BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

ANDREW SOUTH and MARY SOUTH,
Petitioners,

vs.

CITY OF PORTLAND,
Respondent,

and

KATHERINE B. McCOY,
Intervenor-Respondent.

LUBA No. 2006-184

FINAL OPINION
AND ORDER

Appeal from City of Portland.

Ty K. Wyman, Portland, filed the petition for review on behalf of petitioners. With him on the brief was Dunn Carney Allen Higgins & Tongue, LLP.

Linly F. Rees, Deputy City Attorney, Portland, filed a response brief and argued on behalf of respondent.

Megan D. Walseth, Portland, filed a response brief, and argued on behalf of intervenor-respondent. With her on the brief was Ball Janik LLP.

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

RYAN, Board Member, did not participate in the decision.

AFFIRMED 02/13/2007

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

1 Opinion by Bassham.

2 **NATURE OF THE DECISION**

3 Petitioners appeal an administrative decision approving a property line adjustment.

4 **MOTION TO INTERVENE**

5 Katherine B. McCoy (intervenor), the applicant below, moves to intervene on the side
6 of respondent. There is no opposition to the motion and it is allowed.

7 **FACTS**

8 The subject property consists of two adjoining residential lots, lots 1 and 2, part of a
9 four-lot tract zoned for residential use (R-10).[1] The R-10 zone imposes a minimum lot size
10 of 6,000 square feet, and a maximum lot size of 17,000 square feet. Lot 1 is vacant and
11 10,232 square feet in size, while Lot 2 is developed with a single family dwelling and is
12 16,628 square feet in size. On July 25, 2006, intervenor-respondent (intervenor) filed an
13 application with the city to adjust the boundary between lots 1 and 2 northward, so that Lot 1
14 is increased in size from 10,232 square feet to 15,651 square feet and Lot 2 is decreased in
15 size from 16,628 square feet to 11,209 square feet.

16 Under the city's procedures, property line adjustments are typically processed as
17 administrative decisions, without notice, hearing or opportunity for neighboring landowners
18 to comment. At the applicant's request, the city processed the application under its "Type I"
19 land use review procedures, which provides notice to nearby property owners and the
20 opportunity to comment. The city provided notice to petitioners, who are adjoining
21 landowners, and petitioners submitted written comments objecting to the proposed property

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[1] The same four-lot tract was also at issue in *South v. City of Portland*, 46 Or LUBA 588, *aff'd* 193 Or App 512, 93 P3d 845 (2004) (*South I*) and *South v. City of Portland*, 48 Or LUBA 555 (2005) (*South II*). In *South I*, we affirmed a city decision that approved an adjustment or variance to the R-10 maximum lot size, which was necessary to allow a proposed reconfiguration of the property boundaries of all four existing lots. In *South II*, we reversed the separate city decision that approved the proposed reconfiguration, on the grounds that the city's actions did not qualify as "property line adjustments" under the applicable code and statutory definitions, and the city failed to identify any lawful means to achieve the desired configuration of the four lots.

1 line adjustment. Intervenor revised the application in response to some of petitioners'
2 objections.
3 On October 2, 2006, city staff approved the application under the property line
4 adjustment criteria at Portland City Code (PCC) 33.667. This appeal followed.
5 **FIRST ASSIGNMENT OF ERROR**
6 Petitioners argue that the city committed procedural error by failing to provide
7 petitioners a hearing or opportunity to request a hearing on the application. According to
8 petitioners, the challenged October 2, 2006 property line adjustment decision is a quasi-
9 judicial "permit" decision as defined by ORS 227.160(2),[2] because it involved the
10 "discretionary approval of a proposed development of land." Because the challenged
11 decision is an ORS 227.160(2) "permit" decision, petitioners argue, the city must either
12 provide a hearing on the application as required by ORS 227.175(3) or provide the
13 opportunity to request a hearing as required by ORS 227.175(10).
14 Petitioners argue that LUBA has held in at least two cases, *Smith v. City of St. Paul*,
15 45 Or LUBA 281, 286 (2003), and *Warf v. Coos County*, 43 Or LUBA 460 (2003), that
16 property line adjustment decisions are permit decisions under ORS 227.160(2) and the
17 ORS 215.402(4) cognate applicable to counties.
18 The city responds that, while the challenged decision may be a land use decision, it is
19 not a "permit" decision as defined by ORS 227.160(2), because it involved neither a
20 "discretionary approval" nor the "proposed development of land" within the meaning of that
21 statute.

