

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3 FRIENDS OF YAMHILL COUNTY,

4 *Petitioner,*

5 vs.

6 YAMHILL COUNTY,

7 *Respondent,*

8 and

9 CHARLES McCLURE and ELLEN McCLURE,

10 *Intervenors-Respondents.*

11 LUBA No. 2008-060

12 FINAL OPINION

13 AND ORDER

14 Appeal from Yamhill County.

15 Charles Swindells, Portland, represented petitioners.

16 Fredric Sanai, Assistant County Counsel, McMinnville, represented respondent.

17 Steven W. Abel and Sarah S. Curtiss, Portland, represented intervenors-respondents.

18 HOLSTUN, Board Member; RYAN, Board Chair; BASSHAM, Board Member,
19 participated in the decision.

20 TRANSFERRED

21 07/02/2008

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

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NATURE OF THE DECISION

Petitioner appeals a county vested rights determination that intervenors-respondents are entitled to a 36-lot subdivision.

MOTION TO INTERVENE

Charles McClure and Ellen McClure (intervenors), the applicants below, move to intervene on the side of respondent in this appeal. There is no opposition to the motion, and it is granted.

FACTS

Intervenors obtained state and county Measure 37 waivers to develop a 36-lot subdivision on resource land in Yamhill County.¹ In 2007, the voters approved Measure 49, which in general requires those with Measure 37 waivers to choose among certain development options and eliminates the development options authorized by the Measure 37 waivers.² Although most development allowed pursuant to a Measure 37 waiver is no longer authorized, Measure 49 provides that development under Measure 37 waivers that has proceeded far enough to establish a common law vested right may be completed. Oregon Laws 2007 chapter 424, section 5(3). Yamhill County adopted an ordinance establishing a procedure for determining whether development under Measure 37 waivers has proceeded far enough to achieve a common law vested right. Under that ordinance, an independent vesting officer (hearings officer) makes the final decision and appeal is to the Yamhill County Circuit Court. The hearings officer determined that intervenors had established a common law vested right to complete their 36-lot subdivision. This appeal followed.

¹ Measure 37 was codified at former ORS 197.352 (2005).
² Measure 49 is codified at ORS 195.300 to 195.336. *See also* chapter 424, Oregon Laws 2007.

1 **MOTION TO DISMISS**

2 The county determined that intervenors have a vested right to complete the
3 development authorized in their Measure 37 waivers. A common law vested right is the right
4 to complete and continue a use that is rendered unlawful by subsequently enacted legislation;
5 in this appeal the passage of Measure 49. Generally, a local government’s determination that
6 a landowner has a common law vested right is a land use decision over which LUBA has
7 jurisdiction. *Forman v. Clatsop County*, 297 Or 129, 681 P2d 786 (1984). Measure 49,
8 however, contains specific provisions which call into question whether LUBA has
9 jurisdiction over such common law vested rights determinations made in response to
10 Measure 49. The county and intervenors (respondents) argue that LUBA does not have
11 jurisdiction over such determinations and that this appeal should be dismissed.

12 We begin with the codification of Measure 49 at ORS 195.300 to 195.336, and ORS
13 195.305(7) in particular, which provides:

14 “A decision by a public entity that an owner qualifies for just compensation
15 under ORS 195.305 to 195.336 and sections 5 to 11, chapter 424, Oregon
16 Laws 2007, and a decision by a public entity on the nature and extent of that
17 compensation are not land use decisions.”³

18 ORS 195.318(1), under the caption of judicial review, also provides:

19 “A person that is adversely affected by a final determination of a public entity
20 under ORS 195.310 to 195.314 or sections 5 to 11, chapter 424, Oregon Laws
21 2007, may obtain judicial review of that determination under ORS 34.010 to
22 34.100, if the determination is made by Metro, a city or a county, or under
23 ORS 183.484, if the determination is one of a state agency. Proceedings for
24 review of a state agency determination under ORS 195.310 to 195.314 or
25 sections 5 to 11, chapter 424, Oregon Laws 2007, must be commenced in the
26 county in which the affected property is located. Upon motion of any party to
27 the proceedings, the proceedings may be transferred to any other county with
28 jurisdiction under ORS 183.484 in the manner provided by law for change of

³ ORS 195.300(13)(a) defines “just compensation” as:

“Relief under sections 5 to 11, chapter 424, Oregon Laws 2007, for land use regulations enacted on or before January 1, 2007[.]”

