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

6 FAITH J. SCHLABACH, aka FAITH J.
7 BAKER,

8 Plaintiff,

9 v.

10 STATE OF OREGON, by and through the
11 DEPARTMENT OF LAND
12 CONSERVATION AND DEVELOPMENT,

Defendant.

Case No. 06C22233

Honorable James L. Rhoades

STATE OF OREGON'S RESPONSE TO
PLAINTIFF'S MOTION FOR SUMMARY
JUDGMENT AND CROSS-MOTION FOR
SUMMARY JUDGMENT

(Oral Argument Requested – 30 Minutes)

13 Pursuant to ORS 183.484 and ORCP 47, Defendant State of Oregon (“State”) moves for
14 summary judgment in its favor because the Final Order, Claim No. M 129352 that was issued by
15 the Department of Land Conservation and Development (“DLCD”) was correct. This motion is
16 made on the grounds that DLCD, in its Final Order, correctly interpreted and applied Ballot
17 Measure 37 (2004), codified at Oregon Revised Statute (“ORS”) 197.352 (“Measure 37”), to
18 plaintiff Faith J Schlabach’s demand for relief pursuant to Measure 37. DLCD correctly denied
19 Ms. Schlabach’s written demand for compensation under Measure 37 because Ms. Schlabach
20 sold all of her beneficial interest in the property that is the basis for her claim pursuant to a land
21 sale contract on March 26, 1990. Ms. Schlabach’s interest as a land sale contract vendor in the
22 property at issue is not an interest that is recognized as one entitled to relief under Measure 37.
23 The material facts are undisputed and the State is entitled to judgment as a matter of law.

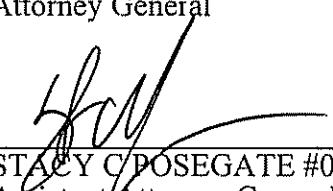
24 Oral argument is requested and is expected to require thirty minutes; official court
25 reporting services are requested.

1 This cross-motion is based on the records and file herein and State's memorandum in
2 support of its cross motion for summary judgment and in response to the Ms. Schlabach's motion
3 for summary judgment.

4 DATED this 17th day of July, 2007.

5 Respectfully submitted,

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7 Attorney General

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STATE OF OREGON'S MEMORANDUM IN
SUPPORT OF ITS RESPONSE TO PLAINTIFF'S
MOTION FOR SUMMARY JUDGMENT AND
CROSS-MOTION FOR SUMMARY
JUDGMENT

(Oral Argument Requested – 30 Minutes)

14 **INTRODUCTION**

15 This matter arises out of Petitioner Faith J. Schlabach's ("Petitioner") demand to the State
16 for compensation under ORS 197.352, commonly known as Ballot Measure 37. Measure 37
17 permits present owners of private real property to seek compensation for reductions in fair
18 market value caused by certain restrictions on an owner's use of private real property. If a claim
19 is valid, public entities have the choice of paying compensation or not applying certain
20 restrictions.

21 In accordance with Measure 37, Petitioner submitted a written demand for compensation
22 to the State, by and through the Department of Administrative Services ("DAS") on May 18,
23 2006 for property located in Douglas County. DAS and the Department of Land Conservation
24 and Development (DLCD) reviewed Petitioner's demand and jointly issued Final Order
25 M129352 on November 8, 2006. The Final Order determined that Petitioner's claim was not

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1 valid because she sold her qualifying ownership interest by land sale contract on March 26,
2 1990. Petitioner filed the instant Petition for Review in response to the Final Order.

3 The cross-motions for summary judgment before the Court address one primary question:
4 did the State correctly interpret and apply Measure 37 when it determined that Petitioner was not
5 a qualifying owner. Petitioner alleges that the State erred because she is the legal owner of the
6 property as a land sale contract vendor, therefore she is entitled to relief under Measure 37. The
7 State does not disagree with Petitioner that she retained bare legal title in the property at issue.
8 However, bare legal title does not rise to the ownership interest that qualifies under Measure 37
9 for relief from certain land use regulations. The Measure 37 claimant must demonstrate that a
10 land use regulation has actually restricted his or her ability to use property that he or she
11 presently owns. Land sale contract vendors do not have any beneficial interest in the property,
12 rather that right passes to the vendee on the execution of the land sale contract. Accordingly,
13 Petitioner, as a vendor has no other interest in the property other than bare legal title and is
14 therefore not an owner as that term is used in Measure 37.

15 MOTIONS

16 The State moves for summary judgment on the Petitioner's Petition for Judicial Review,
17 and on the Measure 37 Claim, as follows:

18 1. Judgment should be granted on the Petition for Judicial Review in the State's
19 favor on the grounds that the State has correctly applied the law as set forth in Final Order
20 M129352. ORS 183.484 (5).

21 2. Petitioner's claim under ORS 197.352(6) Measure 37 should be dismissed
22 because the Court lacks jurisdiction. The Administrative Procedures Act ORS 183.310 *et. seq.*
23 ("APA") provides the exclusive procedure available under Oregon law to test the validity of final
24 orders issued by state agencies.

25

1 as a Measure 37 “waiver.” Although Measure 37 affects Oregon’s land use planning statutes, it
2 did not repeal any of them. The measure merely authorizes a governing body to “modify,
3 remove, or not * * * apply” certain regulations in specific situations. *MacPherson v. DAS*, 340
4 Or 117, 132 (2006). Otherwise, the land use planning laws remain in effect. *Id.*

5 **B. The Administrative Process**

6 Measure 37 permits public entities to adopt procedures for processing claims. ORS
7 197.352 (7). DAS adopted procedural rules, found at OAR 125-145-0010 to 125-145-0105.
8 These rules cover such issues as minimum requirements for a claim against the State, notice and
9 third party participation, and the contents of the administrative record. The State lodged the
10 administrative record of Petitioner’s claim on July 9, 2007 (“*Record*”).

11 When DAS receives a claim, it provides written notice of the claim to neighboring
12 landowners, certain neighborhood or community organizations, and anyone who requests notice.
13 OAR 125-145-0080. This provision is consistent with the notice provisions of ORS 215.416
14 regarding notice of permits. Persons receiving notice, or any other person, may submit
15 comments, evidence and information concerning the claim within ten days of the notice. OAR
16 125-145-0080 (2), (3); (*Record*, § 3).

17 DAS initially reviews Measure 37 claims and forwards them to the appropriate state
18 agency, *i.e.* the “regulating entity” that appears to have enacted or enforced a relevant land use
19 regulation. OAR 125-145-0090. The regulating entity, in this case DLCD, investigates and
20 analyzes the claim and issues a draft report. OAR 125-145-100 (1). The draft report provides
21 the State’s preliminary determination on the necessary elements of the claim, including
22 timeliness of the demand, ownership, the land use regulations that are the basis of the claim, the
23

24
25 compensation only if and when the legislature appropriates funds for that purpose. *See* OAR
660-002-0010 (8) (c).

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1 effect of relevant land use regulations on the property's fair market value, and applicable
2 exemptions, if any. OAR 125-145-100 (2).

3 The draft report is made public on the internet and copies are mailed to the claimant, and
4 any persons who submitted comments or requested notice. OAR 125-145-100 (1). After a ten-
5 day comment period, and based in part on the comments received (*Record*, § 5), DLCD and DAS
6 issue a final report and order (*Record*, § 6). OAR 125-145-100 (3)-(6). The final orders are
7 served on any persons who received copies of the draft report or submitted comments on the
8 draft report. DLCD also makes its final orders public by posting them on its website.

9 **C. Statement of undisputed facts**

10 The State believes the following facts are undisputed based on Petitioner's Measure 37
11 claim and all documents submitted in support of that claim, the State's final orders, the Petition
12 for Review and the Petitioner's motion for summary judgment.

13 1. On April 28, 2006, Petitioner submitted a Measure 37 demand to the State (Claim
14 number M129352) based on claimed restrictions on her 114.10 acre property in Douglas County,
15 Oregon, Tax lot 500, Township 28S, Range 06 West, Section 19 ("Property"). (*Record*, §2)

16 2. Petitioner sought compensation in the amount of \$1,064,750 or the right to divide
17 the Property into eleven lots ranging in size from two acres to 85.41 acres with one dwelling on
18 each vacant lot. (*Record*, § 2, p. 6)

19 3. Petitioner acquired the Property with her husband on November 4, 1966 by
20 warranty deed. (*Record*, §2, pps. 20-21).

