BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

KENDRA LOUKS and JOHN LOUKS,
Petitioners,

vs.

JACKSON COUNTY,
Respondent.

LUBA No. 2011-085

FINAL OPINION
AND ORDER

Appeal from Jackson County.

Kendra Louks and John Louks, Medford, filed the petition for review and argued on their own behalf.

No appearance by Jackson County.

Daniel O'Connor, Medford, filed an amicus brief on behalf of John Duke, Trustee of the Duke Family Trust. With him on the brief was Huycke, O'Connor, Jarvis, Dreyer, Davis & Glatte, LLP.

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

AFFIRMED 02/16/2012

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 hearings officer's decision approving a property line adjustment.

MOTION TO FILE REPLY BRIEF

Petitioners move to file a reply to address new matters raised in the amicus brief. The reply brief is allowed.

FACTS

The subject property consists of two adjoining parcels zoned for exclusive farm use (EFU). Parcel 1 consists of approximately 236 acres and includes a dwelling and barns. Parcel 2 is 1.20 acres in size and is undeveloped. A rancher has conducted a sheep grazing operation on the subject property for a number of years. Amicus, the owners and applicants below, seek to expand Parcel 2 to approximately 19 acres in size, to include the existing dwelling currently located on Parcel 1, and to decrease the size of Parcel 1 to 218 acres.

Amicus filed the property line adjustment (PLA) application on October 27, 2010. Jackson County Land Development Ordinance (LDO) 3.4.3 sets out the approval criteria for a PLA, and provides in relevant part that a PLA in a resource zone "for the purpose of transferring a dwelling from one parcel to another may be approved provided the parcel receiving the dwelling qualifies for a homesite." LDO 3.4.3(G)(3). Apparently to demonstrate that Parcel 2 as adjusted would qualify for a homesite as a "dwelling customarily provided in conjunction with farm use" (farm dwelling) under LDO 4.2.6, based on gross annual income, amicus submitted Schedule F tax forms from the rancher into the record of the property line adjustment application.

On January 12, 2011, amicus filed a separate land use application intended to qualify Parcel 2 as adjusted for a farm dwelling under LDO 4.2.6. LDO 4.2.6(C)(3) requires in relevant part that to qualify as a farm dwelling on non-high-value farmland, an applicant must demonstrate that the subject property is currently employed for farm use that has

produced in the last two years or last three of five years at least $32,000 in gross annual income. On April 1, 2011, county staff issued a tentative decision concluding that Parcel 2 adjusted as proposed in the PLA application qualifies for a farm dwelling, based on evidence that amicus submitted as part of the farm dwelling application. No local appeal of that decision was filed, and on April 14, 2011, the farm dwelling approval became a final decision.

On April 5, 2011, county staff issued a tentative approval of the PLA application. The April 5, 2011 staff decision relied upon the previously approved April 1, 2011 farm dwelling approval to demonstrate that the PLA complies with the LDO 3.4.3(G)(3) requirement that "the parcel receiving the dwelling qualifies for a homesite." On April 18, 2011, petitioners filed a local appeal of the April 5, 2011 PLA decision to the hearings officer. The hearings officer conducted a hearing, at which petitioners argued that the evidence in the record does not demonstrate that Parcel 2 as adjusted qualifies for a homesite. During the open record period following the hearing in the PLA appeal, petitioners submitted into the record some of the financial evidence that was in the record of the farm dwelling approval. On August 12, 2011, the hearings officer issued the decision before us, denying the appeal and approving the PLA. In relevant part, the hearings officer concluded that the April 1, 2011 farm dwelling approval cannot be collaterally attacked in the appeal of the PLA approval, and that as a matter of law the farm dwelling approval is sufficient to demonstrate the PLA complies with the LDO 3.4.3(G)(3) requirement that the "parcel receiving the dwelling qualifies for a homesite." This appeal followed.

