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

6 ERNEST and ARLETTA HANNAN,

7 Plaintiffs,

8 v.

9 STATE OF OREGON, by and through the
10 Oregon Department of Land Conservation and
Development,

11 Defendant.

Case No. 06CV0401MA

DEFENDANT'S REPLY ON ITS MOTION TO
DISMISS

Hearing:
Judge Adler
October 26, 2006
9:00 am
Courtroom G

12 **INTRODUCTION**

13 The only questions before the court at this time are: (1) whether this court has
14 subject-matter jurisdiction over plaintiffs' Measure 37 "Claim for Compensation" and (2)
15 whether plaintiffs can state a claim for monetary compensation under Measure 37 when
16 the State has elected, instead of paying compensation, to not apply certain land use
17 regulations to plaintiffs' proposed use of the property. The answer to both of those
18 questions is "no."

19 Instead of focusing on the two questions presented in the State's motion to dismiss,
20 however, much of the plaintiffs' response addresses the underlying dispute between the
21 parties, which relates to the proper scope of the Measure 37 "waiver" – the decision not to
22 apply certain land use regulations – that the State granted plaintiffs in the Final Order
23 issued in April 2006 (Ex 3 to Decl of Andrus). The "waiver date" is the date on which
24 plaintiffs acquired the property. ORS 197.352 (8). Thus, the question this court
25 *eventually* may need to address, if it denies the State's dismissal motion, is whether
26 plaintiffs first acquired an ownership interest in the property sufficient for Measure 37

1 purposes: (a) when they indicated in a 1973 earnest money receipt that they intended to
2 purchase the property (as they argue); or (b) when they acquired the property by special
3 warranty deed in 1986 (as the State contends).

4 That “scope of waiver” question is not, however, presented by the State’s motion
5 to dismiss. Consequently, the argument on pages 9 through 14 of plaintiffs’ response
6 memorandum is premature and not relevant to any issue currently before the court.
7 Accordingly, the State does not address that issue in this reply.

8 **ARGUMENT**

9 **A. This court lacks subject-matter jurisdiction over plaintiff’s Measure 37**
10 **compensation claim.**

11 Plaintiffs argue that they were not required to pursue relief under the
12 Administrative Procedures Act (“APA”) because they are not challenging the Final Order.
13 Instead, they contend, they merely seek compensation pursuant to Section 6 of Measure 37
14 (now ORS 197.352 (6)) because “offending regulations imposed by the State between
15 1973 and 1986” continue to apply to their property, reducing its value (Pls’ Resp, p 5).
16 The difficulty with plaintiffs’ argument is that it assumes that the State should have given
17 them a waiver dating back to 1973, instead of waiving only those land use regulations that
18 were enacted or adopted after November 10, 1986, that prevent their desired use and
19 reduce the value of the property. In other words, plaintiffs’ Measure 37 complaint
20 necessarily is premised on a contention that the State erred when it determined – as
21 announced in the Final Order – that plaintiffs were entitled only to a waiver dating back to
22 1986. Thus, the substance of the complaint is a challenge to the correctness of the Final
23 Order, even though plaintiffs frame their allegations as a direct claim under Measure 37.

24 In arguing that they were not required to seek judicial review under the APA,
25 plaintiffs rely on the Supreme Court’s decision in *Boise Cascade Corp. v. Board of*
26 *Forestry*, 325 Or 185 (1997), which they argue stands for the proposition that a circuit

1 court has jurisdiction over a compensation claim, even when that claim stems from an
2 agency order (Pls' Resp, p 6). But that is not what *Boise* holds. In that case, the Board of
3 Forestry issued an order denying the plaintiff's logging plan on the ground that it did not
4 sufficiently protect spotted-owl habitat. *See Boise*, 325 Or at 188. The plaintiff filed a
5 circuit-court action for compensation claiming that the denial of its request to log
6 constituted an unconstitutional taking without just compensation. The question before the
7 Supreme Court was whether the circuit court could decide that takings claim or needed to
8 wait for the agency to determine whether its own action had been unconstitutional. The
9 Supreme Court held that the circuit court had concurrent jurisdiction over the takings
10 question, in part because that *constitutional* issue "traditionally falls within an area
11 adjudicated by courts." *Boise*, 325 Or at 196.

