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3
4 IN THE CIRCUIT COURT OF THE STATE OF OREGON
5 FOR THE COUNTY OF MULTNOMAH

6 LARRY L. LUETHE and LAURA B.
7 LUETHE, husband and wife,

8 Plaintiffs,

9 v.

10 MULTNOMAH COUNTY, OREGON, a
11 political subdivision of the State of Oregon;
12 and the DEPARTMENT OF LAND
13 CONSERVATION AND DEVELOPMENT,
14 an agency of the State of Oregon; LAND
15 CONSERVATION AND DEVELOPMENT
16 COMMISSION, an agency of the State of
17 Oregon; DEPARTMENT OF
18 ENVIRONMENTAL QUALITY, an agency
19 of the State of Oregon; and DEPARTMENT
20 OF ADMINISTRATIVE SERVICES, an
21 agency of the State of Oregon,

22 Defendants.

Case No. 0609-09466

STATE AGENCY DEFENDANTS' REPLY IN
SUPPORT OF MOTIONS TO DISMISS

Set for Hearing

Date: January 5, 2007

Time: 9:10 a.m.

Ctrm: 424

Judge Hodson

23 **INTRODUCTION**

24 The State agency defendants move to dismiss this Measure 37 compensation suit for lack
25 of jurisdiction and failure to state a claim upon which relief can be granted. The Complaint
26 alleges that plaintiffs submitted a Measure 37 demand to the State and that the State "ruled by
final order." Plaintiffs' first claim asserts that Final Order 118605 is legally inadequate under
plaintiffs' interpretation of Measure 37. Plaintiffs' third claim seeks a declaratory judgment on
one of the claimed legal inadequacies—lack of transferability.¹

The State contends that the court lacks jurisdiction because claims that a final state
agency order is based on an incorrect interpretation of law are subject to the exclusive judicial

¹ Plaintiffs' second claim is asserted only against defendant Multnomah County.

1 review procedures of the Administrative Procedures Act (APA). Plaintiffs' response to the
2 State's motion confirms their disagreement with the final agency order that is at the center of the
3 parties' dispute. Specifically, plaintiffs contend that the order does not qualify as full relief in
4 lieu of just compensation because (1) it does not "waive" enough land use regulations to give
5 plaintiffs the relief they want; and (2) it does not give plaintiffs an automatic right to transfer
6 buildable lots to subsequent purchasers.

7 To be entitled to any relief beyond the relief granted in the order, plaintiffs must establish
8 that the order is legally invalid. But the exclusive jurisdictional basis for establishing the legal
9 insufficiency of an agency order is the APA. Moreover, the parties' apparent disagreement over
10 "transferability" presents a hypothetical dispute that is contingent on future events. Such a
11 dispute is not presently justiciable under established Oregon law.

12 **REPLY ARGUMENT**

13 **1. Final Order M 118605 Waived Qualifying Land Use Regulations.**

14 Plaintiffs ask this court to construe Section 6 of Measure 37 as a second chance for
15 plaintiffs to prove that a list of statutes and regulations restrict their use of the property and
16 reduce its value.² Plaintiffs mistakenly contend that the State failed to address "additional
17 provisions" which allegedly should have been waived.³ Plaintiffs submitted the same list to the
18 State with their Measure 37 demand. In response to the demand, the State issued Final Order M
19 118605 granting plaintiffs relief from the qualifying land use regulations.⁴

20 DLCD determined that provisions of Goal 4, ORS 215, and OAR 660, division 6 (except
21 fire safety rules) qualify under Measure 37. As to the remaining land use regulations on
22 plaintiffs' list that are enforced by DLCD, the agency determined either that they did not qualify
23 or that no determination was possible based on plaintiffs' demand. ODF "determined that the

24 ² The list is attached to the Complaint as Ex 1 and to the Decl of Roggendorf as Ex 1.

25 ³ Pls' Resp, p 8, lns 7-10.

26 ⁴ Final Order M 118605 was corrected to include the DEQ Final Staff Report and
Recommendation and mailed on December 28, 2006. Decl of Andrus, Ex 2.

1 claim is not valid because none of the laws identified in the claim as administered by [ODF]
2 restrict the claimants' right to divide the property and develop it for uses other than farm or
3 forestry."⁵ DEQ "determined the claim is not valid because none of the laws identified in the
4 claim as administered by [DEQ] have been enforced, and there is no evidence that the laws
5 restrict claimants' ability to divide the property or establish a residence on each parcel."⁶

6 The Final Order addresses as many of the regulations, listed wholesale and without
7 explanation by claimants/plaintiffs, as could reasonably be viewed as restricting use, reducing
8 value, and non-exempt in light of the requested use. For example, plaintiffs list several sections
9 of ORS Chapter 92. DLCD explained: "ORS 92 establishes procedures for subdivisions and
10 partitions, and to the extent that it may restrict the claimants' use of the property the operative
11 provisions of the statutes were in effect in 1973. The claimants have not described or established
12 that the current versions of the listed statutes are more restrictive than those in effect in 1973."⁷

13 Plaintiffs contend that the State failed to address regulations implementing Goal 14
14 (Urbanization) and DEQ's regulations on sewers.⁸ With regard to Goal 14, DLCD was unable to
15 determine how plaintiffs claimed the Goal restricted their use of the property—the regulation
16 plaintiffs cite applies to creation of lots smaller than two acres and other criteria plaintiffs do not
17 allege to be at issue. The DEQ report specifically addresses the sewer regulations which have
18 not been enforced against the property, and in any event DEQ's regulations are not "land use
19 regulations" under Measure 37. *See*, ORS 197.352 (11) (B); Ex 2, pp 21-22.

20

21 ⁵ Ex 2, pp 15-16 ("ORS 527.730 provides that '[n]othing in the Oregon Forest Practices Act shall
22 prevent the conversion of forestland to any other use.' The claim submitted by the claimants
23 proposes a conversion to uses other than farm and forest uses. To the extent that the claimants
24 may propose a forest operation in conjunction with the conversion, claimants have not submitted
25 a written notification requested by law. Without a notification, the Department is unable to
26 determine whether the laws listed in the claim apply to claimants' use of the property or restrict
their use of the property.")

⁶ Ex 2, p 20.

⁷ Ex 2, p 9.

⁸ Pls' Resp, pp 14-15.

1 Whether the agencies’ conclusions, based on their interpretations of Measure 37, are right
2 or wrong, however, is not material to the State’s motion to dismiss.⁹ The issue is whether the
3 court has jurisdiction under Measure 37 to review those conclusions. To the extent the
4 Complaint is based on “continuing application” of ORS 92, Goal 14, DEQ’s sewer regulations,
5 or any other statute or regulation on plaintiffs’ list, plaintiffs are challenging the validity of the
6 Final Order.¹⁰ The APA is the exclusive procedure for that challenge.

7 **2. APA Jurisdiction Is Exclusive.**

8 Plaintiffs offer no alternate interpretation of the exclusivity language of the APA, ORS
9 183.480 (2), which provides that “[j]udicial review of final orders of agencies *shall be solely* as
10 provided by ORS 183.482, 183.484, 183.490 and 183.500” (emphasis added). Plaintiffs do not
11 contend that the state agency defendants are not “agencies” within the meaning of the APA.
12 Plaintiffs do not argue that Final Order M 118605 is not a final order, and offer no authority that
13 some final agency orders are not subject to the exclusivity mandate of the APA.¹¹

14 Although plaintiffs argue that the “plain language” of Section 6 of Measure 37
15 supersedes the APA,¹² they point to nothing in the text or context of Measure 37 that negates the
16 applicability of the APA. *See Fairbanks v. Bureau of Labor and Industries*, 323 Or 88, 93-94
17 (1996) (declining to insert into a statute a provision exempting it from the APA). Plaintiffs
18

19 ⁹ Plaintiffs’ argument concerning the meaning of “in lieu of” (Pls’ Resp, pp 15-19) is solely a
20 question of interpretation.

21 ¹⁰ Plaintiffs also fail to state a claim with respect “non-waived” statutes or regulations. The
22 Complaint alleges *no facts* showing that any statute or regulation applies, restricts use, or results
23 in a reduction in value. For example, the list includes the legislative findings set forth at ORS
24 197.005, a notice requirement under ORS 197.047, and the authority of the Land Conservation
25 and Development Commission “if an interstate land conservation and development planning
26 agency is created by an interstate agreement” in ORS 197.050. Plaintiffs allege no facts which,
if proved, demonstrate that legislative findings have been enforced against the property, or notice
was not given, or that LCDC’s authority (assuming the existence of an interstate agreement,
which is not alleged) restricts plaintiffs’ use of their property in a way that reduces its value.

25 ¹¹ Pls’ Resp, pp 9-12.

