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

6 CHARLES HOFF, an individual,

7 Petitioner,

8 v.

9 OREGON DEPARTMENT OF LAND
10 CONSERVATION & DEVELOPMENT, an
Agency of the State of Oregon,

11 Respondent,

12 and

13 OREGON DEPARTMENT OF
14 ADMINISTRATIVE SERVICES, an Agency
of the State of Oregon,

15 Respondent.
16

Case No. C052804CV

RESPONDENTS' REPLY IN SUPPORT OF
MOTION FOR SUMMARY JUDGMENT

Hearing:
October 30, 2006
1:30 pm

17 1. PGE does not require or permit state trial courts to reconsider Supreme Court
18 authority.

19 Petitioner's interpretation of *PGE v. Bureau of Labor and Industries*, 317 Or 606 (1993)
20 is unfounded (Pet Resp, p 3). Nowhere in that opinion does the Supreme Court state that its
21 decisions involving statutory construction are no longer authoritative if they were issued prior to
22 1993. The Supreme Court has held consistently that when it construes a statute "that
23 interpretation becomes part of the statute, subject only to amendment by the legislature." *Palmer*
24 *v. State of Oregon*, 318 Or 352, 358 (1994). In *Palmer*, the court plainly stated, "[b]ecause the
25 legislature has not amended ORS 138.550 (1) since this court's decision in *North v. Cupp*, this
26 court's interpretation of ORS 138.550 (1) in that case remains the law in Oregon." *Id.* The

1 Supreme Court decided *North v. Cupp* in 1969.¹ *PGE* provides no support for petitioner’s
2 contention that this court should reconsider and essentially overrule *Alexanderson v. Polk County*
3 *Commissioners*, 289 Or 427 (1980).

4 Petitioner’s reliance on *LaDu v. Oregon Clinic P.C.*, 165 Or App 687 (2000) similarly is
5 misplaced (Pet Resp, p 4). In *LaDu*, the plaintiff sought to extend a prior decision to new facts.
6 The Court of Appeals found such an extension was not warranted:

7 “Under *PGE*’s ‘text-in-context’ methodology, ‘person’ in ORS 30.020(1)
8 does not encompass nonviable fetuses. Nothing in the rule of prior construction
9 compels a contrary result. Regardless of whether the result in for *Libbee* [*v.*
10 *Permanente Clinic*, 268 Or 258 (1974)], itself might have been different if
11 decided in accordance with *PGE*’s methodology, nothing in *Libbee* purported to
address the applicability of ORS 30.020 to an action for the death of a nonviable
fetus or to resolve issues of statutory construction bearing on that issue. Indeed,
Libbee expressly avoided that question.

12 “We are thus faced with the choice: We can take *Libbee* at face value,
13 limiting it to its terms, and reach a result that is consonant with *PGE*. Or we can
14 ignore *Libbee*’s express disclaimer and expand its holding so as to construe the
statute in a fashion that cannot be reconciled with *PGE*. The answer is clear.”
165 Or App at 696.

15 The parties’ cross-motions for summary judgment here present a different situation.
16 Unlike the court in *Libbee*, which did not even quote the statute at issue, the court in
17 *Alexanderson* specifically addressed the applicability of statewide land use planning goals,
18 interpreted the relevant statutes by looking at the text, context and legislative history, and
19 decided the same question—whether statewide planning goals apply directly to land use
20 decisions prior to acknowledgement. Thus, the only issue on summary judgment in the present
21 case is whether respondents and this court are bound to follow Oregon law.

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24 ¹ See also, *Crocker and Crocker*, 332 Or 42, 48-53 (2001) (1897 and 1940 Supreme Court interpretations of statute
25 are authoritative in the absence of legislative changes); *State v Ciancanelli*, 339 Or 282, 290-92 (2005) (“A decent
26 respect for the principle of *stare decisis* dictates that this court should assume that its fully considered prior cases are
correctly decided.”); *Kilminster v Day Management Corp.*, 323 Or 618, 629-630 (1996) (1916 case definitively
construed statutory wording); *Glithero and Glithero*, 326 Or 259, 264 (1998) (1992 decision dispositive of
interpretation of statutory wording); *State ex rel Huddleston v Sawyer*, 324 Or 597, 607-608 (1997) (holding that
because pre-*PGE* decision definitively construed statutory wording, court was bound by that interpretation)

1 2. The same principles apply to the applicability of ORS chapter 215.

2 Petitioner argues that state statutes governing agricultural land did not apply to the
3 property because, in 1977, the county’s zoning ordinance defined the land as “suburban” (Resp,
4 pp 6-7). This argument, however, misses the point. Where state law required land to be zoned
5 for agricultural or exclusive farm use, state standards applied directly before and after
6 acknowledgment. *Kenagy v. Benton County*, 115 Or App 131 (1992). In this case, there is no
7 dispute that the property was and is “agricultural land” as that term is (and was) defined in
8 statewide land use planning Goal 3.² As “agricultural land,” regardless of the county’s zoning,
9 the use of the property was limited to “farm uses” as defined in ORS 215.203 (1975) (and those
10 non-farm uses allowed under ORS 215.213 (1975). The zoning on which petitioner relies was
11 never acknowledged and, as a result, the statewide goals applied directly to the use of the
12 property.

