

1                                   BEFORE THE LAND USE BOARD OF APPEALS

2                                   OF THE STATE OF OREGON

3  
4                                   SEAN AGNEW and OLGA AGNEW,  
5   *Petitioners,*

6  
7   vs.

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9                                   JOSEPHINE COUNTY,  
10   *Respondent,*

11   and

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13  
14                                   BRENDA PATTON,  
15   *Intervenor-Respondent.*

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17                                   LUBA No. 2017-017

18                                   ORDER

19  
20   **MOTION TO INTERVENE**

21                   Brenda Patton (intervenor), the applicant below, moves to intervene on  
22 the side of the county. There is no opposition to the motion and it is allowed.

23   **MOTION TO DISMISS**

24                   The challenged decision is a December 29, 2016 planning director  
25 decision approving a property line adjustment for intervenor’s land zoned  
26 Woodland Resource. The planning director approved the property line  
27 adjustment without a hearing or notice to any party other than intervenor. On  
28 February 15, 2017, petitioners filed a notice of intent to appeal the county’s  
29 decision. The county filed a motion to dismiss the appeal, petitioners filed a

1 response to the motion, and the county filed a reply to the response (Renewed  
2 Motion to Dismiss) that sets out another reason the county believes LUBA  
3 lacks jurisdiction over the appeal. We suspended the appeal in order to resolve  
4 the jurisdictional issues. We now resolve the motion.

5 **A. Failure to Exhaust Remedies**

6 The county’s motion to dismiss first alleges that petitioners failed to  
7 exhaust their administrative remedies as required by ORS 197.825(2)(a)  
8 because they failed to file a local appeal of the planning director’s decision.<sup>1</sup>  
9 According to the county, Josephine County Rural Land Development Code  
10 (RLDC) Article 22 allows petitioners to file an appeal of the planning  
11 director’s decision to the board of county commissioners, and petitioners failed  
12 to do so.

13 Petitioners respond that RLDC 22.030(F) provides only the applicant  
14 with the right to appeal a decision to deny a permit using “Ministerial Review  
15 Procedures,” and that pursuant to RLDC 54.020, the county reviewed and  
16 approved intervenor’s application using “ministerial review procedures as set  
17 forth in Article 22.” RLDC 22.030(F) provides that “[u]nless specifically  
18 provided otherwise in this code, a decision to deny a permit utilizing  
19 Ministerial Review Procedures may be appealed by the applicant only to the

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<sup>1</sup> ORS 197.825(2)(a) limits LUBA’s jurisdiction to “to those cases in which the petitioner has exhausted all remedies available by right before petitioning the board for review[.]”

1 Board, subject to the rules and procedures contained in Article 33 applicable to  
2 the appeal of decisions by the director.” Absent a clear articulation by the  
3 county of what provision of the RLDC gives petitioners a right to appeal the  
4 planning director decision to the board of county commissioners, we agree with  
5 petitioners that the RLDC does not appear to give petitioners the right to file a  
6 local appeal of the planning director’s decision, because (1) only the applicant  
7 has a right of appeal, and (2) only a decision to *deny* a permit is subject to  
8 appeal. Petitioners did not fail to exhaust their administrative remedies.

9 **B. Timely Filing**

10 The motion to dismiss also alleges that petitioners failed to file their  
11 notice of intent to appeal within the time provided in ORS 197.830(3)(b). The  
12 county argues that the notice of intent to appeal (NITA) does not state when  
13 petitioners knew about the planning director’s decision. In their response to the  
14 motion to dismiss, petitioners include a sworn declaration that avers that  
15 petitioners first learned about the property line adjustment decision on January  
16 26, 2017, when they reviewed documents provided by intervenor in response to  
17 a discovery request in separate litigation between petitioners and intervenor.  
18 Petitioners’ Response to Motion to Dismiss 3; Declaration of Sean Agnew and  
19 Olga Agnew. Accordingly, petitioners respond, the NITA was timely filed on  
20 February 15, 2017. We agree with petitioners.

