

BEFORE THE BOARD OF COMMISSIONERS OF LANE COUNTY, OREGON

ORDER NO: 18-10-02-03 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 Forest Template Dwelling on Tax Lot 201, Assessor's Map 18-02-11 (File No. 509-PA17-05951; Betz/Evans)

WHEREAS, the Lane County Hearings Official has made a decision to affirm a Planning Director's approval of forest template dwelling application on Tax Lot 201, Assessor's Map 18-02-11;

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 August 28, 2018, the Lane County Hearings Official affirmed his August 8, 2018 decision on the application after reviewing the appeal; and

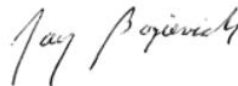
WHEREAS, Lane Code 14.080(4)(d) provides the procedure and criteria that the Board follows in deciding whether or not to conduct an on-the-record hearing for an appeal of a decision by the Hearings Official; and

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 does not comply with the criteria of Lane Code 14.080(4)(d)(iii) and therefore, the Board declines to further review the appeal and consider arguments therein. Findings of fact in support of this determination are attached as Exhibit "A."
2. That the Lane County Hearings Official decision dated August 8, 2018, and the letter affirming the decision dated August 28, 2018 attached as Exhibit "B," which affirmed the Planning Director's decision is adopted, ratified, and affirmed by the Board of County Commissioners as the County's final decision. Furthermore, to the extent that the Hearings Official interpreted Lane Code 16.211(5) and (8), that the Board expressly agrees with and adopts those interpretations.

ADOPTED this 2nd day of October, 2018



Jay Bozievich, Chair
Lane County Board of Commissioners

APPROVED AS TO FORM

Date 9-27-18



LANE COUNTY OFFICE OF LEGAL COUNSEL

ORDER EXHIBIT "A"

FINDINGS IN SUPPORT OF THE ORDER

1. Findings herein are provided for the appeal of Department File No. 509-PA17-05951.
2. Notice of the August 8, 2018 Hearings Official's decision was mailed to the applicant and parties of record on August 8, 2018.
3. On August 20, 2018, Andrew Mulkey, representing LandWatch Lane County, filed a timely appeal and requested that the Board of County Commissioners not conduct a hearing on the appeal and deem the Hearings Official's decision the final decision of the County, pursuant to LC 14.080(4)(d)(ii) and (vi).
4. On August 28, 2018, the Hearings Official reviewed the appeal and affirmed his decision without further consideration pursuant to LC 14.080(4)(a) and (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 deadline for a decision within 150 days after the application was deemed complete was June 4, 2018. Therefore, a final decision by the Board through holding an on-the-record hearing cannot be made within the time constraints of ORS 215.427.
6. In order for the Board to hear arguments on the appeal, Lane Code 14.080(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.*

Issues raised in the appeal statement are largely specific to the application and in regards to a particular dwelling counted within the 160-acre "template" measurement to demonstrate compliance with Lane Code 16.211(5)(c)(i).

The appellant asserts that the applicant cannot use the dwelling on Tax Lot 501 to meet the requirements of Lane Code 16.211(5)(c)(i)(bb) because the County erred in approving a replacement dwelling application in 2001. As described in the Hearings Official's decision, a previous appeal (PA15-05734) involving Tax Lot 501 found that the mobile home was properly removed and replaced in a manner consistent with replacement dwelling regulations. The Planning Director believes that there is not a need for policy guidance on this issue because the Hearings Official has provided a reasonable interpretation of Lane Code 16.211(5)(c)(i)(bb) in the previous appeal and the Hearings Official's determination in this case is consistent with past determinations.

Forest Template Dwelling applications are a common land use application made to the County, but the Planning Director has consistently determined that lawfully placed replacement dwellings do satisfy the "continues to exist" language in Lane Code 16.211(5)(c)(i)(bb) with support from the Hearings Official.

Issues raised in the appeal concerning OAR 660-006-0027(1)(f) and other applicable State law are matters of State law interpretation on which the County would not have deference on appeal to LUBA.

As described in the Hearings Official's decision, the applicant has demonstrated that the proposed dwelling meets siting criteria and that access to the proposed dwelling is feasible. Furthermore, the Hearings Official determined that the Applicant has shown by a preponderance of evidence that qualifying parcels within the template area were lawfully established absent any objective evidence supplied by the appellant.

The Hearings Official has reviewed the appeal and found that the allegations of error have been adequately addressed in his decision and do not warrant reconsideration, as explained in his August 28, 2018 letter affirming his August 8, 2018 decision.

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

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 OAR 660 and Lane Code 16.211(5) and (8).

The appellant has raised the issue that approval of the dwelling fails to meet Big Game Range habitat density standards and Goal 5 policies of the Rural Comprehensive Plan. The Hearings Official's decision details that the intended use of the density standards was to establish the Lane County zoning ordinance and is to be considered in rezoning applications. The Planning Director has held that Goal 5 Big Game policies apply to post-acknowledgement plan amendments (PAPA), and that a PAPA does not require an entirely new Goal 5 analysis. Therefore, an application for a template dwelling does not require a Goal 5 analysis.

