

BEFORE THE BOARD OF COMMISSIONERS OF LANE COUNTY, OREGON

ORDER  
NO: 17-02-14-13

In the Matter of Electing Whether or Not to Hear an Appeal of a Hearings Official Affirmed Decision Approving a Forest Template Dwelling in the Impacted Forest Lands Zone (F-2); Assessor's Map 17-01-19, Tax Lot 106 (File No. 509-PA16-05609/Henton).

WHEREAS, the Lane County Hearings Official has made a decision to affirm a Planning Director approval of a forest template dwelling application in Department File No. 509-PA16-05609; 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; and

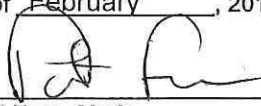
WHEREAS, Lane Code 14.600 provides the procedure and criteria which the Board follows in deciding whether or not to conduct an on the record hearing for an appeal of a decision by the Hearings Official; and

WHEREAS, the Board of County Commissioners has reviewed this matter at a public meeting of the Board.

NOW, THEREFORE, 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 January 5, 2017 and the letter affirming the decision dated January 24, 2017 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.

ADOPTED this 14th day of February, 2017

  
\_\_\_\_\_  
Pat Farr, Chair  
Lane County Board of Commissioners

APPROVED AS TO FORM

Date 2-3-17 Lane County

  
\_\_\_\_\_  
OFFICE OF LEGAL COUNSEL

## Order Exhibit "A"

### FINDINGS IN SUPPORT OF THE ORDER

1. The property subject to this application, hereinafter referred to as the "subject property," is located on tax lot 106, assessor's map 17-01-19. It is located approximately 1.3 miles to the northwest (as the crow flies) of the rural unincorporated community of Walterville and 2,000 feet north of Camp Creek Road. The parcel is approximately 35.8 acres in size, is vacant and does not have a site address. The subject property is within the Lane County Rural Comprehensive Plan boundary designated Forest and is Zoned Impacted Forest Lands (F-2) consistent with the designation.

The subject property contains some moderate slopes in central and northern portions of the site. The southern portion of the site is relatively flat. The site slopes upward towards the north-central portion of the site from approximately 750 feet above mean sea level (MSL) to 880 feet above MSL. It is forested except for the southern portion of the site and an area in the northeastern site corner. The property contains Bonneville Power Administration transmission lines that bisect the parcel from south to north and across the northern property line.

2. All of the abutting and immediately surrounding properties are also zoned Impacted Forest Lands (F-2). Surrounding properties appear to be in forest use with residential development at a low density typically associated with forest dwelling provisions.
3. Lane County adopted its land division regulations on March 26, 1975. The subject property was created as Parcel 3 of Partition Plat 92-P0287.
4. The Applicant has chosen to rely upon Lane Code 16.211(5)(c)(iii) in regard to the establishment of a template forest dwelling. In this regard, Lane Code 16.211(5)(c)(iii)(aa) requires that at least all or a part of at least eleven other lots or parcels that existed on January 1, 1993, are within a template centered on the subject tract. The following tax lots lie, in part or wholly, within this template rectangle:

Parcel #1: Tax lot 103, assessor's map 17-01-19. This parcel was created on November 10, 1992 as Parcel 1 of Partition Plat No. 92-0286.

Parcel #2: Tax lot 107, assessor's map 17-01-19. This parcel was created on November 10, 1992 as Parcel 2 of Partition Plat No. 92-0287.

Parcel #3: Tax lot 108, assessor's map 17-01-19. This parcel was created on November 10, 1992 as Parcel 1 of Partition Plat No. 92-0287.

Parcel #4: Tax lot 300, assessor's map 17-01-19. This parcel was created on December 20, 1977 as Parcel 3 of Partition M 648-76. This parcel also includes tax lots 101 and 307.

Parcel #5: Tax lot 301, assessor's map 17-01-19. This parcel was created on October 27, 1978 as Parcel 1 of Partition M 794-77.

Parcel #6: Tax lot 302, assessor's map 17-01-19. This parcel was created on October 27, 1978 as Parcel 2 of Partition M 794-77. This parcel is occupied by a dwelling that was constructed in 1968.

