BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

McKENZIE BOWERMAN and
BOWERMAN FAMILY LLC,
Petitioners,

vs.

LANE COUNTY,
Respondent,

and

VERN EGGE,
Intervenor-Respondent.

LUBA No. 2016-008

ORDER

INTRODUCTION

The briefing in this appeal was completed after the petition for review was received on June 9, 2016, and intervenor-respondent's (intervenor's) response brief was received on July 25, 2016. Oral argument was scheduled for July 14, 2016. At the request of the parties, that oral argument was rescheduled for September 8, 2016. As we explain in more detail below, intervenor filed a motion to consider extra-record evidence and a motion to dismiss this appeal as moot on August 17, 2016.[1] We issued an order on

[1] Intervenor filed an earlier motion to dismiss challenging LUBA's jurisdiction for reasons other than mootness.

August 26, 2016, cancelling oral argument and suspending this appeal until the motion to dismiss was resolved. On August 31, 2016, petitioners filed a reply to the motion to dismiss as well a motion to consider additional extra-record evidence.

The parties have filed additional memoranda and extra-record evidence in support of and opposing the motion to dismiss. We have considered all of those pleadings. Because the extra-record evidence is submitted to support the parties' arguments regarding our jurisdiction to proceed with this appeal, we have considered all of that extra-record evidence. *Willhoft v. City of Gold Beach*, 39 Or LUBA 743 (2000); *Blatt v. City of Portland*, 21 Or LUBA 337, 342, *aff'd* 109 Or App 259, 819 P2d 309 (1991), *rev den* 314 Or 727 (1992); *Hemstreet v. Seaside Improvement Comm.*, 16 Or LUBA 630, 631-33 (1988).

This has not been a tidy appeal. We set out the history of this appeal in some detail below, to provide an adequate frame of reference to decide the mootness question raised by intervenor's second motion to dismiss.

A. The Decision on Appeal

In an earlier order in this appeal denying intervenor's first motion to dismiss, we set out the following description of the decision on appeal:

> "In this appeal, petitioners seek review of a county planning director's decision approving nine property line adjustments.[2]

[2] As we explain later in this order, petitioners suggest the challenged decision may have approved only eight property line adjustments. For

> Those property line adjustments were approved by a single decision, on April 28, 2015, without a public hearing or written notice of the decision to anyone other [than] the applicant. The applicant is the intervenor-respondent (intervenor) in this appeal. Those property line adjustments significantly reconfigure eight properties zoned Impacted Forest Lands, a forest zone adopted to implement Goal 4 (Forest Lands). Compare Record 80 (beginning configuration) with Record 214 (resulting configuration). Several months later, on August 19, 2015, the planning director approved forest template dwellings for three of those eight reconfigured properties: property 3 (6.61 acres), property 5 (5.43 acres), and property 6 (7.86 acres).[3] Those August 19, 2015 forest template dwelling approvals were subject to appeal locally, but apparently were not appealed. Petitioners' notice of intent to appeal the April 28, 2015 property line adjustment decision was filed with LUBA on January 16, 2016, several months after the forest template dwelling approvals." *Bowerman v. Lane County*, 73 Or LUBA 399-400 (2016) (footnote omitted).

The April 28, 2015 property line adjustment (PLA) decision is made up of a four-page application for property line adjustment review, with attached exhibits. Record 73-175. Those exhibits include maps that show the before and after configurations for one property line adjustment deed that was recorded in 2013, without the required prior land use approval. The exhibits also include drawings, draft deeds and property descriptions for eight more proposed PLAs. The four-page application was approved by a county planner

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purposes of this order we assume the appealed decision approves nine property line adjustments.

[3] Those forest template dwelling approval decisions are not in the record. They are attached as exhibits to intervenor's March 7, 2016 reply to petitioners' response to intervenor's first motion to dismiss.

on April 28, 2015. Record 76. Eight deeds were recorded on June 2, 2015, to complete the PLAs.[4] Record 1-72.

