BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

HERU TARJOTO,	)	
	)	
Petitioner,	)	
	)	
vs.	)	
	)	LUBA Nos. 99-002/003
LANE COUNTY,	)	
	)	FINAL OPINION
Respondent,	)	AND ORDER
	)	
and	)	
	)	
NORMAN FOGELSTROM,	)	
	)	
Intervenor-Respondent.	)	

Appeal from Lane County.

Edward J. Sullivan, Portland, filed the petition for review and argued on behalf of petitioner. With him on the brief was Preston Gates and Ellis.

Stephen L. Vorhes, Assistant County Counsel, Eugene, filed a response brief and argued on behalf of respondent.

Michael E. Farthing, Eugene, filed a response brief and argued on behalf of intervenor-respondent. With him on the brief was Gleaves Swearingen Larsen Potter Scott and Smith.

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

AFFIRMED 09/13/99

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

Opinion by Bassham.

NATURE OF THE DECISION

Petitioner appeals the county's approval of two dwellings not related to forest use on two parcels zoned Impacted Forest Land (F-2).

MOTION TO INTERVENE

Norman Fogelstrom (intervenor), the applicant below, moves to intervene on the side of the county. There is no opposition to the motion, and it is allowed.

MOTION TO FILE REPLY BRIEF

Petitioner moves for permission to file a reply brief, pursuant to OAR 661-010-0039, to address three alleged new matters raised in the response briefs. Petitioner argues that the response brief raises the following new matters (1) that petitioner should have sought review of a 1989 legal lot verification; (2) that LUBA's decision in Tarjoto v. Lane County, __ Or LUBA __ (LUBA No. 97-036, February 5, 1998), which involved a property that plays a role in this case, controls aspects of the present case; and (3) that local code provisions governing nonforest dwellings at issue in this case do not implement any statutory or administrative rules.

The first matter amounts to an argument that petitioner has waived certain issues. An argument regarding waiver of issues is, if raised for the first time in a response brief, a matter that warrants a reply brief. The second matter amounts to an argument that petitioner is collaterally estopped from asserting certain arguments or facts, which is also a matter that warrants a reply brief.

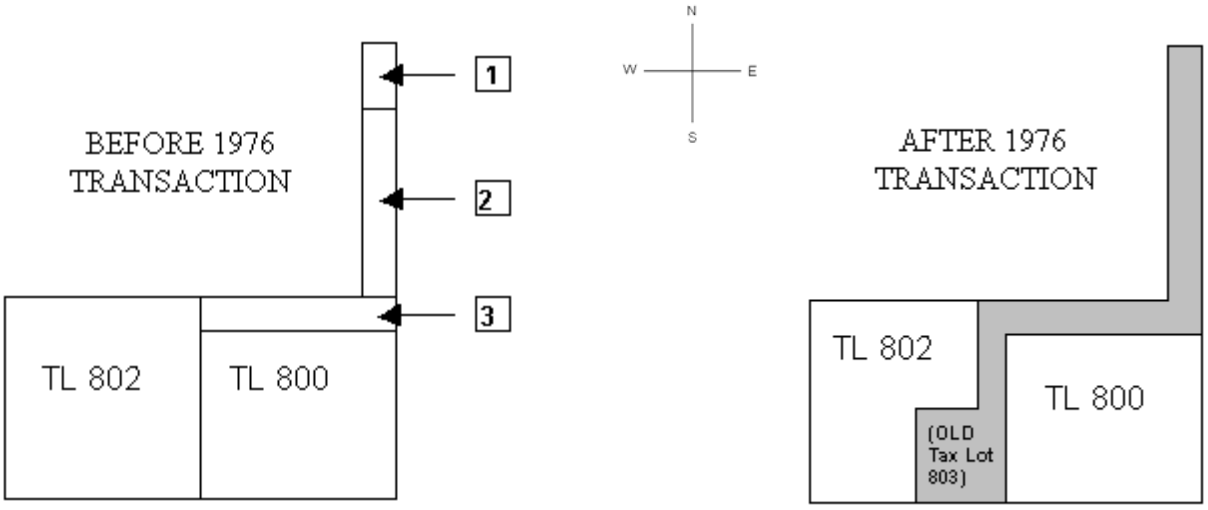
The third matter is a closer question. The county alleged in its response brief that certain local provisions at issue in this case do not implement any statutory or administrative rules, and thus any county interpretation of those local provisions is entitled to deference under ORS 197.829(1) and Clark v. Jackson County, 313 Or 508, 514-15, 836 P2d 710 (1992). Petitioner argues in his reply brief that in fact the local nonforest dwelling

provisions implement OAR chapter 660, division 4 (1991), and thus the county's discretion to interpret those provisions is constrained by the meaning of the rule provisions implemented. We agree with petitioner that the response brief raised a new matter warranting a reply brief.

