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

HERU TARJOTO,)
)
Petitioner,)
)
vs.)
)
LANE COUNTY,)
)
Respondent,)
)
and)
)
FRANK BARTLETT,)
)
Intervenor-Respondent.)

LUBA No. 97-036
FINAL OPINION
AND ORDER

Appeal from Lane County.

Edward J. Sullivan, Portland, filed the petition for review and argued on behalf of petitioner. With him on the brief was Preston Gates & Ellis.

Stephen L. Vorhes, Assistant County Counsel, Eugene, filed the response brief and argued on behalf of respondent.

Allen L. Johnson, Eugene, represented intervenor-respondent.

LIVINGSTON, Administrative Law Judge; GUSTAFSON, Chief Administrative Law Judge, participated in the decision.

AFFIRMED 02/05/98

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

1 Opinion by Livingston.

2 **NATURE OF THE DECISION**

3 Petitioner appeals a decision of a county hearings
4 officer, adopted by the county board of commissioners (county
5 board), that approves an application for a dwelling in the
6 county's Impacted Forest Lands (F-2) zone.

7 **MOTION TO INTERVENE**

8 Frank Bartlett (intervenor) moves to intervene on the
9 side of the respondent. There is no opposition to the motion,
10 and it is allowed.

11 **FACTS**

12 The subject property is a 40.41-acre parcel identified on
13 the county assessor's map as tax lot 400. To the south and
14 east is tax lot 401, which includes 84.39 acres. To the north
15 of tax lot 401 is tax lot 1600, which includes 160 acres.
16 There are three easements in favor of tax lot 401 or 1600,
17 which both belong to Penn Timber, Inc., over tax lot 400,
18 which belongs to intervenor. Without the easements, tax lots
19 401 and 1600 would not have access to a public road.

20 After a hearing on November 7, 1996, the county hearings
21 officer denied intervenor's application on November 26, 1996.
22 Record 198-202. In a January 8, 1997 opinion on
23 reconsideration, the hearings officer granted the application.
24 Record 64-90. Petitioner appealed to the county board which,
25 on February 28, 1997, adopted the hearings officer's decision
26 without a hearing. Record 6.

1 This appeal followed.

2 **ASSIGNMENT OF ERROR**

3 ORS 215.750(1) sets forth the forest template test, under
4 which a single-family dwelling may be established on a lot or
5 parcel located within a forest zone. Petitioner does not
6 contend the test itself was improperly applied, but argues
7 instead that the test should not have been applied at all,
8 since the subject property is not a lawfully created "lot or
9 parcel," as that term is used in the statute.^{1,2}

10 Petitioner and the county analyze differently the
11 creation of the subject property as a separate parcel, because
12 they start at different points in time. According to

¹ORS 215.010 provides that as used in ORS chapter 215:

"(1) The terms defined in ORS 92.010 shall have the meanings given therein, except that 'parcel':

"(a) Includes a unit of land created:

"(A) By partitioning land as defined in ORS 92.010;

"(B) In compliance with all applicable planning, zoning and partitioning ordinances and regulations; or

"(C) By deed or land sales contract, if there were no applicable planning, zoning or partitioning ordinances or regulations.

"(b) Does not include a unit of land created solely to establish a separate tax account."

ORS 92.010(3) defines "lot" as "a single unit of land that is created by a subdivision of land."

²The county's finding that tax lot 401 is a lawful parcel is made pursuant to Lane Code 16.211(7)(e), which states that "[t]he parcel on which the dwelling would be located [must be] lawfully created prior to January 25, 1990." Record 31.

1 petitioner,

2 "The subject property * * * has had its present
3 configuration since its creation in 1981 from a 124-
4 acre tract (former Tax Lot 400), which itself was
5 created in 1979 from a 284-acre property acquired by
6 George Zellner from Oregon Eastern Timber Company in
7 1944. * * * Oregon Eastern Timber Company had
8 acquired the 284-acre property from two separate
9 entities in 1942.

