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

EDNA J. MATHERS,

Plaintiff,

v.

STATE OF OREGON, by and through the Oregon Department of Land Conservation and Development, and CROOK COUNTY, a political subdivision of the State of Oregon,

Defendant.

Case No. 06CV0051

STATE OF OREGON’S MOTION TO DISMISS AND MEMORANDUM OF POINTS AND AUTHORITIES (ORCP 21 A (1) and A (8))

Oral Argument by Telecommunication Requested

ORAL ARGUMENT REQUESTED

Defendant, the State of Oregon, requests oral argument by telecommunication on these Motions to Dismiss, and estimates that 30 minutes will be required. Official court reporting services are requested. The office of counsel for the State is more than 25 miles from the courthouse.

SUMMARY OF PLAINTIFF’S CLAIM

Plaintiff is a property owner in Crook County (Complaint, ¶ 1). She submitted a Measure 37 claim to the State in August 2005, seeking compensation for the reduction in fair market value suffered because of land use regulations that restrict her use of the property (¶ 2). As provided under Measure 37, the State opted not to apply certain land use regulations in lieu of paying compensation to plaintiff. The Department of Land Conservation and Development (DLCD) issued its final agency order to that effect on June 16, 2006.

In her Complaint here, plaintiff asserts a claim for compensation under Section 6 of Measure 37, because the “regulations imposed by the State of Oregon and Crook County

1 between 1966 and the present prevent plaintiff from dividing her property into smaller parcels
2 for sale as residential lots” (Compl, ¶ 11). Plaintiff alleges she acquired her ownership interest in
3 the property in August, 1966 (¶¶ 6, 7), contrary to DLCD’s determination that plaintiff acquired
4 her ownership interest in the property in 1980. Plaintiff does not seek judicial review under the
5 Administrative Procedures Act (APA), which is the exclusive procedure for determining the
6 correctness of agency orders.

7 MOTIONS TO DISMISS

8 The State moves the Court to dismiss plaintiff’s Complaint on the following grounds:

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

10 The Complaint asserts one claim—for compensation under Measure 37. The Court lacks
11 subject matter jurisdiction over this claim for two related reasons:

12 1. The APA is the exclusive means to challenge the correctness of state agency
13 orders. ORS 183.480 (2); *Bay River v. Envir. Quality Comm.*, 26 Or App 717, 720 *rev denied*,
14 276 Or 555 (1976). Plaintiff does not seek judicial review of the State’s Final Order approving
15 her Measure 37 demand. Therefore, as a matter of law, this court lacks subject matter
16 jurisdiction over the Complaint.

17 2. Plaintiff cannot cure the defect in her pleading. Circuit court jurisdiction attaches
18 only if a Petition for Judicial Review is filed within 60 days of the agency’s final order. ORS
19 183.484 (2). DLCD mailed the Final Order more than 60 days ago. Therefore, the Court does
20 not have, and cannot obtain, jurisdiction, and the Complaint should be dismissed.

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

22 1. Plaintiff cannot state a claim for compensation under Measure 37 because, as a
23 matter of law, she cannot allege her property *wrongly* continues to be subject to restrictive state
24 land use regulations 180 days after she submitted her Measure 37 claim to the State (Compl, ¶¶
25 9, 10). Without a modification or amendment of the Final Order, plaintiff cannot establish that
26 any land use regulations continue to apply to the property *in violation of Measure 37*. Except by

1 judicial review under the APA, plaintiff cannot establish that DLCD *should have* decided she
2 acquired the property in August 1966 instead of 1980.

3 2. Plaintiff cannot state a claim for compensation under Measure 37 because she is
4 not entitled to compensation. Section 8 of the statute permits a public entity, “[n]otwithstanding
5 any other state statute or the availability of funds * * *, in lieu of payment of just compensation *
6 * * not to apply the land use regulation or land use regulations to allow the owner to use the
7 property for a use permitted at the time the owner acquired the property.” ORS 197.352 (8).
8 Section 10 of Measure 37 expressly states that the option not to apply land use regulations is
9 within the discretion of the public entity and applies to claims for compensation under Section 6.
10 ORS 197.352 (10). The State elected, in lieu of compensation, to allow plaintiff a use of the
11 property permitted at the time she acquired it.

12 In support of these motions, the State relies upon ORCP 21 A (1) and A (8), ORS
13 197.352, the APA, the files and record of this case, the following Points and Authorities, and the
14 Declaration of Darsee Staley filed concurrently.

15 POINTS AND AUTHORITIES

16 I. Measure 37 Background

17 Oregon voters enacted Ballot Measure 37 through the initiative process in 2004.
18 Codified as part of Chapter 197, where Oregon’s statewide land use planning statutes are found,
19 Measure 37 permits owners of private real property to seek compensation for reductions in fair
20 market value caused by certain land use regulations. As an alternative to payment, public
21 entities may “waive,” that is modify, remove, or not apply, certain regulations.

