BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

DANIEL M. SMITH,
Petitioner,

vs.

CITY OF ST. PAUL,
Respondent.

LUBA Nos. 2003-055 and 2003-056

FINAL OPINION
AND ORDER

Appeal from City of St. Paul.

Michael G. Gunn and Jessica S. Cain, Newberg, filed the petition for review. With them on the brief was Michael G. Gunn, PC. Jessica S. Cain argued on behalf of petitioner.

No appearance by City of St. Paul.

HOLSTUN, Board Member; BASSHAM, Board Chair; BRIGGS, Board Member, participated in the decision.

AFFIRMED 09/04/2003

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 city decision that denies his request for approval of lot line adjustments and variances to allow development of the realigned lots.

FACTS

Petitioner contends that he owns four separate parcels, denominated parcels 1 through 4 on Figure 1, which appears on the following page.[1] Petitioner requested that the city approve his proposal to adjust the property lines between parcel 3 and parcel 1 and between parcel 4 and parcel 2 so that the adjusted lot lines would coincide with city limits and the northern terminus of Fourth Street. With this property line adjustment, adjusted parcel 3 would measure 60 feet by 200 feet and adjusted parcel 4 would measure 60 feet by 100 feet. Petitioner apparently seeks to develop adjusted parcels 3 and 4 and therefore also sought city approval for variances to allow such development. For adjusted parcels 3 and 4, petitioner sought variances from the city's 70-foot width requirement and a reduction of the side yard setback from 9 feet to 3 feet. For adjusted parcel 4, petitioners also sought a variance from the applicable 10,000 square foot minimum lot size.

The city planning commission concluded that petitioner failed to carry his burden of proof to establish that parcels 1 and 3 are separate parcels and that parcels 2 and 4 are separate parcels. On that basis, the planning commission denied the requested lot line adjustments and denied the requested variances as moot. Petitioner appealed the planning commission's decision to the city council. The city council reviewed the planning commission's decision on the record and affirmed the planning commission. This appeal followed.

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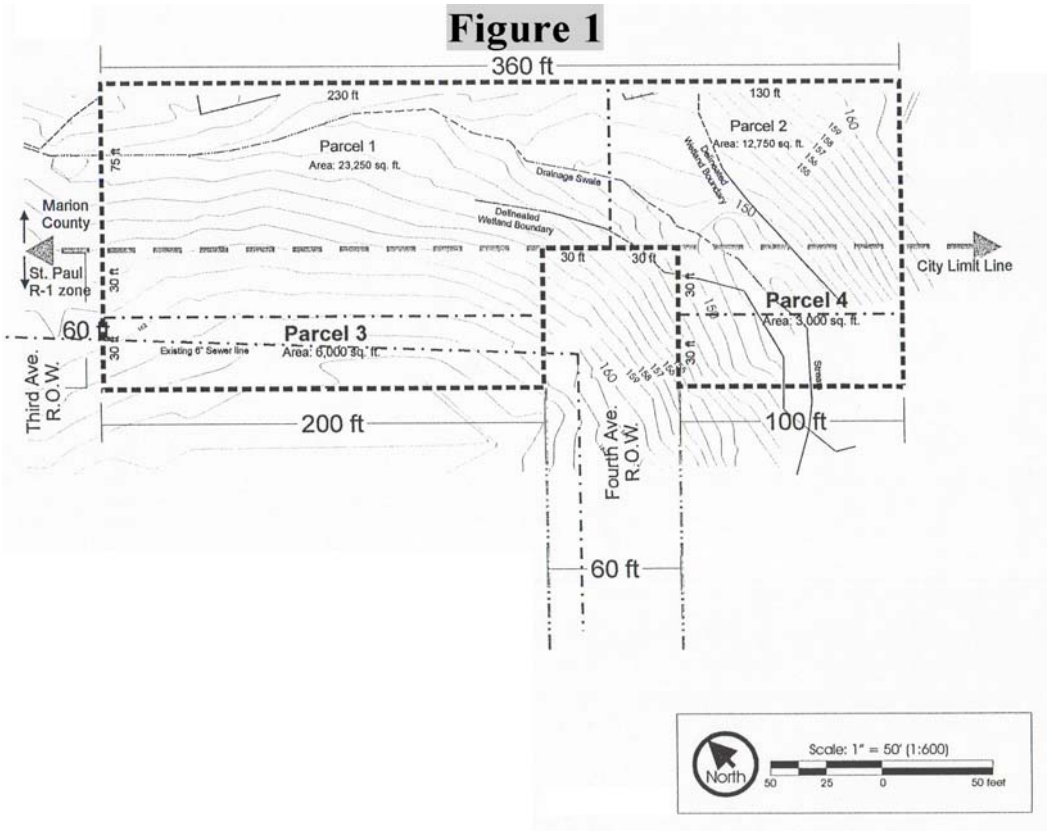
[1] Whether petitioner's property actually includes four separate parcels is the central question in this appeal. Although Figure 1 refers to Fourth Avenue, all the other maps in the record refer to Fourth Street. We refer to Fourth Street in this opinion.



