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

NORMAN and DIANE KALDAHL,  
Plaintiffs,  
v.  
OREGON DEPARTMENT OF LAND  
CONSERVATION AND DEVELOPMENT,  
and STATE OF OREGON,  
Defendants.

Case No. 07-10116  
REPLY IN SUPPORT OF STATE'S MOTION  
FOR SUMMARY JUDGMENT

**INTRODUCTION**

The State already has filed two briefs in this case: a memorandum in support of its own motion for summary judgment and a memorandum opposing plaintiffs' motion for summary judgment. This reply memorandum, therefore, addresses only two issues that plaintiffs raise in their opposition to the State's motion: (1) whether the APA provides the exclusive means by which plaintiffs can obtain judicial review of the State's order on their Measure 37 demand; and (2) whether the statutory interim land-use goals enacted before plaintiffs bought the property applied directly to land-use decisions Benton County made at that time.

**A. The APA provides the only avenue for judicial review of the State's final order on plaintiffs' Measure 37 claim and plaintiffs have no separate claim under ORS 197.352(6).**

Plaintiffs' complaint includes both a request for monetary compensation under Measure 37 and a petition for judicial review under the Administrative Procedures Act ("APA").<sup>1</sup> The

<sup>1</sup> Plaintiffs' assertion that "the APA does not govern this case" (Pls' Resp Memo at 3) is puzzling in light of their inclusion of an APA petition for judicial review in the complaint. (Complaint ¶¶ 10-12).

1 State explained in its opening memorandum the general principle that, when the APA applies, it  
2 provides the *only* means for courts to review agency action. See ORS 183.480(2) (“[j]udicial  
3 review of final orders of agencies shall be solely as provided by ORS 183.482, 183.484, 183.490  
4 and 183.500”). Plaintiffs argue that the APA-exclusivity principle does not apply to final orders  
5 issued on Measure 37 claims because Section 6 of Measure 37 creates a separate cause of action.  
6 (Pls’ Resp Memo at 2-3). The argument fails because APA-exclusivity principles apply even  
7 where other statutes create independent remedies, barring plaintiffs from seeking relief under  
8 those other statutes if they could have petitioned for review under the APA.

9 The APA-exclusivity principle is explained not only in the Declaratory Judgment Act  
10 cases cited in the State’s opening memorandum, but also in Court of Appeals decisions arising  
11 from Oregon Tort Claims Act cases. In both types of cases, the appellate court consistently has  
12 held that even a claim for damages must await APA review when it necessarily is premised on  
13 disagreement with a decision embodied in an agency order. See, e.g., *Muller v Dept. of*  
14 *Agriculture*, 164 Or App 11, 15-16 (1999). *Muller* involved a state agency’s denial of the  
15 plaintiff’s request for a field-burning permit. In the year following that denial, the plaintiff  
16 concluded that his field had yielded less crop than it would have had he been allowed to burn it,  
17 and sued for tort damages in circuit court. See *id.* at 13-14. A jury returned a verdict for the  
18 plaintiff. On appeal, the State argued that the circuit court had lacked jurisdiction over the  
19 plaintiff’s complaint because he could have petitioned for judicial review of the agency’s action  
20 under the APA. The plaintiff countered that he was “not challenging the validity of an agency  
21 order, but rather [was] asking for damages for the consequences of agency action.” *Id.* at 15.  
22 The Court of Appeals ruled in the State’s favor, holding that the APA provided the exclusive  
23 means for review of the agency’s decision:

24 In this case, plaintiff claims damages resulting from the  
25 denial of his application for a burning permit. His entitlement to  
26 damages depends on the validity of the denial. He contends that  
the denial was invalid because the department failed to comply  
with “statutory provisions and rules in effect at all material times.”

This case, in other words, is precisely the sort of case that \* \* \* is

1 subject to review exclusively under the APA, because it challenges  
2 the validity of an agency action on the ground that it “violated a  
3 statute or rule or was otherwise in violation of administrative law.”

4 \* \* \* \* \*

5 Plaintiff insists that APA review is inadequate, because the  
6 remedy he seeks – damages – is not available under the APA.  
7 Indeed, plaintiff argues that precluding him from seeking damages  
8 in this action unconstitutionally deprives him of a remedy.  
9 Plaintiff’s argument amounts to mere question begging, however.  
10 *If he is entitled to a remedy, he must establish the invalidity of the  
11 agency action in the first place. We merely hold that the exclusive  
12 mechanism for establishing the invalidity of the agency action is  
13 provided in the APA. We therefore conclude that the trial court  
14 erred in denying the department’s motion to dismiss.*

15 *Id.* at 16-17 (citation omitted; emphasis added).

