BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

BRIAN MAGUIRE,
Petitioner,

vs.

CLACKAMAS COUNTY,
Respondent.

LUBA No. 2011-040

FINAL OPINION
AND ORDER

Appeal from Clackamas County.

Anne C. Davies, Eugene, filed the petition for review and argued on behalf of petitioner.

Scott Ciecko, Assistant County Counsel, Oregon City, filed the response brief and argued on behalf of respondent.

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

DISMISSED 11/14/2011

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

Opinion by Bassham.

NATURE OF THE DECISION

Petitioners appeal a county hearings officer decision approving a partition of land to site a dwelling, pursuant to Section 11, chapter 424, Oregon Laws 2007 (Measure 49).

MOTION TO TAKE OFFICE NOTICE

Petitioners move for the Board to take official notice of the legislative history of Measure 49, in the form of the state voter's pamphlet. There is no opposition to the motion, and it is allowed.

FACTS

The subject property is a 23.35-acre parcel zoned for exclusive farm use (EFU), developed with a dwelling located in the northern portion of the parcel. The parcel has Class IIIe and IVe non-high value agricultural soils in its northern portion near the existing dwelling, but Class II high-value agricultural soils in its southern portion. On December 26, 2006, the owners filed a claim with the Department of Land Conservation and Development (DLCD) under ORS 197.352 (2005) (Measure 37) seeking to partition and develop the property. After passage of Measure 49, the owners elected to pursue supplemental review of their Measure 37 claim under Section 6 of Measure 49. On May 12, 2010, DLCD approved the Measure 49 claim, authorizing the owners to seek partition of the subject property to create one additional parcel and one additional dwelling. On August 12, 2010, the owners filed an application with the county to partition the property pursuant to the DLCD authorization and Section 11 of Measure 49.

The partition application proposed to create a 19.35-acre remainder parcel with the existing dwelling in the northern portion of the property, and a two-acre parcel in the southern portion of the property, on which would be sited a second dwelling, on high value soils. The county planning director approved the partition, and petitioner appealed to the county hearings officer. Petitioner argued to the hearings officer that Section 11 of Measure

49 requires that dwellings authorized under Measure 49 be clustered with other dwellings and away from high-value soils.

The hearings officer conducted a hearing and on April 18, 2011, issued a final decision approving the proposed partition. This appeal followed.

JURISDICTION

At oral argument, LUBA requested additional briefing from the parties on the question of whether Section 16 of Measure 49, codified at ORS 195.318, deprives LUBA of jurisdiction over the challenged decision. The county and petitioner filed additional briefing, both taking the position that the challenged decision is a "land use decision" subject to LUBA's exclusive jurisdiction. For the following reasons, we disagree, and conclude that pursuant to ORS 195.318, the challenged decision is a decision "under" Section 11 of Measure 49, and therefore is not a land use decision subject to LUBA's jurisdiction.

ORS 197.015(10)(a)(A) defines "land use decision" in relevant part as a final decision or determination made by a local government that concerns the application of a land use regulation. The challenged partition decision in this appeal involved the application of one or more county land use regulations and therefore, absent some intervening statute, the decision is a land use decision subject to our jurisdiction. However, the challenged decision also concerned the application of one or more regulations set out in Section 11 of Measure 49.

As is well known, Measure 37 (2005) limited the ability of local governments to restrict development based on regulations adopted after the owner acquired the property. In lieu of paying "just compensation" for such restrictions, Measure 37 allowed local governments to waive or choose "not to apply" certain land use regulations to allow the owner to use property for a use permitted when the owner acquired the property. Measure 49 (2007) modified Measure 37 (2005) and entirely superseded the remedies for claims for just

compensation filed under Measure 37. *Corey v. DLCD*, 344 Or 457, 466-67, 184 P3d 1109 (2008).

Sections 5 to 11 of Measure 49 concern Measure 37 claims filed prior to the adjournment of the 2007 regular legislative session.[1] Under section 5, a Measure 37 claimant can elect to seek either a limited number of dwellings on newly created lots or parcels under sections 6, 7 or 9, or pursue a so-called "vested rights" claim under section 5(3). Section 11(1) of Measure 49 authorizes local governments to apply certain types of land use regulations to approve a subdivision or partition of property, or one or more dwellings, authorized under sections 5 to 11, with certain limitations.[2] The remaining subsections of

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[1] Sections 12 to 14 of Measure 49 are now codified at ORS 195.310 to 195.314 and concern Measure 37 claims filed after the adjournment of the 2007 regular legislative session.

