BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

GLENEDA E. DORAN BORTON,
Petitioner,

vs.

COOS COUNTY,
Respondent,

and

RAYMOND CASWELL and LINDA CASWELL,
Intervenors-Respondent.

LUBA No. 2005-170

FINAL OPINION
AND ORDER

Appeal from Coos County.

Gleneda E. Doran Borton, San Rafael, California, filed the petition for review and argued on her own behalf.

No appearance by Coos County.

Jerry O. Lesan, Coos Bay, filed the response brief and argued on behalf of intervenors-respondent. With him on the brief was Lesan and Finneran.

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

REVERSED 03/15/2006

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

Opinion by Davies.

NATURE OF THE DECISION

Petitioner challenges a county decision approving a property line adjustment.

MOTION TO FILE REPLY BRIEF

Petitioner moves to file a reply brief, pursuant to OAR 661-010-0039, arguing that the county raised a "new matter" in its response brief and that she is entitled, pursuant to our rules, to file a reply brief to respond to that new matter.[1] Intervenors-respondent (intervenors) contend that the allegation in their response brief that petitioner failed to allege sufficient facts to establish standing is not a "new matter," as petitioner contends, and that the request to file a reply brief should be denied.

Intervenors argue, for the first time in their response brief, that petitioner fails to allege facts that establish that she is "adversely affected."[2] Petitioner's reply brief responds to that allegation, explaining how she is adversely affected. Whether or not petitioner is adversely affected is a new matter for purposes of OAR 661-010-0039, and petitioner's request to file a reply brief is granted. *Boom v. Columbia County*, 31 Or LUBA 318, 319 (1996).

FACTS

The subject property line adjustment involves three lots within an existing subdivision that was platted in 1907. The property is zoned CD-10 (Controlled Development-10) and falls within a Beaches and Dunes Area with Limited Development

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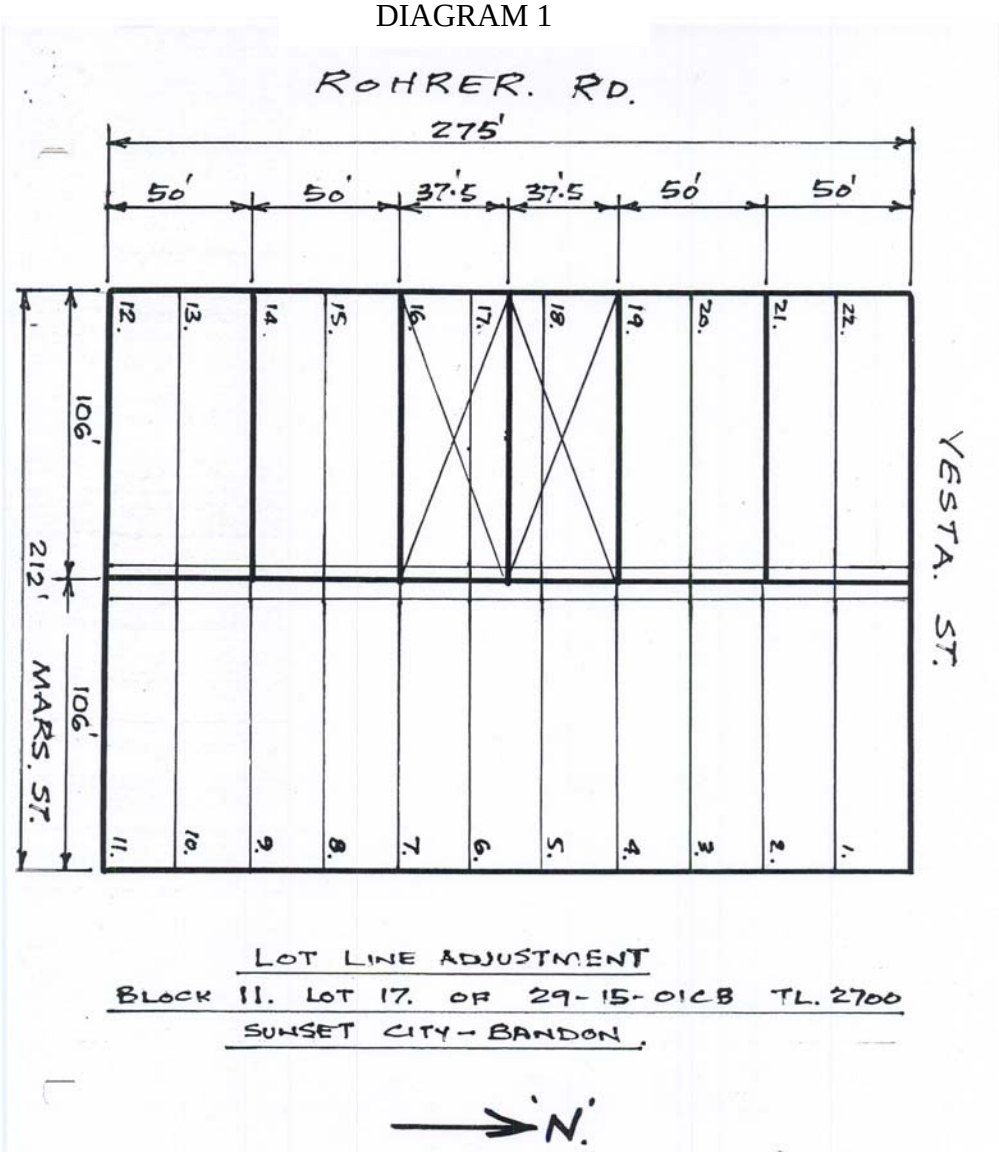
[1] OAR 661-010-0039 provides, in relevant part:

> "A reply brief may not be filed unless permission is obtained from the Board. * * * A reply brief shall be confined solely to new matters raised in the respondent's brief. * * *"

[2] As discussed later in this opinion, prior to briefing on the merits, intervenors filed a motion to dismiss alleging that petitioner lacks standing to file this appeal because she failed to file a timely notice of intent to appeal. However, intervenors did not argue in that motion that petitioner was not "adversely affected" by the challenged decision.

Suitability. Diagram 1 below, taken from Record 7, depicts the three lots, lots 16, 17 and 18, as they existed prior to the challenged property line adjustment. The bolded lines show the boundaries of the newly configured lots. The result of the property line adjustment approved by the county was the deletion of lot 17 and the reconfiguration of two existing lots. The first reconfigured lot, lot 16, comprises what was previously lot 16 and the south half of lot 17; the second lot, lot 18, comprises what was previously lot 18 and the northern half of lot 17.

DIAGRAM 1



The county did not provide notice and did not provide a hearing prior to approving the challenged decision on December 7, 2004. Intervenors subsequently filed an application for a conditional use permit (CUP) seeking approval to construct two dwellings on the two reconfigured lots and four more dwellings on eight other nearby lots of the subdivision.[3] At some point during or after that proceeding, petitioner became aware of the existence of the property line adjustment challenged in this appeal, and on November 16, 2005 filed a notice of intent to appeal (NITA), challenging the county's approval of the property line adjustment.[4]

MOTION TO DISMISS

The intervenor moves to dismiss, arguing that petitioner failed to file a timely notice of intent to appeal (NITA). We will address each of intervenors' alleged bases for dismissal in turn.

A. ORS 197.830(4)

Petitioner's NITA contends that the county failed to provide the required notice of the challenged decision, pursuant to ORS 215.416, and that the deadline for filing the NITA in this appeal is governed by ORS 197.830(4)(b).[5] Pursuant to ORS 197.830(4)(b), a petitioner must file a NITA "within 21 days after the expiration of the period for filing a

[3] It is our understanding that a CUP was required because the proposed development falls within a Beaches and Dunes Area with Limited Development Suitability. Pursuant to the local code, development within a limited suitability area requires conditional use approval.

[4] The county's final decision approving the conditional use permit was also appealed to this Board. LUBA No. 2005-153. That appeal is currently suspended pending resolution of petitioner's Motion to Take Evidence Not in the Record.