21 4. On March 26, 1990, Petitioner conveyed the Property by land sale contract to
22 Ronlee D. Ropp and Lisa R. Ropp ("Ropps") and recorded a memorandum of the contract with
23 Douglas County. (*Record*, § 2, pgs. 22-26; § 4, pps. 4-7).

24 5. The contract has not been fulfilled. (See Petition, ¶2)

25

1 6. On November 8, 2006, DLCD issued its Final Order and Final Staff Report and
2 Recommendation denying Petitioner’s claim for the following reasons:

3 The claimant, Faith Baker Schlabach, states in the claim that she acquired the
4 subject property on November 4, 1966, as evidenced by a warranty deed
5 included with the claim. However, she conveyed the property to Ronlee D. and
6 Lisa R. Ropp on March 26, 1990, as reflected by a memorandum of contract
7 included with the claim.

8 The Douglas County Assessor’s Office confirms that Ronlee D. and Lisa R.
9 Ropp are current owners of the subject property. The claimant, Faith Baker
10 Schlabach, no longer owns the subject property.

11 The claimant, Faith Baker Schlabach, is not an “owner” of the subject property
12 as that term is defined in ORS 197.352(11)(C).

13 (*Record*, §4, p. 5).

14 These facts are undisputed. The parties disagree about the legal consequences of these
15 facts on Petitioner’s right to relief under Measure 37. Thus, the question presented is one of
16 statutory interpretation of Measure 37.

17 **D. Standard of review**

18 The State disagrees with Petitioner that ORCP 47 provides the standard of review over
19 these proceedings because Petitioner has petitioned this Court for review of the State’s Final
20 Order, M129633. ORS 183.484 of the APA provides the standard for review because the State’s
21 Final Order was issued in an other than contested case hearing. ORS 183.484; *Emmell v. Dept.*
22 *of Land Consv. and Dev.*, 2007 Or App. LEXIS 944 (2007) [A final order issued by a state
23 agency denying a Measure 37 claim is an order in an other than contested case proceeding, thus
24 jurisdiction lies in the Circuit Court]; *Powell v. Bunn*, 185 Or App 334, 339 (2002).

25 Contrary to Petitioner’s position, the summary judgment standard set forth in ORCP 47 is
not the applicable standard. *Powell v. Bunn*, 185 Or App at 339 (“viewing factual disputes in the
light most favorable to a nonmoving party” – the usual standard of review in a summary-
judgment motion – “[is] not appropriate in the judicial review of an administrative order in a

1 noncontested case proceeding”). Instead, the appropriate standard of review in the instant case
2 is whether the agency has erroneously interpreted a provision of law and that a correct
3 interpretation compels a particular action. Thus, in deciding these motions for summary
4 judgment on the Petitioner’s APA claim, the only question presented is: whether the State’s Final
5 Order is based on correct interpretations or applications of the law. ORS 183.484(5). If the
6 Court answers this question in the affirmative, the agency is entitled to summary judgment.

7 The Petitioner has also brought a claim for relief directly under Subsection (6) of
8 Measure 37, seeking monetary compensation, and has moved for summary judgment on that
9 claim. As the State explains in section II. C of its argument, *infra*, this Court lacks jurisdiction
10 over the Petitioner’s Measure 37 “just compensation” claim. However, if this Court concludes
11 that it has jurisdiction over that claim, it should apply the ordinary standard under ORCP 47 to its
12 analysis of the parties’ cross-motions for summary judgment: “The trial court must view the
13 evidence and all reasonable inferences it may support in the light most favorable to the
14 nonmoving party and determine whether the moving party, despite that view of the evidence, is
15 entitled to judgment as a matter of law.” *Powell v. Bunn*, 185 Or App at 338.

16 **E. Statutory Interpretation**

17 The circuit court reviews the State’s interpretation of Measure 37 using the same
18 methodology that applies to any statute. *PGE v. Bureau of Labor and Industries*, 317 Or 606,
19 612 n 4 (1993) (three-part methodology applies “not only to statutes enacted by the legislature,
20 but also to the interpretation of laws and constitutional amendments adopted by initiative or
21 referendum, as well as to the interpretation of regulations”). The objective is to discern the intent
22 of those who enacted the law, in this case, the Oregon voters. “The best evidence of the voters’
23 intent is the text of the provision itself. * * * The context of the language of the ballot measure
24 may also be considered[.]” *Stranahan v. Fred Meyer, Inc* , 331 Or 38, 56 (2000) (*quoting*
25 *Roseburg School Dist. v. City of Roseburg*, 316 Or 374, 378 (1993).

1 If the voters' intent is not clear, the court examines the history of the provision.
2 *Stranahan*, 331 Or at 56, citing *Ecumenical Ministries v. Oregon State Lottery Comm.*, 318 Or
3 551, 559 (1994). Legislative history of ballot measures consists of information available to the
4 voters "that disclose the public's understanding of the measure." *Ecumenical Ministries*, 318 Or
5 at 560 n 8 (e.g. "the ballot title and arguments for and against the measure included in the voters'
6 pamphlet, and contemporaneous news reports and editorial comment on the measure").

7 **II. Argument**

8 **A. Measure 37 expressly and contextually provides relief only to claimants who**
9 **presently own an interest in real property that is currently restricted and devalued by land**
10 **use regulations.**

11 The pinnacle of the Petitioner's dispute with the State is the meaning of the term "owner"
12 as it used in Measure 37. Subsection (11) of Measure 37 sets forth a short list of definitions for
13 terms used in the statute, including the term "owner," which it defines as "the present owner of
14 the property, or any interest therein." ORS 193.352 (11)(C). Unfortunately, the statutory
15 definition in Subsection (11)(C), by itself, only establishes that the Measure 37 claimant must be
16 a *present* owner of the property or any interest therein. It does not define "property" or "any
17 interest therein." As a result, the statutory definition does not, standing alone, define what an
18 "owner" or the type of ownership interest that is necessary to qualify for Measure 37 relief.
19 Therefore, the meaning of these terms must be found in the overall context of the statute in
20 accordance with Oregon rules of statutory construction described above². Particularly, Oregon
21

22 ² Moreover, Oregon courts repeatedly have observed that the word "owner" lacks a fixed
23 meaning outside the context and purpose of the statute in which it is used. *Moe v. Beck*, 311 Or
24 499, 504-505 (1991) ("[d]ivining the legislative intent in statutes using the word 'owner' has
25 been a vexing problem for nearly a century"); see also *Pedro v. January*, 261 Or 582, 602
26 (1972) ("When the term 'owner' or 'ownership' is used in a statute, the context and purpose of
the statute governs what is meant by the use of the terms"); *State v. The Calif. Ore. Power Co.*,
225 Or 604, 612 (1961) (owner of an easement not an "owner" under statute imposing liability
for fire suppression costs); *Schram v. Manary*, 123 Or 354, 363 (1927) (term "owner" under

1 case law instructs a Court to look to the use of these terms as they are repeated throughout the
2 statute within the context of the statute. *PGE v. Bureau of Labor and Industries*, 317 Or at 611,
3 *supra*, (“use of the same term throughout the statute indicates that the term has the same meaning
4 throughout.”)

5 **1. Subdivision (1) of Measure 37 establishes that the statute is directed**
6 **only at present owners of a private real property interest that is restricted and devalued by**
7 **a land use regulation.**

8 The first indication of the meaning of these terms is contained in Subsection (1).
9 Subsection 1 states that an “owner of the property” is entitled to relief “[i]f a public entity enacts
10 or enforces a new land use regulation or enforces a land use regulation enacted prior to
11 December 2, 2004, that *restricts the use of private real property or any interest therein and has*
12 *the effect of reducing the fair market value of the property, or any interest therein.*” (emphasis
13 added). Subsection 1 requires the claimant to demonstrate that a land use regulation restricts a
14 property interest that he or she presently owns. If the claimant cannot establish that he or she
15 cannot use the property interest in a certain way because a land use regulation restricts him or her
16 from doing so, then relief is denied.

17 Moreover, the claimant must demonstrate that the same restrictions on use *reduce the fair*
18 *market value of the interest*. If the land use regulation has no effect on the fair market value of
19 the claimant’s interest, he or she is also not injured in a manner that is recognized under Measure
20 37. The ability to realize that market value is essential to a claim. As discussed below, a land
21 sale contract vendor cannot satisfy either of these essential elements.³

22 Mechanic’s Lien law is controlled by context and purpose of statute and “as applied to real
23 property, has no fixed meaning”).

