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2
3 IN THE CIRCUIT COURT OF THE STATE OF OREGON
4 FOR THE COUNTY OF WASHINGTON

5 EUGENE BRAUKMAN, NANCY
6 BRAUKMAN, FARREN KOHLER, and
7 LOIS VERBOORT-KOHLER,

8 Plaintiffs,

9 v.

10 STATE OF OREGON, BY AND THROUGH
11 THE DEPARTMENT OF
12 ADMINISTRATIVE SERVICES,
13 DEPARTMENT OF LAND
14 CONSERVATION AND DEVELOPMENT,

15 Defendants.

Case No. C061530CV

STATE OF OREGON'S REPLY IN SUPPORT
OF' MOTION FOR SUMMARY JUDGMENT

(Oral Argument Requested)

16 INTRODUCTION

17 The State moved for summary judgment on plaintiffs' Petition for Judicial Review, and
18 on their claims for declaratory relief and compensation under Measure 37. As of the date of this
19 Reply, no hearing date has been set.

20 The State's Final Order M 118651 approved the Measure 37 demands submitted by
21 plaintiffs Nancy Braukman and Lois Verboort-Kohler. The State determined that Mrs.
22 Braukman and Mrs. Verboort-Kohler acquired their relevant ownership interests in the private
23 real property at issue in 2001 and 1994 respectively. In lieu of compensation, the State elected
24 "not to apply" state land use regulations enacted after 2001 and 1994 in order to allow Mrs.
25 Braukman and Mrs. Verboort-Kohler a use of the property permitted on the date they acquired
26 their present ownership interests.

27 Plaintiffs allege that the State erred and should have determined that Mrs. Braukman and
28 Mrs. Verboort-Kohler acquired the property in 1971 on the date their husbands acquired the

1 property. Plaintiffs contend that the relevant interest under Measure 37 is a potential right Mrs.
2 Braukman and Mrs. Verboort-Kohler would have had in the event of dissolution of their
3 marriages. Plaintiffs' theory is contrary to Oregon law and should be rejected.

4 **REPLY ARGUMENT**

5 The following reply addresses plaintiffs' arguments in the order presented in plaintiffs'
6 Response to Defendants' Motion for Summary Judgment (hereafter "Pls' Resp").

7 **1. The APA standard of review applies to plaintiffs' APA claim.**

8 Plaintiffs wrongly contend that the court should ignore the APA standard of review
9 because the court rejected the State's motions to dismiss based on APA exclusivity (Pls' Resp,
10 pp 1-2). The State has moved for judgment in its favor on plaintiffs' Petition for Judicial Review
11 under the APA (Am Pet, ¶¶ 1-10). The court should apply the correct standard to the State's
12 motion.

13 **2. An issue of jurisdiction may be raised at any time.**

14 The State has moved separately, and succinctly, for judgment on the bases asserted in its
15 motions to dismiss. Plaintiffs offer no authority for their contention that the State's motion is
16 "precluded" as a matter of law (Pls' Resp, pp 2-4). ORCP 47 contains no such limitation, and
17 jurisdiction may be raised at any time. *See, G.A.S.P. v. Environmental Quality Commission, 201*
18 *Or App 362, 366 (2005).*

19 **3. The State's Motion based on "election" should be granted.**

20 Plaintiffs object to the State's motion for judgment on its affirmative defense of election
21 on the grounds that this argument, like exclusivity, was denied by the court's prior order (Pls'
22 Resp, p 3, ln 23 – p 4, ln 5). The State's motions to dismiss were not based on its waiver election
23 and, thus, the court's order did not address the issue.

24 Plaintiffs also argue that a Measure 37 "waiver must date back to the date the 'any
25 interest' arose" and must be "complete for every interest holder dating back to the date that

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1 interest arose.” Therefore, plaintiffs contend, the State was required to waive regulations since
2 1971 (Pls’ Resp, p 4, lns 10-23). The State granted waivers to plaintiffs Nancy Braukman and
3 Lois Verboort-Kohler from the date they acquired their present interest—precisely what Measure
4 37 requires if a public entity elects waiver “in lieu of compensation.” Plaintiffs are not entitled
5 to compensation.

6 **4. Measure 37 does not create new property interests.**

7 Plaintiffs argue that “any interest” in property, as that phrase is used in Measure 37,
8 creates new interests in property because the phrase is “broadly stated and defined” (Pls’ Resp, p
9 5, lns 1-9). In fact, “any interest” is not defined by Measure 37 and the Supreme Court has ruled
10 that Measure 37 does not alter or amend existing law except to the extent a proper waiver
11 “authorizes a governing body to ‘modify, remove, or not * * * apply’ certain such regulations in
12 specific situations.” *MacPherson v. DAS*, 340 Or 117, 132 (2006) (“all laws not amended
13 remain in effect”). Existing Oregon law does not convey an ownership interest in real property
14 to the spouse of an owner by virtue of marriage. Rather, Oregon law protects the right of
15 spouses to own separate property.

