

HEARING TRANSCRIPT
English v. Multnomah County
107686-140351

Female	[Inaudible] in session Honorable Judge Beckman presiding.
Judge	Good afternoon, please be seated. This is the time set for the hearing in Dorothy English v. Multnomah County motion to strike and cross-motions for summary judgment and could you each at the counsel table just state your name and spell your name for the record and who you represent.
Willis	Joe Willis, Your Honor, W-i-l-l-i-s with Schwabe Williamson for the plaintiff.
Judge	Good afternoon.
Madkour	Steven Madkour, Your Honor, M-a-d-k-o-u-r for Multnomah County.
Thomas	John Thomas, Your Honor, T-h-o-m-a-s for Multnomah County.
Judge	Okay. What should we take up first, maybe the motion to strike it might make sense.
Willis	They're both so inter-related, Your Honor, but..
Judge	Argue them together if you'd like.
Willis	Well, either one but, you know the motion to strike I have nothing more to say other than what the documents [inaudible] very clearly that defense is based on settlement discussions and it's so clearly marked I don't know what other issue there could be on that. That cannot be evidence of any of that and that's all they base it on. So it should be stricken.
Judge	All right, comment?
Thomas	Yes Your Honor I do have some additional remarks on the motion to strike. We have two arguments on the motion to strike. One is that, first is that an offer to compromise is inadmissible only if it actually offers a compromise in our view is that the March 24 letter did not offer any compromise. At the time that we got that letter the county had in place and still has in place a requirement that the, an owner who wanted to develop property submitted development application along with a plat that showed the health and safety considerations that are in our code on the plat and to submit information concerning safe access, availability of septic system water and so on. That review of the development application takes place pre-formation of the lot so the lot doesn't become a legal lot until all of those considerations are determined and it's only after county review of those considerations and the development application that a lot can become a legal lot. Now the March 24 th letter asserted a position that Mrs. English could create a legal lot by simply recording deeds. And she asserted the county had no right to review

	<p>the creation of those lots before they were created. She demanded that the county accept those lots created by the recording of the deed without any review whatsoever. And then she offered to provide the health and safety information only after the county had agreed that those lots would be the lots. Our view is that, that was not compromise of any position, it was an insertion of a demand that the county not follow the regulations which it had in place. The letter essentially says accept our deeds as legal lots or we'll sue you and that's what happened. But even if the letters were determined to be an offer of compromise at the time that the letter was submitted the county told the plaintiff over and over that the county intended to use this letter as a claim and the, in the brief, the plaintiff says that the exhibits attached to the declaration do not state that the letter was being treated as a supplemental claim. Plaintiff has provided no evidence of any intent to treat the letter as a supplemental claim. I'd like to go through those exhibits briefly because..</p>
Judge	It's because they treated it as a settlement negotiation.
Thomas	Say that again.
Judge	You said that there's no intent on the part of the plaintiff. That this letter is a supplemental claim.
Thomas	Our first position is that it is not.
Judge	That's their whole point though isn't it?
Thomas	No. Our first position is it was not a settlement offer because it didn't offer to compromise any position. Our second position is even if you find it was a settlement offer that the county did not treat it as such and told the plaintiff that it was not going to treat it as such over and over and the plaintiff acquiesced in the county taking this over to its board as a supplemental claim.
Willis	Your Honor, excuse me, but I hate to object in the middle of argument. He's so far [inaudible] from anything in that motion now and he's trying to supplement it by a bunch of other argument evidence that I don't think it's going to help you reach a ruling on that.
Thomas	This is in our response, Your Honor, these are the documents attached to my declaration in response to the Motion to Strike.
Judge	Go ahead.
Thomas	On April 27 th , a letter was sent to counsel for the plaintiff in which we said we intend to present the proposal set out in your March 24' 2006 letter to our board for a decision on the 18 th . You will have an opportunity to present written and oral testimony on behalf of Mrs. English. The staff report will be prepared and provided to you prior to the hearing. This was the exact procedure that we had

