06/15/20 AM11:08 LUBA

1 BEFORE THE LAND USE BOARD OF APPEALS
2 OF THE STATE OF OREGON
3
4 HEATHER TUGAW,
5 *Petitioner*,
6
7 and
8
9 TAYLOR HOUSHOUR,
10 *Intervenor-Petitioner*,
11
12 vs.
13
14 JACKSON COUNTY,
15 *Respondent*.
16
17 LUBA No. 2020-016
18
19 FINAL OPINION
20 AND ORDER
21
22 Appeal from Jackson County.
23
24 Garrett K. West, Medford, filed the petition for review and argued on
25 behalf of petitioner and intervenor-petitioner. With him on the brief was Jarvis,
26 Dreyer, Glatte & Larsen LLP.
27
28 Madison T. Simmons, Jackson County Counsel, Medford, filed the
29 response brief and argued on behalf of respondent. With her on the brief was Joel
30 C. Benton.
31
32 RUDD, Board Chair; RYAN, Board Member; ZAMUDIO, Board
33 Member, participated in the decision.
34
35 REVERSED 06/15/2020
36
37 You are entitled to judicial review of this Order. Judicial review is
38 governed by the provisions of ORS 197.850.

Opinion by Rudd.

NATURE OF THE DECISION

Petitioner appeals the county hearings officer's denial of a forest template dwelling application.

MOTION TO INTERVENE

Taylor Houshour (intervenor) moves to intervene on the side of petitioner. The motion is unopposed and is granted.

BACKGROUND

The subject property is 34.08 acres in size and zoned Forest Resource (FR). On October 2, 2018, petitioner and intervenor-petitioner (petitioners) applied to site a forest template dwelling on the property. Record 1.

The FR zone is "intended to conserve forest lands and implement the Oregon Administrative Rules, and Statewide Planning Goal 4 (Forest Lands)." Jackson County Land Development Ordinance (LDO) 5.2.2. As we explained in *Eng v. Wallowa County*, ___ Or LUBA ___ (LUBA No 2018-085, May 7, 2019) (slip op at 6-7):

> "Forest and farm resource lands are generally preserved for forest and farm uses, with other limited allowed uses. ORS 215.700 to 215.783 govern the limited circumstances in which owners of forestland may construct dwellings on that land. * * * ORS 215.750 authorizes the approval of forest template dwellings. Generally, an applicant for a forest template dwelling must demonstrate that the subject property is within a square land area (the template) that contains a certain number of legally created parcels and a certain number of dwellings. The more capable the subject property is at producing wood fiber, the more stringent the requirements for a

1 forest template dwelling approval. *See generally Friends of Yamhill*
2 *County v. Yamhill County*, 229 Or App 188, 192, 211 P3d 297
3 (2009) (interpreting ORS 215.750 and explaining overarching
4 statutory scheme)."

5 ORS 215.750(2) provides that:[1]

6 "In western Oregon, a governing body of a county or its designate
7 may allow the establishment of a single-family dwelling on a lot or
8 parcel located within a forest zone if the lot or parcel is
9 predominantly composed of soils that are:

10 "* * * * *

11 "(b) Capable of producing 50 to 85 cubic feet per acre per year of
12 wood fiber if:

13 "(A) All or part of at least seven other lots or parcels that
14 existed on January 1, 1993, are within a 160-acre
15 square centered on the center of the subject tract; and

16 "(B) At least three dwellings existed on January 1, 1993, on
17 the other lots or parcels[.]"

18 OAR 660-006-0027(3)(b) adds to the criteria set out in ORS 215.750(2) by
19 providing not only that three dwellings must have existed on January 1, 1993, but
20 that the dwellings must "continue to exist on the other lots or parcels."[2]

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[1] ORS 215.750 was amended by House Bill (HB) 2225 (2019). The amendments do not affect the 2018 application that is the subject of this appeal. We refer to the version of ORS 215.750 that applied in 2018 throughout this opinion.

