

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

SCHIRMER CONSULTING, LLC,
Petitioner,

vs.

CITY OF EUGENE,
Respondent.

LUBA No. 2026-029

FINAL OPINION
AND ORDER

Appeal from City of Eugene.

Bill Kloos filed the petition for review and reply brief and argued on behalf of petitioner.

Lauren Sommers filed the respondent's brief and argued on behalf of respondent.

WILSON, Board Chair; ZAMUDIO, Board Member; BASSHAM, Board Member, participated in the decision.

REVERSED

09/09/2026

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

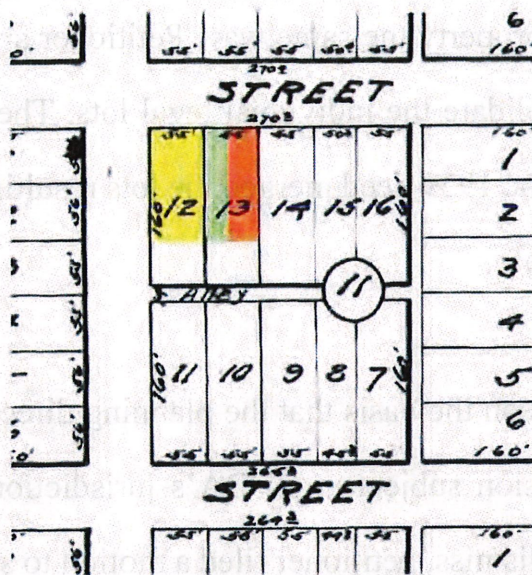
NATURE OF THE DECISION

Petitioner appeals a city planning director's legal lot determination that petitioner has only one legal lot instead of three.

FACTS

This appeal involves determining whether petitioner's property consists of one legal lot or three legal lots.¹ The property was first divided from a much larger property in 1909 when lots 12 and 13 in the Driverton Addition were created. The eastern portion of lot 13 was split off into another lot in 1927 resulting in three separate lots. It is not necessary to detail all of the changes in size and ownership of the property through the years, but in 1959 the property at issue consisted of the northern portions of lots 12 and 13 (including the eastern portion that was split off in 1927) as depicted in the image below.

¹ The city previously found that only one legal lot existed on the property, but petitioner subsequently filed the application at issue in this appeal with additional documentation. Record 8.



DEED #61860 (signed March 6, 1959)

Frank N. Rhodes and Ruth L. Rhodes sells to James F. Eagan and Viola B. Eagan Lots 12 and 13.

This legal description is incorrect and is corrected by the following deed.

DEED #64586 (signed April 1, 1959)

Frank N. Rhodes and Ruth L. Rhodes sells to James F. Eagan and Viola B. Eagan the north 110 feet of Lots 12 and 13.

Prior deeds show 3 legal lots. The Eagans bought all 3 legal lots. The legal description was combined for convenience. There is no legal process that negates existing legal lots simply by shortening/combining the legal descriptions.

- The north 110' of lot 12 remains a legal lot.
- The west 30 feet of the north 110' of Lot 13 remains a legal lot.
- The east 25 feet of the north 110' of Lot 13 remains a legal lot.

1

2 Record 38.²

3 The dispute between the parties is that petitioner argues the three different
4 colored portions of the property are all separate legal lots, while the city found
5 that the three colored lots had once been separate legal lots but had later all
6 merged into a single legal lot. As explained later, prior to 1962 property in the
7 city could be divided and combined by deed because there were no partition or
8 subdivision ordinances regulating such practices. In 1959, the property depicted
9 above was conveyed by deed in one ownership. While the ownership of the
10 property has changed since 1959, the actual property boundaries or composition
11 have not changed. The 1959 deed described the property in a single legal
12 description rather than separately describing individual lots. All subsequent

² The language in red was added by petitioner as part of its application below.

1 transfers of the property described the property the same way. Petitioner argued
2 below that the 1959 deed did not consolidate the individual legal lots. The city
3 planning director, however, found that the 1959 deed merged the lots resulting in
4 only one legal lot. This appeal followed.

5 **MOTIONS**

6 The city filed a motion to dismiss on the basis that the planning director's
7 decision was not a final land use decision subject to LUBA's jurisdiction. In
8 addition to responding to the motion to dismiss, petitioner filed a motion to strike
9 and a motion to take evidence outside of the record in support of its response.

10 **A. Motion to Strike**

11 Petitioner moves to strike a paragraph from the city's motion to dismiss
12 that argues the legal lot verification procedure under which petitioner filed the
13 application at issue in this appeal is merely an informal process. Petitioner argues
14 that this is an evidentiary statement not based on anything in the record or
15 anything that we could take judicial notice of and should be stricken.