13 Petitioner’s argument, like his initial demand, “is based on the assumption that the
14 County’s R-20 zone was the governing land use regulation when he acquired the property in
15 1977.” *Record*, § 6, p 8. That assumption, however, is incorrect. “[B]ecause the County’s R-20
16 Zone had not been acknowledged by the Commission at the time the claimant acquired the
17 property, the Goal 3 ‘commercial’ standard for farmland divisions and the standards for new
18 parcels under ORS 215.263 (19756 edition) applied to the property, rather than the 20,000 square
19 foot minimum parcel size requirement of the unacknowledged R-20 Zone.” *Id.*³

20 In *Alexanderson, supra*, the property owners sought to partition land that was planned for
21 rural residential uses. The county denied the partition on the basis that it did not comply with
22 statewide land use planning goal 3. The property owner in *Alexanderson* made exactly the same
23 argument that petitioner makes here: “[p]etitioner relies on the continued effectiveness of the

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25 ² See Attachment B to Respondents’ Response (copy of Goal 3)

26 ³ Respondents determined that petitioner’s demand was valid because “it is possible that at least one new parcel
could be created” under 1977 standards, “which is more than the current ORS 215.780, Goal 3 and OAR 660-033-
0100 currently allow.” *Record*, § 6, p 8.

1 county's existing plan, ordinances and regulations pending their acknowledgment by LCDC,
2 ORS 197.275 (1), *supra*, and contends that the county is bound to judge his proposed partition
3 under its subdivision ordinance until it is properly revised or amended. This contention has merit
4 unless the county is right in superimposing the statewide goals on individual decisions under the
5 ordinance. The question is whether the legislature meant this to be done." 289 Or at 432. After
6 a thorough review of the development of the pertinent statutes and legislative history, the Court
7 concluded that the county was correct, and that statewide planning goal 3 applied directly to the
8 proposed partition notwithstanding the county's plan and subdivision ordinance. There is no
9 material difference between this case and *Alexanderson*. Goal 3 controlled the division and use
10 of petitioner's property from the time it took effect on January 1, 1975.

11 3. The date on which petitioner acquired the property is not at issue.

12 The court should reject petitioner's attempt to change the allegations of the Petition at
13 this late date. The Petition makes no allegation of factual error by respondents. Petitioner's
14 memoranda on the summary judgment issue concede there is no question of fact in dispute.

15 Petitioner argues that the allegations of paragraph 5 of the Petition contain "sufficient
16 facts to support petitioner's claim that he acquired his interest in his property in 1973" (Resp, pp
17 8-9).⁴ Whether or not these facts would be sufficient to support a claim of ownership since 1973
18 is not an issue because petitioner has made no such claim—not to respondents in his Measure 37
19 demand and not to this court in the Petition.

20 Finally, petitioner contends that he may offer new evidence obtained after respondents
21 issued the Final Order (Resp, pp 8-9). But, the evidence apparently is not new, because
22 presumably he used it to support his demand to the County, a demand he submitted at the same
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25 ⁴ In paragraph 5, petitioner alleges that he submitted a Measure 37 demand to Clackamas County "for 52.86 acres in
26 which he acquired an interest by first amending an existing option agreement with the owner on October 16, 1973 to
create an irrevocable offer to purchase that property, and then executing that option on March 1, 1977." Petitioner
also alleges "Clackamas County found that Petitioner had a continuous ownership interest since March, 1977."

1 time as his state demand. Even if the evidence is new, however, it does not relate to any fact in
2 dispute.

3 In his demand to respondents, petitioner asserted that he acquired the property on March
4 1, 1977 and provided a warranty deed (*Record*, § 2 at 3, 15). Petitioner does not allege that
5 respondents erred by finding that petitioner acquired the property on March 1, 1977. And in any
6 event, the finding is supported by the substantial evidence presented by petitioner in the form of
7 a warranty deed. *See, Norden v. Water Resources Dept.*, 329 Or 641, 649 (2000) (the trial
8 court’s task in reviewing an agency’s factual findings for substantial evidence “is limited to
9 whether the evidence would permit a reasonable person to make the determination that the
10 agency made in a particular case”).

11 4. The applicability state law does not affect the relief granted.

12 Petitioner’s only allegation of error by respondents is that they incorrectly stated in the
13 Final Order that:

14 “The use of Property permitted in 1977 was governed by state laws that
15 include, but are not limited to: the provisions of ORS chapter 92, Statewide Land
Use Planning Goal 3, and ORS chapter 215 that existed at that time.”

16 This court’s conclusion as to the applicability of Goal 3 and ORS chapter 215 will not change the
17 nature or scope of relief to which petitioner was entitled, and received, under Measure 37. *See*,
18 fn 2 above.

19 If a public entity opts not to apply restrictive land use regulations, Measure 37 requires
20 that the waiver allow the claimant a use permitted at the time of acquisition. ORS 197.352 (8).
21 In other words, the public entity waives land use regulations enacted or enforced after
22 acquisition. If a regulation applied at the time of acquisition, then it need not be waived.

23 In this case, respondents waived applicable provisions of Statewide Planning Goal 3 and
24 ORS 215.780 that took effect after March 1, 1977. The applicable provisions of state law in
25 effect on March 1, 1977 are not subject to waiver under Measure 37. If these state laws applied,
26 a “use permitted” at the time of acquisition is a use permitted under these state laws. If the laws


1 did not apply, then they will not affect the determination of a “use permitted” at the time of
2 acquisition. In either situation, the relief already granted to petitioner is the relief to which he is
3 entitled under Measure 37.

4 Respondents’ motion for summary judgment should be granted and the Final Order
5 affirmed.

6 DATED this 17th day of October, 2006.

7 Respectfully submitted,

8 HARDY MYERS
9 Attorney General


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1 **CERTIFICATE OF SERVICE**

2 I certify that on October 17, 2006, I served the foregoing *Respondents' Reply in Support*
3 *of Motion for Summary Judgment* upon the parties hereto by the method indicated below, and
4 addressed to the following:

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