IN THE COURT OF APPEALS OF THE STATE OF OREGON

HOOD RIVER VALLEY RESIDENTS' COMMITTEE, INC., an Oregon non-profit corporation, and **LARRY and SARA MARTIN,** individually, and **ERIC and TAMIKO RUHLEN**, individually, Petitioners-Appellants, v. **LAND CONSERVATION AND DEVELOPMENT COMMISSION; THE DEPARTMENT OF LAND CONSERVATION AND DEVELOPMENT,** an Agency of the State of Oregon, and **THE DEPARTMENT OF ADMINISTRATIVE SERVICES,** an agency of the State of Oregon. Respondents-Respondents.	Marion County Circuit Court TC. 06C-17267 CA No. A135490

APPELLANTS' HOOD RIVER VALLEY RESIDENTS' COMMITTEE, INC., LARRY AND SARA MARTIN'S AND ERIC AND TAMIKO RUHLEN"S REPLY BRIEF, EXCERPT OF RECORD AND APPENDIX

Appeal from a Judgment entered on April 4, 2007 in the Circuit Court for Marion County, Honorable Don A. Dickey, Circuit Judge

Ms. Denise Fjordbeck, OSB No. 822578
DOJ Appellate Division
1162 Court St NE
Salem OR 97301
Telephone: (503) 378-4402

Attorney for Respondent-Respondent Land Conservation and Development Commission, Department of Land Conservation and Development, and the Department of Administrative Services.

Richard P. Benner, OSB No. 75037
Office of Metro Attorney
600 NE Grand Avenue
Portland, Oregon 97232-2736
Telephone: (503) 797-1532

Attorney for Amicus Curiae, Metro

Ralph O. Bloemers, OSB No. 98417
Crag Law Center
917 SW Oak, Suite 417
I. Portland, OR 97205

Telephone: (503) 525-2727

Attorneys for Petitioners-Appellants Hood River Valley Residents Committee, Larry and Sara Martin and Eric and Tamiko Ruhlen.

FILED: AUGUST 2007

Table of Contents

I. Introduction. 1
II. Jurisdiction. 2
III. Standard of Review. 2
IV. First Assignment of Error. 3
V. Second Assignment of Error. 6
A. ORS 197.352 Requires Determination of the Reduction in Value. 9
B. Respondents' Approach Does Not Measure the Cause & Effect. 15
C. Exemption Approach to Valuation is in Error. 18
VI. Third Assignment of Error. 20
A. Statute Specifically Used "Payment of." 20
B. When a Reduction is Proven a "Use" May Be Allowed. 22
VII. Fourth Assignment of Error. 23
VIII. Conclusion. 25

Certificate of Filing and Service

Excerpt of Record (Supplemental)
Excerpt of Record (Case No. 05C16640 - Letter Opinion) ER-47-70

Appendices
Appendix 1 (Hood River County Comprehensive Plan - 1984) App 1-18
Appendix 2 (PSU, Hood River County and HRVRC Maps) App 19-22
Appendix 3 (Case No. 0702-01428 - Def. Mult. Co. Memo) App 23-42
Appendix 4 (Case No. 05-2993-E-3(2) - Order) App 43-52
Appendix 5 (Case No. 05CV0015 - Letter Opinion) App 53-65

Crag Law Center
917 SW Oak St., Suite 417
Portland, OR 97205
Tel. - (503) 525-2724

Table of Authorities

Cases

Andrus v. Allard, 444 U.S. 51 (1979) 11
City of Portland v. Welch, 229 Or 308, 364 P2d 1009 (1961).................... 4
Coast Range Conifers, LLC v. State ex rel. Oregon State Board of Forestry, 339 Or 136, 117 P3d 990 (2005).................... 11, 12
Corey v. DLCD, 210 Or App 543, 152 P3d 933 (2007) 2
Danforth v. U.S., 308 U.S. 271, 60 S. Ct. 231, 84 L.Ed. 240 (1939) 7
Department of Transportation v. Lundberg, 312 Or 568, 825 P2d 641 (1992)................ 24
Fleetwood Homes of Oregon v. Vanwechel, 164 Or App 637, 993 P2d 171 (1999).......... 3
Gaston v. Parsons, 318 Or 247, 864 P2d 1319 (1994).................... 7
K & K Construction, Inc. v. Department of Environmental Quality, 705 N.W.2d 365 (Mich.Ct.App. 2005) 14
Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470 (1987) 11
Kirby Forest Industries v. United States, 467 U.S. 1 (1984) 11
Lingle v. Chevron U.S.A. Inc., 544 US 528 (2005).................... 12
MacPherson v. DAS, 340 Or 117 (2006) 5
Matter of Phelps, 122 Or App 410, 857 P2d 900 (1993).................... 6
Schrader v. Veatch, 216 Or 105, 337 P2d 814 (1959).................... 5
See State v. Calvert __Or App __, __P3d __, 2007 WL 2120646 (2007)……………….24
Tahoe Sierra Preservation Council, Inc v. Tahoe Regional Planning Agency, 535 US 302 (2002).................... 10, 11
U.S. v. Riverside Bayview Homes, Inc., 474 U.S. 121 (1985) 12
Williamson County Regional Planning Comm'n. v. Hamilton Bank, 473 U.S. 172 (1985).................... 18
Young v. State, 161 Or App 32, 983 P2d 1044 (1999).................... 3

Statutes

ORS 174.020.................... 6
ORS 183.482.................... 2
ORS 183.484.................... 2
ORS 183.484(5)(a).................... 3
ORS 197.015.................... 5
ORS 197.015(4) 5
ORS 197.015(6) 4
ORS 197.065(2) 4
ORS 197.160(b) 4
ORS 197.352.................... 6, 7, 9, 10, 12, 13, 14, 17, 18, 21, 22, 23
ORS 197.352(1) 1, 6, 9
ORS 197.352(10) 6, 20, 22
ORS 197.352(2) 7, 19
ORS 197.352(6) 6
ORS 197.352(7) 18, 19
ORS 197.352(8) 1, 4, 6, 20, 22
ORS 197.352(9) 4

Crag Law Center
917 SW Oak St., Suite 417
Portland, OR 97205
Tel. - (503) 525-2724

ORS 197.370(2) 4
ORS 197.375(5) 4
ORS 197.430 4
ORS 197.445(7)(f) 4
ORS 197.480(1) 4
ORS 197.540(1) 4

Constitutional Provisions

Oregon Const Art IV, sec 18 4
Oregon Const Art IV, sec 21 4
Oregon Const Art IV, sec 22 4

Crag Law Center
917 SW Oak St., Suite 417
Portland, OR 97205
Tel. - (503) 525-2724

I. Introduction.

The core statutory change effected by Measure 37 was the provision of just compensation to landowners for a *reduction* in value *caused by* land use regulations. In the past, attorneys advanced this concept for clients as a "regulatory taking" under the U.S. and State Constitutions. Yet, for anything other than a complete taking of property, courts have rejected this concept because of the countervailing effect of benefits and burdens associated with all regulations. Courts have generally found that property owners mutually bear these effects as members of a complex regulatory society. However, through only 13 subsections, Measure 37 achieved a dramatic and complex expansion of takings law. This legal background is part of the context of the statutory scheme's use of the term "just compensation" and aids this court in discerning the people's intent when they voted to put this measure into law.

