

BEFORE THE BOARD OF COMMISSIONERS OF LANE COUNTY, OREGON

ORDER
NO: 18-02-27-06

In the Matter of Electing Whether or Not to Hear an Appeal of a Hearing Official's Denial of a Preliminary Partition in the Non-Impacted Forest Lands Zone (F-1); Assessor's Map 18-01-00-00-01500 (File No. 509-PA17-05297/McDougal).

WHEREAS, the Lane County Hearings Official has made a decision to reverse a Planning Director approval of a preliminary partition application in Department File No. 509-PA17-05297; and

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

WHEREAS, after reviewing the appeal, the Lane County Hearings Official elected to not reconsider and to affirm the decision; and

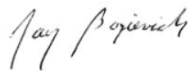
WHEREAS, Lane Code 14.600 provides the procedure and criteria that the Board follows in deciding whether or not to conduct an on the record hearing for an appeal of a decision by the Hearings Official; and

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 finds and **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 December 27, 2017 and the letter affirming the decision dated January 12, 2018 attached as Exhibit "B," that found relevant approval criteria are not met and that the Board of Commissioners affirm and adopt the Lane County Hearings Official decision as the County's final decision, and remain silent on interpretations of ORS 215.780 made by the Hearing Official.

ADOPTED this 27th day of February, 2018.



Jay Bozievich, Chair
Lane County Board of Commissioners

APPROVED AS TO FORM

Date: 2-16-18 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 1500, assessor's map 18-01-00, The subject property has a site address of 37820 Wallace Creek Road and is about 48 acres in size. It is located south of Wallace Creek Road and approximately 1.5 miles (as the crow flies) southwest of the Urban Growth Boundary of Springfield. The applicant proposes to divide the subject property into two parcels, each to contain an existing dwelling. Proposed Parcel 1 is 43.0 acres in size and Parcel 2 is proposed to be 5.0 acres in size.
2. The subject property is designated "Forest" on the Lane County Rural Comprehensive Plan. It is zoned Non-impacted Forest Lands (F-1) zone, consistent with the Plan designation. Surrounding properties to the west, are zoned F-1, Exclusive Farm Use (E-30) zone and Rural Residential (RR-5) zone, to the north properties are zoned Impacted Forest Lands (F-2) zone, and to the east properties are zoned F-1. The abutting property to the south is zoned Non-Impacted Forest (F-1) zone.
3. Based on Assessment and Taxation data, the subject property contains two (2) dwellings, a stick-built dwelling constructed in 1900 and a manufactured dwelling. The 1900 dwelling is located approximately 100' north of the south property line and is shown on a 1983 building permit No. 509-BP83-00767. The Planning Director found that the stick built dwelling has been in lawful existence since the early 1900's and its legal status does not appear to be in question.

The following is the history for the manufactured dwelling:

- a. Permit 509-BP77-01237 was for a temporary mobile home (TMH) placement and associated septic installation. The TMH permit stated the home would be used for residential purposes for a watchman or caretaker. Changes took place during the renewal and according to the permit document, the TMH became a permanent residence as requested and noted on 11-30-78 by department signature at bottom of the permit page. A final inspection was approved on 7-13-78.

At the time the mobile home was first granted permanent status by the County, the subject property was zoned Farm and Forestry (FF-20). Under this zoning designation, a conditional use permit (CUP) would have been required for "accessory dwellings for persons employed on the premises," under Lane Code 10.105-15(10). No such CUP appears to have been applied for.

- b. The mobile home was replaced under permit 509-BP85-01729. A final inspection of the replacement mobile home was approved on 8-19-85.
- c. The mobile home was again replaced under permit 509-BP95-00452 and in conjunction with planning permit 509-PA95-00452, a Planning Director Special Use Permit (SUP) to replace and existing dwelling on a new location in the F-1 zone. The SUP under 509-PA95-00452 was a noticed land use decision and obtained final approval on 4-28-95 and the building permit for the replacement MH in its present day location was finalized on 6-29-97.

- d. The mobile home was again replaced under permit 509-BP16-00296 by administrative approval for a "same site" replacement dwelling. It was replaced with a 1997 Palm Harbor manufactured dwelling in conjunction with planning permit 509-PA14-05490. The building permit was finalized on 7-24-16.

