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

DALLAS A. MARCKX and ELAINE W.
MARCKX,

Plaintiffs,

vs.

MARION COUNTY, by and through its
BOARD OF COMMISSIONERS,

Defendant.

) Case No.: 05C-16356

) REPLY TO PLAINTIFFS' RESPONSE TO
) DEFENDANT'S MOTION TO STRIKE

It has come to Defendant's attention that Defendant failed to follow UTCR 5.020(2) by not attaching a copy of the Plaintiffs' complaint, with the provisions to be stricken shown in parentheses. In order to cure this mistake, Defendant attaches a copy of Plaintiffs' complaint hereto as Exhibit A, with the paragraphs to be stricken shown in parentheses. Defendant apologizes for any inconvenience to Court or counsel as a result.

Plaintiffs' response to Defendant's motion to strike goes into great detail about the merits of Plaintiffs' claim - namely, whether the County can apply Goal 3 directly in analyzing the merits of Plaintiffs' Measure 37 application. However, Defendant's motion to strike is not about the merits. It is about procedure: What is the proper legal process for reviewing adverse local government decisions in the Measure 37 context? The legal question on the merits is: Are judicial interpretations of statutes or rules in existence at the time of a claimant's acquisition of a piece of property, but which are handed down subsequent to a claimant's acquisition of a piece of property, to be applied to the analysis of a claimant's Measure 37 claim today? In other words, the legal issue on the merits is whether subsequent judicial interpretations of rules existing at the time a claimant bought a

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4 piece of property are "new law" which cannot be used to analyze Plaintiffs' Measure 37 claim
5 today, or rather, are merely interpretations of existing law, and the fact that the
6 interpretation did not exist at the date of acquisition does not mean that the interpretation
7 is "bad law" in analyzing Plaintiffs' Measure 37 claim today.

8 However, the legal question *for this motion* is only whether the writ of review
9 process is available to Plaintiffs to contest an adverse local government decision in the
10 Measure 37 context.

11 If Plaintiffs are correct that the writ of review process and Measure 37 claim process
12 are "different and separate," then Plaintiffs are going to have to elect which remedy they
13 choose at some point in the process, because Plaintiffs are clearly not entitled to
14 compensation under the Measure 37 claim, *plus* a remedy of the Court's choosing under the
15 writ of review process. See Andrysek v. Andrysek, 280 Or 61, 70-72, 569 P2d 615 (1977)
16 (if multiple remedies are available, a plaintiff is precluded from an additional recovery after
17 the conclusion of a case based on one of the remedies); Ladd v. General Insurance Co., 236
18 Or 260, 264, 387 P2d 572 (1964) ("The election of one remedy where several remedies are
19 available is a choice, shown by an overt act, between two rights. The pleader is barred,
20 however, only in cases where initially there were two efficacious remedies...In such a
21 situation it would be unjust to vex the defendant twice for the same debt or wrong."
22 (citation omitted)). Plaintiffs attempt to avoid the election of remedy problem by classifying
23 the remedies as "different and separate." But they are not: It is one fact scenario, giving
24 rise to one claim, under one statute, with one form of remedy for adverse decisions.
25 Allowing Plaintiffs to recover compensation under the Measure 37 claim process, *plus* a
26 remedy under the writ of review process, exceeds the scope of relief contemplated in
Measure 37, and this Court is not allowed to grant a greater remedy than that allowed
under Measure 37.

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Contrary to Plaintiffs' argument, Defendant is not arguing that the writ of review process is unavailable to non-claimants to challenge a Measure 37 decision. Clearly it is. Plaintiffs read far too much into Defendant's argument. The reality is that 1000 Friends of Oregon, Oregonians in Action, or any other third party is not involved *in this case*. Defendant argues that "the present owner of property" – the Plaintiffs in this case – have the Measure 37 claim process as their only remedy for an adverse local government decision in this case.