16 *Muller* controls this case. Here, as in *Muller*, plaintiffs seek monetary relief based on an  
17 allegation that they were damaged by state-agency action. And here, as in *Muller*, plaintiffs can  
18 prevail only if they establish that the agency action was unlawful – in this case, because the  
19 agencies incorrectly determined whether plaintiffs could have divided their property for  
20 residential use when they acquired it in November 1973. Consequently, to the extent that  
21 plaintiffs’ claims take issue with the agency’s resolution of their Measure 37 demand, their sole  
22 avenue for relief is through their APA petition for judicial review.

23 Plaintiffs also argue that section 7 of Measure 37 precludes the State “from forcing  
24 claimants into procedural requirements (e.g. APA contested case hearings) that would either  
25 prohibit or limit a claimant’s ability to seek judicial redress under ORS 197.352(6). (Pls’ Resp  
26 Memo at 3). Plaintiffs misunderstand the APA. *Any* order that a state agency issues that meets  
the statutory definition of a “final order” is subject to review under – and only under – the APA.  
*See* ORS 183.310(6). It simply does not matter what agency processes the plaintiffs followed or  
did not follow: the State’s decision on their Measure 37 demand is a “final order” under the  
APA and is, therefore, subject to judicial review only pursuant to APA provisions.

Finally, plaintiffs note correctly that some circuit courts have rejected the State’s APA-  
exclusivity argument. The Josephine County Circuit Court, however, has agreed with the State’s

1 theory and has dismissed ORS 197.352(6) claims for lack of jurisdiction or failure to state a  
2 claim. That court's decisions are attached as Exhibit 1 to this memorandum. The appellate  
3 courts have not yet ruled on this issue in the Measure 37 context.

4 **B. The interim land use planning goals that were enacted before plaintiffs acquired  
5 their property applied directly to county land-use decisions made at that time.**

6 In creating the statewide land use planning system, the 1973 legislature charged the Land  
7 Conservation and Development Commission ("LCDC") with the task of developing statewide  
8 land use planning goals. ORS 197.040(2)(a) (1973). The first LCDC goals went into effect on  
9 January 25, 1975.<sup>2</sup> It is settled that – before LCDC “acknowledged” a county’s comprehensive  
10 plan as being in compliance with the statewide land use planning goals – those goals applied  
11 directly to any land-use decisions the county made, including decisions on applications to divide  
12 property. *See 1000 Friends of Oregon v. LCDC (Curry County)*, 301 Or 447, 452 (1986) (“Once  
13 the [LCDC] goals were adopted, each city and county \* \* \* in Oregon was required to make its  
14 land use decisions and to prepare comprehensive land use plans ‘in compliance with the goals’”);  
15 *Meeker v. Board of Commissioners*, 287 Or 665, 672 (1979) (statewide land use planning goals  
16 applied to division of property). *Cf. Byrd v. Stringer*, 295 Or 311, 318 (1983) (“once  
17 acknowledgment has been achieved, land use decisions must be measured not against the goals  
18 but against the acknowledged plan and implementing ordinances”).

19 The 1973 legislature did not, however, allow counties to ignore the State’s conservation  
20 policies until LCDC adopted the statewide goals. Instead, the legislature enacted interim land  
21 use planning goals that applied from October 5, 1973 – before plaintiffs acquired their property –  
22 until the LCDC goals went into effect in 1975. Plaintiffs contend that those interim goals  
23 applied only to counties’ *planning* decisions and not to decisions that counties made on  
24

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25 <sup>2</sup> Information about the statewide goals most readily is found at DLCD’s website. Specific  
26 information related to the dates on which the goals became effective is at:  
[http://www.oregon.gov/LCD/docs/goals/goal\\_adoption\\_amendment\\_dates.pdf](http://www.oregon.gov/LCD/docs/goals/goal_adoption_amendment_dates.pdf) (last visited July  
26, 2007).

