

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

3
4 CENTRAL OREGON LANDWATCH,
5 *Petitioner,*

6
7 vs.

8
9 DESCHUTES COUNTY,
10 *Respondent.*

11
12 LUBA No. 2024-032

13
14 FINAL OPINION
15 AND ORDER

16
17 Appeal from Deschutes County.

18
19 Carol Macbeth filed the petition for review and argued on behalf of
20 petitioner.

21
22 Stephanie Marshall filed the respondent's brief and argued on behalf of
23 respondent.

24
25 RYAN, Board Chair; RUDD, Board Member, participated in the decision.

26
27 ZAMUDIO, Board Member, did not participate in the decision.

28
29 AFFIRMED 08/21/2024

30
31 You are entitled to judicial review of this Order. Judicial review is
32 governed by the provisions of ORS 197.850.

NATURE OF THE DECISION

Petitioner appeals a hearings officer decision approving nonfarm dwellings on three parcels zoned for exclusive farm use.

FACTS

The applicant, Grossman, submitted three conditional use permit applications seeking approval of nonfarm dwellings on three parcels. The subject properties are 4.98-acre, 4.98-acre, and 5.01-acre parcels that are part of an approximately 311-acre tract zoned Exclusive Farm Use – Sisters Cloverdale Subzone (EFU-SC), Wildlife Area Combining Zone (WA), and Surface Mining Impact Area (SMIA). The subject properties are part of the same tract of land that we described in *Central Oregon Landwatch v. Deschutes County*, ___ Or LUBA ___ (LUBA Nos 2021-110/111, Mar 1, 2022), and the Court of Appeals described in *Central Oregon Landwatch v. Deschutes County*, 320 Or App 650, 652, 514 P3d 1201 (2022) (*Grossman II*). Accordingly, because the subject properties involve the same tract at issue in *Grossman II*, we take some of the facts from *Grossman II*.

In 2004, Grossman applied to the county for lot of record verification, requesting that the county verify that the tract includes up to 10 “lots of record,” as defined in the Deschutes County Code (DCC). *Grossman II*, 320 Or App at 652. The county issued a lot of record verification, verifying that nine of the units

1 of land qualify as “lots of record,” as defined in the DCC (2004 Lot Verification).
2 *Id.*; Record 17-18. The 2004 Lot Verification was not appealed and is final.

3 In 2008, Grossman applied for property line adjustments to reconfigure the
4 size and boundaries of the parcels within the tract that were verified as lots of
5 record in 2004. The county approved the property line adjustments (2009
6 Property Line Adjustments). Thereafter in 2009, Grossman recorded deeds to
7 effect the approved property line adjustments, including deeds for the three
8 subject parcels. Grossman also submitted to the county surveyor a four-page
9 survey (2009 Property Line Adjustment Survey) for recording that included a
10 boundary survey of the tract (Record 713), a depiction of the properties before
11 the property line adjustments (Record 714) and a depiction of the properties after
12 the property line adjustments (Record 715). Record 712 (including the Sheet
13 Index for the survey). The current size and configuration of the three subject
14 parcels resulted from the 2009 deeds. Record 389.

15 The hearings officer held a hearing on the consolidated conditional use
16 permit applications and issued a decision approving the permits, thereby
17 authorizing a dwelling on each of the three subject parcels. This appeal followed.

1 **FIRST ASSIGNMENT OF ERROR**

2 **A. Background**

3 ORS 215.284(2)(c) provides, in relevant part, that the county may approve
4 a nonfarm dwelling on a “lot or parcel created before January 1, 1993.”¹ The
5 hearings officer concluded that the three parcels were created before January 1,
6 1993. Record 35.

7 Petitioner’s first assignment of error is exceedingly difficult to understand.
8 Petitioner’s nominal assignment of error is that the hearings officer improperly
9 construed ORS 215.284(2) and that the decision is not supported by substantial
10 evidence in the whole record. ORS 197.835(9)(a)(C) and (D). Petition for Review
11 7. The county’s response asserts in places that some arguments are waived, but
12 also accepts petitioner’s preservation of error statement in the petition for review.
13 Response Brief 11. We understand that acceptance to concede that the issues
14 raised in the first assignment of error were preserved.

