

1 BEFORE THE LAND USE BOARD OF APPEALS
2 OF THE STATE OF OREGON
3

4 ALFRED I. SILBOWITZ and
5 VIRGINIA LEROUX SILBOWITZ,
6 *Petitioners,*
7

8 vs.
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10 JACKSON COUNTY,
11 *Respondent,*
12

13 and
14

15 ROCKY YOUNGER and GORDON JOHNSTON,
16 *Intervenors-Respondents.*
17

18 LUBA No. 2022-018
19

20 ORDER

21 **MOTIONS TO INTERVENE**

22 Rocky Younger and Gordon Johnston each move to intervene on the side
23 of the county. There is no opposition to the motions, and they are allowed.

24 **JURISDICTION**

25 On February 28, 2022, petitioners filed the Notice of Intent to Appeal
26 (NITA) in this appeal. The challenged decision is a county hearings officer
27 decision approving an application to establish a dwelling on property zoned
28 exclusive farm use pursuant to Ballot Measure 49 (2007). Notice of Intent to
29 Appeal Ex 2, at 1.

1 Section 11(1) of Measure 49 authorizes local governments to apply certain
2 local land use regulations to approve a partition of property or one or more
3 dwellings authorized under sections 5 to 11, with limitations.¹ *See generally*
4 *Maguire v. Clackamas County*, 64 Or LUBA 288 (2011), *aff'd*, 250 Or App 146,
5 279 P3d 314 (2012) (explaining the background of Measures 37 and 49). ORS
6 195.318(1) provides, in relevant part, that a determination by a public entity
7 under sections 5 to 11 of Measure 49 is not a “land use decision,” as defined in
8 ORS 197.015(10)(a)(A):

9 “A person that is adversely affected by a final determination of a
10 public entity under * * * *sections 5 to 11, chapter 424, Oregon Laws*
11 *2007*, * * * may obtain judicial review of that determination under
12 ORS 34.010 to 34.100, if the determination is made by Metro, a city
13 or a county * * *. *A determination by a public entity under * * **
14 *sections 5 to 11, chapter 424, Oregon Laws 2007*, * * * *is not a land*
15 *use decision.*” (Emphases added.)

¹ Oregon Laws 2007, chapter 424, section 11(1), provides, in relevant part:

“A subdivision or partition of property, *or the establishment of a dwelling on property, authorized under sections 5 to 11 of this 2007 Act* must comply with all applicable standards governing the siting or development of the dwelling, lot or parcel including, but not limited to, the location, design, construction or size of the dwelling, lot or parcel. However, the standards must not be applied in a manner that has the effect of prohibiting the establishment of the dwelling, lot or parcel authorized under sections 5 to 11 of this 2007 Act unless the standards are reasonably necessary to avoid or abate a nuisance, to protect public health or safety or to carry out federal law.” (Emphasis added.)

1 Pursuant to ORS 195.318(1), LUBA may not have jurisdiction over the decision
2 that is before us in this appeal.

3 All deadlines in this appeal are suspended to allow the parties the
4 opportunity to brief, and LUBA to resolve, the jurisdictional question that may
5 be raised by ORS 195.318(1) before proceeding to the merits of this appeal. As
6 the appealing parties, petitioners bear the burden of establishing that LUBA has
7 jurisdiction to review the challenged decision. *Billington v. Polk County*, 299 Or
8 471, 475, 703 P2d 232 (1985). Accordingly, within 21 days of the date of this
9 order, petitioners shall file a memorandum explaining why LUBA has
10 jurisdiction to review the challenged decision, and the county and intervenors-
11 respondents shall have 21 days to file responses to petitioners’ memorandum.
12 Thereafter, LUBA will resolve the jurisdictional question. If we determine that
13 we have jurisdiction to review the challenged decision, we will issue an order
14 establishing a new deadline for transmitting the record.

15 Dated this 16th day of March 2022.
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20 _____
21 Melissa M. Ryan
Board Member