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Trial Division, Dept. of Justice
Salem, Oregon

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

CRYSTAL SPRINGS PACKING
COMPANY, INC., an Oregon corporation

Petitioner,
vs.

THE STATE OF OREGON, DEPARTMENT
OF LAND CONSERVATION AND
DEVELOPMENT, LAND CONSERVATION
DEVELOPMENT COMMISSIONER, and
DEPARTMENT OF ADMINISTRATIVE
SERVICES,

Respondents.

CASE NO. 06-3050-Z7

OPINION AND ORDER
ON CROSS MOTIONS FOR
SUMMARY JUDGMENT

This matter came before the court on the parties' cross-motions for summary judgment, and the court having considered said motions and accompanying points and authorities and exhibits as well as the parties' response briefs, and having considered the well-presented argument of counsel at oral argument held on April 2, 2007, Joseph Kellerman on behalf of petitioner and Erika Hadlock on behalf of respondent, and being otherwise fully advised in the premises, the court sets forth the following Opinion and Order.

OPINION

The facts material to the disposition of the parties' motions are not in dispute. The parties agree, and the court finds, there is a single dispositive issue to be determined as a matter of law: did the Respondents correctly determine that Crystal Springs should have a waiver of land use regulations adopted after 1986 pursuant to ORS 197.352 ("Measure 37 claim"), rather than the earlier dates (1969 and 1978) Crystal Springs argues for?

1 The Measure 37 decision of the Respondents in this matter determined 1986 to be the
2 applicable date and granted Crystal Springs' Measure 37 claim to the extent it sought
3 compensation for, or waiver of, land use regulations passed after 1986. Petitioner Crystal
4 Springs argues that by virtue of a corporate merger in 1986, it is deemed to have acquired part of
5 the property in 1969 and part of the property in 1978 when the other corporation to the merger,
6 Highland Orchards, ("Highland") actually acquired the property, and that Crystal Springs thereby
7 acquired what would otherwise have been (arguably) a viable Measure 37 claim belonging to
8 Highland. The dates matter because Crystal Springs seeks to develop the property free of land
9 use regulations adopted between 1969 and 1986 (as to a portion of the property) and regulations
10 adopted between 1978 and 1986 (as to the remainder of the property).¹

11 In determining the correct date in this case, the court looks to the applicable statutes, in
12 this case Measure 37 as codified, and the statute on corporate mergers applicable in 1986, ORS
13 57.480.

14 Measure 37 provides relief to two classes of claimants: (1) the individual or entity who
15 owns the property both at the time the offending land use regulations were enacted and at the
16 time the Measure 37 claim is filed,² and, in certain circumstances not present here, (2) family
17 members. There is no dispute in this case that Crystal Springs owned the property at the time it
18 filed its Measure 37 claim. As to that second measuring date, Crystal Springs clearly qualifies as
19 a Measure 37 claimant.

20 It is the first measuring date that is at issue in this case. As set forth in section (3)(E),
21 Measure 37 does not cover claims concerning land use regulations enacted *before* "the owner"

22
23 ¹ For purposes of deciding whether Crystal Springs was the owner of the property
24 prior to 1986, it does not matter whether the "acquisition" date was 1969 or 1978. Those dates
25 matter only if the State's decision was incorrect and the matter must be remanded for
26 determination of compensation or waiver for each of the two earlier dates. Accordingly, for the
remainder of this opinion and to minimize confusion, the Court will refer to the pre-1986
"acquisition" date as 1969.

27 ² See ORS 197.352(2), (3)(e), and (11)(c).

1 acquired the property. Only regulations enacted *after* the owner acquired the property can
2 provide the basis for a Measure 37 claim. The pivotal word “owner” is defined in Measure 37,
3 11(c)) as “present” owner. Accordingly, if “the [present] owner,” Crystal Springs, acquired the
4 property in 1986, the Respondents’ decision using 1986 as the acquisition date was correct. If
5 Crystal Springs is deemed by virtue of the merger to have acquired the property in 1969, the
6 decision of the Respondents to use 1986 as the acquisition date was incorrect..

7 Both parties also rely on the language of the Oregon statute governing corporate mergers
8 to answer the question about the acquisition date, and the court likewise also looks to the
9 language of the merger statute that was in effect in 1986:

10 1. Crystal Springs is the surviving corporation and Highland ceased to exist as of the
11 effective date of the merger in 1986. ORS 57.480 (b). One practical result of this provision is
12 that Highland does not exist and cannot bring its own Measure 37 claim in this case. If anyone
13 has such a claim, it must be Crystal Springs.

