

LAND USE
BOARD OF APPEALS

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

JUN 2 3 13 PM '80

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ROGER DENHAM and ROGER)
PADDOCK,)
)
Petitioner,)
)
vs.)
)
CLACKAMAS COUNTY,)
)
Respondent.)

LUBA: 80-013
FINAL OPINION AND ORDER

Appeal from Clackamas County

Bernard B. Brink, Hillsboro, filed the petition for review and argued the cause for Petitioners. With him on the brief were Brink, Moore, Brink & Peterson.

Scott H. Parker, County Counsel, and Beth Blount Assistant County Counsel, Clackamas County, filed the petition and argued the cause for Respondent.

Cox, Referee; Reynolds, Chief Referee; Bagg, Referee; participated in the decision.

Affirmed.

June 2, 1980

You are entitled to judicial review of this Order. Judicial review is governed by the provisions of Oregon Laws 1979, ch 772, sec 6(a).

1 Cox Referee.

2 NATURE OF PROCEEDING

3 Petitioners challenge the land use action of Clackamas
4 County Board of Commissioners denying their request for a minor
5 partitioning. Respondent Clackamas County entered its decision
6 on December 21, 1980.

7 STANDING

8 Respondents concede petitioners standing.

9 ISSUES WHICH PETITIONERS SEEK TO HAVE REVIEWED

10 Petitioners set forth as assignments of error the
11 following:

12 "1. Petitioners complied with the zoning requirements
13 on this parcel.

14 "2. The commissioners' order is not supported by
15 adequate facts and conclusions of law; and, there are
16 not facts in the record from which the commissioners
17 could determine that sixty feet of road frontage
18 requires a lot width being the entire length of the
19 lots of sixty feet.

20 "3. The commissioners, in essence, amended the zoning
21 ordinance, under the guise of interpreting the
22 ordinance, by interpreting unambiguous language."

23 FACTS

24 Petitioners desire a minor partition of a 1.11 acre parcel
25 into two parcels, one containing .67 acres and the other .44
26 acres. The 1.11 acre parcel presently fronts on Central Avenue
and has a total frontage of approximately 127.40 feet. The
1.11 acre parcel has a lot depth running west from its frontage
on Central Avenue of 306.39 feet. Petitioners proposed
partition would create two lots. The lot which is the subject

1 of this appeal would be connected to Central Avenue by a
2 driveway 170.75 feet in length and 20 feet in width along the
3 northern most boundary of the 1.11 acre parcel. At
4 approximately 10 feet from Central Avenue this driveway would
5 widen to 60 feet cutting a diagonal or flair across the other
6 lot being created by the partitioning. The Clackamas county
7 zoning ordinance requires a minimum of 60 feet of road frontage
8 per lot in an R-10 zone. The ordinance however does not
9 specifically state the minimum width required for a lot in an
10 R-10 zone. As a consequence the Petitioners argue that the
11 'flair' scheme meets the criteria for the subject lot under the
12 ordinance because the "flair" or "foot" creates the required
13 sixty foot frontage on Central Avenue. A schematic of the
14 proposed creation is attached as Appendix A to this decision
15 and by this reference made a part hereof.

16 In this case the Respondent was faced with the issue of
17 whether the proposed configuration meets the requirement of its
18 zoning ordinance.¹ The Clackamas County Board of
19 Commissioners by a two-to-one vote ruled that the proposed
20 partitioning did not meet the requirements of a lot in an R-10
21 zone when viewed in relation to the zoning ordinance as a
22 whole. The Commission interpreted the ordinance to require a
23 minimum lot width of 60 feet the entire depth of the lot.
24 Respondent invited Petitioners to apply for a variance so that
25 they might achieve the proposed lot configuration. Petitioners
26 chose not to do so and instead appealed Respondents' decision to

1 this Board.

2 DECISION ON MERITS

3 Petitioners request this Board to declare that they have
4 met the standards set forth in the Clackamas County zoning
5 ordinance for a lot in an R-10 zone² and thereby should be
6 allowed to partition the property as proposed. Respondent, on
7 the other hand, argues that Petitioner's literal interpretation
8 of the standards frustrates the county's zoning ordinance as a
9 whole and leads to an absurd result. Respondent reasons that
10 in light of Petitioners proposed interpretation an ambiguity
11 exists and Respondents interpretation of the ordinance
12 controls. We agree with Respondent.

