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

Don Johnston and Son, a partnership
consisting of Gwendolyn J. Johnston and
Donald S. Johnston,

Plaintiff,

v.

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

Defendant.

Case No. 0700303CV

STATE OF OREGON'S CROSS-MOTION FOR
SUMMARY JUDGMENT

(Oral Argument Requested – 30 Minutes)

Pursuant to ORS 183.484 and ORCP 47, Defendant State of Oregon (“State”) moves for summary judgment in its favor because the Final Order, Claim No. M 129633 issued by the Department of Land Conservation and Development (“DLCD”) was correct. This motion is made on the that DLCD, in its Final Order, correctly interpreted and applied Ballot Measure 37 (2004), codified at Oregon Revised Statute (“ORS”) 197.352 (“Measure 37”), to plaintiff Don Johnston and Son’s (“Partnership”) demand for relief pursuant to Measure 37. DLCD correctly determined that the Partnership was entitled to a “waiver” of land use regulations under Measure 37 only as of the date it acquired his present ownership interest in property. The Partnership acquired the property on December 28, 1978 and conveyed its present ownership interest in a portion of the property on April 20, 2006. The material facts are undisputed and the State is entitled to judgment as a matter of law.


Oral argument is requested and is expected to require thirty minutes; official court reporting services are requested.

1 This cross-motion is based on the records and file herein and State's memorandum in
2 support of cross motion for summary judgment and in response to the Partnership's motion for
3 summary judgment.

4 DATED this 23 day of May, 2007.

5 Respectfully submitted,

6 HARDY MYERS
7 Attorney General

8 
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IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF KLAMATH

Don Johnston and Son, a partnership
consisting of Gwendolyn J. Johnston and
Donald S. Johnston,

Plaintiff,

v.

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

Defendant.

Case No. 0700303CV

STATE OF OREGON'S MEMORANDUM OF
LAW IN SUPPORT OF ITS RESPONSE TO
PLAINTIFF'S MOTION FOR SUMMARY
JUDGMENT AND CROSS MOTION FOR
SUMMARY JUDGMENT

(Oral argument requested – 30 minutes)

ORAL ARGUMENT REQUESTED

Defendant the State of Oregon requests oral argument on its Plaintiff's Motion for
Summary Judgment and on the State's Cross-Motion for Summary Judgment. The State
estimates that one hour will be required. Official court reporting services are requested.

INTRODUCTION

This case involves a demand for compensation under ORS 197.352, commonly known as
Ballot Measure 37. Oregon voters enacted Measure 37 through the initiative process in 2004.
Measure 37 permits present owners of private real property to seek compensation for reductions
in fair market value caused by certain restrictions on use. If a claim is valid, public entities have
the choice of paying compensation or not applying certain restrictions.

On June 19, 2006, Plaintiff Don Johnson and Son (the "Partnership") submitted a
Measure 37 demand to the State. The state Department of Administrative Service (DAS) and the
Department of Land Conservation and Development (DLCD) reviewed and denied plaintiffs'

1 demand in accordance with Measure 37. DAS and DLCD jointly issued Final Order M 129633
2 on December 15, 2006. The Final Order determined that Plaintiff acquired the property on
3 December 28, 1978 and that it conveyed its present ownership interest in a portion of the
4 property on April 20, 2006.

5 The parties' cross-motions for summary judgment present two questions of law for the
6 court: (1) is the Partnership the present owner of all of the property at issue, and (2) when did the
7 Partnership acquire the property? Measure 37 relief is only available to present owners and the
8 relief granted is limited by the date the present owner acquired the property. The State is entitled
9 to judgment because the material facts are undisputed and the State's determination of ownership
10 and date of acquisition is supported by substantial evidence and a proper interpretation and
11 application of Oregon law.

12 The Partnership alleges that the State of Oregon, by and through the Department of Land
13 Conservation and Development, (the "State") erroneously determined that the Partnership did not
14 acquire the property until 1978 and that it further erred in determining that the Partnership
15 conveyed a portion of this property in 2006, changing its present owner status. The Partnership
16 argues that it acquired the property when the partnership was formed sometime in 1969, because
17 the partners because the partners intended to convey it to the Partnership at that time. Moreover,
18 the Partnership alleges, it remains a present owner because the 2006 conveyance was rescinded.
19 Neither the law nor substantial evidence in the record supports the Partnership's position.

20 By contrast, the State correctly applied the law to the substantial evidence on the record.
21 The record contained a December 28, 1978 deed wherein each of the partners and a non-partner
22 co-owner conveyed the property to the Partnership. The record also contained an April 20, 2006
23 Bargain and Sale Deed wherein the Partnership conveyed its interest in a portion of the property
24 to two of the partners and a third nonpartner. No documentation was submitted to the State that
25 would refute the clear, unambiguous language of the deeds. Accordingly, the State correctly

1 relied on these deeds in determining that the Partnership first acquired the property in 1978 and
2 subsequently conveyed a portion thereof in 2006. As a result, the Partnership is no longer a
3 present owner of the portion conveyed in 2006. Therefore, the State's determination which is set
4 forth in its Final Order, Claim No. M129633 is correct and, as a matter of law, summary
5 judgment should be granted in the State's favor.

6 MOTIONS FOR SUMMARY JUDGMENT

7 The State moves for summary judgment on the Partnership's Petition for Judicial
8 Review, and on the Measure 37 Claim, as follows:

- 9 1. The Petition for Judicial Review should be dismissed on the grounds that the material
10 facts are undisputed, the State's findings of fact are supported by substantial evidence,
11 and the State's conclusions correctly apply the law. ORS 183.484 (5).
- 12 2. The compensation claim should be dismissed because the court lacks jurisdiction. The
13 Petition for Judicial Review is the exclusive procedure available under Oregon law to test
14 the validity of final orders issued by state agencies.
- 15 3. The compensation claim should be dismissed because, even if plaintiffs' demands were
16 valid, plaintiffs are not entitled to compensation. Measure 37 vests discretion in the
17 public entities, not the claimants, to choose whether to pay compensation or provide
18 alternate relief on valid claims.

19 In support of its Cross-motions and in opposition to the Partnership's Motion for Partial
20 Summary Judgment, the State relies upon Measure 37, the APA, ORCP 47 B, the files and
21 record of this case, the agency *Record* lodged with the court on May 10, 2007, and the following
22 Points and Authorities.

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26ge 3 - STATE OF OREGON'S MEMORANDUM OF LAW IN SUPPORT OF ITS RESPONSE
TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND CROSS MOTION FOR
SUMMARY JUDGMENT

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1 **POINTS AND AUTHORITIES**

2 **I. Background**

3 **A. Measure 37**

4 Oregon voters enacted Measure 37 to offer relief to owners of real property who had been
5 injured by the enactment of land use regulations after the owner acquired his or her real property
6 interest. Under the express language of the statute, a property owner qualifies for Measure 37
7 relief if: (1) a public entity enacts or enforces a “land use regulation” that (2) restricts use and (3)
8 has the effect of reducing fair market value. Subsection 3 of Measure 37 provides that certain
9 land use regulations shall not be a basis for a written demand under Subsection 1, notably
10 regulations in effect when the owners acquired the property. ORS 197.352 (3) (E). Subsection
11 11 defines “owner” as the “present owner of the property, or any interest therein.” ORS 197.352
12 (11) (C).

13 If a claimant meets the foregoing criteria, Measure 37 authorizes the public entity that
14 enforces that land use regulation to either compensate the claimant or to grant a Measure 37
15 “waiver.” ORS 197.352 (8); *see also* ORS 197.352 (10).¹ This latter act is commonly referred to
16 as a Measure 37 “waiver.” Although Measure 37 affects Oregon’s land use planning statutes, it
17 did not repeal any of them. The measure merely authorizes a governing body to “modify,
18 remove, or not * * * apply” certain regulations in specific situations. *MacPherson v. DAS*, 340
19 Or 117, 132 (2006). . Otherwise, the land use planning laws remain in effect. *Id.*

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24 ¹ A measure 37 waiver is shorthand under 197.352 for the public entities authority to “modify,
25 remove, or not to [sic] apply” land use regulations to the extent necessary “to allow the owner to
use the property for a use permitted at the time the owner acquired the property.” DLCD can pay
compensation only if and when the legislature appropriates funds for that purpose. *See* OAR
660-002-0010 (8) (c).

