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

HARRY T. LARSEN and ALBERTA M. LARSEN,

Plaintiffs,

v.

STATE OF OREGON, by and through the Oregon Development of Land Conservation and Development,

Defendant.

Case No. 06CV0048

STATE OF OREGON'S RESPONSE TO PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT; CROSS-MOTION FOR SUMMARY JUDGMENT; MEMORANDUM OF POINTS AND AUTHORITIES

(Oral Argument Requested)

**ORAL ARGUMENT REQUESTED**

Defendant the State of Oregon requests oral argument on its Motion for Summary Judgment in conjunction with argument on plaintiffs' Motion for Partial Summary Judgment. The State estimates that one hour will be required. Official court reporting services are requested.

**INTRODUCTION**

This case involves a demand for compensation under ORS 197.352, commonly known as Ballot Measure 37. Oregon voters enacted Measure 37 through the initiative process in 2004. Measure 37 permits present owners of private real property to seek compensation for reductions in fair market value caused by certain restrictions on use. If a claim is valid, public entities have the choice of paying compensation or not applying certain restrictions. A copy of the statute is attached hereto as Exhibit 1 for the court's convenience.

1 Plaintiffs allege they entered into a contract to purchase property in Jefferson County in  
2 1973. Plaintiffs offer as evidence two cancelled checks, dated June 8, 1973 and November 16,  
3 1973, showing payments to a real estate broker. Plaintiffs also offer an affidavit from plaintiff  
4 Harry T. Larsen asserting that the payments were for the property. The record also contains a  
5 receipt for payment of the full purchase price, bearing a description of the property and dated  
6 March 12, 1974. A warranty deed also confirms that plaintiffs acquired the property on March  
7 12, 1974.

8 On June 13, 2005, plaintiffs submitted a Measure 37 demand to the State. The state  
9 Department of Administrative Service (DAS) and the Department of Land Conservation and  
10 Development (DLCD) reviewed and denied plaintiffs' demand in accordance with Measure 37.  
11 DAS and DLCD jointly issued Final Order M 122803 on August 22, 2006. The Final Order  
12 determined that plaintiffs acquired the property on March 12, 1974 and denied Measure 37 relief  
13 to plaintiffs because state land use regulations enacted after that date do not restrict the use of the  
14 property relative to the regulations in effect on the date of acquisition.

15 Plaintiffs contend that the Final Order is wrong. In their Amended Complaint, plaintiffs  
16 allege that the State erred as a matter of fact and law by determining plaintiffs' acquisition date  
17 was March 12, 1974 instead of June 8, 1973 (§§ 5, 12, 13). Plaintiffs' First Claim for Relief  
18 alleges that plaintiffs are entitled to relief under Measure 37, Section 6, because of the continuing  
19 enforcement of unspecified regulations enacted between June 8, 1973 and March 12, 1974.  
20 Plaintiffs' Second Claim for Relief seeks judicial review of Final Order M 122803 based on the  
21 alleged error in determining plaintiffs' date of acquisition. Plaintiffs' Motion for Partial  
22 Summary Judgment seeks "judgment" on (a) whether plaintiffs' acquired an interest in the  
23 property on June 8, 1973 and (b) whether land use regulations enacted by the State "have the  
24 effect of diminishing the value of the property" (Plaintiffs' Memorandum of Points and  
25 Authorities, p 2, lns 16-23).

1 The State contends that Final Order M 122803 is supported by substantial evidence and a  
2 proper interpretation of the law. Therefore, the State is entitled to judgment on plaintiffs'  
3 Second Claim for Relief. The State is entitled to judgment on plaintiffs' First Claim for Relief  
4 because the Administrative Procedures Act (APA) provides plaintiffs' exclusive remedy for  
5 errors of fact or law contained in the State's Final Order. To the extent plaintiffs' Motion for  
6 Partial Summary Judgment seeks judgment for plaintiffs on either or both of their Claims for  
7 Relief, plaintiffs' Motion should be denied.

8 **MOTIONS FOR SUMMARY JUDGMENT**

9 The State moves for summary judgment on plaintiffs' Petition for Judicial Review, and  
10 on the Measure 37 Claim, as follows:

- 11 1. The Petition for Judicial Review should be dismissed on the grounds that the material  
12 facts are undisputed, the State's findings of fact are supported by substantial evidence,  
13 and the State's conclusions correctly apply the law. ORS 183.484 (5).
- 14 2. The compensation claim should be dismissed because the court lacks jurisdiction. The  
15 Petition for Judicial Review is the exclusive procedure available under Oregon law to test  
16 the validity of final orders issued by state agencies.
- 17 3. The compensation claim should be dismissed because, even if plaintiffs' demands were  
18 valid, plaintiffs are not entitled to compensation. Measure 37 vests discretion in the  
19 public entities, not the claimants, to choose whether to pay compensation or provide  
20 alternate relief on valid claims.

