

BEFORE THE BOARD OF COMMISSIONERS OF LANE COUNTY, OREGON

ORDER NO: 17-09-12-03 IN THE MATTER OF ELECTING WHETHER OR NOT TO HEAR AN APPEAL OF A HEARINGS OFFICIAL AFFIRMED DECISION APPROVING A SPECIAL USE PERMIT FOR A LARGE TRACT DWELLING IN THE IMPACTED FOREST LANDS (F-2) ZONE; ASSESSOR'S MAP 18-02-11; TAX LOT 200 (File No. 509-PA17-05071/Evans and Wolf)

WHEREAS, the Lane County Hearings Official has made a determination approving a special use permit for one single family dwelling in Department File No. 509-PA17-05071; and

WHEREAS, the Lane County Planning Director has received an appeal of the Hearings Official's decision to the Board of County Commissioners pursuant to LC 14.515(3)(f)(ii); and

WHEREAS, the Lane County Hearings Official has affirmed his decision on the application after reviewing the appeal in File No. 509-PA17-05071; and

WHEREAS, Lane Code 14.600 provides the procedure and criteria that the Board follows in deciding whether or not to conduct an on the record hearing for an appeal of a decision by the Hearings Official; and

WHEREAS, the Board of County Commissioners has reviewed this matter at a public meeting of the Board.

NOW, THEREFORE, the Board of County Commissioners of Lane County **ORDERS** as follows:

1. That the appeal does not comply with the criteria of Lane Code 14.600(3) and arguments on the appeal should therefore not be considered. Findings in support of this decision are attached as Exhibit "A."
2. That the Lane County Hearings Official decision dated July 17, 2017, and the letter affirming the decision dated August 3, 2017, attached as Exhibit "B," which found relevant approval criteria are met, are affirmed and adopted by the Board of County Commissioners as the County's final decision. The Board of County Commissioners has reviewed the appeal and the Hearings Official decision and expressly agrees with and adopts the interpretations made by the Hearings Official in the decision.

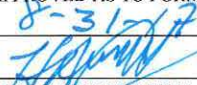
ADOPTED this 12th day of September, 2017.



Pat Farr, Chair
Lane County Board of Commissioners

APPROVED AS TO FORM

Date



LANE COUNTY, OFFICE OF LEGAL COUNSEL

ORDER EXHIBIT "A"

FINDINGS IN SUPPORT OF THE ORDER

1. The property subject to this application, hereinafter referred to as the "subject property," is located on tax lot 200, assessor's map 18-02-11, and is located on the south side of Highway 126 and east of Jasper Road. The parcel is approximately 19 acres in size, is vacant, is forested and does not have a site address. The property is within the Lane County Rural Comprehensive Plan boundary designated Forest Land and is zoned Impacted Forest Lands (F-2) consistent with the designation.

The parcel was first conveyed by deed on February 9, 1914 (See Book 102, Page 573, Lane County Deeds and Records). It was subsequently conveyed on August 12, 1922, and this transaction was recorded In Book 132, Page 519, Lane County Deed and Records. The subject property was first zoned on November 11, 1975, and land division regulations became effective on March 26, 1975.

The subject property was granted preliminary legal lot verification in 509-PA04-05477 and final notice of this action was granted by 509-PA05-05303. The subject property was subsequently verified as a legal lot per 509-PA07-05923 following a series of four property line adjustments to the subject property and surrounding properties in July 2007. It was noticed as a final land use decision per 509-PA07-05924.

2. The site of the proposed dwelling is located in the northeast corner of the subject property approximately 130 feet from the northern property line and 130 feet from the eastern property line. The dwelling will be served by an on-site well and subsurface sewage disposal system. Access is via an existing dirt road system on the subject property.
3. Lane Code 16.211(7) provides that property zoned Impacted Forest Lands that is vacant can qualify for what is called a 'large lot' dwelling if that property is either part of a tract of 160 contiguous acres or is part of a tract of 200 non-contiguous acreage under the same ownership and is located within the same county or an adjacent county. The applicants are relying upon tax lot 3401, assessor's map 19-02-00, a 183 acre parcel located in Lane County and owned by the applicants, to meet the 200-acre standard. Tax Lot 3401 has not been used to qualify another tract for a forest dwelling.

On June 1, 1875, the U.S. government transferred 160 acres to M. Elvey Wooten via Homestead Certificate No. 551. This document was recorded July 30, 1878 (See Book L, Pg 462 & 473, Lane County Deeds and Records). For purposes of identification, this property can be identified as Parcel 1.

On May 31, 1899, the U.S. government transferred 163 acres to John Marshall via Homestead Certificate No. 4549. This document was recorded January 6, 1900 (See Book 27, Page 397, Lane County Deeds and Records). For purposes of identification, this property can be identified as Parcel 2, which was located adjacent to and south of Parcel 1. This parcel would eventually become tax lot 3401.

On June 8, 1901, the U.S. government transferred 160 acres to Oathe Miller via Homestead Certificate No. 4877. This document was recorded September 17, 1901 (See Book 52, Pg 41, Lane County Deeds and Records). For purposes of identification, this property can be identified as Parcel 3, which was located adjacent to and south of Parcel 2.

On January 7, 2010, a property line adjustment transferred ten acres from Parcel 1 to Parcel 2, the latter now being 173 acres (See Instrument No. 2010-00074, Lane County Deeds and Records). On the same day, a second property line adjustment transferred ten acres from Parcel 3 to Parcel 2, the latter now being 183 acres (See Instrument No. 2010-00076, Lane

County Deed and Records). Land County did not review property line adjustment until January 8, 2010.

4. On May 17, 1989, Crown Pacific Partners transferred by warranty deed property located in Section 30 and 31, Township 18 South, Range 2 West to James A. Smejkal. This deed was duly recorded on May 17, 1989 (See Reel 1573, Reception No. 9058305, Lane County Deeds and Records). The property contained what is now tax lot 3401.

On November 26, 1990, James A. Smejkal transferred the timber rights from the property transferred on May 17, 1989, to Columbia Pacific Corp. The timber deed was recorded on December 6, 1990, and can be found on Reel 1668, Reception No. 9058305, Lane County Deed and Records.

On December 31, 1993, James A. Smejkal transferred the above-described property to Smejkal Land & Timber Co., LLC. This bargain and sale deed was recorded January 3, 1994 and can be found on Reel 1909, Reception No. 9400074, Lane County Deeds and Records.

On December 26, 1998, the Smejkal Land & Timber Co., LLC and the Forever Green Forests, LLC merged. Under ORS 63.497(1)(b), when a merger involving a limited liability company takes effect, title to all real estate and other property owned by each of the business entities is vested in the surviving business entity. Forever Green Forests, LLC became the surviving entity in this merger on January 7, 1999.

