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DEPARTMENT OF JUSTICE
TRIAL DIVISION

February 8, 2007

Circuit Court Clerk's Office
Josephine County Courthouse
500 N.W. 6th, Room 256
Grants Pass, Oregon 97526

Re: *Pondelick et al v. Josephine Co. et al*
Josephine County Circuit Court No. 06CV0622

Dear Circuit Court Clerk:

Enclosed for filing please find the State's Reply in Support of Respondents' Motion to Strike in the referenced matter.

A postcard is enclosed for your use in notifying me of the action taken.

Sincerely,

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

Erika L. Hadlock
Sr. Assistant Attorney General

TRIQ8217/ELH/sek
Enclosures
cc: Walter L. Cauble
Steven E. Rich

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

ROY A. PONDELICK and TANA
PONDELICK, Trustees of the Roy A.
Pondelick and Tana Pondelick Revocable
Living Trust and NEAL A. PONDELICK,
Trustee of the Neal A. Pondelick Revocable
Trust,,

Petitioners,

v.

JOSEPHINE COUNTY and STATE OF
OREGON, DEPARTMENT OF LAND
CONSERVATION AND DEVELOPMENT,
DEPARTMENT OF ADMINISTRATIVE
SERVICES,

Respondents.

Case No. 06-CV-0622

REPLY IN SUPPORT OF RESPONDENTS'
MOTION TO STRIKE

The State has moved to strike petitioners' Declaratory Judgment Act and Measure 37 compensation against the State on two grounds: lack of jurisdiction and failure to state a claim upon which relief can be granted. In this memorandum, the State replies briefly to the arguments petitioner makes in opposing that motion.

A. Introduction

Petitioners filed Measure 37 claims with the State and Josephine County, which both determined that petitioners acquired the subject property in 2003 and granted them "waivers" of land use regulations back to that date. Petitioners disagree with the State's and County's assessment of when they acquired the property. Their petition in this case includes three claims against the State, each of which is premised on an allegation that they became "equitable owners" of the property in the early 1970s. (Petition ¶ 8). First, petitioners properly have

1 petitioned for judicial review under the Administrative Procedures Act (“APA”), alleging that
2 the State’s final order should be remanded because it does not acknowledge that petitioners
3 acquired their interest in the property in the 1970s. (Petition ¶¶ 16-19). Second, petitioners
4 contend they are entitled to monetary compensation because land use regulations that have not
5 been waived continue to apply to the property, reducing its fair market value. (Petition ¶¶ 22-
6 24). Third, petitioners seek a declaration that the waivers should date back to the 1970s.
7 (Petition ¶ 26-27).

8 The basic premise of the State’s motion to strike is simple. Because petitioners’ claims
9 are premised on the State having granted an inadequate waiver in its final order, this court has
10 jurisdiction only under the APA. This court lacks jurisdiction over the declaratory judgment and
11 Measure 37 compensation claims, which should be stricken.

12
13 **B. Petitioners’ claims necessarily are based on a contention that the State incorrectly
14 determined when they became owners of the property.**

15 Petitioners acknowledge that “the APA is the exclusive method for *challenging decisions*
16 made by state agencies * * *.” (Petitioners’ Response at 1; emphasis added). They contend,
17 however, that the APA exclusivity principle does not apply here because they do not challenge
18 the State’s decision on their Measure 37 claim; rather, they have filed a completely independent
19 claim for compensation under ORS 197.352(6).

20 Petitioners state boldly that the State’s action on their Measure 37 claim “is completely
21 irrelevant to the cause of action [for compensation] under ORS 197.352.” (Petitioners’ Response
22 at 2). They suggest that – even when the State properly waives all land use regulations that were
23 enacted or adopted since a claimant acquired real property and that restrict use of the property,
24 reducing its value – the claimant *still* is entitled to monetary compensation because *other* land
25 use regulations continue to apply to the property:

26 Even if respondents had granted petitioners the waiver which they contend is due under Measure 37, petitioners still could file a claim for compensation under Measure 37 if respondents continued to

1 enforce land use regulations on the subject properties,
notwithstanding the “waiver.”

