BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

RAYMOND L. PORTER,
Petitioner,

vs.

MARION COUNTY,
Respondent,

and

BOB FRITZ,
Intervenor-Respondent.

LUBA No. 2007-227

FINAL OPINION
AND ORDER

Appeal from Marion County.

Norman R. Hill, Salem, filed the petition for review and argued on behalf of petitioner. With him on the brief was Martinis & Hill.

Jane Ellen Stonecipher, County Counsel, Salem, filed a joint response brief and argued on behalf of respondent. With her on the brief were Wallace W. Lien and Wallace W. Lien, P.C.

Wallace W. Lien, Salem, filed a joint response brief and argued on behalf of intervenor-respondent. With him on the brief were Jane Ellen Stonecipher and Wallace W. Lien, P.C.

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

AFFIRMED 05/22/2008

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

Opinion by Ryan.

NATURE OF THE DECISION

Petitioner appeals a decision by the county determining that a 1.5 acre parcel is a nonconforming Lot of Record under Marion County Rural Zoning Ordinance (RZO) 114.040.

MOTION TO INTERVENE

Bob Fritz, the applicant below, moves intervene on the side of respondent in the appeal. There is no opposition to the motion, and it is granted.

REPLY BRIEF

Petitioner moves to file a reply brief. There is no opposition to the reply brief, and it is allowed.[1]

FACTS

Intervenor applied to the county for administrative review to determine whether a 1.5-acre parcel (Tax Lot 1100) that is zoned Acreage-Residential 3 (AR-3) is a nonconforming lot of record under Marion County Rural Zoning Ordinance (RZO) 114.040. If Tax Lot 1100 is a nonconforming lot of record, intervenor intends to build a dwelling on the property. Record 114. Although the AR-3 zone requires a minimum parcel size of 3 acres, if Tax Lot 1100 is a nonconforming lot of record, then a dwelling is allowed, notwithstanding that Tax Lot 1100 is smaller than the minimum parcel size. The planning department approved the application, and petitioner appealed the approval to the hearings officer. The hearings officer reversed the planning department's approval, and intervenor appealed that decision to the county board of commissioners. The board of commissioners

[1] We note that the reply brief exceeds the five page limit set forth in OAR 661-010-0039 by four pages, and was not accompanied by a request from petitioner to file a reply brief that exceeds five pages or any explanation from petitioner regarding the brief's lack of compliance with that rule. Except as discussed in our resolution of the sixth through ninth assignments of error, we allow the reply brief.

reversed the decision of the hearings officer and approved the application. This appeal followed.

FIRST THROUGH FIFTH ASSIGNMENTS OF ERROR

A description of the history of the creation and subsequent transfers of Tax Lot 1100 is necessary in order to understand both the subject application and the county's decision. Tax Lot 1100 was originally part of a larger approximately 72 acre property owned by Hays. Record 100, 112. In 1975, Hays conveyed Tax Lot 1100 together with an adjacent 1.5 acre parcel (Tax Lot 1200) and a third adjacent parcel to Gallinger. That 1975 deed first described Tax Lot 1100 as a separate parcel, and we understand the county to have found that the 1975 conveyance created Tax Lot 1100 as a separate parcel. It is unclear whether the county's code required county approval to create Tax Lot 1100 in 1975.[2] In 1976, Gallinger conveyed all three parcels to Fritz, the current owner. In 2007, Fritz applied for an administrative review of the status of Tax Lot 1100, claiming that under RZO 114.040, Tax Lot 1100 is a "non-conforming lot of record."

In the first through fifth assignments of error, petitioner challenges the county's determination Tax Lot 1100 is a non-conforming legal lot under RZO 114.040, which provides:

> **"NONCONFORMING LOTS OF RECORD**. Notwithstanding Section 110.680, *supra.* and Chapter 172, those lots or parcels that were not created in conformance with the applicable laws and regulations pertaining to division of land at the time they were created, but meet all of the following standards will be considered nonconforming legal lots.
>
> (a) Prior to January 5, 2000, a lot or parcel created between August 8, 1962 and September 1, 1977, that has been transferred by a recorded deed or contract into an ownership separate from the lot or parcel from which it was separated and has remained in separate ownership since that transfer; and

[2] The hearings officer explained that the county's first subdivision ordinance took effect on August 8, 1962, and that September 1, 1977 is the date that the county first regulated all land divisions, including partitions. Record 66.

(b) The subject lot or parcel has not been combined with a contiguous lot or parcel by a recorded deed or contract; and

(c) There is no record of a land use action or building permit issued based upon or requiring combination of the lot or parcel with contiguous lot(s) or parcel(s) for land use purposes, and there is no record of a land use decision denying a partition."

