

LAND USE BOARD OF APPEALS  
JAN 20 10 28 AM '82

BEFORE THE LAND USE BOARD OF APPEALS  
OF THE STATE OF OREGON

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LESTER VAN SANT,	)	
	)	
Petitioner,	)	LUBA NO. 81-100
	)	
v.	)	FINAL OPINION
	)	AND ORDER
YAMHILL COUNTY,	)	
	)	
Respondent.	)	

Appeal from Yamhill County.

Lester Van Sant, Hillsboro, filed a petition for review and argued the cause on his own behalf.

N. Robert Shields, McMinnville, filed a brief and argued the cause for respondent.

Cox, Referee; Reynolds, Chief Referee; Bagg, Referee; participated in the decision.

Affirmed. 1/20/82

You are entitled to judicial review of this Order.  
Judicial review is governed by the provisions of Oregon Laws 1979, ch 772, sec 6(a).

1 COX, Referee.

2 NATURE OF PROCEEDING

3 This case is brought by the petitioner pro se. After  
4 review of the petition for review and listening to petitioner's  
5 oral argument, this Board is still somewhat unsure as to the  
6 exact nature of petitioner's complaints. A review of the  
7 record and respondent's brief indicates that part of the  
8 confusion may have resulted from an inability by the Yamhill  
9 County Department of Planning and Development to fully  
10 understand petitioner's desires. The record indicates that on  
11 February 3, 1981, petitioner submitted to the "Yamhill County  
12 Department of Planning and Development a completed Yamhill  
13 County Land Use Application" form. On that form, in response  
14 to the question "what is requested," petitioner states

15 "A variance to the AF 20 zone to allow a single-family  
16 residence as a permitted use as provided by section  
17 37-200 of Ordinance 83."

18 Yamhill County Zoning Ordinance Chapter 37 entitled  
19 "Non-Conforming Lots, Uses and Structures," Section 37.200 sets  
20 forth the requirements for obtaining 'non-conforming lot of  
21 record' status. Section 37.200 allows single family dwellings  
22 or mobile homes in any zoning district in which single family  
23 dwellings or mobile homes are permitted or authorized as a  
24 conditional use, provided that on the date of adoption or  
25 amendment of the Yamhill County Ordinance, there existed a  
26 single lot of record.

Even though the petitioner seemingly was requesting

1 "non-conforming lot of record" treatment, the Yamhill County  
2 planning staff memorandum of April 2, 1981 characterizes the  
3 request as

4 "A conditional use/variance to the minimum lot size to  
5 allow an after the fact partition of a previously  
6 conveyed 5.4 acre parcel in an area designated  
7 'Agriculture/Forestry Large Holding' on the  
8 Comprehensive Plan Map and presently zoned 'AF-20.'"   
9 Record 94.

10 Thereafter, petitioner presented his case pro se as if he were  
11 in fact requesting a conditional use/variance to the minimum  
12 lot size rather than what his initial application indicated (a  
13 non-conforming lot of record).

#### 14 ALLEGATIONS OF ERROR

15 Petitioner in his petition for review sets forth several  
16 items as allegations of error. Those items parallel the  
17 provisions of Oregon Laws 1979, ch 772, sec 5(4).<sup>1</sup>

#### 18 FACTS

19 Petitioner apparently is the owner of a 5.44 acre parcel of  
20 property located approximately eight miles northeast of the  
21 City of Newberg, South of Buckhaven Road in the SE 1/4 of  
22 Section 25, T2S-R3W, Tax Lot 2325-800. The land is located in  
23 an area designated Agricultural Forestry, Large Holding on the  
24 Comprehensive Plan Map and is presently zoned Agricultural/  
25 Forestry-20 Acre Minimum (AF 20). The property contains a  
26 growth of fir and heavy underbrush. A 2200 foot private  
roadway provides access to the parcel. The surrounding area is  
a mixture of rural residential, pasture, orchard and forestry

1 uses. The soils on the parcel are agricultural class IV and  
2 site class II for Douglas Fir production according to a "Soil  
3 Survey of Yamhill Area Oregon" prepared by the USDA-SCS on  
4 January, 1974.

5 The subject parcel was originally part of an 18.82 acre  
6 parcel created by conveyance from William E. Duncan to Don F.  
7 and Janice I. Shine in February, 1962. The Shines conveyed the  
8 present 5.44 acre parcel to Charles and Joan Vetter in October,  
9 1970 by contract, followed in August, 1977 by warranty deed.  
10 This conveyance was done without formal approval of Yamhill  
11 County. The Vettters thereafter conveyed the subject parcel to  
12 the petitioner in September of 1979. There is no record of a  
13 partitioning concerning the parcel in Yamhill County records.

