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

CHARLES A. WEITZEL,
Plaintiff/Petitioner,
v.

OREGON DEPARTMENT OF LAND
CONSERVATION & DEVELOPMENT, an
Agency of the State of Oregon; and OREGON
DEPARTMENT OF ADMINISTRATIVE
SERVICES, an Agency of the State of
Oregon,
Defendants/Respondents.

Case No. CV060354

RESPONDENTS' MOTIONS FOR JUDGMENT
ON THE PLEADINGS, OR IN THE
ALTERNATIVE FOR SUMMARY JUDGMENT;
MEMORANDUM OF POINTS AND
AUTHORITIES

(Oral Argument Requested)

ORAL ARGUMENT REQUESTED

Respondents Oregon Department of Land Conservation and Development and
Department of Administrative Services (collectively "State") request oral argument on their
Motions for Judgment on the Pleadings or in the alternative for Summary Judgment. The State
estimates that 30 minutes will be required. Official court reporting services are requested.

INTRODUCTION

This case involves a demand for compensation under ORS 197.352, commonly known as
Ballot Measure 37. Oregon voters enacted Measure 37 through the initiative process in 2004.
Measure 37 permits present owners of private real property to seek compensation for reductions
in fair market value caused by certain restrictions on use. If a claim is valid, public entities have
the choice of paying compensation or not applying certain restrictions. A copy of the statute is
attached hereto as Exhibit 1 for the court's convenience.

ge 1 - RESPONDENTS' MOTIONS FOR JUDGMENT ON THE PLEADINGS, OR IN THE
ALTERNATIVE FOR SUMMARY JUDGMENT; MEMORANDUM OF POINTS AND
AUTHORITIES

DS1/slc/TRIR1590

- 1 1. The Petition for Judicial Review and compensation claim should be dismissed pursuant to
2 ORCP 21B on the grounds that the pleadings show the State is entitled to judgment as a
3 matter of law.
- 4 2. The Petition for Judicial Review should be dismissed pursuant to ORCP 47 and ORS
5 183.484 (5) on the grounds that the material facts are undisputed, the State's findings of
6 fact are supported by substantial evidence, and the State correctly applied the law.
- 7 3. The compensation claim should be dismissed because the court lacks jurisdiction. ORS
8 183.480 (2) provides that ORS 183.484—the Petition for Judicial Review—is the
9 exclusive procedure available under Oregon law to test the validity of final orders issued
10 by state agencies.
- 11 4. The compensation claim should be dismissed because petitioner is not entitled to
12 compensation under ORS 197.352. Measure 37 vests discretion in the State to choose
13 whether to pay compensation or waive regulations; the State chose waiver.

14 In support of its Motions, the State relies upon Measure 37, the APA, ORCP 21 and 47,
15 the files and record of this case, the agency *Record* lodged with the court on March 16, 2007, and
16 the following Points and Authorities.

17 POINTS AND AUTHORITIES

18 I. Measure 37 Requires the State to Pay Compensation or “Waive” Regulations.

19 A property owner qualifies for Measure 37 relief if: (1) a public entity enacts or enforces
20 a “land use regulation” after December 2, 2004, that (2) restricts the owner’s use and (3) has the
21 effect of reducing the fair market value of the owner’s property. ORS 197.352 (1). Section 3
22 provides that certain land use regulations shall not be a basis for a written demand under Section
23 1, notably regulations in effect when the owner acquired the property. ORS 197.352 (3) (E).
24 Section 11 defines “owner” as the “present owner” of the property. ORS 197.352 (11) (C).

1 The parties agree on the description of the property at issue and that petitioner is the
2 present owner (Compl, ¶¶ 1-2; Ans, ¶ 1). The parties also agree that petitioner acquired the
3 property on October 14, 1992 (*id.*). Petitioner does not allege that the State erred by determining
4 that subsequently enacted state land use regulations restricted his use of the property to some
5 extent, thereby reducing its value to some extent (Compl, ¶ 10 and Ex 1 thereto, pp 8, 9).

6 For regulations enacted prior to the effective date of Measure 37 (December 2, 2004),
7 Section 5 requires owners to submit written demands by December 2, 2006 or the date on which
8 a land use regulation is applied “as an approval criteria [sic]” on a specific land use application,
9 whichever is later. After determining that an owner submitted a timely, valid written demand,
10 the public entity has the option to pay compensation or to “modify, remove, or not to [sic] apply”
11 land use regulations to the extent necessary “to allow the owner to use the property for a use
12 permitted at the time the owner acquired the property.” ORS 197.352 (8); *see also* ORS 197.352
13 (10).¹ The parties agree that petitioner submitted a timely Measure 37 demand to the State, the
14 State approved the demand, and Final Order M 122793 constitutes the State’s election to provide
15 alternate waiver relief in lieu of payment of just compensation (Compl, ¶ 10 and Ex 1 thereto;
16 Ans, ¶¶ 5, 13).

