BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

JOHN M. SCHOONOVER, Petitioner, vs. KLAMATH COUNTY, Respondent, and DEPARTMENT OF LAND CONSERVATION AND DEVELOPMENT, Intervenor-Respondent.	LUBA No. 88-024 FINAL OPINION AND ORDER

Appeal from Klamath County.

John M. Schoonover, Klamath Falls, filed the petition for review and argued on his own behalf.

Michael L. Spencer, Klamath Falls, filed a response brief and argued on behalf of respondent.

Gabriella I. Lang, Salem, filed a response brief and argued on behalf of intervenor-respondent.

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

AFFIRMED 08/03/88

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

Opinion by Holstun.

NATURE OF THE DECISION

Petitioner seeks review of Klamath County's decision to deny his request for a change in the comprehensive plan designation from Forestry to Rural and a zone change from Forestry (F) to Rural, 5-acre (R-5) for nine parcels.[1]

FACTS

The nine parcels at issue in this proceeding include approximately 420 acres. Beginning in 1970, petitioner divided the nine parcels into 104 lots.[2] Under the zoning ordinance adopted by the county in 1972, all nine parcels were zoned F. Under the F zone, as adopted in 1972, dwellings were a use permitted outright with no minimum lot size. The parties agree the lots divided from these nine parcels were approved either when the 1972 zoning ordinance applied or before there was a county zoning ordinance.

Petitioner does not dispute that the property is forest land as defined by Statewide Planning Goal 4. Beginning in 1980, the county solicited suggestions from property owners regarding the proper planning and zoning designations for their property. Based on the approved subdivisions for the nine parcels, petitioner requested the property be planned Rural and zoned R-5. Those designations would allow each lot to be developed with a single family residence as a use permitted outright.

Although the county at some point adopted petitioner's

suggested plan and zone designations for the property, they were not acknowledged by the Land Conservation and Development Commission (LCDC). The county in 1984 changed the plan designation to Forestry and the zone to F. These plan and zone changes for the property were not appealed to LUBA. The county's plan and land use regulations were acknowledged by LCDC in 1985, and petitioner did not appeal LCDC's acknowledgment order.

Under the Forestry plan designation and F zone adopted by the county in 1984, there are a number of permitted and conditional uses, but a single family dwelling is permitted only if it is "necessary and accessory to permitted uses." See 1000 Friends of Oregon v. LCDC (Lane County), 305 Or 384, ___ P2d ___ (1988).

Following acknowledgement of the county's plan, petitioner again requested that his property be planned Rural and zoned R-5. As noted supra, the county's approval of petitioner's request led to our decision in DLCD v. Klamath County, LUBA No. 87-070, remanding the county's decision because the county failed to take an exception to Goal 4.[3] Following our remand, the county denied petitioner's requested change in plan and zone designations after petitioner refused to submit evidence to support an exception to Goal 4. This appeal followed.

MOTION TO INTERVENE

The Department of Land Conservation and Development (DLCD)

moves to intervene in this proceeding. There is no objection to the intervention, and it is granted.

DECISION

Petitioner contends that because he subdivided lots in conformance with the then applicable county zoning requirements and ORS Chapter 92, the county may not later amend its plan and zoning ordinance to impose different minimum lot size requirements and make residential use of the previously approved lots subject to more stringent approval requirements.[4] Petitioner's primary argument is that the county's decision violates ORS 92.285 which provides:

> "No retroactive ordinances shall be adopted under ORS 92.10 to 92.048, 92.060 to 92.095, 92.120, 93.640, 93.710 and 215.110."

We understand petitioner to argue the county's application of forestry plan and zone designations to this property in 1984 violates the proscription in ORS 92.285 against retroactive subdivision and partitioning ordinances. From this argument, petitioner apparently reasons that ORS 92.285 is also violated by the county's present refusal to correct the violation by applying the requested rural residential plan and zone designations to the property.[5]

Most states, Oregon included, have elected to avoid certain constitutional issues and questions of fundamental fairness which attend retroactive land use regulations by providing that their land use regulations operate prospectively. See 1 Anderson American Law of Zoning Sec. 6.06 (3d ed 1986).

