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

ROBERT J. ERICSSON,
Petitioner,

vs.

LANE COUNTY,
Respondent.

LUBA No. 2022-068

FINAL OPINION
AND ORDER

Appeal from Lane County.

Robert J. Ericsson filed the petition for review and reply brief and argued on behalf of themselves.

Sara L. Chinske filed the respondent's brief and argued on behalf of respondent.

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

RUDD, Board Member, did not participate in the decision.

AFFIRMED 12/12/2022

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 the county's denial of their request for a refund of the fees that they incurred during the county's proceedings that led to approval of their application to partition the subject property to create three lots pursuant to sections 6 and 11 of Oregon Laws 2007, chapter 424 (Measure 49).

BACKGROUND

The subject property is 10 acres in size and zoned Marginal Lands (ML).[1] ORS 215.327 and Lane Code (LC) 16.214(6) require a minimum parcel size of 20 acres in the ML zone for property adjacent to land zoned for resource uses and 10 acres for other lands in the ML zone.

In 2006, petitioner filed a claim with the Department of Land Conservation and Development (DLCD) under *former* ORS 197.352 (2005), *renumbered as* ORS 195.305 (2007) (Measure 37), seeking to partition and develop the property in ways that were not allowed under ORS 215.327 and local regulations implementing that statute.[2] After the passage of Measure 49 in 2007, petitioner

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[1] Under *former* ORS 197.247 (1991), *repealed by* Oregon Laws 1993, chapter 792, section 55, the county is permitted to designate certain resource lands as "marginal lands" if they meet a series of tests.

[2] Ballot Measure 37 (2004) limited the ability of local governments to restrict development based on regulations adopted after the owner acquired the property. In lieu of paying "just compensation" for such restrictions, Measure 37 allowed local governments to waive or choose "not to apply" certain land use regulations

elected to pursue supplemental review of their Measure 37 claim under section 6 of Measure 49.[3] In 2009, DLCD issued a final order (DLCD Final Order) approving petitioner's Measure 49 claim, authorizing petitioner to seek partition of the subject property to create two additional parcels and to site two additional dwellings, subject to certain terms.

On December 30, 2020, pursuant to the DLCD Final Order and section 11 of Measure 49, petitioner filed an application (Measure 49 Partition Application) with the county to partition the subject property to create three parcels: two two-acre parcels and one six-acre parcel. Record 262. That application was deemed complete on January 29, 2021. On October 18, 2021, the county approved the Measure 49 Partition Application. Record 173. On January 31, 2022, petitioner applied for approval of the final partition plat, and, on May 24, 2022, the final partition plat was recorded. Record 63, 167.

If petitioner's Measure 49 Partition Application was an application for a "permit," as defined in ORS 215.402(4), then ORS 215.427(1) required the

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to allow the owner to use the property for a use permitted when the owner acquired the property.

Ballot Measure 49 (2007) modified Measure 37 and entirely superseded the remedies for claims filed thereunder. *Corey v. DLCD*, 344 Or 457, 466-67, 184 P3d 1109 (2008).

[3] Section 6 of Measure 49 allows DLCD to authorize up to three home site approvals to qualified claimants.

county to make a decision on the application within 150 days.[4] ORS 215.402(4) defines "permit" as the "discretionary approval of a proposed development of land under ORS 215.010 to 215.311, 215.317, 215.327 and 215.402 to 215.438 and 215.700 to 215.780 or county legislation or regulation adopted pursuant thereto." We discuss that statute in more detail below.

ORS 215.427(8) provides:

> "Except when an applicant requests an extension under subsection (5) of this section, if the governing body of the county or its designee does not take final action on an application for a permit, limited land use decision or zone change within 120 days or 150 days, as applicable, after the application is deemed complete, *the county shall refund to the applicant either the unexpended portion of any application fees or deposits previously paid or 50 percent of the total amount of such fees or deposits, whichever is greater.* The applicant is not liable for additional governmental fees incurred subsequent to the payment of such fees or deposits. However, the applicant is responsible for the costs of providing sufficient

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[4] ORS 215.427(1) provides:

> "Except as provided in subsections (3), (5) and (10) of this section, for land within an urban growth boundary and applications for mineral aggregate extraction, the governing body of a county or its designee shall take final action on an application for a permit, limited land use decision or zone change, including resolution of all appeals under ORS 215.422, within 120 days after the application is deemed complete. The governing body of a county or its designee shall take final action on all other applications for a permit, limited land use decision or zone change, including resolution of all appeals under ORS 215.422, within 150 days after the application is deemed complete, except as provided in subsections (3), (5) and (10) of this section."