ORS 197.352 (1) & (2) provide for relief for the value reducing effect of a regulation. ORS 197.352 requires just compensation for the reducing effect of a regulation. If there is no cash to pay just compensation, the governing body may provide an alternative to paying just compensation in cash. ORS 197.352(8) authorizes the governing body that enacted the regulation to remove, modify or not apply it (or them) in lieu of payment of just compensation. However, the statute does not *only* say "not apply." The statute provides three options. The governing body may choose among the approaches depending on the claimant's reduction in value. If the reduction is so great that only "not applying" the regulation could compensate the claimant, then the governing body can compensate accordingly. If the reduction in value is less than that, then the governing body may "modify" the regulation to allow "a use" that is

Crag Law Center
917 SW Oak St., Suite 417
Portland, OR 97205
Tel. - (503) 525-2724

commensurate to the claimant's loss. In all cases, the governing body must determine whether there has been a reduction in value caused by the regulation. Allowing a claimant to allege that a "reduction in value" really means an "increase in value" based on the value of the property to the claimants of an individual exemption to land use regulations that continue to restrict neighbors' property is contrary to law.

II. Jurisdiction.

Pursuant to the direction provided by the Respondents in their order, the Hood River Valley Residents Committee and individual neighbors Eric and Tamiko Ruhlen and Larry and Sara Martin (the "Petitioners") brought this challenge pursuant to ORS 183.484. (ER-36); Respondents' Brief ("Resp Br") at 13. Petitioners are well-aware of this Court's decision in *Corey v. DLCD*, 210 Or App 543, 152 P3d 933 (2007)*, adhered to on reconsideration*, 212 Or App 536 (2007) ("*Corey*").[1] Nonetheless, the Parties agree that the legal issues are fully presented and appropriate for review. Once these legal issues are decided, the substantial evidence issue can be addressed after remand under the appropriate legal standards and process. The Parties continue to have a significant interest in the prompt resolution of these overarching legal issues.

III. Standard of Review.

Petitioners focus their challenge on whether Respondents' decision follows the law and properly interprets key terms in ORS 197.352 including: "has the effect of reducing," "just compensation," "in lieu of payment of" and "governing bodies." Respondents' approach is contrary to the plain language of ORS 197.352 and beyond the

[1] Petitioners' opening brief had a typo in its reference to ORS 183.482. If *Corey* is upheld, Petitioners agree that this case should be formally transferred to the Court of Appeals. Until then, Petitioners do not believe this process is necessary.

Crag Law Center
917 SW Oak St., Suite 417
Portland, OR 97205
Tel. - (503) 525-2724

discretion afforded in it. *See* ORS 183.484(5)(a) and (b). Specifically, Respondents' approach to valuation does not measure the cause and effect between a land use regulation and the Claimants' property. In so doing, Respondents did not determine whether the regulation had the "effect of reducing" the value of Claimant's property.

IV. First Assignment of Error.

The plain language does not afford Respondents the authority to "not apply" land use regulations enacted by the legislature. In an effort to avoid the plain language of the statute, Respondents miscast Petitioners' argument and propose to read meaning into the language of the statute to provide flexibility for them to waive state statutes. For better or worse, ORS 197.352 does not provide this flexibility. They also forecast dire results if the court adheres to the plain language of the statute. However, this court cannot disregard the plain language of the statute even if the effect is onerous for the state agencies. *See Young v. State*, 161 Or App 32, 38, 983 P2d 1044 (1999) ("the legislative power includes the authority to write a seemingly absurd law, so long as the intent to do that is stated clearly"); *Fleetwood Homes of Oregon v. Vanwechel*, 164 Or App 637, 642, 993 P2d 171 (1999) ("[court] cannot subvert the plain meaning of a statute to avoid a supposedly absurd result"). (*See also* ER-5, n. 4 (court cannot ignore plain language of ORS 197.352 even if the result is unfair)). The result of the plain language may be burdensome for Respondents, but it is caused by their own interpretive error.

Respondents seek support for their interpretation by repeatedly stating that Petitioners incorrectly propose that Respondents have no authority to waive land use regulations. (*See e.g.* Resp Br at 19, 23, 26). To the contrary, Petitioners do not argue that Respondents have *no* authority to waive land use regulations, but rather that

Crag Law Center
917 SW Oak St., Suite 417
Portland, OR 97205
Tel. - (503) 525-2724

Respondents have only been granted the authority to waive those land use regulations that they have enacted. Subsection 8 provides a limitation that only: "*the governing body responsible for enacting the land use regulation* may modify, remove, or not to [sic] apply the land use regulation or land use regulations…" ORS 197.352(8) (emphasis added). Respondents seek to ignore this limitation in their interpretation.[2]

Respondents argue that "governing body" in subsection 8 refers only to local governments by reference to the term as it is used elsewhere in ORS chapter 197. Respondents fail to note, however, that throughout the chapter, the term "governing body" is almost always preceded or followed by the term "local," or used in reference to specific local governments.[3] There is no such limitation of the term in ORS 197.352(8), and the definitions section of ORS 197.352 provides no special definition for "governing body." There is no basis to conclude that the term is limited to local governing bodies.[4]

---

[2] Respondents advance a broad reading of the scope of authority granted to the state agencies to "not apply" or "waive" land use regulations. These arguments appear to run afoul of several sections of the Oregon Constitution regarding the legislature's power to enact and amend laws. *See* Oregon Const Art IV, sec 18 ("Bills may originate in either house, but may be amended, or rejected in the other; except that bills for raising revenue shall originate in the House of Representatives."), Art IV, sec 21 (""nor shall any law be passed, the taking effect of which shall be made to depend upon any authority, except as provided in this Constitution."), Art IV, sec 22 ("No act shall ever be revised, or amended by mere reference to its title, but the act revised, or section amended shall be set forth, and published at full length."). The people's initiative power is co-equal with the legislature. This Court must interpret the statute to avoid rendering it constitutionally invalid. *See City of Portland v. Welch*, 229 Or 308, 316, 364 P2d 1009, 1012 (1961).

