BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

NENA LOVINGER and JAMES JUST,
Petitioners,

vs.

LANE COUNTY,
Respondent,

and

MICHAEL LEGAULT,
Intervenor-Respondent.

LUBA No. 2005-098

FINAL OPINION
AND ORDER

Appeal from Lane County.

Nena Lovinger, Fall Creek, and James Just, Lebanon, filed the petition for review. James Just argued on his own behalf.

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

Michael Legault, Fall Creek, filed a response brief and argued on his own behalf.

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

AFFIRMED 01/12/2006

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

Opinion by Davies.

NATURE OF THE DECISION

Petitioner appeals the county's approval of a forest template dwelling and of a request for a riparian setback modification.

MOTION TO INTERVENE

Michael Legault, the applicant below, moves to intervene on the side of respondent. There is no opposition, and it is allowed.

FACTS

The subject property is a 1.2-acre piece of land located on the south side of Little Fall Creek Road. It is designated Forest Land in the Lane County Rural Comprehensive Plan (RCP) and is zoned Impacted Forest Lands (F-2/RCP). The property is located within the 100-year flood hazard area and is within the Floodplain Combining Zone (/FP). The property is currently vacant, and is bordered by Little Fall Creek along the southern property line.

Prior to 1959, the property that was then identified as tax lot 200 included the subject property and a 6.35-acre area of land located north of what is now Little Fall Creek Road. In 1959, the then-owner of tax lot 200 executed a warranty deed transferring fee title in a strip of land through the middle of tax lot 200 to the county for a right-of-way, now Little Fall Creek Road. At some point after 1959, the assessor identified the 6.35-acre area of land remaining north of Little Fall Creek Road as tax lot 203. The subject property, the portion to the south of Little Fall Creek Road, is identified as tax lot 200. In 2003, while intervenor owned both tax lot 200 and tax lot 203, he obtained approval from the county for a forest template dwelling on tax lot 203. As part of that approval, the county confirmed that tax lot 203 is a separate legal lot. Intervenor has since sold tax lot 203.

On June 28, 2004, intervenor applied for approval of a forest template dwelling on tax lot 200. The planning director granted approval of the forest template dwelling. Because the proposed dwelling would be located within the riparian setback area, intervenor sought and the county

approved a modification to the riparian setback requirements. Both the forest template dwelling approval and the approval of the riparian setback modification were appealed to a county hearings officer, who affirmed the planning director's decision on May 9, 2005. In response to objections from staff regarding the riparian modification decision, the hearings officer revised his decision on May 12, 2005. That decision was appealed, and the hearings officer declined to reconsider it on May 26, 2005. On appeal, the board of commissioners declined to hear the appeal, and affirmed the hearings officer's decision on June 8, 2005.

This appeal followed.

FIRST ASSIGNMENT OF ERROR

ORS 215.750(1), OAR 660-006-0027(1)(f) and LC 16.211(5) authorize approval of forest template dwellings.[1] A forest template dwelling may not be approved if the "tract" on which the dwelling will be sited already includes a dwelling. OAR 660-006-0027(1)(i); *see also* ORS 215.750(4)(d) and LC 6.211(5)(a).[2] Where a county approves a forest template dwelling, the remaining portions of the tract upon which the dwelling is sited must be consolidated into a single lot or parcel. ORS 215.705(1)(g). LC 16.211(5)(b) and ORS 215.705(1) also require that the lot or parcel upon which the dwelling will be sited was lawfully created.

A. "Tract" Already Contains a Dwelling

Petitioners argue that the county misconstrued and violated applicable law in finding that the subject property is not part of a tract that already contains a dwelling.[3] Petitioners' argument is

---

[1] Although the statute and administrative rule do not use the term "template dwelling," the Lane Code does. LC 16.211(5). That label is used because this particular approval of a dwelling in a forest zone depends, in part, on the number of lots or parcels and dwellings that fall within a 160-acre square area, the template, centered on the center of the subject tract.

[2] The statutes, administrative rules and local code uniformly define the term "tract" as "one or more contiguous lots or parcels in the same ownership." ORS 215.010(2); LC 16.211(5)(a); OAR 660-006-0027(5).

[3] The discussion under this subsection addresses only whether tax lots 200 and 203 are contiguous and, thus, a single tract. The discussion of whether tax lot 200 qualifies as a lawfully created "parcel" is addressed in subsection B. below.

based upon the premise that tax lot 200 and tax lot 203 constitute only one unit of land because the creation of Little Fall Creek Road in 1959 did not operate to divide then tax lot 200 into two separate noncontiguous units of land. The existence of a forest template dwelling on the tract of which tax lot 200 is a part, petitioners argue, precludes the approval of a forest template dwelling on tax lot 200 now.

The hearings officer adopted findings addressing this issue raised by petitioners during the local proceedings and concluded that tax lots 200 and 203 are not contiguous.[4] While the hearings

---

[4] The findings state, in relevant part:

> "A template dwelling is a dwelling or manufactured dwelling that is allowed on forest land subject to meeting certain requirements. Lane Code 16.211(5)(a) provides that one of those requirements is that the tract upon which the dwelling will be located has no other dwellings or manufactured dwellings on it. Subsection (5)(a) further defines 'tract' to mean one or more contiguous lots or parcels in the same ownership.
>
> "The appellants' argument is as follows: Tax lots 200 and 203 constitute a single tract as they are currently under the ownership of the applicant and are contiguous to one another. Tax lot 200 is occupied with a dwelling and therefore cannot meet the first requirement for the placement of a template forest dwelling.
>
> "The County counters with the argument that Little Fall Creek Road, which bisects the two tax lots, negates the contiguity between those parcels and, in effect, creates two legal lots. Specifically, the County relies upon two theories.
>
> "The County's first theory is that the legal lot status of the two parcels was determined through Planning Action (PA) 03-5878. This was an administrative decision where the County approved a template dwelling for tax lot 203 based upon a legal lot determination that affected both the northern and southern portions of tax lot 200. Notice of this template dwelling approval was given to adjacent property owners and no appeal was made. The flaw with this theory is that the legal lot determination associated with this planning action only provided notice as to the template dwelling approval for tax lot 203. It did not provide legally sufficient notice of a legal lot determination for the remainder parcel (the subject property) nor arguably did it provide standing for anyone to challenge the applicability of that legal lot determination in regard to the remainder parcel. For these reasons, Planning Action 03-5878 did not serve as a final decision in regard to the legal lot status of the subject property.
>
> "The County's second theory is that the intervention of Little Fall Creek Road acted to divide tax lot [200] into two legal lots. First, it points to the definition of 'contiguous' found in Lane Code 16.090: *'Having at least one common boundary line greater than eight feet in length. Tracts of land under the same ownership and which are intervened by a street (local access, public, County, State or Federal street) shall not be considered contiguous.*' Under this definition, the two tax lots are not contiguous. The County further points out that the Little Fall Creek Road right-of-way, as it is adjacent to the two lots, was created by a Warranty Deed that transferred fee ownership to the County. Thus, there is not merely an intervening easement but an intervening ownership between the two lots.

officer's findings address numerous theories, embedded in the hearings officer's decision are two sentences that dispose of this issue:

> "The County further points out that the Little Fall Creek Road right-of-way, as it is adjacent to the two lots, was created by a Warranty Deed that transferred fee ownership to the County. Thus, there is not merely an intervening easement but an intervening ownership between the two lots." Record 91.

The simple, straight-forward question presented is whether the transfer of a fee interest in a strip of land to the county in 1959 served to divide the property remaining on either side of that strip of land.

Petitioners do not dispute that the 1959 warranty deed transferred to the county a fee interest in the strip of land described.[5] However, they argue that the creation of a road does not,

---

> "The County has held that the bisection of property by a road acts to legally divide that road since 1975. In September of 1983, through the adoption of Ordinance 16-83, the County amended its definition of 'contiguous' in its land division regulations to provide that tracts of land that are intervened by a street or road were not to be considered contiguous. This definition was reaffirmed in February of 1984 with the adoption of Ordinance 1-84, which established Lane Code Chapter 16, the zoning provisions that apply outside urban growth boundaries. The definition was again preserved in 1986 changes to Chapters 13 and 16 of the Lane Code.
>
> "In 1989 and again in 1991, the Oregon Legislature revised the definition of 'partition land' in ORS 92.010(7)(d) to exclude from the definition of 'partition' *'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 * * *.'* It has been the County's position that the statute does not have retroactive effect and therefore land divisions caused by the intersection of roads that occurred prior to 1989 serve as valid land divisions.
>
> "* * * * *
>
> "I must agree with the Planning Director's assessment that there is no evidence that the amendments to ORS 92.010(7) were intended to be retroactive and there is some evidence of legislative intent that that was not the case. While the County's interpretation of ORS 92.010(7) will not be given deference during judicial review, it is a reasonable interpretation that must stand until reversed by an appellate body.
>
> "The Planning Director's determination that the subject property is a legal lot is affirmed." Record 90-92 (emphasis in original).

[5] The deed provides, in pertinent part:

> "The parcel of land to which this description applies contains 1.48 acres, of which 1.45 acres lie within the existing right of way, title to which hereby is acknowledged to be in the public, and 0.05 acres lie outside the existing right of way." Record 217.

and never did, serve to partition land. Therefore, tax lots 200 and 203 remain part of the same "tract," and the county erred in approving a second dwelling on that tract. However, as explained below, petitioners and the sources upon which they rely fail to distinguish between roads that are created as mere easements or by dedications that do not transfer the underlying fee, and roads where fee title is transferred to a private owner or a public entity.

The first case petitioners cite in support of their contention that the "Oregon courts have long held that the construction or existence of a road is not sufficient in itself to partition a parcel of land" is *Cabler v. Alexander et al.*, 111 Or 257, 224 P 1076 (1924). Petition for Review 15. In that case, the issue presented was the extent of the property subject to a homestead exemption. The question in that case was not whether a roadway served to legally partition a property; it was, rather, whether a homestead exemption could be claimed for only the land on which the home stood, or whether it also could be claimed for land that was separated from the land on which the house stood by an intervening ownership. The Court discussed the scope of the homestead exemption with regard to land that falls on the other side of a street or alley from the house. However, in that case, the property in question was separated by an intervening ownership, and on that basis, the Court determined that property that was separated from the house by an intervening ownership was not part of the homestead.[6] The Court held:

> "[W]e are satisfied that it never was the intention of our Legislature to give a homestead right in separate, noncontiguous parcels of land. By the words 'noncontiguous parcels' we do not mean separated merely by surveyor's lines, as lots in a block, or separated by streets or alleys, but parcels absolutely disconnected by intervening land, which is this case." *Id*. at 271.

The Court of Appeals cited *Cabler* in another case that petitioners rely upon in support of their assertion that Oregon caselaw has long held that roads do not serve to divide land--*State v. Emmich*, 34 Or App 945, 580 P2d 570 (1978). In *Emmich*, the defendant was convicted of a

[6] The party claiming the homestead exemption owned three parcels of land: one that contained the residence, another that was used and farmed with the property containing the residence, and a third property that was separated from the first two by property in a different ownership.

violation of the subdivision law, which prohibited selling subdivided lands without having complied with the subdivision law. The Court outlined the pertinent facts as follows:

> "Defendant purchased the 2,280 acres in question in 1973 as one parcel of land intersected by a road. Defendant has divided the land on one side of the road into three parts and the land on the other side of the road into two parts." *Emmich*, 34 Or App at 948.