Petitioner's motion to file a reply brief is allowed.

FACTS

The primary issue in these appeals is whether two undeveloped parcels, tax lots (TL) 800 and 802, were lawfully created prior to January 25, 1990. The current configuration of the subject parcels and the surrounding parcels are the result of a complicated series of property transactions over the last 40 years. We describe only the most pertinent transactions, and provide the following figures (not drawn to scale) as an aid to understanding those transactions:



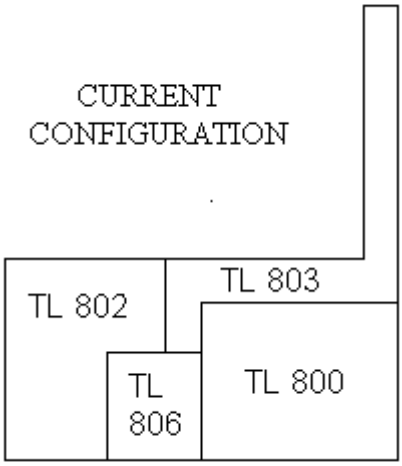
TL 800 is a 39-acre parcel, the remnant of an 80-acre parcel acquired by the Carners in 1966. On October 1, 1970, the Carners sold the western 40-acres of TL 800 to the Fogelstrom Corporation. The western 40 acres of TL 800 became TL 802, while the eastern 40 acres of TL 800 retained that designation.

On October 16, 1970, the Carners sold TL 800 to Ellingsworth. On May 23, 1972,

Ellingsworth sold the northernmost 60 feet of TL 800 (approximately one acre) to the Fogelstrom Corporation by warranty deed. We follow the parties in referring to this strip of land as "parcel 3." The effect of the 1972 transaction between Ellingsworth and the Fogelstrom Corporation was to give TL 802 access across parcel 3 and thence across two similar strips of land (parcels 1 and 2) that the Fogelstrom Corporation had acquired in 1970 and that connected to a county road north of the subject properties. The size and boundaries of TL 800 have remained unchanged since the 1972 transaction.

TL 802 is now a 29-acre parcel, the remnant of the western 40 acres of TL 800 that the Carners sold to the Fogelstrom Corporation in 1970. On January 5, 1976, the Fogelstrom Corporation conveyed by deed to intervenor (1) a ten-acre portion in the southeast corner of TL 802, (2) a 60-foot wide strip of land along the eastern property line of TL 802; and (3) parcels 1, 2, and 3 connecting the foregoing to the county road. We follow the parties in referring to the ten-acre portion of TL 802 conveyed in 1976 as the "bulb," and the strips of land conveyed in 1976 as the "cord." The county assigned the ten-acre portion and the other property conveyed in the 1976 transaction a single tax lot number, hereafter old TL 803. The size and boundaries of TL 802 has remained unchanged since the 1976 transaction.

In 1989, intervenor conveyed the ten-acre portion (the bulb) to petitioner, but retained the cord or strips of land providing access to the bulb, conveying to petitioner an access easement over the cord. The cord retained the TL 803 designation, while the county assigned to the bulb the tax lot number 806. The current configuration consists of three adjacent parcels, TL 802, 806 and 800, each of which is provided access to the county road by TL 803, as represented in the figure below.



In 1992, intervenor filed the challenged applications to build nonforest dwellings on TL 800 and 802. After a torturous procedural history, a county hearings officer approved both applications on August 27, 1996, concluding that both parcels complied with the criteria for nonforest dwellings, including Lane Code (LC) 16.211(7)(e), which requires that "[t]he parcel on which the dwelling would be located was lawfully created prior to January 25, 1990." Petitioner appealed to the county board of commissioners which, on December 16, 1998, affirmed the hearings officer's decision, adopting the hearings officer's findings and interpretations as its own, and adopting additional findings.

This appeal followed.

FIRST ASSIGNMENT OF ERROR

Petitioner argues that the county erred in concluding that TL 800 and 802 were "lawfully created" prior to January 25, 1990, and thus that the subject parcels comply with LC 16.211(7)(e).

