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

LANDWATCH LANE COUNTY,
Petitioner,

vs.

LANE COUNTY,
Respondent,

and

KARIN FALLON and JIM FALLON,
Intervenors-Respondents.

LUBA No. 2020-041

FINAL OPINION
AND ORDER

Appeal from Lane County.

Sean Malone, Eugene, filed the petition for review and reply brief and argued on behalf of petitioner.

No appearance by Lane County.

Bill Kloos, Eugene, filed the response brief and argued on behalf of intervenors-respondents.

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

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

REMANDED 10/20/2020

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

Opinion by Ryan.

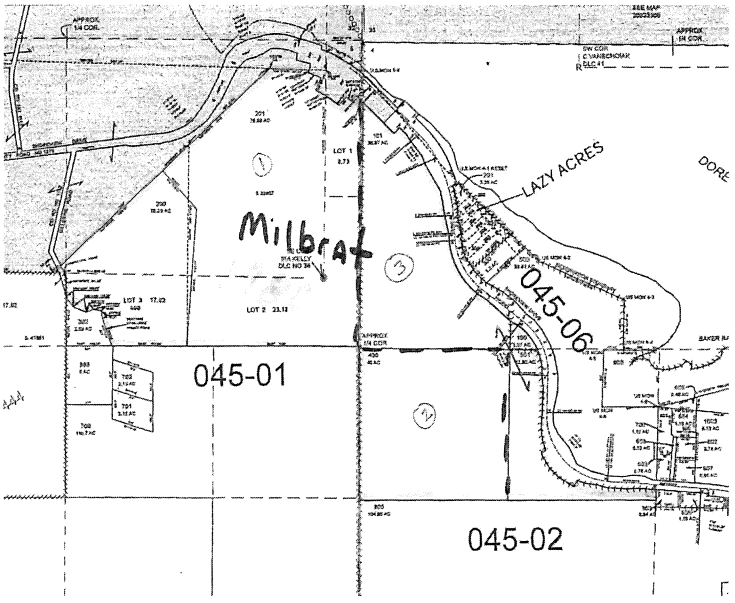
NATURE OF THE DECISION

Petitioner appeals a decision by the hearings officer approving an application for a large tract forest dwelling.

FACTS

Intervenors-respondents (intervenors) own approximately 174 acres of property zoned Impacted Forest Lands (F-2), located in the county four miles east of Cottage Grove, near Dorena Reservoir. We describe in some detail the 174 acres owned by intervenors.

In 1980, the county approved an application by Milbrat for a minor partition, and Milbrat subsequently recorded a partition plat that partitioned an approximately 200-acre property into three parcels. Parcel 1 was approximately 105 acres; Parcel 2 was approximately 40 acres, and Parcel 3 was approximately 55 acres:



Record 14, 365-66, 477. Milbrat transferred Parcel 1 to Formosa in 1988. In 1992, Formosa transferred an approximately 79-acre portion of 105-acre Parcel 1 to Agri-Pac. This unit of land is referred to in the hearings officer's decision as "Tax Lot 201." Formosa retained the remaining 26 acres, which is referred to in the hearings officer's decision as "Tax Lot 200." Tax Lot 200 includes a dwelling. Record 5, 12. No application for a partition of Parcel 1 was filed or approved with the 1992 transfer of Tax Lot 201 to Agri-Pac.

Milbrat transferred Parcels 2 and 3, totaling approximately 95 acres, to intervenors in 1990. In 2001, intervenors acquired Tax Lot 201 by warranty deed. Record 429-30. In 2019, intervenors applied to the county for approval of a large tract forest dwelling. ORS 215.740(1)(b), which is implemented by Lane Code (LC) 16.211(3)(a)(ii), requires that such dwellings be sited on a "tract" that contains at least 160 contiguous acres. ORS 215.010(2) defines "[t]ract" as "one or more contiguous lots or parcels under the same ownership." ORS 215.010(1)(a) provides that "parcel," as used in ORS Chapter 215, "[i]ncludes a unit of land created" "[b]y partitioning land as defined in ORS 92.010," "[i]n compliance with all applicable planning [and] zoning * * * regulations," or "by deed or land sale contract, if there were no applicable planning [and] zoning * * * regulations" at the time the parcel was created. In other words, a "parcel" is a unit of land that was lawfully created. *See Friends of Yamhill County v. Yamhill County*, 229 Or App 188, 193, 211 P3d 297 (2009) (explaining the relationship between the ORS 215.010 definition of "parcel" and "lawful creation").

