BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

DAVID SARETT,
Petitioner,

vs.

LANE COUNTY,
Respondent,

and

D & A BESSETT, LLC,
Intervenor-Respondent.

LUBA No. 2017-055

FINAL OPINION
AND ORDER

Appeal from Lane County.

Sean T. Malone, Eugene, filed the petition for review and argued on behalf of petitioner.

No appearance by Lane County.

Bill Kloos, Eugene, filed the response brief and argued on behalf of intervenor-respondent. With him on the brief was Law Office of Bill Kloos PC.

BASSHAM, Board Member; RYAN, Board Chair; HOLSTUN Board Member, participated in the decision.

REMANDED 11/08/2017

You are entitled to judicial review of this Order. Judicial review is

1 governed by the provisions of ORS 197.850.

Opinion by Bassham.

NATURE OF THE DECISION

Petitioner appeals a 2014 decision that approves a series of property line adjustments between six parcels.

MOTION TO FILE REPLY BRIEF

Petitioner moves to file a reply brief to respond to a motion to take evidence included in the response brief. There is no opposition to the reply brief, and it is allowed.

MOTION TO TAKE EVIDENCE/OFFICIAL NOTICE

Intervenor-respondent D&A Bessett, LLC (intervenor) moves to take evidence outside the record, in the form of a 2017 planning staff decision that verifies four of the six parcels at issue in this appeal as legally created parcels. Alternatively, intervenor argues that the 2017 decision is subject to judicial notice. As discussed below, intervenor argues that the challenges to the 2014 property line adjustment decision that petitioner advances in this appeal could have been advanced in an appeal of the 2017 legal lot verification decision. If so, intervenor argues, then petitioner's challenges to the 2014 decision in this appeal are, in effect, an impermissible collateral attack on the 2017 decision.

Petitioner opposes the motion to take evidence, arguing that intervenor does not identify any basis under OAR 661-010-0045(1) for LUBA to grant a

motion to take evidence.[1] Petitioner is correct that intervenor does not cite any basis under OAR 661-010-0045(1) for LUBA to consider the 2017 legal lot verification decision. We see no grounds under OAR 661-010-0045(1) to grant the motion to take evidence, and therefore the motion is denied.

Petitioner also argues that intervenor does not explain why the 2017 decision is subject to official notice. We understand "official notice" to be a reference to ORS 40.090(1), which defines "law judicially noticed" to include, among other things, the "decisional, constitutional and public statutory law of Oregon, the United States, any federally recognized American Indian tribal government and any state, territory or other jurisdiction of the United States." The 2017 decision is arguably "decisional" law of the county, an administrative arm of the State of Oregon. The 2017 decision is cited to us not to establish any factual predicates, but rather for its impact on our scope of review in this appeal. In our view, it is necessary and appropriate to consider the 2017

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[1] OAR 661-010-0045(1) provides:

> "Grounds for Motion to Take Evidence Not in the Record: The Board may, upon written motion, take evidence not in the record in the case of disputed factual allegations in the parties' briefs concerning unconstitutionality of the decision, standing, ex parte contacts, actions for the purpose of avoiding the requirements of ORS 215.427 or 227.178, or other procedural irregularities not shown in the record and which, if proved, would warrant reversal or remand of the decision. The Board may also upon motion or at its discretion take evidence to resolve disputes regarding the content of the record, requests for stays, attorney fees, or actual damages under ORS 197.845."

decision to resolve intervenor's argument that our scope of review does not include any of the issues raised in this appeal. Accordingly, we shall consider the 2017 decision for the limited purpose of resolving that dispute over our scope of review.

FACTS

Intervenor owns six contiguous parcels zoned for forest use, ranging in size from 20 acres to 96.4 acres. The six parcels total approximately 244 acres. On August 7, 2014, intervenor filed an application with the county seeking approval of an indeterminate number of property line adjustments. In support of the application, intervenor submitted a plan showing the parcels' configuration prior to the adjustments and a plan showing the parcels' configuration after the adjustments. No plans were submitted showing how any property boundaries were adjusted or how the final configuration was to be achieved. The resulting reconfiguration shows that five of the parcels are reduced in size to less than five acres, and clustered together near a county road, leaving an expanded 224.5-acre parcel to the south.[2]

A county planner processed the application under Lane Code (LC) 13.450(4)(c), which allows the applicant for a property line adjustment to obtain "ministerial" approval of a property line adjustment, meaning approval

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[2] Although not reflected in the decision or the record, we understand one purpose of the reconfiguration is to allow one or more of the small parcels near the county road to be developed with dwellings.

without notice or hearing.[3] The planner chose not to employ a different county process, under LC 13.450(5), which provides for planning director review of one or more property line adjustments, under procedures that require notice to

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[3] LC 13.450 provides, in relevant part:

"4. An applicant must obtain ministerial approval or may use the Planning Director review with public notice procedures if the property line adjustment is for:

"(a) The adjustment of a common property line involving only F-1 zoned properties which are less than 200 acres and the applicant submits a title report for each F-1 property that demonstrates the properties are not encumbered by a nonrevocable deed restriction required for certain forest dwellings pursuant to ORS 215.740 and OAR 660 Division 06; or

"(b) The adjustment of a common property line between properties in any zone if each adjusted property is vacant and complies with the minimum area requirements of the zoning before and after the property line adjustment; or

"(c) 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."

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

adjoining property owners and opportunity for comment. Petitioner owns an adjacent parcel located close to where the reduced size parcels are clustered.

On August 11, 2014, the planner issued a decision approving the application. At some point, petitioner discovered the August 11, 2014 decision, and on May 19, 2017, filed this appeal.

