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

DUANE L. OLSON and S. DAVID OLSON,  
Plaintiffs,  
v.  
STATE OF OREGON, by and through the  
DEPARTMENT OF LAND  
CONSERVATION AND DEVELOPMENT,  
Defendants.

Case No. 06C10222  
Honorable Thomas M. Hart  
DEFENDANT'S TRIAL MEMORANDUM

**SUMMARY OF TRIAL ISSUES**

This case involves a final state agency order denying plaintiff S. David Olson’s claim under Measure 37 and approving the Measure 37 claim asserted by plaintiff Duane Olson, David’s son. Measure 37, codified at ORS 197.352, permits owners of private real property to seek compensation for reductions in fair market value caused by certain land use regulations.<sup>1</sup> As an alternative to payment, public entities may opt to “modify, remove, or not to [sic] apply” certain regulations. ORS 197.352 (8).

Defendant, the State of Oregon, determined that David Olson is not an “owner” of “private real property or any interest therein” as that phrase is used in the statute because he sold the property to Duane in 2004. The State determined that Duane Olson is an owner for purposes of Measure 37, and opted to “waive” certain state regulations as provided in ORS 197.352 (8). The State’s Final Order will be offered in evidence at trial as Exhibit 1.

<sup>1</sup> A copy of the statute is attached to this Memorandum as Attachment A for the Court’s convenience.

1 This case will be presented to the Court for trial on stipulated facts pursuant to ORS  
2 183.480 and 183.484. The question presented is: Did the State err by determining that David  
3 Olson is not entitled to relief under Measure 37? Plaintiffs assert the State erred:

- 4 A. By concluding that the interest conveyed by a Trust Deed from Duane Olson to Ticor  
5 Title, naming David Olson as beneficiary, is not present ownership of private real  
6 property or any interest therein for purposes of plaintiffs' Measure 37 claim against  
7 the State of Oregon; or  
8 B. By concluding that David Olson's ownership of Christmas trees growing on the  
9 property is not present ownership of private real property or any interest therein for  
10 purposes of plaintiffs' Measure 37 claim against the State of Oregon.

11 The State contends that an interest in private real property qualifies for relief under  
12 Measure 37 only to the extent that the interest supports a Measure 37 claim. Therefore, only  
13 those who own qualifying interests are "owners" within the meaning of the statute. Neither  
14 David's beneficial interest under the Trust Deed, nor his ownership of Christmas trees, can be a  
15 basis for relief. Consequently, the State correctly determined that David is not an owner. The  
16 Order should be affirmed.

### 17 MEASURE 37 BACKGROUND

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

23 A landowner qualifies for Measure 37 relief if: (1) a public entity enacts or enforces a  
24 "land use regulation" that (2) restricts the owner's use of private real property and (3) has the  
25 effect of reducing the fair market value of the private real property. ORS 197.352 (1).

26 Subsection (3) of Measure 37 provides that certain land use regulations shall not be a basis for a

1 claim under Section (1).<sup>2</sup> 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”<sup>3</sup> 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.<sup>4</sup>

#### 11 SUMMARY OF DEFENDANT’S ARGUMENT

12 Measure 37 requires public entities to pay compensation, or waive regulations in lieu of  
13 compensation, only when a land use regulation (a) “restricts the use of private real **property or**  
14 **any interest therein**” and (b) “has the effect of reducing the fair market value of the **property,**  
15 **or any interest therein.**” ORS 197.352 (1) (emphasis added). If an “interest” is not subject to  
16 land use regulations that restrict its use and reduce its fair market value, that interest cannot be  
17 the basis of a claim. Consequently, the owner of such an interest is not a qualifying property  
18 owner under Measure 37.

19 David Olson transferred ownership of the property in fee simple, by a warranty deed, to  
20 Duane Olson. Duane executed a Trust Deed naming David as beneficiary as security for the  
21 purchase price. As the beneficiary of the Trust Deed, David has no ownership interest in the  
22 property. Moreover, David’s beneficial interest in the Trust Deed is not the subject of any land  
23 use regulations.

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25 <sup>2</sup> None of the exemptions is directly at issue.

26 <sup>3</sup> Subsection (2) defines “just compensation.” ORS 197.352 (2).

<sup>4</sup> DLCD can pay compensation only if and when the legislature appropriates funds. *See* OAR 660-002-0010(8) (c)

1 David and Duane executed a Sale Agreement which set forth the terms of the sale of the  
2 property from David to Duane. In the Sale Agreement, the Olsons excluded “Christmas trees  
3 growing on the property” from the definition of “the Property.” There is no dispute that David  
4 owns the trees, but ownership of the trees is not a real property interest, and not an ownership  
5 interest that qualifies for relief under Measure 37.

## 6 ARGUMENT

### 7 **A. Measure 37 “owners” are those entitled to Measure 37 relief.**

8 Measure 37 was initiated by the people. Therefore, the critical inquiry in interpreting its  
9 provisions is what the voters understood and intended them to mean. In *Stranahan v. Fred*  
10 *Meyer Inc.*, 331 Or 38, 57 (2000), the Supreme Court explained that “it is the people’s  
11 understanding and intended meaning of the provision in question - as to which the text and  
12 context are the most important clue - that are critical to our analysis.” When interpreting a  
13 statutory provision adopted through the initiative process, the Oregon Supreme Court applies the  
14 same methodology that it applies to the construction of a statute. *Stranahan*, 331 Or at 61  
15 (2000); *PGE v. Bureau of Labor and Industries*, 317 Or 606, 612 n 4 (1993). In interpreting the  
16 text, the court considers statutory and judicially developed rules of construction “that bear  
17 directly on how to read the text.” *PGE*, 317 Or at 611.

18 Section (1) of Measure 37 provides:

19 “If a public entity enacts or enforces a new land use regulation or enforces  
20 a land use regulation enacted prior to December 2, 2004, that *restricts the*  
21 *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.”

22 ORS 197.352 (1) (emphasis added). David’s asserted “interests” in the property do not entitle  
23 him to just compensation. Therefore, the State did not err by denying David’s demand on the  
24 grounds that he is not an owner of property or any interest therein within the meaning of the  
25 statute.

1 The definition of “owner,” in ORS 197.352 (11) (C), provides “[o]wner’ is the present  
2 owner of the property, or any interest therein.” The parties do not disagree that “present” means  
3 “at the present time” when the claim was filed. Nor is there any dispute concerning Duane being  
4 a present owner of the property. The dispute concerns whether David qualifies as an “owner” of  
5 “any interest” in the property for purposes of Measure 37.

6 The statutory definition of “owner” is of little aid in interpreting what kind of ownership  
7 interest may be the basis for a Measure 37 claim. Fundamentally, ORS 197.352 (11) (C) defines  
8 an “owner” as an “owner.” The text of the definition provides no guidance on the meaning of  
9 “property” or “any interest therein.” The Court should look at all uses of these same terms  
10 throughout the statute when considering the text and context of a qualifying Measure 37  
11 ownership interest. *PGE*, 317 Or at 611 (“use of the same term throughout a statute indicates  
12 that the term has the same meaning throughout”).

