

NATURE OF THE DECISION

Petitioners appeal a hearings officer’s decision denying an application for an Ownership of Record Dwelling.

FACTS

On February 13, 2006, petitioner Reed applied for an Ownership of Record Dwelling on land zoned Woodland Resource (W-R). In the section of the application entitled “Property Owner,” petitioner Adams is identified as the owner and petitioner Reed is identified as the “applicant.” The application also included a “Letter of Authorization” dated September 28, 2005, valid for one year from that date, signed by petitioner Adams and authorizing petitioner Reed to act as agent “to perform all acts for development on [the] property identified below.” Record 178.

The planning department approved the application with conditions. Certain parties appealed, asserting that petitioner Reed and not petitioner Adams was the present owner of the property and that the application failed to comply with Jackson County Land Development Ordinance (LDO) 4.3.6(D)(1).¹ A hearing was held before the hearings officer. Based on evidence in the record and testimony from the hearing, the hearings officer found that the applicant had failed to meet her burden of proving compliance with all of the applicable criteria, and denied the application. This appeal followed.

FIRST, SECOND, AND THIRD ASSIGNMENTS OF ERROR

Petitioners’ first, second, and third assignments of error generally challenge the hearings officer’s finding that the application does not comply with the provisions of LDO 4.3.6(D)(1).

¹ LDO 4.3.6(D)(1) is one of the Ownership of Record Dwelling approval criteria and requires that the current owner have owned the property continuously since prior to January 1, 1985.

1 **A. Introduction**

2 LDO 4.3.6(D) provides in relevant part:

3 “A dwelling may be approved if:

4 “1. The lot or parcel on which the dwelling will be sited was lawfully
5 created and was acquired and owned continuously by the present
6 owner as defined in subsection (2) below:

7 “(a) Since prior to January 1, 1985; or

8 “(b) By devise or by intestate succession from a person who
9 acquired and had owned continuously the lot or parcel since
10 prior to January 1, 1985; * * * [.]”

11 In reaching his decision, the hearings officer reviewed the evidence in the record regarding
12 LDO 4.3.6(D)(1). That evidence included deed records indicating that Keldon Adams
13 (presumably petitioner Adams’ husband) acquired the property in 1959, that the property was
14 conveyed to the Adams Joint Trust in 1995, and that petitioner Adams is trustee of the
15 Adams Trust. Record 159.² The hearings officer noted that the application states that
16 petitioner Adams is the owner of the property. The hearings officer also noted that the
17 evidence in the record included the signed “Letter of Authorization” discussed above and a
18 separate memorandum from petitioner Adams stating that she is the owner of the subject
19 property. The Adams memorandum was submitted after the appeal hearing but prior to the
20 close of the record. Record 86, 178. At the November 13, 2006 hearing, petitioner Reed
21 also testified that there is no document expressing an agreement by her to purchase the
22 property.

² Based on that evidence, the hearings officer found that petitioner Adams fell within the definition of “owner” as defined in LDO Section 4.3.6(D)(2), which provides:

“For purposes of this subsection, ‘owner’ includes the wife, husband, son, daughter, mother, father, brother, brother-in-law, sister, sister-in-law, son-in-law, daughter-in-law, mother-in-law, father-in-law, aunt, uncle, niece, nephew, stepparent, stepchild, grandparent or grandchild of the owner or a business entity owned by any one or combination of these family members[.]”

1 However, the hearings officer also reviewed other evidence in the record suggesting
2 that petitioner Reed is the owner of the property. That evidence included a letter dated
3 October 9, 2005, from petitioner Reed to an adjacent property owner stating “[w]e are the
4 Reeds * * *. We have recently purchased the 18 acre piece of property to the north of you
5 from Mrs. Adams* * *,” and other similar letters from petitioner Reed to adjacent property
6 owners offering to purchase an easement or “force an easement through legal means” for
7 access to the subject property. Record 117-120.

