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

SAIGE TIMBER, LLC,
Petitioner,

vs.

LINN COUNTY,
Respondent,

and

CASEY A. MEADOWS,
Intervenor-Respondent.

LUBA No. 2023-075

FINAL OPINION
AND ORDER

Appeal from Linn County.

Charles W. Woodward, IV filed the petition for review and reply brief and argued on behalf of petitioner.

Kevan J. McCulloch filed the joint response brief and argued on behalf of respondent. Also on the brief was Alan M. Sorem and Saalfeld Griggs PC.

Alan M. Sorem filed the joint response brief and argued on behalf of intervenor-respondent. Also on the brief was Kevan J. McCulloch and Saalfeld Griggs PC.

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

AFFIRMED 02/02/2024

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

Opinion by Zamudio.

NATURE OF THE DECISION

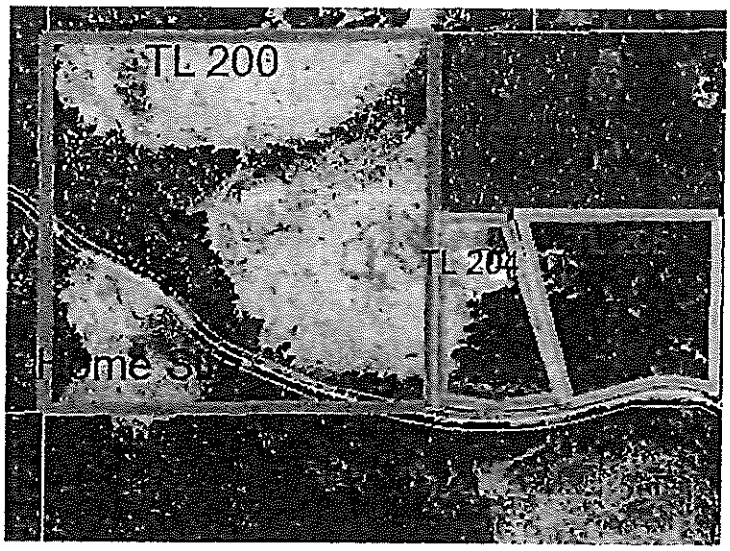
Petitioner appeals a board of county commissioners decision affirming a planning commission decision approving two property line adjustments (PLAs).

MOTION TO INTERVENE

Casey A. Meadows (intervenor), the applicant below, moves to intervene on the side of respondent. The motion is unopposed and is allowed.

