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

LANDWATCH LANE COUNTY,
Petitioner,

vs.

LANE COUNTY,
Respondent,

and

KIM O'DEA,
Intervenor-Respondent.

LUBA No. 2024-017

FINAL OPINION
AND ORDER

Appeal from Lane County.

Sean T. Malone represented petitioner.

Tiffany A. Johnson represented respondent.

Gregory S. Hathaway represented intervenor-respondent Kim O'Dea.

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

DISMISSED 07/02/2024

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

Opinion by Rudd.

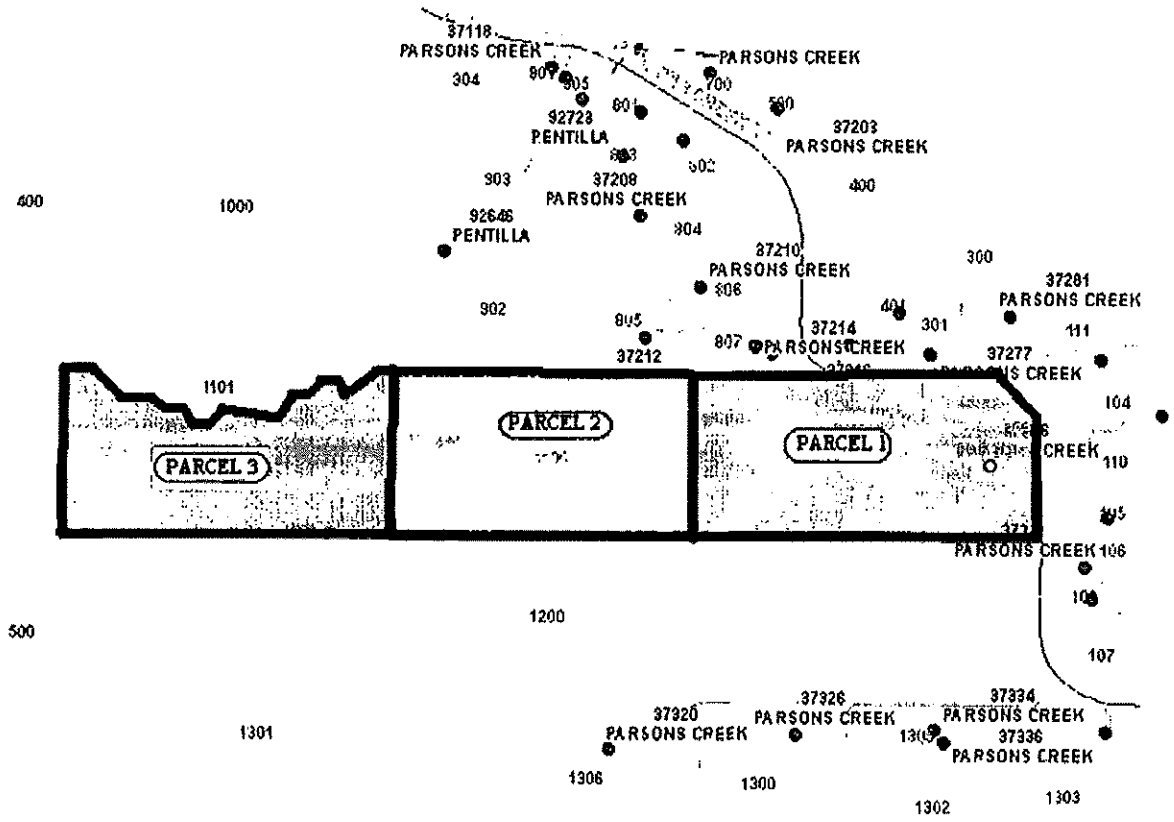
NATURE OF THE DECISION

Petitioner appeals a county planning director decision approving a final legal lot verification.

BACKGROUND

On February 13, 2012, the county planning director approved intervenor O'Dea's (intervenor's) application for a final legal lot verification identifying three parcels on the 56.1-acre subject property (2012 Decision). The subject property and the three parcels approved are shown below:

VICINITY MAP WITH PROPERTY CONFIGURATION



Record 5.