10 "The original 284-acre parent property, which had
11 only 60 feet of frontage on any public road (and no
12 other access) was acquired by deed and remained in
13 the sole ownership of George Zellner since 1944. In
14 1979, Tax Lot 1600 was conveyed to Penn Timber with
15 a 30-foot wide access. In 1981, Penn Timber also
16 acquired the adjacent Tax Lot 401 with three
17 exclusive access easements, as tax lots 1600 and 401
18 did not abut a public road. The remaining 40-acre
19 property, the subject property, was acquired by
20 Intervenor [from Oregon Eastern Timber Company] in
21 1991." Petition for Review 3 (emphasis added).

22 According to the challenged decision, as explained in the
23 county's brief,

24 "The patent of the original 124-acre parcel (tax lot
25 400) was filed for record on September 23, 1907.
26 Record 223, 226, 231. After several conveyances of
27 the 124-acre parcel, it was conveyed [by Oregon
28 Eastern Timber Company] to George Zellner in a 1944
29 deed describing that 124-acre parcel separate from
30 another 160-acre parcel (tax lot 1600) conveyed by
31 the same deed. Record 223, 225, 245-46. The other
32 separately described 160-acre parcel * * * was
33 originally created by deed filed for record July 28,
34 1900. Record 223, 271. That 160-acre parcel * * *
35 was separately conveyed by Mr. Zellner to Penn
36 Timber, Inc. by deed recorded August 20, 1979, which
37 included an easement 'for all purposes related to
38 the raising and harvesting of timber.' Record 223,
39 291-94. On June 23, 1981, in a property line
40 adjustment between the 160-acre parcel and the 124-
41 acre parcel, Mr. Zellner conveyed a portion of the
42 original tax lot 400 to Penn Timber, Inc. to enlarge
43 the original tax lot 1600. Record 223, 225, 247-

1 51.^[3] The remaining reduced 40.41-acre tax lot 400
2 was then conveyed by Mr. Zellner to the intervenor *
3 * * by deed recorded May 31, 1991. Record 223, 225,
4 252-53." Response Brief 3-4 (emphasis added).

5 As the emphasized language makes clear, the county and
6 petitioner base their arguments on alternative
7 characterizations of the 284-acre property. Consequently,
8 they differ in their view of the subject property, tax lot
9 400. According to the county, the 284-acre property included
10 two separate parcels created when the original patents were
11 issued in 1900 (tax lot 1600) and 1907 (tax lot 400). The
12 county maintains that tax lot 400 is thus a lawful parcel
13 under the definition of parcel in ORS 215.010(1)(a)(C).
14 According to petitioner, the 284-acre property was one parcel,
15 which was divided into two parcels in 1979 by the conveyance
16 of tax lot 1600 to Penn Timber, and then into three parcels by
17 the conveyance of tax lot 401 in 1981.

18 Petitioner's entire argument is based on his contention
19 that the creation of tax lot 1600 in 1979 and tax lot 401 in
20 1981, with several easements providing access to a public
21 road, were major partitions that required county approval.
22 That argument relies upon our acceptance of his view that the
23 284-acre property was one parcel in 1979. Yet petitioner
24 provides almost no discussion to support that view.
25 Petitioner places primary reliance on the fact that in 1944,
26 tax lots 1600 and tax lot 400 were conveyed in a single deed

³This portion is now called tax lot 401.

1 from Oregon Eastern Timber Company to George Zellner. See
2 Petition for Review 10. However, the deed describes each tax
3 lot separately. Record 245.

4 The challenged decision states:

5 "Key to [the issue of whether the subject property
6 was a legally created parcel] is the transaction in
7 1981, when a portion of the larger lot [tax lot 401]
8 was transferred to the owner of the adjacent parcel
9 to the northeast. If this transfer of ownership was
10 a partition, it would have been improper because it
11 was not subject[ed] to partition approval.