FIRST ASSIGNMENT OF ERROR

Petitioner argues that the county committed procedural error, prejudicial to petitioner, in processing the application under the provisions for a ministerial decision under LC 13.450(4), rather than under the provisions under LC 13.450(5), which provide for notice to adjoining property owners and opportunity to comment. *See* n 3. Petitioner argues that, in *Bowerman v. Lane County*, __ Or App __, __ P3d __ (Aug 23, 2017), the Court of Appeals held that LC 13.450(4) applies only to a proposal to adjust a single property line, and does not apply to proposals for serial or multiple property line adjustments. The court held that such applications must be processed under the provisions for Planning Director Review, at LC 13.450(5).

In the present case, petitioner argues that there is no dispute that intervenor's application sought county approval for serial property line adjustments. Petitioner contends that, under *Bowerman*, the county erred in processing the application under LC 13.450(4) rather than LC 13.450(5).

On appeal, intervenor concedes that under *Bowerman* it cannot defend the merits of the county's determination to process the application under LC

13.450(4) rather than LC 13.450(5). Intervenor does not dispute that the county committed procedural error in that regard, and that the county's error prejudiced petitioner's substantial rights. However, intervenor argues that petitioner is precluded from advancing any challenge to the August 11, 2014 decision, even the procedural error advanced in the first assignment of error, because petitioner's appeal represents a "collateral attack" on an unappealed decision, the April 28, 2017 county decision that verifies as legally created lots four of the six parcels at issue in this appeal. According to intervenor, the April 28, 2017 legal lot verification recites that the current configuration of each of the four parcels "is the result of approved Property Line Adjustments executed by the following deeds [listing a number of deeds recorded in 2016]." Response Brief App-7.

Intervenor argues that petitioner was sent notice of the April 28, 2017 legal lot verification, and could have appeared in that proceeding and appealed it locally or to LUBA, and in that appeal, could have advanced the same challenges to the 2014 property line adjustments that he advances in the present direct appeal of the August 11, 2014 decision. Intervenor contends that petitioner's failure to appeal the April 28, 2017 decision means that petitioner is precluded from advancing any challenges to the property line adjustments in the present appeal that could have been raised in the legal lot verification process, because doing so would constitute an impermissible "collateral attack" on the April 28, 2017 legal lot verification.

Petitioner replies, and we agree, that the doctrine of "collateral attack" does not limit our scope of review over the issues in the present appeal. Petitioner does not attempt, in this appeal, to challenge the April 28, 2017 legal lot verification. The April 28, 2017 legal lot verification decision simply determined that four of intervenor's parcels were legal lots, which LC 13.010 defines as a "lawfully created lot or parcel." The focus of the legal lot decision was whether the four parcels were lawfully created, and the decision did not purport to verify or approve the configuration of the parcels at issue, or re-approve the 2014 property line adjustments.[4] *See* Response Brief, App 8 (a section of the April 28, 2017 legal lot decision stating that a legal lot decision decision does not mean the "creation or determination" of a "boundary location"). That the 2017 legal lot decision recited the recent history of the subject parcels does not mean that the decision approved or re-approved the boundaries of those parcels resulting from the 2014 property line adjustments. The county decision that approved the serial adjustments resulting in the current configuration of the six parcels at issue in this appeal is the August 11, 2014 decision, the subject of this appeal. On the merits, as noted, intervenor does not dispute that the county followed the wrong procedure in processing

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[4] As petitioner notes, by definition a property line adjustment cannot result in the creation of a new parcel. *See* LC 13.10 (defining a "property line adjustment" as "[a] relocation or elimination of all or a portion of the common property line between abutting properties that does not create an additional lot or parcel"); ORS 92.010(12) (same).

the August 8, 2014 application under LC 13.450(4) rather than LC 13.450(5). Accordingly, the August 11, 2014 decision must be remanded for the county to follow the correct procedure, including providing notice and an opportunity to comment to petitioner and other persons entitled to notice.

The first assignment of error is sustained.

SECOND ASSIGNMENT OF ERROR

Under the second assignment of error, petitioner advances a substantive challenge to the August 11, 2014 decision, arguing that for the reasons stated in the majority opinion in LUBA's *Bowerman* decision, under ORS chapter 92 the county erred in approving serial property line adjustments without assuring that only existing property lines were adjusted.[5]

However, we need not and do not address the second assignment of error. As explained above, remand is necessary for the county to conduct new proceedings and issue a new decision on the application. That proceeding will result in a new decision, and that new decision may well ensure that only

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[5] The majority opinion in LUBA's decision, *Bowerman v. Lane County*, __ Or LUBA __ (LUBA No. 2016-008, Jan 26, 2017), interpreted provisions of ORS chapter 92 to the effect that state law allows only the adjustment of an existing property line, *i.e.*, a property line created by a recorded plat or deed. The court in *Bowerman* did not resolve challenges to the LUBA majority opinion's interpretation of state law, but affirmed LUBA's decision based on the court's interpretation of the county code. Intervenor informs us that a party in *Bowerman* has filed a motion for reconsideration, seeking resolution of the state law issue.

existing property lines are adjusted. No purpose would be served by addressing substantive challenges to the August 11, 2014 decision.

THIRD ASSIGNMENT OF ERROR

In the third assignment of error, petitioner argues that the August 11, 2014 decision is not supported by substantial evidence, because the record does not include a full set of plans or diagrams showing the series of adjustments necessary to reconfigure the subject tract from its initial to final configuration. Petitioner argues that without plans or diagrams showing how each property line is to be adjusted to achieve the final reconfiguration, the county planner who approved the application had no basis to conclude that each of the series of adjustments necessary to achieve the desired reconfiguration were lawful property line adjustments.

Again, because remand under the first assignment of error will result in a new decision based on a new record, we need not and do not resolve petitioner's evidentiary challenges under the third assignment of error.

The county's decision is remanded.