



Deschutes County Board of Commissioners  
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## **AGENDA REQUEST & STAFF REPORT**

### **For Board Business Meeting of April 27, 2016**

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**DATE:** April 20, 2016

**FROM:** Cynthia Smidt                      Community Development Department                      317-3150

**TITLE OF AGENDA ITEM:**

Consideration of adoption of Document 2016-180 approving a Lot of Record Verification. File Nos. 247-15-000222-LR, -000430-A, and -000633-A (Applicant: Tumalo Irrigation District).

**PUBLIC HEARING ON THIS DATE?** No

**BACKGROUND AND POLICY IMPLICATIONS:**

On July 27, 2015 staff issued an administrative approval of a Lot of Record Verification. Central Oregon LandWatch appealed the administrative decision. The Hearings Officer issued a decision on November 12, 2015 approving and affirming the applicant's Lot of Record Verification and staff decision. Central Oregon LandWatch appealed the Hearings Officer's decision and on December 28, 2015, the Board agreed to hear this matter on the record under Order 2015-058. The record closed on January 26, 2016. Board deliberations occurred on February 29, 2016. The Board directed staff to prepare a written decision taking into account the Board's statements at the deliberations for their decision.

The document is staff's recommendation for the written Board decision.

**FISCAL IMPLICATIONS:**

None

**RECOMMENDATION & ACTION REQUESTED:**

Motion: Approval of Document No. 2016-180.

**ATTENDANCE:** Cynthia Smidt

**DISTRIBUTION OF DOCUMENTS:**

Cynthia Smidt, Planning Division

REVIEWED  
\_\_\_\_\_  
LEGAL COUNSEL

For Recording Stamp Only

**DECISION OF DESCHUTES COUNTY  
BOARD OF COUNTY COMMISSIONERS**

**FILE NUMBERS:** 247-15-000633-A / 247-15-000430-A / 247-15-000222-LR

**APPELLANT:** Central Oregon LandWatch  
1539 N.W. Vicksburg Avenue  
Bend, Oregon 97703

**APPLICANT/  
PROPERTY OWNER:** Tumalo Irrigation District

**APPLICANT'S  
REPRESENTATIVE:** Liz Fancher  
644 N.W. Broadway Street  
Bend, Oregon 97703

**REQUEST:** Appeal of a Hearings Officer's decision that affirmed an administrative decision that a 755-acre property zoned OS&C, FP, EFU-TRB, LM, WA, and SBMH consists of eight lots of record and four areas not, independently, considered lots of record.

**STAFF CONTACT:** Cynthia Smidt, Associate Planner

**HEARINGS OFFICER:** Karen Green

**I. HEARINGS OFFICER'S DECISION:**

The Board adopts **Exhibit A** of this decision, the decision of the Hearings Officer and its affirmance of the administrative decision issued on July 27, 2015 in 247-15-000222-LR. Where the administrative decision and/or the Hearings Officer findings conflict with the Finding of Fact and Conclusory Findings of this Board of County Commissioners Decision, the Findings of Fact and Conclusory Findings of this decision control.

## **II. FINDINGS OF FACT:**

The Board adopts the following findings of fact in support of its decision, using the headings and section references in the Hearings Officer's decision:

- E. Procedural History:** On November 12, 2015, the Hearings Officer issued a decision on appeal by Central Oregon LandWatch ("LandWatch") approving and affirming the applicant's Lot of Record Verification and staff decision. On November 23, 2015, LandWatch appealed the Hearings Officer's decision. By Order 2015-058, dated December 28, 2015, the Board accepted review of this appeal under DCC 22.32.027 as an "on the record" review. All parties were given until January 11, 2016 to submit written arguments. The applicant was given until January 25, 2016 to submit rebuttal argument at which time the record closed.

On January 11, 2016, LandWatch filed a transcript of the September 9, 2015 hearing conducted by the Hearings Officer. On January 11, 2016, TID and LandWatch delivered written arguments about the issues raised on appeal with the County. LandWatch also sent County staff a copy of its filed arguments and, accidentally, documents that were not a part of the record. On January 22, 2016, TID filed a document raising procedural objections. TID objected to inclusion of the new evidence filed by LandWatch in the record and argued that LandWatch failed to file the transcript five days prior to the date set for the receipt of written argument. On January 22, 2016, LandWatch filed a response to the procedural issues raised by TID. On January 25, 2016, TID filed rebuttal argument.

On February 29, 2016, the Board deliberated, voted to affirm the Hearings Officer's decision and directed staff to prepare written findings and decision reflective of the Board's statements, findings and decisions reached during deliberations.

## **III. RESOLUTION OF PROCEDURAL ISSUES:**

TID raised two procedural issues, one regarding new evidence and one regarding the County's requirement that LandWatch file a transcript of the September 9, 2015 hearing.

### **New Evidence**

DCC 22.32.030(E) provides that the Board shall make its decision on the record. New evidence is not allowed. New evidence was sent to Deschutes County Planning Division staff on January 11, 2016 by LandWatch as an attachment. TID objected to the inclusion of this evidence in the record and LandWatch agreed that the evidence should not be included in the record. As a result, it was not placed before the Board by staff, was not considered by the Board and is not a part of the record. For reference purposes only, the evidence submitted in error by LandWatch in error and not presented to nor considered by the Board consists of the following documents:

1. Lot of Record Verification application filed by Barbara Tyler for Tax Lot 7891
2. July 8, 1988 letter from Anne W. Squier to William Young

3. Attachment A headed “Tumalo Reservoir Property”
4. Memorandum from Director (Water Resources Department) to Water Resources Commission for August 5, 1988 meeting
5. Attachment B “Tumalo Right-of-Way Easements”
6. Tax Lot Card for Tax Lot 500, 16-11-33
7. Tax Lot Card for Tax Lot 1900, 17-11-00
8. Tax Lot Card for Tax Lot 2100, 17-11-00
9. Tax Lot Card for Tax Lot 400, 16-11-33
10. Tax Lot Card for Tax Lot 8100, 16-11-00

### **Transcript Requirement**

LandWatch filed a transcript with the County on January 11, 2016, the date set for the receipt of written argument. DCC 22.32.024(B) says:

*“Appellants shall submit to the Planning Division the transcript no later than the close of the day five days prior to the date set for a de novo hearing, or, in on-the-record appeals, the date set for receipt of written argument.”*

This code section is ambiguous. It can be read to require that transcripts be filed on the date set for the receipt of written argument or five days prior to that event. The Board finds that the “five days prior to” text applies to both types of appeals described in this section of the code – de novo and those heard on the record. The transcript for on-the-record appeals, therefore, must be filed five days prior to the date set for the receipt of written argument.

In this appeal, however, because TID and other parties did not claim prejudice due to the late filing of the transcript, and because the Board does not find that there is any prejudice, the Board will proceed and decide the LandWatch appeal on the merits.

### **IV. CONCLUSIONARY FINDINGS:**

The County staff and hearings officer determined that eight parcels located entirely within the boundary of Tax Lot 7891 meet the County’s definition of a lot of record. LandWatch disagrees, claiming that units of land created by deed do not meet the definition of the term “lot” or “parcel” and, therefore, cannot be lots of record under DCC 18.04.030.<sup>1</sup> The Board agrees with staff and the hearings officer.

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<sup>1</sup> LandWatch’s statement of this issue in their appeal of the administrative decision does not explain whether it was referring to these terms as defined by County code or by ORS 92.017. The term “Lot of Record” is defined by County code. It uses the phrase “a lot or parcel” in the definition so its meaning must be addressed by the County and the terms provided by the County code are those that apply. These terms are also used in ORS Chapter 92 and have a similar definition which has been applied by the County in assessing the meaning of ORS 92.017.

LandWatch claimed that a 1988 deed that conveyed the eight parcels and parts of four other parcels eliminated all parcel boundaries because the 1988 deed transferred the land using one metes and bounds legal description. County staff and the Hearings Officer disagreed. The Board also disagrees with LandWatch's position on this issue and provides findings, below, that support the Board's determinations.

### **Interpretation of "Lot of Record"**

DCC 18.04.030, Lot of Record, requires the County to determine whether a potential lot of record was a "lot" or "parcel" when created. It, in relevant part, provides:

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

Parcels 1 through 8 on Figure 6 of the administrative decision for File 247-15-00222-LR are either a parcel described on a deed or patent deed or a remainder parcel created by deeds, as explained by the administrative decision.

