BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

McKAY CREEK VALLEY ASSOCIATION, Petitioner, vs. WASHINGTON COUNTY, Respondent, and DARYL McCOY and SUE McCOY, Intervenors-Respondent.	LUBA No. 92-115 FINAL OPINION AND ORDER

Appeal from Washington County.

Kevin Keaney, Portland, filed the petition for review and argued on behalf of petitioner. With him on the brief was Pozzi, Wilson, Atchison, O'Leary & Conboy.

David C. Noren, Hillsboro, filed a response brief and aruged on behalf of respondent.

David B. Smith, Tigard, filed a response brief on behalf of intervenors-respondent. Dorothy Cofield, Portland, argued on behalf of intervenors-respondent.

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

REMANDED 10/26/92

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

Opinion by Sherton.

NATURE OF THE DECISION

Petitioner appeals a decision of the board of county commissioners approving a dwelling in conjunction with farm use in the Agriculture and Forest, 20-acre minimum (AF-20) zone.

MOTION TO INTERVENE

Daryl and Sue McCoy, the applicants below, move to intervene in this proceeding on the side of respondent. There is no opposition to the motion, and it is allowed.

FACTS

From 1984 through 1988, the county interpreted Washington County Community Development Code (CDC) Article VI (Land Divisions), and the provisions of ORS ch 92 which that article implemented, to allow new parcels to be created by recording deeds or land sales contracts separately conveying portions of an existing parcel which are separated by a public road, without additional county review. In other words, under the county's interpretation, the partitioning requirements and procedures of the CDC and ORS ch 92 did not apply to property bisected by a public road.

All properties referred to in this opinion were and are zoned AF-20. An approximately 19 acre parcel (hereafter tax lot 200) was bisected by Collins Rd. Some time prior to the 1986 lot line adjustment proceeding described below, a deed

conveying the 8.04 acre portion of tax lot 200 located south of Collins Rd. was recorded with the county clerk. This 8.04 acre property south of Collins Rd. was thereafter designated tax lot 201 and treated by the county as a separate parcel.[1]

On November 21, 1986, the county approved a lot line adjustment involving the 8.04 acre tax lot 201 and three other parcels 117.5, 5.5 and 0.03 acres in size. The four reconfigured parcels were 42.2, 38.0, 26.4 and 24.5 acres in size. The 24.5 acre parcel (hereafter tax lot 303) is owned by intervenors and is the subject of this proceeding. Three of the four parcels resulting from the lot line adjustment, including tax lot 303, contain portions of what was originally tax lot 201.

In 1988, petitioner initiated a Land Conservation and Development Commission (LCDC) enforcement order proceeding against respondent Washington County, alleging that various patterns and practices of respondent violated state land use laws. On January 10, 1989, LCDC issued an enforcement order against respondent. LCDC Order 88-EO-392. The enforcement order finds, among other things, that "[b]y allowing parcels to be created by a road without complying 'with all

[1]The 11 acre portion of tax lot 200 located north of Collins Rd. has likewise been treated by the county as a separate parcel. Although tax lot 200 plays no further direct role in this case, we note the record appears to indicate it subsequently has either been combined with an adjacent parcel and further divided or undergone a lot line adjustment with an adjacent parcel.

applicable planning, zoning and partitioning ordinances or regulation[s],' the County is violating the legal requirements for creating parcels." Record 45. The enforcement order directs respondent to carry out certain "remedial actions" with regard to specific types of applications. Record 47. The application of these enforcement order requirements to the facts of this case is a matter of dispute between the parties.

On January 19, 1990, intervenors filed their application for approval of a dwelling in conjunction with farm use on the 24.5 acre tax lot 303. The application lists the existing use of the property as "vacant." Record 269. According to the application, "[t]he subject property previously contained mature Douglas Fir trees which have been harvested [and] partially restocked through natural regeneration * * *." Record 272. The application includes a farm management plan proposing the establishment of 5.0 acres of cultured Douglas Fir Christmas trees, to be planted with 1500 trees per acre.

On July 19, 1991, the county planning department approved intervenors' application, and petitioner appealed. On December 12, 1991, the hearings officer approved intervenors' application, and petitioner again appealed. On May 19, 1992, the board of county commissioners approved intervenors' application. This appeal followed.