16 Initially, the city responds that the motion to strike and motion to take
17 evidence outside of the record should be denied for failure to comply with OAR
18 661-010-0045(2)(a) which requires that a "motion to take evidence shall be filed
19 as a separate document and shall not be contained within a brief or other filing"
20 and OAR 661-010-0065(3) which requires that "[a]ll motions must be filed as a
21 separate document and shall not be included with any other filing." While
22 technically the motion to strike and motion to take evidence are improperly filed

1 together as a single document, the caption is clear that there are two separate
2 motions and the motions are not buried within another document such as a
3 petition for review or respondent's brief. The motion to strike is also less than
4 one page long. As the remedy to petitioner's technical error would be to require
5 petitioner to refile the motions separately and there is no confusion or lack of
6 clarity regarding the motions, in this case we will consider petitioner's motions
7 without requiring them to be refiled. *See Gould v. Deschutes County*, LUBA Nos
8 2024-034/035 (July 22, 2024) (remedy for failure to comply with OAR 661-010-
9 0045(2)(a) and OAR 661-010-0065(3) would be to require refiling of the motions
10 as separate documents) (slip order at 1).

11 While we tend to agree with petitioner that the paragraph sought to be
12 stricken is not based on any evidence in the record and is merely the city's attempt
13 to bolster its argument that legal lot verifications are merely advisory, we also
14 agree with the city that the proper disposition is to disregard such allegations
15 rather than strike the paragraph from the pleadings. *Wachal v. Linn County*, 78
16 Or LUBA 227, 229 (2018), *aff'd*, 295 Or App 668, 433 P3d 787 (2019) (citing
17 *Hammack & Associates, Inc. v. Washington County*, 16 Or LUBA 75, 78, *aff'd*,
18 89 Or App 40, 747 P2d 373 (1987)). Therefore, while we will not strike the
19 paragraph, we recognize the paragraph is merely the city's unsupported assertion
20 that the legal lot verification is only advisory.

21 The motion to strike is denied.

1 **B. Motion to Take Evidence Outside of the Record**

2 Petitioner asks us to accept as evidence: (1) three legal lot verifications
3 regarding other properties in the city, along with the city decisions for
4 development of the land that relied on those legal lot verifications; (2) a draft of
5 a proposed comprehensive plan amendment that refers to legal lot verifications
6 as land use decisions; (3) city application forms for legal lot verifications and lot
7 validations; and (4) a city planning department webpage that allows access to all
8 land use decisions, including the three decisions relying upon the legal lot
9 verifications mentioned above, in the first category.

10 OAR 661-010-0045(1) provides that LUBA may

11 “take evidence not in the record in the case of disputed factual
12 allegations in the parties’ briefs concerning unconstitutionality of
13 the decision, standing, ex parte contacts, actions for the purpose of
14 avoiding the requirements of ORS 215.427 or 227.178, or other
15 procedural irregularities not shown in the record and which, if
16 proved, would warrant reversal or remand of the decision.”

17 We will, however, consider evidence outside of the record for purposes of
18 determining whether we have jurisdiction. *Siletz Resorts, LLC v. Lincoln County*,
19 LUBA No 2026-006 (May 5, 2026) (order at 2-3). We also generally accept such
20 evidence without the need for a motion to take evidence outside of the record.
21 *Jensen v. City of Eugene*, 69 Or LUBA 234, 242 (2014). The city argues that the
22 proffered evidence does not relate to whether LUBA has jurisdiction over the
23 challenged decision. While the city’s arguments may go towards the weight of

1 the evidence in favor of our jurisdiction, we agree with petitioner that the
2 evidence sought to be considered relates to jurisdiction.

3 The motion to take evidence outside of the record is granted.

4 **C. Motion to Dismiss**

5 Under ORS 197.825(1), LUBA has “exclusive jurisdiction to review any
6 land use decision or limited land use decision of a local government[.]” A
7 petitioner has the burden of establishing that LUBA has jurisdiction. *Billington*
8 *v. Polk County*, 299 Or 471, 475, 703 P2d 232 (1985). ORS 197.015(10)(a)(A)
9 defines “land use decision” as:

10 “A final decision or determination made by a local government or
11 special district that concerns the adoption, amendment or
12 application of:

13 “(i) The goals;

14 “(ii) A comprehensive plan provision;

15 “(iii) A land use regulation; or

16 “(iv) a new land use regulation[.]”

