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3  
4 IN THE CIRCUIT COURT OF THE STATE OF OREGON  
5 FOR THE COUNTY OF CROOK

6 ROBERT L. RIEMENSCHNEIDER,

7 Plaintiff,

8 v.

9 CROOK COUNTY, a political subdivision of  
10 the State of Oregon; and STATE OF  
11 OREGON, acting by and through the  
Department of Land Conservation and  
Development,

12 Defendants.

Case No. 06CV0074

STATE OF OREGON'S CROSS-MOTION FOR  
SUMMARY JUDGMENT

(Oral argument requested – thirty minutes)

13  
14 Pursuant to ORS 183.484 and ORCP 47, Defendant State of Oregon (“State”) moves for  
15 summary judgment in its favor because the Final Order, Claim No. M119330 issued by the  
16 Department of Land Conservation and Development (“DLCD”) was correct. This motion is  
17 made on the that DLCD, in its Final Order, correctly interpreted and applied Ballot Measure 37  
18 (2004), codified at Oregon Revised Statute (“ORS”) 197.352 (“Measure 37”), to plaintiff Robert  
19 L. Riemenschneider’s (“Plaintiff”) demand for relief pursuant to Measure 37. DLCD correctly  
20 determined that Plaintiff was entitled to a “waiver” of land use regulations under Measure 37  
21 only as of the date he acquired his present ownership interest in property. Plaintiff acquired his  
22 present ownership interest on September 23, 2004 pursuant to a written lease. The material facts  
23 are undisputed and the State is entitled to judgment as a matter of law.

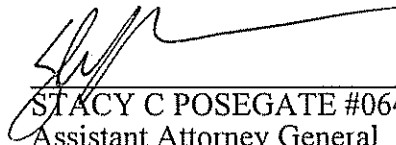
24 Oral argument is requested and is expected to require thirty minutes; official court  
25 reporting services are requested.  
26

1 This cross-motion is based on the records and file herein and State's memorandum in  
2 support of cross motion for summary judgment and in response to Petitioners' motion for  
3 summary judgment.

4 DATED this 25<sup>th</sup> day of April, 2007.

5 Respectfully submitted,

6 HARDY MYERS  
7 Attorney General

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11 OREGON, acting by and through the  
Department of Land Conservation and  
Development,

12 Defendants.

Case No. 06CV0074

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

(Oral argument requested – 30 Minutes)

13 INTRODUCTION

14 Plaintiff Robert Riemenschneider has not suffered the type of injury for which Ballot  
15 Measure 37 provides a remedy.<sup>1</sup> For this same reason, Plaintiff's Motion for Partial Summary  
16 Judgment ("Plaintiff's Motion") must be denied and the State of Oregon's Cross-Motion for  
17 Summary Judgment ("State's Cross-Motion") granted.

18 Measure 37 entitles a qualifying landowner to compensation or other relief only if his or  
19 her present interest in land is restricted by a new land use regulation that also diminishes the  
20 market value of the property. The present interest in land is the interest that the claimant owns  
21 on the date he or she makes a written demand for compensation to the public entity charged with  
22 enforcing the land regulation. If the public entity determines that the claimant acquired that  
23 present interest before the offending land use regulation was enacted or adopted, then the public  
24

25 <sup>1</sup> Ballot Measure 37 enacted as ORS 197.352 ("Measure 37")

1 entity is authorized to either compensate the claimant or not enforce the offending land use  
2 regulations.

3 At the time Plaintiff made his written demand for compensation to the State of Oregon  
4 (“State”), he owned a three year leasehold interest on property that was the subject of his claim,  
5 which he acquired on September 23, 2004. The State, by and through the Department of Land  
6 Conservation and Development (“DLCD”) and the Department of Administrative Services  
7 (“DAS”), used Plaintiff’s present leasehold interest to determine whether Plaintiff had suffered  
8 the type of injury that Measure 37 cures. The State determined that Plaintiff did not qualify for  
9 Measure 37 relief because no land use regulations had been adopted or enacted after September  
10 23, 2004 that restricted or lowered the property value of his present leasehold interest. On this  
11 basis, the State properly issued Final Order M119330 denying Plaintiff’s claim.

12 Plaintiff alleges that the State erred in its order because he acquired his present property  
13 interest 1985. However, Plaintiff admits that on September 23, 2004 he conveyed all of the  
14 interest he originally acquired in 1985 by an unambiguous bargain and sale deed and sale  
15 agreement. Plaintiff, then, was given a three year lease by the new owners of the property.  
16 Plaintiff asks this court to reach a conclusion that the State could not – that these documents are  
17 not what they unambiguously purport to be – instruments of a valid conveyance. Plaintiff has  
18 not proven to the State or this Court, by clear and convincing evidence, that the deed and sale  
19 agreement are not what they purport to be. Accordingly, Plaintiff’s Motion must be denied and  
20 the State’s Cross-Motion granted because the State’s final order is not erroneous.

21 **POINTS AND AUTHORITIES**

22 **I. Background**

23 **A. Measure 37**

24 **A. Overview of Measure 37**

25

26ge 2 - STATE OF OREGON'S MEMORANDUM IN SUPPORT OF ITS CROSS MOTION FOR  
SUMMARY JUDGMENT AND RESPONSE TO PLAINTIFF'S MOTION FOR  
SUMMARY JUDGMENT

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1 Oregon voters enacted Measure 37 to offer relief to owners of real property who had been  
2 injured by the adoption or enactment of land use regulations after the owner acquired his or her  
3 real property interest. Under the express language of the statute, a property owner qualifies for  
4 Measure 37 relief if: (1) a public entity enacts or enforces a “land use regulation” that (2)  
5 restricts use and (3) has the effect of reducing fair market value. Section 3 of Measure 37  
6 provides that certain land use regulations shall not be a basis for a written demand under Section  
7 1, notably regulations in effect when the owners acquired the property. ORS 197.352 (3) (E).  
8 Accordingly, only land use regulations that were enacted or adopted after the qualifying owner  
9 or a family member acquired the property may be the subject of a Measure 37 claim. ORS  
10 197.352(3)(e); *MacPherson v. DAS*, 340 Or. at 122. Section 11 defines “owner” as the “present  
11 owner of the property, or any interest therein.” ORS 197.352 (11) (C).

12 If a claimant meets the foregoing criteria, Measure 37 authorizes the public entity that  
13 enforces that land use regulation to either compensate the claimant or to grant a Measure 37  
14 “waiver.” ORS 197.352 (8); *see also* ORS 197.352 (10).<sup>2</sup> This latter act is commonly referred to  
15 as a Measure 37 “waiver”. Although Measure 37 affects Oregon’s land use planning statutes, it  
16 did not repeal any of them. The measure merely authorizes a governing body to “modify,  
17 remove, or not \* \* \* apply” certain regulations in specific situations. *MacPherson*, 340 Or. at  
18 132. Otherwise, the land use planning laws remain in effect. *Id.*

## 19 **B. Factual background**

20 The parties do not disagree on the following relevant facts:

21 1) Plaintiff acquired fee title as a tenant in common in property located in Crook County  
22 and described below by warranty deed on July 29, 1985:

