1 BEFORE THE LAND USE BOARD OF APPEALS
2
3 OF THE STATE OF OREGON
4
5 LANDWATCH LANE COUNTY,
6 *Petitioner*,
7
8 vs.
9
01/18/19 PM12:49 LUBA
10 LANE COUNTY,
11 *Respondent*.
12
13 LUBA No. 2018-078
14
15 FINAL OPINION
16 AND ORDER
17
18 Appeal from Lane County.
19
20 Andrew Mulkey, Eugene, filed the petition for review and argued on behalf
21 of petitioner.
22
23 No appearance by Lane County.
24
25 ZAMUDIO, Board Member; RYAN, Board Chair; BASSHAM, Board
26 Member, participated in the decision.
27
28 AFFIRMED 01/18/2019
29
30 You are entitled to judicial review of this Order. Judicial review is
31 governed by the provisions of ORS 197.850.

1 Opinion by Zamudio.

2 **NATURE OF THE DECISION**

3 Petitioner appeals a county decision approving a forest template dwelling
4 on land zoned impacted forest lands.

5 **FACTS**

6 The subject property is comprised of vacant land that is zoned impacted
7 forest lands (F-2). The county approved establishment of a dwelling authorized
8 pursuant to ORS 215.750(1). Such dwellings are often referred to in planning
9 parlance as a "forest template dwelling" or "template dwelling." The governing
10 body of a county may approve the construction of a single-family dwelling "on a
11 lot or parcel located within a forest zone" with soil capable of defined levels of
12 timber production if, among other things, a certain number of "other lots or
13 parcels that existed on January 1, 1993, are within a 160–acre square centered on
14 the center of the subject tract." ORS 215.750(1)(a)(A). The 160–acre square is
15 referred to as the "template."

16 ORS 215.750 does not define the term "parcel." However, ORS
17 215.010(1)(a) provides that, for the purposes of ORS chapter 215, "parcel"
18 includes a unit of land created:

19 "(A) By partitioning land as defined in ORS 92.010;[1]

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[1] ORS 92.010(3)(a) provides:

"'Lawfully established unit of land' means:

1 "(B) In compliance with all applicable planning, zoning and
2 partitioning ordinances and regulations; or

3 "(C) By deed or land sales contract, if there were no applicable
4 planning, zoning or partitioning ordinances or regulations."

5 Thus, a "lot or parcel" as used in ORS 215.750 means a unit of land created
6 in one of the ways specified in ORS 215.010(1)(a) or ORS 92.010. In other
7 words, a "lot or parcel" as used in ORS 215.750 must be a "lawfully created" unit
8 of land. A template dwelling may not be established on an unlawfully created
9 unit of land and an applicant cannot rely on lots or parcels that are not "lawfully
10 created" to satisfy the requirements of the forest template dwelling statute.
11 *Friends of Yamhill County v. Yamhill County*, 58 Or LUBA 315, *aff'd*, 229 Or
12 App 188, 198, 211 P3d 297 (2009) (only parcels lawfully created may be counted
13 in determining whether the requirements of the forest template dwelling statute
14 have been met).

"(A) A lot or parcel created pursuant to ORS 92.010 to 92.192; or

"(B) Another unit of land created:

"(i) In compliance with all applicable planning, zoning and subdivision or partition ordinances and regulations; or

"(ii) By deed or land sales contract, if there were no applicable planning, zoning or subdivision or partition ordinances or regulations."

1 The applicant applied to the county for approval to establish a forest
2 template dwelling under Lane Code (LC) 16.211(5), which implements state law
3 and governs the establishment of template dwellings in the impacted forest lands
4 zone. The applicant was required to establish that the subject property was
5 lawfully created and, based on the productivity of the soils of the subject
6 property, that "[a]ll or part of at least eleven other lots or parcels that existed on
7 January 1, 1993" fall within the template. LC 16.211(5)(c)(iii)(aa); LC
8 16.211(5)(b) (a forest template dwelling may only be established if "[t]he lot or
9 parcel upon which the dwelling will be located was lawfully created"); *see also*
10 ORS 215.750(1)(c).[2]

11 The planning director approved the application with conditions, and
12 petitioner appealed to the hearings official, who issued a written decision
13 approving the proposed dwelling with conditions. Petitioner appealed the
14 hearings official's decision to the board of commissioners, which elected not to
15 hear the appeal and adopted the hearings official's decision as the county's final
16 decision. This appeal followed.

