BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

FRIENDS OF YAMHILL COUNTY,
Petitioner,

vs.

YAMHILL COUNTY,
Respondent,

and

MICHAEL HINTERMEYER,
Intervenor-Respondent.

LUBA No. 2016-057

FINAL OPINION
AND ORDER

Appeal from Yamhill County.

Ian Simpson, Portland, filed the petition for review and argued on behalf of petitioner.

No appearance by Yamhill County.

David J. Hunnicutt, Tigard, filed the response brief and argued on behalf of intervenor-respondent. With him on the brief was Oregonians In Action Legal Center.

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

REVERSED 09/01/2016

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 decision by the county approving a property line adjustment.

FACTS

Intervenor-respondent (intervenor) owns property that is zoned AF-80 and consists of high-value farmland.[1] In October 2009, the Department of Land Conservation and Development (DLCD) authorized, with conditions, one additional home site and one additional parcel on intervenor's 80-acre property, pursuant to a final order (DLCD Final Order). Record 81-88. We explain the DLCD Final Order in more detail below.

On December 15, 2015, the county approved an application to partition intervenor's 80-acre parcel into a 78-acre (Parcel 1) and 2-acre parcel (Parcel 2). On December 18, 2015, the county planning director approved intervenor's application to adjust the property lines between Parcel 1 and Parcel 2 to transfer 38 acres from Parcel 1 to Parcel 2, resulting in two forty-acre parcels.

[1] ORS 195.300 sets out definitions that apply to certain statutes governing just compensation for land use regulations. ORS 195.300(10) defines "[h]igh-value farmland" in relevant part to mean "[h]igh-value farmland as described in ORS 215.710 that is land in an exclusive farm use zone or a mixed farm and forest zone, except that the dates specified in ORS 215.710 (2), (4) and (6) are December 6, 2007[.]" ORS 195.300(10)(a).

DLCD appealed the planning director's decision to the board of county commissioners, who affirmed the decision. This appeal followed.

JURISDICTION

ORS 195.318(1) provides in relevant part that a determination by a public entity under sections 5 to 11 of Measure 49 is not a "land use decision" as defined in ORS 197.015(10)(a)(A):

> "A person that is adversely affected by a final determination of a public entity under ORS 195.310 to 195.314 or sections 5 to 11, chapter 424, Oregon Laws 2007 * * * may obtain judicial review of that determination under ORS 34.010 to 34.100, if the determination is made by Metro, a city or a county, or under ORS 183.484, if the determination is one of a state agency. * * * *A determination by a public entity under ORS 195.310 to 195.314 or sections 5 to 11, chapter 424, Oregon Laws 2007 * * * is not a land use decision*." (Emphasis added.)

As relevant here, LUBA has exclusive jurisdiction to review an appeal of a "land use decision." In its response brief, intervenor argues that the last sentence of ORS 195.318(1) deprives LUBA of jurisdiction over the county's decision. That is so, intervenor argues, because the county's determination that Measure 49, Section 11(3)(a)(A) did not prohibit the property line adjustment (PLA) is a decision "under * * * section[] 11, chapter 424, Oregon Laws 2007[.]" At oral argument, petitioner responded that the county's decision is not a decision "under" Section 11(3)(a)(A), citing *Maguire v. Clackamas County*, 250 Or App 146, 279 P3d 314 (2012).

We disagree with intervenor. First, Section 11 sets out approval criteria for "[a] subdivision or partition of property, or the establishment of a dwelling

on property, authorized under sections 5 to 11[.]" The application does not seek, and the challenged decision does not approve, a subdivision or partition of property, or the establishment of a dwelling.

Second, the challenged decision is not a decision "under" Section 11 because the county did not review the PLA application under the authority of Section 11. *Maguire*, 250 Or App at 156 ("the term 'under' as used in ORS 195.318(1) means 'as authorized by' and * * *, if the local government purported to review the Measure 49 partition application under the authority of sections 5 to 11, then ORS 195.318(1) operates to preempt LUBA review"). Rather, the county reviewed the PLA application under the Yamhill County Zoning Ordinance (YCZO) criteria that apply to property line adjustments, and in the course of that review considered petitioner's argument that Section 11(3)(a)(A) prohibits the county from approving the PLA. We do not think consideration of whether a provision of Measure 49 prohibits the PLA is a decision "under" section 11 as that term is used in ORS 195.318(1). Accordingly, the challenged decision is a "land use decision" over which we have jurisdiction.

