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

KOLSKI TRUST,
Plaintiff,
v.
STATE OF OREGON, by and through the
DEPARTMENT OF LAND
CONSERVATION AND DEVELOPMENT,
Defendant.

Case No. 06P1539
STATE'S CROSS MOTION FOR SUMMARY
JUDGMENT
(ORAL ARGUMENT REQUESTED)

Pursuant to ORS 183.484 and ORCP 47, Defendant State of Oregon (“State”) moves for summary judgment in its favor because petitioner Kolski Trust (“Petitioner”) is not entitled to relief under Ballot Measure 37 (2004), codified at Oregon Revised Statute (“ORS”) 197.352. This motion is made on the grounds that Petitioner does not qualify as an “owner” entitled to relief of the subject real property under Measure 37 because it is a seller in a land sales contract without the legal right to use the real property. 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.

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STATE'S CROSS MOTION FOR SUMMARY JUDGMENT

(ORAL ARGUMENT REQUESTED)
SCP/sck/TRIQ4978


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

5 DATED this 28 day of December, 2006.

6 Respectfully submitted,

7 HARDY MYERS
8 Attorney General

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10 
11 STACY C POSEGATE #06474
12 Assistant Attorney General
13 Trial Attorney
14 Tel (503) 947-4700
15 Fax (503) 947-4792
16 Stacy.C.Posegate@doj.state.or.us
17 Of Attorneys for Defendant

26ge 2 - STATE'S CROSS MOTION FOR SUMMARY JUDGMENT

(ORAL ARGUMENT REQUESTED)
SCP/sck/TRIQ4978

Department of Justice
1162 Court Street NE
Salem, OR 97301-4096
(503) 947-4700 / Fax: (503) 947-4792

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5 FOR THE COUNTY OF POLK

6 KOLSKI TRUST,

7 Plaintiff,

8 v.

9 STATE OF OREGON, by and through the
10 DEPARTMENT OF LAND
CONSERVATION AND DEVELOPMENT,

11 Defendant.

Case No. 06P1539

STATE'S MEMORANDUM IN OPPOSITION
TO MOTION FOR SUMMARY JUDGMENT
AND IN SUPPORT OF CROSS MOTION FOR
SUMMARY JUDGMENT

12 **INTRODUCTION**

13 In these cross motions for summary judgment there are no disputed issues of fact, only
14 the legal question of whether a seller in a land sales contract qualifies as an "owner" entitled to
15 relief under Ballot Measure 37 (2004), codified at Oregon Revised Statute ("ORS") 197.352.
16 The interpretation correctly adopted by the Department of Land Conservation and Development
17 ("DLCD") is that a mere seller in a land sales contract does not qualify as an owner because he
18 or she does not have a legal right to use the subject property, rather, that incident of ownership is
19 held by the purchaser. DLCD's interpretation is supported by well settled Oregon laws of
20 statutory construction and its policy behind Oregon's comprehensive land use plan. For these
21 reasons DLCD denied petitioner Kolski Trust's ("Petitioner") claim for compensation under
22 Measure 37.

23 Petitioner now brings its summary judgment on its petition for judicial review of DLCD's
24 final order denying Petitioner's claim under ORS 183.484 and its cause of action against the
25 State for violation of Measure 37 for its refusal to award Petitioner relief. As set forth more fully
26

1 below, Petitioner’s motion should be denied and the State’s cross motion granted because, as a
2 matter of law, Petitioner is not entitled to relief under Measure 37 since it is not a qualifying
3 owner.

4 **BACKGROUND**

5 **A. Ballot Measure 37.**

6 In 2004, Ballot Measure 37 was enacted by Oregon voters through the initiative process
7 and later codified as ORS 197.352 under Chapter 197 entitled “Comprehensive Land Use
8 Planning Coordination.”¹ Measure 37 permits certain owners of private real property to seek
9 compensation from a public entity for reductions in fair market value caused by certain land use
10 regulations that are enacted or enforced by that public entity. The owner is entitled to relief only
11 if it can establish that (1) a public entity enacts or enforces a “land use regulation” that (2)
12 restricts the owner’s use of private real property, and (3) has the effect of reducing the fair
13 market value of the private real property. ORS 197.352 (1). Subsection 11(C) of Measure 37
14 defines an “owner” as “the present owner of the property, or any interest therein.” ORS 197.352
15 (11)(C). The measure includes exceptions for four categories of regulations that are not at issue
16 in this case. ORS 197.352 (3).

17 Subsection (5) of Measure 37 requires landowners to submit their claim to a public entity
18 by December 2, 2006 or within two years from the date on which a public entity applies a land
19 use regulation, whichever is later. ORS 197.352 (5). For all statewide land use regulations, all
20 claims are submitted to the Department of Administrative Services (“DAS”). DAS initially
21 reviews each claim and forwards it to the appropriate state agency, *i.e.* the “regulating entity”
22 that appears to have enacted or enforced a relevant land use regulation. Oregon Administrative
23 Rules (“OAR”) 125-145-0090. The regulating entity, in this case DLCD, investigates and
24 analyzes then issues a draft report on its findings that is made public on the internet and mailed
25

26 ¹ A copy of ORS 197.352 is attached hereto for the court’s convenience as Attachment A.

1 to the claimant and any persons who submitted comments or requested notice. OAR 125-145-
2 100 (1)(2).² After a ten-day comment period, and based in part on the comments received,
3 DLCD and DAS issue a final report and order. (see Final Order attached to Petitioner’s
4 memo)OAR 125-145-100 (3)-(6).

