



CIRCUIT COURT OF OREGON
THIRD JUDICIAL DISTRICT
MARION COUNTY COURTHOUSE
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January 8, 2007

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Re: Vanderzanden v. Land Conservation and Development, et al.
Marion County Circuit Court Case No. 05C19565

Hood River Valley Residents, et al. v. State of Oregon, et al.
Marion County Circuit Court Case No. 06C17267

Messer et al. v. Land Conservation and Development, et al.
Marion County Circuit Court Case No. 06C18036

Dear Ms Hadlock, and Messrs. Kleinman and Bloemers

This matter came before the Court for a hearing in the above-entitled consolidated cases on the Plaintiffs Motions for Partial Summary Judgment and the Defendants' Cross Motions for Partial Summary Judgment in each of the respective cases. The Plaintiffs Bob and Crystal Vanderzanden appeared by and through Jeffrey L. Kleinman, their attorney, the Plaintiffs Hood River Valley Residents, Larry and Sara Martin, and Eric and Tamiko Ruhlen appeared by and through, Ralph Bloemers, their attorney and the Plaintiffs John and Betsy Messer and Douglas and Martha Fast appeared by and through their attorney Jeffrey L. Kleinman, the Defendants appeared by and through Assistant Attorney General, Erika L. Haddock, their attorney and the proposed Intervenor Louise Bernards appeared by and through, Ross Day, her attorney. After reviewing the memoranda on file and hearing oral argument of the parties, the matter was taken under advisement.

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The above three cases were consolidated for consideration of the following issues raised in Petitioners' Motions for Partial Summary Judgment:

Whether the State is using an appropriate method to determine whether, pursuant to Ballot Measure 37 (2004), codified at ORS 197.352, there has been a reduction in the fair market value of claimants' property, specifically, whether the State may determine the issue of reduction in value resulting from the current enforcement of the regulation rather than considering only whether a reduction occurred at the time the regulation was adopted and, as a component of that determination, whether it is lawful for the State to conclude that a claimant under the statute could obtain a transferrable right to make a specified use of the property?

Whether the Department of Land Conservation and Development ("DLCD") and the Department of Administrative Services ("DAS") have authority to waive¹ land use laws enacted by the Legislative Assembly?

Whether it is permissible for the State to waive restrictions to permit claimants to make uses of their properties, even though the waiver is disproportionate to the reduction in fair market value of the property?

Whether laws governing partition and subdivision of land are land use regulations within the ambit of ORS 197.352?

This Court answers each of these questions in the affirmative.

DISCUSSION

The issues presented require this Court to analyze the voters' intent in enacting Ballot Measure 37, codified at ORS 197.352. The first step in this analysis is to consider the text and context of the statute. See *PGE v. Bureau of Labor and Industries*, 317 Or 606, 610-11, 859 P2d 1143 (1993) (instructing courts to consider the text and context of the statute in discerning the voters' intent); see also *Li v. State of Oregon*, 338 Or 376, 388-89, 110 P3d 91 (2005) ("In interpreting voter-initiated constitutional provisions, our goal is to discern the intent of the voters. In doing so, the text of the constitutional provision itself provides the best evidence of the voters'

¹The statute provides that, in lieu of payment, the land use regulations may be modified, removed, or not applied to the property in question. See ORS 197.352(8), (10). For ease of reference, the decision to not apply the regulations to the specified property is often referred to as a decision to "waive" the regulations as to that property. This court will also use the terms "waive" or "waiver" in that sense.

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intent * * * If the voters' intent is clear from the text and context, then the court does not look further"); *Stranahan v. Fred Meyer, Inc.*, 331 Or 38, 57, 11 P3d 228 (2000) (when interpreting an initiative petition, "it is the people's understanding and intended meaning of the provision in question—as to which the text and context are the most important clue—that are critical to our analysis"); *Ecumenical Ministries v. Oregon State Lottery Comm.*, 318 Or 551, 559, 871 P2d 106 (1994) ("[t]he best evidence of the voters' intent is the text of the provision itself" (quoting *Roseburg School Dist. v. City of Roseburg*, 316 Or 374, 378, 851 P2d 595 (1993))).

