

BEFORE THE BOARD OF COMMISSIONERS OF LANE COUNTY, OREGON

ORDER NO:19-02-26-05 In the Matter of Hearing on the Record an Appeal of a Hearings Official Decision Affirming the Planning Director's Decision to Approve a Replacement Dwelling in the Exclusive Farm Use Zone (E-40) on Tax Lot 1400, Assessor's Map 20-05-13 (File No. 509-PA17-05908; Doughty)

WHEREAS, the Lane County Hearings Official has made a decision to affirm a Planning Director's approval of a replacement dwelling on Tax Lot 1400, Assessor's Map 20-05-13; 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 14.080(4)(d)(ii) and (vi), 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 November 26, 2018, the Lane County Hearings Official affirmed his November 8, 2018 decision on the application after reviewing the appeal; and

WHEREAS, Lane Code 14.080(4)(d) 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, on January 29, 2019, the Board of County Commissioners reviewed this matter at a public meeting of the Board and elected to conduct an on the record hearing to consider whether an incorrect approval criteria was applied by the Hearings Official in his decision and limited to evidence in the record; and

WHEREAS, notice of an on the record hearing pursuant to Lane Code 14.080(4)(d)(vii)(ee) was mailed in a timely manner on February 15, 2019; and

WHEREAS, the Board of County Commissioners heard arguments and reviewed the Hearings Official's decision based on materials contained in the record pursuant to Lane Code 14.080(4)(d)(vii) at their regular meeting held February 26, 2019.

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

1. That the Findings in Support of the Order attached as Exhibit "A" are adopted and incorporated into this Order.
2. The Hearings Official's decision dated November 7, 2018, affirmed by the Hearings Official's February 26, 2018 letter, both attached and incorporated as Exhibit "B" to this Order, that found relevant approval criteria are met is affirmed and adopted by the Board as the County's final decision, subject to and modified by the Findings in

Exhibit "A". The Board has reviewed the appeal and the Hearings Official decision and expressly agrees with and adopts the interpretations made by the Hearings Official, except as modified by the Findings set forth in Exhibit "A".

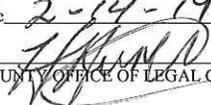
ADOPTED this 12th day of March 2019



Pete Sorenson, Chair
Lane County Board of Commissioners

APPROVED AS TO FORM

Date 2-14-19



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-PA17-05908.
2. Notice of the November 7, 2018 Hearings Official's decision was mailed to the applicant and parties of record on November 8, 2018.
3. On November 19, 2018, Sean T. Malone, 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 14.080(4)(d)(ii).
4. On November 26, 2018, the Hearings Official reviewed the appeal and affirmed his decision without further consideration, pursuant to LC 14.080(4)(b).
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, the applicant's agent has provided a full waiver of the statutory timeline requirements. Therefore, a final decision by the Board through holding an on-the-record hearing can be made within the time constraints of ORS 215.427.
6. In order for the Board to hear arguments on the appeal, Lane Code 14.080(4)(d)(iii) 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 impacts to an inventoried Goal 5 resource; or*
 - *The Director or Hearings Official recommends review.*
7. The Director recommended that the Board hear the appeal in an on the record hearing in order to correct in the Hearings Official decision that application of the incorrect approval criteria at Lane Code 16.212(5)(a) instead of Lane Code 16.212(5)(b) by applying the correct criteria at Lane Code 16.212(5)(b).
8. On January 24, 2019, the applicant's agent submitted a letter to the Board of County Commissioners requesting that the appeal be heard in an on the record hearing and that the Board consider new testimony and evidence.
9. On January 29, 2019, with Order 19-01-29-05, the Board reviewed the matter in a public meeting. The Planning Director recommended the Board conduct an on the record hearing to remedy the Hearing Official's decision that applied the incorrect approval criteria. The Board elected to hold an on the record hearing where they consider evidence confined to the record on February 26, 2018 at 1:30 PM.
10. After conducting the on the record hearing, the Board modified the Hearings Official decision by applying the correct approval criteria at Lane Code 16.212(5)(b) and adopted the following findings towards these approval criteria.
 - a. Consistent with Lane Code 16.212(5)(b)(i), based on evidence submitted by the applicant, the Board finds that a dwelling has consistently been located on the subject property prior to zoning or land use regulations. The date that subarea zoning was first enacted was February 12, 1980, which applied EFU zoning to the subject property under Ordinance 772. Lane County Assessment and Taxation

Records indicate that the dwelling to be replaced has been assessed as a dwelling for purposes of ad valorem taxation for the previous five property tax years.

Other evidence submitted by the applicant that supports existence of a dwelling on the subject property includes affidavits from neighbors and former property owners, and historical aerial photos. The applicant submitted letters from the previous owner of the property which states that a home has been on the property since the early 1900's. In both the 1950's and in 1976/1977, the dwelling on the property at the time had burned, but was replaced each time in the same location. Neighbors of the subject property attest to a fire that destroyed the residence in 1977, and to the continued existence of a dwelling on the subject property. Aerial photos from July 22, 1952 and May 13, 1979 show two structures on the subject property. Both structures visible on the air photos are located in approximately the same location as the existing manufactured home and barn currently existing on the subject property. The Board finds that the evidence submitted is sufficient to demonstrate the existence of a dwelling on the subject property prior to the enactment of zoning in the area.

- b. Consistent with Lane Code 16.212(5)(b)(ii), evidence submitted by the applicant (written statement and photos) and Assessment and Taxation records are accepted as evidence that the existing residence has intact exterior walls and roof structure, indoor plumbing consisting of a kitchen sink, toilet and bathing facilities connected to a sanitary waste disposal system, interior wiring for interior lighting, and a heating system.
 - c. Consistent with Lane Code 16.212(5)(b)(iii) and 16.212(5)(b)(iii)(aa) and (bb), the applicant plans to remove or demolish the existing dwelling. The applicant must record a statement at Lane County Deeds and Records that the dwelling to be replaced has been removed, demolished, or converted. If a dwelling is removed by moving it off the subject parcel to another location, the applicant must obtain approval from the permitting authority for the new location. This criteria has been made a condition of approval.
 - d. Consistent with Lane Code 16.212(5)(b)(iv), the applicant states that the existing dwelling to be replaced will be demolished or removed from the subject property.
 - e. Consistent with Lane Code 16.212(5)(b)(v), as evidenced by the applicant's submittals (written statement and photos) and Assessment and Taxation records, the dwelling has the features described in LC 16.212(5)(b)(ii). The manufactured home has not been removed from the tax rolls as described in LC 16.212(5)(b)(i)(bb) or (cc), as evidenced by Assessment and Taxation records included in the application file and incorporated herein by reference. A replacement dwelling permit for the subject property has not been previously issued or expired.
11. The Board otherwise agrees with and adopts the Hearings Official decision and interpretations made by the Hearings Official in his decision.



November 26, 2018

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

Re: *Appeal of the Hearings Official decision affirming the Planning Director's approval of the Doughty request for a replacement dwelling on tax lot 1400, assessor's map 20-05-13.*

Dear Ms. Kaye:

On November 7, 2018, I issued a decision affirming the Planning Director's approval of the request (PA 18-05908) by the Duane and Tonya Doughty request for a replacement dwelling on tax lot 1400, assessor's map 20-05-13. On November 19, 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 the decision and that a further consideration is not warranted.

Accordingly, on the authority of Lane Code 14.080(4)(b), I shall affirm my November 7, 2018 decision without further consideration. Please advise interested parties of this decision.

Sincerely,


Gary L. Darnielle
Lane County Hearings Official

cc: Rachel Serslev (file)

**LANE COUNTY HEARINGS OFFICIAL
APPEAL OF A PLANNING DIRECTOR APPROVAL OF A REPLACEMENT
DWELLING IN AN EXCLUSIVE FARM USE DISTRICT**

Application Summary

On November 9, 2017, an application for a special use permit to allow the replacement of a dwelling within an exclusive farm use district (E-40) was submitted to Lane County Land Management. On December 1, 2017, the Planning Director deemed the application complete and on April 4, 2018, the Director issued a determination that the subject property complied with the applicable standards and criteria pursuant to LC 16.212(5)(b). On April 16, 2018, a timely appeal was submitted by LandWatch Lane County.

Parties of Record

Duane & Tonya Doughty	LandWatch Lane County	Andrew Mulkey
Lauri Segal		

Application History

Hearing Date: October 11, 2018
 (Record Held Open Until November 1, 2018)

Decision Date: November 7, 2018

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 16.212(5)(b)
Chapter 462, Oregon Laws 2013 (Formerly HB 2746)
OAR 660-033-0130(8)
ORS 215.213(1)(q) and (9)

Findings of Fact

1. The property subject to this application, hereinafter referred to as the “subject property,” is located on tax lot 1400, assessor’s map 20-05-13. It is located at 28072 Cottage Grove-Lorane Road, approximately 7.5 miles west of Cottage Grove, Oregon. The property is 10.33 acres in size and is 320 feet wide for most

of its length. The subject property is designated by the Lane County Rural Comprehensive Plan as Agriculture and is zoned E-40 consistent with the designation. The subject property was first zoned on February 12, 1980, which it was zoned EFU. The subject property is located within a "Peripheral," not a "Major Big Game" area. Surrounding properties to the north, west and south are zoned Exclusive Farm Use (E-40) while properties to the east are zoned Impacted Forest Lands (F-2).

The subject property was created as a separate parcel on September 27, 1943 by a warranty from Oral and Carolyn Crowe, grantors, to Jack and Frances Streimer, grantees. It was the southern remainder of the parcel described by warranty deed found in Book 337, Page 221, Lane County deeds and records after the conveyance by bargain and sale deed of a road dated December 17, 1956 and recorded on Reel 93, Instrument 2941. Also, a small cemetery parcel was excepted out of the 1943 conveyance.

In 1992, a portion of tax lot 1400 was conveyed to create tax lot 1401, labeled Tract II, and tax lot 501, labeled Tract I. (See warranty deed Reel 1815, Instrument 9274391, Lane County Deeds and Records.) The labeling of the property transferred as tracts is an indication of a transfer of two properties not an attempted property line adjustment. In this transaction, Delvin and Jenny Doughty transferred property to Darren and Alisa Kronberger. The Appellant alleges that Kronbergers did not own the property that was adjacent to the transferred property (tax lot 1501) and therefore this constituted an illegal division of the parent property not a property line adjustment. There is nothing in the record to indicate that the Kronberger's owned land adjacent to either tax lot 1401 or 501 and therefore this transaction could not have been a property line adjustment.

Lane County land division regulations did not affect the subject property until March of 1975. The subject property was verified as a legal lot on July 28, 1994 via PA 2300-94 although this decision was not noticed, consistent with Lane County's policy at this time.

2. The dwelling to be replaced was constructed sometime in the early 1900s. The structure was burned in the 1950s and in the 1976/1977 time periods but was replaced each time in its original location. A July 22, 1952 and a May 13, 1979 aerial photograph show the dwelling and a barn on the subject property. The record documents that the existing dwelling has intact exterior walls and roof structure, indoor plumbing consisting of a kitchen sink, toilet and bathing facilities connected to a sanitary waste disposal system, interior wiring for interior lighting and a heating system. The dwelling (manufactured home) has been assessed as a residential structure for the five years previous to the submission of this application for a replacement dwelling.

The replacement dwelling is proposed to be located 100 feet from adjacent property to the west, 1000 feet from adjacent property to the south, and 10 feet from adjacent property to the east. The Applicant has warranted that the existing dwelling will be removed or demolished.

Decision

THE PLANNING DIRECTOR'S DECISION APPROVING THE REQUEST (PA 17-05908) BY DUANE AND TONYA DOUGHTY FOR A SPECIAL USE PERMIT FOR A REPLACEMENT DWELLING ON TAX LOT 1400, ASSESSOR'S MAP 20-05-13 IS AFFIRMED.

Justification for the Decision (Conclusion)

To address the allegations of error, it is important to start with a clear idea of which approval standards apply. Chapter 462, Oregon Laws 2013 (the Act) has primacy as it has essentially defined the nature of replacement dwellings allowed under ORS 215.213(1)(q). OAR 660-033-0130(8) clarifies a portion of the Act and Lane Code 16.212(5) is an attempt to implement the Act and the administrative rule through the Code.

Under Section 2 of the Act, a dwelling may be "*altered, restored or replaced*" if it (1) "*has, or formerly had*" five listed structural features and (2) either proof of appropriate property tax assessment data or proof that the structure was destroyed or demolished. Subsection 2(4) of the Act requires that the dwelling to be replaced be "*removed, demolished or converted*" within one year of the replacement dwelling being certified for occupancy. This section, which is implemented by Lane Code 16.212(5)(b), allows the replacement dwelling to be sited on any part of the same lot or parcel and requires that it comply with applicable siting standards.