22 A landowner qualifies for Measure 37 relief if: (1) a public entity enacts or enforces a
23 “land use regulation” that (2) restricts the owner’s use of private real property and (3) has the
24 effect of reducing the fair market value of the private real property. ORS 197.352 (1).
25 Subsection (3) of Measure 37 provides that certain land use regulations shall not be a basis for a
26

1 claim under Section (1)¹. Subsection (5) requires landowners to assert claims within two years
2 of the effective date of Measure 37 (December 2, 2004) or the date on which a land use
3 regulation is applied “as an approval criteria” on a specific land use application, whichever is
4 later.

5 After determining that an owner submitted a timely, valid claim, the public entity has the
6 option to pay “just compensation”² or to “modify, remove, or not to [sic] apply” land use
7 regulations to the extent necessary “to allow the owner to use the property for a use permitted at
8 the time the owner acquired the property.” ORS 197.352 (8); *see also* ORS 197.352 (10).

9 Allowing the owner to use the property in a way that would otherwise be prohibited is commonly
10 referred to as granting a Measure 37 “waiver.” DLCD is exercising the waiver option.³

11 Measure 37 does not specify any procedure for claim processing, but permits public
12 entities to adopt procedures. The State’s Department of Administrative Services (DAS) adopted
13 procedural rules, found at OAR 125-145-0010 to 125-145-0105, that set minimum requirements
14 for the content of a Measure 37 claim against the State.

15 When DAS receives a claim, it provides written notice of the claim to neighboring
16 landowners, certain neighborhood or community organizations, and anyone who requests notice.
17 OAR 125-145-0080. This provision is consistent with the notice provisions of ORS 215.416
18 regarding notice of permits. Persons receiving notice, or any other person, may submit
19 comments, evidence and information within ten days. OAR 125-145-0080 (2), (3).

20 DAS forwards Measure 37 claims to the state agency that enacted or enforced a relevant
21 land use regulation, *i.e.* the “regulating entity,” in this case DLCD. OAR 125-145-0090. The
22 regulating entity reviews and analyzes the claim, gathers additional information if necessary and
23 available, and issues a draft report. Draft reports explain the preliminary determination of the
24

25 ¹ None of the exemptions are directly at issue.

26 ² Subsection (2) defines “just compensation.” ORS 197.352 (2).

³ DLCD can pay compensation only if and when the legislature appropriates funds for that purpose. *See* OAR 660-002-0010 (8) (c).

1 statutory criteria for relief, including timeliness of the claim, ownership, the land use regulations
2 that are the basis of the claim, the effect of relevant land use regulations on the property's fair
3 market value, and applicable exemptions, if any.

4 The draft report is made public on the internet and copies are mailed to the claimant, and
5 any persons who submitted comments or requested notice. OAR 125-145-0100. After a ten-day
6 comment period, and based in part on the comments received, the regulating entity and DAS
7 issue a final report and order. DLCD serves the final report and order on any persons who
8 received copies of the draft report or submitted comments on the draft report. DLCD also makes
9 the final orders public by posting them on the internet.

10 Section 6 of Measure 37 provides that "[i]f a land use regulation continues to apply to the
11 subject property more than 180 days after * * * written demand for compensation * * *, the
12 present owner * * * shall have a cause of action for compensation under this section in the circuit
13 court." ORS 197.352 (6). This Section essentially imposes a 180 day deadline for public entities
14 to decide claims. In the event a public entity appropriately waives restrictive land use
15 regulations in accordance with Section 8 of Measure 37, no cause of action accrues.

16 II. Plaintiff's Administrative Claim

17 Plaintiff submitted her Measure 37 claim to the state on or about August 5, 2005 (*see*
18 Compl, ¶ 5; Decl of Staley, Ex 3, p 4). DLCD issued a draft report, received and considered
19 comments from plaintiff and others, and issued its Final Order and Report on June 16, 2006
20 (Decl of Staley, Ex 3, p 11 and p 2). DLCD approved plaintiff's claim and granted relief from
21 certain land use regulations (*id.*, p 1).

22 DLCD determined that plaintiff was the present owner of the property and acquired her
23 ownership interest on November 4, 1980 (*id.*, p 6). In her complaint, plaintiff alleges she
24 acquired an ownership interest in the property in August 1966 (Compl, ¶ 6). Plaintiff offered the
25 same allegation to DLCD, and DLCD found that the evidence supported an ownership interest in
26 the property commencing November 4, 1980, and not before (Decl of Staley, Ex 3, p 6).

1 Consequently, DLCD approved plaintiff's claim and waived land use regulations to the extent
2 necessary to allow plaintiff a use of the property permitted at the time she acquired the property
3 in 1980. ORS 197.352 (8).

4 III. The Administrative Procedures Act

5 Plaintiff alleges that this court should accept the argument rejected by DLCD—that
6 plaintiff acquired the property in 1966 rather than 1980. Therefore, the Complaint is a challenge
7 to the correctness of the Final Order. The APA sets forth the exclusive method for such a
8 challenge. ORS 183.480 (2); *Bay River, supra*, 26 Or App at 720; *Ososke v. DMV*, 320 Or 657,
9 659-60 (1995).

