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

LANDWATCH LANE COUNTY,
Petitioner,

vs.

LANE COUNTY,
Respondent,

and

TRANQUIL LANDS, LLC,
Intervenor-Respondent.

LUBA No. 2022-038

FINAL OPINION
AND ORDER

Appeal from Lane County.

Sean Malone filed a petition for review and reply brief and argued on behalf of petitioner.

No appearance by Lane County.

Michael M. Reeder filed the intervenor-respondent's brief and argued on behalf of intervenor-respondent.

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

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

REMANDED 08/8/2022

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

Opinion by Rudd.

NATURE OF THE DECISION

Petitioner appeals a county hearing officer's approval of a tentative partition plan to replat an 80-acre area of land.

MOTION TO INTERVENE

Tranquil Lands, LLC (intervenor), was the applicant below and moves to intervene on the side of the county. The motion is unopposed and is granted.

FACTS

The 80-acre subject property is located south of Fox Hollow Road, approximately four miles south of the Eugene Urban Growth Boundary. The subject property is zoned Nonimpacted Forest Land (F-1), a zone which implements Statewide Planning Goal 4 (Forest Lands).[1] The subject property is

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[1] Goal 4 is:

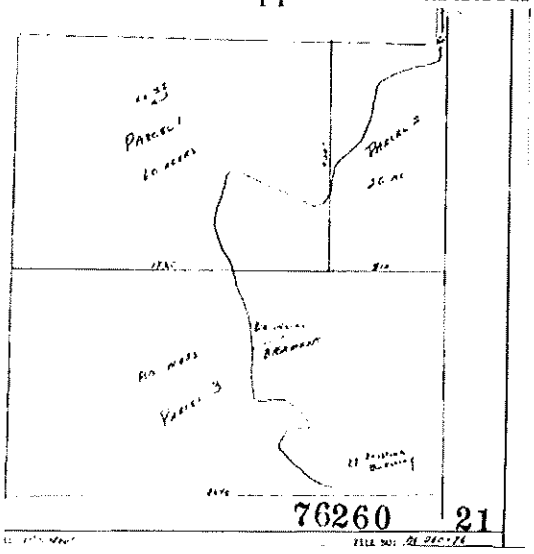
> "[t]o conserve forest lands by maintaining the forest land base and to protect the state's forest economy by making possible economically efficient forest practices that assure the continuous growing and harvesting of forest tree species as the leading use on forest land consistent with sound management of soil, air, water, and fish and wildlife resources and to provide for recreational opportunities and agriculture."

LC 16.210(1) explains that

> "The purpose of the Nonimpacted Forest Land (F-1) Zone is to protect and maintain forest lands for grazing, and rangeland use and forest use, consistent with existing and future needs for agricultural and forest products. The F-1 zone is also intended to allow other uses that are compatible with agricultural and forest activities, to

designated Major Big Game Range, a Statewide Planning Goal 5 (Natural Resources, Scenic and Historic Areas and Open Spaces) resource.[2]

The subject property is part of a larger property that was partitioned into three parcels in 1976 (the M Partition). The subject property comprises the M Partition's 60-acre parcel 1 and the 20-acre parcel 2. The third parcel is not relevant to this appeal. M Partition's parcels 1 and 2 are depicted below.



Record 12.

Intervenor sought to reconfigure the subject property such that parcel 1 would be 75.26 acres and vacant, and parcel 2 would be five acres and contain a single-

