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

LARRY KINE,
Petitioner,

vs.

DESCHUTES COUNTY,
Respondent,

and

ELKAI WOODS
HOMEOWNERS ASSOCIATION,
ELKAI WOODS FRACTIONAL
HOMEOWNERS ASSOCIATION,
and SEVENTH MOUNTAIN GOLF
VILLAGE ASSOCIATION INC.,
Intervenors-Respondents.

LUBA No. 2018-130

FINAL OPINION
AND ORDER

Appeal from Deschutes County.

Christopher P. Koback filed the petition for review and argued on behalf of petitioner. Also on the brief was Hathaway Larson LLP.

No appearance by respondent.

Michael H. McGean filed the response brief and argued on behalf of intervenors-respondents. Also on the brief was Francis Hansen & Martin LLP.

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

RUDD, Board Chair, did not participate in the decision.

AFFIRMED 01/29/2021

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 board of county commissioners determining that petitioner's property constitutes a single lot of record, rather than 11 lots of record.

FACTS

The subject property consists of a golf course and associated facilities located within the Widgi Creek resort area, which is zoned Resort Community (RC). Prior to 1984, the entire area now occupied by the Widgi Creek resort was owned by the federal Bureau of Land Management (BLM). In a 1984 land exchange, BLM granted to petitioner's predecessor-in-interest, Seventh Mountain Development Corporation (the developer), a 235-acre tract consisting of four parcels, Parcels A, B, C, and D, as depicted on a Dependent Resurvey (1984 BLM survey).

On the 1984 BLM survey, Cascades Lakes Highway forms the western boundary of the tract. The eastern boundary is an irregular solid line that meanders south and then curves west to join the highway. On the survey, the internal property lines between Parcels A, B, C, and D are depicted in solid lines, and follow north-south and east-west section lines, specifically the lines for sections 14, 15, 22, and 23 of Township 18 South, Range 11 East. The 1984 BLM survey includes a metes and bounds description for each of Parcels A, B, C, and D.

In 1985, the developer prepared a survey to define the exterior property boundaries of the tract. The 1985 boundary survey showed Parcels A, B, C, and D (denoted as Parcels 1, 2, 3, and 4) in the same configuration as the 1984 BLM survey. Record 439. At some point not shown in the record, the southwestern portion of Parcel C was partitioned for an unrelated development.

In 1990, the developer applied for subdivision plat approval to create 107 residential lots, known as the Seventh Mountain Golf Village. The 1990 subdivision plat consists of five sheets: the main sheet with an overview of the entire subdivision and four detailed sub-sheets. The proposal for 107 residential lots was consistent with a 1983 master plan approved by the county, which limited future development of the property to 107 residential units. The proposed plat depicts the 107 residential lots along with an access road, internal roads and four common areas sprawled across the middle of the property in a north-south axis.[1] The plat does not label or identify the pre-existing Parcels A, B, C, or D as shown on the 1984 BLM survey (or Parcels 1, 2, 3, or 4 as shown on the 1985 boundary survey). The plat depicts section lines as dashed lines, including the section lines that corresponded to the internal property boundaries depicted on the 1984 BLM survey, but also section lines that do not correspond to any internal property boundaries in that survey. The remaining unplatted areas, which

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[1] The four common areas are labeled Tracts A, B, C, and D. However, there is no dispute that these four common areas have no relationship to the pre-existing Parcels A, B, C, and D.

generally surround the platted residential areas and which were intended to be developed as the golf course and related facilities, are labeled "Not in Plat."[2] The county approved the proposed subdivision plat with no changes relevant to this appeal, and the plat was subsequently recorded.

In 1994, the developer conveyed in a single deed its interests in both the golf course and the Seventh Mountain Golf Village. The golf course area, which the 1994 deed identifies as "Parcel 2," was specifically described using the metes and bounds description of Parcels A, B, C, and D as delineated in the 1984 BLM survey, and then excepting out all portions lying within the recorded subdivision plat for the Seventh Mountain Golf Village.

