BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

MALCOLM B. HIGGINS, Petitioner, vs. MARION COUNTY, Respondent, and WELDON NUSBAUM and BARBARA NUSBAUM, Intervenors-Respondent.	LUBA No. 95-055 FINAL OPINION AND ORDER

Appeal from Marion County.

Maureen B. Callahan, Salem, filed the petition for review and argued on behalf of petitioner.

No appearance by respondent.

Donald M. Kelley, Silverton, filed the response brief and argued on behalf of intervenors-respondent. With him on the brief was Kelley and Kelley.

GUSTAFSON, Referee; HANNA, Referee, participated in the decision.

REVERSED 02/28/96

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

Opinion by Gustafson.

NATURE OF THE DECISION

Petitioner appeals the county's approval of a lot line adjustment and a farm-related dwelling in the county's Farm Timber zone.

MOTION TO INTERVENE

Weldon and Barbara Nusbaum move to intervene on the side of respondent. There is no objection to the motion, and it is allowed.

FACTS

Intervenors own 96 acres of contiguous property in the Farm Timber (FT) zone in Marion County. Intervenors characterize their 96 acres as being in two parcels, one of 82 acres and one of 14 acres. Intervenors applied to the county for approval of a lot line adjustment to "adjust" the lot lines of their two parcels to reconfigure the two parcels. The reconfigured parcels will still be 82 and 14 acres, respectively, but in entirely different locations within the 96-acre property.

The county's findings address the factual background precipitating intervenors' request:

> "The subject properties have a history of previous land use decisions. In 1984 the applicants applied for a conditional use to place two farm/timber-related dwellings on a 96 acre parcel (the combined subject properties). The primary dwelling was to be occupied by the applicants while a two bedroom apartment over a shop would house farm help. The Hearings Officer approved

the primary dwelling, but denied the request for a second dwelling. This decision was upheld by the Board of Commissioners on October 24, 1984.

"In 1985, the applicants received a building permit * * * to construct a single family residence (a two bedroom apartment and shop) on the 96 acre parcel. At that time, they were advised by the Planning Division that the apartment was approved as the primary dwelling on the 96 acre parcel and that the apartment could be replaced in the future with a new residence.

"In June, 1989, the applicants obtained a building permit to replace the primary dwelling on the 96 acre parcel. The permit was approved with the condition that the existing residence (apartment) be decommissioned or removed from the property prior to occupying the new dwelling. In August, 1989, the applicants asked for a legal lot determination on the two tax lots comprising the 96 [acre] parcel. Marion County Legal Counsel determined that the tax lots were not separate parcels for land use purposes.

"In 1992 the applicants applied for a conditional use/variance to use the apartment as a temporary dwelling for medical hardship purposes. The Hearings Officer denied both the variance and the conditional use requests. The Marion County Board of Commissioners upheld the denial of the variance for use of the apartment but approved a conditional use for a hardship mobile home.

"In August, 1992, Marion County once again reviewed the status of the two tax lots comprising the 96 acre parcel. Based on additional information supplied by the applicants, the two tax lots were accepted as separate parcels for land use purposes.

"In November 1992, the applicants applied to adjust the lot lines on the two existing tax lots to include the apartment dwelling on a smaller parcel as a non-farm/timber dwelling. The application was denied.

> "In August 1993, the applicants applied for a conditional use to place a second resource related dwelling on the current 82 acre parcel. That application was also denied.
>
> "The applicants now purpose to adjust the lot lines on the 14 acre parcel and the 82 acre parcel to create a new 82 acre parcel and a new 14 acre parcel. Applicants also ask for a farm dwelling for the new 14 acre parcel." Record 5-6. (Emphasis added.)

Approval of the "proposed" farm dwelling for the new 14-acre parcel will not allow creation of an additional dwelling on that new parcel, but rather will legalize the apartment dwelling, which is now located within the existing 82-acre parcel. The existing primary dwelling will be located within the new 82-acre parcel.

The county hearings officer denied intervenors' application. Intervenors appealed to the county board of commissioners, which reversed the hearings officer determination and approved the requests.

Petitioner appeals that approval.

FOURTH ASSIGNMENT OF ERROR

Petitioner alleges the county erred in processing intervenors' application as one for a lot line adjustment since there has never been a legal determination that the 96-acre property consists of more than one parcel. As petitioner contends, by definition a lot line adjustment does not allow a change in the number of lots.

Intervenors respond that the "decision" that the 96-acre property contains two lots was made in 1992, and

that petitioner cannot challenge that earlier decision through this proceeding. To quote intervenors,

> "Throughout this decision, the County has treated the two parcels as separate, consistent with their decision in 1992. Petitioner, in repeated reference to the two parcels as a single parcel, asks LUBA to ignore the legal reality that these are two separate lots. * * * Petitioner failed to file an intent to appeal regarding the initial partition; therefore his right to appeal the County's decision is waived." Response Brief 26-7. (Emphasis added.)

Had the county partitioned the property in 1992, as intervenors now contend it did, petitioner's right to appeal that decision would have been at the time it was made. He could not collaterally attack that decision through this appeal. Sahagian v. Columbia County, 27 Or LUBA 341 (1994). However, the problem with intervenors' argument is that no partition occurred in 1992. In fact, an examination of the record reveals that no determination was made in 1992. Instead, it appears that the county planning office did nothing more than acquiesce to intervenors' desired characterization of the property as being two separate parcels.

Intervenors contend the county's 1992 decision acknowledging the property as two parcels consisted of the following statement:

> "The Planning Commission has decided to acknowledge [the 14-acre parcel], referred to above, as a separate existing parcel for land use purposes, as recommended by the Marion County Office of Legal Counsel." Record 678.

