

APR 13 3 55 PM '81

BEFORE THE LAND USE BOARD OF APPEALS
OF THE STATE OF OREGON

3	DALE M. HERMANN,)	
4	Petitioner,)	LUBA NO. 80-168
5	v.)	FINAL OPINION
6	WASHINGTON COUNTY, and)	AND ORDER
7	NORMAN HANSON,)	
8	Respondent.)	

9 Appeal from Washington County.

10 Dale M. Hermann, Portland, filed a brief and argued the cause for Petitioner.

11 Alan S. Bachman, Hillsboro, filed a brief and argued the cause for Respondent Washington County.

12 Rodney C. Adams, Beaverton, filed a brief and argued the cause for Respondent Norman Hanson. With him on the brief were Thompson, Adams & DeBast.

13 Bagg, Referee; Reynolds Chief Referee; Cox, Referee, participated in the decision.

14 Reversed. 4/13/81

15 You are entitled to judicial review of this Order.
16 Judicial review is governed by the provisions of Oregon Laws
17 1979, ch 772, sec 6(a).
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1 BAGG, Referee.

2 NATURE OF THE PROCEEDING

3 Petitioner Hermann challenges a lot area variance and major
4 partition grant by Washington County. The challenge is made in
5 thirteen separate assignments of error, and we find it only
6 necessary to deal with one of them as set out below.

7 FACTS

8 The property subject to this appeal consists of a total of
9 some 35,427 square feet. The applicant seeks to divide the
10 property in such a manner as to provide three dwelling sites.
11 The RU-3(Z) zone within which the property lies requires 10,000
12 square feet per lot. At first blush, it would appear that the
13 applicant would be well within the 10,000 square foot lot size
14 requirement of the Washington County ordinance. However, under
15 certain instances, Washington County applies a density formula
16 in its zoning ordinance. The formula was applied in this case
17 because section 455-1 of the RU-3 zone requires the "density
18 computation" to be used "for determining the total number of
19 dwelling units that may be constructed on a site considered for
20 development."¹

21 For purposes of computing the allowed density, Washington
22 County's ordinance requires that the net residential area be
23 divided by the minimum lot size. Net residential area is 25
24 per cent of the total lot area. Applying this formula in the
25 present case, the applicant would have a net residential area
26 of only 26,570 square feet (35,427 less 25 per cent). Dividing

1 26,570 by 10,000 (the minimum lot size for the RU-3 zone)
2 equals only 2.6 housing units. Because this figure is less
3 than 3, only 2 parcels could be created for development from
4 the applicant's 35,427 square feet parcel. This density
5 restriction exists even though three parcels could actually be
6 created, each having in excess of 10,000 square feet. Faced
7 with this predicament and apparently on advice of the county,
8 the applicant applied for a variance from the density
9 competition formula. As noted, the variance is not to the
10 actual lot size since the actual lot size for three lots would
11 exceed 10,000 square feet.

12 The parties, and particularly the petitioner, make much of
13 the history of the property and the activities of respondent's
14 predecessor in interest. Some 5207 square feet was taken from
15 the subject property and added on to a neighboring tax lot
16 apparently in order to make it conform to minimum lot size
17 requirements. The effect of this change or adjustment of a lot
18 line was to reduce the size available for building on the
19 subject property. Petitioner believes that this act amounts to
20 a self-created hardship that may not be relied upon by the
21 present owner as justification or partial justification for
22 requesting a lot size variance.

23 ASSIGNMENTS OF ERROR

24 The petitioner makes many assignments of error. They maybe
25 divided into two broad attacks. The first attack is against
26 the variance, and the second attack is against the partitioning.

1 We will deal with only one of the assignments of error on
2 the variance. We find no need to address the remaining
3 assignments of error.

4 Assignment of Error No. VIII alleges there is no provision
5 in the Washington County Zoning Ordinance for a variance to
6 density requirements. Section 2102-1 of the Washington County
7 Community Development Ordinance provides for variances.

