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

6 JAMES COULTER, M.D. and SUSAN
7 COULTER,

8 Petitioners/Plaintiffs,

9 v.

10 MARION COUNTY BOARD OF COUNTY
11 COMMISSIONERS; OREGON
12 DEPARTMENT OF ADMINISTRATIVE
13 SERVICES; OREGON DEPARTMENT OF
14 LAND CONSERVATION AND
15 DEVELOPMENT; and the OREGON
16 WATER RESOURCES DEPARTMENT,

17 Respondents/Defendants.

Case No. 06C-20843

Honorable Don A. Dickey

STATE OF OREGON'S RESPONSE TO
COUNTY'S MOTION FOR SUMMARY
JUDGMENT AND TO PETITIONERS'
MEMORANDUM IN OPPOSITION TO THAT
MOTION

15 In their opposition to Marion County's summary-judgment motion, petitioners argue for
16 an interpretation of Measure 37's waiver provision that contradicts both the plain language of the
17 statute and this Court's prior rulings. The question relates to the proper scope of Measure 37
18 waivers that governments may issue in lieu of paying just compensation. Petitioners contend
19 that Measure 37 waivers provide complete relief only if they waive all restrictive land use
20 regulations enacted since a property owner's *family member* acquired the property. This Court
21 already has rejected that argument:

22 Compensation is computed based on land use regulations in effect
23 on the date the owner or a family member of the owner acquired
24 the property, while *the land use regulations that will be waived* – if
25 the public entity decides to waive the regulations rather than to
compensate the owner – *are determined based on the date the
current owner acquired the property.*

26ge 1 - STATE OF OREGON'S RESPONSE TO COUNTY'S MOTION FOR SUMMARY
JUDGMENT AND TO PETITIONERS' MEMORANDUM IN OPPOSITION TO THAT
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1 *Vanderzanden v. Land Conservation and Development Commission*, Marion Co. Case No.
2 05C19565 (January 8, 2007, letter opinion at 7; emphasis added).¹ Petitioners offer no
3 compelling reason for the Court to changes its interpretation of Measure 37 and conclude that
4 petitioners are entitled to waiver of regulations enacted since their family member acquired the
5 property.

6 The State submits this memorandum to inform the Court of the State’s position on this
7 important question of state law. The State respectfully requests that this Court consider the
8 State’s memorandum despite the fact that the State has not formally appeared in this action.²
9 The State reserves its discussion of the additional issues petitioners raise in their opposition
10 memorandum (water- and aggregate-extraction rights) until those questions arise in the context
11 of petitioners’ claims against the State.

12 ARGUMENT

13 A. Introduction

14 The question presented by the County’s summary-judgment motion is what “waiver” a
15 government can grant in lieu of paying “just compensation” when the present owner of real
16 property is entitled to Measure 37 relief. The County argues that “compensation and waiver are
17 measured by two different time frames. Compensation relates back to family ownership, waiver
18 does not.” (Motion for Summary Judgment at 6). The State agrees. A Measure 37 just-
19 compensation claim may be premised on the restrictive effect of land use regulations enacted or
20 adopted after a property owner’s *family member* acquired the property; thus, the present owner of
21 property sometimes may be entitled to Measure 37 relief even though no restrictive regulations
22 have been enacted since he or she acquired the land. ORS 197.352(1), (3)(E); *see* ORS

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24 ¹ The Vanderzanden letter opinion is attached as Exhibit A to Marion County’s reply
25 memorandum.

² The State has not yet filed an appearance because it understands that petitioners intend to
submit a proposed order abating the case as against the State.

1 197.352(11) (defining “owner” as “the present owner”). But once a government determines that
2 a property owner is entitled to some relief under Measure 37, it may choose to grant a waiver “in
3 lieu of” just compensation. ORS 197.352(8). And a government making that choice has
4 authority to waive (remove, modify or not apply) land use regulations only “to allow the owner
5 to use the property for a use permitted *at the time the owner acquired the property.*” *Ibid*
6 (emphasis added). Thus, a Measure 37 waiver must not allow the present property owner to use
7 the property in a way that he could not have when he acquired it.

