

LAND USE
BOARD OF APPEALS

JUN 29 3 00 PM '88

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

3	CHRIS MULLER and LOIS MULLER,)	
)	
4	Petitioners,)	
)	LUBA No. 88-018
5	vs.)	
)	FINAL OPINION
6	POLK COUNTY,)	AND ORDER
)	
7	Respondent.)	

9 Appeal from Polk County.

10 Thomas E. Knapp, Salem, filed the petition for review and
11 argued on behalf of petitioners. With him on the brief was Sherman,
Bryan, Sherman & Murch.

12 Robert W. Oliver, Dallas, filed the response brief and argued
13 on behalf of respondent.

14 HOLSTUN, Referee; BAGG, Chief Referee; SHERTON, Referee,
participated in the decision.

15 AFFIRMED 06/29/88

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

1 Opinion by Holstun.

2 NATURE OF THE DECISION

3 Petitioners appeal the Polk County Board of Commissioners'
4 decision to affirm the Polk County Planning Director's denial of
5 petitioners' request for a lot line adjustment.

6 FACTS

7 Petitioners submitted to the Polk County Planning Department a
8 request for a lot line adjustment to add 10 acres from an adjoining
9 30 acre parcel to an existing 5.5 acre parcel in the Farm/Forest
10 (F/F) zone.

11 The planning director denied the request on December 17, 1987.
12 Petitioners were advised the planning director's decision could be
13 appealed to the planning commission or board of county commissioners
14 within 10 days.¹ On December 22, 1987, petitioners appealed the
15 planning director's decision to the planning commission. Public
16 hearings were held on January 5 and February 2, 1988, and on
17 February 5, 1988 the planning commission reversed the planning
18 director's decision and approved the lot line adjustment. The
19 planning commission's decision also included a notice stating the
20 commission's decision could be appealed to the board of
21 commissioners within 10 days.²

22 No appeal was filed within 10 days; however, fourteen days
23 later on February 19, 1988, the board of commissioners determined it
24 would review the planning commission's decision on its own motion.
25 At its March 2, 1988 meeting, a majority of the board of
26 commissioners voted to affirm the planning director's decision

1 denying the lot line adjustment.

2 DECISION³

3 Petitioners argue that the county is bound by the notices of
4 appeal rights it included in the planning director's and planning
5 commission's decisions. The notices both stated there would be a
6 ten day appeal period. Petitioners argue they appealed the planning
7 director's decision within the ten days specified and obtained a
8 favorable decision from the planning commission. Petitioners argue
9 it was improper for the county board of commissioners to initiate
10 review of the planning commission's decision 14 days after the
11 planning commission rendered its decision, when it had no adopted
12 procedures providing for such review, as ORS 215.422 requires.⁴

13 The Polk County Subdivision and Partitioning Ordinance (SPO)
14 provides standards and procedures for "subdivision or partition of
15 land in Polk County." SPO p. 1. The SPO contains the following
16 definitions:

17 "Partition Land. To divide an area or tract of land into
18 two or three parcels within a calendar year when such area
19 or tract exists as a unit or contiguous units of land
20 under single ownership at the beginning of such year.
21 Partition land does not * * * include any adjustment of a
22 lot line by the relocation of a common boundary where an
additonal parcel is not created and where the existing
parcel reduced in size by the adjustment is not reduced
below the minimum lot size established by any applicable
zoning ordinance." SPO Sec. 2(W).

23 "Subdivide Land. To divide an area or tract of land into
24 four or more lots, within a calendar year, when such area
25 or tract of land exists as a unit or contiguous units of
land under a single ownership at the beginning of such
year." SPO Sec. 2(GG).

26 In their briefs, petitioners and respondent county argue the

1 above-quoted definitions clearly show the SPO does not apply to lot
2 line adjustments. Therefore, according to the parties, the
3 provisions in the SPO for appeals of decisions concerning partitions
4 and subdivisions do not apply.⁵

5 Both petitioners and the county also argue the appeals
6 procedures in the Polk county Zoning Ordinance (ZO) do not apply
7 because those procedures are limited to decisions on variances,
8 conditional uses and special exceptions.⁶ The zoning ordinance
9 also has a provision allowing the board of commissioners to call up
10 certain decisions of the planning director or planning commission.