In 2016, petitioner, the current owner of the land described as "Parcel 2" in the 1994 deed, applied to the county to verify 10 units of land as "lots of record" under Deschutes County Code (DCC) 18.04.030.[3] Under the DCC, a "lot of record" is a unit of land that the county recognizes as having been lawfully

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[2] Most of the unplatted areas are located on the periphery of the platted residential areas; however, as discussed below, there is a large unplatted area, now occupied by a part of the golf course, that is entirely surrounded by platted residential lots and internal roads.

[3] We quote DCC 18.04.030 in full below. As relevant here, petitioner argued to the county that 10 (then 11) remainder parcels resulting from 1990 subdivision plat qualified as lots of record pursuant to paragraph (A)(5) of the definition of "lot of record" at DCC 18.04.030, which includes a lot or parcel created "[b]y the subdividing or partitioning of adjacent or surrounding land, leaving a remainder lot or parcel."

created and that is eligible for development under the county's land use regulations. In their application, petitioner argued that those segments of the internal property lines for Parcels A, B, C, and D depicted in the 1984 BLM survey survived the 1990 subdivision plat. According to petitioner, these surviving property line segments, combined with the effect of platting the 107 residential lots, roads, and common areas, resulted in the creation of 10 unplatted remainder parcels from the four original parcels, comprising the area labeled "Not in Plat" on the 1990 subdivision plat that is now occupied by the golf course facilities. County staff concluded that, if petitioner's theory is correct, the 1990 subdivision plat would actually have resulted in the creation of 11 unplatted remainder parcels. Accordingly, the application was modified to request verification of 11 remainder parcels.

The hearings officer issued a decision concluding that petitioner had not demonstrated that the property they owned constituted one or more "lots of record" as defined at DCC 18.04.030. Petitioner appealed to the board of county commissioners, which held a *de novo* proceeding. The commissioners issued the county's final land use decision on October 1, 2018, in which they concluded that the 1990 subdivision plat had the effect of vacating the segments of property lines for Parcels A, B, C, and D as shown on the 1984 BLM survey, including for those areas labeled "Not in Plat." Further, the commissioners interpreted paragraph (A)(5) of the definition of "lot of record" at DCC 18.04.030, concluding that, because that code provision is phrased in the singular, only one remainder lot or

parcel created by a partition or subdivision plat may be recognized as a "lot of record." Accordingly, the commissioners verified that petitioner's property consists of one lot of record for purposes of the DCC. This appeal followed.

However, prior to the commissioners' October 1, 2018 decision, petitioner initiated a mandamus action against the county under ORS 215.427 (requiring that the county take final action on, inter alia, an application for a "permit" within 150 days of the date on which the application is submitted). The circuit court concluded that petitioner's application for lot of record verification is not an application for a "permit" and dismissed the petition for mandamus. Petitioner appealed that circuit court dismissal to the Court of Appeals, and LUBA suspended this appeal of the commissioners' October 1, 2018 decision, pending resolution of the proceedings before the Court of Appeals, which affirmed. *State ex rel Kine v. Deschutes County*, 307 Or App 290, 477 P3d 417 (2020). Thereafter, petitioner moved for LUBA to reactivate this appeal.[4]

ASSIGNMENT OF ERROR

Petitioner advances a single assignment of error with a number of overlapping arguments that nonetheless tend to fall into two categories. One category consists of arguments challenging the county's conclusion that

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[4] In his motion, petitioner requests additional briefing or oral argument. We do not see that additional briefing or oral argument is necessary in order to resolve the merits of the appeal. The motion is denied.

petitioner failed to demonstrate that the internal property lines established in the 1984 BLM survey survived approval of the plat.

A second category consists of arguments challenging the county's interpretation of paragraph (A)(5) of the definition of "lot of record" at DCC 18.04.030, to the effect that only one recognized lot of record remainder parcel resulted from the 1990 subdivision plat. As we understand the county's findings, the second conclusion is something of an alternative to its first conclusion: even if petitioner is correct that the 1990 subdivision plat created multiple remainder parcels, the paragraph (A)(5) definition nonetheless limits verification of such remainder parcels to a single "lot of record."

We address each category of arguments as a separate sub-assignment of error.