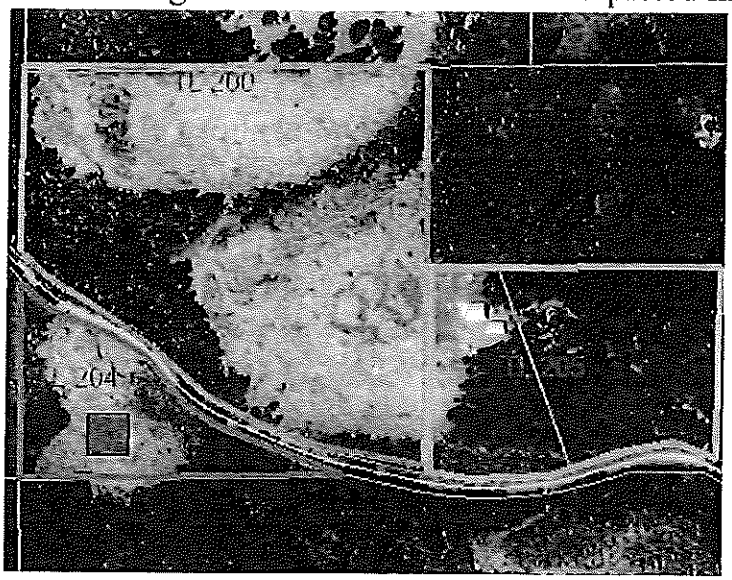
FACTS

The subject property is comprised of three units of land that are zoned Farm/Forest (F/F). We refer to those units of land by their tax lot numbers. Prior to the PLA approvals, Tax Lot 200 was a 38.5-acre parcel bisected by Rodgers Mountain Loop, a county road. Tax Lot 205 was an 8.68-acre parcel developed with a single-family dwelling that is intervenor's residence. Tax Lot 204 was a 5.52-acre parcel developed with two accessory buildings that intervenor uses as outbuildings. On December 14, 2021, the county approved an alternative forestland dwelling on Tax Lot 200 (2021 AFD). The dwelling, outbuildings, 2021 AFD "home site," and the property boundaries prior to the PLAs are shown in the image below.



Record 134

The challenged decision approves two PLAs, which reconfigure the property lines among the three units of land as depicted in the image below.



Record 136

Current Tax Lot 200 is 31.65 acres and undeveloped. Current Tax Lot 205 is 14.20 acres and developed with intervenor's dwelling and outbuildings. Tax Lot 204 is 6.85 acres and developed with a septic system installed pursuant to the 2021 AFD approval.

Intervenor applied for two PLAs in a consolidated application. The planning director approved the two PLAs as proposed. Petitioner appealed that decision to the planning commission, which held a public hearing and accepted oral and written testimony. The planning commission approved the PLAs. Petitioner appealed that decision to the county board of commissioners (the board). The board adopted the planning commission decision without holding a hearing. This appeal followed.

FIRST ASSIGNMENT OF ERROR

As applicable here, ORS 215.427 required the county to make a final decision on intervenor's PLA application within 150 days after the application was deemed complete on September 27, 2022. ORS 215.427(1); Record 3. That 150-day period could be extended up to a maximum of 215 additional days. ORS 215.427(5). The 150-day deadline passed on February 24, 2023, and the final deadline for the county's final decision, after the maximum allowed extensions, was September 27, 2023.

Linn County Code (LCC) 921.220(C) provides:

> "Notwithstanding any provision in this Code to the contrary, if a time limitation is about to expire and a final decision has not been made, or if the Commission has made a decision and a time limit is about to expire, the Board may enter an order affirming the findings and conclusion of the Commission without conducting any further hearings."

On September 26, 2023, the board issued its decision affirming and adopting the planning commission decision without holding a hearing. The

board's decision explains that the 150-day time limit in ORS 215.427 had already expired and there was insufficient time to comply with the final decision deadline in ORS 215.427 and hold a hearing in compliance with public notice and hearing requirements. Record 1.[1]

Petitioner argues that the board misconstrued LCC 921.220(C) and ORS 215.247. Petitioner argues that LCC 921.220(C) entitled petitioner to a *de novo* hearing before the board and that the board's failure to provide that hearing prejudiced petitioner's substantial right. We will reverse or remand land use decision if "[t]he local government * * * [f]ailed to follow the procedures applicable to the matter before it in a manner that prejudiced the substantial rights

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[1] The decision states:

> "On September 26, 2023, the Linn County Board Of Commissioners (Board) approved Resolution & Order No. 2023-352: (l) Noting that the 150-day time limit in ORS 215.427 expired on February 24, 2023 and that Linn County Code (LCC) 921.220(C) states that 'If a time limitation is about to expire and a final decision has not been made, or if the Commission has made decision and a time limit is about to expire, the Board may enter an order affirming the findings and conclusions of the Commission without conducting any further hearings.'; and (2) Resolved and Ordered that because the 150-day time limit has expired, the number of days remaining to comply with ORS 215.427 is not sufficient to comply with public notice and hearing requirements in both state law and County Code, that the findings and conclusions constituting the Linn County Planning Commission decision be affirmed and incorporated as the final decision of the Board in any subsequent appeal or review of lawful appellate and reviewing bodies." Record 1.

of the petitioner." ORS 197.835(9)(a)(B). Those rights are the right to an adequate opportunity to prepare and submit one's case and to a full and fair hearing. *Muller v. Polk County*, 16 Or LUBA 771, 775 (1988).