23 \_\_\_\_\_  
24 <sup>2</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 Township 15 South, Range 15 East of the Willamette Meridian:  
2 Section 4: SW¼  
3 Section 9: N½, N½N½SW¼, N½NW¼SE¼, E½SE¼.  
4 Section 10: SW¼NE¼, SE¼NW¼, SW¼, W½, SE¼  
5 Section 14: That portion of the NW¼NW¼ lying Northwesterly of Highway 126, as  
6 located and constructed.  
7 Section 16: E½E½  
8 Section 22: All that portion lying Northwesterly of Highway 126, as located and  
9 constructed.  
10 (“property”) (See The Record lodged with this Court on April 11, 2007 (“Record”), §2,  
11 p. 17)  
12 2) On September 23, 2004, Plaintiff entered into a sale agreement with John and Sheldon  
13 Arnett for the purchase of Plaintiff’s undivided 25% interest in the property. (Declaration of  
14 Stacy C. Posegate attached hereto (“Posegate Decl.”) ¶ 2, Ex. A)  
15 3) On September 23, 2004, Plaintiff conveyed by bargain and sale deed to John and  
16 Sheldon Arnett “all of his interest” in the property. (Record, §3, p. 7-9)  
17 4) On September 23, 2004, Plaintiff entered into a Lease Agreement and Option to  
18 Purchase with John Arnett and Sheldon Arnett wherein the Arnetts leased the property to  
19 Plaintiff for a term of three years commencing on September 30, 2004. (Record, §3, p. 10-13)  
20 5) On January 4, 2005, Plaintiff, as tenant/purchaser, and John and Sheldon Arnett as  
21 landlord/seller, executed a Memorandum of Lease Purchase Agreement. (Record, §3, p.14, 15)  
22 6) On January 14, 2005, Plaintiff submitted a written demand for compensation pursuant  
23 to Measure 37 to the State of Oregon. (Record, §2)  
24 7) On July 11, 2005, DLCD issued Final Order M 119330 denying plaintiff’s claim on  
25 the grounds that plaintiff does not own an interest in property that has been restricted by a new

1 land use regulation that also has the effect of reducing the market value of the property. (Record,  
2 §6, p.1-6)

3 **C. Standard of review**

4 The State agrees with Plaintiff that the standards set forth in ORCP 47 govern summary  
5 judgment made pursuant to that section. However, the underlying complaint is based entirely on  
6 Plaintiff's claim that State erred in its final order by denying Plaintiff's Measure 37 demand. In  
7 substance, Plaintiff has asked this court to review the State's Final Order. The standards that  
8 generally apply to summary-judgment proceedings in civil cases do not apply when a circuit  
9 court reviews an agency order in other than a contested case. Instead, review of a final order that  
10 is issued by a state agency in an other than contested case is governed by the Administrative  
11 Procedures Act ("APA"), specifically ORS 183.484. Powell v. Bunn, 185 Or. App. 334, 339  
12 (2002) ("viewing factual disputes in the light most favorable to a nonmoving party" – the usual  
13 standard of review in a summary-judgment motion – "[is] not appropriate in the judicial review  
14 of an administrative order in a noncontested case proceeding").

15 The circuit court's review of the agency's action is limited to ensuring that the agency:  
16 correctly interpreted the provision of law; acted within the range of discretion the legislature has  
17 delegated to the agency; and, acted on the basis of substantial evidence in the record. ORS  
18 183.484(5). Here, the parties agree to the facts that are material to the Plaintiff's Motion and the  
19 State's Cross-Motion and disagree only about the legal significance of those facts. Accordingly,  
20 the only question presented for this Court is whether the State's final orders are based on  
21 incorrect interpretations or applications of the law. ORS 183.484(5)(a).

22 With respect to this Court's review of the State's interpretation of Measure 37, the Court  
23 is required to use the same methodology that applies to any statute. *PGE v. Bureau of Labor and*  
24 *Industries*, 317 Or 606, 612 n 4 (1993) (a three-part methodology applies "not only to statutes  
25 enacted by the legislature, but also to the interpretation of laws and constitutional amendments

1 adopted by initiative or referendum, as well as to the interpretation of regulations”). If the statute  
2 is the result of a voter initiative, the statute must be interpreted in accord with the intent of the  
3 voters. *Stranahan v. Fred Meyer, Inc.* 331 Or. 38, 56 (2000).

4 The best evidence of the voters’ intent “is the text of the provision itself” as well as a  
5 consideration of the ballot measure. *Stranahan v. Fred Meyer, Inc.*, 331 Or. at 56, *supra*. If the  
6 voter’s intent is not clear after this inquiry, the Court must conduct a further inquiry into the  
7 legislative history of the provision. *Id.* citing *Ecumenical Ministries v. Oregon State Lottery*  
8 *Comm.*, 318 Or 551, 559 (1994).<sup>3</sup> As discussed more fully below, the collective text of Measure  
9 37 demonstrates that the State’s interpretation of its authority to grant Measure 37 waivers is  
10 both accurate and appropriate.

11 If the Court applies the standards for review of a motion for summary judgment set forth  
12 in Plaintiff’s Motion, summary judgment is still appropriate in the State’s favor. The undisputed  
13 facts demonstrate that, as a matter of law, Plaintiff has not suffered the type of injury that  
14 Measure 37 redresses. Therefore, Plaintiff is not entitled to the relief available under Measure  
15 37.

16 **ARGUMENT**

17 **I. Plaintiff is not entitled to relief because his present ownership interest is not**  
18 **restricted by a land use regulation that was enacted after he acquired that interest.**

19 Measure 37 specifically requires the State to determine, first, whether a person making a  
20 Measure 37 claim is a present owner of real property and if so, what the nature of that interest is.  
21 The State must then determine whether that interest was restricted by a land use regulation after  
22 the claimant or a family member acquired the interest and whether the restriction also diminishes

23 \_\_\_\_\_  
24 <sup>3</sup> Legislative history of ballot measures consists of information available to the voters “that disclose the public’s  
25 understanding of the measure.” *Ecumenical Ministries v. Oregon State Lottery Comm’n*, 318 Ore. 551, 559, n8  
(1994) (e.g. “the ballot title and arguments for and against the measure included in the voters’ pamphlet, and  
contemporaneous news reports and editorial comment on the measure”).

1 the market value of the property. If no land use regulations were enacted after the claimant or a  
2 family acquired their interest the claimant presently holds, the claim is denied.

3 Here, when Plaintiff made written demand for compensation to the State, he was a  
4 present owner of a three year lease that he acquired on September 23, 2004. (Record, §3, p. 10-  
5 13) He was not an owner of fee title that was acquired in 1985 because he sold that interest to  
6 John and Sheldon Arnett on September 23, 2004. (Record, §3, p. 7-9, Posegate Decl. ¶2, Ex. A)  
7 The State denied Plaintiff's claim because it had not enacted or adopted any land use regulations  
8 after September 23, 2004 that restricted Plaintiff's real property interest or diminished the market  
9 value of that interest.

10 **A. A claimant's right to relief under Measure 37 is measured by the date they**  
11 **acquired the property interest they presently own.**

12 The relief available under Measure 37 is not based on the date the claimant first acquired  
13 any interest in the real property that is the subject of their claim. Rather, relief is based on the  
14 date the claimant acquired the property that they presently own. This construction of Measure 37  
15 follows from the text and context and the statute.

16 Subsection (11)(C) defines the term "*owner*" as "*the present owner of the property, or*  
17 *any interest therein.*" This statutory definition of the term "*owner*" specifically applies to each  
18 of the following sections: Subsection (1) permits compensation to be paid to only to the *owner*  
19 of the property. ORS 197.352(1). Subsection (2) requires just compensation to be calculated as  
20 of the date the *owner* makes written demand for compensation. ORS 197.352 (2). Subsection  
21 (3)(E) excludes all land use regulations enacted prior to the date the *owner* or a family member  
22 of the *owner* acquired or inherited *the* subject property. 197.352(3)(E). Subsection (4) grants  
23 just compensation only to the *owner* if the land use regulations continued to be enforced after  
24 180 days. 197.352(4). Subsection (6) entitles the *present owner* to bring an action in circuit  
25 court and to collect attorneys fees, expenses and costs under certain circumstances. 197.352(6).