24 ³ This issue is the subject of three appeals now pending in the Oregon Court of Appeals, *Fairclo*
25 *v. State*, Case No. A134031, *State v. Nash*, Case No. A134557 and *Kolski v. State*, Case No.
A135431. *Nash* is the State’s appeal from a judgment of Marion County, rejecting the State’s
finding that a land sale contract vendor did not qualify for Measure 37 relief. *Fairclo* is an
appeal from a judgment of the circuit court of Klamath County, agreeing with the State that a

1 **2. Subsections (2), (8) and (10) further qualify the proper claimant by**
2 **restricting relief to remedy only present interests in property that are currently restricted**
3 **by land use regulations that also diminish the market value of that interest.**

4 Subsection (2) provides that “[j]ust compensation shall be equal to the reduction in the
5 fair market value of the affected property interest resulting from enactment or enforcement of the
6 land use regulation *as of the date the owner makes written demand for compensation under this*
7 *section.*” From Subsection (2), it is apparent that the relevant property interest is the interest that
8 the claimant owns on the date demand is made and that such interest must be *affected* by the
9 enactment or enforcement of the land use regulation.

10 Both Subsections (8) and (10) similarly provide that a claimant cannot just own any
11 interest, rather he or she must own an interest that entitles him or her to use the property at issue
12 in the absence of the offending land use regulation. Subsection (8) states that, in lieu of
13 payment, the government may waive certain regulations “to allow the owner *to use the property*
14 *for a use permitted at the time the owner acquired the property.*” [emphasis added] Section 10
15 permits the claimant “*to use the property as permitted at the time the owner acquired the*
16 *property*” when a claim has not been paid within two years from the date on which it accrues.
17 ORS 197.352 (10) [emphasis added]. The waiver relief available under Subsections (8) and (10)
18 is limited only to a use the claimant could pursue if the land use regulation is “waived.” If the
19 claimant does not presently own a right to use property that is restricted by a land use regulation,
20 then the relief offered in Subsections (8) and (10) is meaningless- even if granted it would not
21 put the claimant in any greater position than he or she was on the day written demand was made
22 for compensation under Measure 37.

23 land sale contractor vendor is not an “owner” who qualifies for Measure 37 relief. *Kolski* is an
24 appeal from judgment for the State from the circuit of Polk County in which the Court also
25 agreed that a land sale contract vendor is not an “owner” under Measure 37. A copy of the
Klamath county circuit court opinion is attached as Exhibit 1 and the Polk county circuit opinion
is attached as Exhibit 2. No letter opinion was issued in the Marion County action.

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1 The only conclusion that fully comports with the intended meaning and effect of Measure
2 37 is that it provides a remedy only for those claimants that have a present right to use private
3 property that is being restricted by a land use regulation. Indeed, permitting an owner who has
4 no right to use the property to obtain relief under Measure 37 would provide an unlawful
5 windfall to persons who have not been harmed by land use regulations. Petitioner’s argument is
6 not supported by the text, context or purpose of Measure 37.

7 **B. Oregon law supports the State’s decision to deny Petitioner’s claim for**
8 **Measure 37 because a vendor in a land sale contract is not a qualifying owner.**

9 Petitioner is not a qualifying owner under Measure 37 because, as a vendor in a land sale
10 contract, she does not have an interest in property that is restricted by a land use regulation.
11 Particularly, land use regulations do not restrict her from subdividing and developing the
12 Property because she does not have that property interest absent any regulation, rather that right
13 is vested in the vendee. Moreover, because the vendor can only transfer his or her bare legal
14 title, without the right to possess and use the property, land use regulations do not affect the
15 market value of that title.

16 The land sale contract between Petitioner and the Ropps is, essentially, a financing
17 instrument that performs a function similar to that of a seller’s purchase money mortgage.
18 *Harder v. City of Springfield*, 192 Or 676, 689 (1951); *see also* Patrick A. Randolph, Jr.,
19 “Updating the Oregon Installment Land Contract,” 15 *Willamette L Rev* 181, 182 (1979).
20 Petitioner, the vendor, contracted to sell the property, agreeing to convey title when the full
21 purchase price is paid. *Record*, § 2, pps. 22-26; § 4, pps. 4-7; *Bedortha v. Sunridge Land Co.,*
22 *Inc.*, 312 Or 307, 311 (1991) (*citing* Randolph, 15 *Willamette L. Rev* at 182). Petitioner retained
23 the right to receive payments and the right to possession of the property if the Ropps fail to make
24 timely payments. *Ibid.* In the meantime, the Ropps, as vendees, acquired the right to “possess
25 [the] land, to enjoy its fruits and profits, and the right to legal title upon payment of the contract

1 price.” Frank R. Lacy, “Behind and Beyond the 1975 Legislation on Creditors of Vendors,” 55
2 *Or L Rev* 227, 228 (1976); *see also Bedortha*, 312 Or at 311 (*discussing Lacy*, 55 *Or L Rev* at
3 231). Thus, Petitioner does not have any right to use the property unless the Ropps default. In
4 that respect, Petitioner’s interest is similar to the right of a mortgagee to foreclose in the event of
5 default. *Security State Bank v. Luebke*, 303 Or 418, 423 (1987) (a land sale contract vendee is
6 generally considered the “owner”).

7 *Harder v. City of Springfield* illustrates the significance of vendor and vendees’ interests
8 in the property that is the subject of the contract in light of Petitioner’s Measure 37 claim. That
9 case presented the question of who qualified as “property owners benefited” having the right to
10 vote on a local assessment for road improvements. The court found that the City of Springfield
11 was not entitled to exclude land sale contract vendees from voting, where the vendees “would be
12 the beneficiaries of the improvement and the only parties to such a contract required to bear the
13 cost of the benefit flowing from the improvement made.” *Id.* at 685.

14 Noting that the term “owner” does not have a fixed meaning, and after reviewing a
15 variety of authorities regarding land sale contracts, the *Harder* court found that the vendee
16 acquires a full equitable estate with all the incidents of real ownership; including the right to
17 convey, encumber, devise, inherit, and give as dowry. *Id.* at 686-87. The vendee’s heirs may
18 even enforce specific performance on the contract after the vendee’s death. *Id.* Because of this
19 transference of rights, the Court opined that the vendor did not have the requisite interest to be a
20 “property owner benefited” under the city ordinance because that interest was vested with the
21 vendee. *Id.* at 689-90.

22 The analysis in *Harder* is immediately applicable to a Measure 37 claim made by a land
23 sale contract vendor - the vendee to whom a claimant sold the property, rather than the
24 claimant/vendor, is the affected party. In a land sale contract context, only the vendee’s present
25 interest is restricted by land use regulations and thus truly affected. This point is underscored by

1 the use that Petitioner sought in her demand to the State— to subdivide the property into two-acre
2 parcels. As a land sale contract vendor, Petitioner cannot subdivide the property because that
3 action would interfere with the present vendees’ rights. Thus, in 1990, Petitioner conveyed to
4 the Ropps the interest that was restricted by the regulations at issue in Petitioner’s demand.

5 Other cases regarding land sale contracts illustrate the vendee’s actual beneficial
6 ownership of the property versus the vendors bare legal title. *Panushka v. Panushka*, 221 Or
7 145, 14 (1960); *Ernst Brothers Corp. v. Dept. of Rev*, 320 Or 294, 303 (1994) citing *Panushka*,
8 *supra* [The vendor in a land sale contract cannot sell the subject property because, as a matter of
9 law, the vendee is the equitable owner, and consequently, is vested with the exclusive right to
10 sell the property.]; *Braunstein v. Trottier*, 54 Or App 687, 691 (1981)[A land sale contract is
11 primarily a security device affecting the land to which it relates for which the vendor is legal title
12 holder subject to the equitable interest of the vendee.]; *Senior Estates, Inc. v. Bauman Homes,*
13 *Inc.*, 272 Or. 577, 583 (1975)[“Absent any stipulation to the contrary, the purchaser has a right
14 to possession or the rents and profits of the land and the vendor a right to interest on the unpaid
15 purchase price.”]; *City of Reedsport v. Hubbard*, 202 Or 370 (1954) [Vendor in a land sales
16 contract not entitled to the rents and profits in the use of the contracted land while vendees in
17 lawful possession because “all the incidents of a real ownership belong to [the vendee].”]; *W.*
18 *Equities, Inc. v. St. Paul Fire & Marine Ins. Co.*, 184 Or. App. 368, 373 (2002) [“The doctrine of
19 equitable conversion applies; at the time of an agreement to sell real property, the purchaser of
20 the real property is deemed to be the owner thereof, and the seller becomes entitled to receive
21 payment of the purchase price”].

