BEFORE THE LAND USE BOARD OF APPEALS
OF THE STATE OF OREGON

TODD KUETHER,
Petitioner,

vs.

WASHINGTON COUNTY,
Respondent.

LUBA No. 2019-074

FINAL OPINION
AND ORDER

Appeal from Washington County.

A. Richard Vial, Lake Oswego, filed the petition for review and a reply brief. With him on the brief were Matthew A. Martin and Vial Fotheringham LLP. T. Beau Ellis, Lake Oswego, argued on behalf of petitioner.

Jacquilyn E. Saito, Senior Assistant County Counsel, filed a response brief and argued on behalf of respondent.

RUDD, Board Chair; RYAN, Board Member, participated in the decision.

ZAMUDIO, Board Member, did not participate in the decision.

AFFIRMED 2/13/2020

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

Opinion by Rudd.

NATURE OF THE DECISION

Petitioner appeals a county hearings officer's decision determining that certain property does not contain multiple discrete legal parcels.

BACKGROUND

The subject property is a 72.71-acre property zoned Exclusive Forest and Conservation (EFC) that we and the parties sometimes refer to as Tax Lot 103.[1]

A. Petitioner's Application

Petitioner sought confirmation from the county through a Director's Interpretation that the subject 72.71-acre property includes four existing distinct parcels.[2] Petitioner stated in his application, "This interpretation must be done

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[1] The EFC district is a zoning district that implements Statewide Planning Goal 4 (Forest Lands):

> "To conserve forest lands by maintaining the forest land base and to protect the state's forest economy by making possible economically efficient forest practices that assure the continuous growing and harvesting of forest tree species as the leading use on forest land consistent with sound management of soil, air, water, and fish and wildlife resources and to provide for recreational opportunities an agriculture." Washington County Community Development Code (CDC) 342-1; OAR 660-015-0000(4).

An 80-acre minimum lot size applies to requests to divide land and to create new parcels in the EFC zone. Record 307.

[2] Petitioner describes his request for a director's interpretation as similar to a legal lot verification. Petition for Review 13–14. Unlike some other counties, the county does not have an established procedure for determining the legality of a

before any future land use application, plan, amendment, or land use permit, because the outcome of this interpretation shall affect available options for the property. The owner must get this issue decided *before* they can consider their options for the property." Record 42 (emphasis in original). We therefore assume, for purposes of this opinion, that petitioner sought the Director's Interpretation with a future eye to developing with dwellings or other structures allowed in the EFC zone whatever number of parcels the Director's Interpretation determined constitute legal parcels.[3] Stated differently, we assume that petitioner seeks confirmation from the county that the subject property contains four parcels that

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parcel for development purposes where property is zoned EFC, such as the subject property. CDC 217-1 provides:

> "The purpose of the Director's Interpretation is to address uses that are not explicitly provided for in this Code, to provide further interpretation of terms or phrases within this Code, make initial determinations of conformity through a Development and Property Information (DPI) request, and provide guidance and documentation for future application of this Code."

We assume for purposes of this opinion that a county Director's Interpretation is an appropriate procedure for determining the number of legal parcels within a property in the absence of a specific development proposal.

[3] CDC 342-2.8 allows in the EFC zone a "[d]etached dwelling unit (one) which meets the Type I forest structure siting and fire safety standards in Section 428-3. See Section 430-37.2 E. for required standards." A detached dwelling unit outside the Urban Growth Boundary is defined in CDC 106-69.3(B) as a "single dwelling unit * * * on a lot or *parcel*." (Emphasis added.) CDC 106-151 incorporates the definition of parcel in ORS 215.010, which we set out and discuss later in this opinion.

are available for future development, rather than parcels that may be merely transferable. *See Kishpaugh v. Clackamas County*, 24 Or LUBA 164 (1992) (ORS 92.017 does not require recognition of parcels as developable; the function of ORS 92.017 is to prevent local governments from failing to recognize lawful divisions of property such that they cannot be sold to third parties and to establish that property lines established by land divisions remain unless eliminated); *Campbell v. Columbia County*, 25 Or LUBA 479 (1993) (ORS 92.017 requires that local governments recognize lawfully created lots as legal and separately transferable units of land but does not require the local government to allow each lawfully created lot to be developed separately).

