

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3
4 ANDREW SOUTH and MARY SOUTH,
5 *Petitioners,*

6
7 vs.

8
9 CITY OF PORTLAND,
10 *Respondent.*

11 LUBA No. 2003-178

12
13 FINAL OPINION
14 AND ORDER

15
16
17 Appeal from City of Portland.

18
19 Ty K. Wyman, Portland, filed the petition for review and argued on behalf of
20 petitioners. With him on the brief was Dunn, Carney, Allen, Higgins and Tongue, LLP.

21
22 Peter Kasting, Deputy City Attorney, Portland, filed the response brief and argued on
23 behalf of respondent.

24
25 HOLSTUN, Board Member; BASSHAM, Board Chair; BRIGGS, Board Member,
26 participated in the decision.

27
28 AFFIRMED 03/03/2004

29
30 You are entitled to judicial review of this Order. Judicial review is governed by the
31 provisions of ORS 197.850.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19

NATURE OF THE DECISION

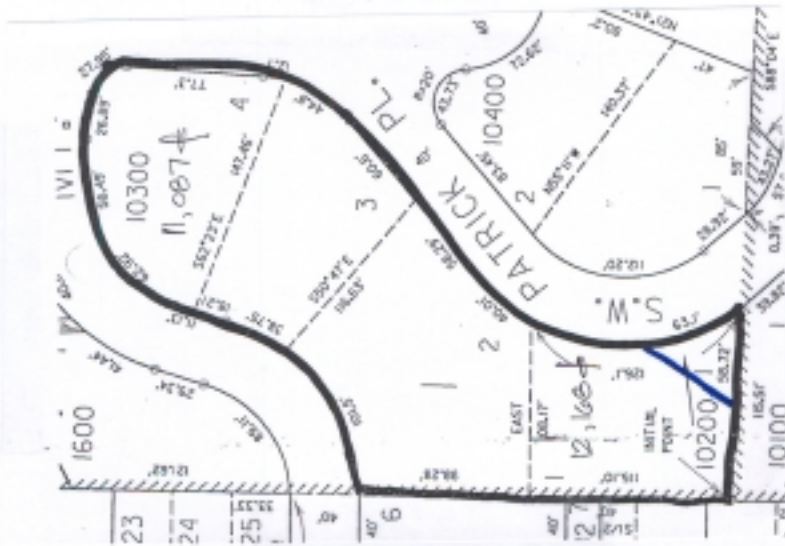
Petitioners appeal a city decision that grants an adjustment to a zoning maximum lot size limitation.

FACTS

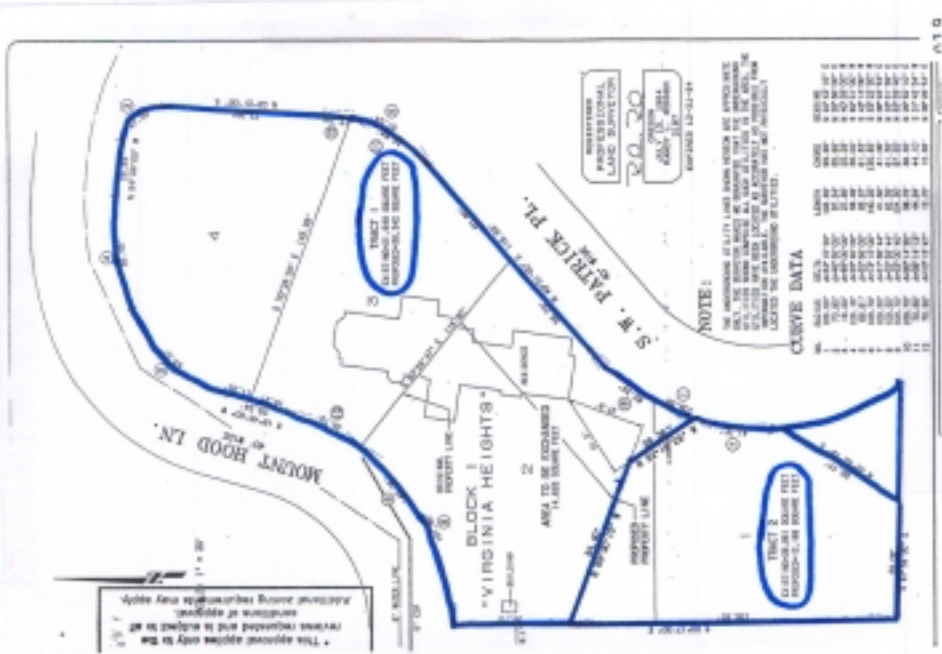
The subject property is made up of four existing lots and includes approximately 48,510 square feet, or a little more than an acre. The owner of the subject property wishes to reconfigure those lots into two tracts. Tract 1 would be approximately three times larger than Tract 2. We include two maps from the record on the following page to show the approximate configuration of the existing 4 lots and the planned reconfiguration into tracts 1 and 2.

