

HARDY MYERS
Attorney General



PETER D. SHEPHERD
Deputy Attorney General

DEPARTMENT OF JUSTICE
TRIAL DIVISION

March 9, 2007

Via Overnight Mail

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

Re: *Bruce Hall v. State et al*
Yamhill County Circuit Court Case No. CV06-0180

Dear Trial Court Clerk:

Enclosed is the *State's Motion for Summary Judgment and Memorandum in Opposition to Plaintiff-Petitioners' Motion for Summary Judgment and in Support of State's Motion for Summary Judgment* in the referenced matter.

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

Respectfully,

Erika L. Hadlock
Sr. Assistant Attorney General

TRIR0857/ELH/sek
Enclosures

cc: Charles F. Hudson

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

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

BRUCE M. HALL,

Petitioner,

v.

STATE OF OREGON, DEPARTMENT OF
ADMINISTRATIVE SERVICES,
DEPARTMENT OF LAND
CONSERVATION AND DEVELOPMENT,
and WATER RESOURCES DEPARTMENT,

Respondents.

Case No. CV06-0180

STATE'S MOTION FOR SUMMARY
JUDGMENT

Pursuant to ORCP 47, respondents State of Oregon *et al* move for summary judgment on the ground that respondents' final order on Hall's Measure 37 claim concluded correctly that Hall did not acquire any interest in the subject property until 1975. Accordingly, respondents are entitled to judgment as a matter of law. Hall already has moved for summary judgment and has requested oral argument. Respondents join in that request and also request official court-reporting services. Respondents estimate that argument on the motions for summary judgment will take one hour.

//
//
//
//

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

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

BRUCE M. HALL,

Petitioner,

v.

STATE OF OREGON, DEPARTMENT OF
ADMINISTRATIVE SERVICES,
DEPARTMENT OF LAND
CONSERVATION AND DEVELOPMENT,
and WATER RESOURCES DEPARTMENT,

Respondents.

Case No. CV06-0180

MEMORANDUM IN OPPOSITION TO
PLAINTIFF-PETITIONERS' MOTION FOR
SUMMARY JUDGMENT AND IN SUPPORT
OF STATE'S MOTION FOR SUMMARY
JUDGMENT

INTRODUCTION

Claimant Hall and his uncle, Coleman Wheeler, formed a business partnership called Willamette Farms in 1959. That partnership held various assets; for purposes of these summary-judgment motions, the State does not dispute Hall's assertion that those partnership assets included the real property that is the subject of this litigation. Wheeler died in 1973 and litigation ensued regarding proper disposition of his estate. In October 1975, Hall and the personal representative of Wheeler's estate entered into a settlement agreement that contemplated transfer of the subject property to Hall. Hall obtained title to the property in February 1976 and has continually owned it since then.

Hall filed a timely Measure 37 claim with respect to the property in 2005, seeking compensation for restrictions on his ability to subdivide and develop it for residential use. The

1 State determined that the claim was valid and, instead of awarding Hall monetary compensation,
2 elected to “waive” certain land use regulations enacted or adopted since Hall acquired the
3 property upon settlement of his litigation against Wheeler’s estate in 1975.

4 The parties’ cross-motions for summary judgment present two legal questions. The first
5 relates to whether the State correctly determined the date on which Hall acquired an interest in
6 the subject property for purposes of Measure 37. Hall contends he acquired an interest in the
7 property as early as 1959, when he entered into partnership with Wheeler. At the latest, Hall
8 argues, he acquired an interest in the property when Wheeler died in 1973. The State disagrees.
9 Partnerships are business entities that hold assets independently from their partners, akin to how
10 corporations hold assets separately from their shareholders. Assuming for purposes of the
11 summary-judgment motions that the property was an asset of the Willamette Farms partnership,
12 the State correctly determined that Hall did not acquire an ownership interest in that property
13 until 1975, when he settled his lawsuit against Wheeler’s estate. Only then did Hall, *as an*
14 *individual*, obtain an interest in the property. Any earlier interest the partnership had in the
15 property – even after Wheeler’s death – did not give Hall a personal interest in the property for
16 purposes of Measure 37. Until then, Hall’s rights with respect to the property were limited to the
17 ability to use it for *partnership* purposes.