The county's finding of compliance with LC 16.211(7)(e) relies primarily on the fact that before March 26, 1975, a legal lot or parcel could be created in most rural areas of Lane County, including the area in dispute, simply by describing the lot or parcel with a metes and bounds description and conveying it to another.[1] On March 26, 1975, the county enacted an

[1]LC 16.090(1) defines "parcel" to

ordinance requiring county approval of any partition of land. The county found that the transactions in 1970 between the Carners and the Fogelstrom Corporation and 1972 between Ellingsworth and the Fogelstrom Corporation had the effect of lawfully creating the parcels now designated TL 800 and 802. The county concluded that after the 1972 transaction the relevant area consisted of five lawfully created parcels: TL 802, TL 800, and parcels 1, 2, and 3 (respectively, the two strips of land running north to the county road and the northernmost 60 feet of TL 800). According to the county, the 1976 transaction had the legal effect of adjusting the boundary lines of some of those five parcels, but did not constitute a partition or create new parcels. Before and after 1976, the county reasoned, there existed five legal parcels, although the configuration of those parcels differed significantly as a result of the 1976 transaction. The county's findings do not explain what property lines were adjusted in 1976, but they imply that parcel 3 was adjusted west and southward to include the ten-acre portion of TL 802 later known as TL 806.

Petitioner challenges the county's conclusions on several evidentiary and legal grounds.

A. May 23, 1972 Transaction

Petitioner argues, first, that the May 23, 1972 transaction between Ellingsworth and the Fogelstrom Corporation could not have created parcel 3, leaving TL 800 in its current configuration because Ellingsworth did not have legal title to TL 800 on that date. According to petitioner, the Fogelstrom Corporation acquired title to TL 800 pursuant to a

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"[i]nclue a unit of land created:

"(a) by partitioning land as defined in LC 16.090;

"(b) in compliance with all applicable planning, zoning, and partitioning ordinances and regulations; or

"(c) by deed or land sales contract if there are no applicable planning, zoning or partitioning ordinances or regulations."

deed dated October 16, 1970, which means that the 1972 deed between Ellingsworth and Fogolstrom Corporation conveying parcel 3 had no legal effect. Consequently, petitioner argues, TL 800 and parcel 3 are in fact one parcel, and TL 800 as currently configured was not "lawfully created."

Petitioner does not explain why the creation of parcel 3 has any bearing on whether TL 800 is a lawfully created lot or parcel. If petitioner's view of the facts were correct, the May 23, 1972 transaction creating parcel 3 would have no legal effect, but that only means that TL 800 is 40 rather than 39 acres in size, and was created earlier than 1972. In any case, petitioner does not cite to any evidence in the record that the Fogelstrom Corporation acquired TL 800 prior to 1972, and it is not otherwise apparent. The chronology of transactions compiled by the hearings officer does not list a deed from Ellingsworth to Fogelstrom Corporation on October 16, 1970, conveying TL 800. Instead, the chronology reflects the following relevant transactions regarding TL 800:

1. A land sale contract between the Carners and Ellingsworth on April 3, 1969.

2. A deed from Ellingsworth to Fogelstrom Corporation on October 7, 1970.

3. A deed from the Carners to Ellingsworth on October 16, 1970, conveying legal title.

The hearings officer noted that a land sales contract begins the process of transferring title, but completion of the contract is necessary before title is transferred. Petitioner does not challenge the county's conclusion on this point. Thus, to the extent petitioner relies on the deed between Ellingsworth to the Fogelstrom Corporation on October 7, 1970, to demonstrate that Fogelstrom Corporation already owned the entirety of TL 800 on May 23, 1972, it is not clear that that deed had any legal effect, because Ellingsworth did not gain title to TL 800 until October 16, 1970.

This subassignment of error is denied.

B. January 5, 1976 Transaction

With respect to TL 802, petitioner argues that the 1976 transaction between the Fogelstrom Corporation and intervenor was an unlawful partition of TL 802, resulting in two illegal parcels: current TL 802 and old TL 803. Petitioner notes that by 1976 all partitions required county approval, and because the January 5, 1976 transaction did not receive county approval, the parcels created from that transaction, specifically TL 802, were not lawfully created.

Petitioner does not directly address the county's conclusion that the January 5, 1976 transaction constituted a property line adjustment rather than a partition. As the county's findings explain, the county did not regulate property line adjustments in 1976, and thus the only applicable requirements are those provided in ORS chapter 92 as it existed in 1976. In 1976, much as it does today, ORS 92.010 defined "partition" to exclude

> "adjustment of a lot line by the relocation of a common boundary where an additional parcel is not created and where the existing parcel reduced in size by the adjustment is not reduced below the minimum lot size established by any applicable zoning ordinance."

The county concluded that because the January 5, 1976 transaction did not create an additional unit of land, and no zoning ordinance applied at the time to any of the parcels involved, the 1976 transaction was merely a property line adjustment that did not create TL 802 on that date or otherwise affect whether it was lawfully created prior to January 25, 1990.

