

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3
4 DEPARTMENT OF LAND CONSERVATION
5 AND DEVELOPMENT,

6 *Petitioner,*

7
8 vs.

9
10 CLATSOP COUNTY,

11 *Respondent,*

12
13 and

14
15 JAMES CARLSON and VIRGINIA CARLSON,

16 *Intervenors-Respondents.*

17
18 LUBA No. 2008-176

19
20 OREGON SHORES CONSERVATION COALITION,

21 RICHARD ROWLAND and PATRICIA ROWLAND,

22 *Petitioners,*

23
24 vs.

25
26 CLATSOP COUNTY,

27 *Respondent,*

28
29 and

30
31 JAMES CARLSON and VIRGINIA CARLSON,

32 *Intervenors-Respondents.*

33
34 LUBA No. 2008-178

35 ORDER ON MOTION TO STRIKE

36 AND MOTION TO DISMISS

37 **MOTION TO STRIKE**

38 Intervenors-respondents (intervenors) filed a motion to dismiss these appeals on
39 November 24, 2008. We issued an order extending the deadline to file responses to the
40 motion on December 5, 2008. The Board subsequently received responses by petitioners

1 Oregon Department of Land Conservation and Development (DLCD) and Oregon Shores
2 Conservation Coalition (OSCC). On January 5, 2009, intervenors filed a 10-page reply
3 memorandum, to reply to the responses filed by DLCD and OSCC. DLCD and OSCC move
4 to strike intervenors' 10-page reply.

5 LUBA's rules regarding motions appear at OAR 661-010-0065. While OAR 661-
6 010-0065(2) provides that an opposing party may file a response to a motion to dismiss, the
7 rule is silent about whether a reply may be filed to such a response.¹ Petitioners ask that
8 LUBA interpret this silence as a prohibition.

9 Petitioners further assert that if LUBA interprets the rule's silence to allow a reply,
10 we should nonetheless grant the motion to strike because the length of intervenors' reply
11 memorandum exceeds five pages and the reply memorandum is not limited to replying to
12 new issues in DLCD's and OSCC's responses. OAR 661-010-0039 authorizes reply briefs in
13 certain circumstances, but limits reply briefs to five pages.² We understand petitioners to
14 contend that if intervenors' reply to petitioners' responses to the motion to dismiss is
15 allowed, the same page and content limits that apply to reply briefs should apply to
16 intervenors' reply memorandum.

¹ OAR 661-010-0065(2) provides:

“* * * A party seeking to challenge the failure of an opposing party to comply with any of the requirements of statutes or Board rules shall make the challenge by motion filed with the Board and served on all parties within 10 days after the moving party obtains knowledge of such alleged failure. However, motions to dismiss for lack of jurisdiction may be filed at any time. An opposing party may, within 14 days from the date of service of a motion, file a response.”

² OAR 661-010-0039 provides:

“A reply brief may not be filed unless permission is obtained from the Board. A request to file a reply brief shall be filed with the proposed reply brief together with four copies as soon as possible after respondent's brief is filed. A reply brief shall be confined solely to new matters raised in the respondent's brief. A reply brief shall not exceed five pages, exclusive of appendices, unless permission for a longer reply brief is given by the Board. A reply brief shall have gray front and back covers.”

1 OAR 661-010-0039 governs reply briefs. The disputed reply memorandum is not a
2 reply brief, and OAR 661-010-0039 is inapposite here. However, petitioners are correct that
3 OAR 661-010-0065 does not authorize replies to responses to motions. As we noted in
4 *Village Properties, L.P. v. City of Oregon City*, 33 Or LUBA 206, 207 (1997), the filing of
5 unauthorized replies to responses to motions can become excessive and, when it does, can be
6 “detrimental to our review, particularly when the arguments of the parties * * * evolve and
7 change.” However, our longstanding practice is to allow such replies, within reason, where
8 they are limited to replying to new issues raised in a response to a motion. *Frevach Land*
9 *Company v. Multnomah County*, 38 Or LUBA 729, 732 (2000).

10 As petitioners correctly point out, intervenors’ reply is not limited to responding to
11 new issues raised in petitioners’ responses. We nevertheless allow intervenors’ reply. OAR
12 661-010-0005 sets forth the purpose of LUBA’s rules and provides guidance for
13 interpretation of the rules.³ The end goal of an appeal before LUBA is a full and fair hearing
14 and a legally correct decision by LUBA. Appeals involving issues that arise under Ballot
15 Measures 37 and 49 are complicated, because they involve an exceedingly unsettled area of
16 the law that is currently in a state of fairly rapid evolution in a number of different forums.
17 In this case we have only a single reply memorandum and with that reply memorandum the
18 legal issues appear to be fairly well framed. We do not believe petitioners have been unfairly

³ OAR 661-010-0005 provides:

“These rules are intended to promote the speediest practicable review of land use decisions and limited land use decisions, in accordance with ORS 197.805-197.855, while affording all interested persons reasonable notice and opportunity to intervene, reasonable time to prepare and submit their cases, and a full and fair hearing. The rules shall be interpreted to carry out these objectives and to promote justice. Technical violations not affecting the substantial rights of parties shall not interfere with the review of a land use decision or limited land use decision. Failure to comply with the time limit for filing a notice of intent to appeal under OAR 661-010-0015(1) or a petition for review under OAR 661-010-0030(1) is not a technical violation.”

1 disadvantaged by intervenors’ unauthorized reply, and that reply has helped clarify the
2 parties’ jurisdictional arguments.

3 The motions to strike are denied.

4 **MOTION TO DISMISS**

5 In this appeal, petitioners challenge a Clatsop County Board of County
6 Commissioners’ (BOC’s) decision that approves intervenors’ application for preliminary
7 subdivision plat approval. Intervenors’ application for preliminary subdivision plat approval
8 relies on Ballot Measure 37 (2004) (Measure 37) waivers of state and county land use laws
9 that would otherwise preclude preliminary subdivision plat approval. The interaction of
10 Ballot Measure 37 and a subsequent ballot measure, Ballot Measure 49 (2007) (Measure 49),
11 is at the heart of the jurisdictional question presented in this appeal. Therefore, we provide
12 an overview of Measures 37 and 49 below before setting out the events that led to this appeal
13 and turning to the jurisdictional question presented by intervenors’ motion to dismiss.

