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

6 ERIKSEN, JACK C.,

7 Claimant-Plaintiff,

8 v.

9 STATE OF OREGON, by and through  
10 DEPARTMENT OF ADMINISTRATIVE  
11 SERVICES; DEPARTMENT OF LAND  
12 CONSERVATION AND DEVELOPMENT  
13 AND LAND CONSERVATION AND  
14 DEVELOPMENT COMMISSION,

15 and

16 LINCOLN COUNTY, a political subdivision  
17 of the State of Oregon, acting by and through  
18 the LINCOLN COUNTY BOARD OF  
19 COMMISSIONERS,

20 Respondents-Defendants.

Case No. 072268

MEMORANDUM IN SUPPORT OF STATE  
DEFENDANTS' MOTION TO DISMISS

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**INTRODUCTION**

After the people enacted Ballot Measure 37 in 2004, the State of Oregon implemented procedures for processing the thousands of demands that have followed. Those procedures, described in the next section of this memorandum, result in a final agency order either denying or approving each Measure 37 demand and, when appropriate, granting relief in the form of a “waiver” of certain land use regulations. Those orders – like other final agency orders – are subject to judicial review under the Oregon Administrative Procedures Act (“APA”).

In some cases, however, a claimant who is dissatisfied with the agency order chooses to seek monetary compensation under Measure 37 in circuit court, either instead of or in addition to

1 filing an APA petition for judicial review. That is the approach that plaintiff has taken in  
2 challenging the State’s decision on his Measure 37 demand. In addition to petitioning for  
3 judicial review of the State’s final order, plaintiff has filed a claim for just compensation under  
4 Section 6 of Measure 37. That claim is based on an allegation that the State has “improperly  
5 applied and construed Measure 37” with respect to plaintiff’s demand. (Petition for Declaratory  
6 Judgment and Judicial Review (“Petition”) at 6). Plaintiff’s petition also includes a Declaratory  
7 Judgments Act claim in which he seeks “a declaration of [plaintiff’s] respective legal rights and  
8 obligations herein, thereby allowing [plaintiff] the right to partition and develop the subject  
9 property.” (Petition at 7).

10 This Court should dismiss plaintiff’s petition in its entirety. As explained below, the  
11 APA provides the exclusive means by which a court may review an agency decision that is  
12 encompassed in a final agency order. Consequently, this Court lacks jurisdiction over plaintiff’s  
13 claims for compensation and for declaratory relief and should dismiss them. In addition, this  
14 Court should dismiss the APA petition for judicial review because it was not timely filed.

## 15 BACKGROUND

### 16 A. Measure 37

17 Oregon voters enacted Ballot Measure 37 through the initiative process in 2004.  
18 Codified as part of Chapter 197, where Oregon’s statewide land use planning statutes are found,  
19 Measure 37 permits owners of private real property to seek compensation for reductions in fair  
20 market value caused by certain land use regulations.

21 A property owner qualifies for Measure 37 relief if: (1) a public entity enacts or enforces  
22 a “land use regulation” after December 2, 2004; (2) the regulation restricts the owner’s use of the  
23 property; and (3) the regulation has the effect of reducing the property’s fair market value. ORS  
24 197.352(1). Section 3 of Measure 37 provides that certain land use regulations shall not be a  
25 basis for a written demand under Section 1, notably regulations in effect when the owner or a  
26 family member acquired the property. ORS 197.352(3)(E). Section 11 defines “owner” as the

1 “present owner” of the property, and lists the relationships on which a “family member” finding  
2 may be based. ORS 197.352(11)(A), (C).

3 For regulations enacted before the effective date of Measure 37 (December 2, 2004),  
4 Section 5 requires owners to submit written demands by December 2, 2006, or the date on which  
5 a land use regulation is applied “as an approval criteria [*sic*]” to the review of a specific land use  
6 application, whichever is later. After determining that an owner submitted a timely, valid written  
7 demand, the public entity has the option to pay compensation or to “modify, remove, or not to  
8 [*sic*] apply” land use regulations to the extent necessary “to allow the owner to use the property  
9 for a use permitted at the time the owner acquired the property.” ORS 197.352(8); *see also* ORS  
10 197.352(10).<sup>1</sup> In this case, the State determined that plaintiff’s Measure 37 demand is valid and  
11 granted plaintiff “waiver” relief from land use regulations enacted after February 5, 1993.  
12 Plaintiff contends that he acquired the property in 1978, not 1993, and argues that he is entitled  
13 to a waiver of regulations enacted after that earlier date.

