BEFORE THE LAND USE BOARD OF APPEALS
OF THE STATE OF OREGON

DEBORAH MATTSON,
Petitioner,

vs.

LANE COUNTY,
Respondent.

LUBA No. 2020-024

FINAL OPINION
AND ORDER

Appeal from Lane County.

Bill Kloos, Eugene, filed the petition for review and a reply brief and argued on behalf of petitioner. With him on the brief was the Law Office of Bill Kloos PC.

H. Andrew Clark, Eugene, filed the response brief and argued on behalf of respondent.

RYAN, Board Member; RUDD, Board Chair; ZAMUDIO, Board Member, participated in the decision.

AFFIRMED 07/16/2020

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 hearings officer affirming the county planning director's rejection of an application for a Type I legal lot verification.

FACTS

This appeal concerns petitioner's request for a legal lot verification, that is, "[a] determination or decision made pursuant to [Lane Code] LC 13.140 that a unit of land is a lawfully established unit of land." LC 13.030(3)(p). Lane Code (LC) 13.140(1) requires a legal lot verification to be reviewed pursuant to "Type II procedures" under LC Chapter 14, except that the county can review a legal lot verification pursuant to "Type I procedures" under LC Chapter 14 if (1) "the subject property was created prior to April 7, 1949 * * *," and (2) "the subject property has not changed configuration since that time."[1] LC 13.140(2)(a) and (b) set out the application requirements for Type I and Type II legal lot verifications. Type II application requirements are more onerous, and the

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[1] LC 14.030(1)(a)(i) describes the Type I process as a "ministerial review of an application based on clear and objective standards and criteria." Type I determinations do not require the exercise of policy or legal judgment. The Planning Director renders a decision on these application without notice or a hearing, and the decision is generally not subject to appeal.

LC 14.030(1)(b)(i) describes the Type II process as a process that is used for determinations that involve interpretation or the exercise of discretion when evaluating approval standards and criteria. The Planning Director issues the initial decision, and that decision is subject to appeal.

application fee is higher. LC 14.040(1) requires in relevant part that an application be "submitted on a form provided by the [planning] Director."

Petitioner submitted a "Type I Land Use Application – Legal Lot Verification" on a county form, seeking a legal lot verification for a 79-acre property zoned EF-40, referred to by petitioner and the county as "Tax Lot 600." Record 276. Petitioner also owns three parcels adjacent to the subject property. After petitioner submitted the application, the planning department communicated by email with petitioner's attorney and requested clarification of some materials in the application, and additional information regarding whether the subject property's configuration had changed since April 7, 1949. Petitioner's consultant and attorney responded with information regarding reconfiguration of adjacent properties, clarified that the application related only to Tax Lot 600 and submitted an amended/corrected Type I application form. Record 271. Approximately 90 days after the application was submitted, the county planning director notified petitioner by letter that the application was rejected because the planning director determined that an application for a Type II legal lot verification was required, due to the planning director's uncertainty about whether the property had changed configuration after 1949. Record 263-64. The letter offered to apply the previously paid fee for a Type I legal lot verification to a future application for a Type II legal lot verification.

Petitioner appealed the letter to the hearings officer, arguing that the applicable LC provisions of the Lane Code do not authorize the planning director

to reject her application, and in the alternative that even if the planning director had the authority to reject her application, the planning director misinterpreted the LC in rejecting her application.

The hearings officer concluded that the LC authorizes the planning director to reject an application that is not filed on the correct form, and that the planning director properly rejected petitioner's application because it was filed on the wrong form and because an application for a Type II legal lot verification was required. The hearings officer declined to reach the merits of whether the subject property changed configuration after April 7, 1949. This appeal followed.

