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

LANDWATCH LANE COUNTY,
Petitioner,

vs.

LANE COUNTY,
Respondent,

and

MATTHEW URNESS and ALYSSIA URNESS,
Intervenors-Respondents.

LUBA No. 2022-095

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.

Michael M. Reeder filed the intervenors-respondents' brief and argued on behalf of intervenors-respondents.

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

AFFIRMED 03/10/2023

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

2 **NATURE OF THE DECISION**

3 Petitioner appeals a hearings officer decision approving an application for
4 a legal lot verification.

5 **MOTION TO INTERVENE**

6 Matthew Urness and Alyssia Urness (intervenors), the applicants below,
7 move to intervene on the side of the county. The motion is unopposed and
8 granted.

9 **BACKGROUND**

10 The subject property is a 10.02-acre property zoned Exclusive Farm Use
11 30-acre minimum (E-30). It is bounded by Thurston Road to the north and
12 McKenzie Highway to the south. It is designated Tax Lot (TL) 1300. TL 1301 is
13 to its west.

14 On December 29, 2021, intervenors applied for a legal lot verification for
15 TL 1300. Lane Code (LC) 13.030(3)(o) defines “legal lot” as “[a] lawfully
16 established unit of land that has been verified and noticed by Lane County
17 through a legal lot verification pursuant to LC 13.140.”

18 LC 13.030(3)(n) defines “lawfully established unit of land” as:

19 “(i) A lot or parcel created by filing a final plat for subdivision or
20 partition; or

21 “(ii) Another unit of land created:

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

1 “(bb) By deed or land sales contract, if there were no
2 applicable planning, zoning or subdivision or partition
3 ordinances or regulations.

4 “(cc) Lawfully established unit of land does not mean a unit
5 of land created solely to establish a separate tax
6 account.”¹

7 Intervenors maintained that TL 1300 was lawfully created in 1995. TL
8 1300 and TL 1301 were once part of a larger property (the parent parcel). The
9 parent parcel was sold to a buyer in 1994 for \$240,000, and ownership of the
10 parent parcel was transferred to the buyer pursuant to a warranty deed (1994
11 Warranty Deed). As part of the transaction, the sellers loaned \$120,000 to the
12 buyer. The \$120,000 loan was secured by a promissory note and a trust deed

¹ This is consistent with the definition at ORS 92.010(3), providing:

“(a) ‘Lawfully established unit of land’ means:

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

“(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.

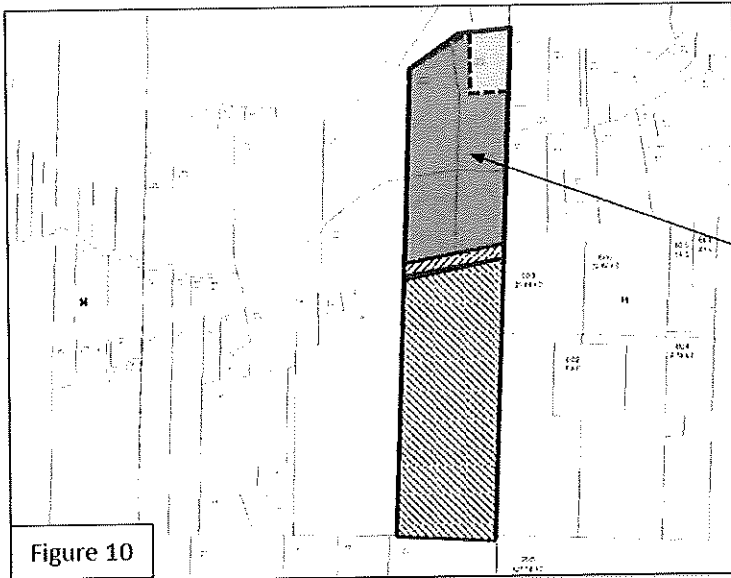
“(b) ‘Lawfully established unit of land’ does not mean a unit of
land created solely to establish a separate tax account.”

1 encumbering only a portion of the parent parcel (1994 Trust Deed).² An escrow
2 company was identified on the 1994 Trust Deed as the trustee, and the sellers
3 were identified as the beneficiaries of the 1994 Trust Deed.

4 The buyer failed to meet the payment requirements set forth in the
5 promissory note, and, sometime in 1995, the escrow company/trustee executed
6 and recorded a notice of default and election to sell the encumbered property.

7 The parent parcel is the northern property shown in the graphic below. On
8 August 23, 1995, a trustee's deed conveying the encumbered portion of the parent
9 parcel to the sellers (1995 Trustee's Deed) was recorded. Because the 1994 Trust
10 Deed encumbered only a portion of the parent parcel, the buyer retained
11 ownership of the unencumbered portion of the parent parcel (the small area in the
12 upper right-hand corner of the northern property shown below), and the sellers
13 regained ownership of the encumbered portion of the parent parcel (the larger
14 area in the northern property shown below).

