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

6 KIM D. WARD; KIM D. WARD L.L.C., a
7 limited liability company; SALLY WARD;
8 DANA WARD; JESSICA WARD; JUSTIN
WARD; and DONNA MOORE,

9 Plaintiffs,

10 v.

11 CITY OF BEND OREGON; STATE OF
12 OREGON; DEPARTMENT OF LAND
13 CONSERVATION AND DEVELOPMENT
14 OF STATE OF OREGON; LAND
CONSERVATION AND DEVELOPMENT
COMMISSION OF STATE OF OREGON;
and DEPARTMENT OF ADMINISTRATIVE
SERVICES OF STATE OF OREGON,

15 Defendants.

Case No. 05CV0448ST

ORCP 21 MOTIONS
(DISMISS, MORE DEFINITE AND CERTAIN
AND STRIKE)

(Oral Argument Requested)

16 **UTCR Compliance**

17 Defendant, State of Oregon, certifies that it made a good faith effort to confer with the
18 plaintiff and was unable to reach agreement. Counsel for the State has conferred with counsel
19 for the Defendant City of Bend and we concur that the motions filed by each defendant should
20 best be heard in a consolidated hearing.

21 The State requests oral argument and official court reporting services. Approximately
22 one hour should be sufficient.

23 These motions are based on ORCP 21 and the accompanying Memorandum of Points and
24 Authorities, exhibits and affidavit.

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Page 1 - ORCP 21 MOTIONS
(DISMISS, MORE DEFINITE AND CERTAIN AND STRIKE)

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1 **ORCP 21 Motions to Dismiss**

2 The State of Oregon moves this court to dismiss plaintiffs' claims, as follows:

3 **Motion No. 1 (Court lacks subject matter jurisdiction – ORCP 21 A (1))**

4 This case is artfully pled in an attempt to avoid the exclusive remedy available to the
5 plaintiffs to determine the *correctness* of the underlying agency decision, which is the basis for
6 determining whether any “Measure 37 cause of action” may be prosecuted at all. That exclusive
7 remedy is judicial review of a State agency’s Final Order under the Administrative Procedures
8 Act.¹ Since judicial review of the Final Order was not sought, the court lacks jurisdiction for the
9 Measure 37 case.

10 **Motion No. 2 (Legal capacity to sue – ORCP 21 A (4))**

11 All plaintiffs, other than the limited liability company itself, should be dismissed because
12 it is only Kim D. Ward LLC that is the owner of the property. Only Kim D. Ward LLC has any
13 legally cognizable interests in the real property so that it can properly sue.

14 **Motion No. 3 (Party asserting the claim is not the real party in interest – ORCP 21 A (6))**

15 All plaintiffs, other than Kim D. Ward LLC, should be dismissed as they are not the real
16 parties in interest in any real property interest relevant to this case.

17 **Motion No. 4 (Failure to state a claim – ORCP 21 A (8))**

18 The Measure 37 claim should be dismissed because it cannot be established as a matter of
19 law until the plaintiffs plead that they were wrongfully denied compensation and/or the property
20 wrongfully continued to be subject to restrictive land use regulations 180 days after filing a
21 written Measure 37 “demand” to the agencies. They have failed to do so. They have not
22 properly challenged the decision on the “demand” and the cause of action that they plead has not
23 been subject to APA judicial review and ruled to be *incorrect*.

24
25 ¹ The APA is found in ORS 183.310 *et seq.*; *Bay River, Inc. v. Environmental Quality Comm.*, 26
26 Or App 717, *rev denied*, 276 Or 555 (1976).

1 **ORCP 21 E Motions to Strike**

2 **Motion No. 5 (Strike irrelevant or redundant pleadings)**

3 Plaintiff apparently seeks to have several “exhibits” (letters written to government
4 officials) treated as allegations in the Complaint.² These exhibits are not pleadings and contain
5 no allegations properly stated. The State moves to have them stricken in the entirety.

6 **Motion No. 6 (Strike irrelevant or redundant pleadings)**

7 The State moves to strike those portions of the actual Complaint (not comprising
8 “exhibits”) as indicated with parentheses, pursuant to UTCR 5.020(2), as they are irrelevant or
9 redundant to any issue in a Measure 37 claim.

