BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

KENNETH A. THOMAS,
Petitioner,

vs.

WASCO COUNTY,
Respondent.

LUBA No. 2008-206

FINAL OPINION
AND ORDER

Appeal from Wasco County.

Michael J. Lilly, Portland, filed the petition for review and argued on behalf of petitioner.

Victor W. VanKoten, Hood River, filed the response brief and argued on behalf of respondent. With him on the brief were Wilford K. Carey and Annala, Carey, Baker, Thompson & VanKoten, P.C.

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

HOLSTUN, Board Member, concurring.

REMANDED 03/03/2009

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

Opinion by Bassham.

NATURE OF THE DECISION

Petitioner appeals a legislative decision adopting text amendments to the county's zoning code.

ASSIGNMENT OF ERROR

Among other changes, the challenged decision amends section 13.040 of the Wasco County Zoning Ordinance (WCZO), to provide that certain contiguous legal lots and parcels that are nonconforming in size and that are "consolidated onto a single deed at any time" are thereby deemed "consolidated for development purposes," with certain exceptions.[1] The

[1] WCZO 13.040(B) is part of the county's regulations concerning nonconforming legal parcels, and provides, in relevant part:

> "Properties Consolidated for Development Purposes
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> "1. Unless they meet the criteria in subsection 2 below, contiguous properties created solely by deed prior to 4 September 1974 consolidated onto a single deed at any time shall be considered one (1) property for development purposes. Any properties sold and in separate ownership after being consolidated onto a single deed shall still meet the definition of a legal parcel but shall not be separately developable unless they meet the criteria in subsection 2 below. Any properties in an agricultural or forest zone that are considered consolidated for development purposes shall retain the date of creation when the earliest deed was filed to allow for lot of record or non-farm dwelling application.
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> "2. Contiguous properties created solely by deed prior to 4 September 1974 consolidated onto a single deed at any time shall be considered separate for development purposes if they meet either a, b, or c below.
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> "a. Each property meets the current minimum lot size of the zone or a combination of properties meet the minimum lot size of the zone.
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> "b. All of the deeds listing the properties included separate metes and bounds descriptions with a separate heading e.g., parcel 1, parcel 2. A separate metes and bounds description without a separate heading shall result in the properties being considered consolidated for development purposes.
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> "c. More than one of the properties has been legally, residentially developed. However any properties not residentially developed less than the minimum lot size will still be considered to be consolidated for development purposes with one of the properties residentially developed."

main question petitioner presents in this appeal is whether WCZO 13.040 is inconsistent with ORS 92.017. That statute, adopted in 1985, 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."

Petitioner recognizes that in *Kishpaugh v. Clackamas County*, 24 Or LUBA 164 (1992), we held that a county land use regulation that for development purposes required combination of substandard lots under the same ownership was not inconsistent with ORS 92.017. We concluded in *Kishpaugh*:

> "The text of ORS 92.017, and its legislative history, make it clear that the functions of ORS 92.017 were (1) to prevent local governments from refusing to recognize lawful divisions of land such that lots and parcels could not be sold to third parties, and (2) to establish that the property lines established by such land divisions remain inviolate, absent the employment of a specific process to eliminate such property lines.
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> "* * * * *
>
> "Nothing in either the text of ORS 92.017 or its legislative history suggests that all lawfully created lots and parcels must be recognized by local governments as being separately developable. In fact, the legislative history * * * makes it reasonably clear that the developability of such lots and parcels is to be determined with reference to planning and zoning standards. Accordingly, the county's determination that tax lots 404 and 405 are not separately developable * * * does not offend ORS 92.017." *Id.* at 172-73.

See also Campbell v. Multnomah County, 25 Or LUBA 479, 482 (1993) (ORS 92.017 does not preclude a local government from imposing zoning or other restrictions which directly or indirectly require that two or more lawfully created lots be combined for purposes of development).

Petitioner urges us, however, to reconsider and overrule *Kishpaugh* and adopt a more expansive view of ORS 92.017. According to petitioner, the irreducible essence of a lot or a parcel is that it is created and intended for development or other productive use, separate and distinct from other units of land. Because the legal significance of a lot or parcel is based on its discrete development or use potential, we understand petitioner to argue, the ORS 92.017

prohibition on consolidating discrete lots or parcels necessarily must be read to also prohibit the county from requiring that lots or parcels be consolidated for "development purposes." Petitioner notes that the WCZO defines "development" in very broad terms to include "any man made changes," potentially encompassing almost all productive use of land.

