

HARDY MYERS
Attorney General



PETER D. SHEPHERD
Deputy Attorney General

DEPARTMENT OF JUSTICE
TRIAL DIVISION

October 31, 2006

Honorable Thomas M. Hart
Circuit Court Judge
Marion County Courthouse
P. O. Box 12869
Salem, Oregon 97309-0869

Re: *Nash v. State*
Marion County Circuit Court No. 06C16920

Dear Judge Hart:

Enclosed for filing please find a Respondents' Cross Motion for Summary Judgment and Respondents' Memorandum in Support of Cross Motion for Summary Judgment and Response to Plaintiffs' Motion for Summary Judgment in the referenced matter.

Postcards are enclosed for the Clerk's use in notifying me of the action taken.

Respectfully,

A handwritten signature in cursive script that reads "Erika L. Hadlock".

Erika L. Hadlock
Sr. Assistant Attorney General

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Enclosures

cc: Christopher B. Matheny
Client

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

6 EDWARD H. and RUTH J. NASH, husband
7 and wife,

8 Claimants-Plaintiffs,

9 v.

10 STATE OF OREGON, by and through
11 DEPARTMENT OF ADMINISTRATIVE
12 SERVICES; DEPARTMENT OF LAND
13 CONSERVATION AND DEVELOPMENT,
14 AND LAND CONSERVATION AND
15 DEVELOPMENT COMMISSION,

16 Respondents-Defendants.

Case No. 06C-16920

Honorable Thomas M. Hart

RESPONDENTS' CROSS MOTION FOR
SUMMARY JUDGMENT

(ORAL ARGUMENT REQUESTED)

14 Pursuant to ORCP 47, respondents move for summary judgment in their favor because
15 plaintiffs are not "owners" of the subject property for purposes of Measure 37 and respondents
16 are entitled to judgment as a matter of law. This court already has set a hearing on plaintiffs'
17 motion for summary judgment at 1:30 on Tuesday, November 21, 2006, and it would be
18 appropriate for this cross-motion to be heard simultaneously, as the issues presented in the two
19 motions are identical. Respondents join plaintiffs' request for official court reporting services.

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

6 EDWARD H. and RUTH J. NASH, husband
and wife,

7 Claimants-Plaintiffs,

8 v.
9

10 STATE OF OREGON, by and through
DEPARTMENT OF ADMINISTRATIVE
SERVICES; DEPARTMENT OF LAND
11 CONSERVATION AND DEVELOPMENT,
AND LAND CONSERVATION AND
12 DEVELOPMENT COMMISSION,

13 Respondents-Defendants.

Case No. 06C-16920

Honorable Thomas M. Hart

RESPONDENTS' MEMORANDUM IN
SUPPORT OF CROSS MOTION FOR
SUMMARY JUDGMENT AND RESPONSE TO
PLAINTIFFS' MOTION FOR SUMMARY
JUDGMENT

14 INTRODUCTION

15 In a 2002 land-sale contract, plaintiffs Edward and Ruth Nash sold real property they had
16 owned for decades to their grandson, Byron Williams. Williams has not yet paid the full
17 purchase price for the property and, as contract vendors, the plaintiffs retain legal title. The
18 cross-motions for summary judgment present a single legal question: Are the plaintiff-vendors
19 still "owners" of the property for purposes of Measure 37? As explained in detail below, the
20 answer to that question is "no." Although contract vendors hold bare legal title to property they
21 sell, that legal interest is not one that can be restricted by a land use regulation in a way that
22 reduces the interest's fair market value. Accordingly, the vendors' interest does not make them
23 "owners" who can be entitled to relief under Measure 37.