17 **II. The Final Order Waives the Regulations at Issue.**

18 Petitioner asserts that he is entitled to compensation under his first claim or reversal or
19 remand of the Final Order under his second claim because the scope of the State’s waiver was
20 “inadequate and incomplete” (Compl, ¶¶ 18, 25). Petitioner alleges that the State failed to waive
21 “land use regulations governing the minimum lot size requirement and the annual farm income
22 requirement for purposes of obtaining approval for a farm dwelling” enacted or amended after
23

24 _____
25 ¹ 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.” DLCDC can pay compensation only if and when the
legislature appropriates funds for that purpose. *See* OAR 660-002-0010 (8) (c); Answer, ¶¶ 12-15

1 October 14, 1992 (Compl, ¶¶ 17, 22, 24, 25). The regulations at issue are found in OAR 660-33-
2 0100, -0130, and -0135, and took effect after October 14, 1992.

3 Petitioner's allegations are unfounded. The Final Order, incorporated into the Complaint,
4 provides:

5 In lieu of compensation under ORS 197.352, the State of Oregon *will not*
6 *apply* the following laws to Charles Weitzel's division of the 103.61 acre subject
7 property into five 20-acre parcels or to his development of a dwelling on each
8 parcel: applicable provisions of Goals 3 and 4, ORS 215 and *OAR 660, divisions 6*
9 *and 33, enacted or adopted after October 14, 1992*. These land use regulations
10 will not apply to 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 they acquired the property on October 14, 1992.

11 Compl, ¶ 10 and Ex 1, p 1; *Record*, § 6, p 1 (emphasis added). Thus, petitioner cannot establish
12 that the State continues to enforce the regulations that petitioners alleges should have been
13 waived.

14 Petitioner submitted the Final Order as an Exhibit to the Complaint. Therefore, on the
15 face of the Complaint, there is no basis for petitioner's claims. The State is entitled to judgment
16 on the pleadings, or summary judgment, as a matter of law.

17 **III. The Petition for Judicial Review is Petitioner's Exclusive Remedy.**

18 The State also moves for judgment on petitioner's compensation claim because the
19 exclusive remedy for errors in final state agency orders is a petition for judicial review under the
20 APA (Answer, ¶ 12). Therefore, the court lacks jurisdiction over a claim for compensation under
21 ORS 197.352 (6). The statutory authority for exclusivity is unambiguous and has been upheld
22 by numerous court decisions. ORS 183.480 (2) provides: "Judicial review of final orders of
23 agencies shall be solely as provided by ORS 183.482, 183.484, 183.490 and 183.500." *See also*,
24 *Lake County v. State of Oregon*, 142 Or App 162, 165 (1996) ("ORS 183.480 (2) and numerous
25 decisions of this court make clear that judicial review of final agency orders shall be solely as

26ge 5 - RESPONDENTS' MOTIONS FOR JUDGMENT ON THE PLEADINGS, OR IN THE
ALTERNATIVE FOR SUMMARY JUDGMENT; MEMORANDUM OF POINTS AND
AUTHORITIES

DS1/slc/TRIR1590

1 provided in the APA”); *Mendieta v. Division of State Lands*, 148 Or App 586, 599-600 (1997),
2 *rev dismissed*, 328 Or 331 (1999) (where “redress would have been available under ORS
3 183.484, had plaintiffs timely filed their petition for judicial review[,]” the Court of Appeals
4 held, “the trial court erred in granting plaintiffs relief under ORS 183.490 and ORS 28.010”);
5 *FOPPO v. County of Marion*, 93 Or App 93, 97 (1988), *rev denied*, 307 Or 326 (1989) (“PERS
6 is subject to the APA; therefore, the APA provides the exclusive methods for its actions and for
7 review of those actions”); *Bay River v. Envir. Quality Comm.*, 26 Or App 717, 720, *rev denied*,
8 276 Or 555 (1976) (rejecting argument that the Declaratory Judgments Act provides a remedy
9 with respect to agency orders in addition to the remedies provided under the APA); *Clarke*
10 *Electric, Inc. v. State Highway Division*, 93 Or App 693 (1988) (Highway Division’s rejection of
11 the plaintiff’s bid on a contract was a final order in other than a contested case and, therefore, the
12 plaintiff should have sought judicial review under the APA); *Muller v. Dept. of Agriculture*, 164
13 Or App 11, 15-16 (1999) (plaintiff could not avoid APA review by suing for damages in tort
14 when “his entitlement to damages depend[ed] on the validity of” an agency’s denial of a permit
15 application).

