BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

MCKENZIE BOWERMAN,
BOWERMAN FAMILY LLC,
Petitioner,

vs.

LANE COUNTY,
Respondent,

and

VERNE EGGE,
Intervenor-Respondent.

LUBA No. 2016-008

FINAL OPINION
AND ORDER

Appeal from Lane County.

Sean T. Malone, Eugene, filed a petition for review and argued on behalf of petitioner.

No appearance by Lane County.

Bill Kloos, Eugene, filed a response brief and argued on behalf of intervenor-respondent. With him on the brief was the Law Office of Bill Kloos, PC.

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

RYAN, Board Member, concurring.

REMANDED 01/26/2017

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

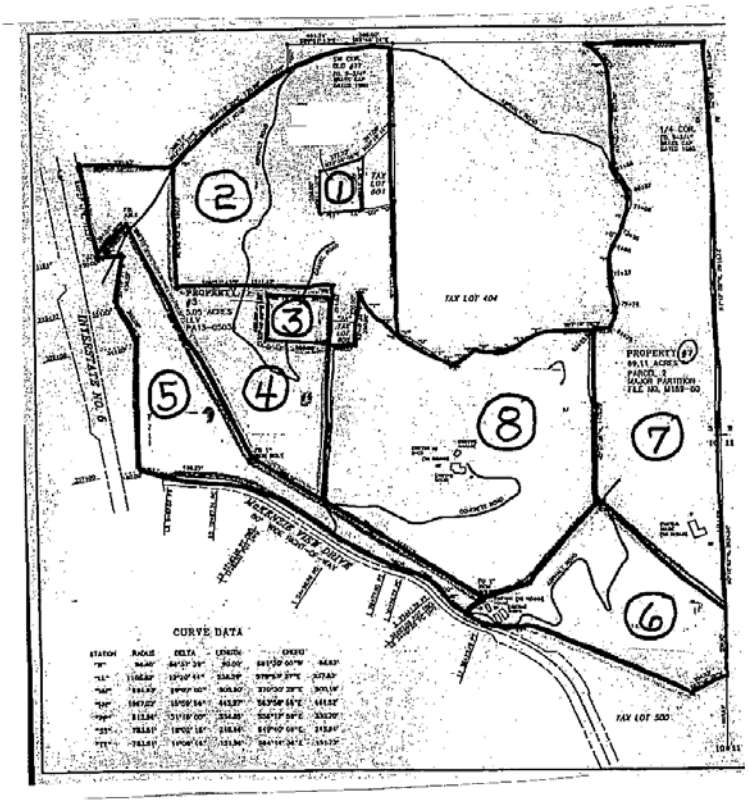
Petitioners appeal a county planning director's decision that approves nine property line adjustments.

FACTS

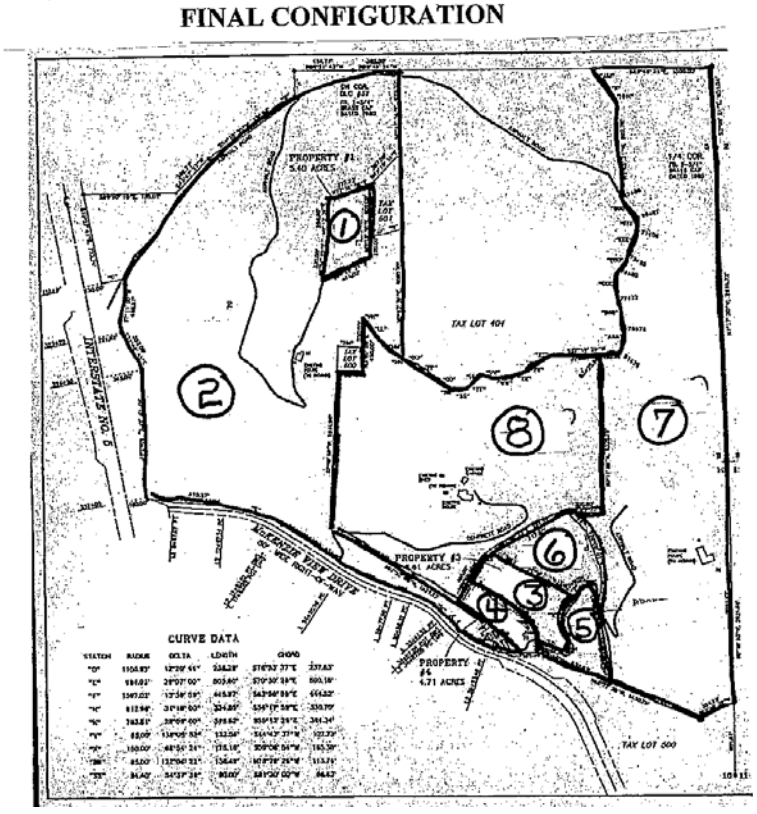
Intervenor-respondent filed two motions to dismiss this appeal. Both of those motions were denied. *Bowerman v. Lane County*, ___ Or LUBA ___ (LUBA No. 2016-008, October 24, 2016, Order); *Bowerman v. Lane County*, 73 Or LUBA 399-404 (2016). We repeat below our discussion of the key facts from those orders.