14 **A. LUBA’s Jurisdiction under Ballot Measure 37 (2004)**

15 In 2004, voters in the State of Oregon approved an initiative measure known as
16 Measure 37. Measure 37 was initially codified at ORS 197.352 (2005) and is now codified,
17 as amended, at ORS 195.305. Measure 37 took effect on December 2, 2004. As relevant
18 here, under Measure 37, a public entity that enacted or enforced a land use regulation that
19 had the effect of reducing the fair market value of property was required to pay “just
20 compensation” in certain circumstances. ORS 197.352(1) (2005).⁴ As an alternative to
21 paying just compensation, ORS 197.352(8) (2005) authorized public entities to “modify,
22 remove, or not * * * apply the land use regulation” so that the property owner could “use the

⁴ ORS 197.352(1) (2005) provided:

“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.”

1 property for a use permitted at the time the owner acquired the property.”⁵ Decisions under
2 ORS 197.352(8) (2005) not to apply land use regulations have come to be called Measure 37
3 waivers. Many Measure 37 claims have been filed, and almost all of the successful Measure
4 37 claims resulted in waivers rather than the payment of monetary just compensation.

5 Under ORS 197.825(1), LUBA has exclusive jurisdiction to review land use
6 decisions and limited land use decisions. Decisions concerning just compensation and
7 waivers under Measure 37 clearly would not have qualified as “limited land use decisions,”
8 within the meaning of ORS 197.015(12).⁶ But because just compensation decisions and
9 waiver decisions under Measure 37 concerned whether to apply the statewide planning goals,
10 comprehensive plans and land use regulations to certain properties, they could have qualified
11 as “land use decisions,” within the meaning of ORS 197.015(10).⁷ However, ORS

⁵ ORS 197.352(8) (2005) provided:

“Notwithstanding any other state statute or the availability of funds under subsection (10) of this section, in lieu of payment of just compensation under [former ORS 197.352], the governing body responsible for enacting the land use regulation may modify, remove, or not to 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.”

⁶ Under ORS 197.015(12) provides:

“‘Limited land use decision’:

“(a) Means a final decision or determination made by a local government pertaining to a site within an urban growth boundary that concerns:

“(A) The approval or denial of a tentative subdivision or partition plan, as described in ORS 92.040 (1).

“(B) The approval or denial of an application based on discretionary standards designed to regulate the physical characteristics of a use permitted outright, including but not limited to site review and design review.

“(b) Does not mean a final decision made by a local government pertaining to a site within an urban growth boundary that concerns approval or denial of a final subdivision or partition plat or that determines whether a final subdivision or partition plat substantially conforms to the tentative subdivision or partition plan.”

⁷ ORS 197.015(10), provides in part:

1 197.352(9) (2005) provided that a decision by a public entity under Measure 37 did not
2 qualify as a “land use decision.”⁸ The applicability of ORS 197.352(9) turned on whether a
3 decision was a decision “under” Measure 37, and we first addressed that question in *DLCD*
4 *v. Klamath County*, 54 Or LUBA 113, *aff’d* 215 Or App 297, 168 P3d 1241 (2007).

5 *DLCD v. Klamath County* concerned a county decision to modify its comprehensive
6 plan and zoning map designations for property, in response to a Measure 37 claim, by
7 adopting new comprehensive plan and zoning map designations for a Measure 37 claimant’s
8 property. LUBA concluded that such a decision to “modify” land use laws was a decision
9 “under” Measure 37, and that pursuant to ORS 197.352(9) (2005) decisions under Measure
10 37 were not land use decisions or appealable to LUBA. Although no appeals of Measure 37
11 *waiver* decisions have been filed at LUBA, like modification decisions, ORS 197.352(9)
12 (2005) would preclude LUBA jurisdiction to review such waiver decisions.

13 LUBA went on to note in *DLCD v. Klamath County* that Measure 37 waiver
14 decisions and modification decisions frequently will leave some land use laws in place that
15 will apply if the property is to be developed. While it was not necessary in *DLCD v.*
16 *Klamath County* to answer the question, LUBA suggested that decisions made by a public

“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[.]”

⁸ ORS 197.352(9) (2005) provided:

“A decision by a governing body under [ORS 197.352 (2005)] shall not be considered a land use decision as defined in ORS 197.015(10).”

1 entity subsequent to a waiver or modification decision that applied remaining land use laws
2 that were not waived or land use laws that were modified under Measure 37 would qualify as
3 land use decisions:

4 “* * * DLCD is undoubtedly correct that some decisions that a public entity
5 will need to make to allow construction of a use that is the subject of a
6 successful Measure 37 claim will be land use decisions. For example, where a
7 county takes action to ‘modify’ a land use regulation or a decision is made [to
8 waive] certain land use regulations (but other land use regulations remain) and
9 under those modified or remaining land use regulations additional
10 discretionary permits are needed to construct the use, any such discretionary
11 permit decisions will almost certainly be land use decisions. We tend to agree
12 that the best reading of ORS 197.352(9) is that such discretionary permits are
13 not properly viewed as decisions *under* ORS 197.352. Rather, such permit
14 decisions are decisions *under* the modified land use regulation or decisions
15 *under* whatever land use regulations remain after the Measure 37 modification
16 or decision not to apply certain land use regulations has been granted.”
17 *DLCD v. Klamath County*, 54 Or LUBA at 120 (emphases in original).

18 In *Welch v. Yamhill County*, 55 Or LUBA 697 (2007), we applied the above reasoning from
19 *DLCD v. Klamath County* to conclude that a county decision that approved a subdivision and
20 applied remaining land use regulations—but did not apply waived regulations based on a
21 Measure 37 waiver—was a land use decision, notwithstanding ORS 197.352(9). As we
22 explained in *Welch*, in rejecting the intervenor’s contention that the subdivision approval
23 decision was a decision “under” Measure 37:

24 “The county’s decision * * * did not determine that it would ‘not * * * apply’
25 certain land use regulations. That determination was made in [the earlier
26 Measure 37 waiver decision]. Rather, the county’s decision [on appeal to
27 LUBA] did exactly the opposite of what intervenor is suggesting: the decision
28 *applied* all of the land use regulations that remained applicable to intervenor’s
29 proposed subdivision. * * *” 55 Or LUBA at 701 (emphasis in original).