A. Effect of 1990 Subdivision Plat

1. Standard of Review

In the present application, petitioner asked the county to determine that the 1990 subdivision plat proposed the continued existence of pre-existing parcel lines and that those pre-existing property lines, in combination with the platted subdivision lots, roads, and common areas, created up to 11 remainder parcels. In doing so, the county found it necessary to interpret ambiguous elements of the 1990 subdivision plat. Based in part on that interpretation of the plat, the county ultimately concluded that the developer did not propose, and the county did not

approve, the continued existence of pre-existing parcel lines, and thus did not create 11 remainder parcels.

The commissioners' interpretation of the 1990 subdivision plat is not an interpretation of the county's comprehensive plan or land use regulations and, thus, is not entitled to the deferential standard of review in ORS 197.829(1).[5] *M & T Partners, Inc. v. Miller*, 302 Or App 159, 170, 460 P3d 117 (2020). Instead, we review the commissioners' interpretation of the 1990 subdivision plat for legal error. *Id.* As discussed below, we agree with the county and intervenors-respondents (intervenors) that the county did not commit legal error in construing the ambiguous elements of the 1990 subdivision plat.

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[5] ORS 197.829(1) provides:

> "[LUBA] shall affirm a local government's interpretation of its comprehensive plan and land use regulations, unless the board determines that the local government's interpretation:
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> "(a) Is inconsistent with the express language of the comprehensive plan or land use regulation;
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> "(b) Is inconsistent with the purpose for the comprehensive plan or land use regulation;
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> "(c) Is inconsistent with the underlying policy that provides the basis for the comprehensive plan or land use regulation; or
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> "(d) Is contrary to a state statute, land use goal or rule that the comprehensive plan provision or land use regulation implements."

2. ORS 92.017

We first discuss ORS 92.017 and associated case law that form part of the legal context for the county's interpretation of the 1990 subdivision plat. *Former* ORS 92.017 (1989) provided that "[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."[6] In *Kishpaugh v. Clackamas County*, we interpreted ORS 92.017 to require that the property lines of lawfully created lots or parcel remain inviolate, absent the employment of a "specific process" to eliminate such property lines. 24 Or LUBA 164, 172 (1992). We did not have occasion in *Kishpaugh* to elaborate on what kind of "specific process[es]" can vacate lot or parcel lines. That issue arose in *Weyerhauser Real Estate Development Co. v. Polk County*, 63 Or LUBA 393, *aff'd*, 246 Or App 548, 267 P3d 855 (2011). In that case, we and the Court of Appeals held that a county-approved partition plat over a portion of an existing subdivision had the effect of vacating the underlying subdivision lot lines, at least where the partition plat did not indicate the continued existence of the subdivision lots.[7] Under the

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[6] We cite the version of ORS 92.017 in effect in 1990, when the subdivision at issue in this case occurred. The current version of ORS 92.017, adopted in 1993, is identical except that it omits the words "changed or." Or Laws 1993, ch 702, § 2. In *Weyerhauser Real Estate Development Co. v. Polk County*, the Court of Appeals noted that the pre-1993 version of ORS 92.017 was broader than the current version, in that a mere "change" to a lot or parcel line could eliminate the protection afforded by ORS 92.017. 246 Or App 548, 267 P3d 855 (2011).

[7] In *Weyerhauser*, the Court of Appeals held:

Weyerhauser decisions, it is clear that partition and subdivision plat approvals are types of "specific process[es]" that can, as provided by law, result in the elimination of property lines and lots and parcels. *See also Van Veldhuizen v. Marion County*, 26 Or LUBA 468 (1994) (recording of partition plat to create a 110-acre parcel vacated pre-existing 50-acre and 60-acre parcels).

> "We conclude that, under the statutes applicable at the time of the 1983 partition, a partition had the effect of vacating previous lot lines, at least where, as here, the partition map does not indicate the continued existence of the lots that were partitioned. Under those statutes, a parcel and a lot were each 'a unit of land,' created by either a partition (parcels) or a subdivision (lots). ORS 92.010(1), (6) (1981). To 'partition land' was to divide 'an area or tract of land' that 'exists as a unit or contiguous units of land under single ownership' into two or three new units, or parcels. ORS 92.010(8) (1981). A partition, then, could divide an owner's single existing parcel or lot, or it could divide an owner's multiple contiguous parcels or lots, into two or three parcels. As examples, under the statutes, a single lot could be partitioned into two parcels, or five lots could be partitioned into three parcels. If multiple lots were redivided into parcels, there was no requirement that the partition of the lots preserve the lines of the previous lots in any way. It is also difficult to imagine that the legislature intended the previous lot lines to survive such a process, creating a spider web of overlapping lots and parcels. Given the authority that counties had in 1983 to approve divisions of land and given that the processes of dividing land were intended to create new units of land, we conclude that the legislature did not intend to require counties to go through a separate, additional process to vacate lots when approving a partition of those lots into new parcels." 246 Or App at 558-59.