On appeal, the defendant argued that his division did not constitute a subdivision because there was not a division into at least four parts, as required by subdivision law then in effect. His argument, although not clearly stated in the opinion, was premised on his assertion that the roadway served to divide the property and that the divisions that he made did not divide one parcel into four parts, and thus did not constitute a "subdivision." Rather, his transfers divided one existing parcel into three separate parcels, and another existing parcel into two separate parcels.

The entirety of the Court's analysis provides:

> "The land was purchased as one unit. It was dealt with as a unity by the defendant. The law has held in other land-use contexts that a parcel of land does not lose its unitary character simply by the happenstance of an intersecting boundary line, street or dedicated road. *Cabler v. Alexander et al.*, 111 Or 257, 262, 271, 224 P 1976 (1924); *City of Lake Oswego v. Grimm's Fuel Co*., 34 Or App 67, 577 P2d 1360 (1978). We are not directed to any case where land was held to be noncontiguous due to separation by anything short of an intervening geographical barrier or parcel of land in separate ownership. Accordingly, we hold that a parcel of land is subject to the Oregon Subdivision Control Law even though intersected by a road * * *." *Id*. at 949.

Although the pertinent facts in *Emmich* are not completely clear, it seems obvious from the context of the opinion that the roadway in *Emmich* was merely an easement, or at least that the Court assumed that it was. The Court explicitly distinguished the situation that it considered to be before it; *i.e.*, where land is bisected by a "street or dedicated road," from the situation where land is separated by a "parcel of land in separate ownership."[7] Accordingly, petitioners cannot rely on

[7] The terms "dedicated" and "dedication" are often used loosely. Black's Law Dictionary defines the term "dedication" as follows:

these cases to support the proposition that property can never be divided by a street or road, no matter how the ownership interest in that strip of land is held.[8]

The transfer to the county in 1959 created three separate parcels of land--the strip of land owned in fee by the county and two parcels of land lying on either side of the roadway, the properties that are now identified as tax lots 200 and 203. Since 1959, tax lots 200 and 203 have been separated by an intervening ownership, are not "contiguous lots or parcels in the same ownership," and are therefore not part of the same "tract." Accordingly, the county did not err in approving the dwelling on tax lot 200, although tax lot 203 already contains a dwelling.

B. Lawfully Created "Lot" or "Parcel"

Petitioners argue that the lot or parcel on which the forest template dwelling is to be sited must have been lawfully created. ORS 215.705(1)(a); LC 16.211(5)(b). They assert that a forest template dwelling may only be allowed on a "lot" or "parcel," pursuant to ORS 197.705(1), and that the subject property is not a "parcel" as defined by ORS 215.010(1).[9] For purposes of ORS chapter 215, the term "parcel" includes a unit of land created in any of the following ways:

"(A) By partitioning land as defined in ORS 92.010;

"The donation of land or creation of an easement for public use." Black's Law Dictionary, Eighth Ed., 442.

An owner of property may dedicate property for use by the public as a right of way. In dedicating the property for that use, the property owner may transfer the fee title to the public. The property owner may also choose, instead, to retain ownership of the property, subject to the dedicated right of way. In the former case, the property owner retains no right or interest in the property. In the latter case, the property owner retains whatever ownership interest he or she has in the property that is compatible with the dedicated public use. It appears that the Court in *Emmich* used the term "dedicated road" to indicate an easement or a dedication without transfer of fee ownership.

[8] Neither *Smith v. Clackamas County*, 313 Or 519, 836 P2d 716 (1992), nor *City of Lake Oswego v. Grimm's Fuel Co.*, 34 Or App 67, 577 P2d 1360 (1978), both cited by petitioners, recognizes the distinction between roadways that are dedicated in fee simple and those in which the grantor merely dedicates to the public an easement.

[9] Although not relevant here, ORS 92.010 defines "lot" as "a single unit of land that is created by a subdivision of land."

> "(B) In compliance with all applicable planning, zoning and partitioning ordinances and regulations; or
>
> "(C) By deed or land sales contract, if there were no applicable planning, zoning or partitioning ordinances or regulations." ORS 215.010(1)(a).

The county relies on subsection (C), arguing that the 1959 warranty deed created the subject property at a time when "there were no applicable planning, zoning or partitioning ordinances or regulations," and that the subject property is therefore a "parcel."

Petitioners cite, first, to ORS 92.017, enacted in 1985, which provides:

> "A lot or parcel lawfully created shall remain a discrete lot or parcel, unless the lot or parcel lines are vacated or the lot or parcel is further divided, as provided by law."

That statute does not assist petitioners. First, the original parent parcel was divided, if at all, in 1959. It was the statutes and ordinances in effect at that time that govern whether the subject property is a "parcel" as defined in ORS 215.010(1)(a)(C).[10] Second, the 1985 statute begs the question whether the parent parcel was "further divided, *as provided by law*."

Petitioners then cite to a 1955 statute that provided:

> "No person shall create a street or way for the purpose of partitioning a parcel of land without the approval of the agency or body authorized to give approval of plans for subdivision under ORS 92.040 with respect to the area in which the parcel is situated." ORS 92.014 (1955).[11]

We understand petitioners to argue that the creation of Little Fall Creek Road violated this statutory provision and was an illegal land division when it occurred in 1959 because there is no county

---

[10] The parties cite to 1989 and 1991 amendments to ORS 92.010(7)(d), defining "partition land." As the hearings officer notes, that statute now excludes from the definition of "partition" "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 * * *." We fail to see, however, how those amendments have any bearing on the legality of a division that allegedly occurred in 1959.

