

LAND USE
BOARD OF APPEALS

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

JUL 22 1 43 PM '80

3	VERA BAXTER,)	
)	
4	Petitioner,)	LUBA No. 79-034
)	
5	v.)	FINAL OPINION
)	AND ORDER
6	MONMOUTH CITY COUNCIL,)	
)	
7	Respondent.)	

8 Appeal from the City of Monmouth.

9 Jossi Davidson, Silverton, filed the Petition For Review
10 and agrued the cause for Petitioner Vera Baxter.

11 Richard Isham, County Counsel, filed the Brief and argued
the cause for the City of Monmouth.

12 REYNOLDS, Chief Referee, COX, Referee, BAGG, Referee;
13 participated in the decision.

14 AFFIRMED. 7/22/80

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16 You ar entitled to judicial review of this Order. Judicial
review is governed by the provisions of Oregon Laws 1979, ch
17 772, sec 6(a).

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1 REYNOLDS, Chief Referee

2 NATURE OF PROCEEDINGS

3 Petitioner appeals the Respondent's grant of a partition
4 which created three lots out of two lots within the city of
5 Monmouth.

6 SUMMARY OF ARGUMENTS

7 Petitioner sets forth four assignments of error. The first
8 assignment of error contends that the city's decision was
9 invalid because it was based upon an unconstitutional
10 partitioning ordinance. According to petitioner the ordinance
11 is unconstitutional because it contains no requirements for a
12 partitioning and decisions may be made on a completely ad hoc
13 and arbitrary basis.

14 Petitioner's second assignment of error is that the
15 "purpose" section of Monmouth's land division ordinance¹ was
16 not complied with in that there was no evidence to establish
17 that the "standards" set forth in the ordinance had been met.
18 In fact, petitioner contends, the record reveals that the
19 proposed partitioning would actually contravene virtually every
20 planning objective stated in the purpose section.

21 Petitioner's third assignment of error is that the city
22 improperly construed the applicable law in that instead of
23 imposing on the applicant for the partitioning the burden of
24 proving that the partitioning complied with the city's
25 ordinances, the burden was actually placed upon the petitioner
26 and others to disprove the proposed partitioning complied with

1 the ordinance "purpose" provision.

2 Petitioner's fourth assignment of error contends that
3 respondent substantially prejudiced the rights of the
4 petitioner by failing to follow applicable procedures. The
5 argument here is that the final order which is actually a
6 letter order signed by the Monmouth Mayor, fails to contain the
7 necessary written findings required under such cases as Green
8 v. Hayward, 275 Or 693, 552 P2d 815 (1976) and Kristensen v.
9 City of Eugene Planning Commission, 24 Or App 131, 544 P2d 591
10 (1976). In addition, petitioner argues that the city failed to
11 follow the applicable procedure to petitioner's substantial
12 detriment because the respondent failed to require that the
13 application for the partitioning contain a map of adjacent
14 property within 800 feet. As a result, according to
15 petitioner, "respondent failed to adequately consider the
16 effect of its decision on that nearby property."

17 The thrust of respondent's response is that the only
18 requirement for allowing a partitioning is that the lots to be
19 created have the minimum square footage and the minimum
20 frontage required by the zone within which the lots lie. In
21 this case, the lots to be created had the necessary 5,000
22 square feet and the necessary 25 foot frontage required by the
23 RM zone, the zone within which the property is located.
24 Respondent points out that the mayor's letter order recites
25 these two facts and is therefore sufficient.

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1 STATEMENT OF FACTS

2 The basic facts are relatively simple and not in dispute.
3 The applicants sought a partitioning of two adjacent parcels
4 into three parcels in a RM zone (12 units per acre) in the City
5 of Monmouth. The third parcel to be created would be flag
6 shaped with access to the lot adjacent to petitioner's home and
7 directly underneath petitioner's bedroom window. Several
8 property owners appeared below both orally and by letter in
9 opposition. These people raised concerns of privacy,
10 aesthetics, safety, land values, traffic and more appropriate
11 available alternatives. The planning commission denied the
12 application and the applicants appealed to the city council.

13 The evidence before the city council indicated that the
14 lots to be created all possessed the minimum square footage
15 required in the RM zone (5,000 square feet) and had the
16 necessary frontage (25 feet). The record of the planning
17 commission was before the city council as well as additional
18 letters and oral testimony in opposition. Following
19 discussion, the members of the council voted to reverse the
20 planning commission and allow the partition. The written
21 letter giving notice of the approval of the minor partition
22 stated that the lot area and the frontage requirements were met
23 and that no evidence indicated that the comprehensive plan and
24 zoning ordinance would prohibit such a minor partition.

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1 OPINION

2 Monmouth Code, Sections 90.370-.380, sets forth the
3 requirements which must be met in order for a partitioning of
4 land into three or less tracts to be granted. Section
5 90.370(a) concerns requirements for filing the application with
6 the city planning commission. Section 90.370(b) provides that
7 the planning commission may require compliance with provisions
8 pertaining to subdivisions whenever it appears possible to
9 ultimately divide the parcel into more lots than indicated on
10 the submitted partitioning plan. Section 90.370(c) sets forth
11 the information which the submitted plan is required to
12 include, such as a vicinity map, a plan showing lot dimensions
13 and sizes, names and addresses of the land owner, a statement
14 regarding contemplated water supply and so forth. Section
15 90.375 provides that:

16 "After all requirements for partitioning have
17 been complied with, six copies of a map thereof shall
18 be furnished to the Commission. The Commission shall
endorse its approval on copies..."

19 Section 90.380 states that approval shall be considered
20 final when properly endorsed, unless recordation of the plan is
21 intended, in which case the requirements for recordation of
22 plats with four or more tracts must be followed.