The following are the Board's interpretation of key parts of this definition:

#### ***"A lot or parcel"***

The terms "lot" and "parcel" used in the definition of a "Lot of Record" are also defined by County code. DCC 18.04.030 defines the terms "lot" and "parcel" as they are defined by ORS Chapter 92.010 as follows:

*"Lot" means a unit of land created by a subdivision of land.*

*"Parcel" means a unit of land created by a partitioning of land.*

DCC 18.04.030 defines the term "subdivide land" as it is defined by ORS 92.010 and defines the term "partition land" in a way similar to the ORS 92.010(9) definition of "partitioning land" as follows:

*"Subdivide lands" means to divide land into four or more lots within a calendar year.*

*“Partition Land” means to divide land into two or three parcels within a calendar year.<sup>2</sup>*

The means of creation is absent from the definitions of “subdivide lands,” “partition land,” “lot” and “parcel.” A lot or parcel, that may qualify as a Lot of Record, therefore, is not limited to a Lot of Record created by modern day land divisions.<sup>3</sup> The terms “lot” and “parcel” include units of land created by deeds or land sales contracts and subdivisions that predate the adoption of ORS Chapter 92 land division rules. DCC 18.04.030, Lot of Record (A)(3) plainly states that units of land created by deed or land sales contract may qualify as lots of record. Units of land created by deed or contract must be lots or parcels or DCC 18.04,030, Lot of Record (A)(3) would be meaningless because no unit of land created by a deed or contract would ever qualify as a lot of record.

The County’s definitions of the terms “lot,” “parcel,” “partition land” and “subdivide lands” are based, in large part, on state law. In 1985, the State Legislature made an intentional decision to change these definitions from ones that applied only to units of land and divisions created by “modern day” land divisions to definitions that apply to units of land created by deeds, contracts and historic land divisions as well.<sup>4</sup> The Legislature deleted the phrase “subject to approval by a city or county under a regulation or ordinance adopted pursuant to ORS 92.046” from the definition of a minor partition. It also removed the words “as defined in this section [Chapter 92]” from the definition of “partition land.” Chapter 717, 1985 Oregon Laws. These same changes were made to Title 18’s definitions. The Title 18 terms “lot” and “parcel,” therefore, were also expanded to apply to a unit of land created by any type of land division.

### ***“Remainder Lot or Parcel”***

Parcels created by deeds or contracts may qualify as lots of record as remainder parcels through the partitioning of adjoining or surrounding land. This occurs when a deed conveys a part of a parent parcel. The part conveyed is created by deed and the part remaining in the ownership of

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<sup>2</sup> The remainder of the County’s definition reads: *“Partition land does not include divisions of land resulting from lien foreclosures, or recorded contracts for the sale of real property and divisions of land resulting from lien foreclosures, or recorded contracts for the sale of real property and divisions of land resulting from the creation of cemetery lots. Partition land does not include a division of land resulting from the recording of a subdivision or condominium plat. Partition land does not include an adjustment of a property line by the relocation of a common boundary where an additional unit of land is not created and where the existing unit of land reduced in size by the adjustment complies with any applicable zoning ordinance.”*

<sup>3</sup> “Modern day” land divisions are partitions and subdivisions approved under the authority of ORS Chapter 92, the State law that creates provisions for partitions and subdivisions that apply across the State. Deschutes County adopted an ORS Chapter 92 subdivision ordinance in 1970 and a partition ordinance in 1977.

<sup>4</sup> The June 10, 1985 testimony of Al Young, Chair of the House Committee on Housing and Urban Development to the Senate Committee on Energy and Natural Resources when it considered House Bill 2381, explains that the Legislature intentionally removed language from the terms “lots” and “parcels” that limited their application to local subdivision and partition processes adopted in accordance with ORS 92 laws adopted in 1973.

the owner of the parent parcel (prior to division) is a remainder parcel. The remainder parcels described in the administrative decision were surrounded by parcels that had been partitioned from a parent parcel by deed and the resulting parcels, therefore, meet the definition of a remainder parcel in DCC 18.04.030, Lot of Record (A)(5).<sup>5</sup> Prior to April 5, 1977, the date the County adopted its first partition ordinance, this method of dividing land was lawful and the only means of creating new parcels.<sup>6</sup> Remainder lots were sometimes created by a “modern day” subdivision or partition approval if the entire parent parcel was not shown on the partition map, plan or plat but this type of lot is no longer allowed to be created – all parts of a divided property must be shown on the plat.

### ***Aggregation of Lots or Parcels Not Required by “Lot of Record” Definition***

Deschutes County’s lot of record definition does not require that lots or parcels held in common ownership at some point in time in the history of the property or lots or parcels conveyed together on one deed or legal description be aggregated for purposes of development. Neither does State law. Any unit of land created by a deed or contract<sup>7</sup> prior to April 5, 1977 is a parcel that may be a “Lot of Record.” Parcels 1 through 8 were created prior to April 5, 1977. The conveyance of these eight parcels and parts of four other parcels together in a legal description in the 1988 deed did not vacate the property lines between the parcels.

The boundaries of “a lot or parcel,” whether created by a deed, contract, partition or subdivision map, plan or plat, exist until the boundaries of the lot or parcel are vacated by a lawful vacation process such as a County-approved lot consolidation or by the approval of a partition or subdivision plat. Lot and parcel lines are not vacated by the description of multiple legal lots of record in a single legal description in deeds between private parties unless consolidation has been required or approved by Deschutes County.<sup>8</sup> This interpretation is consistent with ORS 92.017 which provides that the boundary lines of a lawfully created lot or parcel remain valid until vacated as provided by law.

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<sup>5</sup> This finding replaces and controls over conflicting findings in the administrative decision and hearings officer’s decision that say that lands divided by deed or contract have not been subdivided or partitioned and that the remainder parcels in this case do not meet the strict definitions of DCC 18.04.030, Lot of Record (A)(5).

<sup>6</sup> Subdivision plats allowed property owners to create lots at this time but no similar process was provided for partitions that created parcels.

<sup>7</sup> Parcels may be created by being described on the face of the deed or may be the remainder of the parent parcel not conveyed by the deed.

<sup>8</sup> If more than one legal description is used in a deed, only one lot or parcel will be recognized by the County as being created by that deed unless the lots are described by reference to a recorded subdivision or town plat or a parcel was previously established with discrete boundaries through a deed or contract. Contrary to the hearings officer’s summary of the lot of record provisions of Title 18 on page 10 of her decision, the “lot of record” definition of DCC 18.04.030 does consolidate lots or parcels created by conveyance. Furthermore, this provision of the “Lot of Record” definition is not relevant to the County’s resolution of this appeal as no deed contained more than one legal description.

**Specific Response to Issues Raised in Notice of Appeal**

The Board adopts findings with some changes, presented by TID in its Final Argument filed January 22, 2016, in **Exhibit B** as its findings responsive to the specific issues raised on appeal by LandWatch.

**V. DECISION:**

Based on the foregoing Findings of Fact and Conclusions of Law, the Deschutes County Board of Commissioners hereby **AFFIRMS** the administrative decision of the Planning Division that was upheld by the Hearings Officer and that found that Tax Lot 7891 is comprised of eight legal lots of record and parts of four parcels that may or may not be legal lots of record.

Dated this \_\_\_ day of \_\_\_\_\_, 2016      BOARD OF COUNTY COMMISSIONERS

\_\_\_\_\_  
ALAN UNGER, Chair

\_\_\_\_\_  
TAMMY BANEY, Vice Chair

ATTEST:

\_\_\_\_\_  
Recording Secretary

\_\_\_\_\_  
ANTHONY DeBONE, Commissioner

Mailed this \_\_\_\_\_ day of \_\_\_\_\_, 2016

THIS DECISION BECOMES FINAL UPON MAILING. PARTIES MAY APPEAL THIS DECISION TO THE LAND USE BOARD OF APPEALS WITHIN 21 DAYS OF THE DATE ON WHICH THIS DECISION IS FINAL.



