BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

CHARLES McGOVERN,
Petitioner,

vs.

CROOK COUNTY,
Respondent,

and

MARTIN ESPINOLA,
Intervenor-Respondent.

LUBA No. 2008-053

FINAL OPINION
AND ORDER

Appeal from Crook County.

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

Heidi T. D. Bauer, Assistant County Counsel, Prineville, filed a response brief and argued on behalf of respondent. With her on the brief was David M. Gordon.

Daniel A. Terrell, Eugene, filed a response brief and argued on behalf of intervenor-respondent. With him on the brief was the Law Office of Bill Kloos, PC.

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

REMANDED 09/18/2008

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 decision approving two non-farm parcels and non-farm dwellings on those parcels.

FACTS

The subject property is a 163.08-acre parcel zoned Exclusive Farm Use (EFU-2), developed with a manufactured dwelling and barn. On July 16, 2007, intervenor-respondent (intervenor) applied for a partition to divide the existing parcel into three parcels, the parent parcel of 141.08 acres with the existing dwelling, and two new non-farm parcels each 11 acres in size. Intervenor also applied for conditional use approvals for the two non-farm dwellings.

The county planning commission approved the applications. Petitioner and others appealed the planning commission's decision to the county court. The county court conducted a hearing on the appeal and on March 19, 2008, issued a decision denying the appeal and affirming the planning commission decision. This appeal followed.

FIRST ASSIGNMENT OF ERROR

ORS 215.263(5) authorizes creation of a non-farm parcel and placement of a non-farm dwelling thereon if, among other things, the original parcel from which a non-farm parcel is created was "lawfully created" prior to July 1, 2001. ORS 215.263(5)(a)(B).

To show compliance with ORS 215.263(5)(a)(B), intervenor sought and obtained an "Administrative Determination" dated April 13, 2006, concluding that the parent parcel, tax lot 1200, was created by partition plat on May 18, 1999, from a larger parcel 512 acres in size. The administrative determination states the 1999 plat created three parcels, including tax lot 1200, which then consisted of 167.50 acres. The administrative determination also discusses a December 5, 2000 boundary line adjustment, which increased the size of tax lot 1200 from 167.50 acres to 192.50 acres. Record 397. It is not clear from the record how and

when tax lot 1200 became its present size, but the county's decision states that as a result of a "correction" made by Crook County, the subject property was reduced to the current 163.08 acres.[1]

Petitioner argues that the decision does not explain the nature of the "correction" or other actions that may have post-dated July 1, 2001, and that resulted in the subject property's current size and configuration. Depending on the nature of such actions, petitioner argues, the dates of those actions may be the parcel's date of creation, and therefore the date it was "lawfully created" for purposes of ORS 215.263(5)(a)(B). If that date is after July 1, 2001, petitioner argues, then the parcel does not qualify for a non-farm partition under ORS 215.263(5)(a)(B).

Petitioner also notes an unexplained discrepancy between the administrative determination, which states that the 2000 boundary adjustment increased the size of tax lot 1200 from 167.50 acres to 192.50 acres, and the county court's findings, which state that the 2000 adjustment "changed the size of the subject property from 167.50 acres to 164.77 acres." *See* n 1.

Intervenor responds that it was the 2000 boundary line adjustment decision that configured tax lot 1200 into its current 163.08-acre size, and not a later county "correction"

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[1] The county court's decision states, in relevant part:

> "* * * The property was originally created by partitioning C-LP-135-98, approved by the Planning Department on October 20, 1998. That partitioning divided a 512.5-acre farm parcel to create the subject property, measuring 167.5 acres, one parcel measuring 160 acres and a third parcel measuring 185 acres. A final plat was filed.
>
> "On December 5, 2000, a boundary adjustment was approved which changed the size of the subject property from 167.50 acres to 164.77 acres. A final plat was filed. The boundary line adjustment C-LP(B)-249-00 was recorded on December 18, 2000 * * *.
>
> "As a result of a correction made by Crook County, the size of the subject property has been reduced to approximately 163.08 acres.
>
> "The property has undergone no alterations subsequent to July 1, 2001, and is therefore eligible for partitioning." Record 8.

or other actions subsequent to July 1, 2001. Because tax lot 1200 has not been reconfigured at all since the 2000 boundary line adjustment, intervenor argues, it was "lawfully created" prior to July 1, 2001, and therefore eligible for a non-farm partition under ORS 215.263(5)(a)(B).

