

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

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

ROBERT L. RIEMENSCHNEIDER,

Plaintiff,

v.

CROOK COUNTY, a political subdivision of
the State of Oregon; and STATE OF
OREGON, acting by and through the
Department of Land Conservation and
Development,

Defendants.

Case No. 06CV0074

DEFENDANT STATE OF OREGON'S
MOTIONS TO DISMISS; MEMORANDUM OF
POINTS AND AUTHORITIES (ORCP 21A (1)
AND (8))

Oral Argument by Telecommunication Requested

ORAL ARGUMENT REQUESTED

Defendant, the State of Oregon, requests oral argument by telecommunication on its
Motions to Dismiss, and estimates that 30 minutes will be required. Official court reporting
services are requested. The office of counsel for the State is more than 25 miles from the
courthouse.

INTRODUCTION

Plaintiff submitted a Measure 37 demand to the State in January 2005, asserting a right to
compensation for reduction in fair market value of his interest in real property in Crook County.
The State determined that plaintiff is not entitled to compensation under Measure 37 and, on July
11, 2005, issued its final agency order denying plaintiff's demand. In December 2006, plaintiff
filed his Complaint here, asking the court to determine that he is entitled to \$22,000,000 in
Measure 37 compensation for reduction in fair market value of his real property interest. A copy
of Measure 37, codified at ORS 197.352, is attached for the court's convenience.

1 **MOTIONS TO DISMISS**

2 The State moves the court to dismiss plaintiff's claim for compensation on the following
3 grounds:

4 **Motion No. 1 (Court lacks subject matter jurisdiction – ORCP 21 A (1))**

5 The Complaint asserts one claim—for compensation under Measure 37. The Court lacks
6 subject matter jurisdiction over this claim for two related reasons:

7 1. The Administrative Procedures Act (APA) is the exclusive means to challenge the
8 correctness of state agency orders. ORS 183.480 (2); *Bay River v. Envir. Quality Comm.*, 26 Or
9 App 717, 720 *rev denied*, 276 Or 555 (1976). The State determined that plaintiff is not entitled
10 to Measure 37 compensation, and his Complaint seeks compensation. Thus, plaintiff's claim
11 denies the validity of the order but does not request APA review. Therefore, as a matter of law,
12 this court lacks subject matter jurisdiction over the Complaint.

13 2. Plaintiff cannot cure the defect in his pleading. Even if plaintiff alleged an APA claim,
14 the court still lacks subject matter jurisdiction because the Complaint was not filed within 60
15 days of the agency's final order. ORS 183.484 (2). Plaintiff filed the Complaint more than 17
16 months after service of the order. Therefore, the Court does not have, and cannot obtain,
17 jurisdiction, and the Complaint should be dismissed.

18 **Motion No. 2 (Failure to state a claim – ORCP 21 A (8))**

19 Plaintiff cannot state a claim for compensation under Measure 37 because he is not
20 entitled to compensation. Without a modification or amendment of Final Order M 119330,
21 plaintiff cannot establish that any land use regulations continue to apply to the property in
22 violation of Measure 37. In addition, the Complaint lacks ultimate facts showing that plaintiff
23 presently owns a qualifying interest in real property that is restricted by land use regulations that
24 have the effect of reducing the fair market value of his alleged interest.

25

26

1 In support of these motions, the State relies upon ORCP 21 A (1) and A (8), ORS
2 197.352, the APA, the files and record of this case, the Declaration of Heather Awlasewicz filed
3 concurrently, and the following Points and Authorities.

4 **POINTS AND AUTHORITIES**

5 **I. Measure 37 Background**

6 A property “owner” under Measure 37 “is the present owner of the property, or any
7 interest therein.” ORS 197.352 (11) (C). An owner qualifies for Measure 37 relief if: (1) a
8 public entity enacts or enforces a “land use regulation” after December 2, 2004, that (2) restricts
9 the owner’s use of his interest and (3) has the effect of reducing the fair market value of the
10 interest. ORS 197.352 (1).¹ Section 3 of Measure 37 provides that certain land use regulations
11 shall not be a basis for a written demand under Section 1, notably regulations in effect when the
12 owner acquired his interest. ORS 197.352 (3) (E).

13 For regulations enacted prior to the effective date of Measure 37 (December 2, 2004),
14 Section 5 requires owners to submit written demands by December 2, 2006 or the date on which
15 a land use regulation is applied “as an approval criteria [sic]” on a specific land use application,
16 whichever is later. If an owner submits a timely, valid written demand, the public entity has the
17 option to pay compensation or to “modify, remove, or not to [sic] apply” land use regulations to
18 the extent necessary “to allow the owner to use the property for a use permitted at the time the
19 owner acquired the property.” ORS 197.352 (8); *see also* ORS 197.352 (10).²

20 Measure 37 permits public entities to adopt procedures for processing claims. ORS
21 197.352 (7). The State Department of Administrative Services (DAS) adopted procedural rules,
22 found at OAR 125-145-0010 to 125-145-0105. These rules cover such issues as minimum

23 _____
24 ¹ “If a public entity enacts or enforces a new land use regulation or enforces a land use regulation enacted prior to
25 December 2, 2004, that restricts the use of private real property *or any interest therein* and has the effect of reducing
the fair market value of the property, *or any interest therein*, then the owner of the property shall be paid just
compensation.” (Emphasis added)

26 ² Allowing the owner to use the property in a way that would otherwise be prohibited by land use regulations is
commonly referred to as granting a Measure 37 “waiver.”

