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

LAUREL H. GRIFFITHS,

Plaintiff,

v.

STATE OF OREGON, acting by and through  
the Department of Land Conservation and  
Development,

Defendant.

Case No. 06CV0159SF

MOTION TO DISMISS AND MEMORANDUM  
OF POINTS AND AUTHORITIES (ORCP 21 A  
(1) and A (8))

Oral Argument Requested

**ORAL ARGUMENT REQUESTED**

Defendant, the State of Oregon, requests oral argument on these Motions to Dismiss, and estimates that 30 minutes will be required. Official court reporting services are requested.

**SUMMARY OF PLAINTIFF’S CLAIM**

Plaintiff is a property owner in Deschutes County (Complaint, ¶ 1). She submitted a Measure 37 claim to the State in April 2005, seeking compensation for the reduction in fair market value suffered because of land use regulations that restrict her use of the property (¶ 3). As provided under Measure 37, the State opted to waive certain restrictive land use regulations in lieu of paying compensation to plaintiff. The Department of Land Conservation and Development (DLCD) issued its final agency order to that effect on October 4, 2005 (¶ 4).

In her Complaint here, plaintiff asserts a claim for compensation under Section 6 of Measure 37, because the agency order did not waive “land use regulations promulgated between 1949 and 1985” (Compl, ¶ 10). Plaintiff alleges DLCD incorrectly determined that plaintiff acquired her ownership interest in the property on June 7, 1985, rather than December 12,

1 1949—the date on which plaintiff’s late husband acquired the property (¶¶ 4, 7, 8). Plaintiff  
2 does not seek judicial review under the Administrative Procedures Act (APA), which is the  
3 exclusive procedure for determining the correctness of agency orders.

4 **MOTIONS TO DISMISS**

5 Defendant moves the Court to dismiss plaintiff’s Complaint on the following grounds:

6 **Motion No. 1 (Court lacks subject matter jurisdiction – ORCP 21 A (1))**

7 The Complaint asserts one claim—for compensation under Measure 37. The Court lacks  
8 subject matter jurisdiction over this claim for two related reasons:

9 1. Plaintiff alleges that DLCD’s decision was wrong, but does not petition for judicial  
10 review of that decision under the APA, the exclusive means to challenge the correctness of state  
11 agency orders. ORS 183.480 (2); *Bay River, Inc. v. Environmental Quality Comm.*, 26 Or App  
12 717, 720 *rev denied*, 276 Or 555 (1976). Plaintiff’s allegation that the agency erred is not  
13 actionable under Measure 37. Therefore, the Court lacks subject matter jurisdiction over  
14 plaintiff’s claim.

15 2. Plaintiff cannot cure the defect in her pleading. Even if plaintiff alleged an APA claim,  
16 the Court still lacks subject matter jurisdiction because the Complaint was not filed within 60  
17 days of the agency’s final order. ORS 183.484 (2). Plaintiff filed the Complaint on March 27,  
18 2006, nearly six months after service of the order on October 4, 2005. Therefore, the Court does  
19 not have, and cannot obtain, jurisdiction, and the Complaint should be dismissed.

20 **Motion No. 2 (Failure to state a claim – ORCP 21 A (8))**

21 To state a claim under Measure 37, plaintiff must plead and prove that her property  
22 *wrongly* continues to be subject to restrictive land use regulations 180 days after she submitted  
23 her Measure 37 claim to the State (Compl, ¶¶ 3, 10). Plaintiff cannot establish that any land use  
24 regulations continue to apply to the property *in violation of Measure 37* because she cannot  
25 establish that DLCD *should have* decided she acquired the property in 1949 and *should have*

1 granted a waiver of restrictive land use regulations subsequently enacted or enforced. The time  
2 for disputing DLCD's decision is long since passed (§ 4).

3 In support of these motions, the State relies upon ORCP 21 A (1) and A (8), the  
4 Administrative Procedures Act (APA), the files and record of this case, the following Points and  
5 Authorities, and the Declaration of Darsee Staley filed concurrently.

## 6 POINTS AND AUTHORITIES

### 7 I. Measure 37 Background

8 Oregon voters enacted Ballot Measure 37 through the initiative process in 2004.  
9 Codified as part of Chapter 197, where Oregon's statewide land use planning statutes are found,  
10 Measure 37 permits owners of private real property to seek compensation for reductions in fair  
11 market value caused by certain land use regulations. As an alternative to payment, public  
12 entities may "waive," that is modify, remove, or not apply, certain regulations.

13 A landowner qualifies for Measure 37 relief if: (1) a public entity enacts or enforces a  
14 "land use regulation" that (2) restricts the owner's use of private real property and (3) has the  
15 effect of reducing the fair market value of the private real property. ORS 197.352 (1).  
16 Subsection (3) of Measure 37 provides that certain land use regulations shall not be a basis for a  
17 claim under Section (1)<sup>1</sup>. Subsection (5) requires landowners to assert claims within two years  
18 of the effective date of Measure 37 (December 2, 2004) or the date on which a land use  
19 regulation is applied "as an approval criteria" on a specific land use application, whichever is  
20 later.

21 After determining that an owner submitted a timely, valid claim, the public entity has the  
22 option to pay "just compensation"<sup>2</sup> or to "modify, remove, or not \* \* \* apply" land use  
23 regulations to the extent necessary "to allow the owner to use the property for a use permitted at  
24 the time the owner acquired the property." ORS 197.352 (8); *see also* ORS 197.352 (10).