30 To summarize, under Measure 37, specifically under ORS 197.352(9) (2005), public
31 entity decisions to modify or to waive land use laws in response to Measure 37 claims were
32 not land use decisions and were therefore not reviewable by LUBA. Public entity decisions
33 that were issued following those modification or waiver decisions, which applied modified

1 land use laws or land use laws that were not waived under Measure 37 were land use
2 decisions and were reviewable by LUBA.

3 **B. LUBA’s Jurisdiction under Ballot Measure 49 (2007)**

4 In 2007, voters in the State of Oregon approved another initiative measure, known as
5 Ballot Measure 49 (Measure 49). Measure 49 extensively revised Measure 37. Or Laws
6 2007, ch 424. Oregon Laws 2007, chapter 424, section 5 provides:

7 “A claimant that filed a claim under [Measure 37] on or before [June 28,
8 2007] is entitled to just compensation as provided in:

9 “(1) Section 6 or 7 of this 2007 Act, at the claimant’s election, if the
10 property described in the claim is located entirely outside any urban
11 growth boundary and entirely outside the boundaries of any city;

12 “(2) Section 9 of this 2007 Act if the property described in the claim is
13 located, in whole or in part, within an urban growth boundary; or

14 “(3) A waiver issued before the effective date of this 2007 Act [December
15 6, 2007] to the extent that the claimant’s use of the property complies
16 with the waiver and the claimant has a common law vested right on the
17 effective date of this 2007 Act to complete and continue the use
18 described in the waiver.”⁹

19 In *Corey v. DLCD*, 344 Or 457, 465-67, 184 P3d 1109 (2008), the Oregon Supreme
20 Court held that, with a single exception, the Measure 49 remedies completely replace the
21 Measure 37 remedies:

22 “An examination of the text and context of Measure 49 conveys a clear intent
23 to extinguish and replace the benefits and procedures that Measure 37 granted
24 to landowners. As noted, section 5 of Measure 49, * * * provides that
25 claimants who filed ‘claim[s]’ under ORS 197.352 before Measure 49 became
26 effective (*i.e.*, Measure 37 claimants), are entitled to ‘just compensation’ as
27 provided in designated provisions of Measure 49. * * *

28 “A statement of legislative policy at section 3 of Measure 49 confirms that the
29 legislature intended to create new forms of relief in place of the ones available
30 under Measure 37: ‘The purpose of sections 4 to 22 of this 2007 Act and the

⁹ Section 6 authorizes up to three home sites and section 7 authorizes up to 10 home sites. Section 9 sets out remedies for owners of land within urban growth boundaries.

1 amendments to Ballot Measure 37 (2004) *is to modify Ballot Measure 37*
2 *(2004) to ensure that Oregon law provides just compensation for unfair*
3 *burdens while retaining Oregon’s protections for farm and forest uses and the*
4 *state’s water resources.’ * * **

5 “* * * * *

6 “In the end, we hold only that plaintiffs’ contention that Measure 49 does not
7 affect the rights of persons who already have obtained Measure 37 waivers is
8 incorrect. In fact, Measure 49 by its terms deprives Measure 37 waivers-and
9 *all orders disposing of Measure 37 claims-of any continuing viability, with a*
10 *single exception that does not apply to plaintiffs’ claim. * * **” (Last
11 emphasis added; other emphases added by the court).

12 The “single exception” referenced in *Corey* is provided by subsection 5(3) of
13 Measure 49, where “the claimant has a common law vested right on [December 6, 2007].”
14 As discussed below, the intervenors in the present case have attempted to establish that they
15 have a common law vested right to develop their property, in conjunction with their efforts to
16 obtain the preliminary subdivision plat approval decision that is the subject of the present
17 appeal.

18 Finally, Measure 49, like Measure 37, included specific language to provide that
19 decisions “under” Measure 49 are not land use decisions that are subject to review by LUBA.
20 Measure 49 amended the text of ORS 197.352(9), *see* n 8, and recodified that amended
21 language at ORS 195.305(7).¹⁰ Measure 49 also added a judicial review section, which is
22 codified at ORS 195.318.¹¹

¹⁰ ORS 195.305(7) provides:

“A decision by a public entity that an owner qualifies for just compensation under ORS 195.305 to 195.336 and sections 5 to 11, chapter 424, Oregon Laws 2007, and a decision by a public entity on the nature and extent of that compensation are not land use decisions.”

¹¹ As relevant here, ORS 195.318(1) provides:

“A determination by a public entity under ORS 195.310 to 195.314 or sections 5 to 11, chapter 424, Oregon Laws 2007, is not a land use decision.”

1 **C. Facts**

2 An understanding of the facts and the sequence of events that led to the disputed
3 preliminary subdivision plat decision is necessary to resolve the jurisdictional question that is
4 presented by intervenors’ motion to dismiss. We set out below a general description of the
5 key events that preceded this appeal, followed by a chronological list of those events.

6 In 2006, intervenors sought and were granted Measure 37 waivers by the State of
7 Oregon and Clatsop County. The use described in those waivers was a subdivision of their
8 75.65-acre property into 43 lots and permission to develop a dwelling on each lot. In August
9 of 2007, intervenors filed an application for preliminary plat approval for a 31-lot
10 subdivision of their property. However, before the county was able to take final action on
11 their application, Measure 49 was approved by the voters on November 6, 2007 and took
12 effect on December 6, 2007. A little more than a month after Measure 49 took effect, the
13 county planning commission approved intervenors’ application. The planning commission’s
14 approval of intervenors’ preliminary subdivision plat included a condition of approval that
15 before final plat approval intervenors would have to seek and receive a county determination
16 that their right to proceed with the subdivision was “vested” under Oregon Laws chapter 424,
17 subsection 5(3). Petitioners in this appeal appealed the planning commission’s decision on
18 the preliminary subdivision plat to the BOC, and the BOC suspended that appeal pending a
19 vested rights decision. The county adopted procedures for making Measure 49 vested rights
20 decisions and intervenors sought a vested rights decision under those county procedures.
21 Intervenors’ vested rights application was initially denied by the county’s transportation and
22 development services director. However, the BOC later reversed that decision and found
23 that intervenors’ rights to continue the subdivision were vested under Measure 49. Less than
24 a week later, the BOC affirmed the planning commission’s decision granting preliminary plat
25 approval. Approximately two weeks after the BOC’s preliminary plat decision, DLCD
26 appealed that decision to LUBA and OSCC filed its LUBA appeal one day later. LUBA

1 consolidated those appeals. Finally, approximately two weeks after the LUBA appeals were
2 filed, DLCD filed a petition for writ of review in Clatsop County Circuit Court, to challenge
3 the BOC's vested rights determination.

