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Judge Gary S. Thompson

Judge George W. Neilson
Presiding Judge

Judge Daniel J. Ahern

Twenty-Second Judicial District Trial Courts

July 17, 2007

RECEIVED

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Re: Riemenschneider v. Crook County et al
Crook Co. Circuit Court Case No. 06-CV-0074

Dear Parties:

This matter came before the Court on June 21, 2007, on various motions. The Court heard argument of counsel and took the matter under advisement. The Court has since had an opportunity to review the briefs and supporting material. The following is the Court's finding of fact and ruling.

Finding of Facts

The parties don't contest the chronology of events.

- On November 2, 2004, the voters of the State of Oregon passed Ballot Measure 37.

- On or about January 14, 2005, Plaintiffs submitted a claim for compensation to the Defendants pursuant to the provisions of Ballot Measure 37.
- On July 11, 2005, the State determined that Plaintiff was not entitled to compensation under Measure 37.
- On December 8, 2006, Plaintiff filed a complaint in Crook County Circuit Court seeking compensation under Ballot Measure 37 for the loss in value of their property as a result of regulations imposed by the Defendants.

Issue # 1

Motion to Dismiss for failure to comply with the Administrative Procedures Act (APA).

Ruling

The Court would note that both attorneys cited Oregon statutes that support their respective arguments. Both attorneys acknowledged the law is not clearly settled within the State of Oregon. Clearly this is an issue where the Oregon Appellate Courts need to rule quickly and clearly.

Plaintiff relies on ORS 197.352 (6) and 197.352 (7) for authority:

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:

(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.

Defendants rely on ORS 183.480 (1) and ORS 183.480 (2) and ORS 183.484 (2).

(Judicial Review)

183.480 Judicial Review of agency orders. (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 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.

183.484 Jurisdiction for review of orders other than contested cases; procedure; scope of court authority.

(2) Petitions for review shall be filed within 60 days only following the date the order is served, or if a petition for reconsideration or rehearing has been filed, then within 60 days only following the date the order denying such petition is served. If the agency does not otherwise act, a petition for rehearing or reconsideration shall be deemed denied the 60th day following the date the petition was filed, and in such case petition for judicial review shall be filed within 60 days only following such date. Date of service shall be the date on which the agency delivered or mailed its order in accordance with ORS 183.470.

The language of ORS 197.352 that Plaintiff relies upon describes a prohibition of limits on claims under Measure 37 being imposed by "(7) A metropolitan service district, city or county, or state agency." The limits imposed by ORS 183.484 were passed by the Oregon legislature not a political entity or a state agency. The Plaintiff's right to file for judicial review under ORS 293.316 and/or ORS 183.484 would therefore be subject to dismissal for failure to be filed within 60 days from the service of the order.

The Plaintiff's complaint is brought under Ballot Measure 37. The Court would note on the State's Notice of Right to Appeal or Other Judicial Relief the Defendant advised the Plaintiff after turning down his complaint that he had three options:

1. Judicial review under ORS 293.316: Judicial review under ORS 293.316

may be obtained by filing a petition for review within 60 days from the service of this order. Judicial review under ORS 293.316 is pursuant to the provisions of ORS 183.482 to the Court of Appeals.

2. Judicial review under ORS 183.484: Judicial review under ORS 183.484 may be obtained by filing a petition for review within 60 days from the service of this order. A petition for judicial review under ORS 183.484 may be filed in the Circuit Court for Marion County and the Circuit Court in the county in which you reside.
3. A cause of action under Oregon Laws 2005, chapter 1 (Measure 37 (2004)): A present owner of the property, or any interest therein, may file a cause of action in the Circuit Court for the county where the property is located, if a land use regulation continues to apply to the subject property more than 180 days after the present owner made a written demand for compensation.

As indicated above options 1 and 2 were lost by the Plaintiff by not filing for judicial review within 60 days from Plaintiff being served with the denial. Option 3 doesn't specify a time limit on Plaintiff. It simply states the party can file a Measure 37 claim in Circuit Court if a land use regulation continues to apply to the subject property more than 180 days after the present owner made a written demand for compensation. That is the option Plaintiff has taken. The Court denies Defendant's request to dismiss the matter for lack of jurisdiction.

Issue #2

Defendant's Motion to Dismiss for Failure to State a Claim ORCP 21 A (8).

Defendants argue that Plaintiff doesn't have a claim because he can only trace his ownership interest to 2004. Plaintiff maintains he has held an ownership interest in the property since 1985.

Much of the oral argument was spent with Plaintiff trying to explain the transaction that occurred between Plaintiff Robert L. Riemenschneider and John Arnett and Sheldon Arnett. Plaintiff claims it was equitable mortgage and that Mr. Riemenschneider maintained a continuous ownership interest in the property since 1985.

The Court believes the argument presented by Plaintiff overcomes the Defendant's Rule 21 Motions. As will be discussed below the Court doesn't believe the Plaintiff's argument is so convincing to be conclusive.

Letter to Counsel - Riemenschneider v. Crook County et al
July 17, 2007
Page 5

Issue #3

Plaintiff's Motion for Summary Judgment

1) Whether the Plaintiff is an owner with an acquisition date of July 29, 1985.

Ruling

The Court believes this will be the deciding factor at trial. The Court believes while the Plaintiff may believe they retained an ownership interest it is not clear if they legally did. I asked the parties to brief the 1031 exchange issue. While this is not conclusive it is an example on what needs to be clarified at trial. Plaintiff's Motion for Partial Summary Judgment is denied.

Issue #4

Whether Claimant is entitled to summary judgment as to the Defendant's liability under ORS 197.352 as a matter of law.

Ruling

Denied. Clearly unless Plaintiff can prove at trial that their ownership interest can be traced to 1985 and not 2004, they will not be able to hold Defendants liable under ORS 197.352.

The Court will order that Mr. McLane prepare an order consistent with the Court's ruling. The Court will set the matter for a pre-trial conference at which time the matter shall be set for trial.

Sincerely,



Daniel J. Ahern
Circuit Court Judge

DJA/lb