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[2] ORS 227.160(2) provides, in relevant part:

> "'Permit' means discretionary approval of a proposed development of land, under ORS 227.215 or city legislation or regulation. 'Permit' does not include:
>
> "(a) A limited land use decision as defined in ORS 197.015;
>
> "* * * * *[.]"

1 We assume without deciding that the challenged property line adjustment decision
2 involved the kind of discretion that characterizes an ORS 227.160(2) permit decision.
3 However, we agree with the city that because the challenged decision approves only a
4 property line adjustment, it does not involve the "proposed development of land" and is
5 therefore not a "permit" decision as defined by ORS 227.160(2).

6 First, petitioners do not dispute that the challenged decision approves a "property line
7 adjustment" as that term is defined at ORS 92.010(11), as opposed to something else, such as
8 a replat, partition or subdivision.[3] That distinction is critical. Contrary to petitioners'

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[3] ORS 92.010 defines "partition," "property line adjustment," "replat," "subdivision" and other related terms as follows:

> "(6) 'Partition' means either an act of partitioning land or an area or tract of land partitioned.
>
> "(7) 'Partition land' means to divide land to create two or three parcels of land within a calendar year, but does not include:
>
> "* * * * *
>
> "(b) An adjustment of a property line by the relocation of a common boundary where an additional unit of land is not created and where the existing unit of land reduced in size by the adjustment complies with any applicable zoning ordinance;
>
> "* * * * *
>
> "(10) 'Property line' means the division line between two units of land.
>
> "(11) 'Property line adjustment' means the relocation or elimination of a common property line between abutting properties.
>
> "(12) 'Replat' means the act of platting the lots, parcels and easements in a recorded subdivision or partition plat to achieve a reconfiguration of the existing subdivision or partition plat or to increase or decrease the number of lots in the subdivision.
>
> "* * * * *
>
> "(15) 'Subdivide land' means to divide land to create four or more lots within a calendar year.
>
> "(16) 'Subdivision' means either an act of subdividing land or an area or a tract of land subdivided."

understanding of *Smith* and *Warf*, those cases do not support the proposition that a decision that approves or denies a "property line adjustment," as defined by ORS 92.011, is a statutory permit decision.

The decision in *Smith* was a denial of an application to adjust two property lines on a tract purportedly consisting of four discrete lots, along with variances necessary to develop two of the adjusted lots. Two of the four lots had allegedly been created by road vacations in 1899 and 1966. Apparently because of the requested variances, the city processed the adjustment and variance applications together under its quasi-judicial "Type II" procedure, which require a hearing before the planning commission, rather than processing the property line adjustment application separately under its ministerial "Type I" procedure, which allows for a staff administrative decision. The planning commission denied the property line adjustment applications because it concluded that the applicant's property consisted only of two lots, not four, and that the boundaries Smith sought to adjust did not exist. It then denied the variances as moot. Before LUBA, Smith argued that the city committed procedural error in sending the property line adjustment application to the planning commission for review. According to Smith, the city should have processed that application separately, and issued a final staff decision under its ministerial Type I procedures, which meant that only the variance application would have gone before the planning commission.

LUBA disagreed with Smith's premise that the property line adjustment applications required no discretion and thus should have been processed under the city's ministerial Type I procedures. We cited to our discussion of a subsequent assignment of error, in which we affirmed the planning commission's conclusion that only two discrete lots existed in the subject tract, as an indication that the property line adjustment application required the city to exercise discretion that is inconsistent with a ministerial decision.[4] We concluded that the

[4] We stated in *Smith*:

1 city did not err in applying its quasi-judicial Type II procedures rather than its ministerial
2 Type I procedures.