10 Plaintiff had 60 days from the mailing date of the order to challenge the correctness of
11 DLCD's decision by filing a petition for judicial review in the circuit court. ORS 183.484 (1)
12 and (2). DLCD mailed the Final Order on June 16, 2006 (Decl of Staley, Ex 2). This Court
13 would have jurisdiction to determine whether the agency erred only if plaintiff had filed for
14 judicial review by August 15, 2006.

15 The APA, at ORS 183.484 (2), provides that “[p]etitions for review *shall* be filed within
16 60 days *only* following the date the order is served” (emphasis added). Timely filing of a
17 petition for judicial review is a jurisdictional requirement, as the Court of Appeals explained in
18 *G.A.S.P. v. Environmental Quality Commission*, 201 Or App 362, 366 (2005):

19 “ORS 183.484(1) confers on certain circuit courts jurisdiction for
20 judicial review of orders in other than contested cases. ORS
21 183.484(2) then provides that ‘[p]etitions for review shall be filed
22 within 60 days only following the date the order is served.’ The
23 timely filing of a petition for judicial review of agency action is a
24 jurisdictional requirement. *Ososke v. DMV*, 320 Or 657, 659-60,
25 891 P2d 633 (1995). Accordingly, the failure to comply with that
26 requirement is a matter that cannot be waived and may be raised
for the first time on appeal. As we held in *Hood River County v.
Stevenson*, 177 Or App 78, 81, 33 P3d 325 (2001), ‘[a]
jurisdictional question need not be preserved by a party, much less
raised at a specific point in a proceeding, for a court to consider it.
Courts have an obligation to consider jurisdictional issues *sua
sponte*[.]’”

1 DLCD mailed the Final Order on June 16, 2006. Plaintiff did not file a petition for
2 judicial review by August 15, 2006. Consequently, the court lacks jurisdiction and the
3 Complaint should be dismissed.

4 IV. Plaintiff's Measure 37 Complaint

5 In her Measure 37 Complaint in this court, plaintiff alleges the state continues to enforce
6 land use regulations promulgated between 1966 and the present (Compl, ¶ 9). This allegation
7 can have no other meaning but that DLCD failed to waive regulations that should have been
8 waived. Plainly, plaintiff contends that DLCD erred by granting a waiver only as to regulations
9 enacted or enforced since 1980.

10 Plaintiff chose not to challenge the agency order under the APA.⁴ Consequently,
11 plaintiff cannot establish that DLCD improperly exercised its waiver option under Measure 37.
12 Plaintiff received the relief to which she was entitled under Measure 37 and cannot state a claim
13 for more.

14 The Oregon Court of Appeals consistently has held that the APA establishes the
15 exclusive method to challenge decisions made by state agencies. *See e.g., Lake County v. State*
16 *of Oregon*, 142 Or App 162, 165 (1996) (“ORS 183.480 (2) and numerous decisions of this court
17 make clear that judicial review of final agency orders shall be solely as provided in the APA”);
18 *Mendieta v. Division of State Lands*, 148 Or App 586, 599-600 (1997) *rev dismissed* 328 Or 331
19 (1999) (where “redress would have been available under ORS 183.484, had plaintiffs timely
20 filed their petition for judicial review[,]” the Court of Appeals, following *Lake County*, held “the
21 trial court erred in granting plaintiffs relief under ORS 183.490 and ORS 28.010”); *FOPPO v.*
22 *County of Marion*, 93 Or App 93, 97 (1988) *rev denied* 307 Or 326 (1989) (“PERS is subject to
23
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25 ⁴ The Final Order informed plaintiff of her right to judicial review under ORS 184.484 (Decl of Staley, Ex 3, p 3).
26 *See also* Order of Dismissal by the Court of Appeals in *Hoff v. DLCD*, CA A129414, holding that the circuit court
has jurisdiction of DLCD’s Final Orders in Measure 37 cases as orders in “other than contested cases” and that the
Court of Appeals did not (copy attached as Attachment A).

1 the APA; therefore, the APA provides the exclusive methods for its actions and for review of
2 those actions”).

3 In *Bay River, supra*, the circuit court granted the plaintiff an injunction and declaratory
4 relief under ORS 28.010 with respect to a subsurface sewage disposal system feasibility
5 permit—a matter within the purview of the Department of Environmental Quality. The Court of
6 Appeals reversed and remanded, ordering the circuit court to vacate the judgments and dismiss
7 the complaint. In its opinion, the Court of Appeals explained:

8 “The Oregon Administrative Procedures Act, ORS 183.310 et seq,
9 establishes a comprehensive pattern for the judicial review of
10 administrative decisions. The various APA statutes governing
11 judicial review provide the **sole and exclusive methods of
obtaining judicial review**. *School Dist. No. 48 v. Fair Dis. App.
Bd.*, 14 Or App 35, 512 P2d 799 (1973).

