

BEFORE THE BOARD OF COMMISSIONERS OF LANE COUNTY, OREGON

ORDER NO:
16-05-17-06

IN THE MATTER OF ELECTING WHETHER OR NOT TO HEAR AN APPEAL OF A HEARINGS OFFICIAL'S RECONSIDERED DECISION APPROVING A TEMPLATE FOREST DWELLING IN THE IMPACTED FOREST LANDS ZONE (F-2); ASSESSOR'S MAP 18-02-11, TAX LOT 404 (FILE NO. 509-PA15-05734/SMEJKAL).

WHEREAS, the Lane County Hearings Official has made a decision approving a Template Forest Dwelling application in Department File No. 509-PA15-05734; 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, the Lane County Hearings Official has affirmed his decision on the application after reviewing the appeal in File No. 509-PA15-05734; and

WHEREAS, Lane Code 14.600 provides the procedure and criteria which 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, BE IT ORDERED 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 March 31, 2016, and the letter affirming the decision dated April 15, 2016, attached as Exhibit "B," that found relevant approval criteria are met are affirmed and adopted by the Board of County Commissioners as the County's final decision. The Board of County Commissioners has reviewed the appeal and the Hearings Official decision and expressly agrees with and adopts the interpretations of Lane Code 16.211(5) made by the Hearings Official in the decision.

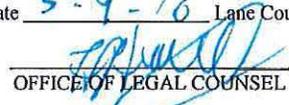
ADOPTED this 17th day of May, 2016.



Faye Stewart, Chair
Lane County Board of Commissioners

APPROVED AS TO FORM

Date 5-9-16 Lane County


OFFICE OF LEGAL COUNSEL

Order Exhibit "A"

FINDINGS IN SUPPORT OF THE ORDER

1. The property subject to this application is located on Tax Lot 404, assessor's map 18-02-11, north of the community of Jasper and Wallace Creek Road, about one-quarter mile east of the City of Springfield's urban growth boundary. The subject property is approximately 15.91 acres in size and is currently vacant. The property slopes upward from the southwestern portion to the northwestern portion of the property, and central portions of the property contain steep slopes. The property is designated Forest on the Rural Comprehensive Plan and is zoned Impacted Forest Lands (F-2).
2. The subject property is bordered on all sides by properties zoned Impacted Forest Lands (F-2). Surrounding properties are rural in character and predominately contain uses that are normally associated with forest practices. Some properties within the site vicinity and one abutting property contain structures associated with low-density residential development.
3. The subject property was determined to be a lawfully created parcel and is identified as a Legal Lot in Legal Lot Verification PA 07-5919. The subject property was then subject to notice and final decision of legal lot verification, in accordance with LC 13.020 with File No. PA 07-05924. Subsequently, the subject property was part of a Property Line Adjustment approval between Tax Lot 404 and 402 (509-PA 10-05232), which was issued in accordance with the provisions of LC 13.450(5).
4. On October 30, 2015, the Agent, Land Planning Consultants, submitted the Template Forest Dwelling application contained in Department File 509-PA15-05734 on behalf of the Applicant, David J. Smejkal. The applicant proposes to construct one single family dwelling pursuant to the provisions in Lane Code 16.211(5).
5. Dwellings authorized by Lane Code 16.211(5) are known as "forest template" dwellings because some of the applicable approval criteria of Lane Code 16.211(5) must be analyzed through the placement of a 160-acre square template centered on the center of the subject property (tract). Additionally, the placement of a dwelling on non-impacted forest land must meet the siting standards provided by Lane Code 16.211(8).
6. On November 22, 2015, staff deemed the application complete. On January 28, 2016, the Planning Director issued a decision approving the Forest Template Dwelling application. On February 8, 2016, the appellant, LandWatch Lane County, filed a timely appeal.
7. On March 3, 2016, the Lane County Hearings Official conducted a public hearing. The record was held open until March 24, 2016. On March 31, 2016, the Lane County Hearings Official issued a decision approving the application.
8. On April 12, 2016, the appellant filed a timely appeal and requested that the Board of County Commissioners not conduct a hearing on the appeal and deem the Hearings Officer's decision the final decision of the County, pursuant to LC 14.515(3)(f)(ii).
9. On April 15, 2016, 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.

11. The Planning Director has consistently found lawfully replaced dwellings to satisfy the “continues to exist” language in Lane Code 16.211(5)(c)(i)(bb) when this issue has been presented. The findings regarding Lane Code 16.211(5)(c)(i)(bb) in this application were consistent with this practice, and were supported by the fact that the dwelling on Tax Lot 501, Assessor’s Map 18-02-11 received land use approvals and requisite building permit and final inspections. Both the Hearings Official’s original decision dated March 31, 2015 and his decision not to further consider the application dated April 15, 2016 support this practice. Additionally, the appeal relates to specific history of replacement of the dwelling located on Tax Lot 501, Assessor’s Map 18-02-11, and at no point did the right to development said replacement dwelling cease during that history.

The Hearings Official’s decision presents a reasonable interpretation of Lane Code 16.211(5)(c)(i)(bb) with regard to the issues raised in this appeal, should other Forest Template Dwelling applications with similar fact patterns be proposed. Therefore, the Planning Director does not believe that the implications of the decision are of countywide significance.

12. Forest Template Dwelling applications are a common land use application made to the County. Irrespective of the frequency of this type of application, when this issue is presented, the Planning Director has found consistently that lawfully replaced dwellings satisfy the “continues to exist” language in Lane Code 16.211(5)(c)(i)(bb), and the Hearings Official’s decision supports this practice. Additionally, the appeal relates to specific history of replacement of the dwelling located on Tax Lot 501, Assessor’s Map 18-02-11. Therefore, the Planning Director does not believe the issue involved in this appeal will reoccur with frequency.

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 Lane Code 16.211(5)(c)(i)(bb). The Planning Director does not believe there is a need for further policy guidance. If these issues arise in the future, the Hearings Official’s decision provides 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 16.211(5) implement the intent of the Impacted Forest Lands Zone (F-2).
14. The Planning Director does not recommend review of the appeals for the reasons cited above.
15. 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.
16. The Board has reviewed this matter at its meeting of May 17, 2016, 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.
17. The Board affirms and adopts the Hearings Official decision of March 31, 2016, as the County's final decision in this matter, has reviewed that decision, and expressly agrees with and adopts the interpretations of Lane Code 16.211(5) made by the Hearings Official in the decision.



March 31, 2016

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

Re: Appeal of Planning Director approval of the request (PA15-05734) By Land Planning Consultants for a template forest dwelling on tax lot 404, assessor's map 18-02-11.

Dear Ms. McKinney:

Please find the Lane County Hearings Official's decision affirming the Planning Director's approval of the Land Planning Consultants' (Smejkal) request (PA 15-05734) for a template dwelling on tax lot 404, assessor's map 18-02-11.