The county and intervenor (together, respondents) respond that the county did not commit any procedural error and that the board properly construed LCC 921.220(C). Respondents further argue that, even if the county did commit procedural error, petitioner is not entitled to any relief because petitioner failed to establish any prejudice to its substantial rights. We agree that petitioner has not established any prejudice to a substantial right and, thus, need not resolve whether the county misconstrued applicable law or whether LCC 921.220(C) provides petitioner a procedural right to a hearing.

Petitioner was entitled to and received a *de novo* hearing before the planning commission, which provided petitioner the opportunity to submit argument and evidence. Petitioner asserts that the board's failure to provide a second *de novo* hearing before the board prejudiced petitioner's substantial rights because petitioner was denied an opportunity to "bring [it's] concerns and arguments against the [planning commission's] Decision in the oversight forum of the [board] as provided by the LCC and protect Petitioner's substantial property rights." Petition for Review 13. Petitioner argues that there is a distinction between the board and the planning commission but does not explain how any difference between those county decision making bodies results in procedural prejudice to its substantial right to prepare and submit its case and to

a full and fair hearing. Petitioner does not identify any argument or evidence that it would have submitted to the board that it was not permitted to submit to the planning commission, other than arguments about how the planning commission erred. We agree with respondents that, even assuming *arguendo* that LCC 921.220(C) provides petitioner a procedural right to a hearing before the board, petitioner has not established any prejudice from the board adopting the planning commission decision without providing a second *de novo* hearing.[2]

The first assignment of error is denied.

SECOND ASSIGNMENT OF ERROR

Petitioner argues that the county misconstrued ORS 215.750(5)(g) and made inadequate findings not based on substantial evidence regarding the requirements of that statute. ORS 215.750(5)(g) prohibits a county from allowing an AFD if, after January 1, 2019, any PLA to the lot or parcel had the effect of qualifying the lot or parcel for a dwelling under ORS 215.750. Petitioner argued to the planning commission that approving the PLAs would make the 2021 AFD approval "out of compliance with ORS 215.750" and that, to avoid violating ORS

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[2] In so concluding, we observe that state law requires only one initial evidentiary hearing for discretionary approvals of development of land. *See* ORS 215.416; ORS 197.797; *Landwatch Lane County v. Lane County*, 79 Or LUBA 96, 98-99 (2019) (quoting *Bard v. Lane County*, 63 Or LUBA 1, 5, *aff'd*, 243 Or App 245, 256 P3d 205 (2011) (summarizing the relevant statutory framework and explaining that local appeal procedures must be consistent with the statutory procedures)). Petitioner does not argue that the county's procedure violates any statutory procedural requirements.

215.750, the county must either deny the PLAs or void the 2021 AFD approval. Record 20. The planning commission concluded that ORS 215.750(5)(g) does not apply to the PLA requests and observed that ORS 215.750 does not prohibit property owners from adjusting property lines after receiving an AFD approval. Record 20-21.

Petitioner argues that the county misconstrued ORS 215.750(5)(g) by concluding that it does not apply to the PLAs. Petitioner argues that, while the 2021 AFD approval was not subject to ORS 215.750(5)(g), the PLAs are subject to that provision "because the effect of the PLA[s] is to qualify a new and different unit of land for an AFD." Petition for Review 17. We understand petitioner to mean that reconfigured Tax Lot 204 is the "new and different unit of land." *Id.*