1 individual land-use applications like applications to subdivide property. Their argument  
2 overlooks important aspects of the Oregon Supreme Court’s decisions in *Petersen, 1000 Friends,*  
3 *Alexanderson and Meeker.*

4 *Petersen v. Klamath Falls, 279 Or 249 (1977)* is the sole Supreme Court case that relates  
5 specifically to application of the interim goals, which were in effect for only about 15 months.  
6 In that case, the Supreme Court analyzed ORS 197.175(1) (1973), which provided:

7                   Cities and counties shall exercise their planning and zoning  
8 responsibilities in accordance with ORS 197.005 to 197.430,  
9 215.055, 215.510, 215.515, 215.535 and 453.345 and the state-  
10 wide planning goals and guidelines approved under ORS 197.005  
11 to 197.430, 215.055, 215.510, 215.515, 215.535 and 453.345.

12 The court explained that, because ORS 215.515 listed the interim goals, the statute required  
13 cities and counties “to exercise their planning functions in accordance with *the interim land use*  
14 *planning goals* \* \* \* and the statewide planning goals and guidelines adopted by [LCDC].”  
15 *Petersen, 279 Or* at 251 (emphasis added).

16 The issue in *Petersen* was the breadth of the phrase “planning and zoning  
17 responsibilities” in ORS 197.175(1). In holding that the phrase covered annexation decisions,  
18 the Supreme Court interpreted the statutory language broadly:

19                   The phrase \* \* \* “planning and zoning responsibilities” –  
20 seems to encompass not only local planning decisions which relate  
21 to immediate land use objectives but also planning decisions which  
22 relate to the uses to which that land will be put in the future. \* \* \*

23                   \* \* \* [T]he exercise of “planning and zoning  
24 responsibilities” must be read to refer not only to the preparation of  
25 comprehensive plans and the enactment of zoning and other  
26 ordinances to implement those plans, but also to *other local*  
*planning activities which will have a significant impact on present*  
*or future land uses, such as the decision to extend city boundaries*  
*by annexation.*

*Id* at 253-54 (emphasis added).

1 Plaintiffs contend that *Petersen* does not apply to counties' decisions on individual land-  
2 use applications, like an application to divide property for residential use. But *Petersen* itself  
3 addressed an individual decision, not a broad plan – the decision whether to annex *specific*  
4 property into Klamath Falls' city limits – and held that it was an exercise of “planning or zoning  
5 responsibility.” More significantly, the statutory language that underlies the *Petersen* rationale  
6 also led to later Supreme Court cases holding that counties were required to apply the statewide  
7 land use planning goals in making decisions on individual land-use applications for actions like  
8 partitioning property.

9 The primary statute describing counties' responsibilities with respect to the goals, pre-  
10 acknowledgement, was ORS 197.175(1) (1973). As explained above, *Petersen* held that the  
11 phrase “planning and zoning responsibilities” in that statute was broad enough to cover  
12 annexation. The Supreme Court did not discuss what additional kinds of land-use decisions the  
13 phrase might cover, presumably because annexation was the only issue before it. But when the  
14 court later held in *Meeker* that Clatsop County had to comply with the statewide land use  
15 planning goals in deciding an application to subdivide property, the court again relied on ORS  
16 197.175(1), as well as its holding in *Petersen*. *Meeker*, 287 Or at 672 n 3. The clear implication  
17 is that ORS 197.175(1), which required counties to comply *both* with the interim goals *and* with  
18 LCDC's statewide land use planning goals in exercising “planning and zoning responsibilities,”  
19 covered county's decisions on individual land use applications, not just broad-based decisions  
20 that applied to many properties. Consequently, the interim goals would have applied to any  
21 request that plaintiffs could have made to divide their property when they acquired it in  
22 November 1973, after the interim goals went into effect.

23 Moreover, *Meeker*, like *Petersen*, also was based on ORS 197.300(1) (1973), which  
24 provided that the Land Use Board of Appeals (“LUBA”) had authority to review any local-  
25 government or state-agency “land conservation and development action” alleged “to be in  
26 conflict with statewide planning goals approved under ORS 197.240 *or interim goals specified in*

1 ORS 215.515.” See *Meeker* 287 Or at 672 n 3; *Petersen*, 279 Or at 254-55. If LUBA has  
2 authority to review actions for compliance with the interim goals, the *Petersen* court held, those  
3 actions must be taken “in accordance with the applicable planning goals in the first place.” 279  
4 Or at 255. Again, the fact that *Meeker* is based on much of the same statutory language as  
5 *Petersen* confirms that the holding of the former case – that counties were required to apply the  
6 goals to individual land use decisions – applies equally to counties’ responsibility to apply the  
7 interim goals in the *Petersen* era.

