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

5 GAVIN RAJNUS, LLC,

6 Petitioner,

7 v.

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

10 Respondent.

Case No. 0603137CV

STATE'S MOTION FOR SUMMARY
JUDGMENT

11 Pursuant to ORCP 47, respondent State of Oregon moves for summary judgment on the
12 ground that the State's final order on petitioner's Measure 37 claim concluded correctly that
13 petitioner is not entitled to relief. Because the State's order is correct, it is entitled to judgment
14 as a matter of law. The State requests oral argument and official court-reporting services, and
15 estimates that one hour will be needed for argument. No hearing date has yet been set.

16 This motion is based on the record and file herein and the State's memorandum in
17 support of its motion for summary judgment.

18 DATED this 2nd day of May, 2007.

19 Respectfully submitted,

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GAVIN RAJNUS, LLC,
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Department of Land Conservation and
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Case No. 0603137CV
MEMORANDUM OF LAW IN SUPPORT OF
STATE'S MOTION FOR SUMMARY
JUDGMENT

INTRODUCTION

The petitioner in this Measure 37 case is Gavin Rajnus, LLC, a limited liability company that acquired the real property at issue in 1999. The LLC submitted a written demand under Measure 37, which the State denied because the LLC acquired the property long after restrictive land use regulations were put in place. The LLC could not have put the property to the desired use when it acquired the land in 1999; consequently, it is not entitled to Measure 37 relief. The LLC's disagreement with the State's decision forms the basis of this litigation.

Petitioner LLC acknowledges that it currently owns the property and has owned it only since 1999. (Petition ¶¶ 5). The LLC appears to contend, however, that it is entitled to Measure 37 relief because it cannot use the property in the same way certain individuals could have when they acquired their interests in the property, as early as 1969, before it was transferred to the LLC. (Petition ¶¶ 13(2), 14(2); see Petition ¶¶ 1, 4, 6). The LLC asserts that, for purposes of Measure 37, it is a "family member" of those individuals, all of whom are related to each other and some of whom are members of the LLC. From that premise, the LLC concludes that the

1 State erred by not taking a “family acquisition date” into account in assessing the LLC’s
2 Measure 37 claim.

3 It is true that, when assessing whether a Measure 37 claim is valid, the State considers
4 whether land use regulations enacted since the property owner “or a family member of the
5 owner” acquired the property restrict its use, reducing its fair market value. ORS 197.352(3)(E);
6 *see* ORS 197.352(1). But LLCs, like other legal entities, do not have “family members” for
7 purposes of Measure 37. An entity can be a family member of an individual, but the converse is
8 not true. *See* ORS 197.352(11)(A). Because petitioner LLC has no family members, it could
9 have a valid Measure 37 claims only if land use regulations enacted since it – *the LLC* – acquired
10 the property have restricted its use and reduced its fair market value. Because no such
11 regulations have been enacted since the LLC acquired the property in 1999, the State correctly
12 determined that it is not entitled to Measure 37 relief. Accordingly, the State is entitled to
13 summary judgment in its favor.

14 BACKGROUND

15 A. Measure 37

16 A property owner qualifies for Measure 37 relief if: (1) a public entity enacts or enforces
17 a “land use regulation” after December 2, 2004, that (2) restricts the owner’s use and (3) has the
18 effect of reducing the fair market value of the owner’s property. ORS 197.352(1). Section 3 of
19 Measure 37 provides that certain land use regulations shall not be a basis for a written demand
20 under Section 1, notably regulations in effect when the owner or a family member acquired the
21 property. ORS 197.352(3)(E). Section 11 defines “owner” as the “present owner” of the
22 property, and lists the relationships on which a “family member” finding may be based. ORS
23 197.352(11)(A) and (C).

24 For regulations enacted prior to the effective date of Measure 37 (December 2, 2004),
25 Section 5 requires owners to submit written demands by December 2, 2006, or the date on which

1 a land use regulation is applied “as an approval criteria [sic]” on a specific land use application,
2 whichever is later. After determining that an owner submitted a timely, valid written demand,
3 the public entity has the option to pay compensation or to “modify, remove, or not to [sic] apply”
4 land use regulations to the extent necessary “to allow the owner to use the property for a use
5 permitted at the time the owner acquired the property.” ORS 197.352(8); *see also* ORS
6 197.352(10). Allowing the owner to use the property in a way that would otherwise be
7 prohibited by land use regulations is commonly referred to as granting a Measure 37 “waiver.”
8 DLCDC can pay compensation only if and when the legislature appropriates funds for that
9 purpose. *See* OAR 660-002-0010(8)(c).

