BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

MICHAEL McKEEL,
Petitioner,

vs.

MULTNOMAH COUNTY,
Respondent,

LUBA No. 2007-186

FINAL OPINION
AND ORDER

Appeal from Multnomah County.

Dean N. Alterman, Portland, filed the petition for review and argued on behalf of petitioner. With him on the brief was Alterman Law Office.

Sandra N. Duffy, Assistant County Counsel, Portland, filed the response brief and argued on behalf of respondent.

RYAN, Board Member; HOLSTUN, Board Chair, participated in the decision.

BASSHAM, Board Member, did not participate in the decision.

AFFIRMED 01/18/2008

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

Opinion by Ryan.

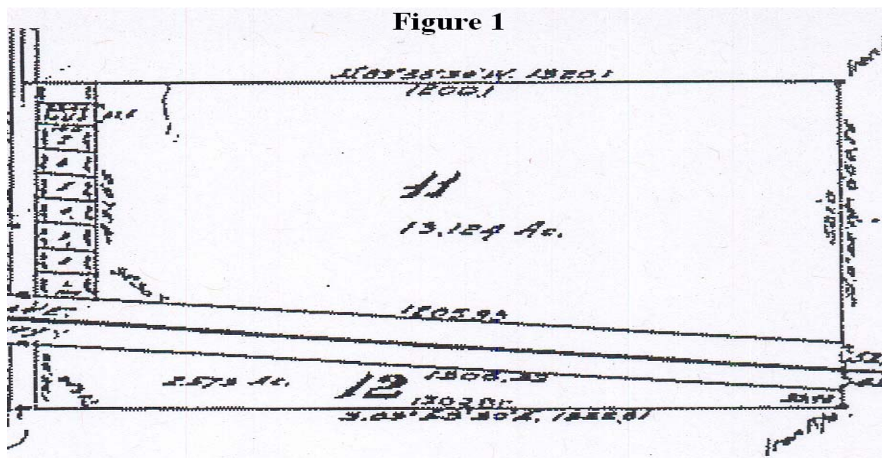
NATURE OF THE DECISION

Petitioner appeals a decision by the county determining that a parcel of land is not a Lot of Record.

BACKGROUND

The property that is the subject of the Lot of Record determination is located at the corner of Southeast Altman Road and Dodge Park Boulevard in Multnomah County.[1] The property is a part of Block 11 of the Proctor Subdivision, which was originally platted in 1912. Block 11 is approximately 14 acres in size and, when platted in 1912, contained 8 lots (Lots 1 through 8) that were approximately 5,000 square feet in size, with the remainder contained in a large parcel of land that was approximately 13 acres in size. Record 197. Lot 1 is the small lot in the southwest corner of Block 11, as shown in Figure 1 below, and is the subject of this appeal.[2]

Figure 1



In 1977, Frazey applied to the county to divide Block 11 to create two 2.5-acre and one 9-acre "lots of exception" out of the 14-acre Block 11, under a then-applicable provision

---

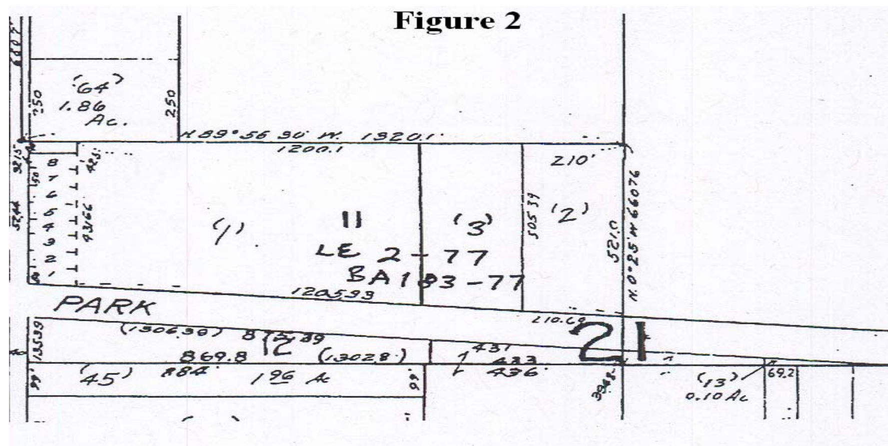
[1] "Lot of Record" is defined in Multnomah County Code (MCC) 36.0005, which we set forth and discuss later in this opinion.

