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

6 PATRICIA BARNES,

7 Petitioner,

8 v.

9 DEPARTMENT OF ADMINISTRATIVE  
10 SERVICES, DEPARTMENT OF LAND  
11 CONSERVATION and Respondent  
12 DEPARTMENT OF STATE LANDS, all for  
13 the STATE OF OREGON, COOS COUNTY,  
a municipal corporation,

Respondents.

Case No. 06CV0703

STATE'S MOTION TO DISMISS FOR FAILURE  
TO STATE A CLAIM

Oral Argument and Official Court-Reporting  
Services Requested

30 Minutes Estimated for Argument

14 Pursuant to ORCP 21A(8), the State respondents (State of Oregon, Department of  
15 Administrative Services, Department of Land Conservation and Development, Department of  
16 State Lands) move to dismiss the case on the ground that petitioner has not stated a claim on  
17 which relief can be granted.

18 This motion is based on the record and file herein and the State's memorandum in  
19 support of its motion to dismiss.

20 DATED this 11<sup>th</sup> day of July, 2007.

21 Respectfully submitted,

22 HARDY MYERS  
23 Attorney General

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

PATRICIA BARNES,  
Petitioner,  
v.

Case No. 06CV0703

MEMORANDUM OF LAW IN SUPPORT OF  
STATE RESPONDENTS' MOTION TO  
DISMISS

DEPARTMENT OF ADMINISTRATIVE  
SERVICES, DEPARTMENT OF LAND  
CONSERVATION and Respondent  
DEPARTMENT OF STATE LANDS, all for  
the STATE OF OREGON, COOS COUNTY,  
a municipal corporation,  
Respondents.

**INTRODUCTION**

One of the few aspects of Ballot Measure 37 (2004) that is *not* controversial is its requirement that a landowner file a “written demand for compensation” with the State before initiating any sort of litigation based on the State’s alleged failure to grant appropriate relief. ORS 197.352(5). The petitioner in this case has not met that basic prerequisite to filing suit. Her petition for judicial review seeks to challenge a final order in which the State denied Measure 37 relief to another person – Frances Engebretson – who did file a Measure 37 demand. But petitioner did not file the Measure 37 demand that resulted in the final order that is the subject of her petition. Accordingly, this Court should dismiss the petition for judicial review for failure to state a claim for relief.

Petitioner fails to state a claim because she has not alleged – and cannot allege – that she filed a Measure 37 demand with respect to the property. In fact, the final order on Measure 37

1 demand number M124760, which is attached to the petition for judicial review, shows that  
2 Engebretson is the only person who filed that demand. Because petitioner did not file the  
3 Measure 37 demand, she cannot state any entitlement to Measure 37 relief. ORS 197.352(5).  
4 And because petitioner has no right to Measure 37 relief, she is not adversely affected or  
5 aggrieved by the final order, which denies relief only to Engebretson. Consequently, petitioner  
6 has not stated a claim for relief under the APA and this Court should dismiss the petition  
7 pursuant to ORCP 21A(8). *See* ORS 183.480; 183.484(3).

## 8 **BACKGROUND**

### 9 **A. Measure 37**

#### 10 **1. Qualifying for relief under Measure 37**

11 A property owner qualifies for Measure 37 relief if: (1) a public entity enacts or enforces  
12 a “land use regulation” after December 2, 2004; (2) the regulation restricts the owner’s use of the  
13 property; and (3) the regulation has the effect of reducing the property’s fair market value. ORS  
14 197.352(1). Section 3 of Measure 37 provides that certain land use regulations shall not be a  
15 basis for a written demand under Section 1, notably regulations in effect when the owner or a  
16 family member acquired the property. ORS 197.352(3)(E). Section 11 defines “owner” as the  
17 “present owner” of the property, and lists the relationships on which a “family member” finding  
18 may be based. ORS 197.352(11)(A), (C).

