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

MARCIA JENKINSON and DAN JENKINSON,
Petitioners,

vs.

LANE COUNTY,
Respondent.

LUBA No. 2024-091

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.

Tiffany A. Johnson filed the respondent's brief and argued on behalf of respondent.

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

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

REVERSED 04/14/2025

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

Opinion by Wilson.

NATURE OF THE DECISION

Petitioners appeal a hearings official decision denying petitioners' applications for two legal lot verifications.

FACTS

This case involves the appeal of a hearings official decision on remand from the Court of Appeals and LUBA. *Jenkinson v. Lane County*, LUBA Nos 2022-101/102 (July 7, 2023) (*Jenkinson I*), *rev'd and rem'd*, 329 Or App 372, 540 P3d 1126 (2023) (*Jenkinson II*). We start by describing the original county decision that preceded remand as context for our later description of the decision challenged in this appeal.

In 2022, petitioners applied to the county for legal lot verifications (LLVs) for two lots. Tax Lot 2001 is approximately 6.24 acres and is developed with a dwelling. Tax Lot 2002 is approximately 0.55 acres located at the northeast corner of Tax Lot 2001 and is developed with petitioners' dwelling. Both tax lots were originally part of a much larger property, which we refer to as the grandparent property. In 1961, two land sale contracts and deeds that occurred on different dates resulted in the grandparent property being divided into four properties. Those divisions created the parent property. In 1964, the southern portion of the grandparent property – the parent property – was divided into four properties through multiple land sale contracts and deeds that occurred on different dates. The 1964 divisions of the parent property created the two tax lots

at issue in this appeal. *See Jenkinson I* (explaining and depicting in greater detail the creation of the subject properties).

In 2022, the county planning director denied the LLVs on the bases that both the 1961 and 1964 divisions were unlawful subdivisions and, thus, the lots were not lawfully created and could not be verified as legal lots. As explained in greater detail later, some land divisions at the time were required to go through the subdivision process and others were not. The planning director found that both the 1961 and 1964 divisions required county subdivision review and approval, and because that did not occur, they did not result in lawfully created properties. Petitioners appealed the planning director's decision to the hearings official. The hearings official affirmed the planning director's decision, but only on the basis that the 1961 land divisions were unlawful. The hearings official specifically declined to reach the issue of the lawfulness of the 1964 land divisions.

Petitioners appealed the hearings official's decision to LUBA. In *Jenkinson I*, we agreed with the hearings official that the 1961 divisions were required to go through the county subdivision process, and because they did not, Tax Lot 2001 and Tax Lot 2002 were not legally created lots. Petitioners appealed our decision to the Court of Appeals. The Court of Appeals reversed and remanded, holding that the 1961 divisions were not governed by county subdivision regulation. *Jenkinson II*, 329 Or App 372. We subsequently

remanded the decision to the county. *Jenkinson v. Lane County*, LUBA Nos 2022-101/102 (May 1, 2024) (*Jenkinson III*).

Jenkinson I, *II*, and *III* resulted in a legal conclusion that the 1961 land divisions were not regulated by county or state law and, thus, were lawful. The only issue for the county to decide on remand was whether the 1964 land divisions were lawful. On remand, the hearings official again affirmed the planning director's decision and found that the 1964 land divisions were not lawful. This appeal followed.

ASSIGNMENT OF ERROR

Petitioners argue the hearings official misconstrued the applicable law. ORS 197.835(9)(a)(D). Lane Code (LC) 13.140(3) provides the criteria for an LLV: "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."

Petitioners argue that Tax Lot 2001 and Tax Lot 2002 are lawfully established units of land under LC 13.030(3)(n)(ii)(bb) because they were created by deed or land sales contract and there were no applicable planning, zoning, or subdivision or partition ordinances or regulations when the parent property was divided in 1964. There is no dispute that the properties were created by deed or land sales contract, so the only issue is whether there were applicable planning, zoning, or subdivision or partition ordinances or regulations that applied to the 1964 land divisions. If there were applicable land division ordinances or regulations, then the land divisions were not lawful. If there were not any applicable ordinances or regulations, then the land divisions were lawful.

