

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

3
4 CHRISTIAN FUTURES, INC.,
5 *Petitioner,*

6
7 vs.

8
9 LANE COUNTY,
10 *Respondent,*

11
12 and

13
14 LANDWATCH LANE COUNTY,
15 *Intervenor-Respondent.*

16
17 LUBA Nos. 2021-099/100

18
19 FINAL OPINION
20 AND ORDER

21
22 Appeal from Lane County.

23
24 Michael E. Farthing filed a petition for review and a reply brief and argued
25 on behalf of petitioner.

26
27 No appearance by Lane County.

28
29 Sean T. Malone filed a response brief and argued on behalf of intervenor-
30 respondent.

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

34
35 ZAMUDIO, Board Chair, did not participate in the decision.

36
37 AFFIRMED

06/23/2022

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

NATURE OF THE DECISION

In these consolidated appeals, petitioner appeals two hearings officer decisions reversing two planning director decisions that concluded that property includes two lawfully established units of land.

FACTS

“There is a road, no simple highway.”¹ In 1886, a petition process was initiated with the county to create a road, and the county issued an order establishing Penn Road as a county road. Petitioner’s property totals 10.06 acres and Penn Road runs through the middle of the property. In 2021, petitioner submitted two applications seeking to verify that the land on the east side and the west side of Penn Road comprises two “lawfully established units of land” as defined in Lane Code (LC) 13.030(3)(n). LC 13.030(3)(n) implements ORS 92.010(3)(a), both of which define “lawfully established unit of land” as:

“(i) A lot or parcel created by filing a final plat for subdivision or partition; or

“(ii) Another unit of land created:

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

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

¹ The Grateful Dead, *Ripple, on American Beauty* (Warner Bros. 1970).

1 “(cc) Lawfully established unit of land does not mean a unit
2 of land created solely to establish a separate tax
3 account.”

4 The planning director issued two decisions concluding that the property on
5 each side of Penn Road constituted two lawfully established units of land,
6 pursuant to a longstanding county policy that petitioner argues is reflected in the
7 LC definition of “contiguous” at LC 13.030(3)(g) and LC 16.090(49). We refer
8 to that policy in this opinion as the “roads divide land” policy, and we set out the
9 definition of “contiguous” below. The roads divide land policy has been applied
10 in past county decisions to support a conclusion that a petition road divides land
11 into separate units of land.

12 Intervenor appealed the planning director’s decisions to the hearings
13 officer. The hearings officer issued a decision (Original Decision) that reversed
14 the planning director’s decisions, concluding that (1) contrary to the planning
15 director’s conclusion, ORS 92.014 is inapposite in determining whether Penn
16 Road divided the property into two lawfully established units of land; and (2)
17 petitioner failed to establish that Penn Road is owned by the county in fee.²

² ORS 92.014 provides:

- “(1) A person may not create a street or road for the purpose of subdividing or partitioning an area or tract of land without the approval of the city or county having jurisdiction over the area or tract of land to be subdivided or partitioned.
- “(2) Notwithstanding ORS 92.175, an instrument dedicating land to public use may not be accepted for recording in this state

1 Petitioner sought reconsideration of the Original Decision. The hearings
2 officer issued a decision on reconsideration, concluding that the planning
3 director’s reliance on the county’s “roads divide land” policy—even if the policy
4 was codified in the LC definition of “contiguous”—is inconsistent with the LC
5 definition of “lawfully established unit of land” because that definition does not
6 use the word “contiguous” at all. Record 76-78. Petitioner sought a second
7 reconsideration of the decisions, and the hearings officer denied the request.
8 Record 61-62. Petitioner then sought a third reconsideration of the decision, and
9 the hearings officer denied the request. Record 1. These appeals followed.

10 **FIRST ASSIGNMENT OF ERROR**

11 In two related and overlapping subassignments of error under its first
12 assignment of error, we understand petitioner to argue that the hearings officer
13 improperly construed LC 13.030(3)(n) and the definition of “contiguous” at LC
14 13.030(3)(g) to conclude that the property on each side of Penn Road does not
15 comprise two lawfully established units of land. Petition for Review 13
16 (identifying LUBA’s standard of review under ORS 197.835(9)(a)(D)). LC
17 13.030(3)(g) and LC 16.090(49) both define “contiguous” as “[h]aving at least
18 one common boundary at least eight feet in length. *Tracts of land under the same*
19 *ownership and which are intervened by a street (local access, public, County,*
20 *State, or Federal street) shall not be considered contiguous.” (Emphasis added.)*

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

1 According to petitioner, the county’s “roads divide land” policy is codified in the
2 definition of “contiguous,” which was enacted by the county in 1984. Therefore,
3 petitioner argues, the two units of land were “lawfully established” in 1984.
4 Petition for Review 25.

5 The hearings officer rejected petitioner’s argument below, and we quote at
6 length the hearings officer’s reasoning here:

7 “Historical Background

8 “Since 1975, the County has had a policy that public roads divide
9 lands. That is, where a road bisects a unit of land, the road divides
10 the land into two separate ‘lawfully created’ units of land,
11 notwithstanding that the two properties are in the same ownership,
12 and notwithstanding the type of interest held in the road; *i.e.*,
13 easement or fee title. That policy was originally based on an
14 interpretation of definitions in LC Chapter 13. The definition of
15 ‘Area, Lot or Parcel’ excluded area within a road right of way. The
16 terms ‘division,’ ‘partition land’ and ‘subdivide land’ all included
17 the language ‘to divide an area.’ The definitions were interpreted
18 together to mean that the area of a lot or parcel ended at the road
19 right of way with the effect that roads divided property.

