

1 BEFORE THE LAND USE BOARD OF APPEALS
2 OF THE STATE OF OREGON

3
4 JAMES WOLCOTT, NANCY WOLCOTT,
5 JOSH PETERSEN and ROLLIE KEENEY,
6 *Petitioners,*

7
8 vs.

9
10 LANE COUNTY,
11 *Respondent,*

02/05/18 PM 1:01 LUBA

12
13 and

14
15 LANDWATCH LANE COUNTY,
16 *Intervenor-Respondent.*

17
18 LUBA No. 2017-096

19
20 FINAL OPINION
21 AND ORDER

22
23 Appeal from Lane County.

24
25 Michael E. Farthing, Eugene, filed the Petition for Review and argued on
26 behalf of petitioners.

27
28 No appearance by Lane County.

29
30 Sean T. Malone, Eugene, filed a Response Brief and argued on behalf of
31 intervenor-respondent.

32
33 Meriel L. Darzen, Bend, filed an amici curiae brief on behalf of Pat
34 Wheeler, Sarah Duemling and Tremaine Arkley.

35
36 BASSHAM, Board Member; RYAN, Board Chair; HOLSTUN Board
37 Member, participated in the decision.

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AFFIRMED

02/06/2018

You are entitled to judicial review of this Order. Judicial review is governed by the provisions of ORS 197.850.

NATURE OF THE DECISION

Petitioners appeal a county decision denying their application for a forest template dwelling.

MOTION TO APPEAR AS AMICI

Pat Wheeler, Sarah Duemling and Tremaine Arkley move to appear as amici curiae in this appeal, on the side of the county. No party opposes the motion and it is allowed.

FACTS

The subject property is a vacant 10-acre parcel zoned Impacted Forest Land (F-2). Petitioners applied to the county for what is commonly known as a “forest template” dwelling, pursuant to Lane County Code (LC) 16.211(5), which implements ORS 215.750. LC 16.211(5)(b) requires that the applicant demonstrate that the “lot or parcel upon which the dwelling will be located was lawfully created.” The planning director, hearings officer and ultimately the board of county commissioners denied the application after concluding that the subject property was not lawfully created.

The relevant history is as follows. In 1919, a recorded deed created and transferred a 40-foot wide strip of land that was an abandoned logging road bisecting a larger unit of land. By 1960, after various transfers, the logging road and the adjacent parcels were in common ownership. That configuration is shown in Figure 1 of Appendix A at the end of this opinion. In 1975, the

1 county adopted its land division regulations, which required county approval
2 for all partitions and subdivisions. In 1983, the then-owner of the larger
3 property that included the logging road parcel sought and obtained county
4 approval for a final partition plat, which divided the larger property that
5 included the logging road parcel into two parcels, Parcels 1 and 2. The 1983
6 final partition plat did not identify property lines for the logging road parcel
7 created in 1919, which had been located entirely within what became Parcel 2
8 of the 1983 partition. Parcel 2, approximately 38 acres in size, was assigned
9 tax lot number (TL) 1500. The configuration after the 1983 partition is shown
10 in Figure 2 of Appendix A at the end of this opinion.

11 In 2001, the owner of TL 1500 filed a land use application requesting a
12 “legal lot verification” decision for TL 1500. Record 589-600. Prior to 2004,
13 Lane Code did not include formal procedures for verifying whether a lot was
14 lawfully created. Instead, the county used an informal process conducted by
15 the county engineer’s office, using a pre-printed form, with blanks to be filled
16 in by the engineer. The first page of the county form included the following
17 pre-printed language:

18 “Based upon the Findings provided in this report, the above
19 referenced property constitutes a legal lot, which means:

- 20 “1. Ownership to this property may be conveyed with the
21 assurance that such a conveyance would not require
22 approval by Lane County land division regulations; and
- 23 “2. Lane County recognizes this property as a legally separate
24 unit of land for the purposes of development. Development

1 would still be subject to applicable zoning, sanitation,
2 access and building regulations.” Record 590.

