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Statement of Material Facts

The decision appealed to this Board is Klamath County Ordinance No. 45.62(M37). That decision amends the Klamath County Comprehensive Plan Map and the Land Use Zoning Map designation of an 80-acre tract of land owned by the Ankenys from Forest-Range (FR) to Suburban Residential (RS). Rec. 2-3. The county initiated proceedings to amend the comprehensive plan and zoning map designations for the property following earlier decisions by the county first to “not apply” certain “land use regulations,” Rec. 16-17, and then to “modify” certain land use regulations by rezoning the property to Suburban Residential (SR). Rec. 13-14. The Ankenys also filed an application for a comprehensive plan and zone change for this property that appears to be still pending before the county. Rec. 95-110 (applications), Rec. 71 (transcript indicating that applications “put on hold”). These, earlier, decisions were made in response to a written demand for compensation made by the Ankenys on September 6, 2005 under Measure 37 (2004), now codified as ORS 197.352.

Measure 37 Background

The question raised by the Ankenys’ Motion to Dismiss requires some understanding of Measure 37 and, as a result, DLCD provides the following summary of the measure.

Measure 37 adds to Oregon’s existing land use laws by providing certain landowners the opportunity to seek relief under certain circumstances when land use laws restrict their use of private real property and have the effect of reducing the fair market value of the property. *See MacPherson v. DAS*, 340 Or.117, 130 P3d 308 (2006) (upholding constitutionality of Measure 37). Under Measure 37, an owner of an interest in private real property qualifies for relief if three criteria are met: (1) a public entity enforces an existing “land use regulation” or enacts or enforces a new “land use regulation”; (2) the land use regulation restricts the owner’s use of

1 private real property; and (3) “the land use regulation has the effect of reducing the fair market  
2 value of the private real property.” ORS 197.352(1). An “owner” is the “present owner of the  
3 property, or any interest therein.” ORS 197.352(11). If the owner qualifies for relief, the  
4 government is required to pay just compensation. ORS 197.352(2). “Just compensation shall be  
5 equal to the reduction in the fair market value of the affected property interest resulting from  
6 enactment or enforcement of the land use regulation as of the date the owner makes written  
7 demand for compensation.” ORS 197.352(2). As an alternative to paying compensation, the  
8 measure provides that state and local governments may “modify, remove or not \* \* \* apply the  
9 land use regulation or land use regulations to allow the owner to use the property for a use  
10 permitted at the time the owner acquired the property.” ORS 197.352(8); *MacPherson v. DAS*,  
11 340 Or at 122. Allowing the present owner to use the property in a way that would otherwise be  
12 restricted by land use regulations is commonly referred to as granting a Measure 37 “waiver.”  
13 Generally, Measure 37 limits non-monetary relief to property owners who acquired their  
14 property prior to the enactment of the land use regulations that provide the basis for their claim.  
15 ORS 197.352(3)(e); see *MacPherson v. DAS*.<sup>2</sup> The measure includes exceptions for four  
16 categories of regulations. ORS 197.352(3).<sup>3</sup>

19 Although Measure 37 was added to Oregon’s land use planning statutes, it did not  
20 otherwise amend or repeal existing laws, including the requirements for amending  
21 comprehensive plans and zoning regulations and map designations. The measure authorizes a  
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23 <sup>2</sup> A Measure 37 claimant is entitled to compensation for regulations enacted prior to the date of acquisition of the  
24 property by the owner *or a family member* of the owner. ORS 197.352(3). This language differs from the language  
25 authorizing “waivers,” which only authorizes government to allow *the present owner* to use the property for a *use*  
26 *permitted when the present owner acquired the property*. ORS 197.352(8).