The planning director concluded that combined Tax Lot 201 and Parcel 3, which we refer to as Adjusted Parcel 3, together with Parcel 2, formed a tract totaling at least 160 acres in size and approved the application. Petitioner appealed the decision to the hearings officer, who denied the appeal and approved the application. This appeal followed.

FIRST AND SECOND ASSIGNMENT OF ERROR

As explained above, intervenors acquired 40-acre Parcel 2 and 55-acre Parcel 3 in 1990. Intervenors then acquired Tax Lot 201, adjacent to the western boundary of Parcel 3, in 2001. We first describe the hearings officer's decision before addressing the assignments of error.

The hearings officer concluded that the 1992 transfer of Tax Lot 201 from Formosa to Agri-Pac did not comply with the then-applicable county land division regulations, and that the division "was an illegal partition." Record 8. However, the hearings officer concluded that the 2001 deed that transferred Tax Lot 201 to intervenors "constituted a *de facto* property line adjustment between Parcel 3 and tax lot 201 that adjusted the line between those two properties to coincide with the western boundary of tax lot 201, essentially eliminating tax lot 201." *Id.* The hearings officer relied on

> "longstanding county policy that supports treating certain deeds or transactions as *de facto* property line adjustments. Stated in its simplest form, under that policy, the county will treat a deed transferring property between adjacent properties, prior to property line adjustment regulations, as a legal adjustment of adjacent

property boundaries."[1] *Id.* at 10.

Relying on the described "longstanding county policy," the hearings officer concluded that the 2001 deed transferring Tax Lot 201 to intervenors eliminated the eastern boundary of Parcel 1 and created a 134-acre Adjusted Parcel 3 that includes the original 55 acres in Parcel 3 and the additional 79 acres in Tax Lot 201. She reasoned that she would apply the county policy to intervenors' application because three "parcels"—40-acre Parcel 2 (owned by intervenors), 134-acre Adjusted Parcel 3 (also owned by intervenors), and the 26-acre Tax Lot 200 (owned by a third party)—existed both before and after the 2001 deed. She also relied on OEC 311(1)(x), which includes a presumption that "[t]he law has been obeyed," to conclude that the 2001 deed transferring Tax Lot 201 to intervenors was a property line adjustment that expanded the western boundary of Parcel 3 to include an additional 79 acres. Based on that reasoning, the hearings officer concluded that intervenors' "tract" includes two lawfully created parcels: 40-acre Parcel 2 and 134-acre Adjusted Parcel 3 (including Parcel 3 and Tax Lot 201).

A. First Assignment of Error

In its first assignment of error, petitioner argues that the hearings officer improperly construed LC 16.211(3) when she concluded that intervenors'

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[1] The decision describes the policy as a "presumption" that is an "equitable solution to the situation where a conveyance on its face is improper," and that "the purpose of the policy is to provide relief to a landowner that would otherwise be stuck owning an illegal lot." Record 11-12.

property is a "tract" comprised of one or more lawfully created parcels. Petitioner argues that the hearings officer's application of an uncodified "longstanding county policy" that treats some deeds as property line adjustments violates ORS 215.416(8)(a). ORS 215.416(8)(a) provides:

> "Approval or denial of a permit application shall be based on standards and criteria which shall be set forth in the zoning ordinance or other appropriate ordinance or regulation of the county and which shall relate approval or denial of a permit application to the zoning ordinance and comprehensive plan for the area in which the proposed use of land would occur and to the zoning ordinance and comprehensive plan for the county as a whole."