The 2012 Decision included a statement that the approved final legal lot verification meant:

> "a. Ownership in this property may be conveyed with the assurance that it will not require approval by Lane County under its land division regulations; and
>
> "b. Lane County will recognize this property as a legally separate unit of land for the purposes of development. Nevertheless, development will still be subject to applicable zoning, sanitation, access, and building regulations [.]" Record 4.

On March 23, 2024, petitioner filed its notice of intent to appeal the 2012 Decision pursuant to House Bill (HB) 3362 (2023), Oregon Laws 2023, chapter 543, section 4, which provides, in relevant part:

> "(1) On or before April 1, 2024, *notwithstanding* the standing requirements of ORS 197.830(2) or *the deadlines imposed by ORS 12.140 or 197.830(9)*, any person may file with the Land Use Board of Appeals a notice of intent to appeal a land use decision made by the county if:
>
> "(a) The challenged decision approved an application for a template dwelling pursuant to ORS 215.750, *a legal lot verification under ORS 92.176*, or a property line adjustment under ORS 92.192;
>
> "(b) The approval of the challenged decision was based on deeds or documents that were forged;
>
> "(c) The applicant whose application is described in paragraph (a) of this subsection is excluded from the definition of 'innocent purchaser' based on the criteria in section 2(4)(a), (b), or (c) of this 2023 Act; and

"(d) The applicant described in paragraph (c) of this subsection owned the property that was the subject of the challenged land use decision on January 1, 2023."[1] (Emphases added.)

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[1] HB 3362 provides that it applies notwithstanding ORS 197.830(2), 12.140 or 197.830(9). ORS 197.830(2) provides:

> "Except as provided in ORS 197.620, a person may petition [LUBA] for review of a land use decision or limited land use decision if the person:
>
> "(a) Filed a notice of intent to appeal the decision as provided in subsection (1) of this section; and
>
> "(b) Appeared before the local government, special district or state agency orally or in writing."

ORS 12.140 provides: "An action for any cause not otherwise provided for shall be commenced within 10 years."

ORS 197.830(9) provides:

> "A notice of intent to appeal a land use decision or limited land use decision shall be filed not later than 21 days after the date the decision sought to be reviewed becomes final. A notice of intent to appeal plan and land use regulation amendments processed pursuant to ORS 197.610 to 197.625 shall be filed not later than 21 days after notice of the decision sought to be reviewed is mailed or otherwise submitted to parties entitled to notice under ORS 197.615. Failure to include a statement identifying when, how and to whom notice was provided under ORS 197.615 does not render the notice defective. Copies of the notice of intent to appeal shall be served upon the local government, special district or state agency and the applicant of record, if any, in the local government, special district or state agency proceeding. The notice shall be served and filed in the form and manner prescribed by rule of the board and shall be accompanied by a filing fee of $300. If a petition for review is not

MOTION TO DISMISS

On May 24, 2024, intervenor filed their motion to dismiss the appeal. Intervenor argues, in part, that the 2012 Decision is not appealable outside of the time limits provided in ORS 197.830(9) pursuant to HB 3362 because it does not meet criteria in HB 3362 section 4(1)(a).[2]

HB 3362 section 4(1)(a) allows appeal of "a legal lot verification *under ORS 92.176*" to LUBA on or before April 1, 2024, notwithstanding that the appeal would otherwise be untimely. (Emphasis added.) ORS 92.176(1) provides a procedure for validation of an unlawfully created unit of land under certain circumstances in the statute:

> "A county or city may approve an application to validate a unit of land that was created by a sale that did not comply with the applicable criteria for the creation of a unit of land if the unit of land:
>
> "(a) Is not a lawfully established unit of land; and

> filed with the board as required in subsections (10) and (11) of this section, the board shall award the filing fee to the local government, special district or state agency."

[2] Intervenor also argues that the appeal should be dismissed because the subject property has a different ownership or ownership structure than it had at the time the application was submitted and therefore fails to meet the standards for appeal under HB 3362 section 4(1)(d); and because petitioner did not exhaust remedies before the county as required by ORS 197.825(2)(a).

