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

6 BETTY L. VANDEBERGHE TRUST,
7 SUSAN L. ELLIOTT, Trustee of the Betty L.
8 Vandeberghe Trust, and SHANNON I.
9 CLARKE, SUSAN L. ELLIOTT, STEVEN T.
VANDEBERGHE, individually as
beneficiaries fo the Betty L. Vandeberghe
Trust,

10 Plaintiffs,

11 v.

12 CLACKAMAS COUNTY; STATE OF
13 OREGON; DEPARTMENT OF LAND
14 CONSERVATION AND DEVELOPMENT
15 OF STATE OF OREGON; LAND
16 CONSERVATION AND DEVELOPMENT
COMMISSION OF STATE OF OREGON;
and DEPARTMENT OF ADMINISTRATIVE
SERVICES OF STATE OF OREGON,

17 Defendants.

Case No. CV06110874

STATE OF OREGON'S REPLY TO
PLAINTIFFS' RESPONSE TO THE STATE'S
MOTION TO DISMISS

(Oral argument requested – 30 minutes)

18 **I. Other circuit courts have ruled that subsection 6 of Measure 37 does not provide an**
19 **independent cause of action in all cases.**

20 Since the State’s Motion to Dismiss (“Motion”) was initially filed, there have been three
21 decisions from two counties that subsection 6 of ORS 197.352 (“Measure 37) does not create an
22 independent cause of action. Both the Circuit Courts of Jefferson and Josephine Counties have
23 ruled that where a state agency or local government issues a timely Measure 37 waiver, there is
24 no separate cause of action under subsection 6 of Measure 37. In the cases of *Pondelick v*
25 *County of Josephine, et. al*, Case No. 06-CV-0622 and *Perrott v. Josephine County*, Case No.

1 06-CV-0677, the court granted the State’s Motion to Strike the plaintiffs’ causes of action for
2 compensation under Subsection 6 and ruled that the plaintiffs’ right to relief was limited to
3 review of the State’s order under the APA.¹ Similarly, in the matter of *Hal Pruitt v. Jefferson*
4 *County*, Jefferson County Circuit Court Case No. 06CV0029, Judge Thompson granted the
5 county’s summary judgment motion/motion to dismiss on the plaintiff’s separate cause of action
6 for compensation under subsection 6 because, in part, the court found that the county had issued
7 a waiver and the only means to challenge that waiver was by a writ of review.² All three of these
8 opinions are attached hereto for the Court’s consideration of the State’s instant Motion to
9 Dismiss.

10 **II. Plaintiff misconstrues the jurisdictional argument.**

11 The State does not contend, as Plaintiffs suggest, that the circuit court lacks jurisdiction
12 to decide a legitimate Measure 37 cause of action under the Administrative Procedures Act
13 (“APA”) simply because the State issued a Final Order. (Response p. 2:20-23) The requirement
14 that a person dissatisfied with the State’s action seek review under the APA applies only when
15 that dissatisfaction arises from a *final order* that is subject to APA review. Consequently, if the
16 State took no action with respect to a Measure 37 demand, the property owner would have a
17 subsection 6 cause of action for compensation once 180 days had passed. However, because the
18 State did issue a Final Order and Plaintiffs’ claim for compensation depends on a finding that the
19 order is invalid, the APA and its exclusionary principles apply.

20 **III. Measure 37 requires that the agency conduct a quasi-judicial proceeding and a**
21 **written expression of its findings.**

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23 _____
24 ¹ Judge Baker’s letter opinions in *Pondelick v. County of Josephine, et. al*, Case No. 06-CV-0622
25 and *Perrott v. Josephine County*, Case no. 06-CV-0677 are attached hereto, collectively, as
26 Exhibit “1”.

² Judge Thompson’s letter opinion in *Pruitt v. Jefferson County*, Jefferson County Case No.
06CV0029 is attached hereto as Exhibit “2”.

