

HARDY MYERS  
Attorney General



PETER D. SHEPHERD  
Deputy Attorney General

DEPARTMENT OF JUSTICE  
TRIAL DIVISION

July 31, 2007

Honorable James L. Rhoades  
Circuit Court Judge  
Marion County Courthouse  
P. O. Box 12869  
Salem, Oregon 97309-0869

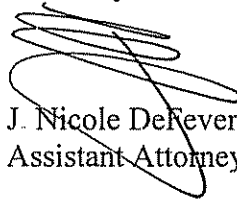
Re: *Smith, Donald et al v. State*  
Marion County Circuit Court No. 07C10683

Your Honor:

Enclosed for filing please find Respondent's Motion for Summary Judgment;  
Memorandum of Points and Authorities, Declaration of J. Nicole DeFever and The Record in the  
referenced matter.

A postcard is enclosed for the Clerk's use in notifying me of the action taken.

Respectfully,



J. Nicole DeFever  
Assistant Attorney General

TRIS4896.DOC/JND/tr1  
Enclosures  
cc: John A. Rankin  
Client

1  
2  
3  
4 IN THE CIRCUIT COURT OF THE STATE OF OREGON  
5 FOR THE COUNTY OF MARION

6 DONALD R. SMITH and MARTHA E.  
7 SMITH, and DON SMITH'S TREE FARM,  
8 INC., an Oregon Corporation,

9 Petitioners,

10 v.

11 STATE OF OREGON, by and through its  
12 DEPARTMENT OF ADMINISTRATIVE  
13 SERVICES and DEPARTMENT OF LAND  
14 CONSERVATION AND DEVELOPMENT,

15 Respondent.

Case No. 07C10683

Honorable James L. Rhoades

RESPONDENT'S MOTION FOR SUMMARY  
JUDGMENT; MEMORANDUM OF POINTS  
AND AUTHORITIES

(Oral Argument Requested)

16  
17 **ORAL ARGUMENT REQUESTED**

18 Respondent requests oral argument on this Motion for Summary Judgment and estimates  
19 15 minutes will be required. Official court reporting services are requested.

20 **INTRODUCTION**

21 The Petitioners in this Measure 37 case are two individuals who have no present  
22 ownership interest in the real property at issue and one corporation that does own the property,  
23 and has been granted the appropriate Measure 37 relief. The individual petitioners, Donald and  
24 Martha Smith, acquired the real property at issue in 1945. In 1992, they transferred their interest  
25 in the property to Don Smith's Tree Farm Inc.

26 On May 30, 2006, the corporation and Donald and Martha Smith submitted Measure 37  
demands asserting that they wish to divide the property for residential development. (*Record*  
§2.) On November 22, 2006, the State granted the corporation's claim and waived certain land  
use regulations from the 1992 date of acquisition. (*Record* §6 pp 1-3, "Final Order A-

1 M129412.”) That same date, the State *denied* Donald and Martha Smith’s claims because  
2 neither of them is a present owner of the property. (*Record* §6 pp 4-5, Final Order B-M129412.)  
3 The petitioners disagree with the State’s decision and timely filed a Petition for Judicial Review  
4 (“Petition”) on January 22, 2007 alleging that respondent erred in its interpretation of Measure  
5 37.

6 Petitioners acknowledge that the corporation currently owns the property. Their  
7 authorized agent, John Rankin, writes that “the Smiths executed the Bargain and Sale Deed  
8 moving the title of the family farm to Don Smith’s Tree Farm.” (*Record* §2 p 3-4.) A copy of the  
9 deed is attached to their demand, which conveys the property to Donald R. Smith Tree Farms,  
10 Inc. (*Record* §2 p 40.) The title report, also attached to their Measure 37 claim, similarly lists  
11 Donald R. Smith Tree Farms Inc. as the “Owner” of the property. (*Record* §2 p 16.)

12 The individual petitioners assert, however, that they are entitled to Measure 37 relief  
13 because they have an interest in the property. (*See Petition* ¶ 8.) Specifically, the relief  
14 demanded only applies to Final Order B-M129412 regarding Donald and Martha Smith. The  
15 Petition’s sole request is that this court find that they “acquired the property on October 31, 1945  
16 and are ‘owners’ as that terms [sic] is defined in ORS 197.352.” (*Id*) No relief is requested for  
17 the corporation.

18 In sum, the State requests this court grant summary judgment in its favor, finding that  
19 Final Order B-M129412 is supported by substantial evidence and a proper interpretation and  
20 application of the law in correctly determining that: (1) Donald and Martha Smith are not entitled  
21 to Measure 37 relief because they are not present owners of the property and do not have an  
22 interest that is compensable under Measure 37.

### 23 MOTION FOR SUMMARY JUDGMENT

24 The material facts are undisputed. The parties agree that the sole dispute in this case is a  
25 question of law -- whether respondent properly interpreted and applied ORS 197.352 (11) (C),  
26 the Measure 37 definition of “owner.” Respondent State of Oregon, by and through its

1 Department of Land Conservation and Development (“DLCD”) and Department of  
2 Administrative Services (“DAS”) (collectively “the State”) move for summary judgment in its  
3 favor.

4 In support of this Motion, respondent relies upon Measure 37, the Administrative  
5 Procedures Act, ORCP 47 B, the files and record of this case, the agency *Record* lodged with the  
6 court on July 31, 2007, and the following Points and Authorities.

