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4 IN THE CIRCUIT COURT OF THE STATE OF OREGON
5 FOR THE COUNTY OF MARION

6 TJ SCHAFFER,

7 Plaintiff,

8 v.

9 MARION COUNTY CASE M 05-08 and
10 STATE OF OREGON CLAIM M119316,

11 Defendant.

Case No. 05C16991

MOTIONS TO DISMISS

(ORCP 21)

(Oral Argument Requested)

12 **UTCR Compliance**

13 Defendant, State of Oregon, certifies that it made a good faith effort to confer with the
14 plaintiff and was unable to reach agreement.

15 The State requests oral argument and official court reporting services. Approximately
16 one-half hour should be sufficient.

17 These motions are based on ORCP 21 and the accompanying Memorandum, exhibits and
18 affidavit.

19 **Motions to Dismiss**

20 **1. Motion No. 1 – The party asserting the claim is not the real party in interest (ORCP 21**
21 **A(6) for purposes of a Measure 37 claim**

22 The State moves to dismiss this case because the plaintiff T J Schaffer is not an owner of
23 the property which is the subject of this Measure 37 claim. The property is owned in fee by
24 Juanita Schaffer by virtue of a deed from plaintiff to her dated May 12, 2004.

25 To the extent that the complaint can fairly be read as a petition for judicial review of an
26 order in other than a contested case, ORS 183.484, (plaintiff states it is an “appeal” in his

1 Certificate of Service), the plaintiff does not meet the standard of one who is adversely affected
2 or aggrieved under the *PETA* factors to determine the correctness of the agency’s interpretation
3 of the law.¹

4 **2. Motion No. 2 – Failure to state ultimate facts sufficient to constitute a claim for relief**
5 **under Measure 37**

6 Because the plaintiff is not the current owner of the property, he has no claim to either
7 compensation or “waiver” of restrictive land use regulations and the direct Measure 37 claim
8 should be dismissed.

9 To the extent that the complaint is a petition for judicial review of an order in other than a
10 contested case, the State reiterates its motion above regarding standing to determine the
11 correctness of the legal interpretations at issue.

12 **3. Motion No. 3 – Plaintiff does not have the legal capacity to sue under Measure 37**

13 The plaintiff is not a lawyer. He has no representational standing. Persons may assert
14 only their own legal rights and cannot rest their claims upon legal rights of third parties.² In this
15 case, the owner is Juanita Schaffer but TJ Schaffer brings the suit in his name. The Measure 37
16 claim should be dismissed.

17 For the reasons outlined above, the case should also be dismissed if it is a petition for
18 judicial review of an order in other than a contested case.

19 ///

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23 _____

24 ¹ *People for the Ethical Treatment of Animals v. Inst. Animal Care*, 312 Or 95, 101-102 (1991)
25 (under the 2nd prong of the “standing” test, a person is aggrieved if the person seeks to further an
26 interest that the legislature expressly wished to have considered. The only interests that Measure
37 expressly concerns are interests in real property. Mr. Schaffer has no legally cognizable
interest in the real property that is the subject of this litigation).

² *Kelly v. Silver*, 25 Or App 441 (1976).

1 **Memorandum of Points and Authorities**

2 Factual Background

3 This is a *pro se* plaintiff who acquired the subject property in 1976 and married Juanita
4 Schaffer in 1978. Mr. Schaffer transferred the property in fee by Statutory Bargain and Sale to
5 Juanita Schaffer on May 12, 2004.³ Mr. Schaffer and Juanita Schaffer were both claimants of
6 record in the Measure 37 claims process at the State Department of Land Conservation and
7 Development. However, Mrs. Schaffer is not a party in this case, even though she is the current
8 owner of the property. If she were to be joined in this case, Mr. Schaffer could not bring this
9 case in any representative capacity. In all events, Mrs. Schaffer did not seek judicial review of
10 the State agency’s Final Order within the statutory period of 60 days and that order is therefore
11 final as a matter of law.

12 The Law

13 1. No ownership interest for Measure 37

14 An agreement for the sale of real property or any interest therein must be made in writing
15 and “agreement” includes a deed.⁴ The deed to Mrs. Schaffer for the subject property is
16 unequivocal – she obtained full ownership in 2004. As a matter of law, she is the real party in
17 interest, and it is only she who would have the capacity to sue as the owner for a purported
18 Measure 37 “cause of action.”⁵ As noted above, her time to challenge the Final Order has run
19 and it is no longer subject to judicial review.⁶

20
21 _____
22 ³ A copy of the deed is attached as Exhibit A

23 ⁴ ORS 41.740 the Parol Evidence Rule and ORS 41.580 (1)(e) The Statute of Frauds and ORS
24 93.020 requiring a transfer of an interest in property (other than a less-than-one-year lease) to be
25 in writing and executed formally

26 ⁵ Measure 37, Section 6 (“the present owner, or any interest therein, shall have a cause of action
* * *”)

⁶ ORS 183.484 (2). A copy of the Certificate of Mailing and the accompanying documents are
attached as Exhibit B (certificate), Exhibit C (persons who got notice), Exhibit D (Final Order)
and Exhibit E (Staff report).

1 Mr. Schaffer was at one time the owner of the property. He is not the present owner of
2 the property and he is not the owner of any interest in the property as shown by the deed that he
3 signed and recorded. Had Mr. Schaffer intended to retain an interest in the property, Oregon law
4 clearly provides for it in ORS 93.280.⁷ If he wishes to reacquire a property interest in the
5 conveyed property, that statute will allow Mrs. Schaffer to deed it to him and it may then be
6 recorded and he will then have a new date of acquisition under Measure 37.

7 Having previously given up all his interest in the property, he has neither the legal capacity to
8 sue, nor is he the real party in interest in a Measure 37 case. He cannot state the ultimate facts
9 sufficient to constitute a Measure 37 "cause of action" because that can only be brought by the
10 "present owner of the property or any interest therein."⁸

11 2. No Standing under the APA

12 A non-owner of property that is subject to an administrative decision might have standing
13 to challenge the decision in very limited circumstances. The persons must meet the test of
14 standing established in the *PETA* case. Mr. Schaffer, however, does not meet any of the factors.

15 The first factor is whether or not the "person has suffered an injury to a substantial
16 interest resulting directly from the challenged governmental action."⁹ No such injury is or could
17 be reasonably alleged under these circumstances. Mr. Schaffer has no legal property interest that
18 could be injured, substantially or not.

19 The second factor is whether or not the "person seeks to further an interest that the
20 legislature expressly wished to have considered."¹⁰ Measure 37 was passed by the electorate

21 _____
22 ⁷ ORS 93.280 states, "Any person or persons owning real property which the person or persons
23 have power to convey may convey such property by a conveyance naming the person or persons
24 and another person or persons, or one or more of themselves and another person or other persons,
as grantees. The conveyance shall have the same effect as a conveyance from a stranger who
owned the property to the persons named as grantees."