1 requirements for a claim against the State, notice and third party participation, and the contents
2 of the administrative record.

3 When DAS receives a claim, it provides written notice of the claim to neighboring
4 landowners, certain neighborhood or community organizations, and anyone who requests notice.
5 OAR 125-145-0080. This provision is consistent with the notice provisions of ORS 215.416
6 regarding notice of permits. Persons receiving notice, or any other person, may submit
7 comments, evidence and information within ten days. OAR 125-145-0080 (2), (3).

8 DAS initially reviews Measure 37 claims and forwards them to the appropriate state
9 agency, *i.e.* the “regulating entity” that appears to have enacted or enforced a relevant land use
10 regulation. OAR 125-145-0090. The regulating entity, in this case the Department of Land
11 Conservation and Development (DLCD), investigates and analyzes the claim and issues a draft
12 report. OAR 125-145-100 (1). The draft report provides the State’s preliminary determination
13 on the necessary elements of the claim, including timeliness of the demand, ownership, the land
14 use regulations that are the basis of the claim, the effect of relevant land use regulations on the
15 property’s fair market value, and applicable exemptions, if any. OAR 125-145-100 (2).

16 The draft report is made public on the internet and copies are mailed to the claimant, and
17 any persons who submitted comments or requested notice. OAR 125-145-100 (1). After a ten-
18 day comment period, and based in part on the comments received, DLCD and DAS issue a final
19 report and order. OAR 125-145-100 (3)-(6). The final orders are served on any persons who
20 received copies of the draft report or submitted comments on the draft report. DLCD also makes
21 its final orders public by posting them on its website.³

22 Section 6 of Measure 37 provides that “[i]f a land use regulation continues to apply to the
23 subject property more than 180 days after * * * written demand for compensation * * *, the
24 present owner * * * shall have a cause of action for compensation under this section in the circuit
25

26 ³ A copy of Final Order M 119330 is attached as Exhibit 3 to the Declaration of Awlasewicz

1 court.” ORS 197.352 (6). This Section essentially imposes a 180 day deadline for the State to
2 decide claims. In the event the State fails to act within 180 days, a claimant can bring his
3 demand to court. If the State renders a decision on a demand within 180 days, no cause of action
4 accrues.

5 **II. Plaintiff’s Administrative Claim**

6 Plaintiff submitted his Measure 37 claim to the state on January 18, 2005 (*see* Compl, ¶
7 5; Decl of Awlasewicz, Ex 3, p 3). DLCDC issued a draft report, received and considered
8 comments from plaintiff and others, and issued its Final Order and Report on July 11, 2005 (Decl
9 of Awlasewicz, ¶ 5 and Ex 3, pp 2, 3). The State denied plaintiff’s claim because DLCDC
10 determined that the State has not enforced land use regulations that restrict plaintiff’s use of his
11 interest in the property (*id.*, pp 1, 3, 6, 7).

12 **III. The Administrative Procedures Act**

13 Plaintiff alleges that he is entitled to compensation under Measure 37. By Final Order M
14 119330, the State determined that plaintiff is not entitled to compensation. Therefore, the
15 Complaint is a challenge to the correctness of the Final Order. The APA sets forth the exclusive
16 method for such a challenge. ORS 183.480 (2); *Bay River, supra*, 26 Or App at 720; *Ososke v.*
17 *DMV*, 320 Or 657, 659-60 (1995).

18 Plaintiff had 60 days from the mailing date of the order to ask the circuit court to review
19 the State’s findings and conclusions and determine whether the State properly denied plaintiff’s
20 demand for compensation. The APA, at ORS 183.484 (2), provides that “[p]etitions for review
21 *shall* be filed within 60 days *only* following the date the order is served” (emphasis added).

22 Timely filing of a petition for judicial review is a jurisdictional requirement, as the Court of
23 Appeals explained in *G.A.S.P. v. Environmental Quality Commission*, 201 Or App 362, 366
24 (2005):

25

26

1 ORS 183.484(1) confers on certain circuit courts jurisdiction for judicial review
2 of orders in other than contested cases. ORS 183.484(2) then provides that
3 '[p]etitions for review shall be filed within 60 days only following the date the
4 order is served.' The timely filing of a petition for judicial review of agency
5 action is a jurisdictional requirement. *Ososke v. DMV*, 320 Or 657, 659-60, 891
6 P2d 633 (1995). Accordingly, the failure to comply with that requirement is a
7 matter that cannot be waived and may be raised for the first time on appeal. As
8 we held in *Hood River County v. Stevenson*, 177 Or App 78, 81, 33 P3d 325
9 (2001), '[a] jurisdictional question need not be preserved by a party, much less
10 raised at a specific point in a proceeding, for a court to consider it. Courts have an
11 obligation to consider jurisdictional issues *sua sponte*[.]

12 DLCD mailed the Final Order on July 11, 2005 (Decl of Awlasewicz, ¶ 5). This court
13 has jurisdiction to determine whether the agency erred only if plaintiff filed for judicial review
14 by September 9, 2005. The Complaint in this case was filed on December 8, 2006, well after the
15 60 day period had expired (OJIN #1). Consequently, the Court lacks jurisdiction and the
16 Complaint should be dismissed.

