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DEPARTMENT OF JUSTICE  
TRIAL DIVISION

July 11, 2006

Washington County Courts  
Washington County Courthouse  
145 N.E. Second  
Hillsboro, Oregon 97124

Re: *Bergey, Bruce et al v. Washington Co. et al*  
Washington County Circuit Court No. C053203CV

Dear Circuit Court Clerk:

Enclosed for filing please find the Reply to Plaintiff's Response to State's Rule 21 Motions to Dismiss and Response to Plaintiff's Motion to Strike in the referenced matter.

A postcard is enclosed for your use in notifying me of the action taken.

Sincerely,

A handwritten signature in cursive script that reads "Paul J. Sundermier".

Paul J. Sundermier  
Senior Assistant Attorney General

TRIP0822/PJS/tr1

Enclosures

cc: Daniel W. Howard  
Chris Gilmore  
Client

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

BRUCE BERGEY, CAROLYN BERGEY,  
MATT BERGEY, EMILY BERGEY, and  
ADAM BERGEY,

Plaintiffs,

v.

WASHINGTON COUNTY, a political  
subdivision of the State of Oregon; OREGON  
DEPARTMENT OF LAND  
CONSERVATION AND DEVELOPMENT,  
an Agency of the State of Oregon; and  
OREGON DEPARTMENT OF  
ADMINISTRATIVE SERVICES, an Agency  
of the State of Oregon,

Defendants.

Case No. C053203CV

REPLY TO PLAINTIFF'S RESPONSE TO  
STATE'S RULE 21 MOTIONS TO DISMISS  
AND RESPONSE TO PLAINTIFF'S MOTION  
TO STRIKE

**Affidavit and Exhibits**

The Motion to Strike the State's motion should be denied as there is no such animal. The motion is not a pleading and is not subject to a motion to strike.

The Court may consider the affidavit and exhibits as they may be helpful in determining the merits of the State's Motion No. 1 (lack of jurisdiction to decide the validity of the State's Final Order). Failure to state ultimate facts sufficient to constitute a claim, the subject of Motion No. 2, as plaintiff points out, cannot be supplemented by affidavits and evidence. Likewise, plaintiff's declaration and exhibit should be disregarded to the extent that they are offered (as stated on the caption) "in support of plaintiffs' response to defendants' ORCP 21 motions."

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1                                   **The APA is NOT the Exclusive Measure 37 Remedy**

2           The plaintiffs misstate the State’s position. The APA is not a remedy for a Measure 37  
3 “cause of action” and the State has not so moved. The APA is the exclusive process by which a  
4 claimant can have the Court decide *if* a State agency correctly decided to deny or approve a  
5 Measure 37 claim, and if it was approved, whether the remedy (compensation or waiver) was  
6 valid or invalid.

7           The Final Order issued by the agency is an order in other than a contested case which  
8 must be reviewed pursuant to ORS 183.480 and 183.484. See also, *Hoff v. DLCD*, Court of  
9 Appeals decision (Judge Wollheim) appended to State’s motion as Exhibit B. There is no  
10 jurisdiction for the Circuit Court or the Court of Appeals to review a Final Order in other than a  
11 contested case (which this case is about) except under the APA.

12           A proper “Measure 37 pleading” is one that is brought in two claims for relief. The first  
13 claim for relief is a Petition for Judicial Review of a Final Order and the second claim for relief  
14 is a “cause of action” under Measure 37 – which is dependent upon the court’s ruling in the  
15 claimant’s favor on the petition for judicial review.<sup>1</sup> Almost all Measure 37 cases against the  
16 State of Oregon have been framed in this way. Only a few have attempted to do what the  
17 plaintiff attempts in this case – ignore the remedy of judicial review of the Final Order.<sup>2</sup>

18                                   **This is Not a Constitutional Case**  
19                                   **This is a Case Based on a New Statute**

20           In an effort to avoid the consequences of failing to seek judicial review of the Final Order  
21 under the APA, and to try to get the Court to review the Final Order under Measure 37 itself, the  
22 plaintiffs try to persuade the Court that “takings claims,” brought as direct actions under the  
23 Oregon or United States Constitutions, are analogous to Measure 37 statutory claims. There is  
24 no merit to that position, and, in all events, the plaintiffs mis-cite the law.

25 <sup>1</sup> The court’s decision on the petition is governed by the APA itself. ORS 183.484.

26 <sup>2</sup> Section 12 of Measure 37 specifically states: “[It] is not intended to modify or replace any other  
remedy.” Thus, Measure 37 was not intended to replace the APA.

1 Both cases cited by the plaintiffs, *Boise Cascade Corp v. Board of Forestry*<sup>3</sup> (a spotted-  
2 owl temporary regulatory takings case) and *Dunn v. Redmond*<sup>4</sup> (a land use law regulatory takings  
3 case), do not support the plaintiffs' position. Those cases were brought as direct constitutional  
4 cases; not like the instant case, based upon a statutory remedy.

