BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

WILLIAM HOFFMAN and DARLENE HOFFMAN,
Petitioners,

vs.

JEFFERSON COUNTY,
Respondent,

and

CENTRAL OREGON LANDWATCH and
OREGON DEPARTMENT OF LAND CONSERVATION
AND DEVELOPMENT,
Intervenors-Respondents.

LUBA No. 2008-090

FINAL OPINION
AND ORDER

Appeal from Jefferson County.

Edward P. Fitch and Lisa D.T. Klemp, Redmond, filed the petition for review and argued on behalf of petitioners. With them on the brief was Bryant, Emerson & Fitch, LLP.

David C. Allen, Madras, filed a response brief and argued on behalf of respondent.

Pamela Hardy, Bend, filed a response brief and argued on behalf of intervenor-respondent Central Oregon Landwatch.

Calvin N. Souther, Jr., Assistant Attorney General, and Virginia L. Gustafson, Assistant Attorney General, Salem, filed a response brief and Calvin N. Souther, Jr. argued on behalf of intervenor-respondent Oregon Department of Land Conservation and Development. With them on the brief was Hardy Myers, Attorney General.

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

AFFIRMED 11/18/2009

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

Petitioner appeals a county decision denying his request for subdivision approval.

MOTIONS TO INTERVENE

Central Oregon LandWatch and the Oregon Department of Land Conservation and Development (DLCD) separately move to intervene on the side of respondent. There is no opposition to the motions, and they are granted.

REPLY BRIEF

Petitioners move for permission to file a reply brief and a supplemental reply brief to respond to new matters in the respondents' briefs. The motion is granted.

FACTS

Petitioners own approximately 188 acres of land that they purchased before the current county exclusive farm use (EFU) zoning was applied their property. Land divisions in the county's EFU zone generally must result in parcels that are at least 80 acres in size. Petitioner seeks approval of a 60-lot subdivision. Many of the proposed lots are as small as two acres. Petitioners' subdivision could not be approved under the currently applicable EFU zoning. Petitioners seek approval of their proposed subdivision under what are called Measure 37 waivers.

Measure 37 was approved by Oregon voters in 2004 and was codified at former ORS 197.352 (2005). Simply stated, Measure 37 authorized public entities to waive land use laws that had the effect of reducing the fair market value of certain property. Petitioners sought and received Measure 37 waivers from the state and county. On February 15, 2007, petitioners filed an application for tentative subdivision plan approval. After a number of county requests for additional information, the county deemed the application complete almost nine months later, on October 8, 2007. Almost one month later, on November 6, 2007, Measure 49 was approved by Oregon voters. The planning director administratively

granted tentative subdivision approval on November 21, 2007. Approximately two weeks later, Measure 49 took effect on December 6, 2007. Measure 49 is codified at ORS 195.300 to 195.336 and Oregon Laws 2007, chapter 424, sections 5 through 11. Simply stated, Measure 49 "extinguish[ed] and replace[d] the benefits and procedures that Measure 37 granted to landowners." *Corey v. DLCD*, 344 Or 457, 465, 184 P3d 1109 (2008). Under Measure 49, eligible claimants may qualify for specific types of "just compensation." [1] The "just compensation" that petitioners would be entitled to under Measure 49 would only include the right to develop the proposed 60-lot subdivision that was made potentially approvable under petitioners' Measure 37 waivers in one circumstance: "to the extent the claimant's use of the property complies with the [Measure 37] waiver and the claimant has a common law vested right on [December 6, 2007] to complete and continue the use described in the [Measure 37] waiver." Or Laws 2007, ch 424, sec 5(3); *see* n 1.

The planning director's November 21, 2007 decision was appealed to the planning commission on December 11, 2007. On January 24, 2008, the planning commission determined that Measure 49 nullified the state and county Measure 37 waivers and that without those Measure 37 waivers the disputed subdivision could not be approved.

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[1] 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 [Measure 49], 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 [Measure 49] if the property described in the claim is located, in whole or in part, within an urban growth boundary; or
>
> "(3) A [Measure 37] waiver issued before [December 6, 2007] to the extent that the claimant's use of the property complies with the [Measure 37] waiver and the claimant has a common law vested right on [December 6, 2007] to complete and continue the use described in the waiver."