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1 **BACKGROUND**

2 **I. Measure 37**

3 Measure 37 – enacted through the initiative in 2004 – amends Oregon’s existing land use
4 laws by providing certain landowners the opportunity to seek relief under certain circumstances
5 when land use laws reduce the value of their private real property. *See MacPherson v. DAS*, 340
6 Or. 117, 130 P.3d 308 (2006) (upholding constitutionality of Measure 37). Under Measure 37,
7 an owner of an interest in real property qualifies for relief if three criteria are met: (1) a public
8 entity enforces an existing “land use regulation” or enacts or enforces a new “land use
9 regulation;” (2) the land use regulation restricts the use of private real property; and (3) “the land
10 use regulation has the effect of reducing the fair market value of the private real property.” ORS
11 197.352(1). An “owner” is the “present owner of the property, or any interest therein.” ORS
12 197.352(11). If the owner qualifies for relief, government is required to pay just compensation.
13 ORS 197.352(2).¹ As an alternative to paying compensation, the measure provides that state and
14 local governments may “modify, remove or not * * * apply the land use regulation or land use
15 regulations to allow the owner to use the property for a use permitted at the time the owner
16 acquired the property.” ORS 197.352(8); *see MacPherson*, 340 Or. at 122. Allowing the owner
17 to use the property in a way that would otherwise be prohibited by land use regulations is
18 commonly referred to as granting a Measure 37 “waiver.” Generally, Measure 37 limits non-
19 monetary relief to property owners who acquired their property prior to the enactment of the land
20 use regulations that provide the basis for their claims. ORS 197.352(3)(e); *see MacPherson*.²

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23 ¹ “Just compensation shall be equal to the reduction in the fair market value of the affected
24 property interest resulting from enactment or enforcement of the land use regulation as of the
25 date the owner makes written demand for compensation. ORS 197.352(2).
26 ² A Measure 37 claimant is entitled to compensation for regulations enacted prior to the date of
acquisition of the property by the owner *or a family member* of the owner. ORS 197.352(3). This
language differs from the language authorizing “waiver,” which authorizes government to allow
the present owner to use the property in a manner permitted when the owner acquired the
property. ORS 197.352(3).

1 The measure includes exceptions for four categories of regulations that are not at issue in this
2 case. ORS 197.352(3).³

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

8 **II. Plaintiffs' claim**

9 For purposes of these cross-motions for summary judgment, the State does not dispute
10 the relevant facts as alleged in the complaint. Plaintiffs Edward and Ruth Nash acquired fee title
11 to the subject property in 1975. (Complaint ¶ 1, Exh 1 at 6). In December 2002, plaintiffs sold
12 the property to their grandson, Byron Williams, by way of a land-sale contract. (Complaint ¶ 1,
13 Exh 1 at 6; Nash Aff, Exh 1). Williams has not paid the contract price in full and is not required
14 to pay the balance until January 1, 2008. (Complaint ¶ 1).

15 In July 2005, plaintiffs and Williams together filed a claim for Measure 37 relief, seeking
16 to divide the property into two residential parcels. The State determined that the Measure 37
17 claim was valid as to Williams but was invalid as to plaintiffs, who are not present owners of the
18 property.⁴ It is the State's determination that plaintiffs are not "owners" of the property that is
19 the subject of this litigation.

20 ³ Those exceptions are for land use regulations "restricting or prohibiting activities commonly
21 and historically recognized as public nuisances," ORS 197.352(3)(A), "restricting or prohibiting
22 activities for the protection of public health and safety," ORS 197.352(3)(B), "required to
23 comply with federal law," ORS 197.352(3)(C), and "restricting or prohibiting the use of a
property for the purpose of selling pornography or performing nude dancing," ORS
197.352(3)(D).

24 ⁴ Plaintiffs assert in passing in their summary-judgment memorandum that Williams now has
25 forfeited his interest in the property. (Plaintiffs' Summary Judgment Memorandum 2 n. 1). Any
26 recent change in ownership is not relevant to the question currently before this court: whether
the State correctly determined that the plaintiffs' interest in the property *at the time the Measure
37 claim was filed* was sufficient to make them "owners" for purposes of Measure 37. If
plaintiffs now wish to claim a different ownership interest based on the September 2006 transfer,
they must file a new claim.

