BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

ALAN W. DeBOER,
Petitioner,

vs.

JACKSON COUNTY,
Respondent,

and

CHRIS N. SKREPETOS,
Intervenor-Respondent.

LUBA No. 2002-058

FINAL OPINION
AND ORDER

Appeal from Jackson County.

Alan D. B. Harper, Medford, filed the petition for review and argued on behalf of petitioner. With him on the brief was Hornecker, Cowling, Hassen and Heysell, LLP.

No appearance by respondent.

Chris N. Skrepetos, Ashland, filed the response brief and argued on his own behalf.

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

REMANDED 10/24/2002

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

Opinion by Holstun.

NATURE OF THE DECISION

Petitioner appeals a county hearings officer decision that denies his request for (1) a determination that his 6.67-acre parcel is a legally created developable parcel, and (2) approval to construct a nonfarm dwelling on that parcel.

FACTS

In 1972, before county zoning was first adopted, a mother deeded a 10-acre parcel to her son and two daughters (daughters). Son and daughters were deeded "undivided one-third * * * interest[s] as Tenants in Common * * *." Record 136. When county zoning was adopted in 1973, the 10 acres were zoned Farm Residential (F-5). In 1973, son sought septic system approval, drilled a well and shortly thereafter commenced construction of a home on the 10 acres.

On May 21, 1974, a registered professional land surveyor filed with the Jackson County Surveyor a survey that showed the 10-acre parcel divided into two parcels—a 3.33-acre parcel that included son's house and a 6.67-acre parcel.[1] Record 194. ORS 209.250(2) requires that a survey be filed with the county surveyor and that a written narrative that describes the purpose of the survey accompany the survey. A written narrative accompanied the 1974 survey.[2] At the time of the 1974 survey, the county zoning ordinance provided that "[t]he minimum parcel area in the F-5 District shall be five acres." Record 144.[3] Until 1989, the county continued to assess the 10 acres as a single unit of land and a single property tax statement was sent to son and daughters as the joint owners.

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[1] We use the term "parcel" here as a descriptive rather than a legal term. The legal consequence if any of filing the 1974 survey with the county surveyor is at the heart of petitioner's first assignment of error.

[2] We set that narrative out later in this opinion.

[3] There does not seem to be any serious dispute that if 3.33-acre and 6.67-acre parcels were created in 1974, the smaller parcel violated the F-5 zone's five-acre minimum parcel size and the subject 6.67-acre parcel exceeded the five-acre minimum parcel size.

The parties apparently agree that an attorney prepared two deeds in 1974. One deed conveyed daughters' undivided interests in the 3.33-acre parcel to son and his wife as tenants by the entirety. The second deed conveyed son's undivided interest in the 6.67-acre parcel to daughters as tenants in common.[4] The parties also apparently agree that son and daughters did not execute these deeds until July 24, 1987.[5]

In a September 13, 1988 letter, the attorney who prepared the above-noted deeds wrote to the county seeking a determination "whether the division which was intended by the parties in 1974 can be recognized." Record 186. On February 9, 1989, in response to that letter, the county planning director wrote a letter to the attorney. In that 1989 letter the planning director stated "this letter will serve to notify interested parties that the 3.3-acre parcel * * * will be recognized as a preexisting nonconforming parcel."[6] Record 138.

Following the planning director's 1989 letter, the deeds conveying the 3.33-acre and 6.67-acre parcels were recorded on March 21, 1989. Since then there have been five separate land use applications concerning the 6.67-acre parcel. We discuss each of those applications below before turning to petitioner's assignments of error.

In an April 15, 1993 decision, the county land use hearings officer denied a request to adjust the property line between the 3.33-acre parcel and the 6.67-acre parcel. The requested adjustment would have increased the 3.33-acre parcel to 4 acres and reduced the 6.67-acre

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[4] In addition to the two deeds, an agreement was also prepared in 1974 to set out son's and daughters' intent to convey the 3.33 acres to son and convey the 6.67 acres to daughters.

