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

MARCIA JENKINSON and DAN JENKINSON,
Petitioners,

vs.

LANE COUNTY,
Respondent.

LUBA Nos. 2022-101/102

FINAL OPINION
AND ORDER

Appeal from Lane County.

Zack P. Mittge filed the petition for review and reply brief and argued on behalf of petitioners. Also on the brief was Hutchinson Cox.

Rebekah Dohrman filed the respondent's brief and argued on behalf of respondent.

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

RUDD, Board Member, did not participate in the decision.

AFFIRMED 07/07/2023

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

Opinion by Zamudio.

NATURE OF THE DECISIONS

Petitioners appeal two hearings officer decisions denying petitioners' applications for two legal lot verifications.

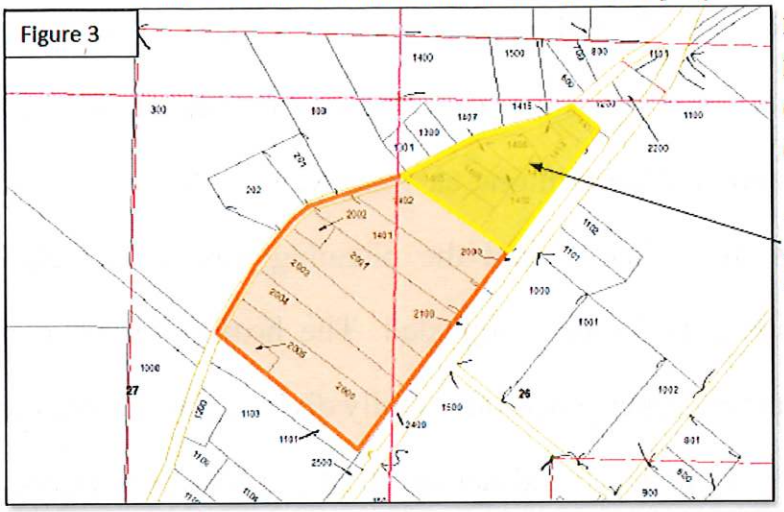
BACKGROUND

Petitioners sought county verification that adjacent tax lots were lawfully established. Tax lot 2001 is approximately 6.24 acres and is developed with a dwelling. Tax Lot 2002 is an approximately 0.55-acre parcel located at the northeast corner of Tax Lot 2001 and is developed with petitioners' dwelling.

The factual history is undisputed. Tax Lots 2001 and 2002 were originally part of a larger property (the grandparent property) owned by Denker between 1943 and 1961. Record 9. On January 12, 1961, Denker conveyed by land sale contract to Keeler the northern portion of the grandparent property, resulting in the creation of two units of land from the grandparent property. On June 23, 1961, Denker conveyed by land sale contract to Davis a portion approximately in the center of the remainder of the grandparent property that Denker still owned, which is the property identified below as Tax Lot 1401. That conveyance resulted in the creation of three units of land from the single Denker remainder. The portion of the grandparent property remaining to the south of tax lot 1401 is the parent property of Tax Lots 2001 and 2002.

Land Sale Contract information for the Parent Property:

Figure 3

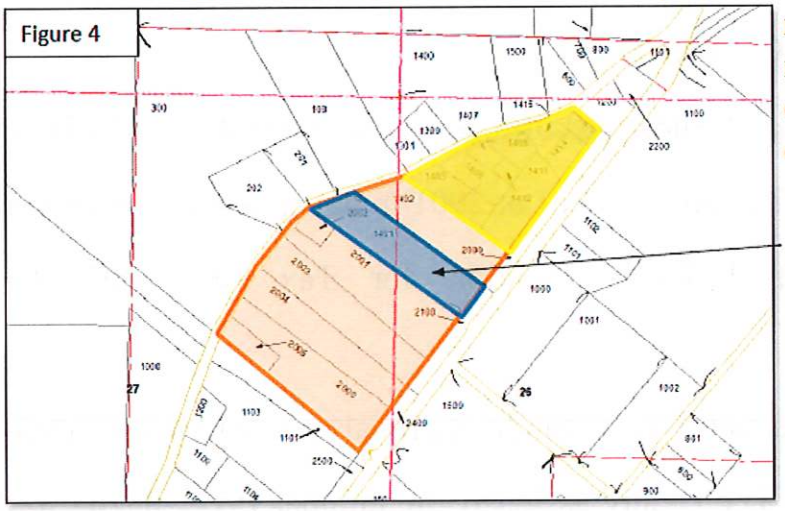


Rec. No.: 182/49085
Date: January 12, 1961
Grantor: George & May Denker
Grantee: Donald & Phyllis Keeler

This contract describes the Subject Property as shown here in Yellow.

