

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

3 OREGON DEPARTMENT OF LAND  
4 CONSERVATION AND  
5 DEVELOPMENT,

6                                   Petitioner,

7 v.

8 KLAMATH COUNTY,

9                                   Respondent,

10 and

11 WAYNE COLE,

12                                   Intervenor-Respondent.

LUBA No. 2006-227

13                                   **OREGON DEPARTMENT OF LAND CONSERVATION AND DEVELOPMENT'S**  
14                                   **PETITION FOR REVIEW**

15  
16                                   **PETITIONER'S STANDING**

17                   Petitioner, the Oregon Department of Land Conservation and Development ("DLCD"),  
18 has standing under ORS 197.830(2) and ORS 197.620. DLCD appeared before Klamath County  
19 during the proceedings leading to the challenged decision, which amends the county's  
20 comprehensive plan and zoning maps. Rec. 68, 210, 252-274.  
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1 **STATEMENT OF THE CASE**

2 **A. Nature of the Land Use Decision and Relief Sought**

3 The decision appealed by DLCD is Klamath County's adoption of Ordinance No. 45.56  
4 (M37) entitled "In the Matter of Amending the Klamath County Comprehensive Plan Map and  
5 Land Use Zoning Map, for Measure 37 Claim Number M37 06-05 (Cole), to Rural Residential  
6 Use (R-2)," which was signed by the Board of County Commissioners on November 21, 2006  
7 (hereafter, the "Ordinance"). Rec. 3. The Ordinance provides that:

8  
9 " \* \* \* the Klamath County Board of Commissioners ordains that the property  
10 described in Exhibit 3, consisting of approximately 36.5 acres, identified as Tax  
11 Lots R-3909-02100-0190, R-3909-02800-00601 and R-3909-02800-00800 on  
12 Assessor map T39S, R9E, Section 28, Klamath County, Oregon is to be zoned  
13 Rural Residential (R-2), 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."

14 Rec. 2-3.

15 DLCD seeks reversal or remand of the Ordinance.

16 **B. Summary of Arguments**

17 1. The County failed to adopt findings concerning Goal 14 of its comprehensive plan when  
18 it acted to "not apply" certain land use regulations to Wayne Cole's use of the property. Goal 14  
19 of the county's comprehensive plan requires urban uses of land to occur within an acknowledged  
20 urban growth boundary. Goal 14 has not been "waived" by the county under 2004 Ballot  
21 Measure 37 (ORS 197.352), and continues to apply as an approval criterion for the Ordinance,  
22 and prohibits the urban uses authorized by the Ordinance.

24 2. The Ordinance is contrary to applicable state law. Under the terms of DLCD's Measure  
25  
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1 37 order for Wayne Cole’s Measure 37 claim to the state, the State of Oregon elected to not  
2 apply certain state “land use regulations” to Wayne Cole’s division of his property into one-acre  
3 parcels or to his development of a dwelling on each parcel. Under the terms of that order, these  
4 state land use regulations “\* \* \*will not apply to the *claimant* only to the extent necessary to  
5 allow *him* to use the subject property *for the use described in this report* \* \* \*.” Rec. 32  
6 (emphasis added). The state has not “waived” state land use regulations to authorize Klamath  
7 County to rezone the property so that *any person* may use the property for *any use* permitted  
8 under the new comprehensive plan and zoning designations. The *property* is still “agricultural  
9 land.” Statewide Land Use Planning Goal 3 still requires that the property be zoned for  
10 agricultural uses. The *property* is still outside of an acknowledged urban growth boundary, and  
11 Statewide Land Use Planning Goal 14 still requires that the property be used for rural uses.  
12

13 3. Klamath County failed to follow applicable requirements for a post-acknowledgement  
14 plan amendment in adopting the Ordinance. Ballot Measure 37 (2004), now codified at ORS  
15 197.352, does not exempt local governments from following the requirements for a post-  
16 acknowledgement plan amendment under ORS 197.610 to 197.625, and ORS 197.646.  
17 Similarly the requirements for county actions amending a comprehensive plan or zoning map  
18 under ORS 215.050, 215.060, 215.223, 215.402 to 215.437, and 215.503 do not vanish simply  
19 because the owner of the property has filed a claim under Measure 37.  
20

21 **C. Summary of Material Facts**

22 This appeal concerns a 36-acre tract of land in Klamath County, immediately southwest  
23 of the urban growth boundary of the city of Klamath Falls. Rec. 2, 16. The tract is located near  
24 the airport, and was zoned and planned for exclusive farm use. Rec. 93, 119, 149. Surrounding  
25 properties are used for pasture. Rec. 149, 151.  
26

1 On January 27, 2005, Wayne Cole filed a demand with Klamath County under Ballot  
2 Measure 37 (ORS 197.352). Rec. 477. On July 13, 2005, the Klamath County Board of  
3 Commissioners approved the claim and, in lieu of paying compensation, ordered that

4 "Klamath County will not apply regulations relating to exclusive farm use and  
5 non-resource zoning; except for those regulations related to the protection of  
6 public health and safety. The claimants may develop and use the property, based  
7 on this order, for a use permitted at the time they acquired an ownership interest  
8 in the property (July 1971)."

9 Rec. 429.

10 On May 27, 2005, Wayne Cole filed a demand with the State of Oregon under ORS  
11 197.352. Rec. 36. On April 4, 2006, the state issued a final order approving that claim, and  
12 "not applying" certain state land use regulations in order to allow Wayne Cole to use the  
13 property for a specific use.

