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

WINDLINX RANCH TRUST,
Petitioner,

vs.

DESCHUTES COUNTY,
Respondent,

and

HODGE KERR and DEBORA KERR,
Intervenors-Respondents.

LUBA No. 2022-022

FINAL OPINION
AND ORDER

Appeal from Deschutes County.

Christopher P. Koback filed the petition for review and reply brief and argued on behalf of petitioner. Also on the brief was Hathaway Larson LLP.

No appearance by Deschutes County.

Tia M. Lewis filed the intervenors-respondents' brief and argued on behalf of intervenors-respondents. Also on the brief was Schwabe, Williamson & Wyatt, P.C.

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

REMANDED 07/07/2022

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

Opinion by Ryan.

NATURE OF THE DECISION

Petitioner appeals a hearings officer decision approving a forest template dwelling.

MOTION TO INTERVENE

Hodge Kerr and Debora Kerr (intervenors), the applicants below, move to intervene on the side of the county. There is no opposition to the motion, and it is allowed.

FACTS

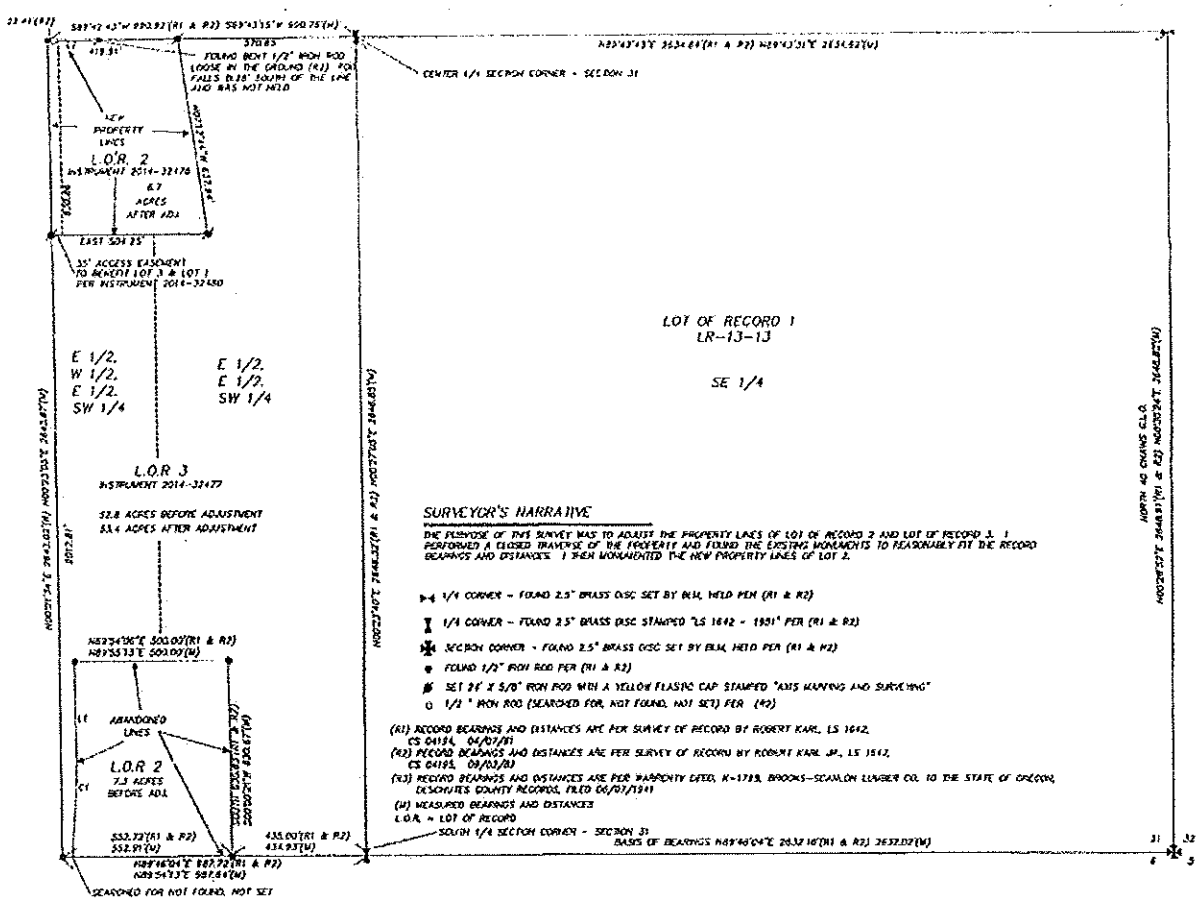
Intervenors own an approximately 6.7-acre parcel that is vacant, zoned Forest Use (F-2), and referred to as Tax Lot 99. To the west of the subject property is the Oregon High Desert Museum (the Museum), and to the west of the Museum is U.S. Highway 97. To the east and south of the subject property is an approximately 213.4-acre tax lot that is developed with a dwelling, zoned F-2, and referred to as Tax Lot 4412.

To the north and northwest of the subject property are three parcels that are owned by petitioner, zoned F-2, and referred to as Parcels 1, 2, and 3, at least one of which is developed with a dwelling. Those three parcels were created in 1990 when petitioner's predecessors-in-interest sought and received approval of a partition (1990 Partition). Record 1271. Petitioner also owns property to the north of those three parcels, but that property is not depicted on the plat for the 1990 Partition. The plat for the 1990 Partition depicts a 60-foot-wide "roadway

easement" running north to south through Parcel 3. The plat also depicts a 60-foot-wide "access easement" running from "Knott Road (Proposed)" south to the northern boundary of Parcel 3 and connecting to the roadway easement.[1] Knott Road is a public road.

In 1994, petitioner's predecessors-in-interest granted to intervenors' predecessors-in-interest—who, at the time, owned Tax Lots 99 and 4412—a 30-foot-wide easement over petitioner's properties to access Knott Road (1994 Easement). Record 215, 1307-12. In 2013, the county approved a property line adjustment that relocated the property lines for Tax Lot 99 from the southwest corner of Tax Lot 4412 to the northwest corner of Tax Lot 4412, as depicted here:

[1] The plat for the 1990 Partition includes a dedication to the public for "all streets and easements as shown." Record 1271.