[2] Petitioner proposes to purchase one or more of those lots from the current owners if Lot 1 is determined to be a Lot of Record pursuant to MCC 36.0005.

of the MCC that allowed the creation of lots in agricultural zones that were below the minimum lot size of 20 acres, provided certain criteria were met. At that time, Brown owned Block 11, and she authorized Frazey to apply for approval of the lots of exception. Record 172-178.

On September 20, 1977, the county board of adjustment approved two lots of exception and a third remainder parcel, according to the configuration shown in Figure 2 below.

Figure 2



The decision contained a condition of approval that provided: "No permits shall issue on the described property until Lots 1-8 and the westerly 765 feet of Lot 11, Proctor, are legally aggregated into one building site." Record 172.[3] At the time of the application, a single

---

[3] The 1977 lot of exception decision contained the following findings:

> "On October 6, 1977, Ordinance Nos. 148 and 149 become effective, which will zone these lots MUA-20. [The ordinance] limits the Lot of Exception provisions to the creation of two parcels from a Lot of Record. In the present case, two new parcels less than 20 acres are proposed, *the balance of the property is to be retained in one ownership, now made up of nine Lots of Record.*
>
> "Thus, approval of two Lots of Exception *and a requirement of aggregation for the balance will result in fewer building sites*. Such is within the purposes of the MUA-20 zoning district." Record 175 (Emphasis added).

We note that in some places in the decision that is the subject of this appeal the hearings officer refers to the 9-acre remainder as a third lot of exception.

family dwelling was located on the western part of the 14-acre parcel, to the east of the eastern property lines of Lots 1 through 8. Record 176.

Approximately three months later, on December 15, 1977, Brown conveyed the eastern 2.5-acre lot of exception to Frazey, through a deed that described the conveyed property as follows:

> "A portion of Block 11 in the duly recorded plat of PROCTOR, * * * more particularly described as follows: [metes and bounds description of the eastern 2.5-acre lot of exception]." Record 161.

Shortly after that deed was recorded, the county issued a building permit to another party. Record 109.

On April 13, 1978, Brown conveyed the remainder of Block 11 to Frazey. That deed described the property being conveyed as follows:

> "*All of Block 11, PROCTOR,* in the County of Multnomah and State of Oregon, * * * and further EXCEPTING that portion described as follows:
>
> "[Metes and bounds description of the eastern 2.5-acre lot of exception]." (Emphasis added). Record 162.

That deed was recorded April 18, 1978.

On April 24, 1978, Frazey conveyed the middle 2.5-acre lot of exception through a deed that described the property being conveyed as follows:

> "A portion of Block 11 in the duly recorded plat of 'Proctor' * * * more particularly described as follows: [metes and bounds description of the middle 2.5-acre lot of exception]."

Record 163-64. Thereafter, Frazey continued to own the remaining nine acres of Block 11. The current owners, the Knifongs, purchased it from Frazey in 1993. Record 166-67.

Petitioner applied to the county to determine whether Lot 1 is a "Lot of Record" as defined in MCC 36.0005. If the property is determined to be a Lot of Record, then, according to MCC 36.2870, the property may be used for any allowed use even though the

1 lot may not meet current minimum lot size, front lot line minimum width, or access
2 requirements.[4]

3 Planning staff concluded that Lot 1 is not a Lot of Record, and petitioner appealed the
4 decision to the hearings officer. The hearings officer concluded that Lot 1 is not a Lot of
5 Record. This appeal followed.

