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

ERIC URSTADT,
Petitioner,

vs.

WASHINGTON COUNTY,
Respondent.

LUBA No. 2019-073

FINAL OPINION
AND ORDER

Appeal from Washington County.

A. Richard Vial, Lake Oswego, filed the petition for review and a reply brief. With him on the brief was Vial Fotheringham LLP. T. Beau Ellis, Lake Oswego, argued on behalf of petitioner.

Jacquilyn E. Saito, Senior Assistant County Counsel, filed a response brief and argued on behalf of respondent.

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

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

AFFIRMED 2/13/2020

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

Opinion by Rudd.

NATURE OF THE DECISION

Petitioner appeals a county hearings officer's decision determining that certain property does not contain multiple discrete legal parcels.

BACKGROUND

The subject property is a 48.01-acre property zoned Exclusive Forest and Conservation (EFC) that we and the parties sometimes refer to as Tax Lot 400.[1]

A. Petitioner's Application

Petitioner sought confirmation from the county through a Director's Interpretation that the subject 48.01-acre property includes two existing parcels.[2]

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[1] The EFC district is a zoning district that implements Statewide Planning Goal 4 (Forest Lands):

> "To conserve forest lands by maintaining the forest land base and to protect the state's forest economy by making possible economically efficient forest practices that assure the continuous growing and harvesting of forest tree species as the leading use on forest land consistent with sound management of soil, air, water, and fish and wildlife resources and to provide recreational opportunities an agriculture."

Washington County Community Development Code (CDC) 342-1; OAR 660-015-0000(4). An 80-acre minimum lot size applies to requests to divide land and to create new parcels in the EFC zone. Record 307.

[2] Petitioner describes his request for a Director's Interpretation as similar to a legal lot verification. Petition for Review 13–14. Unlike some other counties, the county does not have an established procedure for determining the legality of a parcel for development purposes where property is zoned EFC, such as the subject property. CDC 217-1 provides:

Petitioner stated in his application, "This interpretation must be done before any future land use application, plan, amendment, or land use permit, because the outcome of this interpretation shall affect available options for the property. The owner must get this issue decided *before* they can consider their options for the property." Record 30 (emphasis in original). We therefore assume, for purposes of this opinion, that petitioner sought the Director's Interpretation with a future eye to developing with dwellings or other structures allowed in the EFC zone whatever number of parcels the Director's Interpretation determined constitute legal parcels.[3] Stated differently, we assume that petitioner seeks confirmation

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> "The purpose of the Director's Interpretation is to address uses that are not explicitly provided for in this Code, to provide further interpretation of terms or phrases within this Code, make initial determinations of conformity through a Development and Property Information (DPI) request, and provide guidance and documentation for future application of this Code."

We assume for purposes of this opinion that a county Director's Interpretation is an appropriate procedure for determining the number of legal parcels within a property in the absence of a specific development proposal.

[3] CDC 341-2.8 allows in the EFC zone a "[d]etached dwelling unit (one) which meets the Type I forest structure siting and fire safety standards in Section 428-3. See Section 430-37.2 E. for required standards." A detached dwelling unit outside the Urban Growth Boundary is defined in CDC 106-69.3(B) as a "single dwelling unit * * * on a lot or *parcel*." (Emphasis added). CDC 106-151 incorporates the definition of parcel in ORS 215.010, which we set out and discuss later in this opinion.

from the county that the subject property contains two parcels that are available for future development, rather than parcels that may be merely transferable. *See Kishpaugh v. Clackamas County*, 24 Or LUBA 164 (1992) (ORS 92.017 does not require recognition of parcels as developable; the function of ORS 92.017 is to prevent local governments from failing to recognize lawful divisions of property such that they cannot be sold to third parties and to establish that property lines established by land divisions remain unless eliminated); *Campbell v. Columbia County*, 25 Or LUBA 479 (1993) (ORS 92.017 requires that local governments recognize lawfully created lots as legal and separately transferable units of land but does not require the local government to allow each lawfully created lot to be developed separately).

