

BEFORE THE BOARD OF COMMISSIONERS OF LANE COUNTY, OREGON

ORDER NO: 17-09-26-06

In the Matter of Hearing Arguments on the Record on an Appeal of a Hearings Official Affirmed Decision Denying a Forest Template Dwelling in the Impacted Forest Lands Zone (F-2); Assessor's Map 16-02-27, Tax Lot 1506 (File No. 509-PA15-05770/Wolcott).

**WHEREAS**, the Lane County Hearings Official made a decision to affirm a Planning Director denial of a forest template dwelling application in Department File No. 509-PA15-05770; and

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

**WHEREAS**, the Lane County Hearings Official affirmed his decision on the application after reviewing the appeal; and

**WHEREAS**, the Board reviewed the appeal pursuant to the criteria at Lane Code 14.600(3) on August 22, 2017 and elected to conduct an on the record hearing for the appeal; and

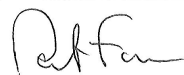
**WHEREAS**, notice of an on the record hearing pursuant to Lane Code 14.400(6) was mailed in a timely manner on September 11, 2017; and

**WHEREAS**, the Board of County Commissioners heard arguments and reviewed the Hearings Official's decision based on materials contained in the record pursuant to Lane Code 14.400 at their regular meeting held September 26, 2017.

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

1. That the Lane County Hearings Official decision dated June 27, 2017 and the letter affirming the decision dated July 12, 2017 attached as Exhibit "B," that found relevant approval criteria are not met are affirmed and adopted by the Board of County Commissioners as the County's final decision. Furthermore, 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.

ADOPTED this 26th day of September, 2017



Pat Farr, Chair  
Lane County Board of Commissioners

APPROVED AS TO FORM

Date 9-18-17 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 1506, Assessor's Map 16-02-27. The subject property is not a part of a tract. It is located north of the Springfield Urban Growth Boundary, south of McGowan Creek Road. The parcel is approximately 10 acres in size, vacant, and does not have a site address. The subject property is within the Lane County Rural Comprehensive Plan boundary designated Forest and is zoned Impacted Forest Lands (F-2) consistent with the designation. All abutting properties are also zoned F-2.
2. The essential chronology pertinent to this application is as follows:
  - a. In a May 19, 1919 bargain and sale deed Jonathan J. Thomas transferred an area of property (tax lot 1400) and a 40-foot wide strip of land that was an abandoned logging road (Mohawk Lumber Company Railway right-of-way) to J. F. Spores, et al. (See Book 119, Page 577 Lane County Deeds and Records.)
  - b. On June 28, 1943, Catherine Spores transferred a large section of the property described above in 2.a., to Donald and Dorothy Stewart. Jonathan Thomas had previously transferred a small portion of the property to David and H.C. Auld in 1919. See Book 119, Page 579, Lane County Deeds and Records. This warranty deed excepted out a 40-foot wide abandoned logging road. (See Book 249, Page 578 Lane County Deeds and Records.) This deed cited a prior deed, recorded May 19, 1919, in which the logging road had been conveyed to David and H.C. Auld. (Volume 119, Page 579, Lane County Deeds and Records.) The Stewart property (minus the abandoned logging road) was subsequently transferred in 1949, 1951, 1952, and 1954.

This property, including the abandoned logging road that was not transferred in this conveyance, is depicted in Figure 1 of Exhibit B Attachment A.
  - c. On May 1, 1960, what are now tax lots 1400 and 1500 (Stewart property) were transferred from Andrew and Manda Akins to Harry and Myrtle Williams by warranty deed. (See Reel 283, Instrument 39981, Lane County Deeds and Records.) At this point in time, the logging road was in the same ownership as tax lots 1400 and 1500.
  - d. Lane County adopted its land division regulations on March 26, 1975. Conveyance by deed prior to that point was lawful.
  - e. In 1984, Myrtle Williams partitioned the property into two parcels. This partition, Partition M1159-84, was approved on July 28, 1984 and the final partition map was recorded. (See Reel 1308, Instrument 8431240, Lane County Deeds and Records.) The final partition map did not reflect the abandoned logging road. This action, which is depicted in Figure 2 of Exhibit B Attachment A, created tax lot 1504 (Parcel 1) and the rest of the property (Parcel 2).