26 ¹² Pls’ Resp, p 2, lns 6-10 and pp 6-9. Plaintiffs’ counsel informed the State that they withdraw
their request for sanctions (p 8, lns 5-17 and fn 1).

1 contend that Measure 37 supersedes the APA because Measure 37 was enacted after the APA
2 and does not contain any reference to the APA,¹³ but this argument is refuted by Measure 37's
3 non-exclusivity provision,¹⁴ numerous appellate cases upholding APA jurisdiction and general
4 principles of Oregon law.

5 In *Olsen v. Deschutes County*, 204 Or App 7, *rev denied*, 341 Or 80 (2006), the Court of
6 Appeals rejected the argument that a later-enacted, and more specific, statute controls over an
7 existing general law. Referring to the same maxim on which plaintiffs rely here,¹⁵ the Court
8 said, "The 'later and more specific' maxim applies when statutes conflict. ORS 174.020 (2).
9 Applying the maxim necessarily renders one of the statutes—the older and more general—
10 meaningless, and should therefore be used only when a conflict actually exists and cannot be
11 avoided." 204 Or App at 13 (citation omitted).

12 Similarly, in *Palmquist v. Flir Systems, Inc.*, 207 Or App 365 (2006), the Court of
13 Appeals stated, "The rule that a general statute gives way to a more specific statute applies only
14 when there is an irreconcilable conflict between the statutes * * * In this case, defendant neglects
15 to identify any conflict at all, much less an irreconcilable one." 207 Or App at 371 (citation
16 omitted). The same is true here. Plaintiffs identify no irreconcilable conflict between the APA
17 and Measure 37. Interpreting Measure 37 in context, on the other hand, gives effect to both the
18 APA and Section 6 and avoids any conflict.

19 3. The APA Governs State Agency Action.

20 Plaintiffs argue that Measure 37 does not require "the use of APA procedures and that the
21 State "chose" to implement an APA process.¹⁶ But, plaintiffs offer no alternative method for
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23 ¹³ Pls' Resp, p 2, Ins 11-21 and pp 9-12.

24 ¹⁴ ORS 197.352 (12): "The remedy created by this section is in addition to any other remedy
25 under the Oregon or United States Constitutions, and is not intended to modify or replace any
26 other remedy."

¹⁵ Pls' Resp, p 12, Ins 4-13.

¹⁶ Pls' Resp, p 2, Ins 16-21 and p 9, Ins 11-25.

1 agencies to render or communicate their decisions on Measure 37 demands. A “‘final order’
2 means final agency action expressed in writing.” ORS 183.310 (6) (b). Measure 37 requires a
3 written demand by property owners, and permits public entities “not to apply” land use
4 regulations in response to a valid demand—that is, “to take action.” The written expression of
5 final agency action on a Measure 37 demand is a final order under the APA. The State has no
6 choice.¹⁷

7 **4. Section 6 Is Not a Second Bite at the Apple.**

8 Plaintiffs assert that a literal interpretation of ORS 197.352 (6) permits plaintiffs to sue
9 for compensation because the State did not waive all the statutes and regulations on plaintiffs’
10 list.¹⁸ This interpretation of Section 6 is so sweeping that it negates the clear intent of the statute
11 to require public entities in the first instance to decide the merits of compensation claims and
12 choose the relief to be provided. Interpreting Section 6 in isolation violates the basic rule of
13 statutory construction—the first level analysis is text *and context*.

14 Without the context of Measure 37 as a whole, the text of Section 6 is too vague and
15 ambiguous to be enforced. For example, Section 6 does not specify which land use regulations
16 are at issue in the “cause of action” or even against whom the action may be asserted.

17 *If a land use regulation continues to apply to the subject property more*
18 *than 180 days after the present owner of the property has made written demand*
19 *for compensation under this section, the present owner of the property, or any*
20 *interest therein, shall have a cause of action for compensation under this section*
in the circuit court in which the real property is located, and the present owner of
the real property shall be entitled to reasonable attorney fees, expenses, costs, and
other disbursements reasonably incurred to collect the compensation.

21 ORS 197.352 (6) (emphasis added). A literal reading of Section 6 alone grants property owners
22 a cause of action based on any land use regulation but no one to sue. The definition of qualifying
23 regulations in Section 1, the exceptions in Section 3, and the delegation of responsibility to the

24 _____
25 ¹⁷ If plaintiffs file a Petition for Judicial Review within 60 days of December 28, 2006, this court
26 will have jurisdiction to review the questions of law raised in the Complaint. *See* ORS 183.484
(2), (5); Decl of Andrus.

¹⁸ Pls’ Resp, pp 11-12.

1 public entities that enforce qualifying regulations in Sections 1, 4, 5 and 7-10 provide critical
2 context for a reasonable interpretation of Section 6. Because Measure 37 provides for state
3 agencies to act on Measure 37 demands, the APA is also context for interpretation of Measure
4 37.

5 Measure 37 requires property owners to submit a demand for compensation to public
6 entities (§§ 4, 5, 6), and permits public entities to adopt “procedures for the processing of
7 claims” (§ 7). Measure 37 also provides that public entities have the option, in their discretion,
8 either to pay compensation or grant alternate “waiver” relief to a property owner who submits a
9 valid written demand (§§ 8, 10). In this context, Section 6 plainly functions as a secondary
10 remedy in the event a public entity fails to process a demand and choose the type of relief to be
11 granted—within 180 days. Furthermore, the availability of a court action and the provision for
12 attorney fees creates an incentive for the public entity to decide claims and to do so within 180
13 days. Construing Section 6 as a second chance to make the same claim for compensation is not
14 compelled by the text and context of the statute, renders much of Measure 37 superfluous,
15 nullifies the established remedy under the APA, and needlessly complicates a process advertised
16 to the voters in 2004 as streamlined.¹⁹

17 Plaintiffs refer to Section 7 in support of their position only in passing, but Section 7
18 provides a key part of the context of Section 6. Section 7 provides:

19 A metropolitan service district, city, or county, or state agency may adopt
20 or apply procedures for the processing of claims under this section, but *in no*
21 *event shall these procedures act as a prerequisite to the filing of a compensation*
22 *claim* under subsection (6) of this section, nor shall the failure of an owner of
23 property to file an application for a land use permit with the local government
24 serve as grounds for dismissal, abatement, or delay of a compensation claim under
25 subsection (6) of this section.²⁰

25 ¹⁹ Search for “streamline” in the 2004 Voters’ Pamphlet, available on the Secretary of State’s
26 website at http://www.sos.state.or.us/elections/nov22004/guide/meas/m37_fav.html.

²⁰ Pls’ Resp, p 5, lns 8-11; plaintiffs’ emphasis.

1 The “procedures” that are not “a prerequisite” to a Section 6 claim are the “procedures for the
2 processing of claims,” if any are adopted by a metropolitan service district, city, county or state
3 agency. The DAS adopted such procedures at OAR 125-145-0010 to 125-145-0105—none of
4 which purport to be a prerequisite to filing a Section 6 claim. The APA is a state statute, not a
5 procedure adopted by a state agency pursuant to Section 7 for the purpose of Measure 37 claims
6 processing.

7 **5. Plaintiffs Misconstrue the State’s Jurisdictional Argument.**

8 The State does not contend that the circuit court would lack jurisdiction to decide a
9 legitimate Measure 37 “cause of action” under the statute. If a public entity failed to decide a
10 claim within 180 days, a cause of action would accrue. Or, if “a metropolitan service district,
11 city, or county, or state agency” adopted and relied upon procedures that purported to extend the
12 180 days period, contrary to Section 7, a cause of action would accrue because such claims
13 processing procedures cannot be made a prerequisite to a Section 6 claim.

14 The State simply contends that the administrative process created by Measure 37 is
15 subject to existing state laws which it neither repealed nor excluded. Consequently, in cases
16 where, as here, a state agency timely determines the merits of Measure 37 demand no claim
17 under Section 6 accrues. Unlike the APA, Section 6 does not grant authority to the court to
18 overturn a final agency order. *See* ORS 183.484 (5).

19 The appellate decisions uniformly holding that the APA is the exclusive procedure for
20 challenging state agency orders present the same question raised by plaintiffs’ Complaint here:
21 were the state agencies right or wrong. In addition to the cases cited in the State’s motion,
22 *Muller v. Dept. of Agriculture*, 164 Or App 11 (1999) illustrates the flaw in plaintiffs’ argument
23 that the State’s Final Order is irrelevant to their claims. In *Muller*, the trial court denied the
24 agency’s motion to dismiss tort claims that were premised on denial of a field burning permit.
25 The Court of Appeals reversed, holding that the APA provides exclusive jurisdiction where the
26 plaintiff’s “entitlement to damages depends on the validity of the denial.” 164 Or App at 16.

