BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

PAUL GRIMSTAD,
*Petitioner,*

vs.

DESCHUTES COUNTY,
*Respondent,*

and

DAN MAHONEY,
*Intervenor-Respondent.*

LUBA No. 2016-035

FINAL OPINION
AND ORDER

Appeal from Deschutes County.

Paul Grimstad, Bend, filed the petition for review and argued on his own behalf.

No appearance by Deschutes County.

Garrett Chrostek, Bend, filed a response brief and argued on behalf of intervenor-respondent. With him on the brief was Bryant, Lovlien & Jarvis, P.C.

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

REMANDED 09/29/2016

You are entitled to judicial review of this Order. Judicial review is

governed by the provisions of ORS 197.850.

Opinion by Bassham.

## NATURE OF THE DECISION

Petitioner appeals a county decision concluding that a tract includes three legal "lots of record" as defined by county code.

## MOTION TO FILE REPLY BRIEF

Petitioner moves to file a reply brief to address issues raised in the response brief regarding jurisdiction. The reply brief is allowed.

## MOTION TO TAKE EVIDENCE

Intervenor-respondent (intervenor) moves to take evidence not in the record, in the form of intervenor's affidavit supporting allegations that relate to whether this appeal was timely filed.[1] As discussed below, the jurisdictional issue turns on when petitioner "knew or should have known" about the lot of record decision at issue in this appeal. Petitioner opposes the motion to take evidence, but we agree with intervenor that it is appropriate for LUBA to consider the affidavit, as well as the contrasting allegations and responses offered by petitioner, regarding when petitioner knew or should have known of

[1] OAR 661-010-0045(1) allows LUBA to consider evidence outside the record, such as the proffered affidavit, based on disputed factual allegations in the parties' briefs concerning, among other things, the standing of parties to appeal to LUBA. In addition, LUBA may consider evidence outside the record, even absent a motion under OAR 661-010-0045, for the limited purpose of resolving disputes regarding the Board's jurisdiction. *Yost v. Deschutes County*, 37 Or LUBA 653, 658 (2000). Note: all citations to the record in this appeal are to the replacement record, with one exception noted below in footnote 8.

the challenged decision. The motion to take evidence is granted, and we shall consider all relevant factual allegations offered by both parties in resolving jurisdictional issues.

**MOTION TO STRIKE**

Petitioner moves to strike an alleged cross-assignment of error in the response brief, and Appendices 6-7 and 8-9 attached to the response brief, which are copies of statutes and a superseded county subdivision/partition ordinance. Unlike petitioner, we perceive nothing in the response brief that purports to assign error to the challenged decision. The statutes and ordinance are subject to official notice. Oregon Evidence Code 202. The motion to strike is denied.

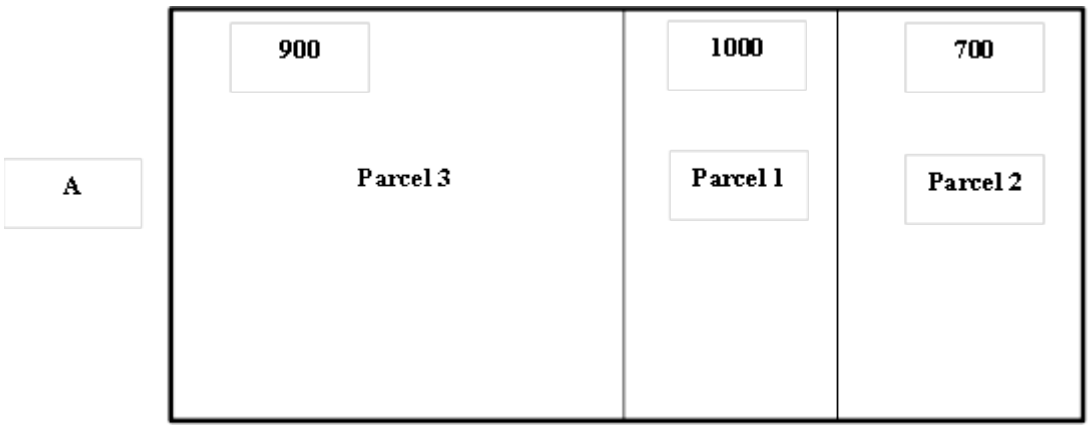
**FACTS**

**A. The Early Years**

In the beginning was a rectangular-shaped 20-acre parcel zoned Exclusive Farm Use (EFU). In 1973, the then-owner conveyed to the Schocks via warranty deed a five-acre parcel (Parcel 1) near the middle of the rectangular parent parcel.[2] On the same date, the owner and the Schocks

