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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. 05C16356

**RESPONSE TO DEFENDANT'S  
MOTION TO STRIKE**

COMES NOW plaintiffs, by and through their attorney, Wallace W. Lien, of Wallace W. Lien, P.C., and do hereby file this response to defendant's Motion to Strike paragraphs 9 through 25 of plaintiffs' complaint, otherwise known as plaintiffs' Petition for Writ of Review.

**1. Additional Background Information**

Plaintiffs agree basically with the statement of background facts provided by defendant as far as it goes. However, defendant fails to acknowledge that in addition to making a decision on plaintiffs Claim, defendant also made several first impression interpretations of Measure 37 and state law (Goal 3 regarding the protection of farm land).

To begin with a summary of the facts of this case is helpful. Plaintiffs' purchased a 65 acre tract in rural Marion County on November 6, 1975. The land was zoned Acreage Residential (5 acre minimum lot size and commonly referred to as AR-5). The property at that time had just been created by a partitioning whereby a small tract had been carved off and retained and the remaining 65 acres

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1 sold to plaintiffs. This is a key factor as it demonstrates that the land use regulations in place at the  
2 time of plaintiffs' acquisition did allow land divisions; and that Goal 3 was not applied directly to the  
3 partitioning to automatically deny any land divisions.

4 Plaintiffs purchased the subject property with the intent of living on it and ultimately  
5 partitioning or subdividing it into 5 acre lots, as was allowed by the zoning. However, plaintiffs' did  
6 not get around to applying for their subdivision until late 1979 when land use regulations were rapidly  
7 changing, including the rezoning of their site to Exclusive Farm Use (EFU), and they were then  
8 denied. Plaintiffs' elected not to appeal that decision, despite strong evidence that this denial was  
9 wrongly decided, and have since lived on their 65 acre tract without making further land use  
10 applications.

11 Uncontroverted evidence submitted to defendant during this Claim process proved that  
12 defendant's imposition of its EFU zoning restricted the uses allowed by plaintiffs because they are  
13 no longer allowed to partition or subdivide their land to 5 acre parcels to be used for rural residential  
14 purposes; and that the EFU zoning regulations caused a reduction in the value of the plaintiffs land.  
15 These are the basic elements of a Measure 37 Claim, nevertheless defendant denied the otherwise  
16 valid claim by virtue of its interpretation of that measure and Goal 3.

17 These interpretations include a determination that state law in effect in 1975 required Goal  
18 3 to be applied directly to quasi-judicial land use applications, despite the fact that plaintiffs property  
19 was zoned for rural residential use and not for farming; and secondarily that if that Goal had been  
20 applied as such in 1975, the result would have been a denial of the rural residential subdivision use  
21 that was otherwise allowed in the zone applicable to the property. Defendant further construed state  
22 law to determine that Goal 3 contained approval criteria, which when applied to plaintiffs' property  
23 would have automatically prohibited partitionings or subdivision of their property.

24 Additional interpretations of law (both Measure 37 and Ordinance 1209) were made by  
25 defendant here by requiring there to be evidence of some specific enforcement of the land use code  
26 against plaintiffs as a prerequisite for approval of a Claim under Measure 37.



1 standing process. Where you have challenges to process, evidence and legal interpretations the sole  
2 and exclusive way to raise those issues is through the writ of review process. ORS 34.020.

### 3 **3. The Measure 37 Cause of Action**

4 The Measure 37 cause of action is completely different and separate from the writ of review  
5 process. The Measure 37 cause of action is a new remedy that is used to ensure the provisions of  
6 Measure 37 are carried out. According to the Ballot Title of Measure 37, the measure creates a “civil  
7 right of action.” This new cause of action was designed partially to make sure local governments  
8 dealt with claims in a timely fashion (ie 180 days), and that relief from the continued enforcement of  
9 restrictive land use regulations was properly granted. Section 6 of the measure characterizes the new  
10 civil remedy as a, “cause of action for compensation” under Measure 37.

11 Nothing is ever said that this new civil cause of action for compensation under Measure 37  
12 eliminates the writ of review process, or supercedes it in any way. It establishes a new remedy to  
13 ensure the mandates of the measure are carried out and carried out in a timely fashion. Section 12  
14 of the Act indicates this new cause of action does not replace any existing remedies in Oregon law.

