LUBA
DEC 11 2024 AM10:26

1 BEFORE THE LAND USE BOARD OF APPEALS
2 OF THE STATE OF OREGON
3
4 SHARON SIMPSON CARROLL and
5 SHARON SIMPSON CARROLL INHERITANCE TRUST,
6 *Petitioners*,
7
8 vs.
9
10 LANE COUNTY,
11 *Respondent*.
12
13 LUBA No. 2024-054
14
15 FINAL OPINION
16 AND ORDER
17
18 Appeal from Lane County.
19
20 Micheal M. Reeder filed the petition for review and argued on behalf of
21 petitioners.
22
23 Tiffany A. Johnson filed the respondent's brief and argued on behalf of
24 respondent.
25
26 RUDD, Board Member; RYAN, Board Member, participated in the
27 decision.
28
29 ZAMUDIO, Board Chair, did not participate in the decision.
30
31 AFFIRMED 12/11/2024
32
33 You are entitled to judicial review of this Order. Judicial review is
34 governed by the provisions of ORS 197.850.

1 Opinion by Rudd.

2 **NATURE OF DECISION**

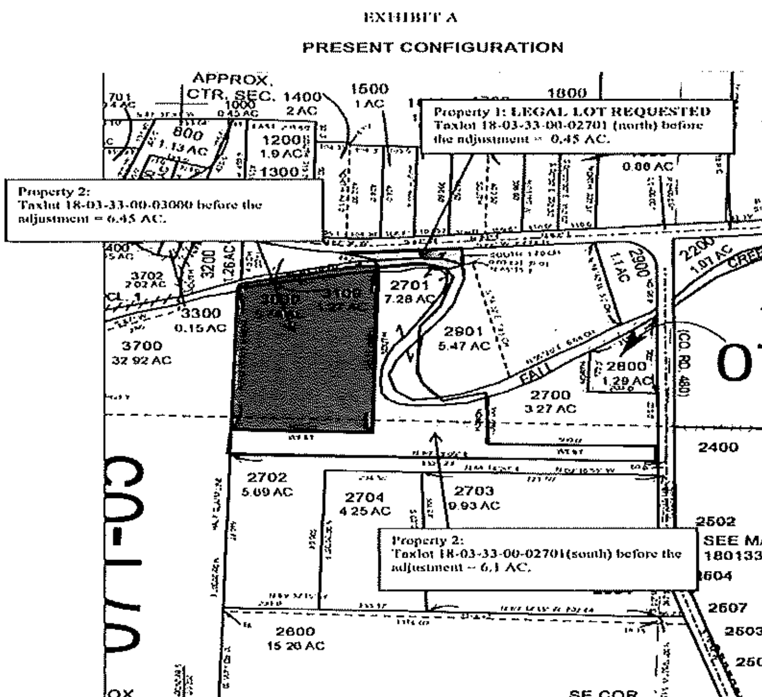
3 Petitioners appeal a hearings official's decision denying a legal lot
4 verification and four property line adjustments.

5 **FACTS**

6 This appeal concerns property described herein as Tax Lot 2701 north
7 (Property 1), Tax Lot 3000 (Property 2), and Tax Lot 2701 south (Property 3).
8 The graphic below shows Property 1 as 0.45 acres, Property 2 as 6.1 acres, and
9 Property 3 as 6.45 acres in size.[1]

EXHIBIT A

PRESENT CONFIGURATION



10 Map 18-01-33-00

[1] The above graphic identifies two parcels as Property 2 but also provides related tax numbers. Property 2 is correctly identified as Tax Lot 3000 and Property 3 is Tax Lot 2701 south. Record 63.

All of the properties are currently zoned Rural Residential 5 (RR-5).[2]

Lane County Code (LC) land division regulations are found in LC chapter 13 and include the following definitions:

> "(n) Lawfully Established Unit of Land. A lawfully established unit of land means:
>
> "(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 all applicable planning, zoning and subdivision or partition ordinances and regulations; or
>
> "(bb) By deed or land sales 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.
>
> "(o) Legal Lot. A lawfully established unit of land that has been verified and noticed by Lane County through a legal lot verification pursuant to LC 13.140. A lot, parcel, or verified lawfully established unit of land that complies with LC 13.140(1)(a)(i) does not require a legal lot verification by the [c]ounty.
>
> "(p) Legal Lot Verification. A determination or decision made pursuant to LC 13.140 that a unit of land is a lawfully established unit of land." LC 13.030(3).

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[2] The properties were all originally zoned Farm Forest.

Petitioners submitted a county application packet seeking a legal lot verification for Property 1, three property line adjustments between Properties 2 and 3 and, following the three adjustments between Properties 2 and 3, a final property line adjustment between Property 1 and the adjusted Property 3. In their December 9, 2022, narrative, petitioners explained that they were

> "proposing an all in one legal lot and property line adjustment. The prior application 509-PA22-05265 was canceled and is being replaced with this application. Per [county staff] the refunded portion of the canceled application will be applied to this new application.
>
> "The attached application consists of a legal lot determination for the north Lot #1 within Tax Lot 18-01-33-00-02701. Legal Lot #3 within 18-01-33-00-02701 has already been verified by Lane County final decision 1079-91. Legal Lot #2 within 18-01-33-00-03000 has already been verified by Lane County final decision 1080-91.
>
> "There is a series of four adjustments to reconfigure the property. The dwellings (TL 3000) and approved replacement dwelling (TL 2701) are both on conforming lots (greater than 5 acres) before and after the adjustments." Record 703.

