

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3
4 KAROL SUSAN WELCH, BEVERLY DAVIS
5 and MICHELLE MICKELSON,
6 *Petitioners,*

7
8 vs.

9
10 YAMHILL COUNTY,
11 *Respondent,*

12
13 and

14
15 JOHN KROO,
16 *Intervenor-Respondent.*

17
18 LUBA No. 2007-111

19 ORDER

20 **MOTION TO INTERVENE**

21 John Kroo, the applicant below, moves to intervene on the side of respondent in the
22 appeal. There is no opposition to the motion, and it is granted.

23 **MOTIONS TO DISMISS**

24 Intervenor has filed two motions to dismiss the appeal. We address each motion
25 below.

26 **A. Intervenor’s First Motion to Dismiss**

27 The challenged decision approved intervenor’s application for a subdivision. In
28 2005, intervenor filed a claim for compensation from the county under ORS 197.352(1)
29 (Measure 37), alleging that land use regulations that were enacted after he acquired the
30 property on February 20, 1965 reduced the fair market value of his property.¹ Record 34-38.

¹ ORS 197.352(1) provides:

“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

1 ORS 197.352(8) allows a local government faced with such a claim for compensation to
2 “modify, remove, or not * * * apply” certain land use regulations. The county adopted Order
3 No. 06-153, in which the county determined that, in lieu of paying compensation under ORS
4 197.352(1), the county would not apply certain land use regulations that were enacted after
5 February 20, 1965 to intervenor’s application to subdivide the property.²

6 After the county adopted Order No. 06-153, intervenor applied to subdivide the
7 subject property. Record 425. After holding multiple hearings on the application, the county
8 adopted Order No. 07-442, approving intervenor’s subdivision application and finding that
9 the application complied with all applicable provisions of the Yamhill County Land Division
10 Ordinance (LDO).³ Record 3.

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 Intervenor also received an order from the Oregon Department of Land Conservation and Development (DLCD) providing that the state would not apply certain land use regulations to intervenor’s proposed subdivision. Record 39-48.

³ Order No. 07-442 explains the procedural history of intervenor’s claim that led to the issuance of Order No. 06-153 and references that order. Record 5-6. Order No. 07-442 states in relevant part:

“[ORS 197.352] does not allow the local jurisdiction to remove, modify, or not apply regulations related to public health and safety. Section 1.3(b) of Ordinance 749 defines exempt *land use regulation* as a regulation that:

“(b) Restricts or prohibits 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.”

“Therefore, health and safety regulations will need to be complied with in evaluating this land division.” Record 5 (Emphasis added).

The exemption found in ORS 197.352(3) is commonly referred to as the “health and safety exemption.” ORS 197.352(3) provides in relevant part:

“Subsection (1) of this section shall not apply to *land use regulations*:

“ * * * * *;

“(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;”

1 In the first motion, intervenor argues that LUBA lacks jurisdiction over the
2 subdivision approval by Yamhill County for a number of reasons. First, intervenor argues
3 that “by its own terms” Order No. 07-442 was a decision “under” ORS 197.352, and
4 therefore LUBA does not have jurisdiction to review the decision. Motion to Dismiss 3.
5 However, intervenor concedes that even after the county adopted Order No. 06-153, various
6 land use regulations continued to apply to intervenor’s proposed subdivision of the property.
7 Motion to Dismiss 6. *See* n 3. We understand intervenor to argue that because those land use
8 regulations are the types of land use regulations that are referenced in ORS 197.352(3), the
9 county’s approval of his subdivision application was a decision “under [ORS 197.352].”
10 Motion to Dismiss 4.

11 Petitioners respond that the county’s approval of intervenor’s subdivision in Order
12 No. 07-442 was not a decision “under” ORS 197.352, but rather a decision applying the land
13 use regulations that remained in place after the county’s decision under ORS 197.352.
14 Therefore, petitioners argue, the county’s decision is a “land use decision” as defined in ORS
15 197.015(11), and is not excluded from LUBA’s jurisdiction under ORS 197.352(9).