"(b) Could have complied with the applicable criteria for the creation of a lawfully established unit of land in effect when the unit of land was sold."[3]

ORS 92.176(1), by its express terms, applies to units of land that are not lawfully established. ORS 92.176(1)(a). ORS 92.010(3)(a) provides that "As used in ORS 92.010 to 92.192, unless the context requires otherwise"

"(3)(a) 'Lawfully established unit of land' means:

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

"(B) Another unit of land created:

"(i) In compliance with all applicable planning, zoning and subdivision or partition ordinances and regulations; or

"(ii) By deed or land sales contract, if there were no applicable planning, zoning or subdivision or partition ordinances or regulations.

"(b) 'Lawfully established unit of land' does not mean a unit of land created solely to establish a separate tax account.

The planning director concluded that the subject property contained three legal lots or parcels, that is, three lawfully created units of land.[4] Record 7. At the time of the 2012 Decision, LC 13.010 provided: "Legal Lot. *A lawfully created lot or*

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[3] ORS 92.176(1) is currently implemented in Lane Code (LC) 13.150(1) "Validation of a Unit of Land."

[4] The planning director was inconsistent in their use of the terms parcel and lot to refer to the units of land being evaluated.

parcel. 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." (Emphasis added.) LC 13.010 also provided that "parcel" includes a unit of land created:

> "(a) By partitioning land as defined in LC 13.010.
>
> "(b) In compliance with all applicable planning, zoning and partitioning ordinances and regulations; or
>
> "(c) By deed or land sales contract if there are no applicable planning, zoning or partitioning ordinances or regulations."

Further, LC 13.010 provided that "legal lot verification" meant "[a] determination that a unit of land was created in conformance with the Lane Code and other applicable law. A preliminary determination shall only become final when it is made and noticed pursuant to LC 13.020."

In the 2012 Decision, the planning director set out the zoning and land division history as follows:

> "1. The first comprehensive Zoning and Land Use Regulations, Ordinance 3 and 4, were adopted in 1949. The subdivision ordinance was revised on 5/02/1962 and again in 1970 in the urbanized areas.
>
> "2. The first Chapter 13 land division regulation for this property was adopted on March 26, 1975. Ordinance 16-83 was adopted on 9/14/83 and remained in effect until 4/15/1993. Laws regulating partition plats and property line adjustments were added to ORS 92 in 1991. Lane County adopted property line regulations on 1/08/2010.

> "3. The first zoning regulation for these propert[ies] were adopted on 08/29/1980 and zoned FF. The properties were rezoned to F-2 on 2/29/1984." Record 6.

The planning director concluded that the parcels identified by intervenor were lawfully created because they were created by deed before land division regulations applicable to the properties were adopted in 1975:

> "The original parent parcel was created as a discrete lot in 1954 when it was separately described by a deed signed prior to applicable Land Division and Zoning Regulations. The parent parcel was divided in 1960 and created three parcels. Parcel 2 was reconfigured in 1970 & 1993 and Parcel 3 was reconfigured in 1996 * * *." Record 7.

The planning director also found:

> "The subject parent property was described as a discrete parcel by Warranty Deed R43/36060. The parent parcel was segregated into three parcels through Warranty Deed RR# 343R/82333, dated 1/30/1960. Boundary Line Agreements 79-30632 and 9376970 adjusted the northern boundary of parcel 2 and Boundary Agreement 9654016 adjusted the northern boundary of parcel 3." *Id.*

The planning director did not make a decision pursuant to the authority granted to the county to validate unlawfully created lots under ORS 92.176(1), but rather a decision that the parcels were created in compliance with the applicable law. The staff report attached as an exhibit to the 2012 Decision describes the application as being for "Final Legal Lot Verification." Record 6. Although not part of the code at the time of the appealed decision, the county's current code includes LC 13.140. LC 13.140 is titled "Legal Lot Verification" and provides that "[a] legal lot verification will be approved if the subject

property is a lawfully established unit of land as defined by this chapter." LC 13.140(3). LC 13.030(3)(n) defines a "lawfully established unit of land" as

> "(i) A lot or parcel created by filing a final plat for subdivision or partition; or
>
> "(ii) Another unit of land created:
>
> "(aa) In compliance with appliable planning, zoning and subdivision or partition ordinances and regulations; or
>
> "(bb) By deed or land sale contract, if there were no applicable planning, zoning or subdivision or partition ordinances or regulations.
>
> "(cc) Lawfully established unit of land does not mean a unit of land created solely to establish a separate tax account."