B The Public Lands Survey System

We first explain in some detail the Public Lands Survey System (PLSS), in order to better frame petitioner's arguments. In *Dykes v. Arnold*, 204 Or App 154, 159–61, 121 P3d 257 (2006), the court of appeals provided an overview of the history of the federal description of western lands for purposes of conveyance through the PLSS, explaining:

> "As is true of all land in the United States north of the Ohio River and west of the Mississippi River, title to land in Oregon was originally vested in the federal government, and much of it was conveyed into private ownership pursuant to federal land 'patents,' or grants, issued by the General Land Office (GLO). Before the federal government would transfer title through those original grants, the land first had to be surveyed by a federal government surveyor. Once surveyed, a plat of the survey, together with the surveyor's field notes, had to be filed with and approved by the federal government.[]

> "The surveys were made using the 'rectangular survey system,' which divided the land into a grid-like pattern of increasingly small squares. Starting with an initial reference line called a 'meridian,' the first level of the grid was formed by the intersection of 'township' lines running north and south with 'range' lines running east and west. The intersection of those lines formed squares that were six miles on each side, called 'townships.' Townships were then subdivided into 'aliquot' parts—which means '[c]ontained in a larger whole an exact number of times; fractional[.]' *Black's Law Dictionary* 81 (8th ed 2004). In particular, a township was subdivided into 36 one-mile squares called 'sections,' each with an area of 640 acres. The sections were assigned a number from 1 to 36, starting in the upper right-hand corner of the township and continuing alternately left and right down the sections, with the square in the lower right hand corner assigned the number 36. * * *
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> "The rectangular survey system also contemplated the potential subdivision of sections into aliquot parts, in part to make the land more affordable for settlers buying it on a per acre basis. Sections were subdivided into quarters of 160 acres each, referred to as the northwest quarter, northeast quarter, southwest quarter, and southeast quarter. The quarters, in turn, could be subdivided into half-quarters of 80 acres and quarter-quarters of 40 acres. Quarter-quarters were the smallest unit of land for which the federal government would issue a grant." *Id.* at 162 (footnote omitted).

Federal surveyors identified remainder areas from quarter-quarter sections where land could not be identified as full 40-acre Government lot (GLots).

> "Where the federal government's work left off, the local government's work began. The federal government's objective was to be able to accurately describe the land with as little surveying as possible, and then convey the land into private ownership. Walter G. Robillard & Lane J. Bouman, *Clark on Surveying and Boundaries* § 4.05, 111 (7th ed 1997) (*Clark on Surveying*). As a result, the federal government surveyed a section's exterior boundaries only; the interior survey work customarily was left to be performed by local officials:

> "'[T]he county surveyor played an important part in the development of America. It was intended that he would complete the identification of the individual parcels or aliquot parts of the sections after the federal government surveyors created the sections and the land went into private ownership.'
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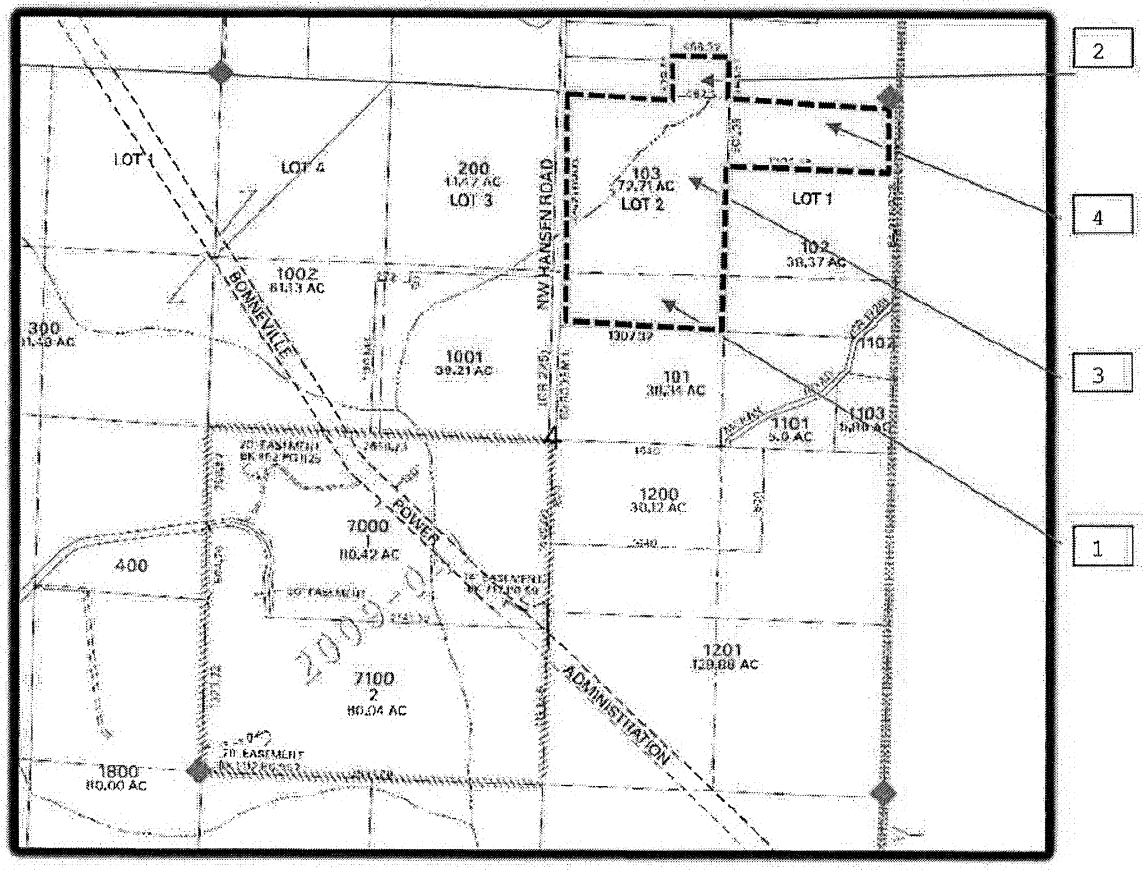
> "*Id.* § 2.13 at 55. Most states therefore provided for an official local surveyor whose duty was to survey the lands for individual ownership, usually at the landowner's request and expense. *Id.* § 2.13 at 55–56; § 4.05 at 111. Over time, as the lands came into private ownership, thousands of miles of interior boundaries and their necessary corners were surveyed by official local surveyors and their deputies. *Id.* § 2.13 at 55–56." *Id.* at 162–64.

