

file

IN THE SUPREME COURT OF THE STATE OF OREGON

LAUREL H. GRIFFITHS,
Plaintiff-Adverse Party,

v.

STATE OF OREGON, acting by and
through its Department of Land
Conservation and Development,
Defendant-Relator.

Circuit Court Case No. 06CV0159SF

Supreme Court No.

MEMORANDUM IN SUPPORT OF
PETITION FOR PEREMPTORY OR
ALTERNATIVE WRIT OF MANDAMUS

MANDAMUS PROCEEDING

SUMMARY OF ARGUMENT

Relator, the Department of Land Conservation and Development (DLCD) of the State of Oregon, seeks a peremptory or alternative writ of mandamus directing the circuit court to vacate its order denying the relator's motion to dismiss, to enter an order granting that motion, and to enter judgment in favor of the state and against plaintiff.

As is further explained below, plaintiff has filed a proceeding challenging the correctness of an order issued jointly by DLCD and by the Department of Administrative Services (DAS), granting plaintiff's claim under Measure 37 (ORS 197.352).¹ Plaintiff has not made a claim under the Administrative Procedures Act, and filed her lawsuit more than 60 days after the issuance of the order challenged. Accordingly, pursuant to ORS 183.480 and ORS 183.484, the trial court was obliged to dismiss the complaint.

¹ Plaintiff did not name DAS as a party to this litigation.

ORS 34.110 authorized this court to issue a writ of mandamus “to any inferior court * * * to compel the performance of an act which the law specially enjoins, as a duty resulting from an office, trust, or station.” A writ is thus appropriate if – as in this case – a trial court has acted without authority or in a manner that violates statutory prohibitions. The Administrative Procedures Act specifically provides that a state agency order may be challenged only under the procedures provided in that act, and only in a suit filed within 60 days of the issuance of the order issued. The actions of the trial court in allowing the underlying suit to proceed violated clear statutory prohibitions. Accordingly, the issuance of a writ of mandamus to that court is appropriate.

Moreover, should this court decline to issue a writ of mandamus, forcing relator to litigate this issue via direct Appeal following a trial, relator – and the trial courts – will be required to spend significant time and money to litigate plaintiff’s claim, despite the fact that, in relator’s view, the trial court has no authority to allow plaintiff to proceed on her untimely claim. That factor further warrants issuance of a writ of mandamus.

ARGUMENT

A. Introduction to Measure 37

Measure 37, codified as ORS 197.352, was adopted by the voters in 2004, and became effective on December 2 of that year. *MacPherson v. DAS*, 304 Or 117, 122, 130 P3d 308 (2006).

1. Oregon Land Use Laws

The primary components of Oregon's land use planning system were created with the passage of Senate Bill 10 in 1969, and Senate Bills 100 and 101 in 1973, codified in ORS Chapter 197.² Senate Bill 10 required cities and counties to adopt comprehensive land use plans and to enact zoning ordinances to implement those plans. Senate Bill 100 created a state agency – the Land Conservation and Development Commission (LCDC) – to establish and amend statewide land use goals, and to review and “acknowledge” the comprehensive plans and zoning regulations adopted by local governments to ensure that they comply with the goals.³ Local governments – cities, counties, and special districts – are responsible for enacting land use regulations to implement their comprehensive plans, and for making land use decisions consistent with the plans, their land use regulations, and any directly-applicable state laws.⁴

2. Measure 37

Under Measure 37, an owner of an interest in real property qualifies for relief if three criteria are met: (1) a public entity enforces an existing “land use regulation” or enacts or enforces a new “land use regulation;” (2) the land use regulation restricts

² See 1969 Or. Laws ch. 324; 1973 Or. Laws ch. 80.

³ See ORS 197.040(2); 197.175(2). All 36 counties in Oregon have adopted comprehensive plans that have been “acknowledged” by LCDC.

⁴ ORS 197.175(2)(c)-(e), 197.646(3), 197.835(8), *see also Kenagy v. Benton County*, 115 Or App 131 (1992).

the use of private real property; and (3) “the land use regulation has the effect of reducing the fair market value of the private real property.” ORS 197.352(1). The land use regulation must have been enacted after the date on which the owner or a family member first acquired the property. ORS 197.352(3)(e). An “owner” is the “present owner of the property, or any interest therein.” ORS 197.352(11). If the owner qualifies for relief, government is required to pay just compensation.