25  
26 <sup>1</sup> None of the exemptions are directly at issue.

<sup>2</sup> Subsection (2) defines "just compensation." ORS 197.352 (2).

1 Allowing the owner to use the property in a way that would otherwise be prohibited is commonly  
2 referred to as granting a Measure 37 “waiver.” DLCD is exercising the waiver option.<sup>3</sup>

3 Measure 37 does not specify any procedure for claim processing, but permits public  
4 entities to adopt procedures. The State’s Department of Administrative Services (DAS) adopted  
5 procedural rules, found at OAR 125-145-0010 to 125-145-0130, that set minimum requirements  
6 for the content of a Measure 37 claim against the State.

7 When DAS receives a claim, it provides written notice of the claim to neighboring  
8 landowners, certain neighborhood or community organizations, and anyone who requests notice.  
9 OAR 125-145-0080. This provision is consistent with the notice provisions of ORS 215.223  
10 regarding zone changes. Persons receiving notice, or any other person, may submit comments,  
11 evidence and information within ten days. OAR 125-145-0080 (2), (3).

12 DAS forwards Measure 37 claims to the state agency that enacted or enforced a relevant  
13 land use regulation, *i.e.* the “regulating entity.” OAR 125-145-0090. The regulating entity  
14 reviews and analyzes the claim, gathers additional information if necessary and available, and  
15 issues a draft report. Draft reports explain the preliminary determination of the statutory criteria  
16 for relief, including timeliness of the claim, ownership, the land use regulations that are the basis  
17 of the claim, the effect of relevant land use regulations on the property’s fair market value, and  
18 applicable exemptions, if any.

19 The draft report is made public on the internet and copies are mailed to the claimant, and  
20 any persons who submitted comments or requested notice. OAR 125-145-0100. After a ten-day  
21 comment period, and based in part on the comments received, the regulating entity and DAS  
22 issue a final report and order. The agencies serve the final report and order on any persons who  
23 received copies of the draft report or submitted comments on the draft report. The agencies also  
24 make the final orders public by posting them on the internet.

25 \_\_\_\_\_  
26 <sup>3</sup> DLCD can pay compensation only if and when the legislature appropriates funds for that purpose. See OAR 660-  
002-0010(8) (c).

1 Section 6 of Measure 37 provides that “[i]f a land use regulation continues to apply to the  
2 subject property more than 180 days after \* \* \* written demand for compensation \* \* \*, the  
3 present owner \* \* \* shall have a cause of action for compensation under this section in the circuit  
4 court.” ORS 197.352 (6). This Section essentially imposes a 180 day deadline for public entities  
5 to decide claims. In the event a public entity appropriately waives restrictive land use  
6 regulations in accordance with Section 8 of Measure 37, no cause of action accrues.

7 II. Plaintiff’s Administrative Claim

8 Plaintiff submitted her Measure 37 claim to the state in April 2005 and there is no dispute  
9 that DLCD decided plaintiff’s claim within 180 days (Compl, ¶¶ 3, 4). DLCD issued a draft  
10 report on September 19, 2005, received and considered comments from plaintiff and others, and  
11 issued its Final Order and Report on October 4, 2005 (Exs 1-3).<sup>4</sup>

12 DLCD determined that plaintiff was the present owner of the property and acquired her  
13 ownership interest on June 19, 1985, by conveyance from her husband, James L. Griffiths (Ex 3,  
14 p 6). DLCD found no evidence that plaintiff obtained an ownership interest in the property prior  
15 to that 1985 conveyance (Ex 3, p 6, fn 1). Consequently, DLCD approved plaintiff’s claim and  
16 waived land use regulations to allow plaintiff a use of the property permitted at the time she  
17 acquired the property in 1985. ORS 197.352 (8).

18 III. The Administrative Procedures Act

19 The APA sets forth the exclusive method for plaintiff to challenge DLCD’s Final Order  
20 on her Measure 37 claim. ORS 183.480 (2); *Bay River, supra*, 26 Or App at 720; *Ososke v.*  
21 *DMV*, 320 Or 657, 659-60 (1995). Plaintiff had 60 days from the mailing date of the order to  
22 challenge the correctness of DLCD’s decision by filing a petition for judicial review in the  
23 circuit court. ORS 183.484 (1) and (2). This Court has jurisdiction to determine whether the  
24 agency erred only if plaintiff filed for judicial review by December 5, 2005.<sup>5</sup>

25 <sup>4</sup> Exhibits 1-3 are attached to the Declaration of Darsee Staley

26 <sup>5</sup> The 60 day period expired on Saturday December 3, 2005, so plaintiff’s petition would have been timely if filed  
by Monday December 5, 2005.

1 The APA, at ORS 183.484 (2), provides that “[p]etitions for review *shall* be filed within  
2 60 days *only* following the date the order is served” (emphasis added). Timely filing of a  
3 petition for judicial review is a jurisdictional requirement, as the Court of Appeals explained in  
4 *G.A.S.P. v. Environmental Quality Commission*, 201 Or App 362, 366 (2005):

5 “ORS 183.484(1) confers on certain circuit courts jurisdiction for  
6 judicial review of orders in other than contested cases. ORS  
7 183.484(2) then provides that ‘[p]etitions for review shall be filed  
8 within 60 days only following the date the order is served.’ The  
9 timely filing of a petition for judicial review of agency action is a  
10 jurisdictional requirement. *Ososke v. DMV*, 320 Or 657, 659-60,  
11 891 P2d 633 (1995). Accordingly, the failure to comply with that  
12 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*[.]’”

