Department of Community Services
Land Use Planning Division
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DECISION OF HEARINGS OFFICER

This document is a final decision on appeal of the Planning Director's Decision in the land use case(s) cited and described below.

Case File: T2-2018-10124

Permit: Planning Director Interpretation

Location: Tax Lots 300, 302, 600, and 700 of Multnomah County Assessor's Map Township 2 North, Range 1 West, Section 33A; Tax Account #R97133015: Prop. ID #R325446 (the "site").[1]

Applicant: James Howsley, Jordan Ramis PC for Andrew Lightcap

Owners of the Properties Involved: Andrew Lightcap, David & Shawn Looney, Arthur & Patricia Wagner

Base Zone: Commercial Forest Use – 2 (CFU-2)

Summary: The applicant has requested an interpretation by the Planning Director that the June 21, 1993, Hearings Officer[2] Decision, Lot of Exception 14-92 and Land Division 49-92 (the "1993 Decision"), is void.

Decision: The hearings officer finds that the 1993 Decision is void.

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[1] Tax lot 15 is now designated tax lot 600, and tax lot 33 is now designated tax lot 300.

[2] For the sake of clarity, the phrase "the Hearings Officer" is intended to refer to the author of the June 1, 1993 decision in LE 14-92 and LD 49-92. The phrase "the hearings officer" is intended to refer to the author of this 2018 decision in T2-2018-1012.

A. SUMMARY

1. Attorney James Howsley filed an application on behalf of Andrew Lightcap (the "appellant")[3], for an interpretation by the Planning Director that the June 21, 1993 land use decision, Lot of Exception 14-92 and Land Division 49-92, is void.

2. The June 21, 1993, Hearings Officer[4] Decision on files LE 14-92 and LD 49-92 (the "1993 Decision") addressed an application that would create two Lots of Exception, which also required approval of a Type I land division (Exhibit B.11, p. 1). The applications involved four different Tax Lots (13, 15, 17, and 62) and three different land owners (the Wagners, Lightcap, and the Looneys) (Exhibit B.11, pp. 1, 6):

Property Interests in LE 14-92 and LD 49-92		
Property Owner	**Tax Lot Number**	**Acres**
Wagners	Tax Lot 13	9.97
Looneys	Tax Lot 17	0.99
	Tax Lot 62	0.32
Looneys/Lightcap	Tax Lot 15*	34.07

*The Decision also references Tax Lot 33, which, as described below, was created after 2.5 acres of Tax Lot 15 was purportedly sold to the Looneys in 1985. (Exhibit B.11, p. 8).

The applications were brought to correct a failed land division of a parcel[5] (Tax Lot 15) zoned Multiple Use Forestry – 19 (MUF-19), as well as to adjust the property lines between the affected parcels (Exhibit B.11, pp. 1, 6-8).

a. *Failed Land Division*

i. On November 5, 1985, Fred Bernet, the then-owner of Tax Lot 15, purported to sell 2.5 acres of that property to the Looneys (creating Tax Lot 33), along with the sale of a 1.31 acre parcel (Tax Lots 17 and 62) (Exhibit B.11, p. 8; Exhibit A.3, pp. 27-30). On March 30, 1989, Fred Bernet purported to sell Brian and Christine Lightcap the 31.57-acre remainder of Tax Lot 15 (Exhibit B.11, p. 8; Exhibit A.3, pp. 31-33). Bernet made the sales purporting to divide Tax Lot 15 without County approval of a land division, which was required at the time of the sale and purported division. The zoning at the time was MUF-19. Multnomah County Planning determined that the

[3] Mr. Lightcap filed the application and appealed the Planning Director's decision. However, Mr. Lightcap is only one of three property owners affected by the requested interpretation. Therefore, the hearings officer uses the term "appellant" to distinguish Mr. Lightcap from the other property owners.

[4] For the sake of clarity, the phrase "the Hearings Officer" is intended to refer to the author of the June 1, 1993 decision in LE 14-92 and LD 49-92. The phrase "the hearings officer" is intended to refer to the author of this 2018 decision in T2-2018-1012.

[5] The hearings officer uses the term "parcel" to refer to the units of land at issue, as the Hearings Officer did in the 1993 decision and the parties have throughout the record, although some of the units of land at issue may not constitute "parcels" as defined by ORS 92.010 or ORS 215.010(1).

