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IN THE COURT OF APPEALS OF THE STATE OF OREGON

DEPARTMENT OF LAND
CONSERVATION AND
DEVELOPMENT,

Petitioner,

v.

KLAMATH COUNTY, THOMAS
ANKENY and LEWIS ANKENY,

Respondents.

Land Use Board of Appeals
No.2007009

CA A135614

PETITIONER'S BRIEF

Judicial Review of the Final Order of the Land Use Board of Appeals

W. DANIEL BUNCH #99440
Klamath County Counsel's Office
305 Main Street, 2nd Floor
Klamath Falls, OR 97601
Telephone: (541) 883-4267

Attorney for Respondent Klamath
County

MICHAEL L SPENCER #830907
Attorney at Law
409 Pine St Ste 204
Klamath Falls OR 97601
Telephone: (541) 883-7139

Attorney for Respondents Thomas
Ankeny and Lewis Ankeny

Continued...

HARDY MYERS #64077
Attorney General
MARY H. WILLIAMS #91124
Solicitor General
RICHARD M. WHITMAN
Attorney-in-Charge
Natural Resources Section
DENISE G. FJORDBECK #82257
Assistant Attorney General
1162 Court St. NE
Salem, Oregon 97301-4096
Telephone: (503) 378-4402

Attorneys for Petitioner

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PETITIONER'S BRIEF

STATEMENT OF THE CASE

Nature of the Proceeding and Relief Sought

The Department of Land Conservation and Development (DLCD) sought review in the Land Use Board of Appeals (LUBA) of an ordinance adopted by the Klamath County Board of Commissioners. ER-1 The December 19, 2006 ordinance amended the comprehensive plan and zoning maps for an 80-acre tract of land owned by respondents Thomas Ankeny and Lewis Ankeny from Forest/Range to Suburban Residential. The ordinance was adopted after the state and the Klamath County Board of Commissioners issued orders approving a claim by the Ankenys under Ballot Measure 37 (2004).¹ The county issued two orders in response to the Ankenys' Measure 37 claim. The first order determined that the Ankenys were entitled to just compensation, and elected not to apply county land use regulations to allow the Ankenys to divide and develop their property. The second, amended order directed that the Ankenys' property be modified to allow them to carry out the same use. ER-5 to ER-7. DLCD did not challenge the county's orders under Measure 37.²

¹ Ballot Measure 37 (2004) expressly provided that it was to be codified in ORS chapter 197. The measure is now codified at ORS 197.352.

² DLCD did not challenge the county's orders because in the agency's view they were not contrary to law. As discussed below, the county's second order provided that the plan and zoning for the property shall be amended, but did not address whether that amendment would be for the Ankenys to carry out a use of the property, or to allow any person to use the property in some manner not allowed by state and local land use regulations.

However, DLCD did appear before the county concerning the subsequent comprehensive plan and zone change to express its belief that the map amendments would violate provisions of state law that still applied to the property. And, when the county proceeded to adopt its ordinance amending its comprehensive plan and zoning maps for the property, DLCD filed a notice of intent to appeal with LUBA, seeking to have the ordinance reversed or remanded as contrary to state law. A copy of DLCD's notice of intent to appeal, including the county's ordinance, is included at ER-1.

Nature of the Judgment to Be Reviewed

Respondents moved to dismiss the notice of intent to appeal on the ground that LUBA lacked jurisdiction to review the county ordinance. Respondents argued that the county ordinance rezoning their property was a decision "under" Measure 37, and that because ORS 197.352(9) provides that "[a] decision by a governing body under this act shall not be considered a land use decision as defined in ORS 197.015(10)," the ordinance was not a land use decision committed to LUBA's exclusive jurisdiction.³ Rec-31 to 32.

DLCD petitions for judicial review of LUBA's Final Opinion and Order granting the respondents' motion to dismiss. That order is included at ER-14 *et seq.*

Statutory Basis of Appellate Jurisdiction

This court has jurisdiction under ORS 197.850.

³ Klamath County made no appearance below. Respondents and Appellant agreed before LUBA that the cross-reference in ORS 197.352(9) to ORS 197.015(10) (defining "guidelines), rather than ORS 197.015(11) (defining "land use decision"), is a codification error. When the measure was drafted, ORS 197.015(10) defined the term "land use decision." ORS 197.015(10) (2003).

Effective Dates for Appellate Purposes

LUBA issued its decision on April 18, 2007. DLCD timely filed its petition for judicial review on May 9, 2007, within 21 days of the date of LUBA's decision. ORS 197.850(3)(a).

Basis of LUBA's Jurisdiction

LUBA had such jurisdiction over the challenged decision pursuant to ORS 197.825(1), providing for the Board's exclusive jurisdiction to review "land use decisions." The county's zone change ordinance was a land use decision because it was a final decision of a local government that concerned the amendment of the comprehensive plan and zoning maps for the property, and because it involved the application of the Statewide Land Use Planning Goals and other state law to that decision.

Question Presented

Did LUBA have jurisdiction under ORS 197.825 to review Klamath County's December 19, 2006 ordinance amending the comprehensive plan and zoning maps for the Ankenys' property, or was jurisdiction barred by ORS 197.352(9), which provides that decisions of a governing body under Measure 37 are not land use decisions?

Summary of Argument

The county's zone change ordinance was a land use decision made "under" laws other than Measure 37. When the county reviewed the proposed comprehensive plan and zone change ordinance for respondents' property, the county had already made its decisions under Measure 37 by approving the respondents' written demand under Measure 37 and at the same time electing to not apply certain local land use

regulations to the claimants' use of their property. The county later changed its election under Measure 37 to modify certain local land use regulations to allow the respondents to carry out a use of the property permitted when they acquired it.

The county's subsequent decision on the proposed comprehensive plan and zone change ordinance was not made under Measure 37. Instead it was made under the procedures that normally apply to such an action, and under the substantive standards that remained after the state and the county had acted to "not apply" or modify certain land use regulations to the respondents' use of their property. It was these earlier "waivers" by the state and the county that were decisions under Measure 37, not the subsequent plan and zone change ordinance.

When a written demand for compensation is made under Measure 37, a public entity must make a series of related decisions in responding to that demand. Normally, these decisions will be made together, in a single order. First, the public entity must decide whether the claimant is entitled to just compensation under the terms of Measure 37. This requires deciding matters including whether a land use regulation restricts the present owner's use of the property, whether the land use regulation has had the effect of reducing the fair market value of the property, and whether the land use regulation falls within any of the exemptions provided by ORS 197.352(3). Next, if the claimant is entitled to compensation, the governing body then must decide how much compensation is due if it elects to pay just compensation. ORS 197.325(2). If the public entity elects not to pay compensation, it may decide to "modify, remove or not * * * apply the land use regulation or

regulations to allow the [present] owner of the property to use the property for a use permitted at the time the [present] owner acquired the property.”⁴ ORS 197.352(8), 197.352(10).⁵

In this case, the state approved the respondents Measure 37 claim, and elected to “not apply” certain state land use regulations. The county approved respondents Measure 37 claim, and elected first to “not apply” certain local land use regulations, and then amended its order to modify certain local land use regulations. There does not appear to be any dispute between respondents and appellant (and LUBA agreed) that all of these decisions were decisions “under” Measure 37.

Nothing in Measure 37, however, alters other state laws that require various procedures to modify a land use regulation. Measure 37 provides an exception to the state’s land use-planning laws; it does not repeal them in their entirety.⁶ When a city or county has granted a “waiver” to “modify, remove or not * * * apply” a local land use regulation so that the present owner may carry out a use of the property that he

⁴ Measure 37 defines the term “owner” as “* * * the present owner of the property, or any interest therein.” ORS 197.352(11)(c).

⁵ The second sentence of ORS 197.352(10) provides that “* * * a metropolitan service district, city, county, or state agency shall have discretion to use available funds to pay claims or to modify, remove, or not apply a land use regulation or land use regulations pursuant to subsection (6) of this act.”

⁶ *Macpherson v. Dep't of Admin. Servs.*, 340 Or 117, 132, 130 P3d 308 (2006) (“* * * [I]t is clear that Measure 37 does not 'cause to cease for a time,' 'delay,' or 'interrupt' any land use regulation. Instead, it authorizes a governing body to 'modify, remove, or not * * * apply' certain such regulations in specific situations. The measure is, in effect, an amendment of the land use regulations in those particulars. No law is 'suspended'; all laws not amended remain in effect.”)

was permitted when he acquired the property, the owner is still required to obtain a “discretionary approval of a proposed development of land” through a “permit” process under either ORS 215.402 to 215.437 (if the property is within an unincorporated area) or ORS 227.160 to 227.187 (if the property is within a city), or to modify or remove the comprehensive plan and zoning designations that would otherwise make the present owner’s use unlawful. ORS 215.050 to 215.060.