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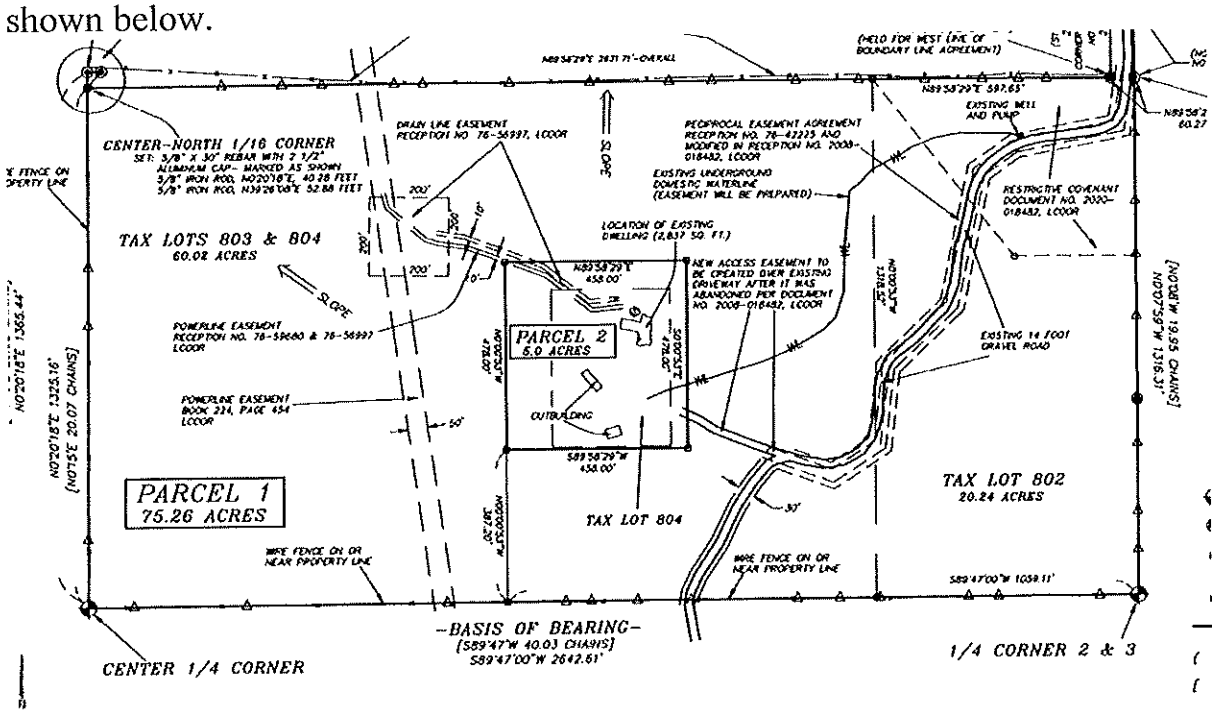
protect scenic resources and fish and wildlife habitat, and to maintain and improve the quality of air, water, and land resources of the county."

[2] Goal 5 is "[t]o protect natural resources and conserve scenic and historic areas and open spaces."

family dwelling sited on the property in 1976. The reconfigured property is shown below.



Record 14.

Lane County Code (LC) 13.130(5) "Property Line Adjustments within a Plat" provides:

> "(a) Property line adjustments within a plat must comply with the replatting requirements of LC 13.120. The proposal can be processed as a property line adjustment if the proposal is only a minor shift in property lines.
>
> "(b) If a property line adjustment within a plat qualifies as a property line adjustment rather than a replat, it must comply with LC 13.130."

Intervenor submitted an application for a property line adjustment, presumably pursuant to LC 13.130(5), to accomplish the reconfiguration. The county returned the property line adjustment application to intervenor and advised intervenor that

the change proposed was not a "minor shift in property lines," and required a tentative plan application.[3]

Intervenor submitted a tentative plan application. The tentative plan application was approved by the planning director. Petitioner appealed the planning director's decision to the hearings officer. The hearings officer approved the tentative plan.

This appeal followed.

FIRST ASSIGNMENT OF ERROR'S SECOND SUBASSIGNMENT

A. Introduction

Both the state and the county define "replat" as "the act of platting the lots, parcels and easements in a recorded subdivision or partition plat to achieve a reconfiguration of the existing subdivision or partition plat *or* to increase or

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[3] LC 13.030(3)(r) defines "minor shift" as:

> "Minor Shift. An adjustment of an existing or proposed property line that does not result in any of the following:
>
> "(i) Modification of acreage of the smaller lot or parcel by more than 25%;
>
> "(ii) Reduction of a lot or parcel to less than 2 acres if said lot or parcel was tentatively approved or platted larger than 2 acres, unless such reduction complies with the minimum lot size of the applicable zoning district;
>
> "(iii) Change in the number of lots or parcels in a plat; or
>
> "(iv) Relocation of access for a lot or parcel."

decrease the number of lots in the subdivision."[4] ORS 92.010(13); LC 13.030(cc) (emphasis added). Both the state and the county define "property line adjustment" as "a relocation or elimination of all or a portion of the common property line between abutting properties that does not create an additional lot or parcel."[5] ORS 92.010(12); LC 13.030(aa). Because a replat does not necessarily change the number of lots within a plat, both state law and local code provide that a property line adjustment may also be a replat.