Lightcap parcel had issues too, because it was created from an unlawful land division. Additional information can be found in the 1993 Decision (Exhibit B.11).

ii. In 1989, for the purpose of legalizing the sales to the Looneys and the Lightcaps, Mr. Bernet submitted an application for a Land Division and Lot of Exception. That application was approved, but, due to a failure to submit a final partition map, that approval expired and the Land Division and Lot of Exception were not perfected. (Exhibit B.11, p. 9).

b. *1992 Application*

i. In 1992, Mr. Looney submitted an application request for a Lot of Exception (Case LE 14-92) and a Land Division (Case LD 49-92) for the purpose of legalizing the sales from Mr. Bernet to the Looneys and Mr. Lightcap. In addition, the application proposed to add 0.05 acres from the Wagner parcel to the proposed Looney parcel and an additional 0.05 acres from the Lightcap parcel to the proposed Looney parcel.

ii. As the Hearings Officer explained, the 1992 application was necessary because "[t]here was no prior approval of a land division, so whatever Bernet sold to the Looneys (and Lightcaps) it was not the ownership of separate parcels." (Exhibit B.11, p. 8). The Hearings Officer went on to suggest that "the Looneys and Lightcaps may own an unequal, but undivided, interest in the original, 34.07 acre parcel, former Tax Lot 15." (Exhibit B.11, p. 8, fn 6).

iii. The Hearings Officer summarized the 1992 applications as follows:

> *"Applicants request approval of a 9.92-acre Lot of Exception through a property line adjustment to transfer .05 acre from a 9.97-acre Lot of Record [Wagner] to an adjoining 35.39-acre Lot of Record [Lightcap/Looney]. From the resulting 35.44-acre tract [Lightcap/Looney], applicants request approval of a 3.92-acre Lot of Exception [Looney]. Due to the request for the 3.92-acre Lot of Exception, applicants also seeks approval of a Type I land division."*

(Exhibit B.11, p. 1).

c. *The Decision (June 21, 1993)*

i. However, the 1993 Decision varied from the summary on page 1 of the Decision. The summary describes the Wagner/Looney boundary line adjustment as a Lot of Exception and the division of the Lightcap/Looney ownership as a Lot of

Exception and a Type I land division (Exhibit B.11, p. 1). However, the decision approved the division of the Lightcap/Looney ownership under the Lot of Exception file number, LE 14-92 (Section I.E.2, p. 7; Section II, p. 10; and Section II.C, p. 35 of the Hearings Officer's decision). The decision approved the Wagner/Looney boundary line adjustment under the Land Division file number, LD 49-92 (Section I.E.3, p. 9; Section IV, p. 36; and Section IV.C, p. 37 of the Hearings Officer's decision).

ii. The Hearings Officer approved, as LE 14-92, the proposed Looney Lot of Exception, legalizing Tax Lot 33, as well as the addition of 0.05 acres from the Lightcaps parcel, subject to the following conditions:

> **2. Conditions Of Approval**
>
> **(a) Boundary Between The Looney and Lightcap Parcels.**
>
> The boundary between the Looney and Lightcap parcels shall be drawn along the line shown for the proposed property line adjustment in LD 49-92, obviating the need to create another 0.05 acre parcel along the boundary of the properties.
>
> **(b) Consolidation of Looney Parcels.**
>
> The purposes of both the MUF and CFU Districts are furthered by the consolidation of parcels and frustrated by the creation of new parcels, which inevitably create the perception of entitlement to a residence. In order to further those objectives, the lot of exception is approved subject to the condition that the Looney's [sic] apply for and receive approval for a lot line adjustment under MCC 11.15.2061 to consolidate Tax Lots 62 (in Section 28) 17, 33 (and the 0.05 acre parcel split off from the Wagner parcel) no later than the end of this calendar year [December 31, 1993] or the date at which they receive approval for a replacement dwelling, whichever comes first. Failure to consolidate the parcels by the deadline will render this approval void."

> **(c) Standards For Review Of a Replacement Dwelling**
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> (1) Rather than being entitled to a replacement dwelling "outright" (*i.e.*, subject only to MCC 11.15.2048 (E)) the Looneys or their successors shall be required to apply for any dwelling to replace the dwelling on the property at the time of this decision; and
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> (2) The application shall be accompanied by proof of the recording of a statement acknowledging the right to undertake forest operations on nearby lands, of the type specified in MCCC 11.15.2074; and
>
> (3) The applicants demonstrate that the replacement dwelling proposed for the lot of exception satisfies the compatibility and fire safety standards in MCC 11.15.2074; and
>
> (4) The applicants demonstrate that the replacement dwelling proposed for the lot of exception satisfies Comprehensive Plan sub-policies 14A., B., D., E., F.
>
> (Section II.C.2(b) of Exhibit B.11, pp. 35-36. Bold and underline in original).

