

1 In support of this motion, respondents rely upon ORCP 47 B, the files and record of this
2 case, the following Points and Authorities, and the Declaration of Paul Klarin filed concurrently.

3 **INTRODUCTION**

4 Lawrence K. and Helen A. Wallin petition for judicial review of a Final Order issued
5 jointly by the Department of Administrative Services (DAS) and the Department of Land
6 Conservation and Development (DLCD) denying petitioners' Measure 37 claim (Ex 1).² The
7 Order determined that petitioners' Measure 37 claim is not valid because respondents have not
8 enforced laws that restrict petitioners' use of the property in a manner that reduces the fair
9 market value of the property relative to the uses to which it could have been put when petitioners
10 acquired it (Ex 1, p 9). This is so because the property was subject to the development standards
11 of statewide planning Goal 4 (Forest Lands) when petitioners acquired it, and less restrictive
12 standards now apply—specifically the urbanization standards of statewide planning Goal 14
13 (Urbanization) because the property is within the Urban Growth Boundary (“UGB”) of the City
14 of Brookings (Ex 6). Moreover, no land use regulation currently enforced by respondents
15 prevents the development petitioners seek.

16 **POINTS AND AUTHORITIES**

17 **A. Introduction to Measure 37**

18 Oregon voters enacted Ballot Measure 37 through the initiative process in 2004.
19 Codified as part of Chapter 197, where Oregon’s statewide land use planning statues are found,
20 Measure 37 permits owners of private real property to seek compensation for reductions in fair
21 market value caused by certain land use regulations. As an alternative to payment, public
22 entities may “waive,” that is modify, remove, or not apply, certain regulations. The Oregon
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26 ² Exhibits 1-6 are attached to the Declaration of Paul Klarin.

1 Supreme Court upheld the constitutionality of Measure 37 in *MacPherson v. DAS*, 340 Or 117, --
2 - P3d --- (2006)

3 **1. Oregon Land Use Laws**

4 The primary components of Oregon’s land use planning system were created with the
5 passage of Senate Bill 10 in 1969, and Senate Bills 100 and 101 in 1973. These bills were
6 codified in ORS Chapter 197.³ Senate Bill 10 required cities and counties to adopt
7 comprehensive land use plans and enact zoning ordinances to implement those plans. Senate
8 Bill 100 created a state agency—the Land Conservation and Development Commission
9 (LCDC)—to establish and amend statewide land use goals, and to review and “acknowledge” the
10 comprehensive plans and zoning regulations adopted by local governments to ensure that they
11 comply with the goals.⁴ Local governments—cities, counties, and special districts—are
12 responsible for enacting land use regulations to implement their comprehensive plans, and for
13 making land use decisions consistent with the plans, their land use regulations, and any directly-
14 applicable state laws.⁵

15 **2. Measure 37**

16 A real property owner qualifies for Measure 37 relief if: (1) a public entity enacts or
17 enforces a “land use regulation” that (2) restricts the owner’s use of private real property, and (3)
18 has the effect of reducing the fair market value of the private real property. ORS 197.352 (1).
19 Subsection (3) of Measure 37 provides that certain land use regulations shall not be a basis for a
20 written demand under Section (1). Subsection (5) requires landowners to present written
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24 ³ See 1969 Or Laws ch 324; 1973 Or Laws ch 80.

25 ⁴ See ORS 197.040(2); 197.175(2). All 36 counties in Oregon have adopted comprehensive plans that have been
26 “acknowledged” by LCDC.

⁵ ORS 197.175(2) (c)-(e), 197.646(3), 197.835(8), see also *Kenagy v. Benton County*, 115 Or App 131 (1992).

1 demands within two years of the effective date of Measure 37 (December 2, 2004) or the date on
2 which a land use regulation is applied “as an approval criteria” on a specific land use application,
3 whichever is later.

4 After determining that an owner submitted a timely, valid written demand, the public
5 entity has the option to pay compensation or to “modify, remove, or not to [sic] apply” land use
6 regulations to the extent necessary “to allow the owner to use the property for a use permitted at
7 the time the owner acquired the property.” ORS 197.352 (8); *see also* ORS 197.352 (10).

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

10 DLCD is exercising the waiver option.⁶

11 **3. The Claims Process**

12 Measure 37 does not specify any procedure for claim processing, but permits public
13 entities to adopt procedures. DAS adopted procedural rules, found at OAR 125-145-0010 to
14 125-145-0130, that set minimum requirements for the content of a Measure 37 claim against the
15 State.

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

21 DAS initially reviews Measure 37 claims and forwards them to the appropriate state
22 agency, *i.e.* the “regulating entity” that appears to have enacted or enforced a relevant land use
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⁶ DLCD can pay compensation only if and when the legislature appropriates funds for that purpose. *See* OAR 660-002-0010 (8) (c).