7 **POINTS AND AUTHORITIES**

8 **A. Jurisdiction**

9 This court has jurisdiction because this is a petition for review in other than a contested  
10 case. Petitioners have petitioned for judicial review under the Oregon Administrative Procedures  
11 Act (APA), ORS 183.310, et seq. ORS 183.484 is the sole and exclusive remedy available for  
12 review of a state agency orders in other than contested cases. ORS 183.480 (2).

13 When “the decision of which judicial review is sought is DLCD’s determination whether  
14 claimants had any entitlement at all” then “[j]urisdiction lies in the circuit court.” *Emmel v.*  
15 *DLCD*, \_\_\_ Or App \_\_ (July 5, 2007); *see also Corey v. DLCD*, 210 Or App 542, 551-52 (2007)  
16 (jurisdiction is in the Court of Appeals when the claim is approved and the issue is the extent of  
17 the waiver).

18 The State denied Donald and Martha Smith’s Measure 37 claim in Final Order B-  
19 M129412. (*Petition* ¶ 5; *Record* § 6.) Petitioners Donald and Martha Smith challenge the  
20 State’s Final Order B-M129412 under ORS 183.484, alleging that the State erred in the  
21 following ways:

22 The property referred to in paragraph 1 of this petition was actually  
23 acquired by the petitioner [sic] DONALD R. SMITH and  
24 MARTHA E. SMITH on October 31, 1945, and the said  
25 petitioners have had a vested interest, as described in ORS197.352,  
in the subject property continuously from that date to today’s date.  
Respondent’s findings to the contrary are a misinterpretation of  
law, and are in error.

WHEREFORE, petitioner [sic] petitions the court for a judgment:

- A. Remanding respondent's order and requiring respondent to provide that petitioners DONALD R. SMITH and MARTHA E. SMITH acquired the property on October 31, 1947 and are "owners" as that terms [sic] is defined in ORS 197.352; AND
- B. Awarding petitioner [sic] their reasonable attorney fees, costs and disbursements incurred in this matter, pursuant to ORS 183.497.

(*Petition* ¶ 8 and prayer for relief). The Petition alleges error only in the State's legal interpretation of Measure 37's definition of "owner" as applied to Donald and Martha Smith. *Id*. The State's Final Order B-M129412 is limited to Donald and Martha Smith and denies their claim. It is an order in other than a contested case because it denies them any entitlement under Measure 37, and jurisdiction lies in the circuit court. (*Record* §6.)

#### **B. Measure 37 Overview**

A property owner qualifies for Measure 37 relief if: (1) a public entity enacts or enforces a "land use regulation" after December 2, 2004, that (2) restricts the owner's use and (3) has the effect of reducing the fair market value of the owner's property. ORS 197.352 (1). Section 11 defines "owner" as "the present owner of the property, or any interest therein." ORS 197.352(11)(C). After determining that an owner submitted a timely, valid written demand, the public entity has the option to pay compensation or to "modify, 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." ORS 197.352 (8) and (10).<sup>1</sup>

#### **C. Administrative Process**

Measure 37 permits public entities to adopt procedures for processing claims. ORS 197.352 (7). DAS adopted procedural rules, found at OAR 125-145-0010 to 125-145-0105. These rules cover such issues as minimum requirements for a claim against the State, notice and third party participation, and the contents of the administrative record.

---

<sup>1</sup> Allowing the owner to use the property in a way that would otherwise be prohibited by land use regulations is commonly referred to as granting a Measure 37 "waiver."

1           When DAS receives a claim, it provides written notice of the claim to neighboring  
2 landowners, certain neighborhood or community organizations, and anyone who requests notice.  
3 OAR 125-145-0080. This provision is consistent with the notice provisions of ORS 215.416  
4 regarding notice of permits. Persons receiving notice, or any other person, may submit  
5 comments, evidence and information within ten days. OAR 125-145-0080 (2), (3); *Record* §3.

6           DAS initially reviews Measure 37 claims and forwards them to the appropriate state  
7 agency, *i.e.* the “regulating entity” that appears to have enacted or enforced a relevant land use  
8 regulation. OAR 125-145-0090. The regulating entity, in this case DLCD, investigates and  
9 analyzes the claim and issues a draft report. OAR 125-145-100 (1). The draft report provides  
10 the State’s preliminary determination on the necessary elements of the claim, including  
11 timeliness of the demand, ownership, the land use regulations that are the basis of the claim, the  
12 effect of relevant land use regulations on the property’s fair market value, and applicable  
13 exemptions, if any. OAR 125-145-100 (2). The draft report on petitioner’s demand in this case  
14 is in the *Record* § 4.

15           The draft report is made public on the internet and copies are mailed to the claimant, and  
16 any persons who submitted comments or requested notice. OAR 125-145-100 (1). After a ten-  
17 day comment period, and based in part on the comments received (*Record* § 5), DLCD and DAS  
18 issue a final report and order. (*Record* § 6.) OAR 125-145-100 (3)-(6). The final orders are  
19 served on any persons who received copies of the draft report or submitted comments on the  
20 draft report. DLCD also makes its final orders public by posting them on its website  
21 ([http://www.oregon.gov/LCD/MEASURE37/final\\_staff\\_reports\\_2006.shtml](http://www.oregon.gov/LCD/MEASURE37/final_staff_reports_2006.shtml)).