ASSIGNMENT OF ERROR

Petitioner's assignment of error is that the hearings officer erred in concluding that LC 13.140(1) allows the planning director to reject her application. We set out the relevant language of LC 13.140:

> "(1) Process:
>
> > "(a) A legal lot verification must be reviewed pursuant to Type II procedures according to LC Chapter 14, except:
> >
> > > "(i) A legal lot verification does not need to be formally reviewed if the lawfully established unit of land is consistent with (aa), (bb), or (cc) in this subsection, and is in the same configuration or has been reconfigured by a lawfully approved property line adjustment application.
> >
> > "* * * * *

> "(ii) A legal lot verification may be reviewed pursuant to Type I procedures according to LC Chapter 14, only if the subject property was created prior to April 7, 1949, the effective date of the County's earliest Subdivision Ordinance, and the subject property has not changed configuration since that time."

The hearings officer concluded that LC 13.140(1)(a)(ii) allowed the planning director to reject the application, once it was determined that the planning director could not conclude that "the subject property has not changed configuration since" April 7, 1949. The hearings officer found that LC 13.140 provides the planning director with the discretion to reject an application submitted under a Type I process and require the application to be submitted under a Type II process. The hearings officer concluded that the word "may" used in LC 13.140(1)(a)(ii) implied discretion. The hearings officer also looked to context provided by (1) LC 13.140(1)(a)(i), which specifies that the default procedure for a legal lot verification is a Type II procedure; by the difference between Type I and Type II processes set out in LC Chapter 14; and by (2) LC 14.040(1), which requires applications to be submitted on "a form prescribed by the Department." She found:

> "The Lane Code, either explicitly or implicitly, authorizes rejection of a land use application, even though it is not called out as clearly as is the authority to reject an appeal. LC 14.040 provides minimum submittal requirements for all applications - Type I, Type II, and other application Types. LC 13.140(2) also provides specific submittal requirements for Type I and Type II legal lot verification applications. Both LC 13.140(2)(a) (submittal standards for Type I legal lot verifications) and LC 13.140(2)(b) (submittal standards for

Type II legal lot verifications) cross reference the Chapter 14 submittal requirements: 'In addition to the submittal requirements identified in LC Chapter 14 * * *.'

"LC 14.040(1) requires that an application be 'submitted on a form provided by the Director.' This language clearly establishes that it is the Planning Director who determines the requisite form, which inherently includes determining the process Type. If an applicant refuses to submit their request on the form directed by the Planning Director, and insists on using a form for the wrong Type of application, LC 14.040(1) authorizes the Planning Director to reject that application. If this were not the case, an applicant could simply file their application on the least expensive Type form and demand that the County process it.

"LC 14.040(l)(c) also requires that an application be accompanied by the 'Required filing fee.' Applicant's theory that the code does not authorize the Planning Director to reject an application, if taken to its logical conclusion, would mean that a local government would be required to process an application even if the applicant refused to pay the filing fee. This result not only makes no sense, it is also contrary to the code. A submittal requirement to pay the filing fee, if ignored, would clearly result in rejection of the application."

" * * * * *

"The appeal does not provide much in the way of guidance on how [LC 13.140(a)(ii)] should be interpreted. Reading the text of subsection (ii) in isolation, it is not clear whether the term 'may' provides discretion to the County to determine whether to apply Type I or Type II procedures. It leaves open the question whether the County can, under certain circumstances, require a Type II process where the subject property was created prior to April 7, 1949 and where the configuration has not changed.

"Read in context with subsection (i), a reasonable reading of subsection (ii) is that the Planning Director has the discretion to require a Type II application in this instance. If the application described in subsection (ii) provided an applicant with the absolute

right to a Type I process, then presumably that exception would have been included in subsection (i). The logical explanation for why subsection (i) is set out separately from subsection (ii) is that the circumstances in subsection (ii) provide the Planning Director broader discretion to require a Type II process when it is determined that discretion is involved.

"When read in a broader context, with an understanding of the different application Types described in LC Chapter 14, it becomes clear that the Planning Director not only had the discretion to require a Type II application, that action was required. The Type I process is expressly limited to situations that do not require the exercise of policy or legal judgment. See LC 14.030(1)(a)(i) ('The Type I procedure involves the ministerial review of an application based on clear and objective standards and criteria .... The Type I procedure does not require interpretation of policy or legal judgement when evaluating development standards and criteria.'). Once the County determined that discretion was involved, it was required to follow the Type II process. Indeed, if it had not, it would have violated its code. *See Rogue Advocates v. Jackson County*, _ Or LUBA_ (LUBA No. 2017-100, February 13, 2018) (where county code limited the Type I process to uses that are 'allowed by right,' the county erred in using Type I provisions to process a floodplain development permit that required the county to determine whether the uses served by the proposed structures are authorized uses under the code).

