

BEFORE THE BOARD OF COMMISSIONERS OF LANE COUNTY, OREGON

ORDER NO:
18-06-12-06

IN THE MATTER OF ELECTING WHETHER OR NOT TO HEAR AN APPEAL OF A HEARINGS OFFICIAL DECISION TO MODIFY AND PARTIALLY REVERSE A PLANNING DIRECTOR'S LEGAL LOT VERIFICATION DECISION FOR ASSESSOR'S MAP AND TAX LOTS 16-02-35-00-00610/1900 AND 16-02-25-00-00302 IN COMBINATION AND 16-02-35-00-01102 (FILE NO. 509-PA17-05996; PODHORSKY)

WHEREAS, the Lane County Hearings Official has made a decision to modify and partially reverse a Planning Director's approval of a legal lot verification application for Assessor's Map and Tax Lots 16-02-35-00-00610/1900 and 16-02-25-0-00302 in Combination and 16-02-35-00-01102, identified as File No. 509-PA17-05996;

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), requesting that the Board elect not to further hear the appeal and to deem the Hearings Official decision the final decision of the County; and

WHEREAS, on May 1, 2018, the Lane County Hearings Official affirmed his April 13, 2018 decision on the application after reviewing the appeal; 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.

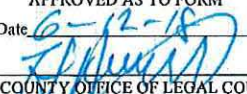
NOW, THEREFORE, the Board of County Commissioners of Lane County **ORDERS** as follows:

1. That the appeal does not comply with the criteria of Lane Code 14.600(3) and therefore, the Board declines to further review the appeal and consider arguments therein. Findings of fact in support of this determination are attached as Exhibit "A."
2. That the Lane County Hearings Official decision dated April 13, 2018, and the letter affirming the decision dated May 1, 2018 attached as Exhibit "B," which modified and partially reversed the Planning Director's decision on the basis that the proposed legal lot configuration does not comply with ORS 92.192(4)(a), are adopted, ratified, and affirmed by the Board of County Commissioners as the County's final decision. Furthermore, the Board of County Commissioners has reviewed the appeal and remains silent on interpretations of ORS Chapter 92 made by the Hearings Official.

ADOPTED this 12th day of June, 2018



Jay Bozlevich, Chair
Lane County Board of Commissioners

APPROVED AS TO FORM
Date 6-12-18


LANE COUNTY OFFICE OF LEGAL COUNSEL

ORDER EXHIBIT "A"

FINDINGS IN SUPPORT OF THE ORDER

1. Findings herein are provided for the appeal of Department File No. 509-PA17-05996.
2. Notice of the April 13, 2018 Hearings Official's decision was mailed to the applicant and parties of record on April 16, 2018.
3. On April 25, 2018, Andrew Mulkey, representing LandWatch Lane County, filed a timely appeal and requested 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).
4. On May 1, 2018, the Hearings Official reviewed the appeal and affirmed his decision without further consideration pursuant to LC 14.535(1).
5. A decision by the Board to hear the appeal on the record must conclude that a final decision by the Board can be made within the time constraints established by ORS 215.427. In this case, it appears that the deadline for a decision within 150 days after the application was deemed complete is June 11, 2018. Therefore, a final decision by the Board through holding an on-the-record hearing cannot be made within the time constraints of ORS 215.427.
6. In order for the Board to hear arguments on the appeal, Lane Code 14.600(3) requires the appeal to comply with one or more of the following criteria:
 - *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.*
7. Issues raised in the appeal statement are largely specific to the application and to the history of deeds recorded for the subject properties. Issues raised in the appeal concerning ORS 92.190(3) and ORS 92.192 are matters of State law interpretation on which the County would not have deference on appeal to LUBA.

The Hearings Official has reviewed the appeal and found that the allegations of error have been adequately addressed in his decision and do not warrant reconsideration, as explained in his May 1, 2018 affirmed decision.

Therefore, the Planning Director does not believe that the implications of the decision are of countywide significance, that the issues will occur with frequency, or that there is a need for policy guidance. To the extent that the issues will occur with frequency, the Hearings Official's decision or any forthcoming LUBA opinion would provide guidance.