1 Here, plaintiffs’ “entitlement” to just compensation “depends entirely on the validity” of
2 the Final Order because if the Order is valid plaintiffs have received the relief to which they are
3 entitled under Measure 37. Plaintiffs’ argument that they are seeking relief that is not addressed
4 by the Order is analogous to Mr. Muller’s argument that the APA does not apply because he
5 was seeking relief—tort damages—not available under the APA. The Court of Appeals rejected
6 that argument, saying that it “amounts to mere question begging, however. If he [Muller] is
7 entitled to a remedy, then he must establish the invalidity of the agency action in the first place.”
8 164 Or App at 16-17. The same is true here. *Compare, Premier Technology v. Oregon State*
9 *Lottery*, 136 Or App 124, 132 (1995) (breach of contract claim “does not challenge the validity
10 of the order; it claims that the order communicated the fact of the breach of the terms of the
11 contract”); *Boise Cascade Corp. v. Board of Forestry*, 325 Or 185, 194-196 (1997) (plaintiff
12 could seek compensation where claim that its property had been unconstitutionally taken did not
13 depend on the validity of the agency order).

14 **6. The State is Not Estopped From Relying on the APA.**

15 Plaintiffs rely on “estoppel” based on a Notice of Appeal Rights provided in the Final
16 Order that informs claimants that they “may” be entitled to relief under the APA or Section 6,
17 and provides a slightly abbreviated version of the text of Section 6.²¹ The State’s choice to put
18 claimants on notice of the remedies they *might* be able to pursue – depending on the particular
19 circumstances of their cases and upon eventual judicial rulings on the jurisdictional issues – does
20 not itself create a remedy in any given case. Rather, the right to a legal remedy is created by law.

21 Plaintiffs’ interpretation of the Notice is unsupported by the language of the Order and
22 also contradicts plaintiffs’ interpretation of Measure 37 as “overriding” the APA. In any event,
23 the Complaint contains no allegations of reliance or any facts on which the court could conclude
24 that such reliance was reasonable. On the contrary, plaintiffs’ allegations uniformly challenge
25 the State’s interpretation of Measure 37.

26

²¹ Pls’ Resp, pp 12-13.

1 **7. A Declaratory Claim Not Based on the State’s Final Order is Not Justiciable.**

2 To the extent plaintiffs contend that their declaratory judgment claim is based on a
3 Department of Justice letter of advice to DLCD, the claim is not stated and is not ripe.²² The
4 State reasonably inferred that plaintiffs were alleging that the statement in Final Order M 118605
5 regarding transferability was the basis of the declaratory judgment claim. No letter of advice is
6 mentioned in the Complaint.

7 The State interprets Measure 37 “waiver” relief under Section 8 as personal to the owner
8 and its interpretation has been upheld by one circuit court decision.²³ The Complaint misstates
9 both the statute and the State’s position:

10 The State defendants have announced that they view any non-application
11 of land use laws under ORS 197.352 (8) as non-transferable to subsequent owners
12 of **property for which such non-application has been granted.**

13 Compl, ¶ 24 (emphasis added). Section 8 does not authorize granting “non-application” to
14 property, but rather to the owner “to allow the owner to use the property for a use permitted at
15 the time the owner acquired the property.” Likewise, the State’s order provides:

16 **FOR INFORMATION ONLY**

17 The Oregon Department of Justice has advised the Department of Land
18 Conservation and Development that “[i]f the current owner of the real property
19 conveys the property before the new use allowed by the public entity is
20 established, then the entitlement to relief will be lost.”²⁴

21 Plaintiffs’ argument is based on the faulty premise that the order “makes no mention of
22 transferability whatsoever” and on an assumption that the claim, if alleged, would be justiciable.

23 Despite relying on *Brown v. Oregon State Bar*, 293 Or 446 (1982), plaintiffs ignore its
24 teaching. Absent an actual dispute, a declaratory claim, like any other claim, is not justiciable.

25 In *Brown*, the Supreme Court described the elements of a justiciable controversy:

26 Justiciability is a vague standard but entails several definite
27 considerations. A controversy is justiciable, as opposed to abstract, where there is
28 an actual and substantial controversy between parties having adverse legal

29 ²² Pls’ Resp, pp 19-21.

30 ²³ http://www.doj.state.or.us/hot_topics/pdf/measure37/crook_co_decision.pdf

31 ²⁴ Ex 2, p 5.

1 interests. The controversy must involve present facts as opposed to a dispute
2 which is based on future events of [sic] a hypothetical issue. A justiciable
3 controversy results in specific relief through a binding decree as opposed to an
4 advisory opinion which is binding on no one. The court cannot exercise
5 jurisdiction over a nonjusticiable controversy because in the absence of
6 constitutional authority, the court cannot render advisory opinions.

7 293 Or at 449 (citations omitted).

8 The Complaint alleges no facts which, if true, demonstrate that plaintiffs have been
9 precluded from transferring their property—with or without the State’s waiver. Unless and until
10 plaintiffs allege present facts showing an actual controversy, the fact that the DOJ has given
11 advice to DLCD is not grounds for relief under any theory.

12 **8. Plaintiffs Have Failed to State a Claim For Compensation.**

13 As explained in the State’s opening memorandum, plaintiffs have not stated – and cannot
14 state – a claim for compensation under Measure 37 because the State has elected to not apply
15 certain land use regulations in lieu of paying just compensation. Plaintiffs’ Complaint lacks
16 ultimate facts sufficient to demonstrate that any regulation not waived, has been enforced,
17 restricts plaintiffs’ use or reduces the fair market value of the property. Instead, plaintiffs assert
18 the legal conclusions they wish the court to find—restrictions on use that result in a reduction in
19 value. The Complaint lacks ultimate facts constituting a claim. *Huang v. Claussen*, 147 Or App
20 330, 332 *rev den* 325 Or 438 (1997) (on a motion to dismiss, the court “disregard[s] any
21 allegations that are conclusions of law”).

22 Plaintiffs allege that “State Defendants have enacted or enforced the list of statutes and
23 administrative regulations attached as Exhibit 1 to this complaint.”²⁵ Such a “bald legal
24 conclusion” is insufficient as a factual predicate for Measure 37 claim. *Walthers v. Gossett*, 148
25 Or App 548, 558 (1997). Moreover, where plaintiffs contend that the State’s initial
26 determination regarding the appropriate scope of waiver is incorrect, they are necessarily
27 alleging that the final agency order is invalid. Unless and until plaintiffs successfully obtain

28 ²⁵ Compl, ¶ 9. To the extent plaintiffs’ claim rests on “enactment,” it lacks any basis in Measure
29 37. No land use regulations enacted after December 2, 2004 are at issue. ORS 197.352 (1).

1 reversal or modification of the order, they cannot state a claim that qualifying regulations
2 “continue to apply.”


3 **CONCLUSION**

4 Here, plaintiffs allege that they are entitled to relief from regulations that the State
5 determined did not qualify under Measure 37. The sole issue in dispute is whether the Final
6 Order is correct, and that issue must be resolved by means of APA review. For the reasons
7 stated above and in the memorandum supporting the State’s motion to dismiss, this court lacks
8 jurisdiction over plaintiffs’ Measure 37 claim and plaintiffs have failed to state ultimate facts
9 constituting a claim upon which relief can be granted. The Complaint should be dismissed.

10 DATED this 28th day of December, 2006.

11 Respectfully submitted,

12 HARDY MYERS
13 Attorney General

14 
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IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF MULTNOMAH

LARRY L. LUETHE and LAURA B.
LUETHE, husband and wife,

Plaintiffs,

v.

MULTNOMAH COUNTY, OREGON, a
political subdivision of the State of Oregon;
and the DEPARTMENT OF LAND
CONSERVATION AND DEVELOPMENT,
an agency of the State of Oregon; LAND
CONSERVATION AND DEVELOPMENT
COMMISSION, an agency of the State of
Oregon; DEPARTMENT OF
ENVIRONMENTAL QUALITY, an agency
of the State of Oregon; and DEPARTMENT
OF ADMINISTRATIVE SERVICES, an
agency of the State of Oregon,

Defendants.

Case No. 0609-09466

DECLARATION OF JON ANDRUS IN
SUPPORT OF STATE AGENCY
DEFENDANTS' MOTION TO DISMISS

I, Jon Andrus, do declare and say:

1. I am employed by the State of Oregon in the Department of Land Conservation
and Development (DLCD), providing administrative support to the Measure 37 Division. I have
held this position since December 12, 2005. I make this declaration based on my personal
knowledge and in support of Defendants' Motion to Dismiss in the above-captioned case.

2. On December 28, 2006, I was responsible for mailing the Corrected Final Order
and Final Staff Reports and Recommendations for Measure 37 claim number M118605 (Luethe).