8. The Planning Director recommends that the Board elect *not* to conduct an on-the-record hearing for the appeal and adopt, affirm, and ratify the Lane County Hearings Official decision as the County's final decision, and expressly agree with and adopt any interpretations of Lane Code 16.211(5) and (8) made by the Hearings Official. The August 8, 2018 Hearings Official's decision and his August 28, 2018 letter affirming his decision does not include a recommendation that the Board of Commissioners conduct an on-the-record hearing for the appeal.
9. To meet the requirements of Lane Code 14.080(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 October 2, 2018, finds that the appeal does not comply with the criteria of Lane Code Chapter 14.080(4)(d)(iii), declines to further review the application, and elects not to hold an on the record hearing for the appeal.
10. The Board therefore elects not to conduct an on-the-record hearing for the appeal and to adopt, affirm, and ratify the Lane County Hearings Official decision as the County's final decision. Furthermore, to the extent that the Hearings Official has interpreted Lane Code 16.211(5) and (8), the Board expressly agrees with and adopts those interpretations.

August 28, 2018



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

Re: *Appeal of Hearings Official decision affirming the Planning Director's approval of the Betz request (PA 17-05951) for a template forest dwelling on tax lot 201, assessor's map 18-02-11.*

Dear Ms. Kaye:

On August 8, 2018, I affirmed the Planning Director's approval of the Betz request (PA 17-05951) for a template forest dwelling on tax lot 201, assessor's map 18-02-11. On August 20, 2018 LandWatch Lane County appealed my decision. Upon a review of this appeal, I find that the allegations of error have been adequately addressed in that decision and that a reconsideration is not warranted.

However, it should be noted that the August 8 decision contained several typographical errors. These errors, which are as follows, do not change the substance of the decision:

1. In the second line of Finding of Fact #1, page 1 of the decision, the assessor's map for the subject property is 18-02-11.
2. In the first paragraph on Page 5 of the decision, the number of lawful parcels and dwellings were reversed. The last two sentences of this paragraph should read:


"Under Subsection (aa) of this standard, an applicant must demonstrate that there were ~~seven~~ **three** dwellings that existed on January 1, 1993 that are located within the 160-acre square template that is centered on the subject property. Under Subsection (bb) of this standard, an applicant must demonstrate that there were ~~three~~ **seven** legal lots that existed on January 1, 1993 and that continue to exist on the other lots or parcels described in LC 16.211(5)(c)(ii)(aa).

3. On Page 7, under Allegation of Error c. the reference to "Goodman" should be changed to "Smejkal."
4. In the second paragraph on Page 9, the reference to PA 15-05734 should be changed to PA 01-05598.

14.080(4)(b) DAD

Accordingly, on the authority of Lane Code ~~14.535(1)~~, I shall affirm my August 8, 2018 decision without further consideration. Please advise interested parties of this decision.

Sincerely,


Gary L. Darnielle
Lane County Hearings Official

cc: Rachel Serslev (file)



August 8, 2018

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

Re: *Appeal of Planning Director approval of the request (PA 17-05951) by Geri Betz for a forest template dwelling on Tax Lot 201, Assessor's Map 18-02-11.*

Dear Ms. McKinney:

Please find the revised Lane County Hearings Official's decision affirming the Planning Director's approval of the request (PA 17-05951) by Geri Betz for a forest template dwelling on Tax Lot 201, Assessor's Map 18-02-11. The previous decision, dated 8/6/18, contained a typographical error in the title and a misstatement regarding the Goal 5 inventory status of Lane County's Big Game Range on page 10.

Sincerely,

Gary L. Darnielle
Lane County Hearings Official

cc: Rachel Serslev (file)

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

Application Summary

On November 30, 2017, a request to establish a dwelling in the Impacted Forest Lands (F-2) zone was submitted to Lane County Land Management Division by Geri Betz. The application was deemed complete on January 5, 2018. On May 8, 2018, the Director issued a determination that the subject property complied with the applicable standards and criteria for a Forest Template Dwelling pursuant to LC 16.211(5) and (8). Notice of the determination was mailed to surrounding property owners and interested parties. On May 21, 2018, a timely appeal was submitted by LandWatch Lane County.

Parties of Record

Geri Betz	LandWatch Lane County	Mike Evans
Andrew Mulkey	Lauri Segel	Sean Malone
Mike Farthing	Bob Smejkal	

Application History

Hearing Date: June 14, 2018
(Record Held Open Until July 26, 2018)

Decision Date: August 8, 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 (LC) 16.211(5)&(8)
ORS 215.730(1)(b)

Findings of Fact

1. The property subject to this application, hereinafter referred to as the "subject property," is located on tax lot 201, assessor's map 18-92-11. The subject property is located approximately half a mile from the Urban Growth Boundary of the City of Springfield. The subject property is vacant, is 18.5 acres in size, and is

owned by the Applicant. It is zoned F-2 Impacted Forest Lands. The subject property is not contiguous to any other properties under the same ownership and therefore is not part of a tract. It is bordered on all sides by property zoned F-2 Impacted Forest Lands.