The application for this permit, which relies upon a supporting narrative, does not specifically state that it is for a "deferred" replacement dwelling permit and the Lane Code does not implement Subsection (7) of Section 2 of Chapter 462, Oregon Laws 2013. That is, neither Lane Code 16.212(5)(a) or (b) address a situation where a permit becomes void unless the dwelling to be replaced is removed or demolished within three months of the issuance of the permit or where there is a restriction on the transfer of the permit. The main difference between the two sections of the Code is that the former addresses situations where the alteration, restoration or replacement occurs in the same site of a lawfully established dwelling and the latter allows the replacement dwelling to be sited on any part of the same lot or parcel.

The Appellant has raised several allegations of error regarding the Director's decision. These allegations are addressed below:

1. The staff report is confusing as it appears to apply the standards of both LC 16.212(5)(a) and (b).

Lane Code 16.212(5)(a) contains standards for replacement dwellings that are located on the “same site” as that of the dwelling being replaced. Lane Code 16.212(5)(b) contain standards for replacement dwellings that are located on the same property but not on the “same site” as that of the dwelling being replaced. In the present case, the Applicant is replacing the existing dwelling within the “same site” area, or a square area with dimensions of 200 feet centered on the existing dwelling. The Applicant’s same site area is not a uniform 200 feet by 200 feet because the location of the existing dwelling prevents this due to its proximity to the Cottage Grove – Lorane Road and the narrowness of the subject property.

It is not clear why the Director addressed the criteria of LC 16.212(5)(b). However, the application and notice indicate that LC 16.212(5)(a) is applicable and the Director’s decision can be affirmed if sufficient evidence exists in the record to demonstrate compliance with these standards.

LC 16.212(5)(a)(i)(aa)

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

The dwelling on the subject property was constructed at a time prior to when building permits or land use approval was required. The subject properties EFU zoning was first applied on February 12, 1980.

LC 16.212(5)(b) provides that if the alteration, restoration, or replacement of a lawfully established dwelling does not meet the requirements in LC 16.212(5)(a)(i) or (iii) it is allowed subject to prior submittal and approval of an application pursuant to Type II procedures of LC Chapter 14, and there is objective evidence demonstrating that the existing dwelling was lawfully placed on the subject property. The Applicant has demonstrated the existence of the dwelling based upon affidavits of neighbors and former property owners, and historical aerial photos taken in 1952 and 1979.

LC 16.212(5)(a)(ii)

The dwelling has: (aa) intact exterior walls and roof structure; and (bb) indoor plumbing consisting of a kitchen sink, toilet and bathing facilities connected to a

sanitary waste disposal system; and (cc) interior wiring for interior lights; and (dd) a heating system;

Photos submitted by the Applicant and Assessment and Taxation records indicate that the existing dwelling has intact exterior walls and roof structure, indoor plumbing consisting of a kitchen sink, toilet and bathing facilities connected to a solid waste disposal system, interior wiring for interior lighting, and a heating system.

LC 16.212(5)(a)(iii)

In the case of replacement, the new dwelling must be sited in the same site as the dwelling to be replaced. For the purpose of LC 16.212(5)(a)(iii) above, “the same site” is defined as a square with dimensions of 200 feet which is centered on the footprint of the established dwelling.

The Applicant’s site plan has defined the “same site” and the location of the replacement dwelling is constrained by this area. In this respect, the “same site” is not a perfect square as its western and northern boundaries are constrained by proximity of the existing home to the Cottage Grove–Lorane Road.

LC 16.212(5)(a)(iv)

In the case of replacement, the dwelling to be replaced must be removed, demolished, or converted to an allowable nonresidential use within one year of the completion of the replacement dwelling.

This has been made a condition of approval. In addition, conditions of approval require that the Applicant record a statement with the Lane County Department of Deeds and Records attesting that the dwelling to be replaced has been removed, demolished or converted and that approval from the permitting authority must be obtained if the dwelling is removed to a location other than the subject property.

LC 16.212(5)(a)(v)

A dwelling established under this section must comply with all applicable siting standards in LC Chapter 16.

LC 16.212(10) requires that uses or activities allowed by LC 16.212(3) through (9), except for farm use, shall comply with the requirements in LC 16.212(10)(a) through (d).

LC 16.212(10)(a)(i)¹ Dwellings and development accessory to residential uses allowed under LC 16.212(3)(z)(iii) to be sited upon tracts located within an area designated by the Department of Fish and Wildlife Habitat Maps as “Major” shall be sited as follows:

(aa) Near dwellings on other tracts.

An aerial photograph² of the subject property shows that the site of the replacement dwelling is located near existing dwellings to the northwest (Rural Address of 27997 Cottage Grove Lorane Road) and northeast (Rural Address of 2807 Cottage Grove Lorane Road). There is also a structure to the southwest of the development site on tax lot 3200 but it is unclear whether this structure is a residence. Regardless, the replacement dwelling’s location is closest to existing dwellings in the area around the subject property.

(bb) With minimal intrusion into forest areas undeveloped by non-forest uses.

The replacement dwelling site is already devoid of trees and is occupied by the existing mobile home, three sheds, a garage, a barn, and a septic area. A forested area exists to the east of the site on tax lot 501 and tax lot 1401, to the south, is heavily forested. Tax lot 1401 is also largely occupied by a Major Big Game Range designation.

(cc) Where possible, when considering LC 16.212(10)(a) (i)(aa) and (bb) above and the dimensions and topography of the tract, at least 500 feet from the adjoining lines of property zoned F-1 and 100 feet from the adjoining lines of property zoned F-2 or EFU.

Property to the west and south are zoned for Exclusive Farm Use. The “same site” area is 100 feet or more from the borders of these properties. Property to the east is zoned F-2 and the setback from the “same site” area is only 10 feet. However, the dimensions of the parcel in conjunction with the need to center the “same site area” on the existing dwelling force a lesser setback than required. The EFU-zoned property to the north is more than 100 feet from the edge of the “same site area” due to a 40-foot setback from the road and the 60-foot width of the road right-of-way.

¹ LC 16.212(10)(a)(i) is applicable because a portion of the subject property is located within a Major Big Game Range.

² “Exhibit 3: Soils Map” received from the Applicant by the Land Management Division on October 17, 2018.

LC 16.212(10) also requires that uses or activities allowed by LC 16.212(3)(z)(iii) and (4) through (9) shall comply with the development requirements in LC 16.212(10)(f) through (h) or (j) when compliance is expressly required by LC 16.212(4) through (9).

Compliance with LC 16.212(10)(h) is explicitly required by LC 16.212(5)(a)(vii). See below.

LC 16.212(5)(a)(vi)

An accessory farm dwelling authorized pursuant to LC 16.212(6)(b) or (7)(e) below may only be replaced by a manufactured dwelling;

This criterion is not applicable.

LC 16.212(5)(a)(vii)

LC 16.212(10)(h) below;

LC 16.212(10)(h): The Director shall require as a condition of approval that the landowner for the dwelling sign and record in the Lane County deed records a document binding the landowner, and the landowner's successors in interest, prohibiting them from pursuing a claim for relief or cause of action alleging injury from farming or forest practices for which no action or claim is allowed under ORS 30.936 or 30.937.

This criterion has been made a condition of approval.

LC 16.212(5)(a)(viii)

The approval described in LC 16.212(5)(a) above is not subject to LC 14.090 and does not expire.

This criterion has been made a condition of approval.

LC 16.212(5)(ix)

If a replacement dwelling approval was issued under LC 16.212(5)(a) and expired prior to January 1, 2014...

This criterion is not applicable.

This allegation of error is dismissed.

2. ***The Planning Director's decision represented a deferred replacement dwelling permit and violated Subsection (7)(a)(A) of Section 2, Chapter 462, Oregon Laws 2013 because it did not restrict the transfer of the permit by the applicant to a spouse or child of the applicant.***

The Lane Code does not implement the deferred replacement dwelling provisions of Chapter 462, Oregon Laws 2013. The language of Section 2(7)(a)(A), Chapter 462, Oregon Laws 2013 regarding permit expiration does not define a deferred replacement permit but characterizes it by way of several limitations that must accompany its issuance.³ Thus, Section 2(7)(a)(A) and (B) requires that the dwelling to be replaced must be removed or demolished within three months after the issuance of the permit and places restrictions on the transferability of the permit. These latter limitations are not present in the Director's decision. The application does not request a deferred replacement dwelling permit and it is clear that there is no intent on the Planning Director's part to characterize or approve the application as a request for a deferred replacement permit.

This allegation of error is dismissed.

3. ***The Planning Director is wrong to conclude that a special use permit for a replacement dwelling do not require a determination that the subject property was lawfully created.***

ORS 215.213(1)(q) allows the "alteration, restoration or replacement of a lawfully established dwelling" subject to Section 2, Chapter 462, Oregon Laws 2013. Subsection 2(4) of Chapter 462, Oregon Laws 2013, which was added to and made a part of ORS 215.203 to 215.311, requires that the replacement dwelling be sited on the same lot or parcel and requires that it comply with applicable siting standards. LUBA has determined that when the word "parcel" is used in ORS Chapter 215, the parcel must be a lawfully created parcel.⁴ The Appellant is correct that the parcel upon which the dwelling to be replaced must have been lawfully created.

The Appellant argues that the subject property is not a legal lot. It points to the 1992 warranty deed transaction that created tax lot 1401. As the county had no property line adjustment regulations at this time, the transfer could be viewed as a 'de facto' property line adjustment if it was to the owner of adjacent tax lot 1501. Unfortunately, this does not appear to be the case. Neither did the warranty deed conform to ORS 92.190(4) (1992) that required that a property line adjustment deed contain a description of the adjusted line, as well as other requirements.

³ The Director argues that the deferred replacement dwelling provisions are not operative until January 2, 2024. This is incorrect. Section 10 of the Act states that Sections 7 through 9 of the Act do not become operative until that date. However, the deferred replacement dwelling provisions are found in Section 2, Subsection (7) of the Act, not Section 7, and are current law.

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

The Appellant then points to the LUBA case of *Hartmann v. Washington County*⁵ for the proposition that the illegal land division had the effect of creating two new lots; divorcing the parent parcel of its legal lot status. The *Hartmann* case is inopposite as it concerned an appeal of a denial of a request for a nonfarm parcel on a piece of land that was the remainder of a parcel partitioned in 1994. LUBA upheld the denial on the basis that the ‘remainder’ of a partition was a new parcel whose “date of creation” was the date of the partition approval.⁶ LUBA relied upon OAR 660-033-0020(4) that defines a “date of creation” to be:

“When a lot, parcel or tract is reconfigured pursuant to applicable law after November 4, 1993, the effect of which is to qualify a lot, parcel or tract for the siting of a dwelling, the date of the reconfiguration is the date of creation or existence. Reconfiguration means any change in the boundary of the lot, parcel, or tract.”

The Appellant is arguing that the 1992 transaction had the effect of creating two new parcels. The fallacy with this argument is that, as demonstrated by the Appellant, the division of the property was not made “pursuant to applicable law” nor was it reconfigured after November 4, 1993. As I indicated in the *Johnson* case⁷, an illegal division of a lawfully created parcel does not negate the lawful status of that parcel but rather voids the development potential, for land use purposes, of the newly created parcel. No new parcel is created because the division is inconsistent with applicable land division law. Further, I would posit that the argument presented by the Appellant is contrary to good public policy. Following the Appellant’s argument, the illegal division of a substandard and vacant parcel zoned EFU would create two parcels that were not lawfully created and I know of no way under current law to cure that defect.⁸ The Appellant’s solution is punitive in that there is no valid purpose served by the creation of dead parcels. The obvious method of correcting an invalid land division is for the recipient of the newly “created” parcel to sue the seller to rescind the transaction. In the interim, the buyer would not be able to develop his or her parcel.

This decision makes a distinction between the verification of a parcel as a “legal lot” and the lawfully established status of that parcel. The subject property, tax lot 1400, could not be verified as a legal lot in its current configuration because of the illegal division of the property that resulted in the creation of tax lot 1401. Nevertheless, there is no argument that tax lot 1400 was lawfully created in 1943.

⁵ *Hartmann v. Washington County*, 36 Or LUBA 442 (1999)

⁶ OAR 660-033-0130(4)(a)(C) requires that the nonfarm dwelling be sited on a parcel or lot created before January 1, 1993.

⁷ *Application of Vernie Johnson*, Lane County Hearings Official Decision in PA 18-05191 (10/10/2018).

⁸ Generally speaking, ORS 92.176 provides for the validation of a unit of land if an otherwise illegal sale could have complied with applicable criteria or the property had an existing dwelling permitted by the jurisdiction.

If the replacement dwelling was to be placed upon tax lot 1401 then the application would have to be denied because that parcel was not lawfully created. Nor could that parcel be verified as a legal lot.

This allegation of error is dismissed.

4. The Planning Director applied the siting standards of LC 16.212(10)(a)(ii)(aa-bb) instead of LC 16.212(10)(a)(i)(aa-cc).