[2] The term "parcel" and related terms "lot" and "tract" have definitions in ORS chapters 92 and 215. In this opinion we will generally refer to the several putative units of land at issue in this appeal as "parcels." However, that reference is not intended to suggest that any units of land so referred to are "parcels" as defined at ORS 92.010 or ORS 215.010. For convenience, we will sometimes refer to units of land or tracts of land by the tax lot number assigned

entered into a land sale contract for the remaining two portions of the parent parcel, located on either side of the deeded five-acre parcel. The county assigned separate tax lot numbers to these three units of land. For clarity, we refer to the three parcels that were transferred or contracted to be transferred to the Schocks as Parcels 1, 2 and 3. Diagram A below illustrates the likely configuration of the parent parcel after 1973:




The western parcel (Parcel 3) was 10 acres in size and was designated tax lot 900. The middle, deeded five-acre parcel (Parcel 1) was designated tax lot 1000, and the eastern parcel (Parcel 2) was five acres in size and designated tax lot 700. At some point, the land sale contract was presumably paid off, and the Schocks acquired full title to all three parcels.

In 1977, the county adopted ordinances that required county approval to create lots and parcels in the EFU zone, via partition or subdivision. Record 8.

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by the county assessor; however, as all parties recognize, tax lot designations do not necessarily correspond to actual units of land.

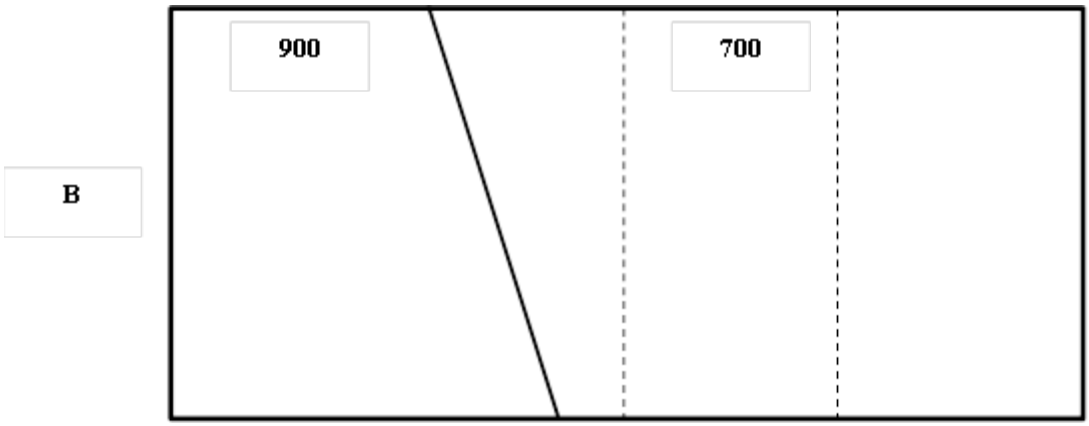
After 1977, recording a deed was no longer a lawful means of creating a unit of land on county EFU lands.

**B. The 1983 Property Line Adjustment**

In 1983, the Schocks applied to the county for a property line adjustment (1983 PLA) to adjust the boundary between Parcels 1 and 3. The apparent intent was to reduce Parcel 3 in size by about approximately 2.5 acres, leaving Parcel 3 with about 7.5 acres, and to increase Parcel 1 in size by about 2.5 acres, leaving Parcel 1 with about 7.5 acres.[3] As discussed below, whether the 2.5 acres of land that the Schocks wanted to transfer between Parcel 3 and Parcel 1 constitutes a legal "lot of record" as defined in county code is one of the issues in this appeal.

The county required the Schocks, as a condition of approval of the 1983 PLA, to consolidate Parcels 1 and 2 (tax lots 1000 and 700). Accordingly, a survey was prepared that showed Parcel 3 (tax lot 900) with approximately 7.5 acres, and Parcel 2 and the expanded Parcel 1 consolidated into a single parcel approximately 12.5 acres in size. Diagram B illustrates the approximate configuration shown on the survey:

[3] The record includes different figures for the exact amount of acreage proposed to be transferred from Parcel 3. For simplicity, we have rounded the number to 2.5 acres.




The county's application form for a PLA included the following pre-printed language:

> "NOTE: THE DEEDS SHALL BE IN THE SAME NAME FOR ALL PARCELS THAT ARE ADJUSTED OR CONSOLIDATED, AND ALL DELINQUENT TAXES FOR ALL PARCELS SHALL BE PAID IN FULL." Record 12.

