BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

LANDWATCH LANE COUNTY,
Petitioner,

vs.

LANE COUNTY,
Respondent,

and

AMY HARWOOD and TREVOR HARWOOD,
Intervenors-Respondents.

LUBA No. 2017-125

FINAL OPINION
AND ORDER

Appeal from Lane County.

Andrew Mulkey, Eugene, filed the petition for review and argued on behalf of petitioner.

No appearance by Lane County.

Troy M. Slonecker, Springfield, filed the response brief and argued on behalf of intervenors-respondents. With him on the brief was the Law Office of Troy M. Slonecker, LLC.

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

AFFIRMED 06/08/2018

You are entitled to judicial review of this Order. Judicial review is

1 governed by the provisions of ORS 197.850.

Opinion by Bassham.

NATURE OF THE DECISION

Petitioner appeals a county board of commissioners' decision approving a forest template dwelling and issuing final notice of a legal lot verification.

FACTS

The subject property is a 33-acre parcel, designated tax lot (TL) 900, and zoned Impacted-Forest Lands (F-2). The subject property was created in 1968, when the county approved a partition, which the county code at the time labeled a "minor subdivision." The approved partition created TL 900 and a smaller adjoining parcel, TL 901, from a parent parcel that was already developed with a dwelling. As a result of the partition, the existing dwelling was located on TL 900, while TL 901 was undeveloped.

In January 2007, intervenors-respondents (intervenors), who then owned both TL 900 and TL 901, recorded two property line adjustment deeds. The two deeds adjusted the boundaries of TL 900 and 901, in a manner that was intended to move TL 901 eastward so that the approximately three-acre TL 901 encompassed the existing dwelling. The effect of the 2007 property line adjustments are illustrated in a diagram from Record 24, at Appendix A.

In March 2007, intervenors obtained from the county a preliminary legal lot verification for TLs 900 and 901, verifying that TLs 900 and 901 as configured by the 2007 property line adjustments were lawfully created units of land and hence eligible for development. Under the county scheme at the time,

a legal lot verification decision was a preliminary decision, and the verification became final only when the property owner applied for and the county approved a development permit for the property.[1] *See Wolcott v. Lane County*, __ Or LUBA __ (LUBA No. 2017-096, Feb 6, 2018) (slip op at 18) (discussing the county's scheme for legal lot verifications in place since July 2004).

In 2010 the county adopted land use regulations setting forth a formal process for property line adjustments, at Lane County Code (LC) 13.450, which among other things requires that property owners obtain county approval in order to relocate or eliminate a property line, prior to recording the deeds that effect the adjustment. LC 13.450(1).

In 2017, intervenors conveyed TL 900 to Harwood Farms, LLC, which then filed the subject application for approval of a permit for a forest template dwelling on TL 900. A forest template dwelling is authorized under ORS 215.750(1), as implemented in the F-2 zone by LC 16.211(5). Among other things, LC 16.211(5)(b) requires that the applicant demonstrate that the "lot or

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[1] Adopted in 2004, Lane County Code (LC) 13.020 provides:

> "Legal Lot Verification. A legal lot verification by the Director is considered final when it is made and noticed pursuant to LC 14.100 and shall occur when: (1) An application is submitted and reviewed pursuant to LC 14.050, excluding 14.050(3)(d), for a legal lot verification on a lot or parcel resulting from a property line adjustment; or (2) If notice is requested by the property owner for any legal lot verification, upon submitting an application for review pursuant to LC 14.050, excluding 14.050(3)(d)."

parcel upon which the dwelling will be located was lawfully created." As part of the application, Harwood Farms, LLC requested that the county's decision on the forest template application serve as final notice of the 2007 preliminary legal lot verification, pursuant to LC 13.020.

The county planning director administratively approved the application. Petitioner appealed the approval to the hearings officer, who held a hearing on September 7, 2017. Petitioner appeared at the hearing, arguing on several grounds that TL 900 was not a lawful parcel and thus not eligible for a development permit. On September 29, 2017, the hearings officer issued a decision denying the appeal and approving the permit. Petitioner appealed the hearings officer's decision to the county board of commissioners, which declined to hear the appeal and adopted the hearings officer's decision as the county's final decision. This appeal followed.