- f. In 2001, preliminary legal lot verification PA 01–05796 first verified the legal lot status of the abandoned logging road. The preliminary verification stated: “The decision that this property constitutes a legal lot will be made at the time of the first permit or application action where a legal lot is required.” The portion of Partition 2 of M1159–84 located north of the logging road was also preliminarily verified as being a legal lot (PA 01–6145) as was the portion of Parcel located south of the logging road (PA 01–6146). (This latter action was preliminary legal lot determination of the subject property’s configuration prior to a 2003 property line adjustment.)
  - g. In 2003, within Parcel 2 of M1159–84, one property line adjustment moved the western boundary of the abandoned logging road north to the west to conform to the northern and western boundary of Parcel 2 (2003–050126) and second adjustment moved the eastern boundary of the abandoned logging road south to conform to the southern boundary of Parcel 2 and west to form the northern boundary of tax lot 1506 (2003–045816). The property line adjustments were based upon the assumption that the abandoned logging road was a legal lot. (The property line adjustment is depicted in Figure 3 of Exhibit B Attachment A and the resulting configuration is depicted in Figure 4 of Exhibit B Attachment A.)
  - h. The subject property was verified as a legal lot through PA 03–05971. Notice of legal lot verifications was not required by Lane County at this time. After the verification of legal lot status, Myrtle Williams transferred the subject property to Archie and Julie Williams by quitclaim deed in 2003. Later that year, Archie and Julie Williams transferred the property to Keeland, Inc.
  - i. Tax lot 1508, located adjacent and to the north of the subject property, was approved for a “unit of land validation plat” in 2016 (PA 16–05765). Partition 2017–P2728 subsequently applied a partition plat to this property, which was duly recorded.
3. On November 18, 2015, the applicant submitted to Lane County Land Management Division a request to establish a forest template dwelling in the Impacted Forest Lands (F–2) zone. On December 11, 2015, staff reviewed the application materials and deemed the application incomplete. The applicant submitted additional materials and staff deemed the application complete on December 14, 2015. The applicant provided a slightly revised site plan on January 6, 2016, and then proceeded to place the application on hold for a total of 202 days as follows: On January 18, 2016, the applicant submitted an owner’s authorization and a 30-day extension to the timelines of ORS 215.427. On February 19, 2016, the agent submitted a second 30-day extension to the timelines of ORS 215.427. A third extension to ORS 215.427 timelines was submitted on April 27, 2016 for a period of 73 days. A fourth extension was submitted on June 1, 2016 for a period of 30 days. On June 20, 2016, the applicant submitted supplemental application materials. A fifth extension was submitted on July 1st for a period of 39 days. On August 5, 2016, the applicant requested that the County proceed with application review. On August 23, 2016, the Planning Director denied the application based on the determination that the application did not comply with Lane Code 16.211(5)(b). Notice of the decision was mailed to surrounding property owners and parties of record. On September 2, 2016, a timely appeal was submitted by the owner and their representative, Lanfear Consulting, LLC. The appeal included submittal of a waiver to the statutory timeline requirements of ORS 215.427 and the right to seek mandamus pursuant to ORS 215.429(1). Upon request by the applicant to resume review, notice of public hearing on the appeal was mailed on April 20, 2017.

4. On May 11, 2017, the Lane County Hearings Official conducted a public hearing. The written record was held open until May 25, 2017 with opportunity for rebuttal on June 1, 2017 and applicant's final written argument by July 8, 2017. On June 27, 2017, the Lane County Hearings Official issued a decision affirming the Planning Director's denial of the application. Notice of the Hearings Official's decision that provided for an appeal deadline of July 10, 2017 was mailed to the applicant and all parties of record on June 27, 2017.
5. On July 7, 2017, the appellant filed a timely appeal and requested that the Board of County Commissioners conduct an on the record hearing on the appeal, pursuant to LC 14.515(3)(f)(i).
6. On July 12, 2017, the Hearings Official reviewed the appeal and affirmed his decision without further consideration pursuant to LC 14.535(1).
7. In order for the Board to hear arguments in an on the record 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.
8. The appellant requested that the Board conduct a hearing on the appeal. Issues raised in the appeal, specifically related to the application of the *WREDCO* case to unnoticed preliminary legal lot determinations, could affect a number of other properties throughout the County.
9. Issues in this appeal involve interpretation of case law, ORS 92, and ORS 197 and not local policies or Lane Code. In the event that a comparable proposal and fact pattern comes before the Land Management Division, the Hearings Official's decision presents a reasonable interpretation of the applicability of *WREDCO* and *Davis* to the specific fact pattern of this application and status of preliminary legal lot verifications issued in 2001 and 2003 for which notice has not been issued. If these issues arise in the future, the Hearings Official's decision and case law provide guidance. However, forest template dwelling applications are a common land use application made to the Land Management Division. The requirement for legal lot verification pursuant to Lane Code 13.020 applies to numerous uses in various zones throughout the County. For these reasons, issues raised in this appeal could occur with frequency.
10. To the extent that this appeal is of countywide significance or will occur with frequency for the reasons cited above, the Planning Director recommended review of the appeal on the record.
11. To meet the requirements of Lane Code 14.600(2)(b), the Board was 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.
12. On August 22, 2017 with Order 17-08-22-09, the Board reviewed the matter in a public meeting, found that the application is arguably of Countywide significance and will reoccur with frequency, as described above, consistent with the criteria for an on the record hearing, and elected to hold an on the record hearing on September 26, 2017.