20 “In 1983, the County Board of Commissioners adopted an ordinance
21 that attempted to better codify that policy. Ordinance 16-83. As
22 relevant, Ordinance 16-83 provided a definition of the term ‘divide’:
23 ‘divide’ applied to the separation of a ‘tract’ or contiguous tracts in
24 the same ownership. The ordinance defined the term ‘contiguous’ as
25 follows: ‘Tracts of land under the same ownership and which are
26 intervened by a street * * * shall not be considered contiguous.’
27 These definitions supported the interpretation that ‘portions of a
28 tract in the same ownership that are separated by a public road were
29 not contiguous and were therefore divided by the public road.’ *See*
30 page 2 of Exhibit D (Mann memo) of the applicant’s July 28, 2021
31 submittal.

1 "In 1984, the definitions discussed above, which were found in LC
2 Chapter 13, were added into LC Chapter 16. Two years later, the
3 County adopted Ordinance 10-86 and 11-86 to revise the definitions
4 to comply with legislative changes made to ORS 92 and 215. *See*
5 HB 2381. Those code amendments included the removal of the
6 definition of 'divide,' set forth above. The definition of 'divide' was
7 the term that referred to the definition of 'contiguous,' and thus
8 provided the necessary connection between the definition of
9 'contiguous' and the determination of what constituted a legal lot.
10 However, planning staff took the position that, notwithstanding the
11 removal of the term 'divide,' the code still adequately reflected the
12 'roads dividing lands' policy. Staff pointed to the definition of
13 'area,' which excluded 'County or local access- public streets.' Both
14 of the terms 'partition land' and 'subdivide land' applied to divisions
15 of an 'area.' Accordingly, staff concluded that 'land divisions
16 (partitions and subdivisions) are not required to create areas within
17 a parcel which already exist by virtue of public roads which separate
18 them.' *See* Mann memo at 2-3.

19 "As relevant, LC Chapter 13 was recently amended. The definitions
20 of 'area' and 'contiguous' were retained. The term 'subdivide land'
21 still refers to 'area': 'To divide an area or tract of land into four or
22 more lots within a calendar year.' However, the definition of the
23 term 'partitioning land' no longer includes reference to 'area':
24 'Dividing land to create not more than three parcels of land within a
25 calendar year.'

26 "Issues on Appeal

27 "* * * * *

28 "The applicant's request for reconsideration and final argument on
29 reconsideration addresses the code's definition of the term
30 'contiguous.' However, the applicant does not explain how the
31 definition of that term leads to its conclusion that the creation of
32 Penn Road divided the land that it bisected into two separate
33 properties. The Mann memo explains the history of the County's
34 reliance on the term 'contiguous.'

1 “The County’s first attempt to codify the ‘roads dividing lands’
2 policy in 1983 relied on the definition of ‘contiguous’ along with the
3 definition of the term ‘divide’: the separation of a tract or contiguous
4 tracts in the same ownership. When the term ‘divide’ was removed
5 from the code in 1986, the County relied on the definition of the
6 term ‘area,’ which excludes county or local access public streets, to
7 support its ‘roads dividing lands’ interpretation. *See* Mann Memo at
8 2. However, in the most recent revisions to LC Chapter 13, the
9 reference to the term ‘area’ was removed from the definition of
10 ‘partitioning land.’ In short, the applicant has not explained how the
11 code’s definition of the term ‘contiguous’ relates to the County's
12 determination that a property is a ‘lawfully established unit of land,’
13 which is what the applicant must demonstrate to obtain approval of
14 the subject legal lot verification request.

15 “As set forth in the Hearings Official’s original decision in this
16 appeal, ‘lawfully established unit of land’ means:

17 “(i) A lot or parcel created by filing a final plat for subdivision or
18 partition; or

19 (ii) Another unit of land created:

20 (aa) In compliance with all applicable planning, zoning and
21 subdivision or partition ordinances and regulations; or

22 (bb) By deed or land sales contract, if there were no
23 applicable planning, zoning or subdivision or partition
24 ordinances or regulations.

25 (cc) ‘Lawfully established unit of land’ does not mean a unit
26 of land created solely to establish a separate tax
27 account.’ LC 13.030(3)(n).

28 “The definition does not employ the term ‘contiguous’ or ‘area.’ The
29 code’s definition of ‘lawfully established unit of land’ is taken
30 directly from the definition of that term in ORS Chapter 92. *See* ORS
31 92.010(3)(a). It may be that the County can define the term ‘lawfully
32 established unit of land’ differently than how the statute defines the
33 term, for purposes of determining what constitutes a legal lot. For

1 instance, it is possible that the County could include in its definition
2 of 'lawfully established unit of land' language that clarifies that
3 certain roads serve to divide land. However, the County did not do
4 that.

5 "There does not appear to be any connection between the code
6 definition of 'contiguous' and the determination of whether a
7 property is a lawfully established unit of land. That is, the definition
8 of 'contiguous' in the Lane Code. Any interpretation that attempts
9 to tie them together is unsupported by the language of the code."
10 Record 11-14 (footnotes omitted).

11 We cannot improve on the hearings officer's explanation for rejecting petitioner's
12 argument below, and we adopt it here. We also conclude that the hearings
13 officer's construction of the relevant LC provisions properly construes those
14 provisions.³

15 The first assignment of error is denied.

16 The county's decision is affirmed.

³ We note that the hearings officer also concluded that petitioner failed to establish that the county holds title to Penn Road in fee; that is, that the county is the owner of the road. Record 1051; Intervenor's Response Brief 17. Petitioner does not challenge the hearings officer's conclusion that Penn Road is not owned by the county in fee.