FIRST ASSIGNMENT OF ERROR

Petitioner argues that the county erred in concluding that TL 900 is a lawful parcel and hence eligible for a forest template dwelling permit. According to petitioner, in 2007 the applicable statutes in ORS Chapter 92 required county approval of a property line adjustment. However, petitioner contends, the county never approved the 2007 property line adjustments. Accordingly, petitioner argues that the 2007 adjustments were unlawful, and that TL 900 as presently configured is not a lawful parcel.

Petitioner argues that since its adoption in 1991, ORS 92.190(3) has provided that local governments may use procedures other than replatting procedures to adjust property lines, as long as those procedures include recording of conveyances conforming to "the *approved* property line adjustment."[2] (Emphasis added.) Thus, petitioner argues, in 2007 (as is also the case today) local governments can adjust property lines without using the statutory procedures for a replat only if the local government has adopted an alternative procedure under which the local government approves the adjustment before conforming property line adjustment deeds are recorded. According to petitioner, it is undisputed that not until 2010 did the county adopt a written procedure for approving property line adjustments prior to recordation of adjustment deeds.

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[2] ORS 92.190 provides, in relevant part:

> "(3) The governing body of a city or county may use procedures other than replatting procedures in ORS 92.180 and 92.185 to adjust property lines as described in ORS 92.010(12), as long as those procedures include the recording, with the county clerk, of conveyances conforming to the approved property line adjustment as surveyed in accordance with ORS 92.060(7).
>
> "(4) A property line adjustment deed shall contain the names of the parties, the description of the adjusted line, references to original recorded documents and signatures of all parties with proper acknowledgment."

Further, petitioner argues that in *Bowerman v. Lane County*, 287 Or App 383, 386, 403 P3d 512 (2017), *opinion withdrawn and superseded on reconsideration*, 291 Or App 651 (2018), the Court of Appeals recognized that ORS chapter 92 requires local governmental approval of property line adjustments:

> "ORS chapter 92 does not, itself, spell out the procedures governing a local government's approval of a property line adjustment. Instead, the legislature has largely left the responsibility to determine the appropriate procedures to local governments, subject to the requirement that any such procedures require the recording of a deed reflecting any *approved* property line adjustment[.]" (Emphasis added.)

Intervenors respond that where ORS 92.190(3) applies it authorizes local governments to adopt procedures other than replatting procedures to adjust property lines, but does not require that such alternative procedures include local government approval *prior to* recording of the adjustment deeds. To the extent ORS 92.190(3) requires local government approval, intervenors argue, it does not mandate any particular type of procedure for approving property line adjustments, as the court noted in *Bowerman*. Intervenors contend that the process the county employed in 2007, including (1) recording of deeds conforming with the requirements of ORS 92.190(4), (2) county approval of a preliminary legal lot verification confirming that both parcels were legal parcels both before and after the adjustment, and (3) a final issuance of the legal lot verification at the time of development approval, is sufficient to

comply with any requirement in ORS 92.190(3) for county approval of the 2007 property line adjustments.

We assume without deciding that ORS 92.190(3) embodies a requirement that, where local governments choose to provide an alternative procedure for property line adjustments other than using replat procedures, that alternative procedure must include local government approval of some kind. However, we agree with intervenors that ORS 197.190(3) does not specify any particular procedures or form of approval, and does not necessarily require that approval be obtained prior to recordation of the adjustment deeds.