Sincerely,



Gary L. Darnielle
Lane County Hearings Official

cc: Amber Bell (file)

ATTACHMENT 2

mile east of the City of Springfield's urban growth boundary. The subject property was determined to be a lawfully created parcel and is identified as a Legal Lot in Legal Lot Verification PA 07-5919. The subject property was then subject to notice and final decision of legal lot verification, in accordance with LC 13.020 with File No. PA 07-05924. Subsequently, the subject property was part of a Property Line Adjustment approval between Tax Lot 404 and 402 (509-PA 10-05232), which was issued in accordance with the provisions of LC 13.450(5).

The subject property is approximately 15.91 acres in size and is currently vacant. The property slopes upward from the southwestern portion to the northwestern portion of the property, and central portions of the property contain steep slopes. The property is bordered on all sides by properties zoned Impacted Forest Land (F-2). The surrounding properties are rural in character and predominately contain uses that are normally associated with forest practices. Some properties within the site vicinity and one abutting property contain structures associated with low-density residential development.

2. The subject property is predominantly composed of soils that are capable of producing approximately 45 cubic feet per acre per year of wood fiber. Based on the soils productivity of the subject property, Lane Code 16.211(5)(c)(i) is applicable in regard to the establishment of a template forest dwelling. In this regard, Lane Code 16.211(5)(c)(i)(bb) requires that at least three dwellings existed on January 1, 1993, and continue to exist on lots located within a 160 acre square centered on the subject property.

Tax lot 501, assessor's map 18-02-11 is one of the three parcels relied upon by the Applicant to meet the standard of Lane Code 16.211(5)(c)(i)(bb). From approximately 1968 through at least August 2000, a 1960 model Universal Manufactured Home, X035106, 47' x 10' was on the subject parcel. An aerial photograph documents that the mobile home was located on the subject property in August of 2000.

The 1960 manufactured home was removed in April 2001 and an application for the Verification and Replacement of a Lawfully Established Dwelling in the Same Location on May 5, 2001.¹ This decision was approved on February 25, 2002 and was valid until February 26, 2006. On October 12, 2005, Greg Stallings (building contractor) applied for a building permit (BP 05-1898) to construct a replacement single family dwelling on tax lot 501. The application was approved on November 10, 2005. Building permit records show that work on the replacement dwelling's foundation, underground plumbing and gas piping occurred during 2005. Final approvals for various aspects of the building permit were issued in December of 2005 but the structure was not complete. The building permit was

¹ The February 25, 2002 Planning Director's decision in PA 01-05598 to approve a verification and replacement of a dwelling on tax lot 500, assessor's map 18-02-11 found that the mobile home had been removed in April of 2001.

extended on September 7, 2007; February 12, 2008; August 1, 2008; and January 2, 2009. On July 17, 2009, the property owner of tax lot 501 and his building contractor (applicant for BP 05-1898) were notified that no progress or inspection approvals had occurred on the project within 155 days and that the permit would expire if no inspection occurred within the next 30 days. On March 12, 2010; April 14, 2011; and October 14, 2011; the property owner of 501 and his electrical contractor (EL 090386) were notified that no progress or inspection approvals had occurred on the wiring project within an excess of 153 days and that the permit would expire if no inspection occurred within the next 30 days. On December 14, 2011, the property owner of tax lot 501 and his building contractor were notified that insufficient progress or inspection approvals had occurred on the project and that the permit would expire if no inspection occurred within the next 30 days.

Inspections of the replacement dwelling were conducted by the Lane County Building Inspector from 2005 through 2006 and into 2007. The permit was extended multiple times between 2007 and 2009 and in February of 2009 they resumed and continued until December of 2012.

The record does not contain any notices from the Lane County Building Department to the property owner or building contractor after December 14, 2011 until December 2, 2012. On December 2, 2012, the property owner of tax lot 501 and his building contractor were notified that insufficient progress or inspection approvals had occurred on the project and that because the project had already had three or more extensions, it was not eligible for further extensions. The project had 35 days from the date of this letter to receive a final inspection. The record does not indicate further action by Lane County on this permit until the dwelling was authorized for occupancy on April 25, 2013.

Lane County Department of Assessment & Taxation showed a \$0 figure for improvements on the subject property between 1997 and 2006. The improvement value was reduced from \$1,750 in 1995 to \$500 in 1997. The application for the Verification of Same Site Replacement notes that the mobile home had been removed in October of 2000 but the Planning Director's decision indicates the mobile home was removed in April of 2001. A neighbor had stated in a notarized statement dated January 2002 that he had been inside the mobile home in 2000 and that it was intact.

Decision

THE PLANNING DIRECTOR DECISION APPROVING THE REQUEST (PA 15-05734) BY LAND PLANNING CONSULTANTS FOR A TEMPLATE FOREST DWELLING ON TAX LOT 401, ASSESSOR'S MAP 18-03-16-10 IS AFFIRMED.

Justification for the Decision (Conclusion)

The subject property is zoned F-2 Impacted Forest Land. The applicant is requesting approval 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 16.211(5) must be analyzed through the placement of a 160-acre square template centered on the center of the subject property (tract). Additionally, the placement of a dwelling on non-impacted forest land must meet the siting standards provided by Lane Code 16.211(8).

Under the template dwelling regulations, the standards differ depending upon the soil productivity of the property upon which the dwelling is to be placed. In the present case, the soils on the subject property are capable of producing only 45 cubic feet per acre per year of wood fiber. Therefore, Lane Code 16.211(5)(c)(i) is applicable. Under Subsection (bb) of this standard, the applicant must demonstrate that there were three dwellings that existed on January 1, 1993 and continue to exist that are located within the 160-acre square template that is centered on the subject property. The Appellant alleges that tax lot 501, one of the three dwellings relied upon by the Applicant, does not qualify under this criterion.

The one allegation of error raised by the Appellant in its appeal is as follows:

The application is not consistent with Lane Code 16.211(5)(c)(i)(bb), which implements ORS 215.750(1)(a)(B) and OAR 660-006-0027(3)(a)(B), because the dwelling on tax lot 501, assessor' map 18-02-11, did not continue to exist up to the time that the forest template dwelling was requested.

This allegation of error is based upon several arguments posed by the Appellant:

1. One argument is that the mobile home on tax lot 501 did not continue to exist between 1997 and 2006. This argument is based upon records from the Lane County Department of Assessment and Taxation that show that the mobile home was devalued from its 1995 value of \$1,750 to \$500 in 1997. Further the Regional Land Information Database (RLID) does not show that a dwelling existed on the property between the years of 1997 and 2006.

The mobile home was first placed on tax lot 501 in 1960. It is not inconceivable that it would only have a value of \$500 seventeen years later. As to the existence of the mobile home itself, that is verified by an aerial photograph of the mobile home taken in 2000 and a sworn affidavit from a neighbor that in the Fall of 2000 he had personally observed that the mobile home contained all of the components of a dwelling located on forest land required by OAR 660-006-0025(3)(p) to authorize a replacement. The Planning Director's approval of the verification and replacement of the mobile home in February of 2002 relied upon this information.