[5] Dates on the original deeds were whited out and the dates of execution were entered in their place. Record 134-35.

[6] The planning director's letter focused on the 3.33-acre parcel because it was smaller than the five-acre minimum parcel size in 1974. The planning director's February 9, 1989 letter explained:

> "The five-acre minimum acreage requirements went into effect with countywide zoning on September 1, 1973. However, we were very generous in our administration of those regulations during the first year. * * * I believe the survey would have been accepted in 1974, under the circumstances outlined, and I see no reason not to extend the same recognition today." Record 139.

parcel to 6 acres. The hearings officer found that both parcels were nonconforming under the EFU zoning that applied in 1994 because both parcels were too small. Although the 3.33-acre parcel would have become *less* nonconforming, the 6.67-acre parcel would become *more* nonconforming, and therefore violate a Jackson County Land Development Ordinance (LDO) provision that prohibited parcel line adjustments that increase the nonconformity of nonconforming lots.[7]

The next three applications all sought approval for a "lot of record" (LOR) dwelling on the 6.67-acre parcel. In a March 29, 1994 decision, the county hearings officer denied the first application for a LOR dwelling. Record 235-243. One of the applicable approval criteria prohibited approval of a "lot of record dwelling" on properties with predominantly prime soils. The hearings officer found that "59 percent of the subject property is 'prime farmland,'" and for that reason the application was denied. Record 238-39.[8]

A second LOR dwelling application was filed in 1995 and later withdrawn. A third LOR dwelling application was filed in 1996. That application was ultimately approved by the county hearings officer in November 1996. In addressing the LDO 218.090(3)(B) requirement that the parcel must have been "lawfully created prior to January 1, 1985," the hearings officer concluded that that question had been resolved in the applicant's favor by the planning director's 1989 letter. The hearings officer characterized that letter as a land

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[7] One of the other criteria for approval of a property line adjustment, LDO 40.020(3), required that the hearings officer find that the parcels were created consistently with "land use/division ordinances and statutes in effect at the time of their creation." Record 228. In the April 1993 property line adjustment decision, the hearings officer found that he was bound by the planning director's 1989 letter:

> "* * * The Hearings Officer can find no procedure in the LDO under which he is empowered to disturb [the planning director's 1989 letter] and he declines to do so in the absence of some expressed authority in the ordinance. [T]he Hearings Officer concludes the subject parcels were lawfully created. The Hearings Officer expresses no opinion with respect to the merits of the [planning director's 1989 letter]." Record 228.

[8] In this March 29, 1994 LOR dwelling decision, the hearings officer expressly declined to consider whether the 6.67-acre parcel was lawfully created. Record 238.

use decision that the opponents had not appealed to LUBA within the applicable deadline for appeal.[9]

The county's 1996 LOR dwelling approval decision was appealed to LUBA.[10] One of the approval criteria for a LOR dwelling requires that the lot or parcel where the dwelling is to be sited must have been lawfully created and acquired by the present owner before January 1, 1985. LUBA reversed the county's decision, concluding that the hearings officer erred in concluding that the 6.67-acre parcel was lawfully created before January 1, 1985:

> "Assuming without deciding that the [planning director's] 1989 determination was a land use decision which was not timely appealed and is therefore now final, we agree with petitioners that, at the earliest, the county recognized the subject property as a separate parcel when the 1989 determination was made. The challenged decision finds, in essence, that the planning director concluded in 1989, based on events from 1974, that the 3.33-acre parcel was lawfully created in 1974. We do not agree with that assessment of the planning director's conclusion. The planning director's [February 9,] 1989 letter did not find, based on the application of the 1973 zoning ordinance, that the partition of former tax lot 100 and the creation of present tax lot 100 and tax lot 102 were lawful; it instead found that the county was 'very generous in [its] administration of [the zoning ordinance] during the first year.' In other words, it found that because the county did not require strict compliance with its own land use regulations in 1974, it would extend the same 'generosity' to intervenor and her siblings in 1989 with respect to events that occurred in 1974.
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> "We need not decide if the [planning director's] 1989 determination was a final land use decision that now precludes an examination of the circumstances leading to county recognition of the subject property as a separate parcel. At most, as petitioners argue, the 1989 determination had the *prospective* effect of legalizing by fiat a *de facto* partition of the parent parcel, a partition which the county itself did not recognize on the tax assessor's maps until 1989. Even that seems doubtful, because the planning director did little more than acquiesce informally to the desire of intervenor and her siblings to have the parent property recognized as two parcels. *See Higgins v. Marion County*, 30 Or LUBA 426, *aff'd* 141 Or App 598, 918 P2d 460 *on reconsideration* 142 Or App 418, 921 P2d 413 (1996) (informal county

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[9] One of the opponents in that LOR dwelling proceeding is the intervenor-respondent in this appeal.

[10] Intervenor-respondent (intervenor) in this appeal was one of the petitioners in the LUBA appeal that challenged the 1996 LOR dwelling decision.

acceptance of two tax lots as separate parcels for land use purposes is not a land use decision)." *Skrepetos v. Jackson County*, 33 Or LUBA 502, 506-07 (1997) (emphases in original; footnote omitted).

Petitioner is the current owner of the 6.67-acre parcel, and is daughters' successor in interest. On March 8, 2002, petitioner sought approval of a nonfarm dwelling on the 6.67 acres. In response to questions that were raised about the legality of the 6.67-acre parcel, petitioner also sought what is referred to as an "Innocent Third Party" determination (ITP). Record 451. An ITP is a county determination that the county will treat a parcel as legal and developable in certain circumstances, even though the parcel "failed to conform with size * * * requirements which were in effect under ordinances or regulations at the time of division * * *." LDO 258.020(6).[11] The county hearings officer denied both applications.

The hearings officer first briefly described the history of the creation of the 6.67-acre parcel and the four decisions described above. The hearings officer then turned to the ITP application and denied it.

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[11] As relevant, LDO 258.020(6) provides:

> "A tract of land which does not conform with ORS 215.010 because it failed to conform with size, dimension, or access requirements which were in effect under ordinances or regulations at the time of division shall not by reason of that defect alone be denied any land development permit otherwise available under current ordinances, if the Director finds, based on evidence submitted by the property owner, that all of the following conditions are true:
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> "A) The tract was created prior to January 31, 1979, and no further division has occurred since that date;
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> "* * * * *
>
> "F) The tract met minimum size and area standards when created or conforms with present size and area standards for the zone, or, if not, the Director finds that the present owner does not own, and has no contract, option or other enforceable legal right to acquire, any adjoining property to the extent necessary to make the tract conforming with present standards, or is prevented by law from doing so."

The hearings officer's decision does not explain why he analyzed the 6.67-acre parcel under LDO 258.020(6). LDO 258.020(6) refers to tracts rather than parcels. That problem aside, the 6.67-acre parcel conformed with the F-5 zone's 5-acre minimum parcel size requirement in 1974. We assume the hearings officer applied LDO 258.020(6) because the 3.33-acre parcel, which was created at the same time the 6.67-acre parcel was created, did not comply with the F-5 zone's 5-acre minimum parcel size.

"To give a favorable [ITP] determination * * * the Hearings Officer must initially conclude that [the 6.67-acre parcel] was created prior to January 31, 1979. LDO 258.020(6)(A). Since no deeds were executed or recorded attempting to create [the 6.67-acre parcel] prior to January 31, 1979, in order to conclude in applicant's favor the Hearings officer must look to LDO 15.020 regarding land division to determine if the 1974 survey is of some help.[12]

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[12] LDO 15.020 provides in relevant part:

"1) Lots or parcels which were established by any of the methods listed in this Subsection and which did not require division approval under the regulations listed in Subsection 2), below, then applicable, shall be considered legally separate tracts. Such lots or parcels will not require further land division review or approvals not required at the time of such division, provided, however, that any lot or parcel resulting from the division shall be subject to all other regulations and standards which are in effect at the time land development permit approval is sought.