[11] The current version of ORS 92.014(1) provides:

> "No person shall create a street or road for the purpose of partitioning an area or tract of land without the approval of the city or county having jurisdiction over the area or tract of land to be partitioned."

approval authorizing the creation of the road, and the resulting units of land, now tax lots 200 and 203, were not lawfully created. Accordingly, petitioners argue, approval of the challenged forest template dwelling violates the requirement that the template dwelling be placed only on a lawfully created parcel of land.

The county responds:

> "The strip of land on which the road exists was acquired by Lane County through a Warranty Deed executed on December 7, 1959. Record 217-218. At that time, the conveyance acknowledged the prior establishment of the existing road right-of-way. Record 217. The deed indicates the conveyance resulted from the relocation of Little Fall Creek road and that title to most of the described area conveyed to Lane County was already held by the public. The action that divided property to the north of the roadway from property to the south of the roadway had already been taken by the property owner at the time of the acquisition of that strip of land by Lane County in 1959." Response Brief 13.

We do not agree with the county that title to most of the strip of land was already held by the public when the 1959 deed was executed. The language of the deed does not support that position. *See* n 5. Rather, it indicates that it is the deed itself that transferred the title to the county. The right of way now identified as Little Fall Creek Road may have been dedicated to the public prior to 1959, as the county asserts. However, nothing supports the county's position that any previous dedication transferred a fee title interest. As is clearly stated in the cases discussed above, the dedication of a mere easement or right to use the strip of land for roadway purposes is not sufficient to divide land. We agree with petitioners, at least on that point. It was the execution of the warranty deed in 1959 that created the land division that petitioners allege violated ORS 92.014 (1955).

The county also argues:

> "Nothing in the record indicates the road was initially created or relocated for the purpose of partitioning a parcel of land or that the establishment of the road or relocation was done without the approval of Lane County, the jurisdiction with authority over partition approvals under ORS 92.040 in 1959." Response Brief 13 n 9.

The county's assertion that the record does not contain evidence that Little Fall Creek Road was created without the required approval of the county does not assist its position. It is the applicant's,

not petitioners', burden to establish compliance with all applicable criteria, including the requirement that the lot or parcel on which the forest template dwelling is sited was lawfully created. *Strawn v. City of Albany*, 20 Or LUBA 344, 350 (1990). If the record lacks evidence of the county's approval, where such approval is required, the applicant fails to carry its burden of proof.

With regard to the county's argument that "[n]othing in the record indicates the road was initially created or relocated for the purpose of partitioning a parcel of land," the parties do not offer much assistance on the meaning of the 1955 statute. However, we tend to agree with the county. There can be many reasons for creating a road; *e.g.*, for the purpose of accessing an adjoining property. In this case, the record reflects that the roadway in question already existed in 1959. The deed was likely only to clarify the ownership or maintenance obligations of that existing roadway. In any event, we do not see that petitioners have pointed to anything in the record that demonstrates that the transfer that was accomplished by the 1959 deed was to create a road for purposes of partitioning then tax lot 200, thus triggering ORS 92.014 (1955). Petitioners do not demonstrate any other approval that was required but not obtained.[12] Accordingly, we agree with the county that the 1955 statute did not apply to the deed.

Finally, even if the statute did apply, we understand the county to assert that in 1959 the county had no applicable partition regulations. Although not argued by the county, we do not see why, absent applicable partition regulations, the county's acceptance of the deed would not be adequate "approval," pursuant to ORS 92.014 (1955).

Petitioners therefore fail to demonstrate any way in which the county's conclusion that tax lot 200 is a lawfully created parcel is in error. This assignment of error is denied.[13]

---

[12] The parties appear to agree that there were no county regulations that would have applied to the 1959 division. If there were any, we have not been cited to them.

[13] We offer no opinion on the county's interpretation of the term "contiguous" in its local code, or the possible effect of an intersecting road that is not owned in fee simple or where the division occurred at a different point in time.

SECOND ASSIGNMENT OF ERROR

Petitioners argue that the county failed to adopt findings addressing LC 16.244, which establishes standards and criteria for the Floodplain Combining Zone for the purpose of minimizing loss due to flood conditions. Essentially, petitioners are arguing that the county was required to demonstrate compliance with those criteria as part of its approval of the challenged approval of intervenor's template dwelling application.

The planning director's findings provide:

> "The subject property is located within the 100-year flood hazard area per Community-FIRM map number 415591-41039C1685F effective June 2, 1999. As a condition of approval, a Floodplain Development Permit will be required prior to land use sign-off of a building permit." Record 151.

The county concedes that the subject property, which falls within the 100-year floodplain, is subject to the criteria found in LC 16.244. However, it argues that the proper time for determining compliance with LC 16.244 is at the building permit stage, and that petitioners have cited to nothing that requires a demonstration of compliance with those criteria at this point in the proceedings; *i.e.*, during consideration of the request for approval of the forest template dwelling. Accordingly, the county was not required to adopt findings of compliance with LC 16.244, and their failure to do so does not provide a basis for reversal or remand.

We agree with the county. The provisions of LC 16.244 regulate the actual construction and placement of structures within the Floodplain Combining Zone. It would not be possible to determine compliance with most if not all of those standards until the building permit was applied for. Petitioners do not explain why the county was required to address compliance with LC 16.244 in the context of approval of a forest template dwelling, and we do not see that it was.

Petitioners' second assignment of error is denied.

THIRD ASSIGNMENT OF ERROR

Petitioners argue that the county misconstrued applicable law and made inadequate findings not supported by substantial evidence in the record in approving intervenor's request for a riparian setback modification.