To assume that the dwelling did not exist prior to the time of its replacement is an impermissible collateral attack on that decision.

The Appellant's first argument also covers the years 2001 and 2006. I believe that this issue is best addressed under the Appellant's second argument.

2. A second argument posed by the Appellant is that even if the mobile home on tax lot 501 can be considered to have existed on January 1, 1993, it did not continue to exist as it was removed in 2001 and the property was vacant until the current dwelling was completed in 2013.

This argument of the Appellant raises several issues.

- a. The first issue is whether a permit for a replacement dwelling satisfies the "continued to exist" requirement of ORS 215.750(1)(a)(B), OAR 660-006-0027(3)(a)(B), and Lane Code 16.211(5)(c)(i)(bb). It is settled law that a county may not be more permissive in its regulations of forest land than that required by statute and administrative rule.² The Appellant's position raises the question of whether the "continued to exist" language requires that the dwelling that existed on January 1 1993 be the same dwelling that exists in the present and is used to satisfy the template dwelling test. An interpretation of this nature appears to be at odds with the statute and administrative rule; the clear legislative intent of which is to allow forest dwellings on forest lands already impacted by residential development. The focus is upon existing residential impact, not whether one of the dwellings causing that impact has been replaced with another dwelling. In the present case, the replacement of the dwelling on tax lot 501 has occurred and is unrelated to whether the Applicant can otherwise meet the template forest dwelling test.

Neither the administrative rule nor the Lane Code prohibit an interpretation that allows a replacement dwelling to be counted as part of the template dwelling application approval process. And it is within this context that Multnomah County's template dwelling regulations were reviewed by LUBA and the Oregon Court of Appeals.³ Neither tribunal found that the regulations impermissibly interpret the statute or administrative rule.

In the *West* case, Multnomah County's forest template dwelling regulations explicitly allowed lawful replacement dwellings. The Lane Code is silent on this issue, although the Planning Director has consistently interpreted the "continued to exist" language to provide for lawful replacement dwellings. I believe that this is a reasonable

² *Reeves v. Yamhill County*, 53 Or LUBA 4 (2006).

³ *West v. Multnomah County*, 70 Or LUBA 235 (2014); *affirmed*, 269 Or App 518 (2015).

interpretation, especially given that Lane Code 16.211(4) allows the replacement of lawfully established dwellings in the Impacted Forest Lands Zone without provision for notice or appeal. This interpretation can be acknowledged by the Board of Commissioners on appeal.

- b. A second issue is whether the time duration between the removal of the mobile home from tax lot 501 (April, 2001) and the application for a replacement dwelling (filed May, 2001) violates the “continued to exist” requirement of Lane Code 16.211(5)(c)(i)(bb). The Appellant accurately notes that the application for the replacement dwelling states that the mobile home was removed in October of 2000 while the Planning Director’s decision in PA 01–05598 assigns a date of April of 2001 to this event. There are no additional facts in the record to resolve this discrepancy so I will to rely upon the Planning Director’s report as neither his factual determination nor his decision was challenged.⁴

The code is silent on this timing issue and there is no evidence of prior administrative practice on the part of the Planning Director on this subject. It is clear, however, that the one-month gap was found not to hinder the approval of the application for the verification and approval of a replacement dwelling. As noted above, the 2002 decision accepting the application and approving the replacement dwelling was not challenged and I do believe that it can be collaterally attacked in this decision.

- c. The third issue is in regard to the scope of an approval of a replacement dwelling permit. The 2002 approval of PA 01–05598 is not specific in identifying what is required for satisfying the permit other than that the development must comply with fire safety, building and sanitation requirements. The Planning Director has interpreted the approval to be satisfied once a building permit is issued within the duration of the permit. After that point, the replacement dwelling approval could only be lost through a revocation process based upon the development not conforming to the approved site plan or if the building permit process terminates prior to the completion and final approval (occupancy permit) of the dwelling.

It is unclear why the Lane County Department of Assessment and Taxation took the mobile home off the tax roll after 1996 although it is likely because of its low assessment value. There would be no structure to place on the tax roll after the mobile home was removed and before the replacement dwelling was certified for occupancy. However, the fact that the replacement dwelling did not get final building permit approval until

⁴ The record does not reflect whether the replacement dwelling regulations of Lane Code 16.211(4) have changed since 2001 but the current provisions require Assessment and Taxation records that show the continuous existence and taxation of the structure since restrictive zoning. Failure to have this information would require a land use determination by the Planning Director.

2013 did not mean that the property was not committed to development. Building permit records submitted by the Applicant indicate that foundation work began in November of 2005 and that framing, plumbing and piping continued through 2006. Many final inspections occurred by December of 2005.

As pointed out by the Appellant, the building permit history of the replacement dwelling on tax lot 501 is spotty and fraught with extensions. Indeed, there appear to be gaps in the building permit record although none of these gaps caused Lane County to formally declare the building permit null and void. The most obvious example was the December 2, 2012 notification that implied that no more extensions of the permit would be allowed and that the final inspection must occur within 35 days. The final inspection did not occur until 145 days from the date of the notice but the permit was not cancelled and an occupancy permit was issued on April 25, 2013. While it appears that Lane County did not follow its building permit procedures or notifications, the processing of BP 05-1898 was never terminated prior to the approval of an occupancy permit. This was all that was required of the replacement dwelling permit approval.

Summary

This decision largely hinges on an interpretation of the legislative intent behind ORS 215.750(1)(a)(B) and OAR 660-006-0027(3)(a)(B). The intent of these rules, I believe, is to relax residential development restrictions on forest land that has already been impacted by existing residential development. I believe the provisions of Lane Code 16.211(5)(c)(i)(bb) must be applied within this context.

Unfortunately, this application for a template dwelling has been made to appear to be less straightforward than it might otherwise be due to the nature of the processing of the approval and development of the replacement dwelling on tax lot 501. For instance, one could speculate that the demolition date of the mobile home was moved back to ease the application through the approval process. Also, the long period of time when there was no habitable dwelling on tax lot 501 strains the common perception of what "continued to exist" should mean. Finally, the processing of the building permit for the replacement dwelling, while presumably done with good intent, might be construed by some to mean that the County picks and chooses when to apply its own regulations. Taken together, these facts invite a land use appeal.

Respectfully Submitted,


Gary Darnielle
Lane County Hearings Official



April 15, 2016

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

Re: Appeal of Hearings Official decision affirming the Planning Director's approval of the Land Planning Consultants' request (PA 15-05734) for a template forest dwelling on tax lot 404, assessor's map 18-03-16-10.

