

1 BEFORE THE LAND USE BOARD OF APPEALS

2
3 OF THE STATE OF OREGON

4
5 VANNETT PROPERTIES, LLC,

6 *Petitioner,*

7
8 vs.

9
10 LANE COUNTY,

11 *Respondent,*

12
13 and

10/30/18 and 11:10 LUBA

14
15 MILTON DECKER and MARY DECKER,

16 *Intervenors-Respondents.*

17
18 LUBA No. 2018-075

19
20 FINAL OPINION

21 AND ORDER

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23 Appeal from Lane County.

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25 William H. Sherlock, Eugene, represented petitioner.

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27 H. Andrew Clark, Assistant County Counsel, Eugene, represented
28 respondent.

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30 Micheal M. Reeder, Eugene, represented intervenors-respondents.

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32 ZAMUDIO, Board Member; RYAN, Board Chair; BASSHAM, Board
33 Member, participated in the decision.

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35 TRANSFERRED

10/30/2018

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37 You are entitled to judicial review of this Order. Judicial review is
38 governed by the provisions of ORS 197.850.

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NATURE OF THE DECISION

Petitioner appeals a decision of the board of county commissioners that adopted a hearings official’s decision that denied petitioner’s application to site a dwelling on property zoned exclusive farm use.

BACKGROUND

The subject property is comprised of approximately 42.6 acres, is vacant, and is zoned exclusive farm use. Petitioner’s predecessors in interest, Milton Decker and Mary Decker (intervenors), previously owned the subject property as part of a tract. Record 500. In 2006, intervenors filed Measure 37 claims for property including 15 existing lots or parcels and one existing dwelling. Record 502. After passage of 2007 Oregon Ballot Measure 49, which superseded Measure 37, intervenors elected supplemental review of their Measure 37 claims under section 6 of Measure 49, which allows the Department of Land Conservation and Development (DLCD) to authorize up to three home site approvals to qualified claimants.¹

In June 2010, DLCD authorized one existing dwelling and two additional home sites on separate lots or parcels on intervenor’s property (2010 DLCD Order). Record 25, 496. The Measure 49 home-site approvals did not authorize additional lots or parcels. Thereafter, intervenors sold the subject

¹ Or Laws 2007, ch 424 (Measure 49).

1 property to petitioner's predecessor in interest. The subject property was
2 eventually conveyed to petitioner in February 2017. Record 430.

3 Measure 49 permits local governments to apply standards for siting a
4 dwelling authorized by Measure 49 (Measure 49 dwelling), so long as those
5 standards are not applied in a manner that prohibits the establishment of the
6 dwelling (unless the standards are reasonably necessary to abate a nuisance, to
7 protect public health or safety, or to carry out federal law).² In Lane County, a
8 Measure 49 dwelling in the exclusive farm use zone is subject to planning
9 director approval pursuant to siting criteria in Lane Code (LC) 16.212(10),
10 which governs development in the exclusive farm use zone. On March 31,
11 2017, petitioner filed a request for planning director approval for a Measure 49
12 dwelling. On January 4, 2018, the planning director initially approved the
13 request. On January 16, 2018, the planning director issued a new decision
14 concurrently revoking the January 4, 2018 approval and denying the request.

² Measure 49, section 11(1) provides:

“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.”

1 Record 45. Petitioner appealed the planning director’s decision and the county
2 hearings official affirmed the director’s decision. Petitioner appealed to the
3 board of county commissioners, which declined further review and adopted the
4 hearings official’s decision as the county’s final decision. This appeal
5 followed.

6 The primary dispute before the county was whether one of intervenors’
7 2010 Measure 49 dwelling authorizations was a property right that attached to
8 the subject property so that petitioner was entitled to build a Measure 49
9 dwelling on the subject property. Measure 49, section 11(6) provides, in part:

10 “An authorization to partition or subdivide the property, or to
11 establish dwellings on the property, granted under section 6, 7 or 9
12 of this 2007 Act runs with the property and may be either
13 transferred with the property or encumbered by another person
14 without affecting the authorization. There is no time limit on when
15 an authorization granted under section 6, 7 or 9 of this 2007 Act
16 must be carried out, except that once the owner who obtained the
17 authorization conveys the property to a person other than the
18 owner’s spouse or the trustee of a revocable trust in which the
19 owner is the settlor, the subsequent owner of the property must
20 create the lots or parcels and establish the dwellings authorized by
21 a waiver under section 6, 7 or 9 of this 2007 Act within 10 years of
22 the conveyance. * * *”

23 Intervenor argued to the hearings officer that when they conveyed the
24 subject property to petitioner’s predecessor in interest they did not intend to
25 also convey one of their Measure 49 dwelling authorizations. Intervenor
26 argued that the 2010 DLCD Order authorized three Measure 49 dwellings on
27 intervenors’ tract, which included 15 existing parcels, but that the 2010 DLCD
28 Order did not attach dwelling approvals to particular parcels, and intervenors

1 did not expressly convey the right to one of the dwelling approvals when
2 conveying the subject property. Record 27. The hearings officer agreed with
3 intervenors and concluded that “in situations where the number of qualifying
4 parcels exceeds the number of approved home sites, the [Measure 49]
5 claimant’s intent must be clearly apparent before a dwelling authorization is
6 transferred with the sale of a qualifying property. In the present case, that intent
7 was clearly lacking.” Record 28. The county determined that petitioner had not
8 established that it possessed a right to construct a Measure 49 dwelling on the
9 subject property. As a result, the county did not apply any county siting
10 standards authorized under Measure 49, section 11(1).

