

BEFORE THE BOARD OF COMMISSIONERS OF LANE COUNTY, OREGON

ORDER NO: 18-02-27-08 IN THE MATTER OF ELECTING WHETHER OR NOT TO HEAR AN APPEAL OF A HEARINGS OFFICIAL DECISION APPROVING A LEGAL LOT VERIFICATION AND NOTICE FOR ONE LEGAL LOT COMPRISED OF ASSESSOR'S MAP AND TAX LOTS 21-01-30-00-01602 AND 01607; (FILE NO. 509-PA17-05487 / JENNINGS / KRYL).

WHEREAS, the Lane County Hearings Official has made a determination approving a Legal Lot Verification and Notice for one legal lot comprised of Assessor's Map and Tax Lots 21-01-30-00-01602 and 01607., pursuant to Lane Code 13.010, 13.020, and 13.450 in Department File No. 509-PA17-05487; 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-PA17-05487; 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 January 9, 2018, and the letter affirming the decision dated January 23, 2018, 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 any interpretations of Lane Code 13.010, 13.020, and 13.450 made by the Hearings Official in the decision.

ADOPTED this 27th day of February, 2018.



Jay Bozievich, Chair
Lane County Board of Commissioners

APPROVED AS TO FORM

Date 2-15-18



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," can be identified as tax lots 1602 and 1607, assessor's map 21-01-30. The subject property is owned by Mirka Kryl and is zoned E-30 Exclusive Farm Use. Tax lot 1602 is zoned R-1 and tax lot 1607 is zoned F-1.
2. Tax lot 1602, was transferred from G-P Timber to G-P Investments by deed on July 15, 1960. (See Reel 159, Instrument 10013, Lane County Deeds and Records.) The property that consists of tax lot 1607 was transferred by bargain and sale deed on September 27, 1983 from tax lot 1600. At this time, tax lot 1600, was over 100 acres in size and tax lot 1602 was over 40 acres in size. Both tax lots were larger than the minimum size required by their respective zoning before and after the transfer. This deed was subsequently recorded on June 24, 1984. (See Reel 1281, Instrument 8402655, Lane County Deeds and Records.) The County considers this latter transfer to be a property line adjustment as the property was conveyed from a portion of adjacent tax lot 1600 and no new parcel was created. The County considers the two tax lots to be one legal lot.
3. After researching deeds that went back as far as 1960, Lane County staff generated a narrative of the deed chains involving tax lots 1602 and 1607. A summarization of these deeds, which includes information about the grantors and grantees, are included in the narrative. The narrative was compiled by a staff member who was a registered professional land surveyor.
4. The subject property was first zoned by Ordinance 688, effective August 29, 1978. The first Chapter 13 land division regulations were applied to the subject property on March 26, 1975.
5. On May 31, 2017, the request for a Director review of a Legal Lot Verification and Notice was submitted to the Land Management Division. The application was reviewed and accepted as complete on June 30, 2017. On October 31, 2017, the Planning Director approved the application, finding that one legal lot exists. Notice of the determination was mailed to surrounding property owners. On November 13, 2017, a timely appeal was submitted by Lauri Segel, represented by Andrew Mulkey, filed a timely appeal on behalf of LandWatch Lane County.
6. On December 14, 2017, the Lane County Hearings Official conducted a public hearing, which was continued to October 26, 2017, at the request of the Applicant. The record was held open until January 5, 2018. On January 9, 2018, the Lane County Hearings Official issued a decision affirming the Planning Director's decision. Notice of the Hearings Official's decision was mailed to the applicant and all parties of record on January 11, 2018.
7. On January 22, 2018, Lauri Segel, represented by Andrew Mulkey, filed a timely appeal on behalf of LandWatch Lane County. Appellants request that the Board of County Commissioners not conduct a hearing on the appeal and deem the Hearings Officer's decision the final decision of the County, pursuant to LC 14.515(3)(f)(ii).
8. On January 23, 2018, the Hearings Official reviewed the appeal and affirmed his decision without further consideration pursuant to LC 14.535(1).

