

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3
4 LANDWATCH LANE COUNTY, 09/10/18 PM 2:58 LUBA

5 *Petitioner,*

6
7 vs.

8
9 LANE COUNTY,

10 *Respondent,*

11
12 and

13
14 MCDOUGAL BROTHERS INVESTMENTS,

15 *Intervenor-Respondent.*

16
17 LUBA No. 2018-013

18
19 FINAL OPINION

20 AND ORDER

21
22 Appeal from Lane County.

23
24 Andrew Mulkey, Eugene, filed the petition for review and argued on
25 behalf of petitioner.

26
27 No appearance by Lane County.

28
29 Bill Kloos, Eugene, filed the response brief on behalf of intervenor-
30 respondent. With him on the brief was the Law Office of Bill Kloos, PC.

31
32 BASSHAM, Board Member; RYAN, Board Chair; ZAMUDIO, Board
33 Member, participated in the decision.

34
35 REMANDED

09/10/2018

36
37 You are entitled to judicial review of this Order. Judicial review is
38 governed by the provisions of ORS 197.850.

NATURE OF THE DECISION

Petitioner appeals a hearings officer’s decision verifying four parcels as legal lots.

FACTS

Intervenor-respondent McDougal Brothers Investments (intervenor) applied to the county to verify six parcels as legal lots, that is, lawfully created units of land, pursuant to Lane Code (LC) 13.020 and LC 16.090. The hearings officer ultimately verified only four of the six parcels as legal lots. These are referred to as Legal Lots 1, 2, 3 and 4. We do not understand petitioner to advance any challenges regarding Legal Lot 4¹, and as discussed below intervenor concedes that remand is necessary with respect to Legal Lot 3. Accordingly, we focus primarily on the facts and circumstances involving Legal Lots 1 and 2. As discussed below, the primary basis or theory for the

¹ Legal Lot 4 is a small parcel that adjoins Legal Lot 1 to the north. However, the county tax assessor has assigned a single tax lot number, tax lot 201, to include both Legal Lot 4 and Legal Lot 1. Confusingly, petitioner frequently refers to “tax lot 201,” in contexts where it seems clear that petitioner is referring to Legal Lot 1, or the parent parcel to Legal Lot 1. The hearings officer adopted separate findings verifying Legal Lot 4, and petitioner does not challenge those findings. Further, none of petitioner’s specific challenges to Legal Lot 1 appear to have any bearing on Legal Lot 4, which under the hearings officer’s theory does not share a parent parcel with Legal Lot 1. Accordingly, we agree with intervenor that petitioner either does not raise any challenges to Legal Lot 4 in this appeal, or that any such challenges are insufficiently developed for review.

1 hearings officer’s conclusion that Legal Lots 1 and 2 were lawfully created and
2 thus are legal lots under LC 13.020 is that both parcels are lawful remainder
3 parcels, left over after a series of lawful transactions reduced them in size.

4 Even with the narrow focus on Legal Lots 1 and 2, the facts and
5 chronology involved in this appeal are complex. We provide a simplified
6 version of the factual background that omits a number of transactions and
7 events that, as far as we can tell, have no bearing on the issues in this appeal.

8 **A. 1948 Creation of Parent Parcel 2.**

9 In 1948, what the parties call Parent Parcel 2 (PP2) was created, as part
10 of a process resulting in the creation of five parcels. *See* Figure 1 at the end of
11 this opinion, illustrating the five parcels created in 1948.² PP2 was a roughly
12 square parcel located a short distance south of what later became 30th Avenue,
13 which was established in 1961.

14 **B. 1962 Subdivision Ordinance.**

15 In 1962 the county first adopted subdivision regulations, which required
16 county approval to subdivide land, with one pertinent exception. Section
17 III.G.4.a of the 1962 subdivision code, which remained unchanged during all
18 relevant times, provided that a division of land was not a “subdivision” if (1)
19 the division was for agricultural use, (2) no street was created, (3) the division

² Figures 1-4 attached to this opinion are very simplified schematics created by LUBA to illustrate for the general reader the approximate effect of the land divisions that, under the hearings officer’s theory, resulted in the present configurations of Legal Lots 1 and 2.

1 resulted in lots that exceed five acres, (4) each lot had a width of at least 300
2 feet, and (5) each lot had frontage of at least 300 feet on a street.³ The unit of
3 land that the hearings officer verified as Legal Lot 1 is, under the hearings
4 officer's theory, the remainder of PP2 after various reductions described below.
5 The hearings officer found that each of the deed transactions that reduced PP2
6 to its present size and shape fell within the Section III.G.4.a exception to the
7 definition of "subdivision," and thus did not require county subdivision
8 approval at the time.

