

BEFORE THE BOARD OF COMMISSIONERS OF LANE COUNTY, OREGON

**ORDER NO:** 18-07-31-06 IN THE MATTER OF ELECTING WHETHER OR NOT TO HEAR AN APPEAL OF A DECISION BY THE LANE COUNTY HEARINGS OFFICIAL AFFIRMING IN PART AND REVERSING IN PART THE PLANNING DIRECTOR APPROVAL OF A REQUEST FOR LEGAL LOT VERIFICATIONS OF FIVE LOTS PURSUANT TO LANE CODE 13.020 ON ASSESSOR'S MAP AND TAX LOTS 20-03-15-00100 & 20-03-10-00-02900, -03100, -03000, AND -01504; (FILE NO. 509-PA17-05998/NORTHWEST MINERAL RESROUCES LLC).

**WHEREAS**, the Lane County Hearings Official has made a decision to affirm in part and reverse in part a Planning Director decision approving five legal lots, pursuant to Lane Code 13.020, in Department File No. 509-PA17-05998; and

**WHEREAS**, the Lane County Planning Director has received an appeal of the Hearings Official's decision to the Board of County Commissioners pursuant to LC 14.515(3)(f)(ii); requesting that the Board elect not to further hear the appeal and to deem the Hearings Official decision as the final decision of the County; and

**WHEREAS**, on June 25, 2018, the Lane County Hearings Official affirmed her reconsidered June 5, 2018 decision on the application after reviewing the appeal; and

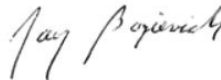
**WHEREAS**, Lane Code 14.600 provides the procedure and criteria that the Board follows in deciding whether or not to conduct an on the record hearing for an appeal of a decision by the Hearings Official; and

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

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

1. That the appeal does not comply with the criteria of Lane Code 14.600(3) and therefore, the Board declines to further review the appeal and consider arguments therein. Finding of fact in support of this determination are attached as Exhibit "A."
2. That the Lane County Hearing's Official reconsidered decision dated June 5, 2018, and the letter affirming the reconsidered decision which found the allegations of error are adequately addressed dated June 25, 2018, and the Lane County Hearings Official Decision affirming in-part and reversing in-part dated May 13, 2018 attached as Exhibit "B" adequately addresses the issues. The Board elects to not conduct an on-the-record hearing for the appeal, to affirm and ratify the Lane County Hearings Official decision as the County's final decision, and remain silent on the Hearings Official's interpretation of State and case law.

**ADOPTED** this 31st day of July, 2018.



Jay Bozievich, Chair  
Lane County Board of Commissioners

APPROVED AS TO FORM

Date 7-25-18

## ORDER EXHIBIT "A"

### FINDINGS IN SUPPORT OF THE ORDER

1. The property subject to this application, hereinafter referred to as the "subject property," is identified as Assessor's Map and Tax Lots 20-03-15-00-00100 (Legal Lot #1), 20-03-10-00-02900 (Legal Lot #2), -03100 (Legal Lot #3), -03000 (Legal Lot #4), and -01504 (Legal Lot #5). The subject property is owned by Mike Miller of Northwest Mineral Resources LLC, and is zoned Sand, Gravel, and Rock Products (SG) Zone and Exclusive Farm Use (E-30) zone.
2. On December 19, 2017, the Applicant submitted a request for final legal lot verifications and notice for eight legal lots. The application was accepted as complete on January 18, 2018. On January 25, 2018, the applicant amended the application to request final legal lot verification and notice for five legal lots. On February 15, 2018, the Planning Director issued a decision approving the legal lot status of all five lots. On February 27, 2018, a timely appeal was submitted by LandWatch Lane County.
3. The findings of fact regarding the assignments of error have been incorporated in the Hearings Official's narrative justification of the decision.
4. On April 12, 2018, the Lane County Hearings Official conducted a public hearing. The hearing was closed but the record was held open to allow for additional testimony. The record closed for applicant final rebuttal on May 3, 2018. On May 14, 2018, the Lane County Hearings Official issued her decision affirming in part and reversing in part the decision of the Planning Director.
5. On May 29, 2018, both the applicant and appellant filed separate appeals of the Hearings Official decision. On June 5, 2018, the Hearings Official issued a subsequent reconsidered decision affirming in part and reversing in part.
6. On June 15, 2018, the applicant appealed the Hearings Official decision. As indicated in their appeal statement, the applicant asserts the Hearings Official decision is invalid and that the decision exceeded authority, and misinterpreted the Lane Code, State Law, and other applicable law.
7. On June 25, 2018, the Hearings Official reviewed the appeal and affirmed her decision without further consideration pursuant to LC 14.535(1).
8. On July 29, 2018, staff mailed notice of the appeal and elect whether or not to hear the appeal to the parties of record.
9. In order for the Board to hear arguments on the appeal, Lane Code 14.600(3) requires one or more of the following criteria to be found by the Board to apply to the appeal:
  - *The issue is of Countywide significance.*
  - *The issue will reoccur with frequency and there is a need for policy guidance.*
  - *The issue involves a unique environmental resource.*
  - *The Planning Director or Hearings Official recommends review.*
10. The election to hear the appeal in a public hearing must be completed within the time constraints of ORS 215.427(2). As of the Elect to Hear meeting, a total of 176 days will have elapsed since the application was deemed complete. The Planning Director acknowledges the issue may be of some Countywide significance and likely recur. However, it would not be feasible for the Board to hold a hearing on this matter

without surpassing the statutory timelines and exposing the County to a possible Writ of Mandamus. Furthermore, the issues raised in this appeal largely concern State and/or case law and not local policy.

11. The issues raised in this appeal do not relate to, or involve, a unique or Goal 5 inventoried resource. The appeal involves the legal lot status of the subject property. In general, issues raised in the appeal concern specific issues related to State and/or case law.
12. The Planning Director recommends that the Board elect not to conduct an on-the-record hearing for the appeal, affirm and ratify the Lane County Hearings Official decision as the County's final decision, and remain silent on the Hearings Official's interpretation of State and case law. Additionally, the Hearings Official's decision and letter of affirmation does not include a recommendation that the Board of Commissioners conduct an on-the-record hearing for the appeal.
13. To meet the requirements of Lane Code 14.600(2)(b), the Board is required to adopt a written decision and order electing to have a hearing on the record for the appeal or declining to further review the appeal. The Board has reviewed this matter at its meeting on July 31, 2018, finds that the appeal does not comply with the criteria of Lane Code 14.600(3), declines to further review the application, and elects not to hold an on-the-record hearing for the appeal.
14. The Board therefore elects not to conduct an on-the-record hearing for the appeal, to affirm and ratify the Lane County Hearings Official decision as the County's final decision, and remain silent on the Hearings Official's interpretation of State and case law.





June 25, 2018

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

Re: *Appeal of a decision by the Lane County Hearings Official affirming in part and reversing in part the Planning Director approval of the request (PA 17-05998) by Northwest Mineral Resources, LLC for legal lot verifications for five lots.*

Dear Ms. Kaye:

On May 14, 2018, I issued a decision affirming in part and reversing in part the Planning Director's approval of the request (PA 17-05998) by Northwest Mineral Resources, LLC for legal lot verifications for five lots—Map 20-13-15, tax lot 100; Map 20-03-10, tax lots 2900, 3000, 3100, and 1504. On May 29, 2018, both the applicant and the opponents filed appeals of the May 14, 2018 Hearings Official decision. The Hearings Official issued a reconsidered decision on June 5, 2018. On June 15, 2018, that reconsidered decision was appealed by Northwest Mineral Resources, LLC.

Applicant first argues that the reconsidered decision is invalid because LC 14.535(4), it contends, does not authorize reconsideration of a decision appealed by an applicant without first obtaining a timeline waiver from the applicant. Applicant misinterprets LC 14.535(4) in several respects. First, LC 14.535(4) does not limit the Hearings Official's authority to reconsider a decision appealed by an applicant. Rather, it imposes a condition – granting a timeline waiver -- upon an applicant wishing to have a decision reconsidered. The impetus is clear—the provision is meant to prevent the circumstance where an applicant seeks reconsideration in order to force the local government to miss the 150-day timeline. The county can choose to forego that condition so long as it determines, pursuant to LC 14.535(2), that a final decision can still be made within the applicable time constraints.

Second, the opponents in this case also appealed the Hearings Official's original May 14, 2018 decision, challenging the Hearings Official's conclusion regarding tax lot 100. Even if applicant is correct that the Hearings Official could not reconsider her decision based on applicant's appeal, the Hearings Official was authorized to address the issues raised in opponents' appeal regarding tax lot 100.

Upon review of the appeal, I find that the allegations of error have been adequately addressed and that reconsideration is not warranted.



Accordingly, on the authority of Lane Code 14.535(1), I affirm my June 5, 2018 reconsidered decision without further consideration. Please advise interested parties of this decision.

