BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

THOMAS LOWELL,
Petitioner,

vs.

JACKSON COUNTY,
Respondent.

LUBA No. 2016-117

FINAL OPINION
AND ORDER

Appeal from Jackson County.

James R. Dole, Grants Pass, filed the petition for review and argued on behalf of petitioner. With him on the brief was Watkinson Laird Rubenstein, P.C.

No appearance by Jackson County.

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

REMANDED 04/05/2017

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

Petitioner appeals a hearings officer's decision approving a property line adjustment between two parcels.

FACTS

Tax lot 300 is 396.33-acres in size, zoned for exclusive farm use (EFU), and consists of four parcels, each vacant. The challenged decision refers to the four "parcels" as "Tracts," Tract A, B, C and D.[1] The Tracts were created by land patents issued in 1909, 1911, 1919, and 1923, and signed by the then-sitting President of the United States (Roosevelt, Taft, Woodrow, Harding, respectively). Petitioner owns an adjacent parcel, which has an access easement over tax lot 300.

The owner of tax lot 300 applied to the county for (1) recognition of the four Tracts as separate parcels, and (2) a property line adjustment between two of the Tracts that comprise tax lot 300. Tract A is currently 160 acres in size. Tract B is 40 acres in size. The proposed property line adjustment would reverse those proportions, making Tract A 40 acres in size and Tract B 160

[1] As defined by ORS 215.010(2), "'Tract' means one or more contiguous lots or parcels under the same ownership." Under that definition, tax lot 300 is a "tract," because it is made up of four contiguous parcels owned by the same person, and the four individual parcels that make up that tract are parcels, not tracts. But in this opinion we use the terminology that the challenged decision uses and refer to the four individual parcels that make up tax lot 300 as "Tracts."

acres in size. The application did not propose or identify potential development of any of the four Tracts.

The applicant's planning consultant submitted proposed findings addressing applicable property line adjustment criteria, at Jackson County Land Development Ordinance (LDO) 3.4. On August 12, 2016, planning staff issued a decision verifying that the four Tracts are discrete, lawfully created parcels, and approving the property line adjustment between Tract A and Tract B.

Petitioner appealed to the hearings officer, arguing in relevant part that the property line adjustment was not consistent with LDO 3.4.3(F), which provides in part:

> "The adjustment will not result in a parcel being made buildable that was not capable of being developed prior to the adjustment for reasons such as being too small or narrow. * * *"

Specifically, petitioner argued

> "The proposal increases the parcel size of Tract B, now existing at 40 acres, which is not currently * * * buildable under the EFU zoning of 80 acres, because it is 'too small,' to a resulting size of 160 acres. As such, this making of an unbuildable parcel buildable violates the JCLDO." Record 35.

The applicant's consultant responded, disputing petitioner's understanding of the term "buildable" used in LDO 3.4.3(F):

> "Appellant misunderstands the context within which the term is used. 'Buildable' pertains to LDO Section 3.4.3(F) and is not a requirement that the subject be of adequate size to qualify for a land use entitlement (*i.e.* large tract test), but rather refers to practical, physical size limitations that prevent the siting of a structure." See LDO Section 13.3(29)." Record 32.

The cited code section, LDO 13.3(29), defines "buildable" to mean:

> "A lot or parcel where a building site can be physically located to meet all minimum setback requirements for structures, wells and on-site septic disposal systems, including septic system repair areas, if required."

On November 8, 2016, the hearings officer issued a decision denying the appeal and approving the adjustment. The hearings officer rejected petitioner's interpretation of LDO 3.4.3(F), that the term "buildable" means a parcel that meets a minimum acreage requirement for a dwelling, and agreed with the applicant's consultant that "buildable" means a parcel capable of meeting setback requirements.[2]

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[2] The hearings officer's decision states, in relevant part:

> "Read together, [LDO 3.4.3(F) and LDO 13.3(29)] require that a property line adjustment cannot result in a parcel meeting all minimum setback requirements for structures, wells and on-site septic disposal systems if the parcel was not capable of being developed prior to the adjustment. Appellant's argument misinterprets the term 'buildable' as it is defined in the LDO and used in this subsection of 3.4.3. The term 'buildable' is <u>not</u> a reference to any LDO minimum acreage requirement for development as urged by Appellant. Consequently, LDO Section 3.4.3(F) is interpreted to mean that if a parcel cannot meet all minimum setback requirements for structures, wells and on-site septic disposal systems before a property line adjustment, a requested property line adjustment cannot modify the parcel boundaries to comply with those setbacks.
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> "The hearings officer rejects Appellant's interpretation of LDO Section 3.4.3(F) and concludes that the proposed property line adjustment does <u>not</u> result in a parcel being made buildable that

This appeal followed.

