

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3  
4 DEPARTMENT OF LAND  
5 CONSERVATION AND DEVELOPMENT,

6 *Petitioner,*

7  
8 vs.

9  
10 JACKSON COUNTY,

11 *Respondent.*

12  
13 LUBA No. 2006-233

14  
15 FINAL OPINION  
16 AND ORDER

17  
18 Appeal from Jackson County.

19  
20 Richard M. Whitman, Assistant Attorney General, Salem, and Steven E. Shipsey,  
21 Assistant Attorney General, Salem, filed the petition for review and argued on behalf of  
22 petitioner. With them on the brief was Hardy Myers, Attorney General.

23  
24 No appearance by Jackson County.

25  
26 BASSHAM, Board Chair; HOLSTUN, Board Member; RYAN, Board Member,  
27 participated in the decision.

28  
29 REVERSED

03/27/2007

30  
31 You are entitled to judicial review of this Order. Judicial review is governed by the  
32 provisions of ORS 197.850.

**NATURE OF THE DECISION**

The Department of Land Conservation and Development (DLCD) appeals a county order approving a four-lot subdivision of a 23.15-acre property, for which the county had previously granted a waiver of county land use regulations under Ballot Measure 37 (ORS 197.352 *et seq.*).

**FACTS**

The subject property is zoned Open Space Reserve (OSR), a forest zone, and is developed with a single family dwelling. On February 28, 2005, the property owners filed a Ballot Measure 37 claim with the county, stating that they desired to divide the property into four lots with a minimum of five acres each, and to build a residence on the three new lots created. The owners claimed that they acquired the property prior to acknowledgment of the county’s comprehensive plan and land use regulations. In response, the county issued Order 327-05, which elected to waive certain acknowledged county comprehensive plan provisions and land use regulations.

The owners subsequently filed with the county an application seeking tentative plat approval for a four-lot subdivision of the property. The planning commission approved the subdivision application. DLCD appealed the planning commission decision to the county board of commissioners, arguing that the owners have not filed a claim under Ballot Measure 37 with the state, that DLCD believed that the statewide planning goals, particularly Goal 4 (Forest Lands), applied directly to the subject property at the time the owners acquired the property, and that the county had no authority to waive applicable state laws and regulations or to approve development that is inconsistent with applicable state laws and regulations.

On November 28, 2006, the board of commissioners denied DLCD’s appeal, and approved the requested subdivision. The decision includes an “admonishment,” stating that the county’s decision is limited to the county’s authority to waive local comprehensive plan

1 provisions and land use regulations, and does not purport to imply or guarantee compliance  
2 with any other laws or regulations.

3 This appeal followed.

4 **ASSIGNMENT OF ERROR**

5 DLCD argues that the board of commissioners' order approving the subdivision is  
6 unlawful, because it authorizes development that is contrary to applicable state law.  
7 According to DLCD, unless and until the state issues a waiver of state laws and regulations  
8 under Ballot Measure 37, the county has no authority to approve the requested development.

9 The county has not filed a response brief. Instead, county counsel informed LUBA  
10 by letter that the county "will be conceding the issue presented by the Petitioner and is  
11 prepared to accept the remand of this matter back for final decision." Given that concession,  
12 we see no purpose in discussing in detail the arguments DLCD presents on appeal. It is  
13 sufficient to state that we agree with DLCD that nothing in the challenged decision or  
14 elsewhere cited to us authorizes the county to approve development that is inconsistent with  
15 applicable state laws and regulations, unless and until those state laws and regulations are  
16 waived or otherwise rendered without effect under Ballot Measure 37.

17 DLCD requests that the challenged decision be reversed, because it "violates a  
18 provision of applicable law and is prohibited as a matter of law." OAR 661-010-0071(1)(c).  
19 The county's letter states that it is prepared to accept "remand" of the decision. The letter  
20 does not discuss why remand rather than reversal is warranted under OAR 661-010-0071(1),  
21 and we agree with DLCD that in the present case reversal is the correct disposition.

22 The county's decision is reversed.