**EXHIBIT A**

**DECISION OF DESCHUTES COUNTY HEARINGS OFFICER**

**FILE NUMBERS:** 247-15-000-222-LR, 247-15-00430-A

**APPLICANT/  
PROPERTY OWNER:** Tumalo Irrigation District  
64697 Cook Avenue  
Bend, Oregon 97701

**APPLICANT'S  
ATTORNEY:** Liz Fancher  
644 N.W. Broadway Street  
Bend, Oregon 97703

**APPELLANT:** Central Oregon LandWatch  
1539 N.W. Vicksburg Avenue  
Bend, Oregon 97703

**PROPOSAL:** Appellant appeals from an administrative determination that a 755-acre property zoned OS&C, FP, EFU-TRB, LM, WA, and SBMH consists of eight lots of record and four areas not considered lots of record.

**STAFF REVIEWER:** Cynthia Smidt, Associate Planner

**HEARING DATE:** September 8, 2015

**RECORD CLOSED:** October 2, 2015

**I. APPLICABLE STANDARDS AND CRITERIA:**

**A. Title 17 of the Deschutes County Code, the Subdivision/Partition Ordinance**

**\* Section 17.08.030, Definitions Generally**

**B. Title 18 of the Deschutes County Code, the Deschutes County Zoning Ordinance**

**1. Chapter 18.04, Title, Purpose and Definitions**

**\* Section 18.04.030, Definitions**

**2. Chapter 18.08, Basic Provisions**

**\* Section 18.08.010, Compliance**

**C. Title 22 of the Deschutes County Code, the Development Procedures Ordinance**

**1. Chapter 22.04, Introduction and Definitions**

- \* Section 22.04.020, Definitions
  - 2. Chapter 22.20, Review of Land Use Action Applications
    - \* Section 22.20.040, Final Action in Land Use Actions
  - 3. Chapter 22.28, Land Use Action Decisions
    - \* Section 22.28.040, Reapplication Limited
  - 4. Chapter 22.32, Appeals
    - \* Section 22.32.010, Who May Appeal
    - \* Section 22.32.015, Filing Appeals
    - \* Section 22.32.020, Notice of Appeal
    - \* Section 22.32.027, Scope of Review
    - \* Section 22.32.030, Hearing on Appeal
- D. Oregon Revised Statutes
- 1. Chapter 92, Subdivisions and Partitions
    - \* ORS 92.010, Definitions for ORS 92.010 to 92.192
    - \* ORS 92.017, When Lawfully Created Lot or Parcel Remains Discrete Lot or Parcel
  - 2. Chapter 197, Comprehensive Land Use Planning
    - \* ORS 197.015, Definitions for Chapters 195, 196 and 197
  - 3. Chapter 215, County Planning; Zoning; Housing Codes
    - \* ORS 215.010, Definitions
    - \* ORS 215.427, Final Action on Permit or Zone Change Application

**II. FINDINGS OF FACT:**

- A. **Location:** The subject property does not have an assigned address. It is identified as Tax Lot 7891 on Deschutes County Assessor’s Map 16-11 and is located between Bend and Sisters.<sup>1</sup>
- B. **Zoning and Plan Designation:** The majority of the subject property is zoned Open Space and Conservation (OS&C). Some areas on the property are zoned Flood Plain (FP), Exclusive Farm Use – Tumalo/Redmond/Bend Subzone (EFU-TRB), and Forest (F-1 and F-2). Portions of the property are subject to three combining zones -- Wildlife Area Combining Zone (WA) to protect portions of the Tumalo Deer Winter Range. Sensitive Bird and Mammal Habitat (SBMH) to protect raptor nest sites, and Landscape

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<sup>1</sup> As noted in the administrative decision, the applicant’s lot-of-record verification request included only part of Tax Lot 7891, but the decision included the entire tax lot.

Management (LM) to protect scenic views.

- C. **Site Description:** The subject property is approximately 755 acres in size,<sup>2</sup> and irregular in shape. The administrative decision concluded the property includes eight lots of record and four areas that are not lots of record. The record indicates the eight verified lots of record range in size from 20 acres to 160 acres.<sup>3</sup>
- D. **Surrounding Zoning and Land Uses:** The subject property is surrounded by sparsely developed rural land. To the west are large tracts of public land zoned Forest (F-1). To the north are large tracts of public and private land zoned F-1 and F-2. To the east is land zoned OS&C, EFU-TRB, and Multiple Use Agriculture (MUA-10). To the south is land zoned OS&C and F-1.
- E. **Procedural History:** Tumalo Irrigation District (hereafter “TID” or “applicant”) acquired the subject property from the State of Oregon in 1988. In 2004, the applicant requested a lot-of-record verification for the subject property. By an administrative decision dated March 23, 2005 (LR-04-37), the county determined that Tax Lot 7891 did not constitute a lot of record. In September of 2005, the county granted approval of three lot line adjustments affecting the subject property (LL-05-71, LL-05-89, and LL-05-101). In those decisions the county again stated Tax Lot 7891 was not a lot of record by itself, but rather was part of a lot of record consisting of Tax Lot 7891 owned by TID, and four tax lots owned by the State of Oregon: Tax Lot 8400 on Assessor’s Map 16-11; Tax Lot 2100 on Assessor’s Map 17-11; Tax Lot 600 on Assessor’s Map 17.11-04A; and Tax Lot 400 on Assessor’s Map 16-11-33.<sup>4</sup>

On April 22, 2015, the applicant submitted the subject application seeking lot-of-record verification for five separate lots, and including new information not in the record of the 2005 lot-of-record application. The application was deemed complete on May 23, 2015. Under Section 22.20.040 of the county’s land use procedures ordinance, the application is not subject to the 150-day period for issuance of final local land use decision because it involves a lot-of-record determination. On July 27, 2015, the Planning Division issued an administrative decision determining that the subject property includes eight lots of record and four additional areas not recognized as lots of record.

On August 7, 2015, Central Oregon LandWatch (hereafter “LandWatch” or “appellant”) filed an appeal of the administrative decision. On September 8, 2015, the Hearings Officer held a public hearing on the appeal. At the hearing, the Hearings Officer received testimony and evidence, left the written evidentiary record open through September 29, 2015, and allowed the applicant through October 6, 2015 to submit final argument

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<sup>2</sup> Appellant states the property has 930 acres. However, assessor’s data in the record shows the property is 754.78 acres in size.

<sup>3</sup> The minimum lot size in the OS&C and FP Zones is 80 acres. Figure 6 of the administrative decision depicts the twelve units of land identified in the administrative decision, including the eight units recognized as lots of record (Lots 1-8) and the four units not recognized as lots of record (Lots 9-12). Figure 6 indicates only three of the verified lots of record – Lots 1, 2 and 5) are at least 80 acres in size.

<sup>4</sup> The requested lot line adjustments also included Tax Lot 500 on Assessor’s Map 17-11-04A which the county found was a lot of record.

pursuant to ORS 197.763. The applicant submitted its final argument on October 2, 2015, and the record closed on that date.

- F. **Proposal:** Appellant appeals from the administrative decision determining that the subject property includes eight lots of record and four areas that are not lots of record.
- G. **Public Agency Comments:** The record indicates the Planning Division did not send notice of the applicant's proposal or the appeal to any public or private agencies.
- H. **Public Notice and Comments:** The Planning Division mailed individual written notice of the appeal hearing to all parties to the administrative proceeding. The record indicates this notice was mailed to six parties. In addition, notice of the appeal hearing was published in the Bend "Bulletin" newspaper, and the subject property was posted with a notice of proposed land use action sign. As of the date the record in this matter closed, the county had received eleven letters from the public in response to these notices. In addition, five members of the public testified at the hearing. Public comments are addressed in the findings below.

### III. **CONCLUSIONS OF LAW:**

#### A. **Preliminary Issue.**

**FINDINGS:** As discussed in the Findings of Fact above, in 2005 the applicant requested a lot-of-record determination and the county found the subject property did not include any lots of record. Opponents argue the county should not consider the subject application in light of its 2005 decision.

Section 22.28.040 of the land use procedures ordinance states in relevant part:

- A. **If a specific application is denied on its merits, reapplication for substantially the same proposal may be made at any time after the date of the final decision denying the initial application.**
- B. **Notwithstanding DCC 22.28.040(A), a final decision bars any reapplication for a nonconforming use verification or for a determination on whether an approval has been initiated. A lot of record determination shall be subject to reapplication under DCC 22.28.040(A) only if the applicant presents new factual evidence not submitted with the prior application. (Emphasis added.)**

The applicant's burden of proof includes new evidence consisting of land conveyances that were not part of the record, or considered in the decision, for the 2005 lot-of-record determination. Therefore, the Hearings Officer finds that under Section 22.28.040(B) the county may consider the subject lot-of-record verification request and is not bound by the 2005 determination.