1 regulation. OAR 125-145-0090. The regulating entity investigates and analyzes the claim and
2 issues a draft report. The draft report provides the agency's preliminary determination on the
3 necessary elements of the claim, including timeliness of the claim, ownership, the land use
4 regulations that are the basis of the claim, the effect of relevant land use regulations on the
5 property's fair market value, and applicable exemptions, if any.

6 The draft report is made public on the internet and copies are mailed to the claimant, and
7 any persons who submitted comments or requested notice. After a ten-day comment period, and
8 based in part on the comments received, the regulating entity and DAS issue a final report and
9 order. The final orders are served on any persons who received copies of the draft report or
10 submitted comments on the draft report. DLCD also makes its final orders public by posting
11 them on its website.

12 **B. Statement of Undisputed Material Facts**

13 The following material facts are undisputed:

- 14 1. On December 29, 2004, petitioners submitted a claim for compensation to the State under
15 Measure 37 (Exs 2 and 5; Pet, ¶ 5). Petitioners wish to subdivide the property into one-
16 acre lots for residential development (Ex 2, pp 5 and 17).
- 17 2. Petitioners acquired the subject property, consisting of slightly more than 29 acres, in
18 June 1979 (Ex 1, p 5; Ex 2, p 44).
- 19 3. Statewide Goals 4 (Forest Lands) and 14 (Urbanization) became effective on January 25,
20 1975 (*see* Attachments B-D to this Memorandum).⁷
- 21 4. Respondents do not dispute that, in June 1979, the property was zoned RA-1 under Curry
22 County regulations (*see* Ex 2, p 5). However, the evidence shows that such zoning
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25 ⁷ The original goals (Att B) are available at http://www.oregon.gov/LCD/docs/history/original_goals_012575.pdf.
26 Goal 4 (Att C) is available at <http://www.oregon.gov/LCD/docs/history/goal4circa012575.pdf>. Goal 14 (Att D) is
available at <http://www.oregon.gov/LCD/docs/history/goal14circa012575.pdf>.

1 conflicted with statewide goals and the County could not have permitted petitioners to
2 develop one-acre residential lots.⁸

3 5. LCDC acknowledged Curry County's comprehensive plan in 1984 (Ex 3).

4 6. In 2001, the Brookings UGB was amended to encompass the subject property, making it
5 subject to Goal 14 (Urbanization) and available for urban development (Exs 4, 6).

6 7. On June 6, 2005, Curry County waived its land use regulations such that petitioners may
7 develop the property consistent with their request (Pet, ¶ 4 and Answer, ¶ 1).

8 **C. Summary Judgment Standard**

9 Petitioners have petitioned for judicial review under ORS 183.484. ORS 183.484 is the
10 exclusive remedy available for review of a state agency order in other than a contested case.
11 ORS 183.480 (2). The applicable standards of review are therefore those set forth in ORS
12 183.484 (5). Under ORS 183.484 (5) (a), this court has authority to review the state agencies'
13 application of the applicable laws.

14 ORCP 47 C authorizes this court to grant summary judgment if there is no genuine issue
15 of material fact and the moving party is entitled to judgment as a matter of law. There are no
16 disputed material facts in this case. As is further explained below, DLCD correctly determined
17 that petitioners' Measure 37 claim was not valid. The Order should be affirmed and judgment
18 entered for respondents.

19 **D. Summary of Argument**

20 Respondents correctly determined that petitioners' Measure 37 claim is invalid because
21 no state land use regulations restrict petitioners' desired use of the property causing a reduction
22 in fair market value as required by ORS 197.352 (1). This conclusion is compelled because:
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24 ⁸ Curry County re-zoned the property FG (Forest Grazing) because of an LCDC enforcement order. See letter dated
25 August 1, 1981 from Curry County Planning Director Robert Higbie to petitioner Lawrence Wallin, included in
26 petitioners' Measure 37 application (Ex 2, pp 64-65) Petitioners have known since at least 1981 that the 1979
zoning of the property conflicted with the statewide land use planning goals.

- 1 • Petitioners' property is within the Brookings UGB and subject to Goal 14. No state
2 regulation restricts residential development of urban property such as petitioners desire,
3 and the County already has approved.
- 4 • Petitioners' development options are greater now than in 1979 when they acquired
5 property and it was subject to Goal 4.
- 6 • Absent any restrictive state land use regulation, and in light of greater development
7 options, no reduction in fair market value has been or can be established.

8 **E. Argument**

9 Petitioners assert that, at the time that they acquired the property in 1979, county zoning
10 regulations allowed the development of one-acre residential lots, that is, that Goal 4 did not
11 apply to the property. They further allege that state regulations in place now prevent them from
12 developing such lots. Neither contention is correct.

