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4 IN THE CIRCUIT COURT OF THE STATE OF OREGON  
5 FOR THE COUNTY OF KLAMATH

6 Don Johnston and Son, a partnership  
7 consisting of Gwendolyn J. Johnston and  
8 Donald S. Johnston,

9 Plaintiff,

10 v.

11 THE STATE OF OREGON, by and through  
12 the Department of Land Conservation and  
13 Development,

14 Defendant.

Case No. 0700303CV

STATE OF OREGON'S AMENDED CROSS-  
MOTION FOR PARTIAL SUMMARY  
JUDGMENT

(Previously argued on June 11, 2007)

15 **AMENDMENT**

16 Based on the Court's request at the June 11, 2007 hearing on the parties cross-motions,  
17 the State amends its response to Plaintiff's Motion for Partial Summary Judgment and its Cross-  
18 Motion for Summary Judgment. Based on the discussion of the parties and the Court at oral  
19 argument, the State's cross-motions are amended to reflect that it moves for partial summary  
20 judgment only as to the correctness of its Final Order B, Claim No. M 129633. All factual  
21 references to Final Order A have been omitted from the cross-motion. There are no changes to  
22 the legal arguments (only their application to facts) because the State's legal basis for its decision  
23 in Final Order "A" is also the legal foundation for its ultimate decision in Final Order "B".

24 **MOTION**

25 Pursuant to ORS 183.484 and ORCP 47, Defendant State of Oregon ("State") moves for  
26 summary judgment in its favor because the Final Order B, Claim No. M 129633 issued by the

1 Department of Land Conservation and Development (“DLCD”) was correct. This motion is  
2 made on the grounds that DLCD, in its Final Order, correctly interpreted and applied Ballot  
3 Measure 37 (2004), codified at Oregon Revised Statute (“ORS”) 197.352 (“Measure 37”), to  
4 plaintiff Don Johnston and Son’s (“Partnership”) demand for relief pursuant to Measure 37.  
5 DLCD correctly determined that the Partnership originally acquired the property at issue on  
6 December 28, 1978 and subsequently conveyed its ownership interest on April 20, 2006. The  
7 material facts are undisputed and the State is entitled to judgment as a matter of law.

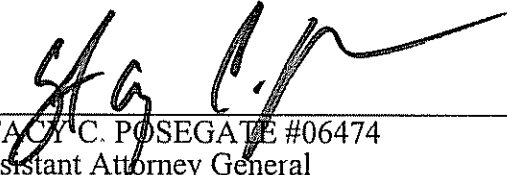
8 The State relies on its oral argument presented on June 11, 2007.

9 This cross-motion is based on the records and file herein and State’s memorandum in  
10 support of cross motion for summary judgment and in response to the Partnership’s motion for  
11 summary judgment.

12 DATED this 18<sup>th</sup> day of July, 2007.

13 Respectfully submitted,

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

Don Johnston and Son, a partnership  
consisting of Gwendolyn J. Johnston and  
Donald S. Johnston,

Plaintiff,

v.

THE STATE OF OREGON, by and through  
the Department of Land Conservation and  
Development,

Defendant.

Case No. 0700303CV

STATE OF OREGON'S AMENDED  
MEMORANDUM OF LAW IN SUPPORT OF  
ITS RESPONSE TO PLAINTIFF'S MOTION  
FOR SUMMARY JUDGMENT AND ITS  
PARTIAL CROSS MOTION FOR SUMMARY  
JUDGMENT

(Previously argued on June 11, 2007)

**ORAL ARGUMENT REQUESTED [Previously argued]**

Defendant the State of Oregon relies on its prior oral argument on June 11, 2007 before the Hon. Rodger J. Isaacson on Plaintiff's Amended Motion for Partial Summary Judgment and on the State's Amended Cross-Motion for Partial Summary Judgment.

**AMMENDMENT**

Based on the Court's request at the June 11, 2007 hearing on the parties cross-motions, the State amends its response to Plaintiff's Motion for Partial Summary Judgment and its Cross-Motion for Summary Judgment. At the June 11, 2007 hearing, the Court asked the parties to discuss the effect of *Corey v. DLCD*, 210 Or App 542 (2007) on the Court's jurisdiction over this dispute. The parties agreed that *Corey* may affect the Court's jurisdiction over its review of the State's decision in Final Order M 129633 A but not over a review of the State's decision in Final

1 Order M 129633 **B** because the State issued a waiver in Final Order “A” and a denial in Final  
2 Order “B”.

3 The Court of Appeals in *Corey* ruled that jurisdiction over review of a final order issued  
4 by a state agency in a Measure 37 was with the Court of Appeals because, in part, the State in  
5 that action had issued a Measure 37 “waiver”. *Corey* was based on a motion to determine  
6 jurisdiction and has not yet reached final judgment. On July 5, 2007, the Court of Appeals  
7 decided in *Emmell v. Dept of Land Conserv. and Dev.*, 2007 Or App. LEXIS 944 (2007) that a  
8 final order issued by a state agency denying a Measure 37 claim is an order in an other than  
9 contested case proceeding, thus jurisdiction lies in the Circuit Court.

10 Based on the possible effect of *Corey* on the Court’s jurisdiction over a review of Final  
11 Order M 129633 **A**, the parties asked the Court to permit them to amend their motions and  
12 present oral argument over the State’s decision in Final Order M 129633 **B** and to withdraw the  
13 motions as to the review of Final Order M 129633 **A**. The Court permitted the amendment and  
14 requested that formal amended motions be filed to reflect that the parties were moving only as to  
15 Final Order M 129633 **B**. The instant response and motion are amended to omit all factual  
16 references to Final Order M 129633 **A**. There are no changes to the legal arguments (only their  
17 application to facts) because the State’s legal basis for its decision in Final Order “A” is also the  
18 legal foundation for its ultimate decision in Final Order “B”.

## 19 INTRODUCTION

20 This case involves a demand for compensation under ORS 197.352, commonly known as  
21 Ballot Measure 37. Oregon voters enacted Measure 37 through the initiative process in 2004.  
22 Measure 37 permits present owners of private real property to seek compensation for reductions  
23 in fair market value caused by certain restrictions on use. If a claim is valid, public entities have  
24 the choice of paying compensation or not applying certain restrictions.

