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

CENTRAL OREGON LANDWATCH,
Petitioner,

vs.

DESCHUTES COUNTY,
Respondent,

and

CYNTHIA GROSSMANN,
Intervenor-Respondent.

LUBA Nos. 2021-110/111

FINAL OPINION
AND ORDER

Appeal from Deschutes County.

Carol Macbeth filed the petition for review and argued on behalf of petitioner.

No appearance by Deschutes County.

Lisa Andrach filed the response brief and argued on behalf of intervenor-respondent. Also on the brief was Fitch & Neary, PC.

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

AFFIRMED 03/01/2022

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 hearings officer decision approving nonfarm dwellings on two parcels zoned for exclusive farm use.

FACTS

The subject properties are 5.19-acre and 5.34-acre parcels that are part of a 311-acre tract zoned Exclusive Farm Use-Lower Bridge (EFU-LB). Intervenor-respondent (intervenor) acquired the tract in 2001, via a single deed that described the land conveyed using a single metes and bounds description.

In 2004, intervenor applied to the county for lot of record verification, requesting that the county verify that the tract includes up to 10 "lots of record," as defined in the Deschutes County Code (DCC).[1] Intervenor presented evidence

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[1] DCC 18.04.030 defines "Lot of Record" to mean, as relevant:

> "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:
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> "1. By partitioning land as defined in ORS 92;
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> "2. By a subdivision plat, as defined in ORS 92, filed with the Deschutes County Surveyor and recorded with the Deschutes County Clerk;
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> "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

that all 10 units of land that make up the tract were created in various lawful ways prior to the adoption of county partition regulations in 1977, including two units of land that were created by deed in 1913 and 1917. On September 13, 2004, the county issued the lot of record verification, verifying that nine of the units of land, including the two units of land created by deed in 1913 and 1917, qualify as "lots of record," as defined in the DCC. 2021-110 Record 231-34; 2021-111 Record 226-29. The county's lot of record verification was not appealed.

In 2008, intervenor applied for the county to approve property line adjustments to reconfigure the size and boundaries of the parcels within the tract that were verified as lots of record in 2004. The county approved the property line adjustments. Subsequently, in 2009, intervenor recorded a number of deeds to effect the approved property line adjustments, including deeds for the two subject parcels. The current size and configuration of the two subject parcels resulted from the 2009 deeds.

> 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.
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> "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."

In 2021, intervenor filed conditional use permit applications with the county, seeking approval of a dwelling not in conjunction with farm use (nonfarm dwelling) on each of the subject parcels. ORS 215.284(2)(c) provides, in relevant part, that the county may approve a nonfarm dwelling on a "lot or parcel created before January 1, 1993."[2] ORS 215.284(2) and other pertinent statutory

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[2] ORS 215.284(2) provides:

> "In counties not described in subsection (1) of this section, a single-family residential dwelling not provided in conjunction with farm use may be established, subject to approval of the governing body or its designee, in any area zoned for exclusive farm use upon a finding that:
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> "(a) The dwelling or activities associated with the dwelling will not force a significant change in or significantly increase the cost of accepted farming or forest practices on nearby lands devoted to farm or forest use;
>
> "(b) The dwelling is situated upon a lot or parcel or portion of a lot or parcel that is generally unsuitable land for the production of farm crops and livestock or merchantable tree species, considering the terrain, adverse soil or land conditions, drainage and flooding, vegetation, location and size of the tract. A lot or parcel or portion of a lot or parcel may not be considered unsuitable solely because of size or location if it can reasonably be put to farm or forest use in conjunction with other land;
>
> "(c) The dwelling will be sited on a lot or parcel created before January 1, 1993;
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> "(d) The dwelling will not materially alter the stability of the overall land use pattern of the area; and

provisions regarding nonfarm dwellings are implemented in the DCC provisions governing the county's exclusive farm use zones, at DCC 18.16.050(G). DCC 18.16.050(G)(1)(a)(6) requires, in relevant part, that "[t]he nonfarm dwelling shall be located on a lot or parcel created prior to January 1, 1993."

County staff approved one of the conditional use permit applications, and the other was referred to the hearings officer after petitioner appealed the first approval. The hearings officer conducted a consolidated appeal proceeding, in which petitioner argued, among other things, that the subject parcels were created in 2009, when intervenor recorded the deeds effecting the 2008 property line adjustments. Petitioner also argued that the county cannot rely upon the 2004 lot of record verification to conclude that the subject parcels were created prior to January 1, 1993, as required by DCC 18.16.050(G)(1)(a)(6) and ORS 215.284(2)(c).

In decisions dated August 10, 2021, the hearings officer rejected petitioner's arguments and approved the conditional use permit applications. These appeals followed.

