

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

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

STANLEY L. SULLIVAN and HELEN E.
SULLIVAN,

Plaintiffs,

v.

STATE OF OREGON, DEPARTMENT OF
LAND CONSDERVATION AND
DEVELOPMENT,

Defendant.

Case No. 06C20159

Honorable Mary Mertens James

REPLY TO PLAINTIFFS' RESPONSE TO
STATE'S MOTIION TO DISMISS

INTRODUCTION

In response to the State’s motion to dismiss, plaintiff insists that this Court has jurisdiction to decide his claims under Measure 37 and the Declaratory Judgment Act, despite the general rule that the Administrative Procedures Act (“APA”) provides the exclusive basis for reviewing agency decisions encompassed within final orders. Plaintiff contends that Measure 37 trumps the APA and that the APA-exclusivity cases cited in the State’s opening memorandum have no relevance to this case. Plaintiff is wrong on both counts.

ARGUMENT

The State explained in its opening memorandum the general principle that, when the Administrative Procedures Act (“APA”) applies, it provides the *only* means for courts to review agency action. See ORS 183.480(2) (“[j]udicial review of final orders of agencies shall be solely as provided by ORS 183.482, 183.484, 183.490 and 183.500”). Plaintiffs argue that the APA-exclusivity principle does not apply to final orders issued on Measure 37 claims because Section

1 6 of Measure 37 creates a separate cause of action. (Plaintiffs' Resp at 3). They attempt to
2 distinguish the APA-exclusivity cases cited in the State's opening memorandum on the ground
3 that those cases related to the Declaratory Judgment Act, while plaintiffs seeks damages under
4 Measure 37, not merely declaratory relief. (Plaintiffs' Resp at 3). But that distinction finds no
5 support in the case law, which establishes that even a claim for damages must await APA review
6 when it necessarily is premised on disagreement with a decision embodied in an agency order.
7 *See Muller v. Dept. of Agriculture*, 164 Or App 11, 15-16 (1999).

8 *Muller* involved a state agency's denial of the plaintiff's request for a field-burning
9 permit. In the year following that denial, the plaintiff concluded that his field had yielded less
10 crop than it would have had he been allowed to burn it, and sued for tort damages in circuit
11 court. *See id.* at 13-14. A jury returned a verdict for the plaintiff. On appeal, the State argued
12 that the circuit court had lacked jurisdiction over the plaintiff's complaint because he could have
13 petitioned for judicial review of the agency's action under the APA. The plaintiff countered that
14 he was "not challenging the validity of an agency order, but rather [was] asking for damages for
15 the consequences of agency action." *Id.* at 15. The Court of Appeals ruled in the State's favor,
16 holding that the APA provided the exclusive means for review of the agency's decision:

17 In this case, plaintiff claims damages resulting from the
18 denial of his application for a burning permit. His entitlement to
19 damages depends on the validity of the denial. He contends that
20 the denial was invalid because the department failed to comply
21 with "statutory provisions and rules in effect at all material times."
22 This case, in other words, is precisely the sort of case that * * * is
23 subject to review exclusively under the APA, because it challenges
24 the validity of an agency action on the ground that it "violated a
25 statute or rule or was otherwise in violation of administrative law."

26 * * * * *

27 Plaintiff insists that APA review is inadequate, because the
28 remedy he seeks – damages – is not available under the APA.
29 Indeed, plaintiff argues that precluding him from seeking damages
30 in this action unconstitutionally deprives him of a remedy.
31 Plaintiff's argument amounts to mere question begging, however.
32 If he is entitled to a remedy, he must establish the invalidity of the
33 agency action in the first place. We merely hold that the exclusive
34 mechanism for establishing the invalidity of the agency action is

1 provided in the APA. We therefore conclude that the trial court
erred in denying the department's motion to dismiss.

2 *Id.* at 16-17 (citation omitted).

