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

MICHAEL GANSEN,
Petitioner,

vs.

LANE COUNTY,
Respondent.

LUBA No. 2020-074

FINAL OPINION
AND ORDER

Appeal from Lane County.

Bill Kloos filed the petition for review and reply brief and argued on behalf of petitioner.

H. Andrew Clark filed the response brief and argued on behalf of respondent.

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

REVERSED 02/22/2021

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 hearings officer decision that determines that petitioner's property is not a lawfully established unit of land.

FACTS

Petitioner owns a 10-acre parcel zoned Rural Residential 10-acre minimum (RR-10) which includes a dwelling that was constructed in 2002. We begin by describing actions related to the subject property that occurred 20 years ago because they are integral to the central dispute between the parties in this appeal.

In early 2001, petitioner's predecessor-in-interest sought and received from the county engineer verification that the then-vacant subject property was a "legal lot," that is, a lawfully created, legally separate unit of land for development purposes that may be conveyed without county approval of a subdivision. Record 380. Prior to 2004, the Lane Code (LC) did not include formal procedures for verifying whether a lot was a legal lot. Instead, the county used an informal process conducted by the county engineer's office, using a pre-printed form, with blanks to be filled in by the engineer.[1] The county engineer

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[1] The first page of the county form included the following pre-printed language:

> "Based upon the Findings provided in this report, the above referenced property constitutes a legal lot, which means:

issued the pre-printed form, hand-numbered PA 01-5412, to petitioner's predecessor-in-interest (the 2001 Verification). Record 380-81.

In October 2001, petitioner purchased the subject property. LC 16.231(2)(a) allows as a permitted use in the RR-10 zone "[o]ne single-family dwelling, mobile home, or duplex on a legal lot" and, in 2002, petitioner sought and received from the county a building permit to construct a dwelling on the subject property (the 2002 Building Permit). Record 131. The 2002 Building Permit is printed on "Lane County Public Works" letterhead, lists the permit number and property address, and shows the status as "Approved." *Id.* The 2002 Building Permit includes a section entitled "Land Use Review." Record 132. The Land Use Review associated with the 2002 Building Permit is printed on "Lane

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> "1. Ownership to this property may be conveyed with the assurance that such a conveyance would not require approval by Lane County land division regulations; and
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> "2. Lane County recognizes this property as a legally separate unit of land for the purposes of development. Development would still be subject to applicable zoning, sanitation, access and building regulations." Record 380.

The second page of the form included the following pre-printed language:

> "This is a preliminary indication that the above referenced property, as further designated on the enclosed map, is a legal lot. The decision that this property constitutes a legal lot will be made at the time of the first permit or application action where a legal lot is required. If the boundaries of this legal lot have changed at the time of a permit or application which requires a legal lot, a new Legal Lot Verification will be required." Record 381.

County Public Works, Land Management Division" letterhead, identifies the zoning as RR-10 and, in the comments section next to the identified zoning, states "SFD & SDS – *LC 16.231(2)(a)*." *Id.* (emphasis added).[2] The Land Use Review also lists the following pre-printed categories: Willamette Greenway, Flood Hazard Area, Class I Stream, Sensitive Wildlife Habitat, Access, Legal Lot Status, and NWI Wetlands on Site.

For all categories except "Legal Lot Status" and "Access," the letter "N" is handwritten next to the category. For the "Legal Lot Status" category, the letter "Y" is handwritten with the additional language "PA 01-5412," the number assigned to the 2001 Verification. At the bottom of the Land Use Review are the pre-printed words "Land Use Approved" with a "Y" handwritten next to them. Next to the words "Planner Signature" are the handwritten initials "SSH."

In 2020, in anticipation of a possible property line adjustment, petitioner applied to the county under the LC's codified formal process for a legal lot verification, seeking to verify that the subject property is a "lawfully established unit of land" as that term is defined at LC 13.030(3)(n).[3] We refer to that term as a "Lawful Parcel" in this opinion.

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[2] Although it is not clear, "SFD" likely means "single-family dwelling," a use allowed in the RR-10 zone. We cannot ascertain from the record the meaning of "SDS."