However, statutory prohibitions against retroactive land use regulations protect uses that exist on the date the regulations are adopted, not uses that could have been, but were not, initiated.

> "It can be argued that all zoning regulations are retroactive, and that all such restrictions destroy rights that are vested. But the courts distinguish between uses which exist and those which do not, at the time of enactment or effect, and a zoning ordinance which terminates the former is unlikely to be approved." Id. at 464. (Footnote omitted).

In addition to the proscription against retroactive subdivison ordinances in ORS 92.285, ORS 215.110(6) provides that no retroactive zoning ordinance may be adopted. ORS 215.130(5) specifically provides:

> "The lawful use of any building, structure or land at the time of the enactment or amendment of any zoning ordinance or regulation may be continued. * * *"

We also note that, in addition to the protections afforded nonconforming uses under Oregon law, uses not yet fully completed or implemented may, in certain circumstances, be allowed to be completed notwithstanding a change in applicable land use laws. Polk County v. Martin, 292 Or 69, 36 P2d 952 (1981); Clackamas County v. Holmes, 265 Or 193, 508 P2d 190 (1973); Mason v. Moutain River Estates, 73 Or App 334, 698 P2d 529 (1985).[6]

In Columbia Hills v. LCDC, 50 Or App 483, 624 P2d 157, rev den 291 Or 9 (1981) the petitioners were the owners of lots in an undeveloped subdivision located on rural land subject to Goal 4. Petitioners argued they were entitled to residential

building permits, notwithstanding Goal 4, by virtue of the prior recorded plat. The Court of Appeals squarely rejected the petitioner's argument saying

> "* * * the only prior land use decision which has arguably been made regarding these parcels is the recording of the plat, which occurred in 1957. Petitioners argue that the recording of the plat entitled the land owner to use the land for what was obviously the intended purpose, given the lot sizes, at the time the plat was recorded, viz., for residential purposes.
>
> "There is, however, no such entitlement. The county could adopt a comprehensive plan and zoning ordinances designating the permissible uses of the land without regard to the fact that there was a plat recorded in 1957. In Pohrman v. Klamath County Comm., 25 Or App 613, 550 P2d 1236 (1976), we held that even assuming that a subdivision is an existing use,
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> > '[z]onining is not merely a catologue of existing uses; it is a legislative judgment based on numerous standards about what future uses a property will, or will not be in the public interest. There is no such thing as a 'right to have a zone conform to an existing use.' 25 Or App at 619." Id. at 490. (Emphasis added).

Under Columbia Hills v. LCDC, land use laws applicable at the time a land use decision is made may not be avoided simply because a subdivision plat previously was recorded in compliance with then applicable land use regulations. In other words, because the plan and zone changes petitioner requests in this proceeding would allow uses not permitted under Goal 4, an exception to Goal 4 is required. Jensen v. Clatsop County, 14 Or LUBA 776, 779 (1986).

Petitioner's error in this case is his assumption that subdivision approval carries with it specific approval for use

of the lots as allowed by the land use regulations existing at the time of subdivision approval. As the court in Columbia Hills clearly stated,

> "* * * platted but undeveloped land is not normally regarded as a 'use' in zoning law for purposes of establishing a prior nonconforming use. * * * The land owners, therefore, have no absolute right to make the particular use of the parcel involved * * * which they wish to make. * * *" 50 Or App at 490-491.

The definitions of "lot", "partition", and "subdivision" carry no inference that the approval of a partition or subdivision carries with it a right to a particular use of the lots created by the partition or subdivision.[7] Petitioner cites nothing in the Klamath County Plan or Development Code which indicates that subdivision approval carries with it approval for a particular use of the lots created, and we find no such provisions.

We also find that nothing in ORS 215.110, 215.130 or 92.285 authorizes the owners of the lots in this appeal to put their properties to residential use now without complying with county plan and zone requirements adopted to comply with Goal 4. The legal existence of the recorded subdivisions is protected by ORS 92.285, and we find nothing in the plan and zone designations applied by the county which affects that existence. Existing lawful uses may be continued under ORS 215.130. However, if the property owners now or in the future wish to construct single family residences on the lots, they must comply with the land use regulations in effect at the time

the property is put to such use.[8]

Petitioner points out that Code Section 26.005 provides that planning commission decisions are final if there is no appeal of the plannning commission's decision "within 10 days of * * * mailing [of the decision]." Petitioner argues the planning commission approved his request and there is no record of an appeal having been filed.