11 "The governing body may call up any action of the Planning
12 Director or Planning Commission in granting or denying a
13 variance, conditional use, or special exception, but such
14 action of the governing body shall be taken at the meeting
15 whereat notice of the decision of the Planning Commission
16 is presented, and when the governing body takes such
17 action, the Planning Commission's records pertaining to
the variance, conditional use, or special exception in
question shall be certified to the governing body by the
Director and at such certification shall stay all
proceedings in the same manner as the filing of a notice
of intention to appeal." ZO Sec. 122.120(d).

18 The county's decision to review this matter apparently was made
19 at the meeting the board of commissioners received notice of the
20 planning director's and planning commission's decisions. However,
21 petitioners and the county argue ZO Sec. 122.120(d), like ZO Sec.
22 122.230, does not apply because the decision is not a "variance,
23 conditional use, or special exception."

24 Thus the county had no written procedure governing lot line
25 adjustments when this decision was rendered. According to the
26 county, the board of commissioners delegated authority to the

1 planning director to make lot line adjustment decisions.⁷ The
2 county states the planning commission had no authority to review the
3 planning director's decision. The county argues the board of
4 commissioners has "inherent authority" to review decisions of the
5 planning director and that its review in this case was proper.
6 Respondent's Brief 6.

7 We agree with petitioners that ORS 215.422(1)(a) requires the
8 county to prescribe the procedures and type of hearing the county
9 will follow in appeals or review of lot line adjustment
10 decisions.⁸ Nothing in the SPO or ZO or any other county
11 ordinance or regulation cited by the parties prescribes such
12 procedures.⁹ We conclude the county's failure to prescribe appeal
13 and review procedures before conducting review in this case was
14 error.¹⁰

15 Although the county erred when it proceeded without first
16 prescribing its review procedure, we find no basis for reversal or
17 remand. Petitioners allege only procedural error.¹¹ Under ORS
18 197.835(8)(a)(B), we may remand a decision based on a procedural
19 error only if the error "prejudiced the substantial rights of the
20 petitioner."

21 In Mason v. Linn County, 13 Or LUBA 1 (1985) we said
22 "[o]ne who complains of procedural error at the local
23 level must not only demonstrate the existence of error but
24 must also show: (1) That a timely objection was made so
that corrective measures might be taken; and (2) the error
was prejudicial to petitioner's substantial rights." Id.
at 4.

25 While petitioners did object to the board of commissioners procedure
26 in this matter, petitioners do not argue their substantial rights

1 were prejudiced. Petitioners' complaint is they have a right to the
2 decision rendered by the planning commission since the board of
3 commissioners did not initiate review until 14 days after the
4 planning commission's decision, rather than within the 10 days
5 specified in the notice of appeal rights. As we recently noted in a
6 decision construing OAR 661-10-005, the "substantial rights" of
7 parties in land use proceedings do not include a right to a
8 particular result. Kellogg Lake Friends v. City of Milwaukie, ____
9 or LUBA ____ (LUBA No. 88-022, Order on Motion to File an Amended
10 Statement of Standing, June 13, 1988). Under ORS 197.835(8)(a)(B),
11 as under OAR 661-10-005, we believe the "substantial rights" of
12 parties that may be prejudiced by failure to observe applicable
13 procedures are the rights to an adequate opportunity to prepare and
14 submit their case and a full and fair hearing.

15 Were the county proceeding under provisions in its land use
16 regulations expressly providing the planning commission's decision
17 would become final after the 10 day appeal period expired,
18 petitioners' argument might have merit. See Muhs v. Jackson County,
19 12 Or LUBA 201, 207 (1984). However, there are no such land use
20 regulation provisions applicable to this decision. Neither do the
21 notices given to petitioners state the decision would become final
22 if no appeal was filed, or no board of commissioners' review
23 commenced, within 10 days.¹²

24 Petitioners do not argue they were denied a full and fair
25 opportunity to prepare the present their arguments on the merits of
26 their request to the board of county commissioners. In the absence

1 of prejudice to petitioners' substantial rights, the procedural
2 errors committed by the county provide no basis for remand under ORS
3 197.835(8)(a)(B).

4 The county's decision is affirmed.
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1 FOOTNOTES

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4 The planning director's decision included the following notice:

5 "Decisions of the Polk County Planning Director may be appealed
6 to the Polk County Planning Commission or Board of
7 Commissioners by any person whose interests are adversely
8 affected or who is aggrieved by the decision. Such appeals
must be filed with the County Clerk within 10 days after the
mailing date of the decision. Contact the Polk County Planning
Department for information on the appeal process and fees."
Record 43.