FIRST THROUGH FIFTH, SEVENTH THROUGH TENTH ASSIGNMENTS OF ERROR

Under each of these assignments of error, petitioners challenge from slightly different perspectives the hearings officer's conclusion that the April 1, 2011 farm dwelling approval establishes as a matter of law that Parcel 2 as adjusted "qualifies for a homesite," and thus

that the PLA complies with LDO 3.4.3(G)(3). We understand petitioners to argue that the April 1, 2011 farm dwelling approval has no legal effect whatsoever for purposes of demonstrating that the property line adjustment complies with LDO 3.4.3(G)(3), and the county can grant the requested property line adjustment only if the county finds, based on substantial evidence in the record supporting the property line adjustment application, that Parcel 2 qualifies for a homesite. According to petitioners, the evidence in the record of the property line adjustment application, specifically the farmer's Schedule F tax records, is insufficient to demonstrate that Parcel 2 as adjusted generates sufficient income to qualify for a farm dwelling LDO 4.2.6.

The hearings officer rejected this argument below, finding:

> "An opponent raised concerns regarding whether the * * * Homesite Approval was properly granted, arguing that the income requirement of [LDO] 4.2.6(C)(1) [was] not satisfied. However, the decision approving that homesite is final. This argument is an impermissible collateral challenge on that decision." Record 9.

Later in the decision, the hearings officer repeats:

> "A substantial portion of the Appellant's [argument is] devoted to challenging the Homesite Approval. Record 237-245. This challenge is impermissible. To repeat, the Homesite Approval became final without appeal, and it is immune from challenge. The Homesite Approval is valid as a matter of law as is the fact that [LDO] 3.4.3(G)(3) is met." *Id*.

On appeal, petitioners dispute that their argument is a collateral attack on the April 1, 2011 farm dwelling approval. According to petitioners, they do not seek to challenge the validity of the April 1, 2011 farm dwelling approval, but simply argue that LDO 3.4.3(G)(3) requires by its terms that the county determine in its *property line adjustment decision* that the parcel receiving the dwelling in fact qualifies for a homesite and that determination must be supported by substantial evidence in the record of the property line adjustment application. Because the county failed to make that determination, and the record does not include sufficient information to make that determination, petitioners argue that remand is necessary

to make the determination required by LDO 3.4.3(G)(3), based if necessary on additional evidence.

In the present case, the applicant filed a separate application for a farm dwelling approval on adjusted Parcel 2, the county approved that application, and that decision was not appealed and became final prior to the county issuing a decision on the property line adjustment decision. The county was therefore entitled to rely on that final farm dwelling approval to determine, in the property line adjustment proceeding, that LDO 3.4.3(G)(3) is satisfied. No purpose would be served in requiring the county to duplicate its April 1, 2011 decision concerning whether Parcel 2 qualifies for approval of farm dwelling, in approving the property line adjustment four days later. Requiring such duplication would render the April 1, 2011 decision meaningless. If the county committed error in its April 1, 2011 farm dwelling approval decision, any such error could have been challenged by filing a local appeal of the farm dwelling approval decision and, if necessary, appealing the outcome of the local appeal to LUBA. For whatever reason, petitioners filed no such local appeal of the farm dwelling approval. Whether petitioners' argument is characterized as an attempt to collaterally attack the April 1, 2011 decision or an argument that the April 1, 2011 decision cannot be given preclusive legal effect regarding the legal and factual issues it resolved, we reject the argument. Petitioners' arguments under these assignments of error do not provide a basis to reverse or remand the challenged property line adjustment decision.

The first through fifth, and seventh through tenth assignments of error are denied.

SIXTH ASSIGNMENT OF ERROR

LDO 4.2.2 provides a table that lists all of the uses allowed in the county's EFU zone. The listed uses are based on the uses allowed or conditionally allowed in the EFU zone under ORS chapter 215. LDO 4.2.3 sets out "General Review Criteria" for the conditionally allowed uses listed in Table 4.2.2, and requires the county to find that:

"[t]he use may be approved only where the use:

"A) Will not force a significant change in accepted farm or forest practices on surrounding lands devoted to farm or forest use; and

"B) Will not significantly increase the cost of accepted farm or forest practices on surrounding lands devoted to farm or forest use. * * *"

The general review criteria at LDO 4.2.3 implement the statutory criteria at ORS 215.296(1) for conditional uses allowed in EFU zones under ORS 215.213(2) or 215.283(2).