Department of Land Conservation and Development
635 Capitol St NE, Suite 150
Salem, OR 97301

CERTIFICATE OF MAILING

I certify that I served M118605 Luethe Final Staff Report and Recommendations and Final Order on:

See Attached List

by following indicated method or methods:

JH

by **mailing** a full, true and correct copy in a sealed, first-class postage-prepaid envelope, addressed to the person(s) listed above, and deposited with the United States Postal Service at Salem, Oregon on the date set forth below.

by **hand delivering** a full, true and correct copy to the person(s) listed above, on the date set forth below.

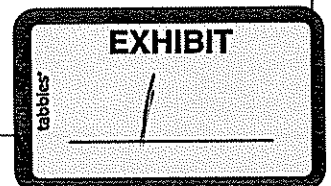
by **faxing** a full, true and correct copy to the person(s) at the fax number(s) shown above, on the date set forth below.

DATED this 29th day of December, 2006.

Name: _____

JH

Title: Measure 37 Support Specialist



BEFORE THE DEPARTMENT OF ADMINISTRATIVE SERVICES,
THE DEPARTMENT OF LAND CONSERVATION AND DEVELOPMENT,
THE BOARD AND DEPARTMENT OF FORESTRY, AND
THE DEPARTMENT OF ENVIRONMENTAL QUALITY
OF THE STATE OF OREGON

IN THE MATTER OF THE CLAIM FOR) FINAL ORDER
COMPENSATION UNDER ORS 197.352) CLAIM NO. M118605
(BALLOT MEASURE 37) OF)
Larry L. and Laura B. Luethe, CLAIMANTS)

Claimants: Larry L. and Laura B. Luethe (the Claimants)

Property: Township 2N, Range 1W, Section 32B, Tax lots 700 and 800, Multnomah County
(the Property)

Claim: The demand for compensation and any supporting information received from the
Claimants by the State of Oregon (the Claim).

Claimants submitted the Claim to the State of Oregon under ORS 197.352. Under OAR 125-145-0010 *et seq.*, the Department of Administrative Services (DAS) referred the Claim to the Department of Land Conservation and Development (DLCD) as the regulating entity. This order is based on the record herein, including the Findings and Conclusions set forth in the Final Staff Report and Recommendation of DLCD (the DLCD Report), the Oregon Department of Forestry (the ODF Report), and the Department of Environmental Quality (the DEQ Report), attached to and by this reference incorporated into this order.

ORDER

The Claim is denied as to laws administered by the Oregon Department of Forestry or the Oregon Board of Forestry, for the reasons set forth in the ODF Report.

The Claim is denied as to the laws administered by the Department of Environmental Quality for the reasons set forth in the DEQ Report.

The Claim is approved as to laws administered by DLCD and the Land Conservation and Development Commission (LCDC) for the reasons set forth in the DLCD Report, and subject to the following terms:

1. In lieu of compensation under ORS 197.352, the State of Oregon will not apply the following laws to Larry and Laura Luethe's portion of the 18.92-acre property into "2 additional parcels of approximately 6 acres each or a 9 lot subdivision" and development of a dwelling on each parcel: applicable provisions of Goal 4, ORS 215 and OAR 660, division 6 (excepting those rules in division 6 concerning fire safety). These land use regulations will not apply to the claimants only to the extent necessary to allow them to use the subject property for the use described in this report, and only to the extent that use was permitted when they acquired the property on August 8, 1973.



2. The action by the State of Oregon provides the state's authorization to the claimants to use the subject property for the use described in this report, subject to the standards in effect on August 8, 1973.

3. To the extent that any law, order, deed, agreement or other legally enforceable public or private requirement provides that the subject property may not be used without a permit, license or other form of authorization or consent, the order will not authorize the use of the property unless the claimants first obtain that permit, license or other form of authorization or consent. Such requirements may include, but are not limited to: a building permit, a land use decision, a "permit" as defined in ORS 215.402 or 227.160, other permits or authorizations from local, state or federal agencies and restrictions on the use of the subject property imposed by private parties.


4. Any use of the subject property by the claimants under the terms of the order will remain subject to the following laws: (a) those laws not specified in Condition 1 above; (b) any laws enacted or enforced by a public entity other than the Commission or the department; and (c) those laws not subject to ORS 197.352 including, without limitation, those laws exempted under ORS 197.352(3).

5. Without limiting the generality of the foregoing terms and conditions, in order for the claimants to use the subject property, it may be necessary for them to obtain a decision under ORS 197.352 from a city and/or county and/or metropolitan service district that enforces land use regulations applicable to the property. Nothing in this order relieves the claimants from the necessity of obtaining a decision under ORS 197.352 from a local public entity that has jurisdiction to enforce a land use regulation applicable to a use of the subject property by the claimants.

This Order is entered by the Director of the DLCD as a final order of DLCD and the Land Conservation and Development Commission under ORS 197.352, OAR 660-002-0010(8), and OAR 125, division 145, and by the Deputy Administrator for the State Services Division of the DAS as a final order of DAS under ORS 197.352, OAR 125, division 145, and ORS 293, and by the Department of Environmental Quality as a final order under ORS 197.352, OAR 125, division 145.


This Order is entered by the Oregon Board and Department of Forestry as a final order of the Board under ORS 197.352, OAR 629-001-0057, and OAR Chapter 125, division 145.

FOR DLCD AND THE LAND
CONSERVATION AND DEVELOPMENT
COMMISSION:



Lane Shetterly, Director
DLCD
Dated this 27th day of April, 2006.

FOR THE DEPARTMENT OF
ADMINISTRATIVE SERVICES:

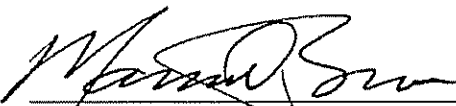


Dugan Petty, Deputy Administrator
DAS, State Services Division
Dated this 27th day of April, 2006.

FOR THE FOR DEPARTMENT OF
ENVIRONMENTAL QUALITY

Paul Slyman, Deputy Director
DEQ
Dated this 27th day of April, 2006

FOR THE OREGON BOARD OF
FORESTRY AND THE OREGON
DEPARTMENT OF FORESTRY:



Marvin Brown, State Forester
ODF
Dated this 27th day of April, 2006.

NOTICE OF RIGHT TO APPEAL OR OTHER JUDICIAL RELIEF

You are entitled, or may be entitled, to the following judicial remedies:

1. Judicial review under ORS 183.484: Judicial review under ORS 183.484 may be obtained by filing a petition for review within 60 days from the service of this order. A petition for judicial review under ORS 183.484 may be filed in the Circuit Court for Marion County or the Circuit Court in the county in which you reside.
2. A cause of action under ORS 197.352 (Measure 37 (2004)): 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 ORS 197.352¹, the present owner of the property, or any interest therein, shall have a cause of action in the circuit court in which the real property is located.

(Copies of the documents that comprise the record are available for review at the Department's office at 635 Capitol Street NE, Suite 150, Salem, Oregon 97301-2540)

¹ By order of the Marion County Circuit Court, "all time lines under Measure 37 [were] suspended indefinitely" on October 25, 2005. This suspension was lifted on March 13, 2006 by the court. As a result, a period of 139 days (the number of days the time lines were suspended) has been added to the 180-day time period under ORS 197.352(6) for claims that were pending with the state on October 25, 2005.

FOR DLCD AND THE LAND
CONSERVATION AND DEVELOPMENT
COMMISSION:

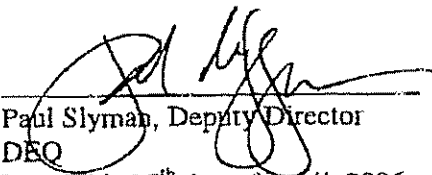
FOR THE DEPARTMENT OF
ADMINISTRATIVE SERVICES:

Lane Shetterly, Director
DLCD
Dated this 27th day of April, 2006.

Dugan Petty, Deputy Administrator
DAS, State Services Division
Dated this 27th day of April, 2006.

FOR THE FOR DEPARTMENT OF
ENVIRONMENTAL QUALITY

FOR THE OREGON BOARD OF
FORESTRY AND THE OREGON
DEPARTMENT OF FORESTRY:


Paul Slyman, Deputy Director
DEQ
Dated this 27th day of April, 2006

Marvin Brown, State Forester
ODF
Dated this 27th day of April, 2006.

NOTICE OF RIGHT TO APPEAL OR OTHER JUDICIAL RELIEF

You are entitled, or may be entitled, to the following judicial remedies:

1. Judicial review under ORS 183.484: Judicial review under ORS 183.484 may be obtained by filing a petition for review within 60 days from the service of this order. A petition for judicial review under ORS 183.484 may be filed in the Circuit Court for Marion County or the Circuit Court in the county in which you reside.
2. A cause of action under ORS 197.352 (Measure 37 (2004)): 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 ORS 197.352¹, the present owner of the property, or any interest therein, shall have a cause of action in the circuit court in which the real property is located.