On April 12, 1983, a county planner approved the PLA application by signing the application, with the addition of a handwritten requirement that "Tax lots 1000 and 700 [Parcels 1 and 2] shall be consolidated." *Id.* Subsequently, the county assessor changed the tax rolls to reflect that tax lot 1000, as adjusted, was combined with tax lot 700, and thereafter the 12.5-acre area of land shown on the 1983 PLA survey was designated tax lot 700.

On September 26, 1983, the Schocks applied for a building permit to construct a single family dwelling on Parcel 3 (tax lot 900). The county granted the building permit.

On January 18, 1984, the Schocks deeded to the Petersons the area currently encompassed by tax lot 700, totaling approximately 12.5 acres. The Petersons are the predecessors-in-interest to intervenor Dan Mahoney. The

January 18, 1984 deed did not separately describe any units of land within the area conveyed.

On June 26, 1987, the Schocks deeded Parcel 3 (tax lot 900) to the Pendergrasses. The deed excluded all land previously transferred to the Petersons in the 1984 deed.

**C. The June 9, 2015 Lot of Record Decision**

Fast forward to 2015. Intervenor, the current owner of the 12.5-acre tract shown on the tax rolls as tax lot 700, applied to the county for a "Lot of Record" verification to determine how many legal units of land exist in the tract he owns. In relevant part, Deschutes County Code (DCC) 18.04.030 defines "Lot of Record" to mean a lot or parcel that conformed to all zoning and subdivision or partition requirements, if any, in effect on the date the lot or parcel was created, and that was created in one of five ways.[4]

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[4] DCC 18.04.030 provides, in relevant part:

> "'Lot of Record' means:
>
> "A. A lot or parcel * * * which conformed to all zoning and subdivision or partition requirements, if any, in effect on the date the lot or parcel was created, and which was created by any of the following means:
>
> "1. By partitioning land as defined in ORS 92;
>
> "2. By a subdivision plat, as defined in ORS 92, filed with the Deschutes County Surveyor and recorded with the Deschutes County Clerk;

On June 9, 2015, a county planner issued the decision challenged in this appeal. The 2015 Lot of Record decision concluded that tax lot 700 includes three legal lots of record: Parcel 1, Parcel 2, and the 2.5-acre sliver of land that the Schocks attempted to transfer from Parcel 3 to consolidate with Parcels 1 and 2 in the 1983 PLA. For lack of better shorthand, in this opinion we will henceforth refer to this 2.5-acre sliver of land as "Parcel X." Diagram C

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"3. By deed or contract, dated and signed by the parties to the transaction, containing a separate legal description of the lot or parcel, and recorded in Deschutes County if recording of the instrument was required on the date of the conveyance. If such instrument contains more than one legal description, only one lot of record shall be recognized unless the legal descriptions describe lots subject to a recorded subdivision or town plat;

"4. By a town plat filed with the Deschutes County Clerk and recorded in the Deschutes County Record of Plats; or

"5. By the subdividing or partitioning of adjacent or surrounding land, leaving a remainder lot or parcel.

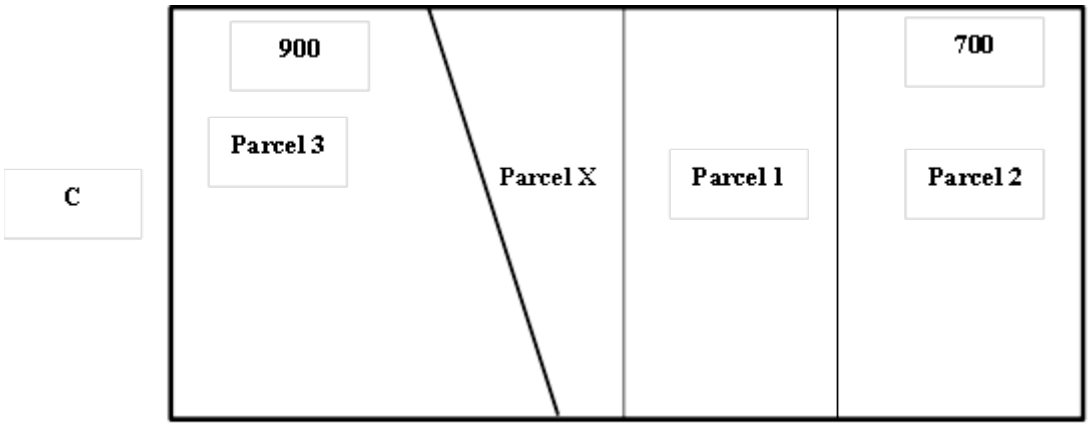
"B. The following shall not be deemed to be a lot of record:

"1. A lot or parcel created solely by a tax lot segregation because of an assessor's roll change or for the convenience of the assessor.

