BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

PETE'S MOUNTAIN HOMEOWNERS ASSOCIATION,
JERRY L. SCHLESSER, and JUDITH LEE MESSNER,
Petitioners,

vs.

CLACKAMAS COUNTY,
Respondent,

and

DONALD BOWERMAN,
W. LEIGH CAMPBELL and CEILLE CAMPBELL,
Intervenors-Respondents.

LUBA No. 2008-065

FINAL OPINION
AND ORDER

Appeal from Clackamas County.

Jeffrey L. Kleinman and Peter D. Mohr, Portland, filed the petition for review and argued on behalf of petitioners.

No appearance by Clackamas County.

Daniel Kearns, Portland, Martha Pagel, Salem, filed the response brief and argued on behalf of intervenors-respondents. With them on the brief were Reeve Kearns, PC and Schwabe Williamson & Wyatt.

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

REVERSED 09/25/2008

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

Opinion by Holstun.

NATURE OF THE DECISION

Petitioners appeal a county hearings officer's decision that grants approval for a 41-lot subdivision in an Agriculture/Forest zone, which implements Statewide Planning Goal 3 (Agricultural Lands) and Goal 4 (Forest Lands), pursuant to Ballot Measure 37 (2004) (hereafter Measure 37) waivers.

MOTION TO INTERVENE

Donald Bowerman, W. Leigh Campbell and Ceille Campbell (intervenors), the applicants below, move to intervene on the side of the respondent in this appeal. There is no opposition to the motion and it is granted.

REPLY BRIEF

Petitioners move for permission to file a reply brief to respond to a new issue raised in the intervenors' response brief. OAR 661-010-0039. The motion is granted.

FACTS

The subdivision that is the subject of this appeal, Tumwater at Pete's Mountain (hereafter Tumwater), was first approved by the county in 2007. As noted above, the disputed subdivision is located in a zone that was adopted to protect agricultural and forest lands. Without Measure 37, Tumwater could not have been approved under the land use laws that were in effect when Tumwater was first approved by the county in 2007. As we explain in more detail below, in 2004 Oregon voters approved Measure 37. Measure 37 allowed certain property owners to seek monetary compensation for the reduction in property value attributable to land use laws that were enacted after they became owners of their property. As an alternative to paying compensation for regulatory reductions in property value, Measure 37 gave local governments the alternative of granting waivers of those

subsequently enacted land use laws.[1] In almost all cases when local governments were faced with Measure 37 claims, they granted waivers rather than pay monetary compensation. Measure 37 was codified at ORS 197.352 (2005). Intervenors sought and were given Measure 37 waivers from the state and county. The legal effect of those waivers was to waive some of the land use laws that were enacted after intervenors became owners of the subject property, including land use laws that would have prohibited the proposed 41-lot residential subdivision.

Based on intervenors' Measure 37 waivers, the county hearings officer applied all remaining applicable land use laws and approved Tumwater. That decision was appealed to LUBA. We remanded the hearings officer's first decision. *Pete's Mountain Homeowners Association v. Clackamas County*, 55 Or LUBA ___ (LUBA No. 2007-124, November 15, 2007). Less than a month after we remanded the hearings officer's decision, Ballot Measure 49 (2007) (hereafter Measure 49) took effect on December 6, 2007. Measure 49 largely replaced the remedies that were available under Measure 37 with a different set of remedies.[2] We discuss those remedies in more detail below.

Following our remand in *Pete's Mountain*, the county hearings officer held an additional hearing and on April 15, 2008 approved Tumwater for a second time. This appeal followed. Intervenors set out a chronology in their brief that sets out the important events in this matter. That chronology is set out in edited form below:

2004 Oregon Voters approve Measure 37

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[1] ORS 197.352(8) (2005) provided in part:

> "[I]n lieu of payment of compensation under this section, the governing body responsible for enacting the land use regulation may modify, remove or not * * * apply the land use regulation or land use regulations to allow the owner to use the property for a use permitted at the time the owner acquired the property."