1 **B. Statement of undisputed facts**

2 The State believes the following facts are undisputed based on The Partnership's Measure
3 37 claim and all documents submitted in support of that claim, the State's final orders, the
4 Partnership's complaint and the answer, and The Partnership's motion for summary judgment.

5 1. In March of 1959, Ralph A. Johnston and Esther M. Johnston, husband and wife,
6 entered into a land sale contract for the sale of the Tax lots 100 (Sections 30C, 31A, 32, 32C),
7 Tax lot 300 and Tax lot 1200 of Klamath County ("Property"), to Ralph Donald Johnston and
8 Gwendolyn Johnston, husband and wife. (See Record filed previously in this Action ("Record"),
9 §2, pp. 13-15).

10 2. On or about September 23, 1977, Ralph Johnston and Esther May Johnston
11 conveyed all of their vendor's interest in the Property, by Warranty Deed, to Ralph Donald and
12 Gwendolyn Johnston, husband and wife, and Donald Scott Johnston & Ginger Marie Johnston,
13 husband and wife. (Record, §3, p. 60-61)

14 3. On or about October 7, 1977, Ralph Donald Johnston and Gwendolyn Jean
15 Johnston, Donald Scott Johnston and Ginger Marie Johnston mortgaged their entire interest in
16 the Property in favor of the Farmers Home Administration. (Record, §3, pp. 62-64)

17 4. On or about December 12, 1978, Ralph Donald Johnston, Gwendolyn Johnston
18 and Donald Scott Johnston executed a written Partnership Agreement for the entity named Don
19 Johnston & Son. (Record, §3, pp. 28-49)

20 5. December 28, 1978, Ralph Donald Johnston, Gwendolyn Johnston and Donald
21 Scott Johnston executed a quitclaim deed, identifying each individual as a grantor and conveying
22 all of the Property to Don Johnston & Son, a partnership consisting of Ralph Donald Johnston,
23 Gwendolyn Johnston and Donald Scott Johnston. (Record, §2, pp. 8-12, §3, pp. 65-69) (the
24 "1978 Deed")

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1 6. On April 22, 1983, a document entitled Corrected Quitclaim Deed identified the
2 grantors in the 1978 Deed as Ralph Donald Johnston, Gwendolyn Jean Johnston, Donald Scott
3 Johnston and Ginger Marie Johnston. Record, §3, pp. 70-72 (The 1983 Corrected Quitclaim
4 Deed shall also be referenced as part of the “1978 Deed”).

5 7. On June 19, 2006, Gwendolyn Johnston and Donald Scott Johnston submitted a
6 written claim for compensation pursuant to ORS 197.352 to the Department of Administrative
7 Services on behalf of the State of Oregon, Claim number M129633. (Record §2, pp. 1-16).

8 8. On April 20, 2006, Don Johnston & Son executed a Bargain and Sale Deed
9 conveying a one third interest in the portion of the Property described as Tax Lot 100 (Section
10 32) and Tax Lot 300 to Donald Scott Johnston, Gwendolyn Johnston and Danny L. Johnston.
11 (Record, §4, pp.11-13)

12 9. Gwendolyn and Donald Scott Johnstons’ claim was amended to add Don
13 Johnston and Son as a claimant. (Record, §3, p. 1, 8.)

14 10. On November 20, 2006, DLCD issued its Draft Staff Report and
15 Recommendation in which it proposed that :

16 Claimant Don Johnston and Son is an “owner” of tax lots 100 (Section 30C), 100
17 (Section 31A), 100(Section 32C) and 1200 as that term is defined by ORS
18 197.352 (11)(C), as of December 28, 1978. Donald and Gwendolyn Johnston are
19 owners of tax lots 100(Section 32) and 300, as that term is defined by ORS
20 197.352(11)(C), as of April 20, 2006.

21 Don Johnston and Son has not established that it is an “owner” of tax lots
22 100(Section 32) and 300 and Donald and Gwendolyn Johnston have not
23 established that they are “owners” of tax lots 100(Section 30C), 100(Section
24 31A), 100(Section 32C) and 1200.

25 (Record, §4, p. 23)

11. On November 21, 2006, a General Judgment based on the stipulation of the
parties to that action was entered in the Klamath County Circuit Court, Case No. 0603971, in
which the 2006 Bargain and Sale Deed was ordered rescinded. The parties to this action were

1 Don Johnston and Son, a partnership v. Sterling Savings Bank, D. Scott Johnston, Gwen
2 Johnston and Danny L. Johnston. (Record, §4, pp.11-13; Plaintiff's Motion, Ex. A.)

3 12. On December 15, 2006, DLCD issued Final Orders A and B, Claim No.
4 M129633, incorporating the recommendation of the Draft Staff Report as to Don Johnston and
5 Son. (Record, §6, pp 1-7)

6 **C. Standard of review**

7 Plaintiff's First Claim for Relief is a Petition for Judicial Review of the State's Final
8 Order, M129633, is within the Administrative Procedure Act ("APA"). The Court's standard for
9 review is governed by ORS 183.484 of the APA-- review of a decision made by a state agency in
10 an other than contested case proceeding. ORS 183.484; *Powell v. Bunn*, 185 Or App 334, 339
11 (2002). The summary judgment standard set forth in ORCP 47 is not the applicable standard.
12 *Powell* at 339 ("viewing factual disputes in the light most favorable to a nonmoving party" – the
13 usual standard of review in a summary-judgment motion – "[is] not appropriate in the judicial
14 review of an administrative order in a noncontested case proceeding"). Instead, the appropriate
15 standard of review in the instant case is (a) whether the agency has erroneously interpreted a
16 provision of law and that a correct interpretation compels a particular action; and (b) was the
17 order supported by substantial evidence in the record.

18 "Substantial evidence exists to support a finding of fact when the record, viewed as a
19 whole, would permit a reasonable person to make that finding." ORS 183.484 (5); *G.A.S.P. v.*
20 *Environmental Quality Commission*, 198 Or App 182, 187 (2005). Judicial review based on the
21 substantial evidence standard is limited in scope. That is, in determining whether substantial
22 evidence supports an agency's factual findings, the question before a circuit court "is limited to
23 whether the evidence would permit a reasonable person to make the determination that the
24 agency made in the particular case." *Norden v. Water Resources Dept.*, 329 Or 641, 649 (2000).

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26ge 7 - STATE OF OREGON'S MEMORANDUM OF LAW IN SUPPORT OF ITS RESPONSE
TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND CROSS MOTION FOR
SUMMARY JUDGMENT

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1 In *Norden*, the Oregon Supreme Court confirmed the plain meaning of the APA standard.
2 The trial court’s task in reviewing an agency’s factual findings for substantial evidence “is
3 limited to whether the evidence would permit a reasonable person to make the determination that
4 the agency made in a particular case.” 329 Or at 649. The Supreme Court affirmed the decision
5 of the state Water Resources Department even though the petitioner was “able to muster
6 evidence to the contrary.” *Id.* In *G.A.S.P v. Environmental Quality Commission*, the Court of
7 Appeals followed *Norden* in concluding that “[t]he court’s purpose on review is not to find the
8 facts itself but to decide ‘whether the evidence would permit a reasonable person to make the
9 determination that the agency made * * *.’” 198 Or App 182, 195-96 (2005). Similarly, in
10 *Garcia v. Boise Cascade Corp.*, the Supreme Court applied the identical contested case standard²
11 in a worker’s compensation case, explaining that “[t]he appropriate question was not whether
12 substantial evidence supported claimant’s claim, but whether substantial evidence supported the
13 referee’s decision.” 309 Or 292, 296 (1990).

14 Thus, in deciding the motions for summary judgment on the Partnership’s APA claim,
15 the only questions presented are: (1) whether the State’s Final Order is based on correct
16 interpretations or applications of the law; and (2) whether the State’s factual findings are
17 supported by substantial evidence in the record. If the Court answers these questions in the
18 affirmative, the agency is entitled to summary judgment. Conversely, if the Court finds that the
19 agency erred in its legal interpretation, the Court shall deny the State’s motion for summary
20 judgment and is required to “set aside or modify the order, or...remand the case to the agency for
21 further action under a correct interpretation of the provision of law.” ORS 183.484 (5). If the
22 Court determines that substantial evidence in the record does not support the agency’s order, the
23 Court may deny the State’s motion and “shall set aside or remand the order.” ORS 183.484(5);
24 *G.A.S.P., supra.*

25 ² See ORS 183.482 (8) (c).

