BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

JAMES JUST,
Petitioner,

vs.

LINN COUNTY,
Respondent.

LUBA No. 2009-024

FINAL OPINION
AND ORDER

Appeal from Linn County.

James Just, Lebanon, filed the petition for review and argued on his own behalf.

Michael E. Adams, Assistant County Counsel, Albany, filed the response brief and argued on behalf of respondent.

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

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

AFFIRMED 06/09/2009

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

Opinion by Ryan.

NATURE OF THE DECISION

Petitioner appeals a county decision approving a property line adjustment.

FACTS

The challenged decision approves a property line adjustment (PLA) between two properties located a few miles south of the City of Lebanon. The western property is 56.86 acres and zoned Farm/Forest (F/F), a resource zone. The eastern property is .99 acres and zoned Rural Residential - 5 Acre Minimum (RR-5). The minimum lot size in the F/F resource zone is 80 acres, and the minimum lot size in the RR-5 zone is 5 acres. The RR-5 property is square-shaped, contains a residence, and is located along the center of the eastern border of the undeveloped F/F property, which is also generally square-shaped. The PLA removes a one-acre square from the F/F property and adds that acre to the RR-5 property. After the PLA, the F/F property is reduced from 56.86 acres to 55.86 acres, and the RR-5 property is increased from .99 acres to 1.99 acres. The resulting 1.99-acre parcel is split-zoned with the original .99 acres still zoned RR-5, and the additional one acre zoned F/F.

The county planning department administratively approved the PLA, and petitioner appealed that approval to the county planning commission. The planning commission approved the PLA, and petitioner appealed that decision to the board of county commissioners, which also approved the PLA. This appeal followed.

ASSIGNMENT OF ERROR

Petitioner's sole assignment of error is that the county misconstrued Oregon Laws 2008, Chapter 12, Section 2 by approving a PLA that resulted in properties that do not meet the minimum lot standards under the applicable zoning designations. Oregon Laws 2008 Chapter 12, Section 2 took effect on March 3, 2008. One of the purposes of the statute was

to allow PLAs with substandard parcel sizes to be approved in certain circumstances.[1] The statute provides:

> "(1) Except as provided in this section, a unit of land that is reduced in size by a property line adjustment approved by a city or county must comply with applicable zoning ordinances after the adjustment.
>
> "(2) Subject to subsection (3) of this section, for properties located entirely outside the corporate limits of a city, a county may approve a property line adjustment in which:
>
> "(a) One or both of the abutting properties are smaller than the minimum lot or parcel size for the applicable zone before the property line adjustment and, after the adjustment, one is as large as or larger than the minimum lot or parcel size for the applicable zone; or
>
> "(b) Both abutting properties are smaller than the minimum lot or parcel size for the applicable zone before and after the property line adjustment.
>
> "(3) On land zoned for exclusive farm use, forest use or mixed farm and forest use, a property line adjustment under subsection (2) of this section may not be used to:
>
> "(a) Decrease the size of a lot or parcel that, before the relocation or elimination of the common property line, is smaller than the minimum lot or parcel size for the applicable zone and contains an existing dwelling or is approved for the construction of a dwelling, if the abutting vacant tract would be increased to a size as large as or larger than the minimum tract size required to qualify the vacant tract for a dwelling;
>
> "(b) Decrease the size of a lot or parcel that contains an existing dwelling or is approved for construction of a dwelling to a size smaller than the minimum lot or parcel size, if the abutting vacant tract would be increased to a size as large as or larger

[1] The legislature enacted Oregon Laws 2008, Chapter 12, Section 2 in response to the decision in *Phillips v. Polk County*, 213 Or App 498, 162 P3d 338 (2007). In *Phillips*, the Court of Appeals affirmed a LUBA decision reversing a PLA that was approved by Polk County. In *Phillips*, the Court held that a PLA that resulted in EFU parcels that did not meet the 80-acre minimum parcel size requirement was precluded, even if the original parcels were also smaller than the minimum parcel size. Under *Phillips*, both parties agree that the decision challenged in this appeal would similarly be precluded.

than the minimum tract size required to qualify the vacant tract for a dwelling; or

"(c) Allow an area of land used to qualify a tract for a dwelling based on an acreage standard to be used to qualify another tract for a dwelling if the land use approval would be based on an acreage standard."

As far as we are aware, no cases have construed the recently enacted statute. The county approved the PLA based on the statute and the sole issue in this appeal is whether the PLA is permissible under subsection (2)(b) of the statute.[2] Under subsection (2)(b), a PLA is permitted if "[b]oth abutting properties are smaller than the minimum lot or parcel size for the applicable zone before and after the property line adjustment." The F/F property was less than the 80-acre minimum parcel size before the PLA and remained less than the minimum after the PLA. The RR-5 property was less than the 5-acre minimum parcel size before the PLA and remained less than the minimum after the PLA. In other words, before and after the PLA both properties were and are "smaller than the minimum lot or parcel size for the applicable zone." The challenged decision would seem to fall squarely within the provision of subsection (2)(b) that allows such PLAs.

Petitioner argues that the challenged decision does not fall within subsection 2(b) because "the [PLA] began with only one property within the applicable F/F zone and ended with two properties within the applicable F/F zone." Petition for Review 5. If petitioner is arguing that approving the PLA resulted in the creation of a new parcel, due to the resulting split-zoned 1.99-acre property having two separate zoning classifications, petitioner is mistaken. ORS 92.010(12)(2008) defines "property line adjustment" as "* * * 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." The challenged decision begins with two properties, ends with two properties, and simply relocates a common property line between

[2] Petitioner does not argue that subsection (3) is applicable to the challenged decision.

those two abutting properties. The fact that a property is split-zoned does not mean that it qualifies as more than one property and does not mean that the county approved something other than a PLA. Further, there is nothing in subsection (2)(b) that prohibits a PLA that results in split-zoned lots or parcels. The only requirement under subsection (2)(b) is that before the PLA there are two lots or parcels that are below the minimum lot or parcel size, and that after the PLA there are two lots or parcels that are below the minimum lot or parcel size. That is precisely what occurred in the challenged decision.

Petitioner cites *Jouvenat v. Douglas County*, ___ Or LUBA ___ (LUBA No. 2008-197, February 13, 2009), in support of his argument. *Jouvenat* involved a proposed partition of a split-zoned parcel that was zoned EFU in part and Tourist Commercial in part into two units of land along the split-zoning line. We held that ORS 215.780 prohibited the partition if the resulting EFU parcel would be below the minimum parcel size. However, that holding has no bearing on whether a property line adjustment that results in a single split-zoned parcel can be approved under Oregon Laws 2008, Chapter 12, Section 2. For that reason, *Jouvenat* is inapposite.

Petitioner's assignment of error is denied.

The county's decision is affirmed.