13 **1. Goal 4 Applied in 1979**

14 There is no dispute that the County zoning ordinance in effect in 1979 did not prohibit
15 development of one-acre residential lots. However, LCDC had not acknowledged the ordinance
16 as complying with the statewide land use planning goals. Therefore, the goals applied directly to
17 the property, and Goal 4 did not allow such development.

18 As adopted in 1975, Goal 4 provided in relevant part:

19 **To conserve forest lands for forest uses.**

20 Forest land shall be retained for the production of wood fiber and other
21 forest uses. Lands suitable for forest uses shall be inventoried and designated as
22 forest lands. Existing forest land uses shall be protected unless proposed changes
are in conformance with the comprehensive plan.

* * * * *

23 **Implementation**

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24 2. Developments that are allowed under the forest lands classification shall
25 be limited to those activities for forest production and protection and other land
management uses that are compatible with forest production. Forest lands shall
be available for recreation and other uses that do not hinder growth. (Att C.)

1 Thus, Goal 4 would not allow one-acre residential lots on land inventoried as forest land;
2 residential development on such lands was limited to those that were necessary and accessory to
3 forest use. *1000 Friends v. LCDC (Lane Co.)*, 305 Or 384, 394-395 (1988). Therefore, at the
4 time petitioners purchased the subject property, it could not be used for the purpose they claim.

5 As noted above, in 1973, SB 100 created LCDC, and tasked the commission with the
6 adoption of statewide land use planning goals. LCDC adopted the goals which took effect on
7 January 25, 1975 (Att B). All cities and counties were given one year to prepare comprehensive
8 plans that were consistent with the statewide goals, ORS 197.250; in practice, however, the
9 process of preparing new plans and obtaining acknowledgment took many years for most
10 jurisdictions. The forest zone in Curry County's comprehensive plan was acknowledged in
11 1984, nearly ten years after the statewide land use planning goals became effective (Ex 3).

12 In the interim between the effective date of the goals and acknowledgment of the county
13 comprehensive plan, the cities and counties were required to apply the statewide goals.
14 *Alexanderson v. Polk County Commissioners*, 289 Or 427 (1980) (applied to a partition). This
15 conclusion is compelled by the statutes that were in place during that time. ORS 197.175 (1)
16 (1973)⁹ provided:

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18 Cities and Counties in this state shall exercise their planning and
19 zoning responsibilities in accordance with ORS 197.005 to
20 197.430, 215.005, 215.510, 215.515, 215.535, and 453.345 and **the**
 statewide planning goals and guidelines approved under [the
 listed state statutes]. (Emphasis added.)

21 Thus, had petitioners applied in 1979 to create the residential subdivision they now
22 desire, Curry County would have been required to apply Goal 4, as well as the applicable state
23 statutes and county ordinance, in making that decision. A Measure 37 claim cannot be based on
24 any of these pre-existing state laws. ORS 197.352 (3) (E) (Measure 37 claims "shall not apply to
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26 ⁹ Available at <http://www.oregon.gov/LCD/docs/history/ors197circa1973.pdf>

1 land use regulations * * * [e]nacted prior to the date of acquisition of the property by the
2 owner”).

3 This conclusion is reinforced by other provisions of SB 100. The plans and all
4 ordinances and regulations adopted by local government were required to conform to the
5 statewide goals. ORS 197.280 (1973). In addition, LCDC was authorized to review certain
6 actions of local governments for consistency with the goals. ORS 197.300 (1) (1973). Finally,
7 after a plan was acknowledged, land use applications were reviewed under plan and
8 implementing ordinances, ORS 197.275 (2) (1977); there would be no need to review such
9 applications under the goals, because the acknowledged comprehensive plan was consistent with
10 the goals.

11 As the Oregon Supreme Court held in *Alexanderson*, construing all of these statutes in
12 context, “[t]he implication is that before acknowledgment, the goals apply to such actions not
13 only in this indirect way but directly.” 289 Or at 434. *See also Sunnyside Neighborhood v.*
14 *Clackamas Co. Comm.*, 280 Or 3, 15-16 (1977) (amendment to comprehensive plan required to
15 comply with goals); *Willamette University v. LCDC*, 45 Or App 355, 365 (1980) (“a local land
16 use decision must comply with the statewide planning goals unless and until the local
17 comprehensive plan is acknowledged by LCDC to be in compliance with the statewide planning
18 goals”). Respondents correctly determined that Goal 4 applied to petitioners’ property when
19 they acquired it.

