

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

3
4 DEPARTMENT OF LAND CONSERVATION
5 AND DEVELOPMENT,
6 *Petitioner,*

7
8 vs.

9
10 JACKSON COUNTY,
11 *Respondent.*

12 LUBA No. 2009-025

13
14 ROBERT A. FERNS,
15 *Petitioner,*

16
17 vs.

18
19 JACKSON COUNTY,
20 *Respondent.*

21 LUBA No. 2009-027

22
23 FINAL OPINION
24 AND ORDER

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28 Appeal from Jackson County.

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30 Steven E. Shipsey, Assistant Attorney General, Salem, filed a petition for review and
31 state agency brief and argued on behalf of petitioner Department of Land Conservation and
32 Development. With him on the briefs were John R. Kroger, Attorney General and, Gary L.
33 Vrooman, Assistant Attorney General.

34
35 Sydnee B. Dreyer, Medford, filed a petition for review and an amicus brief and
36 argued on behalf of petitioner Robert A. Ferns. With her on the briefs were Huycke,
37 O'Connor, Jarvis & Lohman, LLP and Jud Holtey.

38
39 G. Frank Hammond, County Counsel, Medford, filed the response brief and argued
40 on behalf of respondent. With him on the brief were J. Ryan Kirchoff and Michael Jewett.

41
42 RYAN, Board Member; BASSHAM, Board Chair; HOLSTUN, Board Member,
43 participated in the decision.

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45 REVERSED

6/04/2009

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

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NATURE OF THE DECISION

The challenged decision approves a 12-lot subdivision and a dwelling on each lot on land zoned exclusive farm use (EFU).

PARTIES AND BRIEFING

In LUBA No. 2009-025, petitioner Department of Land Conservation and Development (DLCD) appeals the county’s decision to approve a 12-lot subdivision of an approximately 460-acre parcel zoned EFU. In LUBA No. 2009-027, petitioner Ferns (Ferns), the applicant for subdivision approval, appeals a condition of approval that the county imposed when it approved the subdivision. In an order dated February 11, 2009, we consolidated the appeals pursuant to OAR 661-010-0055. Consolidation of separate appeals under LUBA’s rules is a matter of administrative convenience for the parties and the Board, and does not affect the legal relations of the parties to each other or the matters appealed. Consolidation of two appeals does not permit a person who is a petitioner in one appeal to file a response brief in the other appeal, absent filing a timely motion to intervene on the side of respondent in that other appeal. *Leach v. Lane County*, 45 Or LUBA 733, 735 (2003).

Neither of the petitioners in these consolidated appeals moved to intervene in the other petitioner’s appeal. However, subsequent to petitioner Ferns’s filing his petition for review in LUBA No. 2009-027, DLCD filed a state agency brief in LUBA No. 2009-027 pursuant to OAR 661-010-0038 and ORS 197.830(8).¹ Subsequent to petitioner DLCD

¹ ORS 197.830(8) provides:

“If a state agency whose order, rule, ruling, policy or other action is at issue is not a party to the proceeding, it may file a brief with the board as if it were a party. The brief shall be due on the same date the respondent’s brief is due.”

OAR 661-010-0038 provides:

1 filing its petition for review in LUBA No. 2009-025, Ferns filed a motion to appear as
2 amicus in LUBA No. 2009-025 and filed an amicus brief with his motion. In that amicus
3 brief and in a separate motion to dismiss LUBA No. 2009-027, Ferns moved to dismiss the
4 appeals, arguing that LUBA lacked jurisdiction over the appeals. At oral argument, Ferns
5 withdrew the motion to dismiss. The motion to appear as amicus in LUBA No. 2009-025 is
6 granted.

7 **FACTS**

8 This appeal arises out of the Jackson County Board of Commissioners' approval on
9 January 20, 2009 of Ferns's application for a 12-lot subdivision and a dwelling on each lot
10 on land zoned EFU. A brief chronology of key events leading to the challenged decision is
11 set forth below.