"A) Execution of a recorded or unrecorded properly signed and dated conveyance * * * which clearly describes the tract to be conveyed. * * * Except as may be allowed under Chapter 258, no document which creates a tract of land after September 1, 1973, shall be recognized as creating a lot or parcel for development purposes if the resulting tracts would have failed to comply with the standards for development in effect at the time the document was signed, except as to a resulting tract which conforms with standards in effect at the time development permit approval is sought.

"* * * * *

"E) Filing of a survey map with the Jackson County Surveyor which clearly indicates the existence of the parcel by map or legal description only if substantial evidence exists which verifies the intent of the survey was to convey ownership of land.

"* * * * *

"G) Segregation of a tax lot or parcel for financing or security purposes.

"Further division of the lot or parcel established herein shall be subject to all current requirements for a land division.

"2) For the purposes of this Section, division requirements as listed below came into effect at the following times:

"A) Jackson County Subdivision Ordinance, effective May 1, 1959.

"B) Enactment of Countywide zoning regulations, effective September 1, 1973.

"* * * * *

> LDO 15.020 clearly states that a survey map can be considered as a means to convey title 'only if substantial evidence exists which verifies the intent of the survey was to convey ownership of land.' 15.020(1)(E). While the survey map indicates the survey was done for 'mortgage purposes,' the Hearings Officer does not consider such a notation to be substantial evidence that the survey *itself* was intended to transfer title. In most cases, there are significant further steps which are taken after a survey and before title is conveyed. Indeed, in this case, the deeds transferring title per the survey were not even executed until 1987 nor recorded until 1989. For the purposes of LDO 258.020(6)(A) the Hearings Officer determines that [the 6.67-acre parcel] was not created before 1979." Record 3 (emphasis in original).

After denying the ITP determination, based on his conclusion that the 1974 survey was not sufficient to divide the 10-acre parcel into 3.33-acre and 6.67-acre parcels, the hearings officer concluded that the nonfarm dwelling application must also be denied.

> "Similar to the above analysis, the Hearings Officer in order to approve the [nonfarm dwelling application] must conclude that the [6.67-acre parcel] was created prior to January 1, 1993. ORS 215.284(2)(c). Since, as was concluded above, the 1974 survey did not create [the 6.67-acre parcel], the question becomes did the 1987 deeds, recorded in 1989, legally create [the 6.67 acre parcel]? The answer is 'no.' LDO 15.020(1) clearly states that a deed, even if recorded, cannot by itself create separate tracts if the divisions would at the time the deed was executed or recorded have required approval under the regulations listed in [LDO] 15.020(2). The division of [the 10-acre parcel into the 3.33-acre parcel and 6.67-acre parcel] in 1987 and 1989 would have required a minor land partition. [LDO] 15.020(2)(E). [*See* n 12]. No such partition was sought or approved. Thus, the deeds did not create legal parcels." Record 3-4.

> "E) Minor Land Partition Ordinance recorded at Volume 109, page 394, effective January 31, 1979.
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> "* * * * *
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> "G) Land Division Ordinance No. 80-19, effective October 28, 1980, as amended thereafter.
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> "* * * * *
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> "I) Order No. 66-82 establishing interim criteria for determining conformance of partitions with Goal 3 and ORS 215.143; effective February 10, 1982."