ORS 92.190(3) provides that a local government may

> "use procedures other than replatting procedures in ORS 92.180 and 92.185 to adjust property lines as described in ORS 92.010(12), as long as those procedures include the recording, with the county clerk, of conveyances conforming to the approved property line adjustments as surveyed in accordance with ORS 92.060(7)."

The county has, through LC 13.130(5), provided that in limited circumstances, the parcels created through a partition may be reconfigured using a property line adjustment rather than a replat. Petitioner's first assignment of error asserts that the hearings officer misconstrued the law applicable to intervenor's application

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[4] "Replat. The act of platting the lots, parcels, and easements in a recorded subdivision or partition plat to achieve a reconfiguration of the existing subdivision or partition plat *or* to increase or decrease the number of lots or parcels in the subdivision or partition." LC 13.030(cc) (emphasis added).

[5] "Property Line Adjustment. Relocation or elimination of all or a portion of the common property line between abutting properties that does not create an additional lot or parcel." LC 13.030(aa).

and committed procedural error in processing the application using standards applicable to property line adjustments.

B. Second Subassignment

Consistent with state law, the minimum parcel size in the F-1 zone is generally 80 acres.[6] LC 13.130(3)(e) provides:

> "A property line adjustment is subject to the minimum lot or parcel size standards of the applicable zoning district, except in the following circumstances:
>
> "(i) One or both of the abutting properties are smaller than the minimum lot or parcel size for the applicable zone before the property line adjustment and, after the adjustment, one is as large or larger than the minimum lot or parcel size for the applicable zone; or

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[6] LC 16.210(1) provides:

> "The F-1 zone has been applied to lands designated as Forest in the Comprehensive Plan. The provisions of the F-1 zone reflect the forest land policies of the Comprehensive Plan as well as the requirements of ORS Chapter 215 and OAR 660-006. The minimum parcel size, prohibition of new dwellings, and other standards established by this zone are intended to promote commercial forest operations."

Subject to exceptions in ORS 215.780(2), land designated forest land has a minimum lot or parcel size of 80 acres. ORS 215.780(1)(c). LC 16.210(7)(a) similarly provides that "The minimum area requirement for the creation of new or adjusted lots or parcels for land designated Nonimpacted Forest Land (F-1) is 80 acres."

"(ii) Both abutting properties are smaller than the minimum lot or parcel size for the applicable zone before and after the property line adjustment."

When determining that the substandard lot sizes after reconfiguration were nonetheless permissible, the hearings officer relied upon LC 13.130(3)(e)(ii), concluding:

> "The application is being processed as a tentative partition request because that is the only vehicle for processing a replat. And the replat procedures are required because *LC 13.130(5) requires that a property line adjustment of lines within a platted partition or subdivision be processed using the replat procedures where it does not qualify as a 'minor shift'.* That provision does not render this proposal not a property line adjustment. *The proposal is still a property line adjustment, and LC 13.130(3)(e) therefore applies.*
>
> "The Hearings Official concedes that one interpretation is that LC 16.210(7)(b) includes the entire universe of exceptions to the 80-acre minimum requirement. The Hearings Official also concedes that under either the applicant's or LandWatch's interpretation, the Code is lacking consistency in some regard. That said, *the Hearings Official believes that the applicant's interpretation, applying LC 13.130(3)(e) to property line adjustments that are processed as replats to allow a property line adjustment where both properties are substandard both before and after the adjustment, is consistent with the language of the Code and with the intent of both the legislature and the drafters of the Code.*" Record 9-10 (emphases added, internal footnotes omitted).

Petitioner's second subassignment of error is that the hearings officer misconstrued LC 13.130(5) "Property Line Adjustments within a Plat," resulting in an erroneous conclusion that intervenor's application met the applicable standards in LC 13.130(3)(e).

1. Text and Context

When interpreting a law, the first level of analysis requires consideration of the text, context, and if useful, the legislative history. *State v. Gaines*, 346 Or 160, 171-72, 206 P3d 1042 (2009); *PGE v. Bureau of Labor and Industries*, 317 Or 606, 610-12, 859 P2d 1143 (1993). The hearings officer concluded that LC 13.130(5) requires the use of *replat procedures*. LC 13.130(5) "Property Line Adjustments within a Plat" provides, however, that

> "(a) Property line adjustments within a plat must comply with the *replatting requirements of LC 13.120.* The proposal can be processed as a property line adjustment if the proposal is only a minor shift in property lines." (Emphasis added.)

The code text refers to *replatting requirements* in LC 13.120, not *replat procedures* as described by the hearings officer.

