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

LAUREL H. GRIFFITHS,

Plaintiff,

v.

STATE OF OREGON, acting by and through
the Department of Land Conservation and
Development,

Defendant.

Case No. 06CV0159SF

REPLY IN SUPPORT OF MOTION TO
DISMISS

1. The APA is the exclusive procedure for judicial review of state agency orders.

Plaintiff asserts that, for purposes of her Measure 37 demand to the state, she “acquired” the property in 1949. Defendant determined through an administrative claims process that plaintiff acquired the property in 1985, for purposes of her state demand under Measure 37. Plaintiff, in her Complaint and her response to defendant’s motion to dismiss, contends that she is entitled to have the court determine her acquisition date. Thus, plaintiff seeks judicial review of a fact determined by a state agency Final Order, and for that plaintiff must proceed under the Administrative Procedures Act.

Plaintiff focuses her argument on the fact that defendant reviewed and decided her claim in “other than a contested case” (*see*, Response to Motion to Dismiss at 5-6). But, plaintiff’s arguments ignore the mandate of ORS 183.480 (2), which plainly provides, “[j]udicial review of final orders of agencies *shall be solely* as provided by ORS 183.482, 183.484, 183.490 and 183.500” (emphasis added). ORS 183.482 provides jurisdiction for contested cases, while ORS

1 183.484 provides jurisdiction for other than contested cases. Both statutes require filing of a
2 petition for judicial review within 60 days of the state agency's final order.

3 Because plaintiff chose not seek APA review, and the time for filing a petition for review
4 has expired, plaintiff is bound by the agencies' determination of her acquisition date for purposes
5 of her Measure 37 demand against the state. The court lacks jurisdiction to alter the Final Order
6 on plaintiff's claim, and plaintiff has not alleged she is entitled to compensation based on
7 regulations enacted or enforced since 1985.

8 **2. Plaintiff acquired ownership of the property in 1985.**

9 Plaintiff contends she acquired a qualifying Measure 37 interest in the property because
10 of her "marital" or "possessory" interest in her husband's property ownership beginning in 1949
11 (Resp at 9-16). In *Schaffer v. Marion County, et al.*, Cases No. 05C16991 and 05C21655, Judge
12 James Rhoades, Marion County Circuit Court, addressed this type of claim of "interest" and
13 determined that the text and context of Measure 37 does not support claims based on marital
14 status alone.¹

15 In *Schaffer*, the court held that the claimant/plaintiff, Mr. Schaffer, did not have a
16 qualifying ownership interest based solely on his wife's ownership. Specifically, the court found
17 that "[h]aving a potential right to a share of the property if [the parties divorced] does not create
18 in petitioner-plaintiff a current legal right to control or possess the property."² Judge Rhoades'
19 opinion is supported by an extended discussion of principles of statutory interpretation and the
20 text and context of Measure 37. This opinion is well-reasoned authority (although not
21 controlling) that a martial or possessory interest is not a Measure 37 qualifying interest.

22 **3. Plaintiff misconstrues the jurisdictional argument.**

23 Defendant does not contend that the circuit court lacks jurisdiction to decide a legitimate
24 Measure 37 "cause of action" under the statute, ORS 197.352. But, the court cannot determine *if*

25 _____

26 ¹ A copy of the Schaffer opinion is attached hereto as Attachment A; see pp 7-10.

² The cases cited by plaintiff deal only with such post-dissolution rights (Resp at 16).

1 plaintiff has a cause of action without first conducting a judicial review of the Final Order. As
2 plaintiff argues,

3 “A claimant has a right to go to the Circuit Court for compensation *unless*
4 *all offending regulations enacted after the owner acquired an interest in the*
5 *property* and which diminish the value of the property have been modified,
6 removed or waived by the appropriate governmental agency.” (Resp, p 26, lines
7 13-16; emphasis added.)

8 The state agencies here waived certain regulations enacted after the date plaintiff
9 acquired her qualifying Measure 37 interest. This court cannot find that “offending regulations”
10 were not waived, without finding that the state agencies erred. In other words, the APA review
11 is a prerequisite to deciding any Measure 37 cause of action based on an allegedly erroneous
12 waiver, and that APA review is jurisdictional for all the reasons cited in the defendant’s motion.

13 **4. “Inadvertence” does not create a qualifying Measure 37 ownership interest.**

14 Plaintiff argues that her interpretation of Measure 37 is right because title to the property
15 belonged solely to her husband from 1949 until 1985 through inadvertence (Resp, p 2, lines 7-
16 10³). First, the premise of this argument concedes that the Final Order was correct in
17 determining that plaintiff first acquired ownership in 1985. In addition, this argument lacks any
18 support in the text, context or legislative history of Measure 37. Specifically, Oregon property
19 laws do not recognize inadvertence as an exception to the Statute of Frauds or the property
20 recording statutes.

21 Defendant is entitled to rely upon the deeds entered into the county records that establish
22 ownership of the property. *Collins v. Delashmutt*, 6 Or 51, 53-54 (1876) (“The laws of this state
23 provide for the recording of all conveyances of real estate, so that the validity of titles may
24 appear from the inspection of the records . . .”). In *Collins*, the Oregon Supreme Court stated
25 that:

26 ³ Again, plaintiff clearly contends the Final Order was wrong.

1 “[t]he presumption is that all conveyances are duly
2 recorded, and the fact that the record fails to show a conveyance of
3 real property would give rise to the presumption that no such a
4 conveyance is in existence.” *Id.* at 54.

5 Oregon’s current recording laws still contain the same requirement:

6 “*All instruments* contracting to convey fee title to any real
7 property . . . *shall be recorded* by the conveyor not later than 15
8 days after the instrument is executed and the parties are bound
9 thereby.” ORS 93.635(1) (emphasis added).