Property 2 was verified as a legal lot in county Planning Action Number 509-PA91-0179. Record 76. The combined Property 1 and 3, as configured at the time, was determined to be a legal lot in county Planning Action Number 509-PA91-01080.[3] *Id.* Petitioners' application sought to establish both Property 1 as

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[3] We understand these legal lot verifications to have been approved in 1991. Again, Tax Lots 2701 north and south refer to Property 1 (is north) and Property 3 (is south). The hearings official's findings state:

1 a legal lot independent of Property 3 and, in effect, consider the prior
2 identification of all of Tax Lot 2701 as a legal lot as applicable to just Property
3 3.

4 The planning director denied the legal lot verification application.
5 Petitioners appealed the planning director's decision. On May 16, 2024, the
6 hearings official held a public hearing on the application. On July 15, 2024, the
7 hearings official issued a decision affirming the planning director's denial. On
8 July 29, 2024, petitioners applied for reconsideration of the hearings official's
9 decision. On July 30, 2024, the hearings official accepted petitioners' request for
10 reconsideration. On August 6, 2024, the hearings official issued their decision on
11 reconsideration denying petitioners' application. This appeal followed.

> "A legal lot verification request for tax lot 2701 was approved in 1991. The approval is in this record. At that time, the property described by the 1973 quit claim deed was already a part of the legal description for tax lot 2701. In that 1991 approval, there was no discussion of a north vs. a south portion of 2701. Rather, the application was for [a legal lot verification] of the entirety of tax lot 2701 as it existed in 1991.There is no discussion in the record about the effect that the 1991 legal lot verification approval has on this current request, if any." Record 50 n 1.

We understand the property described in the 1973 quitclaim deed referenced in the above quote to be Tax Lot 2701 north, Property 1.

1 **FIRST ASSIGNMENT OF ERROR**

2 **A. Introduction**

3 After the public hearing, the hearings official established the following
4 periods for submittal of additional material:

5 May 30, 2024 – end of the open record period (First Record Period);

6 June 26, 2024 – end of period for responses to open record
7 submittals (Second Record Period);

8 July 3, 2024 – end of period to submit petitioners' final written
9 argument. Record 48.

10 The hearings official did not accept as evidence certain material petitioners
11 submitted during the Second Record Period.[4] Rather, the hearings official
12 determined that new site maps submitted by petitioners were new evidence and
13 improperly submitted during the Second Record Period. In their request for
14 reconsideration, petitioners argued that this evidence should have been
15 considered. In their decision on reconsideration the hearings official found that
16 on June 26, 2024, planning staff

17 "emailed the parties to announce the conclusion of the [record]
18 response period. That email contained a link to [c]ounty staff's
19 memo which questioned the appropriateness of [petitioners']
20 response submittal as it contained new evidence and other parties
21 had not had the benefit of reviewing and commenting on that new
22 evidence. The [h]earings [o]fficial found that the site maps included

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[4] The material is part of the record before LUBA. Petition for Review 7 (citing Record 160-65).

> in [petitioners'] response materials were new evidence and were submitted without any indication from [petitioners] as to what the maps were meant to respond to. Accordingly, the [h]earings [o]fficial rejected the site maps from the record." Record 3.

Opponents' arguments to the hearings official included that Property 1's southern property line was the present centerline of Little Falls Creek, not the historic centerline of the creek as mapped by petitioners in their application. Petitioners argue that the rejected site maps are responsive material because they show that the applicable approval criteria are met even if opponents were correct regarding the location of the disputed property line. Petitioners argue that it is well established that responsive evidence may be submitted during the Second Record Period. Petitioners' first assignment of error is that petitioners were prejudiced by the hearings official's failure to consider this evidence.

B. Standard of Review

We will reverse or remand a local government decision where the local government "[f]ailed to follow the procedures applicable to the matter before it in a manner that prejudiced the substantial rights of the petitioner[.]" ORS 197.835(9)(a)(B). We will also reverse or remand a local government decision where the local government improperly construes the applicable law. ORS 197.835(9)(a)(D).

C. Procedural Error

A petitioner alleging procedural error must identify both the procedure violated and the prejudice to their substantial rights. *Stoloff v. City of Portland*, 51 Or LUBA 560, 563-64 (2006). As we explained in *Eng v. Wallowa County*,

when a procedural error is raised "on appeal to LUBA, the petitioners must demonstrate 'that they objected to the procedural error below, if there was an opportunity to do so' and the error prejudiced their substantial rights. The opportunity to provide comments must be meaningful." 79 Or LUBA 421, 434 (2019) (citation omitted). Therefore, in order for petitioners to establish a basis for reversal or remand, petitioners must identify (1) a procedural error (2) to which petitioners properly objected which (3) prejudiced their substantial rights.

ORS 197.797(6)(c) provides:

> "If the hearings authority leaves the record open for additional written evidence, arguments or testimony, the record shall be left open for at least seven days. Any participant may file a written request with the local government for an opportunity to respond to new evidence submitted during the period the record was left open. If such a request is filed, the hearings authority shall reopen the record pursuant to subsection (7) of this section."

