

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

LANDWATCH LANE COUNTY,
Petitioner,

vs.

LANE COUNTY,
Respondent,

and

STEPHEN FORD,
Intervenor-Respondent.

LUBA No. 2020-085

FINAL OPINION
AND ORDER

Appeal from Lane County.

Sean T. Malone filed the petition for review and reply brief and argued on behalf of petitioner.

No appearance by Lane County.

Bill Kloos filed a response brief on behalf of intervenor-respondent.

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

AFFIRMED

04/29/2021

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

Petitioner appeals a hearings officer’s decision verifying two parcels as legal lots.

BACKGROUND

Lane Code (LC) 13.140 provides for verification of property as a legal lot, more specifically a “lawfully established unit of land,” which is defined to include a unit of land created by “deed or land sales contract, if there were no applicable planning, zoning or subdivision or partition ordinances or regulations.” LC 13.030(3)(n) – (p).

In 2019, intervenor Stephen Ford (intervenor) applied to the county to verify as legal lots two units of land referred to here as Property 1 and Property 2.¹ Property 1 is a parcel approximately 40 acres in size, which was lawfully created in 1910, by a federal patent and a subsequent deed, as “Government Lot 1.” There is no dispute in the present case that Property 1 was, when created in 1910, a lawfully established unit of land for purposes of LC 13.140. Since its creation in 1910, no instrument in the record has further divided Property 1, or explicitly changed its boundaries. However, as discussed below, the parties dispute whether a 1951 deed vacated a portion of Property 1’s property line or merged Property 1 into other property conveyed in that same deed.

¹ Intervenor also applied for a post-verification property line adjustment. No issues are raised in this appeal about that property line adjustment.

1 Property 2 is an irregularly shaped 57.58-acre area of land adjoining
2 Property 1 to the south. Property 2 was apparently once part of a larger unit of
3 land that encompassed Government Lots 3, 4, 5, and 6. Property 2 could be
4 described as consisting of Government Lot 3, plus portions of other Government
5 Lots to the southwest.

6 In 1944, a warranty deed conveyed Property 1 and a large area of land to
7 the south and west, including the area here designated Property 2, to a single
8 ownership, resulting in the creation of a tract.² LC 13.030(3)(mm) (“Tract” means
9 “[o]ne or more contiguous lawfully established units of land under the same
10 ownership.”). In 1951, the owner of that tract executed a series of deeds and land
11 sale contracts. At that time, no county zoning, subdivision, or other land use
12 regulations applied to those conveyances. On August 15, 1951, the owner
13 executed a land sale contract that conveyed by metes and bounds description an
14 irregularly shaped area of land in the middle of the tract, which included a road
15 running north to south.³ The area conveyed on August 15, 1951 is currently
16 designated as tax lots 600, 601, and 602.

² “Tract” means “[o]ne or more contiguous lawfully established units of land under the same ownership. LC 13.030(3)(mm).

³ The north-south road, Doane Road, was created by petition at some point. As an alternative theory, intervenor argued to the hearings officer below that Property 2 could have been separated from remainder of the tract by the creation of Doane Road. The hearings officer did not address that alternative theory.

1 The next day, on August 16, 1951, the owner conveyed by warranty deed
2 an area of land east of the road approximately 97 acres in size, consisting of
3 Property 1 and Property 2. The August 16, 1951, deed listed, in a single
4 paragraph, the property conveyed as consisting of “All of Lot 1 and 3, Section
5 22, Township 18 South Range 5 West of the Willamette Meridian, also:
6 Beginning at the ¾ inch iron pipe * * *” and continuing into a metes and bounds
7 description.” The metes and bounds description encompasses an irregularly
8 shaped area of land west and southwest of Government Lot 3. On September 19,
9 1951, a correction deed for the August 16, 1951 deed was executed that slightly
10 altered the metes and bounds description in a manner that is not material to our
11 analysis. Property 2 proposed here for verification consists of Government Lot 3,
12 plus the irregularly shaped area of land to the southwest that is subject to the
13 metes and bounds description in the August 16, 1951 and September 19, 1951
14 deeds.

