

BEFORE THE BOARD OF COUNTY COMMISSIONERS

FOR THE COUNTY OF MULTNOMAH

In the Matter of the Review	)	
of the Hearing Officer's	)	FINAL ORDER
Decision Affirming the	)	LR 2-92, #184
Planning Director's Approval	)	93-54
of a Residential Building	)	
Permit Application	)	

I. INTRODUCTION

This matter came before the Board of Commissioners ("Board") for a hearing on January 26, 1993. The Board hereby affirms the decision of the Hearings Officer regarding the approval of a residential building permit application based on the findings and conclusions contained herein.

On November 2, 1992, a hearing was conducted before Robert L. Liberty, Hearings Officer for Multnomah County. Appellants and applicant, James Haldors, were invited by the Hearings Officer to submit supplemental memoranda by November 9 regarding issues that arose during the November 2 hearing. On December 15, 1992, the Hearings Officer issued his Decision which affirmed the Planning Directors' Administrative Approval of the applicant's building permit application to construct a single family residence on a 10,000 square foot property located within the Palatine Hill Addition No. 3 Subdivision, an area zoned single family residential and designated R-20 on the Multnomah County zoning map.

A Notice of Review of the Hearing Officer's decision was filed by Paul Duden on behalf of his clients, William Naito, N. Robert Stoll and Douglas Campbell.

The Notice of Review listed its grounds for reversal of decision as:

1. The land in question was an illegally created lot pursuant to MCC .2854(I);
2. The land in question is not a "lot" subject to the exception to the minimum lot size requirement of MCC .2856(B); and
3. The planning decision of Multnomah County rendered meaningless the R-20 zone in the Dunthorpe area.

The Board heard the matter on January 26, 1993. After considering the evidence, the Hearings Officer's decision, the Planning Director's determination, staff recommendations, arguments from the applicant and appellants and the entire record herein, the Board affirmed the Planning Director's and Hearing Officer's approval of the building permit application. The applicant, as prevailing party, was directed to draft findings and conclusions supporting approval of the building permit application.

## II. HISTORY OF PROPERTY

The property which is the subject of this appeal is made up of two, contiguous 5,000 square foot units of land designated as Lot Nos. 1 and 2 of Block 111 of the Palatine Hill Subdivision No. 3, which was platted in 1890. The lots are bounded on the west by Southwest Tryon, and on the south by Southwest Pomona, as represented on the attached vicinity map.

Each of the 20 lots within Block 111 of the subdivision was platted with 5,000 square feet of area.

In 1948, the residents of the Dunthorpe area incorporated a zoning district. The residential zones adopted by that district established minimum lot sizes of 20,000 and 30,000 square feet. In 1955, Multnomah County assumed zoning authority over the Riverdale/Dunthorpe area. The county applied two zones which incorporated the 20,000 square foot (currently the R-20 district) and 30,000 square foot (the R-30 district) minimum lot sizes. An exception to the minimum lot size requirement was adopted for specified preexisting lots as a means of continuing to recognize the property rights created under the 1890 subdivision plat.

On May 28, 1992, applicant purchased the subject property. On June 2, 1992, the county issued a building permit to the applicant, without notice or an opportunity for a hearing. The appellants appealed that decision to LUBA, and the appeal was dismissed by stipulation of the parties on September 3, 1992 in order to provide the appellants with the opportunity for a hearing before Multnomah County.

On September 17, 1992, the Planning Director of Multnomah County issued a written land use decision granting the applicant's building permit application, and this appeal ensued.

### III. APPLICABLE REVIEW STANDARDS

Pursuant to MCC .8270(G) the scope of review of appeals before the Board of County Commissioners is limited to the grounds relied upon by appellants in their Notice of Review and

any hearing permitted under MCC .8270(B). Because no hearing was held pursuant to MCC .8270(B), the scope of the Board's review is limited to the stated grounds within appellants' Notice of Review.

