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

DALLAS MARCKX and ELAINE
MARCKX,

Plaintiffs,

v.

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

Defendant.

Case No. 05C19654

Honorable Jamese Rhoades

STATE OF OREGON'S PRE-TRIAL MOTION
TO DISMISS OR, ALTERNATIVELY, FOR
JUDGMENT ON THE PLEADINGS (MEASURE
37 COMPENSATION CLAIM)

Oral Argument Requested

UTCR COMPLIANCE

Defendant certifies that it made a good faith effort to confer with petitioners, but the parties were unable to reach agreement.

ORAL ARGUMENT REQUESTED

Defendant requests oral argument on this motion and estimates that 30 minutes will be sufficient. Official court reporting services are requested. The parties have conferred and agree to present argument at a pre-trial conference, in the event the court determines that a pre-trial conference should be held. Alternatively, the parties anticipate that presenting argument immediately prior to trial on plaintiffs' Petition for Judicial Review set for October 25, 2006 at 9:30 am will not unduly delay the start of the trial.

MOTION

Defendant the State of Oregon ("State") moves to dismiss plaintiffs' Measure 37 Claim for Compensation. Alternatively, the State moves for judgment on the pleadings on this claim.

1 Plaintiffs' claim is based on an allegation that the State erred by informing plaintiffs' in its Final
2 Order on plaintiffs' Measure 37 demand that plaintiffs' "property was subject to Statewide Goal
3 3" on the date plaintiffs' acquired the property.

4 Plaintiffs are not entitled to compensation under Measure 37 as a matter of law because
5 (a) the Administrative Procedures Act provides the exclusive procedure for judicial review of
6 state agency orders, (b) the State elected to grant "waiver" relief in lieu of compensation under
7 Measure 37, (c) the alleged error by the State does not affect the relief granted, and (d) the claim
8 misconstrues the Order.

9 In support of this motion, the State relies upon ORCP 21 A(1), 21 A(8), and 21 B, ORS
10 183.480 and 183.484, the Petition for Judicial Review and Measure 37 Compensation Claim and
11 State of Oregon's Amended Answer, the file and records of this case, and the following points
12 and authorities.

13 POINTS AND AUTHORITIES

14 Plaintiffs are property owners in Marion County (Petition, ¶ 1). They submitted a
15 demand to the State in February 2005, seeking relief under Measure 37 (Pet, ¶ 8). The State
16 determined the demand was valid and timely, and opted to grant "waiver" relief in lieu of
17 compensation (Pet, Ex 1). The Department of Land Conservation and Development (DLCD)
18 issued its final agency order to that effect on August 16, 2005 (*id.*).

19 Plaintiffs petitioned for judicial review under the Administrative Procedures Act (APA)
20 (Pet, ¶¶ 10-21). The parties will proceed to trial on stipulated facts on the petition on October
21 25, 2006. The sole issue for trial is whether DLCD erred by stating in the Final Order that
22 statewide land use planning Goal 3 (Agriculture) applied to the property when plaintiffs acquired
23 it in November 1975. Plaintiffs' Measure 37 Compensation Claim is based on same allegation of
24 error in the Final Order, and on a misinterpretation of the terms and effect of the Order (Pet, ¶¶
25 22-26).

1 1. The court lacks subject matter jurisdiction.

2 The APA is the exclusive means to challenge the correctness of state agency orders.
3 ORS 183.480 (2); *Bay River v. Envir. Quality Comm.*, 26 Or App 717, 720 *rev denied*, 276 Or
4 555 (1976); *Ososke v. DMV*, 320 Or 657, 659-60 (1995). Plaintiffs' Measure 37 Compensation
5 Claim is based on the State's "action," that is, the Final Order. Therefore, plaintiffs' sole remedy
6 is their petition for judicial review.

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

18 In *Bay River, supra*, the circuit court granted the plaintiff an injunction and declaratory
19 relief under ORS 28.010 with respect to a subsurface sewage disposal system feasibility
20 permit—a matter within the purview of the Department of Environmental Quality. The Court of
21 Appeals reversed and remanded, ordering the circuit court to vacate the judgments and dismiss
22 the complaint. In its opinion, the Court of Appeals explained:

23 "The Oregon Administrative Procedures Act, ORS 183.310 et seq,
24 establishes a comprehensive pattern for the judicial review of
25 administrative decisions. The various APA statutes governing
26 judicial review provide the **sole and exclusive methods of**
 obtaining judicial review. *School Dist. No. 48 v. Fair Dis. App.*
 Bd., 14 Or App 35, 512 P2d 799 (1973).

1 “This is sufficient answer to Bay River’s contention that since it
2 couched its complaint in equitable terms and sought a declaratory
3 judgment, the circuit court obtained jurisdiction pursuant to ORS
4 28.010. A party cannot ignore the judicial review provisions of the
5 APA in favor of a general equitable or declaratory remedy.” 26 Or
6 App at 720 (emphasis added).