#### B. **Title 22 of the Deschutes County Code, the Development Procedures Ordinance**

##### 1. **Chapter 22.32, Appeals**

**a. Section 22.32.010, Who May Appeal**

**A. The following may file an appeal:**

**1. A party: . . .**

**FINDINGS:** The Hearings Officer finds appellant is entitled to appeal because it was a party to the administrative proceedings, having submitted written testimony therein.

**b. Section 22.32.015, Filing Appeals**

**A. To file an appeal, an appellant must file a completed notice of appeal on a form prescribed by the Planning Division and an appeal fee.**

**FINDINGS:** Appellant submitted a completed notice of appeal form and narrative describing the bases of the appeal. The record indicates appellant paid the required appeal fee.

**B. Unless a request for reconsideration has been filed, the notice of appeal and appeal fee must be received at the offices of the Deschutes County Community Development Department no later than 5:00 PM on the twelfth day following mailing of the decision. If a decision has been modified on reconsideration, an appeal must be filed no later than 5:00 PM on the twelfth day following mailing of the decision as modified. Notices of Appeal may not be received by facsimile machine.**

**FINDINGS:** Appellant filed its notice of appeal on August 7, 2015, within twelve days of issuance of the administrative decision on July 27, 2015.<sup>5</sup>

**c. Section 22.32.020, Notice of Appeal**

**Every notice of appeal shall include:**

**A. A statement raising any issue relied upon for appeal with sufficient specificity to afford the Hearings Body an adequate opportunity to respond to and resolve each issue in dispute.**

**FINDINGS:** The narrative attached to appellant's notice of appeal states in relevant part:

*"County Staff erred in determining that there are eight separate lots of record on the subject property. There is also no basis for TID's claim of five separate lots of record. The ownership history of the subject lands does not support a finding that there are any lots of record on the subject property.*

*ORS 92.017 does not act retroactively to resurrect historical conveyances of the*

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<sup>5</sup> The administrative decision is dated June 27, 2015. However, the record indicates the correct date is July 27, 2015.

*subject lands in the early 1900s, but concerns the rights acquired by the current landowner. The State of Oregon in 1988 only conveyed a single parcel to the Applicant TID.*

*Further, patent deeds meet neither definition of 'lot' or 'parcel' and thus cannot be lots of record under DCC 18.040.030.*

*This conveyance also did not transfer the full bundle of rights to the property to TID but imposed use restrictions and retained reversionary rights. TID has no right to seek division of the land into parcels as lots of record.*

*Appellant reserves the right to raise further appeal issues before the Hearings Officer."*

The Hearings Officer finds this statement is sufficient to identify the bases for the appeal. .

**d. Section 22.32.027, Scope of Review**

- A. Before Hearings Officer or Planning Commission. The review on appeal before the Hearings Officer or Planning Commission shall be de novo.**

**FINDINGS:** The Hearings Officer finds *de novo* review means I must consider both the record made during the administrative proceedings and the record on appeal.

**e. Section 22.32.030, Hearing on Appeal**

- A. The appellant and all other parties to the decision below shall be mailed notice of the hearing on appeal at least 10 days prior to any de novo hearing or deadline for submission of written arguments.**
- B. Except as otherwise provided in DCC 22.32, the appeal shall be heard as provided in DCC 22.24. The applicant shall proceed first in all de novo appeals.**
- C. The order of Hearings Body shall be provided as provided in DCC 22.24.020.**
- D. The record of the proceeding from which the appeal is taken shall be a part of the record on appeal.**

\* \* \*

**FINDINGS:** The record indicates notice of the appeal hearing was mailed to all parties to the administrative proceedings at least ten days prior to the hearing. The appeal hearing was conducted in accordance with the procedures set forth in Chapter 22.24 of the procedures ordinance, and the record in this appeal includes the record made during the administrative proceedings. Therefore, the Hearings Officer finds the hearing complied with this section.

### C. Title 18 of the Deschutes County Code, the Deschutes County Zoning Ordinance

**FINDINGS:** The applicant requested verification of five lots of record on a portion of Tax Lot 7891. As discussed in the Findings of Fact above, the administrative decision analyzed Tax Lot 7891 in its entirety and concluded it is comprised of eight lots of record and four additional areas not considered lots of record. The county analyzed the entire tax lot because of what it characterized as “the overlap of historic transactions” reviewed in the decision. Neither appellant nor the applicant objected to or appealed the administrative decision’s expansion of the property subject to the lot-of-record verification.

**1. 1988 Deed.** Appellant and other opponents argue the county cannot approve TID’s lot-of-record verification request because such verification will permit development of the subject property in a manner inconsistent with the 1988 deed by which TID obtained the subject property and the provisions of the WA Zone establishing protections for wintering deer habitat. A copy of the deed is included in the record and is identified as Document Number 88-20572, recorded at Volume 170, Page 0581, of the Deschutes County deed records. The deed states in relevant part:

*“The State of Oregon . . . Grantor, releases and quitclaims to Tumalo Irrigation District . . . Grantee, all right, title, and interest in and to the following described real property . . . so long as said property is held in public ownership and used as a Winter feeding area for wildlife satisfactory to the Oregon Department of Fish and Wildlife. When said property is no longer owned by Tumalo Irrigation District or another public body, or is no longer used for public purpose including use as a Winter feeding area for wildlife satisfactory to the Oregon Department of Fish and Wildlife, the interest of the Grantee, or its assigns, shall automatically terminate and revert to the Grantor.”*

*The true consideration of this conveyance is other good and valuable consideration promised, including a commitment by Tumalo Irrigation District to involve local residents and the community before making decisions on use and management of the land or granting easements.*

*This instrument will not allow use of the property described in this instrument in violation of applicable land use laws and regulations. Before signing and accepting this instrument, the person acquiring fee title to the property should check with the appropriate city or county planning department to verify approved uses.”* (Emphasis added.)

The Hearings Officer finds the above-underscored deed restrictions relate to ownership and use of the subject property.<sup>6</sup> However, deed restrictions are not enforceable by the county unless they are required by a condition of land use approval which is not the case here. These restrictions, and related reversionary clauses, are only enforceable by the parties to the transaction. Moreover, the provisions of the WA Zone apply to development and divisions of land within that zone and not to lot-of-record determinations.

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<sup>6</sup> The Hearings Officer notes the 1988 deed’s legal description expressly reserves to the state all minerals on the property and the right to make use thereof, including “prospecting for, exploring for, mining, extracting, reinjecting, storing, drilling for, and removing such minerals, materials and geothermal resources.” Any such mining activity would require land use approval.

Appellant also argues the administrative decision erred in finding any lots of record on the subject property because the 1988 deed conveyed the property by a single metes-and-bounds description, set forth in Exhibit A to the deed. The primary question in this appeal is the effect of the 1988 deed. In order to address that question, the Hearings Officer must examine the relevant county land use regulations and prior decisions interpreting them, applicable statutory provisions, and relevant case law.

**2. Ordinance Provisions.** Chapter 18.08 of the Deschutes County Code, Basic Provisions, states in Section 18.080.010:

- A. A lot may be used and a structure or part of a structure may be constructed, reconstructed, altered, occupied or used only as DCC Title 18 permits. No new structure shall be constructed on any lot of less area than the minimum for the zone in which it is located, except as provided by DCC Title 18 and ORS 215.203, et. seq.**

Title 18 does not expressly require lot-of-record verification as a prerequisite to development. Nevertheless, the Hearings Officer is aware the county has established such a requirement through policies and practices. Specifically, the county: (1) does not approve or recommend approval of a land use application without first determining that the subject property consists of one or more lots of record; (2) requires an applicant for land use approval to demonstrate the property consists of one or more lots of record; and (3) if there is a question about the property's lot-of-record status, requires an applicant to submit a lot-of-record verification application prior to, or with, an application for development approval under Title 18 or an application for approval of a subdivision, partition, or lot line adjustment under Title 17, the county's subdivision/partition ordinance.