3 The second page of the form included the following pre-printed language:

4 ““This is a preliminary indication that the above referenced
5 property, as further designated on the enclosed map, is a legal lot.
6 The decision that this property constitutes a legal lot will be made
7 at the time of the first permit or application action where a legal
8 lot is required. If the boundaries of this legal lot have changed at
9 the time of a permit or application which requires a legal lot, a
10 new Legal Lot Verification will be required.”” Record 591.¹

11 A county engineering associate concluded that TL 1500, Parcel 2 of the
12 1983 partition, in fact consisted of three parcels: the logging road created in
13 1919, a parcel north of the logging road and a parcel south of the logging road.
14 Accordingly, the engineering associate issued three legal lot verifications on
15 the pre-printed forms, one for each of the three parcels. With respect to the
16 logging road parcel, the engineering associate handwrote in the space for
17 additional comments:

18 “The old abandoned log road right of way that lies within TL 1500
19 is a legal lot, being all within parcel 2 of Partition PA#1159-84.
20 This original 40-foot strip was described on Book 119 Page 577,
21 which included a portion of TL 1400. Then in June 1943 TL 1400
22 was split from the log road. Book 249 Page 578. Therefore TL
23 1500 may contain more than one legal lot. Please contact this
24 office for more details.” Record 591.

¹ The internal quotation marks are original. It is not clear to us what the printed form is quoting or, if not a quote, why this paragraph is set off in quotation marks.

1 In 2003, the owner of TL 1500 recorded three deeds intended to adjust
2 the property lines of the three parcels within TL 1500 that were described in the
3 2001 verifications. Appendix A, Figure 3, illustrates that property line
4 adjustment. The 2003 deeds were intended to reconfigure the 38-acre Parcel 2
5 to result in two 10-acre parcels and an 18-acre parcel. That final configuration
6 is shown in Appendix A, Figure 4. At that time, Lane County Code did not
7 require county land use approval for a property line adjustment. The county
8 assessor assigned tax lot number (TL) 1500 to the adjusted northern 18-acre
9 parcel, TL 1508 to the 10-acre adjusted logging road parcel, and TL 1506 to the
10 10-acre adjusted southern parcel. The property at issue in this appeal is TL
11 1506.

12 After the 2003 property line adjustment deeds were recorded, the owner
13 again applied for legal lot verification decision for the three parcels as adjusted.
14 On October 31, 2003, the county engineering associate issued new legal lot
15 verification decisions on the same pre-printed county forms. In the additional
16 comments section, the engineering associate wrote:

17 "The requirements of the state law for property line adjustments
18 per ORS Chapter 92 [have] been completed. Enclosed are copies
19 of the recorded deeds on document No's 2003-04-2823 and 2003-
20 045816." Record 603.

21 Subsequently, in 2003 the owner conveyed TL 1506 and TL 1508 by deed to
22 third parties. In 2004, the owners of TL 1508 obtained county approval for a
23 dwelling on TL 1508. TL 1506, the property at issue in this appeal, remained
24 undeveloped. Petitioners include the current owners of TL 1506.

1 In 2011, the Court of Appeals issued a decision concluding in relevant
2 part that approval of a partition plat eliminates previously existing subdivision
3 lots within the plat, unless the plat indicates an intent to preserve those
4 previously existing units of land. *Weyerhauser Real Estate Development Co. v.*
5 *Polk Co.*, 246 Or App 548, 588, 267 P3d 855 (2011) (*WREDCO*). In
6 *WREDCO*, LUBA and ultimately the Court of Appeals affirmed a county
7 decision that county approval of a partition plat had erased the previously
8 existing subdivision lots within the plat area.

9 In 2015, petitioners applied to the county for a forest template dwelling
10 on TL 1506 under LC 16.211(5). After several delays requested by petitioners,
11 apparently to address the applicability of *WREDCO* to the application, the
12 county proceeded with the application at petitioners' request on August 5,
13 2016.

14 On August 23, 2016, the county planning director issued a decision
15 denying the application for noncompliance with LC 16.211(5)(b), concluding
16 that the TL 1506 was not "lawfully created." Record 772-93. The planning
17 director concluded that the *WREDCO* case compelled the conclusion that the
18 1911 logging road parcel was eliminated by the 1983 partition, because that
19 partition plat created two parcels and failed to show the property lines for the
20 logging road parcel that was located entirely within Parcel 2. Further, the
21 director concluded that the 2003 legal lot verification decision was preliminary
22 only and did not bind the county to recognize the legality of TL 1506.

1 Petitioners appealed to the hearings official, who conducted a hearing on May
2 11, 2017. On June 27, 2017, the hearings official issued a decision affirming
3 the planning director's denial.