13 Defendant DLCD mailed the Final Order on October 4, 2005 (Ex 2). The Petition in this  
14 case was filed on March 27, 2006, long after the 60 day period had expired (OJIN #1).  
15 Therefore, the Court lacks jurisdiction and the agency order is incontestable.

#### 16 IV. Plaintiff's Measure 37 Complaint

17 In her Measure 37 Complaint in this court, plaintiff acknowledges that DLCD waived  
18 land use regulations enacted after 1985, *i.e.*, the date DLDC determined plaintiff acquired her  
19 interest (Comp1, ¶ 4). Plainly, plaintiff contests the correctness of that determination by alleging  
20 that DLCD should have waived regulations back to 1949, *i.e.*, the date plaintiff contends she  
21 acquired the property (¶¶ 4, 10).<sup>6</sup> Plaintiff chose not to challenge the agency order under the  
22 APA.<sup>7</sup> Consequently, plaintiff cannot establish that DLCD improperly exercised its waiver  
23

24 <sup>6</sup> The Complaint also alleges facts which plaintiff contends support a December 12, 1949 acquisition date (¶¶ 7, 8).

25 <sup>7</sup> The Final Order included a statement outlining plaintiff's right to judicial review under ORS 184 484. Ex 3, p 3;  
26 *see also* Order of Dismissal by the Court of Appeals in *Hoff v DLCD*, CA A129414, holding that the circuit court  
has jurisdiction of DLCD's Final Orders in Measure 37 cases as orders in “other than contested cases” and that the  
Court of Appeals did not (copy attached as Attachment A)

1 option under Measure 37 by failing to waive the additional land use regulations plaintiff believes  
2 should have been waived.

3 The Oregon Court of Appeals consistently has held that the APA establishes the  
4 exclusive method to challenge decisions made by state agencies. *See e.g., Lake County v State*  
5 *Of Oregon*, 142 Or App 162, 165 (1996) (“ORS 183.484 (2) and numerous decisions of this  
6 court make clear that judicial review of final agency orders shall be solely as provided in the  
7 APA”); *Mendieta v. Division of State Lands*, 148 Or App 586, 599-600 (1997) *rev dismissed* 328  
8 Or 464 (1999) (where “redress would have been available under ORS 183.484, had plaintiffs  
9 timely filed their petition for judicial review[,]” the Court of Appeals, following *Lake County*,  
10 held “the trial court erred in granting plaintiffs relief under ORS 183.490 and ORS 28.010”);  
11 *FOPPO v. County of Marion*, 93 Or App 93, 97 (1988) *rev denied* 307 Or 326 (1989) (“PERS is  
12 subject to the APA; therefore, the APA provides the exclusive methods for its actions and for  
13 review of those actions”).

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

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

23 “This is sufficient answer to Bay River’s contention that since it  
24 couched its complaint in equitable terms and sought a declaratory  
25 judgment, the circuit court obtained jurisdiction pursuant to ORS  
26 28.010. A party cannot ignore the judicial review provisions of the  
APA in favor of a general equitable or declaratory remedy.” 26 Or  
App at 720 (emphasis added).<sup>8</sup>

<sup>8</sup> Also, in *Bay River*, as here, the complaint was untimely. 26 Or App at 722, fn. 2



1 DLCD should have determined she purchased the property on December 12, 1949. This case  
2 should be dismissed.

3

4 DATED this 2<sup>d</sup> day of June, 2006.

5

Respectfully submitted,

6


HARDY MYERS

7

Attorney General

8

9

  
DARSEE STALEY #87351  
Senior Assistant Attorney General  
Trial Attorney  
Tel (503) 947-4700  
Fax (503) 947-4792  
darsee.staley@doj.state.or.us  
Of Attorneys for State of Oregon

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Replies  
Due 11/09/05 ?

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IN THE COURT OF APPEALS OF THE STATE OF OREGON

CHARLES HOFF,  
Petitioner,  
v.  
DEPARTMENT OF LAND CONSERVATION  
AND DEVELOPMENT,  
Respondent.

Agency No. M 119114  
CA A129414  
ORDER OF DISMISSAL

Colman & Dockert

Before Wollheim, P.J., Brewer, C.J., and Schuman, J.

Petitioner has petitioned for judicial review of a joint order of the Department of Administrative Services (DAS) and the Department of Land Conservation and Development (DLCD) determining not to apply certain land use regulations to petitioner's parcel of land in lieu of paying compensation under Ballot Measure 37. Respondent has moved for a determination of whether the court has jurisdiction of the order on the ground that the order is an order in other than a contested case and, therefore, jurisdiction lies in the circuit court, not the Court of Appeals. Respondent further requests that, if the court determines that the court does not have jurisdiction of the order, the judicial review be dismissed. Lastly, respondent requests a determination whether the circuit court of Washington County or of Clackamas County has jurisdiction to review the order.

