

HARDY MYERS
Attorney General



PETER D. SHEPHERD
Deputy Attorney General

DEPARTMENT OF JUSTICE
TRIAL DIVISION

March 23, 2007

Jackson Circuit Court
100 S. Oakdale
Medford, Oregon 97501

Re: *Crystal Springs Packing Co. v. State*
Jackson County Circuit Court Case No. 063050Z7

Dear Court Clerk:

Enclosed please find the State's Memorandum in Opposition to Petitioner's Motion for Summary Judgment in the above-referenced matter.

A postcard is enclosed for the Clerk's use in notifying me of the action taken.

Sincerely,

A handwritten signature in cursive script that reads "Erika L. Hadlock".

Erika L. Hadlock
Sr. Assistant Attorney General

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Enclosures

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

CRYSTAL SPRINGS PACKING CO. INC.,
an Oregon corporation,

Petitioner,

v.

THE STATE OF OREGON, DEPARTMENT
OF LAND CONSERVATION AND
DEVELOPMENT, LAND CONSERVATION
DEVELOPMENT COMMISSION, and
DEPARTMENT OF ADMINISTRATIVE
SERVICES,

Respondents.

Case No. 063050Z7

MEMORANDUM IN OPPOSITION TO
PETITIONER'S MOTION FOR SUMMARY
JUDGMENT

INTRODUCTION

When the State is presented with a valid Measure 37 claim, it may choose either to pay just compensation or to "waive" certain land use regulations, that is, to "modify, remove, or not to apply [*sic*] 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.*" ORS 197.352(8) (emphasis added). Measure 37 defines the term "owner" to mean "the present owner of the property, or any interest therein." ORS 197.352(11)(C). Thus, in determining the appropriate scope of a waiver -- which land use regulations to waive -- the question is when the current owner acquired the property.

In this case, the parties agree that Crystal Springs is the present owner of the property. The parties also agree that Highlands Orchard acquired the property in 1969 and 1978, and that Highlands Orchard -- *not* Crystal Springs -- continued to own the property from then until 1986,

1 when the two corporations merged. The State’s conclusion that Crystal Springs acquired the
2 property from Highlands Orchard at the 1986 merger, and is entitled to waiver only of certain
3 land use regulations enacted after that date, should be uncontroversial.

4 Crystal Springs contends, however, that it is entitled to the same waiver of land use
5 regulations, dating back to 1969 and 1978, that Highlands Orchard would have been able to
6 obtain if it still existed, still owned the property, and had filed a Measure 37 claim itself. That
7 argument is not based on Measure 37’s waiver provision, ORS 197.352(8); indeed, Crystal
8 Springs does not cite that provision. Instead, Crystal Springs looks to unrelated areas of the law,
9 including South Carolina’s law on adverse possession, to support its argument that it is entitled
10 to a waiver of land use regulations that predate its ownership of the property. The State explains
11 below why none of Crystal Springs’ arguments has merit.

12 BACKGROUND

13 A. The parties’ motions for summary judgment

14 The parties’ motions for summary judgment focus on a single legal question: For
15 purposes of Measure 37, when did Crystal Springs acquire the property at issue? The State
16 agrees with Crystal Springs that the pertinent facts are undisputed and that this Court may
17 resolve the acquisition-date question as a matter of law.

18 The State does disagree with Crystal Springs regarding one detail of the remedy this
19 Court may order if it rules in Crystal Springs’ favor. Crystal Springs asserts that, under those
20 circumstances, this Court should “order remand to Respondents to either waive the applicable
21 local and state land use regulations retroactive to Highlands Orchard’s acquisition, or pay
22 compensation in the amount of \$9,698,390.” (Pet’s Motion for Summary Judgment at 8). The
23 State agrees that the appropriate remedy would be a remand to the respondent agencies, which
24 then would be able to choose whether to: (1) change the terms of the waiver; or (2) pay Crystal
25 Springs just compensation. *See* ORS 197.352(1), (8). However, if the respondent agencies
26 elected to pay just compensation, they would still need to determine the amount by which the fair

1 market value of Crystal Spring's property interest has been reduced, in accordance with ORS
2 197.352(2). Measure 37 does not require the State to accept the company's estimate of
3 \$9,398,390 as the amount by which the value of its property has been reduced.