FIRST, SECOND AND THIRD ASSIGNMENTS OF ERROR

All three assignments of error concern LDO 3.4.3(F), which as noted requires a finding that the property line adjustment "will not result in a parcel being made buildable that was not capable of being developed prior to the adjustment for reasons such as being too small or narrow."

In the first assignment of error, petitioner challenges the hearings officer's interpretation of LDO 3.4.3(F). In the second and third assignments of error, respectively, petitioner argues that the hearings officer's findings regarding compliance with LDO 3.4.3(F) are inadequate and not supported by substantial evidence. Because the interpretative issue frames the findings and substantial evidence challenges, we first address petitioner's arguments regarding the meaning of LDO 3.4.3(F).

A. Interpretation of LDO 3.4.3(F)

Initially, we do not understand petitioner to challenge the hearings officer's actual interpretation of LDO 3.4.3(F), quoted in footnote 2, to the effect that the LDO 3.4.3(F) prohibition on rendering a non-buildable parcel buildable is concerned only with unadjusted parcels that are unbuildable due to inability to meet minimum setback requirements for structures, wells and on-site septic disposal systems, but are adjusted to meet those setback

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was not capable of development prior to the adjustment of the boundaries." Record 14-15 (underlining in original).

requirements. That is, on appeal, we do not understand petitioner to argue, as he did below, that LDO 3.4.3(F) is concerned with parcels that are adjusted to meet or exceed minimum acreage requirements for certain types of residential development in the EFU zone.[3]

Instead, petitioner appears to challenge an interpretation that the hearings officer did not to make. According to petitioner, the hearings officer interpreted LDO 3.4.3(F) to not require the applicant to submit "any evidence as to the application's underlying purpose or provide evidence as to a parcel's development capacity." Petition for Review 4. Petitioner contends that the proper interpretation of LDO 3.4.3(F) is that it requires an applicant to explain the purpose of the adjustment and provide evidence of the adjusted parcel's development capacity before and after adjustment. *Id.* at 5. Relatedly, in the second and third assignments of error, petitioner argues that the hearings officer adopted no findings regarding the purpose of the adjustment or the

[3] Petitioner does not identify what type of residential development requires a minimum parcel size of 160 acres, but presumably he means dwellings in conjunction with farm use, allowed under Goal 3 and OAR 660-033-0135 on parcels 160 acres in size or larger, if income and other standards are met. We note that the EFU zone allows several other types of dwellings on farm lands that impose no minimum acreage size, including lot of record dwellings under ORS 215.705. In other words, even under petitioners' interpretation as argued below, that prior to the adjustment Tract B would not qualify for a dwelling in conjunction with farm use due to minimum acreage limitations does not necessarily mean that Tract B was not a "buildable" parcel for other types of dwellings, and certainly does not demonstrate that Tract B was not "buildable" for the many types of non-dwelling structures allowed in EFU zones (barns, sheds etc.).

development capacity of the 40-acre Tract B prior to its adjustment to 160 acres in size, and the record includes no evidence on those points.

However, as far as we can tell, the hearings officer's decision did not interpret LDO 3.4.3(F) to the effect that the applicant need not describe the purpose of the adjustment. Even if the hearings officer interpreted LDO 3.4.3(F) to that effect, the text of LDO 3.4.3(F) says nothing about the purpose or intent of the adjustment.[4] The question asked under LDO 3.4.3(F) as interpreted by the hearings officer is whether the adjustment will render a parcel that is not buildable (due to inability to comply with setbacks) into a buildable parcel (able to comply with setbacks). Compliance with LDO 3.4.3(F) is met or not met based solely on whether an unbuildable property becomes buildable, regardless of the purpose of the adjustment, or whether the applicant intends to build a structure on the adjusted property.