5 If, in its final order, DLCD determines that the claimant is a qualified owner and that the
6 claim is timely and valid, DLCD has the option to pay compensation³ or “to modify, remove, or
7 not to [sic] apply” land use regulations to the extent necessary “to allow the owner to use the
8 property for a use permitted at the time the owner acquired the property.” ORS 197.352 (8); *see*
9 *also* ORS 197.352 (10); *MacPherson v. DAS*, 340 Or. 340, 122 (2006). Allowing the owner to
10 use the property in a way that would otherwise be prohibited by land use regulations is
11 commonly referred to as granting a Measure 37 “waiver.”⁴ Although Measure 37 amended
12 Oregon’s land use planning statutes by adding a new section to ORS chapter 197, it did not
13 otherwise amend or repeal the other statutes, land use planning goals or rules.

14 **B. Plaintiff’s claims and undisputed facts.**

15 For purposes of these cross-motions for summary judgment, the State does not dispute
16 the relevant facts as alleged in the complaint.⁵ On March 30, 1964, the property that is the
17 subject of this action and located in Polk County (“Property”) was purchased by John and

18 _____
19 ² The draft report on petitioner’s demand in this case is incorporated into the final order attached
to Petitioner’s motion and attached hereto as Attachment B.

20 ³ “Just compensation shall be equal to the reduction in the fair market value of the affected
21 property interest resulting from enactment or enforcement of the land use regulation as of the
date the owner makes written demand for compensation. ORS 197.352 (2).

22 ⁴ DLCD may pay compensation only if and when the legislature appropriates funds for that
purpose. *See* OAR 660-002-0010 (8) (c).

23 ⁵ The State does disagree with Petitioner’s characterization that in granting Petitioner’s claim,
24 the Polk County Board of Commissioner “ordered that all restrictive land use regulations that
25 were imposed on the subject property after April 7, 1964 be waived.” Motion p. 3:8-11. The
Polk County order expressly limits its waiver to the Petitioner’s obligation to obtain any other
26 necessary permits and waivers, including by any state agency that enforces a state land use
restriction. This fact is significant but not relevant for the purposes of the instant cross motion
and response.

1 Marjorie Kolski. (Complaint ¶ 1). On August 29, 1991, the Property was transferred to
2 Petitioner, John and Marjorie Kolski as trustees for the Kolski Trust, by bargain and sale deed
3 recorded at Polk County Clerk's office on November 14, 1991. (Complaint ¶ 2). Petitioner
4 thereafter sold its interest in the Property to Carolyn Gullette and Timothy Drago as trustees of
5 the Dragull Living Trust by memorandum of land sale contract recorded at Polk County Clerk's
6 office on March 20, 1997. (Complaint ¶ 3).

7 On October 7, 2005, Petitioner filed a claim for Measure 37 relief, seeking compensation in
8 the amount of, approximately, \$132,000 for an alleged diminishment in value of the Property as
9 a result of the enforcement of certain land use regulations. (Complaint ¶¶ 7 and 22). DLCD
10 determined that the Measure 37 claim was invalid because a seller under a land sales contract
11 does not qualify as an "owner" for purposes of Measure 37⁶. (Complaint ¶ 12). Petitioner
12 subsequently filed the instant Complaint against the State of Oregon in which it asserted (1) a
13 Petition for Judicial Review Against Defendant State of Oregon (Erroneous Interpretation of
14 Law-Present Ownership.); and (2) a Cause of Action Under Measure 37 Against Defendant State
15 of Oregon.

16 It is DLCD's determination that Petitioner is not an "owner" entitled to relief that is the
17 subject of this litigation and the basis for Petitioner's Motion for Summary Judgment, this
18 Response and DLCD's Cross-Motion for Summary Judgment. These issues are collectively
19 addressed below.

20 **C. Standard of review.**

21 In its motion for summary judgment, Petitioner accurately describes the standards that
22 generally apply to summary-judgment proceedings in civil cases. But the usual summary-
23 judgment standards for reviewing the facts and evidence do not apply when a circuit court

24

25 ⁶ Petitioner erroneously filed its claim and the instant matter in the name of the Kolski Trust.
26 The seller of the Property, and accordingly the proper claimant and petitioner, is Marjorie Kolski
as Trustee for the Kolski Trust.

1 reviews an agency order in other than a contested case under ORS 183.484. *Powell v. Bunn*, 185
2 Or. App. 334 (2002). The Court of Appeals has explained that “viewing factual disputes in the
3 light most favorable to a nonmoving party” – the usual standard of review in a summary-
4 judgment motion – “[is] not appropriate in the judicial review of an administrative order in a
5 noncontested case proceeding.” *Id.* at 339.

6 In *Powell v. Bunn*, in the course of affirming a trial court’s grant of summary judgment to
7 a state agency on review in other than a contested case, the Court of Appeals explained that its
8 review of factual issues was “limited” instead “to whether the circuit court correctly decided that
9 the order is supported by substantial evidence.” *Id.* at 339. Thus, in deciding the cross-motions
10 for summary judgment presently before the court, the only questions presented could be: (1)
11 whether the Final Order is based on an incorrect interpretation or application of the law;⁷ and, (2)
12 whether the factual findings in the Final Order are supported by substantial evidence in the
13 record.⁸ In this case, the second question presented is not at issue, because, as noted above, the
14 State does not dispute plaintiffs’ factual allegations for purposes of the cross-motions for
15 summary judgment. Accordingly, this court need consider only the legal significance of those
16 facts.

17 ARGUMENT

18 A. **Measure 37 claimants are entitled to relief only if they have a present ownership**
19 **interest in private real property, their interest in the property is restricted by a land**
20 **use regulation, and the land use regulation has the effect of reducing the fair market**
21 **value of the property.**

22
23 ⁷ See ORS 183.484(5)(a) (describing judicial review for incorrect interpretations of law); ORS
183.484(5)(b) (describing judicial review for unlawful exercise of agency discretion).

