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DEPARTMENT OF JUSTICE
TRIAL DIVISION

January 24, 2007

Case Processing
Clackamas County Courts
807 Main Street, Room 104
Oregon City, OR 97045

Re: *Kennedy, Janice W. et al v. Clackamas County et al*
Clackamas County Circuit Court No. CV06030012

Dear Circuit Court Clerk:

Enclosed for filing please find State Defendants' Reply to Response to Motion for Summary Judgment in the referenced matter.

A postcard is enclosed for your use in notifying me of the action taken.

Sincerely,

Paul J. Sundermier
Senior Assistant Attorney General

TRIQ6794 DOC/PJS/tr1

Enclosures

cc: Client
E. Sean Donahue
Michael E. Judd

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

JANICE W. KENNEDY, TRUSTEE OF THE
B.E. WEILER EXEMPTION TRUST and
GAYLEEN D. WEILER,

Plaintiffs,

v.

CLACKAMAS COUNTY, STATE OF
OREGON; DEPARTMENT OF
TRANSPORTATION AND
DEVELOPMENT OF CLACKAMAS
COUNTY, STATE OF OREGON; BOARD
OF COUNTY COMMISSIONERS OF
CLACKAMAS COUNTY, STATE OF
OREGON; STATE OF OREGON,
DEPARTMENT OF LAND
CONSERVATION AND DEVELOPMENT
OF THE STATE OF OREGON; LAND
CONSERVATION AND DEVELOPMENT
COMMISSION OF THE STATE OF
OREGON; and DEPARTMENT OF
ADMINISTRATIVE SERVICE OF THE
STATE OF OREGON,

Defendants.

Case No. CV06030012
STATE DEFENDANTS' REPLY TO RESPONSE
TO MOTION FOR SUMMARY JUDGMENT

The State of Oregon replies to the response to its Motion for Summary Judgment:

**The Attempt to "Reform" a Deed by a Friendly Lawsuit and
Default Judgment**

The plaintiffs recognized that "family ownership" under Measure 37 must be continuous
in order to qualify for the compensation remedy back to the date of original family ownership.
In this case, there was continuous family ownership from the date of original family purchase in
1964 even with an intervening deed having been given to the son, John, in 1973 and his re-

1 deeding of “The Farm” back to the parents in 1975. That transfer in and out did not disrupt
2 family ownership under these facts. If the State elected to pay compensation, the value would be
3 affected by land use regulations adopted after the date of original ownership, “as of the date of
4 the claim.” ORS 197.352 (2).

5 The plaintiffs apparently failed to recognize that if the State elected to grant the “waiver
6 remedy” in Measure 37, in lieu of paying compensation, then the date for which land use
7 regulations would be “not applied” to the property would be the date that the present owner
8 acquired the property. ORS 197.352 (8), (10).

9 In the midst of this litigation, the plaintiffs instituted a separate, inter-familial action in
10 the Circuit Court for Clackamas County, case number CV0603-0011. *See*, Exhibit A attached to
11 the Stipulated Facts filed in this case. (Order and Judgment, 3 pp). That case purported to be a
12 Rescission and Declaratory Relief case but was actually a back-door attempt to reform The Farm
13 deed between the Weilers and their son John. Setting aside the issue that there is no case or
14 controversy, a jurisdictional requirement, when the parties come before the court with a
15 stipulation for an order divesting one party of prior property ownership, a general judgment was
16 entered. The judgment purports to rescind the 1973 deed, declaring it null and void, *nunc pro*
17 *tunc*, as of December 14, 1973 based on the agreement of John Weiler and his sister, Janice
18 Kennedy, Trustee, plaintiff in the instant case. This judgment is without effect in this Measure
19 37 case for at least two reasons.

20 **1. The “family lawsuit” does not affect the State**

21 While the parties to a case are bound by a judgment entered therein, persons or entities
22 who were not parties are not bound by it unless the rules of *issue preclusion* apply. *Barackman*
23 *v. Anderson*, 338 Or 365 (2005).

24 “Issue preclusion arises in a subsequent proceeding when an issue of ultimate fact has
25 been determined by a valid and final determination in a prior proceeding.’ *Nelson v. People’s*
26 *Utility Dist.*, 318 Or 99, 103 (1993). Issue preclusion is a jurisprudential rule that promotes

1 judicial efficiency. *Id.* (citing *State v. Ratliff*, 304 Or 254, 257 (1987)). In *Nelson*, the court
2 identified five requirements essential to the application of issue preclusion: (1) ‘the issue in the
3 two proceedings is identical’; (2) the issue actually was ‘litigated and was essential to a final
4 decision on the merits in the prior proceeding’; (3) ‘the party sought to be precluded has had a
5 full and fair opportunity to be heard on that issue’; (4) ‘the party sought to be precluded was a
6 party or was in privity with a party to the prior proceeding’; and (5) ‘the prior proceeding was the
7 type of proceeding to which this court will give preclusive effect.’ *Id.* at 104.” *Barackman*,
8 *supra*, 338 Or at 368.