The permitting history above shows the manufactured dwelling was initially lawfully placed on the property in 1977. It further shows it was unlawfully granted permanent status according to the Hearing Official. Finally, the record shows that the mobile home has been replaced numerous times although it was moved to a different location in 1995. Replacement approvals prior to 1993 were not noticed.

4. Lane Code 16.210(9)(e)(i) allows division of a property if at least two dwellings lawfully existed on the property prior to November 4, 1993. Lane Code 16.210(9)(e)(i) implements Oregon Revised Statutes (ORS) 215.780(2).
5. The property has site addresses of 37280 Wallace Creek Rd, Springfield Oregon. Generally, the property is located south of Wallace Creek Road.
6. On March 29, 2017, the applicant submitted an application for a preliminary partition in the Non-Impacted Forest Lands Zone (F-1). On April 21, 2017 the agent submitted an amended application narrative under F-1 area criteria subsection (9)(e), division of two existing dwellings. On April 21, 2017, staff deemed the application complete. On April 27, 2017, staff solicited referral responses from affected agencies, service providers and surrounding property owners. Staff received two separate hold requests totaling 60 days from the applicant. On October 3, 2017, the Planning Director approved the application, authorizing the preliminary partition on the subject property, and notice of pending land use decision was mailed in accordance with Lane Code 14.100(4) and LC 14.070(1). On October 16, 2017, the appellant (LandWatch) submitted a timely appeal. Notice of the public hearing on the appeal was mailed on October 17, 2017.
7. On November 16, 2017, the Lane County Hearings Official conducted a public hearing. The written record was held open until November 22, 2017, with opportunity for the appellant (LandWatch) to respond by November 30, 2017, and applicant's final written argument by December 7, 2017. On December 27, the Lane County Hearings Official issued a decision reversing the Planning Director conditional approval and denied the proposal. Notice of the Hearings Official's decision was mailed to the applicant and all parties of record on December 29, 2017.
8. On January 8, 2018, the appellant (the applicant/owner Norm McDougal) filed a timely appeal pursuant to LC 14.515(3)(f)(ii). The applicant was silent on whether they wanted the Board to hear the appeal. However, they paid the lesser appeal fee (\$250) which pertains to the option for the Board to not conduct a hearing on the appeal pursuant to LC 14.515(3)(f)(ii).
9. On January 12, 2018, the Hearings Official reviewed the appeal and affirmed his decision without further consideration pursuant to LC 14.535(1).
10. 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

Regarding time constraints referred to in Lane Code 14.600(3), ORS 215.427(1) requires the County to take final action on applications within 150 days of the application being deemed complete. The 150-day deadline was November 17, 2017. A final decision by the Board through an on the record hearing cannot be made within the time constraints in ORS 215.427(1). Therefore the appeal does not comply with the criteria for an on the record hearing.

11. The appeal issue pertains to the criterion that the manufactured dwelling lawfully existed prior to November 4, 1993. This criterion is very site and structure specific. It requires reviewing the fact pattern for the specific structure in question in the individual application. Therefore, the Planning Director does not believe that the implications of the decision are of countywide significance.
12. This is the first time that staff is seeing this issue raised. 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 and guidance on ORS 215.780. Therefore, the Planning Director finds that there is not a need for further policy guidance.
13. The subject property does not constitute a unique environmental resource. To the extent that the forested areas of the property constitute a unique environmental resource, the provisions of Lane Code 16.210(9) implement the intent of the Non-Impacted Forest Lands Zone (F-1).
14. The Planning Director recommends the Board elect *not* to conduct an on the record hearing for the appeal, affirm, and adopt the Lane County Hearings Official decision as the County's final decision, and remain silent on the Hearings Official's interpretations of ORS 215.780 given that the County does not have deference on interpretation of State law.
15. Additionally, the Hearings Official did not recommend in his decision or letter of affirmation that the Board of Commissioners conduct an on the record hearing for the appeal.
16. 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.
17. The Board has reviewed this matter at its meeting of February 27, 2018, 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.
18. The Board affirms and adopts the Hearings Official decision of December 27, 2017, affirmed by the Hearings Official on January 12, 2018, as the County's final decision in this matter, and remains silent on interpretations of ORS 215.780 made by the Hearings Official in his decision.