15 The issue in a Measure 37 cause of action is whether or not compensation should be awarded  
16 under the Act. To determine that question involves an application of the text of the measure to the  
17 facts presented in the claim process. This cause of action is not designed to be a forum for the  
18 collateral attack on the measure itself or on legal interpretations of the measure that are subsequently  
19 applied to the claim.

20 There is no doubt that had plaintiffs not filed a writ of review in order to challenge the legal  
21 interpretations made by the defendant, and sought to raise those challenges solely under a Measure  
22 37 claim, that defendant would be arguing just the opposite position here: that the only way to raise  
23 those issues would be in a writ of review.

### 24 **4. Review Processes are Mutually Exclusive of Each Other**

25 Defendant argues that the new Measure 37 civil cause of action is the only legal process by  
26 which a person can challenge the legal interpretations of defendant with regard to Measure 37.

1 Neither Measure 37 nor ORS Chapter 34 supports that conclusion. Section 12 of the Act refutes  
2 defendant's position that the cause of action created here is exclusive and eliminates the writ of  
3 review process from consideration. That section provides that the new civil cause of action "is not  
4 intended to modify or replace any other remedy." Defendant argues the remedy provided by a writ  
5 of review is replaced by Measure 37, something that Act itself specifically prohibits.

6 Defendant further ignores the fact that the Measure 37 cause of action is claimant and property  
7 specific. Only the denied claimant is granted this new cause of action under Measure 37, and the  
8 relief is directly solely and exclusive to providing just compensation to that claimant.<sup>2</sup> There is no  
9 standing for special interest groups such as 1000 Friends of Oregon or Oregonians in Action, or even  
10 neighbors to intervene in the new Measure 37 cause of action. This remedy is exclusively for the  
11 aggrieved property owner to obtain compensation, and does not address the types of things covered  
12 by the writ of review statute.

13 Under the position defendant suggests this Court adopt (where the writ of review process  
14 would not be available to the general public to challenge the legal interpretations of the defendant)  
15 the public would be precluded from ever being able to challenge any interpretation defendant made  
16 on Measure 37. Effectively, the defendant is seeking a determination that no member of the general  
17 public who was neither the claimant, nor the property owner involved in the claim, will have any legal  
18 process available to them to overturn its legal interpretation as to Measure 37. Any interpretation that  
19 wipes out the ability of the public to a legally established and long recognized remedy can not be  
20 sustained.

21 Essentially the Measure 37 new civil cause of action is an additional remedy to the writ of  
22 review, and each serves a mutually exclusive and important role in the review of defendant's  
23 decisions in this case. The writ of review allows the appropriate forum for the litigation of  
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25 <sup>2</sup> *Section 6 of Measure 37 provides that "the present owner of the property \*\*\* shall have*  
26 *a cause of action for compensation under this act in the circuit court in which the real*  
*property is located."*

1 evidentiary challenges; improper processing; and questions regarding the proper interpretation of the  
2 law. The Measure 37 process allows property owners the ability to obtain just compensation when  
3 a local government continues (after a 180 day notice) to enforce restrictive land use regulations that  
4 were enacted after they purchased their property. Each serves a different purpose, and where a  
5 decision combines elements of both legal interpretations and continued enforcement of oppressive  
6 regulations, then both remedies arise and may be asserted by the aggrieved parties.

7 Defendant asserts the writ of review process is inconsistent with Measure 37, however as  
8 pointed out in the previous discussion, that position is without merit. The new Measure 37 cause of  
9 action is for just compensation, while the writ of review is to challenge legal process and  
10 interpretations to the law. There is nothing inconsistent in those two distinct processes and purposes.

11 Defendant incorrectly describes plaintiffs' Measure 37 cause of action as an appeal. Such is  
12 not the case. Plaintiffs' writ of review is an appeal of legal interpretations and evidentiary sufficiency  
13 and appropriate processing of a state law (Measure 37 and Goal 3). Plaintiffs' complaint under  
14 Measure 37 is for just compensation because defendant is continuing to enforce its land use  
15 regulations in spite of the relief provided under Measure 37.

16 For its legal authority to support its position, defendant relies on a website posting from  
17 Oregonians in Action that has no legal force and effect at all in this case<sup>3</sup>, and whose relevance to the  
18 argument at hand is not made clear. The passage quoted simply states that the new cause of action  
19 allows the filing of a lawsuit in circuit court, but does not even address the concept that this lawsuit  
20 is the only relief available, and certainly does not say that this remedy is exclusive, or that the  
21 traditional writ of review process is no longer available to address the situation where the county is  
22 making broad legal interpretations of state law that effect the citizenry of the entire county.