B. Intervenor's First Motion to Dismiss

Intervenor's first motion to dismiss was filed on February 16, 2016. That motion to dismiss set out two legal theories. First, LUBA's jurisdiction is generally limited to land use decisions. ORS 197.825(1). Intervenor argued the challenged PLA decision qualifies as a decision "[t]hat is made under land use standards that do not require interpretation or the exercise of policy or legal judgment[.]" ORS 197.015(10)(b)(A). Such decisions are an exception to the ORS 197.015(10)(a) definition of "land use decision." Second, intervenor argued the appeal was not timely filed within the ORS 197.830(9) 21-day deadline for appealing land use decisions to LUBA.[5] Intervenor argued the notice of intent to appeal in this case was filed on January 16, 2016, long after the April 28, 2015 PLA decision became final and the ORS 197.830(9) 21-day deadline to appeal that decision expired.

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[4] ORS 92.190(3) provides:

> "The governing body of a city or county may use procedures other than replatting procedures in ORS 92.180 and 92.185 to adjust property lines as described in ORS 92.010 (12), as long as those procedures include the recording, with the county clerk, of conveyances conforming to the approved property line adjustment as surveyed in accordance with ORS 92.060 (7)."

[5] The ORS 197.830(9) 21-day deadline for appealing land use decisions to LUBA begins on the date the land use decision becomes final.

In their response to the first motion to dismiss, petitioners first responded that the county was required to exercise "policy or legal judgment," making ORS 197.015(10)(b)(A) inapplicable. Because the PLA decision otherwise qualifies as a "land use decision," as ORS 197.015(10)(a) defines that term, petitioners argued LUBA has jurisdiction to review the PLA decision. Petitioners also argued the deadline for filing the appeal is governed by ORS 197.830(3), not ORS 197.830(9), because the county did not hold a hearing on the PLA.[6] Petitioners contended this appeal is subject to ORS 197.830(3)(a), and the appeal was filed within 21 days of the date petitioners received "actual notice," since they were never given actual notice of the PLA decision before they filed their notice of intent to appeal the PLA decision to LUBA on January 16, 2016.

Intervenor then deferred his ORS 197.015(10)(b)(A) argument to the briefing on the merits, and limited his first motion to dismiss to an argument

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[6] ORS 197.830(3) provides in part:

> "(3) If a local government makes a land use decision without providing a hearing, * * * a person adversely affected by the decision may appeal the decision to the board under this section:
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> > "(a) Within 21 days of actual notice where notice is required; or
> >
> > "(b) Within 21 days of the date a person knew or should have known of the decision where no notice is required."

that July 23, 2015 notices of three proposed forest template dwelling decisions were sufficient to give petitioners actual notice of the April 28, 2015 PLA decision. In support of that argument, intervenor provided copies of the three forest template approval decisions. As noted earlier, those three forest template dwellings were proposed for three of the eight properties that achieved their current configuration through the disputed PLAs (properties 3, 5 and 6). Two of the three decisions include a finding that specifically references the PLA decision in addressing whether the properties qualify as "a lawfully created parcel or lot." *Bowerman*, 73 Or LUBA at 403. Intervenor argued that petitioners were mailed copies of the final forest template dwelling decisions on August 21, 2015, over five months before the notice of intent to appeal the PLA decision was filed on January 16, 2016. Intervenor argued the forest template dwelling decisions were sufficient to give petitioners actual notice of the April 28, 2015 PLA decision.

We rejected intervenor's actual notice argument in our May 17, 2016 Order, concluding that the limited references in two of those forest template dwelling decisions to the earlier PLA decision were not sufficient to constitute "actual notice" of the PLA decision, within the meaning of ORS 197.830(3)(a). We denied the motion to dismiss and established a briefing schedule.

