

HARDY MYERS  
Attorney General



PETER D. SHEPHERD  
Deputy Attorney General

DEPARTMENT OF JUSTICE  
TRIAL DIVISION

September 7, 2007

**BY HAND DELIVERY**

Circuit Court Clerk  
Multnomah County Courthouse  
1021 S.W. Fourth Avenue, Room 204  
Portland, Oregon 97204

Re: *Smith et al. v. Multnomah County et al.*  
Multnomah County Circuit Court Case No. 0705-05464

Dear Clerk:

Enclosed for filing please find State Defendants' Reply in Support of Motions to Dismiss.

Please sign and date the attached confirmation card and return it to me. Thank you for your time and attention to this matter.

Very truly yours,

A handwritten signature in black ink, appearing to read "Katherine G. Georges".

#06200

For Katherine G. Georges  
Senior Assistant Attorney General  
Special Litigation Unit

TRIS8071/KGG/cjw

Enclosures

cc: Kristian Roggendorf  
Stephen L. Madkour  
Darsee Staley

HARDY MYERS  
Attorney General



PETER D. SHEPHERD  
Deputy Attorney General

DEPARTMENT OF JUSTICE  
TRIAL DIVISION

September 7, 2007

**BY HAND DELIVERY**

Honorable Jerry B. Hodson  
Circuit Court Judge  
Multnomah County Courthouse  
1021 S.W. Fourth Avenue  
Portland, Oregon 97204

Re: *Smith et al. v. Multnomah County et al.*  
Multnomah County Circuit Court Case No. 0705-05464

*Lenske et al. v. Multnomah County et al.*  
Multnomah County Circuit Court Case No. 0705-05460

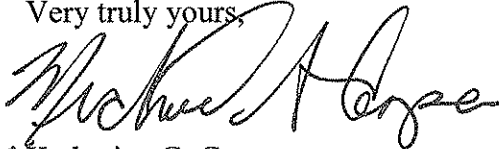
Dear Judge Hodson:

Enclosed please find courtesy copies of the State Defendants' Reply in Support of Motions to Dismiss in the above cases.

The state defendants' ORCP 21 motions to dismiss these cases are scheduled for hearing before you concurrently on September 13, 2007 at 11:00 a.m.

Thank you for your assistance with this matter. Please have your staff call me with any questions.

Very truly yours,

  
#06200  
For Katherine G. Georges  
Senior Assistant Attorney General  
Special Litigation Unit

TRIS8074/KGG/cjw

Enclosures

cc: Kristian Roggendorf  
Stephen L. Madkour  
Darsee Staley

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3  
4 IN THE CIRCUIT COURT OF THE STATE OF OREGON  
5 FOR THE COUNTY OF MULTNOMAH

6 GEORGE RAYMOND SMITH, individually,  
7 as controlling member of THE RAYMOND  
8 SMITH, LLC, and as Trustee for the  
9 RAYMOND SMITH SURVIVOR'S TRUST,  
10 RAYMOND SMITH QUALIFIED  
MARITAL TRUST, and RAYMOND SMITH  
FAMILY TRUST; and SHIRLEE LENSKE,  
as controlling member of LENSKE  
PROPERTIES, LLC,

11 Plaintiffs,

12 v.

13 MULTNOMAH COUNTY, OREGON, a  
14 political subdivision of the State of Oregon;  
15 DEPARTMENT OF LAND  
16 CONSERVATION AND DEVELOPMENT,  
17 an agency of the State of Oregon; LAND  
18 CONSERVATION AND DEVELOPMENT  
19 COMMISSION, an agency of the State of  
Oregon; DEPARTMENT OF FORESTRY, an  
agency of the State of Oregon;  
DEPARTMENT OF ENVIRONMENTAL  
QUALITY, an agency of the State of Oregon;  
and DEPARTMENT OF ADMINISTRATIVE  
SERVICES, an agency of the State of Oregon,

20 Defendants.

Case No. 0705-05464

STATE DEFENDANTS' REPLY IN SUPPORT  
OF MOTIONS TO DISMISS

21  
22 **INTRODUCTION**

23 Plaintiffs have filed a Measure 37 complaint for compensation under ORS 197.352(6).

24 Defendants have moved to dismiss for failure to state a claim and lack of subject matter

25 jurisdiction. For claims filed after November 1, 2006, ORS 197.352(6) has been amended by

26 HB 3546 to extend the time in which a property owner has a cause of action for compensation

1 from 180 to 540 days after the date a Measure 37 claim is submitted to a public entity. Because  
2 the 540 day period has not yet expired, plaintiffs have no cause of action, and their complaint  
3 must be dismissed.

