BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

JOHN LENAHAN,
Petitioner,

vs.

WALLOWA COUNTY,
Respondent,

and

HAYES FAMILY RANCH, LLC,
Intervenor-Respondent.

LUBA No. 2015-025

FINAL OPINION
AND ORDER

Appeal from Wallowa County.

Elaine R. Albrich, Portland, represented petitioner.

Paige L. Sully, County Counsel, Enterprise, represented respondent.

D. Rahn Hostetter, Enterprise, represented intervenor-respondent.

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

TRANSFERRED 08/24/2015

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

Opinion by Ryan.

NATURE OF THE DECISION

Petitioner appeals a decision by the county approving an application to partition land zoned exclusive farm use (EFU) to create two additional parcels in order to site dwellings on the parcels.

FACTS

The subject property is an approximately 150-acre parcel zoned EFU with an existing dwelling, located adjacent to Airport Road. As we explain in more detail below, in October 2010 the Department of Land Conservation and Development (DLCD) issued a final order (DLCD Final Order) that authorized two additional parcels and homesites on the subject property. Record 606-614.

In 2014, Hayes Family Ranch, LLC (intervenor) applied to partition the subject property into three parcels. The application proposed a 146-acre parcel containing the existing dwelling, and two additional parcels of approximately 2 acres adjacent to each other and clustered together on the southern portion of the property. Petitioner opposed the application and argued during the proceedings below that the two 2-acre parcels should be located on a different part of the subject property. Record 254. The county planning commission approved the partition application, and petitioner appealed the decision to the board of county commissioners. The board of county commissioners denied the appeal and approved the partition, and this appeal followed.

JURISDICTION

Sections 5 to 11 of Measure 49 (2007) concern Measure 37 (2005) claims filed prior to the adjournment of the 2007 regular legislative session. *See Maguire v. Clackamas County*, 64 Or LUBA 288 (2011) (explaining the background of Measures 37 and 49). After passage of Measure 49, the

claimant named in the DLCD Final Order elected to proceed under Section 6 of Measure 49, and DLCD issued the DLCD Final Order authorizing two additional parcels for homesites.

Section 11(1) of Measure 49 authorizes local governments to apply certain local land use regulations to approve a partition of property or one or more dwellings authorized under Sections 5 to 11, with limitations.[1] Section

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[1] Oregon Laws 2007, Chapter 424, section 11 provided in relevant part:

> "(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 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.
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> "(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:

11 also sets out additional statutory standards and requirements that local governments must apply in approving the creation of a new lot or parcel, or one or more dwellings authorized under sections 5 to 11 of Measure 49. As relevant here, subsection 3(b) [renumbered (4)(b) in Oregon Laws 2009, Chapter 855, section 14] 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

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> "(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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> "(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."

forest use." Subsection (3)(a) [renumbered (4)(a) in Oregon Laws 2009, Chapter 855, section 14] 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. The DLCD Final Order also includes Conditions 11 and 12, which encapsulate the parcel size limits and clustering requirements of subsections (3)(a) and (b). Record 613.

ORS 195.318(1) provides in relevant part that a determination by a public entity under sections 5 to 11 of Measure 49 is not a "land use decision" as defined in ORS 197.015(10)(a)(A):

> "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 * * * 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.)

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

Petitioner takes the position that the Court of Appeals' holding in *Maguire* is incorrect. That is so, petitioner argues, because the court failed to consider all of the relevant context provided by other sections of Measure 49, and the court failed to consider that the legislature did not amend ORS 197.015(10)(b) to expressly exclude decisions made "under * * * sections 5 to 11, chapter 424, Oregon Laws 2007" from the definition of "land use decision" in ORS 197.015(10)(a).[2]

We decline to disregard the Court's interpretation of ORS 195.318(1) and Measure 49 in *Maguire*, and absent any attempt by petitioner to distinguish the facts of the present appeal from the facts in *Maguire*, *Maguire* controls the outcome of this proceeding. In addition, that the legislature did not when it enacted Measure 49 also enact companion amendments to ORS 197.015(10)(b) does not persuade us that *Maguire* was wrongly decided. *See* n 2. Petitioner points to nothing that requires the legislature to harmonize and amend all prior legislation that is affected by newly enacted legislation. If the legislative enactment results in a conflict, the courts will harmonize conflicting legislation to give effect to all parts. *State v. Guzek*, 322 Or 245, 266-68, 906 P2d 272 (1995). It is fairly easy to harmonize ORS 195.318(1) and ORS 197.015(10)(b). They both describe decisions that the legislature has determined are not "land use decisions" as defined in ORS 197.015(10)(a), which the legislature is free to do.

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[2] Briefly, ORS 197.015(10)(b)(A) through (H) (and (c), (d) and (e)) all describe decisions that the legislature has determined should not be included in the definition of "land use decision" at ORS 197.015(10)(a), and consequently are not subject to review by LUBA.

Petitioner also argues that the county applied the procedural requirements of the Wallowa County Development Ordinance (WCDO) and therefore approved the partition application "under" the WCDO, and not under section 11 of Measure 49. The petitioner and the county in *Maguire* similarly argued that because the county processed the partition application and approved the partition under the county's subdivision ordinance, and applied other provisions of the subdivision ordinance to the application, it was not a decision "under" section 11 of Measure 49. The court (and we) rejected that argument. *Maguire*, 250 Or App at 154-56. The crux of petitioner's argument below was that subsections (3)(a) and (b) of Section 11 (and conditions 11 and 12 of the DLCD Final Order that implement those Measure 49 subsections) require the new 2-acre parcels to be located away from an irrigation ditch that runs on the subject property. Record 204. The board of county commissioners considered that argument and adopted findings that concluded that the conditions of the DLCD Final Order require the parcels to be located where they are on the property, and clustered together. Record 19, 22, 25. The county's partition approval decision was therefore made "under" Section 11, and pursuant to ORS 195.318(1) the challenged decision is not a "land use decision" subject to LUBA's jurisdiction. ORS 195.318(1).

MOTION TO TRANSFER

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

The decision is transferred.