10 This recording mandate is so important that the legislature singled it out as one of three
11 statutes in this Chapter for which penalties for violations attach. *See*, ORS 93.992 (“Violation of
12 ORS 93.635 is a Class D violation.”).

13 **5. Plaintiff does not allege an “unconstitutional taking.”**

14 In an effort to avoid the consequences of failing to seek judicial review of the Final Order
15 under the APA, plaintiff tries to persuade the court that Unconstitutional Takings Claims are
16 analogous to Measure 37 statutory claims (Resp at 6-7). The cases cited by plaintiff, *Boise*
17 *Cascade Corp. v. Board of Forestry*, 325 Or 185 (1997) (a spotted-owl temporary regulatory
18 takings case) and *Dunn v. City of Redmond*, 303 Or 201 (1987) (a land use law regulatory
19 takings case), do not support her position.

20 The Supreme Court in *Boise Cascade* held that the circuit court had primary jurisdiction
21 to determine if an unconstitutional taking occurred and to pay just compensation. The agency,
22 the Board of Forestry, could analyze the unconstitutional takings claim also, but its jurisdiction
23 was neither all-encompassing nor primary. Nothing in *Boise Cascade* suggests that a Final
24 Order of the agency (supposedly responsible for an unconstitutional taking) need not be
25 reviewed under the APA. In fact, *Boise Cascade Corp.* sought and obtained judicial review of
26 the final order of the Board of Forestry. *See*, 131 Or App 552 (1994). The court affirmed the
order, but also held that the record was insufficient to determine, at that time, if a taking had
occurred. Trials and appeals followed.

1 In the *Dunn* case, the Supreme Court explained that a regulatory taking might occur from
2 enforcement or enactment of a land use regulation, but a circuit court might have to withhold
3 judgment on a takings claim “until the legality of the land use decision is placed before and
4 decided by LUBA and the government has had an opportunity to reconsider and modify its
5 decision.” 303 Or at 209. To the extent an appeal to LUBA is analogous to APA review, *Dunn*
6 supports the State’s position. But, Measure 37 claims are not reviewable by LUBA because the
7 statute specifically provides that “[a] decision by a governing body under this section shall not be
8 considered a land use decision as defined in ORS 197.015 (10).” ORS 197.352 (9).

9 **6. The Decision of the Agencies Is a Final Order In Other Than a Contested Case.**

10 Measure 37 *decisions on claims*, are reviewable under the APA. The Court of Appeals,
11 in an unpublished order of dismissal of a Measure 37 case, *Hoff v. DLCD*, CA A129414, this
12 past January, stated:

13 The court determines that the order [a DLCD Final Order on the
14 Measure 37 claim] is an order in other than a contested case, that
15 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.

16 (Brought as an APA judicial review of an order in a contested case; bracketed portion added.)⁴

17 The Court of Appeals added that there was no reason to transfer the judicial review to a circuit
18 court under ORS 14.165 because petitioner Hoff had already filed in two circuit courts. Plaintiff
19 in this case received the same “Notice of Right to Appeal or Other Judicial Relief” as petitioner
20 Hoff, but concluded that Measure 37 somehow provides an alternative route for them to have a
21 court decide the correctness of an agency order (Resp, p 7, lines 7-20). Plaintiff is mistaken, as
22 the Court of Appeals pointed out in the *Hoff* case.

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26 ⁴ A copy of the Court of Appeals Order of Dismissal in *Hoff v. DLCD*, CA A129414 is attached to this Reply as Attachment B.

1 **7. Measure 37 does not disallow APA review.**

2 Plaintiff apparently contends that, absent express reference in Measure 37 to APA
3 review, the APA cannot apply. Plaintiff relies on Section 7 of Measure 37, arguing that “any
4 procedure adopted by the State cannot act as a prerequisite to the filing of a claim for
5 compensation in the Circuit Court” (Resp, p 3, lines 1-4; *see also* pp 7-8). Section 7 allows
6 public entities to adopt or apply procedures for the “processing of claims” but also states that in
7 no event shall these procedures act as a prerequisite to the filing of a compensation claim under
8 subsection (6).” ORS 197.352 (7). However, Section 7 does not address APA review, which is a
9 statute granting jurisdiction to the courts to review state agency orders—not a procedure adopted
10 for processing claims.

11 Whether a claimant or plaintiff must seek judicial review of the Final Order issued in
12 other than the contested case through the APA is not addressed in Measure 37. Plaintiff seems to
13 contend that, because the APA was not specifically cross-referenced in Measure 37, it cannot
14 apply to Final Orders issued pursuant to decisions on Measure 37 claims. Plaintiff’s authority is
15 inapposite (Resp at 7-8).


16 In *State ex rel City of Powers v. Coos County Airport*, 201 Or App 222 (2005), the court
17 found that there were two methods for the court to review the correctness of the formation of a
18 district, under either ORS Chapter 33 or Chapter 34. The challengers filed a declaratory
19 judgment action instead. The Court of Appeals found that the circuit court did not have
20 jurisdiction to hear the challenge. *Id.* at 228. This case does not support plaintiff’s contentions
21 at all.

22 Although the circuit court has jurisdiction to decide a valid Measure 37 cause of action, it
23 cannot determine if there is a valid cause of action except by conducting a judicial review of the
24 state agencies’ Final Order under the APA. Plaintiff would have the circuit court assume the
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1 validity of her cause of action and the invalidity of the agency Final Order. Such assumption do
2 not confer jurisdiction and do not state a claim. Plaintiff's Complaint should be dismissed.