14 On April 10, 2006, Wayne Cole submitted an application to the county to amend the  
15 comprehensive plan and zoning map designations for the property from EFU to RS (Suburban  
16 Residential). Rec. 148-149. On June 22, 2006, Klamath County provided notice to DLCD of the  
17 proposed comprehensive plan and zoning map amendment. Rec. 250.

18 On August 22nd and 29th, 2006, the Klamath County Board of Commissioners held  
19 public hearings on the comprehensive plan and zone change application. Rec. 211-234, 200-210.  
20 The hearing on August 29th was continued to October 16, 2006. Rec. 208.

21 On October 16, 2006, the Klamath County Board of Commissioners held the continued  
22 public hearing on the comprehensive plan and zone change application. Rec. 73-83. At that  
23 hearing, it appears that the county and Mr. Cole agreed to put the application for a  
24 comprehensive plan and zone change "on hold," although there is no writing in the record  
25 evidencing that the application was withdrawn or put "on hold." The Board then proceeded to  
26

1 approve an order amending the county's prior order on Mr. Cole's Measure 37 claim, and  
2 directing county staff to institute proceedings to amend the comprehensive plan and zoning  
3 designations of the property. Rec. 82-83, 70-72.

4 The record includes a copy of a form of notice for the two public hearings on the  
5 proposed comprehensive plan and zone change. Rec. 31. However, the record does not appear  
6 to include public notice of these hearings, and no notice of them was provided to DLCDC under  
7 ORS 197.610.

8  
9 On November 21, 2006 the Klamath County Board of Commissioners approved the  
10 challenged Ordinance. Rec. 3.

11 **D. LUBA Jurisdiction**

12 The challenged decision by Klamath County was a final decision that concerns the  
13 application of the County's acknowledged comprehensive plan and land use regulations, as well  
14 as Statewide Land Use Planning Goals and their implementing regulations. As a result, the  
15 Ordinance is a "land use decision" as defined by ORS 197.015, and review of the Ordinance is  
16 within the exclusive jurisdiction of this Board. ORS 197.825.

17  
18 Wayne Cole has filed a Motion to Dismiss this appeal on the basis that the decision is one  
19 by a governing body under ORS 197.352 and not a land use decision under 197.015(10). The  
20 motion was filed before the record was filed and, as described above in the Statement of Material  
21 Facts, a careful reading of the procedural history leading to the adoption of the challenged  
22 decision is likely important to the Board's decision on jurisdiction.

23  
24 In his Reply to DLCDC's Response to his Motion to Dismiss, Mr. Cole continues to argue  
25 that the Ordinance is a decision "under" ORS 197.352. DLCDC agrees that a decision by Klamath  
26 County to "modify" one or more "land use regulations" to permit Mr. Cole to carry out a use of

1 the property that was permitted when he acquired it, is a decision “under” Measure 37. DLCD  
2 has not appealed either of the orders the county adopted in order to provide non-monetary relief  
3 to Mr. Cole under Measure 37. The real question raised by the Motion to Dismiss is whether  
4 local government permits, zone changes, or other actions to carry out a use authorized by a  
5 Measure 37 “waiver” are also decisions “under” Measure 37.

6 It is telling that the people did not provide that decisions under Measure 37 are not  
7 permit, are not zone changes, are not comprehensive plan amendments, and are not other forms  
8 of local actions that trigger procedural and substantive requirements under existing law that was  
9 not altered by Measure 37. ORS 197.352 does not provide that comprehensive plan and zoning  
10 map amendments no longer need comply with the requirement in ORS 197.175(2) to comply  
11 with the Statewide Land Use Planning Goals. Similarly, ORS 197.352 does not provide that  
12 comprehensive plan and zoning map amendments no longer need comply with procedural  
13 requirements in ORS 197.610 to 197.625, for post-acknowledgment plan amendments, or the  
14 requirements under ORS 215.050, 215.060, 215.223, 215.402 to 215.437, and 215.503 for zone  
15 changes. And ORS 197.352 does not provide that decisions under it are not decisions on a  
16 “permit” as that term is used in ORS chapters 215 and 227.

17 From this context, it is clear that the people contemplated that all of the normal  
18 requirements for obtaining governmental authorization to carry out a use would continue to  
19 apply when a public entity elects to “modify, remove, or not to [*sic*] apply” one or more “land  
20 use regulations” to allow the owner to carry out a use of the property. All ORS 197.352(9) does  
21 is to ensure that the public entity’s decision as to whether the claim is valid, and if so, what form  
22 of relief to provide, is not a “land use decision” subject to the jurisdiction of this Board.  
23  
24  
25  
26

1 Under Mr. Cole's theory, a county could "waive" its current zoning plan provisions to  
2 allow a person a use of the property, and any subsequent decision by the county to authorize  
3 some specific aspect of that use would not be a land use decision. If that is what the people had  
4 intended, they would have stated that "[a]ny decision by a public entity to carry out a use  
5 authorized under this section shall not be considered a land use decision as defined in ORS  
6 197.015(11)."

7 Mr. Cole argues that DLCD's position reads the terms "modify" and "remove" out of  
8 ORS 197.352(8). That is simply not correct. DLCD believes that a public entity may modify or  
9 remove land use regulations that it has enacted. It is simply that in doing so the public entity  
10 must also comply with other existing laws that govern those actions. For example, LCDC is not  
11 authorized by Measure 37 to repeal Statewide Planning Goals without complying with ORS  
12 197.230 to 197.240. If those other laws require a process that results in a separate decision,  
13 implementing the initial decision to "modify, remove, or [sic] not to apply" one or more land use  
14 regulations, that decision is reviewable by the body that normally has jurisdiction for review. In  
15 this case, that body is this Board.  
16  
17

18 In sum, the challenged decision is a land use decision under ORS 197.015(11). LUBA  
19 has jurisdiction to review the challenged land use decision under ORS 197.825(1).