4 To summarize and provide an easy point of reference for these events, we set out
5 below a chronology of the just-described key events before turning to intervenors'
6 jurisdictional arguments.

- 7 1. March 22, 2006. Clatsop County approved Intervenors' Measure 37
8 waiver. The waiver is to allow 75.65 acres to be divided into 43 lots
9 and to allow development of a dwelling on each lot.
- 10 2. May 16, 2006. State of Oregon approved Intervenors' Measure 37
11 Waiver. The county and state waivers allow the same use—a 43-lot
12 subdivision of 75.65 acres and development of a dwelling on each lot.
- 13 3. August 15, 2007. Intervenors submitted an application for preliminary
14 subdivision plat approval. Application was deemed complete on
15 September 24, 2007. The application sought approval for a 31-lot
16 subdivision.
- 17 4. November 6, 2007. Measure 49 was approved by the voters.
- 18 5. December 6, 2007. Measure 49 became effective.
- 19 6. January 15, 2008. County planning commission granted preliminary
20 subdivision plat approval subject to intervenors receiving a vested
21 rights determination under subsection 5(3) of Measure 49.
- 22 7. January 18, 2008. OSCC appealed the planning commission's January
23 15, 2008 preliminary plat approval to the Board of County
24 Commissioners.
- 25 8. January 28, 2008. DLCD appealed the planning commission's
26 January 15, 2008 preliminary plat approval to the Board of County
27 Commissioners.
- 28 9. March 13, 2008. The county adopted a procedure for making vested
29 rights decisions under Measure 49. Ordinance 08-06.
- 30 10. March 31, 2008. Intevenors submitted a vested rights application.
- 31 11. May 30, 2008. Clatsop County's Transportation and Development
32 Services Director determined intervenors' rights to the subdivision
33 were not vested under subsection 5(3) of Measure 49.

- 1 12. June 5, 2008. Intervenor appealed the director’s vested rights
2 decision to the Board of County commissioners.
- 3 13. September 18, 2008. The Board of County Commissioners reversed
4 the director’s decision and found that intervenors have a vested right
5 to the 43-lot subdivision.
- 6 14. September 24, 2008. Board of County Commissioners issued a
7 decision granting preliminary plat approval.
- 8 15. October 9, 2008. DLCD appealed the Board of County
9 Commissioners’ preliminary plat decision to LUBA. (LUBA No.
10 2008-176).
- 11 16. October 10, 2008. OSCC appealed the Board of County
12 Commissioners’ preliminary plat decision to LUBA. (LUBA No.
13 2008-178).
- 14 17. October 21, 2008. LUBA consolidated LUBA Nos. 2008-176 and
15 2008-178).
- 16 18. November 3, 2008. DLCD filed writ of review with Clatsop County
17 Circuit Court to challenge the Board of County Commissioner’s
18 September 18, 2008 vested rights decision. That review is pending
19 before Clatsop County Circuit Court.
- 20 19. November 24, 2008. Intervenor filed their motion to dismiss in
21 LUBA Nos. 2008-176 and 2008-178.

22 **D. Intervenors’ Legal Theories**

23 Intervenors’ legal theory evolved somewhat between their motion to dismiss and their
24 final reply, which was filed after DLCD’s and OSCC’s responses to the motion to dismiss.
25 Intervenors rely primarily on ORS 195.305(7) and to a lesser extent on ORS 195.318(1).
26 Those statutes were set out earlier at footnotes 10 and 11 and are set out again below:

27 “A decision by a public entity that an owner qualifies for just compensation
28 under ORS 195.305 to 195.336 and sections 5 to 11, chapter 424, Oregon
29 Laws 2007, and *a decision by a public entity on the nature and extent of that*
30 *compensation are not land use decisions.*” ORS 195.305(7) (emphasis
31 added).

32 “A determination by a public entity under ORS 195.310 to 195.314 or
33 sections 5 to 11, chapter 424, Oregon Laws 2007, is not a land use decision.”
34 ORS 195.318(1).

1 Intervenor’s arguments focus on ORS 195.305(7), particularly the above-emphasized portion
2 of ORS 195.305(7). In this order, we therefore focus on that statute as well.

3 To begin, we note three points of agreement among the parties. First, all parties agree
4 that intervenors’ state and county Measure 37 waiver decisions were decisions “under”
5 Measure 37, and pursuant to ORS 197.352(9) those decisions were not land use decisions.
6 Second, all parties agree the BOC’s September 18, 2008 vested rights decision is a decision
7 that was rendered “under” Measure 49; and pursuant to ORS 195.305(7) and 195.318(1) that
8 vested rights decision is not a land use decision and is properly subject to review by the
9 Clatsop County Circuit Court in the writ of review that was filed by DLCD on November 3,
10 2008. Third, we do not understand intervenors to dispute that the BOC’s September 24,
11 2008 decision in fact applied local and state land use laws that remained applicable to
12 intervenors’ property after the state and county Measure 37 waivers were granted. For that
13 reason the BOC’s September 24, 2008 preliminary plat decision falls within the ORS
14 197.015(10) definition of “land use decision” unless another statute makes that decision
15 something other than a land use decision and deprives LUBA of jurisdiction.¹² See n 7.
16 Intervenor’s argue that ORS 195.305(7) and ORS 195.318(1) make the BOC’s September 24,
17 2008 preliminary subdivision plat decision something other than a land use decision,
18 notwithstanding the fact that it would otherwise qualify as a “land use decision” under the
19 ORS 197.015(10) definition of that term.