Record 866. Also in 2013, the county issued a lot of record verification pursuant to Deschutes County Code (DCC) 22.04.040 that verified that Tax Lot 4412 comprises two "lots of record" and that Tax Lot 99 comprises one lot of record (2013 Lot Verification).[2] Record 1273-74. In that lot of record verification

[2] DCC 22.04.040 provides, in relevant part:

> "A. Purpose; scope. Concurrent with or prior to the issuance of certain permits, a lot or parcel shall be verified pursuant to this section to reasonably ensure compliance with the zoning and land division laws in effect on the date the lot or parcel was created. Not all permits require verification. If required, verifying that the lot or parcel was lawfully created is a

process, the county determines whether a property is a "lot of record," as defined at DCC 18.04.030.[3]

> threshold issue that should be addressed before the permit may be issued, but does not supersede or nullify other permit requirements. This section 22.04.040 provides an applicant the option to concurrently verify a lot or parcel as part of applying for a permit that requires verification, or preliminarily apply for a declaratory ruling to thereby determine the scope of available permits.
>
> "* * * * *
>
> "D. Findings; Declaratory Ruling. If an applicant is applying for a land use permit listed in subsection (B)(1), the County shall include a finding verifying that the lot or parcel meets the 'lot of record' definition in 18.04.030, a finding noting that the lot or parcel does not meet the 'lot of record' definition in 18.04.030, or a finding noting that verification was not required because the lot or parcel qualified for an exception pursuant to subsection (B)(2). If an applicant is applying for a permit listed in subsection (B)(1) that does not require public notice, or prior to applying for any permit, an applicant may request a declaratory ruling pursuant to DCC Chapter 22.40. If the lot or parcel meets the 'lot of record' definition in 18.04.030, the County shall issue the declaratory ruling determining that the lot or parcel qualifies for all permits listed in subsection (B)(1). If the lot or parcel does not meet the 'lot of record' definition in 18.04.030, the County shall not issue the declaratory ruling and instead shall provide the applicant information on permit options that do not require verification and information on verification exceptions that may apply pursuant to subsections (B)(2)."

[3] DCC 18.04.030 defines "lot of record" to mean, in relevant part,

In 2021, intervenors applied for a forest template dwelling on Tax Lot 99, and the planning director approved the application. Petitioner appealed the decision to the hearings officer, which held a hearing on the application and, at the conclusion, left the record open. Thereafter, the hearings officer approved the application. The board of county commissioners declined to review the hearings officer's decision. This appeal followed.

> "[a] lot or parcel at least 5,000 square feet in area and at least 50 feet wide, which conformed to all zoning and subdivision or partition requirements, if any, in effect on the date the lot or parcel was created, and which was created by any of the following means:
>
> "1. By partitioning land as defined in ORS 92;
>
> "2. By a subdivision plat, as defined in ORS 92, filed with the Deschutes County Surveyor and recorded with the Deschutes County Clerk;
>
> "3. By deed or contract, dated and signed by the parties to the transaction, containing a separate legal description of the lot or parcel, and recorded in Deschutes County if recording of the instrument was required on the date of the conveyance. If such instrument contains more than one legal description, only one lot of record shall be recognized unless the legal descriptions describe lots subject to a recorded subdivision or town plat.
>
> "4. By a town plat filed with the Deschutes County Clerk and recorded in the Deschutes County Record of Plats;
>
> "5. By the subdividing or partitioning of adjacent or surrounding land, leaving a remainder lot or parcel."

FIRST AND SECOND ASSIGNMENTS OF ERROR

Former ORS 215.750(2) (2017), *renumbered as* ORS 215.750(3) (2019), provides:

> "In eastern Oregon, a governing body of a county or its designate may allow the establishment of a single-family dwelling on a lot or parcel located within a forest zone if the lot or parcel is predominantly composed of soils that are:
>
> (a) Capable of producing 0 to 20 cubic feet per acre per year of wood fiber if:
>
> (A) All or part of at least three 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 dwellings existed on January 1, 1993, on the other lots or parcels;
>
> (b) Capable of producing 21 to 50 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 dwellings existed on January 1, 1993, on the other lots or parcels; or
>
> (c) Capable of producing more than 50 cubic feet per acre per year of wood fiber if:
>
> (A) All or part of at least 11 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 dwellings existed on January 1, 1993, on the other lots or parcels."[4]

DCC 18.40.040(5) implements that statute. Under the statute, in order to gain approval of a forest template dwelling, an applicant must identify the soils that predominantly compose the property. The statute provides that, as the soil capability for producing wood fiber increases, more dwellings are required to already exist within the template in order to site a new dwelling.

Natural Resources Conservation Service (NRCS) mapping shows that the subject property is composed entirely of Mapping Unit 156C soils (Wanoga-Fremkle-Henkle complex.[5] The NRCS rates both Wanoga and Henkle soils as

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[4] ORS 215.750 was originally enacted in 1993 in House Bill 3661. Or Laws 1993, ch 792, § 4(6) - (8). *See generally Friends of Yamhill County v. Yamhill County*, 229 Or App 188, 192, 211 P3d 297 (2009) (interpreting ORS 215.750 and explaining the overarching statutory scheme).

[5] Under OAR 660-006-0010, lands suitable for commercial forest uses must be identified using mapping supplied by the NRCS. OAR 660-006-0010 provides:

"(1) Governing bodies shall identify 'forest lands' as defined by Goal 4 in the comprehensive plan. Lands inventoried as Goal 3 agricultural lands, lands for which an exception to Goal 4 is justified pursuant to ORS 197.732 and taken, and lands inside urban growth boundaries are not required to planned and zoned as forest lands.

"(2) Where a plan amendment is proposed:

(a) Lands suitable for commercial forest uses shall be identified using a mapping of average annual wood production capability by cubic foot per acre (cf/ac) as

capable of producing 50 cubic feet per acre per year of wood fiber (cf/ac/yr), and it rates Fremkle soils as capable of producing 47 cf/ac/yr.

Intervenors submitted a forester's report that (1) confirmed the soil makeup of the property and (2) included the results of a forest productivity site assessment that the forester conducted to determine whether the NRCS data was accurate. The assessment measured six trees in various locations on the property. Record 1122-24. The forester concluded, based on the measurements of the trees, that the soils on the property are predominantly capable of producing less than 50 cf/ac/yr.

> reported by the USDA Natural Resources Conservation Service. *Where NRCS data are not available or are shown to be inaccurate, other site productivity data may be used to identify forest land*, in the following order of priority:
>
> "(A) Oregon Department of Revenue western Oregon site class maps;
>
> "(B) USDA Forest Service plant association guides; or
>
> "(C) Other information determined by the State Forester to be of comparable quality.
>
> "(b) Where data of comparable quality under paragraphs (2)(a)(A) through (C) are not available or are shown to be inaccurate, an alternative method for determining productivity may be used as described in the Oregon Department of Forestry's Technical Bulletin entitled 'Land Use Planning Notes, Number 3 April 1998, Updated for Clarity April 2010.'" (Emphasis added.)