iii. The Hearings Officer then approved, as LD 49-92, the transfer of 0.05 acres of land from the 9.97 acre Wagner parcel to the Looney parcel. The Lot of Exception process was the County's methodology for approving a "property line adjustment" because the zoning code did not include a provision for property line adjustments at that time (Exhibit B.10 & B.11). Therefore, the Hearings Officer approved the adjustment of the Wagner parcel, which was below the minimum lot size of 19 acres, as an exception. The Wagner Lot of Exception approval, LD 49-92, contained the following condition:

> **2. Condition**
>
> The lot of exception/property line adjustment between the Wagner and Looney parcels is approved subject to the condition

> that the Looney's [sic] receive approval for a lot line adjustment under MCC 11.15.2061, to consolidate Tax Lots 62 (in Section 28) 17, 33 (and the 0.05 acre parcel split off from the Wagner parcel) no later than the end of this calendar year [December 31, 1993] or the date at which they receive approval for a replacement dwelling, whichever comes first. Failure to consolidate the parcels by the deadline will render this approval void."

(Section IV.C.2 of Exhibit B.11, p. 38. Bold and underline in original).[6]

d. *The Lot Line Adjustment*

i. On November 5, 1993, the County approved as a "Lot Line Adjustment" documents titled, "Parcel 1 PROPERTY LINE ADJUSTMENT LOONEY PROPERTY" (Exhibit B.13), "Parcel 2 PROPERTY LINE ADJUSTMENT WAGNER PROPERTY" (Exhibit B.14), and "Parcel 3 PROPERTY LINE ADJUSTMENT LIGHTCAP PROPERTY" (Exhibit B.15). Exhibit B.13 describes the "Looney Property" as:

> A tract of land situated in the northeast ¼ of Section 33, Township 2 North, Range 1 West of the Willamette Meridian, Multnomah County, Oregon, said tract being Tax Lot 33, described in deed to David Looney, recorded October 30, 1989 in Book 1862, Page 2232, TOGETHER WITH the following described Tracts "A" and "B" [legal description of the units of land transferred from the Wagner and Lighthouse properties to the Looney property).

ii. The approved Lot Line Adjustment and legal description for the Looney Property (Exhibit B.13) was not recorded (Exhibit A.4).

e. *The Replacement Dwelling:* On January 13, 1997, the County approved a replacement dwelling for the Looney property through SEC 26-96/PRE 16-96 (a Significant Environmental Concern and Use Under Prescribed Conditions consolidated application) (Exhibit H.3).

3. On July 26, 2018, the Planning Director issued written decisions determining that the 1993 Decision is not void (Exhibit D.3).

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[6] There is no "Section III" in the 1993 Final Order (Exhibit B.11).

4. On August 8, 2018, the appellant filed a written appeal of the director's decision (Exhibit E.1).

5. County Hearings Officer Joe Turner (the "hearings officer") conducted a duly noticed public hearing to receive testimony and evidence regarding the appeal. Representatives of the appellant, the Looneys, and County staff testified orally regarding the appeal. Contested issues in this case include:

a. Whether the legal description in Exhibit B.13 included all of the parcels owned by the Looneys;

b. Whether the legal description in Exhibit B.13 was intended to consolidate all of the parcels owned by the Looneys;

c. Whether the intent of the surveyor who prepared the legal description in Exhibit B.13 is relevant to the interpretation of the legal description;

d. Whether the 1985 deed from Fred Bernet to the Looneys consolidated the parcels described - tax lots 17, 62 and 33;

e. Whether County approval of the Lot Line Adjustment (Exhibit B.13) fulfilled the condition set out in Section II.C.2(b) of the 1993 Decision;

f. Whether the Looneys actually consolidated tax lots 17, 62 and 33 and the 0.05-acre parcel from the Wagners prior to the December 31, 1993 deadline set out in the 1993 Decision; and

g. Whether the hearings officer has jurisdiction to consider the Looneys' estoppel claims.

6. Based on the findings provided or incorporated herein, the hearings officer finds that the 1993 Decision is void, because the Looneys failed to consolidate tax lots 33, 17, and 62 prior to December 31, 1993. Therefore, the hearings officer grants the appeal, reverses the Planning Director's decision, and finds that the 1993 Decision is Void. The Looney and Lightcap ownerships are returned to the status they were in before the 1993 Decision; each party appears to own an unequal, but undivided, interest in the original, 34.07 acre parcel, current tax lots 15 and 33.

