BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

KAROL SUSAN WELCH, BEVERLY DAVIS
and FRIENDS OF YAMHILL COUNTY,
Petitioners,

vs.

YAMHILL COUNTY,
Respondent,

and

JOHN KROO,
Intervenor-Respondent.

LUBA No. 2008-129

FINAL OPINION
AND ORDER

Appeal from Yamhill County.

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

No appearance by Yamhill County.

Samuel R. Justice, McMinnville, filed the response brief and argued on behalf of intervenor-respondent. With him on the brief was Haugeberg, Rueter, Gowell, Fredricks, Higgins & McKeegan PC.

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

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

REVERSED 12/15/2008

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 decision that grants approval for a 10-lot subdivision.

FACTS

In *Welch v. Yamhill County*, ___ Or LUBA ___ (LUBA No. 2007-111, February 20, 2008) (*Kroo I*) we remanded an earlier county decision that approved the disputed 10-lot subdivision. The parties refer to that appeal as *Kroo I* because the applicant, who was the intervenor in that appeal and is the intervenor in this appeal, is John Kroo. Following our remand, the county conducted additional hearings on June 11 and 18, 2008. On July 9, 2008, the county again approved the disputed subdivision. This appeal followed on July 29, 2008. We will refer to the present appeal as *Kroo II*, to distinguish it from the prior appeal.

The subject property is zoned Agriculture/Forestry (AF-20). The county's AF-20 zone requires that newly divided parcels include at least 20 acres and does not allow residential subdivisions. Under the AF-20 zoning that applies to the subject property, the disputed subdivision could not be approved. Intervenor relied on the Ballot Measure 37 (2004) waivers that he received from the state and the county in 2006 in requesting approval of the disputed subdivision. After our decision in *Kroo I*, during the county's remand proceedings, three petitioners argued that Ballot Measure 49 (2007) had the legal effect of rendering the applicant's Ballot Measure 37 waivers legally ineffective and making a county post-Ballot Measure 49 subdivision approval decision erroneous. Petitioners raise that same issue in their first assignment of error. Intervenor raises a waiver defense in response to that issue, arguing that because that issue was not raised in *Kroo I* that issue may not be raised in this appeal (*Kroo II*). *Beck v. City of Tillamook*, 313 Or 148, 153, 831 P2d 678 (1992). An understanding of the timing of key events in the first appeal and related events concerning Ballot Measure 49 is needed to address petitioners' Ballot Measure 49 argument and

intervenor's waiver defense. We set out those events in some detail below before turning to petitioners' first assignment of error.

A. The County's Initial Subdivision Decision and Petitioners' Appeal in *Kroo I* (March 8, 2006 to June 13, 2007)

Intervenor received Ballot Measure 37 waivers from the county on March 8, 2006 and from the state on July 25, 2006. Those Ballot Measure 37 waivers made it unnecessary for the county to apply its current AF-20 zone or current state statutes that were adopted to protect agricultural and forest land from residential development. Shortly thereafter, on August 1, 2006, intervenor filed an application to divide his property into 12 lots. Almost ten months later, on May 25, 2007, Yamhill County granted approval for a 10-lot subdivision. Twenty-one days later, on June 13, 2007, petitioners appealed that decision to LUBA in *Kroo I*.

B. Ballot Measure 49 and Motion to Abate (November 6, 2007 to November 15, 2007)

While petitioners' appeal of the county's initial subdivision decision was pending at LUBA in *Kroo I*, the Oregon voters approved Ballot Measure 49 on November 6, 2007. One week after Ballot Measure 49 was approved, on November 13, 2007, petitioners filed a Notice of Potential Mootness/Motion to Abate in *Kroo I*. In that notice, petitioners pointed out that Ballot Measure 49 would take effect on December 6, 2007. Petitioners argued that when it took effect, Ballot Measure 49 would entirely supplant Ballot Measure 37. Petitioners further argued that it was their "position that, as of December 6, 2007, the decision that is on appeal in this case will have no practical effect." Notice of Potential Mootness/Motion to Abate 3. However, petitioners went on to say the appeal would not be moot "[i]f intervenor successfully asserts that the proposed subdivision is vested, pursuant to Measure 49[.]" *Id.* Petitioners requested that LUBA abate the appeal pending resolution of the mootness question. On November 14, 2007 intervenor objected to any delay in the appeal, and on November 15, 2007, LUBA denied the motion to abate.