## 20 ARGUMENT

### 21 ASSIGNMENT OF ERROR NO. 1

22 **The county misconstrued the applicable law, and failed to make required findings, when it**  
23 **concluded that the proposed plan and zone change from EFU to R-2 is not subject to the**  
24 **county's acknowledged comprehensive plan policies, including Goal 14, which prohibits the**  
25 **proposed plan and zone change because it would allow urban uses of land outside of an**  
26 **acknowledged urban growth boundary.**

1 Goal 14 of the Klamath County Comprehensive Plan provides in pertinent part that  
2 “Urban growth boundaries shall be established to identify and separate urbanizable land from  
3 rural land.” The property in question is “rural land,” because it is not within an acknowledged  
4 urban growth boundary.

5 In its order on Mr. Cole’s Measure 37 claim, the county (in lieu of paying compensation)  
6 elected to “not apply” “regulations relating to exclusive farm use and non-resource zoning;  
7 except for those regulations relating to the protection of public health and safety.” Rec. 55.  
8 Nothing in the order or in the amended order on Mr. Cole’s Measure 37 claim stops Goal 14 of  
9 the county’s Comprehensive Plan from applying to his use of the property.  
10

11 The Ordinance provides that the new plan and zoning designations of the property are R-  
12 2. The R-2 zone authorizes dwellings on two-acre lots as a permitted use, and dwellings on  
13 smaller lots as a conditional use. KLDC sections 51.320 to 51.340 (attached as Exhibit “A”).  
14 The property is immediately southwest of the urban growth boundary of the city of Klamath  
15 Falls. Rec. 2, 16.  
16

17 There are no findings supporting the Ordinance other than the two Measure 37 orders.  
18 Rec. 2. The county’s failure to adopt findings addressing applicable provisions of its  
19 Comprehensive Plan and land use regulations, including Goal 14, requires that this decision be  
20 remanded. ORS 197.175; 215.416(9); KLDC section 47.030.B.1; KLDC section 48.030.B.2;  
21 *DLCD v. Klamath County*, 40 Or LUBA 221 (2001).  
22

23 In addition, the uses authorized by the R-2 zone are “urban” uses. By allowing urban  
24 uses on rural land (land outside of an acknowledged urban growth boundary), the county’s  
25 Ordinance violates Goal 14 of its Comprehensive Plan, and is prohibited by applicable law.  
26 *DLCD v. Klamath County*, 40 Or LUBA 221 (2001). As a result, this decision must be reversed.

ASSIGNMENT OF ERROR NO. 2

1  
2 **The Ordinance violates Statewide Land Use Planning Goals 3 and 14, and is prohibited as**  
3 **a matter of law. In the alternative, the county failed to adopt findings that the Ordinance**  
4 **complied with Goals 3 and 14.**

5 The property that is the subject of the Ordinance is “agricultural land,” as that term is  
6 defined in Statewide Land Use Planning Goal 3. Rec. 38. Goal 3 requires that “[a]gricultural  
7 lands shall be preserved and maintained for farm use \* \* \*.” Goal 3 also establishes  
8 requirements for county zoning of agricultural lands, and for minimum sizes for new lots or  
9 parcels, consistent with the statutory requirements of ORS chapter 215.

10 The State of Oregon, in its Measure 37 order for Wayne Cole, provided that

11  
12 “In lieu of compensation under ORS 197.352, the State of Oregon will not apply  
13 the following laws to *Wayne Cole’s division of the 20-acre property* into one-acre  
14 *parcels or to his development of a dwelling on each parcel*: applicable provisions  
15 of Goals 3 and 14, ORS 215 and OAR 660, division 33. *These land use*  
16 *regulations will not apply to the claimant only to the extent necessary to allow*  
17 *him to use the subject property for the use described in this report, and only to the*  
18 *extent that use was permitted when he acquired the property on July 14, 1971.”*

19 Rec. 32-33 (emphasis added). The state’s order is very clear. Goals 3 and 14 do not apply to  
20 Mr. Cole’s division of the property or to his development of a dwelling on each parcel. That is  
21 “the use described in this report.” Rec. 35-42. The state did not elect to “not apply” these laws  
22 to authorize persons other than Mr. Cole to carry out other uses of the property, including those  
23 authorized under the county’s R-2 zoning. The state also did not elect to “modify or remove”  
24 Goals 3 or 14 with respect to Mr. Cole’s use of the property. In fact, DLCD could not have  
25 modified or removed any state land use regulations. OAR 660-002-0010(8) limits the authority  
26 of the department under ORS 197.352 to “not applying” state land use regulations. As a result,  
Goals 3 and 14 applied to the county’s adoption of the Ordinance by virtue of ORS

1 197.175(2)(a).

2 Goal 3 requires that “agricultural land” be preserved and maintained for farm use. Goal  
3 14 requires that urban uses occur within an acknowledged urban growth boundary. By allowing  
4 residential development on lots as small as two acres, and on smaller lots as a conditional use,  
5 the Ordinance violates both Goals 3 and 14 by allowing urban-level residential use of  
6 “agricultural land.” *DLCD v. Klamath County*, 40 Or LUBA 221 (2001); ORS 197.835(5)(6).

