COMMISSIONERS PROCEEDINGS
WEDNESDAY, MARCH 4, 2009
CLARK COUNTY, WASHINGTON

The Board convened in the Commissioners' Hearing Room, 6th Floor, Public Service Center, 1300 Franklin Street, Vancouver, Washington. Commissioners Mielke, Stuart, and Boldt, Chair, present.

PUBLIC MEETING: JOHNSON LEGAL LOT DETERMINATION APL2008-00001

Held a public meeting regarding an appeal by Joel and Susan Johnson of an administrative decision concluding that tax lot 32/33 does not constitute a separate legal lot of record in the AG-20 zone.

An appeal of the Clark County Land Use Hearing Examiner's decision on the above-referenced matter will be heard by the Clark County Board of Commissioners following remand of their decision dated July 1, 2008 by the Clark County Superior Court.

The Board of Commissioners did not take public comment, oral or written, at this public meeting.

[Verbatim Transcript]

Marc Boldt: Good morning, welcome to the Board of Clark County's hearing on a land use appeal, re-appeal, whatever you want to call it. It's the meeting to determine the Johnson Legal Lot Determination. This was remanded to us from the courts. We do not take public testimony. First, I have read the pertinent parts of the record.

Steve Stuart: I would also certify that I've read the pertinent parts of the record.

Tom Mielke: I too certify that I have read the pertinent parts of the record.

Boldt: With that I think we are turning to Mr. Horne to maybe give us some background and a couple of options.

Chris Horne: For the record, my name is Chris Horne. Good afternoon, Commissioners. As the board will recall, this land use appeal is before the board based on an application. The lot that is at issue in this case was originally divided in 1991 and when it was divided it caused a platting violation. The reason was that platting is required for all subdivisions or short subdivisions that create parcels less than 5 acres. Because this parcel that was created was 2.9 acres, it constituted a platting violation. The legislature authorized relief to be provided by local governments under certain circumstances and, in fact, Clark County took advantage of that and adopted a provision in its platting ordinance that it's in 17.103, for the purposes of this appeal, that allowed the county to recognize certain lots in the public's interest. That was the basis upon which this lot determination was sought. The key question was whether or not the lot meets the lot dimension requirements for the zoning district in which the property was located and while the parcel is only 2.9 acres, the applicant has asked that the property be treated as if it's 5 acres and the county code

does provide some circumstances in which additional area can be included into a lot. Specifically, the county code provision at the time was 18.411.010 and it provides...largely...this is almost exactly what the code provision says, "that land dedicated or hereinafter acquired shall not be excluded from calculation of lot sizes." Staff in reviewing this lot determination ultimately denied the lot determination, not based on any definition of dedicate or acquire per se, but the attempt by the property owner to include land that was adjacent to I-5 Planning staff felt was inconsistent with the intent of the Board of County Commissioners when they adopted this; that they intended to include county roads or streets where the county only had an easement to those roads and the property owner had the underlying ownership, where a state highway is bought and purchased and owned in fee simple.

In appeal before the examiner the examiner again denied the appeal, but on a more technical basis. The examiner concluded that you couldn't include land unless it was either dedicated or hereinafter acquired, and hereinafter acquired had to relate to when the ordinance was adopted—in this case the original ordinance was adopted in 1980. Because no land was acquired from the appellant's property after 1980, that provision didn't apply so the only question was whether or not there was land dedicated and the examiner accepted a definition or used a definition of "dedicate" that came from Title 17. That's our county's platting ordinance and it's also where this legal lot determination ordinance comes from, but it is not in Title 18 where this 18.411 provision comes up. The examiner concluded that based on the definition of "dedicate" that the appellant's property was not dedicated and, therefore, could not be included to make up the difference; that 2.9 acres they would need an additional 2.1 to get to 5 and, therefore, denied the land use appeal. Actually, I guess I'm in error. The lot area is 4.28. The area that was picked up from I-5 was 2.9, so I mis-recalled those numbers.

In any case, this matter was appealed to the Superior Court and Judge Bennett remanded it back for this board to reconsider. He was concerned with a couple of different issues. First, the county code has two, believe it or not, somewhat inconsistent provisions that discuss what the county duties are when they review an appeal. 2.51.170 says that if you disagree or modify the examiner's decision, you have to adopt findings and conclusions. And then separately there is language in 45.30 under the appeals section, I think it's either E or F, that obligates the board to in a little more detail adopt findings and conclusions that justify its decision regardless of whether you affirm, modify, or reverse the decision of the examiner. So Judge Bennett was concerned that the board's resolution lacked sufficient findings and conclusions. The judge also remanded it for the board to demonstrate compliance with a provision that is from the Land Use Petition Act (LUPA) and that grants the board, or any appealing body, de novo authority when interpreting a statute, but that you're supposed to give deference to the local jurisdiction to hear with expertise to interpret statutes. In this case, as the record is clear, three different entities have interpreted our code. The planning staff interpreted it, and planning staff have the authority under Title 40 to interpret our code. The examiner interpreted it under 2.51.090—he has the authority to interpret it. And the board has the authority in hearing

appeals, and as the author of the code, to interpret it under 2.51.170 and 45.30. So there are really three entities that have some authority to interpret this. I think at a minimum what Judge Bennett wanted some assurance on was that the board had given adequate consideration to staff's interpretation and the examiner's before coming up with its own de novo review.