Dear Ms. McKinney:

On March 31, 2016, I affirmed the Planning Director's approval of the Land Planning Consultants' request (PA 15-05734) for a template forest dwelling on tax lot 404, assessor's map 18-03-16-10. On April 12, 2016 LandWatch Lane County appealed my decision. Upon a review of this appeal, I find that the allegations of error have been adequately addressed in that decision and that a reconsideration is not warranted.

Accordingly, on the authority of Lane Code 14.535(1), I shall affirm my March 31, 2016 decision without further consideration. Please advise interested parties of this decision.

Sincerely,

Gary L. Darnielle
Lane County Hearings Official

cc: Amber Bell (file)



APPEAL OF A HEARING'S OFFICIAL DECISION

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

For Office Use Only: FILE # 509-PAIS-05189 FEE: \$250.00
PKS

Appellant: Land Watch Lane County

Mailing address: See below

Phone: See below Email: See below

Signature: See below Date: _____

Appellant's Representative: Sean T. Malone - Attorney at Law

Mailing address: 259 E. 5th Ave Ste 200-G

Phone: 303-859-0403 Email: seanmalone8@hotmail.com

Signature: Sean Malone Date: 4/12/16

LOCATION (subject property)

18 02 11 404
 Township - Range - Section - Taxlot Subdivision/partition lot/parcel

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

Required Option 1 submittals:

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

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

b. An identification of one or more of the following general reasons for the appeal, or request for reconsideration:

- The Hearings Official exceeded his or her authority;
- The Hearings Official failed to follow the procedure applicable to the matter;
- The Hearings Official rendered a decision that is unconstitutional;
- The Hearings Official misinterpreted the Lane Code, Lane Manual, State Law, or other applicable criteria.

c. The Hearings Official should reconsider the decision to allow the submittal for additional evidence not in the record that addresses compliance with the applicable standards or criteria.

6. Any additional information in support of your appeal.

EXPLANATION OF THE APPEAL PROCESS UNDER OPTION 1

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

Step 1

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

Step 2

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

Step 3

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

Explanation of the Appeal Fee Under Option 1

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

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

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

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

Required Option 2 submittals:

Option 2; The appellant requests that the Board not conduct a hearing on the appeal and deem the Hearing's Official decision the final decision of the County. (Note, the Board may still choose to review the appeal pursuant to Lane Code 14.500(2) or the Hearing's Official may still reconsider the decision pursuant to LC 14.535).

1. Fee is a non-refundable \$250 appeal fee, payable to Lane County.
2. A copy of the decision being appealed, with the department file number. File # 509-PA15-05734
3. Indicate the deadline to submit the appeal. (*Found in the Hearing Official's Decision*) 4/12/16
4. Check one of the items below to identify your party status with the right to appeal the Hearings Official's decision:

I am the owner or contract purchaser of the subject property;

I am the applicant for the subject application;

Prior to the decision by the Hearings Official, I submitted written testimony into the record

I am not one of the persons mentioned above, but wish to appeal the Hearings Official's decision.

5. A letter that addresses each of the following three standards:

- c. The reason(s) why the decision of the Hearings Official was made in error or why the Hearings Official should reconsider the decision;
- d. An identification of one or more of the following general reasons for the appeal, or request for reconsideration:
 - The Hearings Official exceeded his or her authority;
 - The Hearings Official failed to follow the procedure applicable to the matter;
 - The Hearings Official rendered a decision that is unconstitutional;
 - The Hearings Official misinterpreted the Lane Code, Lane Manual, State Law, or other applicable criteria.
- d. The Hearings Official should reconsider the decision to allow the submittal for additional evidence not in the record that addresses compliance with the applicable standards or criteria.

6. Any additional information in support of your appeal.

EXPLANATION OF THE APPEAL PROCESS UNDER OPTION 2

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

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

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

Sean T. Malone

Attorney at Law

259 E. Fifth Ave.,
Suite 200-G
Eugene, OR 97401

Tel. (303) 859-0403
Fax (650) 471-7366
seanmalone8@hotmail.com

April 12, 2016

Via Email

Public Works Department
3060 North Delta Highway
Eugene OR 97408
(541) 682-3577

Re: Appeal Addendum, Option 2 Appeal of Hearings Officer Decision in Smejkal
Template Dwelling Application, 509-PA15-05734

Appellant's Name

LandWatch Lane County
PO Box 5347
Eugene OR 97405

Authorized Representative

Sean T. Malone
Attorney at Law
259 E. 5th Ave, Ste 200-G
Eugene OR 97401
(303) 859-0403
seanmalone8@hotmail.com

Identification of the Decision Sought to Be Reviewed

Appellant hereby appeals the Hearing Officer's March 31, 2016 decision denying the Appellant's appeal of the Director's decision regarding the template dwelling in the Impacted Forest Lands (F-2) zone for applicant Smejkal in 509-PA15-05734, pursuant to Lane Code 16.211(5) and (8). The Hearing's Officer's decision is attached hereto.

Appeal Option

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

Standing

Appellant has standing to appeal because appellant appeared before the Hearings Officer in writing and in person at the hearing.

Appeal Fee

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

Copy of the Decision

A copy of the decision being appealed is attached hereto.

Grounds for Appeal

For an Option 2 appeal, Appellant notes that the form does not require that the appellant raise all issues to preserve those issues on appeal. However, Appellant incorporates all prior testimony, including written and oral, which are attached hereto. Appellant also sets forth the following specific issues on appeal, but this list is not exhaustive.

As it relates to the three dwellings that must have continually existed since 1993 for the template test, the Hearings Officer misconstrued applicable law and made inadequate findings not supported by substantial evidence with regard to the 1960 manufactured home on tax lot 501, pursuant to ORS 215.750(1)(a)(B), OAR 660-006-0027(3)(a)(B), Lane Code 16.211(5)(c)(i)(bb). Specifically, the Hearings Officer misconstrued the phrase "continue to exist" both because for periods of time, (1) no dwelling existed (e.g., from 2000 to 2006) or (2) the manufactured home was so dilapidated that it was uninhabitable from 1997 through 2000.

The dwelling here was removed from taxation in 1997, removed from the subject parcel in 2000, then replaced with, and assessed for, an unpermitted dwelling from 2007-2012, and finally replaced in 2013. Simply put, that dwelling – to the extent it was habitable – did not "continue to exist."

The Assessment and Taxation records show \$0 in real market value between the years 1997 and 2006. Additionally, the Assessment and Taxation information indicates that as of tax year 1997, the 1960 manufactured home was devalued from its 1995 value of \$1750 to little over \$500. Here, the applicant has not provided any evidence of the overall condition or habitability of the 1960 mobile home at the time it was removed

from real market value taxation. The Hearings Officer did not respond to Appellant's allegations regarding habitability.

As it relates to the Hearings Officer's finding that the structure was removed in April 2001, that finding is clearly contradicted by the County's own notation that the structure was demolished in June 2000.