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[2] LC 16.211(5)(c)(iii)(aa) requires at least eleven other parcels within the template if the lot or parcel on which the dwelling will be established is predominately composed of soils capable of producing 85 cubic feet per acre per year of wood fiber, which is slightly stricter than ORS 215.750(1)(c), which requires eleven other parcels for soils capable of producing *more than* 85 cubic feet per acre per year of wood fiber. State limits on forest template dwellings can be supplemented by more restrictive local legislation. *Miller v. Multnomah County*, 153 Or App 30, 956 P2d 209 (1998).

1 **FIRST ASSIGNMENT OF ERROR**

2 The hearings official determined that the subject property and 12 other
3 units of land within the template area are "parcels" for purposes of the template
4 dwelling approval. In the first assignment of error, petitioner argues that the
5 subject property, Tax Lot 605, and four other units of land that the applicant and
6 hearings official relied upon for the template dwelling approval are not lawfully
7 created units of land, and thus, as a matter of law, the subject property is ineligible
8 for a forest template dwelling.[3] ORS 215.750(1)(c); LC 16.211(5)(c)(iii)(aa).

9 **A. Subject Property (Tax Lot 605)**

10 We begin with the subject property. At all relevant times, the underlying
11 tract of land was owned by the same owner, Trout. *See* ORS 215.010(2) ("'Tract'
12 means one or more contiguous lots or parcels under the same ownership."). The
13 subject property was created in 1980 as Parcel 2 of the third partition in a series
14 of three partitions of the same tract (M759-77, M319-78, M167-79), as depicted

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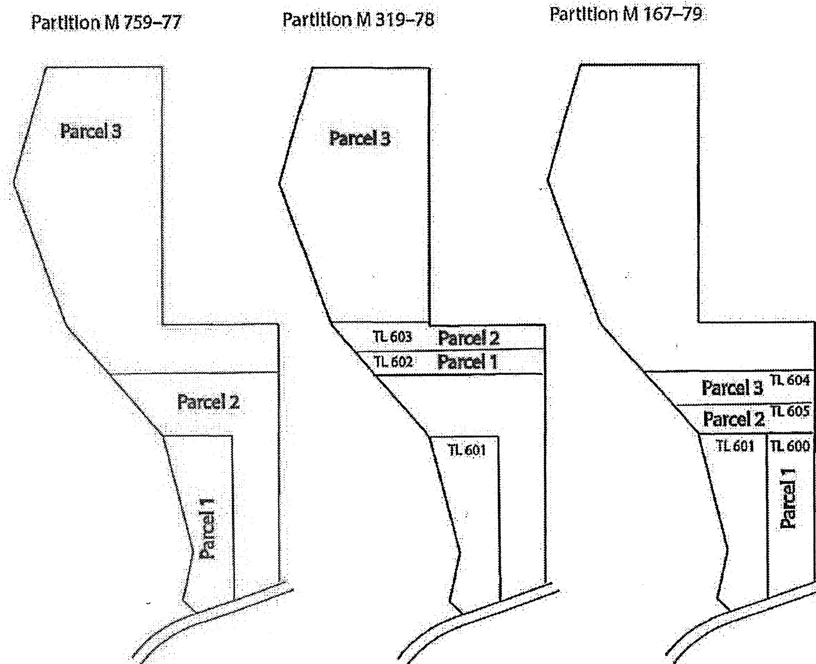
[3] For convenience, we refer to the disputed units of land, as the hearings official did, by tax lot number, while observing that "tax lot" is not synonymous with "parcel" or "lot" for purposes of the forest template dwelling test and tax lot designation does not necessarily describe a lawfully established unit of land. *See* ORS 92.010(3)(b) ("'Lawfully established unit of land' does not mean a unit of land created solely to establish a separate tax account.").

in Figure 1, below. *See* Record 20.[4] We refer to the entire tract of land subject to those partitions as the parent parcel.

FIGURE 1
(PA 17-05773)



The hearings official explained that a partition plan is subject to preliminary approval, is sometimes recorded (though recordation was not required by the county code at the time), and the county issues a final approval

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[4] Figure 1 illustrates the approximate effect of the three land divisions. Petitioner notes that Figure 1, taken from the hearings official's decision, does not accurately depict Parcel 2 of the M319-78 partition because, as recorded, Parcel 2 extended north and was later divided into two tax lots, as discussed further later in this opinion. Petitioner for Review 3, n 1. Record 422. The inaccuracy in the hearings official's Figure 1 is not material to our analysis.