We cannot tell from this record how or when tax lot 1200 was configured to its current size. The 2000 boundary line adjustment plat is at Record 70, that plat does not confirm intervenor's claim that the 2000 boundary line adjustment decision resulted in the current size and configuration of the subject property. Intervenor's claim is also belied by the 2006 administrative decision and the county court's decision at issue in this appeal, both of which state that the 2000 boundary line adjustment decision resulted in a different size and configuration than the current size and configuration, although the two decisions use different numbers. The county court's decision attributes the current size and configuration to a subsequent "correction," but does not further describe or date that action. In addition, we note that the record includes, at Record 221 and 406, a county tax assessor's record for tax lot 1200 that lists four separate actions affecting that tax lot since its creation in 1999: two lot line adjustments of 25 and 2.50 acres, respectively, a sale of 30.23 acres, and a "correction" involving 1.69 acres. The tax assessor's record does not indicate what dates these actions occurred.

We agree with petitioner that remand is necessary for the county to determine what actions if any occurred after July 1, 2001, that affected the size and configuration of tax lot 1200 and whether those actions may have resulted in a new date of creation for tax lot 1200. Petitioner raised the issue below, and as discussed above the findings and record do not adequately resolve that issue. It is possible that, depending on how and when tax lot 1200 became 163.08 acres in size, it may have been "lawfully created" after July 1, 2001.

We note, however, that we disagree with petitioner's premise that the date of *any* action that changed the size or configuration of tax lot 1200 after July 1, 2001, is necessarily

the date that tax 1200 was "lawfully created," for purposes of ORS 215.263(5)(a)(B). Petitioner argues that the "correction" or other actions that affected tax lot 1200's size and configuration were probably property line adjustments. According to petitioner, a property line adjustment necessarily results in "new" parcels, even if the total number of parcels before and after the property line adjustment is the same. Petition for Review 4 (*citing Phillips v. Polk County*, 213 Or App 498, 162 P3d 338 (2007)). Therefore, petitioner argues, if tax lot 1200 was adjusted in size after July 1, 2001, the date of that adjustment is the date the parcel was "created."

Intervenor does not dispute that premise or petitioner's reliance on *Phillips*, but we believe that reliance to be unwarranted. *Phillips* did not involve ORS 215.263(5)(a)(B), or any other statutory requirement involving the date a parcel is created, and does not support the broad proposition that petitioner cites it for. At issue in *Phillips* was a set of property line adjustments that reduced one EFU-zoned parcel below the 80-acre statutory minimum parcel size prescribed in ORS 215.780(1), and further reduced another EFU-zoned parcel that was already below the statutory minimum parcel size. The Court held that those property line adjustments violated ORS 215.780(1). It is true that, in rejecting the county's argument that the 80-acre minimum parcel size in ORS 215.780(1) applies only to decisions that *create* new parcels, not to property line adjustments, the Court stated that:

> "[N]othing in the language of ORS 215.780 authorizes a land use decision that results in the creation of a new parcel of less than 80 acres in an EFU zone through a lot line adjustment based on the fact that the parcel was originally less than 80 acres." 213 Or App at 502.

However, whether property line adjustments "created" new parcels was not at issue in *Phillips*, and none of the statutes discussed or at issue in that case were concerned with the date a parcel was "lawfully created." We do not understand the above-quoted language from *Phillips* to support the broad proposition that property line adjustments necessarily result in "new" parcels that are "created" as of the date of the property line adjustment.