Klamath County’s decisions “under” Measure 37 with respect to the Ankenys’ written demand for compensation were proper and lawful, including both its initial decision to “not apply” certain land use regulations to the Ankenys’ desired use of the property, and its subsequent amended order directing that its land use regulations be modified to allow the Ankenys to carry out that use.

But, in then implementing those decisions under Measure 37 by amending its comprehensive plan and zoning map for the Ankeny’s property so that the Ankenys and *any other person* could carry out that use, the county was no longer acting under Measure 37. Instead it was acting under other state procedures for comprehensive plan and zone changes and other state substantive requirements that still applied to the property. LUBA erred in determining that the county comprehensive plan and zone change ordinance was a decision under Measure 37. This matter should therefore be reversed and remanded to LUBA with instructions to determine whether the county properly adopted the ordinance.

Summary of Material Facts

LUBA correctly summarized the material facts as follows:

Intervenors acquired an 80-acre property in an unincorporated area of Klamath County near the City of Klamath Falls in 1951. Sometime after intervenors acquired their property, it was placed in a Forest/Range (FR) zone. Intervenors filed separate Measure 37 claims with the State of Oregon and Klamath County on September 6, 2005. In response to the county claim, on July 18, 2006, Klamath County determined that it would not apply any land use regulations that were applied to intervenors' property after 1951. In response to the state claim, on July 20, 2006, the Department of Land Conservation and Development issued an order in which it determined that, in lieu of just compensation, the State of Oregon would not apply certain statutes, statewide planning goals and administrative rules so that intervenors could divide their "80-acre property into 1-acre parcels [and develop] a dwelling on each parcel * * *." Almost four months later, on November 7, 2006, Klamath County adopted an Amended Order. The key substantive provision of the Amended Order as set out below:

4. To ensure that the Claimant is afforded full lawful relief under ORS 197.352(8), it is appropriate to modify current zoning to rezone the subject property; said rezoning being necessary to restore fully all uses that were available to the Claimant at the time of the property's acquisition.
5. After further review, it appears to the Board of County Commissioners that the subject property had no zoning in effect on the aforementioned dates; Claimant therefore requests that the current zoning classification of Suburban Residential (RS) apply to the subject property, it being closely analogous to the most intensive and highest-density residential use of the property when it was acquired.

"NOW, THEREFORE, IT IS HEREBY ORDERED that the Order approving the Claimant's Measure 37 claim dated July 18, 2006, is amended to express the intent of the Board of County Commissioners and to further Order as follows:

1. The Comprehensive Plan and Zoning maps of Klamath County shall be modified pursuant to ORS 197.352(8) and (9), to provide for a zoning of Suburban Residential (RS) to the subject property.

2. Notice shall be published on or before November 14, 2006 * * * as required by Oregon law for the adoption of an ordinance by the County with the first public hearing being set for November 21, 2006 * * * and a second public hearing being set for December 12, 2006 * * *.”

* * *

In accordance with the November 7, 2006 Amended Order, notice was published and public hearing were held on November 21, 2006 and December 12, 2006 to consider Ordinance 45-62(M37). On December 19, 2006, the board of county commissioners adopted Ordinance 45-62(M37). Ordinance 45-62(M37) amends the “Klamath County Comprehensive Plan Map and Land Use Zoning Map” to change the map designation from FR to RS.

Rec 67 (ER-17).⁷

ASSIGNMENT OF ERROR

LUBA erred in entering the following order:

Because we do not have jurisdiction over the decision that is the subject of this appeal, this appeal is dismissed.

Rec 73 (ER-23).

Preservation of Error

Error is preserved. DLCD opposed respondents’ Motion to Dismiss, arguing that LUBA had jurisdiction to review the county’s ordinance as a land use decision under ORS 197.015(11), and that the decision was not one made under Measure 37, ORS 197.352(9).

⁷

The quotation omits internal record citations and footnotes.

Standard of review

This court reviews pursuant to ORS 197.850(9). As relevant to this appeal, this court reverses if LUBA's order is unlawful in substance. ORS 197.850(9)(a).

ARGUMENT

A. Introduction - Measure 37 Amends State and Local Land Use Laws; It Does Not Repeal Existing Procedures for Action on a Request to Amend the Comprehensive Plan or Zoning Designations for Property

Measure 37—enacted through the initiative in 2004—amends Oregon's existing land use laws by providing certain landowners the opportunity to seek relief under certain circumstances when land use laws restrict their use of private real property and have the effect of reducing the fair market value of the property. *See Macpherson v. Dep't of Admin. Servs.*, 340 Or 117, 130 P3d 308 (2006) (upholding constitutionality of Measure 37). Under Measure 37, an owner of an interest in private real property qualifies for relief if three criteria are met: (1) a public entity enforces an existing "land use regulation" or enacts or enforces a new "land use regulation;" (2) the land use regulation restricts the owner's use of private real property; and (3) "the land use regulation has the effect of reducing the fair market value of the private real property." ORS 197.352(1). An "owner" is the "present owner of the property, or any interest therein." ORS 197.352(11). If the owner qualifies for relief, government is required to pay just compensation. ORS 197.352(2). "Just compensation shall be equal to the reduction in the fair market value of the affected property interest resulting from enactment or enforcement of the land use regulation as of the date the owner makes written demand for compensation. ORS 197.352(2). As an alternative to paying compensation, the measure provides

that state and local governments may “modify, remove or not * * * apply the land use regulation or land use regulations to allow the owner to use the property for a use permitted at the time the owner acquired the property.” ORS 197.352(8);

Macpherson v. Dep’t of Admin. Servs., 340 Or at 122. Allowing the present owner to use the property in a way that would otherwise be restricted by one or more land use regulations is commonly referred to as granting a Measure 37 “waiver.” Generally, Measure 37 limits non-monetary relief to property owners who acquired their property prior to the enactment of the land use regulations that provide the basis for their claims. ORS 197.352(3)(e); *see Macpherson v. Dep’t of Admin. Servs.*⁸ The measure includes exceptions for four categories of regulations. ORS 197.352(3).⁹

Although Measure 37 supplemented Oregon’s land use planning statutes, it did not repeal any of them. The measure does authorize a governing body to “modify, remove, or not * * * apply” land use regulations to allow the present owner to use the property for a use permitted at the time the present owner acquired the property.

⁸ A Measure 37 claimant is entitled to compensation for regulations enacted prior to the date of acquisition of the property by the owner *or a family member* of the owner. ORS 197.352(3). This language differs from the language authorizing “waivers,” which only authorizes government to allow *the present owner* to use the property for *a use permitted when the present owner acquired the property*. ORS 197.352(8).

⁹ Those exceptions are for land use regulations “restricting or prohibiting activities commonly and historically recognized as public nuisances,” ORS 197.352(3)(A), “restricting or prohibiting activities for the protection of public health and safety,” ORS 197.352(3)(B), “required to comply with federal law,” ORS 197.352(3)(C), and “restricting or prohibiting the use of a property for the purpose of selling pornography or performing nude dancing,” ORS 197.352(3)(D), and regulations “enacted prior to the date of acquisition of the property by the owner or a family member of the owner * * *,” ORS 197.352(3)(E).

ORS 197.352(8); *see also, Macpherson v. Dep't of Admin. Servs.*, 340 Or at 132 (finding Measure 37 not to be an unconstitutional "suspension" of the law).

Otherwise, however, the land use planning laws remain in effect. *Id.*

Measure 37 does not specify how state or local government is to go about modifying, removing, or not applying land use regulations. In practice, state and local governments have done so by order providing that they *will* modify, remove, or not apply one or more land use regulations *when the owner of the property files a request with the government to carry out a specific use of the property*. *See* Rec-16 (state's Measure 37 order); Rec-18 (ER-8) and Rec-21 (ER-11) (county's two orders). This has been the practice because nothing in Measure 37 alters existing legal requirements that govern how laws are applied to a proposed use of property, which normally occurs when an owner seeks some form of authorization for a particular use.

In the context of land use planning, state laws require a property owner to apply for a "permit" for the use of land under ORS 215.416 (counties) or 227.175 (cities). If the use is not allowed under the current comprehensive plan and zoning regulations, the owner must also seek a comprehensive plan and zone change. ORS 197.175; 215.190. Similar laws govern the procedures for applying regulatory laws in other contexts. So, for example, if an owner of property wishes to fill a wetland in a manner that is regulated by state land use regulations, that person must file a permit with the Oregon Department of State Lands (DSL). If DSL had made a decision under Measure 37 to "not apply" certain regulations enacted after the present owner acquired the property to allow that owner to carry out a use of the property, it

would review the permit application under the remaining substantive standards (if any) that applied to the permit (those enacted before the date the owner acquired the property, and those otherwise exempt under ORS 197.352(3)(A) to (D)).

Alternatively, if DSL had made a decision under Measure 37 to modify certain regulations to allow the claimant to use the property, it could amend its rules to authorize the claimant's use of the property, following the procedural requirements for amending state agency rules in ORS 183.335.

