

47.1 Ballot Measure 37 – 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).

47.1 Ballot Measure 37 – 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).

47.1 Ballot Measure 37 – 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).

47.1 Ballot Measure 37 – 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).

47.1 Ballot Measure 37 – 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).

47.1 Ballot Measure 37 – 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).

47.1 Ballot Measure 37 – 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).

47.1 Ballot Measure 37 – 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).

47.1 Ballot Measure 37 – Generally. Under ORS 197.352(9)(2005), LUBA does not have jurisdiction to review a challenge to a final state Ballot Measure 37 Order determining the identity of the “owner” of property for purposes of ORS 197.352 (2005). *Welch v. Yamhill County*, 56 Or LUBA 166 (2008).

47.1 Ballot Measure 37 – Generally. Where a county fails to determine in the decision whether a provision of its local code applies to the proposed subdivision, the county’s silence on the matter in the subdivision decision will not be construed as a decision “not to apply” the provision pursuant to ORS 197.352(8)(2005). *Welch v. Yamhill County*, 56 Or LUBA 166 (2008).

47.1 Ballot Measure 37 – Generally. A warning that subdivision approval could become void in the future if certain owners of the subdivided property who have been granted Ballot Measure 37 waivers cease to own the property is a legally insufficient substitute for a condition of approval that the holders of the needed Ballot Measure 37 waivers must retain their ownership interest until the final plat is recorded. *Hines v. Marion County*, 56 Or LUBA 333 (2008).

47.1 Ballot Measure 37 – Generally. That both the holder of a Ballot Measure 37 waiver and the trustee for her revocable trust signed the subdivision application does not mean that the waiver holder transferred rights granted to her by the waivers to the trust, or that the county erred in granting approval to the trust instead of the waiver holder. *Gardener v. Marion County*, 56 Or LUBA 583 (2008).

47.1 Ballot Measure 37 – Generally. LUBA will not affirm a local government’s decision based on a vested rights theory where the county did not address or adopt that theory in its decision. *Dunn v. Yamhill County*, 55 Or LUBA 206 (2007).

47.1 Ballot Measure 37 – Generally. Where a board of county commissioners previously waived a subdivision approval standard under Ballot Measure 37 (ORS 197.352), that approval standard does not apply to a subsequent proposal to subdivide the

property. *Pete's Mtn. Home Owners Assoc. v. Clackamas County*, 55 Or LUBA 287 (2007).

47.1 Ballot Measure 37 – Generally. Where a subdivision approval criterion was waived under Ballot Measure 37 (ORS 197.352), in a subsequent application for subdivision approval an opponent may not argue for the first time that the waived approval criterion is a public health and safety regulation that cannot be waived under Ballot Measure 37. *Pete's Mtn. Home Owners Assoc. v. Clackamas County*, 55 Or LUBA 287 (2007).

47.1 Ballot Measure 37 – Generally. Whether the county tax assessor in 1971 applied preferential tax assessment to properties that were zoned to allow for agricultural use has little bearing on whether that zone was an “exclusive farm use” zone subject to the limitations of ORS 215.203(1971). Rather, the text and context of the county’s zoning ordinance in 1971 is the best evidence. *Reeves v. Yamhill County*, 55 Or LUBA 452 (2007).

47.1 Ballot Measure 37 – Generally. LUBA will affirm a county’s determination that the Agriculture-A zone adopted in 1971 was not an “exclusive farm use” zone subject to the limitations of ORS 215.203 (1971), for purposes of determining whether proposed dwellings under a Ballot Measure 37 waiver must be “in conjunction with farm use,” where the 1971 ordinance included a separate “exclusive farm use” zone that permitted only the uses allowed under ORS 215.203 (1971), the Agriculture-A zone in contrast permitted a large number of nonfarm uses that bore no relationship to the uses allowed in the statute, and the obvious inference is that the county did not intend the Agriculture-A zone to implement ORS 215.203 (1971). *Reeves v. Yamhill County*, 55 Or LUBA 452 (2007).

47.1 Ballot Measure 37 – Generally. The petitioner’s speculation that the Ballot Measure 37 claimants might transfer the property to a third party before the right to complete development allowed to the claimants under the Ballot Measure 37 waiver is perfected not a basis for reversal or remand. *Reeves v. Yamhill County*, 55 Or LUBA 452 (2007).

47.1 Ballot Measure 37 – Generally. A county is under no affirmative obligation to inquire into the terms of private contracts between Ballot Measure 37 claimants and third party developers to ensure that the claimants have not transferred their interest in the property during the pendency of the development application. Where the claimants sign the application as owners and some issue regarding continued ownership arises during the proceedings, the county may rely upon the claimants’ representations that they still own the property or on publicly available documents, such as deeds, and need not inquire further. *Reeves v. Yamhill County*, 55 Or LUBA 452 (2007).

47.1 Ballot Measure 37 – Generally. LUBA will remand a decision approving a subdivision pursuant to a Ballot Measure 37 waiver where the county fails to address arguments raised below that the subdivision is inconsistent with a 1959 subdivision

ordinance that predated the claimants' date of acquisition and that was not waived under the state and local waivers. *Reeves v. Yamhill County*, 55 Or LUBA 452 (2007).

47.1 Ballot Measure 37 – Generally. If the Ballot Measure 37 claimant's interest in the property is transferred by sale or by operation of law to a third person not named in the Ballot Measure 37 waiver, any entitlement to development approval based on waivers of regulations granted to the claimant is lost. *DLCD v. Jefferson County*, 55 Or LUBA 625 (2008).