The subject property is primarily grass with about eight acres of young Douglas fir. It has moderate to steep slopes that slope downward from the north east to the southwest. The proposed development area is located on a relatively flat area in the southeast corner of the property.

2. The subject property received a preliminary legal lot verification per Land Management Division file No. 509-PA07-05916. This preliminary verification was noticed and became final with department file No. 509-PA07-05924. The property has not been reconfigured.
3. Fifty-six percent of the subject property is composed of soils that have a forest capability rating of above 70 cubic feet per acre per year.

Soil Map Unit #	Soil Type Description	% of Tax Lot	Cu.Ft./Ac./Yr.
113G	Ritner Cobbly Silty Clay Loam, 30 to 60% Slopes	41%	149
116G	Rock Outcrop-Witzel Complex, 10 to 70% Slopes	23%	21
107C	Philomath Silty Clay, 3 to 12% Slopes	21%	45
138G	Witzel Very Cobbly Loam, 30 to 75% Slopes	14%	70
138E	Witzel Very Cobbly Loam, 3 to 30% Slopes	1%	70

Based upon the average soil productivity of the subject property, which is between 50 to 85 cubic feet per acre per year of wood fiber, the 7-parcel template test required by LC 16.211(5)(c)(ii)(aa) is applicable to this application. In addition, LC 16.211(5)(c)(ii)(bb) requires that at least three dwellings existed on January 1, 1993, and continue to exist on lots located within a 160-acre square centered on the subject property. The following table documents eight parcels relied upon by the Applicant to satisfy Lane Code 16.211(5)(c)(ii)(aa):

Count	Assessor's Map	Tax Lot	Year of Creation	Documentation / Deed / LLV / Land Division
1	18-02-11	401	1811	132/519, LLV 509-PA 04-05476
2	18-02-11	404	1922	H/332, LLV 509-PA 04-05480
3	18-02-11	501	1944	LLV 509-PA 15-05130
4	18-02-11	506	1944	LLV 509-PA 15-05130

5	18-02-11	601	1982	Parcel 2 of Partition M 43-81
6	18-02-11	100	1953	460/235
7	18-02-02	200	1973	R631/13118
8	18-02-10	100	1941	222/81

4. Lane Code 16.211(5)(c)(ii)(bb) requires that at least three dwellings existed on January 1, 1993, and continue to exist on lots located within a 160 acre square centered on the subject property. The Applicant has relied upon the following dwellings/tax lots:

Count	Assessor's Map	Tax Lot	Year	Year of Dwelling on Property
1	18-02-11	501	1944	1968 per replacement rights 509-PA 01-05598
2	18-02-11	601	1982	1982 per replacement rights 509-PA 98-05159
3	18-02-11	100	1953	1978 per replacement rights 509-PA 01-05596

The proposed dwelling is located approximately 500 feet from the nearest dwelling on the adjacent Tax Lot 501 to the south east. To the east, Tax Lot 100 also contains a dwelling that is over 1,000 feet from the proposed home site. The home site is located 130 feet from the eastern property boundary, 200 feet from the southern property boundary, approximately 310 feet from the northern property boundary, and over 1,000 feet from the western property boundary.

Slopes are approximately 10 percent at the proposed location of the home site and it is occupied by vegetation that includes grasses, brush, and non-commercial Black Oak trees. The soils in this area are Philomath Silty Clay with 3 to 12 percent slopes, which has a low capability rating compared to soils on most other parts of the subject property. A contour map submitted by the Applicant does not show any ravines, ridges, or slopes greater than 40 percent within 30 feet of the home site.

5. The property is currently accessed by a 1500-foot, existing dirt road off of Weyerhaeuser Haul Road that will be improved to standards required by LC 16.211(8)(e). The Applicant proposes an easement for the use of Weyerhaeuser Haul Road from Wallace Creek County Road to the subject property. The Weyerhaeuser Haul Road is asphalt with a gravel shoulder width of over 16 feet and a grade of less than 16 percent. No other dwellings currently use this road for access. Access to the subject property from the Weyerhaeuser Haul Road will be a private driveway that crosses Tax Lots 302, 403, 404, 401, and 200. In the event that an easement to use Weyerhaeuser Haul Road is not obtained, the applicant proposes an easement using Brand S. Road from Bob Straub Parkway (a Lane County road) to the crossing at Weyerhaeuser Road. A crossing is reserved in a

August 19, 1947 deed. (See Book 354, Pages 176–181, Lane County Deeds and Records.) Brand S Road varies from 12 to 20 feet in width and consists of an all-weather gravel surface with some paved sections. It serves several dwellings and has no grades that exceed 16 percent.