12 “This is sufficient answer to Bay River’s contention that since it
13 couched its complaint in equitable terms and sought a declaratory
14 judgment, the circuit court obtained jurisdiction pursuant to ORS
28.010. A party cannot ignore the judicial review provisions of the
APA in favor of a general equitable or declaratory remedy.” 26 Or
App at 720 (emphasis added).⁵

15 In *Clarke Electric, Inc. v. State Highway Division*, 93 Or App 693 (1988), the plaintiff
16 attempted to assert various tort claims under the Oregon Tort Claims Act, ORS 30.265, arising
17 from the Highway Division’s decision not to award the plaintiff a contract to install traffic
18 signals. The Court rejected the plaintiff’s arguments that the APA did not apply and that another
19 statute conferred jurisdiction. 93 Or App at 695-696. The Court also determined that the order
20 was a final order in other than a contested case with a right to challenge the order under the APA.
21 93 Or App at 696-697. Finally, the Court held that the plaintiff could not proceed directly under
22 the OTCA because the Highway Division’s:

23 “* * * alleged liability in tort is premised on a finding that
24 defendant’s order rejecting the bid was improper. That order was a
25 final order in other than a contested case, and the exclusive
procedure for review of such an order is under the APA. ORS
183.480(2). See *FOPPO v. County of Marion*, 93 Or App 93, 760

26 ⁵ Also, in *Bay River*, as here, the complaint was untimely. 26 Or App at 722, fn. 2.

1 P2d 1363 (1988). Consequently, the trial court did not err in
2 granting Division's motion to dismiss for failure to comply with
the APA time limitations for judicial review.” 93 Or App at 697.

3 Plaintiff's purported cause of action directly under Measure 37 presents the same
4 question. The State's alleged liability is based on the action of the DLCDC. DLCDC is subject to
5 the APA and its orders may be judicially tested only by a timely petition for APA review.
6 Plaintiff does not seek that review, and in any event cannot now make a timely petition.

7 V. Election of Relief

8 Plaintiff cannot assert a claim for Measure 37 compensation because the State chose to
9 provide relief in the form of not applying land use regulations “in lieu of” compensation.
10 Measure 37 provides no right to compensation at the election of the claimant. Instead, the statute
11 grants the public entity the option to determine whether to pay compensation or “modify,
12 remove, or not apply” land use regulations. ORS 197.352 (8) and (10). Consequently, plaintiff
13 cannot state a claim for compensation.

14 Oregon adopted Measure 37 through a ballot initiative in 2004. Oregon courts apply the
15 same methodology for interpreting statutes adopted through the initiative process that they apply
16 in construing statutes adopted by the Legislative Assembly. *Stranahan v. Fred Meyer, Inc.*, 331
17 Or 38 (2000); *PGE v. Bureau of Labor and Industries*, 317 Or 606, 612 n 4 (1993). The
18 objective is to discern the intent of those who enacted the law, in this case, the Oregon voters.
19 “The best evidence of the voters’ intent is the text of the provision itself. * * * The context of the
20 language of the ballot measure may also be considered[.]” *Stranahan*, 331 Or at 56 (quoting
21 *Roseburg School Dist. v. City of Roseburg*, 316 Or 374, 378 (1993)).

22 If the text and context of the statute reveal the clear intent of the voters, “further inquiry
23 is unnecessary.” *PGE*, 317 or at 611; *see also Stranahan*, 331 Or at 56.⁶ The language and
24

25 ⁶ The second level of analysis involves review of the legislative history. The history of ballot initiatives includes the
26 explanatory statement in the Voter's Pamphlet. Measure 37's explanatory statement supports a plain reading of the
statute: “If a property owner proves that a land use regulation restricts the use of the owner's property, and reduces
its value then the government responsible for the regulation will have a choice: pay the owner of the property an

1 structure of Measure 37 clearly show that the voters intended to give public entities, and not the
2 claimants, the choice between paying compensation and not applying land use regulations. The
3 statute provides:

4 (8) Notwithstanding any other state statute or the availability of funds
5 under subsection (10) of this section, in lieu of payment of just compensation
6 under this section, the governing body responsible for enacting the land use
7 regulation may modify, remove, or not to apply the land use regulation or land use
8 regulations to allow the owner to use the property for a use permitted at the time
9 the owner acquired the property.

10 * * * * *

11 (10) Claims made under this section shall be paid from funds, if any,
12 specifically allocated by the legislature, city, county, or metropolitan service
13 district for payment of claims under this section. Notwithstanding the availability
14 of funds under this subsection, a metropolitan service district, city, county, or
15 state agency shall have discretion to use available funds to pay claims or to
16 modify, remove, or not apply a land use regulation or land use regulations
17 pursuant to subsection (6) of this section. If a claim has not been paid within two
18 years from the date on which it accrues, the owner shall be allowed to use the
19 property as permitted at the time the owner acquired the property.

20 ORS 197.352 (8) and (10). Section 8 generally grants the public entities to which a
21 demand for compensation is submitted the option to pay or provide alternate relief. Section 10
22 makes it clear that the option is wholly within the discretion of the public entities and specifically
23 applies to claims, such as plaintiff's, under Section 6 of the statute (Compl, ¶¶ 11, 12).

