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

THOMAS BURKE and EDUCATIVE, LLC,

 Plaintiffs,

 v.

STATE OF OREGON, BY AND THROUGH
THE DEPARTMENT OF
ADMINISTRATIVE SERVICE and THE
DEPARTMENT OF LAND
CONSERVATION AND DEVELOPMENT,

 Defendants.

Case No. CV06060231

DEFENDANT'S MOTION TO DISMISS THE
AMENDED PETITION (MOOTNESS)

(Oral Argument Requested)

Judge Thomas Rastetter
Date: June 4, 2007
Time: 9:00 am
Ctrm: 7 (Third Floor)

ORAL ARGUMENT REQUESTED

Defendant State of Oregon requests oral argument on its Motion to Dismiss on grounds that plaintiffs' Amended Petition for Judicial Review is moot. The State anticipates that this motion may be heard in conjunction with the pending cross-motions for summary judgment set for the above noted date and time. The State estimates 10 minutes will be required. Official court reporting services are requested.

MOTION TO DISMISS

The State moves to dismiss the Amended Petition for Judicial Review on the grounds that this matter is now moot. When plaintiff Thomas Burke submitted his Measure 37 demand to the State, he was a present owner of the property, or any interest therein. The State denied his claim on the grounds that his interest was not restricted by the relevant land use regulations and therefore he was not entitled to relief under ORS 197.352 (1).

The present interest on which Burke based his demand for Measure 37 compensation was the right to occupy a house on the property until December 31, 2006. That interest has now

1 expired. Therefore, Burke is no longer a present owner of the property, has no right to use the
2 property, and is entitled to no relief under Measure 37. A decision on the propriety of the State's
3 denial of Burke's demand will have no practical effect on his rights.

4 In support of this Motion, the State relies upon the pleadings, including the parties'
5 memoranda on their pending Motions for Summary Judgment, Final Order M 118590, ORCP
6 21A (1), ORS 197.352, the files and record of this case, the agency *Record* lodged with the court
7 on December 7, 2006, and the following Points and Authorities.

8 POINTS AND AUTHORITIES

9 A. Burke's Measure 37 Demand

10 Measure 37 permits owners of private real property to submit a written demand for
11 compensation if a reduction in fair market value of the property is caused by land use regulations
12 enacted after the claimant acquired the property. ORS 197.352 (1), (3) (E). On June 13, 2005,
13 Thomas Burke submitted a written demand to the State. The Department of Land Conservation
14 and Development (DLCD), the public entity charged with enforcing the land use regulations at
15 issue, reviewed and denied Burke's demand.

16 Based on the documentation available to the agency during the review process, DLCD
17 determined that Burke acquired the property on August 30, 1967 (*Record*, § 2, pp 27-28). At the
18 time Burke submitted his written demand, on June 13, 2005, Burke remained a "present owner"
19 of "any interest in the property" despite having sold the property to John M. Griffin, MD on
20 March 8, 2005 (*id.*, pp 32-48). The Contract of Sale provided that "Seller [Burke] shall be
21 entitled to possession and control of the Property for so long as Seller shall live on the Property
22 up to and including December 31, 2006" (*id.*, p 35 at ¶ 4.1).

23 As of the date DLCD issued the Final Order, it properly concluded that Burke was an
24 "owner" within the meaning of Measure 37. Since the date of the sale to Dr. Griffin, however,
25 the State had not enforced any land use regulations that restrict Burke's use of the property.
26 Therefore, the State properly concluded that Burke was not entitled to compensation.

1 The Final Order explains that the laws that are the basis for the demand do not restrict
2 Burke's use of the property:

3 The current zoning requirements, minimum lot size and dwelling
4 standards established by Goal 3, ORS 215 and OAR 660, division 33, were all
5 enacted or adopted after claimant Thomas Burke acquired the subject property in
6 1967 and do not allow the desired division or residential development of the
7 property. However, the claim does not establish and there is no evidence in the
8 record to otherwise establish that those laws in any way restrict Mr. Burke's
9 current ownership interest in the subject property: the right to possess an existing
10 dwelling until December 31, 2006.

11 *Record*, § 6, p 7. The State denied Burke's demand because the State has not enforced any land
12 use regulations that restrict Burke's use of the property as required for compensation under
13 Section 1 of Measure 37.¹

14 **B. Burke's "Right to Use" the Property**

15 Plaintiffs subsequently filed the instant suit alleging that the State "incorrectly concluded
16 plaintiff Burke's interest in the property is limited to a right to possess [*sic*] an existing dwelling
17 until December 31, 2006 and that no state land use regulation restricts that right in a manner that
18 reduces the property's fair market value" (Am Pet, ¶ 7). Plaintiffs' theory is argued in detail in
19 the parties' cross-motions for summary judgment. For purposes of this Motion to Dismiss
20 (Mootness), however, the basis for plaintiffs' claim of error is immaterial. The parties' dispute
21 over the proper interpretation of Measure 37 is academic in light of the expiration of Burke's
22 interest. As discussed below, a decision on the question presented in the parties' motions will
23 have no practical effect.