Petitioner does not challenge these conclusions, other than to insist that the January 5, 1976 transaction was a partition or that, if it was a property line adjustment, the county's findings fail to describe how the current configuration of TL 802 was derived from the preexisting five parcels. However, petitioner offers no basis for us to conclude as a matter of law or fact that the 1976 transaction was a partition and not a property line adjustment. If, as the county concluded, there existed five legal parcels before and after the 1976 transaction, it

is more plausible to conclude that the 1976 transaction was a property line adjustment, rather than some combination of partition and merger. Nor do we agree with petitioner that the county's findings are inadequate because they fail to describe the precise manner in which the current configuration of TL 802 was achieved. A property line adjustment could have created the current configuration in several ways, depending on which property boundaries were moved. The county need not specify which of those ways were followed in order to adequately express its ultimate conclusion that the current configuration of TL 802 was achieved by means of a property line adjustment and not a partition.

This subassignment of error is denied.

C. ORS 92.014 (pre-1973)

Petitioner argues that parcels 1, 2, and 3 were created in violation of statutory and local provisions requiring county approval of streets and ways, and that without lawful access provided by those parcels TL 800 and 802 were not lawfully created for purposes of LC 16.211(7)(e).[2]

Petitioner explains that during the relevant period prior to 1973, ORS 92.014 provided that "[n]o person shall create a street or way for the purpose of partitioning a parcel of land without the approval of the agency or body authorized to give approval of plans for subdivision." Similarly, Lane County ordinance 12-70, adopted June 17, 1970, provides that "[n]o person shall create a street or way for the purpose of partitioning a parcel of land without the approval of the body authorized to give approval of plats for subdivisions under the provisions of this ordinance." Petitioner argues that parcel 1, 2, and 3 constitute a "street

[2]Petitioner does not explain what statutory or local provision applicable between 1970 and 1972 required access in order for a parcel to be "lawfully created." Quite possibly such a requirement exists or existed, but if so, petitioner has failed to inform us of it. Nonetheless, because no party raises an issue regarding whether access was necessary in order to lawfully create a parcel between 1970 and 1972 in Lane County, we assume, without deciding, that it was.

or way" and that creation of those three parcels violated ORS 92.014 (pre-1973) because they were done without the county's approval.

The hearings officer rejected a similar argument below, finding that

> "Lane County's revised subdivision ordinance, effective April 2, 1962, to March 1975, defined street to include public ways, and required review of street-creating major partitions only when the street was a public way. Thus, the state directed local governments to approve all partitions involving the creation of streets and ways, including the way created in this transaction. By adopting a different definition of street, Lane County chose to allow, thus approving by default, divisions of land accomplished by the creation of a private way, as long as the way and other divisions did not create four or more lots. From a land division law point of view, the [1972] division creating the 60-foot access route to [TL 802] was permitted." Record 60 (footnote omitted).

The board of commissioners adopted the above-quoted findings and interpretation, supplemented with an additional finding that ORS 92.014 (pre-1973) did not apply at the time any of the five parcels at issue were created because that statute applies only to partitions, i.e., divisions of land by partition plat, and not to divisions of land by a metes and bounds description in a conveyance.

Petitioner argues that ORS 92.014 (pre-1973) is self-executing regardless of whether or how the county implemented it in its code. Further, petitioner contends that ORS 92.014 (pre-1973) applies equally to private and public streets or ways. Columbia County v. O'Black, 16 Or App 147, 150, 517 P2d 688 (1974) (ORS 92.014 does not distinguish between private and public ways); see also Scenic Sites v. Multnomah County Comm., 33 Or App 199, 203, 576 P2d 23 (1978) (creation of seven parcels abutting a private road creates a street or way within the meaning of ORS 92.014). We agree with petitioner that the county cannot rely on its ordinance to avoid the requirements of ORS 92.014 (pre-1973) where the ordinance is less stringent than the statute. We also agree that ORS 92.014 (pre-1973) applies equally, where it applies, to public and private streets or ways. Although petitioner does not directly challenge the county's alternative interpretation of ORS 92.014 (pre-1973), we see nothing in that statute or elsewhere brought to our attention that limits the application

of ORS 92.014 (pre-1973) to partitions effected by filing a partition plat rather than by a metes and bounds conveyance.