During the proceedings below, petitioner submitted as evidence a PLSS survey that was filed with the GLO in 1862 (1862 Survey). Record 1275. The 1862 Survey shows GLots 1 and 2 roughly where the subject property is located, although the subject property does not exactly match the depiction of GLots 1 and 2 shown on that survey. Record 1276. GLot 1 is depicted on the survey as including 42.40 acres and GLot 2 is depicted as including 42.51 acres. Record 1275. Petitioner argued that the subject property contains one entire GLot (GLot 2) and one "remainder" GLot (a portion of GLot 1) as discrete legal parcels. Petitioner also maintained that there were two additional discrete legal parcels because each of those areas of land had as one of their boundaries, a property line shown on the PLSS which had not been vacated.

C. Petitioner's Legal Theories

Petitioner put forth several theories for why the subject property contains four legal parcels.[4]



[4] At one point during the proceedings, petitioner took the position that the subject property contains four legal parcels. Record 40. Later in the proceeding, petitioner took the position that the subject property contains two legal parcels. Record 34, 36, 38. However, the hearings officer addressed in his decision petitioner's argument that the subject property includes four parcels as requested in the original application. Record 17. In his petition for review, petitioner contends "that the parcels numbered 1, 3 and 4 constitute a discrete unit of land and the parcel numbered 2 constitutes a separate discrete unit of land." Petition for Review 4. Given the uncertainty of petitioner's position regarding the number of parcels, we assume for purposes of this opinion that the hearings officer

First, for proposed "Parcel 3" and proposed "Parcel 4" shown on the above schematic, petitioner maintained that the federal government system of identifying GLots in the 1800s established two legal parcels, and that two legal parcels remain because boundary lines shown on the 1862 Survey have not been vacated. Record 1276. We describe the 1862 Survey in more detail in our resolution of the second assignment of error. Petitioner argued that proposed parcel 3, comprising 39.05 acres, was GLot 2 identified on the 1862 Survey. Petitioner contended that proposed Parcel 4, comprising 15 acres, which is a remainder area of land resulting from the conveyance of other portions of GLot 1 in 1979, was the northern portion of GLot 1 depicted on the 1862 Survey. Record 8, 10, 1277.