[2] The text of Measure 49 is found at Oregon Laws 2007, chapter 424. Measure 37 (ORS 197.352) was amended and renumbered as ORS 195.305. Oregon Laws 2007, chapter 424, section 4.

May 18, 2005	Clackamas County Board of Commissioners approved Measure 37 Waivers for Tumwater
March 28, 2006	State of Oregon approves Measure 37 Waivers for Tumwater
January 19, 2007	Intervenors Submit Subdivision Application for Tumwater
January 19, 2007	The County Declares the Tumwater Subdivision Application Complete
June 18, 2007	County Hearings Officer Approves Tumwater for the First Time
November 15, 2007	LUBA Remands the First Tumwater Decision.
December 6, 2007	Measure 49 Takes Effect
February 21, 2008	County Hearings Officer Holds Hearing on Tumwater
April 15, 2008	County Hearings Officer Approves Tumwater for a Second Time
May 2, 2008	Petitioners Appeal the Second Tumwater Decision to LUBA

FIRST ASSIGNMENT OF ERROR

In their first assignment of error, petitioners assert that after Measure 49 took effect, "the subdivision application and * * * proceeding [became] moot and lacking in justiciability, and respondent no longer had jurisdiction to proceed, or to make a decision approving the application." Petition for Review 4. In the alternative, petitioners argue that the county should have denied the application. For the reasons that follow, we do not agree that the disputed subdivision application proceeding was rendered moot by Measure 49, but we do agree that pursuant to Measure 49 the county was required to deny the application.

Most of the appellate court cases that are cited and discussed by the parties concern appeals of Measure 37 waivers themselves, not appeals of land use permits that were approved pursuant to Measure 37 waivers. Notwithstanding that difference, those cases establish important principles regarding the interaction of Ballot Measures 37 and 49. We

discuss two of those decisions before considering intervenors' argument that notwithstanding Measure 49, the county was legally required to continue to process their subdivision application and render a decision on that application, without applying the land use laws that were waived by the Measure 37 waivers.

A. *Frank* and *Corey*

In *Frank v. Department of Land Conservation and Development*, 217 Or App 498, 502-05, 176 P3d 411 (2008) the Court of Appeals established that Measure 49 repealed and replaced the remedies that could be and had been granted under Measure 37 with a different set of remedies. In *Frank*, the Measure 37 claimant appealed the state's Measure 37 waiver, arguing that it should have been broader. We set out the relevant text of the Court of Appeals' *Frank* decision below:

> "The viability of petitioner's claim is affected by amendments to ORS 197.352 [Measure 37] enacted by the voters after the issuance of the order under review. * * * Measure 49 was enacted by popular vote and became effective on December 6, 2007. Or Laws 2007, ch 424. Measure 49 modifies ORS 197.352 by narrowing the circumstances that trigger its remedies and limiting the scope of those remedies.
>
> "In some circumstances, Measure 49 requires refiling and a new adjudication of a previously filed Measure 37 claim. Section 5 of the measure provides:
>
> > "'A claimant that filed a claim under ORS 197.352 on or before the date of adjournment sine die of the 2007 regular session of the Seventy-fourth Legislative Assembly is entitled to just compensation as provided in:
> >
> > "'(1) Section 6 or 7 of this 2007 Act, at the claimant's election, if the property described in the claim is located entirely outside any urban growth boundary and entirely outside the boundary of any city;
> >
> > "'(2) Section 9 of this 2007 Act if the property described in the claim is located, in whole or in part, within an urban growth boundary; or
> >
> > "'(3) A waiver issued before the effective date of this 2007 Act to the extent that the claimant's use of property complies with the waiver and the claimant has a

> common law vested right on the effective date of this 2007 Act to continue the use described in the waiver.
>
> "Because petitioner's property is outside an incorporated city and any urban growth boundary, and her ORS 197.352 claim was filed in 2006, petitioner may need to seek relief under sections 6 or 7 of Measure 49 if she wishes to further pursue a claim under ORS 197.352. Section 6 allows the creation of one, two, or three home sites on property that was the subject of a claim under ORS 197.352 if particular criteria are met. Section 7 allows four to 10 home sites for a previously filed claim under ORS 197.352 under even more particular circumstances. * * *
>
> "* * * * *
>
> "*With the exception of any vested rights to develop uses allowed by the agencies' order, an issue not affected by this review proceeding*, Measure 49 requires petitioner to refile under sections 6 or 7 of the Act in order to develop her rural property inconsistently with the current zoning. There is no reason for this court to issue an opinion on whether DAS and DLCD correctly applied ORS 197.352 to petitioner when that statute has changed, other laws control petitioner's development rights, and those laws require a new application and administrative order." 217 Or App at 502-05 (emphasis added).