24 In this case, The Final Order provides:

25 "In lieu of compensation under ORS 197.352, the State of Oregon will not
26 apply the following laws to Edna Mathers' division of the 80-acre property into 5-
27 acre parcels or to her development of a dwelling on each parcel: applicable
28 provisions of Goal 3, ORS 215 and OAR 660, division 33, enacted or adopted
29 after November 8, 1980 [sic]. These land use regulations will not apply to the
30 claimant only to the extent necessary to allow her to use the subject property for

31 amount equal to the reduction in value or modify, change or not apply the regulation to the owner's property."
32 www.oregon.gov/LCD/MEASURE37/legal_information.shtml#Information_About_the_Election (emphasis added).

1 the use described in this report, and only to the extent that use was permitted
2 when she acquired the property on November 4, 1980.”

3 Decl of Staley, Ex 3, p 1. There is no dispute that DLCD opted not to apply certain land use
4 regulations “in lieu” of paying compensation to plaintiff. If plaintiff was unsatisfied with the
5 relief granted, she had an opportunity to petition the court for judicial review. Plaintiff’s choice
6 to forego judicial review has no effect on DLCD’s choice to provide non-monetary relief under
7 the express terms of Measure 37. Plaintiff is not entitled to compensation.

8 **CONCLUSION**


9 The gravamen of plaintiff’s Complaint is that DLCD’s determination of her acquisition
10 date was wrong. The APA provides the exclusive procedure for plaintiff to dispute DLCD’s
11 determination. Plaintiff did not seek judicial review within the time allowed and, consequently,
12 this court lacks jurisdiction to overturn the determination of the date on which plaintiff acquired
13 her ownership interest in the property for purposes of Measure 37.

14 Plaintiff cannot state a claim for compensation because, as a matter of law, she received
15 the relief to which she is entitled under Measure 37. In addition, there is no dispute that DLCD
16 exercised its discretion to provide relief from regulations in lieu of compensation to plaintiff.
17 The Complaint should be dismissed.

18 DATED this 22 day of September, 2006.

19 Respectfully submitted,

20 HARDY MYERS
21 Attorney General

22 
23 DARSEE STALEY #87351
24 ERIKA HADLOCK #91297
25 Senior Assistant Attorneys General
26 Trial Attorneys
Tel (503) 947-4700
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Darsee.Staley@doj.state.or.us
Erika.Hadlock@doj.state.or.us
Of Attorneys for State of Oregon

COPY

IN THE COURT OF APPEALS OF THE STATE OF OREGON

CHARLES HOFF,

Petitioner,

v.

DEPARTMENT OF LAND CONSERVATION
AND DEVELOPMENT,

Respondent.

Agency No. M 119114

CA A129414

ORDER OF DISMISSAL

Before Wollheim, P.J., Brewer, C.J., and Schuman, J.

Petitioner has petitioned for judicial review of a joint order of the Department of Administrative Services (DAS) and the Department of Land Conservation and Development (DLCD) determining not to apply certain land use regulations to petitioner's parcel of land in lieu of paying compensation under Ballot Measure 37. Respondent has moved for a determination of whether the court has jurisdiction of the order on the ground that the order is an order in other than a contested case and, therefore, jurisdiction lies in the circuit court, not the Court of Appeals. Respondent further requests that, if the court determines that the court does not have jurisdiction of the order, the judicial review be dismissed. Lastly, respondent requests a determination whether the circuit court of Washington County or of Clackamas County has jurisdiction to review the order.

The motion for a determination of jurisdiction is granted. The court determines that the order is an order in other than a contested case, that the circuit court has jurisdiction of judicial review of the order, and that this court does not. On that ground, the court dismisses the judicial review in this court.

The parties have not briefed the question of which circuit court has jurisdiction of a petition for judicial review of a joint DAS/DLCD order in other than a contested case relating to property apparently located in Clackamas County. Moreover, petitioner already has filed actions in the circuit courts of both Washington County and Clackamas County relating to the order; therefore, there is no need for this court to transfer the judicial review to a circuit court under ORS 14.165. Respondent's request to determine which circuit court has jurisdiction of the judicial review of the joint DAS/DLCD order is denied.

Judicial review dismissed.

JAN 17 2006

Date

Robert Wollheim, Presiding Judge

APPELLATE JUDGMENT

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ATTACHMENT
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IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF CROOK

EDNA J. MATHERS,
Plaintiff,
v.

Case No. 06CV0051

DECLARATION OF DARSEE STALEY
IN SUPPORT OF STATE OF OREGON'S
MOTIONS TO DISMISS (ORCP 21 A (1) AND A
(8))

STATE OF OREGON, by and through the
Oregon Department of Land Conservation and
Development, and CROOK COUNTY, a
political subdivision of the State of Oregon,
Defendant.

I, Darsee Staley, do declare and say:

1. I am a Senior Assistant Attorney General at the Oregon Department of Justice,
attorneys for Defendant in the above-captioned matter. I make this declaration based on my
personal knowledge and in support of the State's Motions to Dismiss (ORCP 21 A (1) and A
(8)).