16 **5. Measure 37 requires a present owner/claimant to have “acquired” the property.**

17 Plaintiffs ask the court to interpret “any interest” broadly, but to ignore the statutory
18 requirement that an interest be acquired (Pls’ Resp, p 5, ln 21 – p 6, ln 6). There is no such thing
19 as a “marital interest” in property under Oregon law unless and until a petition for dissolution is
20 filed. ORS 107.105. Mrs. Braukman and Mrs. Verboort-Kohler never acquired their so-called
21 marital interest. Instead these plaintiffs acquired an interest in the property without seeking
22 dissolution. The State properly granted the only waiver authorized by Measure 37—to the date
23 of their actual acquisition.

24 A partial, but undivided, ownership interest in property is not analogous to the potential
25 interest of a spouse prior to seeking dissolution (Pls’ Resp, p 5, lns 24-26). No land use

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1 regulation restricts a spouse's potential right to one day be compensated in a dissolution
2 judgment. Plaintiffs offer no authority under Oregon law that purports to grant a spouse a
3 present right to use, encumber, or convey property owned by the other spouse. Moreover,
4 whatever potential marital interest Mrs. Braukman and Mrs. Verboort-Kohler may have had is
5 not the interest for which they submitted their Measure 37 demand.

6 Even if plaintiffs' alleged marital interest might have been created by operation of law
7 had Mrs. Braukman or Mrs. Verboort-Kohler filed a petition for dissolution, there is no dispute
8 that the alleged marital interest is not a current interest, no petition was filed and no interest ever
9 arose (Pls' Resp, pp 7-8). ORS 107.105, on which plaintiffs rely, applies only "[w]henver the
10 court renders a judgment of marital annulment, dissolution or separation." No such judgment
11 has been rendered. The same statute provides that "[s]ubsequent to the filing of a petition for
12 annulment or dissolution of marriage or separation, the rights of the parties in the marital assets
13 shall be considered a species of coownership." No petition is in evidence.

14 **6. Each plaintiff received a waiver based on their present ownership interest.**

15 Plaintiffs argue that Measure 37 authorizes relief to the current owner of any interest if
16 either the property or the interest is restricted and reduced in value (Pls' Resp, pp 5-7). While
17 the State disagrees with this interpretation, it has no bearing on the present case. As plaintiffs
18 concede, "any interest" refers to current interests, *i.e.* interests on which a Measure 37 demand
19 may be based (*id.*, p 5, lns 16-17). Mrs. Braukman and Mrs. Verboort-Kohler currently own the
20 property and have all the relevant attributes of ownership in their capacity as co-trustees with
21 their husbands of their respective family trusts.

22 Mr. Braukman and Mr. Kohler purchased the property in 1971. From that date they had
23 the right to use the property in a way that was subject to restriction and reduction in value by
24 state land use regulations. When they transferred the property to themselves and their wives as
25 co-trustees, as permitted by Oregon law, the nature of their ownership interest did not change.

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1 Mr. Braukman and Mr. Kohler never relinquished the attributes of ownership relevant to a
2 Measure 37 demand. Plaintiffs' contention that the change in "type" of ownership interest
3 should be irrelevant because the State did not determine that the husbands "present interest" also
4 commenced in 2001 and 1994 is without substance (*see*, Pls' Resp, p 6, lns 1-3).

5 Plaintiffs concede that they are not entitled to relief unless they are current owners of the
6 property, but argue that owning a current interest is not relevant to the relief to be granted (Pls'
7 Resp, pp 8-9). Instead, plaintiffs take the phrase "any interest" out of context and, in addition to
8 assuming an interest which never existed, contend that Measure 37 was intended to grant relief to
9 owners who acquired a present interest based on the date they acquired a potential interest that
10 never could have been the basis of a claim. Nothing in Measure 37 supports plaintiffs'
11 argument.


12 CONCLUSION

13 Oregon law supports the conclusions set forth in Final Order M 118351. Mrs. Braukman
14 and Mrs. Verboort-Kohler acquired their present ownership interests in the subject property in
15 2001 and 1994, respectively. The State's Order properly granted plaintiffs the relief to which
16 they were entitled under Measure 37. The State is entitled to judgment on plaintiffs' Petition for
17 Judicial Review and their claims for compensation and declaratory relief should be dismissed.

18 DATED this 15 day of February, 2007.

19 Respectfully submitted,

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CERTIFICATE OF SERVICE


I certify that on February 15, 2007, I served the foregoing *State of Oregon's Reply in Support of Motion for Summary Judgment* upon the parties hereto by the method indicated below, and addressed to the following:

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