[2] OAR 660-006-0027(3)(b) provides:

"(3) In western Oregon, a governing body of a county or its designate may allow the establishment of a single family

1 LDO 4.3.6(B)(2)(b) provides:

2 "Dwellings, as referenced in this section, must meet the standards
3 listed in Section 4.3.6(A)(1). A forest template dwelling may be
4 allowed if it complies with all of the following requirements. Lots
5 or parcels within urban growth boundaries shall not be used to
6 satisfy the eligibility requirements under this Section.

7 "* * * * *

8 "(2) The lot or parcel on which the dwelling will be sited is
9 predominantly composed of soils that are:

10 "* * * * *

11 "b) Capable of producing 50 to 85 cubic feet per acre per
12 year of wood fiber and all or part of at least seven (7)
13 other lots or parcels that existed on January 1, 1993, are
14 within a 160-acre square centered on the center of the
15 subject tract; and at least three (3) dwellings existed on
16 January 1, 1993, *and continue to exist* on the other lots
17 or parcels[.]" (Emphasis added).

'template' dwelling authorized under ORS 215.750 on a lot or parcel located within a forest zone if the lot or parcel is predominantly composed of soils that are:

"* * * * *

"(b) Capable of producing 50 to 85 cubic feet per acre per year of wood fiber if:

"(A) All or part of at least seven other lots or parcels that existed on January 1, 1993 are within a 160-acre square centered on the center of the subject tract; and

"(B) At least three dwelling existed on January 1, 1993 and continue to exist on the other lots or parcels."

1 The italicized language above is not present in ORS 215.750(2) but is present in
2 in OAR 660-006-0027(3)(b).

3 Because the subject property contains soils capable of producing 57 cubic
4 acre feet per year of wood fiber, petitioners and the county agreed that in order
5 to qualify for a forest template dwelling, petitioners' template had to include
6 seven lots and three dwellings that existed on January 1, 1993.[3] Record 5.
7 Petitioners identified what they believed to be qualifying dwellings, including a
8 dwelling we will refer to as the 1977 dwelling. Staff concluded that the 1977
9 dwelling could not be counted as a qualifying dwelling

> 10 "because of the current configuration of TL 203, on which the 1977
> 11 dwelling sits today. TL 203, is an amalgamation of two former tax
> 12 lots, Former TL 200 and Former TL 203. Those lots existed on
> 13 January 1, 1993 under a single ownership. At that time, Former TL
> 14 200 would have fallen within the forest template square. Former TL
> 15 200 was a flag lot, connecting to Griffin Lane by a 25-foot strip of
> 16 land located between Former TL 203 and the property located at 38-
> 17 2W-28-104. In 2008, those lots were consolidated in their entirety

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[3] ORS 215.750(6) provides that in creating the forest template:

> "Except as described in subsection (7) of this section, if the tract under subsection (2) or (3) of this section abuts a road that existed on January 1, 1993, the measurement may be made by creating a 160-acre rectangle that is one mile long and one-fourth mile wide centered on the center of the subject tract and that is to the maximum extent possible, aligned with the road."

Petitioners' template utilizes this option and is rectangular in shape.

as part of a major land partition into TL 203." Record 10 (internal citations omitted).

Staff explained that LDO 4.3.6(B)(2)(b)

> "requires the applicant to show that there are seven (7) lots or parcels, as defined in [LDO] Section 13.3(152) and (185), that existed on January 1, 1993, that are, all or in part within the 160-acre template. *To be counted, a lot or parcel must currently exist and must have existed on that date*. If a parcel has been created, or recreated, in a different configuration through a partition, it is not considered the same parcel simply because it is labeled on the tax rolls with the same tax lot number. It is not uncommon for the Assessor's Office to assign the same tax lot number to a lot/parcel created from the original lot/parcel. Whether the parcel is functionally unchanged is irrelevant. It is not the same Tax lot 203. By definition, Tax Lot 203 was created after the January 1, 1993 date and cannot be counted toward qualifying parcels or dwellings. 'Creation Date' is defined in [LDO] Section 13.3(60) as:
>
> > "'*The recordation date of a document that creates a lot(s) or parcel(s), or the date of execution of an unrecorded land sale contract, deed or other instrument intended to create new lots or parcels. A lawfully created lot or parcel remains discrete unless the lot or parcel lies are vacated, or the lot or parcel is further divided as provided by law. (ORS 92.017). In addition, in resource zones, when a lot, parcel or tract is reconfigured pursuant to applicable law after November 4, 1993, the effect of which is to qualify a lot, parcel or tract for the siting of a dwelling, the date of the reconfiguration is the date of creation or existence. Reconfigured means any change in the boundary of the lot, parcel or tract.*'" Record 11-12 (first emphasis added; second emphasis in original; internal citations omitted).