19 For regulations enacted before the effective date of Measure 37 (December 2, 2004),  
20 Section 5 requires owners to submit written demands by December 2, 2006, or the date on which  
21 a land use regulation is applied “as an approval criteria [*sic*]” to the review of a specific land use  
22 application, whichever is later. After determining that an owner submitted a timely, valid written  
23 demand, the public entity has the option to pay compensation or to “modify, remove, or not to  
24 [*sic*] apply” land use regulations to the extent necessary “to allow the owner to use the property  
25 for a use permitted at the time the owner acquired the property.” ORS 197.352(8); *see also* ORS

1 197.352(10).<sup>1</sup> In this case, the State determined that claimant Engebretson's Measure 37 demand  
2 was invalid because the regulations that prevent her from filling her 0.73-acre property and  
3 constructing dwellings on it already were in place when she acquired the property in 1978.  
4 (Petition for Judicial Review ("PJR") Ex 1, staff report at 1<sup>2</sup>).

5 **2. The claims process**

6 When DAS receives a Measure 37 demand, it provides written notice to neighboring  
7 landowners, certain neighborhood or community organizations, and anyone who requests notice.  
8 OAR 125-145-0080. DAS forwards the demand to the appropriate state agency, *i.e.*, the  
9 "regulating entity" that appears to have enacted or enforced a relevant land use regulation. OAR  
10 125-145-0090. The regulating entity, in this case DLCDC, investigates and analyzes the demand  
11 and issues a draft report. OAR 125-145-100(1). The draft report provides the State's  
12 preliminary determination on the necessary elements of the demand, including timeliness of the  
13 demand, ownership, the land use regulations that form the basis of the demand, the effect of  
14 relevant land use regulations on the property's fair market value, and applicable exemptions, if  
15 any. OAR 125-145-100(2).

16 The draft report is made public on the internet and copies are mailed to the claimant and  
17 to any person who submitted comments or requested notice. OAR 125-145-100(1). After a

18 \_\_\_\_\_  
19 <sup>1</sup> Allowing the owner to use the property in a way that would otherwise be prohibited by  
20 land use regulations is commonly referred to as granting a Measure 37 "waiver." An LCDC rule  
provides that DLCDC may pay compensation only if and when the legislature appropriates funds  
for that purpose. *See* OAR 660-002-0010(8)(c).

21 <sup>2</sup> Exhibit 1 to the petition for judicial review is a copy of the State's final order on Measure  
22 37 claim number M124760. The first two pages of that document are the order itself; the last six  
23 pages form the staff report that is incorporated into the order. Because petitioner has not  
separately numbered the pages of the exhibit, the State specifies whether it is referring to the  
order or to the staff report when it cites to the exhibit.

24 This Court properly may consider the final order in ruling on this motion to dismiss, as  
25 petitioner attached it to her petition for judicial review and refers to it throughout the petition.  
26 *See Fred Shearer & Sons v. Prendergast*, 152 Or App 657 (1998) (Court of Appeals considered  
document attached to complaint when evaluating whether complaint stated a claim on which  
relief may be granted).

1 comment period, and based in part on any comments received, DLCDC and DAS issue a final  
2 report and order. OAR 125-145-100(3)-(6).

3 **B. Engebretson’s Measure 37 demand**

4 Frances Engebretson filed a Measure 37 demand related to a 0.73-acre property in Coos  
5 County that she wants to fill and on which she wants to build five dwellings. (PJR Ex 1, report  
6 at 1-3). The State assigned the demand number M124760 and determined that Engebretson has  
7 been an owner of the property since November 1978. (PJR Ex 1, report at 1-3). The State  
8 denied Engebretson’s Measure 37 demand on the ground that state land use regulations already  
9 in place, particularly Statewide Planning Goal 16 (Estuaries), would have prevented her from  
10 developing the property when she acquired it in 1978. (PJR Ex 1, order at 1, report at 3-5).