The county responds that the Board in *Kishpaugh* conducted a thorough analysis of the text and legislative history of ORS 92.017, and correctly concluded that the statute was intended to preserve discrete lots or parcels, not to ensure that each discrete lot or parcel is separately developable.

Petitioner has not persuaded us that *Kishpaugh* and *Campbell* were wrongly decided. Petitioner cites to no different text, context or legislative history supporting his preferred interpretation of ORS 92.017, nor provides a compelling reason for us to overrule the holding in those cases that ORS 92.017 does not preclude a local government from applying otherwise valid zoning regulations that require that contiguous nonconforming lots be combined for purposes of development. Accordingly, we adhere to that holding.

Kishpaugh and *Campbell* presume, however, that the local zoning regulation that requires consolidation of lots for development purposes serves a legitimate planning purpose and achieves that purpose in a permissible manner. As a final point, petitioner argues that a critical feature of WCZO 13.040(B) is that whether or not it applies to require consolidation depends on the specific language of the deeds that, at some point in time, transferred contiguous lots by a single deed. Petitioner notes that WCZO 13.040(B)(2)(b) includes an exception allowing separate development if "[a]ll of the deeds listing the properties included separate metes and bounds descriptions with a separate heading e.g., parcel 1, parcel 2." *See* n 1. If a single deed sets out a separate metes and bounds description for each parcel, but does not set out a separate heading, the result is that all the parcels that are described in the deed must be consolidated for development purposes. *Id.* Petitioner argues that the consolidation scheme is apparently built on the county's presumptions regarding the

grantor's intent, and the county uses that presumed intent as the basis for determining whether to consolidate the lots, for purposes of development, or to allow each lot to be developed separately. We understand petitioner to argue, however, that it is impermissible to declare that a lot or parcel has lost all integral development rights based solely on the presence or absence of headings in a deed, or a presumption regarding the grantor's intent.

We agree with petitioner that, while the county almost certainly has a legitimate planning interest in encouraging the consolidation of substandard size lots for development purposes, the method it has employed in adopting WCZO 13.040(B) appears to employ an arbitrary and illegitimate means to achieve that purpose. The code provisions at issue in *Kishpaugh* and *Campbell* did not turn on deeds or the particular language of deeds, and the circumstances presented in those cases involved substandard size properties that were in common ownership at the time of the county's decision. In contrast, under WCZO 13.040(B), consolidation of properties for development purposes is based on whether those properties were at one time transferred on a single deed, and whether or not properties must be consolidated for development purposes depends in part on the specific language of those deeds. Further, WCZO 13.040(B) applies whether or not the affected properties are now separately owned. There are, it seems to us, several problems with the county's approach under WCZO 13.040(B).

First, the deeds to which WCZO 13.040(B) will be applied are likely to have been written at a time when there was no general understanding that transferring more than one property in a single deed or failure to use separate headings or certain words in a deed that conveys more than one property would later result in a requirement that the properties transferred be developed together rather than separately. We agree with petitioner that placing dispositive significance on the presence or absence of separate headings in a deed, for example, appears to be arbitrary. We do not understand why the county believes that a deed that transferred five properties with separate metes and bounds property descriptions,

but no separate headings, should result in all five properties being consolidated for development purposes but a deed that is identical except for the inclusion of separate headings escapes consolidation.