B. The Public Lands Survey System

Because the Public Lands Survey System (PLSS) is central to petitioner's claim that tax lot 400 contains two discrete lots, we begin with an explanation of that system. In *Dykes v. Arnold*, 204 Or App 154, 159–61, 121 P3d 257 (2006), the court of appeals provided an overview of the history of the federal description of western lands for purposes of conveyance through the PLSS, explaining:

> "As is true of all land in the United States north of the Ohio River and west of the Mississippi River, title to land in Oregon was originally vested in the federal government, and much of it was conveyed into private ownership pursuant to federal land 'patents,' or grants, issued by the General Land Office (GLO). Before the federal government would transfer title through those original grants, the land first had to be surveyed by a federal government surveyor. Once surveyed, a plat of the survey, together with the

surveyor's field notes, had to be filed with and approved by the federal government.[]

"The surveys were made using the 'rectangular survey system,' which divided the land into a grid-like pattern of increasingly small squares. Starting with an initial reference line called a 'meridian,' the first level of the grid was formed by the intersection of 'township' lines running north and south with 'range' lines running east and west. The intersection of those lines formed squares that were six miles on each side, called 'townships.' Townships were then subdivided into 'aliquot' parts—which means '[c]ontained in a larger whole an exact number of times; fractional[.]' *Black's Law Dictionary* 81 (8th ed 2004). In particular, a township was subdivided into 36 one-mile squares called 'sections,' each with an area of 640 acres. The sections were assigned a number from 1 to 36, starting in the upper right-hand corner of the township and continuing alternately left and right down the sections, with the square in the lower right hand corner assigned the number 36. * * *

"The rectangular survey system also contemplated the potential subdivision of sections into aliquot parts, in part to make the land more affordable for settlers buying it on a per acre basis. Sections were subdivided into quarters of 160 acres each, referred to as the northwest quarter, northeast quarter, southwest quarter, and southeast quarter. The quarters, in turn, could be subdivided into half-quarters of 80 acres and quarter-quarters of 40 acres. Quarter-quarters were the smallest unit of land for which the federal government would issue a grant." *Id.* at 162 (footnote omitted).

Federal surveyors identified remainder areas from quarter-quarter sections where land could not be identified as full 40-acre Government lots (GLots).

"Where the federal government's work left off, the local government's work began. The federal government's objective was to be able to accurately describe the land with as little surveying as possible, and then convey the land into private ownership. Walter G. Robillard & Lane J. Bouman, *Clark on Surveying and Boundaries*§ 4.05, 111 (7th ed 1997) (*Clark on Surveying*). As a

result, the federal government surveyed a section's exterior boundaries only; the interior survey work customarily was left to be performed by local officials:

> "[T]he county surveyor played an important part in the development of America. It was intended that he would complete the identification of the individual parcels or aliquot parts of the sections after the federal government surveyors created the sections and the land went into private ownership.'
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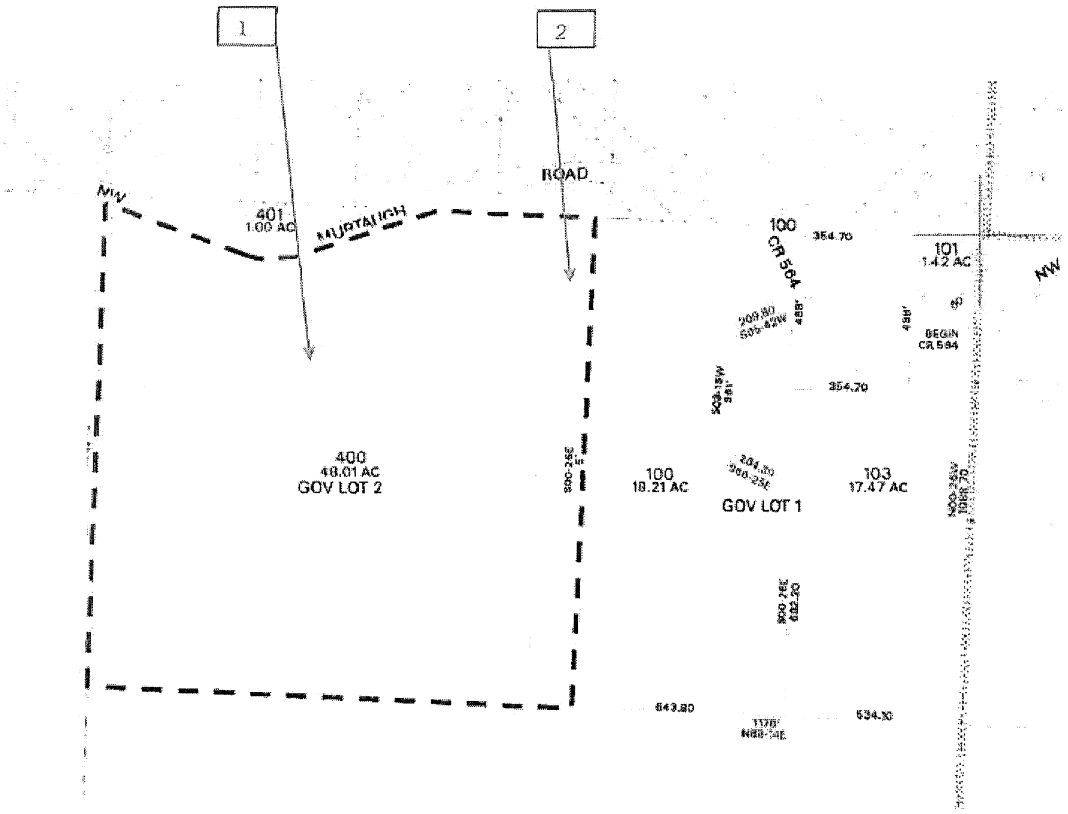
> "*Id.* § 2.13 at 55. Most states therefore provided for an official local surveyor whose duty was to survey the lands for individual ownership, usually at the landowner's request and expense. *Id.* § 2.13 at 55–56; § 4.05 at 111. Over time, as the lands came into private ownership, thousands of miles of interior boundaries and their necessary corners were surveyed by official local surveyors and their deputies. *Id.* § 2.13 at 55–56." *Id.* at 162–64.

