BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

FRIENDS OF DOUGLAS COUNTY
and SHELLEY WETHERELL,
Petitioners,

vs.

DOUGLAS COUNTY,
Respondent.

LUBA No. 2017-127

FINAL OPINION
AND ORDER

Appeal from Douglas County.

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

No appearance by Douglas County.

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

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

REMANDED 07/12/2018

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

Opinion by Bassham.

NATURE OF THE DECISION

Petitioners appeal a county decision approving a boundary line adjustment between two parcels zoned for exclusive farm use, one of which is approved for a nonfarm dwelling.

WITHDRAWAL OF INTERVENORS-RESPONDENTS

On March 12, 2018, LUBA granted Chuck Napier, C.L. Napier and Carroll Napier's (the Napiers) unopposed motion to intervene on the side of respondent. The Napiers' attorney filed a response brief. On June 14, 2018, the Napiers' counsel filed a Notice of Withdrawal as attorney. On June 21, 2018, the Napiers filed a Notice of Withdrawal on behalf of all named intervenors, indicating it was their intent to withdraw the response brief and to withdraw from this appeal as parties. Accordingly, the Napiers are withdrawn as parties in this appeal, and LUBA will not consider the response brief for any purpose.

FACTS

The subject property is a 194.9-acre tract owned by the Napiers, designated for agricultural use and zoned Exclusive Farm Use – Grazing (FG). In July 2017, the county approved a land partition and associated nonfarm dwelling approval to divide the subject property into a 1.21-acre parcel (Unit 2) to allow for the siting of a nonfarm dwelling, leaving a 193.69-acre remainder parcel (Unit 1) that is developed with the Napiers' existing dwelling. The

county's 2017 decision approving the partition and nonfarm dwelling is designated P/D 17-018. In the P/D 17-018 decision, the county approved the partition and nonfarm dwelling approval based on a finding that the 1.21-acre Unit 2 parcel is "generally unsuitable" for farm use, based in part on evidence and findings that the soils on the Unit 2 parcel consist predominantly (approximately 60 percent) of soils that are not suitable for agricultural or forest uses, pursuant to Douglas County Land Use Ordinance (LDO) 3.44.100(1)(e). The partition plat was finalized and recorded in October 2017.

Shortly thereafter, the Napiers applied for approval of a boundary line adjustment between Units 1 and 2. The application proposed reducing Unit 1 to 185± acres, and expanding Unit 2 by 8.7 acres to approximately 9.9 acres in size. The county processed the application as a "ministerial action," under code procedures at LDO 2.090 that do not require notice or hearing, or provide formal opportunity for comment. Despite the absence of notice and lack of opportunity for comment, on November 8, 2017, petitioners provided comments to the county, and argued that the county erred in processing the application under its "ministerial" procedures, and should process the application under its "administrative" procedures at LDO 2.100, which provides for notice and opportunity to submit comments. Further, petitioners argued that expanding Unit 2 by 8.7 acres would necessarily include the surrounding agricultural soils, which would mean that Unit 2 would no longer qualify as "generally unsuitable" for farm use based on soil quality.

On December 1, 2017, the county planning director issued a decision approving the proposed boundary line adjustment. The county's decision did not address the issues raised in petitioners' November 8, 2017 comments. This appeal followed.

FIRST ASSIGNMENT OF ERROR

Under the first assignment of error, petitioners contend that the county erred in processing the application for a boundary line adjustment under the procedures for a ministerial action at LDO 2.090, rather than the procedures for an administrative action at LDO 2.100. Petitioners also contend that the county erred in failing to apply several applicable LDO standards. We address the two arguments under separate subassignments of error.

A. Ministerial Action

The LDO does not include a definition of a "ministerial" action. LDO 1.090 defines "administrative action" as a proceeding:

> "a. In which the legal rights, duties or privileges of specific parties are determined, and any appeal or review thereof, pursuant to the provisions of this ordinance; or
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> "b. The County Board of Commissioners so provides by Ordinance, rule or order."

The LDO sets out a specific list of development applications that the planning director can approve as an administrative action, under LDO 2.060(1), or a ministerial action, under LDO 2.060(2). LDO 2.060(2)(g) provides that the director has the authority to review and approve or deny as a ministerial action an "Adjustment of Common Boundary Lines (Article 37 and Chapter 4)." In

addition, LDO 4.140, part of the LDO section governing boundary line adjustments, provides that the "Director has authority to approve a boundary line adjustment as a Ministerial Action."