1 Under Measure 37, the State is required to perform its a quasi-judicial function because it
2 must apply the criteria set forth in Measure 37 to a claimant's written demand for compensation
3 and, ultimately, reach a decision that directly affects the claimant. *Don't Waste Or. Comm v.*
4 *Energy Facility Siting Council*, 320 Or 132, 148-149 (1994); *Strawberry Hill 4 Wheelers v.*
5 *Benton Co. Bd. of Comm.*, 287 Or 591, 602-03 (1979). Measure 37 necessitates that the agency
6 perform its quasi-judicial function because, upon receipt of a written demand for compensation,
7 an agency must reach a decision that would require it to "apply preexisting criteria to concrete
8 facts," which result will be "directed at a closely circumscribed factual situation or a relatively
9 small number of persons." *Ibid* The written expression of the agency's findings on its quasi
10 judicial hearing is a Final Order under the APA. ORS 183.310 (6) (b) [A "'final order' means
11 final agency action expressed in writing."]. Since Measure 37 requires an agency to take action
12 in response to a valid demand, the agency has no choice but to hold a quasi-judicial hearing in
13 the form of an other than contested case hearing and to issue a written expression of its actions,
14 i.e. a Final Order. Accordingly, the APA applies and if Plaintiffs are dissatisfied with the final
15 order, their remedy is to file a petition for judicial review of the final order within 60 days of its
16 issuance pursuant to the APA.

17 Plaintiffs, on the other hand, argue that a quasi-judicial hearing is not required under
18 Measure 37 because the agency is only required to respond to a written demand with a "yes" or a
19 "no" response. Plaintiff further argues that the agencies' review of "whether it would like to
20 grant a "waiver" is only a "self-actuated administrative decision." (Response 5:11-15). Plaintiffs
21 do not, however, offer an alternative method for agencies to render or communicate their
22 decisions on Measure 37 demands.

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1 **IV. Plaintiffs' remedy against the State is exclusively governed by the APA**

2 **A. Measure 37 does not supersede the APA.**

3 Plaintiffs argue that the APA does not govern Measure 37 because Measure 37 is a
4 specific and subsequently enacted statute, subsection 6 permits jurisdiction to be in the county in
5 where the property is located; and, subsection 7 states that procedures enacted by an agency to
6 process claims cannot be a prerequisite to filing a claim in circuit court under subsection 6. (See
7 Response, generally) None of these arguments demonstrate that review of a state agency's
8 decision is exempted from the APA.

9 Plaintiffs make the generalized argument that subsection 6 supersedes the APA because it
10 is a specific statute, whereas the APA is a general statute. Plaintiffs' argument is not accurate
11 because there is no provision of Measure 37 that actually negates the applicability of the APA.
12 *See Fairbanks v Bureau of Labor and Industries*, 323 Or 88, 93-94 (1996) (declining to insert
13 into a statute a provision exempting it from the APA). For example, Plaintiffs contend that
14 Measure 37 supersedes the APA because Measure 37 was enacted after the APA and does not
15 contain any reference to the APA. This argument is immediately refuted by subsection 12 which
16 specifically provides that the remedies created by Measure 37 are "not intended to modify or
17 replace any other remedy." ORS 197.352(12).

18 Numerous appellate cases upholding APA jurisdiction and general principles of Oregon
19 law also refute Plaintiffs' argument. In *Olsen v. Deschutes County*, 204 Or App 7, *rev denied*,
20 341 Or 80 (2006), the Court of Appeals rejected the argument that a later-enacted, and more
21 specific, statute controls over an existing general law. Referring to the same maxim on which
22 Plaintiffs rely here, the Court said, "The 'later and more specific' maxim applies when statutes
23 conflict. ORS 174.020 (2). Applying the maxim necessarily renders one of the statutes—the
24 older and more general—meaningless, and should therefore be used *only when a conflict actually*
25 *exists and cannot be avoided.*" *Olsen* at 13 (emphasis added).

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1 Similarly, in *Palmquist v. Flir Systems, Inc.*, 207 Or App 365 (2006), the Court of
2 Appeals stated, “The rule that a general statute gives way to a more specific statute applies only
3 when there is an irreconcilable conflict between the statutes * * * In this case, defendant neglects
4 to identify any conflict at all, much less an irreconcilable one.” 207 Or App at 371 (citation
5 omitted). The same is true here. Plaintiffs identify no irreconcilable conflict between the APA
6 and Measure 37. Interpreting Measure 37 in context, on the other hand, gives effect to both the
7 APA and subsection 6 and avoids any conflict.