21 In support of its Motions and in opposition to plaintiffs' Motion for Partial Summary  
22 Judgment, the State relies upon Measure 37, the APA, ORCP 47 B, the files and record of this  
23 case, the agency *Record* lodged with the court on January 9, 2007, and the following Points and  
24 Authorities.

25

1 **POINTS AND AUTHORITIES**

2 **I. PETITION FOR JUDICIAL REVIEW**

3 **A. Overview of Measure 37**

4 A property owner qualifies for Measure 37 relief if: (1) a public entity enacts or enforces  
5 a “land use regulation” that (2) restricts use and (3) has the effect of reducing fair market value.  
6 Section 3 of Measure 37 provides that certain land use regulations shall not be a basis for a  
7 written demand under Section 1, notably regulations in effect when the owners acquired the  
8 property. ORS 197.352 (3) (E). Section 11 defines “owner” as the “present owner of the  
9 property, or any interest therein.” ORS 197.352 (11) (C).

10 For regulations enacted prior to the effective date of Measure 37 (December 2, 2004),  
11 Section 5 requires owners to submit written demands by December 2, 2006 or the date on which  
12 a land use regulation is applied “as an approval criteria [sic]” on a specific land use application,  
13 whichever is later. After determining that an owner submitted a timely, valid written demand,  
14 the public entity has the option to pay compensation or to “modify, remove, or not to [sic] apply”  
15 land use regulations to the extent necessary “to allow the owner to use the property for a use  
16 permitted at the time the owner acquired the property.” ORS 197.352 (8); *see also* ORS 197.352  
17 (10).<sup>1</sup>

18 **B. The Administrative Process**

19 Measure 37 permits public entities to adopt procedures for processing claims. ORS  
20 197.352 (7). DAS adopted procedural rules, found at OAR 125-145-0010 to 125-145-0105. The  
21 state rules cover such issues as minimum requirements for the content of a claim against the  
22 State, notice and third party participation, and the contents of the administrative record.

23  
24 <sup>1</sup> Allowing the owner to use the property in a way that would otherwise be prohibited by land  
25 use regulations is commonly referred to as granting a Measure 37 “waiver.” DLCD can pay  
26 compensation only if and when the legislature appropriates funds for that purpose. *See* OAR  
660-002-0010 (8) (c).

1           When DAS receives a claim, it provides written notice to neighboring landowners,  
2 certain neighborhood or community organizations, and anyone who requests notice. OAR 125-  
3 145-0080. Persons receiving notice, or any other person, may submit comments, evidence and  
4 information within ten days. OAR 125-145-0080 (2), (3); (*Record*, § 3).

5           DAS initially reviews Measure 37 claims and forwards them to the appropriate state  
6 agency, *i.e.* the “regulating entity” that appears to have enacted or enforced a relevant land use  
7 regulation. OAR 125-145-0090. The regulating entity, in this case DLCD, investigates and  
8 analyzes the claim and issues a draft report (*Record*, § 4, pp 11-17).

9           The draft report is made public on the internet and copies are mailed to the claimant, and  
10 any persons who submitted comments or requested notice. After a ten-day comment period, and  
11 based in part on the comments received (*Record*, § 5), DLCD and DAS issue a final report and  
12 order (*Record*, § 6). The final orders are served on any persons who received copies of the draft  
13 report or submitted comments on the draft report. DLCD also makes its final orders public by  
14 posting them on its website  
15 ([http://www.oregon.gov/LCD/MEASURE37/docs/finals2006/M122803\\_Larsen\\_Jefferson.pdf](http://www.oregon.gov/LCD/MEASURE37/docs/finals2006/M122803_Larsen_Jefferson.pdf)).

### 16           **C. Summary of Issues**

17           Plaintiffs assert that they acquired an “interest” in the property on June 8, 1973 because  
18 they (1) made an offer to purchase the property, (2) took possession, and (3) “began making  
19 payments” (Pls’ Memo, pp 3-4). Plaintiffs ask the court to construe “any interest” in property  
20 under Measure 37 to include potentially enforceable contract rights and/or simple possession of  
21 property. Neither is sufficient to support a compensation demand under Measure 37.