9. 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.*
10. The Board finds that the issues raised in this appeal are not of countywide significance. The history of ownership and conveyances that are at issue in this appeal are specific to the subject property. Additionally, LUBA has determined that there is no law that forbids the creation of split zoning, even where a substandard portion of resource land is transferred to another parcel (Just v. Linn County, 59 Or LUBA 112, 2009). Insofar as the Hearings Official's decision contains interpretations of Lane Code Chapter 13, those interpretations are reasonable and consistent with the Land Management Division's past pattern and practice, and are supported by LUBA case law. Therefore, the Board does not believe that the implications of the decision are of countywide significance.
11. The Board does not believe that the issue will reoccur with frequency. While legal lot verification applications are common, the fact pattern in this appeal is not anticipated to reoccur with frequency. The history of ownership and conveyances that are at issue in this appeal are specific to the subject property. Additionally, LUBA has determined that there is no law that forbids the creation of split zoning, even where a substandard portion of resource land is transferred to another parcel (Just v. Linn County, 59 Or LUBA 112, 2009). 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 Board finds that there is not a need for further policy guidance.
12. The Board finds that the subject property does not constitute a unique environmental resource. 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.
13. The Planning Director does not recommend review of the appeal on the record for the reasons cited above.
14. 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.
15. The Board has reviewed this matter at its meeting on January 30, 2017, 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.
16. The Board affirms and adopts the Lane County Hearings Official decision dated January 9, 2018, the letter affirming the decision dated January 23, 2018, as the County's final decision in this matter, and expressly agrees with and adopts any interpretations of Lane Code 13.010, 13.020, and 13.450 made by the Hearings Official in the decision.

**LANE COUNTY HEARINGS OFFICIAL
APPEAL OF AN ADMINISTRATIVE APPROVAL OF LEGAL LOT
VERIFICATION AND NOTICE**

Application Summary

On May 31, 2017, the Lane County Land Management Division received a request for a final legal lot verification and notice (PA 17-05487) for two parcels identified as tax lots 1602 and 1607, assessor's map 21-01-30. The request was accepted as complete by the Planning Director on June 30, 2017 and on October 31, 2017 the application was approved. A timely appeal was filed by LandWatch Lane County on November 13, 2017.

Parties of Record

Mark Jennings
Andrew Mulkey

Mirka Kryl
Lauri Segel

LandWatch Lane County

Application History

Hearing Date: December 14, 2017
(Record Held Open Until January 5, 2018)

Decision Date: January 9, 2018

Appeal Deadline

An appeal must be filed within 12 days of the issuance this decision and final order, 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 13.450
Lane Code 13.010 and 13.020

Motions

The Appellant moves to strike materials submitted by staff on December 29 after the Hearings Official granted a one-day extension to the timelines. This submission was previously approved by the Hearings Official at the request of staff who was not able to supply the requested evidence in the agreed upon time frame. The open record timelines were accordingly moved back so that the Appellant had a full week to review and comment of the material submitted by staff. The Appellant was not prejudiced by the one day extension of the record and therefore this motion is denied.

Findings of Fact

1. The property subject to this application, hereinafter referred to as the “subject property,” can be identified as tax lots 1602 and 1607, assessor's map 21-01-30. The subject property is owned by the Mirka Kryl and is zoned E-30 Exclusive Farm Use. Tax lot 1602 is zoned R-1 and tax lot 1607 is zoned F-1.
2. Tax lot 1602, was transferred from G-P Timber to G-P Investments by deed on July 15, 1960. (See Reel 159, Instrument 10013, Lane County Deeds and Records.) The property that consists of tax lot 1607 was transferred by bargain and sale deed on September 27, 1983 from tax lot 1600. At this time, tax lot 1600, was over 100 acres in size and tax lot 1602 was over 40 acres in size. Both tax lots were larger than the minimum size required by their respective zoning before and after the transfer. This deed was subsequently recorded on June 24, 1984. (See Reel 1281, Instrument 8402655, Lane County Deeds and Records.) The County considers this latter transfer to be a property line adjustment as the property was conveyed from a portion of adjacent tax lot 1600 and no new parcel was created. The County considers the two tax lots to be one legal lot.

After researching deeds that went back as far as 1960, Lane County staff generated a narrative of the deed chains involving tax lots 1602 and 1607. A summarization of these deeds, which includes information about the grantors and grantees, are included in the narrative. The narrative was compiled by a staff member who was a registered professional land surveyor.

3. The subject property was first zoned by Ordinance 688, effective August 29, 1978. The first Chapter 13 land division regulations were applied to the subject property on March 26, 1975.

Decision

THE PLANNING DIRECTOR'S APPROVAL OF THE MARK JENNINGS REQUEST (PA 17-05487) FOR THE LEGAL LOT VERIFICATION AND NOTICE OF ONE LEGAL LOT COMPRISED OF TAX LOTS 1602 AND 1607, ASSESSOR'S MAP 21-01-30 IS AFFIRMED.