13 ORS 197.352 (1) clarifies that the “property or any interest therein” at issue is “private  
14 real property,” and further that such property or interest is subject to land use regulations that  
15 both restrict use and reduce value. The “owner” is “the [present] owner of the property,” that is,  
16 the owner of property that has the required attributes of being subject to land use regulations that  
17 both restrict use and reduce value. In addition the “owner” must have “acquired” ownership of  
18 the property which, as Judge Rhoades recently found, confers the right to possess and control the  
19 property.<sup>5</sup>

20 Linking ownership to a qualifying property interest under Measure 37 is consistent with  
21 Oregon precedent. Oregon’s courts repeatedly have declared that the word “owner” lacks a fixed  
22 meaning outside the context and purpose of the statute in which it is used. For example, in *Moe*  
23 *v. Beck*, the Supreme Court noted that “[d]ivining the legislative intent in statutes using the word  
24 ‘owner’ has been a vexing problem for nearly a century.” 311 Or 499, 504-505 (1991). After  
25 considering the lease agreement at issue, and the six places in the Oregon Safe Employment Act

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26 <sup>5</sup> See, letter opinion in *Schaffer v Marion County, et al*, at 8-9 (copy attached as Attachment B).

1 (including a “definition”) that used the word “owner,” the Court concluded that the lessor of a  
2 vehicle was an “owner” within the meaning of statute.<sup>6</sup>

3 Here, the Court should analyze the intent of the voters by considering the statute as a  
4 whole, and the context of related statutes involving ownership of real property. Although the  
5 question of “total” title is not before the Court, the State has approved claims by co-owners and  
6 joint owners of title. In the Measure 37 context, ownership of title is a significant and  
7 compelling limitation on the scope of a qualifying ownership interest.

8 Measure 37 provides a remedy for land use restrictions that reduce fair market value of  
9 private real property. This context clearly indicates that title ownership or the ability to realize  
10 that market value is essential to a claim. No purpose is served by allowing claims to be asserted  
11 by owners of every conceivable right or interest in property—one must have an *ownership*  
12 interest.<sup>7</sup>

13 **B. David Olson did not “retain” any ownership interest in the property.**

14 Under Oregon law, transfers of any “estate or interest in real property” must be in  
15 writing. ORS 93.020. In this case David transferred the property to Duane by warranty deed.  
16 See ORS 93.010 (real property may be transferred by deed); Exs 2 and 13. If David intended to  
17 retain an ownership interest, he could have done that by conveying the property to Duane and  
18 David, as ORS 93.280 (1) expressly permits:

19 “Any person or persons owning real property which the person or persons  
20 have power to convey may convey such property by a conveyance naming the  
21 person or persons and another person or persons, or one or more of themselves  
22 and another person or other persons, as grantees. The conveyance shall have the  
same effect as a conveyance from a stranger who owned the property to the  
persons named as grantees.”

23 <sup>6</sup> See also *Pedro v January*, 261 Or 582, 602 (1972) (“When the term ‘owner’ or ‘ownership’ is used in a statute,  
24 the context and purpose of the statute governs what is meant by the use of the terms”); *State v The Calif Ore*  
25 *Power Co.*, 225 Or 604, 612 (1961) (owner of an easement not an “owner” under statute imposing liability for fire  
26 suppression costs); *Schram v Manary*, 123 Or 354, 363 (1927) (term “owner” as applied to real property has no  
fixed meaning and purpose of statute controls meaning); *Binhoff v State*, 49 Or 419, 422 (1907) (“owner” has no  
fixed meaning)

<sup>7</sup> See, *Schaffer* opinion at 8 (Att B).

1 In accordance with the Sale Agreement (Ex 3), David transferred the property subject only to  
2 listed encumbrances (including David’s ownership of the Christmas trees) without retaining any  
3 ownership interest. Duane is sole title holder under the deed.<sup>8</sup>

4  
5 **C. The Trust Deed does not convey an ownership interest under Measure 37.**

6 Substantial evidence and the proper interpretation of Measure 37 support the State’s  
7 conclusion that David Olson is not entitled to Measure 37 relief based on his status as a co-  
8 trustee of a trust to which he assigned his beneficial interest in the Trust Deed securing Duane  
9 Olson’s obligation to pay the balance of the purchase price of the property (Exs 5, 10, 11). The  
10 record, and Oregon law, supports the State’s determination that David presently owns no real  
11 property interest. The text, context and purpose of Measure 37 support the State’s interpretation  
12 of “owner” as one who acquires a qualifying ownership interest in real property.

13 The evidence shows that David acquired his present “interest” as a beneficiary of the  
14 Trust Deed on March 1, 2004 (Ex 5). Although plaintiffs argue that this interest was “retained”  
15 at the time of the sale to Duane, the evidence shows that David transferred fee simple title to the  
16 property by warranty deed to Duane without retaining any interest (Ex 3). Duane separately  
17 conveyed legal title to Ticor Title as trustee under the Trust Deed, naming David as the  
18 beneficiary (Ex 5).

19 Duane made the initial payment on the purchase price to Ticor Title at the time of closing  
20 the transaction (Ex 3, p 2; Exs 6 and 7). On April 6, 2004, David assigned his beneficial interest  
21 in the payments secured by the Trust Deed to himself and Duane as co-trustees of the Olson  
22 Living Trust (Exs 10 and 11). Duane made two subsequent annual payments on the purchase  
23 price to the Olson Living Trust (Exs 8, 9).

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25 \_\_\_\_\_  
26 <sup>8</sup> The record does not support any contention that David “intended” to retain any ownership interest. But, even if  
plaintiffs alleged such intent, the State was entitled to rely on the deed which is substantial evidence of an  
unconditional transfer of full fee simple title. See *Schaffer* opinion at 8, ¶ 1 (Att B).

1 Oregon law supports the State's determination of the legal consequences of the Olsons'  
2 transaction. When a trust deed is used to secure payment for the sale of property, full title to the  
3 property is conveyed from the seller to the purchaser and the purchaser uses a trust deed to  
4 convey legal title of the property to a trustee and names the seller as beneficiary. A seller cannot  
5 be both beneficiary and trustee. ORS 86.705 (1) and (6), and 86.790. Consequently, David  
6 retained no ownership interest and did not acquire legal title as a result of the transaction.<sup>9</sup>

7 ORS 86.715 provides that trust deeds are deemed to be mortgages on real property except  
8 to the extent that doing so is inconsistent with the provisions of ORS 86.705 to 86.795. A  
9 mortgage creates only a lien or encumbrance and does not transfer title to the property and is not  
10 an ownership interest in real property. *Sam Paulson Masonry v. Higley*, 276 Or 1071, 1075  
11 (1976). David's interest has the same attributes as a mortgagee's interest, *i.e.* payments as they  
12 become due and remedies in the case of default. *West v. White*, 92 Or App 401, 404-405  
13 *affirmed en banc* 307 Or 296 (1988) (“[t]he beneficiary acquires no more than a lien on the real  
14 property unless and until the grantor defaults and the beneficiary purchases the property at the  
15 trustee's or foreclosure sale”).<sup>10</sup>

16 The word “owner” as used in Measure 37 is limited by the “any interests” that are  
17 actionable under the statute. There is no allegation or evidence that David's right to payments or  
18 to remedies for default is restricted or reduced in value by any state land use regulation. As a  
19 result, David is not the “owner” of any Measure 37 qualifying interest.