23  
24 <sup>3</sup> *Defendant admits that evidence of intent of the voters, not the drafter is what is critical*  
25 *in interpreting law that was enacted by initiative petition. Ecumenical Ministries of*  
26 *Oregon v. Oregon State Lottery Commission, 318 Or. 551, 559, fn. 8 (1994).*

1 Defendant next argues that the two statutes (ORS Chapter 34 and Measure 37) conflict with  
2 one another and that the specific must control over the general. That method of statutory construction  
3 is not applicable here because the two laws are not in conflict as each has a distinct and separate  
4 purpose. In addition, it is not reasonable to argue that the general language of Measure 37 controls  
5 over the very specific provisions of ORS Chapter 34.

6 The more appropriate provisions of statutory construction law applicable in this case are found  
7 in ORS 174.010 where it is held that it is not the office of the judge in statutory interpretation to insert  
8 what has been omitted. Defendant asks that this Court insert a provision to Measure 37 that says its  
9 remedy is exclusive. Such can not and should not be done. ORS 174.010. See also ORS 174.030  
10 where statutes are to be construed in favor of natural rights, and not in a way that would eliminate an  
11 otherwise well established remedy. Here defendant is seeking to eliminate the writ of review process  
12 from consideration of Measure 37 cases altogether, and ORS 174.030 indicates such an interpretation  
13 should not be made.

14 Where a remedy is intended to be exclusive it is incumbent that this limitation be specifically  
15 enumerated in the text. For example, LUBA has "exclusive" jurisdiction to hear land use cases. ORS  
16 197.825(1); ORS 656.018 exclusively requires on the job injuries to be processed through the  
17 Workers' Compensation program. Where the concept of "exclusivity" is not enumerated in the text,  
18 the Court can not add it later. ORS 174.010.

19 Defendant then argues that the writ process could allow a greater remedy that is allowed by  
20 the new Measure 37 cause of action. Certainly the remedies from the two actions are different, and  
21 that stems from the fact that they address two totally separate and distinct aspects of the decision. As  
22 it relates to processing, assessment of evidence and interpretation of law, the writ of review allows  
23 the judge to impose remedies sufficient to correct the determined violations. In the new civil cause  
24 of action under Measure 37 the role of the Court is to determine if the restrictive land use regulations  
25 are continuing to be applied after a 180 day notice, and if so to award just compensation. Is one  
26 remedy greater than the other? Does it really matter? Each process addresses different aspects of the

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1 case and differing remedies should apply.

2 Again, defendant relies on a passage from the Oregonians in Action website to support its  
3 position, but there is nothing in the quoted material that is relevant even to the argument being made.  
4 Even so, it doesn't matter at all what the Oregonians in Action website says, as that is not relevant  
5 to the Courts determination of this matter.

6 Finally, defendant takes the position that this Court does not have the same remedies available  
7 to it that the local government has under the measure itself. Essentially, the defendant is arguing that  
8 where a county continues to enforce restrictive land use regulations that were adopted after the owner  
9 acquired their property - that is refusing to award money compensation or waive the restrictive  
10 regulations - and forces that property owner to this Court to gain relief - that this Court may only  
11 award money damages and can not waive the offending land use regulations. Such a position is  
12 startling in light of the fact that defendant has stated repeatedly that it can not afford to pay claims  
13 under Measure 37, and that it has no money appropriated or available to pay such claims even if it  
14 desired to do so. Yet at the same time they argue that once a case gets to circuit court that money  
15 damages is the only remedy available? This troubling position is a strain of public policy, not to  
16 mention fiscal logic.

17 Defendant offers little to support its position that this Court's power is limited, and what  
18 justification is set forth makes no sense in light of the text and context of Measure 37. Section 6 of  
19 the measure as previously quoted creates a new civil cause of action "for compensation." The word  
20 "compensation" is not defined or limited in any way in the text of Measure 37. The litigation is for  
21 compensation. The form of compensation is up to the Court to decide.<sup>4</sup> The remedy might very well

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24 *It is important that "compensation" be distinguished from "just compensation". Each phrase is*  
25 *used in the measure and it appears each has a different meaning and connotation. The words "just*  
26 *compensation" seem to imply an award of money - basically as that term is used in the law of*  
*eminent domain. See Section 3 of the Act where it references "in lieu of payment of just*  
*compensation" where the implication is that this term refers only to payment of money. See also*  
*Sections 1 and 2 where it provides that an owner is "paid just compensation." On the other hand*

PAGE 8 - Response to Defendant's Motion to Strike

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1 be a money judgment, or it might be an order to waive the offending land use regulations. Certainly  
2 the text of the measure provides for the two alternative forms of relief, and for what reason would  
3 those remedies ever be limited when the matter is taken up by the Court as opposed to the county?

