

1 Opinion by Hanna.

2 **NATURE OF THE DECISION**

3 Petitioner appeals a decision of the county court
4 affirming the planning director's decision recognizing three
5 tax lots as separate legal parcels.¹

6 **MOTION TO INTERVENE**

7 Ralph and Sally Madison (intervenors), owners of the
8 subject property, move to intervene in this proceeding on
9 the side of respondent. There is no objection to the
10 motion, and it is allowed.

11 **FACTS**

12 Intervenors are the owners of three tax lots in Baker
13 County, generally described as tax lots 200, 300 and 2000,
14 which together comprise approximately 118 acres. Tax lot
15 2000 contains approximately 110 acres, and is situated on
16 the west side of a county road which separates it from tax
17 lot 200. Tax lot 200 consists of approximately two acres,
18 and is adjoined on its eastern boundary by the six-acre tax
19 lot 300.

20 Tax lot 200 was created on March 9, 1971, and was

¹All county governing bodies were originally designated "county courts."
Baker County is one of several counties that continues to operate under
that designation. See generally Strawberry Hill 4 Wheelers v. Benton Co.
Bd. of Comm., 287 Or 591, 594-602, 601 P2d 769 (1979) (discussing history
and operation of county courts).

1 purchased by intervenors on April 19, 1974.² Tax lot 300
2 was created by warranty deed and purchased by intervenors on
3 May 22, 1974. At the time it was created, Tax lot 300 was
4 an 11.2-acre parcel. However, after obtaining a variance
5 permit from the county on June 10, 1985, intervenors
6 partitioned a five-acre parcel from tax lot 300, and sold
7 the new five-acre tax lot 400 as a nonforest homesite.
8 Record 75. Tax lot 2000 was created by land sale contract
9 and purchased by intervenors on April 17, 1980.

10 On October 12, 1995, intervenors, by their attorney,
11 sent a letter to the county planning department stating
12 their position that the three above-described lots were each
13 lawfully created and remained discrete parcels for purposes
14 of conveyance under ORS 92.017.³ In that letter,
15 intervenors' attorney stated his intention to advise his
16 clients to proceed with the sale of tax lot 200 without any
17 zoning approval by the county. On October 25, 1995 the
18 county planning director responded:

19 "My research confirms your contention that [tax

²Although the county's decision repeatedly states that tax lot 200 was created "prior to 1971," petitioner identifies a document in the record that suggests it was created on March 9, 1971. Record 87. This discrepancy does not affect the county's analysis or the outcome of this proceeding.

³ORS 92.017 provides:

"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."

1 lots 200, 300 and 2000] are discrete parcels that
2 were lawfully created, and are allowed to remain
3 as such under ORS 92.017. Baker County hereby
4 recognizes that these properties may be bought,
5 sold, or transferred separately as long as they
6 remain discrete parcels. The properties remain
7 subject to the current zoning regulations of the
8 T-G (Timber-Grazing) zone, and any other
9 applicable land use laws." Record 27.

10 Petitioner appealed the planning director's October 25,
11 1995 letter to the city planning commission, which affirmed
12 the director's determination. Petitioner appealed the
13 planning commission's decision to the Baker County Court,
14 which also affirmed the decision. This appeal followed.

15 **JURISDICTION**

16 In their response brief, intervenors move to dismiss
17 this appeal on the grounds that the county's October 25,
18 1995 letter is not a land use decision subject to LUBA's
19 jurisdiction under ORS 197.015(10)(a)(A).⁴ Intervenors
20 argue that the planning director's letter merely expresses
21 the county's concurrence with intervenors' opinion that

⁴ORS 197.015(10)(a) defines land use decision, in relevant part, as follows:

"(A) A final decision or determination made by a local government or special district that concerns the adoption, amendment or application of:

"(i) The Goals;

"(ii) A comprehensive plan provision;

"(iii) A new land use regulation; or

"(iv) A new land use regulation."

1 their land may be sold in three discrete parcels under ORS
2 92.017. Therefore, intervenors argue, the letter is merely
3 advisory and does not involve the application of the goals,
4 the county's comprehensive plan, or any land use
5 regulations.

6 We disagree. From the outset, the county has treated
7 this proceeding as a land use decision.⁵ The record before
8 this Board clearly indicates that, in making the challenged
9 decision, the county undertook extensive research and
10 analysis of local land use regulations dating back to 1970.
11 Record 14-16. The planning commission's decision states:

12 "In order to determine whether the parcels were
13 legally created, the applicable zoning and
14 subdivision ordinance standards, criteria, and
15 procedures must be determined based on the
16 regulations that were in effect at the time the
17 parcels were created." Record 14.

18 The county then applied those regulations to the tax
19 lots in question in order to determine whether the lots were
20 lawfully created under the ordinances applicable at the time
21 of creation. Record 16-23. The county made a decision that
22 the parcels were legally created, and in doing so applied
23 local land use regulations. Accordingly, that decision
24 constitutes a land use decision subject to LUBA jurisdiction
25 under the statutory definition of ORS 197.015(10)(a)(A).

⁵The planning commission's decision states that "[b]ased on advice of county counsel, this action was determined to be a land use action that could be appealed." Record 14.