18 The second question posed by the summary-judgment motions arises only if the State’s
19 decision regarding Hall’s acquisition date was incorrect. The issue then would become whether
20 Hall is entitled only to have the final order modified to grant an earlier waiver date, or whether
21 he also may be entitled to monetary compensation. As the State explains below, it chose to grant
22 Hall a 1975 waiver instead of paying him compensation, and retains the right to elect the waiver
23 remedy again if Hall ultimately convinces a court that he acquired the property earlier than 1975.

24 //

25

1 **BACKGROUND**

2 **A. Measure 37**

3 A property owner qualifies for Measure 37 relief if: (1) a public entity enacts or enforces
4 a “land use regulation” after December 2, 2004, that (2) restricts the owner’s use and (3) has the
5 effect of reducing the fair market value of the owner’s property. ORS 197.352(1). Section 3 of
6 Measure 37 provides that certain land use regulations shall not be a basis for a written demand
7 under Section 1, notably regulations in effect when the owner or a family member acquired the
8 property. ORS 197.352(3)(E). Section 11 defines “owner” as the “present owner” of the
9 property, and lists the relationships on which a “family member” finding may be based. ORS
10 197.352(11)(A), (C).

11 For regulations enacted prior to the effective date of Measure 37 (December 2, 2004),
12 Section 5 requires owners to submit written demands by December 2, 2006, or the date on which
13 a land use regulation is applied “as an approval criteria [*sic*]” on a specific land use application,
14 whichever is later. After determining that an owner submitted a timely, valid written demand,
15 the public entity has the option to pay compensation or to “modify, remove, or not to [*sic*] apply”
16 land use regulations to the extent necessary “to allow the owner to use the property for a use
17 permitted at the time the owner acquired the property.” ORS 197.352(8); *see also* ORS
18 197.352(10). In this case, the State determined that Hall’s Measure 37 claim was valid and
19 granted waiver relief in lieu of compensation.¹

20 **B. Statement of undisputed facts**

21 For purposes of these summary-judgment motions, the State does not dispute the
22 following facts asserted by Hall:

23
24 ¹ Allowing the owner to use the property in a way that would otherwise be prohibited by
25 land use regulations is commonly referred to as granting a Measure 37 “waiver.” DLCD can pay
26 compensation only if and when the legislature appropriates funds for that purpose. *See* OAR
660-002-0010(8)(c).

1 1. On December 9, 1959, claimant Hall and his uncle, Coleman Wheeler, entered
2 into a business partnership they called "Willamette Farms." (*Record* § 2 at 11, 13).

3 2. The subject property was an asset of the Willamette Farms partnership.²
4 (*See Record* § 2 at 11).

5 3. Wheeler died on October 10, 1973. (*See Record* § 2 at 11, 21; *Record* § 6 at 7).
6 Hall then brought an action for a declaratory judgment and an accounting against the personal
7 representative of Wheeler's estate. In that suit, Hall sought "an accounting and a decree
8 determining full interest in plaintiff in the partnership with [Wheeler] known as 'Willamette
9 Farms', less capital contributions made by [Wheeler] during his lifetime from which would be
10 deducted returns of capital to [Wheeler]." (*Record* § 2 at 23-24).

11 4. Hall's dispute with the personal representative of Wheeler's estate was resolved
12 on October 2, 1975, when those parties entered a settlement agreement that provided, in pertinent
13 part:

14 In consideration of settlement of both actions and for the
15 mutual release of all claims of any nature arising out of the
16 controversies between the parties, Hall and defendant agree to
17 terminate such interests as each may have in that certain property
18 often referred to as the Willamette Farms by dividing it as follows:

19 The defendant shall have all of [certain real property]. Hall
20 shall be entitled to all of [other real property, including the
21 property that is the subject of Hall's Measure 37 claim]. * * * All
22 parties concerned agree to execute the appropriate documents to
23 convey the property division as outlined, on January 5, 1976. Hall
24 shall be the owner of the name "Willamette Farms." All water
25 rights shall remain and inure to the land upon which located.

 The defendant shall be entitled to all of the crops and
 livestock produced for the year 1975. * * * Also, defendant shall
 be responsible for all property taxes to and including the end of the
 year 1975. * * *

² The State does not dispute this asserted fact for purposes of these summary-judgment motions, as Hall is not entitled to summary judgment even if Willamette Farms owned the subject property. Title to the property was held by Wheeler, however, not by Willamette Farms, and the State may dispute that Willamette Farms owned the property if this case goes to trial.