Petitioners contend, however, that the Napiers' proposed boundary line adjustment does not qualify as a "ministerial" action for purposes of LDO 2.060(2)(g). According to petitioners, the category of "ministerial" action under the LDO is limited to development actions under criteria that do not require interpretation or the exercise of legal judgment or discretion. Petitioners contend that the criteria that were applied or should have been applied to the proposed application require interpretation and the exercise of legal judgment and discretion, and therefore cannot be processed and approved as a ministerial action.

Petitioners' arguments on this point conflate a number of distinct concepts. The first concept is whether the county's decision constitutes a "land use decision" as defined at ORS 197.015(10)(a).[1] No party disputes in this appeal whether the county's decision is a "land use decision" subject to LUBA's review. In particular, no party argues that the county's decision is

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[1] ORS 197.015(10)(a) defines "land use decision" in relevant part as a final decision by a local government that concerns the application of a "land use regulation." ORS 197.015(10)(b)(A) excludes from the definition of "land use decision" a decision of a local government:

> "That is made under land use standards that do not require interpretation or the exercise of policy or legal judgment[.]"

subject to the exclusion at ORS 197.015(10)(b)(A), for local government decisions that "do not require interpretation or the exercise of policy or legal judgment[.]"[2] However, we understand petitioners to argue that the LDO distinction between "ministerial" and "administrative" actions is meant to track the distinction between "land use decisions" and the exclusion at ORS 197.015(10)(b)(A). From that premise, petitioners argue that because the county's decision approving the Napiers' boundary line adjustment application was subject to standards that require interpretation or the exercise of legal judgment, that the application cannot be processed as a ministerial action.

However, petitioners' premise is unfounded. Nothing cited to us in the LDO suggests that the category of ministerial actions under the LDO is meant to track the exclusion at ORS 197.015 or is limited to actions that would fall within that exclusion. As far as we can tell, a decision on a boundary line adjustment application can be processed as a ministerial action under the LDO because the county board of commissioners has expressly listed that type of application in the list of actions that the planning director is authorized to

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[2] As discussed below, we generally agree with petitioners that the LDO is ambiguous regarding whether certain LDO provisions apply to the Napiers' application for a boundary line adjustment, and that interpretation is necessary to resolve that ambiguity. For that reason alone, the exclusion at ORS 197.015(10)(b)(A) probably would not apply, if it were raised in this appeal. *See Tirumali v. City of Portland*, 169 Or App 241, 7 P3d 761 (2000) (a building permit approval under a standard that require interpretation is not subject to a similar exclusion at ORS 197.015(10)(b)(B) for a "building permit issued under clear and objective land use standards[.]").

process as a ministerial action.[3] The distinction between "ministerial" and "administrative" actions under the LDO is not based, as far as we can tell, on the type of standards that apply, or whether those standards require interpretation or the exercise of legal or policy judgment.

Petitioners confuse matters further by arguing that, because the applicable standards require interpretation and the exercise of legal judgment, the standards therefore require the exercise of "discretion." ORS 197.015(10) and its exclusions do not use the word "discretion," and the use of that word as shorthand for the kinds of decisions that do not fall within the exclusion at ORS 19.015(10)(b)(A) is confusing, for the reasons discussed below. Although petitioners do not cite to it, petitioners may be referring to a subset of land use decisions that qualify as "permits" as defined at ORS 215.402(4), which under the statutes that apply only to "permits" must be processed under procedures that provide notice and opportunity to request a hearing. ORS 215.402(4) defines "permit" in relevant part as the "discretionary approval of a proposed development of land[.]" As we recently explained in *Reed v. Jackson County*:

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[3] That LDO 2.060(2)(g) "authorizes," but does not require, the planning director to process a boundary line adjustment application as a ministerial action suggests that the planning director may have the discretion, in particular cases, to process particular boundary line adjustment applications as an administrative action, or perhaps to elevate review of certain problematic applications to the hearings officer or planning commission. Petitioners provide no argument on this point and we speculate no further.

