BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

KIP V.J. KIPFER and SHERRY KIPFER,
Petitioners,

vs.

JACKSON COUNTY,
Respondent.

LUBA No. 2007-239

FINAL OPINION
AND ORDER

Appeal from Jackson County.

Sherry Kipfer and Kip V.J. Kipfer, Rogue River, filed the petition for review and argued on their own behalf.

No appearance by Jackson County.

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

BASSHAM, Board Member, did not participate in the decision.

REMANDED 07/14/2008

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

Opinion by Holstun.

NATURE OF THE DECISION

Petitioners appeal a county decision that approves property line adjustments.

FACTS

On March 13, 2007, Crater Lake Development, LLC (CLD) submitted an application in which it sought county approval to adjust certain property lines between four parcels. A plat showing the configuration of those parcels before the property line adjustment and after the property line adjustment appears at Record 147. On September 18, 2007, the Jackson County Planning Division (planning division) tentatively approved the application. On that date, the planning division provided notice of its tentative decision and the right to appeal that decision. On September 25, 2007 petitioners filed a local appeal, in which they specified a number of errors. Record 75-80. On November 5, 2007, a hearing on petitioners' appeal was held by a county land use hearings officer. At that hearing, petitioners filed a document that identified additional alleged errors. Record 12-20. In a decision dated November 13, 2007, the county land use hearings officer rejected the appeal and approved the application.

INTRODUCTION

Petitioners appear *pro se*. Their petition for review is difficult to follow and understand. Petitioners' concerns appear to be focused on the planned expansion of the Woodville Cemetery (tax lot 3200) onto 2.9 acres of land that will be added to the existing cemetery by a property line adjustment to the property line between tax lots 3200 and 2100. Those 2.9 acres are located close to petitioners' property, Ward Creek and a well head. Petitioners believe cemetery use of the 2.9 acres is inappropriate. The county had difficulty below, and we have had difficulty on appeal, because petitioners for the most part do not connect their concerns with any legal standard at all. Where petitioners do identify a legal standard, they frequently make no attempt to explain why they believe that legal standard must be applied in approving a property line adjustment.

FIRST ASSIGNMENT OF ERROR

Jackson County Land Development Ordinance (LDO) 1.7.6 provides as follows:

> "Any documented violation of previous land development ordinances related to permissible activities or structures on land that also violate this Ordinance will continue to be a violation subject to all penalties and enforcement under this Ordinance. Likewise, previous judgments rendered under past ordinances remain enforceable. Except as provided for in Chapter 10, when a violation of this Ordinance exists on a property, the County will not approve any application for building or land use permits on that property unless such application addresses the remedy for the violation. *Where a violation of any other local ordinance, state, or federal law has been documented on property to the satisfaction of the County, such violation must be corrected prior to application for a land use or development permit on that property, unless the violation can be remedied as part of the development application.*" (Emphasis added.)

In their first assignment of error, petitioners contend that actions that have been taken on parts of the subject property in the past violate "Part Fourteen – Building and Housing Code," of the Jackson County Codified Ordinances (JCCO). Specifically, petitioners contend that JCCO Chapter 1424 "Grading on private Property" has been violated, because there has been grading activity on the subject property without securing required permits. JCCO 1424.01 and 1424.03.[1] Petitioners also allege that actions have been taken that violate "Part Eighteen – Health and Sanitation." Specifically, we understand petitioners allege JCCO Chapter 1864 "Solid Waste Franchising and Nuisance Abatement" has been violated,

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[1] JCCO 1424.01 provides:

> "There is hereby adopted as County law, Chapter 33 of the Appendix to the Oregon State Structural Specialty Code, being particularly the 1998 Edition thereof, prepared and promulgated by the International Conference of Building Officials, entitled 'Excavation and Grading.'" (Underlining in original.)

1424.03 provides, in part:

> "* * * No person shall violate or fail to comply with any of the provisions of Chapter 33 of the Appendix to the Oregon State Structural Specialty Code, as adopted in Section 1424.01 or fail to comply with a stop-work order issued pursuant to such chapter." (Underlining in original.)

because solid waste has been deposited on the property and caused a public nuisance.[2] JCCO 1864.01(b).[3] We understand petitioners to argue that under LDO 1.7.6, because they have documented that violations of county ordinances exist, the disputed application for property line adjustments must be denied or those violations must be remedied as part of the disputed application.

The first three sentences of LDO 1.7.6 all concern violations of the current LDO or prior versions of the LDO. In their first assignment of error, petitioners do not allege violations of the former or current LDO. The final sentence of LDO 1.7.6, which is emphasized above, applies more broadly. It applies where there is a "documented" "violation of any other local ordinance, state, or federal law." If there is a "documented" violation of any local ordinance, the final sentence of LDO 1.7.6 requires that "such violation must be corrected prior to application for a land use or development permit on that property, unless the violation can be remedied as part of the development application."

