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

LANDWATCH LANE COUNTY,
Petitioner,

vs.

LANE COUNTY,
Respondent.

LUBA No. 2021-010

FINAL OPINION
AND ORDER

Appeal from Lane County.

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

H. Andrew Clark filed the response brief and argued on behalf of respondent.

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

AFFIRMED 05/10/2021

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 DECISION

Petitioner appeals a hearings officer decision verifying as a legal lot a unit of land created by deed in 1951.

FACTS

In 1943, the Culwells acquired a 120-acre parcel (the parent parcel). At that time, no state or county legislation regulated land divisions in that area of the county. In 1947, the state legislature authorized counties to regulate "the subdivision of land," including by requiring planning commission approval to subdivide land and proscribing subdivisions by deed. Or Laws 1947, ch 537, § 7. That law defines the phrase "subdivide land" to mean "partition, plat or subdivide land into four or more lots, blocks or tracts." *Id.*

In 1949, the county adopted Ordinance No. 3 to implement Oregon Laws 1947, chapter 537, section 7. Ordinance No. 3 requires planning commission approval to subdivide land, proscribes subdivisions by deed, and includes the same statutory definition of "subdivide land" quoted above.[1]

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[1] Ordinance No. 3 provides, in relevant part:

> "The regulations hereinafter stated shall apply to the subdivision of all land within the unincorporated territory of Lane County. It shall be unlawful hereafter to subdivide land by 'metes and bounds' and no subdivision plat may be filed or recorded until submitted to and approved by the County Planning Commission. The term 'subdivide' as used in this ordinance shall mean to partition, plat, or subdivide land into four lots, blocks or tracts, or containing a

Over the course of a little over a year, starting in 1950, the Culwells divided and conveyed the parent parcel via a series of deeds. On September 5, 1950, the Culwells deeded a small portion of the parent parcel to adjoining landowners, the Burnetts, and on the same day deeded a different small portion of the parent parcel to other adjoining landowners, the Wooleys. In the record, those lands conveyed are designated as Parcels A and B.[2]

On October 25, 1950, the Culwells conveyed the northern half the remaining parent parcel to Pierson, with the exception of a small sliver of land that was separated from the rest of the remaining parent parcel by a road. The land conveyed to Pierson is designated in the record as Parcel 1. The small sliver of land is designated as Parcel C. The southern half of the remaining parent parcel, which remained in the Culwells' ownership, is designated as Parcel 2 in the record.

On July 25, 1951, the Culwells conveyed most of Parcel 2 to the Wagners, with the exception of a small rectangular area at the western edge of Parcel 2. At approximately the same time, the Culwells deeded that small rectangular parcel to Weeks. The Weeks parcel is the subject property at issue in this appeal.

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dedication of any part thereof as a public street or highway, for other than agricultural purposes." Record 5 n 1.

[2] We note that, because Parcels A and B (and later Parcel C) were conveyed to adjoining landowners, they could be described as "property line adjustments," in modern parlance, if the deeds simply added the land to that of the adjoining landowners rather than creating separate units of land.

Subsequently, sometime in the fall of 1951, the Culwells deeded Parcel C, the small sliver of land, to adjoining landowners, the Lileses.

On March 30, 2020, the current owner of the subject property applied to the county to verify the subject property as a legal lot, or "lawfully established unit of land," pursuant to Lane Code (LC) 13.140. A "lawfully established unit of land" includes a unit of land created (1) "[i]n compliance with all applicable planning, zoning and subdivision or partition ordinances and regulations, or" (2) "[b]y deed or land sales contract, if there were no applicable planning, zoning or subdivision or partition ordinances or regulations." LC 13.030(3)(n)(ii)(aa), (bb) (implementing and adopting verbatim ORS 92.010(3)(a)(B)).

The county planning director concluded that the July 1951 creation of the subject property was not part of a "subdivision" under the county's 1949 Ordinance No. 3, and that no other subdivision or partition regulations applied in July 1951. Accordingly, the planning director verified the subject property as a lawfully established unit of land, pursuant to LC 13.030(3)(n)(ii)(bb).

