LUBA
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1 BEFORE THE LAND USE BOARD OF APPEALS
2 OF THE STATE OF OREGON
3
4 DAVID SHAFFER and
5 JEAN SHAFFER,
6 *Petitioners*,
7
8 vs.
9
10 YAMHILL COUNTY,
11 *Respondent*,
12
13 and
14
15 MARK HORTON,
16 *Intervenor-Respondent.*
17
18 LUBA No. 2024-052
19
20 FINAL OPINION
21 AND ORDER
22
23 Appeal from Yamhill County.
24
25 Edward H. Trompke filed the petition for review and argued on behalf of
26 petitioners. Also on the brief was Jordan Ramis PC.
27
28 No appearance by Yamhill County.
29
30 William K. Kabeiseman represented intervenor-respondent.
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32 RUDD, Board Member; ZAMUDIO, Board Chair, participated in the
33 decision.
34
35 RYAN, Board Member, did not participate in the decision.
36
37 REMANDED 02/03/2025
38

1 You are entitled to judicial review of this Order. Judicial review is
2 governed by the provisions of ORS 197.850.

Opinion by Rudd.

NATURE OF DECISION

Petitioners appeal a county planning director decision approving a lot line adjustment.

FACTS

Yamhill County Land Division Ordinance (YCLDO) 3.010(34) defines "lot line adjustment" as "a 'property line adjustment' defined in ORS 92.010(11) as 'the relocation of a common (lot) line between two abutting properties.'" On April 21, 2022, intervenor-respondent (intervenor) applied to the county for a lot line adjustment between land areas described as Tax Lots 1000 and 1003 and located within the county's Agriculture/Forestry Small Holding Zoning District (AF-10). Record 32, 35. On May 11, 2022, the county issued a letter (the county decision) addressed to intervenor and stating:

> "This letter will serve as your official notification that your request for a lot-line adjustment to transfer approximately 1-acre from Tax Lot [1000] to Tax Lot [1003] resulting in parcels of approximately 4.24 and 4-acres respectively is hereby approved, subject to the following conditions
>
> "1. The resultant parcels shall be surveyed, pursuant to [s]ection 6.120 of the [YCLDO], and a copy of the survey shall be submitted to the [p]lanning [d]irector prior to final approval.
>
> "2. The adjusted property line shall be established in a location that ensures that any existing structures comply with the setback requirements of [s]ection 501.06 the AF-10 * * * Zoning District[.]

"3. No additional lots or parcels shall be created from this property line adjustment.

"4. A copy of the documents conveying the adjusted properties shall be submitted to the [p]lanning [d]epartment prior to recording with the County Clerk. The names on the instrument(s) conveying the property shall be the same as they appear in the tax records of Yamhill County

"5. The documents conveying the adjusted properties shall either describe the readjusted lots in their entirety, or, if the instrument describes only that area being conveyed from one property to the adjoining property, the following statement shall be placed on the instrument:

> "This conveyance is made solely as an adjustment to common boundary between adjoining properties, and does not create a separate parcel that can be conveyed independently of adjacent land.

"* * * * *

"The [YCLDO] provides for appeal of this approval or any condition of approval to the Board of County Commissioners. Any party wishing to appeal this decision must submit an appeal application, along with a $250.00 fee with the [p]lanning [d]epartment by 5 p.m., May 26, 2022. If the decision is not appealed, this letter will be your final notice of approval of the request." Record 32-33 (boldface omitted).

Notice of a lot line adjustment decision in forest zones is required to comply with Type A procedures of section 1301.01 of the county's zoning ordinance. YCLDO 7.040. Yamhill County Zoning Ordinance (YCZO) 1301.01(A) provides, in part:

"(4) *The applicant and the surrounding property owners who are entitled to notice pursuant to state law shall be notified in writing of the [d]irector's decision and of the reasons for the decision.* Others

1 who may have an interest in the decision shall be notified by
2 publication in a newspaper of general circulation in the county.

3 "(5) All decisions of the [d]irector may be appealed to the [b]oard if
4 such an appeal is filed within 15 days from the date of the decision,
5 pursuant to [s]ection 1404 for appeals." (Emphasis added.)

6 Over two years after the county decision, the county sent a notice of the
7 county decision to petitioners (the county notice). Record 3-4. The county notice
8 included the statement:

9 "To: Neighboring Property Owners

10 "Re: Docket L-13-22, RZ Lots [1000] and [1003]

11 "Enclosed please find a copy of a letter to your neighbor Mark
12 Horton approving a lot-line adjustment in May of 2022. Notice of
13 this decision should have been provided to you at that time, but
14 inadvertently was not. Appeal rights are prescribed in ORS
15 197.830." Record 4.

16 ORS 197.830(1) provides that "[r]eview of land use decisions or limited land use
17 decisions under ORS 197.830 to 197.845 shall be commenced by filing a notice
18 of intent to appeal with the Land Use Board of Appeals." This appeal followed.

19 **MOTION TO TAKE EVIDENCE**

20 OAR 661-010-0045(1) provides, in part, that upon written motion, LUBA
21 may take evidence not in the record "in the case of disputed factual allegations in
22 the parties' briefs concerning unconstitutionality of the decision * * * * [or]
23 procedural irregularities not shown in the record and which, if proved, would
24 warrant reversal or remand of the decision." OAR 661-010-0045(2)(a) provides,
25 in part, that a motion to take evidence "shall contain a statement explaining with

1 particularity what facts the moving party seeks to establish, how those facts
2 pertain to the grounds to take evidence specified in section (1) of this rule, and
3 how those facts will affect the outcome of the reviewed proceeding."