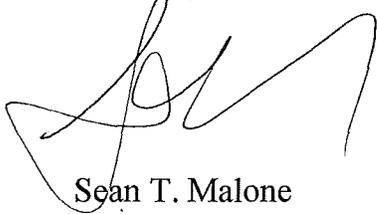
The Hearings Officer also incorrectly determined that Appellant's argument about the existence of the dwelling up to 2001 is an impermissible collateral attack.

The Hearings Officer misconstrued and made inadequate findings not supported by substantial evidence when the Hearings Officer made findings about the intent of the applicable statute, rule, and code provisions.

As noted above, through this appeal and the incorporation of all prior testimony - written and oral - Appellant intends to preserve all arguments raised below.

For the above reasons, the Hearings Officer's decision must be reversed and the application denied.

Sincerely,

A handwritten signature in black ink, appearing to read 'Sean T. Malone', with a large, sweeping flourish extending to the right.

Sean T. Malone

Cc:
Client

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

Application Summary

On October 30, 2015, a request to establish a dwelling in the Impacted Forest Lands (F-2) zone was submitted to Lane County Land Management Division by Land Planning Consultants, an agent for Daved Smejkal. On November 22, 2015, staff reviewed the application materials and deemed the application complete. On January 28, 2016, the Director issued a determination that the subject property complied with the applicable standards and criteria for a Forest Template Dwelling pursuant to LC 16.211(5) and (8). Notice of the determination was mailed to surrounding property owners.

The approval notice provided an appeal deadline of February 9, 2016. On February 8, 2016, a timely appeal was submitted by LandWatch Lane County.

Parties of Record

· David Smejkal	· LandWatch Lane County	· Mike Evans
· Sean Malone	· Robert Emmons	· Michael Reeder

Application History

Hearing Date: March 3, 2016
 (Record Held Open Until March 24, 2016)

Decision Date: March 31, 2016

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 404, assessor's map 18-02-11, north of the community of Jasper and Wallace Creek Road, and is located about one-quarter

mile east of the City of Springfield's urban growth boundary. The subject property was determined to be a lawfully created parcel and is identified as a Legal Lot in Legal Lot Verification PA 07-5919. The subject property was then subject to notice and final decision of legal lot verification, in accordance with LC 13.020 with File No. PA 07-05924. Subsequently, the subject property was part of a Property Line Adjustment approval between Tax Lot 404 and 402 (509-PA 10-05232), which was issued in accordance with the provisions of LC 13.450(5).

The subject property is approximately 15.91 acres in size and is currently vacant. The property slopes upward from the southwestern portion to the northwestern portion of the property, and central portions of the property contain steep slopes. The property is bordered on all sides by properties zoned Impacted Forest Land (F-2). The surrounding properties are rural in character and predominately contain uses that are normally associated with forest practices. Some properties within the site vicinity and one abutting property contain structures associated with low-density residential development.

2. The subject property is predominantly composed of soils that are capable of producing approximately 45 cubic feet per acre per year of wood fiber. Based on the soils productivity of the subject property, Lane Code 16.211(5)(c)(i) is applicable in regard to the establishment of a template forest dwelling. In this regard, Lane Code 16.211(5)(c)(i)(bb) requires that at least three dwellings existed on January 1, 1993, and continue to exist on lots located within a 160 acre square centered on the subject property.

Tax lot 501, assessor's map 18-02-11 is one of the three parcels relied upon by the Applicant to meet the standard of Lane Code 16.211(5)(c)(i)(bb). From approximately 1968 through at least August 2000, a 1960 model Universal Manufactured Home, X035106, 47' x 10' was on the subject parcel. An aerial photograph documents that the mobile home was located on the subject property in August of 2000.

The 1960 manufactured home was removed in April 2001 and an application for the Verification and Replacement of a Lawfully Established Dwelling in the Same Location on May 5, 2001.¹ This decision was approved on February 25, 2002 and was valid until February 26, 2006. On October 12, 2005, Greg Stallings (building contractor) applied for a building permit (BP 05-1898) to construct a replacement single family dwelling on tax lot 501. The application was approved on November 10, 2005. Building permit records show that work on the replacement dwelling's foundation, underground plumbing and gas piping occurred during 2005. Final approvals for various aspects of the building permit were issued in December of 2005 but the structure was not complete. The building permit was

¹ The February 25, 2002 Planning Director's decision in PA 01-05598 to approve a verification and replacement of a dwelling on tax lot 500, assessor's map 18-02-11 found that the mobile home had been removed in April of 2001.

extended on September 7, 2007; February 12, 2008; August 1, 2008; and January 2, 2009. On July 17, 2009, the property owner of tax lot 501 and his building contractor (applicant for BP 05-1898) were notified that no progress or inspection approvals had occurred on the project within 155 days and that the permit would expire if no inspection occurred within the next 30 days. On March 12, 2010; April 14, 2011; and October 14, 2011; the property owner of 501 and his electrical contractor (EL 090386) were notified that no progress or inspection approvals had occurred on the wiring project within an excess of 153 days and that the permit would expire if no inspection occurred within the next 30 days. On December 14, 2011, the property owner of tax lot 501 and his building contractor were notified that insufficient progress or inspection approvals had occurred on the project and that the permit would expire if no inspection occurred within the next 30 days.

Inspections of the replacement dwelling were conducted by the Lane County Building Inspector from 2005 through 2006 and into 2007. The permit was extended multiple times between 2007 and 2009 and in February of 2009 they resumed and continued until December of 2012.

The record does not contain any notices from the Lane County Building Department to the property owner or building contractor after December 14, 2011 until December 2, 2012. On December 2, 2012, the property owner of tax lot 501 and his building contractor were notified that insufficient progress or inspection approvals had occurred on the project and that because the project had already had three or more extensions, it was not eligible for further extensions. The project had 35 days from the date of this letter to receive a final inspection. The record does not indicate further action by Lane County on this permit until the dwelling was authorized for occupancy on April 25, 2013.

Lane County Department of Assessment & Taxation showed a \$0 figure for improvements on the subject property between 1997 and 2006. The improvement value was reduced from \$1,750 in 1995 to \$500 in 1997. The application for the Verification of Same Site Replacement notes that the mobile home had been removed in October of 2000 but the Planning Director's decision indicates the mobile home was removed in April of 2001. A neighbor had stated in a notarized statement dated January 2002 that he had been inside the mobile home in 2000 and that it was intact.

Decision

THE PLANNING DIRECTOR DECISION APPROVING THE REQUEST (PA 15-05734) BY LAND PLANNING CONSULTANTS FOR A TEMPLATE FOREST DWELLING ON TAX LOT 401, ASSESSOR'S MAP 18-03-16-10 IS AFFIRMED.

