BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

RICHARD LULAY and PATRICIA LULAY,
Petitioners,

vs.

LINN COUNTY,
Respondent,

and

GARY R. FELLING,
Intervenor-Respondent.

LUBA No. 2009-131

FINAL OPINION
AND ORDER

Appeal from Linn County.

Patricia Lulay, Clackamas, filed the petition for review and argued on behalf of petitioners.

No appearance by Linn County.

Gary R. Felling, Lyons, filed the response brief and argued on his own behalf.

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

AFFIRMED 02/24/2010

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 denies their appeal of a property line adjustment and variance.

FACTS

Intervenor, one of the applicants below, sought county approval for a property line adjustment between two existing parcels. Under ORS 92.192 and county laws that were adopted to implement that statute, property line adjustments between parcels that are smaller than the required minimum parcel size are permissible, where one of the parcels will be larger than the minimum parcel size after the adjustment. The subject tax lots are zoned Farm/Forest District, a mixed farm and forest zone. Certain additional limitations apply to parcels in mixed farm and forest zones. Under Farm/Forest zoning the nominal minimum parcel size is 80 acres. The property line adjustment would increase an existing 61.14 acre parcel (tax lot 200) to 106.26 acres and decrease an existing 68.12 acre parcel (tax lot 800) from 68.12 acres to 23 acres.

The request was initially approved by the county planning director. On appeal to the planning commission, the planning commission affirmed the planning director's decision. Petitioners appealed the planning commission's decision to the board of county commissioners, which rejected the appeal and affirmed the planning commission's decision. This appeal followed.

FIRST ASSIGNMENT OF ERROR

Petitioners' entire argument under the first assignment of error is set out below:

> "**The resulting 23 acre parcel will be reduced more than the 10% allowed ministerially for forest property**. Pursuant to the Linn County Property Line Adjustment Code the proposed property line adjustment (PLA) *should create a property compatible with the surrounding land uses and existing land development patterns*. These criteria are not supported by substantial evidence in the record. The evidence shows that all surrounding property is occupied by residences and has been used for single family residences for at least the

> past 20 years and have been 'grandfathered' in prior to the land use laws getting stricter as to the amount of land required. '*The goal is to conserve forest lands by maintaining the forest land base and to protect the state's forest economy by making possible economically efficient forest practices that assure the continuous growing and harvesting of forest tree species as the leading use on forest land . . .*' See Land Use (1994 rev with 200[0] supp) Goal 4, Farm and Forest Goals. These goals were placed secondarily to the desire to allow the PLA and variance so that recreational use could be a priority which use would be contrary to the surrounding land use and existing development patterns." Petition for Review 3-4 (emphasis added).

The first problem with the first assignment of error, and the argument that petitioners present under that assignment of error, is that petitioners inadequately identify the legal standards that form the basis of the assignment of error. That shortcoming is compounded by petitioners' failure to develop their arguments or acknowledge or challenge the adequacy of the county's findings that address the applicable legal standards. If we overlook those shortcomings and read the above argument generously, we can identify two arguments that are adequately stated for review, which we address separately below.

A. Compatibility

We understand petitioners to argue that the county's property line adjustment code requires that a property line adjustment "should create a property compatible with the surrounding land uses and existing land development patterns," and that there is not substantial evidence in the record to establish that the disputed property line adjustment complies with that requirement.

The only compatibility standard that we have been able to locate in the county's property line adjustment code appears at Linn County Code (LCC) 925.350(B)(3), which is set out below:

> "A reduction of an authorized unit of land in an EFU, F/F or FCM zoning district may be approved for less than five acres but not less than one acre only if it meets one of the tests in this subsection. *The objective of the tests is to assure compatibility with surrounding land uses and existing land development patterns.* To further that objective, the following tests shall only include resource-zoned lands:

"* * * * *." (Emphasis added.)

Petitioners appear to be relying on the above-emphasized language. That language does not identify an approval standard; it describes the *objective* of the tests set out in the omitted portion of LCC 925.350(3). That problem aside, the county set out the complete text of LCC 925.350(3) in its decision. Record 9-10. Because the smallest resulting parcel is 23 acres and LCC 925.350(3) only applies if a resulting parcel is to be between one and five acres, the county found that LCC 925.350(3) is "not applicable." Record 10. Petitioners neither acknowledge nor assign error to that finding. We therefore reject petitioners' argument.

B. Goal 4

The first sentence of Statewide Planning Goal 4 (Forest Lands) is set out in part below:

> "To conserve forest lands by maintaining the forest land base and to protect the state's forest economy by making possible economically efficient forest practices that assure the continuous growing and harvesting of forest tree species as the leading use on forest land * * *."