C. Briefing in *Kroo* I, Ballot Measure 49 Takes Effect, LUBA's Decision in *Kroo I*

Petitioners filed their petition for review in *Kroo I* on November 27, 2007. In that petition for review, petitioners took the position that Ballot Measure 49 had the legal effect of rendering the county's May 25, 2007 subdivision approval decision of "no practical effect." Petition for Review (*Kroo I*) 6. Petitioners also advanced other arguments, including arguments that the county's May 25, 2007 subdivision approval decision violated certain county land use laws that remained applicable to the disputed subdivision application, because they had not been waived by the state and county Ballot Measure 37 waivers. Ballot Measure 49 took effect on December 6, 2007.[1] LUBA held oral argument in *Kroo I* on January 17, 2008.

Less than a week after oral argument in *Kroo I*, on January 23, 2008, the Court of Appeals issued its decision in *Frank v. DLCD*, 217 Or App 498, 176 P3d 411 (2008). As relevant here, in *Frank* the Court of Appeals held that a property owner's appeal of a LCDC Ballot Measure 37 waiver was rendered moot by Ballot Measure 49.[2] That holding was based on the Court of Appeals' conclusion that Ballot Measure 37 waivers only retained potential legal significance as part of a vested right claim under Section 5(3) of Ballot Measure 49.

On February 20, 2008, LUBA issued its decision in *Kroo I*. LUBA remanded the county's May 25, 2007 decision to address certain county land use standards. In its decision in *Kroo I*, LUBA noted the Court of Appeals' *Frank* decision and acknowledged petitioners'

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[1] Ballot Measure 49 comprehensively amended Ballot Measure 37 and with one exception replaced it with a different system for treating claims for relief from land use laws that reduce property values. The exception appears in Section 5(3) of Ballot Measure 49 and authorizes a property owner to continue development under a previously issued Ballot Measure 37 waiver if the property owner "has a common law vested right on the effective date of [Ballot Measure 49] to complete and continue the use described in the waiver."

[2] It is important to note that the decision that was before the Court of Appeals in *Frank* was a state Ballot Measure 37 waiver of state land use laws, while the decision that was before LUBA in *Kroo I* was a county land use decision, which relied in part on unappealed state and county Ballot Measure 37 waivers.

argument that Ballot Measure 49 had the legal effect of rendering "the present appeal moot." *Kroo I*, slip op 2-3 n 1. However, LUBA rejected that argument, stating that it was not sufficiently developed.

D. Post *Kroo I* Remand Events (February 20, 2008 to September 25, 2008)

Following LUBA's remand in *Kroo I*, intervenor sought a determination from the county that he has a vested right to continue to develop the disputed subdivision under Section 5(3) of Ballot Measure 49. Record 125-454. Shortly thereafter, on March 18, 2008, intervenor asked the county to commence local proceedings to respond to LUBA's remand in *Kroo I*. During those local proceedings, on May 5, 2008, three of the petitioners argued that after Ballot Measure 49 took effect, intervenor's Ballot Measure 37 waivers are void and without those waivers the county could not approve the disputed subdivision. Record 455.

