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

HELEN COLEMAN and CHRISTOPHER
COLEMAN,

Plaintiffs-Petitioners,

v.

STATE OF OREGON, by and through
Department of Administrative Services,
Department of Land Conservation and
Development, and Land Conservation and
Development Commission, and MARION
COUNTY BOARD OF COUNTY
COMMISSIONERS,

Defendants-Respondents.

Case No. 06C15761

Honorable Don A. Dickey

RESPONDENT STATE OF OREGON'S
MOTION FOR SUMMARY JUDGMENT;
MEMORANDUM OF POINTS AND
AUTHORITIES

Hearing Date: February 15, 2007

Time: 1:30 pm

Courtroom: 2C

ORAL ARGUMENT REQUESTED

Respondent the State of Oregon requests oral argument on its Motions for Summary Judgment and estimates one hour will be required. Official court reporting services are requested.

INTRODUCTION

This case involves a demand for compensation under ORS 197.352, commonly known as Ballot Measure 37. Oregon voters enacted Measure 37 through the initiative process in 2004. Measure 37 permits present owners of private real property to seek compensation for reductions in fair market value caused by certain land use regulations that restrict the use and reduce the fair market value of the property or an interest in the property. Regulations enacted prior to the

1 acquisition of the property by the present owner or a family member are not a valid basis for a
2 Measure 37 demand. In response to a valid demand, public entities have the choice of paying
3 compensation or not applying certain restrictions. A copy of the statute is attached hereto as
4 Exhibit 1 for the court's convenience.

5 Petitioner Christopher Coleman is the present owner of private real property in Marion
6 County. Petitioner Helen Coleman is Christopher's mother and the present owner of a leasehold
7 interest in the property. Both petitioners acquired their present interests in the property on
8 October 15, 2001. Both petitioners acquired their present interest from family members; the
9 Coleman family acquired the property on January 29, 1951.

10 On June 7, 2005, Christopher submitted a Measure 37 demand to the State. The
11 Department of Administrative Service (DAS) and the Department of Land Conservation and
12 Development (DLCD) reviewed the demand and determined that the claim was valid because
13 regulations enacted since acquisition of the property in 1951 by Christopher's parents, family
14 members under the statute, restrict use of the property and have the effect of reducing the fair
15 market value of the property to some extent. Helen Coleman acquired her present leasehold
16 interest from a family member, her son Christopher, who in turn acquired his interest from his
17 parents. Her demand, therefore, was valid also.

18 DAS and DLCD jointly issued Final Order M 118566 on April 21, 2006. As expressly
19 permitted under Measure 37, the Final Order grants relief to Christopher and Helen in the form
20 of a "waiver" of land use regulations adopted after acquisition of petitioners' present interests in
21 the property on October 15, 2001, which allows petitioners a use of the property permitted at
22 they acquired their present interests. Petitioners contend that the Final Order should have waived
23 regulations enacted since 1951.

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1 **MOTIONS FOR SUMMARY JUDGMENT**

2 The State moves for summary judgment on each of petitioners' claims:

- 3 1. The State is entitled to judgment on the Petition for Judicial Review because the findings
- 4 of fact in Final Order M 118566 are supported by substantial evidence and the State
- 5 correctly applied the law.
- 6 2. The State is entitled to judgment on the claim for declaratory relief because the court
- 7 lacks jurisdiction. The Administrative Procedures Act (APA) provides the exclusive
- 8 procedure for review of the State's findings and conclusions concerning the "waiver
- 9 date."

10 In support of its Motions, the State relies upon Measure 37, the APA, ORCP 47, the files
11 and record of this case, the agency *Record* lodged with the court on October 16, 2006, and the
12 following Points and Authorities.

13 **POINTS AND AUTHORITIES**

14 **I. PETITION FOR JUDICIAL REVIEW**

15 **A. Overview of Measure 37**

16 A property owner qualifies for Measure 37 relief if: (1) a public entity enacts or enforces
17 a "land use regulation" that (2) restricts use of the property and (3) has the effect of reducing the
18 fair market value of the property. ORS 197.352 (1). Section 3 of Measure 37 provides that
19 certain land use regulations shall not be a basis for a written demand under Section 1, notably
20 regulations in effect when the owner or a "family member" acquired the property. ORS 197.352
21 (3) (E). Section 11 defines "owner" and lists the relations who qualify as "family members" of
22 the owner. ORS 197.352 (11) (C) and (A).