25

1 On June 19, 2006, Plaintiff Don Johnson and Son (the "Partnership") submitted a  
2 Measure 37 demand to the State. The state Department of Administrative Service (DAS) and the  
3 Department of Land Conservation and Development (DLCD) reviewed and denied plaintiffs'  
4 demand in accordance with Measure 37. DAS and DLCD jointly issued Final Order M 129633  
5 on December 15, 2006. The Final Order determined that Plaintiff acquired the property on  
6 December 28, 1978 and that it conveyed its present ownership interest in a portion of the  
7 property on April 20, 2006.

8 The parties' cross-motions for summary judgment present two questions of law for the  
9 court: (1) is the Partnership the present owner of all of the property at issue, and (2) when did the  
10 Partnership acquire the property? Measure 37 relief is only available to present owners and the  
11 relief granted is limited by the date the present owner acquired the property. The State is entitled  
12 to judgment because the material facts are undisputed and the State's determination of ownership  
13 and date of acquisition is supported by substantial evidence and a proper interpretation and  
14 application of Oregon law.

15 The Partnership alleges that the State of Oregon, by and through the Department of Land  
16 Conservation and Development, (the "State") erroneously determined that the Partnership did not  
17 acquire the property until 1978 and that it further erred in determining that the Partnership  
18 conveyed a portion of this property in 2006, changing its present owner status. The Partnership  
19 argues that it acquired the property when the partnership was formed sometime in 1969, because  
20 the partners because the partners intended to convey it to the Partnership at that time. Moreover,  
21 the Partnership alleges, it remains a present owner because the 2006 conveyance was rescinded.  
22 Neither the law nor substantial evidence in the record supports the Partnership's position.

23 By contrast, the State correctly applied the law to the substantial evidence on the record.  
24 The record contained a December 28, 1978 deed wherein each of the partners and a non-partner  
25 co-owner conveyed the property to the Partnership. The record also contained an April 20, 2006

1 Bargain and Sale Deed wherein the Partnership conveyed its interest in a portion of the property  
2 to two of the partners and a third nonpartner. No documentation was submitted to the State that  
3 would refute the clear, unambiguous language of the deeds. Accordingly, the State correctly  
4 relied on these deeds in determining that the Partnership first acquired the property in 1978 and  
5 subsequently conveyed a portion thereof in 2006. As a result, the Partnership is no longer a  
6 present owner of the portion conveyed in 2006. Therefore, the State's determination which is set  
7 forth in its Final Order, Claim No. M129633 B is correct and, as a matter of law, summary  
8 judgment should be granted in the State's favor.

9 **MOTIONS FOR SUMMARY JUDGMENT**

10 The State moves for summary judgment on the Partnership's Petition for Judicial  
11 Review, and on the Measure 37 Claim, as follows:

- 12 1. The Petition for Judicial Review should be dismissed on the grounds that the material  
13 facts are undisputed, the State's findings of fact are supported by substantial evidence,  
14 and the State's conclusions correctly apply the law. ORS 183.484 (5).
- 15 2. The compensation claim should be dismissed because the court lacks jurisdiction. The  
16 Petition for Judicial Review is the exclusive procedure available under Oregon law to test  
17 the validity of final orders issued by state agencies.
- 18 3. The compensation claim should be dismissed because, even if plaintiffs' demands were  
19 valid, plaintiffs are not entitled to compensation. Measure 37 vests discretion in the  
20 public entities, not the claimants, to choose whether to pay compensation or provide  
21 alternate relief on valid claims.

22 In support of its Cross-motions and in opposition to the Partnership's Motion for Partial  
23 Summary Judgment, the State relies upon Measure 37, the APA, ORCP 47 B, the files and  
24 record of this case, the agency *Record* lodged with the court on May 10, 2007, and the following  
25 Points and Authorities.

1 **POINTS AND AUTHORITIES**

2 **I. Background**

3 **A. Measure 37**

4 Oregon voters enacted Measure 37 to offer relief to owners of real property who had been  
5 injured by the enactment of land use regulations after the owner acquired his or her real property  
6 interest. Under the express language of the statute, a property owner qualifies for Measure 37  
7 relief if: (1) a public entity enacts or enforces a “land use regulation” that (2) restricts use and (3)  
8 has the effect of reducing fair market value. Subsection 3 of Measure 37 provides that certain  
9 land use regulations shall not be a basis for a written demand under Subsection 1, notably  
10 regulations in effect when the owners acquired the property. ORS 197.352 (3) (E). Subsection  
11 11 defines “owner” as the “present owner of the property, or any interest therein.” ORS 197.352  
12 (11) (C).

13 If a claimant meets the foregoing criteria, Measure 37 authorizes the public entity that  
14 enforces that land use regulation to either compensate the claimant or to grant a Measure 37  
15 “waiver.” ORS 197.352 (8); *see also* ORS 197.352 (10).<sup>1</sup> This latter act is commonly referred to  
16 as a Measure 37 “waiver.” Although Measure 37 affects Oregon’s land use planning statutes, it  
17 did not repeal any of them. The measure merely authorizes a governing body to “modify,  
18 remove, or not \* \* \* apply” certain regulations in specific situations. *MacPherson v. DAS*, 340  
19 Or 117, 132 (2006). . . Otherwise, the land use planning laws remain in effect. *Id.*

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24 <sup>1</sup> A measure 37 waiver is shorthand under 197.352 for the public entities authority to “modify,  
25 remove, or not to [sic] apply” land use regulations to the extent necessary “to allow the owner to  
use the property for a use permitted at the time the owner acquired the property.” DLCD can pay  
compensation only if and when the legislature appropriates funds for that purpose. *See* OAR  
660-002-0010 (8) (c).

1           **B.       Statement of undisputed facts**

2           The State believes the following facts are undisputed based on The Partnership's Measure  
3 37 claim and all documents submitted in support of that claim, the State's final orders, the  
4 Partnership's complaint and the answer, and The Partnership's motion for summary judgment.

5           1.       In March of 1959, Ralph A. Johnston and Esther M. Johnston, husband and wife,  
6 entered into a land sale contract for the sale of the Tax lots 100 (Sections 30C, 31A, 32, 32C),  
7 Tax lot 300 and Tax lot 1200 of Klamath County ("Property"), to Ralph Donald Johnston and  
8 Gwendolyn Johnston, husband and wife. (See Record filed previously in this Action ("Record"),  
9 §2, pp. 13-15).