On May 8, 2008, the Oregon Supreme Court issued its decision in *Corey v. DLCD*, 344 Or 457, 184 P3d 1109 (2008). Like the Court of Appeals in *Frank*, the Supreme Court held that a property owner's appeal of a LCDC Ballot Measure 37 waiver was rendered moot by Ballot Measure 49. That holding is based on the Supreme Court's conclusion that with the exception of vested rights determinations under Section 5(3) of Ballot Measure 49, Ballot Measure 49 deprives Ballot Measure 37 waivers "of any continuing validity."[3]

On June 18, 2008, the county held its final public hearing on remand. Before the county issued its final decision on remand, the county hearings officer rendered his decision on intervenor's application for a vested rights determination on July 7, 2008. The county hearings officer held that intervenor did not have a vested right under Section 5(3) of Ballot Measure 49. We are informed that intervenor's challenge to the county hearings officer's vested rights decision is currently pending in Yamhill County Circuit Court. On July 9,

[3] Again, as was the case with *Frank*, the Supreme Court's decision in *Cory* concerned the justiciability of an appeal of a Ballot Measure 37 waiver. Neither of those cases concerned an appeal of a land use decision that was issued pursuant to Ballot Measure 37 waivers before Ballot Measure 49 took effect (*as in Kroo I*) or after Ballot Measure 49 took effect (as in *Kroo II*).

2008, the county approved the disputed subdivision for a second time, and on July 28, 2008 petitioners filed this appeal to challenge that decision.

Finally, we note that on September 25, 2008, LUBA issued its decision in *Pete's Mtn. Homeowners Assoc. v. Clackamas County*, ___ Or LUBA ___ (LUBA No. 2008-065, September 25, 2008), *rev pending* (A140272). In that decision, LUBA held that a county erred by approving a residential subdivision of EFU-zoned land based on a Ballot Measure 37 waiver after Ballot Measure 49 took effect. Based largely on the Court of Appeals' decision in *Frank* and the Supreme Court's decision in *Corey*, LUBA concluded that after Ballot Measure 49 took effect on December 6, 2007, previously issued Ballot Measure 37 waivers are legally ineffective and local governments may no longer rely on Ballot Measure 37 waivers to grant land use approvals that would otherwise be precluded by current land use laws.

With the above explanation of the key events in this appeal, we turn to petitioners' first assignment of error.

FIRST ASSIGNMENT OF ERROR

Citing *Corey*, *Frank* and *Pete's Mtn. Homeowners Assoc.*, petitioners argue that after Ballot Measure 49 took effect on December 6, 2007, intervenor's Ballot Measure 37 waivers were no longer legally effective to shield intervenor's subdivision application from the county's current AF-20 zoning. According to petitioners, under that AF-20 zoning, the disputed subdivision could not be approved and the county's decision to the contrary must be reversed.

Intevenor argues that because petitioners could have raised this issue in *Kroo I*, and failed to do so, under the Supreme Court's decision in *Beck v. City of Tillamook* the issue is waived and cannot be raised for the first time in this appeal.[4]

[4] Intervenor advances other arguments in response to petitioners' Ballot Measure 49 argument, which we address below.

A. *Beck v. City of Tillamook (Beck)*

In *Beck*, a city land use decision led to a LUBA appeal, and LUBA's decision in that appeal was not appealed to the Court of Appeals. The Supreme Court referred to that first appeal and decision as *Beck I*. Following additional city proceedings in response to *Beck I*, the city rendered another decision on the same application. That second city decision was appealed to LUBA and resulted in a second LUBA decision. The Supreme Court referred to that appeal and decision as *Beck II*. In rendering its decision in *Beck II*, LUBA concluded that a number of issues that petitioners raised in *Beck II* had been raised by petitioners in *Beck I* and decided adversely to petitioners. Because petitioners had not appealed LUBA's decision in *Beck I* to the Court of Appeals, LUBA refused in *Beck II* to consider those previously decided issues. LUBA's decision in *Beck II* was appealed to the Court of Appeals and the Court of Appeals' decision was appealed to the Supreme Court.