5 The Supreme Court in *Boise Cascade* was reviewing the case following dismissal on  
6 Rule 21 motions. It merely held that, on the facts alleged, the Circuit Court has primary  
7 jurisdiction to determine if an unconstitutional taking occurred and to pay just compensation.  
8 The agency, the Board of Forestry, could analyze the unconstitutional takings claim also, but its  
9 jurisdiction was neither all-encompassing nor primary. Later appeals, following the first trial,<sup>5</sup>  
10 established that *Boise Cascade* had not adequately satisfied the "ripeness" or "futility exception"  
11 requirements prior to bringing a claim. Nothing in *Boise Cascade* suggests that a Final Order of  
12 the agency (supposedly responsible for an unconstitutional taking) need not be reviewed under  
13 the APA. In fact, Boise Cascade Corp. sought and obtained judicial review of the Final Order of  
14 the Board of Forestry.<sup>6</sup> The order was upheld but the Court also held that the record was  
15 insufficient to determine, at that time, if a taking had occurred. Trials and appeals followed.

16 Similarly, in the *Dunn* case, the Supreme Court explained that a regulatory taking might  
17 occur from enforcement or enactment of a land use regulation, but a Circuit Court might have to  
18 withhold judgment on a takings claim "until the legality of the land use decision is placed before  
19 and decided by LUBA and the government has had an opportunity to reconsider and modify its  
20 decision."<sup>7</sup> Measure 37 claims are not reviewable by LUBA because the Measure says so.

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23 <sup>3</sup> 325 Or 185 (1997).

24 <sup>4</sup> 303 Or 201 (1987).

25 <sup>5</sup> Senior Assistant Attorney General Paul Sundermier defended the State at a new trial following  
26 remand by the last Court of Appeal's decision. 186 Or App 291 (2003). The case is once again  
at the Court of Appeals.

<sup>6</sup> 131 Or App 552 (1994).

<sup>7</sup> 303 Or 201, 209 (1987).

1                   **Writ of Review Cases under ORS Chapter 34 are Inapplicable**

2           The plaintiffs cite numerous cases about local government and the effect of the writ of  
3 review statutes on claims against them. The APA controls State agency orders, not the writ of  
4 review law. The plaintiffs seemed to have mixed up the argument about Washington County's  
5 motion with the State's motion.<sup>8</sup>

6                   **The APA is a Prerequisite to filing a Measure 37 case**

7           The APA must be used to test the correctness of agency decision making and two cases  
8 cited by the State in its motion bear repeating and further analysis: *Lone Oak Racing v. Oregon*  
9 *Racing Comm.*, 162 Or App 111 (1999) and *Muller v. Dept. of Agriculture*, 164 Or App 11  
10 (1999). Both cases were brought by plaintiffs complaining about the wrongness of the respective  
11 agencies' decision making. The first case was brought as a declaratory judgment action to set  
12 aside an order of the racing commission concerning the number of racing days allocated to the  
13 plaintiff's track. The trial judge allowed the action and ruled for the plaintiff. The second case  
14 was tried to a jury, over the State's objection, as a negligence claim under the Oregon Tort  
15 Claims Act for damages suffered due to the denial of a field burning permit. The jury awarded  
16 the plaintiff damages and the State appealed.

17           In each case, the Court of Appeals reversed each trial judge for not dismissing the case  
18 for lack of jurisdiction. The decision of each agency had to have been reviewed under the APA  
19 before any other claim could be pursued because that is the only way to determine if the agency  
20 acted correctly.

21           As the Court stated in *Muller*, a plaintiff should not be heard to complain about being  
22 denied a damages remedy because the APA is the exclusive remedy to test the denial of the  
23 permit. The Court stated that is "mere question begging." "If he is entitled to a remedy, then he

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25 <sup>8</sup> See, Response at page 4, line 23 onto page 5, lines 3 to 15. That argument obviously pertains  
26 to the county's motion but is found in the response to the State's motion. There is no "writ of  
review" procedure within the APA. The writ of review does not apply to State agencies. ORS  
34.040(1).