The county's siting standards for dwellings and other structures in the F-2 zone provide:

> "Siting Standards for Dwellings, Structures and Other Uses. The following siting standards shall apply to all new dwellings, manufactured dwellings and structures, and other uses as specified above in LC 16.211(2)(h) and (j), and in LC 16.211(3) through (7) above. These standards are designed to make such uses compatible with forest operations and agriculture, to minimize wildfire hazards and risks and to conserve values found on forest lands. The standards in LC 16.211(8)(a) through (b) below shall be weighed together with the requirements in LC 16.211(8)(c) and (e) below to identify the building site.
>
> "(a) Setbacks. Residences, dwellings or manufactured dwellings and structures shall be sited as follows:
>
> "* * * * *
>
> "(iv) * * * the riparian setback area shall be the area between a line 100 feet above and parallel to the ordinary high water of a Class I stream designated for riparian vegetation protection in the Rural Comprehensive Plan. *No structure other than a fence shall be located closer than 100 feet from ordinary high water of a Class I stream designated for riparian vegetation protection by the Rural Comprehensive Plan.* A modification to the riparian setback standard for a structure may be allowed provided the requirements of LC 16.253(3) or LC 16.253(6), as applicable, are met[.]" LC 16.211(8) (emphasis added).

A. First Sub-Assignment of Error

Petitioners contend that identification of the riparian setback area is necessary in order to determine siting location of a dwelling pursuant to the above quoted siting standards. Identification of the riparian setback area, in turn, requires a determination of the "ordinary high water" line. LC 16.090 defines the "ordinary high water" line as follows:

> "Ordinary High Water. The high water level is defined as that high level of a river which is attained during mean annual flood. It does not include levels attained during exceptional or catastrophic floods. It is often identifiable by physical

> characteristics such as a clear natural line impressed on the bank, shelving, changes in character in the soil, destruction or absence of vegetation not adapted for life in saturated soils or the presence of flotsam and debris. In the absence of identifying physical characteristics, ordinary high water may be determined by Step Backwater analysis upon a two-year frequency flood as determined by the US Army Corps of Engineers."

County staff conducted a "riparian setback examination" to determine the location of the high water line. The planning director concluded that almost all of tax lot 200 falls within the riparian setback area established by LC 16.211(8)(a)(iv). Petition for Review 23 (citing Record 64). On February 9, 2005, the hearings officer conducted a site visit to determine whether the planning director's assessment of the high water line was accurate. Record 65. The hearing officer considered the factors in the definition of the ordinary high water line, reviewed the planning director's determination, and agreed with the planning director's determination of the location of that line.[14]

---

[14] The findings of the hearing officer provide:

> "The location of an ordinary high water line is not always a clear process and it certainly wasn't in regard to the subject property. The Planning Director's determination was based upon the location of a debris line located on the subject property's bank along Little Fall Creek. While the line was relatively distinct, logs located on other portions of the bank and at elevations higher than the debris line gave rise to reasonable speculation that the mean annual flood might be higher. Adding to this confusion was the low precipitation conditions of the last two years and the presence of dense blackberries that might obscure a higher debris line.
>
> "The debris line was the factor that most clearly defined the Planning Director's determination. In the area where it was apparent, there was evidence of vegetation alteration, textural changes in the soil and little evidence of patterns of loose debris above or below the line. It would seem that if the mean annual flood was higher, there would be more evidence of older debris and scour lines at higher elevations. Also, the location of large logs seem to argue as heavily for their being deposited through an exceptional flood event as through the occurrence of annual flooding.
>
> "In the final analysis, it is impossible to say conclusively that the debris line identified by the Planning Director demonstrates an ordinary high water line representative of Little Fall Creek. This is especially true based upon the lack of precise data regarding flooding of the creek over the past few years. It is possible to conclude, however, that the Planning Director has reasonably applied the descriptive factors of the Lane Code 16.090 definition of ordinary high water to the subject property. Based upon the site view and the arguments of the parties it is not possible to say that this determination is clearly wrong. Therefore, I must conclude that the Planning Director's determination of the ordinary high water line should prevail." Record 69-70.

Petitioners first argue that the record does not reflect that the line depicted on the map accurately reflects the observations that were made on the ground. Although the county does not directly address this issue, we do not see that the county's failure to identify specific elevations on the property that are then transferred to a map provides a basis for reversal or remand. The county's decision and its conclusions must be supported by substantial evidence in the record, and the inquiry here is whether the county's determination of the location of the ordinary high water level is supported by substantial evidence.

The applicant submitted a map indicating the location where he believed the ordinary high water mark to be. The planning staff, and then the hearings officer, conducted site visits to confirm that the applicant's map was accurate. We do not see that the county was required to provide elevations in order to confirm that the map accurately reflects on-the-ground observations. The accuracy of the map indicating the location of the ordinary high water mark was subsequently confirmed by staff and the hearings officer, and the map constitutes substantial evidence supporting the challenged decision.

Petitioners also point to the following findings, arguing that the county impermissibly shifted the burden of proof to petitioners:

> "It is possible to conclude, however, that the Planning Director has reasonably applied the descriptive factors of the Lane Code 16.090 definition of ordinary high water to the subject property. Based upon the site view and the arguments of the parties it is not possible to say that this determination is *clearly wrong*. Therefore, I must conclude that the Planning Director's determination of the ordinary high water line should prevail." Record 70 (emphasis added).

Petitioners are correct that the applicant bears the burden of proof throughout the local appeal process. *Strawn v. City of Albany*, 20 Or LUBA 344, 350 (1990); *see also* LC 14.200(2).[15]

---

[15] LC 14.200(2) provides:

> "Burden of Proof. The burden of proof in a hearing shall be as allocated by law. In general, the burden shall be upon the proponent of the application, except that for an appeal on the record, the burden of proof shall be upon the appellant."

