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DEPARTMENT OF JUSTICE
TRIAL DIVISION

June 12, 2006

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

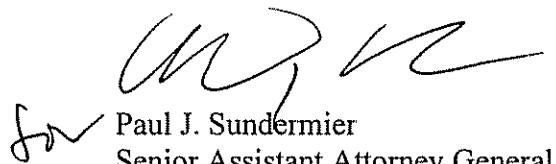
Re: *Kennedy, Janice W. et al v. Clackamas County et al*
Clackamas County Circuit Court No. CV06030012

Dear Circuit Court Clerk:

With this letter is the State's Reply to Plaintiffs' Response to ORCP 21 Motions filed by the State earlier.

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

Sincerely,


for Paul J. Sundermier
Senior Assistant Attorney General

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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,

Case No. CV06030012

DEFENDANT STATE OF OREGON’S REPLY
TO PLAINTIFFS’ RESPONSE TO ORCP 21
MOTIONS

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.

Defendant State of Oregon (and agencies) replies as follows:

The plaintiff misses the point of the Motion to Dismiss. This Court has jurisdiction to decide the correctness of the Final Order issued by the State agency if, and only if, that order is properly challenged. A proper challenge is a necessary predicate to a Measure 37 “cause of action” for compensation. If the agency correctly decided the claim by paying the appropriate amount of just compensation *or*, as was done in this case, by “not applying” land use regulations that were adopted after the present owner acquired the property, then there is no “cause of

1 action” under Measure 37. In other words, there cannot be any Measure 37 cause of action in
2 court until after the court conducts a judicial review of the Final Order under ORS 183.484,
3 which is the exclusive method of determining the correctness of agency decision-making.

4 The plaintiff also missed the point of *State (PEBB) v. OHSU, et al.*, 205 Or App 64
5 (2006) *Pet for Rev extension granted*. The State sued Sundermier, et al. claiming ownership of
6 money from the demutualization of Standard Insurance Co. He then counterclaimed on behalf of
7 a class of public employees. At trial the State alleged that Sundermier should have made an
8 APA claim under ORS 183.490 because there was no Final Order from the agency denying or
9 approving the claim for money. Sundermier argued that was not necessary. Having already
10 been sued for asking the State to distribute the money to the class, he pointed out that the agency
11 had made a final decision by instigating litigation claiming ownership. That issue was not
12 decided by the court. The Court of Appeals found that some claims should have been decided by
13 the issuance of a Final Order, however, it held that ORS 183.490 (action to require the agency to
14 issue an Order) does not apply to tortious or unlawful agency action where there is no Final
15 Order.

16 Tortious or unlawful agency action that is alleged to flow from the issuance of a Final
17 Order is another matter. That is what the instant case is about. In the absence of a direct case
18 under the Oregon or United States Constitutions, these types of cases must first be brought as a
19 challenge to an existing Final Order pursuant to the Administrative Procedures Act (APA).
20 Oregon case law is well established on that point.¹

21
22 ¹ *Boise Cascade Corp. v. Board of Forestry*, 325 Or 185, 197, 202 (agency and circuit court
23 have concurrent jurisdiction to decide a direct action under Art I, section 18 and the 5th
24 Amendment - a takings claim - but the circuit court’s jurisdiction is primary). Subsequently,
25 following the first trial, the Court of Appeals, held that the plaintiff’s claims were not ripe until it
26 had applied for a permit and been denied, or had proved that the application would have been
futile. *Boise IV and Boise V*, 164 Or App 114 (1999) and 186 Or App 291 (2003). The Boise
case was re-tried in May 2004 and is again pending appeal on ripeness grounds. As to the
general rule that APA jurisdiction is exclusive, see Defendant’s ORCP 21 Motion, footnotes 1,
17 and 18 filed previously.

1 Measure 37 did not wipe out any body of law established before its passage. Measure 37
2 in effect created a new statutory remedy because prior case law did not allow recovery of
3 compensation under an inverse condemnation (regulatory takings) claim unless the claimant’s
4 property retained *no viable economic or beneficial interest*. *Coast Range Conifers, LLC v. State*
5 *of Oregon*, 339 Or 136, 146-147 (2005). Mere reduction in the fair market value of property due
6 to land use regulations was not actionable.² (See, e.g., *Dodd v. Hood River County*, 317 Or 172,
7 182 (1993); *Suess Builders Co. v. City of Beaverton*, 294 Or 254 (1982); *Multnomah County v.*
8 *Howell*, 9 Or App 374,380). Measure 37 made reduction in fair market value due to regulations
9 that limit a land use by the owner a basis for a legal claim and gave the governing body the
10 option to pay compensation or waive the offending land use regulation(s). Measure 37 does not
11 trump any existing laws, including the ORCP, the evidence code or the APA.

12 The requirement to exhaust administrative remedies, including judicial review, is not
13 onerous, as plaintiffs seem to claim. It is not a limitation on any Measure 37 remedy – it is the
14 way that the court can determine if the agency correctly decided the Measure 37 claim and,
15 consequently, possibly avoid costly litigation over valuation issues by each side’s experts.

16 Almost all of the Measure 37 cases filed against the State agencies have been filed with petitions

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25 ² The State agrees with the plaintiffs’ statement on Page 5, line 6-7 of the Response: “Measure
26 37 creates a statutory remedy for just compensation that is in addition to those authorized by the
just compensation clause. ORS 197.352(12).” The plaintiffs’ statement would be more complete
to include the “waiver” remedy that is an option given to the governing body.

1 for judicial review of the Final Order under the APA, as suggested by the agency on the Final
2 Order itself.

3 DATED this 12 day of June, 2006.

4 Respectfully submitted,

5 HARDY MYERS
6 Attorney General

7
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CERTIFICATE OF SERVICE

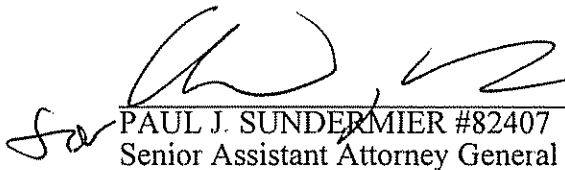
I certify that on June 12, 2006, I served the foregoing Defendant State of Oregon's Reply to Plaintiffs' Response to ORCP 21 Motions upon the parties hereto by the method indicated below, and addressed to the following:

E. Sean Donahue
Donahue & Associates
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Portland, OR 97258
Attorney for Plaintiffs

HAND DELIVERY
 MAIL DELIVERY
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 TELECOPY (FAX)

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Clackamas County Counsel
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Oregon City, OR 97045
Attorney for Clackamas County

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