An existing, unimproved road near the proposed home site that will be improved to function as the private access road and driveway to the proposed dwelling. The driveway follows an existing unimproved road that appears (from aerial imagery) to end at the northern boundary of the subject property. The driveway will be extended through an open, grassy area to the home site. Furthermore, the applicant states that the road will only be relocated where required by Lane Code to meet grade requirements. Because the driveway is in excess of 200 feet it is required by LC 16.211(8)(e)(ii) to have a turnout.

6. Consistent with ORS 215.730(1)(b)(D), the subject property is located within the service boundary of the Pleasant Hill Rural Fire Protection District and the District has submitted written verification of compliance with standards specified in LC 16.211(8)(e). Steve Abel, the Interim Fire Chief, inspected the access road through the subject property and tax lots 200, 302, 401, 402, 403 and 404. In a March 7, 2017 memorandum to Doug Wolf and Mike Evans, the Fire Chief listed the equipment that would access the subject property and did not identify any topographic features that would prevent the Applicant from satisfying the County road standards contained in LC 16.211(8)(e).
7. Well logs from surrounding properties show an average yield of 33 gallons per minute, indicating that an adequate supply of water is available. The water source is from an aquifer as there are no Class I streams on the subject property.

Decision

THE PLANNING DIRECTOR DECISION APPROVING THE REQUEST (PA 17-05951) BY GERI BETZ FOR A TEMPLATE FOREST DWELLING ON TAX LOT 201, ASSESSOR'S MAP 18-02-11 IS AFFIRMED.

Justification for the Decision (Conclusion)

The subject property is zoned F-2 Impacted Forest Land. The Applicant is requesting approval to construct a single-family dwelling as provided by LC 16.211(5)(c). Dwellings authorized by this provision are known as "forest template" dwellings because some of the applicable approval criteria of LC 16.211(5) must be analyzed through the placement of a 160-acre square template centered on the center of the subject property (tract). Additionally, the placement of a dwelling on non-impacted forest land must meet the siting standards provided by LC 16.211(8).

Under the template dwelling regulations, the standards differ depending upon the soil productivity of the property upon which the dwelling is to be placed. In the present case,

a majority of the soils on the subject property are capable of producing about 70 cubic feet per acre per year of wood fiber. Therefore, LC 16.211(5)(c)(ii) is applicable. Under Subsection (aa) of this standard, an applicant must demonstrate that there were seven dwellings that existed on January 1, 1993 that are located within the 160-acre square template that is centered on the subject property. Under Subsection (bb) of this standard, an applicant must demonstrate that there were three legal lots that existed on January 1, 1993 and that continue to exist on the other lots or parcels described in LC 16.211(5)(c)(ii)(aa).

In the present case, the Planning Director found that the application satisfied the approval criteria of LC 16.211(5)(c) and the siting standards of LC 16.211(8). The Appellant raises the following allegations of error:

1. *Tax lot 501, assessor's map 18-02-11, one of the tax lots used to satisfy LC 16.211(5)(c)(ii), was subject to a 2017 property line adjustment that moved the dwelling from one lot to another and therefore it did not "continue to exist" as required by LC 16.211(5)(c)(ii)(bb).*

This application for a template dwelling was submitted on November 30, 2017. A property line adjustment that resulted in a new parcel configuration for the dwelling on tax lot 501 became final on December 18, 2017 via PA 17-05695. The new parcel configuration was not recorded until December 22, 2017 (Instrument No. 2017-062866). Since a permit application must be reviewed under the conditions that exist on the date that it was filed, this property line adjustment is irrelevant to the current appeal.

This allegation of error is dismissed.

2. *The dwelling on tax lot 501, assessor's map 18-02-11, one of the tax lots used to satisfy LC 16.211(5)(c)(ii), does not continue to exist.*

This allegation of error raises several issues. These issues are as follows:

- a. *Whether a replacement dwelling meets the "continued to exist" standard of OAR 660-006-0027(3)(b)(B) and Lane Code 16.211(5)(c)(ii)(bb).*

In the present application, the Applicant is required to satisfy by LC 16.211(5)(c)(ii)(bb) in regard to identifying three dwellings located on lots within the template that existed on January 1, 1993 and continue to exist. The Appellant argues that the dwelling that existed on January 1, 1993 was subsequently replaced and therefore cannot be shown to "continue to exist."

ORS 215.750 recognizes that a dwelling on some forest land is appropriate depending upon the amount of parcelization and development in the area and the quality of the subject property's soils. Indeed, Multnomah County

has acknowledged that the purpose of the statute as authorizing a limited amount of residential development on forest lands that are parcelized and developed with occupied dwellings.¹ The importance of the dwelling is its existence. That is, the three-dwelling requirement can be satisfied by a 5,000 square foot stick-built home or a single-wide mobile home. The importance lies with the residential use that it represents not the structure itself. In that regard, the lawful replacement of a dwelling that has met the January 1, 1993 threshold is consistent with this understanding.