We also do not see that the hearings officer adopted an interpretation of LDO 3.4.3(F) to the effect that the applicant need not provide any evidence regarding whether the adjustment renders an unbuildable property buildable. The hearings officer rejected petitioner's proposed interpretation that LDO

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[4] We note that there are other property line adjustment standards that are arguably concerned with whether the adjustment is intended to qualify the parcel for a dwelling. LDO 3.4.3(G)(4) prohibits an adjustment that has the effect of qualifying a parcel for a dwelling. The applicant stated, and the county found, that the purpose of the adjustment is not to qualify any parcel for a dwelling. Record 99, 109. Petitioner does not challenge that statement or the findings regarding compliance with LDO 3.4.3(G)(4).

3.4.3(F) is concerned with adjustments that qualify a parcel for a dwelling under a minimum acreage standard. But, the hearings officer expressly found that the applicant had submitted substantial evidence to demonstrate compliance with approval criteria, including LDO 3.4.3(F). Record 16. Petitioner disputes that conclusion under the third assignment of error, but it is simply not the case that the hearings officer interpreted LDO 3.4.3(F) to waive the obligation to submit any evidence at all demonstrating compliance with that standard.

Petitioner is, of course, correct that the applicant has the burden of proof, and that in order to obtain approval the applicant must provide substantial evidence demonstrating compliance with LDO 3.4.3(F). Under the hearings officer's interpretation of LDO 3.4.3(F), that presumably means the applicant must provide evidence based on which a reasonable person could conclude that the adjustment does not cause a non-buildable parcel (*i.e.*, one that has no building site capable of meeting setbacks) to become buildable (one that has at least one building site capable of meeting setbacks). We turn, then, to petitioner's challenges to the findings addressing LDO 3.4.3(F) and the evidence supporting those findings.

B. Findings and Evidentiary Challenges

After rejecting petitioner's interpretation, the hearings officer concluded that "the proposed property line adjustment does not result in a parcel being made buildable that was not capable of being developed prior to the adjustment

of the boundaries." *See* n 2. Petitioner argues that this finding is conclusory and inadequate, because it fails to set forth the facts relied upon, or explain how the facts lead to the conclusion that LDO 3.4.3(F) is complied with. Relatedly, petitioner argues that the applicant failed to submit substantial evidence regarding the developability of Tract B before and after the adjustment. According to petitioner, the only evidence submitted on this point is the bare statement of applicant's consultant that "[t]he proposed adjustment will not result in a parcel being made buildable that was not buildable prior to the adjustment. This standard is met." Record 98. Petitioner argues that that bare statement is not substantial evidence, *i.e.*, evidence a reasonable person would rely upon to conclude that LDO 3.4.3(F) is met. Petitioner speculates that there may be some topographic restriction in the 40-acre pre-adjustment Tract B that precludes any building site that complies with setback requirements.

It seems highly likely that prior to the adjustment the 40-acre Tract B possessed at least one building site that met the applicable setbacks. Nonetheless, under the hearings officer's interpretation of LDO 3.4.3(F), some evidence regarding the developability of Tract B before and after the adjustment is necessary to find compliance with that code provision. The applicant's statement that the adjustment will not result in a parcel being made buildable that was not buildable prior to the adjustment was provided before the hearings officer adopted his interpretation, and is so conclusory that we

agree with petitioner that the statement itself is not substantial evidence that the adjustment complies with LDO 3.4.3(F), as the hearings officer interprets it. Further, the hearings officer's ultimate finding of compliance with LDO 3.4.3(F), quoted at n 2, is also conclusory, repeating the language of LDO 3.4.3(F) without any recitation of facts or explanation for why the facts lead to the conclusion that the code provision is met. Accordingly, we agree with petitioner that the hearings officer's finding of compliance with LDO 3.4.3(F) is inadequate and without further explanation is not supported by substantial evidence.

The first assignment of error is denied; the second and third assignments of error are sustained.

The county's decision is remanded.