1 Subsection (8) permits a waiver of land use regulations to allow the *owner*, to use the property,  
2 but only for a “use permitted at the time the *owner* acquired *the* property”. ORS 197.352 (8).  
3 Subsection (10) provides that the *owner* shall be allowed to use the property as permitted at the  
4 time the owner acquired *the* property if a claim has not been paid within two years from the date  
5 on which it accrues. 197.352 (10). Nothing in the text of the statute requires a public entity to  
6 consider a property interest that the claimant may have owned in the past, but subsequently sold  
7 to an unrelated third party. If the claimant later re-acquires that property interest, relief is  
8 available from the date the claimant re-acquired the interest, not the date the claimant may have  
9 originally acquired that interest.

10 That interpretation is supported by the context of Measure 37. That context includes a  
11 wide variety of land use laws and regulations that pre-dated Measure 37. If Measure 37  
12 claimants could obtain broad "waiver" relief based on the date they first acquired the property--  
13 precluding enforcement of land use laws adopted before they re-acquired the property--claimants  
14 would receive a windfall. Presumably, the re-acquisition price would take into account land use  
15 laws that existed on the date of re-acquisiton. If those laws are still subject to waiver, the  
16 claimaint would be compensated twice: once when they re-acquired the property (because the  
17 acquisition price should account for land use laws in existence at that time), and once when they  
18 received waiver relief under Measure 37 (when those same land use laws would be waived).  
19 Any claimant could obtain a similar windfall--undermining the policies in existing land use laws-  
20 -by re-acquiring property that they previously owned. That was not the intent of the Measure.  
21 The public entity, here the State, must consider only the property or property interest that the  
22 claimant presently owned on the date demand was made. Waiver relief must be based on that  
23 date that property interest was most recently acquired by the present owner, not the date it was  
24 first acquired.

25

1           The State’s application of Measure 37 is also confirmed by Judge Dickey of the Marion  
2 County Circuit Court in the case of *Coleman v. State*, Case No. 06C15761. *Coleman* is  
3 significant because it likewise involved a claimant that, at one time, held fee title to the subject  
4 property, but prior to making a written demand for compensation conveyed her entire fee title to  
5 her son and took a lease for a term of years. The State concluded that Measure 37 applies to a  
6 property owner’s present interest, here a leasehold interest. The State then waived land use  
7 regulations that had been enacted or adopted after the date the claimant acquired her leasehold  
8 interest.

9           The petitioner disagreed with the State and argued that she was entitled to a waiver as of  
10 the date she first acquired fee title in the property because, among other things, she continued to  
11 possess the property from that date. Judge Dickey agreed with the State, concluding in his  
12 March 13, 2007 letter opinion:

13           “ORS 197.352(8) does not ask when an “owner” as defined by statute first  
14 obtained any interest in the property, **but only when the person acquired the**  
15 **“present” interest that entitles the person to relief.** Here [petitioner] acquired  
16 the interest that entitles her to relief under the statute on October 15, 2001, when  
17 she became a leaseholder...It is irrelevant that the leasehold was deemed to have  
18 begun before [petitioner’s] time as the property owner ended. The question is not  
19 whether there was an overlap in the types of ownership set forth in ORS  
20 197.352(11)(c) or even whether the transactions were part of a single transaction,  
21 but rather when the person acquired the defined ownership interest that entitles  
22 the person to relief under the statute.” [emphasis added]<sup>4</sup>

23           Here, Plaintiff sold his fee title that he acquired in 1985, then acquired his present  
24 leasehold interest on September 23, 2004. As Judge Dickey concluded in *Coleman*, the date  
25 Plaintiff acquired the interest he presently owns, the leasehold interest, is the date that defines the  
26 scope of Plaintiff’s arguable right to relief. Therefore September 23, 2004 is Plaintiff’s  
27 acquisition date for purposes of waiver relief under Measure 37.

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28 <sup>4</sup> A copy of the *Coleman* letter opinion is attached the Posegate Declaration as Exhibit B.

1           **B. Plaintiff was a present owner of a leasehold interest on the date he made a**  
2 **written demand for compensation under Measure 37 and nothing more.**

3           Plaintiff's real property interest on the date he made his written demand for compensation  
4 was the three year leasehold granted to him by John and Sheldon Arnett. (Record, §3, p. 10-13).  
5 Plaintiff was no longer a present owner of the undivided fee title that he acquired in 1985  
6 because he sold all of his interest in the property to John and Sheldon Arnett by bargain and sale  
7 deed on September 23, 2004. (Record, §3, p. 7-9, Posegate Decl. ¶2, Ex. A) Plaintiff then  
8 acquired a new interest in the property from the present owners, the Arnetts, a three year lease  
9 with an option to purchase. (Record, §3, p. 10-13) When Plaintiff made his written demand for  
10 compensation, his ownership interest in property arose entirely out of the September 23, 2004  
11 lease with the Arnetts . (Record, §3, p. 7-9) Accordingly, the State was required to review  
12 Plaintiff's claim based on his present leasehold interest.

13           **C. Plaintiff did not retain or acquire any ownership interest that would permit**  
14 **him to tack on to his 1985 fee title.**

15           Plaintiff admits that he conveyed his interest in the property to the Arnetts (Plaintiff's  
16 Motion: 3:11-12; Ex. B to Motion p. 1-3) but attempts to construe this conveyance as a financing  
17 agreement. [See Plaintiff's Motion, generally ]. Plaintiff's contention is impossible because he  
18 admits that the documents executing the conveyance are unambiguous, giving rise the  
19 presumption in law that "a deed that is absolute on its face is what it purports to be." *Blue River*  
20 *Sawmills, Ltd v. Gates*, 225 Or. 439, 447-448 (1960). Moreover, because the documents are  
21 unambiguous and integrated<sup>5</sup> extrinsic evidence is inadmissible. *Jarrett v. U. S. National Bank*,  
22 81 Or App 242, 247 (1986), *rev denied* 302 Or 476 (1987)

23

24 <sup>5</sup> The Sale Agreement "sets forth the entire understanding of the parties with respect to the  
25 purchase and sale of the Property [and] supersedes any and all prior negotiations, discussions,  
agreements, and understandings between the parties." (Posegate Decl. ¶ 2, Ex. A).

1 The only exception to this rule involving conveyances in real property involves the  
2 doctrine of equitable mortgages, which can only be proven by clear and convincing evidence.  
3 *Kohler v. Gilbert*, 1959 Or 483 499-501 (1959). Plaintiff did not provide clear and convincing  
4 evidence to the State in his Measure 37 claim that an equitable mortgage occurred, nor has he  
5 provided any competent evidence to this Court that would meet the same high standard of proof.  
6 As a result, the State correctly applied the law of equitable mortgages to the evidence before it,  
7 the same evidence that is undisputed here, and determined that the doctrine did not apply.

8 **1. Plaintiff has not demonstrated by clear and convincing proof that the sale**  
9 **contract and deed did not effect an absolute sale of his 1985 interest.**

10 While there is no one uniform application to determine if a deed, absolute on its face, is a  
11 mortgage, the Oregon Supreme Court has routinely agreed that the threshold analysis is the  
12 mutual intent of the parties at the time the transaction was consummated. *Fry v. D. H. Overmyer*  
13 *Co.*, 269 Or. 281, 292 (1974); *Blue River Sawmills, Ltd. v. Gates*, 225 Or. 439, 460 (1960);  
14 *Umpqua Forest Industries v. Neenah-Oregon Land*, 188 Or 605 (1950). Each case discussing  
15 equitable mortgages has announced a set of factors as guidance in determining the parties mutual  
16 intent. For example, the *Swenson* case cited by Plaintiff synthesized years of Oregon Supreme  
17 court cases to the seven factors set forth in Plaintiff's brief.<sup>6</sup>

18 Regardless of the factors utilized by any given court, the proponent of the equitable  
19 mortgage must establish the security agreement by clear and convincing evidence. *Kohler v.*  
20 *Gilbert*, 1959 Or at 499-501, *supra*. Plaintiff presented nothing to the State nor this Court that  
21 would satisfy this burden. Instead, Plaintiff concedes by his "evidence" that he was not

22 \_\_\_\_\_  
23 <sup>6</sup> Factors that may be considered in determining the intent of the parties include:  
24 "(1) the situation of the parties including their business and social relationship, (2) price fixed in  
25 relation to the actual value of the property conveyed, (3) surrender of possession by grantor, (4)  
26 payment of taxes, (5) payment of rent, (6) liability by grantor to pay interest, (7) financial  
27 circumstances of the grantor, and (8) conduct of the parties before and after the transaction."  
28 *Swenson v. Mills*, 198 Ore. App. 236, 242 (Or. Ct. App. 2005)

1 personally indebted to the Arnetts, rather the parties intended to create a business partnership in  
2 which they would contribute their relative assets to develop the property.