[3] ORS 197.015(6), "governing body of a local government"; 197.065(2), "governing body of each county"; 197.160(b), "Each city and county governing body." There are many examples of the same distinction. *See e.g.* 197.370(2), 197.375(5), 197.430, 197.445(7)(f), 197.480(1), 197.540(1).

[4] As Petitioners indicated in their opening brief, the term "governing body" is also used to exclude decisions made pursuant to ORS 197.352 from the jurisdiction of the Land Use Board of Appeals (LUBA). ORS 197.352(9). According to Respondents' interpretation, this would make Respondents' decision appealable as a land use decisions to LUBA.

Crag Law Center
917 SW Oak St., Suite 417
Portland, OR 97205
Tel. - (503) 525-2724

Regarding the operation of 197.352(8) in relation to Oregon's two state agencies involved here, the Oregon Supreme Court stated that "if the governing body in question is a state agency that is itself part of the executive branch, Measure 37 removes no executive function from the executive branch *and devolves none on its legislative counterpart*." *MacPherson v. DAS*, 340 Or 117, 135 (2006) (emphasis added). Yet, it is exactly this sort of devolution of authority from the legislature to the state agencies that the Respondents rely upon to support their interpretation of ORS 197.352.

While Respondents note that the court did not address the exact question presented here, they insist that the quotation above supports Respondents' view. Resp Br at 24. Respondents argue that if they lack the authority to waive land use regulations enacted by the legislature, they would be required to pay and process claims. This argument ignores the plain text of section 8 and simply has no merit. A plain reading of ORS 197.352 requires that each governing body compensate the property owner for a reduction in value caused by the regulations for which they are responsible for enacting. Respondents are not permitted to provide relief from regulations that they did not enact any more than local governments are responsible for providing relief from regulations that the Respondents enacted.[5] In keeping with this analysis, in a letter to the Director

---

Respondents respond to this inconsistency by arguing that they are already exempt from LUBA jurisdiction. (Resp Br at 22). However, a careful review of the language in ORS 197.015, to which Respondents refer, exempts from the definition of land use decisions appealable to LUBA only those decisions made by LCDC. DAS and DLCD are not exempt from LUBA jurisdiction. Furthermore, the Commission is exclusively defined as LCDC in ORS 197.015(4). Respondents' claims are unpersuasive.

[5] Respondents cite *Schrader v. Veatch*, 216 Or 105, 337 P2d 814 (1959) ("*Schrader*") to support their argument that as a waiver of sovereign immunity, ORS 197.352 should be strictly construed. This case is inapposite. *Schrader* provides that an action will not lie against the State unless there is clear intent by the legislature to waive immunity from

Crag Law Center
917 SW Oak St., Suite 417
Portland, OR 97205
Tel. - (503) 525-2724

of the DLCD, counsel for the Respondents stated that "[c]ities or counties that repeal or amend local ordinances that are required by state law on a broader basis are, we believe, acting in violation of state law." (ER-43). In other words, a person making a demand must pursue relief from the governing body that is responsible for enacting the regulations that are alleged to have reduced the value of the persons' property. By implication, when Respondents attempt to provide relief from a land use regulation through waiver, when that land use regulation was enacted by the legislature, Respondents are acting outside of the authority granted to them.

Finally, Respondents attempt to find an alternative source for the authority to not apply land use regulations in subsection (10). Respondents' reading ignores the limitations of subsection (8) as the source of the authority to not apply duly enacted regulations. As ORS 197.352(8) describes, subsection 10 refers to the "availability of funds" and does not provide an independent grant of authority to not apply regulations.[6]

V. Second Assignment of Error.

ORS 197.352 is comprised of thirteen subsections. ER 10-11. Subsection 1 puts in place an entitlement to prove that relief is due for a reduction in value caused by a land

---

suit. There is no dispute that ORS 197.352(6) constitutes an express waiver of sovereign immunity. Respondents argue for an expansive and contorted reading of ORS 197.352 to minimize the forecasted liability. *Schrader* does not, however, operate to create authority for the state agencies to not apply laws in the first instance.

[6] The parties previously noted that ORS 197.352(10) may be ambiguous and raised a question as to whether the intended reference is to subsection (8) rather than subsection (6). (*See* App Br at 20, Resp Br at 18). Regardless, under either scenario, subsection 10 addresses the source of funding for remedies granted elsewhere in ORS 197.352 and does not grant independent authority to Respondents. If subsection (10) granted this authority, the entirety of subsection (8) would be surplusage. "Whenever possible, [the courts] avoid construing statutes in a manner that renders one or more of their provisions meaningless." *Matter of Phelps*, 122 Or App 410, 415, 857 P2d 900, 902 (1993). This also runs afoul of the rule that specific provisions control general ones. ORS 174.020.

Crag Law Center
917 SW Oak St., Suite 417
Portland, OR 97205
Tel. - (503) 525-2724

use regulation, and specifically allows for claims based on land use regulations that were enacted in the past that are still on the books. Subsection 2 defines the relief as being "equal to the reduction in the fair market value" carried forward "as of the date the owner makes written demand for compensation under this act."[7] The fair market value that must be determined is the value reduction caused by the regulation.

There are two key issues that need to be considered in reviewing the validity of Respondents' method for determining whether relief is due under ORS 197.352: (1) whether Respondents have used a proper methodology to determine whether relief is appropriate pursuant to ORS 197.352 that isolates the cause and effect of a regulation on the value of the Claimants' property; and (2) whether there must be an established decision-making point for observing the effects of a regulation. While ORS 197.352 expanded upon the constitutional rights afforded property owners by providing relief for any reduction in value (as opposed to a complete reduction), the constitutional jurisprudence helps to inform this court on the meaning of "just compensation" as it is used in ORS 197.352. *See e.g. Gaston v. Parsons*, 318 Or 247, 252, 864 P2d 1319 (1994) (related case law forms part of the context of the legislation).