On February 6, 2008, the county adopted Ordinance 0 – 23 – 08, which set out a procedure under which the county would determine whether Measure 37 claimants have achieved a common law vested right pursuant to Section 5(3) of Measure 49.[2] On February 13, 2008, petitioners appealed the planning commission's decision denying their request for subdivision approval to the board of county commissioners. At about the same time, on February 25, 2008, petitioners applied for a vested rights determination under Section 5(3) of Measure 49 and Ordinance 0 – 23 – 08. On April 2, 2008 the board of county commissioners held a hearing on petitioners' request for a vested rights determination and petitioners' appeal of the planning commission decision.[3] At that April 2, 2008 hearing the board of county commissioners voted to continue discussion of the Measure 49 vested rights application and ultimately entered a final decision that petitioners do not have a vested right under Measure 49, on May 7, 2008. Record 43-47. At the April 2, 2008 hearing, the board of county commissioners also voted to deny petitioners' appeal of the planning commission subdivision decision. The decision to deny petitioners' appeal of the planning commission decision was reduced to writing and signed on April 9, 2008. Petitioners filed a motion requesting that the board of county commissioners reconsider that decision. That motion was granted by the board of county commissioners on May 7, 2008. Following a June 4, 2008 hearing, the board of county commissioners issued a second decision, again denying petitioners' appeal of the planning commission decision. This appeal followed.

After oral argument in this appeal, LUBA invited the parties to consider suspending this appeal pending final resolution of an appeal of our decision in *Pete's Mtn. Home Owners*

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[2] Ordinance 0 – 23 – 08 is not included in the record in this appeal, but a copy is attached as Appendix 5 to the petition for review. We take official notice of the ordinance. OEC 202; *Friends of Deschutes County v. Deschutes County*, 49 Or LUBA 100, 103 (2005); *Home Builders Assoc. v. City of Wilsonville*, 29 Or LUBA 604, 606 (1995).

[3] The notice of April 2, 2008 hearing indicated the vested rights hearing would be held at 1:30 p.m. and the hearing on the appeal of the planning commission decision would be held at 2:30 p.m.

Assoc. v. Clackamas County, 57 Or LUBA 472 (2008), a case that addressed the impact of Measure 49 on a pending application for subdivision approval that relied on Measure 37 waivers, which is the central legal issue in this appeal. The parties agreed to do so, and this appeal was suspended on November 10, 2008. On April 1, 2009, the Court of Appeals issued its decision in *Pete's Mountain Homeowners Assn. v. Clackamas Cty*., 227 Or App 140, 204 P3d 802, *rev den* 346 Or 589, 214 P3d 821 (2009). The Court of Appeals' appellate judgment in this matter was effective on August 26, 2009. On October 27, 2009 we issued an order allowing the parties additional time to submit supplemental briefing. On October 29, 2009, petitioners advised LUBA that they did not wish to submit additional briefing, and on November 2, 2009 LUBA advised the parties that it would decide this appeal without additional briefing.

ASSIGNMENTS OF ERROR

A. ORS 215.427(3)(a) (the Goal-Post Statute)

Petitioners' petition for review includes five assignments of error. With two possible exceptions, the critical legal question that forms the basis of all five assignments of error is whether the county erred by failing to apply ORS 215.427(3)(a) to bar application of Measure 49 to petitioners' application for subdivision approval. ORS 215.427(3) is commonly referred to as the goal-post statute and provides that if a land use permit application is complete when filed, or made complete within the deadline established by the statute, a decision on that application must "be based upon the standards and criteria that were applicable at the time the application was first submitted." Petitioners contend their Measure 37 waivers are "standards and criteria that were applicable at the time the application was first submitted," within the meaning of ORS 215.427(3)(a). Petitioners contend Measure 49 adopts new or amended "standards or criteria," and therefore, under ORS 215.427(3)(a), Measure 49 should not have been applied to their application. Petitioners contend this result is required under ORS 215.427(3)(a) because Measure 49 was

adopted and became effective after their application was first submitted on February 15, 2007.[4] As explained below, under the Court of Appeals decision in *Pete's Mountain*, petitioners' goal-post argument is without merit.

Petitioner's request for tentative subdivision approval depends on their Measure 37 waivers, and cannot be approved under existing law without those waivers. With the exception of Measure 37 claimants who have a common law vested right to complete a use authorized by a Measure 37 waiver, Measure 49 rendered all Measure 37 waivers legally ineffective. *Corey v. DLCD*, 344 Or at 467. Under the Court of Appeals' decision in *Pete's Mountain*, petitioners' Measure 37 waivers and the more limited Measure 49 remedies both qualify as "standards and criteria," within the meaning of ORS 215.427(3)(a). *Pete's Mountain*, 227 Or App at 148. Assuming, as we do, that petitioners' February 15, 2007 application was completed in accordance with ORS 215.427(3)(a), the goal-post statute bars application of the Measure 49 "standards and criteria" in place of the "standards and criteria" that apply under petitioners' Measure 37 waiver. Because Measure 49 dictates the opposite result, and requires that the Measure 49 "standards and criteria" be applied in place of "standards and criteria" that apply under petitioners' Measure 37 waiver, Measure 49 and ORS 215.427(3)(a) are inconsistent. The question becomes which of those conflicting statutes prevails. As the Court of Appeals explained in *Pete's Mountain*, Measure 49 supersedes Measure 37 and ORS 215.427(3)(a):