"2. A lot or parcel created by an intervening section or township line or right of way.

"* * * * *"

illustrates the property configuration verified in the June 9, 2015 Lot of Record decision:




The county planner first concluded that the 1983 PLA did not have the effect of consolidating Parcels 1 and 2, because the Schocks failed to record deeds "in the same name," as required by the pre-printed NOTE on the PLA application form. Instead, the planner noted, the Schocks recorded deeds to the Petersons and the Pendergrasses. Further, the planner noted that under the county's code at the time, the 1983 PLA approval expired within one year, or on April 12, 1984, and that by the time the 1987 deed was recorded, the 1983 PLA had expired. Accordingly, the planner gave no effect to the 1983 PLA.

With respect to Parcel 1, the middle parcel, the planner concluded that Parcel 1 was created in 1973 via warranty deed to the Schocks, at a time when a lot or parcel could lawfully be created by deed without county partitioning or subdivision approval, and is thus a "Lot of Record" under DCC 18.04.030(A)(3).

With respect to Parcel 2, the eastern-most parcel, the planner concluded that Parcel 2 had been created in 1973 via the land sale contract, at a time when a lot or parcel could be lawfully created by a land sale contract. We discuss this finding under the second and third assignments of error

Finally, with respect to Parcel X, the 2.5-acre sliver of land, the planner concluded that Parcel X is a "remainder lot," apparently created in September 1983, when the county approved the Schocks' building permit application for the single family dwelling on Parcel 3 (tax lot 900). We discuss this conclusion and quote the relevant findings under the fourth assignment of error, below. *See* n 9.

**D. The 2016 Property Line Adjustment**

Based on the 2015 Lot of Record decision, intervenor then applied to the county for a property line adjustment, which the county approved on February 24, 2016. Under the approved configuration, Parcel 1 became 5.9 acres in size, Parcel 2 became 3.72 acres in size, and Parcel X became 3.07 acres in size. Sometime in January 2016, intervenor had tax lot 700 surveyed, and the surveyor placed stakes and flags on the corners of the three parcels as they were proposed to be adjusted. Some of the stakes were located on the common property line with petitioner's property to the east, including one stake located adjacent to petitioner's driveway. The survey showed that a portion of the Grimstad driveway is in fact located on tax lot 700. On or about January 25, 2016, intervenor spoke with Lisa Grimstad, the co-owner of the Grimstad

property, and informed her that he was reconfiguring his property to allow him to build dwellings on Parcel 2 and Parcel X, as reconfigured. Intervenor offered to grant the Grimstads an easement for the driveway intrusion.

Petitioner Paul Grimstad claims that not until March 14, 2016, did he learn of the 2016 property line adjustment and intervenor's plans to construct dwellings on the reconfigured lots. Petitioner immediately inquired with the county, and discovered the June 9, 2015 Lot of Record decision that is the subject of this appeal. On April 2, 2016, petitioner filed with LUBA a notice of intent to appeal the June 9, 2015 Lot of Record decision.[5] With that introduction, we first turn to the jurisdictional challenges raised by intervenor.

**JURISDICTION**

Intervenor argues that the notice of intent to appeal was untimely filed, and therefore LUBA lacks jurisdiction over the appeal. Intervenor also argues that the subject appeal is moot based on petitioner's failure to appeal the February 24, 2016 property line adjustment. We address each argument in turn.

[5] Petitioner's notice of intent to appeal appeared to challenge both the June 9, 2015 Lot of Record decision and the February 24, 2016 property line adjustment. However, petitioner later filed an amended notice of intent to appeal clarifying that he challenges only the June 9, 2015 Lot of Record decision.

**A. Untimely Filed**

The deadline for appealing to LUBA is generally 21 days from the date the decision becomes final. ORS 197.830(9). However, ORS 197.830(3) provides an extended appeal period in circumstances, like the present one, where the local government does not conduct a hearing on the decision.[6] The parties agree that petitioner's deadline to appeal the June 9, 2015 Lot of Record decision to LUBA is provided by ORS 197.830(3)(b), which allows appeal to LUBA "[w]ithin 21 days of the date a person knew or should have known of the decision * * *."