8 Plaintiffs also argue that there is conflict between the statutes because subsection 7
9 allows an agency to adopt procedures to process claims, but specifically disallows such
10 procedures from acting “as a prerequisite to the filing of a compensation claim under subsection
11 (6).” ORS 197.352 (7). While DAS has adopted such procedures at OAR 125-145-0010 to 125-
12 145-0105, none of these rules purport to be a prerequisite to filing a subsection 6 claim.
13 Moreover, subsection 7 does not contradict the APA because the APA is not a procedural
14 requirement created by the State to process Measure 37 claims. Indeed, nothing in Measure 37
15 states that the procedural prerequisites set forth in the APA, e.g. the filing of a Petition for
16 Judicial review within 60 days of the issuance of agency order, do not have to be followed prior
17 to filing a suit in a circuit court. Accordingly, they must be followed.

18 Finally, Plaintiffs argue that Measure 37 conflicts with the APA because subsection 6
19 permits jurisdiction to be in the county where the property is located. This does not contradict
20 the APA for, at least, two reasons. First, a petition for judicial review is not limited to review in
21 Marion County, as suggested by Plaintiffs. Rather it may also be held in the county where a
22 petitioner resides or in the county where their principal place of business is located. ORS
23 183.484. [Jurisdiction for judicial review of orders other than contested cases is conferred upon
24 the Circuit Court for Marion County and upon the circuit court for the county in which the
25 petitioner resides or has a principal business office.] Second, the relief provided in subsection 6

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1 only arises if the agency has not acted. Therefore, there is no petition for judicial review and the
2 venue requirements under the APA for petitions for judicial review are irrelevant.

3 **B. There is no concurrent jurisdiction over review of the agency's decision**
4 **because there is no independent cause of action under subsection 6.**

5 Plaintiffs argue that the APA does not provide exclusive review over their cause of action
6 because 1) they are not challenging the validity of the State's order, only the damages that flow
7 from the order; and 2) other Court of Appeal cases have held that the APA is not the exclusive
8 basis for review. Notwithstanding Plaintiffs' erroneous application of the authorities cited in
9 their Response, there is an immediate fallacy in their argument that the State's decision to issue a
10 waiver and not compensation creates a cause of action for just compensation. The just
11 compensation that Plaintiffs argue they are entitled to does not flow from the State's decision. It
12 flows, if at all, from the initial enactment of the land use regulations that are the basis of their
13 Measure 37 claim. The State's subsequent decision whether to grant compensation or a waiver
14 did not cause Plaintiffs to suffer any additional loss of use or property value. Plaintiffs do not
15 have an independent cause of action for damages that permits them to avoid the APA.

16 **1. Plaintiffs do not have an independent cause of action because the**
17 **agency has waived.**

18 The plain language of Measure 37 refutes Plaintiffs' contention that they are entitled to
19 monetary compensation even when the State has granted an appropriate waiver of land use
20 regulations. Sections 8 and 10 of Measure 37, which describe the waiver remedy, provide that
21 governments may choose to not apply land use regulations "*in lieu of* payment of just
22 compensation." ORS 197.352(8) (emphasis added); *see* ORS 197.352(10). "In lieu of" means
23 "instead of"; consequently, issuance of a waiver completely replaces the compensation remedy
24 that otherwise would be available. In other words, the compensation and waiver remedies are
25

1 alternatives. If the government chooses waiver, the provisions related to just compensation no
2 longer apply.

3 Subsection 6 of Measure 37, which creates a cause of action for compensation, does state
4 that the cause of action exists when “a land use regulation continues to apply to the subject
5 property more than 180 days after the present owner of the property has made written demand
6 for compensation.” ORS 197.352(6). Plaintiffs read that language literally – and out of context
7 – to mean that a landowner is entitled to monetary compensation *whenever* the State continues to
8 apply a land use regulation to his or her property, not only in those cases in which the State
9 incorrectly has denied a Measure 37 claim or granted too narrow a waiver.