Although it is not clear, the distinctions the county draws between deeds with separate headings and those without, and between deeds with separate property descriptions and those without, may be an attempt to discern and give effect to what the county presumes is the grantor's intent. The county may presume that if the deed includes separate headings, for example, the grantor intended that each property be separately developable, but if not, the grantor intended that all the transferred properties be consolidated for development purposes. However, if that is basis for the distinctions the county has codified in WCZO 13.040(B), that basis also seems arbitrary and illegitimate. Nothing in the record or the county's brief explains why the county believes that giving effect to the grantor's presumed intent in transferring property has anything to do with furthering a legitimate land use planning objective. The effect of the grantor's intent in transferring property is a matter of real estate law, and there is no obvious connection to any county land use planning objective. Further, the grantor's intent in transferring property by deed is a question of fact in any particular case, that can be finally resolved only by a judicial court. In most cases, the grantor's actual intent, if any, in transferring multiple contiguous properties regarding whether or not those properties should be "consolidated" for development purposes will not be evident from the face of the deed, and judicial interpretation would be necessary to reach a final determination regarding intent. Finally, in any case, it is highly unlikely in any circumstance where WCZO 13.040(B) would be applied that the grantor formed any intent, one way or another, regarding the future development of the properties transferred. For these reasons, if the distinctions drawn by WCZO 13.040(B) are based on the county's attempt to give effect to

the grantor's presumed intent, that approach appears to have no relation to a legitimate planning objective.[2]

In sum, the county's apparent objective in encouraging the consolidation of substandard size lots for development purposes almost certainly serves a legitimate planning objective. There are a number of methods that the county can adopt to further that objective that are not based on deeds or the specific language of deeds. A relatively straightforward way would be to adopt code language that simply prohibits development of substandard size lots or parcels, with whatever exceptions the county deems appropriate. However, if the county continues to base its approach for consolidation of substandard size properties on the examination of deeds, the county must identify some legal basis for the distinctions it draws, such that future development rights do not hinge on apparently arbitrary differences in the wording or form of deeds. Because the current record does not include any legal basis we understand for the distinctions the county has embodied in WCZO 13.040(B), the challenged ordinance must be remanded.

The assignment of error is sustained, in part.

The county's decision is remanded.

Holstun, Board Member, concurring.

I believe it is extremely doubtful that counties ever had the authority to adopt local laws that dictated that parcels, which under Oregon real property law exist as legal separate units of land, do not qualify as separate units of land in that county. If counties ever had that

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[2] In addition, we note that ORS 92.285 and ORS 215.111(6) both prohibit adoption of "retroactive" ordinances. In general, a retroactive ordinance is one that "attach[es] a new disability in respect to transactions or considerations already past." *Church v. Grant County*, 37 Or LUBA 646, 650 (2000) (quoting *Black's Law Dictionary*, 1184 (5th ed 1979). That is arguably what WCZO 13.040(B) does. The code provision attaches a significant new disability (loss of separate development rights) to a transaction, a deed, that may be been finalized and recorded 40 years ago. As explained above, in most cases it will be unknown whether the grantor of deeds to which the county will apply WCZO 13.040(B) formed any intent regarding consolidation of development rights, or if so what that intent was. The arguable effect of WCZO 13.040(B), then, is to add to the terms of such deeds an implicit limitation on separate development. The parties do not discuss the prohibition on retroactive ordinances, however, and therefore we do not resolve the question of whether WCZO 13.040(B) is prohibited as a retroactive ordinance.

authority to override the state's real property laws, it is clear that under ORS 92.017 they no longer have that authority.

To simplify, WCZO 13.040(B)(1) requires that contiguous substandard parcels that were created by deed before 1974 must be "considered one property for development purposes" if those contiguous substandard parcels were subsequently transferred by a single deed. *See* n 1. WCZO 13.040(B)(2)(b) creates an exception to that rule where "[a]ll of the deeds listing the properties included separate metes and bounds descriptions with a separate heading * * *." For all practical purposes, the county has adopted the very kind of real property law that ORS 92.017 was adopted to prohibit. WCZO 13.040(B) avoids the literal prohibition in ORS 92.017, by continuing to recognize separate legal parcels as separate legal parcels and only viewing the separate parcels as one parcel *for development purposes only*. But what the county is left with is a land use regulation that applies, or does not apply, based on how the deeds that conveyed those parcels were written. The county has succeeded in avoiding the literal prohibition in ORS 92.017, but in doing so it has adopted a wholly arbitrary basis for determining whether adjoining substandard parcels must be developed together as one parcel. Whether a single deed that conveys more than one substandard parcel has separate metes and bounds descriptions and separate headings might have something to do with whether the deed is effective to convey separate parcels, but it has absolutely nothing to do with whether those parcels should be developed separately or together. This Board rarely has occasion to decide cases based on substantive due process, but this is such a case.