23 Petitioner's first assignment of error is that the
24 partitioning section of the Monmouth Code is unconstitutional
25 because decisions may be made on a completely ad hoc and
26 arbitrary basis. We disagree. The ordinance is drafted in

1 such a manner that if the applicant for the partition supplies
2 the information required by Section 90.370(c) and such other
3 information which may be required under Section 90.370(b), and
4 provided the request is determined to be consistent with the
5 minimum square footage and frontage requirements of the zone
6 within which the property is located, then the partition must
7 be approved. There is little or no discretion which the city
8 may exercise in the matter. Hence, it could not, consistent
9 with its partitioning ordinance, act in an ad hoc or arbitrary
10 fashion.

11 Even if, however, the city were determined to have
12 sufficient discretion to enable it to act in an ad hoc or
13 arbitrary fashion, this does not by itself render the ordinance
14 unconstitutional. As stated in Anderson v. Peden, 284 Or 313,
15 587 P2d 59 (1978):

16 If petitioner's attack on the vagueness of the
17 "most appropriate use" criterion is to have a
18 constitutional footing, it must be found in the risk
19 that ad hoc policy making will grant to some "citizen
20 or class of citizens privileges, or immunities, which,
21 upon the same terms, [do] not equally belong to all
22 citizens." Or Const art I, sec 20. That risk is real
in all discretionary administration. But an attack
based on this premise must show that in fact a policy
unlawfully discriminating in favor of some persons
against others either has been adopted or has been
followed in practice.¹¹ 284 Or at 326 (footnote
omitted).

23 In the present case, petitioner offered no evidence as to
24 a pattern or practice of discrimination. We conclude no
25 constitutional infirmity has been established.

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1 The central issue before us and the issue raised by
2 petitioner's remaining assignments of error is whether the
3 city in approving the partitioning in this case, was
4 required to consider the "purposes" clause of its zoning
5 ordinance, Section 90.220 supra, and make findings with
6 respect to the matters mentioned therein, or whether its
7 approval could be limited to those matters contained in
8 Section 90.370-.380 and a determination as to whether the
9 lots to be created in the RM zone complied with the
10 requirements in that zone pertaining to frontage and size.

11 In Andersen v. Peden, supra, at issue was whether
12 Deschutes County had acted properly in requiring that the
13 petitioner satisfy two tests taken from the "purposes"
14 section of the county's zoning ordinance in order for
15 petitioner to obtain the requested conditional use
16 permit. These tests had not been included expressly in
17 the conditional use section of the ordinance. The Supreme
18 Court, in upholding the county's action, said:

19 "***When a statute or other legislation is
20 prefaced by a list of "purposes," these purposes are
21 not ipso facto standards to govern administrative
22 decisions under it. Depending on what other standards
23 the legislation states or requires to be adopted, the
24 statement of purposes may or may not be intended to
25 serve that role. Cf Marbet v. Portland General
26 Electric Co., 277 Or 447, 459, 561 P2d 154
(1977)...Respondents have apparently construed the
purposes stated in section 1.020 of their ordinance to
be standards for the exercise of further discretion
under it. That is not an implausible reading;...If
the respondents have so construed them, the two quoted
tests did not require further formal adoption;..."
284 Or at 320.

1 The above statement, coupled with an earlier statement made
2 by the Court that:

3 "***While either interpretation is tenable, we
4 believe that the county may reasonably act on its view
5 of what authority it meant to reserve in its
6 ordinance.***" 284 Or at 318.

7 leads us to the conclusion that while Monmouth may have been
8 justified in requiring compliance with the "purposes"
9 provisions in addition to those contained expressly in the
10 partitioning provisions, had it chosen to do so, it was clearly
11 not required to do so. We conclude, therefore, that it was not
12 error for the city to disregard the purpose section of its
13 zoning ordinance in approving the partition.

14 This leaves us, however, with the question of whether the
15 city, in not requiring a copy of the vicinity map showing lands
16 within 800 feet of the subject property, failed to follow the
17 procedures before it in a manner which substantially prejudiced
18 the rights of the petitioner. Petitioner claims that:

19 "No such map was submitted and respondent failed
20 to adequately consider the effect of its decision on
21 that nearby property."

22 While the partitioning ordinance requires the applicant to
23 submit a vicinity map, there is nothing in the ordinance which
24 ties the decision whether to grant the partitioning to a review
25 of the map. In other words, even if the city had received a
26 vicinity map there is nothing in the partitioning ordinance
which would have granted the city discretion to deny the
partition on the basis of what was contained in the vicinity

1 map. Under the city's construction of its partitioning
2 ordinance, the granting of a partition is largely a ministerial
3 decision with little or no room for discretionary choices.
4 Under these circumstances and without more facts alleged by
5 petitioner as to how she was harmed by the omission of a
6 vicinity map, we conclude that petitioner was not prejudiced by
7 this procedural omission.

8 For the foregoing reasons, the decision of the City of
9 Monmouth is affirmed.

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FOOTNOTE

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3 Monmouth Code, Section 90.220, provides as follows:

4 Purpose In their interpretation and application, the
5 provisions of Sections 90.210 to 980.695 shall be held
6 to be the minimum requirement adopted for the public
7 health, safety, and welfare. To protect the people,
8 among other purposes, such provisions are intended to
9 provide for permanently wholesome community
10 environment, adequate municipal services, and safe
11 streets, for accomplishing, among other things, the
12 following objectives:

13 "(a) Better living conditions within new subdivision;

14 "(b) Areas which may be economically developed;

15 "(c) Simplification and definiteness of land
16 descriptions;

17 "(d) Establishment and development of street,
18 utilities, and public areas;

19 "(e) Stabilization of property values in the
20 subdivision and adjacent areas."
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