Sincerely,

A handwritten signature in cursive script that reads "Anne C. Davies". The signature is written in black ink and is positioned above the printed name.

Anne C. Davies  
Lane County Hearings Official

**LANE COUNTY HEARINGS OFFICIAL  
RECONSIDERATION OF THE HEARING OFFICIAL'S DETERMINATION  
REGARDING FIVE LEGAL LOT VERIFICATIONS**

**Application Summary**

On December 19, 2017, the Applicant, Northwest Mineral Resources, LLC, submitted a request for final legal lot verifications and notice (PA 17-05998) for eight legal lots. The application was accepted as complete on January 18, 2018. On January 25, 2018, applicant amended the application to request final legal lot verifications and notice for five legal lots that are identified as Map 20-03-15, tax lot 100 (Legal Lot 1), Map 20-03-10, tax lots 2900, (Legal Lot 2), 3100 (Legal Lot 3), 3000 (Legal Lot 4), and 1504 (Legal Lot 5). On February 15, 2018, the planning director issued a decision approving the legal lot status of all five lots. On February 27, 2018, a timely appeal was submitted by LandWatch Lane County.

On May 14, 2018, the Hearings Official affirmed the Planning Director's determination regarding tax lots 100, 2900, and 3100, and reversed the Planning Director's determination regarding tax lots 1504 and 3000. On May 29, 2018, both Applicant and Appellant filed appeals of the Hearings Official decision. Pursuant to Lane Code 14.535(2)(a), the Hearings Official grants the reconsideration requests.

**Parties of Record**

Northwest Mineral Resources, LLC (Applicant)	LandWatch Lane County (Appellant)
Kim O'Dea (Applicant's Representative)	Andrew Mulkey (Appellant's Representative)
Anna Lee Dixon	Lauri Segel (Appellant's Representative)
Diana Michals	

**Application History**

Appeal Date: May 29, 2018

Reconsidered Decision Date: June 5, 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 14.535  
Lane Code 13.010  
Lane Code 13.020



### Findings of Fact

1. The findings of fact contained in the May 14, 2018 Hearings Official decision in this matter are adopted by reference except where explicitly modified, amended, or replaced.
2. Finding of fact number 5 from the May 14, 2018 decision is amended as follows:

On July 15, 1971, the deed that transferred the land that is now tax lot 101, highlighted in blue on Attachment 2, was recorded. 540R/55027; see Attachment 4 of Applicant's letter dated April 26, 2019 (2007 preliminary legal lot verification file for tax lot 100).

### Decision

THE HEARINGS OFFICIAL'S DECISION IS AFFIRMED IN PART AND REVERSED IN PART.

### Justification for the Reconsidered Decision (Conclusion)

#### Reconsideration Criteria

In order to reconsider a decision, the Hearings Official must first determine that a final County decision can be made within the time constraints established by ORS 215.427(1). LC 14.535(2). The Hearings Official determined that, without a timeline extension, a reconsidered decision under LC 14.535(2)(b)<sup>1</sup> could not be made within the time remaining under ORS 215.427(1). Accordingly, she directed staff to seek a timeline waiver or extension. An unconditional timeline extension had not been obtained from the Applicant by the time this decision was due. Accordingly, this reconsidered decision is limited to the existing record, pursuant to LC 14.535(2)(a).

#### Applicant's Appeal

1. First Appeal Issue (Applicant)

Applicant challenges the Hearings Official's conclusion that tax lot 3000 is not a legal lot. It asserts that the decision determines that tax lot 3000 was legally created (citing page 7 of the decision). Applicant misinterprets the decision. The Hearings Official did not determine that tax lot 3000 was legally created. Rather, the Hearings Official stated that, at the time the 1993 and 2003 property line adjustments occurred, tax lot 3000 was zoned SG and had no minimum lot size. Accordingly, the property line adjustments did not violate the *Phillips* case with regard to tax lot 3000. That is, because there was no minimum lot size applicable to tax lot 3000, the property line adjustments did not unlawfully reduce the size of tax lot 300 below the applicable minimum lot size. The Hearings Official went on to explain, however, that those lot line adjustments *did*

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<sup>1</sup> LC 14.535(2)(b) allows the Hearings Official to re-open the record for additional evidence and briefing.

violate *Phillips* to the extent they further reduced the size of tax lot 1504, which was zoned E-30, a zoning designation that *did* have a minimum lot size. Footnote 8 on page 8 of the decision explains that each of the 1993 and 2003 property line adjustments reduced the sizes of both tax lots 1504 and 3000. The property line adjustments that adjusted tax lot 3000 were unlawful because they also reduced the size of tax lot 1504 below the applicable minimum lot size. “Because the property line adjustments were unlawful, tax lot 3000 is also an illegal lot.”

## 2. Second and Third Appeal Issues (Applicant)

Applicant challenges the Hearings Official’s conclusion that tax lot 1504 is not a legal lot. It asserts that the challenged decision mischaracterizes its position on ORS 92.192, and that tax lot 1504 complies with ORS 92.192.

First, Applicant never argued that tax lot 1504 complied with ORS 92.192. In its April 19, 2018 (first open record period) submittal, Appellant raised the applicability of ORS 92.192, presumably anticipating that Applicant might rely on that statute to justify the legality of tax lot 1504. In retrospect, Appellant was anticipating an issue that Applicant never raised. Appellant argued that, although Section 6 of the legislation (Oregon Laws 2008, Chapter 12) provided that the language of the bill that became ORS 92.192 was retroactive, the retroactivity did not apply in this case. According to Appellant, ORS 92.192 applied retroactively only to property line adjustments that were formally “approved by the County.” Because the 1993 and 2003 property line adjustments were not “approved by the County,” ORS 92.192 did not apply retroactively to those adjustments.

Applicant appears not to have understood the significance of ORS 92.192—that is, assuming the property line adjustments to tax lot 1504 in 1993 and 2003 were unlawful based on the *Phillips* case, the only option for determining that tax lot 1504 was a legal lot was to argue that ORS 92.192 applied retroactively to the 1993 and 2003 property line adjustments, that those property line adjustments complied with ORS 92.192(2) and (3), and that the property line adjustments were not precluded by ORS 92.192(4).<sup>2</sup>

Applicant’s final rebuttal addresses Appellant’s ORS 92.192 argument only to contend that property line adjustments performed prior to the adoption of ORS 92.192 did not have to be formally reviewed by the County. Nowhere did Applicant address the applicability of the substance of ORS 92.192 to the 1993 and 2003 property line adjustments as a way to establish the legality of tax lot 1504. Neither did Applicant specifically address Appellant’s argument that the retroactivity provision in Section 6 applies only to property line adjustments that are formally approved by the County.

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<sup>2</sup> Applicant twice stated that ORS 92.192 was not retroactive. See final rebuttal dated May 3, 2018, page 1 (“ORS 92.192 (2015) does not get retroactively applied.”); pages 5-6 (“ORS 92.192, cited by opposition, had not been enacted and was not retroactive.”) To the extent Applicant meant to limit that statement to its assertion that a property line adjustment did not have to be formally adopted by the county in order to be valid, that intent was certainly not apparent.



The burden is on the Applicant throughout the process to demonstrate, by a preponderance of the evidence, that tax lot 1504 is a legal lot. In this case, that means that Applicant was required to demonstrate that (i) ORS 92.192 applied retroactively to the 1993 and 2003 property line adjustments, (ii) that those property line adjustments complied with ORS 92.192(2) and (3), and (iii) the property line adjustments were not precluded by ORS 92.192(4). Applicant addressed none of these issues during the time the record was open prior to the Hearings Official's decision.

In its appeal statement, Applicant makes conclusory statements that the property line adjustments comply with ORS 92.192 and that subsection (4) is inapplicable. However, Applicant provides no analysis or supporting evidence that supports its conclusory statements. It is not the Hearings Official's job to formulate the parties' arguments or to determine the relevant facts that might support arguments that the parties could have made. While the Hearings Official seeks to render legally and factually correct rulings, she must do so within the confines of a process that is designed to (i) create a level playing field among the participants where the parties are made fully aware of the arguments from the other side, and (ii) result in a fully vetted and well-reasoned opinion. Further, the reconsideration process is aimed more at correcting errors or factual inaccuracies made by the Hearings Official than it is an opportunity for parties to flesh out arguments that they failed to make before the initial decision was rendered.

Based on Applicant's failure to address the seminal issue regarding ORS 92.192 before the close of the record, the Hearings Official confirms her prior determination that Applicant failed to satisfy its burden of proof.

#### Appellant's Appeal

##### 1. Tax Lot 100

The Hearings Official's determination regarding the legal lot status of tax lot 100 was based on a factual finding that the 1971 transfer of tax lot 101 included a strip of land along the eastern border that was later to be dedicated to Lane County for road use. In its appeal, Appellant contends that that transfer conveyed only the land that lay to the west of the right of way.