1 The Partnership has also brought a claim for relief directly under Section 6 of Measure
2 37, seeking monetary compensation, and has moved for summary judgment on that claim. As
3 the State explains in section II. C of its argument, *infra*, this Court lacks jurisdiction over the
4 Partnership’s Measure 37 “just compensation” claim. However, if this Court concludes that it
5 has jurisdiction over that claim, it should apply the ordinary standard under ORCP 47 to its
6 analysis of the parties’ cross-motions for summary judgment: “The trial court must view the
7 evidence and all reasonable inferences it may support in the light most favorable to the
8 nonmoving party and determine whether the moving party, despite that view of the evidence, is
9 entitled to judgment as a matter of law.” *Powell v. Bunn*, 185 Or App 334, 338 (2002), *rev*
10 *denied*, 336 Or 60 (2003).

11 **II. Argument**

12 **A. Under the applicable standards of judicial review, the agency’s decision that**
13 **the Partnership acquired Tax lots 100 (Section 30C), 100 (Section 31A), 100(Section 32C)**
14 **and 1200 on December 28, 1978 is based on an accurate interpretation of the appropriate**
15 **law and is supported by substantial evidence in the record.**

16 The law that governs the Partnership’s Measure 37 claim relating to its acquisition date of
17 Tax lots 100 (Section 30C), 100 (Section 31A), 100(Section 32C) and 1200 (“Property A”) is the
18 following: a) Measure 37; b) ORS 68.130 (1973 ed.) and c) ORS 93.020.³ The parties agree that
19 the scope of a Measure 37 waiver is limited by the date the current owner acquired the property.
20 (Motion p. 3:9-11). Thus, the State’s interpretation of Measure 37 is not at issue.

21 The parties do not agree, however, on the correct interpretation of the laws relating to the
22 conveyances of real property from an individual partner to a partnership. The Partnership argues
23 that the State did not properly apply the statutory presumption set forth in ORS 67.065(4)

24 ³ Although the Partnership originally acquired all of the Property described in the Complaint in
25 one transaction, the Partnership later conveyed a portion of the property to certain individuals in
2006. This portion of the Property is discussed in part II.B of this Response and Cross-Motion.

1 because it did not presume that the Partnership acquired the property in 1969. (Motion, p. 4:3-
2 15). However, the applicable laws are those in effect at the time of the conveyance--ORS 93.020
3 relating to conveyances of real property and ORS Chapter 68 (1973 ed.) entitled "Uniform
4 Partnership Law."⁴ Chapter 67 of the ORS took effect in 1997, after The Partnership acquired
5 the property. The State did not interpret or apply these laws.

6 **1. ORS 93.020**

7 There are only two methods for conveying real property, by a valid written instrument or
8 by operation of law. ORS 93.020⁵; *see, e.g. Martin v. Allbritton*, 124 Or. App. 345 (1993)
9 ["Partial performance of an oral contract for the sale of real property may impel a court of equity
10 to take the contract out of the statute of frauds"]. This has always been the law in Oregon;
11 partnerships are not excluded. *Dodson v. Dodson*, 26 Or 349, 360 (1894). [Parol agreement
12 between partners purporting to convert partnership property where property was purchased with
13 partners separate assets was void under the Statute of Frauds.] Here, the only written instrument
14 that qualifies under ORS 93.020 is the 1978 Deed. Therefore, the Partnership must prove that
15 the Property was conveyed in 1969, if at all, by operation of law.

16 **2. Uniform Partnership Law**

17 The laws that apply to the Partnership's claim that it acquired the Property in 1969 are
18 governed by the earliest version of the Uniform Partnership Act ("UPA") found at ORS, Chapter
19 68 (1973 ed.)⁶. Section 68.130 of the ORS specifically governs the acquisition and character of

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21 ⁴ The Uniform Partnership Act was contained in Chapter 68 until its repeal in 1997.

22 ⁵ No estate or interest in real property, other than a lease for term not exceeding one year, nor
23 any trust or power concerning such property, can be created, transferred or declared otherwise
24 than by operation of law or by a conveyance or other instrument in writing, subscribed by the
25 party creating, transferring or declaring it, or by the lawful agent of the party under written
authority, and executed with such formalities as are required by law.

26 ⁶ It appears that the earliest published version of Chapter 68 is contained in the 1973 edition of
the ORS. No amendments were made to the significant portions of Chapter 68 from the 1953
enactment of the ORS up to and including the 1973 edition.

1 partnership assets providing in pertinent part that “[a]ll property originally brought into the
2 partnership stock or subsequently acquired by purchase or otherwise, on account of the
3 partnership is partnership property.”

4 The Partnership is correct that property purchased with partnership assets and for
5 partnership purposes is presumed an asset of the partnership, even if it is taken in the name of an
6 individual partner. *See, e.g. First Western Mtg. v. Hotel Gearhart*, 268 Or 613, 617 (1974).
7 Stated in terms of ORS 93.020, the conveyance is implied by law because of the specific
8 circumstances. However, where these factors do not exist, there is no legal implication that
9 would supersede the writing requirement of ORS 93.020. *Dodson v. Dodson*, 26 Or at 360.

10 More particularly:

11 When land is purchased with partnership funds and for partnership purposes,
12 there is an implication of law that the land is held for the partnership. But where
13 it is purchased with the separate funds of the partners, it cannot, by a verbal
14 agreement between themselves, be converted into copartnership property,
15 because no trust in lands can be created, unless by writing, except such as arises
16 or results by implication of law; and parol evidence is not admissible to prove
17 any declaration of trust, or agreement of the parties for a trust, although it is
18 received to establish a fact from which the law will raise or imply a trust.]
19 *Dodson v. Dodson*, 26 Or at 360

20 The basis of this common law rule can be found in Oregon’s legal history pertaining to
21 the acquisition of partnership assets. Originally, a partnership was not permitted to hold legal
22 title to real property. *Minter v. Minter*, 80 Or 369, 378 (1916); *Adams v. Church*, 42 Or 270,
23 272-273 (1902). To protect all of the partners, property that had been purchased with partnership
24 assets and for partnership purposes was converted, in equity, to the personal property of each
25 partner. *Ibid*. In effect, a trust was created in favor of the partners. *Adams* at 273. Although the
26 purpose of the implied trust was to convert interest in real property, the conveyance occurred by
27 operation of law and a writing was not required. As explained by the Supreme Court, the trust
28 was implied to:

29 overcome the inequitable conduct of a person who takes money of his
30 copartner under an oral contract of partnership, lets him into possession of
31 the realty, accepts his labors for a long period of time, and finally

1 renounces the relationship on the ground that there is no writing between
2 them declaring the contract. *Minter* at 377.

3 The equitable doctrine permitting the conversion of property to a partnership by
4 operation of law has remained a viable doctrine, even though partnerships may now take title to
5 real property. *See, e.g. Sheppard v. Smith*, 116 Or App 267, 272 (1992) [Partnership acquired
6 real property as a matter of law, even though title was held in partners' individual names
7 because the partners treated it as an asset of the partnership in their partnership agreement, in
8 their management of it and for tax purposes]. Notwithstanding this equitable doctrine, the basis
9 for permitting an equitable conveyance has also survived and remains a threshold issue. If
10 circumstances do not exist that would require an equitable fix, the conveyance is not implied
11 and a conveyance must be through a valid written instrument. *See, e.g. Martin v. Martin*, 77 Or
12 App 226, 229 (1986) [Property used in the partnership but not intended to be partnership
13 property, remained the separate property of the individual partners.]. More specifically, if there
14 is no evidence that the property was purchased by partnership assets and intended for a
15 partnership purpose, the property is not an asset of the partnership absent a valid written
16 instrument. ORS 93.0202; *Dodson v. Dodson*, 26 Or at 360. Here, the State's determination
17 that the property did not become a partnership asset until it was conveyed to the partnership in
18 writing is a correct interpretation of the law and is supported by substantial evidence in the
19 Record.