Petitioners argue that the county implements ORS 197.797(6)(c) at LC 14.070(17)(b) which provides:

> "If the hearing authority leaves the record open for additional written evidence, arguments, or testimony, the record must be left open for at least seven days. Any participant may file a written request with the local government for an opportunity to respond to new evidence submitted during the period the record was left open. If such request is filed, the hearing authority must reopen the record in accordance with subsection (19) below."

Petitioners argue that the hearings official's Second Record Period followed this process and that they had a right to submit their materials in response to opponents' arguments. Petitioners argue that in a different county

1 proceeding, a hearings official accepted new evidence during the second record
2 period, that the hearings official allowed opponents to respond to that new
3 evidence and that the hearings official should have done so here. Petition for
4 Review 11-12. The county responds that petitioners' materials were submitted
5 without any explanation as to their purpose and were new site plans requiring a
6 new application and not responsive material.

7 The county does not respond to petitioners' argument that in another case,
8 a hearings official accepted new evidence and allowed parties to address that
9 evidence. However, petitioners' citation to a prior order does not establish a basis
10 for remand. Although petitioners have identified an instance in which the
11 hearings official did so, petitioners do not identify a legal requirement that
12 nonresponsive new evidence be accepted during the second evidentiary period
13 and then allow other parties to respond.

14 Following petitioners' submittal of the disputed materials, and prior to the
15 deadline for petitioners' final written argument, county staff issued a memo in
16 which they opined that the disputed materials were new evidence and not
17 properly submitted during the Second Record Period. Petitioners argue generally
18 that they did not have notice of staff's concerns regarding the evidence submitted
19 but do not address the email identified by the hearings official as giving
20 petitioners' notice of the staff report. *See* Record 143. Further, as the county
21 argues, in *Sullivan v. City of Woodburn*, we concluded that "A memorandum
22 from the planning staff to the city council concerning the appropriate

interpretation of the city code is not evidence. Therefore, assuming that petitioners did not have an opportunity to rebut the substance of the memorandum provides no basis for reversal or remand of the challenged decision." 31 Or LUBA 192, 200 (1996). Similarly, although petitioners could have responded to the staff commentary in their final legal argument, petitioners have not identified an independent procedural right to respond to the staff memo. Petitioners therefore do not identify a procedural error with respect to the issuance of the staff report questioning their submittals. Petitioners have not identified a procedural error in the hearings official's rejection of the submittals.

The first assignment of error is denied.

SECOND ASSIGNMENT OF ERROR

A. Introduction

LC 14.030(2) provides:

> "Consolidated Review of Applications. When an applicant files more than one application concurrently for the same property or tract of land, the applicant may elect to consolidate the review of the concurrent applications. When review of concurrent applications subject to different procedure types is consolidated, all of the applications will be reviewed under the highest procedure type. When proceedings are consolidated, required notices may be consolidated, provided the notice identifies each application and cites their respective review criteria. When more than one application is reviewed, findings of fact must address each application and a decision must be made on each application."

The county issued a notice of and opportunity to comment on petitioners' application which stated:

1 "If approved, the proposal will result in the following acreage
2 changes:

3 "Adjustment 1:

4 "Property 3: 18-01-33-00-02701 (south portion) will increase
5 from 6.1 acres to 7.0 acres.

6 "Property 2: 18-01-33-00-03000 will decrease from 6.45
7 acres to 5.55 acres.

8 "Adjustment 2:

9 "Property 3: 18-01-33-00-02701 (south portion) will decrease
10 from 7.0 acres to 5.6 acres.

11 "Property 2: 18-01-33-00-03000 will increase from 5.55 acres
12 to 6.95 acres.

13 "Adjustment 3:

14 "Property 3: 18-01-33-00-02701 (south portion) will increase
15 from 5.6 acres to 7.35 acres.

16 "Property 2: 18-01-33-00-03000 will decrease from 6.95
17 acres to 5.2 acres.

18 "Adjustment 4:

19 "Property 1: 18-01-33-00-02701 (north portion) will increase
20 from 0.45 acres to 6.0 acres.

21 "Property 3: 18-01-33-00-02701 (south portion) will decrease
22 from 7.35 acres to 1.8 acres" Record 630.

23 Petitioners argue that they submitted multiple applications for consolidated
24 review and that the hearings official misconstrued the law and adopted
25 inadequate findings unsupported by substantial evidence by failing to make a
26 decision as to each property line adjustment.

1 **B. Standard of Review**

2 We will reverse or remand a local government decision if we find that the
3 local government improperly construed the law or "made a decision not
4 supported by substantial evidence in the whole record;" ORS 197.835(9)(a)(C),
5 (D)). Substantial evidence is evidence a reasonable person would rely upon to
6 reach a decision. *Dodd v. Hood River County*, 317 Or 172, 179, 855 P2d 608
7 (1993). We will remand a land use decision "for further proceedings when * * *
8 the findings are insufficient to support the decision, except as provided in ORS
9 197.835(11)(b)." OAR 661-010-0071(2)(a). Adequate findings identify the
10 relevant approval criterion, the evidence relied upon, and explain how the
11 evidence leads to the conclusion that the criterion is or is not met. *Heiller v.*
12 *Josephine County,* 23 Or LUBA 551, 556 (1992).

