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NATURE OF THE DECISION

Petitioner challenges a hearings officer decision that establishes the legality of five lots.

MOTION TO INTERVENE

Curtis Crichton (intervenor), the applicant below, moves to intervene on the side of respondent. There is no opposition to the motion, and it is allowed.

FACTS

Intervenor owns approximately 39 acres of land zoned Exclusive Farm Use (EFU) and designated as tax lots 1200 and 1300 on the county assessor’s map. The property is part of a subdivision that was platted in 1912 and includes all or part of five lots from that subdivision (lots 39, 40, 46, 47 and 48). In 1948, the property was surveyed to establish the outer boundaries of the five lots. However, that survey did not reflect the boundaries as platted in 1912. The 1948 survey depicts the northern boundaries of lots 39 and 46 to the south of their location in the 1912 plat. The western and eastern boundaries of the lots of the 1948 survey were based on developed roads and are the same in the 1912 plat and the 1948 survey. After 1948, conveyances refer to the 1948 survey description of lots 39 and 46.

On July 3, 2002, intervenor applied for a “determination of lot legality” pursuant to Jackson County Land Development Ordinance (JCLDO) 15.020. Specifically, intervenor requested a determination as to whether tax lots 1200 and 1300 comprised separate parcels, or must be viewed as a single parcel for development purposes. Intervenor also requested a determination as to the legal status of the five subdivision lots. The planning director determined that tax lots 1200 and 1300 were made up of five lots that were legally created by the 1912 plat. Petitioner appealed the planning director’s decision to the county hearings officer. The hearings officer affirmed the planning director’s decision. This appeal followed.

1 **FIRST AND SECOND ASSIGNMENTS OF ERROR**

2 Jackson County Land Development Ordinance (JCLDO) 15.020 provides applicable
3 standards for determining lot legality.¹ A determination of lot legality does not necessarily mean that
4 a lot may be developed. It simply means that the lot is a legally separate lot that may be transferred to
5 a third party. JCLDO Chapter 258 governs whether nonconforming lots are developable.² Petitioner

¹ JCLDO Chapter 15 governs land divisions in general. JCLDO 15.020(1) sets out the types of land divisions that are not subject to further review or approval. It provides, in relevant part:

“Lots or parcels which were established by any of the methods listed in this Subsection and which did not require [planning] approval * * * shall be considered legally separate tracts. Such lots or parcels will not require further land division review or approvals not required at the time of such division, provided, however, that any lot or parcel resulting from the division shall be subject to all other regulations and standards which are in effect at the time land development permit approval is sought.

“* * * * *

- “(C) Recording a final map for a partition or a final plat for subdivision.
- “(D) Creation of a tax lot on the records of the County Assessor when such tax lot was established at a property owner’s request for purposes of land division.
- “(E) Filing of a survey map with the Jackson County Surveyor which clearly indicates the existence of the parcel by map or legal description only if substantial evidence exists which verifies the intent of the survey was to convey ownership of land. * * *”

² JCLDO Chapter 258 provides, in relevant part:

“258.010 PREEXISTING LOTS AND PARCELS:

- “(1) Lots or parcels recognized as separate tracts legally divided or created as defined in Chapter 15 shall not be subject to the division requirements of this Ordinance.
- “(2) Lots and parcels created by division which do not meet the provisions of Chapter 15 of this Ordinance are illegal. The Department may not issue any development permits for such lots or parcels unless all the requirements of this Ordinance are met.
- “(3) The date of creation of a tract of land, lot or parcel shall be considered established by its most recent change in configuration by parcel area reduction, consolidation, land division, vacation or other official County action, if such was required.

“258.020 NONCONFORMING LOTS AND PARCELS:

- “(1) A lawfully created or divided nonconforming lot or parcel, as defined by this Ordinance, shall retain that status until the lot or parcel is made conforming. However, such a nonconforming lot or parcel shall be entitled to the same rights that

1 argues in its first and second assignments of error that the county erred in considering intervenor's lot
2 legality request under JCLDO 15.020(1) without also considering whether intervenor's lots are
3 developable under JCLDO Chapter 258. In its first assignment of error, petitioner challenges the
4 hearings officer's conclusions that (1) JCLDO 258.020 is not relevant to a determination of lot
5 legality; and (2) the hearings officer did not have "jurisdiction" over an application filed pursuant to

such a lot or parcel would otherwise have if the lot or parcel did meet the minimum lot or parcel area, width, or access requirements.