	<p>used when we handle the initial claim. This letter does not say that the, does not use the term supplemental claim but it sets out the exact procedure that we were going, that we used in the original claim. On May 10th an e-mail was sent to counsel for Mrs. English – attached are the placement, agenda placement request. The staff report and the draft board order for the hearings schedule for May 18th The first exhibit attached was the agenda placement request the title of that exhibit is public hearing to consider a supplemental Measure 37 claim by Dorothy English. In the first line of the, of that document what, what action are you requesting from the board. Approval of board order on a supplemental claim. The second exhibit staff analysis of supplemental claim, the term supplemental claim in that document is used at least 5 different times. The draft board order is entitled supplemental order to not apply land use regulations in paragraph C on the first page, claimant Dorothy English has made a supplemental claim by letter from counsel dated March 24, 2006. Later, an agenda was sent to counsel for the, for Mrs. English before the hearing and the agenda item is public hearing to consider supplemental Measure 37 claim by Dorothy English. I go through all this because in the reply brief plaintiff asserted that there was no evidence of any intent to treat the letter as a supplemental claim and that we had not informed the plaintiff's counsel that we were intending to do so. It's impossible for plaintiff's counsel to have read these documents and to not have understood that this was going to be a supplemental claim. In addition, one of the claimants, Mr. Sellers, appeared at the hearing where an opportunity to be heard was offered and did not say anything to our board that this was not intended to be a claim. He asked for a copy of the board order when he left. So, if, in fact, this is an offer of compromise plaintiff has acquiesced in the treatment of this letter as a supplemental claim. She has reaped the benefits of the boards having waived additional regulations and she should not be hurt now to say that it was anything other than a claim. That's all I have on the motion.</p>
Willis	<p>Your Honor, in this file in addition to the letter itself which is marked settlement discussion references is a continuation of our settlement discussions. In fact, references that I'm there still trying even though I think they're wrong to get this resolved for this elderly plaintiff there was never any statement that we're submitting a supplemental claim, in fact, as Mr. Thomas raise other issues he and his colleagues who are not in the room today were told in the most clear terms if we couldn't get this done I'd have no choice but to sue. They were well aware of that and if you'll go back and look at what's attached to our complaint we attached the December 21st letter which went to Mr. Barber a planner for Multnomah County and that's because when I filed this complaint it was before they had any of their so-called ordinances for handling Measure 37 claims. Notwithstanding that I got in the mail a copy of the letter I had submitted on December 2 but date stamped [inaudible] December 10th with a letter from this Mr. Barber saying, we had to do all these things and we had to pay fees and we were going to be subject to the county putting a lien on the property and everything else contrary to Measure 37 and I wrote back to him and pointed out that's wrong and I'm quoting this is attached to our complaint. Two things I also noted the statement that the</p>

	<p>county had made that highly placed Multnomah County officials have openly bragged that its intent and purpose was and is to [inaudible] claimant's ability to obtain regress for the grievances provided by Measure 37. And then this is what I said, I also want to emphasize the 180 day period for Multnomah County to act as running and started on December 2, 2004 with the facts followed by delivery to Multnomah County attorney. Second page, I also noted I was willing to talk with them about settling the matter. I said, let me know if Multnomah County is willing to discuss settlement of this matter. Now that was out of the box, we did continue and I don't want to be hard on Mr. Thomas because I do think Mr. Thomas did make efforts to try to settle this matter but it came down to this. They continued to insist after, and we'll get into this on the summary judgment, after they had issued their first order which I did appear at that hearing. I always made it clear we were not operating under their ordinance. They entered an order that waived only part of the regulations, most of them they didn't waive. We had very candid discussions that the county knew very well the 180 day period was running, the county knew very well from reading it's own order it had never waived those and then they continued to insist that we file a plat and their authority for filing that plat was not on the books in 1953 when Mrs. English purchased her land. And I kept telling them show me something on the books in 53 that says, Mrs. English must do this before she can use her land and we'll do it. You cannot and we will not and then we keep but notwithstanding that look at the letter I was trying to settle the case and offered to do certain things if they would let me do it.</p>
Judge	<p>I'm going to grant the motion to strike, I think it's kind of clear that it's a settlement discussion in bold, that's the title of the document is Settlement Discussions. It says, thanks for meeting with us Friday to review the next steps for development of the English property and to negotiate a settlement in order to head off litigating this case. And that's just reading Rule 408, of the evidence code it says evidence of furnishing or offering to compromise a claim which was disputed as to either validity or amount is not admissible to prove liability for or invalidity of the claim or its amount, so, that's the reason I'm going to grant the motion to strike.</p>
Willis	<p>And on the motion for summary judgment Your Honor there's a motion and cross motion.</p>
Judge	<p>Right.</p>
Willis	<p>And they're obviously inter-related and I think and I don't want to sound presumptuous but, this is one that it's so absolutely clear it's been the rare good fortune I have had to have a motion for summary judgment that is so clear on behalf of my client. But if you start with the text of Measure 37 I don't know when, Your Honor, has last reviewed it. But, it...</p>
Judge	<p>I just poured over it on numerous occasions and it's on my desk I've read it this week.</p>