22 The State agrees with Petitioner that as land sale contract vendor she has retained at least
23 one stick from the metaphorical bundle of property rights: a right to receive payments and legal
24 title. *Bedortha*, 312 Or at 311 (*discussing* Lacy, 55 Or L Rev at 231). But, however important
25 these sticks may be, neither gives the vendor an interest relevant to Measure 37. The right to

1 receive payments and to retain legal title as security for the vendee's contract performance is not
2 a present right to use the property in a way that a land use regulation restricts. In the context of
3 Measure 37, the vendor is not an "owner."

4 **C. Petitioner does not have a separate cause of action for compensation under**
5 **Subsection (6) of Measure 37 because the State acted within 180 days.**

6 Petitioner's sole remedy against the State for review of the Final Order is under ORS
7 183.484 of the APA which provides exclusive review of orders made by a state agency. As
8 stated above, ORS 183.484 provides the basis for that review because the Final Order in this
9 matter was an order in an other than contested case hearing. *Emmell v Dept. of Land Conserv. and*
10 *Dev.*, 2007 Or App. LEXIS 944, *supra*. Review of a final order made by a state agency is *only*
11 taken out of the APA if a statute or other law *expressly* states that review is not under the APA.
12 *Fairbanks v. Bureau of Labor & Indus.*, 323 Or 88 (1996).

13 Contrary to established Oregon law, Petitioner alleges a separate cause of action under
14 Measure 37, outside of the APA, based on the language of Subsection (6) of Measure 37.
15 Petitioner avers that Subsection (6) entitles her to bring a separate cause of action because land
16 use regulations enacted after 1966 continue to apply. Petitioner's myopic interpretation of
17 Subsection (6) ignores the governing authority of the APA and the clear intent of Measure 37 to
18 require public entities in the first instance to decide the merits of compensation claims and
19 choose the relief to be provided. Interpreting Subsection (6) in isolation violates the basic rule of
20 statutory construction—the first level analysis is text *and context*.

21 It is obvious from the text of Subsection (6), that it cannot be interpreted out of context.
22 Otherwise, it would be too vague and ambiguous to be enforced. For example, Subsection (6)
23 does not specify which land use regulations are at issue in the "cause of action" or even against
24 whom the action may be asserted.

25

1 If a *land use regulation* continues to apply to the subject property more than 180
2 days after the present owner of the property has made written demand for
3 compensation under this section, the present owner of the property, or any interest
4 therein, *shall have a cause of action* for compensation under this section in the
5 circuit court in which the real property is located, and the present owner of the
6 real property shall be entitled to reasonable attorney fees, expenses, costs, and
7 other disbursements reasonably incurred to collect the compensation.

8 ORS 197.352 (6) (emphasis added).

9 A literal reading of Subsection (6) alone grants property owners a cause of action based
10 on any land use regulation but identifies no one to sue. Indeed, applying Subsection (6) out of
11 context could lead to many absurd results. For example, the State could be liable in
12 circumstances where it chose to continue to apply certain land use regulations but modified them
13 in accordance with its authority in Subsection (8). Or, reading the subdivision completely out of
14 context, the State could remain liable for land use regulations that continue to apply regardless of
15 whether the applicant actually qualified for relief under Measure 37.

16 As with the meaning of the term “owner,” Subsection (6) must be interpreted consistent
17 with the context of the statute and any other applicable law. The critical context is found in the
18 qualifying regulations in Subsection (1), the exceptions in Subsection (3) and the delegation of
19 responsibility to the public entities that enforce qualifying regulations in Subsections (1), (4), (5)
20 and (7)-(10). If the public entity fails to process written demand within 180 days, Subsection (6)
21 entitles the claimant a direct path to circuit court and a potential claim for attorneys fees. In this
22 context, the APA, which is also context for interpreting Subsection (6), would no longer be the
23 exclusive means of review because there would be no final order to review.

24 Interpreting Subsection (6) as superceding the APA directly contradicts Subsection (12)
25 of Measure 37 which states that “The remedy created by this section *is in addition to any other*
26 *remedy under the Oregon or United States Constitutions, and is not intended to modify or*
27 *replace any other remedy.*” ORS 197.352(12) [emphasis added]. Indeed, construing Subsection
28 (6) as a second chance to make the same claim for compensation is not compelled by the text and

1 context of the statute, renders much of Measure 37 superfluous, nullifies the established remedy
2 under the APA, and needlessly complicates a process advertised to the voters in 2004 as
3 streamlined.⁴

4 The Circuit Courts of Jefferson, Josephine and Clatsop Counties have agreed with the
5 State that where an agency has issued a timely Measure 37 waiver, there is no separate cause of
6 action under Subsection (6). In the cases of *Pondelick v. County of Josephine, et. al*, Case No.
7 06-CV-0622 and *Perrott v. Josephine County*, Case No. 06-CV-0677, the court granted the
8 State's Motion to Strike the plaintiffs' causes of action for compensation under Subsection (6)
9 and ruled that the plaintiffs' right to relief was limited to review of the State's order under the
10 APA.⁵ Similarly, in the matter of *Hal Pruitt v. Jefferson County*, Jefferson County Circuit Court
11 Case No. 06CV0029, Judge Thompson granted the county's summary judgment motion/motion
12 to dismiss on the plaintiff's separate cause of action for compensation under Subsection (6)
13 because, in part, the court found that the county had issued a waiver and the only means to
14 challenge that waiver was by a writ of review.⁶ Finally, in the matter of *Estate of Beelar et al v.*
15 *Clatsop County et al*, Case No. 06-2178, Clatsop County Circuit Court (Judge Cindee S. Matyas)
16 ruled that the APA is the exclusive procedure for review of timely Measure 37 state agency final
17 orders.⁷

18
19
20 _____
21 ⁴ Search for "streamline" in the 2004 Voters' Pamphlet, available on the Secretary of State's
22 website at http://www.sos.state.or.us/elections/nov22004/guide/meas/m37_fav.html.

23 ⁵ Judge Baker's letter opinions in *Pondelick v. County of Josephine, et. al*, Case No. 06-CV-0622
24 and *Perrott v. Josephine County*, Case no. 06-CV-0677 are attached hereto respectively as
25 Exhibits "3" and "4".

⁶ Judge Thompson's letter opinion in *Pruitt v. Jefferson County*, Jefferson County Case No.
06CV0029 is attached hereto as Exhibit "5".

⁷ Judge Matyas issued her opinion from the bench on July 5, 2007, without a written opinion.
Judgment has not yet been entered.

1 As these circuit courts agree, the APA provides the exclusive remedy to review the Final
2 Order in this matter because an order has issued. Therefore, Petitioner does not have a separate
3 cause of action under Measure 37 and summary judgment in the State's favor is appropriate.

4 **D. The State is not required to pay compensation to Plaintiff, regardless of the**
5 **outcome of this matter.**

6 Finally, the State also moves for judgment on Petitioner's Measure 37 claim because
7 Petitioner is not entitled to compensation as a matter of law. The language and structure of
8 Measure 37 clearly show that the voters intended to give public entities the choice between
9 paying compensation and waiving land use regulations. The statute provides:

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

16 * * * * *

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

26 ORS 197.352. Thus, section 8 generally grants the public entities to which a demand for
27 compensation is submitted the option to pay or provide alternate relief. Section 10 makes it clear
28 that the option is wholly within the public entities' discretion and specifically applies to claims
29 brought under section 6.⁸

30 ⁸ If the text and context did not clearly indicate that the choice of relief is vested in the public
31 entities, then a court would review the legislative history. *See, e.g.* the Voters' Pamphlet's
32 explanatory statement for Measure 37: "If a property owner proves that a land use regulation
33 restricts the use of the owner's property, and reduces its value then *the government responsible*
34 *for the regulation will have a choice: pay the owner of the property an amount equal to the*

1 In this case, the State denied Petitioner’s claim. However, even if it had determined that
2 Petitioner’s date of acquisition should be 1966, the State could have elected not to apply
3 restrictive land use regulations in lieu of paying compensation to Petitioner. Therefore,
4 Petitioner cannot utilize Measure 37 to force the state to compensate him for her purported
5 injuries.

