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

6 MULTNOMAH COUNTY, a public body,

7 Petitioner,

8 v.

9 STATE OF OREGON, by and through
10 DEPARTMENT OF ADMINISTRATIVE
11 SERVICES and DEPARTMENT OF LAND
12 CONSERVATION AND DEVELOPMENT,

12 Defendant,

13 and

14 FRED HALL,

15 Intervenor.

Case No. 0512-13144

DEFENDANT'S REPLY IN SUPPORT OF
MOTION FOR SUMMARY JUDGMENT

(Justiciability Issue)

Hearing:

Date: July 28, 2006

Time: 1:30 p.m.

Judge Douglas Beckman

16 Defendant the State of Oregon submits this Reply in response to petitioner Multnomah
17 County's Response to the State's Motion for Summary Judgment.

18 1. Leave to amend should be denied.

19 The County requests that it be granted leave to amend its Petition in the event the court
20 finds that the Petition does not present a justiciable issue (Resp, pp 1-2). As discussed further
21 below, the State's motion demonstrates that the Petition does not raise an issue involving present
22 facts. As a result, the County cannot show it has standing and its claims are not ripe.

23 Specifically, the County's allegations of an "adverse effect" on the County are dependent
24 on future events—*i.e.*, the County's ultimate decision (if any) on Hall's demand to the County
25 and "implementation" of the State's Final Order. The State's Order does not require the County
26 to accept the State's interpretation of Measure 37 and does not affect the County's decision on

1 Hall's county demand. Implementation of the State's Order has not occurred, and the County's
2 fears concerning the effect of implementation are speculative.

3 The County makes no showing that these defects can be cured by amendment. The
4 request for leave to amend should be denied.

5 2. The County lacks standing.

6 The County seeks APA judicial review, for which it must show that it is "adversely
7 affected or aggrieved" by the State's Order. ORS 183.480 (1), (2); 183.484 (3). Nothing in the
8 Order presently affects the County. Rather, the County's Petition alleges the County is adversely
9 affected because "implementation" of the Order "will violate" the County's land use plan and
10 regulations (Pet, ¶¶ 6). The Order specifically states that it does not negate Hall's obligation to
11 seek any permits or Measure 37 waivers from other public entities, including the County (Ex 1, p
12 2, ¶ 3). The Order also expressly provides that "any use of the property by the claimant" remains
13 subject to, among other things, "any laws enacted or enforced by a public entity other than" the
14 state agencies that issued the Order (*id.*, ¶ 4).

15 The County half-heartedly contends that it has standing as a "party" to the agency
16 proceeding (Resp, p 3, lines 10-14 and fn 2; p 4, lines 6-7 and fn 3). In footnote 2, the County
17 quotes the statute clearly stating that "party" standing relates to contested case proceedings under
18 ORS 183.482. There is no dispute that this matter is "other than" a contested case governed by
19 ORS 183.484 (Pet, ¶ 3). In footnote 3, the County mentions that its involvement in Hall's state
20 demand was submission of a letter. The County does not argue, and there is no basis to find, that
21 the County meets any of the 3 criteria for contested case party standing (*compare* fns 2 and 3).

22 There is no genuine dispute concerning whether the County is presently adversely
23 affected by the State's Order. It is not. As alleged in Petition, the County argues that "the
24 development authorized in the State's waiver *will violate* the County's" land use plan and
25 regulations (Resp, p 5, lines 16-18; emphasis added). The County has not, and cannot, allege
26 that it *is adversely affected or aggrieved* by the Order.

1 In addition and as explicitly stated in the Order, the Order does not “authorize”
2 development of Tax Lot 100 absent all legally necessary permits, approvals, licenses, and
3 Measure 37 waivers from other public entities that enforce applicable land use regulations. The
4 County claims it is such an entity, and it has not waived its regulations.¹

5 The cases on which the County relies, *Pen-Nor, Inc. v. Oregon Dept. of Higher*
6 *Education*, 87 Or App 305 (1987) and *People for Ethical Treatment v. Inst. Animal Care*, 312 Or
7 95 (1991) (“*PETA*”), do not support the County’s assertion of standing (Resp, pp 4-5).² In *Pen-*
8 *Nor* court found that the plaintiff, an unsuccessful bidder, was within the class for whose benefit
9 the statutory bidding scheme was enacted. 87 Or App at 310. “Accordingly,” the court said, the
10 plaintiff “has a recognizable and substantial interest in the proper administration of the scheme.”
11 *Pen-Nor* does not hold that anyone with an “interest in the proper interpretation and application
12 of a statute” has standing (Resp, p 4, lines 8-9).

13 *PETA* analyzes APA standing in terms of three “factors.” The County meets none of
14 them. The County does not allege and makes no showing that it (1) “*has suffered* an injury to a
15 substantial interest resulting *directly* from the challenged governmental action;” or (2) is
16 “furthering an interest that the legislature expressly wished to have considered;” or (3) has “such
17 a personal stake in the outcome of the present controversy as to assure concrete adverseness to
18 the proceeding.” 312 Or at 101-104 (emphasis added).

19 The Supreme Court noted in *PETA* that the petitioner’s “zeal makes it sufficiently
20 adversarial,” but zeal alone does not provide the requisite “personal stake” in the outcome. In
21 this case, the State’s Order does not legally affect any “personal stake” of the County. Its
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24 ¹ So far as the record shows, Multnomah County has not issued a decision on Hall’s Measure 37 demand to the
County.