ASSIGNMENT OF ERROR

Petitioner's single assignment of error alleges that the county misconstrued the applicable law in finding that the subject parcels were created prior to January

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"(e) The dwelling complies with such other conditions as the governing body or its designee considers necessary."

1, 1993. ORS 197.835(9)(a)(D). Petitioner advances three arguments in support of that assignment of error.

A. Consolidation by Deed

Intervenor acquired the tract that includes the subject parcels in 2001, via a deed that described the land conveyed using a single metes and bounds description for the entire tract. The 2001 deed did not describe any units of land within the tract, including either of the subject parcels. Further, intervenor's predecessors-in-interest acquired the same tract in 1977, also via a single deed with a single metes and bounds description.

According to petitioner, the 1977 and 2001 deeds demonstrate that the two subject parcels did not exist as discrete units of land before January 1, 1993, the critical date under ORS 215.284(2)(c). Petitioner argues that the subject parcels did not appear in the county's property records, at least in their current size and configuration, until 2009, when intervenor recorded deeds to implement the 2008 property line adjustments.

Petitioner does not dispute that the county's property records also include the 1913 and 1917 deeds that created two parcels that were, at some point, aggregated with other parcels into the larger tract that intervenor eventually acquired in 2001. However, we understand petitioner to argue that either the 1977 deed to intervenor's predecessors or the 2001 deed to intervenor had the legal effect of consolidating into a single parcel all of the separate parcels formerly aggregated in the tract. Petitioner contends that, as a matter of law, intervenor

acquired only a single parcel in 2001, a single parcel that was then illegally divided in 2009 to create the two subject parcels, among others.

Petitioner cites no authority for the proposition that conveying multiple properties via a single deed with a single metes and bounds description has the automatic legal effect of consolidating the conveyed properties into a single parcel. We previously rejected a similar argument advanced by petitioner in a different Deschutes County appeal, *Central Oregon Landwatch v. Deschutes County*, 75 Or LUBA 328 (2017) (*TID*). *TID* involved a board of commissioners determination that a deed conveying a tract of multiple parcels with a single metes and bounds description did not have the effect of consolidating the pre-existing parcels into a single new parcel. The board of commissioners concluded that, under county regulations, the consolidation of parcels required county approval and could not be accomplished by simply recording a deed. LUBA affirmed the county's conclusion. Petitioner does not address or distinguish *TID*. *See also Jackson v. City of Portland*, 54 Or LUBA 138, 145 (2007) (no authority exists for the proposition that listing several lots or parcels or portions of lots or parcels together operates to merge the property described in the deed into a single unit of land); *Thomas v. Wasco County*, 58 Or LUBA 452, 456-57 (2009) (a local government may not adopt regulations that consolidate lots for development purposes based on arbitrary differences in the wording or form of deeds, such as whether a deed transferring multiple properties lists each property under a separate heading).

In the present appeal, as they did in *TID*, petitioners cite *Weyerhaeuser Real Estate Development Co. v. Polk County*, 63 Or LUBA 393, *aff'd*, 246 Or App 548, 267 P3d 855 (2011). However, *Weyerhaeuser* involved a county-approved partition plat, which the county later determined had the effect of eliminating pre-existing subdivision lots within the area encompassed by the partition plat. There is no recorded partition plat or similar plat in the present case. *Weyerhaeuser* provides no support for petitioner's theory of consolidation by deed.

B. The 2004 Lot of Record Verification

Petitioner next argues that the hearings officer erred in relying upon the 2004 lot of record verification to conclude that the subject parcels were created prior to January 1, 1993, as required by DCC 18.16.050(G)(1)(a)(6) and ORS 215.284(2)(c).

Petitioner first argues that the 2004 lot of record verification is not a competent basis to draw conclusions regarding the two subject parcels because it was directed at the entire tract owned by intervenor. As noted, petitioner contends, without any basis, that the tract consists of a single 311-acre parcel. Petitioner argues that a lot of record verification directed at one parcel is not evidence regarding whether two entirely different parcels were created prior to January 1, 1993. However, that argument is unavailing for two reasons: (1) as discussed, petitioner has not established that the 2001 deed conveyed a single 311-acre parcel and (2), in any case, the 2004 lot of record verification is directed

not at the 311-acre tract but, specifically, at each of the nine discrete parcels that the county determined are aggregated within the tract, including the two subject parcels prior to their reconfiguration in 2009.

Petitioner next argues that a lot of record verification cannot be substituted for the inquiry required by ORS 215.284(2)(c): whether the subject properties are parcels that were created prior to January 1, 1993. We understand petitioner to contend that a "lot of record," for purposes of the DCC, is not necessarily the same thing as a "parcel" for purposes of ORS 215.284(2)(c). We understand petitioner to argue that the county must independently evaluate whether the subject parcels are "parcels" within the meaning of the relevant code and statutory definitions, and, if so, when those parcels were created, based on a direct review of recorded deeds and similar evidence.

