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DEPARTMENT OF JUSTICE  
TRIAL DIVISION

November 16, 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 State's Reply to Plaintiff's Response to Motion for Summary Judgment and State's Response to Cross Motion for Summary Judgment 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, appearing to read "Paul J. Sundermier".

Paul J. Sundermier  
Senior Assistant Attorney General

TRIQ1724.DOC/PJS/tr1

Enclosures

cc: Daniel W. Howard  
Chris Gilmore  
Client

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

6 BRUCE BERGEY, CAROLYN BERGEY,  
7 MATT BERGEY, EMILY BERGEY, and  
8 ADAM BERGEY,

9 Plaintiffs,

10 v.

11 WASHINGTON COUNTY, a political  
12 subdivision of the State of Oregon; OREGON  
13 DEPARTMENT OF LAND  
14 CONSERVATION AND DEVELOPMENT,  
15 an Agency of the State of Oregon; and  
16 OREGON DEPARTMENT OF  
17 ADMINISTRATIVE SERVICES, an Agency  
18 of the State of Oregon,

19 Defendants.

Case No. C053203CV

STATE'S REPLY TO PLAINTIFF'S RESPONSE  
TO MOTION FOR SUMMARY JUDGMENT  
AND STATE'S RESPONSE TO CROSS  
MOTION FOR SUMMARY JUDGMENT

20 **The Plaintiff's Cross-Motion for Summary Judgment was not filed on time**

21 This Court should decline to consider the plaintiffs' cross-motion as it was filed outside  
22 the time limits of ORCP 47C<sup>1</sup>. ORCP 47 C provides that the plaintiffs' motion for summary  
23 judgment was due when the State filed its motion – on October 20<sup>th</sup>. The State received  
24 plaintiffs' response and cross motion by mail on November 14<sup>th</sup>. Therefore, plaintiffs missed the  
25 mark by just shy of a month. No extension of time was sought and, because of these tight  
26 timelines before trial, no extension of this magnitude would have been agreed to. With little time  
27 to prepare a response given counsel for the State's trial schedule, this breach of the ORCP

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<sup>1</sup> This matter was set for a 9:00 a.m., November 27, 2006, hearing on the defendants' motions for summary judgment on October 24, 2006 (received by the State two days later). Then the court reset this hearing to 2:30 p.m., November 28, 2006 on October 25, 2006 (received by the State on October 30, 2006). Trial has been scheduled for December 21 and 22, 2006 since last July.

1 presents unwarranted prejudice to the State’s case. Counsel for the State currently has two back-  
2 to-back four-day jury trials in Deschutes County scheduled to begin on November 28<sup>th</sup> (the date  
3 set for the oral argument on the motions at issue) and then on December 5<sup>th</sup>. Other counsels in  
4 this case were aware of this attorney’s heavy trial schedule at least as early as last summer. The  
5 court should decline to hear the cross-motion for summary judgment.

6 **Response to Cross-Motion for Summary Judgment**

7 In case the court considers the plaintiffs’ cross-motion for summary judgment in spite of  
8 its untimeliness, the State responds as follows.

9 **The APA**

10 The State understands the court’s prior ruling. The State merely wishes to preserve its  
11 record, and, if possible, convince the court of the correctness of its position. The State will  
12 continue to assert that the APA provides the proper vehicle for a challenge to an agency Final  
13 Order throughout this case (and others) without disrespect to the court or counsel if they  
14 disagree.

15 **The “waiver” date and the “compensation” date are part of Measure 37**

16 Plaintiffs contend that the two remedies found within Measure 37 are unfair. But that  
17 cannot change the language of the statute. The sponsors of Measure 37, Oregonians in Action,  
18 admitted that a waiver of land use regulations back to the date of earliest family ownership  
19 would most likely fail at the polls. It was a conscious political decision to promote the  
20 alternative waiver date – when the present owner acquired the property – as that is what they  
21 thought most people wanted, rather than a complicated compensation formula to determine the  
22 reduction in fair market value over time.<sup>2</sup>

23 Measure 37 provides a remedy of compensation if the property owner has a viable claim.  
24 However, it also provides an alternative to payment of compensation in the form of the “waiver”

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26 <sup>2</sup> See, Exhibit 110, attached to State’s Motion (Cobos v. DLCD, et al, and opinion and order of  
Judge Hart).