9 Janice Kennedy, Trustee, plaintiff (for The Farm) cannot make the showing required by
10 *Barackman*, *Nelson* and *Ratliff* to give any effect to the judgment purporting to re-write deeds
11 recorded over 30 years ago in relation to the instant case. That judgment, like the deed that they
12 wanted “reformed,” is void for purposes of this litigation. But, as explained later, that deed adds
13 nothing to this analysis anyway.

14 2. A *nunc pro tunc* judgment cannot re-write history, including the deed records

15 “Nunc pro tunc orders are a manifestation of the inherent power of
16 a court to make its record speak the truth, that is, to correct clerical
17 errors at a later time so that the record reflects *what actually*
18 *occurred at an earlier time.*” *State ex rel Juvenile Department of*
Multnomah County v. Dreyer, 328 Or 332, 339 (1999) (emphasis
added).

19 “No court can rightly enter an order *nunc pro tunc* unless the
20 transaction to be recorded *actually took place at the prior date.*
The record must speak the truth and nothing can be entered unless
21 it actually happened *tunc*: *Grover v. Hawthorne*, 62 Ore 65 (116 P.
100), 121 P. 804); *Frederick & Nelson v. Bard*, 66 Ore. 259 (124
22 P. 318); *In re Ryan’s Estate*, 84 Ore. 102 (164 P. 586).” *Roeser v.*
Roeser, 116 Or 108, 112 (1925) (emphasis added).

23 “We reiterate that parties rely on purported ‘*nunc pro tunc*’
24 dispositions at their peril. *See generally, Gillespie v. Kononen*, 310
Or 272, 276 n 7, 297 P. 2nd 361 (1990).” *Macy and Macy v.*
Blatchford, et al., 154 Or App 313, 324 n 9 (1998).

25 The *nunc pro tunc* judgment relied upon to purport to reinstate Mrs. Weiler’s continuous
26 ownership (through ownership of her son John’s ownership) did not correct a clerical error and

1 does not accurately reflect what happened at the earlier time. What happened at the earlier time,
2 according to the parties' Stipulated Order for Rescission (Exhibit A, p 2 attached to Stipulated
3 Facts in the instant case) is that "the Property was mistakenly conveyed by the Weilers to
4 defendant John B. Weiler by deed dated December 14, 1973." The Farm was re-conveyed upon
5 "discovery of the mistaken conveyance" on December 30, 1975. *Id*

6 The mistake, if any, was in the minds of the family and not in the deed records. The
7 court's judgment *nunc pro tunc* cannot change the fact of the mistake in the minds of the parties
8 nor the fact of the proper recording of the deeds. There was no clerical error to correct and there
9 was no other fact that actually occurred that could be corrected by the judgment. The *nunc pro*
10 *tunc* judgment declaring the earlier property transactions null and void has no legal basis,
11 especially against the State in this case.

12 **Mrs. Weiler is not a Claimant**

13 This issue was satisfactorily briefed earlier, but the whole point of having Mrs. Weiler
14 have continuous ownership of The Farm is so that a waiver remedy would relate to her date of
15 acquisition – 1964 – likely long before there were any restrictive land use regulations affecting
16 The Farm. If the two issues above were not present in this case, that might be a valid point; but
17 only if Mrs. Weiler were a claimant and a plaintiff in this case. She is not and has never been.
18 Her date of acquisition was an issue only to establish a valid Measure 37 claim. The State found
19 that the claim was valid and then chose to elect and apply the waiver remedy for the two people
20 who were the actual claimants/plaintiffs.

21 **Conclusion**

22 This case should be dismissed because the appropriate remedy was applied in the
23 appropriate way in this Measure 37 case. Both plaintiffs obtained waivers of land use
24 regulations adopted since the date of their respective ownership. While they think that is
25 insufficient, it is one of the remedies written into the law that the government can elect to
26

1 provide. There is no requirement that the government pay compensation if it elects to provide
2 the waiver remedy.

3 Mrs. Weiler had a break in ownership due to her son's ownership from 1973 to 1975
4 which cannot be "corrected" by the related lawsuit that misuses the jurisprudential power of *nunc*
5 *pro tunc* in an attempt to re-write history. In this case, it hardly matters because Mrs. Weiler is
6 not and never has been a claimant or a plaintiff. Her date of ownership, whether it be 1964 or
7 1975 is irrelevant for waiver purposes.

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9 DATED this 24 day of January, 2007.

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Respectfully submitted,

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HARDY MYERS
Attorney General

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CERTIFICATE OF SERVICE


I certify that on January 24, 2007, I served the foregoing State Defendants' Reply to Response to Motion for Summary Judgment upon the parties hereto by the method indicated below, and addressed to the following:

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