BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

DOUGLAS CAMPBELL, N. ROBERT STOLL, and WILLIAM NAITO, Petitioners, vs. MULTNOMAH COUNTY, Respondent, and JAMES HALDORS, Intervenor-Respondent.	LUBA No. 93-032 FINAL OPINION AND ORDER

Appeal from Multnomah County.

Paul R. Duden, Portland, filed the petition for review and argued on behalf of petitioners. With him on the brief was Tooze, Shenker, Duden, Creamer, Frank & Hutchison.

John L. DuBay, Chief Assistant County Counsel, Portland, filed a response brief and argued on behalf of respondent.

Steven W. Abel and Gregory G. Lutje, Portland, filed a response brief. With them on the brief was Schwabe, Williamson & Wyatt. Steven W. Abel argued on behalf of intervenor-respondent.

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

AFFIRMED 06/17/93

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

Petitioners appeal a county decision approving an application for a building permit.

MOTION TO INTERVENE

James Haldors, the applicant below, moves to intervene on the side of respondent in this appeal. There is no opposition to the motion, and it is allowed.

FACTS

The property at issue in this appeal is made up of lots 1, 2, 19 and 20 of Block 111, Palatine Hill Subdivision No. 3, which was platted in 1890. Each of the four contiguous lots includes 5,000 square feet. A home was constructed on lots 19 and 20 in 1942; lots 1 and 2 are presently vacant. Since 1948, the subject property has been subject to zoning requirements which impose a 20,000 square foot minimum lot size. The current county zoning designation is Single Family Residential (R-20).

In 1984, the four lots and the existing home were sold to the Magids. In 1989, the Magids sold lots 19 and 20 and the existing home to Crosby. In 1992, intervenor purchased lots 1 and 2 and was granted a building permit to construct a home on those lots. The county decision granting that building permit is challenged in this appeal.

DECISION

Petitioners allege four assignments of error. The gist

of those assignments of error is that under the definition of "lot" in the Multnomah County Zoning Ordinance (MCZO), lots 1, 2, 19 and 20 (by virtue of their common ownership) constitute a single "lot."

Petitioners also contend the county incorrectly interpreted and applied the MCZO 11.15.2856(B) lot of record[1] provision which, for purposes of development, separately recognizes certain lots with less than the area and dimensions otherwise required by the R-20 zoning district. Petitioners contend that, in the circumstances presented in this case, this lot of record provision does not have the effect of exempting lots 1 and 2 and lots 19 and 20 from the 20,000 square foot minimum lot size requirement imposed by the R-20 district. Therefore, petitioners argue, the sale of lots 19 and 20 separately from lots 1 and 2 rendered these two combinations of lots (lots 1 and 2 and lots 19 and 20) illegal and nonbuildable. Consequently, petitioners argue the county improperly granted the challenged building permit for lots 1 and 2.

We address the MCZO definition of "lot" and the MCZO lot of record provision separately below.

A. MCZO 11.15.010 Definition of "Lot"

MCZO 11.15.010 defines "lot" as follows:

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[1]Our description of MCZO 11.15.2856(B) as a "lot of record" provision in this opinion is simply for convenience. We discuss the substance of MCZO 11.15.2856(B) infra.

> "A plot, parcel or area of land owned by or under the lawful control of and in the lawful possession of one distinct ownership."

The terms "plot," "parcel" and "area" are not defined in the MCZO.

Petitioners contend lots 1, 2, 19 and 20 together constitute the "plot, parcel or area of land" referred to in the above definition. Petitioners contend those lots constituted "one distinct ownership" when they were purchased by the Magids in 1984 and, therefore, constituted a single "lot" as that term is defined in MCZO 11.15.010. Therefore, according to petitioners, under MCZO 11.15.2854(I), the sale of lots 19 and 20 in 1989 constituted an illegal subdivision of the "lot" comprised of lots 1, 2, 19 and 20. MCZO 11.15.2854(I) provides as follows:

> "No sale or conveyance of any portion of a lot for other than a public purpose, shall leave a structure on the remainder of the lot with less than the minimum lot, yard or setback requirements of this district."

Viewed in isolation, the above quoted definition of lot could be interpreted in the manner petitioners allege. However, we agree with respondent and intervenor-respondent that it is appropriate to interpret the MCZO 11.15.010 definition of "lot" consistently with ORS 92.017, which provides as follows:

> "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."

Under ORS 92.017, local governments must recognize lawfully created lots as legal and separately transferrable units of land. Under ORS 92.017, the county is obliged to grant such separate recognition to lots 1, 2, 19 and 20.[2] However, a local government's obligation to recognize lawfully created lots as separately transferrable units of land does not mean a local government must also allow each such lawfully created lot to be developed separately. To the contrary, ORS 92.017 does not preclude a local government from imposing zoning or other restrictions which directly or indirectly require that two or more lawfully created lots be combined for purposes of development. Kishpaugh v. Clackamas County, ___ Or LUBA ___ (LUBA No. 92-080, October 22, 1992), slip op 11. We turn to the question of whether the four lots at issue in this appeal must be combined for development purposes.

B. MCZO 11.15.2856(B) Lot of Record Provision

MCZO 11.15.2856(B) provides as follows:

> "Where a lot has been a deed of record of less than 80 feet in width, or an area of less than 20,000 square feet, and was held under separate ownership, or was on public record at the time this Chapter became effective, such lot may be occupied by any use permitted in this district. In no case, however, shall a dwelling unit have a lot area of less than 3,000 square feet."

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[2]There is no dispute that lots 1, 2, 19 and 20 were lawfully created when they were platted in 1890.