If Plaintiffs were correct that they are entitled to a remedy both under the writ of review process and under the Measure 37 claim process, then it would be fool-hearty on the part of the County to ever process a Measure 37 claim pursuant to Ordinance 1209. It would be in the County's best interest to simply let the 180 days lapse, and let claimants file their claims for compensation in court under Measure 37. This would defeat the whole purpose of having local government procedures for processing Measure 37 claims in the first place. To allow a greater remedy in circuit court, beyond that allowed by the Measure 37 cause of action, is to exceed the scope of the remedy contemplated by the measure itself.

Plaintiffs may be "startled" by Defendant's position that Measure 37 only allows the court to award compensation, not waiver, but that is exactly what Measure 37 says.

Section 6 of the measure reads as follows:

"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 act, the present owner of the property, or any interest therein, shall have a cause of action for compensation under this act 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."

The definition of "compensation" found in The American Heritage Dictionary, Fourth Edition, is "something, *such as money*, given or received as payment or reparation, as for a service or loss." (Emphasis supplied). Once again, if Plaintiffs were correct that the Court

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4 can issue waivers like the County, as well as compensation, then there is no point in the
5 County ever processing Measure 37 claims through Ordinance 1209. This is contrary to the
6 intent and letter of Measure 37, and goes far beyond the common understanding of the
7 term "compensation." The drafters did not use "compensation" in such a broad manner in
8 section 8, where they expressly granted local governments the power to "modify, remove,
9 or not...apply" land use regulations.

10 Plaintiffs cite section 12 of Measure 37 for the proposition that the remedy of the writ
11 of review process is available to the Plaintiffs. Section 12 reads as follows:

12 "The remedy created by this act is in addition to any other remedy under the Oregon
13 or United States Constitutions, and is not intended to modify or replace any other
14 remedy."

15 The "any other remedy" referred to in this paragraph is the remedy *for use of*
16 *Plaintiffs' land*, not the remedy for Measure 37 claims specifically ("the remedy created by
17 this act"). Measure 37 created a new remedy for a new wrong: The change in value due to
18 a regulation enacted or enforced after an owner acquires its interest. Prior to Measure 37,
19 there was no writ of review in the Measure 37 context, because there was no Measure 37.
20 This provision is designed to insure that some pre-existing process (like eminent domain) is
21 not used as a shield against Measure 37 claims. It is not designed to expand the universe
22 of remedies available to a Measure 37 claimant beyond the one created in the measure
23 itself.

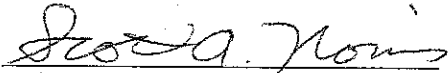
24 After cutting through the bellicosity of Plaintiffs' response, Plaintiffs overstate
25 Defendant's position with regard to the legal issue involved in this motion. Defendant
26 maintains that these Plaintiffs (the current owners) may only use the Measure 37 claim
process pursuant to section 6 of the act to attempt to remedy Defendant's denial of their
Measure 37 claim. For the reasons set forth in the motion and this reply, Defendant is

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entitled to have Plaintiffs' writ of review claims stricken in this case.

Dated this 30th day of August, 2005



Scott A. Norris, OSB #91383
snorris@co.marion.or.us
Assistant County Counsel
Of Attorneys for Defendant

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Page

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

DALLAS A. MARCKX and
ELAINE W. MARCKX

Plaintiffs,

v.

MARION COUNTY, by and through its
BOARD OF COMMISSIONERS,

Defendant.

Case No. OSC16356

**PETITION FOR
WRIT OF REVIEW
and
MEASURE 37 COMPENSATION
CLAIM**

COMES NOW plaintiffs, by and through their attorney, Wallace W. Lien, of Wallace W. Lien, P.C., and for their Writ of Review and Cause of Action under Section 6 of Measure 37, enacted by the people of the State of Oregon, do hereby allege as follows:

1.