[5] The NITA filed by petitioner in this appeal provides:

> "Petitioner was not entitled to notice under ORS 215.416 but is adversely affected by the decision. Her substantial rights were violated when notice and opportunity for a local appeal were not provided. Petitioner files this appeal within 21 days of learning about the decision. ORS 197.830(4)(b) and (6)(b)." NITA 3.

local appeal of the decision established by the local government under ORS 215.416(11)(a)."[6]

Intervenors do not directly assert that ORS 197.830(4) applies. Rather, they rely on the citation in petitioner's NITA and assume, *for the sake of argument*, that petitioner is correct that subsection (4) controls. Relying on ORS 197.830(4)(b), intervenors contend that the timeline for filing a local appeal from an administrative decision is 15 days. According to intervenors, the local appeal period expired on December 22, 2004, 15 days after the challenged administrative decision was issued on December 7, 2004. Under ORS 197.830(4), the timeline for filing a timely NITA would have expired 21 days later, on January 12, 2005.

Intervenors' reliance on ORS 197.830(4) is misplaced because petitioner's reliance on that provision in her NITA is in error. That subsection applies in circumstances where a local government makes a land use decision without a hearing, *pursuant to ORS 215.416(11)*. ORS 215.416(11) authorizes a hearings officer or other person designated by the governing

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[6] ORS 197.830(4) provides, in pertinent part:

> "If a local government makes a land use decision without a hearing pursuant to ORS 215.416 (11) or 227.175 (10):
>
> "(a) A person who was not provided mailed notice of the decision as required under ORS 215.416 (11)(c) or 227.175 (10)(c) may appeal the decision to the board under this section within 21 days of receiving actual notice of the decision.
>
> "(b) A person who is not entitled to notice under ORS 215.416 (11)(c) or 227.175 (10)(c) but who is adversely affected or aggrieved by the decision may appeal the decision to the board under this section within 21 days after the expiration of the period for filing a local appeal of the decision established by the local government under ORS 215.416 (11)(a) or 227.175 (10)(a)."

ORS 215.416(11)(a) provides, in pertinent part:

> "(A) The hearings officer or such other person as the governing body designates may approve or deny an application for a permit without a hearing if the hearings officer or other designated person gives notice of the decision and provides an opportunity for any person who is adversely affected or aggrieved, or who is entitled to notice under paragraph (c) of this subsection, to file an appeal."

body, to approve or deny an application for a permit without a hearing if the decision maker "gives notice of the decision and provides an opportunity for any person who is adversely affected or aggrieved, or who is entitled to notice under [ORS 197.830(4)(c)] to file an appeal." There is no indication that the challenged decision was made pursuant to ORS 215.416(11), and intervenors do not argue that it was. The determination whether petitioner filed a timely NITA is therefore not governed by subsection (4).

Accordingly, the intervenor's contention that petitioner failed to file a timely NITA pursuant to ORS 197.830(4) does not provide a basis to dismiss this appeal.

B. ORS 197.830(5)

Intervenors also argue that ORS 197.830(5) applies.[7] Subsection (5) applies in situations where a local government makes a limited land use decision that is so different from the proposal described in the notice that the notice does not reasonably describe the local government's actions. In this case, all of the parties concede that no notice of the challenged decision was provided, so it is hard to understand how this provision could be applicable. In any event, subsection (5) provides the same standard as ORS 197.830(3), which, as explained below, is the applicable provision in this case.

C. ORS 197.830(3)

ORS 197.830(3) provides:

> "If a local government makes a land use decision without providing a hearing, except as provided under ORS 215.416 (11) or 227.175 (10), or the local

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[7] ORS 197.830(5) provides:

> "If a local government makes a limited land use decision which is different from the proposal described in the notice to such a degree that the notice of the proposed action did not reasonably describe the local government's final actions, a person adversely affected by the decision may appeal the decision to the board 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."

> government makes a land use decision that is different from the proposal described in the notice of hearing to such a degree that the notice of the proposed action did not reasonably describe the local government's final actions, a person adversely affected by the decision may appeal the decision to the board 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."