20 **3. The State's decision that the property was conveyed to the Partnership in
21 1969 is supported by substantial evidence in the record.**

22 The "question on review is not whether substantial evidence supports [plaintiff's] version
23 of the facts but whether, after considering the whole record, substantial evidence supports the
24 [State's] findings." *Garcia v. Boise Cascade Corp.*, 309 Or 292, 296 (1990). Here, the 1978
25 Deed is substantial evidence that the Partnership acquired the property on December 28, 1978
26 from Ralph Donald Johnston, Gwendolyn Johnston, Donald Scott Johnston and Ginger Marie

1 Johnston. (Record, §2, pp. 8-12, 65-69, and §3, pp. 70-72). The State's decision is further
2 supported by the September 23, 1977 fulfillment deed from Ralph and Esther May Johnston to
3 Ralph Donald, Gwendolyn Jean, Donald Scott and Ginger Marie Johnston. (Record, §3, pp. 62-
4 64). The 1977 Deed demonstrates that these four individuals owned the property in 1977, not the
5 partnership. Otherwise, the deed would have conveyed the Property to the Partnership, which it
6 did not.

7 Notwithstanding that the appropriate standard of review does not recognize whether
8 evidence in the record supports a petitioner's versions of the facts, none of the information
9 provided by Plaintiffs refutes the clear and unambiguous language of these deeds. The
10 Partnership's sole argument is that the parties intended for the Property to be a partnership asset
11 in 1969. However, there is no evidence in the record that the Property was conveyed, by
12 operation of law, in 1969. The Record contains a quitclaim deed dated December 28, 1978, by
13 which Ralph Donald Johnston, Gwendolyn Johnston and Donald Scott Johnston conveyed the
14 Property to the Partnership as well as a Correction Quitclaim Deed dated April 22, 1983, by
15 which Ginger Marie Johnston was added as a grantor. Record, §3, p. 70-72. The 1978 Deed and
16 its 1983 Correction are substantial evidence that the Partnership acquired the property on
17 December 28, 1978. The Partnership does not explain how it obtained the Property in 1969, yet
18 it was conveyed in 1977 to the three partners, individually, and to Ginger Marie Johnston, a
19 nonpartner.

20 The Partnership argues that this Court should consider the Partnership Agreement and
21 affidavits submitted in support of its Motion as evidence that the Property was conveyed in 1969.
22 Again, notwithstanding the appropriate standard of review, these documents do not refute the
23 validity of the 1978 Deed.

24 There is nothing in the Partnership Agreement that refutes the unambiguous language of
25 the 1978 Deed. The Partnership Agreement does not identify the date the oral partnership was

1 created, only that it is a partnership consisting of Ralph Donald Johnston, Gwendolyn Johnston
2 and Donald Scott Johnston and that it was created at some point in time following Donald Scott
3 Johnston's 1969 high school graduation. (Record, § 3, page 28) Likewise, Article III of the
4 Partnership Agreement which purports to define the "Term of the Partnership" does not define
5 the date the partnership commenced on because a space provided for the date is blank. (Record,
6 § 3, p. 29). Section 5.1 of the Partnership Agreement refers to the capital contributions made by
7 each partner and identifies them as the assets listed on Exhibit A. (Record, § 3, pgs. 29-30).
8 Exhibit A does identify land, but only as "home place" and "Dead Indian." (Record, §3, p 45) It
9 is impossible to ascertain what property is actually identified in Exhibit A from this description.
10 Moreover, there is no specific information as to the date the Partnership purportedly acquired
11 this property. The Partnership Agreement does not controvert that the Property was conveyed to
12 the Partnership, for the first time, by the 1978 Deed.

13 Similarly, none of the affidavits refute the unambiguous language of the 1978 Deed (or
14 the 1977 Fulfillment Deed). The affidavits contained in the Record from all three partners and a
15 fourth affidavit from a person purporting to be a former employee of the Klamath Production
16 Credit Association. (Record §3, p. 51 (affidavit of Ralph Donald Johnston dated July 11, 2006),
17 p. 52 (affidavit of Gwendolyn Johnston dated July 11, 2006), p. 53 (affidavit of Donald Scott
18 Johnston, dated July 11, 2006) and p. 54 (affidavit of Glenn Haskins, dated July 24, 2006). Each
19 affidavit was drafted in 2006 and submitted in support of the Partnership's Measure 37 claim.
20 No other information corroborating the Johnstons' claim was submitted, such as evidence of
21 income and property taxes, records of repairs and maintenance made on the property or
22 documents relating to mortgage payments. Indeed, the Partnership did not produce such
23 information because no such information exists. (Record, § 3, p.23, Letter from Michael Spencer
24 explaining that the Partnership does not have any other documentation of its purported
25 acquisition).

1 The fourth affidavit, submitted by a person purporting to be a former employee of
2 Klamath Production Credit Association, only declares that the Johnstons were his clients, that the
3 property appeared to be partnership property and that loans from his former employer were used
4 to improve the property. Again, there is no corroborating evidence in support of this fourth
5 affidavit. These affidavits do not contradict the 1978 Deed. Accordingly, the Deed is substantial
6 evidence that the Partnership acquired the Property in 1978 and summary judgment in the State's
7 favor is appropriate.

8 **B. The State's finding that the Partnership is no longer an owner of Tax Lot**
9 **100, Section 32 and Tax Lot 300 is supported by substantial evidence in the record**

10 The State determined that on the date the Partnership made its written demand for
11 compensation, Donald Scott and Gwendolyn Johnston were the owners of Tax Lot 100, Section
12 32 and Tax Lot 300 ("Parcel B"). Therefore, the Partnership was not a present owner of the
13 Parcel B pursuant to ORS 197.352(11)(C) entitled to relief under Measure 37. The State reached
14 this conclusion based on the April 20, 2006 Bargain and Sale Deed contained in the Record by
15 which the Partnership conveyed Parcel B to "D. Scott Johnston, Gwen Johnston and Danny L.
16 Johnston" ("2006 Deed"). (Record, §4, pp.11-13). On November 20, 2006, the State issued its
17 draft report to the claimants and all interested parties in which it stated that the individual
18 partners, not the partnership, were the owner of Parcel B. (Record, §4, pp. 20-30)

19 In response to the draft report, claimants submitted a judgment dated one day after the
20 draft report was issued wherein the Klamath County Circuit Court ordered the 2006 Deed
21 rescinded based on a stipulated judgment between the parties to that action ("2006 Judgment").
22 (Record, §4, p. 11-13; Motion, Ex. A) The only parties to the 2006 Judgment were the
23 Partnership, Sterling Savings Bank, Donald Scott Johnston, Gwendolyn Johnston and Danny L.
24 Johnston. (Id.) The Partnership argues that the State is bound by the 2006 Judgment and must
25

1 determine that the 2006 Deed was rescinded. However, the Partnership’s argument is not an
2 accurate statement of the law because strangers to the action are not bound to a judgment.

3 It is a fundamental rule of law that “the record of a judgment or decree in personam or
4 quasi in rem can affect only parties and privies.”⁷ *Morrison v. Holladay*, 27 Or 175, 180 (1895)
5 cited with approval in *Bartholomae Oil Corp. v. Booth*, 146 Or 154, 162 (1934) [In a suit to
6 establish the plaintiff’s ownership interest in certain real property, the trial court erred when it
7 allowed the defendant to introduce a judgment from a prior action that decreed the defendant’s
8 ownership interest in the same property because plaintiff was not a party to the prior action.]
9 Here, no circumstances exist that would require the State to be bound by the 2006 Judgment or to
10 defer to the findings made therein. The State is merely a stranger to the 2006 Judgment and is
11 not required to accept that a mutual mistake or fraud occurred which would, as a matter of law,
12 validate the rescission granted in the judgment. *Gardner v. Meiling*, 280 Or. 665 (1977)
13 [Rescission not permitted absent evidence of fraud, misrepresentation or mistake]. Accordingly,
14 the State was not confronted with any compelling reason to disregard the 2006 Deed.

15 The case of *McAllister v. Charter First Mortg., Inc.*, 279 Or 279, 285 (1977) is
16 appropriately applied to the instant case because it similarly involved an attempt by the plaintiffs
17 to introduce decree of rescission that had been issued in a prior, unrelated litigation. In
18 *McAllister*, plaintiff purchasers of real estate sued their lender because it failed to conduct a well
19 pump test on real estate that the plaintiffs intended to purchase. If the lender defendant had
20 performed its contractual obligation, the test would have revealed that the well was nearly dry
21 and the plaintiffs would not have purchased the property. The plaintiffs had successfully sued

22 _____
23 ⁷ Parties and privies are defined as “those who have the right to adduce testimony or cross-
24 examine the witnesses introduced by the other side, or who have a right to defend the action or
25 suit, or to appeal from the judgment or decree, or those who claim by mutual succession or
relationship to the same rights of property or subject matter. All other persons are strangers, and
the judgment is not binding upon them...” *Morrison v. Holladay*, 27 Or at 180.