INTRODUCTION

The above lengthy recitation of the factual history that underlies the challenged decision is necessary to understand the critical issues that are presented in this appeal. Unlike the factual history, the issues on appeal are relatively straightforward. The first issue is whether petitioner has to demonstrate that the 6.67-acre parcel was legally created or can be recognized as legally developable, in order to obtain approval for a nonfarm dwelling on that parcel under the LDO. Next, assuming the county properly considered whether the 6.67-acre parcel is a legally developable parcel and that issue is not resolved in petitioner's favor by the 1989 planning director's decision or the 1993 hearings officer property line adjustment decision, petitioner argues that he is entitled to a finding that the 6.67-acre parcel is such a legally developable parcel under LDO 258.020(6) and 15.020(1)(E) or (G). Finally, again assuming that the legality of the parcel must be established and assuming the county correctly concludes that petitioner cannot do so under LDO 258.020(6) and 15.020(1)(E) or (G), petitioner contends that the issue of whether the 6.67-acre parcel is properly viewed as legally developable has been conclusively resolved in petitioner's favor as a matter of law by the 1989 planning director's decision or the 1993 property line adjustment decision. *See* ns 6 and 7 and related text.

SECOND ASSIGNMENT OF ERROR

Among the statutory criteria for approval of a nonfarm dwelling such as the one petitioner seeks approval for, is a requirement that "[t]he dwelling will be sited on a lot or parcel created before January 1, 1993." ORS 215.284(2)(c). Citing *McKay Creek Valley Assoc. v. Washington County*, 24 Or LUBA 187 (1992), *aff'd* 118 Or App 543, 848 P2d 624 (1993), petitioner argues that ORS 215.284(2)(c) does not make the "legality" of the 6.67-acre parcel relevant and the hearings officer erred by considering that question.

We need not decide here whether the county was required to determine whether petitioner's 6.67-acre parcel is properly recognized under the LDO as a legal parcel. As far

as we can tell petitioner never took the position below that he was entitled to approval of his nonfarm dwelling application without regard to whether the 6.67-acre parcel was legally created or is recognized under the LDO as a legally developable parcel. To the contrary, petitioner submitted an ITP application that specifically asked the county to answer that question after his nonfarm dwelling application was opposed on the basis that the subject 6.67-acre parcel is not a legally created or developable parcel. Having made that request and received an answer from the county hearings officer, he may not now argue that the county erred in answering the question.[13]

The second assignment of error is denied.

FIRST ASSIGNMENT OF ERROR

Under his first assignment of error, petitioner alleges the hearings officer erred in concluding under LDO 258.020(6)(A) and LDO 15.020 that petitioner's 6.67-acre parcel was not created prior to January 31, 1979, the relevant date under the county's ITP provisions. The LDO provisions that are at issue in the first assignment of error are not easy to make sense of, and the parties' arguments and the hearings officer's cryptic decision do not make our job any easier. Therefore, rather than trying to describe the parties' arguments and the hearings officer's decision in any detail, we sustain the first assignment of error and go straight to an explanation of what the hearings officer must do on remand.

A. LDO 258.020(6)

We set out the relevant language of LDO 258.020(6) in n 11. As we have already noted, it is not clear to us why the hearings officer applied LDO 258.020(6). LDO 258.020(6) appears to be designed to allow the county to treat a tract that was created in

[13] We recognize that the ITP application was a separate application from the nonfarm dwelling application. However, it is clear that the only reason that application was submitted was to answer questions that were raised by the opponents of the nonfarm dwelling concerning whether the 6.67-acre parcel is properly viewed as a legally created or legally developable parcel. If petitioner believed those questions were irrelevant, he should have taken that position. Having failed to do so, the argument presented in the second assignment of error is waived.

violation of minimum parcel size requirements as though it is a legally developable tract, in certain specified circumstances.[14] Assuming LDO 258.020(6) applies to parcels as well as to tracts, LDO 258.020(6) might be relevant in considering whether the 3.33-acre parcel would be eligible for a land use permit today. However, it is much less clear why it is relevant in determining whether the 6.67-acre parcel is entitled to a land use permit. On remand, the hearings officer must explain why it is necessary to apply LDO 258.020(6).[15]