10          2.       On or about September 23, 1977, Ralph Johnston and Esther May Johnston  
11 conveyed all of their vendor's interest in the Property, by Warranty Deed, to Ralph Donald and  
12 Gwendolyn Johnston, husband and wife, and Donald Scott Johnston & Ginger Marie Johnston,  
13 husband and wife. (Record, §3, p. 60-61)

14          3.       On or about October 7, 1977, Ralph Donald Johnston and Gwendolyn Jean  
15 Johnston, Donald Scott Johnston and Ginger Marie Johnston mortgaged their entire interest in  
16 the Property in favor of the Farmers Home Administration. (Record, §3, pp. 62-64)

17          4.       On or about December 12, 1978, Ralph Donald Johnston, Gwendolyn Johnston  
18 and Donald Scott Johnston executed a written Partnership Agreement for the entity named Don  
19 Johnston & Son. (Record, §3, pp. 28-49)

20          5.       December 28, 1978, Ralph Donald Johnston, Gwendolyn Johnston and Donald  
21 Scott Johnston executed a quitclaim deed, identifying each individual as a grantor and conveying  
22 all of the Property to Don Johnston & Son, a partnership consisting of Ralph Donald Johnston,  
23 Gwendolyn Johnston and Donald Scott Johnston. (Record, §2, pp. 8-12, §3, pp. 65-69) (the  
24 "1978 Deed")

25

1           6.       On April 22, 1983, a document entitled Corrected Quitclaim Deed identified the  
2 grantors in the 1978 Deed as Ralph Donald Johnston, Gwendolyn Jean Johnston, Donald Scott  
3 Johnston and Ginger Marie Johnston. Record, §3, pp. 70-72 (The 1983 Corrected Quitclaim  
4 Deed shall also be referenced as part of the “1978 Deed”).

5           7.       On June 19, 2006, Gwendolyn Johnston and Donald Scott Johnston submitted a  
6 written claim for compensation pursuant to ORS 197.352 to the Department of Administrative  
7 Services on behalf of the State of Oregon, Claim number M129633. (Record §2, pp. 1-16).

8           8.       On April 20, 2006, Don Johnston & Son executed a Bargain and Sale Deed  
9 conveying a portion of the Property described as Tax Lot 100 (Section 32) and Tax Lot 300 to  
10 Donald Scott Johnston, Gwendolyn Johnston and Danny L. Johnston. (Record, §4, pp.11-13)

11           9.       Gwendolyn and Donald Scott Johnstons’ claim was amended to add Don  
12 Johnston and Son as a claimant. (Record, §3, p. 1, 8.)

13           10.      On November 20, 2006, DLCD issued its Draft Staff Report and  
14 Recommendation in which it proposed that: :

15           Don Johnston and Son has not established that it is an “owner” of tax lots  
16 100(Section 32) and 300 and Donald and Gwendolyn Johnston have not  
17 established that they are “owners” of tax lots 100(Section 30C), 100(Section  
18 31A), 100(Section 32C) and 1200.

19           (Record, §4, p. 23)

20           11.      On November 21, 2006, a General Judgment based on the stipulation of the  
21 parties to that action was entered in the Klamath County Circuit Court, Case No. 0603971, in  
22 which the 2006 Bargain and Sale Deed was ordered rescinded. The parties to this action were  
23 Don Johnston and Son, a partnership v. Sterling Savings Bank, D. Scott Johnston, Gwen  
24 Johnston and Danny L. Johnston. (Record, §4, pp.11-13; Plaintiff’s Motion, Ex. A.)

25           12.      On December 15, 2006, DLCD issued Final Order B, Claim No. M129633,  
incorporating the recommendation of the Draft Staff Report as to Don Johnston and Son as to the

1 ownership and entitlement to relief over the portion of the Property identified in the April 20,  
2 2006 quitclaim deed. (Record, §6, pp 1-7).

3 **C. Standard of review**

4 Plaintiff's First Claim for Relief is a Petition for Judicial Review of the State's Final  
5 Order, M129633, is within the Administrative Procedure Act ("APA"). The Court's standard for  
6 review is governed by ORS 183.484 of the APA-- review of a decision made by a state agency in  
7 an other than contested case proceeding. ORS 183.484; *Powell v. Bunn*, 185 Or App 334, 339  
8 (2002). The summary judgment standard set forth in ORCP 47 is not the applicable standard.  
9 *Powell* at 339 ("viewing factual disputes in the light most favorable to a nonmoving party" – the  
10 usual standard of review in a summary-judgment motion – "[is] not appropriate in the judicial  
11 review of an administrative order in a noncontested case proceeding"). Instead, the appropriate  
12 standard of review in the instant case is (a) whether the agency has erroneously interpreted a  
13 provision of law and that a correct interpretation compels a particular action; and (b) was the  
14 order supported by substantial evidence in the record.

15 "Substantial evidence exists to support a finding of fact when the record, viewed as a  
16 whole, would permit a reasonable person to make that finding." ORS 183.484 (5); *G.A.S.P. v.*  
17 *Environmental Quality Commission*, 198 Or App 182, 187 (2005). Judicial review based on the  
18 substantial evidence standard is limited in scope. That is, in determining whether substantial  
19 evidence supports an agency's factual findings, the question before a circuit court "is limited to  
20 whether the evidence would permit a reasonable person to make the determination that the  
21 agency made in the particular case." *Norden v. Water Resources Dept.*, 329 Or 641, 649 (2000).

22 In *Norden*, the Oregon Supreme Court confirmed the plain meaning of the APA standard.  
23 The trial court's task in reviewing an agency's factual findings for substantial evidence "is  
24 limited to whether the evidence would permit a reasonable person to make the determination that  
25 the agency made in a particular case." 329 Or at 649. The Supreme Court affirmed the decision

1 of the state Water Resources Department even though the petitioner was “able to muster  
2 evidence to the contrary.” *Id.* In *G A S P v. Environmental Quality Commission*, the Court of  
3 Appeals followed *Norden* in concluding that “[t]he court’s purpose on review is not to find the  
4 facts itself but to decide ‘whether the evidence would permit a reasonable person to make the  
5 determination that the agency made \* \* \*.’” 198 Or App 182, 195-96 (2005). Similarly, in  
6 *Garcia v. Boise Cascade Corp.*, the Supreme Court applied the identical contested case standard<sup>2</sup>  
7 in a worker’s compensation case, explaining that “[t]he appropriate question was not whether  
8 substantial evidence supported claimant’s claim, but whether substantial evidence supported the  
9 referee’s decision.” 309 Or 292, 296 (1990).