4 It is the plaintiffs' position that this Court has the same remedies available to it that the county  
5 had when it reviewed the claim in the first place. To interpret this measure otherwise would be to  
6 take away a legitimate remedy from the hand of the Court for no apparent reason. In fact, given the  
7 fiscal condition of local government, if the Court does not have the power to waive such regulations,  
8 and its only remedy is a money judgment - the weight of these claims could bankrupt the county. In  
9 addition, if a property owner were guaranteed they would obtain a money judgment upon prevailing  
10 in a Measure 37 case, why would they ever seek relief from the county in the first place? Section 7  
11 of the Act essentially provides that a property owner only has to place the county on notice of the  
12 Claim, and that "in no event shall" the local procedures - such as Ordinance 1209 - "act as a  
13 prerequisite to the filing of a compensation claim" as allowed under Section 6 (the new civil cause  
14 of action).

## 15 5. Conclusion

16 Defendant's Motion to Strike is not well founded and must be denied. The writ of review  
17 process is in place to deal with certain technical aspects of this case and the new civil cause of action  
18 deals with the substantive land use issues and to provide appropriate relief to an aggrieved property  
19 owner.

20 Defendant offers nothing by way of authority or justification, let alone common sense or  
21 reasonable logic for its sometimes inconsistent theory of this case. The Motion fails to consider the  
22 text and context of the measure; ignores entire sections of the act; and relies on website postings as  
23 its justification. Yet the import of what the defendant is asking for in this Motion is incredibly  
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25 *the word "compensation" is used more broadly to address and describe both the payment of money*  
26 *or the waiver of regulations - which is what a Claimant routinely asks for. See Section 2 and 4 and*  
*certainly 6.*

1 significant. Defendant seeks to eliminate an entire process that is open to the public for the review  
2 of its decisions; in favor of a closed process open only to the property owner Claimant. Defendant  
3 seeks to deny this Court's right to provide the relief of waiver, and instead to invite money judgments  
4 it can not pay.

5 Although the process seems cumbersome in the total, having to file both a writ of review and  
6 a civil cause of action under Measure 37, in practice the issues are properly framed and the litigation  
7 on the merits can proceed just as it would if there were only one of these processes invoked. The  
8 parties remain the same. The facts are the same. The interpretations are the same. The issues will  
9 remain the same and will be litigated appropriately. There is no reason at all to strike the writ of  
10 review from this case, and defendant's motion should be denied.

11 DATED this 26 day of August, 2005, at Salem, Marion County, Oregon.

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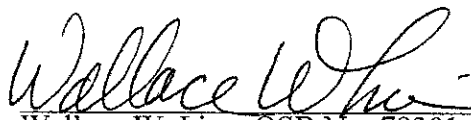
14 Wallace W. Lien, OSB No. 79301  
15 of Wallace W. Lien, P.C.  
16 Attorneys for Plaintiffs  
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1 **CERTIFICATE OF MAILING**

2 I hereby certify that I served the foregoing **RESPONSE TO DEFENDANT'S MOTION TO**  
3 **STRIKE** by depositing a certified true copy thereof in the United States Post Office at Salem,  
4 Oregon, on the 26 day of August, 2005, enclosed in a sealed envelope with postage prepaid,  
5 addressed to the parties listed below at the address most recently known to me, or furnished to me by  
6 said parties, as follows:

7 Scott A. Norris  
8 Assistant County Counsel  
9 P.O. Box 14500  
Salem, OR 97309  
503-373-4367 (fax)

10 In addition, a true copy of said pleading was sent by facsimile transmission to said attorneys at the  
11 numbers provided to me for that purpose.

12   
13 \_\_\_\_\_  
14 Wallace W. Lien, OSB No. 79301  
15 of Wallace W. Lien, P.C.  
16 Attorneys for Plaintiffs