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

RANDY SMITH, TRUSTEE of the E. SMITH  
LIVING TRUST DATED AUGUST 10, 1992,  
  
Petitioner/Plaintiff,  
  
v.  
  
STATE OF OREGON, by and through the  
DEPARTMENT OF LAND  
CONSERVATION AND DEVELOPMENT  
and the DEPARTMENT OF  
ADMINISTRATIVE SERVICES,  
  
Respondents/Defendants.

Case No. CV060239  
  
RESPONDENT'S HEARING MEMORANDUM  
  
JUDGE JONES  
Date: November 17, 2006  
Time: 3:00 pm  
Ctrm: 250

**INTRODUCTION**

This case involves a Measure 37 demand for relief from state land use regulations. Oregon voters enacted Measure 37 through the initiative process in 2004. Codified at ORS 197.352, Measure 37 permits owners of private real property to seek compensation for reductions in fair market value caused by certain land use restrictions. In lieu of payment, public entities may choose "not to apply" land use regulations enacted after the present owner acquired the property. A copy of the statute is attached hereto as Exhibit 1 for the court's convenience.

Since April 1, 2000, petitioner has been the owner, in his capacity as trustee of the Smith Living Trust, of 34.38 acres private real property in Yamhill County. Currently, the property is

1 restricted to exclusive farm use and petitioner cannot divide the property into 1-acre lots for  
2 residential use. Petitioner submitted a Measure 37 demand to respondent the State of Oregon.<sup>1</sup>

3 Respondent reviewed and approved petitioner's demand. In lieu of compensation,  
4 respondent provided relief by issuing a Final Order "not to apply" certain regulations to allow  
5 petitioner a use of the property permitted at the time of acquisition on April 1, 2000 (*Record*, §  
6 6). The Order acknowledges that the relief provided in accordance with Measure 37 will not  
7 allow petitioner to use the property as desired, *i.e.* for a residential subdivision of 1-acre lots.

8 The apparently incongruous decision on petitioner's demand results from the express  
9 language of Measure 37. Section 1 permits only a present owner of property to submit a demand  
10 for compensation. Section 2 excludes certain land use regulations from being a basis for a  
11 demand. At issue here is the exclusion of regulations in effect when the present owner *or a*  
12 *family member* acquired the property. Because petitioner's late parents are family members as  
13 defined by the statute, respondent evaluated the validity of the demand by determining whether  
14 land use regulations currently in effect are more restrictive than the regulations in effect when  
15 Mr. and Mrs. Smith purchased the property in 1967. Petitioner's demand was valid under  
16 Section 1.

17 If a demand is found to be valid, Measure 37 requires public entities to elect whether to  
18 provide monetary compensation or relief from use restrictions "to allow the owner to use the  
19 property for a use permitted at the time the owner acquired the property." ORS 197.352 (8).  
20 The statute defines "owner" as "the present owner." ORS 197.352 (11) (C). In this case, the  
21 present owner, petitioner, acquired the property after exclusive farm use regulations took effect.  
22 At the time of acquisition a residential subdivision of 1-acre lots was not a permitted use.  
23 Consequently, although petitioner's Measure 37 claim is valid, the State's "waiver" of land use  
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26 <sup>1</sup> On October 17, 2006, respondent filed the administrative *Record* of the decision. See OAR 125-145-0105  
Section 2 of the *Record* is petitioner's demand.

1 regulations goes back only to regulations adopted on or after April 1, 2000, and will not allow  
2 the desired subdivision of the property.

3 Petitioner seeks judicial review of respondent's Order pursuant to the Administrative  
4 Procedures Act, ORS 183.484 (APA). The Petition alleges that "the effective acquisition date"  
5 for the property is June 9, 1967 and that respondent "failed to establish" that the date "changed."  
6 The Petition also alleges that the Smith Living Trust has owned the property continuously since  
7 June 9, 1967. The Petitioner does not allege error in connection with the factual or legal basis  
8 for respondent's conclusion that petitioner is the present owner and acquired the property on  
9 April 1, 2000—the relevant inquiry under Measure 37. Respondent is entitled to judgment as a  
10 matter of law.