9 **C. 1965 Minor Subdivision (M65-172).**

10 In 1965, the county approved a "minor subdivision" (M65-172) to create
11 two large lots out of a larger area of land that included the entirety of PP2.⁴

³ Section III.G.4.a of the 1962 Subdivision Ordinance provided, in relevant part:

"Subdivision' means the division of land; except that the following division of land shall not be deemed a subdivision where no new street is created:

"a. A division of land for use for agricultural purposes, where each resulting lot is 5 acres or larger in size, has a width of not less than 300 feet for the entire length between the lot front line and lot rear line, and has frontage of not less than 300 feet on a street; provided that such street has a right of way width of not less than 50 feet and not less than such width as may be called for in the Master Road Plan."
Petition for Review, App-33.

⁴ Under Section III.E.3.a of the 1962 Subdivision Ordinance, a "minor subdivision" was a limited type of partition, defined in relevant part as a division of land within an urbanizing area that results in not more than three

1 The area of land subject to the M65-72 subdivision included the five parcels
2 created in 1948, including PP2, plus additional lands to the north extending to
3 30th Avenue, as well as further east and south. *See* Figure 2. The apparent
4 purpose of M65-172 was to create a large lot, Lot 1, to be conveyed to Lane
5 County Community College for a campus. The boundary line between Lot 1
6 and Lot 2 as depicted on the M65-172 plat runs roughly through the middle of
7 PP2. Land along this boundary line later was dedicated and developed as
8 Gonyea Road, connecting to 30th Avenue to the north.

9 County ordinances in 1965 did not require that approved minor
10 subdivision plats be recorded, and the M65-172 subdivision plat was
11 apparently never recorded. For that reason, the hearings officer in this appeal
12 concluded that the M65-172 subdivision approval did not have the effect of
13 vacating the pre-existing lot or parcel lines that are located within the
14 subdivision plat.⁵ No party challenges that conclusion in this appeal. Both
15 parties proceed on the assumption that PP2's property lines survived the

lots fronting on an existing street. *Petition for Review, App-24*. Section III.E.1 of the 1962 Ordinance defined a "major subdivision" as any subdivision that is not a minor subdivision. One salient difference between the two types of land divisions is that the 1962 Subdivision Ordinance did not require that a minor subdivision be recorded.

⁵ *See Weyerhauser Real Estate Development Co. v. Polk County*, 246 Or App 548, 267 P3d 855 (2011) (a recorded partition plat has the effect of vacating preexisting lot lines created by a 1911 subdivision).

1 approval of M65-172 intact, until modified by subsequent recorded deeds and
2 subdivisions.

3 **D. 1967 Deed Conveying Lot 1 of M65-172.**

4 In 1967, Deed 87571 conveyed to Lane County Community College an
5 area of land that appears to correspond roughly with the bounds of Lot 1 as
6 depicted on the M65-172 subdivision plat. The area conveyed included the
7 eastern portion of PP2. *See* Figure 3. The tax assessor designated the land
8 conveyed in Deed 87571 as tax lot 1400. The hearings officer concluded that
9 the units of land resulting from Deed 87571 fell within the exception to the
10 Section III.G.4.a definition of “subdivision,” and thus did not require county
11 subdivision approval.

12 **E. 1970 Establishment of Gonyea Road.**

13 In 1970, the county established Gonyea Road by ordinance, on land
14 dedicated in 1971 that includes the boundary line between tax lot 1400 and the
15 remaining western half of PP2.

16 **F. 1972 Deed Conveyance of Some of Parent Parcel 2 and Other**
17 **Property.**

18 In 1972, Deed 82423 conveyed land west of Gonyea Road and south of
19 30th Avenue to the Warrens. This deed included land that consisted of the
20 northern portion of PP2, and additional property north of PP2 up to 30th

1 Avenue that had been part of Lot 2 of the M65-172 subdivision plat.⁶ See
2 Figure 4. The land conveyed in Deed 82423 included what is described below
3 as Legal Lot 2. The hearings officer found that Legal Lot 1 is a remainder
4 parcel of PP2 from this conveyance. The hearings officer concluded that the
5 units of land created by Deed 82423 fell within the exception to the Section
6 III.G.4.a definition of “subdivision,” and thus the division did not require
7 county subdivision approval.

8 **G. 1972 Warren Park Subdivision**

9 One day after purchasing tax lot 202, the Warrens applied to the county
10 for a minor subdivision, to create three lots from the property conveyed to
11 them. Record 179. Lot 3 of the proposed subdivision encompassed the
12 western area of tax lot 201 that the hearings officer verified as Legal Lot 2.
13 However, the county concluded that the application actually sought to create
14 four lots, and thus required major rather than minor subdivision approval.
15 Record 176. The plat the county finally approved is a different plat, that
16 depicts only three lots, Lots 1, 2 and 3, in the eastern half of tax lot 202 along
17 Gonyea Road. Record 441.⁷ The approved plat does not depict the area that

⁶ The tax assessor designated the area of land conveyed by Deed 82423 as tax lot 202.