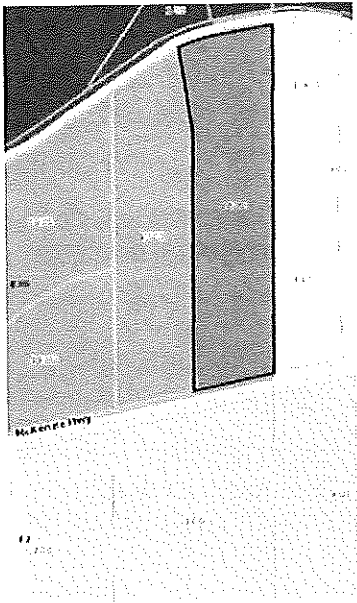
² We understand that the trust deed was dated March 9, 1994, and the warranty deed March 10, 1994. The parties do not argue that the fact that the trust deed predated the warranty deed is relevant to our decision, and we do not discuss it further.



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2 Record 164.

3 Subsequent property line adjustments altered the size of TL 1300 and TL
 4 1301, resulting in the configuration depicted below. The outlined property is TL
 5 1300. The property to the left is TL 1301.



6

7 Record 795.

1 On June 21, 2022, the planning director denied intervenors’ application for
2 a legal lot verification based, in part, upon their conclusion that “divisions of land
3 due to a bank loaning on a portion of property which they subsequently
4 ‘foreclosed’ on and conveyed back to the previous owner, was not a lawful way
5 to create a new property.”³ Record 6.

6 Intervenors appealed the planning director’s decision to the hearings
7 officer. On July 28, 2022, the hearings officer held a hearing on the appeal. The
8 record was held open until August 25, 2022. On September 8, 2022, the hearings
9 officer reversed the planning director’s decision, concluding that TL 1300 was a
10 legal lot created as a result of the foreclosure on TL 1301. This appeal followed.

11 **ASSIGNMENT OF ERROR**

12 Petitioner’s sole assignment of error is that the hearings officer
13 misconstrued the law and erred in concluding that TL 1300 was lawfully created

³ The hearings officer also described the planning director’s decision as concluding that,

“even if the lien foreclosure resulted in lawful units of land, the subsequent property line adjustments in October, 1995 and November, 2002 reduced ‘substandard’ properties, properties that were already below the minimum parcel size for the zone, to a size that was even more substandard, in violation of applicable [LC] provisions.” Record 6.

The hearings officer’s conclusions related to the property line adjustments are not challenged in this appeal.

1 in 1995. We will reverse or remand a local government decision that
2 misconstrues the applicable law. ORS 197.835(9)(a)(D).

3 The county's laws governing the creation of parcels implement state law
4 and must be construed consistent therewith. Before proceeding to resolve the
5 assignment of error, we set out the relevant statutes.

6 ORS 215.010 contains definitions applicable to county zoning. ORS
7 215.010(1) provides:

8 "The terms defined in ORS 92.010 shall have the meanings given
9 therein, except that 'parcel':

10 "(a) Includes a unit of land created:

11 "(A) By partitioning land as defined in ORS 92.010;

12 "(B) In compliance with all applicable planning, zoning and
13 partitioning ordinances and regulations; or

14 "(C) By deed or land sales contract, if there were no
15 applicable planning, zoning or partitioning ordinances
16 or regulations.

17 "(b) Does not include a unit of land created solely to establish a
18 separate tax account."

19 ORS 92.010(9) provides:

20 "'Partitioning land' means dividing land to create not more than
21 three parcels of land within a calendar year, but does not include:

22 "(a) Dividing land as a result of a lien foreclosure, foreclosure of
23 a recorded contract for the sale of real property or the creation
24 of cemetery lots[.]"

1 Similarly, LC 13.030(3)(w)(i) defines “partitioning land” as dividing land
2 to create not more than three parcels of land within a calendar year but not
3 including dividing land as a result of lien foreclosure. Thus, a division of land
4 resulting from a lien foreclosure is not the act of “partitioning land” within the
5 meaning of ORS 92.010(9).

6 Petitioner maintains that TL 1300 is not a legal lot because it was created
7 by the 1994 Warranty Deed, not the 1995 Trustee’s Deed as the hearings officer
8 found. Petitioner explains its position as follows:

9 “Because the 1994 trust deed did not cover the entirety of the
10 property that was governed by the warranty deed, there was a
11 conveyance to the [buyer] that was not held by the trustee escrow
12 company or the [sellers]. That was a conveyance of the ‘full bundle
13 of sticks’ or title in full that was not otherwise held in trust or by the
14 [sellers], and that conveyance did not comply with applicable land
15 use laws (i.e., land division laws).” Petition for Review 13-14.