### 11 OREGON LAND USE LAWS

12 The primary components of Oregon's land use planning system were created with the  
13 passage of Senate Bill 10 in 1969, and Senate Bills 100 and 101 in 1973.<sup>2</sup> Senate Bill 10  
14 required cities and counties to adopt comprehensive land use plans and to enact zoning  
15 ordinances to implement those plans. Senate Bill 100 created a state agency – the Land  
16 Conservation and Development Commission (LCDC) – to establish and amend statewide land  
17 use goals, and to review and "acknowledge" local plans and regulations to ensure compliance  
18 with the statewide goals. Senate Bill 101 amended the state statutes authorizing counties to  
19 adopt exclusive farm use zones.

20 These statutes established the basic framework for land use planning in Oregon.  
21 Additional regulations, including those found at OAR 660, Division 33, as well as amendments  
22 to the statutes and regulations through April 1, 2000, were all in effect when petitioner acquired  
23 the property. Petitioner does not allege any error relating to respondents conclusions about the  
24 relevant land use laws. *See Record*, § 6, pp 6-7.

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<sup>2</sup> 1969 Or Laws Chap 324 (SB 10); 1973 Or Laws Chap 80 (SB 100); and 1973 Or Laws Chap 503 (SB 101).

1 **MEASURE 37**

2 A property owner qualifies for Measure 37 relief if: (1) a public entity enacts or enforces  
3 a “land use regulation” that (2) restricts the owner’s use, and (3) has the effect of reducing the  
4 fair market value, of the private real property. ORS 197.352 (1). Section 3 of Measure 37  
5 provides that certain land use regulations shall not be a basis for a written demand under Section  
6 1, notably regulations in effect when the owner or a family member acquired the property. ORS  
7 197.352 (3) (E). Section 11 defines “owner” as the “present owner” of the property, and lists  
8 the relationships on which a “family member” finding may be based. ORS 197.352 (11) (A) and  
9 (C).

10 Section 5 requires owners to present written demands within two years of the effective  
11 date of Measure 37 (December 2, 2004) or the date on which a land use regulation is applied “as  
12 an approval criteria” on a specific land use application, whichever is later. After determining  
13 that an owner submitted a timely, valid written demand, the public entity has the option to pay  
14 compensation or to “modify, remove, or not to [sic] apply” land use regulations to the extent  
15 necessary “to allow the owner to use the property for a use permitted at the time the owner  
16 acquired the property.” ORS 197.352 (8); *see also* ORS 197.352 (10). Petitioner does not allege  
17 any error relating to respondent’s determination that the demand was valid or respondent’s  
18 choice to grant “waiver” relief in lieu of compensation.<sup>3</sup>

19 **ADMINISTRATIVE PROCESS**

20 Measure 37 does not specify any procedure for claim processing, but permits public  
21 entities to adopt procedures. ORS 197.352 (7). The State Department of Administrative  
22 Services (DAS) adopted procedural rules, found at OAR 125-145-0010 to 125-145-0105, that set  
23 minimum requirements for the content of a Measure 37 claim against the State.

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25 \_\_\_\_\_  
26 <sup>3</sup> 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.” DLCD is exercising the waiver option and can pay compensation only if and when the legislature appropriates funds for that purpose. *See* OAR 660-002-0010 (8) (c)



1 copy of the Declaration of Trust and the death certificates for Earl and Mary Smith in support of  
2 his demand. Respondent issued a Final Order approving the demand.<sup>4</sup>

3 The facts concerning the chain of ownership of the property also are undisputed.  
4 Petitioner's parents, Earl and Mary Smith, acquired the property on June 9, 1967 as reflected in  
5 the warranty deed submitted by petitioner with his demand (*Record*, § 2, p 15-16). In 1992, the  
6 Smiths transferred the property to themselves as trustees of the Trust also by warranty deed (*id*, p  
7 17-19). Mr. Smith died on February 20, 1999 (§ 5, p 7). Mrs. Smith was the sole trustee of the  
8 Trust until her death on April 1, 2000 (§ 5, p 8). In accordance with the Declaration of Trust,  
9 petitioner succeeded Mary Smith as trustee on April 1, 2000 (§ 5, p 4, ¶¶ 3, 6).