22           **D. Standard of Review**

23           In a proceeding pursuant to ORS 183.484, the court determines as a matter of law  
24 whether a final order is supported by substantial evidence and a proper interpretation and  
25 application of the law. ORS 183.484 (5); *Powell v. Bunn*, 185 Or App 334, 339 (2002), *rev*  
26

1 *denied* 336 Or 60 (2003).<sup>2</sup> Thus, in deciding this motion for summary judgment, the only  
2 questions presented are: (1) whether the factual findings in the final orders are supported by  
3 substantial evidence in the record and (2) whether the final orders are based on erroneous  
4 interpretations or applications of the law.<sup>3</sup>

5 The Oregon Supreme Court has explained that judicial review of the former question is  
6 limited in scope to determining whether substantial evidence supports an agency's factual  
7 findings. Thus, the question before a circuit court "is limited to whether the evidence would  
8 permit a reasonable person to make the determination that the agency made in the particular  
9 case." *Norden v. Water Resources Dep't*, 329 Or 641, 649 (2000). As noted below, however,  
10 the parties have agreed, in their pleadings, to undisputed facts that are sufficient for  
11 determination of the present summary judgment motion. Accordingly, this Court need consider  
12 only the legal significance of those facts.

13 Judicial review of the State's interpretation of Measure 37 uses the same methodology  
14 that applies to any statute. *PGE v. Bureau of Labor and Industries*, 317 Or 606, 612 n 4 (1993)  
15 (three-part methodology applies "not only to statutes enacted by the legislature, but also to the  
16 interpretation of laws and constitutional amendments adopted by initiative or referendum"). The  
17 objective is to discern the intent of those who enacted the law, in this case, the Oregon voters.  
18 "The best evidence of the voters' intent is the text of the provision itself. \* \* \* The context of the  
19 language of the ballot measure may also be considered; however, if the intent is clear based on  
20 the text and context of the constitutional provision, the court does not look further." *Stranahan v*

21  
22

---

23 <sup>2</sup> The APA provides: "Substantial evidence exists to support a finding of fact when the record,  
24 viewed as a whole, would permit a reasonable person to make that finding." ORS 183.484 (5)  
25 (c). The "record," for purposes of a petition for review of an order in other than a contested case,  
is the record presented to circuit court. *Norden v. Water Resources Dept.*, 329 Or 641, 649  
(2000).

26 <sup>3</sup> See ORS 183.484(5)(a) (describing judicial review for erroneous interpretations of law); ORS  
183.484(5)(b) (describing judicial review for unlawful exercise of agency discretion).

1 *Fred Meyer, Inc.*, 331 Or 38, 56 (2000) (quoting *Roseburg School Dist v. City of Roseburg*, 316  
2 Or 374, 378 (1993)).<sup>4</sup>

3 **E. Undisputed Facts**

4 The State’s Final Staff Report and Recommendation (*Petition*, Exhibit B; *Record* § 6)  
5 sets forth the factual findings that form the basis for denial of petitioners’ demand. Petitioners  
6 and respondent agree that the following material facts are undisputed:

7 1. The property at issue is 91.85 acres in Clackamas County, commonly identified as  
8 Township 3S, Range 3E, Section 14, Tax Lot 900 (*Petition* ¶ 1; *Record* § 2 pp 9, 16, 41; *Record*  
9 § 6, p 1).<sup>5</sup>

10 2. Petitioners Donald and Martha Smith acquired the property on October 31, 1945  
11 by warranty deed. (*Petition* ¶ 2; *Record* § 2 pp 20-21; *Record* § 6 p 8.)

12 3. Don Smith’s Tree Farm, Inc. acquired the property from Donald and Martha  
13 Smith on September 4, 1992 by bargain and sale deed. (*Petition* ¶ 3, Exhibit A, *Record* §2 pp 3-  
14 4, 16, 29, 33, 40; *Record* § 6 p 8.)

15 4. Don Smith’s Tree Farm, Inc. is an active Oregon corporation registered with the  
16 Secretary of State. (*Petition* ¶ 2; *Record* §2 p 42-43.)

17 5. For purposes of the this motion for summary judgment, the State does not dispute  
18 petitioners’ allegation that Donald and Martha Smith are the sole shareholders of Don Smith’s  
19 Tree Farm, Inc. (*Petition* ¶ 2.)

20 6. On May 30, 2006, Don Smith’s Tree Farm, Inc., Donald Smith and Martha Smith  
21 submitted a written Measure 37 demand to the State seeking compensation for loss in value

22 \_\_\_\_\_  
23 <sup>4</sup> Only if the voters’ intent is not clear does the court examine the history of the provision.  
24 *Stranahan*, 331 Or at 56, citing *Ecumenical Ministries v. Oregon State Lottery Comm.*, 318 Or  
25 551, 559 (1994). Legislative history of ballot measures consists of information available to the  
26 voters “that disclose the public’s understanding of the measure.” *Ecumenical Ministries*, 318 Or  
at 560 n 8 (e.g. ballot title, voters’ pamphlet arguments, news reports and editorial comment).  
<sup>5</sup> Final Order B-M129412, which incorporates the Final Staff Report and Recommendation, was  
submitted by petitioner as part of Exhibit B to the Petition for Review. The same document is  
included in the *Record* as Section 6. Respondent’s Memorandum cites to the *Record*.