3 In support of his Measure 37 claim and his Motion, Plaintiff submitted the declarations of  
4 both Arnetts and his own declaration, along with supporting documents. In support of his  
5 Motion, only, Plaintiff submitted the declaration of his attorney Edward Fitch<sup>7</sup> Based on this  
6 “evidence,” Plaintiff argues that he is entitled to a 1985 acquisition date because his present  
7 interest is ongoing. Plaintiff defines his interest as both one of possession and one in equity.

8 The State does not dispute that on the date Plaintiff made his written demand that he had  
9 a right to possession and that he was an owner of a leasehold interest in the property.<sup>8</sup> However,  
10 the leasehold interest that gave Plaintiff a right of possession is not the same interest in land as  
11 the fee simple that Plaintiff owned prior to the 2004 conveyance. A fee simple is the “highest  
12 estate known in law and imports absolute ownership in the grantee” without any particular  
13 qualifications, restrictions or obligations. *Bergsvik v. Bergsvik*, 205 Or. 670, 682 (1955) (Court  
14 determined that fee simple was not conveyed because the grantor’s intent was to limit the estate  
15 granted). By contrast, the leaseholder’s rights and obligations are confined by statute and by its  
16 agreement with the landlord. ORS 90.100 *et. al.* Plaintiff’s continued possession of the  
17 property does not contradict the clear and unambiguous language of the deed and sale  
18 agreement.<sup>9</sup>

19 \_\_\_\_\_  
20 <sup>7</sup> The State objects to paragraphs 8, 9 and 10 of Mr. Fitch’s declaration as it lacks foundation, is not  
21 relevant and is based on hearsay. The State further objects to the documents attached as Exhibit 7 as none  
22 of the documents are signed and do not appear to have ever been finalized. Instead, only Fitch attests that  
23 these documents embodied the Arnetts and Riemenschneider’s intent. Fitch has no foundation for making  
24 these statements and both the paragraphs and the attached exhibits should be excluded from the Court’s  
25 consideration.

26 <sup>8</sup> Therefore, the State does not address Plaintiff’s arguments in Sections 2, 2.1, 2.2 or 2.3 to the extent  
27 they argue that Plaintiff is an owner of interest in real property. The real issue is the date that Plaintiff  
28 acquired the ownership interest he possessed on the date he made his written demand for compensation.

29 <sup>9</sup> The State’s argument in *Crook County v. All Electors, et. al.*, Case No. 05CV0015 submitted by the  
30 Plaintiff on the issue of the relevance of possession has no bearing on the facts and laws at issue here.  
31 The argument presented was based on the issue of transferability – an issue that is not relevant to his case.

1           The State denies that Plaintiff retained an equitable interest in the property because the  
2 “evidence” submitted by Plaintiff to the State and to this Court demonstrates that the parties  
3 intended to enter into a development deal, not a financing transaction. According to Edward  
4 Fitch’s objectionable declaration, the reason Plaintiff sold his property to the Arnetts was to enter  
5 into a partnership to develop the entire property. (Fitch Dec. ¶ 8). The Arnetts then purportedly  
6 changed their mind and sold the property back to Plaintiff. (Fitch Dec. ¶10). The last transaction  
7 took place after the Final Order was issued by DLCD and therefore was not considered in its  
8 decision. These purported facts do not describe a financing transaction intended by both parties  
9 “at the time the transaction was consummated.” *Blue River Sawmills Ltd. v. Gates*, 225 Or at  
10 446-447, *supra*.

11           Another important factor to consider is the absence of evidence establishing a debt owed  
12 by Plaintiff in favor of the Arnetts. Indeed, even where the parties have entered into an  
13 agreement to reconvey certain real property, but the optionor cannot compel repayment, the  
14 agreement may be regarded as a conditional sale, not a financing transaction. *Kohler v. Gilbert*,  
15 216 Or 483, 503 (1959). The absence of a personal debt "raises such a strong natural inference  
16 in this sort of a case that the transaction was a sale that it practically establishes the point." *Blue*  
17 *River Sawmills, Ltd. v. Gates*, 225 Or 439, 460 (1960). Here, where Plaintiff has not submitted  
18 evidence that the Arnetts had a right to compel repayment, the lease with the option to purchase  
19 appears to be nothing more than a conditional sale.

20           The only explanation offered by Plaintiff as to why the Arnetts took title is in the Arnetts  
21 and Plaintiffs’ declarations that they “took title because of Section 1031 considerations.” There  
22 is no further explanation or description of the purported Section 1031 transaction or why it

23

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24           The argument also does not contradict the State’s position in the instant case because Plaintiff sold his  
25 entire interest in the property without reservation. Plaintiff was then given a lease with an option to  
purchase in a separate, independent transaction. As a result, the date he acquired a lease interest is the  
measuring date for determining whether a restrictive land use regulation was enacted after that date.

26ge 13 - STATE OF OREGON'S MEMORANDUM IN SUPPORT OF ITS CROSS MOTION FOR  
SUMMARY JUDGMENT AND RESPONSE TO PLAINTIFF'S MOTION FOR  
SUMMARY JUDGMENT

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1 would have required Plaintiff to sell his fee title to the Arnetts. Section 1031 of the Internal  
2 Revenue Code permits owners of real property held for income to “exchange” such property for  
3 like kind property to defer capital gains tax. IRC § 1031. If the Arnetts did purchase Plaintiff’s  
4 property as part of a Section 1031 exchange this would further establish that at the time the  
5 transaction was consummated the Arnetts’ intent was to purchase the property outright to avoid  
6 tax consequences – not to assist Plaintiff in financing his purchase of the property. If the Arnetts  
7 did take the Section 1031 deferral, but intended nothing more than an equitable mortgage, such  
8 conduct may be tantamount to an admission of tax fraud. Such intent seems unlikely. The only  
9 conclusion is that Plaintiff has not submitted clear and convincing evidence that the deed and  
10 sale agreement do not do what they unambiguously purport to do – convey all of Plaintiff’s  
11 interest to the Arnetts.

12 **2. Plaintiff has not cited to any authority that, if applied to the instant facts,**  
13 **demonstrate that the deed and sale agreement are really a hidden loan transaction.**

14 Plaintiff’s position is that the parties entered into an equitable mortgage because the facts  
15 in this case are “very similar” to the facts described in *Swenson v. Mills*, 198 Or. App. 236  
16 (2005). (Plaintiff’s Motion 16:16-20.) Yet, Plaintiff does not provide any further explanation as  
17 to these purported similarities. Plaintiff’s conclusory assessment is not accurate.