However, we do not agree with petitioners that the county did, in fact, shift the burden of proof. While the applicant bears the burden of proof to demonstrate that the criteria are satisfied, in a local appeal, it is the local appellant's burden to demonstrate that the initial decision maker erred. *See* LC 14.515(3)(d).[16] We have explained this distribution of burdens as follows:

> "In a local appeal of the initial decision maker's decision, the applicant retains the burden of proof. Although local government procedural rules may impose certain obligations on appellants opposing an initial decision granting land use approval, the burden of proof imposed on the applicant under the above cited decisions remains with the applicant throughout the local proceedings. The opponents of the initial decision maker's decision also have a burden before the local appellate decision maker in the sense that the appellate decision maker may find the initial decision maker's decision to be well reasoned and supported by the evidentiary record. Unless the opponents of the initial decision are able to convince the appellate decision maker that the decision is erroneous in some way, the appellate decision maker may adopt that initial decision as its own. The processing of local appeals in this manner does not impermissibly shift the burden of proof assigned to applicants in land use proceedings in this state." *Coonse v. Crook County*, 22 Or LUBA 138, 142-43 (1991) (footnote omitted.)

While the language the hearings officer used casts some doubt on the standard that he employed, it does not indicate that he impermissibly shifted the burden of proof to petitioners. The

---

The appeal to the hearings officer in this case was *de novo*, not on the record. Record 253.

[16] LC 14.515(3)(d), for instance, requires a local appellant to specify one or more assignments of error, demonstrating how the initial decision maker erred:

> "(i) The Approval Authority exceeded his or her jurisdiction;
>
> "(ii) The Approval Authority failed to follow the procedure applicable to the matter;
>
> "(iii) The Approval Authority rendered a decision that is unconstitutional;
>
> "(iv) The Approval Authority misinterpreted the Lane Code or Manual, State Law (statutory or case law) or other applicable criteria; [or]
>
> "(v) The Approval Authority rendered a decision that violates a Statewide Planning Goal (until acknowledgment of the Lane County Comprehensive Plan, or any applicable portion thereof has been acknowledged to be in compliance with the Statewide Planning Goals by the Land Conservation and Development Commission);
>
> "* * * * *"

hearings officer's conclusion that the planning director's determination of the ordinary high water line was not "clearly wrong" was merely another way of stating that the local appellant had not demonstrated that the planning director erred in any of the ways listed in LC 14.515(3)(d) that would justify reversing or modifying his decision.

Petitioners' first sub-assignment of error to their third assignment of error is denied.

B. Second Sub-Assignment of Error

In this sub-assignment of error, petitioners argue that the county's findings that the proposal complies with LC 16.253(2) and (3) misconstrue applicable law, and that the findings are inadequate and unsupported by substantial evidence.[17] LC 16.253(2) establishes standards for

---

[17] LC 16.253(2) provides, in relevant part:

> "Removal of Vegetation Within the Riparian Setback Area. The following standards shall apply to the maintenance, removal, destruction and replacement of indigenous vegetation within the riparian setback area along Class I streams designated for riparian vegetation protection by the Rural Comprehensive Plan. * * *
>
> "(a) A minimum of seventy-five percent (75%) of the total area within the riparian setback area of any legal lot shall remain in an unaltered, indigenous state except as provided in LC 16.253(2)(b)(i) and LC 16.253(5)(b) below; and
>
> "(b) Removal of existing vegetation from within the riparian setback area of any legal lot shall not exceed the shoreline linear frontage and square footage limitations calculated as follows:
>
> "* * * * *
>
> "(iii) The maximum allowable removal for any legal lot having frontage 400 feet or greater in length along a Class I stream shall not exceed 100 linear feet along the shoreline of the Class I stream and an area not greater than 5,000 square feet within the riparian setback area of a Nonresource Zone, or 10,000 square feet within the riparian setback area of a Resource Zone. * * *."

LC 16.253(3) provides:

> "Modifications. A modification to the applicable riparian setback standard for a structure may be allowed provided the Oregon Department of Fish and Wildlife (hereafter ODF&W) is consulted by the Planning Director at least 10 working days prior to the initial permit decision and an application for a modification to the setback standard has been submitted pursuant to LC 14.050 and approved by the Planning Director pursuant to the requirements of LC 14.100 with findings of compliance addressing the following criteria:

removal of vegetation within the riparian setback area. Petitioners outline the requirements of LC 16.253(2) and (3) as follows:

> "LC 16.253(2)(a) requires, with certain exceptions, that a minimum of 75% of the total area within the riparian setback area of any legal lot remain in an unaltered, indigenous state, except as allowed under LC 16.253(2)(b), which establishes maximum allowable removal standards along shorelines and within the riparian setback zone depending on stream frontage. LC 16.253(3) allows for modification to the applicable riparian setback standard for a structure, subject to ODFW comment and compliance with the criteria of LC 16.253(3)[.]
>
> "* * * * *
>
> "Thus a structure can be sited within the riparian setback area if LC 16.253(2) standards are met and the riparian vegetation does not actually exist at the proposed building site, or if LC 16.253(2) standards are met and compliance would place an 'unduly restrictive burden' on the property owner. The county found that the standards of LC 16.253(2) were met, and that the proposal complied with LC 16.253(3)(a) and (c)." Petition for Review 27.

Petitioners' description of the code is not contested by the county, and we adopt it as an accurate summary of the code's requirements.

1. Ordinary High Water Determination

First, petitioners argue that the county's determination that the proposal complies with LC 16.253(2) and (3)(a) is inadequate because it relies upon the county's determination of the location of the ordinary high water level, which petitioners assert is inadequate. We have already concluded

---

> "(a) The location of a structure within the riparian setback area shall not result in the removal or the alteration of vegetation within the riparian setback area in excess of the standards of LC 16.253(2) above. For purposes of LC 16.253, altered means to eliminate, significantly reduce or interrupt the natural growth cycle of indigenous vegetation by removal or destruction of the vegetation caused by a person; and
>
> "(b) The riparian vegetation does not actually extend all the way into the riparian setback area to the location of the proposed structure. This determination shall include consideration of any evidence of riparian vegetation existing prior to any removal of indigenous vegetation before or during the application review period; or
>
> "(c) It can be demonstrated that an unduly restrictive burden would be placed on the property owner if the structure was not allowed to be located within the riparian setback area."

that the county's ordinary high water level determination was adequate. *See* discussion of first sub-assignment of error to petitioners' third assignment of error above. Accordingly, we will not address this sub-assignment of error further.