Although the legal issue in *Frank* was whether the *Frank* petitioner's challenge to the scope of the state's Measure 37 waiver was moot, in concluding that the appeal was moot the Court of Appeals explained that any rights that the petitioner may have had under Measure 37 were replaced by the Measure 49 remedies. After the passage of Measure 49, the rural property owner in *Frank* could proceed (1) under Section 6 of Measure 49 and seek approval of up to three dwellings, (2) under Section 7 of Measure 49 and seek approval of up to ten dwellings, or (3) under Section 5(3) of Measure 49 and seek to demonstrate that the claimant had "a common law vested right on [December 6, 2007] to continue the use described in the [Measure 37] waiver." Stated differently, the *Frank* petitioner's Measure 37 waiver only had potential continuing legal significance in a decision under Section 5(3) of Measure 49 regarding whether *Frank* had a "common law vested right on [December 6, 2007] to complete and continue the use described in the waiver." The *Frank* petitioner asserted no

such common law vested right claim, and intervenors assert no such common law vested right claim in this appeal.

The Court of Appeals' view of the legal effect of Measure 49 on the Measure 37 claimant in *Frank* was adopted by the Oregon Supreme Court in *Corey v. DLCD*, 344 Or 457, 184 P3d 1109 (2008). That appeal also was an appeal by a Measure 37 claimant who contended on appeal that the state's Measure 37 waiver should have been more extensive.

> "We already have summarized DLCD's position-that Measure 49 has rendered the waiver order at the center of the jurisdictional dispute wholly ineffective and, thus, any further judicial consideration of the order, including the question of the proper forum for review, is inherently meaningless. As we shall explain, we generally agree with DLCD's analysis.
>
> "An examination of the text and context of Measure 49 conveys a clear intent to extinguish and replace the benefits and procedures that Measure 37 granted to landowners. As noted, section 5 of Measure 49, set out above, provides that claimants who filed 'claim[s]' under ORS 197.352 before Measure 49 became effective (*i.e.*, Measure 37 claimants), are entitled to 'just compensation' as provided in designated provisions of Measure 49. Subsection 2(2) of Measure 49 defines 'claim' to include any 'written demand for compensation filed under * * * ORS 197.352,' including those filed under the version of the statute that was 'in effect immediately before the effective date of [Measure 49].' That definition establishes that Measure 49 pertains to all Measure 37 claims, successful or not, and regardless of where they are in the Measure 37 process. Subsection 2(13) then defines 'just compensation' purely in terms of Measure 49 remedies, *i.e.*, '[r]elief under sections 5 to 11 of this 2007 Act for land use regulations enacted on or before January 1, 2007,' and '[r]elief under sections 12 to 14 of this 2007 Act for land use regulations enacted after January 1, 2007.' At the same time, section 4 of Measure 49 extensively amends ORS 197.352 (2005) (Measure 37) in a way that wholly supersedes the provisions of Measure 37 pertaining to monetary compensation for and waivers from the burdens of certain land use regulations under that earlier measure.
>
> "A statement of legislative policy at section 3 of Measure 49 confirms that the legislature intended to create new forms of relief in place of the ones available under Measure 37: 'The purpose of sections 4 to 22 of this 2007 Act and the amendments to Ballot Measure 37 (2004) *is to modify Ballot Measure 37 (2004)* to ensure that Oregon law provides *just compensation for unfair burdens while retaining Oregon's protections for farm and forest uses and the state's water resources.*' * * *
>
> "* * * * *

> "In the end, we hold only that plaintiffs' contention that Measure 49 does not affect the rights of persons who already have obtained Measure 37 waivers is incorrect. In fact, Measure 49 by its terms deprives Measure 37 waivers-and all orders disposing of Measure 37 claims-of any continuing viability, with a single exception that does not apply to plaintiffs' claim. Thus, after December 6, 2007 (the effective date of Measure 49), the final order at issue in the present case had no legal effect. * * *" 344 Or at 465-67 (italics in original, underline emphases added).