Petitioner states that he is divorced from his wife, and did not learn of her conversation with intervenor until March 14, 2016. Petitioner also asserts that he lives and works in Portland, rarely uses the dwelling he co-owns with Lisa Grimstad in Deschutes County, and did not notice the surveyor's stakes on the adjoining property on the rare occasions when he traveled to stay at the Deschutes County dwelling. Intervenor argues that the knowledge of petitioner's former wife, as a co-owner of the property, should be imputed to

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[6] ORS 197.830(3) provides, in relevant part:

> "If a local government makes a land use decision without providing a hearing * * * a person adversely affected by the decision may appeal the decision to the board under this section:
>
> "(a) Within 21 days of actual notice where notice is required; or
>
> "(b) Within 21 days of the date a person knew or should have known of the decision where no notice is required."

petitioner. Even if Lisa Grimstad's knowledge is not imputed to petitioner as a matter of law, intervenor argues that a reasonable person would have noticed the surveyor's stakes that were present in January 2016, and would have known or should have known that the stakes had something to do with a development approval, and made timely inquiries with the county to discover the June 9, 2015 Lot of Record decision. *See Rogers v. City of Eagle Point*, 42 Or LUBA 607, 616 (2002) (under ORS 197.830(3)(b), where a petitioner observes activity or otherwise obtains information reasonably suggesting that a local government has rendered a land use decision, the petitioner is placed on inquiry notice of the decision, and after making timely inquiries must appeal the decision to LUBA within 21 days of the date the decision is discovered. If the petitioner fails to make timely inquiries, the 21 day appeal period begins to run on the date the petitioner was placed on inquiry notice).

However, intervenor cites no authority to impute the knowledge of one co-owner of property to another co-owner for purposes of ORS 197.830(3)(b), and we are aware of none. Unless one co-owner is in some way acting as an agent for another co-owner who is the petitioner before LUBA, we disagree that the knowledge of one co-owner is imputed to another co-owner as a matter of law, for purposes of ORS 197.830(3)(b).

We also disagree with intervenor that, assuming petitioner saw or should have seen the surveyor stakes present on tax lot 700 in January 2016 on his visits, the sight of surveyor stakes on an adjoining property is sufficient in itself

to trigger the obligation to inquire into whether the county has issued development approvals or other land use decisions respecting the property. A landowner may hire a surveyor for reasons having nothing to do with development or a land use approval, for example, in preparation for building a boundary fence or installing boundary landscaping. Further, the surveyor stakes were placed as part of intervenor's application for a lot line adjustment, which is not the decision challenged in this appeal. Even if petitioner knew or should have known that his neighbor was seeking one type of land use approval, a lot line adjustment, that does not mean that the petitioner knew or should have known of a different land use decision regarding the legal lot of record status of his neighbor's property.

In short, intervenor has not established that petitioner knew or should have known of the June 9, 2015 Lot of Record decision, or that prior to March 14, 2016, petitioner gained information sufficient to put petitioner on inquiry notice of that decision, for purposes of ORS 197.830(3)(b), more than 21 days prior to the date petitioner filed this appeal. Petitioner 's notice of intent to appeal was filed within 21 days of the date that petitioner made inquiries with the county, and discovered the June 9, 2015 Lot of Record decision. The appeal was timely filed under ORS 197.830(3)(b).

**B. Mootness**

Intervenor also argues that LUBA's resolution of the present appeal would have no practical effect on the parties, because even if the June 9, 2015

Lot of Record decision were reversed or remanded, the February 24, 2016 property line adjustment is an independent and unchallenged basis for establishing that Parcels 1, 2 and X are legal lots of record. Accordingly, intervenor argues that this appeal should be dismissed as moot. *See Heiller v. Josephine County*, 25 Or LUBA 555, 556 (1993) (LUBA will dismiss an appeal as moot, where the local government issued a subsequent decision rescinding the decision on appeal, and thus LUBA's review of the decision on appeal would have no practical effect on the parties). Relatedly, intervenor argues that petitioner's appeal is an impermissible collateral attack on the unchallenged February 24, 2016 property line adjustment.