Under ORS 92.014 (pre-1973), creation of streets or ways, and partitions in general, are subject to the requirements of ORS chapter 92 only if those streets or ways are created for the purpose of partitioning land. See ORS 92.046 (1971) (allowing but not requiring counties to classify and regulate partitioning of land not otherwise subject to approval under statutory requirements, including ORS 92.014). ORS 92.014 (pre-1973) does not define "street or way" or otherwise indicate the scope of those terms.[3] However, as O'Black points out, the key consideration under ORS 92.014 (pre-1973) is whether the street or way was created "for the purpose of partitioning a parcel of land." 16 Or App at 150. Petitioner does not explain why the creation of parcels 1, 2, and 3 created a street or way for the purpose of partitioning a parcel of land within the meaning of ORS 92.014 (pre-1973). The facts in O'Black and Scenic Sites illustrate the intended scope of that statute. In both cases, a developer bought a large parcel of land, subdivided it into 19 and seven lots, respectively, and sold or intended to sell the lots to others for residential purposes. O'Black, 16 Or App at 149; Scenic Sites, 33 Or App at 201. In both cases, the developer provided access by

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[3]In 1973 the legislature expanded and clarified many provisions and provided definitions for many terms in ORS chapter 92. In relevant part, the 1973 legislation amended ORS 92.014, codified as ORS 92.014(1), to provide that "[n]o person shall create a street or road for the purpose of partitioning an area or tract of land without the approval of the city or county having jurisdiction over the area or tract of land to be partitioned." Further, the 1973 legislation defined "street" to mean:

> "a public or private way that is created to provide ingress or egress for persons to one or more lots, parcels, areas or tracts of land, excluding a private way that is created to provide ingress or egress to such land in conjunction with the use of such land for forestry, mining or agricultural purposes." ORS 92.010(9) (1973) (emphasis added).

While the 1973 definition of "street" is not controlling as to the meaning of the same or functionally similar terms in ORS 92.014 (pre-1973), it would be strikingly incongruent to interpret ORS 92.014 (pre-1973) as imposing greater regulatory scope than subsequent versions, given the general evolution of ORS chapter 92 to impose increasingly more stringent statutory requirements on an area of law that had historically been a matter of real estate law and not state or local regulation. In the present case, petitioner does not contend that parcels 1, 2, or 3 were created for any purpose other than to provide access to parcels in conjunction with the use of those parcels for forestry. Thus, there is little question that if parcels 1, 2, and 3 were created in 1973, ORS 92.014(1) (1973) would not have required county approval.

creating each lot so that it abutted a preexisting logging road on the parent parcel. In both cases, the court concluded, the act of subdividing created a "street or way" within the meaning of ORS 92.014 (pre-1973) because the street or way was created for the purpose of partitioning land.

The present case is distinguishable. If we understand the facts correctly, parcel 1 was created as a means of access to TL 801, the 40-acre parcel immediately north of TL 800, which was landlocked. Similarly, parcel 2 was created from the easternmost 60-feet of TL 801 in order to provide access to TL 800, which was landlocked. Parcel 3 was created from the northern 60-feet of TL 800 in order to provide access to TL 802, which was landlocked. In each case, to the extent a "street or way" was created, it was created for the purpose of providing access across a parent parcel to a separate, pre-existing parcel in different ownership, not for the purpose of partitioning land.

Consequently, we agree with the county, albeit for different reasons, that ORS 92.014 (pre-1973) did not require county approval of the creation of parcels 1, 2, or 3. Petitioner has not demonstrated that parcels 1, 2, or 3 were illegally created, or that any illegality with respect to their creation or the access they provided to TL 800 and 802 renders the subject parcels unlawfully created for purposes of LC 16.211(7)(e).

This subassignment of error is denied.

D. Ordinance 6-75

Petitioner also argues that, regardless of the legality of parcels 1, 2, and 3 and access to TL 800 and 802 under legislation prior to 1975, the transactions in 1976 and 1989 that placed TL 802, 803, and 806 in their current configurations involved access issues that required county approval. Petitioner explains that in 1975 the county adopted Ordinance 6-75, which requires county approval of access creation and imposes certain standards for private roads and easements. Petitioner argues that the 1976 transaction created a road

without county approval, and that the 1989 transaction created new access without county approval.

