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

ROBERT L. RIEMENSCHNEIDER,

Plaintiff,

v.

CROOK COUNTY, a political subdivision of
the State of Oregon; and STATE OF
OREGON, acting by and through the
Department of Land Conservation and
Development,

Defendants.

Case No. 06CV0074

STATE OF OREGON'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 compensation under Measure 37 when the State decided Plaintiff’s claim within the time allowed . The answer to both of those questions is “no.”

Instead of focusing on the two questions presented in the State’s motion to dismiss, much of the plaintiff’s Response addresses the underlying dispute between the parties, which relates to DLCD’s decision to deny plaintiff’s claim in its Final Order M 119330 issued on July 11, 2005 (Ex 3 to Declaration of Heather Awlasewicz submitted concurrently with the State’s Motion to Dismiss). Whether DLCD correctly denied plaintiff’s claim in its Final Order is not an issue presented by the State’s motion to dismiss. Consequently, the argument on pages 10 through 17 of plaintiff’s response is premature and not relevant to any issue currently before the court. Accordingly, the State does not address that issue in this Reply.

1 **II. Nothing in plaintiff's response refutes that a state agency must render a decision**
2 **regarding his claim, thereby invoking the APA and its exclusive remedies.**

3 Plaintiff argues that he was not required to pursue relief under the Administrative
4 Procedures Act ("APA") because he is not challenging the Final Order. Instead, plaintiff
5 contends, he merely seeks damages pursuant to Sections 1, 4 and 6 of Measure 37 (now ORS
6 197.352 (1), (4) and (6)) because the "offending regulations continue to be applied against the
7 claimant's property more than 180 days after a claim is filed with the affected agency" (Pl's
8 Resp., p 3).

9 The difficulty with plaintiff's argument is that it assumes that the State should have given
10 him a waiver dating back to July 29, 1985 instead of outright denying the claim. In other words,
11 plaintiff's Measure 37 complaint necessarily is premised on a contention that the State erred
12 when it determined – as announced in the Final Order – that plaintiff's demand was not valid
13 because no land use regulations had been adopted or enacted that diminished the value of the
14 subject property. Thus, the substance of the complaint is a challenge to the correctness of the
15 Final Order, even though plaintiff frames his allegations as a direct claim under Measure 37.

16 Moreover, although plaintiff argues that Measure 37 requires only that the plaintiff make
17 a claim for compensation and that certain land use regulations continue to apply after 180 days,
18 plaintiff does not propose how the agency acts upon that claim. Plaintiff offers no alternative
19 method for agencies to render or communicate their decisions on Measure 37 demands, other
20 than by issuing a final order. Whereas, Measure 37 specifically requires that an agency take
21 action by determining whether to offer compensation or not apply the land use regulations at
22 issue following a written demand by property owners. A "final order" is only the written
23 expression of the agency's final action. ORS 183.310 (1) and (6) (b). Thus, the final order issued
24 by an agency pursuant to a Measure 37 claim is a "final order" under the APA and subject to its
25 exclusive remedy provisions.

26

1 III. **This Court lacks subject matter jurisdiction because the APA, not ORS Chapter 34**
2 **relating to the procedure for seeking a writ of review, governs the procedures in**
3 **which a claimant seeks to challenge a decision made by a state agency.**

4 In arguing that plaintiff was not required to seek judicial review under the APA, plaintiff
5 erroneously relies on the decisions regarding review of an action by a local government review
6 ORS 34.020. (Pl's Resp., p. 6-8). *Ettner v. City of Medford*, 155 Or App 435 (1998), *Shockey v.*
7 *City of Portland*, 313 Or 414, 421-22 (1992) and *State ex rel City of Powers v. Coos County*
8 *Airport*, 201 Or App 222 (2005) are inapplicable to the instant action because none involved a
9 petition for judicial review under the APA. The fundamental and significant difference between
10 these remedies is that ORS 183.480(2) of the APA specifically requires that "[j]udicial review of
11 final orders of agencies shall be solely as provided by ORS 183.482, 183.484, 183.490 and
12 183.500". By contrast, the section governing the procedures for filing a writ of review, ORS
13 34.040, provides that a writ of review "shall" be allowed to challenge only those decisions where
14 "a substantial interest of a plaintiff has been injured and an inferior court including an officer or
15 tribunal other than an agency as defined in ORS 183.310(1) in the exercise of judicial or quasi-
16 judicial functions...". *Ettner v. City of Medford*, 155 Or. App at 438; *State ex rel City of Powers*
17 *v. Coos County Airport*, 201 Or App 222 at 229. The APA does not so limit the right to seek a
18 petition for review.