22           Plaintiffs contend that State should have determined plaintiffs acquired the property on  
23 June 8, 1973 because plaintiffs could have made a prima facie showing of an equitable exception  
24 to the statute of frauds if plaintiffs had had to sue the seller for failing to honor the alleged  
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1 contract. The premise of plaintiffs’ argument affirms the State’s conclusion—there was *no*  
2 *written contract transferring the property* as required by Oregon law. Plaintiffs acquired the  
3 property when ownership was transferred to them on March 12, 1974, the date the purchase price  
4 was paid and the deed executed.

5 **D. Standard of Review**

6 Plaintiffs have petitioned for judicial review under ORS 183.484. ORS 183.484 is the  
7 sole and exclusive remedy available for review of a state agency order in other than contested  
8 case. ORS 183.480 (2). In a proceeding pursuant to ORS 183.484, the court determines whether  
9 a final state agency order is supported by substantial evidence and whether the agency has  
10 correctly applied the law. ORS 183.484 (5); *Powell v. Bunn*, 185 Or App 334, 339 (2002), *rev*  
11 *denied* 336 Or 60 (2003).

12 The “substantial evidence” standard is set forth in the statute. “Substantial evidence  
13 exists to support a finding of fact when the record, viewed as a whole, would permit a reasonable  
14 person to make that finding.” ORS 183.484 (5) (c). The “record,” for purposes of a petition for  
15 review of an order in other than a contested case, is the record presented to circuit court. *Norden*  
16 *v. Water Resources Dept.*, 329 Or 641, 649 (2000).

17 The usual summary judgment standard for reviewing the facts and evidence does not  
18 apply when a circuit court reviews an agency order in other than contested case under ORS  
19 183.484. *Powell, supra*, 185 Or App at 339. Specifically, “viewing factual disputes in the light  
20 most favorable to a nonmoving party” – the usual standard of review in a summary-judgment  
21 motion – “[is] not appropriate in the judicial review of an administrative order in a noncontested  
22 case proceeding.” *Id.* Rather, the “circuit court’s charge” in reviewing an agency order under  
23 the APA review is to test the “factual determinations for ‘substantial evidence,’” which means  
24 the circuit court decides “only whether ‘the record, viewed as a whole, would permit a  
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1 reasonable person to make' the factual findings" made by the state agency. 185 Or App at 338,  
2 citing ORS 183.484 (5) (c).

3 In *Norden*, the Oregon Supreme Court confirmed the plain meaning of the APA standard.  
4 The trial court's task in reviewing an agency's factual findings for substantial evidence "is  
5 limited to whether the evidence would permit a reasonable person to make the determination that  
6 the agency made in a particular case." 329 Or at 649. The Supreme Court affirmed the decision  
7 of the state Water Resources Department even though the petitioner was "able to muster  
8 evidence to the contrary." *Id.* In *G.A.S.P. v. Environmental Quality Commission*, the Court of  
9 Appeals followed *Norden* in concluding that "[t]he court's purpose on review is not to find the  
10 facts itself but to decide 'whether the evidence would permit a reasonable person to make the  
11 determination that the agency made \* \* \*.'" 198 Or App 182, 194-96 (2005). Similarly, in  
12 *Garcia v. Boise Cascade Corp.*, the Supreme Court applied the identical contested case standard<sup>2</sup>  
13 in a worker's compensation case, explaining that "[t]he appropriate question was not whether  
14 substantial evidence supported claimant's claim, but whether substantial evidence supported the  
15 referee's decision." 309 Or 292, 295-96 (1990).

16 The circuit court reviews the State's interpretation of Measure 37 using the same  
17 methodology that applies to any statute. *PGE v. Bureau of Labor and Industries*, 317 Or 606,  
18 612 n 4 (1993) (three-part methodology applies "not only to statutes enacted by the legislature,  
19 but also to the interpretation of laws and constitutional amendments adopted by initiative or  
20 referendum, as well as to the interpretation of regulations"). The objective is to discern the intent  
21 of those who enacted the law, in this case, the Oregon voters. "The best evidence of the voters'  
22 intent is the text of the provision itself. \* \* \* The context of the language of the ballot measure  
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25 <sup>2</sup> See ORS 183.482 (8) (c).