3. The County's Decision

Citing *Weyerhauser*, the commissioners concluded that, because the 1990 subdivision plat did not indicate the continued existence of any pre-existing parcels or parcel lines, the 1990 subdivision plat vacated all pre-existing parcels and parcel lines.[8] The findings note that the 1990 subdivision plat omitted any labels for the pre-existing parcels, such as "Parcel A," etc., and used dashed lines

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[8] The commissioners' decision states:

> "The Board also finds that while *Weyerhauser* may not be entirely on point, its principle [is] that a partition or subdivision can have the effect of vacating previous lot lines where the partition or subdivision plat does not indicate the continued existence of the prior lots. *See Weyerhauser*, 246 Or App at 558. Here, the plat eliminated any reference to Parcels A, B, C and D in the remainder area and used only a dashed line to represent the underlying section lines. The lack of any clear intent in the 1990 plat to keep the boundaries of Parcels A, B, C and D separate supports the conclusion that the developer/landowner intended to vacate those lines." Record 18.

The commissioners also found:

> "There is no support in the record that the developer ever intended to preserve the boundaries of the remainder along the lines created by the 1984 [BLM survey]. To the contrary, the Board finds it more persuasive that the developer intended to consolidate the 'not in plat' area and to eliminate the prior parcel lines of the 1984 [BLM survey], based on the configuration of the plat, the master plan of development, and/or the development of the golf course on that 'not in plat' area." Record 17.

to represent section lines in place of the former solid lines shown on the 1984 BLM survey to depict the internal property lines between Parcels A, B, C, and D.

Petitioner argues that *Weyerhauser* is distinguishable because the 1990 subdivision plat expressly denoted areas of the subject tract that were "Not in Plat." According to petitioner, the notation "Not in Plat" can only mean that those areas are outside the operational bounds of the subdivision plat and therefore not subject to any land division or consolidation. We understand petitioner to argue that, just as the partition plat at issue in *Weyerhauser* could not possibly have vacated subdivision lot lines located *outside* the partition plat boundaries, the 1990 subdivision plat in the present case cannot operate to vacate pre-existing property lines inside the areas on the 1990 subdivision plat noted as "Not in Plat."

We are not persuaded by petitioner's distinction. The county found that the "configuration of the 1990 plat chosen by the developer would not have been possible except as a subdivision of the entire property subject to the 1984 [BLM survey]." Record 17. The 1990 subdivision plat necessarily depicts (and operates upon) both (1) the 107 subdivision lots and common tracts that became the Seventh Mountain Golf Village and (2) the remainder parcel(s) that were created by the subdivision and that became the Seventh Mountain golf course. There is no possible dispute that the 1990 subdivision plat operated extensively on the entire tract, including creation of the remainder parcel(s). The only lack of clarity is how many remainder parcels the 1990 subdivision plat created. As noted, petitioner's theory is that the 1990 subdivision plat had the effect of further

dividing the four pre-existing parcels into an additional seven parcels, for a total of 11 remainder parcels. That theory cannot easily be squared with the assertion on appeal that the 1990 subdivision plat was limited to areas platted for subdivision lots and common tracts, and had no operation upon the remainder parcel(s) located in areas of the plat noted as "Not in Plat." Whatever the effect of the 1990 subdivision plat, it clearly operated on more than just those areas identified for new subdivision lots and common tracts. Accordingly, we disagree with petitioner that the notation "Not in Plat" distinguishes *Weyerhauser* from the present case.