As for the first issue, Respondents propose to read the statute to set up a choice between "enactment" and "enforcement" in subsection (2). A close examination of Respondents' arguments shows that this reading brings "the meaning of 'enforcement' perilously close to the meaning of 'enactment': an enacted regulation is continuously

---

[7] Likewise, in Black's Law Dictionary, just compensation is defined as "the fair market value at the time of taking." *citing to Danforth v. U.S.,* 308 U.S. 271, 60 S Ct 231 (1939). The definition also contemplates "compensation for delay in payment" and that "[i]nterest is recoverable in eminent domain proceedings as part of just compensation when payment is not contemporaneous with the taking…"

Crag Law Center
917 SW Oak St., Suite 417
Portland, OR 97205
Tel. - (503) 525-2724

enforced until it is repealed." Amicus Br at 4, n.2. Respondents reading of the word "enforcement" does not produce or require an enforcement event, but rather takes place constantly and continually until the regulation is repealed. Amicus Br at 3-5. Regardless, this approach is misguided because ORS 197.352(2) requires that compensation "be equal to the reduction in the fair market value of the affected property interest…" For example, Respondents may not simply accept a demand that asserts that Goal 4 caused a reduction in fair market value based on an estimate of the property's worth in 2006, when the estimate assumes (1) the Claimants' property is exempt from Goal 4, and (2) tens of thousands of acres of farm and forest land in Hood River County which are also restricted by Goal 4 *remain restricted* by Goal 4. This exemption approach is not supported by Respondents' claim that it has leeway to *choose enforcement* to determine whether a loss has occurred. Respondents approach is flawed because the posited increase in value is not due to the restrictions on the Claimants' property. Instead it is *due to the effect of restrictions on other people's property*.

As for the second issue, ORS 197.352(1) requires Respondents to determine whether just compensation is due for a reduction in value. Since Respondents relied upon an estimate that is based on an exemption approach to value there is no way for the public and this Court to know if there has been an actual loss in value.[8] App Br at 33-34;

---

[8] Respondents argue that because they have no cash to pay claims they do not need to figure out the "exact" dollar amount. However, the goal of the statute is to pay claims. Without a valuation of the effect of the regulation, the State of Oregon and local governments are unable to even consider paying claims. There is new legislation that calls for payment of claims through the provision of a conservation fund. http://www.leg.state.or.us/07reg/measures/hb3500.dir/hb3540.en.html. Without an assessment of the value reducing effect, future legislative efforts to pay compensation are effectively stymied and government would cease to fulfill important functions.

Crag Law Center
917 SW Oak St., Suite 417
Portland, OR 97205
Tel. - (503) 525-2724

Amicus Br, App. 1 ("Jaeger") at 117 (discussing how amenity values and scarcity effects interact) and App. 2 (results of professional assessment by regional government).

A. ORS 197.352 Requires Determination of the Reduction in Value.

Respondents dismiss out of hand the context that is provided by constitutional takings jurisprudence in interpreting the meaning of "just compensation" and determining the cause and effect of a regulation. Resp Br at 40. While ORS 197.352 may provide a new threshold for when compensation is due (any diminution), Respondent fails to recognize how existing jurisprudence, in light of the economic complexities inherent in a regulatory scheme, is instructive on the meaning of just compensation in ORS 197.352. To determine whether just compensation is due under ORS 197.352, the Claimants and the Respondents have chosen to equate any regulatory restriction with a loss in current market value without accounting for both the benefits and burdens that flow from the enactment and enforcement of land use regulations. This approach may result in a windfall far in excess of the just compensation intended by ORS 197.352(1).

Both the U.S. and the Oregon Supreme Courts have consistently ruled that the due process clauses of the State and Federal Constitution only require the payment of just compensation for the enactment of a regulation when it results in a complete taking of economically viable use. Of course, ORS 197.352 expands the circumstances under which a property owner is entitled to just compensation beyond that provided for in State and Federal constitutions. However, the existing constitutional takings jurisprudence informs the basic economic logic of how one goes about calculating the value reducing effect of a regulation. Courts have repeatedly recognized that regulations have both positive and negative effects, and, therefore, any calculation of a reduction in value must

Crag Law Center
917 SW Oak St., Suite 417
Portland, OR 97205
Tel. - (503) 525-2724

consider both sides of the equation in determining whether the new regulatory environment actually reduced the value of the property.

Rather than undertaking an analysis based on sound economics, Respondents have rubber stamped Claimants' estimation of the value of the "taking." (ER-74). As a result Respondents have provided relief without proof of reduction in value caused by the regulation. However, the concept of fair market value has been a central consideration in the development of constitutional takings jurisprudence and is embodied in the plain language of ORS 197.352. In attempting to achieve fairness and provide just compensation, high-level appellate courts have embraced the economic principles utilized by Metro and discussed at great length by economist William Jaeger. *See* Amicus Brief, App-1. The courts have never embraced an exemption approach. The statute requires that Respondents actually determine the reduction caused by the regulatory environment.

But Respondents' approach ignores what courts have long recognized—that regulations tend to have both positive and negative effects on land values, requiring any estimation of the effect of regulatory restrictions to consider both. In *Tahoe Sierra Preservation Council, Inc v. Tahoe Regional Planning Agency*, the Court rejected a takings claim based on a temporary moratorium on development in the Lake Tahoe basin, stating: "[L]and-use regulations are ubiquitous and most of them impact property values in some tangential way – often in completely unanticipated ways." 535 US 302, 324 (2002). Although the moratorium restricted profitable building, the Court observed that the restriction could well produce a benefit for all property owners subject to the moratorium. Pointing to the moratorium's amenity effect, the Court observed, "an increase [in property values] makes sense in this context because property values

Crag Law Center
917 SW Oak St., Suite 417
Portland, OR 97205
Tel. - (503) 525-2724

throughout the Basin can be expected to reflect the added assurance that Lake Tahoe will remain in its pristine state." 535 US 302, 341 (2002). The Oregon Supreme Court made the same point in the case of *Coast Range Conifers, LLC v. State ex rel. Oregon State Board of Forestry*, rejecting a takings challenge to forestry regulations that barred tree harvesting immediately adjacent to an active bald eagle nest. 339 Or 136, 117 P3d, 990 (2005). The Court reasoned that, "regulations may, depending on a myriad of economic and other factors, increase or decrease the affected property's value." *Id.* at 997 n.14.