16 LUBA has jurisdiction over “land use decisions.” ORS 197.825(1).⁴ “Land use
17 decision” is defined by ORS 197.015(11) to include a final local government decision that
18 concerns the application of a “land use regulation.” “Land use regulation” is defined by ORS
19 197.015(12) to include “any local government zoning ordinance, land division ordinance

⁴ ORS 197.015(11)(a)(A) defines “land use decision” in relevant part as including:

“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[.]”

1 adopted under ORS 92.044 or 92.046 or similar general ordinance establishing standards for
2 implementing a comprehensive plan.” Thus, LUBA ordinarily has exclusive jurisdiction
3 over all final government decisions that apply land use regulations.

4 However, ORS 197.352(9) excludes from LUBA’s jurisdiction:

5 “[a] decision by a governing body under [ORS 197.352] shall not be
6 considered a *land use decision as defined in ORS 197.015(10)* [sic, should be
7 197.015(11)].” (Emphasis added).

8 Thus, LUBA does not have jurisdiction over a decision by a local government if that decision
9 is a decision “under” ORS 197.352.

10 In *DLCD v. Klamath County*, ___ Or LUBA ___ (LUBA No. 2007-009, April 18,
11 2007), *aff’d* 215 Or App 297, ___ P3d ___ (2007), we reviewed a county ordinance rezoning
12 property that was the subject of a claim under ORS 197.352(1), in order to determine
13 whether it was a decision “under” ORS 197.352. We concluded that it was a decision
14 “under” ORS 197.352, and that consequently, we lacked jurisdiction to review it. In
15 reaching that conclusion, we explained:

16 “* * * where * * * a decision is made ‘not to apply’ certain land use
17 regulations (but other land use regulations remain) and under those * * *
18 remaining land use regulations additional discretionary permits are needed to
19 construct the use, any such discretionary permit decisions will almost
20 certainly be land use decisions. We tend to agree [with DLCD] that the best
21 reading of ORS 197.352(9) is that such discretionary permits are not properly
22 viewed as decisions *under* ORS 197.352. Rather, such permit decisions are
23 decisions *under* * * * whatever land use regulations remain after the Measure
24 37 * * * decision not to apply certain land use regulations has been granted.”
25 (Emphasis in original.) *Id.*

26 The county’s decision in Order No. 07-442 did not determine that it would “not * * *
27 apply” certain land use regulations. That determination was made in Order No. 06-153.
28 Rather, the county’s decision in Order No. 07-442 did exactly the opposite of what
29 intervenor is suggesting: the decision *applied* all of the land use regulations that remained
30 applicable to intervenor’s proposed subdivision. We reject intervenor’s first argument, that

1 Order No. 07-442 is a decision “under” ORS 197.352 or that LUBA lacks jurisdiction to
2 review that decision under ORS 197.352(9).

3 Intervenor next argues that LUBA lacks jurisdiction to consider this appeal because a
4 decision on the appeal may require interpretation of ORS 197.352, and LUBA does not have
5 jurisdiction to interpret that statute. Although intervenor frames the issue as one of
6 jurisdiction, we understand intervenor to argue that interpretation of ORS 197.352 is outside
7 LUBA’s scope of review, and that because that interpretation is outside LUBA’s scope of
8 review, LUBA lacks jurisdiction to review any assignments of error that require an
9 interpretation of ORS 197.352.

10 LUBA has authority to reverse or remand a land use decision if the Board finds that
11 the local government “[i]mproperly construed the applicable law.” ORS 197.835(9)(a)(D).
12 No briefs on the merits have been filed yet in this case, and it is not clear whether any
13 assignments of error will require us to interpret a provision of ORS 197.352. However, as a
14 general proposition we disagree with intervenor that we lack authority to interpret
15 ORS 197.352, or any other statute, as may be necessary in the context of reviewing a land
16 use decision that is subject to our jurisdiction. Intervenor provides no authority for his
17 proposition that LUBA may not interpret the meaning of ORS 197.352 if necessary, and
18 consequently, we reject his argument.