2. Secondary Fuel Break

Petitioners next argue that the county erred in failing to consider or require a secondary fuel break, pursuant to LC 16.211(8)(c). LC 16.211(8)(c) requires fuel breaks around new dwellings in the F-2 zone. It establishes a primary safety zone of 30 feet in all directions from the dwelling and a secondary fuel break extending 100 feet in all directions from the dwelling.[18]

Pursuant to LC 16.253(2)(a), a riparian setback modification may only be approved if 75% of the total area within the riparian setback area remains in an unaltered, indigenous state. *See* n 17. Stated another way, it requires that only 25% of the area within the riparian setback area may be disturbed. The county determined that the entire riparian setback area on the subject property covers 35,900 square feet. It concluded that the driveway, dwelling, on-site sanitary system and primary safety zone required per LC 16.211(8)(c) would require removal of vegetation covering

---

[18] LC 16.211(8)(c) provides, in pertinent part:

> "Fire Siting Standards. The following fire-siting standards or their equivalent shall apply to new residences, dwellings, manufactured dwellings or structures:
>
> "(i) Fuel-Free Breaks. The owners of dwellings, manufactured dwellings and structures shall maintain a primary safety zone surrounding all structures and clear and maintain a secondary fuel break on land surrounding the dwelling or manufactured dwelling that is owned or controlled by the owner in compliance with these requirements.
>
> "(aa) Primary Safety Zone. The primary safety zone is a fire break extending a minimum of 30 feet in all directions around dwellings, manufactured dwellings and structures. * * *
>
> "(bb) Secondary Fuel Break. The secondary fuel break is a fuel break extending a minimum of 100 feet in all directions around the primary safety zone. The goal of the secondary fuel break is to reduce fuels so that the overall intensity of any wildfire would be lessened and the likelihood of crown fires and crowning is reduced. Vegetation within the secondary fuel break shall be pruned and spaced so that fire will not spread between crowns of trees. Small trees and brush growing underneath larger trees shall be removed to prevent spread of fire up into the crowns of the larger trees. Dead fuels shall be removed."

only 8,800 square feet, just less than 25% of the total riparian setback area, and that LC 16.253(2)(a) is therefore satisfied.[19] In its determination of the area to be disturbed, the county did not consider the area required for a secondary fuel break because it concluded that a secondary fuel break is not required in the riparian setback area.

Petitioners argue that the county's conclusion that only 8,800 square feet will be disturbed is erroneous because the county failed to consider the area included in the secondary fuel break required by LC 16.211(8)(c).[20] They contend that nothing in the county's code supports the county's position that secondary fuel breaks are not required within the riparian setback area. They argue that if the required secondary fuel break is considered, as it must, then the proposal would

---

[19] The findings provide, in pertinent part:

> "The subject property is zoned Impacted Forest Land, a Resource Zone, and contains 35,900 square feet of riparian vegetation. The applicant's proposed dwelling is 28' x 40' and thus will displace 1,120 square feet. The primary safety zone required by Lane Code 16.211(8) is 30 feet in all directions around the dwelling. (No secondary fuel break is required within a riparian setback area.) This would require an area of 4,060 square feet to be removed for the dwelling and primary setback and 100 feet of linear shoreline. An additional 4,740 square feet of riparian vegetation is anticipated to be removed with the construction of a driveway, 360 square foot sand filter and drainfield. The total area of riparian setback vegetation to be removed, 8,800 square feet, is less than 25 percent of the total riparian setback area of the subject property.
>
> "The proposal is consistent with the requirement of Lane Code 16.253(2)(a), in that it retains 75+ percent of the total area within the riparian setback area to remain in an unaltered, indigenous state, consistent with Lane Code 16.253(2)(a) and because it results in less than 10,000 square feet of riparian area being removed, consistent with part of Lane Code 16.253(2)(b)(iii). However, the applicant's site plan shows that the length of the proposed dwelling (40 feet), the primary fuel break (60 feet total); and sand filter (10-15 feet?) would result in the removal of more than 100 linear feet of riparian setback area, inconsistent with a portion of Lane Code 16.253(2)(b)(iii). However, as a condition of approval, the sand filter and other components of the subsurface disposal system can be placed within the primary setback area thus bringing the proposal into conformance with Lane Code 16.253(3)(a)." Record 67.

[20] Petitioners also cite to OAR 660-006-0035(3), which requires secondary fuel breaks only on "land surrounding the dwelling that is owned or controlled by the owner[.]" Petitioners assert that the findings fail to identify a local code provision implementing that administrative rule and fail to explain how LC 16.253(2)(a) is complied with if the secondary fuel breaks are only required on land owned and controlled by the applicant. Petition for Review 30.

First, LC 16.211(8)(c)(i) parallels OAR 660-006-0035(3). ("The owners of dwellings * * * shall * * * maintain a secondary fuel break on land surrounding the dwelling * * * that is owned or controlled by the owner * * *."). More importantly, the county's findings did not address this issue because it concluded that secondary fuel breaks were not required in the riparian setback area.

require removal of significantly more vegetation than estimated by the county, and the 75% requirement would not be satisfied.

The county responds that the riparian regulations were adopted to comply, at least in part, with Statewide Planning Goal 4 (Forest Land), and that the Goal 4 findings adopted when the county adopted the riparian regulations acknowledge that "the streams and riparian vegetation provide a sufficient natural barrier against the spread of fire and preservation of the vegetation is consistent with the Goal 4 and related policies of the [Rural Comprehensive Plan.]" Response Brief 32.[21] It asserts that it was understood at that time that "the secondary fuel break required around dwellings would not include riparian setback areas so that riparian vegetation could be preserved." *Id*. at 33.