Until a property owner seeks approval to carry out *a* specific use permitted when he acquired the property, there is nothing to “not apply” a land use regulation to, and similarly there is no basis upon which a public entity may modify or remove a land use regulation to allow the present owner to carry out *a* use. The authorization to “modify, remove, or not * * * apply” the land use regulation in ORS 197.352(8), when placed in the context of existing regulatory laws, contemplates a two-step process if government elects to provide relief by a means other than compensation.¹⁰ The first step is a determination of whether the owner is entitled to relief and, if so, what form of relief the public entity will provide — compensation or a “waiver” (a decision to “modify, remove or not * * * apply” one or more land use regulations to

¹⁰ This type of two-step process is not unique in Oregon land use law. *See, e.g., Heritage Enterprises v. City of Corvallis*, 300 Or 168, 708 P.2d 601 (1985) (describing the two-step process for annexation of land to a city, where only the first step is a land use decision subject to LUBA jurisdiction). For a similar statutory scheme, where one part of a process is expressly see, *Home Builders v. City of Springfield*, 204 Or App 270, 274, 129 P.3d 717-718 (2006) (elements of public facilities plans were not land use decisions, but comprehensive plan amendments necessary to carry out the facilities plan were).

allow the present owner to carry out a use of the property permitted when he acquired the property). The second step, in cases where the public entity has elected to “waive” one or more land use regulations, is taken in response to a permit or a zone change application, at which time the public entity will “not * * * apply” one or more land use regulations to approve a permit allowing the owner’s desired use, or “modify” or “remove” one or more land use regulations by amending the comprehensive plan or zoning designation (or text) to allow the present owner’s use of the property, or both. These, second step, decisions by a public entity are no different from any other decision on a permit or plan amendment, except that the standards that apply to them do not include land use regulations that a public entity has determined to waive in its earlier decision under Measure 37.

LUBA erred in this case by conflating first and second-stage decisions carrying out Measure 37. Only the first are decisions “by a governing body under this section [ORS 197.352].” Measure 37, section 9, ORS 197.352 (9) The second decisions are made “under” whatever procedures and standards remain after the public entity has acted “under” Measure 37.

B. The County’s First Two Orders Were Decisions Under Measure 37

ORS 197.352 (9) provides that “[a] decision by a governing body under this section shall not be considered a land use decision as defined in ORS 197.015(10).”¹¹

¹¹ As noted above, the cross-reference in ORS 197.352(9) should be to “* * * a land use decision as defined in ORS 197.015(11).”

The applicable ordinary definition of the term “under” is “* * * 8 a : required by : in accordance with : bound by (~ a contract to deliver)(statement ~ oath)(~ the necessity of selling)(rights ~ the law).” Webster’s Third International New Dictionary, at 2487.

Measure 37 *requires* a response from a public entity to a written demand for compensation. Under ORS 197.352(4) and (6) if the land use regulation continues to be enforced or continues to apply more than 180 days after the written demand is made, the owner has a cause of action for compensation. Thus, to avoid potential liability, a public entity must act within 180 days to stop enforcing or applying the land use regulation. That was done in this case by the orders of the county and the state finding that the Ankenys were entitled to relief, and directing that certain land use regulations would not apply them to allow them to carry out a use of the property. Rec-10 to Rec-17 (state orders); ER-11 to ER-13 (county order).

In its second (amended) Measure 37 order the county (at the request of the respondents) agreed to rezone the property from Forestry-Range to Suburban Residential. LUBA characterized the county’s Amended Order dated November 7, 2006 as if it were merely a tentative or preliminary decision. ER-22. As a result, the Board concludes that it is the later ordinance rezoning the property, and not the Amended Order that is an exercise of the county’s authority under Measure 37 to “modify, remove or not apply” a land use regulation under ORS 197.352(8).¹²

LUBA characterized the county’s November 7, 2006 Order as a “* * * decision to proceed to take action in the future to adopt an ordinance that would ‘modify’ the

FR planning and zoning by removing the FR planning and zoning and applying RS planning [and] zoning in its place.” Rec-71 (ER-21). It then asserted that “* * *[t]he Amended Order itself did not ‘modify’ the FR designation, it simply initiated a process that might or might not ultimately result in a decision to ‘modify’ the FR planning and zoning.” Rec-71 (ER-21).

LUBA’s characterization of the county’s Amended Order (as initiating a process that might or might not result in a modification) is not correct. The Amended Order expressly provides that “[t]he Comprehensive Plan and Zoning maps of Klamath County *shall be modified* pursuant to ORS 197.352(8) and (9), to provide for a zoning of Suburban Residential (RS) to the subject property.” Rec-19 (ER-9). There is nothing preliminary or tentative about the Amended Order. It is a final decision of the county “under” Measure 37 concerning the form of relief that will be provided to the Ankenys when they apply for a plan or zone change, as required by other applicable law.

C. Ordinance 45-62(M37) Was Not a Decision to “Modify” a Land Use Regulation Under Measure 37 — That Decision Had Already Been Made In the County’s November 7, 2006 Amended Order

The only decision left for the county following its November 7, 2006 Amended Order providing that the county’s comprehensive plan and zoning maps for the property “shall be modified” was to determine the nature and extent of the modification permitted, under the state and local laws that remained applicable to the Ankenys’ use of their property following the earlier orders under Measure 37, and in response to an application from the Ankenys. The county made that subsequent land use decision when it adopted ordinance 45-62 on December 19, 2006. This is no

different in concept from a subsequent action to review a permit, where the review of that permit is “under” the land use regulations that remain applicable to the claimants’ use of the property following a decision “under” Measure 37 to not apply some land use regulation to the claimants’ desired use of the property. Land use regulations enacted before the claimants acquired the property, and other land use regulations that fall under one or more of the exemptions in Measure 37 (for public health and safety, federal law, or public nuisances) remain applicable as standards and criteria for the review of the permit. ORS 197.352(3) (exemptions) and ORS 215.416(8) (approval or denial of a permit * * * shall be based on standards and criteria * * *).

Measure 37 says nothing about when an owner must act to carry out a Measure 37 “waiver.” A public entity’s action in “modifying, removing or not * * * applying” one or more land use regulations in response to a land use application by the property owner may occur years after a written demand was filed and the public entity issued a “waiver” in response to that demand. And nothing in Measure 37 requires that such an application ever be filed.

Decisions to grant a “permit” or, as in this case, to amend a comprehensive plan and zoning map are not decisions required by or “under” Measure 37. They are decisions that are governed by (e.g., that are “under”) existing procedural requirements and whatever substantive “land use regulations” remain following earlier decisions “under” Measure 37.

In concept, the exclusion of decisions “under” Measure 37 from the statutory definition of a “land use decision” in ORS 197.015(11) is no different from the

legislature's earlier choices to exclude decisions under other laws from that definition. In 1995 the legislature amended what was then the definition of "land use decision" in ORS 197.015(10) to exclude a writ of mandamus issued by a circuit court in accordance with ORS 215.428 or 227.178 (commonly known as the 120-day rule), as well as local land use approvals issued in response to such a writ. Or Laws 1995, ch 812, section 1. The Supreme Court held that a decision by a local government to approve a land use in response to an alternative writ of mandamus was not a decision under that statute. *Murphy Citizens Advisory Comm. v. Josephine County*, 325 Or 101, 107-111, 934 P2d 415 (1997). By analogy, the same reasoning applies here. If the voters had intended to exclude all land use decisions made to carry out a use of property authorized by a decision "under" Measure 37, they could have easily provided so in the same manner that the legislature did with respect to land use decisions made in response to a preemptory writ of mandamus.

ORS 197.015(11)(e)(B).

Under LUBA's interpretation of ORS 197.352(9), a public entity could elect to meet its obligations under ORS 197.352(8) only by completing the steps required under other laws to "modify or remove" the land use regulations at issue. This ignores two facts. First, a public entity can't "modify, remove or not * * * apply" a land use regulation to allow the present owner a use permitted when he acquired the property until that person seeks to carry out that use. A public entity can't take these actions in a vacuum, they occur in response to a request from a property owner. Second, existing laws that establish procedures for modifying or removing land use

regulations, such as ORS 215.427 and ORS 197.235 to 197.245, cannot as a practical matter be completed within the 180-day timeframe established by ORS 197.352(4) and (6) together with the review to determine whether the written demand for compensation is entitled to relief under Measure 37.

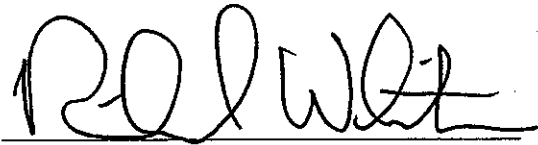
In sum, Measure 37 provides a statutory entitlement to compensation as a result of the enactment or enforcement of land use regulations that restrict the present owner's use of private real property. It allows a public entity to avoid potential liability for compensation by deciding to "modify, remove or not * * * apply" those land use regulations. A public entity's decision to "modify, remove or not apply" a land use regulation in response to a Measure 37 demand is not the same as a subsequent action of a public entity in response to an application for a permit or a plan or zone change. While that subsequent action implements the prior decision to "waive" land use regulations, it is not itself a decision by a governing body "under" ORS 197.352.

