

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

3
4 KATHERINE DUNN and MARTYN DUNN,
5 *Petitioners,*

6
7 and

8
9 FRIENDS OF YAMHILL COUNTY,
10 *Intervenor-Petitioner,*

11
12 vs.

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14 YAMHILL COUNTY,
15 *Respondent,*

16
17 and

18
19 ROBERT JANZEN, BETTY JANZEN
20 and CHARLES LAWRENCE YOUNGMAN, TRUSTEE OF THE
21 YOUNGMAN FAMILY TRUST,
22 *Intervenor-Respondents.*

23
24 LUBA No. 2007-050

25
26 FINAL OPINION
27 AND ORDER

28
29 Appeal from Yamhill County.

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31 Anne C. Davies, Eugene, filed a joint petition for review and argued on behalf of
32 petitioners and intervenor-petitioner.

33
34 Fredric Sanai, Assistant County Counsel, McMinnville, filed a joint response brief
35 and represented respondent. With him on the brief were Catherine A. Wright, Thomas C.
36 Tankersley, and Drabkin, Tankersley & Wright, LLC.

37
38 Catherine A. Wright, McMinnville, filed a joint response brief and argued on behalf
39 of intervenor-respondents. With her on the brief were Fredric Sanai, Thomas C. Tankersley,
40 and Drabkin, Tankersley & Wright, LLC.

41
42 RYAN, Board Member; HOLSTUN, Board Chair; BASSHAM, Board Member,
43 participated in the decision.

44
45 REVERSED

10/11/2007

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

NATURE OF THE DECISION

Petitioners appeal a county decision approving a subdivision on resource land.

FACTS

The subject property is 58.14 acres and is zoned AF-40 (Agriculture/Forestry Large Holding). In 2005, Maude Youngman, Robert Janzen, Betty Janzen, and Charles Youngman filed a claim with the Oregon Department of Land Conservation and Development (DLCD) seeking compensation under ORS 197.352(1) (Ballot Measure 37) in the amount of \$1.2 million for the reduction in the fair market value of the property as a result of land use regulations that the claimants alleged restricted the use of the property.¹ Record 202-204. In lieu of paying compensation, DLCD issued a final order authorizing Maude Youngman, Betty Janzen, Robert Janzen, and Charles Youngman to subdivide the property and site a dwelling on each parcel, with the scope of each claimant’s allowed uses dependent on the date that each owner had acquired his or her ownership interest in the property.² The DLCD Order stated in relevant part:

“The action by the State of Oregon provides the state’s authorization to: Maude Youngman to use the property subject to the standards in effect May 1,

¹ ORS 197.352 codifies Ballot Measure 37, which was adopted by initiative in 2004. ORS 197.352(1) provides in relevant part:

“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.”

² By way of background, in 1991, Mrs. Youngman and her late husband transferred their undivided interests in the property to The Youngman Family Trust. Supplemental Record 226. DLCD determined that Maude Youngman’s transfer of her interest in the property to a revocable trust was not a change in ownership under ORS 197.352. Record 205. Because no party argues otherwise, we assume for purposes of this opinion that Maude Youngman is an “owner” of the subject property, notwithstanding that after her undivided interest in the property was transferred to the Youngman Family Trust she was no longer the fee title owner. In other words, like DLCD, we assume that the title transfer to the revocable trust was not a change in ownership for purposes of our analysis. No party argues that the transfer or the fact that the trust is technically the fee owner makes any difference in the present appeal, and we attach no significance to the transfer or the existence of the trust in our analysis.

1 1962; to Betty Janzen to use the subject property subject to the standards in
2 effect on October 13, 1975; to Robert Janzen to use the property subject to the
3 standards in effect on February 22, 1985; and to Charles Youngman to use the
4 property subject to the standards in effect on June 1, 2004.” Record 198, 211.

5 Maude Youngman in her capacity as trustee for the Youngman Family Trust also
6 filed a claim with the county under ORS 197.352 for relief from county regulations that post-
7 date Maude Youngman’s May 1, 1962 acquisition date. The county subsequently issued an
8 order (County Order) that provides, in lieu of compensation, that the county authorizes the
9 claimant to make an application to divide the property and establish dwellings on
10 undeveloped lots under county land use regulations in effect on May 1, 1962. Unlike the
11 DLCD order, the County Order does not authorize or approve any claims by Betty Janzen,
12 Robert Janzen, or Charles Youngman. The County Order is not in the record in this appeal,
13 but a portion of it is quoted in the decision. Record 5.

14 In 2006, Robert and Betty Janzen and Maude Youngman filed a subdivision
15 application with the county. The county planning commission approved the application, and
16 petitioners appealed the approval to the board of county commissioners. While petitioners’
17 appeal was pending before the board of commissioners, Maude Youngman passed away.
18 The board of commissioners subsequently denied petitioners’ appeal and approved the
19 application. This appeal followed.

20 **REPLY BRIEF**

21 Petitioners request permission to file a reply brief to respond to new issues raised in
22 the response brief. Intervenor’s do not object to the motion, and it is granted.