1 **III. Standard of review**

2 In their motion, plaintiffs accurately describe the standards that generally apply to
3 summary-judgment proceedings in civil cases. But the usual summary-judgment standards for
4 reviewing the facts and evidence do not apply when a circuit court reviews an agency order in
5 other than contested case under ORS 183.484.⁵ The State explains below the different analysis
6 that applies when a court reviews the facts in summary-judgment proceedings in APA cases. In
7 this case, however, the distinction does not matter, as the parties agree on the facts and only the
8 law is in dispute.

9 The Court of Appeals has explained that “viewing factual disputes in the light most
10 favorable to a nonmoving party” – the usual standard of review in a summary-judgment motion –
11 “[is] not appropriate in the judicial review of an administrative order in a noncontested case
12 proceeding.”⁶ In *Powell v. Bunn*, in the course of affirming a trial court’s grant of summary
13 judgment to a state agency on review in other than a contested case, the Court of Appeals
14 explained that its review of factual issues was “limited,” instead, “to whether the circuit court
15 correctly decided that the order is supported by substantial evidence.”⁷

16 Thus, in deciding the cross-motions for summary judgment presently before the court, the
17 only questions presented could be: (1) whether the Final Order is based on an incorrect
18 interpretation or application of the law;⁸ and (2) whether the factual findings in the Final Order
19 are supported by substantial evidence in the record. The Oregon Supreme Court has explained
20 that judicial review of the latter question is limited in scope. That is, in determining whether
21 substantial evidence supports an agency’s factual findings, the question before a circuit court “is
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24 ⁵ *Powell v. Bunn*, 185 Or. App. 334 (2002), *rev den*, 336 Or. 60 (2003).

25 ⁶ *Powell*, 185 Or. App. at 339.

26 ⁷ *Id*

⁸ See ORS 183.484(5)(a) (describing judicial review for incorrect interpretations of law); ORS 183.484(5)(b) (describing judicial review for unlawful exercise of agency discretion).

1 limited to whether the evidence would permit a reasonable person to make the determination that
2 the agency made in the particular case.”⁹

3 Consequently, in deciding a summary judgment motion in a case brought under ORS
4 183.484, a court must apply the substantial-evidence standard of review as explained in *Norden*
5 together with the summary-judgment standard described in *Powell*. The resulting analytic
6 framework requires the court to review the entire record – including any facts admitted into the
7 record on summary judgment – to determine if the record as a whole “would permit” a
8 reasonable person to make the factual findings that the agency made. If so, then the agency is
9 entitled to summary judgment (assuming there also is no legal error). Conversely, if the court
10 determines that the evidence would NOT permit the agency to make the findings it made, then
11 the agency’s motion for summary judgment must be denied.

12 As noted above, however, the State does not dispute plaintiffs’ factual allegations for
13 purposes of the cross-motions for summary judgment. Accordingly, this court need consider
14 only the legal significance of those facts.

15 **IV. Interpretation methodology**

16 When interpreting a statutory provision adopted through the initiative process, the
17 Oregon Supreme Court applies the same methodology that it applies to the construction of a
18 statute. *Stranahan v. Fred Meyer, Inc.*, 331 Or. 38, 61, 11 P3d 228 (2000); *PGE v. Bureau of*
19 *Labor and Industries (PGE)*, 317 Or. 606, 612 n. 4, 859 P.2d 1143 (1993). The objective is to
20 determine the intent of the voters who pass the measure. “The best evidence of the voters’ intent
21 is the text of the provision itself.” *Roseburg School Dist. v. City of Roseburg*, 316 Or. 374, 378,
22 851 P.2d 595 (1993). In interpreting the text, the court considers statutory and judicially
23 developed rules of construction “that bear directly on how to read the text,” and to give words of
24 common usage their plain, natural and ordinary meaning. *PGE*, 317 Or. at 611; ORS 174.010.