1 may also be considered[.]” *Stranahan v. Fred Meyer, Inc.*, 331 Or 38, 56 (2000) (quoting  
2 *Roseburg School Dist. v. City of Roseburg*, 316 Or 374, 378 (1993)).<sup>3</sup>

3 **E. Argument**

4 **1. The State’s finding and conclusion that plaintiffs acquired the property on**  
5 **March 12, 1974 is supported by substantial evidence and correct application**  
6 **of the law.**

7 Plaintiffs assert the State erred in its factual finding and legal conclusion that plaintiffs  
8 acquired the property on March 12, 1974 (Am Compl, ¶¶ 11-14). The correct acquisition date is  
9 the sole issue for review under plaintiffs’ Second Claim for Relief (Petition for Judicial Review).

10 The State’s Final Staff Report and Recommendation (*Record*, § 6, pp 3-9) sets forth the  
11 factual findings that form the basis of the State’s decision. For purposes of the parties’ cross-  
12 motions on the issue of the date of acquisition, there is no dispute over the following facts:

13 1. The property at issue is 24.99 acres in Jefferson County, commonly identified as  
14 Tax Lot 1500 (*Record*, § 2, pp 4, 21, 24; § 6, pp 1 and 3).

15 2. In May or June of 1973, the property was advertised for sale through Johns Real  
16 Estate (§3, p 7; Fitch Aff, Ex 2, p 3). The ad stated that the property owner “will take the  
17 highest offer over \$15,000 cash made by June 20, 1973!”

18 3. On June 8, 1973, Harry Larsen wrote a check for \$100 to Johns Real Estate (§ 2,  
19 pp 18, 29, § 3, p 6; Fitch Aff, Ex 2, p 2 and Larsen Aff, Ex 2, p 11).

20 4. Plaintiffs took possession of the property (*Record*, § 2, p 5; Larsen Aff, p 2).

21 5. On November 16, 1973, Harry Larsen wrote a check for \$100 to Johns Real  
22 Estate (§ 2, pp 18, 29, § 3, p 6; Fitch Aff, Ex 2, p 2 and Larsen Aff, Ex 2, p 11).

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23 <sup>3</sup> If the voters’ intent is not clear, the court examines the history of the provision. *Stranahan*, 331  
24 Or at 56, citing *Ecumenical Ministries v. Oregon State Lottery Comm.*, 318 Or 551, 559 (1994).  
25 Legislative history of ballot measures consists of information available to the voters “that  
disclose the public’s understanding of the measure.” *Ecumenical Ministries*, 318 Or at 560 n 8  
(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           6.       A mortgage held by the Oregon Department of Veterans' Affairs encumbered the  
2           property until March 12, 1974 (*Record*, § 3, p 5; Fitch Aff, Ex 2, p 1).

3           7.       On March 12, 1974, plaintiffs delivered a cashier's check for \$15,000 to an  
4           attorney and received a receipt stating that the payment was for purchase of the property  
5           (§ 2, pp 18, 29, § 3, p 6; Fitch Aff, Ex 2, p 2 and Larsen Aff, Ex 2, p 11).

6           8.       On March 12, 1974, John J. Cunningham transferred ownership of the property to  
7           plaintiffs by warranty deed (§ 2, pp 27-28; Larsen Aff, Ex 1, p 1).

8           The receipt for payment and the warranty deed are substantial evidence demonstrating  
9           that plaintiffs acquired the property on March 12, 1974. The warranty deed reflects a valid  
10          conveyance of the property under Oregon law. ORS 93.020 (transfers of real property must be  
11          made in a writing signed by the transferor). Therefore, the State is entitled to summary judgment  
12          on plaintiffs' Petition for Judicial Review because substantial evidence supports the finding that  
13          plaintiffs acquired the property on March 12, 1974, and the State correctly applied the law.

14                   **2. A "contract to acquire" property is not a real property ownership interest.**

15          Plaintiffs rely on an alleged oral "contract to acquire the property" to establish an  
16          acquisition date of June 8, 1973 (Pls' Memo, pp 3-4). The evidence does not support a finding  
17          that a contract existed on June 8, 1973, but even if an oral contract could be established,  
18          plaintiffs' potential contractual right is to compel Mr. Cunningham to convey the property is not  
19          ownership of a real property interest.

20          For purposes of summary judgment there is no dispute that an advertisement solicited  
21          offers to purchase the property or that Mr. Larsen submitted an offer of \$15,000 (*Record*, § 3, pp  
22          5, 7). However, the evidence does not support a finding that Mr. Cunningham legally accepted  
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1 plaintiffs' offer on June 8, 1973.<sup>4</sup> The advertisement stated that offers would be accepted  
2 through June 20, 1973 and that the owner of the property "will take the highest offer over  
3 \$15,000" (*Record*, § 3, p 7). Plaintiffs' offer of \$15,000 did not satisfy the terms of the ad, and  
4 any purported acceptance of the offer would not have been binding if the owner received a  
5 higher offer by June 20, 1973.