4 Petitioners appealed the hearings official's decision to the county board
5 of commissioners, which conducted an on-the-record hearing on September 26,
6 2017. On the same date, the county board of commissioners issued the
7 county's final decision, adopting a set of its own findings as well as adopting
8 the hearings official's decision as its own. This appeal followed.

9 **FIRST ASSIGNMENT OF ERROR**

10 For three alternative reasons stated in three sub-assignments of error,
11 petitioners argue that the county erred in concluding that TL 1506 is not a
12 "lawfully created" parcel for purposes of LC 16.211(5)(b).

13 **A. Second Sub-Assignment of Error: The Effect of *WREDCO***

14 As noted, *WREDCO*, 246 Or App 548, held that previously existing
15 subdivision lots are eliminated by county approval of a new partition plat,
16 unless the plat indicates an intent to preserve the previously existing lots.²

² In its findings, the board of commissioners commented on the impact of *WREDCO* on the county's procedures for processing requests for legal lot verification:

"The *WREDCO* case altered the landscape for Lane County legal lot determinations in some instances where land containing preexisting legal lots has been partitioned. Previously, the Planning Director recognized and approved properties lawfully created by deed and subsequently subject to partition, contrary to

1 Petitioners do not dispute that under the reasoning in *WREDCO* the 1983
2 partition had the effect of eliminating the previously existing property lines and
3 parcels within Parcels 1 and 2, including the logging road parcel created by
4 deed in 1911. Indeed, we understand petitioners to argue that it is precisely
5 *because* the 1983 partition eliminated all previously existing parcels within the
6 partition plat that the holding in *WREDCO* does not assist the county in
7 evaluating whether TL 1506 is a lawfully created parcel. According to
8 petitioners, TL 1506 was “created” in 2003, long after the 1983 partition, as a
9 result of the county’s action in verifying TL 1506 as a legal lot, based on the
10 2003 property line adjustment deeds. Petitioners argue that *WREDCO* says
11 nothing about the legality of parcels created, or at least recognized as legal lots
12 through a legal lot verification decision, *after* a partition plat that had the effect
13 of eliminating previously existing units of land within the newly platted parcels
14 is approved and recorded. Accordingly, petitioners argue that the county erred

the *WREDCO* findings noted above. This issue was raised to the County on appeal and once Legal Counsel and the Planning Director became aware of the past interpretation, planning staff advised applicants that *WREDCO* would be applied. Many applications appealed on this issue were ultimately withdrawn and a decision on these issues was not issued prior to June 2016. On June 15, 2016, the Hearings Official issued a decision on an appeal that provided further direction on this issue. He opined in File No. PA 15-05290 that *WREDCO* may be determinative and that generally, partitions merge prior legal lots. This solidified the direction determined by the Planning Director and County Counsel to ensure consistency with current case law, and occurred just prior to the Wolcott decision.” Record 8.

1 to the extent it applied *WREDCO* to reject petitioners' claims that TL 1506 was
2 "lawfully created" in 2003.

3 We address below petitioners' arguments that the 2003 legal lot
4 verification decision legally binds the county to recognize TL 1506 as a
5 lawfully created parcel. For present purposes, petitioners' arguments regarding
6 *WREDCO* do not provide a basis for reversal or remand. With respect to the
7 1983 partition and any claim that the logging road parcel created by deed in
8 1911 survived past 1983 as a discrete unit of land, the holding in *WREDCO* is
9 directly on point and controlling. We do not understand petitioners to dispute
10 that much.

11 With respect to the 2003 legal lot verification decision, the county's
12 findings cite the holding in *WREDCO* to explain why the county elected not to
13 follow the currently applicable LC 13.020 process to issue a *final* legal lot
14 verification decision that would essentially finalize the 2003 legal lot
15 verification decision, which the county characterized as a *preliminary*
16 verification.³ The county explained that it might otherwise follow the process

³ The commissioners' findings state:

"Pursuant to [LC] 13.020, a lot or parcel is a final legal lot or parcel when the County makes and notices such a determination per [LC] 14.100, providing that the decision is not appealed and/or becomes a final decision. An applicant may make application for final notice of a preliminary legal lot application for fee or request that notice be included as part of a land use decision for other development. In this case, the subject property was determined to

1 to issue a final verification based on the preliminary 2003 verification, issuing
2 notice and providing opportunity for a hearing, etc., if the 2003 decision were
3 “valid,” but the county concluded that the 2003 legal lot verification decision
4 was “inconsistent with the *WREDCO* case.” Record 8. As discussed below,
5 the county’s central ruling is that the 2003 legal lot verification decision was a
6 preliminary decision, and hence not a final decision binding on the county.
7 The *WREDCO* case has little or no bearing on that central ruling. As far as we
8 can tell, the county relied on the *WREDCO* case primarily to explain why it
9 chose not to initiate a proceeding to issue a final legal lot verification decision
10 under LC 13.020 (which petitioners did not apply for or request). Petitioners
11 have not identified any reversible error in the county’s understanding or
12 application of *WREDCO*.