CONCLUSION

This court should reverse LUBA's decision and remand with instructions to consider the merits.

Respectfully submitted,

HARDY MYERS
Attorney General
MARY H. WILLIAMS
Solicitor General

A handwritten signature in black ink, appearing to read "R. M. Whitman", written over a horizontal line.

RICHARD M. WHITMAN
Attorney-In-Charge
Natural Resources Section
DENISE G. FJORDBECK
Senior Assistant Attorney General

Attorneys for Petitioner
Department of Land Conservation
and Development

DGF:blt/APPA7996

**EXCERPT OF
RECORD**

PETITIONER'S EXCERPT OF RECORD

Pursuant to ORAP 5.50, petitioner submits the following, as indexed below.

INDEX

| <u>Trial Court Record #</u> | <u>Document</u> | <u>ER Page #</u> |
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BEFORE THE LAND USE BOARD OF APPEALS
OF THE STATE OF OREGON

OREGON DEPARTMENT OF LAND
CONSERVATION AND
DEVELOPMENT,

Petitioner,

v.

KLAMATH COUNTY,

Respondent.

JAN08'07 AM 11:37 LUBA
hand delivered

LUBA No. *2007-009*

NOTICE OF INTENT TO APPEAL

I.

Notice is hereby given that petitioner, the Department of Land Conservation and Development ("DLCD"), intends to appeal that land use decision of Respondent Klamath County, entitled "In the Matter of Amending the Klamath County Comprehensive Plan Map and Land Use Zoning Map, for Measure 37 Claim Number M37 48-05 (Ankeny), to Suburban Residential Use (RS)." The challenged decision is characterized as an appeal of the Final Order allowing Claimant to use his property subject to the standards in effect when he acquired the subject property on January 16, 1951, under ORS 197.352(8); and ordering rezoning of Claimant's property in compliance with Ordinance No. 45.62(M37), modifying the Comprehensive Plan Map. The County adopted the challenged decision on December 19, 2006. A copy of the challenged decision is attached to this notice.

II.

Petitioner, DLCD, is represented by Steven E. Shipsey, Assistant Attorney General, Oregon Department of Justice, 1162 Court Street N.E., Salem, Oregon 97301-4096; telephone (503) 947-4500.

//

//

III.

1
2 Respondent Klamath County has as its mailing address and telephone number: 305 Main
3 Street, Suite 335, County Courthouse, Klamath Falls, Oregon 97601-6332 and telephone number
4 (541) 883-5100; and has as its legal counsel: W. Daniel Bunch, Klamath County Counsel,
5 Office of the County Counsel, 305 Main Street, Klamath Falls, Oregon 97601, and telephone
6 number (541) 883-4267.

IV.

7
8 Other persons mailed written notice of the challenged land use decision by respondent, as
9 indicated by respondent's records in this matter are:

10
11 W. Daniel Bunch
12 Klamath County Counsel
13 Office of County Counsel
14 305 Main Street
15 Klamath Falls, OR 97601

16
17 Thomas and Lewis Ankeny
18 2175 N.W. David Street, 4th Floor
19 Portland, OR 97210

20
21 Michael Spencer
22 409 Pine Street, Suite 204
23 Klamath Falls, OR 97601

24
25 Lane Shetterly
26 Director
27 Department of Land Conservation and
28 Development
29 635 Capitol Street N.E., Suite 150
30 Salem, OR 97301

31
32 Jeannine Rustad
33 Planner 3
34 Measure 37 Services Division
35 Department of Land Conservation and
36 Development
37 635 Capitol Street N.E., Suite 150
38 Salem, OR 97301

Estate of George Coleman and
Joseph Mountain Conservator
122 South 5th Street
Klamath Falls, OR 97601

Gregory A. Schechtel
3815 Thicket Court
Klamath Falls, OR 97601

Qwest Corporation
Brad Blinsmon
Property Tax
1801 California Street, 25th Floor
Denver, CO 80202-2658

Thomas R. and Jenise M. Bocchi
5817 Havencrest Drive
Klamath Falls, OR 97603

John I. McKinney
5338 Glenwood Drive
Klamath Falls, OR 97603

Erskine Deloe
P.O. Box 1303
Klamath Falls, OR 97601

1 John M. Van'Ausdall
 2 40 Van Ness
 Ashland, OR 97520

3 Marie E. Owens
 4 1925 Calhoun Street
 Klamath Falls, OR 97601

5 A. L. and Marilyn V. Bruner
 6 607 Avenue De Teresa
 Grants Pass, OR 97526

7 Roderick Carl Wendt, Trustee and
 8 RCW Revocable Trust and
 9 Carol Margaret Wendt, Trustee, et al
 2120 Fairmount Street
 10 Klamath Falls, OR 97601

11 Mark W. Dickey
 P.O. Box 1740
 12 Crescent City, OR 95331

13 Ted Howard
 14 P.O. Box 311672
 Enterprise, AL 36331

15 Earl M. Le'Vernois Trustee and
 16 Le'Vernois Family Trust
 2100 Fairmont
 17 Klamath Falls, OR 97601

18 City of Klamath Falls
 19 P.O. Box 237
 Klamath Falls, OR 97601

20

21 //

22 //

23 //

24 //

25 //

26 //

Bertram F. Rudolph, Jr.
 P.O. Box 2302
 Carmel, CA 93921

Dick G. and Wendy A. DeGroot
 2110 Fairmount Avenue
 Klamath Falls, OR 97601

Eric and Alexandra Spence
 2040 Terrace Avenue
 Klamath Falls, OR 97601

Melvin K. and Evelyn M. Carlson
 2080 Terrace Avenue
 Klamath Falls, OR 97601

Sandra L. Nyback Smith
 2100 Park Avenue
 Klamath Falls, OR 97601

Clyde L. and Santina Ashcraft
 71 Gresham
 Ashland, OR 97520

Mary Charlene Smith and
 Eleanor B. Narciss
 828 Pacific Terrace
 Klamath Falls, OR 97601

Jo Ann Hannigan
 2001 Fairmount
 Klamath Falls, OR 97601

V.

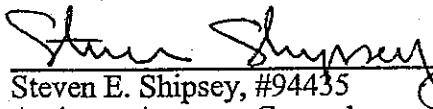
1 Purchase order # 07-1031 in the amount of \$325.00 is enclosed with this notice for filing
2 fees and costs.

3 NOTICE: Anyone designated in paragraphs III or IV of this Notice who desires to
4 participate as a party in this case before the Land Use Board of Appeals must file a Motion to
5 Intervene in this proceeding with the Board as required by OAR 661-010-0050.

6 DATED this 8th day of January 2007.
7

8 Respectfully submitted,

9
10 HARDY MYERS
Attorney General

11
12 

13 Steven E. Shipsey, #94435
14 Assistant Attorney General
Of Attorneys for Petitioner

BOARD OF COUNTY COMMISSIONERS

KLAMATH COUNTY, OREGON

IN THE MATTER OF AMENDING THE KLAMATH)
 COUNTY COMPREHENSIVE PLAN MAP AND)
 LAND USE ZONING MAP, FOR MEASURE 37) ORDINANCE NO. 45.62(M37)
 CLAIM NUMBER M37 48-05 (ANKENY), TO)
 SUBURBAN RESIDENTIAL USE (RS))

WHEREAS, the Klamath County Board of Commissioners (BOCC) held public hearings on May 2, 2006 and on October 30, 2006 regarding Measure 37 Claim Number M37 48-05 concerning Thomas & Lewis Ankeny (Claimant); and

WHEREAS, the Department of Land Conservation and Development of the State of Oregon issued a Final Order (Claim No. M122221) regarding Claimant's property, said Final Order allowing Claimant to use his property subject to the standards in effect when Claimant acquired the subject property on January 16, 1951, said Final Order being attached hereto as Exhibit 1 and by this reference being incorporated herein; and

WHEREAS, Claimant acquired the subject property prior to the enactment of State Land Use Goals; and

WHEREAS, the BOCC entered an Order and an Amended Order finding that Claimant was entitled to compensation, that the County would not pay such compensation, that in lieu of such compensation the County would afford Claimant the relief detailed in ORS 197.352(8), and that a rezoning of the Claimant's property was necessary to afford the Claimant complete legal relief and to restore all uses enjoyed by the Claimant at the time of Claimant's acquisition of the property subject to this Ordinance; and

WHEREAS, in accordance with the BOCC's Order in M37 48-05 dated November 7, 2006, County staff were directed to initiate the process to adopt an Ordinance to modify the