The key holding in *Weyerhauser* is that a partition plat has the effect of vacating underlying pre-existing lot and parcel lines, at least where "the partition map does not indicate the continued existence of the lots that were partitioned." 246 Or App at 558. As extended to a subdivision plat, that holding is applicable here. The simplest and least ambiguous way to propose the continued existence of pre-existing lots or parcels and their property lines on a partition or subdivision plat is to depict their property lines on the partition or subdivision plat, preferably using the conventional solid line denoting a property line, along with clear identifying labels, such as "Remainder Parcel 1," "Remainder Parcel 2," etc. Had the developer explicitly proposed 11 remainder parcels based on the pre-existing parcel lines, then the county decision-maker would have had the opportunity to consider whether such a proposal was consistent with the applicable law,

including the lot of record provisions at DCC 18.04.030. However, the 1990 subdivision plat did not propose, at least expressly, 11 remainder parcels.

In its findings, the county noted that it is the applicant's responsibility to clearly propose desired elements of the subdivision so that the county can determine if such elements comply with the applicable law. The county concluded that the developer did not clearly propose to retain the pre-existing parcel lines, much less to create 11 remainder parcels. Against that background, the county evaluated the physical depictions on the plat, including (1) the absence of pre-existing parcel lines and parcel labels, (2) the dashed lines that the county found to represent section lines rather than property lines, and (3) the "Not in Plat" notations that were applied to all the areas intended for the golf course and related facilities. Contrary to petitioner's preferred interpretation, the county interpreted the "Not in Plat" notations as a proposal by the developer to consolidate all of the otherwise undifferentiated notated areas into a single remainder parcel.[9] As discussed below, the county found that such a proposal would be consistent with paragraph (A)(5) of the definition of "lot of record" at DCC 18.04.030, which was in effect in 1990 and which the county, in its decision, interpreted to allow the recognition of only one remainder parcel as a "lot of record."

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[9] As intervenors point out, in some places, the notation "Not in Plat" is written indiscriminately across dashed section lines that, under petitioner's theory, represent pre-existing parcel lines.

On appeal, petitioner has not demonstrated that the county's interpretation of the 1990 subdivision plat is legally erroneous. Contrary to petitioner's argument, the notation "Not in Plat" does not clearly denote an indication of the continued existence of prior parcel lines or constitute a clear proposal to create multiple remainder parcels. At best, that notation introduces ambiguity into the subdivision plat because it is not at all clear what "Not in Plat" means. We cannot say that petitioner's preferred resolution of that ambiguity is correct when viewed in its legal context and the context of other elements depicted or omitted from the 1990 subdivision plat. Accordingly, we affirm the county's conclusion that, under the reasoning in *Weyerhauser*, the 1990 subdivision plat had the effect of vacating the undepicted pre-existing parcel lines.

4. Miscellaneous Challenges

We address here several additional challenges to county's findings. Petitioner first argues that the findings quoted at note 8 overemphasize the role of the developer's intent. To the extent that the developer's intent is relevant to the analysis, petitioner argues, the record includes (1) the 1985 boundary survey, which depicted Parcels A, B, C, and D, and (2) the 1995 deed, which partially describes the property conveyed by reference to the parcels shown on the 1984 BLM survey. Petitioner argues that this evidence indicates that the developer intended for Parcels A, B, C, and D to survive the 1990 subdivision plat as discrete parcels.

We agree with petitioner that focusing on the intent of the developer in the present case is not the appropriate framework for resolving disputes regarding what the 1990 subdivision plat accomplished regarding remainder parcels. The 1990 subdivision plat is not a deed or similar contract between parties, where ambiguities may be resolved by determining the intent of the parties, based on internal and external evidence. The 1990 subdivision plat is a land use decision by the county land use authority that a proposed plat complies with applicable laws and land use standards. If it is unclear what that plat approved, the county may, in response to the appropriate application, subsequently interpret the plat to determine what the applicant proposed on the plat and what the county actually approved, in light of the then-applicable laws and land use regulations.

However, as we understand it, that is essentially the approach that the county took, focusing its analysis on what was proposed and approved on the subdivision plat, rather than on external evidence of the developer's intent. Petitioner has not demonstrated that any error by the county in evaluating the 1990 subdivision plat in terms of the developer's intent warrants reversal or remand.