Parcel #7: Tax lot 1200, assessor's map 17-01-19. This parcel was created on August 2, 1976 as Parcel 1 of Partition M 188-76. A dwelling was constructed on this property prior to 1993 and which were granted replacement rights per PA 04-05095. The replacement dwelling was permitted per BP 04-00741.

Parcel #8: Tax lot 1300, assessor's map 17-01-19. This parcel was created by deed on January 7, 1957. (See Reel 93, Instrument No. 3106, Lane County Deeds and Records.) A dwelling was constructed on this property prior to 1993 and which were granted replacement rights per PA 02-05680. The replacement dwelling was permitted per BP 02-00958.

Parcel #9: Tax lot 100/200, assessor's map 17-01-19-40. This parcel was created by deed in 1917. (See Legal Lot Verification PA 91-00099.)

Parcel #10: Tax lot 400, assessor's map 17-01-19-40. This parcel was created on November 10, 1992 as Parcel 3 of Partition Plat No. 92-P0286. It was subsequently subject to a property line adjustment. (See Reel 2590, Instrument No. 99079650, Lane County Deeds and Records.)

Parcel #11: Tax lot 500, assessor's map 17-01-19-40. This parcel was created on November 10, 1992 as Parcel 2 of Partition Plat No. 92-P0286.

5. On July 22, 2016, the applicant submitted a request to establish a forest template dwelling in the Impacted Forest Lands (F-2) zone to Lane County Land Management Division. On August 19, 2016, staff reviewed the application materials and deemed the application complete. On October 18, 2016, the Planning 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. On October 31, 2016, a timely appeal was submitted by LandWatch Lane County and Robert Emmons. Notice of public hearing on the appeal was mailed on November 9, 2016.
6. On December 1, 2016, the Lane County Hearings Official conducted a public hearing. The written record was held open until December 8, 2016, with opportunity for rebuttal on December 15, 2016 and applicant's final written argument by December 22, 2016. On January 5, 2017, the Lane County Hearings Official issued a decision approving the application. Notice of the Hearings Official's decision was mailed to the applicant and all parties of record on January 6, 2017.
7. On January 17, 2017, 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).
8. On January 24, 2017, 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 Planning Director and subsequently on appeal, the Hearings Official, have consistently found that 1) reconfiguration of a parcel by property line adjustment after January 1, 1993 does not invalidate that parcel from being counted under a Lane Code 16.211(5)(c) analysis;

and 2) assignment of a tax lot representing a change in ownership on a property description card is not itself an indication of the date of creation of a property. Related to allegations of error raised on appeal, the Hearings Official has found in prior decisions that in *Parsons v. Clackamas County*, 32 Or LUBA 147 (1996), “LUBA held that the ‘date of creation’ provisions of OAR 660-06-005(5) do not apply to the template dwelling provisions of ORS 215.750 and OAR 660-006-0027(3).”

Both the Hearings Official's original decision dated January 5, 2017 and his decision not to further consider the application dated January 24, 2017 support the above described practices.

The Hearings Official has reviewed allegations of error in the appeal, and found in his decision not to further consider the application dated January 24, 2017 that allegations of error have been adequately addressed in the decision and that reconsideration is not warranted.

Therefore, the Planning Director does not find that the implications of the decision are of countywide significance.

11. Forest template dwelling applications are a common land use application made to the Land Management Division. Irrespective of the frequency of this type of application, when these issues have been presented, the Planning Director and subsequently on appeal, the Hearings Official, have consistently found that 1) lots or parcels counted towards Lane Code 16.211(5)(c) must have existed lawfully on January 1, 1993 and that the “date of creation” language is not applicable to template dwelling approvals; 2) reconfiguration of a parcel by property line adjustment after January 1, 1993 does not invalidate that parcel from being counted under a Lane Code 16.211(5)(c) analysis; and 3) assignment of a tax lot representing a change in ownership on a property description card is not itself an indication of the date of creation of a property. The Hearings Official's decision supports these practices. Therefore, the Planning Director finds that the issue involved in this appeal will not 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)(iii)(aa). If these issues arise in the future, the Hearings Official's decision provides guidance. Therefore, the Planning Director finds that there is not a need for further policy guidance.