Petitioner argued that proposed "Parcel 1 is a remainder parcel of the south ½ of the northeast ¼ Section 4 * * * which was first created by the GLO and further documented in 1947[.]" Record 1277. According to petitioner, proposed "Parcel 1," comprising 15 acres, retained a section line as a boundary and is therefore a discrete legal parcel. *Id.*

For "Parcel 2," petitioner put forth three arguments. First, he argued that an 1891 PLSS map had established a section line and because that line was never vacated and served as one of the "Parcel 2" boundaries, parcel 2, comprising 3.66

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correctly evaluated petitioner's original argument that the property contains four parcels.

acres, was also a discrete legal parcel.[5] Record 965, 1145, 1202, 1277. Second, and in the alternative, petitioner argued that the parcel was conveyed by deed by itself in the 1970s and is therefore a discrete legal parcel. Third, and also in the alternative, petitioner argued that the filing of a survey (prepared by Keith Clark for Howard Schmidt) with the county surveyor's office in 1972 (the Clark survey) resulted in the creation of Parcel 2 as a discrete legal parcel.[6]

D. The Hearings Officer's Decision

On July 10, 2019, the hearings officer issued his final decision rejecting petitioner's arguments. The hearings officer described the history of the parcels identified by petitioner. The hearings officer concluded that the PLSS system did not create discrete legal units of land and that its purpose was simply to facilitate

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[5] The hearings officer explained that

> "The parties refer to the PLSS and the Government Land Office Survey (the GLO Survey). Although the terms may have slightly different meanings, those differences are not relevant here. Therefore, the hearings officer uses the term PLSS exclusively to refer to the US. Government's survey that resulted in the establishment of lines identifying Townships, Sections, Quarter Sections, and GLots" Record 7.

We adopt the same approach in this opinion.

[6] Parcel 2 is one of five lots ranging from 3.66 to 5 acres in size shown on the Clark survey of property located to the north of petitioner's property. Record 259.

No county recording stamp is apparent on the face of the copy of the Clark survey in the record. Record 268.

the description of areas of land for future conveyance. The hearings officer also concluded that the parcels were not created by deed. As the hearings officer explained, the GLots were never referenced in the deeds and the property was always conveyed by metes and bounds description:

> "There were '[n]o applicable planning, zoning or subdivision or partition ordinances or regulations * * *' when GLots 1 and 2 were first conveyed by Patent deed [in 1891]. ORS 92.010(3)(a)(B)(ii). However, the Patent deed did not convey GLots 1 and 2 as separate units of land. The Patent deed conveyed, 'the northeast quarter of Section 4 from the United States of America to Joseph Corth (Book 32, Page 393) [totaling 164.9 acres] [Record 60, 923]. GLots 1 and 2 were then created as a separate remainder parcel by the conveyance of the south half of the NE quarter of Section 4 from Joseph Corth to George Bauer (Book 32, Page 442) [totaling 80 acres] [Record 52, 62]. This deed described the property conveyed by metes and bounds description, with no reference to GLots 1 and 2. This remainder parcel was then conveyed from Fred Haufler to the Corporation of the Sisters of Mercy [in 1930] by metes and bounds description, with no reference to GLots 1 and 2 (Book 144, Page 256). All subsequent deeds used this same description until the parcel was further divided by metes and bounds descriptions, with no reference to GLots 1 and 2. GLots 1 and 2 were never described in a conveyance deed as separate units of land."[7] Record 26.

The hearings officer also concluded that (1) "'Parcels 1, 2 and 4' are not discrete, lawfully established units of land, because they did not meet the 38-acre

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[7] A patent is "(2) 4 a : an instrument making a conveyance or grant of public lands." *Webster's Third New Int'l Dictionary* 1654 (unabridged ed 2002). A deed is a signed instrument "5 : often used specifically of an instrument conveying a fee in land" as distinguished from another instrument. *Id.* at 589. A patent is a type of deed.

minimum size in effect when the 'Parcels' were originally created by the division of adjacent properties". and (2) the Clark survey filed with the county surveyor was not a subdivision of the property, and did not create Parcel 2. Record 18–19.

This appeal followed.[8]

SECOND ASSIGNMENT OF ERROR

We begin with petitioner's second assignment of error, in which petitioner argues the county erred in concluding that boundaries shown on the 1862 Survey and the 1891 PLSS did not create discrete legal parcels that can be developed with uses allowed in the EFC zone. ORS 197.835(9)(a)(D). In support of his arguments, petitioner cites a federal statute and federal and state court decisions that refer to the federal PLSS mapping system as "subdividing property." However, the federal statute and the cases that petitioner cites do not support petitioner's premise that a PLSS survey filed with the GLO in 1862 created GLots and other land areas that remain as discrete legal parcels, for purposes of determining whether a parcel exists for development purposes according to the CDC.