18 In *Swenson*, the court considered whether a transaction between two parties involving the  
19 sale of real property and a subsequent lease to the seller was an equitable mortgage. *Swenson v.*  
20 *Mills*, 198 Or. App. 236, *supra* The court determined that an equitable security agreement did  
21 exist because the defendant proved, by clear and convincing evidence, that the deed and the lease  
22 did not effect a sale and lease back of the property. *Id* The competent evidence considered by  
23 the *Swenson* court is significant because it of its glaring dissimilarities to the instant case:

24 On de novo review, these are the factors that weigh in favor of our conclusion  
25 that the transaction was, in fact, a security agreement: At the relevant time,  
Pyramid and Hait were experiencing serious financial difficulty. Plaintiff and

1 Hait were close personal friends, and plaintiff was strongly motivated to help  
2 Hait through the financial crisis and to help Pyromid succeed. The purchase  
3 price for the subject property was only half the property's market value. The  
4 general terms of the agreement were reached in a single telephone conversation  
5 between plaintiff and Hait and without the benefit of an appraisal. The broker  
6 listing the property received no commission for the sale. Pyromid retained  
7 possession of the property and continued in operation and had an obligation  
8 under the lease agreement to pay taxes and make lease payments of \$ 6,000 per  
9 month. The lease amount was below the property's actual market lease value  
10 and was determined based on a 12 percent rate of return on plaintiff's  
11 investment. The sale was conditioned on Pyromid's option to repurchase the  
12 property during the lease on terms favorable to Pyromid, including a repurchase  
13 price the same as plaintiff's purchase price of \$ 600,000, substantially below the  
14 property's market value. The parties contemplated that Pyromid would continue  
15 to list the subject property for sale and that the proceeds of any sale in excess of  
16 \$ 600,000 would be shared between Pyromid and plaintiff.

9 Those facts lead us to conclude that defendant established, by clear and  
10 convincing evidence, that, although the plaintiff and Hait structured the  
11 transaction as an outright sale of the subject property, it was a security  
12 agreement, securing Pyromid's obligation to repay the \$ 600,000 through lease  
13 payments or the repurchase of the property through the exercise of the option.

12 *Swenson* at 242-243.

13 By contrast, Plaintiff has not submitted any competent evidence that shows the  
14 relationship between himself and the Arnetts, his financial condition, the Arnett's motivation in  
15 entering into the agreement, the circumstances surrounding the actual transaction, a comparison  
16 of the lease price to the market price of the property, or any other evidence that would show by a  
17 clear and convincing standard that the sale and lease were, in fact, a security agreement. Instead,  
18 Plaintiff's "evidence" demonstrates that the parties entered into the transaction for the sole  
19 purpose of creating a partnership to develop property.

20 Given the "evidence" submitted by Plaintiff in support of his Measure 37 claim and his  
21 Motion, the only conclusion is that the State correctly determined that Plaintiff sold his 1985  
22 interest, acquired his present leasehold interest in 2004 and that such interest has not been  
23 affected by a new land use regulation. That is, even if the Court agrees with Plaintiff, a remand  
24 to the agency would be the correct order rather than compensation.

1 **II. The State is not required to pay compensation to Plaintiff, regardless of the outcome of**  
2 **this matter.**

3 The State also moves for judgment on Plaintiff's compensation claim because Plaintiff is  
4 not entitled to compensation as a matter of law. The language and structure of Measure 37  
5 clearly show that the voters intended to give public entities the choice between paying  
6 compensation and waiving land use regulations. The statute provides:

7 (8) Notwithstanding any other state statute or the availability of funds  
8 under subsection (10) of this section, in lieu of payment of just compensation  
9 under this section, the governing body responsible for enacting the land use  
10 regulation may modify, remove, or not to apply the land use regulation or land use  
11 regulations to allow the owner to use the property for a use permitted at the time  
12 the owner acquired the property.

13 \* \* \* \* \*

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

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

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<sup>10</sup> If the text and context did not clearly indicate that the choice of relief is vested in the public entities, then a court would review the legislative history. *See, e.g.* the Voters' Pamphlet's explanatory statement for Measure 37: "If a property owner proves that a land use regulation 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 In this case, the State denied Plaintiff's claim. However, even if it had determined that  
2 Plaintiff's date of acquisition should be 1985, the State could have elected not to apply restrictive  
3 land use regulations in lieu of paying compensation to plaintiff. Therefore, Plaintiff cannot  
4 utilize Measure 37 to force the state to compensate him for his purported injuries.

5 **III. Plaintiff's complaint should be dismissed in its entirety for lack of jurisdiction and**  
6 **failure to state a claim because the APA provides the exclusive remedy.**

7 Plaintiff asserts that a literal interpretation of ORS 197.352(6) permits him to sue for  
8 compensation because the State did not waive all the statutes and regulations that may have  
9 restricted Plaintiff's present use of the property. Plaintiff's complaint is governed by the APA  
10 because it is, in substance, a review of a final order made by a state agency. The APA requires  
11 however, that a request for review be brought within 60 days of the date the agency mails its  
12 Final Order. As set forth in the State's accompanying Motion to Dismiss, Plaintiff failed to  
13 make its request for review within the jurisdictional time limits. Therefore, Plaintiff's case must  
14 be dismissed in its entirety because of its jurisdictional defects. The State refers to and  
15 incorporates its arguments made in the Motion to Dismiss that is scheduled to be heard  
16 concurrently with Plaintiff's Motion and the State's Cross Motion.

17 **CONCLUSION**

18 Summary judgment is appropriate in the State's favor because plaintiff Robert  
19 Riemenschneider has not suffered the type of injury that Measure 37 is intended to cure. The  
20 property interest that Plaintiff owned on the date he made a written demand for compensation  
21 was not restricted nor devalued by a land use regulation after he acquired that interest.  
22 Therefore, the State is not authorized to grant Plaintiff any type of relief under Measure 37.  
23 Moreover, even if this Court were to find that that the State erred in its order, Measure 37  
24 authorizes the State to issue a waiver in lieu of compensation. Therefore, Plaintiff is not entitled  
25 to compensation regardless of the outcome of these motions. Finally, regardless of whether the

26ge 17 - STATE OF OREGON'S MEMORANDUM IN SUPPORT OF ITS CROSS MOTION FOR  
SUMMARY JUDGMENT AND RESPONSE TO PLAINTIFF'S MOTION FOR  
SUMMARY JUDGMENT


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1 State's position is correct, the APA is Plaintiff's exclusive remedy, which Plaintiff did not  
2 appropriately pursue. Thus, Plaintiff's complaint should be dismissed in its entirety for lack of  
3 jurisdiction.

4 DATED this 25<sup>th</sup> day of April, 2007.

5 Respectfully submitted,

6 HARDY MYERS  
7 Attorney General

8   
9 STACY C. POSEGATE #06474  
10 DARSEE STALEY #87351  
11 Assistant Attorneys General  
12 Trial Attorneys  
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16 Stacy.C.Posegate@doj.state.or.us  
17 Of Attorneys for State of Oregon

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3  
4 IN THE CIRCUIT COURT OF THE STATE OF OREGON  
5 FOR THE COUNTY OF CROOK

6 ROBERT L. RIEMENSCHNEIDER,

7 Plaintiff,

8 v.

9 CROOK COUNTY, a political subdivision of  
10 the State of Oregon; and STATE OF  
11 OREGON, acting by and through the  
Department of Land Conservation and  
Development,

12 Defendants.

Case No. 06CV0074

DECLARATION OF STACY C. POSEGATE IN  
SUPPORT OF THE STATE OF OREGON'S  
RESPONSE TO PLAINTIFF'S MOTION FOR  
SUMMARY JUDGMENT AND THE STATE'S  
CROSS-MOTION FOR SUMMARY  
JUDGMENT

13 I, Stacy C. Posegate, do declare and say:

14 1. I am an Assistant Attorney General at the Oregon Department of Justice,  
15 attorneys for Defendants in the above-captioned matter. I make this declaration based on my  
16 personal knowledge and in support of the State's Response to Plaintiff's Motion for Summary  
17 Judgment and the State's Cross-Motion for Summary Judgment. .