10 That argument contradicts both the language of the statute and its purpose. Subsection 6
11 of Measure 37 gives the government “180 days after the present owner of the property has made
12 written demand for compensation *under this section*” to assess claims and to decide whether to
13 waive land use regulations or to grant compensation. ORS 197.352(6) (emphasis added). A
14 demand for compensation “under this section” is a demand for compensation under subsections 1
15 and 2 of the statute, which link the amount of monetary compensation due to the government’s
16 continued application of certain land use regulations to property. And subsections 8 and 10 then
17 provide that the government may elect to issue a waiver “in lieu of” granting *that* compensation.
18 Thus, read in context, subsection 6 creates a cause of action for compensation only when the
19 government has not responded to the written demand within the given time period.

20 In addition, Plaintiffs’ argument would completely defeat the voters’ intent of having the
21 State and other government bodies waive certain land use regulations, allowing some people to
22 develop land the way they could have when they acquired it. If compensation *always* were due,
23 even if a proper waiver were granted, the government never would have incentive to issue a
24 waiver. That cannot be how the voters intended Measure 37 to work.

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1 **2. Just compensation for a constitutional taking is not a remedy**
2 **available in a Measure 37 claim nor does it create an independent action under subsection**
3 **6.**

4 Plaintiffs are not correct in their supposition that Measure 37 provides “a statutory
5 remedy that is in addition to that authorized by the just compensation clause in Art I, Section 18
6 of the Oregon Constitution.” (Response p.10:7-21). Measure 37 is not an action for
7 compensation under a taking. “Just compensation” as it is used in the statute does not even have
8 the same meaning as that prescribed in takings law. Rather, it is specifically defined by the
9 statute, without reference to any other Oregon law.

10 Moreover, Measure 37 is not akin to an action for an uncompensated taking by a
11 government entity. There is no question that the owners of real property have certain property
12 rights that may not be taken by the government without just compensation. Or Const, Art I,
13 Section 18; U.S. Const, Amendment V.³ However, a plaintiff in a takings action must prove that
14 the government action has “substantially deprived” the owner of the use of his or her land. *See,*
15 *e.g. Thornburg v. Port of Portland*, 233 Or 178, 189 (1962).

16 Measure 37 does not place this burden on the claimant. Instead, Measure 37 provides an
17 opportunity to the landowner to obtain relief for regulations that restrict his or her use of the
18 property, even if it is a nominal restriction. Indeed, Measure 37 gives certain owners rights that
19 they otherwise would not possess because the State lawfully imposed land use regulations that
20 merely affect the use of the property but leave the owner substantial use of the property. *See,*
21 *e.g., Dodd v Hood River County*, 317 Or 172, (1993) [The landowner acquires property with the
22 knowledge that the government may, at any time, enact regulations that may restrict the uses to
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25 ³ “Private property shall not be taken for public use, nor the particular services of any man be
26 demanded, without just compensation; nor except in the case of the state, without such
compensation first assessed and tendered...” Art. I, §18.

1 which property may be put and thereby reduce its fair market value, provided only that some
2 substantial beneficial use is left to the owner.]

3 When the State issues an order waiving otherwise applicable land use regulations, an
4 owner is merely restored a right to use property of which she or he had previously been lawfully
5 deprived. There is no deprivation for purposes of a Fifth Amendment analysis.

6 **3. Oregon law does not provide concurrent jurisdiction over review of a**
7 **State agency decision.**

8 Plaintiffs' misunderstanding of the law is evident in their citation to *Boise Cascade Corp.*
9 *v Board of Forestry*, 131 Or App. 538 (1994); *Dunn v. City of Redmond*, 303 Or 201 (1987) and
10 *State of Oregon v Oregon Health and Sciences University*, 205 Or App 64 (2006) for the
11 proposition that the APA does not have exclusive jurisdiction in the instant case.