Petitioner argues that the hearings officer's reliance on an uncodified policy is inconsistent with ORS 215.416(8)(a)'s requirement that the county's decision be based on "standards and criteria" set forth in the zoning ordinance or another ordinance. Petition for Review 19-21. Relatedly, petitioner argues that reliance on that uncodified "equitable principles" to justify a lack of compliance with the statutory and LC requirement that the tract on which the dwelling is sought is comprised of lawfully created parcels is inconsistent with the requirement that approval or denial of a permit application be based on codified standards and criteria. *Id.* at 22-24. Citing *Strawn v. City of Albany*, 20 Or LUBA 344, 350-51 (1990), petitioner also argues that the hearings officer's reliance on OEC 311(1)(x) to presume that intervenors "obeyed the law" and effected a property line adjustment in 2001 was improper, given the general rule in land use

proceedings that an applicant bears the burden of proof to demonstrate that all applicable standards and criteria are satisfied. *Id.* at 24 n 3, 24-25.

Intervenors do not respond to petitioner's first assignment of error in any meaningful way. We agree with petitioner that the hearings officer's reliance on a "longstanding county policy," not codified in the zoning ordinance or any other ordinance, to conclude that a "*de facto* property line adjustment" occurred in 2001 is inconsistent with ORS 215.416(8)(a). First, all parties and the hearings officer agreed that, in 2001, state law governed property line adjustments and the county code contained no regulations governing property line adjustments.[2] State law did not and does not provide for, reference, or allow a "*de facto*" property line adjustment. Rather, state law provided for a "*de jure*" property line adjustment—in other words, one that complied with the law.

Second, reliance on an uncodified county policy that is, as the hearings officer described it, "fact-dependent" means that an applicant or an opponent

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[2] ORS 215.780(1)(a), (c) (1999) established a minimum parcel size of 80 acres for land zoned exclusive farm use or designated forestland. In *Phillips v. Polk County*, 213 Or App 498, 504, 162 P3d 338 (2007), the Court of Appeals affirmed LUBA's decision reversing a property line adjustment that resulted in parcels that failed to comply with minimum parcel sizes.

In 2008, the legislature enacted ORS 92.192, which was intended to overrule *Phillips*. ORS 92.192 establishes complicated minimum lot size requirements for property line adjustments affecting non resource and resource-zoned properties in different circumstances. *See Landwatch Lane County v. Lane County*, 77 Or LUBA 486, 491-92 (2018) (explaining ORS 92.192).

cannot know or predict whether the county will rely on that policy to conclude that an applicable approval criterion is met. Record 11. That is, in turn, inconsistent with the purpose of the codification requirement at ORS 215.416(8)(a), which is to identify the standards and criteria that the county will apply to an application "to give the parties and the decision-maker an understanding of what proof and arguments are necessary to show that the application complies with those criteria and to make the outcome capable of prediction." *Zirker v. City of Bend*, 233 Or App 601, 609, 227 P3d 1174 (2010).

The first assignment of error is sustained.

B. Second Assignment of Error

In its second assignment of error, petitioner argues that the hearings officer misconstrued the applicable law and made a decision not supported by substantial evidence in the whole record in characterizing the 2001 transfer of Tax Lot 201 to intervenors as a "*de facto* property line adjustment." Petitioner argues that the 2001 transfer failed to comply with the statutory requirements for property line adjustments in ORS Chapter 92 (1999). First, petitioner argues, the version of ORS 92.010(11) that was in effect in 2001 did not allow a "property line adjustment" as a means to *eliminate* a common property line, but only to *relocate* common property lines. ORS 92.010(11) (1999).[3] Second, petitioner argues, in

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[3] ORS 92.010(11) (1999) provided:

2001, ORS 92.190(3) and (4) included specific requirements for property owners who sought to adjust property boundaries by means other than a replat, based on adopted county procedures.[4] ORS 92.190(3) (1999) authorized local governments to "use procedures other than replatting procedures in ORS 92.180 and 92.185 to adjust property lines as described in ORS 92.010(11) [1999], as long as those procedures include the recording, with the county clerk, of conveyances conforming to the approved property line adjustment as surveyed in accordance with ORS 92.060(7)." ORS 92.190(4) (1999) required "[a] property line adjustment deed" to contain "the description of the adjusted line, references to original recorded documents and signatures of all the parties with proper acknowledgement." Petitioner argues that the 2001 transfer to intervenors was accomplished by a warranty deed that did not include any of the requirements set out in ORS 92.190(4) (1999), and that the hearings officer therefore erred in concluding that the 2001 deed effectuated a property line adjustment.