13 Turning to petitioners’ argument that the 2003 legal lot verification
14 decision “created” TL 1506, petitioners do not explain how a legal lot
15 verification decision—whether preliminary or final—can “create” a unit of
16 land. At most, a legal lot verification decision would recognize that a unit of

be a preliminary legal lot in file no. PA03-05971 [the 2003 legal lot verification decision] and notice of PAS03-05971 has not yet been issued. Conceivably, notice of the legal lot determination made in file no. PA03-05971 could have been issued concurrent with this land use decision if the prior preliminary legal lot determination remained valid. However, both the Planning Director and Hearings Official found that the history of creation of the subject property, in its current configuration, is inconsistent with the *WREDCO* case.” Record 8.

1 land has been created by some other process or event, but the decision itself
2 cannot create (or eliminate) discrete units of land. Under the LC provisions
3 that were adopted in 1975, and which were in effect in 2003 when the legal lot
4 verification decision was issued, creation of a new parcel or lot required county
5 partition or subdivision approval. Recording a deed, or obtaining a legal lot
6 verification, was not and is not a lawful means of creating a parcel.

7 If TL 1506 was created in 2003, then the instrument that created that
8 parcel could only be the deeds recorded to effect the property line adjustment
9 among the three parcels that the then-owner of the 38-acre property believed
10 existed within Parcel 2, based on the 2001 legal lot verification decision.
11 However, petitioners do not argue that the 2003 property line adjustment deeds,
12 which the county did not approve prior to recordation of those deeds, could
13 possibly result in the “lawful” creation of TL 1506. A property line
14 adjustment, by definition, does not result in the creation of a lot or parcel. ORS
15 92.010(12).⁴ If the 2003 property line adjustment deeds created TL 1506, then
16 the adjustment deeds in effect constituted an unlawful partition.

17 In sum, petitioners have not demonstrated that the county erred to the
18 extent that it applied the holding in the *WREDCO* case to the issues presented.

⁴ ORS 92.010(12) defines ““property line adjustment”” to mean “a relocation or elimination of all or a portion of the common property line between abutting properties *that does not create an additional lot or parcel.*” (Emphasis added).

1 Further, petitioners have not demonstrated that any county decision issued in
2 2003 or at any other time had the effect of “creating” TL 1506.

3 **B. First Sub-Assignment of Error: Finality of the 2003 Legal Lot**
4 **Verification Decision**

5 Petitioners argue under the first subassignment of error that the county
6 erred in concluding that the 2003 legal lot verification decision was only
7 “preliminary,”⁵ and that instead the decision represents a final decision that
8 binds the county to recognize TL 1506 as a lawfully created parcel.

⁵ The hearings officer’s decision states:

“The Applicant’s arguments are dependent upon whether Lane County’s legal lot verifications were final land use decisions. I do not believe that they were. The last paragraph of the legal lot verification form states that it was a preliminary decision of legal lot status. It further advised the property owner that the determination that the property constitutes a legal lot would be made at the time of the first permit or application action where a legal lot is required. This is the exact language that was subject to a LUBA opinion [*Davis v. Lane County*, 32 Or LUBA 267 (1997)] regarding Lane County’s legal lot verification process in 1997. In that case, the petitioner challenged the County’s determination that his property did not constitute a legal lot. LUBA found that the County did not have a process for making a legal lot determination binding and, in dicta, seemed to agree with the County that its legal lot verification process wasn’t even a land use decision. Lane County’s current legal lot verification process, found in [LC] 13.020, was not adopted until July of 2004. [] In other words, the preliminary legal lot verifications issued in 2001 and 2003 were issued under the same code authority as existed in 1997.

