IN THE OREGON TAX COURT
MAGISTRATE DIVISION
Property Tax

WILLIAM JOHN KUHN and MARTHA LEIGH KUHN	)	
Plaintiffs,	)	TC-MD 050021C (Control) 050248C
v.	)	
DESCHUTES COUNTY ASSESSOR,	)	
Defendant.	)	**DECISION**

Plaintiffs have appealed the real market value (RMV) of their property for tax years 2002-03, 2003-04, and 2004-05. There are two accounts at issue: 163467 (tax lot 200), and 131396 (tax lot 300).[1] The value of both tax lots is properly before the court for the 2004-05 tax year, because Plaintiffs timely appealed from an order of the county board of property tax appeals (BOPTA). Only tax lot 200 is before the court for the two prior tax years (2002-03 and 2003-04), based on the court's earlier Order finding an alleged error in value of at least 20 percent, as provided in ORS 305.288(1)(b).[2] That Order is incorporated by reference into this Decision.

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[1] The county map numbers are 16111900-00-200 and 16111900-00-300, respectively, for tax lots 200 and 300.

[2] Unless noted otherwise, all references to Oregon Revised Statutes (ORS) are to 2001.

Plaintiffs properly and timely appealed both accounts (the improved parcel and the unimproved, jointly-owned parcel, tax lots 200 and 300) for the 2004-05 tax year from an order of the county board. That appeal was assigned case number TC-MD 050248C. Several months earlier, Plaintiffs appealed the value of both accounts back to tax year 1987-88, under case number TC-MD 050021C. The court issued an Order April 20, 2005, allowing the appeal of the residential account (tax lot 200) to be heard for tax years 2002-03, 2003-04, and 2004-05, with relief, however, contingent upon a finding by the court of an error in value of at least 20 percent, as required by ORS 305.288(1)(b). The appeal of the other account (tax lot 300) was dismissed because the 20-percent error rule does not apply to undeveloped land, and Plaintiffs did not establish "good and sufficient cause," as provided in ORS 305.288(3), (5).

Plaintiffs appeared and testified on their own behalf at trial. Defendant was represented by Laurie Craghead, Assistant County Counsel, Deschutes County. Testifying for Defendant were Theresa Maul, Chief Appraiser, Deschutes County Assessor's Office, and Tom Anderson, Director of Deschutes County Community Development Department.

I. STATEMENT OF FACTS

The following facts are either agreed to by the parties or found by the court. In 1980, Plaintiffs' predecessor in interest, John Barton (Barton), received approval for a conditional use (CU-80-22) to allow a "cluster development" for three lots on an approximately 43 acre parcel in the Tumalo Winter Deer Range. (Def's Ex I at 2-3.) The zoning at the time of the 1980 conditional use approval was Forest Use F-3. The current zoning is F-2, with Landscape Management and Wildlife Area Combining Zone overlays.[3] Ordinarily, the minimum lot size in the Tumalo Winter Deer Range was 40 acres. (Def's Ex I at 2; Ptfs' Ex 15 at 126.[4])

A "cluster development" is a conditional use that allows developments with smaller minimum lot sizes than is otherwise allowed under applicable zoning laws.[5] Commensurate with that conditional use application, Barton amended a previously filed partition application proposing two 4.3 acre parcels and an approximately 34.4 acre parcel designated as a "common

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[3] The minimum parcel size for a single-family residential dwelling not used in conjunction with forest or farm use on land zoned FU-2 was 40 acres per PL-15, section 4.080 (6) (A), and 20 acres for FU-3 zoned land pursuant to section 4.085(6)(A). (Ptfs' Ex 15 at 93, 98.)

[4] The court's numbering of Plaintiffs' Ex 15 is based on the page numbering appearing at the top of the exhibit, which is the method used by the parties at trial. That numbering system does not correspond to the actual page count because the exhibit, marked by volume and page, begins with page 42 (*i.e.*, Vol 33 Page 42).

