BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

JANICE JENSEN,
Petitioner,

vs.

CITY OF EUGENE,
Respondent,

and

LAWRENCE F. COOLEY,
Intervenor-Respondent.

LUBA Nos. 2013-108/109

FINAL OPINION
AND ORDER

Appeal from City of Eugene.

Zack P. Mittge, Eugene, filed the petition for review and argued on behalf of petitioners. With him on the brief was Hutchinson, Cox, Coons, Orr & Sherlock PC.

Anne C. Davies, Assistant City Attorney, Eugene, filed a response brief and argued on behalf of respondent.

Lawrence F. Cooley, Eugene, filed a response brief. Lawrence F. Cooley and Micheal Reeder, Eugene, argued on behalf of intervenor-respondent.

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

AFFIRMED 04/02/2014

You are entitled to judicial review of this Order. Judicial review is

governed by the provisions of ORS 197.850.

Opinion by Holstun.

NATURE OF THE DECISION

Petitioner appeals two building permits for single family dwellings.

INTRODUCTION

In these appeals, petitioner contends the city has approved two dwellings on a single "lot," as the Eugene Code (EC) defines that term. EC 9.0500.[1] Petitioner argues that approving two dwellings on a single lot in the city's R-1 residential zone violates EC 9.2740, which petitioner contends only authorizes one dwelling per lot.[2] Petitioner also contends each of the disputed building permits constitutes a discretionary "permit," as ORS 227.160 defines that term, and the city failed to observe statutory requirements for approving statutory permits.[3]

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[1] EC 9.0500 defines "lot" as follows:

> "A unit of land that is created by the subdivision of land as provided for in this land use code. Otherwise, the words 'lot' and 'parcel' are used interchangeably. (Note: See also definition of 'Parcel,' 'Legal Lot,' and 'Lot of Record.')"

[2] EC 9.2740 includes a table that sets out the "Uses and Permit Requirements" in the city's residential zones. That table includes the following authorization for dwellings: "One-Family Dwelling (1 Per Lot in R-1)."

[3] ORS 227.160(2) provides in relevant part:

> "'Permit' means discretionary approval of a proposed development of land, under ORS 227.215 or city legislation or regulation. * * *"

FACTS

This is a case where resolving the merits of the decision is relatively simple, but the parties' arguments concerning whether events that occurred after the building permits were issued have rendered this appeal moot, leaving LUBA without jurisdiction, are more complex. We set out the relevant facts below, before turning to the parties' jurisdictional arguments and arguments on the merits.

A. The Original Subdivision and Subsequent Property Line Adjustment

The 38th Street PUD was approved and recorded several years ago. Among the lots created by the 38th Street PUD were adjoining lots 12 and 15. As originally created, lot 12 included over 17,000 square feet and lot 15 included over 24,000 square feet. On August 7, 2013, the city approved a property line adjustment (PLA). The city's August 7, 2013 PLA decision adjusted the property line between lots 12 and 15. Record 7. Adjusted lot 12 (with a street address of 3779 Pine Canyon Drive) would include 5,000 square feet; adjusted lot 15 (with a street address of 3781 Pine Canyon Drive) would include over 36,000 square feet. The PLA decision was not appealed locally and was not appealed to LUBA.

B. The First Building Permits

On August 29, 2013, intervenor sought approval for two building permits for single family dwellings. A month and a half later, on October 16, 2013, the city approved building permits for adjusted lot 12 (3779 Pine Canyon Drive) and adjusted lot 15 (3781 Pine Canyon Drive). Record 1-3. Those buildings permits are the subject of this consolidated LUBA appeal.

C. The Deeds to Adjusted Lots 12 and 15

Two days after the building permits were issued, on October 18, 2013, two statutory bargain and sale deeds were recorded. The grantors in both deeds were "Lawrence F. Cooley, the trustee of the Lawrence F. Cooley Living Trust, and Patricia Kay Cooley, the trustee of the Patricia Kay Cooley Living Trust." The grantee in both deeds was Lawrence F. Cooley, the trustee of the Lawrence F. Cooley Living Trust. Lawrence F. Cooley was the applicant below and is the intervenor-respondent (intervenor) in this appeal.