Petitioner also submitted a forester's report, which concluded, based on intervenors' forester's tree measurements as well as measurements of trees on petitioner's adjacent property, that the subject property is predominantly capable of producing 85 cf/ac/yr.[6] Record 794-838. Intervenors' forester then provided a response to petitioner's forester's report that confirmed that the on-site data collected was consistent with the NRCS data. The response noted that, although approximately 25 percent of the subject property has the potential to support Ponderosa pine trees that exceed 50 cf/ac/yr, the property includes other limitations such as lava flow ridges that channel water into pockets of deeper soil in some areas, producing better soils for tree growth. Record 186-89. The hearings officer relied on intervenors' forester's evidence to conclude that the subject property is not predominantly capable of producing more than 50 cf/ac/yr and adopted findings explaining why they did so. Record 45-46.

In the first and second assignments of error, petitioner argues that the hearings officer's conclusion that the subject property is predominantly capable of producing 50 cf/ac/yr or less is not supported by substantial evidence and that the evidence in the record supports a conclusion that the property is predominantly capable of producing 85 cf/ac/yr.

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[6] Petitioner's forester relied on the alternative methods described in OAR 660-006-0010(2)(a). *See* n 5.

A. First Assignment of Error

In its first assignment of error, petitioner argues that the hearings officer's conclusion that the subject property is predominantly composed of soils that are capable of producing less than 50 cf/ac/yr is not supported by substantial evidence in the whole record. ORS 197.835(9)(a)(C). We understand petitioner to argue that the hearings officer's decision to rely on intervenors' forester's evidence is not a decision that a reasonable person would make, based on the evidence in the record.

Substantial evidence is evidence a reasonable person would rely on in making a decision. *Dodd v. Hood River County*, 317 Or 172, 179, 855 P2d 608 (1993). LUBA will generally not second guess a land use decision-maker's choice between conflicting expert testimony, so long as it appears to LUBA that a reasonable person could decide as the decision-maker did, based on all of the evidence in the record. *Westside Rock v. Clackamas County*, 51 Or LUBA 264, 294 (2006); *Wal-Mart Stores, Inc. v. City of Bend*, 52 Or LUBA 261, 276 (2006) ("The critical issue for the local decision maker will generally be whether any expert or lay testimony offered by opponents raises questions or issues that undermine or call into question the conclusions and supporting documentation that are presented by the applicant's experts and, if so, whether any such questions or issues are adequately rebutted by the applicant's experts.").

We agree with the intervenors that a reasonable person could rely on intervenors' forester's initial assessment and subsequent response to petitioner's

forester's evidence to conclude that the soils on the property are predominantly capable of producing less than 50 cfac/yr.

The first assignment of error is denied.

B. Second Assignment of Error

Petitioner's second assignment of error is contingent on its first assignment of error. Petitioner argues that the evidence in the record (1) demonstrates that *former* ORS 215.750(2)(c) (2017) applies and (2) fails to establish that 11 other lots or parcels within the template existed on January 1, 1993. Because we deny petitioner's first assignment of error that challenges the evidentiary basis to support the hearings officer's conclusion, we deny this assignment of error as well.

The first and second assignments of error are denied.

THIRD ASSIGNMENT OF ERROR

A forest template dwelling under ORS 215.750 may be established only on a lawfully created parcel. *Friends of Yamhill County v. Yamhill County*, 229 Or App 188, 198, 211 P3d 297 (2009).[7] In its third assignment of error, petitioner argues that the subject property is not a lawfully created parcel because its

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[7] ORS 215.010(1)(a) provides that the term "parcel" includes units of land created either (1) by partitioning pursuant to statute; (2) "[i]n compliance with all applicable planning, zoning and partitioning ordinances and regulations"; or (3) by deed or contract, if no such ordinances or regulations were applicable. The definition expressly applies to ORS chapter 215. *Friends of Yamhill County*, 229 Or App at 192.

property lines were adjusted in 2013 pursuant to a property line adjustment. Petitioner argues that, under "OAR 660-006-0005," the date of creation of the subject property is 2013, the date of the 2013 property line adjustment, and that the county could not approve the application because the subject property in its current configuration did not exist on January 1, 1993.[8]

Intervenors respond, initially, that petitioner failed to raise, prior to the close of the initial evidentiary hearing, the issue that, under OAR 660-006-0005, the subject property has a new date of creation due to the 2013 property line adjustment. Therefore, intervenors argue, petitioner is precluded from raising the issue for the first time on appeal to LUBA. ORS 197.835(3); *Boldt v. Clackamas County*, 107 Or App 619, 623, 813 P2d 1078 (1991) (petitioner's arguments must have given the county "fair notice" that it needed to address that issue). Petitioner cites Record 855 and 1172 to demonstrate where the issue was raised. Petition for Review 13; Reply Brief 2.

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[8] OAR 660-006-0005 contains 15 definitions. We assume petitioner references the definition of "date of creation and existence" at OAR 660-006-0005(5), which provides:

> "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."

We have reviewed the cited record pages, and nothing in those pages raises the issue petitioner now raises in the third assignment of error. Accordingly, the issue raised in the third assignment of error is waived.

The third assignment of error is denied.