20 **2. Goal 14 Applies Today**

21 As adopted in 1975, Goal 14 provided that, “[u]rban growth boundaries shall be
22 established to identify and separate urbanizable land from rural land” (Att C). After land comes
23 within an urban growth boundary, applicable state laws require that it be made available for
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1 urban uses. *Id.* Petitioners' property is within the Brookings UGB and available for urban
2 development (Exs 4 and 6).

3 The Petition does not identify any state land use regulation that limits petitioners' ability
4 to develop the property into one-acre residential lots. In their Measure 37 application, petitioners
5 assert that the County's FG (Forest Grazing) zoning of the property prevents them using it as
6 they desire (Ex 2, p 5). However, since the land is within the urban growth boundary, *no state*
7 *laws* prohibiting residential development are implicated.

8 Goal 4 and its implementing statutes and rules apply only to lands that lie outside urban
9 growth boundaries. As a result, no state law restricts the desired use of the property or reduces
10 its fair market value relative to when petitioners acquired the property. It follows that
11 respondents properly denied petitioners' Measure 37 claim.

12 In any event, there is no dispute that petitioners are free to move forward with their plans
13 without a Measure 37 waiver from respondents. Respondents deny petitioners' allegation that
14 they cannot develop their property in accordance with their plans (Pet, ¶ 7; Answer, ¶ 4). And,
15 there is no dispute that Curry County is allowing petitioners their desired use (Pet, ¶ 4; Answer, ¶
16 1).

17 CONCLUSION

18 Measure 37 is applicable as to the respondent state agencies only to the extent that a state
19 land use regulation restricts the use of property relative to the uses that were available at the time
20 the current owner acquired the property. Even if Goal 4 applied to petitioners' land within the
21 Brookings UGB, those regulations impose no greater restrictions than were applicable when
22 petitioners acquired the property. In fact, however, the current state regulation under Goal 14 is
23 less restrictive and has not effected a reduction in fair market value.

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1 Respondents did not err in denying petitioners' Measure 37 claim. The state agencies are
2 entitled to summary judgment, their Final Order should be affirmed, and the Petition should be
3 dismissed.

4 DATED this 12th day of June, 2006.

5 Respectfully submitted,

6 HARDY MYERS
7 Attorney General

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

LAWRENCE K. WALLIN and HELEN A. WALLIN,

v.

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

Respondents.

Case No. 05CV0573

DECLARATION OF PAUL KLARIN
IN SUPPORT OF RESPONDENTS' MOTION
FOR SUMMARY JUDGMENT

I, Paul Klarin, do declare and say:

1. I am a Coastal Policy Analyst with the Oregon Coastal Management Program of the Department of Land Conservation and Development. I make this declaration based on my personal knowledge and in support of Respondents' Motion for Summary Judgment.

2. I reviewed the Measure 37 claim submitted to the State of Oregon by the petitioners Lawrence K. and Helen A. Wallin. Their claim was assigned number M 119098. I participated in the preparation of the draft and final staff reports and recommendations.

3. The following Exhibits, attached hereto, are true and correct copies of documents maintained in the files of the Department of Land Conservation and Development (DLCD) on Measure 37 claim M 119098:

- 1 • Exhibit 1 is the Final Order and Final Staff Report and Recommendation on Measure 37
2 Claim No. M 119098. These documents contain a technical error in the description of the
3 property, *i.e.* Section “31” in the property description should be Section “10.”
4 • Exhibit 2 comprises excerpts from petitioners’ “written demand,” or claim, under
5 Measure 37, received by respondent Department of Administrative Services on
6 December 29, 2004 and designated M 119098 (*see also* Exs 1 and 2).
7 • Exhibit 3 is Compliance Acknowledgment 84-ACK-027 Order, signed February 17,
8 1984.
9 • Exhibit 4 is City of Brookings and Curry County Urban Growth Area Joint Management
10 Agreement, effective January 22, 2001.

11 4. Attached hereto as Exhibit 5 is a true and correct copy the Department of
12 Administrative Services registry entry for M 119098. The registry contains the correct Section
13 designation in the property description.

14 5. Attached hereto as Exhibit 6 is a map I prepared using the Curry County web-
15 based GIS map interface. It shows the location of petitioners’ property within the Brookings
16 UGB.

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

20
21 DATED this 9th day of June, 2006.

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24 
25 PAUL KLARIN

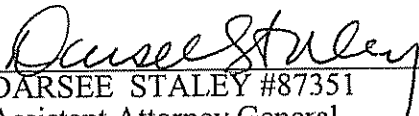
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CERTIFICATE OF SERVICE

I certify that on June 12, 2006, I served the foregoing *Respondents' Motion for Summary Judgment; Points and Authorities, and Exhibits* upon the parties hereto by the method indicated below, and addressed to the following:

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