3 DATED this 10th day of July, 2006.

4 Respectfully submitted,
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7 
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CIRCUIT COURT OF OREGON
THIRD JUDICIAL DISTRICT
MARION COUNTY COURTS
P.O. Box 12869
SALEM, OREGON 97309-0869

JAMESE RHOADES
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June 21, 2006

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Re: Schaffer v. Marion County, et al, Case No. 05C16991 and 05C21655

Dear Counsel:

This matter came before the Court on May 5, 2006, for oral argument on Defendants' motions to dismiss and plaintiff's motion to join. Plaintiff appeared through counsel, Wallace Lien, and Defendants appeared through counsel Scott Norris and Darsee Staley. The matter, being fully submitted, was taken under advisement on that date.

Issue

Whether this court should grant either Defendants' motion to dismiss?

Discussion

Procedural Background

This case relates to the ownership of a certain parcel of property that TJ Schaffer, the petitioner-plaintiff in this case, owned prior to May 12, 2004, when he transferred ownership to Juanita Schaffer, his wife. After Ballot Measure 37 (2004), codified at ORS 197.352,¹ became

¹ The only difference between the measure as presented to the voters and as codified are found in sections 1 and 5. The measure refers to land use regulations enacted prior to or after "the effective date" of the measure, while the statute provides the relevant date, December 2, 2004. Therefore, the remainder of this opinion will cite to the codification, except when quoting from the parties' papers

This court notes that the measure withstood a challenge to its constitutionality. See *MacPherson v DAS*, 340 Or 117, 130 P3d 308 (2006). That decision did not address the issues currently before this court.

ATTACHMENT

A

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effective, petitioner-plaintiff and his wife, Mrs. Schaffer, filed an application for compensation under the statute with both the State of Oregon Department of Land Conservation and Development (DLCD) and Marion County (County).²

On May 26, 2005, with Order 05-62, the County Board of Commissioners denied the application. On July 6, 2005, the DLCD found that Mrs. Schaffer was the current owner of the property in question and that she was entitled to relief. In lieu of compensation, the DLCD chose not to apply certain land use regulations to the property (State Claim No M119316).

Thereafter, in papers filed July 25, 2005, petitioner-plaintiff, acting *pro se*, filed a document in Marion County Circuit Court entitled "Interpretation of Oregon Measure 37 Case No. 05-62," naming the County as defendant. Although petitioner-plaintiff stated that he was entitled to relief "provided by" ORS 197.352 (p 2, line 3), he primarily requested remand to the County for reconsideration and compliance with ORS Chapter 183, which governs agency administrative actions (p 7, lines 2-22). Petitioner-plaintiff attached to his filing both the County and the DLCD's orders (pp 9-17). This July 25, 2005 filing initiated Case No. 05C16991. Petitioner-plaintiff's primary argument was that he was an "owner" as defined in ORS 197.352(11)(C), and therefore any waiver of land use regulations granted by the County or the DLCD should be determined by the date of petitioner-plaintiff's ownership, not only Mrs. Schaffer's ownership. *See* ORS 197.352(8) (providing 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 * * * 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").

On August 19, 2005, petitioner-plaintiff, again acting *pro se*, filed a "Complaint and Summons Ballot Measure 37 Case [05]C 16991," which purported to be an appeal from the County's order and the DLCD's order, and requested "relief from administrative err[or]s" (p 2, lines 14-17, 19). Petitioner-plaintiff specified that "The parties to this contested administrative case" included himself as "plaintiff," and the State of Oregon and Marion County as defendants (p 5, lines 2-6).³ Petitioner-plaintiff designated the findings and conclusions from administrative review as well as a recorded hearing before the Marion County Commissioners as the "record" in the case, and stated that there

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The application does not appear in the record, but all parties concur that an application was filed, and the DLCD and the County issued orders related to the application.

This court designates Mr. Schaffer as a petitioner-plaintiff because it finds, as further explained below, that he is seeking judicial review of the orders issued by the DLCD and the County. In a proceeding for review from the DLCD's order, he would be designated a petitioner; from the County's order, he would be designated a plaintiff. *See* ORS 183.480-483.497; ORS 34.010-34.100.

³The State has never objected to being included in this pleading or this case.

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was no audio record of the state agency's administrative review (p 4, lines 1-3, p 8, lines 12-13). In addition, petitioner-plaintiff states that his "appeal" is timely, citing ORS 183.484 (p 8, lines 6-9). Petitioner-plaintiff attached the County's and DLCD's orders to his document, stating, "Attached to this notice of appeal is a copy of the Orders being appealed * * * " (p 8, line 16, pp 11-22). In the "Relief Sought" section of the document, petitioner-plaintiff requested that this court make certain factual and legal findings, and that this court remand to the County and the State "with an ORDER to make a new finding based on correct(ed) interpretation of facts and law" (p 9, lines 1-14). The certificate of service certified that petitioner-plaintiff had served a copy of the "notice of appeal" on the attorneys representing the County and the DLCD (p 10, lines 13-16). Furthermore, the summons included in petitioner-plaintiff's papers advised the defendants that "The matters to be resolved are alleged administrative err[or]s by Marion County and the State Department of Land Conservation and Development" (p 22, lines 17-18).