#### 10 SUMMARY OF ISSUES

11 The only dispute concerns the correct acquisition date. For purposes of determining the  
12 proper scope of waiver relief, Measure 37 mandates a determination of the “time the *owner*  
13 acquired the property.” Measure 37 defines “owner” as “the present owner.”

14 Petitioner, however, contends respondent should have determined the “effective  
15 acquisition date of the *property*” was June 9, 1967.<sup>5</sup> Respondent found that Earl and Mary  
16 Smith acquired the property on June 9, 1967, but neither Earl nor Mary Smith is the present  
17 owner of the property. Therefore, June 9, 1967 is not the “effective” date for purposes of  
18 Measure 37 waiver relief.

19 The Petition also alleges that the property “remained in ownership” of the Trust after  
20 April 1, 2000, and that Trust has had “continuous ownership” of the property since 1967.<sup>6</sup>  
21 According to the documents submitted by petitioner, Earl and Mary Smith created the Trust in  
22 1992. No evidence supports a finding that the Trust acquired the property, or even existed, in  
23 1967.

24 \_\_\_\_\_  
25 <sup>4</sup> The *Record* includes the original demand (§ 2), the draft report proposing denial (§ 4), petitioner's response to the  
26 draft report and additional documents (§ 5) and the Final Order (§ 6).

<sup>5</sup> See, Pet, ¶¶ 34, 35, 42, 43 and 49.

<sup>6</sup> See, Pet, ¶¶ 34, 35 and 42.

1 If petitioner contends that the Trust, and not petitioner, is the present owner of the  
2 property, then the Trust should have submitted the demand. Assuming for purposes of argument  
3 that the Trust could be an owner, a demand by the Trust would be valid if the property is subject  
4 to land use regulations that restrict use and reduce value compared with the uses permitted in  
5 1992. Incorporeal entities do not have family members under Measure 37. Therefore, the  
6 validity of a demand by the Trust would be determined by the Trust's acquisition date, not the  
7 Smiths' acquisition date.

### 8 STANDARD FOR REVIEW

9 ORS 183.484 is the exclusive means to resolve disputes concerning the propriety of a  
10 state agency order in other than a contested case. ORS 183.480 (2). In a proceeding pursuant to  
11 ORS 183.484, the court determines as a matter of law whether a final order is supported by  
12 substantial evidence and the correct application of the law. ORS 183.484 (5); *Powell v. Bunn*,  
13 185 Or App 334, 339 (2002).

14 The "substantial evidence" standard is set forth in the statute. "Substantial evidence  
15 exists to support a finding of fact when the record, viewed as a whole, would permit a reasonable  
16 person to make that finding." ORS 183.484 (5) (c). The "record," for purposes of a petition for  
17 review of an order in other than a contested case, is the record presented to circuit court. *Norden*  
18 *v. Water Resources Dept.*, 329 Or 641, 649 (2000).

### 19 INTERPRETATION OF MEASURE 37

20 Oregon courts apply the same methodology for interpreting statutes adopted through the  
21 initiative process that they apply in construing statutes adopted by the Legislative Assembly.  
22 *Stranahan v. Fred Meyer, Inc.*, 331 Or 38 (2000); *PGE v. Bureau of Labor and Industries*, 317  
23 Or 606, 612 n 4 (1993). The objective is to discern the intent of those who enacted the law, in  
24 this case, the Oregon voters. "The best evidence of the voters' intent is the text of the provision  
25 itself. \* \* \* The context of the language of the ballot measure may also be considered[.]"

26

1 *Stranahan*, 331 Or at 56 (quoting *Roseburg School Dist. v. City of Roseburg*, 316 Or 374, 378  
2 (1993)). Context may include relevant case law that “helps to define the parameters of the nature  
3 of the rights conferred” by the measure. *Stranahan*, 331 Or at 62. If “the intent of the voters is  
4 not clear from the text and context” of the measure, the court examines the history of the  
5 provision. *Id.* at 56, quoting *Ecumenical Ministries v. Oregon State Lottery Comm.*, 318 Or 551,  
6 559 (1994).