7  
8 A county may not permit a use of private real property under ORS 197.352 unless there  
9 has first been a decision by the state to “not apply” applicable state land use regulations to that  
10 use. *Jackson County v. All Electors, and State of Oregon*, Jackson County Cir. Court No. 05-  
11 2993-E-3(2) (Order on Cross Motions for Summary Judgment, dated January 19, 2006, attached  
12 as Exhibit B).<sup>1</sup> Here, although there was a state decision on Mr. Cole’s written demand to the  
13 state, that decision did not provide a blanket waiver of all state land use regulations to allow any  
14 use of the property that Mr. Cole could have carried out when he acquired it. That is because  
15 such a “blanket waiver” is not authorized by ORS 197.352(8), which (in contrast to the last  
16 sentence of ORS 197.352(10)) only authorizes a public entity to allow *a* use, not “to use the  
17 property as permitted at the time the owner acquired the property.” ORS 197.352(10).

18  
19 In conclusion, the Ordinance violates Goals 3 and 14 because these laws were “waived”  
20 only to the extent necessary to allow Mr. Cole to divide the property and develop a home on each  
21 lot. DLCD did not have the authority to, and did not “waive” or modify or remove Goals 3 or 14  
22 so as to make them not applicable to the county’s Ordinance. Goals 3 and 14 prohibit the uses  
23 authorized by the Ordinance. As a result, the Board must reverse the county’s decision.  
24

25  
26 <sup>1</sup> Although the final judgment has not been entered in this case, DLCD asks that LUBA take official notice of this  
Circuit Court order.

1 In the alternative, as noted under the previous assignment of error, there are no findings  
2 supporting the Ordinance other than the two Measure 37 orders. Rec. 2. Those orders contain  
3 no findings concerning Goal 3 or Goal 14. The county's failure to adopt findings addressing  
4 applicable standards and criteria requires that this decision be remanded. ORS 215.416(9);  
5 KLDC section 47.030.B.1; KLDC section 48.030.B.2; *DLCD v. Klamath County*, 40 Or LUBA  
6 221 (2001).

### 7 **ASSIGNMENT OF ERROR NO. 3**

8 **Klamath County failed to follow applicable requirements for a post-acknowledgement plan**  
9 **amendment and zone change in adopting the Ordinance.**

10  
11 Klamath County failed to provide DLCD with the notice required by ORS 197.610 and  
12 197.615 for post-acknowledgement plan amendments. The failure of the county to comply with  
13 the requirements of ORS 197.610 and 197.615 is substantive, and requires remand of the  
14 Ordinance so that the county may follow the procedures required by law. *Oregon City Leasing,*  
15 *Inc. v. Columbia County*, 121 Or App 173 (1993). Similarly, the record does not show that the  
16 county gave the public notice required by ORS 215.060 or ORS 215.503 for the Ordinance.  
17 ORS 215.060 requires ten days' advance public notice of each hearing. Even if notice was  
18 published of the October 31st and November 21st hearings, that notice appears to have been  
19 published on October 25, 2006 – six days before the first hearing. The county's failure to follow  
20 procedures required for hearings on its comprehensive plan generally, and on a post-  
21 acknowledgment plan amendment specifically, is a failure to follow procedures applicable to the  
22 matter before it in a manner that prejudiced the public's and DLCD's rights to participate fully in  
23 the proceedings. In addition, the county never identified what the applicable standards or criteria  
24 for the comprehensive plan or zone change were. ORS 215.416 and 215.427.  
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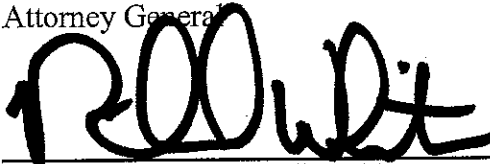
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For the foregoing reasons, DLCD respectfully requests that this Board reverse or remand  
Klamath County's Ordinance No. 45.56(M37).

DATED this 23rd day of January 2007.

Respectfully submitted,

HARDY MYERS  
Attorney General



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Attorney-in-Charge  
Steven E. Shipsey, #94435  
Assistant Attorney General  
Of Attorneys for Petitioner

Klamath County Comprehensive  
Plan and Implementing Zones and Designations

<u>Plan (Designation)</u>	<u>Implementing Zone (Designation)</u>
Forestry (F)	Forestry , (F) Forestry/Range (FR)
Agricultural (AG)	EFU-Grazing (EFU-G) EFU-Cropland/Grazing (EFU-CG) EFU-Cropland (EFU-C)
Non-Resource (NR)	Non-Resource (NR)
Rural (R)	Rural-1 (R-1) Rural-5 (R-5)
Rural Community Residential (RCR)	Rural Community Residential (RCR)
Urban Residential (UR)	Suburban Residential (RS) Low Density Residential (RL) Medium Density Residential (RM) High Density Residential (RH)
General Commercial (CG)	General Commercial (CG) Recreation Commercial (CR) Community Commercial (CC) Neighborhood Commercial (CN)
Transportation Commercial (CT)	Transportation Commercial (CT)
Industrial (I)	Light Industrial (IL) Heavy Industrial (IH)
Open Space and Conservation (OS/C)	Open Space and Conservation (OS/C)

Overlay Zones:

Flood Hazard  
Significant Resource  
Approach Safety  
Airport Noise  
Planned Unit Development (PUD)

**ARTICLE 51.3**  
**RURAL RESIDENTIAL (R-2)**

**51.310 - PURPOSE**

The purpose of this zone is to establish and maintain areas for rural residential uses. This zone allows for large lot residential uses and for small-scale hobby farming. The zone also serves as a buffer between urban uses and natural resource areas.