Justification for the Decision (Conclusion)

The subject property is zoned F-2 Impacted Forest Land. The applicant is requesting approval 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 16.211(5) must be analyzed through the placement of a 160-acre square template centered on the center of the subject property (tract). Additionally, the placement of a dwelling on non-impacted forest land must meet the siting standards provided by Lane Code 16.211(8).

Under the template dwelling regulations, the standards differ depending upon the soil productivity of the property upon which the dwelling is to be placed. In the present case, the soils on the subject property are capable of producing only 45 cubic feet per acre per year of wood fiber. Therefore, Lane Code 16.211(5)(c)(i) is applicable. Under Subsection (bb) of this standard, the applicant must demonstrate that there were three dwellings that existed on January 1, 1993 and continue to exist that are located within the 160-acre square template that is centered on the subject property. The Appellant alleges that tax lot 501, one of the three dwellings relied upon by the Applicant, does not qualify under this criterion.

The one allegation of error raised by the Appellant in its appeal is as follows:

The application is not consistent with Lane Code 16.211(5)(c)(i)(bb), which implements ORS 215.750(1)(a)(B) and OAR 660-006-0027(3)(a)(B), because the dwelling on tax lot 501, assessor' map 18-02-11, did not continue to exist up to the time that the forest template dwelling was requested.

This allegation of error is based upon several arguments posed by the Appellant:

1. One argument is that the mobile home on tax lot 501 did not continue to exist between 1997 and 2006. This argument is based upon records from the Lane County Department of Assessment and Taxation that show that the mobile home was devalued from its 1995 value of \$1,750 to \$500 in 1997. Further the Regional Land Information Database (RLID) does not show that a dwelling existed on the property between the years of 1997 and 2006.

The mobile home was first placed on tax lot 501 in 1960. It is not inconceivable that it would only have a value of \$500 seventeen years later. As to the existence of the mobile home itself, that is verified by an aerial photograph of the mobile home taken in 2000 and a sworn affidavit from a neighbor that in the Fall of 2000 he had personally observed that the mobile home contained all of the components of a dwelling located on forest land required by OAR 660-006-0025(3)(p) to authorize a replacement. The Planning Director's approval of the verification and replacement of the mobile home in February of 2002 relied upon this information.

To assume that the dwelling did not exist prior to the time of its replacement is an impermissible collateral attack on that decision.

The Appellant's first argument also covers the years 2001 and 2006. I believe that this issue is best addressed under the Appellant's second argument.

2. A second argument posed by the Appellant is that even if the mobile home on tax lot 501 can be considered to have existed on January 1, 1993, it did not continue to exist as it was removed in 2001 and the property was vacant until the current dwelling was completed in 2013.

This argument of the Appellant raises several issues.

- a. The first issue is whether a permit for a replacement dwelling satisfies the "continued to exist" requirement of ORS 215.750(1)(a)(B), OAR 660-006-0027(3)(a)(B), and Lane Code 16.211(5)(c)(i)(bb). It is settled law that a county may not be more permissive in its regulations of forest land than that required by statute and administrative rule.² The Appellant's position raises the question of whether the "continued to exist" language requires that the dwelling that existed on January 1 1993 be the same dwelling that exists in the present and is used to satisfy the template dwelling test. An interpretation of this nature appears to be at odds with the statute and administrative rule; the clear legislative intent of which is to allow forest dwellings on forest lands already impacted by residential development. The focus is upon existing residential impact, not whether one of the dwellings causing that impact has been replaced with another dwelling. In the present case, the replacement of the dwelling on tax lot 501 has occurred and is unrelated to whether the Applicant can otherwise meet the template forest dwelling test.

Neither the administrative rule nor the Lane Code prohibit an interpretation that allows a replacement dwelling to be counted as part of the template dwelling application approval process. And it is within this context that Multnomah County's template dwelling regulations were reviewed by LUBA and the Oregon Court of Appeals.³ Neither tribunal found that the regulations impermissibly interpret the statute or administrative rule.

In the *West* case, Multnomah County's forest template dwelling regulations explicitly allowed lawful replacement dwellings. The Lane Code is silent on this issue, although the Planning Director has consistently interpreted the "continued to exist" language to provide for lawful replacement dwellings. I believe that this is a reasonable

² *Reeves v. Yamhill County*, 53 Or LUBA 4 (2006).

³ *West v. Multnomah County*, 70 Or LUBA 235 (2014); *affirmed*, 269 Or App 518 (2015).

interpretation, especially given that Lane Code 16.211(4) allows the replacement of lawfully established dwellings in the Impacted Forest Lands Zone without provision for notice or appeal. This interpretation can be acknowledged by the Board of Commissioners on appeal.

- b. A second issue is whether the time duration between the removal of the mobile home from tax lot 501 (April, 2001) and the application for a replacement dwelling (filed May, 2001) violates the "continued to exist" requirement of Lane Code 16.211(5)(c)(i)(bb). The Appellant accurately notes that the application for the replacement dwelling states that the mobile home was removed in October of 2000 while the Planning Director's decision in PA 01-05598 assigns a date of April of 2001 to this event. There are no additional facts in the record to resolve this discrepancy so I will rely upon the Planning Director's report as neither his factual determination nor his decision was challenged.⁴

The code is silent on this timing issue and there is no evidence of prior administrative practice on the part of the Planning Director on this subject. It is clear, however, that the one-month gap was found not to hinder the approval of the application for the verification and approval of a replacement dwelling. As noted above, the 2002 decision accepting the application and approving the replacement dwelling was not challenged and I do believe that it can be collaterally attacked in this decision.

- c. The third issue is in regard to the scope of an approval of a replacement dwelling permit. The 2002 approval of PA 01-05598 is not specific in identifying what is required for satisfying the permit other than that the development must comply with fire safety, building and sanitation requirements. The Planning Director has interpreted the approval to be satisfied once a building permit is issued within the duration of the permit. After that point, the replacement dwelling approval could only be lost through a revocation process based upon the development not conforming to the approved site plan or if the building permit process terminates prior to the completion and final approval (occupancy permit) of the dwelling.

It is unclear why the Lane County Department of Assessment and Taxation took the mobile home off the tax roll after 1996 although it is likely because of its low assessment value. There would be no structure to place on the tax roll after the mobile home was removed and before the replacement dwelling was certified for occupancy. However, the fact that the replacement dwelling did not get final building permit approval until

⁴ The record does not reflect whether the replacement dwelling regulations of Lane Code 16.211(4) have changed since 2001 but the current provisions require Assessment and Taxation records that show the continuous existence and taxation of the structure since restrictive zoning. Failure to have this information would require a land use determination by the Planning Director.

2013 did not mean that the property was not committed to development. Building permit records submitted by the Applicant indicate that foundation work began in November of 2005 and that framing, plumbing and piping continued through 2006. Many final inspections occurred by December of 2005.

