

IN THE COURT OF APPEALS OF THE STATE OF OREGON

S. DAVID OLSON,

Plaintiff-Respondent,

DUANE L. OLSON,

Plaintiff below,

v.

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

Defendant-Appellant.

Marion County Circuit  
Court No. 06C10222

CA A133922

APPELLANT'S BRIEF

Appeal from the Judgment of the Circuit Court  
for Marion County  
Honorable THOMAS M. HART, Judge

WALLACE W. LIEN #79301

Wallace W. Lien PC

1775 32nd Pl. NE

Salem, OR 97301

Telephone: (503) 585-0105

Attorney for Plaintiff-Respondent

HARDY MYERS #64077

Attorney General

MARY H. WILLIAMS #91124

Solicitor General

DENISE G. FJORDBECK #82257

Assistant Attorney General

1162 Court St. NE

Salem, Oregon 97301-4096

Telephone: (503) 378-4402

Attorneys for Defendant-Appellant

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## APPELLANT'S BRIEF

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### STATEMENT OF THE CASE

#### **Nature of the Proceeding**

S. David Olson and Duane L. Olson, father and son, filed a petition for judicial review of a final order issued jointly by the Department of Land Conservation and Development and the Department of Administrative Services pursuant to ORS 197.352, commonly known as Measure 37. The Olsons also made a claim for compensation under Measure 37. These claims were based on a final order issued by the state agencies. That order denied David Olson's claim and granted Duane Olson's claim, waiving applicable land use regulations adopted after March 1, 2004 as to Duane Olson.

#### **Nature of the Judgment**

Trial was had before the court, without a jury, on stipulated facts agreed upon by the parties and on a number of joint exhibits submitted to the court. The trial court held that the final order denying David Olson's claim was erroneous and reversed that portion of the final order; the final order as to Duane Olson was affirmed.<sup>1</sup> ER 7. The trial court then entered a general judgment modifying the final order as to David Olson, dismissing the compensation claim as moot, and affirming the final order as to Duane Olson. ER 7-8. A petition for attorney fees was denied. ER 10.

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<sup>1</sup> Duane Olson has not filed a Notice of Appeal.

### **Statutory Basis of Appellate Jurisdiction**

This court has jurisdiction over the general judgment pursuant to ORS 19.205(1) and ORS 183.500.

### **Effective Dates for Appellate Purposes**

Judgment was entered on October 13, 2006. ER 6. The Notice of Appeal was timely filed on November 7, 2006. ORS 19.255(1).

### **Basis of Agency and Trial Court Jurisdiction**

The state agencies had jurisdiction pursuant to ORS 197.352. The trial court had jurisdiction pursuant to ORS 183.484.<sup>2</sup>

### **Question Presented**

David Olson sold his interest in the subject property to his son, Duane, by way of a warranty deed on March 1, 2004, retaining only an interest in Christmas trees growing on the property and taking a trust deed as security. Was David Olson a present owner of the property entitled to relief under ORS 197.352?

### **Summary of Argument**

Under Measure 37, only an owner of property is entitled to relief, and only from land use regulations that restrict his or her use of the property. David Olson was not entitled to relief. David Olson was no longer an owner of the property; he sold his entire interest in the real estate by warranty deed. While his son gave a trust deed to

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<sup>2</sup> The state acknowledges that this court ruled on January 31, 2007 that jurisdiction lies not with the circuit court under ORS 183.484, but with this court under ORS 183.482. *Corey v. DLCD* (A129905), 210 Or App ---, --- P3d ---(2007). No appellate judgment has issued in *Corey*, and the state intends to petition for reconsideration.

secure payments on the property, the beneficiary of a trust deed does not have an ownership interest and does not retain a right to use the property.

While David Olson retained an interest in the Christmas trees on the property, that reservation did not give him an interest in the real property itself. Once again, David Olson is not an owner of the property. Even if he were, no land use regulations affected his right to use that interest.

The state agencies were correct to deny David Olson's claim under Measure 37, and the trial court's judgment modifying the agency order should be reversed.

### **Statement of Material Facts**

The parties agreed to the following stipulated facts<sup>3</sup>:

1. The subject property is Tax Lot 600 in Township 9 South, Range 2 West, Section 1C in Marion County.
2. On September 21, 1964, Sherman David Olson and Mildred Olson, husband and wife, acquired the subject property by warranty deed.
3. On February 24, 2004, S. David Olson and Duane Olson, father and son, entered into a Sale Agreement which provided terms for the transfer of ownership of the property from David to Duane and states "subject only to such easements, conditions and restrictions of record acceptable to [Duane] at closing *and reserving ownership of the Christmas trees on the property to [David]*."
4. Pursuant to the Sale Agreement, on March 1, 2004, Duane Olson acquired fee simple titled to the property from S. David Olson.
5. Pursuant to the Sale Agreement:
  - a. "The Property excludes the Christmas trees currently growing on the Property."

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<sup>3</sup> Citations to exhibits and to the record filed below are omitted.

- b. S. David Olson “executed[d] and deliver[ed] to the escrow a statutory warranty deed, conveying the Property to [Duane Olson] subject only to such easement, conditions and restrictions of record acceptable to [Duane Olson] at closing and reserving ownership of the Christmas trees on the property to [S. David Olson].”
6. On March 1, 2004, Duane Olson executed a promissory note and trust deed in favor of S. David Olson to secure payment of the purchase price.
7. The March 1, 2004 trust deed contains the following terms:
  - a. Duane Olson is the grantor; Ticor Title is the trustee; and S. David Olson is the Beneficiary.
  - b. Duane Olson, as grantor, has fee simple title to the subject property.
  - c. Upon default of payments by Duane Olson (grantor), S. David Olson (beneficiary) has the following remedies available: (1) to declare the unpaid balance of the note due and payable; (2) to retake possession of the property and collect the rents, issues, and profits; (3) to foreclose the trust deed judicially or by advertisement and sale; and (4) any other remedies provided by Oregon law.
8. The March 1, 2004 promissory note includes the following terms:
  - a. Duane Olson promises to pay S. David Olson \$36,460 with interest thereon at 4.94% per annum, in annual installments \$3,498.41. The first payment is to be made on March 1, 2004 and subsequent payments are due on March 1 of each year.
9. Duane Olson has made the following payments on the property purchase \* \* \*.
10. On April 6, 2004, S. David Olson established a revocable living trust entitled the “Olson Living Trust.”