ORS 197.352(2).⁵ As an alternative to the requirement of compensation, the measure provides that state and local governments may “modify, remove or not* * *apply the land use regulation or land use regulations to allow the owner to use the property for a use permitted at the time the owner acquired the property.” ORS 197.352(8); ORS 197.352(10); *MacPherson v. DAS*, 340 Or at 122. Allowing the owner to use the property in a way that would otherwise be prohibited by land use regulations is commonly referred to as granting a Measure 37 “waiver.” Generally, Measure 37 limits non-monetary relief to property owners who acquired their property prior to the enactment of the land use regulations that provide the basis for their claims.

ORS 197.352(3)(e); *see MacPherson v. DAS, supra*.⁶ Thus, establishing the date on

⁵ “Just compensation shall be equal to the reduction in the fair market value of the affected property interest resulting from enactment or enforcement of the land use regulation as of the date the owner makes written demand for compensation.” ORS 197.352(2).

⁶ A Measure 37 claimant is entitled to compensation for regulations enacted prior to the date of acquisition of the property by the owner *or a family member* of the owner. ORS 197.352(3). This language differs from the language

which the present owner acquired an interest in the property is critical to determining the scope of the waiver to which the owner is entitled.

Measure 37 does not contain a specific provision for testing the scope of the waiver provided by the government entity. The sole remedy provided pertains to government inaction:

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

ORS 197.352(6). The question presented by the petition herein is: When a state agency has elected to waive land use regulations, has issued an order doing so, and the Measure 37 claimant contends that the waiver is too limited, must the claimant challenge the waiver order under the APA? The state contends that she must, because that is the only method whereby it can be determined that a land use regulation continues to apply when it should have been waived.

B. The Claims Process

Measure 37 does not provide for a process whereby claims may be processed, but does allow public entities to adopt such procedures. DAS adopted procedural

authorizing “waiver”, which authorizes government to allow *the present owner* to use the property in a manner permitted when the owner acquired the property.
ORS 197.352(3).

rules, found at OAR 125-145-0010 to OAR 125-145-0130, that set forth the minimum requirements for making a Measure 37 claim against the state.

When DAS receives a claim, it provides written notice to neighboring landowners, certain neighborhood and community organizations, and other who have requested such notice. OAR 125-145-0080. Those who receive notice, or any other interested person, may comment on the claim. OAR 125-145-0080(2) and (3).

DAS forwards the Measure 37 claim to the state agency that enacted or enforces a relevant land use regulation, the “regulating entity.” OAR 125-145-0090. The regulating entity – DLCD in this case – reviews and analyzes the claim, gathers additional information if necessary and available, and issues a draft report. The draft report is sent to the claimant, any commenters, and others who requested notice, and is posted on the internet. OAR 125-145-0100(1). After a ten-day comment period, the regulating entity issues a final staff report and a final order. OAR 125-145-0100(4); OAR 125-145-0100(6).

C. The Processing of Plaintiff’s Claim

Plaintiff Laurel H. Griffiths is the owner of a 115.5 acre parcel located near Redmond in Deschutes County. Complaint, ER-1; Final Staff Report, ER-**. On April 14, 2005, Ms. Griffiths filed a Measure 37 claim with DAS, seeking compensation in the sum of \$3,772,190 or in the alternative, a waiver of land use regulations that would allow her to divide the property into 58 two-acre parcels and place a residence on each parcel. The investigation and analysis of the claim by the

relevant state agencies, DAS and DLCDC, revealed that Ms. Griffiths' late husband, James L. Griffiths, acquired the property by quit-claim deed on December 12, 1949. ER-**. On June 19, 1985, Mr. Griffiths conveyed ownership of the property to himself and Ms. Griffiths by statutory bargain and sale deed. ER-**. Accordingly, the state agencies determined that Ms. Griffiths' acquisition date was June 19, 1985, and that she was entitled to waiver of land use regulations enacted after that date.

Ms. Griffiths' acreage is zoned for exclusive farm use (EFU) and is therefore subject to Goal 3, adopted in 1975, as well as other statutes and regulations for the protection of farmland for farm use enacted before June 1985. It is not disputed that those regulations would not allow Ms. Griffiths to subdivide the property as she desires to do.

DAS and DLCDC issued their joint final order on October 4, 2005. More than five months later, on March 24, 2006, Ms. Griffiths filed her complaint, seeking \$4 million in compensation under Measure 37. As relevant here, the complaint alleges that the state issued its order "waiving regulations to June 7, 1985 [sic], rather than the true date on which plaintiff acquired an interest in the property of December 12, 1949." ER-2.

In other words, the complaint alleges that the state's final order, waiving regulations adopted after June 19, 1985, is wrong.