"(6) A tract of land which does not conform with ORS 215.010 because it failed to conform with size, dimension, or access requirements which were in effect under ordinances or regulations at the time of division shall not by reason of that defect alone be denied any land development permit otherwise available under current ordinances, if the Director finds, based on evidence submitted by the property owner, that all of the following conditions are true:

"(A) The tract was created prior to January 31, 1979, and no further division has occurred since that date;

"(B) The present owner was not a party to the creation of the tract and is neither a relative by blood or marriage nor a business partner of either of the parties involved in the first transfer of ownership of the tract;

"(C) The tract was acquired for fair market value without knowledge of the illegality involved in the creation of the tract;

"(D) Practical physical access is provided to the property from a County road or state highway through an irrevocable easement or equivalent means;

"(E) The tract has not previously been reviewed under this Section; and,

"(F) The tract met minimum size and area standards when created or conforms with present size and area standards for the zone, or, if not, the Director finds that the present owner does not own, and has no contract, option or other enforceable legal right to acquire, any adjoining property to the extent necessary to make the tract conforming with present standards, or is prevented by law from doing so.

"A property owner or developer shall not be relieved of any other requirement of Jackson County's acknowledged Comprehensive Plan and Land Development Ordinance with respect to the location and approval of permitted and conditional uses within the tract's zoning district, beyond those specified in Subsections (A) through (F), above, in order to obtain land use, building, septic or well permits. * * *

"Nothing in this Subsection is intended to supersede the authority granted in cases provided for in Subsection 280.090(4), which is available for parcels falling within the scope of that provision as an alternative to the relief available under this Subsection." (Bolding in original).

1 JCLDO Chapter 258. In the second assignment of error, petitioner challenges the adequacy of the
2 county’s findings that conclude that JCLDO 258.020(6) does not apply to the lot legality
3 determination.

4 **A. Applicability of JCLDO 258.020 to Lot Legality Determinations**

5 JCLDO 258.010 provides, in relevant part, that

6 “(1) Lots or parcels recognized as separate tracts legally divided or created as
7 defined in Chapter 15 shall not be subject to the division requirements of this
8 Ordinance.”

9 “(2) Lots and parcels created by division which do not meet the provisions of
10 Chapter 15 of this Ordinance are illegal. The Department may not issue any
11 development permits for such lots or parcels unless all the requirements of
12 this Ordinance are met.”

13 Petitioner argues that, read together, these two provisions require that when an application for
14 a lot legality determination is received, the county *must* consider whether each legally created lot is
15 developable, or whether the lot must be combined with other lots in order to develop the property.
16 Petitioner argues that the lot legality determination cannot be made in a vacuum, and that it is
17 essential to know, prior to conveying legal lots to third parties, whether those lots may be developed
18 individually. Petitioner contends that it is much easier to aggregate lots when they are in a single
19 ownership than when they are separately owned. Petitioner argues that even if the developability of
20 the lot does not need to be addressed immediately, at the very least, the county should have adopted a
21 condition of approval that required review under JCLDO Chapter 258 prior to conveying the lots to
22 third parties.

23 We agree with petitioner that a determination of lot legality is only one step in permitting
24 development on that lot. We also agree with petitioner that in many cases, it makes sense for an
25 applicant to request review of the developability of a lot in conjunction with a request for a
26 determination of lot legality. However, we disagree with petitioner that under the JCLDO, an
27 applicant *must* also request a determination of developability when an application for lot legality is

1 submitted.³ While JCLDO 258.010(2) prohibits development on lots that were not legally created,
2 other provisions of JCLDO chapter 258 contain provisions that permit development on illegally
3 created lots, provided certain standards are met. There is nothing in JCLDO 15.020 that requires that
4 an applicant seek a determination of developability prior to or concurrently with a legal lot
5 determination. In the absence of some authority for petitioner’s proposition that the county’s
6 development ordinance *requires* consideration of developability in conjunction with a legal lot
7 determination, petitioner’s argument provides no basis for reversal or remand.