“It is unfortunate, but Lane County’s preliminary legal lot verification process, at least as it existed prior to July 2004, was at

1 Petitioner contends that the 2003 legal lot verification decision on its
2 face represents a final determination that TL 1506 is a legal lot, citing to the
3 printed language on page 1 of the decision:

4 “Based upon the Findings provided in this report, the above
5 referenced property constitutes a legal lot, which means:

6 “1. Ownership to this property may be conveyed with the
7 assurance that such a conveyance would not require
8 approval by Lane County land division regulations; and

9 “2. Lane County recognizes this property as a legally separate
10 unit of land for the purposes of development. Development
11 would still be subject to applicable zoning, sanitation,
12 access and building regulations.” Record 590.

13 Petitioners argue that the above-quoted language is an unambiguous and
14 facially final determination that TL 1506 “constitutes a legal lot,” which means
15 that the property can be conveyed without further county approval, and that the
16 property is recognized henceforth as a legally separate unit of land for purposes
17 of development. In reliance on the 2003 legal lot verification decision,
18 petitioners argue that TL 1506 was conveyed to petitioners’ predecessors-in-
19 interest.

best an advisory statement from the County. Reliance on those
determinations are done at an owner’s peril.” Record 17-18
(footnotes omitted).

The board of commissioners reached a similar conclusion at Record 10-11.

1 As noted, the county’s determination that the 2003 legal lot verification
2 decision is “preliminary” is based in part on the printed language in the last
3 paragraph of the second page of the county form:

4 “[1] This is a preliminary indication that the above referenced
5 property, as further designated on the enclosed map, is a legal lot.
6 [2] The decision that this property constitutes a legal lot will be
7 made at the time of the first permit or application action where a
8 legal lot is required. [3] If the boundaries of this legal lot have
9 changed at the time of a permit or application which requires a
10 legal lot, a new Legal Lot Verification will be required.” Record
11 591 (sentence numbers inserted). .

12 Petitioners argue that the county’s decision—that the 2003 legal lot
13 verification decision was only “preliminary”—creates an apparent conflict
14 between the language on the first page of the form and the last paragraph on the
15 second page of the form. But petitioners argue that, properly interpreted, there
16 is no conflict. According to petitioners, while the first sentence of the last
17 paragraph indicates that the legal lot verification is “preliminary,” the second
18 sentence of that paragraph clarifies that the verification will become final when
19 a permit or application action is sought, for example, when the owner of TL
20 1506 files an application for a forest template dwelling, as in the present case.
21 Petitioners argue that when such a permit application is filed, the legal lot
22 verification becomes final for all purposes, except in the limited circumstances
23 set out in the third sentence of the paragraph: where “the boundaries of this
24 legal lot have changed at the time of a permit or application which requires a
25 legal lot,” in which case “a new Legal Lot Verification will be required.”

1 Because the boundaries of TL 1506 have not changed since 2003, petitioners
2 argue, the third sentence is not operative, and the 2003 verification decision
3 therefore became final and binding against the county when petitioners
4 submitted their application for a forest template dwelling in 2015.

5 However, the second sentence does not suggest that the preliminary
6 verification will automatically become “final” when a permit application is
7 submitted. Instead, it states that “[t]he *decision* that this property constitutes a
8 legal lot *will be made* at the time of the first permit or application action where
9 a legal lot is required.” (Emphasis added.). That sentence clearly suggests that
10 the county will make “[t]he decision” on whether the property constitutes a
11 legal lot as part of a permit application where a legal lot is required, which is
12 precisely what the county did in the present case. Similarly, the third sentence
13 does not suggest that the only circumstances where the county may make the
14 final decision on whether the property constitutes a legal lot is when the
15 boundaries have changed. The third sentence instead states only that a new
16 legal lot verification is required when the boundaries have changed, *i.e.*, the
17 applicant must start over with a new verification process and cannot rely on the
18 initial, preliminary verification.

19 Petitioners are correct that the county’s decision does not explicitly
20 address the language on the first page of the 2003 legal lot verification form,
21 stating that “[b]ased upon the Findings provided in this report, the above
22 referenced property constitutes a legal lot[.]” That language appears to conflict

1 with the county's understanding, based on the last paragraph of the form, that a
2 legal lot verification (prior to 2004) was only preliminary or advisory until a
3 final decision is made at the time of permit approval. The language on the first
4 page of the form is stated in the present tense, and it is couched in definitive
5 terms. It is possible to reconcile that language with the last paragraph on the
6 second page, if it is understood to refer to the effect of the legal lot verification
7 decision, once the county makes a final decision under the terms of the last
8 paragraph. But the county's decision does not expressly adopt that view, nor
9 attempt to reconcile the apparent conflict.