2. The following Exhibits, attached hereto, are true and correct copies of documents
maintained in the files of the Department of Land Conservation and Development (DLCD) on
Measure 37 claim number M121776 (Edna Mathers):

- Exhibit 1 is the Certificate of Mailing for the Draft Staff Report and Recommendation on
May 30, 2006;
- Exhibit 2 is the Certificate of Mailing for the Final Order and Final Staff Report and
Recommendation on June 16, 2006; and
- Exhibit 3 is the Final Order and Final Staff Report and Recommendation.

1 I HEREBY DECLARE THAT THE ABOVE STATEMENT IS TRUE TO THE BEST
2 OF MY KNOWLEDGE AND BELIEF, AND THAT I UNDERSTAND IT IS MADE FOR USE
3 AS EVIDENCE IN COURT AND IS SUBJECT TO PENALTY FOR PERJURY.

4
5 DATED this 22 day of September, 2006.

6
7 
8 DARSEE STALEY
9 Senior Assistant Attorney General

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

CERTIFICATE OF MAILING

I certify that I served M121776 Mathers Draft Staff Report
and Recommendations on:

See Attached List

by following indicated method or methods:

JA 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.

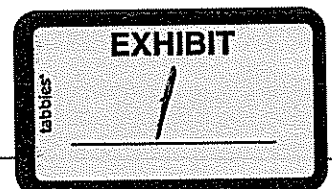
by **hand delivering** a full, true and correct copy to the person(s) listed above, on the date set forth below.

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 30th day of May, 2006.

Name: JA

Title: Measure 37 Support Specialist



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

CERTIFICATE OF MAILING

I certify that I served M121776 Mathers 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.

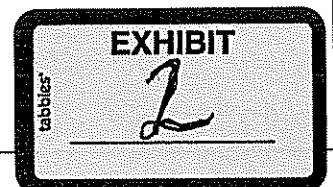
by **hand delivering** a full, true and correct copy to the person(s) listed above, on the date set forth below.

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 16th day of June, 2006.

Name: *JH*

Title: Measure 37 Support Specialist



BEFORE THE DEPARTMENT OF ADMINISTRATIVE SERVICES AND
THE DEPARTMENT OF LAND CONSERVATION AND DEVELOPMENT OF
THE STATE OF OREGON

IN THE MATTER OF THE CLAIM FOR) FINAL ORDER
COMPENSATION UNDER ORS 197.352) CLAIM NO. M121776
(BALLOT MEASURE 37) OF)
Edna Mathers, CLAIMANT)

Claimant: Edna Mathers (the Claimant)

Property: Township 16S, Range 14E, Section 11, Tax lot 1500, Crook County
(the Property)

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

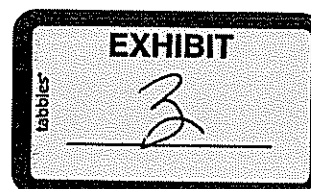
Claimant submitted the Claim to the State of Oregon under ORS 197.352. Under OAR 125-145-0010 *et seq.*, the Department of Administrative Services (DAS) referred the Claim to the Department of Land Conservation and Development (DLCD) as the regulating entity. This order is based on the record herein,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

ORDER

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 Edna Mathers' division of the 80-acre property into 5-acre parcels or to her development of a dwelling on each parcel: applicable provisions of Goal 3, ORS 215 and OAR 660, division 33, enacted or adopted after November 8, 1980. These land use regulations will not apply to the claimant only to the extent necessary to allow her to use the subject property for the use described in this report, and only to the extent that use was permitted when she acquired the property on November 4, 1980.
2. The action by the State of Oregon provides the state's authorization to the claimant to use the property for the use described in this report, subject to the standards in effect on November 4, 1980. On that date, the property was subject to compliance with Crook County's acknowledged EFU zone, and the applicable provisions of Goal 3 and ORS 215 then in effect.
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

FINAL ORDER



Page 1 of 3


unless the claimant first obtains 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 property by the claimant under the terms of the order will remain subject to the following laws: (a) those laws not specified in (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 claimant to use the subject property, it may be necessary for her 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 claimant 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 claimant.

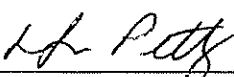
This Order is entered by the Deputy Director of the DLCD as a final order of DLCD and the Land Conservation and Development Commission under ORS 197.352, OAR 660-002-0010(8), and OAR 125, division 145, and by the Deputy Administrator for the State Services Division of the DAS as a final order of DAS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

FOR DLCD AND THE LAND CONSERVATION
AND DEVELOPMENT COMMISSION:
Lane Shetterly, Director



Cora R. Parker, Deputy Director
DLCD
Dated this 16th day of June, 2006.

FOR the DEPARTMENT OF ADMINISTRATIVE
SERVICES:



Dugan Petty, Deputy Administrator
DAS, State Services Division
Dated this 16th day of June, 2006.

NOTICE OF RIGHT TO APPEAL OR OTHER JUDICIAL RELIEF

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

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)

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."

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.