13 **C. Misconstruction of Law**

14 The hearings official found that:

15 "Absent evidence in the record to demonstrate otherwise, the
16 [p]lanning [d]irector correctly determined that the [petitioners have]
17 not provided sufficient evidence to demonstrate that [Property 1]
18 qualifies as a lawfully created unit of land and *denial of the legal lot*
19 *verification and the serial property line adjustments which relied on*
20 *approval of the legal lot verifications was appropriate*." Record 61
21 (emphasis added).

22 Petitioners argue LC 14.030(2) requires addressing each of the property line
23 adjustments, as well as the legal lot verification, and that the hearings official
24 misconstrued the code in determining that an applicant is required to request
25 separate decisions. Petitioners argue that they wanted their applications treated

as consolidated, and that under the code they were entitled to a decision on each property line adjustment. Petitioners argue that they submitted sufficient information for individual approvals and that the county should have advised them if additional submittals were necessary to receive the additional decisions. Petitioners argue that their materials clearly identified four distinct property line adjustments and only one relied on Property 1, the subject of the legal lot verification request. Petitioners maintain that the hearings official erred in concluding that the Property 1 legal lot verification had to be approved before *any* of the property line adjustments could be approved.

In construing the law, we will consider the text, context and legislative history of the law at issue in order to determine the intent of the enacting legislature. *PGE v. Bureau of Labor and Industries*, 317 Or 606, 610-12, 859 P2d 1143 (1993); *State v. Gaines*, 346 Or 160, 171-172, 206 P3d 1042 (2009). The plain language provides that an applicant "may elect" to consolidate the review of multiple applications and that when multiple applications are reviewed "findings of fact must address each application and a decision must be made on each application." LC 14.030(2). The county does not argue that a decision is not required on each application when multiple applications are consolidated. Instead, the county argues that petitioners filed one property line adjustment application.

The hearings official agreed that LC 14.030(2) provides that "[w]hen more than one application is reviewed, findings of fact must address each application

and a decision must be made on each application." *See also* Record 55 n 4. However, the county directs our attention to LC 13.130(3), which provides in part:

> "A Property Line Adjustment requires application pursuant to Type I procedures according to LC [c]hapter 14, unless otherwise specified by this section. *An application for multiple property line adjustments can be made under one application*, pursuant to Type I procedures according to LC [c]hapter 14, so long as the deeds are recorded in the correct sequence. All property line adjustments are subject to the following standards and criteria, unless previously stated in this section:
>
> "* * * * *
>
> *"(b) All properties affected by the proposed adjustment are legal lots pursuant to LC 13.140.*" (Emphases added.)

We agree with the county that LC 13.130(3) allows considering multiple property line adjustment requests as one application and that the property line adjustment criteria require that the adjusted properties be legal lots. The hearings official did not misconstrue the law in determining that a multiple property line adjustment application may be denied based on a finding that one of the properties is not a legal lot, without addressing the remainder of the criteria.

1 **D. Substantial Evidence**

2 Petitioners argue that they submitted four property line adjustment
3 applications as well as the legal lot verification request.[5] However, the hearings
4 official found in their decision:

5 "[Petitioners] submittal for the property line adjustment portion of
6 this application consists of four 'cover pages' for each of the four
7 property line adjustments. Applicant addresses the criteria for a
8 property line adjustment based on the final proposed property
9 configurations. *In other words, the applicant has not submitted four*
10 *individual property line adjustment applications and asked that*
11 *each be analyzed to stand on their own. Instead, the applicant has*
12 *proposed four serial property line moves that finally result in the*
13 *property configurations desired by the applicant. The fourth and*
14 *final property line adjustment involves tax lot 2701 (north portion).*
15 If that tax lot is not approved as a legal lot, the four serial property
16 line adjustments and the final property configurations desired by the
17 applicant cannot be approved." Record 54 (emphasis added,
18 footnote omitted).

19 The hearings official also found:

20 "On the property line adjustment form application, in response to
21 the question 'Does either property have structures with
22 nonconforming setbacks?,' applicant checks 'No' and clarifies in
23 parenthesis that the answer is 'No' after property line adjustment [is]

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[5] The hearings official described petitioners' request as a consolidated application in their decision on reconsideration of the planning director's decision on "the legal lot verification application and four property line adjustments." Record 3. The hearings official also described the request as a consolidated decision, or consolidated decisions, in their original decision. *See for example*, Record 48, 50, 53. The parties do not discuss LC 13.130(2)(b) which provides that pursuant to LC 14.030(2), a legal lot verification request may be consolidated with a property line adjustment application.

complete. This is further evidence that the applicant proposed serial property line adjustments and asked for approval based on whether the final configurations satisfied applicable criteria." Record 54 n 3.

Petitioners argue that they paid a separate fee for each property line adjustment. Petition for Review 26. The county argues, however, that this is incorrect; petitioners paid one application fee for one decision and were required to request separate decisions if such was their desire.[6] Petitioners stated in their December 9, 2022, narrative that they were "proposing an all in one legal lot and property line adjustment." Record 703. The county argues that the fact that petitioners' matter was given just one planning file number reflects that the county treated the request as one application. The hearings official found that petitioners' application addressed the property line adjustment criteria based on the proposed final placement of the property lines. Record 55. Ultimately, the hearings official determined that one of the properties was not a legal lot and therefore the one property line adjustment application proposing to move multiple property lines was properly denied. We agree with the county that the hearings official's conclusion that petitioners submitted a legal lot verification and one property line adjustment application with multiple proposed adjustments is supported by adequate findings supported by substantial evidence.

