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

CHARLES M. FISCHER and LILLIAN M. FISCHER,
Petitioners,

vs.

BENTON COUNTY,
Respondent,

and

MARK LINDGREN, JOSEPHINE ALEXANDER,
JEFFREY PETERMAN and ELIZABETH PETERMAN,
Intervenors-Respondents.

LUBA No. 2008-115

FINAL OPINION
AND ORDER

Appeal from Benton County.

George B. Heilig, Corvallis, filed the petition for review and represented petitioners.
With him on the brief was Heilig Misfeldt & Armstrong, LLP.

Vance M. Croney, Corvallis, represented respondent.

Jannett Wilson, Eugene, Ralph O. Bloemers, Portland represented intervenors-respondents.

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

RYAN, Board Member, did not participate in the decision.

TRANSFERRED 11/20/2008

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

NATURE OF THE DECISION

Petitioners appeal a county decision that determines that petitioners do not have a vested right to establish six additional dwellings on their property.

FACTS

Petitioners seek to establish six new dwellings on approximately 30 acres of land zoned exclusive farm use (EFU). Current land use standards would preclude such development of EFU-land. In 2006, petitioners obtained state and county Measure 37 waivers to subdivide and build six dwellings on the subject property.¹ In 2007, petitioners applied for tentative plat approval for a seven-lot subdivision. The county approved the tentative plat, and the approval was not appealed. In December 2007, the county refused to allow petitioners to proceed with final plat because of the passage of Measure 49.² In general, Measure 49 required those with Measure 37 waivers to choose among certain development options specified in Measure 49 and eliminated the development options authorized by Measure 37. Although most developments allowed pursuant to Measure 37 waivers are 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 continue. Or Laws 2007, ch 424, § 5(3).

Petitioners subsequently filed an application for a vested rights determination arguing that they were entitled to build six additional houses pursuant to their approved tentative plat. The planning commission rejected petitioners' application, and petitioners appealed to the board of county commissioners. The board of county commissioners found that petitioners

¹ Measure 37 was codified at ORS 197.352 (2005).

² Measure 49 is codified at ORS 195.300 to 195.336. *See also* Or Laws 2007, ch 424.

1 had a vested right to subdivide the property but did not have a vested right to establish
2 dwellings on the property. This appeal followed.

3 **JURISDICTION**

4 Intervenor move to dismiss this appeal because it is not a land use decision subject
5 to our jurisdiction. The county joins in intervenors' motion. Intervenor rely on our decision
6 in *Friends of Yamhill County v. Yamhill County*, ___ Or LUBA ___ (LUBA No. 2008-060,
7 July 2, 2008).

8 In *Friends of Yamhill County*, we explained that under Measure 49 the developments
9 authorized by Measure 37 waivers are no longer authorized and are replaced by the more
10 restricted development options specified in Measure 49. If, however, development
11 authorized pursuant to a Measure 37 waiver has progressed to the point that the applicant has
12 established a common law vested right, the applicant will be entitled to proceed with the
13 development under Measure 49. Measure 49 also provides that whether an owner qualifies
14 for just compensation is not a land use decision subject to our jurisdiction. ORS 195.305(7);
15 ORS 195.318(1). In *Friends of Yamhill County*, we found that determinations regarding
16 whether owners have vested rights to continue development pursuant to Measure 37 waivers
17 constitute determinations regarding whether owners are entitled to just compensation under
18 Measure 49 and therefore are not land use decisions subject to our jurisdiction.

19 “We believe the text of ORS 195.305(7) and Measure 49 demonstrates that a
20 local government vested rights determination that development authorized by
21 a Measure 37 waiver may or may not continue is not a land use decision
22 subject to our jurisdiction.” *Friends of Yamhill County*, ___ Or LUBA ___
23 slip op 6.³

³ ORS 195.305(7) provides:

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

1 Intervenors argue that the county’s decision in this case is identical to the county’s
2 decision in *Friends of Yamhill County*, and therefore the same result is required. Although
3 petitioners do not address *Friends of Yamhill County*, they argue that the challenged decision
4 is a land use decision subject to our jurisdiction.

5 The decision that is before us in this appeal is very similar to the decision in *Friends*
6 *of Yamhill County* in that the challenged decision determines whether an applicant has a
7 vested right to continue development pursuant to a Measure 37 waiver. The primary
8 difference between the two decisions is that in *Friends of Yamhill County* the county had
9 established a specific procedure by ordinance for making Measure 49 vested rights
10 determinations. In the present appeal, the county proceeded under its preexisting vested
11 rights ordinance – an ordinance that was not adopted to make Measure 49 vested rights
12 determinations – Benton County Code (BCC) 53.335.⁴ Petitioners also argue that they made

⁴ BCC 53.335 provides:

“**Vested Right to a Nonconforming Use.** A use lawfully initiated under a prior ordinance, but which has not been completed at the time the use becomes nonconforming, shall have a vested right to continue to completion if construction or other preparation has progressed to a substantial degree. The Planning Official shall determine whether an applicant has a vested right to complete a nonconforming use based on the following requirements:

- “(1) The applicant must have relied in good faith on the prior zoning or permit approval in making expenditures to develop his or her property in a given manner.
- “(2) The expenditures made prior to the subsequent zoning regulation must demonstrate that the property owner has gone beyond mere contemplated use and has committed the property to an actual use which would have been made but for passage of the new zoning regulation.
- “(3) The expenditures must relate more to the nonconforming use than to conforming uses. If the expenditures could reasonably apply to preparation of the property for a conforming use, such expenditures may not be considered as vesting a right to a nonconforming use.
- “(4) The amount of prior expenditure must represent more than an incidental expense when considering the cost of the project as a whole.
- “(5) The length of time since the proposed use became nonconforming must be reasonable, considering the nature of the project, economic conditions, or other factors.”