> additional information to address relevant issues identified in the consideration of the application." (Emphasis added.)

There is no dispute that the county failed to make a decision on petitioner's Measure 49 Partition Application within 150 days. Based on their argument that the county's decision approving the application was a "permit," as defined in ORS 215.402(4), petitioner sought a refund of the Measure 49 Partition Application fee, the final partition plat application fee, and the county surveyor and recording fees that they incurred in connection with the final partition plat. In an email to petitioner, the county rejected petitioner's request for a refund of the fees. This appeal of that email to petitioner followed.

ASSIGNMENT OF ERROR

Petitioner's single assignment of error argues that the county improperly construed ORS 215.427(8) in rejecting their request for a refund of the Measure 49 Partition Application fee and the fees associated with approval and recordation of the final partition plat.[5] The single question presented in this appeal is whether

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[5] ORS 197.015(10)(a)(A) defines "land use decision" to include:

> "A final decision or determination made by a local government or special district that concerns the adoption, amendment or application of:
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> "(i) The goals;
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> "(ii) A comprehensive plan provision;
>
> "(iii) A land use regulation; or
>
> "(iv) A new land use regulation[.]"

the county's decision approving petitioner's Measure 49 Partition Application was a "permit," as defined in ORS 215.402(4). "In construing statutes and administrative rules, we are obliged to determine the correct interpretation, regardless of the nature of the parties' arguments or the quality of the information that they supply * * *." *Gunderson, LLC v. City of Portland*, 352 Or 648, 662, 290 P3d 803 (2012). As noted, ORS 215.402(4) defines "permit" as the "discretionary approval of a proposed development of land under ORS 215.010 to 215.311, 215.317, 215.327 and 215.402 to 215.438 and 215.700 to 215.780 or county legislation or regulation adopted pursuant thereto." For the reasons explained below, we agree with the county that the county's decision approving petitioner's Measure 49 Partition Application was not the "discretionary approval of the proposed development of land *under ORS 215.010 to 215.311, 215.317, 215.327 and 215.402 to 215.438 and 215.700 to 215.780 or county legislation or regulation adopted pursuant thereto*." (Emphasis added.)

A. The Decision Is a Decision "Under" Section 11 of Measure 49

Whether a decision is a "permit," as defined in ORS 215.402(4), depends on whether it is the discretionary approval of the proposed development of land "under" the statutes enumerated in ORS 215.402(4): "ORS 215.010 to 215.311,

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We have held that a county decision involving only the application of a state statute is a land use decision because ORS 197.646 requires the county to amend its land use regulations to reflect "land use statutes," and, if the county fails to do so, such statutes are directly applicable to the county's land use decisions. *Perkins v. Umatilla County*, 45 Or LUBA 445, 449-51 (2003).

215.317, *215.327* and 215.402 to 215.438 and 215.700 to 215.780 or county legislation or regulation adopted pursuant thereto." (Emphasis added.) For partition applications authorized by Measure 49, we explained in *Maguire v Clackamas County*, 64 Or LUBA 288 (2011), *aff'd*, 250 Or App 146, 279 P3d 314 (2012), that section 11 of Measure 49 provides substantive statutory standards that govern approvals of applications described in that section, including dwellings "authorized under" section 6 of Measure 49.[6] *See* n 3. We

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[6] Section 11 of Measure 49, as amended by Oregon Laws 2009, chapter 855, section 14, provides, in relevant part:

> "(1) A subdivision or partition of property, or the establishment of a dwelling on property, authorized under sections 5 to 11, chapter 424, Oregon Laws 2007 [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, chapter 424, Oregon Laws 2007, 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) If the property described in a claim is bisected by an urban growth boundary, any new dwelling, lot or parcel established on the property pursuant to an order under section 6, chapter 424, Oregon Laws 2007, must be located on the portion of the property outside the urban growth boundary.

"(3) Before beginning construction of any dwelling authorized under section 6 or 7, chapter 424, Oregon Laws 2007, 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.

"(4)

"(a) A city or county may approve the creation of a lot or parcel to contain a dwelling authorized under sections 5 to 11, chapter 424, Oregon Laws 2007. 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.

"(5) 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, chapter 424, Oregon Laws 2007, 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

held that, "[p]lainly, a decision that applies those Section 11 standards to approve a subdivision, partition or development application is a decision 'under' Section 11 of Measure 49." *Maguire*, 64 Or LUBA at 293.