Land Sale Contract information for the Parent Property:

Figure 4



Rec. No.: 175/36600
Date: June 23, 1961
Grantor: George & May Denker
Grantee: Donald & Elysia Davis

This contract describes the property as shown here in Blue. This sale constituted an unlawful subdivision by creating more than three (3) new properties for the 1961 calendar year.

Record 10.

In summary, in 1961, in two separate conveyances, the grandparent property was first divided into two units of land, and then one of those new units was further divided into three units, creating four units. It is undisputed that the divisions occurred without county subdivision review or approval. Record 10-11.

The planning director denied petitioners' requests for legal lot verifications for Tax Lots 2001 and 2002 because they concluded that petitioners' predecessors created four units of land in one calendar year without complying with the county subdivision ordinance that the planning director concluded applied to the land divisions. Petitioners appealed. The hearings officer also concluded that the grandparent property was unlawfully divided into four or more parcels within a calendar year in 1961 and denied the legal lot verifications in two separate decisions issued on the same date. Petitioners appealed. We consolidated those appeals for review.

FIRST ASSIGNMENT OF ERROR

Petitioners argue that the hearings officer misconstrued the applicable law by denying legal lot verification for Tax Lot 2001 in the appeal of the planning director's denial of legal lot verification for Tax Lot 2002. ORS 197.835(9)(a)(D).

As explained above, petitioners sought approval of legal lot verifications for two adjacent tax lots. The county assigned file number PA22-05164 to the verification application for Tax Lot 2002. The county assigned file number PA22-05165 to the verification application for Tax Lot 2001. The planning director issued separate decisions denying each of the two applications. Petitioners appealed both denials to the hearings officer. Following a consolidated public hearing on the two applications, the hearings officer issued two decision documents. Both decision documents contain an identical paragraph

under the subheading "Decision" stating that the denial of the request for the legal lot verification of Tax Lot 2001 in file number PA22-05165 is affirmed. Record 3, 19.[1]

Petitioners argue that the hearings officer thereby failed to issue a decision on the legal lot status of Tax Lot 2002 in petitioners' local appeal of the planning director's decision in file number PA22-05164. Petitioners argue that this error violates ORS 215.416(11)(a)(A), which allows a local decision-maker to approve or deny a permit without a hearing if the local government provides a local *de novo* appeal. Petitioners argue that "[i]mplicit in the requirement that the County allow the *de novo* hearing is the requirement that the hearing will actually result in a decision on the application being appealed." Petition for Review 8 (underscoring in original). Petitioners also argue that the hearings officer's failure to adopt a decision on the verification of Tax Lot 2002 violates the Lane Code (LC) provisions that implement ORS 215.416(11)(a)(A): LC 14.080(3)(b) and LC 14.070(21)(a) and (c). Petitioners also argue that the hearings officer's error violates ORS 215.427, which requires that the county "take final action" on the application, including the resolution of all appeals, within 150 days of after the application is deemed complete. According to petitioners, the hearings officer failed to issue a decision on the legal lot status of Tax Lot 2002.

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[1] All record citations in this decision are to the Replacement Record.

The county responds, initially, that petitioners allege no interpretational error. We agree. Petitioners do not challenge any interpretation of law. Instead, petitioners assert a procedural error. We will reverse or remand a decision where the local government "[f]ailed to follow the procedures applicable to the matter before it in a manner that prejudiced the substantial rights of the petitioner." ORS 197.835(9)(a)(B). "[T]he 'substantial rights' of parties that may be prejudiced by failure to observe applicable procedures are the rights to an adequate opportunity to prepare and submit their case and a full and fair hearing." *Muller v. Polk County*, 16 Or LUBA 771, 775 (1988). We understand petitioners to argue that state and county law entitle them to a decision on the legal lot status of Tax Lot 2002 in petitioners' local appeal of the of planning director's decision in file number PA22-05164.

The county argues that petitioners could have alerted the hearings officer to the error by filing a motion for reconsideration and that, having failed to do so, petitioners have waived this issue. *See* LC 14.030(1)(b)(ii)(ff) ("Appeals of Hearings Official decisions on Type II appeals requesting Hearings Official reconsideration may be made by a party or the Director."). Again, we agree with the county. "[W]here a party has the opportunity to object to a procedural error before the local government, but fails to do so, that error cannot be assigned as grounds for reversal or remand of the resulting decision." *McCaffree v Coos County*, 79 Or LUBA 512, 517, *aff'd*, 299 Or App 521, 449 P3d 594 (2019), *rev den*, 366 Or 205 (2020) (citing *Torgeson v. City of Canby*, 19 Or LUBA 511, 519

(1990); *Dobaj v. Beaverton*, 1 Or LUBA 237, 241 (1980)). The issue that petitioners raise in their first assignment of error is waived.