LC 13.120(2) "Replatting and Vacations" provides:

> "*The same procedure and standards* that apply to the creation of a plat (tentative plan followed by final plat) apply to a replat pursuant to LC 13.040. If the replat consists of only a minor shift in lot or parcel lines, land use approval may be obtained through a Property Line Adjustment application pursuant to LC 13.130." (Emphasis added.)

Thus, LC 13.120(2) expressly requires that both the procedure and standards applicable to a tentative plan apply to a non-minor shift to a property line.[7] The

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[7] LC 13.130(5)(b) provides: "If a property line adjustment within a plat qualifies as a property line adjustment rather than a replat, it must comply with LC 13.130." Although awkwardly written, read in conjunction with LC 13.130(5)(a) and 13.120(2), we understand this to mean that a minor shift in

parties do not dispute the conclusion that intervenor's proposed adjustment is not a minor shift and the application was processed using the Type II procedure applicable to tentative plans. The text of LC 13.120 dictates, however, that the hearings officer also identify and apply the *standards* applicable to a tentative plan. LC 13.040(1)(a)(i) provides that tentative plan applications are subject to LC 13.050 and 13.060. Accordingly, intervenor's application is subject to LC 13.060(1)(b) "Tentative Partition Plan Application Review Criteria" which include a requirement that all partitions must conform to all of the applicable zoning requirements in the LC.

2. Application of Interpretation

LC 16.210(7) "Land Divisions" provides in part that new land divisions *or adjustments* in the F-1 zone must generally meet the 80 acre parcel size requirement. LC 16.210(7)(b). Exceptions to this requirement include

> "(b) New land divisions or adjustments less than [80 acres] may be approved in accordance with LC Chapter 13 for any of the following circumstances:
>
> "* * * * *
>
> "ii. *For the establishment of a parcel for a dwelling that has existed since before June 1, 1995, subject to the following requirements:*
>
> "(aa) *The parcel established may not be larger than five acres, except as necessary to recognize physical*

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property lines in a plat must comply with LC 13.130 rather than the provisions of LC 13.120 applicable to non-minor shifts in property lines in a plat.

factors such as roads or streams, in which case the parcel cannot be larger than 10 acres; and

"(bb) *The parcel that does not contain the dwelling is not entitled to a dwelling unless subsequently authorized by law or goal and the parcel either:*

"(A) *Meets the minimum land division standards of the zone; or*

"(B) *Is consolidated with another parcel, and together the parcels meet the minimum land division standards of the zone.*

"(cc) Restrictions

"(A) *An application for the creation of a parcel pursuant to paragraph (7)(b)(ii) or (iii) must provide evidence that a restriction on the remaining parcel, not containing the dwelling, has been recorded with the county clerk. The restriction must prohibit dwellings unless authorized by law or goal on land zoned for forest use except as permitted under Subsection (b).*

"(B) A restriction imposed under this subsection is irrevocable unless a statement of release is signed by the county planning director of the county where the property is located indicating that the comprehensive plan or land use regulations applicable to the property have been changed in such a manner that the parcel is no longer subject to statewide planning goals pertaining to agricultural land or forest land." LC 16.210(7)(b) (emphasis added).

The hearings officer considered LC 16.210(7) and concluded that the application could not comply with the section. Record 7. The hearings officer nonetheless approved intervenor's replat application, concluding that the new parcels were not required to comply with the F-1 80-acre minimum parcel size or qualify for the exception in LC 16.210(7) because the parcels were below 80 acres in the before condition and in the after condition and allowed by LC 13.130(3)(e)(ii). The hearings officer found that their conclusion that LC 13.130(5) controlled "was consistent with the intent of both the legislature and the drafters of the code." Record 9. We disagree with the hearings officer.

As the hearings officer recognized, their interpretation must be consistent with state law. *Kenagy v. Benton County*, 112 Or App 17, 20 n 2, 826 P2d 1047 (1992). State law provides that counties *may* allow property line adjustments in forest zones subject to certain limitations. ORS 92.192 provides in part

> "(3) Subject to subsection (4) of this section, for land located entirely outside the corporate limits of a city, a county may approve a property line adjustment in which:
>
> "(a) One or both of the abutting lawfully established units of land are smaller than the minimum lot or parcel size for the applicable zone before the property line adjustment and, after the adjustment, one is as large as or larger than the minimum lot or parcel size for the applicable zone; or
>
> "(b) *Both abutting lawfully established units of land are smaller than the minimum lot or parcel size for the applicable zone before and after the property line adjustment.*