What is missing from petitioner's argument is an explanation of why events involving access to petitioner's property, TL 806, has any bearing on whether TL 800 and 802 were "lawfully created" prior to January 25, 1990. Both TL 800 and 802 were created and provided access prior to 1975, at a time when their creation and access were not subject to state or county regulation. Petitioner has not explained how the property line adjustment that occurred in 1976 created access to either TL 800 or 802. Before and after the 1976 transaction access to both parcels was via parcels 1, 2, and 3, each of which was lawfully created under the standards in effect at the time. Similarly, before the 1989 transaction, access to both TL 800 and 802 was via portions of old TL 803, while after 1989 access to both parcels was via those same portions. The fact that the 1989 transaction changed the boundaries of old TL 803 without county approval may or may not demonstrate illegality with respect to TL 803 and 806, but petitioner has not demonstrated that the 1989 transaction "created" or even affected access to TL 800 and 802 in a manner that required county approval.[4]

Even if the 1976 or 1989 transactions affected access to TL 800 or 802 in some manner requiring county approval, it is not clear that lack of county approval would affect whether TL 800 or 802 were "lawfully created" prior to January 25, 1990. LC 16.211(7)(e) merely requires that a parcel on which a nonforest dwelling is proposed be "lawfully created"

[4]Prior to the 1989 transaction, intervenor obtained the county's verification that old TL 803 (current TL 803 and 806) was a "legal lot." Record Exhibit A 2640-42. During the early stages of the current appeal, petitioner attempted to appeal the county's 1989 legal lot verification with respect to TL 803. The county land division manager rejected that appeal, and petitioner did not appeal that rejection to either the county board of commissioners or LUBA.

on some date prior to January 25, 1990. LC 16.211(7)(e) does not require that, once lawfully created, the parcel must subsequently be free of involvement in illegal transactions.[5]

This subassignment of error is denied.

E. Other Issues

In concluding his argument under the first assignment of error, petitioner lists nine reasons why the assignment of error should be sustained. Some of those reasons are discussed above. We address the remainder below.

1. ORS 92.016

Petitioner argues that ORS 92.016 (1989) was violated by the sale of an "unlawful parcel" to petitioner in 1989.[6] Petitioner does not explain why the 1989 sale of TL 806 to petitioner violated ORS 92.016 or, if so, why that violation affects whether TL 800 and 802 were "lawfully created" prior to January 25, 1990. Absent such explanation, petitioner's argument under this assignment of error is not developed sufficiently to warrant review.[7] Deschutes Development v. Deschutes Cty., 5 Or LUBA 218, 220 (1982).

This subassignment of error is denied.

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[5]For example, if the landowner placed a manufactured home on the parcel without requisite county approval, that illegality would have no discernible relevance to whether the parcel was lawfully created. Similarly, if a parcel were lawfully created, but then changed its access to a public road without obtaining requisite county approval, that subsequent illegality would not affect whether the parcel was lawfully created for purposes of LC 16.211(7)(e).

[6]ORS 92.016(2) (1989) provided in relevant part that:

> "no person may sell any parcel in a major partition or in a minor partition for which approval of a tentative plan is required by any ordinance or regulation adopted under ORS 92.044 or 92.046, respectively, prior to such approval."

[7]Petitioner may be contending that the 1989 transaction was a partition that required county approval. If that is petitioner's argument, he has not demonstrated that the 1989 transaction was a partition rather than simply selling one of the three parcels (presumably parcel 3) that were lawfully created in or prior to 1972. Even if the 1989 transaction constituted a partition requiring county approval, petitioner has not explained why that illegality has any relevance in determining whether TL 800 and 802 were "lawfully created" prior to January 25, 1990.

2. Ordinance 66

Petitioner next argues that the creation of access prior to 1970 (i.e. parcels 1 and 2) violated county Ordinance 66, adopted in 1955. According to petitioner, Ordinance 66 defined "street" to include a "private easement approved by the Planning Commission and recorded with the County Clerk, providing the roadway for ingress and egress from property abutting thereon." Petition for Review 6. Petitioner argues that Ordinance 66 placed the county "within the purview of ORS 92.014, adopted that same year, dealing with county approval of streets and ways." Id. at 6-7.

Petitioner's argument regarding Ordinance 66 is elusive. If we understand petitioner's recitation of facts correctly, parcels 1 and 2 are parcels created in 1969 and 1970, respectively, rather than easements. Petition for Review 2-3. If so, the definition of "street" that petitioner quotes from Ordinance 66 has no relevance to parcels 1 and 2. Petitioner has not cited to any language in Ordinance 66 that requires county approval of the access provided by parcels 1 and 2. To the extent petitioner cites Ordinance 66 to support his view of ORS 92.014 (pre-1973), we rejected that view in our discussion of ORS 92.014 (pre-1973), above.

This subassignment of error is denied.

3. Identity

Petitioner also argues that neither TL 800 nor 802 are the "same" parcels as they existed on the date of their creation, because both parcels had their boundaries changed by subsequent transactions. Petitioner does not explain why TL 800 and 802 are not the same parcels, or what transactions destroyed the identity of those parcels. In any case, no transactions have altered the boundaries of current TL 800 since its creation in 1972. The county found that TL 802 was subject to a property line adjustment in 1976, but that transaction did not create TL 802 or otherwise destroy its identity. See ORS 92.010(7) (1975) (defining "partition land" to exclude property line adjustments where the "existing

parcel reduced in size by the adjustment is not reduced below the minimum lot size"). The 1989 sale did not affect the boundaries of TL 802.