15 **B. Assignment of Error**

16 Petitioner argues that ORS 215.284(2) is properly construed to require the
17 county to ascertain whether the parcels were created before January 1, 1993 by
18 looking at “the official maps and records” of the county. Petition for Review 15-

¹ ORS 215.284(2) is implemented in the DCC provisions governing the county’s exclusive farm use zones at DCC 18.16.050(G). DCC 18.16.050(G)(1)(a)(6) requires, in relevant part, that “[t]he nonfarm dwelling shall be located on a lot or parcel created prior to January 1, 1993[.]”

1 16. From that premise, petitioner relies on a single page from the four-page 2009
2 Property Line Adjustment Survey, and argues that Record 713 is conclusive
3 evidence that the tract is a single parcel of land, not nine parcels of land as the
4 county determined in the 2004 Lot Verification. Petition for Review 18-20.

5 The county responds, and we agree, that the Court of Appeals has rejected
6 petitioner's argument that ORS 215.284(2) requires the county to determine
7 whether a parcel was "lawfully created on or before January 1, 1993" by looking
8 at the "official maps and records" of the county.² *Grossman II*, 320 Or App at
9 656. To the extent that petitioner argues that some of the evidence presented in
10 the proceeding below on these consolidated applications differs from the
11 evidence presented below in *Grossman II*, and accordingly a different
12 interpretation of the statute applies, we reject that argument. Reply Brief 2-3. The
13 issue is one of statutory interpretation, which does not depend on a particular set
14 of facts or evidence. To the extent petitioner is asking LUBA to overturn the
15 Court of Appeals' decision affirming LUBA's decision, LUBA is bound by Court
16 of Appeals precedent and, therefore, has no authority to do so. Accordingly, we
17 reject petitioner's argument.

² We note that petitioner's construction of the statute would require us to insert the phrase "as shown on the official county maps and records" in contravention of ORS 174.010. Petitioner also does not explain how a conflict between the official records, such as deed records, and official maps, would be resolved.

1 The county also points out that petitioner’s argument that relies on Record
2 713 is premised on an incomplete description of the 2009 Property Line
3 Adjustment Survey, and that when Record 713 is considered in context with all
4 four pages of that survey, it is clear that Record 713 is not evidence that the tract
5 is a single unit of land. We agree. Petitioner’s argument relying on a single page
6 of the recorded survey borders on misleading, and certainly does not accurately
7 describe the 2009 Property Line Adjustment Survey. The Sheet Index describes
8 the second page of the survey as “the boundary survey of the Grossman
9 property.” Record 712. Nothing in the 2009 Property Line Adjustment Survey
10 indicates that Sheet 2 found at Record 713 it is intended to depict lawfully created
11 parcels.

12 Next, petitioner argues that a reference on Record 713 to four partitions
13 establishes that those partitions vacated parcel lines and accordingly, the
14 vacations served to disqualify the parcels from eligibility for nonfarm dwellings.
15 The county responds, and we agree, that the partitions listed on Record 713
16 describe partitions of parcels that are adjacent to the tract and are unrelated to the
17 tract.

18 Finally, petitioner argues that the hearings officer’s decision that the
19 parcels were lawfully created on or before January 1, 1993 is not supported by
20 substantial evidence in the whole record because the 2004 Lot Verification is not
21 included in the record. Petition for Review 21. Petitioner does not dispute that
22 the three parcels were included in the 2004 Lot Verification. The county

1 responds, and we agree, that the staff report at Record 389-91 and the Court of
2 Appeals decision in *Grossman II* at Record 1048 is substantial evidence that the
3 parcels are lawfully created parcels under ORS 215.284(2).

4 The first assignment of error is denied.

5 **SECOND ASSIGNMENT OF ERROR**

6 DCC 18.88.060(B) provides siting standards for new dwellings in the WA
7 zone. DCC 18.88.060(B) provides:

8 “The footprint, including decks and porches, for new dwellings shall
9 be located entirely within 300 feet of public roads, private roads or
10 recorded easements for vehicular access existing as of August 5,
11 1992 unless it can be found that:

12 “1. Habitat values (i.e., browse, forage, cover, access to water)
13 and migration corridors are afforded equal or greater
14 protection through a different development pattern; or

15 “2. The siting within 300 feet of such roads or easements for
16 vehicular access would force the dwelling to be located on
17 irrigated land, in which case, the dwelling shall be located to
18 provide the least possible impact on wildlife habitat
19 considering browse, forage, cover, access to water and
20 migration corridors, and minimizing length of new access
21 roads and driveways; or

22 “3. The dwelling is set back no more than 50 feet from the edge
23 of a driveway that existed as of August 5, 1992.”

