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DEPARTMENT OF JUSTICE
TRIAL DIVISION

May 23, 2006

Case Processing
Clackamas County Courts
807 Main Street, Room 104
Oregon City, OR 97045

Re: *Kennedy, Janice W. et al v. Clackamas County et al*
Clackamas County Circuit Court No. CV06030012

Dear Circuit Court Clerk:

Enclosed for filing please find the State's ORCP 21 Motions in the referenced matter.

A postcard is enclosed for your use in notifying me of the action taken.

Sincerely,

Paul J. Sundermier
Senior Assistant Attorney General

TRIO6553.DOC/PJS/tr1
Enclosure

cc: Client
E. Sean Donahue
Michael E. Judd

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

JANICE W. KENNEDY, TRUSTEE OF THE
B.E. WEILER EXEMPTION TRUST and
GAYLEEN D. WEILER,

Plaintiffs,

v.

CLACKAMAS COUNTY, STATE OF
OREGON; DEPARTMENT OF
TRANSPORTATION AND
DEVELOPMENT OF CLACKAMAS
COUNTY, STATE OF OREGON; BOARD
OF COUNTY COMMISSIONERS OF
CLACKAMAS COUNTY, STATE OF
OREGON; STATE OF OREGON,
DEPARTMENT OF LAND
CONSERVATION AND DEVELOPMENT
OF THE STATE OF OREGON; LAND
CONSERVATION AND DEVELOPMENT
COMMISSION OF THE STATE OF
OREGON; and DEPARTMENT OF
ADMINISTRATIVE SERVICE OF THE
STATE OF OREGON,

Defendants.

Case No. CV06030012
ORCP 21 MOTIONS
(DISMISS, MAKE MORE DEFINITE AND
CERTAIN)

UTCR Compliance

Defendant, State of Oregon, certifies that it made a good faith effort to confer with the plaintiff and was unable to reach agreement.

The State requests oral argument and official court reporting services. Approximately one-half hour should be sufficient.

1 their private real property. Under Measure 37, an owner of an interest in real property qualifies
2 for relief if three criteria are met: (1) a public entity enforces an existing “land use regulation” or
3 enacts or enforces a new “land use regulation;” (2) the land use regulation restricts the use of
4 private real property; and (3) “the land use regulation has the effect of reducing the fair market
5 value of the private real property.” ORS 197.352(1). An “owner” is the “present owner of the
6 property, or any interest therein.” ORS 197.352(11). If the owner qualifies for relief,
7 government is required to pay just compensation. ORS 197.352 (2).⁴ As an alternative to the
8 requirement of compensation, the measure provides that state and local governments may
9 “modify, remove or not***apply the land use regulation or land use regulations to allow the
10 owner to use the property for a use permitted at the time the owner acquired the property.” ORS
11 197.352(8); *MacPherson v. DAS*, 340 Or at 122. Allowing the owner to use the property in a way
12 that would otherwise be prohibited by land use regulations is commonly referred to as granting a
13 Measure 37 “waiver.” Generally, Measure 37 limits relief to property owners who acquired their
14 property prior to the enactment of the land use regulations that provide the basis for their claims.
15 ORS 197.352(3)(e), *MacPherson v. DAS*.⁵ The measure provides four other exceptions as well.
16 ORS 197.352(3).⁶

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19 ⁴ “Just compensation shall be equal to the reduction in the fair market value of the affected
20 property interest resulting from enactment or enforcement of the land use regulation as of the
date the owner makes written demand for compensation.” ORS 197.352(2).

21 ⁵ A Measure 37 claimant is entitled to compensation for regulations enacted prior to the date of
22 acquisition of the property by the owner *or a family member* of the owner. ORS 197.352(3). This
23 language differs from the language authorizing “waiver”, which authorizes government to allow
24 *the present owner* to use the property in a manner permitted when the owner acquired the
25 property. ORS 197.352(3).

26 ⁶ In addition, there are exceptions for land use regulations “restricting or prohibiting activities
commonly and historically recognized as public nuisances,” ORS 197.352(3)(A), “restricting or
prohibiting activities for the protection of public health and safety.” ORS 197.352(3)(B),
“required to comply with federal law, “ ORS 197.352(3)(C), and “restricting or prohibiting the
use of a property for the purpose of selling pornography or performing nude dancing,” ORS
197.352(3)(D).

1 Although Measure 37 amended Oregon’s land use planning statutes, it did not repeal any
2 of them. The measure authorizes a governing body to “modify, remove, or not ... apply” certain
3 regulations in specific situations. *MacPherson v. DAS*, 340 Or at 132 (finding Measure 37 not to
4 be an unconstitutional “suspension” of the law). Otherwise the land use planning laws remain in
5 effect. *Id*.