16 **IV. Petitioner is Not Entitled to Compensation.**

17 The State also moves for judgment on petitioner’s compensation claim because he is not
18 entitled to compensation as a matter of law (Answer, ¶¶ 13, 15). The State, pursuant to ORS
19 197.352 (8) and (10), may elect, in lieu of compensation and at its option, “not to apply”
20 restrictive land use regulations to the extent necessary to allow petitioner a use of the property
21 that was permitted by law at the time he acquired it. The State elected in this case to not apply
22 restrictive land use regulations in lieu of paying compensation. Therefore, petitioner is not
23 entitled to compensation.

24
25

1 The language and structure of Measure 37 clearly show that the voters intended to give
2 public entities, and not claimants, the choice between paying compensation and not applying
3 land use regulations. The statute provides:

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

10 * * * * *

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

20 ORS 197.352 (8) and (10).²

21 There is no dispute that petitioner submitted a timely, valid demand for compensation
22 under Measure 37 to the State, and that the State made a timely decision to provide waiver relief
23 in lieu of compensation. Therefore, petitioner is not entitled to compensation.³

24 _____
25 ² If the text and context did not clearly indicate that the choice of relief is vested in the public entities, then a court
26 would review the legislative history *See, e.g.* the Voters' Pamphlet's explanatory statement for Measure 37: "If a
27 property owner proves that a land use regulation restricts the use of the owner's property, and reduces its value then
28 *the government responsible for the regulation will have a choice: pay the owner of the property an amount equal to*
29 *the reduction in value or modify, change or not apply the regulation to the owner's property."* *See,*
30 http://www.oregon.gov/LCD/MEASURE37/legal_information.shtml#Information_About_the_Election (site last
31 visited on January 18, 2007; emphasis added)

32 ³ In addition, if the Final Order were to be found to be incorrect as a matter of law, petitioner's remedies include
33 remand to the agency for re-consideration under a proper interpretation of the law pursuant to the APA, ORS
34 183.484 (5), but do not include compensation.

35 7 - RESPONDENTS' MOTIONS FOR JUDGMENT ON THE PLEADINGS, OR IN THE
36 ALTERNATIVE FOR SUMMARY JUDGMENT; MEMORANDUM OF POINTS AND
37 AUTHORITIES

DS1/slc/TRIR1590

1 **CONCLUSION**

2 The Complaint alleges that petitioner did not obtain appropriate relief on his Measure 37
3 demand because the State “continues to apply” restrictive land use regulations enacted after
4 petitioner acquired the property. The court may determine from the face of the Complaint that
5 the allegation is untrue and the State is entitled to judgment on the pleadings. Alternatively, the
6 court may find that the material fact of petitioner’s acquisition date is undisputed and that the
7 State is entitled to judgment as a matter of law because the Final Order provides petitioner with
8 the relief to which he is entitled under Measure 37. Petitioner’s compensation claim is
9 insufficient for the additional reasons that the court lacks jurisdiction and the State properly
10 elected to provide waiver relief in lieu of compensation. The Complaint should be dismissed in
11 its entirety and judgment entered for the State.

12 DATED this 15 day of March, 2007.

13 Respectfully submitted,

14 HARDY MYERS
15 Attorney General

16 

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23 Of Attorneys for Respondents
24
25

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.

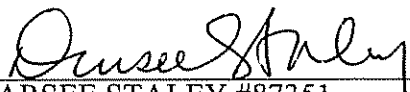
(3) The provisions of ORS 197.360 to 197.380 apply to all elements of a local gov-

1 **CERTIFICATE OF SERVICE**

2 I certify that on March 15, 2007, I served the foregoing *Respondents' Motions for*
3 *Judgment on the Pleadings, or in the Alternative for Summary Judgment; Memorandum of*
4 *Points and Authorities* upon the parties hereto by the method indicated below, and addressed to
5 the following:

6 Daniel W. Howard
7 Lindsay, Hart, Neil & Weigler, LLP
8 1300 SW Fifth Avenue
9 Suite 3400
10 Portland, OR 97201

HAND DELIVERY
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