

DM

IN THE COURT OF APPEALS OF THE STATE OF OREGON

KATHRYN JANE PHILLIPS,)	
Respondent,)	
Cross-Respondent,)	LUBA Nos. 2006-133
)	2006-134
v.)	2006-135
)	
POLK COUNTY,)	
Petitioner,)	
Cross-Respondent,)	CA A134575
)	
and)	
)	
RICHARD MOORE and MICOLE MOORE,)	
Respondents,)	
Cross-Petitioners.)	

OPENING BRIEF AND EXCERPT OF RECORD
Of Petitioner Polk County

Judicial Review of Decision of Land Use Board of Appeals
Final Opinion and Order by Michael Holstun, Board Member

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I. STATEMENT OF THE CASE

A. NATURE OF THE PROCEEDINGS AND RELIEF SOUGHT

This is a proceeding for judicial review of a final opinion and order of the Land Use Board of Appeals (“LUBA”), pursuant to ORS 197.850. Petitioner Polk County seeks reversal or remand of LUBA’s decision.

B. NATURE OF THE ORDER SOUGHT TO BE REVIEWED

LUBA’s final opinion and order reversed Polk County’s approval of property line adjustments despite the fact that the adjustments did not create additional parcels and did not reduce any parcel from a size at or greater than the minimum parcel size for the zone to a size smaller than the minimum parcel size for the zone.

C. STATUTORY BASIS FOR APPELLATE JURISDICTION

Jurisdiction for judicial review of proceedings of LUBA under ORS 197.830 to ORS 197.845 is conferred on the Court of Appeals. ORS 197.850(3).

D. TIMELINESS OF APPEAL

The final opinion and order from LUBA was filed January 2, 2007. ER-1. Petitioner Polk County filed and served its Petition for Judicial Review on January 18, 2007, within the 21 days required by ORS 197.850(3).

E. JURISDICTIONAL BASIS FOR AGENCY ORDER

LUBA has jurisdiction because Polk County’s decision concerns a land use

regulation (property line adjustments). The decision is therefore a land use decision as defined by ORS 197.015(11)(a)(A)(iii), and LUBA has jurisdiction pursuant to ORS 195.825(1).

F. QUESTIONS ON APPEAL

The single Question Presented on Appeal is as follows: Did LUBA make an error when it concluded as a matter of law, that a parcel in the EFU zone that is reduced in size by a property line adjustment must comply with minimum parcel size requirements both before and after the property line adjustment?

G. SUMMARY OF ARGUMENTS

LUBA misconstrued ORS 92.010(7), by overlooking relevant and applicable administrative rule.

H. STATEMENT OF FACTS

Polk County approved two property line adjustments. The subject parcels are zoned EFU and were lawfully created. The minimum parcel size in the EFU zone is 80 acres. App-1.

The beginning configuration of the three parcels was: Parcel 1 (40 acres); Parcel 2 (115) acres; Parcel 3 (61) acres. The final configuration of the three parcels was: Parcel 1 (27 acres); Parcel 2 (27 acres); Parcel 3 (160 acres). ER-2. Both prior to the property line adjustments and after the property line adjustments two parcels were sized below the 80 acre minimum and one parcel was sized above the 80 acre minimum. No new parcels were created.

II. ASSIGNMENT OF ERROR

Assignment of Error

LUBA's order was unlawful because it incorrectly interpreted ORS 92.010(7) to require that in order to not be considered a "partition," all adjusted parcels must begin and conclude at sizes that meet or exceed the minimum parcel size for the applicable zone.

A. PRESERVATION OF ERROR

LUBA unilaterally determined that the "threshold question" - a question not addressed by any of the parties - was "whether the disputed property line adjustments are partitions." ER-5. Accordingly, until this proceeding, the parties have had no opportunity to address LUBA's error.

