BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

JOHN EBAR and ROZANNE EBAR,
Petitioners,

vs.

HARNEY COUNTY,
Respondent.

LUBA No. 2009-035

FINAL OPINION
AND ORDER

Appeal from Harney County.

Tyler D. Smith, Canby, filed the petition for review and represented petitioners. With him on the brief was Tyler D. Smith, P.C.

Stephen D. Finlayson, Special Assistant Counsel, Burns, represented respondent.

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

DISMISSED 07/07/2009

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

Petitioners appeal a planning commission decision approving a property line adjustment.

JURISDICTION

The county moves to dismiss this appeal because the notice of intent to appeal (NITA) was not filed within 21 days following the date that the decision sought to be reviewed became final. The county also argues that petitioners lack standing to appeal because petitioners did not appear at the hearing before the planning commission in this matter. Because we agree with the county that the appeal is untimely, we do not address the county's argument regarding standing.

The subject properties are two adjoining lots within the Garland Estates subdivision, zoned for residential use. The proposed property line adjustment decreases tax lot 500 from 1.45 acres to 1.00 acre in size, and increases tax lot 600 from 1.00 acre to 1.45 acres in size. The applicant owns both tax lots. Petitioners own tax lot 300, also within the subdivision. Petitioners' property is located across the street from and five lots east of tax lots 500 and 600.

The county planning director referred the property line adjustment application to the planning commission for a hearing, and the county provided written notice of the hearing to adjoining property owners. Under the county's code, petitioners were not entitled to receive written notice of the hearing, and were not provided written notice.[1] The county also

[1] As applicable here, Harney County Zoning Ordinance (HCZO) 9.060(3) requires the county to provide written notice to property owners within 250 feet of the subject property. ORS 197.763(2)(a)(B) similarly requires that notice of a quasi-judicial land use hearing be given to property owners "[w]ithin 250 feet of the property which is the subject of the notice where the subject property is outside of an urban growth boundary and not within a farm or forest zone[.]" The county provided written notice to 13 "adjacent property owners." Record 36-37. While the lots surrounding the subject tax lots are relatively large, it is not clear to us that providing notice to adjacent property owners satisfies the requirement to provide notice to all property owners

published public notice of the hearing in the Harney County Times. The planning commission held a hearing on the application on June 18, 2008. Petitioners did not appear at that hearing, and the planning commission made a final decision approving the application on July 16, 2008. The county mailed notice of the decision to persons who appeared at the hearing or submitted comments.

Approximately six months later petitioners made inquiries with the county regarding any land use approvals affecting tax lots 500 and 600 and, on or about February 5, 2009, received a copy of the planning commission decision approving the property line adjustment. On February 26, 2009, petitioners filed an appeal of the planning commission decision with LUBA, and contemporaneously attempted to file a local appeal of the planning commission decision with the county court. The county court declined to accept the local appeal.

ORS 197.830(9) provides that a NITA must be filed within 21 days after the appealed land use decision or limited land use decision becomes final.[2] ORS 197.830(3) provides exceptions to the 21-day time limit of ORS 197.830(9), and provides, in relevant part:

> "If a local government * * * makes a land use decision that is different from the proposal described in the notice of hearing to such a degree that the notice of the proposed action did not reasonably describe the local government's final actions, a person adversely affected by the decision may appeal the decision to [LUBA] under this section:
>
> "* * * * *
>
> "(b) Within 21 days of the date a person knew or should have known of the decision where no notice is required."

Petitioners argue that their appeal was timely filed under ORS 197.830(3)(b), because the final land use decision was different from the proposed action described in the notice of

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within 250 feet of the subject property. Nonetheless, petitioners do not allege, and it does not appear to be the case, that their property is located within 250 feet of the subject lots.

[2] ORS 197.830(9) states:

> "A notice of intent to appeal a land use decision or limited land use decision shall be filed not later than 21 days after the date the decision sought to be reviewed becomes final. * * *"

hearing to such a degree that the notice did not reasonably describe the final land use decision.

