BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

AGNES JANE THOMPSON, Petitioner, vs. CITY OF ST. HELENS, Respondent.	LUBA No. 95-075 FINAL OPINION AND ORDER

Appeal from City of St. Helens.

Agnes Marie Petersen, St. Helens, filed the petition for review and argued on behalf of petitioner. With her on the brief was VanNatta & Petersen

Peter M. Linden, City Attorney, St. Helens, filed the response brief and argued on behalf of respondent.

LIVINGSTON, Chief Referee; HANNA, Referee, participated in the decision.

REMANDED 01/25/96

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

Opinion by Livingston.

NATURE OF THE DECISION

Petitioner appeals a decision of the city council approving a lot line adjustment in the Light Industrial (LI-1) zone.

FACTS

We confine our statement of facts to a discussion of the actual decision petitioner appeals: a lot line adjustment.[1] On October 21, 1994, one of two owners of tax lot 500 applied for a lot line adjustment between tax lots 401 and 500 that would make tax lot 401 a flag lot with access to Milton Way. Tax lot 401 belongs to a corporation of which the applicant is president. The end of the proposed "flag pole" would front for 40 feet on Milton Way, a public road.

A city planner initially reviewed the application against criteria found in Section 19 of the city's subdivision and partition ordinance (SPO).[2] On October 27, 1994, the city planner gave notice to interested parties of

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[1]The record shows that many other issues were debated between petitioner and the city, including the reasons for the lot line adjustment request, whether the likely use of the property after a lot line adjustment would conform to the city's zoning ordinance, and whether a variance necessary to construct a road could be granted without a hearing. None of these issues has any bearing on our disposition of this appeal.

[2]The city land use regulations are found in Ordinance 2616 (ZO), which contains zoning regulations, and Ordinance 2617, which contains subdivision and partition regulations.

his tentative decision to approve the lot line adjustment. Petitioner requested a public hearing on the decision.

On November 9, 1994, the city planner sent notice to interested parties of a public hearing scheduled for December 13, 1994. The notice described the decision as a "decision to allow a partition of [property owner's] parcel." Record 194. On November 16, 1994, the city planner sent a corrected notice to interested parties which stated:

> "In my letter of November 9, 1994 I mentioned incorrectly that there will be a public hearing 'to allow a partition of [applicant's] parcel.' [Applicant] has not asked for a partitioning of his land but rather only a lot line adjustment. The criteria for a lot line adjustment is [sic] not directly defined in the Subdivision/Partitioning Ordinance. The criteria gleaned from the ordinance is [sic] that the lot line adjustment not create a new lot and that the parcel of land that is reduced be at least the minimum for the zoned area." Record 167.

The time of the scheduled public hearing remained December 13, 1994.

On January 10, 1995, after the public hearing, the city planning commission approved the requested lot line adjustment, described in the approval as:

> "[A]djust the common side property line so that it allows access to a parcel of land that currently has no access to a road. One lot has approximately 2.3 acres and the other approximately 6.98 acres. The proposal is to change the lot configuration to increase tax lot 401 from 6.98 to approximately 7.63 acres and decrease tax lot 500 from 2.3 to 1.65 acres."

Record 106.

Petitioner appealed the planning commission's decision to the city council on at least 11 grounds, many of which were not raised before the planning commission.

On April 5, 1995, after a hearing, the city council found, in relevant part:

> "1. The request for a lot line adjustment meets the criteria for lot line adjustments: a) it does not create a new lot; 2) [sic] the subject lots are not reduced below that which is required for the zone in which they are located.
>
> "2. Information introduced in the appeals hearing regarding the application form and alleged deed restrictions is not relevant to this appeal.
>
> "3. No evidence was introduced in the appeal hearing showing that the criteria for lot line adjustments had not been met by the applicant.
>
> "* * * * *" Record 26-27.

This appeal followed.

