BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

THOMAS AND PAMELA MASSON
Petitioner,

vs.

MULTNOMAH COUNTY,
Respondent,

LUBA No. 2004-097

FINAL OPINION
AND ORDER

Appeal from Multnomah County.

Thomas Masson, Gresham, filed the petition for review and argued on his own behalf. With him on the brief was Pamela Masson.

Sandra Duffy, Assistant County Attorney, Portland, filed the response brief and argued on behalf of respondent.

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

AFFIRMED 10/13/2004

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

Opinion by Holstun.

NATURE OF THE DECISION

Petitioners appeal a county decision that their property is not a legal lot of record.

FACTS

A 5.45-acre parcel was divided from its parent parcel in 1953. The Multnomah County Tax Assessor (Assessor) designated that 5.45-acre parcel as Tax Lot 54. Petitioners' predecessor in title, the Stampers, purchased Tax Lot 54 in 1973.[1] In 1973, Tax Lot 54 was zoned SR and Tax Lot 54 met the minimum parcel size requirements in the SR zone.

The City of Gresham annexed a 1.82-acre part of Tax Lot 54 in March, 1974. For tax purposes, the Assessor redesignated the annexed 1.82 acres as Tax Lot 129. The 3.63 acres that were not annexed remained designated as Tax Lot 54. Subsequent to the city's annexation of the 1.82 acres, the Metro Urban Growth Boundary (UGB) was established in 1979. The UGB is located along the city's municipal boundary so that the 1.82 acres are inside the UGB, and the 3.63 acres are outside the UGB.

In 1985, the Stampers fulfilled their obligations under the 1973 land sale contract and took legal title to Tax Lot 54 and Tax Lot 129. The warranty deed includes a metes and bounds description of the property that describes a single 5.45-acre property. When the Stampers took title to Tax Lot 54 and Tax Lot 129 in 1985, they took title to a 5.45-acre parcel, of which: (1) 1.82 acres was inside the city, inside the UGB and zoned R-10 and (2) 3.63 aces was outside the city, outside the UGB and zoned Mix Use Agriculture – 20 (MUA-20).[2]

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[1] The Stampers purchased the property by executing and recording a land sale contract.

[2] All 5.45 acres were rezoned R-10 when the 1.82 acres were annexed in 1974. When the UGB was established in 1979, the 3.63 acres in the county were rezoned to MUA-20, and the 1.82 acres in the city continued to be zoned R-10 by the city. The minimum parcel size in the MUA-20 zone is 20 acres.

A number of things happened in 1996. The Stampers submitted an application to the city to partition the 1.82 acres within the City of Gresham into three parcels. The city granted preliminary approval for that application on May 20, 1996. However, on July 16, 1996, before the final plat was approved and recorded, the Stampers sold the 3.63 acres in the county to petitioners. The Stampers thereafter recorded the partition plat on September 26, 1996. Those three parcels have been developed with single-family homes. The 3.63-acre Tax Lot 54 has an easement across one of those parcels to SE 282nd Avenue in the City of Gresham for access.

The county has a procedure whereby a property owner can seek to have a property declared a legal lot of record. Petitioners filed an application seeking to have their 3.63-acre property declared a legal lot of record. The planning director denied that request. Petitioners appealed the planning director's decision to the county land use hearings officer, who affirmed the planning director's decision. This appeal followed.

FIRST ASSIGNMENT OF ERROR

As Multnomah County Code (MCC) uses the term, a "lot of record" is a lot or parcel that complied with all zoning and land division requirements that were in effect on the date the lot or parcel was created.[3] The county generally recognizes such lots or parcels of record

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[3] MCC 36.0005(L)(13) provides the following definition:

> **"Lot of Record** – [A] Lot of Record is a parcel, lot, or a group thereof which when created and when reconfigured (a) satisfied all applicable zoning laws and (b) satisfied all applicable land division laws. Those laws shall include all required zoning and land division review procedures, decisions, and conditions of approval.
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> "(a) 'Satisfied all applicable zoning laws' shall mean: the parcel, lot, or group thereof was created and, if applicable, reconfigured in full compliance with all zoning minimum lot size, dimensional standards, and access requirements.
>
> "(b) 'Satisfied all applicable land division laws' shall mean the parcel or lot was created:
>
> "1. By a subdivision plat under the applicable subdivision requirements in effect at the time; or

for development purposes, even though the lot or parcel may not comply with the zoning requirements that apply today.