13. Notice of the on the record hearing was mailed to the owner, applicant, appellant, and their representatives, and other parties of record in a timely manner on September 11, 2017 pursuant to Lane Code 14.400.
14. The Board conducted an on the record hearing on September 26, 2017 to review the decision of the Hearings Official and hear additional arguments by parties of record.
15. Per what is now known as the WREDCO case (Weyerhaeuser Real Estate Development Company v. Polk County, 246 Or App 548 (2011)), the Court of Appeals affirmed LUBA's decision, which in part affirms local government finding that a partition plat that creates a new parcel without depicting any nested lot lines has the effect of vacating pre-existing lots, where the partition plat, description, or narrative does not include information indicating intent to preserve pre-existing lots. The Court of Appeals found further that:

*"it seems highly unlikely that the legislature simultaneously intended the adoption of ORS 92.017 (1985) to restore lots that had been vacated when the lots were consolidated by a partition."*

The WREDCO case altered the landscape for Lane County legal lot determinations in some instances where land containing preexisting legal lots has been partitioned. Previously, the Planning Director recognized and approved properties lawfully created by deed and subsequently subject to partition, contrary to the WREDCO findings noted above. This issue was raised to the County on appeal and once Legal Counsel and the Planning Director became aware of the past interpretation, planning staff advised applicants that WREDCO would be applied. Many applications appealed on this issue were ultimately withdrawn and a decision on these issues was not issued prior to June 2016. On June 15, 2016, the Hearings Official issued a decision on an appeal that provided further direction on this issue. He opined in File No. PA15-05290 that WREDCO may be determinative and that generally, partitions merge prior legal lots. This solidified the direction determined by the Planning Director and County Counsel to ensure consistency with current case law, and occurred just prior to the Wolcott decision.

16. In general, the application was denied because the subject property has not yet been not a noticed as a final legal lot pursuant to Lane Code 13.020 and was thus inconsistent with Lane Code 16.211(5)(b). Pursuant to Lane Code 13.020, a lot or parcel is a final legal lot or parcel when the County makes and notices such a determination per Lane Code 14.100, providing that the decision is not appealed and/or becomes a final decision. An applicant may make application for final notice of a preliminary legal lot application for fee or request that notice be included as part of a land use decision for other development. In this case, the subject property was determined to be a preliminary legal lot in file no. PA03-05971 and notice of PA03-05971 has not yet been issued. Conceivably, notice of the legal lot determination made in file no. PA03-05971 could have been issued concurrent with this land use decision if the prior preliminary legal lot determination remained valid. However, both the Planning Director and Hearings Official found that the history of creation of the subject property, in its current configuration, is inconsistent with the WREDCO case.
17. The following issues have been raised on appeal:
  - The particular factual circumstances of creation of the subject property are distinct from the *WREDCO*, *Van Velduizen*, and *Koo* cases.

- The County's preliminary legal lot form relied upon in 2001 and 2003 provided assurances that have now been reversed. The Hearings Official's decision that 2001 and 2003 legal lot verifications were preliminary and not a final determination of the legal lot status of Tax Lot 1506 and related lots and "assurances" therein should be reconsidered.
  - The Hearings Official's decision that Validation of Unit of Land on Tax Lot 1508 did not have the effect of validating the subject property should be reconsidered.
  - Interpretation of ORS 92.176 in the Hearings Official's decision and a Planning Director's 2015 legal lot verification decision on a "lawful remainder" parcel represent conflicting policies.
18. The Hearings Official's initial decision affirming the Planning Director's denial of the forest template dwelling application, dated June 27, 2017 contains extensive discussions addressing Lane Code 16.211(5)(b), the history of the subject property, the applicability of the *WREDCO*, *Koo*, and *Van Velduizen* cases, and legal lot verification and validation of unit of land processes and is supportive of the Division's practice. Additionally, the Hearings Official reviewed the appeal and found that the allegations of error have been adequately addressed in his decision and reconsideration is not warranted, as detailed in his July 12, 2017 affirmed decision.
19. In the *WREDCO* case, the Court of Appeals affirmed LUBA's decision, which in part affirms local government finding that a partition plat that creates a new parcel without depicting any nested lot lines has the effect of *vacating* pre-existing lots, where the partition plat, description, or narrative does not include information indicating intent to preserve pre-existing lots. The Court of Appeals found further that:
- "it seems highly unlikely that the legislature simultaneously intended the adoption of ORS 92.017 (1985) to restore lots that had been vacated when the lots were consolidated by a partition."*
20. The *WREDCO* case altered the landscape for Lane County legal lot determinations in some instances where land containing preexisting legal lots has been partitioned. Previously, the Planning Director recognized and approved properties lawfully created by deed and subsequently subject to partition, contrary to the *WREDCO* findings noted above. This issue was raised to the County on appeal and once Legal Counsel and the Planning Director became aware of the past interpretation, planning staff advised applicants that *WREDCO* would be applied. Many applications appealed on this issue were ultimately withdrawn and a decision on these issues was not issued prior to June 2016. On June 15, 2016, the Hearings Official issued a decision on an appeal that provided further direction on this issue. He opined in File No. PA15-05290 that *WREDCO* may be determinative and that generally, partitions merge prior legal lots. This solidified the direction determined by the Planning Director and County Counsel to ensure consistency with current case law, and occurred just prior to the Wolcott decision.
21. In this case, the Hearings Official's decision documents the specific fact pattern of the subject property's creation. In summary, a 40-foot wide logging road was created in 1919. That road was subsequently merged into common ownership. In 1984, that area was partitioned into Parcel 1 and Parcel 2 of M1159-84. The partition map was recorded and did not denote any retention of the logging road. The logging road and area to the north and south were then verified by the County as preliminary legal lots in 2001 and then reconfigured in 2003 through property line adjustment based on the assumption that they were legal lots. These properties, in their adjusted

configuration, were then verified again by the County as preliminary legal lots in 2003. With regards to the subject property, the Hearings Official's decision determined that the 2001 and 2003 recognition of the subject property as a legal lot is consistent with WREDCO.

