BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

JANICE E. JACKSON,
Petitioner,

vs.

CITY OF PORTLAND,
Respondent.

LUBA No. 2006-214

FINAL OPINION
AND ORDER

Appeal from City of Portland.

Janice E. Jackson, Portland, filed the petition for review and argued on her own behalf.

Linly F. Rees, Deputy City Attorney, Portland, filed the response brief and argued on behalf of respondent.

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

REVERSED 04/24/2007

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 zoning confirmation letter, in which a city planner determines that a portion of a platted lot is not a "legal lot" or a "lot of record" as those terms are used in the Portland Zoning Code.

REPLY BRIEF

Petitioner moves for permission to file a reply brief. The reply brief that accompanied petitioner's motion is not limited to new matters, as required by OAR 661-010-0039. Therefore, petitioner's motion is denied.

FACTS

This appeal concerns lots 5 and 6 of Block Four of Leone Park subdivision (hereafter lots 5 and 6). The Leone Park subdivision plat was recorded many decades ago, long before the city regulated subdivisions or partitions. Lots 5 and 6 are owned by the estate of petitioner's mother. We describe below some of the conveyances of lots 5 and 6 and nearby lots that preceded the acquisition of lots 5 and 6 by petitioner's parents.

1. Leone Park subdivision plat is recorded, and lots 5 and 6 are created.

2. In a single deed, dated 1944, the Mutches convey lots 5 and 6 to the Waltons.[1]

3. In a single deed, dated 1952, the Waltons convey lots 5, 6 and 7 to the Tolkstads.[2]

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[1] The deed includes the following description of the conveyed property:

> "All of Lots Five & Six (5 & 6), Block FOUR Leone Park, in the City of Portland, County of Multnomah, State of Oregon, according to the duly recorded map or plat thereof." Record 20.

[2] The deed includes the following description of the conveyed property:

> "Lots Five (5), Six (6) and Seven (7) in Block Four (4) LEONE PARK, within the corporate limits of the City of Portland, County of Multnomah and State of Oregon." Record 22.

4. In a single deed, dated 1953, the Tolkstads convey lot 7 and the south five feet of lot 6 to the Rushes.[3]

5. In a land sale contract, dated 1962, petitioners' parents (Jacksons) agreed to purchase lot 5 and all but the southern five feet of lot 6.[4]

6. In a single deed, dated 1974, the Tolkstads' successor conveyed to the Jacksons legal title to lot 5 and all but the southern five feet of Lot 6.[5]

Since the 1940s, lots 5 and 6 have been treated as separate lots for property tax purposes. After petitioner's parents acquired those lots, they received separate property tax bills for lot 5 and all but the southern five feet of lot 6.

Lot 5 is improved with a house that was constructed in 1912; lot 6 is vacant and always has been vacant. Petitioner sought city verification that lot 6 could be developed. The answer to that question turns on whether lot 6 qualifies as a "legal lot" or a "lot of record," as the Portland Zoning Code defines those terms. The city concluded that lot 6 does not qualify as either a "legal lot" or a "lot of record." Petitioner argues that lot 6 qualifies as both a "legal lot" and a "lot of record.' For the reasons explained below, we agree with the city that lot 6 does not qualify as a "legal lot," but we find that the city erred in concluding that lot 6 does not qualify as a "lot of record."

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[3] The deed includes the following description of the conveyed property:

> "Lot Seven (7) and the South Five (5) feet of Lot Six (6) in Block Four (4), Leone Park." Record 24.

[4] The land sale contract includes the following description of the property:

> "Lots 5 and 6, except the South 5 feet, Block 4, LEONE PARK, in the City of Portland, County of Multnomah and State of Oregon." Record 25.

[5] The deed includes the following description of the conveyed property:

> "Lot 6, except the south 5 feet, and all of Lot 5, Block 4, LEONE PARK, in the City of Portland, Multnomah County, Oregon." Record 26.

FIRST ASSIGNMENT OF ERROR

In her first assignment of error, petitioner challenges the city's finding that lot 6 does not qualify as a "legal lot." Under Portland City Code (PCC) 33.110.212(C)(3), primary structures, including single family dwellings, are allowed as follows:

> "On lots or combinations of lots created before July 26, 1979 that meet the requirements of this paragraph, and on lots of record or combinations of lots of record that meet the requirements of this paragraph. The requirements are:
>
> "* * * * *
>
> "b. In the R5 zone the *lot*, *lot of record*, or combination of lots or lots of record must meet one of the following:
>
> "(1) Be at least 36 feet wide, measured at the minimum front building setback line, and be at least 3000 square feet;
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> "(2) Have been under a separate tax account from abutting lots or lots of record on November 15, 2003;
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> "(3) Have had an application filed with the City before November 15, 2003 to authorize a separate tax account and have been under a separate tax account from abutting lots by November 15, 2004; or
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> "(4) Have not had a dwelling unit on it since September 10, 2003, or for at least five years, and not have any portion in an environmental overlay zone." (Emphasis added).