FIRST ASSIGNMENT OF ERROR

St. Paul Zoning and Development Ordinance (SZDO) 3.101.01 provides that lot line adjustments are a "Type I Action." Type I Actions result in ministerial decisions by city staff, without notice to the public or a public hearing.[2] SZDO 3.101.02 provides that variance decisions are subject to "Type II Action" review, and the planning commission is the initial decision maker.[3] The city processed petitioners lot line adjustment and variance requests together as a Type II Action.

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[2] SZDO 3.101.01 provides the following description of "Type I Action:"

> "A Type I action is a ministerial review process in which City staff apply clear and objective standards that do not allow much discretion. This process does not provide notice to the public of the application or decision. Appeal is to the Planning Commission. * * *"

[3] SZDO 3.101.02 provides the following description of "Type II Actions:"

> "A Type II action is a quasi-judicial review in which the Planning Commission applies a mix of objective and subjective standards that allow considerable discretion. Public notice and a public hearing is provided. * * * Appeal of a Type II decision is to the City Council. * * *"

Planning staff, in its recommendation to the planning commission, apparently supported the requested lot line adjustments, although staff did not recommend approval of the requested variances. Record 376-93. Petitioner argues that city planning staff should have approved his requested lot line adjustments and then referred his application for variances to the planning commission. Petitioner contends that the city's failure to do so constitutes reversible error.

The challenged decision explains that the city submitted the requests for lot line adjustments to the planning commission, for the initial decision, because the initial decision on the requested variances would require action by the planning commission in any event. Record 10, 22.

Under ORS 197.835(9)(a)(B) the city's failure to follow required procedures provides a basis for reversal or remand only if that failure "prejudiced the substantial rights of the petitioner." We fail to see how the procedure the city followed in this matter constituted error or, even if it did, how following that procedure prejudiced petitioner's substantial rights. Petitioner's legal theory may be that SZDO 3.101.01 grants him a substantial right to a *ministerial* decision on the lot line adjustment request by planning staff rather than a *quasi-judicial* decision by the planning commission in accordance with local procedures that implement the statutory land use "permit" decision making requirements set out at ORS 227.175.[4] If that is petitioner's argument, it is inadequately developed and without merit. As we have explained on several occasions, approval or denial of lot line adjustments can easily involve the exercise of significant legal and factual judgment, which can disqualify such decisions from the statutory ministerial exception to the definition of "land use decision" at ORS 197.015(10)(b)(A). *Warf v. Coos County*, 43 Or LUBA 460, 463 (2003);

[4] ORS 227.160(2) defines "permit" as follows:

> "'Permit' means discretionary approval of a proposed development of land, under ORS 227.215 or city legislation or regulation. * * *"

Goddard v. Jackson County, 34 Or LUBA 402, 410-11 (1998). If the city's decision concerning the property line adjustment is quasi-judicial rather than ministerial, not only did the city not commit error by processing the lot line adjustment as a quasi-judicial matter, it might have committed reversible error if it had not done so. As our review of the third assignment of error makes clear, the city's decision concerning the requested lot line adjustment required that the city exercise significant legal and factual judgment. Because the city's decision concerning the lot line adjustment is correctly viewed as a quasi-judicial "permit" decision, the city committed no error in following its Type II quasi-judicial land use procedures in considering the lot line adjustment applications.