Even if the issue was not waived, the references to Tax Lot 2001 and file number PA22-05165 in the decision for file number PA 22-05164 are clearly typographical errors that do not warrant reversal or remand. The county responds, and we agree, that the hearings officer issued a decision on the legal lot status of Tax Lot 2002 in file number PA22-05164. While the cited paragraph refers to Tax Lot 2001 and file number PA22-05165, the decision document's header refers to file number PA22-05164. Record 3-7. The footers of the exhibits attached to the decision document also refer to file number PA22-05164. Record 8-12. Moreover, the facts and legal analysis for the two applications are identical. The typographical error in the cited paragraph does not warrant reversal or remand. *See Walker v. City of Sandy*, 62 Or LUBA 358, 366-67 (2010) (finding no grounds for reversal or remand where a city council's findings rejected the need for a condition of approval, and yet the condition of approval was erroneously carried forward into the city council's decision).

The first assignment of error is denied.

SECOND ASSIGNMENT OF ERROR

Petitioners argue that the hearings officer misconstrued the applicable law in concluding that the two 1961 conveyances constituted an unlawful division of land. ORS 197.835(9)(a)(D). We start by setting out the applicable law.

LC 13.140(3) provides the criteria for a legal lot verification: "A legal lot verification will be approved if the subject property is a lawfully established unit of land as defined by this chapter." LC 13.030(3)(n) defines "lawfully established unit of land" as:

> "(i) A lot or parcel created by filing a final plat for subdivision or partition; or
>
> "(ii) Another unit of land created:
>
> "(aa) In compliance with all applicable planning, zoning and subdivision or partition ordinances and regulations; or
>
> "(bb) By deed or land sales contract, if there were no applicable planning, zoning or subdivision or partition ordinances or regulations.
>
> "(cc) Lawfully established unit of land does not mean a unit of land created solely to establish a separate tax account."

We are concerned with the regulations that applied to land divisions in 1961. Petitioners argued to the hearings officer that the applicable state land division laws in 1961 regulated only those divisions that created four or more parcels of fewer than five acres each. According to petitioners, the 1961 conveyances were not regulated land divisions because none of those conveyances resulted in parcels of fewer than five acres.

The hearings officer concluded that, while the applicable state law in 1961 included a five-acre limitation, the applicable LC land division regulations did not include a five-acre limitation. Petitioners argue that conclusion misconstrues

the applicable law. Specifically, petitioners argue that the hearings officer's interpretation of the LC is legally incorrect because that interpretation gives effect to the LC in a manner that exceeds the county's delegated authority. Petitioners also argue, in the alternative, that the hearings officer misconstrued the applicable LC subdivision regulations.

The county responds that the hearings officer correctly construed the applicable law and that the hearings officer's interpretation of the LC does not exceed the county's delegated authority in 1961. For the reasons explained below, we conclude that the hearings officer did not misconstrue the applicable law.

We summarize the state and county laws regulating land divisions and the history of those enactments. In 1947, the legislature first authorized county governing bodies to adopt subdivision regulations as follows:

> "The governing body hereby is authorized to adopt regulations for the subdivision of land within the unincorporated territory under its jurisdiction, and it may require that hereafter no land may be subdivided and subdivision plat filed or recorded until submitted to and approved by the county planning commission, and to make the violation of such regulation unlawful, including the sale of subdivided land by metes and bounds, and punishable by fine of one hundred dollars ($100)." Or Laws 1947, ch 537, § 7.

That legislation defined "subdivide land" as follows:

> "The term 'subdivide land' as used in this act shall mean to partition, plat or subdivide land into four or more lots, blocks or tracts, or containing a dedication of any part thereof as a public street or highway, for other than agricultural purposes." *Id.*

That legislation was codified at Oregon Compiled Laws Annotated (OCLA) section 86-1107. OCLA chapter 86 applied to counties.

Also in 1947, the legislature adopted the following, separate definition of "subdivide land" applicable to cities:

> "The term 'subdivide land' shall mean to partition into four or more units, by division or subdivision, any tract or registered plat of land, shown on the last preceding tax roll as a unit or contiguous units, for the transfer of ownership or for building development, whether immediate or future; provided, however, that the division of land for agricultural purposes into tracts containing five or more acres and not involving any new thoroughfare, or the widening of any existing thoroughfare, shall be exempt." Or Laws 1947, ch 346, § 1.