The "single exception" referenced in the second underlined portion of the Supreme Court's decision in *Corey* is the Measure 49 Section 5(3) option to demonstrate that under a Measure 37 waiver that was issued before June 28, 2007, the claimant has a "a common law vested right on [December 6, 2007] to complete and continue the use described in the [Measure 37] waiver." Like the Court of Appeals, the Supreme Court concluded that Measure 37 waivers retain this limited function, but otherwise Measure 37 waivers are of "no legal effect."

B. Intervenors' Arguments

Intervenors filed an action in Clackamas County Circuit Court to demonstrate that they have a common law vested right to continue the use authorized by their state and county Measure 37 waivers. The Clackamas County Circuit Court entered an order in which it ruled against intervenors on June 10, 2008, and a judgment was entered sometime after that date. Intervenors have appealed the judgment in that common law vested rights case to the Court of Appeals. As far as the parties have informed LUBA, that appeal remains pending before the Court of Appeals. Given the Courts' reasoning in *Frank* and *Corey*, the final resolution of that pending vested rights appeal would seem to exhaust any continuing legal significance that intervenors' Measure 37 waivers may retain. The hearings officer's April 15, 2008 decision to approve Tumwater for a second time, which relied on intervenors' Measure 37 waivers, would appear to be inconsistent with the Court of Appeals' and Supreme Court's reasoning in *Frank* and *Corey*.

Intervenors argue that notwithstanding the reasoning in *Frank* and *Corey*, the county was legally required to consider its application for subdivision approval following LUBA's remand in *Pete's Mountain* and approve that application if, after eliminating any land use standards that were waived by intervenors' Measure 37 waivers, Tumwater satisfies any remaining land use standards. We understand intervenors to argue that while their Measure 37 waivers may have ceased to have legal effect after December 6, 2007 under the reasoning in *Frank* and *Corey*, on January 19, 2007, when their application for subdivision approval was deemed complete by the county, their Measure 37 waivers had legal effect. Intervenors argue that the legal effect of their Measure 37 waivers on January 19, 2007 was to render all waived land use regulations inapplicable to their subdivision application. We understand intervenors to argue that under ORS 215.427, known as the "fixed goal-post statute," the land use regulations in effect on January 19, 2007, excepting those land use regulations waived by their Measure 37 waivers, became the relevant approval criteria for their subdivision application (the fixed goal-post). According to intervenors, the voters' later approval of Measure 49, which rendered their Measure 37 waivers "of no legal effect," does not change the fixed goal-post that was established under ORS 215.427 on January 19, 2007, when the application for approval of Tumwater was deemed complete.

C. The Fixed Goal-Post Statute

With some exceptions that do not apply here, ORS 215.427 applies to permits, limited land use decisions and zone changes. For purposes of this opinion, we assume intervenors' January 19, 2007 application for subdivision approval is a "permit." ORS 215.402(4).[3] ORS 215.427(3)(a) is set out below:

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[3] As defined by ORS 215.402(4):

> "'Permit' means discretionary approval of a proposed development of land under ORS 215.010 to 215.311, 215.317, 215.327 and 215.402 to 215.438 and 215.700 to 215.780 or county legislation or regulation adopted thereto. * * *"

> "If the application was complete when first submitted * * * and the county has a comprehensive plan and land use regulations acknowledged under ORS 197.251, approval or denial of the application *shall be based upon the standards and criteria that were applicable at the time the application was first submitted*." (Emphasis added.)

