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. 2003-095

FINAL OPINION
AND ORDER

Appeal from Jackson County.

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

No appearance by Jackson County.

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

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

AFFIRMED 12/08/2003

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 a determination that his 6.67-acre parcel is a legally created and developable parcel and denies his request for approval to construct a dwelling on the parcel.

FACTS

Petitioner owns 6.67 acres in the county's Exclusive Farm Use zone. In 1974, the parent parcel from which the 6.67 acres was divided was located in the county's Farm Residential (F-5) zone. Petitioner sought a county determination that his 6.67-acre parcel was legally created in 1974 and that it is developable under current land use laws. Petitioner also sought county approval to construct a nonfarm dwelling on that parcel. A county hearings officer denied petitioner's requests in 2002. Petitioner appealed that decision to LUBA. In *DeBoer v. Jackson County*, 43 Or LUBA 219 (2002) (*DeBoer I*), we agreed with petitioner that the hearings officer inadequately explained why petitioner's initial request was denied, and we remanded the hearings officer's decision. Following our remand, the hearings officer again denied petitioner's request, and petitioner again appeals to LUBA.[1]

FIRST ASSIGNMENT OF ERROR

The central issue in this dispute is whether petitioner's 6.67-acre parcel was legally created. If it was not legally created, it is not eligible for the dwelling permit that petitioner seeks. Jackson County Land Development Ordinance (LDO) 15.020 sets out a number of methods for establishing separate developable parcels that the county will recognize.[2] In

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[1] The facts in this case are lengthy and complicated and are set out in full in our *DeBoer I* decision. We limit our discussion of the facts in this decision to those facts that are necessary to resolve petitioner's four assignments of error.

[2] 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

1 *DeBoer I*, we remanded so that the county could consider whether a May 21, 1974 survey

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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.

"* * * * *

"E) Minor Land Partition Ordinance recorded at Volume 109, page 394, effective January 31, 1979.

"* * * * *

"G) Land Division Ordinance No. 80-19, effective October 28, 1980, as amended thereafter.

"* * * * *

"I) Order No. 66-82 establishing interim criteria for determining conformance of partitions with Goal 3 and ORS 215.143; effective February 10, 1982."

that was filed with the Jackson County Surveyor "was to facilitate preparation, execution and recording of deeds to convey the property." 43 Or LUBA at 232. If so, LDO 15.020(1)(E) might apply and require that the county recognize the subject parcel as a separate, legally developable parcel. We also remanded so that the county could consider whether the subject parcel might qualify as a separate legally developable parcel under LDO 15.020(1)(G), as a parcel that was segregated for "financing or security purposes." *Id*. at 233. We further noted that in the event the hearings officer found on remand that either LDO 15.020(1)(E) or (G) applies, the hearings officer would have to consider a third question:

> "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 zoning ordinance listed at LDO 15.020(2)(B). 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)." 43 Or LUBA at 234 (footnotes omitted).[3]

On remand the hearings officer first suggested that the evidence tended to show that the 1974 "survey was done as a first step in a process which was intended ultimately to result in a division of the original 10-acre parcel." Record 2. However, rather than decide whether LDO 15.020(1)(E) applies or decide whether LDO 15.020(1)(G) applies, the hearings officer proceeded directly to consider whether division approval was required under the county's 1973 zoning ordinance.

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[3] The land use regulations mentioned in LDO 15.020(2) other than the zoning ordinance either post-date the 1974 survey or clearly do not apply to a division that divides one parcel into two new parcels, which is what petitioner contends happened in 1974. In one of the omitted footnotes, we also noted:

> "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." 43 Or LUBA at 234 n 24.

The hearings officer purported to consider the 1973 zoning ordinance as a whole and in particular considered the purpose statement and the requirement of Article I, Section 3 that all "lots shall * * * be used in conformity with the provisions of this ordinance." Record 4. The hearings officer observed:

> To conclude that the act of filing a survey the net effect of which was to create a lot * * * which violated the zoning ordinance was an act which did not require division approval would contravene well-established rules of statutory [construction] *i.e.*, it would make the zoning ordinance meaningless – a conclusion that is unacceptable unless no other reasonable conclusion is available. * * *" Record 3.

The hearings officer ultimately concluded that under the 1973 zoning ordinance any division of land to create new parcels or new lots required prior county approval. Record 5.

We agree with petitioner that the hearings officer's decision erroneously finds a general requirement for "division approval" in county's 1973 zoning ordinance. That finding is at odds with the county's practice before its minor land partition ordinance was adopted in 1979. More importantly, there is simply no textual support for a general requirement in the 1973 zoning ordinance that *all* land divisions must receive prior county approval before the division could become an accomplished legal fact. However, as we explain below, that does not mean prior county approval was not required under the 1973 zoning ordinance for the particular land division that is at issue in this appeal.