13 Petitioners entire argument relays on an interpretation of
14 but one element of the Respondents zoning ordinance, i.e.,
15 street frontage. Petitioners position fails to take into
16 consideration how the lot configuration they propose allows for
17 anything but a convoluted application of other R-10 zone
18 requirements such as front, rear and side yard setbacks. (See
19 footnote 2.) Petitioners proposal gives rise to questions such
20 as is the "flair" strip used to meet the street frontage also
21 to be considered the front lot line? If it is, from where is
22 the front yard set back measured? If not, which lot boundary
23 is to be considered in determining the front yard, the rear
24 yard, the side yard, etc.? A review of Clackamas county's
25 zoning ordinance indicates that when viewed as a whole the
26 ordinance does not easily accommodate Petitioner's proposal.

1 Specifically, considering the definitions of front lot line and
2 rear lot line as set forth in section III.2 of Clackamas County
3 Zoning Ordinance, Petitioner's proposed dimensional scheme is
4 difficult to analyze. Section III.2 defines lot lines
5 pertinent to the questions raised above regarding setbacks as
6 follows:

7 "LOT LINE, FRONT. Any boundary line separating the
8 lot from a public street or road. In the case of a
9 flag lot, the front lot line (for the purpose of
10 determining setbacks) shall be within the boundaries
11 of the lot by a distance equal to the width of the
12 narrow strip providing access to the lot. Such
13 distance shall be measured from, and the front lot
14 line shall be parallel to, the lot line extending from
the road to the lot line opposite and most distant
from the road (see illustration below for flag shaped
lot₃). Where a lot has no frontage on a public,
county or state road, the front lot line is the line
of the easement or private road serving the lot which
is nearest to the residence. (Adopted May 21, 1979)

15 "LOT LINE, REAR. Any boundary line opposite and most
16 distant from the front lot line, and not intersecting
17 a front lot line. In the case of a corner lot, the
18 rear lot line shall be any one of the boundary lines
19 opposite the most distant from the front lot lines.
Any other such opposite and most distant boundary line
shall be a side lot line (see illustration below for
corner lot). (Adopted May 21, 1979)

20 "LOT LINE, SIDE. Any boundary line not a front or
rear lot line."

21 Petitioner's proposal in effect is based on an assertion
22 that if the R-10 zone doesn't specifically state a lot width
23 requirement, none can be imposed regardless of whether other
24 portions of the controlling ordinance would have to be ignored
25 or manipulated as a result. As was just pointed out

1 Petitioner's proposal would require manipulation of lot line
2 front, rear and side definitions, as well as setback
3 requirements. A more accurate characterization of petitioners'
4 proposal is that of a flag lot. Such a characterization does
5 not require measurement and definitional gymnastics.³

6 As a result of the foregoing discussion it is the
7 conclusion of this Board that an ambiguity or aperture exists
8 in the width standard required for a lot in an R-10 zone in
9 Clackamas County's Zoning Ordinance. When such an aperture
10 occurs it is the responsibility of the Respondent herein to
11 interpret the intent of the legislation and to fill in
12 statutory interstices. Fifth Avenue Corporation vs. Washington
13 County, 288 Or 591, 599, 581 P2d 50 (1978); Bienz v. City of
14 Dayton, 29 Or App 761, 778, 556 P2d 904 (1977). Where, as
15 here, an ambiguity in an ordinance exists we will defer to the
16 local jurisdiction's resolution of that ambiguity where the
17 resolution is based on a construction not contrary to the
18 expressed terms of the ordinance. Bienz v. City of Dayton,
19 supra. Morse v. Division of State Lands, 34 Or App 853,
20 856-7, 581 P2d 520 (1979), aff. 285 Or 197 590 P2d 709 (1979).
21 We find that Respondent's resolution is consistent with the
22 terms of the ordinance. Based on the foregoing, Petitioner's
23 first allegation of error is denied.

24 Second Allegation of Error

25 Petitioners allege:
26

1 "The commissioners' order is not supported by
2 adequate facts and conclusions of law; and there
3 are not facts in the record from which the
4 commissioners could determine that sixty feet of
5 road frontage requires a lot width being the
6 entire length of the lots of sixty feet."