25 ² The County also cites *League of Oregon Cities v. State of Oregon*, 334 Or 645, 662 (2002), which analyzes
26 standing for purposes of the Declaratory Judgment Acts, not the APA (Resp, p 6, lines 1-3). In any event, the claim
asserted by local governments in that case was a direct challenge to a statute with an “officially estimated” fiscal
impact. Here, the County challenges the Order and makes no showing of the “fiscal impact” of the Order.

1 concern over perceived mis-interpretations of Measure 37 is not a “legally cognizable interest in
2 the present case.” *Id.*

3 3. The County’s claims are not ripe.

4 The County contends its claims are ripe because, under *League of Oregon Cities v. State*
5 *of Oregon*, 334 Or 645 (2002), the test is whether the “result” can be “forecast” (Resp, p 8, lines
6 2-7). *League of Oregon Cities* involved a declaratory judgment action challenging Ballot
7 Measure 7. The ripeness issue concerned whether the Measure would become law, because the
8 votes had not been “canvassed” and passage had not been “proclaimed.” 334 Or at 663. The
9 record included the county vote tallies and, consequently, the court found “the ultimate, official
10 result clearly can be forecasted.” *Id.*

11 The ripeness issues raised in the State’s motion are different in kind. No preliminary
12 determination exists—merely awaiting “official” confirmation—on Hall’s demand to County, or
13 Hall’s pending lawsuit, or Hall’s not yet filed land use application. Thus, even if the County’s
14 interpretation of *League of Oregon Cities* were plausible, there is no dispute that the significant
15 “results” cannot be forecast with the kind of certainty available in *League of Oregon Cities*.

16 The County also contends that ripeness for purposes of Measure 37 requires only
17 “plausible and concrete” allegations of harm, citing *MacPherson v. DAS*, 340 Or 117, 124 (2006)
18 (Resp, p 8, lines 8-20). *MacPherson*, like *League of Oregon Cities*, involved a constitutional
19 challenge to the validity of a statute and was brought under the Declaratory Judgments Act, not
20 the APA. The Supreme Court’s *MacPherson* opinion does not address any of the issues actually
21 raised in the present case, including the terms of the DLCDC Order at issue or the status of
22 pending demands against other public entities.³

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24 _____
25 ³ *MacPherson* concerned a neighboring landowner, whose proximity to the property made physical effects plausible
26 and concrete. The County is a public entity that enforces land use regulations in the best interests of its constituency
as a whole; it lacks a concrete presence or interest in any specific property. Indeed, the County’s argument is
premised on public policy concerns which it fails to explain in any plausible or concrete way (Resp, p 7, line 21-p 8,
line 2).

1 Even if the County's interpretation of *MacPherson* were reasonable, the County's
2 allegations are more accurately described as vague and contingent. The County's response to the
3 State's motion does not shed light on what plausible or concrete adverse affect on the County
4 presently flows from the State's Order. Instead, the County recites its conclusions leaving out
5 any explanation of present facts that might support them.

6 For example, the County contends, "the consequences are immediate" and "the issues
7 raised * * * involve real and present facts" and the State's Order "results in a real and immediate
8 impact on the County (Resp, p 7, lines 4-14). The County also asserts "[t]he impact of the Order
9 has real, present ramifications" (Resp, p 8, lines 3-4). But, the State is left to guess what those
10 alleged consequences, impacts, and ramifications are.

11 4. The County's theory of "adversity" also depends on future events.

12 The County apparently contends that it has demonstrated adversity because the State's
13 Order authorizes violation of county law, erodes county interests, and transfers liability to the
14 County (Resp, pp 8-10). In the first instance, the County concedes that the State's Order does
15 not "compel the violation" of county land use regulations (Resp, p 9, lines 19-20). The County
16 argues that the Order "authorizes the violation" and "erodes" the county's protected interests, but
17 fails to identify any language in the Order that authorizes violation of any law.

18 The County wonders whether the State waiver "begs the question of whether the County
19 is now without authority to enforce its own ordinances" (Resp, p 9, line 24-26). But, the County
20 fails to identify how this speculation is at issue in the case. No allegation or claim in the Petition
21 raises the issue. Moreover, the County eventually will act on its own decision concerning its
22 authority if and when it decides to issue a decision on Hall's demand, is compelled to action by a
23 court judgment, or undertakes review of a use application submitted by Hall.

24 The County also contends that the State's Order amounts to a determination of Hall's
25 demand to the County, an "abrogation" of the State's responsibility under Measure 37, and
26 "transfer" of "all responsibility and liability" to the County (Resp, p 10, lines 7-14). The County

1 does not state what determination the State's Order makes on Hall's demand, however, and does
2 not support with authority or argument its conclusion that "this particular waiver * * * in theory
3 and in practice, resolv[es] Hall's claims against Multnomah County" (*id.*). Similarly, the County
4 offers no support for its contentions of abrogation and transfer.


5 5. The State's Motion should be granted.

6 The County's claims are not justiciable because the Petition is not based on present facts
7 or adverse effects arising from the State's Order. In its Response, the County fails to support its
8 bare assertions that its claims are ripe and the parties adverse. The Petition should be dismissed
9 and judgment entered for the State.

10 DATED this 25th day of July, 2006.

11 Respectfully submitted,

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CERTIFICATE OF SERVICE


I certify that on July 25, 2006, I served the foregoing *Defendant's Reply in Support of Motion for Summary Judgment* upon the parties hereto by the method indicated below, and addressed to the following:

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