LANE COUNTY HEARINGS OFFICIAL

REQUEST FOR A PRELIMINARY PARTITION OF NONIMPACTED FOREST LAND (F-1)

Application Summary

On March 29, 2017, Norm McDougal requested preliminary partition approval regarding tax lot 1500, assessor's map 18-01-00. The application was deemed complete on April 21, 2017 and approved by the Planning Director on October 3, 2017. A timely appeal was submitted by LandWatch Lane County on October 16, 2017.

Parties of Record

Jeannie Marr
Michael Farthing

Kim O'Dea
Sean Malone

LandWatch Lane County
William & Lisa Lilles

Application History

Hearing Date: November 16, 2017
(Record Held Open Until December 7, 2017)

Decision Date: December 27, 2017

Appeal Deadline

An appeal must be filed within 12 days of the issuance of a final order on this rezoning request, 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

LC 16.210(9)(e)
ORS 215.780(2)

Findings of Fact

1. The property subject to this application, hereinafter referred to as the "subject property," can be identified as tax lot 1500, assessor's map 18-01-00. The subject property has a site address of 37820 Wallace Creek Road and is about 48 acres in size. It is located south of Wallace Creek Road and approximately 1.5 miles (as the crow flies) southwest of the Urban Growth Boundary of Springfield. The Applicant proposes to divide the subject property into two parcels, each to contain

an existing dwelling. Proposed Parcel 1 is 43.0 acres in size and Parcel 2 is proposed to be 5.0 acres in size.

The subject property is designated "Forest" on the Lane County Rural Comprehensive Plan. It is zoned Non-Impacted Forest Lands (F-1), consistent with that plan designation. Surrounding properties to the west, are zoned F-1, Exclusive Farm Use (E-30) Zone and Rural Residential (RR-5), to the north properties are zoned Impacted Forest Lands (F-2), and to the east properties are zoned F-1. The abutting property to the south is zoned Non-Impacted Forest (F-1).

2. Based on Assessment and Taxation data, the subject property contains two (2) dwellings, a stick-built dwelling constructed in 1900 and a manufactured dwelling. Lane County Assessment and taxation data shows a stick-built dwelling currently assessed on the subject property. The 1900 dwelling is located approximately 100' north of the south property line and is shown on a 1983 building permit No. 509-BP83-00767 site plan. The Planning Director found that the stick-built dwelling has been in lawful existence since the early 1900's and its legal status does not appear to be questioned.

The following is the history for the manufactured dwelling:

- a. Permit 509-BP77-01237 was for a temporary mobile home placement and associated septic installation. The TMH permit stated the home would be used for residential purposes for a watchman or caretaker. Changes took place during renewal and according to the permit document, the TMH became a permanent residence as requested and noted on 11-30-78 by department signature at bottom of permit page. A final inspection was approved on 7-13-78.

At the time the mobile home was first granted permanent status¹ by the County, the subject property was zoned Farm and Forestry (FF-20). Under this zoning designation, a conditional use permit (CUP) would have been required for "accessory dwellings for persons employed on the premises," under LC 10.105-15(10). No such CUP appears to have been applied for nor has staff identified a code provision that would have clearly allowed the conversion of the temporary mobile under permit 509-BP77-01237.

- b. The mobile home was replaced under permit 509-BP85-01729. A final inspection of the replacement mobile home was approved on 8-19-85.
- c. The mobile home was again replaced under permit 509-BP95-00453 and in conjunction with planning permit 509-PA95-00452 a Planning Director Special Use Permit (SUP) to replace an existing dwelling on a new

¹ Apparently by a building inspector who had no apparent authority to do so.

location in the F-2 zone. The staff generated "Vicinity Map" within the SUP is in error as it shows the dwelling site on Tax Lot 2400 while the site plan in the application depicts the dwelling site on Tax Lot 1500.

A current aerial photograph shows where the dwelling existed since 1977-1995. The aerial shows a possible structure where the 1995 mobile home was and staff has advised the Applicant to ensure this MH is removed per the requirements in 509-BP85-00453 and 509-PA95-00452 as both permits stated removal or relocation was required for existing mobile home.

The SUP under 509-PA95-00452 was noticed and obtained final approval on 4-28-95 and the building permit for the replacement MH in its present-day location was finalized on 6-29-97.