Petitioners argue that separate 1.82-acre and 3.63-acre parcels were created in 1974 when the 1.82-acre part of the 5.45 acres was annexed into the city. However, petitioners cite no authority for their theory that the city's annexation of the 1.82 acres had the legal effect of dividing the 5.45-acre parcel into separate parcels. The authorities that the county cites in defense of its decision, which we discuss briefly later in this opinion, are clearly to the contrary. The 1974 annexation brought the annexed property into the City of Gresham, but it did not divide Tax Lot 54 into two separate parcels.

MCC 36.0005(L)(13)(b) sets out the methods that the county recognizes for creating legal lots and parcels. The county recognizes lots or parcels that are created by approved and recorded subdivisions or partitions. The county also recognizes lots and parcels that were created by deed if the deed was recorded or in recordable form before October 19, 1978, when the county first adopted partitioning regulations. *See* n 3. Putting aside the question of whether the county could choose to recognize partial parcel annexations as a method of dividing the omitted and annexed parts of a parcel into separate parcels, MCC 36.0005(L)(13)(b) clearly does not do so. After 1978, a subdivision or partition would have to be approved to make the county portion of the parcel a separate lot or parcel.

> "2. By a deed, or a sales contract dated and signed by the parties to the transaction, that was recorded with the Recording Section of the public office responsible for public records prior to October 19, 1978; or
>
> "3. By a deed, or a sales contract dated and signed by the parties to the transaction, that was in recordable form prior to October 19, 1978; or
>
> "4. By partitioning land under the applicable land partitioning requirements in effect on or after October 19, 1978[.]"

MCC 36.0005(L)(13)(b) appears to be consistent with the statutes that govern creation of new lots and parcels. As particularly relevant here, ORS 92.017 provides as follows:

> "A lot or parcel lawfully created shall remain a discrete lot or parcel, unless the lot or parcel lines are vacated or the lot or parcel is further divided, as provided by law."[4]

ORS 92.012 provides that "[n]o land may be subdivided or partitioned except in accordance with ORS 92.010 to 92.190." As far as we can tell, the 5.45-acre Tax Lot 54 was a lawfully created lot from the date it was first created in 1953. The hearings officer found it was a lawfully created 5.45-acre parcel *no later than* 1973, by virtue of a July 31, 1973 land sale contract that was in recordable form. Record 19. As we have already explained, the annexation of the 1.82-acre portion of Tax Lot 54 did not result in a partition of Tax Lot 54 under MCC 36.0005(L)(13) or the above-described statutes. Neither did establishment of the UGB along the city limits effect a partition of the 5.45 acres. Finally, the Assessor's assignment of Tax Lot 129 to the 1.82 acres in 1974 did not create separate parcels out of the 5.45-acre parcel. ORS 215.010(1)(b); MCC 36.3570(D)(1).[5] The separate tax lot numbers were assigned solely for assessment and taxation purposes.[6]

The first assignment of error is denied.

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[4] As the hearings officer noted, this statute was enacted in 1977. However, as the hearings officer also noted, the rule stated in ORS 92.017 is consistent with prior common law. *State v. Emmich*, 34 Or App 945, 949, 580 P2d 570 (1978).

[5] ORS 215.010(1)(b) provides that for county planning purposes a parcel "[d]oes not include a unit of land created solely to establish a separate tax account." MCC 36.3570(D)(1) similarly provides that a lot of record does not include "[a]n area of land described as a tax lot solely for assessment and taxation purposes[.]"

