

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

3  
4                   ALFRED I. SILBOWITZ and  
5                   VIRGINIA LEROUX SILBOWITZ,  
6                   *Petitioners,*

7  
8                   vs.

9  
10                  JACKSON COUNTY,  
11                  *Respondent,*

12  
13                  and

14  
15                  ROCKY YOUNGER and GORDON JOHNSTON,  
16                  *Intervenors-Respondents.*

17  
18                  LUBA No. 2022-018

19  
20                  FINAL OPINION  
21                  AND ORDER

22  
23                  Appeal from Jackson County.

24  
25                  Christian E. Hearn represented petitioners.

26  
27                  Joel C. Benton represented respondent.

28  
29                  Wendie L. Kellington represented intervenors-respondents.

30  
31                  RYAN, Board Member; ZAMUDIO, Board Chair; RUDD, Board  
32                  Member, participated in the decision.

33  
34                  TRANSFERRED                   06/06/2022

35  
36                  You are entitled to judicial review of this Order. Judicial review is  
37                  governed by the provisions of ORS 197.850.

**NATURE OF THE DECISION**

Petitioners appeal a decision by the hearings officer approving an application for a Measure 49 home site on land zoned exclusive farm use.

**MOTION TO INTERVENE**

Rocky Younger and Gordon Johnston (intervenors) move to intervene on the side of the county. There is no opposition to the motion, and it is allowed.

**BACKGROUND**

The subject property is 40.74 acres zoned exclusive farm use. Intervenor Rocky Younger (Younger) is one of the owners of the property. In 2006, the owners of the property filed claims under Ballot Measure 37 (2004) (*former* ORS 197.352 (2005), *renumbered as* ORS 195.305 (2007)) for the subject property and other properties. After passage of Ballot Measure 49 (2007) (Oregon Laws 2007, chapter 424), which superseded Measure 37, the owners elected supplemental review of their Measure 37 claims under section 6 of Measure 49, which allows the Department of Land Conservation and Development (DLCD) to authorize up to three home site approvals to qualified claimants. In 2010, DLCD issued an Amended Final Order (DLCD Final Order) that authorized one home site on the subject property. Response to Memorandum Regarding Jurisdiction Ex 1, at 4. Thereafter, intervenors filed a Type II EFU Homesite application. Response to Memorandum Regarding Jurisdiction Ex 2.

Measure 49 authorizes local governments to apply standards for siting a dwelling authorized by Measure 49 (Measure 49 dwelling), so long as those

1 standards are not applied in a manner that prohibits the establishment of the  
2 dwelling (unless the standards are reasonably necessary to abate a nuisance, to  
3 protect public health or safety, or to carry out federal law).<sup>1</sup> The county planning  
4 staff denied the application, concluding that the application failed to meet the  
5 criteria in the Jackson County Land Development Ordinance (LDO) for access  
6 and that the subject property is not a lawfully created parcel.

7 Intervenor appealed the decision to the hearings officer. Intervenor  
8 argued to the hearings officer that the subject property had legal access, and the  
9 hearings officer agreed.

10 Intervenor also argued to the hearings officer that the lawful status of the  
11 subject property was determined in the DLCD Final Order and could not be  
12 evaluated by the county in the proceeding on intervenor's Measure 49 home site  
13 application. The hearings officer rejected that argument, concluding that the  
14 DLCD Final Order did not determine the lawful status of the subject property and

---

<sup>1</sup> Measure 49, section 11(1), provides:

“A subdivision or partition of property, or the establishment of a dwelling on property, authorized under sections 5 to 11 of this 2007 Act 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 of this 2007 Act unless the standards are reasonably necessary to avoid or abate a nuisance, to protect public health or safety or to carry out federal law.”

1 that the county could apply the LDO partition provisions in effect in 1984 to  
2 determine the lawful status of the subject property. The hearings officer also  
3 concluded that the subject property could be validated as a lawfully established  
4 unit of land under ORS 92.176 and the LDO provisions for land divisions that  
5 implement that statute at LDO 10.2.1(C). Notice of Intent to Appeal Ex 2, at 14-  
6 15. The hearings officer applied the LDO provisions in effect in 1984 and  
7 approved the application. This appeal followed.