Petitioners argued to the hearings officer that the proposed property line adjustment is a "use" subject to the general review criteria at LDO 4.2.3. The hearings officer disagreed, finding that "Section 4.2.3 by its terms is limited to uses. In this instance no uses are being considered, altered or allowed—only the location of a property line." Record 11. Petitioners assign error to that finding. Petitioners argue that county staff characterized the property line adjustment as a "use," citing to printed language in the notice of tentative decision that county staff provided to nearby property owners. Record 387. Petitioners further argue that it is appropriate to apply LDO 4.2.3 to this property line adjustment, because the adjustment may significantly affect farming practices and increase farming costs on Parcels 1 and 2, by reducing the acreage of grazing land available to the owner of the sheep grazing operation on Parcel 2 and requiring the owner of Parcel 1 to construct new barns and farm structures to replace those now located on Parcel 2.

Petitioners have not established that the hearings officer erred in concluding that LDO 4.2.3 is limited to approval of "uses" and that an application to adjust property lines is not an application for approval of a "use" for purposes of LDO 4.2.3. In referring to the "use," LDO 4.2.3 clearly refers to the list of uses set out in Table 4.2.2, which does not include property line adjustments. Boilerplate printed language in the notice of tentative decision at Record 387 does describe the decision as approving a "use," but that boilerplate language does nothing to undermine the hearings officer's conclusion that a property line adjustment is not a "use" for purposes of LDO 4.2.3.

Amicus notes that LDO 13.3(290) defines "use" as "[t]he purpose for which land, accessways, buildings or structures are designed, arranged, or intended, or for which a building or structure is occupied or maintained, whether on a permanent or temporary basis," and argues that a property line adjustment does not fall within that definition. In the reply brief, petitioner argues to the contrary that if one removes from the definition the references to buildings and structures a property line adjustment can be viewed as a "use" because it concerns the "design" and "arrangement" of "land." However, even under that limited paraphrase LDO 13.3(290) describes "use" as the *purpose* for which land is designed or arranged, not the design or arrangement of land itself. In other words, while adjusting property boundaries likely *facilitates* some intended land use, such as a farm or residential use, the adjustment of boundaries is not itself a "use" of land under the LDO 13.3(290) definition. The hearings officer correctly concluded that LDO 4.2.3 applies only to proposals for uses of land listed in Table 4.2.2, and that a property line adjustment is not a "use" under the county code.

The sixth assignment of error is denied.

ELEVENTH ASSIGNMENT OF ERROR

LDO 8.9 provides standards for approving a parcel area reduction. LDO 8.9.1, entitled "Purpose and Scope," states that the county can approve a parcel area reduction "for the purpose of dividing land to separate preexisting dwellings onto individual parcels," implementing OAR 660-004-0040(7)(h) or (8)(g).[1] LDO 8.9.2 sets out "approval criteria,"

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[1] LDO 8.9 provides, in relevant part:

> **"8.9 PARCEL AREA REDUCTIONS**
>
> **"8.9.1 Purpose and Scope**
>
> "The County may approve a parcel area reduction as a Type 1 permit for the purpose of dividing land to separate preexisting dwellings onto individual parcels, subject to the land division requirements of this Ordinance and compliance with the following: *(OAR 660-004-0040, 7(h) or (8)(g))*

and requires in relevant part a finding that "[t]he requested adjustment does not interfere with accepted farming practices on adjacent lands devoted to farm use and does not adversely alter the stability of the overall land use pattern of the area[.]" LDO 8.9.2(B).

Petitioners argued below that LDO 8.9.2(B) is an applicable approval criterion for the proposed property line adjustment and the county therefore must adopt findings addressing

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"A) The parcel to be divided contains two (2) or more permanent habitable dwellings;

"B) The dwellings were lawfully established before April 3, 2001, except in forest zones where they must have lawfully existed prior to November 4, 1993;

"C) Each new parcel created by the partition contains at least one (1) of the permanent habitable dwellings;

"D) The partition will not create any vacant parcels or lots; andJackson County, Oregon Chapter 8 Page 19

"E) If the parcel to be divided is within one (1) mile of the Ashland, Central Point or Medford urban growth boundary (i.e., the urban fringe), the resulting parcels will also comply with the provisions of OAR 660-004-0040(7)(h) or (8)(g).