The motion for a determination of jurisdiction is granted. The court determines that the order is an order in other than a contested case, that the circuit court has jurisdiction of judicial review of the order, and that this court does not. On that ground, the court dismisses the judicial review in this court.

The parties have not briefed the question of which circuit court has jurisdiction of a petition for judicial review of a joint DAS/DLCD order in other than a contested case relating to property apparently located in Clackamas County. Moreover, petitioner already has filed actions in the circuit courts of both Washington County and Clackamas County relating to the order; therefore, there is no need for this court to transfer the judicial review to a circuit court under ORS 14.165. Respondent's request to determine which circuit court has jurisdiction of the judicial review of the joint DAS/DLCD order is denied.

Judicial review dismissed.

JAN 17 2006

Date

Robert Wollheim, Presiding Judge

ORDER - Page 1 of 2

ATTACHMENT  
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APPELLATE DIVISION  
SALEM, OR

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

LAUREL H. GRIFFITHS,

Plaintiff,

v.

STATE OF OREGON, acting by and through  
the Department of Land Conservation and  
Development,

Defendant.

Case No. 06CV0159SF

DECLARATION OF DARSEE STALEY  
IN SUPPORT OF DEFENDANT'S MOTIONS  
TO DISMISS (ORCP 21 A (1) AND A (8))

I, Darsee Staley, do declare and say:

1. I am a Senior Assistant Attorney General at the Oregon Department of Justice, attorneys for Defendant in the above-captioned matter. I make this declaration based on my personal knowledge and in support of the State's Motions to Dismiss (ORCP 21 A (1) and A (8)).

2. The following Exhibits, attached hereto, are true and correct copies of documents maintained in the files of the Department of Land Conservation and Development (DLCD) on Measure 37 claim number 118317 (Laurel H. Griffiths):

- Exhibit 1 is the Certificate of Mailing for the Draft Staff Report and Recommendation on September 19, 2005;
- Exhibit 2 is the Certificate of Mailing for the Final Order and Final Staff Report and Recommendation on October 4, 2005; and
- Exhibit 3 is the Final Order and Final Staff Report and Recommendation.

1 I HEREBY DECLARE THAT THE ABOVE STATEMENT IS TRUE TO THE BEST  
2 OF MY KNOWLEDGE AND BELIEF, AND THAT I UNDERSTAND IT IS MADE FOR USE  
3 AS EVIDENCE IN COURT AND IS SUBJECT TO PENALTY FOR PERJURY.

4  
5 DATED this 2<sup>nd</sup> day of June, 2006.

6  
7   
8 DARSEE STALEY  
9 Senior Assistant Attorney General

Department of Land Conservation and Development  
635 Capitol St NE, Suite 150  
Salem, OR 97301

## CERTIFICATE OF MAILING

I certify that I served M 118317 Draft Staff  
Report and Recommendations on:

### See Attached List

by following indicated method or methods:

by **mailing** a full, true and correct copy in a sealed, first-class postage-prepaid envelope, addressed to the person(s) listed above, and deposited with the United States Postal Service at Salem, Oregon on the date set forth below.

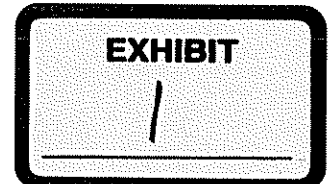
by **hand delivering** a full, true and correct copy to the person(s) listed above, on the date set forth below.

by **faxing** a full, true and correct copy to the person(s) at the fax number(s) shown above, on the date set forth below.

DATED this 19 day of September, 2005.

Name: [Signature]

Title: Office/Rules Support Specialist



Department of Land Conservation and Development  
635 Capitol St NE, Suite 150  
Salem, OR 97301

## CERTIFICATE OF MAILING

I certify that I served M118317 Griffiths Final Staff  
Report and Final Order on:

### See Attached List

by following indicated method or methods:

by **mailing** a full, true and correct copy in a sealed, first-class postage-prepaid envelope, addressed to the person(s) listed above, and deposited with the United States Postal Service at Salem, Oregon on the date set forth below.

by **hand delivering** a full, true and correct copy to the person(s) listed above, on the date set forth below.

by **faxing** a full, true and correct copy to the person(s) at the fax number(s) shown above, on the date set forth below.

DATED this 4<sup>th</sup> day of October, 2005.

Name: NA

Title: Office/Rules Support Specialist

EXHIBIT

2

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

IN THE MATTER OF THE CLAIM ) FINAL ORDER  
FOR COMPENSATION UNDER ) CLAIM NO. M118317  
BALLOT MEASURE 37 (CHAPTER 1, )  
OREGON LAWS 2005) OF )  
Laurel H. Griffiths, CLAIMANT )

Claimant: Laurel H. Griffiths (the Claimant)

Property: Township15S, Range 13E, Section 7, Tax Lot 500, Deschutes County

Claim: The demand for compensation and any supporting information received from the Claimant by the State of Oregon (the Claim).

Claimant submitted the Claim to the State of Oregon under Ballot Measure 37 (2004) (Oregon Laws 2005, Chapter 1) (hereafter, Measure 37). Under OAR 125-145-0010 *et seq.*, the Department of Administrative Services (DAS) referred the Claim to the Department of Land Conservation and Development (DLCDC) as the regulating entity. This order is based on the record herein, including the Findings and Conclusions set forth in the Final Staff Report and Recommendation of DLCDC (the DLCDC Report) attached to and by this reference incorporated into this order.