Petitioner cites 43 USC section 753, which provides:

"In every case of the division of a quarter-section the line for the

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[8] Similar issues were raised in another decision issued by the hearings officer on the same day as the decision challenged in this appeal. We resolve an appeal of that decision in *Urstadt v. Washington County*, ___ Or LUBA ___ (LUBA No 2019-073, Feb 13, 2020).

> division thereof shall run north and south, and the corners and contents of half quarter-sections which may thereafter be sold, shall be ascertained in the manner and on the principles directed and prescribed by [section 752 of this title], and fractional sections containing one hundred and sixty acres or upwards *shall in like manner as nearly as practicable be subdivided* into half quarter-sections, under such rules and regulations as may be prescribed by the Secretary of the Interior, and in every case of a division of a half-quarter section, the line for the division thereof shall run east and west, and the corners and contents of quarter quarter-sections, which may thereafter be sold, shall be ascertained as nearly as may be, in the manner, and on the principles, directed and prescribed by [section 752 of this title]; and fractional sections containing fewer or more than one hundred and sixty acres shall in like manner, as nearly as may be practicable, *be subdivided* into quarter quarter-sections, under such rules and regulations as may be prescribed by the Secretary of the Interior." (Emphases added.)

However, nothing in 43 USC section 753 demonstrates that its use of the term "subdivided" establishes that the federal statute or surveys prepared and filed with the GLO pursuant to its authority creates legal units of land for development purposes. Rather, the statute sets forth how property will be described and then conveyed. This conclusion is consistent with the resolution of a similar issue in *John Taft Corp. v. Advisory Agency*, 161 Cal App 3d 749, 207 Cal Rptr 840 (1984). *Taft* concerned a county's notice of violation of county subdivision law resulting from the sale of land areas described as lots on an 1878 federal survey map. The federal survey map at issue was prepared in accordance with federal standards and "approved and filed in the office of the U.S. Surveyor General of the State of California" *Id.* at 841. The 1878 map showed Lots 1, 2 and 3 of section 21 in Township 4 North, Range 22 West, San Bernadino Meridian in

California. In 1895, Gibson received a patent to over 140 acres of land, described as Lots numbered 1, 2 and 3 as described in the federal survey. Taft acquired title to Lots 1 and 2 and a portion of 3 in 1965. Each conveyance in the chain of title running from the United States to Taft was accomplished by a single ownership which separately identified Lots 1, 2 and 3 but did not divide their ownership. Taft acquired more of the area designated Lot 3 in 1971. *Id.* at 842.

The county adopted a subdivision ordinance with a minimum parcel size in 1972. After adoption of the subdivision ordinance, Taft conveyed Lots 1 and 2 by grant deed and without the county's approval and the county filed a notice of violation. The court agreed with the county that

> "the term 'legal subdivision' as used in the federal survey law refers neither to a physical division of land nor to the allocation of a parcel to more than one owner. The term there refers instead solely to a survey method adopted to facilitate the conveyance of public land to one or more owners by establishing the geographic location of the land on a descriptive map." *Id.* at 843.

The court concluded that the 1878 survey map did not establish a subdivision for purposes of California subdivision law.[9] *Id.* at 844.

Other cases cited by petitioner do not support a different result. For example, citing *Gazzam v. Phillips*, 61 US 372, 377, 1857 WL 8552 (1857), petitioner argues that in discussing an 1820 surveying act similar to what is now

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[9] The court also noted that unlike the U.S. Survey map, a subdivision map is recorded locally in the chain of title, providing constructive notice to transferees. *Taft*, 207 Cal Rptr at 845.

43 USC section 753, "the Supreme Court discussed Congress's intent behind the survey system, noting Congress 'preferred a single tract, though containing more than eighty acres, and though capable of forming a regular half-quarter, to small inconvenient fractions.'" Petition for Review 24. *Gazzam* supports the conclusion that the federal survey system was intended to facilitate the description of property in conveyances.[10] However, *Gazzam* does not establish that the surveys themselves created discrete legal parcels for development purposes.

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[10] In *Gazzam*, plaintiffs, as heirs, claimed title to land based upon an 1833 patent to their ancestors conveying "the southwest quarter section twenty-two, in township four south, of range one west, in the district of land subject to sale at St. Stephens, Alabama, containing ninety-two acres and sixty-seven hundredths of an acre, according to the official plat of the survey of the said land returned to the General Land Office by the surveyor general[.]" *Id.* at 374. Defendants gave in evidence an 1832 patent "for the south subdivision of fractional section twenty-two, same township and range, containing one hundred and ten acres and fifty-one hundredths of an acre, according to the official plat of survey of the said lands returned to the General Land Office by the surveyor general[.]" *Id.* Plaintiffs argued that the land area in question was within the southwest quarter section twenty-two and that the whole of the southwest quarter went to their predecessor under an 1830 federal Pre-emption Act. This would result in plaintiffs receiving 160 acres despite the fact that the patent deed stated that it conveyed 92 acres and it would leave defendants with 43 acres rather than the 110 described in their patent deed.