In their decision, the hearings officer rejected a variant of this argument, which they understood to constitute a "collateral attack" on the 2004 lot of record verification, a final land use decision. On appeal, petitioner insists that no collateral attack is intended. Instead, petitioner argues that the 2004 lot of record verification is a legally insufficient basis to answer the question posed by ORS 215.284(2)(c). In the response brief, intervenor argues that petitioner's arguments are, in substance, a collateral attack on the 2004 verification.

Untangling this dispute requires a discussion of the county's lot of record verification process. Like many counties, Deschutes County requires permit applicants to demonstrate, either in the permit application or in a declaratory

proceeding prior to the permit application, that the subject property is a discrete, lawfully created unit of land that is potentially eligible for development. This process is sometimes called a "legal lot verification." The county's lot of record determination process is found at DCC 22.04.040, titled "Verifying Lots of Record."[3] In that process, the county determines whether the subject property is

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[3] DCC 22.04.040 provides, in relevant part:

> "A. Purpose; scope. Concurrent with or prior to the issuance of certain permits, a lot or parcel shall be verified pursuant to this section to reasonably ensure compliance with the zoning and land division laws in effect on the date the lot or parcel was created. Not all permits require verification. If required, verifying that the lot or parcel was lawfully created is a threshold issue that should be addressed before the permit may be issued, but does not supersede or nullify other permit requirements. This section 22.04.040 provides an applicant the option to concurrently verify a lot or parcel as part of applying for a permit that requires verification, or preliminarily apply for a declaratory ruling to thereby determine the scope of available permits.
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> "* * * * *
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> "D. Findings; Declaratory Ruling. If an applicant is applying for a land use permit listed in subsection (B)(1), the County shall include a finding verifying that the lot or parcel meets the 'lot of record' definition in 18.04.030, a finding noting that the lot or parcel does not meet the 'lot of record' definition in 18.04.030, or a finding noting that verification was not required because the lot or parcel qualified for an exception pursuant to subsection (B)(2). If an applicant is applying for a permit listed in subsection (B)(1) that does not require public notice, or prior to applying for any permit, an applicant

a "lot of record," as defined at DCC 18.04.030. *See* n 1. As we understand it, the county issues a declaratory ruling for a lot of record verification that involves notice of the decision and an opportunity for a local appeal. 2021-110 Record 231-34; 2021-111 Record 226-29. Once final, the resulting verification is a "land use decision," as defined at ORS 197.015(10)(a), potentially appealable to LUBA.

Petitioner is correct that a "lot of record," as defined at DCC 18.04.030, is not necessarily the same thing as a "lot" or "parcel" for purposes of ORS 215.284(2)(c). While the statute and statutory definitions are not approval criteria in the usual sense, the corresponding code provisions implement the statute, and the county cannot lawfully make land use determinations under its code that are contrary to the statutes implemented. *See Kenagy v. Benton County*, 115 Or App 131, 838 P2d 1076, *rev den*, 315 Or 271 (1992) (a local government interpretation of a local code provision that implements state law is not subject to deference). We therefore focus on the relevant statutory provisions.

> may request a declaratory ruling pursuant to DCC Chapter 22.40. If the lot or parcel meets the 'lot of record' definition in 18.04.030, the County shall issue the declaratory ruling determining that the lot or parcel qualifies for all permits listed in subsection (B)(1). If the lot or parcel does not meet the 'lot of record' definition in 18.04.030, the County shall not issue the declaratory ruling and instead shall provide the applicant information on permit options that do not require verification and information on verification exceptions that may apply pursuant to subsections (B)(2)."

As noted, ORS 215.284(2)(c) authorizes nonfarm dwellings on lots or parcels created prior to January 1, 1993. ORS 215.010(1) defines "parcel," for purposes of ORS chapter 215, as follows:

> "The terms defined in ORS 92.010 shall have the meanings given therein, except that 'parcel':
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> "(a) Includes a unit of land created:
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> "(A) By partitioning land as defined in ORS 92.010;
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> "(B) In compliance with all applicable planning, zoning and partitioning ordinances and regulations; or
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> "(C) *By deed or land sales contract, if there were no applicable planning, zoning or partitioning ordinances or regulations*." (Emphasis added.)