On January 19, 2010, Columbia Pacific, Inc. transferred the merchantable timber to Forever Green Forests, LLC via bargain and sale deed. This deed was recorded January 20, 2010.

5. The Hearings Official found and the Board agrees that the property line adjustment deeds recorded as 2010-000744 and 2010-000745, which concerned tax lot 3401, were signed and acknowledged by Forever Green Forests, LLC. The Appellant states that Forever Green Forests, LLC did not acquire ownership interest in the adjusted properties until January 19, 2010 and therefore violated ORS 92.190(4), which requires that the property line adjustment deeds must include "signatures of all parties with proper acknowledgment. This assumption is apparently based upon a January 19, 2010 Bargain and Sale deed from Columbia Pacific, Inc., grantor, to Forever Green Forests, LLC. The Appellant cites *Houk v. Darling, et al.*, 238 Or 484, 486 (1964) for the proposition that the property line adjustments that did not comply with ORS 92.190(4) were either void or invalid.

Tax lot 3401 was lawfully created on May 31, 1899, when the U.S. government transferred 163 acres to John Marshall via Homestead Certificate No. 4549. James Smejkal acquired tax lot 3401 and other contiguous property in 1989. After selling the merchantable timber on the property, Mr. Smejkal deeded to the property to Smejkal Land & Timber Co., LLC, which subsequently merged with Forever Green Forests, LLC in December of 1998. Forever Green Forests, LLC became the surviving entity in this merger on January 7, 1999.

Therefore, Forever Green Forests, LLC was authorized to be the signatory on the two property line adjustments that occurred on January 7, 2010. The January 19, 2010 deed from Columbia Pacific, Inc. to Forever Green Forests, LLC did not transfer ownership but rather transferred rights to the merchantable timber previously transferred in 1990.

6. The Hearings Official found and the Board agrees that Large tract forestland dwelling provisions of ORS 215.740(3)(b) require the owner of a non-contiguous tract to sign a non-revocable deed restriction that precludes that tract to be used as acreage for the future siting of a dwelling. The Appellant has pointed out that tax lot 3800, the southern parcel in property line adjustment deed 2010-000745, has already been used to qualify a large-tract dwelling on tax lot 401, assessor's map 18-02-11 (See PA-15-05810). The Appellant further argues that

the applicant in that decision did not record the deed restriction in violation of ORS 215.740(3)(b).

Tax lot 3800 is the noncontiguous parcel used in justifying a large tract forestland dwelling on tax lot 401, assessor's map 18-02-1. This land use decision was accomplished in 2015 with PA 15-05810. At this time, ten acres of tax lot 3800 had already been transferred to tax lot 3401 via property line adjustment deed 2010-000745. Thus, the ten acres that were transferred from tax lot 3800 were not used twice as the remainder acreage of that tax lot were sufficient to meet the noncontiguous requirements of Lane Code 16.211(7)(b) for tax lot 401. The alleged failure of the applicant in PA 15-05810 to properly record the deed restriction in violation of ORS 215.740(3)(b) is irrelevant to this application.

7. The Hearings Official found and the Board agrees that noncontiguous parcels subject to Lane Code 16.211(7) must be lawfully created.

The Appellant argues that tax lot 3401 was cleaved from former tax lot 3400 and a portion of tax lot 3800 by deed in 2010. On January 19, 2010, Columbia Pacific, Inc. conveyed the property described by tax lots 3400, 3401, and 3300 to Forever Green Forests, LLC. Then in 2015, Forever Green Forests, LLC conveyed tax lot 3401 to the Applicants and also conveyed tax lot 3800 to Mr. Wolf.

The record demonstrates that tax lot 3401 was created on May 31, 1899, when the U.S. government transferred 163 acres to John Marshall via Homestead Certificate No. 4549. This document was recorded January 6, 1900. This transaction is not reflected on the Lane County Assessor's deed card for tax lot 3401. The transfer of a legal lot may be done by deed and does not require land division approval from the County.

8. The Hearings Official found and the Board agrees that in the *Bowerman* case, Lane County had approved nine property line adjustments in a single 2015 decision¹. Relying heavily on its earlier decision in *Warf v. Coos County*, 43 Or LUBA 460 (2003), reiterated its understanding that "[T]o approve a property line adjustment and then approve another property line adjustment for one or both of the adjusted properties, the statutorily required conveyance to complete the first property line adjustment must first be recorded."² LUBA noted that serial property line adjustments would be permissible if each was subject to a separate application and each was recorded by deed prior to the subsequent property line adjustment.

The property line adjustments to tax lot 3401 were completed prior to Lane County's review of property line adjustments. Therefore, there was no application process for the property owners to follow. The two property line adjustments did conform to the *Warf* case since the first adjustment was made and its deed recorded before the second adjustment was made and its deed was recorded. Given the facts of the situation, I do not believe that the 2007 property line adjustments that reconfigured tax lot 3401 were inconsistent with the *Bowerman* decision.

9. The hearing on this matter was held on June 8. The record was held open until June 22 for both parties to submit new evidence and argument. The record was also held open until June 29 but was restricted to responses to the argument and evidence submitted by the other on June 22. The Applicants point out that this allegation was not raised until June 29 and should be excluded. I agree. The Applicants had until July 6 for final rebuttal but they were restricted to final argument. In other words, they had no opportunity to introduce new evidence into the record to refute the Appellant's argument. This issue could have been raised prior to the

¹ *Bowerman v. Lane County*, __ Or LUBA __ (LUBA No. 2016-008, January 26, 2017)

² *Bowerman*, slip op at 29.

hearing in the Appellant's appeal statement, at the hearing, or in the Appellant's June 22 submission. Failure to do so precludes the ability of the hearings official to address this issue unless the record is reopened. [The Hearings Official] decline[d] to reopen the record and dismiss[ed] this allegation of error.

Nevertheless, the record demonstrates that tax lot 200 was first conveyed by deed on August 12, 1922. (See Book 132, Page 519, Lane County Deeds and Records.) Its legal lot status was verified in PA 07-5923. Notice of this verification was mailed on August 2, 2007 and became final on August 14, 2007. The notice contained diagrams of the property prior to and after the property line adjustment.