10 **B. Statement of undisputed facts**

11 The State believes the following facts are undisputed except as noted, based on the
12 complaint and answer.

13 1. This litigation involves real property in Klamath County with the following legal
14 descriptions:

- 15 • Township 40S, Range 11E, No Section, tax lot 6001
- 16 • Township 40S, Range 11E, Section 24, tax lot 801
- 17 • Township 40S, Range 11E, Section 36, tax lot 100

18 (Petition ¶ 5, Ex 7 at 1; *see* Petition ¶ 4).¹

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20 ¹ In the final order, the State found that petitioner LLC does own all three of these
21 parcels (Petition, Ex 7 at 1, 3 n 2), but noted that the 1999 deed to the LLC does not
22 appear to identify tax lot 6001 as being a portion of the property. (Petition, Ex 7 at 5 n
23 4). In the petition, the LLC contends that the State erred by stating in the final order that
24 tax lot 6001 is not a subject of the 1999 deed. (Petition ¶¶ 13(3), 14(3)). Any dispute
25 between the parties concerning the scope of the 1999 deed is not material to the question
26 presented by this summary-judgment motion, which is whether the State erred by
concluding that the LLC does not have a valid Measure 37 claim with respect to any of
the identified property. Moreover, the State has accepted that the LLC is the present
owner of the property, whether or not tax lot 6001 is identified in the 1999 deed, so even
if the State’s description of the deed is erroneous, petitioner has not suffered any
prejudice because of it. *See* section C of this memorandum, *infra*.

Petitioner contends that (1) Gavin Rajnus LLC is not a corporate entity but a limited liability company that is commonly used for the purposes set forth in Paragraph 4, above, in order to retain the family ownership of farm or ranch properties; (2) Gavin Rajnus LLC is a Family Member in that it is a legal entity owned by one or a combination of these family members as provided by ORS 197.352(11)(A); and (3) Tax Lot 6001 and is properly described as Parcel 1 of Land Partition 56-96 in the Deed dated April 8, 1999.

(Petition). Petitioner seeks remand of the final orders.

D. Standard of review

As noted above, petitioner challenges the State’s final order under ORS 183.484, the Administrative Procedures Act (“APA”) provision that governs judicial review of orders in other than contested cases. The summary-judgment standards that usually apply in civil cases do not apply when a circuit court reviews an agency order in other than a contested case. *Powell v. Bunn*, 185 Or App 334 (2002), *rev denied*, 336 Or 60 (2003). The State discusses below the different analysis that applies when a court reviews the facts in summary-judgment proceedings in APA cases. In this case, however, the distinction does not matter, as the material facts outlined in Section B, above, appear not to be disputed and the parties disagree only about those facts’ legal significance.

The Court of Appeals has explained that “viewing factual disputes in the light most favorable to a nonmoving party” – the usual standard of review in a summary-judgment motion – “[is] not appropriate in the judicial review of an administrative order in a noncontested case proceeding.” *Powell*, 185 Or App at 339. Rather, judicial review of the factual findings included in an agency order in other than a contested case is limited to determining whether “the order is supported by substantial evidence.” *Ibid*.

1 Thus, in deciding this motion for summary judgment, the only questions presented could
2 be: (1) whether the final orders are based on incorrect interpretations or applications of the law;³
3 and (2) whether the factual findings in the final orders are supported by substantial evidence in
4 the records. The Oregon Supreme Court has explained that judicial review of the latter question
5 is limited in scope. That is, in determining whether substantial evidence supports an agency’s
6 factual findings, the question before a circuit court “is limited to whether the evidence would
7 permit a reasonable person to make the determination that the agency made in the particular
8 case.” *Norden v Water Resources Dep’t.*, 329 Or 641, 649 (2000).

9 Consequently, in deciding a summary judgment motion in a case brought under ORS
10 183.484, a court must apply the substantial-evidence standard of review as explained in *Norden*
11 together with the summary-judgment standard described in *Powell*. The resulting analytic
12 framework requires the court to review the entire record – including any facts admitted into the
13 record on summary judgment – to determine if the record as a whole “would permit” a
14 reasonable person to make the factual findings that the agency made. If so, then the agency is
15 entitled to summary judgment (assuming there also is no legal error). Conversely, if the court
16 determines that the evidence would *not* permit the agency to make the findings it made, then the
17 agency’s motion for summary judgment must be denied.