"*(4) On land zoned for exclusive farm use, forest use or mixed farm and forest use, a property line adjustment may not be used to:*

"(a) Decrease the size of a lawfully established unit of land that, before the relocation or elimination of the common property line, is smaller than the minimum lot or parcel size for the applicable zone and contains an existing dwelling or is approved for the construction of a dwelling, if another lawfully established unit of land affected by the property line adjustment would be increased to a size as large as or larger than the minimum lot or parcel size required to qualify the other affected lawfully established unit of land for a dwelling;

"(b) Decrease the size of a lawfully established unit of land that contains an existing dwelling or is approved for construction of a dwelling to a size smaller than the minimum lot or parcel size, if another lawfully established unit of land affected by the property line adjustment would be increased to a size as large as or larger than the minimum lot or parcel size required to qualify the other affected lawfully established unit of land for a dwelling;

"(c) Allow an area of land used to qualify a lawfully established unit of land for a dwelling based on an acreage standard to be used to qualify another lawfully established unit of land for a dwelling if the land use approval would be based on an acreage standard; or

"(d) Adjust a property line that resulted from a subdivision or partition authorized by a waiver so that any lawfully established unit of land affected by the property line adjustment is larger than:

"(A) Two acres if the lawfully established unit of land is, before the adjustment, two acres in size or smaller and is high-value farmland, high-value

forestland or within a ground water restricted area; or

"(B) Five acres if the lawfully established unit of land is, before the adjustment, five acres in size or smaller and is not high-value farmland, high-value forestland or within a ground water restricted area." (Emphasis added.)

The county has implemented these provisions in its code in LC 13.130(3) and (4).[8]

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[8] LC 13.130(3) general property line adjustment criteria is consistent with ORS 92.192(3)(a) and (b) and includes:

"(e) A property line adjustment is subject to the minimum lot or parcel size standards of the applicable zoning district, except in the following circumstances:

"(i) One or both of the abutting properties are smaller than the minimum lot or parcel size for the applicable zone before the property line adjustment and, after the adjustment, one is as large or larger than the minimum lot or parcel size for the applicable zone; or

"(ii) Both abutting properties are smaller than the minimum lot or parcel size for the applicable zone before and after the property line adjustment."

LC 13.130(4) provides:

"F-1, F-2, and EFU Zone Criteria. In addition to the standards and criteria in subsection (3) of this section, a property line adjustment in the F-1, F-2, and EFU Zones is subject to the following standards and criteria:

"(a) A property line adjustment cannot be used to:

"(i) Separate a temporary hardship dwelling, relative farm help dwelling, home occupation, or processing facility from the primary residential or other primary use without land use approval to change the accessory use to a primary use; or

"(ii) As prohibited by ORS 92.192(4)(a) – (c), in a manner that would:

"(aa) Decrease the size of a lawfully established unit of land that, before the relocation or elimination of the common property line, is smaller than the minimum lot or parcel size for the applicable zone and contains an existing dwelling or is approved for the construction of a dwelling, if another lawfully established unit of land affected by the property line adjustment would be increased to a size as large as or larger than the minimum lot or parcel size required to qualify the other affected lawfully established unit of land for a dwelling;

"(bb) Decrease the size of a lawfully established unit of land that contains an existing dwelling or is approved for construction of a dwelling to a size smaller than the minimum lot or parcel size, if another lawfully established unit of land affected by the property line adjustment would be increased to a size as large as or larger than the minimum lot or parcel size required to qualify the other affected lawfully established unit of land for a dwelling;

"(cc) Allow an area of land used to qualify a lawfully established unit of land for a dwelling based on an acreage standard to be used to qualify another lawfully established unit of land for a dwelling

The legislature has, however, allowed counties to apply greater restrictions to property line adjustments. ORS 92.192(3)'s provision that counties *may* approve property line adjustments complying with its provisions, such as the provisions reflected in LC 13.130(3) and (4), serves as a floor, not a ceiling, to restrictions on property line adjustments in forest zones. LC 13.130(5)'s provision that a property line adjustment in a plat that is not a minor shift "must comply with the replatting requirements of LC 13.120" imposes stricter requirements on property line adjustments in the F-1 zone than required by state law and requires compliance with LC 16.210(7).[9]

Before relying on LC 13.130(3)(e) to approve the application, the hearings officer evaluated LC 16.210(7) and concluded that it could not be met, explaining:

> "Of particular note, subsection (b)(ii)(bb) requires that, in order to satisfy this exception, (1) the parcel that does not contain the dwelling is not entitled to a dwelling unless subsequently authorized if the land use approval would be based on an acreage standard."