1 letter after all conditions of preliminary approval are completed, including
2 recordation of the partition deeds. The hearings official concluded that, under the
3 county code at the time, a partition becomes final when the final approval letter
4 issues. Record 16. Because that conclusion is unchallenged, we accept it for the
5 purposes of our analysis in this case.

6 The application for partition approval in M759-77 was submitted on
7 December 5, 1977, preliminarily approved on December 30, 1977, and finally
8 approved on January 17, 1978. M759-77 divided the parent parcel into three
9 parcels. Record 401–16.

10 The second partition, M319-78, involved further partition of Parcel 3 of
11 M759-77 into three units of land. The application for partition in M319-78 was
12 submitted on May 4, 1978, preliminarily approved on May 25, 1978, and finally
13 approved on February 22, 1980. Record 417–44. That approval required the
14 owner to dedicate a road easement to access the parcels from the public road that
15 abuts the southern boundary of the parent parcel, Wolf Creek Road. Record 429.
16 The planning record reveals that final approval of M319-78 was apparently
17 delayed, in part, due to a boundary line dispute, which appears also to have also
18 delayed improvement of the road easement. Record 436.

19 The third partition, M167-79, involved further partition of Parcel 2 of
20 M759-77 into three units of land. Application for partition approval in M167-79
21 was submitted on March 22, 1979, preliminarily approved on April 5, 1979, and
22 finally approved on February 22, 1980. Record 445–72. As a condition of

1 approval in M167-79, Trout was required to improve the road easement that was

2 a condition of approval in M319-78. Record 459–61.

3 At all relevant times, ORS 92.010, and the implementing LC land division

4 provisions, required subdivision approval for divisions of land that created more

5 than three units of land within a calendar year.[5] Petitioner argued to the hearings

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[5] *Former* ORS 92.010 (1977) provided, in part:

> "(8) 'Partition land' means to divide an area or tract of land into two or three parcels within a calendar year when such area or tract of land exists as a unit or contiguous units of land under single ownership at the beginning of such year.* * *
>
> "* * * * *
>
> "(12) 'Subdivide land' means to divide an area or tract of land into four or more lots within a calendar year when such area or tract of land exists as a unit or contiguous units of land under a single ownership at the beginning of such year."

The quoted language remained the same during all pertinent years, 1977–1980.

Former LC 13.010 (1975) provided:

> "(2) Partition Land - Divide an area or tract of land into two or three parcels within a calendar year when such area or tract of land exists as a unit or contiguous units of land under single ownership at the beginning of such year.
>
> "* * * * *
>
> "(6) Subdivide Land - To divide an area or tract of land into four or more lots within a calendar year when such area or tract of land exists as a unit or contiguous units of land under a single

1 official that the subject property was not lawfully created because M319-78 and
2 M167-79 became final on the same date, February 22, 1980, and thus the two
3 partition approvals effectively created six units of land within one calendar year,
4 1980. According to petitioner, creation of six units of land from the same tract
5 within one calendar year required subdivision approval and could not lawfully
6 have been accomplished as two separate partition approvals. The hearings official
7 rejected petitioner's argument, reasoning that the parent parcel was not further
8 partitioned within the same calendar year, because M319-78 divided Parcel 3 of
9 M759-77 into no more than three parcels in 1980 and M167-79 divided a
10 different parcel, Parcel 2 of M759-77, into no more than three parcels in 1980.
11 The hearings official concluded that the divisions were properly processed as two
12 partitions and did not require subdivision approval and, thus, the subject property
13 was lawfully created and eligible to establish a forest template dwelling. Record
14 16.

15 Petitioner argues that the hearings official misinterpreted the applicable
16 law because the referent "area or tract of land" was the tract owned by Trout, *i.e.*,
17 the parent parcel, and not the parcels that were created by M759-77 in 1978.

18 We review the county's interpretation of state law and local law that
19 implements state law to determine whether the county's interpretation is correct.
20 ORS 197.835(9)(a)(D); *Kenagy v. Benton County*, 115 Or App 131, 838 P2d

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ownership at the beginning of such year." Record 325 (underscore in original).