This subassignment of error is denied.

4. Property line adjustments

Petitioner argues next that property line adjustments require either a "lot" or a "parcel" boundary line to adjust, and because both TL 800 and 802 were established by a conveyance with metes and bounds description rather than by subdivision or partition plat, the 1976 transaction could not have been a property line adjustment. However, petitioner does not identify any statutory or local provisions applicable in 1976 that limit property line adjustments to lots or parcels created by subdivision or partition plats. To the extent that petitioner relies on the definition of "partition land" at ORS 92.010(7) (1975), we disagree that that definition contains a negative inference to the effect that boundary adjustments of parcels created by means other that partition plat are not property line adjustments.[8]

This subassignment of error is denied.

5. 1989 Agreement

Finally, petitioner argues that "[i]n undertaking the 1989 transaction, intervenor both required an agreement to vary the access from current [tax] lot 803 and did so." Petition for Review 24 (citations to record omitted). Petitioner does not explain why the 1989 agreement between intervenor and petitioner is relevant to whether TL 800 and 802 were "lawfully created" prior to January 25, 1990. Absent that explanation, this subassignment of error is insufficiently developed to warrant review. Deschutes Development, 5 Or LUBA at 220.[9]

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[8]ORS 92.010(7) (1975) defines "Partition land" in relevant part to exclude "any adjustment of a lot line by the relocation of a common boundary where an additional parcel is not created and where the existing parcel reduced in size by the adjustment below the minimum lot size established by any applicable zoning ordinance."

[9]Petitioner's point may be that the 1989 transaction varied the existing access to TL 800 and 802, and thus required county approval. However, if that is petitioner's point, it is not clear that county approval is necessary for transactions that vary access as opposed to create access. Nor has petitioner explained why the absence of

This subassignment of error is denied.

The first assignment of error is denied.

SECOND ASSIGNMENT OF ERROR

Petitioner argues that the county misconstrued the applicable law and made a decision not supported by substantial evidence in determining that the subject parcels satisfy the requirement, at LC 16.211(7)(g), that eleven parcels must exist within a 160-acre square or template centered on the subject parcel. Petitioner argues that for each of the subject parcels the hearings officer erred in determining that there existed eleven parcels within the relevant template.

A. TL 802

With respect to TL 802, the hearings officer found eleven parcels to exist within the template. Petitioner objects that seven of those parcels (TL 1300, 801, 800, 900B, 806, 803 and 100) are illegal parcels or otherwise cannot be counted as qualifying parcels.

1. TL 1300

TL 1300 was created in 1963 by a metes and bounds conveyance. The hearings officer found that TL 1300 was lawfully created. However, petitioner argues that access to TL 1300 is via an easement created in 1960 that did not receive county approval, as required by ORS 92.014 (pre-1973). Consequently, petitioner argues, access to TL 1300 was created in violation of ORS 92.014 (pre-1973), and thus TL 1300 cannot be counted as one of the eleven qualifying parcels for purposes of LC 16.211(7)(g).

Petitioner's argument is premised on the view that ORS 92.014 (pre-1973) required county regulation of all access to all parcels. However, as discussed in the first assignment of error, ORS 92.014 (pre-1973) is limited to streets or ways created for the purpose of partitioning land. Petitioner does not cite to any evidence in the record that the easement

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county approval for changes in access is relevant to determining whether TL 800 and 802 were lawfully created prior to January 25, 1990. See n 4, above.

providing access to TL 1300 was created for the purpose of partitioning land. The county did not err in concluding that TL 1300 is a qualifying parcel.

2. TL 801

According to the parties, TL 801 was created by a 1972 conveyance. However, petitioner argues that the conveyance was not recorded until 1986, when statutory and local provisions required county approval of partitions. Petitioner concedes that the 1972 conveyance was executed in 1972, and does not explain why the date the 1972 conveyance was recorded is controlling as to when and if TL 801 was lawfully created. The county did not err in concluding that TL 801 is a qualifying parcel.

3. TL 800

Petitioner argues, for the same reasons discussed in the first assignment of error, that TL 800 is not a lawfully created parcel. We rejected that argument in our discussion of the first assignment of error. The county did not err in concluding that TL 800 is a qualifying parcel.