12 Plaintiffs are correct that *Boise Cascade Corp.* and *Dunn* permitted circuit court review
13 outside of the APA, but not for the reasons stated in Plaintiffs' response. Both *Boise Cascade*
14 *Corp.* and *Dunn* involved a question of whether a governmental act resulted in a taking of private
15 property. The governmental act in *Boise Cascade Corp.* and *Dunn* was the issuance of an order
16 by a state agency that the plaintiffs argued resulted in a governmental taking. In *Boise Cascade*
17 *Corp.*, the Board of Forestry issued an order denying the plaintiff's application to log because a
18 spotted owl nesting site was located on the relevant property. *Id.* at 540-543. *Dunn* involved a
19 challenge of a final order issued by the Land Use Board of Appeals ("LUBA") that ordinances
20 enacted by the City of Redmond were valid and did not amount to a governmental taking. *Id.* at
21 203. In both cases the plaintiffs argued that the order in question caused a taking because it
22 deprived them of all the economic value of their respective properties.

23 Both Courts determined that the circuit court had jurisdiction over the takings claim
24 because Article I, § 8 of the Oregon Constitution specifically granted jurisdiction to the circuit
25 courts. These courts did not decide that the circuit courts had concurrent jurisdiction to review

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1 the validity of the agency's orders. Rather, each court held that in cases where a plaintiff seeks
2 compensation because the state agency's order is in and of itself a taking, validity of the order is
3 not in question, thus the circuit court need not review the order under the APA. *Boise* at 546-547
4 [The Court agreed with the plaintiff that APA review was not required because "right or wrong,
5 the orders impose a regulation that results in a taking."].

6 This is not the situation here where the compensation that Plaintiffs allege they are
7 entitled to is not caused by the State's decision. Rather, compensation, if due, flows from the
8 initial enactment of the land use regulations, which enactment was the basis of Plaintiffs' written
9 demand to the state. Plaintiffs have already sought a remedy for diminishment in value caused
10 by these land use regulations. Subsection 6 does not give them a second bite at the proverbial
11 apple. Moreover, and as discussed more fully above, an action under Measure 37 is not a takings
12 action under Art I, Section 18 of the Oregon Constitution or Amendment V of the U.S.
13 Constitution. Neither *Boise Cascade Corp* nor *Dunn* support Plaintiffs' arguments.⁴

14 *State of Oregon v. Oregon Health and Sciences University* is similarly inapposite because
15 the court did not decide that it had concurrent jurisdiction to review a decision by a state agency.
16 *Id.* The Court of Appeals agreed with the plaintiff that the APA governed its petition under ORS
17 183.490 to compel the state Public Employee Benefits Board (PEBB) to act.⁵ *Id.* at 74-75. The
18 Court of Appeals further determined, however, that the APA did not govern the plaintiffs tort
19

20 ⁴ Plaintiffs' argument that allowing the circuit courts independent review of a state agency action
21 avoids "having the state 'fox' from supposedly protecting the 'hen-house'" is not appropriate.
22 (Response p. 7:6-14). Plaintiffs attempt to rely on the analogy discussed in *Boise Cascade Corp.*
23 but have again misunderstood the court's opinion. *Boise's* discussion of the fox and hen house
24 analogy pertained to LUBA's review of whether its own action resulted in a taking and
25 determining what compensation if any would be due. *Boise* at 549. LUBA does not review
26 decisions made under Measure 37 because "A decision by a governing body under this section
shall not be considered a land use decision as defined in ORS 197.015 (10)." ORS 197.352 (9).
The State's Final Orders are reviewable by a circuit court as provided by the ORS 183.482 of the
APA. The State does not review its own Final Orders under Measure 37.

⁵ "The court may upon petition as described in ORS 183.484, compel an agency to act where it
has unlawfully refused to act..." ORS 183.490.

1 and breach of contract claims because ORS 183.490 did not provide a remedy for tortious or
2 unlawful agency action. *State of Oregon*, at 76. Instead these were actions based on the
3 agency's "affirmative misconduct – not for inaction or a refusal to act." *Id* This case has no
4 application here, where Plaintiffs' claim is based only on the validity of a state agency's final
5 order – not an act of affirmative misconduct.