12 In 2006, Ferns sought and was granted by the state of Oregon and the county waivers
13 of otherwise applicable state and county land use laws under ORS 197.352 (2005) (Measure
14 37).² The use described in the state's waiver was the subdivision of his 406-acre property
15 into up to 25 lots and permission to develop a dwelling on each lot. Record 143. The
16 county's waiver was not specific regarding the number of lots. Record 125.

17 In 2007, voters in the state approved another initiative measure, known as Ballot
18 Measure 49 (Measure 49). Measure 49 extensively revised Measure 37. *Corey v. DLCD*,
19 344 Or 457, 465-67, 184 P3d 1109 (2008) (the Measure 49 remedies completely replace the

"A state agency that wishes to file a brief under ORS 197.830(8) shall file the brief together with four copies within the time required for respondent's brief. No fee is required. A state agency brief shall have yellow front and back covers."

² In 2004, voters in the state approved an initiative measure known as Measure 37. Measure 37 was initially codified at ORS 197.352 (2005) and is now codified, as amended, at ORS 195.305. As relevant here, under Measure 37, a public entity that enacted or enforced a land use regulation that had the effect of reducing the fair market value of property was required to pay "just compensation" in certain circumstances. ORS 197.352(1) (2005). As an alternative to paying just compensation, ORS 197.352(8) (2005) authorized public entities to "modify, remove, or not * * * apply the land use regulation" so that the property owner could "use the property for a use permitted at the time the owner acquired the property." State and local decisions under ORS 197.352(8) (2005) not to apply land use regulations have come to be called Measure 37 waivers.

1 Measure 37 remedies, with a single exception). Measure 49 extinguished Measure 37
2 waivers except where a waiver holder can successfully demonstrate a common law vested
3 right to complete and continue the use described in the waivers under Oregon Laws 2007,
4 chapter 424, subsection 5(3). *See* n 4.

5 On September 27, 2007, a little over two months before Measure 49 took effect,
6 Ferns filed an application for a 12-lot subdivision and a dwelling on each lot with the county
7 planning department. In May, 2008, Ferns sought a determination from the county under a
8 separate county proceeding that he had a vested right to complete and continue the use
9 described in his waivers pursuant to Oregon Laws 2007, chapter 424 subsection 5(3). In
10 September, 2008, the county's vested rights review authority determined that Ferns did not
11 have a vested right to complete and continue the use described in his waivers. Ferns sought a
12 writ of review in circuit court of that decision, and as of the date of this opinion, the circuit
13 court review proceeding is pending.

14 In October, 2008, the county planning commission denied the subdivision
15 application, and Ferns appealed the denial to the county Board of Commissioners (BOC).
16 While that local appeal was pending, on November 12, 2008, the United States District Court
17 for the District of Oregon issued an opinion in *Citizens for Constitutional Fairness v.*
18 *Jackson County*, USDC Civ No 08-3015-PA (Findings of Fact and Conclusions of Law,
19 November 12, 2008) (*Citizens*). The county appealed the decision in *Citizens* to the United
20 States Court of Appeals for the 9th Circuit and review is currently pending. We discuss
21 *Citizens* later in this opinion.

22 On January 20, 2009, the BOC conditionally approved Ferns's application. The BOC
23 concluded that the application complied with the county's Measure 37 waiver. However, the
24 county found that under Measure 49 and cases construing Measure 49, Ferns no longer

1 possessed a valid waiver of state laws that otherwise prohibit the development.³ However,
2 rather than deny the application, the BOC approved it, subject to a condition of approval that
3 before final plat approval, Ferns must receive a waiver of the applicable state laws that
4 prohibit the subdivision and dwellings, in the form of a positive vesting decision in the writ
5 of review proceeding then pending before the Jackson County circuit court. Record 4, 16.
6 The county's decision and the condition are set forth below:

7 "The [BOC] finds that the development of the proposed 12-lot subdivision
8 does not comply with the current state laws, but that the applicant may be able
9 to demonstrate waiver of such state laws pursuant to Measure 37 and/or
10 Measure 49 or by demonstrating vesting of his right to develop pursuant to a
11 currently pending writ of review action. Therefore, the [BOC] finds it
12 appropriate to impose Condition 9 found in Exhibit 'C' to this Order, which is
13 incorporated by this reference." Record 4.