25 ⁸ Measure 37 (Attached as Exhibit F); Section 11 (C) (definition of owner); Sections 6, 8 and 10
which provide alternative remedies to the present owner.

26 ⁹ 312 Or at 102

¹⁰ *Id.* at 103

1 rather than the legislature, but no part of this law provides for anyone other than the present
2 owner of the property (or owner of any interest in the property) to bring a case. Mr. Schaffer is
3 not an owner of the property and does not have any interest in the property other than as a former
4 owner.


5 The third factor is whether or not the “person has such a personal stake in the outcome of
6 the controversy as to assure concrete adverseness to the proceeding.”¹¹ As was noted by the
7 Oregon Supreme Court, PETA’s “zeal makes it sufficiently adversarial” in that case, but zeal did
8 not provide the requisite “personal stake” in the outcome. In this case, the agency’s order did not
9 and could not legally affect any “personal stake” of Mr. Schaffer. He, like PETA, has no
10 “legally cognizable interest in the present case.”¹²

11 Mr. Schaffer fails to qualify under any of the three factors that might have made him an
12 aggrieved person such that he could seek judicial review under ORS 183.480 and 183.484.

13 **Conclusion**

14 The Measure 37 claim and the petition for judicial review, if any, should be dismissed.
15 DATED this 21st day of September, 2005.

16 Respectfully submitted,
17 HARDY MYERS
18 Attorney General

19 
20 PAUL J. SUNDERMIER #82407
21 Senior Assistant Attorney General
22 Trial Attorney
23 Tel (503) 947-4700
24 Fax (503) 947-4792
25 paul.sundermier@doj.state.or.us

26 ¹¹ *Id.* at 104

¹² *Id.*

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

TJ SCHAFFER,

Plaintiff,

v.

MARION COUNTY CASE M 05-08 and
STATE OF OREGON CLAIM M119316,

Defendant.

Case No. 05C16991

AFFIDAVIT OF PAUL J. SUNDERMIER

STATE OF OREGON)
) ss.
County of Marion)

I, Paul J. Sundermier, being first duly sworn, depose and say:

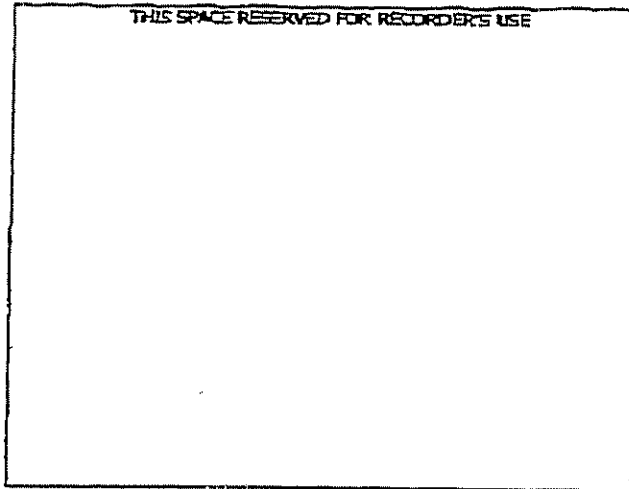
1. I am a Senior Assistant Attorney General and assigned to the above captioned case.
2. I have conferred with the plaintiff by telephone message, email and correspondence prior to filing the instant motion and we have been unable to reach agreement.
3. Exhibit A is a copy of a Statutory Bargain and Sale Deed recorded in deed records of Marion County which shows a complete conveyance of the subject property to Juanita K. Schaffer dated May 12, 2004.
4. Exhibit B is a copy of the certificate of mailing from the Department of Land Conservation and Development concerning the property involved in the instant lawsuit.
5. Exhibit C is a copy of a document showing the persons who were notified of the decisions and copies of the letters that gave notice.



After recording return to:
Juanita K. Schaffer
PO Box 457
Turner, OR 97252

Until a change is requested all tax notices etc.
shall be mailed to the following address:
Juanita K. Schaffer
PO Box 457
Turner, OR 97252

File No.: 7085-352984 (JKW)
Date: May 12, 2004



F.A.T. 352984

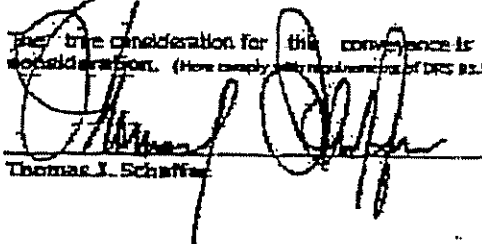
STATUTORY BARGAIN AND SALE DEED

THOMAS J. SCHAFER, Grantor, conveys to JUANITA K. SCHAFER, Grantee, the following described real property:

See Legal Description attached hereto as Exhibit A and by this reference incorporated herein.

THIS INSTRUMENT WILL NOT ALLOW USE OF THE PROPERTY DESCRIBED IN THIS INSTRUMENT IN VIOLATION OF APPLICABLE LAND USE LAWS AND REGULATIONS. BEFORE SIGNING OR ACCEPTING THIS INSTRUMENT, THE PERSON ACQUIRING FEE TITLE TO THE PROPERTY SHOULD CHECK WITH THE APPROPRIATE CITY OR COUNTY PLANNING DEPARTMENT TO VERIFY APPROVED USES AND TO DETERMINE ANY LIMITS ON LAWSUITS AGAINST FARMING OR FOREST PRACTICES AS DEFINED IN ORS 30.500.

The true consideration for this conveyance is \$1000; A transfer for good and sufficient consideration. (How comply with requirements of ORS 92.030)


Thomas J. Schaffer

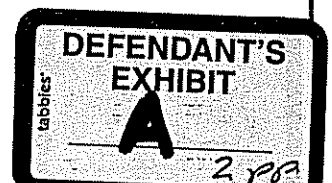
A.T.S

R 30768

82W28D 01400

0063-1552

ALL



APR

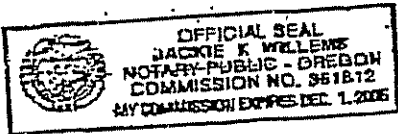
Barpain and Sale Deed
- continued

File No: 7086-062804 (2004)
Date: 06/22/2004

STATE OF Oregon

County of Marion

This instrument was acknowledged before me on this 12 day of May, 2004
by Thomas J. Schaffner.



Jackie K. Willem's
Jackie K. Willem's
Notary Public for Oregon
My commission expires: 12/01/2006

EXHIBIT A

LEGAL DESCRIPTION:

Beginning at a point on the South line of Section 28, in Township 8 South, Range 2 West of the Willamette Meridian, Marion County, Oregon, which is 1122.93 feet South 89° 30' East from the one quarter section corner between Sections 28 and 29; thence North 0° 09' East 2552.25 feet to an iron pipe; thence North 89° 51' East 296.035 feet to an iron pipe; thence South 0° 01' East 2595.66 feet to the South line of said Section 28; thence North 89° 30' West 303.74 feet to the place of beginning.