14 Don F. Shine, an owner of the parent parcel at the time of  
15 the apparently unauthorized partitioning, still owns the parent  
16 parcel as well as other parcels to the northeast and south of  
17 the applicant's property. A lot size variance application for  
18 this parcel had been denied by a Yamhill County hearings  
19 officer on June 5, 1979. That decision was based upon the fact  
20 the parcel was not legally created. The county commissioners  
21 upheld the hearings officer's decision on appeal on August 22,  
22 1979.

23 On April 2, 1981, the Yamhill County Planning Commission  
24 denied petitioner's application as above described. On August  
25 12, 1981, in Order No. 81-426, the Yamhill County Board of  
26 Commissioners denied petitioner's appeal of the April 2, 1981

1 decision. The Board of Commissioners based its decision upon  
2 the findings adopted by the planning commission at their April  
3 2, 1981 meeting. It is apparently Order No. 81-426 which  
4 petitioner is appealing to this Board.

5 DECISION

6 As we indicated above, the way that petitioner brings this  
7 case to this Board causes a great deal of confusion especially  
8 when viewed in the context of his purported application to  
9 receive non-conforming lot of record (Yamhill County Ordinance  
10 37.200) treatment for his property. What appears to have  
11 happened is that the Yamhill County Department of Planning and  
12 Development, with knowledge that as of August 22, 1979 the  
13 County Commissioners had already ruled that the property was  
14 not a legal lot of record, proceeded to treat the petitioner's  
15 application as one for a conditional use permit and a variance  
16 to the minimum lot size. Given the confusion of petitioner and  
17 the confusing way that he presented his petition for review  
18 before this Board, it is not unreasonable to conclude that such  
19 a scenario has taken place. Even if we were to disregard  
20 Yamhill County's apparent good intentions and treat  
21 petitioner's request as, in fact, one for a non-conforming lot  
22 of record, the record submitted to LUBA indicates that Yamhill  
23 County properly rejected petitioner's request. Section  
24 37.200(1) of the Yamhill County Zoning Ordinance provides:

25 "Non-Conforming Lots of Record. (1) Subject to  
26 subsection (2) of this section, in any zoning district  
in which single family dwellings or mobile homes are

1 permitted or authorized as a conditional use, such  
2 uses and customary accessory buildings may be erected  
3 or placed on any single lot of record at the date of  
4 adoption or amendment of this ordinance,  
5 notwithstanding limitations on minimum lot or site  
6 requirements imposed by other provisions of this  
7 ordinance. Such lots must be in separate ownerships  
8 as provided in Section 37.200. The only provisions or  
9 requirements of this Ordinance being excepted by this  
10 section are the minimum lot or site requirements of  
11 the various zoning districts." (Emphasis in original)

12 Section 5.200(74) of the Yamhill County Zoning Ordinance states:

13 "Non-conforming building, structure, use or lot  
14 -- is a lawful existing building, structure, use or  
15 lot at the date of adoption of this Ordinance, or of  
16 any amendment thereto, which does not conform to the  
17 requirements of the zoning district in which it is  
18 located." (Emphasis in original)

19 As can be seen from a review of the facts, there is no  
20 indication, given the series of events that created this 5.4  
21 acre parcel, that a legal or "lawful" lot exists to this date.  
22 The record does not show any evidence introduced by petitioner  
23 to indicate that a "lawful" lot existed at any time prior to  
24 the adoption of the ordinance or even to this date. Therefore,  
25 petitioner's arguments dealing with his right to a  
26 non-conforming lot of record treatment are denied.

#### 27 Constitutional Decision

28 Petitioner throughout his petition for review seems to be  
29 alleging that the action by Yamhill County is unconstitutional  
30 in some manner. We cannot tell from the petitioner's brief  
31 whether he alleges the Yamhill County action is  
32 unconstitutional, its ordinances are unconstitutional, or  
33 whether the Oregon Revised Statutes to which he refers are

1 unconstitutional. To add to the confusion, we are not sure how  
2 any of the above are unconstitutional in the petitioner's  
3 mind. Since petitioner cites no specific provisions of the  
4 Oregon Constitution or United States Constitution, it is  
5 difficult to determine the nature of his argument. Therefore,  
6 any allegation of error petitioner may be making based on  
7 constitutional grounds is denied.

