BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

ROBERT DAVISON and KATHARINE KIMBALL,
Petitioners,

vs.

BENTON COUNTY,
Respondent.

LUBA No. 2008-164

ORDER

MOTION TO DISMISS

The challenged decision is the county's approval of a property line adjustment that moved the boundary between two adjacent parcels that are each 2.94 acres in size and zoned Forest Conservation – 80 (FC). The county moves to dismiss the appeal on the basis that the county's decision to approve a property line adjustment falls within the exception to our jurisdiction for decisions made under "land use standards that do not require interpretation or the exercise of policy or legal judgment."[1] ORS 197.015(10)(b)(A). Petitioners respond that the Benton County Development Code (BCDC) approval criteria for property line adjustments require interpretation and the exercise of legal judgment, and that the decision is therefore a "land use decision" under ORS 197.015(10).[2] Specifically, petitioners argue that

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[1] ORS 197.015(10) provides in relevant part:

"'Land use decision:

"* * * * *

"(b) Does not include a decision of a local government:

"(A) That is made under land use standards that do not require interpretation or the exercise of policy or legal judgment[.]"

[2] As relevant, ORS 197.015(10) provides:

in order for the county to approve a property line adjustment, the county must first determine whether the parcels at issue were "lawfully created," and that that determination requires the exercise of legal judgment.

Under BCDC 94.500, the county must make a threshold determination that "each of the existing properties is legally created."[3] The county contends that that determination is a

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"'Land use decision':

"(a) Includes:

"(A) A final decision or determination made by a local government or special district that concerns the adoption, amendment or application of:

"(i) The [statewide planning] goals;

"(ii) A comprehensive plan provision;

"(iii A land use regulation; or

"(iv) A new land use regulation[.]"

[3] BCDC 94.500 contains the approval criteria for property line adjustments:

"An application for property line adjustment * * * shall be approved if each of the existing properties is legally created and each of the resulting properties:

"(1) Meets the applicable minimum parcel or lot size or complies with 94.200(2) or 94.300(2).

"(2) Retains the entire septic drainfield (and reserve area if one has been designated) on the property. If any portion of the septic system or reserve are is located on the other property, appropriate easements shall be established if not already existing. If no reserve area has been designated, or if the County Sanitarian determines the system or reserve area could potentially be impacted by the proposed property line adjustment, the County Sanitarian may require the applicant to apply for a septic system evaluation certifying that the proposed property line adjustment does not affect any portion of the on site sewage disposal system;

"(3) Maintains required setbacks;

"(4) Maintains required frontage, depth-to-width ratio, and flag-lot dimensions pursuant to Chapter 99 and the applicable zone.

"(5) A property line adjustment involving an existing property that is nonconforming to the standards referenced in subsections (3) and/or (4) of this section may be approved if the property line adjustment will not increase the degree of nonconformity."

relatively simple matter, based on the BCDC definition of "parcel."[4] BCDC 51.020(43) defines the term "parcel," and describes when a parcel is to be considered a legally created unit of land:

> "(a) Except as provided in (b), a parcel is considered legally created and will be recognized as a legally created unit of land if:
>
> "(A) The creation of the parcel was approved by the County pursuant to County zoning and land division ordinances in effect at the time of the partitioning; or
>
> "(B) The creation of the parcel was by one of the following listed methods and the creation of the parcel was in accordance with applicable laws in effect at the time:
>
> "(i) The parcel is shown on a survey filed with the State of Oregon prior to October 5, 1973; or
>
> "(ii) The parcel was described in a land sales contract entered into prior to November 28, 1975; or
>
> "(iii) The parcel was described in a deed recorded prior to November 28, 1975. * * *"

The county argues that the evidence in the record confirms that the subject properties were created by deed recorded prior to November 28, 1975, and therefore the planning staff only had to compare the date of the deed to the date specified in BCDC 51.020(43)(a)(B)(iii). The county maintains that such a date comparison does not require the exercise of policy or legal judgment.

If the obligation of the county planner reviewing the property line adjustment application was limited to comparing the deeds provided with the date specified in BCDC 51.020(43)(a)(B)(iii), we might agree that that exercise does not require interpretation or the exercise of legal judgment. However, BCDC 51.020(43)(a)(B) includes a requirement that the county determine that "[t]he creation of the parcel was by one of the following listed

[4] We note that BCDC 94.500 uses the term "properties," but the term "properties" is not defined in the BCDC.

methods *and the creation of the parcel was in accordance with the applicable laws in effect at the time** * *." The determination as to whether the parcel was created in accordance with the applicable laws in effect at the time the deed was recorded appears to require that the county determine what land use laws were in effect at the time the parcel was created, and then determine whether those laws were followed. We are not prepared to say that such a determination does not involve the exercise of legal judgment, although we leave open the possibility that the county may be able to demonstrate in its response brief that such is the case.

The county's motion to dismiss is denied.

SCHEDULE

The record was received on September 29, 2008. On October 1, 2008, we issued an order suspending the deadline for filing the petition for review and all other deadlines, except the deadline for petitioners to respond to the county's motion to dismiss. Accordingly, petitioners shall have 14 days from the date of this order to file objections to the record filed by the county in this appeal.

Unless objections to the record are filed within 14 days, the petition for review shall be due 21 days after the date of this order. The respondent's brief shall be due 42 days after the date of this order. The final opinion and order shall be due 77 days after the date of this order.

Dated this 4th day of March, 2009.

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Melissa M. Ryan,
Board Member