1 the sellers of the property in a prior suit and obtained a judgment rescinding the real estate
2 purchase contract. In the subsequent suit, the defendant lender asserted that the plaintiffs were
3 estopped from suing the lender because they had already obtained a decree rescinding the sale.
4 The trial court struck the defendant's *res judicata* defense and the plaintiffs ultimately won at
5 trial. The defendant appealed on the basis of the trial court's striking of its defense.

6 The Supreme Court affirmed the trial court's decision and explained that *res judicata* was
7 not a viable defense because different issues were adjudicated in the prior suit and there had not
8 been a final judgment or prejudicial dismissal against the lender defendant. Therefore, the
9 judgment in the prior suit was not binding on the lender defendant and it could not use the
10 judgment to estop the plaintiff from asserting that the sale ever occurred - a foundational fact
11 necessary to the plaintiff's case in the subsequent case.

12 *McCallister* is immediately applicable here where the Partnership seeks to impose its
13 decree of rescission on the State to force it to, basically, pretend that the 2006 Deed never
14 occurred. The State is not required to make such a finding because it was not a party to the
15 action in which the Judgment was rendered and is not in privity with any of the parties to the
16 action. Therefore the State is not bound by the 2006 Judgment⁸.

17 Since the Partnership did not submit any other information that would enable a
18 reasonable person to determine that the 2006 Deed had been rescinded, i.e. because it was a
19 product of fraud, misrepresentation or mutual mistake, the State's determination that the
20 partnership conveyed the Subproperty to the individuals is supported by substantial evidence.
21 *Gardner v. Meiling*, 280 Or 665 (1977). Accordingly, the Partnership is not a present owner of
22
23

24 ⁸ That the State should not be bound to judgments altering deeds in Measure 37 claims is also
25 extremely significant as a matter of policy. Otherwise, claimants who would not otherwise
qualify under Measure 37 because they are no longer owners of private property could obtain
voluntary judgments rescinding their prior conveyance solely to qualify for Measure 37 relief.

1 the Subproperty pursuant to ORS 197.352(11)(C) and summary judgment in the State’s favor is
2 appropriate.

3 **C. The Partnership does not have a separate cause of action for compensation**
4 **under Subsection 6 of Measure 37 because the State acted within 180 days.**

5 The Partnership asserts that a literal interpretation of ORS 197.352(6) permits it to sue for
6 compensation because the State did not waive all the statutes and regulations that may have
7 restricted its present use of the property. This interpretation of Section 6 is so sweeping that it
8 negates the clear intent of the statute to require public entities in the first instance to decide the
9 merits of compensation claims and choose the relief to be provided. Interpreting Section 6 in
10 isolation violates the basic rule of statutory construction—the first level analysis is text *and*
11 *context*.

12 Without the context of Measure 37 as a whole, the text of Section 6 is too vague and
13 ambiguous to be enforced. For example, Section 6 does not specify which land use regulations
14 are at issue in the “cause of action” or even against whom the action may be asserted.

15 *If a land use regulation continues to apply to the subject property more than 180*
16 *days after the present owner of the property has made written demand for*
17 *compensation under this section, the present owner of the property, or any interest*
18 *therein, shall have a cause of action for compensation under this section in the*
circuit court in which the real property is located, and the present owner of the
real property shall be entitled to reasonable attorney fees, expenses, costs, and
other disbursements reasonably incurred to collect the compensation.

19 ORS 197.352 (6) (emphasis added).

20 A literal reading of Section 6 alone grants property owners a cause of action based on any
21 land use regulation but identifies no one to sue. The definition of qualifying regulations in
22 Section 1, the exceptions in Section 3, and the delegation of responsibility to the public entities
23 that enforce qualifying regulations in Sections 1, 4, 5 and 7-10 provide critical context for a
24 reasonable interpretation of Section 6. Because Measure 37 provides for state agencies to act on
25 Measure 37 demands, the APA is also context for interpretation of Measure 37.

1 Measure 37 requires property owners to submit a demand for compensation to public
2 entities (§§ 4, 5, 6), and permits public entities to adopt “procedures for the processing of
3 claims” (§ 7). Measure 37 also provides that public entities have the option, in their discretion,
4 either to pay compensation or grant alternate “waiver” relief to a property owner who submits a
5 valid written demand (§§ 8, 10). In this context, Section 6 plainly functions as a secondary
6 remedy in the event a public entity fails to process a demand and choose the type of relief to be
7 granted—within 180 days. Furthermore, the availability of a court action and the provision for
8 attorney fees creates an incentive for the public entity to decide claims and to do so within 180
9 days. Construing Section 6 as a second chance to make the same claim for compensation is not
10 compelled by the text and context of the statute, renders much of Measure 37 superfluous,
11 nullifies the established remedy under the APA, and needlessly complicates a process advertised
12 to the voters in 2004 as streamlined.⁹

13 Both the Circuit Courts of Jefferson and Josephine Counties have agreed that where an
14 agency has issued a timely Measure 37 waiver, there is no separate cause of action under
15 Subsection 6 of Measure 37. In the cases of *Pondelick v. County of Josephine, et al*, Case No.
16 06-CV-0622 and *Perrott v. Josephine County*, Case No. 06-CV-0677, the court granted the
17 State’s Motion to Strike the plaintiffs’ causes of action for compensation under Subsection 6 and
18 ruled that the plaintiffs’ right to relief was limited to review of the State’s order under the APA.
19 ¹⁰ Similarly, in the matter of *Hal Pruitt v. Jefferson County*, Jefferson County Circuit Court
20 Case No. 06CV0029, Judge Thompson granted the county’s summary judgment motion/motion
21 to dismiss on the plaintiff’s separate cause of action for compensation under Subsection 6
22

23 ⁹ Search for “streamline” in the 2004 Voters’ Pamphlet, available on the Secretary of State’s
24 website at http://www.sos.state.or.us/elections/nov22004/guide/meas/m37_fav.html.

25 ¹⁰ Judge Baker’s letter opinions in *Pondelick v. County of Josephine, et al*, Case No. 06-CV-
0622 and *Perrott v. Josephine County*, Case no. 06-CV-0677 are attached hereto collectively,
respectively, as Exhibits “1”.

1 because, in part, the court found that the county had issued a waiver and the only means to
2 challenge that waiver was by a writ of review.¹¹

3 Finally, the cases cited by the Partnership are inapposite because they do not involve
4 petitions for judicial review of a Final Order. Rather, they involve factual scenarios where the
5 agency acts, essentially, as a participant, as opposed to an administrator. For example, in
6 *Premier Technology v. Oregon State Lottery*, 136 Or App 124 (1995), the state agency had
7 entered into a contract on behalf of the state and allegedly breached its obligations on that
8 contract. The case had nothing to do with whether a state agency had erred in making an
9 administrative decision. *Premiere Technology* has no application to the instant case. [Plaintiff's
10 citation to *PEBB v. OHSU*, 205 Or App 64 (2006) is similarly misplaced. None of the causes of
11 action brought in *PEBB* involved a request to the Circuit Court to review an agency's decision in
12 an other than contested case and to award damages if the agency had erred.]

13 **D. The State is not required to pay compensation to the Partnership, regardless of**
14 **the outcome of this matter.**

15 The State also moves for judgment on the Partnership's compensation claim because the
16 Partnership is not entitled to compensation as a matter of law. The Partnership is entitled to a
17 remedy, but just not compensation because the State has chosen to issue a waiver. The language
18 and structure of Measure 37 clearly show that the voters intended to give public entities the
19 choice between paying compensation and waiving land use regulations. The statute provides:

20 (8) Notwithstanding any other state statute or the availability of funds
21 under subsection (10) of this section, in lieu of payment of just compensation
22 under this section, the governing body responsible for enacting the land use
23 regulations to allow the owner to use the property for a use permitted at the time
24 the owner acquired the property.

23 * * * * *

25 ¹¹ Judge Thompson's letter opinion in *Pruitt v. Jefferson County*, Jefferson County Case No.
06CV0029 is attached hereto as Exhibit "2".