47.1 Ballot Measure 37 – Generally. While the probable intent of the "goal-post" statute at ORS 215.427(3)(a) is to prevent local governments from approving or denying a permit based on legislative amendments that post-date the application, the statute is not expressly limited to legislative amendments. The goal-post statute arguably also operates to prevent local governments from approving or denying a permit application based on state or local regulations that were initially waived under Ballot Measure 37 (ORS 197.352) but later become "applicable" when the claimant dies, the property is transferred, and the right to seek development approval free of the waived regulations is lost. *DLCD v. Jefferson County*, 55 Or LUBA 625 (2008).

47.1 Ballot Measure 37 – Generally. The drafters of Ballot Measure 37 (ORS 197.352) limited development or use rights to the claimant, and that limitation is a central feature of the measure. LUBA will not presume that the voters intended that limitation to be avoided by operation of the goal-post statute at ORS 215.427(3)(a), which if given full effect would allow the local government to grant development approvals based on ORS 197.352 waivers to persons who are not the claimant. *DLCD v. Jefferson County*, 55 Or LUBA 625 (2008).

47.1 Ballot Measure 37 – Generally. Where Ballot Measure 37 (ORS 197.352) and the goal-post statute at ORS 215.427(3)(a) operate together, they come into conflict and cannot both be given full effect. *DLCD v. Jefferson County*, 55 Or LUBA 625 (2008).

47.1 Ballot Measure 37 – Generally. In circumstances where the goal-post statute at ORS 215.427(3)(a) conflicts with Ballot Measure 37 (ORS 197.352), the latter prevails, because ORS 197.352 is the more specific and later-adopted statute. *DLCD v. Jefferson County*, 55 Or LUBA 625 (2008).

47.1 Ballot Measure 37 – Generally. Where the Ballot Measure 37 claimant dies prior to receiving development approval and the property is transferred by operation of law to his heirs, the county errs in approving development on land no longer owned by the Ballot Measure 37 claimant, pursuant to waivers that grant only the claimant the right to develop the property free of the goals, statutes and rules specified in the waiver. *DLCD v. Jefferson County*, 55 Or LUBA 625 (2008).

47.1 Ballot Measure 37 – Generally. A statement in a state waiver under Ballot Measure 37 (ORS 197.352) that the state authorizes the claimant to use the property for the proposed use, subject to standards in effect on the date of acquisition, is not properly

understood to operate as a blanket waiver of all state regulations adopted after the acquisition date, where other sections of the state waiver limit the waiver to the requirements of Goal 3 and related statutes and administrative rules. *DLCD v. Jefferson County*, 55 Or LUBA 625 (2008).

47.1 Ballot Measure 37 – Generally. Where the state specifically waives only Goal 3 and related statutes and administrative rules, an argument that the state should also have waived Goals 7, 11 and 14 is beyond LUBA’s scope of review and must be asserted in a different forum. The only question LUBA may decide is which goals and regulations the state actually waived. *DLCD v. Jefferson County*, 55 Or LUBA 625 (2008).

47.1 Ballot Measure 37 – Generally. ORS 197.352(10), which provides that if a claim is not paid within two years, the owner shall be allowed to use the property as permitted at the time the owner acquired the property, does not apply where the state and local government have issued waivers of state and local regulations. Even if ORS 197.325(10) applies in that circumstance, any rights under that subsection are lost when the property is transferred from the claimant’s ownership. *DLCD v. Jefferson County*, 55 Or LUBA 625 (2008).

47.1 Ballot Measure 37 – Generally. A local government’s decision determining that a subdivision application complies with all applicable land use regulations is not a decision under ORS 197.352(9) that is exempt from LUBA’s jurisdiction; rather, the decision is a land use decision subject to LUBA’s jurisdiction. *Welch v. Yamhill County*, 55 Or LUBA 697 (2007).

47.1 Ballot Measure 37 – Generally. Farms are part of the “existing commercial agricultural enterprise” as that phrase is used in Goal 3 if they contribute to the overall agricultural economy in the area in a substantial way. *Friends of Linn County v. Linn County*, 54 Or LUBA 191 (2007).

47.1 Ballot Measure 37 – Generally. Under ORS 197.352(9), LUBA does not have jurisdiction to review challenges to waivers of land use laws granted to petitioners by the Department of Land Conservation and Development or by the local government. *Friends of Linn County v. Linn County*, 54 Or LUBA 191 (2007).

47.1 Ballot Measure 37 – Generally. Nothing in the language of ORS 197.352(8) requires a local government to condition approval of a partition application that is submitted following a Ballot Measure 37 waiver on the continued ownership of the subject property by the Ballot Measure 37 claimant. *Friends of Linn County v. Linn County*, 54 Or LUBA 191 (2007).

47.1 Ballot Measure 37 – Generally. OAR 660-041-0030, which requires notice to the Department of Land Conservation and Development (DLCD) of an application for or decision on a permit pursuant to a Ballot Measure 37 waiver, is not inconsistent with ORS 197.763(2)(c), which requires a local government if requested by the applicant to

notify DLCD of a hearing on a land use application. *DLCD v. Deschutes County*, 54 Or LUBA 799 (2007).

47.1 Ballot Measure 37 — Generally. LUBA will reverse a county decision that approves a rural subdivision in a forest zone following a county Ballot Measure 37 waiver, where the owner has not obtained a waiver of applicable state regulations. The county has no authority to approve development inconsistent with state regulations, unless and until the state waives those regulations. *DLCD v. Jackson County*, 53 Or LUBA 580 (2007).