

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

JAN14'10 PM12:42 LUBA

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4 MIKE WALKER, HAL B. ANTHONY
5 and WAYNE McKY,
6 *Petitioners,*

7
8 and

9
10 HOLGER T. SOMMER,
11 *Intervenor-Petitioner,*

12
13 vs.

14
15 JOSEPHINE COUNTY,
16 *Respondent.*

17
18 LUBA No. 2008-136

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20 FINAL OPINION
21 AND ORDER

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23 Appeal from Josephine County.

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25 Mike Walker, Hal B. Anthony and Wayne McKy, Grants Pass, represented
26 themselves.

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28 Holger T. Sommer, Merlin, represented himself.

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30 Steven E. Rich, Grants Pass, represented respondent.

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

34
35 REVERSED

01/14/2010

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

1 Holstun, Board Member.

2 **NATURE OF THE DECISION**

3 Petitioners appeal a county decision approving a subdivision on resource land.

4 **FACTS**

5 This appeal concerns a subdivision that could not be approved under existing land use
6 laws. That subdivision was approved, notwithstanding existing land use laws, based on
7 Ballot Measure 37 (2004) waivers. The decision approving the disputed subdivision was
8 rendered after Ballot Measure 49 took effect on December 6, 2007. The Oregon Supreme
9 Court has held that Ballot Measure 49 rendered Ballot Measure 37 waivers legally
10 ineffective, unless the development authorized by the Ballot Measure 37 waivers had been
11 sufficiently developed to create a common law vested right to continue the development. *See*
12 *Corey v. DLCD*, 344 Or 457, 184 P3d 1109 (2008) (for a detailed discussion of Measure 37
13 and Measure 49). No party in this appeal has claimed that the subdivision applicant has
14 acquired a common law vested right to continue development under Measure 49.

15 **DISPOSITION**

16 LUBA's decision in *Pete's Mtn. Home Owners Assoc. v. Clackamas County*, 57 Or
17 LUBA 472 (2008) (*Pete's Mountain I*) also involved a decision that approved a subdivision
18 based on Measure 37 waivers after Ballot Measure 49 took effect. That decision was
19 appealed to the Court of Appeals. Because our decision in *Pete's Mountain I* and potentially
20 the Court of Appeals' decision on appeal would likely be dispositive of the issues presented
21 in the present appeal, the parties agreed to suspend this appeal while the appeal of *Pete's*
22 *Mountain I* was pending at the Court of Appeals.¹

23 In *Pete's Mountain Homeowners Assn. v. Clackamas County*, 227 Or App 140, 204
24 P3d 802, *rev den* 346 Or 589 (2009) (*Pete's Mountain II*), the Court of Appeals affirmed our

¹ In this appeal, record objections had been filed, but the record had yet to be settled.

1 decision and held that it was error for a county to approve a subdivision application that
2 relied on Ballot Measure 37 waivers after Ballot Measure 49 took effect. The Court of
3 Appeals held in *Pete's Mountain II* that the so-called goal post statute at ORS 215.427(3)(a)
4 does not allow such subdivisions to be approved despite Measure 49. *Pete's Mountain II*,
5 227 Or App at 151. After *Pete's Mountain II*, LUBA issued an order allowing the parties in
6 this appeal 21 days to determine whether they wished to continue with this appeal or to
7 stipulate to a summary disposition based on the Court of Appeals' decision in *Pete's*
8 *Mountain II*. The parties subsequently filed a stipulation agreeing to a summary disposition,
9 however, the parties did not specify what the summary disposition should be.

10 LUBA issued another order stating that it presumed the summary disposition the
11 parties agreed to was a reversal of the challenged decision based on *Pete's Mountain II*, but
12 the order allowed the parties additional time to correct that presumption in case it was wrong.
13 The parties did not file any additional pleadings, so we proceed with the understanding that
14 our presumption was correct.

15 In this appeal petitioners challenge a decision that grants a subdivision approval that
16 could not be granted without Measure 37 waivers. The decision was rendered after Ballot
17 Measure 49 took effect and rendered the Measure 37 waivers legally ineffective. Under
18 *Corey* and *Pete's Mountain II*, the county's decision must be reversed.

19 Accordingly, the county's decision's is reversed.