Both the notice provided to adjacent property owners and the publication notice described the proposed action as follows:

> "NOTICE is hereby given that a public hearing will be held * * * to hear the application * * * to apply for a PROPERTY LINE ADJUSTMENT on property located in Garland Acre Estates. The property is on the north side of King Ave, in the R-1 Zone. The affected tax lots are * * * Tax Lot 500 consisting of 1.45 acres and Tax Lot 600 consisting of 1.00 acre. If the proposed Property Line Adjustment occurs, Tax Lot 500 would be decreased by 0.45 acres to become a 1.00-acre parcel and Tax Lot 600 would be increased by 0.45 acres to become a 1.45-acre parcel more or less. The applicant owns both tax lots." Record 33.

As noted, the planning commission approved the property line adjustment as proposed, and the challenged decision describes the final action in virtually identical terms to the notice:

> "* * * The Harney County Planning Commission hereby APPROVES the application * * * for a PROPERTY LINE ADJUSTMENT in the R-1 Zone. The property is located on the north side of King Ave, in the R-1 Zone. The affected tax lots are * * * Tax Lot 500 consisting of 1.45 acres and Tax Lot 600 consisting of 1.00 acre. Tax Lot 500 will be decreased by 0.45 acres to become a 1.00-acre parcel and Tax Lot 600 will be increased by 0.45 acres to become a 1.45-acre parcel more or less." Record 7.

Notwithstanding that the county plainly approved the same property line adjustment that was described in the notice, petitioners argue that "the notice of the proposed action did not reasonably describe the local government's final actions" because the property line adjustment is inconsistent with HCZO 3.090(3)(D), which provides that lots within the Garland Estates subdivision shall "remain the same as shown in the subdivision plat." According to petitioners, the planning commission decision effectively abrogated or amended HCZO 3.090(3)(D), and thus the decision constitutes a *de facto* text amendment of

the HCZO.[3] Because the county can modify the HCZO only pursuant to a legislative action, petitioners contend that county's final decision is a legislative decision, a *de facto* zoning code text amendment, not a simple quasi-judicial property line adjustment. Therefore, petitioners argue, the notice of hearing did not reasonably describe the county's final action.

A quasi-judicial decision that approves a property line adjustment is not transformed into a legislative text amendment, simply because it is arguably inconsistent with an applicable approval criterion. Such a decision is at most an erroneous quasi-judicial decision that may be subject to reversal or remand if timely appealed. HCZO 3.090(3)(D) is unaffected by the decision that is before us in this appeal and remains a part of the HCZO with the same language that was in effect before the challenged decision.

As we explained in *Pacific Cascade Resources v. Columbia County*, 55 Or LUBA 216, 222 (2007), the focus of the "different notice/final action" language in ORS 197.830(3) is on differences between the "nature or scope of the proposed use" as described in the notice of proposed action and as constituted in the final action. Here, there is *no* difference between the nature and scope of the proposed property line adjustment and the property line adjustment approved in the final decision, much less a difference to such a degree that it can be said that the notice does not "reasonably describe" the final action. *See Bigley v. City of Portland*, 168 Or App 508, 4 P3d 741 (2000) (notice provided to petitioner described the proposed development in detail but omitted any description of a disputed parking lot that was approved in the final decision).

Finally, the "different notice/final action" provisions of ORS 197.830(3) generally apply to persons who are misled by a deviation in substance between the notice of proposed action and the final action, and because they are misled by the notice do not appear at the hearing and thereby become entitled to notice of the decision and hence notice of the

[3] In the challenged decision, the planning commission addressed HCZO 3.090(3)(d), but concluded that it did not prohibit the proposed property line adjustment. Record 13.

opportunity to appeal the decision. *Bigley*, 168 Or App at 513-14. Petitioners do not suggest any way in which they were or could have been misled by the notice of hearing, which they were not entitled to receive, did not receive, and apparently were not aware of. Petitioners do not even allege that they were aware of the notices of hearing, much less that they were misled by those notices.

In sum, petitioners have not demonstrated that "the notice of the proposed action did not reasonably describe the local government's final actions" for purposes of ORS 197.830(3). Petitioners do not cite any other statute or basis under which the 21-day deadline in ORS 197.830(9) is tolled or is otherwise inapplicable. Because their appeal was filed more than 21 days from the date the challenged decision became final, we must dismiss this appeal.

The appeal is dismissed.