During the proceedings below, petitioner submitted as evidence a PLSS survey that was filed with the GLO in 1862 (1862 Survey). Record 866. The 1862 Survey shows GLots 1 and 2 roughly where the subject property is located, although the subject property does not exactly match the depiction of GLots 1 and 2 shown on that survey. Record 917–18.

Petitioner maintains that the subject property contains two discrete legal parcels, as shown below. Record 37.



The parcels claimed by petitioner consist of (1) the portion of GLot 2 south of Murtaugh Road and (2) the western remainder portion of GLot 1 after a 1979 sale of a portion of GLot 1. Combined, proposed "Parcels 1 and 2" are 48.01 acres in size. Record 3. Petitioner does not identify the size of each individual parcel.

C. Petitioner's Legal Theory

Petitioner put forth the following theory for why the subject property contains two legal parcels. Petitioner maintained that the federal government system of identifying GLots in the 1800s established two distinct legal parcels,

and that two legal parcels remain because boundary lines shown on the 1862 Survey have not been vacated. Petitioner argued that proposed "Parcel 2" was the portion of GLot 2, identified on the 1862 Survey, remaining after the dedication of a portion of GLot 2 for the creation of Murtaugh Road in 1988. Petitioner contended that proposed "Parcel 1" is a remainder area of land resulting from the conveyance of the eastern portion of GLot 1 in 1979, and was the western portion of GLot 1 depicted on the 1862 Survey.

D. The Hearings Officer's Decision

On July 10, 2019, the hearings officer issued his final decision rejecting petitioner's argument. The hearings officer concluded that the PLSS system did not create discrete units of land and that its purpose was simply to facilitate the description of areas of land for future conveyance. The hearings officer described the history of the parcels identified by petitioner:

> "a. The 1938 Patent deed conveyed 'Lots one and two of Section five in Township two north of Range three west of the Willamette Meridian, Oregon, containing ninety acres and forty hundredths of an acre' described as a single 'tract.' (Attachment C of Exhibit PH-1) (underline added).'
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> "b. In 1947 the Massys conveyed, 'The E 40 ac of Lot 1 and 2 Sec 5, T2N, R2W WM, WCO.' To Perry Meyers (Attachment D of Exhibit PH-1). This conveyance left the remainder of GLots 1 and 2 as a single tract.
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> "c. In 1988 the portions of, 'Government Lots 1 and 2, Section 5, Township 2 North, Range 3 West of the Willamette Meridian* * *' '[l]ying northerly of Murtaugh Road (County Road No. 564)' was divided off from the remainder of GLots

1 and 2, leaving the remainder of the property in its current configuration.

