BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

DOUGLAS BOLLAM,
Petitioner,

vs.

CLACKAMAS COUNTY,
Respondent,

and

SEQUOIA PROPERTY DEVELOPMENT, LLC,
Intervenor-Respondent.

LUBA No. 2006-110

FINAL OPINION
AND ORDER

Appeal from Clackamas County.

Gary P. Shepherd, Portland, filed the petition for review and argued on behalf of petitioner.

No appearance by Clackamas County.

Roger A. Alfred, Portland, filed the response brief and argued on behalf of intervenor-respondent. With him on the brief were Michael C. Robinson and Perkins Coie LLP.

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

AFFIRMED 10/27/2006

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

Petitioner appeals a county decision that approves a zoning map amendment and a 22-lot subdivision and planned unit development (PUD), but denies a property line adjustment.

MOTION TO INTERVENE

Sequoia Property Development, LLC (intervenor), the applicant below, moves to intervene on the side of the county. There is no opposition to the motion, and it is allowed.

FACTS

The subject property is a 4.38 acre parcel consisting of three tax lots, 100, 200 and 304. The subject parcel is rectangular in shape, with a long east-west axis. SE 152nd Drive borders the property on the west, and Rock Creek borders the property on the east. Property owned by petitioner borders the subject parcel to the north. The subject parcel is split-zoned, with tax lots 100 and 200 zoned Future Urbanizable 10-acre minimum (FU-10), while the easternmost tax lot, 304, is zoned exclusive farm use (EFU). *See* figure 1.

South of Tax lot 304 is tax lot 300, which is owned by intervenor and also zoned EFU. Intervenor applied to the county for (1) a property line adjustment that would effectively transfer the one-acre tax lot 304 to tax lot 300; (2) a zone change for tax lots 100 and 200 from FU-10 to Village Standard Lot Residential (VR-5/7), and (3) a 22-lot residential subdivision and PUD on tax lots 100 and 200.

To serve development within the PUD, intervenor proposed to collect storm water and convey it to an existing off-site storm water facility adjacent to the subject parcel to the west. That storm water facility was constructed on land petitioner donated to the county, and was paid for in part by petitioner. The facility is intended to collect storm water from the realigned SE 152nd Drive as well as serve proposed residential development on petitioner's land north of the subject property. Petitioner and the county signed an agreement that

petitioner will have exclusive use of the excess capacity in the existing facility not needed to handle water from the roadway.

The hearings officer denied the property line adjustment because it did not comply with the particular zoning code provision under which intervenor applied. However, the hearings officer found it feasible that the property line adjustment could be approved under a different code provision, and therefore approved the zone change and PUD subject to a condition that intervenor obtain the property line adjustment under that code provision prior to final PUD approval. With respect to storm water, the hearings officer approved intervenor's proposal to expand the existing storm water facility, subject to conditions requiring that the expanded facility not reduce the existing capacity reserved to serve petitioner's development. This appeal followed.

FIRST ASSIGNMENT OF ERROR

Under this assignment of error, petitioner challenges the hearings officer's findings regarding proposed use of the existing storm water facility.

A. Feasibility of Expansion

Petitioner argues that the hearings officer's finding that it is feasible to expand the existing storm water facility to serve the needs of the proposed PUD without infringing on petitioner's right to the reserve capacity in the existing facility is not supported by substantial evidence.[1]

[1] The hearings officer's findings state, in relevant part:

> "The hearings officer finds that the County reserved all excess capacity in the *existing* storm water facility to Mr. Bollam * * *. The applicant in this case does not propose to use the detention capacity in the existing pond or the northern pond. The applicant proposed to create new detention capacity to serve this site by expanding the existing pond to the east. Nothing in the MOU [Memorandum of Understanding between petitioner and the county] prohibits such expansion or reserves any newly created capacity to Mr. Bollam. There is no substantial evidence that the proposed expansion will affect the capacity of the existing pond or the northern pond." Record 10 (emphasis in original).

According to petitioner, the exact reserve capacity of the existing facility, the storm water needs of petitioner's proposed development, and the storm water needs of intervenor's PUD, have not yet been determined. Without knowing those three variables with some precision, petitioner argues, it is impossible to find that it is feasible for an expanded facility to serve intervenor's PUD without infringing on petitioner's right to the existing reserve capacity.