20 **D. David's ownership of Christmas trees does not qualify for Measure 37 relief.**

21 Substantial evidence and the proper interpretation of Measure 37 support the State's  
22 conclusion that David Olson is not entitled to Measure 37 relief because he owns Christmas trees  
23 growing on the property. The evidence shows that David and Duane Olson recognized David's  
24

25 <sup>9</sup> The right of a trustee under a trust deed to assert a Measure 37 claim is not at issue under the facts of this case.

26 <sup>10</sup> In the context of marital rights, Judge Rhoades concluded that a potential to share in the property under divorce statutes is not a present ownership interest under Measure 37 (Att B at p 9, ¶ 3).

1 ownership of Christmas trees as separate and apart from the real property (Ex 3). David's  
2 ownership is described in the deed as an encumbrance. Thus, substantial evidence supports the  
3 State's finding that David is not an owner of the property.

4 Plaintiffs argue that the Christmas trees are "timber" and that timber is equivalent to real  
5 property. However, under Oregon law, Christmas trees are generally considered to be crops and  
6 crops are personal property.<sup>11</sup> Duane's property is currently zoned as farm land (Ex 1, p 7). In  
7 any event, substantial evidence supports the State's determination that David's ownership of the  
8 Christmas trees is not a qualifying Measure 37 ownership interest, and therefore the court need  
9 not decide whether the right to harvest "timber" constitutes a real property interest under  
10 Measure 37.<sup>12</sup>

11 David's contractual right to enter Duane's property for the purpose of tending and  
12 ultimately harvesting Christmas trees does not qualify as a real property ownership interest for  
13 purposes of Measure 37 relief. The plain language of the Sale Agreement as well as the deed  
14 shows that David and Duane understood that the Christmas trees were separate from the property  
15 and were to be severed and removed. In fact, the Sale Agreement defines the Christmas trees as  
16 separate from the property (Ex 3, p 1). The deed states that David owns the Christmas trees and  
17 identifies that interest is an encumbrance on the property (Ex 4).

18 Plaintiffs identify no land use regulation that restricts David's use of his right to maintain  
19 and harvest the Christmas trees. Nor is there any evidence or contention that a state land use  
20 regulation has reduced the fair market value of the Christmas trees. As a result, David is not an  
21

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22 <sup>11</sup> See, e.g., ORS 215.203 ("farm use" includes growing crops, including cultured Christmas trees but not timber);  
23 *Hawkins v. City of La Grande*, 315 Or 57, 70 (1992) ("destroyed crops, although growing from the land, are a  
24 separate entity, capable of being separately damaged and are not subject to limiting rules applicable to real  
25 property").

26 <sup>12</sup> The cases cited by plaintiffs in their summary judgment motion do not support the assertion that David's trees are  
timber and thus real property. See *Coast Range Conifers v Board of Forestry*, 339 Or 136, 151 (2005) (timber is  
considered part of real property unless it is subject to a severance contract); *Paullus v Yarbrough*, 219 Or 611, 637  
(1959) (timber sale contract was a sale of goods under the Uniform Sales Act).

1 "owner" of "any interest" that can form the basis of a Measure 37 claim and the State properly  
2 denied his demand.

3 **CONCLUSION**

4 The financing arrangement used by the Olsons to secure Duane's payment of the  
5 purchase price for the property does not create an interest compensable under Measure 37. Nor  
6 does David's ownership of Christmas trees and the right to maintain and harvest them make him  
7 the owner of a qualifying interest. The State's Order is correct in all respects, supported by  
8 substantial evidence, and should be affirmed.

9 DATED this 3<sup>rd</sup> day of August 2006

10 Respectfully submitted,

11 HARDY MYERS  
12 Attorney General

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Land Conservation and Development, other state agencies and local governments shall give the goals equal weight in any matter in which the goals are required to be applied.

(2) The commission and the department shall consider and recognize regional diversity and differences in regional needs when making or reviewing a land use decision or otherwise applying the goals. [1981 c.748 §20; 1987 c.729 §1; 1995 c.521 §2]

**197.350 Burden of persuasion or proof in appeal to board or commission.** (1) A party appealing a land use decision or limited land use decision made by a local government to the board or Land Conservation and Development Commission has the burden of persuasion.

(2) A local government that claims an exception to a goal adopted by the commission has the burden of persuasion.

(3) There shall be no burden of proof in administrative proceedings under ORS chapters 195, 196 and 197. [1981 c.748 §10a; 1983 c.827 §43; 1991 c.817 §26]

**197.352 Compensation for loss of value due to land use regulation.** The following provisions are added to and made a part of ORS chapter 197:

(1) If a public entity enacts or enforces a new land use regulation or enforces a land use regulation enacted prior to 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.

(2) Just compensation shall be equal to the reduction in the fair market value of the affected property interest resulting from enactment or enforcement of the land use regulation as of the date the owner makes written demand for compensation under this section.

(3) Subsection (1) of this section shall not apply to land use regulations:

(A) Restricting or prohibiting activities commonly and historically recognized as public nuisances under common law. This subsection shall be construed narrowly in favor of a finding of compensation under this section;

(B) Restricting or prohibiting activities for the protection of public health and safety, such as fire and building codes, health and sanitation regulations, solid or hazardous waste regulations, and pollution control regulations;

(C) To the extent the land use regulation is required to comply with federal law;

(D) Restricting or prohibiting the use of a property for the purpose of selling pornography or performing nude dancing. Nothing in this subsection, however, is intended to affect or alter rights provided by the Oregon or United States Constitutions; or

(E) Enacted prior to the date of acquisition of the property by the owner or a family member of the owner who owned the subject property prior to acquisition or inheritance by the owner, whichever occurred first.

(4) Just compensation under subsection (1) of this section shall be due the owner of the property if the land use regulation continues to be enforced against the property 180 days after the owner of the property makes written demand for compensation under this section to the public entity enacting or enforcing the land use regulation.

(5) For claims arising from land use regulations enacted prior to December 2, 2004, written demand for compensation under subsection (4) shall be made within two years of December 2, 2004, or the date the public entity applies the land use regulation as an approval criteria to an application submitted by the owner of the property, whichever is later. For claims arising from land use regulations enacted after December 2, 2004, written demand for compensation under subsection (4) shall be made 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.

(6) 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 this section, the present owner of the property, or any 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.

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

(8) Notwithstanding any other state statute or the availability of funds under sub-

section (10) of this section, in lieu of payment of just compensation under this section, the governing body responsible for enacting the land use regulation may modify, remove, or not to apply the land use regulation or land use regulations to allow the owner to use the property for a use permitted at the time the owner acquired the property.

(9) A decision by a governing body under this section shall not be considered a land use decision as defined in ORS 197.015 (10).

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

(11) Definitions - for purposes of this section:

(A) "Family member" shall include the wife, husband, son, daughter, mother, father, brother, brother-in-law, sister, sister-in-law, son-in-law, daughter-in-law, mother-in-law, father-in-law, aunt, uncle, niece, nephew, stepparent, stepchild, grandparent, or grandchild of the owner of the property, an estate of any of the foregoing family members, or a legal entity owned by any one or combination of these family members or the owner of the property.

(B) "Land use regulation" shall include:

(i) Any statute regulating the use of land or any interest therein;

(ii) Administrative rules and goals of the Land Conservation and Development Commission;

(iii) Local government comprehensive plans; zoning ordinances, land division ordinances, and transportation ordinances;

(iv) Metropolitan service district regional framework plans, functional plans, planning goals and objectives; and

(v) Statutes and administrative rules regulating farming and forest practices.