D. Application of ORS 183.480 and ORS 183.484

As noted above, Measure 37 does not include a process for reviewing a state agency order waiving land use regulations. However, ORS 183.480 provides, in relevant part:

Judicial review of final orders of agencies shall be solely as provided by ORS 183.482, 183.484, 183.490 and 183.500.

ORS 183.480(2). Nothing in Measure 37 exempts final orders issued on claims from this statutory admonition. *See Fairbanks v. Bureau of Labor and Indus.*, 323 Or 88, 93-94, 913 P2d 703 (1996) (declining to insert into a statute a provision exempting it from the APA). And although Ms. Griffiths has made a demand for compensation, the basis for that claim is her contention that the state agencies erred in establishing the date on which she acquired her interest in the subject property. She seeks judicial review of the correctness of the final order; accordingly, she must proceed under the provisions of the APA.

This result is consistent with this court's past decisions. For example, in *Oregon Health Care Assn. v. Health Div.*, 329 Or 480, 486, 992 P2d 434 (1999), this court held that, "ORS 183.480 identifies the *complete range* of permissible bases for challenging in Oregon courts the decisions of an agency to which the APA applies." (Emphasis added.) Both DAS and DLCD are such agencies.

The final order waiving land use regulations is a final order in other than contested case. *See* ORS 183.310(2)(a) (defining a contested case); ORS

183.310(6)(b) (defining a final order). Consequently, the procedure for judicial

review is provided by ORS 183.484. ORS 183.484(2) provides that a petition for judicial review of a final order in other than contested case must be filed within 60 days following service of the order challenged. The date of service is the date of delivery or mailing. *Id.*

In the present case, although she challenges the correctness of the agencies' order, Ms. Griffiths has not filed a petition for judicial review under ORS 183.484, nor did she file within 60 days of the mailing of the order to her on October 4, 2005. Accordingly, her complaint fails to state any claim on which relief can be granted, and must be dismissed. The trial court should be directed to do so.

E. Limitations on Direct Claims under Measure 37

Ms. Griffiths is expected to argue that the language of Measure 37 requires the court to ignore the specific remedy provisions of the APA. This is not the case. ORS 197.352(6) establishes a 180-day deadline within which the government must act; if it does not, it no longer has the option to elect waiver rather than compensation. But that statute does not apply where a waiver has been timely granted. In the present case, if the agencies correctly determined Ms. Griffiths' acquisition date, there is no basis for compensation under ORS 197.352(6); the validity of her compensation claim cannot be determined until a judicial determination of the correctness of the order has been made. Such a judicial determination can only be accomplished under the APA. ORS 183.480(2).

F. Inconsistent decisions merit this court's intervention.

As is indicated by the affidavit and supplemental affidavit of Chief Trial Counsel Stephen Bushong, numerous cases against state agencies have been filed in which the Measure 37 claimant has not filed a petition for judicial review of an allegedly erroneous final order, or has filed a complaint more than 60 days after the mailing of the final order, or both. In some cases, the trial courts have granted motions to dismiss; however, no appeals have been filed in those cases. In other cases, the trial courts have denied the motions to dismiss, forcing the state (and other parties) into expensive and time-consuming trial preparations in cases in which the legislature intended that judicial review occur only under the APA. Because no interlocutory appeal is available, relator could pursue a direct appeal in this case only after being forced to fully prepare for trial, and after going through the significant expenditure in time and money that trial will itself require. Significant additional trial court resources, under those circumstances, would also be expended.

This court has recognized that mandamus is an appropriate remedy where the law requires dismissal of a complaint, and appeal does not provide an adequate remedy. *See Dreyer v. Portland General Electric*, 341 Or 262, 276, --- P3d --- (2006). And this court has also concluded that mandamus is appropriate where a statutory right to be free from litigation is not vindicated by direct appeal after a trial has occurred. *State v. Sawatzky*, 339 Or 689, 693, 125 P3d 722 (2005). Additionally, this court has held that principles of judicial administration and preventing

unnecessary burdens on the trial courts are special circumstances that may justify issuance of the writ. *State ex rel Maizels v. Juba*, 254 Or 323, 332, 460 P2d 850 (1969). Those same principles are in operation here. The state has a statutory right to have the correctness of its final orders litigated only within the framework of the APA, and within a limited time after the order is served. That right cannot be vindicated by a direct appeal after a trial that should never have occurred.

CONCLUSION

The state requests that this court issue a peremptory writ of mandamus, directing the trial court to vacate its order denying the motion to dismiss, issue a new order granting that motion, and enter judgment in favor of the state. In the alternative, the state asks that this court issue an alternative writ directing the trial court to take these actions or to show cause why it has not done so.