Code Section 26.005 does not clearly distinguish between planning commission decisions that become final if not appealed to the board of commissioners and those decisions which require action by the board of commissioners before they can be final decisions. However, Code Section 48.002 clearly specifies "[r]equests for a change of Comprehensive Plan designations shall be subject to the planning commission and Board of Commissioners' review procedure." (Emphasis added). Code Section 28.002 states quasi-judicial plan and zone designation amendments are subject to review by the board of commissioners. Code Section 28.004 provides the board of commissioners, in conducting their review, "shall be governed by the Board of County Commissioners' Internal Rules of Procedure." Those rules provide a procedure whereby the planning commission and board of commissioners conduct a joint hearing, followed by a recommendation by the planning commission to the board of commissioners and a decision by the board of commissioners.[9] The Board of Commissioners followed this procedure, and we find no error.[10]

Petitioner also argues ORS 197.275 and Code Section 10.005 are violated by the county's decision. Prior to its repeal in 1981, ORS 197.275 provided "comprehensive plans and zoning, subdivision and other ordinances adopted prior to October 5, 1972 shall remain in effect until revised under ORS 197.005 et seq." However, petitioner does not explain how the county's decision would violate ORS 197.275, even if it were still in effect.

Code Section 10.005 is simply a repealer with a savings clause which provides that land use approvals granted before the Code's revision in 1984 "shall remain in effect subject to their original conditions of approval." Petitioner offers no basis for us to conclude the subdivisions do not remain in effect subject to their original conditions of approval. While petitioner assumes those original approvals carried a right to particular residential development, that assumption is erroneous.

The county's decision is affirmed.

FOOTNOTES

1

These nine parcels were before LUBA in DLCD v. Klamath County, ___ Or LUBA ___ (LUBA No. 87-070, November 16, 1987). Each of the nine parcels has been subdivided to create a number of lots approximately five acres in size. As noted in our prior review, the legality of those subdivisions was decided by the U.S. District Court and is not an issue in this proceeding.

In his petition for review, petitioner refers to "12 partitions". Petition for Review 1. Our review of the record shows the additional three parcels were discussed briefly by the county. Record 19. However, those three parcels were not included in the county's notices of the local proceedings and were not included in the county's decision for that reason. Id. Petitioner was present at the hearing and offered no objection to their not being included. He offers no theory in his brief why the county's decision not to include those parcels in its decision was error.

Although the county's order does not expressly identify the parcels at issue, it is reasonably clear from the record that only the nine parcels which were the subject of our remand in LUBA No. 87-070 are affected by the county's decision. Our review is limited accordingly.

2

See Record (LUBA No. 87-070) at 2. Petitioner sold the lots, but apparently retains an equitable interest in at least some of the lots and acted on behalf of the lot owners in the local proceedings.

3

In DLCD v. Klamath County, supra, we concluded the U.S. District Court's order directing the county to approve the subdivisions did not direct the county to permit residential use of the property generally or the residential use permissible under prior zoning regulations in particular. We found nothing in the U.S. District Court's order that eliminated the need for the county to comply with Goal 4 or to take an exception to that Goal before planning and zoning the property to permit outright residential use of the property. Slip Op. at 3-5.

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[4] The petition for review contains argument but does not allege specific assignments of error as required by our rules. OAR 661-10-030(3)(d). The county objects to petitioner's failure to include specific assignments of error but does not move to strike the petition or dismiss the appeal. Petitioners who fail to comply with OAR 661-10-030(3) run the risk that respondents or this Board will miss or fail to understand one or more claimed errors. As we have noted in other cases, this failure unnecessarily complicates respondents' job in preparing their briefs and makes our job more difficult. Standard Insurance Co. v. Washington County, ___ Or LUBA ___ (LUBA No. 87-020, September 1, 1987). In such circumstances, we limit our review to those errors clearly discernable from the petition for review, such that respondents are sufficiently apprised of the issues to allow them to respond in their briefs.