26 <sup>3</sup> Those exceptions are for land use regulations “restricting or prohibiting activities commonly and historically  
recognized as public nuisances,” ORS 197.352(3)(A), “restricting or prohibiting activities for the protection of  
public health and safety,” ORS 197.352(3)(B), “required to comply with federal law,” ORS 197.352(3)(C), and

1 governing body to “modify, remove, or not \* \* \* apply” certain regulations in specific situations.  
2 *MacPherson v. DAS*, 340 Or at 132 (finding Measure 37 not to be an unconstitutional  
3 “suspension” of the law). Otherwise the land use planning laws remain in effect. *Id.*

4 What is “A Decision Under this Section”?

5  
6 Subsection (9) of Measure 37 provides that “[a] decision by a governing body under this  
7 section shall not be considered a land use decision as defined in ORS 197.015 (10).”<sup>4</sup> The  
8 applicable ordinary definition of the term “under” is “\* \* \* **8 a** : required by : in accordance with  
9 : bound by (~ a contract to deliver)(statement ~ oath)(~ the necessity of selling)(rights ~ the  
10 law).” Webster’s Third International New Dictionary, at 2487. Measure 37 requires two types of  
11 decisions by a public entity: (1) decisions regarding whether a written demand for compensation  
12 meets the requirements for relief (set forth in subsection (1) of the measure); and (2) decisions  
13 regarding what form of relief to provide if the demand is valid (as set forth in subsections (8) and  
14 (10) of the measure). In this case, Klamath County made a decision under Measure 37 in its  
15 first order that: (1) the written demand of the Ankenys met the requirements for relief, and (2)  
16 that in lieu of paying compensation that it would “not apply” certain “land use regulations” to the  
17 Ankenys’ use of the property. Rec. 16-17. DLCD did not appeal that decision to the Board, and  
18 agrees that the county’s order was not a “land use decision” by application of ORS 197.352(9).  
19 Similarly, DLCD is not asserting that the county’s amended order, directing staff to institute  
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25 “restricting or prohibiting the use of a property for the purpose of selling pornography or performing nude dancing,”  
26 ORS 197.352(3)(D).

<sup>4</sup> As noted by the Ankenys, there was a codification error in the 2005 ORS, and DLCD agrees that the cross-  
reference in ORS 197.352(9) should be to “\* \* \* a land use decision as defined in ORS 197.015(11).”

1 proceedings to amend the comprehensive plan and zoning map designation of the Ankenys'  
2 property, is a "land use decision." Rec. 13-15.<sup>5</sup>

3 Decisions to grant a "permit" or, as in this case, to amend a comprehensive plan and  
4 zoning map are not decisions required by or "under" Measure 37. As noted above, ORS 197.352  
5 was expressly codified as part of ORS chapter 197. Although the people provided that decisions  
6 "under" the measure were not "land use decisions," they did *not* otherwise alter other procedures  
7 or requirements for amending comprehensive plans and land use regulations, or for obtaining  
8 authorizations for a use allowed under a decision to "modify, remove or not to [*sic*] apply"  
9 "land use regulations."  
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11 Thus, while a county's decision to "modify" a county "land use regulation" is not a "land  
12 use decision" because it is a decision "under" ORS 197.352(8), nothing in ORS 197.352 exempts  
13 counties from following the normal procedures for adopting an ordinance to amend their plan  
14 and map designations of a property, and nothing in ORS 197.352 provides that their subsequent  
15 actions to carry out or implement a decision under Measure 37 are not "land use decisions." If  
16 the people had wished that to be the case, then section 9 of Measure 37 would have provided that  
17 *all decisions by a public entity to authorize a use of private real property allowed under section*  
18 *8 shall not be considered a land use decision as defined in ORS 197.015(11).* By providing only  
19 that "*a decision by a governing body under this act \* \* \**" shall not be considered a land use  
20 decision, the people limited the exclusion from this Board's jurisdiction to only the decision by a  
21 county board of commissioners whether and what form of relief is due.  
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25 <sup>5</sup> Unlike the situation in *DLCD v. Klamath County (Cole)*, LUBA No 2006-227, in this matter DLCD has *not*  
26 challenged the county's Measure 37 orders in Klamath County Circuit Court.

