

48.1 Ballot Measure 49 – Generally. County decisions approving an application to partition a property pursuant to final order issued under Ballot Measure 49 into three parcels and an application for a variance to the county’s minimum design standards for private roads for access to the new parcels are decisions “under” Section 11 of Measure 49, where the county’s denial of the requested variance to the road access standards would require the county to deny the requested partition to create the parcels authorized by the DLCD Final Order. In that circumstance, LUBA does not have jurisdiction to review either of the decisions. *Woodward v. Jackson County*, 73 Or LUBA 164 (2016).

48.1 Ballot Measure 49 – Generally. A county’s partition approval decision based on a DLCD Final Order under Ballot Measure 49 is a decision made “under” Section 11 of Measure 49, and pursuant to ORS 195.318(1) the decision is not a “land use decision” subject to LUBA’s jurisdiction. *Lenahan v. Wallowa County*, 72 Or LUBA 69 (2015).

48.1 Ballot Measure 49 – Generally. A county’s conclusory finding that a subdivision applicant does not have a vested right to complete a subdivision under Section 5(3) of Ballot Measure 49 provides no basis for reversal or remand, where the county had adopted a decision that reached the same conclusion over one month earlier and that separate decision had not been judicially challenged and was therefore final. *Hoffman v. Jefferson County*, 60 Or LUBA 101 (2009).

48.1 Ballot Measure 49 – Generally. A decision that grants subdivision approval based on Measure 37 waivers after Measure 49 has taken effect must be reversed under *Corey v. DLCD*, 344 Or 457, 184 P3d 1109 (2008) and *Pete’s Mountain Homeowners Assn. v. Clackamas County*, 227 Or App 140, 204 P3d 802, *rev den* 346 Or 589 (2009). *Walker v. Josephine County*, 60 Or LUBA 333 (2010).

48.1 Ballot Measure 49 – Generally. Prior to the passage of Ballot Measure 49 (2007), Ballot Measure 37 (2004) allowed the holder of a waiver to seek approval to develop property in ways that would otherwise be prohibited by law, in lieu of receiving compensation for loss in property value. *DLCD v. Jackson County*, 59 Or LUBA 101 (2009).

48.1 Ballot Measure 49 – Generally. Under Measure 49, a positive vested rights determination pursuant to subsection 5(3) of Measure 49 now provides the sole basis under Oregon law for a local government to approve a use of a property without having to apply standards and criteria governing the property. *DLCD v. Jackson County*, 59 Or LUBA 101 (2009).

48.1 Ballot Measure 49 – Generally. Where the holder of a Measure 37 waiver has not obtained a positive vested rights determination under Measure 49 on the date a local government approves a land use application under which the use would otherwise not be permitted, the local government is obligated to apply the state and local laws that were waived by the Measure 37 waiver in considering the application. *DLCD v. Jackson County*, 59 Or LUBA 101 (2009).

48.1 Ballot Measure 49 – Generally. Petitioners do not waive their right to argue that a second subdivision approval decision that relies on Ballot Measure 37 waivers and post-dated Ballot Measure 49 was precluded by Ballot Measure 49 by failing to make that argument in their appeal of an earlier subdivision decision that predated Ballot Measure 49. The subject of that earlier appeal was the county’s pre-Ballot Measure 49 subdivision approval decision, not the county’s post-Ballot Measure 49 subdivision approval decision. *Welch v. Yamhill County*, 58 Or LUBA 29 (2008).

48.1 Ballot Measure 49 – Generally. An issue may be waived so that it cannot be raised in a second appeal regarding the same land use application where the issue is “plainly cognizable.” The possibility that a county might adopt a second decision approving a subdivision based on Ballot Measure 37 waivers after Ballot Measure 49 takes effect was not plainly cognizable in a LUBA appeal of an earlier subdivision that pre-dated Ballot Measure 49. *Welch v. Yamhill County*, 58 Or LUBA 29 (2008).