1 (10) Claims made under this section shall be paid from funds, if any,
2 specifically allocated by the legislature, city, county, or metropolitan service
3 district for payment of claims under this section. Notwithstanding the availability
4 of funds under this subsection, a metropolitan service district, city, county, or
5 state agency shall have discretion to use available funds to pay claims or to
6 modify, remove, or not apply a land use regulation or land use regulations
7 pursuant to subsection (6) of this section. If a claim has not been paid within two
8 years from the date on which it accrues, the owner shall be allowed to use the
9 property as permitted at the time the owner acquired the property.

6 ORS 197.352. Thus, section 8 generally grants the public entities to which a demand for
7 compensation is submitted the option to pay or provide alternate relief. Section 10 makes it clear
8 that the option is wholly within the public entities' discretion and specifically applies to claims
9 brought under section 6.¹²

11 CONCLUSION

12 Summary judgment is appropriate in the State's favor because it correctly determined that
13 the Partnership acquired the Property on December 28, 1978, pursuant to a quitclaim deed from
14 the individual partners and one nonpartner. The State further correctly determined that the
15 Partnership was not a present owner of the Subproperty because it conveyed its ownership

16 //

17 //

18 //

19 //

20 //

21 _____
22 ¹² If the text and context did not clearly indicate that the choice of relief is vested in the public
23 entities, then a court would review the legislative history. *See, e.g.* the Voters' Pamphlet's
24 explanatory statement for Measure 37: "If a property owner proves that a land use regulation
25 restricts the use of the owner's property, and reduces its value then *the government responsible
for the regulation will have a choice: pay the owner of the property an amount equal to the
reduction in value or modify, change or not apply the regulation to the owner's property.*"
[http://www.oregon.gov/LCD/MEASURE37/legal_information.shtml#Information About the Election](http://www.oregon.gov/LCD/MEASURE37/legal_information.shtml#Information%20About%20the%20Election)
(site last visited on April 18, 2007; emphasis added).

1 interest to two of the partners and a nonpartner. Moreover, the Partnership's remedies against
2 the State, if at all, are limited under the APA. Accordingly, the Partnership's motion for
3 summary judgment should be denied and the State's cross-motion granted.

4 DATED this 23 day of May, 2007.

5 Respectfully submitted,

6 HARDY MYERS
7 Attorney General

8 

9 STACY C. POSEGATE #06474
10 Assistant Attorney General
11 Trial Attorney
12 Tel (503) 947-4700
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15 Of Attorneys for Defendant

16
17
18
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20
21
22
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24
25
26ge 22 - STATE OF OREGON'S MEMORANDUM OF LAW IN SUPPORT OF ITS RESPONSE
TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND CROSS MOTION FOR
SUMMARY JUDGMENT

SCP/sck/TRIR6264 DOC

LINDI L. BAKER, Circuit Judge
MICHAEL NEWMAN, Circuit Judge



PAT WOLKE, Circuit Judge
THOMAS M. HULL, Circuit Judge

OREGON JUDICIAL DEPARTMENT
Josephine County Court

May 11, 2007

RECEIVED

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MAY 16 2007
Trial Division, Dept. of Justice
Salem, Oregon

Ms. Erika Hadlock
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Salem, Oregon 97301

Mr. Steven E. Rich
County Legal Counsel
500 NW 6th Street
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RE: Perrott v. Josephine County, Oregon and State of Oregon, et al.
Case # 06CV0677
Respondent State of Oregon's Motion to Dismiss
Petitioner's Objection to Respondent Josephine County's Proposed Order

Dear Mr. Cauble, Ms. Hadlock and Mr. Rich:

The Court has reviewed the record herein on the State's Motion to Dismiss. Oral argument was not requested on this motion. Oral argument was requested and held on the objection to Respondent Josephine County's Proposed Order. The Court has had these matters under advisement and makes the following findings:

1. State of Oregon's Motions to Dismiss-

The State raises the same issues raised in another case recently before the Court, Pondelick, et al. v. Josephine County, et al., 06-CV-0622. Further, the Court has earlier ruled on similar issues raised by Respondent Josephine County. For all of the reasons detailed in the Court's earlier rulings, the Court grants the State's Motions to Dismiss and finds that with respect to its claims against the State, Petitioners will be limited to relief under the Administrative Procedures Act.

Page Two

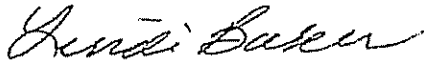
Perrott vs. Josephine County and State of Oregon, 06CV0677

2. Petitioner's Objection to Respondent Josephine County's Proposed Order

Again, this issue was heard by the Court in conjunction with the Pondelick case. For the reasons stated in the Court's Pondelick letter opinion of May 11, 2007, (which letter opinion is fully incorporated herein by this reference) the Court finds that this matter shall be placed on hold until the Corey case is finally resolved.

The Court requests that the attorneys collaborate to fashion an appropriate and mutually acceptable order consistent with the Court's rulings and present the proposed order to the Court for review and execution.

Respectfully yours,



Lindi Baker
Circuit Court Judge

LLB:ts

LINDI L. BAKER, Circuit Judge
MICHAEL NEWMAN, Circuit Judge



PAT WOLKE, Circuit Judge
THOMAS M. HULL, Circuit Judge

OREGON JUDICIAL DEPARTMENT
Josephine County Court

May 11, 2007

RECEIVED

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MAY 16 2007
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Salem, Oregon

Ms. Erika Hadlock
Attorney at Law
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Mr. Steven E. Rich
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500 NW 6th Street
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RE: Roy A. Pondelick and Tana Pondelick, Trustees of the Roy A. Pondelick and Tan Pondelick Revocable Living Trust, et al. v. Josephine County and State of Oregon, Department of Land Conservation and Development, Department of Administrative Services
Case # 06-CV-0622
Respondent State of Oregon's Motions to Strike
Petitioner's Objection to Respondent Josephine County's Proposed Order

Dear Mr. Cauble, Ms. Hadlock and Mr. Rich:

The Court heard these matters on April 9, 2007 and took them under advisement for further review and consideration. Following such further review and consideration, the Court finds as follows:

1. State of Oregon's Motions to Strike Petitioners' Third and Fourth Claims-

The State argues that Petitioners' exclusive remedy in this matter is under the Administrative Procedures Act, ORS 183.484. Accordingly, the State argues that Petitioners' claims under Measure 37 and the Declaratory Judgment Act should be stricken or dismissed. A similar motion was filed by Josephine County. This Court heard that motion and ruled that

Petitioners' exclusive remedy against the County would be through their writ of review. See Court's letter opinion of January 12, 2007. The Court hereby takes judicial notice of such letter opinion and incorporates it in its entirety, including the record and pleadings, into this letter opinion.

For reasons stated in the above referenced letter opinion, but on separate and distinct findings, the Court grants the State's motions to strike. With respect to its claims against the State, Petitioners will be limited to relief under the Administrative Procedures Act.

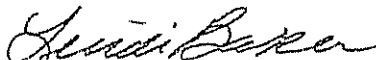
2. Objection to Respondent Josephine County's Proposed Order-

Petitioner has objected to the County's proposed order. This issue was discussed during the above hearing under the larger context that the Court needs to determine what procedure our local court should be following on this and similar cases in view of the recent Court of Appeals case, Corey, et al. v. Department of Land Conservation and Development, 210 Or App 542 (January 31, 2007). In this case, the Court of Appeals ruled that jurisdiction for judicial review of the state matter under ORS 183.482 lies with the Court of Appeals, not the trial court. Ms. Hadlock represented to the Court that the State has moved for reconsideration in the Corey case and that the Corey petitioners have not responded to the State's motion. As such, there has been no appellate judgment entered at this time. In its motion for reconsideration, the State maintains that the review should remain with the trial court.

Given the logistical difficulties involved in the Court transferring the state case to the Court of Appeals and then perhaps learning that the Corey case may require transfer back to the trial court, this Court has determined that this particular issue should be placed on hold until the Corey case is resolved. Then, whether the state issue is addressed at the Court of Appeals or the trial court, proper jurisdiction can be certain and less time and resources will be expended.

In view of this ruling, the Court requests that the attorneys collaborate to fashion an appropriate and mutually acceptable revised order consistent with the Court's rulings and present the proposed order to the Court for review and execution.

