BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

GREG WARF and SUNDARA WARF,
Petitioners,

vs.

COOS COUNTY,
Respondent,

and

BLUE RIDGE INVESTMENTS, LLC
and ROBERT SMEJKAL,
Intervenors-Respondent.

LUBA No. 2002-087

FINAL OPINION
AND ORDER

Appeal from Coos County.

Malcolm J. Corrigall, Coos Bay, filed the petition for review and argued on behalf of petitioners. With him on the brief was Corrigall and McClintock, LLP.

No appearance by Coos County.

Daniel A. Terrell, Eugene, filed the response brief and argued on behalf of intervenors-respondent. With him on the brief was the Law Office of Bill Kloos, PC.

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

REVERSED 01/07/2003

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

Opinion by Holstun.

NATURE OF THE DECISION

Petitioners appeal a county decision that grants approval for two property line adjustments.

FACTS

Intervenors own three contiguous parcels, which we refer to collectively as a tract. Petitioners appealed an October 31, 2001 planning department decision that approved prior property line adjustments among the parcels within the tract. That appeal was dismissed as untimely filed. Warf v. Coos County, 42 Or LUBA 84 (2002). The property line adjustments that are the subject of this appeal further adjust the property lines that were established by that October 31, 2001 decision.

The following page shows the configuration of intervenors' three-parcel tract after the October 31, 2001 decision (Figure 1). The first property line adjustment drops a common vertical (north-south) boundary between the two largest parcels to a horizontal (east-west) position, forming a large parcel to the north and east, a small parcel to the southwest and a smaller parcel in the middle of the tract (Figure 2). The second property line adjustment swings the westernmost common vertical boundary between the two smaller parcels downward more than 180 degrees, making the small middle parcel larger and leaving a small parcel at the southern boundary of the tract (Figure 3).

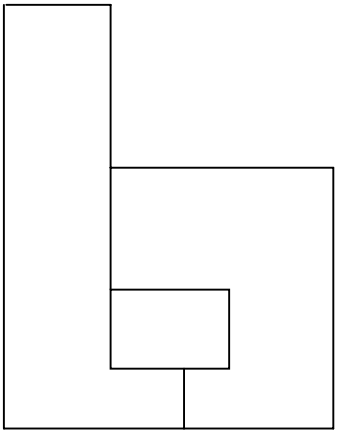

Fig 1: Starting

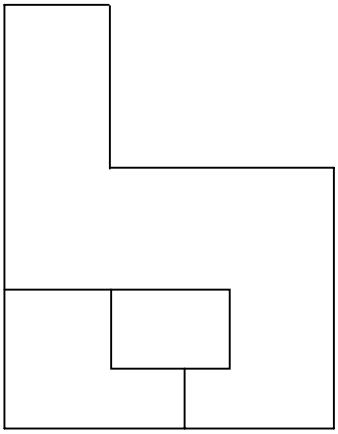

Fig. 2: Configuration after First Adjustment

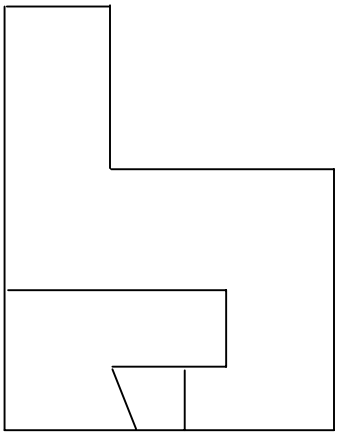

Fig. 3: Configuration after Second Adjustment

The county planning department processed intervenors' application ministerially. By that we mean the planning department did not provide a public hearing before making its decision and did not provide notice to persons other than the applicants or an opportunity for a local appeal of its decision. The planning department made its decision on June 17, 2002.[1] Petitioners learned of the June 17, 2002 decision and filed this appeal with LUBA 16 days later, on July 3, 2002.

[1] That June 17, 2002 decision is a one-page letter addressed to intervenors' representative.