As a matter of policy, the Lane County Board of Commissioners has held that a replacement dwelling meets the standard of “continue to exist.”² In addition, I would point to Multnomah County where this interpretation has been codified into the zoning ordinance.³ Arguably, if either LUBA or the Oregon Court of Appeals would have taken exception to Multnomah County’s explicit allowance of replacement dwellings they would have so stated.

Based upon adopted Lane County policy, I must conclude that a dwelling that lawfully replaced a dwelling that was lawfully established on January 1, 1993 meets the “*continues to exist*” standard of Lane Code 16.211(5)(c) and OAR 660-006-0027(3)(b).

- b. *Whether a lawfully established dwelling may be replaced on forestland if it does not exist at the time of the application of the replacement dwelling permit.*

The Appellant argues that a lawfully established dwelling on forestland may only be replaced if it exists at the time of the application of the replacement dwelling permit. If it did not, then the replacement dwelling permit was improperly approved and therefore the dwelling that existed in 1993 no longer ‘continues to exist’ for purposes of satisfying LC 16.211(5)(c)(ii)(bb). I agree with the Appellant on this issue.

ORS 215.755(1) provides that a dwelling may be replaced if it *has* [emphasis mine] intact exterior walls and roof, indoor plumbing, interior wiring for lighting, and a heating system.⁴ The language of this provision is in the present tense and suggests that the necessary features of the dwelling to be replaced must be present.⁵ Indeed, in *West v. Multnomah County*⁶, LUBA agreed with the County that its definition of dwelling

¹ *West v. Multnomah County*, 70 Or LUBA 235, 242 (2014)

² Lane County Board of Commissioners Order No. 16-05-17-06, adopted May 17, 2016.

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

⁴ Contrast this language with Subsection (2)(a) of Section 2 of Chapter 462, Oregon Laws 2013 which provides that a dwelling in an EFU zone may be replaced if it “has, or formerly had..” the listed fixtures.

⁵ *Hegele v. Crook County*, 56 Or LUBA 156, 165 (2008)

⁶ *West v. Multnomah County*, 70 Or LUBA 235 (2014) *affirmed*, 269 Or App 518, 350 P3d 203 (2015)

would exclude inclusion of a structure that is long abandoned and in a condition that would preclude it being used as a residence. By the same token, for the purposes of a template dwelling test, a dwelling that was removed prior to an application for its replacement would not qualify for a replacement dwelling permit even if it could be shown that it had previously met the structural facilities listed in ORS 215.755(1).

- c. *May the County's determination that the dwelling on tax lot 501 existed on January 1, 1993 and continues to exist be challenged in this appeal?*

This issue is whether the theory of issue preclusion prevents a re-examination of a previous decision regarding the lawfulness of the replacement of the dwelling on tax lot 501. Tax lot 501, and its dwelling, were the subject of contention in another appeal of a template dwelling by the Planning Director (PA 15-05734). In that case, tax lot 501 was one of the three parcels relied upon by the applicant Goodman to satisfy Lane Code 16.211(5)(c)(i)(bb). The hearings official explicitly found, as a factual matter, that the mobile home had been removed in a manner consistent with the replacement dwelling regulations.

The Applicant argues that legal status of the dwelling on tax lot 501 was settled in PA 15-05734 and, under the doctrine of issue preclusion, cannot be challenged in this proceeding. The Applicant cites the ruling in *Nelson v. Emerald People's Utility Dist.*, 318 Or 99, 104 (1993) as providing the five-factor test that the Oregon Supreme Court identified regarding issue preclusion. The five factors, as a discussion of their applicability to the current case, are addressed as follows:

- i. *The issue in the two proceedings is identical;*

In PA 15-05734 the issue was exactly the same as in the present appeal where the dwelling on tax lot 501 is used to satisfy the three-dwelling requirement of ORS 215.750(1), as implemented by OAR 660-006-0027(3), and Lane Code 16.211(5)(c). Both appeals question whether the replacement of the dwelling on tax lot 501 complied with Lane Code and administrative rule requirements for replacement dwellings and whether a dwelling that had been replaced qualifies as a dwelling that "continues to exist" under OAR 660-006-0027(3)(b)(B) and Lane Code 16.211(5)(c).

- ii. *The issue was actually litigated and was essential to a final decision of the merits in the prior proceeding;*

The prior application, as in the present application, was approved by the Planning Director and appealed to the Hearings Official.

The status of the dwelling on tax lot 501 was crucial in meeting the three-dwelling count in the template dwelling test for the applicant in PA 15-05734 as it is for the current applicant in the present appeal. The issue of whether the dwelling had satisfied the replacement dwelling regulations and whether a replacement dwelling qualified as a dwelling that “continued to exist” was raised by the appellant, rebutted by the applicant, and addressed by the Planning Director, the Hearings Official, and the Board of Commissioners in their respective decisions.

