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

6 LARRY L. LUETHE and LAURA B.  
7 LUETHE, husband and wife,

8 Plaintiffs,

9 v.

10 MULTNOMAH COUNTY, OREGON, a  
11 political subdivision of the State of Oregon;  
12 and the DEPARTMENT OF LAND  
13 CONSERVATION AND DEVELOPMENT,  
14 an agency of the State of Oregon; LAND  
15 CONSERVATION AND DEVELOPMENT  
16 COMMISSION, an agency of the State of  
17 Oregon; DEPARTMENT OF  
18 ENVIRONMENTAL QUALITY, an agency  
19 of the State of Oregon; and DEPARTMENT  
20 OF ADMINISTRATIVE SERVICES, an  
21 agency of the State of Oregon,

22 Defendants.

Case No. 0609-09466

STATE DEFENDANTS' REPLY IN SUPPORT  
OF MOTIONS FOR SUMMARY JUDGMENT

(Oral Argument Requested)

Judge Hodson  
Date: October 11, 2007  
Time: 1:30 p.m.  
Ctrm: 410

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27 **INTRODUCTION**

28 The State agency defendants move for summary judgment because plaintiffs' claims  
29 depend solely upon the court's legal interpretation of Measure 37. The facts are undisputed  
30 because plaintiffs' written demand and the State's final order reveal the factual basis for the  
31 State's interpretation—with which plaintiffs disagree. No expert's opinion on the facts or the  
32 law is relevant to the issues of statutory construction on which plaintiffs' compensation claim  
33 depends:

34 (a) Must a "written demand" establish that the claimant qualifies for relief?  
35  
36

1 (b) Is a “cause of action” under Section 6 of Measure 37 properly based on every land  
2 use regulation that “continues to apply” after issuance of a final state agency order, or  
3 only those qualifying land use regulations that were the subject of a written demand  
4 but not waived within 180 days?

5 (c) Does a waiver allowing the claimant the use on which the written demand was based,  
6 free of state law restrictions on that use, satisfy the State’s obligation under Measure  
7 37?

8 Plaintiffs’ claim for declaratory relief likewise presents only a question of statutory  
9 interpretation. Plaintiffs ask the court to declare that Measure 37 permits them to sell the right  
10 embodied in Final Order M 118605: to “partition of the 18.92-acre property into ‘2 additional  
11 parcels of approximately 6 acres each or a 9 lot subdivision’ and development of a dwelling on  
12 each parcel [without enforcement by the State of] applicable provisions of Goal 4, ORS 215, and  
13 OAR 660, division 6 (excepting those rules in division 6 concerning fire safety).” The State  
14 contends its order “not to apply” is personal to plaintiffs. The text and context of Measure 37  
15 provides the basis for the court to resolve the parties’ dispute over “transferability.”

#### 16 **COMPENSATION CLAIM**

17 Plaintiffs contend they are entitled to compensation because Final Order M 118605 is  
18 “facially insufficient” and “wherever an identified land use regulation is not waived, a claimant  
19 has the right to a compensation action to determine whether that unwaived land use regulation  
20 has caused a diminution in value” (Resp, p 8, lns 20-24). The State disagrees. A compensation  
21 claim arises only when “a land use regulation continues to apply” in violation of Measure 37.<sup>1</sup>  
22 Plaintiffs must plead and prove that they submitted a valid demand for compensation based on  
23

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24 <sup>1</sup> The State contends that, because the APA provides the exclusive remedy for any erroneous  
25 interpretations of law in Final Order M 118605, the court lacks jurisdiction to decide a Section 6  
26 claim for compensation. This court has rejected that argument on the State’s Motions to  
Dismiss. The arguments presented in the State’s Motions for Summary Judgment are alternative  
grounds for judgment for the State.

1 the unwaived regulation. Plaintiffs have done neither. The State is entitled to judgment as a  
2 matter of law.

3 **A. “Written Demand”**

4 According to plaintiffs’ interpretation, Measure 37 does not require claimants (or  
5 plaintiffs) to make any showing that they qualify for relief. All a claimant must do is identify  
6 laws and demand some amount of compensation. If a public entity does not pay the demanded  
7 amount or waive all of the identified laws within 180 days, the claimant has a cause of action  
8 (Resp, p 14, ln 23 – p 15, ln 4). The State interprets Measure 37 differently.