4 Plaintiffs argue that defendants’ motions to dismiss should be denied because HB 3546 is  
5 unconstitutional as a violation of due process under the Fourteenth Amendment to the United  
6 States Constitution.<sup>1</sup> Plaintiffs raise no other objections.

7 Plaintiffs are wrong. A cause of action that is created by statute can be altered or  
8 eliminated by statute without a violation of due process. Here, plaintiffs fail to show other  
9 grounds for a violation of due process—i.e., that the legislation is wholly arbitrary or capricious  
10 or that there was any defect in the legislative process to enact HB 3546. Absent such a showing,  
11 plaintiffs fail to show a violation of the Fourteenth Amendment.

12 Plaintiffs’ suit must be dismissed, without prejudice. Plaintiffs can file a complaint for  
13 compensation, if necessary, once the 540-day period expires.

14 **BACKGROUND**

15 Measure 37 has been amended by House Bill 3546. HB 3546 provides a one-year  
16 extension of time, by extending the time period from 180 to 540 days, for government to review  
17 and act upon a Measure 37 claim. It also correspondingly extends from 180 days to 540 days the  
18 date on which a property owner may file a civil cause of action for just compensation: “The  
19 owner of the subject property *has a cause of action for compensation* under ORS 197.352(6)  
20 *only if a land use regulation continues to apply to the subject property more than 540 days after*  
21 *the Measure 37 claim is made.*” HB 3546, § 2(b). Specifically, section 2 of HB 3546 provides:

22 “(2) Notwithstanding ORS 197.352(4) and (6), if a  
23 Measure 37 claim was made on or after November 1, 2006:<sup>2</sup>

24  
25 <sup>1</sup> The Fourteenth Amendment provides: “No State shall \* \* \* deprive any person of life, liberty,  
26 or property, without due process of law; \* \* \* .”

<sup>2</sup> It is undisputed that plaintiffs’ Measure 37 claims were made after November 1, 2006.

1 (a) Just compensation under ORS 197.352 is due the  
2 owner of the property from the public entity only if a land use  
3 regulation continues to be enforced against the property 540 days  
4 after the Measure 37 claim is made to the public entity; and

5 (b) The owner of the subject property has a cause of  
6 action for compensation under ORS 197.352(6) only if a land use  
7 regulation continues to apply to the subject property more than 540  
8 days after the Measure 37 claim is made.”

9 If the claimant is an individual, section 3 of HB 3546 also contains a hold harmless provision so  
10 that the ability to “make or prosecute a Measure 37 claim is not affected by the death of the  
11 claimant during the extended review period provided by subsection (2) of this section.”  
12 HB 3546, § (3).

13 House Bill 3546 declared an emergency and became effective on May 10, 2007, the date  
14 it was passed. Plaintiffs filed their complaint on May 15, 2007. Thus, HB 3546 was the law at  
15 the time plaintiffs filed their complaint. Because the 540 day period has not expired, plaintiffs  
16 do not yet have a cause of action for compensation under Measure 37.

17 The reason the legislature enacted HB 3546 was to allow state and counties an adequate  
18 period of time to resolve a backlog of Measure 37 claims. Measure 37 originally established a  
19 deadline for filing claims of December 4, 2006. *See* ORS 197.352(5). Of the more than 6,600  
20 claims filed with the state, seeking over \$17 billion in compensation, over 3,500 of those claims  
21 were received in the final month before the December 4, 2006 deadline.<sup>3</sup> Plaintiffs are among  
22 the 3,500 claimants who waited until the final month to file claims. The extension of time in  
23 HB 3546 applies to all Measure 37 claims filed on or after November 1, 2006, which includes  
24 plaintiffs. The extension of time was necessary due to the large number of claims filed  
25 immediately before the filing deadline. The extension allows governments the time needed to  
26 appropriately review and process these claims.