We acknowledge the apparent conflict between the policy of protecting riparian vegetation and the policy of requiring removal of vegetation in order to protect dwellings from possible fire hazards. The goal findings adopted during adoption of the riparian regulations would not, in themselves, suffice to support the county's conclusion that secondary fuel breaks are not required within the riparian setback area, if the code unequivocally requires secondary fuel breaks within a riparian setback area. However, the code does not unequivocally require secondary fuel breaks. The county cites to the introductory language of LC 16.211(8)(c), which provides that "the fire-siting standards *or their equivalent* shall apply to new residences * * *." The county argues that

---

[21] The findings that were adopted in support of the ordinance adopting the riparian vegetation setback regulations provide, in pertinent part:

> "In order to balance the need to comply with OAR 660-06-025(1)(b) and to provide adequate fire protection for dwellings located in or near riparian setback areas, standards for the removal of riparian vegetation have been established. Pursuant to OAR 660-06-035(3), only a minimal amount of riparian vegetation can be removed which would consist of a primary fuel break of 30 feet around the dwelling. (The amount of vegetation removal for the primary fuel break would be included in the amount of vegetation authorized for removal within the riparian setback area.)
>
> "An additional, secondary fuel break is required around the dwelling *except within the riparian setback area, which preserves the riparian vegetation consistent with OAR 660-06-025(1)(b)*. Lane County recognizes the Class I Stream as a secondary fuel break because such streams impede the spread of fire and provide a moister environment as a natural barrier against the spread of fire." Record 134 (emphasis added).

the use of the term "or their equivalent" supports its conclusion that secondary fuel breaks are not required in the riparian setback area.

We agree with the county that that language in LC 16.211(8)(c) provides an alternative to the secondary fuel break. As the goal findings adopted in support of the riparian setback regulations explain, the riparian setback area provides an equivalent means of protecting dwellings from fire hazards so that, in certain circumstances, the secondary fuel break provided for in LC 16.211(8)(c) is not required. *See* n 18. Accordingly, the county did not err in failing to require a secondary fuel break in this case and in failing to consider the vegetation that would have been disturbed as a result of that secondary fuel break for purposes of calculating the percentage of undisturbed vegetation. Consequently, the county did not err in concluding that LC 16.253(2)(a) was satisfied.

3. Unduly Restrictive Burden

Finally, petitioners argue that the county erred in determining that prohibiting the proposed dwelling from being sited within the riparian setback area places an unduly restrictive burden on the property owner pursuant to LC 16.253(3)(c). *See* n 17. They argue that the county failed to "offer any explanation of why the inability to site a dwelling on the subject property would constitute an 'unduly restrictive burden on the property owner.'" Petition for Review 31.

Petitioners' argument appears to be based entirely on their assertion that the subject property remains part of tax lot 203, which already contains a dwelling, and that intervenor is not entitled to site two dwellings on one legal lot in any event. According to petitioners, denial of a second template dwelling on one tract does not constitute an unduly restrictive burden. As we explained in our discussion of petitioners' first assignment of error, the subject property is a lawfully created "parcel," separate and distinct from tax lot 203. Accordingly, to the extent petitioners' argument relies on its contention that tax lots 200 and 203 are one parcel or tract, it fails.

The challenged findings conclude that the dimensions of the subject property preclude the siting of a dwelling that does not fall within the riparian setback area.[22] Although petitioners allege, in general, that those findings are inadequate and not supported by substantial evidence in the record, they offer no argument other than the one rejected above. Accordingly, petitioners' challenge to the county's conclusion that an unduly restrictive burden would be placed on the property owner if the structure was not allowed to be sited within the riparian setback area does not provide a basis for reversal or remand.

Petitioners' second sub-assignment of error to their third assignment of error is denied.

The county's decision is affirmed.

---

[22] The findings provide, in pertinent part:

> "Since this decision assumes that the subject property is a legal lot, the question remains whether the applicant would suffer an unduly restrictive burden if the proposed dwelling was not allowed to be located within the riparian setback area. An examination of the applicant's plot plan reveals that the subject property is wedge-shaped, being 130 feet wide at its eastern end and tapering to 45 to 35 feet in width at its western end. Applying a rough scale, it appears that the eastern portion of the subject property tapers to 100 feet in width, measuring between the right-of-way of Little Fall Creek Road to the bank of Little Fall Creek, about 90 feet from its eastern perimeter. Thus, there appears to be a small triangle of land, 90 feet long with a 30-foot wide base that represents the portion of the subject property that does not lie within the 100-foot riparian setback area. Assuming this figure is approximately a 'right triangle' its area would be somewhere around 1350 square feet. [footnote and reference to figure omitted] As seen above, the applicant's 'modest' house is 1,120 square feet in size without accounting for the subsurface disposal system, a driveway, or the primary fuel break. Locating a dwelling in this area would put the proposed structure within the County's right-of-way for Little Fall Creek, which extends 50 feet on either side of its centerline. This location would violate Lane Code 15.083 and Lane Code 16.211(8)(a)(v)(aa). Finally, if the dwelling was sited 30 feet from all other property lines consistent with Lane Code 16.211(8)(a(v)(bb) this situation would be further aggravated.
>
> "The dimensions of the subject property preclude any practicable way that the applicant could site a dwelling with a primary fuel break without severely encroaching on the 100-foot setback from Little Fall Creek. The plot plan appears to be a reasonable compromise given the slope constraints of the subject property, the required setbacks from Little Fall Creek Road, and the distance from the ordinary high water line of Little Fall Creek." Record 68-69.