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26 ⁹ *Norden v. Water Resources Dep’t.*, 329 Or. 641, 649, 996 P.2d 958 (2000).

1 The second level of review is an examination of the history of the provision. The history
2 of an initiated provision includes information available to the voters at the time the measure was
3 adopted that discloses the public’s understanding of the measure. *Ecumenical Ministries v.*
4 *Oregon State Lottery Comm.*, 318 Or. 551, 560 n. 8, 871 P.2d 106 (1994). If, after considering
5 the text, context and history of the measure, the intent of the voters remains unclear, the court
6 may resort to judicial rules of construction to resolve any remaining uncertainty. *PGE*, 317 Or.
7 at 612 n. 4.

8 **ARGUMENT**

9 **I. A person is an “owner” who may be entitled to Measure 37 relief only if the person’s**
10 **interest in the property is one that can be restricted by a land use regulation in a**
11 **way that reduces the fair market value of that interest.**

12 Section 1 of Measure 37 describes when a claim for compensation arises:

13 (1) If a public entity enacts or enforces a new land use
14 regulation or enforces a land use regulation enacted prior to
15 December 2, 2004, that restricts the use of private real property or
any interest therein and has the effect of reducing the fair market
value of the property, or any interest therein, then the *owner* of the
property shall be paid just compensation.

16 ORS 197.352 (emphasis added). “Owner” is defined as “the present owner of the property, *or*
17 *any interest therein.*” ORS 197.352(11)(C) (emphasis added).

18 These provisions establish that, to be an “owner” for purposes of Measure 37, a person
19 must have a present interest in the property. But the definition of “owner,” standing alone,
20 provides little help in determining what kind of ownership interest may be the basis for a
21 Measure 37 claim. The court must look to the rest of the statute in order to understand the
22 meaning of “the present owner of the property, or any interest therein.”

23 Under section 1, a claimant qualifies for Measure 37 relief only if: 1) the claimant has an
24 interest in private real property; 2) a land use regulation restricts the use of claimant’s private
25 real property; and 3) that restriction on use diminishes the property’s fair market value. ORS
26 197.352(1). Thus, an “owner” must be one who has a present right to use the property in the

1 absence of the regulation. Moreover, Measure 37 provides a remedy only when land use
2 restrictions *reduce fair market value* of the property or any interest therein. Thus, the ability to
3 realize that market value is essential to a claim. Qualifying property owners, therefore, are those
4 who presently own the property or any interest therein, and have a right to use the property that
5 is restricted by land use regulations that reduce the value of that interest to the owners.

6 Other sections of the statute confirm that an “owner” must have a present right to use the
7 property. ORS 197.352(8) provides that, in lieu of payment, government may “waive” the
8 regulation “to allow the owner to use the property for a use permitted at the time the owner
9 acquired the property.” And ORS 197.352 (10) provides that if a claim has not been paid within
10 two years of accrual, “the owner shall be allowed to use the property as permitted at the time the
11 owner acquired the property.” If the owner does not have a right to use the property, “waiving”
12 the regulation cannot result in the relief intended by the statute.¹⁰

13 In sum, the term “owner” as used in ORS 197.352 refers to the present owner of a
14 property interest that is subject to land use regulations that both restrict use and reduce value.
15 When a land-sale contract vendor’s interest is viewed in this light, it is clear that the vendor’s
16 interest does not qualify the vendor as an “owner” under the statute.

17 **II. A vendor under a land-sale contract is not an “owner” for Measure 37 because the**
18 **vendor’s interest in property is not restricted by land use regulations and the**
interest’s value is not reduced by those regulations.

