BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

DARRELL KISHPAUGH,	)	
	)	
Petitioner,	)	LUBA No. 92-080
	)	
vs.	)	FINAL OPINION
	)	AND ORDER
CLACKAMAS COUNTY,	)	
	)	
Respondent.	)	

Appeal from Clackamas County.

David B. Smith, Tigard, filed the petition for review and argued on half of petitioner.

Michael E. Judd, Oregon City, filed the response brief and argued on behalf of respondent.

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

AFFIRMED 10/22/92

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

Opinion by Kellington.

NATURE OF THE DECISION

Petitioner appeals a decision of the hearings officer that two different tax lots "constitute one parcel for purposes of residential development" under the Farm Forest (ten acre minimum) (FF-10) zoning district. Record 4.

FACTS

In the beginning there was tax lot 400. In March, 1970, a real estate contract was recorded conveying a part of tax lot 400 from Snyder to Goglins. This property is referred to in this proceeding as tax lot 404. In January, 1971, another part of tax lot 400 was conveyed by Snyder to Goglins under a land sale contract. The second property is referred to in this proceeding as tax lot 405. Tax lots 404 and 405 each consist of 4.85 acres, and both are now owned by petitioner.[1]

On June 18, 1979, the county imposed FF-10 zoning on the subject tax lots. Under the FF-10 zoning district, the minimum parcel size is ten acres. In 1990, petitioner sought a determination that tax lots 404 and 405 are separately developable parcels. The planning department determined tax lots 404 and 405 are not separately developable parcels. Petitioner appealed the planning department's determination to the hearings officer. The

[1]That tax lot 400 exists as a separate parcel distinct from tax lots 404 and 405 is not disputed in this appeal proceeding.

hearings officer affirmed the decision of the planning department concluding, among other things, that for purposes of development, the county considered tax lots 404 and 405 to be one parcel. This appeal followed.

FIRST ASSIGNMENT OF ERROR

> "The county exceeded its jurisdiction, misconstrued the applicable law, and violated a provision of applicable law when it found that ORS 92.017 does not regulate the application of ZDO Sec. 902.02B to the petitioner's 2 lots, and does not preclude the county from treating those 2 lots as one parcel for zoning purposes."

The challenged decision determines, that under Clackamas County Zoning and Development Ordinance (ZDO) 902.02, tax lots 404 and 405 are not separate, developable parcels of land.

ZDO 902.02 provides:

> "A. A parcel is a legal lot of record for purposes of this Ordinance when the lot conformed to all zoning requirements, Subdivision Ordinance requirements, and Comprehensive Plan provisions, if any, in effect on the date when a recorded * * * contract creating the separate lot or parcel was signed by the parties to the * * * contract, except:
>
> "B. Contiguous lots under the same ownership when initially zoned shall be combined, for the purposes of this Ordinance, when any of these lots do not satisfy the lot size requirement of the initial district. A lot or parcel which is a separate legal lot or parcel prior to the adoption of this provision shall remain a separate legal lot regardless of ownership."

At the time tax lots 404 and 405 were created, the following

ZDO provision applied:

> "Existing Lots of Record
>
> "* * * * *
>
> "2. In any district where dwellings are allowed, a one family dwelling may be erected on a lot that has been recorded * * * and was not contiguous to other property under legal control of the same owner or owners, prior to the effective date of this Ordinance, irrespective of the lot width, depth, or area. A one family dwelling may be erected on each such lot of a recorded plat. * * *" ZDO 9.041(A)(1960).

The challenged decision states:

> "* * * At no time prior to October 17, 1980, were Tax Lots 404 & 405 separate parcels under different ownership. The only period of different ownership extended [from] April 10, 1970 until March 19, 1971, but Tax Lot 405 was not a separate parcel during this period of time. It was still part of [Tax Lot 400]. At the date of initial zoning, June 18, 1979, both parcels were under common ownership, and both parcels were undersized parcels in the FF-10 zoning district. This record does not show that either parcel was part of a recorded plat.
>
> "The effect and intent of subsection 9.41(A)(2) of the 1960 Zoning Ordinance was to permit development on undersized lots recorded prior to the effective date of zoning, unless those parcels were contiguous and under the same ownership when initially zoned. Tax Lots 404 & 405 are contiguous, and pursuant to subsection 9.41(A)(2), they were combined for purposes of development under the FF-10 zoning district when they were initially zoned in 1979 because they were both undersized and were under common ownership. The 1980 amendment, which became the current subsection 902.02 of the ZDO utilized different language, but was to the same effect. Because Tax Lots 404 & 405 were not considered separate lots