[2] Section 11 of Measure 49 provides, in relevant part:

> "(1) A subdivision or partition of property, or the establishment of a dwelling on property, authorized under sections 5 to 11, chapter 424, Oregon Laws 2007 [series became sections 5 to 11, chapter 424, Oregon Laws 2007, and sections 2 to 9 and 17, chapter 855, Oregon Laws 2009], must comply with all applicable standards governing the siting or development of the dwelling, lot or parcel including, but not limited to, the location, design, construction or size of the dwelling, lot or parcel. However, the standards must not be applied in a manner that has the effect of prohibiting the establishment of the dwelling, lot or parcel authorized under sections 5 to 11, chapter 424, Oregon Laws 2007, unless the standards are reasonably necessary to avoid or abate a nuisance, to protect public health or safety or to carry out federal law.
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> "(2) If the property described in a claim is bisected by an urban growth boundary, any new dwelling, lot or parcel established on the property pursuant to an order under section 6, chapter 424, Oregon Laws 2007, must be located on the portion of the property outside the urban growth boundary.
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> "(3) Before beginning construction of any dwelling authorized under section 6 or 7, chapter 424, Oregon Laws 2007, the owner must comply with the requirements of ORS 215.293 if the property is in an exclusive farm use zone, a forest zone or a mixed farm and forest zone.
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> "(4) (a) A city or county may approve the creation of a lot or parcel to contain a dwelling authorized under sections 5 to 11, chapter 424, Oregon Laws 2007. However, a new lot or parcel located in an exclusive farm use zone, a forest zone or a mixed farm and forest zone may not exceed:

Section 11 set out additional statutory standards and requirements that local governments must apply in approving creation of a new lot or parcel, or one or more dwellings authorized under sections 5 to 11 of Measure 49. For example, subsection 3(a) provides that a new lot or parcel on resource land may not exceed two acres if the lot or parcel is located on high-value farmland. Particularly relevant in the present case, subsection 3(b) provides that the "new lots or parcels created must be clustered so as to maximize suitability of the remnant lot or parcel for farm or forest use."

The jurisdictional issue arises in the present case under Section 16 of Measure 49, an issue we raise on our own motion. Section 16 of Measure 49, codified at ORS 195.318(1), provides in relevant part:

> "A person that is adversely affected by a final determination of a public entity under ORS 195.310 to 195.314 or sections 5 to 11, chapter 424, Oregon Laws 2007, and sections 2 to 9 and 17, chapter 855, Oregon Laws 2009, may obtain judicial review of that determination under ORS 34.010 to 34.100, if the determination is made by Metro, a city or a county, or under ORS 183.484, if the determination is one of a state agency. * * * *A determination by a public entity under ORS 195.310 to 195.314 or sections 5 to 11, chapter 424, Oregon Laws 2007 * * * is not a land use decision*." (Emphasis added.)

> "(A) Two acres if the lot or parcel is located on high-value farmland, on high-value forestland or on land within a ground water restricted area; or
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> "(B) Five acres if the lot or parcel is not located on high-value farmland, on high-value forestland or on land within a ground water restricted area.
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> "(b) If the property is in an exclusive farm use zone, a forest zone or a mixed farm and forest zone, the new lots or parcels created must be clustered so as to maximize suitability of the remnant lot or parcel for farm or forest use.
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> "(5) If an owner is authorized to subdivide or partition more than one property, or to establish dwellings on more than one property, under sections 5 to 11, chapter 424, Oregon Laws 2007, and the properties are in an exclusive farm use zone, a forest zone or a mixed farm and forest zone, the owner may cluster some or all of the dwellings, lots or parcels on one of the properties if that property is less suitable than the other properties for farm or forest use. If one of the properties is zoned for residential use, the owner may cluster some or all of the dwellings, lots or parcels that would have been located in an exclusive farm use zone, a forest zone or a mixed farm and forest zone on the property zoned for residential use."

The emphasized language clearly provides that a final determination by a public entity "under" sections 5 to 11 of Measure 49 is not a land use decision. Jurisdiction to review final determinations made under sections 5 to 11 of Measure 49 lies with the circuit court. If the partition approval challenged in the present appeal is a final determination "under" section 11 of Measure 49, it follows that the challenged decision is not a land use decision, and LUBA does not have jurisdiction to review the decision.