11 **C. Barnes’s petition for judicial review**

12 Engebretson has not challenged the State’s final order denying her Measure 37 demand.  
13 Rather, the sole petitioner in this case is Patricia Barnes, who did not make the Measure 37  
14 demand that led to the final order she challenges. Petitioner alleges that she “is an owner of the  
15 property” and claims she improperly has been denied use of it “through state regulations and  
16 state land laws.” (PJR ¶¶ 2, 3). She asks this Court to remand the final order to the State “for  
17 correction.” (PJR, prayer).

18 The State notes that the caption for this case lists Coos County as one of the respondents  
19 in this case, despite the fact that the petition appears to challenge only a final order issued by the  
20 State and no action taken by Coos County. The Department of Justice represents only the State  
21 Defendants in this case and does not take any action on Coos County’s behalf. As far as the  
22 State is aware, the court record includes no indication that petitioner ever served Coos County  
23 with the petition in this matter.

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1 **ARGUMENT**

2 Measure 37 relief is available only to qualifying landowners who make “written demand  
3 for compensation.” ORS 197.352(5). Petitioner calls herself an “owner of the property” and  
4 asserts that the State’s final order denied “the Measure 37 claim filed by the property owners.”  
5 (PJR PJR ¶¶ 2, 3). Reading these allegations generously, one could infer that petitioner is  
6 alleging that she filed the Measure 37 claim (the demand) at issue in this case. However,  
7 petitioner attached the State’s final order to her petition and that order shows unequivocally that  
8 Engebretson is the only person who made the Measure 37 demand. (PJR, Ex 1, order at 1).  
9 When there is a conflict between an allegation in a complaint and a document attached to it, the  
10 unambiguous terms of the attached document control whether the complaint states a claim for  
11 relief. *Fred Shearer & Sons v. Prendergast*, 152 Or App 657, 661 (1998) (Court of Appeals  
12 considered document attached to complaint when evaluating whether complaint stated a claim on  
13 which relief may be granted). Here, the final order unambiguously states that Engebretson – not  
14 petitioner – is the claimant who filed the Measure 37 demand; consequently, this Court should  
15 disregard any contrary implication in the petition for judicial review.

16 Moreover, although petitioner is dissatisfied with the final order’s resolution of the  
17 Measure 37 demand, she has not challenged its express finding that Engebretson is “the  
18 claimant.” (PJR Ex 1, report at 1, 2-3). Because the petition for judicial review does not contest  
19 the finding, it is binding on this Court. *See Meltebeke v BOLI*, 322 Or 132, 352 (1995) (citing  
20 another case for proposition that “unchallenged findings of fact are the facts for purposes of  
21 judicial review of an administrative agency’s final order”).

22 In sum, the petition for judicial review, read as a whole, includes no allegation that  
23 petitioner filed the Measure 37 demand at issue, and the final order she has attached to the  
24 petition shows that she could not make that allegation. Because petitioner did not file the  
25 demand, she does not qualify for relief under Measure 37. ORS 197.352(5). And because

1 petitioner does not qualify for Measure 37 relief, she is not adversely affected or aggrieved by  
2 the final order denying relief to Engebretson. It follows that petitioner has not stated, and cannot  
3 state, a claim for relief under the APA and this Court should dismiss her petition for judicial  
4 review under ORCP 21A(8).

5 **CONCLUSION**

6 Petitioner did not file the Measure 37 demand that led the State to issue the final order  
7 that she seeks to challenge in this litigation and, therefore, cannot state a claim for relief.  
8 Consequently, this Court should dismiss the petition and enter judgment in favor of the State.

9 DATED this 17<sup>th</sup> day of July, 2007.

10 Respectfully submitted,

11 HARDY MYERS  
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1 **CERTIFICATE OF SERVICE**

2 I certify that on July 11<sup>th</sup>, 2007, I served the foregoing STATE'S MOTION TO DISMISS  
3 FOR FAILURE TO STATE A CLAIM and MEMORANDUM OF LAW IN SUPPORT OF  
4 STATE RESPONDENTS' MOTION TO DISMISS upon the parties hereto by the method  
5 indicated below, and addressed to the following:

6  
7 Patricia Barnes  
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9 North Bend, OR 97459

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 MAIL DELIVERY  
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