

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

3
4 LANDWATCH LANE COUNTY,
5 *Petitioner,*

6
7 vs.

8
9 LANE COUNTY,
10 *Respondent,*

11
12 and

13
14 ERIC SMITH,
15 *Intervenor-Respondent.*

16
17 LUBA No. 2020-079

18
19 FINAL OPINION
20 AND ORDER

21
22 Appeal from Lane County.

23
24 Sean Malone filed the petition for review and reply briefs and argued on
25 behalf of petitioner.

26
27 H. Andrew Clark filed a response brief and argued on behalf of respondent.

28
29 Bill Kloos filed a response brief and argued on behalf of intervenor-
30 respondent.

31
32 ZAMUDIO, Board Member; RUDD, Board Chair, participated in the
33 decision.

34
35 RYAN, Board Member, did not participate in the decision.

36
37 AFFIRMED

03/26/2021

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

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20

NATURE OF THE DECISION

Petitioner challenges a county hearings official decision approving a forest template dwelling.

MOTION TO STRIKE

On October 20, 2020, the county filed the parties’ stipulated motion to extend the time to file the county’s response brief from October 26, 2020, to November 6, 2020. On October 27, 2020, we granted the motion and instructed the parties to submit an amended motion stating the reasons for the extension as required by OAR 661-010-0067(4). On November 6, 2020, the county filed the parties’ amended stipulation to an extension of time to file the county’s response brief, providing the reasons for the extension and again specifying that the due date for the response brief was November 6, 2020. The county filed its response brief on November 8, 2020, two days later than the parties’ stipulation.

Petitioner moves to strike the county’s response brief as untimely. Petitioner does not assert any prejudice to its substantial rights, and we perceive no such prejudice. The late filing is a technical violation. OAR 661-010-0005 (“Technical violations not affecting the substantial rights of parties shall not interfere with the review of a land use decision or limited land use decision.”). Petitioner’s motion to strike is denied.

1 **BACKGROUND**

2 The subject property is approximately 18 acres in size, zoned Impacted
3 Forest Lands (F-2), and vacant. Intervenor applied to the county for approval to
4 establish a forest template dwelling under Lane Code (LC) 16.211(5) (Feb 15,
5 2016), which, as explained further below, implements state law and governs the
6 establishment of template dwellings in the F-2 zone.¹ The planning director
7 approved the application and petitioner appealed to the hearings official, who
8 approved the proposed template dwelling. This appeal followed.

9 **ASSIGNMENT OF ERROR**

10 In a sole assignment of error, petitioner argues that the hearings official
11 misconstrued applicable law by concluding that Gate Creek Road, a county road,
12 legally divided property. ORS 197.835(9)(a)(D). We start by summarizing the
13 applicable law and explaining the facts that are material to this assignment of
14 error. For the reasons explained below, we affirm the hearings official’s decision.

15 Oregon land use law generally preserves for resource uses land that is
16 zoned for agricultural and forestry. However, the governing body of a county
17 may approve the construction of a single-family dwelling “on a lot or parcel
18 located within a forest zone” with soil capable of defined levels of timber
19 production if, among other things, a certain number of “other lots or parcels that

¹ LC 16.211 was amended on June 16, 2020. Those amendments do not apply to the proceeding in this appeal. We refer to the prior code provisions that applied to intervenor’s application.

1 existed on January 1, 1993, are within a 160-acre square centered on the center
2 of the subject tract.” ORS 215.750(2)(a)(A). The 160-acre square is referred to
3 as the “template” and such dwellings are often referred to as “forest template
4 dwellings” or “template dwellings.”

5 Intervenor applied to the county for approval to establish a forest template
6 dwelling under LC 16.211(5), which implements state law and governs the
7 establishment of template dwellings in the F-2 zone. Among other things,
8 intervenor is required to establish that all or part of at least 11 other lots and
9 parcels that existed on January 1, 1993, are within the 160-acre template and that
10 at least three dwellings “existed on January 1, 1993 and continue to exist on the
11 other lots or parcels.” ORS 215.750(2)(c); OAR 660-006-0027(3)(c); LC
12 16.211(5)(c)(iii).

13 A template dwelling may only be established on a lawfully created unit of
14 land and an applicant may only rely on lots or parcels that are “lawfully created”
15 to satisfy the requirements of the forest template dwelling statute. *Friends of*
16 *Yamhill County v. Yamhill County*, 58 Or LUBA 315, *aff’d*, 229 Or App 188,
17 198, 211 P3d 297 (2009).

18 ORS 92.014 provides:

19 “(1) A person may not create a street or road for the purpose of
20 subdividing or partitioning an area or tract of land without the
21 approval of the city or county having jurisdiction over the area
22 or tract of land to be subdivided or partitioned.

23 “(2) Notwithstanding ORS 92.175, an instrument dedicating land
24 to public use may not be accepted for recording in this state

1 unless the instrument bears the approval of the city or county
2 authorized by law to accept the dedication.”

3 As the Court of Appeals explained in *Lovinger v. Lane County*, “[ORS 92.014]
4 presumes that a person *can* create a street or road for the purpose of subdividing
5 or partitioning a tract of land, so long as the city or county having jurisdiction
6 over it approves.” 206 Or App 557, 564-65, 138 P3d 51 (2006) (emphasis in
7 original).

8 The “parent parcel” of what is now Tax Lot 500 consisted of what is now
9 tax lots 500, 501, 502, and 503.² It is undisputed that the parent parcel was
10 lawfully created. In 1910, Gate Creek Road, a “petition road,” was established
11 on the parent parcel.³ Record 351-61. Tax Lot 500 is south of Gate Creek Road,
12 and tax lots 501, 502, and 503 are north of that road.