8. The issues raised in this appeal do not relate to, or involve, a unique or Goal 5 inventoried environmental resource. This appeal relates to provisions of ORS Chapter 92, Lane Code 13.020, and property-specific deed conveyance history.

The Hearings Official's decision mentions that it is not clear to the Planning Director that ORS 92.192(4) precludes the type of property line adjustment completed in 1992 because farm dwellings are subject to certain criteria (e.g. farm income). However, the appellant has not raised this issue in their appeal statement and as mentioned above, issues raised in the appeal concerning ORS 92.192 is a matter of State law interpretation on which the County would not have deference on appeal to LUBA.

The Planning Director recommends that the Board elect not to conduct an on-the-record hearing for the appeal and affirm and ratify the Lane County Hearings Official decision as the County's final decision. Additionally, the Hearings Official's decision and letter of affirmation does not include a recommendation that the Board of Commissioners conduct an on-the-record hearing for the appeal.

9. 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. The Board has reviewed this matter at its meeting on June 12, 2018, finds that the appeal does not comply with the criteria of Lane Code Chapter 14.600(3), declines to further review the application, and elects not to hold an on the record hearing for the appeal.
10. The Board therefore elects not to conduct an on-the-record hearing for the appeal and to affirm and ratify the Lane County Hearings Official decision as the County's final decision. Furthermore, the Board of County Commissioners has reviewed the appeal and remains silent on interpretations of ORS Chapter 92 made by the Hearings Official.



May 1, 2018

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

Re: *Appeal of the Lane County Hearings Official reversing the Planning Director's approval of the request (PA 17-05966) by Darren Podhorsky for the verification and notice of tax lots 610 and 1900, assessor's map 16-02-25 and tax lot 302, assessor's map 16-02-25 (Legal Lot 1) and tax lot 1102, assessor's map 16-02-35 (Legal Lot 2) as legal lots.*

Dear Ms. Kaye:

On April 13, 2018, I issued a decision reversing the Planning Director's approval of the request (PA 17-05966) by Darren Podhorsky for the verification and notice of tax lots 610 and 1900, assessor's map 16-02-25 and tax lot 302, assessor's map 16-02-25 (Legal Lot 1) and tax lot 1102, assessor's map 16-02-35 (Legal Lot 2) as legal lots. On April 15, 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 April 13, 2018 reconsidered decision without further consideration. Please advise interested parties of this decision.

Sincerely,


Gary L. Darnielle
Lane County Hearings Official

cc: Amber Bell (file)

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

Application Summary

On December 19, 2018, the Lane County Land Management Division received a request for a final legal lot verification and notice (PA 17-05996) for two lots identified as tax lots 610 and 1900, assessor's map 16-02-35 and tax lot 302, assessor's map 16-02-25 (Legal Lot 1) and tax lot 1102, assessor's map 16-02-35 (Legal Lot 2). The request was accepted as complete by the Planning Director on January 12, 2018 and on January 30, 2018 the application was approved. A timely appeal was filed by LandWatch Lane County on February 12, 2018.

Parties of Record

Darren Podhorsky	Jillyn Whitcomb	LandWatch Lane County
Andrew Mulkey	Zack Mitage	Kathy Vinyard
Michelle Briggs	Thom Lanfear	Norm Waterbury

Application History

Hearing Date: March 15, 2018
 (Record Held Open Until April 12, 2018)

Decision Date: April 13, 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

Findings of Fact

1. The property subject to this application, hereinafter referred to as the "subject property," can be identified as tax lots 610 and 1900, assessor's map 16-02-35 and tax lot 302, assessor's map 16-02-25 (Legal Lot 1) and tax lot 1102, assessor's map 16-02-35 (Legal Lot 2). The subject property is owned by the Darren Podhorsky and is zoned E-40 Exclusive Farm Use.

EXHIBIT B

PA 17-05966

April 13, 2018

Page 2 of 7

The Applicant is asserting that tax lots 610 and 1900, assessor's map 16-02-35 and tax lot 302, assessor's map 16-02-25 are a single legal lot. He is also asserting that tax lot 1102, assessor's map 16-02-35 is also a legal lot.