17 Petitioner asserts that the challenged decision is a final decision concerning
18 the application of a land use regulation – Eugene Code (EC) 9.0500 – which
19 defines “Legal Lot” as:

20 “A lot of record that has boundary lines that were established:

21 “(A) Through a partition or subdivision procedure,

22 “(B) By a deed that was signed before April 2, 1962, or

1 “(C) Through approval of an application to validate a unit of
2 land consistent with ORS 92.176.”

3 In turn, a “Lot of Record” is defined as:

4 “A tract of land described on a document that is on record at the
5 Lane County Recorder’s office and that conforms with all applicable
6 state and local land use requirements, including approval thereof, in
7 effect when the document creating the lot was recorded.” *Id.*

8 The city argues that the decision is outside the scope of LUBA’s review
9 because it does not concern the application of a land use regulation, does not
10 involve the exercise of legal judgment, and is not a final decision.

11 **1. The decision concerns the application of a land use**
12 **regulation.**

13 ORS 197.015(11) defines a “land use regulation” as “any local government
14 zoning ordinance, land division ordinance adopted under ORS 92.044 or 92.046
15 or similar general ordinance establishing standards for implementing a
16 comprehensive plan.” The decision on its face concerns the application of a land
17 use regulation, EC 9.0500, and determines whether there is one or three legal lots.
18 Generally, local government legal lot determinations implement state law
19 governing subdivisions and partitions. *See generally* ORS chapter 92.³ The city’s

³ ORS 92.010(3)(a) provides:

 “‘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:

1 land use code does not provide a specific process for legal lot verification. The
2 city planning department provides a legal lot verification application form that
3 sets out the legal lot definition from EC 9.0500 and requires the applicant to
4 provide, among other things, “[a] written description explaining how the lot
5 meets the definition of legal lot per EC 9.0500.” Record 28.

6 The city argues that the definition of “legal lot” in EC 9.0500 is not a “land
7 use regulation” because it does not include any regulatory standards or establish
8 any regulations by which a land use application must be evaluated. We agree with
9 petitioner, however, that EC 9.0500 *does* include regulatory standards. The
10 definition of “legal lot” provides three possible ways for a tract of land to be
11 considered legal. In determining whether a lot is legal, the city must determine
12 whether any of the three possible means of creating a legal lot are satisfied. A
13 number of development applications involve the requirement of a legal lot, such
14 as partitions, property line adjustments, and middle housing. Therefore, the
15 decision involves the application of a land use regulation.

-
- “(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.”

1 **2. The decision involves the exercise of discretion.**

2 The city next argues that the challenged decision did not involve any
3 interpretation or the exercise of legal judgment in determining whether
4 petitioner's property consists of one or three lots. The city does not cite the
5 statute, but presumably relies on ORS 197.015(10)(b)(A) – generally referred to
6 as the ministerial exception – which provides that a “land use decision” does not
7 include a decision “[t]hat is made under land use standards that do not require
8 interpretation or the exercise of policy or legal judgment[.]”

9 As discussed later under petitioner's assignment of error, the property
10 contains at least one legal lot recognized under subsection (B) of the EC 9.0500
11 definition of legal lot because it was established “[b]y a deed that was signed
12 before April 2, 1962[.]” The 1959 deed described the property generally and did
13 not specifically describe three individual lots. The city believes the result of this
14 general description is to merge all existing legal lots into one lot. Petitioner
15 believes that the discrete legal lots remain discrete unless the deed specifically
16 intends to merge the lots. Determining which position was correct certainly
17 required the exercise of policy or legal judgment. Therefore, the ministerial
18 exception of ORS 197.015(10)(b)(A) does not apply.

19 **3. The decision is final.**

20 The city argues that the legal lot verification process is merely a
21 preliminary advisory process whereby the city gives an informal opinion on
22 whether a lot is legal. According to the city, any final decision regarding a

1 property's legal lot status is only made when a specific development application
2 that requires a legal lot is filed. Petitioner responds that the challenged decision
3 has all of the hallmarks of a final land use decision: it describes the approval
4 requested; it describes the standards that apply; and it makes the determination
5 that the subject property consists of one legal lot. According to petitioner, the
6 decision has no quality of informality, requires an application fee, receives a case
7 file number like all other applications that lead to final decisions, and provides
8 no limitation on how the decision may be used.