4 **B. The State's response to Crystal Springs' statement of facts**

5 The State does not dispute the facts set forth in Crystal Springs' Statement of Facts,
6 except as follows:

7 1. The State disputes Crystal Springs' suggestion that Jackson County's order on its
8 Measure 37 claim includes a "ruling that petitioner may avail itself of the development rights
9 that Highlands Orchard would have obtained under ORS 197.352." (Pet's Motion for Summary
10 Judgment at 2). The State acknowledges, however, that Jackson County issued an order waiving
11 land use regulations enacted after the dates in 1969 and 1978 on which Highlands Orchard
12 acquired the property.

13 2. The State disputes Crystal Springs' characterization of the State's final order as
14 "erroneous." (Pet's Motion for Summary Judgment at 2).

15 3. The State acknowledges that Highlands Orchard acquired a portion of the
16 property in 1969 and a portion in 1978. (See Answer ¶ 3). Because the State found those dates
17 irrelevant to when *Crystal Springs* acquired the property, however, the State's final order on the
18 Measure 37 claim does not identify specifically which portion of the property Highlands Orchard
19 acquired in each of those years. Although the State has no reason to doubt Crystal Springs'
20 assertion regarding the dates on which Highlands Orchard acquired specific tax lots, the State
21 reserves the right to make factual findings about those dates on remand if this court rules that the
22 dates are relevant in this case.

23 But none of these disputes is material to the single legal question presently before this
24 Court: whether the State erred when it determined that Crystal Springs acquired the property in
25 1986 and, therefore, is entitled to a waiver of only certain land use regulations enacted after that
26

1 date. Consequently, the disputes should not prevent the Court from entering judgment on that
2 issue.

3 ARGUMENT

4 A. **Crystal Springs acquired Highlands Orchard's assets when the corporations 5 merged in 1986.**

6 When a landowner has a valid measure 37 claim, the State may choose either to pay the
7 landowner just compensation or, instead, to issue a waiver:

8 Notwithstanding any other state statute or the availability of
9 funds under subsection 10 of [Measure 37], in lieu of paying just
10 compensation * * *, the governing body responsible for enacting
11 the land use regulation may modify, remove, or not to apply [*sic*]
12 the land use regulation or land use regulations to allow the owner
13 to use the property for a use permitted *at the time the owner*
14 *acquired the property.*

15 ORS 197.352(8) (emphasis added); *see* ORS 197.352(1), (3)(E) Thus, in determining the proper
16 scope of a Measure 37 waiver, the primary question is when the present owner of the property
17 acquired it. In this case, Oregon corporate-merger law answers that “acquisition date” question.

18 Under then-existing law, the subject property automatically transferred from Highlands
19 Orchard (the disappearing corporation) to Crystal Springs (the surviving corporation) when they
20 merged in 1986:

21 [A]ll property, real, personal and mixed, * * * of or belonging to or
22 due to each of the corporations so merged * * *, *shall be taken and*
23 *deemed to be transferred to and vested in such single [surviving]*
24 *corporation without further act or deed * * *.*

25 ORS 57.480(1)(d) (1985) (emphasis added). Thus, the property transferred to Crystal Springs
26 and vested in that corporation as a result of the 1986 merger. It follows that 1986 is the year in
which Crystal Springs acquired the property.

Crystal Springs argues that the word “transferred” does not have its usual meaning in the
context of ORS 57.480, and that property transfers that occur during corporate mergers “should
not break the chain of title.” (Pet’s Motion for Summary Judgment at 5). According to Crystal

1 Springs, the Court of Appeals has “circumscribed the meaning of the word ‘transferred,’ when
2 such transfer is in the context of a merger.” (Pet’s Motion for Summary Judgment at 5). Crystal
3 Springs reads too much into *Nike v. Spencer*, 75 Or App 362, *rev denied*, 300 Or 451 (1985), the
4 case upon which it relies. First, the *Nike* court’s explanation of ORS 57.480(1)(d) confirms that
5 the surviving corporation does “acquire” the disappearing corporation’s assets upon merger:

6 We believe that ORS 57.480 expresses the legislative intent that a
7 surviving corporation to a merger should *acquire* by operation of
8 law all the interests of the merging corporation and that those
9 interests should not in any way be impaired by the merger.