Petitioner disputes that the county procedure in place prior to 2010 included any form of county "approval" at all. However, as we understand the county's legal lot verification process in place since 2004, the county would evaluate whether the subject properties were lawfully created lots or parcels, including an evaluation of property line adjustments or other changes that prompted the application for a legal lot verification, and issue a preliminary determination as to whether or not the properties as presently configured are legal lots or parcels, and thus eligible for development under county code provisions that limit development rights only to lawfully created lots or parcels. That preliminary determination would become final only when the property owner applies for, and the county approves, a development permit. Under this process, if the county determined that a property line adjustment was improper or illegal, the outcome of the legal lot verification process would presumably

be negative, which would have the consequence that no final legal lot verification could be issued or development permit approved until the illegality was corrected. This approval process may be partially *post-hoc*, but it nonetheless appears to perform a basic function of a land use approval: to ensure that applicable regulations and requirements are met prior to permanent development. Given the absence of more specific statutory requirements for local government approval of property line adjustments, we disagree with petitioner that the 2007 property line adjustments, as preliminarily verified in 2007 and finally verified in the present decision, are inconsistent with ORS 92.190(3). Contrary to petitioner's argument, the adjustments have been approved, although not *finally* approved until the challenged decision was adopted.

The first assignment of error is denied.

SECOND ASSIGNMENT OF ERROR

Under the second assignment of error, petitioner argues that the 2007 property line adjustments were unlawful for four additional reasons.

A. First and Second Sub-Assignments of Error

The first two reasons involve consistency with the principle articulated in *Phillips v. Polk County*, 53 Or LUBA 194, *aff'd* 213 Or App 498, 162 P3d 338 (2007), to the effect that under the statutory scheme applicable in 2007 it was unlawful to adjust property boundaries in a way that results in parcels that fail to comply with applicable minimum parcel sizes. Citing *Phillips*, petitioner

argues that the 2007 property line adjustments were illegal at the time the deeds were recorded, because the resulting parcels did not comply with the applicable 80-acre parcel size applicable in the F-2 zone.

As petitioner recognizes, *Phillips* was legislatively overruled by adoption of Oregon Laws 2008, chapter 12, which in relevant part authorized property line adjustments of substandard size lots and parcels, even if the resulting lots or parcels continue to fail to comply with applicable minimum parcel sizes. Oregon Laws 2008, chapter 12, is codified at ORS 92.192. Section 6 of Oregon Laws 2008, chapter 12, made that legislation retroactive to "property line adjustments approved before, on or after the effective date of this 2008 Act." However, petitioner contends that Oregon Laws 2008, chapter 12, does not retroactively apply to the 2007 property line adjustments, because Section 6 is limited to property line adjustments that were "approved" before, on or after the effective date of the 2008 Act. Petitioner repeats its arguments that the 2007 property line adjustments have never received the county approval required by ORS 92.190(3).

However, as explained above, we have rejected petitioner's arguments that the county process used for the 2007 property line adjustments is inconsistent with ORS 92.190(3). One might debate whether the 2007 property line adjustments were approved "before, * * * or after the effective date of" the 2008 Act, but it had to be one of the two. Accordingly, the first two sub-

assignments of error do not provide a basis for reversal or remand, and are denied.

B. Third Sub-Assignment of Error

Petitioner's argument under the third sub-assignment of error relies on the diagrams in Appendix A, but even with the assistance of those diagrams we do not understand the argument. Petitioner *appears* to argue that the legal effect of the 2007 adjustments was not as the county understood it, to move TL 901 eastward so that it encompassed the existing dwelling, leaving TL 900 vacant and thereby potentially eligible for a dwelling. Instead, we understand petitioner to argue, the 2007 adjustments compressed TL 900 into the boundaries mislabeled in Figure 3 as TL 901, but which is actually TL 900, and expanded TL 901 into the larger parcel that is mislabeled TL 900. Consequently, we understand petitioner to argue that the property that is the nominal subject of the application, TL 900, is developed with an existing dwelling and thus does not qualify for a forest template dwelling.

If that is petitioner's argument, we reject it.[3] If petitioner intends some other argument, it is not sufficiently developed for review. *Deschutes Development v. Deschutes Cty.*, 5 Or LUBA 218 (1981).

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[3] At best, petitioner makes out a case that what is currently labeled as Tax Lot 901 (with the existing dwelling) should be labeled Tax Lot 900, while what is currently labeled Tax Lot 900 (which is undeveloped) should be labeled Tax Lot 901. This at most discloses a tax lot numbering problem. Because there is no confusion over the location of the undeveloped tax lot and there is no

The third sub-assignment of error is denied.