Typically, the zone is appropriate in rural or semi-rural areas where the existing rural land use pattern consists of lots less than one acre in size. This zone may be applied where existing or proposed public facilities or services appropriately serve a density of one dwelling per acre, or where there is a transition between urban levels of service and rural levels of service.

**51.320 - PERMITTED USES**

The following uses shall be permitted subject to site plan review of Article 41, and all other applicable standards, criteria, rules and statutes governing such use:

- A. Single-family dwelling
- B. Manufactured Home
- C. Essential Services
- D. Small Animals - not to exceed 24 animals per acre
- E. Large Animals - not to exceed 2 animals per acre
- F. Home Day Care
- G. Residential Care Home
- H. Residential Care Facility
- I. Accessory Buildings and Uses
- J. Community Park
- K. Emergency Services

**51.330 - CONDITIONAL USES**

The following uses may be permitted subject to standards listed in this article and if the provisions of Article 44 are satisfied:

- A. Extensive Impact Services and Utilities
- B. Cemeteries
- C. Schools
- D. Community Assembly
- E. Churches
- F. Animal Raising - Specialty
- G. Kennel
- H. Bed and Breakfast
- I. Mobile Home
- J. The creation of a new parcel or parcels smaller than the minimum lot size only if the criteria in Article 45.120 are met

E. Fences, Walls and Screening - See Article 64

F. Landscaping - See Article 65

G. Signs - See Article 66

H. Parking - See Article 68

I. Access - See Article 71

IN THE CIRCUIT COURT OF THE STATE OF OREGON FOR JACKSON COUNTY

JACKSON COUNTY, a political	)	
subdivision of the State of Oregon,	)	
	)	
Petitioner,	)	No. 05-2993-E-3(2)
	)	
vs.	)	ORDER ON CROSS-MOTIONS
	)	FOR SUMMARY JUDGMENT
ALL ELECTORS, FREEHOLDERS,)	)	
TAXPAYERS and OTHER INTERESTED )	)	
PERSONS, and STATE OF OREGON,	)	
	)	
Respondents.	)	
_____	)	

This matter is before the Court on the parties' cross-motions for summary judgment. The record before the Court consists of the parties' pleadings, motion papers and exhibits, and the parties' statements at oral argument.

**PROCEDURAL BACKGROUND**

The voters of Oregon passed Ballot Measure 37 in November 2004 and the Oregon legislature subsequently codified the Measure as ORS 197.352.<sup>1</sup> Thereafter, Jackson County established procedures for processing Measure 37 claims and implemented several ordinances and orders, including Order No. 300-05, codifying the procedures.

Jackson County initiated this lawsuit in August 2005. The County states in its Petition that it is necessary for the Court to declare the rights and duties of the parties under Order No.

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<sup>1</sup>The full text of Measure 37 is attached to this order as Exhibit 1.  
1 Order on Cross-Motions for Summary Judgment

300-05 (“the Order”). The County asks the Court to rule on the validity of two sections of Order No. 300-05, Section 1 on transferability of Measure 37 claims and Section 2 on State involvement with Measure 37 claims.

Section 1 reads as follows:

All relief granted by the Jackson County Board of Commissioners under Measure 37 shall be transferable to subsequent owners of the property. To protect the interests of claimants and subsequent owners of the property, Orders of the Board of Commissioners granting relief under Measure 37, and all permits issued pursuant to such Orders, shall continue to advise of the position on this issue taken by the Department of Justice. County employees shall issue such permits to subsequent owners of property that was granted relief under Measure 37.

Section 2 reads as follows:

County employees shall issue such permits as were authorized to owners of property that was the subject of an Order of the Board of Commissioners granting relief under Measure 37, notwithstanding the failure of such owners or any previous or subsequent owners, to file a claim with the State of Oregon or to obtain relief from the State of Oregon under Measure 37. To protect the interests of owners and previous and subsequent owners of the property, the Orders of the Board of Commissioners, and all permits issued pursuant to such Orders, shall advise of the position taken on this issue by the Department of Land Conservation and Development.

Jackson County’s lawsuit is in the form of a declaratory judgment for judicial examination pursuant to ORS 33.710. In order to enter the requested judgment on the validity of the Order, the Court must examine and determine two issues: (1) the extent, if any, to which Measure 37 claims may be transferred to new owners, and (2) whether

Jackson County may issue permits to successful Measure 37 claimants who have not sought or obtained relief from the State for such State regulations as may also apply.<sup>2</sup>

### **THE PARTIES' POSITIONS ON TRANSFERABILITY**

Jackson County's position on transferability is set forth succinctly in the Order and is restated in the Stipulated Facts. It is Jackson County's position that "[a]ll relief granted by the Jackson County Board of Commissioners under Measure 37 shall be transferable to subsequent owners of the property." (Order 300-05, § 1; Stipulated Fact No. 6).

The State takes a contrary position, set out in a letter from the Office of the Oregon Attorney General to the Director of the Oregon Department of Land Conservation and Development dated February 24, 2005, of record in this case as Exhibit 2 to the Affidavit of Katherine G. Georges submitted by the State ("AG Letter"): "relief [provided under Measure 37] is personal to the current owner of the real property. If the current owner of the property conveys the property before the new use allowed by the public entity is established, then the entitlement to relief will be lost." (AG Letter p. 1; Stipulated Fact No. 7).