After reviewing the record, the Hearings Official agrees that it is possible that the eastern boundary of the land that was transferred in 1971 lies at the western edge of the right of way, as Appellant asserts. See Applicant submittal dated April 26, 2018, Attachment 4 (2007 preliminary legal lot verification for tax lot 100), survey attached to 1971 deed. If Appellant is correct, it is possible that the transfers that subsequently occurred in 1974 divided the land in question into more than three lots in one calendar year.<sup>3</sup> That said, it is impossible to state for certain what land was included in the 1971

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<sup>3</sup> If Appellant is correct, the 1971 transfer did not result in three separate parcels (tax lot 104, 101, and 100) as indicated on Attachment 3 to the original decision. Rather, if Appellant is correct, the 1971 transfer resulted in (1) tax lot 101 (located to the west of Horn Lane) and (2) the parent parcel (which would have included the land identified as tax lot 104, the portion of Horn Lane that lies to the east of tax lot 101, and

transfer.<sup>4</sup> If it were possible to re-open the record on reconsideration to introduce evidence clarifying the issue, the Hearings Official could have made a clear determination one way or the other. However, without a timeline waiver or extension, the Hearings Official was unable to find, pursuant to LC 14.535(2), that a final decision by the Board could be made within the required time limits. It is Applicant's burden to demonstrate by a preponderance of the evidence that tax lot 100 is a legal lot. On the record before it, the Hearings Official must conclude that the Applicant has not carried its burden.

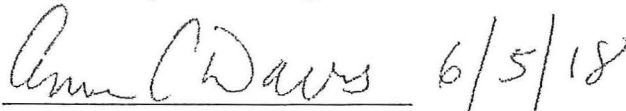
## 2. Tax Lot 2900

Appellant also seeks to have the Hearings Official reconsider her determination that tax lot 2900 is a legal lot. The Hearings Official did not independently determine the legality of tax lot 2900 because the issue was not presented. Appellant did not raise the legality of tax lot 2900 in its appeal statement, at the hearing, or in its material submitted during the first open record period. Neither the Applicant nor the Hearings Official understood Appellant to have challenged tax lot 2900. It is too late for Appellant to introduce a challenge to another tax lot at this time.

### Conclusion

The Hearings Official's original decision affirmed the legal lot status of tax lots 100, 2900, and 3100. She determined that Applicant had failed to carry its burden that tax lots 1504 and 3000 were legal lots. On reconsideration, the Hearings Official determines that Applicant also failed to satisfy its burden of proof as to tax lot 100; the original decision is otherwise affirmed.

Respectfully Submitted,

 6/5/18

**Anne C. Davies**                      **Dated**  
**Lane County Hearings Official**

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the rest of tax lot 100). The 1974 transfers then would have resulted in (1) tax lot 102, (2) tax lot 103/105, (3) a panhandle-shaped lot consisting of tax lot 104 and the portion of Horn Lane that lies east of tax lot 101, and (4) the parent parcel--tax lot 100.

<sup>4</sup> A property description card for tax lot 101 is included in the record. See Applicant submittal dated April 26, 2018, Attachment 4 (2007 preliminary legal lot verification for tax lot 100), tax lot 101 property description card. The property description card, read together with the notations on the tax map for the area, suggest the eastern boundary of tax lot 101 runs 212.79 feet along the western edge of Horn Lane.



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

**Application Summary**

On December 19, 2017, the Lane County Land Management Division received a request for final legal lot verifications and notice (PA 17-05998) for eight legal lots. The application was accepted as complete on January 18, 2018. On January 25, 2018, applicant amended the application to request final legal lot verifications and notice for five legal lots that are identified as Map 20-03-15, tax lot 100 (Legal Lot 1), Map 20-03-10, tax lots 2900, (Legal Lot 2), 3100 (Legal Lot 3), 3000 (Legal Lot 4), and 1504 (Legal Lot 5). Staff reviewed the application materials and accepted the application as complete on February 8, 2018. The application was approved on February 15, 2018, and a timely appeal was filed by LandWatch Lane County on February 27, 2018.

**Parties of Record**

Northwest Mineral Resources, LLC (Applicant)	LandWatch Lane County (Appellant)
Kim O’Dea (Applicant’s Representative)	Andrew Mulkey (Appellant’s Representative)
Anna Lee Dixon	
Diana Michals	Lauri Segel (Appellant’s Representative)

**Application History**

Hearing Date: April 12, 2018

Decision Date: May 14, 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 13.010

Lane Code 13.020

**Findings of Fact**

1. The property subject to this application, hereinafter referred to as the “subject property,” can be identified as assessor’s map 20-03-15, tax lot 100 (Legal Lot 1), map 20-03-10,

tax lots 2900, (Legal Lot 2), 3100 (Legal Lot 3), 3000 (Legal Lot 4), and 1504 (Legal Lot 5).

Tax Lot 100

2. In March of 2007, Lane County issued a preliminary determination concluding that tax lot 100 constitutes a legal lot. No notice was provided for that determination; accordingly, it did not constitute a final land use decision.
3. The county findings in the challenged decision rely on this prior preliminary determination, and do not provide a separate analysis. The deed history relied upon for the 2007 preliminary determination is set forth below.
4. On December 17, 1966, Kirk M Horn conveyed that land that is highlighted in yellow on Attachment 1 to Chloa, Francis, and Harriet Horn. (R 332/71704)
5. In January 1971, the land that is now tax lot 101 (including the abutting portion of what is now Horn Lane), highlighted in blue on Attachment 2, was conveyed by warranty deed. 540R/55027.
6. In February of 1972, Horn Lane was created by deed conveyance, shown in green on Attachment 3. R666/7352904. The Board order accepting the deed clearly identified the road as a public road easement.
7. In January of 1974, what is now tax lot 102 was conveyed out by deed, shown in red on Attachment 4. 675R-7403908.
8. Then in November of that same year (November 8, 1974), tax lot 103 and a small sliver of property across Horn Lane to the east of the northern portion of tax lot 103 (tax lot 500) was conveyed by land sale contract. R720/7451764. See Attachment 5; small, easternmost red parcel. The property line of tax lot 105 was later adjusted to create tax lot 105 (1.72 acres) as it exists today.

Tax Lots 1504 and 3000

9. The parties do not dispute that, as of 1966, the properties that now constitute tax lots 2900, 3000, 3100, 1504, and 1505 were owned as represented on the map attached as Attachment 6.
10. On April 27, 1973, the owners of what is currently tax lots 1500, 1505, 1502, 1503 and part of 1504 (Francis, Harriet, and Chloa Horn) conveyed what is currently tax lots 1503 and 1505 by land sale contract to James and Carol Williams. R640/24295. See Attachment 7.
11. In 1975, the county approved a partition that created two parcels (roughly what is tax lots 1503 and 1505 (parcel 2), and tax lot 1502 (parcel 1)). M 239-75.



12. In 1993, the southern boundary of the Williams property was adjusted further south, as shown on Attachment 8. That line was adjusted further south again in 2003, to the current southern boundary of tax lot 1505. *Id.*

### **Decision**

THE LANE COUNTY PLANNING DIRECTOR'S DECISION TO APPROVE THE NORTHWEST MINERALS, LLC REQUEST (PA 17-05998) FOR THE LEGAL LOT VERIFICATION AND NOTICE OF FIVE LOTS—ASSESSOR'S MAP 20-03-15, TAX LOT 100 (LEGAL LOT 1), MAP 20-03-10, TAX LOTS 2900, (LEGAL LOT 2), 3100 (LEGAL LOT 3), 3000 (LEGAL LOT 4), and 1504 (LEGAL LOT 5)—IS AFFIRMED IN PART AND REVERSED IN PART.

### **Justification for Decision**

The Appellant appeals the Planning Director's verification of five legal lots, raising the following allegations of error:

*The Notice of Decision misstates the zoning of the subject property as E-40, and the findings for Legal Lot 4 (tax lot 3000) and Legal Lot 5 (tax lot 1504) are identical.*

Staff explained in its April 5, 2018 staff report that three tax lots are zoned Sand and Gravel (SG) (2900, 3000, and 3100), one tax lot is zoned E-30 (1504), and one tax lot is split zoned SG and E-30 (100). To the extent the Notice of Decision misstated the zoning, the error was harmless and has been cured by the appeal. The staff report also explained why the findings for tax lots 3000 and 1504 are so similar.

This assignment of error is denied.

*Tax Lots 100, 3000, and 1504 are not legal lots.*

### **Background**

Lane Code contains a process for verifying the status of "legal lots." Lane Code (LC) 13.020.<sup>1</sup>

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<sup>1</sup> LC 13.020 provides:

"A legal lot verification by the Director is considered final when it is made and noticed pursuant to LC 14.100 and shall occur when:

"(1) An application is submitted and reviewed pursuant to LC 14.050, excluding 14.050(3)(d), for a legal lot verification on a lot or parcel resulting from a property line adjustment; or

"(2) If notice is requested by the property owner for any legal lot verification, upon submitting an application for review pursuant to LC 14.050, excluding 14.050(3)(d)."