10 Thus, in deciding the motions for summary judgment on the Partnership’s APA claim,  
11 the only questions presented are: (1) whether the State’s Final Order is based on correct  
12 interpretations or applications of the law; and (2) whether the State’s factual findings are  
13 supported by substantial evidence in the record. If the Court answers these questions in the  
14 affirmative, the agency is entitled to summary judgment. Conversely, if the Court finds that the  
15 agency erred in its legal interpretation, the Court shall deny the State’s motion for summary  
16 judgment and is required to “set aside or modify the order, or...remand the case to the agency for  
17 further action under a correct interpretation of the provision of law.” ORS 183.484 (5). If the  
18 Court determines that substantial evidence in the record does not support the agency’s order, the  
19 Court may deny the State’s motion and “shall set aside or remand the order.” ORS 183.484(5);  
20 *G.A.S.P., supra*.

21 The Partnership has also brought a claim for relief directly under Section 6 of Measure  
22 37, seeking monetary compensation, and has moved for summary judgment on that claim. As  
23 the State explains in section II. C of its argument, *infra*, this Court lacks jurisdiction over the  
24 Partnership’s Measure 37 “just compensation” claim. However, if this Court concludes that it

25 <sup>2</sup> See ORS 183.482 (8) (c).

1 has jurisdiction over that claim, it should apply the ordinary standard under ORCP 47 to its  
2 analysis of the parties' cross-motions for summary judgment: "The trial court must view the  
3 evidence and all reasonable inferences it may support in the light most favorable to the  
4 nonmoving party and determine whether the moving party, despite that view of the evidence, is  
5 entitled to judgment as a matter of law." *Powell v. Bunn*, 185 Or App 334, 338 (2002), *rev*  
6 *denied*, 336 Or 60 (2003).

7 **II. Argument**

8 **A. Under the applicable standards of judicial review, the agency's decision that**  
9 **the Partnership first acquired the Property on December 28, 1978 is based on an accurate**  
10 **interpretation of the appropriate law and is supported by substantial evidence in the**  
11 **record.**

12 The law that governs the Partnership's Measure 37 claim relating to its initial acquisition  
13 date of the Property prior to conveying the portion of the property that is the subject of Final  
14 Order "B" is the following: a) Measure 37; b) ORS 68.130 (1973 ed.) and c) ORS 93.020.<sup>3</sup> The  
15 parties agree that the scope of a Measure 37 waiver is limited by the date the current owner  
16 acquired the property. (Motion p. 3:9-11). Thus, the State's interpretation of Measure 37 is not  
17 at issue.

18 The parties do not agree, however, on the correct interpretation of the laws relating to the  
19 conveyances of real property from an individual partner to a partnership. The Partnership argues  
20 that the State did not properly apply the statutory presumption set forth in ORS 67.065(4)  
21 because it did not presume that the Partnership acquired the property in 1969. (Motion, p. 4:3-  
22 15). However, the applicable laws are those in effect at the time of the conveyance--ORS 93.020  
23 relating to conveyances of real property and ORS Chapter 68 (1973 ed.) entitled "Uniform

24 <sup>3</sup> Although the Partnership originally acquired all of the Property described in the Complaint in  
25 one transaction, the Partnership later conveyed a portion of the property to certain individuals in  
2006. This portion of the Property is discussed in part II.B of this Response and Cross-Motion.

1 Partnership Law.”<sup>4</sup> Chapter 67 of the ORS took effect in 1997, after The Partnership acquired  
2 the Property. The State did not interpret or apply these laws.

3 **1. ORS 93.020**

4 There are only two methods for conveying real property, by a valid written instrument or  
5 by operation of law. ORS 93.020<sup>5</sup>; *see, e.g. Martin v. Allbritton*, 124 Or. App. 345 (1993)  
6 [“Partial performance of an oral contract for the sale of real property may impel a court of equity  
7 to take the contract out of the statute of frauds”]. This has always been the law in Oregon;  
8 partnerships are not excluded. *Dodson v. Dodson*, 26 Or 349, 360 (1894). [Parol agreement  
9 between partners purporting to convert partnership property where property was purchased with  
10 partners separate assets was void under the Statute of Frauds.] Here, the only written instrument  
11 that qualifies under ORS 93.020 is the 1978 Deed. Therefore, the Partnership must prove that  
12 the Property was conveyed in 1969, if at all, by operation of law.

13 **2. Uniform Partnership Law**

14 The laws that apply to the Partnership’s claim that it acquired the Property in 1969 are  
15 governed by the earliest version of the Uniform Partnership Act (“UPA”) found at ORS, Chapter  
16 68 (1973 ed.)<sup>6</sup>. Section 68.130 of the ORS specifically governs the acquisition and character of  
17 partnership assets providing in pertinent part that “[a]ll property originally brought into the  
18 partnership stock or subsequently acquired by purchase or otherwise, on account of the  
19 partnership is partnership property.”

20 \_\_\_\_\_  
21 <sup>4</sup> The Uniform Partnership Act was contained in Chapter 68 until its repeal in 1997.

22 <sup>5</sup> No estate or interest in real property, other than a lease for term not exceeding one year, nor  
23 any trust or power concerning such property, can be created, transferred or declared otherwise  
24 than by operation of law or by a conveyance or other instrument in writing, subscribed by the  
25 party creating, transferring or declaring it, or by the lawful agent of the party under written  
authority, and executed with such formalities as are required by law.

26 <sup>6</sup> It appears that the earliest published version of Chapter 68 is contained in the 1973 edition of  
the ORS. No amendments were made to the significant portions of Chapter 68 from the 1953  
enactment of the ORS up to and including the 1973 edition.

1 The Partnership is correct that property purchased with partnership assets and for  
2 partnership purposes is presumed an asset of the partnership, even if it is taken in the name of an  
3 individual partner. *See, e.g. First Western Mtg. v. Hotel Gearhart*, 268 Or 613, 617 (1974).  
4 Stated in terms of ORS 93.020, the conveyance is implied by law because of the specific  
5 circumstances. However, where these factors do not exist, there is no legal implication that  
6 would supersede the writing requirement of ORS 93.020. *Dodson v. Dodson*, 26 Or at 360.