11. The Olson living trust agreement includes the following terms:
  - a. Duane Olson and S. David Olson are co-trustees.
  - b. During his lifetime, S. David Olson is beneficiary.
  - c. S. David Olson has the right to revoke or amend the Trust Agreement.
  
12. On April 6, 2004, S. David Olson assigned all of his beneficial interest in the trust deed to S. David Olson and Duane Olson as trustees of the Olson Living Trust.
  
13. On March 1, 2005, S. David Olson and Duane Olson submitted Measure 37 demands to the Department of Administrative Services and Marion County for the subject property.
  
14. On August 9, 2005, plaintiffs' [sic] recorded with Marion County land record a Re-Recording Certificate to correct the legal description in Warranty Deed conveying the subject property from S. David Olson to Duane L. Olson, recording S. David Olson's reservation ownership of the Christmas trees on the subject property.
  
15. On August 16, 2005, the Marion County Board of Commissioners issued Order No. 05-103. \* \* \* The State does not dispute this fact but denies that it is relevant or material to the issues in dispute and therefore objects to evidence of the Marion County Order.
  
16. Order No. 05-103 provides, in part, that the Marion County Board of Commissioners "approves the applicant's Measure 37 claim."
  
17. On August 19, 2005, the Oregon Department of Land Conservation and Development issued Final Order, Claim No. M119988.
  
18. The Final Order provides that the State of Oregon will not apply the following land use laws: Statewide Planning Goal 3, ORS 215.263, ORS 215.284 and OAR 660, Division 33 enacted after Duane Olson acquired the subject property on March 1, 2004 to the extent necessary to allow Duane Olson a use of the property permitted when he acquired the property on March 1, 2004.

19. The Final Order determined that S. David Olson does not have a current ownership interest in the subject property for purposes of Measure 37 and therefore denied S. David Olson's claim.

**IT IS SO STIPULATED.**

ER 1-5.

Following argument at trial, the trial court ruled in favor of David Olson, but affirmed the state's final order as to Duane Olson. Tr 27-28. The state appeals from the general judgment entered pursuant to that ruling. ER-8.

**FIRST ASSIGNMENT OF ERROR**

The trial court erred in reaching the following legal conclusion:

1. Plaintiff S. David Olson (Hereinafter "David") is an "owner" as defined by ORS 197.352(11)(C).

ER 7.

**Preservation of error**

In its Trial Memorandum, the state argued that David Olson was not an "owner" for Measure 37 purposes. (Trial Memo at 3, 4-6). The state also argued orally that David Olson was not an owner. Tr 7. Error is preserved.

**SECOND ASSIGNMENT OF ERROR**

The trial court erred in reaching the following legal conclusion:

4. David's ownership of the Christmas trees and the right to go on the land to maintain and harvest the trees is an "interest in land", which qualifies David as an "owner" under ORS 197.352.

ER 7.

**Preservation of error**

In its Trial Memorandum, the state argued that David Olson was not an “owner” for Measure 37 purposes. (Trial Memo at 3, 4-6). The state also argued orally that David Olson was not an owner. Tr 7. Error is preserved.

**THIRD ASSIGNMENT OF ERROR**

The trial court erred in reaching the following legal conclusion:

5. Simultaneous with David’s conveyance of fee simple title to the subject property to Duane, Duane conveyed a Trust Deed to Ticor Title, naming David as a beneficiary of the trust deed. David’s beneficial interest is an “interest in land” which qualifies David as an “owner” under ORS 197.352.

ER 7.

**Preservation of error**

In its Trial Memorandum, the state argued that David Olson was not an “owner” for Measure 37 purposes. (Trial Memo at 3, 4-6). The state also argued orally that David Olson was not an owner. Tr 7. Error is preserved.

**FOURTH ASSIGNMENT OF ERROR**

The trial court erred in reaching the following legal conclusion:

6. David’s ownership interests, through the reservation of ownership of the Christmas trees, and his beneficial interest through the trust deed, are sufficient to qualify David for just compensation as provided by ORS 197.352(1).

ER 7.

### **Preservation of error**

In its Trial Memorandum, the state argued that David Olson was not an “owner” for Measure 37 purposes. (Trial Memo at 3, 4-6). The state also argued orally that David Olson was not an owner. Tr 7. Error is preserved.

### **FIFTH ASSIGNMENT OF ERROR**

The trial court erred in making the following ruling:

7. The State’s decision in Final Order No. M119988 denying the claim of plaintiff S. David Olson on the basis that he is not an owner of the subject property as defined by ORS 197.352(11)(C) is erroneous, and is reversed.

ER 7.

### **Preservation of error**

In its Trial Memorandum, the state argued that David Olson was not an “owner” for Measure 37 purposes. (Trial Memo at 3, 4-6). The state also argued orally that David Olson was not an owner. Tr 7. Error is preserved.

### **SIXTH ASSIGNMENT OF ERROR**

The trial court erred in entering the following order:

NOW, THEREFORE, IT IS ADJUDGED THAT

\* \* \*

2. As to plaintiff S. David Olson’s Petition for Judicial Review, plaintiff’s Petition is granted and the State’s Final Order is reversed and modified as follows:

a. The State will not apply the following laws to S. David Olson’s establishment of a single family dwelling on the 5.05-acre subject property; [sic] applicable provisions of Statewide Planning Goal 3, ORS 215, and OAR 660, division 33 enacted after September 21, 1964. These land use regulations will not apply to S. David Olson’s use of the property only to the extent necessary to allow a use permitted at the time he acquired the property on September 21, 1964; \* \* \* .

