BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

NORM MAXWELL,
Petitioner,

vs.

LANE COUNTY,
Respondent,

and

DARIN GORHAM,
Intervenor-Respondent.

LUBA No. 2000-164

FINAL OPINION
AND ORDER

Appeal from Lane County.

Marianne Dugan, Eugene, filed the petition for review and argued on behalf of petitioner. With her on the brief was Facaros and Dugan.

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

Corinne C. Sherton, Salem, filed a response brief and argued on behalf of intervenor-respondent. With her on the brief was Johnson and Sherton, PC.

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

AFFIRMED 03/21/2001

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 a county decision rezoning a 31-acre tract from Rural Residential 10-acre minimum (RR-10) to Rural Residential 5-acre minimum (RR-5).

MOTION TO INTERVENE

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

FACTS

The subject property is part of Exception Area 260B-1, for which a committed exception to Statewide Planning Goals 3 (Agricultural Lands) and 4 (Forest Lands) was taken in 1990. At that time Exception Area 260B-1 consisted of 11 parcels comprising approximately 105.13 acres. Exception Area 260B-1 was designated Rural Residential in the county's Rural Comprehensive Plan (RCP) and zoned RR-10. The present dispute centers on the western portion of Exception Area 260B-1, which in 1990 contained tax lots (TL) 601, 900 and 905. See Figure 1, below. Whether that area now includes three or four parcels is the central dispute in this case.

TL 900 and 905 were created by partition in 1945.[1] TL 601, 900 and 905 are accessed by County Road 834 (Fire Road) and easements from that road. Fire Road was created in 1918 by dedication of easements to the county. The Fire Road right-of-way was subsequently improved to a point located just inside the eastern border of TL 905, where it

[1]The county's code at Lane Code (LC) 16.090 defines the term "parcel" to include 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."

comes to an apparent dead end. As dedicated, the Fire Road right-of-way continues westward, bisecting TL 905; however, that portion of Fire Road was never improved.

In 1998 and 1999, a series of transactions occurred that radically altered the 1990 configurations of TL 601, 900 and 905, as described below.

A. Adjustment between TL 900 and 905

In March 1998, Mark Gorham and Joyce Gorham purchased TL 900 and 905. On April 30, 1998, the Gorhams recorded a property line adjustment that left TL 900 entirely within the bounds of TL 905, and reduced it in size to two acres, surrounding an existing dwelling formerly on TL 905.[2] See Figure 2. The property line adjustment increased TL 905 from 15.39 acres to 23.18 acres. TL 900 was then sold to a third party.

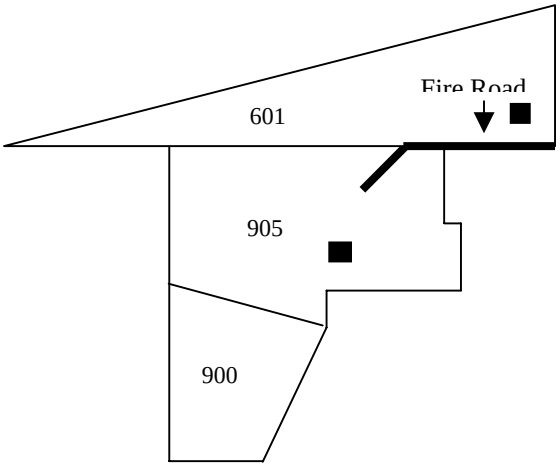

Figure 1

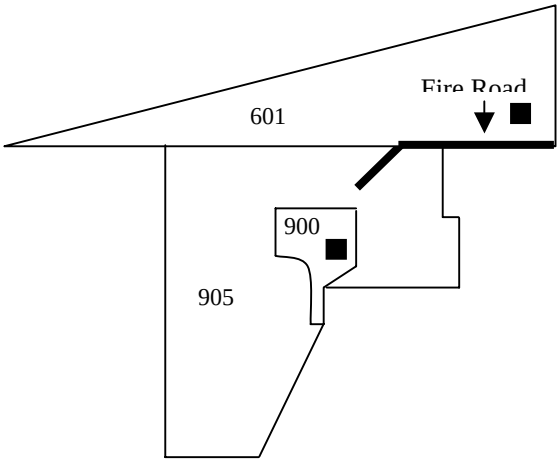

Figure 2

(Not to scale)