Respectfully yours,



Lindi Baker
Circuit Court Judge

LLB:ts

LINDI L BAKER Circuit Judge
MICHAEL HEWMAN Circuit Judge

PAT WOLKE Circuit Judge
THOMAS M HULL Circuit Judge



OREGON JUDICIAL DEPARTMENT
Josephine County Court

January 12, 2007

Mr. Walter L. Cauble
Attorney at Law
111 SE 6th Street
Grants Pass, Oregon 97526

Mr. Steven E. Rich
County Legal Counsel
500 NW 6th Street
Grants Pass, Oregon 97526

RE: Pondelick, et al. v. Josephine County, et al.

Case # 06-CV-0622

Respondent's Motion To Strike; Motion To Quash Writ of Review; Motion To Dismiss

Petition; Motion For Additional Time

Dear Mr. Cauble and Mr. Rich:

The Court heard these motions on November 21, 2006 and allowed Petitioners additional time to respond to Respondent's Points and Authorities which had been submitted just before the hearing. Petitioners' Response was timely filed on November 29, 2006 and the Court took the matter under advisement for further review and consideration. Following such further review and consideration, the Court finds as follows:

Petitioners seek relief under various statutes, including ORS 197.352, commonly referred to as Measure 37. Their underlying claim is that they are entitled to compensation for loss of value to their land. The matter before the Court at this time, however, is limited to the issues raised in Respondent's various motions as to the pleadings. In summary, Petitioners' petition seeks a writ of review under ORS 34.010 et seq. of the decision rendered by the Josephine County Board of Commissioners; a judicial review under ORS 183.484 of the order issued by the State of Oregon, Department of Land Conservation and Development and Department of Administrative Services; compensation under ORS 197.352(6); declaratory judgment regarding the effective date of Petitioners' title acquisition; and reasonable attorney fees, expenses, costs and other disbursements pursuant to ORS 197.352 and/or ORS 183.497.

Respondent basically complains that Petitioners cannot include alternative remedies in their petition and that since Petitioners seek a writ of review, then they are limited to that relief. As such, compensation, declaratory judgment and attorney fees and costs are not authorized under such a writ of review

After carefully considering the arguments of all parties, the Court finds that Petitioners will be limited in this action to the writ of review under ORS 34 010 et seq. Respondent's arguments are well taken in that combining the various forms of relief into one proceeding would require differing standards of review and procedure to the degree that could result in incompatible relief. In conducting a writ of review, the court conducts an appellate type of review of the BCC's decision and is limited to the record in the case in conducting such review. It is not a trial on the merits and no new evidence can be considered or reviewed by the court. Further, under a writ of review, the court's authority is limited by ORS 34 040 to determine only whether the BCC has exceeded its jurisdiction, failed to follow procedure, made a finding or order not supported by substantial evidence in the record or rendered an unconstitutional decision. In a writ of review, the court has authority only to affirm, modify, reverse or annul the BCC's decision or to direct the BCC to proceed according to the court's decision. The court has no authority to impose other remedies Petitioners seek such as declaratory judgment, compensation or attorney fees.

The writ of review procedure is inconsistent with Petitioners' other claims for relief where the procedures, scope of examination and possible remedies are very different. Petitioners have provided no persuasive authority that would adequately support their contention that they should be allowed to seek all remedies in this same action. While Petitioners rely in part on AK Media Group, Inc. v. City of Portland, 192 Or App 204 (2004), the Court of Appeals, in a footnote, points out that the trial court had dismissed the writ of review as moot at the onset of trial and that it was not before that court on appeal. While generally, petitioners and plaintiffs are allowed to plead alternative theories, in the case of a writ of review, due to its unique procedural limitations, it does not seem logical to combine that particular remedy with other, procedurally different forms of relief.

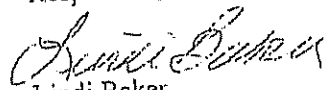
Accordingly, Petitioners will be limited to their claim for writ of relief and will not be allowed to proceed under the declaratory judgment, compensation or attorney fees and costs claims in the same action. Respondent's motions are granted in this regard.

It is further noted that Respondent withdrew its Third Motion to Strike relating to Petitioners' Third Claim (failure to state a claim upon which relief can be granted) and its Motion for Additional Time. The Return was filed with the Court in a timely manner on October 18, 2006.

Page Three
Pondelick, et al vs Josephine County, et al 06CV0622

Respondent's Motion to Quash the Writ of Review and its Motion to Dismiss the Petition in its entirety are denied. This case will proceed as a Writ of Review in the normal course. I ask that Mr. Rich prepare the appropriate documentation of this Court's ruling in this matter.

Respectfully yours,



Lindi Baker
Circuit Court Judge

LLB:ts

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Judge Gary S. Thompson

Judge George W. Neilson
Presiding Judge

Judge Daniel J. Ahern

Twenty-Second Judicial District Trial Courts

May 16, 2007

RECEIVED

MAY 21 2007

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Re: Hal Pruitt v. Jefferson County
Jefferson Circuit Court Case No. 06CV0029

Counsel:

This matter was before the Court for a Motion for Summary Judgment filed by the Plaintiff, Hal Pruitt, and a Counter Motion for Summary Judgment and Dismissal filed by the Defendant, Jefferson County on February 12, 2007. In arguments and exhibits the Court can delineate the following: that the Claimant, Hal Pruitt, is currently 91 years of age and purchased this property in 1951 and 1952. The amount of property is between 38 and 40 acres and has a current assessed value by the county of \$61,360. In the Measure 37 claim, Mr. Pruitt claimed the amount of compensation that the property worth was \$800,000 and in the complaint plead that the property was worth \$1,200,000. In the Measure 37 claim the claimant submits that five to ten acre lots would sell between \$75,000 and \$150,000 per lot. If a person figured that the amount of lots to be sold would be eight lots at five acres each at \$100,000 that would result in a claim of \$800,000 potentially. At the time of the Measure 37 hearing, the commissioners asked Robert Harris what the intent was as far as dividing the property, and Mr. Harris replied that they considered dividing the property into six or eight lots. If you multiply eight lots times the maximum \$150,000 proposed value set forward in the claim, the result is \$1,200,000, the same that is claimed in this law suit. The Court finds that representations were clearly made to the county that the maximum number of lots to be created was eight lots of approximately five acres each.

The Claim submitted by Mr Pruitt on September 23, 2005, was incomplete under the requirements of the county ordinance. Nevertheless, on March 8, 2006, the County Commission heard the claim and made a decision concerning that claim, which was specifically, "not to apply the existing EFU A-1 zoning ordinance regulations and comprehensive plan policies identified by staff to allow Hal Pruitt, claim #. 05-M37-39, to submit an application to divide the property and place a dwelling on each of the vacant lots, subject to a condition that the claim processing fee be paid at or prior to the submittal of the land use application and with the understanding that a maximum of eight parcels can be created." This motion passed two to one. The actual commissioner's journal was drafted but not signed until April 5, 2006. The motion references a waiver of the zoning ordinance regulation and comprehensive plan policies identified in the staff report which include Jefferson County's Zoning Ordinance (JCZO) section 301 (D) (E) which list the type of dwelling permitted in A-1 Zone and which require an eighty-acre minimum lot size. Portions of the Jefferson County Comprehensive Plan Objectives and Policies specified were: (3) in regards to agricultural objective, (3-A). Policy (3-A-1), again regarding preservation of agricultural lands; Policy (3-A-3), cooperating with the urban growth management area; Policy (3-A-5), standards and procedures to insure farm divisions would be appropriate for the continuation of existing commercial agriculture; Goal 6 regarding air, water and land quality, Policy (6-9-3); Goal 10 regarding Housing Policy, (10-B-3); Goal 11, Policy (11-B-5), public facilities, Goal 11, Policy (11-B-6) and Goal 11 public facilities Policy (9).

The Court notes that in the Measure 37 claim by Mr. Pruitt, the claim is for (1) any statute regulating the use of my land or any interest therein; (2) Administrative rules and goals of Land Conservation Development Commission; (3) Local Government Comprehensive Plans, Zoning Ordinances, Land Division Ordinances and Transportation; (4) Statute and Administrative Rules Regulating Farming and Forest Practices. It also reflects ORS 92 Subdivisions and Partitions, ORS 215 County Planning, Zoning, except that portion that deals with health and safety. ORS 197 Comprehensive Land Use Planning. Also specified were ordinances requiring fees above those designated in 1952. No specific ordinances beyond those designations are made in the claim, nor for that matter, are they made in the Plaintiff's complaint. In paragraph nine, the complaint reads: "the Defendant has not fully released the property from all regulations required by Measure 37." In paragraph 10 the complaint reads, "the Defendant has not modified, removed, or not applied the restrictive land use regulations to allow the Plaintiff to use the property for a use permitted at the time he acquired the property pursuant to Measure 37 and more than 180 days have expired since he made demand on Defendant for just compensation."