23 **MOTIONS TO CORRECT CAPTION AND TO INTERVENE**

24 **A. Motion to Correct Caption**

25 In a June 25, 2007 order, we recognized Robert Janzen and Betty Janzen as
26 intervenors on the side of respondent in this appeal. Robert Janzen, Betty Janzen, and
27 Charles Youngman subsequently moved to correct the caption to reflect that Robert Janzen

1 and Betty Janzen are “representatives of the Youngman Family Trust” and that Charles
2 Youngman is the “trustee of the Youngman Family Trust.” Petitioners object to the motion
3 to correct the caption.

4 Robert Janzen and Betty Janzen may have stated to the county that they were
5 appearing personally and as representatives of the Youngman Family Trust, and the county
6 may have treated their appearances below as both personal appearances and appearances for
7 the Youngman Family Trust. But Robert Janzen and Betty Janzen are not appearing at
8 LUBA as representatives of the Youngman Family Trust. The Youngman Family Trust can
9 only appear at LUBA through its trustee or trustees, who must be represented by counsel.
10 We conclude below that Charles Youngman has standing to intervene in this appeal, as
11 trustee for the Youngman Family Trust. The caption will be modified to reflect that his
12 appearance at LUBA is as trustee for the Youngman Family trust, rather than as an
13 individual. That part of intervenors’ motion is granted. The motion to amend the caption
14 with regard to Robert Janzen and Betty Janzen is denied.

15 **B. Youngman Motion to Intervene**

16 In our previous order, we deferred a final decision on Charles Youngman’s motion to
17 intervene. Petitioners object to that motion to intervene. Petitioners argue that Charles
18 Youngman has not satisfied the requirements of ORS 197.830(7) because he was not the
19 applicant below, and he is not a person who appeared before the local government.

20 ORS 197.830(7) provides:

21 “(a) Within 21 days after a notice of intent to appeal has been filed with the
22 board under subsection (1) of this section, any person may intervene in
23 and be made a party to the review proceeding upon a showing of
24 compliance with subsection (2) of this section.

25 “(b) Notwithstanding the provisions of paragraph (a) of this subsection,
26 persons who may intervene in and be made a party to the review
27 proceedings, as set forth in subsection (1) of this section, are:

28 “(A) The applicant who initiated the action before the local
29 government, special district or state agency; or

1 “(B) Persons who appeared before the local government, special
2 district or state agency, orally or in writing.

3 “(c) Failure to comply with the deadline set forth in paragraph (a) of this
4 subsection shall result in denial of a motion to intervene.”

5 Charles Youngman’s motion to intervene identified him as the current trustee of the
6 Youngman Family Trust. As noted above, the owner of the property was identified on the
7 application as Maude Youngman in her capacity as trustee of the Youngman Family Trust.
8 Record 183-85. Therefore, the trustee of the Youngman Family Trust appeared before the
9 local government through the application. As we understand the situation, after Maude
10 Youngman’s death, Charles Youngman became the sole trustee of the Youngman Family
11 Trust. Intervenors’ Response to Objection to Motion to Intervene, Exhibit 2. Charles
12 Youngman is the current trustee, and the trustee appeared by signing the application. Charles
13 Youngman’s motion to intervene is granted.

14 **FIRST ASSIGNMENT OF ERROR**

15 In their first assignment of error, petitioners argue that because the County Order is
16 not included in the record, the county failed to make a decision based on the applicable
17 criteria and that the decision is not supported by substantial evidence. However, petitioners
18 do not identify any applicable criteria that the county failed to consider. The county
19 identified the relevant approval criteria for the application and addressed those criteria. The
20 decision quotes from the portion of the County Order that describes which county land use
21 regulations the county will not apply to Maude Youngman’s application. Record 2, 5, 153-
22 54. Petitioners have not explained why the absence of the entire County Order in the record
23 constitutes error.

24 The first assignment of error is denied.³

³ Due to our resolution of the first assignment of error, we need not consider intervenors’ argument that petitioners are precluded from raising this argument at LUBA because they failed to raise the issue below. We also need not consider intervenors’ request to take official notice of the County Order that is attached to the Response Brief.

1 **SECOND ASSIGNMENT OF ERROR**

2 Petitioners argue that the county erred in approving the application because after
3 Maude Youngman passed away, her right to develop the property with relief from otherwise
4 applicable laws under the DLCDC Order and the County Order ceased to exist. Intervenors
5 concede generally that “rights [under ORS 197.352(8)] are personal to the owners of the
6 property to which they are issued.” Response Brief 7. However, intervenors argue that “* *
7 * there comes a point when the owner has vested those rights, permitting the owner to
8 transfer them.” *Id.* Intervenors argue that prior to Maude Youngman’s death she had begun
9 some of the construction work necessary to develop the proposed subdivision, and incurred
10 substantial costs, and those efforts were sufficient to vest a right to complete the subdivision
11 under the holding in *Clackamas Co. v. Holmes*, 265 Or 193, 508 P2d 190 (1973).