There is no disagreement among the parties that the above provision is awkwardly worded and ambiguous. Both petitioners' and the county's interpretations of MCZO 11.15.2856(B) provide imperfect resolutions of the language of that provision.

The decision of the board of county commissioners challenged in this appeal adopts the decision of the county hearings officer. The hearings officer's decision offers four separate lines of analysis for his interpretation of MCZO 11.15.2856(B) as allowing lots 1 and 2 to be developed separately from lots 19 and 20. The board of county commissioners endorsed the first of those analyses. In this line of analysis, the hearings officer points out MCZO 11.15.2856(B) includes "two qualification clauses, only one of which references ownership." Record 123. The hearings officer then explains, as follows:

> "[The applicant's] property is a 'deed of record of less than * * * 20,000 square feet' and 'was on public record at the time this Chapter became effective * * *.' I recognize that from [petitioner's] perspective, emphasis on the second qualification clause does not resolve the matter, because the County's definition of 'lot' itself uses the phrase 'distinct ownership.' However, I believe the distinction between the two clauses indicates the intent behind the second clause in the exception was to authorize a house on a pre-existing lot, regardless of whether this lot is in common ownership with other, contiguous lots." Id.

In essence, the hearings officer's interpretation concludes that the four lots are described in a "deed of

record," as MCZO 11.15.2856(B) requires, and while those lots are not held under separate ownership (thus not qualifying under the first of the two qualifying clauses of MCZO 11.15.2856(B)), they are shown on a plat recorded in 1890 and, therefore, are "on public record," within the meaning of the second qualifying clause.

In support of the above interpretation of MCZO 11.15.2856(B), respondent and intervenor point out that where the county intends to impose a lot aggregation requirement, it clearly does so. See MCZO 11.15.2018(A)(3) (defining "lot of record" in the Exclusive Farm Use zone as including "[a] group of contiguous parcels of land * * * [w]hich are held under the same ownership").

Petitioners argue that, prior to the effective date of MCZO 11.15.2856(B), the relevant deeds of record conveyed the four lots together. Therefore, according to petitioners, prior to the disputed conveyances there was no deed of record for an area of less than 20,000 square feet, and the MCZO 11.15.2856(B) lot of record provision does not apply to make lots 1, 2, 19 and 20 separately developable. Petitioners concede those lots would be separately developable if each of those lots had been conveyed to separate owners (under the first qualifying clause) or to the same owner by separate deeds of record (under the second qualifying clause). However, because that did not occur here, petitioners argue MCZO 11.15.2856(B) does not operate

to make those lots separately developable.

Petitioners complain that the county's interpretation ignores the "deed of record" language in MCZO 11.15.2856(B) and essentially provides that if there is a recorded plat every lot shown on that plat is recognized as a lot for development purposes, so long as it has at least 3,000 square feet.

Petitioner's construction avoids having the exception provided by MCZO 11.15.2856(B) essentially negate the R-20 zoning district 20,000 square foot minimum lot size.[3] It also gives the most meaning to the "deed of record" language in the first clause of MCZO 11.15.2856(B), which petitioners correctly point out is largely lost in the county's interpretation.

However, petitioners' construction gives little or no meaning to the second of the qualification clauses, because a lot described in a "deed of record" is, by that fact alone, "on public record." Petitioner's attempt to construe the second qualification clause ("or was on public record at the time this Chapter became effective") as providing that

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[3]Petitioners somewhat overstate their case when they say the county's interpretation renders the R-20 minimum lot size a nullity. The lot size minimum would have effect where existing parcels are 40,000 square feet or larger. However, we understand petitioners to contend that either all or nearly all of the area they are concerned about was platted into 5,000 square lots in 1890, and under the county's interpretation of MCZO 11.15.2856(B) each of those lots must be separately recognized because they are shown on plats "on public record" at the time MCZO 11.15.2856(B) became effective.

adjoining lots held in the same ownership nevertheless qualify for the MCZO 11.15.2856(B) lot of record exception, but only if they were conveyed to the same owners by separate deeds, is petitioner's attempt to give meaning to the second of the qualification clauses. We agree it gives meaning to that clause, our difficulty is finding a basis in the language of the second qualification clause for the meaning petitioners suggest.

This Board applies a deferential standard of review when reviewing a local government's interpretation of its own land use regulations. Clark v. Jackson County, 313 Or 508, 515, 836 P2d 710 (1992) ("LUBA is to affirm the county's interpretation of its own ordinance unless LUBA determines that the county's interpretation is inconsistent with express language of the ordinance or its apparent purpose or policy"). The court of appeals has explained that this Board must defer to a local government's interpretation of its own land use regulations unless that interpretation is clearly wrong. See Goose Hollow Foothills League v. City of Portland, 117 Or App 211, ___ P2d ___ (1992); West v. Clackamas County, 116 Or App 89, 840 P2d 1354 (1992); Cope v. City of Cannon Beach, 115 Or App 11, 836 P2d 775, rev allowed 315 Or 643 (1992). Applying that standard here, the county's construction of MCZO 11.15.2856(B) is at least as plausible as that offered by petitioners. We conclude the county's interpretation

represents a reasonable construction of an awkwardly worded ordinance provision and that it is not inconsistent with the language or apparent purpose or policy of that provision. We therefore defer to the county's interpretation.

As a final point, we note that we agree with respondent and intervenor that petitioners' citation of cases from other jurisdictions concluding, based on different regulatory language, that aggregation of adjoining lots in the same ownership is required for development purposes, provides no assistance in determining whether the county correctly construed MCZO 11.15.2856(B).

The county's decision is affirmed.