Respondents respond, and we agree, that the county's conclusion that ORS 215.750 is not applicable criteria for the PLAs is consistent with the text and context of that statute. The express terms of ORS 215.750 demonstrate that the legislature intended the restrictions therein to apply to dwelling applications. ORS 215.750(2) provides that the county "may allow the establishment of a single-family dwelling on a lot or parcel located within a forest zone" under certain specified circumstances. ORS 215.750(5)(g) provides that "[a] proposed dwelling under this section is allowed only if" a property line adjustment "did not have the effect of qualifying the lot or parcel for a dwelling." ORS 215.750(5)(g) prevents an applicant from using a PLA to qualify a newly formed

unit of land for an AFD when the unit of land previously would not have qualified. That statute says nothing about PLAs that change the configuration of a lot or parcel upon which an AFD has been previously allowed, let alone prohibit them. Respondents observe, and we agree, that petitioner's proffered construction of ORS 215.750(5)(g) would make it impossible for an applicant to adjust their property lines after receiving an AFD approval. If the legislature had intended to create such a limitation, it did not do so through ORS 215.750(5)(g).

We conclude that the county did not err in finding that ORS 215.750 does not apply to the PLAs. Accordingly, petitioner's additional arguments that the county's findings with respect to that statute are inadequate and not supported by substantial evidence provide no basis for remand.

The second assignment of error is denied.

THIRD ASSIGNMENT OF ERROR

ORS 92.192(4) contains limitations for PLAs in resource zones, including the subject F/F zone, related to existing and approved dwellings. On resource-zoned land, a PLA may not be used to "[a]llow an area of land used to qualify a lawfully established unit of land for a dwelling based on an acreage standard to be used to qualify another lawfully established unit of land for a dwelling if the land use approval would be based on an acreage standard[.]" ORS 92.192(4)(c). LCC 925.350(B)(8)(c) implements ORS 92.192(4)(c) and adopts the statutory language nearly verbatim. We refer to the statutory provision for purposes of

resolving this assignment of error because the county must apply its code in a manner consistent with the statute.

The county found that *neither* of the land use approvals for intervenor's dwelling or the 2021 AFD "were based on a tract based on an acreage standard." Record 19. Petitioner argues that those findings misconstrue and fail to adequately address ORS 92.192(4)(c). Petitioner argues that the 2021 AFD was approved on an area of land (within former Tax Lot 200) based on an acreage standard and that the PLAs change the acreage of the unit of land on which the AFD remains approved (current Tax Lot 204). As we understand it, petitioner argues that ORS 92.192(4)(c) requires the county to consider whether the 2021 AFD could be approved under the new property line configuration.

Petitioner does not argue that the challenged PLAs will in fact "qualify another lawfully established unit of land for a dwelling" or that the PLAs can "*be used to* qualify another lawfully established unit of land for a dwelling" based on an "acreage standard." ORS 92.192(4)(c) (emphasis added). It is not evident to us that the challenged PLAs qualify another lawfully established unit of land for a dwelling under approval criteria based on an acreage standard. None of the newly created units of land come close to meeting the 160-acre requirement for a large tract forest dwelling under ORS 215.740. As explained above, ORS 215.750(5)(g) would prohibit an AFD on any newly created unit of land that newly qualifies for an AFD based the challenged PLAs. Accordingly, even *assuming without deciding* that the 2021 AFD is "based on an acreage standard,"

and the county erred in concluding otherwise, absent argument and evidence that the PLAs allow the area of land used for the 2021 AFD approval to be used to qualify another lawfully established unit of land for a dwelling based upon an acreage standard, petitioner has failed to establish that the county erred in failing to apply ORS 92.192(4)(c). Thus, petitioner's third assignment of error provides no basis for remand.

The third assignment of error is denied.

FOURTH ASSIGNMENT OF ERROR

Petitioner argues that the county exceeded its authority and misconstrued applicable law by approving PLAs that decrease the size of units of land that were already smaller than the minimum size for the F/F zone. It is undisputed that all the units of land subject to the PLAs did not meet the F/F zone minimum lot or parcel size before the PLAs and do not after the PLAs.