18 As noted above, however, the parties have agreed, in their pleadings, to facts that should
19 be sufficient for determination of the present summary-judgment motions. Accordingly, this
20 Court need consider only the legal significance of those facts.

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25 ³ See ORS 183.484(5)(a) (describing judicial review for incorrect interpretations of law);
26 ORS 183.484(5)(b) (describing judicial review for unlawful exercise of agency discretion).

1 ARGUMENT

2 A. The State is entitled to summary judgment on petitioner’s claim that the State
3 improperly determined that “Gavin Rajnus, LLC is not a Family Member under
4 the provisions of ORS 197.352(11)(A).

5 1. The LLC acquired the property in 1999 and does not have any “family
6 members” whose earlier acquisition date could benefit the LLC for purposes
7 of establishing a Measure 37 claim.

8 Section 1 of Measure 37 defines who may have a claim for Measure 37 relief and under
9 what circumstances:

10 If a public entity enacts or enforces a new land use regulation or
11 enforces a land use regulation enacted prior to December 2, 2004,
12 that restricts the use of private real property or any interest therein
13 and has the effect of reducing the fair market value of the property,
14 or any interest therein, then the owner of the property shall be paid
15 just compensation.

16 ORS 197.352(1). The “owner” is “the present owner of the property, or any interest therein.”
17 ORS 197.352(11)(c).

18 Section 3 of Measure 37 limits the otherwise broad scope of Section 1 by describing
19 categories of land use regulations that cannot form the basis for a Measure 37 claim. Most
20 significantly, the section excludes land use regulations:

21 Enacted prior to the date of acquisition of the property by the
22 owner *or a family member of the owner* who owned the subject
23 property prior to acquisition or inheritance by the owner,
24 whichever occurred first.

25 ORS 197.352(3)(E) (emphasis added). Accordingly, in determining whether a Measure 37 claim
26 is valid, the State must determine the “acquisition dates” both for the owner and for any family
27 member of the owner who previous owned the property. Only land use regulations enacted or
28 adopted after the earlier of those dates can give rise to a valid claim.

29 Petitioner Gavin Rajnus LLC does not – and could not – rely on its own acquisition date
30 in this case, as it does not dispute the State’s determination that no restrictive land use

1 regulations have been enacted since the LLC acquired the property in 1999.⁴ Instead, the LLC
2 contends that it has a valid Measure 37 claim because its family members acquired the property
3 as early as 1969, before many of the land use regulations that affect the LLC’s property were
4 enacted. First, the LLC notes that its Measure 37 claim was based on “land use regulations
5 enacted or enforced by the State of Oregon after the real property was acquired by Family
6 Members on March 12, 1969.” (Petition ¶ 10). Second, the LLC asserts that the State erred by
7 determining that “Gavin Rajnus, LLC is not a Family Member” for purposes of Measure 37.
8 (Petition ¶ 13). Thus, according to the LLC, it has a valid Measure 37 claim because its family
9 members acquired the property in 1969.

10 The LLC’s argument implicates Measure’s 37 definition of “family member” as:

11 the wife, husband, son, daughter, mother, father, brother, brother-
12 in-law, sister, sister-in-law, son-in-law, daughter-in-law, mother-
13 in-law, father-in-law, aunt, uncle, niece, nephew, stepparent,
14 stepchild, grandparent, or grandchild of the owner of the property,
an estate of any of the foregoing family members, *or a legal entity
owned by any one or combination of these family members or the
owner of the property.*

15 ORS 197.352(11)(C) (emphasis added).

16 This clause is easier to read if one uses the shorthand term “relatives” to encompass all of
17 the individual people who are included within the definition of “family member” and separates
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19 _____
20 ⁴ In this respect, the order provides:

21 The current zoning requirements, minimum lot size and dwelling
22 standards established by Goals 3, 4 and 5 and provisions applicable
23 to land zoned forest or agriculture in ORS 215 and OAR 660,
24 divisions 6, 16, 23, and 33, were all enacted or adopted before
25 claimant, Gavin Rajnus, LLC, acquired the subject property on
April 8, 1999. These land use regulations do not allow the
claimant’s desired division and development of the subject
property. Laws enacted or adopted since the claimant acquired the
subject property in 1999 do not restrict the claimant’s desired use
of the property relative to when the claimant acquired it in 1999.

26 (Petition Ex 7 at 6).

1 the other categories of possible family members. So simplified, the statute defines a family
2 member as:

- 3 • [a relative] of the owner of the property,
- 4 • an estate of any of the foregoing [relatives], or
- 5 • a legal entity owned by any one or combination of these [relatives] or the owner
6 of the property.