Klamath County Comprehensive Plan Map and Land Use Zoning Map to reflect that the subject property be zoned for Suburban Residential use (RS); and

WHEREAS, ORS 197.352(8) allows a local government to remove or to modify land use regulations; and

WHEREAS, the findings that support this Ordinance are contained in the Measure 37 Orders referenced above, said Orders being attached hereto as Exhibit 2 and by this reference incorporated herein; and

WHEREAS, the BOCC advertised notice that it would consider these amendments to the Klamath County Comprehensive Plan Map and Land Use Zoning Map on November 21, 2006 at 10:00 a.m. and December 12, 2006 at 10:00 a.m.; and

WHEREAS, the first hearing was held on November 21, 2006 and a second hearing was held December 12, 2006; and

WHEREAS, the BOCC conducted regularly scheduled and duly advertised public hearings and considered the proposed amendment to the Klamath County Comprehensive Plan Map and Land Use Zoning Map; and

WHEREAS, the BOCC having read the proposed Ordinance and considered public testimony; and

WHEREAS, a map depicting the location of the Klamath County Comprehensive Plan Map amendment and zone change are attached as Exhibit 3;

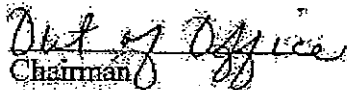
NOW, THEREFORE, the Klamath County Board of Commissioners ordains that the property detailed in Exhibit 3, consisting of approximately 80 acres, identified as Tax Lot R-3809-02100-00600 on Assessor map T38S, R9E, Section 21, Klamath County, Oregon is to be zoned Suburban Residential (RS), as described in KCLDC Article 51.3; that the Klamath County

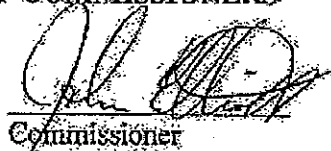
Comprehensive Plan Map is hereby amended accordingly; that the official zoning map designation for the subject property shall be changed accordingly.

This ordinance shall be effective thirty (30) days from the date of passage.

DONE and DATED this 19th day of December, 2006.

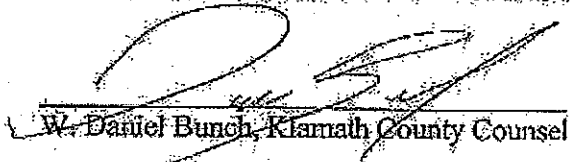
KLAMATH COUNTY BOARD OF COMMISSIONERS


Dan O'Grady
Chairman

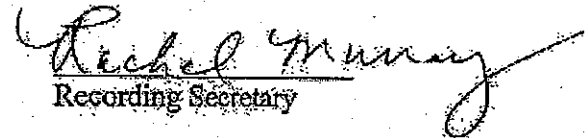

John Black
Commissioner


Commissioner

APPROVED FOR LEGAL SUFFICIENCY:


W. Daniel Bunch, Klamath County Counsel

ATTEST:


Rachel Murray
Recording Secretary

BEFORE THE BOARD OF COUNTY COMMISSIONERS
FOR KLAMATH COUNTY, OREGON

In the Matter of the Measure 37 Claim of

THOMAS AND LEWIS ANKENY

)
) AMENDED ORDER
M37 48-05

WHEREAS, the Board of County Commissioners, having reviewed the records and files in regard to this matter, find as follows:

1. On September 6, 2005, Claimant submitted a claim to Klamath County (M37 48-05) pursuant to ORS 197.352 (Ballot Measure 37) relating to the real property described as Tax Lot 600 in Section 21 of Township 38S, Range 9EWM.
2. On July 18, 2006, the Board of County Commissioners entered an Order approving Claimant's Measure 37 claim in file M37 48-05 (Exhibit A).
3. On July 20, 2006, the Department of Land Conservation and Development of the State of Oregon issued a Final Order approving state claim M122221 (Exhibit B).
4. To ensure that the Claimant is afforded full lawful relief under ORS 197.352(8), it is appropriate to modify current zoning to rezone the subject property; said rezoning being necessary to restore fully all uses that were available to the Claimant at the time of the property's acquisition.
5. After further review, it appears to the Board of County Commissioners that the subject property had no zoning in effect on the aforementioned dates; Claimant therefore requests that the current zoning classification of Suburban Residential (RS) apply to the subject property, it being closely analogous to the most intensive and highest-density residential use of the property when it was acquired.

NOW, THEREFORE, IT IS HEREBY ORDERED that the Order approving Claimant's Measure 37 claim dated July 18, 2006, is amended to express the intent of the Board of County Commissioners and to further Order as follows:

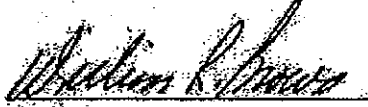
1. The Comprehensive Plan and Zoning maps of Klamath County shall be modified pursuant to ORS 197.352 (8) and (9), to provide for a zoning of Suburban Residential (RS) to the subject property.
2. Notice shall be published on or before November 14, 2006 in the Klamath Falls Herald and News as required by Oregon law for the adoption of an ordinance by the County with the first public hearing being set for November 21, 2006 at 10:00 a.m. and a second public hearing being set for December 12, 2006 at 10:00 a.m.


EXHIBIT 2
FILE # DA 45-162


000018

- This Order does not guarantee Claimant the ability to develop the subject property in the manner desired. Any and all of the exceptions detailed in ORS 197.352(3) may apply to this Order or to any rezone of Claimant's property. Development of the property will be subject to those land use regulations that protect public health and safety, such as fire and building codes, health and sanitation regulations, solid or hazardous waste regulations, pollution control regulations and certain provisions of the Klamath County Land Use Development Code to include Chapter 60 (Planning Development Standards) and Chapter 70 (Public Works Development Standards).
- The Claimant is advised that the Oregon Attorney General and the Department of Land Conservation and Development have stated that the relief afforded by ORS 197.352(3) is personal to the Claimant, allows uses only to the Claimant, does not attach to the Claimant's land, and is not transferable. The rezoning directed by this Order is contrary to these opinions and is subject to legal challenge that could result in the vacation or invalidation of this Order or of any Ordinance rezoning Claimant's property.
- The above paragraph is not intended to limit Claimant's personal development of the property in accordance with those uses permitted at the time of Claimant's acquisition of the subject property.

Done and dated this 7th day of November, 2006.


Chairman


Commissioner


Commissioner

M37 48-05

Thomas & Lewis Ankeny
PO Box 10
Nelson, CA 95958

DLCD
635 Capitol St NE, Ste 150
Salem, OR 97301

Kathryn Burge
4725 Upper Drive
Lake Oswego, OR 97033

Daniel Ankeny
5065 Del Mar Drive
Central Point, OR 97502

Michael Spencer, Attorney at Law
409 Main Street
Klamath Falls, OR 97603

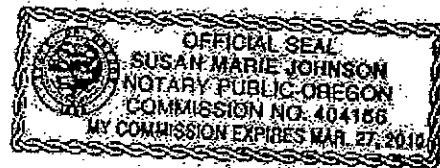
Filed with the county clerk and mailed to the above
this 9 day of Nov, 2005

Alyssa Boles
Alyssa Boles

Subscribed and sworn to before me this

9 day of Nov, 2005.

Susan Marie Johnson
Notary Public for Oregon



Before the Board of Commissioners
Of Klamath County

In the Matter of File Number M37 48-05
Findings and Final Order

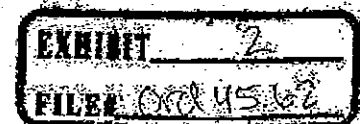
FINDINGS

At a public hearing conducted on July 11, 2006, the Klamath County Board of Commissioners (BOCC) reviewed documentary evidence, considered the staff report of the Planning Department, heard testimony regarding this claim, and made the following findings:

1. On September 6, 2005, the claimants, Thomas and Lewis Ankeny, properly submitted a claim pursuant to ORS 197.352 (Ballot Measure 37).
2. The claimants acquired the subject property on January 16, 1951.
3. For purposes of evaluating compensation, the relevant date would be the same.
4. After the compensation date referenced above, land use laws had been enacted that restricted the use of this property and that reduced its fair market value.
5. Rather than establish an exact amount of compensation and in lieu of such compensation that may have otherwise been due claimant, the BOCC, pursuant to ORS 197.352(8), determined that it was appropriate to modify, remove or not apply land use regulations restricting the use of claimant's property.

ORDER

1. Pursuant to ORS 197.352(8), subject to a decision from the Department of Land Conservation and Development (as applicable), and subject to the county's authority, the BOCC will not apply land use laws and regulations imposed after claimant's acquisition of the subject property, January 16, 1951.
2. Claimants may develop the property subject to this Order in accordance with a use permitted at the time claimant acquired an ownership interest in said property.
3. Any and all of the exceptions detailed in ORS 197.352(3) may apply to this Order.