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<sup>3</sup> *See* attached Exhibit 1 (Governor Kulongoski’s May 10, 2007 letter to legislative leadership);  
*and see* Defendant Multnomah County’s ORCP Rule 21 Motions, Ex. 102 (Governor’s Press  
Release regarding HB 3546).

1 Processing Measure 37 claims requires diligent and time-consuming research by state and  
2 local governments. Notice must be given to neighboring property owners to give them time to  
3 evaluate and comment on claims near their property.<sup>4</sup> The Department of Land Conservation  
4 and Development (DLCD), working with the Oregon Department of Justice (DOJ), must  
5 examine property and ownership records, analyze state and local land use regulations, assess the  
6 impact of those regulations on individual properties, review comments from neighbors, and  
7 determine findings of fact and issue final orders to the claimants.

8 The state has doubled its processing rate from 150 per month to 300 per month since the  
9 last minute surge of new claims filed in the month before the deadline.<sup>5</sup> In order for the state to  
10 complete the processing of Measure 37 claims within the extended timeline provided by  
11 HB 3546, it will be necessary for state agencies to continue to issue final orders at that same  
12 accelerated pace,<sup>6</sup> so contrary to plaintiffs’ suggestion in their brief, HB 3546 does not allow the  
13 state to delay the processing of claims.

14 Governor Kulongoski has directed state agencies to “move forward immediately with the  
15 expeditious review and disposition of Measure 37 claims in the state’s possession,” and has  
16 directed that the state “not withhold action on claims pending any future legislation or possible  
17 changes in the law.”<sup>7</sup> These directives from the Governor, along with the extension of time  
18 provided under HB 3546, will help to ensure that the rights and interests of claimants,  
19 neighboring property owners, nearby communities, and the state at large are met and honored to  
20 the fullest extent.<sup>8</sup>

21  
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23 <sup>4</sup> See Ex. 1, attached.

24 <sup>5</sup> *Id.*

25 <sup>6</sup> *Id.*

26 <sup>7</sup> *Id.*

<sup>8</sup> *Id.*



1           “Food-stamp benefits, like the welfare benefits at issue in  
2           *Goldberg v. Kelly*, 397 U.S. 254, 90 S. Ct. 1011, 25 L. Ed. 2d 287  
3           (1970), ‘are a matter of statutory entitlement for persons qualified  
4           to receive them.’ \* \* \* Such entitlements are appropriately treated  
5           as a form of ‘property’ protected by the Due Process Clause;  
6           accordingly, the procedures that are employed in determining  
7           whether an individual may continue to participate in the statutory  
8           program must comply with the commands of the Constitution.”

9           However, the legislature which creates a statutory entitlement (or other property interest)  
10          is not precluded by having done so from altering or terminating the entitlement by subsequent  
11          legislative enactment:

12           “The procedural component of the Due Process Clause does not  
13           ‘impose a constitutional limitation on the power of Congress to  
14           make substantive changes in the law of entitlement to public  
15           benefits.’”

16          *Id.* at 2529-30 (citation omitted). In *Atkins*, an amendment to the Food Stamp Act reduced the  
17          amount of earned income which would be disregarded in determining eligibility for food stamps.  
18          The amendment had the effect of reducing the benefit levels for some persons and of altogether  
19          extinguishing the entitlement of others who had previously qualified to receive the benefits. The  
20          Supreme Court in *Atkins* held that absent some identified defect in the legislative process, a  
21          legislature has the power to modify or rescind property interests previously conferred:

22           “\* \* \* Congress had plenary power to define the scope and the  
23           duration of the entitlement to food-stamp benefits, and to increase,  
24           to decrease, or to terminate those benefits based on its appraisal of  
25           the relative importance of the recipients’ needs and the resources  
26           available to fund the program.