6 The ad was not an offer capable of unilateral acceptance because it was not sufficiently  
7 definite and certain to establish all the material terms of a contract for the sale of land. Notably,  
8 the ad did not mention that the sale was conditioned on the release of an existing mortgage. At  
9 best, the evidence shows the parties negotiated additional terms of the contract after plaintiffs  
10 submitted their offer. *See Small v. Paulson*, 187 Or 76, 85 (1949) ("insertion of new and  
11 different terms in the attempted acceptance amounts in legal effect to rejection of the offer").

12 The evidence also shows that plaintiffs did not tender payment of the purchase price on  
13 June 8, 1973 (*Record*, § 3, pp 5, 6). Plaintiffs apparently contend that two payments to Johns  
14 Real Estate were partial satisfaction of the purchase price or "money down" (Pls' Memo, p 4, lns  
15 5-6, 14-15), but the cancelled checks made out to Johns Real Estate do not specify the purpose of  
16 the payments. On the other hand, the receipt for tender of the full \$15,000 purchase price on  
17 March 12, 1974 specifically identifies the property and the contingency related to the mortgage  
18 (*Record*, § 3, p 6).

19 On review of a final agency order, the court's role is to determine whether substantial  
20 evidence in the record as a whole supports the findings of fact made by the agency, and that the  
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23 <sup>4</sup> Plaintiffs offer multiple statements of hearsay and double hearsay to support their contention  
24 that the offer was accepted (*Record*, § 3, p 5 and Larsen Aff). The State objects to, and the court  
25 must disregard, the hearsay statements and legal conclusions offered in the Affidavit of Harry T.  
Larsen. *Andrews v. R.W. Hays Co.*, 166 Or App 494, 499 (2000); *Spectra Novae, Ltd. v. Waker  
Associates, Inc.*, 140 Or App 54, 59 (1996) (legal conclusions in affidavits are not sufficient to  
defeat summary judgment motion).

1 agency correctly applied the law. The State’s finding that plaintiffs did not acquire a real  
2 property ownership interest on June 8, 1973 should be affirmed on the facts and the law.

3 **3. “Possession” of property is not an ownership interest.**

4 Plaintiffs offer some evidence that they took possession of the property before paying the  
5 purchase price and obtaining the deed on March 12, 1974 (Pls’ Memo, p 4, lns 13-16; *Record*, §  
6 3, p 6). Although ownership conveys the right to possession, possession alone does not convey  
7 ownership under Oregon law. Trespassers, adverse possessors, licensees and invitees may at  
8 times possess property, but are not owners under the law.

9 “Owner” is a defined term in Measure 37. ORS 197.352 (11) (C) states that “‘Owner’ is  
10 the present owner of the property, or any interest therein.” Only a “present” owner may assert a  
11 claim. Former owners and future owners are excluded.

12 In the context of ORS 197.352, the term “owner” must be limited to those who own a  
13 meaningful interest that qualifies for relief under the statute. Section 1 establishes a right to  
14 compensation for “the owner of the property” when a land use regulation restricts the use and  
15 reduces fair market value of the property.<sup>5</sup> Interpreting the term “owner” in the context of who is  
16 entitled to relief under Measure 37 is consistent with Oregon precedent.

17 Oregon courts repeatedly have declared that the word “owner” lacks a fixed meaning  
18 outside the context and purpose of the statute in which it is used. For example, in *Moe v. Beck*,  
19 the Supreme Court noted that “[d]ivining the legislative intent in statutes using the word ‘owner’  
20 has been a vexing problem for nearly a century.” 311 Or 499, 504-505 (1991). After  
21 considering the lease agreement at issue, and the six places in the Oregon Safe Employment Act  
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23 \_\_\_\_\_  
24 <sup>5</sup> ORS 197.352 (1) provides: “If a public entity enacts or enforces a new land use regulation or  
25 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.”

1 (including a “definition”) that used the word “owner,” the Court concluded that the lessor of  
2 vehicle was an “owner” within the meaning of statute.<sup>6</sup>

3 Prior to acquiring ownership of the property by deed on March 12, 1974, plaintiffs were  
4 not owners of any interest in the property that was, or could have been, restricted by land use  
5 regulations with the effect of reducing the fair market value of the interest. Even if plaintiffs  
6 lawfully possessed the property, they allege no more than mere possession. Plaintiffs concede  
7 that no transfer of ownership was expected, or occurred before they paid the purchase price and  
8 received the deed on March 12, 1974. No land use regulations are identified that restricted  
9 plaintiffs’ alleged possession. Indeed, plaintiffs assert they farmed the property—a permissible  
10 use then and now.