- d. The mobile home was again replaced under permit 509-BP16-00296 by administrative approval for a "same site" replacement dwelling. It was replaced with a 1997 Palm Harbor manufactured dwelling in conjunction with planning permit 509-PA14-05490. The building permit was finalized on 7-24-16.

The permitting history above shows the manufactured dwelling was initially lawfully placed on the property in 1977. It further shows that it was unlawfully granted permanent status. Finally, the record shows that the mobile home has been replaced numerous times although it was moved to a different location in 1995. Replacement approvals prior to 1993 were not noticed.

Decision

THE PLANNING DIRECTOR'S APPROVAL OF THE NORM McDOUGAL REQUEST (PA 17-05297) FOR THE PRELIMINARY PARTITION OF TAX LOT 1500, ASSESSOR'S MAP 18-01-00 IS REVERSED.

Rulings of Objections

At the November 16, 2017 hearing on this matter, and with the agreement of both parties, it was ordered that the record would be held open one week for the Applicant to submit additional evidence and argument. Thereafter, the record was held open another week to allow the Appellant to respond to the information placed into the record by the Applicant during the first week. Finally, the Applicant was allowed one week to submit final argument/rebuttal.

During the first period of the open record (November 22, 2017), the Applicant submitted Lane County Master Road File No 482, regarding Jones Road, and Lane County Master Road File No 421, regarding Wallace Road; a bargain and sale deed dated November 23,

2015 from McDougal Bros. Investments to Norman McDougal; and a Department of Assessment and Taxation deed card for the subject property. At the end of the second week of the open record, the Appellant submitted a five-page letter and three exhibits. The Appellant's letter raised issues regarding the application's compliance with ORS 215.780(2)(e), etc. and provided additional arguments regarding the unlawful nature of the mobile home replacement approvals. Appellant's Exhibit 1 pertained to Lane County's inspection record for the placement of a 1995 mobile home and installation of a sand filter sewage disposal system for 37817 Wallace Creek Road, Springfield, Oregon (BP 95-00453). Exhibit 2 contained excerpts from an application for the verification of replacement rights and corresponding Planning Director decision in file PA 05-6587 approving the application. Exhibit 3 contained excerpts from file PA 14-05490 regarding a subsequent application and Planning Director decision for the verification of replacement rights of the mobile home on Non-Impacted Forest Lands.

The Applicant subsequently argued in its rebuttal statement that the Appellant's November 30, 2017 submission was not responsive to his November 22, 2017 submission and should therefore be stricken from the record. The Appellant responds that the Applicant did not provide any analysis of the documents provided and left it up to the Appellant to interpret their significance. The Appellant also pointed out that it had previously raised the issue that the Applicant's findings were insufficient and that its November 30 submission was an attempt to demonstrate this inadequacy.

I agree with the Appellant that the submission of evidentiary materials without an explanatory narrative may make it difficult to understand what legal argument they are intended to support. In the present case, however, the materials submitted by the Applicant on November 22 are pretty straightforward and aren't open to a wide degree of interpretation. The materials regarding the County's road files can only be relevant in regard to the confusion about the location of the mobile home caused by the bisection of the subject property by Jones Road. These materials show that the County accepted the roads and, I believe, create a presumption that the County retains those roads in fee. In regard to the bargain and sale deed, I cannot interpret its relevance beyond a showing of how and when the Applicant acquired the subject property. Finally, the real property tax lot record does nothing more than identify the subject property's size and deed history back to 1941. None of these materials relate to the placement or subsequent replacement of the mobile home in question. Neither are these materials relevant to the question of whether the two dwellings on the subject property complied with the criteria for a replacement dwelling.

The Appellant argues in its December 12, 2017 submission that the November 30, 2017 materials were intended to demonstrate that the Applicant had not met the requirements of ORS 215.780(2)(c). However, the Appellant could have made the same argument if the Applicant had submitted no materials on November 22, 2017. The Applicant cites

LUBA's decision in the *Marr* case² to support its motion to strike the Appellants November 30, 2017 submission.

As I understand ORS 197.763(6)(c) and (7), during the initial open record period, any person has the right to introduce new evidence and argument. In the present situation, only the Applicant thought it necessary to supplement the record during this period. The Appellant reasonably requested a subsequent period of time to review and respond to the new evidence submitted by the Applicant and this request was granted.