7 In *Clarke Electric, Inc. v. State Highway Division*, 93 Or App 693 (1988), the plaintiff
8 attempted to assert various tort claims under the Oregon Tort Claims Act, ORS 30.265, arising
9 from the Highway Division’s decision not to award the plaintiff a contract to install traffic
10 signals. The Court rejected the plaintiff’s arguments that the APA did not apply and that another
11 statute conferred jurisdiction. 93 Or App at 695-696. The Court also determined that the order
12 was a final order in other than a contested case with a right to challenge the order under the APA.
13 93 Or App at 696-697. Finally, the Court held that the plaintiff could not proceed directly under
14 the OTCA because the Highway Division’s:

15 “* * * alleged liability in tort is premised on a finding that
16 defendant’s order rejecting the bid was improper. That order was a
17 final order in other than a contested case, and the exclusive
18 procedure for review of such an order is under the APA. ORS
19 183.480 (2). See *FOPPO v. County of Marion*, 93 Or App 93, 760
20 P2d 1363 (1988). Consequently, the trial court did not err in
21 granting Division’s motion to dismiss for failure to comply with
22 the APA time limitations for judicial review.” 93 Or App at 697.

23 Plaintiffs’ Measure 37 Compensation Claim presents the same question. The State’s
24 alleged liability is based on the action of DLCD. DLCD is subject to the APA and its orders may
25 be judicially tested only by a petition for APA review. Consequently, plaintiffs’ Measure 37
26 Compensation Claim must be dismissed for lack of jurisdiction.

27 2. Measure 37 gives the State discretion to choose compensation or waiver.

28 Plaintiffs cannot assert a claim for Measure 37 compensation because the State chose to
29 provide relief in the form of not applying land use regulations in lieu of compensation. Measure
30 37 provides no right to compensation at the election of the claimant. Instead, the statute grants
31

1 public entities the option to determine whether to pay compensation or “modify, remove, or not
2 to [sic] apply” land use regulations. ORS 197.352 (8) and (10). Consequently, plaintiffs cannot
3 state a claim for compensation.

4 Oregon adopted Measure 37 through a ballot initiative in 2004. Oregon courts apply the
5 same methodology for interpreting statutes adopted through the initiative process that they apply
6 in construing statutes adopted by the Legislative Assembly. *Stranahan v. Fred Meyer, Inc.*, 331
7 Or 38 (2000); *PGE v. Bureau of Labor and Industries*, 317 Or 606, 612 n 4 (1993). The
8 objective is to discern the intent of those who enacted the law, in this case, the Oregon voters.
9 “The best evidence of the voters’ intent is the text of the provision itself. * * * The context of the
10 language of the ballot measure may also be considered[.]” *Stranahan*, 331 Or at 56 (quoting
11 *Roseburg School Dist. v. City of Roseburg*, 316 Or 374, 378 (1993)).

12 If the text and context of the statute reveal the clear intent of the voters, “further inquiry
13 is unnecessary.” *PGE*, 317 or at 611; *see also Stranahan*, 331 Or at 56.¹ The language and
14 structure of Measure 37 clearly show that the voters intended to give public entities, and not the
15 claimants, the choice between paying compensation and not applying land use regulations. The
16 statute provides:

(8) Notwithstanding any other state statute or the availability of funds
under subsection (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.

* * * * *

(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

¹ The second level of analysis involves review of the legislative history. The history of ballot initiatives includes the explanatory statement in the Voter’s Pamphlet. Measure 37’s explanatory statement supports a plain reading of the statute: “If a property owner proves that a land use regulation 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.*” www.oregon.gov/LCD/MEASURE37/legal_information.shtml#Information_About_the_Election (emphasis added)

1 of funds under this subsection, a metropolitan service district, city, county, or
2 state agency shall have discretion to use available funds to pay claims or to
3 modify, remove, or not apply a land use regulation or land use regulations
4 pursuant to subsection (6) of this section. If a claim has not been paid within two
5 years from the date on which it accrues, the owner shall be allowed to use the
6 property as permitted at the time the owner acquired the property.

7 ORS 197.352 (8) and (10). Section 8 generally grants the public entities to which a
8 demand for compensation is submitted the option to pay or provide alternate relief. Section 10
9 makes it clear that the option is wholly within the discretion of the public entities and specifically
10 applies to claims under Section 6 of the statute (Pet, ¶¶ 22-26).

11 In this case, The Final Order provides:

12 “In lieu of compensation under Measure 37, the State of Oregon will not
13 apply the following laws to Dallas and Elaine Marckx’s division of their property
14 or to the establishment a single family dwelling on each lot or parcel created:
15 applicable provisions of Statewide Planning Goal 3 that took effect after
16 November 6, 1975, applicable provisions of ORS 215.263, 215.780 and 215.284
17 enacted after November 6, 1975; and applicable provisions of OAR 660, division
18 33, enacted after November 6, 1975. These land use regulations will not apply to
19 Dallas and Elaine Marckx’s use of their property only to the extent necessary to
20 allow the claimants a use permitted at the time they acquired the property.”