ER 7.

**Preservation of error**

The state argued that its order denying David Olson's claim should be affirmed. (Trial Memo at 10); Tr 22-23. Error is preserved.

**SEVENTH ASSIGNMENT OF ERROR**

The trial court erred in entering the following order:

4. Plaintiff S. David Olson has a judgment against defendant as indicated above, and may petition for an award of attorney fees, costs and disbursements, in accordance with ORS 183.497 and ORCP 68, to be awarded by supplemental judgment.

ER 8.

**Preservation of error**

The state argued that its order denying David Olson's claim should be affirmed. (Trial Memo at 10); Tr 22-23. Error is preserved.

**EIGHTH ASSIGNMENT OF ERROR**

The trial court erred in entering the following judgment:

IT IS HEREBY ORDERED AND ADJUDGED that:

1. As to plaintiff S. David Olson, defendant's Final Order No. M119988 is hereby reversed and modified; \* \* \* .

Dated this 11<sup>th</sup> day of October, 2006, at Salem, Marion County, Oregon.

s/      Honorable Thomas M. Hart  
         Circuit Court Judge

ER 8.

### **Preservation of error**

The state argued that its order denying David Olson's claim should be affirmed, and judgment entered in favor of the state. (Trial Memo at 10); Tr 22-23. Error is preserved.

### **NINTH ASSIGNMENT OF ERROR**

The trial court erred in entering the following supplemental judgment:

THEREFORE, IT IS ADJUDGED that plaintiffs [sic] shall be entitled to a prevailing party fee in the amount of \$550.00 from defendant, plus reimbursement of filing fee in the amount of \$206.00, but that plaintiffs' request for attorney fees is otherwise denied.<sup>4</sup>

\* \* \*

Dated this 5<sup>th</sup> day of February, 2007, at Salem, Marion County, Oregon.

s/ Judge Thomas M. Hart  
Circuit Court Judge

ER 12.

### **Preservation of error**

The state argued that its order denying David Olson's claim should be affirmed, and judgment entered in favor of the state. (Trial Memo at 10); Tr 22-23. Error is preserved.

### **Combined standard of review**

The relevant facts are undisputed. This court reviews the interpretation of ORS 197.352 for errors of law. *Cat Champion Corp. v. Primrose*, 210 Or App 206, 149 P3d 1276 (2006).

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<sup>4</sup> Although the Supplemental Judgment refers to "plaintiffs," only S. David Olson prevailed and he is the sole judgment creditor listed. ER 12.

## COMBINED ARGUMENT

### A. Introduction to Measure 37

Measure 37, approved by voters in November 2004 and codified at ORS 197.352, provides remedies to some owners whose property is burdened by certain land use regulations.<sup>5</sup> That remedy comes in two forms: if an owner qualifies for relief, he or she is entitled to “just compensation” for the “*reduction in the fair market value of the affected property interest* resulting from enactment or enforcement of the land use regulation. ORS 197.352(1) and (2) (emphasis added). In the alternative, “in lieu of just compensation,” the government entity that adopted or enforces the regulation may “modify, remove, or not \* \* \* apply” the land use regulation(s). *See Macpherson v. Dep’t. of Admin. Servs.*, 340 Or 117, 122, 130 P3d 308 (2006). The latter process is often referred to as granting a Measure 37 waiver. Regulations that may be waived under Measure 37 include any statute regulating the use of land or any interest in land, the Land Conservation and Development Commission’s rules and statewide land-use-planning goals; local comprehensive plans, and zoning, land division, and transportation ordinances, and statutes and rules regulating farm and forest practices. ORS 197.352(11)(B).<sup>6</sup>

Measure 37 provides a general definition of the term “owner.” “‘Owner’ is the present owner of the property or any interest therein.” ORS 197.352(11)(C).

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<sup>5</sup> The measure itself directed that it be placed within ORS Chapter 197. A complete copy of ORS 197.352 is appended to this brief.

<sup>6</sup> Measure 37 includes no funding mechanism, and the state has yet to pay such a claim.

However, as the text of Measure 37 makes clear, not all owners of property are entitled to Measure 37 relief. To be entitled to any relief under Measure 37, an owner must satisfy three criteria: (1) the owner's interest must be an interest in private real property; (ORS 197.352(1)); (2) the property interest must be subject to land use regulations adopted after the owner or a family member of the owner acquired the interest (ORS 197.352(3)(E))<sup>7</sup>; (3) the land use regulations must restrict the uses to which the owner's interest may be put (ORS 197.352(1)); and (4) the restriction must cause a reduction in the fair market value of the owner's interest. ORS 197.352(1).<sup>8</sup>

The trial court held that David Olson was an "owner" under Measure 37 because he continued to hold interests in the real property after selling it to his son. In so doing, the court gave effect to the definitional section of the statute, but ignored the

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<sup>7</sup> That section provides:

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

\* \* \*

(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.

<sup>8</sup> ORS 197.352(1) provides:

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.

substantive provisions of ORS 197.352(1), and ignored the nature of the interests that David Olson held when the Measure 37 claim was made. This was error.

**B. David Olson's beneficial interest in the trust deed is not an interest in property.**

The trial court ruled that David Olson had an interest in property both because he was the beneficiary on the trust deed on the property and because he retained an interest in the Christmas trees. Neither ruling can be sustained.

David Olson delivered to his son a statutory warranty deed for the property. A warranty deed "shall convey the entire interest in the described property at the date of the deed which the deed purports to convey." ORS 93.850(2)(a). *See* Joint Exhibit 4 (Warranty Deed); ER 2. Thus, in the absence of other circumstances, the conveyance of a warranty deed would defeat any claim by David Olson under Measure 37.