### **THE STANDARDS FOR INTERPRETING MEASURE 37**

In interpreting a statute codifying an enacted ballot measure, the Court's task "is to discern the intent of the voters. The best evidence of the voters' intent is the text of

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<sup>2</sup> On October 11, 2006, the parties submitted a 14-item list of stipulated facts, most of which deal with the status of various parties to this action, the source of the Court's jurisdiction, and a summary of the parties' positions in this matter. The Court has considered these stipulated facts in reaching the conclusions set out in this opinion. Neither party has submitted any additional facts that are in dispute, nor does the Court find any disputed facts precluding the entry of the requested declaratory judgment.

<sup>3</sup> Order on Cross-Motions for Summary Judgment

the provision itself.” *Roseburg School District v. City of Roseburg*, 316 Or. 374, 378, 378 n.4 (1993) (“The text of a document must always be the starting point in any interpretative endeavor”); *Stranahan v. Fred Meyer, Inc.*, 331 Or. 38, 58 (2000) (“As always, we begin with the text ...”). If there are “related ballot measures submitted to the voters at the same election,” *Ecumenical Ministries of Oregon v. Oregon State Lottery Commission*, 318 Or. 551, 559 (1994), the Court considers them as the “context” in which the challenged provision is placed. In this case, there were no ballot measures related to Measure 37 on the November 2004 ballot.

In determining the meaning of the text, the Court looks to definitions of terms within the text and to the “plain, natural, and ordinary meaning” of undefined terms. *Ecumenical Ministries*, 318 Or. at 560. The Court may neither ignore text nor add language that is not part of the text. ORS 174.010.

Although “caution is required in ending the analysis before considering the history of an initiat[ive],” *Ecumenical Ministries*, 318 Or. at 559, n.7, “if the intent [of the voters] is clear based on the text and context ... ; the court does not look further.” *Roseburg*, 316 Or. at 378; *Coultas v. City of Sutherlin*, 318 Or. 584, 590 (1994) (court examines history “if there is a plausible alternative reading presented to the court”).

### **ARE MEASURE 37 CLAIMS TRANSFERABLE?**

Section 1 of Measure 37 provides if the County enacts or enforces certain land use regulations which restrict the use of private property and reduce the value of the property, the owner shall be paid just compensation.

Section 6 of Measure 37 provides if the regulation continues to apply for more than 180 days after the present owner has submitted a written demand for compensation, the present owner can sue the County for compensation, attorney fees and other expenses of litigation.

Section 8 of Measure 37 provides instead of the payment mentioned in Section 1 the County may modify, remove or not apply the land use regulation(s) to allow the owner to use the property for a use permitted at the time the owner acquired the property.

Section 10 of Measure 37 provides if the County has not paid compensation due within two years of its accrual, the owner is allowed to use the property as was permitted at the time the owner acquired the property.

“Owner” is defined by Section (11) (C) as “the present owner of the property, or any interest therein.”

The terms “transfer,” “transferability,” “transferable,” and “subsequent owner” are not found in Measure 37.

Measure 37 did not repeal or amend any existing land use law. All land use laws which were in effect prior to the passage of Measure 37 remain in place today. What Measure 37 does is provide a method by which the “present owner” of a parcel could receive compensation or relief from enforcement if the land use regulation diminished the value of his/her property.

When read in context, Measure 37 makes it clear what is meant by “present owner.” The “present owner” must satisfy a requirement of being the owner on two

dates. First, she/he must be the owner at the time the restrictive regulation is passed. Section 1 does not apply to land use regulations “[e]nacted prior to the date of acquisition of the property by the [present] owner.” Section (3) (E).

The second date on which the present owner must qualify to receive the benefit of Measure 37 is “the date the [present] owner makes written demand for compensation...” Section (2). In both cases, the definition of the owner is the same. There is no provision in Measure 37 for previous or subsequent owners.

Under Measure 37 the County has a choice of how to treat the owner who meets the qualifications of ownership on both dates. Section 8 provides in lieu of the payment of compensation as required by Section 1, the County “may modify, remove, or not apply the land use regulation[s] to allow the [present] owner to use the property for a use permitted at the time the [present] owner acquired the property.” The language of Measure 37 is clear: the word “owner” means the person who was the then-present owner at the time the restrictive regulation was enacted as well as the owner on the date when he/she made written demand for compensation.

The term “owner” is used consistently throughout Measure 37. Measure 37 does provide for one situation where a person other than the owner at the time of the passage of the regulation may receive Measure 37’s benefit. Section (3) (E) allows a claimant to benefit as an “owner” at the time the restrictive regulation was passed if the property was owned at that time by a family member. Family member is defined in Section (11) (A). No other exceptions can be found in Measure 37.

In documents filed with this Court Jackson County recognized it is the “present owner,” as defined by Measure 37, who is entitled to *apply* for relief when there is a “loss of value resulting from land use regulations that have been placed on the property since the claimant first acquired an interest in the property.” Petitioner’s Response to Respondent’s Motion, p. 1. (emphasis added). The County asserts, however, any and all “subsequent owners” also obtain the “do not apply” order benefits granted to the successful claimant, even if the successful claimant has taken no steps to act on that relief by the time she sells her interest in the property to the subsequent owner.

At oral argument the attorney for the county asserted that under the County’s Order, the Measure 37 relief granted to the “present owner” claimant would “run with the land” and would be “transferable to subsequent owners of the property.” There is no support for this position of the County in the language of Measure 37.