That legislation was codified at OCLA section 95-1301a.

In 1949, the county adopted the Lane County Subdivision Ordinance, also referred to as Zoning and Land Use Regulation Ordinance No. 3 (Ordinance No. 3) "for the purpose of adopting subdivision regulations in accordance with the provisions in the County Planning Law under Chapter 537, Oregon Laws 1947." Record 119. Ordinance No. 3 defined "subdivide" as follows:

> "The term 'subdivide' as used in this ordinance shall mean to partition, plat, or subdivide land into four (4) or more lots, blocks, or tracts, or containing a dedication of any part thereof as a public street or highway, for other than agricultural purposes. Tracts of land of 5 acres or less should be, for the purpose of this ordinance, presumed to be non-agriculture, non-grazing, non-horticulture and not used for the growing of timber unless proved to be otherwise." *Id.*

In 1953, the OCLA were recodified in the Oregon Revised Statutes (ORS). The definition of "subdivide land" in OCLA section 86-1107 was recodified at

ORS 215.010, and OCLA section 95-1301a was recodified at ORS 92.010(2). ORS chapter 215 concerns county planning. ORS chapter 92 concerns land divisions and applies to both counties and cities.

In 1955, the legislature modified the definition of "subdivide land" at ORS 92.010(2) as follows:

> "'Subdivide land' means to partition a parcel of land into four or more parcels of less than five acres each for the purpose of transfer of ownership or building development, whether immediate or future, when such parcel exists as a unit or contiguous units under a single ownership as shown on the tax roll for the year preceding the partitioning." Or Laws 1955, ch 756, § 1.

The legislature simultaneously eliminated the separate definition of "subdivide land" at ORS 215.010 and amended the definition of "subdivide land" for county planning purposes to refer to the definition in ORS 92.010. *Id.* § 25.

When the relevant conveyances occurred in 1961, the statutory definition of "subdivide land" was the same as it was in 1955, the definition at ORS 92.010(2). The county definition of "subdivide" was the same one that it had adopted in Ordinance No. 3 in 1949. Accordingly, in 1961, state law regulated divisions of land that divided a parcel of land (1) into four or more parcels (2) of fewer than five acres each (3) in one year. Differently, county law in 1961 regulated divisions of land that divided a parcel of land into four or more parcels and did not include a time limitation or acreage exemption.

Petitioners argued to the hearings officer that because Ordinance No. 3 was adopted with the express purpose of implementing state subdivision law,

Ordinance No. 3 should be interpreted to include the concurrent state definition of the term "subdivide land" in 1961. If the county agreed with petitioners' interpretation, then the 1961 conveyances would not be regulated as subdivisions because they did not create parcels of fewer than five acres each.

The hearings officer disagreed that Ordinance No. 3 must be interpreted to include the concurrent state definition of the term "subdivide land" in 1961. The hearings officer reasoned that, between 1947 and 1961, state law did not *require* that counties adopt land division ordinances.[2] The definition of "subdivide" that the county adopted in Ordinance No. 3 followed the state's 1947 definition as applied to counties. Both definitions excluded divisions of land for agricultural purposes. Ordinance No. 3 included an additional presumption that land divisions that resulted in parcels of five acres or fewer were not for "agricultural purposes." However, the county definition did not include an acreage exemption. That is, land divisions that resulted in parcels greater than five acres each were not exempt from county subdivision regulation.

Petitioners argued that the county had no authority to adopt subdivision regulations that were more stringent than those established in state law because (1) the county did not adopt a home rule charter until 1962, so any county authority to regulate subdivisions in 1961 was solely derived from legislatively

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[2] State law did not *require* counties to regulate land divisions until 1973. *Compare* ORS 92.044(1) (1971) *with* ORS 92.044(1) (1973).

delegated authority, and (2) the legislature did not delegate to the county authority to regulate subdivisions more stringently than state law. The hearings officer agreed with the first point and disagreed with the second.

On appeal, petitioners argue that the hearings officer misconstrued the law in concluding that the county had authority to regulate subdivisions more stringently than state law. We understand petitioners to argue that the county was required to amend its code to stay current with the statutory definition of "subdivide land" or, at a minimum, that the county is required to apply Ordinance No. 3 consistently with the statutory definition of "subdivide land" that applied in 1961. We agree with and adopt the hearings officer's reasoning and conclusion that, in 1961, the county was authorized to regulate subdivisions more stringently than state law and that applicable county law prohibited land divisions that resulted in four or more parcels, regardless of the resulting parcel sizes.