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[6] Petitioners have not filed a reply brief.

1 **E. Alternative Findings**

2 Petitioners also argue that the hearings official's findings that the adjusted
3 property lot sizes are uncertain are conclusory and inadequate. Petition for
4 Review 50. The county maintains that the hearings official made findings as to
5 each property line adjustment. Because we conclude that the hearings official was
6 not required to address each proposed property line adjustment, we do not reach
7 this part of the assignment of error.[7]

8 The second assignment of error is denied.

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[7] The hearings official stated "another finding made by the Planning Director was that the site plans provided to show the property line adjustments included property not part of the properties and therefore the acreage calculations were likely inaccurate." Record 55. The hearings official explained:

> "[T]he [p]lanning [d]irector provided findings of fact to support denial of the legal lot verification application and also provided findings of fact to support denial of the serial property line adjustment applications. The [p]lanning director denied the legal lot verification application and denied the serial property line adjustments. The main reason that the serial property line adjustment applications were denied was because the [p]lanning [d]irector denied legal lot verification for tax lot 2701 (the north portion). However, another finding made by the [p]lanning [d]irector was that the site plans provided to show the property line adjustments included property not part of the properties and therefore the acreage calculations were likely inaccurate. See [Record 95]." Record 55.

THIRD ASSIGNMENT OF ERROR

A. Introduction

Petitioners' third assignment of error is that the hearings official erred as a matter of law and is unsupported by substantial evidence when they concluded that Property 1 was not a legal lot. Petition for Review 32.

Property 1 is the

> "north[ern] portion of tax lot 2701 [and] is bounded by the center line of Jasper Lowell Road (County Road No. 480) to the north, tax lot 3100 to the west, the centerline of Little Fall Creek to the south, and tax lot 2901 to the east. The shape of this property may be described as a narrow sliver of land. It is stretched east to west and squeezed north to south between a right-of-way and [a] creek. A 'street view' in the record shows that the subject property looks like a shoulder between the road's south edge and Little Fall Creek." Record 50-51.

Petitioners argue that Property 1 was lawfully created in 1908 when it was all that remained of a parent parcel created by deed on August 7, 1905, and shown on the graphic below.[8] Record 578.

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[8] As we explained above, Property 1 was part of the Tax Lot 2701 verified as a legal lot in 1991 and no party addresses the relevance of the prior legal lot verification including this area of land.

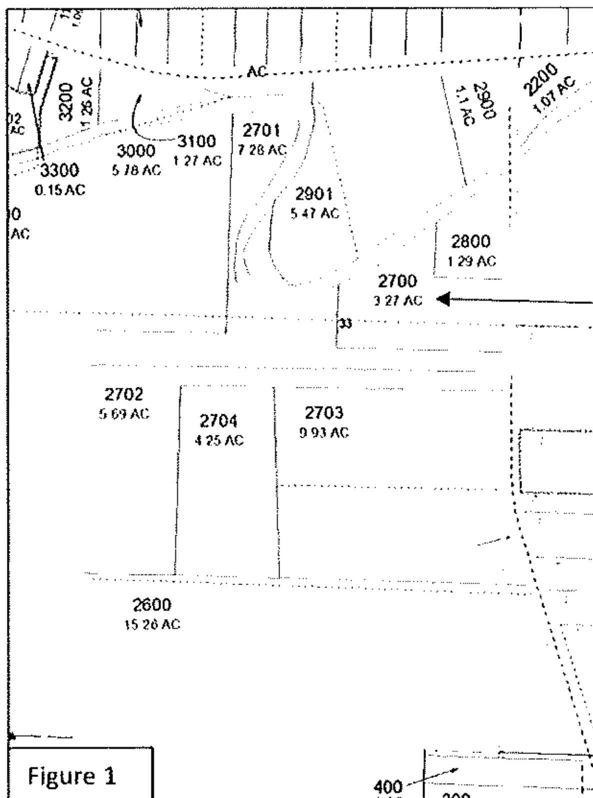

Figure 1

Rec. No.: 72/81

Date: August 7, 1905

Grantor: Fred & E.Y.S. Warner

Grantee: Frank Blair

This deed describes the Parent Property as shown here in Yellow. The portion excepted from this description is shown in Figure 2 below.

The area of land now described as Tax Lot 3100 was conveyed from the parent parcel by deed on September 25, 1905. On June 24, 1907, the areas of land now described as tax lots 3000, 2600, 2700, 2702, 2703, 2704, 2800 and the portion of 2701 south of the creek were conveyed out of the parent parcel by deed. On December 14, 1908, the areas of land now described as Tax Lots 2901 and 2900 were conveyed out of the parent parcel by deed. At this point, all of the land area described as the 1905 parent parcel had been conveyed via deed except that area of land now described as Property 1 and petitioners argue this resulted in the creation of Property 1 as a legal lot.

