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

HENRY FU and JUI-CHIH FU,

Plaintiffs,

v.

STATE OF OREGON, by and through the
DEPARTMENT OF LAND
CONSERVATION AND DEVELOPMENT,

Defendant.

Case No. 06C16298

Honorable James L. Rhoades

STATE OF OREGON’S MOTION TO DISMISS
OR, ALTERNATIVELY, FOR JUDGMENT ON
THE PLEADINGS (MEASURE 37
COMPENSATION CLAIM)

UTCR COMPLIANCE

Defendant certifies that it made a good faith effort to confer with petitioners, but the parties were unable to reach agreement.

ORAL ARGUMENT REQUESTED

Defendant requests oral argument on this motion and estimates that 30 minutes will be sufficient. Official court reporting services are requested.

MOTION

Defendant the State of Oregon (“State”) moves to dismiss plaintiffs’ Measure 37 Claim for Compensation. Alternatively, the State moves for judgment on the pleadings on this claim. Plaintiffs’ claim is based on an allegation that the State erred “by concluding that Goal 3 directly applied to plaintiffs’ property at the time of its acquisition in 1978.”

1 Plaintiffs are not entitled to compensation under Measure 37 as a matter of law because
2 (a) the Administrative Procedures Act provides the exclusive procedure for judicial review of
3 state agency orders, (b) the State elected to grant “waiver” relief in lieu of compensation under
4 Measure 37, (c) the alleged error by the State does not affect the relief granted, and (d) the claim
5 misconstrues the Order.

6 In support of this motion, the State relies upon ORCP 21 A(1), 21 A(8), and 21 B, ORS
7 183.480 and 183.484, the Petition for Judicial Review and Measure 37 Compensation Claim and
8 State of Oregon’s Amended Answer, the file and records of this case, and the following points
9 and authorities.

10 POINTS AND AUTHORITIES

11 Plaintiffs are property owners in Marion County (Petition, ¶ 1). They submitted a
12 demand to the State in July 2005, seeking relief under Measure 37 (Pet, ¶ 7). The State
13 determined the demand was valid and timely, and opted to grant “waiver” relief in lieu of
14 compensation (Pet, Ex 1). The Department of Land Conservation and Development (DLCD)
15 issued its final agency order to that effect on June 1, 2006 (*id.*).

16 Plaintiffs petitioned for judicial review under the Administrative Procedures Act (APA)
17 (Pet, ¶¶ 9-22). Plaintiffs allege DLCD erred by stating that statewide land use planning Goal 3
18 (Agriculture) applied to the property when plaintiff Henry Fu acquired it in March 1978 (*id.*).

19 Plaintiffs also assert a Measure 37 Compensation Claim based on the State’s Final Order
20 on plaintiffs’ demand (Pet, ¶¶ 23-28). Plaintiffs’ Measure 37 Compensation Claim is based on
21 same allegation of error in the Final Order, and on a misinterpretation of the terms and effect of
22 the Order (*id.*).

23 1. The court lacks subject matter jurisdiction.

24 The APA is the exclusive means to challenge the correctness of state agency orders.
25 ORS 183.480 (2); *Bay River v. Envir. Quality Comm.*, 26 Or App 717, 720 *rev denied*, 276 Or

1 555 (1976); *Ososke v. DMV*, 320 Or 657, 659-60 (1995). Plaintiffs’ Measure 37 Compensation
2 Claim is based on an alleged error in the Final Order (Pet, ¶ 24). Therefore, plaintiffs’ sole
3 remedy is their petition for judicial review.

4 The Oregon Court of Appeals consistently has held that the APA establishes the
5 exclusive method to challenge decisions made by state agencies. *See e.g., Lake County v. State*
6 *of Oregon*, 142 Or App 162, 165 (1996) (“ORS 183.480 (2) and numerous decisions of this court
7 make clear that judicial review of final agency orders shall be solely as provided in the APA”);
8 *Mendieta v. Division of State Lands*, 148 Or App 586, 599-600 (1997) *rev dismissed* 328 Or 331
9 (1999) (where “redress would have been available under ORS 183.484, had plaintiffs timely
10 filed their petition for judicial review[,]” the Court of Appeals, following *Lake County*, held “the
11 trial court erred in granting plaintiffs relief under ORS 183.490 and ORS 28.010”); *FOPPO v.*
12 *County of Marion*, 193 Or App 93, 97 (1988) *rev denied* 307 Or 326 (1989) (“PERS is subject to
13 the APA; therefore, the APA provides the exclusive methods for its actions and for review of
14 those actions”).

15 In *Bay River, supra*, the circuit court granted the plaintiff an injunction and declaratory
16 relief under ORS 28.010 with respect to a subsurface sewage disposal system feasibility
17 permit—a matter within the purview of the Department of Environmental Quality. The Court of
18 Appeals reversed and remanded, ordering the circuit court to vacate the judgments and dismiss
19 the complaint. In its opinion, the Court of Appeals explained:

20 “The Oregon Administrative Procedures Act, ORS 183.310 et seq,
21 establishes a comprehensive pattern for the judicial review of
22 administrative decisions. The various APA statutes governing
23 judicial review provide the **sole and exclusive methods of**
24 **obtaining judicial review.** *School Dist. No. 48 v. Fair Dis. App.*
25 *Bd.*, 14 Or App 35, 512 P2d 799 (1973).