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B. HEARING AND RECORD HIGHLIGHTS

1. The hearings officer received testimony at the duly noticed public hearing about this appeal on August 21, 2018.[7] All exhibits and records of testimony have been filed with the Multnomah County Department of Community Services, Land Use Planning Division. The hearings officer opened the hearing by making the statements required by ORS 197.763. The hearings officer disclaimed any *ex parte* contacts, bias or conflicts of interest. The following is a summary by the hearings officer of selected relevant testimony.

2. County Planning Director Michael Cerbone identified the applicable approval standards and summarized his written testimony (Exhibit H.6).

a. He argued that tax lots 33, 17, and 62 were consolidated into a single parcel by the 1985 deed from Fred Bernet to David and Shawn Looney (Exhibit H-4). The phrase "also including" used in the legal description in the deed demonstrates an intent to consolidate the three properties described and convey them as a single unit of land. If the legal description of each tax lot had included a heading labeled "Parcel," then the deed would be read to maintain three separate parcels.

b. The 1993 decision recognized that prior consolidation and only required County approval of the lot line adjustment to consolidate Tracts A and B (portions of the Wagner property) with the previously combined tax lots 33, 17, and 62. The County approved the lot line adjustments on November 5, 1993 (Exhibit B.13), thereby fulfilling the condition of approval in the 1993 Decision.

c. The County did not adopt standards for lot consolidation until 2002. When a person desired to consolidate properties in a single ownership prior to that date, County staff directed them to consolidate the parcels on a deed.

d. The tax lot map identifies taxing districts, not lots of record.

3. Attorney Jamie Howsley, planner Joseph Schaefer, and property owner Andrew Lightcap testified in support of the appeal.

a. Mr. Howsley summarized his written testimony (Exhibit H.8).

i. He argued that there is no substantial evidence that tax lots 33, 17, and 62 were consolidated. The legal description in Exhibit B.13 only describes tax lot 33 and Tracts A and B. It makes no mention of tax lots 17, and 62, which lie on the opposite side of tax lot 33 from Tracts A and B. There is no single legal description that consolidates tax lots 33, 17, and 62 and Tracts A and B into a single parcel. Therefore, the condition of approval of the 1993 Decision was not fulfilled and the decision, by its terms, is void and without effect. This is confirmed by the June 10, 2013, email from

[7] The hearing was originally scheduled for August 16, 2018. However, the parties agreed to reschedule the hearing to August 21, 2018, because the Hearings Officer who was originally scheduled to hear the appeal noted a potential conflict of interest (Exhibit H.1).

County planner George Plummer (attached to Exhibit H.8), which states that the 1993 approvals were allowed to expire and the property at issue, "[i]s still in the state it was when it was created."

ii. This interpretation is consistent with LUBA's decision in *Grimstad v. Deschutes Co.*, 74 Or LUBA 360 (2016), *aff'd without opinion*, 283 Or.App. 648 (2017), holding that a property line adjustment decision requiring consolidation of parcels had no legal effect where deeds consolidating the parcels were never recorded.

iii. He requested the hearings officer hold the record open to allow additional evidence and argument. He agreed to extend the 150 day clock until October 24, 2018.

b. Mr. Schaefer submitted historic tax lot maps and explained the location of the tax lots at issue. (Attached to Exhibit H.7)

c. Mr. Lightcap summarized his meetings with County planners George Plummer and Adam Barber regarding his application for a dwelling on his property, tax lot 15. Mr. Plummer and Mr. Barber both agreed that the 1993 Decision was void and without effect.

4. Attorney Carrie Richter and property owner David Looney testified in opposition to the appeal.

a. Ms. Richter argued that the Looneys fulfilled the condition of approval of the 1993 Decision. The condition requires the Looneys to receive County approval of a lot line adjustment to consolidate tax lots 62, 17, 33, and Tracts A and B. The Looneys did so through the lot line adjustment approved on November 5, 1993 (Exhibit B.13). Therefore, the condition was fulfilled prior to December 31, 1993, the deadline set out in the condition. The appellant is attempting to add the current definition of the term "consolidate" into the text of the condition. However, that interpretation is not supported by the text or context of the condition, citing pps. 17, 23, and 25 of the 1993 Decision (Exhibit B.11). The pothook arrows on the tax lot maps show that the properties were consolidated. The tax lot numbers are not evidence of separate lots.

i. The County approved a replacement dwelling on the Looney property in 1997. The decision approving the replacement dwelling concluded that the Looney property was a separate legal lot of record. The appellant received notice of that decision and did not object to the County's determination.

b. Mr. Looney summarized the history of his property. He understood that he complied with the condition of approval of the 1993 Decision, based on his conversations with the County in 1993 and the County's approval of a building permit for his home in 1997. He relied on the County's determinations.