The applicable county land division ordinance when the land divisions took place in 1964 was the 1962 Subdivision Ordinance. Section II of the 1962 Subdivision Ordinance – Approval of Subdivisions – provided, in pertinent part:

> "B. Approval by the Planning Commission of *statutory subdivisions* of land outside the boundaries of incorporated cities, before a plat for any such subdivision may be filed or recorded in the office of the county recording officer, is hereby required in accordance with this Ordinance, by virtue of the authority granted to the Board of County Commissioners in O.R.S. 215.150.
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> "C. Approval by the Planning Commission of subdivisions of land outside the boundaries of incorporated cities, *other than statutory subdivisions*, is hereby required by virtue of the authority granted to the Board of County Commissioners in O.R.S. 92.046 and 92.048." (Emphases added.)

The 1962 Subdivision Ordinance set up a two-track system for considering subdivisions – statutory subdivisions (Section II.B) and other than statutory subdivisions (Section II.C). The statutory subdivision provisions applied to subdivisions as defined by the ORS 92.010(2) (1961) definition of "subdivide land." 1962 Subdivision Ordinance, Section III.F.5. ORS 92.010(2) (1961) provided that "subdivide land" meant:

> "[T]o 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 of 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*." (Emphases added); *see also Jenkinson I* (explaining that "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") (slip op at 11).

While the 1964 land divisions created four or more parcels from a parcel that was under single ownership the preceding year, the divisions did not result in four parcels that were "less than five acres each." Instead, the 1964 divisions resulted in only one parcel that was less than five acres. Therefore, the 1964 land divisions did not "subdivide land" under ORS 92.010(2) (1961) and were not regulated by the county as a statutory subdivision under Section II.B of the 1962 Subdivision Ordinance.

Section II.C of the 1962 Subdivision Ordinance regulated *some* land divisions that were not statutory subdivisions. Section III.G.4 of the 1962 Subdivision Ordinance provided, in part:

"'Subdivision' means the division of land; except that the following division of land shall not be deemed a subdivision where no new street is created:

> "a. A division of land for use for agricultural purposes, where each resulting lot is 5 acres or larger in size, has a width of not less than 300 feet for the entire length between the lot front line and lot rear line, and has frontage of not less than 300 feet on a street; provided that such street has a right of way width of not less than 50 feet and not less than such width as may be called for in the Master Road Plan.
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> "* * * * *
>
> "c. A division of land which would be a minor subdivision but for the fact that no part of the area being subdivided is within [the] urbanizing area."

Petitioners argued that the land divisions that created the subject lots met the exception to "subdivision" under Section III.G.4(c). It is undisputed that the 1964 land divisions did not create a new street, and that no part of the divided land was located in the urbanizing area. Petitioners argued that the divisions would otherwise be a minor subdivision if they were within the urbanizing area. If the 1964 divisions would otherwise have been minor subdivisions, then, pursuant to the exception, they would not have been subject to any county subdivision regulations and therefore the resultant units of land created by the divisions were lawfully established and could be verified as legal lots.

The 1962 Subdivision Ordinance Section III.E.3 provided:

"'Minor Subdivision' means any subdivision of lan[d] any part of which is within [the] urbanizing area and which:

"a Results in not more than three lots fronting on an existing street; and which

"b. Does not create any new street, or require the widening of any existing street; and which

"c. Does not impede the future highest and best use of the remainder of the tract under the same ownership, or adversely affect the safe and healthful development of such remainder or any adjoining land or access thereto, in the judgment of the Planning Commission; and which

"d. Is not in conflict with any law or ordinance applicable to the land being subdivided."

Petitioners argued below, and reiterate on appeal, that the 1964 land divisions met the definition of "minor subdivision" and were not in the urbanizing area so they met the exception to "subdivision" under Section III.G.4(c) and were not subject to regulation under the 1962 Subdivision Ordinance. The hearings official's decision on remand, however, does not address petitioners' Section III.G.4(c) argument. The hearings official's decision states:

> "In 1964, * * * a series of transactions further divided the subject property, which, taken together created four or more lots: the January 31, 1964 transaction divided the parent property into two parcels, and the February 8, 1964 transactions further divided the remaining portion of the property into two additional parcels, now known as Tax Lots 2001 and 2002, resulting in a total of four parcels. At the time of those 1964 transactions, the Lane County Revised Subdivision Ordinance then in effect required approval by the County of all subdivisions of land, excepting only 'division of land for use for agricultural purposes, where each resulting lot is 5 acres or larger in size.' [1962 Subdivision Ordinance III.G.4(a)]. The 1964 transactions created four parcels, one of which, the parcel

now known as Tax Lot 2002, was less than five acres in size. The two lots created in the February 8, 1964 transactions are therefore not legally created lots under the then-existing County ordinance. The later adjustment to the boundary between Tax Lots 2001 and 2002 was of no effect as to the lawful existence of the lots." Record 5.

The hearings official's decision is silent as to petitioners' argument that the land divisions qualify for the exception to "subdivision" under Section III.G.4(c).[1]

The closest the hearings official comes to addressing petitioners' actual argument is in the final conclusion of the decision:

"The subsequent partitions of the parent property in 1964, however, involved creation of four additional tax lots within one year, the last of which included the subject properties * * *. Therefore, the Hearings Official finds that Tax Lots 2001 and 2002 were not created 'in compliance with all applicable planning and zoning and subdivision partition ordinances' [LC 13.030(3)(n)]. Thus Tax Lots are not lawfully established units of land, and the Director's decision to deny legal lot verification is affirmed." Record 6.

Although the hearings official's decision does not mention Section III.G.4(c), it is apparent that the hearings official denied the decision on the basis that the sequential divisions in 1964 resulted in the creation of more than three

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[1] Oddly, the hearings official's decision explains that the land divisions do not qualify for the exception to "subdivision" under Section III.G.4(a) because not all of the resulting lots are more than five acres. As far as we can tell, petitioners never argued that they met this exception. The crux of this case is whether petitioners satisfied the exception under Section III.G.4(c) – not Section III.G.4(a).

lots in one calendar year. Petitioners argue that the 1962 Subdivision Ordinance does not contain any temporal limitation regulating sequential land divisions. Consequently, the county was required to consider each 1964 deeded land division independently. When considering the deeds independently, petitioners argue that the 1962 Subdivision Ordinance Section III.G.4(c) exempted from the county definition of "subdivision" the February 8, 1964, deed that created tax lots 2001 and 2002.

The county responds that the hearings official correctly concluded that the 1962 Subdivision Ordinance required subdivision approval when a unit of land was divided into four or more lots during a calendar year. The county does not dispute petitioners' allegation that they satisfy all the requirements for a "minor subdivision," except for Section III.E.3(a) – which requires that the land division not result in more than three lots. The county argues that, although none of the multiple land divisions that created the subject properties in 1964 individually resulted in more than three lots, in conjunction, those land divisions created four or more parcels in a calendar year. The county refers to this temporal limitation as "the rule of four."

The county observes that petitioners' Section III.G.4(c) exemption argument is premised "on their theory that each deed conveyance is analyzed separately as a distinct land division." Respondent's Brief 21. In other words, if the hearings official correctly concluded that the rule of four applies, then the facts of this case do not support an exemption to the 1962 Subdivision Ordinance,

and the hearings official did not err by not addressing petitioners' Section III.G.4(c) exemption argument.

We review the hearings official's interpretation to determine whether it is correct. *Gage v. City of Portland*, 319 Or 308, 315, 877 P2d 1187 (1994). Where the hearings official's decision does not contain an interpretation that is adequate for our review, we may construe the local code in the first instance, or we may remand the matter for the hearings officer to adopt an interpretation. An interpretation of a local provision is adequate for review where the findings in the challenged decision articulate or demonstrate the decision maker's understanding of the provision to a degree sufficient to resolve the issues raised in the petition for review. *Huff v. Clackamas County*, 40 Or LUBA 264, 271 (2001). In the present case, while the hearings official's decision does not expressly discuss the rule of four, it is apparent that he relied on the rule of four. The parties have adequately briefed the rule of four issue, and we believe the findings demonstrate the hearings official's understanding of the provision sufficiently for our review.[2]

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[2] Even if the hearings official's interpretation were not sufficient for review, under ORS 197.829(2), "[i]f a local government fails to interpret a provision of its comprehensive plan or land use regulations, or if such interpretation is inadequate for review, [LUBA] may make its own determination of whether the local government decision is correct." Our authority to make a determination under ORS 197.829(2) is discretionary. *Opp v. City of Portland*, 153 Or App 10, 14, 955 P2d 768, *rev den*, 327 Or 620 (1998). In the present case, however, we would exercise that authority if necessary.