An 1820 Act provided that, as nearly as practicable, fractional sections of 160 acres or more would be subdivided into half-quarter sections but fractional sections less than 160 acres would be sold as one unit. The court found that the surveyor general had some latitude of discretion in division of fractional sections exceeding the quantity mentioned in the law "to avoid subdivision of the public domain into ill-shaped and unsaleable fractions." *Id.* at 377. The court concluded that the surveyor general had the power to make the subdivision according to the

Other cases cited by petitioner also fail to support the conclusion that the federal survey created legal units of land—for development purposes.[11] We reach

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plat and in conformity with which the sales were made. The sales were consistent "with the subdivisions, as marked upon the plat of the surveyor general then on file in the office, and to which all the purchasers of the public land had access, and which constituted the guide of the register and receiver in making sales." *Id.* at 375. The court held that even if the surveyor had platted the area incorrectly, plaintiff was only entitled to the 92 acres actually purchased.

[11] For example, petitioner cites *Greenblum v. Gregory*, 160 Wash 42, 45, 294 P 971 (1930) in support of his position. In *Greenblum*, a party sought to quiet title in lots 3, 4, and 9 of a particular section, township and range. Despite the fact that the statutory authority to sell property was limited to "legal subdivisions" of land and the relevant legal subdivisions were in the form of land boundaries established by reference to lots, the board of county commissioners sold 258 acres to the claimant by a deed that described the conveyance by reference to quarter sections. *Id.* at 45. The court held that the claimant was only entitled to the land within those lots entirely within the quarter sections described in the conveyance document:

> "The government was the grantor. To enable it to convey the land, a government survey was made, and the subdivisions within the section were designated as lots. The government did not intend to disregard its own survey and convey something not determined by that survey. The government made its survey and designated it as composed of lots, and when the transfer was made and the amount of acreage stated, title passed to only that portion of the land." *Id.* at 48.

The referenced subdivision did not relate to the legal status for development purposes of the lots conveyed but rather clarified the boundaries of ownership of the 258 acres conveyed in the deed. This supports the conclusion that the purpose of the PLSS system was to provide a system for identifying specific areas of land for conveyance purposes.

the same conclusion as the court in *Taft*. The PLSS did not create discrete units of land for purposes of development.

We agree with the county that, as the court explained in *Dykes v. Arnold*, the purpose of the PLSS system was to facilitate the identification of specific areas of property so that they could be easily referenced in conveyance

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Petitioner also cites *St. Paul & P.R. Co., v. N. Pac. R. Co.*, 139 US 1, 11 S Ct 389 (1891), for the proposition that a reference to a series of GLots in a deed's legal description does not mean that the GLots, together, form one unit of land. However, petitioner has not shown that conveyances to a railroad are similar to conveyances to others. Petitioner also has not shown that the government conveyed noncontiguous properties in a single legal description in *St. Paul*. The Act setting forth the railroad's rights at issue in *St. Paul* was enacted in 1864. The Act provided that the railroad would receive an interest in property, subject to prior interests already granted by the government, after the railroad determined the route. The general route of the railroad was set out in 1868 and the route map filed in the office of the commissioner of the GLO in 1870. It was not until 1870 that the secretary ordered local land officers to remove from availability for disposal (so that the lands would be available to the railroad) those lands within 20 miles of each side of the railroad line and to which rights had not previously been distributed.

The railroad was to receive alternate sections of public land designated by odd numbers, for the purpose of supporting the construction of the railroad. Subsequent conveyances of specific pieces of property had to follow the provision in the statute that the railroad would receive specific pieces of property, unidentified in 1864, in the future. The references in this case to alternate sections of land the railroad would ultimately receive do not support petitioner's conclusion that the sections must be considered discrete legal units of land. Patents were required to follow to issue specific lands to the railroad. *Id.* at 390. *St. Paul* does not discuss how the document recording ownership of the specific properties would describe the properties.

documents. Accordingly, the 1862 Survey did not create discrete legal parcels simply by showing GLots or other boundary lines on the survey.