1 1076, *rev den*, 315 Or 271 (1992). We agree with petitioner that the referent "area
2 or tract of land" was the tract owned by Trout, that is, the parent parcel divided
3 by M759-77, and not Parcels 2 and 3 of M759-77. Thus, under the hearings
4 official's unchallenged finding that the partitions became final on the date the
5 county issued its final approval letter, M319-78 and M167-79 created more than
6 three units of land within a calendar year, and therefore that division of land
7 should have been processed as a subdivision. Accordingly, the subject property
8 was not established pursuant to the appropriate land division procedure.
9 However, our analysis does not end there.

10 Generally, prior actions creating a lot or parcel are not subject to challenge
11 in a subsequent land use proceeding in which the legal status of the subject
12 property is at issue. Instead, where substantive development approval criteria
13 require that a lot or parcel be shown to have been legally created, the applicant
14 need only establish that the action that created the subject unit of land received
15 any local government approvals that were required at that time that the unit of
16 land was created. *See Brodersen v. City of Ashland*, 62 Or LUBA 329 (2010),
17 *aff'd*, 241 Or App 723, 250 P3d 992 (2011); *McKay Creek Valley Assoc. v.*
18 *Washington County*, 24 Or LUBA 187, 193 (1992), *aff'd*, 118 Or App 543, 848
19 P2d 624, *rev den*, 317 Or 272 (1993). If the law at the time required local
20 government approval, and the local government in fact approved the land
21 division, then any procedural or substantive errors the local government might
22 have made in issuing that approval are not a basis to conclude that the unit of land

1 is not a lawful lot or parcel. Stated differently, in challenging a development
2 approval that depends upon a prior, unappealed local government approval,
3 LUBA will not review arguments that the prior, unappealed local government
4 decision was procedurally or substantively incorrect, because such challenge
5 would constitute an impermissible collateral attack on a decision not before
6 LUBA. *Lockwood v. City of Salem*, 51 Or LUBA 334, 344 (2006); *Sahagian v.*
7 *Columbia County*, 27 Or LUBA 341, 344 (1994); *Corbett/Terwilliger Neigh.*
8 *Assoc. v. City of Portland*, 16 Or LUBA 49, 52 (1987).

9 In the present case, the question is whether an applicant for a forest
10 template dwelling can satisfy the statutory requirements by relying on units of
11 land that were created by a division that was approved by the local government,
12 albeit through an incorrect land division process. The units of land that petitioner
13 argues were unlawfully created were approved by the county by final, unappealed
14 land use decisions in partitions M319-78 and M167-79. The applicant's
15 predecessor in interest and the county followed the county's processes for
16 partition and those partition approvals became final when they were not appealed
17 in 1980. While the approvals in M319-78 and M167-79 do not constitute the
18 specific land division approval that was required in 1980, those decisions are final
19 decisions that are immune from collateral attack in this proceeding. Petitioner's
20 argument that the resulting parcels were not lawfully created because the county

1 followed an incorrect land division procedure is akin to an argument that those
2 approvals were substantively incorrect.[6]

3 In sum, petitioner has not demonstrated that the county erred in concluding
4 that the subject property, Tax Lot 605, is a lawfully created parcel for purposes
5 of the template dwelling application. Any procedural error the county might have
6 committed in issuing final approval letters for the partition that created Tax Lot
7 605 cannot be collaterally attacked in this appeal of the county's decision
8 approving a forest template dwelling. For the same reasons, petitioner cannot
9 challenge the county's reliance on the four other parcels that were created by the
10 M319-78 and M167-79 partitions to count toward the requirement that 11 parcels
11 exist within the template area.[7]

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[6] Petitioner has provided no argument or analysis explaining any material difference between the county's partition and subdivision review and approval procedures at the time the disputed units of land were created. Based on our review of the LC provisions that applied at the time, we note that *former* LC Chapter 13 (1975) contained differences between partitions and subdivisions with respect to property transfer restrictions and mapping, surveying, and monumentation requirements. *Compare former* LC 13.025(1) (1975) (no person shall negotiate to sell any lot in a subdivision until after final plat approval and recording) *with former* LC 13.025(3) (1975) (a person may negotiate to sell a parcel in a partition prior to approval); *former* LC 13.100 (1975) (preparation, survey, and monumentation requirements for a subdivision). Record 328; 337. However, in the absence of a developed argument, we do not believe that those differences should prevent application of the collateral attack doctrine.