As security for payments on the property, Duane Olson executed a trust deed with David Olson as beneficiary. ER 2. A trust deed does not grant the beneficiary any right to use the real property. The beneficiary is the person for whose benefit the trust deed is given, ORS 86.705(1); a trust deed is deemed to be a mortgage on the property and is subject to all laws applicable to mortgages, unless those laws are inconsistent with a statute relating specifically to trust deeds. ORS 86.715. The grantor of a trust deed is the owner of the property encumbered. *Sam Paulsen Masonry Co. v. Higley*, 276 Or 1071, 1075, 557 P2d 676 (1976). The beneficiary simply holds a lien against the property. *Id.*

A mortgage conveys no legal or equitable interest in fee or for life to the mortgagee, but merely creates a lien which constitutes security for the debt and grants the mortgagee, upon the mortgagor's default, the right to have the property sold to satisfy the debt. [Citations omitted.]

The same is true of a beneficiary's interest under a trust deed, which is merely a lien on the land as security for the payment of the debt. If the note is paid, the lien is extinguished. Although it is true that, if the note is not paid when due, a foreclosure or trustee's sale would have to take place in Oregon, the holder of the note could waive the security and sue the maker on the note any place where the maker could be found. The beneficiary acquires no more than a lien on the real property unless and until the grantor defaults and the beneficiary purchases the property at the trustee's or foreclosure sale.

*West v. White*, 92 Or App 401, 404-405, 758 P2d 424, *aff'd en banc* 307 Or 296, 766 P2d 383 (1988).

In sum, the warranty deed conveyed all of David Olson's right, title, and interest in the property to Duane (save for the Christmas trees, discussed below); the trust deed merely financed Duane's acquisition of the property and created a lien on the property. That lien gave David Olson no right to use the real property; therefore there were no land use restrictions on his use of his interest in the property, nor was the fair market value of his interest diminished. The trial court erred in ruling otherwise.

**C. The Christmas trees are not an interest in real property.**

The trial court erred in concluding that David Olson's interest in the Christmas trees was an interest in land at all, and secondarily in concluding that interest entitled David Olson to relief under Measure 37, where the use of that interest was not restricted by any land use regulation, nor was its fair market value diminished.

It is apparent that, before they made their Measure 37 claim, the Olsons did not treat the Christmas trees as an interest in real property. In the Sales Agreement for the property, Joint Exhibit 3, the property to be sold was described as "approximately 9

acres of farm property with a shop.” “The Property excludes the Christmas trees currently growing on the Property.” *Id.* at Recital A. The warranty deed, Joint Exhibit 4, conveys the described real property “free of encumbrances except as specifically set forth in” Exhibit A to the deed. The encumbrances include the following:

Also Subject to:

All ownership rights, including severance rights and right to access for maintenance and harvest purposes, to all Christmas trees on the above-described tracts of land shall be reserved in S. David Olson, or his assigns and successors. This reservation shall terminate upon the harvest of all the Christmas trees situated on the tracts as of March 1, 2004, or on December 31, 2014 whichever occurs first.

Joint Exhibit 4, p 2. Thus, it is plain that the Olsons treated the Christmas trees as a crop or as personal property of David Olson to be severed from the land at some later date.

This is consistent with the usual treatment of Christmas trees under Oregon law. Christmas trees are treated differently than standing timber; the latter is considered a part of the realty on which it stands. *See, e.g., Coast Range Conifers, LLC v. State*, 339 Or 136, 150-151, 117 P3d 990 (2005). Christmas trees, on the other hand, are considered to be a crop. *See* ORS 87.700(1) (defining agricultural produce to include Christmas trees); ORS 197.435(2) (defining high value crop areas); ORS 215.203(2) (including Christmas tree cultivation within definition of farm use); ORS 307.720 (exempting value of cultured Christmas trees from property taxation; “shall not be deemed real property”); ORS 308A.056(3)(d) (farm use includes Christmas tree cultivation); ORS 527.620 (exempting Christmas trees from “forest

tree species”). However, even if the Christmas trees could be considered to be standing timber and hence real property, it is clear that David Olson and Duane Olson entered into an agreement to sever the trees from the land; the trees then became personal property and not an interest in the real estate. ORS 72.1070(2) (“contract for the sale \* \* \* of timber to be cut is a contract for sale of goods”; *Paullus v. Yarbrough*, 219 Or 611, 637, 347 P2d 620 (1959) (timber subject to contract to sever is “goods” within Uniform Sales Act).

In summary, David Olson retained a personal property interest, but has no legal interest in the real property that he sold to his son.

**D. The Christmas trees are not property within the ambit of Measure 37.**

Even if the reservation of the Christmas trees reserves some form of real property interest to David Olson, his interest has not been the subject of any state regulation within the domain of Measure 37. As noted above, Measure 37 applies when a public entity enacts or enforces a land use regulation 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*.”

ORS 197.352(1) (emphasis added). Reading the statute as a whole and giving effect to each and every part of it, as this court must do, ORS 174.010, an owner of a property interest that makes a claim under Measure 37 must demonstrate that the use of his or her property interest is restricted by land use regulations adopted after he or

she acquired the property, and that the fair market value of that interest is negatively impacted. Otherwise, the italicized language has no meaning.

In the present case, Duane Olson acquired the fee simple interest in the property in 2004; the state granted Duane a waiver of applicable land use regulations adopted after that time, and the trial court affirmed that decision. David Olson acquired an interest in the fee in 1964, but conveyed away all interests except his interest in the Christmas trees before the passage of Measure 37. There has never been any contention that any land use regulations restrict the use of his interest in the Christmas trees, or reduce the fair market value of his interest in the Christmas trees. As a result, the trial court erred in concluding that David Olson was entitled to any relief under Measure 37. The state properly concluded, in its final order, that he was entitled to no relief and therefore denied his claim; that order should be affirmed. The trial court's judgment should therefore be reversed.

**E. The supplemental judgment should be reversed.**

Although the trial court denied David Olson's petition for attorney fees under ORS 183.497, the court did grant David Olson a supplemental judgment for costs and disbursements. The supplemental judgment should be reversed. A party is entitled to costs and disbursement only if s/he is the prevailing party. ORCP 68 B. Because the substantive judgment against the state must be reversed, the supplemental judgment should also be reversed.