19 The relative rights of the vendor and vendee to a land-sale contract demonstrate that the
20 vendor does not qualify for relief under Measure 37. A land-sale contract performs a function

21 ¹⁰ Interpreting the term “owner” in the context of who is may be entitled to relief under Measure
22 37 is consistent with Oregon precedent. Oregon courts repeatedly have declared that the word
23 “owner” lacks a fixed meaning outside the context and purpose of the statute in which it is used.
24 For example, in *Moe v. Beck*, the Supreme Court noted that “[d]ivining the legislative intent in
25 statutes using the word ‘owner’ has been a vexing problem for nearly a century.” 311 Or. 499,
26 504-505, 815 P.2d 692 (1991). After considering the lease agreement at issue, and the six places
in the Oregon Safe Employment Act (including a “definition”) that used the word “owner,” the
Court concluded that the lessor of a vehicle was an “owner” within the meaning of the statute at
issue. *See also Pedro v. January*, 261 Or 582, 602, 494 P.2d 868 (1972) (“When the term
‘owner’ or ‘ownership’ is used in a statute, the context and purpose of the statute governs what is
meant by the use of the terms”).

1 similar to that of a purchase-money mortgage. *Harder v. City of Springfield*, 192 Or. 676, 689,
2 236 P.2d 432 (1951). Even when the contract is executory – *i.e.*, it has not yet been paid in full –
3 “[t]he purchaser is regarded as the owner and generally has the right to full possession and
4 enjoyment of the property.” *Security State Bank v. Luebke*, 303 Or. 418, 423, 737 P.2d 586
5 (1987). In comparison, the vendor’s interest is quite limited, being “analogous to that of a
6 mortgagee who retains legal title as security for the purchase price.” *Ibid.* The Oregon Supreme
7 Court has recognized the limited nature of the vendor’s interest in describing the “sticks” the
8 vendor retains once it has transferred most of the “bundle” of property rights to the vendee:

9 The portion of the “bundle of sticks” retained by the vendor in a land sale contract
10 includes two large sticks: (1) the right to receive contract payments, and (2) the
11 legal title in the property securing the purchaser’s obligation to make the contract
12 payments, with the “concomitant possibility of resuming general ownership of the
13 land upon default.”

14 *Bedortha v. Sunridge Land Co., Inc.*, 312 Or. 307, 311, 822 P.2d 694 (1991) (citation omitted).

15 Thus, plaintiffs are correct when they assert that they retain legal title to the subject
16 property.¹¹ But neither that title nor the plaintiffs’ right to receive payments gives them the
17 present right to use the property in any way that a land use regulation restricts.¹² In that way, this
18 case is analogous to *Harder*, which presented the question whether a land-sale contract vendee
19 was among the “property owners benefited” who were entitled to vote on a local assessment.
20 The court found that the city could not exclude vendees from voting, as they “would be the
21 beneficiaries of the improvement and the only parties to [executory sale contracts] required to
22 bear the cost of the benefit flowing from the improvement.” 192 Or. at 685. Noting that the
23 term “owner” does not have a fixed meaning, and after reviewing a variety of authorities
24 regarding land sale contracts, the *Harder* court found that the vendor did not have the requisite
25 interest to be a “property owner benefited” under the city ordinance. *Id.* at 690.

25 ¹¹ (See Plaintiffs’ Memorandum in Support of Motion for Summary Judgment at 7).

26 ¹² Petitioner does not claim that the particular land sale contract to which petitioner is a party
contains any terms that make either party’s rights different from a traditional land sale contract.

1 Similarly here, vendee Williams, not the vendor plaintiffs, is the party affected by
2 application of land use regulations to the real property that he has purchased from plaintiffs.
3 This point is underscored by the use that plaintiffs seek in their claim – to subdivide the property.
4 Plaintiffs make no showing that, as land-sale contract vendors, they would even have the right to
5 apply for such a use. Subdividing the property would interfere with Williams’s right to use and
6 possession of the property and is inconsistent with an interest held solely for purposes of
7 securing a debt.¹³

8 In sum, the State properly denied the plaintiffs’ Measure 37 claim because they are not
9 present owners of the property as that term is statutorily defined. And even if plaintiffs did
10 qualify as “owners,” they still would not qualify for relief because they have not established that
11 *their interest* in the property - legal title and a right to receive contract payments - has been
12 restricted by land use regulations that have reduced its fair market value.