In this case, the Court is not required to examine the history of Measure 37 because the County has not presented a “plausible” alternative interpretation of the text of Measure 37 supporting its position on transferability. The interpretation urged by the County would require the Court both to ignore included text (including the definition of “owner”) and to add words that are not part of the text (including the County’s proposed definition of “property”).

Even if the Court were required to consider the history of Measure 37, that history does not support the County’s position. The history of a ballot initiative consists of the “sources of information that were available to the voters at the time the measure was adopted and that disclose the public’s understanding of the measure. Such information

includes the ballot title and arguments for and against the measure included in the voters' pamphlet, and contemporaneous news reports and editorial comment on the measure." *Ecumenical Ministries*, 318 Or. at 559 n.8. There is no discussion or even mention in the voters' pamphlet for the 2004 election of the concept of transferability of Measure 37 claims or rights of subsequent owners, nor do the news reports alluded to in the State's court filings include any such mention or discussion. Under any legal analysis it is clear the voters did not intend Measure 37 claims to be transferable.

County legislation must be consistent with the state statute. *Marquam Farms Corp. v. Multnomah County*, 147 Or. App. 368, 380, 936 P.2d 990 (1997). Measure 37 claims are not transferable. Because Section 1 of Jackson County Order No. 300-05 states Measure 37 claims are transferable, that section is invalid.

#### **STATE INVOLVEMENT IN MEASURE 37 CLAIMS**

Section 2 of Order No. 300-05 directs county employees to issue permits without regard to compliance with or waiver from applicable state statutes.

The State's position on this issue also is contrary to the position of Jackson County reflected in Order No. 300-05. The general statement of the State's position is found in a letter from the Department of Land Conservation and Development to the Jackson County Board of Commissioners dated August 10, 2006, of record in this case as Exhibit 4 to the Georges Affidavit ("LCDC Letter"): "Although the county may 'waive' laws they enact under Measure 37, they have no authority to 'waive' laws another government entity enacts, including state laws... . The failure of the owners of the property to obtain an order from the state waiving applicable state laws means that [the

owners' proposed use] is unlawful, as the County is not authorized to approve the [proposed use] when doing so would violate state laws that are still in effect.” (LCDC Letter p. 1; Stipulated Fact No. 11). A specific instance of State involvement also is described in Stipulated Fact No. 11: for “measure 37 claims based upon property acquisition dates that fall between the adoption of statewide land use planning goals and the acknowledgment by LCDC, the use of real property is subject to both state land use regulations and local land use regulations, and a waiver under Measure 37 from both levels of government is necessary before an owner can use the property.”

On its face, Section 2 of the Order purports to direct county employees to grant permits without consideration of, or regard for, state law. The Oregon Supreme Court and the Court of Appeals both have made it clear counties must consider applicable state laws when deciding whether to issue land use-related permits, even after the county's comprehensive plans have been acknowledged and accepted by the State. *Smith v. Clackamas County*, 313 Or. 519, 524, 524n5 (1992) (“sittings of nonfarm dwellings in EFU zones ... remain subject to certain statutes,” e.g. ORS 215.263(3) & (4), even after the county's “comprehensive and implementing ordinances have been acknowledged”); *Foland v. Jackson County*, 311 Or. 167, 180 n10 (1991) (“[t]he local government's decision must, of course, also comply with any relevant statutes”); *Forster v. Polk County*, 115 Or. App. 475, 478 (1992) (both applicable state statutes and county ordinances and rules “must be interpreted and applied by the county in making its decision” whether to permit construction of a dwelling in an EFU zone”); *Kenagy v. Benton County*, 115 Or. App. 131, 136, 136 n3 (1992) (“relevant state statutes remain applicable to local land use decisions after acknowledgment,” i.e., post-acknowledgment “the statutes are also applicable and the [county's]

decisions must satisfy any statutory requirements that are not embodied in the local law”); *Marquam Farms Corp. v. Multnomah County*, 147 Or. App. 368, 380 (1997) (“relevant state statutes retain their independent applicability to local land use decisions after the local legislation has been acknowledged,” in that case, increasing the size of a dog facility on EFU-zoned land).<sup>3</sup>

It is not enough for the County to include a notation in permits granted to successful Measure 37 claimants to the effect that the State may disagree about whether a state-law waiver also is required. The County does not have the authority to sanction a wholesale disregard for compliance with state statutes that also may govern a particular claimant’s application for building permits. Order No. 300-05 sweeps far too broadly.

The County also argues a property owner “may” wish to apply for a state waiver or “may choose not to make such application.” This argument misses the point. The Order *directs* county employees to issue permits without regard to possible state requirements and it is that mandatory disregard for whether state waivers also are required that renders the Order invalid. If there are cases in which no state waivers are required, the permit can be issued. But it is not for the County to declare in advance that permits “shall” be issued without even an inquiry about whether state requirements also continue to apply.

### **CONCLUSION**

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<sup>3</sup> To the extent Section 2 of the County’s Order deals with the period of time from the date the Land Conservation and Development Commission adopted statewide land use goals and administrative rules (January 25, 1975) and the date Jackson County’s comprehensive plan and zoning ordinance was adopted in 1983, the Order directs employees to disregard state law. During that interim period of time State approval was required before the issuance of permits by the County.

For the reasons stated in this Opinion, Sections 1 and 2 of Jackson County Order No. 300-05 are invalid. The Court will enter judgment reflecting the Court's determination and declaring Sections 1 and 2 to be unenforceable and void. The attorney for the State of Oregon shall prepare the judgment, consistent with this opinion.

SO ORDERED.

DATED: January 19, 2007.

