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BEFORE THE LAND USE BOARD OF APPEALS  
OF THE STATE OF OREGON

JAMES ELLIS and MARJORIE TURNER,  
*Petitioners,*

vs.

MULTNOMAH COUNTY,  
*Respondent.*

LUBA No. 2019-071

FINAL OPINION  
AND ORDER

Appeal from Multnomah County.

Edward H. Trompke, Lake Oswego, filed the petition for review and argued on behalf of petitioners. With him on the brief was Jordan Ramis PC.

Katherine Thomas, Multnomah County Assistant Attorney, Portland, filed the response brief and argued on behalf of respondent. With her on the brief was Jenny M. Madkour, Multnomah County Attorney.

ZAMUDIO, Board Member; RUDD, Board Chair; RYAN, Board Member, participated in the decision.

AFFIRMED

02/03/2020

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

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**NATURE OF THE DECISION**

Petitioners appeal a county hearings officer’s decision (1) denying petitioners’ lot of record verification request, (2) determining that the subject property is not a legal lot of record in its current configuration, and (3) aggregating the subject property with a contiguous lot.

**FACTS**

The subject property is located in the county’s East of Sandy River Rural Plan Area and is zoned Exclusive Farm Use (EFU). The subject property is designated Tax Lot 300, consists of approximately 23.72 acres, and is developed with a dwelling. Tax Lot 300 is contiguous to Tax Lot 1400, which consists of approximately 12 acres, is zoned EFU, and does not contain a dwelling.

In 1979, petitioners’ mother Ruth Ellis Smith (Smith) owned a tract of land that included current Tax Lots 300 and 1400. In December 1979, Smith signed a deed (1979 deed) conveying to petitioner Turner (Turner) “As a gift, a one-half interest in” Tax Lot 1400 “except for reserving a lifetime estate.” Record 533. On January 15, 1980, Smith signed a deed (1980 deed) conveying to Turner “As a gift, the remaining one-half interest in” Tax Lot 1400 “except for reserving a lifetime estate.” Record 537.

On February 20, 1990, Smith owned Tax Lot 300 in fee simple and held the reserved a life estate in Tax Lot 1400. In 2009, petitioner Ellis (Ellis), as successor trustee of Smith’s trust, conveyed Tax Lot 300 to Ellis and Turner as

1 individuals and tenants in common. In 2018, Ellis applied to the county for  
2 verification that Tax Lot 300 is a lot of record under the Multnomah County Code  
3 (MCC). The planning director issued a decision that Tax Lot 300 is not a lot of  
4 record. Petitioners appealed. After a *de novo* hearing, a county hearings officer  
5 affirmed the planning director’s decision. This appeal followed.

6 **ASSIGNMENT OF ERROR<sup>1</sup>**

7 We begin by setting out the relevant MCC provisions. MCC 35.0005  
8 provides, in part:

9 “**Lot of Record** – Subject to additional provisions within each  
10 Zoning District, a Lot of Record is a parcel, lot, or a group thereof  
11 that, when created or reconfigured, (a) satisfied all applicable zoning  
12 laws and (b) satisfied all applicable land division laws, or (c)  
13 complies with the criteria for the creation of new lots or parcels  
14 described in MCC 35.7785. Those laws shall include all required  
15 zoning and land division review procedures, decisions, and  
16 conditions of approval.” (Boldface in original.)

17 For property zoned EFU, MCC 35.2675 further provides, in part:

18 “(A) In addition to the *Lot of Record* definition standards in MCC  
19 35.0005, for the purposes of this district a Lot of Record is  
20 either:

21 “(1) A parcel or lot which was not contiguous to any other  
22 parcel or lot under the same ownership on February 20,  
23 1990, or

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<sup>1</sup> Petitioners raised two assignments of error in the petition for review. After briefing, and prior to oral argument in this appeal, petitioners withdrew their second assignment of error.

1                   “(2) A group of contiguous parcels or lots:

2                   “(a) Which were held under the *same ownership* on  
3                   February 20, 1990; and

4                   “(b) Which, individually or when considered in  
5                   combination, shall be aggregated to comply with  
6                   a minimum lot size of 19 acres, without creating  
7                   any new lot line.” (Italics in original.)