[5] A county hearing officer's decision on Plaintiffs' neighbors' 2001 application for a declaratory ruling to establish minimum side yard setbacks for their property includes a discussion of the procedural history of the original owner's efforts to divide the property to create the two homesites Plaintiffs and their neighbors now occupy. That decision indicates that the properties are in a Wildlife Area (WA), which requires a 40-acre minimum lot size. It further states "PL-15 also allowed as a conditional use cluster developments within which smaller minimum lot sizes could be approved." (Def's Ex R at 2.) PL-15, section 1.030(21) defined a cluster development as "[a] planned development, at least 5 acres in area, permitting the cluster of single-family residences on one part of the property, with no commercial or industrial uses permitted." (Ptfs' Ex 15 at 48.)

area." (Def's Ex R at 2.) Barton received preliminary approval for the minor partition, MP-79-232, on May 13, 1980. (Def's Ex J at 1.) The plat map received final approval by the requisite county officials in November 1980. (Ptfs' Ex 7 at 12.) The conditional use permit and partition created tax lots 100, 200, and 300. Tax lots 100 and 200 are the 4.3 acre parcels, and tax lot 300 is the 34.4 acre parcel.

Plaintiffs purchased tax lot 200, and a one-half interest in tax lot 300, in July 1987. Plaintiffs' neighbors, Jeff and Pat Dowell, purchased tax lot 100, and the other one-half interest in tax lot 300. On June 19, 1987, the month before Plaintiffs purchased their property, Plaintiffs' application for a lot line adjustment was approved by the Deschutes County Community Development Department. (Def's Ex L.) The following year, on November 14, 1988, Plaintiffs' Landscape Management Plan was approved, with two conditions: the first condition noted a 400 foot maximum setback from Sizemore Road imposed by the minor partition, pursuant to which Plaintiffs were required to move their home slightly to the east; the second condition was that Plaintiffs provide a copy of the homeowners maintenance agreement for the commonly-owned property, as part of their building permit. (Def's Ex M at 1.) The lot line adjustment and landscape management plan paved the way for Plaintiffs to construct their home (presumably subject to the submission and approval of a building permit application). In 1989, Plaintiffs built their home on tax lot 200. The Dowells' home was subsequently built on tax lot 100. The total RMV on tax lot 200 (Plaintiffs' homesite) for tax years 2002-03, 2003-04, and 2004-05 was $230,590, $242,830, and $251,670, respectively. The total RMV of tax lot 300 was $183,130 for the 2004-05 tax year.

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The Deschutes County land division code applicable to the 1980 conditional use and partition approvals was PL-14. The applicable zoning ordinance was PL-15.[6] PL-14, section 5.060, required the Deschutes County Planning Director to record partition plans and maps. The Deschutes County Planning Director did not record the partition map for the subject property until October 2004. Therefore, the partition map was not recorded as of January 1, 2002, January 1, 2003, or January 1, 2004. Defendant further admits in its Answer that "some of the other minor partition plats approved during the time frame listed in Plaintiffs' Complaint regarding the subject property's approval were not recorded."[7] Plaintiffs believe there are as many as 500 other parcels in the county with unrecorded partition plats.

Plaintiffs contend that their property had no value for the tax years at issue because various county ordinances required the county to record the "plat" map for their property, and that state law prohibits the sale of their lot unless and until the plat is recorded. Plaintiffs further assert that the Dowells' home was built beyond the applicable setback requirements in the plat map (MP-79-232), that the county refuses to enforce those requirements, and that the county's refusal diminishes the value of Plaintiffs' property. Finally, Plaintiffs assert that the lack of a recorded homeowners agreement providing for the shared maintenance of the jointly owned property (tax lot 300) also reduces the value of their property.

Defendant responds that Plaintiffs' property was part of a "plan" creating a "partition" rather than a "plat" creating a "subdivision." Accordingly, the statutory provision prohibiting the sale of a lot in a subdivision until the plat is recorded is inapplicable. Defendant presents three alternative arguments in response to Plaintiffs' position relative to the alleged setback violations.

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[6] The parties submitted only the 1979 versions of the county ordinances (PL-14 and PL-15) referenced in this Decision. The court's resolution of this case obviates the need for more current versions.

[7] Def's Answer for TC-MD No 050248C at 2.

Finally, Defendant contends that, by their own admission, the deed restrictions Plaintiffs recorded satisfy the requirement of a homeowners agreement. Defendant's bottom line is that Plaintiffs' asserted legal deficiencies are misplaced and that it has comparable sales to support the current tax roll values.