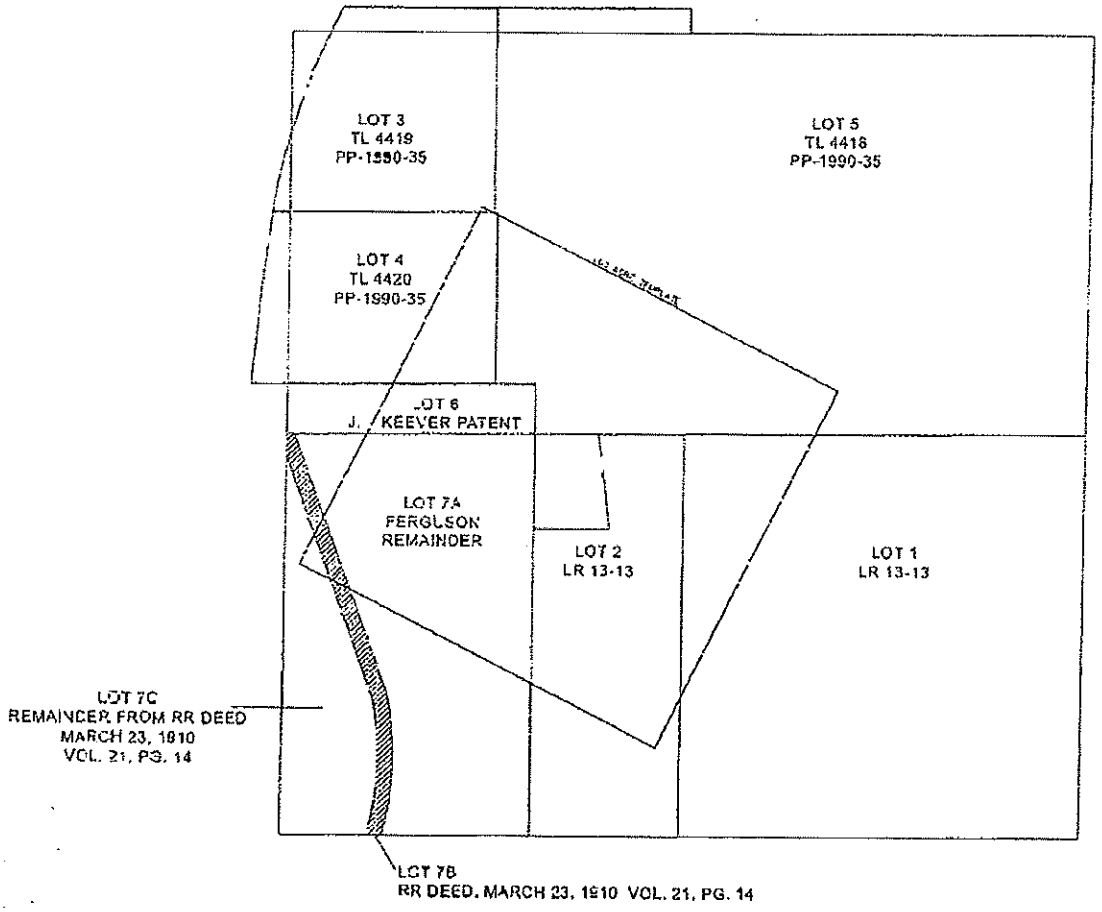
FOURTH ASSIGNMENT OF ERROR

Only parcels that were lawfully created may be counted in determining whether the requirements of the forest template dwelling statute have been met. *Friends of Yamhill County*, 229 Or App at 198. *Former* ORS 215.750(2) (2017) does not define the term "parcel." However, ORS 215.010(1)(a) provides that, for the purposes of ORS chapter 215, "parcel" 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."

Thus, a "parcel," as used in *former* ORS 215.750(2) (2017), means a unit of land created in one of the ways specified in ORS 215.010(1)(a) or ORS 92.010. In other words, a "parcel," as used in *former* ORS 215.750(2) (2017), must be a "lawfully created" unit of land. An applicant cannot rely on lots or parcels that were not "lawfully created" to satisfy the requirements of the forest template dwelling statute. *Landwatch Lane County v. Lane County*, 79 Or LUBA 65, 68 (2019); *Friends of Yamhill*, 229 Or App at 198.

As discussed above, intervenors were required to identify at least seven qualifying parcels. Intervenors identified a minimum of seven and a maximum of nine parcels that intervenors argued were lawfully created "lots or parcels." Intervenors referred to those parcels as Lots 1 through 7 and, more specifically, referred to Lot 7 as Lots 7a, 7b, and 7c.[9] The hearings officer concluded that intervenors established that there exist nine lawfully created parcels within the template. Record 47-51. Intervenors' template and the lots are shown below:



[9] Intervenors' application stated that they were not relying on Lot 7c to meet the required template test. Record 1249.

Record 1127. The subject property is not numbered, but it is within the template, in the upper left-hand corner of Lot 2.

In its fourth assignment of error, we understand petitioner to argue that the hearings officer's conclusion that there exist at least seven lawfully created parcels within the template is not supported by substantial evidence in the whole record because there is no evidence in the record that Lots 2, 6, and 7, including Lots 7a, 7b, and 7c, were created in a manner described in ORS 215.010(1)(a). We also understand petitioner to argue that the hearings officer's decision improperly construes *former* ORS 215.750(2) (2017).

A. Lot 2

In *Central Oregon Landwatch v. Deschutes County*, we explained that a "lot of record" for purposes of the DCC is not the same thing as a "parcel" for purposes of ORS 215.010(1)(a):

> "Petitioner is correct that a 'lot of record,' as defined at DCC 18.04.030, is not necessarily the same thing as a 'lot' or 'parcel' for purposes of ORS 215.284(2)(c). While the statute and statutory definitions are not approval criteria in the usual sense, the corresponding code provisions implement the statute, and the county cannot lawfully make land use determinations under its code that are contrary to the statutes implemented. *See Kenagy v. Benton County*, 115 Or App 131, 838 P2d 1076, *rev den*, 315 Or 271 (1992) (a local government interpretation of a local code provision that implements state law is not subject to deference). We therefore focus on the relevant statutory provisions.
>
> "* * * * *
>
> "Comparing the definition of 'parcel' at ORS 215.010(1) to the

> definition of 'lot of record' at DCC 18.04.030 * * * makes it clear that a parcel, as statutorily defined, does not necessarily qualify as a 'lot of record.' For example, a unit of land may be a 'parcel' for purposes of ORS 215.010(1) but, if it is less than 50 feet wide, it cannot qualify as a 'lot of record.' Conversely, it is possible that a unit of land could qualify as a 'lot of record' but not constitute either a 'lot' or 'parcel' under the statutory definitions. A unit of land created by a 'town plat,' for example, may not slot neatly into the statutory categories of either 'lot' or 'parcel.'" ___ Or LUBA ___, ___ (LUBA Nos 2021-110/111, Mar 1, 2022), *aff'd*, 320 Or App 650, ___ P3d ___ (2022) (slip op at 11-13).

In *Central Oregon Landwatch*, the uncontroverted evidence in the record was that the parcels at issue were created by deed long before planning and zoning ordinances were in effect in the county. Accordingly, we concluded that it was not error for the hearings officer in that case to rely on a prior decision introduced into the record that verified the parcels at issue as "lots of record" pursuant to the definition at DCC 18.04.030, which is analogous to ORS 215.010(1)(a).

In the present appeal, the hearings officer found that Lot 2 was lawfully created, relying on the 2013 Lot Verification:

> "The prior decision in County file LR-13-13 unambiguously determines that Lot 2 was lawfully created in 1906 * * *. In that decision, * * * the County noted '[Lot 2] includes the remaining portion of tax lot 4412' and that it 'was created by the land patent from the United States to John Ferguson dated May 1, 1906, *and the subsequent development of the High Desert Museum, which left the remainder of tax lot 4412 as a legal lot of record.*' I find no basis to determine that the County's earlier lot of record verification was wrong, and because the County's lot of record verification process requires that a lot was lawfully created, I find that [intervenors have] established Lot 2 was a lawfully created parcel as of January 1, 1993." Record 48 (emphasis added).