5. At the end of the public hearing, the hearings officer ordered the record held open for two weeks (until September 4, 2018) to allow all parties an opportunity to submit new argument and evidence. The hearings officer held the record held open for a second two weeks (until September 18, 2018) to allow all parties an opportunity to respond to the evidence submitted during the first open record period, and for a final two weeks (until October 2, 2018) to allow the appellant/applicant an opportunity to submit a final written argument, without any new evidence. The record in this case closed at 4:00 p.m. October 2, 2018.

C. DISCUSSION

1. MCC § 37.0330.B authorizes the hearings officer to hear appeals of Planning Director decisions. Pursuant to ORS 215.416(11)(a), appeals of administrative decisions must be reviewed as a *de novo* matter. The hearings officer is required to conduct an independent review of the record. He is not bound by the prior decision of the Planning Director and does not defer to that decision in any way. New evidence may be introduced in an appeal, and new issues may be raised. The hearings officer must decide whether the appellant carried the burden of proof that the application complies with all applicable approval criteria in light of all relevant substantial evidence in the whole record, including any new evidence submitted during the appeal process.

a. MCC 37.0640(A)(6) provides, "Appeal hearings shall be *de novo*, as if new, and all issues relevant to the applicable approval criteria may be considered. However, written Planning Director interpretations, pursuant to MCC 37.0740, are to be given deference pursuant to MCC 37.0740(A)." MCC 37. 0740(A) provides, "The Planning Director has the authority to decide all questions of interpretation or applicability to specific properties of any provision of the comprehensive framework plan, rural area plan, or other land use code."

b. This application involves the interpretation of a condition of approval imposed in the Hearings Officer's 1993 decision. It does not involve, "[a]ny provision of the comprehensive framework plan, rural area plan, or other land use code." Therefore, MCC 37.0740(A) does not require or allow the hearings officer to give deference to the Planning Director's interpretation. This is consistent with LUBA's holding in *Kuhn v. Deschutes Co*, 74 Or LUBA 190, LUBA No. 2016-048 at p. 7 (2016) (LUBA owes no deference to the board of county commissioners' interpretation of a condition imposed by a county hearings officer and such a condition does not qualify as a "comprehensive plan" or "land use regulation"). Therefore, the hearings officer gives no deference to the Planning Director's decision.

2. The Hearings Officer concluded that, with approval of LE 14-92/LD 49-92, the Looneys would own at least three separate parcels: tax lot 33, tax lots 17 and 62, and the 0.05-acre parcel partitioned off of the Wagner parcel.[8, 9]

3. The Hearings Officer determined that all of the Looney parcels must be consolidated into a single parcel in order to ensure compliance with the zoning regulations in effect at that time, which required the land division; "substantially maintain or support the character and stability of the overall land use pattern of the area," "[h]elp to conserve forest land and maintain parcels in the larger sizes which are can [sic] be more efficiently managed for timber production… help discourage additional parcelization and residential development, changes in the land use pattern which interfere with timber production," and further the purposes of the MUF and CFU Districts (pp. 10, 17, 25, and 35 of Exhibit B.10). Therefore, the Hearings Officer adopted the condition set out in section II.C.2(b) of the 1993 Decision, which provides, in relevant part:

> [t]hat the Looney's [sic] apply for and receive approval for a lot line adjustment under MCC 11.15.2061 to consolidate Tax Lots 62 (in Section 28) 17, 33 (and the 0.05 acre parcel split off from the Wagner parcel) no later than the end of this calendar year [December 31, 1993] or the date at which they receive approval for a replacement dwelling, whichever comes first. Failure to consolidate the parcels by the deadline will render this approval void."

(p 35 of Ex B.11).

a. The hearings officer rejects the appellant's argument that the County misquoted the language of the condition of approval in the 1993 decision, by deleting a comma. The Hearings Officer approved LE 14-92 subject to three conditions of approval, conditions (a) through (c) (Section II.C.2, pp. 35 and 36 of Exhibit B.11). The Hearings Officer approved LD 49-92 subject to a single condition of approval (Section IV.C.2, p. 38 of Exhibit B.11). As noted in Section A.2.c of this Final Order, the language of the condition at Section II.C.2(b), which applies to LE 14-92, is similar to, but slightly different than the language of the condition at Section IV.C.2, which applies to LD 49-92. The condition at Section IV.C.2, which applies to LD 49-92, includes a comma after the citation to MCC 11.15.2061. However, the condition at Section II.C.2(b), which is at issue in this proceeding, does not include a comma after the citation to MCC 11.15.2061.