12. 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).
13. The Hearings Official has not recommended review of the appeal on the record.
14. The Planning Director does not recommend review of the appeal on the record 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 February 14, 2017, and finds that the appeal does not comply with the criteria of Lane Code Chapter 14.600(3), declines further review, and elects not to hold an on the record hearing for the appeal.

17. The Board affirms and adopts the Hearings Official decision of January 5, 2017, affirmed by the Hearings Official on January 24, 2017, as the County's final decision in this matter.



January 24, 2017

Ms. Lydia McKinney, Manager  
Land Management Division  
3050 N. Delta Highway  
Eugene, OR 97409

Re: *Appeal of Hearings Official decision in PA 16-05609 (Henton)*

Dear Ms. KcKinney,

On January 17, 2017, LandWatch Lane County appealed my January 5, 2017 decision in PA 16-05609 affirming the Planning Director's approval of Colby Henton request for a template forest dwelling on tax lot 106, Assessor's Map 17-01-19. I have reviewed the appeal and do not agree that my January 5, 2017 decision misconstrued applicable law and criteria or that the decision was not supported by substantial evidence in the record.

Accordingly, on the authority of Lane Code 14.535(1), I affirm my January 5, 2017 decision.

Sincerely,

  
Gary Darnielle  
Lane County Hearings Official

Cc: File/Amber Bell

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

**Application Summary**

On July 22, 2016, a request to establish a dwelling in the Impacted Forest Lands (F-2) zone was submitted to Lane County Land Management Division by Robert Stevens, an agent for Colby Henton. On August 19, 2016, staff deemed the application complete and on October 18, 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. On October 31, 2016, a timely appeal was submitted by LandWatch Lane County and Robert Emmons.

**Parties of Record**

Colby Henton	LandWatch Lane County	Robert Stevens
Robert Emmons	Lauri Segel	

**Application History**

Hearing Date: December 1, 2016  
(Record Held Open Until December 22, 2016)

Decision Date: January 5, 2017

**Appeal Deadline**

An appeal must be filed within 12 days of the issuance of this decision, using the form provided by the Lane County Land Management Division. The appeal will be considered by the Lane County Board of Commissioners.

**Statement of Criteria**

Lane Code 16.211(5) & (8)

**Findings of Fact**

1. The property subject to this application, hereinafter referred to as the “subject property,” is located on Tax Lot 106, Assessor’s Map 17–01–19. It is located approximately 1.3 miles to the northwest (as the crow flies) of the rural unincorporated community of Walterville and 2,000 feet north of Camp Creek Road. The parcel is approximately 35.8 acres in size, is vacant and does not have



a site address. The subject property is within the Lane County Rural Comprehensive Plan boundary designated Forest and is Zoned Impacted Forest Lands (F-2) consistent with the designation.

The subject property contains some moderate slopes in central and northern portions of the site. The southern portion of the site is relatively flat. The site slopes upward towards the north-central portion of the site from approximately 750 feet above mean sea level (MSL) to 880 feet above MSL. It is forested except for the southern portion of the site and an area in the northeastern site corner. The property contains Bonneville Power Administration transmission lines that bisect the parcel from south to north and across the northern property line.

2. All the abutting and immediately surrounding properties are also zoned Impacted Forest Lands (F-2). Surrounding properties appear to be in forest use with residential development at a low density typically associated with forest dwelling provisions.
3. Lane County adopted its land division regulations on March 26, 1975. The subject property was created as Parcel 3 of Partition Plat 92-P0287 (Partition PA 2975-90).
4. The Applicant has chosen to rely upon Lane Code 16.211(5)(c)(iii) in regard to the establishment of a template forest dwelling. In this regard, Lane Code 16.211(5)(c)(i)(aa) requires that at least all or a part of at least eleven other lots or parcels that existed on January 1, 1993, are within a template centered on the subject tract. The following tax lots lie, in part or wholly, within this template rectangle:

Parcel #1: Tax Lot 103, Assessor's Map 17-01-19. This parcel was created on November 10, 1992 as Parcel 1 of Partition Plat No. 92-0286 (Partition PA 2974-90).

Parcel #2: Tax Lot 107, Assessor's Map 17-01-19. This parcel was created on November 10, 1992 as Parcel 2 of Partition Plat No. 92-0287 (Partition PA 2975-90).