D. The Second Set of Building Permits

On January 24, 2014, the city issued what the city describes as "new" and "reissued" building permits. We understand the city to contend that aside from the different dates the two sets of building permits were issued, the October 18, 2013 and January 24, 2014 building permit decisions are identical.

With the above outline of some of the relevant facts in this appeal, we turn first to the jurisdictional challenges raised by intervenor and respondent.

JURISDICTION

Petitioner's first assignment of error raises two issues. The first issue is whether an adjusted lot still qualifies as a "lot," as EC 9.0500 defines that term. *See* n 1. Assuming an adjusted lot qualifies as a "lot," within the meaning of EC 9.0500, the second issue is whether, on the date the city issued the building permits, the PLA approved on August 7, 2013 had not yet become effective so that the October 16, 2013 building permits authorized two dwellings on a single lot in violation of EC 9.2740. *See* n 2.

Petitioner's second assignment of error really raises a single issue. That issue is whether the October 16, 2013 building permits qualify as a statutory "permit[s]," as ORS 227.160(2) defines that term. *See* n 3. If so, it is

undisputed that the city's decision is not supported by the findings that are required for statutory permits by ORS 227.173(3), and it is undisputed that the city did not provide a prior public hearing or provide the notice and opportunity for a local appeal that is required for statutory permits by ORS 227.173(3), (5) and (10).

There have been three motions to dismiss filed in this appeal. One was filed by intervenor on November 29, 2013. A second motion to dismiss was included in the city's January 22, 2014 response brief. The third motion to dismiss, which is styled a "Renewed Motion to Dismiss," was filed by the city on February 27, 2014, the same day as oral argument in these consolidated appeals. We address those motions to dismiss separately below.

A. Intervenor's November 29, 2013 Motion to Dismiss

As relevant here, LUBA's jurisdiction is limited to "land use decision[s]." ORS 197.825(1). Intervenor's motion to dismiss was based on ORS 197.015(10)(b)(B), which exempts building permits from LUBA review if they are "issued under clear and objective standards."[4]

Because intervenor's reasoning for why the October 16, 2013 building permits qualified for the ORS 197.015(10)(b) exemption for building permits issued under clear and objective standards, and the city's legal theory for issuing those building permits before the October 18, 2013 deeds were recorded were both unclear to us, in a December 24, 2013 Order we declined to

[4] Under ORS 197.015(10)(b)(B) a decision "[t]hat approves or denies a building permit issued under clear and objective standards," is not a land use decision.

rule on the November 29, 2013 motion to dismiss until after the briefing was completed.

For the reasons explained next in our discussion of the city's January 22, 2014 motion to dismiss, we now deny intervenor's November 29, 2013 motion to dismiss.

B. The City's January 22, 2014 Motion to Dismiss

In its January 22, 2014 Response Brief, the city set forth two reasons why it believes LUBA lacks jurisdiction over these two appeals, one based on statutory exclusions from the statutory definition of "land use decision" and one based on mootness. We address them separately below.

1. ORS 197.015(10)(b)(A) and (B)

The city argues that the ORS 197.015(10)(b)(A) exemption for decisions that do not require interpretation or the exercise of judgment applies.[5] The city also elaborates on intervenor's earlier contention that the exemption at ORS 197.015(10)(b)(B) for building permits issued under clear and objective standards applies here. *See* n 4.

The city first points out that it is not disputed that the August 7, 2013 PLA adjusted lots 12 and 15, and that PLA approval was not appealed locally or appealed to LUBA. We understand the city to argue that because that PLA had been approved, the city's decision to approve a single family dwelling for adjusted lot 12 and a second single family dwelling for adjusted lot 15 was governed exclusively by clear and objective standards.

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[5] ORS 197.015(10)(b)(A) exempts decisions that are "made under land use standards that not require interpretation or the exercise of policy or legal judgment" from the statutory definition of "land use decision."

The city concedes that EC 9.8420 sets out a number of "Post Approval" requirements for PLAs.[6] However, the city describes those post approval requirements as a "check list" and contends that they do not, in and of themselves, mean the city's decision to issue the building permits was not rendered under "clear and objective" standards or required "interpretation" or required the "exercise of * * * judgment," within the meaning of ORS 197.0125(10)(b)(A) and (B).

