

# My View of Chapter 92

Leland Myers, March 10, 2005

During my nearly 40 years of surveying, like you, I have observed that a goodly number of people try to avoid the cost of surveys or development by using property line adjustments and partitions rather than using replats. I know of some government administrative bodies in my area that have encouraged these actions because in many cases they can be done without hearings by planning commissions, city councils and/or county commissioners. In response to public clamor our legislators have created the discrete lot or parcel by ORS 92.017 and I guess where the "lot of record" was created, though not defined as such, is by ORS 92.177. Or is the "lot of record" a combination of these two sections? I find many more problems unanswered than resolved by this knee-jerk legislation which was created because someone was overly zealous in developing survey and approval requirements in the view of the public which we are to serve.

I have spent some time trying to find the definition for "lot of record" and the following seems to be the best:

"Lot of record" means any unit of land created as follows:

1. A lot in a platted subdivision;
2. A lot created by land partitioning;
3. A unit of land described by a conveyed deed or land sales contract established prior to requirements for partitions and which conformed with all zoning requirements in effect, if any, when the deed or contract creating the lot was recorded.

Lot of Record, Nonconforming. A parcel of land which lawfully existed as a lot in compliance with all applicable ordinances and laws at the time of creation, but which, because of the application of a subsequent zoning ordinance, no longer conforms to the lot dimension requirement for the zoning district in which it is located.

This definition does not seem to reflect the stipulation made in ORS 92.177. We should be working with planning departments, realtors, title companies, and others to determine what are the underlying problems with Chapter 92, with some emphasis on replat, then work together to resolve them. The attempt to "patch" over many years has the appearance of conflicting and unintentional results. And upon looking back at these statements, maybe the problem is not surveying but how much review and approval time and costs by various government bodies that has been introduced into recording a survey.

Attorney General Opinion No. 1990 WL 519202 gives us a great place to start with a number of issues that should be addressed relative to lot or property line adjustments and replatting. One is the lack of definition for the term "reconfiguration." To me that is a very simple one to resolve as *reconfiguration is the change in the shape and/or any dimension of any lot or parcel*. The opinion goes on to say "ORS Chapter 92 contains no separate overall purpose section. Nonetheless, the purposes of the chapter have been fairly summarized as: (1) assuring accurate surveying, marking, and recording of individual parcels of land; (2) assuring that land is divided and improvements are provided within the framework of state-wide goals and community plans; (3) providing for infrastructure to serve the parcels; (4) providing improvements that relieve external effects of land division (e.g., pollution, congestion); and (5) protecting potential

purchasers from fraud, deceit or misrepresentation by sellers." Is this the way we visualize Chapter 92 or do we need to recommend modifications or additional purposes? As I view this purpose I wonder if it is true that only one-fifth of Chapter 92 is relevant to surveying? Planning issues are clearly more prevalent and have become the foundation of the Measure 37 revolt.

The Opinion tends to close with: "The use of lot line adjustments in subdivisions is a subject in need of legislative clarification. Specifically, we recommend that the legislature provide guidance on the extent to which a subdivision may be changed by lot line adjustments before it is reconfigured. Similarly, it would be helpful for the legislature to clarify whether local ordinances must require recording of amendments to a plat map, as opposed to the mere filing of metes and bounds descriptions of the newly drawn lots." This opinion was made in 1990 and as near as I can tell has not been addressed by us or the legislature. If property line adjustments were prohibited in subdivisions except as may be ordered by a court, then this clarification would not be needed.

According to my 1956 edition of Boundary Control & Legal Principles by Curtis Brown, lot lines can only be changed by "resubdividing." So now we have two possible terms, but I tend to lean towards replat as being a simpler word which also has a history in Oregon law. Other Attorney General opinions make the comment that the rationale and/or intent of the legislature is missing, so it is my hope we can develop the basis for rationale and intent.

Whereas subdivisions and partitions are forms of simultaneous conveyances it is my interpretation they should always be replatted and never property line adjusted in order to remain consistent with the original developer's intent. Part of the problem is the lack of general guidelines, allowing replats to be done under a simpler process than that of a full-fledge new subdivision. If hearings are not required for property line adjustments, then why should they be held for a simple replat? If a subdivision is substantially developed (say with many of the lots built upon, dedicated streets have been serving the neighborhood even though they may be less than new street standards, and utilities are available in the adjacent streets) an improvement requirement should not be necessary to cleanup property deeds. What is in the best interest of the public: to create bad or complicated descriptions using line adjustments or to waive improvement requirements to make lots that are consistent with the rest of the subdivision? Some of the recent proposals to add a property line adjustment section to Chapter 92 merely mimic ORS 92.185 as to the vacation of lot lines, easements and such. Why duplicate current law? I believe we should be giving more attention to ORS 92.180 through 190 rather than creating a new property line provision. I have attached the several paragraphs from the ORSs mentioned above as Appendix A.