8 In this case, the County, like the State, found that petitioners are entitled to Measure 37
9 relief based on the restrictive effect of land use regulations enacted since their family member
10 acquired the property in the early 1940s. The County, like the State, elected to grant waiver
11 relief instead of compensation; accordingly, it granted petitioners a waiver of certain land use
12 regulations enacted after petitioners acquired the property in 1982. In their amended petition,
13 petitioners contend that the County erred by “improperly construing the law to limit the waiver *
14 * * to June 7, 1982.” (Amended Petition at 4; *see* Amended Petition at 4-6 (similar allegations
15 against State)). Instead, they suggest they are entitled either to millions of dollars in just
16 compensation or to a waiver of all restrictive land use regulations enacted since their family
17 member acquired the property in the early 1940s. In other words, petitioners appear to claim that
18 the “waiver date” and the “family-member date” should be the same.

19 In apparent recognition that Marion County judges already have rejected that argument,
20 petitioners strive to differentiate their analysis from that presented in cases like *Vanderzanden*
21 and *Cobos*. They assert that they are not arguing about “the specific date to which the waiver
22 relates” but, instead, are arguing about “the nature of the development rights an owner obtains”
23 from that waiver. (Petitioners’ Response at 2). But as the State explains below, petitioners’
24 argument, no matter how carefully nuanced, amounts to this: petitioners contend they are
25 entitled either to monetary compensation or to a waiver of every restrictive land use regulation

1 that has been enacted or adopted since their family member acquired the property in the early
2 1940s. That is no different than arguing that a Measure 37 waiver must date back to the family
3 member's acquisition date – the theory that this Court has correctly rejected.

4 **B. Cobos and Vanderzanden**

5 Two Marion County Circuit Court judges have rejected the argument that a Measure 37
6 waiver covers land use regulations dating back to a family member's acquisition date. First,
7 Judge Hart ruled in *Cobos* that Measure 37 “does have both a compensation date and a waiver
8 date,” and those dates are different:

9 [S]ection 8 permits a public entity that imposed a land use
10 regulation to choose, in lieu of paying compensation under the act,
to:

11 modify, remove, or not * * * apply the land use regulation
12 or land use regulations to allow the owner to use the
13 property for a use permitted *at the time the owner acquired
the property*

14 ORS 197.352(8) (emphasis added). Consequently, if the public
15 entity chooses not to apply the land use regulations, rather than to
16 compensate an owner for the value lost to the regulations, *the
public entity is limited to permitting the owner of the property to
use the property only for those uses that were permitted at the time
the owner acquired the property.*

17 *Cobos v. Marion County*, Marion Co. Case No. 05C16640 (July 11, 2006, letter opinion, legal
18 analysis at 3; emphasis added).³ In other words, the government issuing a waiver can waive only
19 those land use regulations necessary to allow the owner to use property as he could when he
20 acquired it – those regulations enacted after the owner's acquisition date.

21 This Court ruled similarly, although in a different context, in the *Vanderzanden, Hood*
22 *River Valley Residents Committee* and *Messer* cases brought by individuals and organizations
23 that opposed the State's issuance of Measure 37 waivers. In its letter opinion, this Court ruled

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25 ³ The *Cobos* letter opinion is attached as an exhibit to Marion County's summary-judgment
memorandum.

1 that a Measure 37 waiver involves only those land use regulations enacted since the current
2 owner's acquisition date:

3 Compensation is computed based on land use regulations in effect
4 on the date the owner or a family member of the owner acquired
5 the property, while the land use regulations that will be waived – if
6 the public entity decides to waive the regulations rather than to
7 compensate the owner – are determined based on the date the
8 current owner acquired the property.

9 *Vanderzanden*, letter opinion at 7.

10 Petitioners attempt to avoid *Cobos* and *Vanderzanden* by saying they are not asking for a
11 broader waiver based on a particular *date*, but are asking for a broader waiver based on a need
12 for the waiver to encompass all of the land use regulations that restrict the property's use,
13 reducing its fair market value. (See Petitioners' Response at 6-7). As the State explains below,
14 there is no meaningful difference between the argument petitioners make here and the "family-
15 member waiver date" argument with which this Court already has announced its disagreement.

16 **C. Petitioners' theory renders the last clause of section 8 meaningless.**

17 Petitioners argue that a Measure 37 waiver does not provide complete relief, meaning that
18 no monetary compensation is due, unless the government waives all land use regulations upon
19 which the Measure 37 claim is premised – *i.e.*, the regulations "that restrict an owners' use of
20 property in a manner that reduces its fair market value" – even if those regulations were enacted
21 before the present owner acquired the property. (Petitioners' Response at 6). They contend that
22 section 8's reference to "the" land use regulation means that a waiver must cover *the same* land
23 use regulations that formed the basis of their Measure 37 claim under Sections 1 and 3(E), *i.e.*,
24 all restrictive regulations enacted since petitioners' family member acquired the property.