On September 1, 2005, the County moved to dismiss based on procedural defects in petitioner-plaintiff's service of the County and asserting petitioner-plaintiff was not a real party in interest as required by ORCP 21 A(6). Subsequently, after petitioner-plaintiff retained counsel in this case, the County waived its objections to service.⁴ In the meantime, however, on September 9, 2005, petitioner-plaintiff, acting *pro se*, filed a "Motion to Quash" the County's motion to dismiss in which he stated that case 05C16991 "has nothing to do with compensation. It has only to do with incorrectly recited facts in administrative Orders 05-62 and M119216, inapplicability of Marion County Ordinance 1209, and the need to show distinguishing, codified standards, consistently applied regarding two and five acre parcels," and that "The prayer of the Circuit Court Case 16991 is remand" (p 3, lines 5-10, 12). In addition, petitioner-plaintiff attached a letter he had written to County counsel in which he stated that the administrative actions were unfavorable to him, and that he was asking this court to "remand the case to Marion County Commissioners and to the state of Oregon," referencing the errors he expected to be cured at rehearing and specifically noting that if this court's finding is favorable to petitioner-plaintiff, there will need to be another public hearing (undated letter from petitioner-plaintiff to Scott Norris, p 2, ¶¶ 3, 5-6, p 3, ¶¶ 1-2, & p 4, ¶ 6). Another letter appended to petitioner-plaintiff's motion, sent to County counsel as well as the Attorney General, the DLCD, and a County commissioner, stated that petitioner-plaintiff is "the correct party to bring this action and has no alternate avenue of appeal from the administrative orders that wrongly interpret Measure 37 * * *." He also asserted that, if this court finds in his favor, that finding will "bind reconsideration of the administrative Orders" and stated that, if he did not receive an answer to his complaint within fourteen days, he would ask this court to direct reconsideration of the County's and the State's administrative orders (undated letter from petitioner-plaintiff to Hardy Myers, Lane Shetterly, Scott Norris, and Patti Milne, p 1, ¶ 2 & p 2, ¶¶ 1, 3).

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Because this court finds, below, that petitioner-plaintiff is an improper party to bring Case No. 05C16991, this court need not consider whether petitioner-plaintiff has fulfilled the mandatory procedural steps required to bring a writ of review. See ORS 34.030, 34.050. The County appears to accept that petitioner-plaintiff's case was brought pursuant to ORS 197.352(6) and does not argue that the steps are not fulfilled

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On September 21, 2005, the State moved to dismiss petitioner-plaintiff's case pursuant to ORCP 21 A(6), asserting that petitioner-plaintiff was not a real party in interest because he did not own the property in question so he did not have standing to petition for judicial review of an order in other than a contested case. For the same reason, the State asserted, petitioner-plaintiff could not state a claim directly under ORS 197.352.

It was at this point that petitioner-plaintiff's counsel first entered the case, filing, on September 29, 2005, a response to the motions to dismiss. Counsel asserted that petitioner-plaintiff's filings were made pursuant to ORS 197.352 rather than as an appeal from an administrative order, that, although confusing, petitioner-plaintiff's second filing should be considered a first amended complaint, and that his motion to quash should be regarded as a response to the County's motion to dismiss. Responding to the motions to dismiss, counsel sought to add Mrs. Schaffer as a petitioner-plaintiff in this action, and asserted that petitioner-plaintiff has a sufficient interest in the property to be considered an owner under ORS 197.352(11)(C).⁵

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Petitioner-plaintiff has filed several subsequent *pro se* documents, as outlined below in this footnote. Because petitioner-plaintiff was represented by counsel at the time he filed these documents and counsel did not adopt them, this court does not consider them, except to the extent they indicate what type of action petitioner-plaintiff intended to institute.

On October 25, 2005, petitioner-plaintiff filed a *pro se* "Petition for UNTIMELY Writ of Review Case [0]5C 16991." This document contained many complaints about the process used by and the findings of the County and the DLCD in their respective reviews of petitioner-plaintiff's ORS 197.352 application. Petitioner-plaintiff asserted that he delayed filing the petition because he "only recently received advice that should have been provided with Orders 05-62 and M 119316" (p 7, lines 10-12). (This advice was apparently provided by counsel, since petitioner-plaintiff states in his "Summons and Petition for Writ of Review" filed in Case No. 05C21655 that he learned, after consultation with his attorney, that the DLCD and County had not provided proper appeal instructions, obstructed access to court review, and filed untimely responses in Case No. 05C16991 (Summons and Petition for Writ of Review in Case No 05C21655, p 8, lines 17-22)). Petitioner-plaintiff stated that, in addition to the requests in his original complaint he "now seeks Court jurisdiction over the relief, remedies and requirements of state law at Measure 37" and also sought a stay against the County's revocation of Order 05-62 or a statement by the County that it would vacate Order 05-136 and address the merits of petitioner-plaintiff's petition (p 12, lines 5-13). The filing was signed by both petitioner-plaintiff and Mrs. Schaffer.

On the same day, petitioner-plaintiff filed a *pro se* "Motion for Default Judgment Case [0]5C 16991" related to the County's withdrawal of Order No. 05-62. This filing was also signed by both petitioner-plaintiff and Mrs. Schaffer.

On November 14, 2005, petitioner-plaintiff filed a *pro se* "Reply to Conference Order of the Court Case [0]5C 16991 "

On April 13, 2006, in Case No 05C16991, petitioner-plaintiff filed a *pro se* motion for a default judgment against the County, asserting that he was entitled to such judgment because the County had revoked Order 05-62 and therefore petitioner-plaintiff prevailed in his opposition to the order. Petitioner-plaintiff also asked this court to join Mrs. Schaffer to this case.

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In an affidavit filed as an exhibit to counsel's response, petitioner-plaintiff stated, in response to the State's motion to dismiss, that "the court may order correction of the administrative findings, analysis at law and orders" (p 3, ¶ 9). In response to the County's motion to dismiss, petitioner-plaintiff stated, "The prayer of this case is correction of wrong findings, wrong conclusions at law and incorrect orders. These corrections are not *de novo* Measure 37 relief or compensation, in lieu" (p 4, ¶ 4).