As pointed out by the Appellant, the building permit history of the replacement dwelling on tax lot 501 is spotty and fraught with extensions. Indeed, there appear to be gaps in the building permit record although none of these gaps caused Lane County to formally declare the building permit null and void. The most obvious example was the December 2, 2012 notification that implied that no more extensions of the permit would be allowed and that the final inspection must occur within 35 days. The final inspection did not occur until 145 days from the date of the notice but the permit was not cancelled and an occupancy permit was issued on April 25, 2013. While it appears that Lane County did not follow its building permit procedures or notifications, the processing of BP 05-1898 was never terminated prior to the approval of an occupancy permit. This was all that was required of the replacement dwelling permit approval.

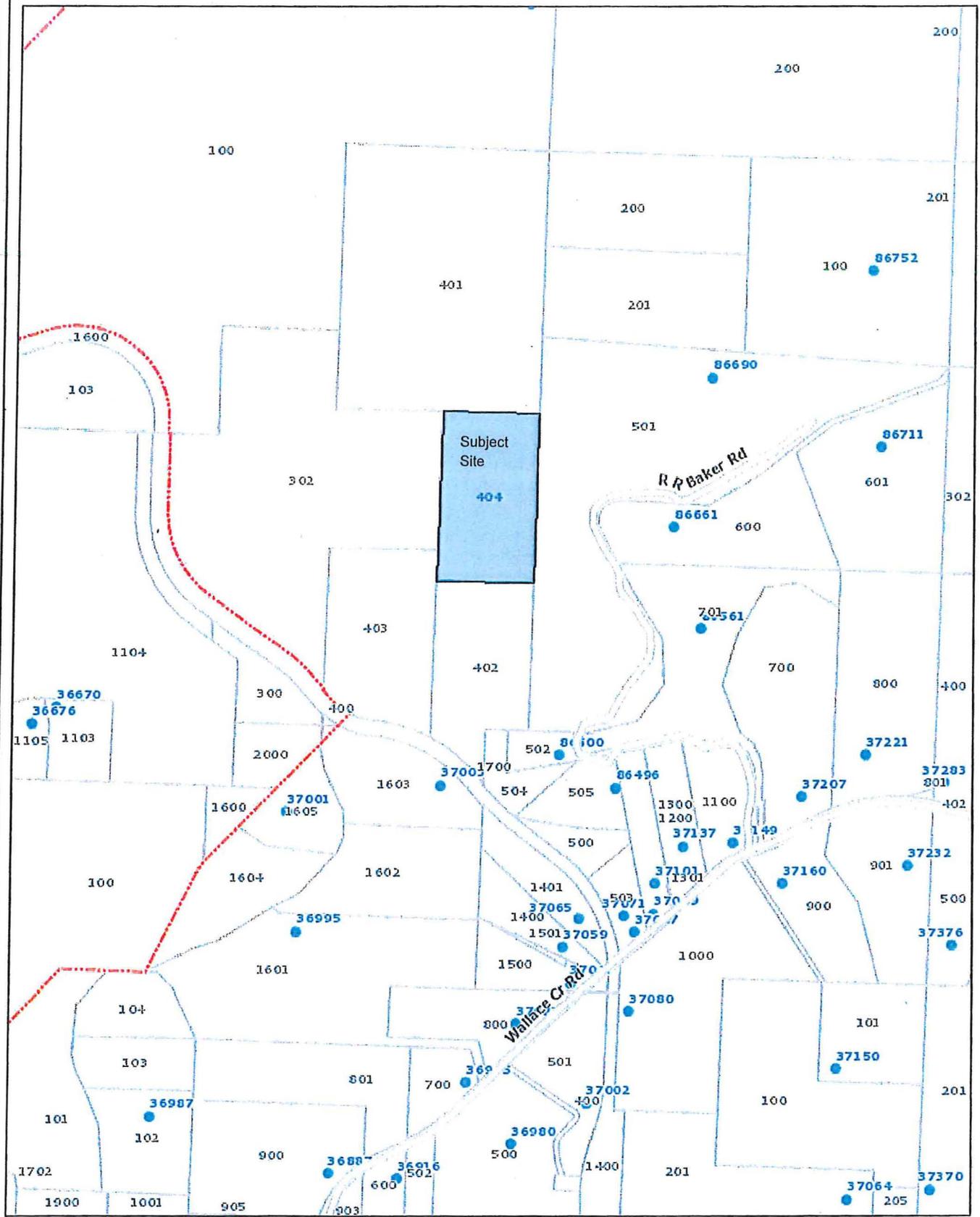
Summary

This decision largely hinges on an interpretation of the legislative intent behind ORS 215.750(1)(a)(B) and OAR 660-006-0027(3)(a)(B). The intent of these rules, I believe, is to relax residential development restrictions on forest land that has already been impacted by existing residential development. I believe the provisions of Lane Code 16.211(5)(c)(i)(bb) must be applied within this context.

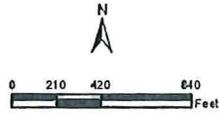
Unfortunately, this application for a template dwelling has been made to appear to be less straightforward than it might otherwise be due to the nature of the processing of the approval and development of the replacement dwelling on tax lot 501. For instance, one could speculate that the demolition date of the mobile home was moved back to ease the application through the approval process. Also, the long period of time when there was no habitable dwelling on tax lot 501 strains the common perception of what "continued to exist" should mean. Finally, the processing of the building permit for the replacement dwelling, while presumably done with good intent, might be construed by some to mean that the County picks and chooses when to apply its own regulations. Taken together, these facts invite a land use appeal.

Respectfully Submitted,


Gary Darnielle
Lane County Hearings Official



The information on this map was derived from digital databases on the Lane County regional geographic information system. Care was taken in the creation of this map, but is provided "as is". Lane County cannot accept any responsibility for errors, omissions or positional accuracy in the digital data or the underlying records. Current plan designation, zoning, etc., for specific parcels should be confirmed with the appropriate agency. There are no warranties, expressed or implied, accompanying this product. However, notification of any errors will be appreciated.