The siting standards of LC 16.212(10)(a)(i) apply to dwellings sited upon tracts located within an area designated by the Department of Fish and Wildlife Habitat Maps as “Major.” The siting standards of LC 16.212(10)(a)(ii) apply to dwellings located on tracts not located on areas designated as being major wildlife habitat. Finding of Fact #14 of the Planning Director’s staff report state that the subject property is located in a Major Big Game area and this conclusion is not contested.

The confusion arises when the last paragraph on page 10 of the staff report notes that the application complies with LC 16.212(10)(a)(ii). However, Finding #14 acknowledges that the proposed location of the replacement dwelling is closer to the residential development on the RR-1 zoned properties, located to the west of the destroyed dwelling’s location, and more than 100 feet from adjacent properties zoned EFU. The staff findings do not specifically address LC 16.212(10)(a)(i)(bb) regarding intrusion into forest areas undeveloped by non-forest uses. However, an aerial photograph submitted by the Applicant that locates various existing and proposed features on the subject property demonstrates that the proposed site for the replacement dwelling is already impacted by non-forest uses. The illustrated photograph shows that the proposed dwelling will be located in an area of primarily open space near the demolished home and near an existing gravel road and old septic tank and drainfield. In conclusion, it is clear that the citation to LC 16.212(10)(a)(ii) is a scrivener’s error and that staff was applying the finding to the approval criteria of LC 16.212(10)(a)(i). I believe that the record supports a determination that these criteria have been met.

This allegation of error is dismissed.

Summary

I agree with the Director’s that her decision cannot be characterized as an approval for a deferred replacement dwelling permit because the Lane Code does not provide for this alternative and the decision did not contain the provisions that are required under Section 2(7)(a), Chapter 462, Oregon Laws 2013 for a deferred replacement permit. Further, I believe that the subject property is a legal lot because it did not lose that status merely

because it was illegally divided without partition approval. Finally, I believe that the application adequately addresses the applicable siting standards of LC 16.212(10) and the standards of LC 16.212(5)(a)(i).

Respectfully Submitted,



Gary Darnielle
Lane County Hearings Official

LAND MANAGEMENT DIVISION

Date Received:



APPEAL OF A TYPE III HEARINGS 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 #

FEE:

Appellant: LandWatch Lane County

Mailing address: See representative for address

Phone: 303-859-0403

Email: seanmalone8@hotmail.com

Signature: see rep signature

Date:

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

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

Phone: 303-859-0403

Email: seanmalone8@hotmail.com

Signature:

Date: 11/18/18

LOCATION (subject property)

tax lot 1400, assessnor's map 20-05-13

Township - Range - Section - Taxlot

Subdivision/partition

lot/parcel

This form is required for appeal of a Type III Hearings Official decision or a Hearings Official decision on an appeal of a Type II Director decision. Please note that your appeal application will be rejected if it does not meet all the requirements of Lane Code 14.080(1) (see below for appeal submittal requirements). A notice of appeal must be filed with the Director prior to 4 p.m. Pacific Time 12 days after the date the notice of decision is mailed (see deadline specified on the decision). You have one of two appeal options. Indicate whether you are requesting review through Option 1 or Option 2.

Option 1 The appellant requests Hearings Official Reconsideration OR Board of Commissioner Review in a Hearing; or

Option 2 The appellant requests that the Board not conduct a hearing on the appeal and deem the Hearings Official decision the final decision of the County.

Required Option 1 submittals:

Option 1 (a) The appellant requests Hearings Official Reconsideration OR

(b) Board of Commissioner Review in a Hearing.

1. Fee is \$3,712 appeal fee, payable to Lane County. *(See the page 3 for important fee information)*
2. A copy of the decision being appealed, with the Department file number. File # _____ and the date of the decision _____
3. Indicate the deadline to submit the appeal. *(Found in the Hearing Official's Decision)* _____
4. Check one of the items below demonstrating how the person filing the appeal is a party as that term is defined in LC 14.015(22) 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, I provided testimony before the Hearings Official;
 - ___ I am not one of the persons mentioned above, but wish to appeal the Hearings Official's decision and my appeal submittal identifies how I qualify as a party.
5. A letter that addresses each of the following 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. Provide an explanation with detailed support specifying one or more of the following assignments of error, 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; or
 - Reconsideration of the decision is requested in order to submit additional evidence not available in the record at the hearing and addressing compliance with relevant standards and criteria.
 - c. Explain the specific issues being raised on appeal with sufficient specificity to afford the approval authority the opportunity to resolve each issue raised.
 - d. The position of the appellant indicating the issue raised in this appeal to the Board was raised before the close of the record at or following the final evidentiary hearing and whether the appellant wishes the application to be approved, denied or conditionally approved.
 - e. State whether the appellant requests that the Board conduct an on-the-record hearing.
 - f. Any additional information in support of your appeal.
6. A Timeline Waiver for Hearings Official reconsideration request by the Applicant. Per Lane Code 14.080(4)(c), in the event a decision of the Hearings Official is being appealed by the applicant for the same application to be reconsidered by the Hearings Official, then to receive reconsideration by the Hearings Official, the applicant must first agree to a waiver of any statutory application timelines, and such a waiver shall be in addition to any other waivers already given.

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 14.080(4)(c)). 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 14.080(4)(d)).

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 Hearings Official decision the final decision of the County.

1. Fee is a non-refundable \$950 appeal fee, payable to Lane County.
2. A copy of the decision being appealed, with the department file number. File # PA17-05908 and the date of the decision Nov. 7, 2018
3. Indicate the deadline to submit the appeal. (*Found in the Hearings Official's Decision*) 11/19/18
4. Check one of the items below demonstrating how the person filing the appeal is a party as that term is defined in LC 14.015(22) 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, I provided testimony before the Hearings Official;
 - I am not one of the persons mentioned above, but wish to appeal the Hearings Official's decision and my appeal submittal identifies how I qualify as a party.

5. A letter that addresses each of the following standards:
- a. The reason(s) why the decision of the Hearings Official was made in error;
 - b. An identification of one or more of the following general reasons for the appeal:
 - 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; or
 - The Hearings Official misinterpreted the Lane Code, Lane Manual, State Law, or other applicable criteria.
 - c. Statement that reconsideration of the decision is NOT requested pursuant to LC 14.080(1)(c)(vii)(ee).
 - d. Explain the specific issues being raised on appeal with sufficient specificity.
 - e. The position of the appellant indicating the issue raised in this appeal to the Board was raised before the close of the record at or following the final evidentiary hearing and whether the appellant wishes the application to be approved, denied, or conditionally approved.
 - f. Provide a written request that the Board not conduct an on the record hearing on the appeal and deem the Hearings Official decision the final decision of the County pursuant to LC 14.080(4)(d).
 - g. Any additional information in support of your appeal.

EXPLANATION OF THE APPEAL PROCESS UNDER OPTION 2

Please note that the Hearings Official has full discretion to affirm, modify or reverse his or her initial decision pursuant to LC 14.080(4)(c), and the Board may still elect to hear the appeal pursuant to LC 14.080(4)(d). 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. Typically, Board review through the "Elect Not to Hear" option occurs through the consent calendar. If Board discussion is desired, that item will be considered separately in an Elect to Hear appeal hearing conducted pursuant to LC 14.080(4)(d)(vii). 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-C
Eugene, OR 97401

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

Via Hand Delivery

November 19, 2018

Public Works Department
3050 North Delta Highway
Eugene OR 97408
(541) 682-3577

Re: Option 2 Appeal of Hearings Official decision in PA 17-05908

Names of the Appellants

LandWatch Lane County, an adversely affected or aggrieved party. LandWatch Lane County also participated before the Hearings Official.

Authorized Representative for Appellant:

Sean T. Malone
Attorney at Law
259 E. 5th Ave, Ste 200-C
Eugene OR 97401
Ph. (303) 859-0403
Fax (650) 471-7366
seanmalone8@hotmail.com

Identification of the Decision Sought to Be Reviewed

Appellant hereby appeals the Hearings Official's November 7, 2018, decision affirming, the Planning Director's decision in PA17-05908 (attached).

Appeal Option

Appellants request Option 2 as set forth in the County's appeal form. Appellants request that the Board not conduct a hearing on the appeal and deem the Hearing's Official decision the final decision of the County.

Appellants object to the use of criteria by the County contained in Chapter 14 that is a result of the recent Chapter 14 code amendments. The criteria for this application must be the criteria that existed at the time the application was deemed complete. The same is true of the appeal fee, which, at the time the application was deemed complete, was \$250. Appellants are, therefore, paying the \$950 appeal fee under protest.

Standing

Appellant has standing to appeal because appellant appeared before the Hearings Officer in writing and in person, as well as through their legal counsel.

Grounds for Appeal

The general reasons for the appeal, as set forth more specifically below, include that findings are not based on substantial evidence and that the decision misconstrued applicable law (including state law and Lane Code). Appellants set forth the following alternative grounds for denial on appeal, including but not limited to the following:

- The Hearings Official misconstrued applicable law and criteria and made inadequate findings not supported by substantial evidence, as outlined below:
 - The decision states that the subject property is located within a “peripheral,” not a “Major Big Game” area. Appellant agrees and never contested that finding in the Director’s decision. However, the decision also states that “Finding of Fact 14 of the PD staff report states that the subject property is located in a Major Big Game Area and this conclusion is not contested.” The Hearings Official goes on, relying on the mistake about the Big Game designation, to find that the staff decision contained a scrivener’s error and LC 16.212 that staff “was applying the finding to the approval criteria of LC 16.212(10)(a)(i). I believe the record supports a determination that these criteria have been met.” First, finding # 14 addresses Class I streams; finding # 12 is the applicable finding but it finds that the subject property is within an area designated Peripheral Big Game. Next the problem is that the staff applied (10)(a)(ii) because the Director found that the subject property is located in an area designated Peripheral, which it is, and that is supported by evidence in the record submitted by staff; (10)(a)(ii) applies for that reason; (10)(a)(i) applies in areas designated “Major Big Game.” The Hearings Official finding is in error, not supported by substantial evidence, and misconstrued applicable law.
 - The decision states that tax lot 501 also was from a portion of tax lot 1400 in 1992. That finding is not supported by substantial evidence. Tax lot 501 was created out of map# 20-04-1800-00500.
 - The decision acknowledges a 1994 LLV but fails to note it was verified in its pre-1992 division by deed configuration. The decision also notes that while the County policy at the time was not to send notice of LLVs, that policy was inconsistent with state law, which *Bowerman v. Lane County* has clarified.
 - The decision lacks substantial evidence to establish that the replacement dwellings after the fires were lawfully established. Appellant did not question the

lawfulness of the replacements because the application was made pursuant to (5)(b) and therefore there was no need to address whether the dwellings were lawfully established. The Hearings Official, however, changed the criteria that the applicant applied under from (5)(b) to (5)(a) in his decision which went through all the (a) criteria instead of the (b) criteria. The Hearings Official findings pursuant to (a) for LC 16.212(5)(a)(i)(aa) is not based on substantial evidence in the record. Indeed, the applicant never presented any information related to this criterion, and the appellant did not contest anything under (5)(a). The Hearings Official decision states that “the dwelling was constructed at a time prior to when building permits or land use approval was required.” However, the Hearings Official does not take into account that the replacement dwellings that the record says existed in 1952 and 1979 based on aerial photos. There is no evidence that the what existed in 1979 at a time when building permits were required, and which is presumably the current dwelling to be replaced, was lawfully placed. There is simply no evidence in the record that the dwelling was lawfully established in 1979.

- The applicant site plan does not show that the replacement dwelling is proposed to be located 1000 feet from adjacent property to the south. That finding is without substantial evidence.
- The reason the Director addressed (5)(b) is because that is what the applicant applied under. The Hearings Official unilaterally changed the application. The application and notice do not indicate, as the Hearings Official alleges, that (5)(a) is applicable. The Hearings Official made the case for (5)(a) unilaterally and the findings thereunder are not based on substantial evidence. (5)(a) was not addressed by staff, the applicant, or the appellant because the applicant did not apply under (5)(a). As it relates to all criteria under (5)(a), appellant reserves all arguments.
- Any finding that the application falls within Major Big Game is not supported by substantial evidence.
- The decision is not based on substantial evidence regarding the nearness/closeness of other dwellings. The Hearings Official relied on an aerial photo in the record but there are no measurements of the distances. The Hearings Official notes that dwellings across a county road and does not know what is located on tax lot 2300 because the record is devoid of evidence about the surrounding development. Footnote 2 is also in error as the soils map was provided by staff on October 18.
- The Hearings Official misconstrued applicable law in determining that the subject property is a legal lot. The subject property was created by an unlawful land division (i.e., partition). LUBA case law is clear that when a parcel is created through a partition, a new parcel is created. There is simply no basis in law or fact to find that the subject property was lawfully created.
- The subject property was created inconsistently with the minimum parcel size for the zone (i.e., the subject property was substandard to the zone).
- The Hearings Official misconstrued applicable law in relying on “good public policy” because that is not a policy enshrined in or arising from statute, rule, or code.