As the maps on the next page show, there is an existing dwelling on lots 2 and 3. The northernmost lot (lot 4) and the southernmost lot (lot 1) are undeveloped. A small triangular portion of lot 1 was sold at some point in the past, but the dimensions of lots 2, 3 and 4 apparently have not changed since they were originally subdivided.

Tract 1 would include 36,342 square feet and would be made up of lot 4, lot 3, most of lot 2 and a small triangular portion of lot 1. The existing dwelling would remain on Tract 1. Tract 2 would include 12,168 square feet and would be made up of most of lot 1 and a part of lot 2. Apparently a new dwelling is to be built on Tract 2.



Existing Configuration



Configuration After Lot Line Adjustment

1 The property owner first sought to reconfigure the four lots through a minor partition.
2 That application was denied for reasons that are not relevant here. Record 8. The property
3 owner now plans to achieve the reconfiguration through a future lot line adjustment (hereafter
4 lot line relocation).¹ As we understand it, the property owner plans to relocate the existing lot
5 line separating lots 2 and 3 to create a new lot line that divides the property into Tract 1 and
6 Tract 2 as shown on the prior page.

7 The subject property is located in the Residential R-10 zone. The R-10 zone imposes
8 both minimum and maximum lot size requirements. The minimum lot size in the R-10 zone
9 is 6,000 square feet, and Tract 1 and Tract 2, as proposed, would meet this minimum lot size
10 requirement. The maximum lot size in the R-10 zone is 17,000 square feet. Tract 2 would
11 not exceed this maximum lot size requirement, but Tract 1 would. The city’s adjustment
12 procedure is used to allow approval of proposals that deviate from zoning ordinance
13 requirements. The adjustment that is the subject of this appeal was granted to allow a future
14 lot line relocation to create Tract 1, which will include 36,342 square feet.

15 **FIRST ASSIGNMENT OF ERROR**

16 As petitioners correctly note, the term “tract” is a defined term.
17 “Tract. A tract is a piece of land within a land division site that is not a lot, lot
18 of record, or a public right-of-way. Tracts have a specific purpose and limited
19 development potential. Examples of purposes of tracts include access, tree
20 preservation, and environmental resource.” Portland City Code (PCC)
21 33.910.030.
22 We understand petitioners to argue that because lots 3 and 4 are lots or lots of record, they
23 cannot constitute a “tract.”

24 The city responds that the planner who was responsible for this application
25 specifically addressed this issue and explained why the term “tract” was used to describe the

¹ We refer to the planned future lot line *adjustment* as a lot line *relocation* to avoid possible confusion with the maximum lot size adjustment decision that is before us in this appeal.

1 two units of land that will be produced by the anticipated reconfiguration. The planner chose
2 to refer to Tract 1 and Tract 2 as “Property 1” and “Property 2.” Petition for Review,
3 Appendix B, page 16. We understand the city to contend that even if the units of land that
4 the challenged decision refers to as Tracts 1 and 2 are not “tracts,” as PCC 33.910.030
5 defines that term, that erroneous labeling of those units of land does not provide a basis for
6 reversal or remand.

7 It may be that mislabeling units of land in an adjustment decision that would allow
8 one of those units of land to exceed the zoning maximum lot size could constitute an error
9 that warrants reversal or remand of the adjustment decision. However, we agree with the city
10 that petitioners make no attempt to explain why the labeling error, assuming it was error,
11 warrants reversal or remand in this case. Because petitioners present no basis for concluding
12 otherwise, we conclude that any error the city committed in referring to Tract 1 and Tract 2 as
13 “tracts” was harmless error and provides no basis for reversal or remand.²

14 The first assignment of error is denied.

15 **SECOND ASSIGNMENT OF ERROR**

16 Petitioners start their argument under this assignment of error by observing that the
17 17,000 square foot maximum lot size restriction applies to “lots.” As petitioners correctly
18 note, “[t]he provision to be adjusted is ‘maximum lot area.’” Petition for Review 5.
19 Petitioners appear to argue that what the challenged decision refers to as Tract 1 is neither a
20 “tract” nor a “lot.” We understand petitioners to argue that because Tract 1 is an aggregation
21 of lots, it is not a “lot,” as PCC 33.910 defines that term.³ Petitioners then argue:

² Petitioners made additional tract-related arguments to the city below that they do not present under their first assignment of error to us. Record 96-97. That may be because those arguments are only relevant if the city actually approves the anticipated lot line adjustments. In any event, because those arguments are not presented in the petition for review, we do not consider them.