> "While all 'permit' decisions as defined at ORS 215.402 are land use decisions, not all land use decisions as defined at ORS 197.015(10)(a)(A) are 'permits.' *See Tirumali v. City of Portland*, 41 Or LUBA 231, 239-42 (2001), *aff'd*, 180 Or App 613, 45 P3d 519, *rev den* 334 Or 632 (2002) (a building permit issued under ambiguous land standards is a 'land use decision' as defined at ORS 197.015(10)(a) because it is issued under standards that require interpretation, but the building permit is not necessarily a 'permit' as defined at ORS 227.160(2), the cognate to ORS 215.402(4))." __ Or LUBA __ (LUBA No. 2018-015, June 26, 2018) (slip op at 5-6).

However, petitioners do not argue that county approval of the Napiers' boundary line adjustment constitutes the "discretionary approval of a proposed development of land" or otherwise constitutes a "permit" as defined at ORS 215.402(4), and we do not see that it does. For one thing, petitioners have not explained how the adjustment of a property line constitutes "development" within the meaning of ORS 215.402(4). Accordingly, petitioners' arguments regarding the exercise of "discretion" do nothing to aid their argument that the challenged decision does not qualify as a ministerial action for purposes of the LDO.

In sum, petitioners have not demonstrated that the county erred in processing the Napiers' application for a boundary line adjustment as a ministerial action under LDO 2.060(2). This subassignment of error is denied.

B. Applicable LDO Standards

As part of their first assignment of error, petitioners contend that the county misapplied or failed to apply several LDO approval standards.

1. LDO 3.37.700

As noted above, LDO 2.060(2)(g) authorizes the planning director to review an application for "Adjustment of Common Boundary Lines (Article 37 and Chapter 4)." LDO Article 37 is entitled "Nonconforming Use" and includes a variety of provisions that chiefly, but not entirely, address nonconforming uses. One subsection, LDO 3.37.700, is entitled "Sale or Transfer of Land to an Adjacent Owner (See Also 4.140)." LDO 4.140 includes provisions governing boundary line adjustments, and it seems clear based on the above cross-references that at least some applications for boundary line adjustments are also subject to the standards at LDO 3.37.700.

Petitioners argue that the county erred in failing to apply the standards at LDO 3.37.700(2), which applies in "Designated Resource Areas."[4] Petitioners contend that the subject parcels, because they are designated for agricultural and forest uses and zoned FG, are part of a "Designated Resource Area."

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[4] LDO 3.37.700(2) provides, in relevant part:

> "The sale or transfer of land to an adjacent owner in designated resource areas shall be permitted provided the following provisions can be met.
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> "* * * * *
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> "e. The transfer in ownership of the affected property would promote the intent of the Comprehensive Plan for the area and would neither create conflicts with adjacent properties nor inhibit their appropriate use or development."

The county's decision did not address the applicability of LDO 3.37.700(2). As noted, no response brief is before us to dispute petitioners' arguments on this point. Petitioners may be correct that the subject property is part of a "Designated Resource Area" and potentially subject to LDO 3.37.700(2). We agree with petitioners that remand is necessary for the county to address that question in the first instance.

2. LDO 4.140(2)(a)(2)

LDO 4.140(2)(a)(2) is a boundary line adjustment approval criterion that requires a finding that:

> "[T]he resulting parcel sizes do not change the existing land use pattern (*e.g.*, two conforming parcels must remain conforming; two nonconforming parcels may remain nonconforming; and, two parcels, one conforming and one non-conforming, may remain as such regardless of which parcel is non-conforming after the exchange or transfer)."

The county's decision found compliance with LDO 4.140(2)(a)(2) based on the fact that before and after the adjustment there was one parcel conforming in size (Unit 1) and one parcel non-conforming in size (Unit 2), which is consistent with one of the examples listed in the parenthetical. Petition for Review Appendix 2. However, petitioners argue that matching one of the nonexclusive set of examples in the parenthetical is insufficient to satisfy the primary requirement of LDO 4.140(2)(a)(2), which is that the "resulting parcel sizes do not change the existing land use pattern[.]" According to petitioners, LDO 4.140(2)(a)(2) could be interpreted more broadly to require that the

county consider whether the "existing land use pattern" is changed when a 1.21-acre parcel that was previously deemed "generally unsuitable" for farm use because of its size and soil composition—and as a result qualified for a nonfarm dwelling pursuant to LDO 3.44.100(1)(e), discussed further below—is expanded to include surrounding agricultural soils in a manner that possibly renders the resulting parcel suitable for farm use.