II. ANALYSIS

The court begins its analysis by setting out certain definitions. A "partition" involves the division of land into two or three "parcels." *See* ORS 92.010(7). A "subdivision," on the other hand, is a division of land into four or more "lots." ORS 92.010(15). The requirements surrounding a subdivision are generally more stringent than the requirements for a partition. Plaintiffs' lots were created through the process of a partition.[8]

The court rejects at the outset Plaintiffs' assertion that the provisions of PL-14 and PL-15 transform their partition into a subdivision. The court recognizes that Plaintiffs' property lies loosely within a Wildlife Area Combining Zone (WA), and that section 8.050(16)(B)(b) of PL-15, made applicable through section 4.190(5), provides that "[a]ll subdivision requirements contained in County Ordinance PL-14 shall be met." (*See* Ptfs' Ex 15 at 182.) Similarly, section 8.050(16)(C) requires applications for cluster developments to be accompanied by a plan with "[a] plat map meeting all the subdivision requirements of * * * PL-14." (*Id*.) However, the fact that the development was required to meet the county's subdivision requirements does not mean that the partition thereby became a subdivision.[9] At the same time,

[8] At the time Barton received approval for the partition, Oregon law distinguished between "major" and "minor" partitions, the former including the creation of a road or street, and the latter not involving roads or streets. *See* ORS 92.010(2) and (4) (1979).

[9] Subdivision designation is important to Plaintiffs for two reasons. First, PL-14, section 4.110(1) prohibits certain title transfers until the final plat is recorded (*See* Ptfs' Ex 14 at 36-37), and section 1.070(46) of that ordinance defines a plat as "[a] final map, diagram, drawing * * * concerning a *subdivision*." (*Id.* at 9.) (emphasis added). Second, Plaintiffs accept Defendant's assertion that the statutory prohibitions in ORS 92.025 against the sale of property prior to the recording of the plat pertain only to subdivisions.

the court's analysis below eliminates the importance, to Plaintiffs' case, of the subdivision designation.

A. *The Lack of a Recorded Plat*

Plaintiffs' principal argument is that applicable county ordinances required the recording of their plat, that the plat was not recorded when the partition was approved (nor at any time on or before the assessment dates here at issue), and that state law prohibited the sale of their property absent the recording of that plat. Accordingly, Plaintiffs contend that their property had no value on the applicable assessment dates.

PL-14, section 5.060, which clearly pertains to partitions (as opposed subdivisions), provides in relevant part:

> "Following approval of the tentative plan for a proposed partitioning, the applicant shall prepare and submit to the Planning Department the *final map or drawing* for the subject partitioning. * * * [T]he original and two (2) copies thereof [shall be] submitted by the Planning Department to the Executive Committee for approval. The original shall be *recorded by the Planning Director* in the office of the County Clerk following approval by the Executive Committee."

(Ptfs' Ex 14 at 41.) (Emphasis added.) Defendant concedes that section 5.060 required "final partition plans and maps * * * to be recorded by the Deschutes County Planning Director after final approval," and that the director "did not record the partition map for the Subject property until October 2004." (Stip Facts 17, 18.) However, Defendant argues that by requiring the recording of "final" maps or drawings after final approval, section 5.060 violates ORS 92.046 (1979), which, according to Defendant, only allowed the county governing body to

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establish recording requirements for "tentative plans" of minor partitions.[10] The court is not persuaded that section 5.060 exceeds the bounds of ORS 92.046, as that statute existed in 1979. However, the court need not resolve that issue, for reasons that become obvious later in this Decision. Moreover, the court will accept, without deciding, that applicable county ordinances required the recording of Plaintiffs' plat and the plat was not recorded on the assessment dates for the years at issue.

The next question is whether state law prohibited the sale of Plaintiffs' property prior to the time the partition plat[11] was recorded. This is where Plaintiffs' subdivision argument becomes important, if only to the parties. That characterization (subdivision) appears driven by Plaintiffs' acceptance of Defendant's contention that the 1979 version of ORS 92.025(1) governs this case. The statute at that time provided:

> "(1) No person shall sell any *lot* in any *subdivision* until the plat of the *subdivision* has been acknowledged and recorded with the recording officer of the county in which the lot is situated." (Emphasis added.)

Clearly, the law in effect at the time Plaintiffs' partition was created applied only to subdivisions, prohibiting any sale until the plat was recorded. However, Plaintiffs are concerned with the value of their property in 2002, 2003, and 2004. ORS 92.025(1) was amended in 1989

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[10] ORS 92.046 (1) (1979) authorized the county governing body to adopt regulations or ordinances requiring approval of proposed partitions, and subsection (2) provided:

> "Such ordinances or regulations may establish the form and contents of the tentative plans of minor partitions submitted for approval and may establish adequate measures for the central filing, including but not limited to recording with the city recorder or the county recording officer, and for the maintenance of tentative plans for minor partitions following approval."