17 **IV. Plaintiff's Measure 37 Complaint**

18 **A. The Complaint seeks relief from Final Order M 119330.**

19 In his Measure 37 Complaint in this court, plaintiff alleges that DLCD continues to
20 enforce regulations that diminish the value of his property (Compl, ¶ 6). In its Final Order, the
21 State concluded that "neither the Land Conservation and Development commission [nor DLCD]
22 have enforced laws subject to Measure 37 that restrict the claimant's use of private real
23 property."⁴ Plainly, plaintiff contends that the State's order is wrong.

24 Plaintiff chose not to challenge the Final Order under the APA.⁵ Consequently, plaintiff
25 cannot establish that the State's findings and conclusions are wrong. The Oregon Court of
26 Appeals consistently has held that the APA establishes the exclusive method to challenge

27 ⁴ Because use restrictions are an essential element of a Measure 37 claimant's right to relief, the State was not
28 required to further evaluate plaintiff's demand. *See*, Ex 3, p 3, 6, 7

29 ⁵ The Final Order included a statement outlining plaintiff's right to judicial review under ORS 184 484. Decl of
30 Awlasewicz, Ex 3, p 2; *see also* Order of Dismissal by the Court of Appeals in *Hoff v DLCD*, CA A129414, holding
31 that the circuit court has jurisdiction of DLCD's Final Orders in Measure 37 cases as orders in "other than contested
32 cases" and that the Court of Appeals did not (copy attached)

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

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

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

21 “This is sufficient answer to Bay River’s contention that since it
22 couched its complaint in equitable terms and sought a declaratory
23 judgment, the circuit court obtained jurisdiction pursuant to ORS
24 28.010. A party cannot ignore the judicial review provisions of the
25 APA in favor of a general equitable or declaratory remedy.” 26 Or
26 App at 720 (emphasis added).⁶

27 In *Clarke Electric, Inc. v. State Highway Division*, 93 Or App 693 (1988), the plaintiff
28 attempted to assert various tort claims under the Oregon Tort Claims Act, ORS 30.265, arising
29 from the Highway Division’s decision not to award the plaintiff a contract to install traffic

⁶ Also, in *Bay River*, as here, the complaint was untimely 26 Or App at 722, fn 2.

1 signals. The Court rejected the plaintiff's arguments that the APA did not apply and that another
2 statute conferred jurisdiction. 93 Or App at 695-696. The Court also determined that the order
3 was a final order in other than a contested case with a right to challenge the order under the APA.
4 93 Or App at 696-697. Finally, the Court held that the plaintiff could not proceed directly under
5 the OTCA because the Highway Division's:

6 “* * * alleged liability in tort is premised on a finding that
7 defendant's order rejecting the bid was improper. That order was a
8 final order in other than a contested case, and the exclusive
9 procedure for review of such an order is under the APA. ORS
10 183.480 (2). See *FOPPO v. County of Marion*, 93 Or App 93, 760
 P2d 1363 (1988). Consequently, the trial court did not err in
 granting Division's motion to dismiss for failure to comply with
 the APA time limitations for judicial review.” 93 Or App at 697.

11 Plaintiff's purported cause of action directly under Measure 37 presents the same
12 question. The State's alleged liability is based on the action of the DLCD. DLCD is subject to
13 the APA and its orders may be judicially tested only by a timely petition for APA review.
14 Plaintiff does not seek that review, and in any event cannot now make a timely petition.

15 B. The Complaint fails to allege ultimate facts.

16 Even if plaintiff were not barred from asserting a compensation claim as a matter of law,
17 the Complaint lacks ultimate facts sufficient to demonstrate that plaintiff's demand under
18 Measure 37 is valid. Plaintiff does not allege any facts supporting a finding of present ownership
19 of a real property interest; he asserts only the conclusion that he qualifies as an owner under
20 Measure 37 (Compl, ¶ 1 (“[p]laintiff has an interest;” “[p]laintiff is an owner”)). Similarly,
21 plaintiff alleges only the conclusion he wishes the court to reach concerning land use regulations
22 restricting his use of his interest in real property (Compl, ¶ 3 (the State “enforces land use
23 regulation effecting the real property [sic]”)). Nor does the Complaint allege any facts
24 supporting the conclusion that these unspecified land use regulations reduced the fair market
25

1 value of his unspecified interest (Compl, ¶ 8 (“[p]laintiff has suffered a loss in value of the
2 property because of the regulations”)).

3 Legal conclusions alone are insufficient to state a claim under ORCP 18A. Rather,
4 plaintiff must allege facts which support the elements of his purported claim. *Huang v.*
5 *Claussen*, 147 Or App 330, 332 *rev den* 325 Or 438 (1997) (on a motion to dismiss, the court
6 “disregard[s] any allegations that are conclusions of law”).

7 Plaintiff also fails to allege that the State did not respond to his demand within 180 days
8 (Compl, ¶ 5). Plaintiff alleges that “Defendants did not pay compensation or modify, remove or
9 waive the land use regulations” (Compl, ¶ 6), but does not and cannot allege that the State did
10 not act. A circuit court compensation claim does not accrue unless the State fails to decide a
11 claim within 180 days. ORS 197.352 (6).

