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

JANELL POWELL,  
Plaintiff,  
v.  
STATE OF OREGON, by and through the  
Oregon Department of Land Conservation and  
Development,  
Defendant.

Case No. 06CV0038  
DEFENDANT'S REPLY ON ITS MOTION TO  
DISMISS  
Oral Argument Requested – 30 minutes

**I. Introduction: the questions presented by the State’s motion to dismiss**

The only questions before the court at this time are: (1) whether this court has subject-matter jurisdiction over plaintiff’s Measure 37 “Claim for Compensation” and (2) whether plaintiff can state a claim for monetary compensation under Measure 37 when the State has elected, instead of paying compensation, to not apply certain land use regulations to plaintiff’s proposed use of the property. The answer to both of those questions is “no.”

Instead of focusing on the two questions presented in the State’s motion to dismiss, however, much of the plaintiff’s response addresses the underlying dispute between the parties, which relates to the proper scope of the Measure 37 “waiver” – the decision not to apply certain land use regulations – that the State granted plaintiff in the Final Order issued in September 2005 (Ex 3 to Decl of Staley). The “waiver date” is the date on which plaintiff acquired the property. ORS 197.352 (8). Thus, the question this court *eventually* may need to address, if it denies the State’s dismissal motion, is whether plaintiff’s present ownership commenced in 1967 or 1985.

That “scope of waiver” question is not, however, presented by the State’s motion to dismiss. Consequently, the argument on pages 9 through 14 of plaintiff’s response memorandum

1 is premature and not relevant to any issue currently before the court. Accordingly, the State does  
2 not address that issue in this reply.

3 **II. This court lacks subject-matter jurisdiction over plaintiff's Measure 37**  
4 **compensation claim.**

5 Plaintiff argues that she was not required to pursue relief under the Administrative  
6 Procedures Act ("APA") because she is not challenging the Final Order. Instead, plaintiff  
7 contends she merely seeks compensation pursuant to Section 6 of Measure 37 (now ORS  
8 197.352 (6)) because "offending regulations imposed by the State between 1967 and 1985"  
9 continue to apply to their property, reducing its value (Pl's Resp, p 5). The difficulty with  
10 plaintiff's argument is that it assumes that the State should have given them a waiver dating back  
11 to 1967 instead of waiving only those land use regulations that were enacted or adopted after  
12 May 29, 1985, that prevent plaintiff's desired use and reduce the value of the property. In other  
13 words, plaintiff's Measure 37 complaint necessarily is premised on a contention that the State  
14 erred when it determined – as announced in the Final Order – that plaintiff was entitled only to a  
15 waiver dating back to 1985. Thus, the substance of the complaint is a challenge to the  
16 correctness of the Final Order, even though plaintiff frames her allegations as a direct claim  
17 under Measure 37.

18 In arguing that plaintiff was not required to seek judicial review under the APA, plaintiff  
19 relies on the Supreme Court's decision in *Boise Cascade Corp. v. Board of Forestry*, 325 Or 185  
20 (1997), which plaintiff argues stands for the proposition that a circuit court has jurisdiction over  
21 a compensation claim, even when that claim stems from an agency order. (Pl's Resp, p 6). But  
22 that is not what *Boise* holds. In that case, the Board of Forestry issued an order denying the  
23 plaintiff's logging plan on the ground that it did not sufficiently protect spotted-owl habitat. *See*  
24 *Boise*, 325 Or at 188. The plaintiff filed a circuit-court action for compensation claiming that the  
25 denial of its request to log constituted an unconstitutional taking without just compensation. The  
26 question before the Supreme Court was whether the circuit court could decide that takings claim

1 or needed to wait for the agency to determine whether its own action had been unconstitutional.  
2 The Supreme Court held that the circuit court had concurrent jurisdiction over the takings  
3 question, in part because that *constitutional* issue “traditionally falls within an area adjudicated  
4 by courts.” *Boise*, 325 Or at 196.

