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

LAWRENCE K. WALLIN AND HELEN A. WALLIN, INDIVIDUALS,

PETITIONERS,

v.

THE DEPARTMENT OF ADMINISTRATIVE SERVICES, THE DEPARTMENT OF LAND CONSERVATION AND DEVELOPMENT, AND THE LAND CONSERVATION AND DEVELOPMENT COMMISSION, AGENCIES OF THE STATE OF OREGON,

Respondents.

Case No. 05CV0573

REPLY IN SUPPORT OF RESPONDENTS' MOTION FOR SUMMARY JUDGMENT

Respondent submits the following argument in reply to petitioners' opposition to the motion for summary judgment.

A. The Context: The Final Order and Staff Report.

In their response to the motion for summary judgment, petitioners assert that the state's position on the status of their property is not clear, and that the state is somehow obligated to enter into a stipulation. Neither contention is true.

This is a petition for judicial review of a final agency order pursuant to the Administrative Procedures Act, ORS 183.484. In its final order in this case, the state agencies denied the petitioners' Measure 37 claim for the reasons set forth in an accompanying staff report. Ex 1, p 1. The staff report makes it clear that the property is no longer subject to Goals 3 and 4 because it is inside the Urban Growth Boundary:

Further, since claimants acquired the subject property in 1979, the Urban Growth Boundary (UGB) for the City of Brookings has been expanded to include the subject property. Through the plan amendment process, the property could be developed to urban densities under the Brookings/Curry County joint management agreement that applies to the subject property. (See City of

1 Brookings and Curry County UGB Joint Management Agreement, adopted
2 January 22, 2001.) Now that the property is within the UGB, state land use laws
3 applicable to the property require that it be made available for urban uses,
4 enhancing rather than restricting the potential uses of the property, and hence its
5 value.

6 * * *

7 In addition, the Harbor Heights area, including the subject property, has been
8 incorporated into the City of Brookings UGB. Development of the area will now
9 be carried out under the provisions set forth in the Joint Management Agreement
10 between the City of Brookings and Curry County. That agreement and provisions
11 of state law provide the property owner with the right to subdivide the property
12 and develop it to urban densities, resulting in a substantial increase in the value of
13 the property since it was acquired in 1979.

14 * * *

15 Based on the findings and conclusions set forth in this report, neither the
16 Commission nor the department have enforced laws that restrict the claimants'
17 use of private real property in a manner that reduces the fair market value of the
18 property relative to how the property could have been used at the time the
19 claimants acquired the property in 1979. Development of the property when it
20 was acquired by the claimants was subject to the standards of Statewide Planning
21 Goal 4 and was limited to land divisions that protect commercial forestlands and
22 dwellings that were "necessary and accessory to a forest use." Furthermore, since
23 the claimants acquired the property the City of Brookings' UBG [sic] has been
24 expanded to include the subject property and the claimants have development
25 rights that did not exist when they acquired the property in 1979.

26 Ex 1, pp 7, 8, 9. Petitioners were clearly informed of the state's position that the law currently
applicable was that related to property within an urban growth boundary, and not state laws and
regulations applicable to farm and forest land.

Petitioners apparently assume, because their claim was denied, that the State opposes
their proposed development. In fact, the denial merely recognizes that Measure 37 does not
apply because the state regulations that petitioners cited simply do not apply to the property as of
the date of the claim. The Order so stated.

Petitioners assert that if that were really the State's position, the State would agree to sign
a stipulated order prepared by them (Resp at 3-4). There is no legal basis for this assertion and it
cannot create a "question of fact" concerning the petition for judicial review. Moreover,
discussions concerning compromise or settlement are not "evidence" for purposes of summary
judgment.

1 The State is entitled either to an order dismissing the petition as meritless, or an order
2 affirming the Final Order.¹ See ORS 183.484 (5) (a). The State is not obliged to enter into any
3 other form of order.