10 **ORCP 21 D Motions to Make More Definite and Certain**

11 **Motion No. 7**

12 The State moves, in the alternative to the motions to dismiss, or if the plaintiff is allowed
13 to re-plead, for an order that the plaintiff make more definite and certain the allegations of which
14 land use regulations adopted or enforced by the State agency defendants precisely had the effect
15 of reducing the fair market value of the subject real property and how that effect occurred.
16 Currently, there is no pleading at all on this element of a Measure 37 claim.

17 **Motion No. 8**

18 The State moves, again in the alternative or in case of leave to amend, for an order that
19 the plaintiff make more definite and certain the allegations of the amount of money by which
20 each precise land use regulation lowered the fair market value of the subject real property.
21 Currently there is only a very vague pleading on “just compensation” which does not comport
22 with the ORCP.³ At the very least, the plaintiff should state the total sum claimed with
23 definiteness and allege with definiteness how each relevant land use regulation (adopted or
24 enforced by the State agencies) caused the reduction in value.

25 ² Complaint, page 2, ¶ 5, lines 20 – 22.

26 ³ Complaint, page 4, ¶ 9

1 **Memorandum of Points and Authorities**

2 This case purports to be a “cause of action” under Measure 37. In reality, it is a
3 disagreement with the decision reached by the State agency responsible for reviewing and acting
4 on the “demand” that the plaintiffs made to the agency.⁴ There is one way – one exclusive way –
5 to challenge a decision reached by a State agency when a demand for a decision is made to it.

6 **Motions No. 1 and 4**
7 **The Administrative Procedures Act Establishes the Exclusive**
8 **Method for Challenging Agency Decisions**

9 Measure 37 blithely states that a “cause of action” may be filed in circuit court when “a
10 land use regulation continues to apply to the subject property more than 180 days after the
11 present owner of the property, or any interest therein” had made a written demand for
12 compensation.⁵ That section of the law must be read in context.⁶ If one does not read the whole
13 law, and reads only that one section, then every claimant would be able to file a “cause of action”
14 for compensation whether or not the agency correctly decided to deny a claim, or whether or not
15 the agency correctly decided to approve a claim and then decided “not to apply” the restrictive
16 land use regulations, as permitted by sections 8 & 10 of the measure.⁷

17 The only way that the circuit court can decide whether or not the agency correctly
18 decided the underlying claim, and therefore send a case for compensation to a jury⁸ if it decided
19 incorrectly, is to conduct a judicial review of the agency order in other than a contested case.⁹

20 ⁴ See, Exhibit A to Affidavit of Sundermier; see also, Complaint, ¶s 5, 7 & 8.

21 ⁵ Measure 37, section 6.

22 ⁶ *PGE v. BOLI*, 317 Or 606 (1993)

23 ⁷ Measure 37 allows an agency to either pay compensation or to “waive” the application of the
24 land use restriction on the particular parcels of real property subject to the claim. Sections 1, 4
25 and 6 identify the compensation remedy and sections 8 and 10 identify the waiver alternative.

26 ⁸ We assume for the sake of this argument that a jury trial is appropriate (which is not conceded).

⁹ ORS 183.484 (“The Record” was filed with the Circuit Court Clerk at the time these Motions
were filed. *Norden v. Water Resources Dept.*, 329 Or 641 (2000). The exhibits to the Affidavit
of Sundermier are also in The Record).

1 No such claim is made, because the plaintiff reads section 6 in a vacuum, and any such petition
2 for review is now untimely. This case should be dismissed because the APA provides exclusive
3 jurisdiction for review of the correctness of an agency Final Order.¹⁰

4 Aside from the many appellate decisions interpreting the exclusivity of APA judicial
5 review, another statute pertaining to this court’s jurisdiction is helpful to determine that Measure
6 37 does not provide an independent basis for jurisdiction over the agency’s Final Order. ORS
7 1.160 provides:

8 When jurisdiction is, by the Constitution *or by statute*, conferred
9 on a court or judicial officer, all the means to carry it into effect are
10 also given; and in the exercise of the jurisdiction, if the course of
11 proceeding is not specifically pointed out *by the procedural*
12 *statutes*, any suitable process or mode of proceeding may be
adopted which may appear *most conformable to the spirit of the*
procedural statutes.

