

1 Opinion by Ryan.

2 **NATURE OF THE DECISION**

3 Petitioner appeals a hearings officer decision denying its application for
4 validation of a unit of land.

5 **MOTION TO TAKE OFFICIAL NOTICE**

6 The county moves for LUBA to take official notice of House Bill 2723
7 (2007). The motion is granted. ORS 40.090(2).

8 **FACTS**

9 Petitioner owns a 2.77-acre unit of land zoned Rural Residential (RR-5).
10 We refer to that unit of land as the Property. In March 1968, the Property was
11 created by a deed from the then-owner of a portion of a larger parcel (Larger
12 Parcel) to petitioner's predecessor-in-interest. The Larger Parcel was previously
13 created by deed in 1965. In 1965, and in 1968, the county's 1962 Subdivision
14 Ordinance provided standards for the creation of new parcels.

15 Petitioner submitted a validation of unit of land application. Record 421-
16 587. The planning director denied the application and petitioner appealed the
17 decision to the hearings officer.

18 After holding a hearing on the application and affirming the planning
19 director's decision, the hearings officer issued two reconsidered decisions in
20 response to petitioner's two requests for reconsideration. In the second
21 reconsideration decision, the hearings officer denied the application because they

1 concluded that the Larger Parcel was not a lawfully established unit of land. This
2 appeal followed.

3 **FIRST ASSIGNMENT OF ERROR**

4 Petitioner’s first assignment of error is that the hearing officer improperly
5 construed ORS 92.176 in denying the application. ORS 197.835(9)(a)(D). ORS
6 92.176 was first enacted in 2007, and provides a process to cure, in some
7 circumstances, the legal lot status of parcels that were not lawfully created. It
8 provides as relevant here:

9 “(1) A county or city may approve an application to validate a unit
10 of land that was created by a sale that did not comply with the
11 applicable criteria for creation of a unit of land if the unit of
12 land:

13 “(a) Is not a lawfully established unit of land; and

14 “(b) Could have complied with the applicable criteria for
15 the creation of a lawfully established unit of land in
16 effect when the unit of land was sold.”¹

17 The hearings officer interpreted ORS 92.176 to require petitioner to
18 demonstrate that the Larger Parcel was lawfully created, and concluded that the
19 Larger Parcel was not lawfully created:

20 “The four 1965 deeds constituted an unlawful division of land,
21 which resulted in an unlawfully created parent property [the Larger
22 Parcel], from which the subject property was later created. Because
23 the parent property was unlawful, it was not possible to create lawful

¹ Lane Code (LC) 13.150(1) implements ORS 92.176, and for ease we refer only to the statutory provisions here.

1 properties out of it.” Record 9.

2 In its first assignment of error, petitioner argues that the hearings officer’s
3 interpretation of ORS 92.176 to require petitioner to demonstrate that the Larger
4 Parcel was lawfully created is inconsistent with the text of the statute.

5 We review the hearings officer’s interpretation of state law (and local law
6 that implements state law) to determine whether the interpretation is correct,
7 affording no deference to the interpretation. *Kenagy v. Benton County*, 115 Or
8 App 131, 838 P2d 1076, *rev den*, 315 Or 271 (1992). In construing the law, we
9 will consider the text, context and legislative history of the law at issue in order
10 to determine the intent of the enacting legislature. *PGE v. Bureau of Labor and*
11 *Industries*, 317 Or 606, 610-12, 859 P2d 1143 (1993); *State v. Gaines*, 346 Or
12 160, 171-172, 206 P3d 1042 (2009). We first consider the text of the statute.

13 Petitioner argues that ORS 92.176(1) unambiguously requires an applicant
14 for validation of a unit of land to demonstrate only that “the unit of land” (1) was
15 not lawfully created, and (2) could have complied with applicable criteria for the
16 creation of a lawfully established unit of land in effect when the unit of land was
17 sold.² Petitioner also points to the text of other provisions of the same statute at

² It is undisputed that the Property “is not a lawfully established unit of land”
under ORS 92.176(1)(a).

ORS 92.010(3) defines “lawfully established unit of land” to mean:

“(A) A lot or parcel created pursuant to ORS 92.010 to 92.192; or

“(B) Another unit of land created:

1 ORS 92.176(2) through (7), and argues that none of those provisions refer to any
2 unit of land other than the unit of land that is the subject of the validation
3 application. Petition for Review 22-23.