24 DCC 18.88.060(C) provides:

25 “For purposes of DCC 18.88.060(B):

26 “1. A private road, easement for vehicular access or driveway
27 will conclusively be regarded as having existed prior to
28 August 5, 1992 if the applicant submits any of the following:

- 1 “a. A copy of an easement recorded with the County Clerk
2 prior to August 5, 1992 establishing a right of ingress
3 and egress for vehicular use;
- 4 “b. An aerial photograph with proof that it was taken prior
5 to August 5, 1992 on which the road, easement or
6 driveway allowing vehicular access is visible;
- 7 “c. A map published prior to August 5, 1992 or assessor’s
8 map from prior to August 5, 1992 showing the road
9 (but not showing a mere trail or footpath).
- 10 “2. An applicant may submit any other evidence thought to
11 establish the existence of a private road, easement for
12 vehicular access or driveway as of August 5, 1992 which
13 evidence need not be regarded as conclusive.”

14 Grossman proposed two options for satisfying DCC 18.88.060(B): (1)
15 locating all development within 300 feet of a road that Grossman argued existed
16 as of August 5, 1992 along the eastern boundary of the three parcels (Eastern
17 Road); or (2) locating all development within unspecified proximity to a road that
18 was not in existence as of August 5, 1992 but exists presently on the western side
19 of the three parcels (Western Road), pursuant to the exception allowing for a
20 different development pattern in DCC 18.88.060(B)(1).³ Record 114-116.

21 The hearings officer concluded that the Eastern Road existed as of August
22 5, 1992. Record 68-69. The hearings officer relied on aerial photographs dated
23 prior to August 5, 1992 showing a road along the eastern boundary of the three

³ Petitioner argues, without support, that “the eastern road * * * was not proposed as an access road by the applicants and is not, in fact, available to the applicants for access.” Petition for Review 32.

1 parcels (Eastern Road); testimony from a licensed professional engineer who
2 submitted maps, comments and aerial photos depicting the Eastern Road; and an
3 affidavit from an individual stating that he used the Eastern Road with farm
4 equipment and that the Eastern Road is a “historical road used by the farmers for
5 decades, extending before 1992.”⁴ Record 68-69. Petitioner does not challenge
6 those findings. The decision requires Grossman to locate all development within
7 300 feet of the Eastern Road. Record 69.

8 The hearings officer rejected Grossman’s request under DCC
9 18.88.060(B)(1) for a different development pattern based on the Western Road.
10 The hearings officer adopted several pages of findings explaining why they
11 rejected Grossman’s request for a different development pattern under DCC
12 18.88.060(B)(1). Record 29-35; 69-73. Those findings include interpretations of
13 DCC 18.88.060(B)(1). In the second assignment of error, petitioner challenges
14 those interpretations of DCC 18.88.060(B)(1).

15 The county responds that petitioner’s second assignment of error
16 challenges a decision that the hearings officer did not make, because the hearings
17 officer concluded that DCC 18.88.060(B)(1) was not met. Accordingly, we
18 understand the county to argue, any interpretations of DCC 18.88.060(B)(1) by

⁴ The Declaration states that “[the individual] has personal knowledge of the roads, he used them when his family owned the property, and he, his family, and other farmers used the roads to travel with vehicles including ‘farm equipment as well as trucks, trailers, tractors.’ (Exhibit 1) They were used to traverse the property and to access neighboring property. (Exhibit 1).” Record 115.

1 the hearings officer are essentially dicta and errors in that interpretation do not
2 provide a basis for reversal or remand. We agree. Arguments from petitioner that
3 challenge an interpretation that is not germane to the decision because the
4 hearings officer found no exception was warranted provide no basis for reversal
5 or remand.

6 The second assignment of error is denied.

7 The county's decision is affirmed.