(C) "Owner" is the present owner of the property, or any interest therein.

(D) "Public entity" shall include the state, a metropolitan service district, a city, or a county.

(12) The remedy created by this section is in addition to any other remedy under the Oregon or United States Constitutions, and is not intended to modify or replace any other remedy.

(13) If any portion or portions of this section are declared invalid by a court of competent jurisdiction, the remaining portions of this section shall remain in full force and effect. [2005 c.1]

### EXPEDITED LAND DIVISIONS

**197.360 "Expedited land division" defined; applicability.** (1) An expedited land division:

(a) Is an action of a local government that:

(A) Includes land that is zoned for residential uses and is within an urban growth boundary.

(B) Is solely for the purposes of residential use, including recreational or open space uses accessory to residential use.

(C) Does not provide for dwellings or accessory buildings to be located on land that is specifically mapped and designated in the comprehensive plan and land use regulations for full or partial protection of natural features under the statewide planning goals that protect:

(i) Open spaces, scenic and historic areas and natural resources;

(ii) The Willamette River Greenway;

(iii) Estuarine resources;

(iv) Coastal shorelands; and

(v) Beaches and dunes.

(D) Satisfies minimum street or other right-of-way connectivity standards established by acknowledged land use regulations or, if such standards are not contained in the applicable regulations, as required by statewide planning goals or rules.

(E) Creates enough lots or parcels to allow building residential units at 80 percent or more of the maximum net density permitted by the zoning designation of the site.

(b) Is a land division that:

(A) Will create three or fewer parcels under ORS 92.010; and

(B) Meets the criteria set forth for an action under paragraph (a)(A) to (D) of this subsection.

(2) An expedited land division as described in this section is not a land use decision or a limited land use decision under ORS 197.015 or a permit under ORS 215.402 or 227.160.

(3) The provisions of ORS 197.360 to 197.380 apply to all elements of a local gov-



CIRCUIT COURT OF OREGON  
THIRD JUDICIAL DISTRICT  
MARION COUNTY COURTS  
P.O. Box 12869  
SALEM, OREGON 97309-0869

JAMESE RHOADES  
Circuit Court Judge  
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June 21, 2006

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Re: Schaffer v. Marion County, et al, Case No. 05C16991 and 05C21655

Dear Counsel:

This matter came before the Court on May 5, 2006, for oral argument on Defendants' motions to dismiss and plaintiff's motion to join. Plaintiff appeared through counsel, Wallace Lien, and Defendants appeared through counsel Scott Norris and Darsee Staley. The matter, being fully submitted, was taken under advisement on that date.

**Issue**

Whether this court should grant either Defendants' motion to dismiss?

**Discussion**

*Procedural Background*

This case relates to the ownership of a certain parcel of property that TJ Schaffer, the petitioner-plaintiff in this case, owned prior to May 12, 2004, when he transferred ownership to Juanita Schaffer, his wife. After Ballot Measure 37 (2004), codified at ORS 197.352,<sup>1</sup> became

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<sup>1</sup>  
The only difference between the measure as presented to the voters and as codified are found in sections 1 and 5. The measure refers to land use regulations enacted prior to or after "the effective date" of the measure, while the statute provides the relevant date, December 2, 2004. Therefore, the remainder of this opinion will cite to the codification, except when quoting from the parties' papers

This court notes that the measure withstood a challenge to its constitutionality. See *MacPherson v DAS*, 340 Or 117, 130 P3d 308 (2006). That decision did not address the issues currently before this court.

ATTACHMENT

2

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effective, petitioner-plaintiff and his wife, Mrs. Schaffer, filed an application for compensation under the statute with both the State of Oregon Department of Land Conservation and Development (DLCD) and Marion County (County).<sup>2</sup>

On May 26, 2005, with Order 05-62, the County Board of Commissioners denied the application. On July 6, 2005, the DLCD found that Mrs. Schaffer was the current owner of the property in question and that she was entitled to relief. In lieu of compensation, the DLCD chose not to apply certain land use regulations to the property (State Claim No M119316).

Thereafter, in papers filed July 25, 2005, petitioner-plaintiff, acting *pro se*, filed a document in Marion County Circuit Court entitled "Interpretation of Oregon Measure 37 Case No. 05-62," naming the County as defendant. Although petitioner-plaintiff stated that he was entitled to relief "provided by" ORS 197.352 (p 2, line 3), he primarily requested remand to the County for reconsideration and compliance with ORS Chapter 183, which governs agency administrative actions (p 7, lines 2-22). Petitioner-plaintiff attached to his filing both the County and the DLCD's orders (pp 9-17). This July 25, 2005 filing initiated Case No. 05C16991. Petitioner-plaintiff's primary argument was that he was an "owner" as defined in ORS 197.352(11)(C), and therefore any waiver of land use regulations granted by the County or the DLCD should be determined by the date of petitioner-plaintiff's ownership, not only Mrs. Schaffer's ownership. *See* ORS 197.352(8) (providing that, "in lieu of payment of just compensation under this section, the governing body responsible for enacting the land use regulation may modify, remove, or not \* \* \* apply the land use regulation or land use regulations to allow the owner to use the property for a use permitted at the time the owner acquired the property").

On August 19, 2005, petitioner-plaintiff, again acting *pro se*, filed a "Complaint and Summons Ballot Measure 37 Case [05]C 16991," which purported to be an appeal from the County's order and the DLCD's order, and requested "relief from administrative err[or]s" (p 2, lines 14-17, 19). Petitioner-plaintiff specified that "The parties to this contested administrative case" included himself as "plaintiff," and the State of Oregon and Marion County as defendants (p 5, lines 2-6).<sup>3</sup> Petitioner-plaintiff designated the findings and conclusions from administrative review as well as a recorded hearing before the Marion County Commissioners as the "record" in the case, and stated that there

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2

The application does not appear in the record, but all parties concur that an application was filed, and the DLCD and the County issued orders related to the application

This court designates Mr. Schaffer as a petitioner-plaintiff because it finds, as further explained below, that he is seeking judicial review of the orders issued by the DLCD and the County. In a proceeding for review from the DLCD's order, he would be designated a petitioner; from the County's order, he would be designated a plaintiff. *See* ORS 183.480-483.497; ORS 34.010-34.100.

<sup>3</sup>The State has never objected to being included in this pleading or this case.

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was no audio record of the state agency's administrative review (p 4, lines 1-3, p 8, lines 12-13). In addition, petitioner-plaintiff states that his "appeal" is timely, citing ORS 183.484 (p 8, lines 6-9). Petitioner-plaintiff attached the County's and DLCD's orders to his document, stating, "Attached to this notice of appeal is a copy of the Orders being appealed \* \* \* " (p 8, line 16, pp 11-22). In the "Relief Sought" section of the document, petitioner-plaintiff requested that this court make certain factual and legal findings, and that this court remand to the County and the State "with an ORDER to make a new finding based on correct(ed) interpretation of facts and law" (p 9, lines 1-14). The certificate of service certified that petitioner-plaintiff had served a copy of the "notice of appeal" on the attorneys representing the County and the DLCD (p 10, lines 13-16). Furthermore, the summons included in petitioner-plaintiff's papers advised the defendants that "The matters to be resolved are alleged administrative err[or]s by Marion County and the State Department of Land Conservation and Development" (p 22, lines 17-18).