8   MCC 35.2610 defines “same ownership” for purposes of MCC 35.2600 through  
9   MCC 35.2690:

10                   “*Same Ownership* - Refers to greater than possessory interests held  
11                   by the same person or persons, spouse, minor age child, same  
12                   partnership, corporation, trust or other entity, separately, in tenancy  
13                   in common or by other form of title. Ownership shall be deemed to  
14                   exist when a person or entity owns or controls ten percent or more  
15                   of a lot or parcel, whether directly or through ownership or control  
16                   or an entity having such ownership or control. For the purposes of  
17                   this subsection, the seller of a property by sales contract shall be  
18                   considered to not have possessory interest.”<sup>2</sup> (Italics in original.)

19                   The hearings officer found that the 1979 and 1980 deeds retained an  
20                   unqualified life estate for Smith. Record 39. The hearings officer found that Tax  
21                   Lots 300 and 1400 were contiguous and under the same ownership on February  
22                   20, 1990, based on Smith’s fee simple ownership of Tax Lot 300 and Smith’s life

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<sup>2</sup> The hearings officer incorrectly cited and quoted MCC 35.2010, which provides definitions for the Commercial Forest Use zone. MCC 35.2610 provides the applicable definitions for the EFU zone. That error does not affect our analysis because the definition of “same ownership” is identical in MCC 35.2010 and MCC 35.2610. We refer in this decision to the applicable definition in MCC 35.2610.

1 estate in Tax Lot 1400. The hearings officer concluded that Smith's life estate is  
2 a "greater than possessory interest." Record 17. The hearings officer further  
3 found that Tax Lots 300 and 1400 must be aggregated into a single lot of record,  
4 pursuant to MCC 35.2675(A), because those lots were contiguous and under the  
5 same ownership on February 20, 1990, and Tax Lot 1400 is less than 19 acres.  
6 Record 19.

7 Petitioners argue that the hearings officer erred by concluding that Smith's  
8 retained life estate in Tax Lot 1400 was "greater than [a] possessory interest."  
9 MCC 35.2610. Petitioners also argue, derivatively, that, because the hearings  
10 officer erred in concluding that Tax Lots 1400 and 300 were under the same  
11 ownership, the hearings officer erred by aggregating Tax Lots 1400 and 300.

12 The county responds that "a life estate is a greater than possessory interest  
13 in land and therefore subject to the aggregation requirements in the [MCC]."  
14 Response Brief 2. The county argues that "same ownership" extends to any  
15 interest in property in which the holder has "some right beyond a present right to  
16 exclusive control of the property." Response Brief 7. The county argues that the  
17 right of a life estate holder to alienate, encumber, and receive rents and income  
18 from the property are greater than possessory interests. The county points out that  
19 the policy purpose underlying the "same ownership" lot of record regulation and  
20 aggregation requirement is preservation of larger areas of resource land. The  
21 aggregation requirement does not apply in resource exception areas or urban

1 zones but does apply in farm and forest resource zones. MCC 35.2675. The  
2 county argues that context supports a broad interpretation of “same ownership.”

3 We review the assignment of error to determine whether the hearings  
4 officer “[i]mproperly construed the applicable law.” ORS 197.835(9)(a)(D).  
5 LUBA generally does not review or resolve disputes regarding instruments  
6 conveying interests in real property, as we explained in *McNichols v. City of*  
7 *Canby*, \_\_\_ Or LUBA \_\_\_, \_\_\_ (LUBA No 2018-012, Feb 8, 2019) (slip op at  
8 11), *aff’d*, 297 Or App 582, 442 P3d 245, *rev den*, 365 Or 556 (2019):

9 “Generally, a final and authoritative determination regarding the  
10 intent and scope of deeds, easements and similar real estate  
11 documents can be obtained only in circuit court, based on  
12 application of real estate law. *See Central Oregon Landwatch v.*  
13 *Deschutes County*, 75 Or LUBA 328, 334–35 (2017) (interpreting  
14 deeds under real estate law is a function within the particular  
15 competence of the circuit court, and is a function that local  
16 governments and LUBA, in the exercise of land use approval and  
17 review, should avoid if possible).”

