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

6 BILLY J. TOWERY,

7 Plaintiff,

8 v.

9 JEFFERSON COUNTY,

10 Defendant.

Case No. 05CV0044

MEMORANDUM OF *AMICUS CURIAE* STATE
OF OREGON IN SUPPORT OF JEFFERSON
COUNTY'S CROSS-MOTION FOR SUMMARY
JUDGMENT

(ORAL ARGUMENT REQUESTED)

11
12 **INTRODUCTION**

13 The State has moved to appear in this case to support Jefferson County in defending its
14 order in response to plaintiff's claim under ORS 197.352 ("Measure 37") because of the State's
15 interest in the proper interpretation and application of that law. The State requests oral argument
16 on the parties' cross-motions for summary judgment.

17 Plaintiff is not entitled to relief on his first claim and his motion for partial summary
18 judgment should be denied, and Jefferson County's motion for summary judgment in its favor on
19 plaintiff's first claim for relief should be granted.

20 In plaintiff's motion for summary judgment on his first claim for relief, plaintiff claims
21 that he is entitled to compensation because more than 180 days have passed and the county has
22 not "modified, removed or not applied the restrictive land use regulations to allow plaintiff to use
23 his property as plaintiff could have at the time he acquired the property." According to plaintiff,
24 he would have been allowed to subdivide his property into one-acre lots and sell the lots for
25 single family residential development. Reading the memoranda in support of summary judgment,
26 one might conclude that the county had not acted on plaintiff's claim at all. However, the county

1 did act, and issued a “waiver” order authorizing subdivision of the 160 acres into one-acre lots
2 and a dwelling on each lot. Leith Affidavit, Ex. 1. Plaintiff’s memoranda do not clearly explain
3 why he believes he is entitled to compensation despite the county’s issuance of the waiver.

4 It may be that plaintiff is dissatisfied with the waiver because the order initially provided
5 that the relief it authorized was not transferable. See Second Amended complaint ¶ 14. The order
6 stated: “This waiver is personal and limited to the claimants listed below, and shall expire
7 immediately upon the sale or transfer of the subject property by all of the claimants listed. Upon
8 sale or other transfer of the subject property, the purchaser or transferee shall be subject to all
9 land use regulations in effect at the time of sale or transfer.” *Id.* at 2.¹

10 In the State’s view, the “nontransferability” condition of the county’s order did nothing
11 more than reflect what the law allows. When a public entity determines that a claimant is
12 entitled to relief under ORS 197.352, subsection (8) of that statute authorizes the county to
13 “modify, remove or not * * * apply the land use regulation or land use regulations to allow the
14 [present] owner to use the property for a use permitted at the time the [present] owner acquired
15 the property.” As is explained further below, the relief is limited to the present owner.²

16 Plaintiff’s second claim for relief appears to be based on his view of the rights afforded
17 him under ORS 197.352. As is explained further below, because his view of ORS 197.352 is
18 wrong, his second claim for relief should also fail as a matter of law. Jefferson County’s motion
19 for summary judgment on the second claim for relief should be granted.

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23 ¹ The waiver language was included pursuant to the county’s ordinance implementing
24 Measure 37, Ordinance O-20-05. To the State’s knowledge, plaintiff has not challenged the
25 ordinance.

26 ² The State’s analysis regarding the “non-monetary” relief afforded by ORS 197.352 was made
public soon after 2004 Ballot Measure 37 took effect, in a letter of advice from the office of the
Attorney General. Leith Affidavit, Ex.2. The State’s views were affirmed by Judge Nielson in
Crook County v. All Electors, Case no 05CV0015. Leith Affidavit, Ex. 3.

BACKGROUND

2 I. Land use planning in Oregon—an overview.

3 The primary components of Oregon’s land use planning system were created with the
4 passage of Senate Bill 10 in 1969, and Senate Bills 100 and 101 in 1973.³ Senate Bill 10
5 required cities and counties to adopt comprehensive land use plans and to enact zoning
6 ordinances and land use regulations to implement those plans. Senate Bill 100 created a state
7 agency—the Land Conservation and Development Commission (LCDC)—to establish and
8 amend statewide land use goals, and to review and “acknowledge” the comprehensive plans and
9 zoning regulations adopted by local governments to ensure that they comply with the goals.⁴
10 Senate Bill 100 also adopted interim statewide land use planning goals that governed planning
11 and development until the LCDC goals took effect. Local governments are responsible for
12 making land use decisions consistent with their comprehensive plans, their land use regulations,
13 and any directly-applicable state laws.⁵

14 Thus, for example, under the statewide planning goals, local governments are required to
15 designate lands that meet certain criteria for exclusive farm use (EFU), or for forest uses. Senate
16 Bill 101 provided that property within exclusive farm use zones would receive favorable
17 property tax treatment and, in return, that the uses of that land would be limited under state law.⁶
18 More recent statutes and LCDC’s Goal 4 establish how lands zoned for forest use may be
19 divided, and control when dwellings are allowed on such land.⁷

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22 ³ See 1969 Or. Laws ch. 324; 1973 Or. Laws ch. 80.