1 venue. *A determination by a public entity under ORS 195.310 to 195.314 or*
2 *sections 5 to 11, chapter 424, Oregon Laws 2007, is not a land use decision.*”
3 (Emphasis added.)

4 As ORS 195.305(7) and ORS 195.318(1) make clear, determinations made “under
5 * * * sections 5 to 11, chapter 424, Oregon Laws 2007” (hereafter sections 5 to 11) are not
6 land use decisions and therefore LUBA does not have jurisdiction to review such
7 determinations. The language “sections 5 to 11” refers to the temporary provisions of
8 Measure 49 relating to previously filed Measure 37 claims. Section 5 provides:

9 “A claimant that filed a claim under ORS 197.352 [renumbered 195.305] on
10 or before the date of adjournment sine die of the 2007 regular session of the
11 Seventy-fourth Legislative Assembly [June 28, 2007] is entitled to just
12 compensation as provided in:

13 “(1) Section 6 or 7 of this 2007 Act, at the claimant’s election, if the
14 property described in the claim is located entirely outside any urban
15 growth boundary and entirely outside the boundaries of any city;

16 “(2) Section 9 of this 2007 Act if the property described in the claim is
17 located, in whole or in part, within an urban growth boundary; or

18 “(3) *A waiver issued before the effective date of this 2007 Act [December*
19 *6, 2007] to the extent that the claimant’s use of the property complies*
20 *with the waiver and the claimant has a common law vested right on*
21 *the effective date of this 2007 Act to complete and continue the use*
22 *described in the waiver.*” (Emphasis added.)

23 Respondents argue that the county’s vested rights determination, which was made
24 pursuant to county ordinances specifically adopted to implement the quoted provisions of
25 Measure 49, is a determination made “under * * * sections 5 to 11” of Measure 49 and is
26 therefore not a land use decision subject to our jurisdiction. According to respondents, the
27 determination that intervenors have a common law vested right to continue with the
28 development authorized by their Measure 37 waiver is a determination made “under * * *
29 sections 5 to 11” – section 5(3) in particular.

30 The question therefore is whether the county’s vested rights determination is a
31 determination made “under” section 5(3) of Measure 49. According to respondents, section

1 5 directs holders of Measure 37 waivers to obtain just compensation under Measure 49 in
2 one of three ways: 1) under section 6 or 7 for properties outside of urban growth boundaries
3 (UGBs); 2) under section 9 for properties inside UGBs; and 3) under a Measure 37 waiver
4 for properties where the owner has a common law vested right to continue and complete
5 development under that waiver. Under respondents' view, a common law vested right is just
6 compensation under subsection (3) of section 5 of Measure 49. Therefore, such a vested
7 right is relief "under" section 5 and is therefore not a land use decision subject to LUBA's
8 jurisdiction.

9 Petitioner's view is more complicated. According to petitioner, section 5 lists three
10 potential ways to obtain just compensation. Petitioner argues that section 5, subsections (1)
11 and (2) both direct property owners to other parts of Measure 49 to obtain just compensation:
12 sections 6 or 7 for properties outside UGBs or section 9 for properties inside UGBs. Under
13 petitioner's view, the just compensation is thus not obtained "under section 5" but "under"
14 sections 6, 7, or 9. According to petitioner, the language in section 5 subsection (3) provides
15 that just compensation is available under a "common law vested right" theory. We
16 understand petitioner to take the position that such relief is not provided "under" section 5 -
17 it is instead provided "under" the vested right itself. Therefore, according to petitioner,
18 vested rights determinations are not just compensation provided "under" section 5 of
19 Measure 49.