18 2. I certify that the document attached hereto as Exhibit "A" and entitled "Sale  
19 Agreement" is a true and correct copy of an original that I received from Plaintiff's counsel in  
20 response to the State of Oregon's First Request for Production of Documents to Plaintiff  
21 Riemenschneider.

22 3. Plaintiff's counsel, Edward Fitch and Michael McLane have stipulated on  
23 Plaintiff's behalf to the authenticity of this document and to its admission as evidence in support  
24 of the State's Response and Cross-Motion for Summary Judgment.  
25

26ge 1 - DECLARATION OF STACY C. POSEGATE IN SUPPORT OF THE STATE OF  
OREGON'S RESPONSE TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT  
AND THE STATE'S CROSS-MOTION FOR SUMMARY JUDGMENT  
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**SALE AGREEMENT**

DATE: September 23, 2004

SELLER: ROBERT L. RIEMENSCHNEIDER AS TO 1/4 INTEREST

BUYER: JOHN ARNETT  
5792 NE 5<sup>TH</sup> STREET  
REDMOND, OR 97756

and

SHELDON ARNETT  
3590 SW 35<sup>TH</sup>  
REDMOND, OR 97756

**RECITAL:**

Seller desires to sell to Buyer and Buyer desires to purchase from Seller an undivided 25% interest in certain real property with all improvements located on it in Crook County, Oregon, having the following legal description (the "Property"):

In Township 15, Range 15 East of the Willamette Meridian:

Section 4: SW 1/4

Section 9: N 1/2, N 1/2 N 1/2 SW 1/4, N 1/2 NW 1/4 SE 1/4, E 1/2 SE 1/4

Section 10: SW 1/4 NE 1/4, SE 1/4 NW 1/4, SW 1/4, W 1/2 SE 1/4

Section 14: That portion of the NW 1/4 NW 1/4 lying Northwesterly of Highway 126, as located and constructed

Section 15: All that portion lying Northwesterly of Highway 126, as located and constructed

Section 16: E 1/2 E 1/2

Section 22: All that portion lying Northwesterly of Highway 126, as located and constructed

**AGREEMENT:**

Now, therefore, for valuable consideration, the parties agree as follows:

1. **Sale and Purchase.** Buyer agrees to purchase a Twenty-Five percent interest (25%) in the Property from Seller and Seller agrees to sell an undivided Twenty-Five percent interest (25%) in the Property to Buyer for the sum of \$1, plus other good and valuable consideration (the "Purchase Price") (lease with option to purchase).

2. **Payment of Purchase Price.** At closing, Buyer shall pay the purchase price in cash.

3. **Closing.** Closing shall take place on or before September 30, 2004 (the "Closing Date"), at the offices of Amerititle, 735 SW Sixth, Redmond, Oregon.

4. **Preliminary Title Report.** Seller has furnished to Buyer a preliminary title report showing the condition of title to the Property, together with copies of all exceptions listed therein (the "Title Report"). Buyer will have 5 days from the date of this agreement to review the Title Report and to notify Seller, in writing, of Buyer's disapproval of any exceptions shown in the Title Report. Those exceptions not objected to by Buyer are referred to below as the "Permitted Exceptions." Zoning ordinances, building restrictions, taxes due and payable for the current tax year, and reservations in federal patents and state deeds shall be deemed Permitted Exceptions. If Buyer notifies Seller of disapproval of any exceptions, Seller shall have 10 days after receiving the disapproval notice to either remove the exceptions or provide Buyer with reasonable assurances of the manner in which the exceptions will be removed before the transaction closes. If Seller does not remove the exceptions or provide Buyer with such assurances, Buyer may terminate this Agreement by written notice to Seller in which event the earnest money shall be refunded to Buyer and this Agreement shall be null and void.

5. **Deed.** On the Closing Date, Seller shall execute and deliver to Buyer a statutory warranty deed, conveying the Property to Buyer, free and clear of all liens and encumbrances except the Permitted Exceptions.

6. **Title Insurance.** Within 15 days after closing, Seller shall furnish Buyer with a standard owner's policy of title insurance in the amount of the purchase price, standard form, insuring Buyer as the owner of the Property subject only to the usual printed exceptions and the Permitted Exceptions.

7. **Taxes; Prorates.** Real property taxes for the current tax year, insurance premiums (if Buyer assumes the existing policy) and other usual items shall be prorated as of the Closing Date.

8. **Possession.** Buyer shall be entitled to possession immediately upon closing.

9. **Representations** Buyer represents that it has accepted and executed this Agreement on the basis of its own examination and personal knowledge of the Property; that Seller and Seller's agents have made no representations, warranties, or other agreements concerning matters relating to the Property; that Seller and Seller's agents have made no agreement or promise to alter, repair, or improve the Property; and that Buyer takes the Property in the condition, known or unknown, existing at the time of this Agreement, "AS IS."

10. **Binding Effect/Assignment Restricted.** This Agreement is binding on and will inure to the benefit of Seller, Buyer, and their respective heirs, legal representatives, successors, and assigns. Nevertheless, Buyer will not assign its rights under this Agreement without Seller's prior written consent which consent shall not be unreasonably withheld.

11. **Remedies** TIME IS OF THE ESSENCE REGARDING THIS AGREEMENT. If the conditions described in Section 6 above are satisfied or waived by Buyer and the transaction does not thereafter close, through no fault of Seller, before the close of business on the Closing Date, Buyer shall forfeit the earnest money deposit to Seller as liquidated damages, and this Agreement shall be of no further effect, it being the intention of the parties that Buyer may forfeit the earnest money and be free of any further obligations under this Agreement. If Seller fails to deliver the deed described in Section 7 above on the Closing Date or otherwise fails to consummate the transaction, the earnest money will be refunded to Buyer, but acceptance by Buyer of the refund will not constitute a waiver of other remedies available to Buyer.

12. **Attorney Fees.** In the event action is instituted to enforce any term of this Agreement, the prevailing party shall recover from the losing party reasonable attorney fees incurred in such action as set by the trial court and, in the event of appeal, as set by the appellate courts.

13. **Notices.** All notices and communications in connection with this Agreement shall be given in writing and shall be transmitted by certified or registered mail, return receipt requested, to the appropriate party at the address first set forth above. Any notice so transmitted shall be deemed effective on the date it is placed in the United States mail, postage prepaid. Either party may, by written notice, designate a different address for purposes of this Agreement.

14. **Entire Agreement.** This Agreement sets forth the entire understanding of the parties with respect to the purchase and sale of the Property. This Agreement supersedes any and all prior negotiations, discussions, agreements, and understandings between the parties. This Agreement may not be modified or amended except by a written agreement executed by both parties.


15. **Applicable Law.** This Agreement shall be construed, applied, and enforced in accordance with the laws of the state of Oregon.

16. **Acceptance.** This Agreement shall be null and void unless accepted by Seller, by Seller's execution of it, on or before September 23, 2004.