B. LDO 15.020

It may well be that the applicability or nonapplicability of LDO 258.020(6) is not critical because all parties apparently agree that LDO 15.020 applies. *See* n 12 (setting out relevant parts of LDO 15.020). LDO 15.020 purports to allow creation of parcels by a variety of different methods. Two of those identified methods are relevant here. The first method is by "[f]iling of a survey map with the Jackson County Surveyor," provided there is substantial evidence that "the intent of the survey was to convey ownership of land." LDO 15.020(1)(E). The second method is by "[s]egregation of a tax lot or parcel for financing or security purposes." LDO 15.020(1)(G).

We set out the relevant language from the hearings officer's decision earlier in this opinion. Petitioner argues, and we agree, that the hearings officer misinterpreted LDO 15.020(1)(E) to require a finding that son and daughters must mistakenly have believed in 1974 that the survey was an instrument that would actually convey title to the 3.33-acre and

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[14] As potentially relevant here, LDO 258.020(6) appears to allow the county to treat a tract that failed to meet minimum size requirements on the date the tract was created as a legally developable tract if the too-small tract was (1) "created prior to January 31, 1979," and (2) the present owner has no legal interest in any adjoining property that would allow the tract to be increased in size to meet current zoning standards.

[15] Intervenor pointed out at oral argument that LDO 258.020(6) was not adopted until after the planning director's 1989 decision. *See* Record 22. Aside from our question about why LDO 258.020(6) applies to the disputed 6.67-acre parcel, which is larger than the 5-acre minimum parcel size that was required in the F-5 zone in 1974, we fail to see how the date LDO 258.020(6) was adopted has any bearing on this matter. There is no dispute that LDO 258.020(6) was in effect when the decision that is challenged in this appeal was adopted. We assume intervenor's point is that the planning director was not relying on LDO 258.020(6) when he decided he would recognize the 3.33-acre parcel as a legal parcel.

6.67-acre parcels shown on the survey.[16] While LDO 15.020(1)(E) is awkwardly worded, and the hearings officer's literal reading of LDO 15.020(1)(E) may be possible, it is not the only possible reading. As we explain below, we conclude that the hearings officer's literal reading of LDO 15.020(1)(E) is incorrect.

LDO 15.020(1)(E) refers to the "intent of the survey." Because a survey is an inanimate object, the survey itself can have no intent. The referenced "intent" is the intent of son and daughters who commissioned the survey. The question under LDO 15.020(1)(E) is whether son and daughters had that survey prepared and filed that survey with the county in 1974 as an initial step in implementing their intent to convey the 3.33-acre and 6.67-acre parcels.[17] The evidence cited by the parties that bears on the answer to that question is conflicting. The 1974 deeds and agreement to transfer the lots suggest the intent of the survey was to facilitate conveyance of the two parcels. On the other hand, the 13-year delay in executing and recording those deeds might reasonably support a conclusion that the intent of recording the survey was for some purpose other than conveying the parcels.[18] The description filed with the survey is ambiguous. It can be read to say the survey was simply to facilitate a mortgage on the part of the 10 acres where son's house was located and it can be read to say a division of the 10-acre parcel was anticipated. Record 195.[19] In applying

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[16] In particular, the following sentence leads us to that agreement with petitioner:

> "* * * While the survey map indicates the survey was done for 'mortgage purposes,' the Hearings Officer does not consider such a notation to be substantial evidence that the survey itself was intended to transfer title. * * *" Record 3.

[17] If the answer to that question is yes, LDO 15.020(1)(E) provides that the county recognizes those parcels as separate parcels from the date the survey was filed with the county.

[18] Intervenor's brief can be read to question whether the deeds and agreement were actually drafted in 1974. Although we are aware of no direct evidence that would question the attorney's representation that he first prepared the deeds and agreement in 1974, we see no reason why the hearings officer could not consider that question on remand.