B. Division of TL 905 into 905A and 905B

In May 1998, intervenor Darin Gorham and his wife Nicki Gorham purchased a half interest in TL 905. On June 1, 1998, the Gorhams submitted an application to the county to

[2]The parties inform us that no county approval is necessary for a property line adjustment, under the county's procedures.

rezone that parcel from RR-10 to RR-5.[3] On June 3, 1998, the county responded that the average parcel size in the exception area was too large to support a zone change to RR-5 pursuant to RCP Goal 2, Policy 11.[4] In the meantime, intervenor applied for and received a legal lot verification for TL 905.[5] Intervenor then applied for a partition of TL 905 into two parcels, 11 and 12.18 acres in size. The county gave tentative partition approval on September 28, 1998, with the condition that the final plat be recorded by September 28, 2000.

However, the final partition plat was not recorded. Intervenor learned from the county surveyor's comments with respect to the partition plat that the Fire Road right-of-way continued west across TL 905 from its apparent dead end, and that the surveyor could find no evidence that the unimproved portion of Fire Road had ever been vacated. Intervenor also

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[3]We follow intervenor in referring to Mark, Joyce, Darin and Nicki Gorham collectively as "the Gorhams." The Gorhams were represented as applicants in the proceedings below by intervenor.

[4]As discussed below, RCP Goal 2, Policy 11 (Policy 11) requires that in zoning rural residential lands minimum lot or parcel sizes of 1, 2, 5 or 10 acres apply, based on "existing development patterns." On February 10, 1988, the county board of commissioners adopted an order interpreting Policy 11 for purposes of evaluating rezoning requests to increase residential density in an exception area. Interpretation No. 1 provides, in relevant part, that the "existing development pattern" is determined by an identification of trends in the existing development, such as average parcel size or parcel density, and that determination must take into account the entire exception area and not isolated parcels within an exception area. Interpretation No. 2 provides in relevant part that:

> "* * * Once the existing residential development pattern of the exception area is defined as indicated in Interpretation No. 1, this can be compared with the various 1, 2, 5 and 10 acre RR zoning district densities and the one proposed. The RR zoning district density which mathematically corresponds (i.e., through addition or subtraction) more closely with the existing development pattern is the one which would 'represent existing development patterns.'" Record 704.

Thus, for purposes of Policy 11, whether RR-10 or RR-5 zoning is appropriate depends on whether the average density of the entire exception area is closer to 10 acres per parcel or closer to five. In other words, the issue becomes whether the average parcel density within the exception area is greater than or less than 7.5 acres per parcel.

[5]The parties inform us that the county's legal lot verification process results in a preliminary determination and does not constitute a final decision by the county that the lot in question is a legal lot. *Davis v. Lane County*, 32 Or LUBA 267, 271-72 (1997). Under the county's practice, a final decision whether a lot is a legal lot is made at the time when action is taken on a building permit or an application for a land use approval that requires a legal lot.

learned of an informal county policy of treating a parcel that is bisected by a public right-of-way as two separate parcels.[6] Rather than finalize the partition plat, intervenor sought a legal lot verification determining that the 3.5-acre portion of TL 905 north of Fire Road was a separate parcel (henceforth TL 905B). On April 21, 1999, the county issued a legal lot verification to that effect. On December 8, 1999, the county issued a legal lot verification for the 18-acre portion of TL 905 south of Fire Road (henceforth TL 905A). See Figure 3, below.

C. Adjustment between Lots 601 and 905B

On April 22, 1999, Mark Gorham purchased TL 601, which adjoined TL 905B to the north. TL 601 was 12.13 acres in size, and contained an existing dwelling in its eastern portion.[7] On June 15, 1999, the Gorhams recorded a property line adjustment that reduced TL 601 to two acres, which included the existing dwelling. The result was to increase TL 905B from 3.5 acres to 13.66 acres. TL 905B was then deeded to Mark Gorham. The county issued legal lot verifications for TL 601 and TL 905B on July 22 and 23, 1999. On August 10, 1999, TL 601 was sold to third parties. On November 26, 1999, Mark Gorham obtained county approval to site a mobile home on TL 905B. The relevant parcels had now taken on their current configuration. See Figure 4.

