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

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DEPARTMENT OF JUSTICE  
TRIAL DIVISION

March 13, 2007

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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

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

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.

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.

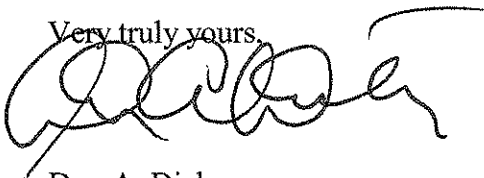
ORS 197.352(6) provides persons designated as “owners” under the statute with a cause of action for compensation if a land use regulation continues to apply to the owner’s property more than 180 days after the owner has made a written demand for compensation. Despite this, the exclusivity provision of 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,

A handwritten signature in black ink, appearing to read "Don A. Dickey", written over the typed name below.

Don A. Dickey  
Circuit Court Judge

DAD:kat  
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