23 ⁴ See ORS 197.040(2); 197.175(2). All 36 counties in Oregon have adopted comprehensive
plans that have been “acknowledged” by LCDC.

24 ⁵ ORS 197.175(2)(c)-(e), 197.646(3), 197.835(8), see also *Kenagy v. Benton County*, 115 Or App
131 (1992).

25 ⁶ 1973 Or. Laws ch. 503.

26 ⁷ See ORS 215.700 to 215.755 (farm and forestland dwellings).

II. Vesting.

2 Part of the law of land use that forms the context for ORS 197.352 is the law of vesting.
3 Oregon courts have recognized that an owner seeking to use property in a particular way may
4 “have acquired a ‘vested right’ to continue the development and subsequently to put the use to its
5 intended function.”⁸ Such rights “vest” only through actual use, or actual development “to the
6 extent that [the landowner] has acquired a right to continue the development” under the factors
7 identified in *Polk County v. Martin*.⁹ The approval of a permit or any other form of
8 governmental authorization does not by itself confer a “vested property right” to carry out the
9 use authorized by the permit. As a result, if the use authorized by government, through a permit
10 or legislatively, is abandoned or subsequently becomes unlawful, then the authorization is lost.¹⁰

11 III. ORS 197. 352 (“Measure 37”).

12 Measure 37 was approved by the Oregon voters at the November 2004 election. The
13 measure adds new statutory provisions as part of Oregon’s land use planning statutes set forth in
14 ORS chapter 197. Under ORS 197.352, if a public entity enforces an existing land use
15 regulation¹¹ after the effective date of the measure, or enacts or enforces a new land use
16 regulation, in a way that restricts the use of private real property and reduces the fair market
17 value of that property, “then the owner of the property shall be paid just compensation.”¹²
18 Generally, ORS 197.352 limits non-monetary relief to property owners who acquired their
19 property prior to the enactment of the land use regulations that provide the basis for their claims.
20 ORS 197.352(3)(e).

21 _____
22 ⁸ *Clackamas County v. Holmes*, 265 Or. 193, 197, 508 P.2d 190 (1973).

23 ⁹ See *Polk County v. Martin*, 292 Or. 69, 82, 636 P2d 952 (1981).

24 ¹⁰ *Lemke v. Lane County*, 57 Or App 55 (1983); *Twin Rocks Watseco v. Sheets*, 15 Or App 445
25 (1973); see also *Fountain Village v. Multnomah County*, 176 Or App 213 (2001) (vested right to
26 complete a use may be abandoned); *K.R.A.M. Corp. v. City of Vernonia*, 95 Or App 534 (1989)
(sewer connection permits do not create contract rights and may be revoked by city).

¹¹ (one adopted after the effective date of the measure)

¹² ORS 197.352(1).

Under ORS 197.352(8), in lieu of paying just compensation to the owner, “the governing
2 body responsible for enacting the land use regulation may modify, remove, or not to apply [sic]
3 the land use regulation * * * to allow the owner to use the property for a use permitted at the
4 time the owner acquired the property.”¹³ Allowing the owner to use his or her property in a way
5 that would otherwise be prohibited by the land use laws is sometimes referred to as granting a
6 “waiver.” Under ORS 197.352(11), the “owner is the present owner of the property, or any
7 interest therein.” In addition, under ORS 197.352(10), if a waiver is not granted, and if just
8 compensation is not paid within two years, “the owner shall be allowed to use the property as
9 permitted at the time the owner acquired the property.”¹⁴