There is no dispute that lot 6 satisfies at least one of the PCC 33.110.212(C)(3)(b)(1) through (4) criteria. Therefore, lot 6 qualifies for a primary structure if it is a "lot" or a "lot of record." Whether lot 6 qualifies as a "lot" is governed by PCC 33.700.130(A).[6] The

[6] As relevant, PCC 33.700.130(A) provides:

> "A lot shown on a recorded plat remains a legal lot except as follows:
>
> "1. The plat has been vacated as provided by City Code;
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> "2. The lot has been further divided, or consolidated, as specified in the 600 series of chapters in this Title, or as allowed by the former Title 34;

Leone Park subdivision plat has not been vacated and lot 6 was not divided or consolidated under PCC Chapter 33 Division 600 or former Title 34. Therefore, PCC 33.700.130(A)(1) and (2) do not apply. But it is undisputed that lot 6, as originally platted in the Leone Park subdivision, is "no longer whole." However, petitioner argues that the larger portion of lot 6 that remained after the southern five feet of lot 6 were conveyed to the Rushes in 1953 along with lot 7 is not properly viewed as a "remnant."

Under PCC 33.910.030, where the Portland Zoning Code does not define a word, it has its "normal dictionary meaning." Webster's Third New International Dictionary includes the following definition of "remnant:" "**1:** a usu. small part, member, or trace remaining * * *: REMAINDER, REST * * *: SURVIVOR[.]" Webster's Third New Intern'l Dictionary, 1921 (unabridged ed 1981).[7] Petitioner cites other dictionary definitions of the words "remnant" and "remainder" that lend some support to her position that the word "remnant" often is used to refer to a small portion of something that remains after a larger part has been taken away. From these definitions, we understand petitioner to argue that where a legal lot has been divided into a large part and a small part so that it is "no longer whole," only the part of the former whole that is *small* qualifies as a remnant that is no longer considered a "legal lot," while the *large* part of the former whole remain a "legal lot." We reject the argument. That distinction is certainly not required by the suggestions in the cited definitions that remnants are usually small. We believe the reference to remnants in PCC 33.700.130(A)(3) is to all of the parts that the original "whole" lot has been divided into. Those divided portions of the original "whole" will always be *smaller* than the original

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> "3. The lot as originally platted *is no longer whole and consists of individual property remnants*. These remnants are not considered legal lots. However, they may still be considered lots of record. See the definition of 'lot of record' in Chapter 33.910, Definitions." (Emphasis added).

[7] That dictionary includes the following relevant definition of "remainder:" "**2 a** : a remaining group, part or trace: REST[.]" *Id*. at 1919.

"whole," even though individual remnants may be larger than other remnants. The reference in PCC 33.700.130(A)(3) to "remnants" was not intended to distinguish between parts of the former whole that are large and parts of the former whole that are small or to disqualify only small parts as lots of record while leaving large parts of the whole as lots of record. If the city had intended to make such a distinction, it would have done more than simply describe the disqualified parts of the whole as "remnants."

The first assignment of error is denied.

SECOND ASSIGNMENT OF ERROR

As previously noted, PCC 33.110.212(C)(3)(b) authorizes a primary structure on lot 6 if it qualifies as a "lot of record," even if it is a "remnant" and thus not does not qualify as a "legal lot." PCC 33.910 includes the following definition of "lot of record."

> "**Lot of Record.** A lot of record is a plot of land:[8]
>
> "[(a)] Which was not created through an approved subdivision or partition;
>
> "[(b)] Which was created and recorded before July 26, 1979; and
>
> "[(c)] For which the deed, or other instrument dividing the land, is recorded with the appropriate county recorder."

Under the above definition, there are three requirements to qualify as a lot of record. First, the lot of record must not have been created by an approved subdivision or partition. Second, the lot of record must have been created and recorded before July 26, 1979. Third, the deed or other instrument that divided land to create the lot of record must be recorded in the appropriate county.