B. STANDARD OF REVIEW

This court may reverse or remand a LUBA order if it finds the "order to be unlawful in substance . ." ORS 197.850(9)(a). This court "does not follow any deferential principal of review with respect to LUBA's rulings on issues of law." Recovery House VI v. City of Eugene, 150 Or App 382, 389; 946 P2d 242 (1997); see also Holland v. City of Cannon Beach, 323 Or 148, 151-52; 915 P2d 407 (1996).

C. ARGUMENT

LUBA's decision is based entirely upon its interpretation of ORS 92.010(7).

App-4. ORS 92.010(7) provides in pertinent part:

"92.010 Definitions for ORS 92.010 to 92.190. As used in ORS 92.010 to 92.190, unless the context requires otherwise: (7) "Partition land" means to divide land to create two or three parcels of land within a calendar year, but does not include: (b) An adjustment of a property line by the relocation of a common boundary where an additional unit of land is not created and where the existing unit of land reduced in size by the adjustment complies with any applicable zoning ordinance;"

The analytical framework governing the construction of statutes is stated most clearly in PGE v. Bureau of Labor and Industries, 317 Or 606; 859 P2d 1143 (1993). PGE provides that the task is to discern the intent of the legislature. PGE, 317 Or at 610. The first level of analysis is to consider the text and context of the statutory provision, including rules of statutory construction that bear directly on how to read the text. PGE, 317 Or at 610-11. If the intent of the legislature is not clear from the text and context inquiry, then the Court proceeds to the second level of analysis, which is to consider legislative history. PGE, 317 Or at 611-12. If, after consideration of text, context and legislative history the intent of the legislature is still unclear, the third level of analysis is to employ general maxims of statutory construction. PGE, 317 Or at 612.

The main portion of the text of ORS 92.010(7) provides that “ ‘partition land’ means to divide land to create . . . parcels. . .” If this was all the statute provided for the analysis would be simple: in order to partition, one must *divide* land and *create* parcels. However, the remaining portion of the text provides that adjustment of a property line is not to be deemed a partition provided that no additional unit of land is *created* and provided further that the existing unit of land reduced in size complies with applicable zoning ordinances. LUBA interpreted this text to require that any parcel reduced in size must both begin and end at a size that is at or above the minimum parcel size for the zone. ER-6.

Polk County and LCDC / DLCD (see OAR 660-033-0100 at App-6; and PCZO 91.960 at App-9) have historically interpreted ORS 92.010(7) and the land use planning concept of minimum parcel size to prohibit *creation* of new parcels that are below the

minimum parcel size and further to prohibit property line adjustments that result in more parcels sized below the minimum than existed before the adjustment. This approach to property line adjustments guarantees that property owners cannot adjust adequately sized parcels into sub-sized parcels under the guise of not *creating* any new parcels while at the same time, not penalizing owners of parcels that happen to be smaller than the minimum parcel size established for the zone. [Allowing property owners the ability to property line adjust a sub-sized parcel is especially significant in light of Measure 37.]

The interpretive question that must be determined is whether ORS 92.010(7) prohibits property line adjustments which reduce the size of a parcel that is already sized below the minimum parcel size for the applicable zone.

A reading of the text of the statute (within the broader statewide land use planning context) supports an interpretation that the primary purpose of the statute is to prohibit the creation of sub-sized parcels, and beyond that, to preclude property line adjustments that result in a greater number of sub-sized parcels after the adjustments than existed before the adjustments. This is how DLCD and most every county in Oregon have interpreted the statute. LUBA's interpretation is contrary to administrative rule, strays from the context of statewide land use planning practice, is not supported by case law and frankly, represents bad public policy.

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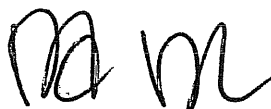
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III. CONCLUSION

Petitioner Polk County requests that the Court reverse LUBA's Final Opinion and Order.

Dated this 13th day of February 2007.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'D. Doyle', is written above a horizontal line.

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Attorney for Petitioner Polk County