BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

STEVE TOGNOLI, Petitioner,	)	
vs.	)	LUBA No. 94-145
CROOK COUNTY, Respondent,	)	FINAL OPINION AND ORDER
and	)	
MAYNARD ALVES and JACOLYN ALVES, Intervenors-Respondent.	)	

Appeal from Crook County.

Peter Livingston, Portland, filed the petition for review. With him on the brief was Lane Powell Spears Lubersky.

No appearance by respondent.

No appearance by intervenors-respondent.

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

REMANDED 01/13/95

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 appeals a Crook County Court decision approving a partition.

MOTION TO INTERVENE

Maynard Alves and Jacolyn Alves, the applicants below, move to intervene on the side of respondent. There is no opposition to the motion, and it is allowed.

FACTS

The subject property is comprised of portions of two sections of land (Sections 12 and 14) located in the county's Exclusive Farm Use (EFU-2) zoning district. Sections 12 and 14 share no common sides, but the southwest corner of Section 12 and the northeast corner of Section 14 touch at a single point.[1] Intervenors own 360 acres of Section 12 (hereafter NE parcel) and 360 acres of Section 14 (hereafter SW parcel), including the portions of those two sections where their corners touch. Under past county practice, parcels that touched in the manner the NE parcel and SW parcel touch were viewed as one parcel, even though it would be impossible to pass between the NE parcel and SE parcel without crossing adjoining parcels.

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[1]A section of land measures one mile on each side and includes 640 acres. The relative positions of Sections 12 and 14 can be pictured as a four-mile square made up of Sections 11 through 14. Section 12 makes up the NE quadrant and Section 14 makes up the SW quadrant. Sections 11 and 13 make up the remaining NW and SE quadrants and are not affected by the challenged decision.

Intervenors requested permission to partition the NE parcel and SW parcel into parcels 1 and 2. Parcel 1 would include 220 acres of the SW parcel and parcel 2 would include 500 acres (140 acres of the SW parcel and the entire 360 acres of the NE parcel). The county planning department administratively approved the requested partition. Petitioner appealed the planning department's decision to the planning commission.

The planning commission denied the appeal as untimely filed, and for lack of standing, without reaching the merits. Petitioner appealed the planning commission's decision to the county court, which held four public hearings on the appeal.

At the county court's June 8, 1994 hearing, intervenors stipulated that the county court could consider the matter on the merits. Much of the discussion at the June 8, 1994 hearing focused on the county's past practice of considering noncontiguous parcels in common ownership in the EFU zone as a single farm unit, a single parcel or both.[2]

At the June 22 and 29, 1994 county court public hearings there was continued discussion concerning whether parcels that abut only at an indefinite point are properly considered a single parcel or separate, noncontiguous

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[2]Whether noncontiguous parcels (including parcels such as the NE parcel and SW parcel that touch only at an indefinite point) are properly viewed as a single "parcel" turns on the definition of the term "parcel." That interpretive issue is addressed in the first assignment of error, infra.

parcels. At the conclusion of the June 29, 1994 public hearing, the county court adopted the latter position, i.e., that such parcels are properly viewed as separate noncontiguous parcels.[3] The county court decided the matter should be remanded to the planning commission to reconsider the proposed partition in light of its determination that the NE parcel and SW parcel are properly viewed as noncontiguous parcels. Petition for Review, Tr 29.

A draft written county court decision was circulated to the parties for comment. At its July 27, 1994 hearing, the county court allowed petitioner to present legal arguments concerning the draft decision. Intervenor's representative then objected to remanding the decision to the planning commission. The county court was advised that under the Crook County Zoning Ordinance (CCZO) it had authority to "affirm, deny or amend the tentative decision, or the Court could refer [the] matter back to the planning commission." Record 113. The county court thereafter voted to approve the planning department's decision to approve the requested partition, but modified that decision to require that "at least 20 acres [be] removed from the proposed parcel 1 and attached to the proposed parcel 2 so that each parcel