9 The State reviewed and decided plaintiffs’ written demand as it did because the State  
10 interprets Measure 37 to require claimants to establish the requisite qualifications for  
11 compensation: (1) present ownership of real property, (2) enforcement of a state land use  
12 regulation, (3) restriction on plaintiffs’ use of their property interest by enforcement of the  
13 regulation, and (4) reduction in the fair market value of their property interest resulting from  
14 enforcement of the regulation restricting plaintiffs’ use. The State determined that all elements  
15 of a valid demand were met with respect to certain regulations enforced by DLCD.

16 As to the remaining land use regulations on plaintiffs’ list, the State determined either  
17 that they did not qualify or that no determination was possible based on plaintiffs’ demand  
18 (*Record*, § 6, pp 9-10, 15-16, 20-21).<sup>2</sup> Instead of demonstrating that the demand in fact  
19 established that Measure 37 mandated relief based on the unwaived regulations, plaintiffs simply  
20 avoid the issue. They argue that “[a]ll of these regulations *can be read* to have the *legal*  
21 *potential* to make development of Plaintiffs’ Property more difficult, more costly, or prevent  
22 development entirely” (Resp, p 15, lns 9-11; emphasis added). Plaintiffs do not argue that their  
23 demand established that any unwaived regulation qualified for relief.

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25 \_\_\_\_\_  
26 <sup>2</sup> The State denied the demand as to regulations administered by DEQ and ODF because  
plaintiffs failed to demonstrate enforcement, restriction or reduction.

1           **B. Burden of Proof**

2           The State’s Motion is based on the Complaint which asserts that the State was required to  
3 assume that a state regulation was enforced, restricted use, and effected a reduction in value if  
4 plaintiffs “claimed” as much (MSJ, p 10). Plaintiffs’ Response to the State’s Motion argues that  
5 Measure 37 requires the State, and ultimately this court, to assume that “identified” regulations  
6 qualify unless the State proves they “in no way reduce the value of Plaintiffs’ Property” (Resp, p  
7 14, lns 19-21). Plaintiffs’ rationale for a meaningless interpretation of “written demand” and for  
8 shifting the burden in the claims process and in this litigation is Measure 37’s lack of “specific  
9 standards of detail” (*id.*, lns 23-24).

10           The phrase “written demand,” used five times in the text of Measure 37, must have some  
11 meaning. Plaintiffs would have the court construe written demand to mean a claim of  
12 entitlement assumed to be true unless proved otherwise by the public entity. If plaintiffs are  
13 correct, then Section 7—expressly permitting public entities to adopt procedures for processing  
14 claims—is a nullity because no process is required. The public entity has only the choice of  
15 writing a check for the amount alleged to be due or waiving all regulations alleged to qualify.

16           In this case, there is no dispute concerning plaintiffs’ present ownership of the property.  
17 But plaintiffs offer no reason to distinguish the ownership predicate from enforcement,  
18 restriction or reduction. If Measure 37 does not require the claimant to establish he or she  
19 qualifies for relief, then all elements would be assumed. Anyone could claim ownership of any  
20 property and the public entity would have to pay unless it proved that the claimant was not the  
21 present owner.

22           The State’s interpretation is based on text and context of Measure 37. Section 1 sets the  
23 criteria of a valid demand. Section 3 provides exceptions. Section 4 clarifies that a written  
24  
25  
26

1 demand must be submitted to “the public entity enacting or enforcing the land use regulation.”<sup>3</sup>  
2 Section 5 sets the deadline for submitting written demands. Section 6 provides a cause of action  
3 if the public entity fails to act on a valid demand.

4 Based on the plain intent of Measure 37 to create a demand, review and decision process,  
5 the State interprets the statute to require that a written demand be valid before the public entity  
6 has an obligation to “pay or waive.”<sup>4</sup> The Court of Appeals analyzed Measure 37 in *Corey v.*  
7 *DLCD*, 210 Or App 542 (2007) consistent with other statutes creating a right to a government  
8 benefit. 210 Or App at 546-547 (“The ‘new property’ includes certain governmental benefits to  
9 which an individual has a *legitimate* claim of entitlement”; emphasis added). A claimant seeking  
10 a transfer of tax dollars must demonstrate that he or she qualifies.

### 11 C. “Continues to Apply”

12 Plaintiffs’ interpretation of Section 6 is just as blithe as their interpretation of the written  
13 demand requirement. The phrase “a land use regulation continues to apply” includes no express  
14 qualifiers. Plaintiffs’ interpretation permits any claimant to sue for compensation because the  
15 State did not waive all the statutes and regulations mentioned in a written demand regardless  
16 whether the regulations were enforced, restricted use or reduced the value of the claimant’s  
17 interest in the property. If the merit of the demand is not an essential element of a compensation  
18 cause of action under Section 6 then all parts of the statute relating to public entities in the first  
19 instance deciding demands and choosing the relief to be provided are superfluous.