**CONCLUSION**

The trial court erred in concluding that David Wilson was entitled to prevail. This court should reverse the judgment and supplemental judgment and remand to the trial court with directions to affirm the final order issued by the state agencies and dismiss the petition for judicial review.

Respectfully submitted,

HARDY MYERS  
Attorney General  
MARY H. WILLIAMS  
Solicitor General



DENISE G. FJORDBECK  
Senior Assistant Attorney General

Attorneys for Defendant-Appellant  
Department of Land Conservation and  
Development

DGF:blt/APPA4084

# **EXCERPT OF RECORD**

## APPELLANT'S EXCERPT OF RECORD

Pursuant to ORAP 5.50, appellant submits the following, as indexed below.

<u>Trial Court Record</u>	<u>Document</u>	<u>ER #</u>
OJIN # 30	Stipulated Facts for Trial to the Court	1
OJIN # 40	General Judgment	6
OJIN # 54	Supplemental Judgment	9
OJIN # 60	Amended Supplemental Judgment	11

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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  
STIPULATED FACTS FOR TRIAL TO THE  
COURT  
Date: August 4, 2006  
Time: 2:30 pm

1. The subject property is Tax Lot 600 in Township 9 South, Range 2 West, Section 1C in Marion County. **Joint Exhibit 1** (Final Order and Final Staff Report and Recommendation), p 1; Petition, ¶ 1; *see also Record*, Section 6, page 1; Final Order Claim No. 119988 (August 19, 2005).<sup>1</sup>
2. On September 21, 1964, Sherman David Olson and Mildred Olson, husband and wife, acquired the subject property by warranty deed, **Joint Exhibit 2** (Warranty Deed #1); *see also Record*, Section 1, page 18-19 (of 27 pages); Exhibit B: 1964 Warranty Deed.
3. On February 24, 2004, S. David Olson and Duane Olson, father and son, entered into a Sale Agreement which provided terms for transfer of ownership of the property from David to Duane and states "subject only to such easements, conditions and restrictions of record acceptable to [Duane] at closing and reserving ownership of the Christmas trees on the Property to [David]." **Joint Exhibit 3** (Sale Agreement), quote at p 3, ¶ 6; *see also Record*, Section 3, pages 14-18 (of 34 pages).

<sup>1</sup> Defendant lodged the agencies' Record, as defined in OAR 125-145-0105, on July 7, 2006 (OJIN # 26).

**ER-2**

- 1 4. Pursuant to the Sale Agreement, on March 1, 2004, Duane Olson acquired fee simple title  
2 to the property from S. David Olson. **Joint Exhibit 4** (Warranty Deed #2); *see also*  
3 *Record*, Section 3, pages 32-34 (of 34 pages).
- 4 5. Pursuant to the Sale Agreement:
- 5 a. "The Property excludes the Christmas trees currently growing on the Property."  
6 **Joint Exhibit 3** at 1; *see also Record*, Section 3, page 14 (of 34 pages).
- 7 b. S. David Olson "execute[d] and deliver[ed] to the escrow a statutory warranty  
8 deed, conveying the Property to [Duane Olson] subject only to such easement,  
9 conditions and restrictions of record acceptable to [Duane Olson] at closing and  
10 reserving ownership of the Christmas trees on the Property to [S. David Olson]."  
11 **Joint Exhibit 3** at 3; *see also Record*, Section 3, page 16 (of 34 pages).
- 12 6. On March 1, 2004, Duane Olson executed a promissory note and trust deed in favor of S.  
13 David Olson to secure payment of the purchase price. **Joint Exhibits 5** (trust deed) and **6**  
14 (promissory note).
- 15 7. The March 1, 2004 trust deed includes the following terms:
- 16 a. Duane Olson is the Grantor; Ticor Title is the Trustee; and S. David Olson is the  
17 Beneficiary. **Joint Exhibit 5** at 1.
- 18 b. Duane Olson, as grantor, has fee simple title to the subject property. **Joint**  
19 **Exhibit 5** at 2.
- 20 c. Upon the default of payments by Duane Olson (grantor), S. David Olson  
21 (beneficiary) has the following remedies available: (1) to declare the unpaid  
22 balance of the note due and payable; (2) to retake possession of the property and  
23 collect the rents, issues and profits; (3) to foreclose the trust deed judicially or by  
24 advertisement and sale; and (4) any other remedies provided by Oregon law.  
25 **Joint Exhibit 5** at 4.
- 26 8. The March 1, 2004 promissory note includes the following terms:

**ER-3**

1 a. Duane Olson promises to pay S. David Olson \$36,460, with interest thereon at  
2 4.94% per annum, in annual installments of \$3,498.41. The first payment is to be  
3 made on March 1, 2004 and subsequent payments are due on March 1 of each  
4 year. **Joint Exhibit 6** at 1.

5 9. Duane Olson has made the following payments on the property purchase price to Ticor  
6 Title and the Olson Living Trust:

7 a. Payment of \$5,269.45 on March 1, 2004 to Ticor Title, which includes an initial  
8 payment of \$5,000 plus \$269.45 for recording fees, county taxes and Ticor Title  
9 escrow rate. **Joint Exhibit 7** (March 1, 2004 Check from Duane Olson to Ticor  
10 Title; March 1, 2004 Ticor Title: Buyer Settlement Statement for Duane Olson).

11 b. Annual payment of \$3,498.41 on March 22, 2005 to the Olson Living Trust.  
12 **Joint Exhibit 8** (March 22, 2005 Check from Duane Olson to Olson Living  
13 Trust).

14 c. Annual payment of \$3,498.41 on April 6, 2006 to the Olson Living Trust. **Joint**  
15 **Exhibit 9** (April 6, 2006 Check from Duane Olson to Olson Living Trust).