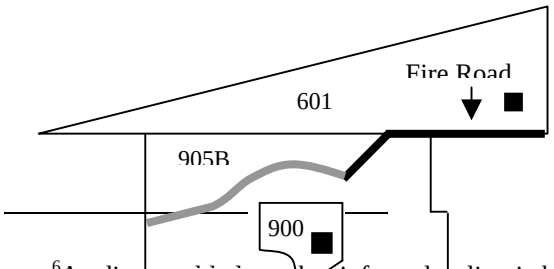

Figure 3

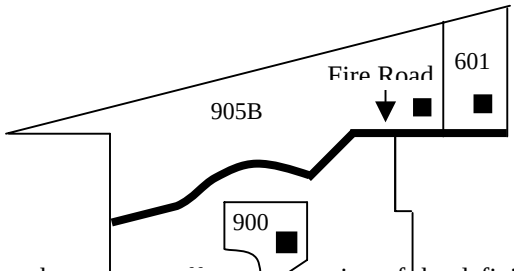

Figure 4

[6]As discussed below, that informal policy is based on the county's interpretation of the definition of the term "contiguous" in LC 16.090, a definition adopted in 1984 that tracts of land under the same ownership and which are intervened by a street shall not be considered contiguous. Record 561. The code definition of "contiguous" referred to the county's definition of "partition land," and "tract," both of which contained that term. However, in 1986 the definitions of "partition land" and "tract" were amended to conform to statutory changes by eliminating, *inter alia*, the term "contiguous." Record 370-71. Thus, the code definition of "contiguous" defines a term that, apparently, no longer exists in the substantive provisions of the county's code. *Id.*

[7]At the time Exception Area 260B-1 was [illegible] TL 601 was part of TL 600, a larger parcel to the north outside the exception area.

On December 17, 1999, intervenor submitted a revised zone change application for TL 905A and 905B, an area totaling 31.68 acres. A hearings officer held a public hearing on January 27, 2000, and closed the evidentiary record on February 7, 2000. On March 9, 2000, the hearings officer issued a decision denying the rezone on the grounds that TL 905A and 905B were not properly viewed as separate parcels and, without viewing them as separate parcels, the average parcel density within the entire exception area still exceeded 7.5 acres per parcel. Intervenor and the county planning director both requested reconsideration. The hearings officer granted reconsideration and reopened the record until June 16, 2000. On July 26, 2000, the hearings officer issued a decision approving the requested rezone to RR-5, incorporating his March 9, 2000 decision except as expressly modified or supplemented. Petitioner appealed the hearings officer's decision to the board of commissioners. On September 13, 2000, the board of commissioners issued an order declining to hold a new hearing and affirming the hearings officer's decision. This appeal followed.

FIRST ASSIGNMENT OF ERROR

Petitioner argues that the county's calculations under Policy 11 are erroneously based on the understanding that there are 103.5 acres within Exception Area 260B-1, as stated in the revised rezoning application, rather than 105.13 acres, as stated in the original rezoning application. According to petitioner, there is no explanation in the decision or record for the 1.63-acre discrepancy.[8] Petitioner contends that, even assuming that TL 905A and 905B are separate parcels, if the average parcel density within Exception Area 260B-1 is calculated using the 105.13-acre figure, then the average parcel density exceeds 7.5 and thus the proposed rezoning must be denied under Policy 11.

[8]Intervenor cites to evidence that the 1.63-acre discrepancy is the effect of calculating the area of TL 905A and 905B with and without the Fire Road right-of-way. At oral argument, petitioner agreed that intervenor's explanation is probably accurate.

Intervenor responds that petitioner waived this issue by failing to raise it before the close of the evidentiary record, as required by ORS 197.763(1) and 197.835(3).[9] According to intervenor, the first time this issue was raised was in petitioner's appeal to the board of commissioners. However, intervenor argues, the board of commissioners' review was on the record before the hearings officer and did not involve an evidentiary hearing.

We agree with intervenor that the issue of whether Exception Area 260B-1 consists of 103.5 or 105.13 acres was not raised before the close of the evidentiary record in a manner that would afford intervenor or the county an opportunity to respond. That issue, the only issue under this assignment of error, is waived.