24 ⁸ The Oregon Supreme Court has explained that judicial review of the latter question is limited in
25 scope. That is, in determining whether substantial evidence supports an agency’s factual
26 findings, the question before a circuit court “is limited to whether the evidence would permit a
reasonable person to make the determination that the agency made in the particular case.”
Norden v. Water Resources Dep’t., 329 Or. 641, 649 (2000).

1 The circuit court reviews DLCD’s interpretation of Measure 37 using the same
2 methodology that applies to any statute. *PGE v. Bureau of Labor and Industries*, 317 Or 606,
3 612 n 4 (1993) (a three-part methodology applies “not only to statutes enacted by the legislature,
4 but also to the interpretation of laws and constitutional amendments adopted by initiative or
5 referendum, as well as to the interpretation of regulations”). If the statute is the result of a voter
6 initiative, the Court must interpret the statute in accord with the intent of the voters. *Stranahan v.*
7 *Fred Meyer, Inc.* 331 Or. 38, 56 (2000).

8 The best evidence of the voters’ intent “is the text of the provision itself” as well as a
9 consideration of the ballot measure. *Stranahan v. Fred Meyer, Inc.*, 331 Or. at 56, *supra*. If
10 the voter’s intent is not clear after this inquiry, the Court must conduct a further inquiry into the
11 legislative history of the provision. *Id* citing *Ecumenical Ministries v. Oregon State Lottery*
12 *Comm*, 318 Or 551, 559 (1994).⁹ As demonstrated below, a proper Measure 37 claimant is not
13 any person holding an ownership interest in private property, rather relief is limited to those
14 whose use of the property and the value of the property will be adversely affected by a land use
15 regulation.

16 **1. It is clear from the text and context of Measure 37, that Oregon voters**
17 **intended to provide relief only to claimants with a present ownership interest**
18 **in the private property at issue.**

19 The kind of ownership interest that is required for relief under Measure 37 can be found
20 in the overall context of Measure 37. ORS 197.352. Subsection (11)(C) of Measure 37 defines
21 the term “owner” as the “present owner of the property, or any interest therein.” ORS
22 197.352(11)(C). This definition does not, standing alone, define what an “owner” is. Nor, are
23 there any specific statutory definitions of “property” or “any interest therein.” The meaning of

24 ⁹ Legislative history of ballot measures consists of information available to the voters “that
25 disclose the public’s understanding of the measure.” *Ecumenical Ministries*, 318 Or at 560 n 8,
26 *supra*, (e.g. “the ballot title and arguments for and against the measure included in the voters’
pamphlet, and contemporaneous news reports and editorial comment on the measure.”)

1 these terms, however, may be found in the overall context of the statute in accordance with
2 Oregon rules of statutory construction described above. More specifically, the Court is
3 instructed to look to the use of these terms as they are repeated throughout the statute within the
4 context of the statute. *PGE v. Bureau of Labor and Industries*, 317 Or at 611, *supra*, (“use of
5 the same term throughout the statute indicates that the term has the same meaning throughout.”)

6 Subsection (1) of Measure 37 clarifies that the “property or any interest therein” at issue
7 is “private real property”, and further, that such property or interest in property must be restricted
8 by land use regulations that have the effect of reducing its value. ORS 197.352 (1). Taken
9 together, subsections (1) and (11) qualify each claimant as (1) a present holder of an interest in
10 private property; (2) who has a right to use the property; (3) which right to use is restricted by a
11 land use regulation; and, (4) the fair market value of that property is reduced by the land
12 regulation.

13 Subsections (8) and (10) also support the interpretation that the claimant must not only
14 have an interest in private property, it must also have a right to use that property. Subsection (8)
15 of Measure 37 provides that, in lieu of payment, a public entity may “waive” the regulation “to
16 allow the owner to use the property for a use permitted at the time the owner acquired the
17 property.” ORS 197.352(8). Subsection (10) of Measure 37 provides that if a claim has not been
18 paid within two years of accrual, “the owner shall be allowed to use the property as permitted at
19 the time the owner acquired the property.” ORS 197.352 (10). If the owner does not have a
20 right to use the property, “waiving” the regulation and permitting the use cannot result in the
21 relief intended by the statute.

22 Subsection (4) of Measure 37 also supports this understanding. Under subsection (4), a
23 claimant has a right to compensation if a land use regulation “continues to be enforced against
24 the property 180 days after the owner of the property makes written demand under this section.”
25 ORS 197.352 (4). Subsection (4) is similarly meaningless if the land use regulation at issue does

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1 not actually restrict or otherwise affect the claimant’s present interest in their right to use the
2 property.

3 Finally, the codification of Measure 37 under the chapter entitled “Comprehensive Land
4 Use Planning Coordination” is further evidence that Measure 37 concerns regulation of the use
5 of land. ORS §§ 197.005 *et seq.* The primary purpose of the Legislature in enacting Chapter
6 197 was to protect against the “uncoordinated use of lands within this state” because such *use*
7 “threatens the orderly development, the environment of this state and the health, safety, order,
8 convenience, prosperity and welfare of the people of this state.” ORS § 197.005(1). If a
9 person’s use of their private real property is not being restricted by a land use regulation, then
10 ORS 197.352 simply does not apply to them.

11 The only conclusion that fully comports with intended meaning of Measure 37 is that it
12 provides a remedy only for those claimants that have a right to use private property that is being
13 restricted by a land use regulation. Indeed, permitting an owner who has no right to use the
14 property to obtain relief under Measure 37 would provide an unlawful windfall to persons who
15 have not been harmed by land use regulations. Petitioner’s argument is not supported by the text,
16 context or purpose of Measure 37.

