

Opinion by Kellington.

NATURE OF THE DECISION

Petitioner appeals a decision of the Deschutes County Board of Commissioners denying petitioner's request for recognition of tract 52 of the Cascade Woods Unit as a legal lot of record under the Deschutes County Zoning Ordinance (DCZO).

FACTS

Petitioner requested county recognition of the subject parcel, tract 52 of the Cascade Woods Unit, as a "legal lot of record."¹ The Cascade Woods Unit is a unit of land which

¹ As far as we can tell there are no specific provisions in the DCZO and the uncodified amendments thereto which require the county to make "lot of record" determinations on demand. The parties apparently assume, however, that the DCZO provision which defines "lot of record," also furnishes a basis for the county to make "lot of record" determinations, as the county did in this case. Deschutes County Ordinance No. 88-009 (Ordinance 88-009) amended DCZO §1.030(67)(J) to define "lot of record" as follows:

"LOT OF RECORD.

- "(i) A lot or parcel at least 5,000 square feet in area and at least 50 feet wide, which conformed to all zoning and subdivision or partition requirements, if any, in effect on the date the lot or parcel was created, and which was created by any of the following means:
 - "(a) By partitioning land as defined in ORS 92.010(8);
 - "(b) By a subdivision plat, as defined in ORS 92.010(9), filed with the Deschutes County Surveyor and recorded with the Deschutes County Clerk;
 - "(c) By deed or contract, dated and signed by the parties to the transaction, containing a separate legal description of the lot or parcel, and recorded in Deschutes County if recording the instrument was required on the date of the conveyance. If such instrument contains more than

consists of at least 290 acres. See Record 6, finding 3. In 1963, petitioner filed a survey with the Deschutes County Surveyor.² This survey was never recorded. The survey depicted 58 subunits of land within the Cascade Woods Unit, with each subunit consisting of (approximately) either five or seven and one half acres. On the survey, each subunit of

one legal description, only one lot of record shall be recognized unless the legal descriptions describe lots in accordance with a recorded subdivision or town plat;

"(d) By a town plat filed with the Deschutes County Clerk and recorded in the Deschutes County Record of Plats; or

"(e) By the subdividing or partitioning of adjacent or surrounding land, leaving a remainder lot or parcel.

"(ii) The following shall not be deemed to be a lot of record:

"(a) A lot or parcel created solely by a tax lot segregation because of an assessor's roll change or for the convenience of the assessor;

"(b) A lot or parcel created by an intervening section or township line or right of way;

"(c) A lot or parcel created by an unrecorded subdivision, unless the lot or parcel was conveyed in accordance with paragraph (i)(c) of this section; or

"(d) A parcel created by the foreclosure of a security interest."

²It is not clear from the record whether petitioner's survey was filed in 1962 or 1963. However, it is not argued that a different result would follow in this appeal if the survey was filed in 1962 as opposed to 1963. Accordingly, we refer to the survey as having been filed in 1963, as petitioner contends in her brief. In addition, we refer to petitioner as the person responsible for the Cascade Woods Unit, even though we understand petitioner's deceased husband and partner(s) were also involved.

land is referred to as a "tract". The subject land, tract 52, is approximately 7.5 acres in size. The Cascade Woods Unit was apparently unzoned at the time the survey was filed. The Cascade Woods Unit was subsequently zoned Rural Residential-10, with a Wildlife Area Combining zone overlay, and was designated Rural Residential and Wildlife Area on the Deschutes County Comprehensive Plan Map.

Additional relevant facts are as follows:

"Between 1963 and 1977, when Deschutes County adopted its subdivision ordinance, a total of 28 of the Cascade Woods tracts were sold either separately or in groups by [petitioner's] family. Property remaining unsold in 1977 * * * included tracts 9, 10, 12, 24-26, 32-42, 44-54, 56 and 57 of the tracts shown on the Cascade Woods survey. Tract 52 of those remaining tracts is still owned by [petitioner] and is the tract for which she now seeks a lot of record determination.

"No subdivision plat for the proposed Cascade Woods subdivision has ever been recorded with the Deschutes County Clerk.

"No deed or conveyance has been recorded in the Deschutes County real property records describing Tract 52 as an individual lot.

"No permits of any kind have been issued supporting construction on Tract 52.

"Tract 52 has not been physically isolated by sales of other Cascade Woods tracts.

"In 1989, applicant filed with the State of Oregon Department of Commerce, Real Estate Division, Subdivision Public Report No. 2682 for 'Cascade Woods Unit 1 (an unplatted Subdivision)' pursuant to ORS 92.305 to 92.425." Record 6.

The county planning department denied petitioner's

requested lot of record determination. Petitioner appealed to the Deschutes County Board of Commissioners (commissioners). The commissioners affirmed the decision of the planning department and denied petitioner's requested lot of record determination for tract 52. This appeal followed.