The first assignment of error is denied.

SECOND AND THIRD ASSIGNMENTS OF ERROR

Petitioner challenges the hearings officer's determination that the division of TL 905 into TL 905A and 905B cannot be challenged in the present case, and therefore those parcels must be considered two separate legal parcels for purposes of the proposed rezoning under Policy 11.

The hearings officer's initial decision questioned the correctness and applicability of county staff's interpretation of local law.[10] However, even assuming the interpretation was

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[9]ORS 197.763(1) provides:

> "An issue which may be the basis for an appeal to the Land Use Board of Appeals shall be raised not later than the close of the record at or following the final evidentiary hearing on the proposal before the local government. Such issues shall be raised and accompanied by statements or evidence sufficient to afford the governing body, planning commission, hearings body or hearings officer, and the parties an adequate opportunity to respond to each issue."

ORS 197.835(3) provides:

> "Issues [before LUBA] shall be limited to those raised by any participant before the local hearings body as provided by ORS 197.195 or 197.763, whichever is applicable."

[10]The hearings officer's decision states, in relevant part:

correct, the hearings officer denied the application because, in the hearings officer's view, assuming that the Fire Road easement has the legal effect of dividing TL 905 into separate legal parcels is inconsistent with ORS 92.010(7) and common law requirements predating the statute.[11] On reconsideration, the hearings officer reiterated his view that the county staff's position concerning TL 905A and TL 905B was inconsistent with applicable law:

> "The Hearings Official is not convinced that the legal effect of a parcel being bisected by a public road right-of-way was, by itself, to divide that parcel into two legal lots. [*State v. Emmich*, 34 Or App 945, 949, 580 P2d 570 (1978)] was clear that the intersection of a parcel of land by a road is subject to the Oregon Subdivision Control law. * * * [Legislative history of ORS 92.010(7)(d)] shows that the amendment was based upon an understanding that a parcel divided by a public road is still considered to be one parcel of property until proper planning procedures are complied with. [The legislative history indicates] that the primary logic of the amendment, the same logic pointed out by this Hearings Official in the March 9, 2000 decision, was that the underlying fee title to the dividing road is still vested with the original property owners." Record 14-15 (footnotes omitted).

> "In the present case, the County hangs its interpretative hat on the definition of 'contiguous' found in [LC] 16.090. This definition, which was adopted in [1984], states that 'Tracts of land under the same ownership and which are intervened by a street * * * shall not be considered contiguous.' It has been the consistent practice of the administrative land use branch of the County to interpret this definition to mean that a parcel under single ownership that is divided by a street or road becomes two legal lots.
>
> "A conclusion that a road bisecting a parcel results in the legal division of that parcel of land does not necessarily follow from the Lane Code's definition of 'contiguous.' That is, there is no citation to legislative history of this code section that explains the reasons or circumstances that led to this definition. There is no guidance about whether there is a distinction between roads that are created through the dedication of easements, reflecting past practice, and roads that are dedicated in fee simple, which is a more prevalent practice today. Nor is there citation to where the County Board of Commissioners [has] either expressly or impliedly embraced the current interpretation." Record 561 (footnote omitted).

[11]ORS 92.010(7) defines the term "partition land" for purposes of ORS chapter 92. ORS 92.010(7)(d), first adopted in 1989 and as amended in 1991, excludes from that definition:

> "A sale or grant by a person to a public agency or public body for state highway, county road, city street or other right of way purposes provided that such road or right of way complies with [applicable requirements in ORS chapter 215]. However, any property divided by the sale or grant of property for state highway, county road, city street or other right of way purposes shall continue to be considered a single unit of land until such time as the property is further subdivided or partitioned[.]"