16 As we understand it, petitioner argues that TL 1300 is not a “lawfully established
17 unit of land” under ORS 92.010 because TL 1300 was created in 1994 by deed
18 and did not comply with applicable planning, zoning, or subdivision or partition
19 ordinances or regulations.

20 Petitioner relies on *Perkins v. Umatilla County*, 45 Or LUBA 445 (2003),
21 as support for its position. In *Perkins*, the owner of a 10-acre property zoned
22 Exclusive Farm Use (EFU) conveyed a three-acre unit of land to the petitioner
23 without complying with applicable land division regulations. Property taxes were
24 not paid on the remaining seven-acre unit of land, and, several years later, the

1 county foreclosed a tax lien and took title to the seven-acre unit of land, which it
2 later sold to the intervenor.

3 ORS 215.263 governs land divisions in EFU zones. ORS 215.263(1)
4 requires “prior review and approval for divisions of land within [EFU] zones
5 established within the county.” However, ORS 215.263(7) provides that ORS
6 215.263 “does not apply to divisions of land resulting from lien foreclosures or
7 divisions of land resulting from foreclosure of recorded contracts for the sale of
8 real property.” We recognized that the appeal in *Perkins* raised two issues: “(1)
9 whether ORS 215.263(7) allows the county to ‘legalize’ a parcel that was
10 previously created without required land use approval; and (2) if not, whether
11 [the seven-acre unit of land] resulted from, or was created by, the * * * lien
12 foreclosure rather than the [prior conveyance].” 45 Or LUBA at 453. We
13 concluded that the seven-acre unit of land was created by the prior conveyance,
14 not from the lien foreclosure, and that ORS 215.263(7) does not authorize county
15 legalization of a parcel created outside the required county process. We also
16 concluded that the legislature did not intend ORS 215.263(7) “to apply in a
17 manner that effectively forces counties to recognize and legitimize prior illegal
18 attempts at land division, whether such actions are viewed as actually ‘creating’
19 a discrete parcel or not.” *Id.* at 456.

20 Petitioner argues that, because the 1994 Trust Deed did not describe and,
21 therefore, did not encumber the entire parent parcel, the 1994 Warranty Deed

1 effectively created TL 1300.⁴ According to petitioner, “[s]imply put, the warranty
2 deed conveyed full title to the [buyer] in [TL 1300], and that property was never
3 subject to the 1994 trust deed or 1995 trustee’s deed. That was an unlawful
4 conveyance that could not have been made legal by a subsequent foreclosure
5 deed.” Petition for Review 17. We agree with intervenors that petitioner
6 misapprehends the effect of the 1994 Warranty Deed, the 1994 Trust Deed, and
7 the 1995 Trustee’s Deed. We also agree that the facts here differ from those in
8 *Perkins* and that *Perkins* is therefore inapposite.

9 The 1994 Warranty Deed conveyed the entire parent parcel—both TL
10 1300 and TL 1301—to the buyer. Record 16. For the reasons explained below,
11 we agree with intervenors that the hearings officer correctly rejected petitioner’s
12 argument that a division of the property occurred as a result of the 1994 Warranty
13 Deed.

14 ORS 86.710 provides that “[t]ransfers in trust of an interest in real property
15 may be made to secure the performance of an obligation of a grantor, or any other

⁴ Petitioner argues:

“The trust deed executed on May 9, 1994 * * * excepted out the subject property, which created an inconsistency between the warranty and trust deeds. * * * The [buyer] never relinquished control of the subject property because the [buyer] retained full title to the subject property from the time it was conveyed via the warranty deed, and the trust deed never governed the subject property.” Petition for Review 14.

1 person named in the deed, to a beneficiary.” ORS 86.705(8) defines “trust deed”
2 as “a deed executed in conformity with ORS 86.705 to 86.815 that conveys an
3 interest in real property to a trustee in trust to secure the performance of an
4 obligation the grantor or other person named in the deed owes to a beneficiary.”⁵
5 ORS 86.715 explains that a trust deed is deemed to be a mortgage on real property
6 and that, “[f]or the purpose of applying the mortgage laws, the grantor in a trust
7 deed is deemed the mortgagor and the beneficiary is deemed the mortgagee.”