The Supreme Court framed the question on review in *Beck* as whether an "appellate court can review legal issues that LUBA decided, not in the order under review, but in an earlier order in the same case, for which judicial review was not sought." 313 Or at 151. The Supreme Court first concluded that *Beck I* and *Beck II* were "two phases of the same case." Just as *Beck I* and *Beck II* were two phases of the same case, *Kroo I* and *Kroo II* are the product of a single application and are two phases of the same case.

The Supreme Court in *Beck* reviewed a number of statutes that govern LUBA review and judicial review of LUBA decisions, and concluded that issues that LUBA decides in an earlier unappealed final opinion in the same case may not be the subject of assignments of error in a later final opinion in the same case. In reaching that conclusion, the Supreme Court expressed agreement with the Court of Appeals' reasoning in *Mill Creek Glen Protection Assoc. v. Umatilla Co*., 88 Or App 522, 746 P2d 728 (1987). 313 Or 153 n 2. In *Mill Creek Glen*, the Court of Appeals held that waiver or law of the case applies not only to issues that were raised and decided in the first decision, but also to issues that "could have

been raised in" the appeal of the first decision. 88 Or App at 526. Thus, under *Beck*, if an issue could have been raised in *Kroo I*, but was not, that issue may not be raised in *Kroo II*. *Adler v. City of Portland*, 25 Or LUBA 546, 552 (1993); *Gage v. City of Portland*, 25 Or LUBA 449, 457 (1993). The question becomes whether the issue that petitioners present in their first assignment of error in *Kroo II* is an issue that petitioners could have and should have raised in *Kroo I*. For the reasons explained below, we conclude that it is not such an issue.

B. The Issue in *Kroo II*

It is important to accurately frame the issue that is presented in petitioners' first assignment of error in *Kroo II*, before attempting to determine whether the allegedly waived issue is an issue that could have been raised in *Kroo I*. We believe petitioners actually raise two issues in their first assignment of error in *Kroo II*. First, petitioners contend that after Ballot Measure 49 took effect, intervenor's Ballot Measure 37 waivers no longer have any legal effect, outside the context of a Section 5(3) Ballot Measure 49 vested rights determination. Second, petitioners contend that because those Ballot Measure 37 waivers no longer have any legal effect, the county committed reversible error on July 9, 2008 by approving the requested subdivision of intervenor's AF-20 zoned property into 10 lots for residential development, following LUBA's remand in *Kroo I*.

C. The Issue in *Kroo I*

In *Kroo I*, petitioners included the following argument in their petition for review:

> "As LUBA is aware, the voters passed Ballot Measure 49 on November 6, 2007. It will become effective on December 6, 2007. At that time, even assuming intervenor were to prevail in this appeal, intervenor's post-Measure 37 tentative subdivision approval will have no further effect. Under Measure 49, the Department of Land Conservation and Development (DLCD) will give notice to most claimants who filed claims under Measure 37, including intervenor-respondent (intervenor), within 120 days of the measure's effective date. The notice will require intervenor to elect whether he wishes to have his claim considered under Measure 49. This is so even where the claimant has an approved post-Measure 37 land use application. If intervenor wishes to

> proceed, he must file a form evidencing that desire and any required supporting documentation. The state and the county will then issue new final orders under Measure 49. *Those new orders will entirely supplant the Measure 37 orders upon which the decision which is the subject of this appeal is based.* It is petitioners' position that, as of December 6, 2007, the decision that is on appeal in this case will have no practical effect." Petition for Review (*Kroo I*) 6 (emphasis added).