I must conclude that the Appellant's November 30, 2017 materials and argument were not responsive to the Applicant's November 22, 2017 submission and must be stricken from the record. If the Appellant had wished to further bolster its case regarding the inadequacy of the Applicant's findings it should have indicated that it desired to do so during the first open record period. It had a right to do so under ORS 197.763(7). It did not indicate that it wished to make a submission during the first open record period and it did not do so.

However, in regard to the Appellant's November 30, 2017 narrative, it should be pointed out that the Appellant had previously alleged that the application failed to comply with ORS 215.780(2)(e) in its November 16, 2017 submission. The Hearings Official is aware that Lane Code 16.210(9)(e) is a creature of that statute and understands that Lane Code 16.210(9)(e) must be applied in a manner that satisfies the intent of ORS 215.780(2)(e) and corollary statutory law.

Justification for the Decision (Conclusion)

The basis on which the Planning Director's preliminary approval of the application rests on the application and interpretation of ORS 215.780(2) and LC 16.210(9)(e).

ORS 215.780(1)(c) provides that the minimum lot or parcel size for land designated as forestland is at least 80 acres unless a lower minimum is justified under ORS 215.780(2). In this regard, ORS 215.780(2)(e) states:

“(e) To allow a division by partition of a lot or parcel zoned for forest use or mixed farm and forest use under a statewide planning goal protecting forestland if:

(A) At least two dwellings lawfully existed on the lot or parcel prior to November 4, 1993;

The Appellant argues that the statute does not allow a landowner to use a replacement dwelling that was placed after November 4, 1993 to qualify a unit of land for a partition. Absent any legislative history to the contrary, I do not believe that the statute states or even implies this result.

² *Landwatch Lane County v. Lane County*, LUBA No. 2016-106 (05/02/2017)

Nevertheless, as determined below under the analysis of Lane Code 16.210(9)(e)(i), I have found that the mobile home did not lawfully exist prior to November 4, 1993 and therefore the partition approval must be reversed. The Applicant has therefore not complied with this statutory provision.

(B) *Each dwelling complies with the criteria for a replacement dwelling under ORS 215.213 (1)(q) or 215.283 (1)(p);*

The Appellant argues that ORS 215.780(1)(e)(A) and (B) refer to the same dwellings. This interpretation can have several meanings. One interpretation is that the dwellings that existed in 1993 must have complied with the replacement dwelling standards at that time. This interpretation does not make sense for several reasons. First, the language of (B) is present tense. If the Legislature intended a look-back to 1993 it would have used the language “complied.” Second, it seems odd that the Legislature would try to apply replacement dwelling standards to a time 20 years prior to when those standards were adopted.

I believe that the Appellant’s preferred interpretation is based upon the same argument used in ORS 215.780(2)(e)(A), above. That is, the dwellings that currently exist and are subject to the replacement dwelling standards must be the same dwellings that existed in 1993. Thus, it argues that one cannot apply the replacement dwelling standards to a dwelling that has been replaced since that date. As stated above, the statute does not state or imply this result.

ORS 215.213(1)(q), which is applicable to uses in counties such as Lane that have adopted marginal lands system, states: “*Subject to section 2, chapter 462, Oregon Laws 2013, alteration, restoration or replacement of a lawfully established dwelling.*”

Section 2(a), Chapter 462 of Oregon Laws 2013 provides that a dwelling may be replaced if the permitting authority finds that the dwelling has or formerly had various intact structural features. The record indicates that both dwellings, as they currently exist, have these structural features.

Section 2(b), Chapter 462 of Oregon Laws 2013 allows the alteration, restoration or replacement of a dwelling when the permitting authority finds that the dwelling was assessed as a dwelling for purposes of ad valorem taxation for the lesser or either (A) the previous five years or (B) from the time when the dwelling was erected upon or affixed to the land and became subject to assessment as real property unless the value of the dwelling was eliminated due to destruction. This statutory provision

differs from its Lane Code counterpart in LC 16.210(6) and will be addressed separately.

The record, in the form of a February 14, 2017 Regional Land Information Database for Lane County, shows assessment and taxation entries for the stick-built dwelling from 1995 to 2016. This data satisfies Section 2(b)(A), Chapter 462 of Oregon Laws 2013, which is the lesser of the two standards. The same document shows two years (2015 & 2016) of taxation and assessment data for the existing mobile home which is generally consistent with the verification of replacement rights through PA 14-05490 and placement on the subject property through BP 16-00296. I believe that the record demonstrates that the assessment and taxation data for the most recent replacement of the mobile home complies with Section 2(b)(B) of Chapter 462 of Oregon Laws 2013. That the mobile home also complies with the necessary physical characteristics of Section 2(a) does not appear to be in question.