17 **2. The term “owner” has no fixed meaning and must be interpreted according**
18 **to the text and context of Measure 37 without regard to the use of the term in**
19 **other Oregon statutes.**

20 Oregon’s courts have repeatedly declared that the word “owner” when appearing within a
21 statute lacks a fixed meaning and must be interpreted according to the context and purpose of the
22 statute in which it is used. For example, in *Moe v. Beck*, 311 Or 499, 504-505 (1991), the
23 Supreme Court attempted to define the term “owner” as it appeared in the Oregon Safe
24 Employment Act and a lease agreement at issue. The *Moe* Court ultimately concluded that the
25 term was defined as a lessor of a vehicle based on its analysis of the entire act, including,

1 significantly, the six different places where the term was used in the act (including a definition).
2 In reaching its conclusion, the Moe Court noted that “[d]ivining the legislative intent in statutes
3 using the word ‘owner’ has been a vexing problem for nearly a century.”¹⁰

4 Significantly, the use of the term “owner” in a voter initiative has similarly been found to
5 not have any fixed technical meaning. 39 Op. Atty Gen. Or. 150, 239 (1978); *Pinkerton v*
6 *Pritchard* (1951) 192 Or 676. Instead “it has been construed to mean different things in different
7 contexts.” 39 Op. Atty Gen. Or. at 239, *supra* The meaning of the term owner (or ownership)
8 as used in a voter initiative must therefore be construed to comport “with the purposes of the
9 proposed initiative and with common understanding.” *Id.*

10 In contrast to well settled Oregon law, Petitioner argues that the State’s interpretation of a
11 Measure 37 claimant’s burden is erroneous because the term “owner, or any interest therein”
12 includes any record owner of any interest in private property, without qualification. In support
13 of its argument, Petitioner points to cases interpreting the term owner as it appears in mechanics
14 lien statutes. (Motion p. 5) However, the Oregon Supreme Court has expressly held that the
15 meaning of the term “owner” as used in mechanics lien statutes and, significantly, as it relates to
16 real property, has no fixed meaning, rather its meaning is “controlled by the context and purpose
17 of the statute.” *Schram v. Manary*, 123 Or. 354, 363 (1927). Clearly, the meaning of “owner”
18 as used in any mechanics lien statute is not relevant to the interpretation of “owner” in ORS
19 197.352.

20 Given Oregon’s laws regarding statutory construction, and, more specifically, the term
21 “owner” as it is used in a voter initiated statute, the interpretation by DLCD that a Measure 37
22 claimant is only entitled to relief upon a showing that it has a present possessory use of the
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24 ¹⁰ See also *Pedro v. January*, 261 Or 582, 602 (1972) (“When the term ‘owner’ or ‘ownership’
25 is used in a statute, the context and purpose of the statute governs what is meant by the use of the
26 terms”); *State v. The Calif. Or. Power Co.*, 225 Or 604, 612 (1961) (owner of an easement not an
“owner” under statute imposing liability for fire suppression costs); *Binhoff v. State* 49 Or 419,
422 (1907) (“owner” has no fixed meaning).

1 private property at issue is consistent with the laws and the intent of the voters in enacting this
2 statute.

3 **B. Petitioner is not entitled to relief because it is not an “owner” under Measure 37.**

4 The State does not dispute that Petitioner holds record title of the Property. However,
5 whether Petitioner is named on the title to the Property is not the proper inquiry. Rather, the
6 issue of concern is whether the Petitioner is an “owner” with the right to receive a waiver or
7 compensation under Measure 37. The question is easily resolved because Petitioner is not
8 entitled to any use of the Property.

9 **1. A seller in a land sale contract is not an “owner” for purposes of Measure 37**
10 **because the seller does not have the right to use or control the land.**

11 “The rights, duties and interest of the parties to a land sale contract, are, for the most part
12 creation of the courts.” *Braunstein v. Trottier*, 54 Or. App. 687, 689 (1981). In a land sale
13 contract, “[t]he seller agrees by contract to convey title upon receipt of the full purchase price,
14 but the buyer has the right to possession before the price is paid. The contract remains in
15 existence for a substantial term before the buyer completes payment.” *Bedortha v. Sunridge*
16 *Land Co.* 312 Or. 307, 311 (1991). The vendor remains the legal owner of the property with a
17 lien on the property as security for any unpaid portion of the purchase money, holding it in trust
18 for the vendee. *Id.* Regardless of the interest, real or personal, held by the vendor, “[a]t the time
19 of an agreement to sell real property, the purchaser of the real property is deemed to be the
20 owner thereof, and the seller becomes entitled to receive payment of the purchase price.” *W.*
21 *Equities, Inc. v. St. Paul Fire & Marine Ins. Co.*, 184 Or. App. 368, 373 (2002) citing *Ernst*
22 *Brothers Corp v. Dept of Rev.*, 320 Or. 294, 303, (1994), see also *Panushka v Panushka*, 221
23 Or. 145, 14 (1960).

24 By contrast, “[t]he vendee is looked upon and treated as the owner of the land” with all of
25 the beneficial interest. *Harder v. Springfield*, 192 Or. 676, 686-687 (1951). The vendee acquires

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1 a full equitable estate with all the incidents of real ownership; it can be conveyed, encumbered,
2 devised, inherited, given as dowry, even his or her heirs may enforce specific performance on the
3 contract after the vendee's death. *Harder v. Springfield*, 192 Or. at 686-687, *supra*. "Absent any
4 stipulation to the contrary, the purchaser has a right to possession or the rents and profits of the
5 land and the vendor a right to interest on the unpaid purchase price. The fruits of possession and
6 the interest are mutually exclusive -- there is no right upon the part of either to have both."
7 *Senior Estates, Inc. v. Bauman Homes, Inc.*, 272 Or. 577, 583 (1975); *see also City of Reedsport*
8 *v. Hubbard*, 202 Or. 370, 389 (1954). In effect, the vendor of the land sale contract does not
9 have any use of the land. His or her interest is only the right to receive the contract payments
10 and forfeiture upon nonpayment. Accordingly, the vendor cannot qualify for relief under
11 Measure 37 because it cannot be a Measure 37 "owner".