          \* \* \*

*Before the statutory change became effective, the existing property  
          entitlement did not qualify the legislature's power to substitute a  
          different, less valuable entitlement at a later date.*

*Id.* at 2529-30 (emphasis added). In *Jones v. Reagan*, 748 F.2d 1331, 1338-39 (9th Cir. 1984),  
          *cert. denied*, 472 U.S. 1029 (1985), concerning a congressional budget reduction bill terminating

1 the property interest in subsidized medical care previously conferred on disabled seamen, the  
2 Ninth Circuit stated:

3 “Congress’ gratuitous provision of free medical care did not give  
4 the seamen a ‘vested right’ to the benefits immune from repeal.  
5 Property rights to public benefits are defined by the statutes or  
6 customs that create the benefits. *See, e.g., Board of Regents v. Roth*, 408 U.S. 564, 577, 92 S. Ct. 2701, 2709, 33 L. Ed. 2d 548  
(1972). *When, as here, the statute authorizing the benefits is amended or repealed, the property right disappears.*”

7 (Emphasis added.) *See also Silverman v. Barry*, 727 F.2d 1121, 1125 (D.C. Cir. 1984) (while the  
8 executive branch may not arbitrarily rescind entitlements guaranteed by the legislative branch,  
9 the legislature itself is free to modify or eliminate statutory entitlements).

10 While the legislative alteration or elimination of a previously conferred property interest  
11 may be a “deprivation,” the legislative process itself provides citizens with all of the “process”  
12 they are “due.” *Atkins v. Parker, supra*, 105 S. Ct. at 2530. *Accord Logan v. Zimmerman Brush*  
13 *Co.*, 455 U.S. 422, 432-33 (1982). *Logan* applied to a statutory entitlement in the form of a right  
14 to pursue a fair employment practice claim. The Court explained that a legislature may not  
15 empower an administrative agency to extinguish, without notice and hearing, an employee's  
16 property interest in pursuing a fair employment practice claim, notwithstanding that the  
17 legislature is itself empowered to extinguish the statutory entitlement through legislative action.  
18 “Of course, the State remains free to \* \* \* eliminate its statutorily created causes of action  
19 altogether -- just as it can amend or terminate its welfare or employment programs. \* \* \* In each  
20 case, the legislative determination provides all the process that is due \* \* \*.” *Id.*

21 Finally, *Res v. Matteucci*, 121 F.3d 483 (9<sup>th</sup> Cir. 1997) involved a statutory entitlement to  
22 a hearing officer position that was classified as permanent, subject to termination only for just  
23 cause. However, the legislature enacted a statute that reclassified the position into the  
24 unclassified service thereby removing the permanent status of the job. Plaintiff was terminated,  
25 and filed suit, contending she was deprived of a property interest without due process. The court  
26 held that the legislature’s re-classification of plaintiff’s position as a hearing officer to an at-will

1 position, and her subsequent termination from employment, did not violate her due process rights  
2 under the Fourteenth Amendment. “When a state alters a state-conferred property right through  
3 the legislative process, ‘the legislative determination provides all the process that is due.’” *Id.* at  
4 485, citing *Logan*, 455 U.S. at 432.

5 Thus, the legislature which creates a property interest may alter or rescind it, whether the  
6 legislative body is federal or state, and whether the interest is an entitlement to economic  
7 benefits, a statutory cause of action, or civil service job protections. *Logan*, 455 U.S. at 432;  
8 *Rea*, 121 F.3d at 485. Here, assuming *arguendo* that plaintiffs had a property interest in the  
9 statutory cause of action created by ORS 197.352(6), the legislature terminated or extinguished  
10 that interest when it enacted HB 3546, which provides that “[n]otwithstanding ORS 197.352(6),”  
11 a property owner who made a Measure 37 claim after November 1, 2006 “has a cause of action  
12 for compensation under ORS 197.352(6) *only if* a land use regulation continues to apply to the  
13 subject property *more than* 540 days after the Measure 37 claim is made.” HB 3546, § (2)(b).  
14 Plaintiffs’ property interest in the statutory cause of action, if any, expired when HB 3546 was  
15 enacted.

