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

FRANK HARTMANN, )  
 )  
 Petitioner, )  
 )  
 vs. )  
 )  
 WASHINGTON COUNTY, )  
 )  
 Respondent. )

LUBA No. 98-172  
  
FINAL OPINION  
AND ORDER

Appeal from Washington County.

Jonathan R. Gilbert, Portland, filed the petition for review and argued on behalf of petitioner. With him on the brief was Brownstein, Rask, Arenz, Sweeney, Kerr and Grim.

Alan R. Rappleyea, Washington County Counsel, Hillsboro, filed the response brief and argued on behalf of respondent.

BASSHAM, Board Member; HOLSTUN, Board Chair; BRIGGS, Board Member, participated in the decision.

AFFIRMED 07/16/99

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

1 Opinion by Bassham.

2 **NATURE OF THE DECISION**

3 Petitioner appeals the county's denial of a non-farm dwelling on land zoned for  
4 exclusive farm use (EFU).

5 **FACTS**

6 The subject property is a vacant 29-acre parcel zoned EFU. The subject property is a  
7 remnant parcel that was once part of a larger parcel. That larger parcel has been reduced in  
8 size twice as a result of two separate county decisions. In 1990, the county approved a  
9 partition of the subject property into three parcels. Parcels 1 and 2 were adjacent 2.5-acre  
10 parcels on which nonfarm dwellings were approved. The county assessor designated Parcels  
11 1 and 2 as tax lots 1300 and 1700, respectively. Parcel 3 was a remainder parcel of  
12 approximately 33 acres containing an existing farm dwelling.

13 The character of the second county decision is at issue in this appeal. In 1994, the  
14 owner of Parcel 3 applied to the county for a partition of Parcel 3 to create a new three-acre  
15 parcel containing the existing farm dwelling. The county approved the partition, and  
16 designated the new nonfarm parcel tax lot 1800. The county also approved as part of the  
17 1994 application a lot line adjustment that moved the southern boundary of tax lot 1700 to  
18 increase the size of tax lot 1700 from 2.5 to 3.79 acres. The 29-acre remainder parcel, the  
19 property that is the subject of this appeal, was designated tax lot 1900.

20 In 1998, petitioner filed the application at issue in this appeal. The application  
21 proposed to designate the entire subject property a nonfarm parcel in order to build a  
22 nonfarm dwelling on it, pursuant to OAR 660-033-0130(4)(a). A county hearings officer  
23 denied the application, finding that the subject parcel had been created in 1994 as a result of  
24 the 1994 partition, and thus that petitioner had failed to demonstrate compliance with OAR  
25 660-033-0130(4)(a)(C), which requires that the proposed nonfarm dwelling "will be sited on

1 a lot or parcel created before January 1, 1993."<sup>1</sup>

2 This appeal followed.

3 **ASSIGNMENT OF ERROR**

4 Petitioner argues that the hearings officer misconstrued OAR 660-033-0130(4)(a)(C)  
5 and erred in finding that the subject property had been created in 1994. According to  
6 petitioner, the date that the subject parcel was created for purposes of OAR 660-033-  
7 0130(4)(a)(C) is controlled by OAR 660-033-0020. OAR 660-033-0020(4) defines the terms  
8 "Date of Creation and Existence" for purposes of OAR chapter 660, division 33, to mean:

9 "When a lot, parcel or tract is reconfigured pursuant to applicable law after  
10 November 4, 1993, the effect of which is to qualify a lot, parcel or tract for the  
11 siting of a dwelling, the date of the reconfiguration is the date of creation or  
12 existence. Reconfiguration means any change in the boundary of the lot,  
13 parcel or tract."

14 The hearings officer found that the 1994 partition

15 "resulted in a 3-acre nonfarm parcel tax lot 1800, and the subject 29-acre  
16 parcel which was given a new lot number 1900. Staff contends that since the  
17 [1994] partition resulted in two new lots the subject parcel does not meet the  
18 standards of OAR 660-033-0130(4)(a)(A)(C) which requires the Applicant to  
19 demonstrate that: '[t]he dwelling will be sited on a lot or parcel created before  
20 January 1, 1993.'