10 We note that the county's decision also cites and relies on LUBA's
11 decision in *Davis v. Lane County*, 32 Or LUBA 267. In that decision, LUBA
12 concluded that a legal lot verification decision was not a final decision of any
13 kind, based on language on a printed county form that is nearly identical to the
14 language in the last paragraph of the 2003 legal lot verification form at issue in
15 this case. 32 Or LUBA at 271-72. The *Davis* decision does not discuss
16 whether language corresponding to the statement on the first page of the 2003
17 verification form was present in the 1997 verification form at issue in *Davis*.
18 Whether that language was present on the 1997 form or not, the fact remains
19 that in 1997 the county took the position that legal lot verification decisions are
20 preliminary and non-binding until a final decision is made at the time of permit
21 approval. LUBA affirmed and adopted that position, in broad terms:

22 "[I]t appears that the county's 'legal lot verification' service is not
23 intended to and in fact approves nothing. Rather, the county's

1 service involves nothing more than reviewing the county records
2 to determine whether those records indicate that the lot was legally
3 created. If an applicant desires a binding ‘approval’ of a legal lot,
4 the process for that approval must be followed; an expressly
5 nonbinding legal lot verification does not provide that process.”
6 *Id.* at 271.

7 As far as we are informed, following *Davis* the county did not take any steps to
8 make legal lot verification decisions final and binding decisions until July
9 2004, when for the first time it adopted code language providing that legal lot
10 verification decisions are final decisions, made final after notice and
11 opportunity for a hearing. If the county wanted to make legal lot verification
12 decisions final decisions prior to July 2004, the county clearly knew how to do
13 so. This history supports the county’s conclusion in the present case that, in
14 2003, legal lot verification decisions were not intended to be final, binding
15 decisions.

16 In sum, it is difficult to give full effect to the language on the first page
17 of the form *and* the language of the last paragraph on the second page of the
18 form, without some interpretational gymnastics either way. However, the
19 county’s conclusion that, in 2003, a legal lot verification decision was a
20 nonfinal, advisory decision is as consistent with the text of the form as
21 petitioners’ preferred interpretation. Further, the county’s conclusion is
22 consistent with the holding in *Davis*, the only caselaw to consider the effect of
23 the county’s legal lot verification process prior to 2004. Given these
24 considerations, petitioners have not demonstrated that the county erred in

1 concluding that the 2003 legal lot verification decision was not a final, binding
2 decision.

3 **C. Third Sub-Assignment of Error: 2016 Validation of TL 1508**

4 As noted, in 2004 the owner of TL 1508 applied for and received county
5 approval to construct a dwelling on TL 1508. In 2016, the owner of TL 1508
6 applied to the county to validate TL 1508 under ORS 92.176.⁶ Adopted in

⁶ ORS 92.176 provides, in relevant part:

“(1) A county or city may approve an application to validate a unit of land that was created by a sale that did not comply with the applicable criteria for creation of a unit of land if the unit of land:

“(a) Is not a lawfully established unit of land; and

“(b) Could have complied with the applicable criteria for the creation of a lawfully established unit of land in effect when the unit of land was sold.

“(2) Notwithstanding subsection (1)(b) of this section, a county or city may approve an application to validate a unit of land under this section if the county or city approved a permit, as defined in ORS 215.402 or 227.160, respectively, for the construction or placement of a dwelling or other building on the unit of land after the sale. * * *

“(3) A county or city may approve an application for a permit, as defined in ORS 215.402 or 227.160, respectively, or a permit under the applicable state or local building code for the continued use of a dwelling or other building on a unit of land that was not lawfully established if:

“(a) The dwelling or other building was lawfully established prior to January 1, 2007; and

1 2007, ORS 92.176 provides a process to cure, in some circumstances, the legal
2 lot status of parcels that were not lawfully created. The county issued a
3 decision validating TL 1508 under ORS 92.176, and on the basis of that
4 validation issued a final legal lot verification decision under LC 13.020.
5 Subsequently, the owner of TL 1508 complied with ORS 92.176(5) and
6 recorded a partition plat.