7 More particularly:

8 When land is purchased with partnership funds and for partnership purposes,  
9 there is an implication of law that the land is held for the partnership. But where  
10 it is purchased with the separate funds of the partners, it cannot, by a verbal  
11 agreement between themselves, be converted into copartnership property,  
12 because no trust in lands can be created, unless by writing, except such as arises  
or results by implication of law; and parol evidence is not admissible to prove  
any declaration of trust, or agreement of the parties for a trust, although it is  
received to establish a fact from which the law will raise or imply a trust.]  
*Dodson v. Dodson*, 26 Or at 360

13 The basis of this common law rule can be found in Oregon's legal history pertaining to  
14 the acquisition of partnership assets. Originally, a partnership was not permitted to hold legal  
15 title to real property. *Minter v. Minter*, 80 Or 369, 378 (1916); *Adams v. Church*, 42 Or 270,  
16 272-273 (1902). To protect all of the partners, property that had been purchased with partnership  
17 assets and for partnership purposes was converted, in equity, to the personal property of each  
18 partner. *Ibid* In effect, a trust was created in favor of the partners. *Adams* at 273. Although the  
19 purpose of the implied trust was to convert interest in real property, the conveyance occurred by  
20 operation of law and a writing was not required. As explained by the Supreme Court, the trust  
21 was implied to:

22 overcome the inequitable conduct of a person who takes money of his  
23 copartner under an oral contract of partnership, lets him into possession of  
24 the realty, accepts his labors for a long period of time, and finally  
renounces the relationship on the ground that there is no writing between  
them declaring the contract. *Minter* at 377.

25

1           The equitable doctrine permitting the conversion of property to a partnership by  
2 operation of law has remained a viable doctrine, even though partnerships may now take title to  
3 real property. *See, e.g. Sheppard v. Smith*, 116 Or App 267, 272 (1992) [Partnership acquired  
4 real property as a matter of law, even though title was held in partners' individual names  
5 because the partners treated it as an asset of the partnership in their partnership agreement, in  
6 their management of it and for tax purposes]. Notwithstanding this equitable doctrine, the basis  
7 for permitting an equitable conveyance has also survived and remains a threshold issue. If  
8 circumstances do not exist that would require an equitable fix, the conveyance is not implied  
9 and a conveyance must be through a valid written instrument. *See, e.g. Martin v. Martin*, 77 Or  
10 App 226, 229 (1986) [Property used in the partnership but not intended to be partnership  
11 property, remained the separate property of the individual partners.]. More specifically, if there  
12 is no evidence that the property was purchased by partnership assets and intended for a  
13 partnership purpose, the property is not an asset of the partnership absent a valid written  
14 instrument. ORS 93.0202; *Dodson v. Dodson*, 26 Or at 360. Here, the State's determination  
15 that the property did not become a partnership asset until it was conveyed to the partnership in  
16 writing is a correct interpretation of the law and is supported by substantial evidence in the  
17 Record.

18           **3.       The State's decision that the Property was conveyed to the Partnership in**  
19 **1969 is supported by substantial evidence in the record.**

20           The "question on review is not whether substantial evidence supports [plaintiff's] version  
21 of the facts but whether, after considering the whole record, substantial evidence supports the  
22 [State's] findings." *Garcia v. Boise Cascade Corp.*, 309 Or 292, 296 (1990). Here, the 1978  
23 Deed is substantial evidence that the Partnership acquired the Property on December 28, 1978  
24 from Ralph Donald Johnston, Gwendolyn Johnston, Donald Scott Johnston and Ginger Marie  
25 Johnston. (Record, §2, pp. 8-12, 65-69, and §3, pp. 70-72). The State's decision is further

1 supported by the September 23, 1977 fulfillment deed from Ralph and Esther May Johnston to  
2 Ralph Donald, Gwendolyn Jean, Donald Scott and Ginger Marie Johnston. (Record, §3, pp. 62-  
3 64). The 1977 Deed demonstrates that these four individuals owned the property in 1977, not the  
4 partnership. Otherwise, the deed would have conveyed the Property to the Partnership, which it  
5 did not.

6 Notwithstanding that the appropriate standard of review does not recognize whether  
7 evidence in the record supports a petitioner's versions of the facts, none of the information  
8 provided by Plaintiffs refutes the clear and unambiguous language of these deeds. The  
9 Partnership's sole argument is that the parties intended for the Property to be a partnership asset  
10 in 1969. However, there is no evidence in the record that the Property was conveyed, by  
11 operation of law, in 1969. The Record contains a quitclaim deed dated December 28, 1978, by  
12 which Ralph Donald Johnston, Gwendolyn Johnston and Donald Scott Johnston conveyed the  
13 Property to the Partnership as well as a Correction Quitclaim Deed dated April 22, 1983, by  
14 which Ginger Marie Johnston was added as a grantor. Record, §3, p. 70-72. The 1978 Deed and  
15 its 1983 Correction are substantial evidence that the Partnership acquired the property on  
16 December 28, 1978. The Partnership does not explain how it obtained the Property in 1969, yet  
17 it was conveyed in 1977 to the three partners, individually, and to Ginger Marie Johnston, a  
18 nonpartner.

19 The Partnership argues that this Court should consider the Partnership Agreement and  
20 affidavits submitted in support of its Motion as evidence that the Property was conveyed in 1969.  
21 Again, notwithstanding the appropriate standard of review, these documents do not refute the  
22 validity of the 1978 Deed.

23 There is nothing in the Partnership Agreement that refutes the unambiguous language of  
24 the 1978 Deed. The Partnership Agreement does not identify the date the oral partnership was  
25 created, only that it is a partnership consisting of Ralph Donald Johnston, Gwendolyn Johnston

1 and Donald Scott Johnston and that it was created at some point in time following Donald Scott  
2 Johnston's 1969 high school graduation. (Record, § 3, page 28) Likewise, Article III of the  
3 Partnership Agreement which purports to define the "Term of the Partnership" does not define  
4 the date the partnership commenced on because a space provided for the date is blank. (Record,  
5 § 3, p. 29). Section 5.1 of the Partnership Agreement refers to the capital contributions made by  
6 each partner and identifies them as the assets listed on Exhibit A. (Record, § 3, pgs. 29-30).  
7 Exhibit A does identify land, but only as "home place" and "Dead Indian." (Record, §3, p 45) It  
8 is impossible to ascertain what property is actually identified in Exhibit A from this description.  
9 Moreover, there is no specific information as to the date the Partnership purportedly acquired  
10 this property. The Partnership Agreement does not controvert that the Property was conveyed to  
11 the Partnership, for the first time, by the 1978 Deed.

