

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3  
4 REMINGTON RANCH, LLC,  
5 *Petitioner,*

6  
7 vs.

8  
9 CROOK COUNTY,  
10 *Respondent,*

11 and

12  
13 GARY EDER, MOLLIE EDER,  
14 MARK McKINNON, CASEY McKINNON,  
15 H. CURTISS BURRELL, PATRICIA BURRELL,  
16 TOM ALEXANDER and  
17 CENTRAL OREGON LANDWATCH,  
18 *Intervenors-Respondents.*

19  
20 LUBA No. 2008-198

21  
22 FINAL OPINION  
23 AND ORDER

24  
25  
26 Appeal from Crook County.

27  
28 Steven P. Hultberg, Bend, filed the petition for review and argued on behalf of  
29 petitioner. With him on the brief was Ball Janik LLP.

30  
31 Heidi T.D. Bauer, Prineville, filed a response brief and argued on behalf of  
32 respondent. With her on the brief was David M. Gordon, County Counsel.

33  
34 Jannett Wilson, Eugene, filed a joint response brief and argued on behalf of  
35 intervenors-respondents Gary Eder, Mollie Eder, Mark McKinnon, Casey McKinnon, H.  
36 Curtiss Burrell, Patricia Burrell and Tom Alexander. With her on the brief were Western  
37 Environmental Law Center and Pamela Hardy.

38  
39 Pamela Hardy, Bend, filed a joint response brief and argued on behalf of intervenor-  
40 respondent Central Oregon LandWatch. With her on the brief were Jannett Wilson and  
41 Western Environmental Law Center.

42  
43 HOLSTUN, Board Member; BASSHAM, Board Chair; RYAN, Board Member,  
44 participated in the decision.

1  
2  
3  
4

REMANDED

08/07/2009

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

**NATURE OF THE DECISION**

Petitioner appeals Ordinance 210, which amends the Crook County Comprehensive Plan (CCCP) map and the Crook County Zoning Ordinance (CCZO) map.

**FACTS**

**A. Ordinance 187**

The county first amended the CCCP and CCZO to authorize approval of destination resorts in 2002.<sup>1</sup> Apparently the Destination Resort Overlay Map that was adopted to show areas of the county that are eligible for approval of destination resorts erroneously omitted a portion of a property known as Remington Ranch. On December 6, 2006, the county adopted Ordinance 187 to correct that error. Section 1 of Ordinance 187 provides:

“The Destination Resort Overlay map is hereby amended to include all of that property included in the lot currently identified as owned by Remington Ranch, LLC and as Crook County Tax Lot 1514000000201 and more specifically identified on the attached Exhibit A. The Planning Director shall so note this amendment on the official maps of Crook County.” Petition for Review, App 1, Page 2.<sup>2</sup>

---

<sup>1</sup> At oral argument we requested that the county provide us with a copy of the ordinance that first enacted the county’s destination resort regulations and maps. In response to that request, the county provided us with four ordinance amendments. Ordinance No. 17, Amendments 52 and 53 and Ordinance No. 18, Amendments 59 and 60. To simplify we will refer to those ordinances as Ordinances 17(52), 17(53), 18(59) and 18(60). We take official notice of those ordinance amendments. OEC 202; *Friends of Deschutes County v. Deschutes County*, 49 Or LUBA 100, 103 (2005); *Home Builders Assoc. v. City of Wilsonville*, 29 Or LUBA 604, 606 (1995). Ordinance 18(60) amended the CCZO map by adding the Destination Resort Overlay Zone. A map (Exhibit A) is attached to Ordinance 18(60), which shows the Destination Resort Overlay Zone. Ordinance 17(53) amended the CCCP Map to show areas that are eligible for Destination Resorts. Ordinance 17(53) referred to an attached map (Exhibit A). If Exhibit A to Ordinance 17(53) is different from Exhibit A to Ordinance 18(60), the county did not give us a copy of that map. We will assume they are the same map, and we will refer to the CCCP and CCZO destination resort maps, collectively, as the Destination Resort Overlay Map.

<sup>2</sup> Ordinance 187 is not in the record. A copy of Ordinance 187 is attached to the petition for review. We also take official notice of Ordinance 187.

1           **B.       Ballot Measure 7-47 and Ordinance 206**

2           On May 20, 2008, Crook County voters approved Ballot Measure 7-47, which  
3 directed to the County Court to take action to prevent future approval of additional  
4 destination resorts. To respond to that directive, the Crook County Court first adopted  
5 Ordinance 206 on June 18, 2008. Before Ordinance 206 was adopted, the CCZO limited  
6 amendment of the Destination Resort Overlay Map to periodic review under ORS 197.628  
7 through 197.636. Ordinance 206 amended the CCZO to authorize the county to amend the  
8 Destination Resort Overlay Map through the post-acknowledgment plan amendment process  
9 at ORS 197.615 to 197.625, rather than waiting for periodic review.