Petitioner argues that the evidence in the record does not establish that Lot 2 was created in one of the ways described in ORS 215.010(1)(a). Rather, petitioner argues, the evidence in the record establishes that, in 2013, the county verified that Lot 2 is a "lot of record" within the meaning of DCC 18.04.030. According to petitioner, the hearings officer's reliance on the 2013 Lot Verification is not sufficient here because that lot of record verification relied on development permits previously issued to the Museum, which is not a manner of lawful creation specified in ORS 215.010(1)(a) (or in DCC 18.04.030, for that matter). *See Grimstad v. Deschutes County*, 74 Or LUBA 360, 375 (2016) ("Neither the decision nor intervenor explains how a development permit approval can create a unit of land, much less a unit of land that is also a Lot of Record as defined at DCC 18.04.030."). Accordingly, petitioner argues that the evidence in the record does not support a conclusion that Lot 2 is a lawfully created parcel.

Intervenors respond that the evidence in the record supports the hearings officer's conclusion that Lot 2 was created by deed. However, we do not understand the hearings officer to have concluded that Lot 2 was created solely by deed, and the findings do not identify a date on which a deed created Lot 2 or otherwise explain why Lot 2 is a "lawfully created" parcel within the meaning of ORS 215.010(1)(a). The findings, quoted above, rely, in part, on a 1906 land patent "*and* the subsequent development of the High Desert Museum, which left the remainder of tax lot 4412 as a legal lot of record." Record 48 (emphasis added); *see also* Record 1273-74. It is not clear what bearing the subsequent

development of the Museum on the property to the west has on whether Lot 2 was lawfully created. Accordingly, we agree with petitioner that the hearings officer's conclusion that Lot 2 was lawfully created is not supported by substantial evidence in the whole record. On remand, the hearings officer should determine whether Lot 2 was created in one of the ways specified in ORS 215.010(1)(a).

B. Lot 6

Lot 6 was originally part of a larger, 320-acre parcel conveyed by patent to Kever in 1908 (Kever Patent). The property that composes Lot 6 is owned by the Museum. The hearings officer concluded that Lot 6 was created in 1990 as a remainder of petitioner's predecessor's property that was not included in the 1990 Partition and that Lot 6 is a lawfully created remainder parcel.[10] Record 48-50.

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[10] The hearings officer found:

> "It is undisputed that Lot 6 was part of the Kever Patent in 1908 and that the Kever Patent consisted of the northwest quarter of Section 31 in Township 18 South, Range 12 E[ast]. The 1990 recorded partition plat [intervenors rely] on shows that this same quarter section was a portion of the overall parcel partitioned through County file MP-90-8. Lots identified as Parcel 1, Parcel 2, and Parcel 3 were created through that action and covered a majority of the quarter section. The only portion of the quarter section not included in those parcels, i.e. remainders, appear to be the Kever strip immediately to the south of Parcel 2 and a small triangular portion on the opposite side of the Highway 97 right-of-way to the northwest of Parcel 1. This official act by the County left the Kever strip (Lot 6) as a separate lot, with the County having utilized the

The hearings officer rejected petitioner's argument below that Lot 6 is not a lawfully created parcel because the property's owner, the Museum, has, in the past, included it as part of a single, large lot of record in other land use permit applications that the county approved. Petitioner does not develop a challenge to the hearings officer's findings rejecting that argument, and we will not develop such a challenge for petitioner. *Deschutes Development v. Deschutes Cty.*, 5 Or LUBA 218, 220 (1982).

Petitioner argues that the hearings officer improperly relied on a portion of DCC 18.04.030 which provides that a remainder parcel that is left after a partition or subdivision can be a "lot of record" but does not have any bearing on whether such a parcel is a lawfully created parcel. *See* n 3. Petitioner points out that that portion of the definition of "lot of record" at DCC 18.04.030 has no analog in the definition of "parcel" at ORS 215.010(1)(a) or the definition of "lawfully established unit of land" at ORS 92.010(3). According to petitioner, Lot 6 was not created "[b]y partitioning land as defined in ORS 92.010" or "[i]n compliance

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> remainder of the Kever Patent for partition Parcels 1 through 3. As [intervenors note], this also appears to be the first time this portion of the Kever Patent was lawfully adjusted.
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> "* * * * *
>
> "Based on the foregoing, the only lawful processes affecting the size and configuration of Lot 6 were the original creation of the Kev[e]r Patent in 1908 and the partition in 1990 that left Lot 6 as a remainder parcel. Lot 6, in its current configuration, is therefore a lawfully created lot that can be used in the template analysis." Record 49-50.

with all applicable planning, zoning and partitioning ordinances and regulations" because the property that composes Lot 6 was not included in the partition plat at all. Intervenors respond that the hearings officer correctly concluded that the 1990 Partition created Lot 6 as a lawfully created remainder parcel.

The issue presented here requires us to interpret ORS 215.010(1)(a), and it appears to be one of first impression. ORS 215.010(1)(a)(A) provides that, for the purposes of ORS chapter 215 and this appeal, "parcel" includes a unit of land created "[b]y partitioning land as defined in ORS 92.010." ORS 92.010(9) in turn defines "partitioning land" to mean "dividing land to create *not more than three parcels of land* within a calendar year." (Emphasis added.) ORS 92.010(7) (1989), which was in effect when the 1990 Partition was approved, similarly provided that "partition land" meant "to divide land into *two or three parcels* of land within a calendar year." (Emphasis added.) Therefore, in order to be approved in accordance with ORS 92.010(7) (1989), the 1990 Partition could create up to three parcels. The 1990 Partition created the three parcels that are shown on the approved partition plat. If the 1990 Partition created a fourth "parcel," the action would have qualified not as a partition but, rather, as a subdivision. *See* ORS 92.010(13) (1989) (defining "subdivide land" to mean "to divide land into four or more lots within a calendar year"). Accordingly, we

conclude that Lot 6 was not created by "partitioning land," and, accordingly, Lot 6 does not meet the definition of "parcel" at ORS 215.010(1)(a).[11]

C. Lot 7

The hearings officer concluded that there was "no dispute" that Lot 7 is a lawfully created parcel, and that the only dispute below was whether Lot 7 is actually comprised of three lawfully created parcels—Lots 7a, 7b, and 7c—as opposed to being a single lawfully created parcel. Record 50-51. Petitioner first challenges the hearings officer's finding that it was undisputed that Lot 7 is a lawfully created parcel: Petitioner argues that it disputed that issue below in numerous submittals to the hearings officer.