20 Plaintiffs make no showing that their demand was valid as to “unwaived” but “identified”  
21 regulations. Instead, plaintiffs offer an expert who will opine that unwaived identified  
22

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23 <sup>3</sup> Enactment alone is sufficient only for post-December 2, 2004 regulations. ORS 197.352 (1)  
24 (“If a public entity enacts or enforces a new land use regulation or enforces a land use regulation  
25 enacted prior to December 2, 2004 \* \* \*”).

26 <sup>4</sup> Judge LaBarre found that Measure 37 claimants are required to prove they qualify for relief.  
See, Ex 1 hereto (Ltr Op in *Wiley v. Multnomah County*, Case No. 0702-01428, p 2, last full  
sentence).

1 regulations “remain in effect” (Resp, p 21, lns 18-22). Such testimony is irrelevant and  
2 inadmissible. As a matter of law, state laws remain in effect unless waived. *MacPherson v.*  
3 *DAS*, 340 Or 117, 132 (2006). The question presented is not what laws remain in effect, but  
4 what laws the State was required to waive based on plaintiffs’ written demand.

5 As the State argued in its Motions to Dismiss, the Complaint fails to state ultimate facts  
6 on which a finding of enforcement could be found as to any of the identified but unwaived state  
7 regulations. For example, the list includes the legislative findings set forth at ORS 197.005, the  
8 requirement that notice of rule changes be given to property owners under ORS 197.047, and the  
9 authority of the Land Conservation and Development Commission “if an interstate land  
10 conservation and development planning agency is created by an interstate agreement or compact  
11 entered into by this state” in ORS 197.050. No facts are alleged which, if proved, would  
12 demonstrate that legislative findings have been enforced against plaintiffs, or notice was not  
13 given, or that LCDC’s authority to negotiate and cooperate with an interstate agency (assuming a  
14 compact was entered into, which is not alleged) restricts plaintiffs’ use of their property in a way  
15 that reduces its value. Plaintiffs’ Response to the State’s Motion for Summary Judgment fails to  
16 cure that defect.

17 **D. “A Use Permitted”**

18 Plaintiffs interpret Measure 37 to permit compensation in addition to a waiver unless  
19 “Plaintiffs can in actuality develop their Property under the waiver currently in place” (Resp, p  
20 21, lns 2-4). Anything less, plaintiffs argue, constitutes a conclusion “that waivers need not be in  
21 any significant sense equivalent to the mandated grant of ‘*just* compensation” (p 9, lns 10-14;  
22 emphasis in original). Generally, plaintiffs argue they are entitled to “any” use permitted, not “a  
23 use permitted.” Specifically, plaintiffs seem to contend that they are entitled to any use  
24 permitted regardless whether it was a use that the State had an opportunity to consider based on  
25 plaintiffs’ written demand.

26

1           Again plaintiffs ignore the essential element of a cause of action under Section 6—that  
2 plaintiffs submitted a valid written demand. Plaintiffs’ demand established that the state  
3 regulations waived by Final Order M 118605 restricted plaintiffs’ use, *i.e.* their legal right to  
4 partition and develop dwellings on the property. Plaintiffs make no showing that the demand  
5 established anything more.<sup>5</sup>

6           In an attempt to create a factual dispute, plaintiffs submit an ORCP 47E affidavit stating  
7 that they “have retained a qualified, unnamed expert who will testify and create a question of fact  
8 concerning, among other things, whether even after the State Defendants’ Measure 37 ‘waiver’  
9 there are land use regulations that remain in effect on Plaintiffs’ property that prevent  
10 development, as well as regulations that make development more costly and difficult to  
11 complete.” The affidavit does not demonstrate the existence of genuine issue of material fact  
12 because (1) the genuine issue is a question of law over the validity of plaintiffs’ demand, (2) the  
13 material facts are set forth in plaintiffs’ demand, and (3) nothing in Measure 37 requires that a  
14 State waiver be sufficient to allow development to go forward. Consequently, evidence that  
15 plaintiffs cannot develop their property under the current waiver is irrelevant and inadmissible.