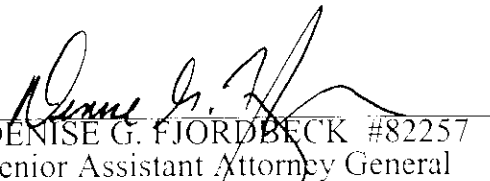
Respectfully submitted,

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NOTICE OF FILING AND PROOF OF SERVICE

I certify that I directed the original Memorandum in Support of Petition for Peremptory or Alternative Writ of Mandamus to be filed with the State Court Administrator, Records Section, at 1163 State Street, Salem, Oregon 97301-2563, on December 14, 2006.

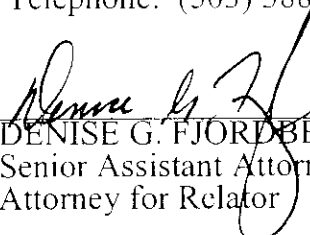
I further certify that I directed the Memorandum in Support of Petition for Peremptory or Alternative Writ of Mandamus to be served upon Edward Fitch, attorney for adverse party Laurel Griffiths, and upon The Honorable Stephen P. Forte, on December 14, 2006, by mailing a copy, with postage prepaid, in an envelope addressed to:

Edward Fitch #78202
Attorney at Law
PO Box 457
Redmond, OR 97756-0103

Telephone: (541) 548-1895

Honorable Stephen P. Forte
Circuit Court Judge
Deschutes County Courthouse
1100 NW Bond St.
Bend, OR 97701

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DENISE G. FJORDBECK
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Attorney for Relator

file

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MANDAMUS PROCEEDING

Relator, the Department of Land Conservation and Development of the State of Oregon, seeks an alternative or peremptory writ of mandamus that vacates an order of the circuit court for Deschutes County. The order at issue denied relator's motion to dismiss for lack of subject matter jurisdiction under the provisions of the Administrative Procedures Act. The underlying case is not set for trial, and has not been stayed.

As demonstrated in the memorandum that accompanies this petition, the trial court erred in issuing the challenged order, in that plaintiff failed to petition for judicial review under the APA, and failed to file her complaint in a timely manner, as required by ORS 183.480 and ORS 183.484. The complaint must be dismissed.

Because the trial court lacked authority to order this matter to proceed on the complaint as filed, a peremptory writ of mandamus is appropriate. *See* ORS 34.110 (“[a] writ of mandamus may be issued to any inferior court * * * to compel the performance of an act which the law specifically enjoins, as a duty resulting from an

office, trust, or station”); ORS 34.160 (authorizing peremptory writ “[w]hen the right to require performance of the [requested] act is clear, and it is apparent that no valid excuse can be given for not performing it”). If this court declines to issue a peremptory writ, relator asks it to issue an alternative writ instead. *See* ORS 34.160 (if peremptory writ is not appropriate, “the alternative writ shall first be issued”); ORS 34.150 (alternative writ shall “command the [court] to perform the [requested] act * * * or show cause * * * why the [court] has not done so”).

A. Statement of Material Facts

On April 10, 2005, plaintiff Laurel Griffiths filed a claim under ORS 197.352, commonly referred to as a Measure 37 claim. Complaint, ER-1; Ex 1 to Complaint, ER-5. Less than 180 days later, on October 4, 2005, the Department of Land Conservation and Development and the Department of Administrative Services issued a final order granting plaintiff’s claim and waiving land use regulations enacted after June 19, 1985. ER-88; Ex 2 to Complaint, ER-12.

On March 24, 2006, plaintiff filed a claim for compensation under Measure 37, seeking a judgment against the state in the sum of \$4 million. In her complaint, plaintiff alleges that her interest in the subject real property dates to December 12, 1949, not to June 7, 1985, as found by the state agencies.

Relator filed a motion to dismiss the complaint on two grounds: because plaintiff failed to petition for judicial review of the final order under the provisions of the Administrative Procedures Act, and because even if the complaint had included an

APA claim, it would not be timely because it was filed more than 60 days after issuance of the final order. ER-35. Plaintiff opposed the motion to dismiss. ER-62. The trial court denied the motion to dismiss by order dated November 15, 2006.

B. This petition is timely.

The order denying the motion to dismiss was entered on November 15, 2006. ER-136. This petition has been filed within 30 days of the date of that order, and is therefore timely. *See State v. Peekema*, 328 Or 342, 346, 976 P2d 1128 (1999) (holding that mandamus petition must generally be filed “within the statutory time limitation required for the filing of an appeal”); ORS 19.255 (generally requiring a notice of appeal to be filed within 30 days of the entry of the judgment at issue).