2 * * * * *

3 The question for the court is whether respondents’ Third Claim for
4 Relief is a challenge to the validity of the state’s order. It is not
5 such a challenge because whether the state’s order is valid is
6 irrelevant to petitioners’ claim pursuant to ORS 197.352. The
state’s order is simply a communication from the state to the effect
that it will continue to apply land use regulations on petitioners’
property.

7 (Petitioners’ Response at 3).

8 The plain language of Measure 37 refutes petitioners’ contention that claimants can be
9 entitled to monetary compensation even when the State has granted an appropriate waiver of land
10 use regulations. Sections 8 and 10 of Measure 37, which describe the waiver remedy, provide
11 that governments may choose to not apply land use regulations “*in lieu of* payment of just
12 compensation.” ORS 197.352(8) (emphasis added); *see* ORS 197.352(10). “In lieu of” means
13 “instead of”; consequently, issuance of a waiver completely replaces the compensation remedy
14 that otherwise would be available. In other words, the compensation and waiver remedies are
15 alternatives. If the government chooses waiver, the provisions related to just compensation no
16 longer apply.

17 Section 6 of Measure 37, which creates a cause of action for compensation, does state
18 that the cause of action exists when “a land use regulation continues to apply to the subject
19 property more than 180 days after the present owner of the property has made written demand
20 for compensation.” ORS 197.352(6). Petitioners read that language literally – and out of context
21 – to mean that a landowner is entitled to monetary compensation *whenever* the State continues to
22 apply a land use regulation to his or her property, not only in those cases in which the State
23 incorrectly has denied a Measure 37 claim or granted too narrow a waiver. (Petitioners’
24 Response at 4).

25 That argument contradicts both the language of the statute and its purpose. Section 6 of
26 Measure 37 gives the government “180 days after the present owner of the property has made

1 written demand for compensation *under this section*” to assess claims and to decide whether to
2 waive land use regulations or to grant compensation. ORS 197.352(6) (emphasis added). A
3 demand for compensation “under this section” is a demand for compensation under subsections 1
4 and 2 of the statute, which link the amount of monetary compensation due to the government’s
5 continued application of certain land use regulations to property. And subsections 8 and 10 then
6 provide that the government may elect to issue a waiver “in lieu of” granting *that* compensation.
7 Thus, read in context, section 6 creates a cause of action for compensation only when the
8 government has either chosen not to waive pertinent land use regulations or has issued a waiver
9 that, as a matter of law, is too narrow.

10 In addition, petitioners’ argument would completely defeat the voters’ intent of having
11 the State and other government bodies waive certain land use regulations, allowing some people
12 to develop land they way they could have when they acquired it. If compensation *always* were
13 due, even if a proper waiver were granted, the government never would have incentive to issue a
14 waiver. That cannot be how the voters intended Measure 37 to work.

15 In sum, petitioners could be entitled to monetary compensation under Measure 37 only if
16 they did not get an adequate waiver. It follows that petitioners could have a claim to
17 compensation only if the State’s final order was flawed because it should have waived land use
18 regulations going back to the 1970s, not only those enacted or enforced after 2003.
19 Consequently, petitioners’ claim for compensation *necessarily* is premised on a theory that the
20 State’s final order is invalid, despite their contention that it is not.

21
22 **C. Because petitioners’ claims are based on the premise that the final order is invalid,
this court has jurisdiction only under the APA.**

23 The main focus of the motion to strike is the State’s explanation that the APA provides
24 the exclusive means by which a court may review an agency order that resolves a Measure 37
25 claim. In arguing to the contrary, petitioners assert that the “APA exclusivity” cases upon which
26

1 the State relies do not apply here because those cases involved issues like “the state’s incorrect
2 interpretation of [a] statute.” (Petitioners’ Response at 3).