12 Similarly, none of the affidavits refute the unambiguous language of the 1978 Deed (or  
13 the 1977 Fulfillment Deed). The affidavits contained in the Record from all three partners and a  
14 fourth affidavit from a person purporting to be a former employee of the Klamath Production  
15 Credit Association. (Record §3, p. 51 (affidavit of Ralph Donald Johnston dated July 11, 2006),  
16 p. 52 (affidavit of Gwendolyn Johnston dated July 11, 2006), p. 53 (affidavit of Donald Scott  
17 Johnston, dated July 11, 2006) and p. 54 (affidavit of Glenn Haskins, dated July 24, 2006). Each  
18 affidavit was drafted in 2006 and submitted in support of the Partnership's Measure 37 claim.  
19 No other information corroborating the Johnstons' claim was submitted, such as evidence of  
20 income and property taxes, records of repairs and maintenance made on the property or  
21 documents relating to mortgage payments. Indeed, the Partnership did not produce such  
22 information because no such information exists. (Record, § 3, p.23, Letter from Michael Spencer  
23 explaining that the Partnership does not have any other documentation of its purported  
24 acquisition).

25

1           The fourth affidavit, submitted by a person purporting to be a former employee of  
2 Klamath Production Credit Association, only declares that the Johnstons were his clients, that the  
3 property appeared to be partnership property and that loans from his former employer were used  
4 to improve the property. Again, there is no corroborating evidence in support of this fourth  
5 affidavit. These affidavits do not contradict the 1978 Deed. Accordingly, the Deed is substantial  
6 evidence that the Partnership acquired the Property in 1978 and summary judgment in the State's  
7 favor is appropriate.

8           **B.       The State's finding that the Partnership is no longer an owner of Tax Lot**  
9 **100, Section 32 and Tax Lot 300 is supported by substantial evidence in the record**

10           The State determined in Final Order B that on the date the Partnership made its written  
11 demand for compensation, Donald Scott and Gwendolyn Johnston were the owners of Tax Lot  
12 100, Section 32 and Tax Lot 300 (hereinafter referred to as "Parcel B"). Therefore, the  
13 Partnership was not a present owner of the Parcel B pursuant to ORS 197.352(11)(C) entitled to  
14 relief under Measure 37. The State reached this conclusion based on the April 20, 2006 Bargain  
15 and Sale Deed contained in the Record by which the Partnership conveyed Parcel B to "D. Scott  
16 Johnston, Gwen Johnston and Danny L. Johnston" ("2006 Deed"). (Record, §4, pp.11-13). On  
17 November 20, 2006, the State issued its draft report to the claimants and all interested parties in  
18 which it stated that the individual partners, not the partnership, were the owner of Parcel B.  
19 (Record, §4, pp. 20-30)

20           In response to the draft report, claimants submitted a judgment dated one day after the  
21 draft report was issued wherein the Klamath County Circuit Court ordered the 2006 Deed  
22 rescinded based on a stipulated judgment between the parties to that action ("2006 Judgment").  
23 (Record, §4, p. 11-13; Motion, Ex. A) The only parties to the 2006 Judgment were the  
24 Partnership, Sterling Savings Bank, Donald Scott Johnston, Gwendolyn Johnston and Danny L.  
25 Johnston. (Id.) The Partnership argues that the State is bound by the 2006 Judgment and must

1 determine that the 2006 Deed was rescinded. However, the Partnership’s argument is not an  
2 accurate statement of the law because strangers to the action are not bound to a judgment.

3 It is a fundamental rule of law that “the record of a judgment or decree in personam or  
4 quasi in rem can affect only parties and privies.”<sup>7</sup> *Morrison v. Holladay*, 27 Or 175, 180 (1895)  
5 cited with approval in *Bartholomae Oil Corp. v. Booth*, 146 Or 154, 162 (1934) [In a suit to  
6 establish the plaintiff’s ownership interest in certain real property, the trial court erred when it  
7 allowed the defendant to introduce a judgment from a prior action that decreed the defendant’s  
8 ownership interest in the same property because plaintiff was not a party to the prior action.]  
9 Here, no circumstances exist that would require the State to be bound by the 2006 Judgment or to  
10 defer to the findings made therein. The State is merely a stranger to the 2006 Judgment and is  
11 not required to accept that a mutual mistake or fraud occurred which would, as a matter of law,  
12 validate the rescission granted in the judgment. *Gardner v. Meiling*, 280 Or. 665 (1977)  
13 [Rescission not permitted absent evidence of fraud, misrepresentation or mistake]. Accordingly,  
14 the State was not confronted with any compelling reason to disregard the 2006 Deed.

15 The case of *McAllister v. Charter First Mortg., Inc.*, 279 Or 279, 285 (1977) is  
16 appropriately applied to the instant case because it similarly involved an attempt by the plaintiffs  
17 to introduce decree of rescission that had been issued in a prior, unrelated litigation. In  
18 *McAllister*, plaintiff purchasers of real estate sued their lender because it failed to conduct a well  
19 pump test on real estate that the plaintiffs intended to purchase. If the lender defendant had  
20 performed its contractual obligation, the test would have revealed that the well was nearly dry  
21 and the plaintiffs would not have purchased the property. The plaintiffs had successfully sued

22 \_\_\_\_\_  
23 <sup>7</sup> Parties and privies are defined as “those who have the right to adduce testimony or cross-  
24 examine the witnesses introduced by the other side, or who have a right to defend the action or  
25 suit, or to appeal from the judgment or decree, or those who claim by mutual succession or  
relationship to the same rights of property or subject matter. All other persons are strangers, and  
the judgment is not binding upon them...” *Morrison v. Holladay*, 27 Or at 180.

