

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

3
4 GARRICK BALSLEY,
5 *Petitioner,*

6
7 vs.

8
9 BENTON COUNTY,
10 *Respondent,*

11 and

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14 MCDOUGAL BROTHERS,
15 *Intervenor-Respondent.*

16
17 LUBA No. 2016-010

18
19 FINAL OPINION
20 AND ORDER

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22 Appeal from Benton County.

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24 Sean T. Malone, Eugene, filed the petition for review and argued on
25 behalf of petitioner.

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27 No appearance by Benton County.

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29 Bill Kloos, Eugene, filed the response brief and argued on behalf of
30 intervenor-respondent.

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

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35 REMANDED 05/06/2016

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

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NATURE OF THE DECISION

Petitioner appeals a decision approving four property line adjustments.

FACTS

Intervenor-respondent McDougal Brothers (intervenor) submitted four applications to adjust the property lines of five properties zoned Rural Residential-5 acre minimum (RR-5). The five properties range in size from 4.9 acres to 20 acres.

Four of the properties are lots that were created as part of the Henshaw Orchards subdivision, platted in 1911. Those lots (Lots 1, 2, 4 and 5) are one tax lot, Tax Lot 2500, for property tax assessment purposes. The fifth property was created in 1984 as part of an approved partition. That property is Tax Lot 2300 for assessment purposes. The applications also proposed relocation of Water Lane, a public road that runs adjacent to the southern boundary of Lots 1, 2, 4, and 5 and intersects with a county road, Bellfountain Road.

On January 5, 2016, the county approved the four applications. The county did not provide notice of the applications or decision to any party, including petitioner, who owns property adjacent to Lot 5. Petitioner appealed the county’s decision on January 26, 2016.¹

¹ Petitioner moves to take evidence not in the record under OAR 661-010-0045 in order to establish that he is “adversely affected” by the decision. ORS 197.830(3) allows any party who is “adversely affected” by a land use decision

1 **JURISDICTION**

2 The county applied the provisions of Benton County Development Code
3 (DC) Chapter 94 to the applications. Intervenor argues that the decision is
4 subject to the exclusion from LUBA’s jurisdiction for decisions “made under
5 land use standards that do not require interpretation or the exercise of policy or
6 legal judgment[.]”² According to intervenor, the standards that apply to a
7 property line adjustment in DC Chapter 94 do not require the county to
8 exercise policy or legal judgment in order to approve or deny the applications.
9 Therefore, intervenor argues, the county’s decision falls under the exclusion at
10 ORS 197.015(10)(b)(A).

11 Petitioner alleges that the county interpreted the DC and exercised legal
12 judgment when the county determined that the applications could be approved
13 as property line adjustments pursuant to DC Chapter 94, rather than as a replat
14 of a recorded subdivision, and therefore the challenged decision is not subject
15 to the ministerial exception at ORS 197.015(10)(b)(A). Petition for Review 9-
16 10; 17 (“what occurred on the property could very well have been a replat”).
17 We agree.

made without a hearing to appeal the decision to LUBA as provided in the statute. Petitioner’s motions are granted.

² ORS 197.015(10)(b)(A) provides that a “land use decision” as described in ORS 197.015(10)(a)(A) does not include a decision “[t]hat is made under land use standards that do not require interpretation or the exercise of policy or legal judgment[.]”

1 The county appears to have interpreted the provisions of DC Chapter 94,
2 which contains the criteria for property line adjustments, and DC Chapter 97,
3 which contains the criteria for subdivisions, and concluded that the provisions
4 of DC chapter 94 applied to the applications but that at least some of the
5 provisions of DC Chapter 97 apply to the applications. The decision states:

6 “The five subject properties are under one ownership[], which
7 allows for the property line adjust[ments] to be accomplished all at
8 once on a single plat, *and also allows for Water Lane to be moved*
9 *to the south (where it will have improved connectivity to Foster*
10 *Road) with a more efficient legal process. (Note that because the*
11 *plat will show a total of five properties, state law requires that the*
12 *property line adjustments be shown on a legal document called a*
13 *‘subdivision plat,’ however no new properties are being created.)”*
14 Record 5 (emphasis added).

15 Although the meaning of the above-quoted paragraph is not entirely clear to us,
16 in it the county appears to have recognized that reconfiguration of the five units
17 of land would trigger application of DC Chapter 97, but determined that the
18 applications could be approved as property line adjustments, without applying
19 all of the criteria in DC Chapter 97 that apply to subdivisions.³ In addition, the
20 county appears to have concluded that the property line adjustment applications

³ DC 97.005 provides that “[a] subdivision is a division of land into four or more parcels or lots within a calendar year. All subdivisions shall be subject to the provisions of this chapter.” DC 97.115(1) requires an application for subdivision approval to include a preliminary plat that conforms to map standards established by the county surveyor and to ORS Chapter 92 governing subdivisions and partitions. DC 97.505 requires a final plat to be recorded in the county records office.

1 do not require either a replat or the application of any DC criteria that may
2 apply to relocation of a public road.⁴ In so concluding, the county interpreted
3 the provisions of the DC and exercised legal judgment. The challenged
4 decision does not fall within the exception at ORS 197.015(10)(b)(A).

5 **ASSIGNMENTS OF ERROR**

6 Petitioner’s first assignment of error alleges that the county’s decision
7 approving the applications is not supported by substantial evidence in the
8 record. Petitioner’s second assignment of error alleges that the county
9 improperly construed the applicable law in failing to process the applications as
10 a “replat.” *See* n 4. Petitioner’s third assignment of error alleges that the county
11 improperly construed the applicable law by failing to require each property line
12 adjustment to be recorded before the next was approved. Petitioner’s fourth
13 assignment of error alleges that the county’s decision that the properties were
14 “legally created” as required by DC 94.500 is not supported by substantial
15 evidence in the record.

16 Intervenor responds to all of petitioner’s assignment of errors with a
17 request that in the event LUBA determines that the county’s decision is not

⁴ DC 97.050 provides that “[a] replat of a recorded subdivision plat shall be reviewed as a new request for a subdivision and shall be subject to all provisions of this chapter.”

DC 51.020(55) defines “replat” to mean “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.”

1 subject to the ministerial exception at ORS 197.015(10)(b)(A), LUBA remand
2 the decision in order for the county to process the applications according to the
3 notice and hearing procedures in ORS 215.416(3) and (11). Even without that
4 response, we would likely have to summarily remand the decision for at least
5 some additional proceedings and findings. The record is exceedingly sparse,
6 making it very difficult to meaningfully address and resolve the merits of
7 petitioner's assignments of error. In addition, remand of the decision to allow
8 notice and an opportunity for others to participate will have the added benefit
9 of creating a more thorough record on which to make and potentially review a
10 decision. Accordingly, we do not reach petitioner's assignments of error.

11 The county's decision is remanded.