23 For regulations enacted prior to the effective date of Measure 37, Section 5 requires
24 owners to submit written demands by December 2, 2006 or two years from the date on which a
25 land use regulation is applied "as an approval criteria [sic]" on a specific land use application,

1 whichever is later (*Record*, § 2). After determining that an owner submitted a timely, valid
2 written demand, the public entity has the option to pay compensation or to “modify, remove, or
3 not to [sic] apply” land use regulations to the extent necessary “to allow the owner to use the
4 property for a use permitted at the time the owner acquired the property.” ORS 197.352 (8); *see*
5 *also* ORS 197.352 (10).¹

6 **B. The Administrative Process**

7 Measure 37 permits public entities to adopt procedures for processing claims. ORS
8 197.352 (7). DAS adopted procedural rules, found at OAR 125-145-0010 to 125-145-0105. The
9 state rules cover such issues as minimum requirements for the content of a Measure 37 claim
10 against the State, notice and third party participation, and the contents of the administrative
11 record.

12 When DAS receives a claim, it provides written notice to neighboring landowners,
13 certain neighborhood or community organizations, and anyone who requests notice. OAR 125-
14 145-0080. Persons receiving notice, or any other person, may submit comments, evidence and
15 information within ten days. OAR 125-145-0080 (2), (3) (*Record*, § 3).

16 DAS initially reviews Measure 37 claims and forwards them to the appropriate state
17 agency, *i.e.* the “regulating entity” that appears to have enacted or enforced a relevant land use
18 regulation. OAR 125-145-0090. The regulating entity, in this case DLCD, investigates and
19 analyzes the claim and issues a draft report (*Record*, § 4, pp 14-21).

20 The draft report is made public on the internet and copies are mailed to the claimant, and
21 any persons who submitted comments or requested notice. After a ten-day comment period, and
22 based in part on the comments received,² DLCD and DAS issue a final report and order (*Record*,

23 ¹ Allowing the owner to use the property in a way that would otherwise be prohibited by land use regulations is
24 commonly referred to as granting a Measure 37 “waiver.” DLCD can pay compensation only if and when the
legislature appropriates funds for that purpose. *See* OAR 660-002-0010 (8) (c).

25 ² *See, Record* Index, p 2 (no responses received). Petitioners’ counsel submitted a letter and document for the record
26 after issuance of the draft report, but did not specifically indicate that the submission was in rebuttal of the draft
report. The letter and document are in the *Record* at Section 3, pp 6-9.

1 § 6). The final orders are served on any persons who received copies of the draft report or
2 submitted comments on the draft report. DLCD also makes final orders public by posting them
3 on its website (http://www.oregon.gov/LCD/docs/measure37/finalreports2006/M118566_Coleman_Marion.pdf)

4 **C. Statement of Undisputed Facts**

5 Final Order M 118566 (*Record*, § 6) sets forth the factual findings that form the basis of
6 the State’s decision. The State relied upon the deeds, lease agreement and other documents
7 submitted by plaintiff (*id.*, § 2 and § 3, pp 6-9). For purposes of the parties’ cross-motions for
8 summary judgment, the following facts are undisputed:

9 1. The property at issue is 10 acres in Marion County, commonly identified as Tax
10 Lot 100 (*id.*, § 2, pp 3, 8; § 6, pp 1 and 4).

11 2. Petitioner Helen Coleman and her husband James acquired the property on
12 January 29, 1951 as shown by the deed submitted with the demand (§ 2, p 11; § 6, p 6).

13 3. On October 15, 2001, Helen and James Coleman conveyed the property in fee
14 simple to Christopher Coleman, their son, by warranty deed (§ 2, p 27-29; § 4, pp 1-3; §
15 6, p 6).

16 4. On October 15, 2001, Christopher entered into a Residential Lease with Helen
17 and James (§ 2, pp 12-17, 31-36; § 6, p 6).

18 5. The Lease provides: “Landlord desires to lease to Tenant and Tenant desires to
19 lease from Landlord the Premises on the terms and conditions stated below” (§ 2, p 12).