SAVE AND EXCEPT the Southerly 1474.65 feet to the above described property which was conveyed to Keith G. Wessley by contracts recorded August 26, 1975, in Reel 23, Page 597, and August 29, 1975, in Reel 23, Page 1332, Deed Records for Marion County, Oregon. A non-exclusive easement for vehicular and pedestrian travel 30 feet in width, the West line of which is described as follows:

Beginning at the Southwest corner of a tract of land conveyed to Norman F. Whitehead, et ux, by deed recorded in Book 497, Page 670, Deed Records for Marion County, Oregon, and running thence North 0° 07' 50" East along the West line of said Whitehead tract a distance of 1474.65 feet and there terminating.

Department of Land Conservation and Development
635 Capitol St NE, Suite 150
Salem, OR 97301

CERTIFICATE OF MAILING

I certify that I served M119316 Schaffer Final Staff Report and Recommendations and Final Order on:

See Attached List

by following indicated method or methods:

by **mailing** a full, true and correct copy in a sealed, first-class postage-prepaid envelope, addressed to the person(s) listed above, and deposited with the United States Postal Service at Salem, Oregon on the date set forth below.

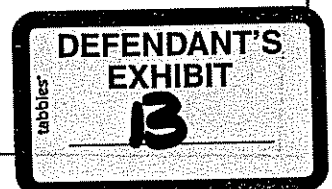
by **hand delivering** a full, true and correct copy to the person(s) listed above, on the date set forth below.

by **faxing** a full, true and correct copy to the person(s) at the fax number(s) shown above, on the date set forth below.

DATED this 6th day of July, 2005.

Name: Deborah Aulasewicz

Title: Office / Rules Support Specialist



7/6/2005

M119316 SCHAFFER (825)

CRYSTAL BOLNER
STATESMAN JOURNAL
PO BOX 13009
SALEM OR 97309-3009

GARY FISH
DLCD
635 CAPITOL STREE NE SUITE 150
SALEM OR 97301

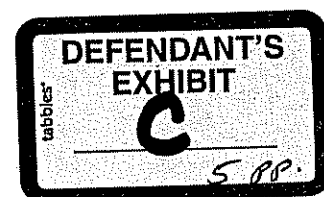
JUANITA & T.J. SCHAFFER
PO BOX 457
TURNER OR 97392

PAT WHEELER
CIAC
12090 ROLLING HILLS RD
MONMOUTH OR 97361

STERLING ANDERSON, PLANNING MANAGER
MARION COUNTY
555 COURT ST NE
PO BOX 14500
SALEM OR 97309-5036

GINNY GUSTAFSON, AAG
DEPARTMENT OF JUSTICE
1162 COURT STREET NE
SALEM OR 97301-4095

JIM JOHNSON, LAND USE PLANNING COORDINATOR
OREGON DEPT OF AGRICULTURE
635 CAPITOL ST NE STE 100
SALEM OR 97301-2532





Oregon

Theodore R. Kulongoski, Governor

Department of Land Conservation and Development

635 Capitol Street NE, Suite 150

Salem, Oregon 97301-2524

Phone: (503) 373-0050

First Floor/Coastal Fax: (503) 378-6033

Second Floor/Director's Office: (503) 378-5518

Web Address: <http://www.oregon.gov/LCD>

July 6, 2005



Sterling Anderson
Marion County Planning Manager
P.O. Box 14500
Salem, Oregon 97309-5036

Re: Ballot Measure 37 Claim Number M119316

Claimants: Juanita and T.J. Schaffer

Dear Mr. Anderson:

Enclosed, in regard to the above-referenced claim for compensation under Ballot Measure 37 (Chapter 1, Oregon Laws 2005), are the Final Staff Report and Recommendations of the Department of Land Conservation and Development and the Final Order.

This Final Staff Report and Recommendations and the Final Order constitute the final decision on this claim. No further action will be taken on this matter.

Thank you for your courtesies.

Yours very truly,

LANE SHETTERLY
Director

Enclosure





Oregon

Theodore R. Kulongoski, Governor

Department of Land Conservation and Development

635 Capitol Street NE, Suite 150

Salem, Oregon 97301-2524

Phone: (503) 373-0050

First Floor/Coastal Fax: (503) 378-6033

Second Floor/Director's Office: (503) 378-5518

Web Address: <http://www.oregon.gov/LCD>

July 6, 2005



Crystal Bolner
Statesman Journal
P.O. Box 13009
Salem, Oregon 97309-3009

Re: Ballot Measure 37 Claim Number M119316

Claimants: Juanita and T.J. Schaffer

Dear Ms. Bolner:

Enclosed, in regard to the above-referenced claim for compensation under Ballot Measure 37 (Chapter 1, Oregon Laws 2005), are the Final Staff Report and Recommendations of the Department of Land Conservation and Development and the Final Order.

This Final Staff Report and Recommendations and the Final Order constitute the final decision on this claim. No further action will be taken on this matter.

Thank you for your courtesies.

Yours very truly,

LANE SHETTERLY
Director

Enclosure





Oregon

Theodore R. Kulongoski, Governor

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Salem, Oregon 97301-2524

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Web Address: <http://www.oregon.gov/LCD>

July 6, 2005



Juanita and T.J. Schaffer
P.O. Box 457
Turner, Oregon 97392

Re: Ballot Measure 37 Claim Number M119316

Claimants: Juanita and T.J. Schaffer

Dear Juanita and T.J. Schaffer:

Enclosed, in regard to the above-referenced claim for compensation under Ballot Measure 37 (Chapter 1, Oregon Laws 2005), are the Final Staff Report and Recommendations of the Department of Land Conservation and Development and the Final Order.

This Final Staff Report and Recommendations and the Final Order constitute the final decision on this claim. No further action will be taken on this matter.

Thank you for your courtesies.

Yours very truly,

LANE SHETTERLY
Director

Enclosure



Oregon

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635 Capitol Street NE, Suite 150

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Second Floor/Director's Office: (503) 378-5518

Web Address: <http://www.oregon.gov/LCD>

July 6, 2005



Pat Wheeler
CIAC
12090 Rolling Hills Road
Monmouth, Oregon 97361

Re: Ballot Measure 37 Claim Number M119316

Claimants: Juanita and T.J. Schaffer

Dear Ms. Wheeler:

Enclosed, in regard to the above-referenced claim for compensation under Ballot Measure 37 (Chapter 1, Oregon Laws 2005), are the Final Staff Report and Recommendations of the Department of Land Conservation and Development and the Final Order.

This Final Staff Report and Recommendations and the Final Order constitute the final decision on this claim. No further action will be taken on this matter.

Thank you for your courtesies.