7 The history of an initiated measure consists of “other sources of information that were  
8 available to the voters at the time the measure was adopted and that disclose the public’s  
9 understanding of the measure.” *Ecumenical Ministries*, 318 Or at 560 n 8. This includes such  
10 things as “the ballot title and arguments for and against the measure included in the voters’  
11 pamphlet, and contemporaneous news reports and editorial comment on the measure.” *Id.*

#### 12 OWNERSHIP UNDER MEASURE 37

13 Respondent found that petitioner is the present owner of the property.<sup>7</sup> The text and  
14 context of the statute indicate that the intent of voters was to provide relief to *owners* of private  
15 real property. ORS 197.352 (1) (“the owner of the property shall be paid just compensation”);  
16 197.352 (2) (“as of the date the owner makes written demand for compensation”); 197.352 (8)  
17 (“to allow the owner to use the property for a use permitted at the time the owner acquired the  
18 property”); 197.352 (10) (“the owner shall be allowed to use the property as permitted at the time  
19 the owner acquired the property”). Section 11 (C) of Measure 37 provides “[o]wner’ is the  
20 present owner of the property, or any interest therein.”

21 According to Section 1, the “property” at issue is “private real property.” Further,  
22 Section 1 limits compensation to owners of property to which land use regulations apply, and  
23 those regulations must both restrict the use of the property and reduce its value. A proper  
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25 \_\_\_\_\_  
26 <sup>7</sup> The Petition does not specify what part of Measure 37 respondent allegedly misinterpreted (Pet, ¶¶ 41-43), and  
does not allege respondent erred in determining that petitioner is the present owner of the property. The allegations  
concerning the Trust’s “continuous” ownership, however, suggest the issue of ownership may be in dispute.

1 claimant under Measure 37 is the present owner of private real property that has the required  
2 attributes of being subject to land use regulations that both restrict use and reduce value.

3 Respondent granted petitioner relief as expressly allowed under Section 8 of Measure 37  
4 “to allow the owner to use the property for a use permitted *at the time the owner acquired* the  
5 property.” The statute does not define “acquire.” The plain, ordinary meaning of acquire,  
6 however, is consistent with the overall intent of Measure 37 to provide relief to present owners  
7 from use restrictions. “Acquire” means “to come into possession, control, or power.” *Webster’s*  
8 *Third New International Dictionary* (2002) at 18 (copy attached).

9 Substantial evidence supports respondent’s finding that petitioner, in his capacity as  
10 trustee of the Trust, is the present owner of the property. In accordance with the terms of the  
11 Trust, petitioner assumed the duties and powers of the original trustees when Mary Smith died  
12 (*Record*, § 5, pp 4-5, ¶ 6). As trustee, petitioner assumed legal title to the property and had the  
13 duty to transfer the property “forthwith” to the beneficiaries (*id.*). The Declaration of Trust also  
14 granted petitioner the authority to manage the property, if necessary, pending distribution of  
15 assets and termination of the Trust “as expeditiously as reasonably possible” (*id.*, ¶ 7).

16 Substantial evidence also supports respondent’s finding that the present owner “acquired”  
17 the property when he assumed control over the disposition of property as successor trustee.  
18 According to the terms of the Trust, petitioner became successor trustee when Mrs. Smith died  
19 (*id.*, ¶ 6). Substantial evidence supports the finding that Mrs. Smith died on April 1, 2000 (*id.*, §  
20 5, p 8 (death certificate)).

21 No evidence supports petitioner’s allegation that the Trust acquired the property on June  
22 9, 1967, *i.e.*, 25 years before it existed. Petitioner’s theory of “trust” ownership also is not  
23 supported by the demand. Petitioner made his demand, and filed the Petition, in his capacity as  
24 trustee, the legal title holder to the property.

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1           Petitioner’s contention that the Trust is the present owner of the property also lacks  
2 support in the law of trusts. In Oregon, a trust is a relationship to property that serves to separate  
3 the legal and equitable interests. For example,

4  
5           “[a] trust is a *method of transferring property*, either during life or at death, for  
6 the benefit of another, with ‘strings attached.’ The person who creates a trust  
7 makes a gift of the property to another, with instructions on how the property is to  
8 be managed and distributed for the benefit of a third person.”