21 " \* \* \* \* \*

22 "The Hearings Officer concurs with the Staff. \* \* \* The subject parcel in this  
23 case was created by the Applicant after January 1, 1993. Even if the  
24 definition of OAR 660-033-0020(4) was controlling, Applicant does not meet  
25 its requirements. The parcel was in fact reconfigured after November 4, 1993,  
26 to create a new nonfarm parcel tax lot 1800. Reconfigured means, any change  
27 in the boundary of the lot, parcel or tract. The boundaries of the subject  
28 parcel were reconfigured to reduce the size of the subject parcel and allow the  
29 creation of a 3-acre nonfarm parcel." Record 8-9 (emphasis in the original).

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<sup>1</sup>OAR 660-033-0130(4)(a)(C) implements ORS 215.284(1)(c), which in the Willamette Valley allows a dwelling not in conjunction with farm use where the dwelling "will be sited on a lot or parcel created before January 1, 1993." For a discussion of the origin and legislative history of ORS 215.284, see Dorvinen v. Crook County, 33 Or LUBA 711 (1997), aff'd 153 Or App 391, 957 P2d 180, rev den 327 Or 620 (1998).

1           Petitioner challenges these findings, first arguing that the 1994 partition was not  
2 intended to and did not have the effect of qualifying the subject property for the siting of a  
3 dwelling, and thus the 1994 partition cannot constitute the event establishing the date the  
4 property was created for purposes of OAR 660-033-0130(4)(a)(C).

5           Second, petitioner contends that, even if the definition in OAR 660-033-0020(4) is  
6 not controlling, the hearings officer erred in concluding that the 1994 partition created the  
7 subject parcel. Petitioner argues that the county's 1994 approval "merely adjusted a property  
8 line of the subject parcel," and thus did not "create" that parcel. Petition for Review 6.  
9 According to petitioner, the subject property was "created" as part of the 1990 partition.

10           We first address petitioner's second argument, as it challenges the primary basis for  
11 the hearings officer's denial. To the extent petitioner argues that the county's 1994 approval  
12 did not result in a partition of the subject property as that term is defined at ORS 92.010, but  
13 was "merely" a lot line adjustment, the record and the law are to the contrary.<sup>2</sup> The 1990  
14 partition plat shows the three parcels created in that proceeding. Record 16. The 1994  
15 approval resulted in an additional parcel, tax lot 1800. Record 15. Therefore the 1994  
16 approval resulted in a partition as defined at ORS 92.010(7) and was not merely a lot line  
17 adjustment, although it included a lot line adjustment that moved the southern boundary of

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<sup>2</sup>ORS 92.010 defines, for purposes of the partition, subdivision and replat provisions of ORS 92.010 to 92.190, the following relevant terms:

- "(5) 'Parcel' means a single unit of land that is created by a partitioning of land.
- "(6) 'Partition' means either an act of partitioning land or an area or tract of land partitioned.
- "(7) 'Partition land' means to divide land into two or three parcels of land within a calendar year, but does not include:  
  
\* \* \* \* \*
- "(b) An adjustment of a property line by the relocation of a common boundary where an additional unit of land is not created and where the existing unit of land reduced in size by the adjustment complies with any applicable zoning ordinance[.]"

1 tax lot 1700 to increase the size of that parcel. The hearings officer correctly found that the  
2 1994 approval partitioned the parent parcel for tax lots 1800 and 1900 into two parcels.

3 Moreover, we disagree with petitioner to the extent he argues that, while the 1994  
4 partition may have created tax lot 1800, it did not create the subject parcel, tax lot 1900,  
5 because tax lot 1900 already existed as a result of the 1990 partition. As the definitions at  
6 ORS 92.010(5), (6), and (7) make clear, the effect of a partition under ORS chapter 92 is to  
7 establish new parcels as of the date the partition plat is approved. Contrary to petitioner's  
8 assertions, ORS chapter 92 does not recognize or assign any legal significance to the concept  
9 of a "remainder" or "parent" parcel.<sup>3</sup> Petitioner concedes as much by arguing that the 1990  
10 partition created the subject property. The hearings officer correctly concluded that the  
11 subject property was created in 1994.

12 With the foregoing in mind, we return to petitioner's initial argument that OAR 660-  
13 033-0020(4) controls the issue of the creation date for the subject property. We understand  
14 petitioner to argue that, notwithstanding that a partition pursuant to ORS chapter 92 creates  
15 each of the resulting parcels, for purposes of siting a nonfarm dwelling under OAR 660-033-  
16 0130(4)(a)(C), "reconfigurations" of a parcel after November 3, 1994, can "create" a parcel  
17 subject to the limitations of the rule only where the effect of the reconfiguration is to qualify  
18 the parcel for the siting of a dwelling. Petitioner contends that, because the 1994 partition  
19 and lot line adjustment "reconfigured" the subject property but did not qualify that parcel for  
20 the siting of a dwelling, the 1994 partition does not provide the applicable date of creation  
21 for the subject parcel.