- All arguments (both written and oral) submitted on behalf of the appellants are incorporated by reference into this section of the appeal addendum as specific issues on appeal, including the attached comments and emails. This also includes the audio recording before the hearings official's hearing and other written submissions.

Incorporation by Reference

Appellants incorporate by reference all testimony – written and oral – as if set forth here in full in support of the appeal.

Reconsideration

Appellants specifically **DO NOT** request reconsideration of the Hearings Official decision.

Appeal Fee

Please find attached a check in the amount of \$950.00 for the appeal fee. As noted above, appellant believes the fee, in the amount of \$950, is not the correct fee, as noted above. However, appellant pays \$950 under protest.

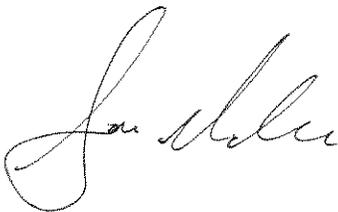
Copy of the Decision

A copy of the decision being appealed is attached hereto.

Position of Appellant

Appellants submitted all information containing all applicable arguments before the close of the record, and, as stated above, appellant incorporates those arguments herein.

Sincerely,



Sean T. Malone
Attorney for Appellant

cc: appellant



November 7, 2018

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

Re: Appeal of Planning Director approval of the Doughty request (PA 17-05908) for a replacement dwelling on tax lot 1400, assessor's map 20-05-13.

Dear Ms. Kaye:

Please find the Lane County Hearings Official's affirming the Planning Director's decision in the request (PA 18-05908) by Duane and Tonya Doughty for a replacement dwelling on tax lot 1400, assessor's map 20-05-13.

Sincerely,


Gary L. Darnielle
Lane County Hearings Official

cc: Rachel Serslev (file)

**LANE COUNTY HEARINGS OFFICIAL
APPEAL OF A PLANNING DIRECTOR APPROVAL OF A REPLACEMENT
DWELLING IN AN EXCLUSIVE FARM USE DISTRICT**

Application Summary

On November 9, 2017, an application for a special use permit to allow the replacement of a dwelling within an exclusive farm use district (E-40) was submitted to Lane County Land Management. On December 1, 2017, the Planning Director deemed the application complete and on April 4, 2018, the Director issued a determination that the subject property complied with the applicable standards and criteria pursuant to LC 16.212(5)(b). On April 16, 2018, a timely appeal was submitted by LandWatch Lane County.

Parties of Record

Duane & Tonya Doughty Lauri Segal	LandWatch Lane County	Andrew Mulkey
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Application History

Hearing Date: October 11, 2018
 (Record Held Open Until November 1, 2018)

Decision Date: November 7, 2018

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 16.212(5)(b)
Chapter 462, Oregon Laws 2013 (Formerly HB 2746)
OAR 660-033-0130(8)
ORS 215.213(1)(q) and (9)

Findings of Fact

1. The property subject to this application, hereinafter referred to as the "subject property," is located on tax lot 1400, assessor's map 20-05-13. It is located at 28072 Cottage Grove-Lorane Road, approximately 7.5 miles west of Cottage Grove, Oregon. The property is 10.33 acres in size and is 320 feet wide for most

of its length. The subject property is designated by the Lane County Rural Comprehensive Plan as Agriculture and is zoned E-40 consistent with the designation. The subject property was first zoned on February 12, 1980, which it was zoned EFU. The subject property is located within a "Peripheral," not a "Major Big Game" area. Surrounding properties to the north, west and south are zoned Exclusive Farm Use (E-40) while properties to the east are zoned Impacted Forest Lands (F-2).

The subject property was created as a separate parcel on September 27, 1943 by a warranty from Oral and Carolyn Crowe, grantors, to Jack and Frances Streimer, grantees. It was the southern remainder of the parcel described by warranty deed found in Book 337, Page 221, Lane County deeds and records after the conveyance by bargain and sale deed of a road dated December 17, 1956 and recorded on Reel 93, Instrument 2941. Also, a small cemetery parcel was excepted out of the 1943 conveyance.

In 1992, a portion of tax lot 1400 was conveyed to create tax lot 1401, labeled Tract II, and tax lot 501, labeled Tract I. (See warranty deed Reel 1815, Instrument 9274391, Lane County Deeds and Records.) The labeling of the property transferred as tracts is an indication of a transfer of two properties not an attempted property line adjustment. In this transaction, Delvin and Jenny Doughty transferred property to Darren and Alisa Kronberger. The Appellant alleges that Kronbergers did not own the property that was adjacent to the transferred property (tax lot 1501) and therefore this constituted an illegal division of the parent property not a property line adjustment. There is nothing in the record to indicate that the Kronberger's owned land adjacent to either tax lot 1401 or 501 and therefore this transaction could not have been a property line adjustment.

Lane County land division regulations did not affect the subject property until March of 1975. The subject property was verified as a legal lot on July 28, 1994 via PA 2300-94 although this decision was not noticed, consistent with Lane County's policy at this time.

2. The dwelling to be replaced was constructed sometime in the early 1900s. The structure was burned in the 1950s and in the 1976/1977 time periods but was replaced each time in its original location. A July 22, 1952 and a May 13, 1979 aerial photograph show the dwelling and a barn on the subject property. The record documents that the existing dwelling has intact exterior walls and roof structure, indoor plumbing consisting of a kitchen sink, toilet and bathing facilities connected to a sanitary waste disposal system, interior wiring for interior lighting and a heating system. The dwelling (manufactured home) has been assessed as a residential structure for the five years previous to the submission of this application for a replacement dwelling.

The replacement dwelling is proposed to be located 100 feet from adjacent property to the west, 1000 feet from adjacent property to the south, and 10 feet from adjacent property to the east. The Applicant has warranted that the existing dwelling will be removed or demolished.

Decision

THE PLANNING DIRECTOR'S DECISION APPROVING THE REQUEST (PA 17-05908) BY DUANE AND TONYA DOUGHTY FOR A SPECIAL USE PERMIT FOR A REPLACEMENT DWELLING ON TAX LOT 1400, ASSESSOR'S MAP 20-05-13 IS AFFIRMED.

Justification for the Decision (Conclusion)

To address the allegations of error, it is important to start with a clear idea of which approval standards apply. Chapter 462, Oregon Laws 2013 (the Act) has primacy as it has essentially defined the nature of replacement dwellings allowed under ORS 215.213(1)(q). OAR 660-033-0130(8) clarifies a portion of the Act and Lane Code 16.212(5) is an attempt to implement the Act and the administrative rule through the Code.

Under Section 2 of the Act, a dwelling may be "*altered, restored or replaced*" if it (1) "*has, or formerly had*" five listed structural features and (2) either proof of appropriate property tax assessment data or proof that the structure was destroyed or demolished. Subsection 2(4) of the Act requires that the dwelling to be replaced be "*removed, demolished or converted*" within one year of the replacement dwelling being certified for occupancy. This section, which is implemented by Lane Code 16.212(5)(b), allows the replacement dwelling to be sited on any part of the same lot or parcel and requires that it comply with applicable siting standards.

The application for this permit, which relies upon a supporting narrative, does not specifically state that it is for a "deferred" replacement dwelling permit and the Lane Code does not implement Subsection (7) of Section 2 of Chapter 462, Oregon Laws 2013. That is, neither Lane Code 16.212(5)(a) or (b) address a situation where a permit becomes void unless the dwelling to be replaced is removed or demolished within three months of the issuance of the permit or where there is a restriction on the transfer of the permit. The main difference between the two sections of the Code is that the former addresses situations where the alteration, restoration or replacement occurs in the same site of a lawfully established dwelling and the latter allows the replacement dwelling to be sited on any part of the same lot or parcel.

The Appellant has raised several allegations of error regarding the Director's decision. These allegations are addressed below:

1. *The staff report is confusing as it appears to apply the standards of both LC 16.212(5)(a) and (b).*

Lane Code 16.212(5)(a) contains standards for replacement dwellings that are located on the “same site” as that of the dwelling being replaced. Lane Code 16.212(5)(b) contain standards for replacement dwellings that are located on the same property but not on the “same site” as that of the dwelling being replaced. In the present case, the Applicant is replacing the existing dwelling within the “same site” area, or a square area with dimensions of 200 feet centered on the existing dwelling. The Applicant’s same site area is not a uniform 200 feet by 200 feet because the location of the existing dwelling prevents this due to its proximity to the Cottage Grove – Lorane Road and the narrowness of the subject property.

It is not clear why the Director addressed the criteria of LC 16.212(5)(b). However, the application and notice indicate that LC 16.212(5)(a) is applicable and the Director’s decision can be affirmed if sufficient evidence exists in the record to demonstrate compliance with these standards.

LC 16.212(5)(a)(i)(aa)

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

The dwelling on the subject property was constructed at a time prior to when building permits or land use approval was required. The subject properties EFU zoning was first applied on February 12, 1980.

LC 16.212(5)(b) provides that if the alteration, restoration, or replacement of a lawfully established dwelling does not meet the requirements in LC 16.212(5)(a)(i) or (iii) it is allowed subject to prior submittal and approval of an application pursuant to Type II procedures of LC Chapter 14, and there is objective evidence demonstrating that the existing dwelling was lawfully placed on the subject property. The Applicant has demonstrated the existence of the dwelling based upon affidavits of neighbors and former property owners, and historical aerial photos taken in 1952 and 1979.

LC 16.212(5)(a)(ii)

The dwelling has: (aa) intact exterior walls and roof structure; and (bb) indoor plumbing consisting of a kitchen sink, toilet and bathing facilities connected to a

sanitary waste disposal system; and (cc) interior wiring for interior lights; and (dd) a heating system;

Photos submitted by the Applicant and Assessment and Taxation records indicate that the existing dwelling has intact exterior walls and roof structure, indoor plumbing consisting of a kitchen sink, toilet and bathing facilities connected to a solid waste disposal system, interior wiring for interior lighting, and a heating system.

LC 16.212(5)(a)(iii)

In the case of replacement, the new dwelling must be sited in the same site as the dwelling to be replaced. For the purpose of LC 16.212(5)(a)(iii) above, “the same site” is defined as a square with dimensions of 200 feet which is centered on the footprint of the established dwelling.

The Applicant’s site plan has defined the “same site” and the location of the replacement dwelling is constrained by this area. In this respect, the “same site” is not a perfect square as its western and northern boundaries are constrained by proximity of the existing home to the Cottage Grove–Lorane Road.

LC 16.212(5)(a)(iv)

In the case of replacement, the dwelling to be replaced must be removed, demolished, or converted to an allowable nonresidential use within one year of the completion of the replacement dwelling.

This has been made a condition of approval. In addition, conditions of approval require that the Applicant record a statement with the Lane County Department of Deeds and Records attesting that the dwelling to be replaced has been removed, demolished or converted and that approval from the permitting authority must be obtained if the dwelling is removed to a location other than the subject property.

LC 16.212(5)(a)(v)

A dwelling established under this section must comply with all applicable siting standards in LC Chapter 16.

LC 16.212(10) requires that uses or activities allowed by LC 16.212(3) through (9), except for farm use, shall comply with the requirements in LC 16.212(10)(a) through (d).

LC 16.212(10)(a)(i)¹ Dwellings and development accessory to residential uses allowed under LC 16.212(3)(z)(iii) to be sited upon tracts located within an area designated by the Department of Fish and Wildlife Habitat Maps as “Major” shall be sited as follows:

(aa) Near dwellings on other tracts.

An aerial photograph² of the subject property shows that the site of the replacement dwelling is located near existing dwellings to the northwest (Rural Address of 27997 Cottage Grove Lorane Road) and northeast (Rural Address of 2807 Cottage Grove Lorane Road). There is also a structure to the southwest of the development site on tax lot 3200 but it is unclear whether this structure is a residence. Regardless, the replacement dwelling's location is closest to existing dwellings in the area around the subject property.

(bb) With minimal intrusion into forest areas undeveloped by non-forest uses.

The replacement dwelling site is already devoid of trees and is occupied by the existing mobile home, three sheds, a garage, a barn, and a septic area. A forested area exists to the east of the site on tax lot 501 and tax lot 1401, to the south, is heavily forested. Tax lot 1401 is also largely occupied by a Major Big Game Range designation.

(cc) Where possible, when considering LC 16.212(10)(a) (i)(aa) and (bb) above and the dimensions and topography of the tract, at least 500 feet from the adjoining lines of property zoned F-1 and 100 feet from the adjoining lines of property zoned F-2 or EFU.