The first assignment of error is denied.

SECOND ASSIGNMENT OF ERROR

Petitioner contends the city erred by arbitrarily applying the SZDO 2.208.03 "Standards for Lots or Parcels," which petitioner contends apply to land divisions, and not to his application for a lot line adjustment.

The statutory definition of "[p]artition land," which excludes lot line adjustments and provides the statutory basis for local governments to approve lot line adjustments without following statutory partitioning or subdivision standards, requires that the unit of land that is reduced in size by the lot line adjustment must comply "with any applicable zoning ordinance." ORS 92.010(7)(b). Therefore, it is not at all clear to us that the city erred by considering whether the proposed lot line adjustment resulted in parcels that meet the city's "Standards for Lots or Parcels." However, we need not decide the question. As we have already explained, the city did not deny petitioner's request because adjusted parcels 3 and 4 do not meet the city's Standards for Lots or Parcels. Even though those lots appear to violate lot width requirements, that was not the reason the city gave for denying petitioner's applications. The city denied petitioner's request for lot line adjustments, because the city concluded that the lot lines petitioner seeks to adjust do not exist. Therefore, even if the

city's application of the SZDO 2.208.03 "Standards for Lots or Parcels" was error, it was harmless error, and provides no basis for reversal or remand.

The second assignment of error is denied.

FOURTH ASSIGNMENT OF ERROR

Under this assignment of error, petitioner argues the city erred by

> "elicit[ing] testimony from Ms. Marcie Garrett, a member of the Planning Commission, regarding the value and availability of the new evidence (the chain of title information) being offered by Petitioner to the City Council to consider prior to making its decision on the Petitioner's appeal." Petition for Review 18.

The meaning and legal significance of the cited testimony is not clear to us, and petitioner does not establish that the testimony affected the city's decision in any way. Petitioner does not establish that the city council's receipt of that testimony was reversible error.

The fourth assignment of error is denied.

FIFTH ASSIGNMENT OF ERROR

Petitioner wished to provide additional chain of title information to the city council regarding the subject property and requested that the city council hear this matter *de novo*. The city council refused to do so, and petitioner contends that refusal was error. Petitioner contends that he is entitled to a quasi-judicial land use hearing before the city council and that such a hearing must include a right to submit new evidence.

SZDO 3.204.03(A) provides that the city council review of planning commission decisions "shall be confined to the record of the initial proceeding," except as provided by SZDO 3.204.03(B). SZDO 3.204.03(B) simply provides that "[t]he City Council may admit additional testimony and other evidence by holding a *de novo* hearing." Neither SZDO 3.204.03(B) nor any other legal authority cited to us limits the city council's discretion in deciding whether to conduct a *de novo* hearing or an on the record hearing when it reviews planning commission decisions that were rendered after a quasi-judicial hearing.

Petitioner was given an opportunity to submit evidence supporting his application to the planning commission. Given that SZDO 3.204.03(A) limits city council review to the planning commission record and that SZDO 3.204.03(B) does not limit the city council's discretion in deciding whether to deviate from that rule and conduct a *de novo* review of the planning commission decision, it follows that the city council did not err in determining that it would limit its review of the planning commission's decision to the record that was compiled before the planning commission.

The fifth assignment of error is denied.

SIXTH ASSIGNMENT OF ERROR

At the conclusion of the city council's March 13, 2003 hearing in this matter, a motion was made to affirm the planning commission's decision to deny the applications. After that motion was seconded, two city councilors voted in favor of that motion, one city councilor voted against the motion, and the mayor abstained.[5] Record 30. Petitioner contends that one of the city councilor who voted in favor of the motion is biased against him and should not have participated in the city council's decision in this matter.