> for purposes of development under the FF-10 zoning district on June 26, 1980, their status did not change with the adoption of subsection 902.02 of the ZDO.
>
> "* * * The Planning Director correctly determined [the ZDO] operates to combine Tax Lots 404 & 405 for purposes of residential development under the FF-10 zoning district.
>
> "* * * * *
>
> "It seems clear * * * that the intent of * * * ORS 92.017 was to restrict local government administration of subdivision or partitioning ordinances which required a subsequent partition approval after contiguous parcels came under common ownership. There is no attempt in ORS 92.017 to regulate the application of zoning ordinances to contiguous parcels, and the legislative history does not indicate any such intent." Record 4.
>
> ORS 92.017 provides:
>
> "A lot or parcel lawfully created shall remain a discrete lot or parcel, unless the lot or parcel lines are changed or vacated or the lot or parcel is further divided, as provided by law."

Petitioner argues ORS 92.017 precludes the county from failing to recognize tax lots 404 and 405 as separately developable parcels.

The county argues tax lots 404 and 405 are not properly recognized as "lawfully created" and separately developable parcels under the county's code, and that ORS 92.017 does not control the challenged decision. The county argues:

> "Respondent believes the important point here is that Tax Lots 404 and 405 were not 'lawfully created' as separate legal lots because * * * they were under common ownership immediately from the time of the creation of Tax Lot 405. Had the

> property that became Tax Lot 405 been conveyed to a third party and subsequently acquired by the owners of Tax Lot 404, petitioner's argument might be correct. Had Tax Lot 405 been approved by an official act of partitioning property, petitioner might be correct. Respondent does not believe, however, that [ORS 92.017] contemplated a situation where a buyer could acquire small pieces of contiguous property[,] piecemeal over a period of time and[,] thereby[,] establish that each is a discreet zoning lot. The legislative history * * * clearly shows the problem aimed at was that parcels 'lawfully created,' i.e. by official partition approval or by conveyance to another party in years prior to partitioning regulations, might be combined simply because they came into common ownership. That is not the situation here, where the Goglins' purchased a 5-acre parcel and subsequently added an additional five acres to it. * * *" Respondent's Brief 5-6.

Under this assignment of error, the critical issue is whether ORS 92.017 requires the county to recognize tax lots 404 and 405 as separately developable parcels.[2] Both petitioner and the county refer us to the legislative history of ORS 92.017 to assist in answering this question.

We may refer to legislative history only where the terms of the disputed statute are ambiguous. Southwood Homeowners Assoc. v. City of Philomath, 106 Or App 21, 24, 806 P2d 162 (1991). We believe that ORS 92.017 is

[2]In its brief, the county strongly suggests it need not recognize lawfully created lots or parcels as separate lots or parcels, where those lots or parcels were held in a single ownership at the time restrictive zoning is imposed. While it is not entirely clear, we do not read the challenged decision to determine that tax lots 404 and 405 are not lawful divisions of land. Rather, we read the challenged decision to simply determine that, due to their size and history, tax lots 404 and 405 do not constitute separately developable parcels.

ambiguous. Specifically, it is not clear whether under ORS 92.017, the county may refuse to recognize tax lots 404 and 405 as separately developable parcels, simply because (1) a minimum lot size was subsequently applied to those tax lots making them substandard in size, and (2) the ZDO requires that such tax lots, held in a single ownership at the time zoning was imposed, be combined for purposes of development approval.

ORS 92.017 was enacted into law by Oregon Laws 1985, chapter 717, section 3. The bill enacting ORS 92.017, HB 2381, embraced several matters relating to land divisions, including a refinement of the definitions of "partition" and "subdivision" and a provision that lawfully created partitions are entitled to the same status as lawfully created subdivisions. In this regard, the following testimony is instructive:

> "The question arose first in Washington County. In other words [county counsel wrote an opinion] relating to a new subdivision that had been approved five years ago or [a] major or minor partition approved during the course of this new era, but related to a lot of record. [The question] said * * * 'we know we can prevent [property owners] from using it by planning and zoning. But how can we clear this line off the map? How can we eliminate that thing, that lot of record?' And the answer came back by construing * * * the subdivision plat law to say that if you hold a subdivision, and you can't sell it for more than a year, you may have to come in and resubdivide. * * * If you reacquire two or more contiguous lots, in the same ownership, it will merge an ownership (the lines will, for all practical purposes, disappear without any change

in the record). And you'll be required to come in and re-partition the [parcels] before you can sell them in the exact same configuration in which they were approved a year earlier. That's the issue.

"* * * * *

"* * * What the bill is saying is once a subdivision always a subdivision, unless you formally vacate it. Once a partition always a partition, unless you formally vacate it. It does not address * * * the lots of record. * * *" Steve Hawes, House Housing and Urban Development Committee (HB 2381), February 21, 1985, tape 35 at 186.