1. Adversely Affected

Under ORS 197.830(3), only a person who is adversely affected by the challenged decision has standing to appeal to LUBA. As explained above in our discussion of petitioner's motion to file a reply brief, intervenors argued for the first time in their response brief that petitioner is not a "person adversely affected by the decision" for purposes of ORS 197.830(3). Specifically, they contend that petitioner does not allege facts sufficient to demonstrate that she is "adversely affected."

We have consistently held that a person whose property is within sight or sound of the subject property is presumptively adversely affected. *Frymark v. Tillamook County*, 45 Or LUBA 685, 690 (2003); *Goddard v. Jackson County*, 34 Or LUBA 402, 409 (1998); *Walz v. Polk County*, 31 Or LUBA 363, 369 (1996). Petitioner alleges that she owns property within sight and sound of the proposed development. Petitioner's Response to Intervenor-Respondent's Response to Petitioner's Request to File a Reply Brief 1. Accordingly, we conclude that petitioner is adversely affected.

2. Knew or Should have Known

Both parties appear to agree that if ORS 197.830(3) applies, then subsection (b), not subsection (a), controls. *See Frymark*, 45 Or LUBA at 698.[8] We understand the parties to

[8] In *Frymark*, we explained the circumstances in which subsection (a) applies and those in which subsection (b) applies. *Frymark*, 45 Or LUBA at 698 (subsection (b) applies where the local government is not required to provide notice of the challenged decision). *Frymark* supports the parties' reliance on subsection (b) in this case.

rely on ORS 197.830(3)(b) rather than ORS 197.830(3)(a) because the county was not obligated to provide notice of the challenged decision to petitioner. Pursuant to ORS 197.830(3)(b), the critical date in determining whether petitioner filed a timely NITA is when she knew or should have known of the decision. If that date is more than 21 days before November 16, 2005, the date petitioner filed the NITA in this appeal, then petitioner's NITA is untimely, and the county's motion to dismiss must be granted.

Petitioner alleges that she learned of the existence of the property line adjustment on October 26, 2005, one day after her consultant learned of the decision through a conversation with a county planner. Intervenors contend that petitioner knew of the decision well before that date. They contend that petitioner must have been aware of the challenged property line adjustment during the proceedings on the CUP. They rely on the following written testimony submitted by petitioner in the CUP proceedings:

> "[The proposal is] for six dwellings on only 11 lots which are 25 feet wide; four are proposed for parcels which would be 50 feet wide by 106 feet long or 5300 square feet each; two dwellings are proposed for parcels which would only be 37.5 feet by 106 feet or 39750 square feet each. These latter two minimum lots do not meet the minimum street frontage/lot width requirements for either city or county * * *." Quoted in Intervenors' Response to Petitioner's Motion to Take Evidence Not in the Record 2 filed in LUBA No. 2005-153.[9]

They conclude from this testimony that petitioner must have known of the challenged decision.

[9] After we noted in a previous order that certain documents upon which the parties relied were part of the file in LUBA No. 2005-153, but were not part of the file in this appeal, the parties submitted documents from that other appeal. Intervenors submitted in this appeal their response to petitioners' motion to take evidence in LUBA No. 2005-153. *See* n 4.

Intervenors also rely on an e-mail message that, they contend, demonstrates that petitioner knew of the decision as early as December 17, 2004.[10] The e-mail message, which is dated December 17, 2004, was received by petitioner and provides:

> "We have just learned that the developer who proposed the condominiums in '03 (Caswell) has applied for and received approval for 6 single family homes on the 11 lots of the western half of Block 11 (Vesta to the north, Mars to the south, Rohrer to the west, alley on the east.) This is a conditional use permit because of the beach and dunes area, so in addition to SNA, adjacent property owners will receive notification (going out 12/23.) Putting 6 homes on 11 25x100' lots means 4 houses on 2 lots each and 2 houses on 1-1/2 lots each * * *." Supplement to Intervenor-Respondent's Motion to Dismiss, Affidavit of Intervenor-Respondent Raymond Caswell.