Property to the west and south are zoned for Exclusive Farm Use. The “same site” area is 100 feet or more from the borders of these properties. Property to the east is zoned F-2 and the setback from the “same site” area is only 10 feet. However, the dimensions of the parcel in conjunction with the need to center the “same site area” on the existing dwelling force a lesser setback than required. The EFU-zoned property to the north is more than 100 feet from the edge of the “same site area” due to a 40-foot setback from the road and the 60-foot width of the road right-of-way.

¹ LC 16.212(10)(a)(i) is applicable because a portion of the subject property is located within a Major Big Game Range.

² “Exhibit 3: Soils Map” received from the Applicant by the Land Management Division on October 17, 2018.

LC 16.212(10) also requires that uses or activities allowed by LC 16.212(3)(z)(iii) and (4) through (9) shall comply with the development requirements in LC 16.212(10)(f) through (h) or (j) when compliance is expressly required by LC 16.212(4) through (9).

Compliance with LC 16.212(10)(h) is explicitly required by LC 16.212(5)(a)(vii). See below.

LC 16.212(5)(a)(vi)

An accessory farm dwelling authorized pursuant to LC 16.212(6)(b) or (7)(e) below may only be replaced by a manufactured dwelling;

This criterion is not applicable.

LC 16.212(5)(a)(vii)

LC 16.212(10)(h) below;

LC 16.212(10)(h): The Director shall require as a condition of approval that the landowner for the dwelling sign and record in the Lane County deed records a document binding the landowner, and the landowner's successors in interest, prohibiting them from pursuing a claim for relief or cause of action alleging injury from farming or forest practices for which no action or claim is allowed under ORS 30.936 or 30.937.

This criterion has been made a condition of approval.

LC 16.212(5)(a)(viii)

The approval described in LC 16.212(5)(a) above is not subject to LC 14.090 and does not expire.

This criterion has been made a condition of approval.

LC 16.212(5)(ix)

If a replacement dwelling approval was issued under LC 16.212(5)(a) and expired prior to January 1, 2014...

This criterion is not applicable.

This allegation of error is dismissed.

2. ***The Planning Director's decision represented a deferred replacement dwelling permit and violated Subsection (7)(a)(A) of Section 2, Chapter 462, Oregon Laws 2013 because it did not restrict the transfer of the permit by the applicant to a spouse or child of the applicant.***

The Lane Code does not implement the deferred replacement dwelling provisions of Chapter 462, Oregon Laws 2013. The language of Section 2(7)(a)(A), Chapter 462, Oregon Laws 2013 regarding permit expiration does not define a deferred replacement permit but characterizes it by way of several limitations that must accompany its issuance.³ Thus, Section 2(7)(a)(A) and (B) requires that the dwelling to be replaced must be removed or demolished within three months after the issuance of the permit and places restrictions on the transferability of the permit. These latter limitations are not present in the Director's decision. The application does not request a deferred replacement dwelling permit and it is clear that there is no intent on the Planning Director's part to characterize or approve the application as a request for a deferred replacement permit.

This allegation of error is dismissed.

3. ***The Planning Director is wrong to conclude that a special use permit for a replacement dwelling do not require a determination that the subject property was lawfully created.***

ORS 215.213(1)(q) allows the "alteration, restoration or replacement of a lawfully established dwelling" subject to Section 2, Chapter 462, Oregon Laws 2013. Subsection 2(4) of Chapter 462, Oregon Laws 2013, which was added to and made a part of ORS 215.203 to 215.311, requires that the replacement dwelling be sited on the same lot or parcel and requires that it comply with applicable siting standards. LUBA has determined that when the word "parcel" is used in ORS Chapter 215, the parcel must be a lawfully created parcel.⁴ The Appellant is correct that the parcel upon which the dwelling to be replaced must have been lawfully created.

The Appellant argues that the subject property is not a legal lot. It points to the 1992 warranty deed transaction that created tax lot 1401. As the county had no property line adjustment regulations at this time, the transfer could be viewed as a 'de facto' property line adjustment if it was to the owner of adjacent tax lot 1501. Unfortunately, this does not appear to be the case. Neither did the warranty deed conform to ORS 92.190(4) (1992) that required that a property line adjustment deed contain a description of the adjusted line, as well as other requirements.

³ The Director argues that the deferred replacement dwelling provisions are not operative until January 2, 2024. This is incorrect. Section 10 of the Act states that Sections 7 through 9 of the Act do not become operative until that date. However, the deferred replacement dwelling provisions are found in Section 2, Subsection (7) of the Act, not Section 7, and are current law.

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

The Appellant then points to the LUBA case of *Hartmann v. Washington County*⁵ for the proposition that the illegal land division had the effect of creating two new lots; divorcing the parent parcel of its legal lot status. The *Hartmann* case is inopposite as it concerned an appeal of a denial of a request for a nonfarm parcel on a piece of land that was the remainder of a parcel partitioned in 1994. LUBA upheld the denial on the basis that the ‘remainder’ of a partition was a new parcel whose “date of creation” was the date of the partition approval.⁶ LUBA relied upon OAR 660-033-0020(4) that defines a “date of creation” to be:

“When a lot, parcel or tract is reconfigured pursuant to applicable law after November 4, 1993, the effect of which is to qualify a lot, parcel or tract for the siting of a dwelling, the date of the reconfiguration is the date of creation or existence. Reconfiguration means any change in the boundary of the lot, parcel, or tract.”

The Appellant is arguing that the 1992 transaction had the effect of creating two new parcels. The fallacy with this argument is that, as demonstrated by the Appellant, the division of the property was not made “pursuant to applicable law” nor was it reconfigured after November 4, 1993. As I indicated in the *Johnson* case⁷, an illegal division of a lawfully created parcel does not negate the lawful status of that parcel but rather voids the development potential, for land use purposes, of the newly created parcel. No new parcel is created because the division is inconsistent with applicable land division law. Further, I would posit that the argument presented by the Appellant is contrary to good public policy. Following the Appellant’s argument, the illegal division of a substandard and vacant parcel zoned EFU would create two parcels that were not lawfully created and I know of no way under current law to cure that defect.⁸ The Appellant’s solution is punitive in that there is no valid purpose served by the creation of dead parcels. The obvious method of correcting an invalid land division is for the recipient of the newly “created” parcel to sue the seller to rescind the transaction. In the interim, the buyer would not be able to develop his or her parcel.

This decision makes a distinction between the verification of a parcel as a “legal lot” and the lawfully established status of that parcel. The subject property, tax lot 1400, could not be verified as a legal lot in its current configuration because of the illegal division of the property that resulted in the creation of tax lot 1401. Nevertheless, there is no argument that tax lot 1400 was lawfully created in 1943.

⁵ *Hartmann v. Washington County*, 36 Or LUBA 442 (1999)

⁶ OAR 660-033-0130(4)(a)(C) requires that the nonfarm dwelling be sited on a parcel or lot created before January 1, 1993.

⁷ *Application of Vernie Johnson*, Lane County Hearings Official Decision in PA 18-05191 (10/10/2018).

⁸ Generally speaking, ORS 92.176 provides for the validation of a unit of land if an otherwise illegal sale could have complied with applicable criteria or the property had an existing dwelling permitted by the jurisdiction.

If the replacement dwelling was to be placed upon tax lot 1401 then the application would have to be denied because that parcel was not lawfully created. Nor could that parcel be verified as a legal lot.

This allegation of error is dismissed.

4. *The Planning Director applied the siting standards of LC 16.212(10)(a)(ii)(aa-bb) instead of LC 16.212(10)(a)(i)(aa-cc).*

The siting standards of LC 16.212(10)(a)(i) apply to dwellings sited upon tracts located within an area designated by the Department of Fish and Wildlife Habitat Maps as "Major." The siting standards of LC 16.212(10)(a)(ii) apply to dwellings located on tracts not located on areas designated as being major wildlife habitat. Finding of Fact #14 of the Planning Director's staff report state that the subject property is located in a Major Big Game area and this conclusion is not contested.

The confusion arises when the last paragraph on page 10 of the staff report notes that the application complies with LC 16.212(10)(a)(ii). However, Finding #14 acknowledges that the proposed location of the replacement dwelling is closer to the residential development on the RR-1 zoned properties, located to the west of the destroyed dwelling's location, and more than 100 feet from adjacent properties zoned EFU. The staff findings do not specifically address LC 16.212(10)(a)(i)(bb) regarding intrusion into forest areas undeveloped by non-forest uses. However, an aerial photograph submitted by the Applicant that locates various existing and proposed features on the subject property demonstrates that the proposed site for the replacement dwelling is already impacted by non-forest uses. The illustrated photograph shows that the proposed dwelling will be located in an area of primarily open space near the demolished home and near an existing gravel road and old septic tank and drainfield. In conclusion, it is clear that the citation to LC 16.212(10)(a)(ii) is a scrivener's error and that staff was applying the finding to the approval criteria of LC 16.212(10)(a)(i). I believe that the record supports a determination that these criteria have been met.

This allegation of error is dismissed.

Summary

I agree with the Director's that her decision cannot be characterized as an approval for a deferred replacement dwelling permit because the Lane Code does not provide for this alternative and the decision did not contain the provisions that are required under Section 2(7)(a), Chapter 462, Oregon Laws 2013 for a deferred replacement permit. Further, I believe that the subject property is a legal lot because it did not lose that status merely

because it was illegally divided without partition approval. Finally, I believe that the application adequately addresses the applicable siting standards of LC 16.212(10) and the standards of LC 16.212(5)(a)(i).

Respectfully Submitted,



Gary Darnielle
Lane County Hearings Official

NOTICE OF PENDING LAND USE DECISION
BY THE LANE COUNTY PLANNING DIRECTOR

Date:	_____
Department File:	509-PA17-05908
Owner/Applicant:	Duane & Tonya Doughty
Assessor's Map & Tax Lot:	20-05-13-00-01400
Address:	28072 Cottage Grove – Lorane Road, Cottage Grove, OR 97424
Acreage:	10.33 acres
Base Zone:	Exclusive Farm Use Zone (E-40)
Comprehensive Plan:	Lane County Rural Comprehensive Plan (/RCP)

You own or occupy property near the above referenced property that is the subject of a land use application and pending decision for conditional **Approval** of this application by the Lane County Planning Director.

Notice to mortgagee, lien holder, vendor or seller: ORS Chapter 215 requires that if you receive this notice, it must be forwarded to the purchaser.

The purpose of this notice is to inform you about the proposal and pending decision, where you may receive more information, and the requirements if you wish to appeal the pending decision by the Director to the Lane County Hearings Official. Any person who is adversely affected or aggrieved or who is entitled to written notice may appeal the decision by filing a written appeal in the manner and within the time period as provided below. Mailing of this notice to you precludes an appeal directly to the Land Use Board of Appeals.

PROPOSAL: A request for Director approval of a replacement dwelling that does not meet the requirements of Lane Code 16.212(5)(a)(i) or (iii) in the Exclusive Farm use Zone (E-40), pursuant to Lane Code 16.212(5)(b) and 16.212(10).

Enclosed is a site plan showing the proposed location of the replacement dwelling, outbuildings, and the driveway access.

The proposed use that could be authorized by approval of the land use application is: one (1) replacement single family dwelling.

The application, all documents and evidence relied upon by the applicant, the applicable criteria, and a copy of the Lane County Planning Director's report are available for inspection at the Lane County Land Management Division at no cost, and copies will be provided at reasonable cost. The name of the Lane County Land Management Division representative to contact **Rachel Serslev** and the telephone number where more information can be obtained is **(541) 682-6903**.

This decision will become final at the end of business day on _____ unless before this time a completed **APPLICATION FOR AN APPEAL OF A DECISION BY THE PLANNING DIRECTOR** form is submitted to and received by the Lane County Land Management Division. **This form is enclosed and must be used if you wish to appeal this decision.**

1. To complete this form, fill in the required information and attach to it all of the materials and information required on the appeal form.
2. Then, submit the completed form to Lane County Planning Director so that it is received by him or her prior to the above mentioned time that the decision becomes final.
3. The Lane County Planning Director shall reject an appeal if it is not received prior to the time that the decision becomes final or if it is not complete.

Failure of an issue to be raised in a hearing, in person or in writing, or failure to provide statements of evidence sufficient to afford the Approval Authority an opportunity to respond to the issue precludes raising the issue in an appeal to the Land Use Board of Appeals.

Prepared by: _____ **Date:** _____
 Rachel Serslev, Planner

Authorized by: _____ **Date:** _____
 Keir Miller, Planning Supervisor
 for Lydia Kaye, Planning Director

EXHIBITS

- Exhibit A:** Conditions of Approval
- Exhibit B:** Vicinity Map
- Exhibit C:** Site Plan

Exhibits below are mailed to the Applicant only. Copies are available upon request. Please contact staff at (541) 682-4287.