- iii. *The party sought to be precluded had a full and fair opportunity to be heard on that issue;*

LandWatch Lane County was the official appellant in PA 15-05734 as it is in the present appeal. In both appeals, LandWatch Lane County fully participated in the proceedings.

- iv. *The party sought to be precluded was a party or was in privity with a party to the prior proceeding;*

As stated above, LandWatch Lane County was the appellant in PA 15-05734 as it is in the present appeal.

- v. *The prior proceeding was the type of proceeding to which preclusive effect will be given.*

In regard to this factor, LUBA has spoken clearly that it does not believe that the doctrine of issue preclusion applies to local land use proceedings.⁷

- d. *Assuming the doctrine of issue preclusion does not apply, does the record support a finding that the dwelling on tax lot 501 was lawfully issued a replacement permit in 2001?*

The Appellant argues that the dwelling on tax lot 501 had been removed from the property prior to the filing of an application for a replacement dwelling. In specific, the Appellant argues that the mobile home had been removed prior to October of 2000 and not in April of 2001 as determined by the Planning Director.

⁷ *Lawrence v. Clackamas County*, 40 Or LUBA 507,520 (2001)

Except for when the mobile home was removed from tax lot 501, the facts are uncontested. The applicant in PA 15-05734 applied for a permit for the verification and replacement of a lawfully established dwelling on April 20, 2001.⁸ However, the same report stated that the mobile home had been removed in April of 2001.

In PA 15-05734, the Hearings Official relied upon the Planning Director's determination that the mobile home was removed in April of 2001 plus notarized testimony that the mobile home existed in 2000. Department of Assessment and Taxation data was felt to be inconclusive as the age of the mobile home could have rendered its value as zero. The owner also offered to provide dated receipts of the donation of the mobile home's heating system but this circumstantial evidence was not placed into the record.

As evidence that the mobile home was removed from tax lot 501 prior to the application for its replacement, the Appellant offers a copy of two photographs. The first photograph, submitted by the Applicant in a July 5, 2018 submission, is a relatively high-resolution color photograph alleged to have been taken August 1, 2000. This photograph shows a square structure and a rectangle structure in a clearing. The photograph is annotated with the dimensions "46'x 12' MH" in parenthesis. This would indicate that the rectangular structure is the mobile home. In its June 21, 2018 submission, the Appellant introduces a copy of a black and white photograph at a lesser scale apparently taken in October of 2000. Despite the Appellant's assertions, this photograph shows the rectangular structure that was present in the earlier photograph. The scale of the photograph does not definitively show whether the square structure remains.

Taken as a whole, the evidence in the record does not indicate that the mobile home on tax lot 501 was removed from the property prior to the filing of the application for its replacement. The determination of the Planning Director made in PA 01-5598 and the Hearings Official in PA 15-05734 regarding the existence of the mobile home and the validity of the replacement dwelling permit is confirmed.

e. *There was no dwelling on the property between 1997 and 2006.*

As pointed out in PA 15-05734, the age of the mobile home between 1997 and when it was removed from the property explains why the Lane County Assessor assigned a zero value to the structure.⁹ After the property owner

⁸ The Planning Director's staff report incorrectly noted that the application was submitted on May 5, 2001. In fact, the application was submitted on April 20, 2001 (as noted in the Appellant's March 3, 2016 submission), and then put on hold by the Applicant on May 5, 2001.

⁹ See May 26, 2016 letter from Mike Cowles, Lane County Assessor.

applied for a replacement dwelling permit and then removed the dwelling, an occupancy-certified structure was not completed until 2006. As explained in the Hearings Official's decision in PA 15-05734, while the building permit process was irregular, the County never did cancel that permit and ultimately issued an occupancy permit for the current dwelling.

This allegation of error is dismissed.

3. ***The application is inconsistent with several working papers to the Lane County Rural Comprehensive Plan, policies for Goals 4 and 5 of the Rural Comprehensive Plan, and OAR 660-006-0027(1)(d) and (f).***

The Appellant makes the following allegations of error:

a. *The Director's approval violates the dwelling density standards of Big Game Ranges.*

The Appellant notes that the entire TRS within which the subject property exists is designated Big Game Range cites OAR 660-006-0027(1)(f) which require that the siting of the dwelling be consistent with density limitations imposed by the acknowledged comprehensive plan and land use regulations. However, the Flora and Fauna Working Paper of the Rural Comprehensive Plan explains that the Big Game Range density standards were integrated into the zoning classifications and minimum lot size recommendations on a regional basis. The density recommendations were not applicable to existing parcels but were to be considered in rezoning applications. Therefore, the approval of dwellings under a template dwelling test does not involve a determination of consistency with Big Game Range density standards.

b. *The Director's approval violates Goal 4 and 5 policies of the Rural Comprehensive Plan.*

Lane County's Rural Comprehensive Plan was acknowledged by LCDC in 1984. In regard to compliance with Statewide Planning Goal 5, Lane County did categorize Big Game Habitat as a 1C significant Goal 5 resource.¹⁰ However, as noted above, the County incorporated the protections recommended in the Flora and Fauna Working Paper into the zoning ordinance. Accordingly, residential development was limited in Big Game Habitat areas and further restriction of development was not necessary to comply with Statewide Planning Goal 5.