1 the sellers of the property in a prior suit and obtained a judgment rescinding the real estate  
2 purchase contract. In the subsequent suit, the defendant lender asserted that the plaintiffs were  
3 estopped from suing the lender because they had already obtained a decree rescinding the sale.  
4 The trial court struck the defendant's *res judicata* defense and the plaintiffs ultimately won at  
5 trial. The defendant appealed on the basis of the trial court's striking of its defense.

6 The Supreme Court affirmed the trial court's decision and explained that *res judicata* was  
7 not a viable defense because different issues were adjudicated in the prior suit and there had not  
8 been a final judgment or prejudiciary dismissal against the lender defendant. Therefore, the  
9 judgment in the prior suit was not binding on the lender defendant and it could not use the  
10 judgment to estop the plaintiff from asserting that the sale ever occurred - a foundational fact  
11 necessary to the plaintiff's case in the subsequent case.

12 *McCallister* is immediately applicable here where the Partnership seeks to impose its  
13 decree of rescission on the State to force it to, basically, pretend that the 2006 Deed never  
14 occurred. The State is not required to make such a finding because it was not a party to the  
15 action in which the Judgment was rendered and is not in privity with any of the parties to the  
16 action. Therefore the State is not bound by the 2006 Judgment<sup>8</sup>.

17 Since the Partnership did not submit any other information that would enable a  
18 reasonable person to determine that the 2006 Deed had been rescinded, i.e. because it was a  
19 product of fraud, misrepresentation or mutual mistake, the State's determination that the  
20 partnership conveyed the Subproperty to the individuals is supported by substantial evidence.  
21 *Gardner v Meiling*, 280 Or 665 (1977). Accordingly, the Partnership is not a present owner of  
22

23  
24 <sup>8</sup> That the State should not be bound to judgments altering deeds in Measure 37 claims is also  
25 extremely significant as a matter of policy. Otherwise, claimants who would not otherwise  
qualify under Measure 37 because they are no longer owners of private property could obtain  
voluntary judgments rescinding their prior conveyance solely to qualify for Measure 37 relief.

1 the Subproperty pursuant to ORS 197.352(11)(C) and summary judgment in the State’s favor is  
2 appropriate.

3 **C. The Partnership does not have a separate cause of action for compensation**  
4 **under Subsection 6 of Measure 37 because the State acted within 180 days.**

5 The Partnership asserts that a literal interpretation of ORS 197.352(6) permits it to sue for  
6 compensation because the State did not waive all the statutes and regulations that may have  
7 restricted its present use of the property. This interpretation of Section 6 is so sweeping that it  
8 negates the clear intent of the statute to require public entities in the first instance to decide the  
9 merits of compensation claims and choose the relief to be provided. Interpreting Section 6 in  
10 isolation violates the basic rule of statutory construction—the first level analysis is text *and*  
11 *context*.

12 Without the context of Measure 37 as a whole, the text of Section 6 is too vague and  
13 ambiguous to be enforced. For example, Section 6 does not specify which land use regulations  
14 are at issue in the “cause of action” or even against whom the action may be asserted.

15 *If a land use regulation continues to apply to the subject property more than 180*  
16 *days after the present owner of the property has made written demand for*  
17 *compensation under this section, the present owner of the property, or any interest*  
18 *therein, shall have a cause of action for compensation under this section in the*  
*circuit court in which the real property is located, and the present owner of the*  
*real property shall be entitled to reasonable attorney fees, expenses, costs, and*  
*other disbursements reasonably incurred to collect the compensation.*

19 ORS 197.352 (6) (emphasis added).

20 A literal reading of Section 6 alone grants property owners a cause of action based on any  
21 land use regulation but identifies no one to sue. The definition of qualifying regulations in  
22 Section 1, the exceptions in Section 3, and the delegation of responsibility to the public entities  
23 that enforce qualifying regulations in Sections 1, 4, 5 and 7-10 provide critical context for a  
24 reasonable interpretation of Section 6. Because Measure 37 provides for state agencies to act on  
25 Measure 37 demands, the APA is also context for interpretation of Measure 37.

1 Measure 37 requires property owners to submit a demand for compensation to public  
2 entities (§§ 4, 5, 6), and permits public entities to adopt “procedures for the processing of  
3 claims” (§ 7). Measure 37 also provides that public entities have the option, in their discretion,  
4 either to pay compensation or grant alternate “waiver” relief to a property owner who submits a  
5 valid written demand (§§ 8, 10). In this context, Section 6 plainly functions as a secondary  
6 remedy in the event a public entity fails to process a demand and choose the type of relief to be  
7 granted—within 180 days. Furthermore, the availability of a court action and the provision for  
8 attorney fees creates an incentive for the public entity to decide claims and to do so within 180  
9 days. Construing Section 6 as a second chance to make the same claim for compensation is not  
10 compelled by the text and context of the statute, renders much of Measure 37 superfluous,  
11 nullifies the established remedy under the APA, and needlessly complicates a process advertised  
12 to the voters in 2004 as streamlined.<sup>9</sup>

13 Both the Circuit Courts of Jefferson and Josephine Counties have agreed that where an  
14 agency has issued a timely Measure 37 waiver, there is no separate cause of action under  
15 Subsection 6 of Measure 37. In the cases of *Pondelick v. County of Josephine, et. al*, Case No.  
16 06-CV-0622 and *Perrott v. Josephine County*, Case No. 06-CV-0677, the court granted the  
17 State’s Motion to Strike the plaintiffs’ causes of action for compensation under Subsection 6 and  
18 ruled that the plaintiffs’ right to relief was limited to review of the State’s order under the APA.

19 <sup>10</sup> Similarly, in the matter of *Hal Pruitt v. Jefferson County*, Jefferson County Circuit Court  
20 Case No. 06CV0029, Judge Thompson granted the county’s summary judgment motion/motion  
21 to dismiss on the plaintiff’s separate cause of action for compensation under Subsection 6

22 \_\_\_\_\_  
23 <sup>9</sup> Search for “streamline” in the 2004 Voters’ Pamphlet, available on the Secretary of State’s  
24 website at [http://www.sos.state.or.us/elections/nov22004/guide/meas/m37\\_fav.html](http://www.sos.state.or.us/elections/nov22004/guide/meas/m37_fav.html).

