

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

3
4 JOHN SPARKS,)
5)
6 Petitioner,)
7)
8 vs.)
9) LUBA No. 95-141
10 TILLAMOOK COUNTY,)
11) FINAL OPINION
12 Respondent,) AND ORDER
13)
14 and)
15)
16 LEONARD SHULL and JEAN SHULL,)
17)
18 Intervenors-Respondent.)

19
20
21 Appeal from Tillamook County.

22
23 John Sparks, Portland, filed the petition for review
24 and argued on his own behalf.

25
26 William K. Sargent, County Counsel, Tillamook, and Lois
27 Albright, Tillamook, filed the response brief on behalf of
28 respondent and intervenors-respondent. With them on the
29 brief was Albright & Kittell, P.C. Lois Albright argued on
30 behalf of intervenors-respondent.

31
32 HANNA, Referee; GUSTAFSON, Referee, participated in the
33 decision.

34
35 AFFIRMED 01/19/96

36
37 You are entitled to judicial review of this Order.
38 Judicial review is governed by the provisions of ORS
39 197.850.

1 Opinion by Hanna.

2 **NATURE OF THE DECISION**

3 Petitioner appeals a decision of the county commission
4 approving a major partition.

5 **MOTION TO INTERVENE**

6 Leonard and Jean Shull (intervenors) move to intervene
7 in this proceeding on the side of respondent. There is no
8 opposition to the motion and it is allowed.

9 **MOTION TO FILE REPLY BRIEF**

10 On November 17, 1995, petitioner submitted a request to
11 file a reply brief. A reply brief accompanied the request.
12 As the basis for the request, petitioner cited new issues
13 the county and intervenors (respondents) raised in their
14 brief. The new issues concern LUBA's jurisdiction, which
15 respondents challenged for the first time in their brief,
16 and respondents' request for attorney fees because
17 "petitioner's appeal was brought in bad faith and was
18 brought primarily for a purpose other than to secure
19 appropriate action by the board." Response Brief 2.

20 Respondents object to petitioner's reply brief, arguing
21 that the issues to which petitioner replies are not new.

22 When a contention that LUBA lacks jurisdiction is made
23 for the first time in the response brief, a reply brief
24 concerning the subject of LUBA's jurisdiction is warranted.
25 Shaffer v. City of Salem, 29 LUBA 592, 594 (1995).

26 The issues of bad faith and jurisdiction were raised

1 for the first time in the county's brief, and are issues
2 petitioner could not have anticipated. Petitioner's motion
3 to file a reply brief is granted.

4 **FACTS**

5 Intervenor's applied to the county for major partition
6 approval in order to divide their property into two separate
7 parcels. Intervenor's residence is on the north end of the
8 subject property. The partition would create a new parcel
9 on the southern portion of intervenor's property (the
10 proposed parcel). The proposed parcel would border
11 petitioner's property which is just to the south of the
12 proposed parcel.

13 Petitioner's parcel was originally owned by intervenor's
14 and was created through an earlier partition of intervenor's
15 property. When petitioner purchased his parcel from
16 intervenor's, intervenor's reserved an easement to provide
17 access across petitioner's parcel to intervenor's parcel.
18 Accordingly, access to intervenor's property is from the
19 south, via an easement across petitioner's parcel. The
20 existing easement would serve the proposed parcel as well.

21 The major partition application was granted
22 administrative approval, which petitioner appealed to the
23 planning commission. The planning commission denied
24 petitioner's appeal, affirming the administrative approval.
25 Petitioner appealed that denial to the county commissioners.
26 On June 28, 1995, the county commissioners denied

1 petitioner's appeal. This appeal followed.

2 **JURISDICTION**

3 Respondents challenge LUBA's jurisdiction over this
4 appeal, contending that "[a] major partition is not a land
5 use decision pursuant to ORS 197.015(10)(b)(A) as the
6 application of major partition standards are ministerial in
7 nature."¹ Respondents' Brief 4. Petitioner responds that a
8 major partition requires the exercise of policy or legal
9 judgment and, accordingly is a land use decision.

10 Under the Tillamook County Land Division Ordinance

¹ORS 197.015(10) states, in relevant part, that a 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 goals;

"(ii) A comprehensive plan provision;

"(iii) A land use regulation; or

"(iv) A new land use regulation; or

** * * * *

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

"(A) Which is made under land use standards which do not
require interpretation or the exercise policy or
legal judgment.