**THE PROPERTY DESCRIBED IN THIS INSTRUMENT MAY NOT BE WITHIN A FIRE PROTECTION DISTRICT PROTECTING STRUCTURES. THE PROPERTY IS SUBJECT TO LAND USE LAWS AND REGULATIONS, WHICH, IN FARM OR FOREST ZONES, MAY NOT AUTHORIZE CONSTRUCTION OR SITING OF A RESIDENCE AND WHICH LIMIT LAWSUITS AGAINST FARMING OR FOREST PRACTICES AS DEFINED IN ORS 30.930 IN ALL ZONES. BEFORE SIGNING OR ACCEPTING THIS INSTRUMENT, THE PERSON ACQUIRING FEE TITLE TO THE PROPERTY SHOULD CHECK WITH THE APPROPRIATE CITY OR COUNTY PLANNING DEPARTMENT TO VERIFY APPROVED USES AND EXISTENCE OF FIRE PROTECTION FOR STRUCTURES.**

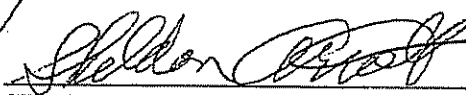
THIS INSTRUMENT WILL NOT ALLOW USE OF THE PROPERTY DESCRIBED IN THIS INSTRUMENT IN VIOLATION OF APPLICABLE LAND USE LAWS AND REGULATIONS. BEFORE SIGNING OR ACCEPTING THIS INSTRUMENT, THE PERSON ACQUIRING FEE TITLE TO THE PROPERTY SHOULD CHECK WITH THE APPROPRIATE CITY OR COUNTY PLANNING DEPARTMENT TO VERIFY APPROVED USES AND TO DETERMINE ANY LIMITS ON LAWSUITS AGAINST FARMING OR FOREST PRACTICES AS DEFINED IN ORS 30.930.

SELLER:

  
ROBERT L. RIEMENSCHNEIDER

BUYER:

  
JOHN ARNETT

  
SHELDON ARNETT

Riemenschneider/State  
P00266



CIRCUIT COURT OF OREGON  
THIRD JUDICIAL DISTRICT  
MARION COUNTY COURTHOUSE  
100 HIGH STREET NE  
P.O. BOX 12869  
SALEM, OREGON 97309-0869

RECEIVED  
MAR 16 2007

DEPARTMENT OF JUSTICE  
TRIAL DIVISION

Don A. Dickey  
Circuit Court Judge  
(503) 373-4445  
Fax: (503) 588-7928

March 13, 2007

Charles F. Hudson  
Attorney at Law  
601 SW Second Avenue, Suite 2100  
Portland, OR 97204-3158

Darsee Staley  
Assistant Attorney General  
1162 Court Street NE  
Salem, OR 97301

Re: Coleman v. State of Oregon  
Marion County Circuit Court Case No. 06C15761

Dear Ms. Staley and Mr. Hudson:

This matter came before the Court on February 15, 2007, for a hearing on Cross Motions for Summary Judgment. The Plaintiffs appeared in person and by and through Charles Hudson, their attorney and the Defendants appeared by and through Darsee Staley, Assistant Attorney General. After hearing oral argument of the parties.

ISSUES

Whether, pursuant to the Court of Appeals' decision in *Corey v. DLCD*, 210 Or App 542, \_\_\_ P3d \_\_\_ (2007), it appears that the Court of Appeals rather than this Court has jurisdiction in this case?

Whether, if jurisdiction resided with this Court, this Court should grant the State's Motion for Summary Judgment because the Department of Land Conservation and Development ("DLCD") correctly applied the law in determining that Plaintiff Helen Coleman acquired her present ownership interest in the property on October 15, 2001, and that finding is supported by substantial evidence?

Whether Petitioners' declaratory judgment action is barred by the exclusive remedy provision of the Administrative Procedures Act ("APA")?

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Whether, in light of the above conclusions, this Court should deny Petitioners' Motion for Summary Judgment?

### DISCUSSION

Petitioners are Helen Coleman and her son, Christopher Coleman. Helen Coleman and her late husband James became owners of the subject property in 1951. On October 15, 2001, Helen and James Coleman deeded the property to Christopher Coleman. On the same date, Christopher Coleman leased the property to Helen and James Coleman, to terminate upon the death of the survivor of Helen and James Coleman. Helen Coleman maintained a continuous right to possess the property, as she went directly from being the property owner to being a lessee of the property.

Christopher Coleman filed a demand pursuant to Ballot Measure 37 (2004), which is codified at ORS 197.352. In the demand, Helen and James Coleman were listed as persons who had an interest in the property. DLCD found the claim valid. Using its discretion, DLCD chose not to pay Christopher Coleman's claim, but rather not to apply the land use regulations that became effective after he acquired ownership of the property and those regulations that became effective after Helen Coleman acquired her lease of the property.

Petitioners now challenge this determination, filing a petition for judicial review pursuant to ORS 183.484 and for declaratory judgment. Petitioners assert that Helen Coleman has retained a statutorily-defined interest in the property since 1951, when she first acquired an ownership interest.

The State and Petitioners have filed cross motions for summary judgment.

In a Petition for Judicial Review, it is this court's duty to determine whether the agency's final order is supported by substantial evidence and whether the agency correctly applied the law. *See* ORS 183.484(5). Thus, in evaluating the Cross Motions for Summary Judgment, this Court must determine whether "the record, viewed as a whole, would permit a reasonable person to make th[e factual] finding" made by the agency. ORS 183.484(5)(c); *see Powell v. Bunn*, 185 Or App 334, 338-39, 59 P3d 559 (2002), *rev den*, 336 Or 60 (2003). If it does not, this Court must set aside or remand the order. *See* ORS 183.484(5)(c). If the agency incorrectly applied the law, this Court must set aside, modify, or remand the order. *See* ORS 183.484(5)(a).

#### A. Jurisdiction.

In *Corey v. DLCD*, 210 Or App 542, \_\_\_ P3d \_\_\_ (2007), the Court of Appeals determined that, when a Measure 37 claimant seeks judicial review of the *extent* of the remedy provided by DLCD rather than review of its determination of *whether* the claimant is entitled to a remedy, jurisdiction

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resides in the Court of Appeals. In this case, as in *Corey*, the question is whether DLCD has properly determined the extent of the remedy to which petitioners are entitled. Consequently, pursuant to *Corey*, it appears that jurisdiction for Petitioners' claim lies in the Court of Appeals rather than this Court. Thus, this Court finds that it is appropriate to transfer this case to the Court of Appeals pursuant to ORS 14.165(1)(a).

Because, however, there is a good deal of uncertainty surrounding the precedential value of *Corey*, this Court will consider, in the alternative, the merits of the parties' motions.

**B. DLCD's Factual and Legal Conclusions.**

As noted, Petitioners disagree with that portion of DLCD's decision determining that it would not apply land use regulations that became applicable after Helen Coleman leased the property in 2001, rather than not applying all regulations that were enacted after she became an owner of the property in 1951.

DLCD found, and the parties agree, that a leasehold interest is a sufficient interest in the property to entitle Helen Coleman to relief under Measure 37. This finding correctly applied the law. ORS 197.352(8) permits a governing body that has enacted a land use regulation to not apply the regulation(s) "to allow the owner to use the property for a use permitted at the time the owner acquired the property." ORS 197.352(11)(C) defines "owner" as "the present owner of the property, or any interest therein." Thus, as a matter of law, a present owner of the property, as well as the present owner of any interest in the property, may obtain a "waiver."

The question, then, is whether DLCD was correct in determining that Helen Coleman's ownership of the property, as defined by the statute, dates to 2001, when she acquired her present leasehold, rather than to 1951, when she acquired the property as an owner. As noted, an "owner" under the statute includes the present owner of the property, which in this case is Christopher Coleman, and the present owner of an interest in the property. *See* ORS 197.352(11)(C). As a leaseholder, Helen Coleman is the present owner of an interest in the property. This interest in the property is different than the ownership interest she once had, and was acquired at a different time than her ownership interest. When Helen Coleman deeded the property to Christopher Coleman, her ownership of the property ended and she acquired a new interest in the property as a leaseholder.

ORS 197.352(8) does not ask when an "owner" as defined by statute first obtained any interest in the property, but only when the person acquired the "present" interest that entitles the person to relief. Here, Helen Coleman acquired the interest that entitles her to relief under the statute on October 15, 2001, when she became a leaseholder.