FIRST ASSIGNMENT OF ERROR

> "Washington County erred because a dwelling in conjunction with farm use may only be established on a 'lot' or 'parcel'."

THIRD ASSIGNMENT OF ERROR

> "Washington County erred by considering the 'collateral attack' and 'retroactivity' non-issues."

Under these assignments of error, petitioners contend approval of a farm dwelling on tax lot 303 does not comply with requirements of the CDC and the 1989 LCDC enforcement order.

A. CDC

CDC 344-3.1D provides that "[d]welling units * * * in conjunction with farm use or the propagation or harvesting of a forest product as defined in ORS Ch. 215 -- [CDC] 430-37.2A(1) and (2)" are permitted uses in the AF-20 zone. The county approved the challenged permit under CDC 430-37.2A(2)(c). CDC 430-37.2A(2) allows "a dwelling in conjunction with farm use * * * on a lot or parcel that is managed as part of" certain farm operations or woodlots. (Emphasis added.) As relevant, the CDC defines "parcel" as:

> "A unit of land that is created by a partitioning of land. Parcel includes lot unless the context requires otherwise. A parcel includes a unit of land created:
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> "[1.] By partitioning land as defined in ORS 92.010;
>
> "[2.] In compliance with all applicable planning, zoning and partitioning ordinances and

regulations; or

"[3.] By deed or land sales contract, if there were no applicable planning, zoning or partitioning ordinances or regulations.

"[4.] Does not include a unit of land created solely to establish a separate tax account."[2] CDC 106-151.

Petitioner contends tax lot 303 does not satisfy the CDC (and statutory) definition of "parcel" because its creation was not approved pursuant to the partitioning provisions of the CDC. Petitioner argues that tax lot 303's existence as a separate parcel is dependent upon the original creation of tax lot 201 as a separate parcel, through the recording of a deed conveying the portion of tax lot 200 south of Collins Rd. According to petitioner, that conveyance was ineffective to create a separate parcel, because the county erroneously relied on the existence of a road bisecting tax lot 200 to justify not requiring compliance with the partitioning provisions of the CDC. Petitioner argues that whether the county believed it was interpreting its code correctly at the time, and whether the then owners of tax lot 200 did everything required of them by the county at the time, are immaterial.

The challenged decision finds that tax lot 201 was created as a separate parcel, prior to 1986, by the

[2]The ORS ch 215 definition of "parcel" is stated in ORS 215.010 and is essentially identical to that in CDC 106-151.

recording of a deed conveying the portion of tax lot 200 south of Collins Rd., in accordance with the county's interpretation of applicable regulations at that time.[3] The county and intervenors (respondents) argue this is sufficient to support the county's determination that tax lot 303 is a "parcel."[4] Respondents argue that in the absence of an express requirement in the CDC that a proposed use must be on a "legally established lot or parcel" or a "legal lot of record," as is the case here, an applicant is not required to prove that the lot or parcel on which a proposed use will be located was lawfully created.[5] According to respondents, to require affirmative proof of the legal status of every lot or parcel involved in a land use proceeding would greatly impede the processing of land use applications.

In Yamhill County v. Ludwick, 294 Or 778, 786-88, 663 P2d 398 (1983) (Ludwick), the Oregon Supreme Court found that a county ordinance standard that dwellings be on an

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[3]The challenged decision does not include a determination on whether the process used to create tax lot 201 prior to 1986 was legally adequate.

[4]Respondents make a related argument that even if this is not sufficient to establish that tax lot 201 was lawfully created as a separate parcel, the subsequent 1986 lot line adjustment created tax lot 303 as a separate parcel. This argument is addressed under the second assignment of error, infra.

[5]Intervenors point out that for certain types of uses, such as urban dwellings, the CDC does require that construction be on a lawfully created "lot of record." CDC 106-115; 430-37.1A.

"existing legal lot-of-record" required the county to determine that the subject lots were legally created before it approved conditional use permits and variances for the dwellings. In Stefansky v. Grant County, 12 Or LUBA 91, 96 (1984), where it was alleged that the parcel subject to a conditional use permit application was not lawfully created, we stated:

> "Ordinarily, we would not consider it appropriate, in reviewing approval of a conditional use permit, to take up claims concerning prior actions related to the property. Generally, our review function is limited to consideration of the approval criteria applied by the decisionmaker to the permit under appeal. * * *" (Emphasis in original.)