[3] LC 13.030(3)(n) defines "Lawfully Established Unit of Land" as

The planning director concluded that the subject property is not a Lawful Parcel. Petitioner appealed the decision to the hearings officer. The hearings officer affirmed the planning director's decision and concluded that the subject property is not a Lawful Parcel and that the 2001 Verification and the 2002 Building Permit did not prohibit them from reaching a different decision. This appeal followed.

FIRST ASSIGNMENT OF ERROR

Petitioner's first assignment of error argues that the hearings officer improperly construed the applicable law in concluding that the determination in the 2002 Building Permit—that the subject property is a Lawful Parcel—does not preclude the county from determining in the challenged decision that the subject property is not a Lawful Parcel. At the outset, we note that petitioner does

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"(i) A lot or parcel created by filing a final plat for subdivision or partition; or

"(ii) Another unit of land created:

"(aa) In compliance with all applicable planning, zoning and subdivision or partition ordinances and regulations; or

"(bb) By deed or land sales contract, if there were no applicable planning, zoning or subdivision or partition ordinances or regulations.

"(cc) Lawfully established unit of land does not mean a unit of land created solely to establish a separate tax account.

not challenge the hearings officer's conclusion that the subject property is not a Lawful Parcel, but rather the hearings officer's conclusion that the 2002 Building Permit is not a land use decision that is binding on the county and, therefore, that the county is not precluded by the 2002 Building Permit from determining that the subject property is not a Lawful Parcel.

This appeal requires us first to determine whether the 2002 Building Permit is a land use decision and, if it is, to determine whether that decision is binding on the county in a subsequent proceeding involving the same property. Accordingly, we first resolve the question of whether the 2002 Building Permit is a land use decision before we turn to the question of its preclusive effect, if any.

A. The 2002 Building Permit is a land use decision.

A local government decision is a "land use decision" as defined in ORS 197.015(10)(a) if it is a final decision that applied, or should have applied, a land use regulation or comprehensive plan provision. *Jaqua v City of Springfield*, 46 Or LUBA 566, 574 (2004). Under ORS 197.015(10)(b)(A), a local government decision is not a land use decision if it "is made under land use standards that do not require interpretation or the exercise of policy or legal judgment." A local government decision that approves or denies a building permit issued under clear

and objective land use standards is also not a land use decision. ORS 197.015(10)(b)(B).[4]

During the proceedings before the planning director and again before the hearings officer, petitioner argued that the 2002 Building Permit was a final land use decision that applied LC 16.231(2)(a) and determined that the subject property is a Lawful Parcel. The hearings officer appears to have determined that the 2002 Building Permit was not a land use decision because it was not a "final decision" for purposes of ORS 197.015(10)(a). The hearings officer concluded that the 2002 Building Permit was not a final decision because it relied, "erroneously," on the 2001 Verification, which was merely a preliminary determination. Record 7. The hearings officer found that "the preliminary 2001

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[4] Examples of cases where building permit decisions were appealed to LUBA and determined to be land use decisions are *Richmond Neighbors v. City of Portland*, 67 Or LUBA 115, 121 (2013) (building permit for an apartment building with commercial ground floor space that applied main street corridor overlay zone standards); *McCullough v. City of Eugene*, 74 Or LUBA 620, 627-29 (2016) (building permits for apartment complex with accessory space that applied multi-family public access and street frontage standards); *Jensen v. City of Eugene*, 69 Or LUBA 234, 239-41 (2014) (building permits for dwellings); *Keith v. Washington County*, 66 Or LUBA 80, 85-87 (2012) (building permit to change the use of an existing structure on land zoned exclusive farm use to a farm stand); *Frymark v. Tillamook County*, 45 Or LUBA 486, 489-91 (2003) (building permit to construct signs advertising an RV park and marina); *Tirumali v. City of Portland*, 169 Or App 241, 246, 7 P3d 761 (2000) (building permit for a dwelling that applied maximum height standards); and *Doughton v. Douglas County*, 82 Or App 444, 728 P2d 887 (1986) (building permit for a single family dwelling on a 21.6-acre parcel zoned exclusive farm use).

determination in this case did not become final with the 2002 issuance of the building permit. The County is therefore not now bound by the 2001 preliminary determination." *Id.*[5]