14 2. Crystal Springs, as the surviving corporation and by operation of law, acquired “all the
15 rights, privileges, ... as well of a public as of a private nature ... and all property, real, personal
16 and mixed ... and all and every other interest, of or belonging to or due to” Highland at the time
17 the merger was consummated. ORS 57.480 (d). Such property was “taken and deemed to be
18 transferred to and vested in” Crystal Springs “without further act or deed.” *Id.* Accordingly, the
19 court need not consider the impact, if any, of the deeds apparently filed several years later
20 concerning the transfer of title from Highland to Crystal Springs.

21 3. Crystal Springs took, *i.e.* acquired, and was vested in, the title and all right and interest
22 Highland had as of 1986. *Id.*

23 The parties dispute whether there was a “transfer” of the property and property rights in
24 1986 sufficient to create a change of ownership such that Crystal Springs should be deemed to be
25 the owner as of 1969. Both the language of the merger statute and the decisions from Oregon
26 courts and other jurisdictions appear at first impression to provide support for the argument that
27

1 Crystal Springs should be deemed the owner as of 1969. For example, the phrase “shall be ...
2 vested in such single [surviving] corporation without further act or deed” certainly implies that
3 the typical “change” in ownership associated with a deed has not occurred. Similarly, using the
4 Black’s Law Dictionary definition of “deemed,” the operative phrase would be that the property
5 is “treat[ed] as if” transferred to and vested in such single [surviving] corporation,” again
6 suggesting the typical transfer of title and its accompanying extinguishment of rights and
7 obligations in the seller has not occurred. The Comment to section 11.06 of the Model Business
8 Corporation Act on the consequences of a merger, states, “A merger is not a conveyance or
9 transfer, and does not give rise to claims of reverter or impairment of title based on a prohibited
10 conveyance or transfer.” Model Business Corporation Act Annotated, 3rd ed., Vol. 3, p. 11-69,
11 comment to §11.06.

12 However, the statutory language also indicates that some sort of *change* in ownership has
13 occurred. Whether the resulting corporation is one of the merging corporations (the “survivor”)
14 or an entirely new corporation with a new name (as is the case in a consolidation),³ and whatever
15 label is put on the transaction in 1986 -- “acquisition,” “transfer,” or something else -- it is beyond
16 dispute that prior to the merger, only Highland owned the property, and after the merger, an
17 entity other than Highland was the owner. Highland’s rights were “taken” from it and “deemed
18 to be transferred and vested in” another entity. ORS 57.480(d). As the chosen corporate
19 survivor, Crystal Springs obtained ownership and rights in the property it did not have prior to
20

21 ³ The official Comments to the Model Business Corporations Act illustrate the
22 various forms corporations may choose for pooling their assets and liabilities and the reasons
23 corporations may choose one form over the other. “A merger is a transaction by which one or
24 more corporations disappear into a surviving corporation, which becomes vested with all the
25 business and assets ... “ It is different than a share exchange, in which “the separate existence of
26 each corporation is not affected; if all the shares of a corporation are acquired through a share
27 exchange, that corporation becomes a wholly owned subsidiary of the acquiring corporation.”
And compare these two forms with a consolidation, in which all corporations disappear and a
new corporation is created. This form is now obsolete “since it is nearly always advantageous for
one of the parties in the transaction to be the surviving corporation ... “ Model Business
Corporation Act Annotated, 3rd ed., Vol. 3, p. 11-2, comment to §11.01.

1 1986.⁴

2 Measure 37 focuses on who owns property when. The rights are personal to the owner
3 and do not flow with the real estate to subsequent owners. Because ownership must be the same
4 at both measuring points, the claims are not transferrable to new owners. The language of the
5 merger statute focuses on property rights, but it contemplates a *change* in *who* owns those rights.
6 It is true that the property rights were taken from Highland and treated as if vested in Crystal
7 Springs without a deed or other evidence of transfer, but by the time Measure 37 claims were
8 created by ballot initiative, there *had* been a change in ownership of the property at issue here
9 and Highland was no longer the “present owner.”

10 The parties to this merger chose the form their transaction would take and they chose
11 which corporation would be the survivor. They could have chosen to have Highland retain an
12 ownership interest of some sort in the property, to have Highland continue to exist and structure
13 their combination in another way, or to have Highland be the survivor corporation, but they did
14 not do so for their own business reasons at the time. In this sense, Crystal Springs is no different
15 than any other property owner who, once Measure 37 had become law, now wishes it had
16 structured the sale of its property differently in order to preserve a Measure 37 claim.⁵ See *Krull*
17 *v. Celotex Corp.*, 611 F. Supp. 146, 150 (N.D.Ill. 1985) (“Corporations are largely the molders
18

19 ⁴ While the phrase “treat as if” suggests Crystal Springs should be treated “as if” it
20 had owned the property in 1969, this “look-back” does not withstand scrutiny. Even the phrase
21 “as if” refers to a change in ownership, albeit a change by operation of law. There is no
22 exception in Measure 37 for changes in ownership by operation of law. To the contrary, the
23 voters enacted only one exception to the requirement of the same ownership at both measuring
24 times, and that exception is for designated family members only. If the voters had wanted to
25 create exceptions for changes in corporate ownership, including changes by merger and by
26 operation of law, they could have done so. It is not for this Court to create exceptions in Measure
27 37 after-the-fact.

