuit Court lacks subject matter jurisdiction is denied.
3. The State of Oregon’s Motion No. 2 for Summary Judgment on the ground that it is not required to pay compensation to plaintiff Janice W. Kennedy (trustee) is denied; the Motion is granted as to plaintiff Gayleen D. Weiler.
4. Plaintiff’s Motion for Summary Judgment on the issue of whether the defendants “are required to consider both legal and beneficial ownership interest of the properties” is granted as to the Farm (Motion “a”); (see Pl. Mot. for SJ at 2).
5. Plaintiffs Motion for Summary Judgment on the issue of whether Lois L. Weiler is an “owner” within the meaning of ORS 197.352(8) is granted as the Farm. (Motion “b.”); (see Pl. Mot. for SJ at 2).

6. Plaintiffs' Motion for Summary Judgment on the issue of whether the Farm has been in continuous family ownership since May 11, 1960 is granted as to the Farm; the Motion is denied as to the Gayleen Property. (Motion "c."); (see Pl. Mot. for SJ at 2).

Respectfully,



Douglas Van Dyk
Circuit Court Judge

DVD/jnh