

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3
4 JOHN ALTO and DOROTHY ALTO,
5 *Petitioners,*

6
7 vs.

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9 CITY OF CANNON BEACH,
10 *Respondent,*

11 and

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14 GEORGE A. LARSEN and ALEXIS LARSEN,
15 *Intervenors-Respondents.*

16
17 LUBA No. 2008-126

18
19 FINAL OPINION
20 AND ORDER

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22 Appeal from City of Cannon Beach.

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24 Michelle Rudd, Portland, represented petitioners.

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26 William R. Canessa, Cannon Beach, represented respondent.

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28 Shawn M. Lindsay, Portland, represented intervenors-respondents.

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

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

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34 TRANSFERRED

11/25/2008

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

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NATURE OF THE DECISION

Petitioners appeal a city decision determining that intervenors-respondents have a vested right to continue development of an addition to their existing house.

MOTION TO INTERVENE

George A. Larsen and Alexis Larsen (intervenors), trustees of the Larsen Living Trust, and 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.

FACTS

Intervenors own an existing duplex on the beach next to the Pacific Ocean. The duplex is a legal nonconforming use. Intervenors seek to convert the duplex into a single-family residence and construct an approximately 1000 square-foot addition. Intervenors applied for Measure 37 waivers from the city and state.¹ The city waived regulations that would have prevented intervenors’ proposed construction. The state denied the waiver request on the basis that no state regulations were implicated by the proposed development. Intervenors then began construction on the conversion and addition. While intervenors were constructing the remodeled dwelling, Measure 49 was adopted and went into effect.² Although most development that was previously made possible by Measure 37 waivers 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).³ Intervenors applied for a vested rights determination

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.
³ Section 5(3) of Measure 49 provides:

“A waiver issued before the effective date of this 2007 Act [December 6, 2007] to the extent that the claimant’s use of the property complies with the waiver and the claimant has a

1 that they be permitted to complete construction of the improvements authorized by the
2 Measure 37 waiver. The city council determined that intervenors had established a vested
3 right to complete the development. This appeal followed.

4 **MOTION TO DISMISS**

5 LUBA’s jurisdiction is generally limited to review of land use or limited land use
6 decisions. ORS 197.825(1). The county and intervenors move to dismiss this appeal on the
7 grounds that Measure 49 vested rights determinations are not land use decisions subject to
8 LUBA’s jurisdiction. Generally, a local government’s determination that a landowner has a
9 common law vested right is a land use decision over which LUBA has jurisdiction. *Forman*
10 *v. Clatsop County*, 297 Or 129, 681 P2d 786 (1984). Measure 49, codified at 195.305(7),
11 however, provides:

12 “A decision by a public entity that an owner qualifies for just compensation
13 under ORS 195.305 to 195.336 and sections 5 to 11, chapter 424, Oregon
14 Laws 2007, and a decision by a public entity on the nature and extent of that
15 compensation are not land use decisions.”⁴

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

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

common law vested right on the effective date of this 2007 Act to complete and continue the
use described in the waiver.”

⁴ 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[.]”

As previously noted, the city’s vested rights determination was granted under section 5(3), chapter 424,
Oregon Laws 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 In *Friends of Yamhill County v. Yamhill County*, ___ Or LUBA ___ (LUBA No.
5 2008-060, July 2, 2008), we concluded that the text of ORS 195.305(7) and Measure 49
6 demonstrate that local government vested rights determinations that development authorized
7 by a Measure 37 waiver may or may not continue are not land use decisions subject to our
8 jurisdiction. *Id.* at slip op 6. According to the county and intervenors, the same principal
9 applies in the present appeal.

10 Petitioners acknowledge that *Friends of Yamhill County* establishes that Measure 49
11 vested rights determinations are not land use decisions subject to our jurisdiction. Petitioners
12 argue, however, that the challenged decision, while including a Measure 49 vested rights
13 determination, goes beyond that determination and also approves any necessary building
14 permits for the subject property. The challenged decision concludes:

15 “* * * the [intervenors] have a common law vested right to complete and
16 continue the development of their proposed improvement on the Property. As
17 ‘just compensation’ under Section 5 of Measure 49 and as otherwise provided
18 by law, this Final City Council Vesting Decision allows the [intervenors] to
19 obtain building permits to construct their proposed improvement on the
20 Property without restriction other than as specified by applicable law.”
21 Record 18.

22 According to petitioners, because the challenged decision authorized building
23 permits, it is both a vested rights determination *and* a land use decision, and therefore LUBA
24 has jurisdiction. Petitioners further argue that the challenged decision is subject to various
25 Statewide Planning Goals and involves the exercise of discretion and policy judgment. On
26 the merits, petitioners would presumably argue that the city erred in failing to apply the
27 purportedly applicable Statewide Planning Goals.

28 The challenged decision is clearly a Measure 49 vested rights determination. The text
29 of ORS 197.305(7), ORS 197.318(1), and Measure 49 are unambiguous and provide that
30 such determinations are not land use decisions. It follows that challenges to such vested

1 rights determinations are not subject to LUBA's jurisdiction. It may be that the city's vested
2 rights determination exceeded the authority granted the city under Oregon Laws 2007,
3 chapter 424, section 5(3). It may also be that a city decision to allow building permits
4 without addressing the statewide planning goals identified by petitioners was error.
5 However, under ORS 195.318(1) the Clatsop County Circuit Court, not LUBA, has
6 jurisdiction to consider those questions.

7 Petitioners filed a conditional motion to transfer the appeal to circuit court in the
8 event LUBA finds it does not have jurisdiction. Accordingly, this appeal is transferred to
9 Clatsop County Circuit Court.