6

7

CONCLUSION

8 The State is entitled to summary judgment, as a matter of law, because it correctly
9 interpreted and applied the law to Petitioner’s written demand for compensation under Measure
10 37. The State correctly determined in its Final Order that Petitioner was not entitled to relief
11 because she did not own an interest in real property that is restricted by a land use regulation that
12 also diminishes the market value of the property. Petitioner is also not entitled to relief for her
13 separate Measure 37 claim because the State issued the Final Order that is the subject of this
14 matter, therefore review of that order is exclusively within the APA. And, finally, even if the
15 Court accepted Petitioner’s argument and permitted relief under Measure 37, the State may
16 choose to issue a Measure 37 waiver in lieu of compensation. Therefore, the State is also

17 //

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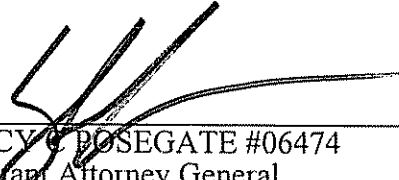
24 reduction in value or modify, change or not apply the regulation to the owner’s property.”
25 [http://www.oregon.gov/LCD/MEASURE37/legal_information.shtml#Information About the Election](http://www.oregon.gov/LCD/MEASURE37/legal_information.shtml#Information%20About%20the%20Election) (site last visited on April 18, 2007; emphasis added).

1 entitled to summary judgment under ORCP 47 because, as a matter of law, Petitioner is not
2 entitled to compensation under Subsection (6) of Measure 37.

3 DATED this 17th day of July, 2007.

4 Respectfully submitted,

5 HARDY MYERS
6 Attorney General



8 STACY C. POSEGATE #06474
9 Assistant Attorney General
10 Trial Attorney
11 Tel (503) 947-4700
12 Fax (503) 947-4792
13 Stacy.C.Posegate@doj.state.or.us
14 Of Attorneys for Defendant



RECEIVED
SEP 11 2006

Trial Division, Dept. of Justice
Salem, Oregon

CAMERON F. WOGAN
Circuit Judge

Circuit Court of the State of Oregon
for KLAMATH COUNTY
316 Main Street
KLAMATH FALLS, OREGON 97601
(541) 883-5624, ext. 244
Fax: (541) 882-6109

Beth Dunaway
Judicial Assistant

Cecilia Britton
Court Clerk

September 7, 2006

Michael Spencer
Attorney at Law
419 Main Street
Klamath Falls, Oregon 97601

Darsee Staley
Assistant Attorney General
Department of Justice
1162 Court Street NE
Salem, Oregon 97301

Re: Fairclo v. State of Oregon
Case No. 06-1934CV

Dear Counsel:

The issue is whether a person holding a vendor's interest in a land sale contract qualifies as an "owner" for the purposes of ORS 197.352, otherwise known as Measure 37. ORS 197.352(1)(C) provides that an "owner" is "the present owner of the property, or any interest therein". I examine the "context of the statutory provision at issue, which includes other provisions of the same statute and other related statutes". PGE v. Bureau of Labor and Industries, 317 Or. 606, 610 (1993). With that context, it simply does not make sense that a person holding a vendor's interest in a land sale contract is an owner for the purposes of this law.

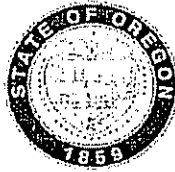
Accordingly, the petitioner's motion for summary judgment is denied. I have set this matter for an attorney conference for Monday, September 25th at 9:00 a.m. to discuss the future of this proceeding.

Ms. Staley should submit an order.

Very truly yours,


CAMERON F. WOGAN
Circuit Court Judge

CFW/bad



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MAR 20 2007

THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE TWELFTH JUDICIAL DISTRICT

Trial Division, Dept. of Justice
Salem, Oregon

William M. Horner
Circuit Court Judge

Polk County Courthouse, Room 301
850 Main Street, Dallas, OR 97338-3178

PHONE - (503) 831-1776
FAX - (503) 623-6614

March 20, 2007

Mark Irick
Attorney at Law
PO Box 105
Dallas, OR 97338

Stacy C. Posagate
Assistant Attorney General
1162 State Street
Salem, OR 97301-4096

RE: KOWALSKI TRUST v. STATE of OREGON via DEPARTMENT of LAND
CONSERVATION and DEVELOPMENT, 06P-1539

Dear Disputants:

Each of you filed Motion for Summary Judgments and both were heard on March 7, 2007. After each of you made your arguments, I took the matter under advisement. I have now had a chance to re-read your written memorandum as well as the notes I took.

Plaintiff is a vendor under a land sales contract for a piece of Polk County realty. The land is currently zoned as Farm/Forest [FF] and they have applied under Measure 37 to allow them to divide the property into two 10 acre tracts and the remainder a 28.22 acre parcel or be financially compensated in the sum of \$132,000.00. That request was denied because of the decision that the plaintiffs were not owners for the purposes of Measure 37. That is the issue to be decided.

The measure is written in terms of a present remedy. If you apply and are successful the governmental agency will remove the land use restriction or pay accordingly. Neither of those remedies would be available to the plaintiff.

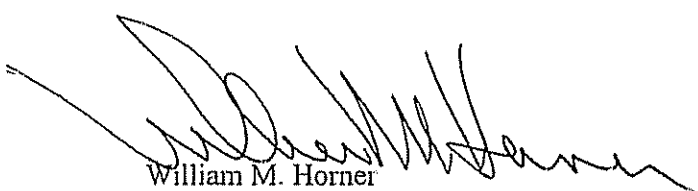
Plaintiff's interest in the realty would not come within the description of just compensation as set out in ORS 197 352[2]. The statute provides the reduction in value is as of the date of application. The value of plaintiff's interest is set out in the land sales contract minus any payments made by the vendee. It is not affected by Measure 37 nor any application that the vendors may make.

If the governmental unit had removed the zoning restriction, plaintiff would not be able to divide the property as, again, its interest in the real property is restricted by the land sale contract.

I am granting defendant's cross motion for summary Judgment finding that the Final Order was based upon a correct interpretation or application of the law. The parties stipulated that the facts were not in dispute.

Ms. Posegate shall prepare the appropriate form of judgment for my signature.

in friendship,



William M. Horner
Circuit Court Judge

LINDI L BAKER Circuit Judge
MICHAEL NEWMAN Circuit Judge



PAT WOLKE, Circuit Judge
THOMAS M HULL Circuit Judge

OREGON JUDICIAL DEPARTMENT
Josephine County Court

January 12, 2007

Mr. Walter L. Cauble
Attorney at Law
111 SE 6th Street
Grants Pass, Oregon 97526

Mr. Steven E. Rich
County Legal Counsel
500 NW 6th Street
Grants Pass, Oregon 97526

RE: Pondelick, et al. v. Josephine County, et al.

Case # 06-CV-0622

Respondent's Motion To Strike; Motion To Quash Writ of Review; Motion To Dismiss

Petition; Motion For Additional Time

Dear Mr. Cauble and Mr. Rich:

The Court heard these motions on November 21, 2006 and allowed Petitioners additional time to respond to Respondent's Points and Authorities which had been submitted just before the hearing. Petitioners' Response was timely filed on November 29, 2006 and the Court took the matter under advisement for further review and consideration. Following such further review and consideration, the Court finds as follows:

Petitioners seek relief under various statutes, including ORS 197.352, commonly referred to as Measure 37. Their underlying claim is that they are entitled to compensation for loss of value to their land. The matter before the Court at this time, however, is limited to the issues raised in Respondent's various motions as to the pleadings. In summary, Petitioners' petition seeks a writ of review under ORS 34.010 et seq. of the decision rendered by the Josephine County Board of Commissioners; a judicial review under ORS 183.484 of the order issued by the State of Oregon, Department of Land Conservation and Development and Department of Administrative Services; compensation under ORS 197.352(6); declaratory judgment regarding the effective date of Petitioners' title acquisition; and reasonable attorney fees, expenses, costs and other disbursements pursuant to ORS 197.352 and/or ORS 183.497.