The first land division regulations for the subject properties were effective March 26, 1975 via Ordinance 5-75. The subject properties were first zoned AGT by Ordinance effective on 7/29/1980 and Ordinance No. 884, effective 2/29/1984 which rezoned the property to E-30.

2. Tax lot 601 was created by deed on June 10, 1971 via a land sales contract from Ralph E. and Christine B. LaLone to Oscar E. and Betty J. Halverson. The contract was recorded on July 21, 1971 and can be found on Reel 541, Instrument No. 55884, Lane County Deeds and Records. Tax lot 601 was determined to be a legal lot via PA 2001-91. This verification was not noticed.

Tax lot 1102 was created by land sales contract on June 10, 1971 via a land sales contract from Ralph E. and Christine B. LaLone to Oscar E. and Betty J. Halverson. The contract was recorded on Reel 540, Instrument 54455, Lane County Deeds and Records. It was determined to be a legal lot through PA 1355-88. This verification was not noticed.

3. Proposed Legal Lot 1, tax lots 610 and 1900, assessor's map 16-02-35, and tax lot 302, assessor's map 16-02-25, were first verified as a single legal lot in 1991 in Planning Action (PA) 91-02001. This verification decision, which was not noticed, found that the property was originally created by land sales contract on June 10, 1971. The area described by this contract shows that the property that is identified as tax lot 610 is a continuous strip of land that is 60-feet wide. This property was adjusted through Warranty Deed 920833 and Warranty Deed 9207741, both signed on 2/5/1992 along with CSF 30234. This property line adjustment incorporated the areas recognized as tax lots 302 and 1900 into tax lot 610. It increased tax lot 610 from 6.18 acres to 49.79 acres and decreased tax lot 1102 to 4.03 acres. (Figure 1 depicts the chronology of the property line adjustments that affect tax lots 610 and 1102.)

Proposed Legal Lot 2, tax lot 1102, was originally created on June 10, 1971 through a warranty deed. (See Reel 540, Instrument 54455, Lane County Deeds and Records.) This property has been occupied with a dwelling since 1971 and has had its boundaries adjusted on three occasions. The first property line adjustment was affected by Warranty Deed 88-52482, signed 12/14/88 and accompanied by CSF 28661. This adjustment increased the property from approximately 3.3 acres to 28.83 acres and reduced tax lot 300 to 83.33 acres. The second property line adjustment was created with Warranty Deed 9006922, signed 2/1/1990 and accompanied by CSF 29259. This adjustment increased tax lot 1102 to 47.68 acres and decreased tax lot 300 to 64.48 acres. The third property line adjustment was created with Warranty Deed 920833 and Warranty

EXHIBIT B

PA 17-05966

April 13, 2018

Page 3 of 7

Deed 9207741, both signed on 2/5/1992, and accompanied by CSF 30234. These adjustments increased tax lot 610 from its approximately 6.16-acre configuration that was verified with legal lot determination PA 2001-91 to 49.79 acres and decreased tax lot 1102 from approximately 47.68 acres to 4.03 acres. At the time of the 1992 property line adjustments, tax lots 610 and 1102 were zoned E-40 and tax lot 1102 was occupied by a residence.

In 1992, tax lots 302 and 1900 were merged with tax lot 1102 through separate property line adjustments. Subsequently, as explained in the above paragraph, these two parcels were conveyed by warranty deeds from tax lot 1102 to tax lot 610 through property line adjustments accomplished through two warranty deeds. (Warranty Deeds 920833 and 9207741.)

4. The subject property was first zoned AGT by Ordinance 66-0008, effective March 25, 1966. 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 PODHORSKY REQUEST (PA 17-05996) FOR THE LEGAL LOT VERIFICATION AND NOTICE OF TWO LEGAL LOTS IDENTIFIED AS TAX LOTS 610 AND 1900, ASSESSOR'S MAP 16-02-35 AND TAX LOT 302, ASSESSOR'S MAP 16-02-25 (LEGAL LOT 1) AND TAX LOT 1102, ASSESSOR'S MAP 16-02-35 (LEGAL LOT 2), IS REVERSED IN REGARD TO THE CONFIGURATION OF THE LEGAL LOTS AS PROPOSED BY THE APPLICANT.