In sum, the courts have recognized that regulations produce a "reciprocity-of advantage" that mitigates the apparent burden imposed by regulatory restrictions. In *Keystone Bituminous Coal Ass'n v. DeBenedictis*, the U.S. Supreme Court declared, "While each of us is burdened somewhat by [land use] restrictions, we, in turn, benefit greatly from the restrictions that are placed on others." 480 U.S. 470, 491 (1987). In determining whether the regulation has resulted in a reduction in value, these benefits must be considered along with any burdens to determine whether the Claimants' allegation of reduction in value is proven. In *Tahoe-Sierra*, the Court also invoked the concept of reciprocity of advantage to reject a takings claim. 535 U.S. at 341.[9]

The Claimants here rest their demand on the notion that the effects of regulation are invariably negative; their consultant's estimate did not allow for or even consider potential positive effects. Respondents have unquestioningly accepted this approach and,

---

[9] The U.S. Supreme Court endorsed the concept of general reciprocity of advantage in *Kirby Forest Industries v. United States*, ruling that regulatory burdens must be born "as concomitants of 'the advantage of living and doing business in a civilized community.'" 467 U.S. 1, 14 (1984) (*quoting Andrus v. Allard*, 444 U.S. 51, 67 (1979)). In *Keystone Bituminous Coal Ass'n v. DeBenedictis*, the Court stated: "The Takings Clause has never been read to require the States or the courts to calculate whether a specific individual has suffered burdens . . . in excess of the benefits received." 480 U.S. 470, 492 n.21 (1987).

Crag Law Center
917 SW Oak St., Suite 417
Portland, OR 97205
Tel. - (503) 525-2724

in so doing, they have ignored the core of ORS 197.352– the provision of just compensation for a reduction in value. Petitioners recognize that litigants advancing claims for regulatory takings have rarely been successful. The courts have stated that a regulatory takings claim can only succeed in "extreme circumstances." *U.S. v. Riverside Bayview Homes, Inc.*, 474 U.S. 121,126 (1985).[10] ORS 197.352 changed that by allowing property owners to seek just compensation for any circumstance where a reduction in value has been proven even if that reduction did not result in the loss of all economically viable use. However, in either case, the award of just compensation must be consistent with sound economic analysis and produce economically accurate results. When faced with this question in the past, the courts have employed a with-and-without calculation that focuses on the cause and effect. The courts strive for accuracy, but not

---

[10] The U.S. Supreme Court has said that a claim will succeed only when the loss in value due to a restriction is the "functional equivalent" of an outright government seizure of private property. *Lingle v. Chevron U.S.A. Inc.*, 544 US 528, 539 (2005). Similarly, the Oregon Supreme Court stated that a regulatory taking occurs only when it "den[ies] an owner the ability to put his or her property to any economically viable use." *Coast Range Conifers, LLC v. State*, 117 P3d 990, 995 (2005). These demanding tests might be viewed as providing limited constitutional protection for private property, but in many ways they comport with sound economic theory and analysis of the value-reducing effects of regulation. A recent report by two OSU economists found that land values (adjusted for inflation) have generally risen since the introduction of Oregon's land-use planning system in 1973 for rural lands zoned for farm and forest use. For the full report visit extension.oregonstate.edu/catalog/pdf/sr/sr1077.pdf (visited 7.30.2007). Through a robust economic analysis of Oregon data, the two economists document how land-use regulations can have three potential effects on land values: restriction effects, amenity effects and scarcity effects. The effect of restricting development likely will be negative, but the effects of scarcity and the amenities associated with regulated development can have a positive effect, *potentially offsetting* the negative restriction effect. http://oregonstate.edu/dept/ncs/newsarch/2007/Jun07/landuse.html (visited 7.30.2007). Another recent study documents past investments made in the land use system and how those investments affect the value of property, both positively and negatively. For example, average farm land values have increased faster than the stock market from 1965 to 2002. http://hdl.handle.net/1957/5503. *See* Table 16 at p. 68 (visited 7.30.2007).

Crag Law Center
917 SW Oak St., Suite 417
Portland, OR 97205
Tel. - (503) 525-2724

exactitude. The courts have long recognized that regulations have a mix of positive and negative effects on land value, involving specific and general reciprocity of advantage and requiring an appropriate evaluation to merit compensation. The courts have recognized these principles in the context of defining just compensation in the regulatory setting. Likewise, ORS 197.352 requires Respondents to calculate the effect of a regulation in an economically sound fashion through use of the term "just compensation."

Respondents now claim to have analyzed the impact of this change in the context of other demands under ORS 197.352, but Respondents have not explained how they have isolated the effect of the regulation. (Resp Br at 30)[11]. In contrast, Metro utilizes an approach that accounts for the difference in value today if regulations are left in place as compared to the result if the regulations are removed from *all* properties. Metro's ability to properly observe a change in value based on today's market is based on its collection of data critical to observing the effect of removing the land use regulation for all property owners in the relevant real estate market. (Amicus Br at 9). Using this approach with the necessary data, it is possible for Metro to factor in both the positive and negative effects of a regulatory change. While this kind of calculation may be somewhat more challenging to perform than the exemption approach, this is akin to the traditional with-and-without technique for evaluating whether there was an economic loss or a gain. Respondents' methodology relies on an estimate that fails to calculate both the benefiting

---

[11] There is no evidence in the record to support the Respondents new argument. The Consultant never considered the impact of the regulation not applying "to other properties with respect to which the state has granted Measure 37 waivers." (Resp Br at 30) As of December 4, 2006, claimants have filed hundreds of Measure 37 demands in Hood River County. (*See* App-19-22).

