BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

JOSEPH H. WARD and ELLA T. WARD, Petitioners,	)	LUBA No. 87-045
vs.	)	FINAL OPINION AND ORDER
CITY OF PORTLAND, Respondent.	)	

Appeal from the City of Portland.

Daniel B. Cooper, Portland, filed a petition for review and argued on behalf of petitioners.

Ruth Spetter, Portland, filed a response brief and argued on behalf of Respondent City of Portland.

BAGG, Referee; DuBay, Chief Referee; HOLSTUN, Referee, participated in the decision.

AFFIRMED 10/05/87

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

Opinion by Bagg.

NATURE OF THE DECISION

Petitioners appeal the city's denial of a request for variances to reduce the minimum lot area of a lot from 10,000 to 7,500 square feet and to reduce the minimum lot width from 70 to 65 feet.

FACTS

Petitioners purchased lots 11 and 12 of Block 35 "Greenhills" in Portland in 1977. The subdivison was platted before 1959. In 1978, the petitioners sold lot 11, and a five foot strip along the northwest side of lot 12. They retained ownership of lot 12 (except for the five foot strip). Lot 12 now contains over 7,500 square feet.

The applicants requested the variance to allow lot 12 to be sold for construction of a single family residence. The city's variance committee heard the application and denied the variance. Petitioners appealed this decision to the city council. The city council conducted a hearing and, on May 22, 1987, the city entered an order denying the appeal.

Petitioners then brought this review proceeding.

FIRST ASSIGNMENT OF ERROR

> "The decision of the Portland City Council to deny the requested variance is an unconstitutional action in that it constitutes a taking of petitioners' property without the payment of just compensation."

Petitioners argue the denial of the variance makes petitioners' property "undevelopable." Petition for Review at

5. Petitioners claim "land use restrictions that preclude any use of property constitute a taking for which compensation must be paid even if the taking is not of permanent duration," citing First Evangelical Luthern Church of Glendale v. County of Los Angeles, California, 482 U.S. ___, 107 Sup. Ct. 52, 96 L. Ed 2d 250 (1987). Petitioners explain the only uses allowed under the zoning code are single family residences, farming or truck gardening, and denial of the variance request precludes residential development. Petitioners go on to say the property is unsuited for any agricultural purpose because of its size and topography.

Respondent argues the city does not engage in a taking action where the property owner "denies himself the use of the property by creating a substandard lot." Respondent's Brief at 3. The city argues the petitioners created their own hardship by denying themselves the ability to develop this property.

Specifically, respondent argues petitioners' 1978 deed changed the configuration of lot 12 from that existing when platted prior to 1959. This alteration deprived petitioners of the right to develop the property under the city code.

The city explains PCC 33.22.050(d) provides

> "No lot, tract, or parcel of land shall be reduced by transfer of ownership, immediate or future, in area, width, or depth to less than stated in subsections (2)(b) and (c) unless approved as provided in Chapter 33.98."

This provision means an individual reducing the size of a lot without specific approval is in violation of the zoning

ordinance. We understand the city to say that approval for the five foot width reduction was not granted under the provisions of Chapter 33.98, the city's "exceptions" provisions.

The city goes on to explain that PCC 33.22.050(g) permits construction on lots of less than 10,000 square feet on lots platted prior to July 1, 1957. However, the city argues petitioners' 7' lot does not fall within this "grandfather clause" because the lot was modified in 1978 in violation of the zoning code.

The city's variance committee explained as follows:

> "3. Exceptional Circumstances or Right Enjoyed by Others: The exceptional circumstance about this lot is that it is one of the smallest lots in this generally R10-zoned area. Development of this site will not set a precedent for development of small lots in this area as all the other lots are larger. However, this parcel was originally a larger lot (approximately 8,070 square feet) but was reduced in size by a previous lot partitioning. If this partitioning had not occurred, the site could have been developed under the substandard lot development criteria of the R10 zone.
>
> "4. Code Intent and Impact: The intent of the R10 section of the code is to allow residential development to occur on sites of 10,000 square feet or larger. Additionally, the R10 zone allows development on lots as small as 7,000 square feet if these lots were platted prior to 1959 (the year this section of the code became effective). This clause is intended to recognize as buildable those lots which were created prior to the implementation of current zones. The application site was platted prior to 1959 and if it still existed in its original configuration it would be developable as a substandard lot. However, a partitioning of the site in the 1970s reduced the size of this lot and created the current unbuildable site contrary to the intent of the R10 zone.

We find the city's interpretation of its code to be reasonable. The record does not show the property was divided in accordance with provisions of PCC 33.98. The city was therefore entitled to conclude that the change in lots 11 and 12 occurred outside the provisions of the city's code. Given PCC 33.22.050(d) requiring conformity with the code, we believe the city's refusal to allow petitioners to develop the lot under the provisions of its "grandfather clause" is reasonable and not contrary to the express language of the city's code. See Alluis v. Marion County, 64 Or App 478, 688 P2d 1242 (1983); PCC 33.22.050(g).