So with that, the board has three options—I guess two essentially. One is to grant the appeal based on the applicant's interpretation of "dedicate," which is fairly broad and taken from a dictionary and would support the granting of an appeal. The board could deny the appeal based on the examiner's decision and comply with Judge Bennett's concerns; basically, adopt the examiner's findings and conclusions as its own, which you are authorized to do. The third alternative is essentially to deny the appeal, affirm the examiner, adopt the examiner's findings and conclusions and then as an alternative basis adopt staff's interpretation about the intent of the ordinance. But truly it's up to the board and it's based on the board's review of the record and interpretation of the code provisions at issue.

Boldt: When you read through the minutes and the resolution that we passed after that evidently went to court, did that have findings in our resolution?

Horne: It had some general comments, the basis for the board's ruling, but Judge Bennett found that those were not sufficiently specific. We'll help you in actually drafting your findings, but essentially if you're going to grant the appeal it largely becomes moot. If you are going to deny the appeal and it's based on the examiner's analysis, then we would suggest that you just adopt the examiner's findings and conclusions as your own unless you conclude that there's an additional or different reason you come to that conclusion. But the case hinges, for the purposes of this appeal I think, on the word "dedicate" and whether or not the examiner erred in using the definition of dedicate that's contained in the county code. LeAnne Bremer or the applicant doesn't think that's appropriate because it wasn't in Title 18. The problem with this appeal is it doesn't just deal with one chapter. Title 17 is the provision under which they are seeking the land use determination, at 17.103, but the language about this historic...allowing consideration of land adjacent to right-of-way is not in 17 either, it's in 18. So you're jumping out of 17 to help decide the lot determination and then the question is can you jump back into 17 to look up the term "dedicate?" The courts have generally said that you should look to the code definition of words and especially unique words and that you only look to the dictionary definition if they're not defined in the code. The problem is I don't think either party has found a case that says you can't use specific portions—in this case one title versus another title—and so I'm not sure there's anything that says you can't do that and I'm not sure there's anything that says that you're required -- well, there are cases that say you are required to use the code. So there's that slight ambiguity that's not entirely clear.

Boldt: Do you have questions?

Mielke: I do. Through all of this I guess I'm looking at the net goal of the property owner and to me agree with the legal definition as the courts have ruled and help the owner go forward to build their home by doing a variance on the property so they can go forward so they can go forward and do what they want to do.

Horne: Certainly a variance is available under certain circumstances. To really answer your question—I don't want to shortcut it—the answer is yes, a variance is available. It's under limited circumstances; it's not an easy thing to prove. So I think the short answer to your question is yes, that's an available option; no, it's not an easy thing to prove by any party and it's intentional. Where you're seeking relief in this case, you have to start out with the operating assumption that the legislature said you're supposed to divide property up in a legal way. This started out as an illegal division to start with so what you're trying to do is use a remedial or a curative or some kind of a fix it ordinance to cure something that was already done illegally and the question is how do you do that. That's where this 5-acre thing came up to start with. You're right and by the way the legislature has provided remedies when there's an illegal sale. What it does is it gives the buyers the right to go back after the seller to force the seller to buy it back, they can seek damages, attorney's fees—a whole number of things. But most times buyers don't want that.

Stuart: Before you go any further though, as I understand it the correct answer the question is -- in this forum, no. Because we're sitting today as a quasi judicial body, so as to dealing with how would you fix this outside the realm of the appeal before us is improper.

Horne: It is true that the facts are fixed and that the court cannot consider facts outside of the record and I wasn't proposing that.

Stuart: I know. I guess I just want to make sure that we keep a clear line because one of the things that is troubling about this process is exactly that, is that there is a clear line that we have to sit up here and act like there's this division of what we do to the extent that we only can look inside this little book for what we're talking about. But for the purposes of what we're doing today, we get in trouble when we step outside of our little box on this whereas when we're dealing with policy issues with things outside of the realm of an appeal, we can do a lot of things.

Mielke: That's right. I recognize that. I recognize that we basically have to sit here with blinders on and work within that field of vision. But I kind of question myself, not having been here before, why we got this far without solving the problem.

Stuart: Agreed.

Boldt: And I think after our motion we talked about the variance last time too that's in the minutes to some degree. Thank you, Mr. Horne.