1. The First Issue in *Kroo II*

The above argument in petitioners' brief in *Kroo I* is sufficient to raise the first issue that petitioners raise in their first assignment of error in *Kroo II* (intervenor's Ballot Measure 37 waivers no longer have any legal effect). It is unimportant that the first issue is not stated in precisely the same way or with precisely the same words in *Kroo I* and *Kroo II*. *See Boldt v. Clackamas County*, 107 Or App 619, 623, 813 P2d 1078 (1991) (to preserve an issue for appeal under ORS 197.763(1) "requires no more than fair notice to adjudicators and opponents, rather than the particularity that inheres in judicial preservation concepts.") Although petitioners' petition for review was filed before Ballot Measure 49 took effect, nearly two months before the Court of Appeals decision in *Frank* and over five months before the Supreme Court's decision in *Corey*, petitioners accurately interpreted Ballot Measure 49 to provide that Ballot Measure 49 orders will "entirely supplant * * * Measure 37 orders." That argument in *Kroo I* was not sufficient to convince us that either the county's May 25, 2007 subdivision decision or petitioners' appeal of that decision was moot, but it was sufficient to raise the first issue presented in petitioners' first assignment of error in *Kroo II*.

2. The Second Issue in *Kroo II*

The second issue in *Kroo II* is whether, after Ballot Measure 49 took effect on December 6, 2007, the county committed error by approving the disputed subdivision on July 9, 2008 in reliance on Ballot Measure 37 waivers. Petitioner did not expressly raise this issue in *Kroo I*. But that is not particularly surprising, because the decision that was before LUBA in *Kroo I* was not the county's future July 9, 2008 decision to approve the disputed

subdivision for a second time; the decision that was before LUBA in *Kroo I* was the county's May 25, 2007 decision which predated Ballot Measure 49 by over six months. It is unsurprising therefore that petitioners' arguments in *Kroo I* were directed at the decision that was before LUBA in that appeal not at a future decision that the county had not yet adopted and might never adopt.

Intervenor asks us to apply *Beck* to require a level of clairvoyance that we do not believe is demanded by *Beck*. It is important to remember that the cross-hairs of Ballot Measure 49 are aimed at Ballot Measure 37 waivers themselves, not pre-Ballot Measure 49 or post-Ballot Measure 49 land use decisions that rely on Ballot Measure 37 waivers. The text of Ballot Measure 49 says nothing about land use decisions that were approved pursuant to Ballot Measure 37 waivers before Ballot Measure 49 took effect or land use decisions that might be adopted pursuant to Ballot Measure 37 waivers after Ballot Measure 49 took effect. To raise the issue that intervenor argues petitioners should have raised in *Kroo I*, petitioners would have had to (1) anticipate LUBA's decision in *Pete's Mountain* or at least anticipate that LUBA or an appellate court would construe Ballot Measure 49 in the way LUBA did in *Pete's Mountain*, (2) anticipate that LUBA might remand the county's decision in *Kroo I*, (3) anticipate that the county might approve the disputed subdivision for a second time following that remand, based on Ballot Measure 37 waivers, and (4) argue that if (1), (2) and (3) come about that such a decision would be erroneous under Ballot Measure 49. *Beck* does not require that petitioners make such anticipatory arguments about possible future decision making.

It is true that petitioners did recognize that Ballot Measure 49 might have some impact on the disputed subdivision application and argued that it had the legal effect of making the county's May 25, 2007 decision moot. As we have already explained we determined that argument was not sufficiently developed and rejected it. But the second issue in *Kroo II* is a different issue (whether Ballot Measure 49 precludes post-Ballot

