

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

3  
4                   PETER SIKORA,  
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 No. 2022-006

18  
19                  FINAL OPINION  
20                  AND ORDER

21  
22                  Appeal from Lane County.

23  
24                  Bill Kloos filed the petition for review and reply brief and argued on behalf  
25 of petitioner.

26  
27                  No appearance by Lane County.

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29                  Sean T. Malone filed the intervenor-respondent's brief and argued on  
30 behalf of intervenor-respondent.

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

34  
35                  AFFIRMED

07/27/2022

36  
37                  You are entitled to judicial review of this Order. Judicial review is  
38 governed by the provisions of ORS 197.850.

**NATURE OF THE DECISION**

Petitioner appeals a county hearings officer's decision denying their request for legal lot verification.

**FACTS**

Petitioner applied for legal lot verification for Tax Lot 607, an approximately 100-acre property zoned exclusive farm use (E-25).

The county adopted land partition regulations in May 1962 (1962 Subdivision Ordinance). Prior to the adoption of the Subdivision Ordinance, Brabham conveyed by warranty deed to Dickie a portion of a larger property that included Tax Lot 607 (Parent Parcel). In July 1963, after adoption of the Subdivision Ordinance, Brabham conveyed to Dickie by warranty deed a portion of the Parent Parcel adjacent to and directly to the south of the property previously conveyed by Brabham to Dickie (1963 Deed). Petitioner contended in the proceeding below that the 1963 Deed to Dickie was a property line adjustment to enlarge the size of the property previously conveyed to Dickie in January 1962 and not an unlawful partition.<sup>1</sup>

The planning director concluded that that 1963 conveyance to Dickie was not a property line adjustment and that the conveyance effectuated a partition that

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<sup>1</sup> At that time, the 1962 conveyance would not have been subject to the 1962 Subdivision Ordinance because the conveyance predated the adoption of that ordinance.

1 failed to comply with the 1962 Subdivision Ordinance. Therefore, they  
2 concluded, Tax Lot 607 is not a legal lot. Petitioner appealed the decision to the  
3 hearings officer and after conducting a hearing, they affirmed the planning  
4 director's decision. This appeal followed.

#### 5 **FIRST ASSIGNMENT OF ERROR**

6 Petitioner's first assignment of error argues that the hearings officer's  
7 decision improperly construed the applicable law and that it is not supported by  
8 substantial evidence in the whole record. ORS 197.835(9)(a)(C) and (D).

#### 9 **A. OEC 311(1)(x)**

10 Petitioner first argues that the hearings officer erred in failing to apply the  
11 presumption set forth in Oregon Evidence Code (OEC) 311(1)(x) that "[t]he law  
12 has been obeyed" in evaluating the 1963 Deed. The hearings officer concluded  
13 that applying the OEC 311(1)(x) presumption would improperly shift the burden  
14 of proof from the applicant, who has the burden to establish by a preponderance  
15 of the evidence that Tax Lot 607 is a legal lot, to the opponents, and declined to  
16 apply the presumption. Petitioner argues that applying OEC 311(1)(x) would not  
17 improperly shift the burden of proof but rather would allow petitioner to establish  
18 that the 1963 Deed was a property line adjustment.

19 Intervenors respond, and we agree, that the hearings officer correctly  
20 concluded that it was neither appropriate nor required to apply OEC 311(1)(x) in  
21 evaluating whether the 1963 Deed was a property line adjustment rather than an  
22 unlawful partition. The presumption in OEC 311(1)(x) does not apply to a legal

1 lot verification because the application of that presumption would impermissibly  
2 shift the burden away from the applicant. Accordingly, the hearings officer did  
3 not err in refusing to apply it.

4 **B. Substantial Evidence**

5 The applicant carries the burden of proof to establish that applicable  
6 criteria are satisfied, regardless of whether the criteria requires the applicant to  
7 prove a positive or negative. *York v. Clackamas County*, \_\_\_ Or LUBA \_\_\_, \_\_\_  
8 (LUBA No 2019-081, Jan 9, 2020) (slip op at 12). Here, in order to demonstrate  
9 that Tax Lot 607 is a legal lot, petitioner was required to demonstrate that the  
10 1963 Deed was a property line adjustment rather than a partition that failed to  
11 comply with the 1962 Subdivision Ordinance.