Both Titles 17 and 18 address lots of record, but with different terminology. Section 18.04.030 defines "lot of record" in relevant part as follows:

- 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. (Emphasis added.)**

Section 17.08.030 includes the following definition for purposes of subdivisions and partitions:

**“Lawfully Established Unit of Land” means:**

1. **A lot or parcel created pursuant to ORS 92.010 to 92.190, or the provisions of this code; or**
2. **Another unit of land created:**
  - A. **In compliance with all applicable planning, zoning, and subdivision or partition ordinances and regulations; or**
  - B. **By deed or land sales contract, if there were no applicable planning, zoning or subdivision or partition ordinances or regulations.**

Both definitions recognize as legal lots those units of land created by subdivisions, partitions, and conveyances.<sup>7</sup> The Hearings Officer is aware that by policy and practice, the county has recognized additional categories of lots of record not expressly included in the definition in Section 18.04.030. Exhibit “A” to the applicant’s September 22, 2015 post-hearing submission is a June 13, 1990 memorandum from former principal planner Kevin Harrison stating a legal lot of record includes:

- a lot or parcel for which the county has issued a building or septic permit; and
- a lot or parcel that was “developed” prior to the county’s involvement in the building permit process – i.e., prior to 1972 for septic permits, and prior to 1975 for building permits.

In addition, the Hearings Officer is aware the county has recognized another lot-of-record category through policy and practice: a “remainder” lot or parcel created through *conveyances* of all surrounding land recorded before the effective date of the county’s subdivision and partition ordinances.<sup>8</sup> *E.g., Korish (A-10-3, LR-10-2).*

Finally, both Titles 17 and 18 address lot line adjustments in their “partition” definitions with identical language in Sections 17.08.030 and 18.04.030, respectively, as follows:

**“Partition land” means to divide land into two or three parcels of land within a calendar year [but] does not include . . . an adjustment of a property line by the**

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<sup>7</sup> The Hearings Officer is aware the county has interpreted the term “created” for purposes of both the legal lot provisions to signify the point in time when a unit of land was subdivided or partitioned, or when it *first* was described *by itself* in a conveyance.

<sup>8</sup> Those dates are 1970 for PL-2, the first subdivision ordinance, and April 5, 1977 for PL-7, the first partition ordinance.

**relocation of a common boundary where an additional unit of land is not created and where the existing unit of land reduced in size by the adjustment complies with any applicable zoning ordinance.**

Section 17.08.030 also defines “property line adjustment” as “the relocation of a common property line between two abutting properties.”

In his aforementioned 1990 memorandum, Kevin Harrison stated the county’s policy with respect to lot line adjustments as follows:

*“A policy dated March 19, 1984, deals with Lot Line Adjustments between two legal lots which are both substandard in size. I believe the policy states that Lot Line Adjustments are OK as long as there is no net change in either lot, and which involves no more than 10% of the largest lot. I believe the first part of the policy is reasonable and defensible (no lot is made more non-conforming), the second is not (if there is no net change, why should we care?).”*

*As you recall, there was some controversy regarding the distinction between Lot Line Adjustments and consolidations. I would like to put that discussion on the back burner, do some more research, and bring it back some time in the future.”*

However, as the applicant notes in its September 22, 2015 post-hearing submission, 2005 House Bill 2755, effective January 1, 2006, amended the definition of “property line adjustment” in ORS 92.010 to include the “elimination” of a common property line between abutting properties.

Based on the foregoing discussion, the Hearings Officer finds the primary distinction between the legal lot provisions in Titles 17 and 18 is that the lot-of-record definition in Title 18 addresses the *developability* of property – i.e., it establishes a minimum lot size of 5,000 square feet, a minimum width of 50 feet, and a requirement that separately-described lots or parcels created by conveyance be deemed consolidated unless the lots are described by reference to a recorded subdivision or town plat.

**3. Administrative Decision.** The administrative decision contains a detailed recitation of the sequential land conveyance history of Tax Lot 7891, illustrated in six figures included in the decision. Figure 6 depicts the boundaries of the verified lots of record and areas not constituting lots of record. The decision includes the following relevant analysis:

*“Based on the sequential conveyances of land, staff finds the subject property (tax lot 7891) wholly contains eight separate legal lots of record, five of which the applicant requested verification. The eight legal lots of record are shown on Figure 6 as Parcels 1 through 8, with Parcels 1, 2, 4, 5, and 6 being the five that the applicant requested verification. The noted legal lots of record are all at least 5,000 square feet in area and 50 feet wide. In addition, the sequential land conveyances for the eight legal lots of record occurred prior to the County’s first subdivision ordinance and zoning ordinance (1970 and 1972, respectively). Since the applicant is not seeking to divide the subject property, the procedures set forth in the current county subdivision ordinance, Title 17, are not applicable.”*

*Two legal lots of record, Parcels 1 and 2 on Figure 6 were established with discrete boundaries in federal conveyances from 1909 and 1910, respectively. These parcels have remained unchanged since first established. Although the two parcels were included in a single deed from 1913, the transaction did not eradicate the parcels' legally established boundaries (see comments below). Parcels 3 and 8 on Figure 6 were first established with discrete boundaries through two separate federal conveyances but were changed through transactions with the State of Oregon in 1914 and 1913, respectively. Both subsequent conveyances separated the parcels, leaving remnants not part of the subject property. Parcels 4, 5, 6, and 7 were first established with discrete boundaries through different federal conveyances but were changed through additional subsequent conveyances between 1912 and 1914. Some land transactions separated parcels and thus left a remnant of the parent parcels, such as Parcel 5, but were not altered further. Some remainder parcels were involved in additional land transactions such as Parcel 7.*

*There are four units of land – Parcels 9, 10, 11, and 12 – shown on Figure 6 that are not recognized as separate legal lots of record. As stated previously, a 1988 conveyance of Parcel V (Fig. 4) separated four units of land – Parcels K, P, T, and S (Fig. 3) and thus created remnant parcels – Parcels W, X, Y, and Z shown on Figure 5. Parcels W, X, Y, and Z are not recognized as separate legal lots of record because the partition and zoning ordinances were in effect at the time of the 1988 conveyance. These parcels are portions of the legal lots identified as Parcels K, P, T, and S (Fig. 3).*

*Most of the parcels reviewed here were included in subsequent deeds that described adjacent lands together in a single deed. Including the parcels in a single deed does not eradicate the boundary lines that legally established those properties in the past. Evidence was not found that indicated the subject legal lots of record were consolidated through a property line adjustment approval or platted as part of a subdivision or partition. In the decision LR-10-2 (A-10-3) and in LR-92-43, LR-92-44, LR-92-46, and LR-92-47, Deschutes County Hearings Officers found that the mere inclusion in a single deed of multiple parcels lawfully created by conveyances did not result in the eradication of the parcels' previous legally established boundary lines.*

*Furthermore, the remnant parcels reviewed here were first established as separate larger parcels with legally established boundaries, and were surrounded by legally established boundaries of other parcels. Although the remainder parcels left behind do not meet the strict definition contained in DCC 18.040.030(A)(5) because the adjacent or surrounding lands have not been subdivided or partitioned, once altered by subsequent conveyances the remnants become legal remainder parcels. In decision LR-10-2 (A-10-3), the County Hearings Officer articulated that remainder lots are surrounded by legally created lots. Staff relies on this determination to identify remainder parcels created by deed prior to partition and subdivision requirements.”*

The administrative decision found the lots of record created by these conveyances remained separate and distinct units of land after the effective dates of the county's first subdivision and

partition ordinances based on ORS 92.017 which states:

**A lot or parcel lawfully created shall remain 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.**

**4. Effect of ORS 92.017.** The parties disagree as to whether ORS 92.017 applies to this case. Appellant argues the statute does not apply to parcels created by deed because the terms “lot” and “parcel” used in ORS Chapter 92 are terms of art meaning units of land created by subdividing or partitioning, respectively, and not by conveyance. ORS 92.010 defines “lot” and “parcel” as follows:

**“Lot” means a unit of land created by a subdivision of land.**

**“Parcel” means a unit of land created by a partitioning of land.**

Appellant also notes the definition of “parcel” in ORS 215.010, unlike the definition in Chapter 92, includes a unit of land created by a deed or land sales contract. Appellant argues that because the “parcel” definition in ORS 215.010 was included in the same 1985 legislation (House Bill 2381) that adopted ORS 92.017, the clear legislative intent was to distinguish between “parcels” for purposes of Chapters 92 and 215, and therefore the legislature did not intend “parcels” subject to ORS 92.017 to include units of land created by conveyances.

The applicant responds that ORS 92.017 applies to “historic lots created by deeds,” relying primarily on two decisions interpreting the statute: *Kishpaugh v. Clackamas County*, 24 Or LUBA 164 (1992), and *Thomas v. Wasco County*, 58 Or LUBA 452 (2009). Each of those decisions is addressed in the findings below.