As the 1962 Subdivision Ordinance regulates divisions of land not subject to regulation under state law, we consider the question of whether the county may regulate divisions of land more stringently than state law. In *Jenkinson II*, the county was not permitted to regulate land divisions more stringently than allowed under state law because the county had not adopted a home rule charter. Thus, the 1961 land divisions were legal because they complied with existing state law. *Jenkinson II*, 329 Or App at 1128. The county adopted a home rule charter in 1962, so presumably the county was able to regulate the 1964 land divisions more stringently than state law required.

The 1964 land divisions were lawful under existing state law, but the county was allowed to regulate such land divisions more stringently. The question is whether the 1962 Subdivision Ordinance actually regulated sequential land divisions under the rule of four as the county argues. As quoted earlier, under Section III.E.3(a), a "minor subdivision," among other things not at issue here, "[r]esults in not more than three lots * * *." There is nothing in the 1962 Subdivision Ordinance that specifically references a temporal limitation or prohibition on sequential land divisions. In other words, there is nothing in the 1962 Subdivision Ordinance that specifically imposes the rule of four.

The county argues that although the 1962 Subdivision Ordinance is silent as to the rule of four, the ordinance's authorizing introductory language shows that the county intended to include the calendar year temporal limitation from

ORS 92.010(2) (1961) in county-regulated "other than statutory subdivisions." The 1962 Subdivision Ordinance introduction states:

> "The following rules, regulations and standards relating to the subdivision of land in Lane County, and the following procedures to be followed by subdividers, the Lane County Planning Commission, and the Board of County Commissioners of Lane County with respect thereto, are *hereby adopted pursuant to O.R.S. 215.150 and 92.010 through 92.990*." (Emphasis added.)

The county attributes more significance to this authorization than is warranted. All this authorization does is set forth the statutes that allow the county to enact the regulations. The authorization statement does not demonstrate that the county intended to adopt the temporal limitation in ORS 92.010(1) (1961) to "other than statutory subdivisions."

The ORS 92.010(1) (1961) definition of "subdivide land" included the rule of four temporal limitation, but it also limited subdivisions to situations that created "four or more parcels of less than five acres each." The 1962 Subdivision Ordinance did not merely incorporate the statutory framework into the local code – the county took some parts of the statutory framework (so as to comply with state law) and applied different standards in other areas. There is nothing in the ordinance's authorization statement that would suggest that when choosing what parts of the statute the county intended to implement that it meant to implement the temporal limitation but not the requirement that all resulting parcels would be less than five acres. The authorization is as silent to that question as the rest of the ordinance.

The county argues that our decision in *Jenkinson I* affirmed the county's interpretation that the rule of four applies. According to the county, the Court of Appeals did not overrule that aspect of our decision. In *Jenkinson I*, we stated:

> "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." Slip op at 16.

If it were not for the Court of Appeals' decision in *Jenkinson II*, we might agree with the county that it correctly applied the rule of four. While it is not entirely clear whether the Court of Appeals overruled that aspect of our decision, even if they did not specifically overrule us, their holding would still seem to apply. The Court of Appeals stated:

> "LUBA concluded that the county was subject to the one-year time limitation that had been a statutory limitation since 1955, even though the county's definition of subdividing land did not include that limitation. LUBA viewed the size limitation differently though, characterizing the absence of the statutory acreage limit in the county's ordinance simply as evidence of the county's more 'stringent' subdivision standards by including, rather than exempting, larger parcels from its approval standards.
>
> "* * * * *
>
> "We conclude that LUBA's interpretation of the statutes is incorrect. LUBA's disparate treatment of the acreage and time limitations is logically inconsistent." 329 Or App at 378.