- Exhibit D:** Staff Report
- Exhibit E:** Comments from Lane County Transportation Planning, dated December 15, 2017
- Exhibit F:** Comments from LandWatch Lane County, dated December 15, 2017
- Exhibit G:** Farm Use and Forest Management Easement
- Exhibit H:** Property Description Card

EXHIBIT A

CONDITIONS OF APPROVAL

509-PA17-05908

All of the following conditions are binding on the applicant or successive owner(s) of the parcel or successive applicant(s) who exercise this approval action.

1. Permit **509-PA17-05908** is not subject to LC 14.700 and does not expire pursuant to Lane Code 16.212(5)(b)(viii).

The following conditions shall be met prior to issuance of a building permit. Failure to meet conditions of approval as specified shall invalidate this approval, and the development rights conditionally allowed by this planning action shall cease:

2. Complete, notarize, and record a Farm and Forest Management Practices Easement for the subject property (**Exhibit G**). The easement is to be submitted to and recorded by Lane County Deeds and Records. A copy of the signed, notarized and recorded Farm and Forest Management Practices Easement must be submitted to Lane County Land Management Division.
3. The removal, conversion, or demolition of the existing dwelling and the proposed replacement dwelling must meet all applicable building and sanitation code and permitting requirements. If the existing dwelling is to be converted to a guest house, the cooking facilities must be removed from the kitchen. A building permit is required to change the use of the structure from a dwelling to a guest house.
4. Per LC 16.212(5)(b)(iii)(bb), if the dwelling is removed by moving it off the subject parcel to another location, the applicant must obtain approval from the permitting authority for the new location.
5. Once conditions 2-4 are completed, submit a building or placement permit application for the replacement dwelling. Contact the Building Program at (541) 682-4651 and the On-Site Wastewater management Program at (541) 682-3754 with questions regarding building and sanitation requirements. To schedule the Permit Review Meeting in which application for a building permit is made, please call (541) 682-3577 or visit the Planner on Duty in the Land Management Division office in the Customer Service Center at 3050 N. Delta Hwy., Eugene, Oregon.
6. In the building or placement permit application submittal, the applicant must submit a Site Plan demonstrating that the parcel configuration, proposed dwelling, driveway, and septic system, are located as on the approved Site Plan, unless modified by the Planning Director. At the discretion of the Planning Director, any deviation from the approved Site Plan may require an application for the Modification of Conditions.
7. Per LC 16.212(5)(b)(iii), the dwelling to be replaced must be removed, demolished, or converted to an allowable nonresidential use within **one year** of the completion of the replacement dwelling. If the dwelling to be replaced is in such a state of disrepair that the structure is unsafe for occupancy or constitutes an attractive nuisance, the county may require the structure to be removed,

demolished, or converted before a date set by the county that is not less than **90 days** after the replacement permit is issued.

8. The applicant must record a statement at Lane County Deeds and Records that the dwelling to be replaced has been removed, demolished, or converted.

The following conditions are provided for informational purposes and shall be fulfilled as they apply to the proposed development:

9. Per LC 15.515, storm water runoff from private property shall not be directed to the Lane County road right-of-way or into any Lane County drainage facility including roadside ditches. Ditches adjacent to Lane County roads are designed solely to accommodate roadway storm water runoff.
10. Per LC 15.205, any work (e.g. utility trenches, culverts, driveways) within the right-of-way will require a Facility Permit.
11. The following is provided for informational purposes as an **Advisory Notice**: Section 93.040(1) of the Oregon Revised Statutes requires the following statement to be included in the body of any instrument transferring or contracting to transfer fee title to real property:

"THIS INSTRUMENT WILL NOT ALLOW USE OF THE PROPERTY DESCRIBED IN THIS INSTRUMENT IN VIOLATION OF APPLICABLE LAND USE LAWS AND REGULATIONS. BEFORE SIGNING OR ACCEPTING THIS INSTRUMENT, THE PERSON ACQUIRING FEE TITLE TO THE PROPERTY SHOULD CHECK WITH THE APPROPRIATE CITY OR COUNTY PLANNING DEPARTMENT TO VERIFY APPROVED USES AND TO DETERMINE ANY LIMITS ON LAWSUITS AGAINST FARMING OR FOREST PRACTICES AS DEFINED IN ORS 30.930."

This Oregon Law disclosure requirement serves a constructive purpose. Approval of a residence for this property is contingent upon compliance with the conditions of the special use permit, and any future owners of the subject property need to understand and adhere to these conditions. This disclosure statement should alert the cautious and potential purchaser to inquire with the Lane County Land Management Division about the conditions of this special use permit.

EXHIBIT D**STAFF REPORT****509-PA17-05908**

Date:	
Department File:	509-PA17-05908
Owner/Applicant:	Duane & Tonya Doughty
Assessor's Map & Tax Lot:	20-05-13-00-01400
Address:	28072 Cottage Grove-Lorane Road, Cottage Grove, OR 97424
Acreage:	10.33 acres
Base Zone:	Exclusive Farm Use Zone (E-40)
Comprehensive Plan:	Lane County Rural Comprehensive Plan (/RCP)

I. PROPOSAL

A request for Director approval of a replacement dwelling that does not meet the requirements of Lane Code 16.212(5)(a)(i) or (iii) in the Exclusive Farm use Zone (E-40), pursuant to Lane Code 16.212(5)(b) and 16.212(10).

II. BACKGROUND INFORMATION

On November 9, 2017, the applicant requested Director review of a replacement dwelling in the 'same site' area to the Lane County Land Management Division. The application was reviewed and accepted as complete on December 1, 2017.

On December 5, 2017, referral responses were solicited from affected agencies, service providers and surrounding property owners. Comments from agencies and service providers as they relate to the applicable criteria are incorporated in the findings and decision below. Copies of all written comments are included in the application file for this proposal and are also incorporated herein by reference.

III. PROPERTY DESCRIPTION AND PROPOSAL

- A. LOCATION:** The subject property is identified as Assessor's Map 20-05-13, Tax Lot 1400, and is located at 28072 Cottage Grove-Lorane Road and is located approximately 7.5 miles west of Cottage Grove, Oregon. The property has approximately 380 feet of linear frontage along Cottage Grove-Lorane Road which abuts the northern property line of the subject property.
- B. SITE DESCRIPTION AND SURROUNDING USES:** The subject property is designated Agricultural on the Rural Comprehensive Plan. Consistent with that designation, the property is zoned Exclusive Farm Use (E-40). Surrounding properties to the north, west, and south are also zoned Exclusive Farm Use (E-40), and the property to the east is zoned Impacted Forest (F-2).

IV. APPROVAL CRITERIA & FINDINGS OF FACT

The purpose of this report is to verify if the above referenced dwelling complies with the applicable requirements of Lane Code 16.212(5)(b) and Lane Code 16.212(10). The code language is in **boldface type, followed by the Findings of Fact.**

(5) **Allowable Residential Uses On High Value Farmland or Land That Is Not High Value Farmland. The following residential uses are allowed on high value farm land or land that is not high value farmland subject to compliance with the general provisions and exceptions specified by this Chapter of Lane Code and compliance with the requirements in LC 16.212(5)(a) through (d) below. Final approval of a non-farm use authorized under LC 16.212(5) below will not be given unless any additional taxes imposed on the change in use have been paid. On January 2, 2024, the provisions in LC 16.212(5)(a) and (b) (adopted to enact HB 2746) will sunset and the previous replacement dwelling provision will be reintroduced unless otherwise acted upon by the legislature (Ordinance No.14-08).**

(b) **The alteration, restoration, or replacement of a lawfully established dwelling that does not meet the requirements in LC 16.212(5)(a)(i) or (iii) above is allowed subject to prior submittal of an application pursuant to LC 14.050, approval of the application by the Director pursuant to LC 14.100 provide written notice of the decision and an opportunity for appeal, and compliance with these requirements:**

(i) **There is objective evidence demonstrating that the existing dwelling was lawfully placed on the subject property. The burden of proof is upon the applicant to provide this evidence to the Director;**

(aa) **The dwelling was assessed as a dwelling for purposes of ad valorem taxation for the previous five property tax years, or, if the dwelling has existed for less than five years, from that time.**

(bb) **If the value of the dwelling was eliminated from the tax roll as a result of the destruction of the dwelling, provide evidence the dwelling was assessed as a dwelling until such time as the value of the dwelling was eliminated. Destruction can include by fire, natural hazard, or by a demolition permit.**

(cc) **If the value of the dwelling was improperly removed from the tax roll by a person other than the current owner, provide evidence. "Improperly removed" means that the dwelling has taxable value in its present state, or had taxable value when the dwelling was first removed from the tax roll or was destroyed by fire or natural hazard, and the county stopped assessing the dwelling even though the current or former owner did not request removal of the dwelling from the tax roll.**

Finding 1.

Based on evidence submitted by the applicant, staff finds that a dwelling has consistently been located on the subject property prior to zoning or land use regulations. The date that subarea zoning was first enacted was February 12, 1980, which applied EFU zoning to the subject property under Ordinance 772.

Lane County Assessment and Taxation Records indicate that the dwelling to be replaced has been assessed as a dwelling for purposes of ad valorem taxation for the previous five property tax years.

Other evidence submitted by the applicant that supports existence of a dwelling on the subject property includes affidavits from neighbors and former property owners, and historical aerial photos. The applicant submitted letters from the previous owner of the property which states that a home has been on the property since the early 1900's. In both the 1950's and in 1976/1977 the dwelling on the property at the time had burned, but was replaced each time in the same location. Neighbors of the subject property attest to a fire that destroyed the residence in 1977, and to the continued existence of a dwelling on the subject property. Aerial photos from July 22, 1952 and May 13, 1979 show two structures on the subject property. Both structures visible on the air photos are located in approximately the same location as the existing manufactured home and barn currently existing on the subject property. Staff finds that the evidence submitted is sufficient to demonstrate existence of a dwelling on the subject property prior to the enactment of zoning in the area.

(ii) The dwelling has or formerly had:

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

Finding 2. Evidence submitted by the applicant (written statement and photos) and Assessment and Taxation records are accepted as evidence that the existing residence has intact exterior walls and roof structure, indoor plumbing consisting of a kitchen sink, toilet and bathing facilities connected to a sanitary waste disposal system, interior wiring for interior lighting, and a heating system. Therefore, staff finds that these criteria are met.

- (iii) The dwelling to be replaced must be removed, demolished, or converted to an allowable nonresidential use within one year of the completion of the replacement dwelling. If the dwelling to be replaced is in such a state of disrepair that the structure is unsafe for occupancy or constitutes an attractive nuisance, the county may require the structure to be removed, demolished, or converted before a date set by the county that is not less than 90 days after the replacement permit is issued.**

Finding 3. The applicant plans to remove or demolish the existing dwelling. This criterion has been made a condition of approval.

- (aa) The applicant must record a statement at Lane County Deeds and Records that the dwelling to be replaced has been removed, demolished, or converted.**

Finding 4. This has been made a condition of approval.

- (bb) If a dwelling is removed by moving it off the subject parcel to another location, the applicant must obtain approval from the permitting authority for the new location.**

Finding 5. This has been made a condition of approval.

- (iv) A replacement dwelling may be sited on any part of the same lot or parcel. A dwelling established under this section must comply with all applicable siting standards in LC Chapter 16. However, the siting standards cannot be applied in a manner that prohibits the siting of the dwelling. If the dwelling to be replaced is located on a portion of a lot or parcel not zoned Exclusive Farm Use, the applicant, as a condition of approval, must execute and record in Lane County Deeds and Records a deed restriction prohibiting the siting of a dwelling on that portion of the lot or parcel. The restriction imposed is irrevocable unless a statement of release is placed by the Director in the Lane County deed records. The Applicant must obtain the signature of the Director on the release which states that the provisions of this subsection regarding replacement dwellings have changed to allow the siting of another dwelling. The Director shall maintain a record of the lots or parcels that do not qualify for the siting of a dwelling under the provisions of this subsection, including a copy of the deed restrictions and release statements filed under this section;**

Finding 6. The applicant states that the existing dwelling to be replaced will be demolished or removed from the subject property.

The existing dwelling is located on Assessor's Map 20-05-13, Tax Lot 1400. The replacement dwelling is also proposed to be located on Tax Lot 1400, in the 'same site' area. It is not Lane County's practice to require a legal lot verification application for a replacement dwelling. Staff reviewed the property description card for Tax Lot 1400 (**Exhibit H**). According to the legal description, the applicant's site plan and other materials in the record, staff has concluded that the existing dwelling and the proposed dwelling locations are both located on the same parcel, tax lot 1400.