Vicinity Map
PA15-05734
Lane County, Oregon

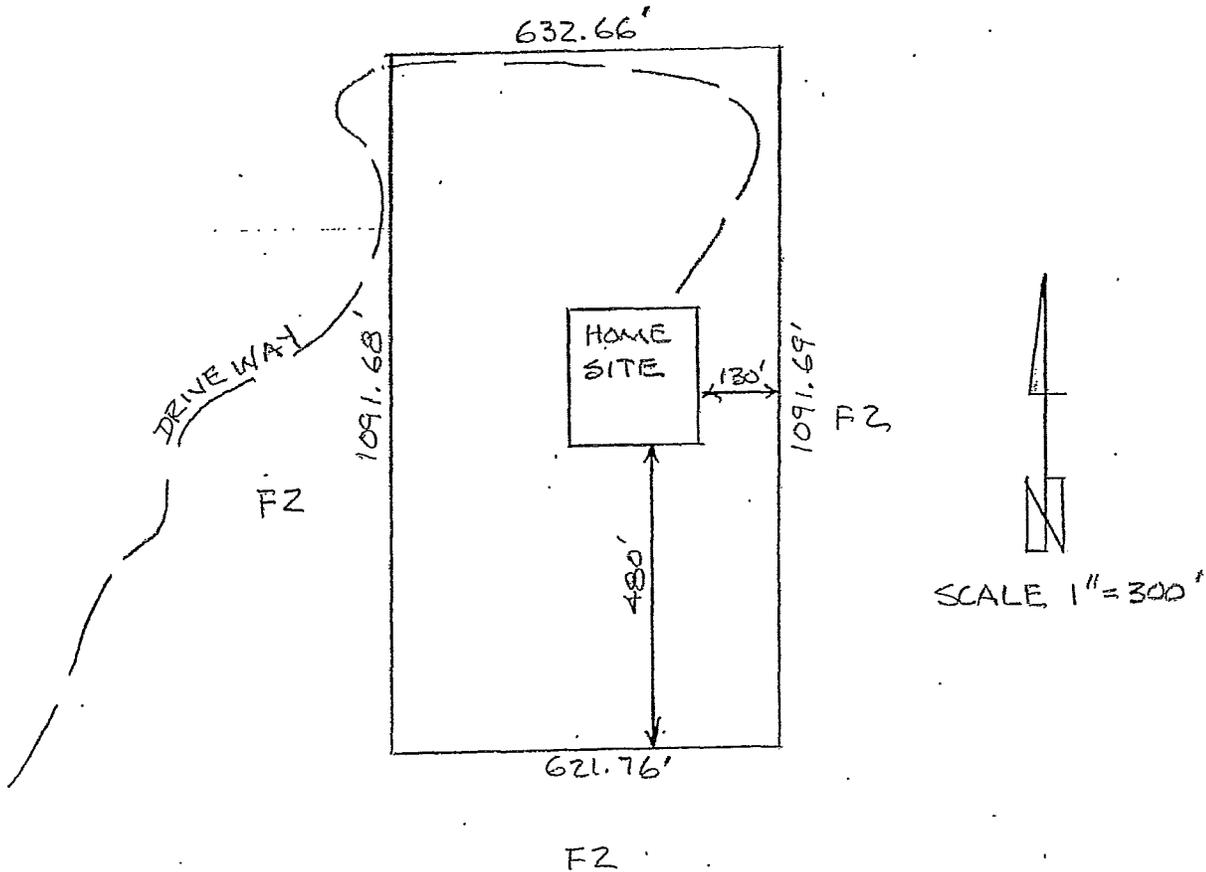
SITE PLAN FOR
TAXLOT 404, MAP 18-02-11
TEMPLATE DWELLING IN FZ ZONE

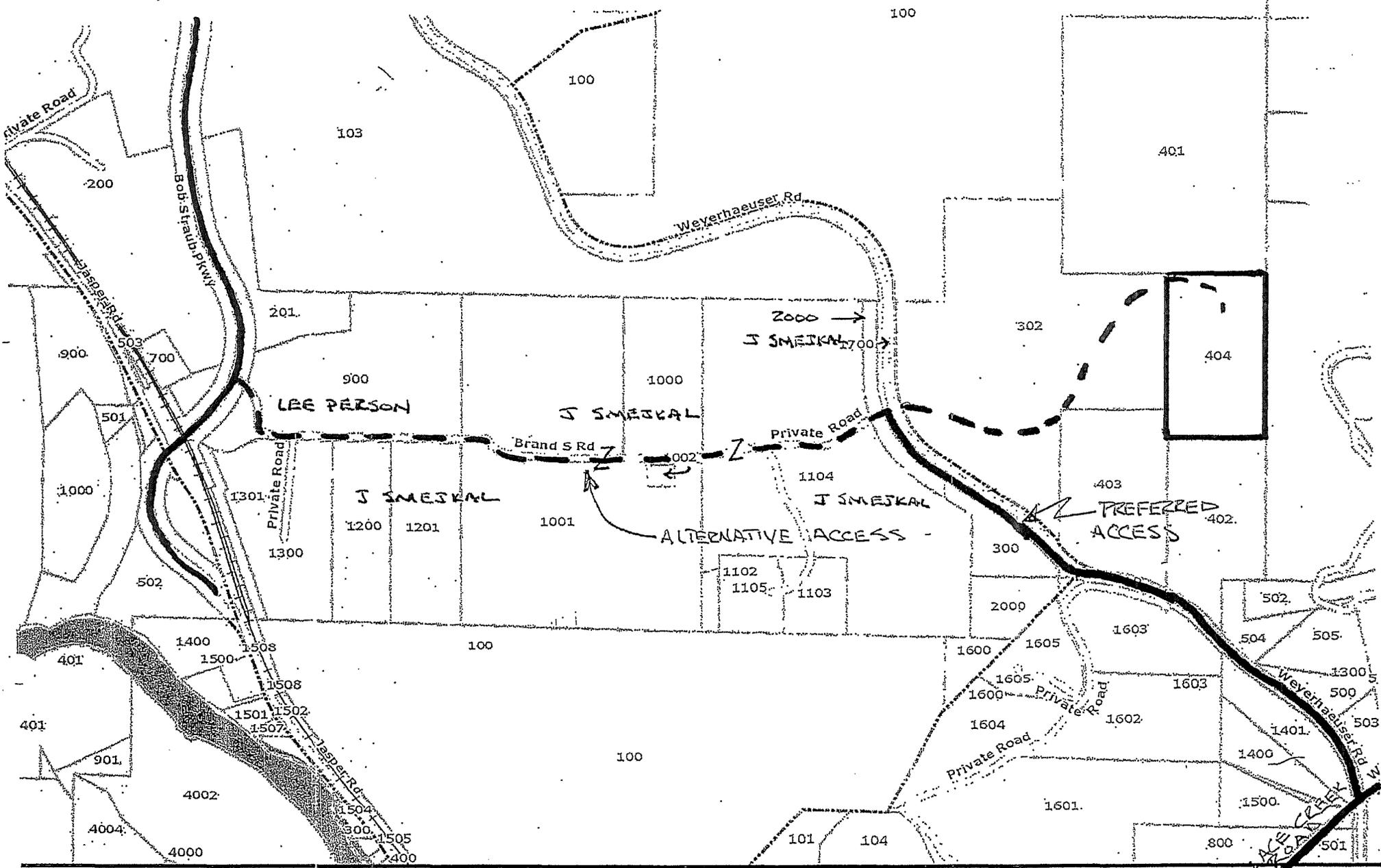
OWNER:

DAVID SMEJKAL
42142 NW PALACE DR.
BANKS, OR. 97106

AGENT:

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





on the Lane
the creation



Proposed Access Plan