[9] As previously cited, LC 13.130(5) provides that within a plat

> "(a) Property line adjustments within a plat must comply with the replatting requirements of LC 13.120. The proposal can be processed as a property line adjustment if the proposal is only a minor shift in property lines.
>
> "(b) If a property line adjustment within a plat qualifies as a property line adjustment rather than a replat, it must comply with LC 13.130."

by law or goal *and* (2) the parcel meets either of the following requirements: '(A) Meets the minimum land division standards of the zone; or (B) Is consolidated with another parcel, and together the parcels meet the minimum land decision standards of the zone.' In this case, the property without the dwelling, Parcel 2, does not satisfy either subsection (A) or (B) quoted above, Thus the subsection (b)(ii) exception to the 80-acre minimum lot or parcel site simply does not apply." Record 7 (emphasis in original).

LC 16.210(7) implements and must be interpreted in a manner consistent with ORS 215.780.[10] We discussed the legislative history of ORS 215.780 in detail in *Russell v. Lane County,* ___ Or LUBA ___ (LUBA No 2020-072, Jan 8, 2021) and explained that the relevant state law authorizes the county to allow the

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[10] ORS 215.780 provides in part that although the minimum lot sizes for property designated forestland is generally 80 acres, a county may adopt a lower minimum lot or parcel size in certain instances including,

> "(b) To divide by partition an area of land zoned for forest use to create a parcel for a dwelling that has existed since before June 1, 1995, subject to the following requirements:
>
> "(A) The parcel created may not be larger than five acres, except as necessary to recognize physical factors such as roads or streams, in which case the parcel may not be larger than 10 acres; and
>
> "(B) The parcel that does not contain the dwelling is not entitled to a dwelling unless subsequently authorized by law or goal and the parcel either:
>
> "(i) Meets the minimum lot or parcel size of the zone; or
>
> "(ii) Is consolidated with another parcel, and together the parcels meet the minimum lot or parcel size of the zone." ORS 215.780(2)(b).

partition of a property to create a five acre parcel to house a qualified dwelling and that both of the resulting parcels may be less than 80 acres, so long as the parcel without the dwelling is constrained in its ability to house a dwelling in the future. *Russell*, ___ Or LUBA at ___ (slip op at 16-17).

> "ORS 215.780(2)(b), (c), and (d) were enacted by the legislature in 1995. That legislation, Senate Bill (SB) 683, was originally introduced at the request of Douglas County in response to our decision in *DLCD v. Douglas County*, 28 Or LUBA 242 (1994). We decided *Douglas County* after the legislature enacted omnibus changes to existing land use statutes in HB 3661 (1993), including, as relevant here, the 80-acre minimum parcel size for lands zoned for forest uses, codified at ORS 215.780(1)(c). In *Douglas County*, we concluded that a county code provision which waived the minimum parcel size in the Timberland Resource District to allow land divisions to create five-acre parcels containing existing dwellings was inconsistent with the newly-enacted ORS 215.780(1)(c) minimum parcel size on lands zoned and designated for forest use. 28 Or LUBA at 257-58. Our opinion referred to those existing dwellings as 'homestead dwellings.' *Id.*
>
> "In its testimony before the 1995 legislature supporting SB 683, Douglas County took the position that LCDC's administrative rules implementing Statewide Planning Goal 4 (Forest Lands) that were in effect in 1992 – prior to the enactment of HB 3661 – authorized the county's homestead dwelling exception, which it sometimes referred to as the 'mom and pop' partition exemption. Exhibit B, Senate Committee on Water and Land Use, SB 683, May 2, 1995 (accompanying statement of Douglas County Planning Director Keith Cubic). Douglas County asserted that, in enacting HB 3661, the legislature did not intend to eliminate the 'mom and pop' partition exemption and SB 683 was needed to clarify that intent. *Id.*
>
> "All of the testimony both in support of and in opposition to the introduced version of SB 683 presumed that a dwelling existed on the parcel that was to be partitioned and that the goal of the 'mom