Petitioner argues here that the hearings officer improperly construed the applicable law when they concluded that the 2002 Building Permit was not a land use decision because it was not "final." Petitioner points to the Land Use Review associated with the 2002 Building Permit, which references "LC 16.231(2)(a)" and includes the letter "Y" and the decision number for the 2001 Verification handwritten next to the pre-printed words "Legal Lot Status." Petitioner argues that the 2002 Building Permit did in fact apply LC 16.231(2)(a) to the application and determined that the subject property was a Lawful Parcel. Petitioner argues that whether the county's issuance of the 2002 Building Permit complied with applicable LC sections requiring notice and an opportunity for a hearing, or whether the 2002 Building Permit contained sufficient substantive analysis regarding the lawful status of the subject property, is not relevant in determining whether the 2002 Building Permit was a final land use decision. Rather, petitioner argues, those issues relate to the merits of the 2002 Building Permit, which is not the subject of this appeal.

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[5] The hearings officer concluded that the 2001 Verification was a preliminary decision that was not final and, therefore, the county was not bound to adhere to its conclusion that the subject property is a Lawful Parcel. Petitioner does not dispute the preliminary nature of the 2001 Verification.

In response, the county takes the position that the 2002 Building Permit was not a land use decision for two reasons. First, the county responds, the 2002 Building Permit was not a land use decision because its issuance by the county failed to follow the process in effect at the time, which required notice and an opportunity for a hearing on land use decisions. Second, the county responds, the 2002 Building Permit "did not contain any substantive analysis of the legality of the subject property." Response Brief 6.

Whether the 2002 Building Permit was issued in accordance with applicable county procedures has no bearing on whether it is a land use decision. Petitioner correctly observes that the procedure that a local government follows in issuing a decision is not determinative of whether the decision is a reviewable land use decision. It is possible for a local government to issue a reviewable land use decision notwithstanding procedural errors in processing and issuing that decision. For example, a local government may issue a discretionary land use decision erroneously following a ministerial procedure. The time to challenge substantive or procedural problems with the issuance of the 2002 Building Permit has long passed. *See* ORS 197.830(6)(b) (providing a 10-year limit for appealing a decision "if notice of a hearing or administrative decision made pursuant to ORS 197.195 or 197.763 is required but has not been provided").

As noted, the hearings officer does not appear to have directly addressed petitioner's argument below, but rather concluded that the 2002 Building Permit was not a land use decision because it was not "final," because the 2001

Verification it cited was not final. However, that analysis misses the point and focuses too much on the undisputedly preliminary nature of the 2001 Verification, rather than the subsequent final land use decision that *was* made in issuing the separate 2002 Building Permit. There is no evidence in the record to support a conclusion that the 2002 Building Permit was not a final decision.

We agree with petitioner that the 2002 Building Permit was a land use decision as defined in ORS 197.015(10)(a). In issuing the 2002 Building Permit, the county appears to have made a combined decision that both the building code standards and applicable land use standards in the LC were satisfied, as many local governments choose to do. *See* n 4. The 2002 Building Permit was a final decision that applied LC 16.231(3)(a) and concluded that the subject property is a parcel created in compliance with the applicable zoning regulations. The associated Land Use Review includes a pre-printed category for "Legal Lot Status" with the letter "Y" written next to it. It also includes the pre-printed phrase "Land Use Approved" with the letter "Y" written next to it and someone's handwritten initials. Whether the decision that the county reached regarding LC 16.231(2)(a) was supported by adequate findings and substantial evidence or reached through a process that provided notice and an opportunity for a hearing has no bearing on whether it was a land use decision. However, whether the 2002 Building Permit was a land use decision may have some bearing on its preclusive effect in a subsequent proceeding, almost 20 years later, which asks the same question that it answered.

B. The county's conclusion in issuing the 2002 Building Permit, that the subject property is a Lawful Parcel, may not be challenged in the 2020 legal lot verification proceeding.

In the first assignment of error, petitioner argues that the equitable doctrine of collateral attack prohibits the county from reaching a conclusion which differs from the conclusion that the county reached in issuing the 2002 Building Permit—that the subject property is a Lawful Parcel.

The county does not take a position on whether, if the 2002 Building Permit is a land use decision, that decision is binding in a subsequent proceeding that requires a determination regarding whether the subject property is a Lawful Parcel. The hearings officer also did not really analyze that issue because they concluded that the 2002 Building Permit was not a final decision.