6 **III. The Claims Process**

7 The Oregon Department of Administrative Services (DAS) has adopted rules governing
8 procedures for filing and reviewing Measure 37 claims with the state. OAR 125-145-0010 to
9 125-145-0130.⁷ The rules provide minimum requirements for what must be contained in a claim.
10 OAR 125-145-0040. Information about claims is made public through a registry of claims
11 maintained by DAS. OAR 125-145-0060. When DAS receives a claim, DAS provides written
12 notice of the claim to anyone who has requested notice, to any owner of record of real property
13 located within certain distances of the property, and to certain neighborhood or community
14 organizations. OAR 125-145-0080.⁸ Persons receiving notice, or any other person, are entitled
15 to submit comments evidence and information within ten days. OAR 125-145-0080 (2),(3).
16 DAS reviews the claim and forwards it to any state agency that appears to have enacted or
17 enforced a relevant land use regulation (termed a “regulating entity”). OAR 125-145-0090. The
18 regulating entity issues a draft report that provides the agency's preliminary determination on the
19 necessary elements of the claim, including whether the claim was timely filed, whether the
20 claimant is an owner of the private real property, when the owner (or family member) acquired
21 the property, whether the land use regulation is exempt under Measure 37, and whether the land
22 use regulation reduced the fair market value of the property. The draft report is mailed to the

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24 ⁷ Measure 37 itself does not provide procedures for claim processing. Most cities and counties
25 have adopted their own ordinances implementing Measure 37 and providing procedures for
26 claims processing.

⁸ This provision was designed to be consistent with ORS 215.223 regarding notice of zone
changes.

1 claimant and any persons who submitted comments on the claim or who requested notice. There
2 follows a ten-day comment period on the claim and the draft report. OAR 125-1435-0100.
3 Based in part on the comments received, the regulating entity and DAS issue a final report and
4 order on each claim. OAR 125-145-0100. The rule also establishes that orders on claims must be
5 based on a written record and specifies the contents of that record. OAR 125-145-0105.

6 ORCP 21 Motions to Dismiss

7 The State of Oregon moves this court to dismiss plaintiffs' claims, as follows:

8 **Motion No. 1 (Court lacks subject matter jurisdiction – ORCP 21 A (1))**

9 This case is brought in an attempt to have the court sit in judgment of the *correctness* of
10 State agency decision-making. An agency can find that a claim was properly made and is valid.
11 Then it can either pay compensation for a valid claim or it can “modify, remove or not apply the
12 regulations” at its option. ORS 197.352. The agency could find, as it did here, that the land use
13 laws that it enforces may be “not applied” or waived as to the current owners’ interests in the
14 property. In that case, the current owners’ dates of acquisition are important because Measure 37
15 provides a waiver option that relates to those dates. ORS 197.352 (8) and (11)(C).

16 This court has jurisdiction to determine if the agency’s final action was based upon
17 substantial evidence in the record only under the Oregon Administrative Procedures Act (APA).
18 ORS 183.484. The APA is the exclusive remedy for judicial review of a State agency’s Final
19 Order.⁹ Since judicial review of the Final Orders underlying these claims were not sought, the
20 court lacks jurisdiction for the Measure 37 case because the time within which to file for judicial
21 review has long passed.¹⁰

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23 _____
24 ⁹ The APA is found in ORS 183.310 *et seq.*; *Bay River, Inc. v. Environmental Quality Comm.*, 26
Or App 717, *rev denied*, 276 Or 555 (1976).

25 ¹⁰ ORS 183.484 (the petition “shall be filed within 60 days only following the date the order is
26 served.” The Final Orders at issue were served on August 26, 2005 as shown by Exhibits 7 & 8
attached to plaintiffs’ complaint).

1 **Motion No. 2 (Failure to state a claim – ORCP 21 A (8))**

2 The Measure 37 claim should be dismissed because a critical element has not been
3 pleaded and cannot be established as a matter of law. That element is that the agency wrongly
4 decided the claim. Unless the plaintiffs plead that they were wrongly denied compensation
5 and/or the property wrongly continued to be subject to restrictive land use regulations (adopted
6 after the current owners acquired it) 180 days after filing a written Measure 37 claim, **and**
7 affirmatively plead that they have challenged that decision appropriately under the APA and won
8 that battle, they cannot state ultimate facts sufficient to constitute a Measure 37 claim.

9 **ORCP 21 D Alternative Motions to Make More Definite and Certain**

10 **Motion No. 3**

11 The State moves, in the alternative to the motions to dismiss, or if the plaintiffs are
12 allowed to re-plead, for an order that the plaintiffs make more definite and certain the allegations
13 of which precise land use regulations adopted or enforced by the State agency defendants had the
14 effect of restricting plaintiffs’ use of the subject real property in a way that reduced the fair
15 market value of plaintiffs’ interest in the property - and how that effect occurred. Currently,
16 there is no pleading at all on this element of a Measure 37 claim. ORS 197.352 (1), (2). The
17 complaint merely states that plaintiffs “are entitled to just compensation” from all defendants in a
18 lump sum figure. That is inadequate under Measure 37 and the ORCP. Plaintiffs must describe
19 each regulation of each defendant governing body and must allege the restriction and the loss in
20 value from the enforcement of each regulation – not from the increase in current value if no land
21 use regulations were in existence. The latter is not relevant in a Measure 37 claim.