12 **2. Petitioner is not entitled to relief merely because it has legal title and an**
13 **alienable interest in the real property.**

14 In contrast to well settled Oregon law regarding statutory construction and the
15 relationship between vendors and vendees in a land sale contract, Petitioner argues that it is
16 entitled to Measure 37 relief because the terms "owner" and "any interest therein" mean "anyone
17 who has any interest in the land – period. An expansive a definition as one can conceive of
18 (sic)." " (see Motion p. 8:7-8). Petitioner further argues that there is no requirement that the
19 "owner" have the right to use the property. Instead, the only relevant inquiry by the public entity
20 reviewing a Measure 37 claim is whether the claimant (1) has any interest in the private land, and
21 (2) whether the value of the land is reduced by a land use regulation. (Motion p7:10-13) The
22 hypothetical given by Petitioner and its supporting authority in its motion demonstrates why its
23 analysis is incomplete.

24 In its hypothetical, Petitioner describes a scenario where a land use regulation has been
25 enacted that restricts the "ability to place a dwelling on each parcel". (Motion p. 7:14-22) Under
26

1 these assumed facts, Petitioner argues that the value of the contract seller's interest in selling the
2 property would then be diminished because he or she can only sell land that cannot be
3 developed. It is clear, however, from Petitioner's illustration that the only "use" that is restricted
4 by a land use regulation is the ability to subdivide and develop private property held subject to
5 the land sales contract. (Motion p.7:15). This is not a use that Petitioner is entitled to, rather the
6 vendee, with the right of possession and all incidents of ownership, is the only person with the
7 legal right to place a dwelling on each parcel.

8 Moreover, Petitioner's argument that it has a right to sell, which right is diminished by a
9 land use regulation, is both factually and legally inaccurate. The case cited by Petitioner for the
10 proposition that it may sell its right, *Security Bank v. Chiapuzio* 303 Or. 418 (1987) does not
11 "implicitly recognize" that a seller in a land sales contract can transfer his or her interests in
12 property after it has been sold pursuant to contract. In *Security Bank*, the issue was whether the
13 defendant would be liable for failure to satisfy a mortgage on property that he mortgaged *prior* to
14 selling it in a land sales contract. The case does not imply anything about the rights of the
15 mortgagee after selling his or her property in a land sales contract. In any event, and assuming
16 *arguendo* that the Petitioner/Vendor did have a right to sell its interest in the transferred property,
17 the land use regulation at issue and described in the hypothetical does not diminish the
18 Petitioner's ability to sell its interest.

19 Similarly, Petitioner misinterpreted the authorities cited in support of its argument that
20 the DLCD erroneously applied the doctrine of equitable conversion. First, Petitioner argues that
21 *Security Bank v. Chiapuzio* 303 Or 418 (1987)¹¹ is authority in support of its argument that the
22 doctrine of equitable conversion was wrongly applied by DLCD because the doctrine does not
23 automatically apply in a land sales contract. Petitioner's analysis is incorrect. In *Security Bank*,

24 ¹¹ It appears from the quoted language cited by Petitioner in its argument relating to the doctrine
25 of equitable conversion on p. 4:18-5:4 that Petitioner may have mistakenly cited to the case of
26 *Senior Estates v. Bauman Homes* 272 Or 577 (1975), but intended to cite to *Heider v Dietz*, 234
Or. 105 (1963) as the basis for its quotation and analysis.

1 the court followed well settled Oregon law regarding the application of the doctrine of equitable
2 conversion as between a vendee in a land sales contract and a third party creditor. The court
3 agreed that not applying this doctrine under these circumstances was “consistent with the self-
4 evident rule that equitable remedies are only granted "in a particular case in order to accomplish
5 equity according to established rules of equity jurisprudence" and that it was not automatically
6 equitable to attach a vendor’s lien to a vendee’s interest. *Security Bank v. Chiapuzio* 303 Or. at
7 425. The court did not alter the application of the doctrine as between the vendor and the
8 vendee.

9 Plaintiff’s analysis of *Bedortha v. Sundridge Land Co.* (1991) 312 Or 307 as “chipping
10 away” at the case entitled *Panushka v. Panushka*, 221 Or 145 (1960), a case that applied the
11 doctrine of equitable conversion, is similarly inaccurate. Not only is *Panushka* good law, it has
12 been cited repeatedly by cases following *Bedortha* for the proposition that a vendor in a land
13 sales contract holds legal title versus the equitable title and all beneficial incidents of ownership
14 held by the vendee.¹² Moreover, the distinction described in *Panushka* and other Oregon cases
15 between real and personal property remains in the context of land use regulations. The statute
16 referred to by Petitioner as being abolished relates only to the administration of probate and
17 estates, not to other transactions in real property. It is clear from well settled Oregon law,
18 including those cases cited by Petitioner, that a vendor in a land sales contract is merely a legal
19 owner with bare legal title – not the type of owner entitled to Measure 37 relief.