FIRST ASSIGNMENT OF ERROR

We begin with a brief explanation of the statutory framework that allowed intervenor to apply for and the county to approve the December 15, 2015 partition.

A. Measure 49

As noted, the subject parcels are zoned AF-80, an exclusive farm use zone that generally prohibits parcels less than 80 acres in size and limits the establishment of new dwellings on existing parcels. In 2004, the voters approved Ballot Measure 37, which allowed the state and local governments facing a claim for compensation for loss of property value from restrictions on the use of property to waive certain land use regulations, to allow the owner to use property for a use permitted when the owner acquired the property. Intervenor filed a claim with the state under Measure 37 for additional home sites. Record 82.

In 2007, the legislature enacted Oregon Laws 2007, chapter 424. That legislation was referred to the voters in the next election as Ballot Measure 49 and the voters approved it. Measure 49 superseded Measure 37. *Corey v. DLCD*, 344 Or 457, 466–67, 184 P3d 1109 (2008). Measure 49 extinguished Measure 37 waivers and allowed a Measure 37 claimant to pursue one of three alternative "pathways" under Measure 49. *Friends of Yamhill County v. Board of Commissioners*, 351 Or 219, 225, 264 P3d 1265 (2011). Under Measure 49, a Measure 37 claimant could elect to seek a limited number of dwellings on newly created lots or could pursue a "vested rights" claim for the full relief previously sought under Measure 37.

Intervenor elected to proceed under Section 6 of Measure 49, which allowed DLCD to authorize up to three home site approvals. As noted, in

October 2009 DLCD issued with conditions the DLCD Final Order, authorizing one additional parcel and one additional home site on intervenor's 80-acre parcel.

Section 11 of Measure 49 sets out additional statutory standards and requirements that local governments must apply in approving the creation of a new lot or parcel, or one or more dwellings authorized under Sections 5 to 11 of Measure 49. As relevant here, subsection (3) provides that a new lot or parcel on resource land may not exceed two acres if the lot or parcel is located on high-value farmland:

> "(a) A city or county may approve the creation of a lot or parcel to contain a dwelling authorized under sections 5 to 11 of this 2007 Act. However, a new lot or parcel located in an exclusive farm use zone, a forest zone or a mixed farm and forest zone may not exceed:
>
> "(A) Two acres if the lot or parcel is located on high-value farmland, on high-value forestland or on land within a ground water restricted area; or
>
> "(B) Five acres if the lot or parcel is not located on high-value farmland, on high-value forestland or on land within a ground water restricted area.
>
> "(b) If the property is in an exclusive farm use zone, a forest zone or a mixed farm and forest zone, the new lots or parcels created must be clustered so as to maximize suitability of the remnant lot or parcel for farm or forest use."

The DLCD Final Order includes Condition 10, which encapsulates the parcel size limits of subsection (3)(a).[2] The partition approved by the county on December 15, 2015, approved the creation of a 2-acre parcel and a 78-acre parcel, and concluded that the partition application complied with Measure 49, Section 11(3)(a)(A). Record 96.

B. Petitioner's Argument

In its first assignment of error, petitioner argues that the county's decision approving the PLA improperly construes Measure 49, and is prohibited by Measure 49. ORS 197.835(9)(a)(D). According to petitioner, Section 11(3)(a)(A) of Measure 49 prohibits the county from approving a property line adjustment to adjust the size of a parcel that was created pursuant to a Measure 49 order if the size of the adjusted parcel exceeds the maximum lot size of two acres set out in that section.

In approving the PLA, the county interpreted two statutes. First, the county interpreted the maximum lot size language in Section 11(3)(a)(A) as applying only to the initial creation of a parcel pursuant to a Measure 49 final order. The county relied on the word "creation" in the first sentence of subsection (3), and concluded that subsection (3) limits the size of parcels created under Measure 49, Section 11 only at the time they are first created. Record 9.