The challenged decision does not address this issue. That is likely because this issue does not appear to have been raised before the hearings officer. But neither the county nor the applicant have appeared in this appeal to argue that the issue was therefore waived pursuant to ORS 197.835(3). Although we do not express any position on the merits of petitioners' first assignment of error, we agree with petitioners that the county's decision should be remanded so that the hearings officer can address the issue presented in the first assignment of error.[4]

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[2] It is unclear to us what solid waste the petitioners are talking about.

[3] JCCO 1864.01(b) provides that one of the purposes of JCCO Chapter 1864 is to:

> "Prohibit and provide for the abatement of accumulation of solid waste causing a public nuisance, a hazard to health or a condition of unsightliness[.]"

[4] LUBA recently considered the meaning of LDO 1.7.6 in *Rogue Aggregates, Inc. v. Jackson County*, ___ Or LUBA ___ (LUBA Nos. 2007-158, 2007-178, 2007-179, 2007-180 and 2007-181, July 8, 2008). In that

The first assignment of error is sustained.

SECOND ASSIGNMENT OF ERROR

In their second assignment of error, petitioners argue that Jackson County has amended the LDO so many times between 2004 and 2007 that petitioners had no way of knowing which version of the LDO applied in this case.

The "Notice of Tentative Staff Decision" says:

> "The following approval criteria were applied in rendering this decision: Sections 3.4.2 and 3.4.3 of the 2004 Jackson County Land Development Ordinance. * * *" Record 123.

Although we conclude later in this opinion that it appears that the 2007 version of the LDO rather than the 2004 version of the LDO should have been applied in this case, the above notice was sufficient to inform petitioners that the county took the position that it was the 2004 version of the LDO that applies to the disputed application.

The second assignment of error is denied.

THIRD ASSIGNMENT OF ERROR

The application in this matter was submitted to the county on March 13, 2007. If that application was later made complete or deemed complete pursuant to ORS 215.427(3)(a), the LDO that was in effect on March 13, 2007 would apply to the disputed property line adjustments. As we have already noted, the planning division notice explained that the county applied the 2004 version of the LDO. As far as we can tell, when the county adopted Ordinance 2006-10 on February 18, 2007, the 2007 version of the LDO replaced the 2004 version of the LDO on that date. It appears to us that the 2007 version of the LDO rather

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case a party argued the LDO 1.7.6 requirement that "a violation" must be "documented" should be interpreted as follows:

> "[M]ere allegations of a code violation are insufficient. Instead, * * * there must be a notice of code violation, a cease and desist order, a code enforcement action, or a similar county document evidencing some code violation in order to trigger obligations under LDO 1.7.6 or 1.8.2(A)." Slip op at 11.

We generally agreed with that interpretation, although it may be that other interpretations are also possible.

than the 2004 version of the LDO should have been applied in this case. We cannot tell whether that makes any difference to the legal or procedural standards that apply in this case, but it appears that the county applied the wrong version of the LDO.

As we noted earlier, the county has not appeared in this case. We therefore do not foreclose the possibility that there is an explanation for why the county applied the 2004 version of the LDO. We remand for the county to either explain why the 2004 version of the LDO is properly applied to the disputed application or to apply the correct version of the LDO. If the legal standards that apply in this case are the same in the 2004 and 2007 versions of the LDO, the county can simply explain that such is the case.

The third assignment of error is sustained.

FOURTH, FIFTH, AND SEVENTH THROUGH ELEVENTH ASSIGNMENTS OF ERROR

The primary dispute between petitioners and the county appears in these assignments of error.

A. Petitioners' September 25, 2007 Notice of Local Appeal

Petitioners' notice of local appeal appears at Record 75-80, in the record that the county filed in this appeal. The hearings officer's decision is two and one-half pages long and adopts the planning division's decision and the applicant's proposed findings as additional findings. Record 1-3, 141-45, 159-61. In response to the issues raised by petitioners, the hearings officer adopted the following findings:

> "The Appellants raised criteria involving flood hazard, LDO 7.1.2, Flood Plain Overlay; Ground water pollution and other environmental hazards. Record [76-80].[5] I do not find that these criteria are applicable to this application.

[5] The hearings officer cited to the page numbers of the local record. We have substituted the corresponding page numbers from the record that the county transmitted to LUBA. Petitioners also attached 51 pages of supporting documentation to their local appeal, which appear at pages 81-121 of record that the county transmitted to LUBA.

"* * * * *

> "The issues raised by the Appellants concern criteria not applicable to boundary line adjustments." Record 2.

Although petitioners complain that "Jackson County refused to address the issues relating to development of land," the above findings show that the hearings officer expressly recognized their September 25, 2007 notice of local appeal, and the arguments contained in that notice of local appeal, and hearings officer found that the "criteria" or legal standards that apply to the disputed property line adjustment do not include the "criteria" or legal standards that petitioners identified in their September 25, 2007 notice of local appeal. Petitioners may disagree with that finding, but they do not assign error to that finding in the fourth assignment of error or any of their other assignments of error. Neither do petitioners make any attempt in the petition for review to explain why the legal criteria that they identified in the September 25, 2007 notice of local appeal must be applied to approve a property line adjustment. Given petitioners' failure to assign error to the hearings officer's findings quoted above and their failure to explain why they believe the criteria identified in the September 25, 2007 notice of appeal must be applied in approving the disputed property line adjustment, we do not agree that the county committed error in the way it addressed petitioners' September 25, 2007 notice of local appeal.