As evidence of bias, petitioner points out that the city councilor's husband was a vocal opponent of the application before the planning commission and before the city council. Record 80-81; 229-30. Petitioner contends that a November 19, 2001 letter to the planning commission from the councilor's husband includes statements that suggest he was privy to the details of confidential settlement negotiations that have occurred during litigation between petitioner and the city. Petitioner speculates that the city councilor shared the substance of these confidential settlement discussions with her husband and that such a sharing of confidential settlement discussions further demonstrates bias. Finally, petitioner points out that at the city council's November 14, 2002 hearing on the applications, the

[5] The fifth city councilor apparently was not present.

allegedly biased city councilor made a motion to affirm the planning commission's decision before the city council had provided petitioner an opportunity for an appeal hearing on the merits.

We do not believe it is appropriate to assume that the city councilor was unable to judge petitioner's appeals on their merits, simply because her husband opposed petitioner's applications. With regard to petitioner's allegations that the city councilor improperly shared confidential settlement negotiation details with her husband, those allegations are insufficiently developed for us to determine whether they are meritorious. Petitioner does not identify which statements he believes demonstrate that the city councilor's husband had knowledge of confidential settlement negotiations. Moreover, petitioner does not explain why he believes that inadvertent or deliberate disclosure of confidential information, if it occurred, establishes that the city councilor was biased in *this* proceeding.

The city councilor's November 14, 2002 motion to affirm the planning commission's decision presents a much closer question. That motion came at the end of an extended discussion by the city council concerning a longstanding fee dispute between the city and petitioner.[6] There was also an extended discussion concerning whether the November 14, 2002 hearing should be continued or whether a decision on the merits should be rendered at that November 14, 2002 hearing.[7] Following the city councilor's motion, the city attorney explained that the motion was premature and that no decision on the merits of the appeal should be adopted until after the city council conducted the required hearing on the merits. Record 82. Following that explanation, the city attorney and the mayor suggested that the city councilor withdraw the motion. In response the city councilor stated, "I am not going to withdraw my motion." Record 82.

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[6] The precise nature of that fee dispute is not clear from the record.

[7] The city council later voted to continue the matter for 120 days and held its public hearing on the appeal on March 13, 2003.

Although the city councilor's refusal to withdraw her motion makes it an exceedingly close question, we do not agree that the city councilor's premature motion demonstrates bias. *See Spiering v. Yamhill County*, 25 Or LUBA 695, 702 (1993) ("petitioner has the burden of showing the decision maker was biased, or prejudged the application, and did not reach a decision by applying relevant standards based on the evidence and argument presented"). It is obvious from the record that there is tension between petitioner and the city council generally and between petitioner and this city councilor in particular. While the city councilor's premature motion could reflect bias, it could also simply reflect a misunderstanding of the procedure that the city council is bound to follow in considering an appeal of the planning commission's decision. In rejecting petitioner's earlier request that she recuse herself in this matter and not participate in the appeal, the city councilor stated

> "[w]ell, I'm not going to do that. I have reviewed and read all of this information." Record 73.

In view of that statement, it is also possible that the city councilor made her premature motion based on her review of the planning commission record and decision rather than on any improper bias against petitioner. The city councilor apparently did not appreciate that, notwithstanding her review of the planning commission decision and record, petitioner was still entitled to present additional argument at a city council hearing on the merits. However, we do not believe that misunderstanding necessarily demonstrates that she had an improper bias against petitioner.[8]

The sixth assignment of error is denied.

[8] We note that the other city councilor who ultimately voted to affirm the planning commission's decision also apparently did not understand why the premature motion to affirm the planning commission's decision was improper. Immediately after the premature motion was defeated by a 3-2 vote, the other city councilor stated, "I don't understand why that motion … wasn't proper." Record 82.