18 However, in this case, LUBA is required to evaluate the 1979 deed and the  
19 1980 deed under the county’s lot of record provision, because the county’s lot of  
20 record provisions require a determination of whether an owner’s property interest  
21 is “greater than possessory.” For reasons explained below, we conclude that  
22 Smith’s unqualified life estate in Tax Lot 1400 is a greater than possessory  
23 interest. Thus, the hearings officer correctly concluded that Tax Lots 1400 and  
24 300 were held under the same ownership on February 20, 1990.

1           **A.     Greater Than Possessory**

2           In order to determine whether an interest in real property is “greater than  
3     possessory,” we first define a possessory interest. A possessory interest is a right  
4     to possess the property. *See Black’s Law Dictionary* 1203 (8th ed 2004) (defining  
5     “possessory interest” as “[t]he present right to control property, including the  
6     right to exclude others, by a person who is not necessarily the owner.”).  
7     “Possess,” is a verb that means “[t]o have in one’s actual control; to have  
8     possession of.” *Id.* at 1201. “Actual possession” is the “[p]hysical occupancy or  
9     control over property.” *Id.* For example, a lease creates and conveys a possessory  
10    interest in land. During the term of the lease, the lessee/tenant has a right to actual  
11    possession.

12           A life estate is a present possessory interest in real property. The duration  
13    of a life estate is limited by the life of some person, known as the measuring life.  
14    *Gray v. Gray*, 205 Or 116, 122, 286 P2d 138 (1955). In this case Smith’s life is  
15    the measuring life. A holder of a life estate is entitled to possession of the subject  
16    property. A life estate holder is also entitled to rents, profits, and other income  
17    generated by the property for the duration of the measuring life. *In re Stout’s*  
18    *Estate*, 151 Or 411, 420, 50 P2d 768 (1935); *Bigsby v. Vogel*, 248 Or App 423,  
19    432, 273 P3d 284 (2012). A life estate can also be leased to a tenant. A life estate  
20    is alienable, and when the measuring life ends, the grantee’s interest in the  
21    property ends. *Hawkins & Roberts v. Jerman*, 147 Or 657, 666–67, 35 P2d 248  
22    (1934). A life tenant can encumber her life estate, but the lien holder’s security

1 interest in the estate ends when the measuring life ends. *Ankeny v. Lieuallen*, 169  
2 Or 206, 113 P2d 1113, *on reh'g*, 169 Or 206, 127 P2d 735 (1941).

3 We conclude that a life estate is “*greater than* possessory” because, in  
4 addition to possession, the life estate holder has the right alienate or encumber  
5 the property and to retain rents, profits, and other income generated by the  
6 property. In so concluding, we observe that a life estate could, by the terms of the  
7 conveyance or reservation, be qualified and limited to only a possessory interest.  
8 However, the 1979 and 1980 deeds do not limit Smith’s life estate to mere  
9 possession. The hearings officer found that nothing in the plain language of the  
10 1979 and 1980 deeds indicates that Smith intended to retain something less than  
11 an unqualified life estate as defined by state law. Record 39.

12 Petitioners argue that the hearings officer ignored Smith’s intention in  
13 conveying to Turner and reserving for herself an interest in Tax Lot 1400 in the  
14 1979 and 1980 deeds. Petitioners rely on their 2019 affidavits to demonstrate  
15 Smith’s intent in conveying and reserving her interest in Tax Lot 1400 in 1979  
16 and 1980. Record 206–10. Petitioners’ affidavits assert that Smith did not farm  
17 Tax Lot 1400, but that she leased it to others who farmed it. Petitioners argue  
18 that, when Smith gifted Tax Lot 1400 to Turner, Smith retained a life estate in  
19 order “to keep the income from leasing the property for farming as retirement  
20 income.” Record 208. Petitioners appear to accept that Smith retained a life  
21 estate in Tax Lot 1400, but argue that the life estate included only the right to



1 income from Tax Lot 1400, and that limited interest is not “greater than  
2 possessory” for purposes of MCC 35.2610.

3 The county responds that the terms of the deed control, petitioners’  
4 argument regarding Smith’s intention is contrary to and ignores the plain  
5 language of the 1979 and 1980 deeds, and that LUBA should not consider the  
6 affidavits as evidence of the grantor’s intent unless LUBA first finds that the  
7 conveyance in the 1979 and 1980 deeds is ambiguous, based on the interpretive  
8 process for resolving deed disputes in civil court cases.<sup>3</sup> Generally, limitations on  
9 evidence that apply in civil proceedings do not apply to land use proceedings.