Nonetheless, the hearings officer concluded that the division of TL 905 could not be challenged in this proceeding:

> "The applicant's argument that the bisection of [TL] 905A creates two legal lots is also founded on a separate proposition: one expounded in the *McKay Valley Creek Association* case.[12] This proposition is that unless legal lot status is an approval criterion, a parcel's legal lot status is determined at the time the parcel was created if any local government approvals were required at that time were given. The applicant correctly notes that the issue of legal lot status is not a zone change approval criterion and then points out those actions that have been taken in reliance on Lane County's policy regarding roads. * * *
>
> "The opponent attempts to differentiate the fact pattern of the *McKay Valley Creek Association* case, where Washington County apparently had a process for approving lot line adjustments, and the present case, where Lane County has no formal process for approving lot line adjustments and its legal lot determinations are preliminary. While the fact patterns are different, Lane County did have a policy, which was consistently applied, that recognized that the intervention of a road would divide a parcel. * * *
>
> "It is therefore the conclusion of the hearings official that [TL] 905A and 905B must be considered two legal lots and * * * the average parcel size therefore meets the standard [of Policy 11]." Record 15.

Petitioner contends that the hearings officer erred in concluding that the principle described in *McKay Valley Creek Association* prevents the county from addressing challenges to the legal existence of parcels proposed for rezoning under Policy 11. The county and intervenor argue to the contrary. Resolving the parties' contentions requires discussion of *McKay Valley Creek Association* and related cases.

McKay Valley Creek Association involved a local standard that allowed a dwelling in conjunction with farm use on a "lot or parcel" that is managed for farm use. In 1986, the subject parcel, lot 303, had been involved in a property line adjustment with several adjoining parcels, including lot 201. Lot 201 had once been the southern portion of lot 200. However, lot 201 had been conveyed separately from lot 200 prior to 1986, consistent with

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[12] *McKay Creek Valley Association v. Washington County*, 24 Or LUBA 187 (1992) (*McKay I*), *aff'd* 118 Or App 543 (1993).

the county's interpretation of its code. That interpretation, which is similar to the county's interpretation in the present case, recognized the creation of new parcels without any county review where the landowner records deeds that separately convey portions of an existing parcel that are separated by a public road.[13] The petitioner in *McKay Valley Creek Association* argued under *Yamhill County v. Ludwick*, 294 Or 778, 663 P2d 398 (1983), that the county could not approve the farm dwelling on lot 303 because it was not a lawful "parcel" as defined by the county's code and statute.[14] The petitioner's argument was not that lot 303 was unlawfully created, but that *lot 201* was unlawfully created prior to 1986, and the 1986 property line adjustment between lot 303 and other lots including lot 201 somehow affected the legal existence of lot 303.[15]

The Board rejected the petitioner's argument, reading *Ludwick* and several LUBA decisions based on *Ludwick* to stand for the proposition that:

> "[U]nder a local standard requiring that a lot or parcel be shown to have been legally or properly created, it must be established that, at the time the lot or parcel was created, any local government *approvals* required at that time were given. * * * Such a local standard does not require a complete reexamination of compliance with every approval standard that may have applied at the time the lot or parcel was created." 24 Or LUBA at 193 (emphasis in original) (*McKay 1*).

Applying that understanding of *Ludwick* to the facts in *McKay I*, the Board held:

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[13]As noted in *McKay I*, in 1989 the Land Conservation and Development Commission issued an enforcement order against the county finding that the county's interpretation was inconsistent with the county's own code. 24 Or LUBA at 189. LUBA held that the enforcement order was prospective and did not require the county to revisit partitions effected under the interpretation prior to the enforcement order. *Id.* at 195.

[14]In *Ludwick*, the court held that the county erred in approving dwellings on five-acre lots in a forest zone with a 40-acre minimum parcel size. The relevant code provision allowed a dwelling on "an existing legal lot of record of less than forty (40) acres" subject to conditional use criteria. The subdivision containing the subject lots had obtained preliminary county approval, but never obtained final approval. The court agreed with LUBA that the lots in question were created as parts of an unauthorized subdivision and were therefore not "existing legal lots of record." *Id.* at 788.

[15]Later in our opinion in *McKay I*, we rejected the county's argument that the 1986 property line adjustment "created" lot 303, because property line adjustments do not create parcels. 24 Or LUBA at 196.

> "In this case, there is no dispute that, at the time a deed conveying tax lot 201 was recorded, the county interpreted its [code] partitioning provisions to be inapplicable to such conveyances. In other words, at the time the deed creating tax lot 201 was recorded, recording a deed for that property was sufficient to create a 'parcel,' and no additional county partitioning approval was required. Therefore, the county's determination that tax lot 201 was created as a separate parcel by deed, together with the subsequent lot line adjustment, provide an adequate basis for concluding tax lot 303 is a 'parcel' under the [code]." *Id* (footnote omitted).