JURISDICTION

As relevant, our jurisdiction is limited to land use decisions. ORS 197.825(1). As defined by ORS 197.015(10)(a), a decision that applies a land use regulation is a land use decision unless one of the statutory exceptions at ORS 197.015(10)(b) applies. There is no dispute that the county applied the Coos County Zoning and Land Development Ordinance (CCZLDO). The CCZLDO is a land use regulation. Therefore the disputed property line adjustment is a land use decision, unless one of the exceptions at ORS 197.015(10)(b) applies. Intervenors move to dismiss, arguing that the challenged property line adjustment is excluded from the ORS 197.015(10)(a) statutory definition of land use decision by ORS 197.015(10)(b)(A), which provides that land use decisions do not include a decision "[w]hich is made under land use standards which do not require interpretation or the exercise of policy or legal judgment."

We tend to agree with much of intervenors' argument that most of the inquiries the county must make in approving a property line adjustment under CCZLDO 3.3.150 might not require the exercise of much, if any, "policy or legal judgment." However, if our discussion later in this opinion of the relevant statutory and CCZLDO provisions that define and limit property line adjustments makes anything clear, it demonstrates that the county's decision that intervenors' application could be accepted, reviewed and approved as a property line adjustment required interpretation and the exercise of significant legal judgment. Therefore, the county's decision is not one that qualifies for the ORS 197.015(10)(b)(A) exception for decisions "made under land use standards which do not require interpretation or the exercise of policy or legal judgment." *See Tirumali v. City of Portland*, 169 Or App 241, 245-47, 7 P3d 761 (2000) (finding the term "finished surface" from which building height was measured under the city's code to be "ambiguous" and in need of interpretation).

Intervenors' motion to dismiss is denied.

INTRODUCTION

An understanding of the relationship between subdivisions, partitions and property line adjustments is helpful in resolving the central question that is presented in this appeal.

A person who wishes to divide an existing parcel into four or more lots may seek approval of a subdivision. ORS 92.010(15) provides the following definition:

> "'Subdivide land' means to divide land into four or more lots within a calendar year."

A person who wishes to divide an existing parcel into two or three parcels may do so by seeking approval of a partition. ORS 92.010(7) provides the following relevant definition:

> "'Partition land' means to divide land into two or three parcels of land within a calendar year, but does not include:
>
> "* * * * *
>
> "(b) An adjustment of a property line by the relocation of a common boundary where an additional unit of land is not created and where the *existing* unit of land reduced in size by the adjustment complies with any applicable zoning ordinances[.]" (Emphasis added.)

As defined by ORS 92.010(11), "'[p]roperty line adjustment' means the relocation of a common property line between two abutting properties."[2]

The above definitions permit some choice on the part of a landowner in dividing property and reconfiguring existing property lines. For example, a person who wishes to divide a single existing parcel into five lots can do so in a single year by seeking approval of a five-lot subdivision. Alternatively, the existing parcel could be divided into five parcels by

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[2] CCZLDO 3.3.150 essentially repeats the ORS 92.010(7)(b) and 92.010(11) provisions governing property line adjustments:

> "Property Line Adjustments. Property line adjustments shall satisfy the requirements of Chapter 92 of the Oregon Revised Statutes. A property line adjustment is the relocation of a common boundary between two *or more* abutting properties where an additional unit of land is not created and where the *existing* unit of land reduced in size by the adjustment complies with any applicable zoning ordinance." (Emphasis added.)

submitting a request for a three-parcel partition one year and a two-parcel partition in the next year.

Similarly, a person who wishes to reconfigure existing, adjoining parcels might be able to accomplish that reconfiguration by partitioning one of those parcels and then combining the resulting parcels so as to achieve the desired configuration. Alternatively, ORS 92.010(7)(b) and 92.010(11) might permit the property owner to accomplish the same objective though a property line adjustment, and thereby avoid the need to seek approval of a partition. The possibilities for realigning existing parcels with a single property line adjustment, *i.e.*, by relocating a common boundary between the two parcels, are somewhat limited. However, the possible realignments of existing parcels that could be achieved through serial property line adjustments appear to be almost unlimited. Moreover, unlike the yearly three-parcel limitation on partitions, there does not appear to be any statutory limitation on the number of property line adjustments that may be approved in any single year. The central question presented in this appeal is whether the county approved a property line adjustment, or whether the county approved something else.