4. TL 900B

The hearings officer found that TL 900B was "barely" within the template, based on examination of the partition plat creating TL 900B. Petitioner argues that this conclusion is not supported by any evidence in the record, but does not explain why. Intervenor cites to the portions of the record the hearings officer relied upon to conclude that TL 900B was within the 160-acre template. We agree that the hearings officer's conclusion is supported by substantial evidence.

5. TL 806

The hearings officer found that TL 806 and current TL 803 were unlawfully created in 1989 from old TL 803. However, the county rejected that finding, concluding instead that TL 806, petitioner's property, was one of three legal parcels (parcels 1, 2, and 3) conveyed to the Fogelstroms in 1976. Petitioner argues that TL 806 was unlawfully created in 1989 and

is not a qualifying parcel, but does not address the county's finding that TL 806 was lawfully created prior to that date. In our discussion of the first assignment of error, we agreed with the county that parcels 1, 2, and 3 were lawfully created parcels, and that TL 806 was not created in 1989. The county did not err in concluding that TL 806 is a qualifying parcel.

6. TL 803

Petitioner argues that TL 803 was unlawfully created in 1989 from old TL 803. Petitioner does not address the county's finding that TL 803 consists of two parcels lawfully created prior to 1975. For the same reasons described above, the county did not err in concluding that TL 803 can be counted as at least one qualifying parcel.[10]

7. TL 100

The hearings officer found TL 100 to be a qualifying parcel, notwithstanding that it is commonly owned with TL 1300. Petitioner argues that a staff memorandum takes the position that contiguous parcels under the same ownership are counted as one parcel. The hearing officer rejected this view, relying on ORS 92.017 ("[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). See Joseph v. Baker County, 33 Or LUBA 38, 40-41 (1997) (county determination that three commonly-owned tax lots remain discrete parcels is a land use decision). Petitioner does not challenge the hearings officer's finding or address ORS 92.017, and we conclude that the county did not err in treating TL 100 as a qualifying parcel.

This subassignment of error is denied.

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[10]The hearings officer counted only one parcel in TL 803, based on a theory that the 1989 transaction merged two of the three parcels in old TL 803. While the county rejected that finding, it did not specify whether TL 803 counts as one or two qualifying parcels. If two, then there are potentially twelve qualifying parcels rather than eleven.

B. TL 800

With respect to TL 800, the hearings officer found 11 parcels within the relevant template. Most of those eleven parcels were also used to satisfy the template test for TL 802. Petitioner raises the same objections to those parcels with respect to TL 800. We reject those arguments, for the reasons expressed above. However, petitioner also challenges the hearings officer's conclusion that TL 400 and 401 are qualifying parcels for TL 800.

With respect to TL 400 and 401, the hearings officer found:

> "These lots have a tortured past. They were originally created in 1991, when a larger parcel * * * was divided into two parcels[.] * * * [T]he problem with this transaction is that it never received partition review or approval, and thus cannot be counted as a legal division. The owners of the property were notified of this difficulty in February of 1995 and were allowed to correct the problem by recreating the division as a lot line adjustment. One of the lots originally created had been sold to the owners of the adjacent parcel, now operating under the name Rosboro Lumber. The various owners were allowed to go back and recreate the division of the property as a lot line adjustment, where the line of the adjacent property was allowed to be adjusted downwards and around so that it absorbed nearly all of the originally created second parcel, leaving the first parcel with just enough acreage to constitute a legal lot under the laws in effect when the division was originally attempted." Record 91-92.

If we understand the hearings officer's findings correctly, in 1995 the boundaries of the original parent parcel were adjusted with respect to an adjoining legal parcel to substantially recreate the boundaries of the unlawful 1991 partition. The hearings officer concluded, based on this history, that TL 400 and 401 were currently lawful qualifying parcels, notwithstanding their prior illegal status between 1991 and 1995.

Petitioner argues that the 1995 property line adjustment cannot validate the 1991 illegal division and thus render TL 400 and 401 qualifying parcels, because the 1995 transaction was subsequent to the filing of intervenor's application. We understand petitioner to argue that intervenor is bound by the factual circumstances present at the time he filed his application to develop a nonforest dwelling on TL 800 in 1992, and thus cannot include TL 400 and 401 as qualifying parcels. However, petitioner does not explain why that is the case.

Although ORS 215.428(3) requires that the county apply the standards and criteria applicable at the time the application is submitted, we are aware of no authority that prohibits the county from taking into account changes in factual circumstances subsequent to the date the application is submitted. Petitioner has not demonstrated that the county erred in considering TL 400 and 401 as qualifying parcels.

This subassignment of error is denied.

The second assignment of error is denied.

The county's decision is affirmed.