8 The first subassignment of error of the first assignment of error is denied.

9 **B. Hearings Officer’s Jurisdiction**

10 ORS 92.205 through 92.245 permit local governments to review an undeveloped subdivision
11 to determine whether the undeveloped subdivision should be modified or vacated so that a new
12 subdivision may be platted that conforms to land division and development requirements. The
13 hearings officer concluded in his decision that ORS 92.205 through 92.245 did not confer
14 “jurisdiction” on him to institute a review of the subject property under those statutes.⁴ Petitioner
15 argues that the hearings officer erred in reaching that conclusion. Petitioner contends that ORS 92.205
16 provides that where a local government, like Jackson County, has authority to make decisions
17 regarding subdivision applications in the first instance, a local government may make decisions
18 regarding undeveloped subdivisions as well. Therefore, petitioner argues, there is nothing in ORS

³ Petitioner also argues that unless lot developability is addressed in the lot legality determination, JCLDO 258.010(1) exempts those lots from further review. We do not agree that JCLDO 258.010(1) has the result that petitioner suggests. JCLDO 258.010(1) merely states that once a legal lot has been established, it is not subject to the *division* requirements of the JCLDO as a whole. It does not automatically allow for development of those lots, regardless of whether they comply with JCLDO 258.020 or other applicable provisions of the ordinance.

⁴ The hearings officer’s decision states, in relevant part:

“[T]he Hearings Officer concludes that JCLDO [258.020(6)] is not * * * applicable * * * in determining lot legality—the only question currently before the Hearings Officer. Secondly, the Hearings Officer has no jurisdiction to institute the review contemplated in ORS 92.205-92.245, and further concludes that said statute is not a [criterion] which he may employ to determine whether or not the instant application should be approved or denied.” Record 4.

1 92.205 through 92.245 that prevents the hearings officer from reviewing undeveloped subdivisions
2 for compliance with current planning and land development requirements under those provisions.

3 In addition, petitioner argues that even if the hearings officer could not make a developability
4 determination under ORS 92.205 through 92.245, that does not mean that the hearings officer *could*
5 *not*, in the context of determining lot legality, review the developability of those lots. According to
6 petitioner, JCLDO 285.050(2) authorizes the hearings officer to make decisions on quasi-judicial
7 applications, and reviews under JCLDO 258.020 are quasi-judicial decisions. Because the hearings
8 officer erred in his conclusion that he did not have the authority to consider the developability of the
9 lots, petitioner argues that the decision must be remanded to allow such review.

10 It is not clear to us what the hearings officer meant in stating that he has “no jurisdiction” to
11 institute the review of undeveloped subdivisions described at ORS 92.205 through 92.245. Petitioner
12 may be correct that, *if* the county instituted a review of an undeveloped subdivision under that statute,
13 the county hearings officer would conduct that review. However, petitioner provides no explanation
14 for why the hearings officer was authorized, much less required, to institute a review of all or part of
15 the 1912 subdivision in the context of the lot legality determination requested by intervenor. As we
16 understand the statute, it authorizes local governments to institute a review of undeveloped
17 subdivisions. ORS 92.215 (a body authorized to approve subdivision plats under ORS 92.040 “may”
18 review specified subdivisions). The purpose of that review is to determine whether such subdivisions
19 conform to current plan and zoning standards and, if not, whether the subdivisions should be replatted
20 or vacated. Review under ORS 92.205 through 92.245 is permissive and, moreover, the statute
21 appears to contemplate that any such review is conducted as a separate proceeding from land use
22 reviews. *See* ORS 92.234(3) (a person aggrieved by vacation of an undeveloped subdivision may
23 appeal such action in the manner provided by ORS 34.010 to 34.100). Petitioner has not
24 demonstrated that ORS 92.205 through 92.245 authorizes or requires the hearings officer to institute a
25 review under the statute in the context of the present legal lot determination, and we do not see that it
26 does.

1 The second subassignment of error of the first assignment of error is denied.

2 **C. Adequacy of Findings**

3 Petitioner argues that the hearings officer’s findings are inadequate, because they fail to
4 explain why the hearings officer concluded that (1) he did not have the authority to consider the
5 developability of the five lots in the instant proceeding; and (2) JCLDO 258.020(6) did not provide
6 applicable approval criteria for the lot legality determination. Petitioner further argues that the
7 decision fails to respond to arguments that petitioner made below that a condition of approval
8 requiring review under JCLDO 258.020(6) was necessary to recognize the legality of the five lots.

9 We have already considered, and rejected, petitioner’s arguments that the hearings officer
10 was legally required to address JCLDO chapter 258 in deciding the number of legal lots that are
11 located on the subject property. Therefore, the hearings officer’s failure to adopt findings that
12 adequately explain why the hearings officer did not consider JCLDO 258.020(6) to be applicable
13 does not provide a basis for remand.