We understand intervenors to argue that their Measure 37 waivers, considered in concert with ORS 215.427(3)(a), had the legal effect of rendering the land use regulations that were the subject of those Measure 37 waivers *inapplicable* to their subdivision application. Therefore, intervenors argue, under ORS 215.427(3)(a), "the standards and criteria that were applicable at the time the application was first submitted" did not include the land use standards that were waived by the state on March 28, 2006 and by the county on May 18, 2005. According to intervenors, Measure 49, which did not take effect until long *after* their application was first submitted and deemed complete on January 19, 2007, could not make those previously waived land use standards applicable to their subdivision application because ORS 215.427(3)(a) prohibits application of standards that were not "applicable at the time the application was first submitted." *East Lancaster Neighborhood Assoc. v. City of Salem*, 139 Or App 333, 337-38, 911 P2d 1283 (1996); *Davenport v. City of Tigard*, 121 Or App 135, 141, 854 P2d 483 (1993). The hearings officer agreed with intervenors below. Petitioners dispute intervenors' understanding of how the fixed goal-post statute applies in this case and assign error to the hearings officer's failures to (1) apply the land use laws that were waived by the state and county Measure 37 waivers and (2) deny the subdivision application because it is precluded by those land use laws.

Intervenors' understanding of the relationship between (1) the ORS 215.427(3)(a) fixed goal-post statute, (2) Measure 37 waivers, (3) completed permit applications that post-date those waivers and predate Measure 49 and (4) Measure 49 itself is, in our view, a plausible reading of those statutes, particularly in view of the reasoning set forth in *Davenport v. City of Tigard*, 121 Or App 141. However, for the reasons explained below, it is clear to us that the Court of Appeals does not share that understanding. Simply stated,

under the Court of Appeals' view of the relationship between Measure 37 waivers and the fixed goal-post statute, Measure 37 waivers are not part of the "standards and criteria that were applicable at the time the application was first submitted." ORS 215.427(3)(a).

D. Burk

In *DLCD v. Jefferson County*, ___ Or LUBA ___ (LUBA No. 2007-177, January 24, 2008), *aff'd* 220 Or App 518, 188 P3d 313 (2008) (*Burk*), LUBA reversed a county decision that approved an application for subdivision approval.[4] The *Burk* subdivision application, like the one that is before us in this appeal, relied on Measure 37 waivers and could not have been approved if the waived land use laws applied. Burk submitted a complete subdivision application after he was granted Measure 37 waivers, but Burk died before the county approved the disputed subdivision. There was no dispute in *Burk* that the Measure 37 waivers were personal to Burk and that they expired when Burk died. However, Burk's personal representative took the position before LUBA that the fixed goal-post statute had the legal effect of freezing the subdivision approval criteria so that they included only those criteria that were applicable to Burk at the time his subdivision application was submitted, and those approval criteria did not include those land use laws that were waived by Burk's Measure 37 waivers.

In our decision in *Burk*, we rejected the personal representative's argument. Citing *Holland v. City of Cannon Beach*, 154 Or App 450, 459, 962 P2d 701 (1998) and *Davenport v. City of Tigard*, we first agreed with the personal representative that the Measure 37 waivers were properly viewed as part of the "standards and criteria," that ORS 215.427(3)(a) requires to remain fixed after a complete permit application is submitted. The right to fixed goal-post under ORS 215.427(3)(a) is not limited to the initial applicant, and as the applicant's successor Burke's personal representative would also be entitled to the benefit of

[4] We refer to that case by the shorthand reference "*Burk*," because Burk was the Measure 37 claimant in that appeal.

the fixed goal-post under ORS 215.427(3)(a). However, we also found that in enacting Measure 37 the voters intended to limit the rights granted under Measure 37 to the Measure 37 claimant and did not intend the rights granted under Measure 37 to pass to a deceased claimant's successor. We concluded that in circumstances where Measure 37 and the fixed goal-post statute operate together, and the Measure 37 claimant dies before final action is taken on a permit application, those statutes came into conflict. Again, that conflict arises because under ORS 215.427(3)(a) the Measure 37 claimant's personal representative would be entitled to the benefit of the Measure 37 waiver, whereas under Measure 37 the waivers are personal to the Measure 37 claimant. We ultimately concluded that because ORS 215.427(3)(a) and Measure 37 were in conflict in that regard, Measure 37 controls because it is the "more specific and later-adopted statute * * *." *Burk*, slip op 15. We concluded that because Measure 37 controls in that circumstance, Burk's personal representative was not entitled to the benefit of the Measure 37 waivers.