Only if the text and context of the statute are unclear does this Court consider the legislative history of the statute, the second level of statutory construction. In a case involving a ballot measure, the legislative history includes items such as the ballot title, arguments regarding the measure included in the voters' pamphlet, and news reports and editorial comment on it. See *Ecumenical Ministries*, 318 Or at 559 n 8; *PGE*, 317 Or at 611-12. If, after completing both levels of statutory construction, the voters' intent remains unclear, the court "may resort to general maxims of statutory construction to aid in resolving the remaining uncertainty." *PGE*, 317 Or at 612.

As will be seen below, this Court finds that, as to the issues raised by petitioners, the voters' intent is clear from the text and context of the statute, and this Court need not reach the second or third level of statutory construction.²

1. The State's Method for Determining Whether There Was a Reduction in Value.

ORS 197.352(1) provides that just compensation must be paid to a property owner if a public entity enacts or enforces a land use regulation that restricts the use of the property and reduces the property's fair market value. Alternatively, and at the discretion of specified entities, the restrictions may be modified, removed, or not applied (waived). See ORS 197.352(8), (10). The property owner begins the process by making a written demand for compensation to the public entity that enacted or is enforcing the relevant regulation. See ORS 197.352(2), (4).

Consequently, a public entity to whom a property owner makes a demand for compensation must first determine whether it has enacted or enforced a regulation that restricts the use of private real property. If so, the entity must then determine whether that regulation "has the effect of reducing the fair market value of the property." See ORS 197.352(1). If it finds that the regulation reduces the fair market value of the property, a determination of whether to pay just compensation to the owner or to modify, remove, or waive the pertinent regulation must be made.

²This Court does not address that portion of petitioners' claims that allege that the State's orders are not supported by substantial evidence in the record, as issues regarding the specific evidence presented in each case are not before this Court for decision in this consolidated matter.

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Petitioners and the State agree that, if a waiver is granted to a claimant, that bare waiver cannot be transferred to another party. In making its determination of whether regulations reduce the fair market value of the subject property, the State considers what fair market value the property might have, if the owner obtained a waiver and made or began to make the use of the property. Petitioners fault this process, arguing that the claimant cannot transfer the waiver in any manner, so the regulation causes no reduction in fair market value to the property.

ORS 197.352(1) requires the public entity to consider whether the land use regulation which restricts the use of the property "has the effect of reducing the fair market value of the property." By virtue of the plain language of ORS 197.352(1), public entities are required to consider whether the value of the property without the applicable regulation would be different from the value of the property with the regulation. Necessarily, then, the public entity must consider what value the property might have if the requisite waiver were granted, and in making this determination must assume that the right to make the specified use of the property may be transferred to another party.³ See *PGE*, 317 Or at 610-11. Otherwise, there would be no way to measure whether the land use regulation reduced the fair market value of the property.

Petitioners also contend that, in determining the issue of whether the regulation has reduced the fair market value of the subject property, the State should calculate the reduction based on the date that the pertinent regulation was enacted rather than considering whether the current enforcement of the regulation reduces the value of the property. ORS 197.352(1) provides that compensation is due when the public entity "*enacts or enforces a new land use regulation or enforces a [previously-enacted] land use regulation,*" the regulation restricts the use of the property, and the regulation reduces the fair market value of the property. ORS 197.352(1) (emphasis added). Once the public entity has determined that a property owner is entitled to compensation, ORS 197.352(2) describes the amount of compensation due. Specifically, it requires that compensation "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" (emphasis added).