24 By the express terms of the contract between Burke and contract purchaser of the
25 property, Burke no longer has any right to live on, use or possess the property.² Under state and
26

27 ¹ "If a public entity * * * enforces a land use regulation enacted prior to December 2, 2004, that
28 restricts the use of private real property or any interest therein and has the effect of reducing the
29 fair market value of the property, or any interest therein, then the owner of the property shall be
30 paid just compensation." ORS 197.352 (1).

31 ² Burke may continue to live on the property at the sufferance of the contract purchaser, but
32 plaintiffs have provided no documentation that Burke has any legal right to possession.

1 local law, as well as Measure 37, Burke’s lack of any present right to use the property renders the
2 Petition moot. Burke no longer owns any interest in the property that allows him to implement
3 any use. Thus, even assuming the State erred and Burke was entitled to Measure 37 relief, he
4 cannot obtain any benefit from approval of his written demand.

5 State regulations implementing Measure 37 with respect to regulations enforced by
6 DLCD provide that no compensation may be paid unless and until the state legislature
7 appropriates funds for that specific purpose. OAR 660-002-0010 (8) (c). The State’s Answer
8 expressly reserves the right to grant waiver relief in the event the court determined that Burke’s
9 demand was valid (§§ 12-15). A waiver would allow Burke to use the property for a use
10 permitted on the date of acquisition. ORS 197.352 (8), (10).

11 Assuming that Burke obtained a waiver, he still lacks any right to use the property and
12 therefore cannot use the property for a use permitted on the date of acquisition or any other use.
13 Specifically, under Clackamas County’s development code, the owner of a property is the
14 “[p]erson or persons holding fee title to a parcel, lot or tract of land, except in those instances
15 when the land is being sold on contract, the contract purchaser shall be deemed the owner”
16 (Clackamas County Code, Title 12, § 202). Burke is not the contract purchaser. Regardless of
17 any waiver under Measure 37, Burke cannot use the property.

18 **C. No Existing Controversy Between the Parties**

19 Oregon courts are empowered to consider disputes that involve present facts and adverse
20 parties, but “judicial power does not include the authority to adjudicate cases in which there is no
21 existing controversy.” *Yancy v. Shatzer*, 337 Or 345, 347 (2004). In *Yancy*, the plaintiff
22 challenged an order of exclusion from two Portland parks. The order expired before the circuit
23 court rendered its judgment. The Court of Appeals held that the case was moot and ordered that
24 the circuit court vacate the judgment. The Supreme Court affirmed.

25 When a case becomes moot, the issue presented is no longer justiciable because no actual
26 and substantial controversy exists between parties having adverse legal interests. *Id.*, 337 Or at

1 349; *see also Brown v. Oregon State Bar*, 293 Or 446, 449 (1982). Absent a justiciable
2 controversy, the court's decision produces no practical effect on the parties' rights. *Yancy*,
3 *supra*, 337 Or at 349; *see also Brumnett v. PSRB*, 315 Or 402, 406 (1993). In this case, Burke
4 has no legal right to use the property for any purpose. A Measure 37 determination that Burke
5 should have been granted a waiver for use of the property has no legal effect on Burke's lack of
6 any present right of use. Any determination by the court would have no practical effect.


7
CONCLUSION

8 Plaintiffs' Amended Petition for Judicial Review is moot. Since December 31, 2006,
9 Burke has owned no interest in the property which allows him any legal right to use the property
10 in any way. Consequently, there is no present controversy, the parties are not adverse, and the
11 court cannot render a decision that will have any impact on Burke's rights.

12 DATED this 9 day of May, 2007.

13 Respectfully submitted,

14 HARDY MYERS
15 Attorney General


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1 **CERTIFICATE OF SERVICE**

2 I certify that on May 9, 2007, I served the foregoing *Defendant's Motion to Dismiss*
3 *the Amended Petition (Mootness)* upon the parties hereto by the method indicated below, and
4 addressed to the following:

5 Gary P. Shepherd
6 Attorney at Law
7 3115 SE Salmon Street
8 Portland, OR 97214

HAND DELIVERY
 MAIL DELIVERY
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