6 Contrary to Plaintiffs' argument, the appellate decisions that are relevant to the instant
7 case uniformly hold that the APA is the exclusive procedure for challenging state agency orders.
8 These cases present the same question raised by Plaintiffs' Complaint here: were the state
9 agencies right or wrong. In addition to the cases cited in the State's motion, *Muller v. Dept. of*
10 *Agriculture*, 164 Or App 11 (1999) illustrates the flaw in Plaintiffs' argument that the State's
11 Final Order is irrelevant to their claims. In *Muller*, the trial court denied the agency's motion to
12 dismiss tort claims that were premised on denial of a field burning permit. The Court of Appeals
13 reversed, holding that the APA provides exclusive jurisdiction where the plaintiff's "entitlement
14 to damages depends on the validity of the denial." 164 Or App at 16.

15 Here, Plaintiffs' "entitlement" to just compensation depends entirely on the validity of
16 the Final Order because if the Final Order is valid, Plaintiffs have received the relief to which
17 they are entitled under Measure 37. Plaintiffs' argument that they are seeking relief that is not
18 addressed by the Final Order is analogous to Mr. Muller's argument that the APA does not
19 apply because he was seeking relief—tort damages—not available under the APA. The Court of
20 Appeals rejected that argument, saying that it "amounts to mere question begging, however.
21 If he [Muller] is entitled to a remedy, then he must establish the invalidity of the agency action in
22 the first place." 164 Or App at 16-17. The same is true here.

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1 **VI. Plaintiffs' have not stated a viable claim for relief under subsection 6 because the State**
2 **chose to waive and did so within the restrictions of subsection 8.**

3 Plaintiffs admit in Paragraph 2b of their Complaint that the State has authority and
4 jurisdiction to "modify, remove or not apply land use regulations" in lieu of granting
5 compensation under ORS 197.352. Yet, they argue in their response that they have stated a
6 cause of action under subsection 6 because the State cannot chose to waive in lieu of granting
7 compensation. Plaintiffs' argument, which should be disregarded given their admission, ignores
8 the text of Measure 37.

9 Plaintiffs first argue that they have stated a claim for relief because the State's waiver is
10 not proportionate to "just compensation" and therefore inadequate. In support of this argument,
11 Plaintiffs argue that the terms "just compensation" must be defined as "the full indemnity for
12 loss or damage sustained by an owner of property." (Response p. 13:3-8). Plaintiffs further
13 argue that the waiver given by the State does not fully indemnify them, thus the State must also
14 pay just compensation. The definition that Plaintiffs ask this Court to accept is based on the
15 interpretation by the Oregon Court of Appeals and Supreme Court in two separate cases
16 involving takings claims under Article I, section 18 of the Oregon Constitution where each court
17 determined the compensation to which the plaintiff could be entitled. (Response p. 13:3-8; *State*
18 *Highway Commission v. Hooper*, 259 Or 555 (1971); *State Highway Commission v. Hazapis*, 3
19 Or App 282, 286 (1970).

20 As discussed above, Measure 37 is not akin to a takings action. Moreover, the terms
21 "just compensation" are specifically defined in Measure 37 as "...the reduction in the fair market
22 value of the affected property interest resulting from enactment or enforcement of the land use
23 regulation as of the date the owner makes written demand for compensation under this section."
24 ORS 197.352. Plaintiffs do not explain why this Court should ignore the definition of just
25 compensation that is expressly stated in subsection 2 of Measure 37. ORS 197.352. Nor do they

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1 explain why the waiver granted by State must be measured by the definition in subsection 2
2 when it is expressly limited by subsection 8 to allow only a use that was permitted when the
3 claimant acquired the property. Plaintiffs' argument is not relevant.