7 We find that Respondents main duty in this situation was to
8 clarify an ambiguity and fill in a statutory interstice. As such
9 it is not a question of fact upon which their decision is based
10 but rather one of law. Therefore, we find that Respondent's
11 findings, conclusions and order, while not artfully drafted, are
12 sufficient. Therefore Petitioner's second allegation of error is
13 denied.

14 Third Allegation of Error

15 Petitioners allege "the commissioners amended the ordinance
16 under the guise of interpreting the ordinance by distorting
17 unambiguous language."

18 In light of our decision regarding Petitioner's first
19 allegation of error wherein we find that as applied to
20 Petitioner's proposed lot configuration the language of the
21 Clackamas County zoning ordinance is ambiguous, Petitioner's
22 third allegation of error is denied.

23 Affirmed.

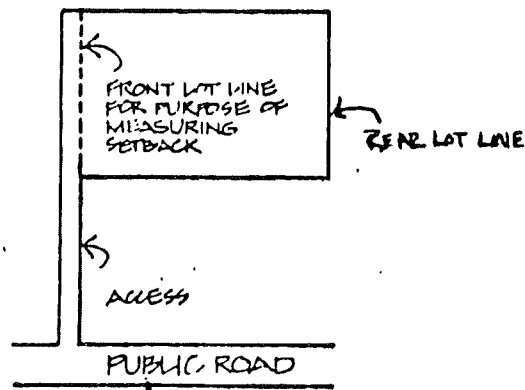
FOOTNOTES

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1. A review of the record indicates that Petitioners herein are not the first to propose this scheme of a 'flair' in order to meet the technical requirements of Respondent's zoning ordinance without the necessity to go through the variance procedure. The earlier decisions approving such a division scheme apparently were not appealed to the Clackamas County Board of Commissioners. Respondent was not, therefore, prior to this proceeding, required to interpret the meaning of its ordinance governing frontage and lot width in an R-10 zone.

2. Clackamas County ordinance setting forth the dimensional standards for lots in an R-10 zone includes at section 4.26 the following standards pertinent to this appeal:
 - "A... Minimum lot size: 10,000 square feet for all principal and transitional uses unless otherwise specified below.
 - "1. Medical and/or dental clinics, and professional type offices: 15,000 square feet.
 - "B... Minimum street frontage: Sixty (60) feet; however no street frontage is required when the lot fronts on an approved, platted private road. (Order 13073)
 - "C... Minimum lot depth: Ninety-five (95) feet.
 - "D... Minimum front yard setback: Twenty-five (25) feet, structures on corner or through lots shall observe the minimum front yard setback on both streets. No structure shall be erected closer than fifty (50) feet from the centerline of any public, county, or state road.
 - "E... Minimum rear yard setback: Twenty-five (25) feet.
 - "F... Minimum side yard setback: Seven (7) feet.
 - "G... Maximum building height: 35 feet.
 - "H... Maximum lot coverage: Twenty-five (25) percent for all dwelling units, thirty (30) percent for all buildings.

1 3. After review of Respondent's zoning ordinance and
2 comparison of the lot line definitions to Petitioners
3 proposal this Board concludes that the nature of
4 Petitioners request is more akin to the establishment
5 of a flag lot requiring a variance than it is to
6 meeting the letter and intent of an R-10 lot. This
7 Board, when reviewing matters before it, looks at the
8 nature of the action not the label given it by the
9 parties. Auckland v. Bd. of Comm. Mult. Co., 21 Or
10 App 596, 536 P2d 444 (1975). Petitioner's labeling of
11 this action as merely a minor partitioning request and
12 nothing more does not accurately reflect that which is
13 sought to be accomplished here.