[6] Although petitioners suggest those tax lot numbers may have been assigned for other reasons, we reject the suggestion. The annexation of the 1.82 acres placed those acres inside the city where different taxes are assessed, thus creating an administrative need to distinguish between those acres and the 3.63 acres that remained outside the city. Although assessor's maps are frequently used for land use planning purposes, that does not mean that the Assessor's designation of Tax Lot 129 was done for anything other than assessment and taxation purposes.

SECOND AND THIRD ASSIGNMENTS OF ERROR

Under these assignments of error, petitioners point to the city's 1996 decision that granted approval of the Stampers' request to divide the 1.82-acre parcel into three parcels, which we understand petitioners argue left their 3.63 acre as a legal separate remainder parcel. Petitioners contend that this decision is a final and unappealed land use decision that created their 3.63-acre parcel.

There are several problems with petitioners' attempt to rely on the city's approval of the partition of the 1.82-acre parcel. The most serious problem is that petitioners' 3.63-acre parcel was not *created* by the partition plat that was recorded on September 26, 1996. Petitioners' parcel had already been created over two months earlier, in violation of ORS 92.012, when the Stampers deeded the 3.63-acre parcel to petitioners on July 16, 1996. No question is presented in this appeal regarding the legal effect of the partition that the city approved and was ultimately recorded on September 26, 1996 with regard to the 1.82-acre portion of the property that the Stampers retained. However, that September 26, 1996 partition of the 1.82 acres that the Stampers retained after their transfer of the 3.63 acres to petitioners on July 16, 1996 did not have anything to do with the 3.63 acres that they had already deeded to petitioners. At that time, petitioners' adjoining 3.63-acre parcel, although improperly created by deed, was no different than a number of other lots and parcels, owned by others, that adjoined the parcel that was partitioned on September 26, 1996. Like most of the other lots and parcels that adjoin the 1.82-acre partition, much of petitioners' adjoining 3.63-acre parcel is not even shown on the final plat that is included in the record. Record Oversized Exhibit B-25.

As is required by ORS 92.100, that final plat includes the signature of the county surveyor. Petitioners also contend that the Assessor has assessed and has been collecting property taxes on the 3.63-acre parcel as though it were a buildable parcel since the plat was

recorded in 1996. We understand petitioners to contend that the county should therefore be bound to recognize the 3.63 acres as a legal lot of record.

As we have already noted, the partition plat that the city approved and the county surveyor signed did not show the boundaries of petitioners' 3.63-acre parcel and did not *establish* those 3.63 acres as a separate parcel. Petitioners' 3.63-acre parcel had already been improperly created by deed, when the petitioners took title to those 3.63 acres from the Stampers on July 16, 1996. The county surveyor's signature on the final plat does not have the legal effect petitioners argue it does. Petitioners may have a remedy for the Assessor's apparently mistaken assessment of the 3.63 acres as a separately developable parcel since 1996. However, even if the Assessor has mistakenly viewed petitioners' 3.63-acre parcel as a buildable lot, that does not provide a basis for requiring the county to consider the 3.63-acre parcel as a legal lot of record when it does not fall within the MCC 36.0005(L)(13) definition of a legal lot of record.

Petitioners' other arguments under these assignments of error are without merit and are rejected without further discussion. The second and third assignments of error are denied.[7]

The county's decision is affirmed.

[7] We have not attempted to note and discuss all of the mistakes that combined to leave petitioners where they are today. While it may not be apparent from our resolution of the above assignments of error, at least some of the problems petitioners now face are not of their making. When only part of a parcel is annexed, and that property is eventually subject to different land use regulations imposed by different units of government a number of problems may arise. With the benefit of hindsight, some of those problems and the difficulties they have caused in this case seem reasonably foreseeable. Those difficulties may constitute a persuasive reason for annexing only whole parcels, absent good reasons to annex only a part of a parcel. In this case those difficulties may leave annexation to the city as the petitioners' only recourse if they wish to develop the 3.63 acres or sell the 3.63 acres as a parcel that can be separately developed. However, for the reasons explained above, and for the reasons explained in the county's decision, those difficulties provide no basis for requiring the county to view the 3.63 acres as a legal parcel of record when it clearly does not qualify as a legal lot of record.