16 10. On April 6, 2004, S. David Olson established a revocable living trust titled the "Olson  
17 Living Trust." **Joint Exhibit 10** (Revocable Living Trust Agreement); *see also Record,*  
18 *Section 3, pages 19-31 (of 34 pages).*

19 11. The Olson Living Trust agreement includes the following terms:

20 a. Duane Olson and S. David Olson are co-trustees. **Joint Exhibit 10** at 1; *see also*  
21 *Record, Section 3, page 19 (of 34 pages);*

22 b. During his lifetime, S. David Olson is beneficiary. **Joint Exhibit 10** at 3; *see also*  
23 *Record, Section 3, page 21 (of 34 pages).*

24 c. S. David Olson has the right to revoke or amend the Trust Agreement. **Joint**  
25 **Exhibit 10** at 2; *see also Record, Section 3, page 20 (of 34 pages).*

**ER-4**

1 12. On April 6, 2004, S. David Olson assigned all his beneficial interest in the trust deed to S.  
2 David Olson and Duane Olson as trustees of the Olson Living Trust. **Joint Exhibit 11**  
3 (Assignment of Trust Deed); *see also Record*, Section 3, page 10-13.

4 13. On March 1, 2005, S. David and Duane Olson submitted Measure 37 demands to the  
5 Oregon Department of Administrative Services and Marion County for the subject  
6 property. **Joint Exhibit 1** at 1; *Record*, Section 1, Measure 37 Claim (March 1, 2005).

7 14. On August 9, 2005, plaintiffs' recorded with the Marion County land records a Re-  
8 Recording Certificate to correct the legal description in Warranty Deed conveying the  
9 subject property from S. David Olson to Duane L. Olson, recording S. David Olson's  
10 reservation ownership of the Christmas trees on the subject property. The Re-Recording  
11 Certificate was recorded in the Marion County land records at Reel 2519, Page 195.  
12 **Joint Exhibit 12.** *see also Record*, Section 3, pages 1-2.

13 15. On August 16, 2005, the Marion County Board of Commissioners issued Order No. 05-  
14 103. *See Record*, Section 4, pages 9-10 (of 31 pages). The State does not dispute this  
15 fact, but denies that it is relevant or material to the issues in dispute and therefore objects  
16 to admission of evidence of the Marion County Order.

17 16. Order No. 05-103 provides, in part, that the Marion County Board of Commissioners  
18 "approves the applicant's Measure 37 claim and, in accordance with the authority granted  
19 under Measure 37, in lieu of paying just compensation, directs that the following land use  
20 regulations not be applied to the subject property: 1. Marion County Rural Zoning  
21 Ordinance (MCRZO) Section 136.060(a); 2. MCRZO Sections 136.0060 (a) (b); 3.  
22 Marion County Comprehensive Plan Agricultural Policies 3 and 4; This action by  
23 Marion County provides the county's authorization to the claimants to use their property  
24 as approved by the board without being subject to the standards and regulations listed  
25 above that took effect after September 21, 1964 as to Sherman David Olson and March 2,  
26 2004 as to Duane L. Olson." *Id.* The State does not dispute this fact, but denies that it is

## ER-5

1 relevant or material to the issues in dispute and therefore objects to admission of evidence  
2 of the Marion County Order.

3 17. On August 19, 2005, the Oregon Department of Land Conservation and Development  
4 issued Final Order, Claim No M119988. **Joint Exhibit 1**; *see also Record*, Section 6.

5 18. The Final Order provides that the State of Oregon will not apply the following land use  
6 laws: Statewide Planning Goal 3, ORS 215.263, ORS 215.284 and OAR 660, Division 33  
7 enacted after Duane Olson acquired the subject property on March 1, 2004 to the extent  
8 necessary to allow Duane Olson a use of the property permitted when he acquired the  
9 property on March 1, 2004. **Joint Exhibit 1** at 1; *see also Record*, Section 6, page 1.

10 19. The Final Order determined that S. David Olson does not have a current ownership  
11 interest in the subject property for purposes of Measure 37 and therefore denied S. David  
12 Olson's claim. **Joint Exhibit 1** at 6; *see also Record*, Section 6, page 6.

13  
14 **IT IS SO STIPULATED:**

15  
16 Dated: August 2, 2006

Wallace W. Lien  
Wallace W. Lien, #79301  
Daniel B. Alchison, #04042  
Attorneys for Plaintiffs

17  
18  
19 Dated: July 31, 2006

Darsee Staley  
Darsee Staley, #87351  
Sr. Assistant Attorney General  
Of Attorneys for Defendant

OCT 13 2006

ENTERED #8

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

DUANE L. OLSON and S. DAVID OLSON,

Case No. 06C10222

Plaintiffs,

Honorable Thomas M. Hart

v.

DEFENDANT'S GENERAL JUDGMENT

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

Defendants.

Plaintiffs' petition for judicial review of the decision of defendant, State of Oregon, concerning plaintiffs' claim for compensation under Measure 37 (ORS 197.352) came before this court on trial by stipulated facts, plaintiffs, DUANE L. OLSON and S. DAVID OLSON, appearing by and through their attorney, DANIEL B. ATCHISON for Wallace W. Line, of Wallace W. Line, P.C., and defendant, STATE OF OREGON, appearing by and through its attorney, DARSEE STALEY, Senior Assistant Attorney General. After trial, at the request of the parties, the court considered plaintiffs' Measure 37 Compensation Claim.

The parties agreed with the court that the petition would be better preserved by proceeding to a trial on stipulated facts. The court accepted the Stipulated Facts submitted by, and consented to, by both parties. The Stipulated Facts are attached hereto and by this reference incorporated herein as the court's findings following trial. The parties also submitted joint exhibits 1-12.