8 The 1994 Trust Deed states that it is a trust deed and that it is

9 “FOR THE PURPOSE OF SECURING PERFORMANCE of each
10 agreement of Grantor herein contained and payment of the sum of
11 One Hundred Twenty Thousand and no/100’s Dollars
12 (\$120,000.00), with interest thereon according to the terms of a
13 promissory note of even date herewith, payable to Beneficiary or
14 order and made by Grantor, the final payment of principal and
15 interest hereof, if not sooner paid, to be due and payable January 10,
16 1995.” Record 583.

17 The 1994 Trust Deed provides:

18 “Upon default by Grantor in payment of any indebtedness secured
19 hereby or on his performance of any agreement hereunder time
20 being of the essence with respect to such payment and/or
21 performance, the Beneficiary may declare all sums secured hereby
22 immediately due and payable. *In such an event, the Beneficiary at*

⁵ The “grantor” is “the person that conveys an interest in real property by a trust deed as security for the performance of an obligation.” ORS 86.705(4). The “trustee” is “a person, other than the beneficiary, to whom a trust deed conveys an interest in real property, or the person’s successor in interest, or an employee of the beneficiary, if the employee is qualified to be a trustee under ORS 86.713.” ORS 86.705(9).

1 *his election may proceed to foreclose this Trust Deed * * * in equity*
2 *as a mortgage or direct the Trustee to foreclose this Trust Deed by*
3 *advertisement and sale, or may direct the Trustee to pursue any*
4 *other right or remedy, either at law or in equity, which the*
5 *Beneficiary may have. In the event the Beneficiary elects to*
6 *foreclose by advertisement and sale, the Beneficiary or the Trustee*
7 *shall execute and cause to be recorded his written notice of default*
8 *and his election to sell the said described real property to satisfy the*
9 *obligation secured hereby whereupon the Trustee shall fix the time*
10 *and place of sale, give notice thereof as then required by law and*
11 *proceed to foreclose this Trust Deed in the manner provided in ORS*
12 *86.735 to 86.795.”⁶ Record 585 (emphases added).*

13 The 1994 Trust Deed named an escrow company as trustee and the sellers as
14 beneficiaries. In 1995, the escrow company/trustee exercised the power of sale
15 after the buyer failed to perform their obligations under the promissory note, and,
16 at the conclusion of that process, the escrow company/trustee executed the 1995
17 Trustee’s Deed, conveying TL 1301 to the sellers. The buyer/grantor under the
18 1994 Trust Deed retained ownership of the unencumbered TL 1300. TL 1300 and

⁶ ORS 86.710 provides:

“Where any transfer in trust of an interest in real property is made pursuant to the provisions of ORS 86.705 to 86.815 to secure the performance of an obligation, a power of sale is conferred upon the trustee. The power of sale may be exercised after a breach of the obligation for which the transfer is security; and a trust deed, executed in conformity with ORS 86.705 to 86.815, may be foreclosed by advertisement and sale in the manner provided in ORS 86.705 to 86.815, or, at the option of the beneficiary, may be foreclosed by the beneficiary as provided by law for the foreclosure of mortgages on real property.” (Emphasis added.)

1 TL 1301 were therefore in different ownership as a result of the 1995 Trustee's
2 Deed.

3 We also agree with intervenors that *Perkins* is distinguishable. In *Perkins*,
4 separate deeds conveyed ownership of different parts of a larger property to
5 different persons, and the county foreclosed a tax lien on one of the parts
6 previously conveyed. Here, the 1994 Trust Deed merely created a security
7 interest in TL 1301 to secure payment of the promissory note. Petitioner's sole
8 argument is that the hearings officer misconstrued the law because the 1994
9 Warranty Deed, either alone or in combination with the 1994 Trust Deed, resulted
10 in a division of the parent parcel. For the reasons set out above, that is incorrect.⁷

⁷ The hearings officer also set out the law applicable to land sale contracts:

“The Oregon Court of Appeals has explained the ‘land sale contract’
as follows:

“In a land sale contract, “[t]he seller agrees by contract to convey title upon receipt of the full purchase price * * *. Timely payment of the installment is a condition precedent to the obligation of the seller to complete performance by delivering the deed. If the buyer defaults on an installment payment, the seller has the right to declare the contract at an end, repossess the property, and retain any payments made to date.

“Thus, a land sale contract implicitly provides a remedy to a seller on default, because the title remains with the seller until the purchase price is paid in full. In the event of a default on a land sale contract, the remedies such as forfeiture or foreclosure arise by operation of law. *See, e.g.*, ORS 93.905-

- 1 The assignment of error is denied.
- 2 The county's decision is affirmed.

ORS 93.915 (procedure for declaring a forfeiture of vendee's interest in a land sales contract).'

Ochs v. Albin, 137 Or App 213, 220, 903 P2d 906 (1995).” Record 7 n 2 (citations omitted).

Here, there was no land sale contract because the seller did not retain ownership of the subject property.