13 (emphasis added). The course of proceeding is not specifically pointed out by Measure 37, but it
14 is specifically pointed out in other procedural statutes – the APA (the *Administrative Procedures*
15 *Act*) is a set of specific procedural statutes that grant jurisdiction to the circuit court to review
16 Final Orders to the exclusion of other procedures.¹¹ A type of Final Order are those issued
17 following “demands” for compensation (or the alternative of “waiver” of regulations) under
18 Measure 37 itself.

19 The Court of Appeals has held that “where the legislature has provided adequate
20 procedures, this court should not create a different procedure pursuant to ORS 1.160.”¹²

21 ¹⁰ *Lone Oak Racing v. Oregon Racing Comm.*, 162 Or App 111 (1999)(circuit had no jurisdiction
22 to issue a declaratory judgment concerning an issue that was subject to judicial review under the
23 APA following the agency’s normal procedures). See also, *Bay River, supra*; *FOPPO v. County*
of Marion, 93 Or App 93, *rev den* 307 Or 326 (1988).

24 ¹¹ ORS 183.480 and 183.484.

25 ¹² *Black v. Arizala*, 182 Or App, 16, 28 (2002), *aff’d* 337 Or 250 (2004); *see also, Muller v.*
26 *State*, 164 Or App 11 (1999)(jury verdict reversed and remanded for judgment of dismissal
because the plaintiff’s negligence action against a State agency was in reality a challenge to the
agency’s Final Order and APA jurisdiction was exclusive).

1 Unless the agency wrongly decided the underlying claim or “demand,” then there is no
2 viable Measure 37 claim for compensation. The court’s jurisdiction to decide the correctness of
3 that underlying demand lies exclusively within the APA and that is the *most conformable*
4 *procedural statutes* to follow.

5 Ironically, the agency Final Order itself advised the plaintiffs that judicial review could
6 be had under ORS 184.484.¹³ The plaintiffs chose not to challenge the agency order at all and to
7 file a case under Measure 37 directly. As noted, the problem with that approach is that the court
8 must *assume* the incorrectness of the Final Order because there would be no Measure 37 case if
9 it were correct; and the court has no jurisdiction to determine that it is incorrect other than
10 through the APA. The time for seeking the court’s jurisdiction to make that determination has
11 expired because the APA provides for review “within 60 days only following the date the order
12 is served.”¹⁴ This case should be dismissed for lack of jurisdiction and for failure to state that a
13 petition for judicial review was brought within 60 days.

14 **Motions 2 and 3**

15 **Legal Capacity/Real Parties in Interest**

16 There are seven plaintiffs in this case. There is only one owner of the subject real
17 property – Kim D. Ward, LLC. All other plaintiffs should be dismissed.

18 The “family members” of the current owner acquired ownership of Tax Lot 601 in 1950
19 and Tax Lot 606 in 1952.¹⁵ If compensation were due, and the government elected to pay
20 compensation rather than waive or “not apply” applicable land use regulations, the date of family
21 acquisition would be relevant. In this case the claim was denied because no laws enforced by the
22 agency that are subject to Measure 37 restricted the use of the real property.¹⁶ This is so because

23 ¹³ See, Affidavit of Sundermier, Ex C, Final Order at page 2 “Notice of Right to Appeal or Other
24 Judicial Relief”

25 ¹⁴ ORS 183.484 (2).

26 ¹⁵ Complaint ¶s 5 & 6; Final agency staff report at page 3, Affidavit of Sundermier, Ex. B

¹⁶ Staff Report, Ex B, *supra*, at 6.

