

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3
4 KATHRYN JANE PHILLIPS,
5 *Petitioner,*

6
7 vs.

8
9 POLK COUNTY,
10 *Respondent,*

11
12 and

13
14 RICHARD MOORE and NICOLE MOORE,
15 *Intervenor-Respondents.*

16
17 LUBA Nos. 2006-133, 2006-134 and 2006-135

18
19 FINAL OPINION
20 AND ORDER

21
22 Appeal from Polk County.

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24 Jannett Wilson, Eugene, filed the petition for review and argued on behalf of
25 petitioner. With her on the brief was the Goal One Coalition.

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27 No appearance by Polk County.

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29 Mark Irick, Dallas, filed the response brief and argued on behalf of intervenor-
30 respondents. With him on the brief was Shetterly, Irick & Ozias.

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

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35 REVERSED

01/02/2007

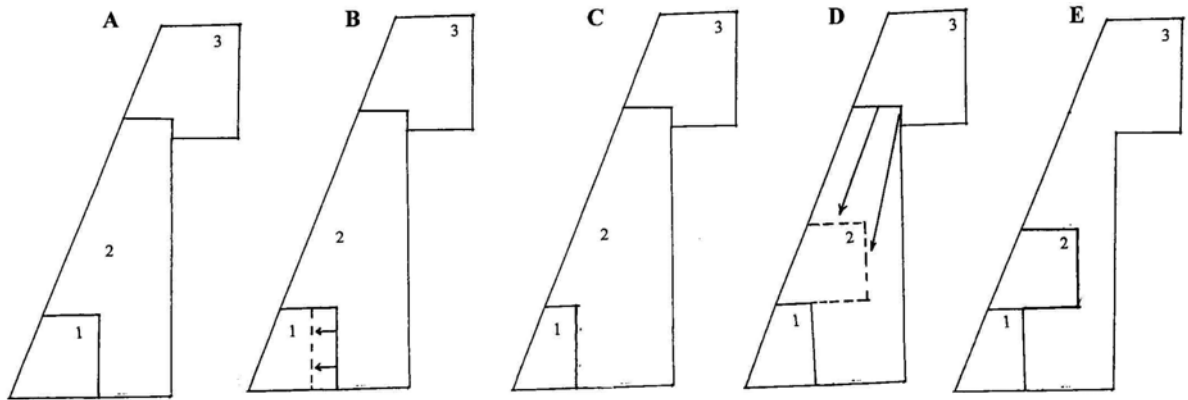
36
37 You are entitled to judicial review of this Order. Judicial review is governed by the
38 provisions of ORS 197.850.

NATURE OF THE DECISION

Petitioner appeals three decisions. The first two decisions approved property line adjustments. The third decision grants approval for a farm dwelling on a 160-acre parcel that is a product of the property line adjustments.

FACTS

Intervenors own three contiguous parcels in the county’s exclusive farm use (EFU) zone. Those parcels include parcel 1 (40 acres), parcel 2 (115 acres) and parcel 3 (61 acres). An existing dwelling and barn are located on parcel 2. The beginning configuration of intervenors’ three parcels is shown in figure A below. The first property line adjustment (First PLA) reduced the area of parcel 1 to 27 acres and increased the area of parcel 2 to 128 acres. Figure B. The resulting configuration is shown in Figure C. The second property line adjustment (Second PLA) reduced the area of parcel 2 to 27 acres and increased the area of parcel 3 to 160 acres. Figure D. The final configuration is shown in Figure E.