22 **Memorandum of Points and Authorities**

23 This case purports to be a suit for just compensation under Measure 37. In reality, it is a
24 disagreement with the decision reached by the State agency responsible for reviewing and acting
25 on the claims that were made to the agency. There is one way – one exclusive way – to

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1 challenge a decision reached by a State agency when it is asked for a decision and the decision is
2 made.

3 **Motions No. 1, & 2**
4 **The Administrative Procedures Act Establishes the Exclusive**
5 **Method for Challenging Agency Decisions**

6 Measure 37 states that a “cause of action” may be filed in circuit court when “a land use
7 regulation continues to apply to the subject property more than 180 days after the present owner
8 of the property, or any interest therein” had made a written demand for compensation.¹¹ That
9 section of the law must be read in context.¹² If one does not read the whole law, and reads only
10 that one section, then every claimant would be able to file a “cause of action” for compensation
11 whether or not the agency correctly decided to deny a claim, or whether or not the agency
12 correctly decided to approve a claim and then decided “not to apply” the restrictive land use
13 regulations, as permitted by sections 8 and 10 of the measure.¹³

14 Yet not all claimants necessarily have claims that meet the criteria of Measure 37. For example,
15 one of Measure 37’s exceptions may apply, the regulation complained of may not meet the
16 measure’s definition of “land use regulation,” or the claimant may not be an “owner” as defined
17 in the Measure, who is qualified to bring a claim. In this case, the owners were found to be
18 qualified to bring claims and the claims were valid. The claims were not rejected as alleged by
19 the plaintiffs.¹⁴ They received waivers in lieu of compensation as permitted by Measure 37.

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23 ¹¹ ORS 197.352 (6).

24 ¹² *PGE v. BOLI*, 317 Or 606 (1993)

25 ¹³ Measure 37 allows an agency to either pay compensation or to “waive” the application of the
26 land use restriction on the particular parcels of real property subject to the claim. Sections 1, 4
and 6 identify the compensation remedy and sections 8 and 10 identify the waiver alternative.

¹⁴ Complaint, page 3, line 26

1 The only jurisdiction that this circuit court has to decide whether or not the agency
2 correctly ecided the claims, and therefore refer the case for a compensation determination¹⁵ if it
3 decided incorrectly, is to conduct a judicial review of the agency orders in other than contested
4 cases.¹⁶ Plaintiffs have not sought judicial review of the orders in this case, because the plaintiffs
5 apparently read section 6 in a vacuum. This case should be dismissed because the APA provides
6 exclusive jurisdiction for review of the correctness of agency Final Orders and any such petition
7 for review is now untimely.¹⁷

8 Aside from the many appellate decisions interpreting the exclusivity of APA judicial
9 review, another statute pertaining to this court’s jurisdiction is helpful to determine that Measure
10 37 does not provide an independent basis for jurisdiction over the agency’s Final Order. The
11 Court of Appeals has held that “where the legislature has provided adequate procedures, this
12 court should not create a different procedure pursuant to ORS 1.160.”¹⁸ ORS 1.160 provides:

13 When jurisdiction is, by the Constitution *or by statute*, conferred
14 on a court or judicial officer, all the means to carry it into effect are
15 also given; and in the exercise of the jurisdiction, if the course of
16 proceeding is not specifically pointed out *by the procedural*
17 *statutes*, any suitable process or mode of proceeding may be
18 adopted which may appear *most conformable to the spirit of the*
19 *procedural statutes*.

19 ¹⁵ Since Measure 37 is a statutory remedy that came into existence in 2004, there is no
20 Constitutional right to a jury trial. *Kendall v. Post*, 8 Or 141 (1879); *Branson v. Gee*, 25 Or 462
(1894); *Caldwell v. Jackson County*, 36 Or App 821 (1978).

21 ¹⁶ ORS 183.484 (the court would be provided “The Record” by the parties); See also, *Norden v.*
Water Resources Dept., 329 Or 641 (2000).

22 ¹⁷ *Lone Oak Racing v. Oregon Racing Comm.*, 162 Or App 111 (1999)(circuit court had no
23 jurisdiction to issue a declaratory judgment concerning an issue that was subject to judicial
24 review under the APA). See also, *Bay River*, *supra*; *FOPPO v. County of Marion*, 93 Or App
25 93, *rev den* 307 Or 326 (1988).

