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

6 KOLSKI TRUST,

7 Plaintiff,

8 v.

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

11 Defendant.

Case No. 06P1539

STATE'S REPLY TO PETITIONER'S
OPPOSITION TO THE STATE'S RESPONSE
AND CROSS-MOTION FOR SUMMARY
JUDGMENT

Oral Argument Requested: 30 Minutes

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13 INTRODUCTION¹

14 The State of Oregon ("State") hereby replies to Petitioner Kolski Trust's ("Petitioner")
15 Memorandum in Opposition to Defendants' Cross Motion for Summary Judgment
16 ("Opposition") on the grounds that Petitioner has not established that the State erred in its legal
17 interpretation and application of ORS 197.352 ("Measure 37")². Petitioner has not demonstrated
18 in its pleadings that its present ability to use the subject property is restricted by a land use

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20 ¹ On January 31, 2007, the Court of Appeals issued an opinion in Corey v. DLCD, Case No. A129905. The
21 petitioners in that case sought judicial review of a DLCD order opting to waive enforcement of certain land use
22 regulations in lieu of paying compensation under Measure 37. The opinion concludes that, "under ORS 183.482,
23 jurisdiction for judicial review lies in this court." Slip op. at 6. That conclusion is not final until the appellate
judgment issues. ORS 19.450; ORAP 14.05. The appellate judgment has not been issued in Corey. In an earlier
case Hoff v. DLCD, CA A129414, the Court of Appeals dismissed a petition for review, finding that it did not have
jurisdiction under ORS 183.482 to review DLCD's order waiving certain land use regulations in lieu of paying
compensation under Measure 37. The opinion in Corey does not mention the earlier unpublished order in Hoff.

24 ² The State also objects to Petitioner's Opposition pursuant to ORCP 47C which requires that any papers opposing a
25 motion for summary judgment be filed not more than twenty days after service of the motion. As the State's motion
26 was filed on December 28, 2006 and served by mail, Petitioner's response was due on January 29, 2006. Petitioner
did not serve its opposition until February 15, 2007.

1 regulation that was enacted or adopted after Petitioner acquired the property. Therefore,
2 Petitioner does not possess a qualifying property interest, or “any interest therein” that would
3 entitle it to relief under Measure 37.

4 **REPLY**

5 **A. The State correctly denied Petitioner’s claim because it does not have an interest in**
6 **the property that is restricted by any relevant land use regulations.**

7 Assuming for argument’s sake that the State agreed not to enforce land use regulations
8 against Petitioner that were enacted after April 7, 1964, such a waiver would be useless because
9 Petitioner does not have a present right to develop the subject the property. This is the reason the
10 State correctly denied Petitioner’s claim and the basis for its argument in its Response to
11 Petitioner’s Motion for Summary Judgment and Cross Motion. The State cannot grant relief to a
12 claimant merely because he or she holds any interest whatsoever in real property, as argued by
13 Petitioner. The claimant’s so called interest must be restricted by a land use regulation that was
14 enacted or adopted after the claimant acquired the property. This threshold requirement is
15 expressly set forth in subsection 1 of Measure 37.³ Here, Petitioner cannot satisfy this threshold
16 element because it has transferred any right it may have had to develop the property by virtue of
17 the land sales contract relating to the subject property. Petitioner’s present right to use the
18 property, or lack thereof, is, therefore, not restricted by any land use regulation.

19 Petitioner has diverted this Court’s attention away from the real issue in this case –
20 whether the interest Petitioner does hold entitles it to relief under Measure 37. Petitioner has
21 argued that the State wrongly applied the doctrine of equitable conversion (Opposition and
22 Motion, generally), as well as wrongly required Petitioner to be in possession of the property
23 (Opposition p.3:4-8), and, finally wrongly required that Petitioner control and own 100% of the

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25 ³ “(1) If a public entity enacts or enforces a new land use regulation or enforces a land use regulation enacted prior to
26 December 2, 2004, that restricts the use of private real property or any interest therein...then the owner shall be paid
just compensation.” ORS 197 352

1 property (Opposition p1:2-2:1). None of these theories are consistent with the State’s argument,
2 its rationale for denying Petitioner’s claim, or are correct statements of the law. Rather, it is the
3 State’s position, rationale and Oregon law that a vendor in a land sale contract does not retain a
4 present right to use the subject property in a manner that would be affected by the relevant land
5 use regulations. As a result, the vendor is not the person for whom Measure 37 was intended to
6 provide relief.