20 6. The Lease identifies “Landlord” as Christopher Coleman, “Tenant” as James and
21 Helen Coleman, and the “Premises” as “that certain residence commonly known as 5369
22 Champoeg Road NE, St. Paul, Marion County, Oregon” (*id.*).

23 7. Pursuant to Sections 1 and 2, the Lease and “Tenant’s right to possession”
24 commenced on October 15, 2001 and will “terminate upon the death of the survivor of
25 James Coleman and Helen Coleman” (*id.*).

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1 8. Section 5 of the Lease permits Helen Coleman to use the Premises “as a dwelling
2 unit and for no other purpose” (§ 2, p 13).

3 9. Section 6 of the Lease prohibits Helen Coleman from making any alterations to
4 the Premises without the consent of Christopher Coleman (*id.*).

5 10. Effective on March 29, 2006, Christopher Coleman made a Consent to Alterations
6 and Improvements, which states: “Pursuant to Section 6 of the Lease, Landlord hereby
7 consents and authorizes Tenant to partition or subdivide, the Premises, obtain all
8 governmental approvals necessary for such partition or subdivision, and make any and all
9 improvements, alterations and additions to the Premises that Tenant shall determine to be
10 appropriate, without limitation and without the requirement of any further consent.” (§ 3,
11 p 9.)

12 **D. Standard of Review**

13 Plaintiffs have petitioned for judicial review under ORS 183.484. ORS 183.484 is the
14 sole and exclusive remedy available for review of a state agency order in other than contested
15 case. ORS 183.480 (2). In a proceeding pursuant to ORS 183.484, the court determines whether
16 a final state agency order is supported by substantial evidence and whether the agency has
17 correctly applied the law. ORS 183.484 (5); *Powell v. Bunn*, 185 Or App 334, 339 (2002), *rev*
18 *denied* 336 Or 60 (2003).

19 The “substantial evidence” standard is set forth in the statute. “Substantial evidence
20 exists to support a finding of fact when the record, viewed as a whole, would permit a reasonable
21 person to make that finding.” ORS 183.484 (5) (c). The “record,” for purposes of a petition for
22 review of an order in other than a contested case, is the record presented to circuit court. *Norden*
23 *v. Water Resources Dept.*, 329 Or 641, 649 (2000).

24 The usual summary judgment standard for reviewing the facts and evidence does not
25 apply when a circuit court reviews an agency order in other than contested case under ORS

1 183.484. *Powell, supra*, 185 Or App at 339. Specifically, “viewing factual disputes in the light
2 most favorable to a nonmoving party” – the usual standard of review in a summary-judgment
3 motion – “[is] not appropriate in the judicial review of an administrative order in a noncontested
4 case proceeding.” *Id.* Rather, the “circuit court’s charge” in reviewing an agency order under
5 the APA is to test the “factual determinations for ‘substantial evidence,’” which means the
6 circuit court decides only “whether ‘the record, viewed as a whole, would permit a reasonable
7 person to make’ the factual findings” made by the state agency. 185 Or App at 338, *citing* ORS
8 183.484 (5) (c).

9 In *Norden*, the Oregon Supreme Court confirmed the plain meaning of the APA standard.
10 The trial court’s task in reviewing an agency’s factual findings for substantial evidence “is
11 limited to whether the evidence would permit a reasonable person to make the determination that
12 the agency made in a particular case.” 329 Or at 649. The Supreme Court affirmed the decision
13 of the state Water Resources Department even though the petitioner was “able to muster
14 evidence to the contrary.” *Id.*

15 In *G.A.S.P v. Environmental Quality Commission*, the Court of Appeals followed *Norden*
16 in concluding that “[t]he court’s purpose on review is not to find the facts itself but to decide
17 ‘whether the evidence would permit a reasonable person to make the determination that the
18 agency made * * *.’” 198 Or App 182, 195-96 (2005) (*citing Norden*). Similarly, in *Garcia v.*
19 *Boise Cascade Corp.*, the Supreme Court applied the identical contested case standard³ in a
20 worker’s compensation case, explaining that “[t]he appropriate question was not whether
21 substantial evidence supported claimant’s claim, but whether substantial evidence supported the
22 referee’s decision.” 309 Or 292, 296 (1990).