Crag Law Center
917 SW Oak St., Suite 417
Portland, OR 97205
Tel. - (503) 525-2724

and burdening effect of the regulation. In so doing, Respondents may be conferring unfair windfalls at great public expense.[12]

For Oregon, this statutory change is *sui generis.* ORS 197.352 continues to test the ability of government to properly implement it, and this case is no exception. As a result, there has been immense speculation by the news media and by the public as to what ORS 197.352 actually requires the governing bodies to calculate. While ORS 197.352 creates a new threshold for compensation it incorporates core principles that have been well-developed in existing jurisprudence – just compensation, fair market value and a determination of the cause and effect of the regulation. Petitioners do not contend that this jurisprudence controls in every particular. However, this jurisprudence is particularly helpful in honing the parameters of just compensation in the context of a reduction that is commonly referred to as a regulatory taking. Respondents cite legislative history to support their argument on the First Assignment of Error. (Resp Br at 40). Yet Respondents ignore numerous statements in the legislative history regarding the people's intent that ORS 197.352 would provide "just compensation" for the reduction *caused by* regulation that "takes" the value of property. The intent of ORS 197.352 was to provide for "just compensation" as it is required for "condemning property or taking it by other action, including laws precluding all substantial beneficial

---

[12] In overturning a takings award based on wetlands regulation, the Michigan Supreme Court stated: "[W]ere we to uphold the trial court's award we would, in effect, single out plaintiffs *to their benefit*, because compensating plaintiffs for the loss of value of their property, especially when it has a significant amount of value and development potential remaining, would be tantamount to making the Petitioners exempt from the regulation . . . to the detriment of others who bear the burden of . . . regulations throughout the state." (italics in original) *K & K Construction, Inc. v. Department of Environmental Quality*, 705 N.W.2d 365, 385-386 (Mich.Ct.App. 2005). Respondents have never shown how they factored out the scarcity benefits of an exemption for the Claimants from the law.

Crag Law Center
917 SW Oak St., Suite 417
Portland, OR 97205
Tel. - (503) 525-2724

or economically viable use" under the Oregon Constitution. (ER-10). The people understood that the constitutional obligation to pay "just compensation" for a complete taking to inform the statutory obligation to pay "just compensation" for a reduction caused by regulations. (App Br at 23-33).[13]

B. Respondents' Approach Does Not Measure the Cause & Effect.

Respondents' approach fails to isolate the specific impact of a regulation on the value of Claimants' property. The value of an exemption from regulations that continue to apply to neighboring properties is not an accurate measure of the reduction caused by a regulation; rather this exemption is fatally confounded with the value created by the land use laws. (*See* Amicus Br at 8-10). As Metro's examples make very clear, Respondents may have provided relief when there is no loss in value. Amicus Br, app. 2, Resolution No. 07-3774: Report of the Chief Operating Officer at 4 ("current regulatory setting has not reduced the fair market value of the subject property").

In this case, Respondents have provided relief based on a presumption of loss that is in turn based on the Claimants' estimate of loss. The demand is for just under $30,000,000. This estimate is based solely upon a presumption of some loss in value created by an exemption for the Claimants from the laws that simultaneously restrict development on neighboring properties. (SER 74). This approach does not measure

[13] Claimants must demonstrate a reduction in value. The court need not agree with Petitioners' method, it need only agree that Respondents cannot provide relief if no reduction has been shown. The Chief Petitioners stated that the reduction would be done using the "efficient statutory procedure already used to determine just compensation." (ER-21). The Ballot Title, Text of Measure, Explanatory Statement and Yes arguments use the term "just compensation" and various forms of the word compensate over 68 times. (ER-10-11). The people understood the measure to extend takings law by using the words "take", "taken" and "taking" over 60 times. (ER-15, 17, 19, and 24). Claimants' consultant even used the word "taking" in describing his estimate. (SER-74).

Crag Law Center
917 SW Oak St., Suite 417
Portland, OR 97205
Tel. - (503) 525-2724

whether existing land use regulations cause a reduction in value and utterly fails to account for potentially positive effects of the regulation. In examining whether Respondents' method of valuation is fair[14] and accurate, the Court must examine whether Respondents' methodology sufficiently isolates the cause and effect relationship between the adopted regulation and a change in value for the property at issue. For older claims, this is most accurately accomplished by looking at the date of enactment. Although, as Metro points out, there may be other methods – provided that those methods do not confound the value by only looking at the value to one property owner from an exemption while all other property owners *remain* restricted by the regulations. As Petitioners pointed out in their opening brief, the most accurate measurement of the effect of the regulation is observed near the time of the enactment by looking at sales data from existing marketable properties before and after the regulation. (App Br at 31-22). Metro also uses this approach. (Amicus Br at 8). In contrast, the Claimants' submitted an estimate that faces the insurmountable problem that it allows one property owner to capture the scarcity of being exempt from the regulation.[15]

As Metro's Brief sets forth, Metro has gathered the data to undertake three different valuation methods and to observe the effect of the regulation at different points in time. Amicus Br at 7. Metro is able to observe the effect of the regulation today.

---

[14] Like Metro, Petitioners use "fair" to mean compensation for a reduction that is actually attributable to the regulations. "Fair" does not allow a remedy based on an estimation that distorts the reduction and fails to account for the benefits provided. Metro Br at 7.

[15] In the regulatory takings context, the Court described this as allowing the property owner to capture the value created by the taking. (*See* App Br at 30, *citing to United States v. Reynolds*, and 46, n.15). The record shows that Claimants' estimate is enhanced by the scarcity of development opportunities in the vicinity. (*See* SER-75)(value attributable to "hard to find Westside location").

Crag Law Center
917 SW Oak St., Suite 417
Portland, OR 97205
Tel. - (503) 525-2724

Metro's approach seeks to determine whether the regulation has the "effect of reducing" the property's fair market value. Amicus Br at 9 (Fourth method discerns effects on value "attributable to the regulation"). Metro is aware of Respondents' method and has chosen not to use it because "it is susceptible to distortion of the cause-effect relationship … [because] the owner's property takes in additional value caused by the application of the regulation to neighboring properties." Amicus Br at 9; *See*, *e.g.* SER-77 ("Looking for that rare piece of Westside property to build a single family residence or possibly divide into multiple homesites – check this parcel out!"). Further, Respondents' approach "can disguise gain on one side of the equation as a loss on the other." *Id*; *See, e.g.*, SER 95 ("any change will devalue my property"). This is a polite way of saying that Respondents method *does not work*. Metro has tried to isolate the effects of the regulation on the value of the claimants' property. Respondents' do not even try to do so.

Petitioners do not read Metro's methods to be perfect or exact. ORS 197.352 provides for relief without addressing the inherent complexity or problems associated with providing the relief. However, Petitioners agree that Metro's methods do provide fair and just compensation and comport with the statutory requirements, unlike the method followed by Respondents. Now, for the first time ever, Respondents claim that their method accounts for the change in value if regulations are not applied to neighboring property owners who own property and may have claims under ORS 197.352. Resp Br at 30. Respondents do not specify whether they have accounted for demands they have already received or for all those that may be outstanding. *Id*. Moreover, neither the Claimants' consultant nor Respondents ever presented any analysis to support Lane Shetterly's statement or the language presented in the challenged Order.