In the combined argument in support of these assignments of error, petitioner first argues that the county failed to find that the application satisfied RZO 114.040(b). Petitioner argues that Hays' transfer of Tax Lot 1100 together with Tax Lot 1200 and a third adjacent parcel to Gallinger in 1975 had the effect of combining Tax Lot 1100 with Tax Lot 1200 by deed, so that RZO 114.040(b) is not satisfied.

The county and intervenor (respondent) respond that the county found that Tax Lot 1100 has not been combined with a contiguous parcel. Respondent points to the county's finding that even though Tax Lot 1100 and Tax Lot 1200 are contiguous, the 1975 deed conveying the properties from Hays to Gallinger, and every other deed conveying the properties thereafter have always described the parcels as separate parcels of land.[3] Respondent also explains that RZO 114.040(b) should be read together with RZO 114.040(c), which requires review of land use actions and building permits that might have required combination of the parcels to ensure that such a combination has not occurred, and that the county found that such a combination has not occurred. We agree with respondent

[3] The county found:

"* * * Tax Lot 1100 was described by separate legal description on a deed as far back as October 16, 1975 * * * when * * * Hays sold it to * * * Gallinger. * * * Fritz purchased the subject property from the Gallingers on November 22, 1976.

"Both pieces [Tax Lot 1200 and Tax Lot 1100] since they were first described in 1967 (tax lot 1200) and 1975 (tax lot 1100), have been described on deeds as separate parcels. They have also never been recombined with the larger tract from which they were separated (a parcel of approximately 72 acres in size comprising numerous tax lots in the area). * * * There is no evidence in the building permit or planning records which indicate that the properties were combined for the purposes of a building permit or land use decision. Tax lots 1100 and 1200 meet the criteria for non-conforming lots of record described above and are, therefore, separate, legal parcels." Record 3.

that Tax Lot 1100 has not been combined with a contiguous parcel, and that the evidence supports the county's finding to that effect.

In the combined argument in support of these assignments of error, petitioner also argues that the county cannot employ RZO 114.040 to recognize Tax Lot 1100 as a separate legal lot, because RZO 114.040 is inconsistent with ORS 92.012. ORS 92.012 provides that "[n]o land may be subdivided or partitioned except in accordance with ORS 92.010 to 92.190." Petitioner asserts that ORS 92.010 to ORS 92.190 provide a mandatory framework for partitions and subdivisions. Further, petitioner cites ORS 92.046(5), which requires in part that a partition tentative plan must comply with the requirements for a partition. Petitioner argues that the county's attempt to find Tax Lot 1100 to be a nonconforming legal lot without requiring compliance with the provisions of ORS 92.010 to ORS 92.190 violates those statutes.

Respondent answers initially that petitioner's argument is an impermissible collateral attack on the current version of RZO 114.040, which became effective in 2002 and was not appealed. Respondent notes that the ordinance was deemed acknowledged under ORS 197.625, and argues that petitioner cannot now argue that the ordinance is inconsistent with state law.[4] We disagree with respondent that the acknowledged status of RZO 114.040 means that it is immune from an as-applied challenge based on alleged inconsistency with a statute. Acknowledgement under ORS 197.625 means only that the ordinance is deemed to comply with the Statewide Planning Goals. Where an acknowledged zoning ordinance

[4] ORS 197.625(1) provides in relevant part:

> "If a notice of intent to appeal is not filed within the 21-day period set out in ORS 197.830 (9), the amendment to the acknowledged comprehensive plan or land use regulation or the new land use regulation shall be considered acknowledged upon the expiration of the 21-day period. * * *"

provision conflicts with a statutory requirement, the statutory requirement prevails. *Kenagy v. Benton County*, 115 Or App 131, 136, 838 P2d 1076 (1992).

In support of his argument, petitioner cites *Stevens v. Jackson County*, 47 Or LUBA 381 (2004). In *Stevens*, the petitioner challenged Jackson County's adoption of an ordinance that provided that lots and parcels established prior to 1989 by any of five listed methods were considered "separate lots" at the time they were created. *Id*. at 399. Based on the petitioner's arguments, the county conceded that in 1989 and for several years prior to 1989 county approval was required in order to create a new lot or parcel. We remanded the decision in order for the county to clarify that its intent in adopting the ordinance was to recognize only lots or parcels established by one of the five listed methods prior to the adoption of county laws that required county approval. We noted one problem with the county's ordinance was that it appeared to allow the county to find that lots or parcels were "created" as of the dates they were illegally formed, and that appeared to be inconsistent with some statutes and rules that are concerned with the date that lots or parcels are lawfully created. *Id*. at 402. In the present case, however, petitioner has not identified any applicable statute or rule that places any significance on the date that Tax Lot 1100 was lawfully created, for purposes of building a dwelling on that parcel.