The County replied on October 12, 2005, opposing the addition of Mrs. Schaffer as a petitioner-plaintiff, since any claim that she might have is related to the date by which a waiver should be determined, rather than, as in petitioner-plaintiff's case, the question of whether a person is an owner under the statute. The County reasserted its position that petitioner-plaintiff is not a real party in interest in this litigation.

On October 14, 2005, in Order No. 05-136, the County Board of Commissioners revoked Order No. 05-62 and found that Mrs. Schaffer was entitled to compensation pursuant to ORS 197.352. In lieu of compensation, however, as provided by statute, the County directed that certain land use regulations, enacted after Mrs. Schaffer became an owner of the property on May 12, 2004, not apply to the property.

On November 28, 2005, after the Circuit Court of Marion County declared ORS 197.352 unconstitutional, this court granted the parties' Stipulated Motion to Place Case in Abeyance. The abatement order was dissolved on March 24, 2006, after the Supreme Court reversed the circuit court's ruling and the circuit court entered an order in accordance with that decision. See *MacPherson v. DAS*, 340 Or 117, 130 P3d 308 (2006).

While this case was in abeyance, on December 12, 2005, petitioner-plaintiff and Mrs. Schaffer, acting *pro se*, instituted another action in Marion County Circuit Court, Case No. 05C21655, by filing a "Summons and Petition for Writ of Review." This document challenged the issuance of the County's Order No. 05-136, and contested the County's and the DLCDC's orders on the same grounds previously raised in Case No 05C16991. Because this case involved the same parties as were involved in Case No. 05C16991, with the exception of an additional plaintiff, the subject real property was the same in both cases, and both matters involved ORS 197.352, the second-filed case, Case No. 05C21655, was consolidated with the existing case on April 20, 2006.

On April 27, 2006, the State filed its reply to petitioner-plaintiff's response to its motion to dismiss. The State argued that Mrs. Schaffer could not make a claim under ORS 197.352 because it only provides a cause of action for compensation. Since she has already obtained a waiver in lieu of compensation, she cannot seek further relief under the statute. And since the ORS 183.484 60-day statute of limitations for review of agency action has passed, the State asserts she cannot obtain review of the agency's determination.

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Legal and Factual Conclusions

Case No. 05C16991

Despite counsel's attempt to interpret petitioner-plaintiff's *pro se* papers as a cause of action under ORS 197.352, this court finds that they are unmistakably an attempt to seek judicial review of the orders issued by the County and DLCD. In both his July 25, 2005 filing, which this court deems his initial complaint, and his August 19, 2005 filing, which this court deems his first amended complaint, petitioner-plaintiff requested that this court correct the County's and the DLCD's flawed interpretation of ORS 197.352 and remand the orders to the respective agencies for reconsideration. In the first amended complaint, petitioner-plaintiff called the action an appeal and stated that he was appealing from the City's and the DLCD's orders, cited ORS 183.484, specifically requested "relief from administrative err[or]s," called the proceeding a contested administrative case, and deemed the proceedings in the County as the record for review. Furthermore, in petitioner-plaintiff's September 9, 2005 "Motion to Quash" and the letters appended thereto, petitioner-plaintiff again called his action an appeal and requested remand to the County and the DLCD, indicating his belief that this court's actions could compel a second hearing. Importantly, petitioner-plaintiff specified in his motion to quash that the action "has nothing to do with compensation," the only form or relief available in an action brought pursuant to ORS 197.352. *See* ORS 197.352(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"). The content of these filings clearly indicate petitioner-plaintiff's intention to file a petition for review pursuant to ORS 183.484, rather than a cause of action under ORS 197.352(6). Even in petitioner-plaintiff's affidavit appended to counsel's response to the motions to dismiss, wherein counsel asked this court to interpret petitioner-plaintiff's pleadings as a cause of action pursuant to ORS 197.352, petitioner-plaintiff continued to indicate that he wished this court to conduct a review of administrative orders and specifically stated that he was *not* seeking "de novo Measure 37 relief."

It was not until petitioner-plaintiff's October 25, 2005 filing – which occurred after counsel had entered the case – that petitioner-plaintiff indicated that he "now" sought to have this court consider his action as one filed pursuant to ORS 197.352. To the extent this was a request to amend the pleadings to include a cause of action pursuant to ORS 197.352(6), this court denies that request. Even if the Court were to defer to the concept of amending counsel came on board, the amendment was filed after petitioner-plaintiff was represented by counsel and the request was not adopted by counsel.

Petitioner-plaintiff's papers therefore indicate his intent to file this action as one for judicial review of the County's and DLCD's orders. While the DLCD's order is subject to review pursuant to ORS 183.484, the order of the County is not subject to such review because that statute applies only to agencies, which does not include local governments. *See* ORS 183.310(1) (defining "agency"); *Oregon Administrative Law* § 2.10 (Oregon CLE 2001) ("A common point of confusion

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arises when lawyers attempt to apply portions of the APA to local government departments or agencies”). It is, however, subject to review in this court pursuant to ORS 34.010 through ORS 34.100, which provides for a writ of review to the circuit court from a decision of an officer or tribunal -- other than an agency -- that has exercised judicial or quasi-judicial functions.

In any event, the result as to the viability of petitioner-plaintiff's case remains the same whether he is proceeding pursuant to judicial review of the County's and the DLCD's orders, or a cause of action pursuant to ORS 197.352. Having previously deeded his interest to his wife, he is not a real party in interest as required by ORCP 21A(6). Therefore, his claim must be dismissed.

To be a real party in interest in his petition for review of the County's order, petitioner-plaintiff must have suffered an injury to his substantial interest. *See* ORS 34.040(1). To appeal from the DLCD's order, petitioner-plaintiff must have been adversely affected or aggrieved by the agency's order.⁶ If petitioner-plaintiff's claim were a cause of action under ORS 197.352, he would have to show that he had standing to pursue the action, which in this case means that he must be a "present owner of the property, or any interest therein." *See* ORS 197.352(6).