23 The circuit court reviews the State’s interpretation of Measure 37 using the same
24 methodology that applies to any statute. *PGE v. Bureau of Labor and Industries*, 317 Or 606,

25 _____
26 ³ See ORS 183.482 (8) (c)

1 612 n 4 (1993) (three-part methodology applies “not only to statutes enacted by the legislature,
2 but also to the interpretation of laws and constitutional amendments adopted by initiative or
3 referendum, as well as to the interpretation of regulations”). The objective is to discern the intent
4 of those who enacted the law, in this case, the Oregon voters. “The best evidence of the voters’
5 intent is the text of the provision itself. * * * The context of the language of the ballot measure
6 may also be considered[.]” *Stranahan v. Fred Meyer, Inc.*, 331 Or 38, 56 (2000) (quoting
7 *Roseburg School Dist. v. City of Roseburg*, 316 Or 374, 378 (1993)).⁴

8 **E. Argument**

9 The State determined that Helen Coleman’s demand was valid because she presently
10 owns a leasehold interest in the property and qualifying land use regulations have been enacted
11 since her “family member” predecessors first acquired the property. The State elected to grant
12 Helen waiver relief in lieu of compensation. Final Order M 118566 provides that the State “will
13 not apply” specified land use regulations “to the extent necessary to allow [Helen] to use the
14 subject property, commensurate with [her] present leasehold interest, for the use described in this
15 report, and only to the extent that use was permitted when [she] acquired [her] current leasehold
16 interest.”

17 **1. The State’s findings of fact are supported by substantial evidence.**

18 The record contains written evidence of three material transactions involving the
19 property. First, in 1951, Helen acquired title to the property by deed. Second, Helen transferred
20 all of her interest to Christopher by deed on October 15, 2001. Third, and also on October 15,
21 2001, Christopher granted Helen a leasehold interest in the property so that she may continue to
22 reside in the house for the rest of her life.

23

24 ⁴ If the voters’ intent is not clear, the court examines the history of the provision *Stranahan*, 331 Or at 56, citing
25 *Ecumenical Ministries v. Oregon State Lottery Comm*, 318 Or 551, 559 (1994). Legislative history of ballot
26 measures consists of information available to the voters “that disclose the public’s understanding of the measure.”
Ecumenical Ministries, 318 Or at 560 n 8 (e.g. “the ballot title and arguments for and against the measure included
in the voters’ pamphlet, and contemporaneous news reports and editorial comment on the measure.”)

1 Petitioners contend that the State erred by finding that Helen sold her interest to
2 Christopher, and instead should have found that Helen “retained a long-term leasehold” (Am
3 Compl, ¶¶ 1, 8). The Statutory Warranty Deed shows that Helen conveyed her entire interest in
4 the property to Christopher on October 15, 2001. The deed reserves no interest of any kind for
5 the grantor.

6 The Residential Lease identifies Christopher is the owner of the leased premises and
7 grants certain rights to the Tenant that the Tenant did not otherwise have (*Record*, § 2, pp 12-17).
8 The Lease does not purport to be based on rights “retained” by the Tenant. Based on the record
9 as a whole, a reasonable person could find that Helen acquired her present leasehold interest on
10 the date of the lease. Based on substantial evidence in the record, the State’s finding should be
11 affirmed.

12 **2. The State correctly applied the law.**

13 Petitioners allege that Helen Coleman is entitled to a waiver allowing a use permitted at
14 the time she acquired her first interest in the property (Am Compl, ¶¶ 8, 10). Measure 37,
15 however, provides for compensation or waiver relief based on the claimant’s present ownership
16 interest. The State provided Helen with the relief to which she is entitled under Measure 37.

17 The State determined that Helen is an “owner” within the meaning of Measure 37.
18 “Owner” is a defined term. ORS 197.352 (11) (C) states that an “‘Owner’ is the present owner
19 of the property, or any interest therein.”

20 Only a “present” owner may assert a claim. Former owners and future owners are
21 excluded. An owner may be one who presently owns “the property” or “any interest therein.”
22 Taken together, these elements of the definition demonstrate that the statute permits claims based
23 on present ownership of the property, or present ownership of an interest in the property. Helen
24 falls only into the second category.