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10 2

11 The planning commission's decision included the following
12 notice:

13 "Decisions of the Polk County Planning Director may be appealed
14 to the Polk County Planning Commission or Board of
15 Commissioners by any person whose interests are adversely
affected or who is aggrieved by the decision. Such appeals
must be filed with the County Clerk within 10 days after the
mailing date of the decision. Appeal forms and fee information
may be obtained at the Polk County Planning Department."
Record 85.

16
17 3

18 Petitioners present argument but do not specify assignments of
19 error as required by OAR 661-10-030(3)(d). The county filed a
20 response brief and does not object to petitioners' failure to comply
21 with OAR 661-10-030(3)(d). Notwithstanding petitioners' failure to
state specific assignments of error, we are able to determine from
the petition the error petitioners allege and their reasons for
asserting the claimed error warrants remand. Accordingly, we will
review the county's decision. OAR 661-10-005; Standard Insurance
Company v. Washington County, ___ Or LUBA ___ (LUBA No. 87-020,
September 1, 1987).

22
23 4

24 ORS 215.422(1)(a) provides in pertinent part:

25 "A party aggrieved by the action of a hearings officer or other
26 decision making authority may appeal the action to
the planning commission or county governing body, or both, however
the governing body prescribes. The appellate authority on its own

1 motion may review the action. The procedure and type of hearing for
2 such an appeal or review shall be prescribed by the governing body *
* * ."

3
4 5

5 The minutes of the board of commissioners' deliberations at the
6 meeting it adopted its decision are confusing. At one point they
7 state that the SPO "governs" the lot line adjustment. Record
8 93-94. On the other hand, the minutes also state the SPO provides
9 no procedures for appeal and that lot line adjustments are viewed as
10 administrative decisions reviewable by the board of commissioners.
11 However, although the SPO does provide procedures for some appeals,
12 SPO Sec. 8(C), it does not provide procedures for board of
13 commissioners' review of "administrative decisions." While the
14 minutes are confusing on the point, we agree with the parties that
15 the SPO does not apply to lot line adjustment decisions. We
16 therefore will assume the SPO appeal procedures were not applicable.

11 6

12 For example, ZO Sec. 122.230 provides in part:

13 "Any person whose interests are adversely affected or who is
14 aggrieved by a conditional use, variance or special exception *
15 * * may file a written appeal to the Planning Commission or
16 governing body within ten (10) days of notification of action.
17 * * *"

16 7

17 Neither the county nor the petitioners identify the source of
18 the planning director's authority to grant lot line adjustments.
19 However, neither party questions the planning director's authority
20 to make the initial determination regarding the requested lot line
21 adjustment. We will assume he had such authority. We note ORS
22 215.042 requires counties to designate a planning director and
23 provides "the director shall be the chief administrative officer in
24 charge of the planning department of the county, if one is
25 created." The Polk County Subdivision and Partitioning Ordinance
26 (SPO) states the planning director is "the designated representative
authorized and appointed by the board to administer the provisions
of [the SPO]." SPO Sec. 2(Z). Polk County Zoning Ordinance (ZO)
Sec. 110.680 provides in part:

24 * * * * *

25 "The director shall handle all matters pertaining to zone
26 changes, variances and conditional uses, and other
administrative matters as prescribed by this ordinance; and
such other matters as directed by the planning commission."

1
2 We also note the county adopted Ordinance 87-027 on December
3 23, 1987. The amendments to the F/F Zone adopted by that ordinance
4 give the director authority to act on lot line adjustment requests
5 in the F/F Zone. The petitioners and county both argue the
6 ordinance did not become effective until after the county's decision
7 in this case. See footnote 9, infra.

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2 Petitioners do state the board of commissioners lacked
3 "authority" to review the lot line adjustment decision. Petition
4 for Review 6-8. ORS 215.422(1)(a) grants the board of commissioners
5 authority to review the decision of lower decision making
6 authorities on its own motion. The board of commissioners' failure
7 to prescribe the procedures it would follow in advance was
8 procedural error. However, that error did not, as petitioners
9 suggest, mean the board of commissioners lacked authority to review
10 the decision. Smith v. Douglas Co., ___ Or LUBA ___ (LUBA No.
11 88-016, June 15, 1988), Slip op at 8.

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9 We also note the county procedures applicable to other types of
10 land use decisions allow it to initiate review on its own motion "at
11 the meeting where * * * notice of the decision of the planning
12 commission is presented." ZO Section 122.120(d). As noted supra,
13 the board of commissioners review of this decision apparently was
14 initiated within the time frame envisioned by ZO Section 122.120(d).