The hearings officer also found, correctly, that neither the original patent from the United States that conveyed the land that is now the subject property nor any deed after that original patent has ever described GLots 1 and 2 as such. The original patent conveyed a 164.91-acre parcel to Corth, described as the "NE quarter of Section four." Record 60. That 164 acres is the total of the south half of Section 4, plus the property encompassing GLot 1 and GLot 2. Shortly after, Corth conveyed to Bauer the South half of the NE quarter of Section 4 containing 80 acres. Record 52, 62. That conveyance left a remainder parcel of approximately 84 acres. The deed history of the 84-acre remainder parcel goes cold in the record until a 1930 conveyance of the remainder parcel from Fred Hauffer to Corporation of the Sisters of Mercy, which described the 84-acre property using a metes and bounds description. Record 26. Stated differently, no conveyance document for property that included GLots 1 and 2 ever described GLots 1 and 2 as such.[12]

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[12] Proposed "Parcel 1" is a remainder parcel resulting from sales in 1979 and 1980 sale. Record 1277. Proposed "Parcel 4" is a remainder area from a sale in 1979. Record 55. The existence of a boundary line in common with a boundary line set in the government survey did not establish a discrete legal parcel. Similar to the purpose of the PLSS Survey identifying GLots, these lines were used to identify land areas.

Petitioner also argues that the county's decision is not supported by substantial evidence. ORS 197.835(9)(a)(C). However, petitioner's assignment of error raises a question of law regarding whether the filing of a PLSS survey with the GLO had the effect of creating parcels as shown on the survey. We conclude above that the filing of a PLSS survey does not have the effect of creating a parcel as shown on the survey for purposes of determining whether a property contains discrete legal parcels for future development purposes under the CDC. Accordingly, petitioner's substantial evidence arguments provide no basis for reversal or remand of the decision.

The second assignment of error is denied.

THIRD ASSIGNMENT OF ERROR

Petitioner's third assignment of error is that the county erred in determining that an unrecorded 1972 survey that included land petitioner has designated "parcel 2" did not partition or subdivide the property shown in the survey to create "Parcel 2." ORS 197.835(9)(a)(D).

The property covered by the Clark survey is approximately 24 acres in size and includes the northernmost part of petitioner's property, the 3.66-acre proposed Parcel 2. By 1976, Schmidt had sold and conveyed all but one of the

areas shown on the 1972 survey to Wiley.[13] Petitioner obtained a partial interest in the property in 2007 and full ownership of the property in 2013. Record 56.

The hearings officer also concluded that the filing of a survey with the county surveyor's office did not create legal lots. The hearings officer cited *Atkins v. Deschutes County*, 102 Or App 208, 210, 793 P2d 345 (1990), in support of his conclusion that the "mere filing of a survey before the adoption of a county subdivision law is insufficient to create a legal lot of record," and that the survey did not have the effect of creating a parcel as a discrete unit of land. Record 19. The petitioner in *Atkins* argued that filing a survey was sufficient to create a legal lot of record because there were no statutory and county subdivision regulations that applied to the property at issue. Both LUBA and the court of appeals affirmed the county's conclusion that the petitioner's arguments did not establish that the filing of the survey created a legal lot of record. The court explained:

> "Petitioner summarizes her argument as being that 'the absence of illegality establishes legality for the purposes of ORS 92.017.' However, that is not a sufficient characterization of the argument. What she really contends is that, because a particular statutory procedure was not required for the creation of her lot, nothing was; therefore, the paper that happened to be filed with the county official sufficed *ipso facto* to create a lot." *Id.* at 210.

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[13] The July 1973 agreement between Schmidt and Wiley described the property by metes and bounds. Record 275. A 1973 sale of a property depicted on the Clark survey from Schmidt to Pitsch also described the property by metes and bounds. Record 269.

Similarly, we agree with the hearings officer that merely filing the Clark survey was inadequate to create a legal lot. ORS 92.010(3)(a)(B) establishes that lawful units of land are 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."

Petitioner has not established that Parcel 2 was created in accordance with either of the above provisions. First, petitioner has not established that the Clark Survey created units of land "[i]n compliance with all applicable planning, zoning and subdivision or partition ordinances and regulations." The county's first subdivision ordinance took effect in 1964 and required approval of subdivision plats by the planning commission prior to the recording of those plats. The 1964 subdivision ordinance defined "[s]ubdivide land" as "to partition a parcel of land into four or more parcels of less than five acres each for the purpose of transfer of ownership or building development[.]" Record 19. The Clark Survey was not subject to the 1964 subdivision ordinance because only one of the lots depicted was less than five acres in size.