[11] Throughout the proceeding Defendant emphasized the distinction between a plat and a plan, because the statutory definition of a plat in the 1979 version of ORS 92.010(9) tied a plat to a subdivision. However, by 2001, a plat came to be defined as "a final subdivision plat, replat *or partition plat*[,]" and by statute a "partition plat" concerns a partition. ORS 92.010(9), (8) (emphasis added).

to expand the restriction to parcels in partitions. The italicized language below reflects the 1989 amendment, pursuant to which the statute read:

> "(1) No person shall sell any lot in any subdivision *or convey any interest in a parcel in any partition* until the plat of the subdivision *or partition* has been acknowledged and recorded with the recording officer of the county in which the lot is situated."

Or Laws 1989, ch 722, § 4(1); *see also* ORS 92.025(1)(1989). A minor amendment in 1991 added the words "or parcel" prior to the last two words of the statute as set forth immediately above, so that the plat was required to be "recorded with the recording officer of the county in which the lot *or parcel* is situated." *See* Or Laws 1991, ch 763, § 6. There have been no further amendments to the statute through 2003. Therefore, as amended, ORS 92.025(1) does in fact prohibit the sale of parcel in a partition until the plat is recorded. That brings the court to the final question relating to the first issue. Assuming ORS 92.025(1) prohibited the sale of Plaintiffs' property, what was the value of that property?[12] Again, Plaintiffs insist the legal impediments render the property worthless. The court disagrees.

A valuation dispute in the property tax arena is governed by the statutory definition of real market value. ORS 308.205 provides in relevant part as follows:

> "(1) Real market value of all property, real and personal, means the amount in cash that could reasonably be expected to be paid by an informed buyer to an informed seller, each acting without compulsion in an arm's length transaction occurring as of the assessment date for the tax year.

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[12] The statutory prohibition in ORS 92.025(1) did not necessarily prevent Plaintiffs from selling their property. The property could always be sold by quitclaim deed. Moreover, in *Ogan v. Ellison*, 297 Or 25, 682 P2d 760 (1984), the Oregon Supreme Court concluded that the statutory prohibition in a very similar statute, ORS 92.016(2), which prohibited the sale of a parcel in a partition prior to *approval* of the tentative plan (as opposed to the *recording* of that plan), did not bar the purchaser from enforcing the seller's promise to convey the property. "The rule that an agreement is illegal and unenforceable if it conflicts with the provisions of a statute is not inexorable and unbending." *Ogan*, 297 Or at 31, *quoting Uhlmann v. Kin Daw*, 97 Or 681, 689, 193 P 435 (1920). The court may inquire into legislative intent unless "the statute expressly declares that an agreement made in contravention of it is void." *Id.*, *quoting Uhlmann* at 689-690. The *Ogan* court concluded that the legislative intent behind the statutory scheme within which ORS 92.016 is a part, was "the prevention of undesirable partitioning of land" as opposed to the sale of property. *Id*. at 32. It would appear that the same legislative intent was behind the adoption of ORS 92.025(1), with the focus being on the recording process as opposed to the approval process.

> "(2) Real market value in all cases shall be determined by the methods and procedures in accordance with the rules adopted by the Department of Revenue and in accordance with the following:
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> "(a) The amount a typical seller would accept or the amount a typical buyer would offer that could reasonably be expected by a seller of the property.
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> "(c) If the property has no immediate market value, its real market value is the amount of money that would justly compensate the owner for loss of the property."

This case raises the question of whether the property has an immediate market value. If not, value would be determined based on the standard of just compensation, per ORS 308.205(2)(c). This is not good news for Plaintiffs because their position essentially asserts that the property had no value by operation of law. Yet, the statutory definition of market value set forth above refutes that assertion, requiring that the property be taxed based on some measure of value.

Plaintiffs assert that they could not morally sell the property because of the legal problems surrounding the unrecorded plat. The statutory prohibition against conveying their parcel until the plat is recorded was enacted two years after they purchased the property, and Plaintiffs, therefore, urge the court to reject any claim that their own purchase demonstrates that the property could be sold notwithstanding the statute. Although that is true, Defendant submitted evidence showing that Brian and Marilyn Sholtis, of Mansfield, Ohio, offered to purchase the Dowells' property in January 2001 for $220,000. (Def's Ex Q at 1.) The Sholtis's offer was submitted by a Portland attorney. The Dowells' property is the other residential lot (technically termed a parcel) created by the unrecorded partition, and, on the applicable assessment dates, the sale of that parcel was as restricted by the statute (ORS 92.025(1)) as Plaintiffs' property. The Dowells rejected the Sholtis's offer and, therefore, it cannot be used as

evidence of an immediate market for the subject property. And, although there were perhaps hundreds of similarly situated parcels plagued by unrecorded plats, neither party submitted any sales of such parcels. Accordingly, on the evidence before it, the court concludes that Plaintiffs' property had no immediate market value. Plaintiffs' value must therefore be determined under the principle of just compensation. *See* ORS 308.205(2)(c).