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1 Helen's present ownership interest is limited to the interest conveyed to her by the
2 Residential Lease. Her leasehold interest is the sole basis on which she was entitled to make a
3 demand. Her prior ownership of the fee, from 1951 to 2001, is not a basis for a demand for
4 compensation. If Helen did not own a present leasehold interest her demand would have been
5 invalid.

6 In the context of ORS 197.352, the term "owner" must be limited to those who own a
7 meaningful interest that qualifies for relief under the statute. The right to compensation set forth
8 in Section 1 of Measure 37 is available only if a land use regulation both "restricts the use of
9 private real property *or any interest therein* and has the effect of reducing the fair market value
10 of the property, *or any interest therein.*" ORS 197.352 (1) (emphasis added). Interpreting the
11 term "owner" in the context of who is entitled to relief under Measure 37 is consistent with
12 Oregon precedent.⁵

13 Section 3 of Measure 37 sets forth the exclusions from the coverage of a compensation
14 claim as defined in Section 1. Thus, Helen's demand was valid only because regulations enacted
15 since "acquisition of the property by the owner or a family member of the owner who owned the
16 subject property prior to acquisition or inheritance by the owner, whichever occurred first"
17 qualify as restrictions on use that have the effect of reducing fair market value. ORS 197.352 (3)
18 (E). However, after a demand is determined to be valid, the State has the option to grant
19 alternate relief by deciding "not to apply the land use regulation or land use regulations to allow
20 the owner to use the property for a use permitted at the time the owner acquired the property."
21 ORS 197.352 (8).

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23 ⁵ See *Moe v. Beck*, 311 Or 499, 504-505 (1991) ("[d]ivining the legislative intent in statutes using the word 'owner'
24 has been a vexing problem for nearly a century"); *Pedro v. January*, 261 Or 582, 602 (1972) ("When the term
25 'owner' or 'ownership' is used in a statute, the context and purpose of the statute governs what is meant by the use
26 of the terms"); *State v. The Calif Ore Power Co.*, 225 Or 604, 612 (1961) (owner of an easement not an "owner"
under statute imposing liability for fire suppression costs); *Schram v Manary*, 123 Or 354, 363 (1927) (term
"owner" as applied to real property has no fixed meaning and purpose of statute controls meaning); *Binhoff v State*,
49 Or 419, 422 (1907) ("owner" has no fixed meaning).

1 The waiver granted to Helen conforms precisely to the terms of Measure 37. Helen
2 acquired the interest on which her demand is based on October 15, 2001 when she was granted a
3 leasehold interest by the property owner pursuant to the Residential Lease. Consequently, the
4 waiver correctly allows a use, if any, permitted under the law in effect when Helen acquired her
5 qualifying interest and only to extent of that interest.

6 **3. The State was not required to determine the nature and scope of Helen’s**
7 **rights under the Residential Lease.**

8 Petitioners allege that Final Order M 118566 is ambiguous (Am Compl, ¶ 8). Petitioners
9 also allege that Helen’s leasehold interest “included the right to subdivide and develop the
10 property to the extent permitted by law” (Am Compl, ¶ 2). Based on these allegations, the State
11 anticipates that petitioners may argue that the State was required to explain its interpretation of
12 the Lease. Petitioners are mistaken.

13 An alleged ambiguity in a state agency order is not grounds for relief under the APA.
14 The statute provides relief for errors of law, abuse of discretion, or lack of substantial evidence to
15 support an order. ORS 183.484 (5). In any event, Final Order M 118566 is not ambiguous.

16 The State’s order clearly sets forth the scope of the relief granted:

17 In lieu of compensation under ORS 197.352, the State of Oregon will not
18 apply the following laws to the claimants’ division of the 10-acre property into
19 two parcels for residential development: applicable provisions of Goal 3, ORS
20 215 and OAR 660, division 33, enacted or adopted after the claimants acquired
21 their interest in the property. These laws will not apply to * * * Helen Coleman⁶
22 only to the extent necessary to allow [her] to use the subject property,
23 commensurate with [her] present leasehold interest, for the use described in this
24 report, and only to the extent that use was permitted when [she] acquired [her]
25 current leasehold interest.