Intervenor responds that the hearings officer correctly found that the agreement between petitioner and the county does not prohibit expanding the existing facility, and further that there is no substantial evidence indicating that the expansion will reduce the capacity reserved for petitioner under the agreement. We agree with intervenor. To the extent petitioner argues that the agreement prohibits expansion of the existing facility, petitioner cites nothing in the agreement or elsewhere that would preclude expansion. With respect to the feasibility of expanding the facility without infringing on petitioner's rights under the agreement, the hearings officer found no substantial evidence that the proposed expansion will affect the capacity of the existing pond. The hearings officer also imposed a condition of approval requiring intervenor to provide "detailed engineering plans and calculations demonstrating that the additional stormwater pond capacity * * * will not reduce the existing capacity reserved" to petitioner. Record 22. We understand that condition to require intervenor to determine the storm water needs of the proposed PUD and to design and construct the expansion to provide the capacity required by the PUD. Petitioner does not challenge that condition or explain why it is insufficient to ensure that the expansion will not infringe on petitioner's rights to the existing reserve capacity.

B. Flood Hazard

In addition, petitioner argues that the proposed expanded facility is inconsistent with applicable county code provisions governing storm water facilities.[2] Although it is not entirely clear, we understand petitioner to argue that the existing storm water facility outlet is currently malfunctioning and sending overflow onto petitioner's property, and that the expanded facility will exacerbate the existing problems with the existing facility. Further, petitioner argues that the expanded facility will result in petitioner's property receiving overland flow in a manner not previously encountered, and without petitioner's consent, contrary to ZDO 1008.04(B). *See* n 2. Finally, petitioner contends that the existing facility is a private-public venture, not a "public" stormwater facility as the hearings officer found, and thus the proposed expansion is inconsistent with ZDO 1008.03(A)(7), which prohibits placement of surface detention facilities in the road right-of-way. *Id.*

Intervenor responds that the hearings officer made an unchallenged finding that the expanded facility will actually improve the functioning of the existing facility, notwithstanding that intervenor is not responsible for the existing facility's problems.[3] The

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[2] Clackamas County Zoning And Development Ordinance (ZDO) 1008.03(A) provides, in relevant part:

> "All development shall be planned, designed, constructed and maintained to:
>
> "* * * * *
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> "2. Protect development from flood hazards;
>
> "* * * * *
>
> "7. Avoid placement of surface detention or retention facilities in road right-of-way."

ZDO 1008.04(B) provides, in relevant part:

> "1. Natural drainage pattern shall not be substantially altered at the periphery of the site.
>
> "2. Greatly accelerated release of stored water is prohibited. Flow shall not be diverted to lands which have not previously encountered overland flow from the same upland source unless adjacent downstream owners agree."

[3] The hearings officer's findings state:

hearings officer also imposed a condition requiring intervenor to provide detailed plans demonstrating that stormwater runoff from the site will not exacerbate existing overflow problems. Petitioner does not directly challenge the finding or condition. We agree with intervenor that the hearings officer did not err in rejecting petitioner's claims that the proposed expansion will exacerbate any problems with the existing facility.

With respect to ZDO 1008.04(B), petitioner asserts that the expanded facility will cause "overland flow" across his property and thus violates that provision. This argument appears to be a variant of petitioner's argument that the expanded facility will exacerbate the overflow problems of the existing facility. Petitioner's citation of ZDO 1008.04(B) adds nothing to that argument, and is rejected for the reasons set out above.

Finally, with respect to ZDO 1008.03(A)(7), petitioner does not assert that either the existing or expanded pond is in a road right-of-way, so it is not clear why petitioner believes that provision is applicable or not met.[4] In any case, the only specific argument petitioner makes is a challenge to the hearings officer's finding that the existing facility is a "public" facility. However, we do not see that the public or private nature of the facility has anything to do with ZDO 1008.03(A)(7). To the extent the character of the facility is relevant to any approval criteria, we agree with intervenor that the existing facility is owned by the county and the hearings officer did not err in finding that the facility is a public storm water facility.

The first assignment of error is denied.

> "The applicant's engineer agreed that the existing storm water pond is not functioning properly. The applicant will modify the outlet structure on the existing pond to improve the pond's function and reduce the existing flooding problems. * * * The applicant is not required to remedy all existing and perceived problems in the area. The applicant is only required to mitigate those problems created or exacerbated by the proposed development. The hearings officer finds that it is feasible to modify the existing pond to ensure that the proposed development will not exacerbate the existing flooding problems on Mr. Bollam's property. The [county] can ensure compliance with this requirement during final engineering review of the proposed PUD. * * *" Record 10.

[4] As far as we can tell, the existing facility is at least partially within the old alignment of SE 152nd Drive, but entirely outside the new alignment.

