



CIRCUIT COURT OF OREGON

FIFTH JUDICIAL DISTRICT
CLACKAMAS COUNTY COURTHOUSE
OREGON CITY, OREGON 97045

THOMAS J. RASTETTER
JUDGE

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DATE: 6-8-07

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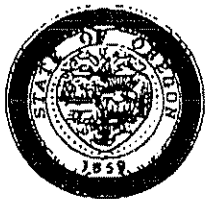
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SUBJECT: Dennis v. State of Oregon

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THOMAS J. RASTETTER
CIRCUIT COURT JUDGE

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June 5, 2007

Darsee Staley
Senior Asst. Attorney General
1162 Court Street NE
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Gary Shepherd
Attorney at Law
0244 SW California Street
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Re: Dennis v. State of Oregon; No. CV 05120033

Dear Counsel:

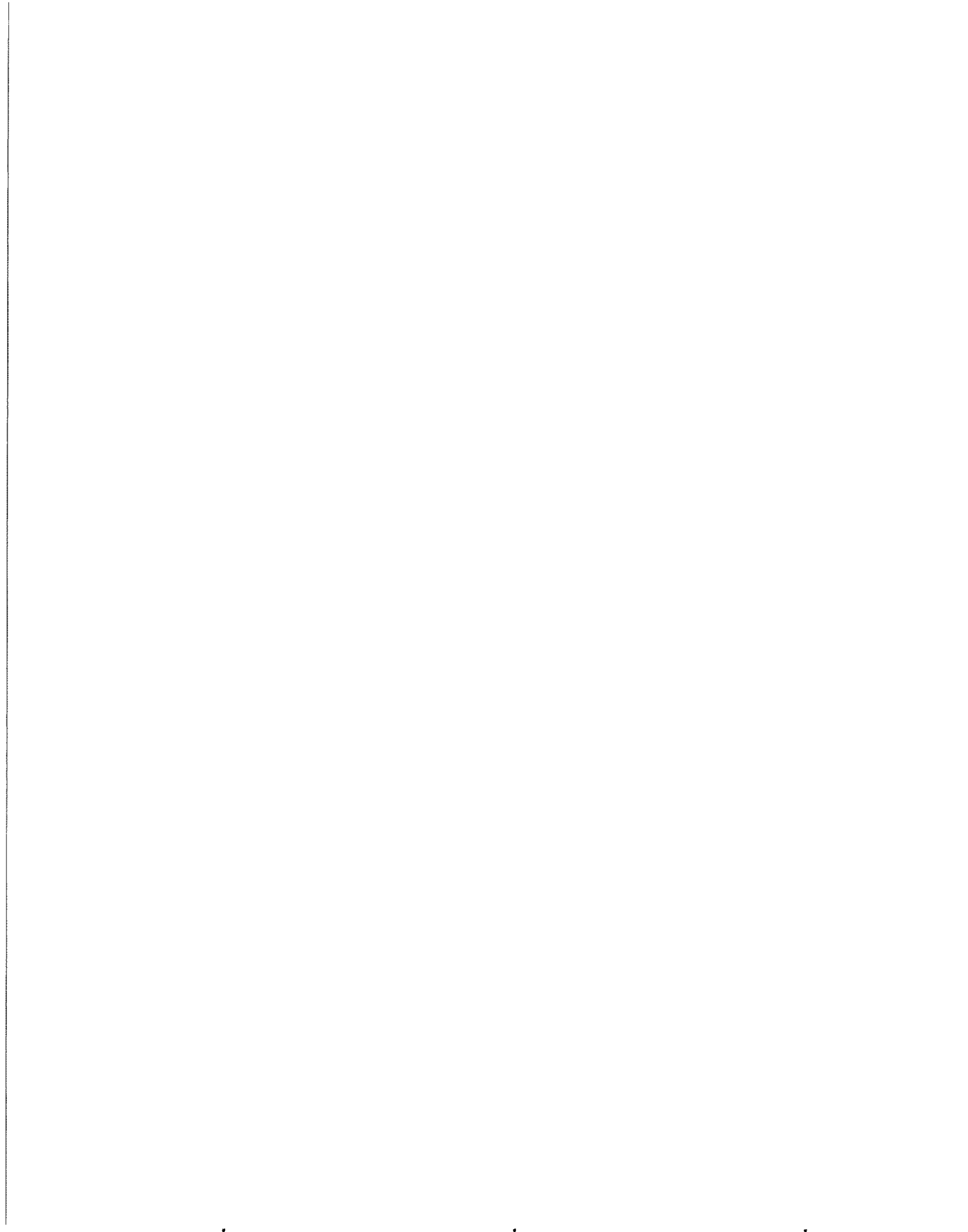
This matter came before the court on June 4, 2007 on the parties' cross motions for summary judgment. At that time the court heard the arguments of counsel and took the matter under advisement. This letter sets forth the court's findings and conclusions.