10. The Hearings Official found and the Board agrees that the record explicitly documents that both the subject property and its noncontiguous counterpart, tax lot 3401, were lawfully created. The record also demonstrates that the property line adjustments that affected the subject property and tax lot 3401 did not violate the precepts of the Bowerman case and were legal at the time of their execution.
11. On April 21, 2016, the applicant submitted a request to expand an existing (K-12) private school in the Exclusive Farm Use (E-25) zone to Lane County Land Management Division. Specifically, the applicant requested to construct one new structure and to expand two existing structures totaling 9,500 square feet of floor area.
12. On January 18, 2017, the applicant submitted a request for a dwelling in the Impacted Forest Lands (F-2) zone to the Lane County Land Management Division. Specifically, requesting one single family dwelling per the 'Large Tract' provisions found in Lane Code 16.211(7).
13. On February 17, 2017, staff deemed the application complete and subsequently sent referral requesting comments about the proposal on February 22, 2017.
14. On May 2, 2017, the Planning Director issued a determination that the subject property complied with the applicable standards and criteria for the proposed expansion pursuant to LC 16.212(7) and (8). Notice of the determination was mailed to surrounding property owners. On May 15, 2017, a timely appeal was submitted by LandWatch Lane County and Robert Emmons. Notice of public hearing on the appeal was mailed on May 18, 2017.
15. On June 8, 2017, the Lane County Hearings Official conducted a public hearing. The written record was held open until July 6, 2017, with opportunity for rebuttal on June 22, 2017, and applicant's final written argument by July 6, 2017. On July 17, 2017, the Lane County Hearings Official issued a decision approving the application. Notice of the Hearings Official's decision was mailed to the applicant and all parties on the same day.
16. On July 31, 2017, the appellant filed a timely appeal and requested that the Board of County Commissioners not conduct a hearing on the appeal and deem the Hearings Official's decision the final decision of the County, pursuant to LC 14.515(3)(f)(ii).
17. On August 3, 2017, the Hearings Official reviewed the appeal and affirmed his decision without further consideration pursuant to LC 14.535(1).
18. In order for the Board to hear arguments on the appeal, Lane Code 14.600(3) requires one or more of the following criteria to be found by the Board to apply to the appeal:
 - *The issue is of Countywide significance.*
 - *The issue will reoccur with frequency and there is a need for policy guidance.*
 - *The issue involves a unique environmental resource.*
 - *The Planning Director or Hearings Official recommends review.*

19. The Board finds that the issues involved in this appeal are not of Countywide significance. The issues in this appeal are focused on a distinctly narrow scope related primarily to a Oregon Court of Appeals decision, *Bowerman vs. Lane County* 287 Or App 383 (2017). Additionally, this particular type of special use permit is relatively rare. According to Land Management Division records, seven similar applications have been received over the last five years.
20. The Hearings Official's decision represents a reasonable interpretation of Lane Code 16.211(7) and the guiding Oregon Administrative Rule and Statute. The Planning Director does not find that the implications of this decision are of such import that they would demonstrate Countywide significance.
21. The Board finds that the issues involved in this appeal will not reoccur with frequency and that there is not a need for further policy guidance. As mentioned above, the issues in this appeal are narrow in in scope and applicability. Requests for Special Use Permits to qualify for a dwelling under the 'large tract' provisions are relatively uncommon land use applications. The amount of acreage required to demonstrate approval is substantial and much of the land that could qualify under this provision has been previously developed or would not easily qualify for a dwelling under the provisions of Lane Code 16.211(7).

The Hearings Official's decision represents a reasonable interpretation of Lane Code 16.211(7) and the guiding Oregon Administrative Rule and Statute.

In the event that a comparable proposal and fact pattern comes before the Land Management Division, the Hearings Official's decision provides sufficient guidance. Therefore, the Planning Director finds that there is not a need for further policy guidance.

22. The Board finds that the issues raised in this appeal do not relate to, or involve, a unique environmental resource. The property does not contain any unique or notable environmental resources, nor does it contain any regulated water bodies, rivers, creeks, or wetlands.
23. The Planning Director does not recommend review of the appeal on the record for the reasons cited above.
24. To meet the requirements of Lane Code 14.600(2)(b), the Board is required to adopt a written decision and order electing to have a hearing on the record for the appeal or declining to further review the appeal.
25. The Board has reviewed this matter at its meeting on September 12, 2017, and finds that the appeal does not comply with the criteria of Lane Code Chapter 14.600(3), declines further review, and elects not to hold an on the record hearing for the appeal.
26. The Board affirms and adopts the Lane County Hearings Official decision dated July 17, 2017, and the letter affirming the decision dated August 3, 2017, as the County's final decision in this matter, and expressly agrees with and adopts the interpretations made by the Hearings Official in the decision.

EXHIBIT B

LANE COUNTY HEARINGS OFFICIAL APPEAL OF A PLANNING DIRECTOR APPROVAL OF A LARGE TRACT DWELLING WITHIN THE F-2 IMPACT FOREST LANDS DISTRICT

Application Summary

On January 18, 2016, a request to establish a large tract dwelling in the Impacted Forest Lands (F-2) zone was submitted to Lane County Land Management Division by Douglas Wolf and Michael Evans. On February 22, 2017, staff deemed the application complete. On May 2, 2017, the Director issued a determination that the subject property complied with the applicable standards and criteria for a Forest Template Dwelling pursuant to LC 16.211(7) and (8). Notice of the determination was mailed to surrounding property owners. On May 15, 2017, a timely appeal was submitted by LandWatch Lane County (LandWatch) .

Parties of Record

Douglas Wolf
Andrew Mulkey

LandWatch Lane County
Robert Emmons

Michael Evans
Lauri Segel-Vaccher

Application History

Hearing Date: June 8, 2017
(Record Held Open Until July 6, 2017)

Decision Date: July 17, 2017

Appeal Deadline

An appeal must be filed within 12 days of the issuance of this decision, using the form provided by the Lane County Land Management Division. The appeal will be considered by the Lane County Board of Commissioners.

Statement of Criteria

Lane Code 16.211(7) & (8)

Findings of Fact

1. The property subject to this application, hereinafter referred to as the "subject property," is located on tax lot 200, assessor's map 18-02-11, and is located on the south side of Highway 126 and east of Jasper Road. The parcel is approximately 19 acres in size, is vacant, is forested, and does not have a site

address. The property is within the Lane County Rural Comprehensive Plan boundary designated Forest Land and is zoned Impacted Forest Lands (F-2) consistent with the designation.

The parcel was first conveyed by deed on February 9, 1914. (See Book 102, Page 573, Lane County Deeds and Records.) It was subsequently conveyed on August 12, 1922 and this transaction was recorded in Book 132, Page 519, Lane County Deeds and Records. The subject property was first zoned on November 11, 1975 and land division regulations became effective on March 26, 1975.

The subject property was granted preliminary legal lot verification in PA 04-5477 and final notice of this action was granted by PA 05-5303. The subject property was subsequently verified as a legal lot per PA 07-05923 following a series of four property line adjustments to the subject property and surrounding properties in July of 2007¹. It was noticed as a final land use decision per PA 07-05924.