The Appellant has also argued that ORS 215.755 is applicable and does not allow a lapse in existence of a dwelling to be replaced. ORS 215.755 applies to "Other forestland dwellings" and subsection (1) provides standards for the "alteration, restoration or replacement" of a lawfully established dwelling. I do not agree with this argument. The two dwellings being contested are not "other forestland dwellings" but rather two dwellings that exist on forest land that are subject to ORS 215.780(2)(e). This statute is specific in regard to which replacement dwelling standards are applicable to a proposed partition under this section of the statute. Further, Section 2(a), Chapter 462 of Oregon Laws 2013 explicitly applies to a replacement dwelling that "*has, or formerly had*" the listed structural characteristics. This language does not preclude the removal of a dwelling prior to the approval for its replacement. By the same token, Section 2(a), Chapter 462 of Oregon Laws 2013 does not incorporate the ORS 215.755 requirement that the replacement approvals contain findings regarding compliance with an acknowledged comprehensive plan and land use regulations.

The Applicant has complied with this statutory provision.

(C) *Except for one parcel, each parcel created under this paragraph is between two and five acres in size;*

Parcel 1 under the proposed partition will be 43 acres in size and Parcel 2 will be 5.0 acres in size. The Applicant has complied with this statutory provision.

- (D) At least one dwelling is located on each parcel created under this paragraph; and***

The existing mobile home will be located on proposed Parcel 1 and the existing stick-built dwelling will be located on proposed Parcel 2. The Applicant has complied with this statutory provision.

- (E) The landowner of a parcel created under this paragraph provides evidence that a restriction prohibiting the landowner and the landowner's successors in interest from further dividing the parcel has been recorded with the county clerk of the county in which the parcel is located. A restriction imposed under this paragraph is irrevocable unless a statement of release is signed by the county planning director of the county in which the parcel is located indicating that the comprehensive plan or land use regulations applicable to the parcel have been changed so that the parcel is no longer subject to statewide planning goals protecting forestland or unless the land division is subsequently authorized by law or by a change in a statewide planning goal for land zoned for forest use or mixed farm and forest use."***

ORS 215.780 is implemented by Lane Code 16.210(9)(e):

- (a) The minimum area requirement for the creation of new lots or parcels for land designated as Impacted Forest Land (F-1) is 80 acres. An exception to this area requirement may be made pursuant to LC 16.210(9)(b)-(g) below;***
- (e) A division by partition of a lot or parcel for at least two existing dwellings or manufactured dwellings subject to compliance with these requirements:***
- (i) At least two dwellings or manufactured dwellings lawfully existed on the lot or parcel prior to November 4, 1993;***

As a preface to this narrative, it must be made clear that I interpret this provision to mean that on November 4, 1993 the dwellings must have lawfully existed on the lot or parcel to be partitioned not the respective parcels that are to be created by the partition.

The Appellant argues that County had no authority to administratively change the status of the "temporary" mobile home to "permanent" in 1978. The Applicant counters that this argument constitutes a collateral attack on the subsequent County decisions approving the replacement of the mobile home.

I do not believe that this is a collateral attack on the County decisions. This land use appeal involves the question of whether the Applicant meets the criteria necessary to authorize the partition of its F-1 zoned land not whether the mobile home should be removed because it is illegal.

The basic facts as I understand them are as follows: The subject property is currently occupied by a stick-built house that was constructed circa 1900 and a mobile home. The mobile home was constructed (placed) in 1977 on property north of Jones Road (County Rd. 482) on the basis of a temporary hardship. The mobile home was replaced in 1985 near or on its previous location. In 1995 the mobile home was relocated to its present location south of Jones Road. The property located north and south of Jones Road was considered as one property until 2015 when a legal lot verification determined that Jones Road effectively split the property with County ownership and created two legal lots. The mobile home and stick-built house are currently located on Legal Lot 2 of that determination.