Crag Law Center
917 SW Oak St., Suite 417
Portland, OR 97205
Tel. - (503) 525-2724

(*Compare* Resp Br at 2 *with* SER 74, 101-108). Respondents did not lay out how this approach addresses the potentially disguised gain on the one side of the equation, the distortion of the cause-effect or the value attributable to scarcity; nor explain, on the other hand, how this approach discerns the effect attributable to regulation. Instead, Respondents have simply adopted the Claimants' estimate. SER-105. The Claimants' consultant never addressed the scarcity effects, reconciled gains on one side of the equation or considered how the reduction in value might be effected if the estimate calculated the effect of lifting the regulation with respect to all other people (let alone those with rights to make a demand under ORS 197.352). (SER-74).

C. Exemption Approach to Valuation is in Error.

Respondents hinge their reliance on an exemption approach to determining reduction in value on their theory of continuing enforcement. For at least two reasons, Respondents attempt to expand the meaning provided by the "or" in the subsection (2) clause "enactment or enforcement" to support their valuation methodology is in error.

First, the provisions in subsection (6) and subsection (2) are related and must be read in context. (Resp Br at 4). These provisions were intended to eliminate the ripeness requirement for claims under ORS 197.352. To this extent, ORS 197.352(7) does away with an analogous ripeness requirement to bring a takings claim under the federal constitution, articulated in *Williamson County Regional Planning Comm'n. v. Hamilton Bank*, 473 U.S. 172 (1985). This case and its progeny require finality of a land use decision making process and denial of compensatory remedies under state law before a federal takings claim is justiciable. When a claim is based on the application of a state land use law, the state land use decisional process must be employed and completed.

Crag Law Center
917 SW Oak St., Suite 417
Portland, OR 97205
Tel. - (503) 525-2724

ORS 197.352(7) disavows these requirements and subsection (2) uses "enactment or enforcement" to emphasize this change to the ripeness requirement. Regardless of when the effect is observed, ORS 197.352(2) requires the agencies to isolate the value reducing effect that has been caused by the land use regulation.[16]

Second, enforcement has a specific meaning in ORS Chapter 197. In this regard, Metro offers a cogent explanation of the foregoing which supports Petitioners' contention. (App Br at 27, Amicus Br at 2-6). Respondents, on the other hand, argue that subsection (2) allows them to choose enactment or enforcement for purposes of compensation. However, the date of observing the effect is distinctly different from using a method that calculates loss by exempting one property owner from the law. Respondents' approach to determining whether the effect of the regulation was a reduction leaves the term "enforcement" without any meaning because it occurs every second of every day. "Continuing enforcement" is a simple way of saying that the law is still on the books. Here, this demand for compensation was filed without any specific enforcement action. Respondents do not identify a meaningful distinction from this order and a specific enforcement action. Resp Br at 36.[17] The Claimants have not filed an application to determine their rights and the Respondents did not use enforcement as the basis for their order. (ER-29 & SER-101 – Final order and staff report reference meeting

---

[16] A statement paid for by David Hunnicut underscored this point. ER-23 ("Measure 37 will end this ridiculous game. Rather than making a landowner submit application after application to the government, knowing full well that each application will be denied. Measure 37 sets up a simple process…").

[17] Respondents cannot use an anytime, anywhere enforcement theory – as this means the decision making process is eternally open-ended. In support, Respondents identify decision making points where the State is called upon to "enforce" land use regulations. (Resp Br at 36). The identification of specific actions taken to enforce land use regulations further undermines the theory of open-ended, continuing enforcement.

Crag Law Center
917 SW Oak St., Suite 417
Portland, OR 97205
Tel. - (503) 525-2724

180-day deadline) As Metro's brief illuminates the use of the date of the claim as the observation date allows Metro to compensate the owner for the time that has elapsed since the taking first occurred (when the law was enacted). Respondents do not present the data to make this calculation. Regardless, ORS 197.352 still requires that compensation will issue for the *cause and effect* of the regulation.

VI. Third Assignment of Error.

Rather than providing a contextual argument, Respondents have blended the provisions of subsection (8) with those in subsection (10). Respondents begin by selectively quoting from the statute in order to eliminate the phrase "payment of" in subsection (8). However, the text does not authorize the alternative remedy "in lieu of just compensation." The text certainly does not authorize the granting of windfall payments or payments when there has been no reduction. Rather, the alternate remedy is authorized in lieu *of payment* of just compensation.[18]

A. Statute Specifically Used "Payment of."

Respondents incorrectly argue that Petitioners wish Respondents to create "a use." (Resp Br at 49). To the contrary, Petitioners merely contend that the statute requires the provision of a remedy that adheres to the limits of just compensation. Exact compensation is not the requirement and Petitioners have not and do not request the valuation to be equivalent within a range of "five cents." (Resp Br at 49). The statute requires an assessment of the cause and effect of the regulation and *just compensation* for

[18] "The purpose of subsection (8) is to provide an alternative remedy *that is the equivalent to payment of compensation.*" 36 Envtl. L. 25. (By David Hunnicut).

Crag Law Center
917 SW Oak St., Suite 417
Portland, OR 97205
Tel. - (503) 525-2724

the reduction.[19] Moreover, ORS 197.352 is to be read in context with the land use code as it is part and parcel of the code itself. If the regulations from which relief is demanded are determined to have caused a reduction in value, then Respondents can pay that amount in cash. Respondents propose to simply toss those regulations out instead of reading provision of ORS 197.352 in context with the rest of Chapter 197. In lieu of "payment of" just compensation (in cash), Respondents may provide a remedy by deciding to remove, modify or not apply the law.[20]

Moreover, Respondents miss the point when they try to reframe Petitioners' arguments to make them appear unreasonable. (Resp Br at 43). Petitioners have not and do not contend that government must choose the specific use to give to a claimant. (*See generally* App Br at 35-47 and 41, fn. 10). Petitioners are merely pointing out that if Respondents must value the measure of the reduction caused by the regulation, why can Respondents not pay just compensation in today's market values through a decision to partially remove or modify the law? The exercise is certainly no more or less difficult than what Respondents have claimed to have done to determine whether the claimant is entitled to compensation in the first place.[21]

---

[19] The statute uses "payment of" in subsection (8) while the word "waiver" is found nowhere in ORS 197.352. Despite its absence from the statute, the word "waiver" has gained common usage to describe the remedy that Respondents have provided.