4 Second, Plaintiffs argue that the State is arbitrarily selecting which land use regulations
5 ("LURS") to waive when it finds that a claim is valid. This is incorrect. When a claim is valid,
6 and the State chooses to grant a waiver, in lieu of compensation, the State will waive the LURS
7 that the claimant demonstrates were enacted after he or she acquired the property, that restrict his
8 or her use of the property and that diminish the market value of the property. ORS 197.352 (1)
9 and (8). Here, the State found that Susan Elliot's claim was valid and issued a waiver of the
10 LURS that were enacted after she acquired her personal interest in the property. [see Final Order
11 attached to Complaint] The State could not have waived any other LURS because it is limited
12 by the language of subsection 8 which restricts all waivers to a use that "was permitted at the
13 time the owner acquired the property." ORS 197.352 (8). If the State had issued a waiver that
14 "fully indemnified" Plaintiffs for all of their purported loss, it would have violated its authority
15 under Measure 37.

16 Finally, the State issued a waiver to Ms. Elliott, and not to the remaining plaintiffs,
17 because Ms. Elliott was the only person to make a written demand for compensation on the
18 property. Plaintiffs' claim that the state "refused a waiver to the rest of the Plaintiffs" is
19 unfounded. (Response 13:19-20)

20 The State granted a waiver that was authorized by Measure 37. Therefore, if Ms. Elliott
21 took issue with the waiver, as she apparently does, her remedy was to file a petition for judicial
22 review. However, because she did not do so within 60 days following the State's issuance of the
23 Final Order, this Court does not have jurisdiction to adjudicate Plaintiffs' claims. Accordingly,
24 the Plaintiffs' complaint must be dismissed.

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1 **CONCLUSION**

2 The gravamen of Plaintiffs' Complaint is that the State erred by not granting them a
3 waiver of all the land use regulations that were in effect on the date they acquired the Property,
4 therefore the court should order the State to pay plaintiffs monetary compensation. Because the
5 APA provides the exclusive procedure for plaintiffs to dispute DLCD's waiver-date
6 determination, this court lacks jurisdiction over the Complaint.

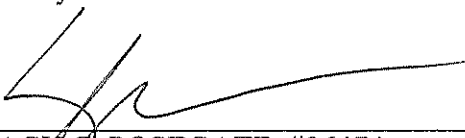
7 In addition, plaintiffs have not stated a claim upon which relief can be granted. Plaintiffs
8 seek monetary compensation but, as a matter of law, they can be entitled to only the form of
9 relief that the State chose under Measure 37 – here, a waiver of land use regulations. In light of
10 that election, plaintiffs have no compensation claim.

11 For both of these reasons, the Complaint should be dismissed

12 DATED this 24 day of May, 2007.

13 Respectfully submitted,

14 HARDY MYERS
15 Attorney General

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



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

OREGON JUDICIAL DEPARTMENT
Josephine County Court

May 11, 2007

RECEIVED

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MAY 16 2007
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Mr. Steven E. Rich
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RE: Perrott v. Josephine County, Oregon and State of Oregon, et al.
Case # 06CV0677
Respondent State of Oregon's Motion to Dismiss
Petitioner's Objection to Respondent Josephine County's Proposed Order

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

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

1. State of Oregon's Motions to Dismiss-

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

Page Two

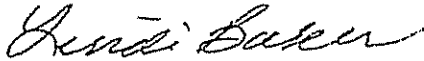
Perrott vs. Josephine County and State of Oregon, 06CV0677

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

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

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

Respectfully yours,



Lindi Baker
Circuit Court Judge

LLB:ts

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



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

OREGON JUDICIAL DEPARTMENT
Josephine County Court

May 11, 2007

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Grants Pass, Oregon 97526

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

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

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

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

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

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

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

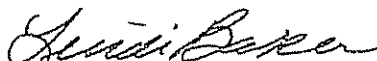
2. Objection to Respondent Josephine County's Proposed Order-

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

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

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

Respectfully yours,



Lindi Baker
Circuit Court Judge

LLB:ts

LINDI L BAKER Circuit Judge
MICHAEL NEWMAN Circuit Judge

PAT WOLKE Circuit Judge
THOMAS M HULL Circuit Judge



OREGON JUDICIAL DEPARTMENT
Josephine County Court

January 12, 2007

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

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

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

Case # 06-CV-0622

Respondent's Motion To Strike; Motion To Quash Writ of Review; Motion To Dismiss
Petition; Motion For Additional Time

Dear Mr. Cauble and Mr. Rich:

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

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

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

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

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

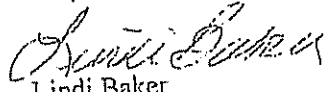
Accordingly, Petitioners will be limited to their claim for writ of relief and will not be allowed to proceed under the declaratory judgment, compensation or attorney fees and costs claims in the same action. Respondent's motions are granted in this regard.