7 **B. Oregon law supports the State’s decision to deny Petitioner’s claim for Measure 37**
8 **because a vendor in a land sale contract does not retain a right to develop property**
9 **that is the subject of that contract.**

10 The State’s position is supported by a long line of Oregon law that defines the vendee’s
11 interest in a land sale contract as an equitable ownership and the vendor’s interest as the legal
12 owner of the title with the right to receive the contract payments. *Panushka v. Panushka*, 221 Or
13 145, 14 (1960); *Ernst Brothers Corp. v. Dept. of Rev*, 320 Or 294, 303 (1994) citing *Panushka*,
14 *supra* [The vendor in a land sale contract cannot sell the subject property because, as a matter of
15 law, the vendee is the equitable owner, and consequently, is vested with the exclusive right to
16 sell the property.]; *Braunstein v. Trottier*, 54 Or App 687, 691 (1981)[A land sale contract is
17 primarily a security device affecting the land to which it relates for which the vendor is legal title
18 holder subject to the equitable interest of the vendee.]; *Senior Estates, Inc. v. Bauman Homes,*
19 *Inc.*, 272 Or. 577, 583 (1975)[“Absent any stipulation to the contrary, the purchaser has a right
20 to possession or the rents and profits of the land and the vendor a right to interest on the unpaid
21 purchase price.”]; *City of Reedsport v. Hubbard*, 202 Or 370 (1954) [Vendor in a land sales
22 contract not entitled to the rents and profits in the use of the contracted land while vendees in
23 lawful possession because “all the incidents of a real ownership belong to [the vendee].”];
24 *Harder v. Springfield* 192 Or 676 (1951) [Vendees in possession of land subject to a land sale
25 contract are owners for the purpose of protesting a special or local assessment because the

1 vendee is looked upon as the owner of the land with all the rights incident to ownership; the
2 vendor merely holds title as equity for the purchase price.]; *W. Equities, Inc. v. St. Paul Fire &*
3 *Marine Ins. Co.*, 184 Or. App. 368, 373 (2002) [“The doctrine of equitable conversion applies; at
4 the time of an agreement to sell real property, the purchaser of the real property is deemed to be
5 the owner thereof, and the seller becomes entitled to receive payment of the purchase price”].

6 As set forth in the case law cited above, the vendee retains the rights incident to the
7 ownership of property. The vendee therefore, and not the vendor, has the right to develop the
8 property. By contrast, the vendor’s interest in the real property is only the right to possession in
9 the event of vendee’s default on the contract. This interest in real property does not qualify the
10 vendor for relief under Measure 37.

11 None of the law cited by Petitioner demonstrates that the State erred in its application of
12 Measure 37 to Petitioner’s case. *Bedortha v Sunridge Land Co.*, 312 Or. 307 (1991) holds only
13 that a judgment debtor may attach its debt to a vendor’s interest in property subject to a land
14 sales contract as well as the vendor’s right to receive payments because the right to receive
15 payment is part of the vendor’s real property interest. The State does not dispute this holding,
16 nor is it relevant to the instant analysis. Likewise, the matter of *Heider v. Dietz*, 234 Or 105
17 (1963) does not support Petitioner’s position nor does it refute the State’s position because it has
18 been superseded by statute and is no longer good law and as stated in *Wyllie v. Von Ruden*, 76
19 Ore. App. 598, 601 (1985). Ironically, the statute identified by *Wyllie* as superseding *Heider*,