In the omitted footnote, LUBA commented:

> "* * * We need not and do not determine in this proceeding whether the county's 1986 interpretation of the [code] or the statutes the [code] presumably was adopted to implement, was erroneous. The important point is that there is no dispute that tax lot 201 was created in accordance with the county's interpretation of the applicable requirements at the time tax lot 201 was created." 24 Or LUBA at 193 n 8.

On appeal to the Court of Appeals, the court affirmed *McKay I* in a split decision. *McKay Creek Valley Association v. Washington County*, 118 Or App 543, 848 P2d 624 (1993) (*McKay II*). The majority read *Ludwick* as being limited to the circumstances of that case:

> "* * * We do not read the *Ludwick* principle as applying in situations where applicable legislation does not make the permissibility of the use subsequently applied for dependent on the correctness of earlier decisions and actions affecting the status of the property. In other words, our understanding of *Ludwick* is that it construes a particular ordinance; it does not establish a general rule whereby every application for a use of land would necessitate a redetermination of the permissibility of every other use that has taken place on the land." 118 Or App at 548.

The court then addressed LUBA's understanding of *Ludwick* and its holding in *McKay I*:

> "LUBA drew a distinction here between prior governmental approvals and the substantive correctness of those approvals, and indicated that the existence of the former could be re-explored in connection with subsequent applications, while the latter question could not be. The property in question passes the test that LUBA deemed to be applicable. Therefore, it is unnecessary for us to decide whether, in the absence of state or local legislation that mandates it in connection with particular applications, even the level of reexamination of earlier actions embodied in that test is appropriate as a general rule. We hold that the legality of the status of respondents' property as a lot or parcel did not

have to be determined here and, therefore, we reject petitioner's assignment." 118 Or App at 549.

When the dust settled on *McKay II*, the court found it unnecessary to disturb LUBA's conclusions under the test articulated in *McKay I*, although it questioned whether that test was even applicable to local government decisions under criteria that did not expressly require that the subject property be a legal parcel or legally created. Because of that resolution, it is unclear whether *McKay I* or *McKay II* provides the pertinent analysis in the present case.

Intervenor asserts, and we agree, that the difference between the test in *McKay I* and the test discussed in the majority opinion in *McKay II* is that *McKay I* would allow inquiry into whether necessary local government approvals were obtained at the time a parcel was created even when the code provisions applicable to the proceeding require only that the property be a "lot of record" or a "parcel," with no express requirement for a finding of legality. *McKay II*, on the other hand, would allow such inquiry only where the code provisions applicable to the proceeding contain an express requirement that the property be "lawfully created," a "legal parcel" or a similar requirement of legality. Although the court's discussion in *McKay II* can be viewed as *dicta*, the court has applied its test in at least one other case. *Marshall v. City of Yachats*, 158 Or App 151, 157, 973 P2d 374, *rev den* 328 Or 594 (1999) (citing *McKay II* to support the proposition that, in the absence of a code provision requiring a "legal lot of record" in order to obtain a building permit, whether the subject property was lawfully partitioned was inconsequential to the court's review of the city's decision to issue a building permit). Accordingly, we deem *McKay II* to be controlling as to what kind of code provisions allow inquiry into the legality of parcels proposed for development. Under *McKay II*, because Policy 11 does not expressly require determination

of the legal status of TL 905A and 905B, that question need not be considered in connection with the county's proceedings under Policy 11.[16]

In sum, petitioner has not established that the hearings officer erred in determining that the lawful status of TL 905A and 905B cannot be challenged in this proceeding.