Although the Court of Appeals affirmed our decision in *Burk*, it did not adopt our reasoning. We understand the Court of Appeals to have rejected the personal representative's argument and LUBA's conclusion that the Measure 37 waivers could be part of "the standards and criteria that were applicable at the time the application was first submitted," within the meaning of ORS 215.427(3)(a). We set out relevant part of the Court of Appeals' reasoning below:

> "In this case, once Burk completed his application, no new state or local land use legislation was enacted-at least none that anyone seeks to have applied to the application. What occurred was a change in the underlying facts pertaining to the application, facts that caused *existing* law to have a different effect. When Burk filed the initial application, he-as the owner who 'acquired the property'-possessed Measure 37 waivers of land use regulations that otherwise would have restricted the use of his property. His death while the application was pending altered the factual underpinning of the application in a significant way. At that point, the applicant was no longer Burk, but petitioner [Burk's personal representative]. And petitioner-who was not the owner who 'acquired the property'-did not possess Measure 37 waivers. That fact caused existing laws to operate differently than they would have had Burk

> remained the applicant. ORS 215.427(3)(a) did not apply to prevent the operation of those existing laws on *petitioner's* development application.
>
> "Petitioner insists that, once Burk completed the development application, Burk's Measure 37 waivers, in effect, 'vested.' Once that vesting occurred, he argues, the waivers became transferrable and inheritable like any other vested property right. Petitioner cites nothing in the wording of ORS 215.427(3)(a) in support of that contention, however. Nor does he cite any case law in support of it. Nor does he cite any provision of the Jefferson County Zoning Ordinance that might support it. He does cite a comment in a state bar continuing legal education handbook that states that, once a property owner completes a development application, that applicant has 'a form of vested right' by virtue of the application, 'assuming, of course, the standards in effect at the time of application can be met.' *Land Use* § 12.22 (OSB CLE 1994). The problem with petitioner's reliance on that comment is that it amounts to question-begging, in that it relies on a premise that is the very matter in contention, namely that Burk's Measure 37 waivers were part of the standards of approval or denial in the first place." 220 Or App at 524-25 (italics in original; underline emphasis added).

We understand the Court of Appeals to have concluded that Measure 37 waivers are not part of the standards for approval or denial that become fixed under the ORS 215.427(3)(a) fixed goal-post statute. To the contrary, under ORS 215.427(3)(a), Measure 37 waivers allow a subdivision application to be approved *notwithstanding that it may not comply with* all "the standards and criteria that were applicable at the time the application was not submitted." Stated differently, Measure 37 waivers authorize a partial *avoidance of* or *alternative to* the fixed goal-post for some property owners; Measure 37 waivers are not *part of* the fixed goal-post. The intervenors in this case are not seeking subdivision approval based solely on the "standards that were applicable" on January 19, 2007, because the standards that the county was bound to apply under ORS 215.427(3)(a) would not allow approval of the subdivision.[5]

[5] In a sense, intervenors in this case are attempting to rely in part on their Measure 37 waivers to secure approval of Tumwater based in part on standards that *were no longer applicable* on January 19, 2007. As we noted earlier, intervenors' Measure 37 waivers allowed them to use their property for a "use permitted at the time the owner acquired the property," *see* n 1. Some of the uses that were permitted at the time intervenors acquired the subject property, including residential subdivision development, were no longer allowed under the land use laws that prevailed on January 19, 2007.