20 CONCLUSION

21 It is apparent from the text and context of Measure 37 and its placement within the land
22 use statutory scheme that only claimants with an ownership interest in their private property and
23

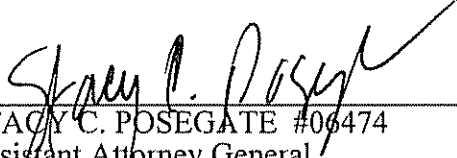
24 ¹² See *Ernst Bros. Corp. v. Department of Revenue*, 320 Or. 294 (1994) and *W. Equities, Inc. v.*
25 *St. Paul Fire & Marine Ins. Co.*, 184 Or. App. 368, 373 (2002) (“The doctrine of equitable
26 conversion applies; at the time of an agreement to sell real property, the purchaser of the real
property is deemed to be the owner thereof, and the seller becomes entitled to receive payment of
the purchase price”).

1 the rightful ability to use the property, which is restricted by a land use regulation, are permitted
2 relief under Measure 37. A review and analysis of the laws of the state of the Oregon and the
3 intent of the voters in approving Measure 37 definitively demonstrate that bare legal title is not
4 enough. For these reasons, DLCD correctly decided the primary issue of law in this matter,
5 whether the Petitioner qualified as an "owner" under Measure 37. Accordingly and for these
6 reasons explained more thoroughly above, the cross-motions for Summary Judgment should
7 appropriately be decided in the State's favor.

8 DATED this 28th day of December, 2006.

9 Respectfully submitted,

10 HARDY MYERS
11 Attorney General

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13 
14 STACY C. POSEGATE #06474
15 Assistant Attorney General
16 Trial Attorney
17 Tel (503) 947-4700
18 Fax (503) 947-4792
19 erika.hadlock@doj.state.or.us
20 Of Attorneys for State of Oregon
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Land Conservation and Development, other state agencies and local governments shall give the goals equal weight in any matter in which the goals are required to be applied.

(2) The commission and the department shall consider and recognize regional diversity and differences in regional needs when making or reviewing a land use decision or otherwise applying the goals. [1981 c.748 §20; 1987 c.729 §1; 1995 c.521 §2]

197.350 Burden of persuasion or proof in appeal to board or commission. (1) A party appealing a land use decision or limited land use decision made by a local government to the board or Land Conservation and Development Commission has the burden of persuasion.

(2) A local government that claims an exception to a goal adopted by the commission has the burden of persuasion.

(3) There shall be no burden of proof in administrative proceedings under ORS chapters 195, 196 and 197. [1981 c.748 §10a; 1983 c.827 §43; 1991 c.817 §26]

197.352 Compensation for loss of value due to land use regulation. The following provisions are added to and made a part of ORS chapter 197:

(1) If a public entity enacts or enforces a new land use regulation or enforces a land use regulation enacted prior to December 2, 2004, that restricts the use of private real property or any interest therein and has the effect of reducing the fair market value of the property, or any interest therein, then the owner of the property shall be paid just compensation.

(2) Just compensation shall be equal to the reduction in the fair market value of the affected property interest resulting from enactment or enforcement of the land use regulation as of the date the owner makes written demand for compensation under this section.

(3) Subsection (1) of this section shall not apply to land use regulations:

(A) Restricting or prohibiting activities commonly and historically recognized as public nuisances under common law. This subsection shall be construed narrowly in favor of a finding of compensation under this section;

(B) 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;

(C) To the extent the land use regulation is required to comply with federal law;

(D) Restricting or prohibiting the use of a property for the purpose of selling pornography or performing nude dancing. Nothing in this subsection, however, is intended to affect or alter rights provided by the Oregon or United States Constitutions; or

(E) Enacted prior to the date of acquisition of the property by the owner or a family member of the owner who owned the subject property prior to acquisition or inheritance by the owner, whichever occurred first.

(4) Just compensation under subsection (1) of this section shall be due the owner of the property if the land use regulation continues to be enforced against the property 180 days after the owner of the property makes written demand for compensation under this section to the public entity enacting or enforcing the land use regulation.

(5) For claims arising from land use regulations enacted prior to December 2, 2004, written demand for compensation under subsection (4) shall be made within two years of December 2, 2004, or the date the public entity applies the land use regulation as an approval criteria to an application submitted by the owner of the property, whichever is later. For claims arising from land use regulations enacted after December 2, 2004, written demand for compensation under subsection (4) shall be made within two years of the enactment of the land use regulation, or the date the owner of the property submits a land use application in which the land use regulation is an approval criteria, whichever is later.

(6) If a land use regulation continues to apply to the subject property more than 180 days after the present owner of the property has made written demand for compensation under this section, the present owner of the property, or any interest 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.

(7) A metropolitan service district, city, or county, or state agency may adopt or apply procedures for the processing of claims under this section, but in no event shall these procedures act as a prerequisite to the filing of a compensation claim under subsection (6) of this section, nor shall the failure of an owner of property to file an application for a land use permit with the local government serve as grounds for dismissal, abatement, or delay of a compensation claim under subsection (6) of this section.

(8) Notwithstanding any other state statute or the availability of funds under sub-

section (10) of this section, in lieu of payment of just compensation under this section, the governing body responsible for enacting the land use regulation may modify, remove, or not to apply the land use regulation or land use regulations to allow the owner to use the property for a use permitted at the time the owner acquired the property.

(9) A decision by a governing body under this section shall not be considered a land use decision as defined in ORS 197.015 (10).

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

(11) Definitions - for purposes of this section:

(A) "Family member" shall include the wife, husband, son, daughter, mother, father, brother, brother-in-law, sister, sister-in-law, son-in-law, daughter-in-law, mother-in-law, father-in-law, aunt, uncle, niece, nephew, stepparent, stepchild, grandparent, or grandchild of the owner of the property, an estate of any of the foregoing family members, or a legal entity owned by any one or combination of these family members or the owner of the property.