FIRST ASSIGNMENT OF ERROR

"County Ordinance 87-015 [sic Ordinance 88-009] violates ORS 92.017."

ORS 92.017 provides:

"A lot or parcel lawfully created shall remain a discrete lot or parcel, unless the lot or parcel lines are changed or vacated or the lot or parcel is further divided, as provided by law."

ORS chapter 92, as it existed at the time the survey was filed, required the employment of certain procedures to "subdivide land." ORS 92.010(2) defined "subdivide land" as follows:

"* * * to partition a parcel of land into four or more parcels of less than five acres each for the purpose of transfer of ownership or building development, whether immediate or future, when such parcel exists as a unit or contiguous units under a single ownership as shown on the tax roll for the year proceeding the partitioning." (Emphasis supplied.)

Petitioner contends that because the Cascade Woods subunits were all greater than five acres, the provisions of ORS chapter 92 governing subdivision of land did not apply to dividing the land within the Cascade Woods Unit. Petitioner asserts it necessarily follows that at the time

the Cascade Woods subunits were allegedly created, there were no applicable provisions of law with which petitioners had to comply to "lawfully" create those units. According to petitioner, the Cascade Woods subunits were lawfully created by a division which occurred as the result of a survey depicting the subunits being filed with the county surveyor. Petitioner also asserts that filing a survey with the county surveyor was a common and lawful method of dividing land at that time. According to petitioner, DCZO §1.030(67)(J), as amended by Ordinance 88-009, quoted in n 1 supra, impermissibly conflicts with ORS 92.017, because the DCZO does not recognize subunits of land created by survey.³

In order to demonstrate that the county exceeded the authority granted to it under ORS 92.017, petitioner must establish that tract 52 was lawfully created in 1963 and, therefore, is within the protection of ORS 92.017.⁴ Cf

³Petitioner also argues that at least one other Oregon county, Jackson County, recognizes units of land created by survey and that this demonstrates that Deschutes County must do the same. However, that the Jackson County Land Development Ordinance contains a scheme for limited recognition for lots and parcels indicated by a survey filed with the county surveyor does not establish that ORS 92.017 requires Deschutes County to recognize that units of land could lawfully be created by filing a survey with the county surveyor.

⁴We note we do not review Ordinance 88-009 itself for compliance with ORS 92.017 because the county's decision adopting Ordinance 88-009 is not identified in the notice of intent to appeal as the subject of this appeal. City of Corvallis v. Benton County, 16 Or LUBA 488, 492-493 (1988). We interpret petitioner's first assignment of error to allege the county's decision in this case to deny lot of record status for the subject subunit of land (tract 52) exceeds the authority granted to the county under ORS 92.017.

Sunnyside Neighborhood v. Clackamas Co. Comm., 280 Or 3, 18, 569 P2d 1063 (1977) (proponent of land use application has the burden of establishing application meets relevant standards). However, we are cited to nothing which establishes the legal effect, if any, of preparing and filing a survey with the county surveyor in 1963. The fact that the Cascade Woods subunits did not fall within the scope of ORS 92.010(2) (as that statute existed in 1963) says nothing about whether there were other statutes, regulations, ordinances or principles of common law, which did apply to creation and division of the 58 Cascade Woods subunits within the meaning of ORS 92.017. It also says nothing about whether filing a survey in 1963 had any legal effect at all, much less whether it had the effect of "lawfully creat[ing]" lots or parcels, within the meaning of ORS 92.017.

We conclude petitioner's assertion, that filing a survey with the county surveyor amounted to the lawful creation of lots or parcels in 1963, provides an inadequate basis on which to conclude that the county's decision refusing to recognize tract 52 as a lot of record exceeds the county's authority under ORS 92.017.⁵

The first assignment of error is denied.

⁵Petitioner cites to legislative history of ORS 92.017. However, the cited legislative history does not answer the basic question of whether, under the law in 1963, petitioner lawfully created 58 subunits of land by filing a survey with the county surveyor.

SECOND ASSIGNMENT OF ERROR

"Respondent has misapplied [Ordinance 88-009]."

Petitioner argues that the county has misapplied its ordinance by failing to recognize the subject Cascade Woods Unit tract 52 as a parcel created by partition. However, we do not understand that tract 52 or any of the the Cascade Woods subunits were (1) created under zoning regulations regulating partitions, (2) "created" pursuant to partition proceedings conducted under ORS chapter 105, or (3) constitute a partition as that term is defined in ORS 92.010. As we understand it, the 58 Cascade Woods subunits, including tract 52, were created, if at all, by a survey.

The county did not err by concluding that tract 52 of the the Cascade Woods subunits does not constitute a lot of record as defined by Ordinance 88-009.

The second assignment of error is denied.

The county's decision is affirmed.