4 **B. The property could not lawfully be developed in 1979.**

5 Petitioners assert that a question of fact exists as to whether the property could have been
6 developed under state law in 1979, because they did in fact develop neighboring land (Resp at 4-
7 5). Whether the property could be *lawfully* developed is a question of law, not a question of fact.
8 And as the State noted in its memorandum (at fn 9), petitioners have known at least since 1981
9 that the development was illegal under state law. The State took enforcement action against
10 Curry County precisely because it allowed such illegal subdivisions.

11 At the time petitioners acquired the property in 1979, it was subject to Goals 3 and 4,
12 because the county's zoning ordinance was unacknowledged. The development proposed by
13 petitioners could not have been lawfully undertaken at that time. No state regulation now
14 restricts such use, not because Measure 37 allows it, but because of the change in the urban
15 growth boundary.²

16 **C. The relative value of the property is not a material fact in dispute.**

17 Petitioners' argument concerning value is not clear (Resp at 5-6). Petitioners seem to
18 contend that a Measure 37 waiver would "get Petitioners back to the uses allowed under the
19 zoning in place * * * in 1979" (Resp, p 6, lns 3-4). Measure 37 does not provide for
20 "reinstatement" of prior zoning (*id.*, lns 13-15). Rather, Measure 37 requires compensation or
21 waiver of restrictive land use regulations. The State correctly determined that petitioners were
22 not entitled to compensation; therefore, they are not entitled to a waiver. ORS 197.352 (8).

23 Also, petitioners appear to be complaining that development costs under the UGB reduce
24 the value of the property (Resp, p 6, lns 4-9). Neither petitioner's argument, nor Mr. Wallin's

25 _____

26 ¹ The State offered to stipulate to a judgment of dismissal without costs.
² The State fails to see the significance of its order in Ballantyne (Resp at 8-9), which involved a property in Josephine County, not within any UGB.

1 affidavit, raise an issue of fact concerning value. If petitioners are asserting that because their
2 property may cost more to develop now than it would have in 1979, their evidence is insufficient
3 to show that the differential amounts to a reduction in value caused by state land use regulations
4 that restrict use of the property as of the date of the claim. *See*, ORS 197.352 (1) and (2).

5 Secondly, this argument is simply makes no sense because no state regulation restricts

6 petitioners' use, and therefore no restricting regulation is effecting a reduction in value. ORS
7 197.352 (1). Finally, even if there is a question of fact, it is immaterial because petitioners must
8 demonstrate both restriction and reduction in order to assert a valid Measure 37 claim.

9 **D. Case law interpreting the goals is applicable.**


10 Petitioners take the extraordinary position that cases decided after 1979 are not applicable
11 to their property (Resp at 7-8). The cases cited by the State interpret statutes, goals, and rules
12 that were in effect when petitioners acquired the property. The cases simply *interpret* the
13 statutes, goals, and rules; they are not "new" laws. *See, e.g., Stephens v. Bohlman*. 314 Or 344,
14 350, fn 6 (1992) (when the Supreme Court interprets a statute, "that interpretation becomes part
15 of the statute as if written into it at time of its enactment").

16 The State is entitled to judgment as a matter of law, and so moves.

17 DATED this 14th day of July, 2006.

18 Respectfully submitted,

19 HARDY MYERS
20 Attorney General

21 
22 DARSEE STALEY #87351
23 Senior Assistant Attorney General
24 Trial Attorney
25 Tel (503) 947-4700
26 Fax (503) 947-4792
Darsee.Staley@doj.state.or.us
Of Attorneys for State of Oregon


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CERTIFICATE OF SERVICE

I certify that on July 14th, 2006, I served the foregoing *Reply in Support of Respondents'*
Motion for Summary Judgment upon the parties hereto by the method indicated below, and
addressed to the following:

Joshua A Clark
Gleaves Swearingen et al
975 Oak St Ste 800
PO Box 1147
Eugene, OR 97440

- HAND DELIVERY
- MAIL DELIVERY
- OVERNIGHT MAIL
- TELECOPY (FAX) *and email*



DARSEE STALEY #873511
Assistant Attorney General
Trial Attorney
Tel (503) 947-4700
Fax (503) 947-4792
darsee.staley@doj.state.or.us