16           The text and context of Measure 37 plainly contemplates that waiver relief from one  
17 government may not provide all rights necessary for “development” because each government is  
18 responsible for determining whether and what relief is available with respect to the regulations it  
19 enacts or enforces. ORS 197.352 (4), (8), (10). Moreover, Measure 37 mandates that demands  
20 be found valid if regulations enacted after a “family member” acquires the property, but  
21 authorizes waiver relief only for the purpose of allowing a use permitted when the “present  
22 owner” acquired the property. The difference between the “value” of compensation and the  
23 “value” of a waiver can be significant when the family date and the acquisition date are decades  
24

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25 <sup>5</sup> For example, plaintiffs argue at length that “sale” is “a use” that is not allowed by the State’s  
26 waiver (Resp, pp 25-26), but do not identify any state land use regulation that restricts sale of the  
property.

1 apart. The argument that Measure 37 requires equivalence between the alternate forms of relief  
2 is not supported by the text, and has been rejected in the context of neighbors' actions against  
3 state waiver orders.<sup>6</sup>

4 In plaintiffs' case, the State fully complied with its Measure 37 obligations by issuing an  
5 order granting waiver relief for a use permitted under state law at the time plaintiffs acquired the  
6 property on August 8, 1973. Whether local regulations, state regulations in effect on August 3,  
7 1973, or previously unenforced state regulations such as DEQ and ODF regulations will make  
8 development more timely or expensive, or even prohibit some use that was not the basis of  
9 plaintiffs' demand, remains to be seen. A Measure 37 waiver is not, and is not intended to be, a  
10 substitute for a land use application. ORS 197.352 (5), (9).

## 11 TRANSFERABILITY

### 12 A. Ripeness

13 Plaintiffs contend their claim for a declaration of "transferability" is ripe because  
14 "whether they avail themselves of the *right* to sell property subject to the waiver, they are  
15 entitled to ask this Court if they indeed have that right" (Resp, p 24, lns 14-15; emphasis in  
16 original). Plaintiffs offer no authority for their argument that a desire to understand one's rights  
17 makes a claim ripe. The Oregon Supreme Court, on the other hand, holds that a ripe claim for a  
18 declaratory judgment requires a dispute over present facts, not future, contingent or hypothetical  
19 events. *MacPherson, supra*, 340 Or at 124-125; *US West Communications v. City of Eugene*,  
20 336 Or 181, 191 (2003). A recent Court of Appeals case reaffirms Oregon law in this regard.  
21 *Beck v. City of Portland*, 202 Or App 360 (2005) (owners of land beneath the proposed route for  
22 an aerial tram denied a declaratory judgment describing their rights in the event the tram was  
23 built).

24 \_\_\_\_\_  
25 <sup>6</sup> Neighbors describe the principal as "proportionality." See, Ex 2 to the State's Motion  
26 (*Vanderzanden v. Land Conservation and Development Commission*, Marion County Case No.  
05C19565 January 8, 2007 ltr op at 6-7).

1 Plaintiffs do not allege, and make no showing, that some potential purchaser of their  
2 property has been deterred by the State’s interpretation of Measure 37 on the issue of  
3 transferability.<sup>7</sup> Instead, plaintiffs assert they “are entitled to ask this Court if they indeed have”  
4 the “*right* to sell property subject to the waiver,” whether they exercise those rights  
5 “immediately or ever” (Resp, p 24, lns 13-15; emphasis in original). That argument fails under  
6 *Beck*, which holds precisely that one is *not* entitled to a declaratory judgment concerning one’s  
7 rights in the abstract, when circumstances implicating those rights may never arise.

8 **B. Interpretation**

9 Plaintiffs’ proffered interpretation of Measure 37 on the issue of transferability involves  
10 the “sale is use” and the “equivalence” of compensation and waiver arguments (Resp, pp 25-32),  
11 both of which are discussed above. In addition, plaintiffs contend that under Oregon law and by  
12 “nature” Measure 37 rights “run with the land” (Resp, p 24, lns 3-4 and pp 32-33).

13 Plaintiffs argue that Measure 37 waiver relief is a form of variance and that, as a matter  
14 of law, “variances run with the land” (p 33, ln 14). The argument fails for two simple reasons.  
15 First, Measure 37 waivers are not variances. Also, variances and other governmental  
16 authorizations to use property do not necessarily “run with the land.”