FIRST ASSIGNMENT OF ERROR

A. Partition or Property Line Adjustment

Under their first assignment of error, petitioners allege the county erred by allowing "[i]ntervenors to reconfigure the shape of their parcels in such a manner that violates the definition of property line adjustment provided in ORS 92.010(11)." Petition for Review 5. With the added observation that the approved reconfiguration does not qualify as a property line adjustment under CCZLDO 3.3.150, we agree with petitioners.

As the concept is used in ORS 92.010(7) and 92.010(11), a property line adjustment is a rather limited tool. As defined by ORS 92.010(11), a property line adjustment is limited to relocating "*a* common property line between *two* abutting properties." (Emphases added.) That means *one* property line may be relocated and it must be a *common* property line

between *two* abutting properties. Another important limitation is implicit in ORS 92.010(11), but reasonably clear when ORS 92.010(11) is read together with ORS 92.010(7)(b).[3] The two properties that share the common property line that is to be adjusted must be "existing" units of land (*i.e.*, existing lots or parcels). That means the subdivision or partition plat or the deed or other legal instrument that created the existing lots or parcels must be recorded before the boundary lines that those lots or parcels create can be further adjusted. Property line adjustments may not be approved for proposed or hypothetical lots or parcels that do not yet separately exist as lots or parcels.

Returning to the property line adjustment that is at issue in this appeal, the first adjustment appears to relocate a single common boundary between the tall "L" shaped parcel on the western side of the tract and the large irregularly shaped parcel on the northern and eastern part of the tract. *Compare* Figures 1 and 2. No common boundary with the central small parcel is affected. If that first adjustment was all that the county's decision approved, it would appear to qualify as a property line adjustment.[4] However, the challenged decision does not stop there and require that the deeds that will be necessary to bring the adjusted property line into existence be recorded. Rather, it purports to proceed immediately to approve a second property line adjustment that results in the final configuration shown in Figure 3 above. There are two problems with that part of the decision.

First, the decision approves two property line adjustments rather than the single adjustment that is permitted by the statutes. Second, the county's decision is not limited to adjusting a common property line between existing parcels. The second property line adjustment adjusts the common property line between the small rectangular parcel in the

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[3] The language of ORS 92.010(7)(b) is quoted above in the text and expressly requires that the "existing unit of land" that is to be reduced in size by a property line adjustment must meet zoning ordinance requirements.

[4] We do not reach or decide that question here.

middle of the tract and the small parcel in the southwestern part of the tract that is shown in Figure 2. The southwestern parcel in Figure 2 is approved but did not exist when the county purported to adjust it in the second adjustment.[5]

What the county approved in this decision is in reality a partition of the large, currently existing "L" shaped parcel in Figure 1 into three parcels. The top part of the "L" is added to the largest of the remaining parcels in Figure 2. Most of the remaining bottom part of the "L" is added to the small rectangular parcel in the middle of Figure 2. The remaining part of the original "L" makes up the smallest of the reconfigured parcels in Figure 3. Because two of the new parcels created out of the original "L" shaped parcel are combined with the other two parcels in Figure 1, there are three parcels in the beginning and three parcels at the end. However, combining of parts of the original "L" shaped parcel with the other two parcels does not mean the original "L" shaped parcel was not partitioned.

It may be that the county's error can be simply corrected by (1) granting approval of the first adjustment, alone, and recording the deeds necessary to implement that property line adjustment, and (2) thereafter seeking approval of the second adjustment once the parcels created by the first adjustment legally exist. As we have already noted, there is no limit that anyone has called to our attention on the number of property line adjustments that can be

[5] We note that CCZLDO 3.3.150 purports to allow adjustments of a common boundary between two "or more" properties. *See* n 2. We question whether the county may allow property line adjustments for more than two existing parcels when ORS 92.010(11) limits property line adjustments to "two abutting properties." It is also not entirely clear to us what a "common" boundary between three or more abutting properties would look like. However, we need not resolve that question here. CCZLDO 3.3.150, like ORS 92.010(11), is limited to "a," *i.e.*, a single, common property line. The challenged decision approves adjustments to two common property lines. Even if the two property line adjustments could be viewed together as adjusting a single common property line between the three existing parcels in Figure 1, the county's decision does not simply relocate that single common boundary. Rather, it first reorients the part of that boundary that separates the two larger parcels (*compare* Figure 1 and Figure 2), and then severs the northern and southern halves and relocates the southern half of that boundary so that it is no longer contiguous with the northern half (*compare* Figure 2 and Figure 3). Severing a common boundary into two detached boundaries and moving one of those severed boundaries to an entirely different location is not simply relocating "a common boundary between two or more abutting properties."

approved, provided that *one* common property line is adjusted at a time and provided that the adjusted property line separates *existing parcels* rather than possible or hypothetical parcels.

