01/25/21 PM 3:59 LUBA

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

LANDWATCH LANE COUNTY,
Petitioner,

vs.

LANE COUNTY,
Respondent.

LUBA No. 2020-086

FINAL OPINION
AND ORDER

Appeal from Lane County.

Sean Malone filed the petition for review and reply brief and argued on behalf of petitioner.

H. Andrew Clark filed the response brief and argued on behalf of respondent. Also on the brief was Sara L. Chinske.

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

AFFIRMED 01/25/2021

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 county hearings officer decision verifying a legal lot and approving a property line adjustment.

FACTS

The applicants applied for a legal lot determination for two properties and for a property line adjustment to adjust the boundary between the two properties. The first property, Tax Lot 800 (Property 1), is 24.68 acres and the second property, Tax Lot 803 (Property 2), is 2.39 acres. Property 1 is zoned Impacted Forest Land (F-2) and Property 2 is zoned Rural Residential-5 acre (RR-5). Property 2 includes a dwelling.

Property 1 and Property 2 were originally part of a 40-acre parcel conveyed from Prairie to Darr in 1957 (Original Parcel).[1] In 1964, Darr conveyed an approximately 7.5-acre portion in the southwest corner of the Original Parcel to Turner and, in 1966, Darr conveyed to Turner a small portion of additional property adjacent to the 7.5-acre portion. In 1970, Turner conveyed a smaller, 2.39-acre portion of that 7.5-acre portion, which is Property 2, to Rhodes.

The remainder of the Original Parcel remained in Darr's ownership until 1970, when Darr conveyed a 6.82-acre portion of the Original Parcel to Wooten.

---

[1] Property 1 and Property 2 have frontage on McGowan View Lane, a public road.

In 1977, Darr conveyed a 24.68-acre portion of the Original Parcel to Wooten. That 24.68 acres is Property 1.

In 2019, the current owners of Property 1 and Property 2 applied for a legal lot verification and property line adjustment to adjust the boundary between Property 1 and Property 2 by decreasing Property 1 from 24.68 to 22.12 acres and increasing Property 2 from 2.39 acres to 4.95 acres. The planning director approved the applications, and petitioner appealed that decision to the hearings officer, who affirmed the planning director's decision. This appeal followed.

ASSIGNMENT OF ERROR

Lane Code 13.140 sets out the criteria for determining whether a property is a legal lot. LC 13.140(3) provides that "[a] legal lot verification will be approved if the subject property is a lawfully established unit of land as defined by this chapter." LC 13.030(3)(n) defines "lawfully established unit of land" to mean:

> "(i) A lot or parcel created by filing a final plat for subdivision or partition; or
>
> "(ii) Another unit of land created:
>
> "(aa) In compliance with all applicable planning, zoning and subdivision or partition ordinances and regulations; or
>
> "(bb) By deed or land sales contract, if there were no applicable planning, zoning or subdivision or partition ordinances or regulations."

In its assignment of error, petitioner argues that "the land division that occurred in 1970 did not comply with applicable land use regulations in the 1962

Subdivision Ordinance and, therefore, the Subject Properties are not lawfully established." Petition for Review 22. At the outset, we understand petitioner's assignment of error to argue only that Property 2 is not a "lawfully established unit of land," based on the assignment of error's reference to "the land division that occurred in 1970" and based on the fact that petitioner's arguments focus only on the 1970 transfer of 2.39 acres from Turner to Rhodes. Petition for Review 7, 22. As noted, Property 1 is the remainder 24.68 acres of the Original Parcel that was conveyed from Darr to Wooten in 1977. Accordingly, we understand petitioner to argue that the express language of the 1962 Subdivision Ordinance (1962 Ordinance) required the then-owner to apply for approval to divide Property 2 from the 7.5-acre parcel transferred from Darr to Turner and, having failed to receive that approval, Property 2 is not a "lawfully established unit of land" under LC 13.030(3)(n).

The hearings officer concluded, based on the text of the 1962 Ordinance and the context provided by applicable statutes, that the 1962 Ordinance was not an "applicable * * * subdivision * * * ordinance[]" and that, therefore, the creation of Property 2 by deed was lawful under LC 13.030(3)(n)(ii)(bb). Before turning to the merits, we first set out the text of the 1962 Ordinance, which, we warn, is not a model of clarity in legislating.

Section III(G)(4) of the 1962 Ordinance provided:

> "'Subdivision' means the division of land; except that the following division of land shall not be deemed a subdivision where no new street is created:

"* * * * *

"c. A division of land which would be a minor subdivision but for the fact that no part of the area being subdivided is within urbanizing area." Record 217-18.

Section III(E)(3) of the 1962 Ordinance defined "minor subdivision" as

"any subdivision of lan[d] *any part of which is within urbanizing area* and which:

"a. Results in not more than three lots fronting on an existing street; and which

"b. Does not create any new street, or require the widening of an existing street; and which

"c. Does not impede the future highest and best use of the remainder of the tract under the same ownership, or adversely affect the safe and healthful development of such remainder or any adjoining land or access thereto, in the judgment of the Planning Commission; and which

"d. Is not in conflict with any law or ordinance applicable to the land being subdivided." Record 216 (emphasis added).

Section III(E)(1) of the 1962 Ordinance defined "major subdivision" as "a subdivision which is not a minor subdivision." *Id.*

Petitioner argued to the hearings officer that the 1970 transfer of Property 2 from Turner to Rhodes was subject to the 1962 Ordinance. In petitioner's view, the carve-out in Section III(G)(4)(c) from the definition of "subdivision"—for divisions that both (1) do not create a new street and (2) would be a minor subdivision if located in the urbanizing area—did not apply to the 1970 transfer because the property owner did not seek a determination from the planning

commission, prior to the transfer, that the division was not a "minor subdivision" or, stated differently, that the requirement of Section III(E)(3)(c) was satisfied.

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(1)(a). 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).

The hearings officer concluded:

> "[T]he threshold requirement for a 'minor subdivision' is that the land involved is within the urbanizing area. Outside of an urbanizable area, the division of land into three or fewer lots that do not front a street or that don't create a new street or require the widening of an existing street [is] not a subdivision." Record 7.

We conclude that the hearings officer's interpretation of Section III(G)(4)(c) best gives effect to its language and to the context provided by all parts of the 1962 Ordinance. That interpretation is that a division of land *located outside the urbanizing area* that (1) does not result in the creation of a new street and (2) would be a minor subdivision if the land was located in an urbanizing area is not, as a matter of law, a land division subject to the 1962 Ordinance. The 1962 Ordinance intended to subject land divisions in the urbanizing area to its provisions; that much is clear. It is also clear that the 1962 Ordinance intended to

treat some divisions of land located outside the urbanizing area differently from divisions of land inside the urbanizing area, and Section III(G)(4)(c) is the embodiment of that different treatment. Petitioner's proposed construction of the 1962 Ordinance—that all land divisions in the county were required to go through an application and determination process, even if only to determine whether the proposed division was subject to the 1962 Ordinance—does not give any meaning to the Ordinance's different treatment of land inside the urbanizing area and land outside the urbanizing area. Additionally, as the hearings officer explained:

> "It makes no sense to require a landowner of land outside the urbanizing area to seek Planning Commission review prior to a land division by deed to obtain a determination that the proposed land division does not ['']impede the future highest and best use of the remainder,' in order to demonstrate that the land division qualifies for the exemption and is not regulated by the Ordinance." Record 7.

We cannot improve upon this additional reasoning regarding why petitioner's interpretation of the 1962 Ordinance is not correct.

The assignment of error is denied.

The county's decision is affirmed.