"As discussed above, LC 14.050(1)(b) requires that all applications '[b]e completed on the form prescribed by the Department.' LC 14.050(1)(b). In this case, the Director prescribed, or attempted to prescribe, the Type II form. However, the applicant refused to submit the correct application form 'prescribed by the Department.' The application provisions of LC Chapter 14 also provided that applications '[m]ay be received by the Director at any time and shall not be considered as accepted solely because of having been received.' LC 14.050(3)(a). This language provides the Director with authority to reject the application where it was not submitted on the correct form or where the full application fee is missing. That is exactly what the Planning Director did. Record 6-7, 8-9.

In her first assignment of error, petitioner argues that LC 13.140(1)(a)(ii) requires the planning director to make a decision either approving the application, denying her application, or elevating the application to a Type II process.[2] Petitioner argues that nothing in the LC provisions that apply to an application for a legal lot verification authorizes the planning director to reject her application. Petitioner argues that the word "may" in LC 13.140(1)(a)(ii) does not give the planning director the authority to reject an application submitted on a Type I form because, according to petitioner, LC 13.140(1)(a) establishes the right of *an applicant* to choose between a Type I and a Type II application process. Petitioner argues that the use of the word "may" is intended to be for the benefit of an applicant, and does not give the planning director the discretion to reject a Type I application that includes the submittal information specified in LC 13.140(2)(a).[3] Petitioner also points to another section of the LC, at LC

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[2] LC 14.030(1)(a)(ii) provides that "a Type I determination may be elevated by the applicant by submitting a Type II application or by the Director. If the application is to be elevated by the Director, the Director should first notify the applicant."

[3] LC 13.140(2) provides the submittal requirements for a Type I and Type II legal lot verification:

> "(a) Type I: In addition to the submittal requirements identified in LC Chapter 14, an application for legal lot verification pursuant to Type I procedures must include a copy of the property description card for the subject property and a copy of the oldest deed creating the subject property, listed on that

14.080(2), which specifically authorizes the planning director to reject *an appeal*, and argues that the absence of similar explicit language authorizing the planning director to reject an application for a Type I legal lot verification provides context that undercuts the hearings officer's interpretation. Petitioner argues that the LC provisions that the hearings officer relied on as context to support her interpretation do not support her interpretation. Petitioner sets out a parade of

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card or a copy of the deed that demonstrates the property was created prior to April 7, 1949.

"(b) Type II: In addition to the submittal requirements identified in LC Chapter 14, an application for legal lot verification pursuant to Type II procedures must include the following for each proposed legal lot:

"(i) A copy of the property description card for the subject property;

"(ii) A copy of every deed listed on the property description card(s) for the subject property;

"(iii) An illustration of each deed's description for the subject property. If multiple deeds utilize the same description, those may be consolidated into one illustration;

"(iv) A narrative of how the parcel was created and changed over time; and

"(v) Any other documentation that demonstrates how the subject property was lawfully created."

horribles that petitioner argues could result if the planning director is allowed to reject an application for a legal lot verification.[4]

The county responds that the hearings officer's interpretation of the relevant LC provisions as authorizing the planning director to reject an application that is submitted on an incorrect form is supported by the text of LC 13.140(1) and relevant context provided in other LC chapters and sections. The county disputes petitioner's argument that the fact that LC 13.140(1)(a)(ii) does not specifically authorize the planning director to reject an application means that the director lacks authority to do so. According to the county, "the director has express and implied authority to manage the land management application process[.]" Response Brief 8. The county sets out its own competing parade of horribles that could result if the planning director lacked the authority to manage the application process and determine what procedures are appropriate for the requested land use approval.[5]

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[4] Petitioner argues:

> "Looking at the code as a whole, if the Hearings Official is right about this interpretation, then the Director would have authority, when an owner comes in to apply for a Type II land partition, to require the owner to file a Type IV application, which begins with a hearing before and recommendation by the Planning Commission, and then goes to the County Board for a hearing and decision. See LC 14.030(l)(d)(i), Procedure Types and Application Processing." Petition for Review 25.