Willis	I will take time..
Judge	It's pretty simple.
Willis	..well I agree, I will take time to walk through all that but it's very clear if you look at our pleadings and the county's pleadings probably on those pleadings alone we're entitled to judgment. But the key dates are December 2, 2004 that's not disputed. A written demand for just compensation was submitted that triggered a 180 day period that 180 days expired on May 31, is that right?
Judge	Yeah, 2005.
Willis	2005, and that's the key date. Now, on May 16, 2005, within the 180 days the county did do something to say they were not going to apply some regulations. But, their order read on its own two feet it's clear many of them they retained and said, you must comply with there's a host of them, tons of them. Any one of those would have prevented her from doing what she had the right to do in 1953 and there's no dispute over what she could have done in 53. You hear nothing out of the county that says, well in 53 she would have had to go file a land use application for a partition or subdivision. She didn't have to do that and people then did not do that, what they did was after being surveyed and they filed the deed and that was the transfer of the property and as long as they remained within what was then the 2 lots you could have up to 3 but, or up to 4 if you had [inaudible] for 2 lots a year you were okay, that's all you had to do.
Judge	Up to 8 lots.
Willis	Well and then we would have to wait the period of time which we said we would and we'd do more and more until we got up to a full 8 lots. There's no dispute over the fact she could have done exactly what she's proposing to do in 1953 so that fact is clear. And so if you stop right there and then you look at the May 31' 05 date 180 days under Measure 37 her cause of action [inaudible] and it's a statutory reference to just compensation to be determined as of the date that she submitted a written demand for just compensation, that's December 2, 2004. And you look at it and what's the difference with and without the restrictions that they're still being opposed on her and that figure is undisputed. There's nothing in this record whatsoever that disputes that figure and I set it up alternatives I thought they might go out and get an appraiser or do something to try to create a fact on that fact issue but they have not. So that's undisputed, and I think you can stop right there, we're entitled to judgment and it gets better because we sued them finally after giving up on, doing everything that I could to try to settle it, we did sue them on May 16 th that was the date this complaint was filed that was in May 16 of 06. And it was after we filed the lawsuit that they, on their own, had another hearing and waived additional regulations and I understand there are motions to say that they're really relying on that but look when that happened that happened months and months after their 180 days expired and months and months after her cause of action [inaudible] and it really isn't at all relevant to her cause of action

on this. But, arguendo saying, well maybe they could make something out of that then what is still left, what's left they argue are some safety regulations and they have this new category they call administrative and procedure and those administrative procedure things is what they now label them and their code they are labeled as land use regulations certainly under Measure 37 they are Land Use regulations.

They do apply and they do restrict value and we have an affidavit from Mrs. English on all of that that simply has not been reputed. Again, even assuming that they could make use of that later order somehow to show more waiver it doesn't help them I think it's proof positive they didn't do it in time. But even if you considered that it doesn't help and the biggest point Your Honor is on this notion of these administrative procedure regulations they are in their land use code. They deal with land divisions they require you to go through a land use process, their own orders said, that anything they were waiving didn't waive those land use regulations, they had to be complied with or developed if commenced. Now, where does that leave Mrs. English in 1953 she didn't have to do it now they tell her before you can make any use of your land if you want according to your written demand you must do it and those are land use processes that means that she has to pay significant fees, she has to provide expensive information that will require experts to help her get it done. Which they know she cannot do and it exposes her to the entire lengthy process and appeals of any body that I call the [inaudible] any who has an interest that doesn't like Measure 37 and everyone knows who Dorothy English is, as soon as that is filed they have the right under those codes to come in and protest and then they have the right under our land use law to take her to the land use Board of Appeals, the Court of Appeals, the Oregon Supreme Court and tie that up for that length of time and impose those kind of cost and delays on her all before according to the county she can use her property according to the written demand for just compensation. And yet they stand here and suggest to the court somehow that's either not within Measure 37 or it doesn't restrict use and frankly, that is absurd. It just is. Nobody in a good conscience say, to put a person through that process and expense and delay and those potential appeals are actual appeals would not reduce the value of that land and I don't think that statement can be made with good faith or good conscience.

So, on those basis I think we're entitled to the summary judgment I would point out since they argued exclusive jurisdiction on the writ of review issues we briefed that to you it's absolutely inconsistent with Measure 37 according to their position the cause of action for just compensation and attorney fees would be written out of Measure 37 if you accepted that position. And it does lead to absurd results and I don't know, I don't think we informed you, when informed or reminded you of your own haul decision which we thought had application to one of those points on these things applying to land divisions but, insofar as you're interested Judge Tickner in Deschutes County has twice rejected a position asserted by the state that exclusive jurisdiction is set forth under the ADA for reviewing an order of the contested case. It's exactly the same position as the writ of review position but it was asserted by the state and their agencies or it's the APA and then let's see,