Parcel #3: Tax Lot 108, Assessor's Map 17-01-19. This parcel was created on November 10, 1992 as Parcel 1 of Partition Plat No. 92-0287 (Partition PA 2975-90).

Parcel #4: Tax Lot 300, Assessor's Map 17-01-19. This parcel was first created in 1964 when it was 132.5 acres in size. (See Reel 243, Instrument 57491, Lane County Deeds and Records.) Tax Lot 300 was cleaved from a larger parcel, described as the southeast one-quarter of the NW one-quarter, of Section 19, of Township 17 South, Range 1 West. (See Volume 426, Page 356, Lane County Deeds and Records.) Prior to the creation of Tax Lot 300, a 20-acre parcel,



known as Tax Lot 301, was created in 1962. (See Reel 166, Instrument 22404, Lane County Deeds and Records.)

In 1972, 5.54 acres were transferred from Tax Lot 300 by land sales contract to create Tax Lot 303. On December 20, 1977, Tax Lot 300 was incorporated into Parcel 3 of Partition M 648-76. Parcel 3 also included Tax Lots 101 and 307. In 2014, Tax Lots 300 and 101 were subject to a ministerial property line adjustment. (PA 14-05695)

Parcel #5: Tax Lot 301, Assessor's Map 17-01-19. This parcel was created on October 27, 1978 as Parcel 1 of Partition M 794-77.

Parcel #6: Tax Lot 302, Assessor's Map 17-01-19. This parcel was created on October 27, 1978 as Parcel 2 of Partition M 794-77. This parcel is occupied by a dwelling that was constructed in 1968.

Parcel#7: Tax Lot 1200, Assessor's Map 17-01-19. This parcel was created on August 2, 1976 as Parcel 1 of Partition M 188-76. A dwelling was constructed on this property prior to 1993 and which were granted replacement rights per PA 04-05095. The replacement dwelling was permitted per BP 04-00741.

Parcel #8: Tax Lot 1300, Assessor's Map 17-01-19. This parcel was created by deed on January 7, 1957. (See Reel 93, Instrument No. 3106, Lane County Deeds and Records.) The Lane County Assessor subsequently assigned tax lot number 1300 to this parcel in 1978. A dwelling was constructed on this property prior to 1993 and which were granted replacement rights per PA 02-05680. The replacement dwelling was permitted per BP 02-00958.

Parcel #9: Tax Lots 100/200, Assessor's Map 17-01-19-40. These tax lots were originally part of Tax Lot 700, which was created on September 1, 1917 by warranty deed. (See Volume 111, Page 625, Lane County Deeds and Records.) Tax Lot 700 was about 260 acres in size at the time of its creation and included present-day Tax Lot 200 and property in Section 20, Township 17 South, Range 1 West to the east.

In 1992, partitions PA 2974-90, adjacent to the west of Tax Lot 700, and PA 2975-90, adjacent to the north of Tax Lot 700, were approved. Also in 1992, a property line adjustment was approved that moved the boundary of Tax Lot 700 west, reducing the size of Parcel 3 of partition PA 2974-90, and north, reducing the size of Parcel 2 of partition PA 2975-90. At this point in time, Tax Lot 700 included present-day Tax Lots 100 and 200 and property in Section 20, Township 17 South, Range 1 West to the east. In 2000, a second property line adjustment was proved that resulted in Tax Lot 700 only including present-day Tax Lots 100 and 200.

Parcel #10: Tax Lot 400, Assessor's Map 17-01-19-40. This parcel was created on November 10, 1992 as Parcel 3 of Partition Plat No. 92-P0286 (Partition PA 2974-90). It was subsequently subject to a property line adjustment. (See Reel 2590, Instrument No. 99079650, Lane County Deeds and Records.)

Parcel #11: Tax Lot 500, Assessor's Map 17-01-19-40. This parcel was created on November 10, 1992 as Parcel 2 of Partition Plat No. 92-P0286 (Partition PA 2974-90).

5. The subject property lies within the McKenzie Fire and Rescue District and the closest fire station, Station No. 2, is at 37818 Camp Creek Road, between 1.5 and 2 miles from the subject property. Station No. 2 has one fire engine with a 1,000-gallon capacity, a medical response vehicle and a water rescue boat. Station No. 1 is located in close proximity to Station No. 1 and has one fire engine with a 1,000-gallon capacity, one water tender with a 2,700 gallon capacity and a rescue unit.