14 Condition 9 provides in relevant part:

15 "**Prior to final plat approval**, the Applicant shall provide the County
16 Planning Staff with an operative and legally valid waiver by the State of
17 Oregon of state land use regulations governing minimum lot sizes and
18 nonfarm housing in the EFU zone or proof of a final LUBA or Court Order of
19 Judgment to which the Applicant was a party holding that such a wavier is
20 legally unnecessary to allow the land division and development. * * *"
21 Record 16 (bold in original).

22 On February 4, 2009, the District Court issued an order staying its decision in *Citizens*
23 pending appeal.

24 To summarize and provide an easy point of reference for these events, we set out
25 below a chronology of the just-described key events before turning to the parties'
26 assignments of error.

- 27 1. October 11, 2006. Jackson County approved Ferns's Measure 37
28 waiver. The waiver is not specific as to the number of lots allowed.
- 29 2. March 6, 2007. State of Oregon approved Ferns's Measure 37 waiver.
30 The state waiver allows a 25-lot subdivision of 406 acres and
31 development of a dwelling on each lot.

³ The decision concedes that state statutes prohibit the proposed subdivision and dwellings. Record 4.

- 1 3. September 26, 2007. Ferns submitted an application for preliminary
2 subdivision plat approval. The application sought approval for a 12-
3 lot subdivision and a dwelling on each lot.
- 4 4. December 6, 2007. Measure 49 became effective.
- 5 5. May 9, 2008. Ferns submitted a vested rights application to the county
6 vested rights review authority.
- 7 6. September 22, 2008. County vested rights review authority determined
8 Ferns's rights to the subdivision were not vested under subsection 5(3)
9 of Measure 49.
- 10 7. October 23, 2008. Planning Commission denied preliminary
11 subdivision application.
- 12 8. November, 2008. Ferns sought a writ of review in circuit court of the
13 county vested rights review authority's vested rights decision.
- 14 9. November 12, 2008. United States District Court for the District of
15 Oregon issued its decision in *Citizens*.
- 16 10. December, 2008. County appealed the decision in *Citizens* to the
17 9thCircuit.
- 18 11. January 20, 2009. Board of County Commissioners issued a decision
19 granting preliminary plat approval subject to Ferns receiving a positive
20 vested rights determination under subsection 5(3) of Measure 49 from
21 the circuit court.
- 22 12. February, 2009. DLCD appealed the Board of County
23 Commissioners' preliminary subdivision decision to LUBA. (LUBA
24 No. 2009-025).
- 25 13. February, 2009. Ferns appealed the Board of County Commissioners'
26 preliminary subdivision decision to LUBA. (LUBA No. 2009-027).
- 27 14. February 4, 2009. District Court issued a stay of its decision in
28 *Citizens* pending appeal.

29 **ASSIGNMENTS OF ERROR**

30 DLCD argues that the county's decision is prohibited as a matter of law and should
31 be reversed. OAR 661-010-0071(1)(c). Citing *Corey*, DLCD argues that Ferns's Measure
32 37 waivers were nullified by the passage of Measure 49, and that without those waivers or a
33 valid vesting decision under Measure 49 the county could not lawfully approve the

1 application because applicable state statutes prohibit the subdivision and dwellings. *See*
2 ORS 215.780 (80-acre minimum parcel sizes for EFU land); ORS 215.263 (restricting land
3 divisions in EFU zones); ORS 215.705 (allowing nonfarm dwellings in farm zones under
4 certain circumstances). Therefore, DLCD argues, the county committed reversible error
5 when it approved the application. DLCD further argues that the county's conditional
6 approval based on Ferns's securing a waiver of applicable state laws from the state is
7 unlawful because no such waiver is available any longer, due to the passage of Measure 49.
8 DLCD also points out that Ferns's vested rights application was denied by the county's
9 vested rights review authority in September, 2008.