25 Petitioners' argument reads the last clause out of Section 8, which provides:

26 [I]n 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 [*sic*] the land use regulation

1 is based on their family member’s 1940s acquisition dates, their waiver goes back only to 1982,
2 after Senate Bill 100 was passed and most of the statewide land use planning goals were adopted.
3 Consequently, the 1982 waivers that petitioners received from the County and the State will
4 allow them to use the property only for a use to which they could have put it in 1982, under the
5 land use regulations – including the goals – that were in place at that time.

6 Petitioners contend that Measure 37 does not allow a government to avoid paying
7 compensation by granting a waiver that, in petitioners’ words, “has no relationship or correlation
8 to the land use regulations that gave rise to the claim to just compensation.” (Petitioners’
9 Response at 17). In petitioners’ view, a waiver that operates “in lieu of” compensation must
10 have more value; consequently, there must be “a direct correlation between the land use
11 regulations giving rise to the claim and the land use regulations being waived.”

12 This Court already has rejected a similar argument. In the consolidated cases of
13 *Vanderzanden, Hood River Valley Residents Committee* and *Messer*, the plaintiffs argued that
14 “there must be a correlation between the amount of compensation due and the type of waiver that
15 is permitted.” *Vanderzanden*, letter opinion at 6. This Court disagreed:

16 As the State points out, the term “in lieu of” does not embrace the
17 concept of proportionality. Rather, “in lieu of” means, as the
18 parties agree, “instead of; in place of; in substitution of,” so that
19 waiver may be provided as an alternative to payment. The concept
20 of providing that the entity may choose between two alternative
21 options does not mean that the relief granted in the two options
22 must necessarily be proportional.

23 Furthermore, the plain text of the statute makes clear that
24 the relief provided by the compensation and waiver provisions is
25 not meant to be proportional. Compensation is computed based on
land use regulations in effect on the date the owner or a family
member of the owner acquired the property, while the land use
regulations that will be waived – if the public entity decides to
waive the regulations rather than to compensate the owner – are
determined based on the date the current owner acquired the
property. In many instances then, the amount of compensation
authorized by the statute will not be proportional to the waiver that
could be granted.

1 *Id.* At 6-7 (citations omitted).

2 That ruling defeats petitioners' argument that a waiver must have a value at least roughly
3 equivalent to the value of the compensation that otherwise would be paid. This Court should
4 reject petitioners' contention that the phrase "in lieu of" means something like "equal to" for the
5 same reason it rejected that argument in *Vanderzanden*.

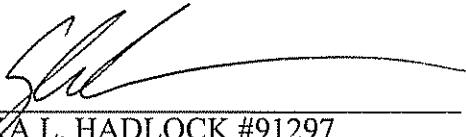
6 **CONCLUSION**

7 When a government chooses to waive land use regulations in lieu of paying just
8 compensation on a Measure 37 claim, it may waive only those land use regulations that prevent
9 an owner from using the property for a use that was allowed when the owner acquired the
10 property, *i.e.*, regulations enacted after the present owner's acquisition date. This Court should
11 reject petitioners' argument that they are entitled to a waiver of all restrictive land use
12 regulations enacted since their family member acquired the property in the early 1940s and grant
13 the County's motion for summary judgment on that point.

14 DATED this 11 day of May, 2007.

15 Respectfully submitted,

16 HARDY MYERS
17 Attorney General

18 
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26^{3e} 8 - STATE OF OREGON'S RESPONSE TO COUNTY'S MOTION FOR SUMMARY
JUDGMENT AND TO PETITIONERS' MEMORANDUM IN OPPOSITION TO THAT
MOTION
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CERTIFICATE OF SERVICE

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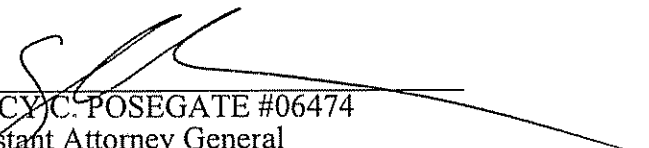
I certify that on May 11, 2007, I served the foregoing STATE OF OREGON'S
RESPONSE TO COUNTY'S MOTION FOR SUMMARY JUDGMENT AND TO
PETITIONERS' MEMORANDUM IN OPPOSITION TO THAT MOTION upon the parties
hereto by the method indicated below, and addressed to the following:

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