¹² Intervenor’s do suggest that the planning commission issued its decision on January 15, 2008 “with the understanding that such approval dealt with the ‘nature and extent’ of the compensation due under Measure 49.” Intervenor’s Memorandum in Support of Motion to Dismiss 4 (emphasis in original). Intervenor’s make a similar suggestion concerning the BOC’s September 24, 2008 decision. *Id.* at 9 We address those suggestions below.

1 **1. Intervenors’ Motion to Dismiss (Jurisdiction)**

2 **a. The Planning Commission’s and the BOC’s**
3 **Understandings**

4 In their November 24, 2008 Motion to Dismiss, intervenors suggest that both the
5 planning commission and BOC understood that their decisions to approve the preliminary
6 plat were decisions regarding the “nature and extent” of compensation due under Measure
7 49. Based on that alleged understanding, intervenors contend that the challenged decision
8 falls within ORS 195.305(7) and, for that reason, is not a land use decision.

9 We agree with DLCD and OSCC that neither the planning commission’s nor the
10 BOC’s *understanding* regarding the nature of their decision has any bearing on whether the
11 BOC’s September 24, 2008 decision actually qualifies as “a decision by a public entity on
12 the nature and extent of [just] compensation,” within the meaning of ORS 195.305(7). That
13 question is primarily or exclusively a question of law, and the county decision makers’
14 understandings about the nature of their decisions are irrelevant. It is also worth noting that
15 nothing in the language of either the planning commission’s or the BOC’s decision supports
16 intervenors’ suggestion.

17 As we explain in more detail in the next section of this order, the challenged
18 preliminary subdivision plat decision applies state and local land use laws that were not
19 waived by intervenors’ Measure 37 waiver. That is not a decision that concerns the “nature
20 and extent of [just] compensation” under Measure 49, within the meaning of ORS
21 195.305(7). The BOC’s September 18, 2008 decision that intervenors’ have a vested right to
22 continue with their effort to subdivide and develop their property was the county’s final
23 decision regarding the “nature and extent of [just] compensation” that intervenors will
24 receive under Measure 49. The “nature” of the just compensation is a vested right to
25 continue under intervenors’ Measure 37 waiver, rather than under the more limited options
26 available under Oregon Laws 2007, chapter 424, subsection 5(1). The “extent” of that just
27 compensation is 43 lots and a right to develop a dwelling on each lot. The preliminary

1 subdivision plat approval decision that is before us in this appeal post-dated the county's
2 final "nature and extent" decision under Measure 49. It is not a decision concerning the
3 "nature and extent of [just] compensation" under Measure 49.

4 **b. Scope of the Measure 37 Waivers**

5 Intervenor also argue in their motion to dismiss that "[p]etitioners' appeal is not
6 about whether the subdivision plat was approved in accordance with applicable land use
7 regulations." Intervenor's Memorandum in Support of Motion to Dismiss 6 (emphasis in
8 original). Intervenor argue that the only issues that DLCD and OSCC can raise in this
9 LUBA appeal concern their dispute with intervenors and the county about whether certain
10 state and local land use laws were waived by the state and county Measure 37 waivers. To
11 clarify, we understand intervenors to contend that this appeal does not concern whether the
12 disputed subdivision complies with state and local land use laws that all parties agree
13 remained applicable to the subdivision following the state and local Measure 37 waivers.
14 Rather, we understand intervenors to argue the dispute is over the scope of those Measure 37
15 waivers, *i.e.* whether certain potentially applicable state and local land use laws were not
16 waived by the state and county Measure 37 waivers. Intervenor contend "[t]his is a
17 quintessential determination concerning the 'nature and extent' of the Measure 37 waivers
18 and is therefore not a land use decision." Intervenor's Memorandum in Support of Motion to
19 Dismiss 6. In a similar vein, intervenors go on to argue:

20 "Therefore, the only issue left for review by LUBA is to assess whether or not
21 the [BOC] erred in approving Intervenor's Preliminary Plat in light of
22 statewide planning goals 4, 11, and 14, Goals 4, 11, and 14 of the Clatsop
23 County Comprehensive Plan, and LWDUO §§ 5.226 and 4.040. In other
24 words *should these regulations apply to Intervenor's Preliminary Plat?* This
25 is clearly a question of the scope, or the 'nature and extent', of the State
26 issued Measure 37 waiver. Consequently, this issue is not a land use decision
27 or limited land use decision for which [LUBA] has jurisdiction." Intervenor's
28 Memorandum in Support of Motion to Dismiss 7 (emphasis added).

29 We agree with DLCD and OSCC that at this point it is not possible to know with any
30 certainty what issues may be presented in this appeal. Therefore, it is possible that

1 petitioners will allege errors concerning state or local land use laws in addition to those
2 intervenors have anticipated. Just as importantly, our jurisdiction does not turn on the issues
3 that petitioners may attempt to present in this appeal. Intervenor confuses the question of
4 LUBA's scope of review with the question of LUBA's jurisdiction. In appeals of land use
5 decisions that post-date and rely on Measure 37 waivers, we have determined that LUBA has
6 jurisdiction to review those decisions if they concern the application of state or local land use
7 laws that were not waived under Measure 37. However, in those appeals, we have refused to
8 entertain challenges to the merits of the underlying Measure 37 waiver. *Welch v. Yamhill*
9 *County*, 56 Or LUBA 166, 173 (2008); *DLCD v. Jefferson County*, 55 Or LUBA 624, 644
10 (2008), *aff'd* 220 Or App 518, 188 P3d 313 (2008); *Pete's Mtn. Home Owners Assoc. v.*
11 *Clackamas County*, 55 Or LUBA 287, 298 (2007); *Friends of Linn County v. Linn County*,
12 54 Or LUBA 191, 202-03 (2007). But just because LUBA's scope of review does not
13 include belated challenges to Measure 37 waivers themselves, that does not mean that LUBA
14 lacks jurisdiction to review decisions that remain subject to local and state land use standards
15 and in fact apply those local and state land use standards in making a decision. The BOC's
16 September 24, 2008 decision is such a decision.