10 Petitioner Ferns, on the other hand, argues that the county was prohibited from
11 imposing the condition of approval requiring a positive vested rights determination. Ferns
12 argues that on the date the BOC made its decision on the subdivision application, the county
13 was required by the decision in *Citizens* to approve the application without condition. We
14 understand Ferns to argue that the District Court's subsequent stay of the decision does not
15 affect that requirement.

16 The county responds that the decision and the condition requiring a vested rights
17 determination reflect the best choice available to the county to reconcile the effect of the
18 *Citizens* decision on the county with the effect of the nullification of Ferns's Measure 37
19 waivers by Measure 49. The county agrees with DLCD that state law prohibits the county
20 from approving the application absent a waiver of those laws, but points out that on the date
21 the county made the decision, the *Citizens* decision was in effect and had not been stayed,
22 and argues that the decision is binding on the county.

23 **A. State Law (Measure 37 and Measure 49)**

24 ORS 215.416(4) provides:

25 "[A permit] application shall not be approved if the proposed use of land is
26 found to be in conflict with the comprehensive plan of the county and other

1 applicable land use regulation or ordinance provisions. The approval may
2 include such conditions as are authorized by statute or county legislation.”

3 Notwithstanding ORS 215.416(4), Measure 37 allowed the holder of a waiver to seek
4 approval to develop property in ways that would conflict with the applicable comprehensive
5 plan and land use regulations and would otherwise be prohibited by law, in lieu of receiving
6 compensation for loss in property value. *See* n 2. Prior to the passage of Measure 49,
7 Ferns’s Measure 37 waivers provided a legal basis for the county to approve the application
8 without having to apply state and local standards and criteria governing EFU-zoned property
9 that all parties agree would prohibit the county from approving Ferns’s application. In
10 *Corey*, the Oregon Supreme Court held that, with a single exception, the Measure 49
11 remedies completely replace the Measure 37 remedies. 344 Or at 465-67. The “single
12 exception” is that under Measure 49, Ferns may be able to develop the property in a way that
13 would otherwise be prohibited by state law if he has a common law vested right to complete
14 and continue the use described in his Measure 37 waivers.⁴

15 Under Measure 49, a positive vested rights determination pursuant to subsection 5(3)
16 of Measure 49 now provides the sole basis under Oregon law for the county to approve the
17 application without having to apply standards and criteria governing EFU-zoned property.

⁴ Oregon Laws 2007, chapter 424, section 5 provides:

“A claimant that filed a claim under [Measure 37] on or before [June 28, 2007] 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 boundaries 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 [December 6, 2007] to the extent that the claimant’s use of the property complies with the waiver and the claimant has a common law vested right on the effective date of this 2007 Act to complete and continue the use described in the waiver.”

1 Stated differently, Measure 49 deprived Ferns’s application of the shield that Measure 37
2 waivers gave it from review under state and local land use laws that would preclude approval
3 of the subdivision. Under Measure 49, Measure 37 waiver holders no longer may seek
4 required land use approvals that rely on those Measure 37 waivers, unless and until the
5 waiver holder demonstrates that he or she had a vested right to complete the use described in
6 the waivers when Measure 49 took effect on December 6, 2007. But because Ferns had not
7 obtained a positive vested rights determination on the date the county approved the disputed
8 subdivision, the county was obligated to apply the state and local laws that were waived by
9 Ferns’s Measure 37 waivers.

10 As explained above, the county imposed a condition of approval requiring Ferns to
11 obtain a positive vested rights determination prior to final plat approval. The legal effect of
12 that positive vested rights determination would be to allow Ferns to proceed with his
13 proposed subdivision under his Measure 37 waivers, notwithstanding that state and local land
14 use laws that apply to the subject property would otherwise preclude approval of the
15 subdivision.