1 of land use regulations adopted or enforced since the present owner acquired the property. That  
2 is clearly spelled out in sections 8 and 10 of the law. ORS 197.352 (8), (10). Both sections state  
3 that the owner shall be allowed to use the property for a use *permitted at the time the owner*  
4 *acquired the property*. It does not say what the plaintiffs would like to insert into the law – *at*  
5 *the time that the owner's family first acquired the property*.

6 **No genuine issue of any material fact**

7 The plaintiffs provided no evidence that they would have to provide at trial in order to  
8 carry their burden of persuasion. For example, Matt and Emily Bergey, the present owners of  
9 their respective lots, should have offered evidence that they would have been allowed to use their  
10 properties for single family residences (the use desired by the claims) *at the time that they*  
11 *acquired their properties*. In fact, as admitted in the brief at page 5, lines 21 -23, Matt Bergey  
12 acquired his lot on November 28, 1994 and Emily Bergey acquired her lot on June 28, 2001,  
13 long after land use regulations were adopted that disallow such use. Those admitted acquisition  
14 dates are the same dates that the agency used in order to issue waivers to each of them. There is  
15 no genuine issue of material fact concerning the correct waiver date, whether or not the Bergeys  
16 could use the lots as desired.

17 The gravamen of plaintiffs' position is found at the top of page 10 of the brief where they  
18 posit that common sense makes the compensation remedy and the waiver remedy essentially  
19 equivalent. But that is not the law that was passed; plaintiffs cannot re-write the statute to fit  
20 their "common sense" argument.

21 Additionally, the plaintiffs suggest that the State's interpretation of the "family  
22 ownership" limitation in the "exemptions" part of the law (Section 3 E) somehow is flawed.  
23 Section 3 begins with "Subsection (1) (the compensation remedy) of this section [sic] shall not  
24 apply to land use regulations:" and then proceeds to list the exemptions. 3 E is the exemption for  
25 land use regulations that were adopted before the earlier of the date the owner or the owner's  
26 family acquired the property. In other words, if compensation is to be paid, it will be based on

1 land use regulations that were adopted or enforced after the owner or the family of the owner  
2 acquired the property. Land use regulations that existed when the owner's family acquired the  
3 property cannot be the basis of a compensation claim. Nothing in Section 3 provides that it  
4 should apply to waivers as well. Sections 8 and 10 make it clear that for a waiver remedy, only  
5 land use regulations that were adopted after the current owner (not the family) acquired the  
6 property can be modified, removed or not applied.

7 This case presents a question of law for the court only. If the State's interpretation is  
8 correct, the statute provides a compensation date and a different waiver date. If the court agrees,  
9 then summary judgment should be granted to the State. No facts are in dispute. It is only this  
10 narrow issue that divides the parties.

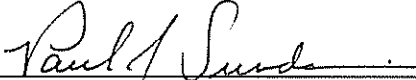
11 **Conclusion**

12 The best evidence of what the voters intended is the text of the measure. The measure is  
13 a statute. In construing a statute the court may not "insert what has been omitted, or omit what  
14 has been inserted." ORS 174.010. Under the plain text of Measure 37 there are two dates that  
15 are consequential to a Measure 37 claimant – the compensation date and the waiver date – and  
16 they are not the same dates. Judgment should be entered in favor of the State.

17 DATED this 16<sup>th</sup> day of November, 2006.

18 Respectfully submitted,

19 HARDY MYERS  
20 Attorney General

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22 \_\_\_\_\_  
23 PAUL J. SUNDERMIER #82407  
24 Senior Assistant Attorney General  
25 Trial Attorney  
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1 **CERTIFICATE OF SERVICE**


2 I certify that on November 16<sup>th</sup>, 2006, I served the foregoing State's Reply to Plaintiff's  
3 Response to Motion for Summary Judgment and State's Response to Cross Motion for Summary  
4 Judgment upon the parties hereto by the method indicated below, and addressed to the following:

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6 Daniel W. Howard  
7 Glen McClendon  
8 Lindsay Hart Neil Weigler  
9 1300 SW 5th Ave Ste 3400  
10 Portland, OR 97201  
11 Attorney for Plaintiffs

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12 Christopher Gilmore  
13 Washington County Counsel  
14 340 Public Svcs Bldg MS24  
15 155 N 1st Ave  
16 Hillsboro, OR 97124  
17 Attorney for Washington County

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