In this appeal, petitioners seek review of a county planning director's decision approving nine property line adjustments. Those property line adjustments were approved by a single decision, on April 28, 2015, without a public hearing or written notice of the decision to anyone other than the applicant. The applicant is the intervenor-respondent (intervenor) in this appeal. Those property line adjustments significantly reconfigure eight properties zoned Impacted Forest Lands, a forest zone adopted to implement Goal 4 (Forest Lands). We include drawings from the record with hand drawn line enhancement to illustrate the beginning and ending configurations on the next page.

STARTING CONFIGURATION



FINAL CONFIGURATION



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The April 28, 2015 property line adjustment (PLA) decision is made up of a four-page application for property line adjustment review, with attached exhibits. Record 73-175. Those exhibits include maps that show the before and after configurations for one property line adjustment deed that was recorded in 2013, without the required prior land use approval. The exhibits also include drawings, draft deeds and property descriptions for eight more proposed PLAs. The four-page application was approved by a county planner on April 28, 2015. Record 76. Eight deeds were recorded on June 2, 2015, to complete the PLAs.[1] Record 1-72.

A little over two months later, on August 19, 2015, the planning director approved forest template dwellings for three of those eight reconfigured properties: property 3 (6.61 acres), property 5 (5.43 acres), and property 6 (7.86 acres). Those August 19, 2015 forest template dwelling approvals were subject to appeal locally, but apparently were not appealed.[2] Petitioners' notice of

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[1] ORS 92.190(3) provides:

> "The governing body of a city or county may use procedures other than replatting procedures in ORS 92.180 and 92.185 to adjust property lines as described in ORS 92.010 (12), as long as those procedures include the recording, with the county clerk, of conveyances conforming to the approved property line adjustment as surveyed in accordance with ORS 92.060 (7)."

[2] Because they were not appealed locally, they became final on September 2, 2015.

intent to appeal the April 28, 2015 property line adjustment decision was filed with LUBA on January 16, 2016, several months after the forest template dwelling approvals.

JURISDICTION

As noted we have already denied two of intervenor's motions to dismiss that advanced a number of legal theories.

A. Intervenor's First Motion to Dismiss

Intervenor's first motion to dismiss argued the appeal of the property line adjustment decision was untimely filed. Although this appeal was filed on January 16, 2016, many months after the April 28, 2015 property line adjustments were approved, and long after the normal 21-day appeal deadline set by ORS 197.830(9) expired, petitioner responded the deadline for filing the appeal is governed by ORS 197.830(3), not ORS 197.830(9), because the county did not hold a hearing on the PLA.[3] Petitioners contended this appeal is

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[3] ORS 197.830(3) provides in part:

> "(3) If a local government makes a land use decision without providing a hearing, * * * a person adversely affected by the decision may appeal the decision to the board under this section:
>
> > "(a) Within 21 days of actual notice where notice is required; or
> >
> > "(b) Within 21 days of the date a person knew or should have known of the decision where no notice is required."

subject to ORS 197.830(3)(a), and the appeal was filed within 21 days of the date petitioners received "actual notice," since they were never given actual notice of the PLA decision before they filed their notice of intent to appeal the PLA decision to LUBA on January 16, 2016.

In his first motion to dismiss, intervenor argued the notices of hearing for the forest template dwellings, which were mailed to petitioner on August 21, 2015, were adequate to give petitioner actual notice of the April 28, 2015 property line adjustment decision. Because petitioners' notice of intent to appeal was not filed until more than 5 months after those August 21, 2015 notices, intervenor argued the notice of intent to appeal in this case was not timely filed.

We rejected intervenor's actual notice argument in our May 17, 2016 Order, concluding that the limited references in two of those forest template dwelling decisions to the earlier PLA decision were not sufficient to constitute "actual notice" of the PLA decision, within the meaning of ORS 197.830(3)(a). 73 Or LUBA at 403.

Intervenor advanced a second jurisdictional challenge in his first motion to dismiss, but deferred it to his brief on the merits. We address that jurisdictional challenge below, under Subsection C.

B. Intervenor's Second Motion to Dismiss

While this appeal was pending, intervenor refiled his application for property line adjustments. That application sought a second county approval of

the same property line adjustments that are the subject of this appeal. On July 8, 2016, the planning director approved the property line adjustments for a second time. However, unlike the first property line adjustment decision, the county mailed written notice of the second property line adjustment decision and provided an opportunity for a local appeal. Petitioners filed a local appeal of that second property line adjustment decision to the county hearings officer. While that local appeal was pending, intervenor filed a motion to dismiss this appeal, arguing that the local appeal of the second property line adjustment decision rendered this appeal moot.

We denied that motion to dismiss for several reasons. One of those reasons was that the planning director's decision reapproved the same decision that is the subject of this appeal. We concluded that under our decision in *Standard Insurance Co. v. Washington County*, 17 Or LUBA 647, 660, *rev'd and rem'd on other grounds*, 97 Or App 687, 776 P2d 1315 (1989), the hearings officer does not have jurisdiction to entertain petitioner's local challenge of that decision while the first property line adjustment decision is before LUBA in this appeal, and for that reason this appeal is not moot. *Bowerman v. Lane County*, ___ Or LUBA ___ (LUBA No. 2016-008, October 24, 2016, Order, slip op at 14-15.[4]

[4] At oral argument, the parties advised LUBA that after LUBA issued its October 24, 2016 Order denying intervenor's second motion to dismiss, the county hearings officer concluded the county lacked jurisdiction to approve the second property line adjustment application while this appeal was pending.