16 In some circumstances, a local government may defer a determination regarding
17 whether proposed development complies with an applicable approval criterion by imposing a
18 condition that requires a showing of compliance with that applicable approval criterion in a
19 future public proceeding. *Gould v. Deschutes County*, 227 Or App 601, 612, __ P3d __
20 (2009). However, that principle has generally been applied in situations where the proposed
21 development is allowed under applicable land use laws and the only question is whether the
22 proposed development complies with all relevant approval criteria. To our knowledge, that
23 principle has never been applied to allow a local government to conditionally approve a
24 proposed development that is prohibited under existing comprehensive plan and zoning
25 designations, so long as the local government conditions such approval on a subsequent
26 change in those comprehensive plan and zoning designations to make the proposed use an

1 allowed use. Similarly, we do not believe that principle allows a county to approve a
2 development that is prohibited under existing land use laws, so long as it conditions that
3 approval on the applicant seeking and obtaining a vested right under subsection 5(3) of
4 Measure 49 to continue to develop a use authorized under Measure 37 waivers. Unless and
5 until Ferns receives a positive vested rights determination under subsection 5(3) of Measure
6 49, Ferns’s Measure 37 waivers are without legal effect and the county must apply existing
7 state and county land use laws in making a decision on Ferns’s proposed subdivision.

8 Because Ferns did not possess a positive vested rights determination on the date the
9 county made its decision, the county was without a legal basis under Oregon law to approve
10 the application. Accordingly, DLCD’s assignments of error are sustained.

11 **B. Federal Law (*Citizens for Constitutional Fairness v. Jackson County*)**

12 In *Citizens*, a group of plaintiffs that had secured county Measure 37 waivers sued the
13 county when the county refused to recognize those Measure 37 waivers after Measure 49
14 took effect. The plaintiffs argued that the Measure 37 waivers are binding constitutionally
15 protected contracts between each plaintiff and the county under the Contract Clause of the
16 United States Constitution. The district court agreed with the plaintiffs and held that the
17 county could not “* * * rely on Measure 49 as an excuse to avoid its obligations under
18 plaintiffs’ Measure 37 waivers.” *Citizens*, slip op 8. The court also concluded that the
19 plaintiffs Measure 37 waivers were quasi-judicial actions by the county that cannot be
20 overruled by a legislative act, Measure 49. *Id.* at slip op 10.

21 In his petition for review, Ferns requests that LUBA remand the county’s decision so
22 that the county can remove the condition of approval requiring Ferns to secure a vested rights
23 determination, arguing that the condition is inconsistent with the decision in *Citizens*.
24 Ferns’s petition for review does not take the position that the county’s decision must be
25 affirmed under the Contract Clause of the United States Constitution. Rather, Ferns argues
26 that the decision in *Citizens* required the county to approve his application without the

1 condition, and that the *Citizens* decision is also binding on LUBA, in its review of the
2 county's decision.

3 There are two problems with Ferns's position. While Ferns may be correct that on
4 the date the county made its decision, *Citizens* was in effect and required the county to
5 recognize the *county* Measure 37 waivers, the *Citizens* decision determined only that the
6 *county-issued* Measure 37 waivers must be recognized by the county; it did not address the
7 status of Measure 37 waivers of applicable *state* laws or obligate the state to recognize those
8 state waivers after Measure 49 took effect.

9 Second, on February 4, 2009, the District Court stayed its judgment pending appeal
10 of the decision to the 9th Circuit. Even assuming without deciding that *Citizens* provided a
11 legal basis under federal law for the county to approve the application on the date the county
12 approved the subdivision decision, the judgment is now stayed and pursuant to the stay, no
13 longer provides a legal basis under federal law for the county to approve the application, or
14 for LUBA to affirm the county's decision. For those reasons, Ferns's assignments of error
15 are denied.

16 **C. Conclusion**

17 As explained above, on the date the decision was made, the county was without legal
18 basis under state or federal law to approve the application. Therefore the decision is
19 prohibited as a matter of law and must be reversed. OAR 661-010-0071(1)(c).

20 Ferns may ultimately be found to possess a vested right under Oregon Laws 2007,
21 chapter 424, Section 5(3). If so, it is possible that vested right may provide a legal basis for a
22 county decision to approve the disputed subdivision. Similarly, the judgment in *Citizens* is
23 stayed pending appeal of the decision to the 9th Circuit. If *Citizens* is affirmed on appeal, that
24 decision might provide a basis for the county to approve the disputed subdivision. Our
25 disposition of the present appeal should not be understood to preclude either possibility.

26 The county's decision is reversed.