SECOND AND THIRD ASSIGNMENTS OF ERROR

Under the second assignment of error, petitioner contends that the property line adjustment removing tax lot 300 from the subject parcel is essential to the PUD application, and that the hearings officer erred in approving the PUD application while at the same time denying the property line adjustment. According to petitioner, because PUDs are prohibited on the EFU-zoned tax lot 300, once the adjustment was denied the hearings officer was required to also deny the PUD application.

Under the third assignment of error, petitioner challenges the hearings officer's determination that it is feasible to approve the property line adjustment under ZDO 1020.05(B)(2). We address these arguments together.

The parties and the hearings officer recognized that the proposed PUD on tax lots 100 and 200 is dependent on a property line adjustment to remove tax lot 300 from the subject parcel. Intervenor applied for a property line adjustment under the general criteria for such adjustments in ZDO 1020.04(A).[5] The hearings officer found that the proposed adjustment did not comply with the ZDO 1020.04(A) requirement that the resulting lots or parcels satisfy the lot size provisions of the underlying zone, here the 80-acre EFU minimum parcel size. However, the hearings officer found it feasible to obtain an adjustment under the standards of ZDO 1020.05, which apply to property line adjustments in the EFU zone, and

[5] ZDO 1020.04 is entitled "General Provisions," and the version governing intervenor's application provided in relevant part:

> **"**Property line adjustments shall be consistent with all of the following provisions:
>
> "A. Property line adjustments involving lots or parcels of land shall satisfy the setback and lot size provisions of the underlying zoning district except, when located within an urban or rural zoning district, an adjustment between undersized lots or parcels may be granted when the adjustment is consistent with all remaining provisions of this subsection. * * *"

which include provisions allowing adjustments to undersize lots or parcels.[6] To that end, the hearings officer imposed conditions stating that the subdivision and PUD applications are

[6] ZDO 1020.05 provides standards for property line adjustments in agricultural lands zoning districts such as the EFU zone. The applicable version provided, in relevant part:

> "A. A property line adjustment shall not be used to reconfigure a lot, parcel, or tract of land, the effect of which is to qualify a lot, parcel, or tract for the siting of a dwelling.
>
> "B. A property line adjustment for a lot, parcel, or tract of land in areas designated Agriculture on the Comprehensive Plan map without an approved homestead or nonfarm use may be permitted pursuant to the following provisions:
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> "* * * * *
>
> "2. A property line adjustment for a lot, parcel, or tract of land less than 80 acres may be approved pursuant to the following provisions:
>
> "a. The property line adjustment will:
>
> "1. Not reduce an undersized lot, parcel, or tract of land more than five percent (5%); and
>
> "2. Only one (1) reduction is approved pursuant to this provision; or
>
> "b. The resulting configuration (size) is determined to be at least as appropriate for the continuation of the existing commercial agricultural enterprise for the properties as compared to the original configuration provided:
>
> "1. It is consistent with existing applicable zoning ordinance provisions and state regulations;
>
> "2. Previous land use decisions, if any, are modified consistent with applicable zoning ordinance provisions; and
>
> "3. The application is reviewed pursuant to Subsection 1305.02 of the Ordinance; * * *
>
> "C. A property line adjustment for a lot, parcel or tract of land in areas designated Agriculture on the Comprehensive Plan map with an approved homestead or nonfarm use may be approved pursuant to the following:
>
> "1. Both properties have approved homestead or nonfarm uses; or

approved and effective only after the county approves a property line adjustment combining tax lots 300 and 304.

Petitioner cites no authority that would preclude the hearings officer from structuring the relationship between the subdivision/PUD approvals and the property line adjustment in the manner done here, or that requires the hearings officer to approve the adjustment prior to or contemporaneously with the preliminary subdivision and PUD approvals.[7] It is clear under the conditions imposed that if the adjustment is not obtained then the preliminary subdivision and PUD approvals cannot become effective, and the final subdivision and PUD plats will not be approved. If there is a legal flaw in that condition, petitioner has not identified it.

Turning to the third assignment of error, petitioner disputes the hearings officer's finding that it is feasible to satisfy the property line adjustment standards at ZDO 1020.05(B). First, petitioner argues, the hearings officer misunderstood the relationship between ZDO 1020.04 and 1020.05. According to petitioner, the "general provisions" at ZDO 1020.04 apply to *all* property line adjustments, including those in agricultural districts. *See* n 5 ("[p]roperty line adjustments shall be consistent with all of the following provisions"). Petitioner contends that ZDO 1020.05 simply supplies *additional* standards when the adjustment is within an agricultural zoning district, just as ZDO 1020.06 supplies additional standards when the adjustment is within a forest zone. Because the hearings officer has already determined that no property line adjustment is permissible under

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> "2. The adjustment affects only one (1) property line and does not result in an increase in the size of the homestead or nonfarm use property[.]"