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G. Philip Arnold, Circuit Judge

cc: David J. Hunnicutt  
Katherine Greene Georges

## EXHIBIT 1

### Measure 37

The following provisions are added to and made a part of ORS chapter 197:

(1) If a public entity enacts or enforces a new land use regulation or enforces a land use regulation enacted prior to the effective date of this amendment 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) 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 under this act.

(3) Subsection (1) of this act shall not apply to land use regulations:

(A) Restricting or prohibiting activities commonly and historically recognized as public nuisances under common law. This subsection shall be construed narrowly in favor of a finding of compensation under this act;

(B) Restricting or prohibiting activities for the protection of public health and safety, such as fire and building codes, health and sanitation regulations, solid or hazardous waste regulations, and pollution control regulations;

(C) To the extent the land use regulation is required to comply with federal law;

(D) Restricting or prohibiting the use of a property for the purpose of selling pornography or performing nude dancing. Nothing in this subsection, however, is intended to affect or alter rights provided by the Oregon or United States Constitutions; or

(E) Enacted prior to the date of acquisition of the property by the owner or a family member of the owner who owned the subject property prior to acquisition or inheritance by the owner, whichever occurred first.

(4) Just compensation under subsection (1) of this act shall be due the owner of the property if the land use regulation continues to be enforced against the property 180 days after the owner of the property makes written demand for compensation under this section to the public entity enacting or enforcing the land use regulation.

(5) For claims arising from land use regulations enacted prior to the effective date of this act, written demand for compensation under subsection (4) shall be made within two years of the effective date of this act, or the date the public entity applies the land use regulation as an approval criteria to an application submitted by the owner of the property, whichever is later. For claims arising from land use regulations enacted after the effective date of this act, written demand for compensation under subsection (4) shall be made within two years of the enactment of the land use regulation, or the date the owner of the property submits a land use application in which the land use regulation is an approval criteria, whichever is later.

(6) 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 this act, the present owner of the property, or any interest therein, shall have a cause of action for compensation under this act in the circuit court in which the real property is located, and the present owner of the real property shall be entitled to reasonable attorney fees, expenses, costs, and other disbursements reasonably incurred to collect the compensation.

(7) A metropolitan service district, city, or county, or state agency may adopt or apply procedures for the processing of claims under this act, but in no event shall these procedures act as a prerequisite to the filing of a compensation claim under subsection (6) of this act, nor shall the failure of an owner of property to file an application for a land use permit with the local government serve as grounds for dismissal, abatement, or delay of a compensation claim under subsection (6) of this act.

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

(9) A decision by a governing body under this act shall not be considered a land use decision as defined in ORS 197.015(10).

(10) Claims made under this section shall be paid from funds, if any, specifically allocated by the legislature, city, county, or metropolitan service district for payment of claims under this act. Notwithstanding the availability of funds under this subsection, 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. If a claim has not been paid within two years from the date on which it accrues, the owner shall be allowed to use the property as permitted at the time the owner acquired the property.

(11) Definitions - for purposes of this section:

(A) "Family member" shall include the wife, husband, son, daughter, mother, father, brother, brother-in-law, sister, sister-in-law, son-in-law, daughter-in-law, mother-in-law, father-in-law, aunt, uncle, niece, nephew, stepparent, stepchild, grandparent, or grandchild of the owner of the property, an estate of any of the foregoing family members, or a legal entity owned by any one or combination of these family members or the owner of the property.

(B) "Land use regulation" shall include:

(i) Any statute regulating the use of land or any interest therein;

(ii) Administrative rules and goals of the Land Conservation and Development Commission;

(iii) Local government comprehensive plans, zoning ordinances, land division ordinances, and transportation ordinances;

(iv) Metropolitan service district regional framework plans, functional plans, planning goals and objectives; and

(v) Statutes and administrative rules regulating farming and forest practices.

(C) "Owner" is the present owner of the property, or any interest therein.

(D) "Public entity" shall include the state, a metropolitan service district, a city, or a county.

(12) The remedy created by this act is in addition to any other remedy under the Oregon or United States Constitutions, and is not intended to modify or replace any other remedy.

(13) If any portion or portions of this act are declared invalid by a court of competent jurisdiction, the remaining portions of this act shall remain in full force and effect.

CERTIFICATE OF FILING

I hereby certify that on January 23, 2007, I filed the original of this OREGON DEPARTMENT OF LAND CONSERVATION AND DEVELOPMENT'S PETITION FOR REVIEW, together with <sup>four copies</sup> ~~one copy~~, with the Land Use Board of Appeals, 550 Capitol Street N.E., Suite 235, Salem, OR 97301-2552, by first-class mail.

DATED this 23rd day of January 2007.



Richard M. Whitman, #89382  
Attorney-in-Charge  
Steven E. Shipsey, #94435  
Assistant Attorney General  
Of Attorneys for Petitioner

CERTIFICATE OF SERVICE

I certify that on January 23, 2007, I served a true and correct copy of this OREGON DEPARTMENT OF LAND CONSERVATION AND DEVELOPMENT'S PETITION FOR REVIEW on the following parties by first-class mail:

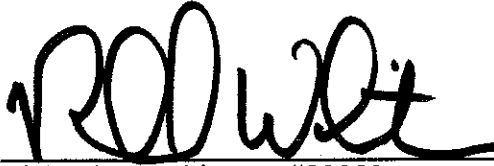
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9 DATED this 23rd day of January 2007.

10 

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12 Attorney-in-Charge  
13 Steven E. Shipsey, #94435  
14 Assistant Attorney General  
15 Of Attorneys for Petitioner