1 arguments in addition to their Measure 49 vested rights claim, in particular that they had a
2 vested right to approval of the subdivision under ORS 215.427 (the goal-post statute) and
3 ORS 92.040.

4 A decision to approve or deny the requested final plat based on the goal-post statute
5 might well be a land use decision subject to our jurisdiction. *See Pete's Mountain*
6 *Homeowners Association v. Clackamas County*, ___ Or LUBA ___ (LUBA No. 2008-065,
7 September 25, 2008), *appeal pending* (Measure 37 waivers are not standards and criteria
8 applicable to a decision pursuant to the goal-post statute).⁵ The county, however, did not
9 make a decision concerning a final plat application. The county's decision was whether
10 petitioners had established a vested right to continue the development under their Measure 37
11 waivers. The county's findings make clear that even though petitioners raised these
12 arguments, the county did not make a decision regarding them.

⁵ ORS 215.427(3)(a) provides:

"If the application was complete when first submitted or the applicant submits additional information, as described in subsection (2) of this section, within 180 days of the date the application was 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."

ORS 92.040(1) provides:

"Before a plat of any subdivision or partition subject to review under ORS 92.044 may be made and recorded, the person proposing the subdivision or partition or authorized agent or representative of the person shall make an application in writing to the county or city having jurisdiction under ORS 92.042 for approval of the proposed subdivision or partition in accordance with procedures established by the applicable ordinance or regulation adopted under ORS 92.044. Each such application shall be accompanied by a tentative plan showing the general design of the proposed subdivision or partition. No plat for any proposed subdivision or partition may be considered for approval by a city or county until the tentative plan for the proposed subdivision or partition has been approved by the city or county. Approval of the tentative plan shall not constitute final acceptance of the plat of the proposed subdivision or partition for recording. However, approval by a city or county of such tentative plan shall be binding upon the city or county for the purposes of the preparation of the subdivision or partition plat, and the city or county may require only such changes in the subdivision or partition plat as are necessary for compliance with the terms of its approval of the tentative plan for the proposed subdivision or partition."

1 “During these proceedings * * * the applicants argued that ORS 215.427 and
2 92.040 require the County to process the existing preliminary subdivision plat
3 approval through to final plat approval. * * *

4 “* * * * *

5 “The applicant is arguing that despite Measure 49, the * * * subdivision
6 should be evaluated based on the set of regulations that existed at the time of
7 application (*i.e.* pre-Measure 49).

8 “The ‘goal-post statute’ states that the adopted and acknowledged county
9 comprehensive plan and land use regulations in place at the time of
10 application shall be applicable. Measure 49 does not change the adopted and
11 acknowledged plan and regulations; instead, Measure 49 changes the
12 eligibility of a property for waiver of regulations by means of state statute.

13 “The applicant’s assertion is in fact not relevant to the present case. The case
14 before the Board of Commissioners is whether a vested right should be
15 granted. If the applicant were to submit a final plat, having completed all
16 conditions of the preliminary plat, the County would have to decide whether
17 the goal post statute requires the County to continue processing the
18 subdivision to platting under the terms of the applicant’s Measure 37 waiver.
19 The goal post statute has no bearing on whether [petitioners] have established
20 a vested right to dwellings on the subdivision lots, because [petitioners] have
21 not made application for any dwellings.

22 “* * * * *

23 “The Board of Commissioners concludes that the goal-post statute is not
24 applicable to the application before the Board; namely, a vested rights
25 determination.

26 “* * * * *

27 “ORS 92.040 is not relevant to the application before the Board of
28 Commissioners. As discussed for the goal post statute, above, the application
29 under review is a request to determine that the applicant’s actions have
30 established a vested right to establish a use. ORS 92.040 is not applicable to
31 that determination.”

32 “The Board of Commissioners concludes that ORS 92.040 is not applicable to
33 the application before the Board.” Record 14-16.

34 What the county did in its decision was to determine whether petitioners had a vested
35 right to continue the development authorized by their Measure 37 waivers. Although BCC
36 53.335 has criteria for determining whether a vested right has been established for purposes

1 of the BCC, the county specifically stated that it was proceeding under the common law test
2 for vested rights announced in *Clackamas Co. v. Holmes*, 265 Or 193, 508 P2d 190 (1973),
3 because the county was making a Measure 49 vested rights determination and Measure 49
4 calls for a determination of whether a common law vested right is warranted. Record 16.
5 There does not appear to be any dispute that the county at least believed it was making a
6 Measure 49 vested rights determination. Because the county had not adopted an ordinance
7 specifically to deal with such situations, it proceeded under BCC 53.335. Although the
8 county in this appeal might have proceeded in a different manner, instead it chose to make
9 the same determination that the county made in *Friends of Yamhill County* – a determination
10 regarding whether, pursuant to Measure 49, an applicant has a vested right to continue
11 development authorized by a Measure 37 waiver. As we held in *Friends of Yamhill County*,
12 such a determination is not a land use decision subject to our jurisdiction.

13 Petitioners move to transfer this appeal to circuit court in the event we find that we do
14 not have jurisdiction over the appeal. Therefore, this appeal is transferred.⁶

⁶ Because we do not have jurisdiction over the challenged decision, we need not resolve petitioners' record objection.