26 “This is sufficient answer to Bay River’s contention that since it
27 couched its complaint in equitable terms and sought a declaratory
28 judgment, the circuit court obtained jurisdiction pursuant to ORS
29 28.010. A party cannot ignore the judicial review provisions of the

1 APA in favor of a general equitable or declaratory remedy.” 26 Or
App at 720 (emphasis added).

2 In *Clarke Electric, Inc. v. State Highway Division*, 93 Or App 693 (1988), the plaintiff
3 attempted to assert various tort claims under the Oregon Tort Claims Act, ORS 30.265, arising
4 from the Highway Division’s decision not to award the plaintiff a contract to install traffic
5 signals. The Court rejected the plaintiff’s arguments that the APA did not apply and that another
6 statute conferred jurisdiction. 93 Or App at 695-696. The Court also determined that the order
7 was a final order in other than a contested case with a right to challenge the order under the APA.
8 93 Or App at 696-697. Finally, the Court held that the plaintiff could not proceed directly under
9 the OTCA because the Highway Division’s:

10 “* * * alleged liability in tort is premised on a finding that
11 defendant’s order rejecting the bid was improper. That order was a
12 final order in other than a contested case, and the exclusive
13 procedure for review of such an order is under the APA. ORS
14 183.480(2). See *FOPPO v. County of Marion*, 193 Or App 93, 760
P2d 1363 (1988). Consequently, the trial court did not err in
granting Division’s motion to dismiss for failure to comply with
the APA time limitations for judicial review.” 93 Or App at 697.

15 Plaintiffs’ Measure 37 Compensation Claim presents the same question. The State’s
16 alleged liability is based on the action of the DLCD. DLCD is subject to the APA and its orders
17 may be judicially tested only by a petition for APA review. Consequently, plaintiffs’ Measure
18 37 Compensation Claim must be dismissed for lack of jurisdiction.

19 2. Plaintiffs’ cannot state a claim for compensation.

20 Plaintiffs cannot assert a claim for Measure 37 compensation because the State chose to
21 provide relief in the form of not applying land use regulations “in lieu of” compensation.
22 Measure 37 provides no right to compensation at the election of the claimants. Instead, the
23 statute grants the public entity the option to determine whether to pay compensation or “modify,
24 remove, or not apply” land use regulations. ORS 197.352 (8) and (10). Consequently, plaintiffs
25 cannot state a claim for compensation.

1 Oregon adopted Measure 37 through a ballot initiative in 2004. Oregon courts apply the
2 same methodology for interpreting statutes adopted through the initiative process that they apply
3 in construing statutes adopted by the Legislative Assembly. *Stranahan v. Fred Meyer, Inc.*, 331
4 Or 38 (2000); *PGE v. Bureau of Labor and Industries*, 317 Or 606, 612 n 4 (1993). The
5 objective is to discern the intent of those who enacted the law, in this case, the Oregon voters.
6 “The best evidence of the voters’ intent is the text of the provision itself. * * * The context of the
7 language of the ballot measure may also be considered[.]” *Stranahan*, 331 Or at 56 (quoting
8 *Roseburg School Dist. v. City of Roseburg*, 316 Or 374, 378 (1993)).

9 If the text and context of the statute reveal the clear intent of the voters, “further inquiry
10 is unnecessary.” *PGE*, 317 or at 611; *see also Stranahan*, 331 Or at 56.¹ The language and
11 structure of Measure 37 clearly show that the voters intended to give public entities, and not the
12 claimants, the choice between paying compensation and not applying land use regulations. The
13 statute provides:

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

20 * * * * *

21 (10) Claims made under this section shall be paid from funds, if any,
22 specifically allocated by the legislature, city, county, or metropolitan service
23 district for payment of claims under this section. Notwithstanding the availability
24 of funds under this subsection, a metropolitan service district, city, county, or
25 state agency shall have discretion to use available funds to pay claims or to
26 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.

¹ The second level of analysis involves review of the legislative history. The history of ballot initiatives includes the explanatory statement in the Voter’s Pamphlet. Measure 37’s explanatory statement supports a plain reading of the statute: “If a property owner proves that a land use regulation restricts the use of the owner’s property, and reduces its value then *the government responsible for the regulation will have a choice: pay the owner of the property an amount equal to the reduction in value or modify, change or not apply the regulation to the owner’s property*” www.oregon.gov/LCD/MEASURE37/legal_information.shtml#Information_About_the_Election (emphasis added).