17 State waivers are decisions “not to apply” land use regulations specifically “to allow *the*  
18 *owner* to use the property for a use permitted at the time the owner acquired the property.” ORS  
19 197.352(8) (emphasis added). That statutory language determines whether the State’s decision  
20 applies only to the present owner’s use of the property, or also applies to any future use of the  
21 property by other people. The authorities on which the State relies demonstrate that Measure 37  
22 by its terms creates a personal right, not a right that “runs with the land.” What the common law,  
23 nature, or *other* statutes, regulations or ordinances may say about the “transferability” of  
24 variances has no bearing.

25 \_\_\_\_\_  
26 <sup>7</sup> The Affidavit of Larry Luethe says he is willing to sell “buildable lots.”

1 Plaintiffs are mistaken when they assert that “in every case” land use permits or  
2 approvals run with the land (Resp, p 32, lns 22-24). Plaintiffs’ citations to treatises of general  
3 application are unpersuasive, given the Oregon principle that “variance law is statutory law, not  
4 common law.” OSB *Land Use*, § 11.2 at 11-3 (1993). “Variance law is largely embodied in  
5 local legislation, and its particulars of course vary from locality to locality.” *Kelley v.*  
6 *Clackamas County*, 158 Or App 159, 164 (1999). And, the right to carry out a use authorized by  
7 a variance may be lost if it is abandoned. In addition, other types of government authorizations  
8 are personal to the owner of property, like permits to engage in activity that results in the  
9 emission of pollutants.

#### 10 VALUATION AFFIDAVIT

11 Plaintiffs submitted an ORCP 47E affidavit asserting they have retained an expert who  
12 will “create a question of fact concerning \* \* \* whether some or all of the regulations identified  
13 by Plaintiffs in their Measure 37 written demand \* \* \* and not subsequently waived by the State  
14 \* \* \* by their continued application to Plaintiffs’ property have created a loss in the fair market  
15 value of Plaintiffs’ property over the zoning laws in place on the property at the time of  
16 Plaintiffs’ acquisition of the various tax lots.” The “valuation affidavit” does not create any  
17 material dispute because it does not relate to any of the legal questions properly before this court  
18 on the State’s Motion. To determine whether the State is entitled to judgment as a matter of law  
19 on plaintiffs’ compensation claim, this court must address whether the State’s final order grants  
20 the Measure 37 relief for which plaintiffs qualify based on their demand. Whether *other* land use  
21 regulations still may restrict some *other* use of the property, with the effect of reducing its fair  
22 market value is not an issue under ORS 197.352 (6).

23 ///

24 ///

25 ///

26


1 **CONCLUSION**

2 The State is entitled to judgment on both of plaintiffs' claims if the State properly  
3 interpreted Measure 37 as applied to plaintiffs' written demand. The questions presented are  
4 legal issues for the court to decide. If the State granted plaintiffs the relief authorized by  
5 Measure 37, they have no claim. The text and context of Measure 37, and the authorities on  
6 which the State relies, support the conclusion that State did not erroneously interpret a provision  
7 of law.

8 DATED this 9 day of October, 2007.

9 Respectfully submitted,

10 HARDY MYERS  
11 Attorney General

12   
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J.F. COPY

CIRCUIT COURT OF THE STATE OF OREGON

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JEROME LABARRE  
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September 20, 2007

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RECEIVED  
SEP 21 2007  
COUNTY COUNSEL FOR  
MULTNOMAH COUNTY, OR

RE: Elinor Wiley v. Multnomah County  
Multnomah County Circuit Court Case Nos. 0702-01428 and 0704-04735

Dear Counsel:

These matters came before this Court on August 30, 2007 for hearing on Petitioner's Writ of Review in Case No. 0702-01428 and on cross-motions for summary judgment in Case No. 0704-04735. Petitioner appeared through counsel M. Christie Helmer. Respondent appeared through counsel Stephen L. Madkour. The matters were fully submitted on that date, and this Court took the matters under advisement.

Case No. 0702-01428 is a Writ of Review action brought by Petitioner to review the Multnomah County Board of Commissioners ("Board") Order denying her Measure 37 claim. Case No. 0704-04735 is an action for Just Compensation Under Measure 37 arising out of the same Board denial.

As set forth at the end of this letter, this Court requires further briefing on the cross-motions for summary judgment in Case No. 0704-04735. Therefore, this letter only constitutes this Court's findings and rulings on Petitioner's Writ of Review in Case No. 0702-01428.

