



CIRCUIT COURT OF OREGON  
THIRD JUDICIAL DISTRICT  
MARION COUNTY COURTHOUSE  
P.O. BOX 12869  
SALEM, OREGON 97309-0869

MARY MERTENS JAMES  
Circuit Court Judge  
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September 28, 2007

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Re: Sullivan, et al v State of Oregon, DLCD  
Case No. 06C20159

Dear Counsel,

This matter came before the court on Plaintiff's Petition for Attorney Fees. Plaintiff is represented by attorney James Vick. Defendant is represented by Assistant Attorney General Erika Hadlock. The Court issued its opinion on August 2, 2007 and on August 28, the Court signed an order granting defendant's Motion to Dismiss and denying plaintiffs' Motion for Summary Judgment as moot. The Court entered a General Judgment on September 10, 2007. Plaintiffs filed a Petition for Attorney Fees on August 24, 2007 and defendant filed its Opposition to Plaintiffs' Petition for Attorney Fees on September 6, 2007. Both parties have waived oral argument. The court then took the matter under advisement.

Plaintiffs seek an award of attorney fees pursuant to ORS 197.352(6) which, in relevant part states, "[the] present owner of the real property shall be entitled to reasonable attorney fees, expenses, costs, and other disbursements reasonably incurred to collect the compensation." ORS 197.352 is entitled, "**Compensation for loss of value due to land use regulation**. Section (1) provides: *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*

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*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 supplied).* Section (2) defines "*just compensation*" as "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." Section (4) provides "*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". Section (6) provides, "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 a written *demand for compensation* under this section, the present owner 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.*"

Section (8) provides that "*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 (sic) 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." The section (8) election is sometimes referred to as a waiver.

A plain reading of the operative sections gives government the option of electing to not enforce the land use regulation rather than to owe "just compensation" if any, for the diminution in the property's fair market value. When the governing body makes such an election, there is no triggering of attorney fees.

Only if the land use regulation applies for more than 180 days can the property owner file a cause of action in circuit court for compensation; the property owner has no cause of action to demand or obtain a waiver. The only court-imposed remedy that the statute contemplates is compensation. The attorney fee provision in the statute only creates a right to reasonable attorney fees incurred to collect compensation. There is no provision for

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attorney fees where, as in this case, the governing body announces that it does not intend to enforce a land use regulation, or where it modifies, removes or does not apply a land use regulation. In the case of a waiver, the property owner is permitted to use its property so there is no reduction in fair market value and thus no compensation due. One doesn't collect a waiver; the two terms—compensation and waiver-- do not have the same meaning. The very title of the statute, "compensation for loss of value due to land use regulation", highlights the basis for an award of attorney fees.

Plaintiffs' resort to the language of House Bill 3540 that has been referred to the voters as Measure 49 to re-write ORS 192.352 (Measure 37) does has no bearing on the interpretation of Section (6). First, the bill is not law unless and until voters approve it in November. Second, based on news reports, many provisions in the bill purportedly repeal ORS 192.352, or revise it, or "fix" it, or eviscerate it, depending on whose arguments in favor or opposed one believes. Whatever its text and context, a proposed measure's provisions are irrelevant to determining the intent of legislation the provisions would amend.

Plaintiffs acknowledge that ORS 192.352 permits government to not apply land use laws in lieu of the payment of just compensation. In this case, plaintiffs expressly waived their claim for compensation, and defendant established ownership of the property to a date that effectively waived any land use regulations affecting its use. As a result, plaintiffs have no restriction on the use of their property, and thus there is no reduction in the fair market value of the land. Accordingly, there is no "compensation for loss of value" to collect, and, it follows, no entitlement to attorney fees.

Will Ms. Hadlock please prepare an order and judgment consistent with this letter opinion?

Very truly yours,

  
Mary Mertens James  
Circuit Court Judge

MMJ/sg  
cc: File