14 **B. The administrative process**

15 When the Department of Administrative Services (“DAS”) receives a claim, it provides  
16 written notice of the claim to neighboring landowners, certain neighborhood or community  
17 organizations, and anyone who requests notice. OAR 125-145-0080. DAS forwards the claim to  
18 the appropriate state agency, *i.e.*, the “regulating entity” that appears to have enacted or enforced  
19 a relevant land use regulation. OAR 125-145-0090. The regulating entity, in this case, DLCD,  
20 investigates and analyzes the claim and issues a draft report. OAR 125-145-100(1). The draft  
21 report provides the State’s preliminary determination on the necessary elements of the claim,  
22 including timeliness of the demand, ownership, the land use regulations that form the basis of the  
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25 <sup>1</sup> Allowing the property owner to use the property in a way that would otherwise be  
26 prohibited by land use regulations is commonly referred to as granting a Measure 37 “waiver.”  
An LCDC rule provides that DLCD may pay compensation only if and when the legislature  
appropriates funds for that purpose. *See* OAR 660-002-0010(8)(c).

1 claim, the effect of relevant land use regulations on the property's fair market value, and  
2 applicable exemptions, if any. OAR 125-145-100(2).

3 The draft report is made public on the internet and copies are mailed to the claimant and  
4 to any person who submitted comments or requested notice. OAR 125-145-100(1). After a  
5 comment period, and based in part on any comments received, the regulating entity and DAS  
6 issue a final report and order. OAR 125-145-100(3)-(6).

7 **C. Plaintiff's Measure 37 demand, the State's final order, and plaintiff's petition**

8 Plaintiff owns property in Lincoln County. (Petition ¶ 1). He submitted a Measure 37  
9 demand to the State in 2006 seeking compensation for the reduction in fair market value  
10 allegedly caused by restrictive land use regulations enacted after he acquired that property. (*See*  
11 *Petition ¶ 8; Hadlock Decl, Ex 1*).<sup>2</sup> The State determined that plaintiff's Measure 37 demand is  
12 valid and granted him "waiver" relief from certain restrictive land use regulations enacted after  
13 he acquired the property in 1993:

14 1. In lieu of compensation under ORS 197.352, the State of  
15 Oregon will not apply the following laws to Jack Eriksen's  
16 division of tax lot 400 into eight 1-acre parcels or to his division of  
17 tax lot 2300 into twenty-three 7,350 square-foot parcels, for  
18 residential development: applicable provisions of Goal 14 and  
19 OAR 660-004-0040, adopted after February 5, 1993. These land  
20 use regulations will not apply to the claimant's division of the  
subject property only to the extent necessary to allow him to use  
the property as described in this report, and only to the extent that  
the use was permitted when he acquired the property on February  
5, 1993. The department acknowledges that it is unlikely that the  
claimant's desired use of the property could have met the standards  
in effect when \* \* \* the claimant acquired it.

21 (Hadlock Decl, Ex 1 at 1).

22 Plaintiff is dissatisfied with the State's final order because it grants a waiver dating back  
23 only to 1993, not a waiver of land use regulations enacted after 1978, when plaintiff contends he  
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25 <sup>2</sup> The State's final order, along with the incorporated staff report, is attached as Exhibit 1 to  
26 the Declaration of Erika Hadlock submitted with the State Defendants' Motion to Dismiss. The  
Court properly may consider that document in ruling on the State's motion to dismiss plaintiff's  
claims against the State for lack of jurisdiction. *See* ORCP 21A(1).

1 acquired the property. Plaintiff alleges that Lincoln County, to which he also submitted a  
2 Measure 37 demand, accepted plaintiff's demand for relief dating back to 1978; however, the  
3 County also noted that plaintiff must obtain a Measure 37 waiver from the State before the  
4 County will process a development application. (Petition ¶ 7).

5 Plaintiff challenges the State's decision on his Measure 37 demand in his "Petition for  
6 Declaratory Judgment, Judicial Review and Measure 37 Claim for Compensation" filed in this  
7 Court. That petition includes three claims against the State: (1) a claim for a declaration that  
8 plaintiff is entitled to divide and develop the property; (2) a petition for judicial review brought  
9 under ORS 183.484, seeking modification of the State's final order to permit plaintiff to partition  
10 and develop the property as he could have when he allegedly acquired it in 1978; and (3) a claim  
11 brought under Section 6 of Measure 37 seeking over \$2,000,000 in "just compensation." As  
12 explained below, this Court lacks jurisdiction over all of those claims.