THE ACTUAL LEGAL LOT STATUS OF THE AFFECTED PARCELS IS AS FOLLOWS:

1. Legal lot 1 (Tax lot 610) is verified as a legal lot but only to the extent of its configuration at the time of its creation in 1971. The 1992 property line adjustment constituted an illegal partition and did not add tax lots 302 and 1900 to tax lot 610.
2. Legal Lot 2 (Tax lot 1102) is verified as a legal lot but only to the extent of its configuration after the 1990 property line adjustment. The 1992 property line adjustment constituted an illegal partition and did not remove tax lots 302 and 1900 from tax lot 1102. Therefore, tax lot 1102 consists of property comprised of tax lots 1102, 1900 and 302.

Justification for the Decision

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

1. Tax lots 1900 and 302 were created through an unlawful division by deed in 1990.

Tax lot 1900 was created by a 1989 warranty deed at a time that Lane County required property to be divided by partition or subdivision. The County acknowledged that tax lot 1900 was illegally created in PA 2003-91. Tax lot 302 was created by a 1990 warranty deed at a time that Lane County required property to be divided by partition or subdivision. The County acknowledged that 302 was illegally created in PA 2002-91.

While the Appellant's allegation of error is correct it is only tangentially relevant to the issue at hand as approval of the legal lot status of these properties is not being requested nor is it relevant to the verification of tax lots 610 and 1102 as legal lots.

This allegation of error is affirmed.

2. The 1992 property line adjustments to tax lots 1102 and 610 were not approved by Lane County and therefore violated ORS 92.190.

The Appellant relies on the language of ORS 92.190(3) to argue that Lane County was required to adopt formal property line adjustment procedures after ORS Chapter 92 was amended in 1985.¹

ORS 92.190(3) states:

"The governing body of a city or county may use procedures other than replatting procedures in ORS 92.180 and 92.185 to adjust property lines as described in ORS 92.010(12), as long as those procedures include the recording, with the county clerk, of conveyances conforming to the approved property line adjustment as surveyed in accordance with ORS 92.060(7)"

As noted in previous Hearings Official decisions, Lane County did not require planning department approval of property line adjustments until January 8, of 2010 with the adoption of Ordinance 2-09. ORS 92.190(3) states that *"The governing body of a city or county may use procedures other than replatting procedures in ORS 92.180 and 92.185 to adjust property lines ..."*

By its language, ORS 92.190(3) is concerned with alternatives to platting. By definition, it does not address the changes to boundaries of parcels created by deed or partitions that were not required to be formally platted, such as Lane County's "M" partitions.² A 1990 Oregon Attorney General opinion³ further

¹ Oregon Laws 1985, c. 369 §4.

² This is consistent with ORS 92.185(1) which states that a replat only applies to a recorded plat.

³ Oregon Att'y Gen OP-6350 (January 25, 1990)

narrows this assessment and concludes that the statute requires the governing bodies of cities and counties to enact appropriate ordinances only when a property line adjustment “reconfigures” a plat. This opinion suggests that it is appropriate to use lot line adjustments to make minor adjustments to plats.

ORS 92.190(3) refers to the use “procedures” by cities and counties. The term ‘procedures’ does not imply formal approval by the County and the procedure used consistently by Lane County until 2010 was to rely upon the survey and recording requirements of ORS 92.190(3) and the mandatory deed components expressed by ORS 92.190(4). The three property line adjustments in question complied with these statutory requirements.

The Appellant has suggested that the Oregon Court of Appeals decision in *Bowerman v. Lane County*, 287 Or App 393 (2017) is definitive on this issue. I do not believe so. The *Bowerman* decision concerned whether the County’s property line adjustment procedures were correctly followed not whether the lack of such procedures were allowed. Indeed, the Court noted:

“ORS chapter 92 does not, itself, spell out the procedures governing a local government’s approval of a property line adjustment. Instead, the legislature has largely left the responsibility to determine the appropriate procedures to local governments, subject to the requirement that any such procedures require the recording of a deed reflecting any approved property line adjustment: ...”