11 **JURISDICTION**

12 LUBA received the petition for review on September 10, 2018. In its
13 sole assignment of error, petitioner argues that the county erred by denying its
14 Measure 49 dwelling siting request because, in petitioner’s view, intervenors’
15 Measure 49 dwelling authorization was transferred to petitioner with the
16 subject property and intervenors’ intent had no bearing on petitioner’s dwelling
17 development right. Petition for Review 4. On September 12, 2018, on its own
18 motion, the Board suspended the appeal and requested argument from the
19 parties regarding whether the Board has jurisdiction over this appeal.

20 Measure 49, section 16, now codified at ORS 195.318(1), provides that a
21 determination by a public entity under Measure 49, sections 5 to 11, is not a
22 land use decision; therefore, such a determination is not subject to LUBA’s

1 jurisdiction.³ See *Maguire v. Clackamas County*, 64 Or LUBA 288 (2011),
2 *aff'd* 250 Or App 146, 279 P3d 314 (2012) (dismissing the appeal for lack of
3 jurisdiction because the county's partition approval was made "under" section
4 11 of Measure 49).

5 In *Woodward v. Jackson County*, 73 Or LUBA 164 (2016), DLCD
6 authorized three dwellings on separate parcels pursuant to section 6 of Measure
7 49. The intervenor applied for, and the county approved, a partition of land into
8 three parcels to site the dwellings and a variance to the county's minimum
9 design standards for private roads. LUBA raised the jurisdictional issue on its
10 own motion. The petitioner acknowledged that ORS 195.318(1) might deprive
11 LUBA of jurisdiction over the partition decision but argued that the county's
12 variance decision was subject to LUBA's jurisdiction. We concluded that the
13 partition and variance decisions were both decisions "under" section 11 of
14 Measure 49 because without the variance, the county could not approve the
15 partition application that was necessary to implement DLCD's order. We

³ ORS 195.318(1) provides, in pertinent part:

"A person that is adversely affected by a final determination of a public entity under ORS 195.310 to 195.314 or sections 5 to 11, chapter 424, Oregon Laws 2007 * * * may obtain judicial review of that determination under ORS 34.010 to 34.100, if the determination is made by Metro, a city or a county, or under ORS 183.484, if the determination is one of a state agency. * * * 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 reasoned that the county reviewed the partition and variance applications under
2 the authority of section 11 of Measure 49. *See Maguire*, 250 Or App at 156
3 (concluding that “the term ‘under’ as used in ORS 195.318(1) means ‘as
4 authorized by’ and that, if the local government purported to review the
5 Measure 49 partition application under the authority of sections 5 to 11, then
6 ORS 195.318(1) operates to preempt LUBA review.”). We dismissed the
7 appeal for lack of jurisdiction.

8 In this appeal, petitioner contends that LUBA has jurisdiction
9 notwithstanding ORS 195.318(1). Petitioner argues that LUBA has jurisdiction
10 because the county’s decision was (1) not based on “clearly enumerated
11 standards within Sections 5 through 11 of Measure 49,” and (2) the county’s
12 decision was made pursuant to siting criteria in LC 16.212(10) and LC 16.245.
13 Petitioner’s Memorandum Regarding Jurisdiction 3. We reject both arguments.
14 The challenged decision was not made pursuant to siting criteria in LC
15 16.212(10) and LC 16.245. While the challenged decision lists LC 16.212(10)
16 and 16.245 as applicable criteria, it did not actually apply those standards
17 because the county determined that petitioner had not established any right to
18 construct a Measure 49 dwelling. The challenged decision is a decision
19 regarding “the establishment of a dwelling” authorized under section 6 of
20 Measure 49, as that phrase is used in section 11 of Measure 49 and is therefore
21 a determination whether petitioner has a right to construct a Measure 49

1 dwelling made “under” sections 6 and 11 of Measure 49. Accordingly, the
2 challenged decision is not a land use decision subject to LUBA’s jurisdiction.

3 **MOTION TO TRANSFER**

4 Petitioner filed a contingent motion to transfer the appeal to the Lane
5 County Circuit Court. Intervenor and the county do not oppose the motion and
6 it is granted. ORS 34.102(4); OAR 661-010-0075(11)(a).

7 The appeal is transferred.