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[8] The Hearings Officer concluded that tax lots 17 and 62 constitute a separate parcel, distinct from tax lots 15 and 33. (p. 8 of Exhibit B.11). However, the decision does not address whether tax lots 17 and 62 constitute one or two parcels. The Hearings Officer noted that, "[t]he owners believe [tax lots 17 and 62] represent a single, albeit discontiguous parcel," (p. 7 of Exhibit B.11). However, the decision does not address that issue any further and does not make any determination as to whether tax lots 17 and 62 consist of one or two parcels.

[9] The Hearings Officer concluded that the 0.05-acre boundary line adjustment parcel was a separate parcel. The decision refers to, "[t]he new 0.05-acre parcel created to adjust the boundary between the Wagner and Looney parcels…" (p. 37 of Exhibit B11).

4. The hearings officer finds that the Looneys complied with the first portion of the condition at Section II.C.2(b); they applied for and received County approval of a lot line adjustment under MCC 11.15.2061 to consolidate Tax Lots 62, 17, and 33, and the 0.05 acre parcel split off from the Wagner parcel. (Exhibit B.13).

a. The hearings officer finds that the legal description in Exhibit B.13 includes all of the Looney properties. The deed refers to, "[T]ax Lot 33, described in deed to David Looney, recorded October 30, 1989 [sic] in Book 1862, Page 2232. TOGETHER WITH the following described Tracts "A" and "B" combined: [metes and bounds description of Tracts A and B]."[10] The cited deed for "Tax Lot 33" recorded in Book 1862, Page 2232, provides a legal description for all of the remaining Looney property; tax lots 33, 17 and 62. (Exhibit H.4). Therefore, the reference to ""Tax Lot 33, described in deed to David Looney, recorded October 30, 1989 [sic] in Book 1862, Page 2232" includes the property described as tax lots 33, 17 and 62.

b. A deed can be used to aggregate multiple separate parcels into a single parcel in fulfillment of a condition of approval, when the totality of the circumstances surrounding the creation of the deed demonstrate such an intent. *McKeel v. Multnomah County,* LUBA No. 2007-186 at p. 9 (2008). The hearings officer finds that the legal description in Exhibit B.13 was intended to consolidate all of the Looney properties into a single lot of record: the legal description includes all of the Looneys' properties, described as "**A** tract of land…," singular; the legal description in Exhibit B.13 includes the word "combined" following the description of the relevant property; the map included with the legal description (Exhibit B.12) eliminates the boundary between tax lots 17 and 62 and includes a "pothook" connecting the combined tax lot17/62 and tax lot 33; and the legal description was submitted to and approved by the County. There was no reason to prepare this legal description and submit it to the County for approval except to fulfill the condition of approval in the 1993 Decision, which required such consolidation by the end of 1993. The Looneys' intent to consolidate the described properties could have been expressed more clearly, i.e., by explicitly including legal descriptions for all the parcels involved, providing a single metes and bounds description of the perimeter boundary of the combined parcels, and/or including the words "consolidate" or "consolidation" in the document. However, the hearings officer finds that the totality of the circumstances in this case supports a finding that the legal description in Exhibit B.13 was intended to consolidate all of the Looney properties into a single lot of record.

i. The appellant provided an affidavit from Erric Jones, the surveyor who's firm prepared the legal description in Exhibit B.13 and the survey in Exhibit B.12, stating that the legal description and survey were not intended to consolidate the Looneys' parcels. (Exhibit J.6). However, the surveyors intent is irrelevant. Deeds must be interpreted to give effect to the intent of the grantor.

[10] It appears, based on the evidence in the record, that the cited deed, in Book 1862, Page 2232, was signed on October 30, 1985, and actually recorded on November 5, 1985 (Exhibit H.4), not October 30, 1989, as stated in the legal description (Exhibit B.13).