3
4 *Muller* controls this case. Here, as in *Muller*, plaintiffs seek monetary relief based on an
5 allegation that they were damaged by state-agency action. And here, as in *Muller*, plaintiffs can
6 prevail only if they establish that the agency action was unlawful – in this case, because the
7 agencies incorrectly determined which land use regulations were subject to waiver, with the
8 result that certain regulations wrongly continue to apply to plaintiffs' property. Consequently, to
9 the extent that plaintiffs' claims take issue with the agency's resolution of their Measure 37
10 demand, their sole avenue for relief would have been a timely filed APA petition for judicial
11 review.

12 Nonetheless, plaintiffs proffer several additional theories why APA-exclusivity principles
13 do not apply to Measure 37 orders. First, plaintiffs argue that this case is analogous to *Premier*
14 *Technology v. Oregon State Lottery*, 136 Or App 124 (1995), in which the Court of Appeals held
15 that the APA did not preclude a civil cause of action against the State. (Plaintiffs' Resp at 2-3).
16 But that decision does not assist plaintiffs. *Premier Technology* was a breach-of-contract case in
17 which the plaintiff sued a state agency for terminating a contract. Because the plaintiff was "not
18 claiming that the agency action violated a statute or rule or was otherwise in violation of
19 administrative law," the Court of Appeals rejected the State's argument that the plaintiff should
20 have sought relief under the APA. *Id.* at 132. Here, as explained above, plaintiffs' claim
21 necessarily must be based on an argument that the State violated a statute – Measure 37 – by not
22 granting them all relief they sought in their Measure 37 claim. That distinction is significant
23 because the APA generally provides relief only where agency action violates a constitutional,
24 statutory or regulatory provision – not where the agency's alleged liability is based *solely* on a
25 contractual or tort theory. *See Muller*, 164 Or App at 15-16 (distinguishing case from *Premier*
26 *Technology*). Because plaintiffs allege that the State violated Measure 37, APA exclusivity

1 principles require that plaintiffs' declaratory judgment and Measure 37 claims against the State
2 be dismissed.

3 Second, plaintiffs argue that Section 7 of Measure 37 precludes application of the APA to
4 orders deciding Measure 37 claims. (Plaintiffs' Resp at 4). But Section 7 states only that
5 governmental procedures "for the processing of claims" must not "act as a prerequisite to the
6 filing of a compensation claim." ORS 197.352(7). The APA is not a procedure "for the
7 processing of claims." Rather, it provides the sole means for judicial review of orders that *result*
8 from the processing of claims. Consequently, Section 7 has no relevance to the jurisdictional
9 issue before this Court.

10 Third, plaintiffs suggest that ORS 197.352(6) trumps the APA because it is a more
11 specific statute than the APA, which is more general. (Plaintiffs' Resp at 4). But in *Olsen v.*
12 *Deschutes County*, 204 Or App 7, *rev denied*, 341 Or 80 (2006), the Court of Appeals rejected
13 the argument that a later-enacted, and more specific, statute always controls over an existing
14 general law. Referring to the same maxim on which plaintiffs rely here, the Court said, "The
15 'later and more specific' maxim applies when statutes conflict. Applying the maxim necessarily
16 renders one of the statutes – the older and more general – meaningless, and should therefore be
17 used only when a conflict actually exists and cannot be avoided." *Id* at 13 (citations omitted);
18 *see also Palmquist v. Flir Systems, Inc.*, 207 Or App 365, 371 (2006) ("The rule that a general
19 statute gives way to a more specific statute applies only when there is an irreconcilable conflict
20 between the statutes").

21 Here, there is no conflict between the APA and Section 6 of Measure 37, so neither
22 statute need be disregarded. As the State explained in its opening memorandum, the APA
23 applies when the State has issued a final order on a Measure 37 claim. Section 6 applies when
24 the State (or another government body) does not take final action on a Measure 37 claim within
25 180 days. In that circumstance, the claimant has a cause of action for monetary compensation.
26 ORS 197.352(6). Thus, the State's APA-exclusivity argument does not render Section 6

1 meaningless, as plaintiffs suggest; instead, it comes into play when the State fails to act within
2 180 days of the filing of a Measure 37 demand. But when, as here, the State has evaluated a
3 Measure 37 claim and issued a decision on it, review of that decision is solely under the APA.