- (v) If the dwelling formerly had features described in LC 16.212(5)(b)(ii), was removed from the tax roll as described in LC 16.212(5)(b)(i)(bb) or (cc), or has a replacement dwelling permit that expired before January 1, 2014, then the replacement dwelling must comply with the following:**
- (aa) Be sited on the same lot or parcel; and**
 - (bb) Use all or part of the footprint of the replaced dwelling or near a road, ditch, river, property line, forest boundary or another natural boundary of the lot or parcel as permitted by LC Chapters 15 and 16; and**
 - (cc) If possible, for the purpose of minimizing the adverse impacts on resource use of land in the area, site dwelling within a concentration or cluster of structures or within 500 yards of another structure.**

Finding 7. As evidenced by the applicant's submittals (written statement and photos) and Assessment and Taxation records, the dwelling has the features described in LC 16.212(5)(b)(ii). Also see **Finding 2**. The manufactured home has not been removed from the tax rolls as described in LC 16.212(5)(b)(i)(bb) or (cc), as evidenced by Assessment and Taxation records included in the application file and incorporated herein by reference. A replacement dwelling permit for the subject property has not been previously issued or expired. Therefore, the above criteria do not apply.

- (vi) **An accessory farm dwelling authorized pursuant to LC 16.212(6)(b) or (7)(e) below may only be replaced by a manufactured dwelling;**

Finding 8. The existing dwelling was not authorized or constructed pursuant to LC 16.212(6)(b) or (7)(e). This criterion is not applicable.

- (vii) **LC 16.212(10)(h) below; and**

Finding 9. This criterion has been made a condition of approval. Also see **Finding 15**.

- (viii) **Land use approval of a decision described in LC 16.212(2)(b) above is not subject to LC 14.700 and does not expire.**

Finding 10. Staff note that the above criterion reference LC 16.212(2)(b), a definition for "Date of Creation and Existence." The reference to LC 16.212(2)(b) appears to be a scrivener's error and the above criterion appears to apply to LC 16.212(5)(b), which is the subject of this application.

The criterion above has been made a condition of approval.

- (ix) **If a replacement dwelling decision was issued under LC 16.212(5)(b) and expired prior to January 1, 2014, the decision is to be deemed valid and effective if prior to January 1, 2015, the applicant:**
- (aa) **Removes, demolishes or converts the dwelling to be replaced to an allowable nonresidential use; and**
- (bb) **Record at Lane County Deeds and Records a statement that the dwelling to be replaced has been removed, demolished or converted.**

Finding 11. A replacement dwelling was not previously issued and/or expired under LC 16.212(5)(b). The above criteria do not apply.

V. DEVELOPMENT SITING STANDARDS

- (10) **Development Requirements. Uses or activities allowed by LC 16.212(3) through (9) above, except farm use, shall comply with the requirements in LC 16.212(10)(a) through (d) below. Uses or activities allowed by LC 16.212(3)(z)(iii) and (4) through (9) above shall comply with the development requirements in LC 16.212(10)(f) through (h) or (j) below when compliance is expressly required by LC 16.212(4) through (9) above.**

- (a) For approval of a use or activity allowed by LC 16.212(4) through (9) above that requires notice and the opportunity for appeal or a hearing, the Approval Authority shall balance the setback requirements of LC 16.212(10)(a) below with the applicable special use approval requirements in LC 16.212(3)(z) and (4) through (9) in order to minimize adverse impacts upon nearby farm and forest uses or to assure optimal siting of proposed dwellings to minimize adverse impacts on nearby farm and forest lands.
- (i) Dwellings and development accessory to residential uses allowed under LC 16.212(3)(z)(iii) to be sited upon tracts located within an area designated by the Department of Fish and Wildlife Habitat Maps as “Major” shall be sited as follows:
- (aa) Near dwellings on other tracts.
- (bb) With minimal intrusion into forest areas undeveloped by non-forest uses.
- (cc) Where possible, when considering LC 16.212(10)(a) (i)(aa) and (bb) above and the dimensions and topography of the tract, at least 500 feet from the adjoining lines of property zoned F-1 and 100 feet from the adjoining lines of property zoned F-2 or EFU.
- (ii) Dwellings and development accessory to residential uses allowed under LC 16.212(3)(z)(iii) to be sited upon all other tracts shall be sited as follows:
- (aa) Where possible, in consideration of the dimensions and topography of the tract, at least 500 feet from adjoining lines of property zoned F-1 and 100 feet from adjoining lines of property zoned F-2 or EFU.
- (bb) On the least valuable farm or forest areas of the tract or located near dwellings on other tracts.

Finding 12. The subject property is located within “Peripheral” and not “Major Big Game” area. There is a small, separated portion of tax lot 1400 located to the south of the primary parcel and surrounded by tax lot 1401. This area is located in a “Major Big Game” area. The development is not planned for this part of the tax lot and will be located near existing dwellings along Cottage Grove-Lorane Road, and in an area developed with the existing dwelling and accessory structures. Therefore, the proposal satisfies criteria (i)(aa) and (bb).

The ‘same site’ area for the proposed replacement dwelling is located 100 feet from the adjoining property to the west and over 1,000 feet from the adjoining property to the south, both zoned Exclusive Farm Use (E-40/RCP). The ‘same site’ area is positioned 10 feet from the adjoining property to the west zoned Impacted Forest (F-2/RCP). The distance from the F-2 property to the east does not satisfy criteria (i)(cc) or (ii)(aa). However, due to the configuration and dimensions of the parcel, it is not possible for the proposal to meet this criterion. The parcel is approximately 320 feet wide and the applicant is allowed to replace the dwelling anywhere within a 200 foot by 200 foot square centered on the existing dwelling while abiding by setbacks found in (10)(b) (addressed by Finding 13). Therefore, it is not possible for the applicant to meet criteria (i)(cc) and (ii)(aa), and staff finds that this criterion is satisfactorily addressed.

Approximately 90 percent of the property is composed of soils rated as Agricultural Class 3. The subject property contains the following soils, described in **Figure 1**. The proposed replacement dwelling is sited on high value soil, but in an area already developed by a residence and accessory structures. Furthermore, development in the area is generally cluster along Cottage Grove-Lorane Road. The proposed replacement dwelling is sited approximately 75 feet from Cottage Grove-Lorane Road, similar to properties northwest and northeast of the subject property. Staff finds that criterion (ii)(bb) is satisfactorily addressed.

Figure 1—Soils on Subject Property

Soil Map Unit #	Soil Type Description	% of Tax Lot	Agricultural Class
135D	Willakenzie Clay Loam, 12 to 20 percent slopes	90%	3
52D	Hazelair Silty Clay Loam, 7 to 20 percent slopes	10%	4

- (b) **Property Line Setbacks. No structure other than a fence or sign shall be located closer than:**
- (i) **20 feet from the right-of-way of a State road, County road or a local access public road specified in LC Chapter 15; and**
 - (ii) **10 feet from all other property lines except as provided below.**

Finding 13. A site plan (**Exhibit C**) submitted by the applicant demonstrates the proposed ‘same site’ replacement area meets (b)(i) and (ii). Staff finds these criteria met.

- (c) **Riparian Setback Area. Except for property located between the Eugene-Springfield Metropolitan Area General Plan Boundary and the Eugene and Springfield Urban Growth Boundaries, where setbacks are provided for in LC 16.253(6), the riparian setback area shall be the area between a line 100 feet above and parallel to the ordinary high water of a Class I stream designated for riparian vegetation protection in the Rural Comprehensive Plan. No structure other than a fence shall be located closer than 100 feet from the ordinary high water of a Class I stream designated for riparian vegetation protection by the Rural Comprehensive Plan. A modification to the riparian setback standard for a structure may be allowed provided the requirements of LC 16.253(3) or LC 16.253(6), as applicable, are met.**
- (d) **Maintenance, Removal and Replacement of Indigenous Vegetation within the Riparian Setback Area. Maintenance, removal and replacement of indigenous vegetation within the riparian setback area designated for riparian vegetation protection by the comprehensive plan must comply with the provisions of LC 16.253(2) or LC 16.253(6), as applicable.**

Finding 14. No Class 1 streams are inventoried on the subject property. Therefore, the above criteria are not applicable to the applicant’s request.

- (h) **The Director shall require as a condition of approval that the landowner for the dwelling sign and record in the Lane County deed records a document binding the landowner, and**

the landowner's successors in interest, prohibiting them from pursuing a claim for relief or cause of action alleging injury from farming or forest practices for which no action or claim is allowed under ORS 30.936 or 30.937.

Finding 15. This criterion has been made a condition of approval and the document is attached as Exhibit H.

Transportation Planning:

Finding 16. LC 15.070(1) requires and 80' setback from the centerline of a Major Collector. LC 15.083(1) requires an additional 10' for Cottage Grove-Lorane Road. Together these require a setback of 90' from the centerline of Cottage Grove-Lorane Road. The applicant's plans show the mobile home being 75' from the property line. The applicant's plans also delineate a Same Site Replacement Area with a 70' setback from the centerline. The actual placement of structures appears to comply with the required 90' from the centerline. These setback requirements are necessary to protect abutting properties and the traveling public from traffic safety hazards, as the leading crash type in rural Lane County is roadway departure.

Finding 17. LC 15.135(6) exempts replacement structures from these standards if existing access connections are being used (i.e. not being changed or added). For safety purposes, this type of roadway classification is typically restricted to a single access connection. Although there is a second access along the frontage, it appears to be for pedestrian access only. There is no document safety concern based on their being no reported crashes within the past five years in the immediate vicinity of the property. Any changes to this access would require a Facility Permit pursuant to LC 15.205 which would trigger compliance with access management standards.

VII. DECISION

Based upon the findings above and the conditions as applied, the proposed development is consistent with the applicable criteria of 16.212(5)(b) and Lane Code 16.212(10). Therefore, **APPROVAL** is granted subject to Conditions of Approval in **Exhibit A**.

LAW OFFICE OF BILL KLOOS PC

OREGON LAND USE LAW

375 W. 4TH AVENUE, SUITE 204
EUGENE, OR 97401
TEL: 541.343.8596
WEB: WWW.LANDUSEOREGON.COM

KIM O'DEA
KIMODEA@LANDUSEOREGON.COM
TEL: 541.954.009

January 24, 2019

Lane County Board of Commissioners c/o Rachel Serslev
LMD
3050 N. Delta Hwy
Eugene, OR 97408

RE: PA 17-05908; Doughty

Dear Board:

Please accept this as the applicant's request that the Board elect to hear the appeal so that it can be remanded to the Hearing Official for additional findings. A remand is needed for the following reasons:

1. The Hearings Official issued the decision under the wrong criteria. As such, the decision is not defensible on appeal. The flaws in the decision were communicated to County Counsel and LMD. See Attachments A and C.
2. The Hearings Official's decision was not mailed to the applicant or the applicant's representative¹. See Attachment D. By the time the error was corrected, the timeline for the HO to reconsider his decision had passed. The flaws in the Notice were communicated to County Counsel and LMD. See Attachment A, B and D.
3. The Hearings Official is the best person to correct the flawed decision. He has already done the research and review necessary to issue this decision. Had the flaws in the decision and notice been identified in time for reconsideration, the Hearings Official would have done so. There is sufficient information in the record for the HO to make positive findings under the correct criteria.
4. As a bonus, a remand would allow the applicant to address a potential appeal issue, which would save the county time and money. Resolving this issue would likely avoid a future appeal to LUBA. The issue relates to Legal Lot status. While the Hearings Official approved legal lot status, a remand would allow the applicant to cure the situation in a cleaner fashion by executing a property line adjustment.

If the Board chooses to hearing this appeal and then remand it to the Hearings Official, the applicant requests that the record be reopened on the limited issue of legal lot status. All other amended findings can be made on the existing record.

¹ Delwin and Beth Doughty are not the applicants.

Doughty: Board letter

January 24, 2019

Page 2 of 2

Sincerely,



Kimberly JR O'Dea

Attachments:

- A: E-mail to County counsel and staff from Kim O'Dea re: findings and notice, dated December 4
- B: Follow up e-mail from Kim O'Dea re: notice, dated December 4.
- C: Response e-mail correspondence, dated December 5
- D: Notice mailing list

Assistant Lane County Legal Counsel

tel: 541.682.4129

From: Kimberly O'Dea [mailto:kimodea@landuseoregon.com]
Sent: Tuesday, December 04, 2018 4:12 PM
To: CLARK Andy; DARNIELLE Gary L
Cc: SERSLEV Rachel; LANFEAR Tom (SMTP)
Subject: Board Appeal PA 17-05908

Hi, Andy (and Gary):

LW has appealed the above HO approval to the Board via the fast track. This decision needs to be sent back to the Hearings Official for further consideration because of some confusion. The Hearings Official supports the remand. How can we make this happen? Here are the issues:

- The applicant applied for a replacement dwelling under LC 16.212(5)(b);
- The Director approved the replacement dwelling under LC 16.212(5)(b);
- The HO affirmed the Director's decision but accidentally applied the criteria of LC 16.212(5)(a). Because the criteria were (5)(a) was applied, the findings are not supported by evidence in the record. In other words, this error makes the decision difficult to defend at LUBA. In short, (5)(a) requires that BP or Land Use record shows that the dwelling was lawfully placed on the subject property. The applicant cannot meet that criteria. The applicant applied under LC 16.212(5)(a), which allows "other evidence."
- The HO findings appear mostly accurate, however they are placed under the incorrect approval standards which makes the approval difficult, at best, to defend.
- To further complicate things, Staff forgot to provide notice to the applicant's representative, Thom Lanfear. Further, the HO decision failed to list him as a party. Thom did not get notice until his clients called him the day before the appeal period was over. He immediately contacted staff and requested a copy of the decision.