[3]Petitioner contends the county court adopted his opposite contention on this question. Petition for Review 4. This may be a typographical error in the petition for review but, if not, petitioner is wrong. Furthermore, whichever position the county court adopted at the June 29, 1994 hearing, our disposition of this appeal is the same.

contains a minimum of 160 acres." Record 14. The decision requires that a final plat be submitted and recorded in accordance with the specified changes. Although the disputed decision is somewhat unclear, we understand it to leave the NE parcel unaffected and to require that the applicant modify the partition so that the SW parcel would become two parcels containing "a minimum of 160 acres [to meet] the requirements of CCZO 3.020(9) and Crook County Land Development Ordinance. (CCLDO) 5.010 [to] 5.060."[4] Record 113.

Petitioner requested an opportunity to object to the amended partition, but that request was refused. Id. This appeal followed.

FIRST ASSIGNMENT OF ERROR

Petitioner characterizes the county's decision as "creating a new parcel out of the Section 12 property * * *."[5] Petition for Review 8. Petitioner contends that in doing so, the county was required to apply a number of CCLDO standards, but did not do so. More specifically, we understand petitioner to contend the county's past practice

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[4]Summarizing, as originally proposed the partition would have resulted in two parcels, a 500 acre parcel (composed of all of what is now the NE parcel together with a 140 acre portion of what is now the SW parcel) and a 220 acre parcel (composed of part of what is now the SW parcel). As amended and approved by the county court, the NE parcel remains in its current configuration and the SW parcel is to be divided in some unspecified way into two parcels of not less than 160 acres each.

[5]In this opinion, the "Section 12 property" is what we refer to as the NE parcel.

under its planning and land use regulations was to allow partitions to create new parcels, which were approved as single parcels but were made up of noncontiguous units of land.[6] Petitioner then reasons the county may not now allow noncontiguous units of land (which were approved together as a single parcel to meet minimum lot size requirements) to be considered separate parcels by interpretational fiat. We understand petitioner to contend that if the county wishes now to consider the NE parcel and SW parcel as separate parcels, it must demonstrate each of those units of land satisfy relevant CCLDO standards.

The main problems with petitioner's arguments under this assignment of error are that they (1) assume facts much different than those presented in this case, and (2) ignore the county's explanation for why it views the NE and SW parcels as separate parcels.

Although petitioner cites the ORS 92.010(5) definition of "parcel,"[7] both petitioner and the county treat the issue presented under this assignment of error as a question of

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[6]From our review of the record, petitioner appears to be correct in this contention.

[7]ORS 92.010(5) provides:

> "'Parcel' means a unit of land that is created by a partitioning of land."

proper interpretation of the CCLDO and CCZO.[8] We, therefore, do so as well.

CCZO 1.030(88) defines "parcel" as follows:

> "Parcel. Includes a unit of land created:
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> "(a) by partitioning land as defined in ORS 92.010;
>
> "(b) in compliance with all applicable planning, zoning and partitioning ordinances and regulations; or
>
> "(c) by deed or land sales contract, if there were no applicable planning, zoning or partitioning ordinances or regulations.
>
> "* * * * *"

The NE and SW parcels were not created pursuant to CCZO 1.030(88)(a) and (b) and do not qualify as either separate parcels or a single parcel under those sections of the CCZO. However, we do not understand petitioner to dispute that the NE and SW parcels were created by deed prior to the county's adoption of any "planning, zoning or partitioning ordinances or regulations." Therefore the NE and SW parcels are properly viewed as separate parcels if they are properly viewed as separate units of land created by deed.[9]

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[8]The CCLDO 1.070(29) definition of "parcel" is identical to ORS 92.010(5).