Justification for the Decision

The Appellant raises several allegations of error made by the Planning Director. These allegations are addressed below:

1. *The transfer of tax lot 1607 creates a substandard non-impacted forest parcel and is therefore illegal.*

The Applicant relies upon LUBA's decision in *Landwatch Lane County v. Lane*

County (*Farver*), __ LUBA No. __ (LUBA No. 2016-124, June 29, 2016) for the proposition that a deed transferring property between adjacent properties, prior to property line adjustment regulations, constitute a legal adjustment of adjacent property boundaries. The Appellant distinguishes the present fact pattern from the *Farver* case because in the present situation the receiving property and the transferred property had different zoning. The Appellant further argues that the transfer created a sub-standard sized F-1 parcel.

In 1983 there were no regulations regarding property line adjustments and Lane County accepted deed transfers as a valid method of adjusting adjacent property boundaries. At the time of the deed transfer, both parcels involved in the transfer were larger than the minimum parcel size dictated by their respective zoning. The same is true after the deed transfer. As there is no prohibition on the creation of split-zoning through either a deed transfer or a property line adjustment I must conclude that the transfer was valid and lawfully created one legal lot.

The LUBA decision in *Just v. Linn County*, 59 Or LUBA 112 (2009) appears to be relevant. In *Just*, Linn County had approved a property line adjustment between one parcel that was zoned F/F and one that was zoned RR-5. Both parcels were below the minimum size required by their respective zoning. The adjustment transferred one acre of the F/F-zoned parcel to the RR-5 parcel, creating a split-zone situation in the latter. LUBA held that this was not a violation of ORS 92.192 (Oregon Laws 2008, Chapter 12, Section 2) because no parcel was reduced below the minimum size dictated by its zoning, and there was no prohibition against the creation of split-zoning through a property line adjustment.

In the present case, tax lot 1607 was cleaved from tax lot 1600¹ when Rex Timber transferred the property to Bohemia Inc. At the time of the transfer and after the transfer both properties were larger than the minimum lot size required by their respective zoning.

This allegation of error is dismissed.

2. ***The record does not show that Bohemia Inc. owned tax lot 1602 at the time of the conveyance of tax lot 1607 nor is there any evidence of when Willamette Industries acquired tax lot 1602. The assertion that “Bohemia Inc. liquidates assets” or that “Willamette Industries purchase Bohemia’s Assets” is not sufficient to meet the burden of proof.***

Bohemia Lumber acquired tax lot 1602 in 1962 through a bargain and sales deed from Georgia-Pacific Investment and Georgia-Pacific Timber Company. County staff's research noted that Bohemia Lumber Company became Bohemia Inc. through a change in its articles of incorporation in 1973. Copies of the change in

¹ See Lane County Department of Assessment and Taxation deed record for tax lot 1607.

the articles of incorporation are not in the record. Staff's research also noted that Willamette Industries purchased Bohemia's assets in the 1990s after the later was liquidated. No records of these acquisition are included in the record.

The Appellant does not allege that Bohemia Inc. did not own tax lot 1602 at the time of the conveyance of tax lot 1607 nor does it allege that Willamette Industries did not acquire Bohemia's assets in the 1990s. It merely alleges that the documents chronicling those events are not in the record. The evidence that these transactions took place is in the reporting of the events by the research narrative submitted by staff who was and currently is an Oregon registered professional land surveyor. Absent evidence that the narrative was incorrect, the written testimony by staff is sufficient to meet the preponderance of the evidence standard in this proceeding.

This allegation of error is dismissed.

Conclusion

That the 1984 transfer of tax lot 1607 to 1602 is to be considered as having the same effect as a property line adjustment was settled by *Landwatch Lane County v. Lane County (Farver)*. This has been Lane County's policy until it adopted property line adjustment regulations in 2009.

I must admit that the creation of a split-zoned parcel where the transferred property was below the minimum lot size for its zoning appeared to be questionable. However, LUBA has determined that there is no law that forbids the creation of split zoning (*Just v. Linn County*), even where a substandard portion of resource land is transferred to another parcel. Further, the transfer was not inconsistent with *Phillips v. Polk County*, 53 Or LUBA 194 (2007) as the parcel losing acreage was above the minimum lot size before and after the transfer. The important thing to remember is that the 1984 transfer of tax lot 1607 did not create a separate parcel and the Applicant is not asking that it be verified as such.