The term “legal lot” is defined as “a lawfully created lot or parcel.” LC 13.010. A lawfully created (or established) unit of land can include a lot or parcel created pursuant to ORS 92.010 to 92.190 (provision governing land divisions); a unit of land created in compliance with all applicable planning, zoning and land division requirements; or a unit of land created by deed or land sales contract if there were no applicable planning, zoning, and land division requirements. LC 13.010. In this case, the applicant requested that the Planning Director recognize five legal lots. Appellants challenge the legal lot status of tax lots 100, 3000, and 1504.

A. Tax Lot 100

Appellant argues that tax lot 100 was illegally divided in 1974. Its main contention is that, what started out as one unit of land at the beginning of 1974 (the land that encompasses what is now tax lots 100, 102, 103, and 105; see Attachment 2) ended up including four separate units of land by the end of the 1974 calendar year (tax lots 100 (#1), 102 (#2), 103 (#3), and 105 (#4)). Appellant relies on the 1973 version ORS Chapter 92 to support its argument.

ORS 92.010(10)(1973) provided the following definition of “subdivide land:” “divide an area or tract of land into four or more lots within a calendar year when such area or tract of land exists as a unit or contiguous units of land under single ownership at the beginning of such year.” According to Appellant, in 1973 an owner could not transfer multiple pieces of one unit of land through deed or land sale contract to purchasers where the resultant configuration included four separate units of land.

Applicant asserts that Appellant is wrong that four new units of land were created in 1974. It argues that tax lot 100 was not “created” by the transfers, and that only three, not four, new units of land were created (tax lots 102, 103, and 105). Applicant is incorrect, however, that the statute required the creation of four new units of land. Rather, the statute prohibits an owner from dividing one area or tract of land into four or more lots in a calendar year. In this case, the unit of land that existed at the beginning of 1974 included all of the land highlighted in yellow on Attachment 2. By the end of 1974, four parcels existed where only one had existed at the beginning of the year. Tax lot 100, even though it was originally the parent parcel prior to the transfers, is counted as one of the four, pursuant to the statute.

The Hearings Official does not agree with Appellant, however, that the parent parcel was divided into four separate units of land in 1974. The February, 1972 deed that dedicated Horn Lane to the County did not convey fee title. While a Warranty Deed is generally used to convey fee title, the November 21, 1973 Board Order accepting the dedication expressly stated that the dedication was for a public road easement. The Oregon Courts have explained that a public roadway that is a mere easement, and not owned in fee by the public entity, does not serve to separate units of land. *See Lovinger v. Lane County*, \_\_\_ Or LUBA \_\_\_ (LUBA No. 2005-098, January 12, 2006), *aff’d* 206 Or App 557, 138 P3d 51, *rev den.* 342 Or 254, 149 P3d 1213 (2006). Because Horn Lane is merely an easement, and not an ownership in fee title, the November, 1974 transfer of the tax lot 103/105 property created only one lawful property, not two. Therefore, by the end of 1974, there existed only three properties out of the parent parcel—tax lot 102, tax lot 103/105, and the remainder of tax lot 100. Accordingly, the Hearings Official disagrees with the Appellant that the 1974 transactions constituted an illegal *de facto* subdivision.



### Land Sale Contract

The January, 1974 transaction (creating tax lot 102) was executed through a land sale contract. That is, the parties executed an agreement (Land Sales Contract), the buyer made a down payment, and the buyer then made payments to the seller until the purchase price was paid in full. In this arrangement, the seller retains title to the property but has no rights to occupy the property. See *Security State Bank v. Luebke*, 303 Or 418, 737 P2d 586 (1987). Appellant raises the issue that the division resulting from this January, 1974 deed may not have occurred until 1993, when the warranty deed, finalizing the transfer of fee title to the buyer, was executed. If that is the case, then the 1993 transfer would have constituted an illegal partition, thus resulting in unlawfully created parcels.

The parties provide no legal support for their positions regarding the use of land sales contracts in this context. While it is true that technically the seller of a land sales contract retains title until the buyer has paid off the entire purchase price, it is also true that the buyer is generally considered to be the equitable owner and the seller is considered to be the owner of the purchase price until such time as the entire purchase price is paid off. See *Cassidy v. Pavlonnis*, 227 Or App 259, 205 P3d 58 (2009)(explaining the doctrine of equitable conversion). In layman's terms, this means that in most circumstances, the buyer is considered the owner of the property, and the transfer of most property rights is considered complete when the parties enter into a land sale contract; *i.e.*, January, 1974 in this case. See also *Heider v. Deitz*, 234 Or 105, 112, 380 P2d 619 (1963) (equitable conversion invoked to accomplish equity according to established rules of equity jurisprudence). To consider a land division to have occurred many years after a land sale contract was entered into would very likely have numerous unintended consequences, such as the application of later adopted land division regulations that were not in effect when the sale actually occurred. Accordingly, in keeping with the equitable conversion line of cases, the Hearings Official concludes that, for purposes of determining legal lot status in this case, the conveyance is considered to have occurred in 1974.

In conclusion, the parent parcel that existed at the beginning of 1974 was divided into three, not four, separate parcels by the end of the year because the transfer of tax lots 103 and 105 in a single deed conveyed a single parcel intersected by a road easement. Further, for purposes of determining legal lot status, the transfer of tax lot 102 by land sale contract occurred when the contract was entered into, in January of 1974. Accordingly, tax lot 100 is a legal lot and Appellant's assignment of error is denied.

### B. Tax Lots 3000 and 1504

Applicant also requests legal lot verifications for tax lots 2900, 3000, 3100, and 1504. Appellants challenge the legal lot status of tax lots 1504 and 3000. The status of these lots are discussed together because their creation, and legal lot status, depend upon many of the same conveyances.

Appellant's main contentions are 1) that the 1993 and 2003 property line adjustments



(depicted on Attachment 8) violated ORS 92.190(3) and (4)<sup>2</sup> and 2) that the property line adjustments violated the holding in the *Phillips* case.

1. ORS 92.190(3) and (4)

ORS 92.190(3) and (4) provide the requirements that a county must follow to adjust property lines of platted subdivisions or partitions. *See* Lane County Hearings Official Decision, *Podhorsky* PA 17-05996, April 13, 2018). Appellant contends that the 1993 and 2003 property line adjustments were invalid because they were not “approved.” However, as Applicant correctly notes, Lane County did not provide a specific process for approval of property line adjustments until 2010. To the extent Appellant is arguing that every property line adjustment that was done before 2010 was invalid, the Hearings Official respectfully disagrees. *See LandWatch Lane County (Farver)*, \_\_\_ Or LUBA \_\_\_ (LUBA No. 2016-124, June 29, 2017) (property line adjustments that occurred before formal process in 2010 still valid.)

2. *Phillips v. Polk County*

In *Phillips v. Polk County*, a property owner used a property line adjustment to decrease the size of a unit of land that was zoned for exclusive farm use. *Phillips*, 53 Or LUBA 194, *aff'd* 213 Or App 498, 162 P3d 339 (2007). The adjustment resulted in a unit of land that was smaller than the minimum lot size in the zone (Exclusive Farm Use, 80-acre minimum). LUBA and the Court of Appeals cited to the definition of “partition” in ORS Chapter 92,<sup>3</sup> as well as the statutory and

<sup>2</sup> ORS 92.190 provides, in relevant part:

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

“(4) A property line adjustment deed shall contain the names of the parties, the description of the adjusted line, references to original recorded documents and signature of all parties with proper acknowledgment.”

<sup>3</sup> ORS 92.010(7)(2005) defined “partition land” as follows:

“to divide land to create two or three parcels of land within a calendar year, but does not include:

“\* \* \* \* \*

“(b) An adjustment of a property line by the relocation of a common boundary where an additional unit of land is not created *and where the existing unit of land reduced in size by the adjustment complies with any applicable zoning ordinance* [.]” Emphasis added.

local code provisions imposing the 80-acre minimum lot or parcel size. ORS 215.780(1)(a). It held that a “property line adjustment” that either starts with and results in a lot or parcel that is smaller than the minimum lot size in the zone is a *de facto* partition and is improper.

In this case, Appellant argues that the 1993 and 2003 property line adjustments, like the property line adjustments in the *Phillips* case, resulted in lots or parcels that were below the minimum lot size for the applicable zone. The property line adjustments involved tax lots 3000, 1504 and what is now 1505. Tax lot 3000 was and is zoned SG and has no minimum lot size. Accordingly, the reduction of 3000 by the property line adjustments does not implicate the *Phillips* holding. Tax lot 1504, however, is zoned E-30.<sup>4</sup> The minimum lot size in the E-30 zone is 30 acres. At the time of the property line adjustments in this case, tax lot 1504 was below 30 acres in size. Accordingly, the reduction in size of tax lot 1504 by the 1993 and 2003 property line adjustments implicates the holding in *Phillips*.