The second and third assignments of error are denied.[17]

FOURTH AND FIFTH ASSIGNMENTS OF ERROR

In the fourth assignment of error, petitioner argues the hearings officer erred in concluding that the property line adjustment between TL 900 and TL 905 cannot be challenged in this proceeding.[18] In the fifth assignment of error, petitioner contends that the hearings officer erred in concluding that the property line adjustment between TL 905B and

[16]The petition for review does not address *McKay II*. However, we understand petitioner to object generally to the application of any principle that effectively insulates the county's interpretation from review. We share petitioner's concern that, under *McKay II* and the manner in which the county applies its code and its interpretation, the opportunities for challenging the correctness of the county's interpretation (*e.g.* whether it is consistent with ORS 92.010(7)(d)) are limited, if they exist at all. However, intervenor points out that LC 16.231(2)(a) allows a dwelling in the county's rural residential zones only on a "legal lot." LC 16.090 defines "legal lot" to mean "lawfully created lot or parcel." Thus, while no determination of the legality of a parcel is required under Policy 11 in the present case, other code provisions, such as LC 16.231(2)(a), may require such a determination in other situations. Decisions under LC 16.231(2)(a) or similar provisions presumably may address whether parcels created without county approval under the county's interpretation are "lawfully created." We do not understand the county or intervenor to contend that, in such a proceeding, the correctness of the county's interpretation could not be challenged in the appropriate forum. In any case, the present case does not require us to decide that question.

[17]Petitioner's arguments under the second and third assignments of error include a challenge to the hearings officer's determination that Fire Road had not been vacated. To the extent it is necessary to address those arguments under our disposition of these assignments of error, we disagree with petitioner that the hearings officer's determination that Fire Road had not been vacated misconstrues the applicable law or is not supported by substantial evidence.

[18]Petitioner argues that the property line adjustment between TL 900 and 905 was illegal because it reduced an already substandard parcel further in size, and because it constituted an illegal partition or replat without county approval, rather than a property line adjustment, under *Goddard v. Jackson County*, 34 Or LUBA 402 (1998) (reconfiguration of property lines so that entire parcels are moved and property lines not in common are moved is not a property line adjustment under ORS chapter 92).

TL 601, while improper, was irrelevant because it did not affect the parcel count for purposes of Policy 11.[19]

However, we need not address petitioner's contentions in detail. Petitioner does not argue that either of the disputed property line adjustments affected the number of parcels or other required calculations under Policy 11. Nor does petitioner identify any requirement in Policy 11 or another applicable standard that requires the county to consider prior property line adjustments within Exception Area 260B-1, in order to apply Policy 11. Absent arguments to that effect, petitioner's contentions under these assignments of error do not provide a basis for reversal or remand.

The fourth and fifth assignments of error are denied.

SIXTH ASSIGNMENT OF ERROR

Petitioner argues that the county's findings regarding sewage, water supply, access, natural hazards, and effect on resource lands under Policy 11 are inadequate and not supported by substantial evidence.[20]

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[19]The hearings officer determined that the property line adjustment between TL 905B and TL 601 violated applicable law because it reduced TL 601 below the minimum lot size under the RR-10 zoning. However, the hearings officer opined that this deficiency "can be cured through a less direct series of lot line adjustments." Record 16. It is unclear to us what the hearings officer means.

[20]Policy 11 requires evaluation of the following in applying a rural residential designation:

"i. Existing development pattern and density;

"ii. On-site sewage disposal suitability, or community sewerage;

"iii. Domestic water supply availability;

"iv. Access;

"v. Public services;

"vi. Lack of natural hazards;

"vii. Effect on resource lands."

A. Sewage Disposal Suitability

The hearings officer found that 12 of the 31 acres of the subject property have soils suitable for subsurface sewage disposal, and that three disposal sites have already been identified. Petitioner argues that the hearings officer failed to consider that the majority of the property is in a floodplain. Petitioner also points out several inconsistencies in the hearings officer's discussion of soils.[21] However, petitioner has not established that failure to consider the portion of the property in the floodplain, or the cited inconsistencies, render the county's findings inadequate or not supported by substantial evidence.

This subassignment of error is denied.

B. Water Supply

The hearings officer relied on an analysis of 11 well logs in the area to conclude there were adequate domestic water supplies to support the rezoning. Record 30. Petitioner argues that the hearings officer erred in discounting petitioner's testimony that his well output has declined in recent years. However, the choice of conflicting evidence is up to the county, if a reasonable person would rely on the evidence that is ultimately chosen. *Tigard Sand and Gravel, Inc. v. Clackamas County*, 33 Or LUBA 124, 138, *aff'd* 149 Or App 417, 943 P2d 1106 (1997). Petitioner has not established that a reasonable person could not rely upon the evidence the hearings officer relied upon.