ORS 197.352 (BALLOT MEASURE 37) CLAIM FOR COMPENSATION

**OREGON DEPARTMENT OF LAND CONSERVATION AND DEVELOPMENT
Final Staff Report and Recommendation**

June 16, 2006

STATE CLAIM NUMBER: M121776

NAME OF CLAIMANT: Edna Mathers

MAILING ADDRESS: 20283 Murphy Road
Bend, Oregon 97702

PROPERTY IDENTIFICATION: Township 16S, Range 14E, Section 11
Tax lot 1500
Crook County

OTHER INTEREST IN PROPERTY: Edward P. Fitch
PO Box 457
Redmond, Oregon 97756

DATE RECEIVED BY DAS: August 8, 2005

180-DAY DEADLINE: June 23, 2006¹

I. SUMMARY OF CLAIM

The claimant, Edna Mathers, seeks compensation in the amount of \$1 million 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 claimant desires compensation or the right to divide the 80-acre property into 5-acre parcels and to develop a dwelling on each parcel. The subject property is located at the geographical coordinates listed above, near Bend, in Crook County. (See claim.)

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 Edna Mathers' division of the 80-acre property into 5-acre parcels and to her development of a dwelling on each parcel: applicable provisions of Statewide Planning Goal 3

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).

(Agricultural Lands), ORS 215 and Oregon Administrative Rules (OAR) 660, division 33, enacted or adopted after November 4, 1980. These laws will not apply to the claimant only to the extent necessary to allow her to use the subject property for the use described in this report, and only to the extent that use was permitted when she acquired the property on November 4, 1980. (See the complete recommendation in Section VI. of this report.)

III. COMMENTS ON THE CLAIM

Comments Received

On October 12, 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 does not address whether the claim meets the criteria for relief under ORS 197.352. Comments concerning the effects a use of the subject property may have on surrounding areas are generally not something that the department is able to consider in determining whether to waive a state law. If funds do become available to pay compensation, then such effects may become relevant in determining which claims to pay compensation for instead of waive a state law. (See the comment letter in the department's claim file.)

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 August 8, 2005, for processing under OAR 125, division 145. The claim identifies "all state planning regulations, goals and guidelines, and ORS Chapter 215" 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 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 claimant, Edna Mathers, acquired an interest in the subject property from her husband, Lloyd Mathers on November 4, 1980, as reflected by a deed creating an estate by the entirety included with the claim. Lloyd Mathers acquired the subject property in October 1966, as reflected by a warranty deed included with the claim. The Crook County Assessor’s Office confirms the claimant’s current ownership of the subject property.

Conclusions

The claimant, Edna Mathers, is an “owner” of the subject property as that term is defined by ORS 197.352(11)(C), as of November 4, 1980. The claimant’s husband, Lloyd Mathers, is a “family member” as defined by ORS 197.352(11)(A) and acquired the subject property in October 1966.

2. The Laws That are the Basis for This Claim

In order to establish a valid claim, 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 claim indicates that the claimant desires to divide the 80-acre subject property into 5-acre parcels and develop a dwelling on each parcel. The claim identifies “all state planning regulations, goals and guidelines, and ORS Chapter 215” as restricting the desired use.²

² The claimant has summarily cited numerous state laws as applicable to this claim, but does not establish how each of the laws either applies to the subject property or restricts its use in a manner that reduces its fair market value. On their face, most of these regulations either do not apply to the claimant’s property or do not restrict its use in a manner that reduces its fair market value. This report addresses only those regulations that the department finds are applicable to and restrict the claimant’s use of the subject property, based on the claimant’s asserted desired use.

The claim is based generally on Crook County's current Exclusive Farm Use (EFU) zone and the applicable provisions of state law that require such zoning. The claimant's property is zoned EFU as required by Goal 3, in accordance with ORS 215 and OAR 660, division 33, because the claimant's property is "agricultural land" as defined by Goal 3.³ Goal 3 became effective on January 25, 1975, and required that agricultural lands as defined by the Goal be zoned EFU pursuant to ORS 215.

Current land use regulations, particularly ORS 215.263, 215.284 and 215.780 and OAR 660, division 33, enacted or adopted pursuant to Goal 3, prohibit the division of EFU-zoned land into parcels less than 80 acres and establish standards for development of dwellings on existing or proposed parcels on that land.

ORS 215.780 establishes an 80-acre minimum size for the creation of new lots or parcels in EFU zones and became effective on November 4, 1993 (Chapter 792, Oregon Laws 1993). ORS 215.263 (2005 edition) establishes standards for the creation of new parcels for non-farm uses and dwellings allowed in an EFU zone.

OAR 660-033-0135 (applicable to farm dwellings) became effective on March 1, 1994, and interprets the statutory standard for a primary dwelling in an EFU zone under ORS 215.283(1)(f). OAR 660-033-0130(4) (applicable to non-farm dwellings) became effective on August 7, 1993, and was amended to comply with ORS 215.284(4) on March 1, 1994. The Commission subsequently adopted amendments to comply with House Bill 3326 (Chapter 704, Oregon Laws 2001, effective on January 1, 2002), which were effective on May 22, 2002. (See administrative rule history for OAR 660-033-0100, -0130 and -0135.)