#### ORS 92.192

Following the Court of Appeals’ decision in *Phillips*, the 2008 legislature adopted ORS 92.192. That statute provided some relief from *Phillips* by identifying some circumstances where a lawful property line adjustment could result in a sub-standard lot. Presumably, if the circumstances outlined in ORS 92.192 fit the facts of this case, and if the legislature made ORS 92.192 apply retroactively, then the 1993 and 2007 property line adjustments could be deemed lawful.

Both parties presented arguments concerning the retroactivity of ORS 92.192. Interestingly, Applicant contends ORS 92.192 is not retroactive. Appellant contends that it applies retroactively, but only for purposes of property line adjustments that are approved by the local government. *See* HB 3629, Section 6.<sup>5</sup> Appellant contends that the 1993 and 2003 property line adjustments were not approved, and staff confirms that the county did not have a process for approving property line adjustments until 2010. The Hearings Official need not determine whether ORS 92.192 applies retroactively in this case because the Applicant concedes that it does not. Further, Applicant has provided no argument or evidence demonstrating that the parcels enlarged by the property line adjustments satisfied the requirements of ORS 92.192(4).<sup>6</sup>

The Applicant carries the burden of proof throughout the process, and it has failed to

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<sup>4</sup> In its final rebuttal, Applicant asserts that tax lot 1504 was zoned SG in 1993. Page 5 of Final Rebuttal, May 3, 2018. However, the record does not support that assertion. See submittal of applicant, April 19, 2018, Official Zoning Map, Plot #402.

<sup>5</sup> Section 6 provides: “Section 2 of this 2008 Act and the amendments to ORS 92.010 and 92.060 by section 3 and 4 of this 2008 Act apply to property line adjustments approved before, on or after the effective date of this 2008 Act.”

<sup>6</sup> Subsection (4) generally prohibits a property owner from reducing one parcel by increasing the size of another parcel so the larger parcel can qualify for an additional dwelling.



demonstrate by a preponderance of the evidence that tax lot 1504 is a legal lot.<sup>7</sup>

Appellants' assignment of error with regard to tax lots 1504 and 3000 is sustained.<sup>8</sup>

**Conclusion**

The Planning Director determined that tax lots 100, 1504, 2900, 3000, and 3100 are legal lots. Appellant challenges the legal lot status of tax lots 100, 1504, and 3000. The Hearings Official confirms the Planning Director's determination that tax lot 100 is a legal lot, but overturns her decision that tax lots 1504 and 3000 are legal lots. The Planning Director's determination that tax lots 2900 and 3100 are legal lots was not challenged.

**Respectfully Submitted,**

 5/14/18

**Anne Davies**                      **Dated**  
**Lane County Hearing Official**

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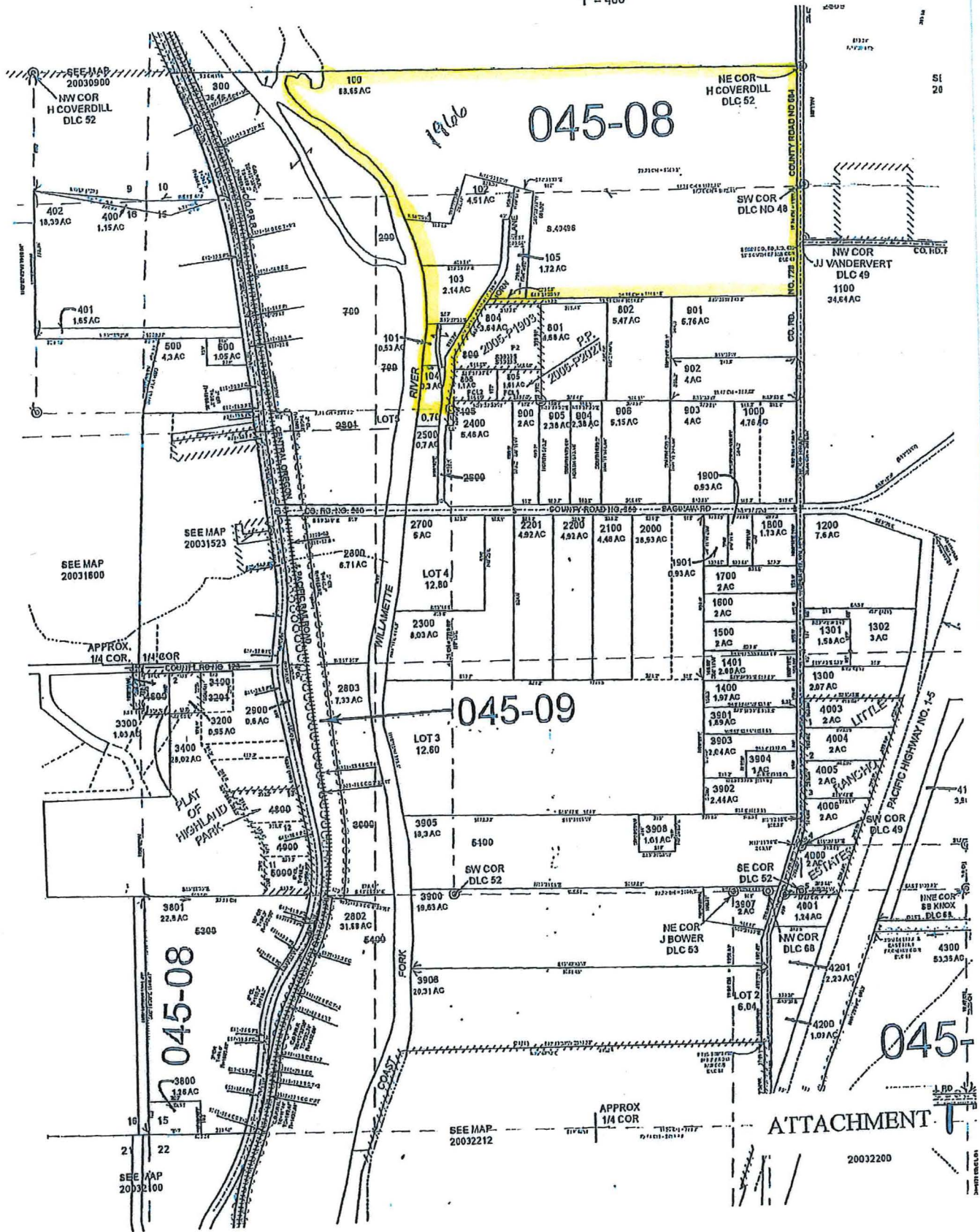
<sup>7</sup> Applicant may wish to request on appeal or reconsideration that the record be re-opened to allow arguments on the critical issue of the retroactivity of ORS 92.192, and its applicability to the facts in this case.

<sup>8</sup> Both the 1993 and the 2003 property line adjustments were unlawful because they reduced tax lot 1504 below the applicable minimum lot size. Although the applicable zoning for tax lot 3000 (SG) has no minimum lot size, each of the 1993 and 2003 property line adjustments reduced both tax lot 1504 and tax lot 3000 by a single deed. Because the property line adjustments were unlawful, tax lot 3000 is also an illegal lot.



FOR ASSESSMENT AND TAXATION ONLY

SECTION 15 T.20S. R.3W. W.M.  
Lane County  
1" = 400'