22. While the fact pattern of the subject property creation is somewhat distinct from WREDCO as so asserted by the appellant, staff find that the effect of WREDCO appears to staff to be clear; a partition generally has the effect of vacating underlying legal lots. For example, in the WREDCO decision, LUBA appears to have applied a broad interpretation of ORS 92.017, stating:

*"Although Van Veldhuizen involved parcels rather than lots, we see no principled reason why the holding in that case—that an approved partition plat can vacate or consolidate otherwise discrete units of land—cannot be applied to lots created by a recorded subdivision plat, as the footnote in Koo suggests. Such a partition approval pursuant to local partition regulations is a "specific process" that can have the effect of "vacating" lots or parcels for purposes of ORS 92.017."*

This same, more general logic appears to apply to the factual pattern of creation of the subject property.

23. The County's legal lot verification process does not have the effect of *creating* properties. Properties may be created only in accordance with ORS 92 and Lane Code Chapter 13. While the subject property was verified through legal lot verification in 2001 and 2003, the Planning Director and Hearings Official have found that the abandoned logging road was vacated given that the recorded partition was a specific process under ORS 92 and the partition map did not depict any nested lot lines. The Planning Director and Hearings Official's decision was also based on the finding that the 2001 and 2003 preliminary legal lot verification determinations recognizing the existence of the abandoned logging road is not consistent with ORS 92 or WREDCO. This conclusion is not based on the adoption of new legislation or code, but rather the finding that the 2001 and 2003 preliminary legal lot determinations were inconsistent with ORS 92 in the first place.
24. With regards to the applicant's assertions regarding the legal lot form, the County adopted notice of legal lot provisions at LC 13.020 in 2004. Not until 2010 was the requirement for notice of decision at time of legal lot verification determination codified. While some if not many of prior legal lot verifications have since been noticed as final land use decisions, some have not. The unfortunate situation now is that there are some unnoticed legal lot verifications that recognized lots or parcels in a manner that was inconsistent with WREDCO. The implications for such properties are that they could either be unlawfully created or that an application for validation of unit of land pursuant to ORS 92.176 will be required to validate unlawful parcels. Unfortunately, unless new case law determines otherwise, WREDCO must be applied as a matter of law.
25. The Hearings Official's June 27, 2017 decision describes that the last paragraph of the legal lot verification form states that it was a preliminary decision of legal lot status. This disclaimer represents the same process evaluated by LUBA in the *Davis v. Lane County*<sup>1</sup> decision, which determined that the County did not have a process for making legal lot determinations binding and in dicta, seemed to agree with the County that its legal lot verification process was not even a land use decision. The Hearings Official stated that while unfortunate, the County's legal lot process as it

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<sup>1</sup> Davis v. Lane County, 32 Or LUBA 267 (1997)

existed prior to July 2004 was at best an advisory statement and reliance on those preliminary legal lot determinations was done at the owner's peril. Furthermore, it does not appear that the Hearings Official found the statute of ultimate repose in ORS 197 to be applicable based on the consideration that the 2001 and 2003 preliminary legal lot determinations were not even land use decisions.

26. The Hearing's Official's July 12, 2017 affirmed decision further responds to the appellant's assertion that the fact pattern in the *WREDCO*, *Van Velhuizen*, and *Koo* cases are distinct from the fact pattern in this application and confirms that, based on these cases, the logging road property lines were vacated with the partition filed under PA1159-84. The Hearings Official's affirmed decision also confirms that the preliminary legal lot determinations were issued under the same code authority that existed at the time of the 1997 *Davis V. Lane County* decision and that the County's legal lot verification process is not a final land use decision, and arguably not a land use decision. The 2001 and 2003 preliminary legal lot determinations cannot resurrect a vacant parcel.
27. Where a property is not a legal lot, an applicant may request County review and approval of a validation of unit of land process under ORS 92.176. The Hearings Official's decision stated that ORS 92.176 provides the sole statutory remedy to cure the legal lot status of parcels that were not lawfully created. If there has been an instance where an unlawful remainder was approved through legal lot verification and not validation of unit of land, that specific Director approval is not determinative of policy, it appears that the fact pattern in File No. 509-PA15-05292 was distinct from that of the subject property, and the Hearings Official has evaluated and addressed in his decision this issue with more specificity since the time that decision was issued.
28. Issues pertaining to ORS 92.176 requirements appear to be a matter of statutory interpretation for which the County would not have deference on appeal at LUBA. While it is important to ensure that State law is applied correctly irrespective of whether this matter is appealed to LUBA, staff find that the Hearings Official's decision appears to be consistent with State law.
29. Finally, the Hearings Official's affirmed decision further confirms that the statutory validation of unit of land process under ORS 92.176 is the remedy for illegal creation of the subject property and should be used for that purpose.
30. In summary, the Planning Director and Hearings Official found that the history of creation of the subject property, in its current configuration, is inconsistent with the *WREDCO* case. The abandoned logging road was vacated with the 1984 partition pursuant to ORS 92 and cannot be reconstituted through a legal lot verification application. The 2001 and 2003 legal lot verification applications were only preliminary based on Lane Code provisions in effect at the time and as described in the *Davis* case. It appears that ORS 92.176 provides the sole statutory remedy to cure the legal lot status of parcels that were not lawfully created. Issues raised in this appeal originate from and are addressed by existing case law and State law. In the likely event of an appeal to LUBA, the County would not have deference at LUBA on interpretation of case law, ORS 92, and ORS 197. If these issues arise in the future, the Hearings Official's decision and case law provide guidance, and if the decision is appealed to LUBA, a subsequent LUBA decision will provide clarity on interpretation of State law.
31. For the above stated reasons, the Board has moved to adopt the attached Order, affirming and adopting the Lane County Hearings Official affirmed decision as the County's final decision, and expressly agreeing with and adopting interpretations made by the Hearings Official.