3 While we did state in *Smith*, as petitioners point out, that the "city's decision
4 concerning the lot line adjustment is correctly viewed as a quasi-judicial 'permit' decision,"
5 that statement was intended to reject the petitioner's view that the city's decision on the
6 application should have been processed under the city's ministerial Type I procedures rather
7 than its quasi-judicial Type II procedures. To the extent *Smith* can be read to suggest that all
8 property line adjustment applications that involve the exercise of discretion are statutory
9 "permit" decisions as that term is defined in ORS 227.160(2) and ORS 215.402(4), we now
10 question the suggestion. While we did not analyze the issue in these terms, it seems apparent
11 that the applicant in *Smith* did not in fact propose a "property line adjustment" as that term is
12 defined in ORS 92.010(11), *i.e.*, the "relocation or elimination of a common property line
13 between abutting properties." Instead, what the applicant essentially proposed was a

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"Under ORS 197.835(9)(a)(B) the city's failure to follow required procedures provides a basis for reversal or remand only if that failure 'prejudiced the substantial rights of the petitioner.' We fail to see how the procedure the city followed in this matter constituted error or, even if it did, how following that procedure prejudiced petitioner's substantial rights. Petitioner's legal theory may be that [the city's code] grants him a substantial right to a ministerial decision on the lot line adjustment request by planning staff rather than a quasi-judicial decision by the planning commission in accordance with local procedures that implement the statutory land use 'permit' decision making requirements set out at ORS 227.175. If that is petitioner's argument, it is inadequately developed and without merit. As we have explained on several occasions, approval or denial of lot line adjustments can easily involve the exercise of significant legal and factual judgment, which can disqualify such decisions from the statutory ministerial exception to the definition of 'land use decision' at ORS 197.015([11])(b)(A). *Warf v. Coos County*, 43 Or LUBA 460, 463 (2003); *Goddard v. Jackson County*, 34 Or LUBA 402, 410-11 (1998). If the city's decision concerning the property line adjustment is quasi-judicial rather than ministerial, not only did the city not commit error by processing the lot line adjustment as a quasi-judicial matter, it might have committed reversible error if it had not done so. As our review of the third assignment of error makes clear, the city's decision concerning the requested lot line adjustment required that the city exercise significant legal and factual judgment. Because the city's decision concerning the lot line adjustment is correctly viewed as a quasi-judicial 'permit' decision, the city committed no error in following its Type II quasi-judicial land use procedures in considering the lot line adjustment applications." 45 Or LUBA at 285-86 (footnote omitted).

1 "partition," dividing two lots or parcels into four lots or parcels.[5] Because the applicant in
2 *Smith* did not propose a "property line adjustment," *Smith* does not support the broad
3 proposition petitioners in the present case urge on us, that all property line adjustments that
4 involve the exercise of discretion are statutory permit decisions.

5 *Warf* lends even less support to petitioners' view. In *Warf*, the applicant proposed a
6 series of two purported "property line adjustments" that substantially reconfigured a tract
7 consisting of three discrete parcels. We concluded that the applicant effectively sought and
8 the county effectively approved a *de facto* partition rather than property line adjustments. 43
9 Or LUBA at 466-67. We held that the county erred in failing to provide the notice and
10 opportunity for a hearing required in approving a partition, under county regulations that
11 implemented statutory permit requirements.[6] *Id.* at 472.

12 Because the present case does not involve a *de facto* partition or something other than
13 a "property line adjustment" as defined at ORS 92.010(11) that might constitute a statutory
14 permit decision, the above-cited cases do not support petitioners' argument that the city erred
15 in failing to provide petitioners with a hearing or opportunity to request a hearing.

16 Even more to the point, the city argues, and we agree, that the challenged decision is
17 not a "permit" as defined at ORS 227.160(2) because it does not involve the "proposed
18 development of land, under ORS 227.215 or city legislation or regulation." As the city
19 points out, ORS 227.215 authorizes cities to adopt a "development ordinance," and defines

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[5] More precisely, the lot configuration Smith sought required the creation of two new parcels, each composed partly of portions of the two existing lots Smith owned and land that, the city concluded, Smith did not own.