Based upon the recitation above, I do not believe that the mobile home lawfully existed as of November 4, 1993. The temporary mobile home was given permanent status by a building inspector who had no apparent authority to do so. No planning authorization was granted and, under the then existing zoning, it appears that the only way the mobile home could have achieved permanent status was to acquire a conditional use permit as an accessory dwelling for persons employed on the premises. There is no record of such a permit ever being requested or approved. It is possible that a subsequent land use action could "cure" the illegal status of the mobile home. The mobile home received a replacement building permit in 1985 but there was no notice associated with this decision and therefore it was not a land use decision that could change the legal status of the mobile home. A subsequent special use permit (PA 95-00452) came after the 1993 deadline.

The Appellant also argues that the mobile home did not exist on the subject property in 1993 but rather was located on a parcel to the north. In 1977, the mobile home was located north of Jones Road, which separated it from the stick-built dwelling. In 1995, the mobile home was moved, via a replacement dwelling permit, to its present location south of Jones Road.

The property was treated as a single parcel by the County and the property owner until 2015 when it was subject to legal lot verification PA 15-05177. Indeed, in 1991 it was verified as being a single legal lot in PA 91-03270. Since there was no verification that Jones Road had created two separate legal lots in 1993, I believe that it is reasonable to hold that the

mobile home was located on the same lot or parcel as the stick-built house on November 4, 1993.

For the reasons explained above, I must conclude that as of November 4, 1993 only one dwelling lawfully existed on the subject property.

- (ii) ***Each dwelling or manufactured dwelling complies with the requirements for a replacement dwelling or manufactured dwelling in LC 16.210 (6);***

For reasons not understood by this hearings official, the Planning Director applied the replacement dwelling provisions of Lane Code Chapter 16.211(4). The applicable replacement dwelling standards, of course, are found in LC 16.210(6). However, the standards for replacement dwellings in the two zones are identical.

LC 16.210(6) provides:

- (a) ***The alteration, restoration, or replacement of a lawfully established dwelling or manufactured dwelling is an allowed use without the need for notice and the opportunity for appeal subject to compliance with the general provisions and exceptions in LC Chapter 16, LC 16.211(8) below and with these requirements:***

As indicated earlier in this decision, the provisions of Lane Code 16.210(6)(a)(i) are not consistent with Section 2(b) of Chapter 462 of Oregon Laws 2013, which limits the assessment and taxation findings that are required.

- (i) ***The property owner provides:***

- (aa) ***Building permit or land use application records from the Lane County Land Management Division indicating that the existing dwelling or manufactured dwelling was lawfully constructed or placed on the subject property; or***

The Planning Director has concluded that both dwellings satisfy Lane Code 16.210(6)(a)(i)(aa). A narrow reading of this provision supports this conclusion as the mobile home was lawfully placed on the subject property as a temporary mobile home. Arguably, it became unlawful at a later date (one year later) when the temporary status expired.

The placement of the stick-built structure preceded zoning of the property.

- (bb) *Records from the Lane County Assessment and Taxation Office indicating that the structure has existed on the property and been taxed on a continuous, annual basis from a date that, as determined by the Director, predates zoning that would restrict or regulate the establishment of a dwelling on the subject property.***

Lane Code 16.210(6)(a)(i)(bb) is more rigorous than Section 2(b) of Chapter 462 of Oregon Laws 2013 in the sense that it requires a lookback to the time that zoning applied to the two dwellings. The stick-built dwelling was constructed around 1900, prior to any zoning and its property was first zoned in November of 1975 (FF-20). The County has continuous records of the dwelling since 1982 but the record only contains assessment and taxation information about this structure that goes back to 1995.

The mobile home was placed on its property in 1977 at a time when the property was zoned FF-20. At that time, it could only be allowed on a temporary-caretaker basis in that zone. The record only contains assessment and taxation data back two years for this structure as it is currently located but no data regarding its location prior to 1993.

The record does not support a finding that either dwelling satisfied this standard.

- (ii) *The dwelling or manufactured dwelling has:***

- (aa) *intact exterior walls and roof structure;***
(bb) *indoor plumbing consisting of a kitchen sink, toilet and bathing facilities connected to a sanitary waste disposal system;*
(cc) *interior wiring for interior lights; and*
(dd) *a heating system; and*

Both dwellings, as they currently exist, comply with these structural characteristics.