	<p>Judge Thompson in a Jefferson County case of mine rejected squarely the county's writ of review position identical to what their raising here. So, [inaudible] that's pretty easy to get rid of because you just can't read Measure 37 and look at their position and accept that. On the other notion I would add one thing because we can't, we didn't have the opportunity to get any further written information but the county argues that somehow they're entitled to great deference if they call something a health or safety regulation under Measure 37 and they're wrong, they're entitled to no deference on that, that's a state statute it's Measure 37 language that determines what is regulation, I'm trying to quote and I'm doing it by memory I may not be exactly right but it's a regulation that prohibits or restricts activities for health and safety purposes.</p>
Judge	Better not use the word "prohibit," it's just "restrict."
Willis	Okay.
Judge	Which I think is kind of an important point.
Willis	<p>Okay. But any event that's, they're not entitled to deference on how they read the statute it's the statute that controls not their ordinance. And we just pointed out one or two examples of that where and this goes back to general land use law and it goes back to many of the same reasons I think that people pass Measure 37. If you look at the example or two we pointed out to you on their safety and convenience is what the ordinance says that they wouldn't waive safety and convenience and there's nothing about convenience that is a safety standard and then beyond that they have the ordinance set up so the approval authority it has to be, it has to satisfy whatever that approval authority deems is safe or convenient. And you can certainly imagine many cases where these land use regulations and codes gave these regulators huge powers over people's ability to use their property by saying you have to set aside what that person deems is safe and convenient. So you have that as deemed broader than what is absolute a safety issue. But then you throw convenience on top of it, so we could walk in there and get turned down because some planning director or some other county representative says, well I deem it not convenient now that's the position that they have set forth to you as a regulation they say is an example. And there was one thing on the exemptions they argued that our position that you must read exemptions narrowly in favor of finding compensation applies only to nuisances that's incorrect if you look carefully at the language it talks in terms of the entire section being treated that way and they're labeled 1, 2, 3 the exemption set in Section 3 and that language is very clear it applies to all of them. So, it's with or without they fail on the notion because it is separate inquiry maybe I can poin that out to you better Judge if I turn to it. I stand corrected they talk in terms of the entire subsection if you look down at 3, it notes subsection 1, subsection... so each of the numbered articles in this are subsections and so subsection 1 of this section shall not apply to land use regulations and then it starts what this series is. And then if you look at Part A of subsection 3 it says this subsection will clearly, all of these numbered subsections are numbered as subsections and when it says this subsection it clearly refers to</p>

	<p>subsection 3 so it's the entire set of these restrictions. It might have been more artful to put at the very bottom that the language is clear that that's what has to happen and with or without that we make no claim that we don't have to comply with a safety regulation but look at and then look at the sanitary septic tank systems one of those lots is a no, already has a septic tank system in it that's been approved but according to them we have to file an application, pay fees, go through hearing processes be subject to appeals and then have their delegates tell Mrs. English that not only must she have a safe sanitary system but she, they can also tell her to build an underground sewer system out to the right-of-way in case and if ever in the future there's a public sanitary sewer constructed there. Well that has nothing to do with safety she admits that she has a safe sanitary system there and those are the kind of problems on that. Procedural things are the biggest, Judge. And I'm deeply concerned about Mrs. English, her age and health and I think it's time that this matter be concluded and I do ask that you grant our summary judgment and deny theirs, so.</p>
<p>Judge</p>	<p>All right, thank you. John.</p>
<p>Thomas</p>	<p>I want to just talk generally about Measure 37 for a minute. Some of the claims filed in Measure 37 we've seen a wide range of claims come in [inaudible] some of them are conceptual, some of them say like this is English I'd like to put 8 lots similar on like 20 acres and that's all the information you get. Others I've heard of, I don't think this has happened in Multnomah county but I've heard in other counties some claimants have come in with actual a plat that identifies all the lots that they want to do, want to create, where they're going to be created, dimensions, other information that allows the governing body to have a more detailed idea of the proposed development. Our view of Measure 37 is that the response to the Measure 37 claim is only required to respond to the claim itself and the [inaudible] of the claim. So if you have a conceptual claim saying I want to put 8 lots somewhere on my 20 acres then the governing body is required if it does not want to pay compensation to waive the regulations that would prohibit 8 lots on 20 acres. It is not required under Measure 37 to waive all of the other regulations that might apply once the development plan is finally brought forward. And in this case Multnomah County in it's 2005 order which is the only order now that is before the court waived every regulation that would have prohibited the creation of 8 legal lots with 8 houses on the 20 acres owned by Mrs. English. It reserved the right to review additional regulations depending on how those 8 lots were going to be situated there was no information in the claim that told that. There was no drawing, nothing to show how those 8 lots might be situated.</p> <p>Depending upon how you locate those lots on this property which is steeply sloped in some areas which does not have room for direct access for all 8 lots onto the road because of its shape. Some additional regulations may or may not be implicated but until the county knew what the arrangement was going to be the county did not just waive every regulation it reserved the regulations other than those that would prohibit the development of 8 lots. So, the claim, if the claim is general the response is going to be general I think fewer regulations are going to</p>