7 Petitioners argue in the alternative that, even if the 2003 legal lot
8 verification decision is not a final and binding decision, the 2016 decision
9 validating TL 1508 and in particular the recording of the partition plat required
10 by ORS 92.176(5) had the legal effect of establishing the adjoining TL 1506 as
11 a lawful “remainder” parcel. Petitioners argue that in another 2015 decision

“(b) The permit does not change or intensify the use of the dwelling or other building.

“(4) An application to validate a unit of land under this section is an application for a permit, as defined in ORS 215.402 or 227.160. An application to a county under this section is not subject to the minimum lot or parcel sizes established by ORS 215.780.

“(5) A unit of land becomes a lawfully established parcel when the county or city validates the unit of land under this section if the owner of the unit of land causes a partition plat to be recorded within 90 days after the date the county or city validates the unit of land.

“(6) A county or city may not approve an application to validate a unit of land under this section if the unit of land was unlawfully created on or after January 1, 2007.”

1 with similar facts, the planning director verified a parcel as a legal lot under LC
 2 13.020, based on the fact that an adjoining parcel, part of the same illegal land
 3 division that occurred in 1975, had later been validated under ORS 92.176,
 4 with the recordation of a partition plat required by ORS 92.176(5). The
 5 director in that 2015 decision concluded that the validation of the adjoining
 6 parcel left the subject parcel “as a lawful remainder of the original tract.”
 7 Record 82. According to petitioners, the same conclusion should apply in the
 8 present case: because TL 1508 has been validated under ORS 92.176, with
 9 recordation of the partition plat required by ORS 92.176(5), the illegally
 10 created TL 1506 can be verified as a legal lot because it is now a “lawful
 11 remainder” of that 2016 partition.

12 The hearings official rejected that argument below:

13 “ORS 92.176 provides a statutory process to cure the legal lot
 14 status of parcels that were not lawfully created. It is the only
 15 statutory process that provides this type of relief and it is
 16 discretionary with the County. While the partition plat of 1508
 17 did divide Parcel 2 of Partition M1159-84 into two properties,
 18 only one of those two properties can be considered to be lawfully
 19 created. To allow the partition of tax lot 1508 to validate the legal
 20 lot status of either of those two properties would seem to
 21 circumvent the sole statutory remedy to an illegally created parcel
 22 and it would usurp the County’s authority to administer that
 23 process. Further, without validating one of the two remaining
 24 pieces of Partition 2 through ORS 92.176, it is arguable whether
 25 the County has the authority to grant partition plat status to that
 26 property under ORS 92.176(5).

27 “In summary, the partition platting of tax lot 1508 doesn’t have the
 28 effect of endowing the adjacent portions of Parcel 2 of M1159-84
 29 with legal lot status. The Applicant must go through the same

1 validation of unit of land process as was done for tax lot 1508 to
2 confer the subject property with legal lot status.” Record 18-19.

3 The board of commissioners affirmed the foregoing, agreeing with the hearings
4 officer that “the statutory validation of [the] unit of land process under ORS
5 92.176 is the remedy for illegal creation of the subject property and should be
6 used for that purpose.” Record 182.

7 In short, the hearings official and board of commissioners rejected the
8 “remainder” approach taken in the 2015 planning director decision cited by
9 petitioners. Whether that rejection is based on an interpretation of LC 13.020
10 or ORS 92.176, petitioners make no attempt to demonstrate that the county
11 erred in concluding that in order to obtain a final legal lot verification decision
12 under LC 13.020, based on the operation of ORS 92.176, petitioners must first
13 file for relief under ORS 92.176 and obtain from the county a validation under
14 the statute.

15 The third sub-assignment of error is denied.

16 The first assignment of error is denied.

17 **SECOND ASSIGNMENT OF ERROR**

18 ORS 197.830(6) is a statute of ultimate repose, providing that the appeal
19 periods described in ORS 197.830(3), (4) and (5) (which generally provide for
20 an extended appeal period for certain decisions under certain circumstances)

1 may not exceed either a three-year period or 10-year period, depending on
2 whether notice was required but not provided.⁷

3 Petitioners repeat their argument that the 2003 legal lot verification
4 decision was a final decision, but add the argument that, as a final land use
5 decision, the 2003 legal lot verification decision could have been appealed to
6 LUBA, presumably under ORS 197.830(3). According to petitioners, because
7 no party appealed the 2003 legal lot verification decision within either the
8 three-year or 10-year period prescribed in ORS 197.830(6)(a) or (b), the 2003
9 legal lot verification decision is now final for all purposes. From that premise,
10 petitioners argue that the county cannot collaterally attack the finality of the
11 2003 legal lot verification decision in the process of evaluating petitioners'
12 application for a forest template dwelling on TL 1506.