C. The Petition for Review

Petitioners' June 7, 2016 petition for review includes five assignments of error. Those assignments of error are briefly summarized below.

1. First Assignment of Error (Setbacks)

Lane Code (LC) 13.450(4) authorizes ministerial approval of a PLA in certain specified circumstances. One of those circumstances is set out in LC 13.450(4)(c), which authorizes ministerial approval of a PLA with a surveyor certification concerning setbacks and lot or parcel sizes.[7]

In their first assignment of error, petitioners contend the PLAs result in nonconforming setbacks.

2. Second Assignment of Error (Ministerial Procedure)

Petitioners argue LC 13.450(4) only authorizes ministerial approval of a PLA if the proposal is for a single PLA. Here the county approved nine PLAs in a single decision. Petitioners argue that decisions that approve more than one PLA require written notice to adjoining property owners and an opportunity to comment under LC 13.450(5).[8]

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[7] The text of LC 13.450(4)(c) is set out below:

> "The adjustment of a common property line between properties where a surveyor certifies that any property reduced in size by the adjustment is not reduced below the minimum lot or parcel size for the applicable zone, and where the setbacks from existing structures and improvements do not become nonconforming or more nonconforming with the setback requirements."

[8] LC 13.450(5) provides in part:

> "All other property line adjustment applications are subject to Planning Director review with public notice, pursuant to LC 14.050 and 14.100."

3. Third Assignment of Error (Error to Adjust Theoretical Property Lines)

As noted earlier, the challenged decision approves nine property line adjustments—one previously recorded PLA and eight new PLAs. Some of the eight PLAs further adjust the adjusted property lines that are proposed in one or more of the other eight PLAs. Citing LUBA's decision in *Warf v. Coos County*, 43 Or LUBA 460 (2003), petitioners argue the statutes authorizing property line adjustments do not authorize further adjustments of adjusted property lines that have not yet become effective because the deed that conveys property in accordance with the adjusted property line has not yet been executed and recorded. Petitioners contend that until the deed that makes an adjusted property line effective is executed and recorded, the adjusted property line is only a theoretical or possible property line and is not accurately described as a "property line." As noted earlier, the eight new PLAs were approved on April 28, 2015, and all of the deeds for the eight new PLAs were recorded together over a month later, on June 2, 2015. Petitioners further argue that legislative changes to the property line adjustment statutes that were adopted in 2008 in response to *Phillips v. Polk County*, 53 Or LUBA 197, *aff'd* 213 Or App 498, 162 P3d 338 (2007), do not affect this aspect of LUBA's *Warf* decision.

LC 14.100(4) requires notice of a director decision to surrounding property owners, within specified distances of the property that is the subject of the decision. Those distances vary based on zoning.

4. Fourth Assignment of Error (Eight PLAs Premised on Prior Illegal PLA)

The deed for the PLA between tax lot 400 and tax lot 100 was recorded in 2013 without county approval. Record 102. The eight PLAs make further adjustments to the adjusted property line between tax lots 400 and 100. Petitioners contend it is unclear whether the challenged PLA decision grants land use approval for the 2013 PLA. If it does not, petitioners contend it was error to approve further adjustments of a property line that is the product of a PLA that has not received land use approval.

5. Fifth Assignment of Error (Surveyor's Certificate)

As noted earlier, the LC 13.450(4)(c) ministerial PLA approval procedure the county followed requires a surveyor's certificate that setbacks are not rendered nonconforming by the PLA. *See* n 7. In one subassignment of error, petitioners argue the surveyor's certificate in this case does not specifically list tax lot 400. Therefore, petitioners argue, the PLA decision should have been processed under the LC 13.450(5) notice and comment procedure rather the LC 13.450(4) ministerial procedure. The county's failure to do so deprived petitioners of their opportunity to comment on the proposal. Petitioners contend that right to comment is a "substantial right" and the county's procedural error is therefore a basis for remand. ORS

197.835(9)(a)(B).[9] In their second subassignment of error, petitioners contend the surveyor's certificate is wrong about the setbacks not being made nonconforming by the PLAs. Therefore, petitioners argue, under LC 13.450(5), the notice and comment procedure should have been followed and the county's failure to do so prejudiced petitioners' substantial rights.