Plaintiffs are the present owners of real property located at 5035 Howell Prairie Road SE, Aumsville, Oregon 97325, which tract is 65 acres in size and which is located in rural Marion County. Plaintiffs purchased the subject property by land sale contract on November 6, 1975, a Memorandum of which was recorded in the Marion County Deed Records at Reel 29, Page 916 on November 12, 1975. Plaintiffs have continuously owned and occupied the subject property since November 6, 1975.

2.

Defendant is a duly organized and existing political subdivision of the State of Oregon charged with carrying out certain duties and responsibilities as prescribed by law. Under Measure

1 - Petition for Writ of Review/Measure 37 Cause of Action

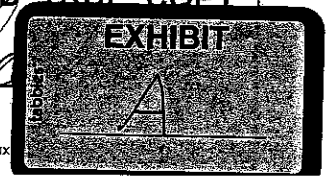
CERTIFIED TRUE COPY

WALLACE W. LIEN

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Wallace W. Lien
Attorneys



1 37, defendant is charged with the duty to review and decide claims filed thereunder which relate to
2 county zoning matters. Defendant is not authorized to deal with claims involving state law or state
3 mandated goals and guidelines.

4 3.

5 On November 6, 1975, when plaintiffs' acquired the subject property, it was zoned AR- 5
6 (Acreage Residential-5 acre minimum). Under the AR-5 zone, plaintiffs had the ability to obtain a
7 13 lot subdivision. Each lot in the subdivision would have been entitled to approval for one single
8 family dwelling to be constructed on that lot. Plaintiffs' intent when purchasing the property was to
9 subdivide the property for residential development in a manner permitted within the AR-5 zone.
10 Plaintiffs, had they applied for a subdivision immediately upon purchase of the subject property in
11 1975 would have received an approval from defendant for the subdivision and attendant housing.

12 4.

13 Plaintiffs elected not to pursue their subdivision until several years later. On January 18,
14 1979, plaintiffs filed Subdivision Plat No. 851 to divide the subject property into nine 5 acre lots,
15 leaving a larger tract for themselves to accommodate their home and outbuildings. At that time, the
16 subject property continued to be designated AR-5, but defendant was in the process of completing
17 its comprehensive plan, and the subject property was being re-zoned to Exclusive Farm Use (EFU).
18 Because of the impending zone change, defendant denied plaintiffs subdivision application. Plaintiffs
19 elected not to appeal this decision, even though they considered it to be an erroneous application of
20 the then existing law.

21 5.

22 By October 17, 1979, the zoning for the subject property was changed from AR-5 to EFU.
23 The EFU zone does not allow rural residential subdivisions as proposed by plaintiffs, or houses to be
24 placed on 5 acre lots. The EFU zone significantly restricts plaintiffs ability to use the subject
25 property. Defendant has subsequent to plaintiffs acquisition also adopted more restrictive subdivision
26 provisions and provisions relating to limited ground water. These additional land use regulations

AGE 2 - *Petition for Writ of Review/Measure 37 Cause of Action*

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1 provide significant restrictions on the use of the subject property which reduce the value of the tract
2 and which are not exempt from the provisions of Measure 37.

3 6.

4 Effective December 2, 2004, Measure 37, passed by the people of the State of Oregon, was
5 enacted into law. Measure 37 provides for compensation to property owners who have had rights
6 taken away and property values reduced by restrictive land use regulations.

7 7.

8 On January 27, 2005, plaintiffs filed a claim under Measure 37 with defendant for the subject
9 property. Under Measure 37, this claim was timely filed and was complete when filed with all
10 relevant information necessary for defendant to make a decision on the claim. A companion claim
11 was filed with the State of Oregon on February 24, 2005. No decision has been made on the state
12 claim as of the date of filing of this action.

13 8.

14 On June 2, 2005, defendant issued Order, No. 05-69, denying plaintiffs' claim for
15 compensation under Measure 37. A copy of Order No. 05-69 is attached hereto as Exhibit "A".

16 **FOR PLAINTIFFS PETITION FOR WRIT OF REVIEW, (Lack of Substantial Evidence)**
17 plaintiffs allege the following:

18 9.