16 Plaintiffs cite one case which they contend is “on point” here—*Grotten v. California*, 251  
17 F.3d 844 (9<sup>th</sup> Cir. 2001). Plaintiffs’ Response at 5-6. *Grotten* is not apposite here, since it does  
18 not involve a claim that the legislative amendment or repeal of a previously conferred statutory  
19 property interest or entitlement violates due process under the Fourteenth Amendment.<sup>9</sup>

20 Because, as *Logan* and *Atkins*, *supra*, indicate, the legislative process affords all the due  
21 process required by the Constitution, the alteration of plaintiffs’ property interest, if any, in the  
22

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23 <sup>9</sup> In *Grotten*, plaintiff alleged that his due process rights were violated because he attempted to  
24 apply for temporary and reciprocal real estate appraiser’s licenses under federal and state law, but  
25 defendants refused to give him the proper materials. The court found that the statute in question  
26 provided that an individual licensed or certified as a real estate appraiser in another state may  
apply for a reciprocal license, that the statute “create[ed] a property interest in an unissued  
license” if plaintiff qualified, and that plaintiff “was entitled, at a minimum, to the proper  
application materials.” *Grotten*, 251 F.3d at 850. Here, unlike *Grotten*, plaintiffs were not denied  
Measure 37 application materials.

1 cause of action created by ORS 197.352(6), by extending the period of claim accrual from 180 to  
2 540 days, was not a deprivation without due process under the Fourteenth Amendment.

3 **II. HB 3546 does not violate substantive due process.**

4 That does not end the inquiry. A federal interest remains in “protecting the individual  
5 citizen from state action that is wholly arbitrary or irrational.” *Logan*, 455 U.S. at 432 (citation  
6 omitted).

7 “To establish a violation of substantive due process, the plaintiffs must prove that the  
8 government’s action was ‘clearly arbitrary and unreasonable, having no substantive relation to  
9 the public health, safety, morals, or general welfare.’” *Lingle v. Chevron U.S.A., Inc.*, 544 U.S.  
10 528, 541 (2005) (citing *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395 (1926));  
11 *Halverson v. Skagit County*, 42 F.3d 1257, 1262 (9th Cir. 1994). Where, as here, the plaintiffs  
12 rely on substantive due process to challenge legislation that does not impinge on fundamental  
13 rights,<sup>10</sup> the courts “do not require that the government’s action actually advance its stated  
14 purposes, but merely look to see whether the government *could* have had a legitimate reason for  
15 acting as it did.” *Haverson* at 1262 (emphasis in original), quoting, *Wedges/Ledges of*  
16 *California, Inc. v. City of Phoenix*, 24 F.3d 56, 66 (9<sup>th</sup> Cir. 1994). Further, in a substantive due  
17 process challenge, the court’s “concern is with the rationality of a government action regardless  
18 of its impact.” *Id.* (quoting *Kawaoka v. City of Arroyo Grande*, 17 F.3d 1227, 1238 (9<sup>th</sup> Cir.),  
19 *cert. denied*, 115 S. Ct. 193 (1994)). To prevail, plaintiffs must show that the legislature “could  
20 have had no legitimate reason for its decision.” *Kawaoka*, 17 F.3d at 1234. “If it is ‘at least  
21 fairly debatable’” that HB 3546 is rationally related to a legitimate governmental interest, “there  
22 has been no violation of substantive due process.” *Id.*; *Halverson* at 1262.

23

24

25 <sup>10</sup> The protections of substantive due process are most often reserved for the vindication of  
26 fundamental rights, which this case does not involve. *See Albright v. Oliver*, 114 S. Ct. 807, 812  
(1994) (“The protections of substantive due process have for the most part been accorded to  
matters relating to marriage, family, procreation, and the right to bodily integrity.”).

1 In this case, HB 3546 is rationally related to a legitimate governmental interest. The  
2 legislature took notice of the inability of state and local government agencies to process the large  
3 number of Measure 37 claims filed at the last minute, within the final month before a statutory  
4 deadline to file Measure 37 claims expired, and it extended the time period for governments to  
5 review and process these claims. It also extended, from 180 to 540 days, the date on which a  
6 cause of action for compensation under Measure 37 could be filed in circuit court, if a land use  
7 regulation is not waived or modified and continues to apply to the subject property. Through its  
8 action, the legislature enabled government agencies to continue processing claims fairly and  
9 accurately. By passing HB 3546, the legislature anticipated a significant problem which would  
10 have affected state and local governments, a large number of Measure 37 claimants and  
11 surrounding property owners, and it passed a law to resolve that problem. Because the  
12 legislature's actions were rationally related to a legitimate government interest, HB 3546 does  
13 not violate substantive due process.