The county argues in its memorandum on jurisdiction that the challenged partition decision is not a decision "under" Section 11. According to the county, while the proceedings below and on appeal to LUBA turn on the interpretation of Section 11(4)(b), the hearings officer ultimately interpreted Section 11(4)(b) not to require that the applicant cluster the existing and new dwelling. That argument presumes that the hearings officer correctly determined that Section 11(4)(b) does not require clustering in this case. Regardless of the merits of that determination, however, it is clear that the partition approval was subject to other standards in Section 11. For example, creation of the two-acre parcel was presumably governed by Section 11(4)(a)(A), which provides that the new lot or parcel may not exceed two acres if located on high-value farmland.

Petitioner argues in his memorandum on jurisdiction that LUBA has held in the Measure 37 context that subdivision and partition decisions that implement Measure 37 waivers are not decisions "under" Measure 37, and thus are not land use decisions. *Welch v. Yamhill County*, 55 Or LUBA 697, 701 (2007). Measure 37 (2005) had a jurisdictional exclusion, then codified at ORS 197.352(9) (2005), providing simply that decisions "under" Measure 37 were not land use decisions. According to petitioner, the judicial review provisions of Section 16 of Measure 49 are similar to that in *former* ORS 197.352(9) (2005), and for the same reasons expressed in *Welch* LUBA should conclude that a subdivision or partition decision that implements a prior Measure 49 authorization is not a final

determination "under" Sections 5 to 11 of Measure 49, for purposes of Section 16, ORS 195.318(1).

We disagree. Measure 37 included no provisions analogous to Section 11 of Measure 49, and was silent regarding any post-waiver partition, subdivision or development approvals that may have been necessary to carry out prior local government decisions under Measure 37 "not to apply" land use regulations that were not in effect when the owner acquired the property. By contrast, Section 11 of Measure 49 requires the public entity to apply, with limitations, certain types of local regulations to subdivision, partition and development applications implementing a Measure 49 authorization, and further provides substantive statutory standards that govern approvals of those applications. Plainly, a decision that applies those Section 11 standards to approve a subdivision, partition or development application is a decision "under" Section 11 of Measure 49.

Petitioner next argues that this Board held, in *DLCD v. Clatsop County*, 58 Or LUBA 714 (2009), that a preliminary subdivision plat approval that post-dated and relied on a vested rights determination made pursuant to Section 5(3) of Measure 49 is a land use decision subject to LUBA's review, because it is not a decision concerning the "nature and extent" of just compensation" under Measure 49.

The "nature and extent" language derives from Section 4 of Measure 49, codified at ORS 195.305(7), which amended the jurisdictional exclusion in Measure 37 at *former* ORS 197.352(9) (2005). As amended, ORS 195.305(7) provides:

> "A decision by a public entity that an owner qualifies for just compensation under ORS 195.305 to 195.336 and sections 5 to 11, chapter 424, Oregon Laws 2007, and sections 2 to 9 and 17, chapter 855, Oregon Laws 2009, and a decision by a public entity on the nature and extent of that compensation are not land use decisions."

Petitioner is correct that in *DLCD v. Clatsop County*, we concluded that the prior vested rights determination was the decision referred to in ORS 195.305(7) that determines that an owner "qualifies for just compensation" and the "nature and extent of that

compensation[,]" and that the subdivision approval that followed was not subject to the jurisdictional exclusion at ORS 195.305(7):

> "[T]he challenged preliminary subdivision plat decision applies state and local land use laws that were not waived by intervenors' Measure 37 waiver. That is not a decision that concerns the 'nature and extent of [just] compensation' under Measure 49, within the meaning of ORS 195.305(7). The [county's] September 18, 2008 decision that intervenors' have a vested right to continue with their effort to subdivide and develop their property was the county's final decision regarding the 'nature and extent of [just] compensation' that intervenors will receive under Measure 49. The 'nature' of the just compensation is a vested right to continue under intervenors' Measure 37 waiver, rather than under the more limited options available under Oregon Laws 2007, chapter 424, subsection 5(1). The 'extent' of that just compensation is 43 lots and a right to develop a dwelling on each lot. The preliminary subdivision plat approval decision that is before us in this appeal post-dated the county's final 'nature and extent' decision under Measure 49. It is not a decision concerning the 'nature and extent of [just] compensation' under Measure 49." *Id.* at 729.