Petitioners appealed the staff denial to the hearings officer, explaining:

> "While we agree that the dwellings that existed on January 1, 1993 must continue to exist (because the code expressly says so), we

1 disagree that the lots must do so as well. More specifically,
2 dwellings are required to 'continue to exist,' while no such
3 requirement is included for lots or parcels." Record 10.

4 The hearings officer concurred with staff that LDO 4.3.6(B)(2)(b) required that
5 (1) the three dwellings be in existence in 1993 and (2) remain sited on the same
6 lots as existed in 1993. Because the land underlying one of the three dwellings,
7 the 1977 dwelling, was reconfigured through a 2008 lot merger, the hearings
8 officer concluded that the 1977 dwelling could not be counted as one of the three
9 qualifying dwellings, and denied the application.[4]

10 This appeal followed.

11 **ASSIGNMENT OF ERROR**

12 It is undisputed that the subject property meets the *parcel-number*
13 requirement for a forest template dwelling, even without counting Tax Lot 203.
14 It is undisputed that the 1977 dwelling existed on January 1, 1993, continues to
15 exist, and is sited within the template area. The only issue on appeal is whether
16 the 1977 *dwelling* that is sited on Tax Lot 203 may be counted to authorize the

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[4] The hearings officer found:

"Applying the provisions of LDO 13.3(60), reconfigured former tax lots 200 and 203 were recreated and came into existence in 2008 as current tax lot 203; therefore, the Hearings Officer agrees with and adopts Staff's conclusion that '[current] Tax Lot 203 was created after the January 1, 1993 date and cannot be counted toward qualifying parcels or dwellings.' In other words, tax lot 203, as currently reconfigured, could not have 'existed on January 1, 1993' as required by the LDO and state statute." Record 16.

1 forest template dwelling. The hearings officer concluded that the 1977 dwelling
2 is not a qualifying dwelling because Tax Lot 203 was reconfigured in 2008 and
3 therefore did not "exist[] on January 1, 1993." LDO 4.3.6(B)(2)(b). In other
4 words, reconfiguration of the underlying parcel disqualified the 1977 dwelling.
5 Thus, only two identified dwellings qualified, and not the required three.

6 Petitioners argue that the hearings officer misconstrued LDO
7 4.3.6(B)(2)(b) and erred in denying the forest template dwelling application
8 because he construed LDO 4.3.6(B)(2)(b) to require that the *parcels* that existed
9 in 1993 "continue to exist" in the same configuration as on January 1, 1993 on
10 the date of the application. According to petitioners, neither the LDO (nor ORS
11 217.750) require that parcels continue to exist in the same configuration as
12 existed on January 1, 1993.

13 The parties dispute the applicable standard of review. Petitioners argue that
14 LDO 4.3.6(B) simply implements ORS 215.750(1)(b) and, thus, our review of
15 the hearings officer's interpretation of the county code is subject to ORS
16 197.835(9)(a)(D) and we will reverse or remand the land use decision if the
17 hearings officer improperly construed applicable law. *Kenagy v. Benton County*,
18 115 Or App 131, 838 P2d 1076, *rev den*, 315 Or 271 (1992); *Forester v. Polk*
19 *County*, 115 Or App 475, 478, 839 P2d 241 (1992). Differently, the county argues
20 that LDO 4.3.6(B) contains additional, more restrictive requirements that ORS
21 215.750, and LUBA "should give deference to the Hearings Officer's

1 interpretation of LDO 4.3.6(B) in that the Board should consider that
2 interpretation in its review." Response Brief 3.