In general, a parcel can be created only through a "partition," the relevant statutory definitions of which expressly exclude property line adjustments. ORS 92.010(6), (7), (8).[2] With an exception discussed below, a decision that qualifies as a "property line adjustment" as defined at ORS 92.010(12), *i*.e., that only relocates or eliminates a common property line between abutting properties, typically does not "create" new parcels or result in parcels with a new date of creation.[3] *McKay Creek Valley Assoc. v. Washington County*, 24 Or LUBA 187, 196 (1992), *aff'd* 118 Or App 543, 848 P2d 624 (1993).

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[2] In response to *Phillips*, the legislature enacted amendments to ORS 92.010 (HB 3629, Ch 12, Oregon Laws 2008 Special Session), effective March 3, 2008, and retroactively applicable to property line adjustments approved before the effective date. For present purposes, there is no substantive difference between the old and amended statute. We quote relevant portions of the statute, as amended:

> "(6) 'Parcel' means a single unit of land that is created by a partition of land.
>
> "(7) 'Partition' means either an act of partitioning land or an area or tract of land partitioned.
>
> "* * * * *
>
> "(9) 'Partitioning land' means dividing land to create not more than three parcels of land within a calendar year, but does not include:
>
> "* * * * *
>
> "(b) Adjusting a property line as property line adjustment is defined in this section.
>
> "* * * * *
>
> "* * * * *
>
> "(12) 'Property line adjustment' means a relocation or elimination of all or a portion of the common property line between abutting properties that does not create an additional lot or parcel."

[3] That assumes the reconfiguration actually qualifies as a "property line adjustment," rather than a *de facto* partition or replat. We note that the 2000 boundary line adjustment decision is probably more accurately characterized as a replat, as that term is defined at ORS 92.010(13), than a property line adjustment, because it reconfigured an existing partition plat and did much more than relocate "the common property line between abutting properties."

An exception to that general rule is at OAR 660-033-0020(4), which defines the term "date of creation and existence" for purposes of the administrative rule governing agricultural lands, and provides:

> "When a lot, parcel or tract is reconfigured pursuant to applicable law after November 4, 1993, the effect of which is to qualify a lot, parcel or tract for the siting of a dwelling, the date of the reconfiguration is the date of creation or existence. Reconfigured means any change in the boundary of the lot, parcel or tract."

Where OAR 660-033-0020(4) applies, the result of a property line adjustment accomplished after November 4, 1993, that has the effect of qualifying an adjusted parcel for the siting of a dwelling is that the adjusted parcel has a new "date of creation" for purposes of OAR chapter 660, division 033. OAR 660-033-0020(4) plays a role in limiting nonfarm dwellings on agricultural land that are allowed under several statutes on parcels created prior to January 1, 1993. *Bollam v. Clackamas County*, 52 Or LUBA 738 (2006); *Hartmann v. Washington County*, 36 Or LUBA 442, 448 (1999); *see also* OAR 660-033-0130(4)(a), ORS 215.284(1) and (2).

It is not clear to us whether OAR 660-033-0020(4) applies to a nonfarm partition or a nonfarm dwelling authorized under ORS 215.263(5)(a)(B). However, we do not address that issue in the present case, because it is not clear whether the "correction" or whatever actions led to tax lot 1200's current size and configuration had the effect of qualifying a lot or parcel for the siting of a dwelling, and the parties provide no briefing or argument on the rule. If it becomes necessary on remand, the county should consider whether OAR 660-033-0020(4) has any bearing on the date the subject property was lawfully created. In any case, the county should adopt more adequate findings explaining how and when tax lot 1200 achieved its current size and configuration, and determine if that action or those actions affected the date the subject property was "lawfully created" for purposes of ORS 215.263(5)(a)(B).

The first assignment of error is sustained.