1 allegedly resulting from land use regulations enacted or enforced after they acquired the land.  
2 (*Petition* ¶ 3, Exhibit A; *Record* § 2.)

3 7. On November 22, 2006, the State issued Final Order A, granting the corporation's  
4 claim, and waiving certain land use regulations from its September 4, 1992 date of acquisition.  
5 (*Petition* ¶ 5, *Record* §6 pp 1-3, 6-14, Final Order A-M129412 and Final Staff Report and  
6 Recommendation.)

7 8. On November 22, 2006, the State issued Final Order B, denying Donald and  
8 Martha Smith's claims because neither of them is a present owner of the property. (*Record* §6  
9 Final Order B-M129412.) (*Petition* ¶ 5; *Record* §6 pp 4-14, Final Order B-M129412 and Final  
10 Staff Report and Recommendation.)

## 11 ARGUMENT

12 **A. The State properly determined that neither Donald Smith nor Martha Smith are the**  
13 **“owner” of the property as that term is defined in ORS 197.352(11)(C) because they**  
14 **are not present owners of a property interest that is subject to land use regulations**  
15 **that both restrict use and reduce value.**

16 The concept of property ownership is fundamental to Measure 37. “Owner” is  
17 specifically defined as “the **present owner** of the property, or **any interest therein.**” ORS  
18 197.352(11)(c) (emphasis added). Section 1 of Measure 37 defines who may have a claim for  
19 Measure 37 relief:

20 If a public entity enacts or enforces a new land use regulation or  
21 enforces a land use regulation enacted prior to December 2, 2004,  
22 that restricts the use of private real property or any interest therein  
23 and has the effect of reducing the fair market value of the property,  
24 or any interest therein, then the owner of the property shall be paid  
25 just compensation.

26 ORS 197.352(1). Thus, a claimant qualifies for Measure 37 relief only if: (1) the  
27 claimant has an interest in private real property; (2) a land use regulation restricts the use of  
28 claimant's private real property; and (3) that restriction on use diminishes the property's fair  
29 market value. ORS 197.352(1). As a result, an “owner” of “any interest” must be one who has a

1 present right to use the property in the absence of the regulation. Moreover, Measure 37  
2 provides a remedy only when land use restrictions reduce fair market value of the owner's  
3 property interest. Thus, the ability to realize that market value is essential to a claim.<sup>6</sup> In sum,  
4 the term "owner" as used in ORS 197.352 refers to the present owner of a property interest that  
5 is subject to land use regulations that both restrict use and reduce value.<sup>7</sup>

6 Petitioners ignore the critical facts concerning ownership of the property at issue in this  
7 case. It is undisputed that the corporation presently owns the property. (*Petition* ¶ 2; *Record* § 2  
8 p 3-4, 16, 40.) Yet, Donald and Martha Smith seemingly allege that they have the same interests  
9 in the property and the same rights to Measure 37 relief as the corporation. (*Petition* ¶ 8). That  
10 blurring of identities and interests is not appropriate. As explained below, the individual  
11 petitioners have *no* ownership interest in the property; rather it is the corporation which is the  
12 present owner of the property. This Court should reject any attempt by these individuals to base  
13 their Measure 37 claims on the rights they might have, if they had not transferred the property to  
14 the corporation in 1992.

---

15 <sup>6</sup> Interpreting the term "owner" in the context of who is may be entitled to relief under  
16 Measure 37 is consistent with Oregon precedent. Oregon courts repeatedly have declared that  
17 the word "owner" lacks a fixed meaning outside the context and purpose of the statute in which  
18 it is used. For example, in *Moe v. Beck*, the Supreme Court noted that "[d]ivining the legislative  
19 intent in statutes using the word 'owner' has been a vexing problem for nearly a century." *Moe*  
20 *v. Beck*, 311 Or 499, 504-505 (1991). After considering the lease agreement at issue, and the six  
21 places in the Oregon Safe Employment Act (including a "definition") that used the word  
22 "owner," the Court concluded that the lessor of a vehicle was an "owner" within the meaning of  
23 the statute at issue. *See also Pedro v. January*, 261 Or 582, 602 (1972) ("When the term 'owner'  
24 or 'ownership' is used in a statute, the context and purpose of the statute governs what is meant  
25 by the use of the terms").

26 <sup>7</sup> In respect to the meaning of the term "interest," Measure 37 differs significantly from the  
insurance policy interpreted in *Tualatin Valley Housing v. Truck Ins. Exchange*, 208 Or App 155  
(2006), *rev denied*, 342 S Ct 344 (2007). In *Tualatin Valley Housing*, a criminal act exclusion in  
the policy covered dishonest or criminal acts committed by "anyone else with an interest in the  
property ... or anyone to whom you entrust the property for any purpose." *Id.* at 157. The Court  
of Appeals held this policy language covered tenants who had a legal right to occupy the  
property, even though their tenancy was not a real property interest. *Id.* at 161. The court based  
its broad interpretation of the insurance policy's terms largely on the absence of any language  
indicating that an ownership interest was required. *See id.* at 161-63. Therefore, the *Tualatin*  
*Valley* holding does not inform a proper interpretation of Measure 37, which is framed around  
the questions of who owns the property, how long they have owned it and the impact on the fair  
market value of the property.