> "We are confronted with a case in which two statutes apply, but do so in inconsistent fashion. On the one hand, the goal-post statute provides that, once petitioners' application was completed, the standards and criteria that applied at that time—including, as we have held, their Measure 37 waivers—cannot be changed. On the other hand, Measure 49 provides that petitioners'

[4] The parties dispute whether petitioners submitted the additional information that was needed to make their application complete within 180 days, as required by ORS 215.427(3)(a). In view of our resolution of this appeal, we assume without deciding that petitioners timely completed their application in accordance with ORS 215.427(3)(a).

> Measure 37 waivers no longer have legal effect. There is no way to reconcile the two statutes as they apply to this case.
>
> "* * * * *
>
> "We conclude * * * that, although Measure 37 waivers are part of the standards and criteria that cannot be changed under the goal-post statute, Measure 49 supersedes both Measure 37 and the goal-post statute." 227 Or App at 150-51.

Based on the Court of Appeals' decision in *Pete's Mountain*, we conclude that petitioners' goal-post statute arguments provide no basis for reversal or remand.

B. The County's Nonconforming Use Determination

In the challenged decision, the board of county commissioners adopted the following findings:

> "The Court's ruling [in *Corey v. DLCD*] means the only landowners who may continue to develop property under Measure 37 are those who completed enough of the permitted development to require the government to allow full completion. A land owner who has not sufficiently developed property under a Measure 37 waiver retains no rights under Measure 37.
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> "The burden is on the applicant to show sufficient development has occurred to retain any rights under Measure 37. The County finds applicant has not met this burden with substantial evidence in the record. The County finds that the applicant has not sufficiently developed the property to retain any rights under Measure 37.
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> "Accordingly, Jefferson County lacks legal authority to approve this land use application." Record 3.

Petitioners argue that they requested that the county find that they have a vested right under Section 5(3) of Measure 49 as part of the land use proceedings that led to the decision on their subdivision application. We understand petitioners to argue that the above findings do not reflect that the county commissioners considered the evidence that that they submitted in support of that request on January 17, 2008, which appears at Record 207-209.

Although petitioners make little attempt to argue that the evidence they submitted on January 17, 2008 was sufficient to establish that they have a common law vested right to

complete the disputed subdivision, we agree with petitioners that the above-quoted findings are not adequate to provide an explanation on the merits regarding why the county believes petitioners failed to carry their burden to demonstrate that they had a vested right under Section 5(3) of Measure 49 to continue development of the proposed subdivision. But the board of county commissioner's decision denying petitioners' request for tentative plan approval is dated June 11, 2008. Over one month earlier, on May 8, 2008, the county had issued a separate decision under the procedure it adopted to render vested rights decisions under Section 5(3) of Measure 49. In that May 8, 2008 decision the county had determined that petitioners do not have a vested right to complete the disputed subdivision. Record 43-47. That May 8, 2008 decision states that petitioners "DO NOT have a vested right [to] a 60-lot subdivision." Record 46. The decision also states that it is "not a land use decision" and that the county's vesting decision "may be appealed to the Jefferson County Circuit Court in a Writ of Review proceeding * * *."[5] Record 46-47.

While the county's June 11, 2008 decision in this matter does not expressly reference its earlier May 8, 2008 vested rights decision concerning petitioners' proposed subdivision, we believe it is most likely that the board of county commissioners intended to rely on its May 8, 2008 decision to resolve the vested rights question under Section 5(3) of Measure 49. We do not believe the board of county commissioners intended to decide that question on the merits for a second time in its June 11, 2008 decision. According to the county, its May 8, 2008 vesting decision was not challenged in a writ of review proceeding. Respondent's Brief 13 n 3. If so that decision is now final, and if we were to remand the board of county commissioners' June 11, 2008 decision for additional vested rights findings, the county

[5] ORS 195.318(1) provides that "[a] determination by a public entity under [Measure 49], is not a land use decision" reviewable by LUBA and that county decisions under Measure 49 are reviewable via writs of review in circuit court.

presumably would simply recite that undisputed fact.[6] Therefore, even if the cited findings are inadequate to explain why petitioners do not have a vested right under Section 5(3) of Measure 49, any inadequacy in those findings does not provide a basis for reversal or remand.