We disagree with intervenor on both points. The February 24, 2016 property line adjustment relied upon the June 9, 2015 Lot of Record decision to establish that there are three legal lots of record within tax lot 700, and did not purport to independently establish the legal status of the three units of land.[7] All the property line adjustment decision itself accomplished was to approve adjustments to the property lines of the three units of land that the June 9, 2015 Lot of Record decision had determined to be legal lots of record. If petitioner

[7] The February 24, 2016 property line adjustment decision was included in the original record, when it was not clear which decision petitioner intended to appeal. But the February 24, 2016 decision was omitted from the replacement record that the county later transmitted to LUBA, and which is the record settled on appeal. Nonetheless, no party objects to our consideration of the February 24, 2016 decision for purposes of determining whether the present appeal is moot.

prevails in the present appeal, one potential outcome is that we or the county may ultimately conclude that there are fewer than three units of land within tax lot 700, or that not all of the units of land that exist within tax lot 700 are legal Lots of Record as defined at DCC 18.04.030. Intervenor has not explained how such a conclusion would "collaterally attack" the unchallenged property line adjustment, which simply reconfigures the internal property lines for the units of land within lot 700 that were identified in the June 9, 2015 Lot of Record decision. In addition, our review may well impact whether intervenor is entitled to seek additional dwellings on Parcel 2 and Parcel X. For the foregoing reasons, the present appeal is neither a collateral attack on the property line adjustment decision, nor moot as having no potential for practical effect on the parties.

**FIRST ASSIGNMENT OF ERROR**

Petitioner first challenges the planning staff's conclusion that the 1983 PLA expired without taking effect. Petitioner notes that as defined at ORS 92.010(12), a property line adjustment cannot create an additional lot or parcel, and the 1983 PLA was not intended to create any new lots or parcels. Instead, petitioner argues, the 1983 PLA was intended to reduce the number of parcels by requiring the consolidation of Parcel 1 and Parcel 2. According to petitioner, the 1983 PLA became final and effective, notwithstanding that the Schocks failed to record conforming deeds for all parcels in the same name within one year of the decision. We understand petitioner to argue that if the 1983 PLA is

given effect, the property that intervenor now owns was consolidated into a single parcel, pursuant to the condition imposed in that decision.

However, the 1983 PLA approval by itself did not have the effect of moving any property boundaries or consolidating any units of land. Both acts are accomplished only by the recording of deeds that reflect the adjusted or vacated boundaries. As noted, two deeds were recorded following the 1983 PLA. We discuss those two deeds further below. However, for present purposes, we reject petitioner's argument that the 1983 PLA decision, in itself and without more, achieved a reconfiguration of intervenor's property.

The first assignment of error is denied.

**SECOND AND THIRD ASSIGNMENTS OF ERROR**

Petitioner next challenges the county's conclusion that Parcel 2, the easternmost five-acre parcel in tax lot 700, is a Lot of Record. As noted, the planner concluded that the 1973 land sale contract created Parcel 2. DCC 18.04.030 defines "Lot of Record" in relevant part to include a unit of land created:

> "By deed or contract, *dated and signed by the parties to the transaction,* containing a separate legal description of the lot or parcel, and recorded in Deschutes County if recording of the instrument was required on the date of the conveyance. If such instrument contains more than one legal description, only one lot of record shall be recognized unless the legal descriptions describe lots subject to a recorded subdivision or town plat[.]" (Emphasis added.)

The record before the county included only page 1 of the 1973 land sale contract. Record 21. Apparently, the other page(s) have been lost or are no longer available. Page 1 does not include either the date or the signatures of the parties. Under the second assignment of error, petitioner argues that because the document at Record 21 lacks signatures and a date, it is not sufficient to establish that Parcel 2 is a lot of record as defined at DCC 18.04.030. Under the third assignment of error, petitioner argues that the document at Record 21 also does not contain "a separate legal description" of Parcel 2, and to the extent it can be construed to contain any legal description, it appears to describe more than one unit of land. If so, petitioner argues that under DCC 18.04.030 "only one lot of record shall be recognized[.]"

Intervenor responds that while the document at Record 21 may not meet the "technical requirements" of DCC 18.04.030 because it lacks evidence of a signature or date, it is nonetheless substantial evidence that the county could rely upon to conclude that Parcel 2 is a legal Lot of Record as defined at DCC 18.04.030. Intervenor argues that there is no reason to suppose that the 1973 land sale contract was not signed and dated.

In the alternative, intervenor argues, even if the record is insufficient to establish that the land sale contract was not the instrument that created Parcel 2, LUBA may nevertheless affirm the county's on this point under ORS 197.835(11)(b), because the record "clearly supports" the county's conclusion that Parcel 2 is a lot of record as defined at DCC 18.04.030, based on the 1973

warranty deed that created the five-acre parcel in the middle of the 20-acre parent parcel.[8] According to intervenor, the transfer of Parcel 1 in the middle of the 20-acre parent parcel had the legal effect of creating two remainder parcels on either side of that parcel: the five acre Parcel 2 to the east, and the ten-acre Parcel 3 to the west.