14 In any event, it is not clear to us why JCLDO 258.020(6) would even be applicable when
15 determining whether development could be allowed on the subject property. JCLDO 258.020(6)
16 applies to

17 “[a] tract of land *which does not conform with ORS 215.010 because it failed to*
18 *conform with size, dimension, or access requirements which were in effect under*
19 *ordinances or regulations at the time of division shall not by reason of that defect*
20 *alone be denied any land development permit * * *.*” (Emphasis added.)

21 There is no argument that there were any applicable “size, dimension or access” requirements in place
22 when the subdivision was platted in 1912 or at the time of the 1948 survey. JCLDO 258.020(6)
23 provides an opportunity for applicants who own land that does not fit the definitions set out in ORS
24 215.010 to obtain development approval for that land, provided they meet the six listed criteria.⁵

⁵ ORS 215.010 sets out applicable definitions for ORS chapter 215. Those definitions include:

“(1) The terms defined in ORS 92.010 shall have the meanings given therein, except that ‘parcel’:

1 Because JCLDO 258.020(6) does not apply in the in the circumstances presented in this case, the
2 hearings officer's failure to explain why he believed it did not apply was not error. For the same
3 reasons, we also disagree with petitioner that the hearings officer's failure to adopt a condition of
4 approval that required review under JCLDO 258.060(6) was error.

5 The first and second assignments of error are denied.

6 **THIRD ASSIGNMENT OF ERROR**

7 Petitioner argues that the hearings officer's conclusion that the subject property includes five
8 legal lots is not supported by substantial evidence. Petitioner concedes that there is substantial
9 evidence to support a finding that three legal lots are located on the subject property. However,
10 petitioner argues that there is no evidence in the record to support the conclusion that the boundaries
11 of the two northern lots, lots 39 and 46, are in essentially the same configuration as when they were
12 platted in 1912. Petitioner contends that rather than rely on evidence pertaining to the location of the
13 northern boundaries, the planning director speculated as to how the current configuration of those lots
14 came about, and reached a conclusion that the northern boundaries resulted from the 1948 survey
15 readjusting those lines from the lines as they existed as a result of the 1912 plat.

16 Petitioner has not pointed out to us where the county is required to adopt a finding, supported
17 by substantial evidence, to show that lots 39 and 46 are in essentially the same configuration as when
18 they were originally platted in 1912 in order to determine that lots 39 and 46 are legal lots. The 1948

“(a) Includes a unit of land created:

“(A) By partitioning land as defined in ORS 92.010;

“(B) In compliance with all applicable planning, zoning and partitioning ordinances and regulations; or

“(C) By deed or land sales contract, if there were no applicable planning, zoning or partitioning ordinances or regulations.

“(b) Does not include a unit of land created solely to establish a separate tax account.

“(2) ‘Tract’ means one or more contiguous lots or parcels under the same ownership.”

1 survey was carried out to establish boundaries to facilitate the conveyance of the property for sale.
2 See Record 175.⁶ Deeds conveying the subject property and the property immediately to the north
3 describe the land comprising lots 39 and 46 based on the 1948 survey, and divide the 1912 lots
4 between the two properties based on the 1948 survey lines. As the planning director notes, there were
5 no standards for adjusting property lines at the time of the 1948 survey. The planning director could
6 certainly conclude, based on that evidence, that the 1948 survey adjusted the property boundary of
7 lots 39 and 46. In any case, the fact that the planning director adopted findings, which were in turn
8 adopted by the hearings officer, that reconcile the difference between the 1912 subdivision lines and
9 the 1948 survey for those lots, is irrelevant to the conclusion that the lots exist.

10 The third assignment of error is denied.

11 The county's decision is affirmed.

⁶ Record 175 is a copy of a document dated December 1948. It explains the purpose of the 1948 survey of the property and outlines the procedures used to create the survey map:

“To describe a tract of land [owned by J.W. Bennett] to be sold, to furnish descriptions so the title could be quieted on same due to inability to set corners of lots in said tracts.

“* * * * *

“Survey Procedure:

“We located a 4” x 4” x ‘X’ stone with remains of three bearing trees for corners, distances checking within limits to each according to official corner notes * * * .

“We described all that property now being occupied by Mr. Bennett using existing property lines. * * * Record was plotted as close as could be interpreted from the existing plat, filed on 10th August 1912.”