In Stefansky, we also noted that the Supreme Court relied in Ludwick on an approval standard requiring an "existing legal lot-of-record" and stated we did not know whether the Grant County ordinance contained a similar provision.[6] Stefansky, 12 Or LUBA at 97 n 4. Another instance in which we reviewed the legality of a previously created parcel was where the challenged decision was a county determination that a parcel was not a legal "lot of record" as that term was defined in the county code. Atkins v. Deschutes County, 19 Or LUBA 84, aff'd 102 Or App 208 (1990).

Unlike the code provision at issue in Ludwick, the

[6]However, in Stefansky we proceeded to review the issue of whether the parcel was lawfully created, because the county's decision included a determination on the legality of the subject parcel.

relevant code provisions here do not specifically require a determination that a lot or parcel was "legally" created. Further, none of the above described opinions hold that prior actions creating a lot or parcel are subject to collateral attack in a subsequent land use proceeding where the status of the subject property as a "legal" lot or parcel, "lot of record" or "lot or parcel" as defined by the local code is at issue. Rather, those cases simply stand for the proposition that under a local standard requiring that a lot or parcel be shown to have been legally or properly created, it must be established that, at the time the lots or parcels were created, any local government approvals required at that time were given. Yamhill County v. Ludwick, supra (no final partition approval); Stefansky v. Grant County, supra (ownerships created for estate planning purposes not sufficient under state and local partitioning approval requirements);[7] Atkins v. Deschutes County, supra (filing of plat with county surveyor not shown to be legally sufficient to create new lots). Such a local standard does not require a complete reexamination of compliance with every approval standard that may have applied at the time a lot or parcel was created.

In this case, there is no dispute that, at the time a deed conveying tax lot 201 was recorded, the county

[7]We noted in Stefansky that the findings were "confusing." Id at 96. We do not read that case to be inconsistent with our holding in this case.

interpreted its CDC partitioning provisions to be inapplicable to such conveyances. In other words, at the time the deed creating tax lot 201 was recorded, recording a deed for that property was sufficient to create a "parcel," and no additional county partitioning approval was required. Therefore, the county's determination that tax lot 201 was created as a separate parcel by deed, together with the subsequent lot line adjustment, provide an adequate basis for concluding tax lot 303 is a "parcel" under the CDC.[8]

This subassignment of error is denied.

B. LCDC Enforcement Order

In the enforcement order, LCDC states that "[b]y allowing parcels to be created by a road without complying 'with all applicable [partitioning regulations],' the County is violating legal requirements for creating parcels." Record 45. In Section VI ("Order"), LCDC ordered the county to:

> "* * * make land use decisions in compliance with its acknowledged comprehensive plan and land use regulations. To do this, Washington County specifically shall comply with the remedial actions described by [the hearings officer] in

[8]The AF-20 zone is an exclusive farm use zone. CDC 344-1. The CDC 430-37.2A(2) requirement that a farm dwelling be on a "lot or parcel" and the CDC 106-151 definition of "parcel" parallel ORS 215.213(2) and 215.010. We need not and do not determine in this proceeding whether the county's 1986 interpretation of the CDC or the statutes the CDC presumably was adopted to implement, was erroneous. The important point is there is no dispute that tax lot 201 was created in accordance with the county's interpretation of the applicable legal requirements at the time tax lot 201 was created.

> Section VI of [his recommendation] with respect to the following types of applications:
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> "1. Plan/zone changes from AF-10 to AF-5.
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> "2. Non-farm dwellings in EFU and AF-20 zones.
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> "3. Forest Dwellings in the EFC zone.
>
> "4. Non-forest Dwellings in the EFC District.
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> "5. Major and Minor Partitions outside UGB's.
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> "6. Lot Line Adjustments in EFU and AF-20 Districts." (Emphasis added.) Record 46-47.

The remainder of Section VI of the enforcement order addresses how LCDC will monitor the county's actions regarding the types of applications listed above. Record 47-49.

Section VI of the hearings officer's recommendation ("Recommended Enforcement Order") sets out the remedial actions the hearings officer recommends for particular types of actions, under six headings:

> "AF-10 to AF-5"
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> "Nonfarm Dwellings in EFU and AF-20 Districts"
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> "Forest Dwellings in the EFC District"
>
> "Non Forest Dwellings in the EFC District"
>
> "Recognition of Parcels Based Upon Existence of Roads"
>
> "Lot Line Adjustments" Record 58-60.