11 **4. A potential equitable right to enforce an oral agreement does not**  
12 **demonstrate ownership under Measure 37.**

13 Assuming for purposes of argument that plaintiffs could have enforced an alleged oral  
14 agreement against Mr. Cunningham, that potential right to specific performance would have  
15 resulted in a transfer of the property to plaintiffs, not on June 8, 1973, but on some later date.  
16 The undisputed facts, however, show that whatever potential equitable right of enforcement  
17 plaintiffs may have had, they never asserted it. Mr. Cunningham conveyed the property to  
18 plaintiffs on March 12, 1974—that fact, too, is undisputed.

19 The State objects to plaintiffs’ effort to litigate a hypothetical cause of action against a  
20 non-party. In any event, even if plaintiffs would have had an equitable basis to enforce the  
21 alleged oral contract against Mr. Cunningham, determining the existence of such an equitable

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22 <sup>6</sup> See also *Pedro v. January*, 261 Or 582, 602 (1972) (“When the term ‘owner’ or ‘ownership’ is  
23 used in a statute, the context and purpose of the statute governs what is meant by the use of the  
24 terms”); *State v. The Calif. Ore. Power Co.*, 225 Or 604, 612 (1961) (owner of an easement not  
25 an “owner” under statute imposing liability for fire suppression costs); *Schram v. Manary*, 123  
Or 354, 363 (1927) (term “owner” as applied to real property has no fixed meaning and purpose  
of statute controls meaning); *Binhoff v. State*, 49 Or 419, 422 (1907) (“owner” has no fixed  
meaning).

1 basis here is a purely academic exercise and a non-justiciable issue. No equities are at issue  
2 because the State was not a party to the alleged contract and plaintiffs have no need to enforce  
3 any oral agreement—they in fact acquired the property by warranty deed on March 12, 1974.

4 On the merits, plaintiffs’ evidence fails to support their contention that the alleged oral  
5 contract was enforceable because it was “implemented by specific performance” (Pls’ Memo, p  
6 4, ln 8). To satisfy the equitable exception to the requirement that a contract for the sale of real  
7 property be in writing, the proponent of the contract must satisfy three elements. *Mukai Living*  
8 *Trust v. Lopez*, 199 Or App 341 (2005). Proof of the agreement must show clearly the precise  
9 terms and that the terms were certain and unambiguous. Evidence of “performance” of the terms  
10 must show “conduct that is explainable only on the ground that it was performed as part of the  
11 contractual *quid pro quo* and not for some other reason unrelated to the agreement.” Also, “there  
12 must be equitable grounds for enforcing the agreement.” 199 Or App at 345 (citations omitted).

13 Here, the alleged terms do not show a final, binding agreement existed on June 8, 1973.  
14 There is no evidence that Mr. Cunningham retracted the public offer under which other potential  
15 purchasers could have “outbid” plaintiffs, but there is evidence that transfer of ownership was  
16 contingent on satisfaction of a mortgage. Thus, the alleged terms of the contract are not certain  
17 and unambiguous.

18 Plaintiffs offer hearsay evidence that a broker told them they could take possession, and  
19 Mr. Larsen asserts that plaintiffs in fact took possession of the property on June 8, 1973. But,  
20 plaintiffs offer no evidence at all of conduct by Mr. Cunningham that can be explained only by  
21 the existence of a contract with plaintiffs. In fact, there is no evidence of any conduct by  
22 Cunningham except execution of the warranty deed on March 12, 1974. That conduct may be  
23 explained by the fact that the purchase price was tendered on that day.

24 The final element of the equitable exception is the “equities” of enforcing an alleged oral  
25 agreement. Plaintiffs offer no evidence, and no authority, on which this court can assess the

1 equities between plaintiffs and Mr. Cunningham in a claim by plaintiffs against the State.  
2 Plaintiffs' effort to assert a Measure 37 real property ownership interest based on an oral  
3 agreement with a non-party that would have been enforceable, if at all, only in an action against  
4 Mr. Cunningham, should be rejected.