[9]There is no question presented in this appeal about whether the county could in the future apply the interpretation announced in this decision to allow noncontiguous parcels, that may have been approved under the CCZO and CCLDO as a single parcel, to be treated now as separate parcels. Nothing

There is no question that the NE and SW parcels were created by deed. The central question is whether they are properly viewed as separate units of land. Because the CCLDO does not directly address this question, the county looked to the CCLDO provision which identifies the unit of land potentially subject to partitioning requirements. The county explained that, as relevant, CCLDO 1.070(31) defines "Partition Land" as follows:

> "Partition Land. To divide an area or tract of land into two or three parcels within a calendar year when such area or tract of land exists as a unit or contiguous units of land under single ownership at the beginning of such year."

Under this definition, separate units of land nevertheless are properly viewed as a single unit of land if they are "contiguous" and under "single ownership." Because the NE and SW parcels are under common ownership, the only question is whether the NE parcel and SW parcel are "contiguous." The county court concluded they are not, and explained:

> "* * * The Oregon Department of Revenue's Manual of Cadastral Map Standards, Concepts and Cartographic Procedures, Glossary, P. 8, 1989 edition, states: 'lands meeting at a common corner, no parts or sides being common, do not constitute contiguous bodies of land.' The Manual also states that * * * 'A land parcel can be enclosed by an unbroken boundary line'. * * *"

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in this opinion should be read to suggest that we believe the county may properly treat parcels created by such partitions as separate parcels without demonstrating such separate parcels each comply with applicable parcel size, land division and other applicable provisions of state and local law.

> "* * * Property that meets at the diagonal * * * only meets at an infinite point, and therefore the parcel can not be enclosed by an unbroken line. * * *" Record 16.

We do not understand petitioner to challenge the county's finding that the NE and SW parcels are not contiguous. To the extent he does, petitioner offers no specific challenge to the above finding, and we can see no basis for faulting the county court's conclusion that the NE and SW parcels are not contiguous and, therefore, are properly viewed as separate parcels under CCZO 1.030(88). Because the county court's decision simply recognizes the NE and SW parcels as existing parcels created by deed prior to the county's adoption of planning and land use regulations, and does not purport to approve them as separate parcels, petitioner's first assignment of error presents no basis for reversal or remand.[10]

SECOND ASSIGNMENT OF ERROR

Petitioner contends the county court erred in approving a partition that is different than the partition applied for. Until the county court substituted the partition approved at its July 27, 1994 public hearing, petitioner's objections were all directed at the original application approved by the planning department. Petitioner contends

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[10]As we note above, the result might well be different if the NE and SW parcels had been approved as a single parcel under applicable county comprehensive plan and land use regulations. However, that question is not presented in this appeal.

that although he requested an opportunity to challenge this modified partition, he was refused an opportunity to do so. Petitioner contends that while the county court may have authority to modify and approve the partition as modified, it may not do so without giving petitioner an opportunity to challenge that modified partition.

Petitioner is correct. See Bonner v. City of Portland, 11 Or LUBA 40, 60 (1984) ("[I]nterested parties must be given ample opportunity to comment on an alteration[.]"). The county court may not substitute and approve a modified partition, after the public hearing is closed, without providing the parties an opportunity to comment on the modified partition.

The second assignment of error is sustained.

REMAINING ASSIGNMENTS OF ERROR

In petitioner's six remaining assignments of error, he alleges that under the CCLDO, the county court must require that certain additional information be submitted before approving a modified partition. Petitioner also argues that although the county court approved a partition of the SW parcel, it erroneously failed to identify the location of the new parcels. Moreover, petitioner contends that because the county did not identify the location of the parcels to be created from the SW parcel, the county court did not and could not adopt findings demonstrating that those parcels comply with relevant standards governing partitions of land

in the EFU-2 zone.

The county has not appeared in this proceeding. The challenged decision does not explain why the information petitioner argues is required was not required. Neither does the decision explain why identifying the location of the approved parcels may be deferred until recording of the final plat or why the standards governing partitions in the EFU-2 zone are not addressed in the challenged decision. Because we must remand the challenged decision in any event, the county will have an opportunity to address these assignments of error on remand if the modified partition of the SW parcel is approved again on remand.

The remaining assignments of error are sustained.

The county's decision is remanded.