Jenkinson II applied to the 1961 land divisions where the county was not permitted to expand the universe of land divisions subject to regulation. In the present case, the county theoretically could have applied more stringent regulations – including the rule of four – but, as explained, there is simply nothing in the 1962 Subdivision Ordinance that establishes that the county meant to adopt the rule of four. Given that the ordinance is silent as to the rule of four, we believe the county's argument that the rule of four was nonetheless incorporated into the 1962 Subdivision suffers from the same logical inconsistency as our decision in *Jenkinson I*.

Finally, given that the 1962 Ordinance is silent as to the rule of four, our decision that the rule of four does not apply is consistent with our decision in *Landwatch Lane County v. Lane County*, LUBA No 2021-010 (May 10, 2021). Although that case involved the prior subdivision ordinance and involved state law, we similarly considered whether an ordinance that was silent as to a temporal limitation nonetheless included such a limitation.[3] The hearings officer in that case found that there was no temporal limitation and looked only to the action that created the lots at issue. We agreed with the hearings officer's interpretation:

> "In our view, of the possible interpretations presented, the hearings officer's interpretation is the most consistent with the text and

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[3] Initially the petitioner argued for application of the rule of four but then at oral argument changed their argument to be for the application of the rule of four but not limited to only one calendar year.

> context, and probable legislative intent, of [the relevant ordinance and statute]. As noted, [the relevant ordinance and statute] are silent regarding any temporal parameters. What [the statute] authorizes counties to proscribe, and what [the ordinance] expressly proscribes, is the *action* of subdividing land by deed. As noted, 'subdivide land' is defined as acting 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.' Fairly read, that definition is focused on singular actions (*i.e.*, recording a deed) that accomplish one or more of two proscribed results: (1) dividing land into four or more units or (2) dedicating a public street or highway. Note that the second prohibition is clearly singular in nature: it effectively prohibits any attempt to dedicate by deed a public street without planning commission review and approval, regardless of whether or not the landowner has dedicated land for a public street in the past. In turn, that suggests that the first prohibition is also focused on an effort to divide land into four or more units in a single instrument. Nothing in the text or context of [the relevant statute and ordinance] suggests that the legislative focus was on a cumulative tally of proscribed actions over some undefined period.
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> "The hearings officer's interpretation is more consistent with the text of [the relevant statute and ordinance] because it focuses on the specific proscribed action, rather than importing a temporal framework to evaluate cumulative actions over time. The action proscribed, recording an instrument that accomplishes one of the two proscribed results, is a single event that, by its nature, occurs at one point in time." *Landwatch Lane County*, LUBA No 2021-010 (slip op at 10-11).

While this involves a different ordinance and statute, the analysis is equally applicable as in the *Landwatch* case where the applicable ordinance was also silent as to a temporal limitation. We believe the same analysis applies in the present case.

In conclusion, the county can only apply the rule of four by being more stringent than state law, as the land divisions at issue were lawful under state law. As the 1962 Subdivision Ordinance is silent as to any temporal limitation, the county must be able to point to something else that incorporates the temporal limitation of state law without incorporating the "all lots must be less than five acres" limitation of state law. All the county points to is the language authorizing the county to enact the ordinance pursuant to state statutes. That language hardly demonstrates that the county intended to incorporate all aspects of state law, and it certainly does not demonstrate that the county meant to incorporate some but not all aspects of state law.

The first assignment of error is sustained.

DISPOSITION

Petitioners argue that they satisfied the exception to "subdivision" under Section III.G.4(c). The county concedes that the 1964 land divisions meet the requirements for an exception under Section III.G.4(c), but for the fact that under the rule of four, petitioners created more than three lots. In other words, the only basis the county has for denying the LLVs is that the land divisions violated the rule of four. As we have explained, the 1962 Subdivision Ordinance did not include the rule of four, and the county could not deny the LLVs on that basis.

LUBA will reverse a local government's decision where the local government "[i]mproperly construed the applicable law" under ORS 197.835(9)(a)(D), and its decision cannot be sustained under a correct

interpretation of the law. *Curtin v. Jackson County*, 56 Or LUBA 649, 654-55 (2008). Given that the county's only basis for denying the LLVs improperly construes the law, the decision cannot be sustained under a correct interpretation of the law.

The county's decision is reversed.