	<p>be directly impacted and fewer regulations are going to be waived if the claim is specific I want to have my 8 lots in this particular place, I want to have access with this easement road, I'm going, providing other details then the claim is going to definitely implicate additional regulations and the board will have to consider those additional regulations before it makes its decision. Now, the English claim was to create 8 separate legal parcels out of the existing parcel through a series of partitions not to exceed 2 partition parcels per year without creating any type of a road. That was the extent of the claim. The 2005 order provided the plaintiff by waiving all of the regulations that would have prohibited the creation of 8 lots, 2 lots per year provided Mrs. English with all of the relief that she was entitled to under Measure 37 based upon the scope of her claim. I want to discuss for a minute the process the difference that we have with respect to our understanding of Measure 37 as it relates to the development process. Our view of Measure 37 is that a claim is made under Measure 37 and when that claim was adjudicated certain regulations are waived assuming no compensation was paid which has been the rule. Certainly regulations are waived other regulations are not. The, once the, and in fact Measure 37 contemplates that certain regulations will continue to be in effect for instance health and safety regulations. Measure 37 once the Measure 37 order is issued by the governing body however, that does not entitle the claimant to go get a building permit. The claimant still has to go through the development process the same development process, the one Mr. Willis is describing that he claims is so onerous is the same development process that everyone who has, who develops property in the State of Oregon and Multnomah County and each county has their own process has to follow.</p>
Judge	But they didn't have to follow it in 1953, right because it didn't exist?
Thomas	That's correct. That's correct.
Judge	Wasn't that the point of Measure 37?
Thomas	Well that's part of the point of Measure 37.
Judge	Well wasn't that the intent of the people who voted for it?
Thomas	Well I want to refer you to subsection 3. Because subsection 3 provides for exemptions it does not take us back to 1953 and leave us there. It provides exemptions so maybe in 1953 there was no law that prohibited having sale of pornographic materials but that doesn't mean that you can sell pornographic materials on that property now.
Judge	I understand the list of exemptions.
Thomas	Okay. So, with respect particularly to the health and safety exception the county has a health and safety requirement the requirement to review at the time of lot formation whether or not health and safety considerations are met with respect to each lot. Does the lot have safe access, does it have a sewer, does it have septic

	<p>capability and so. The county is entitled to make that review of these lots, these proposed lots at the time of lot formation. That review is made through an application for a permit to develop. Measure 37 does, provides that the county may and, in fact, requires the county to continue to enforce those regulations how is the county to continue to do that without receiving information from the property owner as to what the [inaudible] is going to do. And that information is received in the development process and by development application. So we don't just go back to 1953 and do everything the way we did it back in 1953.</p>
Judge	<p>He agrees with you, and so do I.</p>
Thomas	<p>I don't think he does agree with me, he's say....</p>
Judge	<p>Well on health and safety he has to because they're listed there as an exception.</p>
Thomas	<p>Okay. But his view and the position that's been taken in this case is he can record two deeds and we don't have anything to say about health and safety. He's got legal lots. That's the position of the plaintiff in this case.</p>
Judge	<p>[Inaudible] understand his position.</p>
Thomas	<p>Well I'll, that's what it says in the brief. That's what it said in his March 24 letter. If that's not the position I'm sure Mr. Willis will correct me. So in any event our view is that a development application is required so that we can apply our health and safety regulations to the proposed development and what the development application, the way the development application is treated after a Measure 37 claim has been granted is, the development application is reviewed without regard to all of the regulations that were, that were waived. But it is reviewed with regard to all the regulations that are health and safety regulations that are exempt under subsection 3 and that the county would have an obligation to review the proposed development with respect to those regulations. I want to talk for a minute just because Mr. Willis raised it in their brief about the 2 regulations I, one of the main concerns we have about the posture of this case is that the plaintiff has conceded in our brief that there are certain health and safety regulations that the county may continue to apply. It's in the reply brief I don't have exactly the page (maybe we can find that) as you can see that there are certain health and safety regulations that the county can continue to apply. But she fails to identify even one that she concedes is appropriate to apply. All that we had in the reply brief was comments on 2 of the regulations. Mr. Willis and in the brief talks, complains about this language about safe and convenient the full text is deemed to be safe and convenient for pedestrians, passengers and emergency vehicles. Well, he says convenience is not a safety matter, we disagree. If an access is inconvenient for passenger and particularly for emergency vehicles creates a safety issue. So convenience for emergency vehicles is a safety issue. And then they complained about the deems, deems essentially means decides. Well, someone has to decide and it is the county's duty and responsibility to make that decision, it's always been that way that's, these regulations aren't new to Measure 37 and whether or</p>

not a septic system, the ground will percolate someone is going to make a decision whether the ground will percolate. Whether or not access of safety that saved us some fire department is going to say I can't get a truck in there that will be deemed to be unsafe by that fire department. So, I think the word deems is simply another word for decides and that decision is the county's and, of course, it's got to be made in good faith if it wasn't it'd be an abuse of discretion and it could be stricken. The same thing is true of the sewer, the sewer issue the, there's no sewer so far as I know for miles from this property. If the county were to require Mrs. and it only says may, it doesn't say shall provide this sewer line.