3 In the decision on review, the hearings officer expressly states that LDO
4 4.3.6(B) is substantially identical to ORS 215.750 and will be interpreted
5 consistent with ORS 215.750.[5] The hearings officer also recognizes that the
6 definition of date of creation or existence of a lot in LDO 13.3(60) is substantially
7 the same as that in OAR 660-006-0005(5).[6] The hearings officer's decision does
8 not differentiate between the local code requirements and state law.

9 We agree with petitioners that we review the hearings officer's
10 interpretation of LDO 4.3.6(B) to determine whether the interpretation is correct,
11 affording no deference to the hearings officer's interpretation. ORS
12 197.835(9)(a)(D); *Gage v. City of Portland,* 319 Or 308, 315, 877 P2d 1187

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[5] *See* Record 13 ("The Hearings Officer notes that the language of LDO 4.3.6(B)(2)(b) is substantially identical to the ORS 215.750(2)(b), so the LDO provisions will be interpreted consistently with the referenced, corollary statute."); Record 17 ("Applicant's proposed interpretation loosens the restrictions on residential development on forest lands and allows for additional residential development that would not otherwise be permitted or allowable under the state and local regulatory scheme.").

[6] Record 15 ("The Hearings Officer notes that this language is substantially identical to the definition of 'Date of Creation and Existence' set forth in the administrative rules of the Oregon Land Conservation and Development Department [(LCDC)], OAR 660-006-0005(5)."); Record 16 ("[T]ax lot 203, as currently reconfigured, could not have 'existed on January 1, 1993' as required by the LDO and state statute.").

1 (1994). For the reasons set forth below, we reverse the hearings officer's
2 decision.

3 A local government is not required to allow forest template dwellings.
4 *Yontz v. Multnomah County*, 34 Or LUBA 367, 371, *aff'd*, 155 Or App 644, 967
5 P2d 532 (1998), *rev den*, 328 Or 247 (1999). As the hearings officer recognized:

6 "Oregon case law provides that county regulations may not establish
7 less restrictive standards for approving forest template dwellings
8 than the standards set by ORS 215.750, but a county is permitted, in
9 its discretion, to impose stricter standards. *Reeves v. Yamhill*
10 *County*, 53 Or LUBA 4 (2006); *Miller v. Multnomah County*, 153
11 Or App 30, 40, 956 P2d 209, 215 (1998)." Record 12.

12 We agree with the hearings officer that state law authorizes the county to impose
13 additional restrictions on the development of forest template dwellings which are
14 above and beyond those set forth in the statute.[7] The hearings officer concluded
15 that the local code should be strictly construed to support as principal uses

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[7] In *Miller*, the county denied a property owner's application for a conditional use permit (CUP) for a dwelling in a forest zone. The county's regulations were more restrictive than the applicable version of ORS 215.750(1)(C) (1998), which provided that in western Oregon, a county may allow a single family dwelling on a lot predominantly composed of soil capable of producing more than 85 cubic acre feet per year of wood fiber, where the forest template contains seven lots with the forest template where at least three dwellings existed on January 1, 1993 on the other lots or parcels. The court of appeals rejected the argument that the state statute precluded more restrictive local regulation, citing the provisions in ORS 215.750(4)(a) (1998) that the proposed dwelling was not allowed "[i]f it is prohibited by or will not comply with the requirements of an acknowledged comprehensive plan or acknowledged land use regulations or other provisions of law."

1 "activities that primarily involve management and harvest of timber, firewood
2 and other forest products," and not residential activities, again, citing *Miller.*
3 Record 17. The hearings officer failed, however, to explain whether and how
4 state and local law differ in this case. Instead, the hearings officer appears to have
5 assumed that the county requirements for a template dwelling duplicate and
6 require the same analysis as the state law requirements. *See* n 5.