1 (Record § 2 at 25-26).

2 5. On October 21, 1975, the litigation was dismissed based on the parties'
3 settlement. (Record § 2 at 30).

4 6. Hall received title to the subject property in his own name in February 1976.
5 (Record § 2 at 31).

6 7. Hall filed a Measure 37 claim with respect to the subject property in May 2005.
7 (Record § 6 at 5).

8 8. The State issued a final order with respect to Hall's Measure 37 demand; that
9 order includes a finding that Hall acquired the subject property on October 2, 1975. (Record § 6
10 at 1).

11 Hall's summary-judgment motion includes certain assertions that the State *does* dispute:

12 1. "As partners, Bruce Hall and Coleman Wheeler each possessed an interest in the
13 lands held by the partnership, including the subject property." (Pl's Motion for Summary
14 Judgment at 2). The State disputes this assertion because it is not a *factual* assertion but is a
15 legal conclusion, and one with which the State disagrees. As explained below, as a matter of law
16 the Willamette Farms partners had *no* personal interest in the partnership's assets.

17 2. "[S]ince 1959, Hall has had an interest in the property * * *." (Pl's Motion for
18 Summary Judgment at 3). Again, this is a legal conclusion with which the State disagrees, not a
19 factual assertion. As a matter of law, Hall's interest was in *the Willamette Farms partnership*; he
20 had no personal interest in partnership assets.

21 3. The 1973 settlement agreement between Hall and the personal representative of
22 Wheeler's estate "confirms [Hall's asserted] proportional interest" in partnership assets. (Pl's
23 Motion for Summary Judgment at 3). Nothing in the settlement agreement, portions of which
24 are included in the Record, suggests that it "confirms" or ratifies anything about the Willamette
25

26ge 5 - MEMORANDUM IN OPPOSITION TO PLAINTIFF-PETITIONERS' MOTION FOR
SUMMARY JUDGMENT AND IN SUPPORT OF STATE'S MOTION FOR SUMMARY
JUDGMENT
ELH/slc/TRIR0855

1 Farms partnership or its assets. The settlement agreement merely resolved the dispute between
2 Hall and Wheeler's estate.

3 **C. Standard of review**

4 Hall properly has petitioned for judicial review of the State's final order under ORS
5 183.484, which is the portion of the Administrative Procedures Act ("APA") that governs
6 judicial review of orders in other than contested cases. In an ORS 183.484 proceeding, the court
7 determines whether a final order is supported by substantial evidence in the record and whether
8 the agency has correctly applied the law. ORS 183.484(5); *Powell v. Bunn*, 185 Or App 334,
9 339 (2002), *rev denied*, 336 Or 60 (2003). The "record," for purposes of judicial review of an
10 order in other than contested case, is the record developed in circuit court. *Norden v. Water*
11 *Resources Dept.*, 329 Or 641, 649 (2000).³

12 All parties now have moved for summary judgment pursuant to ORCP 47. The standards
13 that generally govern a court's evaluation of the facts and evidence presented with summary-
14 judgment motions do not apply in an ORS 183.484 proceeding, and the State discusses below the
15 different analysis that does apply in APA cases. Hall contends that the APA standards may not
16 apply here, because he has sued directly under ORS 197.352(6) as well as under the APA. In
17 this case, however, the difference in the summary-judgment standards does not matter, as those
18 differences relate only to assessment of factual disputes; here, the parties agree on the material
19 facts and only the legal significance of those facts is in question.

20

21 ³ On January 31, 2007, the Court of Appeals issued an opinion in *Corey v DLCD*, Case
22 No. A129905. The petitioners in that case sought judicial review of a DLCD order opting to
23 waive enforcement of certain land use regulations in lieu of paying compensation under Measure
24 37. The opinion concludes that, "under ORS 183.482, jurisdiction for judicial review lies in this
25 court." Slip op. at 6. That conclusion is not final until the appellate judgment issues. ORS
19.450; ORAP 14.05. The appellate judgment has not been issued in *Corey*, and the State plans
to petition the Court of Appeals for reconsideration. The State agrees with Hall that the most
prudent course at this time is to continue this litigation in circuit court, with the understanding
that it may need to be transferred to the Court of Appeals if the *Corey* decision ultimately stands.