9           *OSB Administering Trusts in Oregon CLE*, § 1.2 (emphasis added). The Oregon Supreme Court  
10 has described a trust as “an equitable obligation, either express or implied, resting upon a person  
11 by reason of a confidence reposed in him to apply or deal with property for the benefit of some  
12 other person, or for the benefit of himself and another or others, according to such confidence.”  
13 *Shipe v. Hillman*, 206 Or 556, 562 (1955) (quoting *Templeton v. Bockler*, 73 Or 494, 506 (1914)).  
14 Similarly, the court has explained that “[a]n express trust is created when a grantor or trustor  
15 presently divests himself or herself of full legal and equitable ownership in property, with legal  
16 title held by a trustee and equitable ownership resting in a beneficiary.” *Brown v. Brown*, 206 Or  
17 App 239, 249 (2006) (citations omitted).

18           The Declaration of Trust submitted in support of the demand shows that Earl and Mary  
19 Smith used the Trust as a will substitute, to transfer the property to their sons without probate  
20 upon the death of the survivor. *See, e.g., Shipe, supra*, 206 Or at 562 (“In Oregon an express trust  
21 can come into existence only by writings subscribed by the party creating the trust, or his lawful  
22 agent, and executed with such formality as may be required by law. ORS 93.020.”). The  
23 Restatement (Third) of Trusts §§ 11, 25 (2003) and the Oregon Uniform Trust Code, ORS  
24 130.001 et seq. acknowledge that the common purpose of a revocable trust is to serve as a will  
25 substitute. The Restatement §11 and ORS 130.500 provide that the mental capacity required to  
26 execute a revocable trust is the same as that to execute a will. Similarly, the OUTC imposes  
certain testamentary restrictions and protections on revocable trusts, such as revocation by

1 divorce, protections to pretermitted children, advancement of distributions, and nonademption of  
2 devises.

3 Under a will, transfer of the property would have occurred as a matter of law on the same  
4 date—when Mrs. Smith passed away. *See*, ORS 112.355 (devise of property effective on date of  
5 death). In either case, ownership and control of the property passed to petitioner and constitutes  
6 a new ownership “acquisition” under Measure 37.

### 7 ACQUISITION DATE

8 The concept of an “effective acquisition date” lacks any foundation in the text or context  
9 of Measure 37 (and the Petition identifies none). Measure 37 provides a dual acquisition date  
10 analysis. To determine the validity of the claim, DCLD looks at the date the present owner or a  
11 family member acquired the property, whichever occurred first. If a claim is valid, DLCD must  
12 grant waiver relief in lieu of compensation. DLCD looks only to the present owner’s acquisition  
13 date to determine what land use regulations must be waived “to allow a use permitted at the time  
14 the owner acquired the property” as required by Measure 37.

15 The Petition asks the court to instruct respondent to issue a “corrected Final Order  
16 [providing] that the State of Oregon will not apply [certain land use regulations] enacted or  
17 adopted after June 9, 1967.”<sup>8</sup> In other words, petitioner seeks relief back to the date the Smiths’  
18 acquired the property, rather than the date the petitioner acquired the property. Petitioner  
19 apparently contends Measure 37 entitles him to a waiver as of the date respondent found that  
20 petitioner’s “family members” acquired the property.

21 Measure 37 sets forth the applicable definition of “family member.”

22 “‘Family member’ shall include the wife, husband, son, daughter, mother,  
23 father, brother, brother-in-law, sister, sister-in-law, son-in-law, daughter-in-law,  
24 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

25 \_\_\_\_\_  
26 <sup>8</sup> *See*, Pet, ¶¶ 29, 38 and 46.

1           foregoing family members, or a legal entity owned by any one or combination of  
2           these family members or the owner of the property.”

3           ORS 197.352 (11) (A) (emphasis added). The term “family member” appears only once in  
4           Measure 37. Section 3 (E) provides that Section 1 “shall not apply” to land use regulations  
5           “[e]nacted prior to the date of acquisition of the property by the owner or a **family member** of  
6           the owner who owned the subject property prior to acquisition or inheritance by the owner,  
7           *whichever occurred first.*” ORS 197.352 (3) (E) (emphasis added).