If the county were to require Mrs. English to put a sewer line out to this road it has no sewer anywhere near it, it would be an abuse of discretion and I don't think the court should presume that the county is going to abuse its discretion in the handling of these claims. I want to talk briefly about writ of review, our view, we set forth that, I think as clearly as we can in our briefs but our basic view of that is that this does not preclude Mrs. English from bringing this claim, we're not claiming that this court does not have jurisdiction to decide the compensation issue but under Measure 37 the only issue is just compensation. Our position is that the decisions that the board made when it adjudicated the 2005 claim were required if the claimant disputed them to be raised by writ of review. In the 2005 order the board made a number of determinations based upon the claim it categorized the regulations it determined that certain regulations needed to be waived in order for 8 lot subdivision to be created or 8 lots to be created, it determined that certain other regulations did not need to be waived in order for creation of 8 lots. And it made the other determinations that are set forth in that order. We don't, we're not saying that the court does not have jurisdiction [inaudible] compensation claim. We are saying that the court does not have jurisdiction to review those decisions and the correctness of those decisions that were made by the board in that order.

We don't believe that the cases that were cited by the plaintiff are inconsistent with that position. We are not arguing as the defendants did in Shockey & Etner that because the writ of review remedy was available but they don't have any right to be in court. We are not saying that here, we're saying that the issues that were decided by the board in the order had to be raised by writ of review but just compensation is to be determined in this proceeding. I guess I want to, do want to discuss the construction issue. I think if you look at 197.352(3) the introductory phrase there subsection 1 which is 1 of, which is above, of this section shall not apply to land use regulations: and then it goes a, b, c, d and e. And in (a) it says restricting or prohibiting activities commonly and historically recognized as public nuisances under common law. This subsection regarding nuisances shall be construed narrowly in favor of finding of compensation under this section then it goes onto to (b) which is restricting or prohibiting activities for protection of public health and safety there is no sentence in (b) that says, that subsection will be construed narrowly in favor of finding of compensation. None in (c), none in (d) and none in (e). The only subsection that is restricted to a narrow construction of subsection (a) the language in subsection (a) does not apply to (b), (c), (d) or (e). We believe that at least with respect that if the court is going to examine the

	<p>determinations of the county in the 2005 order that at least with respect to regulations related to health and safety the court should broadly construe that term because those regulations are for the protection of the public.</p> <p>Finally, a word about just compensation our view of the case is this, if the court determines that the county's order in 2005 provided the plaintiff with all the relief she was entitled to in the context of the claim that she made which was I want to create 8 lots on my property somewhere then she's not entitled to any just compensation if she got all the relief that she was entitled to by that order. If the order was responsive directly to the claim that she made. If the court believes otherwise then the court it appears to me needs to identify the specific regulations that continue to be enforced that are not exempt under Measure 37 and that entitle the plaintiff to just compensation. And until those specific regulations have been identified we cannot determine just compensation. The plaintiff has not identified any specific regulation which it claims entitles the plaintiff to just compensation and the language of the statute says if a public entity [inaudible] enforces a new land use regulation enacted prior to December 2nd well we have to know before we can determine just compensation which land use regulations we're talking about. One thing is certain and that is just compensation is not \$1,150,000.00 we know that from the record because that was the amount of Mrs. English's claim before the 2005 order was entered. She claimed that in her claim that because she was prohibited from creating 8 lots on her property just compensation was \$1,150,000.00. As a result of the 2005 order the creation of 8 lots is a permitted use on her property right now. So it can't be \$1,150,000.00 because the conditions have changed dramatically now she can create 8 lots on her property by matter of right whereas she couldn't at the time she claimed her just compensation was \$1,150,000.00. So we have an issue of fact right there not to mention the other reason we have an issue of fact is we don't know what regulations are still in effect that restrict use and how much they reduce the value. Until we have a list of those regulations how can we have a trial on just compensation.</p> <p>Finally, there's an assertion in the briefs that Mrs. English's statement in her affidavit establishes just compensation. An owner can testify to value, the value of her property that is not what's in her affidavit, she's claiming just compensation. Just compensation is not a matter in which an owner is competent to testify to it, it requires expert testimony. So, her affidavit does not in and of itself establish just compensation and that concludes my remarks.</p>
Judge	Okay. Mr. Willis.
Willis	Very briefly Your Honor, there is nothing in this record by the county. I think you're well aware of the resources it has and the number of [inaudible] that he uses that in anyway raises a fact issue on the amount of just compensation. I thought they were going to try to do that and they have not. And this notion that counsel stands here and tells you that as of the date of the 2005 order she was allowed, or I think his words were as a matter of right, to divide that property into 8 lots. That's absolutely wrong as of the date of that order look at the rest of the things that they