17 Intervenor also appear to conflate or confuse decisions about whether local or state
18 land use laws *should be* or *can be* waived under Measure 37, with subsequent questions that
19 may arise in appeals of land use decisions about the correct interpretation of a previously
20 issued Measure 37 waiver, *i.e.*, whether particular local or state land use laws *were waived* or
21 *were not waived* by a particular Measure 37 waiver. Pursuant to ORS 197.352(8) the
22 "should be" or "can be" decisions were made in the Measure 37 waiver decisions
23 themselves, pursuant to ORS 197.352(8) (2005). Pursuant to ORS 197.352(9) (2005), such
24 Measure 37 waiver decisions are something other than land use decisions. But the later,
25 backward-looking questions that may arise in a LUBA appeal challenging a subsequent land
26 use decision concern the *scope* of the Measure 37 waiver. In resolving a question about the

1 scope or meaning of a Measure 37 waiver, LUBA is asked to resolve any ambiguities in the
2 Measure 37 waiver about which land use laws were waived or which land use laws were left
3 applicable to the proposed use by the Measure 37 waiver, not whether land use laws “should
4 be” or “can be” waived under Measure 37. A decision about the scope of a previously issued
5 Measure 37 waiver is not a decision about the “nature and extent of [just] compensation”
6 under Measure 49; it is a decision about the meaning of a Measure 37 waiver. It is the
7 Measure 37 waiver that determined the nature and extent of the waiver that was appropriate
8 under Measure 37. LUBA may not second-guess the county or state about how broad their
9 Measure 37 waiver “should be,” but LUBA is free to consider the meaning of a previously
10 adopted Measure 37 waiver, where an issue about that meaning is properly presented in an
11 appeal of a land use decision that relies on that prior Measure 37 waiver. *DLCD v. Jefferson*
12 *County*, 55 Or LUBA at 644. We reject intervenors’ arguments to the contrary in their
13 motion to dismiss.

14 The parties also dispute whether our decision in *DLCD v. Klamath County* lends any
15 support to intervenors’ motion to dismiss. As we have already explained, in *DLCD v.*
16 *Klamath County* we simply held that a decision under Measure 37 to “modify” local land use
17 laws in response to a county Measure 37 claim fell within the ORS 197.352(9) (2005)
18 exclusion to LUBA’s jurisdiction under Measure 37. That decision lends no support to
19 intervenors’ motion to dismiss this appeal of a preliminary subdivision plat approval that was
20 based on a Measure 37 waiver and a vested rights determination under subsection 5(3) of
21 Measure 49.

22 **2. Intervenors’ Reply to Petitioners’ Response to Motion to Dismiss**
23 **for Lack of Jurisdiction (Mootness Argument)**

24 Intervenors advance a legal argument in their reply that was not advanced in their
25 motion to dismiss—at least it was not advanced with sufficient clarity in the motion to
26 dismiss for petitioners to recognize and address the argument. Because we reject that
27 argument below, there is no need to allow petitioners an additional opportunity to address

1 intervenors’ new legal argument. Simply stated, in their reply, intervenors not only argue
2 that ORS 195.305(7) deprives LUBA of jurisdiction over the BOC’s September 24, 2008
3 preliminary subdivision plat decision, they also take the position that the writ of review
4 proceeding at Clatsop County Circuit Court concerning the BOC’s September 18, 2008
5 vested rights decision will render this appeal moot. We set out key portions of intervenors’
6 argument below:

7 “If the Intervenor’s vested right determination is affirmed, then Intervenor’s
8 have a common law vested right to complete the subdivision, and there are no
9 more ‘land use decisions’ to be made. Under Oregon’s common law of vested
10 rights, when a development has reached a certain stage, the property owner is
11 said to have acquired a ‘vested right to continue the development *and*
12 *subsequently to put the use to its intended function.*’ *Clackamas County v.*
13 *Holmes*, 265 Or. 193, 197, 508 P.2d 190 (1973) (emphasis added). In *Eklund*
14 *v. Clackamas County*, 36 Or App 73, 81-82 (1978), the Court of Appeals held
15 that because the landowners had established a vested right in their
16 development, they must be allowed to complete the project based on the
17 nonconforming use, and the completion could not be ‘conditioned’ on gaining
18 another approval for a local boundary commission. This holding implies that
19 a vested right creates a nonconforming use that may be continued in the
20 regular manner as other nonconforming uses. *Id.* at 82. In fact, the Oregon
21 [Court of Appeals] has treated vested rights and nonconforming uses ‘as
22 inextricably related.’ *Fountain Village Development Co. v. Multnomah*
23 *County*, 176 Or. App. 213, 222-223, 31 P.3d 458, 462-463 (2001).

24 “* * * The ‘allowance of nonconforming uses applies *not only to those*
25 *actually in existence but also to uses which are in various stages of*
26 *development* when the zoning ordinance is enacted.’ *Holmes*, 265 Or. at 197.
27 ‘*Holmes* concerns the degree of development which must exist before an
28 owner of partially developed property can be said to have established a
29 ‘lawful use’ of property under the statutes, so as to use the property as
30 intended *even though the use would not be permitted* under the zoning law
31 which became effective while the property was being improved. *Polk County*
32 *v. Martin*, 292 Or. 69, 80, 636 P.2d 952 (1981) (emphasis added). The Court
33 in *Martin* treated the right to continue the development of one’s property and
34 to use the property as a ‘vested right’. Specifically, the Court ‘viewed the
35 vested right (to develop a use) *as having merged into the fully developed*
36 *nonconforming use.*’ *Fountain Village Development Co. v. Multnomah*
37 *County*, 176 Or. App. 213, 222-223, 31 P.3d 458, 462-463 (2001).

38 “Therefore, because the very nature of a nonconforming use is that it does not
39 conform with land use rules and regulations that would otherwise apply to the
40 property, the issue of whether or not the County properly applied the land use

1 criteria to the Intervenor's land use application becomes moot if the Circuit
2 Court affirms the intervenor's vested right. The issue of what the applicable
3 land use criteria are, and whether Intervenor's development complies with
4 them, is inherent to the vested rights determination. No further 'land use
5 decisions are needed.