14 **III. HB 3546 does not violate procedural due process.**

15 Plaintiffs also argue that HB 3546 violates procedural due process, because they “were  
16 offered no notice or opportunity to be heard before a neutral decision maker.” Plaintiffs’  
17 Response at 7.

18 While an individual is entitled to notice and hearing before state action deprives him of  
19 life, liberty or property, no such right exists for legislative enactments that affect a general class  
20 of persons. When the legislature enacts a law that affects a general class of persons, all of those  
21 persons have received procedural due process by the legislative process itself, and they have no  
22 right to individual notice and hearing. “[W]hen the complained of action is legislative in nature,  
23 due process is satisfied when the legislative body performs its responsibilities in the normal  
24 manner prescribed by law.” *Halverson v. Skagit County*, 42 F.3d at 1261; *Sierra Lake Reserve v.*  
25 *City of Rocklin*, 938 F.2d 951, 957 (9<sup>th</sup> Cir. 1991), *vacated*, 113 S. Ct. 31 (1992), *on remand*, 987  
26 F.2d 662 (9<sup>th</sup> Cir. 1993). Governmental decisions which affect a general class of citizens, and

1 are not directed at one or a few individuals, “do not give rise to the constitutional procedural due  
2 process requirements of individual notice and hearing; general notice as provided by law is  
3 sufficient.” *Id.*, citing, e.g., *Christensen v. Yolo County Bd. of Supervisors*, 995 F.2d 161, 166  
4 (9<sup>th</sup> Cir. 1993) (no individual notice and hearing required where county zoning decision affects a  
5 large number of people and individuals are not targeted). In such a case, individuals’ rights are  
6 “protected in the only way that they can be in a complex society, by their power, immediate or  
7 remote, over those who make the rule.” *Halverson*, 42 F.3d at 1261 (quoting *Bi-Metallic Inv.*  
8 *Co. v. State Bd. Of Equalization*, 239 U.S. 441, 445 (1915)).

9 Plaintiffs complain of conduct that is legislative in nature. Plaintiffs do not show any  
10 defect in the legislative process to enact HB 3546, and therefore procedural due process has been  
11 satisfied.

12 **CONCLUSION**

13 The legislative alteration or elimination of a previously conferred property interest does  
14 not itself violate due process. The state is entitled to alter the cause of action created by ORS  
15 197.352(6) and did so through the legislative process. Plaintiffs have failed to show that this  
16 process was defective, or that HB 3546 is arbitrary.

17 Accordingly, plaintiffs fail to show that HB 3546 violates due process, and defendants’  
18 motions to dismiss should be granted. Plaintiffs can file their complaint, if necessary, once the  
19 540-day period expires.

20 DATED this 7 day of September, 2007.

21 Respectfully submitted,

22 HARDY MYERS  
23 Attorney General

24  #06250

25 FOR KATHERINE G. GEORGES #84231  
26 Senior Assistant Attorney General  
Trial Attorney  
kate.georges@doj.state.or.us  
Of Attorneys for State Defendants



THEODORE R. KULONGOSKI  
Governor

May 10, 2007

The Honorable Peter Courtney  
Senate President  
900 Court St. NE, S-203  
Salem, OR 97301

The Honorable Jeff Merkley  
Speaker of the House  
900 Court St. NE, H-269  
Salem, OR 97301

The Honorable Floyd Prozanski  
Oregon State Senate  
900 Court St. NE, S-319  
Salem, OR 97301

The Honorable Greg Macpherson  
Oregon House of Representatives  
900 Court St. NE, H-385  
Salem, OR 97301

Dear President Courtney, Speaker Merkley, Sen. Prozanski and Rep. Macpherson:

Today I have signed Enrolled House Bill 3546, which grants to the state and local governments 540 days to make final decisions on claims filed under Ballot Measure 37 (ORS 197.352) on and after November 1, 2006. This amounts to an extension of time equal to 360 days beyond the 180 days provided in the measure for action on claims. House Bill 3546 also includes a hold-harmless provision for claimants during the extension period. Since Measure 37 extinguishes the rights of claimants who die before their claims are filed or completed, House Bill 3546 guarantees that the heirs of any claimant who dies during its extension period shall have the right to continue to pursue the decedent's claim.