JURISDICTION

Under ORS 197.825, this Board has jurisdiction over "land use decisions," as the term is defined in ORS 197.015(10).[3] The city moves to dismiss this appeal on

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[3]ORS 197.015(10) provides, in relevant part:

"'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:

the ground that the challenged decision falls under the exclusion, stated in ORS 197.015(10)(b)(A), from the types of decisions described in ORS 197.015(10)(a). The city argues, and the challenged decision finds, that the only two criteria for a lot line adjustment are those found in SPO Section 3(9)(b), which states an exclusion to the definition of "partition land."

SPO Section 3 is the definitions section of the SPO. SPO Section 3(9) states, in relevant part:

> "Partition Land. To [divide] an area or tract of land into two (2) or three (3) parcels * * * within a calendar year but does not include:
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> "* * * * *
>
> "b. any adjustment of a lot line by the relocation of a common boundary where an additional parcel is not created and where the existing parcel reduced in size by the adjustment is not reduced below the minimum

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> "(i) The goals;
>
> "(ii) A comprehensive plan provision;
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> "(iii)A land use regulation; or
>
> "(iv) A new land use regulation; or
>
> "(B) A final decision or determination of a state agency other than the commission with respect to which the agency is required to apply the goals;
>
> "(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 of policy or legal judgment;
>
> "* * * * *"

> lot size established by any applicable Zoning Ordinance."

The exception to our review jurisdiction provided for nondiscretionary decisions is exceedingly narrow. Flowers v. Klamath County, 98 Or App 384, 391-92, 80 P2d 227 (1989); Doughton v. Douglas County, 82 Or App 444, 449, 728 P2d 887 (1986), rev den 303 Or 74 (1987); Warren v. City of Aurora, 23 Or LUBA 507, 510 (1992). While we agree with the city that the two criteria stated in SPO Section 3(9)(b) may indeed be applied without interpretation or the exercise of policy or legal judgment, the city's focus on the application of the two criteria obscures the more important question of whether they are, in fact, the appropriate criteria or the only criteria that should be applied. The city's land use regulations do not specifically address lot line adjustments. SPO Section 3(9)(b) does no more than state that certain lot line adjustments are not partitions. Determining which criteria, if any, within the city's land use regulations apply to lot line adjustments requires an interpretation of those regulations and the exercise of legal judgment. LUBA therefore has jurisdiction over this appeal.

ISSUE PRECLUSION

Petitioner makes 14 assignments of error. In its brief the city contends assignments of error 1, 2, 3, 5, 8 and 11 should be denied, because they concern issues that were not raised before the city planning commission, but were raised

for the first time before the city council. The city also contends these issues were not properly listed in petitioner's notice of appeal from the planning commission to the city council.[4]

Petitioner filed two notices of appeal to the city council, on January 13, 1995 and January 24, 1995. Record 78-80, 92-93, 138-41. After receiving the January 13, 1995 notice of appeal, the city attorney informed petitioner that the notice did not conform to "our ordinance," which "requires that the appeal notice state the grounds for appeal. The issue must be one that was raised before the Planning Commission." Record 84. The ordinance in question is ZO 5.020(3), which states:

> "Appeals and Procedures
>
> "a. All decisions or rulings of the Planning Commission may be appealed to the City Council by an affected person.
>
> "b. Written notice of appeal shall be filed with the City Administration within seven (7) calendar days of the decision. Such notice shall state the grounds for the appeal and the decision being appealed.
>
> "c. The City Council may hold an evidentiary or review hearing to consider such an appeal from a decision or ruling of the Planning Commission, and may affirm, reverse or modify such decision in whole or in part.

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[4]The city's argument in its brief that certain issues raised by petitioner are precluded because she did not follow the procedures stated in the ZO is inconsistent with its argument, discussed below, that the ZO does not apply to the city's decision.

> "d. An issue which may be the basis for an appeal shall be raised not later than the close of the record at or following the final hearing before the Planning Commission or City Council. Such issue shall be raised with such sufficient specificity so as to afford the Planning Commission or City Council and the parties opportunity to respond to each issue raised."