***Kishpaugh.*** The question in *Kishpaugh* was whether ORS 92.017 prevented the county from refusing to allow separate development of two units of land created by 1970 and 1971 land sale contracts, each of which created a parcel smaller than the 10-acre minimum lot size in the applicable zone adopted in 1979. The contracts separately conveyed the two properties (Tax Lots 404 and 405) to the same parties. Because the two properties were in contiguous ownership at the time the minimum lot size was adopted, the county declined to recognize each lot as “separately developable” on the basis of a provision of its zoning code that stated:

*“Contiguous lots under the same ownership when initially zoned shall be combined, for the purposes of this Ordinance, when any of these lots do not satisfy the lot size requirement of the initial district. A lot or parcel which is a separate legal lot or parcel prior to the adoption of this provision shall remain a separate legal lot regardless of ownership.”*

After an extensive review of the statute’s legislative history, LUBA held:

*“The text of ORS 92.017, and its legislative history, make it clear that the functions of ORS 92.017 were (1) to prevent local governments from refusing to recognize lawful divisions of land such that lots and parcels could not be sold to third parties, and (2) to establish that the property lines established by such land divisions remain inviolate, absent the employment of a specific process to*

*eliminate such property lines.*

*\* \* \**

*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 governments as being separately developable. In fact, the legislative history \* \* \* 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 \* \* does not offend ORS 92.017."*

**Thomas.** In *Thomas*, the petitioner appealed from the county's legislative adoption of an amendment to its zoning ordinance. That provision stated certain contiguous lots and parcels nonconforming in size and "consolidated onto a single deed at any time" are thereby deemed "consolidated for development purposes." The petitioner argued the ordinance violated ORS 92.017. LUBA adhered to its holding in *Kishpaugh*, but held the ordinance at issue in *Thomas* did violate ORS 92.017, based on the following reasoning:

*"We agree with petitioner that, while the county almost certainly has a legitimate planning interest in encouraging the consolidation of substandard size lots for development purposes, the method it has employed in adopting WCZO 13.040(B) appears to employ an arbitrary and illegitimate means to achieve that purpose. The code provisions at issue in Kishpaugh and Campbell did not turn on deeds or the particular language of deeds, and the circumstances presented in those cases involved substandard size properties that were in common ownership at the time of the county's decision. In contrast, under WCZO 13.040(B), consolidation of properties for development purposes is based on whether those properties were at one time transferred on a single deed, and whether or not properties must be consolidated for development purposes depends in part on the specific language of those deeds. Further, WCZO 13.040(B) applies whether or not the affected properties are now separately owned. There are, it seems to us, several problems with the county's approach under WCZO 13.040(B).*

*First, the deeds to which WCZO 13.040(B) will be applied are likely to have been written at a time when there was no general understanding that transferring more than one property in a single deed or failure to use separate headings or certain words in a deed that conveys more than one property would later result in a requirement that the properties transferred be developed together rather than separately. We agree with petitioner that placing dispositive significance on the presence or absence of separate headings in a deed, for example, appears to be arbitrary. We do not understand why the county believes that a deed that transferred five properties with separate metes and bounds property descriptions, but no separate headings, should result in all five properties being consolidated for development purposes but a deed that is identical except for the inclusion of separate headings escapes consolidation.*

*Although it is not clear, the distinctions the county draws between deeds with*

*separate headings and those without, and between deeds with separate property descriptions and those without, may be an attempt to discern and give effect to what the county presumes is the grantor's intent. The county may presume that if the deed includes separate headings, for example, the grantor intended that each property be separately developable, but if not, the grantor intended that all the transferred properties be consolidated for development purposes. However, if that is the basis for the distinctions the county has codified in WCZO 13.040(B), that basis also seems arbitrary and illegitimate. Nothing in the record or the county's brief explains why the county believes that giving effect to the grantor's presumed intent in transferring property has anything to do with furthering a legitimate land use planning objective. The effect of the grantor's intent in transferring property is a matter of real estate law, and there is no obvious connection to any county land use planning objective. Further, the grantor's intent in transferring property by deed is a question of fact in any particular case, and that can be finally resolved only in a judicial court. In most cases, the grantor's actual intent, if any, in transferring multiple contiguous properties regarding whether or not those properties should be 'consolidated' for development purposes will not be evident from the face of the deed, and judicial interpretation would be necessary to reach a final determination regarding intent. Finally, in any case, it is highly unlikely in any circumstance where WCZO 13.040(B) would be applied that the grantor formed any intent, one way or the other, regarding the future development of the properties transferred. For these reasons, if the distinctions drawn by WCZO 13.040(B) are based on the county's attempt to give effect to the grantor's presumed intent, that approach appears to have no relation to a legitimate planning objective. [Footnote omitted.]*

*In sum, the county's apparent objective in encouraging the consolidation of substandard size lots for development purposes almost certainly serves a legitimate planning objective. There are a number of methods that the county can adopt to further that objective that are not based on deeds or the specific language of deeds. A relatively straightforward way would be to adopt code language that simply prohibits development of substandard size lots or parcels, with whatever exceptions the county deems appropriate. However, if the county continues to base its approach for consolidation of substandard size properties on the examination of deeds, the county must identify some legal basis for the distinction it draws, such that future development rights do not hinge on apparently arbitrary differences in the wording or form of deeds." (Emphasis added.)*

In his concurring opinion in *Thomas*, LUBA Board Member Holston stated in relevant part:

*"I believe it is extremely doubtful that counties ever had the authority to adopt local laws that dictated that parcels, which under Oregon real property law exist as legal separate units of land, do not qualify as separate units of land in that county. If counties ever had the authority to override the state's real property laws, it is clear that under ORS 92.017 they no longer have that authority.*

*To simplify, WCZO 13.040(B) requires that contiguous substandard parcels that were created by deed before 1974 must be 'considered one property for*

*development purposes' if those contiguous substandard parcels were subsequently transferred by a single deed. See n 1. WCZO 13.040(B)(2)(b) creates an exception to that rule where '[a]ll of the deeds listing the properties included separate metes and bounds descriptions with a separate heading \* \* \*.' For all practical purposes, the county has adopted the very kind of real property law that ORS 92.017 was adopted to prohibit. \* \* \* Whether a single deed that conveys more than one substandard parcel has separate metes and bounds descriptions and separate headings might have something to do with whether the deed is effective to convey separate parcels, but it has absolutely nothing to do with whether those parcels should be developed separately or together." (Emphasis added.)*

**Analysis.** The Hearings Officer finds that contrary to appellant's argument, LUBA's *Kishpaugh* and *Thomas* decisions make clear ORS 92.017 protects units of land lawfully created by conveyances. In other words, such units of land remain discrete lots or parcels under the statute unless their boundaries are vacated or further divided "as provided by law."

The remaining question is whether the boundaries of the eight verified lots of record were vacated "as provided by law." There is no dispute the boundaries of these units of land were not vacated by subsequent subdivisions or partitions.<sup>9</sup> Nor does the record indicate the boundaries were vacated by lot line adjustments as the three aforementioned lot line adjustments did not eliminate any lot lines.<sup>10</sup>

Appellant argues the boundaries of the verified lots of record were vacated by the recording of the 1988 deed from the State of Oregon to TID which described the transferred property by a single metes-and-bounds description. Appellant asserts the language of the deed reflects the grantor's intent that the property be developed, if at all, as a single parcel.

The Hearings Officer finds there are several problems with appellant's argument. First, as appellant acknowledges, LUBA's *Thomas* decision holds the grantor's intent with respect to a *transfer* of land is not relevant in determining whether a unit or units of land created thereby are separately *developable* under a county's land use regulations. Nevertheless, appellant argues the county's administrative decision erred in not concluding from "the plain language" of the 1988 deed that the state *intended* to convey – and TID to have -- only a single unit of land, and therefore the county must honor that intent by not recognizing multiple lots of record within the subject property. Appellant's September 8, 2015 submission contains a lengthy discussion of how grantor intent should be determined, and concludes with the assertion that ORS 92.017 "was not enacted to contradict the unambiguous terms of deeds" such as the 1988 deed. I find appellant in effect argues the county should adopt as a matter of policy and practice the very

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<sup>9</sup> In *Weyerhaeuser Real Estate Development Co. v. Polk County*, 246 Or App 548 (2011), the Oregon Court of Appeals held that a partition served to vacate subdivision lot lines because when the partition was approved in 1983 the county had authority to eliminate subdivision lot lines through replatting and partition approval. With respect to the effect of ORS 92.017, the court held that ORS 92.017 did not have the effect of restoring lots that had been vacated when the lots were consolidated by a partition.