6 "Conversely, if the Circuit Court reverses the County's [vested rights]
7 decision and denies Intervenor's vested right, the issue currently before
8 LUBA again becomes moot. Without a vested right, the Intervenor's
9 subdivision cannot exist, because only the vested right allows continued
10 development under Measure 37 rather than Measure 49. In either scenario,
11 this appeal before LUBA is mooted by the Writ of Review currently pending
12 in Clatsop County Circuit Court and should be dismissed." Intervenor's
13 Reply to Petitioner's Responses to Motion to Dismiss 3-5 (italics in original,
14 underlining added).

15 Although it is possible that intervenors may intend a more nuanced argument, in the
16 emphasized parts of their argument quoted above, intervenors appear to take the position that
17 a final favorable judicial ruling regarding the county's September 18, 2008 decision that
18 intervenors have a vested right under subsection 5(3) of Measure 49 to "complete and
19 continue the use described in the [Measure 37] waiver," will have at least one important legal
20 consequence. That ruling will render this appeal of the BOC's September 24, 2008
21 preliminary subdivision plat approval moot, because the county's vested right decision
22 necessarily will give intervenors a right to county approval of the use described in the
23 Measure 37 waivers (a 43-lot subdivision and the right to construct 43 dwellings). Stated
24 more bluntly, while the precise basis for intervenors' legal position is not clear to us,
25 intervenors contend that a final subsection 5(3) vested right decision under Measure 49 will
26 make it unnecessary for intervenors to seek and receive the preliminary plat and final plat
27 approvals they otherwise would have had to obtain under Measure 37, before Measure 49
28 was adopted.

29 For the reasons that follow we conclude that the vested rights cases intervenors cite
30 do not support their argument, and intervenors fail to acknowledge and give meaning to the
31 complete text of subsection 5(3) of Measure 49.

1 vested right decision is rejected by the Clatsop County Circuit Court are not land use laws
2 that were enacted *after* intervenors commenced development. Those land use laws are
3 among the set of land use laws that were not waived under Measure 37 and therefore applied
4 to intervenors’ development at the time intervenors commenced development. Because the
5 Measure 37 waivers did not waive those existing land use laws, they have remained in effect
6 while intervenors development has proceeded. The vested rights cases cited by intervenors
7 do not support their view of the legal effect of a subsection 5(3) Measure 49 vested right
8 determination.

9 **b. The Text of Section 5 of Measure 49**

10 Intervenor’s contention about the legal effect of a vested right determination under
11 Measure 49 presents a question of statutory interpretation, and we therefore turn to the text of
12 section 5 of Measure 49. *PGE v. Bureau of Labor and Industries*, 317 Or 606, 612 n 4, 859
13 P2d 1143 (1993). In addition to misreading the vested rights cases that they rely on,
14 intervenors fail to give effect to all of the text of section 5 of Measure 49. Section 5 of
15 Measure 49 has already been set out, but we set out the relevant text again:

16 “A claimant that filed a claim under [Measure 37] on or before [June 28,
17 2007] is entitled to just compensation as provided in:

18 “(1) Section 6 or 7 of this 2007 Act, at the claimant’s election, if the
19 property described in the claim is located entirely outside any urban
20 growth boundary and entirely outside the boundaries of any city;

21 “(2) Section 9 of this 2007 Act if the property described in the claim is
22 located, in whole or in part, within an urban growth boundary; or

23 “(3) A waiver issued before the effective date of this 2007 Act [December
24 6, 2007] to the extent that the claimant’s use of the property complies
25 with the waiver and the claimant has a common law vested right on the
26 effective date of this 2007 Act to complete and continue the use
27 described in the waiver.”

28 Subsection 5(3) of Measure 49 contains two requirements, but intervenors only
29 recognize and acknowledge one requirement. Intervenor may continue to seek to develop

1 their 43-lot subdivision and construct dwellings on the subdivision lots only if: (1) the
2 desired subdivision and dwellings “compl[y] with intervenors’ [Ballot Measure 37] waiver,”
3 and (2) intervenors can establish that they had “a common law vested right * * * to complete
4 and continue [that use]” on December 6, 2007. Intervenors rely exclusively on the second
5 requirement without giving effect to the first requirement. Even if it were possible to
6 construe the vested rights cases that intervenors cite to apply as broadly as intervenors argue,
7 the first requirement in subsection 5(3) of Measure 49 must be given effect. Intervenors’
8 desired subdivision and dwellings must “compl[y] with intervenors’ [Ballot Measure 37]
9 waiver.” Although the term “waiver” did not appear in Measure 37, it is a defined term
10 under Measure 49. Or Laws 2007, ch 424 § 2(20).¹³ The first requirement in subsection 5(3)
11 of Measure 49—comply with the Measure 37 waiver—could only mean intervenors must
12 comply with any state and local land use laws that were not waived under Measure 37. In
13 this case, those remaining laws require that intervenors seek and receive preliminary plat and
14 final plat approval for their proposed subdivision, under the state and local land use laws that
15 were not waived by their state and county Measure 37 waivers. An affirmative vested right
16 decision under subsection 5(3) gives intervenors the right to continue to *seek* any required
17 land use approvals that they had not already obtained before December 6, 2007. A final
18 affirmative vested rights decision in concert with the Measure 37 waivers allows intervenors
19 to seek those land use approvals without having to comply with land use laws that were
20 waived, but that vested right decision does not make those approvals unnecessary or
21 guarantee that intervenors will be successful in seeking those approvals under state and local
22 land use laws that were not waived under Measure 37.

¹³ Or Laws 2007, chapter 424 subsection 2(21) provides:

“‘Waive’ or ‘waiver’ means an action or decision of a public entity to modify, remove or not apply one or more land use regulations under ORS 195.305 to 195.336 and sections 5 to 22, of this 2007 Act or ORS 197.352, as in effect immediately before [December 6, 2007], to allow the owner to use property for a use permitted when the owner acquired the property.”