Stuart: Thanks, Chris. Well, sorry for cutting off the discussion. It's one of those things that we have been smacked on the hand for because we tend to do the same thing, but where it is absolutely appropriate once we make a decision on this to have a conversation following up with that saying, alright, now what do we do? For the purposes of what is before us, for me the question was whether the narrow interpretation of dedication and of dedicated was appropriate and whether the hearings examiner had adequately provided record to back up that determination. I found that the hearings examiner had; that there was information within the hearings examiner's decision that not only went through the definitions of whether an [inaudible] applied where, but also the definitions of how dedicated would be applied and an analysis of the applicant's definition, which was based on—from what I saw in the record—was based on a dictionary definition that the hearings examiner I think appropriately identified was not on point. The bottom line of it is that the hearings examiner's, and other's, and through the judicial process I believe a narrow interpretation is appropriate. I think that when we look outside of the realm of the court process, I think it is appropriate to look at what are the unforeseen consequences of terminology, of words, within our code. But for the purposes of sitting as a judge I believe that a narrow interpretation is the most appropriate. Thus, I would reaffirm the hearings examiner's decision in logic and not agree with staff's interpretation because, again, it's interpretation and interpretation should be left for the process of code making.

Boldt: I would agree with you, commissioner. Once thing that I took from this, and I looked at my notes, is I tried my hardest to find findings for the applicant because we were going to – like you just said, Mr. Horne, if we're going to overturn the appeal we have to have findings of our own and I couldn't get to the findings of my own to base my facts of overturning the decision. As Commissioner Stuart said, that's what we're left with. The findings of the hearings examiner stand, as far as my opinion, and then hopefully there is some remedy after this. That's unfortunate, but...

Mielke: And we see that. We're caught between the blinders and have to follow that code of law. We have other provisions down the road that we could probably fix this, but under the scenario we have and the evidence that's been presented to us I agree that we have to uphold that.

Boldt: So would you like to make a motion to...I believe...Mr. Horne, uphold the hearings examiner's findings? Is that...?

Horne: For the record, your motion—one motion anyhow, given the ruling that the board has discussed—would be a motion to reject appeal and affirm the hearings examiner, adopting as your own the examiner's findings and conclusions.

Stuart: One other question for staff though: there were two issues that were remanded back to us by the court, one of them was – it said the matter is remanded back to the Board of County Commissioners to render a land use decision that: a) contains the conclusions the board reached regarding the specific grounds for appeal and the reasons

for those conclusions or adopts the decision of the Hearings Examiner as its decision to the extent that decision addresses the merits of petitioners appeal, and b) gives deference to Clark County Planning Staff's interpretation of the meaning of 18.411.010 as it relates to the issue on appeal.

Horne: That was in my discussion – I think that the court…actually LUPA does not say that you have to give deference to planning staff per se. What it says is that the court has to grant deference to the interpretation to the extent it's ambiguous to the interpretation of the local agency with expertise. You are part of that local agency, but to ensure that we comply with Judge Bennett's concerns that the board give deference, or at least give consideration, to the analysis that staff gave in terms of "dedicate" and its result. That's why my earlier comments the board should consider the staff's interpretation. I think Commissioner Boldt said he rejected staff's basis for the intent, and focused more on what the examiner said. You are required, according to this order, to give deference to staff. That doesn't mean you're required to follow it. It means you're required to give some deference to their definition of dedicate and then come up to the conclusion you think best implements the county code.

Stuart: So when I made the comment that I also reject the staff's interpretation because even though it may lead to unforeseen consequences or to…I forget the term that was used…results that were not what they would have expected and not as they have been, that for the purposes of this the narrow interpretation that the hearings examiner has provided is the one that should be used for the purposes of this appeal. Is that getting at what…? Because the court can't tell us to do what the staff says obviously.

Horne: Correct. The court only said that you're required to consider it, analyze it, and decide whether, based on your review and your analysis of this code, whether you agree or disagree, but you have to give some deference to that opinion of staff. You're not required to follow. You are entitled to disagree with it so it's just the board has to say that it's considered staff's interpretation and upon the weight of all the evidence it disagrees with it.

Stuart: So I don't need to include that in my motion then?

Horne: You certainly can and it would be good to include it as a part of the motion that that they considered staff's definition of dedicate and rejects it upon the better weight of the evidence.

Stuart: Alright, so my motion would be to move that after reviewing the weight of the evidence on the record and rejecting staff's interpretation of CCC 18.411.010, that we explicitly adopt the Hearings Examiner's decision to the extent that the decision addresses the merits of the petitioners appeal.

Horne: Yes.

Stuart: I just did it.

Mielke: Second that.

Boldt: Thank you. It's moved and seconded to deny the appeal and uphold the Hearings Examiner's decision as Commissioner Stuart stated. All in favor say aye.

Stuart: Aye.

Mielke: Aye.

Boldt: Aye. All opposed? Motion carried. Thank you very much. Meeting adjourned.

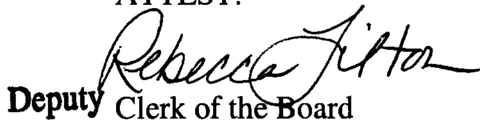
BOARD OF COUNTY COMMISSIONERS

Marc Boldt, Chair

Steve Stuart, Commissioner

Tom Mielke, Commissioner

ATTEST:



**Deputy** Clerk of the Board

rt