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[8] PCC 33.910 includes the following definition of "plot:"

> "A piece of land created by a partition, subdivision, deed, or other instrument recorded with the appropriate county recorder. This includes a lot, a lot of record, a tract, or a piece of land created through other methods."

The relevant part of the challenged decision, in which the city concludes that lot 6 is not a lot of record, is made up of four sentences. We set those four sentences out below:

> "(1) The northerly 41.25 feet of Lot 6 was not created through an approved subdivision or partition. (2) *This lot remnant was created before July 26, 1979,* but the deed history indicates that this portion of Lot 6 has always been conveyed together Lot 5 as a single unit of property. (3) The legal descriptions in the deeds you provided always include this portion of Lot 6 in the same sentence as Lot 5, effectively describing the two together as a single unit. (4) The deed history therefore does not clearly establish this remnant of Lot 6 as a lot of record." Record 2 (emphasis and sentence numbers added).

In the first sentence, the city planner clearly found that part (a) of the definition is satisfied. The next three sentences seem to assume that the recordation requirements in subsections (b) and (c) are met. There is a specific reference to those deeds in the third sentence. The deeds are in the record and all of them indicate that the deeds were recorded in the Multnomah County land records. The only remaining question that needs to be answered affirmatively for current lot 6 to qualify as a lot of record under PCC 33.910 is that lot 6 must have been "created before July 16, 1979." The first clause of the second sentence states "This lot remnant was created before July 26, 1979 * * *." Lot 6, in its current configuration, came into existence, at the latest, when the Tolkstads' successor conveyed legal title to lot 5 and all but the southern five feet of Lot 6 to the petitioner's parents in 1974. Lot 6 in its current configuration came into existence before July 26, 1979, and based on the above definition, would appear to qualify as a "lot of record."

Notwithstanding the first clause of the second sentence, the balance of that sentence and the last two sentences appear to take the opposite position, *e.g,*. that current lot 6 was not created before July 16, 1979. The only legal theory offered for this opposite conclusion is that "Lot 6 has always been conveyed together with Lot 5 as a single unit of property." The only cited support for that theory is set out in the third sentence, which states "[t]he legal descriptions in the deeds you provided always include this portion of Lot 6 in the same

sentence as Lot 5, effectively describing the two together as a single unit of land." (Emphasis added).

We put aside the inconsistency between the first clause of the second sentence and the balance of the decision and assume the city planner intended to say that new lot 6 does not qualify as a lot of record because it was not created before July 26, 1979. However, we reject the only reason the planner gave for concluding that new lot 6 was not created before July 26, 1979. The description of new lot 6 "in the same sentence as Lot 5" does not, as the decision maker concluded, "effectively describ[e] the two together as a single unit." As the text from earlier deeds makes clear, it is not unusual to transfer multiple lots in a single deed that describes more than one lot in a single sentence. *See* ns 1, 2, 3 and 5. Absent some expression of intent that separately listed lots or parcels are to be merged into a single unit of land, the listing of multiple lots or parcels in a single paragraph or sentence does not operate to merge those lots or parcels into a single unit of land. That is certainly the case today under ORS 92.017.[9] And even before ORS 92.017 was adopted in 1985, the city cites no authority for the proposition that listing several lots or parcels or portions of lots or parcels in a single sentence in a pre-1985 deed, as opposed to listing them in separate sentences, operated to merge those lots, parcels or portions of lots or parcels into a single unit of land. We are aware of no such authority.

Finally, the city suggests in its brief that while a land sale contract or deed that separately identifies lot 5 and the larger portion of original lot 6 in the same sentence might be sufficient to create new lot 6 or separately transfer new lot 6 as a matter of real property law, it is within the city's discretion to interpret the word "created" in the definition of "lot of record" in PCC 33.910 to require that lots that are created by deed must be described in

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[9] ORS 92.017 provides:

> "A lot or parcel lawfully created shall remain a discrete lot or parcel, unless the lot or parcel lines are vacated or the lot or parcel is further divided, as provided by law."

separate sentences. We do not agree. First of all, the interpretation the city advocates in its brief is simply not stated in the city planner's decision that is before us in this appeal. More importantly, there is absolutely no textual or contextual support for such a novel interpretation of the word "created." If the city wishes to assign such novel legal significance to the choice of syntax in a deed, it must amend the PCC 33.910 definition of "lot of record" to state that principle. The words in the current definition cannot be interpreted to state such a principle.

The second assignment of error is sustained.

The city's decision is reversed.