7 The hearings officer's decision offers no rationale for interpreting
8 language in the LDO differently than that language has been interpreted in the
9 context of state law. We recognize, as the county emphasizes, that the statute and
10 local code language differ because ORS 215.750(2)(b) does not contain the
11 "continue to exist" language found in the LDO. However, the hearings officer
12 did not acknowledge, let alone address or rely on that difference. The hearings
13 officer also does not discuss OAR 660-006-0027(3)(b) or the similarity of the
14 language in the rule to that in the LDO.

15 The hearings officer reasoned:

16 "Former tax lots 200 and 203 are situated in a forest resource zone,
17 the lots were reconfigured long after November 4, 1993, and the lots
18 are being considered in connection with 'the siting of a dwelling'
19 under LDO 4.3.6(B)(2)(b); therefore, the 'date of creation or
20 existence' for reconfigured, current tax lot 203, on which the 1977
21 dwelling sits, is February 25, 2008, when the major partition plat
22 was recorded.

23 "The parties agree, and the Hearings Officer concurs, that the three
24 dwellings required by LDO 4.3.6(B)(2)(b) must be located on one
25 of the seven or more parcels situated within the Forest Template
26 Rectangle and in existence on January 1, 1993.

1 "[Petitioners'] attorney contends that the parcels and dwellings
2 within the Forest Template Rectangle should be counted 'as they
3 existed on January l, 1993' and that the 'parcels are required only to
4 have existed on January 1, 1993 within the [template].' However,
5 the language of LDO 4.3.6(B)(2)(b) is that 'all or part of at least
6 seven (7) other lots or parcels that existed on January 1, 1993, are
7 within [the template.]' * * * The use of the verb 'are' indicates
8 present tense, requiring that the parcels be *currently* located within
9 the selected template. If the state and county had intended to count
10 the qualifying parcels as they existed in 1993, they should have, and
11 would have, used the past tense verb 'were.'

12 "Applying the provisions of LDO 13.3(60), reconfigured former tax
13 lots 200 and 203 were recreated and came into existence in 2008 as
14 current tax lot 203; therefore, the Hearings Officer agrees with and
15 adopts Staff's conclusion that '[current] Tax Lot 203 was created
16 after the January 1, 1993 date and cannot be counted toward
17 qualifying parcels or dwellings.' In other words, tax lot 203, as
18 currently reconfigured, could not have 'existed on January 1, 1993'
19 as required by the LDO and state statute. The Hearings Officer
20 disagrees with Applicant's arguments on this issue, because they
21 disregard the changes to lot configuration that have occurred after
22 1993 and totally ignore the plain language of LDO 13.3(60)."
23 Record 15-16 (emphasis in original; internal citations omitted).

24 In construing the law, we will consider the text, context and legislative
25 history of the law at issue in order to determine the intent of the enacting
26 legislature. *PGE v. Bureau of Labor and Industries*, 317 Or 606, 610-12, 859 P2d
27 1143 (1993); *State v. Gaines*, 346 Or 160, 171-172, 206 P3d 1042 (2009). When
28 determining that the code requires that the lots remain in their 1993 configuration,
29 the hearings officer analyzed LDO 4.3.6(B)(2)(b), which requires "all or part of
30 at least seven (7) other lots or parcels that existed on January 1, 1993, are
31 within a 160-acre square centered on the center of the subject tract; and

1 that at least three (3) dwellings existed on January 1, 1993, and continue to exist
2 on the other lots or parcels[.]"

3 In *Landwatch Lane County v. Lane County*, 75 Or LUBA 151 (2017)
4 (*Sayre*), we rejected the interpretation adopted by the hearings officer in this case.
5 The petitioner Landwatch argued "that the legislature would have used the word
6 'were' if the legislature intended an applicant to turn the clock back and rely on
7 the configuration that existed prior to January 1, 1993 without consideration of
8 later changes to a parcel's configuration" *Id.* at 158. We disagreed with
9 Landwatch that the use of the word "'are' prohibits an applicant from relying on
10 the January 1, 1993 configuration of a later-reconfigured parcel when counting
11 parcels toward the minimum parcel count." *Id.* at 158-59.