1 It is settled that an individual's interest in a company – be it an LLC, corporation, or  
2 other entity – does not give the individual any ownership interest in the company's assets,  
3 including real property. The corporation, not individual shareholders, owns the company's  
4 assets. See ORS 60.074(2)(d) and (e). Shareholders merely own shares of the corporation,  
5 which entitle them to certain privileges, such as notice of shareholder meetings, voting rights,  
6 inspection of records, and the potential for distributions. See ORS 60.144 to 60.265. The  
7 shareholders do not directly benefit from the increase or decrease in the value of the corporate  
8 property; rather, shareholders of a corporation are not personally liable for the acts or debts of  
9 the corporation. ORS 60.151(2).

10 The fundamental principle that business entities are distinct from their individual owners  
11 is well established in the corporate context, as is the principle that those individuals do not  
12 directly possess the corporate assets. The Oregon Supreme Court emphasized that principle in  
13 *City of Salem v. H.S.B.*, a case in which a closely held corporation owned one parcel of real  
14 property and a partnership of the corporation's shareholders owned an adjacent parcel. *City of*  
15 *Salem v. H.S.B.*, 302 Or 648, 651; 733 P2d 890, 894 (1987). The State condemned part of the  
16 partnership's parcel and the corporation argued that it, too, was entitled to compensation because  
17 "unity of ownership" existed between the two parcels. The Supreme Court rejected that  
18 argument, noting that the parties could not properly ask the court to disregard the corporation's  
19 separate existence and consider it an alter ego of its shareholders:

20 The corporate form and its limited liability were created to  
21 promote the growth and development of corporate enterprise and  
22 investment. The concepts have become cornerstones of corporate  
23 law, cornerstones that we will not attack with hammer and chisel  
24 unless it is demonstrated to be an absolute necessity. Nothing  
25 more than convenience to the stockholders has been shown here.  
26 We hold that, in determining the identity of the owner of  
condemned parcels, **the courts of Oregon will not disregard the  
corporate form and look to the identity of individual  
shareholders in order to determine unity of ownership**, whether  
such unity be determined by substantial or by complete identity of  
record title holders of the separate parcels at the date of the taking.  
**To do so would merely provide a benefit to the shareholders by**

1 **relieving them — for some limited purpose — of the**  
2 **consequences of the corporate form they have voluntarily**  
3 **assumed.**

3 *Id.* at 655 (emphasis added).

4 Moreover, the *H.S.B.* court stressed, once the individual shareholders took advantage of  
5 the limited liability associated with having a corporation hold the real property, they could not  
6 later claim individual interests in that property:

7 Incorporation may hold many attractions — limited tax and other  
8 forms of liability not least among them — but it is, at bottom, the  
9 creation of a legal entity different from other entities. **A**  
10 **corporation is not its incorporators or shareholders**; it is not a  
11 partnership or joint venture; it is, rather, another and particular  
12 kind of creature, with its own rights and duties. See generally ORS  
chapter 57. If its shareholders perceive a need to hold certain  
separate properties as a unit, because the loss of any would affect  
the entire unit, their creature can do so. ORS 57.030 (4). But,  
**while the corporation holds the property, the shareholders do**  
**not.**

13 *Id.* at 654 (emphasis added).

14 The *H.S.B.* analysis provides useful guidance in this case. As did the *H.S.B.* shareholders,  
15 Donald and Martha Smith created the corporation so they could enjoy certain benefits, such as  
16 estate planning. The Smiths submitted comments, through their authorized agent, in response to  
17 the Draft Staff Report, which acknowledges that “[w]hen they conveyed their individual interests  
18 in the subject property to Don Smith’s Tree Farm, Inc. for estate planning purposes ..., they  
19 exchanged their individual interests for interests in the Subchapter S corporation.” (*Record* § 5  
20 pp 2.) Having chosen to take advantage of the benefits of forming the corporation, Donald and  
21 Martha Smith also must shoulder the associated burdens, including the fact that they have no  
22 individual interest in the real property assets of Don Smith Tree Farms, Inc. Their interests are  
23 limited to common stock in the corporation.

24 Three other circuit courts, upon examining ownership issues under Measure 37 that  
25 involve LLC’s and corporations, have concluded that only the business entity is the present  
26 owner with an interest in the property. In *Freeman Properties v. DAS*, the Curry County Circuit

1 Court was similarly faced with both individuals and a business entity making Measure 37 claims  
2 on the same property. In his ruling, Judge Margolis held that the LLC was the owner of the  
3 property, not the individual members of the LLC, and that “[o]nly the owner ... of property may  
4 be entitled to compensation or waiver under Measure 37.” *Freeman Properties* at p 2.<sup>8</sup>

5 A second circuit court decision, involving the merger of two corporations, also found no  
6 remaining Measure 37 interest. In *Crystal Springs Packing Co., Inc. v. State of Oregon*, Jackson  
7 County Circuit Court Judge Schiveley held that the merger of another corporation and its  
8 properties into Crystal Springs resulted in a transfer of the ownership of the property to Crystal  
9 Springs. *Crystal Springs* at p 4-5<sup>9</sup>. As a result, the acquisition date for Crystal Springs was the  
10 date of the merger, not the date the other corporation purchased the property. No Measure 37  
11 interests of the other corporation survived the ownership transfer. The court noted that  
12 petitioner’s situation “is no different than any other property owner who, once Measure 37 had  
13 become law, now wishes it had structured the sale of its property differently in order to preserve  
14 a Measure 37 claim.” *Id* at 5.

