

LAND USE
BOARD OF APPEALS

BEFORE THE LAND USE BOARD OF APPEALS

AUG 24 4 37 PM '87

OF THE STATE OF OREGON

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2
3 RICHARD M. KILIAN and)
SHARON L. KILIAN,)
4)
Petitioners,) LUBA No. 87-032
5)
vs.) FINAL OPINION
6) AND ORDER
CITY OF WEST LINN,)
7)
Respondent.)
8

9 Appeal from the City of West Linn.

10 A. Gregory McKenzie, Oregon City, filed the petition for
review and argued on behalf of Petitioners. With him on the
11 brief were Canning, Tait & McKenzie, P.C.

12 John H. Hammond, West Linn, filed the response brief and
argued on behalf of Respondent City of West Linn.

13 Thomas C. Thetford, Salem, filed the response brief and
14 argued on behalf of Respondent-Participant William Snell
Construction Company.

15 BAGG, Referee; HOLSTUN, Referee; participated in the
16 decision.

17 DuBAY, Chief Referee, Dissenting.

18 REVERSED 08/24/87

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

1 Opinion by Bagg.

2 NATURE OF THE DECISION

3 Petitioners appeal the City of West Linn's approval of a
4 minor partition and lot line adjustment. Petitioners ask that
5 we reverse the decision.

6 FACTS

7 In 1974, J.W. and J.B. Kosta purchased certain property in
8 the City of West Linn. The Kostas conveyed portions of the
9 property to others. Five ownerships were created by the
10 conveyances, including an ownership owned by petitioners herein
11 and another by the applicant, Snell Construction Company. None
12 of these transactions received preliminary or final
13 partitioning approval from the city.

14 Snell Construction Company applied for the minor partition
15 and lot line adjustment subject to this appeal after its
16 attempt to obtain a building permit failed because of the prior
17 illegal partitionings. In December, 1986 the planning director
18 approved the minor partition and lot line adjustment.

19 Petitioners appealed the director's approval to the planning
20 commission, and the planning commission issued an order on
21 February 17, 1987, denying the appeal and granting the minor
22 partition and lot line adjustment. Petitioners herein appealed
23 that decision to the City of West Linn City Council which
24 similarly denied the appeal and granted the request.

25 ASSIGNMENT OF ERROR No. 1

26 "The City of West Linn exceeded its jurisdiction by

1 approving a minor partition and lot line adjustment of
2 the subject property when the city's own records
3 acknowledge that the property had been illegally
4 partitioned in 1975 and the property ownership was in
5 dispute."

6 Petitioners argue that a prior owner, Kosta, illegally
7 partitioned portions of what were then known as Tax Lots 162
8 and 163. Snell Construction Company purchased the resultant
9 illegally partitioned Tax Lots 1100 and 1200. According to
10 petitioners, the partitioning is illegal because in order to
11 partition land, one must own all of the land to be
12 partitioned. That is, Snell Construction Company may not
13 establish its parcels as legally separate and discrete from the
14 rest of the original parcel without the co-application of the
15 other owners or without owning the entirety of the property to
16 be divided.¹ Because the applicant owns only the property to
17 be separated from the rest of the original Kosta ownership, the
18 partitioning is improper, according to petitioners.

19 Petitioners claim that the appropriate remedy under these
20 circumstances is a partitioning under ORS 105.205, et seq, to
21 provide for a court decree as to what parties own what
22 properties. Petitioners conclude the City of West Linn had no
23 jurisdiction to grant the minor partition under provisions of
24 ORS Chapter 92.

25 Respondent City argues the purpose of the minor partition
26 and boundary line adjustment was to give legal status to Tax
Lots 1100 and 1200 so that a building permit might be issued
for a single family dwelling on the combined parcels.

1 Respondent claims a necessary adjunct to the minor partition
2 and lot line approval is legalization of the boundaries between
3 the Snell Construction Company property and other neighboring
4 tracts "with the end result being that these lots become
5 legitimized legal lots of record as a result of these
6 actions." Brief of Respondent City at 4. Respondent argues
7 three legally partitioned parcels will be created by this
8 action where none previously existed.

9 The statutes controlling partitionings do not speak of
10 ownerships. ORS 92.010(7). ORS 92.010(8) does, however,
11 define partitioning as a "division of land." Here, the owner
12 is not dividing his land. The whole to be divided is not
13 before the county, only the applicant's land is before the
14 county. In order to divide the applicant's land from the
15 neighboring lands, all the land affected, the "whole," must be
16 present before the county for division. The applicant's
17 unilateral attempt to separate it's property from neighboring
18 ownerships is not a proper subject for the partitioning statute
19 or the county partition ordinance because only the applicant's
20 property was submitted for partitioning approval.² The
21 applicant is not partitioning at all. As a result of the
22 applicant's action, there remains only two lots under its
23 ownership. The applicant owned these two lots before the
24 partition was approved and nothing has happened to legalize the
25 various improper partitionings in the original Kosta ownership.

26 The first assignment of error is sustained.

1 ASSIGNMENT OF ERROR No. 2

2 "The City of West Linn failed to follow applicable
3 procedures in the matter before it which prejudiced
4 substantial rights of the petitioners by failing to
5 schedule a hearing on petitioner's appeal before the
6 West Linn City Council within the 120-day limit
7 specified in ORS 227.178."