The remedial action recommended by the hearings officer for "Recognition of Parcels Based Upon Existence of Roads" is:

> "For the purpose of the application of county

> planning, zoning, and partitioning ordinances and regulations, only recognize the existence of a 'parcel' as defined by ORS 215.010 regardless of whether a parcel is bisected by a public road." Record 59-60.

Petitioner contends the above quoted hearings officer's recommended remedial action prohibits the county from recognizing tax lot 303 as a "parcel" in applying its CDC provisions to intervenors' farm dwelling application, because tax lot 303's existence as a separate parcel is dependent upon the creation of tax lot 201 as a separate parcel. According to petitioner, the county cannot recognize the creation of tax lot 201 as a separate parcel because it was based on the bisection of tax lot 200 by a public road.

Looking at the above quoted remedial action in isolation, it is unclear in what situations the prohibition against county "recognition" of the existence of separate parcels due to bisection by a public road was intended to apply. However, it is clear the six sections of the hearings officer's recommendations on remedial actions parallel the six types of applications to which the LCDC order says those remedial actions are to be applied. Therefore, it is clear that the prohibition in question applies only to applications for county approval of major or minor partitions outside urban growth boundaries. In other words, it applies prospectively to county decisions approving rural partitions, and does not require the county

to determine, before taking action on every permit application, whether the subject property cannot be recognized as a separate parcel due to the manner in which it was created.

This subassignment of error is denied.

The first and third assignments of error are denied.

SECOND ASSIGNMENT OF ERROR

> "Washington County erred because it wrongly concluded that the 1986 lot line adjustment transformed the property at issue into a 'lot' or 'parcel.'"

The challenged decision also finds that tax lot 303 qualifies as a "parcel," as defined by CDC 106-151 and ORS 215.010 because it is a "'unit of land created' in its present configuration by [the 1986] lot line adjustment 'in compliance with all applicable planning, zoning and partitioning ordinances and regulations.'" Record 8.

Petitioner argues that a parcel cannot be "created" by a lot line adjustment because a lot line adjustment, by definition, is not a partition and does not "create" additional units of land.

The definitions of "partition" in CDC 106-153 (1986) and ORS 92.015(7)(b) clearly provide that "partition" does not include "any adjustment of a property line by the relocation of a common boundary where an additional unit of land is not created and where the existing unit of land reduced in size by the adjustment complies with any

applicable [ordinance provisions]." CDC 605-1 (1986) contains a parallel description of "lot line adjustment." In this case the 1986 lot line adjustment did not purport to create an additional unit of land, but rather relied on the existence of tax lot 201 as a separate parcel. Additionally, the one parcel that was reduced in size by the lot line adjustment (117.5 acres to 42.2 acres) exceeded the minimum lot size in the AF-20 zone.

We therefore agree with petitioner that tax lot 303 was not "created" as a separate parcel by the 1986 lot line adjustment. However, this provides no basis for reversing or remanding the county's decision, as we conclude supra the county's determination that tax lot 303 is a "parcel" is supported on other grounds.

The second assignment of error is sustained.

FOURTH ASSIGNMENT OF ERROR

> "Washington County erred by concluding that compliance with the farm management plan is a ministerial decision that may be validated by the planning director."

The county approved the subject farm dwelling as a dwelling in conjunction with "a woodlot capable of producing an average over the growth cycle of $10,000 in gross annual income" under CDC 430-37.2A(2)(c).[9] Record 8, 86, 104.[10]

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[9]CDC 430-37.2A(2)(c) parallels ORS 215.213(2)(b)(B). Petitioner does not challenge the county's determination that the growing of cultured Christmas trees constitutes a "woodlot" and, therefore, we make no decision on this issue. However, we note that in Harwood v. Lane County, ___

The challenged decision includes the following condition:

> "Prior to Final Approval and Issuance of a Building Permit, the Applicant Shall:
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> "1. Upon implementation of the farm management plan, provide documentation from a qualified expert (such as an Extension Agent) that the Christmas trees are planted in an acceptable manner (i.e. that at least five acres of Douglas fir seedlings are planted at typical densities of 1500 per acre and are likely to survive as a producing crop). This documentation shall be obtained within two years of preliminary approval for the dwelling and shall constitute final approval of the farm management plan. * * *
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> "* * * * *" (Emphasis in original.) Record 2.