Since this needs to go back to the Hearings Official anyway, the applicant would also like the opportunity to address "legal lot" concerns in an attempt to avoid future appeal. To do that, the record would need to be reopened on that limited issue alone.

Happy to talk about this further. Time is of the essence.

Thank you,

Kim

Kimberly O'Dea

From: Kimberly O'Dea
Sent: Tuesday, December 04, 2018 4:36 PM
To: Andy.CLARK@co.lane.or.us; gdarnielle@lcog.org
Cc: SERSLEV Rachel; tlanfear@pacinfo.com
Subject: RE: Board Appeal PA 17-05908

As a quick follow-up, Thom just looked at the notice mailing list at the applicants' are not listed. It is unclear how they actually got their copy of the notice. Ouch.

Kimberly Joy-Ritterbush O'Dea, Attorney At Law
 Law Office of Bill Kloos, PC, 375 West 4th Street, Suite 204, Eugene, OR 97401
 (541)954-0095 (office/cell), e-mail: KimODEa@landuseoregon.com, Web: www.landuseoregon.com

Please do not read, copy or disseminate this communication unless you are the intended addressee. This e-mail communication may contain confidential and/or privileged information intended only for the addressee. If you have received this e-mail in error, please call immediately at 541-954-0095. Also, please notify me by e-mail. Thank you.

From: Kimberly O'Dea
Sent: Tuesday, December 04, 2018 4:12 PM
To: 'Andy.CLARK@co.lane.or.us' <Andy.CLARK@co.lane.or.us>; gdarnielle@lcog.org
Cc: SERSLEV Rachel <Rachel.SERSLEV@co.lane.or.us>; tlanfear@pacinfo.com
Subject: Board Appeal PA 17-05908

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Happy to talk about this further. Time is of the essence.

Thank you,

Kimberly O'Dea

From: Kimberly O'Dea
Sent: Wednesday, December 05, 2018 5:38 PM
To: CLARK Andy
Cc: tlanfear@pacinfo.com
Subject: RE: Board Appeal PA 17-05908

Andy:

Thank you much.

Yes, the 5(a) was a typo. The applicant filed under 5(b). The Director Decision is under 5(b). The HO applied 5(a).

Kimberly Joy-Ritterbush O'Dea, Attorney At Law
Law Office of Bill Kloos, PC, 375 West 4th Street, Suite 204, Eugene, OR 97401
(541)954-0095 (office/cell), e-mail: KimODEa@landuseoregon.com, Web: www.landuseoregon.com

Please do not read, copy or disseminate this communication unless you are the intended addressee. This e-mail communication may contain confidential and/or privileged information intended only for the addressee. If you have received this e-mail in error, please call immediately at 541-954-0095. Also, please notify me by e-mail. Thank you.

From: CLARK Andy <Andy.CLARK@co.lane.or.us>
Sent: Wednesday, December 05, 2018 3:35 PM
To: Kimberly O'Dea <kimodea@landuseoregon.com>
Cc: SERSLEV Rachel <Rachel.SERSLEV@co.lane.or.us>; MILLER Keir C <Keir.MILLER@co.lane.or.us>
Subject: RE: Board Appeal PA 17-05908

Kim:

I have removed Gary from this email to avoid further *ex parte* communications.

I will discuss this matter with the planning staff and we'll get back to you with our thoughts, at which time I'll need to bring the appellant into the discussion (if not sooner). As I understand the current status, it is outside the time period for a reconsideration by the HO and, therefore, a remand would likely need to come from the Board. But, as mentioned, I'll discuss with staff. In the meantime, can you clarify what standard your client made application under? You initially say it was under LC 16.212(5)(b), but your 3rd bullet, last sentence, references under LC 16.212(5)(a). Should I assume the later reference is a typo?

It looks like this has been scheduled with the Board for January 29, so it appears we aren't under significant time pressure.

Andy Clark

DO NOT
SEPARATE
PACKET

5

CERTIFICATE OF MAILING

509-PA17-05908
DOUGHTY/LANFEAR
11/08/2018

This is to certify that I, Amber Wolles, mailed Notification of

HEARINGS OFFICIAL DECISION

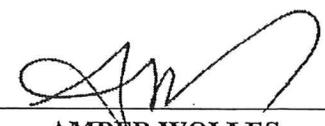
To the person(s) shown on the attached copy of mailing label &/or attached letter & delivered said information to the authorized for the US Post Office in Springfield, Oregon on

Date Mailed: 11/8/2018

End of Comment Period: _____

Appeal Deadline: 11/20/2018

Hearing Date: _____



AMBER WOLLES

NOTE: Surrounding property owners listed are "the owners of record of all property on the most recent property tax assessment rolls" on RLID as per Lane Code 14.300(3)(d). If a tax lot appears on the notice list & there are no corresponding addresses than the tax records have not been updated; therefore, these property owners were not notified.

509-PA17-05908
DOUGHTY/LANFEAR
11/08/2018

DOUGHTY DELWIN A & J BETH
PO BOX 95
LORANE OR 97451

ANDREW MULKEY
ATTORNEY AT LAW
3638 KINCAID ST
EUGENE OR 97405

LANDWATCH LANE COUNTY
PO BOX 5347
EUGENE OR 97405

LANDWATCH LANE COUNTY
BOB EMMONS
40093 LITTLE FALL CREEK RD
FALL CREEK OR 97438

LYDIA KAYE

BEFORE THE BOARD OF COMMISSIONERS OF LANE COUNTY, OREGON

ORDER NO: 19-01-29-05 In the Matter of Electing Whether or Not to Hear an Appeal of a Hearings Official Decision Affirming the Planning Director's Decision to Approve a Replacement Dwelling in the Exclusive Farm Use Zone (E-40) on Tax Lot 1400, Assessor's Map 20-05-13 (File No. 509-PA17-05908; Doughty)

WHEREAS, the Lane County Hearings Official has made a decision to affirm a Planning Director's approval of a replacement dwelling on Tax Lot 1400, Assessor's Map 20-05-13; 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 14.080(4)(d)(ii) and (vi), 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 November 26, 2018, the Lane County Hearings Official affirmed his November 8, 2018 decision on the application after reviewing the appeal; and

WHEREAS, Lane Code 14.080(4)(d) 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 complies with the criteria of Lane Code 14.080(4)(d)(iii) and therefore, the Board will review the appeal and consider arguments therein in an on the record hearing. Findings of fact in support of this determination are attached as Exhibit "A."
2. An on the record hearing is set for February 26, 2019, and the parties who may participate in the Board on the record hearing are detailed in Lane Code 14.080(4)(d)(vii)(gg), and include the Director, the applicant and applicant's representative – Duane and Tonya Doughty and Thom Lanfear, and the appelland and the appelland's representative – LandWatch Lane County and Sean T. Malone.

ADOPTED this 29th day of January, 2019



Pete Sorenson, Chair
Lane County Board of Commissioners

APPROVED AS TO FORM

Date

1-15-19

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-PA17-05908.
2. Notice of the November 7, 2018 Hearings Official's decision was mailed to the applicant and parties of record on November 8, 2018.
3. On November 19, 2018, Sean T. Malone, 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 14.080(4)(d)(ii).
4. On November 26, 2018, the Hearings Official reviewed the appeal and affirmed his decision without further consideration, pursuant to LC 14.080(4)(b).
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, the applicant's agent has provided a full waiver of the statutory timeline requirements. Therefore, a final decision by the Board through holding an on-the-record hearing can be made within the time constraints of ORS 215.427.
6. In order for the Board to hear arguments on the appeal, Lane Code 14.080(4)(d)(iii) 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 impacts to an inventoried Goal 5 resource; or*
 - *The Director or Hearings Official recommends review.*

The issues raised in the appeal statement are largely specific to the application. More specifically, the appellant asserts that the Hearings Official did not apply the correct Lane Code approval criteria to this proposal for a replacement dwelling. The applicant applied for a replacement dwelling under Lane Code 16.212(5)(b) and the Planning Director approved the application based on that approval criteria. The Hearings Official affirmed the Planning Director's decision, but in the Hearings Official's decision, the first allegation of error is that the Planning Director addressed the wrong approval criteria in the Director's decision. The Hearings Official addressed what he believed to instead be the correct approval criteria at Lane Code 16.212(5)(a) and otherwise affirmed the Planning Director's decision. The appellant raises this issue, indicating that there is no evidence in the record that the proposal meets the approval criteria at Lane Code 16.212(5)(a) as found by the Hearings Official.

Further, the appellant raises an issue regarding the applicable siting standards of Lane Code 16.212(10)(a). The Big Game Habitat designation of the subject property determines if Lane Code 16.212(10)(a)(i) or 16.212(10)(a)(ii) is the correct criteria to be applied. The Hearings Official made findings that subsection (i) does apply to the proposal and the appellant argues that this finding is in error, not supported by substantial evidence, and misconstrues applicable law.

Other issues raised in the appeal statement include the legal lot status of the subject property and how the proposal meets the siting criteria in Lane Code 16.212(10). On November 26, 2018, the Hearings Official reviewed the allegations and affirmed his decision.

Based on the above summary of the issues, 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.

7. The issues raised in this appeal do not relate to, or involve a Goal 5 inventoried environmental resource. Issues raised in this appeal relate to provisions of Lane Code 16.212(5)(b) and (10), Chapter 462 Oregon Laws 2013, OAR 660-033-0130(8), and ORS 215.213(1)(q) and (9).
8. The Planning Director concurs with the appellant that the incorrect approval criteria was applied by the Hearings Official when Lane Code 16.212(5)(a) was applied to the proposal instead of Lane Code 16.212(5)(b). Therefore, the Planning Director recommends that the Board elect to hear the appeal and conduct an on the record hearing pursuant to Lane Code 14.080(4)(d)(vii)(aa). This action will allow the Board to consider only the evidence confined in the record. The parties who may participate in the Board on the record hearing are detailed in Lane Code 14.080(4)(d)(vii)(gg), and include the Director, the applicant and applicant's representative – Duane and Tonya Doughty and Thom Lanfear, and the appellant and the appellant's representative – LandWatch Lane County and Sean T. Malone.
9. To meet the requirements of Lane Code 14.080(4)(d)(ii), 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 January 29, 2019, finds that the appeal does comply with the criteria of Lane Code Chapter 14.080(4)(d)(iii) and elects to hold an on the record hearing for the appeal.
10. The Board therefore elects to conduct an on-the-record hearing in which the Board will consider evidence confined to the record, and sets an on the record hearing for February 26, 2019.



PETER SORENSON

Lane County Commissioner
South Eugene District
peter.sorenson@co.lane.or.us

January 29, 2019

Lane County Board of Commissioners and
Steve Mokrohisky
County Administrator
Lane County Government
125 East 8th Avenue
Eugene, Oregon 97401

Dear Commissioners and Mr. Mokrohisky,

Today the Lane County Board of Commissioners are hearing land use matters that involve testimony or written materials submitted by Landwatch Lane County (hereafter Landwatch).

Landwatch is appearing through their staff and volunteers and their attorney, Sean Malone. I want to place into the record of today's proceedings that I have a possible conflict of interest involving the relationship between my law firm, Sorenson Law Office and Sean Malone's law firm but I do not believe that this relationship will have any bearing on my independence and ability to decide a land use matter involving his client, Landwatch.

Prior to my being elected as a Lane County Commissioner (and continuing on a part time basis) I have been the owner of a business, Sorenson Law Office. My law firm has done business with and continues to do business with Mr. Malone's law firm . This business involves representing mutual clients, not Landwatch, in Federal public interest litigation outside of Lane County and outside of the State of Oregon and having no involvement in land use matters, Oregon law or Lane County.

I have never discussed land use matters involving Lane County or Landwatch with Sean Malone. We maintain a strict policy of never discussing or communicating about any of my work as a Lane County Commissioner and his work as an advocate for Landwatch.

I have discussed this issue (of a possible conflict of interest) with my own attorney and Lane County's legal counsel and both have informed me that they do not see a conflict of interest. Steve Dingle, Lane County Counsel, has suggested that I place this information before the board as a cautionary measure.

Finally, I ask that Lane County staff alert me where Sean Malone's name is mentioned in a particular file or item to be discussed or decided by the Board of Commissioners.

Very truly yours,

A handwritten signature in black ink, appearing to read 'Pete Sorenson', written over the closing 'yours,'.

Pete Sorenson
Lane County Commissioner