[7] Indeed, we question petitioner's assumption that the county cannot allow a use on a portion of a split-zoned parcel that is zoned for that use unless the use is also allowed in all other zones applicable to other portions of the parcel. The contrary proposition seems equally plausible. If so, then obtaining a property line adjustment to separate tax lot 300 from the rest of the subject parcel prior to final plat approval may not be strictly necessary. However, we need not and do not resolve that question here.

ZDO 1020.04, petitioner argues, the hearings officer erred in concluding that it is feasible to obtain an adjustment under other provisions of the county code.

Intervenor responds, initially, that the hearings officer merely found that it was feasible to comply with the standards of ZDO 1020.05. The hearings officer did not find that the proposed adjustment *complied* with those standards, and was not required to make that finding. Intervenor argues that any such determination will be made in a separate decision.[8] According to intervenor, the only question in the present case is whether the hearings officer's feasibility finding is adequate and supported by substantial evidence. *Salo v. City of Oregon City*, 36 Or LUBA 415, 425 (1999).

With respect to the relationship between ZDO 1020.04 and 1020.05, intervenor argues that ZDO 1020.05 is the more specific provision and therefore it supersedes any conflicting provisions in ZDO 1020.04.

We tend to agree with petitioner that ZDO 1020.04 provides general standards applicable to all property line adjustments, while ZDO 1020.05 provides additional provisions when an adjustment is proposed in agricultural districts.[9] However, we also tend to agree with intervenor that the specific ZDO 1020.05 provisions allowing adjustments for undersize lots trumps the general ZDO 1020.04(A) requirement that resulting lots satisfy the minimum parcel size. As the hearings officer noted, ZDO 1020.04(A) itself includes a provision authorizing adjustments for undersize lots that are located "within an urban or rural zone." The hearings officer found, however, that the EFU zone is not an "urban or rural"

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[8] The parties advise us that in fact following the challenged decision intervenor applied for and the county approved a property line adjustment under ZDO 1020.05. That decision has been appealed to LUBA. *Bollam v. Clackamas County*, __ Or LUBA __ (LUBA No. 2006-164).

[9] We say that we "tend" to agree with petitioner because we recognize that the meaning of and interrelationship between ZDO 1020.04 and 1020.05 (as amended in 2006) may be at issue in the appeal of the property line adjustment decision in LUBA No. 2006-164. We need not and do not adopt a definitive view of those code provisions in this opinion. We address them only to the extent necessary to resolve petitioner's challenge to the hearings officer's finding that it is feasible to obtain a property line adjustment under ZDO 1020.05.

zone as ZDO 1020.04(A) uses those terms.[10] Reading ZDO 1020.04(A) and 1020.05 together, it seems reasonable to conclude that adjustments involving undersize lots in an agricultural zones are governed by ZDO 1020.05 rather than 1020.04(A) with respect to parcel size requirements. Petitioner has not demonstrated that ZDO 1020.04(A) precludes intervenor from obtaining an adjustment involving tax lots 300 and 304 under ZDO 1020.05.

Next, petitioner argues that the proposed adjustment cannot be approved under ZDO 1020.05 because ZDO 1020.05(A) specifies that an adjustment "shall not be used to reconfigure a lot, parcel or tract of land, the effect of which is to qualify a lot, parcel, or tract of land for the siting of a dwelling." *See* n 6. Petitioner contends that the purpose of the adjustment is to allow a residential PUD on tax lots 100 and 200, and therefore an adjustment under ZDO 1020.05 is prohibited.

The "reconfiguration" language in ZDO 1020.05(A) is identical to, and is almost certainly intended to implement, the OAR 660-033-0020(4) definition of "Date of Creation and Existence," which specifies that the date of creation of a lot or parcel that is reconfigured after November 4, 1993 is the date of reconfiguration. *See* also ZDO 406.03(I). That definition plays a role in limiting non-farm dwellings on agricultural lands under the Goal 3 and statutory regulatory scheme, which allows certain nonfarm dwelling approvals only on parcels created before November 4, 1993. It is not at all clear that that language is intended to limit reconfigurations of land affecting only a portion of a split-zoned parcel that is not agricultural land and is not zoned EFU. Without attempting to resolve that question here, it is by no means obvious that ZDO 1020.05(A) precludes intervenor from obtaining an adjustment that combines tax lots 300 and 304. Petitioner has not demonstrated that the hearings officer erred in concluding that it is feasible to obtain an adjustment involving tax lots 300 and 304 under ZDO 1020.05.