Yours very truly,

LANE SHETTERLY
Director

Enclosure

BEFORE THE DEPARTMENT OF ADMINISTRATIVE SERVICES, THE DEPARTMENT OF LAND CONSERVATION AND DEVELOPMENT OF THE STATE OF OREGON

IN THE MATTER OF THE CLAIM) FINAL ORDER
FOR COMPENSATION UNDER) CLAIM NO. M119316
BALLOT MEASURE 37 (CHAPTER 1,)
OREGON LAWS 2005) OF)
Juanita Schaffer and TJ Schaffer, CLAIMANTS)

Claimants: Juanita Schaffer and TJ Schaffer (the Claimants)

Property: Tax Lot 1400, T 8S, R.2W, Section 28D, W.M., Marion County

Claim: The demand for compensation and any supporting information received from the Claimants by the State of Oregon (the Claim).

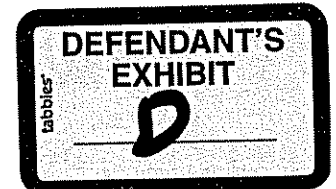
Claimants submitted the Claim to the State of Oregon under Ballot Measure 37 (2004) (Oregon Laws 2005, Chapter 1) (hereafter, Measure 37). Under OAR 125-145-0010 *et seq.*, the Department of Administrative Services (DAS) referred the Claim to the Department of Land Conservation and Development (DLCD) as the regulating entity. This order is based on the record herein, including the Findings and Conclusions set forth in the Final Staff Report and Recommendation of DLCD (the DLCD Report) attached to and by this reference incorporated into this order.

ORDER

The Claim is approved as to laws administered by DLCD and the Land Conservation and Development Commission (LCDC) for the reasons set forth in the DLCD Report, and subject to the following terms:

1. In lieu of paying just compensation under Measure 37, the State of Oregon will not apply the following laws to Juanita Schaffer's use of the property to divide it into two-acre parcels and establish a small business office: applicable provisions of Statewide Planning Goal 3 (Agricultural Lands), ORS 215, and OAR 660, Division 33, enacted since May 12, 2004, to the extent necessary to allow Ms. Schaffer a use of the property permitted at the time she acquired the subject property.

2. The relief granted by this order does not authorize Juanita Schaffer to use the property for a use that was not permitted when she acquired the Property. The use of the Property in 2004 was governed by state laws that include, but are not limited to: the applicable provisions of Statewide Planning Goal 3 (Agricultural Lands), ORS 215, and OAR 660, Division 33 that existed at that time.



3. To the extent that any law, order, deed, agreement or other legally-enforceable public or private requirement provides that the Property may not be used without a permit, license, or other form of authorization or consent, this order does not authorize the use of the Property unless the Claimants first obtains that permit, license, or other form of authorization or consent. Such requirements may include, but are not limited to: a building permit, a land use decision, a permit as defined in ORS 215.412 or ORS 227.160, other permits or authorizations from local, state or federal agencies, and restrictions on the use of the Property imposed by private parties.

4. Any use of the Property by the Claimants under the terms of this order remains subject to the following laws: (a) those laws not specified in (1), above; (b) any laws enacted or enforced by a public entity other than DLCD; and (c) those laws not subject to Measure 37 including, without limitation, those laws exempted under section (3) of Measure 37.

5. Without limiting the generality of the foregoing terms, in order for the Claimants to use the Property, it may be necessary for the Claimants to obtain a decision under Measure 37 from a city and/or county and/or metropolitan service district that enforces land use regulations applicable to the Property. Nothing in this order relieves the Claimants from the necessity of obtaining a decision under Measure 37 from a local public entity that has jurisdiction to enforce a land use regulation applicable to a use of the Property by the Claimants.

This Order is entered by the Director of the DLCD as a final order of DLCD and the Land Conservation and Development Commission under Measure 37, OAR 660-002-0010(8), and OAR 125, division 145, and by the Deputy Administrator for the State Services Division of the DAS as a final order of DAS under Measure 37, OAR 125, division 145 and ORS 293.

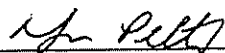
FOR DLCD AND THE LAND CONSERVATION
AND DEVELOPMENT COMMISSION:


Lane Shetterly, Director

DLCD

Dated this 6th day of July, 2005.

FOR the DEPARTMENT OF ADMINISTRATIVE
SERVICES:


Dugan Petty, Deputy Administrator
DAS, State Services Division

Dated this 6th day of July, 2005.

NOTICE OF RIGHT TO APPEAL OR OTHER JUDICIAL RELIEF

You are entitled, or may be entitled, to the following judicial remedies:

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.

(Copies of the documents that comprise the record are available for review at the Department's office at 635 Capitol Street NE, Suite 150, Salem, Oregon 97301-2540)

FOR INFORMATION ONLY

The Oregon Department of Justice has advised the Department of Land Conservation and Development that "[i]f the current owner of the real property conveys the property before the new use allowed by the public entity is established, then the entitlement to relief will be lost."

**BALLOT MEASURE 37 (2004, CHAPER 1 OREGON LAWS 2005)
CLAIM FOR COMPENSATION**

OREGON DEPARTMENT OF LAND CONSERVATION AND DEVELOPMENT

Final Staff Report and Recommendation

July 6, 2005

STATE CLAIM NUMBER: M119316

NAME OF CLAIMANTS: Juanita Schaffer and
T.J. Schaffer

MAILING ADDRESS: P.O. Box 457
Turner, Oregon 97392

IDENTIFICATION OF PROPERTY: Township 8S, Range 2W, Section 28D
Tax Lot 1400
Marion County

DATE RECEIVED BY DAS: January 14, 2005

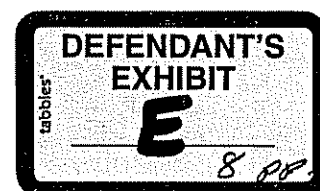
180-DAY DEADLINE: July 13, 2005

I. CLAIM

Juanita and T.J. Schaffer, the claimants, seek compensation in the amount of \$1,044,600 for the reduction in fair market value as a result of land use regulations that are alleged to restrict the use of certain private real property. The claimants desire compensation or the right to divide the property into two-acre parcels and establish a small business office. The property is 7.67-acres located 250 west of Pine Tree Lane SE and 1500 feet north of Mill Creek Road SE in Marion County (See claim.)

II. SUMMARY OF STAFF RECOMMENDATION

Based on the findings and conclusions set forth below, the Department of Land Conservation and Development (the department) has determined that the claim is valid as to Juanita Schaffer and is not valid as to T.J. Schaffer. Department staff recommends, that in lieu of compensation, the requirements of the following laws enforced by the Land Conservation and Development Commission (the Commission) or the department, not apply to Juanita Schaffer in order to allow her to divide the property into two-acre parcels and establish a small business office, to the extent that those uses were permitted when she acquired the property on May 12, 2004: applicable provisions of Statewide Planning Goal 3 (Agricultural Lands), ORS 215, and OAR 660, Division 33. The department acknowledges that the relief recommended in this report



will not allow Ms. Schaffer to use her property in a manner set forth in the claim. (See the complete recommendation in Section VI. of this report.)