Petitioner next argues that, if the county is correct that the 1990 subdivision plat vacated the property line segments of Parcels A, B, C, and D located in the areas noted as "Not in Plat," then the county cannot explain why the exterior property lines of the tract, which separate the tract owned by the developer from adjoining property owned by others, were not also vacated. However, unlike the

interior property lines for Parcels A, B, C, and D, the 1990 subdivision plat *does* depict the exterior property lines of the tract, using a solid line interspersed at intervals with three dots. Those lines correspond to the exterior property lines depicted on the 1984 BLM survey and the 1985 boundary survey. The 1990 subdivision plat clearly did not propose any change to the exterior property lines, much less the vacation of exterior property lines.

Petitioner also argues that the county erred in placing too much weight on the fact that the 1990 subdivision plat used dashed lines rather than solid lines where the boundaries of Parcels A, B, C, and D coincided with section lines on the 1984 BLM survey. However, the county is correct that the 1990 subdivision plat appears to follow a convention of using solid lines for property lines and dashed lines for lines other than property lines. The dashed lines on the plat corresponding to section lines are labeled with section numbers, and dashed lines are used consistently throughout the plat to depict what are obviously section lines, both in areas where the boundaries of Parcels, A, B, C, and D overlapped section lines on the 1984 BLM survey and areas where no such overlap existed. The county did not err in giving weight to the fact that the 1990 subdivision plat depicted dashed lines, rather than solid lines, in areas where section lines and the boundaries of Parcels A, B, C, and D overlapped on the 1984 BLM survey.

5. Conclusion

In sum, ORS 92.017 does not, as petitioner suggests, require the county to identify and apply some kind of special dedicated process for vacating pre-

existing parcel lines. *Weyerhauser* instructs that simple partition plats and, by extension, subdivision plats, can vacate pre-existing property lines in the absence of indications on the plat that the applicant proposed, and the local government approved, the continued existence of such pre-existing property lines. Here, the only indication on the 1990 subdivision plat that could be construed as a proposal to continue the existence of pre-existing internal parcel lines was the unclear notation "Not in Plat" in otherwise undifferentiated areas of the plat where the developer planned to construct a golf course. However, in the absence of direct indications, such as depictions of property lines and parcel labels, the county reasonably interpreted the 1990 subdivision plat as a whole to have the effect of vacating all of the pre-existing interior property lines shown on the 1984 BLM survey.

B. Interpretation of DCC 18.04.030

As noted, petitioner requested verification of 11 parcels as "lots of record" pursuant to paragraph (A)(5) of the definition at DCC 18.04.030, which includes lots or parcels created "[b]y the subdividing or partitioning of adjacent or surrounding land, leaving a remainder lot or parcel."[10] The hearings officer

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[10] DCC 18.04.030 provides, in full:

"'Lot of Record' means:

"A. 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:

"1. By partitioning land as defined in ORS 92;

"2. By a subdivision plat, as defined in ORS 92, filed with the Deschutes County Surveyor and recorded with the Deschutes County Clerk;

"3. 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 of the instrument was required on the date of the conveyance. If such instrument contains more than one legal description, only one lot of record shall be recognized unless the legal descriptions describe lots subject to a recorded subdivision or town plat;

"4. By a town plat filed with the Deschutes County Clerk and recorded in the Deschutes County Record of Plats; or

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

"B. Notwithstanding subsection (A), a lot or parcel validated pursuant to ORS 92.176 shall be recognized as a lot of record.

"C. The following shall not be deemed to be a lot of record:

"1. 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.

"2. A lot or parcel created by an intervening section or township line or right of way.

concluded that the original Parcels A, B, C, and D from the 1984 BLM survey were not created in any of the ways described in DCC 18.04.030, and hence were not "lots of record." The board of commissioners' decision did not reach that question.

Addressing petitioner's claim that multiple remainder parcels were created by the 1990 subdivision plat, and hence qualify as "lots of record" under paragraph (A)(5) of the definition at DCC 18.04.030, the commissioners adopted the staff and hearings officer's position that, because paragraph (A)(5) is phrased in the singular, it recognizes only one remainder lot of record resulting from a partition or subdivision plat.[11] As noted, we understand this conclusion to

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> "3. A lot or parcel created by an unrecorded subdivision, unless the lot or parcel was conveyed pursuant to subsection (A)(3) above.
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> "4. A parcel created by the foreclosure of a security interest."