15 Intervenor, the current owner of the property conveyed in the August 16,
16 1951 deed, applied to the county to verify Property 1 and Property 2 as two legal
17 lots. Intervenor also filed a separate application for a property line adjustment
18 between the two properties. The county planning director verified Property 1 as
19 a legal lot, but concluded that intervenor had failed to provide sufficient
20 information to determine how Property 2 was created and hence whether it was
21 a lawfully established unit of land. Accordingly, the planning director denied the
22 associated application for a property line adjustment between Properties 1 and 2.

1 Intervenor appealed to the county hearings officer, who conducted an
2 evidentiary hearing at which intervenor submitted additional evidence. Petitioner
3 appeared in opposition, and argued that Property 2 was never a lawfully
4 established unit of land, because no recorded conveyance, including the 1951
5 conveyances, ever described the boundary of Property 2 independently from
6 Property 1.

7 The hearings officer ultimately concluded that (1) Property 1 (Government
8 Lot 1) was lawfully created in 1910, (2) the remainder of the property conveyed,
9 consisting of Government Lot 3 and the irregularly-shaped area of land described
10 in the metes and bounds description, constitutes a unit of land that is distinct from
11 Property 1, and (3) the August 16, 1951 deed did not serve to vacate or merge
12 Property 1 into the larger property conveyed in that deed. The hearings officer
13 also concluded that creation of Property 2 by deed in this manner was a lawful
14 means of creating a parcel in 1951.

15 This appeal followed.

16 **ASSIGNMENT OF ERROR**

17 In a sole assignment of error, petitioner argues that the hearings officer
18 misconstrued the applicable law in verifying Property 1 and Property 2 as legal
19 lots. The hearings officer's findings state, in relevant part:

20 “Under the facts in this case, Property 1 was created in 1910. That
21 fact is uncontroverted. On August 16, 1951, a deed was [executed]
22 that transferred all of Property 1 and all of Property 2 with a single
23 legal description. The Hearings Official understands Land Watch to

1 argue that because Property 2 was never described independently of
2 Property 1, it does not qualify as a legal lot.

3 “The Hearings Official disagrees. As of 1910, Property 1 was a
4 discrete, lawful unit of land. Under ORS 92.017(2) and LC
5 16.090(126)(d), it remains a discrete unit of land to this day because
6 its property lines were never vacated. On August 16, 1951, when all
7 of Property 1 and Property 2 were lawfully transferred in one deed,
8 Property 2 was created. That is because Property 1 was already a
9 lawfully created unit of land, it could not lose that unitary character,
10 and Property 2 was the ‘remainder’ of the property described in that
11 August 16, 1951 deed. The deed did not and could not serve to
12 merge Property 1 and Property 2.” Record 6 (footnote omitted).⁴

13 **A. Property 2**

14 Petitioner presents two distinct theories for its misconstruction of law
15 argument, based on two statutory provisions. The first theory, as we understand
16 it, is based on ORS 92.010(3)(a)(B)(ii), which LC 13.140 implements. ORS
17 92.010(3) defines a “lawfully established unit of land” to mean, in relevant part,
18 a unit of land created by “deed or land sales contract, if there were no applicable
19 planning, zoning or subdivision or partition ordinances or regulations.”⁵

⁴ Petitioner does not challenge the hearings officer’s conclusion that the 1951 deed conveyed and effectively combined Government Lot 3 with the portion of land subject to the metes and bounds description to create Property 2. In other words, no party argues that Government Lot 3 remained a discrete unit of land after the 1951 conveyance.

⁵ ORS 92.010(3)(a) provides, in full:

“Lawfully established unit of land” means:

“(A) A lot or parcel created pursuant to ORS 92.010 to 92.192; or

1 Petitioner argues that, as a matter of law, to create a “lawfully established unit of
2 land” by deed or land sales contract within the meaning of ORS
3 92.010(3)(a)(B)(ii) requires that the creating instrument include a discrete
4 description for each unit of land created, distinct from other units of land that
5 may be conveyed in the same instrument.

6 Petitioner cites no authority or legislative history supporting that narrow
7 reading of ORS 92.010(3)(a)(B)(ii), and we are aware of none. The hearings
8 officer’s decision includes a discussion of a Deschutes County code provision
9 defining “lot of record,” to include units of land created by deed if the deed
10 includes a separate legal description for every unit of land created by the deed.
11 However, as the hearings officer noted, Lane Code does not include any similar
12 limiting language. ORS 92.010(3)(a)(B)(ii) also includes no language to that
13 effect. Petitioner’s reading of ORS 92.010(3)(a)(B)(ii) inserts a requirement into
14 the statute that is not present, contrary to ORS 174.010.⁶ The fact that some

“(B) Another unit of land created:

“(i) In compliance with all applicable planning, zoning and
subdivision or partition ordinances and regulations; or

“(ii) By deed or land sales contract, if there were no
applicable planning, zoning or subdivision or partition
ordinances or regulations.”