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[6] EC 9.8420 provides as follows:

"**9.8420 Post-Approval Requirements**.

"**(1)** Upon approval of a property line adjustment, the city shall record with Lane County a Notice of Approval for Property Line Adjustments that contains the revised legal descriptions of the two existing lots affected by the adjustment.

"**(2)** In accordance with state law, the owners of the property affected by the adjustment are responsible for creating and recording a deed with Lane County Deeds and Records that reflects the new location of the property line. The property owners are also responsible for submitting requests to the Lane County Department of Assessment and Taxation for transfers on the assessment roll in accordance with the approved adjustment.

"**(3)** The respective property owners are responsible for payment of any public liens, assessments and fees that may be required prior to recording the notice of approval.

"**(4)** The respective property owners are responsible for meeting the statutory requirements for the survey and monumentation of the new line by an Oregon licensed surveyor."

One of the post-approval requirements, EC 9.8420(2), provides in part: "In accordance with state law, the owners of the property affected by the adjustment are responsible for creating and recording a deed with Lane County Deeds and Records that reflects the new location of the property line." The reference to "state law" is a reference to ORS 92.190.[7]

The August 29, 2013 building permits sought approval for two dwellings and both of those dwellings were proposed for an area that was included in original lot 12. Therefore, the critical issue the county staff person had to resolve when he or she was asked to approve those building permits was whether all actions had been completed that needed to be completed to adjust the boundaries of lots 12 and 15 so that adjusted lot 12 and adjusted lot 15 replaced the original lots 12 and 15 that were created when the 38th Street PUD was approved and recorded.

With regard to EC 9.8420(2), we agree with the city that if the building permit application had included the deeds that were recorded two days after the building permits were issued, the city's decision to issue the building permit

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[7]ORS 92.190 provides, in part, as follows:

> "(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 (12), 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).
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> "(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."

likely would have qualified for both the ORS 197.015(10)(b)(A) exemption for "decisions made under land use standards that do not require interpretation or the exercise of policy or legal judgment," and the ORS 197.015(10)(b)(B) exemption for building permits "issued under clear and objective standards." That is because, with the recorded deeds required by EC 9.8420 and ORS 92.190(3) and (4), the city staff person issuing the building permit would not have to determine whether the building permit could be issued before the required deeds were recorded.

But on October 16, 2013, when the disputed building permits were issued, the deeds required by EC 9.8420 and ORS 92.190(3) and (4) had not been recorded. The city and intervenor take the position that the building permits for adjusted lots 12 and 15 could be issued before the deeds required by EC 9.8420 and ORS 92.190(3) and (4) were recorded. Whatever the merits of that position, the city apparently decided that it could issue the building permit *before* the required deeds were recorded, and that decision (1) was not guided by clear and objective standards, and (2) required the "interpretation or the exercise of policy or legal judgment." As far as we can tell, that decision was guided by no standards and there is really no question in our view that the city's decision that the building permits could issue before the deeds were recorded required interpretation and the exercise of legal judgment. Therefore, the exemptions set out 197.015(10)(b)(A) and (B) do not apply, and the October 16, 2013 building permits are land use decisions subject to LUBA review.

The only case cited by the city in arguing the exemptions in ORS 197.015(10)(b)(A) and (B) apply is inapposite. In *Willamette Oaks v. City of Eugene*, ___ Or LUBA ___ (LUBA Nos. 2013-043, 2013-047, 2013-048,

2013-049, 2013-050 and 2013-051, September 11, 2013), slip op 9, we transferred the appeal to circuit court, because we concluded that petitioner had not established that the city applied or should have applied any land use regulations. We did not conclude that the ORS 197.015(10)(b)(A) and (B) exemptions applied.

The city was required to apply land use regulations in issuing the challenged building permits and for that reason the building permits qualify as "land use decisions," as ORS 197.015(10)(a) defines that term. The challenged building permits do not qualify for the exemptions in ORS 197.015(10)(b)(A) and (B). Therefore, LUBA has jurisdiction over this appeal unless the appeal has been rendered moot by events that post-date the October 16, 2013 building permits.