The problem with the remainder of petitioner's argument is that the statutes cited by petitioner require compliance with ORS 92.010 to 92.190 in the creation of *new* parcels and lots, and petitioner has identified no provision in ORS 92.010 to ORS 92.190 that expressly forecloses the county from applying RZO 114.040 to determine after Tax Lot 1100 was created that Tax Lot 1100 constitutes a nonconforming legal lot. There is no explicit prohibition in the statutes cited by petitioner preventing the county from making a determination regarding the legal or illegal status of lots or parcels that were not created in

conformance with applicable county laws and regulations at the time they were initially created.[5]

Absent a more focused argument from petitioner regarding how the county's action violates state law, petitioner arguments under these assignments of error provide no basis for reversal or remand of the decision.[6]

The first through fifth assignments of error are denied.

SIXTH THROUGH NINTH ASSIGNMENTS OF ERROR

In these assignments of error, petitioner challenges the county's determination that under RZO 110.800 a private road could serve Tax Lot 1100 because the parcel was created prior to May 1, 1977. Because petitioner makes a combined argument in support of the four assignments of error, we address them together.

RZO 110.800 provides in relevant part:

> "* * * A private drive shall not serve more than 4 dwelling units unless the parcels, on which those units are proposed to be placed, were established with the approval of the Marion County Planning Commission or Hearings Officer in accordance with state law and Marion County Ordinances, prior to May 1, 1977, or were approved under Chapter 121, Planned Development."

The county found in relevant part:

> "Chapter 110.800 provides a standard maximum of four dwelling units being served by an easement unless one of three exceptions to the standard apply: (1) the parcels were established with the approval of the Marion County

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[5] We note that, although not cited by petitioner, ORS 92.018 appears to embody one remedy that the legislature created for buyers of lots and parcels that are not created in conformance with applicable subdivision or partition regulations – rescission or damages. In addition, we note that ORS 92.176, which took effect January 1, 2008, provides that the county may approve an application to validate a unit of land created by a sale that did not comply with applicable criteria if, among other things, the unit of land could have complied with applicable criteria when it was sold. Because petitioner makes no cognizable argument regarding how these statutes might apply in the present appeal, we need not and do not decide in the present case whether those statutes, read together, support a conclusion that in enacting ORS 92.010 to 92.190 the legislature intended to preclude or prohibit additional local government remedies for legally recognizing lots or parcels that were not created in conformance with applicable laws at the time the lot or parcel was first created.

[6] Because we do not sustain these assignments of error, we need not address respondent's argument that ORS 197.763(1) and ORS 197.835(3) preclude petitioner from raising the issues raised in these assignments of error.

> Planning Commission or Hearings Officer in accordance with State law and Marion County ordinances, (2) the parcels were established prior to May 1, 1977, or (3) the parcels were approved under Chapter 121, Planned Development. In this case, both of the parcels were created prior to May 1, 1977 and, therefore, would be exempt from the maximum of four dwellings being served off of Hays Lane. A new dwelling could be established on tax lot 1100 under this exemption. * * *" Record 4.

The county concluded that since Tax Lot 1100 was created prior to May 1, 1977, it was exempt from the four dwelling limit. In so finding, the county interpreted RZO 110.800 as providing three separate exceptions to the four dwelling limit. The second of those exceptions is "for parcels created prior to May 1, 1977." Petitioner does not assign error to the county's interpretation of RZO 110.800 in the petition for review, but rather argues in the petition for review that the county erred in concluding that Tax Lot 1100 was created prior to May 1, 1977, and restates the arguments made in support of the first through fifth assignments of error. As discussed above, we have already rejected petitioner's challenges to the county's conclusion that Tax Lot 1100 was created prior to 1977.

In the reply brief, petitioner attempts for the first time to assign error to the county's interpretation of RZO 110.800 as providing three, rather than two, exceptions to the four dwelling limit. We will not consider assignments of error that are raised for the first time in a reply brief. Therefore, we disregard Page 6 line 22 to Page 8 line 13 of the reply brief. Accordingly, these assignments of error provide no basis for reversal or remand of the decision.[7]

The sixth through ninth assignments of error are denied.

The county's decision is affirmed.

[7] Because we do not sustain these assignments of error, we need not address respondent's argument that ORS 197.763(1) and ORS 197.835(3) preclude petitioner from raising the issue raised in these assignments of error.