In addition, the following testimony is also instructive:

"* * * The intent of the bill was twofold. First, to clarify that units of land created under current subdivision and partition regulations * * * remain recognized units of land until their description is lawfully changed by vacation, replatting or other means. Second, it recognizes units of land that were lawfully created prior to the enactment of current subdivision and partition statutes.

"On the first point * * * the generally accepted interpretation of current subdivision and partition statutes was judged incorrect by a legal opinion written by the Washington County Counsel -- an opinion that was later endorsed by Legislative Counsel as being correct. These legal opinions said that lots or partitions created under local subdivision and partition ordinances should go back through the local government review process if they were contiguous and under single ownership, past the end of the calendar year in which they were created. In other words, a subdivision that was legally created, [and that] wasn't sold, technically should go back through the process on a yearly basis. [This applies to] any of those lots that are still contiguous and under the same ownership. Or if contiguous lots or parcels owned by different parties come * * * under single ownership, * * *. If * * * one party

was bought out, if there was a foreclosure, through an inheritance, [then] the line separating the two units essentially disappeared. * * *

"Most counties are using a common sense interpretation of the statutes and do not require already approved lots or parcels to be re-reviewed simply for reasons of ownership. HB 2381 makes that common sense interpretation law * * *.

"[T]he second element of the bill deals with units of land * * * legally created prior to the * * * existence of subdivision and partition statutes. The new statutes were enacted in 1973. They did not address units of land * * * created before that date. Neither has legislation enacted since 1973.

"The current statutes recognize units of land in two types. Lots and parcels. Both [lots and parcels] rely for definition on local subdivision and partition processes adopted in accordance with statutes first enacted in 1973. In other words, the Oregon statutes are silent on the definition of a lot or parcel of land. [HB 2381] replaces reference to specific statutes with language which essentially says that if a lot or parcel was created in a lawful manner, meaning according to laws in existence at the time it was created, [it] is still recognized as a legitimate lot or parcel, and does not need to be reevaluated under current law to be recognized as such. * * *

"* * * * *

"An important point I need to make about this bill is that it in no way gives new development rights to anyone. So, to get it on the record, we're not trying to legitimize lots of record for any kind of development. People shouldn't look at this as having a piece of property and going in for a building permit. Development of property affected by [HB 2381] remains subject to current state and local land use and zoning laws, ordinances and regulations. The practical effect of the bill is to allow units of land that were lawfully created over the years to be sold and in so doing provides

> for the equitable treatment of property owners who have not been well treated under current law. * * *" (Emphasis supplied.) Representative Al Young, Senate Energy and Natural Resources Committee (HB 2381), June 10, 1985, tape 146A at 213.

Representative Young continued his testimony:

> "* * * Our intent was not to open the window to circumvent the land use laws in any way, or legitimize anything that was * * * done that didn't comply with the rules at the time. Again, [there is] no interest in legitimizing lots for development. Simply, for the transfer of those lots which, in some cases, is quite important. Some of these lots that were created have three homes on them. And [through] nobody's coniving or anything else, were in separate ownership and have come back into one ownership through inheritance or foreclosure * * * and the owner took it back, and all the sudden they have a five acre parcel with a house on it next to the home that they live in and they cannot sell it legally." Id. at 355.

Answering a question from Senator Day, Representative Young further stated:

> "* * * This simply has to do with people who thought that they were legitimately dividing their land * * *. [T]hey did everything that they should have, they partitioned or subdivided it legally, and then all of the sudden [through] no fault of their own, they simply cannot sell one or two of those [lots or parcels]. The first part of the bill just * * * corrects an error * * * that essentially says your subdivision, if you don't sell out by the end of the calendar year, you have to come back to the city and get reapproval on it, or review of it. And that, I'm certain, was never the intent of the legislature to require that. [HB 2381] will make [such lots and parcels] remain that way until they're essentially vacated. And the lines dissolved. And there is provision for that in the statutes." Id. at 397.

The following citizen testimony is also instructive in

outlining the problem that was intended to be corrected by the adoption of HB 2381, including what is now ORS 92.017:

> "Some time ago I wanted to sell some of my land to my son. Because I live on exclusive farm use land I realized that I can't divide it. My adjoining neighbor wanted to sell some of his land so I checked with the county [planning department] to see if I could buy this land and resell it to my son. [The planner] saw no problem as long as no new tax lot is formed. So, I purchased the land and then went back to the county. This time I was told the county legal counsel had determined that two adjoining tax lots in the same name must be considered one. I support exclusive farm use tax lots not being divided, but I don't think we should be forced to combine tax lots just because they're in the same name. * * *" Pat Hurley, Senate Energy and Natural Resources Committee June 10, 1985 (HB 2381), tape 146A at 432.