C. Intervenor's Deferred Jurisdictional Challenge

A jurisdictional challenge that was first included in intervenor's first motion to dismiss was deferred to its brief on the merits. In that jurisdictional challenge intervenor contended the April 28, 2015 property line adjustment decision is a ministerial decision of the type that is statutorily excepted from the ORS 197.015(10)(a) definition of "land use decision."

LUBA's jurisdiction is generally limited to land use decisions. ORS 197.825(1). Intervenor argues the challenged PLA decision qualifies as a decision "[t]hat is made under land use standards that do not require interpretation or the exercise of policy or legal judgment[.]" ORS 197.015(10)(b)(A). Such decisions are an exception to the ORS 197.015(10)(a) definition of "land use decision."

As will become clearer in our discussion of the first and third assignments of error below, the challenged property line adjustment decision required that the county exercise considerable interpretation and legal judgment. For that reason, we reject intervenor's final jurisdictional challenge.

FIRST ASSIGNMENT OF ERROR

Lane Code (LC) 13.450 sets out the county's procedural requirements and approval standards for property line adjustments.[5] LC 13.450(1) requires

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[5] We set out relevant text of LC 13.450 below:

"**13.450 Property Line Adjustments**.

"(1) No person shall relocate or eliminate all or a portion of a common property line without review and approval of a property line adjustment application or as otherwise provided by this chapter.

"(2) The Planning Director shall review one or more property line adjustments when the following standards are met:

"(a) An application is submitted on a form provided by the County ; and

"(b) Owner(s) of all properties involved in the property line adjustment consent in writing to the proposed adjustment and agree to record a conveyance or conveyances conforming to the approved property line adjustment; and

"(c) The property line adjustment relocates or eliminates all or a portion of a common property line between abutting properties that does not create an additional unit of land; and

"(d) The property line adjustment complies with the surveying and monumenting requirements of ORS Chapter 92.

"* * * * *

"(4) An applicant must obtain ministerial approval or may use the Planning Director review with public notice procedures if the property line adjustment is for:

"* * * * *

"(c) The adjustment of a common property line between properties where a surveyor certifies that any property reduced in size by the adjustment is not reduced below the minimum lot or parcel size for the applicable zone, and where the setbacks from existing

county approval for property line adjustments. LC 13.450(4) sets out three circumstances where ministerial approval of property line adjustments, *i.e.*, without a prior hearing or notice and an opportunity for a local appeal hearing, is required. LC 13.450(5) provides that in all other circumstances, property line adjustments must be approved by the planning director with a prior hearing or with notice and an opportunity for an appeal hearing. LC 14.050; 14.100; 14.500.

The county planning director apparently relied on LC 13.450(4)(c) to approve the disputed property line adjustments without notice of the director's decision or an opportunity for a local appeal. Petitioners argue that the authority for ministerial approval set out at LC 13.450(4)(c) does not apply in this case, and that the planning director erred by approving the property line adjustments without providing notice and an opportunity for a local appeal.

LC 13.450(4)(c) requires that the county approve property line adjustments ministerially if two requirements are met:

> structures and improvements do not become nonconforming or more nonconforming with the setback requirements.
>
> "(5) All other property line adjustment applications are subject to Planning Director review with public notice, pursuant to LC 14.050 and 14.100.
>
> "* * * * *."

1. "[A] surveyor certifies that any property reduced in size by the adjustment is not reduced below the minimum lot or parcel size for the applicable zone[,]

2. "[T]he setbacks from existing structures and improvements do not become nonconforming or more nonconforming with the setback requirements." *See* n 5.

The record includes a surveyor certificate, which certifies as follows:

"I, Ted Baker, a registered professional land surveyor in the state of Oregon, do certify that any property reduced in size by the adjustment is not reduced below the minimum lot or parcel size for the applicable zone.

"I also certify that the setbacks from existing structures and improvements do not become nonconforming or more nonconforming with the setback requirements of the zoning.

"Ted Baker, PLS 2488" Record 176.

Initially, both petitioner and intervenor misread LC 13.450(4)(c) to require that the surveyor certificate address both minimum lot size and setbacks. LC 13.450(4)(c) only requires that the surveyor certify that the "property reduced in size by the adjustment is not reduced below the minimum lot or parcel size for the applicable zone." Although the surveyor certificate for this property line adjustment decision does not even identify what the minimum lot or parcel size in the F-2 zone is, the surveyor certificate certifies none of the parcels "reduced in size by the adjustment[s]" are "reduced below the minimum lot or parcel size for the applicable zone."[6] The surveyor certificate goes

[6] The F-2 zone does not appear to have a numerical minimum lot or parcel size. LC 10.104-40 does impose a highly discretionary minimum area

further and certifies—without identifying what the F-2 zoning district setbacks are—that none of the property line adjustments result in setbacks from existing structures and improvements becoming nonconforming or more nonconforming.