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1 ORS 93.645, specifically provides that a judgment debtor's lien on the interest held by a vendor
2 in a land sale contract is junior to the vendee's interest.⁴ Moreover, the lien is extinguished upon
3 the conveyance of the property to the vendee when the contract is fulfilled. *Id.*

4 Petitioner also argues that *Panushka v. Panushka*, 221 Or 145 (1960) cited in the State's
5 Response and Cross Motion is, essentially, no longer good law because it was limited to its facts
6 by *Heider* and *Bedortha*. Contrary to Petitioner's argument, *Panushka* and the six other cases
7 cited by the State in its response and cross motion are good authority for the only relevant
8 proposition in this case – a vendor in a land sale contract does not retain an interest in the subject
9 property interest that would permit it to develop that property. That right is transferred to the
10 vendee. To clarify, the State does not dispute that the vendor retains an interest. The State
11 merely points out that the vendor's interest does not entitle it to relief under Measure 37. Thus,
12 Petitioner, as a vendor, does not possess an interest in the property that is the subject of its
13 Measure 37 claim that would entitle it to relief under the well settled law of Oregon.
14 Accordingly, the State did not err in its final order and summary judgment in the State's favor is
15 appropriate.

16 **CONCLUSION**

17 None of the law cited in Petitioner's response demonstrates that the State erred in its
18 application of the law relating to relationship between a vendor and a vendee in a land sales
19 contract. Nor, did Petitioner distinguish or otherwise attempt to discredit the law cited by the

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21 ⁴ (1) The interest of the purchaser, his heirs and assigns, under a contract for the purchase and sale of realty, if such
22 contract or memorandum thereof has been recorded in deed records, shall have priority over the lien of any
subsequent judgment against the seller of the property, his heirs and assigns, and conveyance in fulfillment of said
contract shall extinguish the lien of any such judgment.

23 (2) Subsection (1) of this section shall not be construed to limit the right of a judgment creditor to execute upon a
vendor's interest in a land sales contract.

24 (3) For the purposes of subsection (1) of this section, 'judgment' includes any lien which by law becomes a lien
25 upon real property in the same manner as a judgment, and includes a judgment or any such lien in favor of the State
of Oregon and its agencies


26 ORS 93.645; see also *Wyllie v Von Ruden*, 76 Ore. App. at 601-602, *supra*

1 State as support for its application of the law. Instead, the Petitioner has fabricated a position
2 that has not been espoused by the State that Measure 37 will only permit relief to sole owners of
3 real property with a present right of possession. The State's position, by contrast, is that it
4 correctly denied Petitioner's claim because Petitioner cannot demonstrate that it currently
5 possesses an interest in land that has been restricted by land use regulations that were enacted or
6 adopted after Petitioner acquired the property. For these reasons, the State requests that the
7 Court deny Petitioner's Motion for Summary Judgment and grant the State Cross-Motion for
8 summary judgment.

9 DATED this 26th day of February, 2007.

10 Respectfully submitted,

11 HARDY MYERS
12 Attorney General

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1 **CERTIFICATE OF SERVICE**

2 I certify that on February 26 2007, I served the foregoing STATE'S REPLY TO
3 PETITIONER'S OPPOSITION TO THE STATE'S RESPONSE AND CROSS-MOTION FOR
4 SUMMARY JUDGMENT upon the parties hereto by the method indicated below, and addressed
5 to the following:

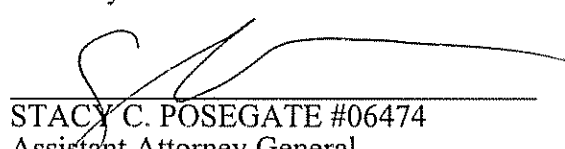
6
7 Mark Irick
8 Shetterly, Irick & Oziaas
9 P.O. Box 105
10 Dallas, OR 97338

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

11 DATED this 26 day of February, 2007.

12 Respectfully submitted,

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