ORDER

The Claim is approved as to laws administered by DLCDC and the Land Conservation and Development Commission (LCDC) for the reasons set forth in the DLCDC Report, and subject to the following terms:

1. In lieu of compensation under Measure 37, the State of Oregon will not apply the following laws to Laurel Griffiths' division and residential development of her 115.5-acre property: provisions of ORS 215 and OAR 660, division 33, enacted after June 19, 1985. These land use regulations will not apply to Laurel Griffiths' use of her property only to the extent necessary to allow the claimant a use permitted at the time she acquired an interest in the property on June 19, 1985.
2. The action by the State of Oregon provides the state's authorization to the claimant to use her property subject to the standards in effect on June 19, 1985. On that date, the property was subject to applicable provisions of Statewide Planning Goal 3 and ORS 215.
3. To the extent that any law, order, deed, agreement or other legally enforceable public or private requirement provides that the property may not be used without a permit, license, or other form of authorization or consent, the order will not authorize the use of the property unless the claimant first obtains that permit, license or other form of authorization or consent. Such

FINAL ORDER

EXHIBIT

3

Page 1 of 3

requirements may include, but are not limited to: a building permit, a land use decision, a permit as defined in ORS 215.402 or ORS 227.160, other permits or authorizations from local, state or federal agencies, and restrictions on the use of the property imposed by private parties.

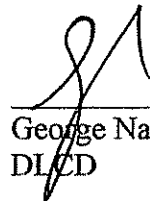
4. Any use of the property by the claimant under the terms of the order will remain subject to the following laws: (a) those laws not specified in (1) above; (b) any laws enacted or enforced by a public entity other than the Commission or the department; and (c) those laws not subject to Measure 37 including, without limitation, those laws exempted under Section (3) of the Measure.

5. Without limiting the generality of the foregoing terms and conditions, in order for the claimant to use the property, it may be necessary for her to obtain a decision under Measure 37, from a city and/or county and/or metropolitan service district that enforces land use regulations applicable to the property. Nothing in this order relieves the claimant from the necessity of obtaining a decision under Measure 37, from a local public entity that has jurisdiction to enforce a land use regulation applicable to a use of the property by the claimant.

This Order is entered by the Deputy Director of the DLCD as a final order of DLCD and the Land Conservation and Development Commission under Measure 37, OAR 660-002-0010(8), and OAR 125, division 145, and by the Deputy Administrator for the State Services Division of the DAS as a final order of DAS under Measure 37, OAR 125, division 145, and ORS 293.

FOR DLCD AND THE LAND CONSERVATION  
AND DEVELOPMENT COMMISSION:

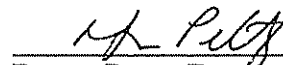
Lane Shetterly, Director



George Naughton, Deputy Director  
DLCD

Dated this 4<sup>th</sup> day of October, 2005.

FOR the DEPARTMENT OF ADMINISTRATIVE  
SERVICES:



Dugan Petty, Deputy Administrator  
DAS, State Services Division

Dated this 4<sup>th</sup> day of October, 2005.

EXHIBIT 3, PAGE 2 OF 11

## NOTICE OF RIGHT TO APPEAL OR OTHER JUDICIAL RELIEF

You are entitled, or may be entitled, to the following judicial remedies:

1. Judicial review under ORS 293.316: Judicial review under ORS 293.316 may be obtained by filing a petition for review within 60 days from the service of this order. Judicial review under ORS 293.316 is pursuant to the provisions of ORS 183.482 to the Court of Appeals.

2. Judicial review under ORS 183.484: Judicial review under ORS 183.484 may be obtained by filing a petition for review within 60 days from the service of this order. A petition for judicial review under ORS 183.484 may be filed in the Circuit Court for Marion County and the Circuit Court in the county in which you reside.

3. A cause of action under Oregon Laws 2005, chapter 1 (Measure 37 (2004)): A present owner of the property, or any interest therein, may file a cause of action in the Circuit Court for the county where the property is located, if a land use regulation continues to apply to the subject property more than 180 days after the present owner made a written demand for compensation.

(Copies of the documents that comprise the record are available for review at the Department's office at 635 Capitol Street NE, Suite 150, Salem, Oregon 97301-2540)

### FOR INFORMATION ONLY

The Oregon Department of Justice has advised the Department of Land Conservation and Development that "[i]f the current owner of the real property conveys the property before the new use allowed by the public entity is established, then the entitlement to relief will be lost."

