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

DIANA V. GARDENER and JUDSON M. PARSONS,

Petitioners,

v.

LAND CONSERVATION AND DEVELOPMENT COMMISSION; THE DEPARTMENT OF LAND CONSERVATION AND DEVELOPMENT, an agency of the State of Oregon; and THE DEPARTMENT OF ADMINISTRATIVE SERVICES, an agency of the State of Oregon,

Respondents.

Case No. 06C14217

Honorable James L. Rhoades

REPLY TO PETITIONERS' MEMORANDUM IN OPPOSITION TO DISMISS PETITION FOR JUDICIAL REVIEW

Respondents move to dismiss the petition for judicial review because petitioners did not file their petition within 60 days of the date on which the order was served, as ORS 183.484 (2) requires.¹ In response, petitioners do not dispute that the 60-day deadline applies; nor do they contend that they filed their petition within that 60-day period. Rather, petitioners argue that their failure to meet the 60-day deadline is excused because of actions the Marion County Circuit Court took in conjunction with holding Measure 37 unconstitutional in *MacPherson v. DAS*. In particular, petitioners focus on an order the circuit court issued stating that “all time lines under Measure 37 are suspended indefinitely” (Motion to Dismiss, Attachment C). According to petitioners, that order suspended the 60-day APA deadline for challenging the Final Order on the Page claim.

¹ “Petitions for review shall be filed within 60 days only following the date the order is served * * *.”

1 Petitioners' argument fails for two reasons. First, the 60-day timeline for challenging
2 orders in other than contested cases is not one of the "time lines under Measure 37." A timeline
3 arising "under" a certain law is one that the law itself creates. Measure 37 sets out several,
4 including a statute of limitations, ORS 197.352 (5), and one that governs when a cause of action
5 accrues, ORS 197.352 (6). Those timelines are the ones that the circuit-court order may have
6 suspended.² Deadlines set by other laws, including the APA, simply do not fall within the scope
7 of the order suspending "time lines under Measure 37."

8 Second, the circuit court had no authority to suspend the 60-day APA deadline for filing a
9 petition for judicial review, even had it meant to do so. A court has jurisdiction under the APA
10 only to the extent provided by statute, and the requirement that a petition for judicial review be
11 filed within 60 days is jurisdictional. *See Oregon Health Care Assn. v. Health Div.*, 329 Or 480,
12 491-93 (1999) (applying statutory analysis in determining whether Court of Appeals had
13 authority to review non-final orders in contested cases); *Ososke v. DMV*, 320 Or 657, 661 (1995)
14 ("the untimely filing of a petition for judicial review of a final order of DMV is a jurisdictional
15 defect"). The APA includes no provision that would permit a court to extend that deadline.
16 Consequently, even if the circuit court meant the suspension order in *MacPherson* to toll filing
17 deadlines under the APA, that order could have no such effect. *See G.A.S.P. v. Environmental*
18 *Quality Commission*, 201 Or App 362, 366 (2005) (finding "doubtful" the proposition that a
19 circuit court could extend the deadline for filing a petition for judicial review of the agency
20 order).

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24 ² Courts have not yet addressed which of the Measure 37 timelines were suspended by the *MacPherson* suspension
25 order, whether that order applied in all jurisdictions throughout the state, or who was bound by it and under what
26 circumstances. The uncertainty regarding the precise boundaries of the suspension order are not important here,
however; all this court need decide is whether an order that, by its terms, suspended only timelines "under Measure
37" also suspended the APA deadline for filing a petition for judicial review

1 **CERTIFICATE OF SERVICE**

2 I certify that on July 10th, 2006, I served the foregoing *Reply to Petitioners'*

3 *Memorandum in Opposition to Dismiss Petition for Judicial Review* upon the parties hereto by
4 the method indicated below, and addressed to the following:

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