8           When a land use regulation restricts the use of private property after acquisition and  
9           continuous ownership by a family member, the present owner may demand compensation as of  
10          the date of the written demand. ORS 197.352 (1), (2). The reduction in fair market value is  
11          calculated based on the effect of land use regulations that were in place on the date that “the  
12          owner or a family member of the owner” acquired the property and the effect of any new land  
13          use regulations in place on the date that a Measure 37 claim was filed. The “compensation date”  
14          is the date on which the difference in market value would be figured if a public entity elects to  
15          pay the difference in value.

16          Sections 8 and 10 of Measure 37 allow public entities to waive enforcement of restrictive  
17          land use regulations in lieu of paying compensation. In that event, the important date is the  
18          present owner’s acquisition date, not the family member’s acquisition date. The “waiver date” is  
19          “the time the owner acquired the property.” ORS 197.352 (8), (10). The “owner” is “the present  
20          owner.”

21          Respondent determined that Earl and Mary Smith, father and mother of petitioner, were  
22          family members of the present owner.<sup>9</sup> Respondent concluded the demand was valid by  
23          excluding only the land use regulations in effect when the Smiths acquired the property because  
24          their ownership “occurred first.” Respondent properly elected to provide waiver relief in lieu of

25          \_\_\_\_\_

26          <sup>9</sup> If the Trust is the owner, then no family member analysis is required. The Trust has no “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.”

1 compensation. The relief granted is precisely the relief to which petitioner is entitled—a waiver  
2 to allow a use permitted at the time the *present* owner acquired the property.

3 As explained above, when property is held “in trust,” the trustee is vested with legal title  
4 to property, while the beneficiary has the equitable right to the benefits. Where the trustee is also  
5 the grantor, the trust is revocable, and the benefits are retained by the grantor during his or her  
6 lifetime, Measure 37 does not distinguish between the grantor’s ownership prior to and after  
7 creation of the trust. All rights of use and control remain with the grantor. Therefore, transfer of  
8 the property in this case from the Smiths individually to themselves as trustees of a trust over  
9 which they had full power and derived all benefit did not constitute a new acquisition.<sup>10</sup>

### 10 **COMPENSATION CLAIM**

11 Petitioner also asserts a claim for compensation under Measure 37. Petitioner contends  
12 the Final Order “wrongfully determined that the effective acquisition date of the Real Property  
13 for purposes of Measure 37 was April 1, 2000 and not June 9, 1967,” and therefore post-  
14 acquisition restrictive land use regulations wrongfully continue to apply (Pet, ¶ 49). Petitioner is  
15 not entitled to compensation under Measure 37 as a matter of law because (a) the APA provides  
16 the exclusive procedure for judicial review of state agency orders and (b) the State elected to  
17 grant “waiver” relief in lieu of compensation under Measure 37. *See* Respondent’s Amended  
18 Answer, ¶¶ 10-12.

### 19 **APA EXCLUSIVITY**

20 The APA is the exclusive means to challenge the correctness of state agency orders.  
21 ORS 183.480 (2); *Bay River v. Envir. Quality Comm.*, 26 Or App 717, 720 *rev denied*, 276 Or  
22 555 (1976); *Ososke v. DMV*, 320 Or 657, 659-60 (1995). Petitioner’s Measure 37 Compensation  
23 Claim is based on an alleged error in the Final Order (Pet, ¶¶ 48-53). Therefore, petitioner’s sole  
24 remedy is his petition for judicial review (Am Ans, ¶ 10).

25 \_\_\_\_\_  
26 <sup>10</sup> If, however, the Trust as a separate legal entity acquired the property independent of the Smiths in 1992, and  
continues as the present owner, and assuming a demand is made on behalf of the Trust, then August 20, 1992 is the  
date on which both validity of the demand and the scope of waiver (if any) will be determined.

