

## The best M37 policy decisions are made where?

I recently came across a decision by the Oregon Appellate Court that upheld an earlier LUBA decision in the case between DLCD and Klamath County (Thomas Ankeny and Lewis Ankeny)<sup>1</sup>. The case involves a Klamath County decision to rezone Measure 37 property (Ankeny) from a forest range zone (FR) to a rural residential zone (RS). Like many other Measure 37 claimants, at the time Ankeny's bought their property there were no restrictions on developing the property. The Ankeny's submitted a Measure 37 claim to both the State and the County and received waivers from both agencies. What was interesting though was that Klamath County did not stop with just a waiver; as part of the Measure 37 "relief", the County decided to rezone the property from a forest range zoning to a suburban residential zoning, appropriate for the Ankeny's intended use.

This seems like a sensible decision. It provides the necessary relief called for in Measure 37 by "modifying" the offending land use law so that the Ankeny's can develop their property as they would have been able to in 1951 and it allows the county to use existing methodology for processing the land use application by following the guidelines for property zoned RS. As expected, DLCD quickly appealed this decision, claiming it is a land use decision subject to appeal by the DLCD. Klamath County responded to DLCD saying no, the decision is not a land use decision because it was made as appropriate "relief" in lieu of compensating the Ankeny's for the loss of value caused by the land use ordinances. Measure 37 specifically defines relief under Measure 37 as NOT a land use decision, and therefore NOT subject to appeal by DLCD. And as it turns out, the State Appellate Court and LUBA agrees; Klamath County did act appropriately.

In hindsight the decision to rezone Measure 37 properties by Klamath County may be the smartest County decision on record for Measure 37. On the surface it seems sensible. It solves the immediate relief that the measure called for by allowing the property owner the ability to develop as they would have been able to do when they acquired the property but it also offers several assurances that promote smart planning principles and litigation avoidance. Looking at the specifics surrounding the Ankeny's case, we see the following benefits to rezoning:

1. The Ankeny's will need to follow the subdivision application process according to the suburban residential (RS) zoning. Unlike most other measure 37 waivers which allow the property

owner to develop the land as they would have been able to do when they acquired the property, the Klamath County relief accomplishes this but according to a prescribed plan and methodology already in the Klamath County comprehensive plan. The Ankeny's can now file an application for a planned development in a RS zone, in accordance with all regulations for that zone which would include provisions for water conservation and management, health and safety, density regulations, drainage regulations, open space requirements, public transit requirements, public access requirements and all of the other development friendly requirements existing in the Klamath County code. On the surface, this may seem unfair to the Ankeny's because by following the RS zoning regulations they are required to build to today's standards which is by far more regulatory and costly to develop with. However this trade off is a win-win scenario because of #2.

2. The Ankeny's end up with a *conforming use* product. They avoid the pitfalls plaguing other Measure 37 projects which surround *non-conforming uses*. As a conforming use, they can easily obtain conventionally financing for their project, they do not have to worry about transferability, and they are not concerned with vesting in the event that Measure 37 is repealed with proposed Measure 49. In a nutshell, they are able to operate as a traditional development, using tried and true development practices and avoid the uncertainties surrounding Measure 37 waivers. It will be several months and maybe years before the inherent risk associated with Measure 37 projects is mitigated through the efforts of trail-breaking pioneers. Claimants with only a waiver and no real "relief" will find themselves appealed by powerful bureaucracies like DLCDC, if for no other reason than to test their ability to prevent development like in the aforementioned Ankeny case. Yes, a power struggle has ensued and DLCDC is willing to go to great lengths to prevent development. To be certain, avoiding the pitfalls of a Measure 37 waiver is invaluable.
3. The County wins because they avoid additional litigation that is guaranteed to be brought against counties who opt to provide only a waiver of regulations and not any actionable relief. Measure 37 calls for relief so that property owners can develop their property as they would have been able to when they acquired it. This is in lieu of payment for reduction of property value. As seen in discussion surrounding LUBA's recent Klamath County decision, providing only a waiver is not considered adequate relief for a Measure 37 claim. There is no real relief

with a waiver and it is not considered enough to compensate the land owner for lost value. The relief doesn't occur with a waiver until the property owner is allowed to develop his property as he would have been able to when he acquired the property. Yes this is a very critical point that has yet to be flushed out through the court system. Has the County and State agencies provided adequate relief according to the requirements within Measure 37? Taken from the Appellate Court decision, *"A resolution expressing an intention to allow a use is not the equivalent of a legislative act actually declaring a former use restriction removed or declaring a new use permitted or allowed."* To paraphrase, a waiver alone does not "modify, remove or not enforce" a land use regulation. Until the property owner has been allowed to develop his/her property, adequate relief required by Measure 37 has not been provided. Therefore the County and State can be accused of not providing the relief required by Measure 37 and the claimant would then have additional recourse. However, according to the State Appellate Court, the act of rezoning does provide adequate relief which does satisfy the requirements of Measure 37.

4. Oregonians win because the development will be built to today's standards for environmental, health, safety, public services, and involve community input. Ordinances surrounding development procedures are in place for a good reason. One could argue that sometimes the ordinances go too far and they place a heavy burden on the developer, however most of the requirements do benefit the public in some way and they should not be ignored with a Measure 37 development. Measure 37 simply allows the land owner to develop the property as he/she would have been able to when the property was purchased. In my opinion, it was never intended to circumvent standard procedures of process and review to insure code compliance, health and safety. It also doesn't suggest that it can be done in a way that jeopardizes the public's best interest. Following a County's comprehensive plan ensures the project is developed according to best practices for health, safety and community.

So if we can agree that the decision to rezone the Ankeny's property in Klamath County was a good solution to provide tangible relief and satisfy the requirements of Measure 37, why are other counties only issuing a waiver? In my opinion it is because the County planners generally do not like to make policy. They look for policy advice from the State or from other counties who have "crossed that bridge." In some cases county commissioners will make policy

decisions if they see the long term benefit of making such decisions. However with all of the ensuing Measure 37 litigation, county commissioners have taken a wait and see approach and avoid entering any policy decisions of their own. Also, it seems most of the effort is in processing claims and not in evaluating the procedure by which claims are processed. With the October, 2007 ruling in Klamath County, it is possible that other counties will see this as an opportunity to create a new Measure 37 policy, protecting both the claimants rights and the concerns of the county.

Finally, in some counties it will be more difficult to implement a zone change policy for Measure 37 claims because an appropriate zoning doesn't exist. For example, Deschutes County does not have an appropriate zoning for many of the Measure 37 claims currently on record. The closest zoning for a residential subdivision would be a rural residential cluster development. However severe restrictions exist with a rural residential cluster development which would be prohibitive for 99% of the existing Measure 37 claims. Deschutes County would need to modify their comprehensive plan to include a "RS" or "R2" zoning similar to Klamath County or Jefferson County, implement a minimum parcel size which conforms to health and safety regulations and require that all other development application requirements are followed. Obviously changing the comprehensive plan is a difficult task and will take several months to implement; nevertheless the ending result would provide the relief required by Measure 37 and substantial benefits to everyone involved including the planning departments and the public.

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<sup>1</sup>*Oregon Appellate Court Ruling can be found at: [www.measure37.org](http://www.measure37.org)*