22 We disagree with petitioner's interpretation of OAR 660-033-0020(4). The evident

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<sup>3</sup>Particularly where partitions carve smaller parcels from a larger one, or where one of the parcels retains an existing dwelling or farm operation, it is convenient to conceive of partitions as leaving a "remainder" parcel rather than creating each of the resulting parcels. However, that conception has no basis in ORS chapter 92 or other authority of which we are aware, and is inconsistent with the definitions of "parcel" and "partition" at ORS 92.010(5) and (6).

1 purpose of the definition at OAR 660-033-0020(4) is to expand the set of circumstances that  
2 create a parcel, for purposes of siting a nonfarm dwelling pursuant to OAR 660-033-0130(4)  
3 and ORS 215.284(1), to include circumstances where a lot line adjustment or similar  
4 reconfiguration is approved, the effect of which is to qualify a lot or parcel for a nonfarm  
5 dwelling.<sup>4</sup> Petitioner's interpretation essentially narrows the set of circumstances that create  
6 a parcel for purposes of OAR 660-033-0130(4) to include only those events that have the  
7 effect of qualifying the parcel to site a dwelling thereon. However, that interpretation is at  
8 odds with the ORS chapter 92 definitions discussed above, which articulate the general rule  
9 that partition provides the "date of creation" for the resulting parcels. Petitioner's reading of  
10 the rule essentially carves out an exception to the statutory scheme, such that, for purposes of  
11 OAR 660-033-0130(4), where partition does not qualify a parcel for a nonfarm dwelling that  
12 partition does not determine the parcel's date of creation, even though the date of partition is  
13 the date of creation for resulting parcels in all other circumstances.

14 When OAR 660-033-0020(4) is properly construed, the apparent inconsistency that  
15 petitioner's interpretation creates between the legal effects of partition described in ORS  
16 92.010(5) and (6) and in OAR 660-033-0020(4) disappears. Although OAR 660-033-  
17 0020(4) addresses the concept of "Date of Creation" for purposes of OAR chapter 660,  
18 division 33, it neither provides nor suggests that it is a comprehensive statement of the means  
19 by which parcels can be created. As indicated above, an apparent purpose of OAR 660-033-  
20 0020(4) is to close a potential loophole in the regulation of nonfarm dwellings by expanding  
21 the set of circumstances in which lots or parcels can be "created" for purposes of OAR 660-  
22 033-0130(4)(a). Further, although the last sentence of OAR 660-033-0020(4) defines

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<sup>4</sup>For example, because OAR 660-033-0130(4) and ORS 215.284(1) allow a nonfarm dwelling in the Willamette Valley only where the parcel is predominately composed of Class IV through Class VIII soils, absent OAR 660-033-0020(4) an applicant could qualify a parcel for a nonfarm dwelling by obtaining approval for a lot line adjustment that reconfigures the boundaries of the parcel to reduce the proportion of Class III and better soils on the parcel below fifty percent.

1 "reconfiguration" in broad terms as "any change in the boundary" of the parcel, construed in  
2 context with the definitions at ORS 92.010 it is clear that partition does not "reconfigure" a  
3 parcel within the meaning of the rule. That is precisely because the legal effect of partition is  
4 to create each of the resulting parcels. Because a partition does not leave an existing  
5 remainder parcel, but instead creates new parcels, the parent parcel that existed prior to  
6 partition does not legally exist after partition. Consequently, a partition does not change the  
7 boundary of a parcel and thus is not a "reconfiguration" within the meaning of the rule.

8           Because the hearings officer correctly determined that the subject parcel was created  
9 in 1994, and that OAR 660-033-0020(4) does not control the date the parcel was created, the  
10 hearings officer properly denied petitioner's application for a nonfarm dwelling under OAR  
11 660-033-0130(4)(a)(C). Petitioner's arguments to the contrary do not provide a basis to  
12 reverse or remand the challenged decision.

13           The assignment of error is denied.

14           The county's decision is affirmed.