[5] An initial problem with petitioner's argument is that even if the county adopted a "retroactive ordinance" within the meaning of ORS 92.285, it did so in 1984. Petitioner offers no explanation for why he did not appeal the 1984 decision.

Because neither respondent argues petitioner's failure to appeal the county's 1984 decision precludes his argument that ORS 92.285 is offended by the decision in this proceeding, we will consider the issue raised by petitioner.

[6] The multi-factor analysis required to demonstrate a vested right to development despite a change in land use regulations is set out in the Supreme Court's decision in Polk County v. Martin, supra at 81, note 7. Petitioner makes no attempt to demonstrate that the subdivisions in this case satisfy the factors necessary to establish a vested right. In addition we note that even if a vested right could be demonstrated, a vested right to a use, like a nonconforming use, carries no right to have the zoning district conform to that use.

[7] The terms are defined in ORS 92.010 as follows:

"* * * * *

"(1) 'Lot' means a unit of land that is created by a subdivision of land.

"* * * * *

"(7) 'Partition' means either an act of partitioing land or an area or tract of land partioned.

"* * * * *

"(14) 'Subdivision' means either an act of subdividing land or an area or a tract of land subdivided."

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8 Petitioner also suggests the county's decision violates the prohibition in the U.S. Constitution, Article I Section 10, against ex post facto laws. However, the constitutional prohibition against ex post facto laws is generally limited to penal sanctions. Megdal v. Board of Dental Examiners, 280 Or 293, 299, 605 P2d 723 (1980); Brown v. Multnomah County Dist. Ct., 280 Or 95, 99, 570 P2d 52 (1977). Even if the ex post facto clause were applicable, it would not be violated by the county's decision for the same reasons the county's decision does not constitute retroactive legislation.

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9 The relvant portions of the board of commissioners' internal rules of procedure provide as follows:

"SECTION 5 - HEARING PROCEDURE - JUDICIAL PROCEDURE FOR CHANGE OF COMPREHENSIVE PLAN DESIGNATION AND/OR CHANGE OF ZONE DESIGNATION

"The hearing shall be called to order at the time and place as provided by public notice. All hearings shall be joint hearings with the County Planning Commission.

"1. The Chairman of the Board will officially open the hearing, state the name of the applicant and request.

"* * * * *

"3. The Chairman of the Board will then pass the gavel to the Chairman of the Planning Commission.

"4. The Chairman of the Planning Commission will then conduct the public hearing.

"5. At the conclusion of the Planning Commission

hearing, the Planning Commission will make its recommendation to the Board. The Board will then receive the gavel.

"6. The Board of Commissioners will then take action * * *.

"* * * * *

"8. After all testimony is taken, the Board shall close the hearing to public testimony.

"9. Following discussion, the Chairman will ask for a motion. The motion will include adequate findings of fact and conclusions of law.

"10. The Chairman will call for a vote on the motion.

"* * * * *"

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10 Even if proceeding in this manner was error, it would be procedural error. Petitioner was present throughout the proceedings and did not object below. He may not do so now. Mason v. Linn County, 13 Or LUBA 1, aff'd in part rev'd in part on other grounds sub nom. Mason v. Moutain River Estates, 73 Or App 334, 698 P2d 529, rev den 299 Or 314 (1985). We also note that the county could not, consistent with ORS 215.050 and 215.060, adopt a procedure that allowed final decisions on comprehensive plan amendments to be adopted by the planning commission. Colwell v. Washington County, 79 Or App 82, 91, 718 P2d 747, rev den 301 Or 338 (1986).

CERTIFICATE OF MAILING

I hereby certify that I served the foregoing Final Opinion and Order for LUBA No. 88-024, on August 3, 1988, by mailing to said parties or their attorney a true copy thereof contained in a sealed envelope with postage prepaid addressed to said parties or their attorney as follows:

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Dated this 3rd day of August, 1988.

Angie Crosby
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