There is no dispute that at the time of the 1974 survey, the minimum parcel size in the county's F-5 zone was 5 acres. While the subject property includes 6.67 acres, the other lot that was created from the 10-acre parent parcel only included 3.33 acres and, therefore, did not meet the F-5 minimum parcel size requirements in 1974. Although we do not agree with the hearings officer's finding of a general requirement in the 1973 zoning ordinance for approval of two-parcel partitions (minor partitions), the hearings officer's decision does refer to a type of approval that was in fact required under the 1973 zoning ordinance for land divisions that create one or more substandard lots.

> "* * * The filing of the survey was essentially a request to obtain a variance from the zoning ordinance because the effect thereof would be to create a lot (TL 100) which did not conform to the minimum lot size of the zone (and which already contained a dwelling)." Record 4.

Had petitioner's predecessors divided the 10-acre parcel into two five-acre parcels, those parcels would have met the 1973 zoning ordinance minimum parcel size requirements in the F-5 zone. Assuming LDO 15.020(1)(E) or 15.020(1)(G) apply, a division of a 10-acre parcel into two five-acre parcels would not have required county approval under LDO 15.020(2) and the county likely would be required to recognize the two five-acre lots as separate developable parcels under LDO 15.020, even though neither of those parcels meets the current EFU zoning minimum parcel size. However, that is not what petitioner's predecessors did. The 1974 survey that petitioner contends created petitioner's 6.67-acre parcel also created a 3.33-acre parcel. Such a division required county approval of a variance under the 1973 zoning ordinance to permit division of a 10-acre parcel that met the zoning ordinance minimum parcel size requirement into two parcels where one of those new parcels would meet the minimum parcel size and one of those new parcels would not.[4] Because the division of the 10-acre parcel into a 6.67-acre parcel and a 3.33-acre parcel in 1974 required approval under one of the regulations listed in Section 2 of LDO 15.020 (the 1973 zoning ordinance), the county is not required to recognize petitioner's parcel as a "legally separate" parcel under LDO 15.020.

The first assignment of error is denied.

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[4] Article VII, Section 1 of the 1973 zoning ordinance provided as follows:

> "The planning commission may vary or modify requirements of [the zoning ordinance] where strict application would cause an undue or unnecessary hardship. No variance shall be granted to allow the use of property for a purpose not authorized within the district in which the proposed use would be located. Variances will, under most circumstances, be limited to requirements governing yards, lot dimensions and coverage, heights, and parking areas. * * *" Record 127.

SECOND ASSIGNMENT OF ERROR

The LDO includes authority for what petitioner refers to as an innocent third party determination. LDO 258.020(6).[5] In 2002, the hearings officer found that petitioner did not qualify for an innocent third party determination, and petitioner assigned error to that finding in *DeBoer I*. We expressed doubt in *DeBoer I* about whether LDO 258.020(6) could apply to petitioner's 6.67-acre parcel:

> "[I]t 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 violation of minimum parcel size requirements as though it is a legally developable tract, in certain specified circumstances. 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)." 43 Or LUBA at 230 (footnotes omitted).

The hearings officer's response to the above is a single sentence in a footnote:

> "The Hearings Officer agrees that he mistakenly applied LDO 258.020(6) in his original decision and that it does not apply here." Record 2 n 1.

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[5] 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." (Emphasis added.)

Petitioner argues that the above finding is simply insufficient to allow review. We agree with petitioner that the hearings officer's terse dismissal of a relevant legal issue makes our review more difficult. However, we understand the hearings officer to take the position that LDO 258.020(6) is limited to recognizing parcels that are substandard and does not apply to parcels that met zoning minimum parcel size requirements when they were created, as we suggested might be the case in our decision in *DeBoer I*. The hearings officer appears to be correct in that position. However, even if we and the hearings officer are wrong about that, we have already determined in our disposition of the first assignment of error that the 6.67-acre parcel was not created in 1974 when the survey was filed with the county surveyor. That means the earliest the 6.67-acre parcel was created was 1987, when the first deed that conveyed the 6.67-acre parcel to petitioner's predecessors was executed. Therefore petitioner is not entitled to an innocent third party determination under LDO 258.020(6), because the parcel was not "created prior to January 31, 1979," as criterion A under LDO 258.020(6) requires. *See* n 5.

The second assignment of error is denied.

THIRD AND FOURTH ASSIGNMENTS OF ERROR

We did not reach petitioner's third and fourth assignments of error in *DeBoer I* and explained our reasons for not doing so as follows:

> "[In a February 9, 1989 letter, the planning director] recognized the 3.33-acre parcel as a legal parcel. The 1993 hearings officer decision that ultimately denied [petitioner's predecessors'] 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.[6] Petitioner contends in the third and fourth assignments of error that the hearings officer in this proceeding should have considered whether those

[6] In a 1993 decision, the county hearings officer denied a request for a property line adjustment to increase the 3.33-acre parcel to 4 acres and to reduce the 6.67-acre parcel to 6 acres. That request was denied because neither lot met the then applicable EFU-zoning minimum parcel size requirement, and the 6.67-acre parcel would be rendered more non-conforming by the requested property line adjustment. 43 Or LUBA at 222.