19 (Plaintiffs re-allege all the factual allegations contained in Paragraphs 1-8 of this Petition and
20 Complaint.)

21 10.

22 (Defendant's Order No. 05-69 is not supported by substantial evidence in the whole record,
23 in that there is no supporting evidence that plaintiffs proposed subdivision would have been denied
24 in 1975 at the time they acquired the property; that the denial of plaintiffs 1979 subdivision was a
25 correct application of the law in place in 1979; that the 1979 denial would have been identically
26 denied had the application been filed after plaintiffs acquired the subject property in 1975; that Goal

AGE 3 - *Petition for Writ of Review/Measure 37 Cause of Action*

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1 3 applied directly to plaintiffs property at the time it was acquired in 1975; that Goal 3 contains any
2 approval criteria that could have been used to deny a quasi-judicial subdivision application in the AR-
3 5 zone; that defendant has power and authority to determine the applicability and Measure 37
4 application of the statewide goals and guidelines; or that Goal 3 had any effect on the value of
5 plaintiffs property for Measure 37 purposes.)

6 11.

7 (During the period of 1975 through 1982, defendant routinely approved rural subdivisions on
8 AR-5 lands regardless of the type or quality of soil. The presence of the resource goals (3 and 4) did
9 not preclude defendant for approval of such subdivisions during this period of time. Goal 3 does not
10 include mandatory approval criteria for quasi-judicial land use applications such as a subdivision
11 would be. There is no evidence in this record that the adoption of Goal 3 automatically would have
12 resulted in a denial of plaintiffs subdivision application.)

13 12.

14 (ORS 34.040(1)(c) provide that a writ shall issue when defendant made a finding or order not
15 supported by substantial evidence in the whole record.)

16 13.

17 (Plaintiff's right to compensation under Measure 37, which is a substantial interest, has been
18 taken away by defendant's denial of their claim, has resulted in injury by way of lost value in the
19 subject property.)

20 **FOR PLAINTIFFS PETITION FOR WRIT OF REVIEW**, (Improper Construction of
21 Law) plaintiffs allege the following:

22 14.

23 (Plaintiffs re-allege all the factual allegations contained in Paragraphs 1-13 of this
24 Petition/Complaint.)

25 15.

26 (Defendant's Order No. 05-69 improperly construes Measure 37 by concluding that the
PAGE 4 - *Petition for Writ of Review/Measure 37 Cause of Action*

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1 presence of Goal 3 prior to plaintiffs acquisition of the subject property automatically prohibited the
2 subdivision of the subject property even though it was zoned AR-5 and under all applicable county
3 regulations could otherwise have been subdivided in 1975 when the plaintiffs acquired the property.
4 Defendant's interpretation of the mandates and effect of the Goal 3 to plaintiff's property and
5 development rights is incorrect.)

6 16.

7 (Plaintiffs allege that while Goal 3 may have been enacted prior to their acquisition, they had
8 no knowledge of its existence. No one on behalf of defendant put plaintiffs on notice that the normal
9 regulations applied to their property were in fact incorrect and that Goal 3 actually prohibited
10 development rights that were otherwise granted in the AR-5 zone.)

11 17.

12 (Application of statewide goals to individual quasi-judicial land use decisions prior to
13 acknowledgment was not a legal mandate applicable to plaintiffs at the time they purchased the
14 property in November of 1975. All the legal authority cited in defendant's decision became law after
15 the acquisition of the subject property by plaintiffs in 1975.)

16 18.

17 (Goal 3 and its attendant policies and guidelines do not contain mandatory approval criteria
18 which would have be capable, even if directly applied to a quasi-judicial subdivision application, to
19 have caused a subdivision in the AR-5 zone to have been denied in 1975 when plaintiffs acquired the
20 subject property.)

21 19.