It is irrelevant that the leasehold was deemed to have begun before Helen Coleman's time as the property owner ended. The question is not whether there was an overlap in the types of

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ownership set forth in ORS 197.352(11)(C) or even whether the transactions were part of a single transaction, but rather when the person acquired the defined ownership interest that entitles the person to relief under the statute.

There is no basis in the record for determining that Helen and James Coleman retained an ownership interest in the property when they deeded the property to Christopher Coleman. The contracts of the transaction are unambiguous: Helen and James deeded the property to Christopher without reserving any life estate or interest in the property. Christopher then leased the property to Helen and James. There is no ambiguity in those documents, and they establish that Helen and James Coleman intended to transfer a present ownership interest to Christopher Coleman. See *Pyburn v. Hammond*, 107 Or App 665, 813 P2d 1095, *rev den*, 312 Or 150 (1991) (where defendant's deed to his stepson did not reserve a life estate but, three years later, both defendant and his stepson executed an addendum to deed stating that they each intended that defendant reserve a life estate, court stated, "An unexpressed intent of defendant and his stepson could not create a reservation of a life estate \* \* \*. Defendant did not reserve and, therefore, did not have a life estate"); *Hanns v. Hanns*, 246 Or 282, 295-96, 423 P2d 499 (1967) (to be valid, a deed must be delivered with the intent that it will create a present interest in the grantee).

Indeed, Helen Coleman's declaration supports DLCD's finding, as she states that she and James Coleman intended to transfer fee ownership of the property to Christopher Coleman. The entirety of the admissible and relevant portions of the declarations of Helen and Christopher Coleman<sup>1</sup> do not establish that there is an ambiguity in the formation of the contract. Their declarations indicate, at the most, that the written contracts do not reflect the agreement Petitioners made. But Petitioners do not seek reformation, and the sale and lease contracts are complete on their face. See *Hunnell v. Roseburg Resources Co.*, 183 Or App 228, 234, 51 P3d 680, *rev den*, 335 Or 114 (2002) ("An unambiguous contract that mistakenly fails to reflect the intent of the parties through inadvertent omission is remedied through a claim for reformation"; to obtain reformation, the party must prove an antecedent agreement, mutual mistake, and that the party was not grossly negligent). The agreement Petitioners assert they made or the intentions they assert they had – that Christopher Coleman would obtain possession and control of the property only upon the death of both Helen and James Coleman – contradict the written agreements. Consequently, this Court finds that the written agreements fully integrated the parties' agreement, at least as to the parties' legal responsibilities related to the property at issue. Evidence of any agreement that contradicts the

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<sup>1</sup>The following portions of Christopher Coleman's January 11, 2007 declaration are inadmissible and, if jurisdiction resided in this court, would be stricken: the portion of ¶ 4 that purports to speak to the intention of Helen and James Coleman and the second sentence of ¶ 5. Consistent with that, the portions of Christopher Coleman's January 31, 2007 declaration that purport to speak to the intention and interest of Helen and/or James Coleman would be stricken.

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written agreement is inadmissible.<sup>2</sup> See ORS 41.740 (when an agreement has been reduced to writing, no evidence of the terms of the agreement are admissible unless the pleadings allege a mistake or imperfection in the writing or the validity of the agreement is disputed); *Harris v. Warren Family Properties, LLC*, 207 Or App 732, 738-39, 143 P3d 548 (2006) (“where an agreement is reduced to writing *and there is no ambiguity to be explained*,” the writing is subject to the parol evidence rule (emphasis in original)); *State v. Triad Mechanical, Inc.*, 144 Or App 106, 119, 925 P2d 918, *rev den*, 324 Or 488 (1996) (“the alleged oral agreement was so closely connected in subject matter to the agreement that was reduced to writing that it would not be natural, given the provisions of [the contract], to fail to address in writing the claims now made,” so the parol evidence rule barred evidence of the oral agreement); *Hatley v. Stafford*, 284 Or 523, 534-35, 588 P2d 603 (1978) (“The court should presume that the writing was intended to be a complete integration, at least when the writing is complete on its face, and should admit evidence of consistent additional terms only if there is substantial evidence that the parties did not intend the writing to embody the entire agreement”).<sup>3</sup>

DLCD’s finding that Helen Coleman possessed only a leasehold interest in the property, and that her leasehold interest commenced on October 15, 2001, is therefore supported by substantial evidence and is a correct application of the law.

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<sup>2</sup>As stated in *Card v. Stirnweis*, 232 Or 123, 131, 374 P2d 472 (1962):

The purpose of ORS 41.740 and 42.220 in placing the judge in the position of the parties whose writing he is endeavoring to understand is like the act of a person who, upon seeing another studying a photograph of an individual from which the background has been cut away, hands to the person the background part so that he may restore the mutilated photograph and see the picture as it was when the camera was snapped.

The restoration of the background to the mutilated photograph does not alter or change a single line or part of the photograph, but it may enable the one viewing the photograph to discern more clearly what is represented by it.

Consistent with this analogy, considering both the photograph (the contracts) and the background (the parties’ relationships and their current declarations), it appears that Petitioners essentially agreed that Helen and James Coleman would have a life estate. That was not, however, the contract terms to which the parties agreed. Because those terms are clear, and any other agreement between petitioners fully contradicts those terms, this court cannot give effect to any other background agreement, no matter how sympathetic Petitioners’ plight.

<sup>3</sup>Given this Court’s conclusion that, as a matter of law, any other agreement between Petitioners cannot be considered, it is unnecessary to remand to DLCD for it to consider whether the evidence presented to this court but not to DLCD would affect its conclusion.

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C. Declaratory Judgment.

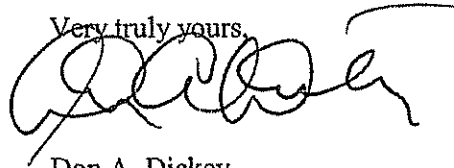
ORS 197.352(6) provides persons designated as “owners” under the statute with a cause of action for compensation if a land use regulation continues to apply to the owner’s property more than 180 days after the owner has made a written demand for compensation. Despite this, the exclusivity provision of the APA applies and divests this court of authority to consider Petitioners’ declaratory judgment claim. See ORS 183.480(2) (providing that judicial review of final agency orders “shall be solely as provided by” the APA); *Ashland Drilling, Inc. v. Jackson County*, 168 Or App 624, 629-31, 4 P3d 748, *rev den*, 331 Or 429, 26 P3d 148 (2000). In any event, for the reasons outlined above, petitioners’ declaratory judgment action lacks merit.

**CONCLUSION**

This Court transfers this case to the Court of Appeals pursuant to ORS 14.165(1)(a) and *Corey*.

In the alternative, this Court finds that DLCD’s final order is supported by substantial evidence and is a correct application of the law. Therefore, this Court would grant the State’s Motion for Summary Judgment and deny Petitioners’ Motion.

Very truly yours,



Don A. Dickey  
Circuit Court Judge

DAD:kat  
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**CERTIFICATE OF SERVICE**

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I certify that on April 25, 2007, I served the foregoing STATE OF OREGON'S CROSS-MOTION FOR SUMMARY JUDGMENT, MEMORANDUM IN SUPPORT OF STATE'S CROSS-MOTION FOR SUMMARY JUDGMENT AND RESPONSE TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT, and DECLARATION OF STACY C. POSEGATE IN SUPPORT OF STATE'S RESPONSE TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND THE STATE'S CROSS-MOTION FOR SUMMARY JUDGMENT upon the parties hereto by the method indicated below, and addressed to the following:

Edward P. Fitch  
Bryant, Emerson & Fitch, LLP  
888 SW Evergreen Avenue  
PO Box 457  
Redmond, OR 97756

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 MAIL DELIVERY  
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