8 The city did not schedule petitioners' appeal of the
9 planning commission's grant of the decision on review here
10 until more than 120 days from the time the application was
11 first filed. The applicant herein filed a writ of mandamus in
12 circuit court to force the city to grant the application as
13 provided in ORS 227.178. The writ was issued, and the city
14 granted the application. Petitioners complain that they were
15 thereby denied a hearing necessary to exhaust their
16 administrative remedies. See ORS 197.835(8)(a)(B) providing we
17 may reverse or remand a decision when a local government fails
18 to follow "procedures applicable...in a manner that prejudices
19 the substantial rights of the petitioner." Petitioners also
20 complain that the 120 day limitation provided for in
21 ORS 227.178(1)

22 "does not apply because Snell was not dividing land
23 into two or more parcels as required by
24 ORS 227.215(1)." Petition for Review at 21.

25 By this second argument, we understand petitioners to say that
26 the partitioning is not a "permit" within the meaning of ORS
27 227.160(2); and, therefore, the 120 day limit for action under
28 ORS 227.178 does not apply.

29 Whether or not the 120 day limit applies, petitioners'

1 argument must fail. The city council took action to approve
2 the minor partition and lot line adjustment based on the
3 decision of the planning commission. The April 8, 1987,
4 regular city council meeting shows extensive argument on the
5 merits of the proposed partition. We find no indication the
6 city council did not act on the merits of the application
7 simply because it approved the grant made by the planning
8 commission.³ We therefore find no error in the city's action
9 as alleged.

10 This assignment of error is denied.

11 ASSIGNMENT OF ERROR No. 3

12 "The City erred in approving Snell's application for
13 minor partition and lot line adjustment because the
14 application was not supported by substantial evidence
that Snell was the undisputed owner of the subject
property."

15 Petitioners argue the record does not reveal substantial
16 evidence to show that Snell Construction Company is the owner
17 of the property divided. Petitioners complain that evidence of
18 ownership provided to the city, a title insurance policy, is
19 insufficient proof of ownership. See Record Exhibit N, listing
20 William Snell Construction Company as the insured and stating
21 "The fee simple title to said land is, at the date hereof,
22 vested in" the applicant.

23 We believe the title insurance policy is evidence of
24 ownership upon which a reasonable mind may rely. Petitioners
25 introduce nothing to suggest that the declaration of ownership
26 appearing on the title policy is in error. See, Christian

1 Retreat Center v. SOC of Washington County, 28 Or App 673, 560
2 p2d 1100 (1977).

3 The third assignment of error is denied.

4 The decision of West Linn City Council is reversed.

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1 DuBay, dissenting.

2 I disagree with the majority's view that Snell Construction
3 Company is precluded from seeking a partition of property it
4 owns without participation by other owners.

5 Approval of the partition application will result in three
6 legally cognizable parcels from what was at one time a single
7 legal tract owned by J.W. and J.B. Kosta. No party contends
8 any of these three parcels violates the county's land use
9 regulations. This squarely falls within the definition of
10 partitioning in ORS 92.010(8):

11 "'Partition land' means to divide land into two or
12 three parcels of land within a calendar year...."

13 Neither this definition nor any other provision in ORS
14 Chapter 92 provides any basis for the majority's view that
15 dividing land requires ownership of all land to be divided.
16 The partition order does not affect the legal title to the
17 property. The order does permit owners of parcels approved
18 through the statutory procedures to legally transfer
19 ownership.

20 Kosta's grantees have separate interests in each of the
21 several tracts that were once in one ownership. ORS 92.016
22 prohibits sale of any of these tracts until a partition
23 application is approved. To require a partition application by
24 owners of each separate ownership is to add a requirement that
25 is not in the statute. This Board's unadorned imposition of
26 this requirement without a clear legislative policy direction
is unwarranted.

1 I disagree with the result and would deny the first
2 assignment of error and affirm the city's decision.

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1 FOOTNOTES

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4 ORS 92.010(8) provides

5 "'Partition land' means to divide land into two or
6 three parcels of land within a calendar year, but does
7 not include:

8 "(a) a division of land resulting from a lien
9 foreclosure, foreclosure of a recorded contract for
10 sale of real property or the creation of cemetery
11 lots; or

12 "(b) an adjustment of a property line by the
13 relocation of a common boundary where an additional
14 unit of land is not created and where the existing
15 unit of land reduced in size by the adjustment
16 complies with any applicable zoning ordinance.'"

17 2

18 We express no opinion as to whether petitioner's suggestion
19 that the judicial partition under ORS Chapter 105 is an
20 appropriate remedy under these circumstances. ORS 92.018
21 provides for damages and equitable relief for purchase of a lot
22 or parcel "created without approval of the appropriate city or
23 county authority...."

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25 We do not read ORS 227.178 to require the city to simply
26 approve a land use decision because the 120 days provided for
in the statute has expired. Rather, we believe the statute
simply requires the city to act, and if it does not act, it is
subject to relief in circuit court. ORS 227.178(7) provides:

27 "If the governing body of the city or its designate
28 does not take final action on an application for a
29 permit or zone change within 120 days after the
30 application is deemed complete, the applicant may
31 apply in the circuit court of the county where the
32 application was filed for a writ of mandamus to compel
33 the governing body or its designate to issue the
34 approval. The writ shall be issued unless the
35 governing body shows that the approval would violate a
36 substantive provision of the city comprehensive plan
or land use regulations as defined in ORS 197.015."