

1                               BEFORE THE LAND USE BOARD OF APPEALS

2                               OF THE STATE OF OREGON

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4                               AILEEN P. KAYE, TERRY BERRY,  
5                               and RICHARD VAN PELT,  
6                               *Petitioners,*

7  
8                               vs.

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10                              MARION COUNTY,  
11                              *Respondent,*

12  
13                              and

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15                              MATTHEW SWISHER and DONNA SWISHER,  
16                              *Intervenors-Respondents.*

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18                              LUBA No. 2008-190

19  
20                              ORDER ON  
21                              MOTION TO DISMISS  
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23   **MOTION TO INTERVENE**

24               Matthew Swisher and Donna Swisher, the applicants below, move to intervene on the  
25 side of the respondent in this appeal. There is no opposition to the motion, and it is granted.

26   **FACTS**

27               The southern and western boundary lines of intervenors' property abut Spong's  
28 Landing Park. It was brought to the county's attention that the previous owners of  
29 intervenors' property had constructed a fence that encroached onto park property. The  
30 encroachment was not discovered upon the subsequent sale to intervenors. The fence as it  
31 stands encloses approximately 6,135 square feet of park property.

32               The board of commissioners (BOC) held a public hearing regarding the matter on  
33 October 1, 2008. The BOC determined that it was in the public interest to convey the strip of  
34 land along the park's northern boundary line to intervenors. The BOC issued Order No. 08-

1 143 on October 6, 2008 approving the sale of the property for a sum of \$5,000. This appeal  
2 followed.

3 **MOTION TO DISMISS**

4 As relevant here, LUBA's jurisdiction is limited to land use decisions. ORS  
5 197.825(1).<sup>1</sup> Respondent argues that the BOC's decision does not fall within the statutory  
6 definition of "land use decision" provided in ORS 197.015(10)(a)(A).<sup>2</sup> According to the  
7 county, the BOC's decision was rendered pursuant to ORS 275.330(2).<sup>3</sup> The county asserts  
8 that in making its decision to convey property under ORS 275.330(2), the county was not  
9 required to apply any of the land use standards set out at ORS 197.015(10)(a)(A). *See* n 2. It

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<sup>1</sup> ORS 197.825(1) provides:

"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 or limited land use decision of a local government, special district or a state agency in the manner provided in ORS 197.830 to 197.845."

<sup>2</sup> ORS 197.015(10)(a) defines a land use decision to include the following:

- "(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[.]"

<sup>3</sup> ORS 275.330(2) provides:

"In addition to the methods described in subsection (1) of this section, lands that have been set aside for county forest, public park or recreational area may be alienated, sold or conveyed, in part or in whole, by the public body upon a finding that it is in the best interest of the public. Upon a determination that an alienation, sale or conveyance is in the public interest, the lands set aside may be sold at public or private sale, or other lands may be taken in exchange and set aside for park or recreational purposes. When a sale, an alienation or conveyance takes place, the proceeds shall be held for maintenance and improvement of existing park and recreation lands or future acquisition of lands to be set aside for park or recreational purposes."

1 follows, the county argues, that the challenged decision is not a land use decision that is  
2 subject to LUBA's review, and this appeal should be dismissed.

3 A decision "concerns" the application of a comprehensive plan or land use regulation  
4 if (1) the decision maker was required by law to apply its comprehensive plan or land use  
5 regulations as approval standards, but did not, or (2) the decision maker in fact applied plan  
6 provisions or land use regulations. *Dorall v. Coos County*, 53 Or LUBA 32, 34 (2006)  
7 (citing *Jaqua v. City of Springfield*, 46 Or LUBA 566, 574 (2004)). In *Many Rivers Group v.*  
8 *City of Eugene*, 25 Or LUBA 518, 523 (1993) we concluded that we did not have jurisdiction  
9 to review a decision regarding the ownership and management of a park. That decision was  
10 rendered pursuant to ORS 275.330. However, in reaching that conclusion in *Many Rivers*  
11 *Group*, we noted that petitioners did not argue that the county was required to apply its  
12 comprehensive plan or land use regulations and petitioners did not identify any applicable  
13 comprehensive plan or land use regulation standards. *Id.* at n 3. In the present appeal,  
14 petitioners identify a comprehensive plan objective that they contend the county should have  
15 applied.

16 The Marion County Comprehensive Plan (MCCP) includes a number of Parks and  
17 Recreation Policies, beginning at MCCP II F-3. The MCCP also includes a number of Parks  
18 and Recreation Objectives, beginning at MCCP II F-9. The Parks and Recreation Objective  
19 for Spong's Landing Park appears at MCCP II F-10. That MCCP Objective states:

20 "Acquire 10 acres adjacent to Spongs Landing and further develop the park to  
21 include additional trails, paths, open play fields, and nature studies."

22 The MCCP objective involved here is very specific. It directs the county to acquire  
23 an additional 10 acres of land adjacent to Spong's Landing Park. While it may be that the  
24 Objective simply does not apply at all to a decision to *sell* Spong's Landing Park property,  
25 we believe the Objective could reasonably be interpreted to prohibit a sale of Spong's  
26 Landing Park property, particularly if the sale of Spong's Landing Park property would make  
27 it more difficult to acquire the 10 acres referenced in the Objective. Stated differently, the

1 scope of the M CCP Spong's Landing Park Objective is sufficiently ambiguous that its  
2 applicability to the challenged decision is not clear.

3 Petitioners, during oral testimony at the October 1, 2008 public hearing, argued that  
4 the M CCP calls for the county to acquire a 10-acre addition to Spong's Landing Park and  
5 that selling Spong's Landing Park property conflicts with the comprehensive plan. Record  
6 17. A letter from Friends of Marion County dated October 1, 2008 specifically cites and  
7 quotes the M CCP Spong's Landing Park Objective quoted above. Record 43. As far as we  
8 can tell, the county did not respond that the cited M CCP Objective does not apply to the  
9 challenged decision and did not take the position that the challenged conveyance of 6,135  
10 square feet of Spong's Landing Park property is consistent with that Objective.

11 We agree with petitioners that the challenged decision falls within the statutory  
12 definition of "land use decision" in ORS 197.015(10)(a)(A)(ii). Petitioners identified a  
13 M CCP Objective that certainly could be interpreted to apply to a decision to sell 6,135  
14 square feet of Spong's Landing Park property and could be interpreted to prohibit a decision  
15 to sell Spong's Landing Park property. The county did not respond to petitioners' argument  
16 or provide any basis for us to conclude that the cited M CCP Objective does not apply. Given  
17 these circumstances, we conclude that the challenged decision is a land use decision and that  
18 we have jurisdiction to review the decision. It also seems very likely that the county's  
19 decision will have to be remanded to allow the county to adopt an explanation for why the  
20 county interprets the Spong's Landing Park Objective to apply or not to apply to a decision  
21 to sell Spong's Landing Park property. If the Spong's Landing Park Objective does apply to  
22 a decision to sell Spong's Landing Park property, the county will need to determine whether  
23 the challenged sale of Spong's Landing Park property is consistent with that objective.

24 The county's motion to dismiss is denied.

1   **BRIEFING SCHEDULE**

2           If the county does not voluntarily move to remand the challenged decision for  
3 additional findings, the petition for review shall be due 21 days from the date of this order.  
4 The respondent's and intervenors-respondents' brief shall be due 42 days from the date of  
5 this order. The Board's final opinion and order shall be due 77 days from the date of this  
6 order.

7           Dated this 18<sup>th</sup> day of February, 2009.  
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Michael A. Holstun  
Board Member