B. *Goddard v. Jackson County*, 34 Or LUBA 402 (1998).

Before turning to the second assignment of error, we note that both parties appear to misread our decision in *Goddard*. Petitioners appear to read that case to stand for the proposition that what would otherwise be a proper property line adjustment becomes improper if it is too complex. Intervenors appear to take the position that the challenged property line adjustments survive scrutiny under *Goddard*, because they are much simpler than the property line adjustments that were at issue in that case: "[t]he two property line adjustments involved in this appeal are not 'complex.'" Intervenor's Brief 7.

The property line adjustment that we found improper in *Goddard* was a much clearer example of an improper property line adjustment. But the property line adjustment in *Goddard* was not improper because it was complex, it was improper because it did much more than simply relocate a common property line.

> "We agree with intervenors that the reconfiguration of the parcels within the subject property does not readily conform to the statutory definition of 'replat.' However, it does not necessarily follow that the approved reconfiguration of parcels constitutes a property line adjustment. A property line adjustment is limited, by its definitional terms, to relocation of common boundary lines.[6] * * * ORS 92.010(11). As petitioners point out, the challenged decision approves a reconfiguration of property lines that moves entire parcels, including boundary lines that are not common with any of the property lines of the parcel (parcel 3) into which parcels 1 and 2 are moved.
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> "Intervenors explain that the county in effect approved two separate property line adjustments, as shown in diagrams attached to intervenors' brief. The diagrams depict a first adjustment that moves all four boundaries of parcel 2 so that parcel 2 is located in the corner of parcel 3, notwithstanding that parcel 2 and 3 share only one common boundary. The second adjustment moves all

[6] This sentence can be read to suggest that a single property line adjustment may encompass relocation of multiple common boundary lines between abutting properties. We clarify in this opinion that a single property line adjustment decision may only approve the relocation of a single common boundary between abutting properties.

> four boundaries of parcel 1 into parcel 3, next to parcel 2, notwithstanding that parcel 1 and parcel 3 do not share a single common boundary line or touch at any point.
>
> "Intervenors' diagrams succinctly demonstrate that the reconfiguration approved by the challenged decision is *not* a property line adjustment as defined by ORS 92.010(11). Although the reconfiguration is not a 'replat' as that term is used in ORS 92.180 to 92.190 because it does not modify an existing plat, it resembles a replat in the scope of the changes it makes to property boundaries. A property line adjustment is essentially a *de minimus* form of replat. *See* ORS 92.190(3) (requiring that a property line adjustment be processed as a replat unless the local government authorizes other procedures). ORS 92.190(3) contemplates a fundamental distinction between a replat and a property line adjustment. That distinction is inherent in the definition of property line adjustment at ORS 92.010(11), which limits it to the 'relocation of a common property line between two abutting properties.'
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> "We conclude that, because the challenged decision relocates property lines that are not common to abutting properties, it reconfigures the subject property in a manner that violates the definition of property line adjustment at ORS 92.010(11) and the statutory distinction between a property line adjustment and a replat. The county's attempted reconfiguration is not authorized by any provision of ORS chapter 92 or any local provision directed to our attention." 34 Or LUBA at 414-15 (emphasis in original; footnote omitted).

The complex collection of property line adjustments in *Goddard* that were approved in a single county decision dramatically reconfigured the existing parcels. Our opinion in *Goddard* concluded that the approved reconfiguration was a replat in all but name, but because of the way ORS 92.010(12) defines replat, the desired reconfiguration could not be approved as a replat.[7] However, we also noted that the desired reconfiguration might be achieved by partitioning and combining existing parcels.[8]

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[7] ORS 92.010(12) provides:

> "'Replat' means the act of platting the lots, parcels and easements in a recorded subdivision or partition plat to achieve a reconfiguration of the existing subdivision or partition plat or to increase or decrease the number of lots in the subdivision."