LCC 925.320(B)(4) provides that "a lawfully established unit of land *in non-resource zoning districts* which does not meet the size standard of the zoning district may be further reduced in size by a [PLA]." (Emphasis added.) Petitioner argued below that LCC 925.320(B)(4) prohibits county approval of the PLAs because the subject units of land are within a *resource* zoning district. The county rejected that argument and found that LCC 925.320(B)(4) is not applicable, the PLAs are not prohibited by the county code, and the PLAs are allowed under ORS 92.192(3)(b). Record 47. ORS 92.192(3) provides:

"Subject to subsection (4) of this section, for land located entirely

outside the corporate limits of a city, a county may approve a property line adjustment in which:

> "(a) One or both of the abutting lawfully established units of land are smaller than the minimum lot or parcel size for the applicable zone before the property line adjustment and, after the adjustment, one is as large as or larger than the minimum lot or parcel size for the applicable zone; or
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> "(b) Both abutting lawfully established units of land of land are smaller than the minimum lot or parcel size for the applicable zone before and after the property line adjustment."

Petitioner argues that because the county has not implemented ORS 92.192(3)(b) in the LCC, the county may not approve the PLAs because there is no authority in the LCC to do so. Respondents respond, and we agree, that petitioner has cited nothing that requires the county to enact a local code provision to allow a PLA that the county may approve under ORS 92.192(3)(b). The county did not err in relying on ORS 92.192(3)(b) to support its decision.

The fourth assignment of error is denied.

FIFTH ASSIGNMENT OF ERROR

The county may not approve a PLA that will "create building encroachments into specified setback areas." LCC 925.320(B)(5)(c). The county found:

> "This criterion requires a finding that any structures currently on the property shall not create building encroachments into specified setback areas. No structures currently exist on the property. Any future structures proposed to be developed on the property are subject to the applicable structural setback standards found in LCC 934, unless approved for a variance. If a variance cannot be approved, then a structure would not be allowed to encroach into the

required setback.

> "[Petitioner] argued at the Commission hearing that site improvements for the access road have encroached into the F/F zone setback standard of 50 feet. The Commission finds that the 50-foot setback does not apply to driveways or access ways providing ingress and egress to or from private parking areas, pursuant to LCC 934.205(8)(4).
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> "According to the Linn County Geographic Information Systems (GIS) and the maps submitted by [intervenor], the proposed [PLAs] do not cause encroachment into specified setback areas. Any future construction will have to meet the minimum structural setbacks for the F/F zoning district, unless approved for a variance. The Commission finds the applications satisfy this criterion." Record 12.

Petitioner argues that the county misconstrued LCC 925.320(B)(5)(c) by concluding that the criterion only applies to structures currently on the property. Respondents respond, and we agree, the county did not interpret LCC 925.320(B)(5)(c) to apply only to existing structures. Instead, the county expressly stated that future construction must meet setback requirements or obtain a variance. There is nothing in the code that requires intervenor to submit a building site plan in the PLA record to establish that a future AFD will not create building encroachments to comply with LCC 925.320(B)(5)(c).

Petitioner also argues that the county made inadequate findings not based on substantial evidence when finding that the application complied with LCC 925.320(B)(5)(c) because the PLA allows the access road for the AFD to encroach into an applicable setback area. Petition for Review 25-26. Petitioner does not explain how a roadway would create a *building* encroachment or

challenge the county's finding that driveways or accessways are not subject to setback requirements. This argument provides no basis for remand.

The fifth assignment of error is denied.

SIXTH ASSIGNMENT OF ERROR

Petitioner argues that the PLA approvals "invalidat[e]" the 2021 AFD approval. Petition for Review 27. The 2021 AFD provides, as "Condition 1," that "An alternative forestland dwelling is authorized for the 38.50-acre property." Record 40. According to petitioner, the 2021 AFD approval is therefore conditioned on the subject property remaining 38.50 acres. Petitioner argues that the county erred in approving the proposed PLA without imposing a condition of approval eliminating the 2021 AFD approval.