On September 1, 2005, the County moved to dismiss based on procedural defects in petitioner-plaintiff's service of the County and asserting petitioner-plaintiff was not a real party in interest as required by ORCP 21 A(6). Subsequently, after petitioner-plaintiff retained counsel in this case, the County waived its objections to service.<sup>4</sup> In the meantime, however, on September 9, 2005, petitioner-plaintiff, acting *pro se*, filed a "Motion to Quash" the County's motion to dismiss in which he stated that case 05C16991 "has nothing to do with compensation. It has only to do with incorrectly recited facts in administrative Orders 05-62 and M119216, inapplicability of Marion County Ordinance 1209, and the need to show distinguishing, codified standards, consistently applied regarding two and five acre parcels," and that "The prayer of the Circuit Court Case 16991 is remand" (p 3, lines 5-10, 12). In addition, petitioner-plaintiff attached a letter he had written to County counsel in which he stated that the administrative actions were unfavorable to him, and that he was asking this court to "remand the case to Marion County Commissioners and to the state of Oregon," referencing the errors he expected to be cured at rehearing and specifically noting that if this court's finding is favorable to petitioner-plaintiff, there will need to be another public hearing (undated letter from petitioner-plaintiff to Scott Norris, p 2, ¶¶ 3, 5-6, p 3, ¶¶ 1-2, & p 4, ¶ 6). Another letter appended to petitioner-plaintiff's motion, sent to County counsel as well as the Attorney General, the DLCD, and a County commissioner, stated that petitioner-plaintiff is "the correct party to bring this action and has no alternate avenue of appeal from the administrative orders that wrongly interpret Measure 37 \* \* \*." He also asserted that, if this court finds in his favor, that finding will "bind reconsideration of the administrative Orders" and stated that, if he did not receive an answer to his complaint within fourteen days, he would ask this court to direct reconsideration of the County's and the State's administrative orders (undated letter from petitioner-plaintiff to Hardy Myers, Lane Shetterly, Scott Norris, and Patti Milne, p 1, ¶ 2 & p 2, ¶¶ 1, 3).

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4

Because this court finds, below, that petitioner-plaintiff is an improper party to bring Case No. 05C16991, this court need not consider whether petitioner-plaintiff has fulfilled the mandatory procedural steps required to bring a writ of review. See ORS 34.030, 34.050. The County appears to accept that petitioner-plaintiff's case was brought pursuant to ORS 197.352(6) and does not argue that the steps are not fulfilled

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On September 21, 2005, the State moved to dismiss petitioner-plaintiff's case pursuant to ORCP 21 A(6), asserting that petitioner-plaintiff was not a real party in interest because he did not own the property in question so he did not have standing to petition for judicial review of an order in other than a contested case. For the same reason, the State asserted, petitioner-plaintiff could not state a claim directly under ORS 197.352.

It was at this point that petitioner-plaintiff's counsel first entered the case, filing, on September 29, 2005, a response to the motions to dismiss. Counsel asserted that petitioner-plaintiff's filings were made pursuant to ORS 197.352 rather than as an appeal from an administrative order, that, although confusing, petitioner-plaintiff's second filing should be considered a first amended complaint, and that his motion to quash should be regarded as a response to the County's motion to dismiss. Responding to the motions to dismiss, counsel sought to add Mrs. Schaffer as a petitioner-plaintiff in this action, and asserted that petitioner-plaintiff has a sufficient interest in the property to be considered an owner under ORS 197.352(11)(C).<sup>5</sup>

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5

Petitioner-plaintiff has filed several subsequent *pro se* documents, as outlined below in this footnote. Because petitioner-plaintiff was represented by counsel at the time he filed these documents and counsel did not adopt them, this court does not consider them, except to the extent they indicate what type of action petitioner-plaintiff intended to institute.

On October 25, 2005, petitioner-plaintiff filed a *pro se* "Petition for UNTIMELY Writ of Review Case [0]5C 16991." This document contained many complaints about the process used by and the findings of the County and the DLCD in their respective reviews of petitioner-plaintiff's ORS 197.352 application. Petitioner-plaintiff asserted that he delayed filing the petition because he "only recently received advice that should have been provided with Orders 05-62 and M 119316" (p 7, lines 10-12). (This advice was apparently provided by counsel, since petitioner-plaintiff states in his "Summons and Petition for Writ of Review" filed in Case No. 05C21655 that he learned, after consultation with his attorney, that the DLCD and County had not provided proper appeal instructions, obstructed access to court review, and filed untimely responses in Case No. 05C16991 (Summons and Petition for Writ of Review in Case No 05C21655, p 8, lines 17-22)). Petitioner-plaintiff stated that, in addition to the requests in his original complaint he "now seeks Court jurisdiction over the relief, remedies and requirements of state law at Measure 37" and also sought a stay against the County's revocation of Order 05-62 or a statement by the County that it would vacate Order 05-136 and address the merits of petitioner-plaintiff's petition (p 12, lines 5-13). The filing was signed by both petitioner-plaintiff and Mrs. Schaffer.

On the same day, petitioner-plaintiff filed a *pro se* "Motion for Default Judgment Case [0]5C 16991" related to the County's withdrawal of Order No. 05-62. This filing was also signed by both petitioner-plaintiff and Mrs. Schaffer.

On November 14, 2005, petitioner-plaintiff filed a *pro se* "Reply to Conference Order of the Court Case [0]5C 16991 "

On April 13, 2006, in Case No 05C16991, petitioner-plaintiff filed a *pro se* motion for a default judgment against the County, asserting that he was entitled to such judgment because the County had revoked Order 05-62 and therefore petitioner-plaintiff prevailed in his opposition to the order. Petitioner-plaintiff also asked this court to join Mrs. Schaffer to this case.

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In an affidavit filed as an exhibit to counsel's response, petitioner-plaintiff stated, in response to the State's motion to dismiss, that "the court may order correction of the administrative findings, analysis at law and orders" (p 3, ¶ 9). In response to the County's motion to dismiss, petitioner-plaintiff stated, "The prayer of this case is correction of wrong findings, wrong conclusions at law and incorrect orders. These corrections are not *de novo* Measure 37 relief or compensation, in lieu" (p 4, ¶ 4).

The County replied on October 12, 2005, opposing the addition of Mrs. Schaffer as a petitioner-plaintiff, since any claim that she might have is related to the date by which a waiver should be determined, rather than, as in petitioner-plaintiff's case, the question of whether a person is an owner under the statute. The County reasserted its position that petitioner-plaintiff is not a real party in interest in this litigation.

On October 14, 2005, in Order No. 05-136, the County Board of Commissioners revoked Order No. 05-62 and found that Mrs. Schaffer was entitled to compensation pursuant to ORS 197.352. In lieu of compensation, however, as provided by statute, the County directed that certain land use regulations, enacted after Mrs. Schaffer became an owner of the property on May 12, 2004, not apply to the property.

On November 28, 2005, after the Circuit Court of Marion County declared ORS 197.352 unconstitutional, this court granted the parties' Stipulated Motion to Place Case in Abeyance. The abatement order was dissolved on March 24, 2006, after the Supreme Court reversed the circuit court's ruling and the circuit court entered an order in accordance with that decision. *See MacPherson v. DAS*, 340 Or 117, 130 P3d 308 (2006).