## 8 **JURISDICTION**

9 On March 16, 2022, on its own motion, the Board suspended the appeal  
10 and requested argument from the parties regarding whether the Board has  
11 jurisdiction over this appeal. Petitioners submitted a memorandum regarding  
12 jurisdiction, and intervenors submitted a response. For the reasons set forth  
13 below, we conclude that we lack jurisdiction over the appeal.

14 Measure 49, section 16, now codified at ORS 195.318(1), provides that a  
15 determination by a public entity under Measure 49, sections 5 to 11, is not a land  
16 use decision; therefore, such a determination is not subject to LUBA's  
17 jurisdiction. *See Maguire v. Clackamas County*, 64 Or LUBA 288 (2011), *aff'd*,  
18 250 Or App 146, 279 P3d 314 (2012) (dismissing the appeal for lack of  
19 jurisdiction because the county's partition approval was made "under" section 11  
20 of Measure 49).

21 In *Woodward v. Jackson County*, 73 Or LUBA 164 (2016), DLCD  
22 authorized three dwellings on separate parcels pursuant to section 6 of Measure  
23 49. The intervenor applied for, and the county approved, a partition of land into

1 three parcels to site the dwellings, and a variance to the county’s minimum design  
2 standards for private roads. LUBA raised the jurisdictional issue on its own  
3 motion. The petitioner acknowledged that ORS 195.318(1) might deprive LUBA  
4 of jurisdiction over the partition decision but argued that the county’s variance  
5 decision was subject to LUBA’s jurisdiction.

6 We concluded that the partition and variance decisions were both decisions  
7 “under” section 11 of Measure 49 because the county reviewed the partition and  
8 variance applications under the authority of section 11 of Measure 49. *See also*  
9 *Maguire*, 250 Or App at 156 (concluding that “the term ‘under’ as used in ORS  
10 195.318(1) means ‘as authorized by’ and that, if the local government purported  
11 to review the Measure 49 partition application under the authority of sections 5  
12 to 11, then ORS 195.318(1) operates to preempt LUBA review”). We dismissed  
13 the appeal for lack of jurisdiction. *See also Lenahan v. Wallowa County*, 72 Or  
14 LUBA 69 (2015) (rejecting an argument that the county applied the procedural  
15 requirements of county’s code and therefore approved the partition application  
16 “under” the code and not “under” section 11 of Measure 49); *Vannett Properties,*  
17 *LLC v. Lane County*, 78 Or LUBA 345 (2018) (rejecting an argument that a  
18 decision denying an application for a Measure 49 dwelling was not a decision  
19 regarding “the establishment of a dwelling” authorized under section 6 of  
20 Measure 49, as that phrase is used in section 11 of Measure 49).

21 In this appeal, we understand petitioners to contend that LUBA has  
22 jurisdiction notwithstanding ORS 195.318(1) because the hearings officer  
23 applied the land division criteria in LDO 10.2.1(C) to validate the subject

1 property as a lawfully established unit of land and, therefore, that part of the  
2 challenged decision is not a decision under Measure 49.<sup>2</sup> That argument is nearly  
3 identical to the argument we rejected in *Woodward*. Whether the hearings officer  
4 applied land division criteria in the LDO to the application without adequate  
5 notice or public participation does not change the fact that the challenged decision  
6 is a decision regarding “the establishment of a dwelling” authorized under section  
7 6 of Measure 49, as that phrase is used in section 11 of Measure 49, and is  
8 therefore a determination of whether intervenors have a right to construct a  
9 Measure 49 dwelling “under” sections 6 and 11 of Measure 49. Accordingly, the  
10 challenged decision is not a land use decision subject to LUBA’s jurisdiction.

11 **MOTION TO TRANSFER**

12 Petitioners filed a contingent motion to transfer the appeal to the Jackson  
13 County Circuit Court. Intervenors and the county do not oppose the motion, and  
14 it is granted. ORS 34.102(4); OAR 661-010-0075(11)(a).

15 The appeal is transferred to Jackson County Circuit Court.

---

<sup>2</sup> Petitioners argue that no application for validation of the subject property as a lawfully established unit of land was made pursuant to LDO 10.2.1(C), and no notice was provided that the criteria in LDO 10.2.1(C) would apply to the Measure 49 home site application. Memorandum Regarding Jurisdiction 8-10.