The statute therefore requires that the compensation be calculated as of the date the owner made the claim. Using that date, the public entity is to determine how much the enactment or enforcement of the regulation has reduced the value of the property. If the statute provided only that the entity was to consider whether the *enactment* of the regulation reduced the value of the property, petitioners' argument might be correct. But it does not. The entity must also consider whether the

³Although this Court does not decide whether the right to pursue a use that is permitted by the granting of a waiver may actually be transferred to a new owner, it notes that the right to continue making the use may possibly be transferrable by virtue of the doctrines of nonconforming use and the vesting of a right to continue development begun by the owner pursuant to a permit.

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enforcement of the regulation has reduced the value of the property. Enforcement of the regulation will, generally if not always, be current, for if the regulation is not being enforced against the property, the owner would be able to make the relevant use of the property and would not need to make an ORS 197.352 claim. An entity is therefore directed to consider not only whether, as of the date of the demand, the enactment of the regulation reduced the fair market value of the property, but also whether the current enforcement of the regulation is reducing the fair market value of the property. See *PGE*, 317 Or at 610-11.

In determining whether a property owner is entitled to relief under the statute, it is therefore appropriate for the State to consider whether there is a current loss to the fair market value of the property, in that the fair market value of the property would increase if the State waived land use regulations that are currently being enforced against the property and instead permitted the owner to obtain a transferrable right to make that use.⁴

2. *DLCD's and DAS's Authority to Waive Land Use Laws.*

Petitioners assert that ORS 197.352 does not provide state agencies with authority to waive state statutes governing land use in lieu of providing compensation under ORS 197.352. Rather, according to petitioners, only the state legislature may decide to waive the laws. Petitioners base their argument on the language of ORS 197.352(8), which provides that:

Notwithstanding any other state statute or the availability of funds under subsection (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* [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. (Emphasis added)

If read alone and without further analysis of the statute, this subsection appears to indicate that only the Legislative Assembly – the “governing body responsible for enacting” state-wide land use laws – could waive those state laws. Such authority would, of course, be gratuitous, as the legislature already possesses the power to modify, remove, or not apply state laws. In any event, petitioners’ argument fails to account for subsection (10), which specifically grants discretion to a

⁴Plaintiffs contend that determining whether there has been an increase in value of a claimant’s property, when land use regulations continue to apply to the property of adjoining landowners, means that the value of the claimant’s property is determined based on a “monopoly” or “exceptional” value rather than the “fair market value” required by ORS 197.352. Even assuming that this Court agreed that determining value in this manner is unfair, that is what the plain text of the statute requires

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“metropolitan service district, city, county, or *state agency* 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)” (emphasis added). In addition, subsection (4) requires that the property owner make demand for compensation to the “*public entity* enacting or *enforcing* the land use regulation” (emphasis added). The term “public entity” is defined in ORS 197.352(11)(D) as including “the state.” It is an agency of the State that enforces state land use regulations, and thus the state agency from which the property owner is entitled to demand compensation. Interpreting the text of the statute as a whole, it is clear that the state agencies are the state entities that have authority to choose between paying compensation or modifying, removing, or not applying the regulations. *See PGE*, 317 Or at 610-11.

Because subsection (10) specifically grants to state agencies the authority to waive land use regulations, this Court finds that ORS 197.352 authorizes state agencies to waive state land use laws.

3. The Proportionality of the Waiver to the Reduction in Value.

As previously noted, ORS 197.352(1) and (2) entitle a property owner to just compensation if a land use regulation that restricts the use of the property is enacted or enforced against the property and has the effect of reducing the fair market value of the property. The entity required to pay this compensation may, in its discretion and “in lieu of payment of just compensation,” choose to modify, remove, or not apply the regulation so that the owner may use the property “for a use permitted at the time the owner acquired the property.” ORS 197.352(8) (emphasis added); *see* ORS 197.352(10).

