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

6 VICTOR C. COBOS and PAMELA J.  
7 COBOS,

8 Plaintiffs,

9 v.

10 MARION COUNTY, by and through its  
11 BOARD OF COMMISSIONERS,,

12 and

13 STATE OF OREGON, by and through the  
14 DEPARTMENT OF LAND  
15 CONSERVATION AND DEVELOPMENT

16 Defendants.

Case No. 05C16640

MOTION FOR SUMMARY JUDGMENT

(Oral Argument Requested)

17 **MOTION**

18 The State of Oregon, by and through the Department of Land Conservation and  
19 Development, (hereafter "the State") moves this court for an Order and Judgment affirming the  
20 Final Order which is the subject of Plaintiffs' Petition for Judicial Review of agency action and  
21 dismissing the Measure 37 cause of action against the State.

22 This motion is brought pursuant to ORCP 47 B and is supported by the accompanying  
23 Memorandum of Points and Authorities and attached exhibits. The State requests oral argument  
24 which is estimated to take one hour and official court reporting services are requested.

25 **MEMORANDUM OF POINTS AND AUTHORITIES**

26 The State agrees that this case properly is before the court as a Petition for Judicial  
Review of the Final Order issued by the Department of Land Conservation and Development

1 pertaining to the plaintiffs' Measure 37 claim. The "cause of action" directly under Measure 37,  
2 however, is premature, is not ripe and is moot if the agency correctly applied the law in its order.

3 This is a simple case of deciding who correctly applied the law. There are no relevant  
4 facts in dispute. Both sides agree that this case turns on the meaning of the phrase "at the time  
5 the owner acquired the property" in the text of Measure 37. The claimant believes that "the  
6 owner" means the family member who originally acquired the property. The government, the  
7 drafter of Measure 37 and the plain language of that law all point to a contrary conclusion: "the  
8 owner" means the present owner of the property.<sup>1</sup> The term "owner" is important as it relates to  
9 dates that apply to the government option of paying compensation or of waiving land use  
10 regulations. Both parties agree in their respective pleadings that resolution of this issue will fully  
11 resolve the case involving the State and the Cobos and, consequently, this case is fully ripe for  
12 Summary Judgment at this time.

### 13 Background

14 This case concerns the remainder of parcels of property in Marion County that were  
15 owned by family members of the claimant/petitioners since 1946. The Cobos, who are the  
16 current owners of the property, obtained their ownership by deeds in 1999 and in 2001.

17 Measure 37, adopted by voters in November 2004, allows a property owner to make a  
18 claim for compensation based upon the enactment or enforcement of a land use regulation that  
19 restricts the use of private real property (or any interest therein) and has the effect of reducing the  
20 fair market value of the property (or any interest therein). The claim for compensation is limited  
21 by Sections 3, 8 and 10 of the act.

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23

24 <sup>1</sup> A copy of Measure 37 is attached as Exhibit A. Frequently Asked Questions and Answers  
25 about Measure 37 posted on the drafter's website, Oregonians in Action ([www.oia.org](http://www.oia.org)),  
26 questions 20 and 27, are attached as Exhibit B. The Chief Petitioner's Statement (David  
Hunnicut) given for inclusion in the Voter's Pamphlet – explaining the two different dates in  
Statement #2 – is attached as Exhibit C. Remarks of Mr. Hunnicutt at a public forum on January  
5, 2005, are attached as Exhibit D.

1 A Measure 37 complaint is not a Constitutional “takings” claim under either the United  
2 States or Oregon Constitutions. It is a statutory, alternative remedy “cause of action” for  
3 reduction in fair market value as of a specific date in time if the governing body has not opted to  
4 “waive” the application of a regulation that reduces the property’s fair market value.

5 **Compensation Limitations**

6 When a land use regulation restricts the use of private property after acquisition and  
7 continuous ownership by a family member, the current owner may assert a claim for  
8 compensation for the difference between the fair market value of the current owner’s private  
9 property interest -- with and without the regulation -- as of the date of the written claim. In this  
10 case, the claim was filed at the State Department of Administrative Services on or about  
11 December 10, 2004. That is the “compensation date” on which the difference in market value  
12 would be figured if the State of Oregon elected to pay the difference in value. In this case, the  
13 State of Oregon elected not to pay the difference, an option available to it under Section 8.

14 **Alternative to Compensation -- Waiver**

15 Sections 8 & 10 of Measure 37 allow the governing body responsible for the enactment  
16 of a land use regulation to “waive” the enforcement of the regulation as to the claimant’s  
17 property in lieu of paying compensation.<sup>2</sup> In that event, the important date is the “waiver date.”  
18 The waiver date is “the time the owner acquired the property.”<sup>3</sup> “Owner” is defined as “the  
19 present owner of the property or any interest therein.”<sup>4</sup>

20 **Land Use Regulations That Can be Waived**

21 The claimants/present owners of the property are not entitled to compensation if the  
22 governing body elects to waive the land use regulation that restricts the present owners’ use and  
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24 <sup>2</sup> The actual language of the measure states that “the governing body responsible for enacting the  
25 land use regulation may modify, remove, or not to apply (sic) the land use regulation” in Section  
26 8 and “modify, remove or not apply a land use regulation” in Section 10.

<sup>3</sup> Section 8.