26 The phrase “commensurate with [her] present leasehold interest” is not ambiguous.

“Commensurate” means co-extensive with or corresponding to,⁷ and in this context plainly refers

6 The order also granted relief to James Coleman. Mr. Coleman passes away before vesting any rights granted by the order.

7 See, www.m-w.com/dictionary/commensurate

1 to the interest granted by the Residential Lease which speaks for itself. The State was not legally
2 required to interpret the Lease when it issued the Order.

3 The phrase “when [she] acquired [her] current leasehold interest” is not susceptible of
4 multiple interpretations. Helen acquired her leasehold interest when it was granted by the
5 property owner. There is no allegation or evidence that Helen ever had a leasehold interest
6 before the Lease, or that the Lease existed or had effect prior to October 15, 2001.

7 The plain language of the Lease refutes petitioners’ allegation that it grants the lessee
8 “the right to subdivide and develop the property” (*Record*, § 2, pp 12-13). To the extent
9 petitioners contend the Consent executed by Christopher Coleman on March 29, 2006 grants
10 such rights, those rights were not part of the Lease at the time petitioners submitted their
11 demand. Nevertheless, nothing in the State’s order prohibits petitioners from litigating the
12 meaning of the Lease in the appropriate forum against the appropriate party.

13 **II. DECLARATORY JUDGMENT CLAIM**

14 Petitioners’ declaratory judgment claim asks the court to conclude that the State should
15 have granted Helen a waiver of land use regulations enacted after January 29, 1951 and compel
16 the State to “act pursuant to a correct interpretation of the law” (Am Compl, ¶ 13). This claim
17 should be dismissed for lack of jurisdiction and failure to state a claim (Answer, ¶¶ 14, 15). As
18 the Oregon Court of Appeals consistently has held, the APA establishes the exclusive method to
19 challenge decisions made by state agencies. *See e.g., Lake County v. State of Oregon*, 142 Or
20 App 162, 165 (1996) (“ORS 183.480 (2) and numerous decisions of this court make clear that
21 judicial review of final agency orders shall be solely as provided in the APA”); *Mendieta v.*
22 *Division of State Lands*, 148 Or App 586, 599-600 (1997), *rev dismissed*, 328 Or 331 (1999)
23 (where “redress would have been available under ORS 183.484” the Court of Appeals held “the
24 trial court erred in granting plaintiffs relief under * * * ORS 28.010”); *FOPPO v. County of*
25 *Marion*, 93 Or App 93, 97 (1988), *rev denied*, 307 Or 326 (1989) (“PERS is subject to the APA;

26

1 therefore, the APA provides the exclusive methods for its actions and for review of those
2 actions”); *Bay River v. Envir. Quality Comm.*, 26 Or App 717, 720, *rev denied*, 276 Or 555
3 (1976).

4 The exclusive nature of the APA remedy applies even where a plaintiff attempts to use
5 other statutory causes of action to get relief from an agency decision. In *Bay River*, the Court of
6 Appeals rejected an argument that the Declaratory Judgment Act, ORS 28.010 *et seq.*, provides a
7 remedy with respect to agency orders in addition to the remedies provided under the APA. The
8 circuit court in that case had granted the plaintiff an injunction and declaratory relief with respect
9 to its application for a subsurface sewage disposal system feasibility permit – a matter within the
10 Department of Environmental Quality’s purview. The Court of Appeals reversed and remanded,
11 ordering the circuit court to vacate the judgment and dismiss the complaint. The appellate court
12 explained that Bay River could not circumvent APA review merely by raising its complaint
13 about agency actions in the context of another statute:

14 The Oregon Administrative Procedures Act, ORS 183.310
15 *et seq.*, establishes a comprehensive pattern for the judicial review
16 of administrative decisions. The various APA statutes governing
17 judicial review provide the *sole and exclusive methods of obtaining*
18 *judicial review.*

19 This is sufficient answer to Bay River’s contention that
20 since it couched its complaint in equitable terms and sought a
21 declaratory judgment, the circuit court obtained jurisdiction
22 pursuant to ORS 28.010. A party cannot ignore the judicial review
23 provisions of the APA in favor of a general equitable or
24 declaratory remedy.