ZO 5.020(3) does not clearly preclude a party from raising new issues on appeal from the planning commission to the city council. Moreover, the minutes of the city council hearing on March 13, 1995 show that the city council did not limit the issues addressed by petitioner, beyond a request that she restrict her comments to "the criteria for the lot line adjustment which is under appeal." Record 36. Since the city council conducted what was in fact a de novo hearing, petitioner is not prevented by her failure to comply with ZO 5.020(3) from raising any issue at LUBA.[5]

FIFTH, SEVENTH AND TENTH ASSIGNMENTS OF ERROR

Petitioner contends the city failed to consider criteria in the ZO that are applicable to a lot line adjustment, in particular ZO 3.010 and 4.010(8). ZO 3.010 states:

> "Access. Every lot shall abut a street, other than an alley, for at least sixty (60) feet, unless it is:
>
> "a. On an approved cul-de-sac.

[5]The city does not contend that ORS 197.835(3) limits the scope of LUBA's review.

"b. Specified otherwise within requirements for the zone.

"c. On a private street, in which case the lot shall abut the street for at least twenty-five (25) feet, but the road shall serve no more than two (2) dwelling units."

The conclusion that the ZO does not apply in this case is found only in the city's brief and is inconsistent with the language of the challenged decision itself.[6] In its brief, the city argues the ZO does not apply to this lot line adjustment because there is not presently a proposal to develop either of the lots. However, the ZO purpose statement, found at ZO 1.020, is not as limited as the city contends. ZO 1.020 says, among other things, that the ordinance is to "guide and encourage the most appropriate use and development of land"; "provide reasonable access"; "facilitate adequate provisions for transportation"; and "promote the public health, peace, safety and welfare." The creation of lots with less than the minimum frontage stated in ZO 3.010 could frustrate some, if not all, of these objectives.

ORS 197.829(3) permits LUBA, in cases where a local government fails to interpret adequately a provision of its land use regulations, to make its own determination of whether the local government decision is correct. Not only

[6]The decision does not specifically apply any provision of the ZO, but it does refer to "the Zoning Ordinance." Record 15.

is the argument in the city's brief at odds with the actual language of the challenged decision, but here it is clear on the face of the ZO that it applies. Not to apply the appropriate frontage requirements at the time of a lot line division would result in the creation of lots that do not comply with the ZO. That would render the ZO frontage requirements moot.

Which provisions of the ZO apply is somewhat less clear. Finding 9 of the challenged decision states: "The Zoning Ordinance requires that all lots or parcels have road frontage of various amounts. The minimum is 25 feet for flag lots."[7] Record 15. This reference is apparently to ZO 4.010(8), which states:

> "Street Frontage. Flag lots with a minimum street frontage of 20 feet shall be permitted provided that the Planning Director or Planning Commission finds that the following conditions exist:
>
> "a. The flag lot is the only reasonable method by which the rear portion of an unusually deep land parcel, in comparison to other lots on the block, may be provided with access.
>
> "b. The private accessway shall provide access to not more than two parcels.
>
> "c. Minimum paving width of the private accessway shall be 16 feet.
>
> "d. All side lines will be at right angles to straight street lines and radial to curved street lines.

[7]The city's stated minimum of 25 feet for flag lot frontage is inconsistent with the 20-foot standard stated in ZO 4.010(8), quoted below.

"e. Each lot shall have sufficient turn-around in addition to required off-street parking spaces to eliminate the necessity for a vehicle to back out onto the street.

"f. Abutting neighbors may request the following screening for the portion of the flag lot next to them. Low screening, not to exceed 4 feet along the first 75 feet of the flag pole and 5 to 6 foot screening after that around the lot's perimeter. The screening shall consist of a sight-obscuring fence or landscaping that within five years will be 5 feet high and 75% sight-obscuring.