** * * * *

1 (LDO) the major partition regulations provide for the
2 exercise of policy or legal judgment. LDO Section 10(1)
3 states:

4 "The purpose of major partition review is to
5 ensure that the division of land assures adequate
6 access, sewage disposal, and water supply, that
7 all proposed parcels meet all Land Use Ordinance
8 requirements, and that the development of newly
9 created parcels or roads will not present a threat
10 or unnecessary inconvenience to the health,
11 safety, or welfare of the general public."

12 LDO Sections 12 through 15 set forth materials required
13 to be submitted to the county for evaluation for a major
14 partition. The county is required to evaluate these
15 materials to determine if the purposes of LDO Section 10(1)
16 have been met. That evaluation requires the application of
17 policy or legal judgment. See Flowers v. Klamath Falls, 98
18 Or App 384, 391-392, 780 P2d 227 (1989). Although the
19 county may have applied only minimal policy or legal
20 judgment to this particular application, the application of
21 policy or legal judgment is generally required to fulfill
22 the requirements of LDO Sections 10 through 15, the major
23 partition ordinance.² Accordingly, a major partition under
24 the LDO is a land use decision under ORS 197.015(10).

25 **FIRST ASSIGNMENT OF ERROR**

26 Petitioner contends that the county failed to make
27 adequate findings and made a decision not supported by

²Although intervenors applied for a major partition, it appears that the application could have been processed as a minor partition.

1 substantial evidence to establish compliance with LDO
2 Section 1(2)(i) and (l), which provide:

3 "(2) These regulations are necessary:

4 "* * * * *

5 "(i) for the protection of the public from
6 pollution, flood, slides, fire, and
7 other hazards to life and property;

8 "* * * * *

9 "(l) to protect in other ways the public
10 health, safety, and general welfare."

11 These provisions are aspirational standards that
12 describe the purposes of the LDO. Petitioner has not
13 established that they are mandatory criteria for a major
14 partition. See Ellison v. Clackamas County, 28 Or LUBA 521,
15 525 (1995).

16 The first assignment of error is denied.

17 **SECOND ASSIGNMENT OF ERROR**

18 Petitioner contends that the county failed to make
19 adequate findings and made a decision not supported by
20 substantial evidence to establish compliance with LDO
21 Section 10(1) and Section 12(1)(b) and (e). Additionally,
22 petitioner contends that by requiring intervenors to
23 establish a turnaround at the end of the easement, the
24 county is taking his property for public use without just
25 compensation in violation of the Oregon constitution.

26 LDO Section 12(1) provides, in relevant part:

27 "A tentative plan for a major partition shall
28 consist of materials adequate to provide the

1 following information:

2 * * * * *

3 "(b) The location, name, purpose and width of all
4 existing and proposed rights-of-way,
5 roadways, and easements on or abutting the
6 tract, as well as the percent of grade on the
7 center line of each roadway.

8 * * * * *

9 "(e) Statements describing:

10 "(1) the proposed method of sewage disposal;
11 and

12 "(2) The proposed method of water supply.

13 * * * * *

14 LDO Section 10(1) describes the purposes of major
15 partition review.

16 Again, petitioner has not established that LDO Section
17 10(1) is any more than an aspirational provision or that it
18 is a mandatory criterion for major partition approval.

19 Under LDO 12 (1)(b) and (e) the county must verify that
20 an easement exists for specified purposes. The county
21 acknowledged the existence of the easement for purposes of
22 ingress and egress as well as to carry utility services for
23 sewage disposal and water supply. Petitioner's contention
24 that the county permitted an expansion of the use of
25 intervenors' easement beyond that contemplated by petitioner
26 when he conveyed the easement misconstrues the duties of the
27 county under the LDO. Acknowledgment of the existence of an
28 easement does not authorize any particular use of that

1 easement. The county met the requirements of the LDO.

2 With respect to petitioner's constitutional argument,
3 petitioner has not established that the county is granting
4 the public use of his property, nor has he made a legal
5 argument addressing the constitutional provision sufficient
6 for our review. See Joyce v. Multnomah County, 23 Or LUBA
7 116, 118 (1992).

8 The second assignment of error is denied.

9 The county's decision is affirmed.³

³The county, petitioner and intervenors engaged in discussions to resolve this appeal. During the discussions, in response to a question of what petitioner wanted, petitioner suggested a monetary settlement. Because petitioner suggested a monetary settlement, respondents now contend that petitioner's pursuit of this appeal was brought in bad faith and was brought primarily for a purpose other than to secure appropriate action by the Board. Respondents have not established that, because petitioner engaged in settlement discussions that included a suggestion of a monetary settlement, his pursuit of this appeal was brought in bad faith and was brought primarily for a purpose other than to secure appropriate action by the Board.