BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

KENNETH W. GODDARD, STEVEN C. DIERKS, MARTHA V. YOUNG, WILLIAM C. YOUNG, SHARON A. HULL, GERALD G. GARLAND and WILMA SCHEID, Petitioners, vs. JACKSON COUNTY, Respondent, and WILLIAM J. CRAVEN and LAURA CRAVEN, Intervenors-Respondent.	LUBA Nos. 97-147, 97-148 and 97-164 FINAL OPINION AND ORDER

Appeal from Jackson County.

Michael A. Holstun, Portland, filed the petition for review and argued on behalf of petitioners.

No appearance by respondent.

Richard H. Berman, Medford, filed the response brief and argued on behalf of intervenors-respondent. With him on the brief was Blackhurst, Hornecker, Hassen & Ervin B. Hogan.

GUSTAFSON, Board Chair; HANNA, Board Member, participated in the decision.

REVERSED (LUBA No. 97-147/148) 04/30/98
AFFIRMED (LUBA No. 97-164) 04/30/98

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

Per curiam.

NATURE OF THE DECISION

In this consolidated appeal, petitioners appeal a decision approving property line adjustments with respect to two parcels (LUBA Nos. 97-147 and 97-148) and a decision denying a local appeal of those property line adjustments (LUBA No. 97-164).[1]

MOTION TO INTERVENE

William J. Craven and Laura Craven (intervenors) move to intervene on the side of the respondent in all three appeals. There is no opposition to the motion, and it is allowed.

MOTION FOR LEAVE TO FILE REPLY BRIEF

Petitioners request leave to file a reply brief. A reply brief accompanies the request. Petitioners explain in a memorandum why a reply brief is justified under OAR 661-10-039. There is no objection to the reply brief. We agree that the reply brief addresses new issues raised in the response brief, in accordance with OAR 661-10-039, and it is allowed.

MOTION TO STRIKE

Intervenors move to strike arguments that, they contend, petitioners raised for the first time at oral argument.

---

[1]Both parties direct the entirety of their argument to the decisions at issue in LUBA No. 97-147 and 97-148, the planning staff's approval of the property line adjustment. We follow the parties in treating the decisions at issue in LUBA No. 97-147 and 97-148 as a single decision, and, for purposes of discussion, we denote that decision the "challenged decision." Neither party addresses the decision at issue in LUBA No. 97-164, denying local appeal of the planning staff's approval of the property line adjustment. On our own motion, we address a jurisdictional issue arising from the decision at issue in LUBA No. 97-164, and, for purposes of discussion, denote that decision the "local appeal decision."

Petitioners respond that the arguments to which intervenors object were responses to new arguments raised in intervenors' brief, and that petitioners properly addressed those arguments at oral argument.

We agree with petitioners that their oral argument was responsive to matters raised in intervenors' response brief and that petitioners committed no violation of our administrative rules in addressing such matters in oral argument.

Intervenors' motion to strike is denied.

FACTS

The subject property is a tract approximately 66 acres in size zoned exclusive farm use (EFU), comprised of six tax lots within three legal parcels. The three parcels were created by deed sometime before 1973. The property is rectangular in shape, with a long access strip of land at the northwest corner, so that, viewed on a map, the property resembles a long-handled pot. The access strip is for purposes of this opinion denoted parcel 1, consisting of tax lots 2104 and 2103, totaling approximately one acre. The western third of the remaining rectangle is here denoted parcel 2, consisting of tax lots 2201 and 2200, totaling 20 acres. The eastern two-thirds of the rectangle is here denoted parcel 3, consisting of tax lots 500 and 501. Tax lot 500 is approximately 44 acres in size, while tax lot 501 is less than an acre in size.

In 1995, intervenors applied for a property line adjustment to reconfigure the three parcels. Intervenors proposed creating two five-acre parcels in the southeastern corner of Parcel 3/tax lot 500, and consolidating the remaining parcels and tax lots into a 56-acre remainder parcel. At a pre-application conference, the county commented that it could find evidence of only two legal parcels on the property, and that application proceeded no further.

In November 1996, intervenors filed a second application, proposing the same property line adjustment. The pre-application form lists the three groups of tax lots comprising the three parcels on the property, and describes the proposal as follows:

> "LLA [lot-line adjustment] to relocate property lines & consolidate useable EFU portions into one large block." Record 14.