Petitioner appealed the planning director's decision to the hearings officer, arguing in relevant part that the series of transactions from 1950 to 1951 cumulatively constituted a "subdivision" within the meaning of Ordinance No. 3. Because Ordinance No. 3 requires planning commission approval to subdivide land and, because the Culwells received no planning commission approval, petitioner argued that the subject property was not created in compliance with Ordinance No. 3.

The hearings officer rejected that argument, noting that neither Oregon Laws 1947, chapter 537, section 7, nor Ordinance No. 3 included any temporal limitation, such as that found in the currently applicable statute and county subdivision ordinance, which both define "subdivide land" as the creation of "four or more lots within a calendar year." ORS 92.010(16); LC 13.030(3)(jj). Accordingly, the hearings officer verified the subject property as a legal lot.

This appeal followed.

ASSIGNMENT OF ERROR

Petitioner argues that the hearings officer misconstrued Ordinance No. 3 and interpreted that ordinance in a manner that is inconsistent with its express language and purpose. Petitioner couches our standard of review in the framework set out in ORS 197.829 (setting out LUBA's standard of review for interpretations of local comprehensive plans and land use regulations). However, as the county correctly observes, ORS 197.829 provides a deferential standard of review most appropriately applied to a *governing body* interpretation of local land use legislation, not a hearings officer interpretation. *See Gould v. Deschutes County*, 233 Or App 623, 629, 227 P3d 758 (2010) (neither LUBA nor the courts owe deference to a hearings officer's interpretation of local land use legislation).

In addition, and more to the point, the local regulation at issue here directly implements state statute. Therefore, even if the county governing body had rendered the challenged interpretation, no deferential standard of review would apply. ORS 197.829(1)(d). In the present case, we directly interpret that state

statute. Under these circumstances, the appropriate standard of review is whether the interpretation is legally correct, applying the general rules of statutory construction set out at ORS 174.010 and in cases such as *State v. Gaines*, 346 Or 160, 206 P3d 1042 (2009), and *PGE v. Bureau of Labor and Industries*, 317 Or 606, 859 P2d 1143 (1993). These cases generally require a multi-step process evaluating first text and context, then legislative history and, if necessary, applicable canons of statutory construction.

According to petitioner, the hearings officer narrowly interpreted the Ordinance No. 3 definition of "subdivide land" to include only proposals to divide land into four or more lots *at the same time*. Petitioner argues that that interpretation inserts a limitation into the scope of Ordinance No. 3 that is not present in the text. Further, petitioner argues that the hearings officer's narrow interpretation of Ordinance No. 3 is inconsistent with its purpose, which petitioner argues is to regulate land divisions creating four or more units of land. Petitioner contends that, under the hearings officer's interpretation, Ordinance No. 3 is rendered largely meaningless because a subdivider can create large land divisions while completely avoiding the requirements of the law by engaging in an unlimited series of divisions by deed.

In its petition for review, petitioner no longer argues for interpreting Ordinance No. 3 to include an implicit temporal limitation, which would treat as a "subdivision" the sequential creation of four or more new units of land within a year or similar period. Instead, petitioner argues for a different interpretation,

one that was also presented below but that was not addressed by the hearings officer—that Ordinance No. 3 prohibits creating a total of four or more units of land without planning commission approval, regardless of when or over what period those units of land are created. Petitioner argues that this interpretation, unlike the implied "within the calendar year" limitation primarily argued below and the hearings officer's implied "at one time" interpretation, does not require inserting new language into the text of Ordinance No. 3. *See* ORS 174.010 (in interpreting a statute, a court should not "insert what has been omitted").

Petitioner's proffered interpretation is considerably more restrictive than the current requirements under LC chapter 13 and ORS chapter 92. Under petitioner's interpretation, a landowner would violate Ordinance No. 3 if they divided their land by deed, creating one new parcel each time, four or more times over an unlimited period—for example, once every 10 years for 40 years. Under petitioner's proffered interpretation, the fourth land division in year 40 would trigger the requirement for planning commission review and approval for all four land divisions as a single "subdivision." That approach is highly problematic and almost certainly not what the county contemplated when adopting Ordinance No. 3 or what the legislature contemplated in adopting Oregon Laws 1947, chapter 537, section 7.[3]

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[3] Because the county was not a home rule county in 1949, and because Ordinance No. 3 appears to implement without any substantive changes the relevant language of Oregon Laws 1947, chapter 537, section 7, we assume that