The claimant's family first acquired the subject property in 1966, prior to the adoption of the statewide planning goals and their implementing statutes and rules. No county zoning applied to the subject property in 1966.

Conclusions

The current zoning requirements, minimum lot size and dwelling standards established by Goal 3, ORS 215 and OAR 660, division 33, were all enacted or adopted after the claimant's family acquired the subject property. These laws restrict the use of the subject property relative to the uses allowed when the claimant's family acquired the property.

3. Effect of Regulations on Fair Market Value

In order to establish a valid claim, 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."

³ The claimant's property is "agricultural land" because it contains Natural Resources Conservation Service Class I-IV soils.

Findings of Fact

The claim includes an estimate of \$1 million as the reduction in the subject property's fair market value due to current regulations. This amount is based on the claimant's estimate of the fair market value of the subject property.

Conclusions

As explained in Section V.(1) of this report, the claimant is Edna Mathers whose family acquired the subject property in 1966. Under ORS 197.352, the claimant is 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 claimant's family acquired the subject property restrict the desired division and development of the property. The claimant estimates the reduction in value due to the restrictions to be \$1 million.

Without an appraisal or other documentation it is not possible to substantiate the specific dollar amount the claimant demands 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 department since the claimant's family acquired the 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

The claim is based on state land use regulations that restrict the use of the subject property, relative to the uses permitted when the claimant's family acquired the property, including applicable provisions of Goal 3, ORS 215 and OAR 660, division 33, which Crook County has implemented through its current EFU zone. All of these land use regulations were enacted or adopted after the claimant's family acquired the subject property.

Conclusions

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 claimant's family acquired the property in October 1966. As a result, these laws are not exempt under ORS 197.352(3)(E). Laws in effect when the claimant's family acquired the subject property are exempt under ORS 197.352(3)(E) and do not provide a basis for compensation. In addition, other land use laws enacted or adopted for a purpose set forth in ORS 197.352(3)(A) to (D) are also exempt and would not provide a basis for compensation.

VI. FORM OF RELIEF

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 claimant's ability to divide the 80-acre property into 5-acre parcels and to develop a dwelling on each parcel. The claim asserts that the laws enforced by the Commission or the department reduce the fair market value of the subject property by \$1 million. 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, and without verification of whether or the extent to which the claimant's desired use of the property was allowed under the standards in effect when she acquired the 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.

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 Edna Mathers to use the subject property for a use permitted at the time she acquired the property on November 4, 1980.

At that time the claimant acquired the property, it was subject to Crook County's acknowledged EFU zone.⁴ When the claimant acquired the subject property, the desired division and development of the property would have been governed by the county's EFU zone and the applicable provisions of Goal 3 and ORS 215 then in effect.

In addition to the applicable provisions of Goal 3 and ORS 215 in effect on November 4, 1980, and other laws in effect when the claimant acquired the subject property, there may be other laws that apply to the claimant's 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 claimant seeks a building or development permit to carry out a specific use, it may become evident that other state laws apply to that use, and depending on when they were enacted or adopted, may continue to apply to the claimant's property. In addition, some of these laws may be exempt under ORS 197.352(3)(A) to (D) and will continue to apply to the subject property on that basis.

⁴ Crook County's EFU zone was acknowledged by the Commission for compliance with Goal 3 on February 16, 1979.

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 claimant has 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 claimant should be aware that the less information she has provided to the department in her claim, the greater the possibility that there may be additional laws that will later be determined to continue to apply to her use of the subject 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 Edna Mathers' division of the 80-acre property into 5-acre parcels or to her development of a dwelling on each parcel: applicable provisions of Goal 3, ORS 215 and OAR 660, division 33, enacted or adopted after November 8, 1980. These land use regulations will not apply to the claimant only to the extent necessary to allow her to use the subject property for the use described in this report, and only to the extent that use was permitted when she acquired the property on November 4, 1980.
2. The action by the State of Oregon provides the state's authorization to the claimant to use the property for the use described in this report, subject to the standards in effect on November 4, 1980. On that date, the property was subject to compliance with Crook County's acknowledged EFU zone, and the applicable provisions of Goal 3 and ORS 215 then in effect.
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 claimant first obtains 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 property by the claimant under the terms of the order will remain subject to the following laws: (a) those laws not specified in (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 claimant to use the subject property, it may be necessary for her 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 claimant 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 claimant.

VII. COMMENTS ON THE DRAFT STAFF REPORT


The department issued its draft staff report on this claim on May 30, 2006. OAR 125-145-0100(3), provided 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.

1 **CERTIFICATE OF SERVICE**

2 I certify that on September 22, 2006, I served the foregoing *State of Oregon's Motion to*
3 *Dismiss and Memorandum of Points and Authorities* upon the parties hereto by the method
4 indicated below, and addressed to the following:

5 Edward P. Fitch
6 Bryant Emerson & Fitch, LLP
7 P.O. Box 457
8 Redmond, OR 97756-0103

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11 HAND DELIVERY
12 MAIL DELIVERY
13 OVERNIGHT MAIL
14 TELECOPY (FAX)

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