19 Based on the foregoing, none of the cases cited by plaintiff stand for the proposition that
20 a petition for review is not the exclusive means of challenging a final order by a state agency
21 because each case only discusses a writ of review. This is especially true because the exclusive
22 language of the APA only applies to decisions made by a state agency. whereas decisions made
23 by any other governmental entity may be governed by ORS 34.040. ORS 183.310 (agency is
24 defined as any "state board, commission, department, or division thereof, or officer authorized
25 by law to make rules or to issue orders, except those in the legislative and judicial branches")
26 Therefore, the exclusivity language of the APA, which is the basis for the State's motion to

1 dismiss, was not at issue in any of the cases cited by plaintiff because none involved a decision
2 made by a state agency.

3 It is also worth nothing that plaintiff misconstrues and inappropriately applies the Court
4 of Appeal's discussion in *State ex rel City of Powers v. Coos* as standing for the proposition that
5 if the voters did not include a specific reference in Measure 37 to the APA, then the APA was
6 not intended to be the exclusive remedy. (Pl's Resp p 7.) Plaintiff's interpretation and
7 application of this case is erroneous. As discussed above, all actions taken by a state agency are
8 subject to the APA, and all decisions made in other than contested cases are required, under the
9 APA, to be challenged by petition for judicial review. ORS 183.480(2), 183.484. As a result, a
10 petition for review is the only available remedy pursuant to the express language of the APA.

11 The language of Measure 37 need not specifically refer to exclusivity, it must only
12 provide that a state agency be required to take action. At that point, the laws governing the
13 procedures that a state agency must follow when taking action, i.e. the APA, are exclusively
14 invoked. Consequently, only those remedies provided for in the APA are available to challenge
15 a decision made by the state agency.

16 By contrast, decisions made by governmental entities other than county agencies are not
17 necessarily entitled to a writ of review. As the matter of *Ettner v. City of Medford*, 155 Or. App
18 435 (1998) cited by plaintiff explains, a claimant must meet the requirements set forth in ORS
19 34.040, particularly; the claimant must seek to challenge a judicial or quasi-judicial decision.
20 Accordingly, where a claimant seeks to challenge a decision that was not the product of judicial
21 or quasi judicial review, the claimant is entitled to a writ of review only if a statute or other law
22 specifically entitles the claimant to seek a writ of review. That was the issue that was squarely
23 before the Court of Appeals in *State ex rel City of Powers v. Coos County Airport*, 201 Or App
24 222, *supra*.

25 The plaintiffs in *State ex rel City of Powers v. Coos County Airport* brought an action for
26 declaratory relief challenging a resolution to create a county airport. The defendants then moved

1 to dismiss for lack of subject matter jurisdiction on the grounds that a writ of review was the
2 plaintiffs' exclusive remedy.

3 The court first recognized that "when a writ of review is available, it is the *exclusive*
4 remedy and that a court lacks jurisdiction over a declaratory judgment action that seeks review of
5 governmental actions that are subject to review by a writ of review." *Id.* at 229. Thus "a person
6 who may challenge a governmental decision by writ of review may not bring an action for a
7 declaratory judgment regarding the decision." *Id.* Ultimately, the Court of Appeals held that the
8 county's decision to form the airport district was quasi-judicial and decided, on that basis alone,
9 that a writ of review was the exclusive means for challenging the decision. *Id.* at 230.¹