⁶ ORS 174.010 provides in relevant part that “[i]n the construction of a statute,
the office of the judge is simply to ascertain and declare what is, in terms or in

1 counties may impose additional requirements does not demonstrate that either
2 ORS 92.010(3)(a)(B)(ii) or LC 13.140 includes those requirements.

3 Petitioner cites no other statute, law, common law principle, or any other
4 authority that, in 1951, would have prohibited creating Property 2 in the manner
5 the hearings officer described. Prior to the adoption of partition and subdivision
6 ordinances, a deed was a multi-function instrument, used not only to convey
7 existing units of land, but also to create new units of land, to vacate or consolidate
8 units of land, and also adjust property boundaries of existing units of land,
9 without creating new units of land. Under current regulatory schemes, those
10 functions are accomplished by different mechanisms. As far as we are informed,
11 in Lane County in 1951, a single deed could both (1) convey an existing unit of
12 land and (2) create and convey a new unit of land described by the rest of the
13 property conveyed by the deed. Petitioner has not established that accomplishing
14 this result in Lane County in 1951 required that the legal descriptions in the deed
15 take any particular form, specifically that each unit of land be distinctly identified
16 and separately described by metes and bounds.

17 Under petitioner’s first theory, we understand petitioner to argue that even
18 if the August 16, 1951 deed created Property 2 as a discrete unit of land, the
19 resulting unit of land was “unlawful.” However, absent citation to some law in
20 effect in 1951 that prohibited the creation of Property 2 in that manner, petitioner

substance, contained therein, not to insert what has been omitted, or to omit what
has been inserted[.]”

1 has not demonstrated that Property 2 is not a “lawfully established unit of land”
2 within the meaning of ORS 92.010(3)(a)(B)(ii) and LC 13.140.

3 **B. Property 1**

4 Petitioner’s second theory, as we understand it, is that the August 16, 1951
5 deed had the legal effect of merging all the property conveyed in that deed into a
6 single legal unit of land. Under this theory, the August 16, 1951 deed effectively
7 vacated Property 1, and merged it with the remainder of the property conveyed,
8 resulting in only one “lawfully established unit of land” for purposes of ORS
9 92.010(3)(a)(B)(ii) and LC 13.140.

10 Petitioner acknowledges that the hearings officer rejected that theory,
11 citing ORS 92.017. That statute, adopted in 1985, provides:

12 “A lot or parcel lawfully created shall remain a discrete lot or parcel,
13 unless the lot or parcel lines are vacated or the lot or parcel is further
14 divided, as provided by law.”

15 *See also* LC 13.020(5) (same). However, petitioner argues that it is entirely
16 consistent with ORS 92.017 to understand the August 16, 1951 deed to have the
17 effect of merging Property 1 with adjoining property into a single unit of land,
18 because in Lane County in 1951 a deed was a lawful way of accomplishing that
19 result. Petitioner contends that merger in this fashion is sufficient to vacate
20 Property 1, “as provided by law” for purposes of ORS 92.017. Accordingly,
21 petitioner argues, the hearings officer erred in verifying Property 1 and Property
22 2 as two legal lots.

1 Intervenor responds, initially, that petitioner’s theory of “merger” was
2 never raised with the requisite specificity during the proceedings below, and is
3 thus waived on appeal, pursuant to ORS 197.763(1).⁷ *Boldt v. Clackamas County*,
4 107 Or App 619, 623, 813 P2d 1078 (1991) (ORS 197.763(1) requires fair notice
5 to adjudicators and opponents). Petitioner replies that it took the position below
6 that the August 16, 1915 deed resulted in a single unit of land. *See* Record 25-26
7 (“The August 16, 1951 deed created a new legal lot containing all of the land east
8 and north [of the land conveyed in the August 15, 1951 deed]”). While the issue
9 was not framed in terms of “vacation” or “merger,” petitioner argues that the
10 hearings officer understood the issue clearly enough to address it in their findings,
11 quoted above, concluding that Property 1 had not been “merged” with Property
12 2 into a single unit of land.

