



CIRCUIT COURT OF THE STATE OF OREGON

FOURTH JUDICIAL DISTRICT  
MULTNOMAH COUNTY COURTHOUSE  
1021 S.W. FOURTH AVENUE  
PORTLAND, OR 97204-1123

JERRY B. HODSON  
JUDGE

PHONE (503) 988-5101  
FAX (503) 276-0948  
Jerry.B.Hodson@ojd.state.or.us

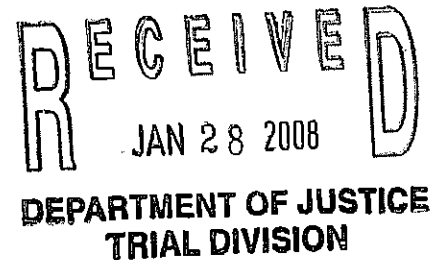
Via Facsimile and U.S. Mail

January 24, 2008

Stephen F. Crew  
Kristian Roggendorf  
O'Donnell, Clark & Crew LLP  
Fremont Place II, Suite 302  
1650 NW Naito Pkwy.  
Portland, Oregon 97209

Stephen L. Madkour  
Deputy County Attorney  
Multnomah County Attorney  
501 SE Hawthorne, Suite 500  
Portland, Oregon 97214

Darsee Staley  
John Geil  
Senior Assistant Attorneys General  
Department of Justice  
1162 Court Street NE  
Salem, Oregon 97301-4096



RE: *Luethe v. Multnomah County, Oregon, et al.*,  
Multnomah County Circuit Court Case No. 0609-09466

Dear Counsel:

As you will recall, I took under advisement the plaintiffs' proposed findings of fact and conclusions of law and the defendants' motions to dismiss based on Measure 49. I am granting defendants' motion to dismiss.

Measure 49 eliminates former section 6 of Measure 37, which gave a landowner a cause of action for just compensation in circuit court. (Measure 49, Section 4.) Measure 49 creates a new framework for resolution of claims and allows for judicial review of an agency decision that is

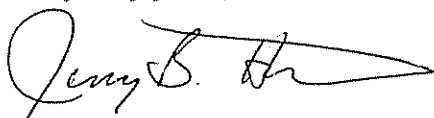
limited to the evidence in the record before the pertinent public entity. (Measure 49, Section 5, 16.) Accordingly, if Measure 49 is applied retroactively to plaintiffs' claims, then the present controversy is moot and should be dismissed.

Plaintiffs contend that as a matter of statutory interpretation Measure 49 does not apply retroactively to their claims, and that if it does, that application is unconstitutional. The language of Measure 49 makes clear that it was intended to be applied retroactively to claims made under Measure 37. Section 2 of Measure 49 states that a "claim" under Measure 49 includes claims filed under Measure 37: "'Claim' means a written demand for compensation filed under (a) ORS 197.352, as in effect immediately before the effective date of this 2007 Act." (Measure 49, Section 2(2).) As stated above, section 4 of Measure 49 eliminates former section 6 of Measure 37, which created a cause of action in circuit court. Section 5 of Measure 49 spells out how claims filed under Measure 37 are dealt with under Measure 49, depending on the location of the property. Plaintiffs argue that although Measure 49 may apply to some Measure 37 claims, it does not apply to Measure 37 claims that have ripened into a "cause of action" under Measure 37. I find nothing in Measure 49 that suggests the distinction posed by plaintiffs, and therefore, conclude that it applies to all claims, including plaintiffs' claims in this case.

I am also unpersuaded by plaintiffs' constitutional objections to the application of Measure 49 to this case. I will specifically address only the arguments that plaintiffs have a vested right under Oregon property law, under the Due Process Clause of the Fourteenth Amendment or under the Takings Clause of the Fifth Amendment. I recognize the seeming unfairness of applying a new law to a party who has relied upon existing law in a pending action. Nonetheless, the Oregon Supreme Court has ruled that the legislature is authorized to retroactively apply statutory amendments to pending cases without running afoul of the state or federal constitutions. Accordingly, no constitutional impediment prevents the retroactive application of Measure 49, and this litigation is now moot.

As a result of my decision on defendants' motion to dismiss, plaintiffs' proposed findings of fact and conclusions of law have become moot as well. At the last hearing, plaintiffs' counsel said that they take the position that they are entitled to attorney fees, even if I grant defendants' motion to dismiss, and they asked for an opportunity to brief this issue. I ask that the parties confer regarding a briefing schedule, keeping in mind the time frame set out in ORCP 68, and confer regarding a proposed form of order and judgment.

Very truly yours,



Jerry B. Hodson  
Circuit Court Judge