1 The Court of Appeals has explained that “viewing factual disputes in the light most
2 favorable to a nonmoving party” – the usual standard of review in a summary-judgment motion –
3 “[is] not appropriate in the judicial review of an administrative order in a noncontested case
4 proceeding.” *Powell*, 185 Or App at 339. Instead, the circuit court’s charge is to decide whether
5 “the order is supported by substantial evidence” and any subsequent appellate review is limited
6 to determining whether the circuit court correctly made that decision. *Ibid*.

7 “Substantial evidence exists to support a finding of fact when the record, viewed as a
8 whole, would permit a reasonable person to make that finding.” ORS 183.484(5)(c).
9 Consequently, in determining whether substantial evidence supports an agency’s factual
10 findings, the question before a circuit court “is limited to whether the evidence would permit a
11 reasonable person to make the determination that the agency made in the particular case.”
12 *Norden*, 329 Or at 649. If substantial evidence supports the agency’s decision, it does not matter
13 that the record also includes “evidence to the contrary.” *Ibid*. See also *G.A.S.P v. Environmental*
14 *Quality Commission*, 198 Or App 182, 194-96 (2005) (“[t]he court’s purpose on review is not to
15 find the facts itself but to decide ‘whether the evidence would permit a reasonable person to
16 make the determination that the agency made’”).

17 Thus, in deciding the cross-motions for summary judgment presently before the court, the
18 only questions presented could be: (1) whether the State’s final order on Hall’s Measure 37
19 claim is based on an incorrect interpretation or application of the law;⁴ and (2) whether the
20 factual findings in the final order are supported by substantial evidence in the record. As noted
21 above, however, the State does not dispute Hall’s factual allegations for purposes of the parties’
22 motions for summary judgment. Accordingly, this court need consider only the legal
23 significance of those facts.

24
25 ⁴ See ORS 183.484(5)(a) (describing judicial review for incorrect interpretations of law); ORS
183.484(5)(b) (describing judicial review for unlawful exercise of agency discretion).

1 **ARGUMENT**

2 **A. Introduction**

3 Hall has sued the State because he disagrees with its determination of the date on which
4 he “acquired the property” at issue for purposes of Measure 37, which determines the scope of
5 the waiver to which he is entitled. ORS 197.352(8). For purposes of these summary-judgment
6 motions, the State does not dispute Hall’s assertions that a partnership called Willamette Farms
7 owned the subject property starting no later than 1959, and that Hall and Conrad Wheeler were
8 the two partners of Willamette Farms. After Wheeler died in 1973, Hall sued Wheeler’s estate
9 for an accounting of the partnership assets. That litigation settled in 1975; as part of the
10 settlement, the personal representative of Wheeler’s estate agreed that the subject real property
11 would be transferred to Hall.

12 Hall filed a Measure 37 claim seeking compensation for the reduction in fair market
13 value allegedly caused by land use regulations that prevent him from dividing the subject
14 property and developing it for residential use. The State determined that Hall “acquired the
15 property” on the date of the 1975 settlement with Wheeler’s estate and gave him a waiver of
16 certain land use regulations enacted or adopted after that date. The question this case presents is
17 whether the State’s determination was correct or if, instead, Hall acquired the property earlier,
18 either when he entered into partnership with Wheeler in 1959 or when Wheeler died in 1973.
19 That question may be answered by applying basic principles of partnership law as it existed in
20 the early 1970s.

21 **B. Hall’s status as a partner in Willamette Farms gave him only an interest in the**
22 **partnership, not in partnership assets.**

23 “A partnership is an association of two or more persons to carry on as coowners a
24 business for profit.” ORS 68.110(1) (1983).⁵ Each partner’s interest in the partnership “is his

25 ⁵ Oregon’s Uniform Partnership Law was adopted in 1939. *See* Or Laws 1939, ch 550.
26 *Unfortunately, the bound volumes of the Oregon Revised Statutes from the 1970s that are*
8 - **MEMORANDUM IN OPPOSITION TO PLAINTIFF-PETITIONERS' MOTION FOR**
SUMMARY JUDGMENT AND IN SUPPORT OF STATE'S MOTION FOR SUMMARY
JUDGMENT

1 share of the profits and surplus”; that interest is personal property, not real property. ORS
2 68.430 (1983). All property brought into the partnership belongs to the partnership; the
3 partnership also may acquire real property in its own name. ORS 68.130(1), (3) (1983).
4 Although each partner may hold specific partnership property “as a tenant in partnership” with
5 the other partners, ORS 68.420(1) (1983), the partner has no *personal* interest in that property:

6 A partner does not own a proportional part of specific
7 partnership property. The value of a partner’s interest in specific
8 partnership property is reflected in his “interest in the partnership,”
9 which is his interest in profits and surplus. ORS 68.430.