13 The above-quoted finding indicates that the hearings officer understood
14 petitioner’s argument to be that Property 2 was not a discrete legal lot. The
15 hearings officer rejected that argument in part based on the continued legal

⁷ ORS 197.763(1) provides:

“An issue which may be the basis for an appeal to [LUBA] shall be raised not later than the close of the record at or following the final evidentiary hearing on the proposal before the local government. Such issues shall be raised and accompanied by statements or evidence sufficient to afford the governing body, planning commission, hearings body or hearings officer, and the parties an adequate opportunity to respond to each issue.”

1 existence of Property 1. We agree with intervenor that the hearings officer did
2 not appear to recognize as a distinct “issue” the argument presented on appeal—
3 namely, that the August 16, 1951 deed effectively vacated Property 1, and
4 merged it with the remainder of the property conveyed, creating a new single unit
5 of land. We agree with intervenor that petitioner did not raise that issue during
6 the local proceeding with the specificity required by ORS 197.763(1). Therefore,
7 that issue is waived.

8 Moreover, on the merits, we agree with intervenor that petitioner has not
9 demonstrated that, as a matter of law, the August 16, 1951 deed merged Property
10 1 and the other conveyed property into a single new unit of land. Petitioner cites
11 no authority for that proposition, other than a footnote in *LandWatch Lane*
12 *County v. Lane County*, 78 Or LUBA 164, 174 n 9 (2018) (*McDougal*), based on
13 LUBA’s speculation regarding the reach of the holding in *Weyerhauser Real*
14 *Estate Development Co. v. Polk County*, 246 Or App 548, 267 P3d 855 (2011).
15 In *Weyerhauser*, the Court of Appeals held that a recorded partition plat had the
16 effect of vacating preexisting lot lines created by a 1911 subdivision. In
17 *McDougal*, LUBA speculated, but did not decide, whether that holding could be
18 extended to a recorded deed that conveyed, using a single metes and bounds
19 descriptions, portions of two pre-existing parcels.

20 Petitioner also cites to a Lane County hearings officer’s decision at Record
21 74-75 involving a different property, concluding that where the owner conveys
22 by deed portions of two existing parcels using a single metes and bounds

1 description, and there is no indication of an intent to convey multiple parcels, the
2 county will presume that the owner intended to vacate the property line between
3 the portions conveyed and, thus, the county will recognize only one legal lot. We
4 understand petitioner to argue that a similar presumption should be applied here.

5 Intervenor responds that the present case does not involve conveyance of
6 *portions* of two existing parcels, but instead conveyance of the entirety of
7 Property 1, a discrete pre-existing unit of land, plus other adjoining land.
8 Intervenor argues that the speculative *dicta* in *McDougal* and the Lane County
9 decision cited by petitioner, even if correct as applied to their facts, do not address
10 circumstances where a recorded deed conveys the entirety of a lawfully created
11 unit of land with other land.

12 We agree with intervenor that the cases cited are distinguishable, because
13 they involve deeds conveying *portions* of existing parcels, via a single metes and
14 bounds description. Here, the August 16, 1951 deed separately conveyed the
15 entirety of Property 1 by reference to “All of Lot 1.” The only metes and bounds
16 description in the deed affected Property 2. Petitioner has not established that, as
17 a matter of law, Property 1 was merged with other property conveyed in the
18 August 16, 1951 deed, and thereby lost its status as a discrete legal lot. As we
19 explained in *Jackson v. City of Portland*, “it is not unusual to transfer multiple
20 lots in a single deed” and, even before ORS 92.017 was adopted in 1985, we are
21 aware of no authority for the proposition that listing several lots or parcels or
22 portions of lots or parcels together in a pre-1985 deed operated to merge the

1 property described in the deed into a single unit of land. 54 Or LUBA 138, 145
2 (2007); *see also Thomas v. Wasco County*, 58 OR LUBA 452 (2009) (a local
3 government may not adopt regulations that consolidate lots for development
4 purposes based on arbitrary differences in the wording or form of deeds, such as
5 whether a deed transferring multiple properties lists each property under a
6 separate heading).

7 In sum, petitioner has not demonstrated that the hearings officer erred in
8 verifying Property 1 and Property 2 as two legal lots.

9 The assignment of error is denied.

10 The county's decision is affirmed.