After carefully considering the law, the pleadings and oral arguments of both parties, the Stipulated Facts, and being otherwise fully advised on the matter, the court finds:

1. Plaintiff S. David Olson (Hereinafter "David") is an "owner" as defined by ORS 197.352(11)(C).
2. David, along with his wife, originally acquired the property subject to this action (hereinafter "subject property") on September 21, 1964.
3. On March 24, 2004, plaintiff S. David Olson conveyed fee simple title to the subject property subject to his son, plaintiff Duane L. Olson (hereinafter "Duane") reserving to himself "all ownership rights" to all Christmas trees on the subject property.
4. David's ownership of the Christmas trees and the right to go on the land to maintain and harvest the trees is an "interest in land", which qualifies David as an "owner" under ORS 197.352.
5. Simultaneous with David's conveyance of fee simple title to the subject property to Duane, Duane conveyed a Trust Deed to Tigor Title, naming David as beneficiary of the trust deed. David's beneficial interest is an "interest in land" which qualifies David as an "owner" under ORS 197.352.
6. David's ownership interests, through the reservation of ownership of the Christmas trees, and his beneficial interest through the trust deed, are sufficient to qualify David for just compensation as provided by ORS 197.352(1).
7. The State's decision in Final Order No. M119988 denying the claim of plaintiff S. David Olson on the basis that he is not an owner of the subject property as defined by ORS 197.352(11)(C) is erroneous, and is reversed.
8. The State's decision in Final Order No. M119988 approving the claim of plaintiff Duane Olson and electing to not apply the applicable state land use regulations as of the date Duane acquired the subject property, March 1, 2004, is upheld.

NOW, THEREFORE, IT IS ADJUDGED that

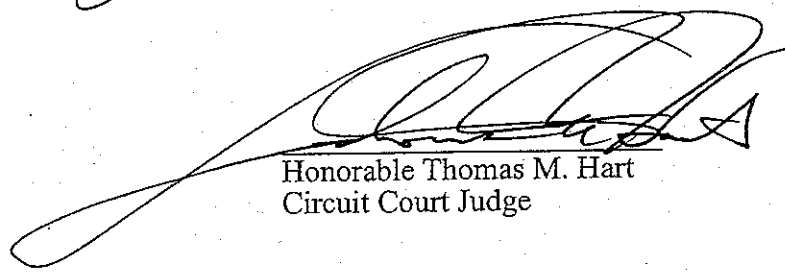
1. As to plaintiff Duane L. Olson, plaintiff's Petition for Judicial Review is granted and the Final Order No. M119988 is affirmed as to his claim, plaintiff's Measure 37 cause of action is moot.
2. As to plaintiff S. David Olson's Petition for Judicial Review, plaintiff's Petition is granted and the State's Final Order is reversed and modified as follows:
  - a. The State will not apply the following laws to S. David Olson's establishment of a single family dwelling on the 5.05-acre subject property; applicable provisions of Statewide Planning Goal 3, ORS 215, and OAR 660, division 33 enacted after September 21, 1964. These land use regulations will not apply to S. David Olson's use of the property only to the extent necessary to allow the claimant a use permitted at the time he acquired the property on September 21, 1964;

- b. Any use of the subject property by plaintiff under the terms of this judgment will remain subject to the following laws: (a) those laws not specified in subparagraph a, above; (b) any laws enacted or enforced by a public entity other than defendant; and (c) those laws not subject to ORS 197.352 including, without limitation, those laws exempt under ORS 197.352(3).
  - c. Nothing in this judgment relieves plaintiff from the necessity of obtaining a decision under ORS 197.352 from a local public entity that has jurisdiction to enforce a land use regulation applicable to a use of the subject property by the claimants.
3. to plaintiff S. David Olson's Measure 37 Compensation Claim, the court finds that the claim is moot.
  4. Plaintiff S. David Olson has a judgment against defendant as indicated above, and may petition the court for an award of attorney fees, costs and disbursements in accordance with ORS 183.497 and ORCP 68, to be awarded by supplemental judgment.

IT IS HEREBY ORDERED AND ADJUDGED that:

1. As to plaintiff S. David Olson, defendant's Final Order No. M119988 is hereby reversed and modified; and
2. That plaintiff Duane L. Olson's claim under Measure 37 is valid and defendant's Order No. M119988 as to plaintiff Duane L. Olson is affirmed, and the court finds his Measure 37 cause of action is moot.

DATED this 14th day of October, 2006, at Salem, Marion County, Oregon.



Honorable Thomas M. Hart  
Circuit Court Judge

Submitted by: Darsee Staley  
Senior Assistant Attorney General  
Of Attorneys for Defendant

DUE 1/23/07

STATE OF OREGON  
MARION COUNTY COURTS

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ENTERED

JAN 23 2007

Marion County Circuit Court

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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,  
Defendant.

Case No. 06C10222  
TMH

**SUPPLEMENTAL JUDGMENT  
(For Award of Costs)**

THIS MATTER came on regularly before this court on December 15, 2006, on plaintiffs' Cost Bill and Motion for Attorney Fees, the Hon. Thomas Hart presiding, and Wallace W. Lien, of Wallace W. Lien, P.C., appearing on behalf of plaintiffs and Darsee Staley, Senior Assistant Attorney General, appearing on behalf of defendant; and

This Court having heard the arguments of the parties, and reviewed the applicable pleadings, and being otherwise fully advised in the premises; now

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PAGE 1 - Supplemental Judgment

**WALLACE W. LIEN**

A PROFESSIONAL CORPORATION

1775 32<sup>nd</sup> Place NE, Suite A • Salem, Oregon 97301-8774 • 503-585-0105 office • 503-585-0106 fax  
Contact by e-mail at: wlien@lienlaw.com

2911

1 THEREFORE, IT IS ADJUDGED that plaintiffs shall be entitled to a prevailing party fee in  
2 the amount of \$550.00 from defendant, but that plaintiffs' request for attorney fees is otherwise  
3 denied.