## 5 **II. APA EXCLUSIVITY**

6 The Oregon Court of Appeals consistently has held that the APA establishes the  
7 exclusive method to challenge decisions made by state agencies. *See e.g., Eppler v. Board of*  
8 *Tax Service Examiners*, 189 Or App 216, 220 (2003); *Lake County v. State of Oregon*, 142 Or  
9 App 162, 165 (1996) (“ORS 183.480 (2) and numerous decisions of this court make clear that  
10 judicial review of final agency orders shall be solely as provided in the APA”); *Mendieta v.*  
11 *Division of State Lands*, 148 Or App 586, 599-600 (1997), *rev dismissed*, 328 Or 331 (1999)  
12 (where “redress would have been available under ORS 183.484, had plaintiffs timely filed their  
13 petition for judicial review[,]” the Court of Appeals held, “the trial court erred in granting  
14 plaintiffs relief under ORS 183.490 and ORS 28.010”); *FOPPO v. County of Marion*, 93 Or App  
15 93, 97 (1988), *rev denied*, 307 Or 326 (1989) (“PERS is subject to the APA; therefore, the APA  
16 provides the exclusive methods for its actions and for review of those actions”); *Bay River v.*  
17 *Envir. Quality Comm.*, 26 Or App 717, 720, *rev denied*, 276 Or 555 (1976).

18 The exclusive nature of the APA remedy applies even where a plaintiff attempts to use  
19 other statutory causes of action to get relief from an agency decision. For example, in *Bay River*,  
20 the Court of Appeals rejected an argument that the Declaratory Judgment Act, ORS 28.010 *et*  
21 *seq.*, provides a remedy with respect to agency orders in addition to the remedies provided under  
22 the APA. The circuit court in that case had granted the plaintiff an injunction and declaratory  
23 relief with respect to its application for a subsurface sewage disposal system feasibility permit –  
24 a matter within the Department of Environmental Quality’s purview. The Court of Appeals  
25 reversed and remanded, ordering the circuit court to vacate the judgment and dismiss the

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1 complaint. The appellate court explained that Bay River could not circumvent APA review  
2 merely by raising its complaint about agency actions in the context of another statute:

3           The Oregon Administrative Procedures Act, ORS 183.310  
4           et seq, establishes a comprehensive pattern for the judicial review  
5           of administrative decisions. The various APA statutes governing  
6           judicial review provide the *sole and exclusive methods of obtaining*  
7           *judicial review.*

8           This is sufficient answer to Bay River’s contention that  
9           since it couched its complaint in equitable terms and sought a  
10          declaratory judgment, the circuit court obtained jurisdiction

11          pursuant to ORS 28.010. A party cannot ignore the judicial review  
12          provisions of the APA in favor of a general equitable or  
13          declaratory remedy.

14          *Bay River*, 26 Or App at 720 (emphasis added; citation omitted). *See also Eppler*, 189 Or App at  
15          222 (“plaintiff’s sole recourse [in arguing that state licensing requirements were preempted by  
16          federal law] was to raise their preemption claim in the contested case proceeding before the  
17          board and seek judicial review, under the APA, of any adverse ruling by the board”); *Lake*  
18          *County*, 142 Or App at 165-66 (1996) (declaratory relief not available where plaintiff could have  
19          sought judicial review of an agency order under the APA).

20          The Court of Appeals also has rejected the argument that the Oregon Tort Claims Act  
21          (“OTCA”), ORS 30.265 et seq., provides a remedy with respect to agency orders that is  
22          cumulative to the APA remedy. In *Clarke Electric, Inc. v. State Highway Division*, 93 Or App  
23          693 (1988), the plaintiff contractor sued under the OTCA for harm allegedly arising from the  
24          Highway Division’s rejection of the plaintiff’s bid on a contract. The Court of Appeals held that  
25          the Division’s rejection of the plaintiff’s bid was a final order in other than a contested case and,  
26          therefore, that the plaintiff should have sought judicial review under the APA. *Id.*, 93 Or App at  
27          696-97. The court specifically rejected the plaintiff’s argument that, because it sought damages,  
28          it was entitled to proceed directly under the OTCA:

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1 Finally, plaintiff argues that it is seeking damages in tort under the  
2 Oregon Tort Claims Act, ORS 30.265, not review of the Division's  
3 order and, therefore, that the time limitations of the APA are not  
4 applicable. However, defendant's alleged liability in tort is  
5 premised on a finding that defendant's order rejecting the bid was  
6 improper. That order was a final order in other than a contested  
7 case, and the exclusive procedure for review of such an order is  
8 under the APA. \* \* \* Consequently, the trial court did not err in  
9 granting Division's motion to dismiss for failure to comply with  
10 the APA time limitations for judicial review.