We have held that, in challenging a development approval that depends upon a prior, unappealed land use decision, LUBA will not review arguments that the prior, unappealed decision was procedurally flawed or substantively incorrect, because such a challenge would constitute an impermissible collateral attack on a decision not before LUBA. *Landwatch Lane County v. Lane County*, 79 Or LUBA 65, 72-73 (2019) (arguments that a prior partition failed to comply with applicable procedures are outside LUBA's scope of review as a collateral attack on the partition decision because the partition decision was an unappealed land use decision); *Lockwood v. City of Salem*, 51 Or LUBA 334, 344 (2006) (arguments that two prior city decisions extending the effective date of a preliminary public facility agreement were invalid are outside LUBA's scope of

review as a collateral attack on those two prior unappealed city decisions); *Sahagian v. Columbia County*, 27 Or LUBA 341, 344 (1994) (arguments that challenge an unappealed prior decision redesignating park property as forest are a collateral attack on that earlier unappealed redesignation decision); *Perry v. Yamhill County*, 26 Or LUBA 73, 77, *aff'd*, 125 Or App 588, 865 P2d 1344 (1993) (in an appeal of a county decision determining that two lots comply with conditions of a prior unappealed preliminary subdivision approval, arguments that challenge the prior unappealed preliminary subdivision approval are outside LUBA's scope of review as a collateral attack on the prior subdivision approval); *Corbett/Terwilliger Neigh. Assoc. v. City of Portl*and, 16 Or LUBA 49, 52 (1987) (in an appeal of a decision to approve a parking lot and variance, arguments that challenge previously issued building permits in superblocks are outside LUBA's scope of review as a collateral attack on the unappealed building permits). However, in all of those cases, the party attempting to challenge the substance of the prior, unappealed land use decision was not the local government. In that way, those decisions are not quite on the mark. Here, it is the county that is, in effect, attempting collaterally to challenge its own prior decision.

A somewhat, though not entirely, analogous situation occurred in a decision that petitioner cites to support their position. In *Safeway, Inc. v. City of North Bend*, 47 Or LUBA 489 (2004), we reversed the city's denial of an application for parking lot improvements that were intended to implement a previous site plan approval for a gas station and associated parking. The city

council denied the parking lot improvement application after agreeing with the intervenor that the city had miscalculated the lot area in the previous site plan review and, as a result, miscalculated the required number of parking spaces to be constructed. We concluded that the city's attempt to correct that miscalculation by denying the subsequent application for construction of the improvements was "nothing short of a collateral attack on the correctness of the [prior] decision." *Safeway*, 47 Or LUBA at 501. Similarly, here, the county's attempt to correct what the county has essentially concluded was a mistake in the 2002 Building Permit is nothing short of a collateral attack on the correctness of that decision.

Several judicial decisions that have overturned a local government's actions in refusing to issue a subsequent permit that implements a prior, unappealed, or appealed and resolved, development decision are instructive here. In *Doney v. Clatsop County*, 142 Or App 497, 921 P2d 1346 (1996), the plaintiffs had prevailed in a mandamus action in circuit court seeking to compel the county to issue a road access permit for an apartment on their property that the City of Seaside had previously approved. The county appealed the circuit court's issuance of a peremptory writ. The court first expressly noted that the process that the city followed, or did not follow, in approving the apartment was not evident from the record. The court then concluded that, in any event, the city's decision was a final land use decision that was not appealed to LUBA, and that the county was precluded from refusing to issue a necessary road access permit

because the county believed that the city should not have approved the apartment. The court held that "all issues pertaining to the permissibility of the apartment development use that plaintiffs sought—including any traffic and road issues or restrictions required by the agreements or for other reasons—were or could have been resolved through the city's land use decision and through an appeal to LUBA from that decision." *Doney*, 142 Or App at 502. The court cited *Beck v. City of Tillamook*, 313 Or 148, 831 P2d 678 (1992), and *Mill Creek Glen Protection Assoc. v. Umatilla Co.*, 88 Or App 522, 746 P2d 728 (1987), for the proposition that the county was prohibited from having "a second bite at the apple." *Id.* at 503.