22 (Defendant misconstrued Measure 37 by effectively dating this application from the 1979 date
23 when it denied plaintiffs' subdivision request instead of the date they acquired the subject property
24 in 1975. Defendant has promulgated its Ordinance 1209, and has applied that ordinance to the
25 processing of this application. A copy of defendant's ordinance is attached hereto as Exhibit "B".
26 To comply with this ordinance, defendant requires any claimant to provide evidence of a validly

AGE 5 - *Petition for Writ of Review/Measure 37 Cause of Action*

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1 submitted land use application or a verification from its planning department that the proposed use
2 being claimed under Measure 37 is not currently allowable as a pre-requisite to defendant accepting
3 and processing a claim. Ordinance 1209, Section 4(1)(c). Defendant in this case has misconstrued
4 the law, as Measure 37 has no such triggering requirement, and Section 7 of the Measure specifically
5 prohibits defendant from adopting any procedure that acts as a pre-requisite to the filing of a claim.
6 Defendant further misconstrues the law as it relates to this application by judging the application as
7 of the 1979 denial date rather than the 1975 acquisition date and ignoring changes in policy and the
8 law between those two dates. Ordinance 1209 is invalid to the extent that it violates Measure 37 in
9 its requirement of pre-requisites to filing claims.)

10 20.

11 (Defendant has no jurisdiction to deal with Goal 3 in a Measure 37 setting, as that is the
12 exclusive province of the State of Oregon. In dealing with Goal 3, defendant has misconstrued its
13 provisions by finding that it applied directly to the subject property in 1975, even though the local
14 zoning was AR-5 and not agricultural; that the action in denial of plaintiffs subdivision in 1979 was
15 a correct and lawful decision; that the same decision would have been reached in 1975 when the
16 plaintiffs acquired the property; that Goal 3 contains mandatory approval criteria at all; that Goal 3,
17 if it contains approval criteria in the first place, that this criteria when applied to the plaintiffs property
18 and subdivision proposal would have resulted in a denial of their application in 1975 when they
19 acquired the property; and that the existence in Goal 3 created restrictions that would effect the value
20 of plaintiffs property when it was purchased in 1975, and which would otherwise preclude the value
21 reduction required for a valid Measure 37 claim.)

22 21.

23 (ORS 34.040(1)(d) provides that a writ shall issue when defendant improperly construed the
24 applicable law.)

25 22.

26 (Plaintiff's right to compensation under Measure 37, which is a substantial interest, has been

1 taken away by defendant's denial of their claim, and has resulted in injury by way of lost value in the
2 subject property.)

3 23.

4 (Plaintiffs have filed the undertaking required by ORS 34.050 contemporaneously herewith
5 in the form of a cash deposit in the amount of \$100, and affidavit of surety, and does hereby assert
6 that they will pay all costs and disbursements that may be adjudged by this Court to defendant in this
7 proceeding.)

8 24.

9 (Pursuant to ORS 34.100, this Court has the power to reverse the decision of the defendant as
10 expressed in Order No. 05-69, and to award restitution to plaintiffs. Restitution as used in this statute
11 includes the right to reimbursement for attorney fees, costs and disbursements incurred in bringing
12 this Writ of Review proceeding, as well as the damages sustained by plaintiffs as otherwise alleged
13 herein.)

14 25.

15 (In light of defendant's improper application of applicable law, a stay should be issued pursuant
16 to ORS 34.070 requiring defendant to desist from any further enforcement of any and all restrictive
17 land use regulations that reduce the fair market value of plaintiffs' property.)

18 **FOR PLAINTIFF'S CAUSE OF ACTION UNDER MEASURE 37** plaintiff's do hereby
19 allege as follows:

20 26.

21 Plaintiff re-alleges all the factual allegations contained in Paragraphs 1-24 of this
22 Petition/Complaint.

23 27.

24 Plaintiffs have made written demand for compensation under Measure 37. Defendant has
25 wrongfully determined that the restrictive provisions of the EFU zone continue to apply to their
26 property in Order No. 05-69, and have wrongfully denied plaintiffs claim. See Exhibit "A".