"d. In 2011, Anita McNulty conveyed to the applicant, Eric Urstadt:

> "ALL OF THE FOLLOWING DESCRIBED PARCEL LYING SOUTHERLY OF MURTAUGH ROAD (COUNTY ROAD NO. 564):
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> "GOVERNMENT LOTS 1 AND 2, SECTION 5, TOWNSHIP 2 NORTH, RANGE 3 WEST OF THE WILLAMETTE MERIDIAN IN THE COUNTY WASHINGTON AND STATE OF OREGON
>
> "EXCEPT THAT PORTION OF GOVERNMENT LOT 1 LYING EAST OF THE WEST LINE OF THAT TRACT DESCRIBED IN DEED TO WARREN WHIPPLE, ET UX, RECORDED NOEMBER 28, 1977 IN BOOK 1220, PAGE 254, WASHINGTON COUNTY, OREGON.
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> "AND ALSO EXCEPT THAT PORTION LYING WITHIN THE BOUNDARIES OF MURTAUGH ROAD (COUNTY ROAD NO. 564). Attachment E of Exhibit PH-1."[4] Record 21-22 (underscoring in original; footnote omitted).

The hearings officer concluded:

> "Based on the deeds conveying the site, it has always been described as a single tract of land, consisting of all or portions of GLots 1 and 2 as a single tract. Therefore, the land that makes up the current site

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[4] A patent is "(2) 4 a: an instrument making a conveyance or grant of public lands." *Webster's Third New Int'l Dictionary* 1654 (unabridged ed 2002). A deed is a signed instrument "5 : often used specifically of an instrument conveying a fee in land" as distinguished from another instrument. *Id.* at 589. A patent is a type of deed.

consists of a single unit of land, because the site was never described or divided into separate units." Record 22.

This appeal followed.

SECOND ASSIGNMENT OF ERROR

We begin with petitioner's second assignment of error, in which petitioner argues the county erred in concluding that boundaries shown on the 1862 Survey did not create discrete legal parcels that can be developed with uses allowed in the EFC zone. ORS 197.835(9)(a)(D). In support of his arguments, petitioner cites a federal statute and federal and state court decisions that refer to the federal PLSS mapping system as "subdividing property." However, the federal statute and the cases that petitioner cites do not support petitioner's premise that a PLSS survey filed with the GLO in 1862 created GLots and other land areas that remain as discrete legal parcels, for purposes of determining whether a parcel exists for development purposes according to the CDC. In an opinion issued this date in *Keuther v. Washington County*, ___ Or LUBA ___ (LUBA No 2019-074, Feb 13, 2020) (*Keuther*), petitioner presented an identical assignment of error. We concluded that the PLSS did not create discrete units of land for development purposes and denied the assignment of error. For the reasons explained in *Keuther*, we also deny the second assignment of error here.

The second assignment of error is denied.

FIRST ASSIGNMENT OF ERROR

Petitioner argues that the county erred in referring to state statutes for guidance as to whether the subject property is comprised of two distinct legal

parcels because the GLots and remnants of areas depicted on the PLSS he asserts are lawful parcels were created prior to the enactment of state statutes addressing subdivision and partition of property. Petition for Review 2. Petitioner argues that the county may not rely on the existing statutory definition of "parcel" at ORS 215.010 to determine whether the GLots or remnants are lawful parcels.[5] Petition for Review 12. Rather, petitioner argues that the county should rely on case law cited by petitioner below regarding the effect of the filing of a PLSS survey with the GLO as "subdividing" property. As we noted above, in an opinion issued this

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[5] In his decision, the hearings officer cited ORS 215.010's definition of "parcel" to support his conclusion the subject property is one legal parcel. ORS 215.010(1) provides that as used in the chapter:

> "(1) The terms defined in ORS 92.010 shall have the meanings given therein, except that "parcel":
>
> "(a) Includes a unit of land created:
>
> "(A) By partitioning land as defined in ORS 92.010;
>
> "(B) In compliance with all applicable planning, zoning and partitioning ordinances and regulations; or
>
> "(C) By deed or land sales contract, if there were no applicable planning, zoning or partitioning ordinances or regulations.
>
> "(b) Does not include a unit of land created solely to establish a separate tax account."

date in *Keuther*, petitioner presented an identical assignment of error. We denied the assignment of error.

For the reasons explained in *Keuther*, the first assignment of error is denied.

The first assignment of error is denied.

The county's decision is affirmed.