1 Additional evidence that this was the intent of the voters is provided by the use of the  
2 term “governing body” in section 9 of Measure 37. In the context of counties, a “governing  
3 body” is the county board of commissioners. ORS 203.030; 203.035; *see also*, ORS 215.020;  
4 215.050; 215.060; 215.223; 215.406; 215.416; 215.422; 215.427 (describing the authority of a  
5 county governing body in the land use planning context). ORS 215.431 authorizes counties to  
6 make decisions on comprehensive plan amendments through their planning commission or  
7 hearings officer. Decisions by a planning commission or by a hearings officer to carry out a use  
8 authorized by a Measure 37 “waiver” are not decisions of the county’s “governing body” and  
9 therefore are clearly subject to this Board’s jurisdiction if they otherwise meet the definition of a  
10 land use decision. *Cf. League of Women Voters v. Washington County*, 56 Or App 217 (1982)  
11 (Under prior version of ORS 197.825 limiting LUBA’s jurisdiction to “\* \* \* decisions of a  
12 county \* \* \* governing body,” LUBA had no jurisdiction to review a county ordinance adopted  
13 by initiative). If the Ankenys’ interpretation of ORS 197.352(9) were correct, it would mean that  
14 decisions on a comprehensive plan amendment to carry out a Measure 37 waiver would be  
15 appealed to this Board if the final decision was a decision of a hearings officer or planning  
16 commission, and would be reviewed elsewhere if it was a decision of a county board of  
17 commissioners. There is absolutely *no* indication in the text, context, or history of Measure 37  
18 indicating that the voters intended this result. Rather, the text and context of Measure 37 is clear  
19 that only a governing body’s decision concerning the entitlement to relief and form of relief are  
20 encompassed by the exclusion from this Board’s jurisdiction under ORS 197.352(9).  
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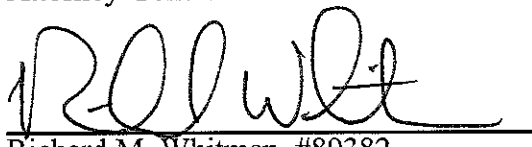
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1 For the foregoing reasons, DLCD respectfully requests that this Board deny the Ankenys'  
2 Motion to Dismiss in this matter. Pursuant to OAR 661-010-0065(3), DLCD requests oral  
3 argument on the motion to dismiss.

4 DATED this 2nd day of February 2007.

5  
6 Respectfully submitted,

7 HARDY MYERS  
8 Attorney General

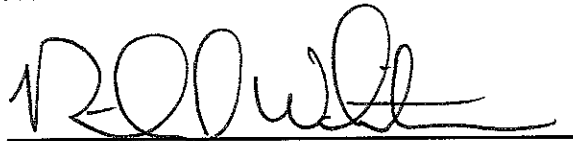
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CERTIFICATE OF FILING

I hereby certify that on February 2, 2007, I filed the original and one copy of the OREGON DEPARTMENT OF LAND CONSERVATION AND DEVELOPMENT'S RESPONSE TO RESPONDENT-INTERVENOR'S MOTION TO DISMISS with the Land Use Board of Appeals, 550 Capitol Street N.E., Suite 235, Salem, OR 97301-2552, by first-class mail.

DATED this 2nd day of February 2007.



Richard M. Whitman, #89382  
Steven E. Shipsey, #94435  
Assistant Attorneys General  
Of Attorneys for Petitioner

CERTIFICATE OF SERVICE

1  
2 I certify that on February 2, 2007, I served a true and correct copy of the OREGON  
3 DEPARTMENT OF LAND CONSERVATION AND DEVELOPMENT'S RESPONSE TO  
4 RESPONDENT-INTERVENOR'S MOTION TO DISMISS on the following parties by first-  
5 class mail.

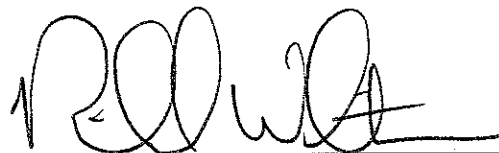
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20 DATED this 2nd day of February 2007.

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