A. What Does ORS 92.017 Require?

The text of ORS 92.017, and its legislative history, make it clear that the functions of ORS 92.017 were (1) to prevent local governments from refusing to recognize lawful divisions of land such that lots and parcels could not be sold to third parties, and (2) to establish that the property lines established by such land divisions remain inviolate, absent the employment of a specific process to eliminate such property lines.

Under ORS 92.017, the county could not refuse to recognize as separate, two lawfully divided parcels, simply because one parcel was never held in an ownership separate from the other parcel. ORS 92.017 requires recognition of such parcels as separate until some action is taken to

erase the lawfully established property lines. If the challenged decision refused to recognize as separate, parcels that were lawfully divided, simply because those parcels were held in a single ownership, such a determination would violate ORS 92.017. However, we do not read the challenged decision to make any determination about the sanctity of the division of tax lots 404 and 405. Rather, the challenged decision simply determines that the parcels are, for zoning purposes, not separately developable.

B. Does ORS 92.017 Require that Tax Lots 404 and 405 Be Treated as Separately Developable Parcels?

Nothing in either the text of ORS 92.017 or its legislative history suggests that all lawfully created lots and parcels must be recognized by local government as being separately developable. In fact, the legislative history quoted above makes it reasonably clear that the developability of such lots and parcels is to be determined with reference to planning and zoning standards. Accordingly, the county's determination that tax lots 404 and 405 are not separately developable, because they were not in separate ownerships at the time of the imposition of restrictive zoning, does not offend ORS 92.017.

The first assignment of error is denied.

SECOND ASSIGNMENT OF ERROR

> "The county misconstrued the applicable law and made a decision not supported by substantial

> evidence in the whole record when the hearings officer found the petitioner's Tax Lots 404 and 405 were not under separate ownership prior to 1980, and thus were not exempt from the operation of the aggregation provisions of ZDO Sec. 902.02B."

The dispute under this assignment of error relates to whether tax lots 404 and 405 are separately developable under ZDO 902.02. To have acquired separate development rights under ZDO 902.02(B), tax lots 404 and 405 must have been held in separate ownership "prior to the adoption of" ZDO 902.02.[3] ZDO 902.02 was adopted on June 26, 1980. If tax lots 404 and 405 were held in separate ownership prior to June 26, 1980, then ZDO 902.02(B) requires the county to recognize those parcels as separately developable. However, if not held in separate ownership on that date, ZDO 902.02(B) requires tax lots 404 and 405 be considered "combined" for purposes of development approval.

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[3]Actually, ZDO 902.02 is a little more complicated. As applied here, ZDO 902.02(A) provides that where a parcel is created by contract, and at the time of its creation such parcel conformed to all plan, zone and land division requirements, such parcel is considered to be a developable parcel. However, under ZDO 902.02(B), if at the time restrictive zoning is initially imposed on the parcel, (1) the parcel is under the same ownership as contiguous parcel(s), and (2) the parcel does not conform to the minimum lot size requirements of the zone, the parcel must be "combined," for purposes of development under the ZDO, with the contiguous parcels in the same ownership. However, the last sentence of ZDO 902.02(B) provides an exception to the exception:

> "* * * A lot or parcel which is a separate legal lot or parcel prior to the adoption of this provision shall remain a separate legal lot regardless of ownership."

The dispute under this assignment of error has to do with the meaning of this last sentence of ZDO 902.02(B).

The issue is whether tax lots 404 and 405 were separate parcels held in separate ownerships "prior to" June 26, 1980. The challenged decision interprets the "prior to" language of ZDO 902.02(B) to mean that on June 26, 1980, tax lots 404 and 405 must have been in separate ownership.

Petitioner argues this interpretation of ZDO 902.02(B) is wrong. Petitioner argues that ZDO 902.02(B) is more reasonably interpreted to mean that so long as the disputed parcels were held in separate ownership, at any time prior to June 26, 1980, those parcels must be considered separately developable.

We must defer to a local government's interpretation of its code so long as the proffered interpretation is not "clearly contrary to the enacted language," or "inconsistent with express language of the ordinance or its apparent purpose or policy." Clark v. Jackson County, 313 Or 508, 514-15, ____ P2d ___ (1992). The interpretation of ZDO 902.02(B), that in order to be recognized as separately developable, a parcel must have been in separate ownership on June 26, 1980, is not "clearly contrary" to the terms of, or "inconsistent with the express language" or "apparent purpose or policy" of, ZDO 902.02. Therefore, that interpretation provides no basis for reversal or remand.

The second assignment of error is denied.

The county's decision is affirmed.