<sup>10</sup> The applicant argues, and the Hearings Officer agrees, that these lot line adjustments could not have eliminated any lot lines inasmuch as in 2005, state law did not allow lot lines to be eliminated or lots consolidated through lot line adjustments. Such consolidation was not permitted until ORS Chapter 92 was amended by 2005 House Bill 2755 which took effect January 1, 2006.

type of land use regulation found in *Thomas* to violate ORS 92.017 – i.e., a requirement that units of land be deemed consolidated for purposes of development based on the presence or absence of certain language in a conveyance and the grantor’s intent presumed therefrom.<sup>11</sup>

Second, even assuming grantor intent is relevant in determining whether a conveyance served to vacate the boundaries of lawfully created units of land, appellant has not demonstrated the 1988 deed in fact reflects the state’s intent to prohibit recognition or development of multiple lots of record within the subject property. The description of the property through a single metes-and-bounds description suggests only that the grantor intended to *transfer* a single unit of land. And the aforementioned deed restrictions suggest the grantor intended for the transferred property to be used for wintering deer habitat. But neither appellant nor opponents have identified any language in the deed that suggests the state intended that the transferred property could not be recognized and used as multiple units of land.

Finally, appellant argues that as a matter of law, execution and recording of a deed serves to vacate previously existing lot or parcel boundaries, relying on *dicta* in LUBA’s decision in *Oregon Natural Desert Association v. Harney County*, 65 Or LUBA 246 (2012). The Hearings Officer finds appellant’s reliance on that decision is misplaced. The issue in that case was whether the county erred in approving a dwelling on an EFU-zoned parcel that the petitioner argued was part of a larger tract with which it was consolidated as a result of a previous approval of a lot-of-record dwelling. LUBA held that while a county can require lot consolidation as a condition of dwelling approval, such dwelling approval does not *itself* serve to eliminate lot lines. LUBA did not cite or make any reference to its decision in *Thomas*.

**5. Conclusion.** Based on the foregoing discussion, the Hearings Officer finds ORS 92.017 applies to and protects historic units of land lawfully created by conveyance(s) that predate the county’s land use regulations. I further find there is no merit to appellant’s argument that because of its language and presumed grantor intent, the 1988 deed had the legal effect of vacating the boundaries of the eight lots of record verified by the county’s decision.

**IV. DECISION:**

Based on the foregoing Findings of Fact and Conclusions of Law, the Hearings Officer hereby **AFFIRMS** the administrative decision on appeal.

Dated this 12<sup>th</sup> day of November, 2015.      Mailed this 12<sup>th</sup> day of November, 2015.



Karen H. Green, Hearings Officer

**THIS DECISION BECOMES FINAL TWELVE DAYS AFTER MAILING UNLESS TIMELY APPEALED BY A PARTY.**

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<sup>11</sup> The Hearings Officer finds I need not decide in this case whether that portion of Paragraph (A)(3) of the lot-of-record definition in Section 18.04.030 relating to specific deed language violates ORS 92.017.



## EXHIBIT B

### Response to Specific LandWatch Grounds for Appeal

#### Appeal Issue One<sup>1</sup>

LandWatch: *New evidence is irrelevant because a 2005 lot of record decision filed by Barbara Tyler “was a legal determination that the State’s conveyance of all the land in a single deed in 1988 meant that \*\*\*separate historic parcels no longer existed.”*

**Response:** The County’s 2005 Tyler lot of record decision decided that the 1988 deed did not create a legal lot of record because partition approval was required but was not obtained. The decision was limited in scope and was reflective of the law at the time which provided that deeds were not a lawful means of creating lots and that County approval was required in order to consolidate existing parcels. Neither the County decision nor the 1988 deed eliminated existing, lawfully created parcel lines.

DCC 22.28.040(B) specifically allows TID to reapply for a lot of record determination if it presents evidence not submitted with the 2005 lot of record application. The deed and patent records filed by Tumalo Irrigation District are new evidence. The deeds and patents are relevant because DCC 18.04.030 “Lot of Record” says that parcels created by deed may qualify as legal lots of record.

#### Appeal Issue Two

LandWatch: *The hearings officer was wrong in finding that wildlife protections imposed as deed restrictions in the 1988 deed from the State of Oregon to Tumalo Irrigation District are irrelevant to the lot of record determination because a lot of record verification is a prerequisite to development.*

**Response:** The hearings officer was correct. Deed restrictions are not land use laws. They are a contract between the State of Oregon and TID. They cannot be used to decide County land use cases. ORS 197.015(10); ORS 197.175(2)(d) (County to make land use decisions based on acknowledged comprehensive plan and land use regulations); ORS 197.763(5)(b) (arguments must be directed toward criteria in plan or land use regulations).

#### Appeal Issue Three

LandWatch: *ORS 92.017 does not apply to parcels created by deed because the parcels are not a unit of land created by partitioning [as defined by ORS 92.010(9)].*

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<sup>1</sup> Each appeal issue is identified by the paragraph number assigned to it by LandWatch’s November 23, 2015 appeal document. The italicized text that follows the word “LandWatch” is a short summary of the appeal issue. It is not a finding of the Board nor is it a precise statement of the LandWatch arguments which is set out in full in the appeal document. The findings that begin after the word “Response” are the Board’s findings that respond to each appeal issue.

**Response:** The controlling issue is whether parcels created by deeds meet the County’s definition of a “lot of record”? DCC 18.04.030(A)(3) provides “a lot or parcel \* \* created by any of the following means \*\* by deed or contract \*\*\*.” If a parcel is a unit of land created by partition plat only, it would never be possible for a parcel created by deed to become a legal lot of record – something clearly not intended by the code.

LandWatch’s argument that parcels created by deed are not protected by ORS 92.017 has been rejected by LUBA in numerous cases, including *Joseph v. Baker County*, 33 Or LUBA 38 (1997), *Tarjoto v. Lane County*, 34 Or LUBA 124 (1998), *Smith v. Jackson County*, 37 Or LUBA 779 (2000), *Masson v. Multnomah County*, 48 Or LUBA 100 (2004); and *Porter v. Marion County*, 56 Or LUBA 635(2008). No legal case supports LandWatch’s argument. LandWatch’s claim that *Just v. Lane County*, 50 Or LUBA 399 (2005) directly contradicts the hearings officer’s finding that ORS 92.017 applies to parcels created by deed is misplaced. The *Just* case involves the interpretation of the term “ownerships” and does not involve an interpretation of ORS 92.017.<sup>2</sup>

LandWatch’s claim that parcels created by deed have not been created by “partitioning land” as the term is defined by ORS 92.010(9) is wrong. State law, ORS 92.010(9), defines “partitioning land” as “dividing land to create not more than three parcels of land within a calendar year” by any means; not only by a County-approved partition plat.<sup>3</sup> The term was amended in 1985 so that “partition land” includes units of land created by deeds. In 1985, the Oregon Legislature amended the terms “parcel,” “partition” and “partition land” by removing language that limited the terms to ORS Chapter 92 land divisions. This change broadened the definitions to apply to units of land created by deeds and historic subdivisions.

Al Young, the Chair of the House Committee on Housing and Urban Development that crafted ORS 92.017, testified to the Senate Committee on Energy and Natural Resources regarding House Bill 2381 on June 10, 1985, that the definitions of “lots” and “parcels” were changed to include units of land created before 1973. Mr. Young testified as follows:

*“As I said, the second element of the bill deals with units of land that were legally created prior to the existence of subdivision and partition statutes. When these statutes were enacted in 1973, they did not address units of land that were created before that date. Neither has legislation since 1973. Current statutes recognize*

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<sup>2</sup> LandWatch cites text in Footnote 3 of the *Just* case that cites the definitions of the terms “lot” and “parcel” from ORS 92.010. It also says that ORS 215.010(1) adopts the definitions of ORS 92.010 except that it adds units of land created by deed or land sale contract before land use regulations applied. LandWatch has argued that this “addition” means that the term “parcel” used in ORS 92.010 does not include parcels created by deed – a conclusion that is inconsistent with prior LUBA decisions that apply the protections of ORS 92.017 to parcels created by deeds. The legislative history of House Bill 2381 shows that the ORS 92.010 definition of “parcel” was broadened in 1985 to include lots created by pre-1973 subdivisions and by deed to lots created by 1973 and later land divisions. The definition of “parcel” applied in farm zones only was narrowed by ORS 215.010(1) by the addition of a requirement that all parcels in farm zones be lawfully created. **Note:** ORS Chapter 215 has been amended since 1985 to apply to forest zones as well.