48.1 Ballot Measure 49 – Generally. As a general rule a county may limit its proceedings following a remand to the issues that provided the basis for the LUBA remand. However, a county may not refuse to consider the effect of Ballot Measure 49 on a subdivision applicant’s Ballot Measure 37 waivers, where that issue is squarely presented in the second appeal and was not decided and did not need to be decided in the first appeal. *Welch v. Yamhill County*, 58 Or LUBA 29 (2008).

48.1 Ballot Measure 49 – Generally. If an applicant for subdivision approval has a vested right under Section 5(3) of Ballot Measure 49, it is because the applicant satisfies 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. After Ballot Measure 49 took effect, Ballot Measure 37 waivers are no longer effective. Therefore, until the subdivision applicant receives a vested rights determination, a county decision to grant preliminary subdivision approval must stand on its own, and without a legally effective Ballot Measure 37 waiver such a preliminary subdivision approval decision cannot stand on its own. *Welch v. Yamhill County*, 58 Or LUBA 29 (2008).

48.1 Ballot Measure 49 – Generally. When Measure 49 took effect, its effectiveness created a great deal of legal uncertainty regarding the continuing legal relevance of Measure 37 waivers, actions that may have been taken under those waivers and decisions that may have been issued pursuant to those waivers. *Biggerstaff v. Yamhill County*, 58 Or LUBA 476 (2009).

48.1 Ballot Measure 49 – Generally. A county decision that Measure 49 claimants have a vested right to continue with their effort to subdivide and develop their property is the county’s final decision regarding the “nature and extent of [just] compensation” that the claimants will receive under Measure 49. The “nature” of the just compensation is a vested right to continue under the claimant’s Measure 37 waiver, rather than under the more limited options available under Oregon Laws 2007, chapter 424, subsection 5(1).

The “extent” of that just compensation is specified number of lots and dwellings. *DLCD v. Clatsop County*, 58 Or LUBA 714 (2009).

48.1 Ballot Measure 49 – Generally. A preliminary subdivision plat approval decision that post-dates a vested rights determination under Measure 49 is a land use decision subject to LUBA’s review and is not a decision concerning the “nature and extent of [just] compensation” under Measure 49. *DLCD v. Clatsop County*, 58 Or LUBA 714 (2009).

48.1 Ballot Measure 49 – Generally. A common law vested right under subsection 5(3) of Measure 49 will shield a claimant from land use laws that were waived under Measure 37; but that common law vested right will not shield a claimant from land use laws that were not waived under Measure 37 and therefore remain applicable to the claimant’s development. *DLCD v. Clatsop County*, 58 Or LUBA 714 (2009).

48.1 Ballot Measure 49 – Generally. Subsection 5(3) of Measure 49 includes two requirements. First, claimants must comply with their Measure 37 waiver. Second, claimants must establish that they have a common law vested right to the use described in the Measure 37 waiver. Under the first requirement, Measure 37 claimants remain subject to and must comply with any land use laws that were not waived by the Measure 37 waiver. *DLCD v. Clatsop County*, 58 Or LUBA 714 (2009).

48.1 Ballot Measure 49 – Generally. Measure 37 claimants who on December 6, 2007 had already received all required permits and approvals under land use laws that remained applicable after his or her Measure 37 waiver decision was issued must seek a vested rights determination under subsection 5(3) of Measure 49. If they are successful in that regard, then they may proceed to complete the development that was begun under Measure 37. *DLCD v. Clatsop County*, 58 Or LUBA 714 (2009).

48.1 Ballot Measure 49 – Generally. Measure 37 claimants who on December 6, 2007 had not yet received all required permits and approvals under land use laws that remained applicable after his or her Measure 37 waiver decision was issued must seek a vested rights determination under subsection 5(3) of Measure 49. If they are successful in that regard, they must still obtain any permits or other approvals that are required under land use laws that were not waived by their Measure 37 waiver. *DLCD v. Clatsop County*, 58 Or LUBA 714 (2009).