EXHIBIT B



June 27, 2017


Ms. Lydia McKinney, Manager  
Lane County Land Management Division  
Public Service Building  
125 E. 8th Ave.  
Eugene, OR 97401

*Re: Appeal of Director denial of the James and Nancy Wolcott request (PA 15-05770) for a forest template dwelling regarding tax lot 1506, assessor's map 16-02-27.*

Dear Ms. McKinney:

Please find the Lane County Hearings Official's decision affirming the Planning Director's denial of the James and Nancy Wolcott request (PA 15-05770) for a forest template dwelling regarding tax lot 1506, assessor's map 16-02-27 for failure to comply with Lane Code 16.211(5)(b).

Sincerely,

  
Gary L. Darnielle  
Lane County Hearings Official

CC: Amber Bell (file)

## EXHIBIT B

### LANE COUNTY HEARINGS OFFICIAL APPEAL OF A PLANNING DIRECTOR APPROVAL OF A TEMPLATE DWELLING WITHIN AN F-2 DISTRICT

#### Application Summary

On November 18, 2015, a request to establish a forest template dwelling in the Impacted Forest Lands (F-2) zone was submitted to the Lane County Land Management Division by Josh Petersen on behalf of James and Nancy Wolcott. On December 14, 2015, staff deemed the application complete and on August 23, 2016, the Planning Director issued a determination that the application did not comply with Lane Code 16.211(5)(b). The notice of the determination was mailed to surrounding property owners. On September 2, 2016, a timely appeal was submitted by the Applicant.

#### Parties of Record

Josh Petersen	LandWatch Lane County	Robert Emmons
James & Nancy Wolcott	Mike Farthing	Thom Lanfear
Sean Malone	William Enos	

#### Application History

Hearing Date: May 11, 2017  
(Record Held Open Until June 8, 2017)

Decision Date: June 27, 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(5) & (8)

#### Findings of Fact

1. The property subject to this application, hereinafter referred to as the "subject property," is located on Tax Lot 1506, Assessor's Map 16-02-27. The subject property is not a part of a tract. It is located north of the Springfield Urban Growth Boundary, south of McGowan Creek Road. The parcel is approximately 10 acres in size, is vacant, and does not have a site address. The subject property

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is within the Lane County Rural Comprehensive Plan boundary designated Forest and is zoned Impacted Forest Lands (F-2) consistent with the designation. All abutting properties are also zoned F-2.

2. The essential chronology pertinent to this application is as follows:
  - a. In a May 19, 1919 bargain and sale deed Jonathan J. Thomas transferred an area of property (tax lot 1400) and a 40-foot wide strip of land that was an abandoned logging road (Mohawk Lumber Company Railway right-of-way) to J. F. Spores, et al. (See Book 119, Page 577 Lane County Deeds and Records.)
  - b. On June 28, 1943, Catherine Spores transferred a large section of the property described above in Finding 2.a., to Donald and Dorothy Stewart.<sup>1</sup> This warranty deed excepted out a 40-foot wide abandoned logging road. (See Book 249, Page 578 Lane County Deeds and Records.) This deed cited a prior deed, recorded May 19, 1919, in which the logging road had been conveyed to David and H.C. Auld. (Volume 119, Page 579, Lane County Deeds and Records.) The Stewart property (minus the abandoned logging road) was subsequently transferred in 1949, 1951, 1952, and 1954.  
  
This property, including the abandoned logging road that was not transferred in this conveyance, is generally depicted in Figure 1 of Attachment A.
  - c. On May 1, 1960, what are now tax lots 1400 and 1500 (Stewart property) were transferred from Andrew and Manda Akins to Harry and Myrtle Williams by warranty deed. (See Reel 283, Instrument 39981, Lane County Deeds and Records.) At this point in time, the logging road was in the same ownership as tax lots 1400 and 1500.
  - d. In 1984, Myrtle Williams partitioned the property into two parcels. This partition, Partition M1159-84, was approved on July 28, 1984 and the final partition map was recorded. (See Reel 1308, Instrument 8431240, Lane County Deeds and Records.) The final partition map did not reflect the abandoned logging road. This action, which is depicted in Figure 2 of Attachment A, created tax lot 1504 (Parcel 1) and the rest of the property (Parcel 2).
  - e. In 2001, preliminary legal lot verification PA 01-05796 first verified the legal lot status of the abandoned logging road. The preliminary verification stated: "*The decision that this property constitutes a legal lot will be made at the time of the first permit or application action where a*

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<sup>1</sup> Jonathan Thomas had previously transferred a small portion of the property to David and H.C. Auld in 1919. See Book 119, Page 579, Lane County Deeds and Records.)