Petitioner argues that there is not substantial evidence in the record to support a conclusion that Lot 7 is a lawfully created parcel because the evidence in the record is that Lot 7 was first created by deed in 1980, after the operative

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[11] Petitioner argued below that neither petitioner nor its predecessor has ever owned Lot 6. Record 355-56, 682, 685, 706, 851-52, 887-88. Petitioner's predecessor took title to its property in 1981 by deed from Brooks Resources. Record 887-88 (1981 deed from Brooks Resources to petitioner's predecessor conveying the northern half of Section 31, excepting a part described in the deed which appears to be Lot 6). Petitioner argued that, in 1982, Lot 6 was transferred by deed from Brooks-Scanlon to the Museum. Record 682. If the evidence in the record supports that Lot 6 was transferred to the Museum in 1982 by a deed from Brooks-Scanlon, then it appears to support a conclusion that petitioner's predecessor did not own Lot 6 when the 1990 Partition was approved and recorded. If that is correct, then Lot 6 is not a remainder parcel from the 1990 Partition. However, petitioner does not raise that issue on appeal, and, accordingly, we do not consider it.

date of 1977 when the county first regulated land divisions. Accordingly, petitioner argues, Lot 7 is not a parcel created in one of the three ways specified in ORS 215.010(1)(a). Petitioner also argues that the hearings officer's findings are inadequate because the findings fail to include an explanation of why Lot 7 is a lawfully created parcel and, accordingly, fail to address an issue that petitioner raised regarding deeds from 1980 and 1982 that transferred property in the western and eastern portions of Lot 7 to the Museum without complying with the applicable county partition regulations.[12] The hearings officer did not directly address petitioner's argument that the 1980 deed created Lot 7, and we agree with petitioner that the findings are inadequate to address its argument that Lot 7 is not a lawfully created parcel.[13]

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[12] Intervenors' application explains that a 1982 deed transferred a portion of Lot 7a, which is east of Lot 7b, to the Museum. Record 1248.

[13] The hearings officer found:

> "According to [intervenors], Lot 7 is a legal lot because it is a remainder resulting from the creation of other lots carved out of what is referred to as the 'Ferguson Patent.' The Ferguson Patent was initially created in 1906 and consisted of the entire southwest quarter of Section 31 in Township 18 South, Range 12 East. [Intervenors argue] that because the Subject Property, Lot 1, and Lot 2 were all lawfully created lots from that same original patent, the remainder—Lot 7—is itself a lawfully created lot. As noted above, there is no dispute that Lot 7, as depicted by [intervenors], is a lawfully created lot. The dispute in the record is whether Lot 7 is actually three distinct lots—identified by [intervenors as] Lot 7a, Lot 7b, and Lot 7c." Record 50.

The hearings officer found that Lots 7a, 7b, and 7c are each lawfully created parcels that were created in 1910, when the then-owner executed a warranty deed (1910 Deed) to the Oregon Trunk Railway (OTR):

> "The express language of the 1910 Deed conveys full title of the Lot 7b area to OTR. Given the date of the deed, well before the County had any partition regulations, that conveyance was sufficient to lawfully create a new parcel. By carving out that parcel from the Ferguson Patent, two additional parcels (Lot 7a and Lot 7c) were also necessarily created. Based on those facts, those three parcels were lawfully created at that time unless a later lawful process altered those parcel boundaries.
>
> "[Petitioner's] Testimony asserts that the 1910 Deed acted as the grant of an easement for a railroad right-of-way rather than the conveyance of a parcel. I find no language in the 1910 Deed that serves such a purpose. To the contrary, the deed language expressly state[s] that i[t] conveys 'all of the following described property, free from all encumbrances,' and then proceeds to describe a specific strip of property. The deed language is extremely broad in terms of what is being conveyed. The deed language also refers to OTR's successors and assigns. Further, unlike a different deed to OTR to the north, the 1910 Deed does not contain a reversionary clause that depends on the actual construction of a railroad. Looking at the plain language of the 1910 Deed, the express purpose of that instrument was to convey the property itself and not to convey only the right to use the property for some limited purpose.
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> "[Petitioner's] Testimony next asserts that the 1910 Deed could not have conveyed a parcel because the strip of land described was not certain. To the contrary, the 1910 Deed refers to specific dimensions and also to an area that was then staked on the ground. Other documents depict the location of the railroad in the same area, meaning that others were able to identify the parcel of land after it

was conveyed."[14] Record 51.

1. Lot 7b

Petitioner challenges the hearings officer's conclusion that the 1910 Deed conveyed fee title to Lot 7b to OTR and argues, as it argued below, that the 1910 Deed transferred only an easement to Lot 7b. In support, petitioner argues that the 1910 Deed (1) contains language specifying that the conveyance is "for railroad purposes," which petitioner argues means the interest transferred was an easement; (2) allows the location of the property described to be changed (50 feet on either side of the railroad trunkline as "the same is now or may hereafter be located and staked out over and across and upon" the 80-acre Lot 7); and (3) recites that the consideration is $1. Petitioner also cites evidence in the record from intervenors that the location of Lot 7b is not ascertainable at present. Record 1248 ("The exact location of the railroad parcel is not known but it is clear that the railroad parcel is located within the template."); Record 1249 ("[Intervenors are] not, however, asking the County to count Lot C as a parcel that is located within the template because the exact location of the railroad parcel is not known."). Petitioner also points out that the 1910 Deed, and other deeds in the

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[14] The 1910 Deed to OTR provides, in part, that the grantors "give, grant, bargain, sell and convey unto the said [OTR], its successors and assigns forever, all the following described real property, free from all incumbrances, to-wit: A strip of land for railroad purposes one hundred feet in width being fifty (50) feet on each side of and parallel with the center line of the [railroad] as the same is now or may hereafter be located and staked out over and across the and upon the following described real estate * * *." Record 1286.

record to OTR, were recorded as easements in the county's official records. Finally, petitioner points to a 1979 quitclaim deed from OTR conveying any and all interest in the entirety of the 80-acre Lot 7, rather than conveying an interest only in Lot 7b, and argues that "[q]uitclaims like that are commonly used to terminate easement interests." Petition for Review 28-29. In support of its arguments, petitioner cites *Cappelli v. Justice*, 262 Or 120, 496 P2d 209 (1972) (a deed conveying "a right of way 30 feet in width" conveyed an easement rather than a fee simple estate); *Bernards v. Link*, 199 Or 579, 248 P2d 341 (1952) (a right-of-way deed which, for a consideration of $1, conveyed a strip of land over and across and out of the land of the grantors for use as a right-of-way, and which was subject to a condition subsequent which revested title in the grantors in the event the stipulated condition occurred, granted an easement, and not the fee); and *Hall v. Meyer*, 270 Or 335, 338, 527 P2d 722 (1974) (citing 5 *Restatement of Property* section 471 (1944), which lists factors that are important in determining whether an instrument creates an easement or an estate). Petitioner argues that the hearings officer failed to address petitioner's arguments and the evidence described above.