12 We understand petitioner to argue that the hearings officer erred in  
13 concluding that the evidence in the record failed to support a conclusion that the  
14 1963 Deed was a property line adjustment, because there is no evidence in the  
15 record to support a conclusion that the 1963 Deed was a partition that failed to  
16 comply with the 1962 Subdivision Ordinance. In other words, we understand  
17 petitioner to argue that the hearings officer could not reasonably conclude that  
18 the 1963 Deed was an unlawful partition unless there was evidence in the record  
19 that it was not a property line adjustment. Petition for Review 26.

20 We understand petitioner to argue that the evidence in the record supports  
21 only a conclusion that the 1963 Deed was a property line adjustment that was not  
22 required to comply with the 1962 Subdivision Ordinance. The evidence petitioner

1 points to is (1) the Dickies' ownership of the property to the north when the 1963  
2 Deed was executed and recorded; (2) that no dwelling has ever existed on the  
3 property conveyed in the 1963 Deed; (3) there is no evidence that the property  
4 conveyed in the 1963 Deed has ever been treated as a separate parcel; and (4) that  
5 a 1976 partition created two parcels from the property owned by the Dickies, a  
6 partition that would not have been necessary if the Dickies' properties already  
7 consisted of two separate parcels.

8 The hearings officer considered each of petitioner's arguments and  
9 concluded that petitioner had not satisfied their burden to establish that the 1963  
10 Deed was a property line adjustment rather than a partition that failed to comply  
11 with the 1962 Subdivision Ordinance. Record 8-10. The hearings officer  
12 concluded that the evidence in the record did not demonstrate that the 1963 Deed  
13 effectuated a property line adjustment rather than a conveyance, because the  
14 evidence was speculative.

15 Substantial evidence is evidence a reasonable person would rely on in  
16 making a decision. *Dodd v. Hood River County*, 317 Or 172, 179, 855 P2d 608  
17 (1993) (citing *Younger v. City of Portland*, 305 Or 346, 351-52, 752 P2d 262  
18 (1988)). In reviewing a substantial evidence challenge, LUBA's role is not to  
19 reweigh the evidence, but rather to determine if a reasonable person, viewing the  
20 whole record, could reach the conclusion that the decision maker reached. *1000*  
21 *Friends of Oregon v. Marion County*, 116 Or App 584, 587-88, 842 P2d 441  
22 (1992). LUBA is not authorized to second guess the judgments made by local

1 decision makers with respect to the credibility of evidence presented at local land  
2 use hearings. *Sanders v. Clackamas County*, 10 Or LUBA 231, 237 (1984). We  
3 conclude that the hearings officer could reach the conclusion they reached,  
4 viewing the whole record.

5 The first assignment of error is denied.

6 **SECOND ASSIGNMENT OF ERROR**

7 The 1962 Subdivision Ordinance exempted an “exchange of land between  
8 owners of abutting property” from its requirements. Record 10. In the second  
9 assignment of error, petitioner argues that the land division accomplished by the  
10 1963 Deed was not required to comply with the 1962 Subdivision Ordinance  
11 because the “exchange of land” provision applied to circumstances where a  
12 property line shifted in exchange for money.

13 The hearings officer rejected that construction below and concluded that  
14 the “exchange of land” provision applied “to swaps of land between abutting  
15 property owners, where one owner gave a piece of his land to the adjoining  
16 property owner, and in consideration, the adjoining property owner transferred to  
17 his neighbor a piece of his land.” Record 11. The hearings officer relied on the  
18 dictionary definition of “exchange”: “to give and receive reciprocally (as things  
19 of the same kind: BARTER, SWAP[.]” *Id.* The hearings officer also relied on the  
20 phrase “of land” to conclude that the provision requires *land* to be swapped.  
21 Petitioner argues that the hearings officer improperly construed the exchange of  
22 land provision because the dictionary definition also includes “1: the act of

1 giving or taking one thing in return for another as if equivalent[.]” Petition for  
2 Review 31 (citing *Webster’s Third New Int’l Dictionary* (unabridged ed 2002) at  
3 792).

4 Intervenor argues, and we agree, that the hearings officer properly  
5 construed the “exchange of land” provision to apply only in circumstances where  
6 a swap of land between abutting property owners occurred, and not to  
7 circumstances where land was exchanged for money. The hearings officer relied  
8 on the plain, ordinary meaning of the word “exchange” and the phrase “of land”  
9 in reaching their conclusion.

10 The second assignment of error is denied.

11 The county’s decision is affirmed.