10 It may be helpful to emphasize how ORS 197.352 fits within the framework of other
11 laws. Despite how some may describe ORS 197.352, the measure did not repeal existing land
12 use regulations. Rather, ORS 197.352 amends those laws by providing that certain property
13 owners, under certain circumstances, are entitled to relief from a land use regulation. As
14 described above, they are entitled to relief in the form of compensation, or in the alternative, they
15 are entitled to non-monetary relief in the form of a “waiver” of the land use regulation. Where
16 ORS 197.352 does not otherwise provide, the existing body of land use law remains in effect.
17 *See MacPherson v. DAS*, 340 Or 117, 132 (2006) (finding Measure 37 not to constitute an
18 unconstitutional “suspension” of the law). The State’s position is that—like property owners
19 before Measure 37 who have obtained permission for a specific use of their property—those who
20 obtain permission in the form of a “waiver” under Measure 37, must vest that right according to
21 the criteria described in *Polk County v. Martin*, 292 Or 69, 636 P2d 952 (1981) before another
22 person who does not have that statutory entitlement to non-monetary relief from the land use
23 regulation may lawfully acquire and continue it.

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25 ¹³ ORS 197.352(8).

26 ¹⁴ ORS 197.352(10).

IV. Standard of review.

2 Determining whether a Measure 37 “waiver” is necessarily transferable to subsequent
3 owners of real property requires the court to interpret Measure 37. Oregon courts apply the same
4 methodology for interpreting statutes adopted through the initiative process that they apply in
5 construing statutes adopted by the Legislative Assembly.¹⁵ The objective is to discern the intent
6 of those who enacted the law, in this case, the Oregon voters. “The best evidence of the voters’
7 intent is the text of the provision itself. * * * The context of the language of the ballot measure
8 may also be considered[.]”¹⁶ Context may include relevant case law that “helps to define the
9 parameters of the nature of the rights conferred” by the measure.¹⁷ If “the intent of the voters is
10 not clear from the text and context” of the measure, the court examines the history of the
11 provision.¹⁸

12 The history of an initiated measure consists of “other sources of information that were
13 available to the voters at the time the measure was adopted and that disclose the public’s
14 understanding of the measure.”¹⁹ This includes such things as “the ballot title and arguments for
15 and against the measure included in the voters’ pamphlet, and contemporaneous news reports
16 and editorial comment on the measure.”²⁰

ARGUMENT

18 Plaintiff apparently wants not simply to use the property for certain purposes himself, but
19 to sell *to someone else* for a particular use, a use that would otherwise be unlawful. Yet when

21 ¹⁵ *Stranahan v. Fred Meyer, Inc.*, 331 Or. 38, 61, 11 P.3d 228 (2000); *PGE v. Bureau of Labor and Industries*, 317 Or. 606, 612 n.4, 859 P.2d 1143 (1993).

22 ¹⁶ *Stranahan*, 331 Or. at 56 (quoting *Roseburg School Dist. v. City of Roseburg*, 316 Or. 374, 378, 851 P.2d 595 (1993)).

23 ¹⁷ *Stranahan*, 331 Or. at 62.

24 ¹⁸ *Id.* at 56, quoting *Ecumenical Ministries v. Or. State Lottery Comm’n.*, 318 Or. 551, 559, 871 P.2d 106 (1994).

25 ¹⁹ *Ecumenical Ministries*, 318 Or. at 559 n. 8.

26 ²⁰ *Id.*

1 government exercises the option under ORS 197.352 to “not apply” a land use regulation in lieu
2 of compensation, the laws regulating that property do not change. When the property is
3 transferred, the zoning of that property remains the same. The statute does not authorize
4 government to provide that anyone may use the land for any purpose. Accordingly, ORS 197.352
5 does not authorize the county to grant the relief to which plaintiff claims to be entitled. The text,
6 context and legislative history of Measure 37 demonstrate that the relief is personal to the
7 claimant and does not “run with the land.”

8 **I. The text of Measure 37 demonstrates that Measure 37 “waivers” are not**
9 **transferable.**

10 The text of ORS 197.352 reveals that the voters did not intend to make a “waiver”
11 transferable if the landowner that obtained it does not actually use the land in accordance with
12 the waiver. Section 1 of the measure gives “the owner of the property” a right to receive just
13 compensation. In lieu of compensation, the “waiver” provisions—sections 8 and 10—both
14 authorize a public entity to allow “the owner” to use the property in a way that was permitted at
15 the time “the owner” acquired the property.

16 ORS 197.352(11)(c) defines “owner” as “the *present* owner of the property, or any
17 interest therein.”²¹ Thus, the text of ORS 197.352 demonstrates that the voters intended both the
18 right to receive just compensation, and any right to use the property in accordance with a waiver
19 in lieu of compensation, to belong to the *present* owner of the property. If the voters had
20 intended to make either right transferable to subsequent owners, a contrary intent could have
21 been expressed in the text of the measure.