⁷ One of the lots currently located within the area platted as the Warren Park subdivision is Legal Lot 3, designated as tax lot 205, which the hearings officer verified in its present configuration, following a transaction that the hearings officer characterized as a merger or property line adjustment. However, given that intervenor concedes that remand is necessary to address flaws in the

1 was verified as Legal Lot 2 at all. The hearings officer concluded that the
2 western half of tax lot 202, Legal Lot 2 in its present configuration, is a lawful
3 unplatted remainder of the Warren Park subdivision.

4 **H. County Proceedings.**

5 As noted, the hearings officer verified Legal Lots 1, 2, 3 and 4, and
6 denied verification for Legal Lots 5 and 6. The denial of Legal Lot 6 resulted
7 in modifying the southeastern boundaries of Legal Lot 1, but because no issue
8 is raised in this appeal regarding Legal Lots 5 or 6 or the modification of Legal
9 Lot 1's boundaries, we do not describe them further. Petitioner appealed the
10 hearings officer's decision to the board of commissioners, which elected not to
11 hear the appeal, affirming the hearings officer's decision as the county's final
12 decision. This appeal followed.

13 **FIRST ASSIGNMENT OF ERROR**

14 Petitioner argues that the hearings officer erred in verifying Legal Lot 1
15 as a legal lot. As noted, the hearings officer concluded that the 1967
16 conveyance (Deed 87571) that created what was designated as tax lot 1400
17 from the eastern portion of PP2 plus lands further to the east, to be conveyed to
18 the college for a campus, fell within the exception at Section III.G.4.a of the

verification of Legal Lot 3, we do not describe here the creation or
configuration of Legal Lot 3.

1 then-applicable 1962 Subdivision Ordinance, and thus did not require county
2 subdivision approval.⁸

3 Petitioner first argues that Deed 87571 in fact resulted in three parcels,
4 not the two parcels described in the hearings officer's findings. That is because
5 the hearings officer found that the boundaries of PP2 were not vacated by the

⁸ The hearings officer's findings state, in relevant part:

"The portion of the parent parcel east of Gonyea Road was conveyed in 1967. (Reel 350, Instrument 87571, Lane County Deeds and Records). This property can now be identified as tax lot 1400. The Appellant has argued that this transfer required land division approval.

"Lane County's Revised Subdivision Ordinance, adopted April 2, 1962, controlled land divisions in Lane County at this time. The ordinance required the approval of a minor subdivision within an urbanizing area. [The subject property] lay within an urbanizing area. However, Section III.G.4.a of that ordinance provided that a division of land was not a 'subdivision' if (1) no street was created; (2) the division resulted in lots that were 5 acres or larger in size; (3) the lots had a width of not less than 300 feet for the entire length of the lot; (4) the lots had frontage of not less than 300 feet on a street; and (5) the abutting street had a right of way width of not less than 50 feet and not less than such width as may be called for in the Master Road Plan.

"The 1967 instrument transferred one parcel of land. 30th Avenue, a four-lane road accepted by the County in 1961[] that has a right of way width of at least 220 feet, abutted this parcel for more than 300 feet. The land transfer did not create a road, was larger than 5 acres in size, had a width in excess of 300 feet. * * * Therefore, no minor subdivision approval was required from Lane County for this transfer." Record 15 (footnote omitted).

1 1965 minor subdivision approval in M65-172. According to petitioner, when
2 the metes and bounds description of land conveyed by Deed 87571 is applied
3 to the existing boundaries of PP2, three parcels resulted from the conveyance,
4 described as follows from east to west. The first parcel is the eastern portion of
5 tax lot 1400 that lay outside the boundaries of PP2. Petitioner argues that of
6 the three resulting parcels, only this parcel fronts on 30th Avenue or any street
7 for the requisite 300 feet. The second, middle, parcel, is the eastern portion of
8 PP2 that was also conveyed to the college.⁹ This middle parcel, petitioner
9 notes, did not have frontage on 30th Avenue, or any street then existing. The
10 third resulting parcel is the western remainder of PP2, which is the parcel that
11 ultimately was verified as Legal Lot 1 (after other reductions), which petitioner
12 argues in 1967 did not have frontage on 30th Avenue or any street then
13 existing. Accordingly, petitioner argues that the hearings officer erred in
14 concluding that the 1967 conveyance fell within the Section III.G.4.a exception
15 to the requirement to obtain county subdivision approval.

⁹ We need not in this opinion decide whether petitioner is correct that the 1967 deed created three parcels, including a middle parcel conveyed to the college consisting of the eastern portion of PP2. If necessary on remand the hearings officer should consider and resolve that issue. We note only that the principle stated in *Weyerhauser*, 246 Or App 548, might be extended to recorded deeds, to the effect that a recorded deed conveying under a single metes and bounds description an area of land that includes portions of two preexisting parcels will act to vacate the internal property lines within the conveyed area of land, and thus convey only a single unit of land.