As already noted, petitioners apparently misread LC 13.450(4)(c) to require that the surveyor's certificate certify that "the setbacks from existing structures and improvements do not become nonconforming or more nonconforming with the setback requirements." But petitioners contend the county may not rely on the surveyor certificate and the county itself must determine if the property line adjustments result in nonconforming, or more nonconforming, setbacks. Petitioners contend that for at least one of the properties, the property line adjustments result in nonconforming setbacks. Petition for Review 22-23.

We do not understand intervenor to dispute that the property line adjustments result in at least some nonconforming setbacks. Rather, intervenor, like petitioner, interprets LC 13.450(4)(c) to require that the surveyor certify both that minimum lot size and set back requirements are met. Intervenor argues the that county was not obligated or authorized under LC 13.450(4)(c) to independently determine whether setbacks are rendered nonconforming by the property line adjustments, but instead the county can only determine if the

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requirement for land divisions. Because petitioners raise no issue concerning minimum lot or parcel size we do not consider the question further.

applicant has filed a surveyor's certification that setbacks have not become nonconforming or more nonconforming.

Because both parties misread LC 13.450(4)(c) in this regard, we reject intervenor's argument that the planning director was not obligated to determine whether the property line adjustments result in nonconforming setbacks, although we do so for a different reason than petitioners. Because there is no dispute that the property line adjustment resulted in nonconforming setbacks, we agree with petitioner that the county should not have applied LC 13.450(4)(c) to approve the disputed property line adjustments ministerially. Under LC 13.450(5), *see* n 5, the planning director should have provided a prior hearing on the proposed property line adjustments, or provided notice of his decision approving the property line adjustments and provided an opportunity for a local appeal. The planning director erred by failing to do so.

Finally, as noted earlier, one jurisdictional question in this case turns in part on whether the PLA was rendered under standards that require interpretation or the exercise of legal judgment. Petitioner argues that the planning director was required to exercise legal judgment in determining whether to approve the disputed property line adjustments ministerially. We agree with petitioners that in determining whether the proposed property line adjustments result in nonconforming or more nonconforming setbacks, the planning director was required to apply language in LC 16.211(8)(a) that

requires interpretation or the exercise of policy or legal judgment.[7] As noted earlier, this means the exception to LUBA's jurisdiction set out at ORS 197.015(10)(b)(A) does not apply to the challenged decision.

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[7] One need not read very far through LC 16.211(8)(a) to see that significant legal judgment is required to determine what the required setbacks are in the F-2 zone. LC 16.211(8) provides, in part:

> "(a) Setbacks. Residences, dwellings or manufactured dwellings and structures shall be sited as follows:
>
> "(i) Near dwellings or manufactured dwellings on other tracts, near existing roads, on the most level part of the tract, on the least suitable portion of the tract for forest use and at least 30 feet away from any ravine, ridge or slope greater than 40 percent;
>
> "(ii) With *minimal intrusion* into forest areas undeveloped by nonforest uses; and
>
> "(iii) *Where possible, when considering LC 16.211(8)(a)(i) and (ii) above and the dimensions and topography of the tract*, at least 500 feet from the adjoining lines of property zoned F-1 and 100 feet from the adjoining lines of property zoned F-2 or EFU; and
>
> "(iv) Except for property located between the Eugene-Springfield Metropolitan Area General Plan Boundary and the Eugene and Springfield Urban Growth Boundaries, where setbacks are provided for in LC 16.253(6), the riparian setback area shall be the area between a line 100 feet above and parallel to the ordinary high water of a Class I stream designated for riparian vegetation protection in the Rural Comprehensive Plan. No structure other than a fence shall be located closer than 100 feet from ordinary high water of a Class I stream designated for riparian

The first assignment of error is sustained.

SECOND ASSIGNMENT OF ERROR

Petitioners argue that LC 13.450(4)(c) authorizes the planning director to ministerially approve "[t]he adjustment of a common property line between properties * * *." *See* n 5. Petitioners argue the reference to "a common property line" means an application can only propose a single property line adjustment. Because the application in this case proposed nine property line adjustments, petitioners contend the ministerial approval required by LC 13.450(4)(c) is not appropriate and that this is a second reason the application should have been processed under LC 13.450(5) with a prior hearing or notice and an opportunity for a local appeal hearing. To bolster this argument,

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> vegetation protection by the Rural Comprehensive Plan. A modification to the riparian setback standard for a structure may be allowed provided the requirements of LC 16.253(3) or LC 16.253(6), as applicable, are met; and
>
> "(v) Structures other than a fence or sign shall not be located closer than:
>
> "(aa) 20 feet from the right-of-way of a state road, County road or a local access public road specified in Lane Code LC Chapter 15; and
>
> "(bb) 30 feet from all property lines other than those described in LC 16.211(8)(a)(v)(aa) above; and
>
> "(cc) The minimum distance necessary to comply with LC 16.211(8)(a) above and LC 16.211(8)(b) through (d) below." (Emphases added.)

petitioners note that unlike LC 13.450(4)(c), which refers to "[t]he adjustment of a common property line between properties," LC 13.450(2) refers to "one or more property line adjustments." *See* n 5. Petitioners contend this shows the county knows how to distinguish between cases when a single property line adjustment is authorized and when multiple property line adjustments are authorized.