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 be 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 recognized as two parcels.' *Higgins v. Marion County*, 30 Or LUBA 426[, 432, *aff'd* 141 Or App 598, 918 P2d 460, *on reconsideration* 142 Or App 418, 921 P2d 413 (1996)]. 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.
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> "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." 43 Or LUBA at 235-36 (footnotes omitted).

On remand the hearings officer concluded that the planning director's February 9, 1989 letter was not a land use decision and did not conclusively establish that the subject property is properly viewed as a separate parcel. The hearings officer also concluded that the hearings officer 1993 property line adjustment did not establish that the subject property must be viewed as a separate parcel.[7] Petitioner repeats his third and fourth assignments of error in this appeal of the hearings officer's decision on remand.

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[7] Actually, it is not clear to us that the hearings officer considered the 1993 property line adjustment decision. The hearings officer's decision appears to refer to a subsequent 1994 decision that denied a request for approval of a "lot of record" dwelling on the subject property. That 1994 denial of an application for a "lot of record" dwelling on the property was based on the hearings officer's finding that the property contains predominantly prime farmland and for that reason the application violated one of the approval criteria for "lot of record" dwellings, which prohibits such dwellings on parcels that contain predominantly prime farmland.

A. The February 9, 1989 Planning Director Letter

As our decision in *DeBoer I* explains, there have been questions concerning the subject 6.67-acre and 3.33-acre parcels since the late 1980s. In 1988, questions were raised concerning the deeds that first conveyed the 6.67-acre parcel and 3.33-acre parcels in 1987. As we explained in *DeBoer I*:

> "In a September 13, 1988 letter, the attorney who prepared the [1987] deeds wrote to the county seeking a determination 'whether the division which was intended by the parties in 1974 can be recognized.' 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.'" 43 Or LUBA at 221 (record citations and footnotes omitted).[8]

Petitioner contends that the February 9, 1989 letter is a land use decision that independently establishes the legality of his 6.67-acre parcel, and that the hearings officer erred by concluding otherwise. The hearings officer apparently relied on our decision in *Higgins v. Marion County* in concluding that the 1989 planning director's decision was not a land use decision that may be relied upon to establish the 6.67-acre parcel as a separate legally developable parcel.[9]

This 1994 decision expressly did *not* consider whether the 6.67-acre parcel was legally created. 43 Or LUBA at 223 n 8. However, petitioner does not assign error based on this apparent mistake by the hearings officer.

[8] In one of the omitted footnotes we explained:

> "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:
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> > "'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.'" 43 Or LUBA at 221-22 n 6 (record citation omitted).

[9] The hearings officer's findings are as follows:

An initial problem that petitioner faces under this assignment of error is that the subject of the February 9, 1989 letter is the 3.33-acre parcel, not the 6.67-acre parcel. The 6.67-acre parcel is not specifically mentioned in the letter, and the letter never expressly states that the county will recognize the 6.67-acre parcel as a separate legally developable parcel. That problem aside, the facts that led Marion County to acquiesce in the property owner's desire in *Higgins* to have the county recognize that his parcel was made up of two separate parcels are not materially different than the facts that led Jackson County to write the February 9, 1989 letter to petitioner's predecessors' lawyer.[10] Petitioner offers no persuasive basis for distinguishing the Februrary 9, 1989 letter in this appeal from the county's decision in *Higgins*.[11] Given the similarity of the county's decision here and the county's decision in *Higgins*, we conclude that the February 9, 1989 letter is not properly viewed as a land use decision that (1) approves a division of the 10-acres into a 6.67-acre

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> "The Hearings Officer believes the 1989 Planning Director's Decision was not a land use decision, but more akin to an acquiescence to the parties wishes. *Higgins v. Marion County* * * * compares favorably on this point." Record 5.

[10] In *Higgins*, the property owners and the county disputed whether the 14-acre and 82-acre tax lots that made up a 96-acre parcel were properly viewed as separate developable parcels. The county initially took the position that they were not. 30 Or LUBA at 428. Later, the county changed its position and took the position that they were separate parcels. *Id.* LUBA concluded that "the county's * * * acquiescence to [the property owners'] desired characterization of their property was not a decision upon which petitioner could base an appeal." *Id.* at 431. LUBA concluded in *Higgin*s that the county's acquiescence "was not a land use decision to partition or otherwise establish the existence of two separate parcels * * *." *Id*. at 432.