Second, petitioner has not established, and does not argue, that proposed Parcel 2 was lawfully created by deed when it was first conveyed in 1975 because "there were no applicable planning, zoning or subdivision or partition ordinances or regulations." Proposed Parcel 2 was not conveyed as a separate unit of land

before county land use regulations became applicable to the property in 1973. When proposed Parcel 2 was conveyed as a separate unit of land in 1975, it did not comply with the applicable land use regulations that took effect in 1973 and that required a 38-acre minimum parcel size for the creation of new parcels.[14] Record 14.

Petitioner also argues that the hearings officer's decision is not supported by substantial evidence.[15] ORS 197.835(9)(a)(C). As in the second assignment of error, the question that petitioner's assignment of error presents is a question of law. We conclude above that the hearings officer correctly concluded that filing

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[14] The hearings officer concluded:

> "'Parcel 2' was first conveyed as a separate parcel in a deed from the Wileys to the Schmidts recorded in 1975. (Book 1211, page 483).
>
> "(C) The applicant's 'Parcel 2' was not created as a separate unit of land until after the effective date of the adoption of the FRC-38 zoning. 'Parcel 2'did not meet the required 38-acre minimum lot size in effect at the time it was created. Therefore, the division of 'Parcel 2' from former tax lot 5300 could only legally occur as a lot line adjustment between the site and tax lot 5300. 'Parcel 2' either merged with the applicant's 'Parcel 3' or it remains part of former tax lot 5300 (current tax lot 2200)." Record 20.

[15] Petitioner argued that this case is distinguishable from *Atkins* because, unlike the petitioner in *Atkins*, petitioner submitted, in addition to evidence of an unrecorded survey, testimony from an attorney with real estate title expertise, a surveyor and evidence petitioner argued established that the county had treated unrecorded surveys differently in the past.

a survey was not sufficient to subdivide or partition land or create separate parcels. Accordingly, petitioner's arguments under this subassignment of error provide no basis for reversal or remand.

The third assignment of error is denied.

FIRST ASSIGNMENT OF ERROR

The hearings officer concluded that

> "[t]he 'Parcels' were not created through the County's subdivision or partition processes, pursuant to ORS 92.010 to 92.192. ORS 92.010(3)(a)(A). Even if the PLSS was a subdivision that created lots or parcels, those lots or parcels were not, '[c]reated pursuant to ORS 92.010 to 92.192." Record 25.

Petitioner argues that the county erred in referring to state statutes for guidance as to whether the subject property is comprised of four distinct legal parcels because the GLots and remnants of areas depicted on the PLSS he asserts are lawful parcels were created prior to the enactment of state statutes addressing subdivision and partition of property.[16] Petition for Review 2. Petitioner argues that the county may not rely on the existing statutory definition of "parcel" to

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[16] Although the county does not argue that petitioner failed to challenge alternative findings, the hearings officer found that: "Even if the applicant is correct that GLots and section lines are lot lines that separate discrete units of land, the site only consists of a single lawfully established unit of land. The applicant's 'Parcels 1, 2 and 4' were created by the division of the units of land described in the PLSS. As discussed above, the 'Parcels' did not comply with the 38-acre minimum lot size standard in effect when they were originally created." Record 25.

determine whether the GLots or remnants are distinct lawful parcels.[17] Petition for Review 12–13. Rather, petitioner argues that the county should rely on case law cited by petitioner below regarding the effect of the filing of a PLSS survey with the GLO as "subdividing" property. We agree with the county's response that because petitioner has not established that the 1862 Survey *created* parcels, and has not established that the Clark survey created "Parcel 2," the first assignment of error provides no independent basis for reversal or remand. Stated differently, we agree with the county that any error in applying the statutory

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[17] In his decision, the hearings officer cited ORS 215.010's definition of "parcel" to support his conclusion the subject property is one legal parcel. ORS 215.010(1) provides that as used in the chapter:

> "(1) The terms defined in ORS 92.010 shall have the meanings given therein, except that "parcel":
>
> "(a) Includes a unit of land created:
>
> "(A) By partitioning land as defined in ORS 92.010;
>
> "(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.
>
> "(b) Does not include a unit of land created solely to establish a separate tax account."

definition of parcel at ORS 215.010 is harmless error, because there are no parcels to which to apply that definition.

The first assignment of error is denied.

The county's decision is affirmed.