[5] The county argues:

We review the hearings officer's interpretation of the LC to determine whether it is correct. *Gage v. City of Portland*, 319 Or 308, 315, 877 P2d 1187 (1994). In interpreting the meaning of a local code provision, our task is to discern the intent of the governing body in enacting the provision. ORS 174.020. At the first level of the analysis, we examine the text and context of the provision. *PGE v. Bureau of Labor and Industries*, 317 Or 606, 610-11, 859 P2d 1143 (1993).

For the reasons explained below, we conclude that the hearings officer's interpretation is correct, and gives effect to all of the relevant LC provisions. First, we agree with the hearings officer that use of the word "may" means that the planning director has some discretion to reject an application that is not properly filed. Petitioner has not established that the word "may" in LC 13.140(1)(a)(ii) means something other than its usual permissive meaning. Second, we reject petitioner's assertion that the text of LC 13.140(1)(a)(ii) means that the provision is for the benefit of an applicant to choose either a Type I or

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> "The county code describes four types of procedures for reviewing land use applications (Types I, II, III and IV) all of which provide for varying degrees of analysis and complexity. See LC 14.030(1) * * * The county scheme would prove unworkable if the Director lacked the authority to dictate which applications and associated procedures were appropriate for the requested land use approval. Under the Petitioner's theory an applicant could file a Type II application with the associated fee; request, for example, a post-acknowledgment plan amendment (a Type IV procedure with a higher fee); and demand that the Director process it even though the level of analysis and staff time would vastly exceed what the Type II fee is intended to cover." Response Brief 25.

Type II process. The provision provides that a legal lot verification "*may be reviewed* pursuant to Type I procedures[.]" It is the county, not the applicant, that "reviews" the request for a verification and based on that language, it is reasonable to conclude that the county may determine the appropriate review procedure.

Third, we reject petitioner's argument that once the petitioner had submitted what is required under LC 13.140(2), the county was required to process the application under Type I procedures. As the hearings officer found, Type I procedures are reserved for applications that do not require the "exercise of policy or legal judgment." Record 8. When the planning staff reviewed the application submittals, it concluded that it was not clear whether the application could satisfy the second requirement in LC 13.140(1)(a)(ii), and that making that determination would require the exercise of discretion, and asked for additional information from petitioner. Petitioner's consultant and counsel provided some additional information that the planning staff concluded did not provide clear answers to the question. At that point, the county could have chosen to deny the application but it was not required to deny the application. It was allowed to reject the application.

Fourth, we agree with the hearings officer's understanding of the context provided by other LC sections she cited, which she found give the planning department discretion to manage the application process and, implicitly, to reject an application that is not filed on the correct form. Finally, we do not agree with

petitioner's tripartite view of the options available to the county: approval, denial, or elevation to a Type II procedure. That view is not supported by the provisions that the hearings officer relied on, for the reasons that she explained in the decision and quoted above.[6] The hearings officer's interpretation of the relevant provisions of the LC as allowing the planning director to reject an application that is submitted on an incorrect form is correct.

In a final portion of the assignment of error, petitioner argues that the hearings officer was required to address the merits of her application and verify the legal status of the subject property, *i.e.* determine whether the property had changed configuration after April 7, 1949. The hearings officer concluded that because the planning director properly rejected the application, there was no application to review, and consequently no merits to decide. Record 5-6. That conclusion was correct.

The assignment of error is denied.

The county's decision is affirmed.

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[6] If we were forced to choose between the competing parades of horribles put forth by petitioner and the county, we think that the county's are more likely to occur than the petitioner's. *See* n 4 and n 5.