There are at least three flaws in petitioners' argument under the second assignment of error. The most significant is that LC 13.450(2), which petitioners concedes envision more than one property line adjustment, applies to all property line adjustments, whether approved ministerially or with public involvement under LC 13.450(5). The second flaw is that LC 13.450(5) refers to multiple property line adjustment *applications* and says nothing about how many property line adjustments may be proposed in *a single application*, which is the circumstance we have in this appeal. *See* n 5. The third flaw is that the lengthy remaining text of LC 13.450(5) which is not quoted in n 5 is littered with singular references like the one that petitioners rely on in LC 13.450(4)(c).

In sum, we disagree with petitioner that LC 13.450 precludes an application for more than one property line adjustment in a single application.[8]

The second assignment of error is denied.

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[8] We address the more nuanced question of what it means to adjust one or more common property lines between common properties in the next assignment of error.

THIRD ASSIGNMENT OF ERROR

The maps included in our discussion of the facts shows the starting and final configurations of the eight properties. We refer to those maps to describe the relevant facts for this assignment of error. In a nutshell, petitioner argues that some of the nine property line adjustments that were approved on April 28, 2015 did not adjust common property lines between *existing* properties. Rather, petitioner argues, some of those property line adjustments approved additional property line adjustments between properties that were reconfigured by one or more of the earlier property line adjustments. But those reconfigured properties did not yet exist in the configuration that had been approved in earlier property line adjustments, because the deeds required to complete those property line adjustments had not yet been recorded. For simplicity we refer to this circumstance as simply "further adjustment of adjusted properties." As noted earlier, all the deeds with the exception of the 2013 deed that was recorded without prior property line adjustment approval were recorded together on June 2, 2015. We understand petitioners to argue that in order to approve a property line adjustment and then approve an additional property line adjustment for one of those adjusted properties, the deed to complete the first property line adjustment must first be executed and recorded.[9]

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[9] ORS 92.190(3) requires that county procedures for property line adjustments must "include the recording, with the county clerk, of conveyances conforming to the approved property line adjustment as surveyed in accordance with ORS 92.060 (7)."

The property line adjustment between what are labeled properties #6 and #8 was the first property line adjustment. That property line adjustment is the one that was recorded in 2013 without prior county approval. That property line adjustment enlarged property 6 slightly. If the starting and final configurations are compared, it can be seen that the property line adjustments, effectively made property #6 into a nest, into which properties #3, #4 and #5 were relocated and properties #4 and #5 were significantly reduced in size. The table below illustrates those changes.

Property	Beginning Area	Final Area	Starting location	Final location
#3	5.05 Ac	6.61 Ac	Middle of Property	SE Corner
#4	43.74 Ac	4.71 Ac	West Side of Property	SE Corner
#5	34.53 Ac	5.43 Ac	West Side of Property	SE Corner
#6	37.72 Ac	7.86 Ac	SE Corner of Property	SE Corner

ORS 92.010 defines the concept of "partitioning land" to exclude "property line adjustment[s]" and also defines "property line," and "[p]roperty line adjustment." We set out those definitions below:

> "(9) 'Partitioning land' means dividing land to create not more than three parcels of land within a calendar year, but does not include:
>
> "* * * * *
>
> "(b) Adjusting a property line as property line adjustment is defined in this section[.]
>
> "* * * * *
>
> "(11) 'Property line' means the division line between two units of land."

> "(12) 'Property line adjustment' means a relocation or elimination of all or a portion of the common property line between abutting properties that does not create an additional lot or parcel."

LUBA has struggled over the years to determine the meaning and scope of the above statutory language, in various contexts. The relevant statutes have been revised at times in response to some of our decisions. We discuss below some of those decisions and some of the statutory changes. We turn first to our decision in Warf v. Coos County, 43 Or LUBA 460 (2003), which bears directly on the issue presented in this appeal.

A. Warf v. Coos County

In *Warf*, LUBA reversed a county decision that approved a single application to reconfigure three properties via two property line adjustments, as shown in the below figures:

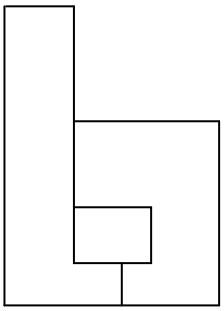

Fig 1: Starting Configuration

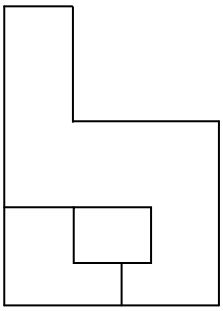

Fig. 2: Configuration after First Adjustment

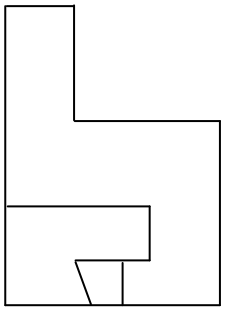

Fig. 3: Configuration after Second Adjustment

In rejecting the county's single decision that approved three property line adjustments, LUBA set out the then existing relevant statutes at ORS 92.010 (2001):

> "(7) 'Partition land' means to divide land into two or three parcels of land within a calendar year, but does not include:
>
> " * * * * *
>
> "(b) An adjustment of a property line by the relocation of a common boundary where an additional unit of land is not created and where the *existing unit of land* reduced in size by the adjustment complies with any applicable zoning ordinances[.]"
>
> "(11) 'Property line adjustment' means the relocation of a common property line between *two* abutting properties." (Emphases added.)

