

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

3
4 MOLLY JACOBSEN and DANA JACOBSEN,
5 *Petitioners,*

6
7 vs.

8
9 DOUGLAS COUNTY,
10 *Respondent,*

11 and

12
13 FULLERTON & LEFEVRE,
14 *Intervenor-Respondent.*

15
16 LUBA No. 2007-203

17
18 FINAL OPINION
19 AND ORDER

20
21 Appeal from Douglas County.

22 Molly Jacobsen, Winston, and Dana Jacobsen, Winston, represented themselves.

23
24 Paul E. Meyer, Douglas County Counsel, Roseburg, represented respondent.

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26 James W. Spickerman, Eugene, represented intervenor-respondent.

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

30
31 REMANDED

32 08/24/2010

33
34 You are entitled to judicial review of this Order. Judicial review is governed by the
35 provisions of ORS 197.850.
36

NATURE OF THE DECISION

Petitioners appeal a decision by the county approving a partition of an approximately 27.85-acre parcel into two parcels along the City of Winston’s urban growth boundary (UGB).

REPLY BRIEF AND MOTION TO TAKE EVIDENCE

Petitioners filed a 17-page reply brief. No motion accompanied that reply brief. Within that reply brief petitioners also move to take evidence outside the record. The reply brief is disallowed, and the motion to take evidence is denied.

FACTS

The subject property is a 27.85-acre property, of which a 1.85-acre portion of the property lies within the City of Winston’s UGB and contains a Pepsi-Cola plant. Record 13. Intervenor-respondent (intervenor) proposed to divide the subject property into two parcels, a 26-acre parcel and a 1.85-acre parcel, along the UGB boundary line.¹ The county planning commission approved the partition, and the board of county commissioners declined to review the planning commission decision. This appeal followed.

ASSIGNMENTS OF ERROR

Douglas County Comprehensive Plan Land Use Element Policy 5 (Policy 5) provides in relevant part:

¹ Intervenor filed a concurrent partition application with the City of Winston that was approved, and petitioners appealed that city decision to LUBA (LUBA No. 2007-138). The city subsequently moved for a voluntary remand of the city’s decision because intervenor had indicated to the city that it planned to withdraw the application. We granted the city’s motion and remanded that decision in an opinion dated August 3, 2010. *Jacobsen v. City of Winston*, __ Or LUBA __ (LUBA No. 2007-138, August 3, 2010).

In a motion to dismiss the present appeal, the county confirmed that intervenor had withdrawn the county partition application as well. Intervenor has notified LUBA that it will not appear at oral argument. In an order dated July 23, 2010, we suggested that based on intervenor’s withdrawal of the county partition application, we would grant a motion for voluntary remand from the county. The county subsequently indicated that it would not file such a motion. We therefore resolve the appeal in this final opinion and order.

1 “Divisions of *legally created properties* along the boundaries separating * * *
2 urban growth boundaries from resource lands shall be allowed, in spite of the
3 size of the property on either side of such boundary, providing the zoning of
4 the property within the boundary is a developmental classification. * * *”
5 (Emphasis added.)

6 The county adopted findings that explained that the subject 27.85-acre property is a “legally
7 created propert[y]” as provided in the first sentence of Policy 5. Record 6-7. The county
8 found in part that “land partitioning regulations in effect on February 15, 1972 provided that
9 creation of a parcel of ten acres or less required review and approval; parcels of greater than
10 ten acres were exempt from review standards. * * * The 27.85 acre parcel was exempt from
11 partitioning review in 1972 * * *.” Record 6-7. The land partitioning regulations that were
12 in effect as of February 15, 1972 were still in effect in 1973 when the subject 27.85-acre
13 parcel was created.

14 Throughout petitioners’ four assignments of error that are set out in their petition for
15 review, petitioners argue that the subject property is not a “legally created propert[y],” as
16 required by Policy 5 in order for the county to approve the partition that is before LUBA in
17 this appeal. Petitioners argue that the subject 27.85-acre property is one of two parcels
18 created by the partition of an approximately 30-acre parent parcel into a 1.98-acre parcel and
19 a 27.85-acre parcel in 1973 without review and county approval under the county’s
20 subdivision laws that applied in 1973. Petition for Review 12-13, 16, 19, 21, 23-25, 32.
21 Petitioners argue that the 1972 land partitioning regulations did not exempt the partition of
22 the 30-acre parcel into two parcels, because one of the parcels was less than 10 acres, and
23 that the county’s interpretation of the applicable 1972 land partitioning regulations set out
24 above is inconsistent with the language of the regulations. Thus, according to petitioners, the

1 subject property is not a “legally created propert[y]” and the proposed partition cannot
2 comply with Policy 5.²

3 We agree with petitioners that the county’s findings at Record 6-7 do not adequately
4 explain its conclusion that the subject 27.85-acre property is a “legally created propert[y]”
5 that was created in accordance with applicable subdivision laws when it was created in 1973.
6 The decision fails to explain how the dividing an approximately 30-acre parent parcel in
7 1973, without review and approval by the county, to create a 27.85 acre parcel and a 1.98
8 acre parcel (that is less than ten acres), resulted in “legally created properties.”

9 The county’s decision is remanded.³

² Petitioners also argue that the zoning of the 1.85-acre portion of the subject property located within the UGB is not a “developmental classification” as set forth in Policy 5. We do not reach that issue.

³ Oral argument that was previously scheduled for August 26, 2010 at 11:00 a.m. is cancelled.