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*legal lot is required.*” The portion of Partition 2 of M1159-84 located north of the logging road was also preliminarily verified as being a legal lot (PA 01-6145) as was the portion of Parcel located south of the logging road (PA 01-6146). (This latter action was a preliminary legal lot determination of the subject property’s configuration prior to a 2003 property line adjustment.)

- f. In 2003, within Parcel 2 of M1159-84, one property line adjustment moved the western boundary of the abandoned logging road north to the west to conform to the northern and western boundary of Parcel 2 (2003-050126) and second adjustment moved the eastern boundary of the abandoned logging road south to conform to the southern boundary of Parcel 2 and west to form the northern boundary of tax lot 1506 (2003-045816). The property line adjustments were based upon the assumption that the abandoned logging road was a legal lot. (The property line adjustment is depicted in Figure 3 of Attachment A and the resulting configuration is depicted in Figure 4 of Attachment A.)
  - g. The subject property was re-verified as a legal lot with PA 03-05971. Notice of legal lot verifications was not required by Lane County at this time. After the verification of legal lot status, Myrtle Williams transferred the subject property to Archie and Julie Williams by quitclaim deed in 2003. Later that year, Archie and Julie Williams transferred the property to Keeland, Inc.
  - h. Tax lot 1508, located adjacent and to the north of the subject property, was approved for a “unit of land validation plat” in 2016 (PA 16-05765). Partition 2017-P2728 subsequently applied a partition plat to this property, which was duly recorded.
3. Lane County adopted its land division regulations on March 26, 1975.

### **Decision**

THE PLANNING DIRECTOR DECISION DENYING THE REQUEST (PA 15-05770) JAMES AND NANCY WOLCOTT FOR A TEMPLATE FOREST DWELLING ON TAX LOT 1506, ASSESSOR’S MAP 16-02-27 FOR FAILURE TO COMPLY WITH LANE CODE 16.211(5)(b) IS AFFIRMED.

### **Justification for the Decision (Conclusion)**

The subject property is zoned F-2 Impacted Forest Land. The Planning Director approved the Applicant’s has request to construct a single-family dwelling as provided by Lane Code 16.211(5)(c). Dwellings authorized by this provision are known as “forest template” dwellings because some of the applicable approval criteria of Lane Code

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16.211(5) must be analyzed through the placement of a 160-acre rectangle template centered the subject property (tract) as it existed on January 1, 1993. Under Lane Code 16.211(5)(b), the lot or parcel upon which the forest template dwelling will be located must have been lawfully created. The Planning Director, relying upon what is known as the *WREDCO* case<sup>2</sup>, found that the subject parcel, which had originally been an abandoned logging road, was vacated by Partition M1159-84.

The relevant history of the subject property can be summarized as follows:

1. In 1919, Jonathan J. Thomas transferred a large piece of property, located north and south of what is now McGowan Creek Road, to J.F. Spores, et al. Bisecting a portion of that property was an abandoned logging road originally used as a logging flume by the Mohawk Lumber Company. It was physically located within the transferred property but the bargain and sale deed excepted it out of that conveyance.
2. Subsequently, the ownership of the logging road and surrounding property were merged.
3. In 1984, the property that contained the logging road was partitioned into two parcels (M1159-84). The logging road was located within Parcel 2 of that partition but the recorded partition map did not show it nor was the road referenced by that action. The partition map was recorded.
4. The logging road was subject to two preliminary legal lot verification decisions, one in 2001 (PA 01-6146) and one in 2003 (PA 03-5970), that concluded that it was a legal lot. The other two properties within Parcel 2 that were split by the logging road also were preliminarily verified as being legal lots.
5. In 2003, under the impression that it was a legal lot because of the preliminary legal lot verifications, the logging road was greatly expanded through a property line adjustment. The property line adjustment moved the borders of the logging road so that they coincided with what is today tax lot 1508. The subject property became tax lot 1506 to the south, and the property that had lain to the east of the logging road became an expanded tax lot 1500.
6. In 2016, Lane County approved a request for the validation of unit of land for tax lot 1508. Partition plat approval of this property was subsequently granted and the plat was recorded in 2017.

Based upon the chronology listed above, the Applicant makes several arguments for why the subject property is a legal lot:

1. *The WREDCO decision is not applicable as that decision is limited to the vacation of parcels and lots created by government-approved land decisions.*

The Applicant has argued that the *WREDCO* decision is not applicable as it was limited to the elimination of lot lines and, in the present case, there were no lot lines to eliminate. I disagree. The *WREDCO* decision was an affirmation of

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<sup>2</sup> *WREDCO v. Polk County*, 246 Or App 548 (2011)

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LUBA's decisions in *Van Velduizen v. Marion County*, 26 Or LUBA 468 (1994), and *Koo v. Polk County*, 33 Or LUBA 487 (1997). In the former case, LUBA had ruled that a recorded partition plat can vacate underlying parcels that were created by land sales contract. By extension, that holding must apply to parcels created by deed.