<sup>4</sup> Section 11(C).

1 reduces the land's value. However, that waiver is subject to further limitations built into the  
2 measure.

3 The most important of those limitations is that the current owner does not get a waiver of  
4 all land use regulations that restrict use back to the time of family ownership, but only back to  
5 "the time the owner acquired the property."<sup>5</sup> In other words, if the governing body elected to  
6 pay compensation, the reduction in value would be based upon any and all restrictive land use  
7 regulations enacted or enforced since the original "family member" acquired the property. If the  
8 governing body elects to waive the application of the restrictive land use regulation instead of  
9 paying compensation, the only land use regulations that are waived are those that have been  
10 enacted since the present owner acquired the property (and are not otherwise exempt under  
11 Section 3).<sup>6</sup>

### 12 The State Agency Correctly Applied the Law

13 DLCD received the claim and processed it. It applied the law to the facts and determined  
14 that the Cobos had a valid claim due to long-time family ownership and the likelihood that land  
15 use regulations enacted by the State reduced the fair market value of the property since 1946.  
16 DLCD elected to waive ("not apply") those land use regulations that were adopted after the  
17 Cobos, respectively, had acquired deeds to the property. The present owners acquired the  
18 property in 1999 and 2001. Those are the effective dates for "waiver" or "non-application" of  
19 restrictive land use regulations.

20 All State of Oregon restrictive land use regulations in place before the Cobos acquired  
21 their property are not waived because the owner is only entitled to use the property as permitted  
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23 <sup>5</sup> This phrase is used in both Sections 8 & 10. Section 10, however, creates a waiver by  
24 operation of law when the government neither elects to waive the regulation nor to pay  
25 compensation within two years of the date the claim accrues. But the waiver clearly applies only  
26 to regulations that have restricted the property since the time the owner acquired the property  
because the owner may only *use* the property "as permitted at the time the owner acquired the  
property."

<sup>6</sup> See, Exhibit Bs, C & D and Section 8 of Measure 37, Exhibit A.

1 upon acquisition according to Section 6 (“allow the owner to use the property for a use permitted  
2 at the time the owner acquired the property”).

3 The Final Order properly limited the waiver to allow uses permitted at the time the  
4 present owners acquired the property. The fact that the owners want uses that would have been  
5 allowed in 1946 is understandable (as that is relevant to the “compensation date” for comparing  
6 values) but it is not what Measure 37 was intended to provide and not what Measure 37 provides.

7 The agency final order should be affirmed.

8 **Measure 37 Cause of Action for Compensation**

9 Section 6 of the measure allows the present owner to file a “cause of action for  
10 compensation” in the circuit court where the property is located if a land use regulation continues  
11 to apply more than 180 days after the written demand was filed. Obviously, read in context, the  
12 *land use regulation* referred to must be one that should have been waived, if waiver was elected  
13 by the government, and was not. Thus, the importance of applying the correct sections and the  
14 correct dates of the measure to “waivers” versus “compensation” again becomes evident.

15 The plaintiffs have not stated and cannot state a claim for relief (or a cause of action) if  
16 they were not entitled to the waiver of land use regulations other than those that were waived; to  
17 wit, those that were enacted after the date the current owners acquired the property. As a  
18 corollary, if the restrictive land use regulations that came into existence after the Cobos’  
19 ownership date have been waived, then they are not entitled to any compensation and the  
20 Measure 37 compensation claim fails as a matter of law.

21 Those are the facts, that is the law and the claim should be dismissed.

22 **CONCLUSION**

23 The Measure 37 cause of action is not ripe and fails to state a claim and should be  
24 dismissed.

25 The Petition for Judicial Review is the appropriate procedure for deciding this matter. If  
26 the agency properly construed the law, there is no Measure 37 cause of action for compensation.


1 If the agency misconstrued the law, the proper course is for the court to remand the case to the  
2 agency for a proper construction of the law.<sup>7</sup> However, the decision of the court should affirm  
3 the agency's Final Order because it properly construed the law.<sup>8</sup>

4 There is no allegation that the agency acted outside the scope of its delegated authority,  
5 made an inconsistent decision or violated any laws.<sup>9</sup> Petitioners' sole allegation is that the State  
6 "improperly misconstrued Section 8 by creating a two-tiered process where claims have a  
7 'compensation date,' which is the date the claimant's family acquired the property, and a 'waiver  
8 date,' which is when the claimant acquired the property."<sup>10</sup> Both parties agree that is the cardinal  
9 question for this court to decide.

10 Finally, in the construction of a statute "the office of the judge is simply to ascertain and  
11 declare what is \* \* \* contained therein, not to insert what has been omitted, or to omit what has  
12 been inserted \* \* \*."<sup>11</sup>

13 DATED this 16<sup>th</sup> day of August, 2005.

14 Respectfully submitted,  
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23 <sup>7</sup> ORS 183.484(5); *Keeton-King Construction v. State of Oregon*, 106 Or 663 (1991).  
24 <sup>8</sup> ORS 183.484(5)(a) (court may affirm when agency did not erroneously interpret a provision of  
25 law)  
26 <sup>9</sup> ORS 183.484(5)(b)  
<sup>10</sup> Petition at 10, ¶ 37  
<sup>11</sup> ORS 174.010