[7] Tax Lots 600, 604, and 603 in Township 19 South, Range 06 West, Section 2, and Tax Lot 600 in Township 18 South, Range 6 West, Section 35.

B. Tax Lot 603

Petitioner next argues that the county erred in counting Tax Lot 603 as one of the eleven lots or parcels created before 1993 that must exist within the template. Petitioner argues that Tax Lot 603 was unlawfully created twice. First, in 1980 as part of partition M319-78, and a second time in 1988, pursuant to a deed, without required county approval. The 1988 deed further divided Parcel 2 of the M319-78 partition, creating two new units of land, Tax Lot 500 and the remnant of Parcel 2 of the M319-78 partition, which retained the Tax Lot 603 designation. See Record 399 (county tax lot map showing Tax Lots 603 and 500).

The hearings official agreed with petitioner below that Tax Lot 500 was not a lawfully created unit of land and could not be counted to satisfy the forest template dwelling test. However, with respect to Tax Lot 603, the hearings official reasoned that the 1988 deed conveyance "did not compromise or vacate the legal status of" the underlying Parcel 2 of the of the M319-78 partition, "although it altered the configuration of that parcel." Record 17. Petitioner argues that the hearings official erred in counting Tax Lot 603 to satisfy the template test. Petition for Review 13–14.

The hearings official found that 12 parcels existed within the template area on January 1, 1993, which is one more than the minimum 11 parcels required to satisfy the template test. Thus, even if the hearings official erred in counting Tax Lot 603 as one of the 12 qualifying parcels, that error appears to be harmless. Accordingly, petitioner's argument regarding the legality of Tax Lot 603 does

1 not provide a basis for reversal or remand, because the application would satisfy
2 the 11-parcel requirement without counting Tax Lot 603.

3 The first assignment of error is denied

4 **SECOND ASSIGNMENT OF ERROR**

5 In the second assignment of error, petitioner argues that the proposed
6 dwelling site violates the county fire safety siting standards, which require the
7 dwelling be surrounded by a 30-foot primary fire break and an additional 100-
8 foot secondary fuel break "on land surrounding the dwelling or manufactured
9 dwelling that is owned or controlled by the owner in compliance with these
10 requirements." LC 16.211(8)(c)(i); OAR 660-006-0035(3).[8]

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[8] LC 16.211(8)(c)(i) provides:

> "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." (Underscore in original.)

LC 16.211(8)(c)(i) implements OAR 660-006-0035(3), which provides:

> "The owners of the dwellings and structures shall maintain a primary fuel-free break area surrounding all structures and clear and maintain a secondary fuel-free break area on land surrounding the dwelling that is owned or controlled by the owner in accordance

1 The site plan shows the dwelling located 100 feet from the northern
2 property boundary of the subject property. Record 59. It is undisputed that the
3 applicant does not own or control the property to the north of the property
4 boundary. Petitioner argues that the hearings official's decision fails to address
5 petitioner's argument that the LC standards require 130-feet total distance
6 between the dwelling and the property boundaries.

7 The challenged decision includes condition of approval number five that
8 requires a "minimum primary fuel break surrounding the proposed dwelling [of]
9 at least **30 feet**, plus the down slope additional safety zone as needed." Record
10 490 (boldface in original). The condition also requires "minimum secondary fuel
11 breaks surrounding the primary safety zone [of] at least **100 feet**, not to project
12 beyond the subject parcel." Record 490–91 (boldface in original). The hearings
13 official affirmed that condition of approval. Record 14.

14 The hearings official reasoned, correctly, that the slopes surrounding the
15 dwelling do not require the 30-foot primary fuel break be expanded. The hearings
16 official also reasoned, correctly, that the combined 100-foot fuel break satisfies
17 the siting standards because LC 16.211(8)(c)(i) requires a secondary fuel break
18 only "on land that is owned or controlled by the owner." Record 19.

19 The second assignment of error is denied.

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with the provisions in 'Recommended Fire Siting Standards for Dwellings and Structures and Fire Safety Design Standards for Roads' dated March 1, 1991, and published by the Oregon Department of Forestry."

1 The county's decision is affirmed.