8 *Alexanderson* provides a more detailed discussion of the counties’ obligation to apply the  
9 statewide land use planning goals in making individual land use decisions. In that case, the  
10 Supreme Court again relied heavily on ORS 197.300(1)(b) (1973), the statute authorizing LCDC  
11 to review whether a “land conservation and development action” conflicted “with statewide  
12 planning goals \* \* \* or interim goals.” (Emphasis added). See *Alexanderson v. Polk County*  
13 *Commissioners*, 289 Or 427, 434 (1980). The court held that the phrase “land conservation and  
14 development action” encompassed decisions on individual land-use applications:

15 *We read “action” in this context to go beyond the adoption*  
16 *of plans and general ordinances so as to reach action on*  
17 *applications of these general policies to specific tracts of land.*  
This includes minor partitions if the local government has brought  
them within its subdivision ordinance.

18 289 Or at 434 (emphasis added). Based partly on that statutory language, the court held that  
19 Polk County was required to apply the statewide goals “to partitions under its subdivision  
20 ordinance.” *Ibid* Because ORS 197.300(1)(b) went into effect on October 5, 1973, the  
21 *Alexanderson* holding applies to the interim goals that also went into effect on that date, not just  
22 to the LCDC statewide goals adopted in 1975.

23 Plaintiffs correctly point out that the *Alexanderson* court also relied on a provision in  
24 ORS 197.275(2) stating “that *after* a compliance acknowledgment, ‘the goals shall apply to land  
25 conservation and development actions . . . only through the acknowledged comprehensive plan  
26 and implementing ordinances.” 289 Or at 434 (emphasis in original). The court found an

1 “implication \* \* \* that before acknowledgment, the goals apply to such actions not only in this  
2 indirect way but directly.” *Ibid* Plaintiff argues that the *Alexanderson* holding does not apply  
3 with respect to the interim goals because the provision of ORS 197.275(2) that the *Alexanderson*  
4 court cited did not exist in 1973. That argument is unavailing for two reasons. First, the  
5 statutory language in ORS 197.175 and 197.300(1) upon which *Meeker* and *Alexanderson* also  
6 relied *did* exist in 1973. Second, *Alexanderson*’s citation to ORS 197.275(2) should be  
7 considered of lesser importance than its reliance on the 1973 statutes. As Justice Tongue pointed  
8 out in dissenting from denial of a petition for rehearing, ORS 197.275(2) was not enacted until  
9 1977 – *after* the time frame for which the *Alexanderson* majority was seeking to determine  
10 legislative intent; consequently, it cannot be fundamental to the *Alexanderson* decision. *See*  
11 *Alexanderson v. Polk County Commissioners*, 290 Or 137, 140 (1980) (Tongue, J., dissenting  
12 from denial of petition for rehearing).

13 In sum, *Alexanderson*’s holding that counties were required to apply goals to individual  
14 land-use applications applies both to the interim goals and to LCDC’s statewide goals, as it is  
15 expressly based on statutory language that related to both sets of goals. *Alexanderson* thus  
16 supports the 1973 legislature’s intent to take immediate steps to conserve dwindling agricultural  
17 and environmental resources, which the Supreme Court described several years later:

18 The alacrity with which the legislature acted is  
19 significant. The adoption of goals by LCDC was expected  
20 to take time, but land use decisions could not come to a  
21 halt. The legislature did not postpone action. It adopted  
interim statutory goals to guide comprehensive planning  
and *land use decisions* until LCDC goals were adopted.

22 \* \* \* \* \*

23 The interim statutory goals reflect a legislative  
24 intention that *land use decisions*, even during the  
25 transitional period, be based upon consideration of a full  
range of environmental, conservation, recreational,  
agricultural, economic and other substantive legislative  
concerns.

26 *1000 Friends v. LCDC*, 292 Or 735, 747-48 (1982) (emphasis added).

1           The *1000 Friends* court’s use of the phrase “land use decisions” in this discussion of the  
2 1973 legislature’s intent is significant, as that phrase later was statutorily defined “to include the  
3 ‘*application of*’ the state-wide planning goals, comprehensive plan or zoning, subdivision or  
4 other ordinance that implements a comprehensive plan.” *Alexanderson*, 289 Or at 441 (emphasis  
5 added). Thus, *1000 Friends*, too, presumes that the interim goals applied directly to counties’  
6 decisions on the application of their ordinances to individual land-use proposals.