III. COMMENTS ON THE CLAIM

Comments Received

On February 22, 2005, pursuant to OAR 125-145-0080, the Department of Administrative Services (DAS) provided notice to the owners of surrounding properties. According to DAS, there were no written comments, evidence or information received by DAS in response to the 10-day notice.

IV. TIMELINESS OF CLAIM

Requirement

Ballot Measure 37 (2004), Section 5, requires that a written demand for compensation be made:

1. For claims arising from land use regulations enacted prior to the effective date of the measure (December 2, 2004), within two years of that effective date or the date the public entity applies the land use regulation as an approval criteria to an application submitted by the owner, whichever is later; or
2. For claims arising from land use regulations enacted after the effective date of the measure (December 2, 2004), within two years of the enactment of the land use regulation, or the date the owner of the property submits a land use application in which the land use regulation is an approval criteria, whichever is later.

Findings of Fact

The claim was submitted to DAS on January 14, 2005 for processing under OAR 125, Division 145. The claim identifies the Special Agricultural Zones and "post acquisition land use restriction and zoning" that restrict the use of the property as the basis for the claim. Only laws that were enacted prior to December 2, 2004, the effective date of Measure 37 (2004) are the basis for this claim (see citations of statutory and administrative rule history of the Oregon Revised Statutes and Oregon Administrative Rules).

Conclusions

The claim has been submitted within two years of December 2, 2004, the effective date of Measure 37 (2004), based on land use regulations adopted prior to December 2, 2004, and is therefore timely filed.

V. ANALYSIS OF CLAIM

1. Ownership

Ballot Measure 37 (2004) provides payment of compensation or relief from specific laws to “owners” as that term is defined in the measure. Ballot Measure 37 (2004), Section 11(C) defines “owner” as “the present owner of the property, or any interest therein.”

Findings of Fact

T.J. Schaffer acquired the subject property on November 24, 1976 (Marion County Deed Records, Reel 63, pages 1152 and 1153). A copy of a marriage certificate between T.J. and Juanita Schaffer, dated March 28, 1978, is included in the claim. T.J. Schaffer transferred fee title to the property to Juanita Schaffer on May 12, 2004 (Marion County Deed Records, Reel 2318, and page 405). The Marion County Tax Statement for 2005-2006 shows Juanita K. Schaffer as the current and sole owner of the subject property.

Conclusions

Claimant Juanita Schaffer is an “owner” of the subject property as, that term is defined by Section 1 of Ballot Measure 37. T.J. Schaffer is a “family member” as defined in Section 11(A) of the Measure, but he is not an “owner” under Section 11(C). T.J. Schaffer’s ownership interest in the property terminated on May 12, 2004 when he transferred the property to Juanita Schaffer.

2. The Laws that are the Basis for this Claim

In order to establish a valid claim, Section 1 of Ballot Measure 37 requires, in part, that a law must restrict the claimant’s use of private real property in a manner that reduces the fair market value of the property relative to how the property could have been used at the time the claimant or a family member acquired the property.

Findings of Fact

The claim states that: “antecedent law allowed 1 residence for each two acres” and “allowed small business office with ten or fewer employees.”

The claim specifically identifies Marion County’s Special Agriculture (SA) Zone, Chapter 137, which restricts the use of the claimants’ property to divide it and develop it with residences.

The property is zoned SA in compliance with ORS 215.283. The SA zone precludes dwellings and subdivisions, stating, “Subdivisions and planned developments, however, are not consistent with the purpose of this zone and are prohibited”.

OAR 660 Division 33 establishes standards for the approval of farm and non-farm dwellings. Specifically, OAR 660-033-0135 requires that for the approval of a dwelling “customarily

provided in conjunction with farm use,” the owner demonstrate, in part, that the owner’s farm operation produced a certain gross farm annual income from the sale of farm products in the last two or three of the last five years. For a non-farm dwelling, ORS 215.284(4) as applied by OAR 660-033-0130(4) requires, in part, that a non-farm dwelling may only be established on a parcel predominately composed of Class IV to VIII soils. The subject property is predominantly composed of Class I to IV soils in accordance with the description of the county’s Special Agriculture Zone and is therefore not eligible for a non-farm dwelling.

As provided in ORS 215.448, ORS 215.283(2)(i), provides for home occupations on lands zoned EFU where such uses satisfy ORS 215.296 and OAR 660-006-0130(5), and the additional provision under OAR 660-033-0130(14). The claim states that current regulations would not allow a “small business with ten or fewer employees.” Oregon Laws 1983, Chapter 743 (HB 2625 (1983)) amended ORS 21.213 and 215.214, to add Section (2) into ORS 215 (codified into ORS 215.448). These laws were enacted in 1983, and require that home occupations not employ more than five full or part time persons (ORS 215.488(1) (b)).

The claimant and current owner, Juanita Schaffer, acquired the subject property on May 12, 2004. OAR 660-033-0135 (applicable to farm dwellings) became effective on March 1, 1994, and interprets the statutory standard for a primary dwelling in an EFU zone under ORS 215.283(1)(f). OAR 660-033-0130(4) (applicable to non-farm dwellings) became effective on August 7, 1993, and was amended to comply with ORS 215.284(4) on March 1, 1994 (see citations of administrative rule history for OAR 660-033-0130 and 0135(7)).

Conclusions

Statewide Planning Goal 3, ORS 215 and OAR 660-033-0100, amended and adopted since the property was acquired by family member T.J. Schaffer in 1976, restricts the use of the property relative to the uses allowed when he acquired the property on November 24, 1976. The statutory and rule provisions for farm and non-farm dwellings in ORS 215 and OAR 660, Division 33, clearly do not allow a single family dwelling to be approved on the subject property whereas it is possible that a dwelling could be approved under the more general provisions of ORS 215.213(1) (f) or ORS 215.213(3) (1975 edition) in effect on November 24, 1976.

The statutory and rule provisions for home occupations clearly do not allow home occupations to employ more than five full or part time persons, whereas it is possible that a home occupation without that limit could be approved under the more general provisions for home occupation under ORS 215.213(2)(h) (1975 edition) that were in effect on November 24, 1976, until they were amended in 1983, to include the current statutory limit on the number of employees.

3. Effect of Regulations on Fair Market Value

In order to establish a valid claim, Section 1 of Ballot Measure 37 requires that any laws described in Section V. (2) of this report must have “the effect of reducing the fair market value of the property, or any interest therein.”

Findings of Fact

The claim includes the following amounts and basis of the Fair Market Value Reduction (FMVR) that are alleged to be caused by each of the cited regulations:

<u>FMVR:</u>	<u>Law or Rule:</u>	<u>Basis of Evaluation:</u>
\$60,000	MC 137.010 – 090 rules	RMV \$137,390 less unrecognized diminution of value \$77,390, subject to litigation, in account R 30768 due to Measure 37 – 37 facts.
\$300,000	Post acquisition land rules	Anticipated fair value of constructed Residences that could not be developed in compliance with post acquisition rules.
\$9,600	Post acquisition revenue loss	\$9,600 (185 * 4 acres * 26 years/2) Excess collection of property tax, each of 26 years.
\$625,000	Post acquisition loss	\$625,000 Rental value loss (two residences in 26 years).
\$50,000	Administrative resistance at Marion County	Anticipated cost to move Marion County to honor valid claim.