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[2] Several subsections of Section 11, including Subsections 3 and 6, were renumbered in Oregon Laws 2009, chapter 855, section 14.

Second, the county interpreted ORS 92.192 (2008) to provide authority for approving the PLA.[3] The county concluded that ORS 92.192 (2008), which was enacted and took effect after Measure 49 took effect, provided the county with authority to approve the PLA. We discuss ORS 92.192 (2008) in more detail below.

In construing the meaning of a statute, our task is to determine the legislature's intent and the voters' intent in adopting the measure, looking at the text, context, and legislative history of the measure, and resorting if necessary to maxims of statutory construction. *State v. Gaines*, 346 Or 160, 171–72, 206 P3d 1042 (2009). Examining the statutory text in context and the legislative history, we conclude that the legislature intended Section 11(3)(a)(A) of Measure 49 to serve as a permanent restriction on the maximum size of a parcel created pursuant to a Measure 49 final order. We also conclude that ORS 92.192 (2008) does not allow the county to approve the PLA in contravention of Measure 49.

1. Measure 49, Section 11(3)(a)

As noted, the county focused on the word "creation" in the first sentence of Section 11(3)(a)(A). The county erred in focusing in isolation on the words "the creation of a lot or parcel" in the first sentence, and failed to give effect to the second sentence of that subsection. In our view, the second sentence is

[3] ORS 92.192 (2008) was amended in 2015 to prohibit adjustment of parcels created pursuant to Measure 49. Or Laws 2015, chapter 423, §1 (HB 2831).

more textually relevant in resolving the question presented in this appeal. The first sentence of Section 11(3)(a) provides the county with the authority to approve the initial creation of Parcel 1 and Parcel 2. The second sentence allows the county to authorize creation of "a new lot or parcel" as long as it does not exceed two acres. Parcel 2 was a "new parcel" when it was created, and remains a "new parcel" within the meaning of the statute today, because it did not exist before intervenor partitioned his 80-acre parcel into Parcel 1 and Parcel 2.[4] The second sentence does not include the words "when created" or "at the time of creation" to modify the phrase "new lot or parcel" or the phrase "two acres" and does not suggest any other temporal limit on the maximum lot size. Nothing in the second sentence restricts the two-acre maximum lot size to the moment when the new parcel was created. The county's interpretation would insert words to that effect into the second sentence of the statute where they do not exist, in contravention of ORS 174.010.[5]

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[4] We note that Section 11(6)(a) provides in relevant part that "[a] lot or parcel lawfully created based on an authorization under section 6, 7 or 9, chapter 424, Oregon Laws 2007, remains a discrete lot or parcel, unless the lot or parcel lines are vacated or the lot or parcel is further divided, as provided by law."

[5] ORS 174.010 provides that "[i]n 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."

Context provided by the purpose of Measure 49 also supports an interpretation of Section 11(3)(a)(A) that maintains the restriction on Parcel 2 to not exceed two acres. The purpose of Measure 49, as stated in the measure itself, is to "modify [Measure 37] to ensure that Oregon law provides just compensation for unfair burdens while retaining Oregon's protections for farm and forest uses and the state's water resources." ORS 195.301(2). It is more consistent with the general purpose of Measure 49 to interpret Section 11(3)(a)(A) as not being temporally restricted to the moment when a parcel is created, and not after.

In addition, the legislative history of Section 11(3), the maximum lot size and clustering provisions, supports an interpretation of Section 11(3)(a)(A) that maintains the restriction on Parcel 2 to not exceed two acres. The legislative history explains that the purpose of the maximum lot size and clustering provisions was "to cluster the dwellings in one area and maintain the open area for agricultural production, as opposed to spacing widely dwellings across the footprint of the farm property with roads and everything else that goes with those dwellings." Audio Recording, Joint Special Committee on Land Use Fairness, SB 1019, April 19, 2007, 2:10:33-2:15:05 (statement of Lane Shetterley, Director, DLCD, summarizing the policy reasons for maximum lot size and clustering in Section 11(3)). The maximum lot size provisions in Section 11(3)(a)(A), together with the clustering provisions in Section 11(3)(b), serve to implement that purpose by keeping the newly created home

site parcel small enough to maximize the suitability of the remainder of the property that contains high-value farm or forest land for farm or forest use. Interpreting Section 11(3)(a) to allow lots greater than the maximum lot size would frustrate that purpose.