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<sup>3</sup> The Court of Appeals explained the process for interpreting deeds in *James B. House Living Tr. ex rel. House v. Thompson*, 230 Or App 595, 600–01, 217 P3d 228 (2009):

“In interpreting a deed, our objective is to ascertain the meaning that most likely was intended by the parties who entered into it. We look first to the wording of the deed itself, considering its text in the context of the document as a whole. If the text’s meaning is unambiguous, the analysis ends, and we interpret the provision’s meaning as a matter of law.

“In determining whether a term in a deed is ambiguous, the court can consider evidence of the circumstances surrounding its execution. A provision is ambiguous only if it is capable of more than one plausible and reasonable interpretation. If the court determines that the document’s provisions are ambiguous, the court may then examine extrinsic evidence with the goal of resolving the ambiguity. If an ambiguity nonetheless remains, the court may resolve the contract’s meaning by turning to applicable maxims of construction.” (Internal citations omitted.)

1 *Foland v. Jackson County*, 70 Or LUBA 247 (2014). The county does not provide  
2 any authority for the position that LUBA should follow civil court doctrines  
3 regarding interpretation of deeds in deciding in a land use proceeding whether  
4 Smith’s interest in Tax Lot 1400 was “greater than possessory” for purposes of  
5 the lot of record regulations. However, we need not resolve that issue, because,  
6 even if we consider petitioners’ affidavits, those affidavits do not establish that  
7 Smith’s retained life estate was not “greater than possessory.”

8         Petitioners’ affidavits seek to establish that Smith did not actually possess  
9 or intend to possess Tax Lot 1400, and Smith’s retained life estate was intended  
10 only to allow her to continue receiving income from Tax Lot 1400 during her  
11 life. Even if we consider petitioners’ affidavits and accept the allegations therein  
12 as true, the fact that that Smith did not actually possess or intend to possess Tax  
13 Lot 1400 is beside the point. The question presented in this case is not whether  
14 Smith’s interest in Tax Lot 1400 was possessory, but whether Smith’s interest in  
15 Tax Lot 1400 was “greater than possessory.” Pursuant to the plain language of  
16 the 1979 and 1980 deeds, Smith had the right to possess *and* the right to receive  
17 lease income from Tax Lot 1400, along with the right to encumber, alienate, and  
18 lease the property on February 20, 1990. Nothing in petitioners’ affidavits  
19 undermines the hearings officer’s conclusion that Smith’s interest in Tax Lot  
20 1400 was “greater than possessory” within the meaning of MCC 35.2610.

21         Petitioners argue that a life estate is “equivalent to a leasehold interest—a  
22 mere possessory interest—and something far less than ownership.” Petition for

1 Review 12. Petitioners observe that a life estate is for a defined term of the  
2 measuring life and a leasehold interest is for a term of months or years. The  
3 county responds, and we agree, that the fact that a life estate and leasehold interest  
4 share some similar characteristics does not undermine the fact that a life estate  
5 includes rights beyond possession.

6 Petitioners assert that because a life tenant cannot convey fee simple, the  
7 life estate is limited to a possessory interest and, thus, is not greater than a  
8 possessory interest. The county responds, and we agree, that if the ability to  
9 transfer fee simple ownership were the test for what qualifies as “greater than  
10 possessory,” the only property interest that would qualify would be fee simple  
11 ownership, which would render meaningless the phrase “greater than  
12 possessory.” “Same ownership” for purposes of MCC 35.2610 and 35.2675 is  
13 not limited to fee simple ownership and includes the life estate in this case.

14 **B. Aggregation**

15 Petitioners argue that the hearings officer erred in concluding that Tax Lot  
16 1400 and 300 must be aggregated into one lot of record under MCC  
17 35.2675(A)(2)(b). The hearings officer’s aggregation decision was based on the  
18 conclusion that Tax Lots 1400 and 300 were held under the same ownership on  
19 February 20, 1990, and Tax Lot 1400 is less than the 19-acre minimum lot size.  
20 We affirm that conclusion for the same reasons explained above.

21 The assignment of error is denied.

22 The county’s decision is affirmed.