\$1,044,600 TOTAL

No other information or explanation is provided that substantiates the reduction in fair market value being alleged by the claimants.

Conclusions

As explained in section V. (1) of this report, Juanita Schaffer is the current owner of the subject property. She acquired the property on May 12, 2004, from her husband, T.J. Schaffer. T.J. Schaffer is a “family member” as defined in Section 11(A) of Measure 37 who acquired the property on November 24, 1976. The claimants are due compensation for land use laws that restrict the use of the subject property in a manner that reduces its fair market value.

Without an appraisal or other substantiating documentation, it is not possible to substantiate the specific dollar amount the claimants demand for compensation. Nevertheless, the department has determined that it is more likely than not that there has been some reduction in the fair market value of the subject property as a result of laws enacted or enforced by the Commission or the department.

4. Exemptions under Section 3 of Measure 37

Ballot Measure 37 (2004) does not apply to certain laws. In addition, under Section 3 of the Measure, certain types of laws are exempt from the Measure.

Findings of Fact

The claim includes a general reference to the county (SA) Zone and “post acquisition land use restriction and zoning” that restrict the use of the property relative to what would have been allowed when the property was acquired. These provisions include Statewide Planning Goal 3, “Agricultural Lands,” ORS 215, specifically ORS 215.203 (specifically ORS 215.780), and OAR 660, Division 33, which Marion County has implemented through applying its SA Zone to the property. None of these laws appear to be exempt, either on their face or as applied to the subject property, under Section 3 of Measure 37.

Conclusions

Without a more specific listing of laws that are the basis for the claim, it is not possible for the department to determine what laws may fall under one or more of the exemptions under Measure 37. It does appear that the general statutory, goal and rule restrictions on residential development and home occupations apply to the owner’s anticipated use of the property, and for the most part these laws would not come under any of the exemptions in Measure 37. There may be other specific laws that continue to apply under one or more of the exemptions in the Measure, or because they are laws that are not covered by the measure to begin with.

VI. FORM OF RELIEF

Section 1 of Measure 37 provides for payment of compensation to an owner of private real property if the department has enacted or enforced a law that restricts the use of the property in a manner that reduces its fair market value. In lieu of compensation, the department may choose to not apply the law to allow the owner to carry out a use of the property allowed at the time the owner acquired the property. The Commission has by rule directed that if the department determines a claim is valid, the Director must provide non-monetary relief unless and until funds are appropriated by the legislature to pay claims.

Findings of Fact

Based on the findings and conclusions set forth in this report, claimant T.J. Schaffer is not an owner of an interest in the property and, therefore, the department is not authorized to provide any relief to him under Ballot Measure 37. As to claimant Juanita Schaffer, laws enacted or enforced by the Commission or the department restrict division of the property into parcels or lots and certain small businesses that are not home occupations. The claimant cannot create the desired two-acre lot development and establish a small business office with more than five full or part time employees on this 7.6-acre parcel. The laws enacted or enforced by the Commission or the department reduce the fair market value of the property. The claim asserts this amount to be \$1,044,600. Although the claim included some information as to how the claimants arrived at

this amount, no specific explanation was provided as the method they employed for establishing the reduction in the fair market value. No appraisal or other substantiating documentation was provided to substantiate the specific dollar amount the claimant demands for compensation. Nevertheless, based on the record for this claim, the department acknowledges that the laws on which the claim is based likely have reduced the fair market value of the property to some extent.

No funds have been appropriated at this time for the payment of claims. In lieu of payment of compensation, Measure 37 authorizes the department to modify, remove or not apply all or parts of certain land use regulations to allow Juanita Schaffer to use the subject property for a use permitted at the time she acquired the property on May 12, 2004.

Conclusion

Based on the record, the department recommends that the claim be denied as to T.J. Schaffer on the basis that he is not an owner of an interest in the property as defined in Ballot Measure 37, Section 11(C). The department further recommends that the claim be approved as to claimant Juanita Schaffer, subject to the following terms:

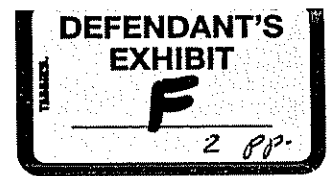
1. In lieu of compensation under Measure 37, the State of Oregon will not apply the following laws to Juanita Schaffer's use of the property to divide it into two-acre parcels and establish a small business office: applicable provisions of Statewide Planning Goal 3 (Agricultural Lands), ORS 215, and OAR 660, Division 33, enacted since May 12, 2004, to the extent necessary to allow Ms. Schaffer a use of the property permitted at the time she acquired the subject property. The department acknowledges that the relief recommended in this report will not allow the claimant to use the property in the manner set forth in the claim.
2. The relief granted by this order does not authorize the claimant, Juanita Schaffer, to use the property for a use that was not permitted when she acquired the property on May 12, 2004.
3. To the extent that any law, order, deed, agreement or other legally enforceable public or private requirement provides that the property may not be used without a permit, license, or other form of authorization or consent, this order does not authorize the use of the property unless the claimants first obtain that permit, license, or other form of authorization or consent. Such requirements may include, but are not limited to: a building permit, a land use decision, a permit as defined in ORS 215.412 or ORS 227.160, other permits or authorizations from local state or federal agencies, and restrictions on the use of the property imposed by private parties.
4. Any use of the property by the claimants remains subject to the following laws: (a) those laws not specified in (1) above; (b) any laws enacted or enforced by a public entity other than the Commission or the department; and (c) those laws not subject to Measure 37 including, without limitation, those laws exempted under section (3) of the Measure.
5. Without limiting the generality of the foregoing terms, in order for the claimant to use the property, it may be necessary for the claimant to obtain a decision under Measure 37 from a city and/or county and/or metropolitan service district that enforces land use regulations applicable to

the property. Nothing in this order relieves the claimant from the necessity of obtaining a decision under Measure 37 from a local public entity that has jurisdiction to enforce land use regulation applicable to a use of the property by the claimant.

VII. COMMENTS ON THE DRAFT STAFF REPORT

The department issued its draft staff report on this claim on June 21, 2005. OAR 125-145-0100(3), provided an opportunity for the claimant or the claimant's authorized agent and any third parties who submitted comments under OAR 125-145-0080 to submit written comments, evidence and information in response to the draft staff report and recommendation. Comments received have been taken into account by the department in the issuance of this final report.