SECOND ASSIGNMENT OF ERROR

OAR 660-033-0130(4)(c) requires that a finding that the land on which a proposed non-farm dwelling will be sited is "generally unsuitable" for agricultural use, including livestock grazing. The two 11-acre parcels proposed for non-farm dwellings consist predominantly of Class VII agricultural soils, and have no irrigation rights. Opponents testified below that the entire original 512-acre parcel, including the two 11-acre proposed parcels, had been used for spring grazing up until 1970. The county, however, relied on other evidence to conclude that the two 11-acre parcels are generally unsuitable livestock grazing.[4]

Petitioner argues that the county's finding is not supported by substantial evidence. According to petitioner, because there was no cross-fencing to keep cattle from the two 11-acre portions of tax lot 1200, it is probable that cattle grazed freely over the entire original 512-acre parcel, including the two 11-acre portions. Petitioner contends that evidence of historical grazing of the subject property is a "substantial obstacle" to a finding that the property is generally unsuitable for grazing. *Clark v. Jackson County*, 17 Or LUBA 594, 606 (1989).

Intervenor responds that the opponents' testimony of grazing over the entire original 512-acre parcel prior to 1970 does not so undermine the evidence the county chose to rely

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[4] The county found, in relevant part:

> "The Court considered opponent testimony about possible historic use of the property for grazing from Sandy Demaris and Rusty Cox. Demaris and Cox suggested that the property had been used for spring grazing from approximately 1938 until 1970. The applicant provided information that states that the subject property is not entirely fenced nor are several adjacent properties that were originally part of the original Espinola Tract (which measured 512.5 acres). Without either perimeter or cross fencing it is difficult to conclude that the particular non-farm parcels or non-farm dwelling sites could have been utilized specifically for grazing. During the Planning Commission's October 10, 2007 discussion about the site visit of September 5, 2007 it was noted that there was no evidence of livestock on the subject property. In light of compelling visual evidence provided by both the site visit and the herbaceous forage report, which shows the steep, rocky surface conditions and insufficient amounts of herbaceous forage, the Court is unconvinced that the proposed non-farm sites are suitable for grazing." Record 16.

upon as to render that evidence unsubstantial. We agree. The evidence the county chose to rely upon includes the herbaceous forage report, the soils on the 11-acre dwelling sites, the planning commission's site visit, and the uncertainty over whether grazing on the entire property that occurred more than 38 years ago included the dwelling sites. A reasonable person could rely on that evidence to conclude that the dwelling sites are generally unsuitable for grazing, notwithstanding the countervailing testimony indicating that the dwelling sites might have been grazed prior to 1970.

The second assignment of error is denied.

THIRD ASSIGNMENT OF ERROR

ORS 215.422(1)(c) limits the amount that counties may charge for local land use appeals, requiring that the appeal fee be "reasonable and * * * no more than the average cost of such appeals or the actual cost of the appeal, excluding the cost of preparation of a written transcript." Crook County Code (CCC) 18.172.050 requires the county to set application and appeal fees annually, and requires that "[f]ees charged for processing permits shall be no more than the actual or average cost of providing that service."[5] The county's appeal fee schedule requires an appeal fee of $1,850 plus 20 percent of the initial application fee. In the present case, the appeal fee the county charged petitioner was $2,440 ($1,850 plus 20 percent of the $2,950 application fee).

[5] CCC 18.172.050 provides, in relevant part:

> "(1) All fees for permits, variances, zone map amendments, comprehensive plan amendments, zone text amendments, appeals, and any other necessary review or permits pursuant to this title shall be set annually as determined by the county court.
>
> "* * * * *
>
> "(4) Fees charged for processing permits shall be no more than the actual or average cost of providing that service."