7 Thus, a landowner may have three types of relatives for purposes of Measure 37: an individual
8 relative, an estate of an individual relative, or a legal entity that is owned either by the property
9 owner or by the property owner's relatives.

10 Here, the present owner of the property is the LLC, so the question is whether the LLC
11 has any family members for purposes of Measure 37. It does not. LLCs (and other business
12 entities) are not human beings, so they cannot have individual relatives, like spouses, children or
13 parents. Consequently, LLCs also cannot have family members that are estates of individual
14 relatives. And, because LLCs do not have relatives, they cannot have family members in the
15 form of legal entities owned by those relatives. The only type of family member that an LLC
16 could have is "a legal entity owned by * * * the owner of the property," *i e.*, a legal entity owned
17 by the LLC that also owns the property.

18 In this case, there is no allegation that the petitioner LLC owns other legal entities that
19 qualify as its family members. Rather, the LLC contends that various individuals in the Rajnus
20 family are the relevant family members for purposes of establishing its rights under Measure 37.
21 But as explained above, individuals cannot be family members of business entities like LLCs.
22 The petitioner LLC in this case simply has no family members and, therefore, can rely only on
23 its *own* acquisition date in seeking relief under Measure 37. Because the LLC acquired the
24 property in 1999, and no land use regulations that restrict its desired use of the property have
25 been enacted since then, the LLC does not have a valid claim for Measure 37 relief. *See* ORS

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JUDGMENT

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1 197.352(1), (3)(E). For that reason, the State is entitled to summary judgment on the LLC's
2 claim against it.

3 **2. The LLC is not entitled to the Measure 37 rights the individual Rajnuses**
4 **would have if they had not transferred the property to the LLC.**

5 Although the LLC was the only Measure 37 claimant with respect to the real property it
6 owns, and is the only petitioner in this litigation, some of the allegations in its petition invite this
7 Court to consider the LLC and its members as having identical interests in that property. The
8 State anticipates the LLC may raise similar arguments in response to this summary-judgment
9 motion. For example, the LLC may argue that it is entitled to the Measure 37 rights its members
10 would have if they still owned the property.

11 This Court should reject any attempt by the LLC to base its Measure 37 claim on the
12 rights its members would have, if they had not transferred the property to the LLC in 1999. It is
13 settled that an individual's interest in a company – be it an LLC, corporation, or other entity –
14 does not give the individual any ownership interest in the company's assets, including real
15 property. With respect to LLCs, that principle is embodied in statute:

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

18 ORS 63.239. The LLC, not individual members in it, owns the company's assets. ORS
19 63.077(2)(b).

20 Because LLCs are a relatively recent creation, the Oregon appellate courts have not yet
21 had an opportunity to discuss the significance of ORS 63.239 and related statutes. However, the
22 fundamental principle that business entities are distinct from their individual owners is well
23 established in the corporate context, as is the principle that those individuals possess only
24 interests in the businesses themselves, not in the businesses' assets. The Oregon Supreme Court
25 emphasized that principle in *City of Salem v. H.S.B.*, a case in which a closely held corporation
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1 owned one parcel of real property and a partnership of the corporation's shareholders owned an
2 adjacent parcel. *Id.* at 651. The State condemned part of the partnership's parcel and the
3 corporation argued that it, too, was entitled to compensation because "unity of ownership"
4 existed between the two parcels. The Supreme Court rejected that argument, noting that the
5 parties could not properly ask the court to disregard the corporation's separate existence and
6 consider it an alter ego of its shareholders:

7 The corporate form and its limited liability were created to
8 promote the growth and development of corporate enterprise and
9 investment. The concepts have become cornerstones of corporate
10 law, cornerstones that we will not attack with hammer and chisel
11 unless it is demonstrated to be an absolute necessity. Nothing
12 more than convenience to the stockholders has been shown here.
13 We hold that, in determining the identity of the owner of
14 condemned parcels, *the courts of Oregon will not disregard the
15 corporate form and look to the identity of individual shareholders
16 in order to determine unity of ownership*, whether such unity be
17 determined by substantial or by complete identity of record title
18 holders of the separate parcels at the date of the taking. *To do so
19 would merely provide a benefit to the shareholders by relieving
20 them — for some limited purpose — of the consequences of the
21 corporate form they have voluntarily assumed.*

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

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

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

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

1 The *H.S.B.* analysis provides useful guidance in this case. As did the *H.S.B.*
2 shareholders, the Rajnuses presumably created the LLC so they could enjoy certain benefits,
3 perhaps related to estate planning or avoidance of personal liability. *See, e.g.*, ORS 63.165(1)
4 (“A member or manager is not personally liable for a debt, obligation or liability of the limited
5 liability company solely by reason of being or acting as a member or manager”). Having chosen
6 to take advantage of the benefits of forming LLC, the Rajnuses also must shoulder the associated
7 burdens, including the fact that they have no individual interest in the LLC’s assets. Only the
8 LLC is an “owner” of the property that is the subject of this litigation and it acquired the property
9 too recently to be entitled to any Measure 37 relief.