As the hearings officer noted, in the same 1947 legislative session in which the legislature adopted Oregon Laws 1947, chapter 537, section 7, via House Bill (HB) 418 (1947), it also adopted Oregon Laws 1947, chapter 346, section 1, via HB 331 (1947), which provides a definition of "subdivide land" applicable to cities.[4] Unlike HB 418, which applies to counties, the legislature chose in HB 331 to address, within cities, the potential loophole for a series of divisions by deed by specifying that its regulations applied to the division of land as "shown *on the last preceding tax roll*." (Emphasis added.) That language applies a temporal limit by which to measure whether multiple divisions of land within cities "subdivide land," and it effectively limits the potential for property owners to end-run city subdivision regulations by recording a series of divisions by deed. Notably, the legislature included no similar language or limitations in HB 418, and the county included no similar limitations in adopting Ordinance No. 3 to

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the county's legislative intent was aligned with the legislature's. Accordingly, our analysis assumes that evidence of the legislature's intent in adopting Oregon Laws 1947, chapter 537, section 7, is relevant to understanding the county's intent in adopting Ordinance No. 3.

[4] Oregon Laws 1947, chapter 346, section 1, includes the following definition:

> "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."

implement HB 418. HB 331 demonstrates that the legislature was aware of the potential to end-run subdivision regulations by separate, sequential land divisions, but chose not to close that potential loophole on lands subject to county jurisdiction.[5]

Petitioner offers no suggestion why the legislature would effectively prohibit land in counties from being divided by deed four or more times over an unlimited period while allowing such land divisions in cities if they are spread out over more than one tax roll period. As we understand the legislative history in the record, in adopting HB 331 and HB 418, the legislature was more concerned with unregulated land divisions in rapidly developing cities than in relatively undeveloped rural areas.

In addition, we note that petitioner's proffered interpretation is not entirely free from the rule of statutory construction not to "insert what has been omitted." ORS 174.010. HB 418 and Ordinance No. 3 are silent regarding any temporal parameters on counting land divisions toward the prohibited four or more. Petitioner's proffered interpretation can be understood to insert into the text of those provisions the temporal parameter of "an unlimited period of time."

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[5] Not until 1955 did the legislature impose a limit on the number of partitions that can occur *per year* without county subdivision approval. Or Laws 1955, ch 756, §§ 1, 25. In addition, in 1974, the legislature adopted provisions regulating "series partitions" (*i.e.*, series of four or more land divisions that occur within a period that exceeds one calendar year). ORS 92.305 to 92.495; Or Laws 1974, ch 1.

Because HB 418 and Ordinance No. 3 are silent regarding the actual mechanics of how the prohibition on four or more divisions by deed is intended to function, it is likely that any interpretation will "insert" language to one degree or another. *See Preserve the Pearl, LLC v. City of Portland*, 72 Or LUBA 261, 269 (2015) ("When trying to determine the intended meaning of an ambiguous land use regulation, on some level the interpreter can almost always be accused of inserting what has been omitted.").

In our view, of the possible interpretations presented, the hearings officer's interpretation is the most consistent with the text and context, and probable legislative intent, of HB 418 and Ordinance No. 3. As noted, HB 418 and Ordinance No. 3 are silent regarding any temporal parameters. What HB 418 authorizes counties to proscribe, and what Ordinance No. 3 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 HB 418 and Ordinance No. 3 suggests that the legislative focus was on a cumulative tally of proscribed actions over some undefined period.

The hearings officer's interpretation is more consistent with the text of HB 418 and Ordinance No. 3 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. In that sense, the hearings officer's interpretation also has a temporal element, but that temporal element is incidental to the interpretation of the express language.

As the hearings officer noted, under their interpretation, a county landowner could easily have avoided the regulatory requirements of Ordinance No. 3, between the years 1949 and 1955, by recording a series of land divisions by deed. However, as noted above, the 1947 legislature was apparently not concerned with that potential loophole on county lands and chose not to impose on counties the restrictions on sequential divisions that it expressly imposed on cities. Based on the record and arguments before us, petitioner has not established any basis to ignore that relatively clear indication of legislative intent.

The assignment of error is denied.

The county's decision is affirmed.