Intervenors do not respond to petitioner's arguments at all except to argue that the hearings officer correctly concluded that, based on the broad conveyance language and reference to successors and assigns, the 1910 Deed conveyed fee title to Lot 7b. The hearings officer's decision does not address the evidence in the record petitioner cites that calls into question whether the 1910 Deed

transferred fee title or an easement to Lot 7b and, in particular, does not address the evidence in the record that concedes that the location of Lot 7b, based on the 1910 Deed, is unknown. However, while they are barely so, the hearings officer's findings are adequate to explain that the hearings officer relied on the express language of the 1910 Deed, its binding effect on successors and assigns, and its specific description of the location of Lot 7b to conclude that it transferred a fee interest in the property. We cannot say that no reasonable person would rely on the evidence the hearings officer relied on to reach that conclusion. *Dodd*, 317 Or at 179.

2. Lots 7a and 7c

In the alternative, petitioner argues that, even if Lot 7b was lawfully created by the 1910 Deed, the evidence in the record does not support a conclusion that Lots 7a and 7c are lawfully created parcels. Lot 7a is the area to the east of Lot 7b. Petitioner argues that the evidence in the record does not support a conclusion that Lot 7a is a lawfully created parcel and that, at best, the hearings officer relied on intervenors' argument that Lot 7a is a "lot of record" pursuant to the "remainder" provision of DCC 18.04.030 which, as discussed above, has no analog in ORS 215.010(1)(a). With respect to Lot 7c, which is the area to the west of Lot 7b, petitioner similarly argues that there is no evidence in the record supporting a conclusion that Lot 7c is a lawfully created parcel.

Intervenors do not respond to petitioner's arguments, and the hearings officer's decision does not explain why Lots 7a and 7c are "lawfully created" in

one of the manners specified in ORS 215.010(1)(a).[15] We agree with petitioner that the hearings officer's findings are inadequate to explain why they concluded that Lots 7a and 7c are lawfully created parcels. On remand, the hearings officer should determine whether Lots 7a and 7c are lawfully created parcels under ORS 215.010(1)(a).

The fourth assignment of error is sustained, in part.

FIFTH ASSIGNMENT OF ERROR

DCC 18.40.050(A)(1)(e) provides that,

> "[i]f road access to a dwelling is by a road owned and maintained by a private party or by the Oregon Department of Forestry, the U.S. Bureau of Land Management or the U.S. Forest Service, then the applicant shall provide proof of a long-term road access use permit or agreement. The road use permit may require the applicant to agree to accept responsibility for road maintenance."

DCC 18.04.030 defines "access" to mean "the right to cross between public and private property allowing pedestrians and vehicles to enter and leave property."

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[15] The hearings officer found:

> "Other arguments presented in [petitioner's] Testimony rely on deeds and conveyances that relate to other parcels that do not include Lot 7 generally or the Lot 7b area specifically. I therefore find that those arguments do not change the primary conclusion that Lot 7b (and therefore Lot 7a and Lot 7c) were lawfully created in 1910. In light of the absence of any clear legal process since that time that would have changed those lots, I find that [intervenors have] demonstrated that these lots are separate lots that existed as of January 1, 1993 and, therefore, can be included in the template analysis." Record 51.

As noted, petitioner owns the three parcels to the north and northwest of the subject property and additional property to the north of those three parcels. As also noted, the roadway easement shown on the plat for the 1990 Partition was dedicated to the public and is a public road.

The hearings officer found two independent reasons for why intervenors have access to Knott Road. First, they concluded that intervenors have access to Knott Road over the roadway easement dedicated on the plat for the 1990

Partition.[16] Second, they concluded that intervenors have access to Knott Road pursuant to the 1994 Easement.[17]

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[16] The hearings officer found:

> "Evidence in the record supports [intervenors'] position in both regards. First, the portion of Scale House Road leading to and connecting to the Subject Property is a public road. As such, it is not 'a road owned and maintained by a private party or by the Oregon Department of Forestry, the U.S. Bureau of Land Management or the U.S. Forest Service.' The public nature of the road is evidenced by Partition Plat 1990-035, which created three parcels (Parcel 1, Parcel 2, and Parcel 3) generally lying to the north of the Subject Property. The plat clearly shows a 60-foot road right of way across the entirety of Parcel 3 up to the edge of the Subject Property. The plat includes dedication language, and it includes an acceptance of the dedication by the County.
>
> "The Staff Report reiterates that 'The Deschutes County Road Department confirmed the portion of Scale House Road lying within the area platted on Partition Plat No. 1990-35 is a public road.' While the Staff Report notes that it is not clear if other portions of Scale House Road are public (i.e. the portion of Scale House Road north of Parcel 3 connecting to Knott Road), I find that this is not relevant to the analysis—road access to the Subject Property is from the portion of Scale House Road that is a public road. This criterion does not state that all public roads providing access to the dwelling must themselves be further connected to other public roads. Even so, the County's decision approving the partition was based on all three parcels in that partition having access to a 'legally dedicated public road.' Based on the information in the record, that access for Parcel 3 could have occurred only if all or a portion of Scale House Road qualified as a legally dedicated public road. I find no evidence in the record that the status of the road changed from public to private at a later time. Because the Subject Property provides access

In its first subassignment of error, petitioner challenges the hearings officer's conclusion that DCC 18.40.050(A)(1)(e) is satisfied by the roadway easement dedicated on the plat for the 1990 Partition. Petitioner argues, as it

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to the dwelling from a public road, this criterion does not apply." Record 43.

[17] The hearings officer found:

"In the alternative, I find that [intervenors have] demonstrated proof of a long-term road access agreement by virtue of a 1994 easement granted to [intervenors'] predecessor. That easement provides access to and from the area currently occupied by the Subject Property along Scale House Road to Knott Road. By the express terms of the easement, the easement rights run with the land. Based on that agreement, this criterion is satisfied.