Finally, intervenors argue that even if petitioner did not know of the decision prior to October 26, 2005, she at least had sufficient information to put her on notice to investigate and that reasonable inquiry would have led her to discover the existence of the challenged decision. *See Willhoft v. City of Gold Beach*, 38 Or LUBA 375, 390 (2000). In *Wilhoft*, we explained a petitioner's inquiry obligation as follows:

> "Determining the date a petitioner 'should have known' of the decision that is appealed under ORS 197.830(3)(b) (1997) is not complicated where a petitioner has no reason to suspect that the decision was made until the petitioner is given a copy of the decision. However, where there are circumstances that would lead a reasonable person to realize that an appealable land use decision may have been rendered, it is necessary to consider whether a reasonable person would have made appropriate inquiries and thereby discovered the actual decision or confirmed the existence of the decision. We emphasize that the obligation to make reasonable inquires under ORS 197.830(3)(b) (1997) is an objective one, and it turns on what a reasonable person would do rather than what the petitioner actually did. Therefore, if a petitioner observes activity that would reasonably suggest that an appealable land use decision may have been adopted, the petitioner is obligated under ORS 197.830(3)(b) (1997) to make appropriate inquiries with the local government and discover the decision. If the petitioner does so and

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[10] Petitioner moves to strike the e-mail, arguing that it is not part of the record and that intervenors have not filed the necessary motion to take evidence outside the record, pursuant to OAR 661-010-0045. We have held that we may consider extra-record evidence, in the absence of a motion to take evidence, for the limited purpose of determining jurisdiction. *Neighbors for Sensible Dev. v. City of Sweet Home*, 39 Or LUBA 766 (2001); *Mazeski v. Wasco County*, 31 Or LUBA 126 (1996). Petitioner's motion to strike is denied.

> files an appeal within 21 days after discovering the decision, the appeal is timely under ORS 197.830(3)(b) (1997). However, if the petitioner fails to make such appropriate inquiries, the 21-day appeal period nevertheless begins to run." *Id.*

Petitioner responds that she neither knew nor should she have known, even through reasonable inquiry, of the existence of the challenged decision until her consultant informed her of it on October 26, 2005. She contends that there is nothing in the December 17, 2004 e-mail message that would have led a reasonable person to (1) realize that an appealable land use decision might have been made or (2) make inquiries about such a possibility. She asserts that the fact that she argued, in the CUP proceeding, that certain lots did not satisfy the minimum lot size requirements does not demonstrate that she was in any way aware of the existence of the property line adjustment. Intervenors contend that petitioner "had to be aware that applicants were *seeking* to combine eight lots into four two-lot home sites and to divide three lots into two home sites." Response to Petitioner's Motion to Take Evidence Not in the Record (LUBA No. 2005-153) 2-3 (emphasis added). Petitioner responds:

> "The emphasis (added) is on knowing what they were seeking to do, which we were opposing, and which is very different from knowing that a land division had already occurred in December 2004." Response to Intervenors' Motion to Dismiss 3.

Apparently at no time before, during or after the CUP proceedings did the county indicate to petitioner that the plat considered during the CUP proceedings was the result of a previous property line adjustment decision. Rather, as petitioner asserts:

> "The county's repeated statements that the property was 'existing legal lots' which were 'platted in 1907' created circumstances – not that would reasonably suggest that a land use decision may have been recently adopted – but one that would reasonably suggest just the opposite." Response to Intervenors' Reply to Petitioner's Response to Intervenors' Motion to Dismiss 1.

Petitioner was clearly confused about what had occurred and how the lots came to be configured as they were during the CUP proceedings. That confusion, however, was not

unreasonable and likely was shared by some of the county staff.[11] We agree with petitioner that neither the December 17, 2004 e-mail message nor any of the discussions that intervenors refer to were sufficient to put petitioner on notice of the existence of the challenged property line adjustment or to trigger any inquiry beyond what petitioner had already made.