Holman v. City of Warrenton, 242 F Supp 2d 791 (D Or 2002), is even more apposite to the present appeal. In *Holman*, the city refused to issue a building permit to implement a previously approved conditional use permit because it believed that it had wrongly issued the conditional use permit and that the use did not comply with the city's ordinances. After the plaintiff's mandamus claim against the city was decided in his favor in circuit court and the circuit court ordered the city to issue plaintiff's building permit, plaintiff brought suit in federal court seeking damages under 42 USC § 1983 (2000) and alleging takings and due process violations. The federal district court granted the plaintiff's summary judgment motion on the procedural due process claim. Citing and relying on *Doney*, the court concluded that the city could not reexamine the conditional use permit decision after the time for appeal of that decision had

passed and that the city was precluded from collaterally attacking its decision in a later proceeding. The court found that the city's actions "effectively revoked that permit and restricted Plaintiff's use of his property without notice or an opportunity to be heard." *Holman*, 242 F Supp 2d at 809.

We agree with petitioner that the county's decision that the subject property is not a Lawful Parcel is an impermissible collateral attack on the 2002 Building Permit. For the reasons explained by the district court in *Holman* and the Court of Appeals in *Doney*, the county is not permitted to reexamine the validity of the determination made in the 2002 Building Permit in a later proceeding. In other words, the county is not allowed to have a "second bite at the apple." *Doney*, 142 Or App at 503.

In so holding, in addition to judicial precedent, we also consider the legislative policy embodied in ORS 197.830(6), which is a statute of ultimate repose that sets a maximum period of 10 years for appealing a land use decision that required notice of a hearing or administrative decision that was not provided.[6] The county argues, and petitioner does not dispute, that the 2002

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[6] ORS 197.830(6) provides:

"The appeal periods described in subsections (3), (4) and (5) of this section:

"(a) May not exceed three years after the date of the decision, except as provided in paragraph (b) of this subsection.

Building Permit required notice of a hearing or administrative decision and that such required notice and hearing were not provided.

In *Jones v. Douglas County*, the court summarized at length the legislative history of the 2011 amendments to ORS 197.830(6) that enacted the current version of the statute:

> "[In 2011], the legislature enacted HB 3166, which amended ORS 197.830, the statute on which LUBA relied to determine that the appeal of the 1995 approval was timely. In sum, HB 3166 imposed a retroactive 10-year statute of ultimate repose on the appeal of certain land use decisions for which government was required to give notice but had failed to do so.
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> "When HB 3166 was introduced in the House Judiciary Committee, Representative Tim Freeman illustrated the need for a statute of repose concerning land use decisions for which notice was required but not given by explaining the Boweses' particular circumstances and the financial and evidentiary hardships that arise from defending an appeal that is taken many years after a decision is made. Audio Recording, House Committee on Judiciary, HB 3166, Mar 22, 2011, at 36.5 - 4:10.7 (statement of Rep Tim Freeman), http://www.leg.state.or.us/listn/ (accessed Dec. 5, 2011). As Freeman summarized, HB 3166 provides that '10 years is it, the land use decision is final'—that is, the bill sets the point at which certain land use decisions *can no longer be challenged. Id.* at 4:08.0 - 4:29.5.
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> "David Hunnicutt of Oregonians in Action also testified in support of the bill. According to Hunnicutt, the creation of such a repose

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> "(b) May not exceed 10 years after the date of the decision if notice of a hearing or an administrative decision made pursuant to ORS 197.195 or 197.763 is required but has not been provided."

> period provides 'a better balance between the legitimate rights of folks to file appeals in land use decisions and the rights of the property owner [or] any applicant[s] to be certain, at some point in time, *that the approval that they received from the local government is final and can no longer be challenged.*' *Id.* at 5:42.0 - 6:31.1 (statement of David Hunnicutt). Hunnicutt's position appeared to resonate with members of the judiciary committee, who discussed the possibility that, without the proposed repose period, *challenges to decisions could be brought years after a dwelling had been constructed and occupied and the ownership of the property had changed. Id.* at 13:08.0–13:50.2.
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> "Edward Sullivan, a proponent of HB 3166—and the Boweses' attorney—also testified before the judiciary committees in both the House and Senate. He indicated that he not only had proposed the 10-year limit but that he also had proposed that the amendments 'deal[] with cases that are still alive'—*i.e.*, this case. Audio Recording, Senate Committee on Judiciary, HB 3166, May 12, 2011, at 5:09.8 - 6:19.2 (statement of Edward Sullivan), http://www.leg.state.or.us/listn/ (accessed Dec. 5, 2011); *see also* Audio Recording, House Committee on Judiciary, HB 3166, Mar 22, 2011, at 10:32.9 - 10:48.0 (statement of Edward Sullivan), http://www.leg.state.or.us/listn/ (accessed Dec. 5, 2011).
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> "Ultimately, the legislature amended ORS 197.830 consistently with Sullivan's proposals. As pertinent, ORS 197.830(6)(b) now provides that the 21-day appeal periods to LUBA described in subsections (3), (4), and (5), '*[m]ay not exceed 10 years after the date of the decision if notice of a hearing or an administrative decision* made pursuant to ORS 197.195 or 197.763 *is required but has not been provided.*' Or Laws 2011, ch 483, § 1 (emphases added)." 247 Or App 56, 65-67, 270 P3d 264 (2011) (footnote omitted; first through third emphases added; fourth and fifth emphases in original).