In assessing whether petitioner-plaintiff is a real party in interest, this court accepts the allegations made in his complaints as true, but also may consider matters outside the pleadings. *See* ORCP 21 A. Specifically, this court considers Exhibit A to the County's Motion to Dismiss and Exhibit A to the State's Motion to Dismiss, both of which show that Mrs. Schaffer is the sole owner of the property in question, as well as Exhibit F to the State's Motion to Dismiss, a copy of Ballot Measure 37 which, as noted, was codified at ORS 197.352.

In general, ORS 197.352 requires a public entity that enacted a land use regulation to compensate a property owner if that regulation reduces the fair market value of the owner's property, if that owner or the owner's family member acquired the property before the regulation was enacted. *See* ORS 197.352(1), (3)(E). Alternatively, and in its discretion, the public entity could choose to permit the owner of the property to use the property "for a use permitted at the time the owner acquired the property" rather than providing compensation to the owner. ORS 197.352(8).

The definitions portion of ORS 197.352 defines owner as "the present owner of the property, or any interest therein." ORS 197.352(11)(C). It is this definition of "owner" that petitioner-plaintiff asks this court to interpret. It is clear that an "owner" under the statute may include a person who has a partial, but present, ownership interest. This would include anyone who, though not the only owner of the property, is a co-owner of the property, such as a tenant in common or joint tenant. That is not, however, the position in which petitioner-plaintiff finds himself, for Mrs. Schaffer is the only owner of the property currently listed on the deed (Exhibits A, deed, appended to defendants' Motions to Dismiss).

6

Although the statute also confers standing on parties to seek judicial review, there is no "party" to a proceeding when the order is in an other than a contested case (the type of order at issue here), because there is no formal proceeding. *See Oregon Administrative Law* § 7.11

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Petitioner-plaintiff contends that, although he is not a current owner of the property in fee simple, he has an interest in it by virtue of the fact that he purchased it in 1976, has lived on it continuously since that time, conveyed it to Mrs. Schaffer, is still responsible for the mortgage on it, and has a marital right in it should he and Mrs. Schaffer divorce. Petitioner-plaintiff has suggested that he conveyed the property to Mrs. Schaffer for the purpose of refinancing the property, and, through counsel, that he intended to deed the property to her and himself as tenants by the entirety (counsel's Response to motions to dismiss, p 6, lines 24-24 & Exhibit 2 to Response, p 3, ¶ 2). Whatever petitioner-plaintiff's purpose in executing a new deed, and whether his omission from the title was intentional or not, the fact remains that petitioner-plaintiff unconditionally deeded the entire property to Mrs. Schaffer and Mrs. Schaffer alone. She is the only owner currently named on the deed.

Potentially, petitioner-plaintiff could be correct in asserting that, although he does not own the property, he has an "interest therein" sufficient to qualify him for relief under the statute. The question, therefore, is whether the "interest therein" requires some form of present *ownership* interest in the property, or only an interest in the property itself. To answer this question, this court must discern the intent of the voters in enacting this definition of "owner" by considering the text and context of the statute. This includes consideration of the use of the term "owner" throughout the statute. See *PGE v. Bureau of Labor and Indus.*, 317 Or 606, 610-11, 859 P2d 1143 (1993) (instructing courts to consider the text and context of the statute in discerning the voters' intent, and instructing that "use of the same term throughout a statute indicates that the term has the same meaning throughout the statute"); *Ecumenical Ministries v. Oregon State Lottery Comm'n*, 318 Or 551, 559, 871 P2d 106 (1994) ("[t]he best evidence of the voters' intent is the text of the provision itself" (quoting *Roseburg Sch. Dist v. City of Roseburg*, 316 Or 374, 378, 851 P2d 595 (1993))); *Li v. Oregon*, 338 Or 376, 388-89, 110 P3d 91 (2005) ("In interpreting voter-initiated constitutional provisions, our goal is to discern the intent of the voters. In doing so, the text of the constitutional provision itself provides the best evidence of the voters' intent * * * * If the voters' intent is clear from the text and context, then the court does not look further"); *Stranahan v. Fred Meyer, Inc.*, 331 Or 38, 57, 11 P3d 228 (2000) (when interpreting an initiative petition, "it is the people's understanding and intended meaning of the provision in question—as to which the text and context are the most important clue—that are critical to our analysis").⁷

7

Only if the text and context of the statute are unclear does this court consider the legislative history of the statute, the second level of statutory construction. In a case involving a ballot measure, the legislative history includes items such as the ballot title, arguments regarding the measure included in the voters' pamphlet, and news reports and editorial comment on it. See *Ecumenical Ministries*, 318 Or at 559 n 8; *PGE*, 317 Or at 611-12. If, after completing both levels of statutory construction, the voters' intent remains unclear, the court "may resort to general maxims of statutory construction to aid in resolving the remaining uncertainty." *PGE*, 317 Or at 612. As will be discussed below, this court finds that it need not reach the second or third level of statutory construction.

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Considering the statute as a whole, to have a meaningful “interest therein” in property for the purposes of ORS 197.352(11)(C), an owner must have “acquired” the property. Both the compensation and waiver provisions of the statute depend on the owner’s acquisition of the property before the owner becomes entitled to any relief under the statute. *See* ORS 197.352(1), (2), & (3)(E) (providing that the owner of the property is entitled to compensation for the reduction in value to the property caused by land use rules enacted before the property was *acquired* by the owner (or a family member of the owner who owned the property prior to the acquisition or inheritance by the owner)); ORS 197.352(8) (providing that a public entity may “modify, remove, or not * * * apply the land use regulation * * * to allow the owner to use the property for a use permitted at the time the owner *acquired* the property” (emphasis added)).