12 As support for its position, Landwatch pointed to the Land Conservation
13 and Development Commission (LCDC) definition of "Date of Creation and
14 Existence" at OAR 660-006-0005(5), which states:

15 "When a lot, parcel or tract is reconfigured pursuant to applicable
16 law after November 4, 1993, the effect of which is to qualify a lot,
17 parcel or tract for the siting of a dwelling, the date of the
18 reconfiguration is the date of creation or existence. Reconfigured
19 means any change in the boundary of the lot, parcel or tract."

20 We discussed at length the history of the adoption of this definition in *Sayre* and
21 relied upon that history before concluding that when applying the forest template
22 dwelling requirements set forth in the OAR, there is no requirement that the 1993
23 lots be fixed in time. We explained:

"The administrative rule history of OAR 660-006-0005(5) indicates that LCDC adopted the rule after it recognized that '[t]he reconfiguration of a parcel *to meet parcel and dwelling requirements for template dwellings* * * * is not contemplated by the language of [HB 3661 [(1993)].]' February 11, 1994, Director's Report to LCDC for February 18, 1994 LCDC Meeting, at 4-5 * * *. The minutes of the February 18, 1994 LCDC meeting explain the purpose of OAR 660-006-0005(5):

"'Mr. Blanton said this issue rose out of discussions regarding lot line adjustments and the impact of those lot line adjustments on the requirements of the Goal 4 rule. * * *

"'The department's concern with lot line adjustments and how they affect the date of creation, Mr. Blanton said, is that there are date requirements, particularly for template dwellings on forest land and the lot of record productivity standards that are impacted by the relocation of a lot boundary. *The department wanted to avoid the situation where lot line adjustments are used to qualify a parcel or tract that would not have otherwise qualified under the productivity test, or that the requirement for the template would be moved by the relocation of the common boundary. The department did not believe this was the intent of the drafters of HB 3661, and the reason the 1993 date was put in was not to allow the template to 'walk.'*

"'Mr. Blanton said the proposed language says that when a parcel is reconfigured by moving a lot line, the date that parcel was created changes to the date that it is reconfigured. The commission has heard some concern about how this impacts a road relocation, or a survey error which requires adjustment of a property boundary, or what happens if a property boundary divides a structure. The concern had been raised that the impact of this language unfairly will penalize owners who are seeking lot line adjustments for those reasons.

"'* * * * *

"'Mr. Johnson said there were two other situations staff is concerned about: lot of record on the agricultural side where the predominant soil class has to be determined; and the template situation discussed earlier.

"'Commissioner Brogoitti asked what the affect of this issue would be on county planning departments. Mr. Schlack, AOC land use specialist, said based on staff recommendation, many lots or parcels that would have qualified for a lot of record that because there has been a simple lot line adjustment to address one of the issues [the Lane County Planning Director] identified, would no longer qualify. Mr. Schlack thought there would be people coming to the county saying they thought they did everything right and now this rule is going to disqualify them.

"'*Director Benner said the objective was not to disqualify anyone who qualified prior to the reconfiguration. Nor was the objective to qualify someone who did not qualify prior to the reconfiguration.*

"'Commissioner Pfeiffer recalled testimony from the Realtors Association expressing concern about how broad the draft language was because it appeared to them it captured reconfigurations that occurred prior to November 4, 1993. It was his sense that not only was that not the intent, no one was reading the language to hit reconfigurations that occurred prior to November 4, 1993.

"'The staff returned with the following amendment:

"'(4) Date of creation and existence. When a lot, parcel or tract is reconfigured, <u>pursuant to applicable law after November 4, 1993, the effect of which is to qualify a lot, parcel or tract for the siting of a dwelling</u>, the date of the reconfiguration is the date of creation or existence. Reconfigured means any change in the boundary of the lot, parcel or tract.'

"'It was MOVED by Commissioner Throop, seconded by Commissioner Pfeiffer and passed unanimously to approve the staff recommendation as amended." Minutes, February 18, 1994 LCDC Meeting 22-24." *Sayre*, 75 OR LUBA 159-60 (underscoring in LCDC materials; emphasis in *Sayre*).