### **Decision**

THE PLANNING DIRECTOR DECISION APPROVING THE REQUEST (PA 16-05609) BY COLBY HENTON FOR A TEMPLATE FOREST DWELLING ON TAX LOT 106, ASSESSOR'S MAP 17-01-19 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 rectangle 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 Applicant has chosen to rely upon the most stringent standards of Code 16.211(5)(c)(iii) so that no soils analysis is necessary. Under Subsection (aa) of this standard, the applicant must demonstrate that all or a part of at least eleven other lots or parcels that existed on January 1, 1993 are within a 160-acre square centered on the center of the subject tract. 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 tract.

The allegations of error raised by the Appellants in their appeal are as follows:

1. ***Tax Lot 300, Assessor's Map 17-01-19, is not a legal lot because it was reconfigured by property line adjustment in 2015 with the parcel boundaries of Tax Lot 101, which was unlawfully created. It can therefore not be counted towards the 11 lots required under Lane Code 16.211(5)(c)(iii).***

Tax Lot 300, Assessor's Map 17-01-19, was created on December 20, 1977 as Parcel 3 of Partition M 648-76. This partition was recorded on December 30, 1977. Lane County adopted applicable land division regulations on March 26, 1975.

The Appellant points out that 4.08 acres of what was to become Parcel 3 was cleaved from that property in 1977 by deed; creating Tax Lot 307. (See Warranty Deed #76-60344, recorded on November 15, 1976, Lane County Deeds and Records.) The Appellant also notes that prior to the 1976 partition, Tax Lot 307 was created from the property that was to become Parcel 3 of that partition. (See Warranty Deed 77-40811, recorded July 5, 1977, Lane County Deeds and Records.) This tax lot was thereafter was consolidated into Parcel 3 through Partition M 648-76.

The Appellant then notes that Tax Lot 101, which constitutes the easternmost portion of Parcel 3, was created on February 3, 1961<sup>1</sup> and was verified as a legal lot via PA 00-5425 on April 27, 2000. Tax Lot 101 was subsequently consolidated into Parcel 3 through Partition M 648-76. Tax Lot 101 was reconfigured through a property line adjustment in 2014 (PA 14-05695) and subsequently approved for a template dwelling (PA 15-05541).

Even accepting all of the above as being true, I do not see the relevance in terms of the Applicant's ability to count Tax Lot 300 as one of the 11 lots required under the template dwelling test. I agree with the Appellant that Tax Lots 307 and 101 were vacated by Partition M 648-77 via operation of the *Weyerhaeuser* case<sup>2</sup> but the Applicant is not counting those parcels in his template count.

The various property line adjustments that occurred within the boundaries of Tax Lot 300 did not create any legal lots that did not exist prior to January 1, 1993 within the Applicant's template diagram. I have previously ruled that a reconfiguration of a parcel by property line adjustment does not invalidate that parcel from being counted under a Lane Code 16.211(5)(c) analysis.<sup>3</sup>

*This allegation of error is dismissed.*

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<sup>1</sup> See Reel 167, Instrument 22459, Lane County Deeds and Records.

<sup>2</sup> *Weyerhaeuser Real Estate Development Co. v. Polk County*, 246 Or App 548 (2011)

<sup>3</sup> *Application of Daniel Clements*, Lane County Hearings Official decision in PA 16-05125 (November 7, 2016)

4. *Tax Lot 1300, Assessor's Map 17-01-19-40 is not a legal lot because it was created for tax lot purposes in 1978.*

The Lane County Assessor's deed card for Tax Lot 1300 shows that it was assigned a tax lot number in 1978. However, the property was actually created in 1958 by deed transfer. (See Reel 93, Instrument No. 3106, Lane County Deeds and Records.) As explained in previous decisions, the assignment of a tax lot number usually represents a change in ownership of a parcel or a change of use but not necessarily its date of creation.

*This allegation of error is dismissed.*

5. *Tax Lots 100 and 200, Assessor's Map 17-01-19-40 do not represent a legal lot.*

The Appellant argues that the partition that created Tax Lots 100 and 200 were illegal because it created lots below the minimum lot size and because the property from which the parcels were created was divided into more than three parcels within a calendar year.