8 The record before the hearings officer also contained an access easement dated
9 February 6, 2006, granting an easement over adjacent property from the easement grantor to
10 “[the Reeds], agents for the following described real property * * * [legal description of the
11 subject property omitted.]” The easement states that the consideration received by the
12 grantor from petitioner Reed was \$10,000. The easement states that it is perpetual, and
13 contains language stating that it binds and benefits the parties’ successors “to include Judith
14 Adams owner of record tax lot 500.” Record 180-181.

15 Also included in the record before the hearings officer was a letter dated November 3,
16 2006 from petitioner Reed’s attorney to petitioner Reed. The letter discussed the validity of
17 the access easement with respect to the easement grantor’s title to his property. Record 127-
18 28. The letter indicates that the writer reviewed a copy of the easement and other documents
19 relevant to the easement grantor’s title. The opening sentence of the letter describes its
20 purpose as follows:

21 “You have asked that we provide an opinion with respect to whether you have
22 a valid easement * * * *in favor of your property* which is generally described
23 as * * *.” (Emphasis added.)

24 The letter concluded by stating:

25 “Given the above, it is our opinion that *your property is benefited by an*
26 *easement* that satisfies Condition 6 * * *[of the tentative staff decision on the
27 application].” (Emphasis added.)

28 In reaching a decision on the application, the hearings officer found:

1 “The Applicant, herself, submitted a recorded easement where it is indicated
2 she and Coy Reed paid \$10,000 to purchase an easement in their name as
3 ‘agents for the (subject) property.’ * * * The easement does not indicate for
4 whom the Reeds are serving as agents. The Applicant also supplied a legal
5 opinion from her attorney dated November 3, 2006, stating that she and Coy
6 Reed had a valid easement across the adjoining property providing access to
7 their property: ‘* * * in view of substantial consideration that was paid in the
8 amount of \$10,000, it appears that the easement in favor of your property is
9 valid and binding.’

10 “Because of conflicting statements by the Applicant regarding the status of
11 ownership and despite Adams’ statement that she has owned it since 1959, I
12 conclude that the Applicant has failed to carry the burden of proof as to the
13 necessary continuous ownership by Adams. This finding is based on the
14 written statement by the Applicant that she and her husband bought the
15 property in 2005, before the application was filed; the recorded easement
16 indicating they purchased an easement in their name for several thousand
17 dollars; and the opinion from their attorney that the easement provided access
18 to their property.” Record 4 (underlining in original).

19 **B. First, Second and Third Assignments of Error**

20 At the outset, we note that in general, to successfully overcome a denial of a permit
21 on evidentiary grounds, a petitioner must demonstrate that the burden of proof was met as a
22 matter of law. *Wal-Mart Stores, Inc. v. City of Hillsboro*, 46 Or LUBA 680, 699-700, *aff’d*,
23 194 Or App 211, 95 P3d 269 (2004). In their first assignment of error, petitioners allege that
24 the deeds in the record demonstrate as a matter of law that petitioner Adams, as Trustee of
25 the Adams Joint Trust, is the owner of the property.³ In their second assignment of error,
26 petitioners argue that the hearings officer’s decision is not supported by substantial evidence
27 in the record. In their third assignment of error, petitioners challenge the hearings officer’s
28 reliance on the easement’s language to conclude that petitioner Reed owns the property,
29 arguing that the easement in fact supports the contrary conclusion.

³ As noted above, the hearings officer found that petitioner Adams fell within the definition of “owner” set forth in LDO 4.3.6(D)(2). *See* n 2. The hearings officer also found that the definition of owner included the Adams Joint Trust and that the conveyance of the property to the trust did not interrupt the continuous ownership requirement of LDO Section 4.3.6(D)(1). Record 3. When we refer to petitioner Adams’ ownership of the property in this opinion, it is in her capacity as trustee of the Adams Joint Trust.