[19] The entire survey narrative is as follows:

LDO 15.020(1)(E), the hearings officer must determine, based on all the evidence that is placed before him, whether there is substantial evidence that son's and daughters' intent in having the survey prepared and filed in 1974 was to facilitate preparation, execution and recording of deeds to convey the property. [20]

C. LDO 15.020(1)(G)

We understand petitioner to argue that without regard to whether the 1974 survey shows son and daughters intended to convey the two parcels as they ultimately did, that survey is sufficient to show son's and daughters' intent to segregate the 3.33-acre "parcel for financing or security purposes." The hearings officer does not consider whether the 6.67-acre parcel could be considered a legal parcel under LDO 15.020(1)(G).

Intervenor argues petitioner never raised this issue below. However, it is undisputed that the hearings officer concluded that LDO 15.020 applies. Having reached that conclusion, the hearings officer was obligated to consider whether any of the seven methods of creating parcels applies in this case. While he likely would not have stopped with LDO 15.020(1)(E) if petitioner had specifically called LDO 15.020(1)(G) to his attention, we believe the hearings officer's recognition that LDO 15.020(1) applies is sufficient to carry

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"PURPOSE: To define the boundaries of [son's] undivided interest in the parent tract for mortgage purposes.

"PROCEDURE: The monuments of Recorded Survey No. 4140 were recovered and used as control in separating [son's] parcel from the parent tract." Record 195.

[20] If the hearings officer finds that this is the case, subject to our discussion below concerning LDO 15.020(2)(B), the survey would have been sufficient to create a 3.33-acre parcel and a 6.67-acre parcel with those parcels owned by son and daughters as tenants in common. When the deeds were executed and recorded in 1987 and 1989, those deeds would not have *created* the parcels in violation of partitioning regulations in effect at that time, as the challenged hearings officer's decision suggests. This is because those deeds would simply be conveying parcels that are legally recognized by the county under LDO 15.020(1)(E) as a result of the 1974 survey.

with it an obligation to consider all seven of the listed methods, at least where the method provided by LDO 15.020(1)(G) arguably applies.[21]

D. LDO 15.020(2)(B)

In the event that the hearings officer concludes on remand that either LDO 15.020(1)(E) or (G) provides a basis for recognizing the 1974 survey as sufficient to create separate 3.33-acre and 6.67-acre parcels that were held by son and daughters as tenants in common until deeds were later recorded, another issue that the hearings officer did not reach in his initial decision must be resolved. LDO 15.020(1) only allows legal recognition of parcels created by the methods set out in that section if those parcels "did not require division approval under the regulations listed in [LDO 15.020(2)]."

If the 1974 survey had the legal effect of partitioning the 10-acre parcel into 3.33-acre and 6.67-acre parcels in 1974, the survey would apparently not have been subject to any of the county's partition regulations, because they all postdate 1974. In fact, with one exception, the subdivision ordinance adopted in 1959 is the only listed regulation that was in effect in 1974, and we do not understand petitioner to argue the division of the 10-acre parcel into one 3.33-acre and one 6.67-acre parcel in 1974 would have been regulated as a subdivision.[22] The only potentially applicable "division requirement," is the zoning ordinance.

The question the hearings officer must answer, if he concludes that either LDO 15.020(1)(E) or (G) applies, is whether "division approval" was required under the county

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[21] As with our conclusion concerning LDO 15.020(1)(E), if LDO 15.020(1)(G) applies, the two parcels held by son and daughters as tenants in common would be recognized by the county as a result of son's and daughters' actions in 1974. The subsequent conveyances of those parcels would simply be conveying parcels that were recognized by LDO 15.020(1)(G) based on actions taken in 1974. Those deeds would not be the instrument that *created* the parcels.