Partitions PA 2974-90 and PA 2975-90 were consolidated for processing and were both approved on November 23, 1992. The parcels were zoned F-2 Impacted Forest Land and area standards were found in Lane Code 16.211(7). Lane Code 16.211(7)(a) stated that the minimum lot size in that zone must meet the average minimum requirements specified in Lane Code 16.211(3)(c). Lane Code 16.211(3)(c)(iii) allowed an average minimum acreage of 24 acres if the property's soils had a potential yield of between 120 and 164 cubic feet per acre per year. The soils of the partitions that were created were in that range and each parcel was at least 26 acres in size.

The second argument made by the Appellant was that Partition PA 2975-90 was illegal because it divided Tax Lot 100 into four pieces: Parcels 2 and 3 of PA 2975-90 and a portion of Parcels 2 and 3 of PA 2974-90, which also contained property out of Tax Lot 102. I must agree with the Appellant that the two consolidated partition actions violated ORS 92.010(9), which defines "partitioning land" as dividing land to create not more than three parcels of land within a calendar year. The Applicant argues that those two partitions, as well as subsequent legal lot verifications, cannot be collaterally attacked. On the contrary, they can.

In regard to the collateral attack issue, more correctly characterized as issue preclusion, LUBA noted in *Nelson v. Clackamas County*<sup>4</sup> that land use

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<sup>4</sup> *Nelson v. Clackamas County*, 19 Or LUBA 131, 140 (1990)



adjudication "is incompatible with giving preclusive effect to issues previously determined by a local government tribunal in another proceeding." That is, the county is not bound to resolve "claims" made in one application consistently with "claims" in earlier applications. In the *Nelson* case, LUBA relied upon the Restatement §83(1), comment 'h' that suggests that issue preclusion should not be invoked against the government in adjudications before an administrative agency if an exception applies. One such exception is where the applicable legal context has changed.<sup>5</sup> The *Weyerhaeuser* case, decided in 2011, changed the legal context in regard to the sanctity of legal lots and the ability of subsequent partitions and subdivisions to vacate those lots.

The Oregon Supreme court has noted that issue preclusion might lie if five factors are met.<sup>6</sup> Those five factors are as follows: (1) the issue in the two proceedings is identical; (2) the issue was actually litigated and was essential to a final decision on the merits in the prior proceeding; (3) the party sought to be precluded had a full and fair opportunity to be heard on that issue; (4) the party sought to be precluded was a party or was in privity with a party to the prior proceeding; and (5) the prior proceeding was the type of proceeding to which preclusive effect will be given. In the present case, neither the Applicant nor the Appellant were parties to the prior proceedings.

Issues regarding issue preclusion aside, I do not believe that the Applicant has to rely upon either the sanctity of the two prior partition actions or the subsequent legal lot verifications. Tax Lots 100/200, Assessor's Map 17-01-19-40, are counted as one parcel in the Applicant's template parcel count. As Tax Lot 700, they were created by deed in 1917 although the Lane County Assessor's Official Record of Descriptions of Real Properties suggests that Tax Lot 200 was created in 1947. While Tax Lot 100 appeared to be vacated by its inclusion within Parcel 3 of PA 2975-90 and Parcel 2 of PA 2974-90, only nine acres of Tax Lot 200 (then tax lot 700) was included within the boundaries of Parcel 3 of Partition PA 2975-90. Therefore, the Applicant may count Tax Lot 200 towards his template dwelling count.

*This allegation of error is dismissed.*

### **Summary**

I do not believe that the Applicant needs to rely upon an issue preclusion argument to justify the 11 parcels included in his template dwelling parcel count. Each one of the 11 parcels was created prior to January 1, 1993, is located within the Applicant's template

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<sup>5</sup> Restatement (Second) of Judgments, §28(2), comment c.

<sup>6</sup> *Nelson v. Emerald People's Utility Dist.*, 318 Or 99, 103-104, 862 P2d 29 1293 (1993).

diagram, and was not wholly vacated by subsequent partitioning or eliminated through property line adjustments.

**Respectfully Submitted,**



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