“Acquisition” of the property occurs when the person gains the right to possess, control, or exercise power over the property. *See Webster’s Third New International Dictionary, Unabridged* (2002) (defining “acquire” as “to come into possession, control, or power”). “Possession” or “control” of the property equates to an actual holding of the rights that run with the land, which permits the person to exercise authority over the property. *See id.* (defining “possession” as “the act or condition of having in or taking into one’s control or holding at one’s disposal * * * actual physical control or occupancy of property by one who holds for himself and not as a servant of another without regard to his ownership and who has legal rights to assert interests in the property against all others having no better right than himself,” and defining “control” as “to exercise restraining or directing influence over[,] * * * have power over,” or “power or authority to guide or manage”). To actually hold the rights that run with the land, the person must have an ownership interest in the property. Consequently, to “acquire” the property for the purposes of the statute, the person must legally own the property, either in whole or in part. This means that the definition of “owner” contained in ORS 197.352(11)(C) requires that the person be a present legal owner of the property, or have a present legal ownership interest in the property.

None of the interests petitioner-plaintiff identifies give him the legal ownership interest required under the statute. Having a potential right to a share of the property if petitioner-plaintiff and Mrs. Schaffer divorced does not create in petitioner-plaintiff a current legal right to control or possess the property. Rather, during the marriage, Mrs. Schaffer, as holder of the title in fee simple, has the legal right to sell the property at her discretion, without consulting petitioner-plaintiff or sharing the proceeds of the sale with him. As the sole owner of the property, she also has the legal right to exclude petitioner-plaintiff from it. The fact that Mrs. Schaffer may permit petitioner-plaintiff to exercise ownership rights with regard to the property does not make him a legal owner of the property. Unless Mrs. Schaffer deeds the property to petitioner-plaintiff in whole or in part, she has no ability to confer ownership status on petitioner-plaintiff. Petitioner-plaintiff’s counsel cites no support for his contention that plaintiff could not be removed from the property without some action by the court. Furthermore, the fact that petitioner-plaintiff shares the responsibility for the mortgage of the property does nothing more than make him obligated to pay as co-signor. It does not make him an owner of the property. The fact that he is jointly responsible for the mortgage on the property certainly provides him with an interest in what happens to and occurs on the property, but it does not

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elevate him to the status of someone who has the right to control the property.

Because petitioner-plaintiff is not an owner as defined by ORS 197.352(1)(C), the County's and DLCD's orders that failed to recognize his ownership interest in the property could not possibly have caused an injury to his substantial interest or caused him to be adversely affected or aggrieved. Nor would he have standing to bring an action pursuant to ORS 197.352(6), because he is not a "present owner of the property, or any interest therein." See ORS 197.352(6). As a result, petitioner-plaintiff is not the real party in interest to Case No. 05C16991 and that action must be dismissed. See ORCP 21 A(6); ORCP 26 A; ORS 34.040(1); ORS 183.480(1); *People for Ethical Treatment v. Institutional Animal Care*, 312 Or 95, 101-02 (1991) (finding that a person is "aggrieved" if "(1) the person has suffered an injury to a substantial interest resulting directly from the challenged governmental action; (2) the person seeks to further an interest that the legislature expressly wished to have considered; or (3) the person has such a personal stake in the outcome of the controversy as to assure concrete adverseness to the proceeding" (citations omitted)); *Association of Unit Owners v. Dunning*, 187 Or App 595, 609-13, 69 P3d 788 (2003) (considering whether statute at issue authorized plaintiff to assert a claim in determining whether plaintiff was a real party in interest); cf. *Orr v. East Valley Water Dist.*, 203 Or App 430, 125 P3d 834 (2005) (plaintiffs had standing under ORS 34.040 because they asserted an injury to their property interests), *rev den*, 340 Or 308 (2006).

This court understands petitioner-plaintiff's frustration at not being considered a legal owner of the property and thus not being entitled to the relief provided by ORS 197.352. This court is, however, constrained by the unambiguous text of the statute. It is not for this court to read more into the statute than is there. See ORS 174.010 ("the office of the judge is simply to ascertain and declare what is, in terms or in substance, contained therein, not to insert what has been omitted, or to omit what has been inserted"); *PGE*, 317 Or at 611 (citing principle). Nor is it for this court to question the policy choices present in the statute. As the Supreme Court stated, "[w]hether Measure 37 as a policy choice is wise or foolish, farsighted or blind, is beyond this court's purview." *MacPherson*, 340 Or at 141. This court may only interpret the language that the voters chose to enact. That language requires that a person seeking relief under ORS 197.352 have a current ownership interest in the property.

This court must next consider whether to permit petitioner-plaintiff to amend his pleadings to add Mrs. Schaffer as a petitioner-plaintiff. This court has the authority to grant petitioner-plaintiff's motion to amend the pleadings to include her as a petitioner-plaintiff for judicial review of the County's and the DLCD's orders. See ORCP 23 A. If this court granted the amendment, the pleadings may relate back to when petitioner-plaintiff filed the action, and, if so, her petitions for judicial review would be timely. See ORCP 23 C (if new claim "arose out of the conduct, transaction or occurrence set forth * * * in the original pleading, the amendment relates back to the date of the original pleading"); ORS 183.484(2) (providing 60-day time limit for appeals for judicial review in other than contested cases).