12 "The transaction in question was a warranty deed
13 where George Zellner transferred ownership of 84.39
14 acres to Penn Timber. Penn Timber already owned the
15 parcel [tax lot 1600] that was adjacent to the north
16 of the 89.39 acre property transferred by the 1981
17 deed. This transaction could be viewed as a not
18 permitted partition or an appropriate lot line
19 adjustment. It had all the characteristics of a lot
20 line adjustment described in ORS 92.010(7)(b): the
21 lot line affected was a common boundary between two
22 parcels, no additional unit of land was created and
23 the existing unit of land, the subject property,
24 remained in compliance with the applicable zoning
25 ordinances. The fact that the assessor gave the
26 enlarged parcel two tax numbers [tax lots 1600 and
27 401] does not indicate that two parcels were
28 created.

29 "It is Lane County policy to regard a real estate
30 transaction as legal if that is technically and
31 legally possible. The fact that the transaction was
32 later redone in a manner that specifically
33 recognized that it was a lot line adjustment does
34 not affect the earlier transaction.^[4]

35 "Appellant also argues that the property in question
36 was re-aggregated into one parcel during the time
37 that was held by George [Zellner], from 1949 to
38 1979. For a time the idea of aggregation by common

⁴This is a reference to a "Correction and Lot Line Adjustment Deed" (Correction Deed), dated November 13, 1995. Record 332-34. The Correction Deed states that it corrects and replaces the May 31, 1991 deed whereby George Zellner conveyed the subject property to intervenor and intervenor's wife. Record 317-19.

1 ownership at the beginning of a calendar year was
2 popular in some parts of Oregon. This notion was
3 created by the language in the then applicable
4 partition law, ORS 92.010. The notion was also
5 ended by statute with the passage of ORS 92.017. In
6 this case, the owner of the several parcels had not
7 done anything to indicate that he regarded the
8 parcels as being aggregated. In fact, he had done
9 exactly the opposite, having sold one of the parcels
10 [i.e., tax lot 1600, in 1979]. After the passage of
11 ORS 92.017, common ownership of adjacent parcels is
12 not enough to show that the parcels have been
13 aggregated into a single parcel. Since there is no
14 evidence of anything else in this case, appellant's
15 arguments that the parcels were aggregated and thus
16 required partition review are not correct.

17 "In the same way, [intervenor's] arguments that the
18 transactions wherein the owner of the subject
19 property granted an easement across the property
20 were partitions is not correct. Earlier definitions
21 of partition in ORS 92.010 did focus on the creation
22 of a road, and place special requirements on
23 partitions that involved the creation of a road.^[5]
24 There is, however, a distinction between a sale of
25 land that creates a separate parcel and the grant of
26 an easement for road purposes. The transactions
27 about which appellant is concerned were easements
28 and not the actual sale of property, and thus do not
29 fall within the regulation of partitions.

30 "The subject property was created as a separate
31 parcel in 1907. It was reduced in size in 1981 but
32 no new parcel was created at that time." Record 31-
33 32 (emphasis added).

34 We agree with the county that two separate parcels, tax
35 lots 1600 and 400, were created when patents were filed for
36 record in 1900 and 1907. Although both parcels belonged to
37 Oregon Eastern Timber Company (from 1942 to 1944) and then to

⁵The version of ORS 92.010 in effect in 1979 and 1981 made a distinction between "major partitions," which included the creation of a "road or street," and "minor partitions," which did not. Former ORS 92.040 required an application for local government approval of major partitions, but not of minor partitions. The present version of ORS 92.040 does not make this distinction. It requires local government approval of all partitions.

1 George Zellner (from 1944 to 1979, when he conveyed tax lot
2 1600 to Penn Timber), the two parcels were never merged into a
3 single parcel by vacating the parcel lines. Under ORS 92.017,
4 the two parcels remained discrete. Kishpaugh v. Clackamas
5 County, 24 Or LUBA 164, 172 (1992).

6 Therefore, for the reasons stated by the decision, the
7 subsequent adjustment of the boundary between the parcels,
8 such that tax lot 401 was removed from tax lot 400 and added
9 to tax lot 1600, was not a partition. Tax lot 400 is a
10 lawfully created parcel.

11 The assignment of error is denied.

12 The county's decision is affirmed.