Respectfully Submitted,


Gary Darnielle
Lane County Hearings Official



January 23, 2018

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

Re: *Appeal of a decision affirming the Planning Director approval of the request (PA 17-05487) by the Mark Jennings for a legal lot verification and notice for Tax Lots 1602 and 1607, Assessor's Map 21-01-30.*

Dear Ms. Kaye:

On January 9, 2018, I issued a decision affirming the Planning Director's approval of the request (PA 17-05487) by the Mark Jennings for a legal lot verification and notice for Tax Lots 1602 and 1607, Assessor's Map 21-01-30. On January 22, 2018 this decision was appealed by LandWatch Lane County. 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 January 9, 2018 reconsidered decision without further consideration. Please advise interested parties of this decision.

Sincerely,

Gary L. Darnielle
Lane County Hearings Official

cc: Rafael Sebba (file)

Andrew Mulkey

Attorney at Law

1375 W. 13th Ave., Eugene, OR 97402 • (208) 596-3235 • afmulkey@gmail.com

January 22, 2018

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 509-PA17-05487,
Jennings application for Legal Lot Verification for Tax Lots 1602 and 1607,
Map No. 21-01-30-00.**

Appellant's Name

LandWatch Lane County
PO Box 5347
Eugene OR 97405
(541) 741-3625

Authorized Representative

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

Identification of the Decision Sought to be Reviewed

The Appellant listed above hereby appeals the Hearing Official's January 9, 2018 decision, which denied Appellant's appeal of the Planning Director's approval of an application for a legal lot verification of Tax Lots 1602 and 1607 as a single legal lot, Map No. 21-01-30-00

Copy of the Decision

A copy of the Hearings Official's January 9, 2018 decision and the Director's October 31, 2017 decision is attached hereto.

Appeal Deadline

The appeal deadline is January 22, 2018. Lane Code 14.510 sets a 12-day appeal deadline from the “date of signing of the decision provided notice of the decision occurs as required by law.” The 12-day appeal period ended on Sunday, January 21st, and in that case, the deadline ends on the following business day, Monday, January 22, 2018.

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’s decision the final decision of the County.

Appellant’s Standing

Appellant LandWatch Lane County appealed the Director’s decision in 509-PA17-05487 to the Hearings Official, and Appellant participated in those proceedings in person and in writing.

Appeal Fee

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

Grounds for Appeal

The Appellant hereby incorporates all prior written and oral testimony submitted in the proceedings below. Appellant intends to preserve all arguments raised below. The following list of issues on appeal is not exhaustive.


The Hearings Official and the Director’s decision fail to show that a prior owner of Tax Lot 1600 conveyed Tax Lot 1607 to an adjacent landowner in 1983. Both the Director and the Hearings Official failed to support their findings with substantial evidence in the whole record. The evidence does not show who owned Tax Lot 1602 in 1983. Without that evidence, the applicant failed to demonstrate that Tax Lot 1607 was conveyed to an adjacent landowner. The Hearings Official cannot rely on the credentials of the Planning Staff in lieu of actual evidence of ownership of Tax Lots 1607 and 1602 in 1983. The Hearings Official provided the applicant and the Planning Staff with more time to come up with the necessary documents, and they failed to submit additional documentation of ownership or provide a reason why such evidence could not be produced.

At the hearing on December 14, 2017, Appellant argued that the conveyance of 1607 resulted in a substandard-sized parcel within the F-1 zone. That action failed to comply with ORS chapter 92 and the County’s comprehensive plan provisions for forestlands. In his decision, the Hearings Official failed to address all of Appellant’s arguments. For example, Appellant argued that the Director’s decision violated Goal 4. The Hearings Official did not address that argument.

In support of his decision, the Hearings Official cites *Just v. Linn County*, 59 Or LUBA 112 (2009). The evidence in the record does not demonstrate that the conveyance at issue in these proceedings complied with the LUBA's decision in *Just v. Linn County*. LUBA's opinion in *Just v. Linn County* supports Appellant's position. In this case, unlike the circumstances in *Just*, the resulting parcel did not comply with the minimum parcel size for the zone. The Planning Department alleges that the conveyance of 1607 was a property line adjustment. If that is true, then the adjustment resulted in a substandard-sized parcel within the F-1 zone. In *Just v. Linn County*, both properties at issue were substandard both before and after the adjustment. That cannot be said for the properties at issue here. The Hearings Official also erred when he concluded that the conveyance of Tax Lot 1607 complied with LUBA's opinion in *Phillips v. Polk County*, 53 Or LUBA 194 (2007).