While this case was in abeyance, on December 12, 2005, petitioner-plaintiff and Mrs. Schaffer, acting *pro se*, instituted another action in Marion County Circuit Court, Case No. 05C21655, by filing a "Summons and Petition for Writ of Review." This document challenged the issuance of the County's Order No. 05-136, and contested the County's and the DLCD's orders on the same grounds previously raised in Case No 05C16991. Because this case involved the same parties as were involved in Case No. 05C16991, with the exception of an additional plaintiff, the subject real property was the same in both cases, and both matters involved ORS 197.352, the second-filed case, Case No. 05C21655, was consolidated with the existing case on April 20, 2006.

On April 27, 2006, the State filed its reply to petitioner-plaintiff's response to its motion to dismiss. The State argued that Mrs. Schaffer could not make a claim under ORS 197.352 because it only provides a cause of action for compensation. Since she has already obtained a waiver in lieu of compensation, she cannot seek further relief under the statute. And since the ORS 183.484 60-day statute of limitations for review of agency action has passed, the State asserts she cannot obtain review of the agency's determination.

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*Legal and Factual Conclusions*

*Case No. 05C16991*

Despite counsel's attempt to interpret petitioner-plaintiff's *pro se* papers as a cause of action under ORS 197.352, this court finds that they are unmistakably an attempt to seek judicial review of the orders issued by the County and DLCD. In both his July 25, 2005 filing, which this court deems his initial complaint, and his August 19, 2005 filing, which this court deems his first amended complaint, petitioner-plaintiff requested that this court correct the County's and the DLCD's flawed interpretation of ORS 197.352 and remand the orders to the respective agencies for reconsideration. In the first amended complaint, petitioner-plaintiff called the action an appeal and stated that he was appealing from the City's and the DLCD's orders, cited ORS 183.484, specifically requested "relief from administrative err[or]s," called the proceeding a contested administrative case, and deemed the proceedings in the County as the record for review. Furthermore, in petitioner-plaintiff's September 9, 2005 "Motion to Quash" and the letters appended thereto, petitioner-plaintiff again called his action an appeal and requested remand to the County and the DLCD, indicating his belief that this court's actions could compel a second hearing. Importantly, petitioner-plaintiff specified in his motion to quash that the action "has nothing to do with compensation," the only form or relief available in an action brought pursuant to ORS 197.352. See ORS 197.352(6) ("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 this section, the present owner of the property, or any interest therein, shall have a cause of action for compensation"). The content of these filings clearly indicate petitioner-plaintiff's intention to file a petition for review pursuant to ORS 183.484, rather than a cause of action under ORS 197.352(6). Even in petitioner-plaintiff's affidavit appended to counsel's response to the motions to dismiss, wherein counsel asked this court to interpret petitioner-plaintiff's pleadings as a cause of action pursuant to ORS 197.352, petitioner-plaintiff continued to indicate that he wished this court to conduct a review of administrative orders and specifically stated that he was *not* seeking "de novo Measure 37 relief."

It was not until petitioner-plaintiff's October 25, 2005 filing – which occurred after counsel had entered the case – that petitioner-plaintiff indicated that he "now" sought to have this court consider his action as one filed pursuant to ORS 197.352. To the extent this was a request to amend the pleadings to include a cause of action pursuant to ORS 197.352(6), this court denies that request. Even if the Court were to defer to the concept of amending counsel came on board, the amendment was filed after petitioner-plaintiff was represented by counsel and the request was not adopted by counsel.

Petitioner-plaintiff's papers therefore indicate his intent to file this action as one for judicial review of the County's and DLCD's orders. While the DLCD's order is subject to review pursuant to ORS 183.484, the order of the County is not subject to such review because that statute applies only to agencies, which does not include local governments. See ORS 183.310(1) (defining "agency"); *Oregon Administrative Law* § 2.10 (Oregon CLE 2001) ("A common point of confusion

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arises when lawyers attempt to apply portions of the APA to local government departments or agencies”). It is, however, subject to review in this court pursuant to ORS 34.010 through ORS 34.100, which provides for a writ of review to the circuit court from a decision of an officer or tribunal – other than an agency – that has exercised judicial or quasi-judicial functions.

In any event, the result as to the viability of petitioner-plaintiff’s case remains the same whether he is proceeding pursuant to judicial review of the County’s and the DLCD’s orders, or a cause of action pursuant to ORS 197.352. Having previously deeded his interest to his wife, he is not a real party in interest as required by ORCP 21A(6). Therefore, his claim must be dismissed.

To be a real party in interest in his petition for review of the County’s order, petitioner-plaintiff must have suffered an injury to his substantial interest. *See* ORS 34.040(1). To appeal from the DLCD’s order, petitioner-plaintiff must have been adversely affected or aggrieved by the agency’s order.<sup>6</sup> If petitioner-plaintiff’s claim were a cause of action under ORS 197.352, he would have to show that he had standing to pursue the action, which in this case means that he must be a “present owner of the property, or any interest therein.” *See* ORS 197.352(6).

In assessing whether petitioner-plaintiff is a real party in interest, this court accepts the allegations made in his complaints as true, but also may consider matters outside the pleadings. *See* ORCP 21 A. Specifically, this court considers Exhibit A to the County’s Motion to Dismiss and Exhibit A to the State’s Motion to Dismiss, both of which show that Mrs. Schaffer is the sole owner of the property in question, as well as Exhibit F to the State’s Motion to Dismiss, a copy of Ballot Measure 37 which, as noted, was codified at ORS 197.352.

In general, ORS 197.352 requires a public entity that enacted a land use regulation to compensate a property owner if that regulation reduces the fair market value of the owner’s property, if that owner or the owner’s family member acquired the property before the regulation was enacted. *See* ORS 197.352(1), (3)(E). Alternatively, and in its discretion, the public entity could choose to permit the owner of the property to use the property “for a use permitted at the time the owner acquired the property” rather than providing compensation to the owner. ORS 197.352(8).

The definitions portion of ORS 197.352 defines owner as “the present owner of the property, or any interest therein.” ORS 197.352(11)(C). It is this definition of “owner” that petitioner-plaintiff asks this court to interpret. It is clear that an “owner” under the statute may include a person who has a partial, but present, ownership interest. This would include anyone who, though not the only owner of the property, is a co-owner of the property, such as a tenant in common or joint tenant. That is not, however, the position in which petitioner-plaintiff finds himself, for Mrs. Schaffer is the only owner of the property currently listed on the deed (Exhibits A, deed, appended to defendants’ Motions to Dismiss).

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6

Although the statute also confers standing on parties to seek judicial review, there is no “party” to a proceeding when the order is in an other than a contested case (the type of order at issue here), because there is no formal proceeding. *See Oregon Administrative Law* § 7.11.

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Petitioner-plaintiff contends that, although he is not a current owner of the property in fee simple, he has an interest in it by virtue of the fact that he purchased it in 1976, has lived on it continuously since that time, conveyed it to Mrs. Schaffer, is still responsible for the mortgage on it, and has a marital right in it should he and Mrs. Schaffer divorce. Petitioner-plaintiff has suggested that he conveyed the property to Mrs. Schaffer for the purpose of refinancing the property, and, through counsel, that he intended to deed the property to her and himself as tenants by the entirety (counsel's Response to motions to dismiss, p 6, lines 24-24 & Exhibit 2 to Response, p 3, ¶ 2). Whatever petitioner-plaintiff's purpose in executing a new deed, and whether his omission from the title was intentional or not, the fact remains that petitioner-plaintiff unconditionally deeded the entire property to Mrs. Schaffer and Mrs. Schaffer alone. She is the only owner currently named on the deed.