2. The site of the proposed dwelling is located in the northeast corner of the subject property approximately 130 feet from the northern property line and 130 feet from the eastern property line. The dwelling will be served by an on-site well and subsurface sewage disposal system. Access is via an existing dirt road system on the subject property.
3. Lane Code 16.211(7) provides that property zoned Impacted Forest Lands that is vacant can have what is called a "large lot" dwelling if that property is either part of a tract of 160 contiguous acres or is part of a tract of 200 non-contiguous acreage under the same ownership and is located within the same county or an adjacent county. The Applicants are relying upon tax lot 3401, assessor's map 19-02-00, a 183 acre parcel located in Lane County and owned by the Applicants, to meet the 200-acre standard. Tax lot 3401 has not been used to qualify another tract for a forest dwelling.

On June 1, 1875, the U.S. government transferred 160 acres to M. Elvey Wooten via Homestead Certificate No. 551. This document was recorded July 30, 1878. (See Book L, Pg 472 & 473, Lane County Deeds and Records.) For purposes of identification, this property can be identified as Parcel 1.

On May 31, 1899, the U.S. government transferred 163 acres to John Marshall via Homestead Certificate No. 4549. This document was recorded January 6, 1900. (See Book 27, Pg 397, Lane County Deeds and Records.) For purposes of identification, this property can be identified as Parcel 2, which was located adjacent to and south of Parcel 1. This parcel would eventually become tax lot 3401.

¹At the time the properties were owned by James A. Smejkal. Each of these four adjustments were individually recorded.

On June 8, 1901, the U.S. government transferred 160 acres to Oathe Miller via Homestead Certificate No. 4877. This document was recorded September 17, 1901. (See Book 52, Pg 41, Lane County Deeds and Records.) For purposes of identification, this property can be identified as Parcel 3, which was located adjacent to and south of Parcel 2.

On January 7, 2010, a property line adjustment transferred ten acres from Parcel 1 to Parcel 2, the latter now being 173 acres. (See Instrument No. 2010-00074, Lane County Deeds and Records.) On the same day, a second property line adjustment transferred ten acres from Parcel 3 to Parcel 2, the latter now being 183 acres. (See Instrument No. 2010-00075, Lane County Deeds and Records.) Lane County did not review property line adjustments until January 8, 2010.

4. On May 17, 1989, Crown Pacific Partners transferred by warranty deed property located in Section 30 and 31, Township 18 South, Range 2 West to James A. Smejkal. This deed was duly record on May 19, 1989. (See Reel 1573, Reception No. 8921569, Lane County Deeds and Records.) This property contained what is now tax lot 3401.

On November 26, 1990, James A. Smejkal transferred the timber rights from the property transferred on May 17, 1989 to Columbia Pacific Corp. This timber deed was recorded on December 6, 1990 and can be found on Reel 1668, Reception No. 9058305, Lane County Deeds and Records.

On December 31, 1993, James A. Smejkal transferred the above-described property to Smejkal Land & Timber Co., LLC. This bargain and sale deed was recorded January 3, 1994 and can be found on Reel 1909, Reception No. 9400074, Lane County Deeds and Records.

On December 26, 1998, the Smejkal Land & Timber Co., LLC and the Forever Green Forests, LLC merged. Under ORS 63.497(1)(b), when a merger involving a limited liability company takes effect, title to all real estate and other property owned by each of the business entities is vested in the surviving business entity. Forever Green Forests, LLC became the surviving entity in this merger on January 7, 1999.

On January 19, 2010, Columbia Pacific, Inc. transferred the merchantable timber by to Forever Green Forests, LLC via bargain and sale deed. This deed was recorded January 20, 2010.

Decision

THE PLANNING DIRECTOR DECISION APPROVING THE REQUEST (PA 17-05071) BY DOUG WOLF AND MICHAEL EVENS FOR A LARGE LOT DWELLING PER LANE CODE 16.211(7) ON TAX LOT 200, ASSESSOR'S MAP 18-02-11 IS AFFIRMED.

Justification for the Decision (Conclusion)

The subject property is zoned F-2 Impacted Forest Land. The Applicants are requesting approval to construct a single-family dwelling as provided by Lane Code 16.211(7). Dwellings authorized by this provision are known as “large lot” dwellings because the property either contains 160 contiguous acres or it contains at least 200 acres in one ownership that is not contiguous but is located within the same county or in an adjacent county and is zoned for forest use. Additionally, the placement of a dwelling on impacted forest land must meet the siting standards provided by Lane Code 16.211(8).

The following are the Appellant’s allegations of error:

1. *The property line adjustment deeds recorded as 2010-000744 and 2010-000745 were not signed by a party with ownership interest in the property nor were they properly acknowledged by a party with an ownership interest.*

The property line adjustment deeds recorded as 2010-000744 and 2010-000745, which concerned tax lot 3401, were signed and acknowledged by Forever Green Forests, LLC. The Appellant states that Forever Green Forests, LLC did not acquire ownership interest in the adjusted properties until January 19, 2010 and therefore violated ORS 92.190(4), which requires that the property line adjustment deeds must include “signatures of all parties with proper acknowledgment. This assumption is apparently based upon a January 19, 2010 Bargain and Sale deed from Columbia Pacific, Inc., grantor, to Forever Green Forests, LLC. The Appellant cites *Houk v. Darling, et al.*, 238 Or 484, 486 (1964) for the proposition that the property line adjustments that did not comply with ORS 92.190(4) were either void or invalid.

Tax lot 3401 was lawfully created on May 31, 1899, when the U.S. government transferred 163 acres to John Marshall via Homestead Certificate No. 4549. James Smejkal acquired tax lot 3401 and other contiguous property in 1989. After selling the merchantable timber on the property Mr. Smejkal deeded to the property to Smejkal Land & Timber Co., LLC, which subsequently merged with Forever Green Forests, LLC in December of 1998. Forever Green Forests, LLC became the surviving entity in this merger on January 7, 1999.

Therefore, Forever Green Forests, LLC was authorized to be the signatory on the two property line adjustments that occurred on January 7, 2010. The January 19, 2010 deed from Columbia Pacific, Inc. to Forever Green Forests, LLC did not transfer ownership but rather transferred rights to the merchantable timber previously transferred in 1990. *This allegation of error is dismissed.*

2. *Tax lot 3800, the southern property described in property line adjustment deed 2010-000745 has already been used to qualify a large-tract dwelling on tax lot 401.*

Large tract forestland dwelling provisions of ORS 215.740(3)(b) require the owner of a non-contiguous tract to sign a non-revocable deed restriction that precludes that tract to be used as acreage for the future siting of a dwelling. The Appellant has pointed out that tax lot 3800, the southern parcel in property line adjustment deed 2010-000745, has already been used to qualify a large-tract dwelling on tax lot 401, assessor's map 18-02-11. (See PA 15-05810) The Appellant further argues that the applicant in that decision did not record the deed restriction in violation of ORS 215.740(3)(b).