25 *Bay River*, 26 Or App at 720 (emphasis added; citation omitted). *See also, Lake County*, 142 Or
26 App at 165-66 (1996) (declaratory relief not available where plaintiff could have sought judicial
27 review of an agency order under the APA).

28 The Petition for Judicial Review is petitioners’ exclusive remedy in this case. The
29 Second Claim for Relief, seeking declaratory relief under ORS 28.010, should be dismissed.


1 **CONCLUSION**

2 The State's factual findings concerning the date on which petitioner Helen Coleman
3 acquired her present interest in the property are supported by substantial evidence and should be
4 affirmed. The State correctly applied the law by granting Helen waiver relief on the terms set
5 forth in Measure 37. Final Order M 118566 is valid and should be affirmed. The State is
6 entitled to judgment as a matter of law.

7 DATED this 11 day of January, 2007.

8 Respectfully submitted,

9 HARDY MYERS
10 Attorney General

11 
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Land Conservation and Development, other state agencies and local governments shall give the goals equal weight in any matter in which the goals are required to be applied.

(2) The commission and the department shall consider and recognize regional diversity and differences in regional needs when making or reviewing a land use decision or otherwise applying the goals. [1981 c.748 §20; 1987 c.729 §1; 1995 c.521 §2]

197.350 Burden of persuasion or proof in appeal to board or commission. (1) A party appealing a land use decision or limited land use decision made by a local government to the board or Land Conservation and Development Commission has the burden of persuasion.

(2) A local government that claims an exception to a goal adopted by the commission has the burden of persuasion.

(3) There shall be no burden of proof in administrative proceedings under ORS chapters 195, 196 and 197. [1981 c.748 §10a; 1983 c.827 §43; 1991 c.817 §26]

197.352 Compensation for loss of value due to land use regulation. The following provisions are added to and made a part of ORS chapter 197:

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

(2) Just compensation shall be equal to the reduction in the fair market value of the affected property interest resulting from enactment or enforcement of the land use regulation as of the date the owner makes written demand for compensation under this section.

(3) Subsection (1) of this section shall not apply to land use regulations:

(A) Restricting or prohibiting activities commonly and historically recognized as public nuisances under common law. This subsection shall be construed narrowly in favor of a finding of compensation under this section;

(B) Restricting or prohibiting activities for the protection of public health and safety, such as fire and building codes, health and sanitation regulations, solid or hazardous waste regulations, and pollution control regulations;

(C) To the extent the land use regulation is required to comply with federal law;

(D) Restricting or prohibiting the use of a property for the purpose of selling pornography or performing nude dancing. Nothing in this subsection, however, is intended to affect or alter rights provided by the Oregon or United States Constitutions; or

(E) Enacted prior to the date of acquisition of the property by the owner or a family member of the owner who owned the subject property prior to acquisition or inheritance by the owner, whichever occurred first.

(4) Just compensation under subsection (1) of this section shall be due the owner of the property if the land use regulation continues to be enforced against the property 180 days after the owner of the property makes written demand for compensation under this section to the public entity enacting or enforcing the land use regulation.

(5) For claims arising from land use regulations enacted prior to December 2, 2004, written demand for compensation under subsection (4) shall be made within two years of December 2, 2004, or the date the public entity applies the land use regulation as an approval criteria to an application submitted by the owner of the property, whichever is later. For claims arising from land use regulations enacted after December 2, 2004, written demand for compensation under subsection (4) shall be made within two years of the enactment of the land use regulation, or the date the owner of the property submits a land use application in which the land use regulation is an approval criteria, whichever is later.

(6) If a land use regulation continues to apply to the subject property more than 180 days after the present owner of the property has made written demand for compensation under this section, the present owner of the property, or any interest therein, shall have a cause of action for compensation under this section in the circuit court in which the real property is located, and the present owner of the real property shall be entitled to reasonable attorney fees, expenses, costs, and other disbursements reasonably incurred to collect the compensation.