C. No further application need be made to the circuit court.

As is documented by the motion and reply included in the Excerpt of Record, relator made the same legal argument in the circuit court that it makes in support of this mandamus petition. The circuit court has rejected those arguments. Attempting to present those arguments again would serve no useful purpose.

D. Relator has no other adequate remedy.

The state acknowledges that it could pursue a direct appeal of this issue after a full trial. But the remedy of direct appeal is not adequate in this case. This is so because the state is defending many cases in which this issue is present; the cost of

litigating those cases, particularly in an instance where the legislature intended that the state not be required to defend its order, is extremely high.¹

The state is presently defending more than 100 lawsuits brought under Measure 37. In many of those suits, the petitioners have properly and timely filed under ORS 183.484 to challenge the final order in other than contested case issued by the state agencies. The state ordinarily seeks dismissal of all claims that are not brought within 60 days of service of the final agency order. *See* attached affidavit of Stephen Bushong. But the decisions of the circuit courts on those motions have been inconsistent. In two cases, the Marion County Circuit Court granted the motion to dismiss, holding that it lacked jurisdiction to review agency orders if a petition is not filed within 60 days. *See* Orders attached to Bushong affidavit. In six other cases, including this one, circuit courts in three different counties have denied the state's motion to dismiss.² *Id.* In another nine cases, such motions to dismiss could be dispositive, and dozens of pending cases include a non-APA claim (such as a declaratory judgment claim, claims directly under Measure 37, or other types of claim) in addition to a proper claim under ORS 183.484; it thus appears that attorneys

¹ For the same reasons, Linn County is expected to file a petition for writ of mandamus in the near future, contending that a writ of review proceeding is the exclusive remedy against local governments where their waiver orders are alleged to be incorrect. *Weber v. Linn County*, Linn County Circuit Court No. 060827.

² While the state was in the process of preparing this petition, motions to dismiss were denied in 3 additional cases. *See* Supplemental Affidavit of Stephen K. Bushong.

are uncertain of the appropriate jurisdictional basis for relief. Bushong affidavit. Because of the importance of the legal issues involved, it would be of benefit not only to the state, but to the bench and bar generally, to have this purely legal issue resolved as quickly as possible. Direct appeal will not provide a timely remedy at law.

In the absence of mandamus intervention by this court, the present matter will likely proceed to discovery, further motions, and trial. The cost to the state in litigating such a case, with the necessity of hiring expert appraisers, planners, and other witnesses, together with attorney fees, would likely reach \$100,000 per case. If these proceedings should be dismissed, the state agencies – and the courts – are incurring time and expenses that will ultimately be wasted.

As this court has held, mandamus is an appropriate remedy where direct appeal will not vindicate the statutory right at issue – here, the right to have its orders challenged only as provided by the APA and only in a timely proceeding. In *State v. Sawatzky*, 339 Or 689, 693, 125 P3d 722 (2005), this court noted that a statutory right to avoid a trial may be vindicated in mandamus:

It is true, at least abstractly, that relator's position also could be vindicated on a direct appeal after conviction. This court, however, has not regarded that fact as defeating an application for a writ of mandamus in circumstances like those presented in this case. Instead, generally speaking, this court has concluded that mandamus is an appropriate remedy in a double or former jeopardy matter, because a defendant's "ordinary right to appeal after conviction does not vindicate his [or her] statutory right to be free from a second prosecution for the same offense."

339 Or at 693 at n 4. In the present case, likewise, if the state is correct, then it has a right not to have its orders questioned more than 60 days after they were issued. That right should be maintained by issuance of a writ of mandamus.

This court has also held that the prevention of unnecessary burdens on the trial courts may be a special circumstance that justifies issuance of the writ. *State ex rel Maizels v. Juba*, 254 Or 323, 332, 460 P2d 850 (1969). Given the sheer number of cases pending in the trial courts, where dispositive motions could save considerable trial time and judicial resources, this case is an appropriate one for the issuance of the writ.

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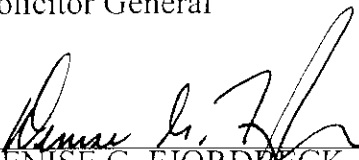
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CONCLUSION

This court should issue a peremptory writ of mandamus, directing the circuit court to vacate its order denying the motion to dismiss, enter a new order granting that motion, and enter a judgment in favor of relator. If this court declines to enter a peremptory writ, this court should issue an alternative writ that directs the circuit court to take those actions or to show cause for its failure to do so.

Respectfully submitted,

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