1 Finally, we note that our decision in this order is arguably inconsistent with some
2 language in our recent decision in *Welch v. Yamhill County*, __ Or LUBA __ (LUBA No.
3 2008-129, December 15, 2008), *review pending* (A140952), a decision that the parties do not
4 discuss. That case concerned a county decision that granted subdivision approval based on
5 Measure 37 waivers, after Measure 49 took effect and after a county hearings officer
6 determined that the subdivision applicant in that case did not have a subsection 5(3) vested
7 right under Measure 49. At the time of our decision in *Welch*, the applicant was challenging
8 the hearings officer’s vested rights decision in circuit court and that challenge was pending.
9 A factual difference between *Welch* and this appeal is that in *Welch*, at the time the county
10 approved the subdivision, the subdivision applicant had received an *unfavorable* vested
11 rights determination whereas intervenors in this appeal received a *favorable* vested rights
12 determination just before the subdivision was approved. *Welch* was a procedurally
13 complicated case, and we will not attempt to describe that case in detail here. However,
14 there is language in our decision in *Welch* that can be read to support intervenors’ contention
15 in this appeal that a positive vested rights decision under subsection 5(3) of Measure 49
16 might make it unnecessary for a Measure 37 claimant to comply with land use laws that had
17 not been waived and had not yet been complied with at the time the Measure 37 claimant was
18 found to have a vested right under subsection 5(3) of Measure 49.¹⁴ That suggestion is
19 dictum and unclear dictum that is arguably inconsistent with our conclusion in this order.

¹⁴ That language is set out below:

“If intervenor possessed a final vested rights determination from the Yamhill County Circuit Court or hearings officer and if the court or hearings officer determined that intervenor had a vested right to the disputed preliminary subdivision approval, that vested rights determination would likely provide authority for the disputed preliminary subdivision approval that is independent of the county’s July 9, 2008 decision. But if intervenor is found to have such a vested right it will be because his subdivision development activities satisfy the vested rights criteria set out in *Clackamas County v. Holmes*, 265 Or 193, 198-99, 508 P2d 190 (1973), not because the proposed subdivision complies with land use laws that were not waived by intervenors Ballot Measure 37 waivers. * * *” *Welch*, slip op 13-14.

1 Rather than attempt to clarify here what we meant to say in *Welch*, we now disavow that
2 suggestion in *Welch*.

3 As we explain above, an affirmative vested right decision under subsection 5(3) of
4 Measure 49 gives a Measure 37 claimant the right to *seek* development approval under land
5 use laws that were not waived by their Measure 37 waivers, without complying with land use
6 laws that were waived under Measure 37. Such a vested rights decision does not make those
7 approvals unnecessary or guarantee that Measure 37 claimants will be successful in seeking
8 those approvals under state and local land use laws that were not waived under Measure 37.
9 If land use laws that remain applicable to a claimant's property under a Measure 37 waiver
10 have not been considered and found to be satisfied before December 6, 2007, a Measure 37
11 claimant who wishes to proceed with a development that was authorized by a Measure 37
12 waiver must (1) secure a final vested rights decision under subsection 5(3) of Measure 49,
13 and (2) secure all land use permits or other approvals that are required under the land use
14 laws that were not waived under the Measure 37.

15 We now summarize the obligations of Measure 37 claimants who wish to take
16 advantage of subsection 5(3) of Measure 49 and proceed with development that was begun
17 under a Measure 37 waiver. The obligation of Measure 37 claimants who on December 6,
18 2007 had already received all required permits and approvals under land use laws that
19 remained applicable after his or her Measure 37 waiver decision was issued is fairly clear.
20 Such Measure 37 claimants must seek a vested rights determination under subsection 5(3) of
21 Measure 49. If they are successful in that regard, then they may proceed to complete the
22 development.

23 Measure 37 claimants who have not yet received all required permits and other
24 approvals that are necessary under land use laws that remained applicable to their property
25 after the Measure 37 waiver have a somewhat more difficult task. Such Measure 37

1 claimants also must seek a vested right determination under subsection 5(3) of Measure 49.¹⁵
2 However, a favorable subsection 5(3) Measure 49 vested rights decision will not be all that
3 these Measure 37 claimants will be required to secure before they can continue to complete
4 their development. As we explain above, an affirmative vested right decision under
5 subsection 5(3) of Measure 49 gives this class of Measure 37 claimants the right to *seek*
6 development approval under land use laws that were not waived by their Measure 37
7 waivers. Such a subsection 5(3) vested rights decision under Measure 49 does not make
8 those approvals unnecessary or guarantee that such Measure 37 claimants will be successful
9 in seeking those approvals under state and local land use laws that were never waived under
10 Measure 37.

11 **E. Conclusion**

12 The county’s September 24, 2008 decision to grant preliminary plat approval is not a
13 decision “under” Measure 49, and it is not a decision regarding “the nature and extent of
14 [just] compensation” under Measure 49. Therefore, ORS 195.305(7) and 195.318(1) do not
15 deprive LUBA of jurisdiction over the BOC’s September 24, 2008 decision granting
16 preliminary plat approval. Because that decision applies state and county land use laws, it is
17 a “land use decision,” within in the meaning of ORS 197.015(10)(a). Under ORS
18 197.825(1), LUBA has exclusive jurisdiction to review land use decisions. LUBA therefore
19 has jurisdiction to review the BOC’s September 24, 2008 preliminary plat approval decision.

20 Additionally, for the reasons explained above, this appeal is not moot. Assuming
21 intervenors are ultimately successful in their defense of the BOC’s September 18, 2008
22 vested rights decision in the pending Clatsop County writ of review proceeding, they must

¹⁵ Measure 37 claimants who on December 6, 2007 had not yet secured all required land use permits or approvals under land use laws that were not waived likely will face a much more difficult burden in establishing that they had a common law vested right to complete development under subsection 5(3) of Measure 49, as compared to those Measure 37 claimants who had already secured all such permits or approvals and had begun actual construction.

1 secure preliminary plat and final plat approval from Clatsop County under state and local
2 land use regulations that were not waived by the state and county Measure 37 waivers. The
3 challenged decision grants preliminary plat approval and, therefore, this appeal is not moot.

4 Intervenor's Motion to Dismiss is denied.

5 Dated this 28th day of April, 2009.

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Michael A. Holstun
Board Member