(7) A metropolitan service district, city, or county, or state agency may adopt or apply procedures for the processing of claims under this section, but in no event shall these procedures act as a prerequisite to the filing of a compensation claim under subsection (6) of this section, nor shall the failure of an owner of property to file an application for a land use permit with the local government serve as grounds for dismissal, abatement, or delay of a compensation claim under subsection (6) of this section.

(8) Notwithstanding any other state statute or the availability of funds under sub-

section (10) of this section, in lieu of payment of just compensation under this section, the governing body responsible for enacting the land use regulation may modify, remove, or not to apply the land use regulation or land use regulations to allow the owner to use the property for a use permitted at the time the owner acquired the property.

(9) A decision by a governing body under this section shall not be considered a land use decision as defined in ORS 197.015 (10).

(10) Claims made under this section shall be paid from funds, if any, specifically allocated by the legislature, city, county, or metropolitan service district for payment of claims under this section. Notwithstanding the availability of funds under this subsection, a metropolitan service district, city, county, or state agency shall have discretion to use available funds to pay claims or to modify, remove, or not apply a land use regulation or land use regulations pursuant to subsection (6) of this section. If a claim has not been paid within two years from the date on which it accrues, the owner shall be allowed to use the property as permitted at the time the owner acquired the property.

(11) Definitions - for purposes of this section:

(A) "Family member" shall include the wife, husband, son, daughter, mother, father, brother, brother-in-law, sister, sister-in-law, son-in-law, daughter-in-law, mother-in-law, father-in-law, aunt, uncle, niece, nephew, stepparent, stepchild, grandparent, or grandchild of the owner of the property, an estate of any of the foregoing family members, or a legal entity owned by any one or combination of these family members or the owner of the property.

(B) "Land use regulation" shall include:

(i) Any statute regulating the use of land or any interest therein;

(ii) Administrative rules and goals of the Land Conservation and Development Commission;

(iii) Local government comprehensive plans; zoning ordinances, land division ordinances, and transportation ordinances;

(iv) Metropolitan service district regional framework plans, functional plans, planning goals and objectives; and

(v) Statutes and administrative rules regulating farming and forest practices.

(C) "Owner" is the present owner of the property, or any interest therein.

(D) "Public entity" shall include the state, a metropolitan service district, a city, or a county.

(12) The remedy created by this section is in addition to any other remedy under the Oregon or United States Constitutions, and is not intended to modify or replace any other remedy.

(13) If any portion or portions of this section are declared invalid by a court of competent jurisdiction, the remaining portions of this section shall remain in full force and effect. [2005 c.1]

EXPEDITED LAND DIVISIONS

197.360 "Expedited land division" defined; applicability. (1) An expedited land division:

(a) Is an action of a local government that:

(A) Includes land that is zoned for residential uses and is within an urban growth boundary.

(B) Is solely for the purposes of residential use, including recreational or open space uses accessory to residential use.

(C) Does not provide for dwellings or accessory buildings to be located on land that is specifically mapped and designated in the comprehensive plan and land use regulations for full or partial protection of natural features under the statewide planning goals that protect:

(i) Open spaces, scenic and historic areas and natural resources;

(ii) The Willamette River Greenway;

(iii) Estuarine resources;

(iv) Coastal shorelands; and

(v) Beaches and dunes.

(D) Satisfies minimum street or other right-of-way connectivity standards established by acknowledged land use regulations or, if such standards are not contained in the applicable regulations, as required by statewide planning goals or rules.

(E) Creates enough lots or parcels to allow building residential units at 80 percent or more of the maximum net density permitted by the zoning designation of the site.

(b) Is a land division that:

(A) Will create three or fewer parcels under ORS 92.010; and

(B) Meets the criteria set forth for an action under paragraph (a)(A) to (D) of this subsection.

(2) An expedited land division as described in this section is not a land use decision or a limited land use decision under ORS 197.015 or a permit under ORS 215.402 or 227.160.


(3) The provisions of ORS 197.360 to 197.380 apply to all elements of a local gov-

1 **CERTIFICATE OF SERVICE**

2 I certify that on January 11, 2007, I served the foregoing *Respondent State of Oregon's*
3 *Motion for Summary Judgment; Memorandum of Points and Authorities* upon the parties hereto
4 by the method indicated below, and addressed to the following:

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7 Lane Powell, PC
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