Potentially, petitioner-plaintiff could be correct in asserting that, although he does not own the property, he has an "interest therein" sufficient to qualify him for relief under the statute. The question, therefore, is whether the "interest therein" requires some form of present *ownership* interest in the property, or only an interest in the property itself. To answer this question, this court must discern the intent of the voters in enacting this definition of "owner" by considering the text and context of the statute. This includes consideration of the use of the term "owner" throughout the statute. See *PGE v. Bureau of Labor and Indus*, 317 Or 606, 610-11, 859 P2d 1143 (1993) (instructing courts to consider the text and context of the statute in discerning the voters' intent, and instructing that "use of the same term throughout a statute indicates that the term has the same meaning throughout the statute"); *Ecumenical Ministries v. Oregon State Lottery Comm'n*, 318 Or 551, 559, 871 P2d 106 (1994) ("[t]he best evidence of the voters' intent is the text of the provision itself" (quoting *Roseburg Sch. Dist. v. City of Roseburg*, 316 Or 374, 378, 851 P2d 595 (1993))); *Li v. Oregon*, 338 Or 376, 388-89, 110 P3d 91 (2005) ("In interpreting voter-initiated constitutional provisions, our goal is to discern the intent of the voters. In doing so, the text of the constitutional provision itself provides the best evidence of the voters' intent \* \* \* \* If the voters' intent is clear from the text and context, then the court does not look further"); *Stranahan v. Fred Meyer, Inc.*, 331 Or 38, 57, 11 P3d 228 (2000) (when interpreting an initiative petition, "it is the people's understanding and intended meaning of the provision in question—as to which the text and context are the most important clue—that are critical to our analysis").<sup>7</sup>

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7

Only if the text and context of the statute are unclear does this court consider the legislative history of the statute, the second level of statutory construction. In a case involving a ballot measure, the legislative history includes items such as the ballot title, arguments regarding the measure included in the voters' pamphlet, and news reports and editorial comment on it. See *Ecumenical Ministries*, 318 Or at 559 n 8; *PGE*, 317 Or at 611-12. If, after completing both levels of statutory construction, the voters' intent remains unclear, the court "may resort to general maxims of statutory construction to aid in resolving the remaining uncertainty." *PGE*, 317 Or at 612. As will be discussed below, this court finds that it need not reach the second or third level of statutory construction.

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Considering the statute as a whole, to have a meaningful “interest therein” in property for the purposes of ORS 197.352(11)(C), an owner must have “acquired” the property. Both the compensation and waiver provisions of the statute depend on the owner’s acquisition of the property before the owner becomes entitled to any relief under the statute. *See* ORS 197.352(1), (2), & (3)(E) (providing that the owner of the property is entitled to compensation for the reduction in value to the property caused by land use rules enacted before the property was *acquired* by the owner (or a family member of the owner who owned the property prior to the acquisition or inheritance by the owner)); ORS 197.352(8) (providing that a public entity may “modify, remove, or not \* \* \* apply the land use regulation \* \* \* to allow the owner to use the property for a use permitted at the time the owner *acquired* the property” (emphasis added)).

“Acquisition” of the property occurs when the person gains the right to possess, control, or exercise power over the property. *See Webster’s Third New International Dictionary, Unabridged* (2002) (defining “acquire” as “to come into possession, control, or power”). “Possession” or “control” of the property equates to an actual holding of the rights that run with the land, which permits the person to exercise authority over the property. *See id.* (defining “possession” as “the act or condition of having in or taking into one’s control or holding at one’s disposal \* \* \* actual physical control or occupancy of property by one who holds for himself and not as a servant of another without regard to his ownership and who has legal rights to assert interests in the property against all others having no better right than himself,” and defining “control” as “to exercise restraining or directing influence over[,] \* \* \* have power over,” or “power or authority to guide or manage”). To actually hold the rights that run with the land, the person must have an ownership interest in the property. Consequently, to “acquire” the property for the purposes of the statute, the person must legally own the property, either in whole or in part. This means that the definition of “owner” contained in ORS 197.352(11)(C) requires that the person be a present legal owner of the property, or have a present legal ownership interest in the property.

None of the interests petitioner-plaintiff identifies give him the legal ownership interest required under the statute. Having a potential right to a share of the property if petitioner-plaintiff and Mrs. Schaffer divorced does not create in petitioner-plaintiff a current legal right to control or possess the property. Rather, during the marriage, Mrs. Schaffer, as holder of the title in fee simple, has the legal right to sell the property at her discretion, without consulting petitioner-plaintiff or sharing the proceeds of the sale with him. As the sole owner of the property, she also has the legal right to exclude petitioner-plaintiff from it. The fact that Mrs. Schaffer may permit petitioner-plaintiff to exercise ownership rights with regard to the property does not make him a legal owner of the property. Unless Mrs. Schaffer deeds the property to petitioner-plaintiff in whole or in part, she has no ability to confer ownership status on petitioner-plaintiff. Petitioner-plaintiff’s counsel cites no support for his contention that plaintiff could not be removed from the property without some action by the court. Furthermore, the fact that petitioner-plaintiff shares the responsibility for the mortgage of the property does nothing more than make him obligated to pay as co-signor. It does not make him an owner of the property. The fact that he is jointly responsible for the mortgage on the property certainly provides him with an interest in what happens to and occurs on the property, but it does not

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elevate him to the status of someone who has the right to control the property.

Because petitioner-plaintiff is not an owner as defined by ORS 197.352(1)(C), the County's and DLCD's orders that failed to recognize his ownership interest in the property could not possibly have caused an injury to his substantial interest or caused him to be adversely affected or aggrieved. Nor would he have standing to bring an action pursuant to ORS 197.352(6), because he is not a "present owner of the property, or any interest therein." See ORS 197.352(6). As a result, petitioner-plaintiff is not the real party in interest to Case No. 05C16991 and that action must be dismissed. See ORCP 21 A(6); ORCP 26 A; ORS 34.040(1); ORS 183.480(1); *People for Ethical Treatment v Institutional Animal Care*, 312 Or 95, 101-02 (1991) (finding that a person is "aggrieved" if "(1) the person has suffered an injury to a substantial interest resulting directly from the challenged governmental action; (2) the person seeks to further an interest that the legislature expressly wished to have considered; or (3) the person has such a personal stake in the outcome of the controversy as to assure concrete adverseness to the proceeding" (citations omitted)); *Association of Unit Owners v. Dunning*, 187 Or App 595, 609-13, 69 P3d 788 (2003) (considering whether statute at issue authorized plaintiff to assert a claim in determining whether plaintiff was a real party in interest); cf. *Orr v. East Valley Water Dist*, 203 Or App 430, 125 P3d 834 (2005) (plaintiffs had standing under ORS 34.040 because they asserted an injury to their property interests), *rev den*, 340 Or 308 (2006).