As we explained above, ORS 215.327 prohibits new parcels in the ML zone that are smaller than 10 acres. Thus, ORS 215.327 (and the LC's implementing regulations) would prohibit the county from approving petitioner's partition application, which sought to create two two-acre parcels and one six-acre parcel. For that reason, the county's decision *approving* partition of the subject property into parcels that are smaller than 10 acres is not the "approval of a proposed development of land *under ORS * * * 215.327 * * * or county legislation or regulation adopted pursuant thereto*" and, therefore, is not a "permit," as defined in ORS 215.402(4). (Emphasis added.) Rather, the county's decision is the approval of a proposed development of land "under" the DLCD Final Order and section 11 of Measure 49. Stated differently, the county's decision is the approval of a proposed development of land *notwithstanding* ORS 215.327, which, if it applied, would otherwise prohibit that approval. That conclusion is evident from the terms of the DLCD Final Order and from the terms of the county's decision on petitioner's Measure 49 Partition Application, which apply the DLCD Final Order. Record 190.

> 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."

B. The Procedure That the County Applied Does Not Determine Whether the Decision Was a Permit

We also understand petitioner to argue that the county's decision approving petitioner's Measure 49 Partition Application was a "permit," as defined in ORS 215.402(4), because, in processing the application, the county applied the "Type II" procedures described in LC 14.030(1)(b) that apply when the county processes certain land use applications. Petition for Review 7. LC 14.030(1)(b)(i) provides, in relevant part:

> "The Type II procedure involves the Director's interpretation and exercise of discretion when evaluating approval standards and criteria. Uses or development evaluated through this process are uses that are conditionally permitted or allowed after Director review that may require the imposition of conditions of approval to ensure compliance with development standards and approval criteria. Type II decisions are made by the Director, in some cases after notice of application and opportunity to comment. Type II decisions may be appealed.
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> "*The Type II procedure applies to a variety of applications including, but not limited to review of applications for: permitted uses subject to standards, conditional use permits, and tentative partition and subdivision applications made pursuant to LC Chapter 13.*" (Emphasis added.)

Petitioner's argument that the county's decision was a permit because the county applied the procedures in LC 14.030(1)(b) that apply to applications for permits is unpersuasive. That the county applied the LC procedures that it applies to applications for permits to petitioner's Measure 49 Partition Application does not mean that all of the decisions that the county reaches after applying those procedures are necessarily permits or that the county's decision approving

petitioner's application was a permit. The second paragraph of LC 14.030(1)(b)(i), emphasized above, describes the types of applications to which the Type II procedures apply, which include applications for both discretionary and nondiscretionary decisions.

To the extent petitioner argues that the county's decision is a decision "under" one of the statutes enumerated in ORS 215.402(4)—*i.e.*, "ORS 215.402" itself—because the county applied LC procedures that it has adopted to ensure compliance with statutory procedures for permit applications, that argument is unpersuasive for the same reason that petitioner's argument above regarding those LC procedures is unpersuasive. We do not think the legislature intended that the definition of "permit" in ORS 215.402(4) encompass any decision that a county makes under locally adopted provisions that implement the procedures for permits set out in ORS 215.402 to 215.435. Counties are free to, and often do, apply the same procedures to permit applications that they apply to other, non-permit applications. Applying the specific procedures that state statute requires for permit applications to other land use applications does not convert all decisions reached after applying those procedures into statutory permits.

Because the county's decision was not a "permit," as defined in ORS 215.402(4), ORS 215.427(8) did not require the county to refund petitioner any fees, application-related or otherwise.[7]

The assignment of error is denied.

The county's decision is affirmed.[8]

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[7] Also according to petitioner, the fees that they incurred for approval and recordation of the final partition plat are "additional governmental fees incurred subsequent to the payment of such fees or deposits," within the meaning of ORS 215.427(8), and they are not liable for those fees. The challenged decision does not address petitioner's request for a refund of the fees that they incurred for approval and recordation of the final partition plat. However, we understand from the respondent's brief that the basis for the county's decision to reject a refund of the fees that petitioner incurred for approval and recordation of the final partition plat is that the county's decision approving the Measure 49 Partition Application was not a permit. It follows that those fees are not available to petitioner as "additional governmental fees incurred subsequent to the payment of such fees or deposits," within the meaning of ORS 215.427(8).

[8] Petitioner filed a precautionary motion to transfer the appeal in the event that LUBA determines it lacks jurisdiction. Jurisdiction over the decision challenged in this appeal is not disputed. *See* n 5. For that reason, we need not address petitioner's precautionary motion.