10 75 Or App at 372 (emphasis added). In other words, when a corporate merger occurs, the
11 disappearing corporation’s property automatically is transferred to the surviving corporation,
12 which “acquires” it.

13 Second, *Nike* holds only that the surviving corporation acquires those assets, rights and
14 privileges that the disappearing corporation already had at the time of merger. In *Nike*, the asset
15 or right at issue was an existing guaranty in favor of the corporation that disappeared when it
16 merged with Nike. The Court of Appeals held that the disappearing corporation’s guaranty
17 transferred to Nike by operation of law upon merger, and that Nike could take advantage of it.
18 *Ibid*. In other words, Nike obtained a right – the right to enforce the guaranty – that the
19 disappearing corporation had possessed immediately before the companies merged.

20 *Nike* does not aid Crystal Springs, which asks this court to give it something that
21 Highlands Orchard did *not* have at the time of the 1986 merger: the right to develop the property
22 under the land use regulations that existed in 1969 and 1978. In 1986, Measure 37 had not
23 passed, Highlands Orchard had no Measure 37 waiver, and Highlands Orchard could develop the
24 property only as allowed under land use regulations then in effect. The land, as it could be
25 developed in 1986, is what Crystal Springs acquired when it merged with Highlands Orchard
26 that year. Under Measure 37, therefore, Crystal Springs is entitled to a waiver of land use
regulations dating back only that far.

1 Crystal Springs also argues that it “should be able to ‘tack’ Highlands Orchard’s
2 acquisition date for purposes of ORS 197.352,” because the property transferred from Highlands
3 Orchard to Crystal Springs “by operation of law” upon merger, not by a sale or other
4 conveyance. (Pet’s Motion for Summary Judgment at 6). In other words, Crystal Springs
5 believes that it is allowed to claim ownership of the property back to 1969 and 1978 merely
6 because it acquired the property from Highlands Orchard by merger, instead of by purchase. The
7 single case upon which Crystal Springs relies is unhelpful, however, because it is based on South
8 Carolina’s law on adverse possession, not on any generally applicable corporate-merger
9 principles.

10 *Catawba Indian Tribe v. South Carolina*, 978 F2d 1334 (4th Cir 1992), arose when the
11 Tribe asserted ownership rights over various parcels of land in South Carolina that were
12 possessed by other people at the time the Tribe filed its complaint. Many of the defendants
13 asserted that they had adversely possessed their land for the 10-year period required in South
14 Carolina, and the Tribe no longer could claim ownership of it. The Tribe responded that some of
15 the defendants were corporations that had possessed the property for less than ten years. *See id.*
16 at 1338. The question presented was: when a present corporate owner obtained the property by
17 merging with another corporation, could the present surviving corporation “tack” its less-than-
18 ten-year period of ownership onto the time during which the previous corporate owner had
19 possessed the property, bringing the total adverse-possession period to at least 10 years?

20 The Fourth Circuit’s determination that the surviving corporation could “tack” its
21 ownership period onto that of the disappearing corporation was based on common-law principles
22 of adverse possession. South Carolina cases had established that tacking was not allowed for
23 purposes of establishing adverse possession *except* “in cases of intestate succession,” when the
24 heir took the property “by operation of law.” *Id.* at 1342-43; *see id.* at 1339-40. In considering
25 corporate mergers, the Fourth Circuit noted that property is transferred from the disappearing
26 corporation to the surviving corporation “by operation of law” in those situations, too. *Id.* at

1 1344. Having noted that truism, the court concluded without additional elaboration that South
2 Carolina courts “would allow tacking in the context of a corporate merger.” *Ibid*

3 *Catawba Indian Tribe* does not support Crystal Springs’ assertion that it should be able to
4 tack onto Highlands Orchard’s ownership period for purposes of Measure 37. First, the Fourth
5 Circuit’s ruling on a matter of South Carolina law is not binding on this court. More
6 importantly, the principles underlying the law of adverse possession – which relate explicitly to
7 who *possesses* property, not to who owns it – are not easily applied to Measure 37, where the
8 principle of ownership is paramount. Nothing in Measure 37 allows the present owner of the
9 property to “tack onto” a previous owner’s period of possession to take advantage of the
10 previous owner’s acquisition date.¹