The condition itself does not state what procedures the county will use for final approval of the farm management plan. However, the county's findings provide:

> "* * * The review and approval of the documentary evidence [required by the above quoted condition] by the Planning Director is a ministerial decision made under clear and objective standards and does not involve the exercise of significant factual or legal judgment. No public notice and hearing are required." (Emphasis added.) Record 8.

Petitioner's entire argument is the following:

> "Review of intervenors' proposed farm management plan before issuance of a building permit involves

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Or LUBA ___ (LUBA No. 92-001, April 27, 1992), slip op 7-8, we found that Christmas trees are "perennials," as that term is used in ORS 215.213(2)(b)(A). We also note that "woodlot" is defined as "a relatively restricted area devoted to the growing of forest trees." Websters Third New International Dictionary 2631 (1981).

[10]The board of commissioners' decision incorporates the findings of the hearings officer, which incorporate findings from the July 19 and November 14, 1991 staff reports.

> discretion; it should occur through Type II contested case proceedings rather than through a Type I review.[11] Washington County, however, concluded that discretion is not involved and that the act is merely ministerial. Because [this] decision is wrong, LUBA should * * * reverse this part of the decision." Petition for Review 9.

Respondents argue the future county decision granting final approval to implementation of the farm management plan required by the above quoted condition does not require the exercise of discretion, interpretation or judgment. Therefore, respondents argue the decision required by the condition is a ministerial decision not requiring notice or the opportunity for a hearing. Respondents further argue this two-stage decision making process for approval of dwellings in conjunction with farm use in the AF-20 zone (and other resource zones) is set out in CDC Appendix B, Standard 4, and is not specifically challenged by petitioner.

In McKay Creek Valley Assoc. v. Washington County, 18 Or LUBA 71, 81 (1989), we held that county decisions approving dwellings in conjunction with farm use under what is now CDC 430-37.2A(2)(b) (dwellings on a lot or parcel planted in perennials capable of producing $10,000 or more in average gross annual income) are "discretionary" and,

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[11]Under the CDC, a Type I review does not include a hearing or opportunity to comment on the proposed action, and notice of the decision is given only to the applicant. CDC 202-1.3. A Type II review includes notice of the proposed action to interested parties, an opportunity for comment and an opportunity for a local appeal. CDC 202-2.3.

therefore, "permits" as defined by ORS 215.402(4). For similar reasons, a county decision approving a dwelling on a lot or parcel that is a woodlot capable of producing $10,000 or more in average gross annual income under CDC 430-37.2A(2)(c) is also "discretionary" and a "permit," as defined by statute. ORS 215.416(3), (5) and (11) require that a decision on an application for a "permit" be made only after notice and a hearing or an opportunity to request a hearing through a local appeal.

A local government may, by imposing conditions or otherwise, defer a final determination concerning compliance with an applicable permit approval standard to a later stage. However, if the decision to be made at the later stage is itself discretionary, the approval process for the later stage must provide the statutorily required notice and opportunity for hearing, even though the local code may not require such notice and hearing in other circumstances. Rhyne v. Multnomah County, ___ Or LUBA ___ (LUBA No. 92-058, July 10, 1992), slip op 8-9; Headley v. Jackson County, 19 Or LUBA 109, 114 n 9 (1990); Holland v. Lane County, 16 Or LUBA 583, 596 (1988).

In this case, the county's findings state that its determination of compliance with CDC 430-37.2A(2)(c) is dependent upon intervenors planting five acres of Douglas fir seedlings "in an acceptable manner (i.e. the trees are planted at typical densities and are likely to survive as a

producing crop)." Record 104. Similarly, the condition imposed requires that the five acres of seedlings be "planted at typical densities of 1500 per acre and * * * likely to survive as a producing crop." Record 2. We agree with petitioner that the determination of whether the planted seedlings "are likely to survive as a producing crop" involves discretion. Therefore, the county's procedure for granting final approval to the implementation of intervenors' farm management plan, prior to issuing a building permit, must include notice to interested parties and a hearing or opportunity to request a hearing. Accordingly, the challenged decision incorrectly determines that "[n]o public notice and hearing are required." Record 8.

The fourth assignment of error is sustained.

The county's decision is remanded.