1           **C.    ORS 197.015(10)(b)(A)**

2           In Respondent’s Renewed Motion to Dismiss, the county takes the  
3 position that petitioners’ citation to and quotation of the RLDC’s “ministerial  
4 review procedures” at RLDC 54.020 amounts to an admission that the  
5 challenged decision falls within the ministerial exception to LUBA’s  
6 jurisdiction at ORS 197.015(10)(b)(A) for decisions that do not require “the  
7 exercise of policy or legal judgment.” Petitioners respond, and we agree, that  
8 the county mischaracterizes petitioners’ position. Petitioners did not concede or  
9 otherwise take the position that the challenged decision is subject to the  
10 ministerial exception at ORS 197.015(10)(b)(A) by citing and quoting the  
11 procedures that the county relied on in making its decision.

12           Petitioners also respond by citing several RLDC provisions that  
13 petitioners argue required the county to exercise legal judgment in approving  
14 the property line adjustment. RLDC 54.050 sets out “Special Review  
15 Standards” for property line adjustments. RLDC 54.050 provides in relevant  
16 part that “[i]n addition to the review standards contained in Chapter 7 (General  
17 Development Standards) and Chapter 8 (Public Facilities Development  
18 Standards), the tentative approval of property line adjustments shall comply  
19 with all of the following additional standards[,]” listed in (A) through (D).  
20 Petitioners argue that the plain language of RLDC 54.050 requires property  
21 line adjustments to comply with the general development standards in RLDC  
22 Article 7, and the public facilities development standards in RLDC Article 8.

1           In the decision, the county determined that (1) one general development  
2 standard, RLDC 71.010(A), did not apply to the application, and (2) a second  
3 general development standard, RLDC Article 76, Fire Safety Standards, did not  
4 apply because “no new development is proposed at this time,” but that “future  
5 development will be subject to Article 76 fire safety standards.”<sup>2</sup> Petitioners’  
6 Response to Renewed Motion to Dismiss, Exhibit 2. The county did not apply  
7 any provisions of RLDC Article 8 to the application. According to petitioners,  
8 the county’s identification of the applicable and inapplicable land use standards  
9 from Article 7 and Article 8 requires legal judgment in order to determine  
10 which provisions apply.

11           RLDC 54.040(C) makes the Tentative Plan Review standards at RLDC  
12 50.050(A) applicable to property line adjustments. RLDC 50.050.A(4) requires  
13 the tentative plan to comply with “[o]ther development standards contained  
14 within this code and all other applicable master plans, rules, resolutions,  
15 ordinances, codes, technical manuals and policies of the county or the state or  
16 federal governments.” Petitioners argue that determining which “other”  
17 development standards contained in the RLDC and any applicable master

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<sup>2</sup> RLDC 11.030 defines “development” as “[a]ny alteration of improved or unimproved real estate, including but not limited to a land division, buildings or other structures, mining, dredging, filling, grading, paving, excavation, or drilling operations.” Petitioners argue that as defined in RLDC 11.030, “development” includes a property line adjustment.

1 plans, rules, etc. and with any applicable county, state or federal laws requires  
2 the exercise of legal judgment.

3 We agree with petitioners. The provisions of the RLDC that govern  
4 property line adjustments by their express terms make the general development  
5 standards, the public facilities development standards, and “other”  
6 development standards contained in the RLDC and in other local, state or  
7 federal laws applicable to a property line adjustment application. Applying at  
8 least some of those standards requires the exercise of legal judgment, and the  
9 county has not established that determining which development standards  
10 apply, or do not apply, to a property line adjustment application can be done  
11 without exercising legal judgment. *Thompson v. City of St. Helens*, 30 Or  
12 LUBA 339, 343 (1996) (determining which criteria, if any, within the city’s  
13 land use regulations apply to lot line adjustments requires an interpretation of  
14 those regulations and the exercise of legal judgment). Accordingly, the  
15 decision does not fall within the exception to LUBA’s jurisdiction at ORS  
16 197.015(10)(b)(A).

17 The county’s motion to dismiss is denied.

18 **RECORD**

19 The next event in the review proceeding is transmittal of the record by  
20 the county. The county shall transmit the record to LUBA and the parties  
21 within 21 days of the date of this order.

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1 Dated this 3<sup>rd</sup> day of May, 2017.

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Melissa M. Ryan

5 Board Member