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The claims set forth in petitioner-plaintiff's pleadings relate to his own personal interest in the property and whether that interest is sufficient to grant him rights as an owner under ORS 197.352. Any claims Mrs. Schaffer would raise in this action would, necessarily, be different although related, as she is the legal owner of the property in question.⁸ Adding her to the action would therefore not cause the action to be prosecuted by a real party in interest as to the claims petitioner-plaintiff raises. See ORCP 26 A (requiring court to provide plaintiff a reasonable time to join or substitute the real party in interest when an objection on that basis is raised); *Reutter v RWS Constr., Inc.*, 128 Or App 365, 369, 875 P2d 1187 (1994) (considering the commentary to FRCP 17, upon which Rule 26 was based, which states that the purpose of the rule is "'to protect the defendant against a subsequent action by the party actually entitled to recover, and to insure generally that the judgment will have its proper effect as res judicata'"). Nor would adding Mrs. Schaffer to the action permit this court to reach the issues asserted by petitioner-plaintiff in the pleadings any more sufficiently than it already has, since any claims she might seek to raise regarding to the County's and the DLCD's orders would, as noted, be different from those asserted by petitioner-plaintiff. Petitioner-plaintiff does not indicate that Mrs. Schaffer, if added to the action, would raise any claims that are not capable of being addressed in another action.⁹

For these reasons, justice does not require that this court grant petitioner-plaintiff's request to amend the pleadings to add Mrs. Schaffer as a petitioner-plaintiff in this action. This court therefore denies that motion.⁹

Case No 05C21655

As to any claims contained in this action relating to the DLCD's order, they are untimely because they were not brought within 60 days of July 6, 2005, the date the order was served, as required by ORS 183.484(2).

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It is likely that any claims Mrs. Schaffer would assert would be based on the DLCD's interpretation of when she acquired the property. See ORS 197.352(8) (permitting the public entity to waive land use regulations to permit a use of the property that was permitted "at the time the owner acquired the property").

9

Specifically, petitioner-plaintiff's counsel mentions only that they would "more appropriately address the Measure 37 civil cause of action." As previously found, however, this action does not state a claim pursuant to ORS 197.352, but only seeks judicial review of final orders issued by the County and the DLCD. Petitioner-plaintiff does not indicate that there are any claims related to this judicial review, specific to Mrs. Schaffer and potentially barred by the statute of limitations, that he wishes to raise. Furthermore, this court notes that Mrs. Schaffer is a party to Case No 05C21655, which is a petition for writ of review from the County's October 14, 2005 issuance of Order No 05-136 and also raises issues regarding the DLCD's order.

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On October 14, 2005, the County revoked Order No. 05-62 and substituted Order No. 05-136. To the extent this action challenges the County's findings in Order No. 05-136, it is timely because it was brought within 60 days of the date of that decision. *See* ORS 34.030.

Both Mr. and Mrs. Schaffer are named as plaintiffs in this action.

As to Mr. Schaffer, the action must be dismissed because, for the same reasons discussed above, Mr. Schaffer is not a real party in interest to this action. *See* ORCP 21 A(6); ORCP 26 A; ORS 34.040(1).

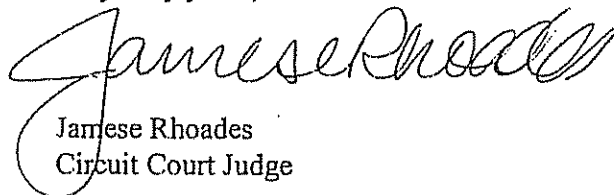
As to Mrs. Schaffer, the action must be dismissed because she fails to include a verification by an attorney that the attorney "has examined the process or proceeding, and the decision or determination therein, and that it is erroneous as alleged in the petition." *See* ORS 34.030. This is a requirement that must be fulfilled before the circuit court may issue the writ. The failure to include the verification means that this court cannot issue the writ, and therefore, that it cannot review the proceeding. *See Shevchynski v. City of Eugene*, 157 Or App 355, 970 P2d 237 (1998) (court has no authority to issue writ of review until statutory requirements are met, and cannot review the proceeding until it has issued the writ of review); *Shipp v. Multnomah County*, 133 Or App 583, 588-89, 891 P2d 1345 (discussing procedure for issuing writ and making the review), *rev den*, 321 Or 246 (1995). Mrs. Schaffer's failure to fulfill this mandatory requirement means that this court cannot issue the writ. However, this court grants Mrs. Schaffer leave to amend her complaint if done within 20 days of the date of this letter, to include the attorney verification, as well as the mandatory undertaking (*see* ORS 34.050), if it was not already given.

Conclusion

This court grants Defendants' motions to dismiss action 05C16991, without leave to amend, because petitioner-plaintiff is not the real party in interest to this action. Ms. Staley will kindly prepare the appropriate form of general judgment of dismissal.

This court grants the County's motion to dismiss action 05C21655 as to Mr. Schaffer without leave to amend, and as to Mrs. Schaffer with leave to amend as stated above. Mr. Norris will kindly prepare the appropriate form of general judgment of dismissal as to Mr. Schaffer and a form of order regarding Mrs. Schaffer.

Very truly yours,



James Rhoades
Circuit Court Judge

JLR:nl

Reply
Dec 11/09/05 ?

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✓ ECH

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

Clackamas
& Clatsop

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

ORDER - Page 1 of 2

ATTACHMENT
B


RECEIVED
2006
APPELLATE DIVISION
SALEM, OREGON

1 **CERTIFICATE OF SERVICE**

2 I certify that on July 10, 2006, I served the foregoing *Reply in Support of Motion to*
3 *Dismiss* upon the parties hereto by the method indicated below, and addressed to the following:

4 Edward P. Fitch
5 Bryant, Emerson & Fitch, LLP
6 888 SW Evergreen Avenue
7 PO Box 457
8 Redmond, OR 97756-0103

— HAND DELIVERY
 MAIL DELIVERY
— OVERNIGHT MAIL
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