Facts

Measure 37 became effective on December 2, 2004 and has been codified at ORS 197.352. To prevail on a Measure 37 claim, the present owner of the property must show that a new land use regulation: (1) "restricts the use of private real property or any interest therein," and (2) "has the effect of reducing the fair market value of the property, or any interest therein." ORS 197.352(1). If the owner presents a valid Measure 37 claim, then "the owner of the property

shall be paid just compensation." *Id.* However, in place of just compensation, the governing body may elect to "waive" the land use regulations to "allow the owner to use the property for a use permitted at the time the owner acquired the property." ORS 197.352(8).

Petitioner owns 103.04 acres of land ("property") located on Sauvie Island in Multnomah County. Petitioner acquired her property on September 7, 1955 and has maintained continuous ownership of her property. Petitioner's property is currently designated as Exclusive Farm Use ("EFU") and has been designated as EFU since 1977. Prior to the EFU designation, Petitioner's property was designated as F-2. Petitioner filed a Measure 37 claim form on July 6, 2006 seeking to "divide the property into at least 5 lots, and to develop at least 4 of these lots for residential home sites." Return of Writ of Review Record ("Rec.") at 84. Although Petitioner's claim form listed the amount of her claim as \$1,050,000 to \$1,600,000, the appraisal she relied on estimated her property's diminution of value as \$250,000 to \$1,000,000. Rec. at 84, 88. Petitioner's claim form indicated her preferred resolution of the claim was waiver of the applicable regulations. Rec. at 84.

Petitioner's claim was presented to the Multnomah County Board of Commissioners ("Board") on December 7, 2006 and December 14, 2006. The Board issued Order No. 06-207 ("Board Order") on December 14, 2006 denying Petitioner's claim.

The Board Order stated that its basis for denial was that: (1) "dividing property in itself is not a 'use' of land subject to the provisions of Measure 37 and that development rights gained through a waiver are personal to the claimant and will result in no restriction in use if transferred to a third party," and (2) "a reduction in value has not occurred because development rights cannot be transferred." Rec. at 30.

Petitioner timely filed her Petition for Writ of Review pursuant to ORS 34.030 in Case No. 0702-01428. The Writ was issued on February 7, 2007. Respondent timely filed the Return on February 28, 2007.

#### Issues

Petitioner's Writ of Review sets forth four assignments of error in the Board's Order: (1) the Board's findings and Order were not based on substantial evidence in the whole record, (2) the Board improperly construed the applicable law, (3) the Board exceeded its jurisdiction, and (4) the Board's decision was unconstitutional. This Court's consideration of the Writ of Review is made pursuant to ORS 34.010 to ORS 34.100.

#### Analysis

##### *A. The Board's Findings and Order Were Based on Substantial Evidence in the Whole Record*

Petitioner had the burden to plead and prove the elements of her Measure 37 claim to the Board. The Board found that Petitioner established that she was the current owner of the

property having continuous ownership since acquiring the property on September 7, 1955. Rec. at 29. The Board also found that Petitioner's property is currently designated as EFU, with a prior designation of F-2. *Id.* The Board agreed that EFU zoning requires "newly created properties from a land division to be at least 80-acres in size," and EFU zoning "generally limit[s] the establishment of new dwellings to those that are necessary for farm purposes." *Id.* However, the Board ultimately found that Petitioner did not present a valid Measure 37 claim because she failed to establish both a restriction in use and a reduction in fair market value of her property. Rec. at 31.

The Board found that Petitioner failed to establish a restriction in use of her property because dividing property in itself is not a use. Although Petitioner initially argued that Measure 37 identifies "land division" ordinances as a type of "land use regulation," Petitioner's counsel conceded in her oral argument before this Court that subdividing property is not a use (both Petitioner and Respondent use the terms "divide" and "subdivide" interchangeably; this letter will use the term "subdivide"). At the hearing before this Court, Petitioner argued that her plan was actually to subdivide and develop her property. However, Petitioner's presentation to the Board did not include any evidence of a specific plan to develop her property. The language in Petitioner's Measure 37 claim form was that the EFU land use regulations "restrict the owner's ability to divide the property into at least 5 lots, and to develop at least 4 of these lots for residential home sites," and the claim form indicated that "the attached appraisal and concept plan on page 35 of that documents shows the development concept anticipated at this time." Rec. at 84. However, the attached appraisal and concept plan did not contain any specific plan for development, but instead contemplated the transferability of "building sites" for "future homes" and "potential homesites." Rec. at 124. The concept plan on page 35 of the appraisal contained a map showing anticipated division of land without development and stated that "further subdivision of the property in compliance with the previous F-2 zoning will generate a number of potential, acreage, building sites." *Id.* The appraisal referred to the subdivided property as the "four lot configuration east to the Gilbert River, with the potential to convert to residential uses \* \* \*." Rec. at 129.