NOTICE OF RIGHT TO APPEAL OR OTHER JUDICIAL RELIEF

I. A cause of action under ORS 197.352 (Measure 37 (2004)): If a land use regulation continues to apply to the subject property more than 180 days after the present owner of the property has made written demand for compensation under ORS 197.352, the present owner of the property, or any interest therein, shall have a cause of action in the circuit court in which the real property is located.

Dated this 18th day of July, 2006.

William R. Brown
Chair

[Signature]
Commissioner

Out of Office
Commissioner

APPROVED AS TO FORM:

[Signature]
County Counsel

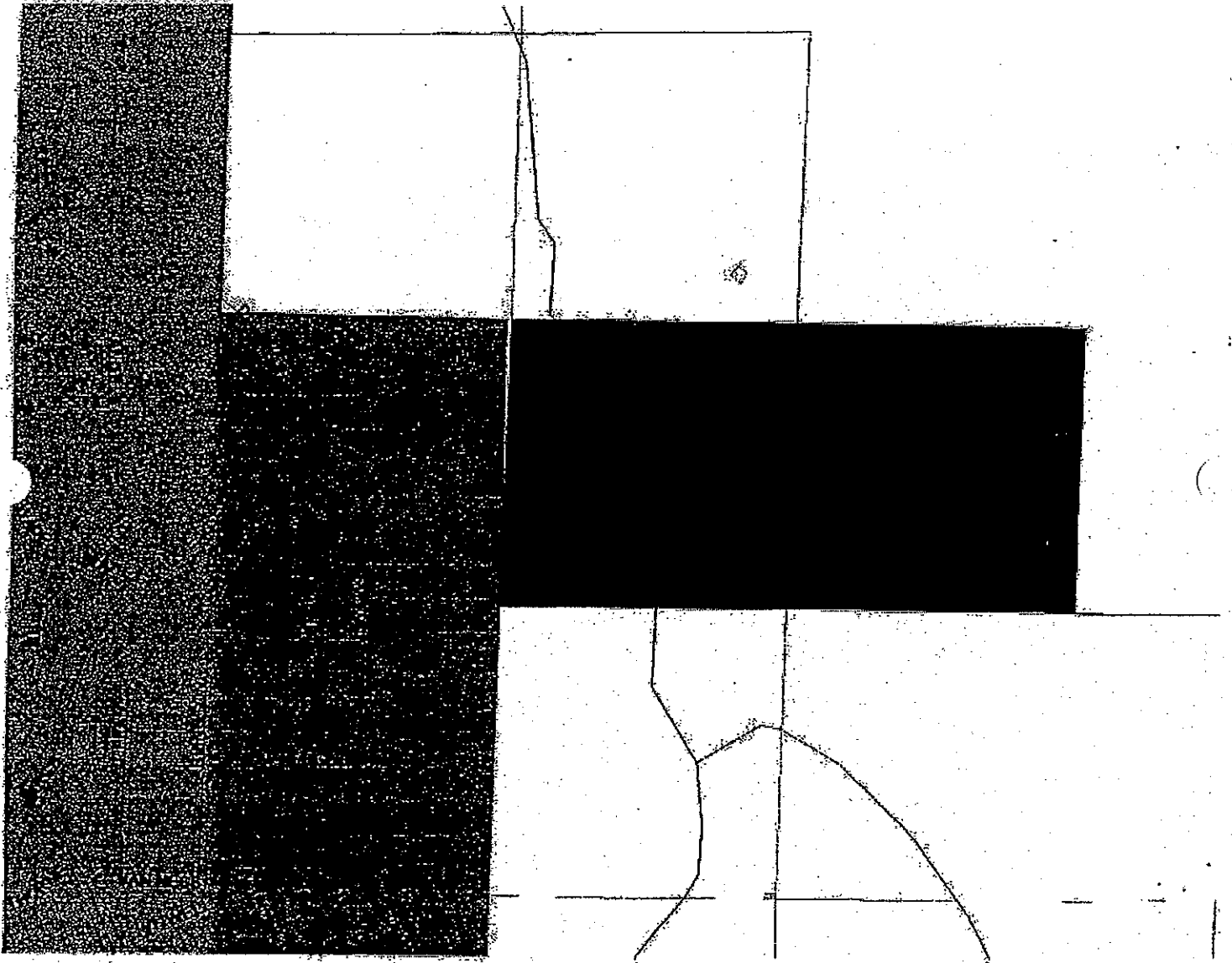


EXHIBIT 3
FILE # 82-40-62

000023

BEFORE THE LAND USE BOARD OF APPEALS
OF THE STATE OF OREGON

APR18'07 AM 8:37 LUBA

DEPARTMENT OF LAND
CONSERVATION AND DEVELOPMENT,
Petitioner,

vs.

KLAMATH COUNTY,
Respondent,

and

THOMAS ANKENY and LEWIS ANKENY,
Intervenor-Respondents.

LUBA No. 2007-009

FINAL OPINION
AND ORDER

Appeal from Klamath County.

Richard M. Whitman and Steven E. Shipsey, Assistant Attorneys General, Salem,
represented petitioner.

No appearance by Klamath County.

Michael L. Spencer, Klamath Falls, represented intervenor-respondents.

HOLSTUN, Board Member; BASSHAM, Board Chair; RYAN, Board Member,
participated in the decision.

DISMISSED

04/18/2007

You are entitled to judicial review of this Order. Judicial review is governed by the
provisions of ORS 197.850.

1 INTRODUCTION

2 In the year 2004, voters in the State of Oregon approved an initiative measure known
 3 as Ballot Measure 37 (Measure 37). Measure 37 has been codified at ORS 197.352. Under
 4 ORS 197.352(1), a public entity that “enacts or enforces” a “land use regulation” that “has
 5 the effect of reducing the fair market value of * * * property” must pay just compensation in
 6 certain circumstances.¹ ORS 197.352(2) provides guidance on computing “just
 7 compensation.” ORS 197.352(3) creates exceptions for certain laws that would otherwise
 8 qualify as “land use regulations.”² ORS 197.352(4), (5) and (7) set out and authorize
 9 procedures for submitting, processing and making decisions on claims for just compensation.
 10 ORS 197.352(6) provides claimants with a cause of action in circuit court if the land use
 11 regulation that is the subject of a Measure 37 claim “continues to apply to the subject
 12 property more than 180 days after the present owner of the property has made written demand
 13 for compensation * * *.”

14 As an alternative to paying just compensation, ORS 197.352(8) provides that a public
 15 entity that enacted a land use regulation that gave rise to a claim under Measure 37 “may
 16 modify, remove, or not * * * apply the land use regulation or land use regulations to allow the
 17 owner to use the property for a use permitted at the time the owner acquired the property.”³

¹ The text of ORS 197.352(1) is set out below:

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

² ORS 197.352(11)(B) defines the term “land use regulation” very broadly to include comprehensive plans, zoning ordinances and other conventional land use regulations as well as a variety of other laws. The exceptions at ORS 197.352(3) narrow the reach of the broad ORS 197.352(11)(B) definition somewhat.

³ ORS 197.352(8) provides:

“Notwithstanding any other state statute or the availability of funds under subsection (10) of this section, in lieu of payment of just compensation under this section, the governing body responsible for enacting the land use regulation may modify, remove, or not * * * apply the

1 Intervenor acquired an 80-acre property in an unincorporated area of Klamath
 2 County near the City of Klamath Falls in 1951. Sometime after intervenors acquired their
 3 property, it was placed in a Forest/Range (FR) zone.⁴ Intervenor filed separate Measure 37
 4 claims with the State of Oregon and Klamath County on September 6, 2005. Record 161-63,
 5 320-29. In response to the county claim, on July 18, 2006, Klamath County determined that
 6 it would not apply any land use regulations that were applied to intervenors' property after
 7 1951. Record 16-17.⁵ In response to the state claim, on July 20, 2006, the Department of
 8 Land Conservation and Development issued an order in which it determined that, in lieu of
 9 just compensation, the State of Oregon would not apply certain statutes, statewide planning
 10 goals and administrative rules so that intervenors could divide their "80-acre property into 1-
 11 acre parcels [and develop] a dwelling on each parcel * * *." Record 5-12. Almost four
 12 months later, on November 7, 2006, Klamath County adopted an Amended Order. The key
 13 substantive provisions of the Amended Order are set out below:

14 "4. To ensure that the Claimant is afforded full lawful relief under ORS
 15 197.352(8), it is appropriate to modify current zoning to rezone the

land use regulation or land use regulations to allow the owner to use the property for a use permitted at the time the owner acquired the property."

⁴ According to the Klamath County Land Development Code (LDC) 55.210:

"The purpose of [the FR] zone is to promote management and conservation of lands of mixed farm and forest use. The productive potential of this land is considered to be greater than that of Non-Resource (NR) zoned lands, but less than that of Farm (EFU) or Forestry (F) zoned lands.