Measure 37
Text of Measure



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 the effective date of this amendment 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.
- 2) Just compensation shall be equal to the reduction in the fair market value of the affected property interest resulting from enactment or enforcement of the land use regulation as of the date the owner makes written demand for compensation under this act.
- 3) Subsection (1) of this act shall not apply to land use regulations:
 - A) Restricting or prohibiting activities commonly and historically recognized as public nuisances under common law. This subsection shall be construed narrowly in favor of a finding of compensation under this act;
 - B) Restricting or prohibiting activities for the protection of public health and safety, such as fire and building codes, health and sanitation regulations, solid or hazardous waste regulations, and pollution control regulations;
 - C) To the extent the land use regulation is required to comply with federal law;
 - D) Restricting or prohibiting the use of a property for the purpose of selling pornography or performing nude dancing. Nothing in this subsection, however, is intended to affect or alter rights provided by the Oregon or United States Constitutions; or
 - 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.
- 4) Just compensation under subsection (1) of this act shall be due the owner of the property if the land use regulation continues to be enforced against the property 180 days after the owner of the property makes written demand for compensation under this section to the public entity enacting or enforcing the land use regulation.
- 5) For claims arising from land use regulations enacted prior to the effective date of this act, written demand for compensation under subsection (4) shall be made within two years of the effective date of this act, or the date the public entity applies the land use regulation as an approval criteria to an application submitted by the owner of the property, whichever is later. For claims arising from land use regulations enacted after the effective date of this act, written demand for compensation under subsection (4) shall be made within two years of the enactment of the land use regulation, or the date the owner of the property submits a land use application in which the land use regulation is an approval criteria, whichever is later.
- 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 act, the present owner of the property, or any interest therein, shall have a cause of action for compensation under this act 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 act, but in no event shall these procedures act as a prerequisite to the filing of a compensation claim under subsection (6) of this act, 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 act.
- 8) Notwithstanding any other state statute or the availability of funds under subsection (10) of this act, in lieu of payment of just compensation under this act, 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.
- 9) A decision by a governing body under this act shall not be considered a land use decision as defined in ORS 197.015
- 10)

10) Claims made under this section shall be paid from funds, if any, specifically allocated by the legislature, city, county, or metropolitan service district for payment of claims under this act. Notwithstanding the availability of funds under this subsection, a metropolitan service district, city, county, or state agency shall have discretion to use available funds to pay claims or to modify, remove, or not apply a land use regulation or land use regulations pursuant to subsection (6) of this act. If a claim has not been paid within two years from the date on which it accrues, the owner shall be allowed to use the property as permitted at the time the owner acquired the property.

11) Definitions - for purposes of this section:

A) "Family member" shall include the wife, husband, son, daughter, mother, father, brother, brother-in-law, sister, sister-in-law, son-in-law, daughter-in-law, mother-in-law, father-in-law, aunt, uncle, niece, nephew, stepparent, stepchild, grandparent, or grandchild of the owner of the property, an estate of any of the foregoing family members, or a legal entity owned by any one or combination of these family members or the owner of the property.

3) "Land use regulation" shall include:

) Any statute regulating the use of land or any interest therein;

i) Administrative rules and goals of the Land Conservation and Development Commission;

ii) Local government comprehensive plans, zoning ordinances, land division ordinances, and transportation ordinances;

v) Metropolitan service district regional framework plans, functional plans, planning goals and objectives; and

) Statutes and administrative rules regulating farming and forest practices.

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

o) "Public entity" shall include the state, a metropolitan service district, a city, or a county.

12) The remedy created by this act is in addition to any other remedy under the Oregon or United States Constitutions, and is not intended to modify or replace any other remedy.

13) If any portion or portions of this act are declared invalid by a court of competent jurisdiction, the remaining portions of this act shall remain in full force and effect.

PJS

P. O. Box 457, Turner, OR 97392 0457

September 20th, 2005

schaffer@open.org

503 743 2999

Mr. Paul Sundermeir
ODOJ Senior Assistant Attorney General
1162 Court Street NE
Salem, Or 97301 – 4096

Dear Mr. Sundermeir:

Thank you for a September 15th, 2005, letter concerning **OSC 16991**. Your office may have a clerical error on the case numbers. I am a *pro se* litigant.

Your letter contains the following paragraph:

"I received a copy of a "Complaint and Summons" from the State Department of Land Conservation and Development. Although these documents are legally insufficient and do not constitute a proper summons and no proper service of the summons was effected, I am willing to accept for this case only, your submissions as a challenge to the State's decision on your Measure 37 Claim."

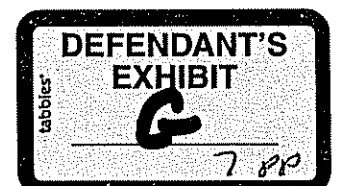
Would you please explain, why you believe there to be a deficiency (ies) in the *submissions*? Is there a violation of an uncured, *codified* requirement or was the Department of Land Conservation and Development and Attorney General, Hardy Myers, not advised (by personal service and a mailed copy of Complaint and Summons) on August 19th, 2005, of Plaintiff wish to put the disagreement before the Court?

Did the state not have a notice and opportunity to make a timely reply to the Court?

Again, thank you for a reply.

Regards,

TJ Schaffer



HARDY MYERS
Attorney General

PETER D. SHEPHERD
Deputy Attorney General



DEPARTMENT OF JUSTICE
TRIAL DIVISION

September 15, 2005

T.J. Schaffer
PO Box 457
Turner, OR 97392-0457

Re: *TJ and Juanita Schaffer v Marion County et al*
Marion County Circuit Court No. 05C16991

Dear Mr. Schaffer:

I received a copy of a "Complaint and Summons" from the State Department of Land Conservation and Development. Although these documents are legally insufficient and do not constitute a proper summons and no proper service of the summons was effected, I am willing to accept for this case only, your submissions as a challenge to the State's decision on your Measure 37 Claim.

I will be filing an appearance on behalf of the State. In the interim, please do not seek a default from the Court without giving me ten days prior written notice according to the Rules of Civil Procedure.

If you have any questions, please feel free to call me. I left you a telephone message asking you to call about my proposed motions against your complaint. If you can and choose to correct the deficiencies I will not file the motions.

Sincerely,

Paul J. Sundermier
Senior Assistant Attorney General

TRIM5542 DOC/PJS/tr1

schaffer

From: schaffer [schaffer@open.org]
Sent: Friday, September 16, 2005 11:47 AM
To: Paul.Sundermier@state.or.us
Subject: OSC 16991

<Paul.Sundermier@state.or.us >

Dear Mr. Sundermier

I believe you left a message on my telephone, while we were in Portland. Of late, we find ourselves in Portland, often.

I understand you want to ask me a question about DLCD's advice to seek assistance with the Circuit Court for Marion County Case OSC 16991, regarding material errors in a finding and DLCD administrative order M-119316. It had seemed the guidance might have been from ODOJ.

As you may know, I am an "owner" of property subject to a Measure 37 claim. DLCD does not want to recognize my "ownership". The property is a part of interstate commerce; my "ownership" is supported by plenty of legal precedent and the fact the state did not enact any other law to otherwise codify a different standard for "ownership", than that reflected in Measure 37. I am an owner and that dates my ownership to a time in 1976, if there then were any applicable and correctly codified standards.