EXHIBIT 3, PAGE 3 OF 11

**BALLOT MEASURE 37 (CHAPTER 1, OREGON LAWS 2005)  
CLAIM FOR COMPENSATION**

**OREGON DEPARTMENT OF LAND CONSERVATION AND DEVELOPMENT  
Final Staff Report and Recommendation**

October 4, 2005

**STATE CLAIM NUMBER:** M118317

**NAME OF CLAIMANT:** Laurel H. Griffiths

**MAILING ADDRESS:** 717 NW Helmholtz  
Redmond, Oregon 97756

**PROPERTY IDENTIFICATION:** Township 15S, Range 13E, Section 7  
Tax Lot 500  
Deschutes County

**OTHER CONTACT INFORMATION:** Chris B. Bedsaul, Agent  
63215 Wishing Well Lane  
Bend, Oregon 97701

Debra K. Carter  
Attorney-in-fact for Laurel H. Griffiths  
717 NW Helmholtz  
Redmond, Oregon 97756

**CURRENT ZONING** EFU-T/R/B (Tumalo/Redmond/Bend)

**DATE RECEIVED BY DAS:** April 14, 2005

**180-DAY DEADLINE:** October 11, 2005

**I. SUMMARY OF CLAIM**

The claimant, Ms. Laurel H. Griffiths, seeks compensation in the amount of \$3,772,190 for the reduction in fair market value as a result of certain land use regulations that are alleged to restrict the use of certain private real property. The claimant desires compensation or the right to divide the 115.5-acre property into 58, approximately two-acre parcels, and to develop a dwelling on each parcel created. The property is located at 717 NW Helmholtz, near Redmond, in Deschutes County. (See claim.)

EXHIBIT 3, PAGE 4 OF 11

## II. SUMMARY OF STAFF RECOMMENDATION

Based on the findings and conclusions set forth below, the Department of Land Conservation and Development (the department) has determined that the claim is valid. Department staff recommends that, in lieu of compensation, the requirements of the following state laws enforced by the Land Conservation and Development Commission (the Commission) or the department not apply to Laurel Griffiths' use of the property for residential development: applicable provisions of Statewide Planning Goal 3 (Agricultural Lands), ORS 215 and OAR 660, division 33, enacted after June 19, 1985. These laws will not apply to the claimant only to the extent necessary to allow Laurel Griffiths a use of the property permitted at the time she acquired it in 1985. (See the complete recommendation in Section VI. of this report.)

## III. COMMENTS ON THE CLAIM

### Comments Received

On April 19, 2005, the Department of Administrative Services (DAS) provided written notice to the owners of surrounding properties. According to DAS, five written comments, evidence or information were received in response to the 10-day notice.

The comments do not address whether the claim meets the criteria for relief (compensation or waiver) under Measure 37. Comments concerning the effects a use of the property may have on surrounding areas generally are not something that the department is able to consider in determining whether to waive a state law. If funds do become available to pay compensation, then such effects may become relevant in determining which claims to pay compensation for instead of waiving a state law. (See comment letters in the department's claim file.)

The department received no comments on the draft staff report.

## IV. TIMELINESS OF CLAIM

### Requirement

Ballot Measure 37, Section 5, requires that a written demand for compensation be made:

1. For claims arising from land use regulations enacted prior to the effective date of the measure (December 2, 2004), within two years of that effective date or the date the public entity applies the land use regulation as an approval criteria to an application submitted by the owner, whichever is later; or
2. For claims arising from land use regulations enacted after the effective date of the measure (December 2, 2004), within two years of the enactment of the land use regulation, or the date the owner of the property submits a land use application in which the land use regulation is an approval criteria, whichever is later.

## **Findings of Fact**

This claim was submitted to DAS on April 14, 2005, for processing under OAR 125, division 145. The claim identifies ORS 197 and 215 and OAR 660, division 33 as laws that restrict the use of the property and are the basis for the claim. Only laws that were enacted prior to December 2, 2004, the effective date of Measure 37, are the basis for this claim. (See citations of statutory and administrative rule history of the Oregon Revised Statutes and Oregon Administrative Rules.)

## **Conclusions**

The claim has been submitted within two years of December 2, 2004; the effective date of Measure 37, based on land use regulations adopted prior to December 2, 2004, and is therefore timely filed.

## **V. ANALYSIS OF CLAIM**

### **1. Ownership**

Ballot Measure 37 provides for payment of compensation or relief from specific laws for “owners” as that term is defined in the Measure. Ballot Measure 37, Section 11(C) defines “owner” as “the present owner of the property, or any interest therein.”

## **Findings of Fact**

The claimant’s now-deceased husband, James L. Griffiths, acquired the subject property on December 12, 1949, as reflected by a Quit Claim Deed included with the claim. On June 19, 1985, James L. Griffiths conveyed ownership of the property to himself and his wife, claimant Laurel H Griffiths, as reflected by a Statutory Bargain and Sale Deed, also included with the claim.

## **Conclusions**

The claimant, Laurel Griffiths, is an “owner” of the subject property, as that term is defined by Section 11(C) of Ballot Measure 37, as of June 19, 1985. James L. Griffiths is a “family member” to Laurel Griffiths as of 1949, as that term is defined in Section 11(A) of the Measure.<sup>1</sup>

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<sup>1</sup> The claim asserts that the claimant has owned the property since her husband acquired it in 1949, based on her marriage to James Griffith in 1948. However, marriage itself does not create any ownership interest in the property. The deeds included in the claim establish that the claimant’s husband, James Griffiths acquired the property in 1949, and that he conveyed the property to himself and the claimant in 1985. There is no documentation in the claim file to indicate that the claimant had any ownership interest in the property prior to the transfer of property to her in 1985.

## **2. The Laws that are the Basis for this Claim**

In order to establish a valid claim, Section 1 of Ballot Measure 37 requires, in part, that a law must restrict the claimant's use of private real property in a manner that reduces the fair market value of the property relative to how the property could have been used at the time the claimant or a family member acquired the property.