10 Numerous cases under the APA illustrate the erroneous nature of plaintiff's argument that
11 the absence of a specific reference in Measure 37 has legal significance. The Declaratory
12 Judgment Act, like Measure 37, does not refer to the APA. *See* ORS 28.010, *et seq.*
13 Nonetheless, a person aggrieved by an agency order may not circumvent APA review by
14 challenging the agency's action by seeking declaratory relief. That is true even though the
15 Declaratory Judgment Act includes a provision stating expressly that the Act is "remedial" and
16 "is to be liberally construed and administered." ORS 28.120; *Bay River v. Envir. Quality*
17 *Comm.*, 26 Or App 717, 720 *rev denied*, 276 Or 555 (1976), *see also Clarke Electric, Inc. v.*
18 *State Highway Division*, 93 Or App 693 (1988) (plaintiff asserting claim under Oregon Torts
19 Claims Act required to follow APA although statute did not make express reference to APA)

20 It is clear from the foregoing that Plaintiff's supposition, that APA does not provide the
21 exclusive means of review because there is no reference to it in Measure 37, is an inaccurate
22 legal conclusion.

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25 ¹ Prior to reaching this decision, the appellate court discussed the possibility that the board's decision may be
26 construed as a legislative decision *Id.* at 229. In that context, the appellate court agreed that the statute creating the
airport district would have to expressly announce that a writ of review was the exclusive means to challenge the
boards' decision *Id.*

1 **IV. Measure 37 does not repeal the remedies permitted in the APA, rather it allows any**
2 **claimant the right to challenge a state agency's decision by petition for judicial**
3 **review.**

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

15 Second, 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 APA². 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 183.480.³ In addition, the line of appellate

20 _____
21 ² On January 31, 2007, the Court of Appeals issued an opinion in *Corey v. DLCD*, Case No. A129905. The
22 petitioners in that case sought judicial review of a DLCD order opting to waive enforcement of certain land use
23 regulations in lieu of paying compensation under Measure 37. The opinion concludes that, "under ORS 183.482,
24 jurisdiction for judicial review lies in this court." Slip op. at 6. That conclusion is not final until the appellate
25 judgment issues. ORS 19.450; ORAP 14.05. The appellate judgment has not been issued in *Corey*. In an earlier
26 case *Hoff v. DLCD*, CA A129414, the Court of Appeals dismissed a petition for review, finding that it did not have
27 jurisdiction under ORS 183.482 to review DLCD's order waiving certain land use regulations in lieu of paying
28 compensation under Measure 37. The opinion in *Corey* does not mention the earlier unpublished order in *Hoff*

³ ORS 183.480 provides, in part:

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

1 cases that explains APA exclusivity includes cases that involved orders in other than contested
2 cases; that doctrine is not limited to litigation that arises from orders in contested-case
3 proceedings. *See, e.g., Mendieta v. Division of State Lands*, 148 Or App 586, 599-600 (1997),
4 *rev dismissed*, 328 Or 331 (1999) (where “redress would have been available under ORS
5 183.484, had plaintiff timely filed their petition for judicial review[,]” the Court of Appeals held,
6 “the trial court erred in granting plaintiffs relief under ORS 183.490 and ORS 28.010”).

7 Finally, the fact that no contested-case hearing was held does not mean, as plaintiff
8 contends, that they did not have “any ability to be heard.” (Pl’s Resp, p 5). To the contrary,
9 plaintiff could attach any evidence plaintiff wished to the Measure 37 claim plaintiff filed with
10 the State, including any evidence supporting plaintiff’s contention that he acquired the property
11 in 1985. Plaintiff also had an opportunity to comment on the draft staff report that related to his
12 claim. If the evidence or argument that plaintiff provided the state agencies was incomplete, that
13 is a problem of him own making. It does not call into question the adequacy of APA relief or
14 entitle plaintiff to circumvent that judicial-review process.

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

17 “On judicial review of an order in other than a contested case proceeding, ORS
18 183.484 affords the parties the opportunity to develop a record like the one that
parties are entitled to develop at an earlier stage in a contested case proceeding.”

19 *Norden v Water Resources Dept*, 329 Or 641, 649 (2000). Plaintiff is simply wrong when he
20 asserts that “there is, at best, a limited record available for judicial review” (Pl’s Resp, p 6).
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24 agency rule.
25 (2) Judicial review of final orders of agencies shall be *solely* as provided by ORS 183 482,
26 183 484, 183.490 and 183.500.