In summary, I do not believe that the scope of the *WREDCO* decision was as limited as proposed by the Applicant. It seems to me that focus of the Court of Appeals decision was on the authority of a County to use the partition process to vacate underlying property, not the type of instrument that created the underlying property. In the present situation, Partition M1159-84 operated to vacate the underlying legal lot status of the logging road.

*This allegation of error is dismissed.*

- The legal lot status of the subject property was recognized through the legal lot verifications in PA 01-5796 and PA 03-05971 and these decisions cannot be collaterally attacked and are protected by the 10-year statute of repose.***

The issue here is the status of the preliminary legal lot verifications that were issued by Lane County regarding the subject property and adjacent properties. The Applicant argues that the legal lot verifications in PA 01-5796 and PA 03-05971 are determinative for two reasons. The first reason is that issue preclusion shields them from collateral attack because the exact issue of lawful creation was addressed in those decisions. The second reason is that under ORS 197.830(6)(b), the 10-year period of repose has run on the two legal lot verification determinations.

The Applicant's arguments are dependent upon whether Lane County's legal lot verifications were final land use decisions. I do not believe that they were. The last paragraph of the legal lot verification form states that it was a preliminary decision of legal lot status. It further advised the property owner that the determination that the property constitutes a legal lot would be made at the time of the first permit or application action where a legal lot is required. This is the exact language that was subject to a LUBA opinion regarding Lane County's legal lot verification process in 1997.<sup>3</sup> In that case, the petitioner challenged the County's determination that his property did not constitute a legal lot. LUBA found that the County did not have a process for making a legal lot determination binding and, in dicta, seemed to agree with the County that its legal lot verification process wasn't even a land use decision. Lane County's current legal lot verification process, found in Lane Code 13.020, was not adopted until July of 2004.<sup>4</sup> In other words, the preliminary legal lot verifications issued in 2001 and 2003 were issued under the same code authority as existed in 1997.

<sup>3</sup> *Davis v. Lane County*, 32 Or LUBA 267 (1997)

<sup>4</sup> Lane County Ordinance No. 7-04; effective 7/15/2004.

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It is unfortunate, but Lane County's preliminary legal lot verification process, at least as it existed before July of 2004, was at best an advisory statement from the County. Reliance on those determinations are done at an owner's peril.

*This allegation of error is dismissed.*

**3. *The legal lot status of the subject property was rehabilitated by the Planning Director approval of PA 16-05765 and the recording of Land Partition Plat No. 2017-P2728.***

The Applicant argues that the legal lot status of the subject property was "rehabilitated" by the Planning Director approval of PA 16-05765, which was a validation of unit of land action taken under the authority of ORS 92.176. The justification for that request was an admission that the underlying abandoned logging road had been vacated by the operation of Partition M1159-84 and that preliminary legal lot determinations were inadequate to show that the property was lawfully created.

Essentially, the County's action acknowledged that tax lot 1508, located adjacent and north of the subject property, was unlawfully created by a deed sale. The Applicant then reasons that since this property is the central portion (14.7 acres) of Parcel 2 of Partition M1159-84, the creation of a partition plat (2017-P2728) to implement the validation of unit of land action served to divide Parcel 2 into two additional parcels; the subject property and tax lot 1500. The Applicant argues by analogy that the case of *Lovinger v. Lane County*, 206 Or App 557 (2006), where an intervening ownership of a road right-of-way was found to establish two, non-contiguous legal lots, is instructive. That case can be distinguished from the present fact pattern for several reasons. First, the road in *Lovinger* was established prior to the implementation of land division standards in the County. Second, ORS 92.010(9)(d) currently does not recognize that such a transaction would partition property. Finally, the applicant in *Lovinger* owned the property on both sides of the road. This is not a situation where property is partitioned and the remainder of the parent property is considered a legal lot. Here, the subject property, tax lot 1508, and tax lot 1500, are under different ownerships. The partition plat implementing the validation of unit of land did not create a remainder of that applicant's property.

ORS 92.176 provides a statutory process to cure the legal lot status of parcels that were not lawfully created. It is the only statutory process that provides this type of relief and it is discretionary with the County. While the partition plat of 1508 did divide Parcel 2 of Partition M1159-84 into two properties, only one of those two properties can be considered to be lawfully created. To allow the partition of tax lot 1508 to validate the legal lot status of either of those two properties would seem to circumvent the sole statutory remedy to an illegally created parcel and it

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would usurp the County's authority to administer that process. Further, without validating one of the two remaining pieces of Partition 2 through ORS 92.176, it is arguable whether the County has the authority to grant partition plat status to that property under ORS 92.176(5).

In summary, the partition platting of tax lot 1508 doesn't have the effect of endowing the adjacent portions of Parcel 2 of M1159-84 with legal lot status. The Applicant must go through the same validation of unit of land process as was done for tax lot 1508 to confer the subject property with legal lot status.