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26 ²¹ Measure 37, section 11(c) (emphasis added).

11. **II. The context of Measure 37 confirms that the voters did not intend to make Measure 37 waivers transferable.**

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3 ORS 197.352 must be construed in the context of otherwise applicable state law. The
4 right to use land in accordance with a “waiver” is an exception to the statewide land use planning
5 system described in the introduction to this memorandum. The first clause in ORS 197.352
6 states that it is to be codified in ORS chapter 197, one of the primary elements of the state land
7 use planning laws. But, other than the “waiver” provisions, nothing in the statute provides that
8 state or local laws that would otherwise apply to a person’s use of property will not apply to a
9 use that is carried out under ORS 197.352.

10 The “vested rights” principle in existing Oregon law –described above -- is also properly
11 considered as part of the context of ORS 197.352. At the time ORS 197.352 was adopted, the
12 voters presumably were aware that an authorization to carry out a use of land does not vest solely
13 on the basis of a governmental approval.²² Thus, it is reasonable to conclude that when voters
14 granted a right of just compensation—or a “waiver” in lieu of compensation—to the “present
15 owner” of property under ORS 197.352, they intended the “waivers” to be treated like other
16 governmental authorizations. Such rights “vest” only through actual use or development.²³

17 A waiver under ORS 197.352 is no different from any other authorization to carry out a
18 use of land. It does not vest solely on the basis of its issuance. *Fountain Village*, 176 Or App at
19 221. The granting of a waiver gives the owner no “vested” right that can be transferred to a
20 subsequent owner.

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22 ²² See *Fountain Village*, 176 Or. App. at 221.

23 ²³ The law of vesting is largely common law, and most statutes, rules and ordinances are silent
24 concerning whether a change in the ownership of property following a governmental
25 authorization will affect the authorization. The case law described above centers on the question
26 whether a subsequent change in the law can eliminate the authorization – making it clear that
until the rights vest – they may be eliminated. The same rule applies where, as with Measure 37,
the text of the statute, rule or ordinance makes the governmental authorization particular to a
person or dependent on some other condition.

1 **III. The history of Measure 37 does not clearly demonstrate a contrary intent.**

2 The voters' pamphlet materials on Measure 37 shed little light on the transferability
3 issue.²⁴ The issue is not mentioned in the ballot title or explanatory statement. There were forty
4 "arguments in favor" of Measure 37 in the voters' pamphlet, but none directly addressed the
5 transferability issue. The "arguments in opposition" to the measure do not address the issue
6 either.

7 The chief petitioners of Measure 37 did state in the Voters' Pamphlet that once a claimant
8 conveys his or her property to a new owner, the new owner will have his or her own new "date
9 of acquisition" for purposes of determining what laws may give rise to a claim on his or her
10 behalf. Leith Affidavit, Ex. 4 at 23.

11 **IV. Plaintiff is not prohibited from selling lots.**

12 Plaintiff appears to assert that the waiver is inadequate because it does not authorize him
13 to sell buildable one-acre lots, the "use" he says that was authorized when he acquired the
14 property. However, the State does not read ORS 197.352 to prohibit the transfer of property, or
15 to prohibit the transfer of a vested property right. In this case, once a plat of the plaintiff's
16 desired division is recorded, by statute, the plaintiff will be authorized to convey individual lots.
17 ORS 92.017. And once the remainder of the use authorized by a waiver is vested, the right to
18 continue that use also may be conveyed without the right being lost. ORS 215.130.

19 The limitation in ORS 197.352(8) that authorizes government to "not apply" a land use
20 regulation to allow the "owner" (defined as "present owner") to use the property for a use
21 permitted at the time the "[present] owner" acquired the property does not prohibit such a
22 transfer. That limitation to the "present owner" means simply that the statutory entitlement for
23 the present owner's use of the property would not continue if the present owner transfers the
24 property without vesting the waiver right. The county's condition in its order was consistent
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26 ²⁴ The Voters' Pamphlet material is attached as Exhibit 4.

1 with that limitation, and does not give rise to a right to compensation under the other provisions
2 of ORS 197.352.