11 *Id.* at 697 (citations omitted).<sup>7</sup>

12 Thus, the plaintiff in *Clarke Electric* could not circumvent APA review of an agency  
13 order by seeking monetary damages under the OTCA, just as the plaintiff in the Declaratory  
14 Judgment Act cases cited above could not avoid APA review merely by seeking declaratory  
15 relief with respect to agency actions. The same principle applies to section 6 of Measure 37 –  
16 although it, too, creates a statutory cause of action, claimants who allege error in an agency order  
17 on a Measure 37 claim must seek judicial review under the APA.

### 18 **III. MEASURE 37 ELECTION**

19 The language and structure of Measure 37 clearly show that the voters intended to give  
20 public entities, and not claimants, the choice between paying compensation and not applying  
21 land use regulations. The statute provides:

22 (8) Notwithstanding any other state statute or the  
23 availability of funds under subsection (10) of this section, in lieu of  
24 payment of just compensation under this section, the governing  
25 body responsible for enacting the land use regulation may modify,  
26 remove, or not to apply the land use regulation or land use  
27 regulations to allow the owner to use the property for a use  
28 permitted at the time the owner acquired the property.

29 \* \* \* \* \*

30 (10) Claims made under this section shall be paid from  
31 funds, if any, specifically allocated by the legislature, city, county,  
32 or metropolitan service district for payment of claims under this

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33 <sup>7</sup> See also *Muller v. Dept. of Agriculture*, 164 Or App 11, 15-16 (1999) (plaintiff could not avoid  
34 APA review by suing for damages in tort when "his entitlement to damages depend[ed] on the  
35 validity of" an agency's denial of a permit application).

1 section. Notwithstanding the availability of funds under this  
2 subsection, a metropolitan service district, city, county, or state  
3 agency shall have discretion to use available funds to pay claims or  
4 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.

5 ORS 197.352.

6 Thus, section 8 generally grants the public entities to which a demand for compensation  
7 is submitted the option to pay or provide alternate relief. Section 10 makes it clear that the  
8 option is wholly within the public entities' discretion and specifically applies to claims brought  
9 under section 6.<sup>8</sup>

10 In the event the court determines pursuant to ORS 197.484 that plaintiffs' Measure 37  
11 demand should have been approved as valid (which is denied), the State may elect not to apply  
12 certain land use regulations in lieu of compensation. The State reserves its right to make that  
13 election. Because the State has reserved its right to elect to not apply land use regulations that  
14 may be applicable, plaintiffs presently do not have a claim for compensation under Measure 37.

## 15 CONCLUSION

16 Plaintiffs' Motion for Partial Summary Judgment fails to demonstrate that plaintiffs are  
17 entitled to "judgment" on an acquisition date of June 8, 1973 or on the scope of regulations that  
18 diminish the value of the property. For this reason, and because plaintiffs' compensation claim  
19 is barred by the exclusivity provisions of the APA, and because Measure 37 permits the State to  
20 elect waiver relief in lieu of compensation, plaintiffs motion must be denied.

21 \_\_\_\_\_  
22 <sup>8</sup> If the text and context did not clearly indicate that the choice of relief is vested in the public  
23 entities, then a court would review the legislative history. *See, e.g.* the Voters' Pamphlet's  
24 explanatory statement for Measure 37: "If a property owner proves that a land use regulation  
25 restricts the use of the owner's property, and reduces its value then *the government responsible  
for the regulation will have a choice*: pay the owner of the property an amount equal to the  
reduction in value or modify, change or not apply the regulation to the owner's property."  
[http://www.oregon.gov/LCD/MEASURE37/legal\\_information.shtml#Information About the El  
ction](http://www.oregon.gov/LCD/MEASURE37/legal_information.shtml#Information%20About%20the%20Election) (site last visited on December 5, 2006; emphasis added).



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-

1 **CERTIFICATE OF SERVICE**

2 I certify that on January 9, 2007, I served the foregoing *State of Oregon's Response to*  
3 *Plaintiffs' Motion for Partial Summary Judgment; Cross-Motion for Summary Judgment;*  
4 *Memorandum of Points and Authorities* upon the parties hereto by the method indicated below,  
5 and addressed to the following:

6 Edward P. Fitch  
7 Michael R. McLane  
8 Bryant, Emerson & Fitch, LLP  
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Redmond, OR 97756  
Attorney for Plaintiffs

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

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