THIRD ASSIGNMENT OF ERROR

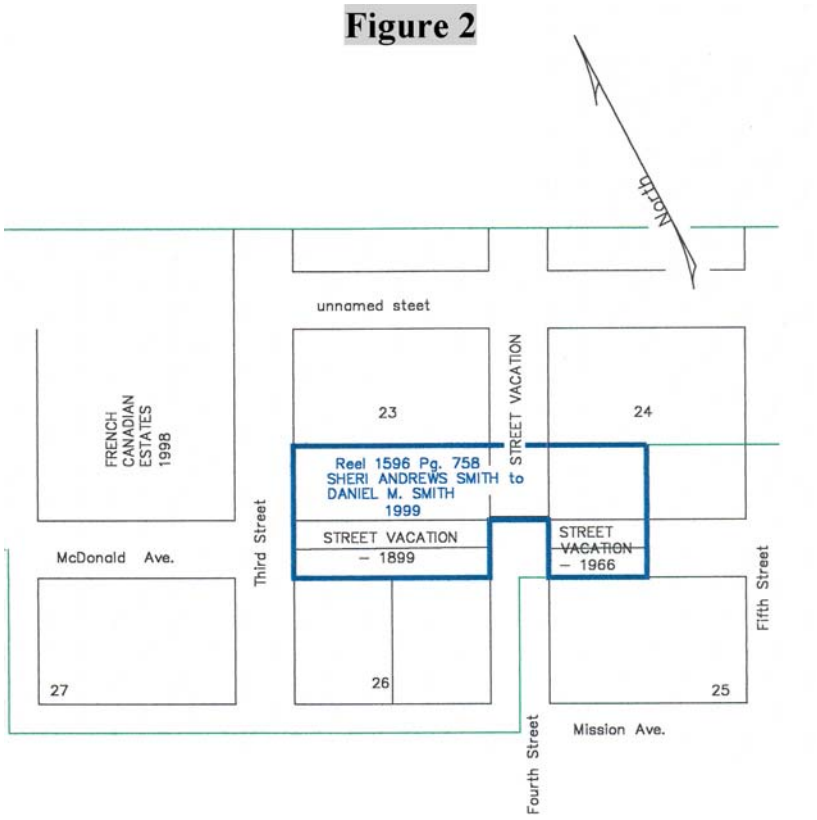
The record in this appeal includes a lengthy discussion of the history of the disputed property beginning with the recording of the St. Paul town plat in 1875 and continuing up through a 1999 conveyance to petitioner. A complete discussion of those transactions would unnecessarily lengthen and complicate our decision in this matter. We therefore limit our discussion to the events that are critical to petitioner's legal theory that he is the owner of a larger tract that is comprised of parcels 1, 2, 3 and 4, as shown on Figure 1.

We begin with an assumption that the St. Paul town plat, which was recorded in the 1875, had the legal effect of creating a number of streets and a number of blocks as discrete units of land. For purposes of this appeal, the relevant blocks are blocks 23, 24, 25, and 26 and the relevant streets are Third Street, Fourth Street, McDonald Avenue and Mission Avenue. Figure 2 on the following page shows these blocks and streets with an outline of the subject property superimposed on those streets and blocks.

We turn first to petitioner's legal theory for the current existence of the 30-foot wide 200-foot long parcel 3 that is shown on Figure 1. In 1899, the county vacated a number of streets.[9] Among the vacated streets was McDonald Street between blocks 23, and 26. At the time of the 1899 street vacation, blocks 23 and 26 were both owned by Peter Kirk. Petitioner contends that the legal effect of that 1899 street vacation was to create two 30-foot wide parcels between blocks 23 and 26, one lying north of the centerline of the former McDonald Avenue right-of-way in this location and one lying south of that centerline. We understand petitioner to take the position that after the 1899 street vacation, Peter Kirk owned blocks 23 and 26 and, in addition, became the owner of two 30-foot wide 200-foot long parcels located between those blocks. For the reasons explained below, we do not agree with petitioner.

[9] The City of St. Paul was not incorporated until 1901.

