

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

3
4 RONALD LENN and KATHLEEN LENN,
5 *Petitioners,*

6
7 vs.

8
9 LANE COUNTY,
10 *Respondent,*

11
12 and

13
14 DENNIS BOTTEM,
15 *Intervenor-Respondent.*

16
17 LUBA No. 2011-092

18
19 FINAL OPINION
20 AND ORDER

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22 Appeal from Lane County.

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24 Zack P. Mittge and William H. Sherlock, Eugene, represented petitioners.

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26 Stephen L. Vorhes, Assistant County Counsel, Eugene, represented respondent.

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28 Micheal M. Reeder, Eugene, represented intevenor-respondent.

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

32
33 TRANSFERRED

07/09/2012

34
35 You are entitled to judicial review of this Order. Judicial review is governed by the
36 provisions of ORS 197.850.

NATURE OF THE DECISION

Petitioners appeal a decision by the county approving an application to partition land and site a dwelling pursuant to Oregon Laws 2007, chapter 424 (Measure 49).

MOTION TO INTERVENE

Dennis Bottem moves to intervene on the side of the respondent. There is no opposition to the motion and it is allowed.

FACTS

The subject property is a 31.98 acre parcel zoned Exclusive Farm Use (E-40), located two miles north of the community of Crow. On April 19, 2010, the Department of Land Conservation and Development (DLCDC) issued a Final Order and Home Site Authorization that, pursuant to Section 6 of Measure 49, authorized the owners of the property to seek partition of the property to create one additional parcel and one additional dwelling.¹ Record 453-61. Intervenor then sought county approval to partition the property and site an additional dwelling on the property pursuant to the DLCDC authorization. The county planning director approved the applications, and petitioners appealed. The hearings official issued a decision modifying in part and affirming the planning director's approval of the applications. The board of commissioners declined to review the hearings official's decision. This appeal followed.

JURISDICTION

Section 11(1) of Measure 49 authorizes local governments to apply certain 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 ORS 195.318(1) provides in

¹ Under Section 6 of Measure 49, a claimant can elect to seek a limited number of dwellings on newly created lots or parcels.

² Section 11, chapter 424, Oregon Laws 2007 provides, in relevant part:

1 relevant part that a determination by a public entity under Sections 5 to 11 of Measure 49 is
2 not a “land use decision” as defined in ORS 197.015(10)(a)(A):

3 “A person that is adversely affected by a final determination of a public entity
4 under ORS 195.310 to 195.314 or sections 5 to 11, chapter 424, Oregon Laws
5 2007 * * * may obtain judicial review of that determination under ORS 34.010
6 to 34.100, if the determination is made by Metro, a city or a county, or under

“(1) 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 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 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.

“(2) Before beginning construction of any dwelling authorized under section 6 or 7 of this 2007 Act, 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.

“(3) (a) A city or county may approve the creation of a lot or parcel to contain a dwelling authorized under sections 5 to 11 of this 2007 Act. 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:

“(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

“(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.

“(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.

“(4) 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 of this 2007 Act, 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.”

1 ORS 183.484, if the determination is one of a state agency. * * * A
2 *determination by a public entity under ORS 195.310 to 195.314 or sections 5*
3 *to 11, chapter 424, Oregon Laws 2007 * * * is not a land use decision.”*
4 (Emphasis added.)

5 Prior to briefing, LUBA requested argument from the parties regarding the question of
6 whether ORS 195.318(1) deprives LUBA of jurisdiction over the challenged decision. The
7 parties submitted memoranda addressing the jurisdictional issue, and intervenor took the
8 position that LUBA does not have jurisdiction over the appeal of the challenged decision
9 based on ORS 195.318(1) and our decision in *Maguire v. Clackamas County*, ___ Or LUBA
10 ___ (LUBA No. 2011-040, November 14, 2011), *aff'd* 350 Or App 146, ___ P3d ___ (2012).
11 Petitioners argued that our holding in *Maguire* misinterpreted ORS 195.318(1). We conclude
12 that we lack jurisdiction over the appeal.

13 In *Maguire*, the Court of Appeals affirmed our decision that dismissed an appeal of a
14 county hearings officer’s approval of a partition and dwelling because LUBA lacked
15 jurisdiction over the appeal pursuant to ORS 195.318(1). *Maguire*, 350 Or App 146, 156
16 (holding that the local government purported to review the Measure 49 partition application
17 under the authority of sections 5 to 11 of Measure 49, and that ORS 195.318(1) operates to
18 preempt LUBA review). The challenged decision results from an application for county
19 approval of a partition and dwelling pursuant to a DLCD Final Order and Home Site
20 Authorization, and is a decision “under” Section 11 of Measure 49. Accordingly, for the
21 reasons set forth in *Maguire*, we do not have jurisdiction over the appeal.

22 **MOTION TO TRANSFER**

23 Petitioners filed a precautionary motion to transfer the appeal to circuit court in the
24 event LUBA determines it does not have jurisdiction over the appeal. OAR 661-010-
25 0075(11)(c). The motion is granted.

26 The decision is transferred.