5 Most significantly for purposes of this case, the question before the circuit court in *Boise*  
6 – whether the plaintiff was entitled to compensation as a result of an unconstitutional taking –  
7 did *not* depend on whether the Board of Forestry had erred in issuing the underlying order, which  
8 merely denied the logging application based on the presence of spotted-owl habitat and did not  
9 involve the takings issue.<sup>1</sup> Consequently, the issue before the Supreme Court was whether the  
10 circuit court could decide that constitutional question in the first instance, or had to wait for the  
11 agency to address that issue, too. That is a completely different question from the one presented  
12 here, which is what type of circuit-court proceeding plaintiff was required to bring to challenge  
13 the correctness of a decision that the agencies *already* had made in a final order: a petition for  
14 judicial review under the APA or a compensation claim under ORS 197.352 (6). *Boise* provides  
15 no assistance in answering that question.

16 *Dunn v. City of Redmond*, 303 Or 201 (1987), which plaintiff also cites, provides even  
17 less support for plaintiff’s assertion that this court may decide the correctness of agency action in  
18 the context of a Measure 37 compensation claim. In *Dunn*, the Supreme Court held that a circuit  
19 court could *not* properly decide a compensation claim when the plaintiff’s entitlement to  
20 compensation depended on the validity of agency action, and that action had not yet proceeded  
21 through exclusive LUBA review. 303 Or at 209.

22 Plaintiff’s remaining arguments against the exclusivity of the APA remedy are similarly  
23 unconvincing. First, plaintiff notes that Measure 37 does not cross-reference the APA.  
24 Plaintiff’s observation is correct, but lacks legal significance. The Declaratory Judgment Act,  
25 like Measure 37, does not refer to the APA. *See* ORS 28.010, *et seq.* Nonetheless, a person

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<sup>1</sup> The Board did not address the constitutional takings issue because the plaintiff “did not at hearing attempt to present evidence that any “taking” had in fact occurred.” 325 Or at 189.

1 aggrieved by an agency order may not circumvent APA review by challenging the agency's  
2 action by seeking declaratory relief. That is true even though the Declaratory Judgment Act  
3 includes a provision stating expressly that the Act is "remedial" and "is to be liberally construed  
4 and administered." ORS 28.120.

5 Second, plaintiff asserts that Section 7 of Measure 37 "states that any procedure adopted  
6 by the State cannot act as a prerequisite to the filing of a claim for compensation in the Circuit  
7 Court"(Pl's Resp, p 2). In fact, Section 7 says only that any procedures the State or other  
8 government may adopt *for the processing of claims* shall not act as prerequisites to the filing of a  
9 Section 6 compensation claim in circuit court. That is not the same as stating that a person  
10 dissatisfied with the State's decision on a Measure 37 claim may file a Section 6 compensation  
11 claim without first having sought review under the APA. And plaintiff overlooks what Measure  
12 37 *does* say about other statutory remedies – that the measure "is not intended to modify or  
13 replace any other remedy." ORS 197.352 (12). In other words, the Section 6 compensation  
14 claim neither replaces the APA remedy nor modifies its exclusive nature.

15 Finally, plaintiff notes that the Final Order in this case did not issue after a contested-case  
16 hearing and suggest that the absence of such a hearing means they were not required to seek  
17 relief pursuant to the APA. But the statute that describes the exclusive nature of the APA  
18 remedy applies to orders in other than contested cases, like the Final Order here, not only to  
19 orders issued after contested-case hearings. ORS 183.480.<sup>2</sup> In addition, the line of appellate  
20 cases that explains APA exclusivity includes cases that involved orders in other than contested  
21 cases; that doctrine is not limited to litigation that arises from orders in contested-case

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22 <sup>2</sup> ORS 183.480 provides, in part:

23 (1) Except as provided in ORS 183.415 (5)(b), any person adversely affected or aggrieved by an  
24 order or any party to an agency proceeding is entitled to judicial review of a final order, whether  
25 such order is affirmative or negative in form. A petition for rehearing or reconsideration need not  
26 be filed as a condition of judicial review unless specifically otherwise provided by statute or  
agency rule

(2) Judicial review of final orders of agencies shall be *solely* as provided by ORS 183.482,  
183.484, 183.490 and 183.500.