Petitioners and the State agree that the use of the term “a use” indicates that the voters intended to limit the waiver to a specific use. They differ on whether that use is the use requested by the property owner or whether it must instead be a use that is chosen by the State to be equivalent to the compensation owed to the owner. Petitioners assert that the State is not bound to permit the use requested by the claimant but rather that the term providing for waiver “in lieu of payment” means that there must be a correlation between the amount of compensation due and the type of waiver that is permitted, and it is for the State to determine what use is permissible. The State contends that the statute does not provide it with discretion to choose what use is allowed and that if the use requested by the claimant would have been permitted at the time the claimant acquired the property, the State must allow that use.

The State’s reading of subsections (8) and (10) is correct; petitioners’ is not. As the State points out, the term “in lieu of” does not embrace the concept of proportionality. Rather, “in lieu of” means, as the parties agree, “instead of; in place of; in substitution of,” so that waiver may be provided as an alternative to payment. The concept of providing that the entity may choose between two alternative options does not mean that the relief granted in the two options must necessarily be proportional.

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Furthermore, the plain text of the statute makes clear that the relief provided by the compensation and waiver provisions is 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. See ORS 197.352(1), (2), (3)(E), (8), (10); see also pp. 2-4 of Exhibit B to letter opinion in *Cobos v. Marion County*, No. 05C16640. In many instances, then, the amount of compensation authorized by the statute will not be proportional to the waiver that could be granted.

Accordingly, a waiver granted pursuant to ORS 197.352 need not be proportional to the compensation due a claimant under the statute. See *PGE*, 317 Or at 610-11.

4. The Inclusion of Partition and Subdivision Laws in ORS 197.352.

As previously noted, ORS 197.352 authorizes the waiver of land use regulations to allow a use that was permitted at the time the claimant acquired the property. The definition of "land use regulations" includes, among other things, "Any statute regulating the use of land or any interest therein," "Administrative rules and goals of the Land Conservation and Development Commission," "Local government comprehensive plans, zoning ordinances, land division ordinances, and transportation ordinances," and "Statutes and administrative rules regulating farming and forest practices." ORS 197.352(11)(B)(i), (ii), (iii), and (v) (emphasis added).

Petitioners maintain that the State does not have authority to waive the statutes contained in ORS chapter 215 that regulate land division. Their argument is that there is a distinction between the "use" of land and the "division" of land recognized by ORS chapter 215, and ORS 197.352 permits waiver only as to statutes that regulate "use" of land.

Petitioners' argument parses too finely the meaning of "use of land." Definitions of "use" include "the act or practice of using something," "the legal enjoyment of property that consists in its employment, occupation, exercise, or practice," "a particular service or end," and "the benefit in law of one or more persons, specifically: the benefit of or the profit arising from lands and tenements to which legal title is held by a person in whom a trust or confidence is reposed that another person should take and enjoy." *Webster's Third New International Dictionary, Unabridged* (2002). Statutes that regulate land divisions by mandating minimum lot and parcel sizes via separately-applicable zoning designations on the land regulate the "use" of the land because they govern the purposes to which the land may be put and the benefit or enjoyment the owner may receive from the land. As such, those statutes are subject to ORS 197.352. To the extent ORS 197.352(11)(B)(iii) singles out local land division ordinances but not state-wide laws, it is clear that the definition in

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ORS 197.352(11)(B)(i), which is applicable to state laws, applies to *any* statute that regulates the use of land. This necessarily includes any state statutes that regulate land division. See *PGE*, 317 Or at 610-11.

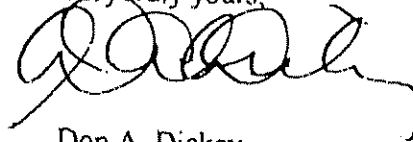
The State therefore has authority to waive statutes that regulate land divisions.

CONCLUSION

This Court grants Respondents' Motion for Partial Summary Judgment in its entirety and denies petitioners' motions for summary judgment.

On the separate issue of the Intervenor's Motion, Mr. Day is to furnish a form of Order allowing the motion to intervene.

Very truly yours,



Don A. Dickey
Circuit Court Judge

DAD:kat
cc: Ross Day
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