- A. **Beginning Configuration.** Parcel 1 (40 acres); Parcel 2 (115 acres); Parcel 3 (61 acres)
- B. **First Adjustment.** The property line between Parcels 1 and 2 is adjusted to shift 13 acres from Parcel 1 to Parcel 2. Parcel 3 is not affected.
- C. **Intermediate Configuration.** Parcel 1 (27 acres); Parcel 2 (128 acres); Parcel 3 (61 acres)
- D. **Second Adjustment.** The property line between Parcels 3 and 2 is adjusted to shift 101 acres from Parcel 2 to Parcel 3. Parcel 1 in the intermediate configuration is not affected.
- D. **Final Configuration.** Parcel 1 (27 acres); Parcel 2 (27 acres); Parcel 3 (160 acres)

1 The third county decision approved a farm dwelling on the new 160-acre parcel 3. That farm
2 dwelling was approved pursuant to Polk County Zoning Ordinance (PCZO) 136.040(D),
3 which is the PCZO equivalent of OAR 660-033-0135(1).¹

4 **REPLY BRIEF**

5 Petitioner moves for permission to file a reply brief. That motion is granted.

6 **DECISION**

7 **A. The County’s Decision and Petitioner’s Assignments of Error**

8 With exceptions that do not apply here, ORS 215.780(1)(a) imposes an 80-acre
9 minimum lot or parcel size in EFU zones. The county’s EFU zone is consistent with this
10 statutory 80-acre minimum lot or parcel size requirement. PCZO 136.070(A). In approving
11 the First PLA and Second PLA the county applied county standards for property line
12 adjustments. PCZO 91.960(2) imposes “General Standards” and PCZO 91.960(3) imposes
13 special standards for PLAs in “Resource Zones.”²

¹ PCZO 136.040(D) provides as follows:

“(D) *Dwelling for the Farm Operator on Other Farmland - Acreage Standard [OAR 660-033-0135(1)]*. A farm dwelling may be authorized on a tract of land not classified as high value, subject to the following standards:

- “(1) The parcel on which the dwelling is to be located is at least 160 acres in size;
- “(2) The subject tract is currently in farm use;
- “(3) The dwelling will be occupied by a person or persons who will be principally engaged in the farm use of the land such as planting, harvesting, marketing or caring for livestock, at a commercial scale; and
- “(4) The subject tract is currently vacant (no dwellings, excepting lawfully established seasonal farm worker housing).”

OAR 660-033-0135(1) authorizes counties to approve dwellings for farm operators on EFU-zoned parcels that are not classified as high-value farmland, subject to the same standards set out at 136.040(D)(1) through (4). OAR 660-033-0135(1)(a)(A), like PCZO 136.040(D)(1) requires that the dwelling be sited on a parcel that is at least 160 acres in size.

² As relevant, PCZO 91.960 provides:

1 Petitioner alleges six assignments of error. In her first assignment of error, petitioner
2 alleges the county erred in approving the Second PLA, because at the time the Second PLA
3 was approved, the property line that the Second PLA purported to adjust was a hypothetical
4 property line, because the First PLA has not been completed. In her second assignment of
5 error, petitioner alleges the county failed to adopt findings addressing the increased resource
6 productivity standard at PCZO 91.960(3)(b). *See* n 2. In her third assignment of error,
7 petitioner alleges the county failed to adopt adequate findings to demonstrate that the PLAs
8 are “consistent with the Comprehensive Plan and meet the intent and purpose of the [EFU]
9 zone,” as required by PCZO 91.960(2)(a). *Id.* In her fourth assignment of error, petitioner

“PROPERTY LINE ADJUSTMENTS. A property line adjustment requires an application to and approval from the Planning Director, except for those exclusions in Section (1) below. A survey of the adjusted property line may be required pursuant to Oregon law. A resulting property description is recommended that describes both resulting properties. For all adjustments requiring review and approval, the applicant(s) must demonstrate that the adjustment will meet the General Standards listed in (2) below.

“* * * * *

“(2) **GENERAL STANDARDS.** Except for those exclusions noted in Section (1) above, all property line adjustments shall meet the following criteria:

“(a) The adjustment shall be consistent with the Comprehensive Plan and meet the intent and purpose of the zone; and

“* * * * *

“(3) **ADJUSTMENTS IN RESOURCE ZONES.** Except for those exclusions noted in Section (1) above, property line adjustments must meet the General Standards listed in (2) above. In addition, the applicant(s) must demonstrate that such adjustments meet the following criteria:

“(a) An adjustment between a parcel(s) which is as large or larger than the minimum parcel size and a parcel(s) which is smaller than the minimum parcel size will result in the same number of parcels as large or larger than the minimum parcel size; or

“(b) An adjustment between parcels which are smaller than the minimum parcel size will increase the resource productivity of at least one of the affected parcels; and

“(c) The adjustment will not result in a parcel(s) which will conflict with commercial farm or forest operations in the area.”

