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

ROY A. PONDELICK and TANA	)	Case No.: 06-CV-0622
PONDELICK, Trustees of the Roy A.	)	
Pondelick and Tana Pondelick	)	ORDER ON MOTIONS TO STRIKE, TO
Revocable Living Trust and NEAL A.	)	QUASH, TO DISMISS, AND FOR
PONDELICK, Trustee of the Neal A.	)	ADDITIONAL TIME
Pondelick Revocable Trust,	)	
	)	
Petitioners,	)	
	)	
vs.	)	
	)	
JOSEPHINE COUNTY and STATE OF	)	
OREGON, DEPARTMENT OF LAND	)	
CONSERVATION AND DEVELOPMENT,	)	
DEPARTMENT OF ADMINISTRATIVE	)	
SERVICE,	)	
	)	
Respondents.	)	

This matter came before the court for hearing on November 21, 2006. The court issued a letter opinion on January 12, 2007. Steven Rich, Josephine County Counsel, submitted a proposed order incorporating the court's findings. On objections to that proposed order, a second hearing was held on April 9, 2007. The court having heard arguments of counsel, having reviewed the pleadings submitted by the parties, and otherwise being fully informed, the court now finds as follows:

1. As against Josephine County, the statutory writ of review under ORS Chapter 34 is the only relief Petitioners may apply for in

1 this matter. To allow Petitioners to plead alternative forms of  
2 action could result in inconsistent and incompatible forms of relief.  
3 In that regard, the arguments of Respondent Josephine County are well  
4 taken.

5 2. The statutory measures of Chapter 34 do not provide for  
6 awards of attorney fees, costs, damages, or compensation. The only  
7 relief permitted under the statutory provisions governing the writ of  
8 review consists of an order of this court to (a) affirm, modify,  
9 reverse or annul the decision or determination reviewed; (b) award  
10 restitution if necessary; or (c) direct the inferior court, officer,  
11 or tribunal to proceed according to the decision of this court.  
12 Petitioners may not plead against the County remedies or relief not  
13 provided for by ORS Chapter 34.  
14

15 3. Respondent Josephine County has withdrawn the Motion to  
16 Quash, the Motion to Dismiss and the Motion for Additional Time.  
17 Those motions are therefore not before the court in this matter.

18 4. Respondent Josephine County's First, Second, Third, Fourth  
19 and Fifth Motions to Strike are well taken and should be granted in  
20 some particulars.  
21

22 5. As against the State of Oregon, Petitioners' only relief is  
23 afforded by the Administrative Procedures Act, ORS Chapter 183.  
24 Petitioners may not plead against the State remedies or relief other  
25 than the relief provided by the APA.

26 6. The Oregon Court of Appeals decision in Corey v DLCD, 210 Or

1 App 542 (2007) raises significant concerns about the procedure to be  
2 followed by this court in the APA claim against the State. On  
3 reconsideration, the Court of Appeals adhered to its earlier opinion  
4 in Corey, finding that jurisdiction to hear the review under APA  
5 standards was exclusive in the Court of Appeals. Corey v DLCD, 212  
6 Or App 536 (2007). It appears that there is a substantial question  
7 as to whether this court has jurisdiction to hear the APA claim  
8 asserted by Petitioners against the State of Oregon. That question  
9 cannot be resolved by this court, but must await the final resolution  
10 of Corey v DLCD, either in the Court of Appeals or on review by the  
11 Oregon Supreme Court.  
12

13 7. In the event that the appellate court ultimately decides  
14 that jurisdiction is in fact exclusive in that court to hear APA  
15 claims like the one asserted in this case, the APA claim asserted by  
16 Petitioners herein should be transferred to the Court of Appeals for  
17 their resolution. If the appellate court should decide that the  
18 Circuit Courts properly have jurisdiction to hear these matters, the  
19 case should proceed in the Circuit Court on the APA claim.  
20

21 8. In any event, the APA claim and the writ of review must  
22 proceed separately and may not be heard together.

23 NOW, THEREFORE, IT IS HEREBY ORDERED that Respondent Josephine  
24 County's First, Second, Third, Fourth and Fifth Motions to Strike are  
25 granted in the following particulars:

26 (a) Petitioners' third claim for relief is stricken in its

entirety;

(b) Petitioners' fourth claim for relief is stricken in its entirety;

(c) Petitioners' third, fifth prayers for relief are stricken from the petition;

(d) Petitioners' fourth prayer is stricken to the extent attorney fees against the State and Josephine County are claimed by Petitioners under ORS 197.352.

(e) Paragraph 9 of the petition is stricken in its entirety.

(f) This matter shall proceed to hearing in this court on the issues permitted by ORS 34.040 and raised by the petition, and no others.

(g) Petitioners' claim against the State of Oregon under the APA is stayed and held in abeyance until a final appellate judgment is issued in Corey v DLCD as cited above.

(h) Petitioners are granted leave to file an amended pleading consistent with this Order pursuant to ORCP 25A.

Dated: August 27<sup>th</sup>, 2007.

lsl LINDI L. BAKER  
CIRCUIT COURT JUDGE

Submitted By:  
Steven E. Rich, OSB #80099  
Attorney for Respondent  
Josephine County



Certified True Copy Of The Original  
Dated This AUG 29 2007  
Trial Court Administrator  
By: OSHOW