12 Most significantly for purposes of this case, the question before the circuit court in
13 *Boise* – whether the plaintiff was entitled to compensation as a result of an
14 unconstitutional taking – did *not* depend on whether the Board of Forestry had erred in
15 issuing the underlying order, which merely denied the logging application based on the
16 presence of spotted-owl habitat and did not involve the takings issue.¹ Consequently, the
17 issue before the Supreme Court was whether the circuit court could decide that
18 constitutional question in the first instance, or had to wait for the agency to address that
19 issue, too. That is a completely different question from the one presented here, which is
20 what type of circuit-court proceeding plaintiffs were required to bring to challenge the
21 correctness of a decision that the agencies *already* had made in a final order: a petition for
22 judicial review under the APA or a compensation claim under ORS 197.352 (6). *Boise*
23 provides no assistance in answering that question.

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25 _____
26 ¹ The Board did not address the constitutional takings issue because the plaintiff "did not
at hearing attempt to present evidence that any "taking" had in fact occurred." 325 Or at
189.

1 *Dunn v. City of Redmond*, 303 Or 201 (1987), which plaintiffs also cite, provides
2 even less support for their assertion that this court may decide the correctness of agency
3 action in the context of a Measure 37 compensation claim. In *Dunn*, the Supreme Court
4 held that a circuit court could *not* properly decide a compensation claim when the
5 plaintiff's entitlement to compensation depended on the validity of agency action, and that
6 action had not yet proceeded through exclusive LUBA review. 303 Or at 209.

7 Plaintiffs' remaining arguments against the exclusivity of the APA remedy are
8 similarly unconvincing. First, plaintiffs note that Measure 37 does not cross-reference the
9 APA. Plaintiffs' observation is correct, but lacks legal significance. The Declaratory
10 Judgment Act, like Measure 37, does not refer to the APA. *See* ORS 28.010, *et seq.*
11 Nonetheless, a person aggrieved by an agency order may not circumvent APA review by
12 challenging the agency's action by seeking declaratory relief. That is true even though the
13 Declaratory Judgment Act includes a provision stating expressly that the Act is "remedial"
14 and "is to be liberally construed and administered." ORS 28.120.

15 Second, plaintiffs assert that Section 7 of Measure 37 "states that any procedure
16 adopted by the State cannot act as a prerequisite to the filing of a claim for compensation
17 in the Circuit Court." (Pls' Resp, p 2). In fact, Section 7 says only that any procedures the
18 State or other government may adopt *for the processing of claims* shall not act as
19 prerequisites to the filing of a Section 6 compensation claim in circuit court. That is not
20 the same as stating that a person dissatisfied with the State's decision on a Measure 37
21 claim may file a Section 6 compensation claim without having sought review under the
22 APA. And plaintiffs overlook what Measure 37 *does* say about other statutory remedies –
23 that the measure "is not intended to modify or replace any other remedy." ORS 197.352
24 (12). In other words, the Section 6 compensation claim neither replaces the APA remedy
25 nor modifies its exclusive nature.

26

1 Finally, plaintiffs note that the Final Order in this case did not issue after a
2 contested-case hearing and suggest that the absence of such a hearing means they were not
3 required to seek relief pursuant to the APA. But the statute that describes the exclusive
4 nature of the APA remedy applies to orders in other than contested cases, like the Final
5 Order here, not only to orders issued after contested-case hearings. ORS 183.480.² In
6 addition, the line of appellate cases that explains APA exclusivity includes cases that
7 involved orders in other than contested cases; that doctrine is not limited to litigation that
8 arises from orders in contested-case proceedings. *See, e.g., Mendieta v. Division of State*
9 *Lands*, 148 Or App 586, 599-600 (1997), *rev dismissed*, 328 Or 331 (1999) (where
10 “redress would have been available under ORS 183.484, had plaintiffs timely filed their
11 petition for judicial review[,]” the Court of Appeals held, “the trial court erred in granting
12 plaintiffs relief under ORS 183.490 and ORS 28.010”).