10           **C.       Ordinance 210**

11           Ordinance 210 is the ordinance that is the subject of this appeal. Ordinance 210  
12 repeals the Destination Resort Overlay Map, except for four properties for which destination  
13 resorts have already been approved or for which a destination resort application is currently  
14 under review. Section One of Ordinance 210 explains:

15           “Ordinance 18[(60)], Section 1, and Ordinance 17[(53)], Section 1, Exhibit A  
16 are amended by repealing the existing Destination Resort Overlay Zone Map  
17 adopted May 22, 2002 as amended by Ordinance 187 and substituting the  
18 following described properties to be mapped as designated for destination  
19 resorts. The properties comprise the area within the boundaries of existing  
20 approved and currently applied for destination resorts in Crook County (as  
21 shown on the map attached hereto as Exhibit A)[.]” Record 20.

22           Ordinance 210 was adopted on October 15, 2008, a little over 22 months after Ordinance 187  
23 was adopted.

24           **ASSIGNMENT OF ERROR**

25           Petitioner argues that Ordinance 210 must be reversed because it was adopted in  
26 violation of ORS 197.455(2) which provides as follows:

27           “[A] county shall adopt, as part of its comprehensive plan, a map consisting of  
28 eligible lands within the county. The map must be based on reasonably  
29 available information and may be amended pursuant to ORS 197.610 to  
30 197.625, *but not more frequently than once every 30 months*. The county

1 shall develop a process for collecting and processing concurrently all map  
2 amendments made within a 30-month planning period. A map adopted  
3 pursuant to this section shall be the sole basis for determining whether tracts  
4 of land are eligible for destination resort siting pursuant to ORS 197.435 to  
5 197.467.” (Emphasis added.)

6 Petitioner contends that because Ordinance 210 amended the county’s maps showing lands  
7 that are eligible for destination resorts, and did so less than 30 months after Ordinance 187  
8 amended those same maps, Ordinance 210 must be reversed.

9 **A. Correction of a Scrivener’s Error is not an Amendment**

10 The county first argues that ORS 197.455(2) limits how often a destination resort  
11 map can be “amended” through post-acknowledgment plan amendments. The County  
12 contends that Ordinance 187 merely corrected a “scrivener’s error,” and that the record does  
13 not show that Ordinance 187 was processed as a post-acknowledgment plan amendment  
14 “pursuant to ORS 197.610 to 197.625.” We understand the county to argue that correction of  
15 a scrivener’s error does not “amend[]” the county’s Destination Resort Overlay Map, within  
16 the meaning of ORS 197.455(2), and is not a post-acknowledgement plan amendment within  
17 the meaning of ORS 197.610 to 197.625 We understand the county to argue it therefore did  
18 not violate ORS 197.455(2) when it adopted Ordinance 210 less than 30 months after it  
19 adopted Ordinance 187.

20 Although it is true that nothing in the record establishes that Ordinance 187 was  
21 processed according to the procedures for post-acknowledgement plan amendments set forth  
22 in ORS 197.610 to 197.625, it is equally true that the record does not establish that  
23 Ordinance 187 was not processed as a post-acknowledgment plan amendment. We will not  
24 assume Ordinance 187 was not processed as a post-acknowledgment plan amendment.

25 As we have already explained, Ordinance 18(60), Section 1 and Ordinance 17(53),  
26 Section 1 adopted the Destination Resort Overlay Map in 2002. Those decisions were land  
27 use decisions that had been final for more than four years when Ordinance 187 was adopted  
28 in 2006. Ordinance 187 applied the Destination Resort Overlay to a number of acres that

1 were not included in the Destination Resort Overlay, as shown on the Destination Resort  
2 Overlay Map that was adopted by Ordinance 18(60), Section 1 and Ordinance 17(53),  
3 Section 1.<sup>3</sup> That was an “amendment” of the Destination Resort Overlay Map, within the  
4 meaning of ORS 197.455(2). We reject the county’s argument that Ordinance 187 was  
5 something other than an amendment of the Destination Resort Overlay Map, simply because  
6 the county may have intended to adopt different mapping for those acres in 2002.

7 **B. Ordinance 187 is Void**

8 The county next argues that if Ordinance 187 “amended” the county’s Destination  
9 Resort Overlay Map, within the meaning of ORS 197.455(2), that amendment is void and  
10 therefore does not constitute an amendment of the Destination Resort Overlay Map for  
11 purposes of ORS 197.455(2). According to the county, at the time Ordinance 187 was  
12 adopted, county law limited Destination Resort Overlay Map amendments to periodic  
13 review. We understand the county to argue that Ordinance 187 was not adopted in periodic  
14 review.