1 the current owner of the property (both tax lots), and the owner of record since December 27,
2 1994, is Kim D. Ward, LLC. No other plaintiff has any interest in the real property that is
3 legally cognizable. Their interests are those of members of an LLC – a creature of statute – and
4 those interests are personal property by statute.¹⁷

5 A limited liability company is most similar to a corporation. Its creation and governance
6 is pursuant to statute – ORS Chapter 63. When the statute provides that the members’ interest in
7 the company is personal property and that they have no interest in specific company property,
8 including not being a co-owner, then the statute is clear and should control the issue in this case.
9 That issue is, who is the current owner of the real property or any interest therein, and when did
10 that owner acquire the property? It is answered by the Complaint and by ORS Chapter 63.¹⁸

11 An LLC is a “person” throughout the Oregon Revised Statutes, unless the context
12 otherwise requires.¹⁹ One of those other statutes is ORS 93.280, which states,

13 Any person or persons owning real property which the person or persons
14 have power to convey may convey such property by a conveyance naming
15 the person or persons and another person or persons, or one or more of them-
16 selves and another person or other persons, as grantees. The conveyance shall
17 have the same effect as a conveyance from a stranger who owned the
18 property to the persons named as grantees.

19 Thus, Kim D. Ward could have conveyed the property to himself and children and even an LLC
20 in part, retaining some ownership interest. But that is not what was done. He conveyed all of his

21 ¹⁷ ORS 63.239 (“A membership interest is personal property. A member is not a coowner of and
22 has no interest in specific limited liability company property”). See, also, Complaint, ¶4 which
23 alleges that the individuals are “members” of the LLC (plaintiffs claim that Kim D. Ward
24 recently transferred an interest from the LLC to himself for purposes of “making and completing
25 a Measure 37 claim” but that establishes only a later date of acquisition of the “current owner”
26 and avails nothing as respects the waiver of any DLCDD-enforced land use regulations after his
most recent acquisition – if any).

¹⁸ ORS 63.077(2)(b) provides, “Unless its articles of organization provide otherwise, * * * each
limited liability company organized under this chapter may: *purchase, take receive, lease, or*
otherwise acquire, own, hold, improve, use and otherwise deal in or with real or personal
property or any interest in real or personal property, wherever situated;” (emphasis added for
subpart (b)).

¹⁹ ORS 63.002

1 real property ownership interest to the LLC, receiving at that time a member's interest in the
2 LLC, to wit, personal property.

3 Oregon case law also recognizes the different effect on ownership once property is
4 transferred into a corporation. An instructive case, in the area of eminent domain, is *City of*
5 *Salem v. H.S.B. et al*, 302 Or 648 (1987). The property owners in that case tried to convince the
6 court that they had "unity of ownership" in different parcels of land even though the individual
7 shareholders of the corporation owned one parcel and the corporation owned another parcel. The
8 Supreme Court held that "incorporation is a status which should not be assumed and discarded at
9 the whim of the incorporators."²⁰ The Court said, "A corporation is not its incorporators or
10 shareholders; it is not a partnership or joint venture; it is, rather, another and particular kind of
11 creature, with its own rights and duties. *See generally*, ORS Chapter 57. * * * But while the
12 corporation holds the property, the shareholders do not."²¹ The relationship between an LLC and
13 its members is almost exactly like the corporation and its shareholders. That relationship should
14 not be discarded at the whim of the members so that they can make a Measure 37 claim.

15 The only owner of the property with legally cognizable rights/interests therein is Kim D.
16 Ward, LLC. It does not matter why the LLC was created (plaintiff states it was for estate
17 planning purposes)²² because once it is created, and once it became the owner of the property (as
18 it did on December 1994)²³ then its members have only a personal property interest in the LLC
19 and not an interest in the real property itself. All other plaintiffs should be dismissed for these
20 reasons (as well as their failure to state a claim under ORCP 21 A (8)).

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²⁰ 302 Or at 654.

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²¹ *Id.*

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²² Complaint at page 2, ¶ 4, line 10

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²³ Complaint at page 3, ¶ 5, line 2

1 **Motions No. 5 and 6 – Strike Exhibits and particular phrases**

2 Plaintiffs attached numerous letters to the complaint as exhibits and claim in the
3 complaint that they should be treated as allegations.²⁴ Those letters are irrelevant and redundant.
4 If there is any evidentiary significance to the information in those letters, they should be properly
5 placed in a pleading as allegations of whatever it is to which they are supposed to be relevant.
6 Wholesale adoption by reference of irrelevant and redundant pages of correspondence is not
7 proper pleading under the rules. *Davis v. Tyee Industries, Inc.*, 295 Or 467, 482-3 (1983).