<sup>3</sup> Certain acts, such as a lien foreclosure, are excluded from this definition.

*units of land in two types: “Lots” and “Parcels,” both of which rely for definition on local subdivision and partition processes adopted in accordance with statutes first enacted in 1973.*

*HB 2381 replaces references [in the definitions of “Lot” and “Parcel”] to specific statutes with language that, essentially, says that if a lot or parcel was created in a lawful manner – meaning according to laws in existence at the time it was created – it is still recognized as a legitimate lot or parcel [by ORS 92.017/HB 2381], and does not need to be reevaluated under current law to be recognized as such.”*

Furthermore, LandWatch’s interpretation of ORS 92.017 cannot be correct because it would render the State’s subdivision control law unenforceable. The subdivision law and ORS 92.017 use the same definitions of “lot” and “parcel.” ORS 92.025(2) prohibits the sale of a “parcel in a partition” until a partition plat has been filed. If a “parcel in a partition” only means parcels created by a County-approved partition plat, rather than a partition that occurs due to the recording of deeds, it would not be illegal to divide land without County approval.

#### **Appeal Issue Four**

*LandWatch: The hearings officer incorrectly interpreted LUBA’s decision in the Kishpaugh and Thomas cases as holding that ORS 92.017 applies to lots created by deed. Parcels are created by private deed transactions that the County can’t regulate. Lot lines “fall way” based on private transactions.*

**Response:** The hearings officer’s interpretation of the *Kishpaugh* and *Thomas* cases is correct. It is also consistent with the holdings or discussion of ORS 92.017 and parcels created by deeds contained in numerous other LUBA cases including *Joseph v. Baker County*, 33 Or LUBA 38 (1997), *Tarjoto v. Lane County*, 34 Or LUBA 124 (1998), *Smith v. Jackson County*, 37 Or LUBA 779 (2000); *Masson v. Multnomah County*, 48 Or LUBA 100 (2004); *Porter v. Marion County*, 56 Or LUBA 635(2008).<sup>4</sup>

The County is clearly authorized and required by State law to regulate the creation of lots and parcels and was so authorized in 1988. State law requires the County to regulate the creation of lots and parcels by County land division regulations. ORS 92.044. State law also grants counties the authority to review and approve lot consolidations. ORS 92.010(9),(12).

Lawfully created parcel lines created by deeds do not “fall away.” ORS 92.017 says that they remain in place until governmental action occurs to eliminate the lines. LUBA agrees. *Smith v. Jackson County*, 37 Or LUBA 779(2000) (conveyance of three parcels in one deed in 1993 did not vacate the property lines between the historic parcels). LandWatch has cited no law that supports its claim that the 1988 deed effected a consolidation of existing lots as a matter of real estate law and no such legal authority for the proposition has been found by a search of real estate case law in Oregon.

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<sup>4</sup> These cases are discussed in TID’s Final Argument filed with the hearings officer.

ORS 92.017 appropriately guided the Hearings Officer in determining the legal effect of deeds in creating lots and parcels. Lot creation is a state-wide issue governed by ORS Chapter 92. While ORS 92.017 does not prevent the County from imposing requirements that substandard lots or parcels be developed together or comply with County zoning rules, it prevents the County from eliminating lawfully created lot lines. Furthermore, to the extent that the County may not be required to apply ORS 92.017, the County retains the right to interpret its own code in a manner that is consistent with the rules of ORS 92.017 as long as the interpretation is plausible. LandWatch has not claimed or shown that the County's interpretation is not plausible.

### **Appeal Issue 5**

LandWatch: *The holding of LUBA's Weyerhaeuser case was not applied by the hearings officer. If applied, it would prevent the County from finding that more than one lot exists within the "parcel" that LandWatch believes was created by the 1988 deed.*

**Response:** The *Weyerhaeuser* case is not "on point." It determined the legal effect of a partition plat on subdivision lots; not the legal effect of recording a deed on parcels created by deed. The boundaries of the *Weyerhaeuser* lots were eliminated by a lawful partition approved before ORS 92.017 was adopted. In the TID case, the act alleged to have eliminated is a 1988 conveyance by deed; not a partition. ORS 92.017 was in effect in 1988 so it is unlikely that the parties to the deed would have expected the existing lot lines between the existing parcels to be eliminated by the deed.

Furthermore, the Oregon Court of Appeals considered the *Weyerhaeuser* case on appeal and did not follow LUBA's reasoning that lots cannot exist inside a parcel. Instead, the Court of Appeals found that a partition plat eliminates lot lines of lots within the boundary of a new partition parcel based on the text of the State's 1981 subdivision and partition law that allows the platting of multiple parcels into new parcels.<sup>5</sup> The Court makes it very clear that its decision is based on this law as written in 1981. That law does not apply to deeds recorded in 1988.

Finally, LandWatch has not established that the County must interpret its lot of record definition to eliminate the lot lines of parcels conveyed together on a single deed, including lots and parcels that comply with minimum lot size requirements, simply because the deed uses a single legal description to convey multiple parcels. LUBA's decision of the Thomas case requires that the County must identify some legal basis for treating this type of legal description differently than any other "so that future development rights do not hinge on apparently arbitrary differences in the wording or form of deed." *See*, page 14, Decision of Hearings Officer Green quoting

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<sup>5</sup> The Court of Appeals explained: "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." *Weyerhaeuser*, 246 Or App 548, 558, 267 P3d 855 (2011).

*Thomas*. No such legal basis was identified and accordingly, the County interprets its lot of record code provision(s) to recognize lawfully created lot lines.

The case of *ONDA v. Harney County*, 65 Or LUBA 246 (2012) does not, as claimed by LandWatch, recognize that the execution and recordation of a deed, alone, eliminates property lines. Instead, it holds that a document of some sort, such as a deed or survey, is required to effectuate a property line adjustment or another formal process that has the legal effect of vacating property lines and that consolidation will not be found to occur – even where consolidation was required by a prior approval granted by the County (a lot of record dwelling approval).

### **Appeal Issue 6**

LandWatch: *The hearings officer failed to recognize that a deed may eliminate parcel boundaries and that a lot line adjustment is not necessary to do so.*

**Response:** In 1988, eight existing parcels and parts of four existing parcels were conveyed by the State of Oregon to TID. These parcels are shown on Figure 3 (Lots F, G, K, L, M, N, O, P, Q, R, S, and T) of the administrative decision. All twelve parcels met the County’s definition of a lot of record. LandWatch claims that state real property law prevents Deschutes County from finding that any of these parcels are lots of record because their property boundaries were eliminated by the 1988 deed. LandWatch is incorrect.

Nothing in state law requires the County to interpret its lot of record law to vacate property lines between lots and parcels or between lots of record. The County’s interpretation of its code is that the act of conveying legal lots together in a single deed, alone, does not eliminate lots of record.

In 1988, a deed was not a lawful means of creating lots and it did not consolidate lots. *Smith v. Jackson County*, 37 Or LUBA 779 (2000) (conveying three parcels in one deed in 1993 did not vacate the property lines between the parcels; a vacation of lot lines must occur through a “specific process”). ORS 92.017 was in effect in 1988 and allows that the parcel lines of the parcels conveyed on the 1988 deed would remain discrete parcels unless vacated or divided as provided by law. The 1988 deed was not a means of vacation or land division “provided by law.” See, *South v. City of Portland*, 48 Or LUBA 555 (2005) (boundaries of lots conveyed on a single deed did not eliminate lot lines; City could not eliminate lot lines by approval of a lot line adjustment).

### **Appeal Issue 7**

LandWatch: *The County must find, as a matter of law, that a deed that conveys land by a metes and bounds legal description conveys one parcel and eliminates all existing, lawfully created lot lines.*

**Response:** No provision of law supports this claim. Furthermore, such a finding would violate ORS 92.017 which says that existing lot lines remain until vacated by a means prescribed by law such as a replat or lot consolidation.