Figure 2



At the time of the 1899 street vacation, petitioner alleges the following relevant statute governed the effect of the vacation on the ownership of the underlying roadway:

> "'The part so vacated, * * * if the same be a street or alley; * * * shall be attached to the lots or ground bordering on such street or alley; and all right or title thereto shall vest in the persons owning the property on such side thereof, in equal portions, according to the length or breadth of such lots or ground as the same may border on such street or alley.' *Of the Government of Cities and Towns*, Title XXVII Chapter VI. §2742, L. 1864, D.Cd. P. 927, §7; H.C. §4184 (1864)." Petition for Review 9.[10]

Petitioner argues that the above language

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[10] ORS 271.140 similarly provides:

> "The title to the street or other public area vacated shall attach to the lands bordering on such area in equal portions; except that where the area has been originally dedicated by different persons and the fee title to such area has not been otherwise disposed of, original boundary lines shall be adhered to and the street area which lies on each side of such boundary line shall attach to the abutting property on such side. If a public square is vacated the title thereto shall vest in the city."

> "does not indicate that the original town plat is amended or altered in any way to reflect an enlargement of lots. Rather, the statute states that that the vacated streets shall vest with all title thereto in the owners of the adjoining properties." *Id*.

As we noted earlier, petitioner reads this statute to provide that the 1899 vacation created two 30-foot by 200-foot parcels between blocks 23 and 26. Petitioner misreads the statute. In particular, petitioner ignores the statutory direction that the vacated right-of-way "shall be *attached* to the lots or ground bordering on such [vacated] street or alley." (Emphasis added.) The vacation of McDonald Avenue between blocks 23 and 26 in 1899 "attached" the part of that right-of-way north of the centerline to block 23 and "attached" the part of that right-of-way south of the centerline to block 26. Referring to Figure 2 and using petitioner's term, blocks 23 and 26 were both "enlarged" to include the vacated right-of-way; the 1899 vacation of McDonald Avenue between blocks 23 and 26 did not create two new 30-foot by 200-foot parcels between blocks 23 and 26. While it is true that the recorded town plat technically was not "amended" or "altered" by the 1899 vacation, and remains as recorded in 1875, that does not mean that the vacation did not have the legal effect of enlarging blocks 23 and 26 rather than creating two new 30-foot by 200-foot strips of land next to those blocks.[11]

The next relevant event occurred in 1973, when Lindy Phillips and Mary Lou Phillips deeded "[a]ll of Block 26" to Don, Margaret, Thomas and Sharon Rader.[12] At that time, the Phillips owned blocks 23 and 26. Petitioner argues that because this 1973 deed only referred to Block 26, and did not specifically mention the adjoining vacated right-of-way, it did not convey the 30-foot wide portion of the former McDonald Avenue right-of-way that attached to Block 26 when that portion of McDonald Avenue was vacated in 1899. Petitioner

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[11] Even if petitioner were correct that the 1899 street vacation created two new 30-foot by 200-foot parcels, the 1875 town plat would not reflect that change either, unless and until an amended town plat is prepared and recorded to reflect the street vacation.

[12] Block 26 was later divided in half, as shown on Figure 2.

contends that he took title to the 30-wide parcel that the Phillips retained, as the Phillips' successor in title.

Petitioner erroneously assumes that the omission of any reference to the vacated southern portion of the McDonald Avenue right-of-way means the 1973 deed did not also convey one-half of the adjoining vacated right-of-way to the Raders. In *Fahey v. City of Bend*, 252 Or 267, 449 P2d 438 (1969), a city street was vacated, and the city later took title to lots that adjoined the vacated street. Thereafter, the city conveyed the lots, without reference to the vacated right-of-way, and the city later took the position that it therefore retained title to one-half of the vacated street right-of-way that adjoined the lots. The court first observed that it was clear that a "deed which describe[s] the land simply by the lot description" is sufficient to convey title to one-half of an adjoining street, in the circumstance where that street has not yet been vacated.[13] *Id*. at 269. The court stated the question was "whether the same rule should be applied when the conveyance is made after the adjoining street has been vacated," which is also the relevant question in this appeal. *Id*. The court held:

> "No distinction should be made between conveyances made before and conveyances made after the vacation of the adjoining street; in both cases the adjoining strip should be held to pass by the deed in the absence of the manifestation of a contrary intent." *Id*. at 270.