13 **CONCLUSION**

14 As a matter of law, the plaintiffs’ status as vendors to a land-sale contract does not make
15 them “owners” of the subject property for purposes of Measure 37, and the State correctly denied

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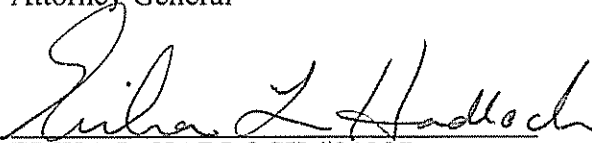
24 ¹³ Judge Cameron F. Wogan of the Klamath County Circuit Court has ruled in favor of the State
25 on this issue: “it simply does not make sense that a person holding a vendor’s interest in a land
26 sale contract is an owner for the purposes of this law [Measure 37]. *Fairclo v. State of Oregon*,
Klamath County 06-1934CV, September 7, 2006, opinion letter. A copy of the *Fairclo* opinion
letter is attached as Exhibit 1 to this memorandum.

1 the Measure 37 claim as to their asserted interest. Accordingly, plaintiffs' motion for summary
2 judgment should be denied and the State's cross-motion for summary judgment should be
3 granted.

4 DATED this 31st day of October, 2006.

5 Respectfully submitted,

6 HARDY MYERS
7 Attorney General

8 

9 ERIKA L. HADLOCK #91297
10 Sr. Assistant Attorney General
11 Trial Attorney
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SEP 11 2006

Trial Division, Dept. of Justice
Salem, Oregon

CAMERON F. WOGAN
Circuit Judge

Circuit Court of the State of Oregon

for KLAMATH COUNTY
316 Main Street
KLAMATH FALLS, OREGON 97601
(541) 883-5624, ext. 244
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Beth Dunaway
Judicial Assistant

Cecilia Britton
Court Clerk

September 7, 2006

Michael Spencer
Attorney at Law
419 Main Street
Klamath Falls, Oregon 97601

Darsee Staley
Assistant Attorney General
Department of Justice
1162 Court Street NE
Salem, Oregon 97301

Re: Fairclo v. State of Oregon
Case No. 06-1934CV

Dear Counsel:

The issue is whether a person holding a vendor's interest in a land sale contract qualifies as an "owner" for the purposes of ORS 197.352, otherwise known as Measure 37. ORS 197.352(11)(C) provides that an "owner" is "the present owner of the property, or any interest therein". I examine the "context of the statutory provision at issue, which includes other provisions of the same statute and other related statutes". PGE v. Bureau of Labor and Industries, 317 Or. 606, 610 (1993). With that context, it simply does not make sense that a person holding a vendor's interest in a land sale contract is an owner for the purposes of this law.

Accordingly, the petitioner's motion for summary judgment is denied. I have set this matter for an attorney conference for Monday, September 25th at 9:00 a.m. to discuss the future of this proceeding.

Ms. Staley should submit an order.

Very truly yours,


CAMERON F. WOGAN
Circuit Court Judge

CFW/bad

EXHIBIT

55

1 **CERTIFICATE OF SERVICE**

2 I certify that on October st 31, 2006, I served the foregoing Respondents' Cross Motion for
3 Summary Judgment and Respondents' Memorandum in Support of Cross Motion for Summary
4 Judgment and Response to Plaintiffs' Motion for Summary Judgment upon the parties hereto by
5 the method indicated below, and addressed to the following:

6
7 Christopher B. Matheny
8 Law Offices of David Hilgemann
9 530 Center Street NE
Suite 700
Salem, OR 97301-3740

HAND DELIVERY
 MAIL DELIVERY
 OVERNIGHT MAIL
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