The Appellant specifically cites Rural Comprehensive Plan Goal 4 Policy #11 which states "*Encourage the consolidation of forest land ownership in*

¹⁰ *Save TV Butte v. Lane County*, LUBA No. 2017-031, Slip Op at 26 (1/8/2018)

order to form larger more viable forest resource units.” First, this policy is aspirational and does not provide an objective standard that applies to a quasi-judicial land use permit process. Second, the action taken by the County does not have any impact upon parcelization. Rather, the template dwelling process forces an applicant to recognize and work within the existing parcelization pattern within a 160-acre square template.

- c. *The Planning Director’s approval violates OAR 660-006-0027(1)(f).*

OAR 660-006-0027(1)(f) applies to “Lot of Record” dwellings in forest zones. Template dwellings are covered by OAR 660-006-0027(3). While “Lot of Record” standards require habitat protection, template dwelling regulations do not.

This allegation of error is dismissed.

4. *The dwelling on tax lot 601 does not “continue to exist.”*

The dwelling on tax lot 601 is being counted towards the application’s compliance with LC 16.211(5)(c)(ii)(bb). A 1972 Hilcrest 20’ x 40’ manufactured dwelling was placed on tax lot 601 in 1981 (BP 2367-81). At this time the property was zoned FF-20, which allowed a dwelling as a permitted use. The current dwelling replaced that structure in 1998 via replacement dwelling permit PA 98-05159. Prior to the replacement dwelling, the manufactured dwelling was assessed on a separate tax account for personal property (MH 4141121). When a manufactured dwelling is replaced with a stick-built dwelling the value of the new dwelling is added to the property’s land account and the account for the manufactured dwelling is removed. The discussion above regarding Allegation of Error #2 is applicable.

This allegation of error is dismissed.

5. *Tax lot 600 is not a legal lot.*

The Appellant alleges that tax lot 600 was created via a circuit court foreclosure order and therefore it was not lawfully created. Tax lots 600 and 701 were created as independent foreclosures. Per ORS 92.010(9)(a) exempts property created by lien foreclosure as a division of land that requires partition approval. It was verified as a legal lot in PA 2509-92.

Regardless of the history of tax lot 600, the reliance upon this tax lot or its dwelling is not necessary to satisfy LC 16.211(5)(c)(ii)(aa) or (bb).¹¹

¹¹ The Planning Director did not base her findings that the application satisfied LC 16.211(5)(c)(ii)(aa) or (bb) on this tax lot.

This allegation of error is dismissed.

6. *The application does not comply with the access requirements in Lane Code 16.211(8)(e).*

The Appellant alleges that the Applicant has not demonstrated that both of the alternative routes meet the slope, width and turnout criteria of LC 16.211(8)(e).

The Applicant's preferred access route is over an existing driveway, passing through multiple properties zoned Impacted Forest Lands, to Weyerhaeuser Road, which is owned by Willamalane Park and Recreation District. The access will then follow Weyerhaeuser Road to Wallace Creek Road, travelling through rural residentially zoned property as it nears the latter road. Weyerhaeuser Road has at least a 16-foot travel surface and not grades in excess of 16 percent. This is consistent with the standards of Lane Code 16.211(8)(e)(i) and (iv). In the event that permission is not granted to use Weyerhaeuser Road, the alternative access would be to cross Weyerhaeuser Road and travel west along Brand S Road until it intersects with Bob Straub Parkway. Brand S Road also has a minimum travel surface of 16 feet and no slopes in excess of 16 percent. Lane County transportation staff have noted that both Weyerhaeuser Road and Brand S. Road meet current access standards.¹²

Either access route requires the use of the existing driveway that has been inspected by the Pleasant Hill Fire Protection District and has been found adequate and feasible to be improved, where necessary, to fire district and Lane Code standards. Compliance with the road access standards of LC 16.211(8)(e) have been made a condition of approval.

This allegation of error is dismissed.

7. *The Applicant has not submitted deeds showing that all of the lots used by the Applicant were lawfully created.*

The evidentiary standard is one of 'preponderance of the evidence.' Deeds are one type of relevant evidence as are County decisions that verify, either in a preliminary or final way, the legal lot status of property. Other types of evidence such as partition or subdivision approvals, the deed description cards created by the County Assessor, and executed and recorded land sale contracts are also relevant.