C. Fourth Sub-Assignment of Error

The fourth sub-assignment of error assumes that Oregon Laws 2008, chapter 12, codified at ORS 92.192, applies retroactively to the 2007 adjustments. Nonetheless, petitioner argues that the county erred in concluding that the requirements of ORS 92.192 are met, in three particulars.

ORS 92.192(3) allows adjustments between "abutting lawfully established units of land."[4] Petitioner contends that, after its initial creation in

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dispute that the forest template dwelling was approved for the undeveloped tax lot, petitioner's argument provides no basis for remand.

[4] ORS 92.192 (2015) provides, in relevant part:

> "(3) Subject to subsection (4) of this section, for land located entirely outside the corporate limits of a city, a county may approve a property line adjustment in which:
>
> > "(a) One or both of the abutting lawfully established units of land are smaller than the minimum lot or parcel size for the applicable zone before the property line adjustment and, after the adjustment, one is as large as or larger than the minimum lot or parcel size for the applicable zone; or
> >
> > "(b) Both abutting lawfully established units of land are smaller than the minimum lot or parcel size for the applicable zone before and after the property line adjustment.
>
> "(4) On land zoned for exclusive farm use, forest use or mixed farm and forest use, a property line adjustment may not be used to:

1968, TL 901 was unlawfully partitioned further as reflected in a deed recorded in 1973. Petitioner contends that the subdivision ordinance in effect in 1973 required that the further partition receive county approval as a minor subdivision. Intervenors respond that the 1973 deed was the product of an

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> "(a) Decrease the size of a lawfully established unit of land that, before the relocation or elimination of the common property line, is smaller than the minimum lot or parcel size for the applicable zone and contains an existing dwelling or is approved for the construction of a dwelling, if another lawfully established unit of land affected by the property line adjustment would be increased to a size as large as or larger than the minimum lot or parcel size required to qualify the other affected lawfully established unit of land for a dwelling;
>
> "(b) Decrease the size of a lawfully established unit of land that contains an existing dwelling or is approved for construction of a dwelling to a size smaller than the minimum lot or parcel size, if another lawfully established unit of land affected by the property line adjustment would be increased to a size as large as or larger than the minimum lot or parcel size required to qualify the other affected lawfully established unit of land for a dwelling; [or]
>
> "(c) Allow an area of land used to qualify a lawfully established unit of land for a dwelling based on an acreage standard to be used to qualify another lawfully established unit of land for a dwelling if the land use approval would be based on an acreage standard[.]"

approved minor subdivision (M73-42), found at Record 374-77. As far as we can tell, intervenors are correct.

Petitioner next argues that sometime between 1973 and 2007 TL 901 was reduced in size, but the findings and record do not explain what caused that reduction and whether it was lawful. Intervenors respond that in 1988 a deed was recorded dedicating land from TL 901 to the county for the adjacent Cedar Flat Road. Record 176, 213. We agree with intervenors that petitioner has not identified any reason to believe that the 1988 road dedication was unlawful.

Finally, petitioner argues that ORS 92.192(4) (2015) prohibits property line adjustments that decrease the size of a unit of land that contains an existing dwelling, if for the purpose of qualifying another unit of land for a dwelling. According to petitioner, the 2007 adjustments were intended to qualify a second dwelling to be located on TL 900. Petitioner concedes that the 2007 adjustments did not violate the express language of any provision of ORS 92.192(4), but argues that the adjustments violated the spirit of the statute. Intervenors respond, and we agree, that petitioner's arguments regarding ORS 92.192(4) do not provide a basis for reversal or remand.

The fourth sub-assignment of error is denied.

The second assignment of error is denied.