[20] Respondents' interpretation proposes to read the word "payment" out of the statute. Under Respondents' interpretation it would be sufficient to say "in lieu of just compensation." The statute promised to provide just compensation, not more or less. (*See e.g.* ER-21 ("The process is quick, clean and extremely efficient and will be the basis for determining just compensation under Ballot Measure 37")).

[21] Respondents provide a "different baselines" argument for compensation and waiver. The idea is that cash compensation is computed from the acquisition date of the family member, while waiver is based on the acquisition date of the current owner. "If the two forms of relief were intended to be commensurate, the non-parallel provisions concerning

Crag Law Center
917 SW Oak St., Suite 417
Portland, OR 97205
Tel. - (503) 525-2724

B. When a Reduction is Proven a "Use" May Be Allowed.

Respondents claim that they do not grant more than a use here – but there is nothing limiting the owner of the property from coming back and asking for more and more without limit – particularly given Respondents' focus on the phrase "or enforcement." (ER-22) (if a property owner submits demand for use or compensation based upon one regulation, the same property owner is not precluded from later demanding use or compensation based upon regulations that existed at the time the property owner submitted her first demand). Respondents are granting the applicant "a use" without consideration to the difference between the language in subsection (8) that allows for a remedy to be provided in 180 days or less and what must be provided as *penalty* if a remedy is not provided within two years of the demand pursuant to subsection (10). (ER-47-48, 61-66) While Respondents have a degree of discretion to implement their responsibilities under ORS 197.352, there is no basis to support Respondents' reading that they may grant a complete waiver of the law worth an inestimable value because they cannot pay just compensation. Respondents have converted "a use" under the statute into "any use" while the law seeks to provide "just compensation". Respondents have converted the statute into a law that entitles the Claimants to use the property for any uses that may have been allowed when the Claimants first owned the property

---

the acquisition dates that form the baseline for evaluating a claim also would be parallel." (Resp Br at 46). The parallelism in this paragraph seems sensible, but it is not. The baselines are about *who* can demand cash compensation and *who* can demand a waiver, not how to calculate reduction in value or the scope of a waiver. The limit on the number of waivers has no bearing on how to calculate the scope of any given waiver, any more than a particular acquisition date would affect how to calculate compensation.

Crag Law Center
917 SW Oak St., Suite 417
Portland, OR 97205
Tel. - (503) 525-2724

without regard to any actual reduction in value. Respondents' approach does not comply with the law.

VII. Fourth Assignment of Error.

Respondents look at the value of the use demanded as a surrogate for determining the actual reduction in value. This approach, however, conflicts directly with their finding that the use that has been demanded is personal to the owner. Even so, the use, if establish and vested, is a non-transferable non-conforming use. These and other as-of-yet undetermined caveats significantly undermine Respondents' present day observation of value using an exemption method to determine the reduction in value.

In essence, Respondents are presenting the position that they do not have to determine the value of the use – which is de facto evidence that they have not undertaken the task of determining the reduction in value attributable to the land use regulations. However, Respondents fail to acknowledge that they do not even consider the limits on the use and its transferability. Ignoring these caveats may lead to an inflated and inaccurate valuation regardless of the method being used to determine the effect. For example, a claim for a subdivision is inconsistent with the use and transferability requirements of ORS 197.352. (ER-41)("allowing an owner to subdivide property by not applying a prohibition would do him no good, of course, unless the subdivision remained lawful after its transfer to one or more new owners"). A claim for just compensation under ORS 197.352 has two basic requirements: (1) a current owner's *use is restricted* and (2) the use restriction results in a reduction in the fair market value of the property.

Crag Law Center
917 SW Oak St., Suite 417
Portland, OR 97205
Tel. - (503) 525-2724

A subdivision is a *process and not a use*.[22] In addition, a claim for a subdivision does not transfer as a right granted under ORS 197.352 from the current owner to a subsequent owner.[23] (ER-41). Therefore, the first requirement for a claim under ORS 197.352 is not satisfied. Furthermore, the proper value of not applying regulations to one person is limited by the fact that the waiver right that is provided (and used to determine value) completely lacks transferability. For a claim that is just under $30,000,000, any notion of just compensation requires Respondents to consider potentially significant discounts to the particular use that is allowed. *Department of Transportation v. Lundberg*, 312 Or 568, 825 P2d 641 (1992). Respondents, however, provide no analysis of vesting and present no support for their position.

On the one hand, Respondents state that the use is not transferable but Respondents simply assume the use vests for purposes of determining the value of the right in the first place. Respondents do so to avoid having to discount for the significant questions that are raised by the very method Respondents have chosen to employ to estimate value reduction in the first place. At bottom, Petitioners contend that limits on transferability and applicable exemptions have a potentially significant impact on value that needs to be determined.[24] Petitioners raised concerns about the exemptions in ORS 197.352 early on in their comments and in their petition for review. (App Br at 48, SER-4 ("the Order injures the Ruhlens because it poses an increased fire risk to them and their

---

[22] *See* App 3 at 36-40 (explaining act of subdividing real property is a process, not a use).
[23] *See Id*. at 32-36 (explaining that ORS 197.352 rights are not transferable).
[24] The Hood River County Comprehensive Plan was put in place to "protect public health and safety." (App. 1 at 3). The public health and safety issue was preserved in the record below and is plain on the face of the petition for review. *See State v. Calvert* __Or App __, __P3d __, 2007 WL 2120646 (2007).

Crag Law Center
917 SW Oak St., Suite 417
Portland, OR 97205
Tel. - (503) 525-2724

property"), SER-95 (the development "will put my property at risk for forest fire"), SER-91 ("fire danger…would be a result"), SER-93 ("adding a substantial number of residential houses…increase the fire danger of this and therefore our, property").

Respondents cannot reach a finding that there has been a reduction in value by assuming that there is no limit on transferability or that the plainly stated exceptions do not limit value. If Respondents' valuation method—of valuing the land with land use law in place versus valuing the owners' right if the land has no land use law in place for that one individual (through an exemption)—is found to comply with the statute, then Respondents must consider the effect these limits and exceptions have on the fair market value of the use proposed by Claimants for the land.

VIII. Conclusion.

For the foregoing reason, Petitioners respectfully request that the court declare that the Order exceeds the Respondents' authority under the law and remand the matter for further action consistent with this finding.

Respectfully submitted, this August 1, 2007.

/s/ Ralph O. Bloemers
Ralph O. Bloemers OSB# 98417
Crag Law Center
917 SW Oak St., Suite 417
Portland, OR 97205
Tel. 503.525.2727
Fax. 503.296.5454