1 alleges the county’s findings fail to demonstrate that the PLAs comply with the PCZO
2 91.960(3)(c) requirement that the newly configured parcels will not “conflict with
3 commercial farm or forest operations in the area.” *Id.* In her fifth assignment of error,
4 petitioner contends that because the county has failed to demonstrate that the PLAs comply
5 with applicable standards, the county approval of the farm dwelling violates the PCZO
6 136.040(D)(1) requirement that the newly approved farm dwelling be located on a 160-acre
7 parcel. *See* n 1. Finally, in her sixth assignment of error, petitioner alleges that the county
8 erred in approving the new farm dwelling because the county failed to establish that the new
9 farm “dwelling will be occupied by a person or persons who will be principally engaged in
10 the farm use of the land,” as required by PCZO 136.040(D)(3). *Id.*

11 **B. Property Line Adjustments**

12 A threshold question that neither the county nor petitioner address is whether the
13 disputed property line adjustments are partitions. A second threshold question is whether the
14 purported property adjustments can, under the facts presented in this case, be approved in the
15 EFU zone based on county standards that have no analog in the EFU zoning statutes.
16 Although neither petitioner nor the county raise or address those questions “the parties may
17 not prevent a court from noticing and invoking an applicable statute by relying only on other
18 sources of law.” *Miller v. Water Wonderland Improvement District*, 326 Or 306, 309 n 3,
19 951 P2d 720 (1998). The parties’ failure to recognize and address applicable statutes,
20 similarly does not preclude LUBA from noticing and applying applicable statutes. *Wetherell*
21 *v. Douglas County*, 204 Or App 732, 739, 132 P3d 41, *rev allowed* 341 Or 140 (2006).

22 **1. The First and Second Property Line Adjustments are Partitions**

23 As defined by ORS 92.010(11), a property line adjustment is “the relocation or
24 elimination of a common property line between abutting properties.”³ While the First and

³ ORS 92.010(11) provides:

1 Second PLA’s described earlier in this opinion would appear to fall within the ORS
2 92.010(11) definition of a “property line adjustment”, those property line adjustments can
3 also be described as partitions. The First PLA can also be viewed as a partition of parcel 1
4 into a 27-acre parcel and a 13-acre parcel with a subsequent addition of the 13-acre parcel to
5 parcel 2. The Second PLA can also be viewed as a partition of parcel 2 into a 27-acre parcel
6 and a 101-acre parcel with a subsequent addition of the 101-acre parcel to parcel 3. ORS
7 92.010(7) excludes certain property line adjustments from the statutory definition of
8 “partition land.”⁴ PCZO 91.150(25) sets out a similar definition of “partition land.”⁵ While
9 there are wording differences in ORS 92.010(7) and PCZO 91.150(25), we conclude that
10 both ORS 92.010(7) and PCZO 91.150(25) require that the parcel or lot that is reduced in
11 size by a property line adjustment must comply with any applicable zoning ordinance
12 requirements, including minimum parcel or lot size requirements under the applicable zoning
13 ordinance, both before and after the property line adjustment.

“‘Property line adjustment’ means the relocation or elimination of a common property line between abutting properties.”

⁴ ORS 92.010(7) provides, in relevant part:

“‘Partition land’ means to divide land to create 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[.]*”

⁵ PCZO 91.150(25) provides in relevant part:

“‘Partition Land.’ To divide a parcel into two or three parcels within a calendar year when such parcel exists at the beginning of such year. ‘Partition land’ does not include:

“* * * * *

“(c) Adjustment of a property line by the relocation of a common boundary where an additional parcel is not created and where the existing parcel reduced in size by the adjustment is not reduced below the minimum size established by any applicable zoning ordinance[.]”