(B) "Land use regulation" shall include:

(i) Any statute regulating the use of land or any interest therein;

(ii) Administrative rules and goals of the Land Conservation and Development Commission;

(iii) Local government comprehensive plans; zoning ordinances, land division ordinances, and transportation ordinances;

(iv) Metropolitan service district regional framework plans, functional plans, planning goals and objectives; and

(v) Statutes and administrative rules regulating farming and forest practices.

(C) "Owner" is the present owner of the property, or any interest therein.

(D) "Public entity" shall include the state, a metropolitan service district, a city, or a county.

(12) The remedy created by this section is in addition to any other remedy under the Oregon or United States Constitutions, and is not intended to modify or replace any other remedy.

(13) If any portion or portions of this section are declared invalid by a court of competent jurisdiction, the remaining portions of this section shall remain in full force and effect. [2005 c 1]

EXPEDITED LAND DIVISIONS

197.360 "Expedited land division" defined; applicability. (1) An expedited land division:

(a) Is an action of a local government that:

(A) Includes land that is zoned for residential uses and is within an urban growth boundary.

(B) Is solely for the purposes of residential use, including recreational or open space uses accessory to residential use.

(C) Does not provide for dwellings or accessory buildings to be located on land that is specifically mapped and designated in the comprehensive plan and land use regulations for full or partial protection of natural features under the statewide planning goals that protect:

(i) Open spaces, scenic and historic areas and natural resources;

(ii) The Willamette River Greenway;

(iii) Estuarine resources;

(iv) Coastal shorelands; and

(v) Beaches and dunes.

(D) Satisfies minimum street or other right-of-way connectivity standards established by acknowledged land use regulations or, if such standards are not contained in the applicable regulations, as required by statewide planning goals or rules.

(E) Creates enough lots or parcels to allow building residential units at 80 percent or more of the maximum net density permitted by the zoning designation of the site.

(b) Is a land division that:

(A) Will create three or fewer parcels under ORS 92.010; and

(B) Meets the criteria set forth for an action under paragraph (a)(A) to (D) of this subsection.

(2) An expedited land division as described in this section is not a land use decision or a limited land use decision under ORS 197.015 or a permit under ORS 215.402 or 227.160.

(3) The provisions of ORS 197.360 to 197.380 apply to all elements of a local gov-

ORS 197.352 (BALLOT MEASURE 37) CLAIM FOR COMPENSATION

**OREGON DEPARTMENT OF LAND CONSERVATION AND DEVELOPMENT
Final Staff Report and Recommendation**

August 15, 2006

STATE CLAIM NUMBER: M122697

NAME OF CLAIMANT: Marjorie Kolski Trust

MAILING ADDRESS: 255 Culver Lane S.
Salem, Oregon 97302

PROPERTY IDENTIFICATION: Township 7S, Range 5W, Section 16
Tax lot 600
Polk County

OTHER CONTACT INFORMATION: Mark Irick
PO Box 105
Dallas, Oregon 97338

OTHER INTEREST IN PROPERTY: Dragull Living Trust
1365 Perrydale Road
Dallas, Oregon 97338

DATE RECEIVED BY DAS: October 7, 2005

180-DAY DEADLINE: August 22, 2006¹

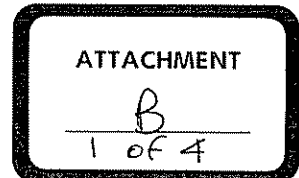
I. SUMMARY OF CLAIM

The claimant, the Marjorie Kolski Trust, seeks compensation in the amount of \$132,000 for the reduction in fair market value as a result of land use regulations that are alleged to restrict the use of certain private real property. The claimant desires compensation or the right to divide the 48-acre property into three parcels and to develop a dwelling on each parcel. The subject property is located at 1365 Perrydale Road, near Dallas, in Polk County. (See claim.)

II. SUMMARY OF STAFF RECOMMENDATION

Based on the findings and conclusions set forth below, the Department of Land Conservation and Development (the department) has determined that this claim is not valid because the claimant

¹ This date reflects 180 days from the date the claim was submitted, as extended by the 139 days that all timelines under Measure 37 were suspended during the pendency of *MacPherson v. Dept. of Admin. Svcs.*, 340 Or 117 (2006).



has not established its ownership of the subject property. (See the complete recommendation in Section VI of this report.)

III. COMMENTS ON THE CLAIM

Comments Received

On June 6, 2006, pursuant to Oregon Administrative Rule (OAR) 125-145-0080, the Oregon Department of Administrative Services (DAS) provided written notice to the owners of surrounding properties. No written comments were received in response to the 10-day notice.

IV. TIMELINESS OF CLAIM

Requirement

ORS 197.352(5), requires that a written demand for compensation be made:

1. For claims arising from land use regulations enacted prior to the effective date of Measure 37 (December 2, 2004), within two years of that effective date, or the date the public entity applies the land use regulation as an approval criteria to an application submitted by the owner, whichever is later; or
2. For claims arising from land use regulations enacted after the effective date of Measure 37 (December 2, 2004), within two years of the enactment of the land use regulation, or the date the owner of the property submits a land use application in which the land use regulation is an approval criterion, whichever is later.

Findings of Fact

This claim was submitted to DAS on October 7, 2005, for processing under OAR 125, division 145. The claim identifies ORS 215.263, 215.284 and 215.780, OAR 660 and Goals 3 and 4 as the basis for the claim. Only laws that were enacted or adopted prior to December 2, 2004, are the basis for this claim.

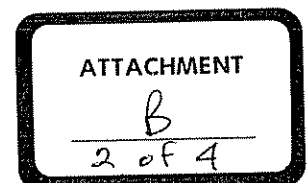
Conclusions

The claim has been submitted within two years of the effective date of Measure 37 (December 2, 2004), based on land use regulations enacted or adopted prior to December 2, 2004, and is therefore timely filed.