A pre-application conference was held November 12, 1996, at which county planning staff granted approval. The planning staff made the challenged decision in LUBA No. 97-147/148 by writing on the pre-application form "OK to do LLA creating 2 5-acre parcels." Record 14. An attached drawing of the tax lots on the property shows "cross-out lines" on the boundary lines between parcel 1 (tax lots 2103 and 2104) and parcel 2 (tax lots 2200-2201), between tax lot 2200 and tax lot 2201, and between parcel 2 (tax lots 2200 and 2201) and parcel 3 (tax lots 500 and 501). The map also depicts the two 5-acre parcels in the southeastern corner of parcel 3/tax lot 500. A

notation at the bottom of the map indicates "OK" next to the name of the county planning staff who approved the application. The county approved the application without providing a hearing or notice of the decision or opportunity for local appeal. The parties advise us that, subsequent to the challenged decision, intervenors recorded a new plat showing the two five-acre parcels and the consolidated remainder parcel.

Petitioners own property adjacent to or within 500 feet of the subject property. Petitioners learned of the challenged decision on July 30, 1997, when the county mailed them notice of intervenors' application to place two non-farm dwellings on the two five-acre parcels created by the property line adjustment.[2] On August 5, 1997, petitioners filed a local appeal of the challenged decision with the county. The county rejected that appeal the same day, on the basis that the challenged decision was "not a land use decision." Supp. Record 2. On August 6, 1997, petitioners filed two notices of intent to appeal with LUBA challenging creation of the two five-acre parcels. On August 22, 1997, petitioners filed a notice of intent to appeal with LUBA challenging the county's denial of their local appeal (LUBA No. 97-164).

[2]A county hearings officer subsequently denied that application on the ground that the hearings officer could not determine whether the property line adjustment at issue in this appeal resulted in lawful creation of the two five-acre parcels. That denial was appealed to this Board (Craven v. Jackson County, LUBA No. 97-184). We affirmed that decision in a memorandum opinion issued this date.

PRELIMINARY ISSUES

A. LUBA NO. 97-164

Neither party makes any argument or raises any issues with respect to the local appeal decision at issue in LUBA No. 97-164, which essentially determined that petitioners had no right to a local appeal. Petitioners fail to assign error to any aspect of the local appeal decision, and thus fail to establish any basis to reverse or remand that decision. See Scholes v. Jackson County, 28 Or LUBA 407, 410 (1994). Accordingly, we must affirm the county's decision appealed in LUBA No. 97-164. Id.

Our disposition of LUBA No. 97-164 obviates a potential jurisdictional problem we raise sua sponte. In Franklin v. Deschutes County, 139 Or App 1, 911 P2d 339 (1996), the Court of Appeals addressed a situation nearly identical to the present appeals, where petitioners appealed both a planning director's decision and a hearings officer's denial of the local appeal. The hearings officer determined that she had no jurisdiction to review the planning director's decision and hence petitioners had no right to local appeal of the planning director's decision. Petitioners did not assign error to the hearings officer's denial, but rather directed all assignments of error and argument to the planning director's decision. We reached the merits of the planning director's decision and remanded that decision without any disposition of the hearings officer's denial. Franklin v. Deschutes County, 30 Or LUBA 33

(1995). On appeal to the Court of Appeals, intervenor argued that we lacked jurisdiction over the planning director's decision, because the hearings officer's denial was the final decision for purposes of ORS 197.015(10)(a)(A). The Court of Appeals rejected that interpretation of ORS 197.015(10)(a)(A), noting that the hearings officer's decision essentially determined that the planning director's decision was the final decision. 139 Or App at 6. In that circumstance, the court explained, treating the hearings officer's decision as the final decision and hence the only decision appealable to LUBA would enable local governments to effectively evade review of their substantive decisions. Id. The court then rejected a similar challenge based on the exhaustion requirements of ORS 197.825(2)(a). Id. at 7.

The Court of Appeals' jurisdictional analysis in Franklin v. Deschutes County controls the present appeals. A necessary consequence of the local appeal decision and our affirmation of it is that petitioners had no right to a local appeal and thus that the planning staff's decision was the final decision appealable to LUBA. Accordingly, we conclude that the local appeal decision does not create a jurisdictional obstacle to our review of the planning staff's decision, based on the finality requirement at ORS 197.015(10)(a)(A) or the exhaustion requirement at ORS 197.825(2)(a).

The county's decision in LUBA No. 97-164 is affirmed.

B. Standing

Intervenors challenge petitioners' standing to appeal. Petitioners' standing is based on ORS 197.830(3), which provides that, where a local government makes a land use decision without providing notice or a hearing, a person "adversely affected" by the decision may appeal to this Board within 21 days of the date the person knew or, in some cases, should have known of the decision.[3] Petitioners have filed affidavits stating that each of the seven petitioners either owns property adjacent to the subject property or property within 500 feet and within sight and sound of the two five-acre parcels created by the challenged decision.