(Emphasis added)

1 proceedings. *See, e.g., Mendieta v. Division of State Lands*, 148 Or App 586, 599-600 (1997),  
2 *rev dismissed*, 328 Or 331 (1999) (where “redress would have been available under ORS  
3 183.484, had plaintiff timely filed their petition for judicial review[,]” the Court of Appeals held,  
4 “the trial court erred in granting plaintiffs relief under ORS 183.490 and ORS 28.010”).

5         Moreover, the fact that no contested-case hearing was held does not mean, as plaintiff  
6 contends, that they did not have “any ability to be heard.” (Pl’s Resp, p 5). To the contrary,  
7 plaintiff could attach any evidence plaintiff wished to the Measure 37 claim plaintiff filed with  
8 the State, including any evidence supporting plaintiff’s contention that she acquired the property  
9 in 1967. Plaintiff also had an opportunity to comment on the draft staff report that related to her  
10 claim. If the evidence or argument that plaintiff provided the state agencies was incomplete, that  
11 is a problem of her own making. It does not call into question the adequacy of APA relief or  
12 entitle plaintiff to circumvent that judicial-review process.

13         In addition, plaintiff could have supplemented whatever material she submitted to the  
14 State had plaintiff filed a timely petition for judicial review under ORS 183.484:

15                 “On judicial review of an order in other than a contested case proceeding,  
16 ORS 183.484 affords the parties the opportunity to develop a record like the one  
17 that parties are entitled to develop at an earlier stage in a contested case  
proceeding.”

18 *Norden v. Water Resources Dept.*, 329 Or 641, 649 (2000). Plaintiff is simply wrong when she  
19 asserts that “there is, at best, a limited record available for judicial review” (Pl’s Resp, p 6).

20         In sum, the only way in which plaintiff properly could challenge the State’s decision on  
21 their Measure 37 claim was by filing a timely petition for judicial review. Because she did not,  
22 plaintiff’s complaint should be dismissed.

23 **III. Plaintiff cannot state a claim for Measure 37 compensation because the State has**  
24 **elected to waive land use regulations in lieu of paying compensation.**

25         As the State explained in its original motion, plaintiff has not stated – and cannot state – a  
26 claim for compensation under Measure 37 because the State has elected to not apply certain land

1 use regulations in lieu of paying just compensation. Plaintiff's responsive memorandum does  
2 not address that issue; nonetheless, the State provides a bit more explanation of this aspect of its  
3 motion to dismiss.

4 Measure 37 provides two alternative remedies – payment of just compensation and  
5 “waiver” – and permits the government, not the claimant, to choose between them. In this case,  
6 the State has elected the waiver remedy by opting not to apply certain land use regulations to  
7 plaintiff's property in lieu of paying compensation. If plaintiff had timely challenged the scope  
8 of that waiver under ORS 183.484, a reviewing court theoretically might have determined that  
9 plaintiff was correct that she first acquired the property in 1967, not in 1985. At that point, the  
10 State once again would have had the *choice* whether to pay just compensation or, instead, to not  
11 apply land-use regulations back to 1967. *See* ORS 197.352 (8), (10). In other words, the State  
12 would not have been compelled to pay monetary compensation even if plaintiff had successfully  
13 challenged the Final Order in an ORS 183.484 judicial-review proceeding. Plaintiff cannot state  
14 a claim for such compensation merely by attempting to avoid APA review.


15 **IV. Conclusion**

16 For the reasons stated above and in the State's motion to dismiss, this court lacks  
17 jurisdiction over plaintiff's Measure 37 claim and plaintiff has failed to state ultimate facts  
18 constituting a claim upon which relief can be granted. This court should dismiss the complaint  
19 with prejudice.

20 DATED this 17<sup>th</sup> day of October, 2006.

21 Respectfully submitted,

22 HARDY MYERS  
23 Attorney General


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1 **CERTIFICATE OF SERVICE**

2 I certify that on October 17, 2006, I served the foregoing *Defendant's Reply on its*  
3 *Motion to Dismiss* upon the parties hereto by the method indicated below, and addressed to the  
4 following:

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