We do not find the city to have engaged in a taking of petitioners' property. Petitioners' inability to develop the lot is not the result of governmental action, but the result of petitioners'own act in reducing the size of lot 12. Unlike the First Evangelical Church[1] case cited by petitioners, the city imposed no prohibition on use of property, but has in place a code which permits development only when certain conditions are satisfied. The city did not adopt a regulation depriving petitioners use of their property. Rather, the city adopted minimum standards for buildable lots and provided a grandfather clause for nonconforming lots such as petitioners'. It is petitioners' subsequent action that makes the grandfather clause inapplicable and the lot therefore unbuildable. Petitioners may not now claim their property has been taken.

The first assignment of error is denied.

SECOND ASSIGNMENT OF ERROR

> "The decision to deny the variance is not consistent with the acknowledge [sic] comprehensive plan and land use regulations of the City of Portland. In making the decision the City Council improperly construed the applicable law."

Petitioners argue that even with the boundary adjustment in 1978, the property in question still exceeds the 7,000 square foot minimum required by city code for lots grandfathered under PCC 33.22.050(g). It is, therefore, developable, in petititioners' view. Petitioners argue the city incorrectly interpreted its code to prohibit development given the fact that the property is still in excess of the minimum lot size required.[2]

Petitioners also take issue with the city's characterization of the property transfer in 1978 as a "partitioning." Petitioners argue no partitioning occurred because there was only a readjustment of the common boundary line between lots 11 and 12. As support for this claim petitioners cite PCC 34.16.045 defining "partitioned land" which exempts from the definition a lot line adjustment. Petitioners note the definition also excludes divisions occurring because of lien foreclosure and claim that

> "a lien foreclosure could have occurred in that the mortgages that were shown in the record affected lot 11 plus the northwesterly five feet of lot 12 even at a time when lot 11 and lot 12 were nominally in common ownership." Petition for Review at 10.

We believe the fact no such foreclosure occurred eliminates

whatever validity this claim may have.

Also, whether or not petitioners "partitioned" the lots is not critical to this case. The city's decision rests on the fact the lot was changed, not whether the actions can be properly characterized as a partitioning.

Finally, petitioners' interpretation of the city's code to allow development on lots exceeding 7,000 square feet may be reasonable. However, we will not overturn the city's decision if the city's interpretation of its code is also reasonable. The city argues that any adjustment to the lot size removes the protection of the grandfather clause. This interpretation is reasonable. We are obliged, given the reasonableness of this interpretation, to sustain the city in this regard. See our discussion under the first assignment of error, supra.

The second assignment of error is denied.

THIRD ASSIGNMENT OF ERROR

> "The decision of the Portland City Council to deny the variance request is not supported by substantial evidence in the record."

FOURTH ASSIGNMENT OF ERROR

> "The record does not contain sufficient findings of fact to support the decision and therefore should be remanded."

In the last two assignments of error, petitioners argue the city's decision is not supported by substantial evidence in the record and claims the findings are deficient. With respect to the substantial evidence issue, petitioners argue the record clearly shows that contrary to the finding of the variance

committee, other lots in the immediate vicinity of the subject property are of no greater size than the subject property. Further, petitioners again argue that because the property exceeds the 7,000 square foot minimum, even with the five foot reduction width, petitioners are entitled to develop the property under the city's code.

The allegedly erroneous finding is as follows:

> "Development of this site will not set a precedent for development of small lots in this area as all the other lots are larger". R 57

The city's conclusion about property in the general vicinity is not critical to the decision where the city found the petitioners did not meet the necessary showing of hardship under PCC 33.26.020. The code requires petitioners to show a hardship before a variance will be allowed. As the finding recited at page 4 of this opinion illustrates, the city found the hardship criterion was not satisfied because petitioners created their own hardship. A denial may be sustained where any applicable criterion has not been met. Weyerhaeuser v. Lane Co., 7 Or LUBA 42 (1982).

With respect to the issue of findings, petitioners complain that the city did not explain whether removal of 500 square feet from lot 12 and adding it to lot 11 was inconsistent with the city zoning code. We disagree. The city explained that reduction in the size of the lot took petitioners out of the protection of the grandfather clause in PCC 33.22.050(g). That is, the change in the lot configuration deprives petitioners of

the benefit under the code, whether or not the resulting lot is consistent with the lot area requirements in the grandfather clause requirements. This explanation adequately articulates the reason the grandfather clause does not apply and why the variance was denied. Sunnyside Neighborhood v. Clackamas County Comm., 280 Or 3, 569 P2d 1063 (1977)

The third and fourth assignments of error are denied.

The decision of the City of Portland is affirmed.

FOOTNOTES

1

First Evangelical Church does not assist petitioner in this proceeding. In that case, the Supreme Court assumed, without deciding, there was a taking. The case simply says that if a taking occurs, the government must pay for the period of time the property is taken. Here, petitioner does not seek money damages. More importantly, as we conclude in this opinion, petitioners' property has not been taken--temporarily or permanently.

2

We do not understand petitioners to say no variance is needed. Petitioners appear to concede that a variance is needed even under the grandfather clause. We note, however, that nothing in the grandfather clause suggests a variance is required if the lot exceeds the size requirements in the code. See PCC 33.22.050(g).

However, because we do not understand petitioners to claim no variance is needed we offer no opinion on whether petitioners are entitled to a permit without first applying for a variance.