LUBA agreed with petitioners that the nominal property line adjustments in *Warf* were not consistent with the ORS 92.010(11) definition of that term. LUBA determined that that statute permitted only the relocation of *one* property line, and it had to be a *common* property line between *two* abutting properties. *Warf*, 43 Or LUBA at 466. Further, LUBA noted that "existing unit of land" language in the 2001 version of ORS 92.010(7)(b) supports a conclusion that "[p]roperty line adjustments may not be approved for proposed or hypothetical lots or parcels that do not yet separately exist as lots or parcels"

in their adjusted configuration. *Id.*[10] LUBA concluded "there is no limit that anyone has called to our attention on the number of property line adjustments that can be approved, provided that one common property line is adjusted at a time and provided that the adjusted property line separates *existing parcels* rather than possible or hypothetical parcels." *Id.* at 468 (emphasis in original). LUBA further noted:

> "If intervenors wish to proceed by way of serial property line adjustments they must seek separate approvals for each of the needed property line adjustments and implement each step before proceeding to seek approval for additional property line adjustments that may be needed to achieve their desired reconfiguration of their parcels." *Id.* at 471.

As indicated by the above figures, LUBA concluded that further adjustment of adjusted properties in a single decision was not permitted.

B. 2005 Statutory Amendment

In 2005, the legislature passed HB 2755 (2005), which among other things, amended definitions at ORS 92.010 (7) and (11). The legislative history indicates that the Oregon Association of County Engineers and Surveyors supported the language for the revisions to ORS 92, but there is no explanation as to why specifically ORS 92.010 (7) or (11) were amended in relevant exhibits, minutes or recordings of committee hearings on the proposed HB 2755. At one point in a public hearing on the bill, HB 2755 was referred to as a

[10] This is the phenomenon that we are referring to in this opinion as further adjustment of adjusted properties in a single decision.

housekeeping bill. *House Committee on Land Use*, March 23, 2005, Tape 44 A. A review of the entire bill makes it quite clear that the amendments were mostly changes in phraseology, rather than substantive amendments, save sections regarding easements and public roads. The relevant change to ORS 92.010 was as follows:

> "([*11*] **12**) 'Property line adjustment' means the relocation **or elimination** of a common property line between [*two*] abutting properties." (Bracketed italics indicating deleted language; boldface and underlining indicating new language.)

In 2009, LUBA revisited *Warf* after the 2005 amendments, noting that ORS chapter 92 did not preclude approval of more than one property line adjustment in a single decision, so long as the adjusted property lines are common property lines between abutting, existing properties. *Kipfer v. Jackson County*, 58 Or LUBA 436, 445 (2009). LUBA generally agreed with the hearings office in that case who concluded:

> "The 2005 ORS amendments deleted the reference to two abutting properties so that it then defined 'property line adjustment' to mean 'the relocation of or elimination of a common property line.' Of importance here is the fact that ORS 92.010([11]) no longer required that the adjustment occur between two abutting properties. The new language authorizes a common property line to be adjusted among any number of properties." *Id.* at 444-445.

It is important to note that *Kipfer* involved multiple property line adjustments that occurred between existing abutting properties, and the lines that were

relocated existed prior to being adjusted.[11] *Kipfer* did not concern a decision which approved multiple property line adjustments where a later property line adjustment adjusted a common property line between properties that had been reconfigured by earlier property line adjustments (further adjustment to an adjusted property).

C. 2008 Amendments

In 2008, ORS 92.010 was again amended by HB 3629. Oregon Laws 2008, ch 12 (Spec Sess). The impetus for this bill was *Phillips v. Polk County*, 53 Or LUBA 194, *aff'd*, 213 Or App 498, 162 P3d 338 (2007), *rev den*, 344 Or 43 (2008). That decision reversed Polk County's approval of two property line adjustments and a farm dwelling. As significant here, LUBA held in *Phillips* that any property that is affected by a property line adjustment must comply with minimum parcel size requirements after the adjustment, even if one or both of the adjusted properties were less than the minimum parcel size applicable in the zone in which the land was situated.[12]

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[11] By "existing" properties and "existing" property lines we mean the deed required to bring the property line into existence and to bring the property into existence in its adjusted configuration had been recorded.

[12] In reaching that conclusion, LUBA relied on the language in the then applicable version of ORS 92.010(7)(b) that provided a property line adjustment did not constitute a partition of land provided "the existing unit of land reduced in size by the adjustment complies with any applicable zoning ordinance[.]" 53 Or LUBA at 201.

The 2008 statutory change statutorily overruled *Phillips* by permitting property line adjustments for pre-existing undersized properties, even if one or both of the adjusted properties did not comply with minimum lot or parcel sizes before or after the property line adjustment, in certain circumstances. Recordings from relevant 2008 committee meetings demonstrate that similar bill language had been submitted in 2007, but was introduced too late to be considered and adopted. Real estate and land use practitioners pushed for a revised version of the bill in 2008, which was unanimously supported. *House Committee On Agriculture and Natural Resources*, February 5, 2008; *Senate Committee on Environment and Natural Resources*, February 13, 2008. The committee meetings also demonstrate the purpose of the bill was clearly to alter the result under the *Phillips* case and to also prevent improper abuses of the property line adjustment process.