### 13 ARGUMENT

#### 14 A. This Court should dismiss the APA claim on the ground that it was not timely filed.

15 The APA provides that "[p]etitions for review *shall* be filed within 60 days *only*  
16 following the date the order is served." ORS 183.484(2) (emphasis added). Timely filing of a  
17 petition for judicial review is a jurisdictional requirement, as the Court of Appeals has explained:

18 ORS 183.484(1) confers on certain circuit courts jurisdiction for  
19 judicial review of orders in other than contested cases. ORS  
20 183.484(2) then provides that "[p]etitions for review shall be filed  
21 within 60 days only following the date the order is served." The  
22 timely filing of a petition for judicial review of agency action is a  
23 jurisdictional requirement. *Osoke v. DMV*, 320 Or 657, 659-60,  
24 891 P2d 633 (1995). Accordingly, the failure to comply with that  
25 requirement is a matter that cannot be waived and may be raised  
for the first time on appeal. As we held in *Hood River County v.*  
*Stevenson*, 177 Or App 78, 81, 33 P3d 325 (2001), "[a]  
jurisdictional question need not be preserved by a party, much less  
raised at a specific point in a proceeding, for a court to consider it.  
Courts have an obligation to consider jurisdictional issues *sua*  
*sponte*[".]"

26 *G.A.S.P. v. Environmental Quality Commission*, 201 Or App 362, 366 (2005).

1           The final order in this case issued and was served on plaintiff on March 29, 2007. (See  
2 Hadlock Decl, Ex 2 (certificate of mailing)). Sixty days from that date was May 28, 2007, a  
3 legal holiday. Accordingly, the 60-day deadline for filing the petition for judicial review fell on  
4 the next business day, Tuesday, May 29. But plaintiff did not file the petition for judicial review  
5 until May 30, one day too late. (See Hadlock Decl, Ex 3 (petition)). Because plaintiff did not  
6 file his petition within the 60-day limitations period, this Court lacks jurisdiction over the APA  
7 claim and should dismiss it with prejudice.

8       **B.       Plaintiff properly could seek review of the final order only under the APA;  
9               consequently, this Court lacks jurisdiction over his other claims for relief.**

10           This Court also lacks jurisdiction over the other two claims in plaintiff’s petition, which  
11 are premised on alleged flaws in the final order. Plaintiff’s claim for declaratory relief  
12 incorporates the State’s final order (Petition ¶ 6), complains about the order granting relief only  
13 from post-1993 land use regulations, and “seeks clarification of the rights granted to him under  
14 the terms of the Final Order issued by the State” and a declaration stating that he may “partition  
15 and develop the subject property.” (Petition ¶ 8, prayer). In his compensation claim against the  
16 State, plaintiff alleges that the State has “improperly applied and construed Measure 37 to the  
17 Subject Property” and seeks either monetary compensation or, in the alternative, “a waiver of the  
18 land use regulations that have been adopted since the time Eriksen first acquired an interest” in  
19 the property in 1978. (Petition ¶¶ 16, 17).

20           Thus, in seeking monetary compensation and declaratory relief, plaintiff challenges the  
21 correctness of decisions made in the context of the State’s final order. As explained below,  
22 however, the APA sets forth the exclusive method for bringing such a challenge. ORS  
23 183.480(2) (“Judicial review of final orders of agencies shall be *solely* as provided by ORS  
24 183.482, 183.484, 183.490 and 183.500”; emphasis added). Accordingly, this Court lacks  
25 jurisdiction to decide either the Measure 37 compensation claim or the claim for declaratory  
26 relief.

1           The Oregon Court of Appeals consistently has held that the APA establishes the  
2 exclusive method to challenge decisions made by state agencies. *See e.g., Eppler v. Board of*  
3 *Tax Service Examiners*, 189 Or App 216, 220 (2003); *Lake County v. State of Oregon*, 142 Or  
4 App 162, 165 (1996) (“ORS 183.480 (2) and numerous decisions of this court make clear that  
5 judicial review of final agency orders shall be solely as provided in the APA”); *Mendieta v.*  
6 *Division of State Lands*, 148 Or App 586, 599-600 (1997), *rev dismissed*, 328 Or 331 (1999)  
7 (where “redress would have been available under ORS 183.484, had plaintiffs timely filed their  
8 petition for judicial review[,]” the Court of Appeals held, “the trial court erred in granting  
9 plaintiffs relief under ORS 183.490 and ORS 28.010”); *FOPPO v. County of Marion*, 93 Or App  
10 93, 97 (1988), *rev denied*, 307 Or 326 (1989) (“PERS is subject to the APA; therefore, the  
11 APA provides the exclusive methods for its actions and for review of those actions”); *Bay River,*  
12 *Inc. v. Environmental Quality Comm’n*, 26 Or App 717, 720, *rev denied*, 276 Or 555 (1976).