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FOR INFORMATION ONLY

The Oregon Department of Justice has advised the Department of Land Conservation and Development that “[i]f the current owner of the real property conveys the property before the new use allowed by the public entity is established, then the entitlement to relief will be lost.”

ORS 197.352 (BALLOT MEASURE 37) CLAIM FOR COMPENSATION
OREGON DEPARTMENT OF LAND CONSERVATION AND DEVELOPMENT
Final Staff Report and Recommendation

April 27, 2006

STATE CLAIM NUMBER: M118605

NAMES OF CLAIMANTS: Larry L. and Laura B. Luethe

MAILING ADDRESS: 13225 Northwest McNamee Road
Portland, Oregon 97231

PROPERTY IDENTIFICATION: Township 2N, Range 1W, Section 32B
Tax lots 700 and 800
Multnomah County

OTHER CONTACT INFORMATION: Mark P. O'Donnell
Kristian Roggendorf
O'Donnell & Clark, LLP
1706 Northwest Glisan Street, Suite 6
Portland, Oregon 97209

DATE RECEIVED BY DAS: June 14, 2005

180-DAY DEADLINE: April 29, 2006¹

I. SUMMARY OF CLAIM

The claimants, Larry and Laura Luethe, seek compensation in the amount of \$900,000² for the reduction in fair market value as a result of land use regulations that are alleged to restrict the use of certain private real property. The claimants desire compensation or the right to "all permitted uses except farm or forest uses, including but not limited to 2 additional parcels of approximately 6 acres each or a 9 lot subdivision" on the 18.92-acre property. The subject property is located at 13225 NW McNamee Road, near Portland, in Multnomah County. (See claim.)

¹ This date reflects 180 days from the date the claim was submitted, as extended by the 139 days that all timelines under Measure 37 were suspended during the pendency of *MacPherson v. Dept. of Admin. Svcs.*, 340 Or 117 (2006).

² The claimants included two estimates: one based on two six-acre parcels, resulting in a reduction in fair market value of approximately \$550,000 and another based on a division of nine new parcels, resulting in a reduction in fair market value of approximately \$700,000 to \$1,300,000. The department averaged the low and high figures of this range.

II. SUMMARY OF STAFF RECOMMENDATION

Based on the findings and conclusions set forth below, the Department of Land Conservation and Development (the department) has determined that the claim is valid. Department staff recommends that, in lieu of compensation, the requirements of the following state laws enforced by the Land Conservation and Development Commission (the Commission) or the department not apply to Larry and Laura Luethe's partition of the 18.92-acre property into two to nine new parcels and to their development of a dwelling on each parcel: applicable provisions of Statewide Planning Goal 4 (Forest Lands), ORS 215 and Oregon Administrative Rules (OAR) 660, division 6. These laws will not apply to the claimants only to the extent necessary to allow them to use the subject property for the use described in this report, and only to the extent that use was permitted when they acquired the property on August 8, 1973. (See the complete recommendation in Section VI of this report.)

III. COMMENTS ON THE CLAIM

Comments Received

On July 7, 2005, pursuant to OAR 125-145-0080, the Oregon Department of Administrative Services (DAS) provided written notice to the owners of surrounding properties. According to DAS, one written comment was received in response to the 10-day notice.

The comment is relevant to whether a state law restricts the claimants' use of the property; and whether the restriction of the claimants' use of the property reduces the fair market value of the property. The comment has been considered by the department in preparing this report.

IV. TIMELINESS OF CLAIM

Requirement

ORS 197.352(5) requires that a written demand for compensation be made:

1. For claims arising from land use regulations enacted prior to the effective date of Measure 37 (December 2, 2004), within two years of that effective date, or the date the public entity applies the land use regulation as an approval criteria to an application submitted by the owner, whichever is later; or
2. For claims arising from land use regulations enacted after the effective date of Measure 37 (December 2, 2004), within two years of the enactment of the land use regulation, or the date the owner of the property submits a land use application in which the land use regulation is an approval criteria, whichever is later.

Findings of Fact

This claim was submitted to DAS on June 14, 2005, for processing under OAR 125, division 145. The claim identifies state land division statutes (ORS 92), applicable provisions of ORS 92, 197, 215 and 227 and administrative rules contained in OAR 660 as laws that restrict

the use of the property and as the basis for the claim.³ Only laws that were enacted or adopted prior to December 2, 2004, are the basis for this claim.

Conclusions

The claim has been submitted within two years of the effective date of Measure 37 (December 2, 2004), based on land use regulations enacted or adopted prior to December 2, 2004, and is therefore timely filed.

V. ANALYSIS OF CLAIM

1. Ownership

ORS 197.352 provides for payment of compensation or relief from specific laws for “owners” as that term is defined in ORS 197.352. ORS 197.352(11)(C) defines “owner” as “the present owner of the property, or any interest therein.”

Findings of Fact

The claimants, Larry and Laura Luethe, acquired the subject property on August 8, 1973, from his parents Brooks and Virginia Luethe, as reflected by a warranty deed included with the claim. Brooks and Virginia Luethe acquired the subject property on April 8, 1940, as reflected by a warranty deed recorded that date and included with the claim. The Multnomah County Assessor’s Office confirms that the claimants are the current owners of the subject property.

Conclusions

The claimants, Larry and Laura Luethe, are “owners” of the subject property as that term is defined by ORS 197.352(11)(C), as of August 8, 1973. Claimant Larry Luethe’s parents are “family members” as defined by ORS 197.352(11)(A), and acquired the subject property on April 8, 1940.

2. The Laws That are the Basis for This Claim

In order to establish a valid claim, ORS 197.352(1) requires, in part, that a law must restrict the claimants’ use of private real property in a manner that reduces the fair market value of the property relative to how the property could have been used at the time the claimants or a family member acquired the property.

Findings of Fact

The claim indicates that several provisions contained in Multnomah County regulations⁴ and state requirements⁵ have restricted the property so that it cannot be further divided into two to nine additional new parcels.

³ The claim also lists state laws administered by other agencies. This report only addresses those laws administered by the department or Commission.

The claim is based generally on Multnomah County's current Commercial Forest (CFU-2) zone and the applicable provisions of state law that require such zoning. The claimants' property is zoned CFU-2 as required by Goal 4 in accordance with ORS 215 and OAR 660, division 6, because the claimants' property is "forest land" under Goal 4. Goal 4 became effective on January 25, 1975, and requires that forest land be zoned for forest use (see statutory and rule history under OAR 660-015-0000(4)). The forest land administrative rules (OAR 660, division 6) became effective on September 1, 1982, and ORS 215.705 to 215.755 and 215.780 became effective on November 4, 1993 (Chapter 792, Oregon Laws 1993). OAR 660-006-0026 and 660-006-0027 were amended on March 1, 1994, to implement those statutes.

Together, ORS 215.705 to 215.755 and 215.780 and OAR 660, division 6, enacted or adopted pursuant to Goal 4, prohibit the division of forest land into parcels less than 80 acres and establish standards for development of dwellings on existing or proposed parcels on those lands⁶.

The claimants' family acquired the subject property on April 8, 1940, prior to the adoption of the statewide planning goals and their implementing statutes and regulations. The current owners, Larry and Laura Luethe, acquired the property on August 8, 1973.

The claim also summarily lists certain other statutes contained in ORS 92, 197, 215 and 227 and rules contained in OAR 660 as limiting the use of the property, with no description of why or how these laws restrict the claimants' desired use.

ORS 92 establishes procedures for subdivisions and partitions, and to the extent that it may restrict the claimants' use of the property the operative provisions of the statutes were in effect in 1973. The claimants have not described or established that the current versions of the listed statutes are more restrictive than those in effect in 1973.

ORS 197 establishes procedures for comprehensive land use planning, and the claimants have not described or established how the listed statutes restrict the claimants' desired use of the property.

In addition to the specific statutes contained in ORS 215 described above, the claim also lists statutes in this chapter that establish procedures for county planning and zoning. The statutes authorizing county zoning predate 1973. The statutes addressing uses of land zoned for exclusive farm use do not apply to this property. The claimants have not described or established how the listed statutes restrict the claimants' desired use of the property. ORS 227 establishes procedures for city planning and zoning. To the extent ORS 227.110 applies to this property, its operative provisions were in effect in 1973. The claimants have not

⁴ These local regulations include Multnomah County's subdivision and zoning regulations and comprehensive plan policies.