The 2008 legislation modified these relevant definitions:

> "([*8*] **9**) '[*Partition*] **Partitioning** land' means [*to divide*] **dividing** land to create not more than three parcels of land within a calendar year, but does not include:
>
> "(a) [*A division of land resulting from*] **Dividing land as a result of a** lien foreclosure * * *;
>
> "[(b) *An adjustment of a property line by the relocation of a common boundary where an additional unit of land is not created and where the existing unit of land reduced in size by the adjustment complies with any applicable zoning ordinance*;]

> "(b) **Adjusting a property line as property line adjustment as defined in this section**;
>
> "* * * * *."
>
> "(12) 'Property Line Adjustment' means [*the*] **a** relocation or elimination of **all or** a **portion of the** common property line between abutting properties **that does not create an additional lot or parcel**." (Bracketed italics indicating deleted language; bold and underlining indicating new language.)

HB 3629 (2008) also included language now codified at ORS 92.192, which was modified in 2015, to establish complicated minimum lot size requirements for property line adjustments affecting substandard sized properties in different circumstances. HB 3629 (2008) also amended the definition of "partition" at ORS 92.010(8). The prior ORS 92.010(8)(b) definition of "partition" excluded property line adjustments, which were in part described as instances "where the existing unit of land reduced in size by the adjustment complies with any applicable zoning ordinance." In 2008, that language was removed from the ORS 92.010(8)(b) definition of "partition." As noted earlier, LUBA in *Warf* had relied in part on that language to conclude that a single decision may not adjust property lines between properties and then grant further property line adjustments for those adjusted properties before the deeds that completed the initial property line adjustments have been recorded to bring those adjusted properties into existence. The question for us in this appeal is whether that 2008 statutory change necessitates a different result here from LUBA's conclusion in *Warf* that a property line adjustment can only be approved for an

adjustment of a common property line between *existing* properties and cannot be approved for hypothetical properties that do not yet exist as adjusted properties because the deed needed to bring the hypothetical property into existence had not yet been recorded on the date that the further property line adjustment was approved.

D. Further Adjustment of Adjusted Properties

To repeat, in *Warf*, LUBA relied in part on the "existing unit of land reduced in size by the adjustment complies with any applicable zoning ordinance" language in ORS 92.010(7)(b) to conclude that property line adjustments may only adjust a common property line between existing properties, and that a single property line adjustment decision may not approve an adjustment of a common property line between existing properties and then approve an additional property line adjustment between one or both of those adjusted properties and another property before the deed that completed the initial property line adjustment is recorded. While it is possible that our holding in *Warf* was the target of the 2008 legislative amendments, there is absolutely no suggestion in the legislative history that it was. To the contrary, all indications in the legislative history are that the deletion of the "existing unit of land reduced in size by the adjustment complies with any applicable zoning ordinance" was directed at the "complies with any applicable zoning ordinance" language which was relied on by LUBA in *Phillips* to conclude property line adjustments involving a substandard property that did not bring

the property into compliance with the applicable zoning ordinance violated that language. Again, the purpose of that 2008 legislation was to set out the circumstances and limitations that applied to property line adjustments between properties that do not comply with minimum lot or parcel size requirements. That 2008 legislation was not adopted to address *Warf*. The "existing unit of land" language was simply a collateral casualty.

There is additional statutory language that supports the above conclusion. As noted earlier, ORS 92.190 requires that conveyances be recorded to complete property line adjustments:

> "(3) The governing body of a city or county may use procedures other than replatting procedures in ORS 92.180 and 92.185 to adjust property lines as described in ORS 92.010 (12), as long as those procedures include the recording, with the county clerk, of conveyances conforming to the approved property line adjustment as surveyed in accordance with ORS 92.060 (7).
>
> "(4) A property line adjustment deed shall contain the names of the parties, the description of the adjusted line, references to original recorded documents and signatures of all parties with proper acknowledgment."

ORS 92.190(3) requires that a deed be recorded to complete a property line adjustment. ORS 92.190(4) requires that a property line adjustment deed must include a reference to the original recorded deed for the properties for which a property line adjustment deed is being recorded. That statutory requirement is problematic where a single decision approves multiple property line adjustments, including further adjustment of adjusted properties, because it

would be difficult or impossible to refer to the "original recorded documents and signature of all parties" because on the date the property line adjustments were approved those documents would not yet have been recorded.

We conclude that under existing statutes multiple property line adjustments may be approved in a single decision, so long as those property line adjustments adjust common property lines between existing properties. But "further adjustment of adjusted properties" is not permissible under existing statutes in a single decision. To approve a property line adjustment and then approve another property line adjustment for one or both of the adjusted properties, the statutorily required conveyance to complete the first property line adjustment must first be recorded. The existing ORS 92.010(12) definition of property line adjustment ("a relocation or elimination of all or a portion of the common property line between abutting properties that does not create an additional lot or parcel") admittedly does not expressly state that common property lines may only be adjusted between existing properties, but neither does it say property line adjustments may be approved for common property lines between hypothetical properties that may exist in the future if a deed is recorded in the future to bring the properties into existence.