1 The First PLA reduced 40-acre parcel 1 to 27 acres. Parcel 1 did not comply with the
2 80-acre minimum parcel size in the EFU zone, either before or after the First PLA. The First
3 PLA therefore falls within the ORS 92.010(7) and PCZO 91.150(25) definitions of
4 “partition.” The county did not follow partition procedures, and, more importantly, a 40-acre
5 parcel in the EFU zone cannot be partitioned to create 27-acre and 13-acre parcels because
6 the minimum parcel size in the EFU zone is 80 acres.⁶ The Second PLA reduced parcel 2
7 from 128 acres to 27 acres. Even if we overlook the flawed First PLA that allowed the 128
8 acre parcel 2 to be created at the expense of parcel 1 in the first place, the Second PLA
9 reduced that version of parcel 2 under the 80-acre minimum parcel size in the county’s EFU
10 zone so that it violated the 80-acre minimum lot size. The Second PLA was therefore a
11 partition. And, like the First PLA, that partition was improper because it created a 27-acre
12 parcel that does not comply with the 80-acre minimum parcel size in the EFU zone.

13 **2. PCZO 91.960(3)**

14 Even if we put aside the fact that the First and Second PLAs are actually partitions,
15 the county’s interpretation and application of PCZO 91.960(3) in this case is inconsistent
16 with the EFU zoning statute, and the EFU statute controls where it conflicts with local
17 zoning ordinances that were adopted to implement the EFU zoning statute. *See Kenagy v.*
18 *Benton County*, 112 Or App 17, 20 n 2, 826 P2d 1047 (1992) (counties “may not apply

⁶ PCZO 112.020 provides:

“112.020. LOTS NOT TO BE REDUCED BELOW MINIMUM. No lot or parcel of land held under separate ownership at the effective date of this ordinance (November 13, 1970) shall be separated in ownership or reduced in size below the minimum lot width or lot areas required by this ordinance, nor shall any lot or parcel of land held under separate ownership at the effective date of this ordinance, which has a width or an area less than required by this ordinance, be further reduced unless approved in accordance with this ordinance, including provisions and standards for the creation of new parcels in the zone.”

As we have already noted, ORS 215.780 imposes a statutory minimum lot or parcel size of 80 acres in EFU zones and PCZO 136.070(A) similarly imposes an 80-acre minimum lot and parcel size in the county’s EFU zone.

1 criteria that are inconsistent with or less restrictive than the statutory standards”). In this
2 case, however the First PLA is characterized, the net effect is to reduce the previously
3 existing 40-acre parcel so that it became a 27-acre parcel. That action was inconsistent with
4 the ORS 215.780(1)(a) 80-acre minimum lot and parcel size. Reducing the area of parcel 1,
5 which was already smaller than the ORS 215.780(1)(a) 80-acre minimum parcel size, so that
6 parcel 1 was even smaller, is inconsistent with ORS 215.780(1)(a). Similarly, however the
7 Second PLA is characterized, and overlooking the impropriety of the First PLA, the net
8 effect of the Second PLA was to reduce a 128-acre parcel to a 27-acre parcel. Reducing the
9 area of parcel 2, which prior to the Second PLA complied with the ORS 215.780(1)(a) 80-
10 acre minimum parcel size, so that parcel 2 violated the minimum parcel size, is inconsistent
11 with ORS 215.780(1)(a).

12 The First PLA and the Second PLA are inconsistent with ORS 215.780(1)(a), and
13 those decisions therefore are reversed. Because the farm dwelling that was approved for
14 reconfigured parcel 3 cannot be approved without the First and Second PLAs that are
15 necessary to make parcel 3 satisfy the 160-acre minimum size requirement for approval of a
16 farm dwelling under PCZO 136.040(D) and OAR 660-033-0135(1), that decision must also
17 be reversed.