1 **1. First Assignment of Error**

2 In support of their assertion that the deeds in the record provide conclusive evidence
3 of Adams’ ownership as a matter of law, petitioners cite ORS 93.020. However, petitioners
4 do not explain what bearing that statute has on the question of ownership of property in the
5 present case. That statute addresses the general requirements for creation of an interest in
6 real property, and provides that interests in real property can be created only by operation of
7 law or by written instrument. The statute does not say that a recorded deed is conclusive
8 evidence of present ownership of the property described in the deed.

9 Although the existence of a recorded deed, and the absence of any other recorded
10 deed or other instruments conveying title to the same property, is evidence of ownership of
11 property, the existence of a recorded deed in the record does not conclusively confirm the
12 *present* ownership of property. A deed evidences that the grantee is the owner of the interest
13 conveyed in the deed, in the property described in the deed, on the date of the deed.
14 Recording a deed gives constructive notice of the grantee’s ownership interest to other
15 claimants of interests in the same property. *See* ORS 93.643. However, other parties could
16 be owners of, or claim an interest in, the same property under an unrecorded document, such
17 as an unrecorded deed or land sale contract. *But see, e.g.* ORS 93.635 and ORS 93.990(3)
18 (requiring recordation within 15 days after execution of all instruments contracting to convey
19 fee title at a time more than 12 months after the date the instrument is executed, and
20 providing that violation of ORS 93.635 is a class D violation).

21 The first assignment of error is denied.

22 **2. Third Assignment of Error**

23 Petitioners’ third assignment of error claims that the hearings officer erred in relying
24 on the easement because the only reasonable conclusion a person could reach after reviewing
25 the easement is that petitioner Reed is not the owner of the property. The easement is an
26 awkwardly worded revision of a Stevens Ness easement form. It grants an easement to the

1 Reeds, as “agents for * * * tax lot 500,” which is the subject property. The easement also
2 purports to benefit “successors in interest * * * to include Judith Adams owner of record tax
3 lot 500.” Whatever the legal effect of the easement form, we agree with petitioners that the
4 easement suggests that Judith Adams is at least the owner of record of the property and that
5 the Reeds are her “agent.” However, the letter from petitioner Reed’s attorney describing the
6 easement as benefiting “petitioner Reed’s property” could lead a reasonable person to read
7 the awkwardly worded easement in the way the hearings officer read it: as some evidence
8 that petitioner Reed owns the property.⁴ The hearings officer’s partial reliance on the
9 easement was not unreasonable, in light of the easement’s confusing language and other
10 evidence in the record regarding that language.

11 The third assignment of error is denied.

12 3. Second Assignment of Error

13 We review the hearings officer’s decision to determine whether the decision is
14 supported by substantial evidence in the whole record. ORS 197.835(9)(a)(C).⁵ Substantial
15 evidence is evidence a reasonable person would rely on in reaching a decision. *City of*
16 *Portland v. Bureau of Labor and Ind.*, 298 Or 104, 119, 690 P2d 475 (1984). A county
17 decision that the applicant in this matter failed to carry her burden of proof with regard to the
18 continuous ownership requirement is supported by substantial evidence unless the applicant
19 sustained her burden of proof as a matter of law. *Jurgenson v. County Court of Union*
20 *County*, 42 Or App 505, 510, 600 P2d 1244 (1979).

⁴ Although petitioner Adams may be the record owner of tax lot 500, that does not necessarily mean that the Reeds could not be the owners in fact of the property under a conveyance or contract that is not of record, a point which we discuss below.

⁵ Petitioners argue that the hearings officer’s decision is not reviewable under the “substantial evidence” standard because that standard only applies where an approval criterion is a question of fact, and the question of ownership is a question of law. We understand petitioners to argue that any evidentiary questions regarding ownership of the subject property must be resolved solely by referring to the official county record of deeds. We reject the argument.