ORS 92.010 includes more restrictive definitions of "parcel" and related terms, such as "partition," which effectively limit the scope of the term "parcel," for purposes of ORS chapter 92, to units of land created by partition plat. Thus, ORS 215.010(1) supplies the operative definition of "parcel" in the present case. ORS 92.010 includes the operative definitions of "lot," "subdivision," etc.[4]

Comparing the definition of "parcel" at ORS 215.010(1) to the definition of "lot of record" at DCC 18.04.030, quoted at n 1, makes it clear that a parcel, as statutorily defined, does not necessarily qualify as a "lot of record." For

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[4] A lawfully created unit of land that is neither a lot nor a parcel, as defined in ORS 92.010, may nonetheless, for purposes of ORS chapter 92, fall into a larger category described as a "lawfully established unit of land." ORS 92.010(3)(a).

example, a unit of land may be a "parcel" for purposes of ORS 215.010(1) but, if it is less than 50 feet wide, it cannot qualify as a "lot of record." Conversely, it is possible that a unit of land could qualify as a "lot of record" but not constitute either a "lot" or "parcel" under the statutory definitions. A unit of land created by a "town plat," for example, may not slot neatly into the statutory categories of either "lot" or "parcel."

That caveat aside, in some cases, a verified "lot of record" will also constitute either a "lot" or "parcel," as statutorily defined, and vice versa. And the present case fits squarely within that common overlap. In the present case, the 2004 lot of record verification determined, among other things, that intervenor's tract included two parcels created by deed in 1913 and 1917. As discussed above, the two parcels that are the subject of this appeal are reconfigured versions of those two parcels, which were verified as "lots of record" in the 2004 decision.

Because the 2004 lot of record verification decision was processed with notice and an opportunity for a local appeal, and is a final land use decision, we see no error in relying on that decision in part or in whole in the present proceeding, to the extent that it provides probative answers to the question posed by ORS 215.284(2)(c) and to the extent that it was included in the record before the hearings officer. If a final lot of record verification fully answers the question posed by ORS 215.284(2)(c), no further evidence may be necessary to support the county's conclusions on that point. Here, the 2004 lot of record verification

determined, based on a review of the relevant county records, that two of the parcels concerned were created by deed in 1913 and 1917, at a time when no applicable planning, zoning, or partitioning ordinances existed. That fits squarely within the definition of "parcel" at ORS 215.010(1)(a)(C). The 2004 verification appears to probatively, if not definitively, answer the questions posed by ORS 215.284(2)(c): are the subject properties lots or parcels under the relevant definitions and, if so, were they created prior to January 1, 1993?

As noted, petitioner argues that deeds prior to 2004 consolidated the two parcels with others and that deeds recorded in 2009 resulted in new or different parcels than those evaluated in the 2004 lot of record verification. We have rejected those arguments. Petitioner has not established that it is necessary for the county to look beyond the 2004 verification decision, or to evaluate additional information, in order to determine whether the two parcels at issue in this appeal are "parcels," as defined at ORS 215.010(1), which were created prior to January 1, 1993, as required to satisfy ORS 215.284(2)(c).

C. ORS 92.017(1)

ORS 92.017(1) provides that "[a] lawfully created lot or parcel remains a discrete lot or parcel unless the lot or parcel lines are vacated or the lot or parcel is further divided as provided by law."

During the proceedings below, petitioner argued that ORS 92.017(1) does not provide support for intervenor's applications because ORS 92.017(1) is

limited to a "lot" or "parcel," as those terms are defined in ORS chapter 92.[5] That argument was apparently presented as an anticipatory riposte, in case intervenor attempted to rely on ORS 92.017 to avoid petitioner's theory of consolidation by deed, discussed and rejected above.

Intervenor responded below that ORS 92.017 is not dispositive and not a statute that intervenor relied upon to support the application, but, in the alternative, intervenor addressed and disputed petitioner's interpretation of ORS 92.017. The hearings officer also addressed and rejected petitioner's arguments regarding ORS 92.017, interpreting the statute's scope to include parcels that were created by deed.[6] However, like intervenor, the hearings officer did not appear to rely on ORS 92.017 to support any findings under any approval criteria.

On appeal, petitioner assigns error to the hearings officer's interpretation of ORS 92.017. However, as far as we can tell, the hearings officer's

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[5] As noted above, the ORS 92.010 definition of "parcel" is more restrictive than the ORS 215.010(1) definition of "parcel," and the former does not include units of land created by deed.

[6] The hearings officer's decision states:

> "The Hearings Officer finds that the ORS 92.017 phrase 'when lawfully created lot or parcel' is properly interpreted broadly to mean the inclusion of units of land that are lawfully created by a recorded deed prior to 1993. Specifically, the Hearings Officer finds that the [*sic*] ORS 92.017 is not limited to parcels created by the act of partitioning (or lots created by subdividing)." 2021-110 Record 46; 2021-111 Record 41.

interpretation of ORS 92.017 was *dicta*, at best. Accordingly, it is not necessary to address petitioner's challenges to that interpretation.

The assignment of error is denied.

The county's decision is affirmed.