Additional conveyances of parts of the parent property followed and petitioners explain that Property 1 was identified as a result of survey work in the

late 1960s/early 1970s. On March 19, 1973, a quitclaim deed from Bromley to Simpson described Property 1. The hearings official concluded that the deeds provided by petitioners did not show how Bromley acquired an interest in Property 1 to convey and that the quitclaim deed did not create Property 1 as a legal lot.[9] Petitioners contend:

> "There was no reason for the [h]earings [o]fficial to pursue the matter further than the creation date of [Property 1] to determine that the property is a lawfully created unit of land. The record establishes that, from the date in 1908 to the present, the size and shape of [Property 1] has not changed by action of deed. This is unlike the situation for [Property 3] which has been reconfigured multiple times since the land south of Little Fall Creek was divided from the parent parcel, for which subsequent deed history is needed to determine whether it was lawfully established in its present configuration. The size and shape of [Property 1] has not changed since its creation. [Property 1] is a lawfully established unit of land." Petition for Review 40 (citations omitted).

B. Standard of Review

Our review of the county's interpretation of state law is subject to ORS 197.835(9)(a)(D) and we will reverse or remand the land use decision if the county improperly construed applicable law. We give no deference to a governing body's interpretation of a local provision that implements state law. *Kenagy v. Benton County*, 115 Or App 131, 134-36, 838 P2d 1076, *rev den*, 315 Or 271 (1992).

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[9] The hearings official also found that whether Property 1, if created in 1973, complied with all applicable subdivision laws was not analyzed.

1 C. **Misconstruction of Law**

2 1. **1908 Deed**

3 Petitioners argue that Property 1 exists because as of 1908 it is all that
4 remains of the 1905 parent parcel. Petitioners argue that the relevant deeds
5 included unambiguous metes and bounds property descriptions, and the hearings
6 official improperly relied on a legal presumption applied to interpreting
7 ambiguous deeds amid ownership disputes between adjacent property owners.
8 Petitioners maintain the hearings official misconstrued the law.

9 The county does not respond directly to petitioners' argument that a 1908
10 remainder is a legal lot and instead argues that either (1) there is no remainder in
11 petitioners' ownership because of a legal presumption that the remainder was
12 included in another conveyance or (2) any remainder was never conveyed by the
13 owners of the parent parcel and is not owned by *petitioners*. We are, however,
14 required to properly construe statutes, independent of the arguments made by the
15 parties.

16 ORS 92.017(1) provides: "A lawfully created lot or parcel remains a
17 discrete lot or parcel unless the lot or parcel lines are vacated or the lot or parcel
18 is further divided as provided by law." Similarly, LC 13.020(5) provides: "A lot
19 or parcel lawfully created remains a discrete lot or parcel, unless the lot or parcel
20 lines or the lot or parcel in further divided in a lawful manner." ORS 215.010(1),
21 which is implemented in LC 13.030(3)(n), provides

22 "As used in this chapter:

1 "(1) The terms defined in ORS 92.010 shall have the meanings given
2 therein, except that 'parcel':

3 "(a) Includes *a unit of land created*:

4 "(A) By partitioning land as defined in ORS 92.010;

5 "(B) In compliance with all applicable planning,
6 zoning and partitioning ordinances and
7 regulations; or

8 "(C) By deed or land sales contract, if there were no
9 applicable planning, zoning or partitioning
10 ordinances or regulations.

11 "(b) Does not include a unit of land created solely to establish
12 a separate tax account." (Emphasis added.)

13 These provisions all refer to when a lot is created but do not define "create."
14 When a term is undefined, we will consider its usual construction.[10] Webster's
15 defines "create" in part as "to bring into existence." *Webster's Third Int'l*
16 *Dictionary* 532 (unabridged ed 2002). In *Landwatch Lane County v. Lane*
17 *County*, we explained that a lawful lot or parcel may be created "*through a deed*
18 or land sales contract *describing the area of land as a unit* before planning,

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[10] LC 13.030(1) provides:

"When a Term Is Not Defined. Terms not defined in this section will have their ordinary accepted meanings within the context in which they are used. Webster's Third New International Dictionary of the English Language, Unabridged, Copyright 1981, Principal Copyright 1961, will be considered a standard reference for defining the meanings of terms not defined in this section or elsewhere in Lane Code."

zoning or subdivision or partition ordinances or regulations became applicable." 80 Or LUBA 415, 419 (2019) (emphases added). Differently, in *Atkins v. Deschutes County*, the property owner argued that "because a particular statutory procedure was not required for the creation of [their] lot, nothing was; therefore the [survey] that happened to be filed with the county official sufficed *ipso facto* to create a lot." 102 Or App 208, 210, 793 P2d 345 (1990). The court disagreed and determined that although there were no applicable statutory or county subdivision regulations, the simple filing of a survey with a county official did not create a legal lot of record. *Id.* at 210-11. We conclude that simple existence as a remainder does not create a legal lot.