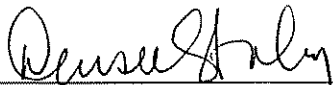
12 CONCLUSION

13 The gravamen of plaintiff’s Complaint is that the State was wrong to conclude that
14 plaintiff is not entitled to compensation under Measure 37. The APA provides the exclusive
15 procedure for plaintiff to dispute that conclusion. Plaintiff did not seek judicial review within the
16 time allowed and, consequently, this court lacks jurisdiction to overturn the State’s decision.

17 The Complaint fails to state ultimate facts sufficient to constitute a claim. Moreover,
18 plaintiff cannot state a claim for compensation because, as a matter of law, he is not entitled to
19 compensation. The Complaint should be dismissed.

20 DATED this 14 day of January, 2007.

21 Respectfully submitted,
22 HARDY MYERS
23 Attorney General

24 
25 _____
26 DARSEE STALEY #87351
Senior Assistant Attorney General
Tel (503) 947-4700
Fax (503) 947-4792
darsee.staley@doj.state.or.us

Land Conservation and Development, other state agencies and local governments shall give the goals equal weight in any matter in which the goals are required to be applied.

(2) The commission and the department shall consider and recognize regional diversity and differences in regional needs when making or reviewing a land use decision or otherwise applying the goals. [1981 c.748 §20; 1987 c.729 §1; 1995 c.521 §2]

197.350 Burden of persuasion or proof in appeal to board or commission. (1) A party appealing a land use decision or limited land use decision made by a local government to the board or Land Conservation and Development Commission has the burden of persuasion.

(2) A local government that claims an exception to a goal adopted by the commission has the burden of persuasion.

(3) There shall be no burden of proof in administrative proceedings under ORS chapters 195, 196 and 197. [1981 c.748 §10a; 1983 c.827 §43; 1991 c.817 §26]

197.352 Compensation for loss of value due to land use regulation. The following provisions are added to and made a part of ORS chapter 197:

(1) If a public entity enacts or enforces a new land use regulation or enforces a land use regulation enacted prior to December 2, 2004, that restricts the use of private real property or any interest therein and has the effect of reducing the fair market value of the property, or any interest therein, then the owner of the property shall be paid just compensation.

(2) Just compensation shall be equal to the reduction in the fair market value of the affected property interest resulting from enactment or enforcement of the land use regulation as of the date the owner makes written demand for compensation under this section.

(3) Subsection (1) of this section shall not apply to land use regulations:

(A) Restricting or prohibiting activities commonly and historically recognized as public nuisances under common law. This subsection shall be construed narrowly in favor of a finding of compensation under this section;

(B) Restricting or prohibiting activities for the protection of public health and safety, such as fire and building codes, health and sanitation regulations, solid or hazardous waste regulations, and pollution control regulations;

(C) To the extent the land use regulation is required to comply with federal law;

(D) Restricting or prohibiting the use of a property for the purpose of selling pornography or performing nude dancing. Nothing in this subsection, however, is intended to affect or alter rights provided by the Oregon or United States Constitutions; or

(E) Enacted prior to the date of acquisition of the property by the owner or a family member of the owner who owned the subject property prior to acquisition or inheritance by the owner, whichever occurred first.

(4) Just compensation under subsection (1) of this section shall be due the owner of the property if the land use regulation continues to be enforced against the property 180 days after the owner of the property makes written demand for compensation under this section to the public entity enacting or enforcing the land use regulation.

(5) For claims arising from land use regulations enacted prior to December 2, 2004, written demand for compensation under subsection (4) shall be made within two years of December 2, 2004, or the date the public entity applies the land use regulation as an approval criteria to an application submitted by the owner of the property, whichever is later. For claims arising from land use regulations enacted after December 2, 2004, written demand for compensation under subsection (4) shall be made within two years of the enactment of the land use regulation, or the date the owner of the property submits a land use application in which the land use regulation is an approval criteria, whichever is later.

(6) 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.

(7) A metropolitan service district, city, or county, or state agency may adopt 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 claim under subsection (6) of this section, nor shall the failure of an owner of property to file an application for a land use permit with the local government serve as grounds for dismissal, abatement, or delay of a compensation claim under subsection (6) of this section.

(8) Notwithstanding any other state statute or the availability of funds under sub-

A

section (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.

(9) A decision by a governing body under this section shall not be considered a land use decision as defined in ORS 197.015 (10).

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

(11) Definitions - for purposes of this section:

(A) "Family member" shall include the wife, husband, son, daughter, mother, father, brother, brother-in-law, sister, sister-in-law, son-in-law, daughter-in-law, mother-in-law, father-in-law, aunt, uncle, niece, nephew, stepparent, stepchild, grandparent, or grandchild of the owner of the property, an estate of any of the foregoing family members, or a legal entity owned by any one or combination of these family members or the owner of the property.

(B) "Land use regulation" shall include:

(i) Any statute regulating the use of land or any interest therein;

(ii) Administrative rules and goals of the Land Conservation and Development Commission;

(iii) Local government comprehensive plans; zoning ordinances, land division ordinances, and transportation ordinances;

(iv) Metropolitan service district regional framework plans, functional plans, planning goals and objectives; and

(v) Statutes and administrative rules regulating farming and forest practices.

(C) "Owner" is the present owner of the property, or any interest therein.