⁵ State laws that are administered by the department or the Commission that are referenced in the claim include provisions of ORS 92, 197, 215 and 227, Goals 1 to 14 (except Goal 7) and many of the implementing rules for the Goals.

⁶ In a comment letter dated April 17, Multnomah County asks how this conclusion can be "reconciled with the (Oregon Dept. of Justice) opinion that a grant of regulatory relief is not transferable. (1)f the only reason the claimant is seeking to divide the property into 2 acre lots is so that they can sell them, but the right to develop the properties is not transferable, than how is *their* use of the property restricted?"

described or established how the listed statute restricts the claimants' desired use of the property⁷.

The claim also lists a large number of state administrative rules administered by the department in OAR 660 (including Goals 1 to 14) in addition to those specific rules addressed above with regard to residential development on land zoned for forest use. The claimants have not described or established how any of the listed rules restrict the claimants' desired use of the property. With the exception of the specific statutes in ORS 215, Goal 4 and the rules implementing Goal 4 relating to residential development of land zoned for forest use, the department is unable to determine whether the listed statutes or rules apply to the claimants' desired use of the property.

Conclusions

The current zoning requirements, minimum lot size and dwelling standards established by Goal 4 and provisions applicable to residential use of land zoned for forest use in ORS 215 and OAR 660, division 6, were all enacted or adopted after the claimants' family acquired the subject property in 1940 and do not allow the desired division or development of the property. These laws restrict the use of the property relative to the uses allowed when the claimants acquired the property.

This report addresses only those state laws that are identified in the claim, or that the department is certain apply to the subject property, based on the uses that the claimants have identified. There may be other laws that currently apply to the claimants' use of the subject property, and that may continue to apply to the claimants' use of the property, that have not been identified in the claim. In some cases, it will not be possible to know which laws apply to a use of the subject property until there is a specific proposal for that use. When the claimants seek a building or development permit to carry out a specific use, it may become evident that other state laws apply to that use.

3. Effect of Regulations on Fair Market Value

In order to establish a valid claim, ORS 197.352(1) requires that any land use regulation described in Section V.2 of this report must have "the effect of reducing the fair market value of the property, or any interest therein."

Findings of Fact

The claim includes an estimate of \$900,000 as the reduction in the subject property's fair market value due to current regulations. This amount is based on a "preliminary limited review appraisal and interpretation of comparable sales," according to the claim.

⁷ In a comment letter dated April 17, Multnomah County states that this report fails to identify the specific statutes and rule from which the claimant is receiving relief, or how these regulations restrict the use and reduce the value of the property. Further, "if regulations are to be set aside, the report should be amended to identify the specific regulations at issue, and explain how they restrict the claimant's (sic) use of the property and reduce its value.

Conclusions

As explained in Section V.1 of this report, the claimants are Larry and Laura Luethe who acquired the subject property on August 8, 1973. Under ORS 197.352, the claimants are due compensation for land use regulations that restrict the use of the subject property in a manner that reduces its fair market value. Based on the findings and conclusions in Section V.2 of this report, laws enacted or adopted since the claimants acquired the subject property restrict the desired division and development of the property. The claimants estimate the reduction in value due to the restrictions to be \$900,000⁸.

Without an appraisal or other documentation, it is not possible to substantiate the specific dollar amount the claimants demand for compensation. Nevertheless, based on the submitted information, the department determines that it is more likely than not that the fair market value of the subject property has been reduced to some extent as a result of land use regulations enforced by the Commission or the department⁹.

4. Exemptions Under ORS 197.352(3)

ORS 197.352 does not apply to certain land use regulations. In addition, under ORS 197.352(3), certain types of laws are exempt from ORS 197.352.

Findings of Fact

The claim is based on state land use regulations that restrict the use of the subject property, including applicable provisions of Goal 4, ORS 215 and OAR 660, division 6, which Multnomah County has implemented through its current CFU-2 zone. All of these land use regulations were enacted or adopted after the claimants' family acquired the subject property.

Conclusions

Without a specific development proposal for the subject property, it is not possible for the department to determine all the laws that may apply to a particular use of the property, or whether those laws may fall under one or more of the exemptions under ORS 197.352. It appears that none of the general statutory, goal and rule restrictions on residential division and development of the subject property were in effect when the claimants acquired the property in 1973. As a result, these laws are not exempt under ORS 197.352(3)(E).

Laws in effect when the claimants acquired the subject property are exempt under ORS 197.352(3)(E), and will also continue to apply to the claimants' use of the property. In addition, the department notes that ORS 215.730 and OAR 660, division 6, include standards for

⁸ In a comment letter dated April 17, Multnomah County states the following about this conclusion: "Evidence that there is *likely* a reduction (in fair market value) is not evidence *of* a reduction. Further, findings regarding the effect on the fair market value of the claimant's (sic) property are vague, and fail to consider the DOJ opinion on transferability."

⁹ In a comment letter dated April 17, Multnomah County faults the report's conclusion about the loss of fair market value, indicating that a loss of \$900,000 does not take into account "the substantial costs inherent" in subdividing and building homes on the new lots.

siting dwellings in forest zones. Those provisions include fire protection standards for dwellings. ORS 197.352(3)(B) specifically exempts regulations “restricting or prohibiting activities for the protection of public health and safety, such as fire and building codes...” Accordingly, siting standards for dwellings in forest zones in ORS 215.730 and OAR 660, division 6, are exempt under ORS 197.352(3)(B).

There may be other laws that continue to apply to the claimants’ use of the subject property that have not been identified in the claim. In some cases, it will not be possible to know which laws apply to a use of subject property until there is a specific proposal for that use. When the claimants seek a building or development permit to carry out a specific use, it may become evident that other state laws apply to that use. In some cases, some of these laws may be exempt under ORS 197.352(3)(A) to (D).

This report addresses only those state laws that are identified in the claim, or that the department is certain apply to the subject property based on the uses that the claimants have identified. Similarly, this report only addresses the exemptions provided for under ORS 197.352(3) that are clearly applicable, given the information provided to the department in the claim. The claimants should be aware that the less information they have provided to the department in the claim, the greater the possibility that there may be additional laws that will later be determined to continue to apply to their use of the subject property.

VI. FORM OF RELIEF

ORS 197.352(1) provides for payment of compensation to an owner of private real property if the Commission or the department has enforced one or more laws that restrict the use of the property in a manner that reduces its fair market value. In lieu of compensation, the department may choose to not apply the law in order to allow the present owner to carry out a use of the property permitted at the time the current owner acquired the property. The Commission, by rule, has directed that if the department determines a claim is valid, the Director of the department must provide only non-monetary relief unless and until funds are appropriated by the legislature to pay claims.

Findings of Fact

Based on the findings and conclusions set forth in this report, laws enforced by the Commission or the department restrict the claimants’ ability to divide the 18.92-acre property into “2 additional parcels of approximately 6 acres each or a 9 lot subdivision.” The claim asserts that the laws enforced by the Commission or the department reduce the fair market value of the subject property by \$900,000¹⁰. However, because the claim does not provide an appraisal or other specific documentation establishing how the specified restrictions reduce the fair market value of the subject property, a specific amount of compensation cannot be determined. Nevertheless, based on the record for this claim, the department acknowledges that the laws on which the claim is based likely have reduced the fair market value of the subject property to some extent.

¹⁰ In a comment letter dated April 17, Multnomah County suggests that such a sum of \$900,000 “clearly assumes that development rights are transferable”. If the state accepts this reduction in value, than the state “appears to accept that development rights are transferable”.

No funds have been appropriated at this time for the payment of claims. In lieu of payment of compensation, ORS 197.352 authorizes the department to modify, remove or not apply all or parts of certain land use regulations to allow Larry and Laura Luethe to use the subject property for a use permitted at the time they acquired the property on August 8, 1973. Although the claimants' family acquired the property in 1940, ORS 197.352 only authorizes the department to not apply the laws to allow the claimants to use the property for a use permitted at the time they acquired the subject property, not for a use allowed when the family acquired the property.