This language suggests that a procedure that leaves the process up to the property owner but that culminates with a recorded deed that reflects the property line adjustment, is sufficient to meet the statute. To be clear, the Court did not say that the legislature required some sort of approval process.

In conclusion, the challenged property line adjustments reconfigured parcels that were created by deed and have not been platted. ORS 92.190(3) is not applicable in this situation.

This allegation of error is dismissed.

3. ***The 1992 property line adjustments to tax lots 1102 and 610 violated ORS 92.192(2) and (4)(b) because they reduced tax lot 1102, which was occupied with a dwelling, below the minimum parcel size and increased tax lot 610 to a size larger than the minimum lot size to qualify the parcel for a dwelling.***

The case of *Phillips v. Polk County*⁴ established that a property line adjustment may not reduce a property below the applicable minimum lot size established by the zoning ordinance. Chapter 12, Section 2 of Oregon Laws 2008 codified this

⁴ *Phillips v. Polk County*, 53 Or LUBA 194, 213 Or App 498 (2007)

EXHIBIT B

PA 17-05966

April 13, 2018

Page 6 of 7

opinion in ORS 92.192 and Section 6 made the Act retroactive. Specifically, ORS 92.192(4)(a) prohibits a property line adjustment that would decrease the size of a lawfully established unit of land that, before the relocation or elimination of the common property line, is smaller than the minimum lot or parcel size for the applicable zone and contains an existing dwelling or is approved for the construction of a dwelling, if another lawfully established unit of land affected by the property line adjustment would be increased to a size as large as or larger than the minimum lot or parcel size required to qualify the other affected lawfully established unit of land for a dwelling. This is the situation presented by the 1992 property line adjustment.

At the time tax lots 300 and 1102 were subject to the property line adjustments, they were zoned Exclusive Farm Use with a 40-acre minimum lot size (E-40). The first property line adjustment occurred in 1988. This adjustment increased tax lot 1102 from approximately 3.3 acres to 28.83 acres and reduced tax lot 300 to 83.33 acres. This property line adjustment is consistent with ORS 92.192(3)(a) as that provision is applied retroactively. By the same token, the 1990 property line adjustment was also consistent with this provision as it increased tax lot 1102 to 47.68 acres, above the minimum lot size, and decreased tax lot 300 to 64.48 acres, which is still above the minimum lot size. It was the 1992 property line adjustment that ran afoul of ORS 92.192(4)(a) as tax lot 1102, which was occupied with a dwelling, was reduced below the minimum lot size, and tax lot 610 was increased beyond the minimum lot size and theoretically now eligible for a dwelling. The intent of the 1992 adjustments is clear and is explained in the 1992 survey (CS30234) which states that the purpose of the adjustments was “to have two separate buildable legal lots.”

The Planning Director does not read ORS 92.192(4)(a) as an absolute prohibition to this type of lot line adjustment concerning EFU-zoned land because in order to get approval for a farm dwelling there are income-related standards that must be met. I do not agree with this interpretation. In the *Phillips* case, LUBA focused on the definition of “partition land” in ORS 92.010(7)(b) and found that the contested property line adjustments were not property line adjustments because the parcel that was reduced in size did not comply with the applicable zoning ordinance after its reconfiguration. Accordingly, the 1992 property line adjustment constituted an illegal partition of property. Because this action was illegal it was null and void and the properties involved reverted to their previous legal condition.

In conclusion, tax lot 1102 is a lawfully created parcel that has the configuration that was created by the 1990 property line adjustment. Because the 1992 property line adjustment (partition) was void, tax lot 610 retains its original 1971 configuration.

This allegation of error is affirmed.

Conclusion

The decision in this appeal revolves around two property line adjustment issues. The first issue is whether Lane County needed to have adopted property line adjustment approval standards after 1985. I do not believe so, especially if the properties subject to the reconfiguration were not platted parcels or lots. The second issue involves whether any of the property line adjustments should be considered as illegal partitions. I believe that the 1992 property line adjustment that affected both legal lots violated ORS 92.192(4)(a) and was an illegal partition that must be considered to be void. The resulting decision verifies the legal lot status of tax lot 610 and 1102 but not in the configuration proposed by the Applicant.