28 ⁵ It is this symmetry of consequences, whether as a result of a merger or some other
form of business transaction, or a single-owner sale of a home with no retention of even a partial
interest, that moots any argument that the consequences of “losing” a Measure 37 claim should
not turn on the form of corporate combination chosen 20 years ago.

1 of their own destinies in acquisition transactions: They may buy assets without assuming
2 liabilities, they may buy stock and preserve the acquired company as a subsidiary ..., they may
3 engage in upstream or downstream mergers, they may consolidate – there is no need to ring all
4 the changes with which a knowledgeable corporate practitioner is familiar...”).

5 Moreover, what Crystal Springs acquired in 1986 was the same title and the same rights
6 Highland had at the time of the merger. In 1986, Highland had the right to develop its property
7 consistent with the land use regulations in effect in 1986. That is the “interest” acquired by
8 Crystal Springs, and that interest has not been impaired in any way by the decision of the
9 Respondents in this case to waive land use regulations enacted after 1986. Highland could
10 contribute to the merger only what it had in 1986, and in 1986 it did not have a Measure 37 claim
11 or even an inchoate interest in such a claim.⁶

12 There is nothing in the language of either Measure 37 or the Oregon corporate merger
13 statute providing relief to a surviving corporation based upon a right the non-surviving
14 corporation would have acquired *for the first time* 20 years later if the merger not taken place, if
15 the non-survivor had maintained its ownership interest in the property until after Measure 37
16 passed, and if it had filed its own Measure 37 claim. To the contrary, Measure 37's definition of
17 “owner” as “present owner” provides a straightforward benchmark: who owned the property at
18 the time the offending regulation was enacted, and who owned the property at the time the
19 Measure 37 claim was filed.

20 Crystal Springs argues in this case that using 1986 as the acquisition date would violate
21 the merger statute because it would impair a right that Highland had in the property at that time,
22 relying on the decision in *Nike, Inc. v. Spencer*, 75 Or. App. 362, 372 (surviving corporation
23 “should acquire by operation of law all the interests of the merging corporations and that those
24

25 ⁶ A right that came into existence for the first time in 2004 was not “inchoate” in
26 1969 or 1978 because it was not “imperfect” or “partial” or “unfinished” or “begun but not
27 completed” back then. (Black’s Law Dictionary definition of “inchoate”). There was no right,
28 inchoate or otherwise, to compensation or to have land use regulations waived until 2004.

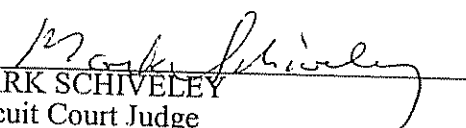
1 interests should not in any way be impaired by the merger"). The problem with this argument is
2 a temporal one: Highland did not have a right *in 1986* to develop its property free of the land use
3 regulations passed between 1969 and 1986. No such right existed until Measure 37 was enacted.
4 And by that time, Highland no longer existed and did not own the property. Highland had clear
5 title to the property in 1986 and that is what Crystal is deemed to have acquired in 1986.

6 The Court is mindful of the argument for the sanctity of the concept of seamless
7 continuity of ownership in mergers "under which the surviving corporation stands in the shoes of
8 the disappearing corporation in every respect." *Krull v. Celotex Corp.*, 611 F. Supp. at 148.
9 However, that concept does not exist in a vacuum. When the Court also considers that
10 corporations choose the form of their business transactions (or at least the parties here did so) and
11 gives meaning to the language of Measure 37 and its focus on who owned what property when,
12 the conclusion that Crystal Springs was not the "present owner" in both 1969 and when it filed a
13 Measure 37 claim adequately takes into consideration all the competing principles and language.

14 **ORDER**

15 Based on the above and foregoing and good cause appearing therefore, it is hereby
16 ORDERED that Petitioner Crystal Springs' motion for summary judgment is denied, and
17 Respondents' motion for summary judgment is granted.

18
19 DATED THIS 10 day of May 2007.

20 
21 MARK SCHIVELEY
22 Circuit Court Judge

23
24 cc: Mr. Joseph Kellerman
25 Ms. Erika Hadlock
26 *Sent 5-10-07*
27 *alH.*