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

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

26                           This is sufficient answer to Bay River’s contention that  
                              since it couched its complaint in equitable terms and sought a

1           declaratory judgment, the circuit court obtained jurisdiction  
2           pursuant to ORS 28.010. A party cannot ignore the judicial review  
3           provisions of the APA in favor of a general equitable or  
4           declaratory remedy.

5           *Bay River*, 26 Or App at 720 (emphasis added; citation omitted). *See also Eppler*, 189 Or App at  
6           222 (“plaintiffs’ sole recourse [in arguing that state licensing requirements were preempted by  
7           federal law] was to raise their preemption claim in the contested case proceeding before the  
8           board and seek judicial review, under the APA, of any adverse ruling by the board”); *Lake*  
9           *County*, 142 Or App at 165-66 (1996) (declaratory relief not available where plaintiffs could  
10          have sought judicial review of an agency order under the APA).

11          The Court of Appeals also has rejected the argument that the Oregon Tort Claims Act  
12          (“OTCA”), ORS 30.265 *et seq.*, provides a remedy with respect to agency orders that is  
13          cumulative to the APA remedy. In *Clarke Electric, Inc. v. State Highway Division*, 93 Or App  
14          693 (1988), the plaintiff contractor sued under the OTCA for harm allegedly arising from the  
15          Highway Division’s rejection of the plaintiff’s bid on a contract. The Court of Appeals held that  
16          the Division’s rejection of the plaintiff’s bid was a final order in other than a contested case and,  
17          therefore, that the plaintiff should have sought judicial review under the APA. *Id.*, 93 Or App at  
18          696-97. The court specifically rejected the plaintiff’s argument that, because it sought damages,  
19          it was entitled to proceed directly under the OTCA:

20                 Finally, plaintiff argues that it is seeking damages in tort under the  
21                 Oregon Tort Claims Act, ORS 30.265, not review of the Division’s  
22                 order and, therefore, that the time limitations of the APA are not  
23                 applicable. However, defendant’s alleged liability in tort is  
24                 premised on a finding that defendant’s order rejecting the bid was  
25                 improper. That order was a final order in other than a contested  
26                 case, and the exclusive procedure for review of such an order is  
27                 under the APA. Consequently, the trial court did not err in granting  
28                 Division’s motion to dismiss for failure to comply with the APA  
29                 time limitations for judicial review.

30          *Id.* at 697 (citations omitted).<sup>3</sup>

31          <sup>3</sup> *See also Muller v. Dept. of Agriculture*, 164 Or App 11, 15-16 (1999) (plaintiff could not  
32          avoid APA review by suing for damages in tort when “his entitlement to damages depend[ed] on  
33          the validity of” an agency’s denial of a permit application).

1           Thus, the plaintiff in *Clarke Electric* could not circumvent APA review of an agency  
2 order by seeking monetary damages under the OTCA, just as the plaintiffs in the Declaratory  
3 Judgment Act cases cited above could not avoid APA review merely by seeking declaratory  
4 relief with respect to agency actions. The same principle applies to section 6 of Measure 37 –  
5 although it, too, creates a statutory cause of action, people who contest the legality of an agency  
6 order on a Measure 37 claim must seek judicial review under the APA. Accordingly, this Court  
7 could have jurisdiction only over plaintiff’s APA claim (except that it is untimely filed, as  
8 explained above), and should dismiss the compensation and declaratory-judgment claims for lack  
9 of jurisdiction.

10 **C. Plaintiff cannot state a claim for compensation because the State has elected to “not**  
11 **apply” certain land use regulations in lieu of paying compensation.**

12           The Court should dismiss the Measure 37 compensation claim even if it determines that it  
13 has jurisdiction over the claim, on the ground that the State’s continuing option to “waive” land  
14 use regulations in lieu of paying compensation means that plaintiff has not stated – and cannot  
15 state – a claim for monetary compensation. As explained below, Measure 37 grants *the public*  
16 *entity*, not Measure 37 claimants, the option to determine whether to pay compensation or to  
17 “modify, remove, or not apply” land use regulations. ORS 197.352(8), (10).