26 ¹⁸ *Black v Arizala*, 182 Or App, 16, 28 (2002), *aff’d* 337 Or 250 (2004); *see also*, *Muller v.*
State, 164 Or App 11 (1999)(jury verdict reversed and remanded for judgment of dismissal
because the plaintiff’s negligence action against a State agency was in reality a challenge to the
agency’s Final Order and APA jurisdiction was exclusive).

1 (emphasis added). The course of proceeding is not specifically pointed out by Measure 37, but it
2 is specifically pointed out in other procedural statutes – the APA (the Administrative *Procedures*
3 Act) is a set of specific procedural statutes that grants jurisdiction to the circuit court to review
4 Final Orders to the exclusion of other procedures.¹⁹

5 Unless the agency wrongly decided the underlying claim and therefore a regulation
6 continues to apply despite a qualifying claim, then there is no viable Measure 37 claim for
7 compensation. The court’s jurisdiction to decide the correctness of that underlying demand lies
8 exclusively within the APA and that is the “*most conformable procedural statutes*” to follow.

9 Ironically, the agency Final Order itself advised the plaintiffs that judicial review could
10 be had under the APA, specifically, ORS 184.484.²⁰ The plaintiffs chose not to challenge the
11 agency order at all and to file a case directly under Measure 37. The problem with that approach
12 is that the court would have to *assume* the incorrectness of the Final Order because there would
13 be no Measure 37 case if it were correct. The court has no jurisdiction to determine that it is
14 incorrect other than through the APA. The time for seeking the court’s jurisdiction to make that
15 determination has expired because the APA provides specifically for review “within 60 days
16 *only* following the date the order is served.”²¹ This case should be dismissed for lack of
17 jurisdiction and for failure to state that a petition was filed, and failure to file a petition for
18 judicial review within 60 days of issuance of the order.

19 **Motion No. 3 – Make More Definite & Certain**

20 Plaintiffs have not pled how the regulations of which they complain qualify them for
21 relief under Measure 37. Each land use regulation that was “enforced” must be set out in a
22 pleading that alleges (1) who enforced or adopted it and when, (2) what was its effect on (how it
23 restricted) the *use* of the real property interest of the present owner, and (3) what was the

24 ¹⁹ ORS 183.480 and 183.484.

25 ²⁰ See, Exhibits 7, p. 3 & Exhibit 8, p. 3 attached to plaintiffs’ complaint.

26 ²¹ ORS 183.484 (2) (emphasis added).

1 reduction in fair market value of that property interest of the present owner caused by the precise
2 regulatory restriction. ORCP 16, 18 B, 20 and 21. These are critical elements of a Measure 37
3 claim – *what* regulation and *how* it restricted the current owner’s use.²² That is a condition
4 precedent to any claim that fair market value has been reduced. And then, the effect of the
5 regulation’s restriction must relate to a specific value reduction; not the speculative increase in
6 value of the whole site due to presumed non-enforcement of any land use regulations on this
7 parcel but presuming the enforcement on all the neighbors’ parcels.

8 Presumably, plaintiffs attach certain exhibits showing prior ownership of the property by
9 family members rather than allege how a land use regulation, supposedly enforced by a State
10 agency since the current owners acquired possession, reduced the fair market value of the
11 property as of the date of the Measure 37 claim.²³ As the court can see, there is nothing in any
12 part of the Complaint that explains the rationale for the over seven million dollar compensation
13 pleas.

14 Finally, the pleading for fees and costs does not follow the statute (Measure 37, ORS
15 197.252 (6)). There is no right to fees and costs unless those are “reasonably incurred to collect
16 the compensation” and that should be pled with specificity as to the part of the action that relates
17 to the statutory recovery.

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Conclusion

20 Any Measure 37 claim by the current owners must allege the elements of a cause of
21 action under that law with specificity and not by (inferred) reference to exhibits that have no
22 allegations at all. However, the current owners cannot proceed with the Measure 37 cause of
23 action because they never properly challenged the underlying agency orders. Those orders are
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25 ²² Measure 37, ORS 197.252 (1) and (8), e.g.


26 ²³ ORS 197.352.

1 not reviewable under Measure 37, but only under the APA. There can be no Measure 37 cause
2 of action if the agency's decision was correct and the time for challenging the correctness of that
3 decision has run. This case should be dismissed.

4 DATED this 23^d day of May, 2006.

5 Respectfully submitted,

6 HARDY MYERS
7 Attorney General

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CERTIFICATE OF SERVICE

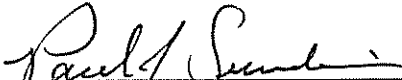
I certify that on May 23rd, 2006, I served the foregoing ORCP 21 Motions (Dismiss, Make More Definite and Certain) upon the parties hereto by the method indicated below, and addressed to the following:

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