Tax lot 3800 is the noncontiguous parcel used in justifying a large tract forestland dwelling on tax lot 401, assessor's map 18-02-1. This land use decision was accomplished in 2015 with PA 15-05810. At this time, ten acres of tax lot 3800 had already been transferred to tax lot 3401 via property line adjustment deed 2010-000745. Thus, the ten acres that were transferred from tax lot 3800 were not used twice as the remainder acreage of that tax lot were sufficient to meet the noncontiguous requirements of Lane Code 16.211(7)(b) for tax lot 401. The alleged failure of the applicant in PA 15-05810 to properly record the deed restriction in violation of ORS 215.740(3)(b) is irrelevant to this application.

This allegation of error is dismissed.

3. Tax lot 3401 was not lawfully created.

The Appellant has argued that noncontiguous parcels subject to Lane Code 16.211(7) must be lawfully created. I agree.

The Appellant argues that tax lot 3401 was cleaved from former tax lot 3400 and a portion of tax lot 3800 by deed in 2010. On January 19, 2010 Columbia Pacific, Inc. conveyed the property described by tax lots 3400, 3401 and 3300 to Forever Green Forests, LLC. Then in 2015, Forever Green Forests, LLC conveyed tax lot 3401 to the Applicants and also conveyed tax lot 3800 to Mr. Wolf.

The record demonstrates that tax lot 3401 was created on May 31, 1899, when the U.S. government transferred 163 acres to John Marshall via Homestead Certificate No. 4549. This document was recorded January 6, 1900. This transaction is not reflected on the Lane County Assessor's deed card for tax lot 3401. The transfer of a legal lot may be done by deed and does not require land division approval from the County.

This allegation of error is dismissed.

4. ***The property line adjustments associated with tax lot 3401 violate the Bowerman decision's² prohibition against serial property line adjustments.***

In the *Bowerman* case, Lane County had approved nine property line adjustments in a single 2015 decision. Relying heavily on its earlier decision in *Warf v. Coos County*, 43 Or LUBA 460 (2003), reiterated its understanding that “[T]o approve a property line adjustment and then approve another property line adjustment for one or both of the adjusted properties, the statutorily required conveyance to complete the first property line adjustment must first be recorded.”³ LUBA noted that serial property line adjustments would be permissible if each was subject to a separate application and each was recorded by deed prior to the subsequent property line adjustment.

The property line adjustments to tax lot 3401 were completed prior to Lane County’s review of property line adjustments. Therefore, there was no application process for the property owners to follow. The two property line adjustments did conform to the *Warf* case since the first adjustment was made and its deed recorded before the second adjustment was made and its deed was recorded. Given the facts of the situation, I do not believe that the 2007 property line adjustments that reconfigured tax lot 3401 were inconsistent with the *Bowerman* decision.

This allegation of error is dismissed.

5. ***The property line adjustments associated with tax lot 200 violate the Bowerman decision's prohibition against serial property line adjustments.***

The hearing on this matter was held on June 8. The record was held open until June 22 for both parties to submit new evidence and argument. The record was also held open until June 29 but was restricted to responses to the argument and evidence submitted by the other on June 22. The Applicants point out that this allegation was not raised until June 29 and should be excluded. I agree. The Applicants had until July 6 for final rebuttal but they were restricted to final argument. In other words, they had no opportunity to introduce new evidence into the record to refute the Appellant’s argument. This issue could have been raised prior to the hearing in the Appellant’s appeal statement, at the hearing, or in the Appellant’s June 22 submission. Failure to do so precludes the ability of the hearings official to address this issue unless the record is reopened. As I decline to reopen the record I must dismiss this allegation of error.

Nevertheless, the record demonstrates that tax lot 200 was first conveyed by deed on August 12, 1922. (See Book 132, Page 519, Lane County Deeds and Records.)

² *Bowerman v. Lane County*, ___ Or LUBA ___ (LUBA No. 2016-008, January 26, 2017)

³ *Bowerman*, slip op at 29.

It's legal lot status was verified in PA 07-5923. Notice of this verification was mailed on August 2, 2007 and became final on August 14, 2007. The notice contained diagrams of the property prior to and after the property line adjustment.

This allegation of error is dismissed.

Conclusion

The record explicitly documents that both the subject property and its noncontiguous counterpart, tax lot 3401, were lawfully created. The record also demonstrates that the property line adjustments that affected the subject property and tax lot 3401 did not violate the precepts of the *Bowerman* case and were legal at the time of their execution.

Respectfully Submitted,



Gary Darnielle
Lane County Hearings Official



August 3, 2017

Ms. Lydia McKinney, Manager
Land Management Division
3050 N. Delta Highway
Eugene, OR 97408

Re: *Appeal of Hearings Official decision affirming the Planning Director's approval of the Wolf-Evans' request (PA 17-05071) for a large tract dwelling on tax lot 200, assessor's map 18-02-11.*

Dear Ms. McKinney:

On July 17, 2017, I affirmed the Planning Director's approval of the Wolf-Evans' request (PA 17-05071) for a large tract forest dwelling on tax lot 200, assessor's map 18-02-11. On July 31, 2017 LandWatch Lane County appealed my decision. Upon a review of this appeal, I find that the allegations of error have been adequately addressed in that decision and that a reconsideration is not warranted.

In specific, the Appellant has argued that the property line adjustments that reconfigured tax lots 200 and 3401 were recorded at the same time since the recording date was identical. However, while the date stamps may be the same, it is a physical impossibility that they were recorded at the exact same time as each reconfiguration was given a different recording number. Apparently, the Lane County Deeds and Records Department provide the same date stamp of a transaction that includes the recordation of one or multiple documents of a single nature.

The Appellant's allegation that its June 29, 2017 argument about property line adjustments to tax lot 200 was a response to new information introduced into the record via planning files PA 07-05924 and PA 07-05923 is correct as these files had been submitted by Planning Staff on June 22, 2017. PA 07-05923 was a legal lot verification approval by Lane County of tax lot 200. PA 07-05924 was legal notice of this and six other legal lot verification decisions issued by Lane County earlier that year. The discussion under Allegation of Error #5 in the July 17, 2017 decision addressed the property line adjustments to tax lot 200 and found them to be proper.