Because the Court of Appeals has concluded that Measure 37 waivers are not part of the approval standards that become fixed under ORS 215.427(3)(a), it follows that ORS 215.427(3)(a) did not preclude Measure 49's revision of the remedies available under Measure 37. Intervenors' remedies under Measure 49 do not include a 41-lot subdivision, unless intervenors are ultimately successful in their appeal of the circuit court's judgment and are able to obtain a judicial determination that they have a common law vested right to complete a 41-lot subdivision under Measure 49 (Oregon Laws chapter 2007, chapter 424, section 5(3)). We assume the fact that (1) intervenors' January 19, 2007 subdivision application was approved by the county on June 18, 2007, (2) that decision was appealed to LUBA, and (3) LUBA remanded that June 18, 2007 decision on November 15, 2007 may have played a role in the circuit court's vested rights decision.[6] But whatever the outcome of that appeal and any subsequent common law vested rights proceedings, intervenors do not have a separate right under ORS 215.427(3)(a) to have their January 19, 2007 application for preliminary subdivision approval reviewed as though the land use laws that were rendered inapplicable to the subject property by their Measure 37 waivers remained inapplicable after

[6] *Holmes v. Clackamas County*, 265 Or 193, 197-99, 508 P2d 190 (1973) sets out the following tests for determining whether a property owner has made substantial expenditures that give rise to a common law vested right to continue development notwithstanding a change in applicable law:

> "Some courts have attempted to define substantial expenditures on the basis of the ratio of expenses incurred to the total cost of the project. * * *
>
> "* * * * *
>
> "The test of whether a landowner has developed his land to the extent that he has acquired a vested right to continue the development should not be based solely on the ratio of expenditures incurred to the total cost of the project. We believe the ratio test should be only one of the factors to be considered. Other factors which should be taken into consideration are the good faith of the landowner, whether or not he had notice of any proposed zoning or amendatory zoning before starting his improvements, the type of expenditures, *i.e.*, whether the expenditures have any relation to the completed project or could apply to various other uses of the land, the kind of project, the location and ultimate cost. Also, the acts of the landowner should rise beyond mere contemplated use or preparation, such as leveling of land, boring test holes, or preliminary negotiations with contractors or architects. * * *" (Citations omitted.)

Measure 49 took effect on December 6, 2007. After December 6, 2007, those previously waived land use regulations were no longer waived and therefore applied to the disputed application for preliminary subdivision approval, subject only to the remedies authorized by Measure 49.

Finally, we recognize that *Burk* and this appeal do not present the same legal question. In *Burk* the question was what effect, if any, the fixed goal-post statute has when a Measure 37 claimant dies after submitting a complete subdivision application. The question in this appeal is what effect, if any, the fixed goal-post statute has on a subdivision application that relies on Measure 37 waivers, if final action had not been taken on that application on December 6, 2007, when Measure 49 took effect. However, in both instances someone was seeking to avoid the land use laws that were waived by the Measure 37 waiver, based not on the Measure 37 waiver itself, but based on the ORS 215.427(3)(a) fixed goal-post statute. In *Burk*, the personal representative was attempting to rely on the goal-post statute to avoid those land use laws notwithstanding that Measure 37 waivers are personal to the claimant and the Measure 37 claimant died before subdivision approval was given. In this appeal, intervenors are attempting to avoid the land use laws that were waived by intervenors' Measure 37 waivers notwithstanding that Measure 49 has rendered their Measure 37 waivers of no "legal effect." In both cases, protection under the goal-post statute from changes in applicable law is only available if the Measure 37 waivers are properly viewed as part of the "standards and criteria that were applicable at the time the application was first submitted." ORS 215.427(3)(a). The Court of Appeals concluded in *Burk* that they are not.

E. Due Process

Finally, citing the Court of Appeals' decision in *Corey v. DLCD*, 210 Or App 542, 152 P3d 933, *adh'd to on recons*, 212 Or App 536, 159 P3d 3327 (2007), *dismissed as moot* 344 Or 457, 184 P3d 1109 (2008), intervenors argue that if the legal effect of Measure 49 is

to deprive intervenors "of their Measure 37 waiver rights, that deprivation could not occur without a meaningful process that meets the procedural requirement[s] that are the legal predicate to the deprivation of a protected property right." Respondent's Brief 5.

