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3 IN THE CIRCUIT COURT OF THE STATE OF OREGON
4 FOR THE COUNTY OF YAMHILL

5 MARLA ROBISON,

6 Petitioner,

7 v.

8 STATE OF OREGON, by and through its
9 DEPARTMENT OF ADMINISTRATIVE
10 SERVICES and DEPARTMENT OF LAND
11 CONSERVATION AND DEVELOPMENT,

12 Respondent.

Case No. CV050305

RESPONDENT'S TRIAL MEMORANDUM

Judge John L. Collins

Date: September 7, 2006

13 **INTRODUCTION**

14 The parties present this case for trial to court pursuant to ORS 183.484 for judicial review
15 of a state agency order in other than a contested case. The facts are undisputed and presented in
16 the Statement of Stipulated Facts for Trial. Respondent also relies upon the facts agreed upon in
17 the summary judgment record, and the agency *Record* lodged on July 3, 2006 (OJIN #17).

18 Respondent incorporates and relies upon the legal arguments presented in its Response to
19 Petitioner's Motion for Summary Judgment. Respondent also relies upon the court's opinion
20 denying petitioner's Motion for Summary Judgment. The arguments set forth in this Trial
21 Memorandum address issues that respondent anticipates petitioner intends to raise at trial.

22 **STANDARD FOR REVIEW**

23 ORS 183.484 is the exclusive means to resolve disputes concerning the propriety of a
24 state agency order in other than a contested case. ORS 183.480 (2); *Bay River v. Envir. Quality*
25 *Comm.*, 26 Or App 717, 720 *rev denied*, 276 Or 555 (1976). In a proceeding pursuant to ORS
26 183.484, the reviewing court determines as a matter of law whether a final order is supported by

1 substantial evidence and the correct application of the law. ORS 183.484 (5); *Norden v. Water*
2 *Resources Dept.*, 329 Or 641, 649 (2000).

3 The “substantial evidence” standard is set forth in the statute. “Substantial evidence
4 exists to support a finding of fact when the record, viewed as a whole, would permit a reasonable
5 person to make that finding.” ORS 183.484 (5) (c). The “record,” for purposes of a petition for
6 review of an order in other than a contested case, is the record presented to circuit court. *Norden*
7 *supra*.

8 In *Norden*, the Oregon Supreme Court confirmed the plain meaning of the APA standard.
9 The trial court’s task in reviewing an agency’s factual findings for substantial evidence “is
10 limited to whether the evidence would permit a reasonable person to make the determination that
11 the agency made in a particular case.” 329 Or at 649. The Supreme Court affirmed the decision
12 of the state Water Resources Department even though the petitioner was “able to muster
13 evidence to the contrary.” *Id.* In *G.A.S.P v. Environmental Quality Commission*, the Court of
14 Appeals followed *Norden* in concluding that “[t]he court’s purpose on review is not to find the
15 facts itself but to decide ‘whether the evidence would permit a reasonable person to make the
16 determination that the agency made * * *.’” 198 Or App 182, 194-96 (2005).

17 Under ORS 183.484 (5) (a), this court also has authority to review respondent’s
18 interpretation of the applicable laws for error. Again, the statute’s meaning is plain. “We review
19 the judgment in favor of the superintendent on review of his order to determine if the trial court
20 correctly interpreted and applied the correct legal standards.” *Powell v. Bunn*, 185 Or App 334,
21 340 (2002). If the circuit court determines that respondent made an error of law, the court
22 remands the case to allow the agency to apply the correct legal standard. *Polaski v. Clark*, 158
23 Or App 166, 171 (1999).

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1 **RELIEF GRANTED TO PETITIONER UNDER MEASURE 37**

2 Petitioner Marla J. Robison submitted a demand to respondent for just compensation
3 pursuant to ORS 197.352. Respondent determined that petitioner’s demand was valid and
4 exercised its option not to apply state land use regulations in effect after petitioner acquired the
5 property. Respondent’s Final Order authorizes petitioner to use the property for a use permitted
6 at the time she acquired it, on May 26, 1972.¹ At the time of acquisition, the property was
7 subject to the provisions of ORS 215 that existed at that time.²

8 **PETITIONER’S ALLEGATION OF ERROR**

9 Petitioner contends that the state agencies’ decision on her Measure 37 claim was
10 incorrect because, in 1972, her property “was not in an exclusive farm use zone created by
11 Yamhill County pursuant to ORS 215.203 (1971) at the time of petitioner’s acquisition of the
12 property” (Petition, ¶ 8). Therefore, according to petitioner, the limitations on non-farm uses set
13 forth in ORS 215.213 (1971) did not apply to the property (*id.*).

14 **SUBSTANTIAL EVIDENCE**

15 Respondent concluded that petitioner’s property was subject to the provisions of ORS
16 Chapter 215 in effect in 1972. These statutes regulated the uses permitted on property that was
17 taxed “at its true cash value for farm use and not for the true cash value it would have if applied
18 to other than farm use.” ORS 308.370 (1) (1971). Substantial evidence supports respondent’s
19 finding that the property received farm tax assessment, and petitioner does not dispute that
20 finding.³

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23 ¹ A copy of the Final Order is attached to the stipulated facts as Exhibit 2. Copies of the Final Order and Final Staff
Report and Recommendation are in the *Record* at Section 6.