Respondent basically complains that Petitioners cannot include alternative remedies in their petition and that since Petitioners seek a writ of review, then they are limited to that relief. As such, compensation, declaratory judgment and attorney fees and costs are not authorized under such a writ of review

After carefully considering the arguments of all parties, the Court finds that Petitioners will be limited in this action to the writ of review under ORS 34.010 et seq Respondent's arguments are well taken in that combining the various forms of relief into one proceeding would require differing standards of review and procedure to the degree that could result in incompatible relief In conducting a writ of review, the court conducts an appellate type of review of the BCC's decision and is limited to the record in the case in conducting such review It is not a trial on the merits and no new evidence can be considered or reviewed by the court. Further, under a writ of review, the court's authority is limited by ORS 34.040 to determine only whether the BCC has exceeded its jurisdiction, failed to follow procedure, made a finding or order not supported by substantial evidence in the record or rendered an unconstitutional decision. In a writ of review, the court has authority only to affirm, modify, reverse or annul the BCC's decision or to direct the BCC to proceed according to the court's decision. The court has no authority to impose other remedies Petitioners seek such as declaratory judgment, compensation or attorney fees.

The writ of review procedure is inconsistent with Petitioners' other claims for relief where the procedures, scope of examination and possible remedies are very different Petitioners have provided no persuasive authority that would adequately support their contention that they should be allowed to seek all remedies in this same action. While Petitioners rely in part on AK Media Group, Inc. v. City of Portland, 192 Or App 204 (2004), the Court of Appeals, in a footnote, points out that the trial court had dismissed the writ of review as moot at the onset of trial and that it was not before that court on appeal While generally, petitioners and plaintiffs are allowed to plead alternative theories, in the case of a writ of review, due to its unique procedural limitations, it does not seem logical to combine that particular remedy with other, procedurally different forms of relief

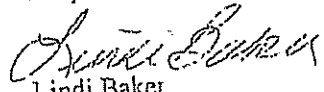
Accordingly, Petitioners will be limited to their claim for writ of relief and will not be allowed to proceed under the declaratory judgment, compensation or attorney fees and costs claims in the same action. Respondent's motions are granted in this regard.

It is further noted that Respondent withdrew its Third Motion to Strike relating to Petitioners' Third Claim (failure to state a claim upon which relief can be granted) and its Motion for Additional Time The Return was filed with the Court in a timely manner on October 18, 2006

Page Three
Pondelick, et al vs Josephine County, et al 06CV0622

Respondent's Motion to Quash the Writ of Review and its Motion to Dismiss the Petition in its entirety are denied. This case will proceed as a Writ of Review in the normal course. I ask that Mr. Rich prepare the appropriate documentation of this Court's ruling in this matter.

Respectfully yours,


Lindi Baker
Circuit Court Judge

LLB:ts

LINDI L. BAKER, Circuit Judge
MICHAEL NEWMAN, Circuit Judge

PAT WOLKE, Circuit Judge
THOMAS M. HULL, Circuit Judge



OREGON JUDICIAL DEPARTMENT
Josephine County Court

May 11, 2007

RECEIVED

MAY 16 2007

Trial Division, Dept. of Justice
Salem, Oregon

Mr. Walter L. Cauble
Attorney at Law
111 SE 6th Street
Grants Pass, Oregon 97526

~~Ms. Erika Hadlock~~
Attorney at Law
1162 Court Street NE
Salem, Oregon 97301

Mr. Steven E. Rich
County Legal Counsel
500 NW 6th Street
Grants Pass, Oregon 97526

RE: Perrott v. Josephine County, Oregon and State of Oregon, et al.
Case # 06CV0677
Respondent State of Oregon's Motion to Dismiss
Petitioner's Objection to Respondent Josephine County's Proposed Order

Dear Mr. Cauble, Ms. Hadlock and Mr. Rich:

The Court has reviewed the record herein on the State's Motion to Dismiss. Oral argument was not requested on this motion. Oral argument was requested and held on the objection to Respondent Josephine County's Proposed Order. The Court has had these matters under advisement and makes the following findings:

1. State of Oregon's Motions to Dismiss-


The State raises the same issues raised in another case recently before the Court, Pondelick, et al. v. Josephine County, et al., 06-CV-0622. Further, the Court has earlier ruled on similar issues raised by Respondent Josephine County. For all of the reasons detailed in the Court's earlier rulings, the Court grants the State's Motions to Dismiss and finds that with respect to its claims against the State, Petitioners will be limited to relief under the Administrative Procedures Act.

2. Petitioner's Objection to Respondent Josephine County's Proposed Order

Again, this issue was heard by the Court in conjunction with the Pondelick case. For the reasons stated in the Court's Pondelick letter opinion of May 11, 2007, (which letter opinion is fully incorporated herein by this reference) the Court finds that this matter shall be placed on hold until the Corey case is finally resolved.

The Court requests that the attorneys collaborate to fashion an appropriate and mutually acceptable order consistent with the Court's rulings and present the proposed order to the Court for review and execution.

Respectfully yours,


Lindi Baker
Circuit Court Judge

LLB:ts

LINDI L. BAKER, Circuit Judge
MICHAEL NEWMAN, Circuit Judge



PAT WOLKE, Circuit Judge
THOMAS M. HULL, Circuit Judge

OREGON JUDICIAL DEPARTMENT
Josephine County Court

May 11, 2007

RECEIVED

MAY 16 2007

Trial Division, Dept. of Justice
Salem, Oregon

Mr. Walter L. Cauble
Attorney at Law
111 SE 6th Street
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Ms. Erika Hadlock
Attorney at Law
1162 Court Street NE
Salem, Oregon 97301

Mr. Steven E. Rich
County Legal Counsel
500 NW 6th Street
Grants Pass, Oregon 97526

RE: Roy A. Pondelick and Tana Pondelick, Trustees of the Roy A. Pondelick and Tan Pondelick
Revocable Living Trust, et al. v. Josephine County and State of Oregon, Department of Land
Conservation and Development, Department of Administrative Services
Case # 06-CV-0622
Respondent State of Oregon's Motions to Strike
Petitioner's Objection to Respondent Josephine County's Proposed Order

Dear Mr. Cauble, Ms. Hadlock and Mr. Rich:

The Court heard these matters on April 9, 2007 and took them under advisement for further review and consideration. Following such further review and consideration, the Court finds as follows:

1. State of Oregon's Motions to Strike Petitioners' Third and Fourth Claims-

The State argues that Petitioners' exclusive remedy in this matter is under the Administrative Procedures Act, ORS 183.484. Accordingly, the State argues that Petitioners' claims under Measure 37 and the Declaratory Judgment Act should be stricken or dismissed. A similar motion was filed by Josephine County. This Court heard that motion and ruled that

Page Two

Pondelick vs. Josephine County and State of Oregon 06CV0622

Petitioners' exclusive remedy against the County would be through their writ of review. See Court's letter opinion of January 12, 2007. The Court hereby takes judicial notice of such letter opinion and incorporates it in its entirety, including the record and pleadings, into this letter opinion

For reasons stated in the above referenced letter opinion, but on separate and distinct findings, the Court grants the State's motions to strike. With respect to its claims against the State, Petitioners will be limited to relief under the Administrative Procedures Act.

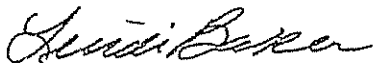
2. Objection to Respondent Josephine County's Proposed Order-

Petitioner has objected to the County's proposed order. This issue was discussed during the above hearing under the larger context that the Court needs to determine what procedure our local court should be following on this and similar cases in view of the recent Court of Appeals case, Corey, et al. v. Department of Land Conservation and Development, 210 Or App 542 (January 31, 2007). In this case, the Court of Appeals ruled that jurisdiction for judicial review of the state matter under ORS 183.482 lies with the Court of Appeals, not the trial court. Ms. Hadlock represented to the Court that the State has moved for reconsideration in the Corey case and that the Corey petitioners have not responded to the State's motion. As such, there has been no appellate judgment entered at this time. In its motion for reconsideration, the State maintains that the review should remain with the trial court.

Given the logistical difficulties involved in the Court transferring the state case to the Court of Appeals and then perhaps learning that the Corey case may require transfer back to the trial court, this Court has determined that this particular issue should be placed on hold until the Corey case is resolved. Then, whether the state issue is addressed at the Court of Appeals or the trial court, proper jurisdiction can be certain and less time and resources will be expended.

In view of this ruling, the Court requests that the attorneys collaborate to fashion an appropriate and mutually acceptable revised order consistent with the Court's rulings and present the proposed order to the Court for review and execution.