(D) "Public entity" shall include the state, a metropolitan service district, a city, or a county.

(12) The remedy created by this section is in addition to any other remedy under the Oregon or United States Constitutions, and is not intended to modify or replace any other remedy.

(13) If any portion or portions of this section are declared invalid by a court of competent jurisdiction, the remaining portions of this section shall remain in full force and effect. [2005 c.1]

EXPEDITED LAND DIVISIONS

197.360 "Expedited land division" defined; applicability. (1) An expedited land division:

(a) Is an action of a local government that:

(A) Includes land that is zoned for residential uses and is within an urban growth boundary.

(B) Is solely for the purposes of residential use, including recreational or open space uses accessory to residential use.

(C) Does not provide for dwellings or accessory buildings to be located on land that is specifically mapped and designated in the comprehensive plan and land use regulations for full or partial protection of natural features under the statewide planning goals that protect:

(i) Open spaces, scenic and historic areas and natural resources;

(ii) The Willamette River Greenway;

(iii) Estuarine resources;

(iv) Coastal shorelands; and

(v) Beaches and dunes.

(D) Satisfies minimum street or other right-of-way connectivity standards established by acknowledged land use regulations or, if such standards are not contained in the applicable regulations, as required by statewide planning goals or rules.

(E) Creates enough lots or parcels to allow building residential units at 80 percent or more of the maximum net density permitted by the zoning designation of the site.

(b) Is a land division that:

(A) Will create three or fewer parcels under ORS 92.010; and

(B) Meets the criteria set forth for an action under paragraph (a)(A) to (D) of this subsection.

(2) An expedited land division as described in this section is not a land use decision or a limited land use decision under ORS 197.015 or a permit under ORS 215.402 or 227.160.

(3) The provisions of ORS 197.360 to 197.380 apply to all elements of a local gov-

Replies
Due 11/19/05 ?

00

00

660005AEV023605

✓ OGF
✓ EHT

IN THE COURT OF APPEALS OF THE STATE OF OREGON

CHARLES HOFF,
Petitioner,
v.
DEPARTMENT OF LAND CONSERVATION
AND DEVELOPMENT,
Respondent.

Agency No. M 119114
CA A129414
ORDER OF DISMISSAL

Comments
& Docketed

Before Wollheim, P.J., Brewer, C.J., and Schuman, J.

Petitioner has petitioned for judicial review of a joint order of the Department of Administrative Services (DAS) and the Department of Land Conservation and Development (DLCD) determining not to apply certain land use regulations to petitioner's parcel of land in lieu of paying compensation under Ballot Measure 37. Respondent has moved for a determination of whether the court has jurisdiction of the order on the ground that the order is an order in other than a contested case and, therefore, jurisdiction lies in the circuit court, not the Court of Appeals. Respondent further requests that, if the court determines that the court does not have jurisdiction of the order, the judicial review be dismissed. Lastly, respondent requests a determination whether the circuit court of Washington County or of Clackamas County has jurisdiction to review the order.

The motion for a determination of jurisdiction is granted. The court determines that the order is an order in other than a contested case, that the circuit court has jurisdiction of judicial review of the order, and that this court does not. On that ground, the court dismisses the judicial review in this court.

The parties have not briefed the question of which circuit court has jurisdiction of a petition for judicial review of a joint DAS/DLCD order in other than a contested case relating to property apparently located in Clackamas County. Moreover, petitioner already has filed actions in the circuit courts of both Washington County and Clackamas County relating to the order; therefore, there is no need for this court to transfer the judicial review to a circuit court under ORS 14.165. Respondent's request to determine which circuit court has jurisdiction of the judicial review of the joint DAS/DLCD order is denied.

Judicial review dismissed.

JAN 17 2006
Date

Robert Wollheim
Robert Wollheim, Presiding Judge

DEC 17 2005

ATTACHMENT
B

SALEM

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

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

ROBERT L. RIEMENSCHNEIDER,

Plaintiff,

v.

CROOK COUNTY, a political subdivision of
the State of Oregon; and STATE OF
OREGON, acting by and through the
Department of Land Conservation and
Development,

Defendants.

Case No. 06CV0074

DECLARATION OF HEATHER AWLASEWICZ

I, Heather Awlasewicz, do declare and say:

1. I have been employed by the State of Oregon in the Department of Land Conservation and Development (DLCD) since December 2004. I have provided administrative support to the Measure 37 Division since October 2005, and currently act as the Measure 37 Operations Coordinator. I make this declaration based on my personal knowledge.
2. On July 11, 2005, I was responsible for mailing the Final Order and Final Staff Report and Recommendation for Measure 37 claim number M119330 (Riemenschneider).
3. Attached hereto are true and correct copies of the Certificate of Mailing that I prepared (identified as Exhibit 1), the list of persons and addresses to which the mailing was sent (Exhibit 2), and the Final Order and Final Staff Report and Recommendations (Exhibit 3).
4. At the request of Darsee Staley, Senior Assistant Attorney General, I reviewed the originals of the attached Exhibits in the DLCD's files on January 18, 2007. The


1 Certificate of Mailing (Ex 1) is incomplete because it does not state that the Final Order
2 was mailed along with the Final Staff Report and Recommendations.

3 5. The Final Order and Final Staff Report and Recommendations (Ex 3) were both mailed,
4 by me, on July 11, 2005, to the list of addressees (Ex 2).

