

BEFORE THE LAND USE BOARD OF APPEALS FEB 27 3 39 PM '81
OF THE STATE OF OREGON

3	JOHN TYLER,)	
)	
4	Petitioner,)	LUBA NO. 80-092
)	
5	v.)	FINAL OPINION
)	AND ORDER
6	LANE COUNTY and HAROLD GABLE,)	
)	
7	Respondents.)	

8 Appeal from Lane County.

9 John Tyler, Dexter, filed a brief and argued the cause on
10 his own behalf.

11 William A. Van Vactor, Eugene, filed a brief and argued the
12 cause for Respondent Lane County.

13 Michael E. Farthing, Eugene, filed a brief and argued the
14 cause for Respondent Gable.

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

17 Affirmed.

2/27/81

18 You are entitled to judicial review of this Order.
19 Judicial review is governed by the provisions of Oregon Laws
20 1979, ch 772, sec 6(a).
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1 COX, Referee.

2 NATURE OF PROCEEDING

3 See statement of facts.

4 STANDING

5 Respondent Gable attacks petitioner's standing on the
6 grounds that petitioner failed to allege facts showing adverse
7 affect or aggrievement. We find petitioner sufficiently
8 established his standing. Petitioner received notice of the
9 July 8, 1980 hearing, appeared and states the subject
10 partitioning will adversely impact his agriculture operation
11 which is adjacent to the subject property. Respondent did not
12 allege those statements are untrue.

13 FACTS

14 On January 10, 1980, the Land Development Review Committee
15 of Lane County (LDRC) approved Respondent Gable's land
16 partition subject to six conditions. Condition no. 5 required
17 Gable to submit "positive findings for conformance with state
18 goals" within one year from the date of the approval.

19 On January 16, 1980, a notice of this conditional approval
20 was mailed to the petitioner, a neighboring landowner. The
21 record includes a certificate of mailing to petitioner and
22 other neighboring landowners. Petitioner claims he did not
23 receive the mailed notice.

24 January 31, 1980 was the last day to appeal the LDRC
25 conditional approval as per Lane Code 13.125(3). No appeal of
26 this decision was made.

1 On May 16, 1980, a Lane County planning staff member sent
2 Gable a letter indicating the January 10, 1980, approval was
3 withdrawn because the partitioning was in violation of
4 Statewide Goal No. 4. The denial letter did not mention the
5 one-year period in which Gable had to show conformance with the
6 statewide goals. On May 28, 1980, Gable appealed the May 16,
7 1980, denial letter to the Lane County Board of Commissioners.

8 On June 25, 1980, Lane County notified petitioner by letter
9 of a July 8, 1980 hearing before the Board of County
10 Commissioners on Respondent Gable's appeal of the staff
11 denial.

12 On July 8, 1980, Lane County determined that the staff
13 denial of Gable's partition request was untimely. Lane County
14 directed that an order be prepared with findings dismissing for
15 lack of jurisdiction the Gable appeal. The stated basis for
16 dismissal is the staff denial was improper considering the fact
17 that the January 10, 1980 LDRC decision gave Gable one year,
18 not just four months, to demonstrate compliance with the goals.

19 On September 17, 1980, Order No. 80-9-17-12 was entered
20 dismissing for lack of jurisdiction Respondent Gable's appeal
21 upon the finding that Lane County's staff denial was untimely.

22 Petitioner Tyler filed a notice of intent to appeal the
23 July 8, 1980 decision prior to September 17, 1980. However, by
24 stipulation of the parties, the commencement of this appeal was
25 held in abeyance until after September 17, 1980 when the order
26 was entered.

1 appeal to seek review of the LDRC decision.

2 We conclude that with respect to those assignments of error
3 in the petition for review which seek to challenge the validity
4 of the LDRC decision of January 10, 1980, respondent's motions
5 to dismiss are well taken. Petitioner has only appealed the
6 county's July 8, 1980 (final on 9/17/80) decision which
7 concluded the staff denial of May 16, 1980 was improper. As
8 regards the January 10, 1980 decision, petitioner did not
9 exhaust his administrative remedies below since he failed to
10 properly seek county review of the LDRC decision.¹ Had
11 petitioner sought to appeal the January 10 decision within a
12 reasonable time after he received notice of the decision on
13 June 25, 1980, the county would have been in a position to
14 determine whether, given the circumstances, his appeal was
15 timely. If the county denied the appeal on the basis it was
16 not timely filed, petitioner could have appealed that decision
17 to this Board. If, on the other hand, the Board of
18 Commissioners had allowed the appeal, it would have had the
19 opportunity to review the LDRC decision. If the county decided
20 against the petitioner, petitioner could then have appealed
21 that decision to this Board. As the case stands now, however,
22 the county has never had a properly executed request to review
23 the merits of the January 10, 1980, LDRC decision. Under these
24 circumstances, the Board will not review the validity of the
25 LDRC decision.