10 *Shinn v. Vaughn*, 83 Or App 251, 254 (1986).

11 Thus, a partner’s interest in a partnership is analogous to a shareholder’s interest in a
12 corporation: the partner has a personal-property interest in partnership profits and surplus; the
13 shareholder has a personal-property interest in corporate stock. In neither case, however, does
14 the individual partner or shareholder have a *personal* interest in the business’s assets. Indeed,
15 when a partner contributes property to a partnership, the partner loses “all direct ownership
16 rights” in that property. *First Western Mtg. v. Hotel Gearhart*, 268 Or 613, 620 (1974).
17 Consequently, in a partnership, each partner has a right to possess partnership property only “for
18 partnership purposes”; he cannot possess the property “for any other purpose without the consent
19 of the partners.” ORS 68.420(2)(a) (1983).

20 Accordingly, Hall obtained no personal interest in Willamette Farms assets – including
21 any interest the partnership had in the subject property – merely because he was one of

22 available in the Oregon Supreme Court Law Library do not include ORS chapter 68, where the
23 Uniform Partnership Law is now codified, as that chapter was not revised during that time
24 period. The earliest available version of chapter 68 available in that library is from 1983; that
25 version of the chapter does not indicate that any of the statutes in chapter 68 had been amended
between the Law’s 1939 adoption and 1983. In addition, review of the Law as it existed in 1940
confirms that the pertinent provisions in existence then are substantively identical to the
analogous 1983 provisions, except for renumbering. Accordingly, the State cites to the 1983
version of the statutes in this memorandum, with confidence that the statutes were no different in
1973 or 1975.

26ge 9 - MEMORANDUM IN OPPOSITION TO PLAINTIFF-PETITIONERS' MOTION FOR
SUMMARY JUDGMENT AND IN SUPPORT OF STATE'S MOTION FOR SUMMARY
JUDGMENT
ELH/slc/TRIR0855

1 Willamette Farms' partners. Rather, he had a proportional interest *in the partnership* that
2 entitled him to a certain distribution of funds if the partnership terminated. That personal-
3 property interest gave him no individual ownership interest in the subject property, and the State
4 correctly determined that Hall did not acquire an interest in the property in 1959 when he entered
5 into partnership with Wheeler.

6 The remaining question is whether Hall acquired a personal interest in the subject
7 property when Wheeler died in 1973. He did not. It is true that a partnership dissolves when one
8 partner dies. ORS 68.530(4) (1983). However, that dissolution does not terminate the
9 partnership; rather, the partnership continues "until the winding up of partnership affairs is
10 completed." ORS 68.520 (1983). And the continuing partnership continues to own the property;
11 consequently, the remaining partner still may possess specific partnership property only for
12 partnership purposes. ORS 68.420(2)(d) (1983). The partnership is "wound up" after
13 dissolution by having the partnership assets (partnership property plus any contributions from
14 partners necessary to pay liabilities) distributed to pay partnership liabilities in an order specified
15 by statute. ORS 68.620(1), (2) (1983). Only after that distribution is complete is any "surplus
16 applied *to pay in cash* the net amount owing to the respective partners." ORS 68.600(1) (1983)
17 (emphasis added).

18 Accordingly, when Wheeler died in 1973, the Willamette Farms partnership continued.
19 Hall maintained his personal-property interest in that partnership, but did not acquire any
20 individual interest in Willamette Farms assets, including the subject property. Instead, the law
21 entitled him only to a certain portion of the partnership's cash value after all liabilities were paid.
22 In this particular case, Hall and Wheeler's estate decided to settle their disagreement about
23 proper distribution of partnership assets by distributing the assets themselves, without first
24 reducing them to cash value. Thus, upon settling that litigation in 1975, Hall acquired an
25 individual interest in the subject real property. However, Hall had no personal interest in that

1 real property before the settlement; rather, he had only a personal-property interest in the
2 partnership, which the personal representative of Wheeler’s estate could have chosen to satisfy
3 by paying Hall cash instead of agreeing to give him the subject property.