Accordingly, for purposes of ORS 197.830(3), petitioner knew, or she should have known, of the challenged property line adjustment no earlier than when her consultant informed her of its existence, on October 26, 2005. She filed her NITA within 21 days of that date and her appeal was therefore timely filed.

Intervenors' motion to dismiss is denied

FIRST ASSIGNMENT OF ERROR

Petitioner argues that the county erred in ministerially approving the subject "property line adjustment" because the challenged decision does not satisfy the definition of "property line adjustment." ORS 92.010(11) (2003) defines the term "property line adjustment" as "the relocation of a common property line between two abutting properties."[12] Petitioner contends that the challenged decision approves a "replat" as that term is defined by ORS 92.010(12).[13] The challenged property line adjustment decision,

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[11] Several of our previous cases make clear just how unclear the process around property line adjustments can be. *See Warf v. Coos County*, 42 Or LUBA 84 (2002)*; Maxwell v. Lane County*, 39 Or LUBA 556, *rev'd* 178 Or App 210, 35 P3d 1128 (2001), *modified/adhered to as modified* 179 Or App 409, 40 P3d 532 (2002); *Goddard v. Jackson County*, 34 Or LUBA 402 (1998).

[12] We note that ORS 92.010(11) was recently amended to provide:

> "'Property line adjustment' means the relocation *or elimination* of a common property line between abutting properties." ORS 92.010(11) (2005) (emphasis added).

Intervenors do not address this amendment or contend that the 2005 amendment applies retroactively to the challenged decision, which was adopted December 7, 2004. We therefore apply ORS 92.010(11) (2003), which does not include within the definition of a "property line adjustment" the *elimination* of a common property line between two abutting properties.

[13] ORS 92.010(12) defines "replat" as:

which eliminated one lot and reconfigured two others, petitioner contends, violates provisions of applicable law and is prohibited as a matter of law.[14] Pursuant to OAR 661-010-0071(1)(c), she argues, the challenged decision must be reversed.[15]

Intervenors concede that, if we conclude petitioner has standing in this appeal, the county erred in administratively approving intervenors' proposed reconfiguration of lots 16, 17 and 18 as a single "property line adjustment." Intervenors argue, however, that the decision should be remanded, not reversed, because it is not prohibited as a matter of law.

> "the act of platting 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."

[14] Petitioner also argues that the reconfigured lots fail to meet the minimum lot standards. However, we agree with intervenors that, because the matter is reversed, it is premature to address this argument.

[15] OAR 661-010-0071(1) provides:

"The Board shall reverse a land use decision when:

"(a) The governing body exceeded its jurisdiction;

"(b) The decision is unconstitutional; or

"(c) The decision violates a provision of applicable law and is prohibited as a matter of law."

OAR 661-010-0071(2) provides:

"The Board shall remand a land use decision for further proceedings when:

"(a) The findings are insufficient to support the decision, except as provided in ORS 197.835(11)(b);

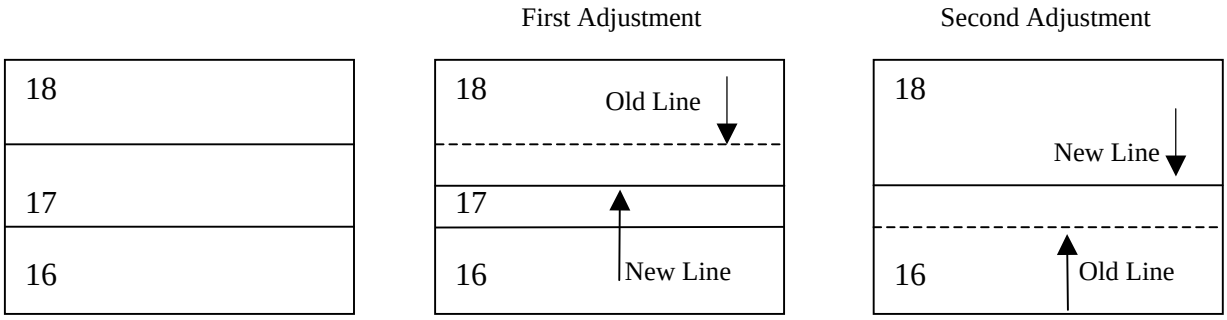
"(b) The decision is not supported by substantial evidence in the whole record;

"(c) The decision is flawed by procedural errors that prejudice the substantial rights of the petitioner(s); or

"(d) The decision improperly construes the applicable law, but is not prohibited as a matter of law."