2. The City's Contention that the October 18, 2013 Deeds Render These Appeals Moot

The city's next jurisdictional challenge assumes that the appealed building permits qualify as land use decisions that are reviewable by LUBA in these appeals, but takes the position that the subsequent recording of the deeds for 3779 Pine Canyon Drive and 3781 Pine Canyon Drive (adjusted lots 12 and 15) renders these appeals moot.

Petitioner first argues LUBA should not consider whether the October 18, 2013 deeds render these appeals moot, because those deeds are not in the record. Petitioner contends those deeds cannot be considered as extra-record evidence under ORS 197.835(2)(a) and OAR 661-010-0045 because the deeds

do not qualify as the kind of extra-record evidence LUBA may consider under the statute and rule.[8]

While LUBA's review of a land use decision on the merits is generally limited to the record unless extra-record evidence is authorized under ORS 197.835(2)(a) or OAR 661-010-0045, LUBA has long held that it may consider extra-record evidence without a motion under OAR 661-010-0045, to determine if it has jurisdiction to review the decision on appeal on the merits. *Hardesty v. Jackson County*, 58 Or LUBA 162, 164 (2009); *Yost v. Deschutes County*, 37 Or LUBA 653, 658 (2000); *Leonard v. Union County*, 24 Or LUBA 362, 377 (1992); *Hemstreet v. Seaside Improvement Comm*, 16 Or LUBA 630, 631-33 (1988). We have considered all of the extra-record evidence supplied by the parties in determining whether we have jurisdiction.

For the reasons explained later in this opinion, we conclude the October 18, 2013 deeds render any error the city may have committed harmless error. If that were the only issue in this appeal, those deeds might also render this appeal moot. However, the first issue under the first assignment of error is

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[8] OAR 661-010-0045(1) is slightly broader than the statute and provides:

> "Grounds for Motion to Take Evidence Not in the Record: The Board may, upon written motion, take evidence not in the record in the case of disputed factual allegations in the parties' briefs concerning unconstitutionality of the decision, standing, ex parte contacts, actions for the purpose of avoiding the requirements of ORS 215.427 or 227.178, or other procedural irregularities not shown in the record and which, if proved, would warrant reversal or remand of the decision. The Board may also upon motion or at its discretion take evidence to resolve disputes regarding the content of the record, requests for stays, attorney fees, or actual damages under ORS 197.845."

whether the unit of land that results from a PLA qualifies as a "lot," as defined by EC 9.0500 and as that term is used in EC 9.2740. *See* ns 1 and 2. The recording of the deeds on October 18, 2013 did not render this appeal moot regarding that issue.

The City's January 22, 2014 motion to dismiss is denied.

C. The City's February 27, 2013 Renewed Motion to Dismiss

Finally, on February 27, 2014 the city renewed its motion to dismiss. The city argues:

> "* * * Respondent now renews it motion to dismiss, relying now on new building permits that the City has issued to Intervenor based on those two deeds. *See* Exhibit A, attached hereto. In an abundance of caution, the City opted to re-issue the building permits in anticipation of Petitioner's argument that the original building permits were issued prematurely, before the necessary deeds were recorded. These consolidated appeals are now moot because intervenor filed the necessary the necessary deeds on October 18, 2013 and the City subsequently re-issued the building permits based on those deeds." Renewed Motion to Dismiss 1.

The "new" or "reissued" building permits the city refers to above are the January 24, 2014 building permits we noted earlier. We do not believe it matters whether they are more accurately described as "new" or "reissued." It appears to be undisputed that except for the different dates they were issued, as a substantive matter, the October 16, 2013 and January 24, 2014 building permits and the development they authorize are identical.

Citing *Rose v. City of Corvallis*, 49 Or LUBA 260, 271 (2005) and *Standard Insurance Co. v. Washington County*, 17 Or LUBA 647, 658 (1989), petitioner contends the city lacked authority or jurisdiction to reissue or issue new versions of the October 16, 2013 building permits while these appeals of those October 16, 2013 building permits was pending before LUBA.