4 **C. Even if Hall had some interest in Willamette Farms’ assets, it was not the sort of**
5 **interest in real property that can support a Measure 37 claim.**

6 Hall appears to contend that his interest in Willamette Farms gave him some sort of
7 personal interest in the partnership’s assets. But even if Hall were correct, the question would
8 remain whether that interest made him an “owner” of Willamette Farm’s assets for purposes of
9 Measure 37. Only if Hall were an “owner” of Willamette Farms’ property, as that term is
10 statutorily defined, could he be entitled to a waiver of land use regulations enacted or adopted
11 after the partnership’s 1959 acquisition date.

12 **1. Ownership and Measure 37**

13 Several aspects of Measure 37 center on the word “owner,” which is important both to
14 determining who has a valid Measure 37 claim and the scope of relief to which a claimant is
15 entitled. The word is first used in section 1 of Measure 37, which describes when a claim for
16 compensation arises:

17 (1) If a public entity enacts or enforces a new land use
18 regulation or enforces a land use regulation enacted prior to
19 December 2, 2004, that restricts the use of private real property or
20 any interest therein and has the effect of reducing the fair market
value of the property, or any interest therein, then the *owner* of the
property shall be paid just compensation.

21 ORS 197.352 (emphasis added). “Owner” is defined as “the present owner of the property, *or*
22 *any interest therein.*” ORS 197.352(11)(C) (emphasis added).

23 These provisions establish that, to be an “owner” for purposes of Measure 37, a person
24 must have a present interest in the property. But the definition of “owner,” standing alone,
25 provides little help in determining what kind of ownership interest may be the basis for a

1 Measure 37 claim. The court must look to the rest of the statute in order to understand the
2 meaning of “the present owner of the property, or any interest therein.”

3 Under section 1, a claimant qualifies for Measure 37 relief only if, among other things,
4 the claimant has an interest in private real property *and* a land use regulation restricts the use of
5 that property. ORS 197.352(1). Thus, an “owner” must be a person who would have a present
6 right to use the property in the regulation’s absence. Moreover, Measure 37 provides a remedy
7 only when land use restrictions reduce the fair market value of the property or any interest
8 therein. *Ibid*. Consequently, the ability to realize market value is essential to a Measure 37
9 claim. A qualifying property owner, therefore, is one who presently owns the property or any
10 interest therein, and has a right to use the property that is restricted by land use regulations that
11 reduce the value of *that property interest*.⁶

12 The term “owner” also is important in sections 8 and 10 of Measure 37, which describe
13 governmental authority to waive land use regulations in lieu of paying just compensation. Those
14 provisions specify that waiver relief is available only to an “owner” and that the scope of the
15 waiver depends on the date on which the owner acquired his or her interest in the property. ORS
16 197.352(8), (10).

17 In sum, the term “owner” as used in ORS 197.352 refers to the present owner of a
18 property interest that is subject to land use regulations that both restrict use and reduce value. If
19 the owner’s property interest gives rise to a Measure 37 claim, the State must then determine

20 ⁶ Interpreting the term “owner” in the context of who may be entitled to relief under
21 Measure 37 is consistent with Oregon precedent. Oregon courts repeatedly have declared that
22 the word “owner” lacks a fixed meaning outside the context and purpose of the statute in which
23 it is used. For example, in *Moe v. Beck*, the Supreme Court noted that “[d]ivining the legislative
24 intent in statutes using the word ‘owner’ has been a vexing problem for nearly a century.” 311
25 Or 499, 504-505 (1991). After considering the lease agreement at issue, and the six places in the
Oregon Safe Employment Act (including a “definition”) that used the word “owner,” the court
concluded that the lessor of a vehicle was an “owner” within the meaning of the statute at issue.
See also Pedro v. January, 261 Or 582, 602 (1972) (“When the term ‘owner’ or ‘ownership’ is
used in a statute, the context and purpose of the statute governs what is meant by the use of the
terms”).

1 when the owner acquired *that interest*, which will govern the scope of any waiver that will be
2 granted.