The extension of time provided under House Bill 3546 was made necessary because the backlog of late claims has become insurmountable under Measure 37's timelines. More than 6,600 Measure 37 claims have been filed with the state, seeking compensation estimated to exceed \$17 billion. The total exceeds 7,000 claims including claims filed exclusively with local governments. Of these claims, more than 3,500 were received by the state alone between November 10 and December 4, 2006.

While the state has issued at least 2,593 Final Orders on claims, more than 3,600 claims remain to be processed. Without this legislation, on May 14, the state would have begun missing the 180-day deadline on claims, exposing the state to liability for billions of dollars in damages under the measure, plus attorney fees and costs, not to mention millions of dollars just in litigation costs for the state. This situation was not tenable, and I applaud the legislature for showing the leadership to both accommodate the reasonable expectations of claimants that their claims will be processed fairly, and to protect the state from potentially ruinous costs and liability.

President Courtney, Speaker Merkley, Sen. Prozanski and Rep. Macpherson  
May 10, 2007  
Page Two

Processing claims requires due diligence and time-consuming research. Notice must be given to neighboring property owners to give them time to assess and comment on claims near their property. The Department of Land Conservation and Development (DLCD), working with the Department of Justice (DOJ), must examine property and ownership records, analyze state and local land use regulations, assess the impact of those regulations on individual properties, review comments from neighbors, and determine findings of fact and issue final orders to the claimants.

The state has doubled its processing rate from an average of 150 claims per month to more than 300 per month since the surge of new claims began late last year. In order for the state to complete the processing of claims under the extension of time provided for under House Bill 3546, it will be necessary for the state agencies to continue to issue final orders at that same pace.

I have received assurances from DLCD and DOJ that the state can meet the extended timeline under House Bill 3546, while still meeting the high standards of due care and diligence in evaluating claims that both claimants and those who stand to be affected by claims deserve.

Based on those assurances, I am directing the state agencies to move forward immediately with the expeditious review and disposition of the Measure 37 claims in the state's possession. I am specifically directing that the state *not* withhold action on claims pending any future legislation or possible changes in the law.

I am further directing DLCD and DOJ to submit to me a written report on the total of claims closed by final order on a monthly basis, beginning with the first report – for the month of June – on July 10, 2007, and continuing monthly thereafter until all of the pending claims have been resolved.

I am committed to the fair implementation of Ballot Measure 37, recognizing the significant rights and interests on the part of claimants, neighboring property owners, nearby communities and the state at large. These directives, with the extension of time provided under House Bill 3546, will help to ensure that those rights and interests are met and honored to the fullest extent possible.

Sincerely,



THEODORE R. KULONOSKI  
Governor

c: Members, Joint Land Use Fairness Committee  
Attorney General Hardy Myers  
Lindsay Ball, Director, DAS  
Lane Shetterly, Director, DLCD  
Oregon Counties

CERTIFICATE OF SERVICE

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I certify that on September 7, 2007, I served the foregoing STATE DEFENDANTS' REPLY IN SUPPORT OF MOTIONS TO DISMISS upon the parties hereto by the method indicated below, and addressed to the following:

Kristian Roggendorf  
O'Donnell & Clark LLP  
Fremond Place II, Suite 302  
1650 NW Naito Parkway  
Portland, OR 97209

HAND DELIVERY  
 MAIL DELIVERY  
 OVERNIGHT MAIL  
 TELECOPY (FAX)

Stephen L. Madkour  
Multnomah County Attorney's Office  
501 SE Hawthorne Blvd, Ste 500  
Portland, OR 97214

HAND DELIVERY  
 MAIL DELIVERY  
 OVERNIGHT MAIL  
 TELECOPY (FAX)

 #06200  
FOA KATHERINE G. GEORGES #84231  
Senior Assistant Attorney General  
Trial Attorney  
Tel (503) 947-4700  
Fax (503) 947-4793  
kate.georges@doj.state.or.us  
Of Attorneys for State Defendants