6 **FIRST AND THIRD ASSIGNMENTS OF ERROR**

7 In his third assignment of error, petitioner argues that the county misinterpreted MCC
8 36.0005 in determining that the subject property is not a Lot of Record. Petitioner's main
9 argument in support of his third assignment of error is found in support of his first
10 assignment of error, and we address those assignments of error here together.[5]

11 MCC 36.0005 provides in relevant part:

12 "* * * [A] Lot of Record is a parcel, lot, or a group thereof that, when created
13 or reconfigured, (a) satisfied all applicable zoning laws and (b) satisfied all
14 applicable land division laws, or (c) complies with the criteria for the creation
15 of new lots or parcels described in MCC 36.7785. Those laws shall include all
16 required zoning and land division review procedures, decisions, and
17 conditions of approval.

18 "(a) 'Satisfied all applicable zoning laws' shall mean: the parcel, lot, or
19 group thereof was created and, if applicable, reconfigured in full

---

[4] MCC 36.2870(B) provides:

"A Lot of Record which has less than the minimum lot size for new parcels or lots, less than the front lot line minimums required, or which does not meet the access requirement of MCC 36.2885, may be occupied by any allowed use, review use or conditional use when in compliance with the other requirements of this district."

[5] Petitioner asks us to reverse the decision of the hearings officer. Petition for Review 2, 12. Pursuant to OAR 661-010-0071, we are authorized to reverse a land use decision when:

"(a) The governing body exceeded its jurisdiction;

"(b) The decision is unconstitutional; or

"(c) The decision violates a provision of applicable law and is prohibited as a matter of law."

1 compliance with all zoning minimum lot size, dimensional standards,
2 and access requirements.

3 "(b) 'Satisfied all applicable land division laws' shall mean the parcel or lot
4 was created:

5 "1. By a subdivision plat under the applicable subdivision
6 requirements in effect at the time; or

7 "2. By a deed, or a sales contract dated and signed by the parties to
8 the transaction, that was recorded with the Recording Section
9 of the public office responsible for public records prior to
10 October 19, 1978; or

11 "3. By a deed, or a sales contract dated and signed by the parties to
12 the transaction, that was in recordable form prior to October
13 19, 1978; * * *"

14 In considering whether Lot 1 is a Lot of Record under MCC 36.0005, the hearings
15 officer found in relevant part that "* * * the means * * * used [in 1978] by [the county] to
16 achieve aggregation into one building site was to convey land by deed. * * *" Record 12.[6]
17 Petitioner does not challenge that finding. The hearings officer found that Lot 1 as platted in
18 1912 was "reconfigured" by the April 13, 1978 deed, and therefore no longer exists as a
19 separate lot. The hearings officer found that the remaining 9 acres make up a Lot of Record
20 pursuant to the provisions of MCC 36.0005, and that Lot 1 was aggregated with the other 7
21 subdivision lots and the rest of the 9-acre remainder by the April 13, 1978 deed, in
22 fulfillment of the condition of approval.[7] Record 12-13.

---

[6] We understand this finding to take the position that multiple lots or parcels could be aggregated into a single parcel by a deed in which the grantor adequately expressed that intent.

[7] Specifically, the hearings officer found:

> "* * * Even if other methods of aggregation into one building site were available, the facts show that the method of aggregation used in this case was to convey a deed with a metes and bounds description of the * * * property that eliminated all reference to Proctor Lots 1 through 8.
>
> "* * * * *

1 In his first assignment of error, petitioner challenges the hearings officer's
2 determination that the April 13, 1978 deed had the effect of aggregating Lots 1 through 8
3 with the remainder parcel that remained after the board of adjustment approved the two, 2.5-
4 acre lots of exception. Petitioner argues first that the April 13, 1978 deed does not contain
5 any language to show that Brown, the grantor, intended to aggregate Lots 1 through 8 with
6 each other or the property to their east. Petitioner next argues that because the land described
7 in the April 13, 1978 deed fails to describe the 9-acre remainder parcel in a separate metes
8 and bounds description, it was not intended to and did not have the effect of creating a single
9 9-acre parcel. Finally, petitioner argues, in spite of the condition of approval prohibiting
10 building permits for the new lots of exception, the county issued a building permit for one of
11 the lots of exception in January, 1978. Thus, petitioner argues, the April 13, 1978 deed could
12 not have been intended to fulfill that condition of approval, because the county had ignored
13 the condition and issued one building permit.