The findings addressing Parcel 2 do not address the requirement for signatures and a date, or whether the instrument contains "a separate legal description" of Parcel 2, or whether the instrument contains more than one legal description. The requirement for a signed and dated instrument may be technical in nature, but it is one of the definitional requirements for a Lot of Record. The findings do not even address that requirement, much less explain how the county can conclude, in their absence, that Parcel 2 is a Lot of Record based on the 1973 land sale contract.

Similarly, we agree with petitioner that if the county relies on the 1973 land sale contract as the instrument that created Parcel 2 as a Lot of Record, it

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[8] ORS 197.835(11)(b) provides:

> "Whenever the findings are defective because of failure to recite adequate facts or legal conclusions or failure to adequately identify the standards or their relation to the facts, but the parties identify relevant evidence in the record which clearly supports the decision or a part of the decision, the board shall affirm the decision or the part of the decision supported by the record and remand the remainder to the local government, with direction indicating appropriate remedial action."

must address the definitional requirements for "separate legal description," and must further consider whether the land sale contract includes a legal description and, if so, more than one legal description.

We disagree with intervenor's alternative argument that LUBA can rely on ORS 197.835(11)(b) to affirm the county's conclusion that Parcel 2 is a Lot of Record, despite inadequate findings. ORS 197.835(11)(b) operates to allow LUBA to overlook inadequate findings only when the evidentiary record "clearly supports" the decision. Intervenor does not cite any evidence in the record that clearly supports the county's conclusion that the 1973 land sale contract is the instrument that renders Parcel 2 a Lot of Record. Instead, intervenor advances an alternative legal theory, which the county did not consider, that Parcel 2 was indirectly created by an entirely different instrument, the 1973 warranty deed. Intervenor might be correct that in 1973 the legal effect of creating Parcel 1 as a five-acre parcel in the middle of a 20-acre parcel was to create remainder five and 10-acre parcels on either side of Parcel 1. However, even if so, the relevant question is whether Parcel 2, one of those remainder parcels, meets the requirements of a Lot of Record as defined at DCC 18.04.030. Parcel 2 may well have been created in 1973 by either the warranty deed or the land sale contract, but even if we assume that to be the case, Parcel 2 is a Lot of Record only if it meets all definitional requirements.

ORS 197.835(11)(b) is a limited vehicle, and does not allow LUBA to affirm a decision based on an alternative legal theory not considered below,

which in turn requires significant and discretionary legal and evidentiary determinations. We conclude that remand is necessary for the county to adopt more adequate findings, supported by substantial evidence, regarding whether Parcel 2 qualifies as a Lot of Record as defined at DCC 18.04.030.

The second and third assignments of error are sustained.

**FOURTH ASSIGNMENT OF ERROR**

With respect to Parcel X, the 2.5-acre sliver of land, the county found that Parcel X was created in 1983 when the county granted building permits for a dwelling on tax 900.[9] The rationale for that finding is difficult to follow, but

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[9] The county's findings state:

> "Lot Creation: [Parcel X] is a remainder lot. The parent parcel of [Parcel X] is the 10-acre lot created by the Exhibit I land sale contract on April 25, 1973. The approximate location of that lot is shown on Exhibit L. In 1983, building permits were issued to allow the construction of a home and greenhouse on Tax Lot 900 as it is currently configured and shown on Exhibit A without including [Parcel X] which was made part of Tax Lot 700 by this time. This fact is shown by the Exhibits M and N building permits, which were issued after a roll change was approved that changed the size and shape of Tax Lot 900 by excluding [Parcel X]. See, Exhibit E (roll change 4-20-83 removed 2.17 acres which became 'part of TL 700').
>
> "Applicable Law: Deschutes County treats the approval of a building permit as a determination that a lot is a legal lot of record at the time the permit is issued. In this case, both permits were approved by the Planning Department. The Board of Commissioners also grants lot of record status to remainder lots created by actions that are recognized as lawful means of creating legal lots of record." Record 9 (boldface omitted).

we understand it to hinge on the perception that the building permit application to site a dwelling on Parcel 3 assumed that Parcel 3 had already been reduced in size, pursuant to the 1983 PLA. Record 27. The county reasoned that the building permit approval had the effect of granting legal lot of record status to Parcel 3, in its reduced size configuration. The county then cited a county practice of recognizing as legal lots of record remainder lots created by lawful means of creating legal lots of record. Based on those premises, the county concluded that Parcel X is a legal lot of record, because it is a "remainder" lot, apparently created in September 1983 when the county approved the building permit application for a dwelling on Parcel 3.