In *Goddard*, we agreed with the intervenors that because the parcels at issue in that appeal were created by deed rather than by partition plats, the statutory replatting provisions did not apply.

[8] We explained:

C. Conclusion

We summarize the key conclusions we have reached above. First, petitioners appear to argue that, as a matter of law, serial property line adjustments cannot be used to achieve complex reconfigurations of existing parcels. We reject that argument. No statute or local provision that is cited by the parties or that we have been able to locate limits the number of property line adjustments that a property owner may submit for approval by the county. Petitioners' concern that almost any reconfiguration of existing parcels might be possible if enough separate property line adjustments are approved appears to be a valid one. That potential for land owners to reconfigure existing parcels without following subdivision and partition requirements is not dramatically different from the potential for land owners to achieve *de facto* subdivisions of their land thorough serial partitions. The legislature has recognized the potential for avoiding subdivision requirements through serial partitions and limited the number of times a parcel can be partitioned in a single year. If the legislature perceives a similar need to limit serial property line adjustments, it presumably will amend the statutes to address that need.

Second, we also disagree with intervenors' argument that because there is no express limit on the number of property line adjustments that can be submitted in a single application, multiple property line adjustments may be submitted in a single application and approved in a single decision. Intervenors may be able to achieve their desired

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> "Our analysis of ORS chapter 92 arguably creates a statutory void, where parcels lawfully created before 1973 by means other than a partition or subdivision plat pursuant to ORS chapter 92 cannot be reconfigured in the manner the county attempted here, *or where reconfiguration can only be accomplished through a process of vacation of boundary lines and subsequent land division*. * * *" 34 Or LUBA at 415 n 9 (emphasis added).

Although the emphasized language can be read to suggest that a two-step process (first vacate boundary lines, second partition or subdivide resulting parcels) is required, we see no reason why a single partition plat that proposes both dividing existing parcels and consolidating existing or newly divided parcels could not be proposed. Such a partition plat of parcels that were not initially created by a plat could be the functional equivalent of a replat of existing parcels that were initially created by a plat.

reconfiguration of their existing parcels by multiple property line adjustments. However, that does not mean that the relevant statutes and CCZLDO provisions are properly interpreted to allow the county to approve in a single decision as many hypothetical intermediate property line adjustments as are needed to create a fictional configuration that through a final property line adjustment achieves the desired reconfiguration. If intervenors wish to proceed by way of serial property line adjustments they must seek separate approvals for each of the needed property line adjustments and implement each step before proceeding to seek approval for additional property line adjustments that may be needed to achieve their desired reconfiguration of their parcels.

The first assignment of error is sustained.

SECOND ASSIGNMENT OF ERROR

We conclude above that the challenged decision approves a *de facto* partition of intervenors' property. Under the CCZLDO, decisions that approve partitions are administrative decisions. CCZLDO 6.5.300(4)(D) requires that notice of partition decisions must be provided in accordance with CCZLDO 5.7.100. CCZLDO 5.7.100(2) requires that notice of administrative decisions must be given to adjoining property owners and must explain that persons who are entitled to such notice have a right to seek a local appeal of the noticed decision.[9]

There is no dispute that the county (1) failed to process the disputed decision as an administrative decision, (2) failed to provide the required notice of decision, and (3) failed to provide the required opportunity for a local appeal. Petitioners argue that the county erred by not providing the required notice and opportunity for a local appeal before it approved the disputed application. We agree.

The second assignment of error is sustained.

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[9] As adjoining property owners, petitioners would have been entitled to notice of the decision under CCZLDO 5.7.100(2), had such notice been given.

The disputed application must be amended to propose a property line adjustment or must be submitted as an application for partition approval. In either event, a new application will be required. Accordingly, the county's decision is reversed. *Angius v. Washington County*, 35 Or LUBA 462, 464-66 (1999); *Seitz v. City of Ashland*, 24 Or LUBA 311, 314 (1992).