1 Intervenor responds that the 1967 conveyance did not result in the
2 unlawful creation of any parcels. To the extent the creation of the parcel or
3 parcels that comprise tax lot 1400 was unlawful, intervenor argues that any
4 unlawfulness therein does not impact the lawfulness of the remainder portion
5 of PP2 that ultimately, with a further reduction in size in 1972, was verified as
6 Legal Lot 1. Intervenor also argues that, to the extent the hearings officer’s
7 findings regarding the effect of the 1967 conveyance are inadequate, the record
8 includes evidence that “clearly supports” a finding that the parcels resulting
9 from the 1967 conveyance were lawful. ORS 197.835(11)(b).¹⁰

10 Intervenor provides no response, at least any we understand, to
11 petitioner’s argument that only one of the parcels resulting from the 1967
12 conveyance, the eastern portion of tax lot 1400, had the requisite 300 feet of
13 frontage on a street necessary under Section III.G.4.a of the 1962 Subdivision
14 Ordinance to fall within the exception to the requirement to obtain county
15 subdivision approval. If the boundaries of PP2 survived the 1965 M65-172

¹⁰ ORS 197.835(11)(b) provides:

“Whenever the findings are defective because of failure to recite adequate facts or legal conclusions or failure to adequately identify the standards or their relation to the facts, but the parties identify relevant evidence in the record which clearly supports the decision or a part of the decision, the board shall affirm the decision or the part of the decision supported by the record and remand the remainder to the local government, with direction indicating appropriate remedial action.”

1 subdivision approval, as the hearings officer found and no party disputes, then
2 the western remainder portion of PP2 did not, in 1967, have 300 feet of
3 frontage on a street, or frontage of any length on any street. The only street in
4 the area at that time was 30th Avenue, and PP2 had no frontage on 30th
5 Avenue.¹¹

6 Section III.G.4.a of the 1962 Subdivision provides an exception to the
7 requirement to obtain county subdivision approval only where “each resulting
8 lot” meets the required elements, including the requirement to have 300 feet of
9 frontage on a street. *See* n 3. Intervenor does not dispute, at least in any way
10 we understand, that the phrase “each resulting lot” refers to all units of land
11 resulting from a land division, including remainder lots or parcels such as the
12 western portion of PP2. If there is some reason to conclude that the western
13 portion of PP2 is not a “resulting lot” from the 1967 Deed (87571) for purposes
14 of Section III.G.4.a of the 1962 Subdivision Ordinance, neither the hearings
15 officer nor intervenor cites it. We agree with petitioner that for the exception at
16 Section III.G.4.a to apply, each of the resulting units of land must meet the

¹¹ Intervenor notes elsewhere that PP2 was (and its remnant still is) designated as tax lot 201, and that during this period (mid-1960s through the early 1970s) tax lot 201 also encompassed properties to the north that extended to 30th Avenue. But, as intervenor correctly notes, a tax lot may include more than one discrete unit of land. That PP2 was in 1967 part of a tax lot whose tax lot boundaries extended via other properties to 30th Avenue does not mean that PP2 itself extended to or fronted on 30th Avenue, for purposes of Section III.G.4.a.

1 Section III.G.4.a requirements, including the requirement to have 300 feet of
2 frontage on a street. Failing that, the exception does not apply, and county
3 subdivision approval would have been required.

4 Intervenor argues nonetheless that the 1967 conveyance was intended to
5 implement the 1965 M65-172 subdivision approval, which the hearings officer
6 found was never recorded and hence did not function to vacate the preexisting
7 property lines within the plat, including the boundaries of PP2. We understand
8 intervenor to argue that because the 1967 conveyance was intended to
9 implement the 1965 M65-172 subdivision approval, the lawfulness of the
10 parcels resulting from the 1967 conveyance is not determined by whether the
11 resulting parcels met the exception criteria set out in Section III.G.4.a (and
12 hence whether county approval was required or not), but rather by whether the
13 resulting parcels are consistent with the M65-172 subdivision approval.

14 That is an interesting argument, but one that is hard to square with the
15 hearings officer's decision, which relies solely upon Section III.G.4.a to
16 conclude that the 1967 conveyance did not result in unlawful parcels, and
17 which gives no apparent consideration to the 1965 M65-172 subdivision
18 approval. Further, under the hearings officer's conclusion that the M65-172
19 subdivision did not vacate the preexisting property lines within the plat,
20 including PP2, a conclusion that intervenor does not dispute, it is hard to see
21 how creating a parcel (or possibly two parcels, if petitioner is correct) from
22 land encompassed by PP2 is consistent with the M65-172 subdivision plat,

1 which does not depict the boundaries of PP2 at all. Conveying land
2 corresponding to Lot 1 of the M65-172 subdivision would be consistent with
3 the plat, if it resulted in leaving Lot 2 as depicted on the M65-172 subdivision
4 plat as a remainder parcel, but conveying Lot 1 in a manner that results in the
5 western portion of PP2 as a remainder parcel, and possibly created a third
6 parcel consisting of the eastern portion of PP2, as petitioner argues, does not
7 seem consistent with the M65-172 subdivision approval.