5 I HEREBY DECLARE THAT THE ABOVE STATEMENT IS TRUE TO THE BEST
6 OF MY KNOWLEDGE AND BELIEF, AND THAT I UNDERSTAND IT IS MADE FOR USE
7 AS EVIDENCE IN COURT AND IS SUBJECT TO PENALTY FOR PERJURY.

8 DATED this 18th day of January, 2007.

9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26


HEATHER AWLASEWICZ

Department of Land Conservation and Development
635 Capitol St NE, Suite 150
Salem, OR 97301

CERTIFICATE OF MAILING

I certify that I served M119330 Riemenschneider Final Staff Report and Recommendations and Final Report on:

See Attached List

by following indicated method or methods:

by **mailing** a full, true and correct copy in a sealed, first-class postage-prepaid envelope, addressed to the person(s) listed above, and deposited with the United States Postal Service at Salem, Oregon on the date set forth below.

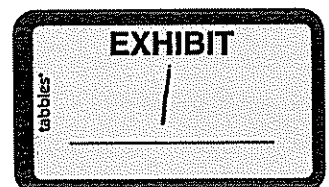
by **hand delivering** a full, true and correct copy to the person(s) listed above, on the date set forth below.

by **faxing** a full, true and correct copy to the person(s) at the fax number(s) shown above, on the date set forth below.

DATED this 11th day of July, 2005.

Name: Barbara Aulasewicz

Title: Office/Rules Support Specialist



7/11/2005

M119330 RIEMENSCHNEIDER (826)

EDWARD FITCH
BRYANT, EMERSON & FITCH
PO BOX 457
REDMOND OR 97756

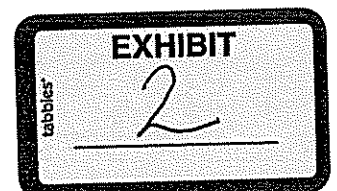
MARK RADABAUGH
EMPIRE CORPORATE PARK
20300 EMPIRE AVE STE B-1
BEND OR 97701

PAT WHEELER
CIAC
12090 ROLLING HILLS RD
MONMOUTH OR 97361

BILL ZELENKA, PLANNING DIRECTOR
CROOK COUNTY COURTHOUSE
300 E 3RD ST RM 11
PRINEVILLE OR 97754-1990

GINNY GUSTAFSON, AAG
DEPARTMENT OF JUSTICE
1162 COURT STREET NE
SALEM OR 97301-4095

JIM JOHNSON, LAND USE PLANNING COORDINATOR
OREGON DEPT OF AGRICULTURE
635 CAPITOL ST NE STE 100
SALEM OR 97301-2532



BEFORE THE DEPARTMENT OF ADMINISTRATIVE SERVICES, THE
DEPARTMENT OF LAND CONSERVATION AND DEVELOPMENT OF THE
STATE OF OREGON

IN THE MATTER OF THE CLAIM) FINAL ORDER
FOR COMPENSATION UNDER) CLAIM NO. M 119330
BALLOT MEASURE 37 (CHAPTER 1,)
OREGON LAWS 2005) OF)
Robert Riemenschneider, CLAIMANT)

Claimant(s): Robert Riemenschneider (the Claimant)

Property: Tax Lots 1210 and 1210A01, T.15S, R.15E, Section 4, 9, 10,14, 15, 16,
22 W.M., Crook County (the Property)

Claim: The demand for compensation and any supporting information received
from Robert Riemenschneider by the State of Oregon (the Claim).

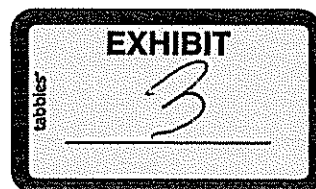
Robert Riemenschneider submitted the Claim to the State of Oregon under Ballot Measure 37 (2004) (Oregon Laws 2005, Chapter 1) (hereafter, Measure 37). Under OAR 125-145-0010 *et seq.*, the Department of Administrative Services (DAS) referred the Claim to the Department of Land Conservation and Development (DLCD) as the regulating entity. This order is based on the record herein, including the Findings and Conclusions set forth in the Final Staff Report and Recommendation of DLCD (the DLCD Report) attached to and by this reference incorporated into this order.

ORDER

The Claim is denied as to laws administered by DLCD and the Land Conservation and Development Commission (LCDC) for the reasons set forth in the DLCD Report.

This Order is entered by the Director of the DLCD as a final order of DLCD and the Land Conservation and Development Commission under Measure 37, OAR 660-002-0010(8), and OAR chapter 125, division 145, and by the Deputy Administrator for the State Services Division of the DAS as a final order of DAS under Measure 37, OAR chapter 125, division 145 and ORS chapter 293.

FINAL ORDER



FOR DLCD AND THE LAND
CONSERVATION AND DEVELOPMENT
COMMISSION:


Lane Shetterly, Director

DLCD

Dated this 11th day of July, 2005.

FOR the DEPARTMENT OF
ADMINISTRATIVE SERVICES:


Dugan Petty, Deputy Administrator

DAS, State Services Division

Dated this 11th day of July, 2005.

