BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

MICHAEL LABARE,
Petitioner,

vs.

CLACKAMAS COUNTY,
Respondent.

LUBA No. 2014-084

FINAL OPINION
AND ORDER

Appeal from Clackamas County.

Ross Day, Portland, filed the petition for review.

Nathan K. Boderman, Assistant County Counsel, Oregon City, filed a response brief.

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

AFFIRMED 01/13/2015

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 hearings officer interpretation of the county's zoning and development ordinance.

REPLY BRIEF

Petitioner moves for permission to file a reply brief. The reply brief is allowed.

ASSIGNMENT OF ERROR

Petitioner argues that the county hearings officer's interpretation of Clackamas County Zoning and Development Ordinance (ZDO) 1107.04(B)(2)(b) improperly construes that section of the ZDO. ORS 197.835(9)(a)(D). ZDO 1107.04(B)(2)(b) provides one way for a property line adjustment between two parcels that are less than the minimum Exclusive Farm Use zone (EFU-zone) parcel size (80 acres) to be approved:

> "2. A property line adjustment for a lot, parcel, or tract of land less than 80 acres may be approved pursuant to the following provisions:
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> " * * * * *
>
> "b. *The resulting configuration (size) is determined to be at least as appropriate for the continuation of the existing commercial agricultural enterprise <u>on each property</u>, as compared to the original configuration*[.]"[1] (italics and underlining added).

[1] ZDO 1107.04(B)(2) implements in part ORS 92.192, which allows in certain circumstances a property line adjustment of two parcels in an exclusive farm use zone that do not meet minimum lot sizes for the EFU zone. *See Just*

Petitioner applied to the county for an interpretation of whether a property line adjustment could be approved under ZDO 1107.04(B)(2)(b) that would adjust the property line between two adjacent parcels in the county's Agricultural zone, an EFU zone. Each parcel is less than 80 acres in size. Petitioner hypothesized that ZDO 1107.04(B)(2)(b) would allow moving the property line that separates Parcel 1, a 60-acre parcel, and Parcel 2, a 20-acre parcel. Parcel 1 is used to grow commercial nursery stock. On Parcel 2, 18 acres are used for commercial hay production, and two acres for an existing dwelling. Petitioner proposed to move the property line separating Parcels 1 and 2 so that the 18 acres of Parcel 2 currently used for hay production would be added to Parcel 1 to become part of the commercial nursery stock operation. The result would be that Parcel 1 would include 78 acres and Parcel 2 would include 2 acres and include only the existing dwelling and no commercial agricultural enterprise. Petitioner hypothesized that such a reconfiguration of the two parcels would be consistent with ZDO 1107.04(B)(2)(b), because the physical areas of both parcels currently occupied by commercial agricultural enterprises would continue to be occupied by a commercial agricultural enterprise after the adjustment. Specifically, petitioner argued that the 18-acre physical area of Parcel 2 to be incorporated into Parcel 1 would constitute one of the two properties referred to in the phrase "each property." Because commercial agricultural enterprises would continue on both of the physical areas that make up the 78-acre Parce1 after reconfiguration, petitioner argued that such a reconfiguration complies with ZDO 1107.04(B)(2)(b).

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v. Linn County, 59 Or LUBA 112 (2009) (explaining the provisions of ORS 92.192).

The planning director and the hearings officer rejected petitioner's proposed interpretation of ZDO 1107.04(B)(2)(b), and instead interpreted the phrase "each property" to refer to the two parcels or units of land that are reconfigured. Under their interpretation, ZDO 1107.05(B)(2)(b) requires that, after the reconfiguration, each of the two parcels involved must continue to be of a size and configuration appropriate to continue the existing commercial agricultural enterprise on each parcel. For the reasons below, we agree with that interpretation.

The term "property" is not defined in the ZDO. The hearings officer relied on context provided by the definition of "property line adjustment" in ZDO 1107.02(A) and "property line" in ZDO 1107.02(F), each of which include reference to a "lot of record."[2] The hearings officer concluded that that context demonstrates that the county's use of the word "property" in ZDO 1107.04(B)(2)(b) was intended in the generic sense to mean something akin to the unit of land that is the subject of the property line adjustment application,

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[2] ZDO 1107.02(F) defines "property line" as "[t]he division line(s) between two abutting lots of record." ZDO 1107.02(A) defines "property line adjustment" as "[a] relocation of a common property line between two abutting lots of record, where an additional lot of record is not created, and any existing lot of record reduced in size by the adjustment complies with the provisions of this Ordinance."

ZDO 202 defines "Lot of Record" in relevant part as "[a] lot, parcel, other unit of land, or combination thereof, that conformed to all zoning and Subdivision Ordinance requirements and applicable Comprehensive Plan provisions, in effect on the date when a recorded separate deed or contract creating the lot, parcel or unit of land was signed by the parties to the deed or contract[.]" ZDO 1107.02(B) provides in relevant part "[a]s used in this section, the words 'lot' and 'parcel' are synonymous with the term 'lot of record.'"

and to be synonymous with the terms "lot of record," "lot," and "parcel." Record 8-9.

Petitioner argues that the hearings officer's interpretation is inconsistent with the maxim of statutory construction that the use of one term in one section and not in another section indicates purposeful omission and that the hearings officer's interpretation of the word "property" fails to recognize that the county used an undefined term, "property," instead of using one of the defined terms "lot of record," "parcel," or "lot" that the hearings officer found the word "property" to mean. Accordingly, petitioner argues, the hearings officer erred in inserting words into the ZDO in contravention of ORS 174.010.[3]

We review the hearings officer's interpretation to determine whether it is correct. *Gage v. City of Portland*, 133 Or App 346, 349-50, 891 P2d 1331 (1995). We think it is correct and is the only reading of the ZDO provision that is consistent with the full text and context of ZDO 1107.04(B)(2)(b). Although the county's use of the word "property" is imprecise, petitioner's interpretation focuses exclusively on the word "property" and ignores context provided in the definition of "property line adjustment" and "property line" found in the same ZDO section governing Property Line Adjustments, which support the hearings officer's interpretation of the word "property" as referring generally to

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[3] ORS 174.010 provides:

> "In the construction of a statute, the office of the judge is simply to ascertain and declare what is, in terms or in substance, contained therein, not to insert what has been omitted, or to omit what has been inserted; and where there are several provisions or particulars such construction is, if possible, to be adopted as will give effect to all."

whatever units of land (parcels, lots, or lots of record) are the subject of the property line adjustment application that triggers application of ZDO 1107.04(B)(2)(b).

Petitioner's interpretation also fails to acknowledge context provided by the requirement that "each" property maintain the existing commercial agricultural enterprise on the property. The phrase "each property" refers back to the two units of land, however they are described – as parcels, lots, or lots of record – that are the subject of the property line adjustment application that triggers application of the standards in ZDO 1107.04(B)(2)(b) in the first place. That reference supports the interpretation of "property" as being synonymous with the two units of land that are the subject of the application. The size of those two units of land (78 acres and two acres) must "be at least as appropriate for the continuation of the existing commercial agricultural enterprise on each property" as was the "original" size (60 acres and 20 acres).

The assignment of error is denied.

The county's decision is affirmed.