1 In the present case, there are at least two factual circumstances that could support the
2 hearings officer’s decision regarding ownership. First, the Adams Trust could have deeded
3 the property to petitioner Reed through a deed that remains unrecorded, in which case legal
4 ownership is vested in petitioner Reed, notwithstanding that the deed is unrecorded. Second,
5 the Adams Trust and petitioner Reed could have entered into a land sale contract that
6 remains unrecorded, in which case equitable ownership has vested in petitioner Reed, again,
7 notwithstanding that the land sale contract or memorandum thereof has not been recorded. In
8 either case, petitioner Adams would not be the present owner of the property. The hearings
9 officer apparently did not believe petitioners’ testimony that the ownership of the property
10 had not been transferred.

11 We agree with petitioners that the deed records described above clearly would be
12 substantial evidence that petitioner Adams is the present owner of the subject property,
13 absent evidence to the contrary. However, other evidence in the record before the hearings
14 officer, much of it either created in the first instance by or introduced into the record by
15 petitioner Reed, created a question regarding the present ownership of the property.⁶ In
16 reaching his decision, the hearings officer particularly noted that petitioner Reed had paid
17 substantial consideration for the access easement prior to filing the application, and that
18 petitioner Reed’s attorney opined that the access easement benefited “petitioner Reed’s
19 property.” The hearings officer chose to rely on that evidence in order to find that the
20 applicant had not met the burden of proving compliance with LDO section 4.3.6(D)(1), and

⁶ At the November 13, 2006 appeal hearing, petitioner Reed presented evidence to rebut some of the evidence in the record that created a question regarding ownership. Petitioner Reed stated that the property is currently owned by petitioner Adams, and that she would like to purchase the property in the future, following approval of an ownership of record dwelling. In response to a question from the hearings officer regarding whether there was any document expressing an agreement to buy the property, petitioner Reed responded “No.” She also explained that her written statement to adjacent neighbors that she had purchased the property was part of a “strategy,” although she did not elaborate on that strategy. In response to a question from the hearings officer about purchasing an easement for \$10,000, she explained that she realized access was important for the approval, so she procured an easement, and that she is a “risk-taker.” Apparently that evidence did not persuade the hearings officer that one of the circumstances described above had not occurred.

1 petitioners failed to submit anything into the evidentiary record to explain why petitioner
2 Reed's attorney understood that petitioner Reed owned the property, notwithstanding the
3 language in the easement that can be read to suggest otherwise.

4 We recognize that petitioners face a particularly difficult burden in producing proof
5 that an unrecorded transfer of ownership from petitioner Adams to petitioner Reed that they
6 contend has not occurred, in fact has not occurred. But petitioners' failure to offer any
7 explanation for why petitioner Reed's attorney believed petitioner Reed owns the property
8 seems to be a particularly significant omission. Perhaps additional evidence that petitioner
9 Adams had taken actions consistent with her ownership of the property would have
10 convinced the hearings officer to overlook petitioner Reed's actions that suggest she owns
11 the property.⁷ But whatever difficulties of proof petitioners face, those difficulties are
12 largely a product of petitioner Reed's actions, and the hearings officer was not obligated to
13 ignore those actions. The hearings officer did not err in requiring that petitioners provide a
14 better explanation for why he should conclude that petitioner Adams owns the subject
15 property, notwithstanding the evidence to the contrary.

16 Where reasonable persons could reach contrary conclusions based on conflicting
17 evidence, either conclusion is supported by substantial evidence. *Douglas v. Multnomah*
18 *County*, 18 Or LUBA 607, 617 (1990); *Bradley v. Washington County*, 47 Or LUBA 11, 19
19 (2004). The hearings officer's conclusion that the applicant, petitioner Reed, failed to
20 establish that petitioner Adams is the present owner of the property was reasonable in light of
21 conflicting evidence in the record before him, and he did not err in denying the application
22 on that basis.

23 The second assignment of error is denied.

⁷ For example, if petitioner Adams had continued to pay property taxes on the subject property during 2006, following petitioner Reed's representations that she was the property owner, that evidence would contradict the suggestion that Adams had transferred ownership to petitioner Reed.

1 The county's decision is affirmed.