We agree with petitioners that LDO 4.140(2)(a)(2) *could* be interpreted more broadly to encompass more than the three examples listed in the parenthetical. Because the county's decision must be remanded in any event for the reasons discussed above, we conclude that on remand the county should consider petitioners' arguments regarding LDO 4.140(2)(a)(2) and adopt any necessary findings or interpretations.

3. LDO 3.44.100(1)(e)

LDO 3.44.100(1)(e) is one of the criteria for a division of nonresource lands in designated resource areas to allow for the siting of a nonfarm dwelling, and requires a finding that:

> "The parcel(s) for the non-farm dwelling(s) is generally unsuitable for the production of farm crops and livestock or merchantable tree species considering the terrain, adverse soil or land conditions, drainage or flooding, vegetation, location and size of the tract. A parcel may not be considered unsuitable based solely on size or location if the parcel can reasonably be put to farm or forest use in conjunction with other land."

A related criterion, LDO 3.43.100(1)(b)(3), states that a parcel or portion of a parcel is presumed to be "suitable" for farm use if it is predominantly

composed of Class I-IV agricultural soils. Petitioners argue that in P/D 17-018 the county concluded that the proposed 1.2-acre parcel (Unit 2) is generally unsuitable for farm or forest use, based on a soils report finding that over 50 percent of the soils on Unit 2 are Class VII non-agricultural soils. Petitioners argue that the proposed boundary line adjustment adds over eight acres of Class III agricultural soil to Unit 2. In this circumstance, petitioners argue, the county must evaluate whether the adjusted Unit 2 continues to comply with LDO 3.44.100(1)(e). Otherwise, petitioners argue, the boundary line adjustment would undermine the foundation for P/D 17-018, and effectively circumvent one of the principal means for ensuring that the division of nonresource lands in designated resource areas for nonfarm dwellings does not unnecessarily remove suitable resource land from production.

LDO 3.44.100(1)(e) is based on the provisions of ORS 215.263(4), which authorizes creation of new parcels smaller than the minimum parcel size applicable in exclusive farm use zones in order to site nonfarm dwellings only if, in relevant part, the new parcels are "generally unsuitable" for farm use, based on soil quality and other considerations. Petitioners are probably correct that the Napiers' partition and nonfarm dwelling application was approved in large part because the Napiers specifically proposed creation of Unit 2 from a small rocky portion of the parent parcel that, considered in isolation, was not predominantly composed of agricultural soils. Had the Napiers instead proposed a nearly 10-acre parcel that was predominantly comprised of

agricultural soils, the result might well have been denial of the partition and nonfarm dwelling applications. We generally agree with petitioners that, under such circumstances, county approval of the Napiers' application for a boundary line adjustment could effectively undercut the factual predicate for compliance with a statutory-based standard designed to minimize loss of productive resource lands to non-resource uses.

However, that observation aside, petitioners have not cited us to anything in the LDO or elsewhere that would render LDO 3.44.100(1)(e) an *approval standard* for a post-partition boundary line adjustment, even if the adjustment arguably undercuts one of the factual predicates for the partition approval. Absent citation to authority to that effect, petitioners' arguments under LDO 3.44.100(1)(e) do not provide a basis for reversal or remand.

This subassignment of error is denied.

The first assignment of error is sustained, in part.

SECOND ASSIGNMENT OF ERROR

Petitioners' second assignment of error repeats and elaborates on their arguments that the boundary line adjustment is erroneous because it conflicts either with P/D 17-018 or with the criteria at LDO 3.43.100 and LDO 3.44.100 that govern the partition of resource lands to allow for the siting of nonfarm dwellings on new parcels that are "generally unsuitable" for farm use.

Petitioners contend that the county approval of the boundary line adjustment is an impermissible "collateral attack" on P/D 17-018. We disagree

with petitioners. Approving a boundary line adjustment to a parcel under the applicable standards does not "collaterally attack" the partition decision that created the parcel under different standards, even assuming the adjusted parcel would not comply with the partition standards that were applied when the parcel was created.

Finally, as explained above, petitioners have not demonstrated that any of the partition or nonfarm dwelling approval standards applied to create Unit 2 applies as approval standards to a boundary line adjustment for Unit 2. Accordingly, petitioners' arguments under the second assignment of error do not provide a basis for reversal or remand.

The second assignment of error is denied.

The county's decision is remanded.