D. Intervenor-Respondent's Response Brief

Initially, intervenor argues that petitioners' petition for review is attempting to collaterally attack the three forest template dwelling decisions in this appeal. Intervenor contends petitioners had an opportunity to challenge the finding in those forest template dwellings that the disputed properties were lawfully created and because they failed to take advantage of that opportunity they should not be permitted to collaterally attack those forest template dwelling decisions in this appeal.

Intervenor contends petitioners' first assignment of error is without merit because LC 13.450(4)(c) simply requires a surveyor certification, it does not require that the planning department review that surveyor certification to determine if the certification is accurate or correct.

Intervenor contends petitioners' second assignment of error is similarly without merit, because there is nothing in the text of LC 13.450(4)(c), or

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[9] ORS 197.835(9)(a)(B) directs LUBA to reverse or remand a land use decision where a local government "[f]ailed to follow the procedures applicable to the matter before it in a manner that prejudiced the substantial rights of the petitioner[.]"

elsewhere in LC 13.450, that prohibits use of the LC 13.450(4)(c) ministerial procedure the county relied on where more than one PLA is proposed.

Without acknowledging *Warf*, intervenor argues that petitioners' third assignment of error is without merit, because nothing prohibits approving further adjustments of adjusted property lines, just because the deed that will make those adjusted property lines effective has not yet been recorded. We understand intervenor to argue the statutes authorizing PLAs authorize decisions that approve both adjustments of existing property lines and property lines that may become effective in the future when a deed is recorded to make an approved PLA effective.

In response to petitioners' fourth assignment of error, intervenor contends the PLA application and the surveyor's certificate both include the 2013 PLA. And finally, intervenor contends petitioners' fifth assignment of error is derivative of others that take the position that notice and comment procedures should have been followed. Intervenor contends the ministerial procedure was correctly followed here.

INTERVENOR'S SECOND MOTION TO DISMISS AND MOTION TO CONSIDER EXTRA-RECORD EVIDENCE

On June 3, 2016, while this appeal of the April 28, 2015 PLA decision was pending at LUBA, intervenor filed an application that requested the county to provide notice of legal lot verification and property line adjustment. Second Motion to Dismiss and Motion to Consider Extra-Record Evidence (MTD)

Exhibit A. The first page of that application explained "The purpose of this Application is to notice PA 15-05077 which will validate the adjustments as being lawful and the resulting parcels as lawful." PA 15-05077 is the application that became the April 28, 2015 PLA decision when the planning department approved it. Attached to that page is the three-page application that led to the April 28, 2015 PLA decision, without the exhibits. On July 8, 2016 the planning director approved the PLAs (MTD Exhibit B).[10] The before and after configurations of the eight properties shown on MTD Exhibit B are the same before and after configurations of the eight properties that were approved in the April 28, 2015 PLA decision. On July 11, 2016, the director gave notice of the July 8, 2016 decision and indicated the decision would become final if not appealed by July 25, 2016 (MTD Exhibit C).[11] The Bowerman Family LTD Partnership is included on the list of persons that were mailed copies of MTD Exhibit C. On July 25, 2016, petitioners filed a local appeal of the July 8, 2016 decision. MTD Exhibit E. A hearing has been held before a county land use hearings official in that local appeal, and as far as we are informed a decision by the hearings officer has not yet been rendered.

Turning to intervenor's second motion to dismiss, LUBA generally dismisses appeals as moot, where its decision resolving the appeal would be

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[10] MTD Exhibit B includes a map showing the before and after configuration of the parcels, but does not include deeds or individual PLAs.