The city responds that *Rose* and *Standard* are distinguishable. We agree with the city. *Standard* concerned a proposal that generated a number of appeals. The second county decision was appealed to LUBA and remanded, and LUBA's decision was appealed to the Court of Appeals. *Standard Insurance Co. v. Washington County*, 16 Or LUBA 717 (1988). The Court of Appeals affirmed LUBA's decision. *Standard Insurance Co. v. Washington County*, 93 Or App 78, 761 P2d 534 (1988). But before the Court of Appeals entered its appellate judgment, making its decision final, the city took further action on the remanded decision. LUBA's decision had sustained two assignments of error and remanded for additional findings regarding those assignments of error. 16 Or LUBA at 723, 729. The county's decision, rendered while the appeal of LUBA's decision remanding the county's decision remained pending before the Court of Appeals, presumably adopted additional findings to respond to LUBA's remand. The county's decision in *Standard Insurance* did not simply reissue or issue a new decision that duplicated the earlier decision, which is the case with the city decisions here.

Rose, like *Standard*, was a complicated case. But for purposes of its potential applicability in this case it is also distinguishable. It did not involve a case where a decision on appeal had simply been reissued without substantive amendments; the decision on appeal in *Rose* also modified the prior decision. 49 Or LUBA at 271.

However, while we reject petitioner's argument that the city lacked jurisdiction to reissue the building permits or issue new versions of those building permits, because the new or reissued building permits were substantively identical, we question whether such reissued or new versions of the October 16, 2013 building permits necessarily moot this appeal. In her

final memorandum filed March 14, 2014, petitioner cites *Warren v. Lane County*, 297 Or 290, 295, 686 P2d 316 (1984). *Warren* concerned an appeal of a decision that amended the county's comprehensive plan and zoning map and required approval of a statewide planning goal exception. While the appeal of that decision was pending, the county readopted the comprehensive plan and zoning map amendments, and the county moved to dismiss the appeal as moot. The Oregon Supreme Court denied the motion:

> "In its motion to dismiss, Lane County relies on *Citadel Corp. v. Tillamook Co.,* 66 Or App 965, 675 P2d 1114 (1984), *Carmel Estates, Inc. v. LCDC*, 51 Or App 435, 625 P2d 1367 (1981), *rev. den,* 291 Or 309, 634 P2d 1346 (1981) and *Card v. Flegel,* 26 Or App 783, 554 P2d 596 (1976), all of which are inapposite. In *Carmel Estates*, the county held hearings and made new findings before enacting a new ordinance which was held to supersede the prior one, rendering an appeal challenging the prior ordinance moot. For the purposes of judicial review, a new ordinance enacted on a new record and different findings will generally supersede the prior one and render any decision on the sufficiency of the prior record moot. Such is not the case here.
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> "For purposes of judicial review, adopting a new comprehensive plan, which, in effect, readopts a prior plan amendment and is enacted on essentially the same findings, does not moot a prior appeal challenging the adequacy of those findings. A determination by LUBA of substantive issues raised by petitioners would not be meaningless. The effect of the recently adopted new comprehensive plan and zone designations for the subject property is that, on remand, LUBA would determine whether the new plan complied with goal exception standards. We hold that this appeal is not moot and deny Lane County's motion to dismiss."

There may be bases for distinguishing *Warren* and concluding that the present appeal is moot. However, there has been no shortage of motions and responses in this appeal, and we decline to delay this appeal for additional briefing on the significance of *Warren*. And without that briefing, we decline

to find this appeal is moot. We therefore turn to petitioner's assignments of error.

FIRST ASSIGNMENT OF ERROR

As we have already explained, one of the issues presented under the first assignment of error is whether the PLA was effective to create adjusted lots 12 and 15 when it was approved on August 7, 2013, or whether the PLA did not become effective until the deeds for adjusted lots 12 and 15 were recorded on October 18, 2013. If it is the latter, the building permits, when issued on October 16, 2013, authorized construction of two single family dwellings on original lot 12 in violation of EC 9.2740. *See* n 2. While both ORS 92.190(3) and (4) and EC 9.8420(2) both clearly require that deeds be recorded, they are both silent on when the approved property line adjustment becomes effective. *See* ns 6 and 7.

We need not decide the question. Now that the deeds have been recorded, there can be no question that one of the approved dwellings will be located on adjusted lot 12 and the other will be located on adjusted lot 15. Any error the city may have committed in issuing the building permits two days before the required deeds were recorded was rendered harmless error when the deeds were recorded.