15 Last, a third recent decision has also found that LLC members are not owners of the real  
16 property. In *Gavin Rajnus, LLC v. State of Oregon*, the Klamath County Circuit Court held that  
17 the agency correctly interpreted and applied the law in denying the claim. “The individual  
18 members of the LLC do not have individual interests in the property of the LLC and thus, the  
19 LLC cannot use their acquisition date for purposes of determining when the [L]LC acquired the  
20 property.” *Gavin Rajnus* at 3.<sup>10</sup>

21 Petitioners Donald and Martha Smith’s argument fails because it is settled that an  
22 individual’s interest in a company – be it a corporation, LLC or other entity – does not give the

23 \_\_\_\_\_  
24 <sup>8</sup> DeFever Decl., Ex 1, *Freeman Properties East/West v. DAS*, Curry County Circuit Court No.  
06CV0772.

25 <sup>9</sup> DeFever Decl., Ex 2, *Crystal Springs Packing Co., Inc v State of Oregon*, Jackson County  
Circuit Court No. 06-3050-Z7.

26 <sup>10</sup> DeFever Decl., Ex 3, *Gavin Rajnus, LLC v. State of Oregon*, Klamath County Circuit Court  
No. 0603137CV.

1 individual any ownership interest in the company's assets, including real property. Nothing in  
2 the text or context of Measure 37 supports petitioners Donald and Martha Smith's contention that  
3 they are owners of the property. Petitioners' alleged status as the corporation's sole shareholders  
4 means that they own the corporation's stock, not its assets. The State properly evaluated whether  
5 petitioner's Measure 37 demand was valid. Final Order B-M129412 should be affirmed and this  
6 motion for summary judgment granted.

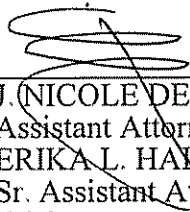
7 **CONCLUSION**

8 In its Final Order B-M129412, the State correctly determined that the individual  
9 petitioners are not entitled to Measure 37 relief because they are not "owners" of the property.  
10 Accordingly, the State is entitled to summary judgment on the petition.

11 DATED this 31<sup>st</sup> day of July, 2007.

12 Respectfully submitted,

13 HARDY MYERS  
14 Attorney General

15   
16 \_\_\_\_\_  
17 J. NICOLE DEFEVER #030929  
18 Assistant Attorney General  
19 ERIKA L. HADLOCK #91297  
20 Sr. Assistant Attorney General  
21 Trial Attorneys  
22 Tel (503) 947-4700  
23 Fax (503) 947-4792  
24 nicole.defever@doj.state.or.us  
25 erika.hadlock@doj.state.or.us  
26 Of Attorneys for Respondents

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26

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

DONALD R. SMITH and MARTHA E. SMITH, and DON SMITH'S TREE FARM, INC., an Oregon Corporation,

Petitioners,

v.

STATE OF OREGON, by and through its DEPARTMENT OF ADMINISTRATIVE SERVICES and DEPARTMENT OF LAND CONSERVATION AND DEVELOPMENT,

Respondent.

Case No. 07C10683

Honorable James L. Rhoades

DECLARATION OF J. NICOLE DEFEVER

I, J. Nicole DeFever, do declare and say:

1. I am an Assistant Attorney General assigned to represent respondent State of Oregon, by and through its Department of Administrative Services and Department of Land Conservation and Development in this case.
2. I am making this declaration in support of the State's Motion for Summary Judgment.
3. Attached to this Declaration as Exhibits 1 through 3 are true copies of circuit court opinions.

DATED this 31 day of July, 2007.



\_\_\_\_\_  
J. NICOLE DEFEVER #03092  
Assistant Attorney General



**CIRCUIT COURT OF OREGON**  
Fifteenth Judicial District

**JESSE C. MARGOLIS**  
CIRCUIT JUDGE

Curry County Courthouse  
PO Box 810  
Gold Beach, Oregon 97444  
541-247-4511

June 15, 2007

Christopher P. Koback  
Attorney At Law  
1300 SW 5<sup>th</sup> Ave, Suite 2300  
Portland, OR 97201-5630

Erika Hadlock  
Sr. Assistant Attorney General  
1162 Court Street NE  
Salem, OR 97301

Re: Freeman Properties East/West v Oregon Department of Administrative Services, et al;  
Curry County Circuit Court Case No 06CV0772

Dear Counsel,

This matter came before the Court on June 11, 2007 for argument on Defendants/respondents' Motion for Summary Judgment. The matter was taken under advisement at the conclusion of the hearing. This letter is provided to advise the parties of the Court's decision.

As a preliminary matter the Court considered whether the Circuit Court properly has jurisdiction in this matter. The record shows that Plaintiffs' Measure 37 claims were denied rather than accepted. Therefore this Court has jurisdiction pursuant to ORS 183.484.

The parties have agreed to facts which they believe are sufficient for determination of the present summary judgment motions. It is undisputed that Plaintiffs/petitioners Freeman Properties East, LLC, and Freeman Properties West, LLC are owners of property in Curry County, and that all Plaintiffs/petitioners have filed a claim under Measure 37 (codified as ORS 197.352) concerning that property. The individual Plaintiffs/petitioners, Cynthia Von Lom and Mark Silverstein are members of the LLCs and claim a property interest in the subject property which they assert stems from their membership in the LLCs. They also are children of Edward Freeman.