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1 OPINION ON THE MERITS

2 Petitioner has raised two issues in his petition for review
3 addressing the propriety of the county's July 8, 1980 decision
4 in which it declared that the planning staff's denial of the
5 Gable partition was improper. These issues are addressed in
6 the first and third assignments of error. The first assignment
7 of error is that the Board of Commissioners violated its legal
8 duty to determine whether the partition approved by LDRC on
9 January 10, 1980, complied with statewide land use goals,
10 specifically goals 3, 4, 5 and ORS 215.243. As has been
11 previously discussed, however, the only issue before the Board
12 of Commissioners on July 8, 1980, was the propriety of the
13 planning staff's denial of the Gable partition. The Board of
14 Commissioners held the planning staff's denial was premature
15 because Mr. Gable had not been given a full year to demonstrate
16 that the partition would comply with the statewide planning
17 goals. The Board of Commissioners did not have as an issue
18 before it the merits of LDRC's January 10, 1980, decision and
19 was, therefore, under no duty to address the statewide planning
20 goals or ORS 215.243.

21 Petitioner's third assignment of error alleges that "the
22 Board of Commissioners committed reversible error by failure to
23 conduct a public hearing on July 8, 1980, as advertised,
24 thereby denying due process to those in opposition to the
25 partition." Petitioner contends it was error for the Board of
26 Commissioners to limit the discussion at that hearing to

1 jurisdictional questions and refusing to address the merits of ,
2 the January 10, 1980 LDRC decision. We disagree with
3 petitioner for the reasons set forth in our discussion of
4 petitioner's first assignment of error. The LDRC decision of
5 January 10, 1980, was not before the Board of Commissioners as
6 that decision had not been appealed. Accordingly, it was not
7 error to refuse to consider testimony relating to the merits of
8 a decision not before the Board of Commissioners.

9 Therefore, respondents' motion to dismiss the petition for
10 review is granted with respect to those allegations of error
11 attacking the January 10, 1980, LDRC decision. In addition,
12 petitioner's allegations regarding Lane County's July 8, 1980
13 (final on 9/17/80) decision are denied.²

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1 ASSIGNMENTS OF ERROR

2 Petitioner sets forth six assignments of error, four of
3 which are addressed to the merits of the January 10, 1980 LDRC
4 decision. The remaining two are directed at the July 8, 1980
5 (final on 9/17/80) Lane County Board of Commissioner's decision.

6 MOTIONS TO DISMISS

7 Respondents both move to dismiss petitioner's petition for
8 review on several bases. The motions generally go to the issue
9 that petitioner did not timely appeal the January 10, 1980,
10 LDRC conditional partition approval. Respondents argue that
11 petitioner, by attacking Order 80-9-17-12 which was merely a
12 dismissal of an appeal of an inappropriate staff denial, is
13 attempting to attack a decision made on January 10, 1980, which
14 he failed to timely appeal pursuant to Lane County Code
15 13.125(3). Under that provision, an aggrieved party may appeal
16 the decision of the LDRC within 15 days of the decision date.
17 That appeal would have gone to the Lane County Board of
18 Commissioners. Respondents argue that since petitioner failed
19 to appeal that decision within the allotted 15 days, this Board
20 has no jurisdiction over the January 10, 1980 decision.

21 Petitioner argues it wasn't until June 25, 1980, when he
22 received notice of the July 8, 1980, hearing before the Board
23 of County Commissioners that he first learned of the January
24 10, 1980, LDRC decision. Instead of attempting to at that time
25 appeal LDRC's decision to the Board of County Commissioners,
26 petitioner waited until dismissal of Gable's July 8, 1980

FOOTNOTE

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3 Petitioner may have misunderstood the scope of review of
4 the Board of Commissioners consideration of the Gable appeal.
5 Petitioner may have thought that by participating in that
6 appeal he could get before the Board of Commissioners the issue
7 of the validity of the January 10, 1980, LDRC decision.
8 However, the scope of the Gable appeal as we understand it was
9 solely to determine whether the May 16 staff denial of the
10 Gable partition was proper. The review by the Board of County
11 Commissioners, therefore, was of the staff's May 16 denial of
12 the Gable partition. It did not extend to a review of the
13 January 10, 1980, LDRC decision.

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10 Though not presented to us for review in this case, the
11 Board questions the legality of making compliance with
12 statewide goals a condition subsequent to approval rather than a
13 condition precedent to approval. Goal compliance is not a
14 performance standard like a curb and gutter standard in a
15 subdivision approval. Goal compliance is a substantive
16 requirement. This is an especially bothersome issue in light of
17 Lane Code's Section 13.125 et seq. lack of provision for appeal
18 of a delcaration of condition satisfaction.