"The [FR] zone shall be applied to those lands located in southern Klamath County which primarily consist of a juniper-sagebrush-bitterbrush vegetation cover, have no forest productivity rating or are predominantly rated as Class VII forest lands, may be significant wildlife habitat, and are areas of mixed BLM and private ownership."

⁵ The relevant text of the county's July 18, 2006 order is set out below:

"1. Pursuant to ORS 197.352(8), subject to a decision from the Department of Land Conservation and Development (as applicable), and subject to the county's authority, the [Board of County Commissioners] will not apply land use laws and regulations imposed after claimant's acquisition of the subject property, January 16, 1951." Record 16.

1 subject property; said rezoning being necessary to restore fully all uses
2 that were available to the Claimant at the time of the property's
3 acquisition.

4 "5. After further review, it appears to the Board of County Commissioners
5 that the subject property had no zoning in effect on the aforementioned
6 dates; Claimant therefore requests that the current zoning classification
7 of Suburban Residential (RS) apply to the subject property, it being
8 closely analogous to the most intensive and highest-density residential
9 use of the property when it was acquired."

10 **"NOW, THEREFORE, IT IS HEREBY ORDERED** that the Order
11 approving Claimant's Measure 37 claim dated July 18, 2006, is amended to
12 express the intent of the Board of County Commissioners and to further Order
13 as follows:

14 "1. The Comprehensive Plan and Zoning maps of Klamath County *shall*
15 *be modified pursuant to ORS 197.352(8) and (9)*, to provide for a
16 zoning of Suburban Residential (RS) to the subject property.

17 "2. Notice *shall be published* on or before November 14, 2006 * * * as
18 required by Oregon law for the adoption of an ordinance by the County
19 with the first public hearing being set for November 21, 2006 * * * and
20 a second public hearing being set for December 12, 2006 * * *."
21 Record 13 (emphases added).

22 In accordance with the November 7, 2006 Amended Order, notice was published and
23 public hearings were held on November 21, 2006 and December 12, 2006 to consider
24 Ordinance 45-62(M37). On December 19, 2006, the board of county commissioners adopted
25 Ordinance 45-62(M37). Ordinance 45-62(M37) amends the "Klamath County
26 Comprehensive Plan Map and Land Use Zoning Map" to change the map designation from
27 FR to RS. Record 2. Relevant portions of Ordinance 45-62(M37) are set out below:

28 **"WHEREAS**, in accordance with the [Board of County Commissioners']
29 Order in M37 48-05 dated November 7, 2006, County staff were directed to
30 initiate the process to adopt an Ordinance to modify the Klamath County
31 Comprehensive Plan Map and Land Use Zoning Map to reflect that the subject
32 property be zoned for Suburban Residential use (RS); and

33 **"WHEREAS**, ORS 197.352(8) allows a local government to remove or to
34 modify land use regulations;

35 " * * * * "

1 "NOW, THEREFORE, the Klamath County Board of Commissioners
 2 ordains that the property * * * consisting of approximately 80 acres, * * * is to
 3 be zoned Suburban Residential (RS), as described in KCLDC Article 51.3;
 4 that the Klamath County Comprehensive Plan Map is hereby amended
 5 accordingly; that the official zoning map designation for the subject property
 6 shall be changed accordingly." Record 1-3.

7 On January 8, 2007, petitioner filed this appeal with LUBA to challenge Ordinance
 8 45-62(M37). On January 19, 2007, intervenors moved to dismiss this appeal.

9 **MOTION TO DISMISS**

10 As relevant here, LUBA's jurisdiction is restricted to land use decisions. ORS
 11 197.825(1).⁶ The term "land use decision" is defined by statute to include a final local
 12 government decision that amends a comprehensive plan or land use regulation. ORS
 13 197.015(11).⁷

14 Klamath County is a "local government." ORS 197.015(14). No party disputes that
 15 Ordinance 45-62(M37) is a *final* decision of the Klamath County Board of Commissioners.
 16 It is also undisputed that Ordinance 45-62(M37) amends the Klamath County Comprehensive

⁶ ORS 197.825(1) provides, in relevant part:

"Except as provided in ORS 197.320 and subsections (2) and (3) of this section, the Land Use Board of Appeals shall have exclusive jurisdiction to review any land use decision * * * of a local government * * * in the manner provided in ORS 197.830 to 197.845."

⁷ As relevant, ORS 197.015(11) provides:

"Land use decision":

"(a) Includes:

"(A) A final decision or determination made by a local government or special district *that concerns the adoption, amendment or application of.*

"(i) The goals;

"(ii) A *comprehensive plan* provision;

"(iii) A *land use regulation*; or

"(iv) A new land use regulation[.]" (Emphases added).

1 Plan and the county's official zoning map (which is a land use regulation as ORS
2 197.015(12) defines that term). Under ORS 197.015(11), it is clear that Ordinance 45-
3 62(M37) is a land use decision and subject to LUBA's review jurisdiction under ORS
4 197.825(1), unless some other law requires a different conclusion. Intervenor's argue that
5 ORS 197.352(9) is such a law. ORS 197.352(9) appears immediately after the first eight
6 subsections of the Measure 37 statute discussed above, and provides as follows:

7 "A decision by a governing body under [ORS 197.352] shall not be considered
8 a land use decision as defined in ORS 197.015(10) [sic, should be
9 197.015(11)]."

10 The parties agree that the reference in ORS 197.352(9) to ORS 197.015(10) rather
11 than to ORS 197.015(11), where the statutory definition of "land use decision" is now
12 codified, is a codification error. Petitioner agrees that ORS 197.352(9) makes a decision
13 under ORS 197.352 something other than a "land use decision," as that term is defined by
14 ORS 197.015(11). The more difficult question is whether Ordinance 45-62(M37) is a
15 decision *under* ORS 197.352. Petitioner argues that it is not.

16 In the county's July 18, 2006 Order and in the state's July 20, 2006 Order, the county
17 and state determined that intervenors were entitled to just compensation under ORS
18 197.352(1). *See* n 1. In those decisions the state and county also made a decision that, in lieu
19 of paying just compensation, the state and county would "not * * * apply" certain state and
20 county land use regulations, as authorized by ORS 197.352(8). *See* n 3. No party disputes
21 that those decisions were decisions under ORS 197.352. Therefore, pursuant to ORS
22 197.352(9), those decisions were not land use decisions.

23 In the November 7, 2006 Amended Order, the county purported to rely on ORS
24 197.352(8) a second time to decide that "under ORS 197.352(8), it is appropriate to modify
25 current zoning to rezone the subject property," in lieu of paying just compensation under
26 ORS 197.352(1). Record 13. In effect, in the Amended Order, the county revisited its July
27 18, 2006 Order and replaced its decision "not to apply" the FR planning and zoning with a

1 decision to proceed to take action in the future to adopt an ordinance that would “modify” the
2 FR planning and zoning by removing the FR planning and zoning and applying RS planning
3 zoning in its place. The parties apparently agree that the November 7, 2006 Amended Order
4 is also a decision “under” ORS 197.352.

5 Petitioner argues that although the Order and Amended Order are not land use
6 decisions by virtue of ORS 197.352(9), ORS 197.352(9) does not extend to decisions such as
7 Ordinance 45-62(M37), which are rendered *after* a public entity makes a decision to “modify,
8 remove or not * * * apply” a land use regulation. We set out the relevant part of petitioner’s
9 argument below:

10 “Decisions to grant a ‘permit’ or, as in this case, to amend a comprehensive
11 plan and zoning map are not decisions required by or ‘under’ Measure 37. As
12 noted above, ORS 197.352 was expressly codified as part of ORS chapter 197.
13 Although the people provided that decisions ‘under’ the measure were not
14 ‘land use decisions,’ they did *not* otherwise alter other procedures or
15 requirements for amending comprehensive plans and land use regulations, or
16 for obtaining authorizations for a use allowed under a decision to ‘modify,
17 remove or not to [sic] apply’ ‘land use regulations.’

18 “Thus, while a county’s decision to ‘modify’ a county ‘land use regulation’ is
19 not a ‘land use decision’ because it is a decision ‘under’ ORS 197.352(8),
20 nothing in ORS 197.352 exempts counties from following the normal
21 procedures for adopting an ordinance to amend their plan and map
22 designations of a property, and nothing in ORS 197.352 provides that their
23 subsequent actions to carry out or implement a decision under Measure 37 are
24 not ‘land use decisions.’ If the people had wished that to be the case, then
25 section 9 of Measure 37 would have provided that *all decisions by a public
26 entity to authorize a use of private real property allowed under section 8 shall
27 not be considered a land use decision as defined in ORS 197.015(11)*. By
28 providing only that ‘*a decision by a governing body under this act * * **’ shall
29 not be considered a land use decision, the people limited the exclusion from
30 [LUBA’s] jurisdiction to only the decision by a county board of
31 commissioners whether and what form of relief is due.” Oregon Department
32 of Land Conservation and Development’s Response to Respondent-
33 Intervenor’s Motion to Dismiss 5 (emphases in original).