Coussens v. Stevens, 200 Or. App. 165, 113 P.3d 952, 955 (2005). In this case, the Looneys are both the grantor and grantee of the properties described in Exhibit B.13.

ii. The use of a "pothook" connecting tax lots 33 and 17 on the survey is not conclusive evidence that these parcels were consolidated. A pothook can indicate properties in the same ownership or to indicate that adjoining properties are part of the same unit of land. (Exhibits J.6 and Attachment 4 of Exhibit I.2). However, the use of a pothook on the survey, in combination with other evidence, does support a finding that the Looneys intended the legal description to consolidate all of the parcels in their ownership as required by Section II.C.2(b) of the 1993 Decision.

c. The hearings officer rejects the County's argument that the 1985 deed from Fred Bernet to the Looneys was intended to consolidate the parcels described - tax lots 16, 72 and 33 - into a single parcel and the 1993 Decision merely completed that consolidation by approving the separation of tax lot 33 from tax lot 15. There is no substantial evidence to support that determination.

i. As noted in *McKeel*, multiple lots or parcels can be aggregated into a single parcel by a deed when the deed language adequately expresses that intent. However, not every deed results in consolidation. "Absent some expression of intent that separately listed lots or parcels are to be merged into a single unit of land, the listing of multiple lots or parcels in a single paragraph or sentence does not operate to merge those lots or parcels into a single unit of land." *Jackson v. City of Portland*, 54 Or LUBA 138, LUBA No. 2006-214 at p. 8 (2007).

ii. In this case, the 1985 deed (Exhibit H.4) provides separate metes and bounds legal descriptions for three units of land (tax lots 33, 17, and 62) linked by the words, "ALSO INCLUDING…" There is conflicting evidence in the record regarding the effect of such a description. James Clayton, the Multnomah County Surveyor, stated that in his experience, where a deed intends to describe separate units of land, the legal description for each unit includes a heading, such as, "Parcel 1, "Parcel 2," and "Parcel 3." Whereas, phrases such as "together with" or "also including" indicate an intent to describe a single unit of land. (Attachment 4 of Exhibit I.2). However, the appellant's expert, Alan Brickley, opined that the term, "also including" in a legal description does not have the effect of consolidating multiple parcels into one (Exhibit I.1).

iii. As LUBA noted, "[t]he interpretation of ambiguous deeds and the determination of grantor intent is a function within the particular competence and jurisdiction of the circuit court. It is a function that the county, in exercise of its land use decision-making authority, and LUBA, in exercise of its review authority, should avoid if at all possible." *Central Oregon Landwatch v. Deschutes Co*, LUBA No. 2016-056 at p. 11 (2017); *See also, Thomas v. Wasco County*, 58 Or LUBA 452, 456 (2009)(The grantor's intent in transferring property by deed can only be resolved by a judicial court). Given the conflicting evidence in the record, the hearings officer cannot find that the 1985 deed was intended to and did consolidate tax lots 17, 62 and 33 into a single parcel.

(A) LUBA also held in *Central Oregon Landwatch* that lots in Deschutes County may not be consolidated by deed; County approval is required to consolidate lots in Deschutes County. However, that holding was based on the Board of County Commissioners interpretation of the Deschutes County Code and is inapplicable in this case.

d. The County's interpretation, that Mr. Bernet's deed to the Looneys consolidated tax lots 33, 17, and 62, is also inconsistent with the Hearings Officer's findings and decision.

i. The Hearings Officer expressly states that, "describing the Looneys' ownership as a 3.81-acre parcel fails to recognize that Tax Lots 17 and 62 constitute a separate parcel." (p. 8 of Exhibit B.11, emphasis added).

ii. In discussing the division of the Lightcap/Looney ownership, the Hearings Officer required consolidation of, "[t]he Looney parcel**s**…," plural (p. 17 of Exhibit B.11, emphasis added). The additional 0.05-acre parcel divided from the Wagner parcel was not at issue in this portion of the decision. Therefore, if the 1985 deed from Mr. Bernet to the Looneys consolidated tax lots 33, 17, and 62 as argued by the County, the division of the Lightcap/Looney ownership would create a single "Looney parcel," combined tax lots 33, 17, and 62.

iii. In addition, the Hearings Officer approved LD 49-92, subject to a condition that the Looneys consolidate the 0.05-acre parcel divided off of the Wagner parcel with the remainder of the Looneys' ownership (Section IV.C.2 of the 1993 Decision). The Hearings Officer also approved LE 14-92, which divided the Looneys' and Lightcap' combined ownership into separate parcels, subject to a condition that the Looneys consolidate all of their parcels. (Section II.C.2(b) on p. 35 of Exhibit B.11). If the 1985 deed from Mr. Bernet to the Looneys consolidated tax lots 33, 17, and 62 as argued by the County, the condition in Section II.C.2(b) would be redundant; Section IV.C.2 of the 1993 Decision already required consolidation of the only remaining parcel within the Looneys' ownership.