Again, HB 3362 applies, in part, to "legal lot verifications *under ORS 92.176*[.]" Petitioner points out that the term "legal lot verification" does not appear in ORS 92.176 and responds that the legislature's inclusion of the reference to ORS 92.176 was simply a mistake on the part of the legislature. ORS 174.020 provides:

> "(1)(a) In the construction of a statute, a court shall pursue the intention of the legislature if possible.
>
> "(b) To assist a court in its construction of a statute, a party may offer the legislative history of the statute.
>
> "(2) When a general provision and a particular provision are inconsistent, the latter is paramount to the former so that a particular intent controls a general intent that is inconsistent with the particular intent.

> "(3) A court may limit its consideration of legislative history to the information that the parties provide to the court. A court shall give the weight to the legislative history that the court considers to be appropriate."

Petitioner directs our attention to legislative history supporting petitioner's argument that HB 3362 was enacted specifically to provide the potential to appeal a series of land use approvals obtained by intervenor, including the 2012 Decision challenged in this appeal. Petitioner urges us to give effect to the intent of the legislature determining whether the appeal is allowed under HB 3362 and deny the motion to dismiss.

In *State v. Gaines*, the court reiterated that the first step of statutory interpretation requires "an examination of the text and context," that primary weight must be given to text and context, and concluded that "nothing in ORS 174.020 purports to require the courts to retreat from that long standing recognition." 346 Or 160, 206 P3d 1042 (2009). The court explained: "a party is free to proffer legislative history to the court and the court will consult the history after examining the text and context, "even if the court does not perceive an ambiguity in the statute's text where that legislative history appears useful to the court's analysis. However, the extent of the court's consideration of that history, and the evaluative weight that the court gives it is for the court to determine." *Id.* at 172. The court continued:

> "With regard to this changed methodology, we clarify that a party seeking to overcome seemingly plain and unambiguous text with legislative history has a difficult task before it. Legislative history may be used to confirm seemingly plain meaning and even to

> illuminate it; a party also may use legislative history to attempt to convince a court that superficially clear language actually is not so plain at all – that is, that there is a kind of latent ambiguity in the statute. For those of similar purposes, whether the court will conclude that the particular legislative history on which a party relies is of assistance in determining legislative intent will depend on the substance and probative quality of the legislative history itself * * * *When the text of a statute is truly capable of having only one meaning, no weight can be given to legislative history that suggests -or even confirms- that legislators intended something different.*" *Id.* at 172-73 (emphasis added.)

We agree with petitioner that the legislative history supports its assertion that HB 3362 was intended to respond to a series of land use approvals obtained by intervenor. Petitioner's argument that we should disregard the language "under ORS 92.176" is, however, untenable. ORS 174.010 provides:

> "In the construction of a statute, the office of the judge is simply to ascertain and declare what is, in terms or in substance, contained therein, not to insert what has been omitted, or to omit what has been inserted; and where there are several provisions or particulars such construction is, if possible, to be adopted as will give effect to all."

ORS 174.010 provides that we may not omit what has been inserted. Giving effect to both "legal lot verification" and "under ORS 92.176," we conclude that "under ORS 92.176" is "truly capable of having only one meaning," the intent of legislators notwithstanding. *See Ooten v Clackamas County*, 70 Or LUBA 338, 343, 357 (2014) (where an LCDC rule used the word "and," the correct interpretation was that it was conjunctive, and Bassham, T. concurring that even if LCDC may not have intended to use the word "and," LCDC was the correct body to fix any mistake in drafting the rule), *aff'd*, 270 Or App 214, 346 P3d

1305 (2015). The planning director verified, or confirmed as consistent with the law, the existence of three parcels.[5] The legal lot verification at issue was not approved under ORS 92.176. Accordingly, HB 3362 does not apply to petitioner's appeal of the 2012 Decision and petitioner's appeal is untimely. ORS 19.830(9).

The motion to dismiss is granted.

The appeal is dismissed.

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[5] Webster's dictionary defines "verify" as including "to confirm or substantiate in law by oath or proof." *Webster's Third New Int'l Dictionary* 2543 (unabridged ed 2002).