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

6 NORMAN and RADAH RALSTON, Husband
7 and Wife, MARY GOTTLIEB, and BILLIE
8 ANN BYBEE,

9 Plaintiff,

10 v.

11 WASHINGTON COUNTY, STATE OF
12 OREGON, by and through its DEPARTMENT
13 OF ADMINISTRATIVE SERVICES; LAND
14 CONSERVATION AND DEVELOPMENT
15 COMMISSION and DEPARTMENT OF
16 LAND CONSERVATION AND
17 DEVELOPMENT,

18 Defendants.

Case No. 06C18522

DEFENDANT STATE OF OREGON'S REPLY
IN SUPPORT OF MOTIONS TO DISMISS

19 **1. Plaintiffs' interpretation of Section 6 of Measure 37 is inconsistent with the**
20 **administrative process created by the statute.**

21 Plaintiffs argue that Section 6 creates a cause of action that depends solely on the text of
22 Section 6 (Response, pp 2 and 4). Tracking the language of Section 6,¹ plaintiffs contend: "if a
23 land use regulation that has the effect of decreasing the fair market value of the Plaintiffs'
24 property continues to apply to the Plaintiffs' property, the Plaintiffs are entitled to file an action
25 in this Court for compensation equal to the decrease in fair market value of the Plaintiffs'
26 property" (Resp, p 2, lns 12-15). Accordingly, plaintiffs would have the court interpret Section 6

¹ "If a land use regulation continues to apply to the subject property more than 180 days after the present owner of the property has made written demand for compensation under this section, the present owner of the property, or any interest therein, shall have a cause of action for compensation under this section in the circuit court in which the real property is located, and the present owner of the real property shall be entitled to reasonable attorney fees, expenses, costs, and other disbursements reasonably incurred to collect the compensation " ORS 197 352 (6).

1 as “the exclusive remedy for a property owner who makes a claim for compensation” (Resp, p 4,
2 Ins 11-12). This interpretation makes Section 6 so sweeping that it negates the clear intent of the
3 statute to require public entities in the first instance to decide the merits of compensation claims
4 and choose the relief to be provided.

5 The objective of statutory interpretation is to discern the intent of those who enacted the
6 law, in this case, the Oregon voters. “The best evidence of the voters’ intent is the text of the
7 provision itself. * * * The context of the language of the ballot measure may also be
8 considered[.]” *Roseburg School Dist. v. City of Roseburg*, 316 Or 374, 378 (1993) (citations
9 omitted). Consideration of the text and context of the statutory provision at issue is the first level
10 of statutory interpretation. *PGE v. Bureau of Labor and Industries*, 317 Or 606, 610-612
11 (1993).²

12 Section 6 cannot be interpreted in isolation because it depends critically upon the context
13 of Measure 37 as a whole. For example, Section 6 does not specify which land use regulations
14 are at issue in the “cause of action,” or even against whom the action may be asserted. In
15 context, however, the intent of Section 6 reasonably can be ascertained.

16 Measure 37 requires property owners to submit a demand for compensation to public
17 entities (§§ 4, 5, 6), and permits public entities to adopt “procedures for the processing of
18 claims” (§ 7). Measure 37 also provides that public entities have the option, in their discretion,
19 either to pay compensation or grant alternate “waiver” relief to a property owner who submits a
20 valid written demand (§§ 8, 10). In this context, Section 6 plainly functions as a secondary
21 remedy in the event a public entity fails to process a demand and choose the type of relief to be
22 granted—within 180 days. Furthermore, the availability of a court action and the provision for
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24 ² Legislative history is considered at the second level, “[i]f, but only if, the intent of the legislature is not clear from
25 the text and context inquiry.” *PGE, supra*. At the third level, “[i]f, after consideration of text, context, and
26 legislative history, the intent of the legislature remains unclear, then the court may resort to general maxims of
statutory construction to aid in resolving the remaining uncertainty.” *Id.*

1 attorney fees creates an incentive for the public entity to decide claims and to do so within 180
2 days.

3 **2. Plaintiffs' Complaint challenges the Final Order.**

4 In its Final Order, the State determined that Radah Ralston acquired the property for
5 purposes of a Measure 37 claim upon dissolution of the Gottlieb Family LLC in September 2005.
6 If the State correctly determined the acquisition date, then its legal conclusion is also correct—
7 Radah Ralston is not entitled to compensation under Measure 37.³ Plaintiffs' Complaint alleges
8 that the State erred in its determination of the acquisition date and by denying relief.

9 ORS 183.480 (2) provides that “[j]udicial review of final orders of agencies *shall be*
10 *solely* as provided by ORS 183.482, 183.484, 183.490 and 183.500” (emphasis added). Plaintiffs
11 do not contend that the Final Order is not a final order, and offer no authority that some final
12 orders are not subject to the exclusivity mandate of the APA. Moreover, nothing in the text,
13 context or overall structure of Measure 37 negates the applicability of the APA. *See Fairbanks*
14 *v. Bureau of Labor and Industries*, 323 Or 88, 93-94 (1996) (declining to insert into a statute a
15 provision exempting it from the APA).