8 Variances are allowed for

- 9 "(a) yard requirements;
- 10 "(b) height requirements;
- 11 "(c) lot width;
- 12 "(d) lot depths;
- 13 "(e) lot areas;
- 14 "(f) site obscuring fence requirements and other
similar provisions as set forth in this code;
- 15 "(g) access to lots which do not abut a public street;
- 16 "(h) other dimensional requirements of this article."
Section 2102-1.1.²

15 As mentioned above, each of the lots includes over 10,000
16 square feet. Applying the density formula, however, the
17 resulting square footage available for houses was 26,570 square
18 feet. Only 2.6 houses could be built. The applicant did not
19 want to be limited by that density computation formula as he
20 wanted to be able to build on three lots. He needed to obtain
21 a waiver of the density computation formula, not the minimum
22 lot area (the actual lot area exceeded the minimum 10,000
23 square foot requirement for each lot). However, the Washington
24 County Ordinance does not provide for variances from the
25 density computation formula. "Lot size" may be varied under
26 section 2102-1, supra; but the density calculation is an

1 additional requirement to the RU-3 zone, it is not part of the
2 "lot size" limit in the zone. Therefore, the density formula
3 and its resultant development limit is beyond the scope of the
4 variance regulation.

5 It would appear to the Board that the remedy in situations
6 such as this is not a lot size variance, but a zone change. A
7 zone change to a zone having a smaller minimum square footage
8 per lot would avoid the difficulty created by the peculiar
9 provisions of the RU-3 zone and the accompanying density
10 calculation formula. For example, the RU-4 zone requires only
11 7,000 square feet per lot. Were this property designated RU-4,
12 the applicant could realize his desired plan. Another possible
13 remedy is to remove the density formula from application where
14 the net size of each proposed lot meets or exceeds the size
15 prescribed for each zone.

16 Perhaps the absence of a variance for density requirements
17 was a legislative oversight; but equally possible is the
18 proposition that the drafters of the ordinance felt the density
19 calculation itself was liberal enough to encompass most
20 situations in which a lot size variance would be otherwise
21 applicable. That is, the 25 per cent lot size reduction
22 applicable to the density requirement may, of itself, consider
23 the maximum by which the framers of the ordinance wished to
24 reduce any lot through a variance procedure.

25 It is our conclusion that the Washington County Zoning
26 Ordinance does not provide for variances to density

1 calculations. We believe the county to have attempted such a
2 variance in the instant case, and we sustain petitioner's
3 eighth assignment of error. It is our view that the
4 partitioning is tied to the variance, and it may not stand
5 without the variance.³ For this reason, the consolidated
6 decision of the Washington County Board of Commissioners is
7 reversed.

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10 COX, Concurring.

11 I concur in the outcome only because the county's
12 requirement that the applicant comply with the "density
13 computation" was not cross appealed to this Board.

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FOOTNOTES

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3 "Should a density computation be required for a land
4 development project, for the purpose of establishing
5 the total number of dwelling units that may be
6 constructed, the net residential site shall be used.

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"A fixed percentage of the site as required according
to the following schedule:

"(a) 25 percent for site area that is devoted to
detached single-family units.

"* * * *

"Section 101-1.3 maximum number of lots and dwelling
units - the maximum number of lots and dwelling units
that may be approved shall be computed by dividing the
net residential site area by the minimum lot area
requirement of the applicable zoning district."

2

"Other dimensional requirements of this article"
referred to in the variance section does not appear to
include density requirements, at least the parties
have not so argued and we will not so presume.

3

The order of the Washington County Board of
Commissioners recites the variance and the partitioning
were "consolidated."

1 CERTIFICATE OF MAILING

2 I hereby certify that I served the foregoing Final Opinion
3 and Order for LUBA No. 80-168, on April 13, 1981, by mailing
4 to said parties or their attorney a true copy thereof contained
in a sealed envelope with postage prepaid addressed to said
parties or their attorney as follows:

5 Dale M. Hermann
6 Suite 310
7 610 SW Broadway
8 Portland, OR 97205

Rodney C. Adams
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8 Alan S. Bachman
9 Assistant County Counsel
10 Washington County Administration Bldg.
11 150 N. First Avenue
12 Hillsboro, OR 97123

11 Dated this 13th day of April, 1981.

13 
14 Jeanne Hubbard
15 Secretary to the Board