The "lots of record" are creating quasi-subdivisions with no control whatsoever. I know of at least one county allowing property line adjustments of a number of "lots of record" under a single ownership as a prelude to subdividing or partitioning. Apparently, based on ORS 92.017 and 177 every parcel of land within the State of Oregon is a "lot of record" because it has been identified by a tax lot number, is represented by a tax map and has a deed record. A tax map is not a map of survey and in some cases the parcels are not represented very well. For us surveyors the problem with tax numbers are that they are administrative and can be changed on a whim. They are not used to describe property on deeds, so an identification process is needed. A "lot of record" has been determined to be a legal division of property with no identification other than the deed creating it. There are other implications that I do not intend to follow here, but it does appear to me that it would be logical to allow replats of "lots of record" so that we do not have to worry about procedures for property line adjustments or after-the-fact partitions for improperly

formed parcels. Further, the replatting process could be used on parcels created by deed, particularly where the deed does not correctly represent the occupied property. What better opportunity to correct unsurveyed parcels than to create a plat that is signed by all the affected land owners stating that they wish to continue occupying the property they claim? And further, those parcels could be given a partition or subdivision identification in an after-the-fact correction. The level of survey and amount administrative review will need to be determined for this work.

In my opinion, the present partition numbering system of using the year and a series number used by the county clerks is a terrible way to identify partitions. Names of people, geographic locations, roads, township and section, or any other unique names would permit a better chain of property identification during replat or other division of property within a partition. I know of counties that use deed document numbers, which is the true recording number, in addition to the partition number. The county surveyor does have the opportunity to apply his numbering system, that is not uniform from county to county. Since I am going to advocate the elimination of partitioning later in this discussion, the partition numbering system would become a non-issue.

For the sake of this discussion, let's take the simplest example of shifting a property line 10 feet parallel to the lot line. The property line adjustment does not shift the lot line because it is set by the subdivision plat. Using 50 feet as the lot width the description becomes for one parcel to be the East 40 feet of Lot 6; and the other parcel would be the West 10 feet of Lot 6 and all of Lot 7. This goes against the principal of simultaneous conveyances and causes maps and descriptions to become messy, particularly if the adjustment line becomes more complicated than in this example. I believe this violates the legislative intent to keep descriptions simple, ie a tract number of some sort rather than a metes and bounds description, which is a principle purpose of ORS Chapter 92.

Time for a proposed definition. *Tract of land is any contiguous property in a single ownership. It can consist of a lot, a group of lots, parcel or parcels, metes and bounds properties, one or more lots of record, government sections or aliquot parts thereof, properties partially bordered or fully surrounded by natural or man-made features, any other means man can find to describe a piece of property, or with any combination of the above.*

Another issue that keeps cropping up is that some seem to indicate a replat must be for the entire subdivision or for the subdivision exteriors only. Neither is true because ORS 92.185 clearly states "within the replat area." There can be a replat of just Lots 6 and 7 as in the above example or any other part of a subdivision. Let's say that the example block has 10 lots, the procedure I recommend is that Lots 6 and 7 are vacated by the replat and new Lots 11 and 12 are created. Lots that are not changed in configuration would not need to be renumbered. This would alleviate any potential problem about Lots 6 and 7 as to whether they are the old or new configuration because those numbers no longer exist. New deeds need to be drawn no matter what method is used to reconfigure a lot, so wouldn't it be at least as easy to have the owner of the new Lot 11 quit claim all interest in Lot 12 and vice versa to establish the necessary deed record? A deed may not be necessary where each land owner must sign a declaration on the plat which could or would stipulate them to be the owner of their respective lots. The plat is recorded in the county deed records, therefore it can and should become a portion of the chain of title and would preempt the need for additional titles. Any lot(s) in an additional replat in the same block would be given the next available number(s).

My experience has been, even though the law permits other procedures other than replatting, most small cities and counties have not adopted adequate alternate procedures to do so. Yet they approve property line adjustments without any process for doing so either. Maybe this is another area in which surveyors can provide a community service in providing an updated model ordinance related to the division of lands. A model needs to have explanatory material with each suggested ordinance provision so that the purpose and/or reason is clear. We surveyors need to help our communities to vacate undeveloped and undevelopable subdivisions. There are many paper subdivisions that do not fit the land upon which they were created. In my community, minimal surveys were done and most were speculative land divisions of pre-1900.