8 For the same reason, the bracketed portions of the complaint itself allege irrelevant or
9 redundant (and perhaps, frivolous) allegations not tending to prove any Measure 37 claim.²⁵
10 Basically those parts pertain to actions of the members of the LLC, which is irrelevant; to the
11 reason for creating the LLC, which is irrelevant; to the acquisition dates alleged in paragraph 8
12 as they are irrelevant to “relief” alleged (when the government “waives” or “does not apply” the
13 regulation instead of paying compensation); and to the prayer for legal interest for which the
14 State is immune and is not recoverable under Measure 37 anyway.²⁶ These portions of the
15 complaint should be stricken under the rule.

16 **Motions No. 7 and 8 – Make More Definite & Certain**

17 Presumably, plaintiffs seek to attach the exhibits rather than allege how a land use
18 regulation, adopted or enforced by a State agency since the current owner acquired possession,
19 reduced the fair market value of the property as of the date of the Measure 37 claim.²⁷ As the
20 court can see, there is nothing in any part of the Complaint that explains the rationale for the over
21 two million dollar compensation plea (and then some, so it is alleged). There also is no concise
22 statement of facts constituting a Measure 37 compensation claim, which must include more than

23 _____
24 ²⁴ Complaint at page 2, ¶ 5, lines 20-22

25 ²⁵ The “marked-up” complaint is attached to this Memorandum. UTCR 5.020 (2).

26 ²⁶ *Young v. State*, 195 Or App 31, 49-51 (2004).

²⁷ Measure 37, attached as Exhibit E to Sundermier Affidavit, sections 1, 2, 3E, 4, 6, 8, 10.

1 a laundry list of rules and statutes without any further explanation (the supposed reason for the
2 exhibits).

3 No allegation appears anywhere in the Complaint, or even the letters themselves, from
4 which any reasonable person could deduce the “effect” of the laundry list or any part thereof on
5 the reduction in fair market value of the property. Each land use regulation that was adopted or
6 enforced must be set out in a pleading that alleges (1) who enforced or adopted it and when, (2)
7 what was its effect on (how it restricted) the *use* of the real property, and (3) what was the
8 reduction in fair market value of the property. ORCP 16, 18 B, 20 and 21.

9 Furthermore, specific parts of the complaint have been underlined that are too conclusory
10 and vague to constitute sufficient allegations. In paragraph 6, it is not at all clear what the “This”
11 means in the underlined sentence and how that might relate to any unidentified State land use
12 regulations. In paragraph 7, the phrase “land use regulations complained of” do not appear in the
13 complaint and are not complained about - other than the laundry list in the exhibits. This is a
14 critical element of a Measure 37 claim – what regulation and how it affected the current owner’s
15 use.²⁸ That is a condition precedent to any claim that fair market value has been reduced. And
16 then, the effect of the regulation’s restriction must relate to that value reduction. No such
17 allegation is made. In paragraph 9, there is a conclusion only about compensation. Those
18 sentences need to address the elements, again, of causation – which regulations, adopted or
19 enforced by whom, when, how they affected use and how they reduced fair market value.

20 Finally, the pleading for fees and costs does not follow the statute (Measure 37, section
21 6). There is no right to fees and costs unless those are “reasonably incurred to collect the
22 compensation” and that should be pled with specificity.

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26 ²⁸ Measure 37, sections 1 and 8, e.g.

1 **Conclusion**

2 Any Measure 37 claim by the current owner (the LLC) must allege the elements of a
3 cause of action under that law with specificity and not by reference to exhibits that have no
4 allegations at all. However, the current owner cannot proceed with the Measure 37 cause of
5 action because its “demand” for a decision on the claim called for, and resulted in a Final Order
6 of the State agency (DLCD). That decision is not reviewable under Measure 37, but only under
7 the APA. There can be no Measure 37 cause of action if the agency’s decision was correct and
8 the time for challenging that decision has run. This case should be dismissed.

9 DATED this ____ day of July, 2006.

10 Respectfully submitted,

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