Intervenors argue that the affidavits are insufficient to establish that petitioners are "adversely affected" within the meaning of ORS 197.830(3). Intervenors contend that petitioners cannot be "adversely affected" by a property line adjustment, which merely redraws invisible property boundaries. According to intervenors, petitioners must allege a tangible impact on the use and enjoyment of their property caused by a specific development proposal.

---

[3]ORS 197.830(3) provides:

> "If a local government makes a land use decision without providing a hearing * * * a person adversely affected by the decision may appeal the decision to [LUBA] under this section:
>
> "(a) Within 21 days of actual notice where notice is required; or
>
> "(b) Within 21 days of the date a person knew or should have known of the decision where no notice is required."

Petitioners respond that land use decisions approving even intangible proposals such as property line adjustments can "adversely affect" proximate property owners within the meaning of ORS 197.830(3). See Stephens v. Josephine County, 11 Or LUBA 154, 156 (1984)(adjacent land owners are adversely affected and have standing to appeal partition of land). We agree. As we stated in Walz v. Polk County, 31 Or LUBA 363, 369 (1996):

> "It is well established that someone whose property is within sight and sound of a property is presumptively considered 'adversely affected or aggrieved' by land use decisions affecting it."

Nothing in Walz or other decisions directed to our attention limits ORS 197.830(3) to persons affected by tangible development impacts. Petitioners have demonstrated that they own property adjacent to, within sight and sound, and within 500 feet of the two five-acre parcels created by the challenged decision. We conclude that petitioners have adequately demonstrated they are "adversely affected" by the challenged decision, pursuant to ORS 197.830(3).

C. Untimely Appeal

Intervenors next contend that petitioners failed to file their notices of intent to appeal within 21 days of the date they knew or should have known of the challenged decision, as required by ORS 197.830(3)(b). Intervenors state that notice of intervenors' nonfarm dwelling applications was mailed to petitioners on July 8, 1997, and that attached to the notice was a map of the subject property showing the two five-acre

parcels. Intervenors contend that petitioners knew or should have known from the map that the county had made a decision in 1996 approving the property line adjustments that created the two five-acre parcels.

Petitioners respond that the notice of intervenors' nonfarm dwelling applications makes no reference to prior property line adjustments. Further, the map attached to the notice shows the two five-acre parcels in dotted lines, suggesting that the parcels have not yet been created. Petitioners state, supported by additional affidavits, that the notice caused one petitioner to make inquiries with the county, resulting in that petitioner learning of the challenged decision on July 18, 1997. The notice of intent to appeal was filed within 18 days of July 18, 1997.

We agree with petitioners that the notice of intervenors' nonfarm dwelling application and the map attached were not sufficient to apprise petitioners of the 1996 property line adjustments. A reasonable person would not be expected to have knowledge of the confused parcel boundaries within the subject property existing prior to the challenged decision.[4] Absent that knowledge, a reasonable person could easily fail to appreciate that the dotted lines around the two five-acre parcels necessarily signify a prior property line adjustment. We conclude that petitioners filed their notices of intent to

[4]As noted above, the county initially could not determine whether there were two or three parcels within the subject property.

appeal within 21 days of the date they knew or should have known of the challenged decision.

D. Land Use Decision

Intervenors challenge our jurisdiction to review the challenged decision, arguing that the county's approval of the property line adjustment is not a "land use decision" as defined by ORS 197.015(10).[5] Intervenors contend that the challenged decision is an "objective ministerial determination," by which they presumably mean that it falls within the exception at ORS 197.015(b)(A) for decisions made "under land use standards which do not require interpretation or the exercise of policy or legal judgment."

Intervenors concede that the present case appears to be controlled by Thompson v. City of St. Helens, 30 Or LUBA 339

---

[5]ORS 197.015(10) provides:

"'Land use decision':

"(a) Includes:

"(A) A final decision or determination made by a local government or special district that concerns the adoption, amendment or application of:

"(i) The goals;

"(ii) A comprehensive plan provision;

"(iii) A land use regulation; or

"(iv) A new land use regulation[.]"

"* * * * * *

"(b) Does not include a decision of the local government:

"(A) Which is made under land use standards which do not require interpretation or the exercise of policy or legal judgment."