3 Petitioners’ attempt to distinguish cases like *Clarke Electric, Inc. v. State of Oregon*, 93
4 Or App 693 (1988), is unavailing. In *Clarke*, the plaintiff contractor sued the State, which had
5 rejected its bid on a contract for installation of traffic signals. The plaintiff sought damages
6 associated with the State’s alleged violation of a statute that required the State to “award the
7 contract to the lowest responsible bidder.” *Id.* at 695-96. The Court of Appeals held that the
8 circuit court had lacked jurisdiction over the case because the plaintiff’s only recourse against the
9 State would have been to file an APA challenge to the order in which the State rejected its bid:

10 Finally, plaintiff argues that it is seeking damages in tort
11 under the Oregon Tort Claims Act, ORS 30.265, not review of the
12 Division's order and, therefore, that the time limitations of the
13 APA are not applicable. However, *defendant's alleged liability in*
14 *tort is premised on a finding that defendant's order rejecting the*
15 *bid was improper*. That order was a final order in other than a
16 contested case, and *the exclusive procedure for review of such an*
17 *order is under the APA*. Consequently, the trial court did not err in
18 granting [the State’s] motion to dismiss for failure to comply with
19 the APA time limitations for judicial review.

20 *Id.* at 697. *See also Muller v. Dept. of Agriculture*, 164 Or App 11, 15-17 (1999) (plaintiff sued
21 State for damages allegedly caused by the State’s denial of the plaintiff’s request for a field-
22 burning permit; Court of Appeals held that the APA provided the exclusive means for review of
23 the agency’s decision, and the circuit-court claim for damages should have been dismissed).

24 In this case, as in *Clarke*, the State’s alleged liability for monetary damages is premised
25 on its final order violating a statute: here, Measure 37. Because the State cannot owe petitioners
26 monetary compensation unless the waiver issued in the final order was inadequate, petitioners’
exclusive means for seeking review was under the APA. Consequently, this court lacks
jurisdiction over petitioners’ Measure 37 and declaratory judgment claims against the State and
should strike them from the petition.

1 The decision in *Premier Technology*, 136 Or App 124 (1995), upon which petitioners
2 rely, does not change the analysis. In that breach-of-contract case, the plaintiff sued a state
3 agency for terminating a contract. Because the plaintiff was “not claiming that the agency action
4 violated a statute or rule or was otherwise in violation of administrative law,” the Court of
5 Appeals rejected the State’s argument that the plaintiff should have sought relief under the APA.
6 *Id.* at 132. Here, as explained above, petitioners’ claim necessarily must be based on an
7 argument that the State violated a statute – Measure 37 – by not granting them all relief they
8 sought in their Measure 37 claim. That distinction is significant because the APA generally
9 provides relief only where agency action violates a constitutional, statutory or regulatory
10 provision – not where the agency’s alleged liability is based *solely* on a contractual or tort theory.
11 *See Muller*, 164 Or App at 15-16 (distinguishing case from *Premier Technology*). Because
12 petitioners allege that the State violated Measure 37, APA exclusivity principles require that
13 petitioners’ declaratory judgment and Measure 37 claims against the State be dismissed.

14

CONCLUSION

15
16 For the reasons stated above and in the memorandum supporting the State’s motion to
17 strike, this court lacks jurisdiction over petitioners’ declaratory judgment and Measure 37 claims
18 because the APA provides the exclusive means for challenging state-agency decisions that are
19 embodied in final orders. For the same reasons, petitioners have failed to state ultimate facts

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1 constituting claims upon which relief can be granted. This court should strike the declaratory
2 judgment and Measure 37 claims against the State from the petition.

3 DATED this 5th day of February, 2007.

4 Respectfully submitted,

5 HARDY MYERS
6 Attorney General

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1 **CERTIFICATE OF SERVICE**

2 I certify that on February ^{8th} 2007, I served the foregoing *Reply in Support of Respondents'*
3 *Motion to Strike* upon the parties hereto by the method indicated below, and addressed to the
4 following:

5
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7 Cauble, Dole & Sorenson
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