and pop' partition exemption was to allow a homeowner living in an existing dwelling on a forest-zoned property to partition the property to create a small, five-acre parcel for the existing dwelling and a separate parcel that would either meet the 80-acre minimum parcel size or be consolidated with another forest-zoned parcel to meet the 80-acre minimum parcel size. *See, e.g.*, Testimony, House Committee on Legislative Rules, SB 683, May 25, 1995, Ex A (statement of 1000 Friends of Oregon representative Anthony Boutard) ('SB 683 * * * [was] drafted to restore the one-time 5-acre land division for an existing house which was eliminated by the 1993 Legislature.'); Tape Recording, House Committee on Legislative Rules, SB 683, May 25, 1995, Tape 88, Side A (statement of Oregon Forest Industries Council (OFIC) representative Lincoln Cannon) ('[T]hat way, people who live in houses and own forest lands can sell their forest lands without having to sell their house also or move out of their house.')

"The -A3 amendments introduced by OFIC at the House Legislative Rules Committee's May 25, 1995 work session proposed, for the first time, language that would allow a parcel created 'to facilitate a forest practice' to be below 80 acres and provided that 'parcels' created pursuant to that language would not be eligible for the siting of a dwelling. SB 683, -A3 amendments (May 23, 1995). The -A3 amendments also introduced language that required a deed restriction to be placed 'on the remaining parcel, not containing the dwelling.' *Id.* This language therefore applies to the situation when one of the resulting parcels has a dwelling. The -A3 amendments also introduced the language on which petitioner relies, referencing 'the newly created parcel.' *Id.* All of these changes were carried over into the -A4 amendments introduced at the committee's May 26, 1995 work session, which became the engrossed version of the bill. SB 683, -A4 amendments (May 26, 1995); Or Laws 1995, ch 700, § 1.

"Testimony from OFIC in favor of the :-A3 amendments, which it drafted, explained that

> '[t]he other provision of this bill allows for the creation of parcels of less than 80 acres such that, for timber transaction

> purposes, * * * for example, the most common way timberland is transacted among timber firms is through what's called the 1031 process. * * * And they would like the ability to * * * create parcels less than 80 acres * * *. * * * *It creates no new opportunities for dwellings or any new dwellings in the forest. It does not change the uses.*' Tape Recording, House Committee on Legislative Rules, SB 683, May 25, 1995, Tape 88, Side A (statement of OFIC representative Lincoln Cannon) (emphasis added).

"At the same work session, in response to a question from Representative Roberts regarding whether timber companies could sell or exchange parcels below 80 acres 'as long as they don't put a residence up,' Seneca Sawmill representative Mike Evans responded, 'That's correct.' Tape Recording, House Committee on Legislative Rules, SB 683, May 25, 1995, Tape 88, Side B. Department of Land Conservation and Development (DLCD) representative Bob Rindy explained the agency's understanding that the portion of the -A3 amendments which became ORS 215.780(2)(d) was proposed to allow forest land owners to swap forest parcels and that 'no dwellings are involved necessarily.' *Id.* Representative Beyer testified that what became paragraph (2)(d) seems to keep land in forest uses, and Rindy opined that carving up small parcels could create pressure to place a dwelling on the smaller parcels in order to manage the forest resources on small parcels as small woodlots. *Id. Representative Roberts then asked whether an owner could aggregate multiple parcels which were created pursuant to what became paragraph (2)(d) in order to create an 80-acre parcel and then site a dwelling on it, in response to which Rindy explained that, in DLCD's opinion, if any of the parcels contained the deed restriction set out in what became ORS 23 215.780(6)(a), then no dwelling would be allowed, even if the parcel met the minimum parcel size. Id.*

"The above legislative history provides strong support for interpreting the plain text of ORS 215.780(2)(d) as prohibiting new dwellings on any parcels created pursuant to that paragraph and provides some support for interpreting the deed restriction provision in paragraph (6)(a) as a limiting restriction, in spite of the inartful

> language referring to 'the newly created parcel,' in the singular. *The legislative history clearly shows that the legislature was concerned about and intended to limit new dwellings on substandard-sized parcels in forest zones that were created pursuant to ORS 215.780(2)(d).*" *Id.* at ___ (slip op at 13-17) (first emphasis in original, second and third emphases added, internal footnotes omitted).

Thus, ORS 215.780 and LC 16.210(7) allow the creation of two substandard parcels if the applicable criteria are met. We agree with petitioner that the hearings officer misconstrued the LC. LC 13.130(3)(e) does not apply to intervenor's application to complete a non-minor shift in property lines. A request to accomplish a non-minor shift in property lines through a property line adjustment or replat to create two substandard parcels, one five-acres in size with a dwelling established before 1995, must comply with LC 16.210(7), which, as we explain above, allows a replat to create two parcels less than 80 acres in size, subject to applicable criteria and conditions.