Petitioners' challenge to the above quoted findings provides no basis for reversal or remand.

C. The Measure 37 Waivers are not Licenses

Citing *Brusco Towboat v. State Land Bd.*, 284 Or 627, 589 P2d 712 (1978), petitioners argue their state and county Measure 37 waivers should be viewed as revocable licenses that became irrevocable after petitioners acted on those waivers. According to petitioners, their Measure 37 waivers became irrevocable after they filed their subdivision application and began incurring expenses in pursuing approval of that application.

Brusco Towboat concerned a challenge to the validity of Oregon State Land Board rules that required leases for and imposed rents on permanent structures that occupied submerged and submersible lands. *Brusco Towboat* had very little to do with express revocable licenses. That decision does, however, note the following regarding licenses between private parties:

> "* * * Between private parties, the general rule is that when expenditures have been made to construct permanent improvements on another's land in reliance on an express license to do so, the license cannot thereafter be revoked, at least without payment of compensation. * * *" 284 Or at 644-45.

As the Oregon Supreme Court noted, a similar rule applies where riparian owners have been granted rights under wharfing statutes to construct wharves over submerged and submersible lands and they have constructed such wharves. Such wharfing statutes do not "vest any right

[6] Although petitioners filed a reply brief to respond to other new matters raised in the respondents' briefs, petitioners' reply brief includes no challenge to the county's representation that no writ of review was filed to challenge the county's May 8, 2008 decision that petitioners do not have a vested right under Section 5(3) of Measure 49.

until exercised; [they are] a license, revocable at the pleasure of the legislature, until acted upon or availed of." *Brusco Towboat*, 284 Or at 639 (quoting from *Bowlby v. Shively*, 22 Or 410, 420-21, 30 P 154 (1892), *aff'd Shively v. Bowlby*, 152 US 1, 14 S Ct 548, 38 L Ed 331 (1894)).

We understand petitioners to contend that their Measure 37 waivers similarly should be viewed as licenses that became irrevocable when petitioners submitted their application for tentative subdivision approval and began incurring expenses in pursuit of approval of that application for subdivision approval.

We see no basis for petitioners' claim that their Measure 37 waivers are licenses.[7] First, a "license," in the sense that petitioners use that term, is generally a personal right to use the land of another.[8] David A. Thomas, *Thompson on Real Property* § 64.02(a) at 2 (Second Edition 1994); A. James Casner, *American Law of Property* § 8.77 at 287 (1974). Petitioners own their land, and it is unlikely that they could possess a license to use their own land. Second, as we have already explained, when the legislature adopted Measure 49 it included Section 5(3), which shields holders of previously issued Measure 37 waivers from having to accept the reduced "just compensation" that is available under Sections 5(1) and 5(2) of Measure 49, but only if those Measure 37 claimants have made the types and levels of expenditures under their Measure 37 waivers that establish a common law vested right to

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[7] Even if petitioners' Measure 37 waivers could be characterized as licenses, as intervenor Central Oregon LandWatch points out, the cases that have allowed fully developed wharves to remain where a license was not revoked before the wharf was completed would not necessarily assist petitioners in this case, since there was little or no approved development on the subject property when Measure 49 took effect on December 6, 2007.

[8] Black's Law Dictionary defines license as follows:

> "**license**, n. * * * A permission, usu. revocable, to commit some act that would otherwise be unlawful; esp., an agreement * * * that it is lawful for the licensee to enter the licensor' land to do some act * * *
>
> > "'[A] license is an authority to do a particular act, or series of acts, upon another's land without possessing any estate therein. * * * Kent, *Commentaries on American Law* *452-53 (George Comstock ed., 11th ed. 1866)." *Black's Law Dictionary*, 1002 (9th ed. 2009).

complete the Measure 37 authorized use under the principles established in *Clackamas Co. v. Holmes*, 265 Or 193, 197, 508 P2d 190 (1973). *Corey v. DLCD*, 344 Or at 466. Petitioners have been given an opportunity to demonstrate that they have a vested right to continue the disputed subdivision under Section 5(3) of Measure 49. We reject petitioners attempt to characterize their Measure 37 waivers as licenses, in an attempt to secure an additional remedy that is not provided for in Measure 49.

D. Conclusion

For the reasons explained above, petitioners' assignments of error supply no basis for reversal or remand of the county's decision. We therefore reject those assignments of error and affirm the county's decision.