### **Findings of Fact**

The claim identifies ORS 197 and 215 and OAR 660, division 33 as laws that restrict development of the property and reduce its value.<sup>2</sup>

The claim is based, generally, on Deschutes County's current Exclusive Farm Use (EFU) Zone and the applicable provisions of state law that require such zoning. The claimant's property is zoned EFU, as required by Statewide Planning Goal 3 in accord with OAR 660, division 33, and ORS 215 because the claimant's property is "Agricultural Land" as defined by Goal 3. Goal 3 became effective on January 25, 1975, and required that agricultural lands as defined by the Goal, be zoned EFU pursuant to ORS 215.

Current land use regulations, particularly ORS 215.263, 215.284, and 215.780 and OAR 660, division 33 as applied by Goal 3, do not allow the subject property to be divided into parcels less than 80 acres and establish standards for allowing the existing or any proposed parcels to have farm or non-farm dwellings on them.

ORS 215.780 established an 80-acre minimum size for the creation of new lots or parcels in EFU zones and became effective November 4, 1993 (Chapter 792, Oregon Laws 1993). ORS 215.263 (2003 edition) establishes standards for the creation of new parcels for non-farm uses and dwellings allowed in an EFU zone.

OAR 660-033-0135 (applicable to farm dwellings) became effective on March 1, 1994, and interprets the statutory standard for a primary dwelling in an EFU zone under ORS 215.283.

OAR 660-033-0130(4)(e) (applicable to non-farm dwellings in marginal lands counties) became effective on August 7, 1993.

The claimant's family acquired the subject property in 1949, prior to the adoption of the Statewide Planning Goals and their implementing statutes and regulations that currently restrict the use of the property.

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<sup>2</sup> The claim states that ORS 197 "created restrictions on the development or improvements on the identified property of this Claim that was permitted conditionally in 1971." However, that procedural statute does not its face, restrict the use of the property, and the claimant's summary statement does not establish how any of its provisions, in fact, restrict the use of the property in a manner that reduces its fair market value. In the absence of any explanation by the claimant as to how any provisions of that statute restrict the use of the property, this report does not address that statute further.

## Conclusions

The zoning requirements, minimum lot size and dwelling standards established by Statewide Planning Goal 3 (Agricultural Lands) and provisions applicable to land zoned EFU in ORS 215 and OAR 660, division 33, were enacted before Laurel Griffiths' family acquired the subject property in 1949, and restrict the use of the property relative to uses permitted when her family acquired the property.

This report addresses only those state laws that are identified in the claim, or that the department is certain apply to the property based on the uses that the claimant has identified. There may be other laws that currently apply to the claimant's use of the property, and that may continue to apply to the claimant's use of the property, that have not been identified in the claim. In some cases, it will not be possible to know what laws apply to a use of property until there is a specific proposal for that use. When the claimant seeks a building or development permit to carry out a specific use, it may become evident that other state laws apply to that use.

### 3. Effect of Regulations on Fair Market Value

In order to establish a valid claim, Section 1 of Ballot Measure 37 requires that any land use regulation described in Section V (2) of this report must have "the effect of reducing the fair market value of the property, or any interest therein."

### Findings of Fact

The claim includes an informal estimate of \$3,772,190 as the reduction in the property's fair market value as a result of current regulations. This amount is the claimant's estimate of the market value of 58 lots of approximately two-acres in size and each with a residential dwelling unit, based on comparisons with other nearby properties.

### Conclusions

As explained in Section V.(1) of this report, the current owner is Laurel Griffiths, whose husband acquired the subject property on December 12, 1949. Under Ballot Measure 37, Laurel Griffiths is due compensation for land use regulations that restrict the use of the subject property in a manner that reduces its fair market value. Based on the findings and conclusions in Section V.(2) of this report, regulations adopted after 1949 restrict the ability of the claimant to divide and develop her property. The claim estimates the reduction in value due to these restrictions to be \$3,772,190.

Without an appraisal or other documentation, it is not possible to substantiate the specific dollar amount the claimant demands for compensation. Nevertheless, based on the submitted information, the department determines that it is more likely than not that there has been some reduction in the fair market value of the subject property as a result of land use regulations enforced by the Commission or the department.

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#### **4. Exemptions under Section 3 of Measure 37**

Ballot Measure 37 does not apply to certain land use regulations. In addition, under Section 3 of the Measure, certain types of laws are exempt from the Measure.

#### **Findings of Fact**

The claim includes state land use regulations that restrict the use of the property relative to what would have been allowed in 1949, when the claimant's family acquired an interest in the property. These provisions include Statewide Planning Goal 3 (Agricultural Lands) and applicable provisions of ORS 215 and OAR 660, division 33, which Deschutes County has implemented through its EFU zone. None of these laws appear to be exempt under Section 3(E) of Ballot Measure 37, which exempts laws in effect when the claimant's family acquired the property.

#### **Conclusions**

Without a specific development proposal for the property, it is not possible for the department to determine what laws may apply to a particular use of the property, or whether those laws may fall under one or more of the exemptions under Measure 37. It does appear that the general statutory, goal and rule restrictions on residential development and use of farm land apply to the claimant's use of the property, and for the most part these laws are not exempt under Section 3(E) of Measure 37.