[6] It is worth noting that approval or denial of a tentative partition pertaining to a site inside an urban growth boundary is a "limited land use decision." ORS 197.015(13). ORS 227.160(2) and ORS 215.402(4) exclude limited land use decisions from the respective definitions of "permit." *See* n 2. Presumably, the City of St. Paul decision at issue in *Smith* involved land within an urban growth boundary. If so, the most accurate characterization of the *de facto* partition at issue in *Smith* is probably a "limited land use decision," and hence that decision was not a "permit." Conversely, the most accurate characterization of the *de facto* partition at issue in *Warf* is probably a "permit" decision, because it involved a site outside an urban growth boundary and did not qualify for any exclusion from the definition of "permit."

1 "development" in relevant part to include "dividing land into two or more parcels, including
2 partitions and subdivisions as provided in ORS 92.010 to 92.285[.]"[7] The initial and more
3 general descriptions of "development" refer to "building or mining operations" and "material
4 change in the use or appearance of a structure or land," neither of which would seem to
5 include partitions and subdivisions. In themselves, partitions and subdivisions result only in
6 placing new lines on maps and plats, without necessarily changing the use or appearance of a
7 structure or land. As defined by ORS 92.010, property line adjustments do not divide land
8 into two or more parcels, and are not partitions or subdivisions. Because the legislature
9 carefully listed actions that divide land such as "partitions and subdivisions as provided in
10 ORS 92.010 to 92.285" as one type of "development" defined in ORS 227.215, but chose not
11 to list with that definition other actions under ORS chapter 92 that do not divide land, such as
12 property line adjustments, there is a strong inference that the legislature did not intend
13 "development" to include property line adjustments.

14 While the ORS 227.215(1) definition of development applies by its terms only "as
15 used in this section," as noted ORS 227.215(2) authorizes cities to adopt a development
16 ordinance, the same ordinance that is referenced by the definition of "permit" at
17 ORS 227.160(2). We can think of no reason to read the term "development" in
18 ORS 227.160(2) more broadly than the term is defined in ORS 227.215(1). Consequently,
19 we agree with the city that a proposed property line adjustment is not a "proposed

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[7] ORS 227.215 provides, in relevant part:

> "(1) As used in this section, 'development' means a building or mining operation, making a material change in the use or appearance of a structure or land, dividing land into two or more parcels, including partitions and subdivisions as provided in ORS 92.010 to 92.285, and creating or terminating a right of access.
>
> "(2) A city may plan and otherwise encourage and regulate the development of land. A city may adopt an ordinance requiring that whatever land development is undertaken in the city comply with the requirements of the ordinance and be undertaken only in compliance with the terms of a development permit."

1 development of land," and therefore the challenged decision approving a property line
2 adjustment is not a "permit" as defined by ORS 227.160(2). It follows that the city did not
3 err in failing to provide petitioners with a hearing or the opportunity to request a hearing, as
4 required by ORS 227.175.

5 The first assignment of error is denied.

6 **SECOND ASSIGNMENT OF ERROR**

7 The city planning staff person who issued the challenged decision took the position
8 that Lots 1 and 2 are eligible for a property line adjustment only if the lots are either "legal
9 lots" or "lots of record."[8] The PCC does not define the term "legal lot," but
10 PCC 33.700.130(A) provides that:

11 "A lot shown on a recorded plat remains a legal lot except as follows:

12 "1. The plat has been vacated as provided by City Code;

13 "2. The lot has been further divided, or consolidated, as specified in the
14 600 series of chapters in this Title, or as allowed by the former Title
15 34;

16 "3. The lot as originally platted is no longer whole and consists of
17 individual property remnants. These remnants are not considered legal
18 lots. However, they may still be considered lots of record. See the
19 definition of 'lot of record' in Chapter 33.910, Definitions."

20 PCC 33.700.130(A) apparently implements ORS 92.017, which provides that a lawfully
21 created lot or parcel "shall remain a discrete lot or parcel unless the lot or parcel lines are
22 vacated or the lot or parcel is further divided as provided by law."

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[8] In its response brief, the city argues that it is not clear that the city was *required* to determine whether Lots 1 and 2 were either legal lots or lots of record, in order to gain eligibility for a property line adjustment. The city points out that the code criteria applicable to property line adjustments refer only to "properties," as does the statutory definition of property line adjustment. Nonetheless, the city argues that even if legal lot or lot of record status is a prerequisite to application of the property line adjustment criteria, city staff properly concluded that Lots 1 and 2 are either legal lots or lots of record. The staff decision does not explain the basis for the conclusion that the subject lots must be either legal lots or lots of record to qualify for a property line adjustment, and we agree with the city that the source of that obligation is not clear. However, for purposes of discussion, we assume without deciding that under the PCC the city must find that Lots 1 and 2 are legal lots or lots of record in order to qualify those lots for a property line adjustment.