Retrospective law is unconstitutional in Oregon. That is, agencies cannot go back and change the legal meanings of words or change the formula for relief on filed Measure 37 claims. It is my understanding, that even if the Legislature held a special meeting, it could not materially change filed Measure 37 claims.

Measure 37, a state law, was enacted by a sweeping majority of voters, though DLCD wants to pretend it is more unconstitutional than initial enactment of SB 100, which does not stand on very stable Constitutional ground, because of special interests that appear to be favored. I think that was noted by Chief Justice Edwin Peterson.

I understand SB 100 had an administrative review mechanism, that on abandonment, validates Measure 37. In some conceptualization Measure 37 may actually be the abandoned part of SB 100.

Measure 37 is remedial law. It just releases economic potential wrongly impaired, by SB

9/20/2005

100. Our petition, if successful, just restores our interest to a status of not being encumbered by unconstitutional SB-100 manipulation. It seems important for you and ODOJ to understand, I am just curing a defect with respect to our property. It just restores for us, the same rights to which many Oregonians would be entitled, except for administrative blundering that cannot be cured with a retrospective law. Remedial law does not have to generate the same solution for all people at one time. All people are not uniformly disaffected by SB 100 law. Remedies may reflect some contrast.

The Court Case OSC 16991 now has jurisdiction; the former administrative jurisdiction of DLCD seems at least to be in abeyance, until DLCD corrects errs in their administrative order. It seems wise to ask the Court for leave to accomplish the administrative changes and find out if we can agree to withdraw OSC 119316.

If you have questions or would like to share and discuss precedent, please send email, to me. Please also include OSC 16991 in the title of your email. It will help.

I hope you were listening to the Congressional examination and especially the concluding responses of Judge John Roberts. This case fits very well into the Judge's testimony.

BTW: I use the Supreme Court Library, from time to time.

I am

tj schaffer

Note: The Complaint and Summons was dated August 19th, 2005.

CERTIFICATE OF SERVICE

I certify that on 19 August 2005, I served a true copy of this notice of appeal on Lane Shetterly, Department of Land Conservation and Development, 635 Capital Street Suite 150, Salem, OR 97301-2524 and to Scott Norris, Marion County Legal Services, P.O. Box 14500, Salem, OR 97309.

T.J. Schaffer

August 19th, 2005

✓ August 19th, 2005

schaffer@open.org

503 743 2999

Judge James L. Rhoades
Circuit Court of Oregon for Marion County
County Court House
Salem, OR 97301

Honorable Judge Rhoads:

Re: Request to consolidate Measure 37 review petitions and correct errs
Case OSC 16991

Appellant Schaffer filed an action (***Case Number OSC 16991***) with the Circuit Court seeking review of Marion County Order 05-62. He since discovered the Circuit Court also has jurisdiction to review Order M119316 from the state Department of Land Conservation and Development, concerning the same or related issues.

Measure 37 Petitioner Schaffer on December 7th, 2004 filed a claim for Measure 37 relief at Marion County and learned thereafter, a similar claim for Measure 37 relief was also due and timely filed January 14th, 2004 with State of Oregon. Marion County subsequently published Order 05-62; the state published Order M 119316.

Appellant Schaffer filed the appeal request relative to Order 05-62 on July 25, 2005, the statutory due date for review of the Marion County Order. On July 6th, 2004 Appellant Schaffer received a copy of a staff report, and later found it also contained Order M 119316. Timely appeal from that Order is due 60 days after July 6th, 2005.

Consistent with ORS 183.484 the Circuit Court is the appropriate review authority for each Order. If respondents and the Court agree, appeal of Order 05-62 and M 119316 may be consolidated.

Appellant Schaffer wishes to appeal both Orders.

Common Facts:

Both Orders deny Appellant Schaffer Measure 37 status as an “owner” of said property, consistent with language in Measure 37. According to its text, Measure 37 relief is available, if petitioner is found with “*any interest therein*”.

If qualifying owner status is found, the period of consistent ownership and entitlement to Measure 37 remedies would reference antecedent (pre 1976) rules and law. Schaffer had purchased the property about 1976, built one home and married. Two sons, were born while they resided at the property. In 2004 Schaffer titled the property in his wife’s name. These facts are not contested.

What is not agreed is, if the act of titling the property in his wife’s name accidentally extinguished Measure 37 entitlements. Hence there is interest in the meaning of words of Measure 37, “*any interest, therein*”. Marion County and the state of Oregon seem to have similar concern for the same facts and beg a finding, that Appellant has no surviving interest in the property, even through the words of Measure 37 seem to say otherwise.

In other documents Appellant Schaffer suggests County reliance on zoning rules and maps may be defective as to ORS 183 requirements concerning, standards, notice, codification and application of alleged acreage requirements. Aside from public health and sanitation exigencies, with which Appellant Schaffer agrees, imposition of several contrasted alleged acreage requirements may be unlawfully arbitrary, according to ORS 183 and case law: *Megdal V Board of Dental Examiners*, 288 Or. 293, 605 P.2nd 273 (1980). If alleged antecedent zoning rules were misapplied, Measure 37 relief, if any, might be affected.

Mr. Norris at Marion County advised of deficiencies in the original request for court review. Plaintiff Schaffer asks to replace the original with this complaint.

Please find service of NOTICE of APPEAL served at the Department of Land Conservation and Development with this letter, together with Order M119316 and the related staff report.

Respectfully,

T.J. Schaffer

cc:

Marion County Legal Services, County Office Building, P. O. Box 1450, Salem, OR 97301;
Lane Shetterly, Director, Department of Land Conservation and Development, 635 Capital Street NE 150, Salem, OR 97301-2524 Telephone 503 373 0050

1 **CERTIFICATE OF SERVICE**

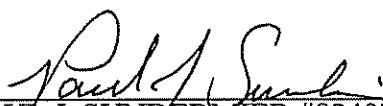
2 I certify that on September 21st, 2005, I served the foregoing Motion to Dismiss and
3 Affidavit of Paul J. Sundermier upon the parties hereto by the method indicated below, and
4 addressed to the following:

5
6 T.J. Schaffer
7 PO Box 457
8 Turner, OR 97392-0457
9 Plaintiff Pro Se

HAND DELIVERY
 MAIL DELIVERY
 OVERNIGHT MAIL
 TELECOPY (FAX)

9 Scott A Norris
10 Marion Co Legal Counsel
11 555 Court St NE
12 PO Box 14500
13 Salem, OR 97309
14 Attorney for Marion County

HAND DELIVERY
 MAIL DELIVERY
 OVERNIGHT MAIL
 TELECOPY (FAX)

15 
16 PAUL J. SUNDERMIER #82407
17 Senior Assistant Attorney General
18 Trial Attorney
19 Tel (503) 947-4700
20 Fax (503) 947-4792
21 paul.sundermier@doj.state.or.us