In this case the first two property line adjustments between property #6 and property #8 and property #1 and property #2 were adjustments of common property lines between existing properties. But beginning with the third property line adjustment the decision approved further adjustments of adjusted

(hypothetical) properties.[13] We agree with petitioners that under existing statutes it was error for the county to do so.

Finally, if it is not obvious, the same result that intervenor attempted to achieve in a single decision appears to be permissible under the statutes in more than one decision if deeds are recorded and additional applications are submitted after those deeds are recorded to avoid a single decision that approves further adjustment of adjusted properties. If the legislature believes property owners should be allowed to achieve that result in a single property line adjustment decision, the statutes can be amended to allow such property line adjustments. However, as they are currently worded, we conclude they do not permit, in a single property line adjustment decision, further adjustment of adjusted properties or further adjustment of adjusted property line.

The third assignment of error is sustained.

FOURTH ASSIGNMENT OF ERROR

As we have explained earlier one of the property line adjustments approved by the challenged decision is between properties #6 and #8. Petitioners contend it is not clear whether the county intended to approve that 2013 property line adjustment and, if it did not, then at least some of the approved property line adjustments are "premised on an un-reviewed and unlawful 2013 property line adjustments." Petition for Review 34.

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[13] In fact, beginning with the eighth property line adjustment, the decision also approves further adjustments of adjusted property lines.

For the reasons set out in intervenor's brief, it is sufficiently clear that the county intended to and in fact did approve nine property line adjustments, including the 2013 property line adjustment were the deed was recorded prematurely.

The fourth assignment of error is denied.

FIFTH ASSIGNMENT OF ERROR

Petitioners' fifth assignment of error is not easy to understand. To the extent we understand it, it does not appear to request any relief that will not already be required by our decision to sustain the first assignment of error.

The fifth assignment of error is denied.

The county's decision is remanded.

Ryan, Board Member, concurring.

I write separately because I disagree with the majority's resolution of the third assignment of error. As the majority opinion explains, the county's unitary decision approved eight property line adjustments (nine including the 2013 property line adjustment), and some of the approved property line adjustments were between properties that had been reconfigured by one or more of the earlier property line adjustments also approved in the decision. Stated differently, at the time of the county's decision, some of the property lines did not yet exist in the location that had been approved in earlier property line adjustments, because the deeds required to complete those property line adjustments had not been recorded. The majority terms this "further adjustment

of adjusted properties." However, there appears to be no factual dispute that after the county's decision, the deeds were recorded in the order necessary to adjust each property line before adjusting an additional property line. The majority concludes that county approval of "further adjustment of adjusted properties" is not allowed in a single decision under existing statutes. In my view, the express language of the relevant statutes simply does not support the majority's conclusion.

The text of the relevant provisions of ORS 92.010 that the majority relies on is set out again here:

> "(11) 'Property line' means the division line between two units of land.
>
> "(12) 'Property line adjustment' means a relocation or elimination of all or a portion of the common property line between abutting properties that does not create an additional lot or parcel."

The phrase "units of land" used in the definition of "property line" is not defined. The word "properties" used in the definition of "property line adjustment" is also not defined. The majority concludes that ORS 92.010(12) mandates that a single property line adjustment decision may not approve an adjustment of a common property line between existing properties and then approve an additional property line adjustment between one or both of those adjusted properties and another property before the deed that completed the initial property line adjustment is recorded. In essence, the majority favors the holding in *Warf v. Coos County*, and this decision extends that holding even

after statutory changes that eliminated the language that was the basis for that holding.

As the majority details, multiple statutory changes after LUBA's 2003 decision in *Warf* have resulted in elimination of the "existing unit of land reduced in size by the adjustment complies with any applicable zoning ordinance" language in ORS 92.010(7)(b) that LUBA relied on in *Warf* to reach its conclusion. As correct as *Warf* may have been in light of the applicable statutory language in 2003, *Warf* has no real relevance to the issue presented in this appeal, because of the statutory changes. In my view, the majority's interpretation of ORS 92.010(11) and (12) effectively inserts the word "existing" into those statutory provisions: in ORS 92.010(11) before the phrase "units of land," and in ORS 92.010(12) before the word "properties," and that contravenes ORS 174.010.[14]

The majority also cites as support ORS 92.190(4), which specifies the information that must be included in property line adjustment deeds. The majority reasons:

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[14] 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."

> "That statutory requirement is problematic where a single decision approves multiple property line adjustments, including further adjustment of adjusted properties, because it would be difficult or impossible to refer to the 'original recorded documents and signature of all parties' because on the date the property line adjustments were approved those documents would not yet have been recorded." Slip op 28.

However, ORS 92.190(4) is not an approval standard for a property line adjustment at all, but rather specifies the information that must be included in property line adjustment deeds. Nothing in ORS 92.190(4) supports the conclusion that a county may not approve both multiple property line adjustments and further adjustments of adjusted properties in a single decision. A condition of approval could easily address the statutory requirement that specifies the information required to be contained in a property line adjustment deed by requiring each deed to comply with the statute.

For the reasons set forth above, ORS 92.010(11) or (12) do not prohibit the county from approving multiple property line adjustments in a single decision or approving further adjustment of adjusted properties in that single decision. I would deny the third assignment of error.