9 The city relies on *Davis v. Lane County*, 32 Or LUBA 267 (1997), for the
10 proposition that the decision is not a final land use decision. In *Davis*, similar to
11 the present situation, the county had a legal lot verification process in which an
12 applicant would submit a "land use application" and pay an application fee. *Id.*
13 at 268. In *Davis*, the county engineer concluded that the property at issue did not
14 constitute a legal lot. *Id.* The legal lot determination included the following
15 language:

16 "This is a preliminary indication that the above-referenced property
17 * * * is not a legal lot. The decision that this property does not
18 constitute[] a legal lot will be made at the time of the first permit or
19 application action where a legal lot is required." *Id.* (internal
20 quotation marks and citation omitted).

21 The petitioner in *Davis* tried to appeal the county's engineer's decision to
22 the county planning director, but the planning director refused to accept the

1 appeal on the basis that it was not a final land use decision. On appeal to LUBA,
2 we agreed with the county:

3 “In this case, although petitioner completed a ‘Land Use
4 Application’ form, the county code provides no process for making
5 a binding declaratory determination outside the land use approval
6 and permitting process, and the county did not purport to make a
7 determination that is binding on petitioner. Rather, as the county’s
8 determination states, the verification provided to petitioner is a
9 preliminary, advisory opinion on whether the lot was legally
10 created. A binding, final determination will be made at such times
11 as petitioner files an application for an approval which requires a
12 legal lot. At this point, the county has not made a final land use
13 decision over which we have jurisdiction.” *Id.* at 272 (footnotes
14 omitted).

15 The city argues that the present case is identical to *Davis* other than the
16 fact that the decision in *Davis* specifically stated that it was a preliminary,
17 advisory opinion.⁴ While the city is largely correct, that is a distinction with a
18 difference. In *Davis*, we dismissed the appeal because the challenged decision
19 specifically stated that it was not a final decision. There is nothing in the decision
20 in the present case that gives any indication that the decision is not final. The
21 decisionmaker’s characterization of the decision is not dispositive. The substance
22 of the decision and the process to obtain the decision determine whether the
23 decision is a land use decision. In *Davis*, the decision stated on its face that it was

⁴ Lane County eventually adopted a legal lot verification process. *See, e.g., Leckie v. Lane County*, 338 Or App 742, 746, 566 P3d 702 (2025) (observing that the petitioner applied for legal lot verification under Lane Code (LC) 13.140).

1 advisory and not a final decision for any purpose and identified the process that
2 an applicant would undertake to obtain a final binding decision. Here, the city
3 has an application form and a process for a legal lot verification, which indicates
4 to the applicant and to us that a planning director's legal lot verification decision
5 is a final binding decision on the question of legal lot status. As petitioner
6 emphasizes, nothing in the Eugene Code or on the legal lot verification
7 application form states that a decision on such an application is preliminary. The
8 only thing indicating that the decision is not final is the city's unsupported
9 assertion. If the city planning director had intended the decision to be preliminary
10 or advisory only then language such as that in *Davis* could have been included in
11 the decision, but it was not. We agree with petitioner that the challenged decision
12 is a final decision.

13 The motion to dismiss is denied.

14 **ASSIGNMENT OF ERROR**

15 Petitioner argues that the city misconstrued the applicable law in
16 determining that the property consists of only one legal lot instead of three. As
17 discussed earlier, prior to 1962 there was no partition or subdivision process in
18 the city. Prior to 1962, legal lots could be established by deed. EC 9.0500. There
19 is no dispute about the facts. In 1959, the subject property was transferred by a
20 deed that generally described the boundaries of the property and did not provide
21 discrete descriptions for separate lots. Petitioner accurately describes the issue:

22 "The disagreement between the Petitioner and the [city] does not

1 relate to when legal lots are created. It relates to when legal lots
2 disappear.

3 “The rule the [city] applies can be summarized as follows: If two or
4 more legal lots are conveyed in a single deed that does not call out
5 those legal lots with discrete legal descriptions then those discrete
6 legal lots vanish; they merge. Thus, the three discrete units of land
7 that resulted from the pre-1962 conveyances merged to become a
8 single legal lot based on the legal description in the 1959 deed.”
9 Petition for Review 12-13.

10 Initially, petitioner argues that the city’s decision is contrary to ORS
11 92.017(1), which was enacted in 1985 and provides:

12 “A lawfully created lot or parcel remains 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 In *Kishpaugh v. Clackamas County*, 24 Or LUBA 164, 172 (1992), we
16 explained the purposes of ORS 92.017:

17 “[T]he functions of ORS 92.017(1) were (1) to prevent local
18 governments from refusing to recognize lawful divisions of land
19 such that lots and parcels could not be sold to third parties, and (2)
20 to establish that property lines established by such land divisions
21 remain inviolate, absent the employment of a specific process to
22 eliminate such property lines.”