At the hearing before this Court, Petitioner acknowledged the lack of a specific plan for development in her presentation to the Board. In addition, Petitioner conceded that her presentation to the Board was not meant to be read as a specific plan for development because she wanted the ability to consider a variety of future division and development scenarios once she received the requested Measure 37 waiver. In other words, Petitioner wanted to keep her options open. Petitioner claimed that she was not required to present a specific plan for development in her Measure 37 claim, but she failed to cite any authority as to why a specific plan for development would not be required. Without a specific plan for development, the Board could only read Petitioner's presentation as a plan to subdivide her property. Therefore, the Board's finding that Petitioner failed to establish a restriction in use of her property was supported by the evidence in the record.

This conclusion is made notwithstanding the statements in the Board Order and at the hearing before the Board that Petitioner's claim was "complete." The Board Order noted that Petitioner's claim constituted a "complete 'written demand for compensation' within the meaning of the measure." Rec. at 29. In addition, Mr. Ken Born, a Department of Community Services Planner, testified at the Board hearing on December 7, 2006 that Petitioner's claim was "the most complete, the most comprehensive" claim received at his office. Transcription of Proceedings ("Tr.") at 8. This Court agrees with Respondent that these statements reference only the fact that Petitioner had submitted the proper materials to allow the Board to review her claim. These statements do not speak to the validity of Petitioner's claim. This Court also agrees with Respondent that Petitioner's claim can only be read as a "complete" plan to subdivide property, and, as Petitioner conceded in oral argument before this Court, subdividing property is not a use.

The Board also found that Petitioner failed to establish a reduction in the fair market value of her property because development rights are not transferable. As an initial matter, this Court agrees with Respondent that an unacted upon Measure 37 waiver is not transferable. The statutory language only considers relief to the "owner" and defines "owner" as the "present owner of the property, or any interest therein." ORS 197.352(11)(C). In addition, this Court agrees with the other recent Oregon Circuit Court decisions finding that an unacted upon Measure 37 waiver is not transferable. See *Mathis v. State*, Yamhill County Circuit Court No. CV060308 (June 25, 2007 Letter Opinion); *Jackson County v. All Electors*, Jackson County Circuit Court No. 05-2993-E-3(2) (Jan. 19, 2007 Order); *Crook County v. All Electors*, Crook County Circuit Court No. 05CV0015 (Aug. 1, 2006 Letter Opinion). Petitioner argues that the fair market value analysis requires assumption of transferability, pointing to *Vanderzanden v Land Conservation and Development*, Marion County Circuit Court Nos. 05C19565, 06C17267, 06C18036 (Jan. 8, 2007 Letter Opinion). The court in *Vanderzanden* held that "the public entity must consider what value the property might have if the requisite waiver were granted, and in making this determination must assume that the right to make the specified use of the property may be transferred to another party" under either the doctrine of nonconforming use or the vesting of a right. *Id.* at 4. This Court agrees that in order to conduct a fair market value analysis, one would need to be able to assume transferability. However, as *Vanderzanden* contemplates, when the doctrine of nonconforming use or the vesting of rights cannot be assumed, then transferability cannot be assumed, making the fair market value analysis impossible. *Id.* This is consistent with the notion that an unacted upon waiver cannot be transferred.

In the case at bar, transferability of development rights cannot be assumed for undeveloped subdivided lots. A plan to subdivide and transfer undeveloped lots with unacted upon development rights gained through waiver is invalid because unacted upon Measure 37 waivers are not transferable. In addition, as the Oregon Court of Appeals stated in *Parks v Board of County Commissioners*, "[p]latted but undeveloped land is not normally regarded as a 'use' in zoning law for purposes of establishing a prior nonconforming use." 11 Or App 177, 196, 501 P2d 85, *reh'g den* (1972), *rev den* (1973). The vesting of rights involves a similar analysis. *Clackamas County v. Holmes*, 265 Or 193, 508 P2d 190 (1973). Therefore, neither the doctrine of nonconforming use nor the vesting of rights can be assumed for development rights transferred

with undeveloped subdivided lots. Because Petitioner's concept plan did not include a specific plan for development, it was properly read as a plan to subdivide and transfer the undeveloped property. Petitioner's appraisal erroneously assumed that development rights would be transferred with the undeveloped subdivided property and calculated the value of "building sites" for "future homes." Rec. at 124. It should be noted that the Board Order cites Mr. Bob Alcantara, Senior Appraisal Supervisor with the Multnomah County Division of Assessment and Taxation, as stating that the appraisal was "well written and the estimates of value well supported." Rec. at 30. However, the crucial point is that Mr. Alcantara ultimately concludes that the estimates are based on the invalid assumption that the development rights would be transferable. *Id.* This Court agrees with Respondent that transferability of development rights cannot be assumed for undeveloped subdivided lots. Therefore, the Board's finding that Petitioner failed to establish a reduction in the fair market value of her property was supported by the evidence in the record.

