

HARDY MYERS
Attorney General



PETER D. SHEPHERD
Deputy Attorney General

DEPARTMENT OF JUSTICE
TRIAL DIVISION

April 6, 2007

Via Overnight Mail

Trial Court Clerk
Yamhill County Courthouse
535 East Fifth
McMinnville, Oregon 97128

Re: *Hall v. State*
Yamhill County Case No. CV060180

Dear Trial Court Clerk:

Enclosed is the State's Reply on its Motion for Summary Judgment.

Also enclosed is a postcard for the Court's use in notifying counsel of action taken.

Sincerely,

A handwritten signature in black ink, appearing to read "Erika L. Hadlock".

Erika L. Hadlock
Sr. Assistant Attorney General

TRIR3517 DOC/ELH/sek
Enclosures

cc: Charles F. Hudson

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

6 BRUCE M. HALL,

7 Petitioner,

8 v.

9 STATE OF OREGON, DEPARTMENT OF
10 ADMINISTRATIVE SERVICES,
11 DEPARTMENT OF LAND
12 CONSERVATION AND DEVELOPMENT,
and WATER RESOURCES DEPARTMENT,

12 Respondents.

Case No. CV06-0180

STATE'S REPLY ON ITS MOTION FOR
SUMMARY JUDGMENT

13 In this memorandum, the State briefly replies to some of the arguments that plaintiff Hall
14 makes in his response memorandum concerning: (a) the standards that apply to summary-
15 judgment motions made in the context of an ORS 183.484 proceeding; (b) the types of interests
16 in real property that may trigger a right to relief under Measure 37; and (c) this Court's lack of
17 jurisdiction over plaintiff's claims for just compensation and for declaratory relief.

18 **A. On motions for summary-judgment in an ORS 183.484 proceeding, the only**
19 **question for a circuit court regarding an agency's factual findings is whether those findings**
20 **are supported by substantial evidence in the record.**

21 The parties appear generally to agree that no material facts are disputed for purposes of
22 these summary-judgment motions and that only legal questions are presently before the court.
23 Nonetheless, because plaintiff has expressed disagreement with the State regarding the judicial-
24 review standards that generally *would* apply if a plaintiff challenged an agency's factual findings,
25 the State takes this opportunity to respond.

1 In *Powell v. Bunn*, as here, the plaintiffs challenged an agency’s final order in other than
2 a contested case under ORS 183.484 and included a non-APA claim in the same complaint. The
3 parties filed cross-motions for summary judgment on both claims. *Powell v. Bunn*, 185 Or App
4 334, 337-38 (2002), *rev denied*, 336 Or 60 (2003). With respect to the non-APA claim (for
5 declaratory and injunctive relief), the Court of Appeals held that it could apply the usual standard
6 of review for summary-judgment motions “without difficulty”: the court would “review the
7 evidence and all reasonable inferences in the light most favorable to the nonmoving party and
8 determine whether the moving party is entitled to judgment as a matter of law.” *Id.* at 338.

9 But the Court of Appeals held that the usual summary-judgment standard was “not
10 appropriate” in reviewing the final agency order. Rather, “the circuit court was to decide only
11 whether ‘the record, viewed as a whole, would permit a reasonable person to make’ the factual
12 findings that the [agency] made. ORS 183.484(5)(c).” *Ibid.* On appeal, the Court of Appeals
13 would determine only whether the circuit court had followed that standard. *Id.* at 339.

14 The *Powell* court’s explanation of the APA substantial-evidence standard is significant
15 here because the court’s statements explicitly relate to a circuit-court decision granting summary
16 judgment to a state agency on APA review of the agency’s order. *See id.* at 336. It is precisely
17 because judicial review of factual findings under the APA is for “substantial evidence” that the
18 Court of Appeals held that the usual summary-judgment standard of “viewing factual disputes in
19 the light most favorable to a nonmoving party” is not appropriate in an APA case. *Id.* at 339.
20 Consequently, even in a summary-judgment proceeding, the only question related to an agency’s
21 factual findings is whether they are supported by substantial evidence; the usual ORCP standards
22 simply do not apply. In light of that holding, plaintiff’s assertion that “*Powell* does not support
23 the conclusion that a circuit court may grant summary judgment based on an evaluation of
24 factual findings under the substantial evidence test” is puzzling. (Plaintiff’s Resp at 8).