As this court has previously noted, " ' just compensation' is a condemnation law test," and, oddly enough, the value sought is "fair market value or 'value in exchange.' " *Truitt Brothers, Inc. v. Department of Revenue*, 10 OTR 111, 114 (1985). The court elaborated by stating that ORS 308.205 "is simply saying that if there is no immediate market, then the value of the property is to be estimated using a method other than the sales comparison approach." *Id*.[13]

The other two methods for valuing property are the income and cost approaches. *See* OAR 150-308.205-(A)(2)(a) (2001). The income approach is clearly inapplicable because the subject property is residential and generates no income. Accordingly, Plaintiffs' value must be based on the cost approach. Plaintiffs have the statutory burden of proof under ORS 305.427, and they have not submitted any evidence on the cost approach. Accordingly, the values on the roll are sustained.

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[13] That makes sense because Plaintiffs are required to pay taxes based on the "value" of their property, and the court has no doubt that, if the government took (condemned) their property, Plaintiffs would expect monetary compensation. The law requires that compensation be "just." That no doubt brings some comfort to Defendant who, on a number of occasions, reminded the court that, although Plaintiffs claim they did not have a legal lot of record, the county acted as though the properties were legally established. Plaintiffs were issued a number of approvals and permits before they were allowed to build their home, which they have now lived in for 25 years. Moreover, the Dowells were also issued all the approvals required for the construction of their home, and they, too, have lived there for many years.

B. *Remaining Issues*

The other two points asserted by Plaintiffs concern the alleged setback violations and the nonexistent homeowners agreement. As to the first point, there is insufficient evidence for the court to determine whether the Dowells' home was built beyond the applicable setback requirements in the plat map. Additionally, assuming the home was built beyond the applicable setbacks, Plaintiffs have not provided any market evidence of how that would affect the value of *their* property, as opposed to the Dowells' property.

As to the second point, Defendant responds that Plaintiffs do, in fact, have a recorded homeowners agreement, but that they are simply not satisfied with the parameters of that agreement. In support of that assertion, Defendant points to a letter written by Plaintiffs to the Deschutes County Community Development Department in 1997, in which they state "[t]he deed restrictions of record met your definition of the necessary joint homeowners maintenance agreement. Unfortunately the wording on this accepted document is so vague on certain points of the restrictions * * * that it becomes extremely difficult and expensive for the parties of the agreement to enforce compliance." (Def's Ex O at 1.) The court's response to this issue is the same as its response to the alleged setback violations. Namely, assuming the required homeowners agreement does not exist, Plaintiffs have failed to demonstrate the market impact of that deficiency.

III. CONCLUSION

For the reasons set forth above, the court concludes that Plaintiffs' request for a reduction in value must be denied. Plaintiffs have not established that the statutory prohibition against the sale of their property prior to the recording of the plat rendered their property valueless. Additionally, Plaintiffs have not established that their neighbors erected their home in violation

of applicable setback requirements; nor have they established what, if any, impact such a violation would have in the value of their property. Finally, Plaintiffs have not established that a required homeowners agreement does not exist and, if that is true, how the nonexistence of such an agreement impacts the value of their property. Now, therefore,

IT IS THE DECISION OF THIS COURT that Plaintiffs' appeal is denied and the values on the assessment and tax rolls for the years at issue are upheld.

Dated this _____ day of March 2006.

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DAN ROBINSON
MAGISTRATE

If you want to appeal this Decision, file a Complaint in the Regular Division of the Oregon Tax Court, by <u>mailing</u> to: 1163 State Street, Salem, OR 97301-2563; or by <u>hand delivery</u> to: Fourth Floor, 1241 State Street, Salem, OR.

Your Complaint must be submitted within <u>60</u> days after the date of the Decision or this Decision becomes final and cannot be changed.

This document was signed by Magistrate Dan Robinson March 23, 2006. The Court filed and entered this document March 23, 2006.