Accordingly, on the authority of Lane Code 14.535(1), I shall affirm my July 17, 2017 decision without further consideration. Please advise interested parties of this decision.

Sincerely,


Gary L. Darnielle
Lane County Hearings Official

cc: Eric Forsell (file)

ATTACHMENT 3

LAND MANAGEMENT DIVISION

Date Received:

RECEIVED JUL 31 2017



APPEAL OF A HEARINGS OFFICIAL DECISION

PUBLIC WORKS DEPARTMENT 3050 NORTH DELTA HIGHWAY, EUGENE OR 97408
PLANNING: 541-682-3577 BUILDING: 541-682-4651 SANITATION: 541-682-3754

For Office Use Only: FILE # 59-PA17-05071 CODE: _____ FEE: _____

Appellant: LWLC

Mailing address: PO Box 5347 Eugene 97405

Phone: [scribble] Email: _____

Signature: [scribble] Date: 7-31-17

Appellant's Representative: Andrew Molkey

Mailing address: see attached

Phone: attached Email: afmolkey@gmail.com

Signature: attached Date: 7-31-17

LOCATION (subject property)
18021100 00200
Township - Range - Section - Taxlot Subdivision/partition lot/parcel

You have **one of two appeal options**. Your appeal application will be rejected if it does not contain all the required submittals.

Required Option 1 submittals:

Option 1 (The appellant requests Hearings Official Reconsideration OR Board of Commissioner Review in a Hearing.)

1. Fee is \$3,712 appeal fee, payable to Lane County. (See the reverse side for important fee information)
2. A copy of the decision being appealed, with the Department file number. File # _____
3. Indicate the deadline to submit the appeal. (Found in the Hearing Official's Decision) _____
4. Check one of the items below to identify your party status with the right to appeal the Hearings Official's decision:
 - I am the owner or contract purchaser of the subject property;
 - I am the applicant for the subject application;
 - Prior to the decision by the Hearings Official, I submitted written testimony into the record
 - I am not one of the persons mentioned above, but wish to appeal the Hearings Official's decision for the reasons explained in my letter.
5. A letter that addresses each of the following three standards:
 - a. The reason(s) why the decision of the Hearings Official was made in error or why the Hearings Official should reconsider the decision;

- b. An identification of one or more of the following general reasons for the appeal, or request for reconsideration:
- The Hearings Official exceeded his or her authority;
 - The Hearings Official failed to follow the procedure applicable to the matter;
 - The Hearings Official rendered a decision that is unconstitutional;
 - The Hearings Official misinterpreted the Lane Code, Lane Manual, State Law, or other applicable criteria.
- c. The Hearings Official should reconsider the decision to allow the submittal for additional evidence not in the record that addresses compliance with the applicable standards or criteria.
- d. The position of the appellant indicating the issue raised in this appeal to the Board was raised before the close of the record at or following the final evidentiary hearing and whether the appellant wishes the application to be approved, denied or conditionally approved.

6. Any additional information in support of your appeal.

7. A Timeline Waiver for Hearings Official reconsideration request by the Applicant. Per Lane Code 14.535(4), in the event a decision of the Hearings Official is being appealed by the applicant for the same application to be reconsidered by the Hearings Official, then to receive reconsideration by the Hearings Official, the applicant must first agree to a waiver of any statutory application timelines, and such a waiver shall be in addition to any other waivers already given.

EXPLANATION OF THE APPEAL PROCESS UNDER OPTION 1

There are 3 steps involved in an appeal of a Hearings Official decision. Each requires a fee for services.

Step 1

When the appeal is submitted, the Hearings Official has the option to reconsider the decision (Refer to LC 14.535). If the Hearings Official reconsiders the decision, the fee is \$1,152.

Step 2

If the Hearings Official elects not to reconsider the decision, the appeal is forwarded to the Board of County Commissioners. The fee is \$1,484.80. The Board then decides whether or not to hear the appeal (Refer to LC 14.600)

Step 3

If the Commissioners elect to hear the appeal, the fee for the Board hearing is \$2,227.20. If the Board does not elect to hear the appeal, the parties of record may appeal the decision to the Land Use Board of Appeals (LUBA). If the Commissioners do not hear the appeal, \$150 of the \$1,484.80 fee (Step 2 above) will be refunded, in addition to the \$2,227.20, for a total refund of \$2,377.20.

Explanation of the Appeal Fee Under Option 1

The total due when submitting the appeal is \$3,712. You will get a refund if the Hearings Official reconsiders the decision, or the County Commissioners elect not to hear the appeal.

If the Hearings Official reconsiders the decision, the refund is \$2,560.

If the County Commissioners elect not to hear the appeal, the refund is \$2,377.20.

If the Board elects to hear the appeal, there is no refund.

Required Option 2 submittals:

Option 2; The appellant requests that the Board not conduct a hearing on the appeal and deem the Hearings Official decision the final decision of the County.

1. Fee is a non-refundable \$250 appeal fee, payable to Lane County.
2. A copy of the decision being appealed, with the department file number. File # PA 17-05071
3. Indicate the deadline to submit the appeal. (*Found in the Hearings Official's Decision*) 7-29-17 (Saturday)
4. Check one of the items below to identify your party status with the right to appeal the Hearings Official's decision:
 I am the owner or contract purchaser of the subject property;
 I am the applicant for the subject application;
 Prior to the decision by the Hearings Official, I submitted written testimony into the record
 I am not one of the persons mentioned above, but wish to appeal the Hearings Official's decision.
5. A letter that addresses each of the following three standards:
 - a. The reason(s) why the decision of the Hearings Official was made in error;
 - b. An identification of one or more of the following general reasons for the appeal:
 - The Hearings Official exceeded his or her authority;
 - The Hearings Official failed to follow the procedure applicable to the matter;
 - The Hearings Official rendered a decision that is unconstitutional;
 - The Hearings Official misinterpreted the Lane Code, Lane Manual, State Law, or other applicable criteria.
 - c. The position of the appellant indicating the issue raised in this appeal to the Board was raised before the close of the record at or following the final evidentiary hearing and whether the appellant wishes the application to be approved, denied or conditionally approved.
6. Any additional information in support of your appeal.

7-31-17
Monday

EXPLANATION OF THE APPEAL PROCESS UNDER OPTION 2

LMD Staff will prepare a memorandum (with an Order) for the Board to review the appeal during their regular public meetings as an item under the Public Works section. The parties of record will be notified of the tentative meeting date on which the Board will review the appeal.

There may be no separate discussion of this item. If Board discussion is desired, that item will be considered separately in an Elect to Hear appeal hearing pursuant to Lane Code 14.600.