"[Petitioner's] Testimony asserts that the easement [intervenors rely] on expressly excludes access to the Subject Property. That argument is based on language in the easement that refers to and excludes a parcel that, at the time of the easement, was referred to as Tax Lot 99. The easement granted access only to the parcel of land that was then referred to as Tax Lot 4412. A subsequent property line adjustment between Tax Lot 99 and Tax Lot 4412 had the effect of 'moving' Tax Lot 99 (now Tax Lot 600, the Subject Property) from the southwest side of Tax Lot 4412 to the northwest side of Tax Lot 4412. The reconfiguration of the two lots, however, did not change the scope of the easement. That is, the physical land benefited by the easement stayed fixed, regardless of what name was given to the parcels or tax lots that land was part of. Because all of former Tax Lot 4412 was benefited by the easement, and because the Subject Property now occupies a portion of former Tax Lot 4412, the Subject Property enjoys the benefit of the easement. Of note, the County has previously determined that this private easement benefits the Subject Property and satisfies this Code provision." Record 43-44.

argued below, that that conclusion is not supported by substantial evidence because the portion of Scale House Road located north of petitioner's Parcel 3 and south of Knott Road is not a public road and, accordingly, there is no evidence that intervenors have access to a public road, as required under the definition of "access" at DCC 18.04.030. In its second subassignment of error, petitioner argues that the hearings officer's conclusion that the 1994 Easement provides intervenors with access to Knott Road is not supported by substantial evidence in the record. Because the second subassignment of error is dispositive, we address it.

Petitioner argues that the 1994 Easement does not benefit the subject property as it is currently configured and that the 1994 Easement was intended to benefit only Tax Lot 4412 as it existed in 1994, when the subject property was located in the southwest corner of Tax Lot 4412 instead of the northwest corner of Tax Lot 4412. Petitioner argues that the 2013 property line adjustment that moved the subject property to its current location does not result in the 1994 Easement benefiting the subject property.

Intervenors respond that the 1994 Easement expressly benefits the subject property because it expressly describes the benefitted property as including the same physical area now comprising the subject property, citing Record 215 to 216, 1130, and 1312. We have reviewed the cited record pages, and we agree with intervenors that substantial evidence in the record supports the hearings officer's conclusions that the subject property is within the boundaries of the legal

description of the benefitted property in the 1994 Easement and that the 1994 Easement benefits the subject property.

The second subassignment of error is denied.[18]

The fifth assignment of error is denied.

SIXTH ASSIGNMENT OF ERROR

Former ORS 215.750(2) (2017) requires an applicant to establish that at least seven lots or parcels "are within a 160-acre square centered on the center of the subject tract."[19] In its sixth assignment of error, petitioner argues that the hearings officer's conclusion that intervenors' proposed 160-acre square was centered on the center of the subject property is not supported by substantial evidence in the whole record. ORS 197.835(9)(a)(C).

Intervenors' surveyor used a center of gravity method and a pin test to determine the center of the subject property. Petitioner submitted its own pin test, using a mathematical formula, that determined that the center was in a different, more southerly location. The hearings officer found that intervenors' surveyor's evidence supported a conclusion that intervenors' proposed 160-acre square was centered on the center of the subject property:

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[18] Because the hearings officer found alternative, independent reasons for why DCC 18.40.050(A)(1)(e) is met, and because we sustain one of the alternative reasons, we need not address petitioner's first subassignment of error.

[19] ORS 215.750 was amended in 2019, but the parties agree that the prior version applies.

"The first step in this analysis is to identify the 160-acre square that will be used as the template. The Applicant submitted materials prepared by a surveyor that identified both the center of the Subject Property and the 160-acre square area around that center. The surveyor used two methods for identifying the center of the Subject Property - the 'center of gravity test' and the 'pin test.' In the first test, the surveyor divided the Subject Property, which is trapezoidal, into triangles for which the center of gravity could be determined and then weighted to approximate the center of gravity for the entire parcel. To test the validity of that point, the surveyor then created a cardboard cutout in the shape of the Subject Property that was balanced on a pin, indicating that the point derived from the center of gravity test was also the center of mass for the cardboard cutout and, therefore, the center of that same shape when extrapolated to the Subject Property. The code does not prescribe which method is to be used, and LUBA has indicated that both methods are reasonable for identifying the center of a trapezoidal property. Based on the foregoing, I find that the Applicant appropriately identified the center of the Subject Property.

"The Windlinx Testimony critiques the methodology of the Applicant's surveyor. However, I find that those critiques do not undermine the ultimate findings of the Applicant's surveyor. The first critique is that the surveyor allegedly did not use a 'mathematical formula' to derive the center point. This criticism appears to be based on new statutory language in ORS 215.750 that defines the center of a subject tract as the 'mathematical centroid of the tract.' That language, however, was not effective in Deschutes County until November 1, 2021, after the date the Application was deemed complete, and the center of gravity test remains a reasonable method for identifying the center point for this Application. Further, the center of gravity test relies on mathematical formulas.

"The second critique is that the surveyor did not correctly perform the pin test because, for example, the surveyor did not expressly state that the cardboard model used in the test was to scale. Based on the surveyor's description of the pin test and the fact that he stated he was following the methodology for that test as described by LUBA, I find that it is more likely than not that the surveyor used a

> model that had the same shape as the Subject Property. Even so, the stated purpose of the pin test was for the surveyor to 'test' his calculation of the location pursuant to the center of gravity test. As a licensed surveyor, I find the Applicant's surveyor was qualified to locate the center point and that his analysis can be relied on despite the criticisms presented in opposing testimony." Record 46-47.

As explained above, substantial evidence is evidence a reasonable person would rely on in reaching a decision. In reviewing the evidence, we may not substitute our judgment for that of the local decision-maker. Rather, we must consider all the evidence in the record to which we are directed and determine whether, based on that evidence, the local decision-maker's conclusion is supported by substantial evidence. *Younger v. City of Portland*, 305 Or 346, 358-60, 752 P2d 262 (1988); *1000 Friends of Oregon v. Marion County*, 116 Or App 584, 588, 842 P2d 441 (1992). Moreover, as also explained above, LUBA will generally not second guess a land use decision-maker's choice between conflicting expert testimony, so long as it appears to LUBA that a reasonable person could decide as the decision-maker did, based on all of the evidence in the record. We conclude that a reasonable person could rely on the evidence submitted by intervenors explaining how the center of the subject property was determined and that petitioner's evidence does not undermine intervenors' evidence such that the decision is not supported by substantial evidence in the whole record.

The sixth assignment of error is denied.

The county's decision is remanded.