24 ² ORS Chapter 215 (1971) is in the record attached at Exhibit E to Respondent’s Response to Petitioner’s Motion
for Summary Judgment.

25 ³ The Petition does not allege respondent lacked substantial evidence, and petitioner did not dispute this fact on
26 summary judgment.

1 **SUMMARY JUDGMENT RULING**

2 The court’s decision denying petitioner’s Motion for Summary Judgment resolved the
3 sole dispute in the case—whether respondent properly determined that state farm use restrictions
4 applied to the property when petitioner acquired it. The court rejected petitioner’s argument that
5 the county’s zoning ordinance required the county to permit uses inconsistent with the farm use
6 restrictions of ORS 215. The material facts and the relevant laws are the same at trial as on
7 summary judgment, and the same conclusion is compelled. Respondent “was neither without
8 substantial evidence for it’s decision nor incorrect in its application of the law.”

9 **TAX TREATMENT OF OTHER ZONES**

10 For purposes of this case, respondent does not dispute the proffered testimony of Yamhill
11 County’s present tax assessor, Dave Lawson. Lawson asserts that, at the relevant time, Yamhill
12 County granted automatic farm tax assessment to all rural properties in Yamhill County,
13 regardless of the zoning, if any. This testimony does not contradict the findings or conclusions
14 of the court on summary judgment.

15 To the extent Lawson’s testimony relates to the county zone at issue, the Agricultural A
16 zone applicable to petitioner’s property, it confirms the information provided to respondent
17 during agency review of petitioner’s Measure 37 demand and submitted to the court on summary
18 judgment. Petitioner received the benefit of state law reducing her taxes, in exchange for
19 application of special farm use restrictions on the property. To the extent Lawson’s testimony
20 relates to other zones, or unzoned land, his testimony is irrelevant. The tax status and land use
21 regulation of other property in the county at the time of petitioner’s acquisition of her land is not
22 at issue and is beyond the scope of justiciable issues before the court.

23 This case involves the court’s review of respondent’s Final Order deciding petitioner’s
24 Measure 37 demand. No actual controversy exists between the parties as to any property other
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1 than the property at issue on petitioner's demand.⁴ Moreover, there is no dispute that petitioner's
2 property received exclusive farm use tax assessment. Whether Yamhill County assessed other
3 properties at true value for exclusive farm use is not probative of any fact in dispute.

4 Respondent anticipates that petitioner will argue that Lawson's testimony is relevant to
5 the question of the county's intent in granting farm use assessment to petitioner's property.
6 Petitioner contends that the county's indiscriminate application of farm use assessment would
7 contradict a finding of intent to designate the Agricultural A zone as a qualified farm use zone.
8 However, Measure 37 does not require a determination of the county's intent. The only question
9 is what law applied.

10 On review under the APA, the only question before the court is whether the record
11 contains substantial evidence that petitioner's property was within a farm use zone qualified for
12 automatic farm use tax assessment. That fact is undisputed. Therefore, state farm use statutes
13 applied to petitioner's property on the date of acquisition as a matter of law.

14 **LAND USE PLANNING "PRACTICE"**

15 Petitioner also contends that the county's intent with respect to farm use designation
16 under state law is supported by the practice of the county planning department at the relevant
17 time. Petitioner proffers the testimony of the present Yamhill County planning director, Mike
18 Brandt. Brandt asserts that the county's practice in 1972 was to make land use decisions
19 consistent with the county ordinance then in effect (Ex 1).

20 Respondent contends that Brandt's testimony is irrelevant. The only determination to be
21 made by this court is whether respondent correctly decided petitioner's Measure 37 demand.
22 The county's historical practice is not probative of the legal issue of what law applied at the time
23 of acquisition. Even if the county failed in practice to follow the law, Measure 37 does not
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25 ⁴ See, e.g., *Brown v Oregon State Bar*, 293 Or 446, 449 (1982) (justiciable issues involve actual and substantial
26 controversies between adverse parties and result in specific relief as opposed to advisory opinions).

1 mandate a perpetuation of that error. In any event, Brandt's testimony is insufficient to
2 overcome the presumption that the county followed the law. ORS 40.135 (j) and (x).

3 Brandt asserts that the county made its decisions consistent with the county zoning
4 ordinance. As the court found on summary judgment, the ordinance language governing the
5 applicable zone is not inconsistent with application of the state restrictions. Any further inquiry
6 into what the county "would have permitted" in 1972 is not mandated by Measure 37 or the
7 APA. Section 8 of Measure 37 requires a legal determination of what law applied when
8 petitioner acquired the property, so that future planning decisions may be made to conform to "a
9 use permitted" at that time.


10 CONCLUSION

11 Respondent opted to grant petitioner a Measure 37 "waiver" to allow her "a use permitted
12 at the time [she] acquired the property." ORS 197.352 (8). The Final Order concludes that, at
13 the time petitioner acquired the property, state statutes governing use of farm land applied.
14 Respondent's finding that the property was granted farm use tax assessment is supported by
15 substantial evidence. Respondent's conclusion that in exchange for special assessment, the
16 property was subject to special regulations is supported by law. The Petition should be
17 dismissed.

18 DATED this 10th day of September, 2006.

19 Respectfully submitted,

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21 Attorney General


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1 **CERTIFICATE OF SERVICE**

2 I certify that on September 6, 2006, I served the foregoing *Respondent's Trial*
3 *Memorandum* upon the parties hereto by the method indicated below, and addressed to the
4 following:

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