After around 100 years of subdivision plats having notations written on them, I don't know why a determination has been made that this is no longer an acceptable practice. It appears that the ORSs permit the County Surveyor's copy to receive notations. It is understood that the reason for subdivision and partition plats to be recorded with the County Clerks is their status as simultaneous conveyances, but I think we should stipulate that the exact duplicates shall be recorded as maps of surveys with the county surveyor. In this way all surveys for an area will be indexed in one location. I know in some counties this is already being done, but the disposition of the exact duplicates needs to be clarified and standardized.

I've heard a planning concern about the need to combine small substandard lots by replatting. Most of the small lots were made in the original development of many communities. Early miners, loggers and generally single male laborers had a much smaller need for housing and adjoining property. It was not uncommon for living cabins to be around 12' by 16', so a 25-foot wide lot was adequate. Smaller lots also provide a means of flexibility where a person could buy 3 25-foot lots instead of a 100-foot lot which exceeds the buyer's needs. Larger lots also tend to introduce more need for property line adjustments. Lot lines are not necessarily property lines, but in a subdivision, property lines should almost always be lot lines. I do not see the small lots being a problem as long as they are used in compliance with zoning regulations which should address property or tract lines. Owning more than one lot as a tract is an acceptable principal and once a building is across a number of lots they certainly are not treated as individual lots anymore. It might be advisable to replat all lots in a block if a partial replat is being done but not against the wishes of other lot owners for their property in the block.

In Brown, the definition of subdivision is the dividing of land into two or more pieces. I believe the only reason that Oregon Law stipulated four or more units of land when the first subdivision statute was created in 1947 was to allow folks to break larger parcels into smaller units that were not in need of utility services. It was apparently intended to be a cost saving measure. However, the original provisions of law did not permit series land divisions so that the subdivision provisions could be circumvented. That was dropped a few years ago because the public wanted a way to divide land into smaller and smaller parcels without the need to meet the requirements necessary for a subdivision. My, has that led to some exception property situations. Now the public does regulate all divisions of land so the intent of the original four lot or more is no longer valid. Recently the differences between partitions and subdivisions have shrunk dramatically with many ORS provisions clumsily using both subjects. It is time to revisit Chapter 92 and make a wholesale upgrade of the subdivision regulations.

To begin, I would suggest we do away with partitions entirely and create a three or four tier subdivision statute. The first tier could be for large lots of 40 acres or more (generally all lots would be larger than the minimum lot size for agriculture and timber zones) in which streets or roads and utilities would not be needed. I would suggest that these would not have a subdivision

name or numbered lots. Just plain old metes and bounds or aliquote part descriptions, and the only time a map or survey would be needed would be in the event there was a complicated division line involved. Minimal approvals should be necessary; i.e., does the division comply with zoning regulations. It is ludicrous to me that large acreages (usually anything larger than the minimum acreage required for agriculture or timber uses) should have parcel numbers.

The second tier could be for when lets say at least one lot out of a maximum of 2 to 4 is smaller than 10 or 40 acres (whatever the magic number is for the minimum size that would require a survey) and could include the smallest lots allowed by zoning regulations. Another criteria may be is the parcel description surveyable or identifiable. If not, it should probably be surveyed to make the description clear. Using man-made objects such as fences is not a good means of identifying property as fences are very easy to move. It may be appropriate to require a survey of man-made features that are used for property lines. The important limiting factor may not be the size in acres but to how complex the lot boundary. A dividing line that zigs and zags around objects, buildings, trees or whatever should be surveyed and monumented for peace of mind no matter what the lot size. Usually these would be rural developments where water and sewer services are not available and every parcel would front on a public road. This level would not have a need to dedicate new roads or streets, and utilities are already installed or utility construction would be the responsibility of the individual lot purchaser. A plat would be required and possibly a survey would be needed if at least one lot meets the criteria established for when a lot needs surveying, but no dedication of land to the public would be necessary. Again approvals should be mostly zoning. This tier may be the logical place for replats in developed subdivisions and partitions.

I have debated with myself as to whether we need one or two tiers for urban subdivisions. This would be where full fledged subdivisions would be done using procedures very similar to our current process. My concern is whether a proposed subdivision may be so big it has a major impact on schools and services other than utilities for which a separate tier would be necessary. Probably not, as this is not a survey but a municipality issue.