Under MCC .8260(B)(3), a Notice of Review must contain the specific grounds relied upon for review. Appellants' Notice for Review lists three grounds for reversal, but only the first two contain specific grounds for appeal. Because appellants' third ground for reversal does not specify a statutory or code standard not met, it is excluded from the Board's scope of review.

At the hearing before the Hearings Officer, a question was raised whether County Comprehensive Plan policy numbers 37 and 38 were within the Hearings Officer's scope of review pursuant to MCC .8295. The Board affirms the Hearings Officer's determination that his review was limited to the specific grounds stated in the Notice of Appeal pursuant to MCC .8295(A). Failure to show compliance with the Comprehensive Plan was not asserted as a ground for review before the Hearings Officer, nor on appeal to this Board. Therefore, the issue is not reviewable in this proceeding as provided in MCC .8295(A).

#### IV. REVIEW OF THE ARGUMENTS ON THE MERITS

##### A. The Subject Property Qualifies for the Grandfathering Exception of MCC .2856(B).

The subject property is zoned single family residential, R-20, on the Multnomah County zoning map. Single family dwellings are prescribed, permitted uses in that zoning

district pursuant to MCC .2852(A). As noted in the Planning Director's findings, applicant's Building Permit request adequately demonstrates compliance with all relevant criteria under MCC .2854 except for the lot size requirement under subparts (A) and (I).

MCC .2854(A) states the minimum lot size in the R-20 zone shall be 20,000 square feet. An exception to the 20,000 square foot minimum lot size requirement is provided under MCC .2856(B) which reads:

Where a lot has been a deed of record of less than 80 feet in width, or an area of less than 20,000 square feet, and was held under separate ownership, or was on public record at the time this Chapter became effective, such lot may be occupied by any use permitted in this district. In no case, however, shall a dwelling unit have a lot area of less 3,000 square feet. (Emphasis added.)

The primary question in this appeal is whether Applicant's property qualifies for application of this exception to the 20,000 square foot minimum lot size requirement. The Board concurs with the Hearing Officer's rationale for affirming the Planning Director's determination that the subject property qualifies for this exception.

The text of the Code provision provides two alternative methods for undersize lots of record to qualify for the exception. A lot qualifies if it either: (1) was held under separate ownership; or (2) was on the public record as of November 15, 1962, the date of adoption of the Zoning Chapter of the Multnomah County Code. Because Lots 1 and 2, Block 111, Palatine Hill Addition Number 3 were platted in 1890, they have

been on the public record for seventy-two years prior to the adoption of the zoning chapter. Therefore, the Board finds the Hearings Officer was correct in his first line of analysis for affirming the Planning Director's Determination.

Appellants maintain the county should ignore the literal language of MCC .2856(B) because of the concept of aggregation of contiguous parcels under common ownership found in the text of other jurisdictions' land use regulations. As did the Hearings Officer, the Board is not persuaded that land use laws of other jurisdictions provides any guidance here. The determination whether the applicant qualifies for the lot size exception must be based solely upon the criteria in the Multnomah County Zoning Ordinance and not upon regulations of other jurisdictions. As noted in appellants' hearing memorandum, "the issue is what the ordinance says" (Appellants' Hearing Memorandum at 8).

The Board also rejects appellants' implied claim that the definition of "lot" in the zoning code constitutes an aggregation requirement that precludes transfers of platted subdivision lots. Since MCC .2856(B) includes no aggregation requirement, the Board cannot invoke one in this quasi-judicial proceeding. In some zones the zoning ordinance includes specific aggregation requirements. For example, in the exclusive farm use ("EFU") zoning category contained in MCC .2002-.2030, specific aggregation language can be found within MCC .2018(A)(2)(d) and (A)(3). Similar aggregation provisions are contained within the CFU zoning category. Because lot aggregation provisions are not

applicable within the R-20 zone, the Board cannot apply such criteria here.