4 The hearings officer's decision does not identify anything in the text of
5 ORS 92.176 or any other statute that supports their interpretation of ORS 92.176.
6 The county's brief similarly does not identify anything in the text of ORS 92.176
7 that supports the hearings officer's interpretation of ORS 92.176.

8 However, the county's brief cites ORS 92.177 as providing context in
9 support of the hearings officer's interpretation of ORS 92.176. ORS 92.177
10 provides:

11 "When a unit of land was sold before January 1, 2007, but was not
12 a lawfully established unit of land, the governing body of the city or
13 county or its designee shall consider and may approve an application
14 for the creation of a parcel pursuant to ORS 92.176, notwithstanding
15 that less than all of *the owners of the existing lawfully established*
16 *unit of land* have applied for the approval." (Emphasis added.)

17 The county argues that ORS 92.177's reference to "the owners of the existing
18 lawfully established unit of land" supports an interpretation of ORS 92.176 that
19 requires an applicant for validation of a unit of land to establish that the parent

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

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

1 property from which the property that is the subject of the validation application
2 was sold is an “existing lawfully established unit of land.” Petitioner argues that
3 ORS 92.177 merely authorizes a city or county to accept an application to
4 validate of a unit of land that is signed by less than all of the owners of the parent
5 property, but does not require that an applicant for validation of a unit of land
6 pursuant to the provisions of ORS 92.176(1) establish in their application that the
7 parent property is lawfully established.

8 We agree with petitioner. ORS 92.177 recognizes that an application for
9 validation of a unit of land could possibly or likely not be able to gather the
10 signatures of all of the owners of a parent property from which the property that
11 is the subject of the validation application was sold.

12 We agree with petitioner that nothing in the express language of ORS
13 92.176 requires petitioner to demonstrate that the Larger Parcel was lawfully
14 created. ORS 92.176(1) allows a county to approve “an application to validate *a*
15 *unit of land* that was created by a sale that did not comply with the applicable
16 criteria for creation of a unit of land if *the unit of land*” satisfies (a) and (b).
17 (Emphases added.) The statutory remedy is tied to “an application” and focuses
18 the analysis on “the unit of land” that is the subject of the application.

19 However, petitioner also argues, and we agree, that because it is
20 undisputed that the 1962 Subdivision Ordinance was in effect in 1968, ORS
21 92.176(1)(b) requires petitioner to establish that the 1968 creation of the Property
22 could have complied with the 1962 Subdivision Ordinance. Petitioner argues that

1 the hearings officer's findings are inadequate in failing to address whether in
2 1968 the Property could have complied with the 1962 Subdivision Ordinance,
3 which petitioner argues is the "issue [that] goes directly to the heart of" whether
4 the application can satisfy ORS 92.176(1)(b). Petition for Review 36-37.

5 The hearings officer adopted no findings regarding whether the 1968
6 creation of the Property could have complied with the 1962 Subdivision
7 Ordinance.³ Petitioner takes the position in the petition for review that nothing in
8 the 1962 Subdivision Ordinance would have required petitioner to demonstrate
9 that the Larger Parcel was lawfully created. Petition for Review 27. Remand is
10 required in order for the hearings officer to address in the first instance whether
11 in 1968 the Property could have complied with the 1962 Subdivision Ordinance.

12 The first assignment of error is sustained.

13 **SECOND ASSIGNMENT OF ERROR**

14 Petitioner's second assignment of error argues that the hearings officer
15 erred in failing to address 13 issues that petitioner raised during the proceedings
16 below. Petition for Review 41-43. Petitioner's second assignment of error is
17 framed as precautionary in order to preserve issues on appeal and on remand.

³ We express no opinion here regarding whether the express language of the 1962 Subdivision Ordinance would have required petitioner to demonstrate that the Larger Parcel was lawfully created.

1 Petition for Review 41 n 7. Accordingly, we need not and do not reach the second
2 assignment of error.⁴

3 The county's decision is remanded.

⁴ We note that Issue 10 is a restatement of the issues raised in the first assignment of error. Petition for Review 42.