14 The county responds that the hearings officer's determination that the April 13, 1978
15 deed aggregated Lots 1 through 8 with the remainder 9-acre parcel was correct,
16 notwithstanding that that deed did not contain a specific metes and bounds description of that
17 9-acre parcel. The county points to the language in the April 13, 1978 deed that conveyed
18 "All of Block 11, [except that property that had previously been conveyed in the December,
19 1977 deed]," without reference to individual subdivision lots, and notes that all previous
20 deeds conveying property in Block 11 prior to the transfer between Brown and Frazey had
21 specifically referred to "Lots 1 through 8." Record 154, 157, 158. The county explains that

---

"A deed conveying a land area that includes Lots 1 through 8, Block 11, Proctor and a part of Lot [sic should be Block] 11 Proctor was recorded prior to October 19, 1978. The deed was filed to satisfy the requirements of a land use decision of the Board of Adjustment, discussed below. The lot did not comply with the 20-acre minimum lot size of the applicable zoning district. This lot was, however, lawfully created as it was approved as a lot of exception under rules that allowed the creation of lots smaller than the minimum lot size and created by deed pursuant to that approval. This lot, therefore, satisfied all applicable zoning laws." Record 11.

1 the hearings officer found that the April 13, 1978 deed transferred the rest of Block 11 to
2 Frazey, and approximately 10 days later, Frazey transferred the middle lot of exception by a
3 deed describing that middle lot.[8]

4 The county next points to evidence in the record regarding the condition of approval
5 requiring aggregation, the timing of the various conveyances and the descriptions of property
6 contained in the deeds, all of which lack a reference to "Lots 1 through 8." In addition, the
7 county points out that the planning file for the 1977 lot of exception approval contains a
8 handwritten note below the explanation of the condition of approval that required
9 aggregation of Lots 1 through 8 that says "Turned in 4/17/78, Phil." Record 136.[9] Finally,
10 the county notes that at the time the lots of exception were approved and aggregation was
11 required, there was no procedure for consolidating lots, and argues that the hearings officer
12 correctly found that the process used for vacating lot lines in 1978 was through a deed.[10]

13 In addressing the MCC 36.0005 definition of Lot of Record, the hearings officer
14 found that although Lot 1 is not itself a Lot of Record, the 9-acre remainder of which it is a
15 part is a Lot of Record under MCC 36.0005(a) and (b)(2). Apparently, this is because at the
16 time the 9-acre remainder came into existence in April, 1978, it satisfied all applicable
17 zoning and land division laws as a result of the 1977 lot of exception approval. Although it

---

[8] The hearings officer found:

> "The applicant notes that this deed includes the Knifong property and other land in Block 11 located to the east of the Knifong property. The additional land is one of the lots of exception, the middle lot of the three lots approved by BA 183-77. The 1978 deed conveyed two of the approved lots of exception together. This deed included all of the Knifong property and removed all reference to the Proctor lots lying in this area. Multnomah County accepted this deed as complying with the condition of the lot of exception approval to aggregate the Proctor lots into one building site. Subsequently, the area authorized as the middle lot of exception was separately conveyed and developed as authorized by BA 183-77 and the westernmost lot of exception was conveyed, as a single lot with a metes and bounds description to the Knifongs." Record 13.

[9] We understand the county to view the planning file notation as a reference to the April 13, 1978 deed that was recorded April 18, 1978. Record 162.

[10] As noted above, petitioner does not challenge that finding.