Respectfully yours,



Lindi Baker
Circuit Court Judge

LLB:ts

LINDI L. BAKER Circuit Judge
MICHAEL NEWMAN Circuit Judge

PAT WOLKE Circuit Judge
THOMAS M. HULL Circuit Judge



OREGON JUDICIAL DEPARTMENT
Josephine County Court

January 12, 2007

Mr. Walter L. Cauble
Attorney at Law
111 SE 6th Street
Grants Pass, Oregon 97526

Mr. Steven E. Rich
County Legal Counsel
500 NW 6th Street
Grants Pass, Oregon 97526

RE: Pondelick, et al. v. Josephine County, et al.

Case # 06-CV-0622

Respondent's Motion To Strike; Motion To Quash Writ of Review; Motion To Dismiss

Petition; Motion For Additional Time

Dear Mr. Cauble and Mr. Rich:

The Court heard these motions on November 21, 2006 and allowed Petitioners additional time to respond to Respondent's Points and Authorities which had been submitted just before the hearing. Petitioners' Response was timely filed on November 29, 2006 and the Court took the matter under advisement for further review and consideration. Following such further review and consideration, the Court finds as follows:

Petitioners seek relief under various statutes, including ORS 197.352, commonly referred to as Measure 37. Their underlying claim is that they are entitled to compensation for loss of value to their land. The matter before the Court at this time, however, is limited to the issues raised in Respondent's various motions as to the pleadings. In summary, Petitioners' petition seeks a writ of review under ORS 34.010 et seq. of the decision rendered by the Josephine County Board of Commissioners; a judicial review under ORS 183.484 of the order issued by the State of Oregon, Department of Land Conservation and Development and Department of Administrative Services; compensation under ORS 197.352(6); declaratory judgment regarding the effective date of Petitioners' title acquisition; and reasonable attorney fees, expenses, costs and other disbursements pursuant to ORS 197.352 and/or ORS 183.497.

Respondent basically complains that Petitioners cannot include alternative remedies in their petition and that since Petitioners seek a writ of review, then they are limited to that relief. As such, compensation, declaratory judgment and attorney fees and costs are not authorized under such a writ of review

After carefully considering the arguments of all parties, the Court finds that Petitioners will be limited in this action to the writ of review under ORS 34 010 et seq. Respondent's arguments are well taken in that combining the various forms of relief into one proceeding would require differing standards of review and procedure to the degree that could result in incompatible relief. In conducting a writ of review, the court conducts an appellate type of review of the BCC's decision and is limited to the record in the case in conducting such review. It is not a trial on the merits and no new evidence can be considered or reviewed by the court. Further, under a writ of review, the court's authority is limited by ORS 34 040 to determine only whether the BCC has exceeded its jurisdiction, failed to follow procedure, made a finding or order not supported by substantial evidence in the record or rendered an unconstitutional decision. In a writ of review, the court has authority only to affirm, modify, reverse or annul the BCC's decision or to direct the BCC to proceed according to the court's decision. The court has no authority to impose other remedies Petitioners seek such as declaratory judgment, compensation or attorney fees.

The writ of review procedure is inconsistent with Petitioners' other claims for relief where the procedures, scope of examination and possible remedies are very different. Petitioners have provided no persuasive authority that would adequately support their contention that they should be allowed to seek all remedies in this same action. While Petitioners rely in part on AK Media Group, Inc. v. City of Portland, 192 Or App 204 (2004), the Court of Appeals, in a footnote, points out that the trial court had dismissed the writ of review as moot at the onset of trial and that it was not before that court on appeal. While generally, petitioners and plaintiffs are allowed to plead alternative theories, in the case of a writ of review, due to its unique procedural limitations, it does not seem logical to combine that particular remedy with other, procedurally different forms of relief.

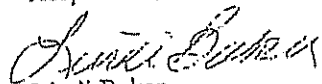
Accordingly, Petitioners will be limited to their claim for writ of relief and will not be allowed to proceed under the declaratory judgment, compensation or attorney fees and costs claims in the same action. Respondent's motions are granted in this regard.

It is further noted that Respondent withdrew its Third Motion to Strike relating to Petitioners' Third Claim (failure to state a claim upon which relief can be granted) and its Motion for Additional Time. The Return was filed with the Court in a timely manner on October 18, 2006.

Page Three
Pondelick, et al vs Josephine County, et al 06CV0622

Respondent's Motion to Quash the Writ of Review and its Motion to Dismiss the Petition in its entirety are denied. This case will proceed as a Writ of Review in the normal course. I ask that Mr. Rich prepare the appropriate documentation of this Court's ruling in this matter.

Respectfully yours,


Lindi Baker
Circuit Court Judge

LLB:ts

Crook County Courthouse
300 NE 3rd St
Prineville, OR 97754-1990
(541) 447-6541 - Fax (541) 447-5116
Reply to ()



Jefferson County Courthouse
75 SE "C" Street, Suite C
Madras, OR 97741-1750
(541) 475-3317 - Fax (541) 475-3421
Reply to ()

Judge Gary S Thompson

Judge George W Neilson
Presiding Judge

Judge Daniel J. Ahern

Twenty-Second Judicial District Trial Courts

May 16, 2007

RECEIVED

MAY 21 2007

BEERY ELSNER & HAMMOND

Mr. Christopher D. Crean
Attorney at Law
1750 SW Harbor Way, #380
Portland, OR 97201

Mr. James E. Leuenberger
Attorney at Law
4800 SW Meadows Rd.
P O Box 1684
Lake Oswego, OR 97035

Re: Hal Pruitt v. Jefferson County
Jefferson Circuit Court Case No. 06CV0029

Counsel:

This matter was before the Court for a Motion for Summary Judgment filed by the Plaintiff, Hal Pruitt, and a Counter Motion for Summary Judgment and Dismissal filed by the Defendant, Jefferson County on February 12, 2007. In arguments and exhibits the Court can delineate the following: that the Claimant, Hal Pruitt, is currently 91 years of age and purchased this property in 1951 and 1952. The amount of property is between 38 and 40 acres and has a current assessed value by the county of \$61,360. In the Measure 37 claim, Mr. Pruitt claimed the amount of compensation that the property worth was \$800,000 and in the complaint plead that the property was worth \$1,200,000. In the Measure 37 claim the claimant submits that five to ten acre lots would sell between \$75,000 and \$150,000 per lot. If a person figured that the amount of lots to be sold would be eight lots at five acres each at \$100,000 that would result in a claim of \$800,000 potentially. At the time of the Measure 37 hearing, the commissioners asked Robert Harris what the intent was as far as dividing the property, and Mr. Harris replied that they considered dividing the property into six or eight lots. If you multiply eight lots times the maximum \$150,000 proposed value set forward in the claim, the result is \$1,200,000, the same that is claimed in this law suit. The Court finds that representations were clearly made to the county that the maximum number of lots to be created was eight lots of approximately five acres each.

The Claim submitted by Mr. Pruitt on September 23, 2005, was incomplete under the requirements of the county ordinance. Nevertheless, on March 8, 2006, the County Commission heard the claim and made a decision concerning that claim, which was specifically, "not to apply the existing EFU A-1 zoning ordinance regulations and comprehensive plan policies identified by staff to allow Hal Pruitt, claim #. 05-M37-39, to submit an application to divide the property and place a dwelling on each of the vacant lots, subject to a condition that the claim processing fee be paid at or prior to the submittal of the land use application and with the understanding that a maximum of eight parcels can be created." This motion passed two to one. The actual commissioner's journal was drafted but not signed until April 5, 2006. The motion references a waiver of the zoning ordinance regulation and comprehensive plan policies identified in the staff report which include Jefferson County's Zoning Ordinance (JCZO) section 301 (D) (E) which list the type of dwelling permitted in A-1 Zone and which require an eighty-acre minimum lot size. Portions of the Jefferson County Comprehensive Plan Objectives and Policies specified were: (3) in regards to agricultural objective, (3-A). Policy (3-A-1), again regarding preservation of agricultural lands; Policy (3-A-3), cooperating with the urban growth management area; Policy (3-A-5), standards and procedures to insure farm divisions would be appropriate for the continuation of existing commercial agriculture; Goal 6 regarding air, water and land quality, Policy (6-9-3); Goal 10 regarding Housing Policy, (10-B-3); Goal 11, Policy (11-B-5), public facilities, Goal 11, Policy (11-B-6) and Goal 11 public facilities Policy (9).