3
4 **2. Hall's interest in Willamette Farms did not allow him individual "use" of the
property in a way that could be restricted by land use regulations.**

5 As explained above, as long as the Willamette Farms partnership existed, Hall had only
6 an individual interest in the partnership, not a personal interest in the partnership's assets. His
7 interest in the partnership was defined by its monetary value; he had no personal right to use any
8 of Willamette Farms' property. Only the partnership could make use of that property in any way
9 that could be restricted by a land use regulation. *See* ORS 68.420(2)(a) (1983) (partners may use
10 partnership property "only for partnership purposes"). Consequently, even if Hall's status as a
11 Willamette Farms partner gave him sort of amorphous interest in the partnership's assets, it was
12 a personal-property interest in the *value* of those assets only, not an interest that gave Hall the
13 right to use the property and, thus, made him an "owner" for purposes of Measure 37. Hall
14 became an owner, *i.e.*, he "acquired the property" only in 1975, and the State correctly
15 determined that he is entitled to a waiver dating back only that far.

16
17 **D. If Hall acquired the property before 1975, his only remedy is amendment of the
final waiver order; he is not entitled to monetary compensation.**

18 If this Court rules in Hall's favor, it will then need to decide what form of relief to grant,
19 as Hall has requested both a reversal and remand of the final order and monetary compensation.
20 As noted above, Hall properly has brought this action as a petition for judicial review pursuant to
21 ORS 183.484. Under that APA provision, this court "may affirm, reverse or remand the order" if
22 it finds that the State erroneously interpreted Measure 37, and that a correct interpretation
23 compels a different result. ORS 183.484(5)(a). In the State's view, the only appropriate remedy
24 in this case would be a remand to DLCD and DAS, so those agencies could decide whether to
25 grant additional waiver relief or, instead, to give Hall monetary compensation. If the agencies

1 chose to grant a more comprehensive waiver, Hall no longer would have any claim for monetary
2 compensation, and that claim should then be dismissed as moot.

3 A fundamental aspect of Measure 37 is that it authorizes *the public entity*, not the
4 claimant, to choose whether to pay compensation or to “modify, remove, or not apply” land use
5 regulations when the claimant qualifies for Measure 37 relief. ORS 197.352(8), (10). The
6 statute provides:

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

14 * * * * *

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

ORS 197.352.

Thus, section 8 generally grants the public entities to which a demand for compensation
is submitted the option to pay or provide alternate relief. Section 10 makes it clear that the
option is wholly within the public entities’ discretion and applies even when a claimant brings a
suit for monetary compensation under ORS 197.352(6). And neither section 8 nor section 10
identifies any point in the administrative process – or in litigation – during which the State’s
right to elect the waiver remedy disappears. Rather, those provisions give the State the right to
elect waiver instead of compensation *at any time*. Thus, if this Court agrees with Hall’s

1 allegation that he acquired the subject property earlier than 1975, the State is entitled to choose
2 whether to grant a correspondingly broader waiver, under ORS 197.352(8) and (10), or to pay
3 Hall monetary compensation under ORS 197.352(6). As it was initially, that choice between
4 remedies would remain the State's to make.

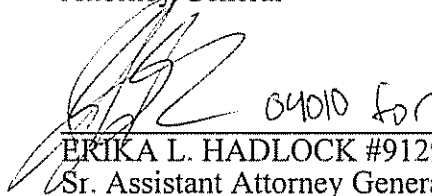
5 **CONCLUSION**

6 The State correctly determined that Hall acquired the property in 1975. Accordingly, this
7 Court should deny Hall's motion for summary judgment and should enter summary judgment in
8 the State's favor.

9 DATED this 9th day of March, 2007.

10 Respectfully submitted,

11 HARDY MYERS
12 Attorney General

13  04010 for
14 ERIKA L. HADLOCK #91297
15 Sr. Assistant Attorney General
16 Trial Attorney
17 Tel (503) 947-4700
18 Fax (503) 947-4792
19 erika.hadlock@doj.state.or.us
20 Of Attorneys for Defendants-Respondents


1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

CERTIFICATE OF SERVICE

I certify that on March 14, 2007, I served the foregoing *State's Motion for Summary Judgment and Memorandum in Opposition to Plaintiff-Petitioners' Motion for Summary Judgment and in Support of State's Motion for Summary Judgment* upon the parties hereto by the method indicated below, and addressed to the following:

John C. Pinkstaff
Charles F. Hudson
Lane Powell, PC
601 SW Second Ave. Ste 2100
Portland, OR 97204

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

 04010 for

 ERIKA L. HADLOCK #91297
 Sr. Assistant Attorney General
 Trial Attorney
 Tel (503) 947-4700
 Fax (503) 947-4792
 erika.hadlock@doj.state.or.us
 Of Attorneys for State of Oregon Respondents