Measure 49 land use decisions that rely on Ballot Measure 37 waivers) and it is directed at a different decision than the decision that was the subject of the appeal in *Kroo I* (the county's July 9, 2008 decision on remand). The question is whether that is an issue petitioners should have raised in *Kroo I* and should be precluded from raising in *Kroo II* because they did not raise the issue in *Kroo I*. In *Jackson Cty. Citizens' League v. Jackson Cty*., 171 Or App 149, 156, 15 P3d 42 (2000), the Court of Appeals declined to find an argument was waived under *Beck* in that case simply because it was theoretically possible to make the same argument in an earlier appeal. Citing *Beck* and *Mill Creek Glen*, the Court of Appeals explained that "some kind of 'waiver' principle should apply [in that circumstance,] if it could be said that a party has inappropriately kept a second issue in reserve for a second appeal to LUBA, when the second issue was plainly cognizable at the time of the first appeal." In that case the Court of Appeals concluded that it was not plainly cognizable that Jackson County would interpret comprehensive plan policies on remand to raise the same question that had arisen under a statewide planning goal challenge in the initial appeal. We conclude that it was not plainly cognizable when petitioners filed their petition for review in *Kroo I* on November 27, 2007 how Ballot Measure 49 would apply to previously approved Ballot Measure 37 subdivisions that were the subject of LUBA appeals on December 6, 2007. More particularly, it was not plainly cognizable on November 27, 2007 that when Ballot Measure 49 took effect it would operate in the future to preclude approval of subdivisions based on Ballot Measure 37 waivers if LUBA remanded the initial subdivision decision in those pending LUBA appeals. In this case, it was not plainly cognizable on November 27, 2007 that the county's May 25, 2007 decision would be remanded by LUBA on February 20, 2008 and that the county would on July 9, 2008 approve the subdivision for a second time based on the Ballot Measure 37 waivers, notwithstanding a July 7, 2008 county decision that found petitioners have no vested right to develop the subdivision under Section 5(3) of Ballot Measure 49.

For the reasons explained above, petitioners did not waive their right to raise the issues presented in their first assignment of error.

D. Kroo's Remaining Arguments

1. Yamhill County Zoning Ordinance (YCZO) 403.03

The county's Agriculture/Forest zoning districts are codified at YCZO Section 403. YCZO 403.03 provides limited authorization for dwellings and would not allow the subject property to be divided into 10 lots for residential development. In their petition for review, petitioners argue that YCZO 403.03 precludes county approval of the disputed subdivision now that intervenor's Ballot Measure 37 waivers no longer have legal effect. Intervenor argues petitioners waived this issue by failing to raise YCZO 403.03 specifically below.

We reject intervenor's waiver argument. All parties understood that that the disputed subdivision could only be approved if intervenor's Ballot Measure 37 waivers made it unnecessary to apply certain land use regulations that were adopted after intervenor became an owner of the property. The county's Ballot Measure 37 waiver expressly references YCZO 403. Record 168. Petitioners were not required to specifically identify YCZO 403 to argue that because Ballot Measure 49 rendered intervenors Ballot Measure 37 waivers legally ineffective, the disputed subdivision could not be approved.

2. County Decision to Limit Issues on Remand

Intervenor next attempts to rely on the general rule that in responding to a LUBA remand, a local government can limit the scope of its proceedings to the issues it must resolve to respond to LUBA's remand. *McCulloh v. City of Jacksonville*, 49 Or LUBA 345, 359 (2005); *O'Rourke v. Union County*, 31 Or LUBA 174, 176 (1996); *Wilson Park Neigh. Assoc. v. City of Portland*, 27 Or LUBA 106, 127, *aff'd* 129 Or App 33, 877 P2d 1205 (1994).

As we have already explained, in *Kroo I* LUBA did not have to resolve what effect Ballot Measure 49 might have on a county decision on remand. The effect of Ballot Measure

49 on a county decision on remand, if raised in *Kroo I*, might have had some bearing on the appropriate remedy in *Kroo I*. But the effect of Ballot Measure 49 on a post-Ballot Measure 49 land use decision had no bearing on petitioners' challenge of the county's May 25, 2007 pre-Ballot Measure 49 land use decision. The question of whether Ballot Measure 49, once it took effect, precluded county approval of a subdivision that relied on Ballot Measure 37 waivers did not arise in a way that required that the question be answered until the county rendered such a post-Ballot Measure 49 decision. The county therefore cannot rely on petitioners' failure to raise a question that did not need to be answered in *Kroo I* to avoid its obligation to answer that question in the context of the first county decision in this matter where the question was squarely presented.