This court understands petitioner-plaintiff's frustration at not being considered a legal owner of the property and thus not being entitled to the relief provided by ORS 197.352. This court is, however, constrained by the unambiguous text of the statute. It is not for this court to read more into the statute than is there. See ORS 174.010 ("the office of the judge is simply to ascertain and declare what is, in terms or in substance, contained therein, not to insert what has been omitted, or to omit what has been inserted"); *PGE*, 317 Or at 611 (citing principle). Nor is it for this court to question the policy choices present in the statute. As the Supreme Court stated, "[w]hether Measure 37 as a policy choice is wise or foolish, farsighted or blind, is beyond this court's purview." *MacPherson*, 340 Or at 141. This court may only interpret the language that the voters chose to enact. That language requires that a person seeking relief under ORS 197.352 have a current ownership interest in the property.

This court must next consider whether to permit petitioner-plaintiff to amend his pleadings to add Mrs. Schaffer as a petitioner-plaintiff. This court has the authority to grant petitioner-plaintiff's motion to amend the pleadings to include her as a petitioner-plaintiff for judicial review of the County's and the DLCD's orders. See ORCP 23 A. If this court granted the amendment, the pleadings may relate back to when petitioner-plaintiff filed the action, and, if so, her petitions for judicial review would be timely. See ORCP 23 C (if new claim "arose out of the conduct, transaction or occurrence set forth \* \* \* in the original pleading, the amendment relates back to the date of the original pleading"); ORS 183.484(2) (providing 60-day time limit for appeals for judicial review in other than contested cases).

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The claims set forth in petitioner-plaintiff's pleadings relate to his own personal interest in the property and whether that interest is sufficient to grant him rights as an owner under ORS 197.352. Any claims Mrs. Schaffer would raise in this action would, necessarily, be different although related, as she is the legal owner of the property in question.<sup>8</sup> Adding her to the action would therefore not cause the action to be prosecuted by a real party in interest as to the claims petitioner-plaintiff raises. *See* ORCP 26 A (requiring court to provide plaintiff a reasonable time to join or substitute the real party in interest when an objection on that basis is raised); *Reutter v RWS Constr., Inc.*, 128 Or App 365, 369, 875 P2d 1187 (1994) (considering the commentary to FRCP 17, upon which Rule 26 was based, which states that the purpose of the rule is "to protect the defendant against a subsequent action by the party actually entitled to recover, and to insure generally that the judgment will have its proper effect as res judicata"). Nor would adding Mrs. Schaffer to the action permit this court to reach the issues asserted by petitioner-plaintiff in the pleadings any more sufficiently than it already has, since any claims she might seek to raise regarding to the County's and the DLCD's orders would, as noted, be different from those asserted by petitioner-plaintiff. Petitioner-plaintiff does not indicate that Mrs. Schaffer, if added to the action, would raise any claims that are not capable of being addressed in another action.<sup>9</sup>

For these reasons, justice does not require that this court grant petitioner-plaintiff's request to amend the pleadings to add Mrs. Schaffer as a petitioner-plaintiff in this action. This court therefore denies that motion.<sup>9</sup>

*Case No. 05C21655*

As to any claims contained in this action relating to the DLCD's order, they are untimely because they were not brought within 60 days of July 6, 2005, the date the order was served, as required by ORS 183.484(2).

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It is likely that any claims Mrs. Schaffer would assert would be based on the DLCD's interpretation of when she acquired the property. *See* ORS 197.352(8) (permitting the public entity to waive land use regulations to permit a use of the property that was permitted "at the time the owner acquired the property")

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Specifically, petitioner-plaintiff's counsel mentions only that they would "more appropriately address the Measure 37 civil cause of action." As previously found, however, this action does not state a claim pursuant to ORS 197.352, but only seeks judicial review of final orders issued by the County and the DLCD. Petitioner-plaintiff does not indicate that there are any claims related to this judicial review, specific to Mrs. Schaffer and potentially barred by the statute of limitations, that he wishes to raise. Furthermore, this court notes that Mrs. Schaffer is a party to Case No. 05C21655, which is a petition for writ of review from the County's October 14, 2005 issuance of Order No. 05-136 and also raises issues regarding the DLCD's order.

To: Mr. Lien, Ms. Staley & Mr. Norris  
Re: Schaffer v. Marion County, et al, Case No. 05C16991 & 05C21655  
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On October 14, 2005, the County revoked Order No. 05-62 and substituted Order No. 05-136. To the extent this action challenges the County's findings in Order No. 05-136, it is timely because it was brought within 60 days of the date of that decision. *See* ORS 34.030.

Both Mr. and Mrs. Schaffer are named as plaintiffs in this action.

As to Mr. Schaffer, the action must be dismissed because, for the same reasons discussed above, Mr. Schaffer is not a real party in interest to this action. *See* ORCP 21 A(6); ORCP 26 A; ORS 34.040(1).

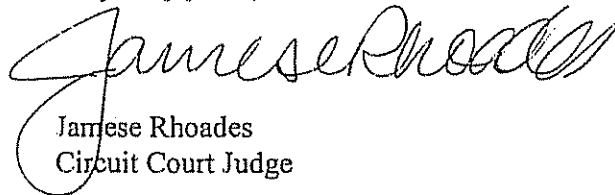
As to Mrs. Schaffer, the action must be dismissed because she fails to include a verification by an attorney that the attorney "has examined the process or proceeding, and the decision or determination therein, and that it is erroneous as alleged in the petition." *See* ORS 34.030. This is a requirement that must be fulfilled before the circuit court may issue the writ. The failure to include the verification means that this court cannot issue the writ, and therefore, that it cannot review the proceeding. *See Shevchynski v. City of Eugene*, 157 Or App 355, 970 P2d 237 (1998) (court has no authority to issue writ of review until statutory requirements are met, and cannot review the proceeding until it has issued the writ of review); *Shipp v. Multnomah County*, 133 Or App 583, 588-89, 891 P2d 1345 (discussing procedure for issuing writ and making the review), *rev den*, 321 Or 246 (1995). Mrs. Schaffer's failure to fulfill this mandatory requirement means that this court cannot issue the writ. However, this court grants Mrs. Schaffer leave to amend her complaint if done within 20 days of the date of this letter, to include the attorney verification, as well as the mandatory undertaking (*see* ORS 34.050), if it was not already given.

### **Conclusion**

This court grants Defendants' motions to dismiss action 05C16991, without leave to amend, because petitioner-plaintiff is not the real party in interest to this action. Ms. Staley will kindly prepare the appropriate form of general judgment of dismissal.

This court grants the County's motion to dismiss action 05C21655 as to Mr. Schaffer without leave to amend, and as to Mrs. Schaffer with leave to amend as stated above. Mr. Norris will kindly prepare the appropriate form of general judgment of dismissal as to Mr. Schaffer and a form of order regarding Mrs. Schaffer.

Very truly yours,



Jamese Rhoades  
Circuit Court Judge

JLR:nl


**CERTIFICATE OF SERVICE**

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I certify that on August 3, 2006, I served the foregoing *Defendant's Trial Memorandum* upon the parties hereto by the method indicated below, and addressed to the following:

Wallace W Lien  
Wallace W Lien PC  
1775 32nd Pl NE Ste A  
Salem, OR 97303  
Attorney for Plaintiffs

- HAND DELIVERY
- MAIL DELIVERY
- OVERNIGHT MAIL
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