20 Determining whether common law vested rights are just compensation provided
21 "under sections 5 to 11" of Measure 49 is a question of statutory construction, which we
22 resolve by application of the principles set out in *PGE v. Bureau of Labor and Industries*,
23 317 Or 606, 859 P2d 1143 (1993). We must attempt to determine the meaning of the statutes
24 enacted by the legislature or initiatives enacted by the people in the exercise of their initiative
25 powers. *Id.* at 610. We first examine the statutory text in context and, if necessary,
26 legislative history and canons of statutory construction. *Id.* at 610-12. In examining the text,

1 we are constrained “not to insert what has been omitted, or to omit what has been inserted.”
2 ORS 174.010.

3 We believe the text of ORS 195.305(7) and Measure 49 demonstrates that a local
4 government vested rights determination that development authorized by a Measure 37 waiver
5 may or may not continue is not a land use decision subject to our jurisdiction. Section 5
6 provides the three bases for obtaining just compensation for previously filed Measure 37
7 claims. While subsection (3) does not refer to other provisions of sections 5 to 11, as
8 subsections (1) and (2) do, it is reasonably clear that just compensation under a vested rights
9 theory is just compensation granted “under” section 5(3). Such just compensation does not
10 need to be provided by multiple provisions of sections 5 to 11; it need only be provided
11 under sections 5 to 11, and it is provided under section 5. Petitioner’s subtle parsing of the
12 word “under” is not persuasive.⁴ The most straightforward reading of the text of ORS
13 195.305(7), 195.318(1), and sections 5 to 11 is that vested rights determinations are not land
14 use decision subject to LUBA’s jurisdiction.

15 Petitioner also argues that the context of section 11 demonstrates that the phrase
16 “under sections 5 to 11” must not apply to vested rights determinations. Petitioner identifies
17 sections 11(1) and 11(5), which include restrictions on development authorized “under
18 sections 5 to 11” that petitioner argues would not apply to a Measure 37 vested rights
19 development.⁵ According to petitioner, because these provisions similarly apply to

⁴ We understand that petitioner appealed the challenged decision to LUBA in an abundance of caution, and given the complexity surrounding Measure 37 and Measure 49, we cannot fault petitioner for such caution.

⁵ 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 development authorized “under * * * sections 5 to 11” and were not intended to apply to
2 vested rights developments under Measure 37 waivers, that must also mean that vested rights
3 determinations are not authorized “under sections 5 to 11” within the meaning of ORS
4 195.305(7) and 195.318(1). As we explained earlier, we believe the most straightforward
5 reading of the text of ORS 195.305(7) and 195.318(1) is that just compensation under a
6 vested rights theory is provided “under * * * section 5” and therefore is not a land use
7 decision subject to our jurisdiction. Even if petitioner is correct that sections 11(1), (3), and
8 (5) in particular would not apply to such vested rights developments, an issue we specifically
9 do not address in this opinion, whatever contextual support that might lend to petitioner’s
10 theory that ORS 195.305(7) and 195.318(1) do not deprive LUBA of jurisdiction over such
11 decisions is insufficient to overcome the text of those statutes. LUBA does not have
12 jurisdiction to hear this appeal.

Section 11(5) provides:

“An owner is not eligible for more than 20 home site approvals under sections 5 to 11 of this 2007 Act, regardless of how many properties that person owns or how many claims that person has filed.”

Although not cited by petitioner, section 11(3) also falls in this category and provides:

- “a) A city or county may approve the creation of a lot or parcel to contain a dwelling authorized under sections 5 to 11 of this 2007 Act. However, a new lot or parcel located in an exclusive farm use zone, a forest zone or a mixed farm and forest zone may not exceed:
 - “(A) Two acres if the lot or parcel is located on high-value farmland, on high-value forestland or on land within a ground water restricted area; or
 - “(B) Five acres if the lot or parcel is not located on high-value farmland, on high-value forestland or on land within a ground water restricted area.
- “(b) If the property is in an exclusive farm use zone, a forest zone or a mixed farm and forest zone, the new lots or parcels created must be clustered so as to maximize suitability of the remnant lot or parcel for farm or forest use.”

1 Petitioner filed a conditional motion to transfer the appeal to Yamhill County Circuit
2 Court in the event LUBA determines that it does not have jurisdiction over the appeal. OAR
3 661-010-0075(11). Therefore, this appeal is transferred.