Petitioners cite *Central Oregon Landwatch v. Deschutes County*, an appeal of a board of commissioners' decision determining that a large acreage property included eight lots of record and four lots that were not lots of record, which we affirmed. 75 Or LUBA 328, 336-39 (2017). The Deschutes County Code (DCC) definition of "lot of record" in DCC 18.04.030(A)(5) provided that it includes a parcel created "by the subdividing or partitioning of adjacent or surrounding land, leaving a remainder lot or parcel." *Id.* at 336. We afforded deference to the county's interpretation of DCC 18.04.030(A)(5) to conclude that "partition" included creation of a parcel by deed before the county had a subdivision or partition ordinance and that a 1914 "remainder" parcel was a legal lot of record. Similar language addressing the creation of remainders does not exist in the LC and the case is not instructive. In fact, tellingly, we stated: "We tend to agree with

1 petitioner that *a remainder parcel created by deed that does not include a legal*
2 *description of the remainder parcel could not qualify as a lot of record* under
3 DCC 18.04.030(A)(3)" which provides:

> 4 "By deed or contract, dated and signed by the parties to the
> 5 transaction, containing a separate legal description of the lot or
> 6 parcel, and recorded in Deschutes County if recording of the
> 7 instrument was required on the date of the conveyance. If such
> 8 instrument contains more than one legal description, only one lot of
> 9 record shall be recognized unless the legal descriptions describe lots
> 10 subject to a recorded subdivision or town plat[.]" *Id.* at 338-39
> 11 (emphasis added, brackets in original).

12 Petitioners also cite *Landwatch Lane County v. Lane County*, an appeal of
13 a decision verifying two parcels as legal lots. LUBA No 2020-085 (Apr 29, 2021)
14 (slip op at 5-13). In *Landwatch,* a warranty deed conveyed property including the
15 land described as property 1 and property 2. Property 1 was created in 1910. In
16 1951, property 1 and property 2 were conveyed together.[11] The hearings official
17 concluded that the legal description in the 1951 deed included the land in property
18 1, that the remainder of the land in the 1951 deed was property 2, and the 1951
19 deed did not merge properties 1 and 2. Thus, property 2 was conveyed by deed.
20 *Landwatch* is a case in which a deed had one legal description that included the

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[11] Property 1 was created in 1910 and had not been further divided since 1910. Property 2 was once part of a larger property that included Govt Lots 3, 4, 5 and 6 and was an irregularly shaped 57.58-acre unit of land. A 1944 warranty deed conveyed property 1 and a large area including property 2, creating a tract. Part of this tract was sold off in 1951 and then the next day the owner conveyed property 1 and property 2 with a single legal description.

property 1 and property 2 land areas. It is not a case where a "remainder" property not included in a deed was nonetheless created and the case is not instructive.

We conclude that the hearings official correctly construed the law in not relying on the 1908 "remainder" status of Property 1, without more, to conclude that Property 1 is a legal lot. For the reasons set out above, the hearings officer did not err in finding that the 1908 deed that did not describe Property 1 did not establish it as a legal lot.

2. Quitclaim Deed

Before the hearings official, petitioners set out an alternative theory that Property 1 was created via a 1973 quit claim deed. Petition for Review 42 n 13; Record 57. As the hearings official discussed, Oregon courts have found in some instances that it is appropriate to assume that property not described in a deed was conveyed with adjacent property. Record 58-59; *Hurd v. Byrnes*, 264 Or 591, 506 P2d 686 (1973). In *Hurd,* the court opined

> "Where narrow strips of land have been the subject of dispute in construing various conveyances, we have held that there should be a constructional preference in favor of the grantee. We have pointed to a number of considerations which warrant this preference. We have taken the view that where the conveyance or reservation of title to narrow strips of land is in question, the probable intent of the grantor is not to retain title if he does not own abutting land. * * * Supporting this conclusion is the general rule that ambiguities in a deed are to be construed against the grantor." *Id* at 598.

Based on their consideration of *Hurd,* the hearings official found that "[t]he history that the hearings official finds most persuasive and grounded in the

1 evidence is [petitioners'] theory that [Property 1] was presumed conveyed in
2 1905 along with tax lot 3100 in the transaction between Fred Warner and Robert
3 Allen [and] Frank Blair[]" based on a legal presumption that an owner intends to
4 convey all that they owned rather than retain an insignificant sliver. Record 58-
5 59.

6 In their third assignment of error, petitioners abandon this alternative
7 argument and instead argue that the hearings official erred in determining that
8 Property 1 was conveyed with tax lot 3100 in 1908.[12] Petitioners argue that the
9 "hearings official erred as a matter of law in concluding that [Property 1] was
10 included as part of the deed conveying [tax lot] 3100, a deed that precisely
11 described the land being conveyed and that does not describe [Property 1] as
12 being conveyed." Petition for Review 46. Petitioners express concern that future
13 county staff will determine that the hearings official's conclusion that petitioners'
14 *Hurd* argument was persuasive is law of the case that prevents future applications

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[12] Petitioners argue "The Hearings Official erred by concluding that the property was not lawfully established as a remainder (Petitioner[s'] first theory) and applying principles of real estate law to land use issues." Petition for Review 43. Petitioners also maintain "There is no ambiguity in any of the relevant deeds that created the subject property to 'interpret' such that could lead one to conclude that [Property 1] is not a lawfully created remainder as LUBA has held can properly exist." Petition for Review 45.

1 intended to demonstrate that Property 1 was lawfully created.[13] Petition for
2 Review 50.

3 We consider the decision before us and do not predict what approach future
4 staff will take to a future application.[14] The county responds, and we agree, that
5 the hearings official's consideration of *Hurd,* as was requested by petitioners,
6 was not error when the hearings official evaluated the chain of title to determine
7 if Property 1 was created by deed.