³ PCC 33.910 defines “lot” as:

1 “* * * Were lot size restrictions applicable to aggregations of lots, then many
2 such aggregations would doubtless violate the ‘maximum lot area’ standard.
3 Furthermore, nothing in the context of the term ‘lot’ suggests that an applicant
4 may choose to have the term apply to aggregated lots.

5 “Because the [PCC] does not authorize an Adjustment to the maximum lot
6 area standard in this circumstance, the Decision violates and is prohibited by
7 applicable law and [LUBA] must reverse it.” Petition for Review 5-6.

8 We do not understand petitioners’ argument. If petitioners are arguing that Tract 2 is
9 not properly viewed as a lot and the 17,000 square foot maximum lot size only applies to lots,
10 then it would appear to follow that the disputed adjustment was unnecessary. If so, we fail to
11 see how it could possibly be more than harmless error to grant an adjustment to a legal
12 standard that does not apply.

13 The city reads petitioners’ second assignment of error to challenge the city’s authority
14 to grant an adjustment to the maximum lot size standard in advance of the future lot line
15 relocation decision that would create oversized Tract 1. Assuming the maximum lot size
16 standard applies to the unit of land that the decision refers to as Tract 1, an adjustment to that
17 standard is necessary. Granting that adjustment in advance of a decision that approves the lot
18 line relocation or relocations that will create proposed Tract 1 will avoid creating a tract that
19 violates the maximum lot size restriction. Petitioners offer no explanation for why it is error
20 to grant the adjustment prospectively, rather than contemporaneously with the anticipated lot
21 line relocation. As the city notes, nothing in PCC 33.805 prohibits prospective adjustments
22 to maximum lot size restrictions, to allow oversize lots to be created later.

23 The second assignment of error is denied.

“A * * * legally defined piece of land other than a tract that is the result of a land division.
This definition includes the State definition of both lot, (result of subdividing), and parcel,
(result of partitioning). See also, Ownership and Site.”

1 **THIRD ASSIGNMENT OF ERROR**

2 PCC 33.805.040 states that the applicant for an adjustment must demonstrate that
3 applicable approval criteria “have been met.” The relevant approval criterion in this case is
4 PCC 33.805.040(B), which as relevant requires “the proposal will not significantly detract
5 from the livability or appearance of the residential area * * *.”

6 The challenged decision finds

7 “[N]o new development is proposed or anticipated in the area of Tract 1. * * *
8 Therefore granting the Adjustment will have no impact on the livability or
9 appearance of the residential area.” Record 14.

10 **A. Improper Interpretation**

11 In their first subassignment of error, petitioners argue the city improperly interpreted
12 the term “proposal” in PCC 33.805.040(B) to include only “bricks and mortar” changes.
13 Petition for Review 7.

14 We do not understand petitioners’ first subassignment of error. Petitioners do not
15 identify any aspect of the “proposal” that they believe the city should have considered but did
16 not consider. Petitioners’ first subassignment of error provides no basis for reversal or
17 remand.

18 **B. Failure to Consider the Impact of the Tract 2 Building Site**

19 The ultimate goal of the property owner is to create Tract 2 as a new building site at
20 the south end of the property. Petitioners contend that the city erred by not requiring that the
21 property owner, in addressing PCC 33.805.040(B), also “evaluate the effect that an additional
22 building site may have on the livability and appearance of the residential area around the
23 Site.” Petition for Review 7-8.

24 The potential new building site (Tract 2) is not created by the appealed adjustment. In
25 fact, the adjustment is required because Tract 1 is too large and, as far as we can tell, the
26 adjustment has nothing to do with Tract 2. Because the adjustment does not create Tract 2 or
27 authorize Tract 2 as a building site, we agree with the city that it was not required under PCC

1 33.805.040(B) to address any impacts that might be associated with a future property line
2 relocation that would create Tract 2 or any impact of residential development of that building
3 site if Tract 2 is created in the future. What the city was required to address under PCC
4 33.805.040(B) was whether allowing Tract 1 to be larger than 17,000 square feet will
5 “significantly detract from the livability or appearance of the residential area.” The city
6 found that it would not. Other than their arguments concerning Tract 2, petitioners present
7 no challenge to the city’s finding that allowing oversized Tract 1 is consistent with PCC
8 33.805.040(B). The fact that the disputed adjustment may have the indirect effect of making
9 it possible to create Tract 2 in the future does not mean that the disputed adjustment itself
10 creates Tract 2 or that the potential adverse impacts of Tract 2, if it is created in the future,
11 must be addressed in the challenged adjustment for Tract 1 under PCC 33.805.040(B).

12 The third assignment of error is denied.

13 The city’s decision is affirmed.