11 **B. The property transfer did not improperly “impair” Crystal Springs’ title to the**
12 **property; Crystal Springs acquired exactly those property rights that Highlands**
13 **Orchard had before the merger.**

14 ORS 57.480 (1985) provides that when the surviving corporation acquires the
15 disappearing corporation’s assets as a result of merger, “the title to any real estate * * * vested in
16 any of [the disappearing corporations] shall not revert or be in any way impaired by reason of
17 such consolidation or merger.” Crystal Springs contends that the State impermissibly “impaired”
18

19 ¹ The *Catawba Indian Tribe* ruling appears to misread South Carolina case law. The general
20 principle in South Carolina is that a person who occupies property that another person originally
21 disseised from its owner may *not* tack onto the disseisor’s period of possession for purposes of
22 establishing ten years of adverse possession. *Id.* at 1342 (quoting *Eperson v. Stansill*, 42 SE 426,
23 427 (SC 1902)). An exception to that rule exists “when possession is cast by operation of law
24 from ancestor to heir *in possession*” because, in that circumstance, “there is no break in the
25 continuity of possession.” *Eperson*, 42 SE at 427 (emphasis added). The *Catawba Indian Tribe*
26 court focused on *Eperson* court’s use of the phrase “by operation of law,” and held that tacking
of adverse-possession periods may occur in the corporate-merger context, too, because property
is transferred “by operation of law” during a merger. 978 F2d at 1343-44. But the federal court
overlooked a significant aspect of *Eperson*: that an “heir *in possession*” could tack possession
periods precisely because there was “no break in the continuity of possession.” 42 SE at 427
(emphasis added). In *Catawba Indian Tribe*, the surviving corporation did not already possess
the property when it merged with the property’s previous occupier, and the Fourth Circuit may
have misinterpreted South Carolina law in holding that tacking could occur in those
circumstances.

1 its title to the subject property by its “refusal to recognize the Highlands Orchard acquisition
2 date.” (Pet’s Motion for Summary Judgment at 3).

3 Crystal Springs misunderstands the statute, which provides simply that the surviving
4 corporation acquires all of the real-property rights that belonged to the disappearing corporation.
5 The disappearing corporation does not retain any interest in the real property after a merger, even
6 a contingent interest; if it did, a possibility of reverter would be created in violation of ORS
7 57.480 (1985). *See* ORS 105.772 (implicitly defining reverters). The State’s determination that
8 Crystal Springs acquired the property upon its merger with Highlands Orchard in 1986 does not
9 create or recognize any impermissible possibility of reverter in favor of the latter corporation.

10 Nor does the State’s determination that Crystal Springs is entitled to a waiver of land use
11 regulations dating back only to 1986 constitute an impermissible “impairment” of Crystal
12 Springs’ title to the property. When the corporations merged in 1986, Crystal Springs acquired
13 all of the property interests that Highlands Orchard had in the property. Moreover, Crystal
14 Springs could have developed the property exactly as Highlands Orchard could have at that time.
15 The State’s decision to waive only certain land use regulations enacted after the 1986 merger
16 does not impair the title that vested in Crystal Springs as a result of that merger. Rather, it
17 returns Crystal Springs to exactly the position it occupied then: it may develop the property “for
18 a use permitted at the time the owner [Crystal Springs] acquired the property” from Highlands
19 Orchard in 1986.

20

21 **C. The corporation that survives a merger is not analogous to the grantor of a
22 revocable trust.**

23 Crystal Springs notes correctly that the State does not view the placement of property in a
24 revocable trust as a “transfer” of property when the grantor of the property also is the trustee of
25 the revocable trust. (Pet’s Motion for Summary Judgment at 7). No transfer has occurred in
26 those circumstances because the owner of the property before it is placed in trust (the grantor) is
the same as the owner of the property after it is placed in trust (the trustee).