As explained, the 1955 legislature revised the definition of "subdivide land" to include only land divisions that resulted in the creation of "parcels of less than five acres each." Or Laws 1955, ch 756, § 1. That same legislation provided:

> "The governing body of a county or a city may, by regulation or ordinance, adopt standards, *in addition to those otherwise provided by law*, governing, in the area over which the county or city has jurisdiction under section 4 of this Act, the approval of plats of subdivisions and of partitioning of land by creation of a street or way *where the additional standards are considered necessary to carry out development patterns or plans and to promote the public health, safety and general welfare*. Such standards *may include*, taking into

> consideration the location and surrounding area of the proposed subdivisions, requirements for placement of utilities, for the width and location of streets or for minimum lot sizes and such other requirements as the governing body considers necessary for lessening congestion in the streets, for securing safety from fire, flood, pollution or other dangers, for providing adequate light and air, for preventing overcrowding of land or for facilitating adequate provision of transportation, water supply, sewerage, drainage, education, recreation *or other needs*." *Id.* § 9(1) (emphases added).

Based on that legislation, the hearings officer found that the legislature expressly authorized counties to impose more restrictive regulations than those set forth in statute. The hearings officer concluded that Ordinance No. 3 regulated land divisions where the resulting parcels were more than five acres unless the divisions were for agricultural purposes. Petitioners did not contend or demonstrate that the 1961 conveyances were for agricultural purposes. Therefore, the hearings officer affirmed the denials of the legal lot verification applications.

Petitioners argue that the LC definition of "subdivide" in 1961 was not the county's attempt to regulate subdivisions more stringently than state law, that the different county definition was instead a mere artifact, and that the county is therefore required to give effect to the 1961 statutory definition. Other than the legislative history recounted above, petitioners provide no evidence of the county's intent in not amending the LC in lock step with state law. Inaction is not a strong indicator of intent and is not sufficient to overcome the plain text.

Petitioners further argue that Oregon Laws 1955, chapter 756, section 9, does not authorize the county to adopt a more stringent definition of "subdivide land." We do not read section 9 so narrowly. Instead, we agree with the hearings

officer that provision did delegate authority to the county to regulate the division of land more stringently than state law, including by applying a different and more restrictive definition of "subdivide land." The hearings officer did not misconstrue state law or apply county law in a manner that exceeded the county's delegated authority.

In the alternative, petitioners argue that the hearings officer misconstrued Ordinance No. 3. According to petitioners, the LC did not require subdivision approval for the 1961 conveyances. Again, Ordinance No. 3 provides:

> "The term 'subdivide' as used in this ordinance shall mean to partition, plat, or subdivide land into four or more lots, or containing a dedication of any part thereof as a public street or highway, for other than agricultural purposes." Record 119.

Petitioners argue that this definition, by its terms, prohibits only a "singular event (*i.e.*, recording a deed)" that divides land into four or more units. Petition for Review 21. Petitioners argue that the two 1961 conveyances do not constitute regulated subdivision of land because the divisions were accomplished by way of two separate instruments. Petitioners cite *Landwatch Lane County v. Lane County*, ___ Or LUBA ___, ___ (LUBA No 2021-010, May 10, 2021) (slip op at 10-11), where we observed that the state law definition of "subdivide land" "did not include a temporal limitation, but instead focused on whether a 'single instrument' resulted in proscribed act—the creation of four or more units of land or the creation of a street." Petition for Review 13. Petitioners acknowledge that, by 1961, state law had been amended to regulate land divisions resulting in four

or more parcels, even under multiple conveyance instruments, "when such parcel exists as a unit or contiguous units under a single ownership as shown on the tax roll for the year preceding the partitioning." Or Laws 1955, ch 756, § 1. The hearings officer applied that temporal limit. Petitioners argue that the county was required to give effect to the statutory definition of "subdivide land" in 1961, including *both* the calendar year and five-acre limitations.

We agree that the county was required to give effect to the temporal limitation in state law that was effective in 1961. That is, a party dividing land within the county could not avoid subdivision regulation by splitting conveyances into separate instruments within the same year. Accordingly, the fact that the 1961 conveyances were accomplished by two separate instruments does not exempt the overall division into four parcels within a single year.

However, for the reasons explained above, we agree with the hearings officer that the county was not required to apply the five-acre limitation. The hearings officer did not misconstrue Ordinance No. 3.

The second assignment of error is denied.

The county's decision is affirmed.