The Planning Director relies upon eight parcels to conclude that LC 16.211(5)(c)(ii)(aa) has been satisfied. The Planning Director's decision cites documentation regarding the creation of each parcels and lists its date of creation.

¹² See March 15, 2018 statement from Lane County Transportation Planning. (Exhibit "F" to the Planning Director's decision.)

This list was reviewed by County staff who are skilled in the reading of deeds and other documents regarding the creation of property.

More definitively, the record contains the following documentation regarding the lawful creation of the subject property and the properties relied upon by the Planning Director for the satisfaction of LC 16.211(5)(c)(ii)(aa):

- In regard to the subject property, final legal lot verification and notice for tax lot 201, assessor's map 18-02-11. (PA 07-5916)
- A preliminary legal lot verification for tax lot 401, assessor's map 18-02-11. (PA 04-5476)
- A preliminary legal lot verification for tax lot 404, assessor's map 18-02-11. (PA 04-5480)
- A final legal lot verification and notice for tax lot 501, assessor's map 18-02-11. (PA 15-5130)
- A final legal lot verification and notice for tax lot 506, assessor's map 18-02-11. (PA 15-5130)
- Final partition approval M 43-81, dated June 22, 1982, for tax lot 601, assessor's map 18-02-11 plus Lane County Assessor deed description card.
- Lane County Assessor deed description card for tax lot 100, assessor's map 18-02-11 showing property creation in 1953.
- County Assessor deed description card for tax lot 200, assessor's map 18-02-02 showing property creation in 1973. The 1973 deed is also in the record.
- Lane County Assessor deed description card for tax lot 100, assessor's map 18-02-10 showing property creation in 1942.
- A final legal lot verification and notice for tax lot 201, assessor's map 18-02-11. (PA 07-5916)

Absent any objective evidence by the Appellant that the above-documentation is incorrect, I must conclude that the Applicant has shown by a preponderance of the evidence that all of the properties relied upon by the Planning Director for the satisfaction of LC 16.211(5)(c)(ii)(aa) and the subject property were lawfully created.

This allegation of error is dismissed.

8. *The Application does not meet the siting standards of Lane Code 16.211(8).*

In its June 21, 2018 submission, the Appellant raises many questions regarding compliance with the siting standards of LC 16.211(8). Pages 11 through 18 of the Planning Director's decision addresses conformity with these standards. I have reviewed this analysis and find that it is supported by evidence in the record and

based upon this evidence, I believe that the standards of LC 16.211(8)(a)–through(b) were adequately weighed together with the requirements in LC 16.211(8)(c) and (e) below to identify the building site. Where necessary, conditions of approval have been required to ensure compliance with various requirements of LC 16.211(8).

This allegation of error is dismissed.

Summary

The Appellant has raised numerous issues regarding the Planning Director’s decision, the most substantial of which is in regard to whether replacement dwellings are consistent with the “*continue to exist*” standard of OAR 660–006–0027(3)(b)(B) and Lane Code 16.211(5)(c)(ii)(bb) and whether, in the present case, the dwelling on tax lot 501 was lawfully replaced. This decision answers both questions in the affirmative.

For the reasons outlined above, I concluded that the Planning Director’s decision must be affirmed.

Respectfully Submitted,


Gary Darnielle
Lane County Hearings Official

LAND MANAGEMENT DIVISION

Date Received:

RECEIVED AUG 20 2018



APPEAL OF A 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:

LWLC

Mailing address:

PO Box 5347 Eugene 97405

Phone:

541-741-3625

Email:

kopsbran@aol.com

Signature:

Date:

8-20-18

Appellant's Representative:

Andrew Mulkey

Mailing address:

1375 W. 13th Ave Eugene

Phone:

(208) 596-3235

Email:

see attached statement

Signature:

see attached statement

Date:

LOCATION (subject property)

18 02 11 201

Township - Range - Section - Taxlot

Subdivision/partition

lot/parcel

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

Required Option 1 submittals:

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

1. Fee is \$3,712 appeal fee, payable to Lane County. (See the reverse side for important fee information)

2. A copy of the decision being appealed, with the Department file number. File # _____

3. Indicate the deadline to submit the appeal. (Found in the Hearing Official's Decision) _____

4. Check one of the items below to identify your party status with the right to appeal the Hearings Official's decision:

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

I am the applicant for the subject application;

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

I am not one of the persons mentioned above, but wish to appeal the Hearings Official's decision for the reasons explained in my letter.

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

a. The reason(s) why the decision of the Hearings Official was made in error or why the Hearings Official should reconsider the decision;

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

6. Any additional information in support of your appeal.

7. A Timeline Waiver for Hearings Official reconsideration request by the Applicant. Per Lane Code 14.535(4), 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 14.535). If the Hearings Official reconsiders the decision, the fee is \$1,152.

Step 2

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

Step 3

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

Explanation of the Appeal Fee Under Option 1

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

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

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

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