Petitioner argues that an appeal fee of $2,440 is not reasonable and likely exceeded the average of such appeals or the actual cost of this appeal, contrary to ORS 215.422(1)(c). The county rejected that argument below, finding:

> "Appellant raises a challenge to the appeal fee applied in their Appeal Petition dated November 20, 2007. Appellant did not make a motion to allow new evidence to be accepted on this matter at the County Court. Appellant did not identify any evidence in the record that the appeal fee is unreasonable or exceeded the average or actual cost of the appeal. * * * Therefore as there is no evidence in the record regarding the appeal fee the Court denies Appellant's request for relief on this matter.
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> "The Court also finds that the Crook County Code [Sec] 18.172.050(1) provides that all appeal fees be set annually by the County Court. The Court also finds that the proper forum for disputing the appeal fee would have been to challenge the annual order adopted by the County Court, in this case Crook County Order 2007-56, when it was in fact adopted." Record 15 (emphasis original).

Petitioner acknowledges that we addressed a similar challenge to the county's appeal fee in *Young v. Crook County*, __ Or LUBA __ (LUBA No. 2007-250, June 11, 2008), *review pending* (A139342). In *Young*, we stated:

> "[W]e believe that in the context of an as-applied challenge the initial burden rests on the local appellant to produce a *prima facie* case that the appeal fee that is charged pursuant to a previously adopted fee schedule is 'more than the average cost of such appeals or the actual cost of the appeal,' depending on which approach the county's fee schedule has taken. We do not believe that the county has that initial burden in an as-applied challenge, merely because the local appellant asserts below that the appeal fee charged the appellant is inconsistent with ORS 215.422(1)(c)." *Young*, slip op 15.

Petitioner argues that we erred in *Young* in placing on the local appellant the initial burden of demonstrating that an appeal fee applied to the appellant violates ORS 215.422(1)(c). According to petitioner, "only the county is likely to have access to the data required to calculate the actual or average costs of its appeals, as only the county can know how much staff time and other resources are expended on such appeals[.]" Petition for Review 9. Petitioner requests reconsideration of that issue, and argues that where an appellant objects to the county that an appeal fee is unreasonable, the county should have the initial burden of

documenting that the appeal fee is reasonable and no more than the average cost of such appeals or the actual cost of the appeal.

We adhere to our holding in *Young* that, in the context of an as-applied challenge to an appeal fee, an appellant's *mere allegation* during the proceedings below that the fee is unreasonable does not thereby oblige the county to undertake the initial burden of production to demonstrate that the appeal fee complies with ORS 215.422(1)(c). In general, the initial burden of producing evidence supporting allegations of inconsistency with a statutory or constitutional obligation often lies with the challenger, even if the ultimate burden of proof and persuasion on that issue lies with the local government. *See Lincoln City Chamber of Comm. v. City of Lincoln City*, 164 Or App 272, 991 P2d 1080 (1999) (upholding an ordinance that places the initial burden of production on applicants to prepare a "rough proportionality report" that the city uses to determine whether exactions comply with the federal Takings Clause, even if the city has the ultimate burden of persuasion). We continue to believe that an appellant must do more than merely allege that an appeal fee is unreasonable or inconsistent with ORS 215.422(1)(c), but must present *some* initial evidence on that point, in order to shift the burden of production to the county to demonstrate otherwise.

We would feel differently if petitioner were correct that the county has exclusive access to the data needed to present a *prima facie* case that a particular appeal fee is inconsistent with ORS 215.422(1)(c). However, petitioner has not demonstrated that such is the case. The county annually reviews its appeal fee schedule. The record of that annual review presumably includes the evidence the county relied upon to comply with ORS 215.422(1)(c), in adopting the fee schedule. That evidence is presumably part of the public record, and readily available to the public or obtainable through a public records request. It is not obvious why an appellant could not obtain copies of that public record, and submit it in support of his arguments that the particular appeal fee applied in his case is

inconsistent with ORS 215.422(1)(c). Even if such evidence were not readily available, it is not clear why an appellant could not submit testimony, based on reasonable assumptions regarding staff time and other expenses to process an appeal, and cite that testimony in support of his arguments that the appeal fee charged him violates the statute. Such testimony would likely be sufficient to shift the burden of production to the local government, which would then be obligated to adopt findings, supported by substantial evidence, demonstrating that the appeal fee complies with the statute.