If the Board approves an Order and elects to not conduct a hearing, the final County land use decision may be appealed to Land Use Board of Appeals.

Please note that the Hearings Official has full discretion to affirm, modify or reverse his or her initial decision pursuant to LC 14.535, and the Board may still elect to hear the appeal pursuant to Lane Code 14.600(2).



*Protecting Our Natural Heritage
From the Coast to the Cascades*

P.O. Box 5347 • Eugene, OR 97405 • (541) 741-3625 • www.landwatch.net

July 31, 2017

Via Hand Delivery

Lane County Public Works Department
3050 North Delta Highway
Eugene, OR 97408
(541) 682-6900

**Re: Appeal by Option 2 of Hearings Official Decision in Wolf-Evans application
for large tract dwelling, 509-PA17-05071, Assessor's Map 18-02-11-00-00200.**

Appellant's Name

Landwatch Lane County
PO Box 5347
Eugene OR 97405

Authorized Representative

Andrew Mulkey
Attorney at Law
1375 W 13th Ave.
Eugene, OR 97402
Tel. (208) 596-3235
afmulkey@gmail.com

Identification of the Decision Sought to be Reviewed

Appellant, Landwatch Lane County, hereby appeals the Hearing Official's July 17, 2017 decision denying the Appellants' appeal of the Director's decision in 509-PA17-05071 approving a large tract dwelling on property owned by Douglas Wolf and Michael Evans (Tax Lot 200, Assessor's Map 18-02-11) in the Impacted Forest Lands (F-2) zone pursuant to Lane Code 16.211(7) and (8).

Copy of the Decision

A copy of the Hearings Official's July 17, 2017 decision is attached hereto.

Appeal Deadline

The appeal deadline is Monday, July 31, 2017. The appeal period runs for 12 days after the issuance of a Hearing Officers decision. In this case, the Hearings Officer issued the decision on July 17, 2017, and the last day of the appeal period occurred a Saturday, July 29, 2017. "When the last day of the appear period so computed is a Saturday [or] Sunday... the appeal period shall run until 5:00 o'clock p.m. on the next business day. Lane Code 14.510.

Appeal Option

Appellant requests Option 2 as set forth in the County's attached appeal form. Appellant requests that the Board of Commissioners not conduct a hearing on the appeal and deem the Hearings Officer decision the final decision of the County.

Appellant's Standing

Appellant appealed the Director's decision in 509-PA17-05071 to the Hearings Official, and Appellant participated in those proceedings in person and in writing. The Hearings Official listed Appellant as a party of record in his July 17, 2017 opinion.

Appeal Fee

Please find the attached check in the amount of \$250.00 for the appeal fee.

Grounds for Appeal

The Hearings Official erred in his decision affirming the Planning Director's approval of 509-PA17-05071. Appellant incorporates all prior testimony, including written and oral. Appellant sets forth the following specific issues on appeal, but the description below is not exhaustive.

The decision by the Land Use Board of Appeals in *Bowerman v. Lane County*, ___ Or LUBA ___ (LUBA No. 2016-008, January 26, 2017) requires that the Hearing Official reverse the Planning Director's approval of a large tract dwelling in this case and deny the applicant's request for a large tract dwelling. The *Bowerman* decision explains that before a landowner can record a property line adjustment deed for a particular property, any prior deed that adjusts the property "must first be recorded." *Id.* (Slip. Op. at 29). In this case, the Hearings Official was wrong to conclude that "the 2007 [sic] property line adjustments that reconfigured tax lot 3401" complied with the statutory requirements described in *Bowerman*. Hearings Official Opinion at 6. The Hearings Official misapplied the law to the facts. Note that the record shows the adjustment deeds for Tax Lot 3401 were recorded in 2010. Evidence in the record shows that the two 2010 property line adjustment deeds for Tax Lot 3401 were recorded at the exact same time on the exact same day. Therefore, the first property adjustment deed for Tax Lot 3401 was not

recorded before the second property adjustment deed, and the property line adjustments violate *Bowerman*.

The same circumstances apply to the property line adjustments that reconfigured the subject parcel, Tax Lot 200 in 2007. Evidence in the record shows that the serial property line adjustments that reconfigured Tax Lot 200 were all recorded at the same time on the same day. Therefore, those adjustments also violate the statutory requirements for property line adjustments as described in the *Bowerman* decision. The Hearings Official erred by failing to respond to Appellant's arguments regarding Tax Lot 200.

In a June 29, 2017 letter, Appellant argued that the 2007 property line adjustment deeds unlawfully reconfigured Tax Lot 200, and that the County cannot approve a large tract dwelling for an unlawfully configured parcel. Appellant's argument was in response to two planning action files 509-PA17-05924 and 508-PA17-05923, submitted to the record on June 22, which contained the 2007 property line adjustment deeds. Those planning action files showed that Tax Lot 200 was unlawfully re-configured, and Appellant had a right to respond to that information on June 29. Therefore, the Hearings Official erred when he excluded and did not consider the Appellant's June 29th arguments regarding Tax Lot 200.

The Hearing Official erred when he concluded that the notice for the 2007 legal lot verification for Tax Lot 200 contained diagrams of the property prior to and after the property line adjustment. Evidence in the record shows that the notice letter was three pages