MONEY AWARD	
Judgment Creditor	S. David Olson and Duane Olson 6984 Lakeside Drive NE Salem, OR 97305
Attorney for Judgment Creditor	Wallace W. Lien Wallace W. Lien, P.C. 1775 32 <sup>nd</sup> Place NE, Suite A Salem, OR 97301
Judgment Debtor	STATE OF OREGON
Date of Birth of Judgment Debtor	Not Applicable
SSN/EIN of Judgment Debtor	Unknown
Drivers License of Judgment Debtor	Not Applicable
Attorney for Judgment Debtor	Darsee Staley Senior Assistant Attorney General 1162 Court Street NE Salem, OR 97301
Others Entitled to Portion of Award	None
Amount of Money Award	\$550.00 for Prevailing Party Fees
Interest Accrual	Interest shall accrue at the judgment rate of nine percent (9%) per annum simple interest on the unpaid balance from the date hereof until paid in full.

21 DATED this 23<sup>rd</sup> day of January, 2007, at Salem, Marion County, Oregon.

22  
23  
24 Judge Thomas M. Hart  
Circuit Court Judge

25 Submitted by:  
26 Wallace W. Lien, OSB No. 79301  
Attorneys for Plaintiffs

DOE 2/14/07

**ER-11**  
STATE OF OREGON  
MARION COUNTY COURTS

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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, )  
 )  
Defendant. )

Case No. 06C10222  
TMH

**AMENDED  
SUPPLEMENTAL JUDGMENT  
(For Award of Costs)**

THIS MATTER came on regularly before this court on December 15, 2006, on plaintiffs' Cost Bill and Motion for Attorney Fees, the Hon. Thomas Hart presiding, and Wallace W. Lien, of Wallace W. Lien, P.C., appearing on behalf of plaintiffs and Darsee Staley, Senior Assistant Attorney General, appearing on behalf of defendant; and

This Court having heard the arguments of the parties, and reviewed the applicable pleadings, and being otherwise fully advised in the premises; now

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**WALLACE W. LIEN**

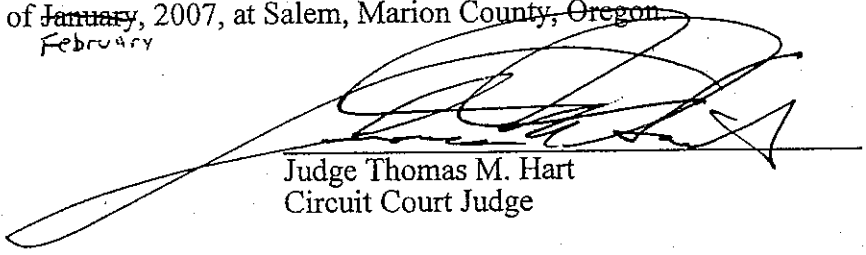
A PROFESSIONAL CORPORATION

1775 32<sup>nd</sup> Place NE, Suite A • Salem, Oregon 97301-8774 • 503-585-0105 office • 503-585-0106 fax  
Contact by e-mail at: wlien@lienlaw.com

1 THEREFORE, IT IS ADJUDGED that plaintiffs shall be entitled to a prevailing party fee in  
 2 the amount of \$550.00 from defendant, plus reimbursement of filing fee in the amount of \$206.00,  
 3 but that plaintiffs' request for attorney fees is otherwise denied.

MONEY AWARD	
Judgment Creditor	S. David Olson 6984 Lakeside Drive NE Salem, OR 97305
Attorney for Judgment Creditor	Wallace W. Lien Wallace W. Lien, P.C. 1775 32 <sup>nd</sup> Place NE, Suite A Salem, OR 97301
Judgment Debtor	STATE OF OREGON
Date of Birth of Judgment Debtor	Not Applicable
SSN/EIN of Judgment Debtor	Unknown
Drivers License of Judgment Debtor	Not Applicable
Attorney for Judgment Debtor	Darsee Staley Senior Assistant Attorney General 1162 Court Street NE Salem, OR 97301
Others Entitled to Portion of Award	None
Amount of Money Award	\$756 (Includes \$206 filing fee and \$550 prevailing party fee)
Interest Accrual	Interest shall accrue at the judgment rate of nine percent (9%) per annum simple interest on the unpaid balance from the date hereof until paid in full.

21 DATED this 1st day of ~~January~~, 2007, at Salem, Marion County, Oregon  
 22 February

23   
 24 Judge Thomas M. Hart  
 25 Circuit Court Judge

26 Submitted by:  
 Wallace W. Lien, OSB No. 79301  
 Attorneys for Plaintiffs

PAGE 2 - Amended Supplemental Judgment

**WALLACE W. LIEN**

A PROFESSIONAL CORPORATION

1775 32<sup>nd</sup> Place NE, Suite A • Salem, Oregon 97301-8774 • 503-585-0105 office • 503-585-0106 fax  
 Contact by e-mail at: wlien@lienlaw.com

**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 subsection (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.

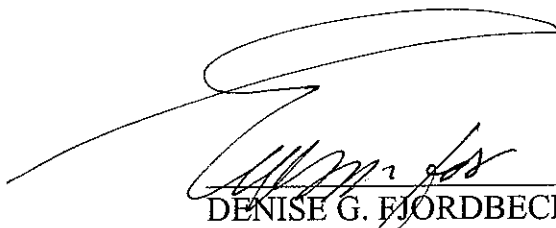
(13) If any portion or portions of this section are declared invalid by a court of competent jurisdiction, the remaining portions of this section shall remain in full force and effect. [2005 c.1]

## NOTICE OF FILING AND PROOF OF SERVICE

I certify that I directed the original Appellant's Brief to be filed with the State Court Administrator, Records Section, at 1163 State Street, Salem, Oregon 97301-2563, on February 16, 2007.

I further certify that I directed the Appellant's Brief to be served upon Wallace W. Lien, attorney for respondent, on February 16, 2007, by mailing two copies, with postage prepaid, in an envelope addressed to:

Wallace W. Lien  
Wallace W. Lien PC  
1775 32nd Pl. NE  
Salem, OR 97301



DENISE G. FJORDBECK  
Senior Assistant Attorney General

Attorney for Defendant-Appellant

DGF:blt/APPA4084