The other day we had a discussion about how a survey is also for the neighbors even though they did not order it or are they paying for any part of the survey. The discussion was relative to the removal of monuments if the surveyor did not receive payment. If the survey is in fact for other parties, then the public should pay the bill. To carry this further, the county surveyors would do all the surveys in this state with their staff of licensed surveyors! It is my opinion that the survey recording law was for the purpose of showing all why and where a monument was set so that extensive surveys would not be necessary to determine their origin. It is not to provide a freebie survey for an adjoiner. The 45 day requirement to record a survey needs to be reviewed and a determination made as to how important is this time frame. If the private surveyor is to survive to serve, then more flexibility is needed so they can have some leverage to collect their fees.

We must think outside the box and totally revamp Chapter 92 to fit the desires of the public we are serving and to make it clear and understandable. Recent various court decisions tend to reflect intent can be interpreted in ways that may not be in the best interest of the public. There may be some misstatements in the above, but I have made what I consider to be my best interpretation of the law and conditions as they now exist. This document is intended to be a beginning of what could be a long process.

## Appendix A

**92.017 When lawfully created lot or parcel remains discrete lot or parcel.** A lot or parcel lawfully created shall remain a discrete lot or parcel, unless the lot or parcel lines are vacated or the lot or parcel is further divided, as provided by law. [1985 c.717 §3; 1993 c.702 §2]

**92.177 Creation of lot or parcel following improper formation.** Where application is made to the governing body of a city or county for approval of the creation of lots or parcels which were improperly formed without the approval of the governing body, the governing body of a city or county or its designate shall consider and may approve an application for the creation of lots or parcels notwithstanding that less than all of the owners of the existing legal lot or parcel have applied for the approval. [1993 c.436 §2; 1995 c.595 §14]

### REPLATTING

**92.180 Authority to review replats.** (1) Each agency or body authorized to approve subdivision or partition plats under ORS 92.040 shall have the same review and approval authority over any proposed replat of a recorded plat.

(2) Nothing in this section regarding replatting shall be construed to allow subdividing or partitioning of land without complying with all the applicable provisions of this chapter. [1985 c.369 §2; 1991 c.763 §18]

**92.185 Reconfiguration of lots or parcels and public easements; vacation; notice; utility easements.** The act of replatting shall allow the reconfiguration of lots or parcels and public easements within a recorded plat. Except as provided in subsection (5) of this section, upon approval by the reviewing agency or body as defined in ORS 92.180, replats will act to vacate the platted lots or parcels and easements within the replat area with the following conditions:

(1) A replat, as defined in ORS 92.010 shall apply only to a recorded plat.

(2) Notice shall be provided as described in ORS 92.225 (4) when the replat is replatting all of an undeveloped subdivision as defined in ORS 92.225.

(3) Notice, consistent with the governing body of a city or county approval of a tentative plan of a subdivision plat, shall be provided by the governing body to the owners of property adjacent to the exterior boundaries of the tentative subdivision replat.

(4) When a utility easement is proposed to be realigned, reduced in width or omitted by a replat, all affected utility companies or public agencies shall be notified, consistent with a governing body's notice to owners of property contiguous to the proposed plat. Any utility company that desires to maintain an easement subject to vacation under this section must notify the governing body in writing within 14 days of the mailing or other service of the notice.

(5) A replat shall not serve to vacate any public street or road.

(6) A replat shall comply with all subdivision provisions of this chapter and all applicable ordinances and regulations adopted under this chapter. [1985 c.369 §3; 1991 c.763 §19; 1993 c.702 §9]

**92.190 Effect of replat; operation of other statutes; use of alternate procedures.** (1) The replat of a portion of a recorded plat shall not act to vacate any recorded covenants or restrictions.

(2) Nothing in ORS 92.180 to 92.190 is intended to prevent the operation of vacation actions by statutes in ORS chapter 271 or 368.

(3) The governing body of a city or county may use procedures other than replatting procedures in ORS 92.180 and 92.185 to adjust property lines as described in ORS 92.010 (11), as long as those procedures include the recording, with the county clerk, of conveyances conforming to the approved property line adjustment as surveyed in accordance with ORS 92.060 (7).

(4) A property line adjustment deed shall contain the names of the parties, the description of the adjusted line, references to original recorded documents and signatures of all parties with proper acknowledgment. [1985 c.369 §4; 1989 c.772 §24; 1991 c.763 §20]

Observation: The longer I look at what land surveyors do to themselves biennially, the more I know the reason why we will never reach the goal of being known as PROFESSIONALS. Virtually every legislative session we invite the public to tell us how to do our job and ask a body of citizen legislators to adopt laws to keep us in line. If we are to become that allusive PROFESSIONAL, then we must self-regulate.

Leland Myers