[11] The commissioners' findings summarize the staff position as follows:

> "Staff concurs with [intervenors and the] Hearings Officer that [paragraph (A)(5)], is written in the singular, 'leaving 'a' remainder lot or parcel.' So at most, as a matter of textual interpretation, the Code would recognize only one lot of record consisting of all of the 'not in plat' areas.
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> "Applicant argues [that a recent county board of commissioners]' decision affirms the notion that a single partition-by-deed can leave multiple discontiguous remainders. Staff does not see any explicit finding on this issue in the cited decision, although the effect of the decision could be viewed to recognize partition-by-deed with

constitute an alternative to the primary conclusion that the 1990 subdivision plat vacated the pre-existing parcel lines. We understand the commissioners to conclude that, even if the 1990 subdivision plat in fact created more than one remainder parcel, only one remainder parcel can be recognized as a "lot of record" under paragraph (A)(5).[12]

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multiple discontiguous remainders. However, it does not appear that the Board deliberated on that particular issue in [that decision]. In any event, the partition-by-deed issue in that case is not presented here.

"Subsection (A)(5) in the Lot of Record definition providing for a single remainder lot of record was a part of the County Code at the time of the 1990 Seventh Mountain Golf Village plat. This provision makes it clear that, by default, any remaining land surrounding the plat could become only one single lot of record. The developer had the opportunity to show multiple remainders on the plat, if it had been the developer's intent to provide for multiple remainders. It is the landowner's obligation to clearly express such an intent if it had truly intended to create multiple remainders along the same lines as the 1984 [BLM survey]." Record 13-14.

[12] The commissioners' findings state, in relevant part:

"The Board finds that [paragraph (A)(5)] in the Lot of Record definition providing for a single remainder lot of record was a part of the County Code at the time of the 1990 Seventh Mountain Golf Village plat. This provision makes it clear that, by default, any remaining land surrounding the plat could become only one single lot of record. The developer had the opportunity to show multiple remainders on the plat, if it had been the developer's intent to provide for multiple remainders. It is the landowner's obligation to clearly express such an intent if it had truly intended to create multiple remainders along the same lines as the 1984 [BLM survey]. As such, the Board finds that the 'not in plat' area is recognized as

On appeal, petitioner challenges the commissioners' interpretation of paragraph (A)(5). Petitioner first argues that the commissioners erred to the extent that they concluded that paragraph (A)(5) functions as a "specific process" to vacate pre-existing parcel lines under *Kishpaugh*. However, as explained above, the commissioners concluded that the 1990 subdivision plat, not paragraph (A)(5), operated to vacate the underlying parcel lines pursuant to the holding in *Weyerhauser*.

Petitioner next argues that the commissioners erred in concluding that only one remainder parcel can be recognized as a lot of record under paragraph (A)(5). According to petitioner, the phrase "leaving a remainder lot or parcel" is written in the singular to be grammatically correct, to match the singular "lot or parcel" in the main text of subsection (A). Where a partition or subdivision plat creates multiple remainder parcels, petitioner contends that the correct approach under paragraph (A)(5) is to evaluate each remainder parcel individually and determine whether each one resulted from the partition or subdivision plat, and hence qualifies as a lot of record.

As noted, ORS 197.829(1) requires LUBA to affirm a governing body's interpretation of its own land use regulations unless the interpretation is inconsistent with the provision's express language, purpose, or underlying policy. The test under ORS 197.829(1) is not whether the interpretation is correct,

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a single legal lot as an effect of the 1990 plat, under [paragraph (A)(5)]." Record 17.

or the best or superior interpretation, but whether the governing body's interpretation is "plausible," given its text and context. *Siporen v. City of Medford*, 349 Or 247, 243 P3d 776 (2010).