3 **V. Plaintiff's Second Claim for Relief also fails as a matter of law**

4 Plaintiff's Second Claim for Relief, entitled "Inverse Condemnation of Measure 37 rights
5 by Recording Unauthorized Restrictions in the Deed Records", alleges that the county's order
6 violates his constitutional rights because it "prohibit[s] transfer of plaintiff's property rights."
7 Second Amended complaint, ¶ 17. Plaintiff's constitutional claim is based on his understanding
8 of ORS 197.352 and his view that the county's action, pursuant to its Measure 37 ordinance,
9 "takes" what he believes are his property rights. In other words, the constitutional claim hinges
10 on plaintiff's interpretation of ORS 197.352. Because ORS 197.352 does not afford plaintiff the
11 rights he claims, the basis for his theory of constitutional deprivation fails.

12 Further, regardless of the exact scope of the rights granted by ORS 197.352, until those
13 rights have vested, the statutory authorization is nothing more than a revocable license, and does
14 not constitute a property right under either the State or federal Constitutions, and may be altered
15 or even eliminated without compensation. *Brusco Tugboat Co. v. State*, 284 Or 627, 639
16 (1978)(construing another statutory authorization – the right of a riparian owner to construct a
17 wharf – as a revocable license until vested, and denying a claim for compensation for a
18 subsequent restriction of that statutory authorization).

19 Finally, ORS 197.352 does not give claimant a right to compensation when
20 government has elected to "waive" the applicable land use regulations. The remedy section of
21 ORS 197.352, section 8, gives government the choice whether to pay compensation or "waive"
22 land use regulations once a right to relief is established. Here, Jefferson County has elected to
23 waive the land use regulations that are the basis for the claim. As a result, claimant's sole remedy
24 is to challenge the county's "waiver."


CONCLUSION

2 The text, context and history of ORS 197.352 demonstrate that a public entity's decision
3 to modify, remove or not apply a law in response to a ORS 197.352 claim is personal to the
4 owner making the claim; it does not run with the land. Accordingly, the Jefferson County waiver
5 order is consistent with ORS 197.352, plaintiff is not entitled to compensation, and plaintiff's
6 motion for summary judgment should be denied, and Jefferson County's cross-motion for
7 summary judgment should be granted.

8 DATED this 18 day of September, 2006.

9 Respectfully submitted,

10 HARDY MYERS
11 Attorney General

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14 _____
15 KATHERINE G. GEORGES #84231
16 Senior Assistant Attorney General
17 Trial Attorney
18 Tel (503) 947-4700
19 Fax (503) 947-4793
20 kate.georges@doj.state.or.us
21 Of Attorneys for State of Oregon
22
23
24
25
26

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CERTIFICATE OF SERVICE

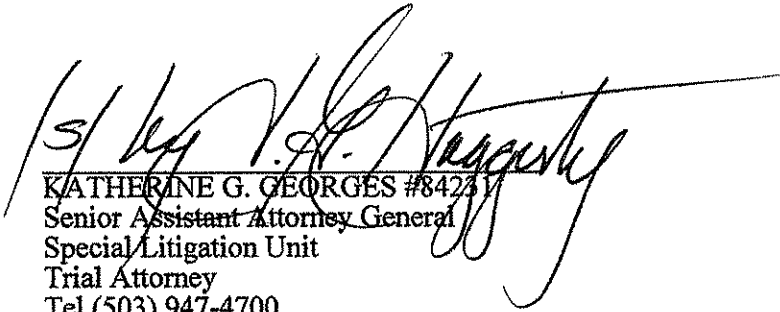
I certify that on September 18, 2006, I served the foregoing MEMORANDUM OF AMICUS CURIAE STATE OF OREGON IN SUPPORT OF JEFFERSON COUNTY'S CROSS-MOTION FOR SUMMARY JUDGMENT upon the parties hereto by the method indicated below, and addressed to the following:

Donald Joe Willis
Schwabe Williamson & Wyatt, PC
1211 SW 5th Avenue, Suite 1900
Portland, OR 97204

HAND DELIVERY
 MAIL DELIVERY
 OVERNIGHT MAIL
 TELECOPY (FAX)

Jacqueline G. Haggerty
Jefferson County Counsel
66 SE D Street, Suite A
Madras, OR 97741

HAND DELIVERY
 MAIL DELIVERY
 OVERNIGHT MAIL
 TELECOPY (FAX)



KATHERINE G. GEORGES #84231
Senior Assistant Attorney General
Special Litigation Unit
Trial Attorney
Tel (503) 947-4700
Fax (503) 947-4793
kate.georges@doj.state.or.us
Of Attorneys for Intervenor State of Oregon