18           In interpreting statutes adopted through the initiative process, like Measure 37, Oregon  
19 courts apply the same methodology as they apply in construing statutes adopted by the  
20 Legislative Assembly. *Stranahan v. Fred Meyer, Inc.*, 331 Or 38 (2000); *PGE v. Bureau of*  
21 *Labor and Industries*, 317 Or 606, 612 n 4 (1993). The objective is to discern the intent of those  
22 who enacted the law, in this case, the Oregon voters. “The best evidence of the voters’ intent is  
23 the text of the provision itself. \* \* \* The context of the language of the ballot measure may also  
24 be considered[.]” *Stranahan*, 331 Or at 56 (quoting *Roseburg School Dist. v. City of Roseburg*,  
25 316 Or 374, 378 (1993)). If the text and context of the statute reveal the clear intent of the  
26 voters, “further inquiry is unnecessary.” *PGE*, 317 Or at 611; *see also Stranahan*, 331 Or at 56.

1           The language and structure of Measure 37 clearly show that the voters intended to give  
2 public entities, and not claimants, the choice between paying compensation and not applying  
3 land use regulations. The statute provides:

4           Notwithstanding any other state statute or the availability of funds  
5 under subsection (10) of this section, in lieu of payment of just  
6 compensation under this section, the governing body responsible  
7 for enacting the land use regulation may modify, remove, or not to  
8 apply the land use regulation or land use regulations to allow the  
9 owner to use the property for a use permitted at the time the owner  
10 acquired the property.

11                           \* \* \* \* \*

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

23           ORS 197.352(8), (10). Even if that language were ambiguous, a review of the statute's  
24 legislative history would confirm the State's authority to waive land use regulations instead of  
25 paying compensation. Measure 37's explanatory statement reflects the voters' intent that public  
26 entities have the choice whether to pay compensation or to waive application of land use  
27 regulations: "If a property owner proves that a land use regulation restricts the use of the  
28 owner's property, and reduces its value then *the government responsible for the regulation will  
29 have a choice: pay the owner of the property an amount equal to the reduction in value or  
30 modify, change or not apply the regulation to the owner's property.*"<sup>4</sup>

31           In this case, the State waived certain land use regulations and, if a courts rules that the  
32 waiver should have been broader in scope, it may again elect to issue that broader waiver in lieu  
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34 <sup>4</sup> See [www.oregon.gov/LCD/MEASURE37/legal\\_information.shtml](http://www.oregon.gov/LCD/MEASURE37/legal_information.shtml)  
35 #Information\_About\_the\_Election (site last visited on August 9, 2007; emphasis added).

1 of paying monetary compensation. The State retains the right to make that choice between  
2 remedies; nothing in ORS 197.352 puts a time limit on the State's right to elect to issue a waiver  
3 instead of paying compensation. In other words, the State cannot be compelled to pay monetary  
4 compensation even if plaintiff succeeds in challenging the merits of the final order. Accordingly,  
5 plaintiff's just-compensation claim does not state a claim upon which relief can be granted.


6 **CONCLUSION**

7 The gravamen of plaintiff's compensation and declaratory-judgment claims against the  
8 State is that the State erred by determining that plaintiff is entitled to waiver only of certain land  
9 use regulations enacted since 1993. Because the APA provides the exclusive procedure for  
10 people to dispute determinations made in the context of final orders issued by the State – like  
11 those about which plaintiff complains – this Court lacks jurisdiction over plaintiff's claims for  
12 monetary and declaratory relief and should dismiss them. Moreover, this Court should dismiss  
13 the APA claim on the ground that petitioner did not file the petition for judicial review within the  
14 60-day limitations period. In sum, all three claims against the State should be dismissed.

15 DATED this 3<sup>rd</sup> day of October, 2007.

16 Respectfully submitted,

17 HARDY MYERS  
18 Attorney General


19   
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26 Of Attorneys for Respondents-Defendants

1 **CERTIFICATE OF SERVICE**

2 I certify that on October <sup>3<sup>rd</sup></sup>, 2007, I served the foregoing MEMORANDUM IN  
3 SUPPORT OF STATE DEFENDANTS' MOTION TO DISMISS upon the parties hereto by the  
4 method indicated below, and addressed to the following:

5  
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7 Litchfield & Carstens LLP  
8 PO Box 1730  
9 Newport, OR 97365

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