V. ANALYSIS OF CLAIM

1. Ownership

ORS 197.352 provides for payment of compensation or relief from specific laws for "owners" as that term is defined in ORS 197.352. ORS 197.352(11)(C) defines "owner" as "the present owner of the property, or any interest therein."



Findings of Fact

It is stated in the claim that the claimant, the Marjorie Kolski Trust, acquired the subject property on March 30, 1964, and now has an interest in the property as "seller under land contract." According to the information provided in the claim, the claimant sold the subject property to the Dragull Living Trust by a land sales contract on March 20, 1997. An amended August 30, 2005, title report from Ticor Title submitted with the claim establishes the Dragull Living Trust's current ownership of the subject property as of March 20, 1997. The claimant, the Marjorie Kolski Trust, no longer owns the subject property.²

Conclusions

The claimant, the Marjorie Kolski Trust, has not established that it is an "owner" of the subject property as that term is defined in ORS 197.352(11)(C).

2. The Laws That are the Basis for This Claim

In order to establish a valid claim, ORS 197.352(1) requires, in part, that a law must restrict the claimant's use of private real property in a manner that reduces the fair market value of the property relative to how the property could have been used at the time the claimant or a family member acquired the property.

As explained in Section V.(1), the claimant, the Marjorie Kolski Trust, is not an "owner" of the subject property as that term is defined in ORS 197.352(11)(C). Therefore, no laws enforced by the Land Conservation and Development Commission (the Commission) or the department restrict the claimant's use of private real property with the effect of reducing its fair market value.

3. Effect of Regulations on Fair Market Value

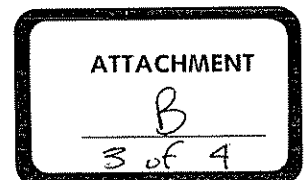
In order to establish a valid claim, ORS 197.352(1) requires that the land use regulation(s) (described in Section V.(2) of this report) must have "the effect of reducing the fair market value of the property, or any interest therein."

As explained in Section V.(1) of this report, the claimant, the Marjorie Kolski Trust, is not an "owner" of the subject property as that term is defined in ORS 197.352(11)(C). Therefore, no laws restrict its use of the subject property with the effect of reducing its fair market value.

4. Exemptions Under ORS 197.352(3)

ORS 197.352 does not apply to certain land use regulations. In addition, under ORS 197.352(3), certain types of laws are exempt from ORS 197.352.

² As a seller under a land sale contract, the claimant has retained a personal property interest in receiving payments under the contract but does not have any right to use the property it sold and does not have a real property interest that can be restricted and reduced in value by any land use regulation.



As explained in Section V.(1) of this report, the claimant, the Marjorie Kolski Trust, is not an "owner" of the subject property as that term is defined in ORS 197.352(11)(C). Therefore, the issue of whether any laws are exempt from ORS 197.352 is not relevant.

VI. FORM OF RELIEF

ORS 197.352(1) provides for payment of compensation to an owner of private real property if the Commission or the department has enforced one or more laws that restrict the use of the property in a manner that reduces its fair market value. In lieu of compensation, the department may choose to not apply the law in order to allow the present owner to carry out a use of the property permitted at the time the present owner acquired the property. The Commission, by rule, has directed that if the department determines a claim is valid, the Director of the department must provide only non-monetary relief unless and until funds are appropriated by the legislature to pay claims.

Findings of Fact

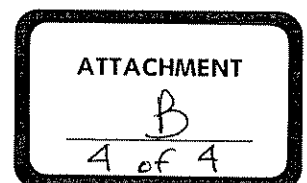
Based on the record, the department finds that the claim is not valid because the claimant is not an owner of the subject property.

Conclusions

Based on the record before the department, the claimant, the Marjorie Kolski Trust, has not established that it is entitled to relief under ORS 197.352(1) as a result of land use regulations enforced by the Commission or the department. Therefore, the department recommends that this claim be denied.

VII. COMMENTS ON THE DRAFT STAFF REPORT

The department issued its draft staff report on this claim on August 1, 2006. OAR 125-145-0100(3), provided an opportunity for the claimant or the claimant's authorized agent and any third parties who submitted comments under OAR 125-145-0080 to submit written comments, evidence and information in response to the draft staff report and recommendation. Comments received have been taken into account by the department in the issuance of this final report.



CERTIFICATE OF SERVICE

I certify that on December 28th, 2006, I served the foregoing STATE'S CROSS MOTION FOR SUMMARY JUDGMENT and STATE'S MEMORANDUM IN OPPOSITION TO MOTION FOR SUMMARY JUDGMENT AND IN SUPPORT OF CROSS MOTION FOR SUMMARY JUDGMENT upon the parties hereto by the method indicated below, and addressed to the following:

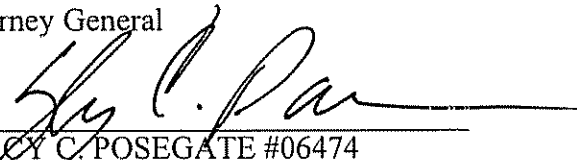
Mark Irick
Shetterly, Irick & Oziaas
P.O. Box 105
Dallas, OR 97338
Attorney for Plaintiff

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

DATED this 28th day of December, 2006.

Respectfully submitted,

HARDY MYERS
Attorney General



STACY C. POSEGATE #06474
Assistant Attorney General
Trial Attorney
Tel (503) 947-4700
Fax (503) 947-4792
Stacy.C.Posegate@doj.state.or.us
Of Attorneys for Defendant