7           Other cases confirm that the appellate courts do not distinguish between the types of  
8 county land-use decisions to which the interim goals applied directly and those to which LCDC’s  
9 statewide land use planning goals applied directly before LCDC acknowledged the counties’  
10 comprehensive plans. For example, in *Housing Council v City of Lake Oswego*, 291 Or 878  
11 (1981), the Supreme Court explained that ORS 197.175(1), “which obliges cities and counties to  
12 ‘exercise their planning and zoning responsibilities...in accordance with...the state-wide  
13 planning goals,’” has “not been narrowly confined to the adoption of land use plans and zoning  
14 ordinances.” *Id* at 882. As support for that assertion, the court cited both *Petersen*, which  
15 related to the interim goals, and *Meeker*, which related to LCDC’s statewide goals. *See id* at  
16 882 n 3. The court also noted that ORS 197.175(1) had remained “substantially unchanged”  
17 since it was enacted in 1973, *id* at 882, further suggesting that the requirement that counties  
18 apply “the goals” directly in making pre-acknowledgment land-use decisions applied just as  
19 much to the 1973 interim goals as it did to the LCDC goals that became effective in 1975. *See*  
20 *also Jurgenson v. Union County Court*, 42 Or App 505, 508-09 (1979) (applying *Petersen* in  
21 explaining why statewide land use planning goals apply to partitions of property).

22  
23 **C. Summary of State’s argument on summary judgment**

24           The ultimate question presented by this Measure 37 case is whether plaintiffs could have  
25 divided their agricultural land for residential use when they acquired it in November 1973. For  
26 all the reasons set forth above, Benton County would have been required to apply the interim

1 goals to any partition or subdivision application that plaintiffs submitted at that time. And, as  
2 explained in the State's opening memoranda, application of those interim goals – particularly the  
3 goal requiring conservation of prime farmlands for the production of crops – would have  
4 precluded that residential development. Because plaintiffs could not have divided their land for  
5 residential use when they acquired it, they do not qualify for Measure 37 relief with respect to  
6 that use.

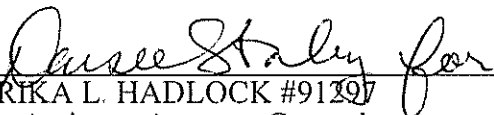
7 **CONCLUSION**

8 For the reasons stated above and in the memorandum supporting the State's motion for  
9 summary judgment, this Court lacks jurisdiction over plaintiffs' Measure 37 claim and should  
10 dismiss it. On the merits of both the Measure 37 claim and the APA claim, the State is entitled  
11 to summary judgment in its favor, as it correctly determined that plaintiffs could not have  
12 divided their property for residential use when they acquired it in November 1973 and, therefore,  
13 do not qualify for Measure 37 relief.

14 DATED this 27 day of July, 2007.

15 Respectfully submitted,

16 HARDY MYERS  
17 Attorney General

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26

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

MAY 16 2007

Trial Division, Dept. of Justice  
Salem, Oregon

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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

MAY 16 2007

Trial Division, Dept. of Justice  
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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:

I. 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.

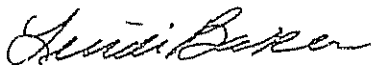
2. Objection to Respondent Josephine County's Proposed Order-

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 NEWMAN Circuit Judge

PAT WOLKE Circuit Judge  
THOMAS M HULL Circuit Judge



OREGON JUDICIAL DEPARTMENT  
Josephine County Court

January 12, 2007

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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

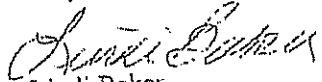
Accordingly, Petitioners will be limited to their claim for writ of relief and will not be allowed to proceed under the declaratory judgment, compensation or attorney fees and costs claims in the same action. Respondent's motions are granted in this regard

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

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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

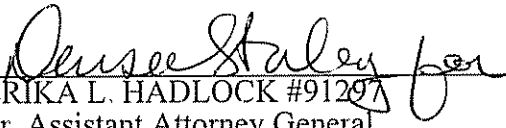
**CERTIFICATE OF SERVICE**

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I certify that on July 27, 2007, I served the foregoing REPLY IN SUPPORT OF STATE'S MOTION FOR SUMMARY JUDGMENT upon the parties hereto by the method indicated below, and addressed to the following:

Joel D. Kalberer  
Weatherford, Thompson, Cowgill et al  
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PO Box 667  
Albany, OR 97321

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

  
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