3. Mootness and Intervenor's Vested Rights Claim

Finally, in responding to arguments in the petition for review that Ballot Measure 49 may have rendered this appeal moot, intervenor argues that Ballot Measure 49 preserves Ballot Measure 37 waivers to the extent the holder of such a Ballot Measure 37 waiver has a vested right to the development that is authorized by the waiver. As we noted earlier, intervenor is challenging in a different forum the county hearings officer's July 7, 2008 decision that intervenor does not have a vested right to the development authorized by his Ballot Measure 37 waivers. Intervenor then argues "[e]ven if Intervenor-Respondent's [Ballot Measure 37] rights are dependent on a positive vesting determination, this matter is not moot." Intervenor-Respondent's Brief 12. Intervenor goes on to argue:

> "A decision by LUBA allows the vesting decision to continue to its natural conclusion. A reversal here for the lack of a final vesting decision might place the Intervenor-Respondent in the position of obtaining a vested right in a local approval that had been denied (by LUBA) because it was not 'vested.'" *Id*. at 12-13.

If intervenor possessed a final vested rights determination from the Yamhill County Circuit Court or hearings officer and if the court or hearings officer determined that intervenor had a vested right to the disputed preliminary subdivision approval, that vested

rights determination would likely provide authority for the disputed preliminary subdivision approval that is independent of the county's July 9, 2008 decision. But if intervenor is found to have such a vested right it will be because his subdivision development activities satisfy the vested rights criteria set out in *Clackamas County v. Holmes*, 265 Or 193, 198-99, 508 P2d 190 (1973), not because the proposed subdivision complies with land use laws that were not waived by intervenors Ballot Measure 37 waivers. Unless and until intervenor receives such a vested rights determination, a county decision to grant preliminary subdivision approval must stand on its own. Without a legally effective Ballot Measure 37 waiver, the county's July 9, 2008 decision cannot stand on its own.

The legal relevance and status of land use approvals that were granted based on Ballot Measure 37 waivers has certainly been called into question by Ballot Measure 49. It is fairly easy to imagine how a pre-Ballot Measure 49 preliminary subdivision approval decision (such as the decision that was before us in *Kroo I*) might have some bearing on whether intervenor has a vested right under Ballot Measure 49 to continue with development of the subdivision. But under Section 5(3) of Ballot Measure 49, the holder of a Ballot Measure 37 waiver must demonstrate that he or she had a vested right to the development authorized by the Ballot Measure 37 waiver *as of December 6, 2007*. Therefore, even if the county could rely on intervenor's Ballot Measure 37 waiver to grant the disputed July 9, 2008 preliminary subdivision approval, it is difficult see how that decision could have any bearing on whether petitioner had a vested right over eight months earlier, on December 6, 2007, to continue with development of the disputed subdivision. Given that we have already concluded that the county could not rely on intervenor's Ballot Measure 37 waivers to apply the remaining land use laws and grant preliminary subdivision approval on July 9, 2008, we decline to speculate about what legal effect that preliminary subdivision approval decision might have in a vested rights determination or otherwise, if the county could rely on intervenor's Ballot Measure 37 waivers to grant that preliminary subdivision approval.

E. Conclusion

For the reasons explained above, petitioners did not waive their argument that Ballot Measure 49 renders intervenor's Ballot Measure 37 waivers legally ineffective, as a basis for county approval of the disputed subdivision. Intervenor's Ballot Measure 37 waivers are without legal effect, except to allow intervenor to continue to seek ultimate resolution of his vested rights claim before the Yamhill County Circuit Court and hearings officer. The county's July 9, 2008 decision to approve the disputed subdivision was based on its failure to recognize that intervenor's Ballot Measure 37 waivers no longer shield intervenor's property from current land use laws that preclude approval of the disputed subdivision. For that reason, the county's decision must be reversed.

The county's decision is reversed.[5]

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