NOTICE OF RIGHT TO APPEAL OR OTHER JUDICIAL RELIEF

You are entitled, or may be entitled, to the following judicial remedies:

1. Judicial review under ORS 293.316: Judicial review under ORS 293.316 may be obtained by filing a petition for review within 60 days from the service of this order. Judicial review under ORS 293.316 is pursuant to the provisions of ORS 183.482 to the Court of Appeals.
2. Judicial review under ORS 183.484: Judicial review under ORS 183.484 may be obtained by filing a petition for review within 60 days from the service of this order. A petition for judicial review under ORS 183.484 may be filed in the Circuit Court for Marion County and the Circuit Court in the county in which you reside.
3. A cause of action under Oregon Laws 2005, chapter 1 (Measure 37 (2004)): A present owner of the property, or any interest therein, may file a cause of action in the Circuit Court for the county where the property is located, if a land use regulation continues to apply to the subject property more than 180 days after the present owner made a written demand for compensation.

(Copies of the documents that comprise the record are available for review at the Department's office at 635 Capitol Street NE, Suite 150, Salem, Oregon 97301-2540)

**BALLOT MEASURE 37 (CHAPTER 1, OREGON LAWS 2005)
CLAIM FOR COMPENSATION**

OREGON DEPARTMENT OF LAND CONSERVATION AND DEVELOPMENT

**Final Staff Report and Recommendation
July 11, 2005**

STATE CLAIM NUMBER: M119330

NAME OF CLAIMANT: Robert Riemenschneider

MAILING ADDRESS: P O. Box 457
Redmond, Oregon 97756

IDENTIFICATION OF PROPERTY: Township 15S, Range 15E, Section 4, 9, 10,
14, 15, 16, 22 Tax Lots 1210 and 1210AO1,
Crook County

OTHER INTEREST IN PROPERTY: Sheldon Arnett
John Arnett

DATE RECEIVED BY DAS: January 18, 2005

180-DAY DEADLINE: July 17, 2005

I. CLAIM

Robert Riemenschneider, the claimant, seeks compensation in the amount of \$3,400,000 to \$5,900,000 for the reduction in fair market value as a result of certain land use regulations that are alleged to restrict the use of certain private real property. The claimant desires compensation or the right to divide the subject property into two-acre parcels "more or less", and allow the owners to build access roads to the parcels. The property contains 1,425.68 acres of land located near Prineville. (See claim.)

II. SUMMARY OF STAFF RECOMMENDATION

Based on the findings and conclusions set forth below, the Department of Land Conservation and Development (the department) has determined that the claim is not valid because neither the Land Conservation and Development Commission (the Commission) nor the department have enforced laws subject to Measure 37 that restrict the claimant's use of private real property. Based on this determination, the department does not make any further evaluation or determination on the merits or substance of the claim. (See the complete recommendation in Section VI. of this report.)

III. COMMENTS ON THE CLAIM

Comments Received

On March 15, 2005, pursuant to OAR 125-145-0080, the Oregon Department of Administrative Services (DAS) provided written notice to the owners of surrounding properties. According to DAS, no written comments, evidence or information were received in response to the 10-day notice.

IV. TIMELINESS OF CLAIM

Requirement

Ballot Measure 37, Section 5, requires that a written demand for compensation be made:

1. For claims arising from land use regulations enacted prior to the effective date of the measure (December 2, 2004), within two years of that effective date or the date the public entity applies the land use regulation as an approval criteria to an application submitted by the owner, whichever is later; or
2. For claims arising from land use regulations enacted after the effective date of the measure (December 2, 2004), within two years of the enactment of the land use regulation, or the date the owner of the property submits a land use application in which the land use regulation is an approval criteria, whichever is later.

Findings of Fact

The claim was submitted to DAS on January 18, 2005, for processing under OAR 125, Division 145. The claim identifies Crook County's exclusive farm use (EFU) zoning, and all regulations enacted since 1985, as the basis for this claim. Only laws that were enacted prior to December 2, 2004, the effective date of Measure 37, are the basis for this claim. (See citations of statutory and administrative rule history of the Oregon Revised Statutes and Oregon Administrative Rules.)

Conclusions

The claim has been submitted within two years of December 2, 2004, the effective date of Measure 37, based on land use regulations enacted prior to December 2, 2004, and is therefore timely filed.

V. ANALYSIS OF CLAIM

1. Ownership

Ballot Measure 37 provides for payment of compensation or relief from specific laws for "owners" as that term is defined in the Measure. Ballot Measure 37, Section 11(C) defines "owner" as "the present owner of the property, or any interest therein."

Findings of Fact

According to the claim, Robert Riemenschneider, the claimant, and Ronald L. Riemenschneider (father) acquired the subject property, approximately 1,100 acres zoned EFU and 300 acres zoned Airport Obstructions (AO1), as tenants in common on July 29, 1985. Mr. Riemenschneider provided a warranty deed and a title report dated August 6, 1985, to substantiate that acquisition date.

On September 23, 2004, Robert Riemenschneider sold subject property to Sheldon and John Arnett. The same day, Robert Riemenschneider leased the property from Sheldon and John Arnett, with an option to buy. (See Bargain and Sale deed and lease agreement in claim file.)

Conclusions

The claimant, Robert Riemenschneider, acquired the subject property on July 29, 1985. However, on September 23, 2004, he terminated his ownership when he sold the property to John and Sheldon Arnett. He subsequently leased the property back with an option to buy. The lease constitutes a new ownership interest with a new acquisition date. The claimant is an “owner” of the property as that term is defined in section 11(C) of Measure 37. The terms of the September 23, 2004 lease establish the claimant’s current interest in the property.