[10] Apparently, the ZDO distinguishes between "urban" and "rural" zones on the one hand, and "natural resource" zones on the other. The EFU zone is a natural resource zone.

Finally, petitioner notes that the subject parcel is already developed with a dwelling (which will be removed under the subdivision and PUD proposal). Therefore, petitioner argues, a property line adjustment is not available under ZDO 1020.05(B), which applies only to parcels that do not have an "approved homestead or non-farm use." *See* n 6. Petitioner does not cite to any evidence that the dwelling is an "approved homestead or non-farm use." Even assuming that the dwelling is an approved homestead or non-farm use, ZDO 1020.05(C) appears to provide a means to adjust the boundary of a property that includes a homestead or nonfarm use. *Id*. Whatever the case, petitioner has not demonstrated that the hearings officer erred in concluding that it is feasible to obtain an adjustment involving tax lots 300 and 304 under ZDO 1020.05.

The second and third assignments of error are denied.

FOURTH ASSIGNMENT OF ERROR

The county provided notice of the hearing before the hearings officer to property owners within 300 feet of the subject parcel, including petitioner, pursuant to a county code provision applicable to properties within the urban growth boundary. However, petitioner argues that in fact the county code requires the county to provide notice to property owners within 750 feet of the property, while ORS 197.763 requires notice to owners within 500 feet, because part of the property is zoned EFU. Petitioner contends that the decision must be remanded to provide notice within the expanded area required by code and statute.

We assume without deciding that petitioner is correct that the county code, properly understood, requires notice to property owners within 750 feet of the subject property. However, even with that assumption, petitioner fails to demonstrate a basis to reverse or remand the challenged decision. Petitioner recognizes that a failure to provide notice is typically viewed as a procedural error, and that LUBA may reverse or remand the decision based on procedural error only if petitioner demonstrates that the error prejudiced *petitioner's* substantial rights. ORS 197.835(9)(a)(B); *Patterson v. City of Independence*, 49

Or LUBA 589, 597 (2005) (procedural error resulting in prejudice to persons other than the petitioner does not provide a basis to reverse or remand the decision under ORS 197.835(9)(a)(B)); *Cape v. City of Beaverton*, 41 Or LUBA 515, 523 (2002) (same). However, petitioner argues that the city's error here is properly viewed as "substantive" rather than procedural, based on the reasoning in *Oregon City Leasing, Inc. v. Columbia County*, 121 Or App 173, 177, 854 P2d 495 (1993) (failure to provide notice of a post-acknowledgment plan amendment to the Department of Land Conservation and Development (DLCD) as required by ORS 197.610 and 197.615 is a substantive, not procedural, error).

Oregon City Leasing, Inc. involved a complete failure to provide notice of a post-acknowledgement plan amendment to DLCD. The Court of Appeals noted the critical role DLCD plays in reviewing plan amendments and disseminating notice regarding such plan amendments, under the state land use scheme. The court remanded the case to LUBA to determine what consequences flow from failure to provide notice to DLCD. In a series of cases, LUBA has determined that, absent a showing of prejudice to the petitioner, remand is warranted for violation of the notice requirements of ORS 197.610 and 197.615 only in limited circumstances. *Bryant v. Umatilla County*, 45 Or LUBA 653, 657 (2003) (short of complete failure to provide notice, inadequate notice to DLCD under ORS 197.610(1) requires remand only if that failure (1) prejudiced the petitioner's substantial rights or (2) was likely to prejudice the substantial rights of other persons who may be relying on DLCD's notice to participate in the post-acknowledgment plan amendment); *No Tram to OHSU v. City of Portland*, 44 Or LUBA 647, 653-56 (2003) (same); *Stallkamp v. City of King City*, 43 Or LUBA 333, 351-52 (2002), *aff'd* 186 Or App 742, 66 P3d 1029 (2003) (same).

Thus, *Oregon City Leasing, Inc.* does not stand for the broad proposition espoused by petitioner that failure or partial failure to provide notice required under any code or statute is a "substantive" error that obviates the ORS 197.835(9)(a)(B) requirement that the petitioner

show prejudice to the petitioner's substantial rights, in order to obtain reversal or remand of a decision for failure to satisfy a procedural requirement. Under petitioner's approach, every failure to provide notice would be an automatic basis for reversal or remand, thus significantly expanding our scope of review in a manner inconsistent with ORS 197.835(9)(a)(B). We decline to adopt that view.

The fourth assignment of error is denied.

The county's decision is affirmed.