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1 **B. Any land use regulations enacted before October 2, 1975, did not restrict plaintiff**
2 **Hall's use of the property; consequently, he is entitled to a waiver of regulations dating**
3 **back only to 1975.**

4 Plaintiff argues that he had “any interest” in the property for purposes of Measure 37
5 when it was owned by Willamette Farms, in which he was a partner. Accordingly, he contends
6 he is entitled to a waiver of land use regulations going back to 1959, when Willamette Farms
7 acquired the property.

8 But the pertinent question is not whether plaintiff's status as a Willamette Farms partner
9 gave him “any interest” in the property before he obtained a personal interest in the property in
10 1975. Rather, in determining the relief to which a property owner is entitled under Measure 37,
11 the question is what “use” of the property “the owner” would have been able to carry out “at the
12 time the owner acquired the property.” ORS 197.352(8). A qualifying property owner is
13 entitled to a “waiver” of land use regulations that will allow the owner to make that use of the
14 property. *Ibid.*

15 From 1959 until October 2, 1975, Willamette Farms was the owner of the property and
16 was the *only* entity or individual entitled to make use of it. Although Hall and Wheeler each
17 could direct the partnership's use of the property, they could not use the property for other than
18 partnership purposes. And when Wheeler died in 1973, Hall still could use the property only for
19 partnership purposes, even though he was the sole surviving partner. ORS 68.420(2)(d). In
20 other words, neither of the individual partners could “use the property for a use” before 1975;
21 only the partnership itself had that ability and the individual partners acted only on the
22 *partnership's* behalf in making decisions about how the property should be used.

23 Thus, if the Willamette Farms partnership still owned the property, it would be entitled to
24 a waiver of state land use regulations that would allow it to put the property to a use that it could
25 have carried out in 1959. But Willamette Farms no longer owns the property, plaintiff does.
26 Under Measure 37, plaintiff is entitled only to a waiver that will allow him to use the property in

1 a way that *he* could have used it when he acquired it. Because plaintiff did not have a right to
2 use the property for his own benefit until October 2, 1975, he is entitled to a waiver of land use
3 regulations dating back only that far.¹


4 **C. This Court lacks jurisdiction over plaintiff's claims for declaratory relief and**
5 **monetary compensation.**

6 As plaintiff suggests in his response memorandum, the State has taken the position in
7 Measure 37 litigation that circuit courts have jurisdiction to review the State's decisions on
8 Measure 37 demands *only* under the APA, and that the courts lack jurisdiction to address claims
9 for "just compensation" or declaratory relief when those claims are premised on disagreement
10 with determinations encompassed within the State's final orders. The State acknowledges that it
11 did not flesh out that argument in its opening memorandum and anticipates that the parties can
12 address the jurisdictional issue in later proceedings, if this court denies the State's pending
13 motion for summary judgment on the merits.

14 DATED this 6th day of April, 2007.

15 Respectfully submitted,

16 HARDY MYERS
17 Attorney General

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19 _____
20 ERIKA L. HADLOCK #91297
21 Sr. Assistant Attorney General
22 Trial Attorney
23 Tel (503) 947-4700
24 Fax (503) 947-4792
25 erika.hadlock@doj.state.or.us
26 Of Attorneys for Defendants-Respondents

25 ¹ Plaintiff suggests in his response memorandum that the State believes he lacks standing.
26 (*See* Plaintiff's Resp at 15). That is not an accurate characterization of the State's argument. Of
course plaintiff has "standing" under Measure 37; he is the present owner of the property and is
entitled to the Measure 37 relief he obtained in the State's final order.

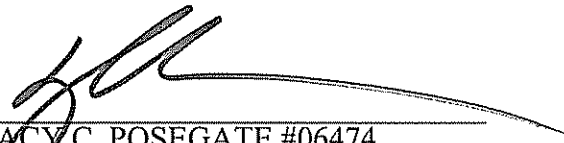
1 **CERTIFICATE OF SERVICE**

2 I certify that on April 10, 2007, I served the foregoing *State's Reply on its Motion for*
3 *Summary Judgment* upon the parties hereto by the method indicated below, and addressed to the
4 following:

5 Charles F. Hudson
6 Lane Powell, PC
7 601 SW Second Ave. Ste 2100
Portland, OR 97204

___ HAND DELIVERY
___ MAIL DELIVERY
 OVERNIGHT MAIL
___ TELECOPY (FAX)

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STACY C. POSEGATE #06474
Assistant Attorney General
Trial Attorney
Tel (503) 947-4700
Fax (503) 947-4792
Stacy.C.Posegate@doj.state.or.us
Of Attorneys for State of Oregon Respondents