The county found that the 2021 AFD Condition 1 simply identified the property. Furthermore, the county found that no applicable law "requires compliance with permit conditions associated with a conditional use permit prior to the approval or completion of a [PLA]." Record 23. Petitioner does not challenge that latter finding. Respondents respond, and we agree, that the sixth assignment of error does not state any basis for reversal or remand.

The sixth assignment of error is denied.

SEVENTH ASSIGNMENT OF ERROR

Petitioner argues that the county's findings of compliance with LCC 925.350(B)(7) are not supported by substantial evidence. LCC 925.350(B)(7) provides, in relevant part, that "[a] property proposed to be reduced in size below

* * * the 10% allowed ministerially for forested property shall not result in a property size which would alter the stability of the land use pattern of the area." The PLAs reduce Tax Lot 200 from 38.50 acres to 31.65 acres, which is beyond the 10% allowed ministerially for forested property, and therefore LC 925.350(B)(7) applies.

The county concluded that the PLAs will not result in a property size which would alter the stability of the land use pattern of the area. Record 17-19. The county found, in part:

> "Tax lots 204 and 205 are increasing in size and tax lot 200 will decrease in size from 38.5 acres to 31.65 acres. According to Linn County GIS, properties within Section 24 on County Assessor map T10S, R01W, acreages range from 1.75 acres to 192.64 acres. There are 12 established or initiated dwellings. The average acreage size for properties in the surrounding area is approximately 40 acres. Six (6) of the properties are 10 acres or less, including tax lots 204 and 205. The average size of the smaller properties is 5.32 acres. Both tax lots 204 and 205 currently exist above that average size and will increase in size as a result of the adjustment.
>
> "Eight (8) of the properties are over 10 acres, but less than the minimum property size of the F/F zoning district. The average size of those eight properties is 32.77 acres. Tax lot 200 will decrease in size from 38.5 acres to 31.65 acres, but will result in being 1.18 acres less than the average size of the properties over 10 acres, but less than the minimum property size of the F/F zoning district. The Commission reasons that the stability of the land use pattern in the area won't be altered because tax lots 204 and 205 currently exist above the average size of properties in the area below 10 acres and will increase in size as a result of the adjustment and because tax lot 200 is not decreasing in an amount that is drastically different than the average size of properties that are over 10 acres, but less than the minimum property size of the F/F zoning district." Record 18.

Petitioner argues that the PLAs "will result in an 'orphan lot' of 6.85 acres that is approved for an AFD, which is a property size that will 'alter the stability of the land use pattern of the area.'" Petition for Review 29. Petitioner further argues that the PLAs will eliminate the requirement of any owner of the 6.85-acre parcel to submit tree stocking reports to the County Assessor that are required for forest-zoned properties over 10 acres under LCC 933.170 and that decreasing the approved AFD parcel from 38.5 acres to 6.85 acres will remove state tax incentives to maintain the parcel as small-tract forestland.

Respondents respond, and we agree, that petitioner's arguments do not provide a basis for remand under the substantial evidence standard of review. Substantial evidence is evidence that a reasonable person would rely on in making a decision. *Dodd v. Hood River County*, 317 Or 172, 179, 855 P2d 608 (1993). In reviewing the evidence, LUBA may not substitute its judgment for that of the local decision maker. Rather, LUBA must consider all the evidence to which it is directed, and determine whether based on that evidence, a reasonable local decision maker could reach the decision that it did. *Younger v. City of Portland*, 305 Or 346, 358-60, 752 P2d 262 (1988).

The county evaluated the surrounding properties and analyzed average property size, uses, and approved dwellings from which the county could reasonably conclude that the PLAs would not alter the stability of the land use pattern of the area.

To the extent that petitioner argues that the findings are inadequate, petitioner's argument also provides no basis for remand. Where a petitioner does not explain why challenged findings are inadequate, but rather disagrees with the conclusion reached in those findings, petitioner's challenge to the findings will not be sustained. *Knapp v. City of Corvallis*, 55 Or LUBA 376, 380-81 (2007).

The seventh assignment of error is denied.

The county's decision is affirmed.