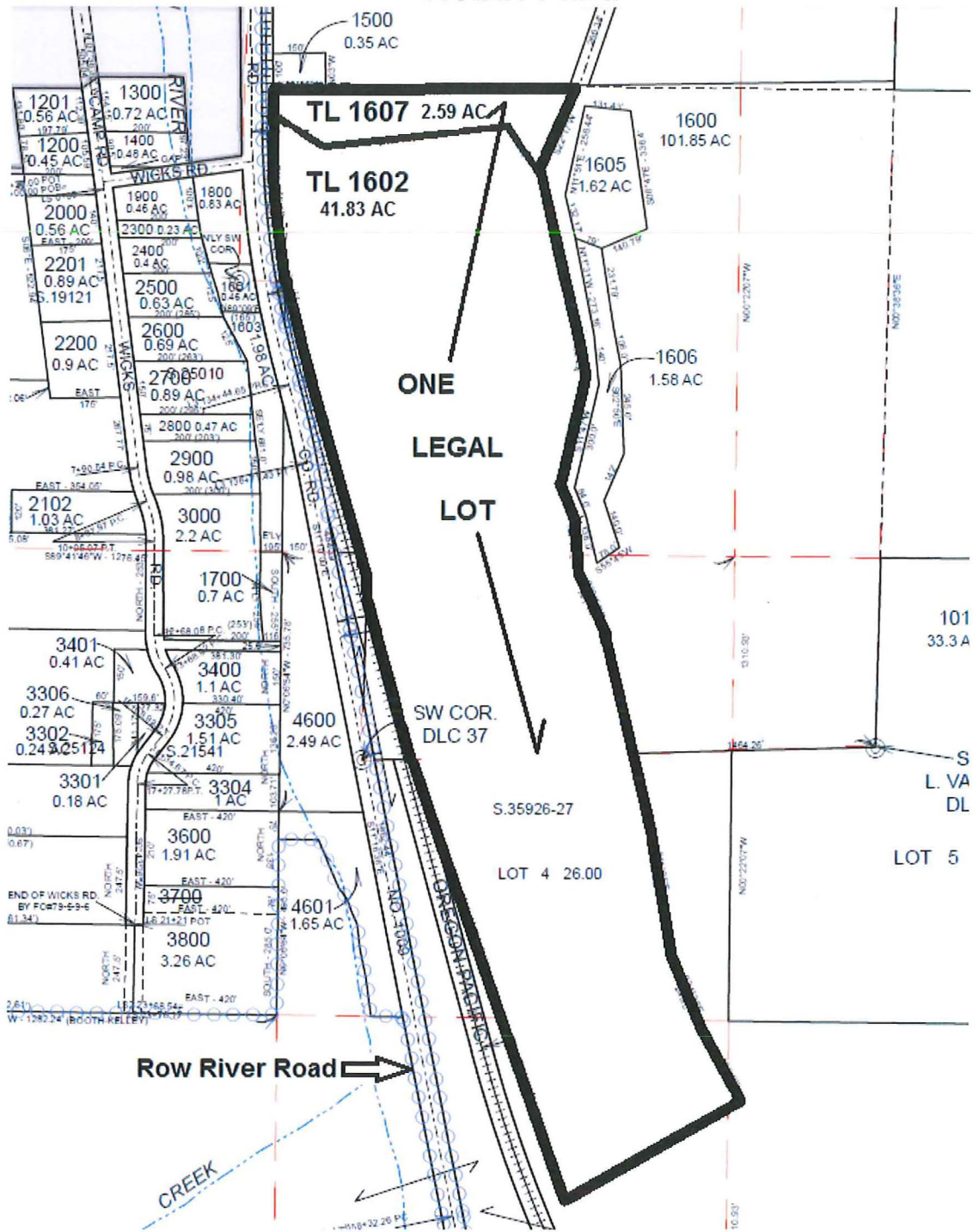
The conveyance of Tax Lot 1607 violated ORS chapter 92, Goal 4, and the comprehensive plan provisions for forestlands. The applicant failed to provide sufficient evidence for the Director's decision. For the above reasons, the Hearings Official's decision must be reversed and applicant's request for approval must be denied. By affirming the Director's decision, the Hearings Official exceeded his jurisdiction because the Hearings Official misinterpreted applicable law and failed to base his findings on substantial evidence in the whole record.

Respectfully,



Andrew Mulkey
Attorney at Law
On behalf of LandWatch Lane County

VICINITY MAP



Map 21-01-30

Note: This is only a graphical representation to aid in locating the approximate location of the subject property. It is not intended to depict the actual location of the boundary nor is it the result of a survey. Information shown is based upon information provided by the applicant.