Intervenors appear to believe that the challenged decision could have been approved as two separate property line adjustments.[16] *See* Diagram 2 (artist's rendition).

DIAGRAM 2



We do not agree with intervenors that the same result could be achieved through serial property line adjustments. Under the relevant statutes in effect on the date the appealed decision was adopted. The adjustment that intervenors contend constitutes the second property line adjustment, *i.e.*, the adjustment of the property line between Lot 18 and the reconfigured Lot 17, is actually the action that resulted in the elimination of Lot 17. That action is not the "relocation of a common boundary line between two abutting properties." Rather, it is the consolidation of two lots into one. It would appear that the challenged decision does, in fact, satisfy the definition of a "replat" because it reconfigures the existing subdivision plat to "decrease the number of lots in the subdivision." In any event, the proposed reconfiguration cannot be achieved through a single property line adjustment or

[16] Intervenors argue in their response brief as follows:

> "Intervenor-Respondents' request for a property line adjustment required approval of the adjustment of two separate property lines. One involved the property line common to Lots 16 and 17 and once that was adjusted the second adjustment involved the property line between Lot 18 and the reconfigured Lot 17." Response Brief 5-6.

through serial property line adjustments under the statutes in effect on the date the appealed decision was adopted.[17] Accordingly, reversal is appropriate.

Petitioner's first assignment of error is sustained.

SECOND ASSIGNMENT OF ERROR

Petitioner argues that the county erred in failing to provide the Sunset Neighborhood Association (SNA) and property owners within 100 feet of the subject property notice of the challenged decision.[18] Petitioner argues that she is the contact person for the SNA, and as such was entitled to notice. The county's failure to provide such notice, she asserts, prejudiced her substantial rights.[19]

Petitioner filed this appeal as an individual, not on behalf of the SNA.[20] Intervenors argue that petitioner does not own property within 100 feet of the subject property, and petitioner concedes that she was not entitled to notice of the challenged decision. According to intervenors, petitioner has no standing to challenge the adequacy of the notice on behalf of other property owners or on behalf of SNA.

We agree with intervenors. The only petitioner in this appeal is an individual who owns property more than 100 feet from the subject property. Petitioner does not appeal the challenged decision as a representative for SNA. She concedes that she was not entitled to

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[17] If they chose to do so, it appears that intervenors could file new applications for serial property line adjustments. Under the new definition of property line adjustment in ORS 92.010(11) (2005), it is possible that the proposed reconfiguration could be approved as two separate adjustments. *See* n 12.

[18] It is unclear to us what basis petitioner relies upon to conclude that the SNA, the recognized neighborhood association, and property owners within 100 feet of the subject property were entitled to notice of the challenged decision. In any event, intervenors response appears to assume that she is correct, and we will adopt that assumption.

[19] While our disposition of the first assignment of error makes any discussion of the second assignment of error superfluous, we address it briefly in the interests of judicial efficiency.

[20] In response to intervenors' motion to clarify whether the petitioner named in the NITA was petitioner, the individual, or the neighborhood association, petitioner clarified that she was the sole petitioner, appealing on her own behalf. *See Borton v. Coos County*, ___ Or LUBA ___ (LUBA No. 2005-170, Order, January 23, 2006).

notice of the challenged decision. We have explained that a petitioner "may not assert possible prejudice to the rights of *other persons* as a basis for reversal or remand." *Cape v. City of Beaverton*, 41 Or LUBA 515, 523 (2002) (emphasis in original) (citing *Bauer v. City of Portland*, 38 Or LUBA 432, 439 (2000)). Any failure to provide notice to others did not prejudice *petitioner's* substantial rights.

Petitioner's second assignment of error is denied.

The challenged decision is reversed.