5. However, the hearings officer finds that condition of approval (b) of LE 14-92 required consolidation of the lots, in addition to County approval of a lot line adjustment. The last sentence of the condition provides, "Failure to consolidate the parcels by the deadline will render this approval void" (Section II.C.2(b) on p. 35 of Exhibit B.11; underline omitted). The County and the Looneys argue that the condition only requires County approval of a lot line adjustment to consolidate the parcels; recording of deeds was not required. However, County approval of a property line adjustment, by itself, does not have the effect of consolidating any units of land; consolidation is only accomplished by the recording of deeds that reflect the vacated boundaries. *Grimstad v. Deschutes Co.*, 74 Or LUBA 360, LUBA No. 2016-035 at p. 18 (2016), *aff'd without opinion*, 283 Or.App. 648 (2017). The Hearings Officer clearly intended to require consolidation of the

Looney parcels into a single lot of record, finding that consolidation was required to comply with applicable approval criteria (see Section II.A.1(d), p. 17, II.A.4, p. 23, II.A.7, p. 25, and II.C.2(b), p. 35, of Exhibit B.11.[11] In addition, the plain language of the condition requires "consolidation;" the last line of condition (b) of LE 14-92 provides, "Failure to consolidate the parcels by the deadline will render this approval void."

a. The County argues that LUBA's holding in *Grimstad* was based on the interpretation of the Deschutes County Code and application forms, which required that deeds consolidating parcels through an approved property line adjustment be recorded in the same name for all parcels. However, the portion of LUBA's decision cited above was not based on any interpretation of the Deschutes County Code regarding the names on the deeds. LUBA clearly held that recording of a deed is required to vacate existing parcel boundaries, independent of the wording of the Deschutes County Code.

6. Unfortunately, the Looneys did not consolidate their parcels by December 31, 1993, the deadline set out in condition (b) of LE 14-92. As discussed above, the Looneys received County approval through the lot line adjustment process of a survey that was intended to consolidate parcels 33, 17, and 62, and the 0.05-acre parcel divided off of the Wagner parcel. However, they did not record the survey prior to December 31, 1993. Therefore, pursuant to the plain language of the Hearings Officer's decision, the June 21, 1993 approval is void. The ownerships remain as they were prior to the Hearings Officer's June 25, 1993 decision: the Looneys own TLs 17 and 62 and the 0.05-acre parcel separated from the Wagners' property via LD 49-92 and, it appears, the Looneys and Mr. Lightcap own an unequal, but undivided, interest in the original, 34.07 acre parcel, current tax lots 600 (formerly tax lot 15) and 300 (formerly tax lot 33).

7. The Looneys argued that the appellant should be estopped from arguing that the 1993 decision is void, because he failed to object in 1994, after the deadline imposed by the Hearings Officer expired, or in 1997, when the Looneys obtained approval of a replacement dwelling. While the hearings officer understands the Looneys' arguments, the hearings officer has no equitable jurisdiction to address those claims.

D. CONCLUSION

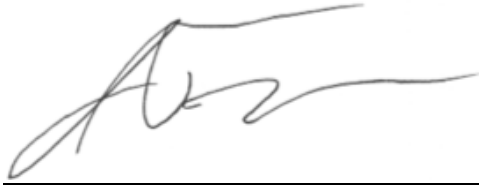
Based on the above findings the hearings officer concludes that the Hearings Officer's approval of LE 14-92 and LD 49-92 is void, because the Looneys failed to consolidate tax lots 33, 17, and 62 prior to December 31, 1993 as required by the 1993 Decision.

E. DECISION

[11] The hearings officer notes, there are two Sections II.A.1(d) in Exhibit B.11, on pp. 12 and 17. The hearings officer is referring to the second Section II.A.1(d), on p. 17 of Exhibit B.11.

Based on the findings, discussion, and conclusions provided or incorporated herein and the public record in this case, the hearings officer hereby grants the appeal, reverses the Planning Director's decision, and finds that the Hearings Officer's approval of LE 14-92 and LD 49-92 is void.

DATED this 18th day of October 2018.



Joe Turner, Esq., AICP
Multnomah County Land Use Hearings Officer

This Decision is final when mailed. Appeals may be filed with the Oregon Land Use Board of Appeals within the time frames allowed by State law.