In her reply brief, petitioner contends:

> "* * * The [October 18, 2013] deeds do not convey property that is depicted in the approved property line adjustment, as required by EC 9.8420(2) and ORS 92.190(4), and are not property line adjustment deeds. In fact, the bargain and sale deeds purport to convey property from the intervenor and his wife to the Intervenor that Intervenor does not own. The Intervenor was the owner of only one of the two lots at issue in the prior property line adjustment, the remaining lot – Lot 15 – is owned by two separate parties. These deeds are likely invalid, in any case they neither

> establish the lots at issue as legal lots nor moot the present appeal." Reply Brief 2-3 (footnote omitted).

In the omitted footnote, petitioner explains that a title report that intervenor submitted with his PLA application shows that the portion of Lot 15 that is designated as Tax Lot 1101 is owned by William C. Temes and Katheryn M. Temes Co-Trustees of the William C. Temes and Kathryn M. Temes, Revocable Trust, as does a "Regional Land Information Database: Summary Property Report." Reply Brief 3, n 3.

One of the October 18, 2013 bargain and sale deeds purports to convey 5,000 square feet of Lot 12 as shown on the 38th Street PUD from Lawrence F. Cooley, the trustee of the Lawrence F. Cooley Living Trust, and Patricia Kay Cooley, the trustee of the Patricia Kay Cooley Living Trust," as grantors to Lawrence F. Cooley, the trustee of the Lawrence F. Cooley Living Trust, as grantee. The other October 18, 2013 deed purports to convey the remainder of Lot 12 and all of Lot 15 as shown on the 38th Street PUD from the same grantors to the same grantee.

Petitioner first argues "[t]he deeds do not convey property that is depicted on the approved property line adjustment * * *." Petitioner's Reply Brief 2. As far as we can tell, they do—one deed includes a perimeter description of the 5000 square foot Parcel 1 (3779 Pine Canyon Drive) and the other deed includes a perimeter description of 36,000 square foot Parcel 2 (3781 Pine Canyon Drive) as shown on the approved PLA. Record 7; Respondent's Brief Appendix 1-6. We reject petitioner's unexplained contention that the deeds do not convey the property depicted on the PLA. Petitioner next suggests that the conveyance required to complete a property line adjustment cannot be a "bargain and sale" deed. Again, petitioner's

contention is unexplained. While a bargain and sale deed does not carry with it any "covenants of title," it is a statutorily authorized form of deed. ORS 93.860. We reject petitioner's unexplained contention that the deed required by ORS 92.190(3) and (4) and EC 9.8420(2) cannot be a bargain and sale deed. Finally, petitioner contends that the purported grantors in the conveyance of former lot 15 to intervenor as trustee do not own all of lot 15 with the result that "[t]hese deeds are likely invalid." Petitioner's Reply Brief 3.

It may be that all of the owners of Lot 15 did not join in the October 18, 2013 bargain and sale deed, as petitioner alleges. The "Regional Land Information Database: Summary Property Report" does appear to support petitioner's position. However, the title report that petitioner is relying on only purports to show the owner "as of: January 09, 2013 * * *." We similarly cannot assume the information in the data base is current.

But there is no question that deeds that appear to convey ownership of the property in accordance with the approved PLA were recorded on October 18, 2013. Petitioner is effectively arguing that the city was not entitled to take the October 18, 2013 deeds at face value and was obligated take action independently to verify that the grantors on those deeds in fact constitute all of the owners of the property that the deeds purport to convey. We reject that argument.

If all of the owners of former Lot 15 did not join in the October 18, 2013 conveyance, they of course likely retain any ownership interest they have in former lot 15 and an additional deed or deeds will be required to correct that failure. But for purposes of issuing the building permits that are the subject of this appeal, the city was entitled to rely on the October 18, 2013 deeds to satisfy EC 9.8420 and ORS 92.190(3) and (4) and issue building permits for

adjusted lots 12 and 15 on October 18, 2013. While there frequently is some overlap in land use law and real estate law, the city is not obligated to ask and answer the kinds of questions petitioner raises about the efficacy of the October 18, 2013 deeds to constitute the conveyances required by EC 9.8420 and ORS 92.190(3) and (4). The city may have acted prematurely by two days by issuing those building permits on October 16, 2013. But the recording of those deeds on October 18, 2013 renders any error the city may have committed on October 16, 2013 by issuing the building permits before the deeds were recorded harmless. We certainly can think of no purpose that would be served by remanding the building permits so that they could simply be reissued.