The italicized portion of the LDO definition of "creation date" provided below is the same as the OAR definition:

"The recordation date of a document that creates a lot(s) or parcel(s), or the date of execution of an unrecorded land sale contract, deed or other instrument intended to create new lots or parcels. A lawfully created lot or parcel remains discrete unless the lot or parcel liens are vacated, or the lot or parcel is further divided as provided by law. (ORS 92.017). In addition, in resource zones, *when a lot, parcel or tract is reconfigured pursuant to applicable law after November 4, 1993, the effect of which is to qualify a lot, parcel or tract for the siting of a dwelling, the date of reconfiguration is the date of creation or existence. Reconfigured means any change in the boundary of the lot, parcel or tract*. See OAR 660-006-0005 & 033-0020)" LDO 13.3(60) (emphasis added).

We rejected this interpretation of identical language in *Sayre*, and the hearings officer's decision does not include any analysis supporting a different conclusion here. In its response brief, the county argues:

"The only other mention of 'other lots or parcels' in the text of LDO 4.3.6(B)(2)(b) is the 'other lots or parcels that existed on January 1, 1993' that must be within the template. Thus, as found by the Hearings Officer, the term 'other lots and parcels' with regard to the lots or parcels on which the dwellings must continue to exist, must be the previously referenced other 'lots or parcels' that were required to have 'existed on January 1, 1993." Response Brief 8.

1 The county relies on the use of the past tense of the verb "exist" in LDO
2 4.3.6(B)(2)(b) to support a conclusion that the parcels—as they "existed" on
3 January 1, 1993—must "continue to exist" on the date of the application.
4 The hearings officer's decision does not include the interpretation of the
5 "continue to exist" provision that is provided by the county in its brief, or discuss
6 the rule making history we discuss above, or provide any analysis or conclusion
7 that the county code is more restrictive than state law. Instead, the hearings
8 officer states that the LDO should be strictly construed to conserve forest land
9 and to implement Goal 4 (Forest Lands) and the related OAR. Record 17.
10 The hearings officer interpreted the LDO as identical to state law. The
11 hearings officer improperly construed the LDO in a manner that is inconsistent
12 with state law, because, as we explained in *Sayre*, state law does not require that
13 a *parcel* "continue to exist" in the same configuration in order to count a
14 qualifying dwelling sited on that parcel.
15 The assignment of error is sustained.
16 **DISPOSITION**
17 ORS 197.835 sets out LUBA's scope of review and requires LUBA to
18 adopt rules defining the circumstances in which it will reverse rather than remand
19 a land use decision that is not affirmed. Those rules are set out in OAR 661-010-
20 0071(1) and (2). ORS 197.835(9) provides that LUBA shall "reverse or remand"
21 a land use decision if, as relevant here, LUBA finds that the local government
22 "[i]mproperly construed the applicable law." ORS 197.835(9)(a)(D).

1 Additionally, ORS 197.835(10)(a)(A) and (B) require LUBA to reverse a
2 local government decision and order the local government to approve an
3 application for development that was denied by the local government if, in
4 relevant part "the local government decision is outside the range of discretion
5 allowed the local government under its comprehensive plan and implementing
6 ordinances" or "the local government's action was for the purpose of avoiding
7 the requirements of ORS 215.427 or ORS 227.178."
8 Petitioners cite ORS 197.835(9)(a)(D) and argue in the petition for review
9 that the hearings officer "improperly construed the applicable law." Petition for
10 Review 4. Petitioners' requested disposition in the petition for review is reversal.
11 Petition for Review 5 ("[p]etitioners request this Board reverse"); Petition for
12 Review 3 ("[t]he Board should reverse.") Petitioners do not cite ORS
13 197.835(10)(a) or argue that the county's decision must be reversed pursuant to
14 that statute.
15 The county erred as a matter of law because the reasons given for denying
16 the application are prohibited as a matter of law. Therefore, the county's decision
17 must be reversed. OAR 661-010-0071(1)(c).
18 The county's decision is reversed.