"* * * * *

"8.9.2 Approval Criteria

"Applications will be processed under the Type 2 procedures of Section 3.1.3, unless otherwise specified in this Ordinance, and may only be approved when all of the following criteria are met:

"A) The requested adjustment will not have an appreciable adverse impact on the health, safety, or welfare of surrounding property owners or the general public;

"B) *The requested adjustment does not interfere with accepted farming practices on adjacent lands devoted to farm use and, does not adversely alter the stability of the overall land use pattern of the area*;

"C) If the requested adjustment is to the minimum lot size, the applicant has demonstrated that all reasonable efforts to obtain the requisite amount of additional land needed to conform with the minimum lot size requirement through purchase, partitioning, or lot line adjustment are unfeasible; and

"D) Nonconforming lots or parcels created pursuant to this subsection must meet the access requirements of this Ordinance. * * * Except as indicated above, divisions made under this Section will comply with all other land division procedures and standards set forth in this Ordinance." (Emphasis added.)

alleged impacts on accepted farming practices on Parcels 1 and 2 caused by the property line adjustment. The hearings officer rejected that argument, stating:

> "Section 8.9 concerns 'parcel area reduction[s] * * * for the purpose of *dividing land* to separate preexisting dwellings onto individual parcels.' Emphasis added. The creation of a new lawful parcel is central to the applicability of Section 8.9, but the Application does not seek to create a new parcel. Rather, it seeks approval to move the lines that separate two existing lawful parcels. There is no requirement that the Application address Section 8.9.2" Record 6-7.

On appeal, petitioners argue that the hearings officer erred in concluding that LDO 8.9.2(B) does not apply to a property line adjustment. Petitioners note that while the LDO 8.9.1 "Purpose and Scope" provisions speak of partitions and land divisions, LDO 8.9.2 "Approval Criteria" instead speaks of "adjustments." We understand petitioners to argue that unlike LDO 8.9.1, LDO 8.9.2 is not concerned with parcel area reductions to divide land to separate preexisting dwellings, but instead supplies approval criteria for any property line "adjustment," in addition to property line adjustment approval criteria set out in LDO 3.4.

The relationship between the subsections of LDO 8.9 is somewhat unclear. LDO 8.9 as a whole is entitled "Parcel Area Reductions." LDO 8.9.1 is entitled "Purpose and Scope," and describes that purpose as concerning parcel area reductions for the purpose of dividing land. Rather oddly for a purpose statement, LDO 8.9.1 goes on to include substantive approval criteria, land division standards implementing OAR 660-004-0040(7)(h) and (8)(g), which governs application of Statewide Planning Goal 14 (Urban Lands) to rural residential areas. LDO 8.9.2 is labeled "Approval Criteria," but oddly enough for a subsection of a code section that seems to concern "parcel area reductions" does not mention "parcel area reductions." Instead, LDO 8.9.2 includes three of four criteria that refer to the "requested adjustment," but it is not entirely clear what is meant by "adjustment." A property line adjustment could be viewed as a "parcel area reduction," in that one or more parcels whose boundaries are adjusted could be reduced in size. But that is not necessarily the case: a

property line adjustment could move a common boundary in a way that that does not result in a net reduction in area for any parcel.

We note that LDO 8.9.2(C) gives a specific example of an "adjustment," specifically an "adjustment" to the minimum lot size. The same criterion requires the applicant for an adjustment to the minimum lot size to demonstrate that additional land cannot be obtained via a "lot line adjustment," which suggests that a "requested "adjustment" as that term is used in LDO 8.9.2 does not refer to a property line adjustment. The above suggests that LDO 8.9.2 uses the term "adjustment" to mean a requested adjustment or variance of sorts to some standard.

That view is supported by the larger context. LDO Chapter 8 as a whole is entitled "Dimensional Standards, Measurements and Adjustments." As used in other sections of LDO chapter 8, the term "adjustment" appears to refer to adjustments to dimensional standards, setbacks, etc. *See* LDO 8.5.3(A) (providing for an adjustment to a solar orientation setback). Under the LDO in general, the term "adjustment" generally means a minor modification or variance to a standard. *See* LDO 3.12 (general standards for approving an administrative adjustment).

The approval criteria for a property line adjustment are set out in LDO 3.4.3, which include no cross-reference to LDO 8.9.2. Given the context of LDO 8.9.2(B), it is relatively clear that the "adjustment" referred to in that subsection means an adjustment or variance to dimensional, size setback or similar standards, not a "property line adjustment." Accordingly, the hearings officer did not err in concluding that LDO 8.9.2 does not supply approval standards for a property line adjustment.

The eleventh assignment of error is denied.

The county's decision is affirmed.