"g. The minimum setbacks on all sides of any dwelling constructed shall be 10 feet."

ZO 4.010(8) provides an exception to the street frontage requirements of ZO 3.010. However, before the city can rely on that exception, it must make findings that show ZO 4.010(8) is satisfied.

These assignments of error are sustained.

FIRST ASSIGNMENT OF ERROR

Petitioner contends that because the map of the minor partition which created tax lot 401 was never recorded, as required by the applicable provisions of the SPO, tax lot 401 is not a legal lot, and therefore, the lot line adjustment between tax lots 401 and 500 cannot be approved. The challenged decision finds only that "[a]ll parcels are legally created and recognized." Record 15.

Findings must (1) identify the relevant approval standards, (2) set out the facts which are believed and relied upon, and (3) explain how those facts lead to the

decision on compliance with the approval standards. Sunnyside Neighborhood v. Clackamas Co. Comm., 280 Or 3, 20-21, 569 P2d 1063 (1977); Vizina v. Douglas County, 17 Or LUBA 829, 835 (1989); Bobitt v. Wallowa County, 10 Or LUBA 112, 115 (1984). Additionally, findings must address and respond to specific issues, raised in the proceedings below, that are relevant to compliance with applicable approval standards. Hillcrest Vineyard v. Bd. of Comm. Douglas Co., 45 Or App 285, 293, 608 P2d, 201 (1980); Norvell v. Portland Area LGBC, 43 Or App 849, 853, 604 P2d 896 (1979); Skrepetos v. Jackson County, 29 Or LUBA 193, 208 (1995); McKenzie v. Multnomah County, 27 Or LUBA 523, 544-45 (1994); Heiller v. Josephine County, 23 Or LUBA 551, 556 (1992).

Because the ZO and the SPO do not directly address lot line adjustments, it is difficult to identify applicable approval standards. We cannot tell whether or how it is relevant that the minor partition that created tax lot 401 may never have been completed. It may affect the boundary of tax lot 401 that is being adjusted. Since petitioner raised as an issue the legality of tax lot 401 and supplied evidence that supports her claim that tax lot 401 was never actually created, the city must determine and state whether or not there is an applicable approval standard to which the issue is relevant. Doing so will require an interpretation of the ZO and SPO that the city should make in the first instance. See Marcott Holdings, Inc. v. City of Tigard, ___

Or LUBA ___, (LUBA No. 95-011, October 20, 1995), slip op 27. If there is an applicable approval standard, the city cannot make a finding that tax lot 401 is legal without supporting that finding with evidence.

This assignment of error is sustained.

SECOND AND THIRD ASSIGNMENTS OF ERROR

Under these assignments of error, petitioner contends the city erred in finding that the applicant alone owns tax lots 401 and 500. Petitioner maintains the evidence shows that tax lot 401 is owned by the applicant and his wife, and tax lot 500 is owned by a business controlled by the applicant.

The challenged findings are not made under any identified ZO provision. Even if they are incorrect, the errors are harmless, since the lot line adjustment cannot be accomplished unless the requisite deeds are properly signed by the actual property owners.

These assignments of error are denied.

FOURTH AND SIXTH ASSIGNMENTS OF ERROR

Petitioner contends the city erred in finding that the applicant requested the lot line adjustment in order to "better utilize the land for development." Record 15. However, the challenged decision does not identify the proposed future use as a criterion relevant to lot line adjustments, and petitioner does not establish that it is. Thus the possibility that the challenged finding is

factually erroneous provides no basis for reversal or remand of the challenged decision.

These assignments of error are denied.

REMAINING ASSIGNMENTS OF ERROR

To the extent they do more than restate the assignments of error already addressed, the remaining assignments of error attack certain findings as irrelevant. If findings are irrelevant, they neither support nor impair a decision and provide no basis for remand or reversal.

These assignments of error are denied.

The city's decision is remanded.