21 Pet, Ex 1, p 1. There is no dispute that DLCD opted not to apply certain land use regulations in
22 lieu of paying compensation to plaintiffs. Plaintiffs are not entitled to compensation.

23 3. The applicability of Goal 3 does not affect the relief granted.

24 Plaintiffs allege that the State continues to apply, or intends to continue applying
25 restrictive land use regulations more than 180 days after plaintiffs submitted their demand (¶¶
26 23-24). However, plaintiffs do not allege that any regulations that should have been waived
27 were not waived. The court’s conclusion as to the applicability of Goal 3 will not change the
28 nature or scope of relief to which plaintiffs were entitled, and received, under Measure 37.

29 If a public entity opts not to apply restrictive land use regulations, Measure 37 requires
30 that the waiver allow the claimant a use permitted at the time of acquisition. In other words, the
31 public entity waives land use regulations enacted or enforced after acquisition. If a regulation
32 applied at the time of acquisition, then it need not be waived.

1 In this case, the State waived applicable provisions of Statewide Planning Goal 3 *that*
2 *took effect after November 6, 1975*. The applicable provisions of Goal 3 in effect on November
3 6, 1975 are not subject to waiver under Measure 37. If Goal 3 applied, a “use permitted” at the
4 time of acquisition is a use permitted under Goal 3. If Goal 3 did not apply, then Goal 3 will not
5 affect the determination of a “use permitted” at the time of acquisition. In either situation, the
6 relief already granted to plaintiffs is the relief to which they are entitled under Measure 37.

7 4. Plaintiffs’ Measure 37 Compensation Claim misconstrues the Order.

8 Plaintiffs allege that the Final Order:

9 “* * * wrongfully determined that Goal 3 directly applied to the subject
10 property *in such a way as to prohibit* plaintiffs’ ability to divide the property into
tracts as small as 5 acres and to place dwellings on each newly created tract* * *.”

11 Pet, ¶ 23 (emphasis added). Measure 37 does not require the State to make the determinations
12 that plaintiffs attribute to the Order. Moreover, the Final Order did not make any determination
13 regarding the way in which Goal 3 would be applied or what it would prohibit (Pet, Ex 1).

14 In the Order, the State provided accurate information concerning application of Goal 3.
15 In an endnote, the Order acknowledges that the post-waiver process will be within the
16 jurisdiction of Marion County in the first instance (Ex 1, p 3). The Order attempts to provide
17 guidance to the claimants, and the county, by providing references for use in subsequent
18 determinations of how Goal 3 applies. However, the State’s Order does not compel a specific
19 outcome should plaintiffs choose to file an application for a particular land use.

20 **CONCLUSION**

21 The State issued a Final Order on plaintiffs’ Measure 37 demand. Therefore, the sole and
22 exclusive remedy for alleged errors relating to that demand is a petition for judicial review. The
23 court lacks jurisdiction over a claim for compensation and plaintiffs cannot state a claim for
24 compensation.

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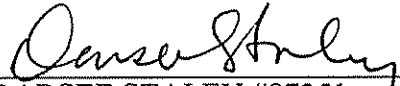
1 Plaintiffs' claim for compensation also is without merit under the terms of Measure 37.
2 The statute permits the State, at its option, to pay compensation or not apply certain land use
3 regulations. The State elected to waive, not pay.

4 Plaintiffs' claim also fails on its own terms. The allegations of the claim misstate the
5 terms and effect of the Final Order. Whether or not the State correctly stated that Goal 3 applied,
6 the Order to "not apply" regulations enacted after plaintiffs acquired the property was proper and
7 the only relief to which plaintiffs were entitled under Measure 37.

8
9 DATED this 4th day of October, 2006.

10 Respectfully submitted,

11 HARDY MYERS
12 Attorney General

13 
14 _____
15 DARSEE STALEY #87351
16 Senior Assistant Attorney General
17 Trial Attorney
18 Tel (503) 947-4700
19 Fax (503) 947-4792
20 darsee.staley@doj.state.or.us
21 Of Attorneys for State of Oregon

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CERTIFICATE OF SERVICE

I certify that on October 4, 2006, I served the foregoing *State of Oregon's Pre-trial Motion to Dismiss or, Alternatively, for Judgment on the Pleadings* upon the parties hereto by the method indicated below, and addressed to the following:

Wallace W Lien
Wallace W Lien PC
1775 32nd PI NE Ste A
Salem, OR 97303

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



 DARSEE STALEY #87351
 Assistant Attorney General
 Trial Attorney
 Tel (503) 947-4700
 Fax (503) 947-4792
 darsee.staley@doj.state.or.us