4 On November 20, 2024, petitioners filed their motion to take evidence not
5 in the record, asserting that the county's "procedural errors violated petitioners'
6 due process rights under the state and federal constitutions, and * * * those
7 procedural irregularities prejudiced petitioners by foreclosing their right to a local
8 *de novo* appeal." Motion to Take Evidence 1. Petitioners explain that they seek
9 to establish that they were not provided timely notice of the county decision.
10 Petitioners argue that as a result of the lack of timely notice, they were precluded
11 from filing an appeal within 15 days of the county decision as required by YCZO
12 1301.01(A)(5) and obtaining a *de novo* public hearing before the board of
13 commissioners as provided by YCZO 1404.01(A)(2).[1] Motion to Take Evidence
14 4.

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[1] YCZO 1404.01 provides that, upon determination that the appeal request is complete and in order, a public hearing will be scheduled on the appeal. YCZO 1404.01(A)(2) further provides that, in hearing and deciding such an appeal, "[t]he [b]oard shall make findings based on the testimony or other evidence received by it as justification for its action[.]" Petitioners contend:

> "The facts demonstrate th[at] petitioners were denied due process under the Oregon statutes and federal constitution because, first, YCZO 1301[(A)(4)] expressly grants petitioners and other similarly situated property owners the right to notice of the decision. Second, YCZO 1301.01[(A)(5)] expressly grants petitioners the right to appeal to the [b]oard of [c]ommissioners so long as their appeal was

1 No party responded to petitioners' motion to take evidence or filed a
2 response to the petition for review. The county and intervenor never assert that
3 petitioners were given timely notice of the lot line adjustment. Further, as set out
4 above, the county notice sent to neighboring property owners in 2024
5 acknowledged that neighboring property owners were not provided timely notice.
6 Petitioners have not identified a disputed fact in the parties' briefs with respect
7 to procedure.

8 We refer to the two tax lots collectively as "the subject property."
9 Petitioners also argue that they seek to establish substantive facts regarding the
10 subject property by including

11 "recorded deeds, the current county assessor's map with dimensions
12 that are consistent with the deeds, two prior county land use decision
13 files that show the prior configuration of the subject property and
14 abutting properties, and a recorded survey consistent with the last
15 prior land use file. These documents all consistently show that prior
16 to the approved lot line adjustment, the subject property consisted
17 of only one lawfully created unit of land, not two." Motion to Take
18 Evidence 2.

19 Petitioners argue that they were entitled to a *de novo* hearing to present their
20 evidence to the board of commissioners and that, if they had been given a *de novo*
21 appeal, then they could have submitted the cited evidence. Petitioners have not
22 shown that *copies of the described documents* are relevant to the disposition of
23 their procedural assignment of error.

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filed within 15 days of May 21, 2022, 'pursuant to Section 1404 for appeals.'" Motion to Take Evidence 4.

1 The motion to take evidence is denied.

2 **THIRD ASSIGNMENT OF ERROR**

3 We will remand a land use decision if "[t]he decision is flawed by
4 procedural errors that prejudice the substantial rights of the petitioner(s)[.]" OAR
5 661-010-0071(2)(c). Petitioners' third assignment of error is that the county's
6 failure to follow the applicable notice provisions prejudiced petitioners'
7 substantial rights to a local *de novo* hearing. Where the applicable process for
8 review of an application requires notice and an opportunity for a hearing, an
9 adequate opportunity to prepare and submit a case and a full and fair hearing is a
10 substantial right. *Johnson v. Jackson County*, 59 Or LUBA 94, 99-100 (2009).
11 We have explained that a local government's failure to provide a party who is
12 entitled to notice under the local code with notice of a hearings officer's decision.
13 and notice of an appeal hearing on another party's appeal of the hearings officer's
14 decision, prejudices the party's right to participate in the appeal hearing and
15 remand is required. *Oakleigh-McClure Neighbors v. City of Eugene*, 71 Or
16 LUBA 317, 320 (2015). It is undisputed that petitioners were not given timely
17 notice of the county decision. Petitioners were entitled to notice of the planning
18 director decision and the related opportunity for a local appeal. The county's
19 failure to provide a local appeal prejudiced petitioners' substantial rights.

20 The third assignment of error is sustained.

21 **FIRST AND SECOND ASSIGNMENTS OF ERROR**

1 Petitioners' first assignment of error is that the county decision is not
2 supported by adequate findings. Petitioners' second assignment of error is, in
3 part, that the decision is not supported by substantial evidence in the record.
4 Petitioners also make an alternative argument in their second assignment of error
5 that if their motion to take evidence is granted, we should, based upon that
6 evidence, conclude that the county decision is incorrect.[2]

7 For the reasons set forth previously in this opinion, petitioners' motion to
8 take evidence is denied. We do not address the alternative second assignment of
9 error further. Because we sustained petitioners' third assignment of error, we
10 remand the county's decision for the county to provide the petitioners with an
11 appeal hearing. Although OAR 661-010-0071(2)(a) and (b) provide that we may
12 remand due to inadequate findings or a lack of substantial evidence, it is
13 premature for us to address the findings and substantial evidence challenges prior
14 to the local appeal hearing and we do not address them further.

15 The decision is remanded.

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[2] Petitioners maintain that the county decision is incorrect and requires reversal because, based on evidence outside the record, the subject property is only one unit of land and the county may not approve the use of the lot line adjustment process to create a second unit of land. We shall reverse a land use decision where "[t]he decision violates a provision of applicable law and is prohibited as a matter of law." OAR 661-010-0071(1)(c). We conclude that petitioners are entitled to a local appeal hearing and we do not express any opinion on the correctness of the planning director's decision.