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

KATHRYN McCALLIE, BETTE J.  
SUDERMAN, and BARBARA L.  
THOMPSON, trustee of the Carkuff  
Revocable Living Trust,

Petitioners,

v.

OREGON DEPARTMENT OF LAND  
CONSERVATION & DEVELOPMENT, an  
Agency of the State of Oregon,

Respondent,

and

OREGON DEPARTMENT OF  
ADMINISTRATIVE SERVICES, an Agency  
of the State of Oregon

Respondent.

Case No. CV060341

RESPONDENTS' REPLY TO PETITIONERS'  
OPPOSITION TO STATE'S SUMMARY  
JUDGMENT MOTION

**INTRODUCTION**

The parties have filed cross-motions for summary judgment in this Measure 37 case. In this memorandum, the State replies briefly to two points raised in petitioners' opposition to the State's summary-judgment motion.

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1 those regulations “to allow the owner to use the property *for a use permitted at the time the*  
2 *owner acquired the property.*” ORS 197.352(8) (emphasis added). Thus, a waiver – by its very  
3 definition – can date back only to the time at which the claimant’s ownership interest was such  
4 that the claimant had a right to “use” the property.

5 Here, even if petitioners became owners of “any interest” in the property when they were  
6 named Trust beneficiaries in 1983, they had no right to *use* the property until years later, when  
7 they became successor trustees. Because there was no “use permitted” to petitioners until they  
8 became successor trustees, the State can give a waiver dating back only to that point in time. If  
9 the State granted a waiver back to 1983, it would be violating Measure 37’s mandate to “not  
10 apply” land use regulations only to the extent necessary to allow the owner to use the property  
11 “for a use permitted” on the date of acquisition.

12 **B. It does not matter whether petitioners’ interest as beneficiaries properly is**  
13 **characterized as contingent or as vested; all that matters is that petitioners’ interest**  
14 **as beneficiaries gave them no right to use the Trust property.**

15 In their opposition memorandum, petitioners contend that they had a vested interest in the  
16 Trust property as beneficiaries. Again, the State disagrees for the reasons set out in its opening  
17 memorandum. In short, the petitioners’ interest was not vested because the Trust grantors could  
18 have revoked the Trust at any time. *See Jones v. Department of Revenue*, 9 OTR 335 (1983)  
19 (holding that beneficiaries’ interests in property held in a revocable trust vested when the grantor  
20 died).

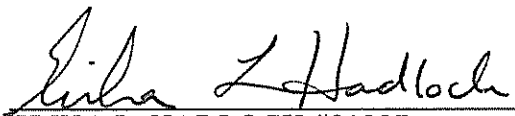
21 But this Court need not resolve the parties’ dispute regarding what label appropriately  
22 may be attached to the interest petitioners held as beneficiaries. For purposes of determining  
23 whether the State gave the petitioners a correct waiver date, all that matters is that petitioners had  
24 no right to “use” the property when they were mere beneficiaries; they acquired that authority  
25 only when they became successor trustees. As explained above and in the State’s opening  
26 memorandum, the fact that petitioners lacked a right to use the property when they were

1 beneficiaries means: (1) that they were not "owners" of the property at that time; and (2) even if  
2 they were owners beginning in 1983, the State correctly granted a waiver dating back only to the  
3 later date on which petitioners became successor trustees because it was only then that they  
4 obtained a right "to use the property." ORS 197.352(8).

5 DATED this 22<sup>nd</sup> day of February, 2007.

6 Respectfully submitted,

7 HARDY MYERS  
8 Attorney General


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16 Of Attorneys for Respondents

1 **CERTIFICATE OF SERVICE**

2 I certify that on February 22<sup>nd</sup>, 2007, I served the foregoing RESPONDENTS' REPLY  
3 TO PETITIONERS' OPPOSITION TO STATE'S SUMMARY JUDGMENT MOTION upon the  
4 parties hereto by the method indicated below, and addressed to the following:

5  
6 David B. Smith  
7 Attorney at Law  
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10 Attorney for Petitioners

HAND DELIVERY  
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