1 could be stated more clearly, we understand the hearings officer to have found that because
2 that aggregated remainder 9-acre parcel is a Lot of Record under MCC 36.0005, Lot 1 as it
3 was originally platted could not also be a Lot of Record, because it no longer existed after its
4 lot lines were vacated by the April 13, 1978 deed.[11]

5 Neither party cites any statute or other law that governs how property should be
6 described in a deed in order to have the effect of vacating or consolidating property lines, and
7 we are aware of none. However, there appears to be no dispute that in 1978, the method
8 Multnomah County recognized for vacating lot lines where necessary in creating lots of
9 exception under the then-applicable provision of the MCC was by description in a deed.
10 Given the totality of the circumstances surrounding the 1977 lot of exception decision and
11 the subsequent conveyances of the property shortly thereafter, we agree with the hearings
12 officer's conclusion that the April 13, 1978 deed was intended to and had the effect of
13 aggregating the subdivision lots within the 9-acre remainder parcel in order to fulfill the
14 condition of approval. Consequently, the hearings officer was correct in determining that the
15 remainder 9-acre parcel is a Lot of Record, and Lot 1 no longer exists as a separate lot. In so
16 deciding, however, we do not mean to suggest that a legal description such as the description
17 found in the April 13, 1978 deed that conveys a portion of an entire block in a platted
18 subdivision, without specific reference to individual lots platted within that block, in all cases
19 would have the effect of aggregating those lots into a single unit of land. The particular
20 context in which that April 13, 1978 conveyance occurred leads us to conclude that the
21 hearings officer was correct in finding that the April 13, 1978 deed was in fact intended to
22 aggregate the lots and fulfill the condition of approval of the 1977 lot of exception decision.

23 The first and third assignments of error are denied.

---

[11] We also note that the hearings officer concluded that even if the 1978 deed did not have the legal effect of vacating Lots 1 though 8, "[the 9-acre remainder parcel is] limited by the 1977 decision, deed, and implementation of the lot of exception decision to building no more than one home on the subject property." Record 14.

SECOND ASSIGNMENT OF ERROR

In his second assignment of error, petitioner argues that the county misconstrued ORS 92.017 in determining that Lot 1 is not a Lot of Record.[12] In support of his second assignment of error, petitioner again argues that the hearings officer erred in determining that the lot lines for Lots 1 through 8 have been vacated. Petitioner relies on our decision in *Jackson v. City of Portland*, 54 Or LUBA 138 (2007). In *Jackson*, we reversed a city decision that interpreted a deed as resulting in a lot consolidation in part because the city offered no explanation or rationale for its conclusion that the deed language had the effect of consolidating the lots. As the county correctly points out, the facts of the present appeal are distinguishable. In J*ackson*, there was no previous condition of approval requiring consolidation of the subject lots, or any other evidence indicating an intent on the part of the grantors to consolidate the subject lots, and evidence in the record indicated that the grantees had treated the lots as separate lots during the length of their ownership. We agree with the county that all of those factors make *Jackson* inapposite to the present appeal.

We have already determined in our resolution of the first and third assignments of error above that the hearings officer was correct in finding that the April 13, 1978 deed vacated the lot lines for Lots 1 through 8. We therefore do not further address petitioner's arguments under the second assignment of error challenging that determination.

To the extent petitioner argues that the hearings officer's resolution of the question of whether Lot 1 is a Lot of Record under MCC 36.0005 requires a different analysis than the analysis required to determine whether Lot 1 is a separate unit of land for purposes of ORS 92.017, we disagree with petitioner. The hearings officer found that the April 13, 1978 deed vacated the lot lines of Lots 1 through 8 and consolidated those lots with the remainder of

---

[12] ORS 92.017 provides:

> "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."

1 Block 11. Under ORS 92.017, Lot 1 no longer remains a "discrete lot" because the "lot * * *
2 lines [were] vacated * * *, as provided by law." Thus, ORS 92.017 does not assist petitioner
3 in his assertion that Lot 1 remains a discrete lot.
4 The second assignment of error is denied.
5 The county's decision is affirmed.