*This allegation of error is dismissed*

### Summary

The crux of this case revolves around a lawfully established parcel that served as a logging road in the early 1900s. That parcel was vacated by the recording of a 1984 partition map that did not recognize the underlying legal lot. A 2003 property line adjustment manipulated the vacated logging road to create the subject property. Prior and subsequent preliminary legal lot verification decisions could not resuscitate the legal lot status of the logging road because they were not final decisions and probably not even land use decisions. Finally, I do not believe that the validation of unit of land action and subsequent partition platting of tax lot 1508 had the effect of creating a legal remainder in the subject property.

**Respectfully Submitted,**



**Gary Darnielle**  
**Lane County Hearings Official**



ATTACHMENT A  
PA 15-05770

Figure 1

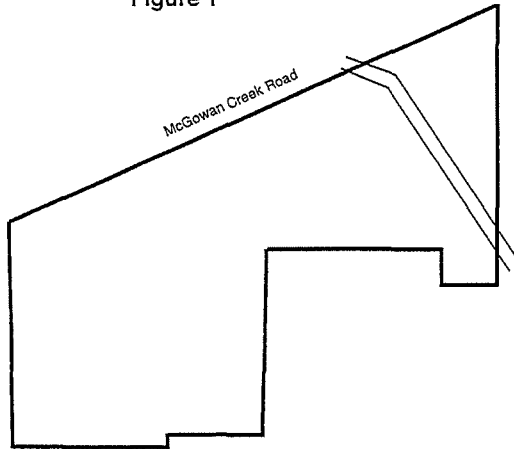


Figure 2

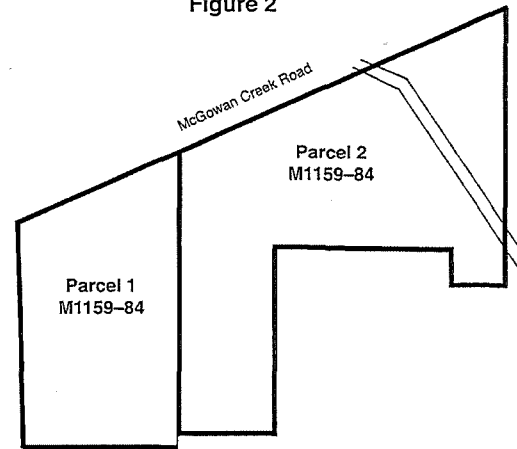


Figure 3

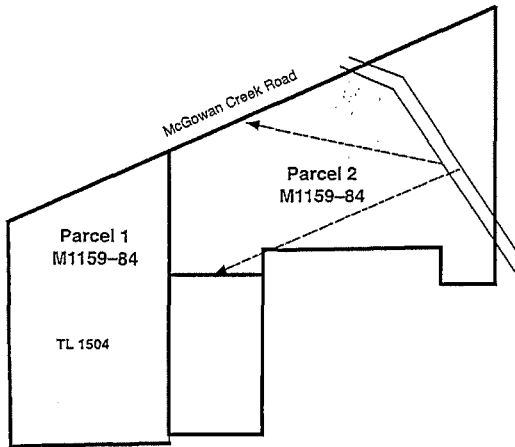


Figure 4

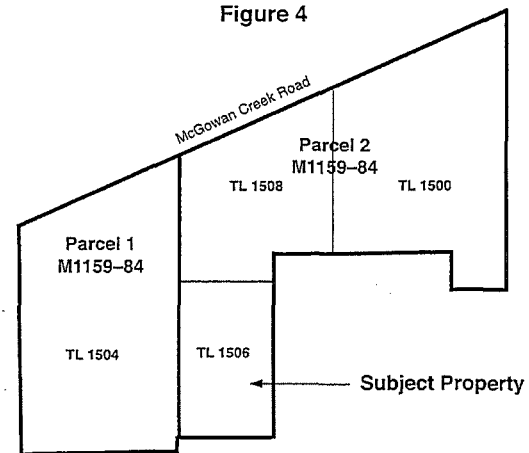


EXHIBIT B

## EXHIBIT B



July 12, 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 denial of the Wolcott request (PA 15-05770) for a template forest dwelling on tax lot 1506, assessor's map 16-02-27.*

Dear Ms. McKinney:

On June 27, 2016, I affirmed the Planning Director's denial of the Wolcott request (PA 15-05770) for a template forest dwelling on tax lot 1506, assessor's map 16-02-27. On July 7, 2017 the Applicant 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 regard to the issue of whether Partition M1159-84 vacated the underlying logging road, in the *Van Velduizen* case LUBA found that a partition could vacate an underlying parcel created by a land sales contract. The preliminary legal lot verification decisions were issued under the same code authority as existed at the time of the 1997 *Davis v. Lane County* decision and the language of the legal lot verification form cannot bootstrap the deficiencies in the legal lot determination process. The preliminary legal lot verifications were not final decisions and, arguably, were not even land use decisions, and therefore cannot reconstitute a vacated parcel. Finally, the statutory validation of legal lot process of ORS 92.176 is the remedy for the illegal creation of the subject property and should be used for that purpose.

Accordingly, on the authority of Lane Code 14.535(1), I shall affirm my June 27, 2017 decision without further consideration. Please advise interested parties of this decision.

Sincerely,



Gary L. Darnielle  
Lane County Hearings Official

cc: Amber Bell (file)