34 We agree in part and disagree in part with the above argument. Although the question
35 is not presented in this case, and we therefore need not and do not decide the question here,
36 DLCD is undoubtedly correct that some decisions that a public entity will need to make to

1 allow construction of a use that is the subject of a successful Measure 37 claim will be land
2 use decisions. For example, where a county takes action to “modify” a land use regulation or
3 a decision is made “not to apply” certain land use regulations (but other land use regulations
4 remain) and under those modified or remaining land use regulations additional discretionary
5 permits are needed to construct the use, any such discretionary permit decisions will almost
6 certainly be land use decisions. We tend to agree that the best reading of ORS 197.352(9) is
7 that such discretionary permits are not properly viewed as decisions *under* ORS 197.352.
8 Rather, such permit decisions are decisions *under* the modified land use regulation or
9 decisions *under* whatever land use regulations remain after the Measure 37 modification or
10 decision not to apply certain land use regulations has been granted.

11 But Ordinance 45-62(M37) is not a permit decision, or similar decision, which was
12 rendered under a modified land use regulation or a decision that was rendered under whatever
13 land use regulations remain after a Measure 37 modification or decision not to apply certain
14 land use regulations has been granted. To the contrary, Ordinance 45-62(M37) is the county
15 decision to “modify,” rather than “not * * * apply,” the FR planning and zoning designation
16 that formed the local basis for intervenors’ Measure 37 claim. Until Ordinance 45-62(M37)
17 was adopted, the FR plan and zoning designation remained in place on the subject property,
18 although the county had decided in its July 18, 2006 Order “not to apply” the FR planning
19 and zoning to intervenors. The November 7, 2006 Amended Order was at best a decision to
20 proceed to adopt an ordinance in the future that would “modify” the FR planning and zoning.
21 Ordinance 45-62(M37) is the only county decision that purports to “modify” the FR
22 designation. The Amended Order itself did not “modify” the FR designation, it simply
23 initiated a process that might or might not ultimately result in a decision to “modify” the FR
24 planning and zoning.

25 Petitioner suggests that the city should have followed post-acknowledgment plan
26 amendment procedures in adopting Ordinance 45-62(M37). That may well be the case, but

1 that question goes to the merits of whether the county committed a procedural error in the
2 way it went about adopting Ordinance 45-62(M37) to “modify” the property’s FR planning
3 and zoning designation. We also note that we question whether applying the RS designation
4 to the subject property is accurately characterized as a decision to “modify, remove, or not
5 * * * apply” the prior FR planning and zoning designation. Ordinance 45-62(M37) clearly
6 does more than “not * * * apply” the FR planning and zoning. As we have already noted,
7 that was accomplished by the July 18, 2006 Order. The authority granted by ORS 197.352(8)
8 to “modify” the FR planning and zoning designation would seem to authorize the county to
9 change or “modify” some part of the FR planning and zoning as it applies to the subject
10 property, while leaving the FR planning and zoning (as modified) in place “to allow the
11 owner to use the property for a use permitted at the time the owner acquired the property.”
12 However, just as whether the county may have committed procedural errors in adopting
13 Ordinance 45-62(M37) goes to the merits, whether the county may exceeded its authority to
14 “modify” the subject property’s existing planning and zoning under ORS 197.352(8) in
15 adopting Ordinance 45-62(M37) goes to the merits, rather than to the jurisdictional question
16 that is before us now—whether LUBA or the circuit court has jurisdiction to review
17 Ordinance 45-62(M37).⁸

18 To summarize, the November 7, 2006 Amended Order did not purport to, and in fact
19 did not, “modify” the FR planning and zoning designation for intervenors’ property. Rather
20 the November 7, 2006 Amended Order merely *initiated* the process that in turn led the county
21 to adopt the only decision that purports to “modify” the FR planning and zoning designation.
22 Ordinance 45-62(M37) is the county decision whereby the county purported to exercise its
23 authority under ORS 197.352(8) to “modify” the FR designation of intervenors’ property.

⁸ We also note that whether Ordinance 45-62(M37) is reviewable via a writ of review in circuit court or by LUBA has no significant bearing on the scope of review, since both the circuit court and LUBA have authority to determine whether a decision maker exceeded its jurisdiction, improperly construed applicable law, or failed to follow applicable procedures. ORS 34.040; 34.100; 197.835(9).

1 Under ORS 197.352(8), a decision to “modify” a land use regulation in response to a
2 Measure 37 claim is not a land use decision. Therefore, LUBA does not have jurisdiction
3 over this appeal. If the county exceeded its authority under ORS 197.352 in adopting
4 Ordinance 45-62(M37), or in some other way committed procedural or legal errors that
5 render Ordinance 45-62(M37) invalid, ORS 197.352(8) makes it clear that jurisdiction to
6 consider those questions lies somewhere other than LUBA.

7 Finally, we asked the parties to submit additional briefing on the question of whether
8 the November 7, 2006 Amended Order is a “final” decision that could be challenged in
9 circuit court, via a writ of review. We have concluded that we need not consider whether the
10 November 7, 2006 Amended Order could have been reviewed via a writ of review to resolve
11 the jurisdictional issue in this appeal. We need only answer a single question to determine
12 whether we have jurisdiction over this appeal. Again, that question is whether it is the
13 November 7, 2006 Amended Order or Ordinance 45-62(M37) that is the county’s decision to
14 “modify” the subject property’s FR planning and zoning designation. For the reasons
15 explained above, the November 7, 2006 Amended Order was at most a decision to go
16 forward to give the notice and prepare the ordinance for adoption that would be necessary to
17 actually “modify” the property’s FR planning and zoning, within the meaning of ORS
18 197.352(8). Only when the county adopted Ordinance 45-62(M37) did it in fact “modify” the
19 FR planning and zoning designation. Under ORS 197.352(9), such a decision is not a land
20 use decision that is subject to LUBA review.

21 Because we do not have jurisdiction over the decision that is the subject of this
22 appeal, this appeal is dismissed.⁹

⁹ Under OAR 661-010-0075(11), once a jurisdictional issue is raised at LUBA, all parties have ten days to file a motion requesting that LUBA transfer the appeal to circuit court in the event that LUBA determines that it does not have jurisdiction over the appeal. No party filed a motion to transfer pursuant to OAR 661-010-0075(11).

Certificate of Mailing

ER-24

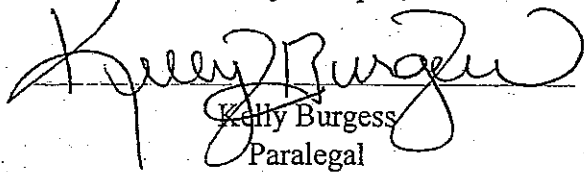
I hereby certify that I served the foregoing Final Opinion and Order for LUBA No. 2007-009 on April 18, 2007, by mailing to said parties or their attorney a true copy thereof contained in a sealed envelope with postage prepaid addressed to said parties or their attorney as follows:

Michael L. Spencer
Michael L. Spencer, LLC
409 Pine Street, Suite 204
Klamath Falls, OR 97601

Richard M. Whitman
Assistant Attorney General
Department of Justice
1162 Court Street NE
Salem, OR 97310

W. Daniel Bunch
Klamath County Counsel
305 Main Street
Klamath Falls, OR 97601

Dated this 18th day of April, 2007.


Kelly Burgess
Paralegal

Debra A. Frye
Executive Support Specialist

000074

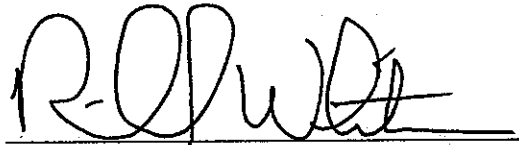
NOTICE OF FILING AND PROOF OF SERVICE

I certify that I directed the original Petitioner's Brief to be filed with the State Court Administrator, Records Section, at 1163 State Street, Salem, Oregon 97301-2563, on May 30, 2007.

I further certify that I directed the Petitioner's Brief to be served upon W. Daniel Bunch, attorney for respondent Klamath County, and upon Michael L. Spencer, attorney for respondents Thomas Ankeny and Lewis Ankeny, on May 30, 2007, by mailing two copies, with postage prepaid, in an envelope addressed to:

W. Daniel Bunch
Klamath County Counsel's Office
305 Main Street, 2nd Floor
Klamath Falls, OR 97601

Michael L Spencer
409 Pine St Ste 204
Klamath Falls OR 97601



RICHARD M. WHITMAN
Attorney-In-Charge
Natural Resources Section
DENISE G. FJORDBECK
Senior Assistant Attorney General

Attorney for Petitioner

DGF:blt/APPA7996