- (vi) *A temporary manufactured home or recreational vehicle approved under LC 16.210(3)(o) above is not eligible for replacement under LC 16.210(6)(a) above; and*

LC 16.210(3)(o) pertains to temporary manufactured homes that are in conjunction with an existing dwelling as a temporary use for the term of a hardship suffered by the resident or a relative of the resident.

The original temporary permit (MH 1237-77) for the mobile home was approved for the Wester Rivers Girl Scout organization. This permit was for a caretaker residence for the existing girl scout camp. There is no indication that the mobile home was to be used in a hardship capacity.

- (ii) *Except for one lot or parcel, each lot or parcel created under LC 16.210(9)(e) above is between two and five acres in size;*

The application is for one 43-acre parcel and one five-acre parcel.

- (iii) *At least one dwelling or manufactured dwelling is located on each lot or parcel created under LC 16.210(9)(e) above;*

The partition is structured so that the stick-built residence will be located on one lot and the manufactured dwelling will be located on the other lot.

- (iv) *A lot or parcel may not be divided under Lane Code 16.210(9)(e) if an existing dwelling on the lot or parcel was approved under a statute, an administrative rule or a land use regulation as defined in ORS 197.015 that required removal of the dwelling or that prohibited subsequent division of the lot or parcel;*

This provision is not applicable.

- (v) *A landowner allowed a division under LC 16.210(9)(e) shall sign a statement that shall be recorded with Lane County Deeds and Records declaring that the landowner and the landowner's successors in interest will not in the*

future complain about accepted farm or forest practices on nearby lands devoted to farm or forest use;

The Planning Director has made this a condition of approval.

- (vi) *The land owner of a lot or parcel created under LC 16.210(9)(e) above shall provide evidence that a restriction prohibiting the landowner and the landowner's successors in interest from further dividing the lot or parcel has been recorded with Lane County Deeds and Records. This restriction shall be irrevocable unless a statement of release signed by the Planning Director indicating that the Lane County Rural Comprehensive Plan or land use regulations applicable to the lot or parcel have been changed in such a manner that the lot or parcel is no longer subject to statewide planning goals protecting fo rest land or unless the land division is subsequently authorized by law or by a change in a statewide planning goal for land zoned for forest use or mixed farm and forest use; and*

The Planning Director has made this a condition of approval.

- (viii) *The Planning Director shall maintain a record of lots and parcels that do not qualify for division under restrictions imposed by LC 16.210(9)(e)(vii) above. The record shall be readily available to the public.*

The Applicant has also argued that his application should be approved under LC 16.290(d)³, which reads, in part:

- (d) *A division by partition of a lot or parcel for an existing dwelling subject to compliance with these requirements:*
- (i) *The parcel created for the existing dwelling or manufactured dwelling may not be larger than five acres, except as necessary to recognize physical features such as roads or streams, in which case the parcel shall not be larger than 10 acres;*
 - (ii) *The existing dwelling lawfully existed prior to June 1, 1995;*
 - (iii) *The parcel that does not contain the dwelling is not entitled to a dwelling unless subsequently authorized by law or goal and the parcel either:*
 - (aa) *contains at least 80 acres; or*

³ ORS 215.780(2)(d).

(bb) is consolidated with another parcel, and together the parcels contain at least 80 acres.

The Planning Director interpreted this section to apply only to forestland that was occupied by one dwelling. I agree. This provision clearly talks about the existence of one dwelling and the absence of a dwelling on a second parcel. The Applicant's interpretation is not a reasonable reading of this textual portion of the Code or of ORS 215.780(2)(d).

Conclusion

The mobile home did not lawfully exist on November 4, 1993 and therefore the partition must be denied.

Respectfully Submitted,



Gary Darnielle
Lane County Hearings Official



January 12, 2018

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


Re: *Appeal of reversal of Planning Director approval of the request (PA 17-05297) by Norm McDougal for the partition of Tax Lot 1500, Assessor's Map 18-01-00.*

Dear Ms. Kaye:

On December 27, 2017, I issued a decision reversing the Planning Director's approval of the request (PA 17-05297) by Norm McDougal for the partition of Tax Lot 1500, Assessor's Map 18-01-00. On January 8, 2017 this decision was appealed by the Applicant. 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.

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

Sincerely,


Gary L. Darnielle
Lane County Hearings Official

cc: Deanna Wright (file)