1 Crystal Springs argues that a corporation that survives a merger is in an analogous
2 position:

3 A surviving corporation is liable for all debts and liabilities
4 of the merging corporation. Likewise, a grantor/beneficiary of a
5 revocable trust is directly liable for all liabilities of the trust. * * *
The surviving corporation should be given the same rights as a
revocable trust *vis-a-vis* ORS 197.352.

6 (Pet’s Motion for Summary Judgment at 7).

7 This argument misconstrues the reason that the State does not view a grantor’s placement
8 of property in a revocable trust as a transfer of the property. In Oregon, a trust is best viewed not
9 as a distinct legal entity but as a means of establishing persons’ *relationships* to property in a
10 way that divides legal and equitable interests in the property among those persons:

11 A trust is a method of transferring property, either during life or at
12 death, for the benefit of another, with “strings attached.” The
13 person who creates a trust makes a gift of the property to another,
with instructions on how the property is to be managed and
distributed for the benefit of a third person.

14 *OSB Administering Trusts in Oregon CLE*, § 1.2 (emphasis added). The trustee administers the
15 trust in the beneficiaries’ interest. *See* ORS 130.650; ORS 130.655(1).

16 A person is the “owner” of property for purposes of Measure 37 if the person’s property
17 interest gives the person a right to use the property in a way that land use regulations can restrict,
18 reducing the interest’s fair market value. *See* ORS 197.352(1), (8), (10), (11)(C). In a trust
19 relationship, only the trustee has the right to use trust property in a way that could give rise to a
20 Measure 37 claim. *See* ORS 130.690; ORS 130.725(2), (3), (8). It is that ability to control trust
21 property that makes the trustee the “owner” for purposes of Measure 37. Consequently, no
22 change in ownership occurs when a person who owns property puts that property into a
23 revocable trust of which the person also is trustee.

24 No similar continuity of ownership exists when two corporations merge. Before 1986,
25 Highlands Orchard was the sole owner of the property at issue in this case. After the
26 corporations merged, only Crystal Springs owned the property. Because different corporate

1 entities owned the property before and after the merger, a change of ownership took place, and
2 that change in ownership triggered a new "acquisition date" for purposes of Measure 37.


3 **CONCLUSION**

4 Crystal Springs acquired the property in 1986 when it merged with Highlands Orchard,
5 which had owned the property until that time. Because Measure 37 allows the State to waive
6 certain land use regulations only "to allow the owner to use the property for a use permitted at
7 the time the owner acquired the property," Crystal Springs is entitled to a waiver of regulations
8 dating back only to 1986. Crystal Springs has no right to get the broader waiver that Highlands
9 Orchards could have obtained if it still existed, still owned the property, and had filed its own
10 Measure 37 claim.

11 DATED this 22nd day of March, 2007.

12 Respectfully submitted,

13 HARDY MYERS
14 Attorney General

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16 ERIKA L. HADLOCK #91297
17 Sr. Assistant Attorney General
18 Trial Attorney
19 Tel (503) 947-4700
20 Fax (503) 947-4792
21 erika.hadlock@doj.state.or.us
22 Of Attorneys for Respondents

23 TRIR2102/ELH/sek

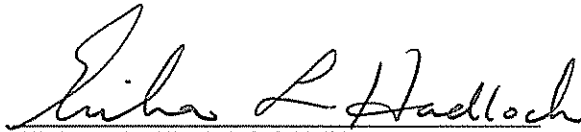
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CERTIFICATE OF SERVICE

I certify that on March 23rd, 2007, I served the foregoing *Memorandum in Opposition to*
Petitioner's Motion for Summary Judgment upon the parties hereto by the method indicated
below, and addressed to the following:

Joseph E. Kellerman
Hornecker et al
717 Murphy Road
Medford, OR 97504
Attorney for Plaintiff

HAND DELIVERY
 MAIL DELIVERY
 OVERNIGHT MAIL
 TELECOPY (FAX)



ERIKA L. HADLOCK #91297
Sr. Assistant Attorney General
Trial Attorney
Tel (503) 947-4700
Fax (503) 947-4792
erika.hadlock@doj.state.or.us
Of Attorneys for State of Oregon