Conclusions

Based on the record, the department recommends that the claim be approved, subject to the following terms:

1. In lieu of compensation under ORS 197.352, the State of Oregon will not apply the following laws to Larry and Laura Luethe's portion of the 18.92-acre property into "2 additional parcels of approximately 6 acres each or a 9 lot subdivision" and development of a dwelling on each parcel: applicable provisions of Goal 4, ORS 215 and OAR 660, division 6 (excepting those rules in division 6 concerning fire safety). These land use regulations will not apply to the claimants only to the extent necessary to allow them to use the subject property for the use described in this report, and only to the extent that use was permitted when they acquired the property on August 8, 1973.
2. The action by the State of Oregon provides the state's authorization to the claimants to use the subject property for the use described in this report, subject to the standards in effect on August 8, 1973.
3. To the extent that any law, order, deed, agreement or other legally enforceable public or private requirement provides that the subject property may not be used without a permit, license or other form of authorization or consent, the order will not authorize the use of the property unless the claimants first obtain that permit, license or other form of authorization or consent. Such requirements may include, but are not limited to: a building permit, a land use decision, a "permit" as defined in ORS 215.402 or 227.160, other permits or authorizations from local, state or federal agencies and restrictions on the use of the subject property imposed by private parties.
4. Any use of the subject property by the claimants under the terms of the order will remain subject to the following laws: (a) those laws not specified in Condition 1 above; (b) any laws enacted or enforced by a public entity other than the Commission or the department; and (c) those laws not subject to ORS 197.352 including, without limitation, those laws exempted under ORS 197.352(3).
5. Without limiting the generality of the foregoing terms and conditions, in order for the claimants to use the subject property, it may be necessary for them to obtain a decision under ORS 197.352 from a city and/or county and/or metropolitan service district that enforces land use regulations applicable to the property. Nothing in this order relieves the claimants from the necessity of obtaining a decision under ORS 197.352 from a local public entity that has jurisdiction to enforce a land use regulation applicable to a use of the subject property by the claimants.

VII. COMMENTS ON THE DRAFT STAFF REPORT

The department issued its draft staff report on this claim on April 7, 2006. OAR 125-145-0100(3), provided an opportunity for the claimants or the claimants' authorized agent and any third parties who submitted comments under OAR 125-145-0080 to submit written comments, evidence and information in response to the draft staff report and recommendation. Comments received have been taken into account by the department in the issuance of this final report.

**ORS 197.352 (BALLOT MEASURE 37)
CLAIM FOR COMPENSATION**

**OREGON DEPARTMENT OF FORESTRY
Final Staff Report and Recommendation**

April 27, 2006

STATE CLAIM NUMBER: M118605

NAMES OF CLAIMANTS: Larry L. and Laura B. Luethe

MAILING ADDRESS: 13225 McNamee Road
Portland, OR 97231

PROPERTY IDENTIFICATION: Township 2N, Range 1W, Section 32B
Tax lots 700 & 800
Multnomah County

OTHER CONTACT INFORMATION: Mark P. O'Donnell
O'Donnell & Clark, LLP
1706 NW Glisan Street, Suite 6
Portland, OR 97209

DATE RECEIVED BY DAS: June 14, 2005

180-DAY DEADLINE: April 29, 2006¹

I. SUMMARY OF CLAIM

See Department of Land Conservation and Development (DLCD) Staff Report.

II. SUMMARY OF STAFF RECOMMENDATION

Based on the findings and conclusions set forth below, the Department of Forestry (ODF) has determined the claim is not valid because none of the laws identified in the claim as administered by the Board of Forestry (Board) or by the Department of Forestry (ODF) restrict the claimants' right to divide the property and develop it for uses other than farm or forestry. ORS 527.730 provides that "[n]othing in the Oregon Forest Practices Act shall prevent the conversion of forestland to any other use." The claim submitted by the claimants proposes a conversion to uses other than farm and forest uses. To the extent that the claimants may propose a forest operation in conjunction with the conversion, claimants have not submitted a written notification as required by law. Without a notification, the Department is unable to determine whether the laws

¹ This date reflects 180 days from the date the claim was submitted, as extended by the 139 days that all timelines under Measure 37 were suspended during the pendency of *MacPherson v. Dept. of Admin. Svcs.*, 340 Or 117 (2006).

listed in the claim apply to the claimants' use of the property or restrict their use of the property. As a result, the Department has not enforced an existing state land use regulation with respect to the claimant's use of the property. (See the complete recommendation in Section VI. of this report.)

III. COMMENTS ON THE CLAIM

Comments Received

See DLCD Final Staff Report.

IV. TIMELINESS OF CLAIM

Requirement

See DLCD Final Staff Report for requirements.

Findings of Fact

This claim was submitted to DAS on June 14, 2005, for processing under OAR 125, division 145. The claim identifies ORS 92, 197, 215, 227, 526, 527, and 454, OAR 340, 629, 660, and 661 as the basis for the claim. Only laws that were enacted or adopted prior to December 2, 2004, are the basis for this claim.

Conclusions

The claim has been submitted within two years of the effective date of Ballot Measure 37 (December 2, 2004), based on land use regulations enacted or adopted prior to December 2, 2004, and is therefore timely filed.

V. ANALYSIS OF CLAIM

1. Ownership

ODF adopts the findings of fact and conclusions of law regarding ownership contained in the DLCD Final Staff Report for this claim.

2. The Laws That are the Basis for This Claim

In order to establish a valid claim, ORS 197.352(1) requires, in part, that a law must restrict the claimants' use of private real property in a manner that reduces the fair market value of the property relative to how the property could have been used at the time the claimants or a family member acquired the property.

Findings of Fact

The claimants desire compensation or the right to divide the 16.91-acre property into a 9-lot subdivision. The claim lists the following state statutes and rules administered by ODF or the Board as laws that restrict the use of the property as the basis for the claim: ORS 526.016; 526.031, 526.166, 526.168, 526.194, 526.305 to 370, 526.425, 526.490, 526.500 to 515, 526.900, 526.905, 527.610 to 770, 527.990 and 527.992. The claim also lists the following rules of the Board: OAR 629-001-0000 to 0055, 629-020-0000 to 0070, 629-045-0005 to 0010, 629-605-0100 to 0500, 629-610-0000 to 0090, and 629-625-0000 to 0700. The only discussion in the claim as to how or why these laws restrict the use of the property that the claimants seek to carry out is the following statement: "State forestry statutes limit the development and division of land zoned for forestry." The property is zoned for commercial forestry use. However, the laws listed in the claim only apply to forest operations (which is not the use the claimants have described in their claim).

One of the cited laws, ORS 527.730, Conversion of forestland to other uses, states, "Nothing in the Oregon Forest Practices Act shall prevent the conversion of forestland to any other use." No laws enforced by the Board or ODF restrict the division of the property or the establishment of dwellings.

The subject property does appear to include trees. Certain uses of property are forest "operations" that are regulated under the Forest Practices Act. If trees are harvested for commercial use, some laws listed in the claim will apply to the operation.

A notification of intent to conduct a forest operation is required in order for ODF to determine whether laws it or the Board may enforce apply to the claimants' intended use of the subject property in a way that restricts the use of the subject property, and reduces its fair market value. No notification has been made.

The claim lists additional state statutes and regulations that are administered by the Departments of Land Conservation and Development, Environmental Quality, and Water Resources. These statutes and regulations are not administered or enforced by the Board and ODF and are not addressed in this report.

Conclusions

Nothing in the laws that are listed in the claim and enforced or administered by ODF or the Board applies to or restricts the division of the property or residential development of this property by the claimants.

Persons proposing to conduct a forest operation are required to submit a notification of the operation to ODF. Nothing in ORS 197.352 relieves an operator or landowner from this obligation, and until a notification is submitted, ODF is unable to determine whether laws it or the Board administers apply to the claimants' use of the property.

3. Effect of Regulations on Fair Market Value

In order to establish a valid claim, ORS 197.352(1) requires that any land use regulation described in Section V.(2) of this report must have “the effect of reducing the fair market value of the property, or any interest therein.”

Findings of Fact

The claimants have not demonstrated that any land use regulations administered by ODF or the Board restrict their use of the subject property.

Conclusions

The claimants have not demonstrated that laws enforced or administered by ODF or the Board restrict their use of this property and thus, have not demonstrated that those laws reduce the fair market value of the subject property.

4. Exemptions Under ORS 197.352(3)

ORS 197.352 does not apply to certain land use regulations. In addition, under ORS 197.352(3), certain types of laws are exempt from ORS 197.352.

Findings of Fact

ORS 197.352(3) exempts laws enacted before a claimant acquired their interest in the property. Claimant acquired an interest in the property on August 8, 1973. Most forest practice laws were first enacted in 1971 and 1972, although some date back to 1941. ODF is unable to determine whether 197.352(3)(E) or other exemptions in 197.352(3) may apply because the claimants have not proposed a use that is subject to these laws.

Some FPA regulations were enacted to control water pollution resulting from forest operations. ORS 197.352(B) specifically exempts regulations “restricting or prohibiting activities for the protection of public health and safety..., including pollution control.” Such regulations may apply to the property, depending upon the activities the claimants may wish to undertake.

Other FPA regulations cited by the claimants may be exempted under ORS 197.352(3).

Conclusions

ODF concludes that many of the specified land use regulations are likely exempt under ORS 197.352(3). Until there is a notification of an operation, however, a final determination of the applicability of the listed laws to a particular forest operation on the property cannot be made.

