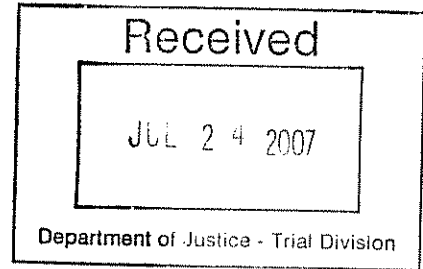


Jim L. Fun
Judge



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July 16, 2007

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RE: Eugene Braukman, Nancy Braukman, Farren Kohler,
Lois Verboort Kohler v. State of Oregon Department of
Administrative Services, Department of Land
Conservation and Development, C0615630CV

Consolidated with,

Eugene Braukman, Nancy Braukman, Farren Kohler, Lois
Verboort Kohler, Braukman Loving Trust, and Kohler
Family Trust, v. Washington County, C061907CV

Dear Counsel:

This case came before a three judge panel in joint session April 25, 2007 on Defendants' Motion for Summary Judgment and Plaintiffs' Motion for Partial Summary Judgment. The Panel considering the oral argument of the parties, together with the documents and records filed herein, grants Defendant Washington County's Motion for Summary Judgment, to dismiss plaintiff's action for declaratory judgment, and denies Defendant's motion to dismiss the claim for compensation.

Plaintiff's filed claims pursuant to ORS 197.352 (Ballot Measure 37) against the State and Washington County seeking declaratory relief and compensation for land use rules that restricted the use of their property. Defendants State and Washington County moved for summary judgment asserting that plaintiff's remedy is through writ of review, and because the restrictive land use rules have been waived, plaintiff's action for compensation should be dismissed.(1)

Plaintiff's responded with a motion for partial summary judgment to declare defendant's decision was erroneous and unsupported by substantial evidence. Plaintiffs' contend that the applicable date to determine which land use regulations should be waived, is the date which plaintiff's Lois Verboort-Kohler and Nancy Braukman married their respective husbands, not the date they acquired title to the property.

Plaintiff's claims involve a single parcel of real property. Plaintiff's Eugene Braukman and Farren Kohler purchased real property by land sale contract in 1971. In 1994, Plaintiff Farren Kohler established a trust, and conveyed his interest in the property by warranty deed, to himself, and his wife plaintiff Lois Verboort-Kohler as trustees in the Loving Trust. In 2001, plaintiff Eugene Braukman conveyed his interest in the property by warranty deed to himself and his wife, plaintiff Nancy Braukman, as trustees of the Braukman Trust. The State and Washington County chose to waive the land use regulations that were enacted in 1971, the date Plaintiffs Eugene Braukman and Farren Kohler purchased the property, but continued to apply the land use regulations as to their wives and the trust that were in effect in 1994 and 2001 respectively, determining that plaintiff's Lois Verboort-Kohler and Nancy Braukman acquired an ownership interest when title to the property was placed in their name.

Review of an agency order by Writ of Review is the exclusive means to challenge an agency finding and decision ORS 34.102. Court review of an agency decision is whether the order is legally erroneous or substantial evidence is lacking to support the agencies findings. The standard for judicial review of an agency order is whether the record as a whole would permit a reasonable person to make the factual findings made by the agency.

(1) By separate order, the Panel abates plaintiff's claims against the State

Plaintiff contends that the Order of Defendant Washington County was incorrect in determining plaintiff's did not acquire an ownership interest in the property when they married. Plaintiffs' argue Oregon marriage laws protect and enforce a spouse's interest in property during marriage, and therefore, a marital interest of one spouse in another spouse's real property should be recognized as an ownership interest pursuant to ORS 197.352(8).

This case turns on the narrow question of whether or not Measure 37 approved by the voters and codified at ORS 197.352 recognizes marriage as an ownership interest in property for the purposes of qualifying for relief under the statute. ORS 197.352(11)(C) defines owner as "the present owner of the property or ... having any interest therein." The plain language of the statute defines an owner as the "present owner" ORS 197.352(11)(C), which contemplates that the owner of property is recognized as the owner or co-owner of the property. Oregon courts have recognized a deed as presumptive proof ownership of real property. See Hilterbrand v. Carter, 175 Or App 335 (2001). Oregon statutes have also codified the common law requirement that conveyance of real property be written ORS 93.020. An interpretation that future and past owners are owners under ORS 197.352 is contrary to the definition of present owner in ORS 197.352(11)(C).

Plaintiffs further urge an interpretation of "present owner of the property ...or any interest therein" to mean that plaintiff wives have an ownership interest in the property from the date their husbands acquired the property, rather than the date on which plaintiff wives acquired the property by deed. Both the compensation and waiver provisions of ORS 197.352 are contingent on an owner's acquisition of the property. ORS 197.352(1), (3)(E) and (E)(8) share common requirements. ORS 197.352(1) allows compensation to be paid for a reduction of value to "the owner" of the property. The owner of the property under ORS 197.352 (3)(E) is also entitled to compensation for the reduction in value to the property caused by land use rules enacted before the property was acquired by the owner or a family member of the owner that acquired the property prior to the acquisition or inheritance by the owner". Similarly, the waiver provision of ORS 197.352(8) provides that "the governing body may modify, remove, or not....apply the land use regulation...to allow the owner of the property for a use permitted at the time the owner acquired the property". The statutory scheme in ORS 197.352 is legally and logically consistent only by granting relief to those that have acquired the property, and are thereby owners of the property.

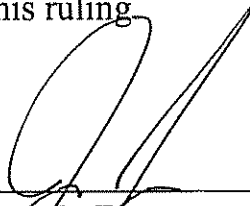
Plaintiff spouses acquired the property when the deed was entered in their name in 1971, and 1994 respectively, when they became owners as evidenced by deed. Plaintiff's assertion that marriage creates a "marital interest" in real property, is an interpretation inconsistent with the context of ORS 197.352 and at odds with the text of the provision itself. The text of ORS 197.352 does not provide for automatic ownership of spouses for purposes of seeking relief. Both the compensation and waiver provisions of the statute depend on the owner's acquisition of the property. Plaintiff's interpretation of "any interest therein" requires the court to deviate from the text and context of ORS 197.352, and construe Oregon dissolution law in an overly broad manner. Plaintiffs Lois Verboort-Kohler and Nancy Braukman could not transfer, convey or encumber the property before they acquired the property by deed. In short, while plaintiffs may have a future interest in the property, neither has a legally recognizable present interest.

For the foregoing reasons, the Panel finds that the legal conclusions of Defendant Washington County are legally correct and supported by substantial evidence. Consequently, Plaintiff's action for declaratory judgment is dismissed and defendant's motion to dismiss the claim for compensation is denied. The Defendant to submit an order consistent with this ruling

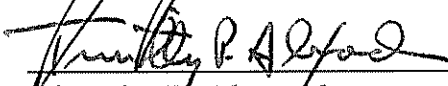
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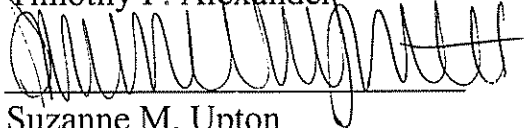
Dated: 7.17.07



James L. Fun



Timothy P. Alexander



Suzanne M. Upton

Judges of the Circuit Court