Laws in effect when the claimant's family acquired the property are exempt under Section 3(E) of Measure 37, and will continue to apply to the claimant's use of the property. There may be other laws that continue to apply to the claimant's use of the property that have not been identified in the claim. In some cases, it will not be possible to know what laws apply to a use of property until there is a specific proposal for that use. When the claimant seeks a building or development permit to carry out a specific use, it may become evident that other state laws apply to that use. And, in some cases, some of these laws may be exempt under subsections 3(A) to 3(D) of Measure 37.

This report addresses only those state laws that are identified in the claim, or that the department is certain apply to the property based on the uses that the claimant has identified. Similarly, this report only addresses the exemptions provided for under Section (3) of Measure 37 that are clearly applicable given the information provided to the department in the claim. The claimant should be aware that the less information she has provided to the department in her claim, the greater the possibility that there may be additional laws that will later be determined to continue to apply to her use of the property.

#### **VI. FORM OF RELIEF**

Section 1 of Measure 37 provides for payment of compensation to an owner of private real property if the Commission or the department has enforced a law that restricts the use of the property in a manner that reduces its fair market value. In lieu of compensation, the department

may choose to not apply the law in order to allow the present owner to carry out a use of the property permitted at the time the current owner acquired the property. The Commission, by rule, has directed that if the department determines a claim is valid, the Director must provide only non-monetary relief unless and until funds are appropriated by the legislature to pay claims.

### **Findings of Fact**

Based on the findings and conclusions set forth in this report, certain laws enforced by the Commission or the department restrict the division of the subject property 115.5-acre property into 58, approximately two-acre parcels, and the development of a dwelling on each parcel. The claim asserts the laws enforced by the Commission or department reduce the fair market value of the subject property by \$3,772,190. However, because the claim does not provide an appraisal or other documentation establishing how the specified restrictions reduce the fair market value of the property, a specific amount of compensation cannot be determined. Nevertheless, based on the record for this claim, the department acknowledges that the laws on which the claim is based likely have reduced the fair market value of the property to some extent.

No funds have been appropriated at this time for the payment of claims. In lieu of payment of compensation, Ballot Measure 37 authorizes the department to modify, remove or not apply all or parts of certain land use regulations to allow Laurel Griffiths to use the subject property for a use permitted at the time she acquired an interest in the property on June 19, 1985. At that time, the property was subject to the provisions of Deschutes County's acknowledged EFU zone then in effect.

### **Conclusion**

Based on the record, the department recommends that the claim be approved, subject to the following terms:

1. In lieu of compensation under Measure 37, the State of Oregon will not apply the following laws to Laurel Griffiths' division and residential development of her 115.5-acre property: provisions of ORS 215 and OAR 660, division 33, enacted after June 19, 1985. These land use regulations will not apply to Laurel Griffiths' use of her property only to the extent necessary to allow the claimant a use permitted at the time she acquired an interest in the property on June 19, 1985.
2. The action by the State of Oregon provides the state's authorization to the claimant to use her property subject to the standards in effect on June 19, 1985. On that date, the property was subject to applicable provisions of Statewide Planning Goal 3 and ORS 215.
3. To the extent that any law, order, deed, agreement or other legally enforceable public or private requirement provides that the property may not be used without a permit, license, or other form of authorization or consent, the order will not authorize the use of the property unless the claimant first obtains that permit, license or other form of authorization or consent. Such requirements may include, but are not limited to: a building permit, a land use decision, a permit

as defined in ORS 215.402 or ORS 227.160, other permits or authorizations from local, state or federal agencies, and restrictions on the use of the property imposed by private parties.

4. Any use of the property by the claimant under the terms of the order will remain subject to the following laws: (a) those laws not specified in (1) above; (b) any laws enacted or enforced by a public entity other than the Commission or the department; and (c) those laws not subject to Measure 37 including, without limitation, those laws exempted under Section (3) of the Measure.

5. Without limiting the generality of the foregoing terms and conditions, in order for the claimant to use the property, it may be necessary for her to obtain a decision under Measure 37, from a city and/or county and/or metropolitan service district that enforces land use regulations applicable to the property. Nothing in this order relieves the claimant from the necessity of obtaining a decision under Measure 37, from a local public entity that has jurisdiction to enforce a land use regulation applicable to a use of the property by the claimant.

#### **VII. COMMENTS ON THE DRAFT STAFF REPORT**

The department issued its draft staff report on this claim on September 19, 2005. OAR 125-145-0100(3), provided an opportunity for the claimants or the claimants' authorized agent and any third parties who submitted comments under OAR 125-145-0080 to submit written comments, evidence and information in response to the draft staff report and recommendation. Comments received have been taken into account by the department in the issuance of this final report.

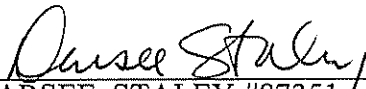
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1 **CERTIFICATE OF SERVICE**

2 I certify that on June 2, 2006, I served the foregoing *Motion to Dismiss and*  
3 *Memorandum of Points and Authorities and Declaration of Darsee Staley* upon the parties hereto  
4 by the method indicated below, and addressed to the following:

5 Edward P. Fitch  
6 Bryant, Emerson & Fitch, LLP  
7 888 SW Evergreen Avenue  
8 PO Box 457  
9 Redmond, OR 97756-0103

\_\_\_ HAND DELIVERY  
✓ MAIL DELIVERY  
\_\_\_ OVERNIGHT MAIL  
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