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

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

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

Respectfully yours,



Lindi Baker
Circuit Court Judge

LLB:ts

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(541) 447-6541 - Fax (541) 447-5116
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Jefferson County Courthouse
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Judge Gary S. Thompson

Judge George W Neilson
Presiding Judge

Judge Daniel J Ahern

Twenty-Second Judicial District Trial Courts

May 16, 2007

RECEIVED

MAY 21 2007

BEERY ELSNER & HAMMOND

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Attorney at Law
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Portland, OR 97201

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

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

Counsel:

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

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

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

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

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

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

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

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

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

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

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

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

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

Mr. Clean may draw the appropriate order

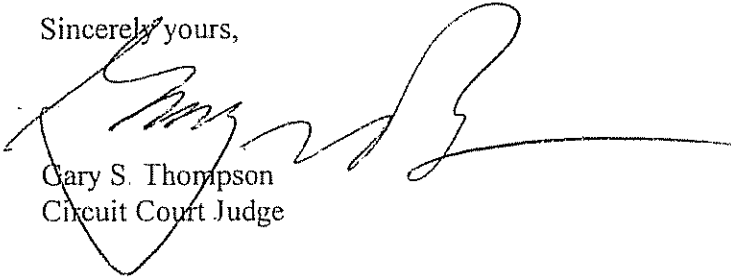
Secondly, there is the Motion for Summary Judgment that goes to the issue that the differences between the parties should have been decided in a writ of review proceeding following the decision by the County Commission as to the waiver that was executed by county and whether it

Christopher D. Crean
James E. Leuenberger

May 16, 2007
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was a comprehensive waiver of the ordinances allowing Mr. Pruitt to divide the property as requested and waiving the applicable zoning and comprehensive plan portions as identified by staff. That the issue is no longer judiciable because a waiver has been granted and any differences that might be distinguished regarding the extent of that waiver should have been decided in another forum through a writ of review rather than in this compensation case. If one considers that if a waiver has been comprehensively granted, and the parties have not contested it in a proper forum as to the extent of that waiver, then it is premature to file a compensation action in this case because of not following through on determining the judiciability of that compensation claim because of the extent of the waiver. A party in a Measure 37 action does not get two remedies, either the ordinances that affect his division of property are waived, or in the alternative he can file an action for reduction of fair market value of his property because of the lack of a waiver. The claimant under Measure 37 should not have both a compensation action and a waiver of the regulations. That is inapposite to the content of ORS 197.352 and its intent. This Court finds that the decision by the County Commission on March 8, 2006 was a quasi-judicial decision subject to review by a writ of review proceeding. The Court grants the Defendant's Motion for Summary Judgment and/or Dismissal on the reasoning set forward by Mr. Crean in his argument and in his memorandum. Mr. Crean may also draw the appropriate order regarding this matter.

Sincerely yours,



Gary S. Thompson
Circuit Court Judge

1 **CERTIFICATE OF SERVICE**

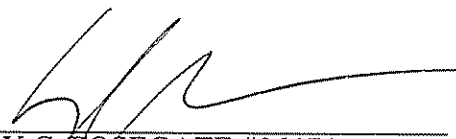
2 I certify that on May 21st, 2007, I served the foregoing STATE OF OREGON'S REPLY
3 TO PLAINTIFFS' RESPONSE TO THE STATE'S MOTION TO DISMISS upon the parties
4 hereto by the method indicated below, and addressed to the following:

5
6 John W. Shonkwiler
7 Attorney at Law
8 13425 SW 72nd Avenue
9 Tigard, OR 97223

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 TELECOPY (FAX)

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9 Michael E. Judd
10 Clackamas County Counsel
11 2051 Kaen Road
12 Oregon City, OR 97045

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