The LLCs acquired the property by deed on or about August 12, 2003. The LLCs are successors in interest to the ownership of the property by Edward W. Freeman. The purpose of the transfer of the property to the LLCs was, at least in part, for estate planning purposes.

of the property to the LLCs was, at least in part, for estate planning purposes

In 2005, the LLCs and members Van Lom and Silverstein submitted Measure 37 claims. Those claims were denied by the State for two reasons. The first reason was that the individual Petitioners were not owners of the property and therefore had no right to Measure 37 relief. The second reason was that the LLCs acquired the land long after restrictive land use regulations were put in place, and therefore they were not entitled to Measure 37 relief.

The issues here, which involve legislative interpretation, may be framed essentially as follows:

1. Do the current owner LLCs have "family members" for purposes of Measure 37?
2. Are the individual Plaintiffs/petitioners Van Lom and Silverstein present owners of the property and therefore entitled to claim relief pursuant to Measure 37?
3. Does this Court have jurisdiction in relation to the second claim for relief?

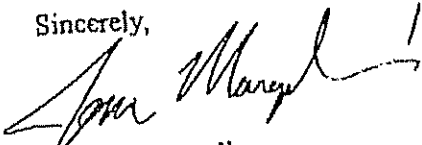
In regard to the first issue, Defendants/respondents argue that the statutory language defines "family member" and that the definition does not include individuals as family members of a legal entity such as an LLC when that LLC is an owner, although it does include a legal entity owned by any one or combination of family members or the owner of the property. Plaintiffs/petitioners argue that family relationships are, as a matter of logic, reciprocal and that the definition contained in Measure 37 of the term "family member" is ambiguous. The language of Measure 37 is clear in relation to the definition of who a family member is. That definition does not include individuals as family members of an LLC or legal entity when that legal entity is the owner. Plaintiffs/petitioners' interpretation of that definition would require the Court to ignore the fact that the legislation clearly defines those who may be considered family members. Because that language is clear, the Court need not consider the intent of the legislation. It may be that there is an incongruity here created by the lack of a definition within Measure 37 that provides for a reciprocal relationship in the case of a legal entity, but that incongruity is not a flaw in the State's argument. Plaintiffs/petitioners' interpretation requires more than just a linguistic analysis or interpretation of the existing language of Measure 37, it requires one to add language that does not exist within the Measure.

In regard to the second issue, ORS 63.239 expressly states that a member of a limited liability company has no interest in specific limited liability property. Measure 37 defines owner as "owner is the present owner of the property, or any interest therein". To interpret Measure 37 to mean a membership interest in an LLC is a property interest in specific property of the LLC would be contrary to ORS 63.239. In a vacuum, another interpretation of Measure 37 is plausible, but when read in context with ORS 63.239, the Court may rest on a first level textual analysis because only a single construction is plausible. Plaintiffs/petitioners Von Lom and Silverstein are not owners of the property. Only the owner or owners of property may be entitled to compensation or waiver under Measure 37.

Given the conclusions above, the issue regarding the claim for compensation is rendered moot.

The parties submitted briefs containing detailed arguments with authority on the issues discussed in this letter. The resolution of these issues at the trial court level does not require any further detail than is set forth in this opinion letter, particularly when it is likely that ultimate resolution of these issues will be rendered in the appellate Courts. Defendant/respondent's Motion for Summary Judgment is allowed. Ms. Hadlock should submit the appropriate form of order on the motion and a general judgment dismissing the petition.

Sincerely,



Jesse C. Margolis  
Circuit Court Judge

RECEIVED

MAY 14 2007

Trial Division, Dept. of Justice  
Salem, Oregon

IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF JACKSON

CRYSTAL SPRINGS PACKING  
COMPANY, INC., an Oregon corporation

Petitioner,

vs

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

Respondents.

CASE NO 06-3050-Z7

OPINION AND ORDER  
ON CROSS MOTIONS FOR  
SUMMARY JUDGMENT

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

**OPINION**

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

1 - OPINION AND ORDER

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

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

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

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

---

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

27 <sup>2</sup> See ORS 197.352(2), (3)(e), and (11)(c).

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

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

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

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

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

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

28 3 - OPINION AND ORDER

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

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

---

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

1 1986<sup>4</sup>

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

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

---

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

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

5 - OPINION AND ORDER

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

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

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

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

---

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

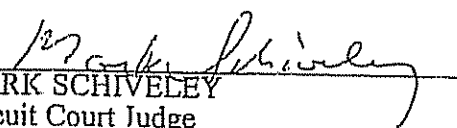
1 interests should not in any way be impaired by the merger"). The problem with this argument is  
2 a temporal one: Highland did not have a right *in 1986* to develop its property free of the land use  
3 regulations passed between 1969 and 1986. No such right existed until Measure 37 was enacted. 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

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

14 **ORDER**

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

18  
19 DATED THIS 10 day of May 2007

20   
21 MARK SCHIVELEY  
22 Circuit Court Judge

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

28 7 - OPINION AND ORDER



Marci W. Adkisson  
Circuit Judge

# Circuit Court of the State of Oregon

THIRTEENTH JUDICIAL DISTRICT  
KLAMATH COUNTY COURTHOUSE  
316 MAIN STREET  
KLAMATH FALLS, OREGON 97601  
(541) 883-5626 EXT. 251  
Fax: 541-883-5620