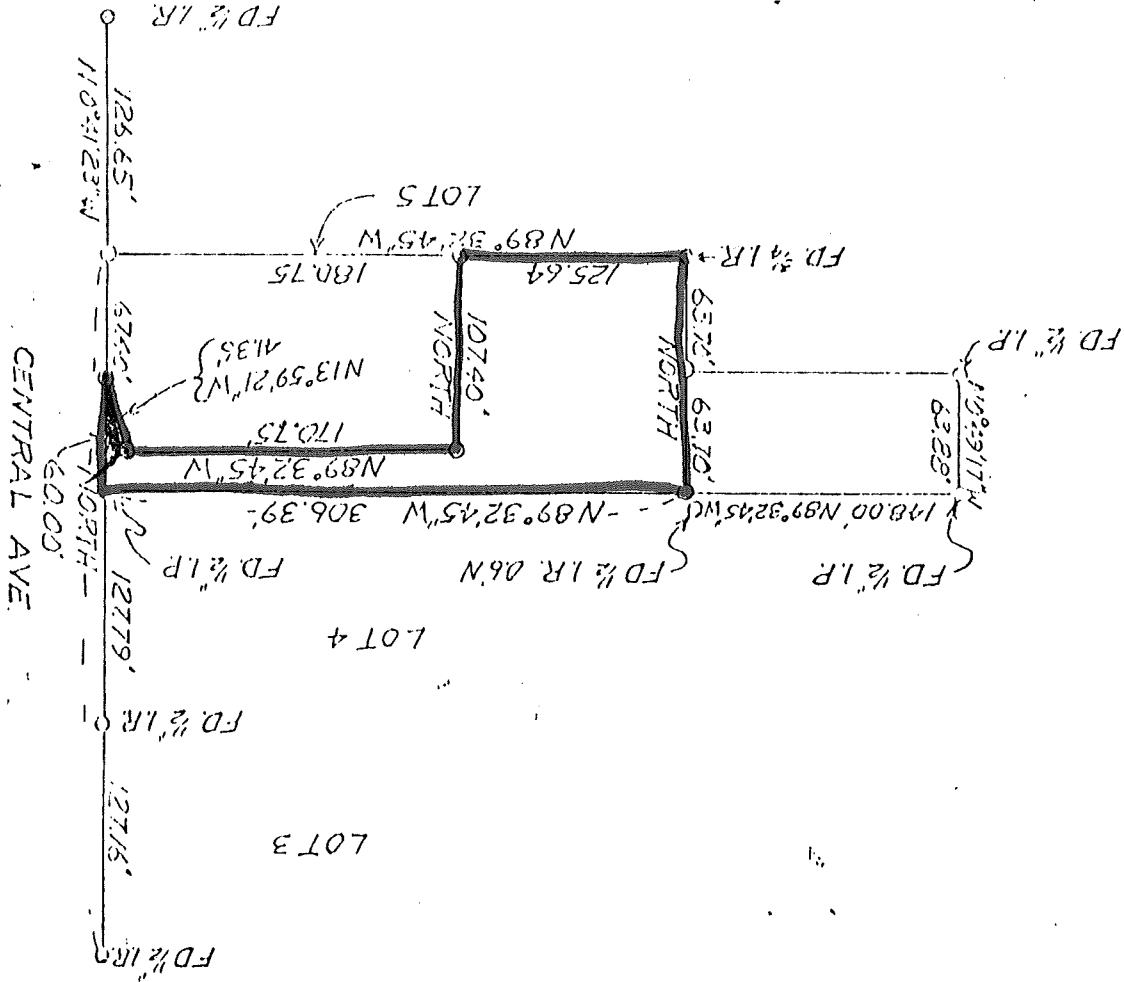
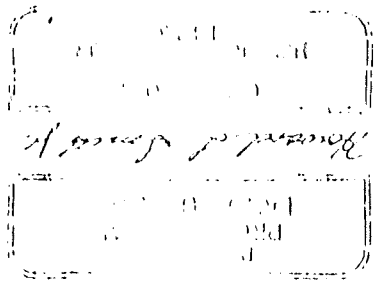
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17 **FLAG SHAPED LOT**

A SURVEY FOR BOB DENHAM
 LOT 5, BLOCK 1, OSWEGO ACRES, SE 1/4 SEC. 18
 T2S, R1E, WM, CLACKAMAS COUNTY, OREGON

JULY 10, 1979
 SCALE 1"=100'
 0 SET 5/8" x 30" L.R.

BASIS OF BEARING WESTERLY
 RIGHT OF WAY CENTRAL AVE

79



CENTRAL AVE