[11] In *Skrepetos v. Jackson County*, 33 Or LUBA 502 (1997), an earlier appeal of a different land use decision concerning this property, we cited *Higgins* in expressing doubts about whether the February 9, 1989 planning director's decision was properly viewed as a land use decision:

> "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* * * * (informal county acceptance of two tax lots as separate parcels for land use purposes is not a land use decision)." 33 Or LUBA at 507 (emphasis in original; footnote omitted).

parcel and a 3.33-acre parcel or (2) otherwise establishes the 6.67-acre parcel and 3.33-acre parcel as separate parcels.

The third assignment of error is denied.

B. The 1993 Property Line Adjustment Decision

As noted earlier, in his 1993 decision the county hearings officer denied a request for a property line adjustment that would have reduced the 6.67-acre parcel to 6 acres. The requested property line adjustment was denied because one of the applicable criteria for property line adjustments prohibited property line adjustments that "increase the nonconformity of nonconforming lots." 43 Or LUBA at 222. The 6.67-acre parcel was smaller than the minimum parcel size required under the EFU zoning that applied to the property in 1993. However, before he reached that conclusion and denied the requested property line adjustment, the hearings officer addressed the property line adjustment criterion that appears at LDO 40.020(3) and requires the parcels that are the subject of a property line adjustment request must have been "created consistently with 'land use/division ordinance and statutes in effect at the time of their creation.'" 43 Or LUBA at 222 n 7. In addressing that criterion, the 1993 hearings officer's decision expressed no view concerning the merits of the February 9, 1989 planning director's decision, but took the position that he was bound by the planning director's earlier decision.

We understand petitioner to argue that because the hearings officer took the position in the 1993 property line decision that he must defer to the February 9, 1989 planning director's letter with regard to the issue of whether the 6.67-acre and 3.33-acre parcels were legally established, the county is legally bound to do so in this decision as well. As previously noted, the hearings officer does not really respond to this issue. Rather than prolong this matter, we address the question here, rather than remand the hearings officer's decision again so that he can be given another chance to do so.

Petitioner's legal theory for his position under the fourth assignment of error is not entirely clear. If petitioner believes the county is forever bound by the conclusion of law that the hearings officer adopted in the 1993 property line adjustment decision concerning the legal effect of the February 9, 1989 planning director decision, he cites no authority for that belief. We are not aware of any authority for the proposition that the county is bound to adopt the same conclusion of law in this separate, unrelated quasi-judicial land use decision that concerned the same property that the hearings officer adopted in a different, unrelated decision in 1993.

If petitioner's legal theory under the fourth assignment of error is issue preclusion, we reject it. Although the argument that might be read as an issue preclusion argument is directed at intervenor-respondent, it is the *county's* decision that is the subject of petitioner's fourth assignment of error. Even if we assume that in an appropriate case a party in a local land use proceeding might be able to assert issue preclusion against a county decision maker in an appeal of a county decision to LUBA, we conclude that petitioner fails to demonstrate that this is such a case here for two reasons. *See Nelson v. Clackamas County*, 19 Or LUBA 131, 138 (1990) (assuming without deciding that issue preclusion can theoretically be applied against a county in a land use proceeding where the county is the decision maker). First, a number of specific requirements must be satisfied to assert issue preclusion. *Nelson v. Emerald People's Utility Dist.*, 318 Or 99, 104, 862 P2d 1293 (1993). Petitioner makes no attempt to demonstrate that those requirements are met here. One of those requirements is that the issue that the party asserts is precluded must have been "essential to a final decision on the merits in the prior proceeding." *Id.* We seriously question whether the hearings officer's legal conclusion that the February 9, 1989 planning director's decision required that the hearings officer also find the parcels were legally divided was *essential* to his final decision to deny the property line adjustment. That finding concerning the February 9, 1989 planning director's decision would be essential to a decision to *approve* the requested

property line adjustment, but it appears to have been unnecessary to the hearings officer's 1993 decision to *deny* the requested property line adjustment. Second, as we have already noted, the property line adjustment decision is in a decision that is unrelated to the decision that is at issue in this appeal. As we explained in *Nelson*:

> "[W]e believe the system of local government land use adjudications established by state statute and local regulations places primary importance on expeditious adjudications, contemporaneous application of the same approval criteria, as set out in comprehensive plans and land use regulations, to all similarly situated applicants and the ability of a local government tribunal to make an independent determination on the application of those approval criteria to the facts before it. This system is incompatible with giving preclusive effect to issues previously determined by a local government tribunal in another proceeding." 19 Or LUBA at 140.

Because petitioner offers no persuasive reason for giving the 1993 hearings officer's legal conclusion the kind of preclusive effect he argues it should be given in a separate unrelated decision concerning the same property, we reject the argument.

The fourth assignment of error is denied.

The county's decision is affirmed.