25 <sup>10</sup> Judge Baker’s letter opinions in *Pondelick v. County of Josephine, et. al*, Case No. 06-CV-  
0622 and *Perrott v. Josephine County*, Case no. 06-CV-0677 are attached, collectively and  
26 respectively, as Exhibit “1” to the State’s Memo in Support of its Response to Plaintiffs’ Motion  
for Summary Judgment and the State’s Cross-Motion for Summary Judgment.

1 because, in part, the court found that the county had issued a waiver and the only means to  
2 challenge that waiver was by a writ of review.<sup>11</sup>

3 Finally, the cases cited by the Partnership are inapposite because they do not involve  
4 petitions for judicial review of a Final Order. Rather, they involve factual scenarios where the  
5 agency acts, essentially, as a participant, as opposed to an administrator. For example, in  
6 *Premier Technology v. Oregon State Lottery*, 136 Or App 124 (1995), the state agency had  
7 entered into a contract on behalf of the state and allegedly breached its obligations on that  
8 contract. The case had nothing to do with whether a state agency had erred in making an  
9 administrative decision. *Premiere Technology* has no application to the instant case. [Plaintiff's  
10 citation to *PEBB v. OHSU*, 205 Or App 64 (2006) is similarly misplaced. None of the causes of  
11 action brought in *PEBB* involved a request to the Circuit Court to review an agency's decision in  
12 an other than contested case and to award damages if the agency had erred.]

13 **D. The State is not required to pay compensation to the Partnership, regardless of**  
14 **the outcome of this matter.**

15 The State also moves for judgment on the Partnership's compensation claim because the  
16 Partnership is not entitled to compensation as a matter of law. Even if this court determines that  
17 the Partnership is entitled to a remedy, the State is permitted authorized under Measure 37 to  
18 chose to grant a waiver as opposed to compensation. The language and structure of Measure 37  
19 clearly show that the voters intended to give public entities the choice between paying  
20 compensation and waiving land use regulations. The statute provides:

21 (8) Notwithstanding any other state statute or the availability of funds  
22 under subsection (10) of this section, in lieu of payment of just compensation  
23 under this section, the governing body responsible for enacting the land use  
24 regulation may modify, remove, or not to 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.

25 <sup>11</sup> Judge Thompson's letter opinion in *Pruitt v. Jefferson County*, Jefferson County Case No.  
06CV0029 is attached hereto as Exhibit "2".

\* \* \* \* \*

1 (10) Claims made under this section shall be paid from funds, if any,  
2 specifically allocated by the legislature, city, county, or metropolitan service  
3 district for payment of claims under this section. Notwithstanding the availability  
4 of funds under this subsection, a metropolitan service district, city, county, or  
5 state agency shall have discretion to use available funds to pay claims or to  
6 modify, remove, or not apply a land use regulation or land use regulations  
7 pursuant to subsection (6) of this section. If a claim has not been paid within two  
8 years from the date on which it accrues, the owner shall be allowed to use the  
9 property as permitted at the time the owner acquired the property.

6 ORS 197.352. Thus, section 8 generally grants the public entities to which a demand for  
7 compensation is submitted the option to pay or provide alternate relief. Section 10 makes it clear  
8 that the option is wholly within the public entities' discretion and specifically applies to claims  
9 brought under section 6.<sup>12</sup>

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22 <sup>12</sup> If the text and context did not clearly indicate that the choice of relief is vested in the public  
23 entities, then a court would review the legislative history. *See, e.g.* the Voters' Pamphlet's  
24 explanatory statement for Measure 37: "If a property owner proves that a land use regulation  
25 restricts the use of the owner's property, and reduces its value then *the government responsible  
for the regulation will have a choice*: pay the owner of the property an amount equal to the  
reduction in value or modify, change or not apply the regulation to the owner's property."  
[http://www.oregon.gov/LCD/MEASURE37/legal\\_information.shtml#Information About the Election](http://www.oregon.gov/LCD/MEASURE37/legal_information.shtml#Information%20About%20the%20Election)  
(site last visited on April 18, 2007; emphasis added).

1 **CONCLUSION**

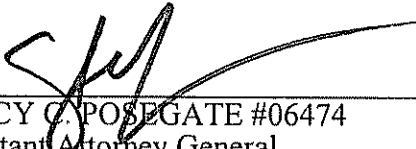
2 Summary judgment is appropriate in the State's favor because it correctly determined that  
3 the Partnership no longer owns Property B which is the basis of the State's Final Order B  
4 denying the Partnership's Measure 37 claim. The Partnership originally acquired the entire  
5 Property on December 28, 1978 but subsequently conveyed it to two individual partners and  
6 nonpartner on April 20, 2006. As a result, the Partnership lost its ownership status.

7 The State is also entitled to summary judgment on Plaintiff's Measure 37 claim for  
8 compensation because review of Final Order B is exclusively within the APA. Moreover,  
9 Measure 37 expressly permits the State to elect to grant a waiver as opposed to compensation.  
10 Accordingly, even if this Court determines that Partnership is entitled to relief, as a matter of law  
11 the State is not required to pay the Partnership compensation, instead it may grant a waiver in  
12 accordance with Measure 37.

13 DATED this 18<sup>th</sup> day of July, 2007.

14 Respectfully submitted,

15 HARDY MYERS  
16 Attorney General

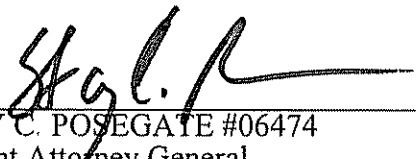
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1 **CERTIFICATE OF SERVICE**

2 I certify that on July <sup>18<sup>th</sup></sup> 2007, I served the foregoing STATE OF OREGON'S  
3 AMENDED CROSS-MOTION FOR PARTIAL SUMMARY JUDGMENT and AMENDED  
4 MEMORANDUM OF LAW IN SUPPORT OF ITS RESPONSE TO PLAINTIFF'S MOTION  
5 FOR SUMMARY JUDGMENT AND ITS PARTIAL CROSS MOTION FOR SUMMARY  
6 JUDGMENT upon the parties hereto by the method indicated below, and addressed to the  
7 following:

8  
9 Michael L. Spencer  
10 Attorney at Law  
11 409 Pine Street  
12 Klamath Falls, OR 97601

\_\_\_ HAND DELIVERY  
13  MAIL DELIVERY  
14 \_\_\_ OVERNIGHT MAIL  
15 \_\_\_ TELECOPY (FAX)

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