THIRD ASSIGNMENT OF ERROR

Petitioner's arguments under the third assignment of error are based on LUBA's opinion in *Bowerman v. Lane County*, 75 Or LUBA 86 (2017). In its *Bowerman* decision, LUBA interpreted the relevant provisions of ORS chapter 92 to limit the reconfiguration of property boundaries that can be lawfully accomplished as a property line adjustment only to the adjustment of *recorded* property lines. In LUBA's view, this meant that a decision approving property line adjustments that involve multiple adjustments of the same property line is not a lawful decision, because it would require the further adjustment of an unrecorded and hence nonexistent property line. In the present case, petitioner argues that the record indicates that the two deeds accomplishing the 2007 adjustments were recorded at the same exact time, which makes it impossible to determine whether the deeds adjusted an already adjusted, but unrecorded, property line, in contravention of LUBA's holding in *Bowerman*.

The short answer to petitioner's argument is that on May 9, 2018, after petitioner filed the petition for review in this appeal, the Court of Appeals issued an opinion on reconsideration of its 2017 *Bowerman* decision, in which the court took up a question it had initially declined to answer, and rejected LUBA's interpretation of the relevant ORS chapter 92 provisions with respect to the problem presented by a single decision that approves multiple adjustments of the same property line. *Bowerman*, 291 Or App 651. According to the court:

> "A county's approval of sequential property line adjustments could accommodate the deed information requirements by conditioning approval on the requirement that each deed comply with ORS 92.190(4). In this case, petitioner calls attention to the fact that that is exactly what happened: After the county's approval of the property line adjustments, the deeds were recorded in the order necessary to adjust each property line prior to adjusting an additional property line—exactly as they would have been had the county approved petitioner's requested property line adjustments in the context of a series of separate applications." *Id.* at 658.

In other words, the court held that there is no categorical prohibition in ORS Chapter 92 on approving sequential property line adjustments in a single decision, as long as the conforming deeds are recorded in the order necessary to legally create each property line before it is further adjusted.

In the present case, intervenors argue that while both deeds are stamped with the same hour and minute, in fact it is evident that they were recorded in sequence, with the first adjustment, stamped 2007-00689, referencing the original deeds it was adjusting, and the second adjustment, stamped sequentially as 2007-00690, referencing 2007-00689 as the deed it was adjusting. Record 207, 211. We agree with intervenors that petitioner has not established that the 2007 adjustments violated any statutory provision, or otherwise were unlawful property line adjustments under the principles articulated in the Court of Appeals' decision in *Bowerman*, 291 Or App 651.

The third assignment of error is denied.

The county's decision is affirmed.

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Appendix A

Figure 1

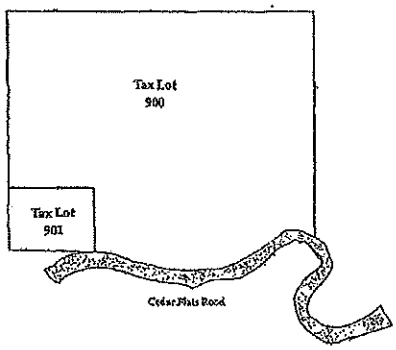


Figure 2

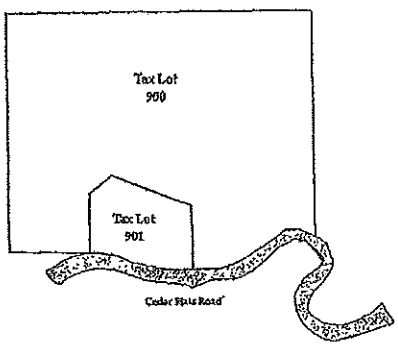
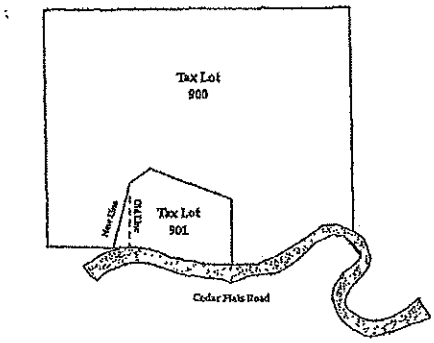


Figure 3



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