Background:

This case involves a 30-acre parcel of real property in Clackamas County. On March 31, 1969, plaintiff's husband W. Dale Dennis (Dale) and his brother, Dallas Dennis (Dallas), bought the property under a land sales contract. At the time of that purchase Dale was married to plaintiff. On December 30, 1978, Dallas conveyed his one-half of the vendees' interest to Dale, leaving Dale as the sole vendee on the contract. On April 9, 1979 the contract of sale was paid in full and the seller conveyed title to Dale by warranty deed. On April 16, 1979, Dale executed a deed conveying an undivided one-half interest in the property to plaintiff as tenant by the entirety. In January of 2005, Dale quitclaimed his interest to plaintiff, leaving her as the sole owner.

In April of 2005 Ms. Dennis filed a Measure 37 claim with the state, maintaining that she had owned the property since 1979, which was the date she acquired an interest as tenant by the entirety. She requested that she be allowed to develop the property at the density allowed in 1979, or alternatively, that she be awarded compensation of more than \$6 million. During the





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time the claim was being processed Ms. Dennis' attorney submitted a letter taking the position that Ms. Dennis' interest in the property actually began in 1969 when her husband bought the property, since she had a marital interest in the real estate as of that date. Because of that, plaintiff maintained that the state should waive all restrictive land use regulations enacted after 1969, not 1979 as originally stated.

Defendant reviewed the claim and determined that it was valid. However, the final order waived only those regulations adopted after April 16, 1979, the date that Ms. Dennis acquired an interest as tenant by the entirety. The state did not accept plaintiff's position that her interest dated from 1969, when her husband bought the property, and concluded that it did not need to waive the land use regulations which were imposed on the property between 1969 and 1979. Plaintiff then filed this action for judicial review under ORS 183.484, for a declaratory judgment and for compensation under Measure 37. The essence of plaintiff's claim is that defendant incorrectly determined that she did not obtain an interest in the property when her husband bought the property in 1969.

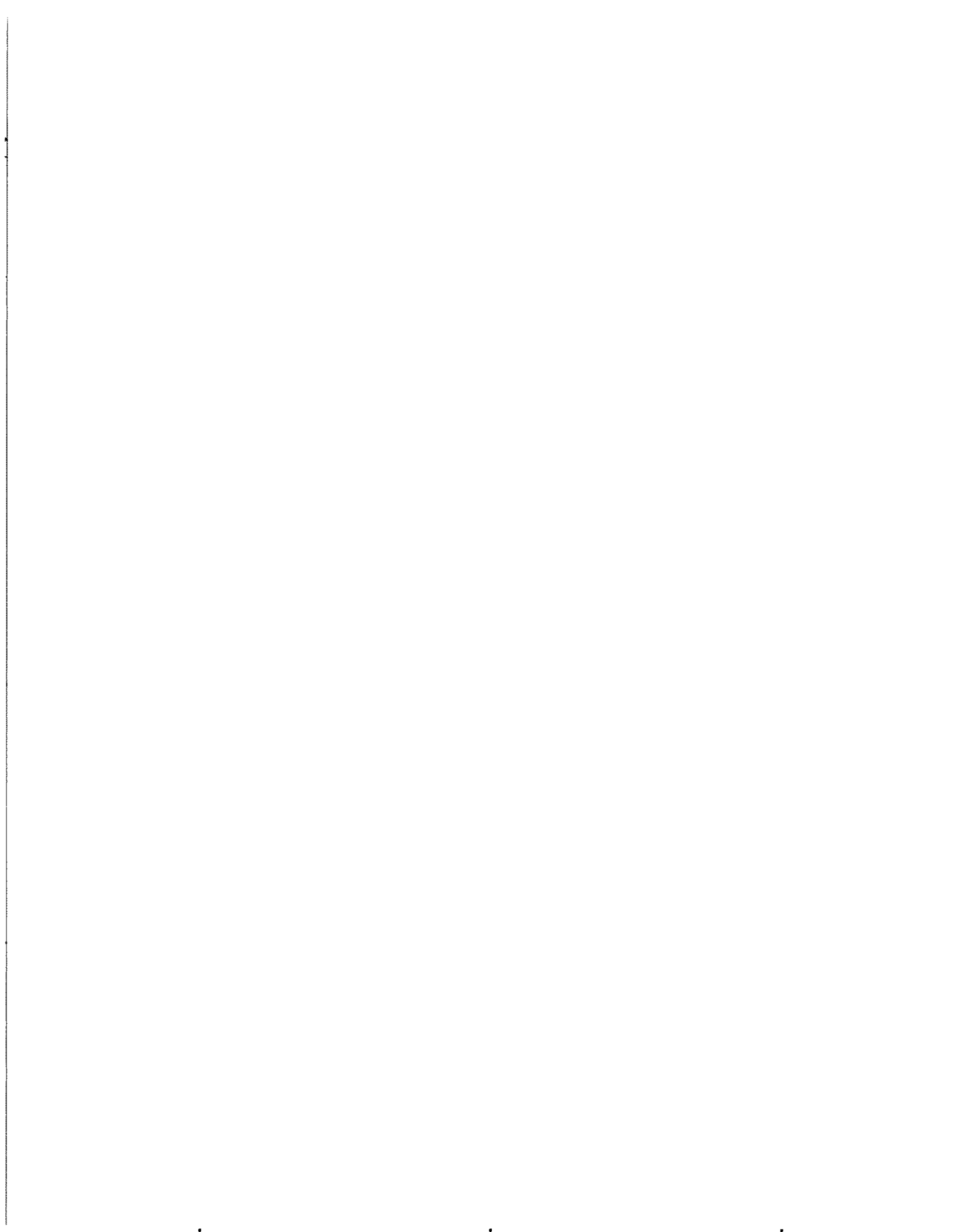
Jurisdiction over Petition for Judicial Review:

A threshold issue to consider is whether this court has jurisdiction over the petition for judicial review because of the holding in *Corey v. DLCD*, 210 Or App 542 (2007), *adhered to on recon*, 2007 Or App LEXIS 669 (May 9, 2007). *Corey* held that DLCD creates an entitlement to benefits when it accepts a Measure 37 claim as valid, and gives the claimant a protected property interest in the waivers. Accordingly, *Corey* holds that such claims should be handled as contested cases before DLCD, and under ORS 183.482, jurisdiction for judicial review lies with the Court of Appeals, and not the Circuit Court.

The state has argued that *Corey* is not binding on this court since there is not yet a final appellate judgment in that case. However, ORS 14.165 (1) provides that if an action against a public body is filed in Circuit Court, and the Circuit Court determines it does not have jurisdiction, or has doubts about its jurisdiction, the Circuit Court shall transfer the case to the appropriate tribunal or refer the question to the Court of Appeals. Because of the holding in *Corey*, I will transfer the petition for judicial review to the Court of Appeals.

Remaining Claims:

This court does have jurisdiction over the remaining claims for a declaratory judgment and for compensation under Measure 37. It is my decision to abate these claims pending a resolution of the petition for judicial review by the Court of Appeals. I believe this is necessary for the reasons explained below.