#### 8 Applicable Law and Procedures

9 Here the petition for review is also confusing. In it  
10 petitioner seems to argue that the subject property constitutes  
11 a non-conforming lot of record under 37.200. As we mentioned  
12 before, such an allegation regarding that specific ordinance  
13 provision is not well founded. Petitioner's application,  
14 however, was treated by both the Yamhill County Planning  
15 Commission and the Yamhill Board of Commissioners as a request  
16 for a conditional use permit and a variance to the minimum lot  
17 size. Petitioner seems to have gone along with that treatment  
18 for throughout the record of the proceeding before both local  
19 bodies, petitioner addressed the staff findings and conclusions  
20 as they were presented.

21 In reviewing the material before this Board to see if the  
22 respondent followed the applicable law and procedures required  
23 of it, we can only conclude that it has. Petitioner makes no  
24 specific showing where an applicable law or procedure has not  
25 been complied with. Review of the materials in the record  
26 indicates that Yamhill County went to great lengths to apply

1 the law governing the creation of a non-farm residential  
2 dwelling in an exclusive farm use zone. The county's findings  
3 identify the applicable law and apply the facts to it. The  
4 findings are extensive enough to encompass consideration of all  
5 the arguments petitioner apparently was making before any of  
6 the county governing bodies. The findings indicate that the  
7 provisions of ORS 215.213 were applied to the decision. In  
8 addition, the Yamhill County Zoning Ordinance, Section 11.370,  
9 which was enacted pursuant to OPS 215.243 and OPS 215.213 was  
10 applied. Also, the county applied Section 41 (variances) of  
11 its zoning ordinance and concluded that petitioner had failed  
12 to meet the standards of that ordinance. The petitioner does  
13 not allege in any comprehensible form how these various  
14 provisions were inappropriately applied.

15 Petitioner apparently is also alleging that Senate Bill 419  
16 (Oregon Laws 1981, ch 884) is relevant and controls the outcome  
17 of this case. Review of the county's proceedings indicate the  
18 county postponed the order in this case several times in an  
19 attempt to determine what the Oregon State Legislature was  
20 going to do with the "lots of record" bill. Petitioner  
21 apparently claims that his property is covered by Senate Bill  
22 419 and, therefore, his property should be considered a lot of  
23 record. We can not agree with petitioner's apparent  
24 reasoning. First, Senate Bill 419 was not in effect at the  
25 time the contested decision was made. Second, even if the new  
26 statute were deemed to be in effect, the subject property is

1 not within the definition of a lot of record contained in SB  
2 419's codified form. The statute provides:

3 " 'Lot of record' means a lot or parcel in the  
4 unincorporated area of a county outside of the  
5 Willamette Greenway and outside of areas designated in  
6 a county comprehensive plan as being in a flood plain  
7 or geological hazard area or designated for urban,  
8 industrial or commercial development and which was  
9 lawfully created by or transferred to the present  
10 owner by a deed or sales contract executed after  
11 December 31, 1964, and before January 1, 1975."  
12 Oregon Laws 1981, ch 884.

13 Since the subject parcel was neither lawfully created by  
14 petitioner nor transferred to him until 1979, the petitioner  
15 does not fall within the scope of the statute.

#### 16 Burden of Proof

17 Much of petitioner's confusion appears to result from his  
18 misunderstanding as to who has the burden of proving that his  
19 property meets state and local zoning laws. Petitioner  
20 apparently is arguing the county has the burden to prove his  
21 land does not meet the laws and has not shouldered that  
22 burden. Petitioner has the whole process backwards.  
23 Petitioner is asking that his land be treated in a manner not  
24 allowed outright by local and state law. As such, he has the  
25 burden of proving that he falls within stated exceptions or  
26 that the laws do not control the specific situation. As the  
Supreme Court stated:

27 "In other words, a denial is supported by  
28 substantial evidence \* \* \* unless the reviewing court  
29 can say that the proponent of change sustained his  
30 burden of proof as a matter of law." Jurgenson v.  
Union County Court, 42 Or App 505, 600 P2d 1241 (1979).

1 Petitioner has not shouldered his burden and, therefore, all of  
2 his allegations directed at such an issue are denied.

3 Summary

4 We have attempted to present in a reasonably logical form  
5 what we understand to be petitioner's concerns. We feel the  
6 county has dealt with petitioner fairly and given our  
7 understanding of the petition for review, we find no error by  
8 the county. Therefore, we affirm its decision.

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FOOTNOTES

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Oregon Laws 1979, ch 772, sec 5(4)(a) states:

"(4) The board shall reverse or remand the land use decision under review only if:

"(a) The board finds that the city, county or special district governing body:

"(A) Exceeded its jurisdiction;

"(B) Failed to follow the procedure applicable to the matter before it in a manner that prejudiced the substantial rights of the petitioner;

"(C) Made a decision that was not supported by substantial evidence in the whole record;

"(D) Improperly construed the applicable law; or

"(E) Made a decision that was unconstitutional;"