1 must establish the invalidity of the agency action in the first place. We merely hold that the  
2 exclusive mechanism for establishing the invalidity of the agency action is provided in the APA.  
3 We therefore conclude that the trial Court erred in denying the department's motion to dismiss."<sup>9</sup>

4 This is what the State claims in this case. If the plaintiffs have a Measure 37 cause of  
5 action, it would be due to the invalidity of the agency's Final Order. The only way to test the  
6 validity of the Final Order is pursuant to ORS 183.480. This was not done. It had to have been  
7 done within 60 days of issuance of the order. ORS 183.464.<sup>10</sup>

8 Incongruously, the plaintiffs themselves argue that "plaintiffs have properly pled and are  
9 entitled to proceed with their claims under Measure 37 - - either for compensation *or for a*  
10 *correct interpretation of the scope of the waiver relief.*" <sup>11</sup> Nowhere in Measure 37 itself is there  
11 any authority for the Court to make a "correct interpretation of the scope of the waiver relief"  
12 and to change the agency's Final Order. That is only possible under the APA.<sup>12</sup> The Court is  
13 given authority only to address the "cause of action" for compensation under Measure 37 - it has  
14 no authority under Measure 37 to change the agency Final Order

15 **The "Compensation Date" and the "Waiver Date" are not Imaginary**

16 Nowhere in the Response do the plaintiffs address the sections of Measure 37 that explain  
17 the concept of waiver as an alternative to paying compensation and enforcing land use  
18 regulations. Instead, they explain how they would have liked the law to have been written.

19 Sections 1 through 6 of ORS 192.352 concern the payment of compensation for land use  
20 regulations that restrict an owner's use of property and lower its market value.

21 \_\_\_\_\_  
<sup>9</sup> 164 Or App at 16 - 17.

22 <sup>10</sup> The plaintiffs state that Judge Redman (who was *pro tem*) denied the State's Rule 21 motions  
23 in *Kennedy v. Clackamas County and DLCD* by "rejecting the State's argument that Measure 37  
24 provided for an exclusive judicial remedy." This counsel's recollection of the ruling from the  
25 bench about ten days ago was very simple: "With all due respect, I am going to deny the State's  
26 motions." There was no further explanation.

<sup>11</sup> Response at page 9, line 12 (emphasis added).

<sup>12</sup> ORS 183.484 (5) and (6) give the court authority to change the agency order or to remand for  
further consideration in light of the court's ruling based upon a review of "substantial evidence  
in the record," which, in this case, plaintiffs have not provided.

1 Sections 8 and 10 of ORS 192.352 concern the alternative to payment of compensation –  
2 the option of the governing body to “modify, remove or not to (sic) apply” the land use  
3 regulation(s).

4 The option to not apply the regulation is often referred to as a “waiver.” The waiver is  
5 limited by the terms of the law to the date that the owner acquired the property. The “owner” is  
6 not the “family member” as defined in ORS 192.352(11)(A). The “owner” is the “owner”  
7 defined in ORS 192.352(11)(C). The owner “is the present owner of the property or any interest  
8 therein.” Thus, the present owner of the property, or owner of an interest in the property that  
9 could have a “use” affected, can be the claimant and can be the person who is entitled to a waiver  
10 back to the “date the owner acquired the property” as written in Sections 8 and 10.

11 There are two dates that are important in a Measure 37 analysis – the date that the family  
12 member acquired the property (for payment of compensation for reduced value) and the date that  
13 the present owner of the affected use acquired the property (for waiver(s) of the restrictive land  
14 use regulations). The language of the statute is clear. This distinction is embraced by the  
15 sponsors of Measure 37, Oregonians in Action. A page from its website explaining this  
16 distinction was attached to the motion at Exhibit C, Sundermier affidavit, and, while certainly  
17 not any kind of legal authority for the Court, it is interesting to note that this organization  
18 expected Measure 37 to be enforced in the way that the State reads the law and not in the way  
19 that the plaintiffs want it to be read.

20 Again, the interpretation of Measure 37 is a quasi-judicial function by the State agency in  
21 the first instance (in order to decide the merits of the claim) and then a judicial function by the  
22 Court in the second instance in order to determine if the agency was correct or not – the APA  
23 judicial review. Had the plaintiffs’ complaint contained an APA claim for relief along with the  
24 Measure 37 claim for relief, the Court would have jurisdiction to analyze the agency’s decision  
25 and then to decide if there was a legitimate Measure 37 claim for compensation. The plaintiffs  
26 chose the route of making only a Measure 37 claim.

1 **Conclusion**


2 The complaint should be dismissed because the Court is without jurisdiction.

3 The complaint should be dismissed, alternatively, because the plaintiffs have not and  
4 cannot state a Measure 37 claim for compensation without first having alleged that a court of  
5 competent jurisdiction has invalidated the agency order in a way that authorizes the claim for  
6 compensation.

7 DATED this 11<sup>th</sup> day of July, 2006.

8 Respectfully submitted,

9 HARDY MYERS  
10 Attorney General

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**CERTIFICATE OF SERVICE**

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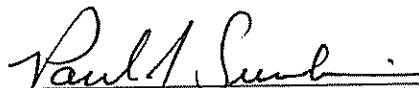
I certify that on July 11<sup>th</sup>, 2006, I served the foregoing Reply to Plaintiff's Response to State's Rule 21 Motions to Dismiss and Response to Plaintiff's Motion to Strike upon the parties hereto by the method indicated below, and addressed to the following:

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