	<p>still apply to her, look at the rest of the things they admit they still apply to her to this date she cannot do one thing on that property without going through a whole series of land use regulations that were not on the books in 1953 and they do it's absolute [inaudible] on her. And there's nothing to refute any factual information with respect to the amount of that compensation. So, I asked the court to deny their motion and grant ours for the amount set forth in the motion.</p>
<p>Judge</p>	<p>I'm going to grant the motion for summary judgment in favor of the plaintiff as to liability and the reasoning is that the, first of all the land use regulation in Measure 37 does apply to land division which is what Mrs. English wants to do. That's in 197.352(11)(b)(3) and the claim was filed December 2, 2004, 180 days expired on May 31, 2005 and the court finds that the county did fail to modify, remove or not apply various land use ordinances including land division ordinances in it's March 17, 2005 order or in its May 18, 2006 order. I think the interpretation of this statute at least for me is first impression and really requires an interpretation of the word restrict. The, I guess I should have said I'm denying defendant's motion for summary judgment because they're so, as they are sometimes in these cross motions for summary judgment the granting of one is the denial of the other. But the county did, in it's order, waive certain regulations that prohibit the division or make it impossible or prevent but that isn't the word that Measure 37 uses, the word it uses is restrict. It says if a public entity enacts or enforces a new land use regulation or enforces a land use regulation enacted prior to December 2, 2004 that restricts the use of private real property or any interest therein and has the effect of reducing the fair market value of the property or any interest therein. Then the owner of the property shall be paid just compensation. The county acknowledged, well the plaintiff acknowledges that health and safety regulations are exempt in subsection (3)(b) but there remains a third category regulations for instance Section 33.786 requirement for filing a partition application 33.7865 a tentative plan approval 33.8015 through 33.8035 requiring final partition plat and steps that need to be followed to record the document and create the parcels. All of these were, of course, passed after 1953 Mrs. English wouldn't have had to follow those but the county has taken the position that and it is a possible interpretation that the board restrict that these don't actually, the, actually Mr. Thomas the word you used, kept using in your argument was prohibit and you're saying that these are just procedural and administrative regulations that have to do with dividing land. And they're not covered by Measure 37 but I think they are if the legislature had wanted to use, let me go through this more methodically.</p> <p>I don't think that the statute makes sense when read that way, these so-called procedural requirements were adopted after Mrs. English acquired the property, they did not have to be followed when she bought the property, of course, because they didn't exist. She is willing to follow all the regulations that were in effect in 1953 when she bought the property and anything in the exceptions including health and safety that were passed after she bought the property but these post-1953 so-called procedural requirements for plat and so forth do restrict her ability to subdivide by regulating her intended use to divide her land. They do, if you look up the restrict in the dictionary synonyms include repress or curb. Synonyms</p>

	<p>for restrict are not prohibit or prevent so the legislature used the word knowing that there was another word prohibit as they used frequently in subsection 3 of Measure 37 you'll notice in the exceptions it talks about that the, that subsection (1) of this section shall not apply to land use regulations (a) restricting or prohibiting activities commonly recognized as creating public nuisance and (b) restricting or prohibiting activities they know how to use that word and they could have used it in Measure 37 but they only used the word restrict which include repress or curb which, of course, these so-called procedural regulations for some of which I just outlined requiring plan approvals, final partition plats and so forth. They do restrict repressed or curb her ability to divide her land. The legislature could have included in it's list of exceptions this third category of regulations in addition to the public nuisance, the health and safety and so forth. They could have included an exception for procedural rules applicable to land division that do not actually prevent or prohibit land division if they're followed but the legislature didn't use that so there's that old Latin phrase [inaudible] the inclusion of one is the exclusion of the other and by including in the list of exceptions the ones that they did in leaving out the other so-called procedural regulations the legislature necessarily excluded those from the list of exceptions. That's about as clearly as I can state it, the writ of review I think the, in paragraph 6 of the Measure 37 gives Mrs. English a cause of action for compensation under this section in the Circuit Court in which the real property is located that's where we are, and of course the Section 12 makes the remedy provided in this case created by this section is in addition to any other remedy under Oregon or United States Constitutions the, I think the analogous opinions in <i>Etner v. City of Medford</i>, <i>Boise Cascade v. Board of Forestry</i> and the ones listed in plaintiff's brief are also support for the fact that there is no exclusive remedy in this case for writ of review. If there were it would just be right, Measure 37 which I think clearly provides for this lawsuit. I think I have jurisdiction, the, I'm not comfortable granting the summary judgment on the dollar amount and the reason is that I think partly because I think Mr. Thomas has some argument that, I think I would be remiss if I didn't have some testimony as to what these procedural hoops that the county is claiming that she had to jump through, what they actually caused in terms of dollar loss and maybe it could be a short hearing but I think, I think it's not proper for a motion for summary judgment particularly the way it was stated, well in the claim it asked for \$1,150,000.00 or even some higher amount. I just, as I read it, I just don't think it's appropriate as far as the summary judgment motion. So I'm just granting plaintiff's motion on the liability issue and not on the dollar amount. So those are my rulings and, I don't know, is there anything else that we need to do today you want to pick a trial date or.</p>
Willis	I would like very much to find some procedure to get this concluded as fast as possible because of Mrs. English's age and health.
Judge	I'm going to be doing the Hall case on the week of December 4, I could do this one on December 11 just the following week.