(1996), where we held that the city's application of its regulations respecting lot-line adjustments required interpretation of those regulations and the exercise of legal judgment. We agree with intervenors that Thompson controls, and that the county's application of its regulations respecting property line adjustments to the complex factual and legal circumstances of this case required interpretation and the exercise of legal judgment. Accordingly, we conclude that the challenged decision is a "land use decision" within the meaning of ORS 197.015(10)(a).

THIRD ASSIGNMENT OF ERROR

Petitioners argue that the challenged decision in LUBA No. 97-147 and 97-148 does not approve a property line adjustment but rather a partition of tax lot 500 or a replatting of the three parcels comprising the subject property. Accordingly, petitioners contend, the county erred by not processing intervenors' application as a partition or replat, both of which require notice and a hearing.

More specifically, petitioners argue that the terms of the challenged decision approve the two new five-acre parcels created within parcel 3/tax lot 500 without consolidating the other parcels, with the result that five parcels now exist within the tract rather than three. Petitioners point out that nothing in the challenged decision requires consolidation of the remaining parcels or tax lots. Even if the county intended to consolidate parcels 1, 2 and part of 3 into one

parcel, and thus end up with three parcels, petitioners contend that the actual consequence of the decision is to partition parcel 3/tax lot 500 into two new parcels in addition to the three existing parcels.

The county's land development ordinance (LDO) 16.015(6) defines the act of partitioning land as follows:

> "A division of land into two or three parcels within a calendar year. Partition of land does not include the following:
>
> "* * * * *
>
> "(B) An adjustment of a property line under Chapter 40 of this ordinance."

LDO 16.015(6) parallels and implements the statutory definition at ORS 92.010(7):

> "'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 ordinance."

ORS 92.010(11) defines "property line adjustment" to mean "the relocation of a common property line between two abutting properties." Petitioners contend that the definitions at ORS 92.010(7) and (11) limit property line adjustments to <u>relocations</u> of common boundaries lines. According to petitioners, the new boundary lines around the new five-acre parcels were not "relocated" because they do not derive from

and have no relationship with the common property lines that existed between the prior abutting properties. Petitioners conclude that the property boundaries created by the challenged decision are lawful only if processed as a partition or as a replat as defined in ORS 92.010(12).[6]

Intervenors respond that the challenged decision did not result in either a partition or a replat as defined by ORS 92.010(12). A partition, intervenors note, increases the number of parcels, and the decision took three existing parcels and merely reconfigured their boundaries, leaving the same number of parcels. Nor did the reconfiguration constitute a replat, as that term is used in ORS 92.180 to 92.190.[7] By the terms of ORS 92.185(1), a replat applies only

---

[6]ORS 92.010(12) states:

> "'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."

[7]ORS 92.185 provides:

> "The act of replatting shall allow the reconfiguration of lots or parcels and public easements within a recorded plat. * * * [R]eplats will act to vacate the platted lots or parcels and easements within the replat area with the following conditions:
>
> "(1) A replat, as defined by ORS 92.010 shall apply only to a recorded plat.
>
> "* * * * *
>
> "(3) Notice, consistent with the governing body of a city or county approval of a tentative plan of a subdivision plat, shall be provided by the governing body to the owners of property adjacent to the exterior boundaries of the tentative subdivision replat.
>
> "* * * * *

to a reconfiguration of an existing partition plat or subdivision plat. Because the three parcels at issue here were created by deed and not as part of a partition plat or subdivision plat, intervenors argue, there is no plat to "replat" and hence the provisions of ORS 92.180 to 92.190 do not apply.

We need not resolve whether petitioners are correct that the challenged decision creates an additional two parcels rather than merely reconfiguring three existing parcels. For the following reasons, we conclude that even if only three parcels resulted from the county's reconfiguration, that reconfiguration did not constitute a property line adjustment and is contrary to applicable law.

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. LDO 16.015(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

---

> "(6) A replat shall comply with all subdivision provisions of this chapter and all applicable ordinances and regulations adopted under this chapter."

of the property lines of the parcel (parcel 3) into which parcels 1 and 2 are moved.

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 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).[8] ORS 92.190(3) contemplates a fundamental

[8]ORS 92.190(3) states:

> "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(11), as long

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."

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, and is prohibited as a matter of law. [9]

Because the decision violates a provision of applicable law and is prohibited as a matter of law, it must be reversed. OAR 661-10-071(10)(c). Resolution of the third assignment of error makes it unnecessary to address petitioners' first and second assignments of error. Harrell v. Baker County, 28 Or LUBA 260, 261 (1994).

> 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)."

[9] 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. If so, that is a consequence of the statutory framework, and it is not within our province to alter that framework.

The county's decision in LUBA No. 97-147 and 97-148 is reversed.