Textually, paragraph (A)(5) in the definition of "lot of record" at DCC 18.04.030 is phrased in the singular. As petitioner argues, that may well simply reflect agreement with the singular reference to "lot or parcel" in the main body of subsection (A). But it could also reflect a deliberate choice to limit the number of recognized remainders left over after a partition or subdivision, as the county concluded. That view has some contextual support in paragraphs (A)(1) and (2) of the definition, which recognize as lots of record lots or parcels created by partition or subdivision plat. *See* n 10. Under this view, if an applicant wishes to create multiple large "remainders" and have those units of land recognized as lots of record, the applicant simply needs to expressly propose them as part of the subdivision or partition plat. If so, such lots or parcels could then gain recognition as lots of record pursuant to paragraphs (A)(1) or (2). We note that the commissioners' findings summarize a section of the hearings officer's decision concluding that paragraphs (A)(1) and (2) are intended to address lots and parcels created under "modern" partitions and subdivision laws, while paragraph (A)(5) is intended to address older partitions and subdivisions that predate "modern" partition and subdivision laws. Record 13. If so, this suggests that paragraph (A)(5) plays a more limited role than paragraphs (A)(1) and (2) and provides

further support for the commissioners' restrictive interpretation of paragraph (A)(5).

We conclude that petitioner has not demonstrated that the commissioners' interpretation of paragraph (A)(5) of the definition of "lot of record" at DCC 18.04.030 is inconsistent with its express language, purpose, or underlying policy, or that it is "implausible" in view of its text and context. Accordingly, we must affirm that interpretation.

C. Non-contiguous Remainder Parcels as a Single Lot of Record

Finally, we understand petitioner to argue that, even if the county is correct that the pre-existing property lines were vacated by the 1990 subdivision plat, the layout of the plat itself appears to create at least two non-contiguous remainder parcels. Petitioner faults the county for failing to explain in its findings how a single lot of record designation can encompass two non-contiguous units of land.

It is reasonably clear from the county's findings that it believes that multiple non-contiguous units of land can be designated a single "lot of record" for purposes of the DCC. The findings do not address the fact that the 1990 subdivision plat appears on its face to create two non-contiguous remainder parcels.[13] Although it seems unusual to designate two non-contiguous parcels as

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[13] The first encircles the subdivision lots and common areas like a snake, while the second is an oval-shaped area in the center that is surrounded by subdivision lots and internal roads, with no apparent physical connection to the first remainder.

a single "lot of record" for development purposes, petitioner does not identify any land use regulation or statute that would preclude the county from doing so. Accordingly, petitioner's arguments do not provide a basis for reversal or remand.

Relatedly, petitioner argues that, to the extent that the county interprets paragraph (A)(5) of the definition of "lot of record" at DCC 18.04.030 to effectively preclude petitioner from separately conveying or separately developing these two noncontiguous pieces of land, the county's interpretation conflicts with ORS 92.017. In *Kishpaugh*, LUBA noted legislative history of ORS 92.017 indicating that the legislature did not intend for the statute to preclude local governments from treating discrete lots and parcels as a single unit for purposes of development under the applicable planning and zoning standards.[14] As we understand the function of the county's lot of record provisions, a unit of land that is not recognized as a lot of record cannot be

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[14] In *Kishpaugh*, we stated:

> "Nothing in either the text of ORS 92.017 or its legislative history suggests that all lawfully created lots and parcels must be recognized by local government as being separately developable. In fact, the legislative history quoted above makes it reasonably clear that the developability of such lots and parcels is to be determined with reference to planning and zoning standards. Accordingly, the county's determination that tax lots 404 and 405 are not separately developable, because they were not in separate ownerships at the time of the imposition of restrictive zoning, does not offend ORS 92.017."

developed under the county's land use regulations. However, such property presumably could be conveyed. In the hypothetical event that two pieces of land formerly recognized as a single lot of record are separately conveyed, it is not clear what would happen to the lot of record designation. Presumably, the county would provide an answer to that question in response to an appropriate future application. However, petitioner has not demonstrated that that hypothetical must be addressed in the present decision or that failure to address it in this decision represents reversible error.

D. Conclusion

For the foregoing reasons, we affirm the county's conclusion that the 1990 subdivision plat vacated the pre-existing internal property lines. Further, we affirm its interpretation of paragraph (A)(5) of the definition of "lot of record" at DCC 18.04.030 to the effect that the 1990 subdivision plat resulted in only one lot of record for purposes of the DCC.

The assignment of error is denied.

The county's decision is affirmed.