10 **B. The State is entitled to summary judgment on petitioner’s claim that it erred by**
11 **denying the Measure 37 claim on the ground that “Gavin Rajnus, LLC is a**
corporate entity.”

12 In the final order, the State asserted correctly that Gavin Rajnus LLC is a domestic
13 limited liability company registered with the Oregon Secretary of State. (Petition, Ex 7 at 5 n 3).
14 However, the State also mistakenly described the LLC as a “corporate entity,” instead of as a
15 “limited liability company” at one point in the order. (Petition, Ex 7 at 5). Petitioner makes that
16 discrepancy the basis for one of its claims against the State: “Petitioner is aggrieved by the Final
17 Order denying its claim on the grounds that * * * Gavin Rajnus, LLC is a corporate entity.”
18 (Petition ¶ 13). Instead, petitioner asserts, it “is not a corporate entity but a limited liability
19 company that is commonly used * * * to retain the family ownership of farm or ranch
20 properties.” (Petition ¶ 14).

21 The State is entitled to summary judgment on this claim because petitioner is not
22 adversely affected or aggrieved by the single misstatement that it is a corporate entity. As
23 explained in section A of this memorandum, *neither* an LLC *nor* a corporation can have
24 individual family members for purposes of Measure 37. Consequently, the State correctly
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1 determined that petitioner LLC is not entitled to Measure 37 relief, and that determination was
2 not dependent on the State's inadvertent mischaracterization of the LLC as a corporate entity.

3 **C. The State is entitled to summary judgment on petitioner's claim that it erred by**
4 **denying the Measure 37 claim on the ground that "failure to include the property**
5 **description for Tax Lot 6001 in the Deed dated April 8, 1999."**

6 In the final order, the State found that petitioner LLC owns all three parcels of land at
7 issue in this litigation (*see* Petition, Ex 7 at 1, 3 n 2), but noted that the 1999 deed to the LLC
8 does not include a property description for tax lot 6001. (Petition, Ex 7 at 5 n 4). In its petition
9 for judicial review, the LLC contends that the State erred by stating in the final order that tax lot
10 6001 is not a subject of the 1999 deed. (Petition ¶¶ 13(3), 14(3)).

11 The State is entitled to summary judgment on this claim because petitioner is not
12 adversely affected or aggrieved by the State's statement about the scope of the 1999 deed. The
13 State accepted, in the final order, that the LLC is the present owner of tax lot 6001, *whether or*
14 *not* that tax lot is identified in the 1999 deed. As a result, petitioner is not prejudiced by the
15 State's description of that deed – even if the description is incorrect, it does not change the
16 undisputed fact that the LLC owns tax lot 6001. Accordingly, the State is entitled to summary
17 judgment on petitioner's related claim, even if this Court denies the State's summary-judgment
18 motion on the overriding LLC family-member issue.

19 CONCLUSION

20 The State correctly determined that petitioner LLC owns the property but is not entitled
21 to Measure 37 relief because no land use regulations have been enacted since it acquired the
22 property in 1999 that restrict its desired use of the property, reducing its fair market value.
23 Petitioner is not adversely affected or aggrieved by the statements in the final order that
24 petitioner is a corporate entity and that the 1999 deed does not include a property description for
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1 tax lot 6001. Accordingly, the State is entitled to summary judgment in its favor on each of
2 petitioner's claims.

3 DATED this 2nd day of May, 2007.

4 Respectfully submitted,

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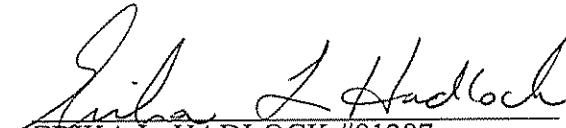
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CERTIFICATE OF SERVICE

I certify that on May 2nd, 2007, I served the foregoing *State's Motion for Summary Judgment and Memorandum of Law in Support of State's Motion for Summary Judgment* upon the parties hereto by the method indicated below, and addressed to the following:

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