ATTACHMENT

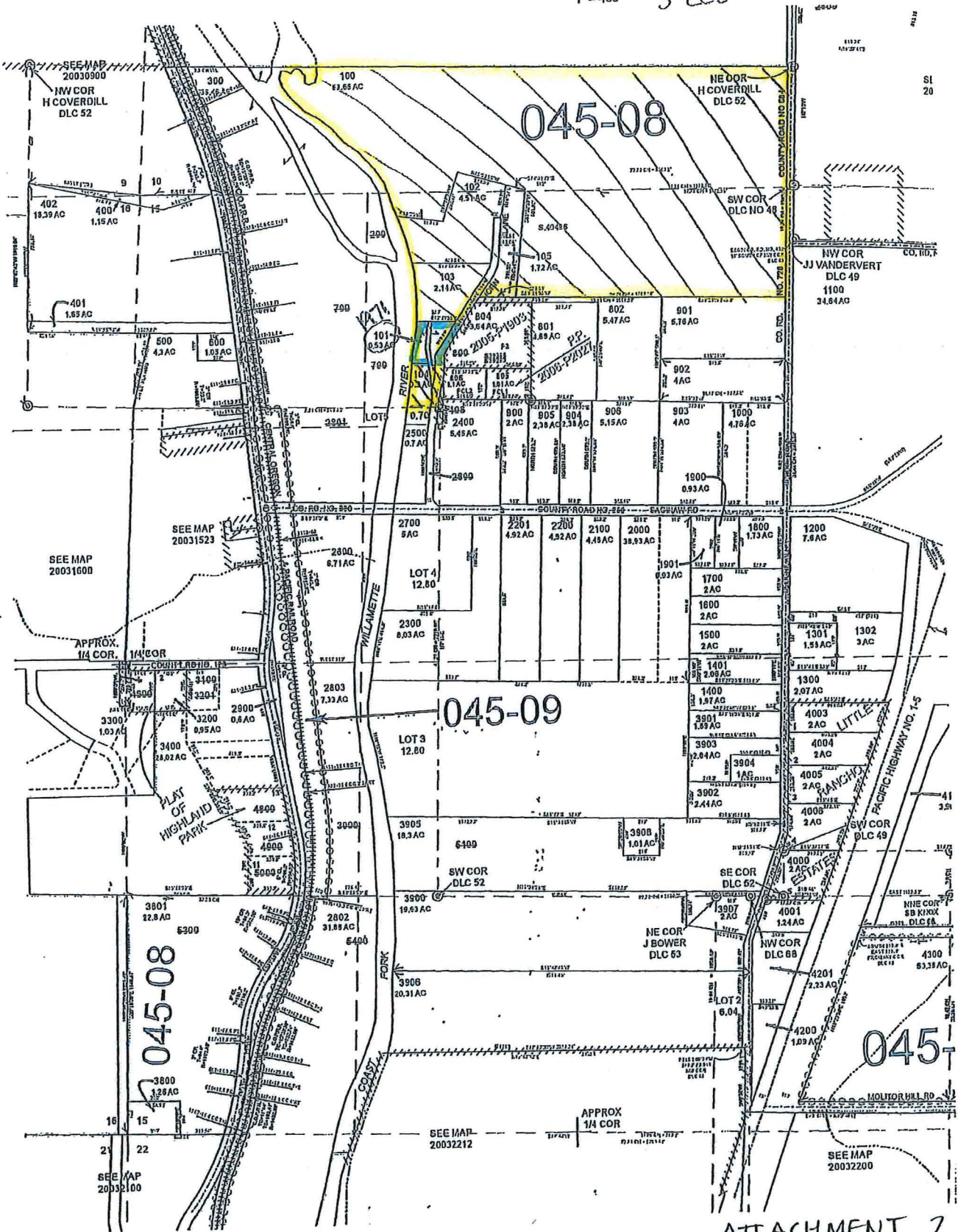
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FOR ASSESSMENT AND TAXATION ONLY

SECTION 15 T.20S. R.3W. W.M.  
Lane County

1" = 400' 3 ULS



ATTACHMENT 2

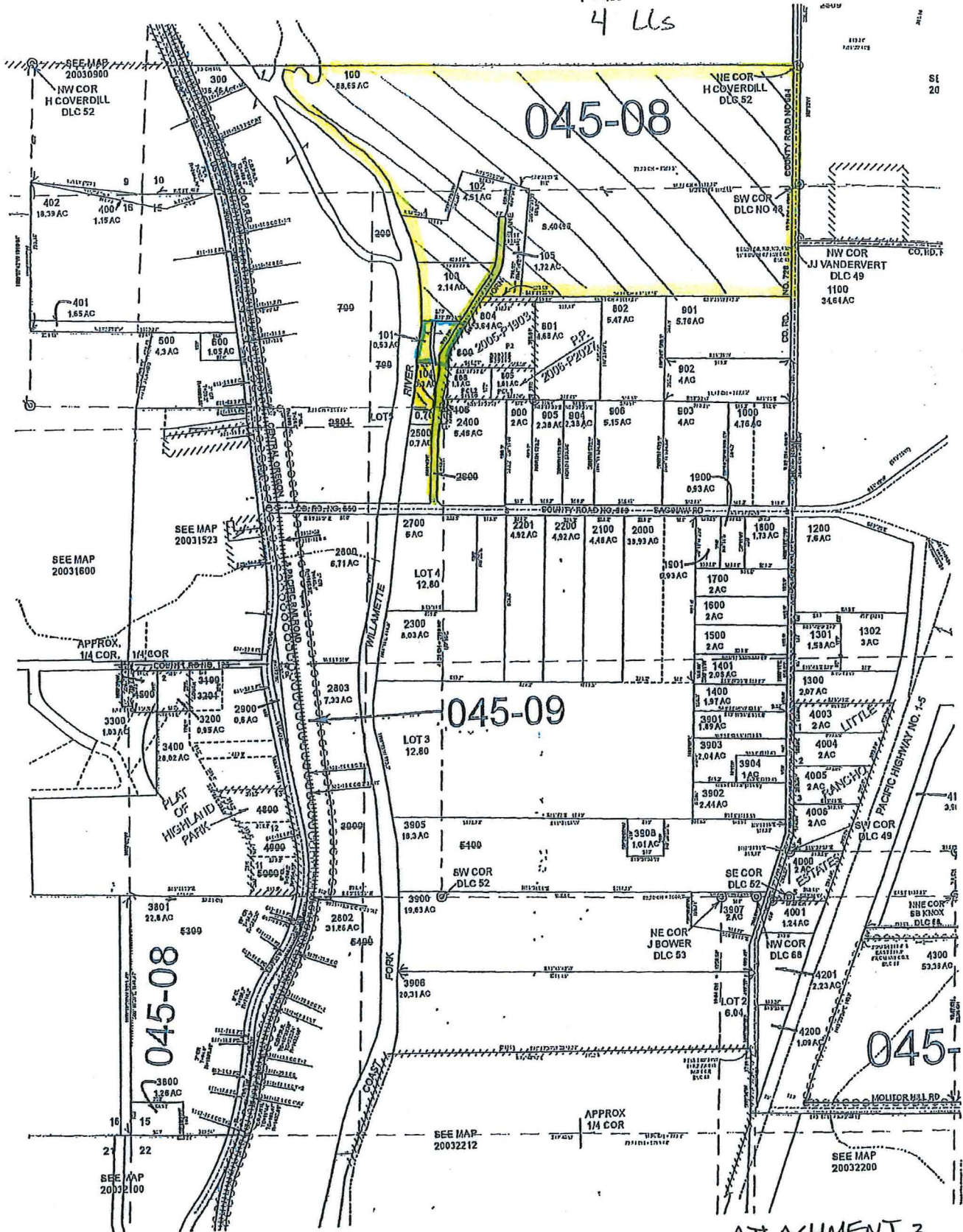


FOR ASSESSMENT AND TAXATION ONLY

SECTION 15 T.20S. R.3W. W.M.  
Lane County

1" = 400'