15 We question the county’s assumption that an unappealed ordinance that amended a  
16 county’s Destination Resort Overlay Map outside periodic review would be void or a nullity,  
17 if local law limited such amendments to periodic review. If such a decision was appealed,  
18 violation of such a local law might provide a basis for reversal or remand, but we seriously  
19 question whether an unappealed amendment outside periodic review would be void unless  
20 the local law specifically provided that amendments adopted outside periodic review were  
21 void. However, we need not and do not resolve the question here. The record does not  
22 establish that Ordinance 187 was adopted outside periodic review, and we will not assume  
23 that it was.

---

<sup>3</sup> We are unable to determine precisely how many acres were affected.

1           **C.     Repeal and Replace**

2           Intervenors-respondents argue:

3           “Ordinance 210 expressly did not amend Crook County’s destination resort  
4           map; it repealed the map and replaced it with a description of the four  
5           properties which had already been approved or were in the application process  
6           for destination resorts development. \* \* \*” Response Brief of Intervenors-  
7           Respondents 2 (underline emphasis in original).

8           We understand intervenors-respondents to contend that an ordinance that repeals the county’s  
9           existing Destination Resort Overlay Map, which shows lands that are *eligible* for destination  
10          resorts, and replaces that Destination Resort Overlay Map with another map that shows lands  
11          where destination resorts have already been approved or are in the process of being  
12          approved, is not an ordinance that “amends” a map that shows “eligible lands” for  
13          development of destination resorts.

14          We are not persuaded. Ordinance 210 itself recognizes that the county’s destination  
15          resort maps are “amended by repealing the existing Destination Resort Overlay Map \* \* \*  
16          and substituting” a version of that map that shows fewer properties as eligible for destination  
17          resorts. As a practical matter, ordinances adopting comprehensive plan and zoning map  
18          amendments almost always repeal the existing map and replace the repealed map with  
19          another map that reflects the desired change in mapping. Such ordinances are just as much  
20          amendments as ordinances that direct planning staff to go to the original map and erase  
21          designations, add designations or change designations to achieve the desired mapping.

22          We also do not think it is legally significant that the map that was adopted by  
23          Ordinance 210 purports to show existing destination resorts, whereas the map that was  
24          repealed purported to show lands that are *eligible* for destination resorts.<sup>4</sup> We do not think  
25          the different terminology on the adopted map means Ordinance 210 is something other than

---

<sup>4</sup> The map that was adopted by Ordinance 210 is titled “Destination Resorts in Crook Co.” As previously noted, the repealed Destination Resort Overlay Zone Map shows lands that are eligible for destination resorts.

1 an amendment of the Destination Resort Overlay Map that showed lands eligible for  
2 destination resorts. As Ordinance 210 recognizes, one of the four areas that remains eligible  
3 for destination resorts under Ordinance 210 is Crossing Trails, and that destination resort has  
4 not yet been approved. As to Crossing Trails, there can be no argument that the adopted map  
5 is anything other than a map that shows lands “eligible” for a destination resort. And even  
6 with regard to the other three properties where destination resorts have been approved and  
7 “exist” in some form, those lands also remain “eligible” for the approved destination resort.

8 **D. Conclusion**

9 We agree with petitioner that both Ordinance 187 and Ordinance 210 amend the  
10 county’s Destination Resort Overlay Map, which was adopted pursuant to ORS 197.455(2).  
11 Ordinance 210 was adopted a little more than 22 months after Ordinance 187. Under ORS  
12 197.455(2), it was error for the County Court to adopt Ordinance 210 sooner than 30 months  
13 after it adopted Ordinance 187.

14 Petitioner asks that we reverse Ordinance 210. While it was error for the county to  
15 adopt Ordinance 210 when it did so on October 15, 2008, the 30-month anniversary of  
16 Ordinance 187 passed on June 6, 2009. It is not apparent to us that it would be a violation of  
17 ORS 197.455(2) for the county to readopt Ordinance 210. Under OAR 661-010-0073,  
18 LUBA must reverse a land use decision if “[t]he decision violates a provision of applicable  
19 law and *is* prohibited as a matter of law.” (Emphasis added.) Ordinance 210 violated  
20 applicable law and adoption of amendments to the Destination Resort Overlay Map sooner  
21 than 30 months after the most recent amendment was prohibited as a matter of law on  
22 October 15, 2008. However, as far as we can tell, adoption of Ordinance 210 on remand is  
23 no longer prohibited as a matter of law, since the time required under ORS 197.455(2) has  
24 now passed. Therefore, remand rather than reversal is appropriate. On remand the county

1 can determine whether it wishes to readopt Ordinance 210 or to respond to Ballot Measure 7-  
2 47 in some other way.<sup>5</sup>

3 The county's decision is remanded.

---

<sup>5</sup> At oral argument we asked the parties if this appeal was moot, since the 30 month deadline has already passed. Petitioner responded that while the county might readopt Ordinance 210, it could also take some other action to respond to Ballot measure 7-47. Because the county has the option to do something other than readopt Ordinance 210, petitioner argued this appeal will have some practical effect and is not moot. We agree with petitioner.