BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

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 13 demand 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 17 the owner to use the property for a use permitted at the time the owner acquired the 18 property."[3]

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[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:

1 Intervenors 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] Intervenors 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:

> "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 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.

“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 * * * 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 * * *.” Record 13 (emphases added).

In accordance with the November 7, 2006 Amended Order, notice was published and public hearings 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. Record 2. Relevant portions of Ordinance 45-62(M37) are set out below:

“**WHEREAS**, in accordance with the [Board of County Commissioners’] 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;

1 "* * * * *

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

8 On January 8, 2007, petitioner filed this appeal with LUBA to challenge Ordinance
9 45-62(M37). On January 19, 2007, intervenors moved to dismiss this appeal.

10 **MOTION TO DISMISS**

11 As relevant here, LUBA's jurisdiction is restricted to land use decisions. ORS
12 197.825(1).[6] The term "land use decision" is defined by statute to include a final local
13 government decision that amends a comprehensive plan or land use regulation. ORS
14 197.015(11).[7]

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

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

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

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

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

24 In the November 7, 2006 Amended Order, the county purported to rely on ORS
25 197.352(8) a second time to decide that "under ORS 197.352(8), it is appropriate to modify
26 current zoning to rezone the subject property," in lieu of paying just compensation under
27 ORS 197.352(1). Record 13. In effect, in the Amended Order, the county revisited its July

18, 2006 Order and replaced its decision "not to apply" the FR planning and zoning with 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 zoning in its place. The parties apparently agree that the November 7, 2006 Amended Order is also a decision "under" ORS 197.352.

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

> "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. As noted above, ORS 197.352 was expressly codified as part of ORS chapter 197. Although the people provided that decisions 'under' the measure were not 'land use decisions,' they did *not* otherwise alter other procedures or requirements for amending comprehensive plans and land use regulations, or for obtaining authorizations for a use allowed under a decision to 'modify, remove or not to [sic] apply' 'land use regulations.'
>
> "Thus, while a county's decision to 'modify' a county 'land use regulation' is not a 'land use decision' because it is a decision 'under' ORS 197.352(8), nothing in ORS 197.352 exempts counties from following the normal procedures for adopting an ordinance to amend their plan and map designations of a property, and nothing in ORS 197.352 provides that their subsequent actions to carry out or implement a decision under Measure 37 are not 'land use decisions.' If the people had wished that to be the case, then section 9 of Measure 37 would have provided that *all decisions by a public entity to authorize a use of private real property allowed under section 8 shall not be considered a land use decision as defined in ORS 197.015(11).* By providing only that '*a* decision *by a governing body under this act* * * *' shall not be considered a land use decision, the people limited the exclusion from [LUBA's] jurisdiction to only the decision by a county board of commissioners whether and what form of relief is due." Oregon Department of Land Conservation and Development's Response to Respondent-Intervenor's Motion to Dismiss 5 (emphases in original).

We agree in part and disagree in part with the above argument. Although the question is not presented in this case, and we therefore need not and do not decide the

question here, DLCD is undoubtedly correct that some decisions that a public entity will need to make to allow construction of a use that is the subject of a successful Measure 37 claim will be land use decisions. For example, where a county takes action to "modify" a land use regulation or a decision is made "not to apply" certain land use regulations (but other land use regulations remain) and under those modified or remaining land use regulations additional discretionary permits are needed to construct the use, any such discretionary permit decisions will almost certainly be land use decisions. We tend to agree that the best reading of ORS 197.352(9) is that such discretionary permits are not properly viewed as decisions *under* ORS 197.352. Rather, such permit decisions are decisions *under* the modified land use regulation or decisions *under* whatever land use regulations remain after the Measure 37 modification or decision not to apply certain land use regulations has been granted.

But Ordinance 45-62(M37) is not a permit decision, or similar decision, which was rendered under a modified land use regulation or a decision that was rendered under whatever land use regulations remain after a Measure 37 modification or decision not to apply certain land use regulations has been granted. To the contrary, Ordinance 45-62(M37) is the county decision to "modify," rather than "not * * * apply," the FR planning and zoning designation that formed the local basis for intervenors' Measure 37 claim. Until Ordinance 45-62(M37) was adopted, the FR plan and zoning designation remained in place on the subject property, although the county had decided in its July 18, 2006 Order "not to apply" the FR planning and zoning to intervenors. The November 7, 2006 Amended Order was at best a decision to proceed to adopt an ordinance in the future that would "modify" the FR planning and zoning. Ordinance 45-62(M37) is the only county decision that purports to "modify" the FR designation. The 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.

1 Petitioner suggests that the county should have followed post-acknowledgment plan
2 amendment procedures in adopting Ordinance 45-62(M37). That may well be the case, but
3 that question goes to the merits of whether the county committed a procedural error in the
4 way it went about adopting Ordinance 45-62(M37) to "modify" the property's FR planning
5 and zoning designation. We also note that we question whether applying the RS designation
6 to the subject property is accurately characterized as a decision to "modify, remove, or not
7 * * * apply" the prior FR planning and zoning designation. Ordinance 45-62(M37) clearly
8 does more than "not * * * apply" the FR planning and zoning. As we have already noted,
9 that was accomplished by the July 18, 2006 Order. The authority granted by ORS
10 197.352(8) to "modify" the FR planning and zoning designation would seem to authorize the
11 county to change or "modify" some part of the FR planning and zoning as it applies to the
12 subject property, while leaving the FR planning and zoning (as modified) in place "to allow
13 the owner to use the property for a use permitted at the time the owner acquired the
14 property." However, just as whether the county may have committed procedural errors in
15 adopting Ordinance 45-62(M37) goes to the merits, whether the county may exceeded its
16 authority to "modify" the subject property's existing planning and zoning under ORS
17 197.352(8) in adopting Ordinance 45-62(M37) goes to the merits, rather than to the
18 jurisdictional question that is before us now—whether LUBA or the circuit court has
19 jurisdiction to review Ordinance 45-62(M37).[8]
20 To summarize, the November 7, 2006 Amended Order did not purport to, and in fact
21 did not, "modify" the FR planning and zoning designation for intervenors' property. Rather
22 the November 7, 2006 Amended Order merely *initiated* the process that in turn led the
23 county to adopt the only decision that purports to "modify" the FR planning and zoning

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

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

23 Because we do not have jurisdiction over the decision that is the subject of this
24 appeal, this appeal is dismissed.[9]

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[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).