8 As to intervenor's argument that any inadequacy in the hearings officer's
9 findings regarding Section III.G.4.a can be overlooked pursuant to ORS
10 197.835(11)(b), intervenor does not cite to any evidence that "clearly supports"
11 a finding that each of the parcels resulting from the 1967 conveyance,
12 including the western portion of PP2, complied with the 300-foot frontage
13 requirement of Section III.G.4.a of the 1962 Subdivision Ordinance.

14 Finally, petitioner argues that the hearings officer failed to address or
15 find that the parcels created by the 1967 conveyance were divided for "use for
16 agricultural purposes." *Id.* On the contrary, petitioner argues, it is clear that at
17 least the parcel(s) created as part of tax lot 1400 for the college were not
18 created for use for agricultural purposes.

19 Intervenor responds to a similar argument under the third assignment of
20 error, regarding Legal Lot 2, that no issue regarding the Section III.G.4.a
21 requirement that the division of land be for "use for agricultural purposes" was

1 raised below, and thus the issue is waived pursuant to ORS 197.763(1).¹²
2 Response Brief 33. At oral argument, petitioner responded that the issue was
3 raised at Record 147 (“[T]he evidence shows that the landowners did not divide
4 the property for ‘use for agricultural purposes.’”). We agree with petitioner
5 that Record 147 sufficiently raises the issue with respect to the 1972 deed that
6 resulted in Legal Lot 1 in its current configuration, and created the parent
7 parcel to Legal Lot 2. Intervenor does not argue waiver with respect to the
8 same argument directed at the 1967 deed. Accordingly, we will consider the
9 argument.

10 As petitioner correctly notes, the hearings officer’s findings do not
11 address whether the division of land accomplished by the 1967 deed was for
12 “use for agricultural purposes.” We agree with petitioner that remand is
13 necessary for the hearings officer to consider that language, and to reconsider
14 the conclusion that the 1967 deed fell within the exception at Section III.G.4.a.

15 The first assignment of error is sustained, in part.

¹² ORS 197.763(1) states:

“An issue which may be the basis for an appeal to [LUBA] shall be raised not later than the close of the record at or following the final evidentiary hearing on the proposal before the local government. Such issues shall be raised and accompanied by statements or evidence sufficient to afford the governing body, planning commission, hearings body or hearings officer, and the parties an adequate opportunity to respond to each issue.”

1 **SECOND ASSIGNMENT OF ERROR**

2 Petitioner challenges the hearings officer’s verification of Legal Lot 3,
3 also known as tax lot 205. Legal Lot 3 was created in 1977 by Deed 50741,
4 when the Warrens, the owner of Lot 2 of the three-lot Warren Park subdivision,
5 conveyed 10 acres of Lot 2 to the Oregon Research Institute, retaining a two-
6 acre portion. Record 506-07. Oregon Research Institute then conveyed the 10-
7 acre parcel (tax lot 208) to the college. Record 505 (Deed 58421).

8 The hearings officer rejected petitioner’s argument that this 1977
9 division of Lot 2 into two-acre and 10-acre parcels was unlawful, concluding
10 that no new unit of land was in fact created by the 1977 deeds. The hearings
11 officer found that, because the Warrens owned both Lot 2 and Lot 3 of the
12 Warren Park subdivision, in some unexplained way Deed 50741 had the effect
13 of merging the commonly-owned 10-acre remainder of Lot 2 and Lot 3 into a
14 single lot, apparently as a *de facto* property line adjustment or replat. The
15 hearings officer concluded that before and after Deed 50741 only three lots
16 existed within the Warren Park subdivision, and therefore no partition or
17 division of land occurred at all.

18 Petitioner argues, among other things, that the hearings officer’s finding
19 that Lot 2 and 3 of the Warren Park subdivision were in common ownership in
20 1977—the premise for his unexplained conclusion that Lot 2 and 3 merged—is
21 not supported by substantial evidence. Intervenor concedes that there is no

1 evidence in the record that the Warrens owned Lot 3 in 1977, and requests that
2 the decision be remanded for further evidentiary proceedings.

3 Intervenor does not respond to petitioner's other arguments directed at
4 Legal Lot 3. In our view, petitioner's other arguments warrant as much or
5 more attention on remand than the question of who owned Lot 3 of the Warren
6 Park subdivision in 1977.¹³ We agree with the parties that remand is warranted,
7 but conclude that remand should not be limited to accepting evidence regarding
8 ownership of Lot 2 and 3. On remand, the hearings officer should consider all
9 of the arguments in petitioner's second assignment of error.