1 Intervenor's motion to dismiss is denied.

2 **FIRST ASSIGNMENT OF ERROR**

3 Under the first assignment of error, petitioner argues
4 that the county "failed to interpret or adequately consider"
5 the applicable local ordinances from 1970 and 1974 in making
6 its determination that tax lots 200, 300 and 2000 were
7 lawfully created for purposes of ORS 92.017.

8 First, petitioner contends that because the creation of
9 tax lot 200 in 1971 created a lot that was smaller than five
10 acres, that lot was presumed to be non-agricultural under
11 the 1970 ordinance. Although petitioner's argument is
12 unclear, it is apparently petitioner's contention that
13 intervenors' predecessor in interest was therefore required
14 to apply for a conditional use permit prior to creating tax
15 lot 200 by partition. Petitioner is improperly applying an
16 ordinance that regulates the use of property to a partition.
17 The planning commission determined that the ordinance in
18 effect when tax lot 200 was created was the 1970 Interim
19 Zoning Ordinance, which contained no standards or procedures
20 regulating land divisions. Record 14. Accordingly, the
21 county correctly concluded that tax lot 200 was lawfully
22 created under the applicable regulations.

23 Regarding tax lots 300 and 2000, petitioner contends
24 that the county failed to consider applicable subdivision
25 ordinance requirements regarding minor partitions.
26 Intervenor responds that the county's decision correctly

1 considers the 1974 zoning ordinance and the 1974 subdivision
2 ordinance in determining that the lots were lawfully
3 created. The planning commission's decision states:

4 "The 1974 Baker County Subdivision Ordinance
5 contained procedures for County review of major
6 partitions and subdivisions. The 1974 Subdivision
7 Ordinance references minor partitions but does not
8 contain specific procedures for County review of
9 minor partitions. Section 2.030 indicated that it
10 was 'Reserved for Minor Partitions.' No review
11 procedures for minor partitions were firmly
12 adopted until March 9, 1984 * * *.

13 * * * * *

14 "The properties identified as [tax lots 300 and
15 2000] were created as minor partitions, and will
16 be considered to be legally created parcels if
17 each parcel met the [zoning ordinance]
18 requirements of the zone in which it was located
19 at the time the parcel was created." Record 17-
20 19.

21 After correctly determining that the 1974 subdivision
22 ordinance contained no regulations regarding minor
23 partitions, the county went on to apply the 1974 zoning
24 ordinance requirements to the property at issue. The
25 planning commission concluded that tax lots 300 and 2000 met
26 the applicable minimum land width and minimum ownership size
27 requirements under the 1974 ordinance. Record 19-20. The
28 planning commission also correctly determined that the
29 county court's approval of intervenors' variance request in
30 1985 allowing a five-acre partition of tax lot 300 was
31 lawful under the applicable 1983 subdivision ordinance.
32 Record 20-22.

1 The first assignment of error is denied.

2 **SECOND ASSIGNMENT OF ERROR**

3 Under the second assignment of error, petitioner
4 contends that the county erred in its determination that the
5 tax lots in question were lawfully created because, at the
6 time of partitioning, the county failed to apply the
7 Statewide Planning Goals. Petitioner argues that because
8 the county's zoning ordinances were not acknowledged by the
9 Land Conservation and Development Commission (LCDC) until
10 1986, the county was required to directly apply the goals to
11 any minor partitions that occurred prior to 1986.

12 Intervenor responds, and we agree, that at the time the
13 tax lots at issue were created, Oregon statutes did not
14 require that minor partitions be approved under either state
15 or local land use law. Since Baker County did not elect to
16 regulate minor partitions under its subdivision ordinance,
17 the county was not required to apply the goals directly to a
18 minor partition. See Alexanderson v. Polk County, 289 Or
19 427, 616 P2d 459 (1980). In Alexanderson, the court held
20 that where the county's comprehensive plan had not been
21 acknowledged, the county was only required to apply the
22 goals to minor partitions "if the local government has
23 brought them within its subdivision ordinance". Id. at 434.

24 The second assignment of error is denied.

25 **THIRD ASSIGNMENT OF ERROR**

26 In the third assignment of error, petitioner contends

1 that the county erred by making a decision without giving
2 "proper review and deference to the previous decisions and
3 the previous directors and governing bodies." It is unclear
4 what decisions and governing bodies petitioner refers to.
5 Petitioner points to intervenors' testimony during a hearing
6 on the 1985 variance request which suggests that intervenors
7 may have believed that tax lots 200 and 300 would be merged
8 into a single parcel after the variance was granted.
9 Petitioner also points to a one-page letter in the record
10 dated June 1, 1994 from a former planning director to
11 intervenors stating that the three tax lots would be
12 "considered one parcel for ownership/sale purposes." Record
13 103. Petitioner also cites to other letters from various
14 government officials regarding the status of the tax lots in
15 question.

16 The statements and correspondence cited by petitioner
17 are not final decisions of governing bodies, and are not
18 entitled to deference by the county in making its decision.
19 Petitioners have not identified a basis on which this Board
20 can reverse or remand the county's decision.

21 The third assignment of error is denied.

22 The county's decision is affirmed.