16 Because plaintiffs chose not to seek APA review, and the time for filing a petition for
17 review has expired, plaintiffs are bound by the agencies' determination of Radah Ralston's
18 acquisition date for purposes of her Measure 37 demand against the State. The court lacks
19 jurisdiction to alter the Final Order. The Complaint should be dismissed.

20 **3. Section 7 of Measure 37 confirms the applicability of the APA.**

21 Plaintiffs argue that if the APA applies, Section 7 would be “omitted” from the statute
22 (Resp, p 3, ln 22 – p 4, ln 7). Section 7 provides:

23 “A metropolitan service district, city, or county, or state agency may adopt
24 or apply procedures for the processing of claims under this section, *but in no*
event shall these procedures act as a prerequisite to the filing of a compensation

25 ³ No land use regulations adopted since September 2005 restrict use of the property or reduce its fair market value.
26 The Complaint does not allege otherwise.

1 *claim under subsection (6) of this section, nor shall the failure of an owner of*
2 *property to file an application for a land use permit with the local government*
3 *serve as grounds for dismissal, abatement, or delay of a compensation claim under*
4 *subsection (6) of this section.” (Plaintiffs’ emphasis, Resp, p 3, lns 24-26.)*

5 The “procedures” that are not “a prerequisite” to a Section 6 claim are the “procedures
6 for the processing of claims,” if any are adopted by a metropolitan service district, city, county or
7 state agency. The State’s Department of Administrative Services adopted such procedures at
8 OAR 125-145-0010 to 125-145-0105. The APA, however, is a state statute, not a procedure
9 adopted by a state agency pursuant to Section 7 for the purpose of Measure 37 claims processing.

10 Plaintiffs offer no authority that the APA does not apply to final orders based on statutes
11 that do not directly cross-reference the APA. In *Oregon Health Care Assn. v. Health Div.*, 329
12 Or 480, 486 (1999), the Supreme Court explained that the proper analysis is whether the
13 challenged order is within the purview of the APA. The Court said, “ORS 183.480 identifies the
14 complete range of permissible bases for challenging in Oregon courts the decisions of an agency
15 to which the APA applies.” Both DAS and DLCD are such agencies. Measure 37 created an
16 administrative process that results in final state agency orders. Those orders are subject to
17 exclusive review under the APA.

18 **4. Plaintiffs misconstrue the State’s jurisdictional argument.**

19 The State does not contend that the circuit court would lack jurisdiction to decide a
20 legitimate Measure 37 “cause of action” under the statute. If a public entity failed to decide a
21 claim within 180 days, a cause of action would accrue. Or, if “a metropolitan service district,
22 city, or county, or state agency” adopted and relied upon procedures that purported to extend the
23 180 days period, a cause of action would accrue because such claims processing procedures
24 cannot be made a prerequisite to a Section 6 claim.

25 In cases where a state agency timely determines the merits of Measure 37 demand,
26 however, no claim accrues. The State’s interpretation does not “carve out an exception” for
ownership issues or any other element of a valid written demand (Resp, p 4, lns 8-10). Rather,

1 the State contends that the administrative process created by Measure 37 is subject to existing
2 state laws which it neither repealed nor excluded.

3 The appellate decisions uniformly holding that the APA is the exclusive procedure for
4 challenging state agency orders present the same question raised by plaintiffs' Complaint here:
5 was the state agency right or wrong. Plaintiffs' reliance on *Premier Technology v. Oregon State*
6 *Lottery*, 136 Or App 124 (1995) is misplaced (Resp, p 4, ln 15 – p 5, ln 11). The plaintiffs'
7 breach of contract claim in *Premier* raised a different issue.

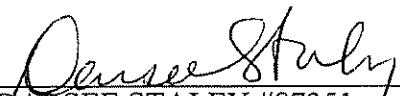
8 In *Premier*, the Court of Appeals found that an agency letter terminating a contract was
9 not alleged to be right or wrong, but to have a certain effect as an element of an independent
10 cause of action—for breach of contract. The court acknowledged that “[t]he sole avenue for
11 review of the validity of final agency orders is through the APA. ORS 183.480(2).” 136 Or App
12 at 131. But, the court concluded, the plaintiffs' breach of contract claim “does not challenge the
13 validity of the order; it claims that the order communicated the fact of the breach of the terms of
14 the contract.” *Id.* at 132.

15 Here, plaintiffs allege that Radah Ralston is entitled to relief under Measure 37. The
16 Final Order concluded she is not. The sole issue in dispute is whether the Final Order is correct,
17 and that issue must be resolved by means of APA review.

18 DATED this 30 day of November, 2006.

19 Respectfully submitted,

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21 Attorney General

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DISMISS

DS1/elv/TRIQ2674

1 **CERTIFICATE OF SERVICE**


2 I certify that on November 30, 2006, I served the foregoing *Defendant State of Oregon's*
3 *Reply in Support of Motions to Dismiss* upon the parties hereto by the method indicated below,
4 and addressed to the following:

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