4 ULS



ATTACHMENT 3

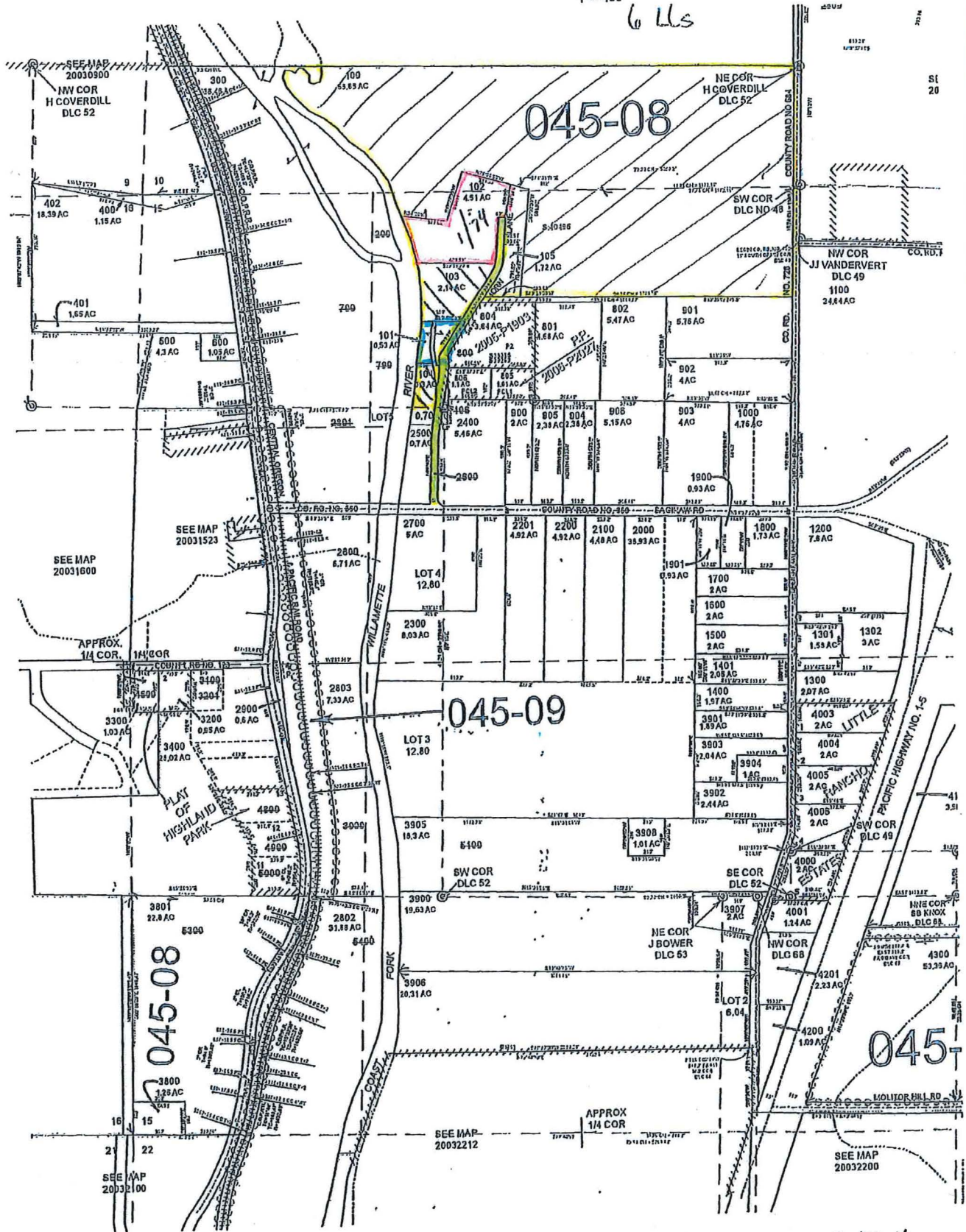


FOR ASSESSMENT AND TAXATION ONLY

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Lane County

1" = 400'

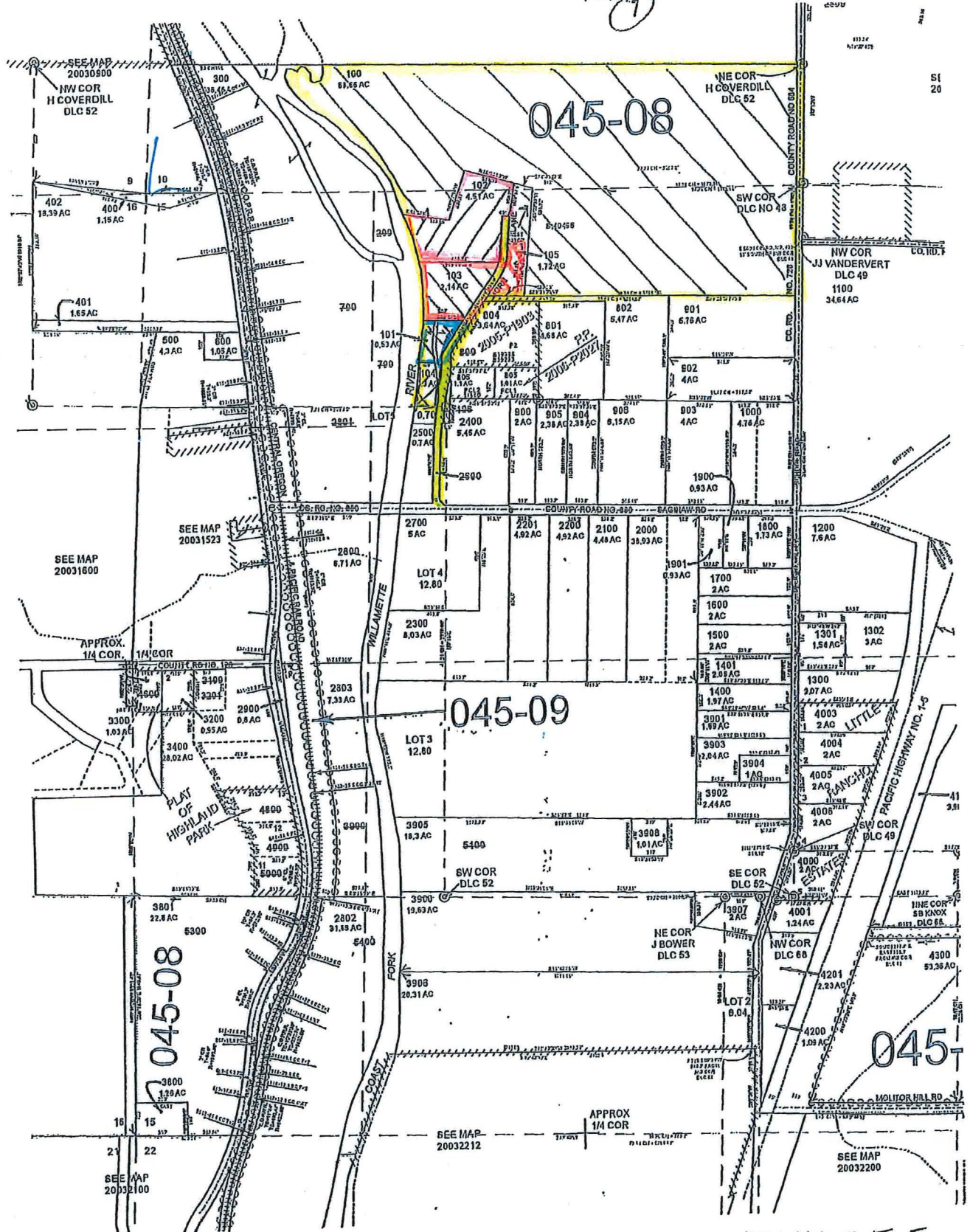
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FOR ASSESSMENT AND TAXATION ONLY

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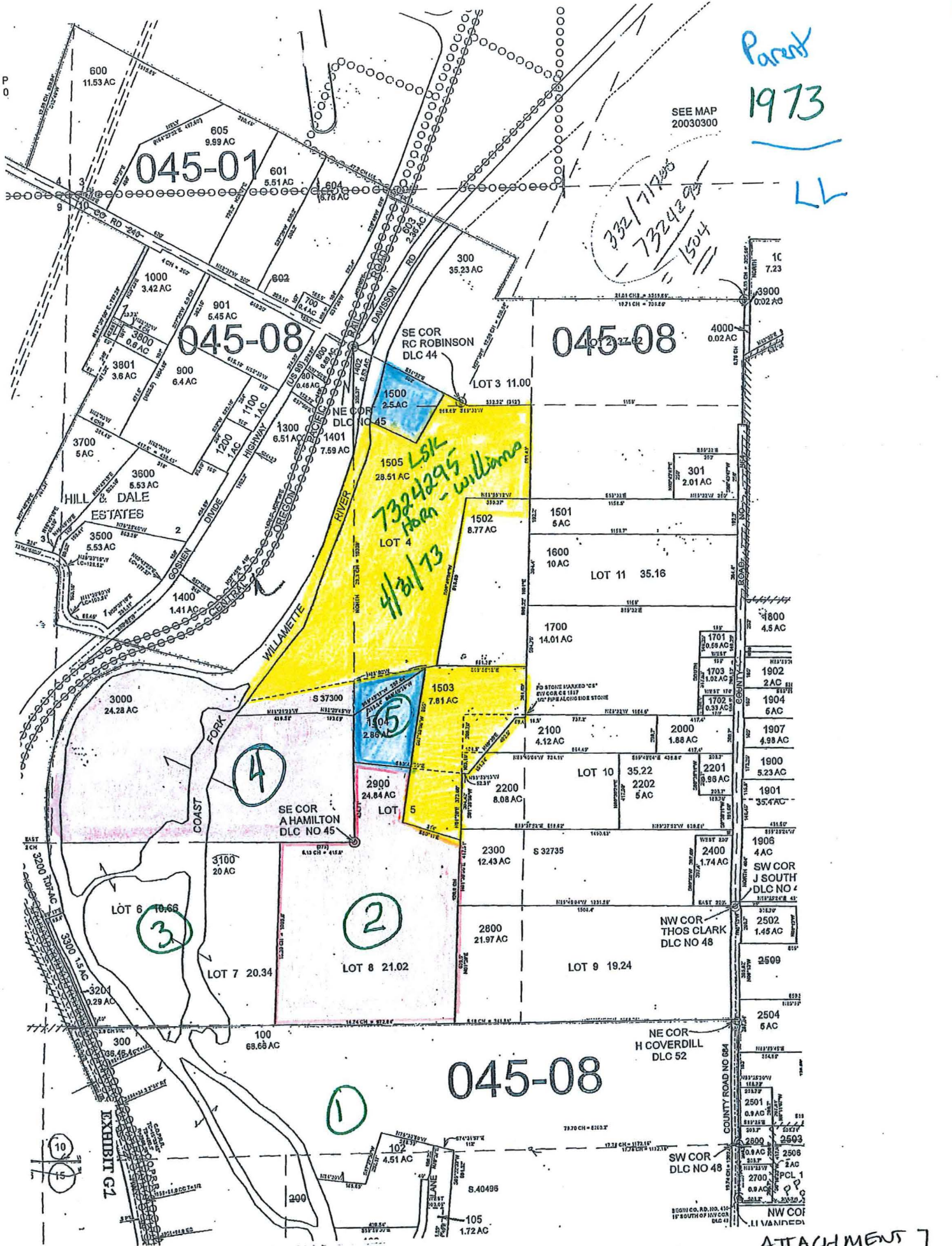