Intervenors respond that the 1999 version of the statute did not specifically prohibit property line adjustments to eliminate a common boundary line, and that

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> "'Property line adjustment' means the relocation of a common property line between two abutting properties."

Petitioner argued to the hearings officer that, under the law applicable in 2001, in order to eliminate a common property line, a replat was required. Record 66.

[4] All parties agree that in 2001 the county had not adopted any procedures for relocating or eliminating property lines by means other than a replat. No party assigns any legal significance to this fact.

the hearings officer's conclusion that the 2001 deed effectuated a property line adjustment was correct. Intervenors also respond that strict compliance with the deed requirements set out in ORS 92.190(4) (1999) was not necessary in order to conclude that a property line adjustment had occurred. Finally, intervenors put forth several policy arguments for why we should affirm the hearings officer's decision that the 2001 transfer was a *de facto* property line adjustment.

The hearings officer rejected petitioner's argument that the definition of "property line adjustment" in ORS 92.010(11) (1999) limited property line adjustments to only the relocation, and not the elimination, of common property lines:

> "LandWatch is correct that the 1999 version of ORS Chapter 92 did not include within the definition of 'property line adjustment' the elimination of a unit of land. However, the Hearings Official does not believe that that fact precludes treating the 2001 transfer as a *de facto* property line adjustment. The significance of the statutory definition of 'property line adjustment' in this case is anything but clear. Arguably, a statutorily defined 'property line adjustment' did not qualify as a partition, and thus was not subject to the land division requirements. However, that did not mean that a person could not adjust a property line between two properties in such a way that would eliminate one of the properties involved. It might have meant that it did not qualify as a 'property line adjustment' under the statute. But that does not necessarily translate into a conclusion that such an adjustment of a property line was illegal." Record 11.

Petitioner does not challenge that finding.

However, we need not address the issue because, even assuming for purposes of this opinion that, under ORS 92.010(11) (1999), property line

adjustments could eliminate a common boundary line, we agree with petitioner that the 2001 deed did not contain any of the required content set out in ORS 92.190(4) (1999). Intervenors do not dispute that point. Rather, intervenors argue that a property line adjustment occurs when it meets the *definition* of property line adjustment, regardless of the information contained in the deed. However, that argument does not acknowledge the requirement in ORS 92.190(4) (1999) that the appropriate deeds contain specific content. For that reason, the hearings officer improperly relied on the 2001 deed to conclude that the 2001 transfer was a "*de facto* property line adjustment."

The second assignment of error is sustained.

DISPOSITION

We will reverse a land use decision when 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 when "[t]he decision improperly construes the applicable law, but is not prohibited as a matter of law." OAR 661-010-0071(2)(d).

In our resolution of the first assignment of error, we concluded that the hearings officer improperly construed the applicable law when she relied on an uncodified "longstanding county policy" to conclude that intervenors' 174-acre property includes two lawfully created parcels, one of which (Adjusted Parcel 3) was created by a "*de facto* property line adjustment" in 2001. In our resolution of the second assignment of error, we concluded that the hearings officer improperly

construed the applicable law and made a decision not supported by substantial evidence in the record when she relied on the 2001 deed to conclude that the 2001 transfer of Tax Lot 201 to intervenors was a "*de facto* property line adjustment."

Accordingly, we remand the decision to the hearings officer to apply the standards and criteria that are contained in the county's codified ordinances to the application, without reliance on uncodified county policy or the 2001 warranty deed as effectuating a "*de facto* property line adjustment."

The county's decision is remanded.