In this case there is was no manifestation of any intent that the Phillips would retain the one-half of the vacated McDonald Avenue right-of-way that "attached" to Block 26 in 1899. Block 26, with the attached southern half of McDonald Avenue between Blocks 23 and 26, passed to the Raders in 1973, and petitioner is not among the Raders' successors in title.

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[13] In such a case, the grantee takes title to one-half of the adjoining right-of-way, subject to the right-of-way.

Returning to Figure 1, parcel 3 is not a legally separate part of petitioner's larger property. In fact, parcel 3 is not part of petitioner's larger property at all. The city correctly concluded that there is no property line between parcel 3 and parcel 1 to adjust.[14] It follows that the city correctly denied petitioner's application for a lot line adjustment between parcels 1 and 3.

We turn next to the requested lot line adjustment between parcels 2 and 4, as shown on Figure 1. In 1966, the portion of McDonald Avenue between blocks 24 and 25 was vacated. Title to the northern half of this part of McDonald Avenue "attached" to block 24 and title to the southern half of the part of McDonald Avenue "attached" to block 25. In 1966, Raphael Cooke owned blocks 24 and 25 and one-half of the vacated McDonald Avenue right-of-way between blocks 24 and 25 attached to those adjoining blocks. In 1968, Raphael and Joann Cooke conveyed the west half of Block 25 to Jerry Connor and Angela Connor. This 1968 deed included a metes and bounds description of the conveyed property. That metes and bounds description included the adjoining east one-half of Fourth Street and the adjoining north one-half of Mission Avenue, but did not include the adjoining southern one-half of the McDonald Avenue that was vacated two years earlier. Petitioner contends that he owns this southern one-half of McDonald Avenue as successor in title to the Cookes. It is this southern one-half of McDonald Avenue that petitioner identifies as the 30-foot by 100-foot parcel 4 on Figure 1.

The omission of the southern one-half of the previously vacated McDonald Avenue right-of-way from the metes and bounds description of the property the Cookes conveyed to the Connors was not sufficient to manifest an intent on the Cookes' part to retain that 30-foot

[14] The city purports to rely on a memorandum prepared by the city attorney, a staff report and a Marion County hearings officer decision in concluding that there is no property line to adjust between parcels 1 and 3. There are portions of the city attorney's memorandum, the planning staff report and the Marion County hearings officer's decision that we do not agree with. Our reasons for agreeing with the city's ultimate conclusion that the property lines that petitioner seeks to adjust do not exist are as set forth in this opinion.

by 100-foot strip of land. Something more than a failure to mention the adjoining right-of-way is required to manifest an intent to retain title to that strip of land. As the Oregon Supreme Court explained in *Cross v. Talbot*, 121 Or 270, 273, 254 P 827 (1927):

> "[W]here the land described by metes and bounds actually abuts upon the highway, the grantee, in the absence of some clear intention on the part of the grantor to otherwise limit the description, will take to the center of the highway to the same extent that he would had the highway been actually mentioned as a boundary."[15]

Title to what petitioner shows as parcel 4 on Figure 1 passed to the Connors in 1968 and petitioner is not a successor in interest to the Connors. Parcel 4 is therefore not a separate part of petitioner's larger holding as shown on Figure 1. Like parcel 3, parcel 4 is not part of petitioner's larger property at all. The city correctly concluded that there is no property line between parcel 4 and parcel 2 to adjust. It follows that the city correctly denied petitioner's application for a lot line adjustment between parcels 2 and 4.

The third assignment of error is denied.

The city's decision is affirmed.

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[15] The court's decision in *Cross* includes a quotation from a Vermont Supreme Court decision that explains the public policy behind this rule:

> "The rule itself is mainly one of policy, and one which to the unprofessional might not seem of the first importance; but it is at the same time one which the American courts especially have regarded as attended with very serious consequences, when not rigidly adhered to, and its chief object is to prevent the existence of innumerable strips and gores of land, along the margins of streams and highways, to which the title for generations shall remain in abeyance, and then, upon the happening of some unexpected event, and one consequently not in express terms provided for in the title deeds, a bootless, almost objectless, litigation shall spring up to vex and harass those who in good faith had supposed themselves secure from such embarrassment." 121 Or at 275.