10 The second assignment of error is sustained.

11 **THIRD ASSIGNMENT OF ERROR**

12 The third assignment of error challenges the hearings officer's
13 verification of Legal Lot 2. As noted, in 1972 part of PP2 and other property
14 was conveyed to Warren by Deed 82423. Later in 1972, the county approved
15 the Warren Park subdivision to create three lots out of the eastern half of the

¹³ Among other things, petitioner argues that the hearings officer apparently misunderstood that the Warrens retained the 10-acre parcel created from Lot 2 of the Warren Park subdivision, when in fact it appears that the Warrens retained the two-acre parcel that was ultimately verified as Legal Lot 3, and conveyed the 10-acre parcel to the Oregon Research Institute. Record 506-07. As petitioner argues, Legal Lot 3 is not adjacent to Lot 3 of the Warren Park subdivision, and even if the Warrens owned Lot 3 at the time of the 1977 deed, the two units of land could not have merged into a single unit of land. Petitioner also argues that in 1977 the creation of a two-acre parcel on lands zoned and planned for resource use could not have complied with then applicable state and local laws.

1 property conveyed in Deed 82423, leaving the western half as the remainder.
2 Legal Lot 2 is that remainder. However, petitioner argues for three reasons that
3 the 1972 creation of the parent parcel to Legal Lot 2 by Deed 82423 was
4 unlawful.

5 Petitioner first argues that Deed 82423 effected a land division, and that
6 the hearings officer did not find, and could not find—given the subsequent
7 Warren Park subdivision—that the purpose of the land division resulting from
8 Deed 82423 was to create parcels for agricultural use. Petitioner notes that the
9 Warrens filed an application to subdivide tax lot 202 one day after purchasing
10 the parent parcel, with the apparent purpose of creating several small parcels to
11 be conveyed and developed as part of the college campus. Accordingly,
12 petitioner argues that the Section III.G.4.a exception does not apply, and the
13 land division required county subdivision approval.

14 As explained above, intervenor argues this issue was not raised below.
15 However, as noted, petitioner clearly raised the issue at Record 147. Petitioner
16 is correct that the hearings officer’s findings do not address whether the land
17 division effected by Deed 82423 was “for use for agricultural purposes.”
18 Section III.G.4.a excludes from the definition of “subdivision,” and hence the
19 requirement to obtain subdivision approval, “[a] division of land for use for
20 agricultural purposes, where each resulting lot” meets several stated
21 requirements. *See* n 3. We agree with petitioner that remand is necessary for

1 the hearings officer to consider whether the division effected by Deed 82423
2 was “for use for agricultural purposes.”

3 Petitioner also argues, as it argued in the first assignment of error, that
4 the western portion of PP2 (and the parcel ultimately verified as Legal Lot 1),
5 did not have 300 feet of frontage on a street when Deed 82423 was transacted,
6 as required to fall within the Section III.G.4.a exception to the requirement to
7 obtain subdivision approval. Petitioner contends that Gonyea Road, which was
8 established in 1971 and which terminates at the border of the remainder parcel
9 that was verified as Legal Lot 1, does not provide 300 feet of frontage to Legal
10 Lot 1. For that additional reason, petitioner argues that the 1972 land division
11 effectuated by Deed 82423 required county subdivision approval.

12 Intervenor responds that the dedicated boundaries of Gonyea Road do
13 not terminate at the border of Legal Lot 1, but actually extend some distance
14 into Legal Lot 1. According to intervenor, if the boundaries of Gonyea Road
15 that extend into Legal Lot 1 are measured around their perimeter, the total
16 distance exceeds 300 feet. The hearings officer adopted no findings on this
17 point. It is not clear to us that the three sides of the terminus of a right-of-way
18 are properly viewed as “frontage” on that right-of-way for purposes of Section
19 III.G.4.a. Nonetheless, on remand the hearings officer may address that
20 argument in the first instance.

21 Finally, petitioner argues that the 1972 land division rendered by the
22 recording of Deed 82423 arguably resulted in *four* lots, and thus required

1 approval as a *major* subdivision. As noted, the hearings officer assumed that
2 the boundaries of PP2 survived the county-approved M65-172 subdivision.
3 According to petitioner, the boundaries of PP2 existing in 1972, when overlain
4 by the boundaries created by Deed 82423, would have resulted in four parcels:
5 (1) a parcel to the north of PP2 conveyed to the Warrens; (2) a parcel
6 consisting of the northern portion of PP2, also conveyed to the Warrens; (3) a
7 remainder parcel consisting of the southern portion of PP2 (Legal Lot 1), and
8 (4) a parcel to the northwest of PP2 and west of the portions conveyed to the
9 Warrens, which became the parent parcel for Legal Lot 4. Because Deed
10 82423 arguably resulted in four parcels, petitioner argues, county approval of a
11 major subdivision, rather than a minor subdivision, was required.

12 Intervenor does not respond to this theory, and the hearings officer's
13 findings do not address it. Petitioner does not cite any authority for the
14 proposition that a deed conveyance of portions of two discrete parcels under a
15 single metes and bounds description has the effect of creating multiple units of
16 land within the conveyed property, based on the internal preexisting property
17 lines. Based on the reasoning in *Weyerhauser*, 246 Or App 548, it seems more
18 likely that such a recorded conveyance, under a single metes and bounds
19 description, would have the effect of vacating any internal preexisting property
20 lines, and resulting in conveyance of a single unit of land. If so, then petitioner
21 is incorrect that a major, rather than minor, subdivision would have been
22 required. However, we need not resolve this issue, because for purposes of

1 legal lot verification the question is whether county subdivision approval was
2 required at all.¹⁴ If the answer to that question is yes, it does not matter, as far
3 as we can tell, whether the required subdivision should have been processed as
4 a major or minor subdivision.