The second subassignment of error is sustained.

The first assignment of error is sustained, in part.

FIRST ASSIGNMENT OF ERROR'S FIRST SUBASSIGNMENT AND SECOND ASSIGNMENT OF ERROR

Petitioner's first assignment of error's first subassignment of error is that the county erred by approving the application based upon property line adjustment criteria without requiring a property line adjustment application. As we explained in our resolution of the first assignment of error's second

subassignment of error, intervenor's application was correctly processed as a tentative plan. No property line adjustment application was required.

Petitioner's second assignment of error is that the county erred by not adopting findings addressing the need for intervenor to submit a request to modify its application, changing it from a tentative plan application to a property line adjustment application. Because we determined in our resolution of the first assignment of error's second subassignment of error that the application was correctly processed as a tentative plan, no modification was required and the second assignment of error is denied.

The first assignment of error's first subassignment of error is denied.

The second assignment of error is denied.

THIRD ASSIGNMENT OF ERROR

We have described the county's Goal 5 Policy 11 in detail in previous cases.

> "Goal 5 is '[t]o protect natural resources and conserve scenic and historic areas and open spaces.' OAR 660-015-0000(5). In order to implement Goal 5, local governments are required to 'adopt programs that will protect natural resources.' *Id.* The county's program to protect natural resources was acknowledged by the [LCDC] to comply with Goal 5 in 1984. The county's Goal 5 program includes a map and inventory of big game habitat determined to be 'significant or important' within the meaning of OAR 660-016-0000(5)(c) (Big Game Habitat Inventory). *Save TV Butte v. Lane County*, 77 Or LUBA 22, 40 (2018). As noted, the subject properties are included on that inventory as Major Big Game Range.

> "One component of the county's acknowledged Goal 5 program is Rural Comprehensive Plan (RCP) Goal 5, Flora and Fauna Policy 11 (Policy 11), which provides:
>
> > *'Oregon Department of Fish and Wildlife [(ODFW)] recommendations on overall residential density for protection of big game shall be used to determine the allowable number of residential units within regions of the County. Any density above that limit shall be considered to conflict with Goal 5 and will be allowed only after resolution in accordance with OAR 660-16-000. The County shall work with [ODFW] officials to prevent conflicts between development and Big Game Range through land use regulation in resource areas, siting requirements and similar activities which are already a part of the County's rural resources zoning program.'*
>
> "The ODFW recommendations referenced in Policy 11 consist of an overall residential density standard of one dwelling per 80 acres in Major Big Game Range and one dwelling per 40 acres in Peripheral Big Game Range." *King v. Lane County*, ___Or LUBA ___, ___ (LUBA No 2021-047/2021-052, Oct 15, 2021) (slip op at 4-6), *aff'd*, 317 Or App 136, 501 P3d 1058 (2022) (emphasis added, internal footnotes omitted).

The hearings officer concluded that "Policy 11 and the holdings in the LUBA decisions do not apply to property line adjustments or replats; they only apply to approvals of dwellings. The Hearings Official agrees." Record 11. Petitioner's third assignment of error is that the hearings officer misconstrued the law with respect to the county's Goal 5 Policy 11 because the policy applies "when the decision reduces the density of the dwelling located in Major Big Game Range" and that the county must complete an economic, social, environmental and

energy (ESEE) analysis before approving the application. Petition for Review 32-33.

Policy 11 provides that "[ODFW] recommendations on overall residential density for protection of big game shall be used *to determine the allowable number of residential units* within regions of the County." Record 10 (emphasis added). Intervenor's application does not implicate the allowable number of residential units. Parcel 2 contains an existing dwelling. No additional dwelling is proposed. We agree with the hearing officer and intervenor that Policy 11 is not applicable.

The third assignment of error is denied.

DISPOSITION

Petitioner asks that we reverse or remand the decision. We will reverse a decision where the decision "violates a provision of applicable law and is prohibited as a matter of law." OAR 661-010-0071(1)(c). We will remand a decision which "improperly construes the applicable law, but is not prohibited as a matter of law[.]" OAR 661-010-0071(2)(d). Because we conclude that the hearings officer improperly construed LC 16.210(7) and LC 13.130(5), remand is the appropriate remedy.

The decision is remanded.