

CAROL E. JONES  
CIRCUIT JUDGE



YAMHILL COUNTY COURTHOUSE  
535 NE 5<sup>TH</sup> STREET  
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June 25, 2007

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Mathis et al v State CV060308

Dear Mr. Day and Ms. Hadlock:

This matter came before me on April 17, 2007, upon a stipulated facts trial, Plaintiffs have moved to dismiss their First and Second claims for relief. That motion was orally granted at the time of the hearing, and the case proceeded to trial solely upon Plaintiffs' claim for declaratory relief pursuant to ORS 28.010.

Defendants have moved for involuntary dismissal of the declaratory judgment claim pursuant to ORCP 54B, arguing that the claim is not justiciable. I conclude that the matter is justiciable. Although the State is correct in its assertion that a sale of the property to Coyote or any other potential buyer is not yet certain, is hard to imagine when, in the State's view, the matter would become justiciable short of the completion of an actual sale. Plaintiff's rights are substantially affected in that it cannot feasibly determine the terms of sale without knowing whether its restored property rights are able to transferred to a buyer. This case is distinguishable from *Beck v. City of Portland*, 202 Or App 360 (2005). In *Beck*, Defendant City had passed an ordinance proposing the development of an aerial tram over Plaintiffs' neighborhood. There was no certainty at the time Plaintiff's filed their claim that the tram development would proceed, or how it would proceed. Here, Defendants have issued a final Order granting a Measure 37 "waiver." Although the issue of transferability of the rights granted under the waiver was not specifically addressed in the Order other than by way of a paragraph captioned "for information only," advising that the Oregon Department of Justice had "advised" that the rights could not be conveyed; Plaintiffs seek to have the court declare the nature of the rights that were restored to them. Without that knowledge, Plaintiffs' ability to transfer their property is significantly impaired. The Court in *Beck* noted that Plaintiffs there had not raised the issue of impact upon their ability to sell their property:

For example, none of the plaintiffs alleged that potential buyers of their property had been deterred from purchasing Gibbs Street property because of defendant's enactments. Whether even that would have been sufficient to establish the existence of a justiciable

controversy under ORS 28.020 for the declaration that plaintiffs sought, we reserve for another day.

*Id.* @ 371.

Here, Plaintiffs have raised this issue by way of their Affidavits and the Stipulated Facts. Even without the contingent offer to purchase by Coyote, that Plaintiffs have expressed a desire to transfer the property, combined with their inability to determine its value absent certainty about the transferability of the Measure 37 waiver is sufficient to show the “existing state of facts” which threaten Plaintiffs’ legal rights which is necessary for the court to exercise jurisdiction with respect to a declaratory relief claim. *Beck* @ 370.

Motion to Dismiss for lack of justiciability is denied.

Defendants moved, at the conclusion of Plaintiff’s case, for involuntary dismissal pursuant to ORCP 54B(2), arguing that the plaintiff has shown no right to relief upon the facts submitted and the law. That motion is granted. I conclude that a Measure 37 “waiver” is not transferrable. The statute is unambiguous in its restoration of rights to “the present owner” in the case of a waiver in lieu of compensation. Plaintiff’s position would have future owners benefitting from Measure 37 waivers by waiving regulations already in effect prior to the acquisition of property by a future owner. Petitioner argues that nothing in Measure 37 suggests that a “waiver” is temporary in nature. Petitioner is incorrect. The plain language of the statute provides that the government “may modify, remove or not to [sic] apply the land use regulation or land use regulations *to allow the owner to use the property for a use permitted at the time the owner acquired the property*” (emphasis added). ORS 197.352(8). Further, the term “owner” means “the present owner of the property, or any interest therein.” ORS 197.352(11)(C). The text and context of the statute is clear, then, that the duration of the “waiver” does not extend to any point beyond which the present owner would be using the property, that the benefit of the waiver is given exclusively to the present owner, and that once the property is transferred the waiver expires. To adopt Petitioner’s position would be to render the words “. . . to allow the owner to use the property for a use permitted at the time the owner acquired the property” meaningless.

Plaintiff’s Claim for Declaratory Relief is dismissed.

I ask Ms. Hadlock to prepare an order.

Yours truly,



Carol E. Jones  
Circuit Judge