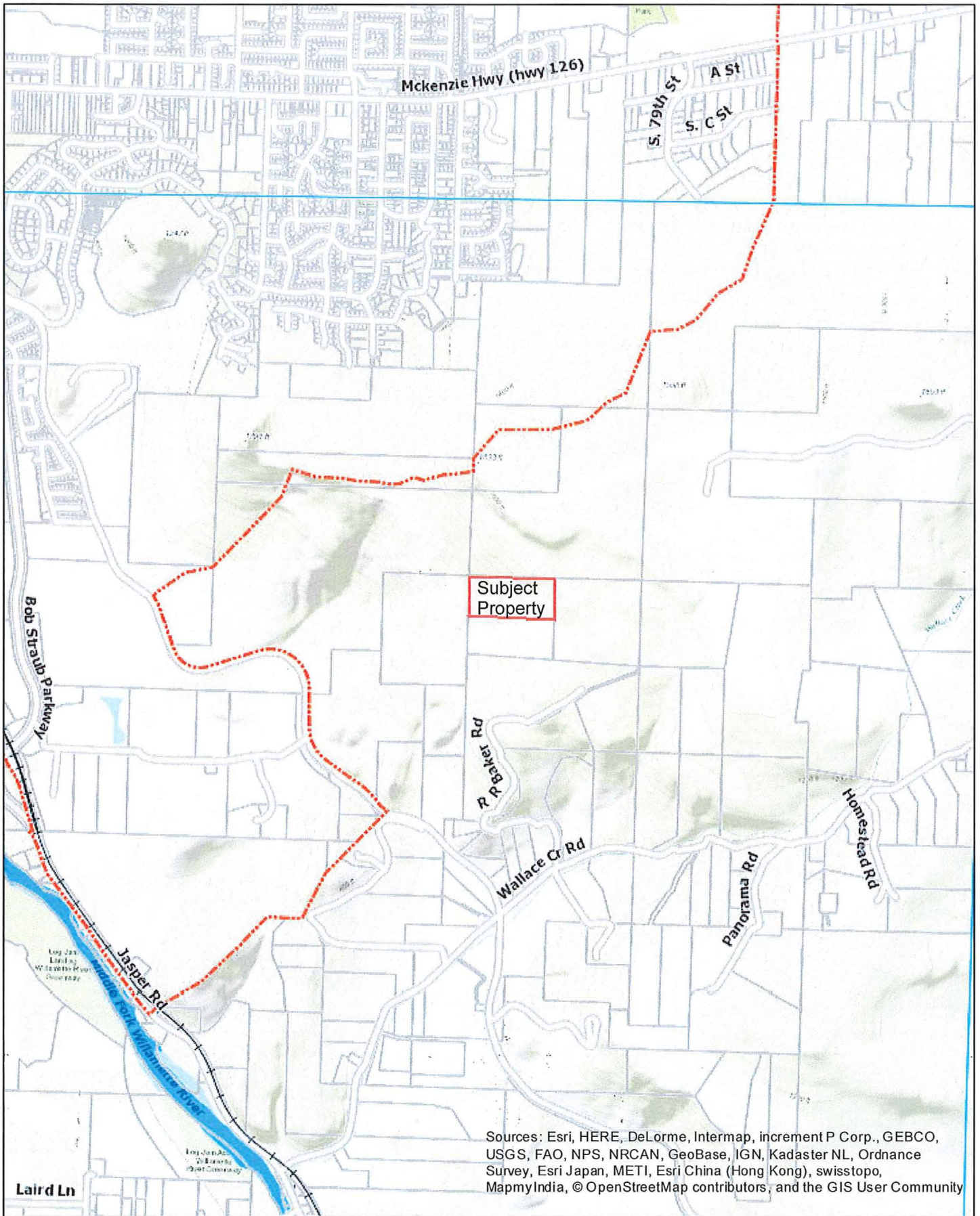
As a result of the unlawful property line adjustments, Tax Lot 3401, the applicant's qualifying tract for purposes of establishing a large tract dwelling, is not a legal lot and cannot be used to qualify a large tract dwelling. Evidence in the record shows that if the property line adjustments to Tax Lot 3401 are invalid, then Tax Lot 3401 is a three parcel tract that contains two unlawfully created parcels. Evidence in the record also shows that the current location of Tax Lot 200 on which the applicant seeks to build a large tract dwelling does not correspond to the location of the underlying parcel that the applicant used to demonstrate that the subject property was lawfully created. Unlawfully created parcels cannot be used for the purpose of establishing a large tract dwelling, and for that reason, the Hearing Official's approval fails to comply with the large tract dwelling statute and Lane Code. For the above reasons, the Hearings Official's decision must be reversed and the application for a large tract dwelling on the subject property must be denied.

Respectfully,



Andrew Mulkey
Attorney for Landwatch Lane County

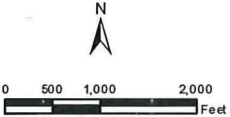
ATTACHMENT 4



Subject Property

Sources: Esri, HERE, DeLorme, Intermap, increment P Corp., GEBCO, USGS, FAO, NPS, NRCAN, GeoBase, IGN, Kadaster NL, Ordnance Survey, Esri Japan, METI, Esri China (Hong Kong), swisstopo, MapmyIndia, © OpenStreetMap contributors, and the GIS User Community

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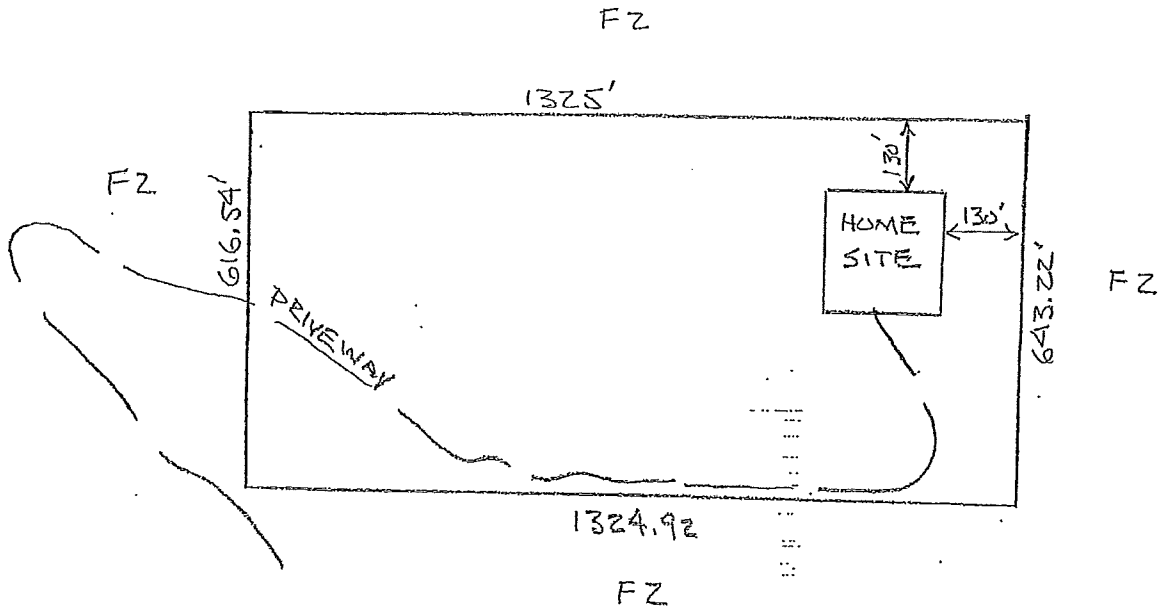


Vicinity Map
Lane County, Oregon

ATTACHMENT 4
SITE PLAN for
TAX LOT 200, MAP 18-02-11
FZ TEMPLATE DWELLING



SCALE 1" = 300'



OWNERS:
DOUG WOLF &
MICHAEL EVANS
PO BOX 2114
JASPER, OR. 97438

AGENT:
LAND PLANNING CONSULTANTS
475 OAKDALE AVE.
SPRINGFIELD, OR 97477