13 Moreover, the fact that no contested-case hearing was held does not mean, as
14 plaintiffs contend, that they did not have “any ability to be heard” (Pl’s Resp, p 5). To the
15 contrary, plaintiffs could attach any evidence they wished to the Measure 37 claim they
16 filed with the State, including any evidence supporting their contention that they acquired
17 the property in 1973. Plaintiffs also had an opportunity to comment on the draft staff
18 report that related to their claim. If the evidence or argument that plaintiffs provided the
19 state agencies was incomplete, that is a problem of their own making. It does not call into
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22 ² ORS 183.480 provides, in part:

23 (1) Except as provided in ORS 183.415 (5)(b), any person adversely
24 affected or aggrieved by an order or any party to an agency proceeding is
25 entitled to judicial review of a final order, whether such order is affirmative
26 or negative in form. A petition for rehearing or reconsideration need not be
provided as a condition of judicial review unless specifically otherwise
provided by statute or agency rule.
(2) Judicial review of final orders of agencies shall be *solely* as provided by
ORS 183.482, 183.484, 183.490 and 183.500.

(Emphasis added).

1 question the adequacy of APA relief or entitle plaintiffs to circumvent that judicial-review
2 process.

3 In addition, plaintiffs could have supplemented whatever material they submitted
4 to the State had they filed a timely petition for judicial review under ORS 183.484:

5 “On judicial review of an order in other than a contested
6 case proceeding, ORS 183.484 affords the parties the
7 opportunity to develop a record like the one that parties are
entitled to develop at an earlier stage in a contested case
proceeding.”

8 *Norden v. Water Resources Dept.*, 329 Or 641, 649 (2000). Plaintiffs are simply wrong
9 when they assert that “there is, at best, a limited record available for judicial review * * *”
10 (Pls’ Resp, p 6).

11 In sum, the only way in which plaintiffs properly could challenge the State’s
12 decision on their Measure 37 claim was by filing a timely petition for judicial review.
13 Because they did not, their complaint should be dismissed.

14 **B. Plaintiff cannot state a claim for Measure 37 compensation because the State**
15 **has elected to waive land use regulations in lieu of paying compensation.**

16 As the State explained in its original motion, plaintiffs have not stated – and cannot
17 state – a claim for compensation under Measure 37 because the State has elected to not
18 apply certain land use regulations in lieu of paying just compensation. Plaintiffs’
19 responsive memorandum does not address that issue; nonetheless, the State provides a bit
20 more explanation of this aspect of its motion to dismiss.

21 Measure 37 provides two alternative remedies – payment of just compensation and
22 “waiver” – and permits the government, not the claimant, to choose between them. In this
23 case, the State has elected the waiver remedy by opting not to apply certain land use
24 regulations to plaintiffs’ property in lieu of paying compensation. If plaintiffs had timely
25 challenged the scope of that waiver under ORS 183.484, a reviewing court theoretically
26 might have determined that plaintiffs were correct that they first acquired the property in

1 1973, not in 1986. At that point, the State once again would have had the *choice* whether
2 to pay just compensation or, instead, to not apply land-use regulations back to 1973. *See*
3 ORS 197.352 (8), (10). In other words, the State would not have been compelled to pay
4 monetary compensation even if plaintiffs had successfully challenged the Final Order in
5 an ORS 183.484 judicial-review proceeding. Plaintiffs cannot state a claim for such
6 compensation merely by attempting to avoid APA review.


7 **CONCLUSION**

8 For the reasons stated above and in the State's motion to dismiss, this court lacks
9 jurisdiction over plaintiffs' Measure 37 claim and plaintiffs have failed to state ultimate
10 facts constituting a claim upon which relief can be granted. This court should dismiss the
11 complaint with prejudice.

12 DATED this 17th day of October, 2006.

13 Respectfully submitted,

14 HARDY MYERS
15 Attorney General

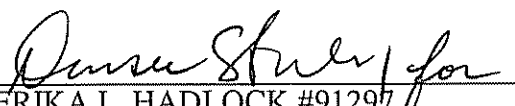
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1 **CERTIFICATE OF SERVICE**

2 I certify that on October 17, 2006, I served the foregoing *Defendant's Reply on its*
3 *Motion to Dismiss* upon the parties hereto by the method indicated below, and addressed to the
4 following:

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