***B. The Board Properly Construed the Applicable Law and Did Not Exceed Its Jurisdiction.***

Petitioner argues that the Board improperly construed the applicable law and exceeded its jurisdiction because it considered the transferability of Petitioner's requested waiver. However, in order to conduct a fair market value analysis, one must be able to consider and assume transferability. *Vanderzanden* at 4. If transferability cannot be assumed, the fair market value analysis cannot be completed. The Board properly construed the applicable law and did not exceed its jurisdiction by considering the transferability of Petitioner's requested waiver. Moreover, as stated above, this Court finds that the Board correctly analyzed the issue of transferability in finding that Petitioner failed to establish a reduction in the fair market value of her property.

***C. The Board's Actions Were Constitutional.***

Petitioner's briefing broadly stated that the Board denied Petitioner her "property rights in violation of the federal and state constitutions" but did not specify which constitutional provisions were violated nor offer any argument on those contentions. Petitioner's Reply to County's Memorandum in Support of Board Order No. 06-207 at 15 (June 7, 2007). When the Court questioned Petitioner's counsel at the hearing about her constitutional argument, counsel briefly stated that the Board's action violated Petitioner's equal protection rights. Because Petitioner did not specify nor cite any authority, it is unclear whether she was referring to the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution or to the similar Privileges and Immunities Clause in Article I, section 20 of the Oregon Constitution, or to both.

Under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, "[n]o state shall \* \* \* deny to any person within its jurisdiction the equal protection of the laws." Under Article I, section 20 of the Oregon Constitution, "[n]o law shall be passed

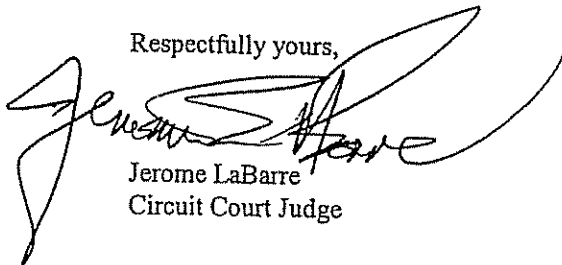
granting to any citizen or class of citizens privileges, or immunities, which, upon the same terms, shall not equally belong to all citizens." Although each constitutional provision requires a different analysis, both require a showing in the record that Petitioner was treated differently than those similarly situated. See *Jones v. Helms*, 452 US 412, 423-24, 101 S Ct 2434, 69 L Ed 2d 118 (1981); *In re Marriage of Crocker*, 157 Or App 651, 655-61, 971 P2d 469 (1998), *aff'd*, 332 Or 42, 22 P3d 759 (2001). The record before this Court does not contain such a showing, and Petitioner has failed to persuade this Court that the Board's actions in this matter were unconstitutional.

### Conclusion

Based upon the foregoing analysis, this Court concludes that the Board's findings and Order were based on substantial evidence in the whole record, the Board properly construed the applicable law and did not exceed its jurisdiction, and the Board's actions were constitutional. Therefore, this Court concludes that in Case No. 0702-01428, Board Order No. 06-207, dated December 14, 2006, should be affirmed. Mr. Madkour, please prepare an Order.

Supplemental briefing is needed on the cross-motions for summary judgment in Case No. 0704-04735 to discuss the effect of this decision on that case and on such motions. My Judicial Clerk, Katie Jo Johnson, will be contacting counsel shortly to set up a time for a telephone conference with this Court to establish a briefing schedule.

Respectfully yours,

A handwritten signature in black ink, appearing to read "Jerome LaBarre", written over a horizontal line.

Jerome LaBarre  
Circuit Court Judge

JLB/kjj

1 **CERTIFICATE OF SERVICE**


2 I certify that on October 9, 2007, I served the foregoing *State Agency Defendants' Reply in*  
3 *Support of Motions for Summary Judgment* upon the parties hereto by the method indicated  
4 below, and addressed to the following:

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