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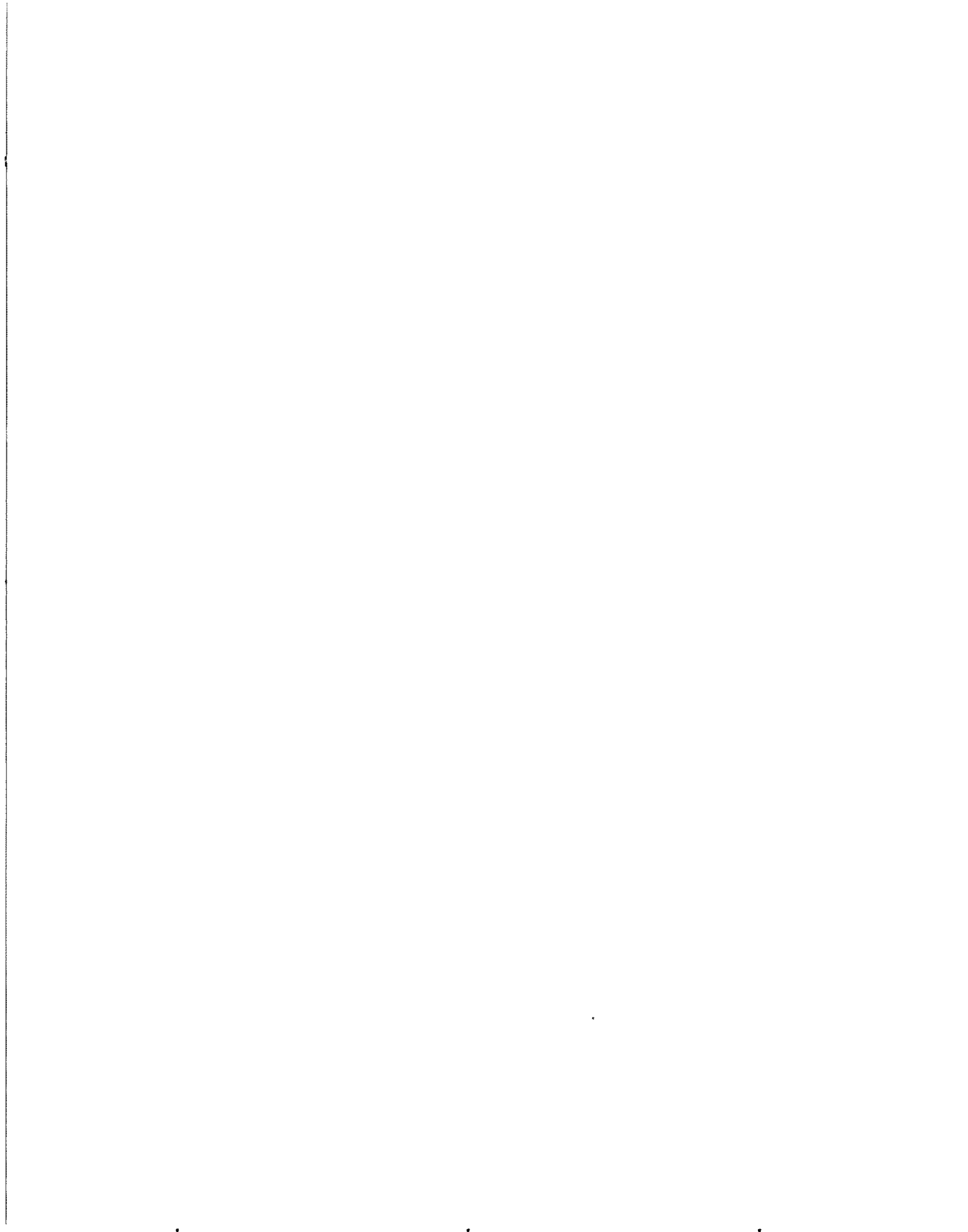
First, if the petition for judicial review is decided by the Court of Appeals and the remaining claims were contemporaneously processed in Circuit Court, there could be inconsistent results. It is possible that the Court of Appeals could decide that DLCD's decision was correct while a Circuit Court jury could award compensation under the Measure 37 claim. Conversely, the Court of Appeals could decide that the agency's decision was incorrect and a jury could deny compensation under Measure 37.

This problem arises because, in my view, there are at least two apparent legal avenues for challenging an agency's Measure 37 decision, and plaintiff has understandably chosen to pursue both. First, the law clearly authorizes a petition for judicial review to be brought from a final agency decision under ORS 183.480 *et seq.* Under that procedure an aggrieved Measure 37 applicant may file a petition for judicial review to challenge the agency's final order on the application. The court then reviews the agency's order and may affirm, reverse or remand the order. ORS 183.482 (8)(a); 183.484 (5)(a).

On the other hand, the statute which codified Measure 37, ORS 197.352, is equally clear that if post-ownership restrictive land use regulations continue to apply to the subject property more than 180 days after demand for compensation has been made, the owner then has a claim for compensation in Circuit Court. While a Measure 37 compensation lawsuit is a claim for money damages, it also necessarily involves a determination by the Circuit Court whether the agency's decision was correct. That is, in a "waiver" case such as this, before compensation can be paid to a claimant under a Measure 37 lawsuit, it must first be determined whether the claimant's interest in the property is such that they are due either compensation or a waiver of the regulations at issue in the lawsuit. If the agency is correct that a plaintiff's interest is such that those regulations did not have to be waived, the plaintiff is not entitled to compensation. Alternatively, if the agency was wrong, and the plaintiff's interest is such that the regulations could have been waived but were not, the plaintiff is then entitled to just compensation.

Both of these avenues of legal redress essentially deal with the same fundamental question, *viz.*, whether the agency's decision was correct. But because plaintiff has chosen to challenge the agency's order by the petition for judicial review, we do not yet know the final outcome on the agency's final order. In effect, plaintiff's petition for judicial review has taken away the "finality" of the agency's final order; it is still subject to change. The petition for judicial review could result in DLCD's final order being affirmed, reversed or remanded. If that review results in a waiver of all of the regulations back to 1969, plaintiff has no compensation claim to pursue.

Certainly plaintiff has the right to file a claim for compensation since 180 days have run since the demand for compensation was made and the regulations continue to apply to the property. She has done so and her rights under Measure 37 have been preserved. However, because she has also chosen to challenge the agency's final order through a petition for review, the outcome of



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which will determine whether any of the regulations will continue to apply to the property, the Measure 37 claim must be abated.

I would ask that Ms. Staley submit a form of order transferring the petition for judicial review to the Court of Appeals, and abating the remaining claims until that matter is resolved.

Very truly yours,



Thomas J. Rastetter
Circuit Court Judge