² For convenience, we refer to the disputed unit of land, Tax Lot 500, 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 that a 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.”).

³ The challenged decision refers to Gate Creek Road as a “petition road” but does not define “petition road.” Our understanding of the hearings official’s reference to “petition road” is informed by ORS 368.073, which provides:

“A county governing body may initiate proceedings to acquire title or a lesser interest in real property for public road purposes:

“(1) On its own action; or

1 In 1979, the portion of Gate Creek Road material to this appeal was
2 dedicated to the county. The deed dedicating the road grants “a public road
3 easement on and over the following described property[,] * * * [s]aid parcel
4 being forever dedicated to the use of the public for road purposes and granting a
5 public road easement.” Record 371.

6 The hearings official found: “[T]he County approved Gate Creek Road in
7 1910 when it accepted the road petition and the road was created. The road
8 divided the land at issue, and tax lot 500 is therefore a lawfully established unit
9 of land.” Record 8. The hearings official counted Tax Lot 500 as one of the 11
10 qualifying parcels and counted the dwelling on Tax Lot 500 as one of the three
11 qualifying dwellings for purposes of approving the forest template dwelling
12 under LC 16.211(5)(c).

“(2) If a person files the following with the county governing
body:

“(a) A *petition* described in ORS 368.081; or

“(b) A written proposal to dedicate or donate land owned by
that person for public road purposes.” (Emphasis
added.)

It appears to us that the 1910 Gate Creek Road petition process resulted in the county viewing, surveying, and marking the road described in the road petition. Record 353. It is not clear to us from the challenged decision or briefing when Gate Creek Road was physically constructed (as opposed to legally created). No party argues that the date of construction has any legal import for purposes of the application of ORS 92.014.

1 Petitioner argues that Tax Lot 500 is not a lawfully created unit of land
2 and, thus, as a matter of law, Tax Lot 500 is not a qualifying parcel and the
3 dwelling located thereon is not a qualifying dwelling. The hearings official’s
4 decision assumes that any road approved by the county serves to divide land
5 under ORS 92.014. Petitioner accepts that a road may legally divide property and
6 create distinct legal parcels.⁴

7 Petitioner’s sole assignment of error is that the hearings official
8 misconstrued ORS 92.014 by concluding that the 1979 dedication of Gate Creek
9 Road divided the parent parcel and lawfully created Tax Lot 500. Petitioner
10 argues that the 1979 dedication conveyed a public road easement and that an
11 easement—as contrasted with a fee title conveyance—cannot not legally divide
12 property as a matter of law. As we understand it, petitioner’s position is that only
13 a road that is created by a deed conveying property in fee title can serve to legally
14 divide property, essentially by creating an intervening parcel under separate
15 ownership.

16 Intervenor responds that we should affirm the hearings official’s decision
17 because petitioner’s assignment of error is based on the 1979 dedication deed and
18 petitioner failed to challenge the hearings official’s dispositive finding that Gate

⁴ The challenged decision and the parties do not address ORS 92.010(9)(d), which excludes from the statutory definition of “partitioning land” the act of selling or granting property to the county for a county road. We need not and do not analyze whether ORS 92.010(9)(d) has any bearing on the correct interpretation of ORS 92.014 in the circumstances of this appeal.

1 Creek Road was legally created as a petition road in 1910. We agree with
2 intervenor. While the 1910 petition and the 1979 dedication deed concern the
3 same county road, Gate Creek Road, the hearings official found that the 1910
4 road petition legally created the road for purposes of ORS 92.014, with the legal
5 effect of dividing the parent parcel and lawfully creating Tax Lot 500. Petitioner
6 does not assign error to that finding in the petition for review. Accordingly,
7 petitioner's argument that, as a matter of law, the 1979 dedication did not legally
8 divide the parent parcel provides no basis for reversal or remand. *See Yeager v.*
9 *Benton County*, 42 Or LUBA 72, 79-80 (2002) (LUBA will affirm a decision
10 where petitioner fails to challenge a finding that independently supports the
11 decision).

12 In a reply brief replying to intervenor's response brief, petitioner argues
13 that the hearings official did not find that the 1910 road petition conveyed fee
14 title to the county. Petitioner quotes the following sentence from the petition for
15 review: "The 1910 petition does not indicate any intent to transfer fee title to the
16 County and no money was exchanged." Petition for Review 6. That sentence is
17 contained in a block quotation describing petitioner's arguments to the hearings
18 official during the local proceeding. Petitioner did not raise or reiterate that same
19 argument to LUBA in the petition for review. In that same reply brief, petitioner
20 points out that the record does not contain any deed conveying separate fee title
21 for any property used as a part of Gate Creek Road. Petitioner also emphasizes
22 in that reply brief that intervenor and respondent do not argue in the response

1 briefs that a road petition is tantamount to a deed, as it relates to the creation of a
2 unit of land.

3 Petitioner thereby argues for the first time in the reply brief that the
4 hearings officer erred in concluding that the 1910 petition road divided the parent
5 parcel and lawfully created Tax Lot 500. We agree with intervenor that petitioner
6 failed to challenge that finding in the petition for review. We do not consider the
7 merits of an argument raised for the first time in the reply brief. *See* OAR 661-
8 010-0039 (“A reply brief * * * shall not include new assignments of error or
9 advance new bases for reversal or remand.”). Because petitioner did not
10 challenge the hearings official’s conclusion that the 1910 petition road divided
11 the parent parcel and lawfully created Tax Lot 500, petitioner’s assignment of
12 error, which is based on the 1979 dedication, provides no basis for reversal or
13 remand.⁵

14 The assignment of error is denied.

15 The county’s decision is affirmed.

⁵ We express no opinion regarding the unchallenged finding that the 1910 petition road legally divided property and thereby lawfully created Tax Lot 500.