B. Petitioners' November 5, 2007 Submittal

At the November 5, 2007 hearing before the hearings officer, petitioners submitted what they refer to as a "Supplement and Addendum to Appeal." Record 12-20. Petitioners object that the hearings officer did not respond to the issues presented in their Supplement and Addendum to Appeal:

> "During the hearing the hearings officer never mentioned a word about the written Supplement and Addendum to their Appeal that was submitted timely, before the hearing started, nor was a word of it acknowledged in the decision." Petition for Review 27.

We note that the Supplement and Addendum to Appeal that appears at Record 12-20 expands on the issues that are raised in the September 25, 2007 notice of local appeal. Those arguments are not always easy to understand, and it may be that the hearings officer could properly reject some of those arguments for that reason alone. However, the hearings officer erred by not responding to the Supplement and Addendum to Appeal in his findings.

It appears to us that petitioners and the county may have very different views about the legal standards that must be considered in approving a property line adjustment. Specifically, the county appears to view property line adjustments to be entirely separate from, and independent of, any required decision making criteria that govern the permissible *use* or *development* of property. If the county concludes that some or all of the development issues that petitioners raise in the Supplement and Addendum to Appeal are based on legal standards that do not apply in this property line adjustment proceeding, the county should explain its reasoning in reaching that conclusion.

In its findings on remand, the county must address the issues raised in the Supplement and Addendum to Appeal.

C. Petitioners' Remaining Arguments Under the Fourth, Fifth, and Seventh Through Eleventh Assignments of Error

Petitioners raise a number of other arguments under these assignments of error. Some of those issues will have to be addressed when the hearings officer considers the Supplement and Addendum to Appeal. Other issues that are raised under these assignments of error are not sufficiently stated and developed in the petition for review to establish an additional basis for reversal or remand, and we reject them for that reason.

The fourth, fifth, and seventh through eleventh assignments of error are sustained in part.

SIXTH ASSIGNMENT OF ERROR

Under this assignment of error, petitioners cite our decision in *Warf v. Coos County*, 42 Or LUBA 84 (2002) and argue that under the reasoning in that case the purported

property line adjustments that the county approved in this case exceed the statutory authority for approving property line adjustments. The argument that is included at pages 15-16 of petitioners' petition for review makes it clear that petitioners intended to cite *Warf v. Coos County*, 43 Or LUBA 460 (2003), where we explained:

> "As the concept is used in ORS 92.010(7) and 92.010(11), a property line adjustment is a rather limited tool. As defined by ORS 92.010(11), a property line adjustment is limited to relocating '*a* common property line between *two* abutting properties.' * * * That means *one* property line may be relocated and it must be a *common* property line between *two* abutting properties. Another important limitation is implicit in ORS 92.010(11), but reasonably clear when ORS 92.010(11) is read together with ORS 92.010(7)(b). The two properties that share the common property line that is to be adjusted must be 'existing' units of land (*i.e.*, existing lots or parcels). That means the subdivision or partition plat or the deed or other legal instrument that created the existing lots or parcels must be recorded before the boundary lines that those lots or parcels create can be further adjusted. Property line adjustments may not be approved for proposed or hypothetical lots or parcels that do not yet separately exist as lots or parcels." 43 Or LUBA at 466 (emphases in original; footnote omitted).[6]

As the findings that were prepared by the applicant and adopted by the hearings officer note, the ORS 92.010(11) definition of "property line adjustment" was amended in 2005. Record 145. That definition now appears at ORS 92.010(12).[7] That change in statutory language could call into question the conclusion that we reached in *Warf*. Additional changes to the statutes governing property line adjustments were adopted during a legislative special session in 2008, which also changed the statutory language that we relied

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[6] Petitioners also cite *Goddard v. Jackson*, 34 Or LUBA 402, 414 (1998) in support of their position that the disputed property line adjustments are not authorized by the relevant statutes.

[7] Prior to its amendment in 2005, the text of ORS 92.010(11) provided the following definition of property line adjustment:

> "'Property line adjustment' means the relocation of a common property line between two abutting properties."

The amended definition that took effect in 2005 now appears at ORS 92.010(12), which provides:

> "'Property line adjustment' means the relocation or elimination of a common property line between abutting properties."

on in *Warf*. Oregon Laws 2008, ch 12 (Spec Sess). But if the limitation on property line adjustments that we described in the above-quoted portion of our decision in *Warf* is unaffected by the change in statutory language, the challenged decision appears to be inconsistent with *Warf*, because in a single decision it grants multiple property line adjustments to tax lot 2100. On remand, the hearings officer must address whether the multiple property line adjustments to tax lot 2100 are consistent with the current ORS Chapter 92 grant of authority to approve property line adjustments.

The sixth assignment of error is sustained.

The county's decision is remanded.