19 Next, intervenor argues that the county’s decision in Order No. 07-442 was a decision
20 “that [was] made under land use standards that do not require interpretation or the exercise of
21 policy or legal judgment,” and, as such, is not a “land use decision.” ORS 197.015(11)(b)(A).
22 Intervenor appears to argue that a decision regarding whether the application complies with
23 the LDO provisions that remain applicable to intervenor’s proposed use of the property does
24 not require interpretation or the exercise of policy or legal judgment. Intervenor provides no
25 explanation regarding how the county’s decision falls within ORS 197.015(11)(b)(A)’s
26 “ministerial” exception to the definition of land use decision. Without a more developed

1 argument from intervenor, we are not able to agree at this point that the county’s decision
2 qualifies for the ORS 197.015(11)(b)(A) exception to the statutory definition of land use
3 decision.⁵ Intervenor is free to develop such an argument in its brief on the merits.

4 Finally, although his argument is not well developed, intervenor appears to argue that
5 the provisions of the LDO that prescribe the procedures to be followed in applying for
6 subdivision approval under the remaining applicable land use regulations do not apply to
7 intervenor’s proposed subdivision of the property because those provisions were enacted
8 after the date that intervenor acquired the property. We have already noted above that after
9 the county’s decision in Order No. 06-153, certain land use regulations continued to apply to
10 intervenor’s proposed use of the property. It is those remaining land use regulations that
11 required intervenor to file an application to subdivide his property according to the
12 procedures governing the county’s processing and review of intervenor’s application.
13 Intervenor has not explained why those provisions of the LDO do not apply to the county’s
14 review of intervenor’s application for compliance with the remaining applicable provisions
15 of the LDO. We reject intervenor’s final argument.

16 Intervenor’s first motion to dismiss is denied.

17 **B. Intervenor’s Second Motion to Dismiss**

18 In his second motion to dismiss, intervenor argues that the appeal should be
19 dismissed because petitioners have failed to file the petition for review within the time set

⁵ However, in reviewing the portions of the LDO that the county applied, we note at least one provision that appears to require “interpretation or the exercise of policy or legal judgment”:

“6.070 Lands Subject to Hazardous Conditions

“Lands which the Director finds to be unsuitable for development due to flooding, inadequate drainage, steep slopes, rock formations, earthquake activity, landmass instability, pollutants or other factors or conditions likely to be harmful to the safety, and general health of future residents or the general public, shall not be developed for building purposes and may be used for open space unless adequate methods for overcoming these conditions are submitted and approved by all appropriate agencies.”

1 forth in our rules. On July 20, 2007, petitioners filed a precautionary record objection. OAR
2 661-010-0026(2). On August 1, 2007, the county filed a response to the record objection that
3 disputes some of petitioners' objections, and essentially agreed with others. At the same
4 time, the county transmitted a supplemental record including a number of items in response
5 to some of petitioners' objections.

6 OAR 661-010-0026(6) provides:

7 "If an objection to the record is filed, the time limits for all further procedures
8 under these rules shall be suspended. *When the objection is resolved, the*
9 *Board shall issue an order declaring the record settled and setting forth the*
10 *schedule for subsequent events. Unless otherwise provided by the Board, the*
11 *date of the Board's order shall be deemed the date of receipt of the record for*
12 *purposes of computing subsequent time limits."* (Emphasis added).

13 Thus, under OAR 661-010-0026(6), after a record objection is filed the time limits for
14 all further procedures under our rules remain suspended until the Board issues an order
15 settling the record, even if the local government transmits a supplemental record to the
16 parties that purports to resolve some or all of the record objections. We have not previously
17 issued an order settling the record, and the time limit for filing the petition for review has not
18 commenced. OAR 661-010-0026(6).

19 Intervenor's second motion to dismiss is denied.

20 **RECORD OBJECTIONS**

21 As noted above, petitioners filed objections to the record, and the county
22 subsequently filed a response to those objections and a supplemental record. Petitioners have
23 confirmed that the county's response and the supplemental record satisfy their record
24 objections.

25 The record is settled as of the date of this order. The petition for review shall be due
26 21 days after the date of this order. The response briefs shall be due 42 days after the date of
27 this order. The final opinion and order shall be due 77 days after the date of this order.

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Dated this 6th day of November, 2007.

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Melissa M. Ryan

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Board Member