Petitioner argues, and we agree, that that conclusion is deeply flawed. Neither the decision nor intervenor explains how a building permit approval can create a unit of land, much less a unit of land that is also a Lot of Record as defined at DCC 18.04.030. The decision cites two informal processes: (1) a county practice to recognize lots on which a building permit has been issued as being a Lot of Record, and (2) the board of commissioners' practice to accord Lot of Record status to remainder lots created by actions that are recognized as lawful means of creating legal lots of record. However, neither informal practice has any counterpart or support in DCC 18.04.030. Further, even if the building permit approval is a valid basis for recognizing Parcel 3 as a legal lot of record, that building permit approval did not *create* Parcel 3, and therefore

could not possibly have *created* Parcel X as a remainder lot or any other separate unit of land.

On appeal, intervenor argues that the findings regarding Parcel X merely rely on the 1983 building permit to recognize the legal Lot of Record status of Parcel 3, not for Parcel X. However, the lot of record status for Parcel 3 was not an issue before the county planner, and is not an issue on appeal to LUBA. Intervenor offers no theory that we can understand, even an alternative one, for how Parcel X can be viewed as a Lot of Record as defined at DCC 18.04.030.

The fourth assignment of error is sustained.

**FIFTH ASSIGNMENT OF ERROR**

As petitioner notes, DCC 18.04.030 recognizes as a Lot of Record a unit of land created by "the subdividing or partitioning of adjacent or surrounding land, leaving a remainder lot or parcel." *See* n 4. To the extent the county relies on the foregoing language to conclude that Parcel X is a "remainder lot or parcel," petitioner argues that the county erred, because that language applies only to remainder lots or parcels created as part of the subdividing or partitioning of land, and at no point was Parcel X involved in any subdivision or partition.

The county's decision did not rely on the above-quoted language from DCC 18.04.030 to conclude that Parcel X is a Lot of Record, and intervenor does not argue that that language could apply in the present case. Accordingly,

petitioner's arguments under this assignment of error provide no additional basis for reversal or remand. The fifth assignment of error is denied.

**SIXTH ASSIGNMENT OF ERROR**

In the "Background" section of the challenged decision the county refers several times to the fact that the tax rolls currently reflect the inclusion of the area encompassed by Parcel X within tax lot 700, a tax roll change that occurred after the 1983 PLA. Petitioner argues that to the extent the county relied upon tax lot information to conclude that Parcel X is a legal Lot of Record, the city erred.

We generally agree with petitioner that tax lot information has no particular bearing on whether a unit of land is a Lot of Record as defined at DCC 18.04.030. Subsection B of DCC 18.04.030 lists four circumstances where the unit of land is *not* deemed to be a Lot of Record, including those where the unit of land is "created solely by a tax lot segregation because of an assessor's roll change[.]" *See* n 4. However, as far as we can tell, the county's decision did not rely upon tax lot information to conclude that Parcel X is a Lot of Record. The references to tax lot information in the Background section of the decision are simply that, background information. Accordingly, petitioner's arguments under the sixth assignment of error do not provide an additional basis for reversal or remand.

The sixth assignment of error is denied.

**CONCLUSION**

As noted, on January 18, 1984, the Schocks deeded to the Petersons a 12.5-acre tract of land, designated tax lot 700, in a warranty deed that was recorded on January 19, 1984. Record 15-17. In 1987, the Schocks deeded to the Pendergrasses a 7.5-acre parcel, designated tax lot 900. Both deeds appear to include metes and bounds legal descriptions consistent with the survey prepared for the 1983 PLA approval, *i.e.*, the Peterson deed appears to convey consolidated Parcels 1 and 2, along with the 2.5-acre sliver of land we refer to here as Parcel X. And the Pendergrass deed appears to convey Parcel 3 less the 2.5 acre sliver of land that was conveyed to the Petersons in 1984. As we explained under the first assignment of error, the 1983 PLA decision itself, without more, is incapable of achieving any reconfiguration of the subject parcels. We observe that if any instrument created the current configuration of what is now designated as tax lot 700, it would seem to be the 1984 deed to the Petersons. However, the 1984 deed almost certainly could not have *lawfully* created any new units of land, because by 1984 state law and the county's code required a subdivision or partition approval in order to create an additional lot or parcel. Record 8.

Remand is necessary for the county to reconsider, in light of the foregoing, whether Parcel 2 and Parcel X exist as separate units of land and, if so, whether they qualify as Lots of Record as defined by DCC 18.04.030.

The county's decision is remanded.