1 ORS 197.352 (8) and (10). Section 8 generally grants the public entities to which a
2 demand for compensation is submitted the option to pay or provide alternate relief. Section 10
3 makes it clear that the option is wholly within the discretion of the public entities and specifically
4 applies to claims under Section 6 of the statute (Petition, ¶¶ 23-28).

5 In this case, The Final Order provides:

6 “In lieu of compensation under ORS 197.352, the State of Oregon will not
7 apply the following laws to Henry and Jui-Chih Fu’s partition of the 55.72-acre
8 property into 27 parcels or to their development a dwelling on each parcel:
9 applicable provisions of Goal 3, ORS 215 and OAR 660, division 33. These laws
10 will not apply [to] the claimants only to the extent necessary to allow Henry Fu to
11 use the subject property for the use described in this report, and only to the extent
12 that use was permitted when he acquired the property on March 15, 1976, and to
13 allow Jui-Chih Fu to use the subject property for the use described in this report,
14 and only to the extent that use was permitted when she acquired the property on
15 March 27, 1984.”

16 Pet, Ex 1, p 1 of 12. There is no dispute that DLCD opted not to apply certain land use
17 regulations “in lieu” of paying compensation to plaintiffs. Plaintiffs are not entitled to
18 compensation.

19 3. The applicability of Goal 3 does not affect the relief granted.

20 Plaintiffs allege that the State continues to apply, or intends to continue applying
21 restrictive land use regulations more than 180 days after plaintiffs submitted their demand (¶¶
22 24-26). However, plaintiffs do not allege that any regulations that should have been waived
23 were not waived. The court’s conclusion as to the applicability of Goal 3 will not change the
24 nature or scope of relief to which plaintiffs were entitled, and received, under Measure 37.

25 If a public entity opts not to apply restrictive land use regulations, Measure 37 requires
26 that the waiver allow the claimant a use permitted at the time of acquisition. In other words, the
27 public entity waives land use regulations enacted or enforced after acquisition. If a regulation
28 applied at the time of acquisition, then it need not be waived.

1 In this case, the State waived applicable provisions of Statewide Planning Goal 3 *that*
2 *took effect after acquisition*. The applicable provisions of Goal 3 in effect when plaintiffs
3 acquired their ownership interests in the property are not subject to waiver under Measure 37. If
4 Goal 3 applied, a “use permitted” at the time of acquisition is a use permitted under Goal 3. If
5 Goal 3 did not apply, then Goal 3 will not affect the determination of a “use permitted” at the
6 time of acquisition. In either situation, the relief already granted to plaintiffs is the relief to
7 which they are entitled under Measure 37.

8 4. Plaintiffs’ Measure 37 Compensation Claim misconstrues the Order.

9 Plaintiffs allege that the Final Order:

10 “* * * has wrongfully determined that restrictive state land use regulations
11 continue to apply to the subject property, and has wrongfully denied plaintiffs’
claim.”

12 Pet, ¶ 24. The allegation is unfounded in both respects.

13 Plaintiffs’ demand to the State was not denied. The Final Order provides that “[t]he
14 Claim is approved” (Pet, Ex 1, p 1). The Order goes on to grant appropriate relief under the
15 express terms of Measure 37.

16 Contrary to plaintiffs’ allegation, the Final Order determines that provisions of Goal 3
17 that took effect after plaintiffs acquired the property “*will not apply*” (*id.*; emphasis added). The
18 Order also accurately states the plaintiffs’ use of the property remains “subject to the standards in
19 effect” on the date of acquisition and that those standards include “applicable provisions of Goal
20 3” (*id.*, and p 7, fn 5 and accompanying text). The Order makes no change in state law regarding
21 Goal 3 and provides the relief available to plaintiffs under Measure 37. Nothing in the Order can
22 be construed to “wrongfully” continue the application of state land use regulations.

23 **CONCLUSION**

24 The State issued a Final Order on plaintiffs’ Measure 37 demand. Therefore, the sole and
25 exclusive remedy for alleged errors relating to that demand is a petition for judicial review. The

1 court lacks jurisdiction over a claim for compensation and plaintiffs cannot state a claim for
2 compensation.


3 Plaintiffs' claim for compensation also is without merit under the terms of Measure 37.
4 The statute permits the State, at its option, to pay compensation or not apply certain land use
5 regulations. The State elected to waive, not pay.

6 Plaintiffs' claim also fails on its own terms. The allegations of the claim misstate the
7 terms and effect of the Final Order. Whether or not the State correctly stated that Goal 3 applied,
8 the Order to "not apply" regulations enacted after plaintiffs acquired the property was proper and
9 the only relief to which plaintiffs were entitled under Measure 37.

10 DATED this 4th day of October, 2006.

11 Respectfully submitted,

12 HARDY MYERS
13 Attorney General


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1 **CERTIFICATE OF SERVICE**

2 I certify that on October 4, 2006, I served the foregoing *State of Oregon's Motion to*
3 *Dismiss or, Alternatively, for Judgment on the Pleading* upon the parties hereto by the method
4 indicated below, and addressed to the following:

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