ATTACHMENT 5









Parent  
1973  
LL

SEE MAP  
20030300

732/71700  
7324295  
1504

045-01

045-08

045-08

045-08

ATTACHMENT 7

LOT 4  
7324295  
L5K  
4/21/73  
Holan - Williams

⑤

④

③

②

①

EXHIBIT G1

SW COR  
DLC NO 48

NE COR  
H COVERDILL  
DLC 52

NW COR  
THOS CLARK  
DLC NO 48

SE COR  
A HAMILTON  
DLC NO 45

NE COR  
DLC NO 45

SE COR  
RC ROBINSON  
DLC 44

HILL & DALE  
ESTATES

COAST FORK

WILLAMETTE RIVER

600  
11.53 AC

605  
9.99 AC

601  
5.51 AC

604  
18.78 AC

1000  
3.42 AC

901  
6.45 AC

602  
0.44 AC

300  
35.23 AC

3801  
3.6 AC

900  
6.4 AC

1200  
1 AC

1300  
6.51 AC

1401  
7.59 AC

1500  
2.5 AC

1505  
28.51 AC

1502  
8.77 AC

1501  
6 AC

1600  
10 AC

1700  
14.01 AC

1701  
0.58 AC

1703  
1.02 AC

1702  
0.33 AC

3700  
5 AC

3600  
5.53 AC

3500  
5.53 AC

1400  
1.41 AC

3000  
24.28 AC

2900  
24.84 AC

2100  
4.12 AC

2200  
8.08 AC

2300  
12.43 AC

2800  
21.97 AC

2000  
1.88 AC

2400  
1.74 AC

2501  
0.9 AC

2502  
1.45 AC

2503  
0.9 AC

3201  
0.29 AC

3100  
20 AC

3200  
1.5 AC

100  
68.68 AC

102  
4.51 AC

105  
1.72 AC

2201  
0.88 AC

2202  
5 AC

2301  
0.88 AC

2401  
0.88 AC

2504  
6 AC

2505  
2 AC

2506  
2 AC

2507  
2 AC

2508  
2 AC

LOT 6  
10.66

LOT 7  
20.34

LOT 8  
21.02

LOT 9  
19.24

LOT 10  
35.22

LOT 11  
35.16

LOT 3  
11.00

LOT 5  
7.81 AC

LOT 10  
35.22

LOT 11  
35.16

LOT 3  
11.00

LOT 5  
7.81 AC

LOT 10  
35.22

LOT 11  
35.16

LOT 3  
11.00

LOT 5  
7.81 AC

LOT 10  
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LOT 11  
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LOT 3  
11.00

LOT 5  
7.81 AC

LOT 10  
35.22

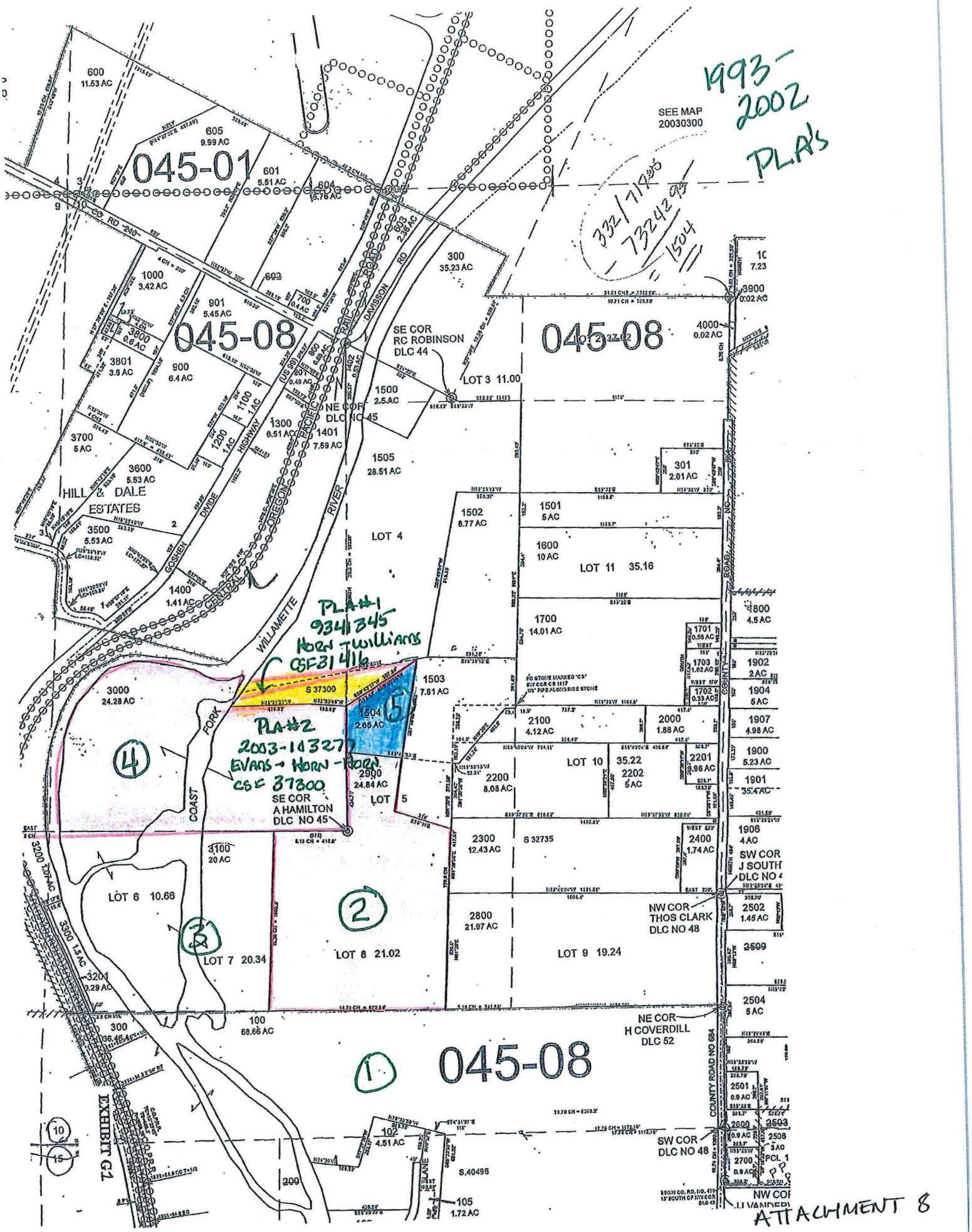
LOT 11  
35.16



1993-2002 PLATS

SEE MAP 20030300

332/71745  
73242  
1504



PLAT #1  
9341345  
Horn Williams  
CSE 31416

PLAT #2  
2003-10327  
EVANS - HORN - HORN  
CSE 37300  
SE COR  
A HAMILTON  
DLC NO 45

④

②

①

ATTACHMENT 8



**LAW OFFICE OF BILL KLOOS, PC**

OREGON LAND USE LAW

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EUGENE, OR 97401  
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WEB: [WWW.LANDUSEOREGON.COM](http://WWW.LANDUSEOREGON.COM)

June 18, 2018

Lane County Board of Commissioners  
c/o Lane County Land Mgmt. Div.  
125 E. 8<sup>th</sup> Ave  
Eugene, OR 97401

RE: Northwest Mineral Resources PA 17-05998; Option 2 appeal to Board

Dear Commissioners:

The Hearings Official's reconsidered decision is in error because:

1. The Hearings Official reconsidered decision is invalid. Pursuant to LC 14.600(4), the Hearings Official does not have authority to reconsider a decision without a waiver. No waiver was granted by the applicant. As such, the original HO decision stands and this appeal is not necessary.
2. If it is found that the decision is valid, the decision denies legal lot status to Tax Lot 100. Evidence in the record supports a finding that tax lot 100 is the lawful remainder of an original parent parcel after lawful conveyances. The subject legal descriptions are in the record, including the 1971 transfer. That the Hearings Official failed to read the legal description is not a basis for denial. The 1974 transfers resulted in three or less parcels. TL 100 was not created in 1974, it was created in 1966.
3. If it is found that the decision is valid, then the waiver was implicit in accepting the reconsideration based on LC 14.600(4). The HO finding that she did not have time to read the legal descriptions in the record, and thus could not make a determination, is without merit.

In general, the hearings official exceeded her authority, and misinterpreted the Lane Code, State law and other applicable law.

The appellant raised substantive issues before the close of the record at or following the final evidentiary period. The applicant wishes the application to be approved.

Sincerely,

*/s/ Kimberly J.R. O'Dea*

Kimberly J.R. O'Dea

Attachment 2