Laws in effect when claimants Larry and Laura Luethé acquired the subject property are exempt under ORS 197.352(3)(E), and will continue to apply to the claimants’ use of the property. There may be other laws that continue to apply to the claimants’ use of the subject property that have not been identified in the claim. In some cases, it will not be possible to know which laws apply to a use of property until claimants submit a notification of intent to conduct a commercial

forest operation. When the claimants submit a notification, it may become evident that other state laws apply to that use. In some cases, some of these laws may be exempt under ORS 197.352(3)(A) to (D).

This report addresses only those state laws that are identified in the claim, or that the department is certain apply to the subject property based on the uses that the claimants have identified. Similarly, this report only addresses the exemptions provided for under ORS 197.352(3) that are clearly applicable, given the information provided to the department in the claim. The claimants should be aware that the less information they have provided to the department in the claim, the greater the possibility that there may be additional laws that will later be determined to continue to apply to their use of the subject property.

VI. FORM OF RELIEF

Based on the current record, the claimants are not entitled to relief under ORS 197.352. ODF denies any relief for this claim because neither the Board nor the Department has enforced laws that restrict the division of the subject property into parcels or lots, or the use of the property for residential purposes.

VII. COMMENTS ON THE DRAFT REPORT

ODF issued its draft staff report on this claim on April 7, 2006. OAR 125-145-0100(3), provides an opportunity for the claimant or the claimant's authorized agent and any third parties who submitted comments under OAR 125-145-0080 to submit written comments, evidence and information in response to the draft staff report and recommendation. Comments received have been taken into account by the department in the issuance of this final report.

**ORS 197.352 (BALLOT MEASURE 37 (2004))
CLAIM FOR COMPENSATION**

**OREGON DEPARTMENT OF ENVIRONMENTAL QUALITY
Final Staff Report and Recommendation
April 27, 2006**

STATE CLAIM NUMBER:	M118605
NAMES OF CLAIMANTS:	Larry L. and Laura B. Luethe
MAILING ADDRESS:	13225 McNamee Road Portland, OR 97231
PROPERTY IDENTIFICATION:	Township 2N, Range 1W, Section 32B Tax lots 700 & 800 Multnomah County
OTHER CONTACT INFORMATION:	Mark P. O'Donnell O'Donnell & Clark, LLP 1706 NW Glisan Street, Suite 6 Portland, OR 97209
DATE RECEIVED BY DAS:	June 14, 2005
180-DAY DEADLINE:	April 29, 2006 ¹

I. SUMMARY OF CLAIM

See Department of Land Conservation and Development (DLCD) Staff Report.

II. SUMMARY OF STAFF RECOMMENDATION

Based on the findings and conclusions set forth below, the Department of Environmental Quality (Department) has determined the claim is not valid because none of the laws identified in the claim as administered by the Department or the Environmental Quality Commission (Commission) have been enforced, and there is no evidence that the laws restrict claimants' ability to divide the property or establish a residence on each parcel. In addition, the claimants have not filed applications with the Department, or Multnomah County, which has been delegated authority by the Department to administer the on-site

¹ This date reflects 180 days from the date the claim was submitted, as extended by the 139 days that all timelines under Measure 37 were suspended during the pendency of *MacPherson v Dept of Admin Svcs*, 340 Or 117 (2006).

sewage disposal system within the County, to construct on-site sewage disposal systems on the property, and the Department has taken no action to enforce the on-site sewage disposal statutes or implementing rules with respect to the claimants or the property. (See the complete recommendation in Section VI. of this report.)

III. COMMENTS ON THE CLAIM

See DLCD staff report.

IV. TIMELINESS OF CLAIM

See DLCD staff report.

V. ANALYSIS OF CLAIM

1. Ownership

The findings of the Draft Staff Report of the Department of Land Conservation and Development on this claim regarding ownership are incorporated into this report by this reference.

2. The Laws that Are the Basis for the Claim

In order to establish a valid claim, ORS 197.352(1) requires, in part, that a law must restrict the claimant's use of private real property in a manner that reduces the fair market value of the property relative to how the property could have been used at the time the claimant or a family member acquired the property.

Findings of Fact

The claimants, Larry and Laura Luethe, seek compensation in the amount of \$9,000,000² for the reduction in fair market value as a result of land use regulations that are alleged to restrict the use of certain private real property. The claimants desire compensation or the right to "all permitted uses except farm or forest uses, including but not limited to 2 additional parcels of approximately 6 acres each or a 9 lot subdivision" on the 18.92-acre property. The subject property is located at 13225 NW McNamee Road, near Portland, in Multnomah County (See claim.)

The claim lists a number of specific statutes and rules from ORS chapters 454 and OAR chapter 340, Division 071. Nothing in those statutes and rules restrict the division of land into residential lots as proposed by claimants.

² The claimants included two estimates: one based on two six-acre parcels, resulting in a reduction in fair market value of approximately \$550,000; and another based on a division of nine new parcels, for a reduction in fair market value of approximately \$700,000 to \$1,300,000. The department averaged the low and high figures of this range.

The cited statutes and rules require an application to the Department, or a local government that has been delegated authority by the Department to administer the on-site sewage disposal program, before construction of an on-site sewage disposal system. The claimants have not filed an application to construct an on-site sewage disposal system or systems on the property. Under ORS 197.352(7), property owners are not required to file a land use application with a local government prior to seeking relief under the Measure, but there is no corresponding exemption from state permit requirements.

Under ORS 197.352(1), existing laws may be the basis for relief only if a public entity enforces existing laws. The Department has taken no action to enforce the on-site sewage disposal statutes or implementing rules with respect to the claimants or the property. Until the Department takes some specific action with respect to the property, there is no basis for relief under ORS 197.352.

Under ORS 197.352(11) “land use regulations” do not include administrative rules of the Oregon Environmental Quality Commission. As a result, no relief may be authorized with regard to the Commission’s rules.

Conclusions

Nothing in the laws and rules cited by claimants restricts the division of the property into residential lots. The claim includes no evidence demonstrating how the listed statutes and rules restrict the use of the property. DEQ has not enforced a state land use regulation to restrict claimants’ use of their property. Furthermore, Measure 37 does not exempt claimants or the Department from following the legal requirements to apply for an on-site sewage disposal permit prior to construction. Until the Department has acted on such a permit application, there is no basis for a claim for relief. Finally, the Commission rules listed in an exhibit to the claim are not state “land use regulations” under ORS 197.352(11).

3. Effect of Regulations on Fair Market Value

In order to establish a valid claim, Section 1 of Ballot Measure 37 requires the current land use regulation(s) described in Section V. (2). of this report to have “the effect of reducing the fair market value of the property, or any interest therein.”

Findings of Fact

The claimants have not demonstrated that any land use regulations administered by the Department restrict their use of the subject property.

Conclusions

The claimants have not demonstrated that laws and regulations administered by the Department or Commission restrict their use of the property and thus, has not

demonstrated that those laws and regulations reduce the fair market value of the subject property.

4. Exemptions under section 3 of Measure 37

Ballot Measure 37 (2004) does not apply to certain land use regulations. The type of land use regulations not subject to a claim for compensation under Ballot Measure 37 are set forth in section 3 of the measure. These include laws restricting or prohibiting activities for the protection of public health and safety such as sanitary regulations.

Findings of Fact

The statutes and rules listed in the claim likely are exempt as laws enacted to protect the public health and safety. Without some evidence from the claimants as to how and why the listed laws restrict the use of the property, however, the Department is unable to determine whether this or other exemptions under ORS 197.352 (3) apply. (See section V.2, above.)

VI. FORM OF RELIEF

Based on the current record, the claimants are not entitled to relief under ballot Measure 37. Department staff recommend this claim be denied because neither the Department nor the Commission has enforced laws that restrict the division of the subject property, or the use of the property for residential purposes.

VII. COMMENTS ON THE DRAFT STAFF REPORT

The Department issued its draft staff report on this claim on April 7, 2006. OAR 125-145-0100(3), provided an opportunity for the claimants or the claimants' authorized agent and any third parties who submitted comments under OAR 125-145-0080 to submit written comments, evidence and information in response to the draft staff report and recommendation. The Department received no comments on the draft staff report.

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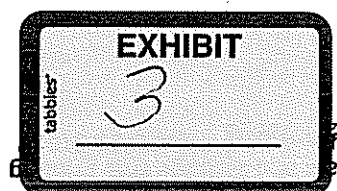
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1 **CERTIFICATE OF SERVICE**


2 I certify that on December 28, 2006, I served the foregoing *State Agency Defendants' Reply in*
3 *Support of Motions to Dismiss and Declaration of Jon Andrus in Support of State Agency*
4 *Defendants' Motion to Dismiss* upon the parties hereto by the method indicated below, and
5 addressed to the following:

6 Kristian Roggendorf
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