The final issue petitioner raises under the first assignment of error is whether "adjusted" lot 12 and "adjusted" lot 15 qualify as a "lot" as EC 9.0500 defines that term. We conclude that they are. As defined by EC 9.0500, a "lot" is "[a] unit of land created by the subdivision of land * * *." Lots 12 and 15 were created by the 38th Street PUD, which we understand to be a subdivision. The "adjustment" of lots 12 and 15 does not change the fact that both lots were "created" by a subdivision. If petitioner's argument is that the adjusted lots were created by the PLA rather than the 38th Street PUD and therefore are no longer properly viewed as having been created by the 38th Street PUD, that requires a strained and narrow reading of the EC 9.0500 definition, which we reject.

The first assignment of error is denied.

SECOND AND THIRD ASSIGNMENTS OF ERROR

Petitioner's second and third assignments of error both depend on a faulty premise—that the disputed building permits both qualify as a statutory "permit," within the meaning of ORS 227.160(2). *See* n 3.

As we explained in *Tiramali v. City of Portland*, 41 Or LUBA 231, 240, *aff'd* 180 Or App 613, 45 P3d 519 (2002):

> "The cases where this Board or the Court of Appeals has determined that approval or denial of a building permit involves the kind of discretion that renders it a 'permit' as defined in ORS 227.160 or 215.402 have tended to involve circumstances where there is some question as to the nature of the proposed use or whether the use is permitted at all in the zone. *See Doughton v. Douglas County*, 82 Or App 444, 728 P2d 887 (1986) (a determination whether a dwelling is customarily provided to support a farm use requires significant factual, policy and legal judgment and is therefore a permit); *Hollywood Neigh. Assoc. v. City of Portland*, 22 Or LUBA 789 (1991) (determination that a methadone clinic is a permitted use as a 'medical clinic' in a commercial zone requires significant discretion and is therefore a permit); *Pienovi v. City of Canby*, 16 Or LUBA 604, 606 (1988) (nonconforming use determination is a permit decision). Each of the decisions in those cases, and many others like them found to be permit decisions under ORS 227.160 or ORS 215.402, involve the exercise of legal, factual or policy discretion of a kind that brings them within the ambit of a statutory 'permit.' However, as far as we can tell, we have never held that a building permit for a use that is unquestionably a permitted use in the applicable zone is also a statutory 'permit,' solely because in issuing that building permit the local government interpreted an ambiguous term in a land use regulation that applies to that permitted use. Here, the only 'discretion' the city exercised involved an interpretation whether the term 'finished surface' in the code definition of the term 'grade' is limited to a paved surface or also includes nonpaved surfaces where fill has been placed. We do not believe that an interpretation of such a code provision under such circumstances is the type of 'discretionary approval' that results in a 'permit' under ORS 227.160(2)."(Footnote omitted.)

The uses approved by the two building permits are single family dwellings, which are permitted outright in the R-1 zone. There is nothing unclear about the nature of the proposed uses. Under our reasoning in

Tirumali, the building permits are not statutory permits and the city did not err by failing to treat them as such. Petitioner's reliance on *Lamar Advertising Company v. City of Eugene*, 54 Or LUBA 295, 302-04 (2007), and *Frymark v. Tillamook*, 45 Or LUBA 486 (2003) is misplaced. In both of those cases the nature of the proposed use was unclear.

The second and third assignments of error are denied.[9]

The city's decisions are affirmed.[10]

[9] To the extent petitioner's reference to *Kerns Neighbors for Rational Growth v. City of Portland*, ___ Or LUBA ___ (LUBA No. 2012-085, February 26, 2013) on page 7 of the petition for review was intended as an argument that the city erred by failing to adopt findings in support of the building permits even if the building permits are not statutory permits, we reject the argument. Our review in this matter has been possible without findings.

[10] On February 25, 2014, petitioner moved to strike a reply that the city filed on February 20, 2014. We deny the motion to strike.