2. The Laws that are the Basis for the Claim

In order to establish a valid claim, Section 1 of Ballot Measure 37 requires, in part, that a law must restrict the claimant’s use of private real property in a manner that reduces the fair market value of the property relative to how the property could have been used at the time the claimant or a family member acquired the property.

Findings of Fact

The claim does not clearly identify a specific law or regulation that restricts the claimant’s use of the subject property. The claim states that laws or regulations generally “restricts the ability of the owners to develop the property consistent with the dimensional standards and usage allowed in 1985.” The claim filed with Crook County more clearly seeks to waive the EFU designation because “the owners intend to divide this into smaller parcels with nonfarm dwellings as there are no agricultural activities in the area.” In a cover letter to Crook County, Ed Fitch, attorney for the claimant, further identifies his client’s objectives as being “restrict[ed by] the ability of the applicant [sic] to subdivide this property into parcels of two acres more or less and allowing the owners to build access roads to the parcels.”

A May 27, 2005, letter from Mr. Fitch provides additional direction with regard to regulation that is alleged to affect this property. With regard to the 1,100 acres zoned EFU, Mr. Fitch additionally cites “revisions in the state statutes (e.g. ORS 203 and 205)” as regulations for which a waiver is sought. He also seeks waiver of Goal 11, Public Facilities Planning.

With regard to the 300 acres zoned (AO1), he requests a waiver of “all state regulations, including those enacted by the Oregon Department of Transportation through the Aeronautics Division that would effect the development of this property, excepting those which may fall into an exemption under measure 37.” He again cites Goal 11 and “also any other goals or implementing regulations concerning urban type development outside the UGB that were or have been adopted since 1985.”

The claimant’s interest in this property is limited to that of a lessee under the terms of the September 23, 2004 lease. To the extent the claimant has claimed that laws or regulations have restricted the use of the property, he has not identified or established that any laws or regulations enacted after he acquired his interest in the property have restricted his use of the property as that use is defined under the terms of the lease.

Conclusions

The claimant’s interest in the subject property is limited to that of a lessee under the terms of a September 23, 2004 lease. The claimant has not identified a land use regulation that restricts his rights to use the property under the terms of his leasehold interest in the property. Nor has he cited any land use regulations affecting the property that have been enacted since he acquired his interest on September 23, 2004.

3. Effect of Regulations on Fair Market Value

In order to establish a valid claim, Section 1 of Ballot Measure 37 requires that any laws described in Section V. (2) of this report must have “the effect of reducing the fair market value of the property, or any interest therein.”

Findings of Fact

The claim asserts that land use regulations have restricted the use of the subject property thereby reducing its value. However, none of the regulations relied upon were enacted subsequent to the claimant’s acquisition of a leasehold interest in the property on September 23, 2004. In addition, the claimant has not established that any of any regulations reduce the value of his leasehold interest in the property.

Conclusions

The claimant has not demonstrated that any state land use regulation restricts his use of private real property under the terms of his leasehold interest, and has not demonstrated that any land use regulations reduce the fair market value of his interest in the subject property.

4. Exemptions under Section 3 of Measure 37

Ballot Measure 37 does not apply to certain land use regulations. In addition, under Section 3 of the Measure, certain types of laws are exempt from the Measure.

Findings of Fact

All laws and regulations cited in the claim were enacted prior to Mr. Riemenschneider's acquisition of a leasehold interest in the property on September 23, 2004.

Conclusions

All laws and regulations cited in the claim are exempt under Ballot Measure 37 Section 3(E) because they were enacted prior to the date the claimant acquired the property.

VL FORM OF RELIEF

Based on the record, the claimant is not entitled to relief under Ballot Measure 37. Department staff recommend that this claim be denied because neither the Commission nor the department have enforced laws that restrict the claimant's interest in the private real property that is the subject of this claim. Based on this determination, the department does not make any further evaluation or determination on the merits or substance of the claim.

VII. COMMENTS ON THE DRAFT STAFF REPORT


The department issued its draft staff report on this claim on June 22, 2005. OAR 125-145-0100(3), provided an opportunity for the claimant or the claimant's authorized agent and any third parties who submitted comments under OAR 125-145-0080 to submit written comments, evidence and information in response to the draft staff report and recommendation. Comments received have been taken into account by the department in the issuance of this final report.

1 **CERTIFICATE OF SERVICE**

2 I certify that on January 16, 2007, I served the foregoing *Defendant State of Oregon's*
3 *Motions to Dismiss; Memorandum of Points and Authorities (ORCP 21A(1) and (8))* and
4 *Declaration of Heather Awlasewicz* upon the parties hereto by the method indicated below, and
5 addressed to the following:

6 Edward P. Fitch
7 Bryant, Emerson & Fitch, LLP
8 888 SW Evergreen Avenue
9 PO Box 457
Redmond, OR 97756

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

10
11 
12 _____
13 DARSEE STALEY #87351
14 Assistant Attorney General
15 Trial Attorney
16 Tel (503) 947-4700
17 Fax (503) 947-4792
18 Darsee.Staley@doj.state.or.us
19 Of Attorneys for State of Oregon
20
21
22
23
24
25
26