This legislative history makes it clear that, in adopting amendments to ORS 197.830(6), the legislature intended that, after a set period of time has passed,

certain land use decisions are not subject to, in the words of the sponsoring representative and other proponents, "challenge." The legislature's intent in amending the statute to provide a truly final period of repose for land use decisions informs our conclusion that allowing an *indirect* challenge to a final land use decision that the legislature has prohibited from direct challenge by appeal to LUBA would be inconsistent with the legislative policy embodied in the statute of ultimate repose that favors finality in land use decisions.

A Lawful Parcel is one created in compliance with all applicable planning, zoning, and subdivision or partition ordinances and regulations. The county determined in the 2002 Building Permit that the parcel was created in compliance with all applicable planning, zoning, and other regulations. We conclude that the doctrine of collateral attack precludes the county from challenging the decision made in the 2002 Building Permit that the subject property is a Lawful Parcel by concluding in a 2020 legal lot verification proceeding that it is not.

The first assignment of error is sustained.

SECOND ASSIGNMENT OF ERROR

In the second assignment of error, petitioner argues that the county violated petitioner's procedural and substantive due process rights, protected by the Fourteenth Amendment to the United States Constitution, in determining that the subject property is not a Lawful Parcel. Petitioner also argues that the county's determination that the subject property is not a Lawful Parcel effected a regulatory taking of his property in violation of the Fifth Amendment to the

United States Constitution. However, because we sustain the first assignment of error and resolve the appeal on subconstitutional grounds, we do not reach petitioner's constitutional arguments. *See Planned Parenthood Assn. v. Dept. of Human Res.*, 297 Or 562, 564-65, 687 P2d 785 (1984) (subconstitutional arguments should be addressed prior to addressing arguments that a challenged decision violates constitutional provisions); *DeFazio v. WPPSS*, 296 Or 550, 555, 679 P2d 1316 (1984) (same).

DISPOSITION

Petitioner seeks reversal of the hearings officer's decision with an "order * * * to approve the application consistent with the 2002 legal lot verification." Petition for Review 33. Although they do not cite it, we presume petitioner is referring to the operative language in ORS 197.835(10), which provides:

> "(a) The board shall reverse a local government decision and order the local government to grant approval of an application for development denied by the local government if the board finds:
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> > "(A) Based on the evidence in the record, that the local government decision is outside the range of discretion allowed the local government under its comprehensive plan and implementing ordinances; or
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> > "(B) That the local government's action was for the purpose of avoiding the requirements of ORS 215.427 or 227.178.
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> "(b) If the board does reverse the decision and orders the local government to grant approval of the application, the board shall award attorney fees to the applicant and against the local government."

The main problem with petitioner's proposed disposition is that a legal lot verification does not seek approval of "an application for development." Rather, it seeks verification of the subject property as a Lawful Parcel. Accordingly, there is no application for us to order the county to "approve." That request is denied.

We will reverse a land use decision when the decision "violates a provision of applicable law and is prohibited as a matter of law." OAR 661-010-0071(1)(c). We will remand a decision when "[t]he decision improperly construes the applicable law, but is not prohibited as a matter of law." OAR 661-010-0071(2)(d). In our resolution of the first assignment of error, we concluded that the county erred in making a decision that did not adhere to the 2002 Building Permit determination. Accordingly, the decision is prohibited as a matter of law.

The county's decision is reversed.