AGE 7 - *Petition for Writ of Review/Measure 37 Cause of Action*

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28.

Defendant's decision is not supported by substantial evidence in the whole record of this case; and it improperly construes Measure 37 in the particulars cited above.

29.

Section 6 of Measure 37 provides that where defendant continues to apply its restrictive land use regulations, a cause of action lies with the present property owner for compensation. Defendant's decision denying plaintiffs' Measure 37 claim indicates its present intent to continue to apply the EFU and other restrictive zoning to their property, and to refuse to allow any subdivision or residential development thereon. As such, plaintiffs are entitled to compensation for defendant's action.

30.

Defendant is entitled to just compensation in the amount of \$975,000 which represents the reduction in the fair market value of the subject property resulting from the enactment and enforcement of the EFU zoning as of January 27, 2005, which is the date of filing of their claim with defendant.

31.

Plaintiffs are entitled to be reimbursed for all of their attorney fees, expenses, costs, and other disbursements reasonably incurred in this matter, and to otherwise collect the just compensation due them pursuant to Section 6 of Measure 37.

WHEREFORE, plaintiffs, and each of them, pray for Judgment of this Court against defendant in this matter in the following particulars:

1. For issuance of an Order allowing the Writ of Review, and instructing the Court Clerk to issue the Writ of Review commanding defendant to return the Writ to this Court with a certified copy of the complete record of the proceedings before defendant which resulted in the entry of Order No. 05-69, and fixing the date on which said return shall be made; and
2. For Judgment of this Court reversing the action taken by defendant in Order No. 05-69, and finding that plaintiffs' Measure 37 Claim is valid for all purposes; and
3. For restitution to plaintiffs for monetary damages incurred by them as a direct and proximate result of defendant's decision in Order No. 05-69, to and including attorney fees, costs and disbursements incurred herein, in the amount to be determined by this Court in subsequent

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proceedings; and

- 4. Ordering defendant to immediately desist from any further enforcement of any and all restrictive land use regulations that reduce the fair market value of plaintiffs' property pursuant to ORS 34.070 until such time as any judgment of this Court under Measure 37 is paid in full pursuant to Section 10 of Measure 37; and
- 5. For an award of just compensation to plaintiffs in the amount of \$975,000 for the reduction in the fair market value of their property which results from the enactment and enforcement of restrictive land use regulations; and
- 6. For an award to plaintiffs for all their reasonable attorney fees, expenses, costs and other disbursements incurred in this action, and to otherwise collect the just compensation that is awarded by this Court; and
- 7. For such further and different relief as this Court deems just and equitable.

DATED this 1st day of July, 2005, at Salem, Marion County, Oregon. By execution hereof, I, Wallace W. Lien do hereby certify that I have examined the process and proceeding and the decision made by defendant, and that said decision, to the best of my knowledge, belief and understanding of the laws of the State of Oregon is erroneous as alleged herein. This certification is intended to comply with ORS 34.030.

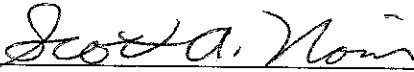
/s/ WALLACE W. LIEN
 Wallace W. Lien, OSB No. 79301
 of Wallace W. Lien, P.C.
 Attorneys for Plaintiffs

CERTIFICATE OF MAILING

I hereby certify that I served true and correct copies of the foregoing Reply to Plaintiff's Response to Defendant's Motion to Strike on the following person:

Wallace W. Lien
Attorney at Law
1775 32nd Place NE, Suite A
Salem OR 97303-1674
Attorney for Plaintiffs

by mailing said person copies thereof. I further certify that said copies were placed in a sealed envelope and addressed as noted above, that said copies were deposited in the United States mail at Salem, Oregon, on the 30 day of August, 2005.



Scott A. Norris
Assistant Legal Counsel
Of Attorneys for Defendant