23 The parties dispute whether ORS 92.017(1) is retrospective or prospective,
24 but that question misses the point at issue in this appeal. ORS 92.017(1) ensures
25 that lots that were legally created before partition or subdivision ordinances were
26 adopted remain legal lots unless the lot or parcel lines are vacated. If petitioner is
27 correct that the 1959 deed did not merge all existing legal lots into one legal lot
28 then ORS 92.017(1) would prevent the city from refusing to recognize all three

1 legal lots. The city does not disagree with petitioner that ORS 92.017(1) would
2 prevent it from not recognizing three existing legal lots. The city argues instead
3 that the 1959 deed *did* vacate any existing legal lots and merged them into just
4 one legal lot. If the city is correct that the 1959 deed merged all existing lots into
5 one legal lot then ORS 92.017(1) would not *legislatura ex machina* resuscitate
6 the three lots that had been legally vacated. Therefore, the question is not whether
7 ORS 92.017(1) is retrospective, but rather what the effect of the 1959 deed was.

8 We faced a similar situation in *Landwatch Lane County v. Lane County*,
9 LUBA No 2020-085 (Apr 29, 2021) (*Ford*). In *Ford*, the petitioner made the
10 same argument as the city does here that a deed that conveyed multiple lots in a
11 single deed prior to partition of subdivision ordinances had the effect of merging
12 those lots into one legal lot. We rejected the petitioner's argument:

13 “As we explained in *Jackson v. City of Portland*, ‘it is not unusual
14 to transfer multiple lots in a single deed’ and, even before ORS
15 92.017 was adopted in 1985, we are aware of no authority for the
16 proposition that listing several lots or parcels or portions of lots or
17 parcels together in a pre-1985 deed operated to merge the property
18 described in the deed into a single unit of land. 54 Or LUBA 138,
19 145 (2007)[.]” LUBA No 2020-085 (slip op at 12-13).

20 We also faced a similar situation in *Central Oregon Landwatch v.*
21 *Deschutes County*, LUBA Nos 2021-110/111 (March 1, 2022), *aff'd*, 320 Or App
22 650, 514 P3d 1201 (2022). (*Grossman*). In *Grossman*, the property description
23 in the deed was even more generic than in *Ford*, where multiple parcels were
24 described in a single deed. In *Grossman*, the deed used a single metes and bounds

1 description that included multiple lawfully created parcels. We again rejected the
2 merger by deed theory:

3 “Petitioner cites no authority for the proposition that conveying
4 multiple properties via a single deed with a single metes and bounds
5 description has the automatic legal effect of consolidating the
6 conveyed properties into a single parcel. We previously rejected a
7 similar argument advanced by petitioner in a different Deschutes
8 County appeal, *Central Oregon Landwatch v. Deschutes County*, 75
9 Or LUBA 328 (2017) (*TID*).” *Grossman*, LUBA Nos 2021-110/111
10 (slip op at 7).

11 While the city is correct that prior to local regulations regarding partition
12 and subdivision a deed *could* vacate existing legal lots and merge them into a
13 single lot, unless the deed specifically intends to vacate existing parcels the
14 existing legal lots remain legal lots. In other words, if the deed is silent regarding
15 merger of legal lots then there is no merger. In the present case, the deed is like
16 the deed in *Ford* and more descriptive than the deeds in *Grossman* and *TID*.
17 There is no language in the deed that points towards any intent to merge existing
18 legal lots into a single lot. Under our existing caselaw, the 1959 deed did not
19 merge the three existing legal lots into a single lot.⁵ Therefore, the city
20 misconstrued the law in determining that there is only one legal lot.

21 The assignment of error is sustained.

22 **DISPOSITION**

⁵ The city also argues that a 1926 deed merged any existing legal lots under the same theory. That argument is rejected for the same reason as the 1959 deed.

1 Petitioner requests that if we sustain the assignment of error that we reverse
2 the city's decision. We will reverse a decision when the decision violates a
3 provision of applicable law and is prohibited as a matter of law. ORS
4 197.835(9)(a)(D); OAR 661-010-0071(1)(c). The city's decision violates the
5 applicable law by determining that due to merger there is only one legal lot.
6 Under the applicable law there are three legal lots. This is not a situation where
7 the city's findings could be corrected on remand by adopting different findings
8 or accepting additional evidence. The city's decision is prohibited as a matter of
9 law. Therefore, reversal is the proper disposition.⁶

10 The city's decision is reversed.

⁶ At oral argument, the city agreed that if petitioner prevailed in its assignment of error that reversal would be the proper disposition.