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

6 KIM D. WARD; KIM D. WARD L.L.C., a
7 limited liability company; SALLY WARD;
8 DANA WARD; JESSICA WARD; JUSTIN
WARD; and DONNA MOORE,

9 Plaintiffs,

10 v.

11 CITY OF BEND OREGON; STATE OF
12 OREGON; DEPARTMENT OF LAND
13 CONSERVATION AND DEVELOPMENT
14 OF STATE OF OREGON; LAND
CONSERVATION AND DEVELOPMENT
COMMISSION OF STATE OF OREGON;
and DEPARTMENT OF ADMINISTRATIVE
SERVICES OF STATE OF OREGON,

15 Defendants.

Case No. 05CV0448ST

SUPPLEMENTAL BRIEFING REGARDING
CONVEYANCES

16
17 INTRODUCTION

18 At a December 4, 2006, hearing, the Court requested that the parties brief whether there
19 are exceptions to the general rule that a valid, unambiguous deed conveys all of the estate that it
20 purports to convey on its face other than the equitable mortgage exception. The State has not
21 found authority for exceptions to that general rule other than the equitable mortgage exception.¹
22 Therefore, Plaintiff Kim Ward's argument—that his continued possession of the property is an
23 "interest" within the meaning of ORS 197.352 that he has held since he first acquired the
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25 ¹ In reaching this conclusion, the State reviewed Oregon law, several publications on Real
26 Property published by the Oregon State Bar, *Powell on Real Property* (Michael Allen Wolf ed.,
Matthew Bender), *Thompson on Real Property, Second Thomas Edition* (David A. Thomas ed.,
1999), and *Corbin on Contracts, Revised Edition* (Joseph M. Perillo ed., 1997).

1 property that is restricted by state land use regulations—must fail. Accordingly, he is not
2 entitled to assert a claim under Measure 37.

3 **ANALYSIS**

4 There is a presumption that a deed absolute on its face is “what it purports to be unless
5 and until proved otherwise by clear and convincing evidence.” *Fry v. D.H. Overmyer, Co., Inc.*,
6 269 Or 281, 292 (1974). However, if the parties’ mutual intent was to use the deed as a security,
7 such a deed may create an equitable mortgage, rather than transfer the property. *Swenson v.*
8 *Mills*, 198 Or App 236, 241-42, *rev den* 339 Or 136 (2005).

9 There do not appear to be any other exceptions to the general rule stated in *Fry*. As a
10 matter of practice, the absence of other exceptions to the rule that valid, unambiguous deeds
11 convey the interests they purport to convey makes sense. Deeds are written instruments that
12 convey interests in real property. *Black’s Law Dictionary*, 423 (7th ed. 2002). A deed defines
13 the scope of a conveyance, and in order to modify or rescind a conveyance, a party must
14 generally modify or nullify a deed. Indeed, statutes regarding warranty deeds, special warranty
15 deeds, bargain and sale deeds, and quitclaim deeds confirm that, unless a grantor explicitly
16 reserves an interest in the property in a deed, the deed is an effective transfer of the grantor’s
17 entire interest in the property. ORS 93.850, 93.855, 93.860 and 93.865. Cases considering those
18 statutes also indicate that a reservation of a property interest is required to keep an interest in the
19 property conveyed in the grantor. *E.g. MacHaffie v. Dept. of Revenue*, 312 Or 122 (1991) (“A
20 bargain and sale deed conveys ‘the entire interest in the described property at the date of the deed
21 which the deed purports to convey,’” (quoting ORS 93.860)); *Ono v. Coos County*, 102 Or
22 App 32, 35, *rev den* 310 Or 281 (1990) (“By definition, a quitclaim deed is one that passes
23 whatever title, interest or claim that the grantor may have in the described property, without
24 warranting the validity of the title or containing any other covenants of title.”).

25 As with other written instruments, courts will generally not look beyond the face of a
26 deed to determine what the parties intended in the absence of an ambiguity. *Realvest Corp. v.*

1 *Lane County*, 196 Or App 109, 116 (2004); *Pioneer Resources, LLC v. Lemargie*, 175 Or App
2 202, *rev den* 333 Or 339 (2001). Once the grantor delivers an executed deed to a grantee, the
3 grantor can no longer reserve any interest not reserved by the deed, as title to the property
4 conveyed is then vested in the grantee. *Hilterbrand v. Carter*, 175 Or App 335, 339 (2001).
5 Thus, if a grantor wants to reserve an interest in the property, the deed *must* include language
6 reserving an interest to the grantor. *See Oliver v. Johnson*, 166 Or 475, 480 (1941) (A
7 reservation in a deed constitutes "the creation in behalf of the grantor of a new right issuing out
8 of the thing granted[.]").

9 In the absence of a reservation, a grantor cannot be said to have retained an interest in the
10 property because deeds transfer *all* interests in the real property conveyed not explicitly reserved
11 by a grantor to the grantee. If no interest is explicitly reserved, the grantor may *reacquire* an
12 interest in the property, but cannot be said to have *retained* one.

13 Kim Ward does not claim to have reserved any interest in the property by deed. Rather,
14 he alleges that because he transferred the property to Kim W. Ward LLC and is the majority
15 shareholder of the LLC, it is as though he had reserved an interest in the property. In essence, he
16 asks the Court to ignore the effect of his conveyance of the property. Had Ward intended to keep
17 an interest in the property, he could have provided for a reservation with Kim W. Ward LLC.
18 For instance, he could have arranged for a sale and lease-back transaction with Kim Ward LLC.
19 *See Powell on Real Property* §17.00 Scope Note (Michael Allen Wolf, Ed., Mathew Bender).
20 Similarly, he could have arranged to reserve an easement, *profit a prendre*, or other interest as
21 part of the sale. However, he did not. Therefore, the scope of his permission to use the property
22 is controlled by the LLC's right to use the property.

23 Ward has attempted to string together a theory as to how he reserved an interest in the
24 property without actually doing so. In Oregon, his theory must fail. The LLC acquired all of
25 Ward's interest in the property in 1994. Thus, even if he subsequently acquired something that
26

1 could be considered an “interest,” the 1994 transfer created a break in his continuous ownership
2 of the property.

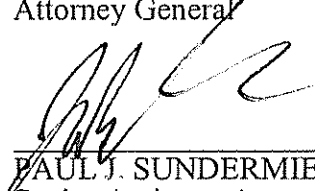
3 **CONCLUSION**

4 The deed transferring the property from Kim Ward to Kim W. Ward, LLC does not
5 reserve any interest in Kim Ward, and therefore effectively transferred all of Kim Ward’s interest
6 in the property to Kim W. Ward, LLC. As the deed did not create an equitable mortgage, any
7 reservation of interest had to be in the deed. Indeed, because the law does not recognize
8 exceptions—other than the equitable mortgage exception—to the general rule that a valid,
9 unambiguous deed conveys the estate it purports to convey, Kim Ward did not retain any interest
10 in the property when he transferred it to Kim W. Ward, LLC.

11 DATED this 2nd day of January, 2007.

12 Respectfully submitted,

13 HARDY MYERS
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1 **CERTIFICATE OF SERVICE**

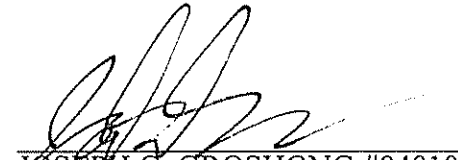
2 I certify that on January 2, 2007, I served the foregoing *State's Supplemental Briefing*
3 *Regarding Conveyances* upon the parties hereto by the method indicated below, and addressed to
4 the following:

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