Further justification for affirming the Planning Director's and Hearing Officer's decisions is provided by Multnomah County's consistent interpretation for more than 30 years that MCC .2856(B) applies in cases such as this. As noted in applicant's hearing memorandum, Robert Baldwin, the Multnomah County Planning Director for more than 20 years, testified in court that the county consistently interpreted and applied MCC .2856(B) to allow residential construction on lots platted before the ordinance became effective, provided the lots were larger than 3,000 square feet.

The type of development proposed by applicant is identical to a building permit granted in 1967 on two contiguous 5,000 square foot lots in Block 106 of the Palatine Hill No. 3 subdivision. This precedent occurred in the same subdivision as applicant's.

The Board interprets MCC .2856(B) to allow single family dwelling units on lots such as the subject property provided such lots were platted before zoning laws became effective.

B. The Individual Lots Created Under the 1890 Subdivision Must Remain Recognizable Lawful Divisions of Land Under State Law.

Appellants contend the two subject lots plus two contiguous lots owned by the same owner comprise one lot under the zoning code. See, MCC 11.15.0010. According to appellants,

a 1989 conveyance of two of these lots violated the county code and disqualified the lots from development under MCC .2854(I).

ORS 92.010 defines the term "lot" to be "a unit of land that is created by a subdivision of land." As noted by the Hearings Officer, the statutory definition of "lot" is cross-referenced and applied to county zoning and planning provisions pursuant to ORS Chapter 215. Therefore, because the two lots comprising the subject property were lawfully created under the 1890 Subdivision Plat, they constitute discrete tracts of land for conveyance purposes.

The Board affirms the Hearings Officer's determination that ORS 92.017 resolves the issue raised by appellants regarding the legality of the subject property. The testimony of representative Al Young that is included in the Hearings Officer's decision demonstrates that the statute was intended to preempt local ordinances that attempted to reconsolidate contiguous lots and parcels that happened to be under common ownership.

Both the text of ORS 92.017 and its legislative history confirm that the functions of the statute were: (a) to prevent cities and counties from refusing to recognize lawful divisions of land, thus raising concerns about land's alienability; and (b) to establish that the property lines created by such land divisions remain discrete and inviolate, absent the use of legal methods to change or eliminate such property lines. The statute mandates recognition of such parcels as separate and distinct

until some action is taken to erase the lawfully established property lines.

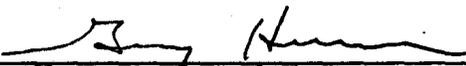
Because the two lots comprising the subject property have not been changed, vacated or further divided, as provided by law, the Board finds that ORS 92.017 operates to require continued recognition of the lots regardless of ownership. As noted by the Hearings Officer, ORS 92.017 does not affect the developability of lots because that determination must be made with reference to planning and zoning standards such as those provided under MCC .2856(B) discussed above.

V. CONCLUSIONS AND DECISIONS

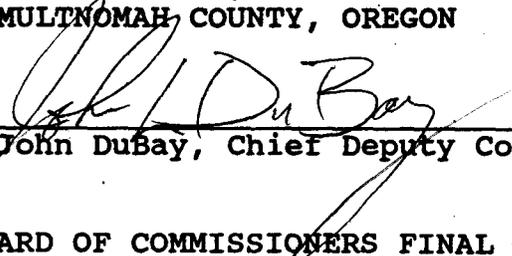
Based on the above findings and evaluation, the Board of Commissioners concludes that the building permit application complies with the applicable standards of the Multnomah County Code. Therefore, the Board of Commissioners hereby affirms the Hearing Officer's and Planning Director's decision in this matter and approves the building permit requested in LR2-92, #184.

DATED this 23rd day of February, 1993.



  
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Gary Hansen, Vice-Chair  
Gladys McCoy, Multnomah County Chair

REVIEWED  
LAURENCE KRESSEL, COUNTY COUNSEL  
FOR MULTNOMAH COUNTY, OREGON

By:   
\_\_\_\_\_  
John DuBay, Chief Deputy County Counsel

9-BOARD OF COMMISSIONERS FINAL ORDER ON LR 2-92, #184

(GGL:3615982.109)