We conclude that to read Section 11(3)(a)(A) in the way that the county and intervenor propose would be inconsistent with the text of that section and the purpose of both Measure 49 and the purpose of the relevant subsection, because it would allow larger lots than the maximum lot size specified in Section 11(3)(a)(A) to be created, and would decrease the suitability of the remainder of the property for farm use. We agree with petitioner that the county's approval of the PLA is prohibited by Section 11(3)(a)(A).

2. ORS 92.192 (2008)

ORS 92.192 (2008) provided:

> "(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.
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> "(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:
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> "(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 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."

According to the county and intervenor, ORS 92.192 (2008) authorizes the PLA. That is so, the county found, because ORS 92.192 (2008) was enacted after Measure 49 took effect, and did not expressly exclude parcels created pursuant to a Measure 49 final order.[6] Also according to the county and

[6] Measure 49 took effect on December 6, 2007.

intervenor, ORS 92.192 (2008) does not conflict with Section 11(3)(a)(A), because the latter does not restrict the maximum size of new parcels after they are initially created. We rejected that interpretation of Section 11(3)(a) above.

ORS 92.192 was enacted in response to our and the Court of Appeals' decisions in *Phillips v. Polk County*, 53 Or LUBA 197, *aff'd* 213 Or App 498, 162 P3d 338 (2007). *See Just v. Linn County*, 59 Or LUBA 112, 113 (2009) (so explaining). In *Phillips* the court upheld our decision that concluded that the provisions of ORS 215.780(1)(a) prohibited adjusting the property lines between two or more parcels zoned exclusive farm use where any of the parcels being adjusted were less than the minimum lot size provided in ORS 215.780(1)(a). In enacting ORS 92.192 (2008), the legislature authorized adjusting property lines between undersized parcels in the EFU zone if both parcels already failed to meet the minimum lot size specified in ORS 215.780.

We conclude that ORS 92.192 and Measure 49, Section 11(3)(a)(A) are not inconsistent with each other. Rather, the statutes address different situations. ORS 92.192 allows property line adjustments for undersized parcels in the EFU zone. Measure 49, Section 11(3)(a)(A), on the other hand, imposes a *maximum parcel size* of two acres for certain undersized parcels that are authorized by Measure 49. ORS 92.192 cannot be used to authorize through a property line adjustment an undersized parcel that nevertheless *exceeds* the maximum lot size specified in Section 11(3)(a)(A), because that would run afoul of Section 11(3)(a)(A). By way of example, if intervenor sought to

decrease the size of Parcel 2 below two acres and increase the size of Parcel 1 accordingly, ORS 92.192 could authorize the property line adjustment that intervenor seeks.

In conclusion, Section 11(3)(a)(A) prohibits the county from approving a property line adjustment that would allow a parcel to exceed the maximum lot size required by that section. ORS 92.192 (2008) does not authorize a property line adjustment that Section 11(3)(a)(A) prohibits.

The first assignment of error is sustained.

SECOND ASSIGNMENT OF ERROR

Yamhill County Zoning Ordinance (YCZO) 403.11(B)(2)(a) requires in relevant part that the parcels "subject to alteration in size through a lot line adjustment shall be shown to be at least as appropriate for the continuation of the existing commercial agricultural enterprise in the area as were the parcels prior to adjustment." In its second assignment of error, petitioner argues that the county's conclusion that the PLA satisfies YCZO 403.11(B)(2)(a) improperly construes that provision. Because we conclude above that Measure 49, Section 11(3)(a)(A) prohibits the PLA, we need not address petitioner's alternative argument under the YCZO.

The county's decision is reversed.[7]

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[7] OAR 661-010-0071(1)(c) provides in relevant part that LUBA shall reverse a land use decision when "[th]e decision violates a provision of applicable law and is prohibited as a matter of law."