Respectfully Submitted,



Gary Darnielle

Lane County Hearings Official

FIGURE 1
(PA 17-05966)

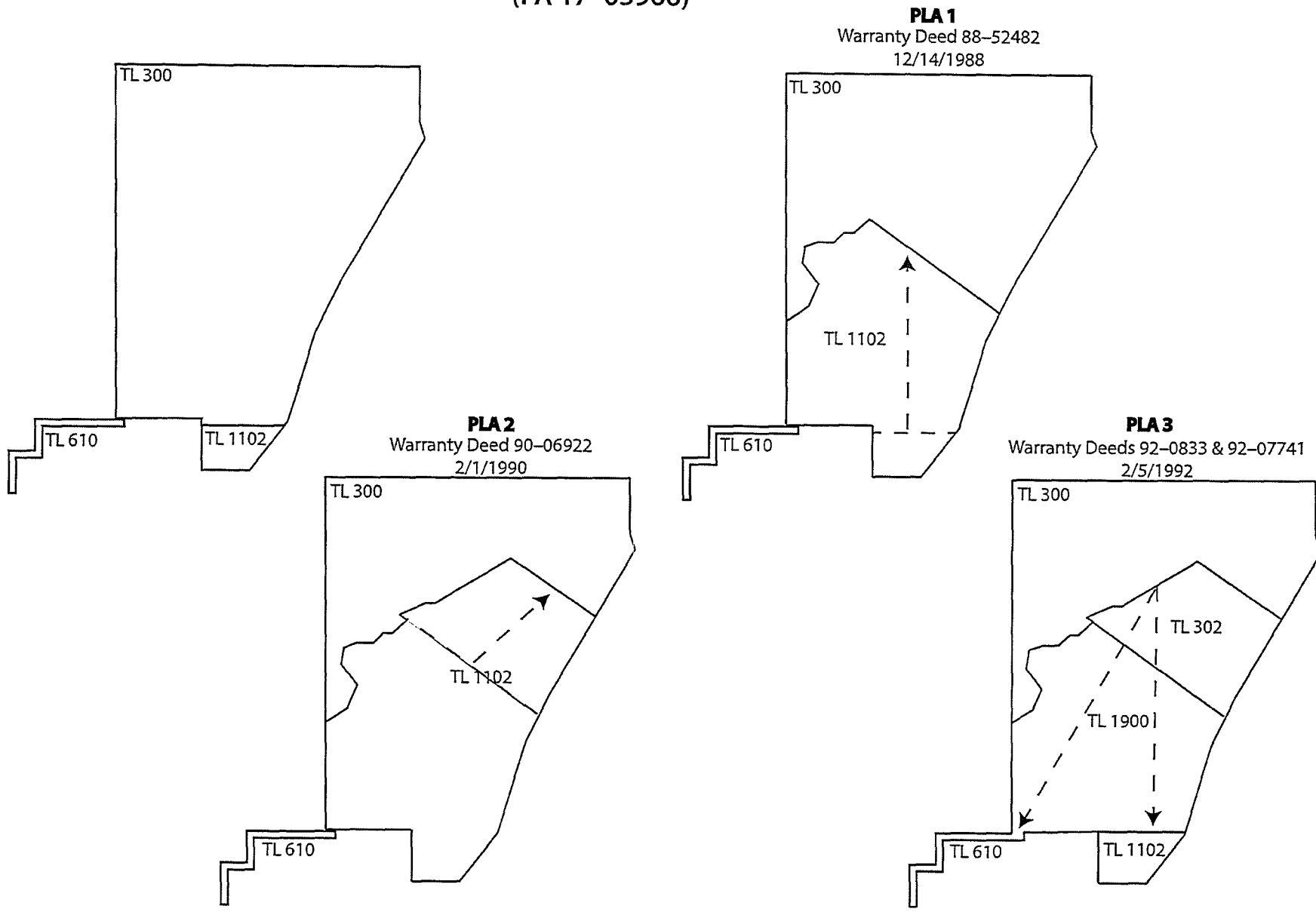


EXHIBIT B