This subassignment of error is denied.

C. Access

The hearings officer concluded that the subject property is provided access from Fire Road, which has an average improved width of 20 feet, consistent with guidelines from the

[21]The hearings officer misstates the percentage of the property with soils that are suitable for on-site sewage disposal and at one point seems to confuse Meda and Newberg soil types. Record 21, 30. However, notwithstanding these misstatements, the challenged decision establishes that either 12.06 acres or 14.13 acres of the subject property are suitable for properly designed on-site sanitary disposal systems approved the County Sanitarian. *Id.*

Oregon Department of Transportation (ODOT) for local roads serving less than 250 vehicles per day. Petitioner argues that the width calculation erroneously includes the point where Fire Road intersects with Siuslaw River Road, and that the actual width excluding that intersection is 19.7 feet. The county responds, and we agree, that the width calculation does not include the intersection. Record 573.

This subassignment of error is denied.

D. Lack of Natural Hazards

The hearings officer found that the floodplain of the Siuslaw River impacts the subject property and may restrict the location of future development. However, the hearings officer concluded that this criterion was met because development could be allowed through a permit process where structures are built one foot above the flood hazard elevation. Record 31.

Petitioner argues that the floodplain is actually larger than reflected on official maps relied upon by the county. Further, petitioner argues that the hearings officer "ignore[d] the safety issues related to people attempting to travel through flooded areas to and from their homes, and the environmental issues related to increased human development causing water pollution during times of flooding." Petition for Review 26. Petitioner cites to photographs in the record showing portions of Fire Road under standing water.

However, petitioner has not demonstrated that the county erred in relying upon official floodplain maps in finding compliance with this criterion. Nor has petitioner demonstrated that the hearings officer erred in failing to consider off-site travel safety issues or water pollution under this criterion.

This subassignment of error is denied.

E. Effect on Resource Lands

The hearings officer discusses resource lands adjacent to the subject property, particularly commercial timber lands to the south, and concludes that, due to steep slopes and

setbacks that buffer development, the challenged rezoning will not adversely impact existing farm or forest lands. Record 31.

Petitioner argues, first, that the hearings officer erred in failing to consider impacts on water quality, fish habitat and big game habitat under this criterion. However, petitioner does not explain why this criterion requires consideration of such impacts.

Petitioner next contends that the hearings officer failed to consider impacts on three small resource-zoned parcels to the north and west of the subject property, two of which have existing dwellings. The hearings officer found that no resource use occurs on these parcels. Petitioner does not challenge that finding or explain why, given that finding, additional findings are necessary.

Finally, petitioner argues that the challenged rezoning may lead to other rezonings within Exception Area 260B-1, and the hearings officer should have considered the potential impacts if the entire area were rezoned to RR-5 or RR-2. However, petitioner does not explain why Policy 11 requires that potential impacts of future decisions must be considered in the context of this decision.

This subassignment of error is denied

The sixth assignment of error is denied.

SEVENTH ASSIGNMENT OF ERROR

Petitioner argues that the hearings officer erred in reconsidering his initial decision based on the request of the county planning staff. According to petitioner, doing so creates a conflict of interest.

The county argues that nothing in the code or other applicable law prohibits county staff from requesting reconsideration of a hearings officer's decision. The county also argues that petitioner has not established why granting such a request constitutes a conflict of interest. We agree.

The seventh assignment of error is denied.

EIGHTH ASSIGNMENT OF ERROR

Petitioner explains that the county charged him a fee of $1,000 to appeal the hearings officer's decision to the board of commissioners. Petitioner submits that the county's fee violates ORS 215.422(c), which allows the county to charge "no more than the average cost of such appeals or the actual cost of the appeal[.]"

The county responds that LC 16.261(1) authorizes the county planning department to charge fees for the purpose of defraying expenses involved in processing applications under the code. Lane Manual 60.851 sets forth various fees for specified applications and local appeals. According to the county, the fees required in the present case were those authorized by code and set forth in the county's manual, and petitioner's attempt to challenge those fees is an impermissible collateral attack. We agree. *Cummings v. Tillamook County*, 30 Or LUBA 17, 21 (1995).

The eighth assignment of error is denied.

The county's decision is affirmed.