5 Finally, intervenor makes an overarching response that any errors that
6 might have stemmed from Deed 82423 with respect to the creation of the
7 *parent parcel* to Legal Lot 2 were subsequently cured, with respect to Legal
8 Lot 2, by county approval of the Warren Park subdivision.

9 We generally agree with intervenor that, for purposes of legal
10 verification, the fact that the parent parcel of the unit of land being verified
11 may have been created without required county subdivision approval does not
12 taint a lot or parcel that was subsequently lawfully created from that parent
13 parcel. The only difficulty in applying that general principle to the present
14 facts is that Legal Lot 2 is an *unplatted* remainder of the Warren Park
15 subdivision. *See* Record 441. Legal Lot 2 is, literally, not depicted at all on
16 the approved Warren Park subdivision plat, not even as a remainder. While
17 Legal Lot 2 in its current configuration *resulted* from the Warren Park

¹⁴ Further, as intervenor notes, in determining whether a lot or parcel was lawfully created, the relevant question is whether any local government approvals required at the time were given, not whether the local government approval was substantively correct. *Broderson v. City of Ashland*, 62 Or LUBA 329 (2010), *aff'd* 241 Or App 723, 250 P3d 992 (2011); *McKay Creek Valley Assoc. v. Washington County*, 24 Or LUBA 187, 193 (1992), *aff'd* 118 Or App 543, 848 P2d 624, *rev den* 317 Or 272 (1993).

1 subdivision, it is not entirely accurate to say that the county *approved* the
2 creation of Legal Lot 2 in its current configuration, at least in the sense of
3 applying subdivision approval standards to Legal Lot 2. Because Legal Lot 2
4 is an unplatted remainder lot, the general principle that intervenor invokes may
5 not operate, or operate in the same way, as when applied to a lot or parcel that
6 is part of a county-approved partition or subdivision plat. If the Warren Park
7 subdivision did not involve any county approval of Legal Lot 2 in its current
8 configuration, then it is arguable that the 1972 deed that created the parent
9 parcel of Legal Lot 2 has the most bearing on whether Legal Lot 2 can be
10 verified as a lawfully created lot.

11 On remand, the hearings officer should resolve this question in the first
12 instance. There may be documents not in this record from the Warren Park
13 subdivision that could support a conclusion that the Warren Park subdivision
14 approved Legal Lot 2 in its current configuration. Or there may be other
15 reasons not briefed to us to conclude that Deed 82423 does not govern the
16 question of whether Legal Lot 2 is a lawfully created lot. However, as the
17 briefing and record now stands, we agree with petitioner that the county's
18 findings do not demonstrate that Legal Lot 2 can be verified as a lawfully
19 created lot.

20 The third assignment of error is sustained.

21 The county's decision is remanded.

22

Figure 1 (1948 Partition)

30th Avenue

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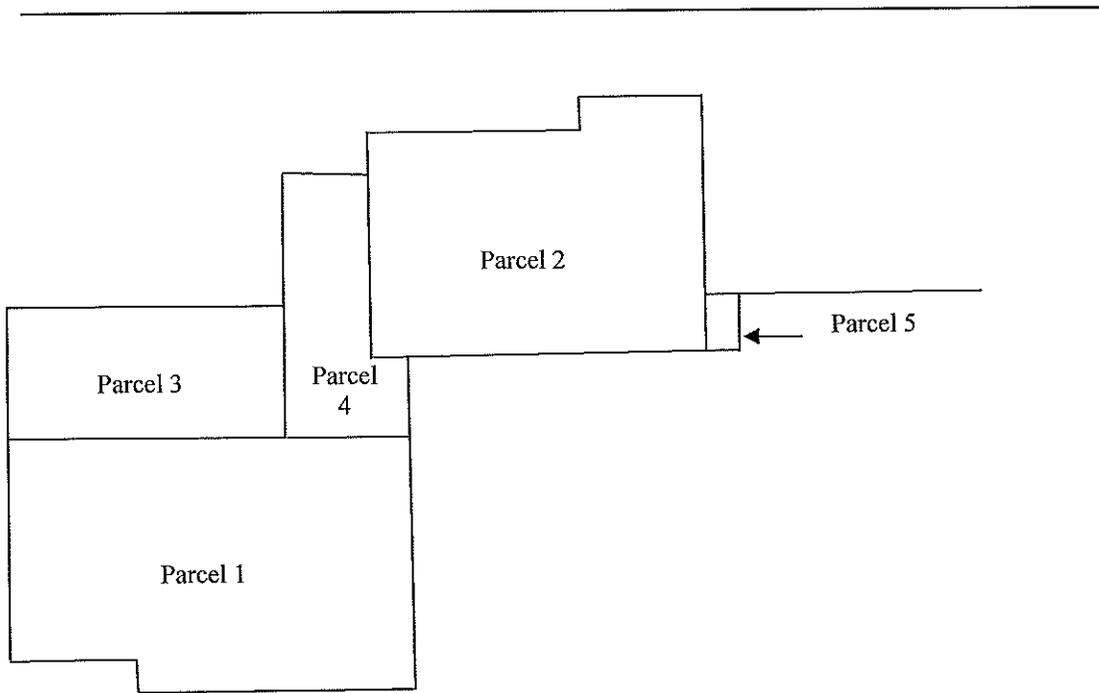