[22] Under ORS 92.010(15) and (16), the act of dividing "land into four or more lots within a calendar year," constitutes "the act of subdividing land."

zoning ordinance listed at LDO 15.020(2)(B).[23] If so, it does not matter whether LDO 15.020(1)(E) or (G) would otherwise apply. If "division approval" was required under the county zoning ordinance listed at LDO 15.020(2)(B), and such "division approval" was not obtained, the 6.67-acre parcel and 3.33-acre parcel may not be recognized as "legally separate tracts" under LDO 15.020(1) and (2).[24]

THIRD AND FOURTH ASSIGNMENTS OF ERROR

As we stated earlier, the planning director's 1989 decision recognized the 3.33-acre parcel as a legal parcel. The 1993 hearings officer decision that ultimately denied daughters' request for a property line adjustment includes a finding that the hearings officer was bound by that 1989 planning director decision with regard to the question of the legality of the 6.67-acre parcel. Petitioner contends in the third and fourth assignments of error that the hearings officer in this proceeding should have considered whether those decisions conclusively resolved the issue of whether the 6.67-acre parcel is properly viewed as a legally created parcel.

As intervenor points out, there are some problems with petitioner's argument that either of those decisions should given preclusive legal effect. For example, with regard to the 1989 planning director's decision, intervenor points out that in a case that is in some respects similar to this one, we refused to give *any* legal effect to a decision we characterized as "no more than acquiescence to [the property owner's] desire to have the property

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[23] No party cites any provision of the zoning ordinance that explicitly required "division approval." That is not surprising since zoning ordinances typically impose regulatory requirements such as minimum parcel sizes, but rely on other regulations, such as subdivision regulations or partition regulations, to approve land divisions. Nevertheless, without more assistance than we have received from the parties or from the hearings officer in the challenged decision, we will not attempt to determine on our own whether the zoning ordinance in effect in 1974 required "division approval," within the meaning of LDO 15.020(1).

[24] By suggesting that the hearings officer consider LDO 15.020(1)(E) and (G) first, and then consider whether the zoning ordinance in effect in 1974 "required division approval" and disqualify legal recognition of the parcels under LDO 15.020(1) and (2) only if one or both of LDO 15.020(1)(E) and (G) are found to apply, we do not mean to suggest the hearings officer must proceed in that order.

recognized as two parcels." *Higgins v. Marion County*, 30 Or LUBA at 432. With regard to the 1993 hearings officer decision denying the property line adjustment, petitioner appears to argue that the issue of the legality of the 3.33-acre and 6.67-acre parcels was addressed and resolved in that appeal, and because intervenor was a party in that local proceeding, intervenor should not be allowed to question that finding in this appeal. As we explained in *Lawrence v. Clackamas County*, 40 Or LUBA 507, 519-20 (2001), *aff'd on other grounds* 180 Or App 495, 43 P3d 1192, *rev den* 334 Or 327 (2002), while issue preclusion can apply in land use proceedings, it does not apply in all land use proceedings.

On remand, if the hearings officer determines that the disputed 6.67-acre parcel cannot be recognized as a legal parcel under LDO 258.020(6) or 15.020, he should consider any arguments that petitioner may advance concerning the legal effect in this proceeding of the 1989 planning director decision or the hearings officer's 1993 decision denying the requested property line adjustment. He should also consider any contrary arguments by intervenor.[25]

We do not consider petitioner's third and fourth assignments of error.

The county's decision is remanded.

[25] In fact all of the arguments that were presented to the hearings officer in the local proceedings about the legal effect of the 1989 and 1993 decisions were presented by intervenor, who argued they did not have preclusive legal effect. Therefore, while the issue concerning the appropriate legal effect to assign to those decisions was preserved, the hearings officer did not have the benefit of petitioner's legal arguments on this issue. On remand, if this issue must be resolved, we assume the hearings officer will have the benefit of argument on this issue from all parties.