We understand petitioners to argue that the county improperly subordinated the above objective of Goal 4 to the applicants' desire for a property line adjustment and variance to facilitate recreational use of his property.

With one exception, the general rule is that a local government must apply the statewide planning goals directly to its land use decisions before its comprehensive plan and land use regulations are acknowledged by the Land Conservation and Development Commission under ORS 197.251, but need not do so after its comprehensive plan and land use regulations are acknowledged. ORS 197.175(2).[1] *Byrd v. Stringer*, 295 Or 311, 313, 666

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[1] ORS 197.175(2) provides:

> "Pursuant to ORS chapters 195, 196 and 197, each city and county in this state shall:
>
> "(a) Prepare, adopt, amend and revise comprehensive plans in compliance with goals approved by the commission;

P2d 1332 (1983). The exception to that general rule is for post-acknowledgment land use decisions that (1) adopt new comprehensive plans or land use regulations or (2) amend previously acknowledged comprehensive plans or land use regulations. ORS 197.175(2)(a); *Sommer v. Josephine County*, 49 Or LUBA 134, 146, *aff'd* 201 Or App 528, 120 P3d 927 (2005). The challenged decision does not adopt a new comprehensive plan or new land use regulation, and it does not amend the county's existing comprehensive plan and land use regulations. As far as we know, all Oregon cities and counties now have acknowledged comprehensive plans and land use regulations, and petitioners do not claim that the Linn County Development Code is not acknowledged.[2] Because petitioners offer no explanation for why they think the county was required to demonstrate affirmatively that the disputed property line adjustment and variance are consistent with the above quoted language from Goal 4, their argument provides no basis for reversal or remand, and we reject the argument.

The first assignment of error is denied.

SECOND ASSIGNMENT OF ERROR

Petitioners' entire argument under the second assignment of error is set out below:

> "(b) Enact land use regulations to implement their comprehensive plans;
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> "(c) If its comprehensive plan and land use regulations have not been acknowledged by the commission, make land use decisions and limited land use decisions in compliance with the goals;
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> "(d) If its comprehensive plan and land use regulations have been acknowledged by the commission, make land use decisions and limited land use decisions in compliance with the acknowledged plan and land use regulations; and
>
> "(e) Make land use decisions and limited land use decisions subject to an unacknowledged amendment to a comprehensive plan or land use regulation in compliance with those land use goals applicable to the amendment."

[2] As the Court of Appeals observed twenty years ago as LCDC's acknowledgment process was nearing completion:

> "[I]t is somewhat questionable whether we should write any opinion to affirm an acknowledgment order at this point in history. The exercise is akin to writing a veterinary textbook on the treatment of dinosaurs." *Denison v. Douglas County* 101 Or App 131, 137, 789 P2d 1388, 1391 (1990).

"**Respondent Improperly Granted the Variance**.

"Pursuant to Linn County Variance Procedure Code §938.300 – Decision Criteria Property Development Standards Respondent cannot grant a variance unless all of the required conditions exist, namely that there are conditions or circumstances on the land that renders development impractical or impossible, that a variance will not have a significant adverse affect on property, improvements, or public health or safety in the vicinity of the subject property, and that the variance is limited to the minimum necessary to permit otherwise normal development of the property. These criteria are not met and are not supported by substantial evidence in the record.

"Additionally, variance relief is not available to facilitate the applicant's desire for a particular lot configuration. Applicants/Intervenors wanted this particular lot line adjustment so they could keep a significant portion of the original 68 +/- acre parcel and only sell off a 23 +/- acre parcel so that they could obtain much needed financial relief as stated in the record of the November 4, 2009 proceedings. This is not the type of hardship that that creates a need for a variance.

"Respondent's decision to grant the variance in this case is not supported by substantial evidence [in] the whole record." Petition for Review 4.

A. LCC 938.300 Variance Criteria

LCC 938.300 requires that the county find that (1) a requested variance is needed because there is a circumstance or condition present on the property that "renders development impractical or impossible," (2) the variance "will not have a significant adverse affect on property," and (3) "the variance is limited to the minimum necessary."[3] We

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[3] The complete text of LCC 938.300 is set out below:

"(A) Except as provided in LCC 938.100, a variance may be granted from the standards regulating property development as set forth in LCC 934 (Development Standards Code) if on the basis of the application, investigation, testimony and evidence submitted, the findings and conclusions show that all of the criteria in subsection (B) have been met.