Figure 2 (1965 Minor Subdivision)

30th Avenue

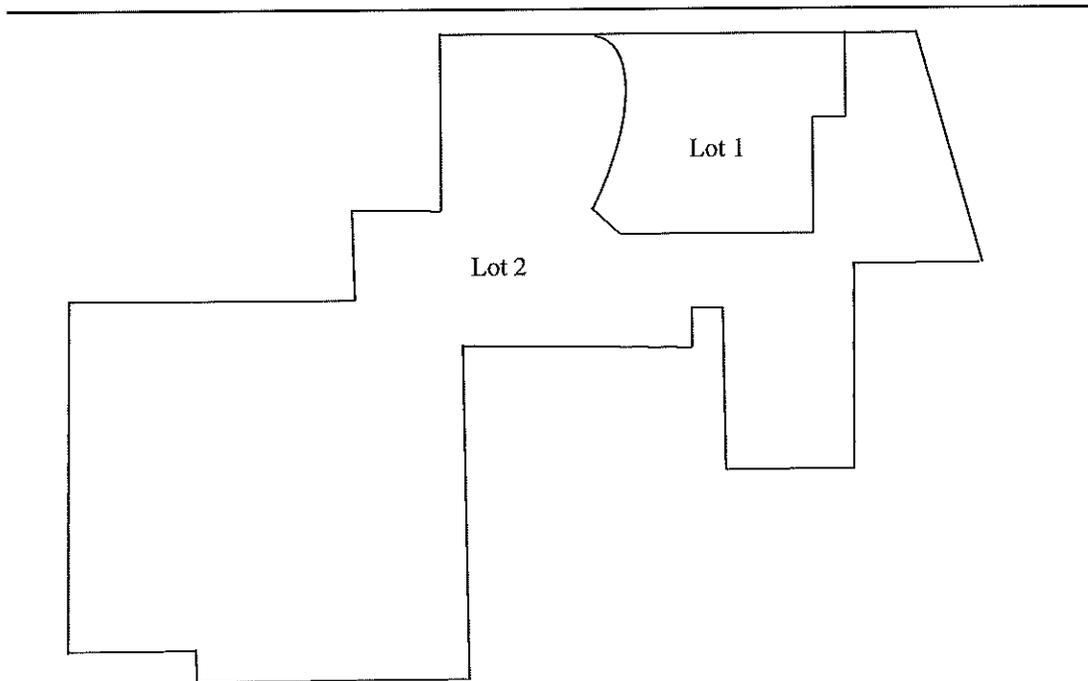


Figure 3 (1967 Deed)

30th Avenue

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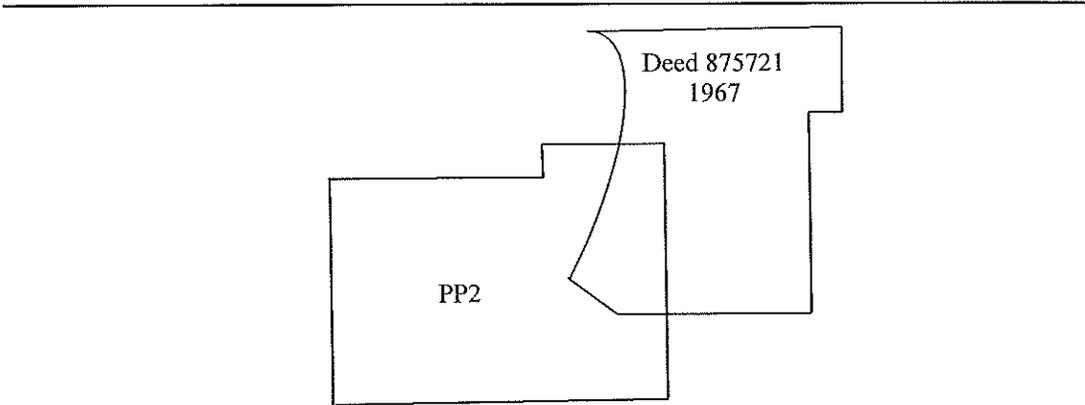


Figure 4 (1972 Deed)

30th Avenue