12 Although this case raises many potential issues under ORS 197.352, the second
13 assignment of error as framed by the parties does not require that we resolve most of those
14 issues. Other than the vested rights theory identified in the previous paragraph, no party
15 appears to dispute that the waivers that were granted to Maude Youngman in the DLCDC
16 Order and the County Order are necessary prerequisites for the county to approve the
17 subdivision application. Similarly, we do not understand any party to dispute that the
18 waivers that were granted to Maude Youngman were rendered void or legally ineffective by
19 Maude Youngman’s death. For purposes of this opinion, we assume that petitioners are
20 correct that waivers granted under ORS 197.352 are personal to the claimant, those waivers
21 can be used only by the claimant, and that those waivers become void or legally ineffective
22 upon the claimant’s death.

23 However, intervenors appear to contend that, notwithstanding that Maude
24 Youngman’s waivers were no longer available as a source of authority for the county to grant
25 preliminary subdivision approval after Maude Youngman’s death, when the county granted
26 preliminary subdivision approval, Maude Youngman had a vested right to receive such

1 preliminary subdivision approval under the principles set out in *Clackamas Co. v. Holmes*.
2 We understand intervenors to argue that the existence of this vested right made the
3 previously granted waivers, which were rendered void or ineffective when Maude
4 Youngman died, unnecessary.

5 As to intervenors' vested rights theory, the decision before us is the county's decision
6 approving the preliminary subdivision application, not a decision on a claim of vested rights.
7 Although intervenors argued to the county that the county should approve the preliminary
8 subdivision application because Maude Youngman's actions had vested a right under *Holmes*
9 to develop the proposed subdivision, the county's findings do not mention vested rights or
10 consider that theory. Rather, the county adopted findings concluding that the board of
11 county commissioners could continue to act on the subdivision application and approve it,
12 because the planning commission had "already issued its final approval[.]"⁴ In any event,
13 we do not understand the county's finding. Because the planning commission decision was
14 appealed to the board of county commissioners, the planning commission decision did not
15 become "final" in any sense that we can understand.

16 Intervenor make no attempt to defend that finding or to challenge the county's
17 failure to address their vested rights argument. LUBA is not the appropriate body to
18 determine, in the first instance, whether intervenors have a vested right to develop their
19 proposed subdivision. We therefore decline to affirm the county's decision based on a vested
20 rights theory that the county did not address in its decision or adopt.

21 The second assignment of error is sustained.

⁴ The county found:

"On December 12, 2006, Maude E. Youngman died. However, county counsel advised the Board that it could continue to consider the subdivision application because the Planning Commission had already issued its final approval, subject to appeal to the Board." Record 2.

1 **THIRD THROUGH TENTH ASSIGNMENTS OF ERROR**

2 In sustaining the second assignment of error, we sustained petitioners’ argument that
3 Maude Youngman’s death rendered the previously granted waivers under ORS 197.352 void
4 or ineffective, and that without those waivers, the county could not approve the preliminary
5 subdivision application. In the third and fifth assignments of error, petitioners put forth
6 alternative bases for why the application could not be approved. In their fourth assignment
7 of error, petitioners argue an alternative basis for why Maude Youngman’s waivers were
8 rendered void or ineffective by her death.⁵ Finally, in their sixth through tenth assignments
9 of error, petitioners argue that the findings of compliance with various provisions of the
10 Yamhill County Land Division Ordinance are inadequate and not supported by substantial
11 evidence, and that the county’s decision does not demonstrate compliance with ORS
12 215.730(1) and related administrative rules implementing that statute that are concerned with
13 the siting of dwellings in forest zones. Our resolution of the second assignment of error
14 makes resolving the remaining assignments of error unnecessary.

15 **CONCLUSION**

16 Petitioners request that the challenged decision be reversed because the challenged
17 approval is prohibited as a matter of law. OAR 661-010-0071(1)(c) (LUBA shall reverse a
18 land use decision when the decision “violates a provision of applicable law and is prohibited
19 as a matter of law”). Intervenors do not dispute petitioners’ position that reversal, rather than
20 remand, is the appropriate disposition if LUBA sustains the second assignment of error. We
21 agree with petitioners that, as the issues under the second assignment of error are framed by

⁵ More specifically, in their third assignment of error, petitioners argue that the county erred in approving the subdivision because Robert and Betty Janzen, rather than Maude Youngman, were the named applicants. In their fourth assignment of error, petitioners argue that the county erred in approving the subdivision because Maude Youngman was the trustor of a revocable trust, and after the death of a trustor of a revocable trust, that trust became irrevocable. In their fifth assignment of error, petitioners argue that because Maude Youngman owned only an undivided three-fifths interest in the property, the “county was required to grant the approval subject to the owners’ proportionate shares of the property.” Petition for Review 16.

1 the parties, sustaining that assignment of error means that the county's approval of the
2 subdivision application is "prohibited as a matter of law." As explained above, no party
3 disputes that Maude Youngman's waivers under ORS 197.352 became void or legally
4 ineffective upon her death, and no longer were a basis for the county to approve the
5 subdivision application. Accordingly, reversal rather than remand is the appropriate
6 disposition.

7 The county's decision is reversed.