(B) *Decision criteria.*

"(1) A variance from a development standard as set forth in LCC 934 (Development Standards Code) is needed because conditions or circumstances or both exist on the land or structure involved that renders development impractical or impossible;

understand petitioners to argue that the county's findings regarding the LCC 938.300 variance criteria are not adequate to demonstrate that the three LCC 938.300 variance criteria are satisfied and are not supported by substantial evidence.

The county adopted more than four pages of single-spaced findings that address the three LCC 938.300 variance criteria. Record 14-18. Petitioners do not acknowledge, discuss or make any attempt to explain why they believe those findings are inadequate. Petitioners similarly advance only an undeveloped assertion that they believe those unchallenged findings are not supported by substantial evidence.

As we have explained on numerous occasions, a petitioner at LUBA must do more than disagree with a decision or assert an undeveloped claim that the appealed decision does not comply with applicable criteria. *Swyter v. Clackamas County*, 40 Or LUBA 166, 185 (2001); *Marine Street LLC. v. City of Astoria*, 37 Or LUBA 587, 596 (2000); *Deschutes Development v. Deschutes Cty*, 5 Or LUBA 218, 220 (1982). Petitioners' argument that the LCC 938.300 variance criteria are not satisfied is not sufficiently developed for review, and for that reason the argument is rejected.

B. Applicant's Desires/Hardship

Petitioners contend the variance cannot be granted simply to accommodate the applicant's desires. However, petitioners make no attempt to demonstrate that the county based its decision on a desire to accommodate the applicant's desires, rather than its findings that the application complies with relevant approval criteria. Petitioners also seem to contend that the variance must be based on a "hardship," but cite no criterion that imposes a

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"(2) Granting a variance from a development standard will not have a significant adverse affect on property, improvements, or public health or safety in the vicinity of the subject property; and

"(3) Approval of the variance is limited to the minimum necessary to permit otherwise normal development of the property for the proposed use."

"hardship" requirement. Petitioners' arguments concerning the applicants' desires and the lack of a hardship provide no basis for reversal or remand.

The second assignment of error is denied.

THIRD ASSIGNMENT OF ERROR

Petitioners' entire argument under the third assignment of error is set out below:

> "**Respondent[] did not require intervenor's application to be complete prior to approval.**
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> "The application failed to contain significant and accurate information and therefore the Department did not base its decision on completely accurate information. Additionally, the Department completed parts of Intervenor's application on behalf of Intervenor, namely § V. (D), (E), and (F) relating to the reasons for the variance. Petitioners are prejudiced by this advocacy because it misstates the true reasons for the variance. The applicant gave contradictory testimony regarding the reasons for the variance and the PLA at the November 4, 2009 [hearing]. At the hearing on November 4, 2009 petitioners raised the issue of bias and interest on the part of the Department which concern was dismissed by the Board of Commissioners. It was clear that the Board of Commissioners had not read nor familiarized themselves with the complex legal issues involved. The decision was not reached by applying the standards to the evidence presented." Petition for Review 5.

A. Inaccurate Information

Petitioners' undeveloped claim that the challenged decision is based on inaccurate information is not sufficiently developed to allow review.

B. Improper Staff Assistance/Bias

Parties in a quasi-judicial land use proceeding have a right to a decision by a "tribunal which is impartial in the matter * * *." *Fasano v. Washington Co. Comm.*, 264 Or 574, 588, 507 P2d 23 (1973). However, we are aware of no authority for the propositions that planning staff may not assist applicants for land use permit approval or that planning staff—as opposed to the ultimate local government decision maker—must be impartial in their dealings with applicants for land use permit approval and opponents of such permits. To the contrary, planning staff frequently take a position in support of or in opposition to land use

permit applications. In this case, the initial decision was rendered by the planning director, and a lack of impartiality on the part of the planning director could potentially run afoul of the impartial tribunal requirement in *Fasano*. However, petitioners exercised their right to appeal the planning director's decision to the planning commission and to appeal the planning commission's decision to the board of county commissioners. Because the planning director did not render the decision that is before us in this appeal, any lack of impartiality on the part of the planning director in this matter is legally irrelevant.

C. Real Reason for the Variance

Petitioners claim there was misleading testimony about the real reason for the requested property line adjustment and variance, but fail to identify any approval standard that makes an applicant's real motivation for a property line adjustment or variance legally relevant. Based on that failure, petitioners' contention that there may have been confusion about the true reason for the request provides no basis for reversal or remand.

D. Board of County Commissioners' Preparation

Petitioners' undeveloped assertion that "the Board of Commissioners had not read nor familiarized themselves with the complex legal issues involved" and did not "apply[] the standards to the evidence presented" is not sufficiently developed to allow review and for that reason is rejected.

The third assignment of error is denied.

The county's decision is affirmed.