4 Finally, plaintiffs contend that Sections 8 and 10 of Measure 37 allow the State to elect to
5 waive certain land use regulations, instead of paying monetary compensation, only within 180
6 days of when a claim is filed. Thus, according to plaintiffs, if the State issues a waiver based on
7 its understanding of when a Measure 37 claimant acquired property, and that understanding later
8 turns out to be incorrect, the claimant is entitled to “just compensation” under the statute and the
9 State may not correct its mistake by granting more comprehensive waiver relief. (*See* Plaintiffs’
10 Resp at 5-8).

11 Plaintiffs’ argument overlooks the plain language of Measure 37. Sections 8 and 10 do
12 not identify any point in the administrative process – or in litigation – during which the State’s
13 right to elect the waiver remedy disappears. Consequently, those provisions give the State the
14 right to elect waiver instead of compensation *at any time*. Thus, had plaintiffs filed a timely
15 petition for judicial review, and ultimately prevailed, the State presumably would have complied
16 with the resulting judgment by issuing a new order either granting a broader waiver, under ORS
17 197.352(8) and (10), or paying plaintiffs compensation under ORS 197.352(6). As before, that
18 choice between remedies would remain the State’s to make.

19 In this case, the State chose to waive certain land use regulations in lieu of paying the
20 plaintiffs just compensation. Because the State has made that choice – and retains the right to
21 choose the waiver remedy again, should this court ultimately decide that the State’s initial waiver
22 is insufficient – plaintiffs cannot state a claim for compensation.

23 CONCLUSION

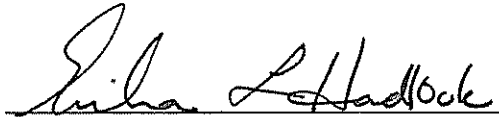
24 For the reasons stated above and in the memorandum supporting the State’s motion to
25 dismiss, this court lacks jurisdiction over plaintiffs’ Measure 37 and Declaratory Judgment Act
26

1 claims and plaintiffs have failed to state ultimate facts constituting any claim upon which relief
2 can be granted. Accordingly, plaintiffs' complaint should be dismissed.

3 DATED this 12th day of March, 2007.

4 Respectfully submitted,

5 HARDY MYERS
6 Attorney General

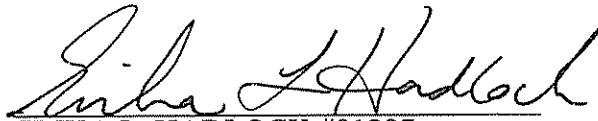
7 
8 ERIKA L. HADLOCK #91297
9 Sr. Assistant Attorney General
10 Trial Attorney
11 Tel (503) 947-4700
12 Fax (503) 947-4792
13 erika.hadlock@doj.state.or.us
14 Of Attorneys for Defendants
15
16
17
18
19
20
21
22
23
24
25
26

1 **CERTIFICATE OF SERVICE**

2 I certify that on March 12, 2007, I served the foregoing REPLY TO PLAINTIFFS'
3 RESPONSE TO STATE'S MOTION TO DISMISS upon the parties hereto by the method
4 indicated below, and addressed to the following:

5 James D. Vick
6 Attorney at Law
7 698 12th Street SE, Suite 200
8 Salem, OR 97301

9 HAND DELIVERY
10 MAIL DELIVERY
11 OVERNIGHT MAIL
12 TELECOPY (FAX)

13 

14 ERIKA L. HADLOCK #91297
15 Sr. Assistant Attorney General
16 Trial Attorney
17 Tel (503) 947-4700
18 Fax (503) 947-4792
19 erika.hadlock@doj.state.or.us
20 Of Attorneys for Defendant
21
22
23
24
25
26