The County Commission executed a formal waiver on May 24, 2006 which sets forward specifically a waiver of (a) 2003 Jefferson County Zoning Ordinance sections 301(A) (B), (D), and (E) and (b) Jefferson County Comprehensive Plan (3-A), (3-A-1), (3-A-3), (3-A-5), (6-C-3), (10-B-3), (11-B-5), (11-B-6), and policy (9). This formal waiver specifies the property and is

indicating that it is personal to the claimant Ben Howell Pruitt, that it bars a claim for compensation on subject property, that the waiver is granted to allow the following specified use of the property described specifically to allow (a) Ben Howell Pruitt to submit an application to divide the property into a maximum of eight lots, and (b), to allow a dwelling on each vacant lot. The required processing fees were to be paid at or before the filing of the land use application based on this waiver. It further indicates that the zoning on the subject property is not changed and that the property owner must obtain required planning, zoning, building, electrical, plumbing, mechanical, sanitation, driveway or other similar permits. This was signed by the commissioners on May 24, 2006, as approved on March 8, 2006. The decisions made by the Commissioner in their March 8 decision, signed on April 5, 2006, and formally endorsed on May 24, 2006, are virtually identical.

Although it was not clear until September 13, 2006, in Ordinance 0-157-06 that the announcing of the decision was a formal waiver. Ordinance 0151-05, which was enacted on November 9, 2005, allows a waiver upon final execution of a written order and Ordinance 0-96-05 enacted on July 13, 2005, indicates that the Board is to deliberate and to announce its decision. A claim for compensation in this case was filed on May 22, 2006, two days before the formal waiver was executed by the county. The 180 days expired on March 23, 2006.

ORS 197.352 et seq., sets forward the contents of the ballot Measure 37. ORS 197 set forward that unless a governmental entity waives the regulations that would restrict a person from developing the property as he could at the time of his ownership preceding the time of the passing of the ordinances, that they can file a claim for compensation for the reduction of fair market value against the governmental entity that is still requiring the regulations that are restricting the usage of the property. Exception is made 197.352 (3) to Health & Safety Regulations. Unfortunately the statute does not provide an exclusive list.

In extensive arguments before the Court on February 12, 2007, counsel for the Plaintiff contends that there was a judicial vacuum in deciding which ordinances are health and safety ordinances as specified in sub section 3 of ORS 197.352, but they would not be determined in a compensation suit such as this. Counsel for the Defendant, Jefferson County, agreed that they would normally not be considered in a compensation suit like this, but should have been reviewed after the county court's decision if the claimant disagreed with the waiver or the extent of the waiver. The Defendant contends that a writ of review proceeding should be utilized. The Defendant further contends that the 60-day deadline for review of the proceeding has passed as to all three decisions, and that the Plaintiff has lost his remedy if he disagrees with the extent of the waiver by the County Commission.

Although there are a few things that are clear in ORS 197.352, these things can principally be indicated as clear. That is, that if the governmental entity does not waive the land use ordinances that would restrict the property from the division that the claimant could have accomplished at

the time of its original acquisition, that the land owner may file a claim for compensation under ORS 197.352 in circuit court. In the alternative, if the governmental entity waives those ordinances and allows the person to divide his property as allowed under the time of acquisition, then no cause of action arises for compensation. When the Court originally made its decision several months ago regarding denying the Defendant's motion to dismiss, it was under the impression that ultimately the extent of the waiver has to be decided by the Court in this compensation action. Both counsel disagreed.

After reflection and reading the statute closely, I agree with both counsel. Specifically, the area that we are looking at most closely is ORS 197.352 (3) (b) which ordinances "restricting or prohibiting activities for the protection of public health and safety, such as fire and building codes, health and sanitation regulations, solid or hazardous waste regulations and pollution control regulations." Although it is really not said within this law suit, it has been argued in part and implied in part, that fees that are being required, going through the land use process, requiring an approval of a transportation system, that the Plaintiff does not believe these acres fall within ORS 197.352 (3) ©. However, within sixty days of the Defendant's decision, whether it be the initial declaration in county court on March 8, 2006, with the signature of that document on April 5, 2006, or formal waiver document on May 24, 2006, there was no writ of review filed by the Plaintiff regarding the propriety of that decision by the County Commission.

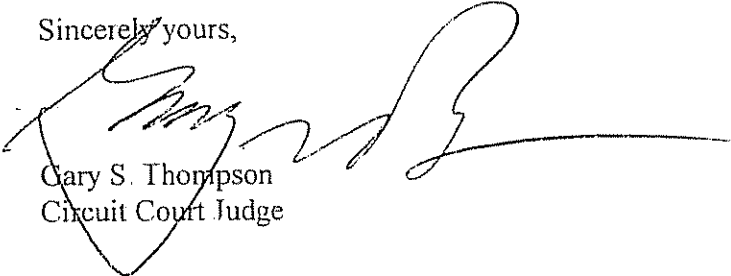
The Defendant indicates that the Plaintiff's Motion for Summary Judgment should be denied for a variety of reasons. First, that there has been no salient evidence offered on the lack of fair market value, a critical issue in a compensation case, that there is no judicable issue that is available for the Court to decide in this case because the county has waived the required ordinances and is allowing the Plaintiff to subdivide his property as requested and as allowed at the time of acquisition and that therefore, there is not longer a judicable issue in this compensation suit. Certainly from the onset it appears that the intent of the county court was to waive the zoning and the comprehensive plan issues regarding this property and allow Mr. Pruitt to divide the property as requested in both his original claim and by his representations that were made through his agent at the time of the hearing.

The Plaintiff's Motion for Summary Judgment is denied for two reasons. First, that he has not fairly set forward information and affidavits that set forward why there is a reduction of the fair market value of the property described and competent evidence of the reduction of value. Secondly, has not identified the ordinances fairly and completely in regards to how the waiver by the county was incomplete at its initial decision time.
Mr. Clean may draw the appropriate order.

Secondly, there is the Motion for Summary Judgment that goes to the issue that the differences between the parties should have been decided in a writ of review proceeding following the decision by the County Commission as to the waiver that was executed by county and whether it

was a comprehensive waiver of the ordinances allowing Mr. Pruitt to divide the property as requested and waiving the applicable zoning and comprehensive plan portions as identified by staff. That the issue is no longer judiciable because a waiver has been granted and any differences that might be distinguished regarding the extent of that waiver should have been decided in another forum through a writ of review rather than in this compensation case. If one considers that if a waiver has been comprehensively granted, and the parties have not contested it in a proper forum as to the extent of that waiver, then it is premature to file a compensation action in this case because of not following through on determining the judiciability of that compensation claim because of the extent of the waiver. A party in a Measure 37 action does not get two remedies, either the ordinances that affect his division of property are waived, or in the alternative he can file an action for reduction of fair market value of his property because of the lack of a waiver. The claimant under Measure 37 should not have both a compensation action and a waiver of the regulations. That is inapposite to the content of ORS 197.352 and its intent. This Court finds that the decision by the County Commission on March 8, 2006 was a quasi-judicial decision subject to review by a writ of review proceeding. The Court grants the Defendant's Motion for Summary Judgment and/or Dismissal on the reasoning set forward by Mr. Crean in his argument and in his memorandum. Mr. Crean may also draw the appropriate order regarding this matter.

Sincerely yours,



Gary S. Thompson
Circuit Court Judge

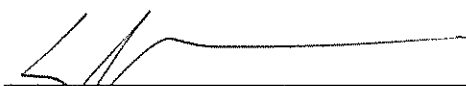
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CERTIFICATE OF SERVICE

I certify that on May 23 2007, I served the foregoing STATE OF OREGON'S CROSS-MOTION FOR SUMMARY JUDGMENT and MEMORANDUM OF LAW IN SUPPORT OF ITS RESPONSE TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND CROSS MOTION FOR SUMMARY JUDGMENT upon the parties hereto by the method indicated below, and addressed to the following:

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