

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

3
4 JEFFREY WOODWARD,
5 *Petitioner,*

6
7 vs.

8
9 JACKSON COUNTY,
10 *Respondent,*

11
12 and

13
14 DAVID TOURZAN,
15 *Intervenor-Respondent.*

16
17 LUBA No. 2015-088/089

18
19 FINAL OPINION
20 AND ORDER

21
22 Appeal from Jackson County.

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24 Jeffrey Woodward, Jacksonville, represented himself.

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26 Joel C. Benton, County Counsel, Medford, represented respondent.

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28 Mark S. Bartholomew, Medford, represented intervenor-respondent.

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

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33 TRANSFERRED 03/29/2016

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

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NATURE OF THE DECISION

In LUBA No. 2015-088, petitioner appeals a hearings officer’s decision approving a partition. In LUBA No. 2015-089, petitioner appeals a hearings officer’s decision approving a variance to private road standards.

MOTION TO INTERVENE

David Tourzan (intervenor), the applicant below, moves to intervene on the side of the respondent in both appeals. The motions are allowed.

JURISDICTION

The subject property is approximately 75 acres and is zoned Exclusive Farm Use (EFU). Access to the property is via an existing private road, South Quail Run Road, which provides access from Highway 238 to the subject property and several other properties, and terminates at the subject property.

In January 2009, the Department of Land Conservation and Development (DLCD) issued a final order (DLCD Final Order) that authorized three dwellings on the subject property pursuant to Section 6 of Ballot Measure 49 (2007). Record Vol II 294-301. The DLCD Final Order required each dwelling to be located on a separate lot or parcel. Intervenor-respondent subsequently applied to partition the property into three parcels and for a variance to the county’s minimum design standards for private roads.¹

¹ Jackson County Land Development Ordinance (LDO) 9.5.3, Table 9.5-1 sets out minimum design standards for private roads and requires an easement

1 Planning staff approved the partition and variance applications, and
2 petitioner and others appealed the decisions to the hearings officer. The
3 hearings officer approved the applications, and these appeals followed.

4 **JURISDICTION**

5 Section 11(1) of Measure 49 authorizes local governments to apply
6 certain local land use regulations to approve a partition of property or one or
7 more dwellings authorized under Sections 5 to 11, with limitations.² *See*
8 *Maguire v. Clackamas County*, 64 Or LUBA 288 (2011), *aff'd* 250 Or App
9 146, 279 P3d 314 (2012) (explaining the background of Measures 37 and 49).

width of 25 to 35 feet depending on the number of lots served, a minimum travel surface width of 10 feet, and two travel lanes if the road serves seven or more lots. Record Vol I 354-55. Intervenor sought a variance to allow to allow easement widths of 16 to 20 feet, and a single travel lane with a travel surface of 12 feet. *Id.* at 355.

² Oregon Laws 2007, Chapter 424, section 11(1) provides in relevant part:

“A subdivision or partition of property, or the establishment of a dwelling on property, authorized under sections 5 to 11 of this 2007 Act [series became Oregon Laws 2007, Chapter 424, sections 5 to 11; Oregon Laws 2009, Chapter 855, sections 2 to 9 and 17; and Oregon Laws 2010, Chapter 8, sections 2 to 7] 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 ORS 195.318(1) provides in relevant part that a determination by a public
2 entity under sections 5 to 11 of Measure 49 is not a “land use decision” as
3 defined in ORS 197.015(10)(a)(A):

4 “A person that is adversely affected by a final determination of a
5 public entity under ORS 195.310 to 195.314 or sections 5 to 11,
6 chapter 424, Oregon Laws 2007 * * * may obtain judicial review
7 of that determination under ORS 34.010 to 34.100, if the
8 determination is made by Metro, a city or a county, or under ORS
9 183.484, if the determination is one of a state agency. * * * A
10 *determination by a public entity under ORS 195.310 to 195.314 or*
11 *sections 5 to 11, chapter 424, Oregon Laws 2007 * * * is not a*
12 *land use decision.” (Emphasis added.)*

13 After the petition for review was received, LUBA requested argument
14 from the parties regarding the question of whether ORS 195.318(1) deprives
15 LUBA of jurisdiction over the challenged decisions. In *Maguire v. Clackamas*
16 *County*, 250 Or App 146, 279 P3d 314 (2012), the Court of Appeals affirmed
17 our decision that dismissed an appeal of a county hearings officer’s approval of
18 a partition and dwelling because LUBA lacked jurisdiction over the appeal
19 pursuant to ORS 195.318(1). *Maguire*, 250 Or App at 146, 156 (holding that
20 the local government purported to review the Measure 49 partition application
21 under the authority of sections 5 to 11 of Measure 49, and that ORS 195.318(1)
22 operates to preempt LUBA review).

23 Petitioner appears to acknowledge that ORS 195.318(1) may deprive
24 LUBA of jurisdiction over the appeal of the partition decision if that was the
25 only decision the county made, but argues that the county’s variance decision is

1 independent of the county’s decision to approve the partition. Brief of
2 Petitioner Regarding LUBA Jurisdiction 3-4.

3 Intervenor responds that one of the approval criteria for the partition
4 application requires a demonstration of satisfaction of the road access design
5 standards at LDO 9.5.3. *See* n 1. According to intervenor, South Quail Run
6 Road provides the only access to the subject property and the new parcels and
7 new dwellings, and in its existing state does not meet the road access design
8 standards. Accordingly, intervenor argues, the variance decision is as much a
9 decision “under * * * section[] 11” of Measure 49 as the partition decision, is
10 necessary to implement the DLCD Final Order that allows up to three new
11 parcels and dwellings, and without the variance the county could not approve
12 the partition application.

13 We agree with intervenor. The county reviewed the partition and
14 variance applications under the authority of section 11 of Measure 49. Record
15 Vol I 352; Vol II 320, 322. Both are decisions the county made “under * * *
16 section 11” of Measure 49 in order to allow intervenor to create parcels and site
17 dwellings authorized by a DLCD Final Order. There may be circumstances
18 where a local government approves a partition under Measure 49, and at the
19 same time approves or denies a land use permit that is related to the parcels or
20 dwellings authorized under Measure 49, where it would be consistent with
21 Oregon Laws 2007, Chapter 424, section 11(1) for LUBA to review an appeal
22 of the separate decision on the land use permit. However, in the present case

1 we agree with intervenor that refusing to grant the requested variance to the
2 road access standards would require the county to deny the requested partition
3 to create the parcels authorized by the DLCDC Final Order (*i.e.*, “ha[ve] the
4 effect of prohibiting the establishment of the dwelling, lot or parcel authorized
5 under” Measure 49), and therefore that Oregon Laws 2007, Chapter 424,
6 section 11(1) excludes the variance decision from our jurisdiction.

7 **MOTION TO TRANSFER**

8 Petitioner filed a precautionary motion to transfer the appeal to circuit
9 court twenty-one days after LUBA issued its order requesting additional
10 briefing on the jurisdictional issue. OAR 661-010-0075(11)(c). Intervenor
11 opposes the motion to transfer because petitioner failed to request a transfer
12 within 14 days, the time set in OAR 661-010-0075(11)(b).

13 We conclude that the untimely filing of the motion to transfer
14 approximately seven days late is only a technical violation of LUBA’s rules.
15 OAR 661-010-0005. Intervenor has not established that his rights have been
16 substantially prejudiced by the late filing of the motion to transfer. The motion
17 is granted.

18 The appeals are transferred.