In *Corey*, DLCD determined that petitioners had a valid Measure 37 claim. After making that determination, DLCD then determined that it would waive certain land use laws but ultimately determined that certain land use laws that petitioners sought to avoid remained applicable. Petitioners appealed that DLCD decision to the Court of Appeals and Marion County Circuit Court. The jurisdictional question on appeal was whether DLCD's determination regarding the scope of the waiver was a contested case. If that determination was a contested case, the Court of Appeals had jurisdiction to hear petitioners' appeal of that determination. If that determination was not a contested case, the circuit court had jurisdiction to hear petitioners' challenge.

As defined by ORS 183.310(2)(a), a "contested case" includes agency proceedings "[i]n which the individual legal rights, duties or privileges of specific parties are required by statute or Constitution to be determined only after an agency hearing at which such specific parties are entitled to appear and be heard[.]" After concluding that no statute requires notice and a hearing on Measure 37 claims and that the Oregon Constitution does not do so either, the Court of Appeals concluded that the relevant question "reduces to this: Does anything in the United States Constitution require DLCD to provide a Measure 37 claimant with notice and a hearing before DLCD decides not to waive certain land use regulations for the benefit of the claimant?" 210 Or App at 546. Relying on *Koskela v. Willamette Industries, Inc*., 331 Or 362, 15 P3d 548 (2000), the Court of Appeals concluded that when DLCD determined that petitioners had a valid Measure 37 claim, petitioners thereafter had a property right in the requested waivers that was protected by the Due Process Clause of the Fourteenth Amendment. The Court of Appeals concluded that DLCD's subsequent decision to grant

some but not all of the requested waivers deprived petitioners of a portion of that protected property right and was therefore a contested case.

Because *Corey* dealt with a state agency's denial of a protected property right, rather than a legislative grant of a property right followed by a legislative modification of that property right, *Corey* lends no support to petitioners in this appeal. Stated differently, the process that is required of a state agency under the Fourteenth Amendment to deprive a person of a legislatively granted property right has little or nothing to do with the process that the Fourteenth Amendment requires of a state legislative body to amend a property right once that legislative body creates that property right in the first place. Intervenors' contention that they are entitled to notice and a hearing before their Measure 37 waivers could be modified or extinguished by the legislature's referral and the voters' approval of Measure 49 is without merit.

> "A state has control over the offices it creates. A state legislature may 'at [its] pleasure create or abolish them, or modify their duties. It may also shorten or lengthen the term of service.' *Higginbothan v. City of Baton Rouge*, 306 U.S. 535, 538, 83 LEd 968, 59 SCt 705 (1939). The Nevada Supreme Court has held that Nevada's legislature may modify or abolish any state office. *Shamberger v. Ferrari*, 73 Nev 201, 314 P2d 384 (1957). When a state alters a state-conferred property right through the legislative process, 'the legislative determination provides all the process that is due. . .' *Logan[v. Zimmerman Brush Co.*, 455 U.S. [422, 433, 71 LEd 2d 265, 102 SCt 1148 (1981)]; accord *Gattis v. Gravett*, 806 F2d 778, 781 (8th Cir 1986) (holding that legislative alteration or elimination of previously conferred property interest does not violate due process). Thus, the legislative process is sufficient to comport with minimal federal due process requirements." *Rea v. Matteucci*, 121 F3d 483, 485 (9th Cir 1997).

The process followed by the legislature in referring the matter to the voters, the election and the process that is provided in Measure 49 itself is sufficient to provide the due process that was required by the Fourteenth Amendment to adopt Measure 49 to replace the remedies that were provided by Measure 37 with the remedies provided by Measure 49.

F. Conclusion

There is no dispute that the land use laws that were waived by intervenors' Measure 37 waiver do not allow the requested 41-lot subdivision. Because intervenors' Measure 37 waivers no longer have "legal effect," the disputed subdivision application was subject to those previously waived land use laws after December 6, 2007. The hearing officer erred by failing to apply those previously waived land use laws when she rendered her decision in this matter on April 15, 2008. If those previously waived land use laws are applied, intervenors' application must be denied.

The hearings officer's decision is reversed.[7]

[7] Our resolution of the first assignment of error makes it unnecessary to address petitioners' second assignment of error.