Joan Moseley  
Judicial Assistant

July 23, 2007

Julie McKay  
Clerk/Bailiff

RECEIVED

JUL 26 2007

Title Division, Dept. of Justice  
Salem, Oregon

William Brandsness  
Attorney at Law  
411 Pine Street  
Klamath Falls OR 97601

Erika L. Hadlock  
Senior Assistant Attorney General  
Department of Justice  
1162 Court Street NE  
Salem OR 97301-4096

RE: *Gavin Rajnus, LLC v State of Oregon*  
Case No. 0603137CV

Dear Counsel:

This matter came before the Court on June 26, 2007, for arguments on the parties' Motions for Summary Judgment. The matter was taken under advisement. The Court has reviewed the record, arguments of counsel, and exhibits presented at the hearing

Based upon the record, the Court makes the following findings:

1. The court has jurisdiction in this case pursuant to ORS 183.484.
2. The parties are not in dispute in regard to the facts of the case, thus this Court need only examine the legal aspect concerning the facts and determine if the agency correctly interpreted the law as applied in this case
3. Gavin Rajnus, LLC, is the owner of the property in dispute and acquired the ownership in 1999. Gavin Rajnus, LLC, filed a Measure 37 claim in a timely manner
4. Donald Rajnus, Sharon Rajnus, Gavin Rajnus, and Julie Rajnus are members of the LLC. The LLC is a successor in interest of the property from Donald and Sharon Rajnus. It is not disputed that Donald Rajnus had a property interest in the disputed property dating from 1969 until the transfer to the LLC in 1999. The purpose of the transfer of the property to the LLC was for estate planning purposes.
5. The claim submitted by the LLC was denied by the State because the LLC acquired the property after restrictive land use regulations were put in place, and therefore were not



William Brandsness  
Erika L Hadlock  
*Gavin Rajnus LLC v State of Oregon*  
July 23, 2007  
Page 2

entitled to Measure 37 relief.

There are three primary issues to be resolved in this case:

- 1 The effect of the State in its Final Order stating that Gavin Rajnus, LLC, is a corporate entity
- 2 Whether the LLC as a current owner has "family members" for purposes of Measure 37?
- 3 The effect of the failure to include a property description for Tax Lot 6001 in the deed dated April 8, 1999.

The first issue is easily disposed of as in the final order the State correctly states that Gavin Rajnus, LLC is a domestic limited liability company registered with the Secretary of State. The fact that they also described the LLC as a corporate entity is not material once the issue regarding the definition of "family member" is disposed of, as neither entity can have individual family members for purposes of Measure 37.

The second issue is whether the LLC, a business entity, can have "family members" as defined in ORS 197.352(1)(A). The statute clearly and unambiguously defines who is a family member. An LLC as a business entity cannot have any family member as described in the statute, except a legal entity owned by the LLC.

As a subissue, the Petitioner argues that Donald Rajnus is considered an owner under the statute and therefore, his interest (even though not in the form of an LLC) still applies to the real property and his acquisition date is the one to be used for the claim. An "owner" is defined in ORS 197.375(1)(c) as "the present owner of the property, or any interest therein."

Donald Rajnus is not a named party to this case and has not made written demand as required by ORS 197.352(2) and thus not entitled to relief in this case. Even if written demand had been made, the ownership interest in an LLC pursuant to ORS 63.329 provides:

A membership interest is personal property. A member is not a co-owner of and has no interest in specific limited liability company property.

Clearly, only the owner or owners of property may be entitled to compensation or waiver under Measure 37. And in this case the owner/claimant is the LLC.

William Brandsness  
Erika L Hadlock  
*Gavin Rajnus LLC v State of Oregon*  
July 23, 2007  
Page 3


The third issue is that in the Final Order the State stated that it did not appear that the 1999 deed included one of the parcels of land at issue in the claim (tax lot 6001) However, the State does appear to have considered the parcel because it stated " . this report considers tax lots 6001, 801, and 100 as the subject property "

In conclusion, the LLC cannot have family members as defined by statute The individual members of the LLC do not have individual interests in the property of the LLC and thus, the LLC cannot use their acquisition date for purposes of determining when the LC acquired the property The other two issues raised by the Petitioner do not change the determination made by the State in its Final Order

Petitioner's Motion for Summary Judgment is denied. Respondent's Motion for Summary Judgment is granted as the agency correctly interpreted and applied the law to this claim

Ms. Hadlock may draft the appropriate form of Order.

Very truly yours,



MARCI W. ADKISSON  
Circuit Judge


MWA:jm

1 **CERTIFICATE OF SERVICE**

2 I certify that on July 31, 2007, I served the foregoing Respondent's Motion for Summary  
3 Judgment; Memorandum of Points and Authorities and Declaration of J. Nicole DeFever upon  
4 the parties hereto by the method indicated below, and addressed to the following:

5  
6 John A. Rankin  
7 Attorney at Law  
8 26715 SW Baker Road  
9 Sherwood, OR 97140  
10 Attorney for Petitioners

HAND DELIVERY  
 MAIL DELIVERY  
 OVERNIGHT MAIL  
 TELECOPY (FAX)

11  
12   
13 J. NICOLE DEFEVER #03092  
14 Assistant Attorney General  
15 Trial Attorney  
16 Tel (503) 947-4700  
17 Fax (503) 947-4792  
18 Nicole.DeFever@doj.state.or.us  
19 Of Attorneys for Respondent  
20  
21  
22  
23  
24  
25  
26