[11] MTD Exhibit C includes the first page of MTD Exhibit A.

without practical effect. *Thunderbird Hotels, LLC v. City of Portland*, 56 Or LUBA 430, 432 (2008); *Rest Haven Memorial Park v. City of Eugene*, 44 Or LUBA 231, 238, *aff'd*, 189 Or App 90, 74 P3d 1107 (2003); *Mobile Crushing Company v. Lane County*, 13 Or LUBA 97, 99 (1985). Intervenor argues petitioners only seek remand of the PLAs so that the county can provide notice and an opportunity for local appeal. Intervenor argues that the PLA readoption process that is currently before the county hearings officer has provided petitioners the notice and procedure that petitioners asked for in their petition for review in this LUBA appeal, and therefore this appeal is moot.

We will not attempt to describe and address all the punches and counter punches that follow in the parties' additional memoranda that were filed after the second motion to dismiss. There are several reasons why we agree with petitioners that this appeal is not moot. We note below three of them, any one of which is a sufficient reason to deny intervenor's second motion to dismiss.

Petitioners first argue that intervenor's theory that the July 11, 2016 notice and local appeal renders this LUBA appeal moot assumes that there will be a final decision by the county in that local appeal. Petitioners contend the applicant could withdraw the application that led to that appeal at any time and if the applicant did so there would be no decision in that local appeal. Petitioners argue that if this appeal is dismissed as moot, petitioners might be left with no opportunity to challenge the PLA decision on its merits if intervenor withdraws the application that led to the July 8, 2016 decision.

Because of that possibility, this appeal will have a practical effect and is not moot.

Petitioners next argue that intervenor is simply wrong about the scope of their assignments of error in the petition for review. In particular petitioners argue they are not simply asking LUBA to remand the April 28, 2015 PLA decision for notice and an opportunity for a local appeal. Petitioners contend their first, third, fourth and fifth assignments of error all challenge the April 28, 2015 PLA decision on its merits. Again, we agree petitioners.

Finally, *Standard Insurance Co. v. Washington County*, 17 Or LUBA 647, 660, *rev'd and rem'd on other grounds*, 97 Or App 687, 776 P2d 1315 (1989), stands for the proposition that once a LUBA appeal is perfected to challenge a land use decision at LUBA, a local government no longer has jurisdiction to modify the appealed land use decision until LUBA finally resolves the appeal. In response to the July 11, 2016 notice of the county's readoption the April 28, 2015 decision with opportunity to appeal, petitioners filed an appeal and challenged the decision based on arguments similar to those presented in the petition for review. MTD, Exhibit E; Petitioners' Response to Intervenor's Motion to Dismiss, Exhibit A. But that local appeal could not result in a sustainable decision by the hearings official that modifies or reverses the April 28, 2015 decision. Under *Standard Insurance*, the county lacks jurisdiction to modify or reverse that April 28, 2015 PLA decision. Petitioners identified this jurisdictional problem in their arguments to the county.

Petitioners' Response to Intervenor's Motion to Dismiss, Exhibits A and B. Because it appears that the county is without jurisdiction to grant petitioners the relief they request in their local appeal of the July 8, 2016 decision, this appeal will have a practical effect and for that reason alone is not moot.

We expressly decline to address the parties' arguments about whether a decision in this appeal will have a practical effect on the three August 19, 2015 forest template dwelling approval decisions on three of the eight properties that were the subject of the April 28, 2015 PLA decision. That question is not properly presented in this appeal. Regardless of the answer to that question, our decision concerning the April 28, 2015 decision that approves PLAs for eight properties will have a practical effect on at least five of those eight properties, even if it has no effect on the three properties for which forest template dwellings were approved on August 19, 2015.

For the reasons just explained, intervenor's second motion to dismiss is denied. Oral argument and the deadlines for future events in this appeal will be rescheduled separately.

Dated this 24th day of October, 2016.

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Michael A. Holstun
Board Member