

CLAUDIA M. BURTON  
Circuit Court Judge  
Office Location:  
100 High Street, 3<sup>rd</sup> Floor  
Salem, Oregon  
(503) 584-7713  
(503) 584-7718 Fax



**CIRCUIT COURT OF OREGON**  
THIRD JUDICIAL DISTRICT  
MARION COUNTY COURTHOUSE  
PO BOX 12869  
SALEM, OREGON 97309-0869

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Trial Division, Dept. of Justice  
Salem, Oregon

June 29, 2007

Mr. Walter Gowell  
Haugeberg, Rueter et. al.  
PO Box 480  
McMinnville, OR 97128

Ms. Stacy Posegate  
Assistant Attorney General  
1162 Court St. NE  
Salem, OR 97301

RE: *Rohde et al v. State*  
Marion County Circuit Court Case No. 06C19406

Dear Counsel:

As you are aware, cross-motions for summary judgment were argued before me on April 23, 2007. At that time, I granted plaintiffs' summary judgment motion and denied defendant's on the record. That ruling was subsequently reduced to a judgment signed by me on May 16, 2007.

Plaintiffs have now petitioned for an award of attorney's fees. Defendant has responded, and both parties requested that the court rule on the written submissions.

Standard

Plaintiffs request fees under ORS 183.497 and 182.090. The inquiry is essentially the same.

ORS 183.497(1)(b) requires an award of fees if the court determines that the state agency "acted without a reasonable basis in fact or law." ORS 183.497(1)(a) permits a discretionary award of attorney's fees. However, caselaw establishes that the court should not exercise this discretion where the agency has acted reasonably. *McKean-Coffman v. Employment Division*, 314 Or 645, 650 (1992).

ORS 182.090(1), like 183.497(1)(b), provides that the court shall award attorney's fees if the court finds "that the State agency acted without a reasonable basis in fact or in law."

Thus, I am required to analyze whether the state's position in this proceeding was reasonable. In particular, the issue is whether the agency's legal position was reasonable, as there were no disputed facts.

### Analysis of the State's Position

While counsel are well aware of the facts, a brief summary may be helpful to readers of this opinion. Plaintiffs acquired the subject property in April of 1979 from their mother, Bessie Huffman. Ms. Huffman's deed to plaintiffs, however, reserved a life estate to Ms. Huffman. Ms. Huffman died, and thus her life estate was extinguished, in October of 2004. The issue before the court was whether Measure 37 entitled petitioners to roll back land use restrictions on the property<sup>1</sup> to their 1979 acquisition of title, as plaintiffs contended, or only to the expiration of Ms. Huffman's life estate, as contended by the agency.

Counsel and the court confronted this issue with a new voter-enacted statute. There was virtually no relevant caselaw or legislative history. The relevant statutory provisions are set forth at the endnote of this letter.<sup>a</sup>

I found that plaintiffs became "owners" of the property in 1979 pursuant to the statutory definition when they acquired the fee title subject to the life estate. I further found that the statute did not appear to require anything more than becoming an "owner" within the meaning of the statute for a person to have "acquired" the property for purposes of subsections (3)(E) and (8) of the statute.

The state's position, as best this court can understand it, was that plaintiffs did not acquire the right to subdivide the property until their mother's life estate was extinguished. Subsection (8) of the statute allows for a rollback of restrictions "to allow the owner to use the property for a use permitted at the time the owner acquired the property." The state's position, in essence, was that the phrase "use permitted at the time the owner acquired the property" meant not only permitted by land use regulations, but also permitted by the nature of the ownership interest. In other words, if the nature of the ownership interest acquired did not "permit" the requested use, the owner would not be entitled to a rollback of the land use restrictions.

I did not and do not agree with the state's construction of subsection (8). However, reasonable minds could perceive ambiguity in the critical phrase. That, combined with the lack of legislative history or appellate guidance on construction of the


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<sup>1</sup> The state had decided to remove restrictions rather than pay damages

statute, leads me to conclude that the state's position was not without a reasonable basis in the law, and therefore an award of attorney's fees is not mandatory. Moreover, the state's position was not so unreasonable as to, in my view, justify the exercise of my discretion to award attorney's fees.

Would Ms. Posegate please submit a supplemental judgment denying plaintiffs' petition for attorney's fees?

Sincerely,

  
Claudia M. Burton  
Circuit Court Judge

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<sup>a</sup> ORS 197.352 The following provisions are added to and made a part of ORS chapter 197:

(1) If a public entity enacts or enforces a new land use regulation or enforces a land use regulation enacted prior to December 2, 2004, that restricts the use of private real property or any interest therein and has the effect of reducing the fair market value of the property, or any interest therein, then the owner of the property shall be paid just compensation.

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(3) Subsection (1) of this section shall not apply to land use regulations:

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(E) Enacted prior to the date of acquisition of the property by the owner or a family member of the owner who owned the subject property prior to acquisition or inheritance by the owner, whichever occurred first.

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(8) Notwithstanding any other state statute or the availability of funds under subsection (10) of this section, in lieu of payment of just compensation under this section, the governing body responsible for enacting the land use regulation may modify, remove, or not to apply the land use regulation or land use regulations to allow the owner to use the property for a use permitted at the time the owner acquired the property.

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(11) Definitions - for purposes of this section:

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(C) "Owner" is the present owner of the property, or any interest therein.