It is true that, in *DLCD v. Clatsop County*, we quoted in a footnote the last sentence of ORS 195.318(1), Section 16 of Measure 49, which as noted provides that "[a] determination by a public entity under * * * sections 5 to 11, chapter 424, Oregon Laws 2007 * * * is not a land use decision." We also referred to both ORS 195.305(7) and ORS 195.318(1) in concluding that we had jurisdiction over the challenged subdivision plat approval. *Id.* at 738. However, we did not otherwise address or analyze ORS 195.318(1). The judicial review provisions of ORS 195.318(1) are written in different terms than the jurisdictional exclusion provisions of ORS 195.305(7), and presumably serve some independent function. To the extent we conflated ORS 195.305(7) and 195.318(1) in *DLCD v. Clatsop County*, we may have erred.

However, *DLCD v. Clatsop County* is also distinguishable. Importantly, we did not have occasion in *DLCD v. Clatsop County* to consider whether the subdivision decision at issue had been approved "under" the standards in Section 11 of Measure 49, and the jurisdictional consequences if so for purposes of ORS 195.318(1). The issue simply did not arise. Further, it is significant that the subdivision application at issue in *DLCD v. Clatsop County* was based on a vested rights claim pursuant to Section 5(3), rather than an

authorization for new dwellings and lots pursuant to Sections 6, 7 or 9 of Measure 49, as provided in Sections 5(1) and (2).[3] Measure 49 includes no standards for resolving a vested rights claim under Section 5(3); it is purely a matter of common law. A determination that an owner has a common law vested right to "complete and continue the use described in the [Measure 37] waiver" is arguably not a local government "authorization" of any kind, but an adjudication of the rights of the owner. Section 5(3) includes no standards that would apply to a decision to approve a subdivision, based on a prior Measure 37 waiver. Section 11 sets out the standards that apply to a "subdivision or partition of property, or the establishment of a dwelling on property, *authorized* under sections 5 to 11" of Measure 49 (emphasis added). Despite the broad series reference, it is arguable that the standards in Section 11 apply only to residential development authorized under Sections 5(1) and (2), pursuant to Sections 6, 7 and 9, and do not govern subsequent approvals that may be required to implement a vested rights determination under Section 5(3). We note that Sections 6, 7 and 9 exclusively and expressly "authorize" residential development. The development standards in Section 11 seem to be uniformly directed at residential development. *See* n 2. By contrast, a common law vested rights claim under Section 5(3) could be for any type of development, residential, commercial or industrial. Thus, although we need not resolve the question in this appeal, it

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[3] Section 5 of Measure 49 provides:

> "A claimant that filed a claim under ORS 197.352 [renumbered 195.305] on or before the date of adjournment sine die of the 2007 regular session of the Seventy-fourth Legislative Assembly [June 28, 2007] is entitled to just compensation as provided in:
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> "(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;
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> "(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
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> "(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."

is arguable that the Section 11 standards do not govern subsequent development of a vested rights claim, and any local government decision approving such development based on a vested rights adjudication is not a decision "under" Section 11, for purposes of ORS 195.318(1).

In any case, even if we incorrectly decided *DLCD v. Clatsop County*, and should have dismissed that appeal based on ORS 195.318(1), that offers no basis not to give effect to the plain language of ORS 195.318(1) in the present case. As explained above, the county's partition approval was clearly made "under" Section 11, and therefore pursuant to ORS 195.318(1) the challenged decision is not a "land use decision" subject to LUBA's jurisdiction.

Pursuant to ORS 195.318(1), exclusive jurisdiction for judicial review of the county's decision lies with the circuit court. OAR 661-010-0075(11)(a) authorizes LUBA to transfer an appeal to circuit court, upon the request of any party, in the event that the Board determines that the appealed decision is not reviewable as a land use decision. OAR 661-010-0075(11)(b) provides that "[i]f the Board raises a jurisdictional issue on its own motion, a motion to transfer to circuit court shall be filed not later than 14 days after the date the moving party learns the Board has raised a jurisdictional issue." The Board raised the jurisdictional issue at oral argument on October 20, 2011. More than 14 days has elapsed, and no party has filed a motion to transfer this appeal to circuit court. Accordingly, this appeal is dismissed. OAR 661-010-0075(11)(c).