This statement was an unsigned notation, dated only "1992," at the end of an August 25, 1992 county counsel memorandum to a county planner. Nowhere in the record is there any indication as to when or how the planning commission may have made such a "decision." Nor is there any indication that the county has ever amended its official maps to reflect the purported change.

Rather, it appears that this statement was added to end of the counsel's memorandum, without any decision ever being made, to acknowledge the "advice" of the county counsel's memorandum.

To the extent the notation is explained at all, an October 5, 1992 letter to intervenors from a county planner states:

> "The Marion County Planning Division, under advice from Marion County Legal [Counsel], has further reviewed the status of the parcels of land owned by you at the above listed address. The creation of tax lot 63626-000 as a separate parcel from tax lot 63838-000 will be recognized by Marion County for future land use reviews and actions. A copy of this letter will be added to your legal lot determination file for future county reference. * * *" Record 697.

The "advice" from the county counsel's office appears to be the memorandum to which the notation from the planning commission was added. That memorandum recognizes the counsel's 1989 determination that the county's maps showed the property as one lot and acknowledges that no legal determination to change the status of the lots has been

made. Nonetheless, the county counsel concludes that if litigation was commenced to determine whether the parcel should be considered two lots, intervenors would "likely" prevail. On that basis, he recommended acknowledging two lots, even though "the record instruments do not clearly support that determination." Record 678; 699.[1]

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[1]The county counsel's memo, upon which the planning staff relied, states, in part:

> "One difficulty I had [in the 1989 determination] was that apparently there was no private or public road serving this property when it was created as a remainder after the partitioning of other land adjacent to it.
>
> After long discussions with [intervenors' attorney] the only known recorded instrument which describes a private road is the 1971 land sale contract. There is no known survey which shows a private or public roadway serving [the 14 acre parcel].
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> However, [intervenors' attorney] has assembled a good historical information demonstrating that a private roadway did exist to serve [the 14 acre parcel]. Should this matter be formally presented to a court by some action, such as a declaratory judgment, [intervenors] would probably prevail in establishing the existence of this easement for a time period at least prior to 1962, when the county adopted its first subdivision and partitioning ordinance.
>
> Of course, no litigation has occurred. So, I cannot give the Planning Division a legal direction that [the 14 acre parcel] was served by a valid, existing easement, and must be recognized as a separate 'legal lot.' However, the historical evidence supports the conclusion that an easement did in fact exist and was in fact used. [It is] a policy judgment whether you acknowledge [the 14 acre parcel] as a separate existing parcel for land use purposes, created in conformance with the county's subdivision and partitioning ordinance of the time.
>
> I understand the reluctance of the Planning Division to accept parcels as legal where the record instruments do not clearly support that determination. However, this determination affects only one parcel of land in the area. There seems little purpose in compelling [intervenors] to proceed with

Intervenors appear now to recognize that some determination was necessary in 1992 to establish the existence of two lots, and hence attempt to characterize the county's 1992 acquiescence as a "partition," which petitioner was required to, but did not timely challenge. However, the county's 1992 acquiescence to intervenors' desired characterization of their property was not a decision upon which petitioner could base an appeal.

We recognize that a local government can make a de facto land use decision, without satisfying any of the procedural or substantive requirements for such a decision, by entering into an agreement regarding the application of its local regulations. See e.g. Murphy Citizens Advisory Comm. v. Josephine County, 319 Or 477 (1994); DLCD v. Benton County, 27 Or LUBA 49 (1994). However, the action in this case did not rise to that level. Rather, the county's action was no more than an acquiescence to intervenors' desire to have the property recognized as two parcels. The undated, unsigned notation at the end of the county counsel's memorandum, upon which intervenors now rely, was not a land use decision to partition or otherwise establish the existence of two separate parcels on intervenors'

> litigation when the evidence indicates that [they are] likely to prevail. I doubt very much that acknowledging [the 14 acre parcel] as a separate parcel for land use purposes would have much precedential value. Very few people would be able to marshal the kind of history that [intervenors have]. So, I recommend acknowledgment of [the 14 acre parcel] as a separate parcel for land use purposes. Record 677-78; 698-99.

property. In fact, no determination has ever been made as to the legal nature of the two lots. Thus, it appears that intervenors' application and the county's approval of it rest upon a presumption regarding the nature of the 96-acre parcel, which is supported by neither the facts nor the law.[2]

Because the city never made a decision to partition the property, revise its maps or otherwise establish the existence of two lots, petitioner is not precluded in this appeal from challenging the county's authority to approve a lot line adjustment.

Moreover, petitioner is correct that since a lot line adjustment requires more than one lot, and the county has never partitioned or otherwise established that intervenors' 96-acre parcel is more than one parcel, the county could not process a lot line adjustment for the property. Likewise, it had no authority to approve a second farm-related dwelling for a second parcel that has not been legally established.

The fourth assignment of error is sustained.

REMAINING ASSIGNMENTS OF ERROR

In the remaining assignments of error, petitioner challenges the merits of the county's lot line adjustment

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[2]The record reveals that petitioner raised the legality of the lots and the lot line adjustment process before the board of commissioners. See Record 674. The decision does not respond to petitioner's allegations, or in any way address the legality of the lots.

approval and farm-related dwelling approval. Since we determine that the county lacked authority to approve a lot line adjustment request for a single parcel, or to accept a farm-related dwelling application for a parcel that has not been legally established, no purpose would be served by addressing the merits of those approvals.

The county's decision is reversed.