The Court notes that in the Measure 37 claim by Mr. Pruitt, the claim is for (1) any statute regulating the use of my land or any interest therein; (2) Administrative rules and goals of Land Conservation Development Commission; (3) Local Government Comprehensive Plans, Zoning Ordinances, Land Division Ordinances and Transportation; (4) Statute and Administrative Rules Regulating Farming and Forest Practices. It also reflects ORS 92 Subdivisions and Partitions, ORS 215 County Planning, Zoning, except that portion that deals with health and safety. ORS 197 Comprehensive Land Use Planning. Also specified were ordinances requiring fees above those designated in 1952. No specific ordinances beyond those designations are made in the claim, nor for that matter, are they made in the Plaintiff's complaint. In paragraph nine, the complaint reads: "the Defendant has not fully released the property from all regulations required by Measure 37." In paragraph 10 the complaint reads, "the Defendant has not modified, removed, or not applied the restrictive land use regulations to allow the Plaintiff to use the property for a use permitted at the time he acquired the property pursuant to Measure 37 and more than 180 days have expired since he made demand on Defendant for just compensation."

The County Commission executed a formal waiver on May 24, 2006 which sets forward specifically a waiver of (a) 2003 Jefferson County Zoning Ordinance sections 301(A) (B), (D), and (E) and (b) Jefferson County Comprehensive Plan (3-A), (3-A-1), (3-A-3), (3-A-5), (6-C-3), (10-B-3), (11-B-5), (11-B-6), and policy (9). This formal waiver specifies the property and is

indicating that it is personal to the claimant Ben Howell Pruitt, that it bars a claim for compensation on subject property, that the waiver is granted to allow the following specified use of the property described specifically to allow (a) Ben Howell Pruitt to submit an application to divide the property into a maximum of eight lots, and (b), to allow a dwelling on each vacant lot. The required processing fees were to be paid at or before the filing of the land use application based on this waiver. It further indicates that the zoning on the subject property is not changed and that the property owner must obtain required planning, zoning, building, electrical, plumbing, mechanical, sanitation, driveway or other similar permits. This was signed by the commissioners on May 24, 2006, as approved on March 8, 2006. The decisions made by the Commissioner in their March 8 decision, signed on April 5, 2006, and formally endorsed on May 24, 2006, are virtually identical.

Although it was not clear until September 13, 2006, in Ordinance 0-157-06 that the announcing of the decision was a formal waiver. Ordinance 0151-05, which was enacted on November 9, 2005, allows a waiver upon final execution of a written order and Ordinance 0-96-05 enacted on July 13, 2005, indicates that the Board is to deliberate and to announce its decision. A claim for compensation in this case was filed on May 22, 2006, two days before the formal waiver was executed by the county. The 180 days expired on March 23, 2006.

ORS 197.352 et seq., sets forward the contents of the ballot Measure 37. ORS 197 set forward that unless a governmental entity waives the regulations that would restrict a person from developing the property as he could at the time of his ownership preceding the time of the passing of the ordinances, that they can file a claim for compensation for the reduction of fair market value against the governmental entity that is still requiring the regulations that are restricting the usage of the property. Exception is made 197.352 (3) to Health & Safety Regulations. Unfortunately the statute does not provide an exclusive list.

In extensive arguments before the Court on February 12, 2007, counsel for the Plaintiff contends that there was a judicial vacuum in deciding which ordinances are health and safety ordinances as specified in sub section 3 of ORS 197.352, but they would not be determined in a compensation suit such as this. Counsel for the Defendant, Jefferson County, agreed that they would normally not be considered in a compensation suit like this, but should have been reviewed after the county court's decision if the claimant disagreed with the waiver or the extent of the waiver. The Defendant contends that a writ of review proceeding should be utilized. The Defendant further contends that the 60-day deadline for review of the proceeding has passed as to all three decisions, and that the Plaintiff has lost his remedy if he disagrees with the extent of the waiver by the County Commission.

Although there are a few things that are clear in ORS 197.352, these things can principally be indicated as clear. That is, that if the governmental entity does not waive the land use ordinances that would restrict the property from the division that the claimant could have accomplished at

the time of its original acquisition, that the land owner may file a claim for compensation under ORS 197.352 in circuit court. In the alternative, if the governmental entity waives those ordinances and allows the person to divide his property as allowed under the time of acquisition, then no cause of action arises for compensation. When the Court originally made its decision several months ago regarding denying the Defendant's motion to dismiss, it was under the impression that ultimately the extent of the waiver has to be decided by the Court in this compensation action. Both counsel disagreed.

After reflection and reading the statute closely, I agree with both counsel. Specifically, the area that we are looking at most closely is ORS 197.352 (3) (b) which ordinances "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." Although it is really not said within this law suit, it has been argued in part and implied in part, that fees that are being required, going through the land use process, requiring an approval of a transportation system, that the Plaintiff does not believe these acres fall within ORS 197.352 (3) ©. However, within sixty days of the Defendant's decision, whether it be the initial declaration in county court on March 8, 2006, with the signature of that document on April 5, 2006, or formal waiver document on May 24, 2006, there was no writ of review filed by the Plaintiff regarding the propriety of that decision by the County Commission.

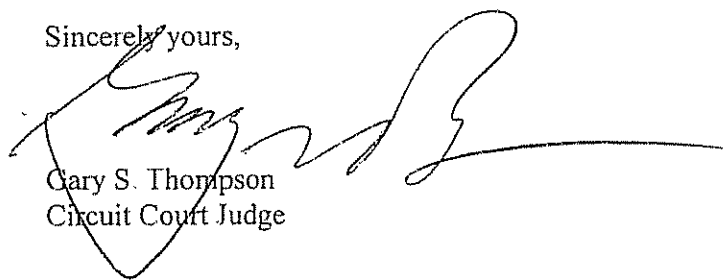
The Defendant indicates that the Plaintiff's Motion for Summary Judgment should be denied for a variety of reasons. First, that there has been no salient evidence offered on the lack of fair market value, a critical issue in a compensation case, that there is no judicable issue that is available for the Court to decide in this case because the county has waived the required ordinances and is allowing the Plaintiff to subdivide his property as requested and as allowed at the time of acquisition and that therefore, there is not longer a judicable issue in this compensation suit. Certainly from the onset it appears that the intent of the county court was to waive the zoning and the comprehensive plan issues regarding this property and allow Mr. Pruitt to divide the property as requested in both his original claim and by his representations that were made through his agent at the time of the hearing.

The Plaintiff's Motion for Summary Judgment is denied for two reasons. First, that he has not fairly set forward information and affidavits that set forward why there is a reduction of the fair market value of the property described and competent evidence of the reduction of value. Secondly, has not identified the ordinances fairly and completely in regards to how the waiver by the county was incomplete at its initial decision time.
Mr. Clean may draw the appropriate order.

Secondly, there is the Motion for Summary Judgment that goes to the issue that the differences between the parties should have been decided in a writ of review proceeding following the decision by the County Commission as to the waiver that was executed by county and whether it

was a comprehensive waiver of the ordinances allowing Mr. Pruitt to divide the property as requested and waiving the applicable zoning and comprehensive plan portions as identified by staff. That the issue is no longer judiciable because a waiver has been granted and any differences that might be distinguished regarding the extent of that waiver should have been decided in another forum through a writ of review rather than in this compensation case. If one considers that if a waiver has been comprehensively granted, and the parties have not contested it in a proper forum as to the extent of that waiver, then it is premature to file a compensation action in this case because of not following through on determining the judiciability of that compensation claim because of the extent of the waiver. A party in a Measure 37 action does not get two remedies, either the ordinances that affect his division of property are waived, or in the alternative he can file an action for reduction of fair market value of his property because of the lack of a waiver. The claimant under Measure 37 should not have both a compensation action and a waiver of the regulations. That is inapposite to the content of ORS 197.352 and its intent. This Court finds that the decision by the County Commission on March 8, 2006 was a quasi-judicial decision subject to review by a writ of review proceeding. The Court grants the Defendant's Motion for Summary Judgment and/or Dismissal on the reasoning set forward by Mr. Crean in his argument and in his memorandum. Mr. Crean may also draw the appropriate order regarding this matter.

Sincerely yours,




Gary S. Thompson
Circuit Court Judge

1 **CERTIFICATE OF SERVICE**

2 I certify that on July 17, 2007, I served the foregoing STATE'S RESPONSE TO
3 PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND CROSS-MOTION FOR
4 SUMMARY JUDGMENT and MEMORANDUM IN SUPPORT OF RESPONSE AND
5 CROSS-MOTION FOR SUMMARY JUDGMENT upon the parties hereto by the method
6 indicated below, and addressed to the following:

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