1 PCC 33.910 defines “lot of record” as a plot of land:

2 “[1] Which was not created through an approved subdivision or partition;

3 “[2] Which was created and recorded before July 26, 1979; and

4 “[3] For which the deed, or other instrument dividing the land, is recorded
5 with the appropriate county recorder.”

6 City staff reviewed deeds and other evidence and concluded that Lots 1-4 were
7 created by subdivision plat prior to 1937. In that year, the city foreclosed on Lots 1-4, and in
8 1938 the city transferred those lots by deed. The 1938 deed specifically excluded the
9 southeast corner of Lot 1, which apparently remained in the city’s possession and was later
10 sold separately. That southeast corner of Lot 1 is now known as tax lot 10200. City staff
11 concluded that Lot 2 is a legal lot as described in PCC 33.700.130(A). Staff concluded that
12 Lot 1 met the three elements of the lot of record definition at PCC 33.910, and thus both lots
13 qualified for a property line adjustment. Record 3-4.

14 Petitioners challenge the staff conclusion that Lot 1 qualifies as a lot of record.
15 Petitioners do not dispute that Lot 1 satisfies each of the three elements of the definition at
16 PCC 33.910. Instead, petitioners appear to argue that in order to be a “lot of record” the
17 evidence and findings must also demonstrate that the lot was “legally created.” Petition for
18 Review 12. According to petitioners, the city must identify the ordinances that applied in
19 1938 and determine that creation of Lot 1 by deed was lawful, that is, not contrary to any
20 then-applicable ordinance. Petitioners argue that the challenged decision does not analyze
21 the ordinances that applied in 1938 or explain why the zoning ordinance then in effect
22 permitted creation of a parcel by deed. Petitioners cite to a 1930 state statute that sets out
23 standards for subdivision plats, and argue that that statute appears to require city approval of
24 the parcels created by the 1938 deed. Further, petitioners argue there is no evidence that Lot
25 1 or tax lot 10200 met any applicable standards in effect in 1938 regarding lot size, shape,
26 access, or other requirements.

Petitioners do not identify any code provision requiring that a lot must be "legally created" in order to qualify as a "lot of record" as defined at PCC 33.910. On the contrary, PCC 33.700.130(A)(3) clearly contemplates that a lot may be a lot of record, even if it is not a "legal lot." Instead, petitioners cite *Yamhill County v. Ludwick*, 294 Or 778, 663 P2d 398 (1983), as the source of a legal obligation to demonstrate that Lot 1 is "legally created." That case involved a county code provision that permitted residential development only where the county finds that the subject property is an "existing legal lot of record," and the Court's analysis turned on that specific code requirement. Petitioners identify no similar applicable code provision or other authority in the present case that explicitly or implicitly requires that a lot be legally or lawfully created in order to qualify as a "lot of record" as defined by PCC 33.910. That circumstance alone distinguishes *Ludwick*.

Even if petitioners could identify some code provision or other authority requiring that Lot 1 be "legally created" in order to qualify as a lot of record under PCC 33.910, petitioners have not demonstrated that remand would be warranted in the present case to conduct that inquiry. The city argues, and we agree, that the 1930 statute that petitioners cite merely sets out subdivision plat requirements and does not require that the city approve parcels created by deed. The city has attached to its brief copies of the entire city zoning codes in effect in 1924 and 1942, and asserts that nothing in those codes prohibited creation of a parcel by deed, required city partition approval, or imposed minimum lot sizes, dimensional standards or other standards that might apply to the 1938 partition. Petitioners do not dispute that assertion and, as far as we can determine, the city is correct. Petitioners have not demonstrated that there is any basis to suspect that the creation of Lot 1 by deed in 1938 was contrary to applicable law.

The second assignment of error is denied.

The city's decision is affirmed.