Willis	I need to get to my office and get help because of my docket, Your Honor, if I could do that and call everybody right back.
Judge	That's fine. I just looked, just so you know my schedule I'm, I've got special except things and also Judge Koch wants me to be the criminal procedure judge in January, February and March, so I'm not available...
Willis	Congratulations.
Judge	...CPC they dole out the crimes to the various judges for trial. So, I could be available the week of, well actually the next 2 weeks I'm available and then I'm available on the week of December 11 and the week of December 18. But then I'm not available again until April. I don't see why this hearing would last several days but I'm always surprised.
Thomas	Your Honor, I need to check those dates myself. I know the next 2 weeks won't work because we couldn't get testimony together in 2 weeks.
Judge	Yeah, I was thinking that would be a little bit optimistic.
Thomas	I guess if I could ask a point of clarification which is what are we trying?
Judge	Pardon me.
Thomas	I don't, I'm not, it's not clear to me what we're trying. Which regulations we are..
Judge	I'm just wanting testimony on the loss of value of her property.
Thomas	But that has to be predicated upon the specific regulations that remain in effect that the plaintiff claims is causing her loss and unless we know what those regulations are and we have ...
Judge	I think he has a list of about 30 of them I mentioned some there's quite a few that have really nothing to do with health and safety, so....
Willis	Well...
Judge	..those are the ones.
Willis	I think also, Your Honor, the statute requires us to look to the date of December 2, 04 as of that date as to...
Judge	Right, the county has 180 days if they haven't waived all of the ones that restrict then what's the loss of value and maybe it's \$1,150,000.00 but I'm just not comfortable ordering that as a matter of law. I figure the case is going to go up to the Court of Appeals anyway and they might as well have a number that's based on something other than the pleading.

Thomas	Your Honor, how are we to determine which regulations are at issue for this case. Is it all the regulations, are you ruling on all the regulations that plaintiff claims that we did not waive are subject to compensation under Measure 37 including the health and safety regulations. Because plaintiff has conceded that some unidentified health and safety regulations may be imposed. So until we know..
Judge	I guess I'm not ready to, I don't have a basis to rule on that, that's a good question and ...
Thomas	Thank you.
Judge	..it seems to be that has to be briefed and that could be a little trial hearing memoranda submitted to me giving your two positions on that point. But I tried to state the basis for my ruling in as much detail actually as I'm able to at this point.
Willis	I think I understand it.
Judge	There's like 100 pages of these things about that thing.
Willis	I would like to get an order over to you, I'd like to get a timing set and I'll talk to Mr. Thomas about even in the possibility perhaps of obviating that hearing to see if it's possible.
Judge	That would be good.
Thomas	Well I think we do need a briefing on that issue, we may, Mr. Willis is talking about settlement negotiations that's one point but if we do need an order from this court either after summary hearing or at some point in time before we enter into the issue of just compensation as to which particular regulations the court [inaudible]
Judge	It seems to me an expert could come and look at the regulations and say which ones are just health and safety and all the others that apply, if apply and reduce the value in x dollars, I mean, I can't do that.
Thomas	Well with all due respect Your Honor I think that's the court's obligation [inaudible] ..
Judge	Oh no, I'm going to do it
Thomas	..I mean..
Judge	I'm going to do it after I've had evidence on it from people that are experts in the field of appraisal and application of these rules that the county is trying to impose. I just, I can't do it as I sit here right now is all I'm saying.
Thomas	Your Honor I...

Judge	I'll do it in this case.
Thomas	Your Honor there are two distinct issues here. One is, is this an issue, is this a regulation that was not waived that entitles the plaintiff to just compensation. And with each regulation that's in play here we need to have a ruling from Your Honor with respect to that regulation on that issue. Once we have that, we have to have that first so then we could go to an appraiser and say, now tell me with this list the court has determined are the regulations that are not exempt...
Judge	It's going to be part of the hearing. I just can't do it right now Mr. Thomas. I agree with you.
Thomas	What I'm suggesting is we need two hearings.
Willis	Well, Judge just a moment. He did not file a motion to make this complaint more definite and certain trying to get any more information out of it. Yes, there are opportunities for discovery if he really feels that's the case and all I see is a humongous delay and much more expensive briefing for no reason. I would like to get you're an order, I understand your order and I am very comfortable that each of us with our experience could have an appraiser if they really dispute the figures with a figure that's why I think there may be some good chance that we'll come to some resolution of avoiding the [inaudible]
Judge	Okay, well that would be my hope as well. If I could get back to my secretary Patty Martin, hopefully, we can do it in one of those weeks in December.
Thomas	Is it going to be one trial then Your Honor, we're not going to do two.
Judge	Well, we'll do the first part on the first and the second part on the second. I guess I'll just read anything that you submit but it makes a lot of sense to do it in that order. To get to the money part and the appraiser is last.
Thomas	Thank you, Your Honor.
Judge	But, yeah, I would like to do it in one trial.