8 The hearings official did not misconstrue the law.

9 **D. Substantial Evidence**

10 Petitioners argue that "the fact that the boundary of [Property 1] was not
11 described in any deed until the 1973 quitclaim deed does not mean that it was not
12 created as a lawful remainder in 1908[]" and "*that the county's fixation on*
13 *ownership history is a red herring and cannot be a basis for concluding that*
14 *[Property 1] is not a lawfully created remainder.*" Petition for Review 46-47
15 (emphasis added). Petitioners maintain "[t]hat a property was never separately

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[13] Petitioners also state that the hearings official improperly relied upon the county's historic recognition of quit claim deeds between adjacent property owners as de facto property line adjustments because there was no proof that the grantor of the quitclaim deed owned Property 1. Petition for Review 49. Petitioners note that the hearings official found that there was no evidence the grantor owned the quit claimed property and petitioners do not explain the relevance of the reference to de facto property line adjustments. *Id.*

[14] We note that the county asserts in its respondent's brief that the hearings official's consideration of *Hurd* does not create or extinguish a property right.

1 conveyed by deed does not invalidate its lawfully created status." Petition for
2 Review 46. For the reasons set forth above, this is an incorrect statement of law.
3 For the reasons described below, we agree with the county that substantial
4 evidence supports the hearings official's decision that petitioners did not meet
5 their burden to show Property 1 is a legal lot, separately conveyed by deed.

6 The hearings official found persuasive *petitioners' alternative argument*
7 that Property 1 was conveyed along with tax lot 3100 as a result of a *Hurd*
8 analysis. The hearings officer concluded:

9 "Unfortunately there is still an evidentiary issue related to
10 Bromley's authority to quitclaim tax lot 2701 in 1973 to Simpson.
11 [Petitioners] assert[] that Bromley owned tax lots 3100 and 3000
12 (via deeds from 1954 and 1952, respectively) and was the owner of
13 tax lot 3100 at the time of the 1973 quitclaim deed. Regarding tax
14 lot 3100, the hearings official does not find any evidence in the
15 record that shows with certainty that Bromley was the owner of tax
16 lot 3100 in 1973. The evidence in the record only demonstrates that
17 Bromley was the owner of tax lot 3100 via a 1954 deed. Evidence
18 that Bromley owned tax lot 3100 and [Property 1] in 1973 would
19 require evidence that Bromley continuously held title to that
20 property beyond the 1973 quitclaim deed. All that a 1954 deed
21 demonstrates is that Bromley owned that property in 1954.

22 "It is unfortunate that this deed history along with the
23 contemporaneous survey work reported by [petitioners] are absent
24 from the record as it is very possible that these documents would
25 shed further light on whether [Property 1] was a lawfully established
26 unit of land. As the record stands, there is not enough evidence to
27 demonstrate that [Property 1] satisfies the applicable criteria to be
28 considered a lawfully established unit of land.

29 "[Petitioners' assert] that there are no ownership ambiguities. That
30 is not accurate. There is ambiguity regarding ownership of [Property

1 1] in the late 1960s/early 1970s. In addition, the site maps provided
2 by [petitioners] have created questions about the correct location of
3 the boundary between tax lot 2701 to the east and tax lot 2901 to the
4 west. Both legal descriptions describe boundary lines extending to
5 the center of Little Fall Creek and yet [petitioners'] site maps appear
6 to cross over the creek to the east and take in some of tax lot 2901's
7 property. [Petitioners'] assert[] that the actual location of property
8 lines will not be known until field work is completed. However, in
9 the record there is evidence that some field work has been completed
10 and the property lines shown on [petitioners'] site maps still appear
11 to include property from tax lot 2901." Record 60-61.

12 As the county explains in their brief:

13 "There is gap in the conveyance history that creates uncertainty as
14 to whether [t]ax [l]ot 2701 is a lawfully established unit of land.
15 There is no evidence in the record showing how A.M. Bromley
16 acquired [t]ax [l]ot 2701. It is unclear whether [t]ax [l]ot 2701 was
17 conveyed to A.M. Bromley, which is necessary to show A.M.
18 Bromley had the right to convey Property 1 to Kearney & Patricia
19 Simpson. Lack of evidence of how [t]ax [l]ot 2701 was originally
20 transferred out of ownership of H.A. Allen [and] Frank Blair does
21 not establish [p]etitioners' ownership in the property. * * *

22 "Petitioners did not provide information showing the full
23 conveyance history through deeds or quiet title judgment or court
24 order to clarify the ambiguity of ownership to show [t]ax [l]ot 2701
25 meets the criteria for a lawfully established unit of land."
26 Respondent's Brief 18-19.

27 The county then argues:

28 "[T]he fact that a deed was executed in 1973 does not mean that fee
29 title was transferred if the grantors were not the fee owners of the
30 property. The record does not provide sufficient history of chain of
31 title for the period preceding the 1973 deed to demonstrate that the
32 grantor in 1973 was the fee owner of [Property 1]." Respondent's
33 Brief 19.

1 The county argues, and we agree, that substantial evidence supports the hearings
2 official's conclusion that petitioners did not meet their burden to establish that
3 Property 1 is a legal lot.
4 The county's decision is affirmed.