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

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

17           “The Oregon Administrative Procedures Act, ORS 183.310 et seq,  
18 establishes a comprehensive pattern for the judicial review of  
19 administrative decisions. The various APA statutes governing  
20 judicial review provide the **sole and exclusive methods of**  
**obtaining judicial review.** *School Dist. No. 48 v. Fair Dis. App.*  
*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  
28.010. A party cannot ignore the judicial review provisions of the  
APA in favor of a general equitable or declaratory remedy.” 26 Or  
App at 720 (emphasis added).

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



1 (8) Notwithstanding any other state statute or the availability of funds  
2 under subsection (10) of this section, in lieu of payment of just compensation  
3 under this section, the governing body responsible for enacting the land use  
4 regulation may modify, remove, or not to apply the land use regulation or land use  
5 regulations to allow the owner to use the property for a use permitted at the time  
6 the owner acquired the property.

7 \* \* \* \* \*

8 (10) Claims made under this section shall be paid from funds, if any,  
9 specifically allocated by the legislature, city, county, or metropolitan service  
10 district for payment of claims under this section. Notwithstanding the availability  
11 of funds under this subsection, a metropolitan service district, city, county, or  
12 state agency shall have discretion to use available funds to pay claims or to  
13 modify, remove, or not apply a land use regulation or land use regulations  
14 pursuant to subsection (6) of this section. If a claim has not been paid within two  
15 years from the date on which it accrues, the owner shall be allowed to use the  
16 property as permitted at the time the owner acquired the property.

17 ORS 197.352 (8) and (10). Section 8 generally grants the public entities to which a  
18 demand for compensation is submitted the option to pay or provide alternate relief. Section 10  
19 makes it clear that the option is wholly within the discretion of the public entities and specifically  
20 applies to claims under Section 6 of the statute (Pet, ¶ 51).

21 In this case, The Final Order provides:

22 “In lieu of compensation under ORS 197.352, the State of Oregon will not  
23 apply the following laws to Randy Smith’s division of the 34.38-acre property  
24 into 1-acre parcels: applicable provisions of Goal 3, ORS 215 and OAR 660,  
25 division 33, enacted or adopted after April 1, 2000. These laws will not apply to  
26 the claimant only to the extent necessary to allow him to use the subject property  
for the use described in this report, and only to the extent that use was permitted  
when he acquired the property on April 1, 2000. The department acknowledges  
that the relief to which the claimant is entitled under ORS 197.352 will not allow  
the claimant to use the subject property in the manner set forth in the claim.”

*Record*, § 6, p 1. There is no dispute that DLCD opted not to apply certain land use regulations  
“in lieu” of paying compensation to petitioner. Petitioner is not entitled to compensation.

## CONCLUSION

Measure 37 does not require public entities to determine an “effective acquisition date”  
for the property. Rather, the statute allows relief based on “the time the owner acquired the  
property.” Petitioner became the owner of the property when he became the trustee of the Trust  
on April 1, 2000. That fact is supported by substantial evidence.

1           Petitioner's Measure 37 compensation claim is without merit. Respondent issued a Final  
2 Order on petitioner's Measure 37 demand. Therefore, the sole and exclusive remedy for alleged  
3 errors relating to that demand is the petition for judicial review. The court lacks jurisdiction over  
4 a claim for compensation.

5           Petitioner's claim for compensation also fails under the terms of Measure 37. The statute  
6 permits public entities such as the State, at their option, to pay compensation or not apply certain  
7 land use regulations. The State elected to waive, not pay.

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9           DATED this 15 day of November, 2006.

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Respectfully submitted,


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HARDY MYERS  
Attorney General

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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-

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-

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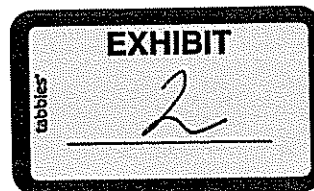
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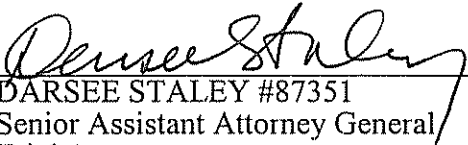


1 **CERTIFICATE OF SERVICE**

2 I certify that on November 15, 2006, I served the foregoing *Respondent's Hearing*  
3 *Memorandum* upon the parties hereto by the method indicated below, and addressed to the  
4 following:

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