In the event LUBA adheres to its decision in *Young*, petitioner argues in the alternative that he in fact tried to introduce evidence regarding the reasonableness of the appeal fee, but the county rejected that "new evidence." Petition for Review 9-10. Petitioner argues that the county erred in rejecting the "new evidence," and that the county cannot deny an appellant the opportunity to present evidence regarding the reasonableness of an appeal fee, or require that the appellant submit such evidence during the proceedings before the planning commission.

We agree with petitioner, in the abstract, that the governing body must allow an appellant an opportunity to present evidence regarding the reasonableness of an appeal fee, even if its review is otherwise confined to the record compiled before the review body whose decision is appealed. However, it is not clear that petitioner in fact attempted to submit evidence regarding the reasonableness of the appeal fee, or if so that the county rejected such an attempt. Petitioner does not identify what "new evidence" petitioner attempted to submit, or substantiate his assertion that he tried to submit new evidence and the county rejected that attempt. As quoted above, the county found that petitioner failed to file a motion to submit new evidence regarding the reasonableness of the appeal fee or whether the appeal fee complied with ORS 215.422(1)(c), that petitioner failed to cite to any evidence in the existing record, and therefore the county had no evidence before it on that issue. Nothing

cited to us in the county's findings purports to reject any proffered evidence regarding the reasonableness of the appeal fee.

Although petitioner does not cite it to us, intervenor points out that in a letter submitted to the planning commission petitioner and others compared the county's appeal fee to other counties' appeal fees, and argued based on that comparison that the county's appeal fee is unreasonable and does not reflect the average cost of appeals.[6] Intervenor argues, however, that petitioner never cited the letter to the county court or made similar allegations in their submittals to the court. Even if the letter at Record 231 is a sufficient showing to shift the burden to the county of demonstrating compliance with ORS 215.422(1)(c), which intervenor disputes, because petitioner never cited it to the county, the county correctly found that petitioner failed to identity *any* evidence in the record that the appeal fee is unreasonable or exceeded the average or actual cost of the appeal.

Intervenor is correct that petitioner's notice of appeal at Record 92 merely objected that the appeal fee is unreasonable, and did not include arguments such as those made in the letter at Record 231. As far as petitioner has established, petitioner failed to submit or attempt to submit any evidence regarding the reasonableness of the appeal fee, and further

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[6] In an October 10, 2007 letter to the planning commission, the opponents argued:

> "* * * Should you rule in favor of the applicant we are then moved to ask County Court to hear our appeal. The fee charged for an appeal from the planning commission follows the algorithm of $1850 + (20% [of the initial application fee]).
>
> "The fees charged for an appeal from the planning commission in other Oregon counties are dramatically lower. For example, fees to appeal from the planning commission in four other Oregon counties are as follows: Yamhill County - $250, Morrow County - $250, Lincoln County - $260, and Wasco County - $500. Source: county websites September 26, 2007. There are no differences between the economic conditions in these counties and those in Crook County that could begin to account for 7 (seven) plus times difference in the fee charged for processing an appeal in Crook County.
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> "Even if we prevailed at County Court the appeals fees charged that exceed documented average cost or documented actual cost of the appeal will not be refunded as they are in comparable jurisdictions. We find these unreasonably high fees for appeals in violation of ORS 215.422(1)(c) and statewide planning Goal 1." Record 231.

failed to draw the county court's attention to the only arguable evidence on that point, at Record 231. Accordingly, we agree with intervenor that, consistent with our decision in *Young*, the county court was not obligated to produce evidence and undertake the burden to demonstrate that the appeal fee charged petitioner complied with ORS 215.422(1)(c).

The third assignment of error is denied.

The county's decision is remanded.