(Emphasis added).

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

4 **V. Plaintiff cannot state a claim for Measure 37 compensation because the State has**
5 **denied the claim and Section 6 is not a second bite at the apple.**

6 Plaintiff asserts that a literal interpretation of ORS 197.352 (6) permits plaintiff to sue for
7 compensation simply because the State denied the claim and continued to enforce land use
8 regulations that diminished the value of his property 180 days after plaintiff made his claim.
9 (Pl’s Resp p 5-6). This interpretation of Section 6 is so sweeping that it negates the clear intent
10 of the statute to require public entities in the first instance to decide the merits of compensation
11 claims and choose the relief to be provided. Interpreting Section 6 in isolation violates the basic
12 rule of statutory construction—the first level analysis is text *and context*.

13 Without the context of Measure 37 as a whole, the text of Section 6 is too vague and
14 ambiguous to be enforced. For example, Section 6 does not specify which land use regulations
15 are at issue in the “cause of action” or even against whom the action may be asserted.

16 *If a land use regulation continues to apply to the subject property more*
17 *than 180 days after the present owner of the property has made written demand*
18 *for compensation under this section, the present owner of the property, or any*
19 *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.

20 ORS 197.352 (6) (emphasis added). A literal reading of Section 6 alone grants property owners
21 a cause of action based on any land use regulation but no one to sue. The definition of qualifying
22 regulations in Section 1, the exceptions in Section 3, and the delegation of responsibility to the
23 public entities that enforce qualifying regulations in Sections 1, 4, 5 and 7-10 provide critical
24 context for a reasonable interpretation of Section 6. Because Measure 37 provides for state
25 agencies to act on Measure 37 demands, the APA is also context for interpretation of Measure
26 37.

1 Measure 37 requires property owners to submit a demand for compensation to public
2 entities (§§ 4, 5, 6), and permits public entities to adopt “procedures for the processing of
3 claims” (§ 7). Measure 37 also provides that public entities have the option, in their discretion,
4 either to pay compensation or grant alternate “waiver” relief to a property owner who submits a
5 valid written demand (§§ 8, 10). In this context, Section 6 plainly functions as a secondary
6 remedy in the event a public entity fails to process a demand and choose the type of relief to be
7 granted—within 180 days. Furthermore, the availability of a court action and the provision for
8 attorney fees creates an incentive for the public entity to decide claims and to do so within 180
9 days. Construing Section 6 as a second chance to make the same claim for compensation is not
10 compelled by the text and context of the statute, renders much of Measure 37 superfluous,
11 nullifies the established remedy under the APA, and needlessly complicates a process advertised
12 to the voters in 2004 as streamlined.⁴

13 Plaintiff’s reference to Section 7 in support of his position also provides a key part of the
14 context of Section 6. Section 7 provides:

15 A metropolitan service district, city, or county, or state agency may adopt
16 or apply procedures for the processing of claims under this section, but *in no*
17 *event shall these procedures act as a prerequisite to the filing of a compensation*
18 *claim* under subsection (6) of this section, nor shall the failure of an owner of
19 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.

20 The “procedures” that are not “a prerequisite” to a Section 6 claim are the “procedures for the
21 processing of claims,” if any are adopted by a metropolitan service district, city, county or state
22 agency. The DAS adopted such procedures at OAR 125-145-0010 to 125-145-0105—none of
23 which purport to be a prerequisite to filing a Section 6 claim. The APA is a state statute, not a
24 procedure adopted by a state agency pursuant to Section 7 for the purpose of Measure 37 claims
25 processing.

26 ⁴ Search for “streamline” in the 2004 Voters’ Pamphlet, available on the Secretary of State’s
website at http://www.sos.state.or.us/elections/nov22004/guide/meas/m37_fav.html.


1 **IV. Conclusion**

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

6 DATED this 1st day of February, 2007.

7 Respectfully submitted,

8 HARDY MYERS
9 Attorney General

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CERTIFICATE OF SERVICE

I certify that on February 1 , 2007, I served the foregoing *Defendant State of Oregon's Reply on Its Motions to Dismiss* upon the parties hereto by the method indicated below, and addressed to the following:

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