13 We have already rejected petitioners' premise that the 2003 legal lot
14 verification decision was a final decision. As we suggested in *Davis*, if a
15 county legal lot verification decision is not a final decision, then it cannot be

⁷ ORS 197.830(6) provides:

“The appeal periods described in subsections (3), (4) and (5) of this section:

“(a) May not exceed three years after the date of the decision, except as provided in paragraph (b) of this subsection.

“(b) May not exceed 10 years after the date of the decision if notice of a hearing or an administrative decision made pursuant to ORS 197.195 or 197.763 is required but has not been provided.”

1 appealed to LUBA, under ORS 197.830(3) or any other statute. 32 Or LUBA
2 at 271-72. Therefore, the statutory termination of appeal deadlines at ORS
3 197.830(6) plays no role in this case.

4 Further, even if we assume that the 2003 legal lot verification decision
5 was a final land use decision that could have been appealed to LUBA, it is not
6 clear to us that ORS 197.830(6) would (implicitly) prohibit the county from
7 considering the finality, nature and effect of the decision in resolving the issues
8 raised by petitioners' forest dwelling application. In so doing, the county is not
9 appealing or challenging the 2003 legal lot verification decision, but
10 interpreting its ambiguous language so that its effect on petitioners' pending
11 application can be understood and applied. Such an interpretive exercise
12 would not accurately be viewed as a collateral attack on the 2003 legal lot
13 verification decision, or an attempt to appeal the 2003 decision in a manner
14 inconsistent with the statutes of ultimate repose at ORS 197.830(6).

15 The second assignment of error is denied.

16 The county's decision is affirmed.

17

Appendix A

1

2

Figure 1

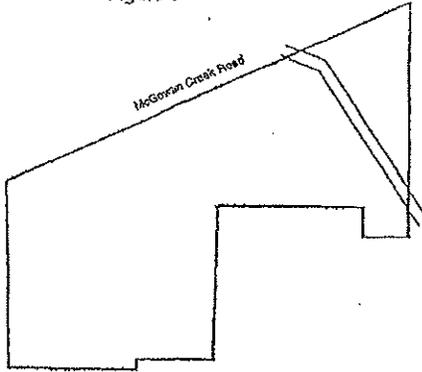


Figure 2

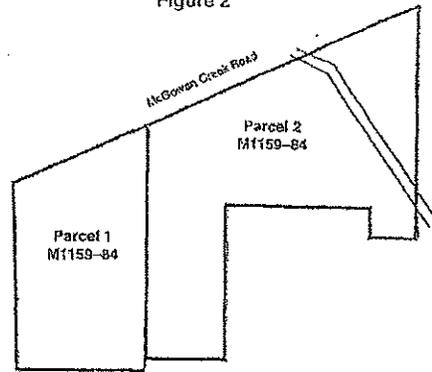


Figure 3

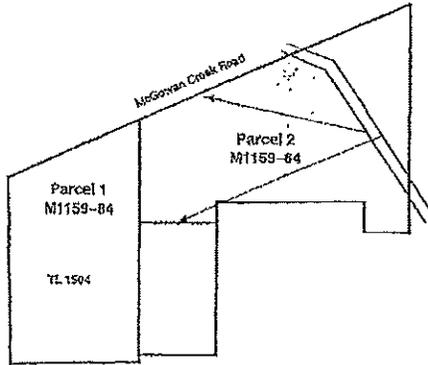
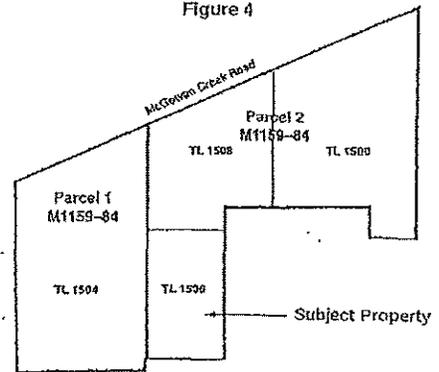


Figure 4



3

Certificate of Mailing

I hereby certify that I served the foregoing Final Opinion and Order for LUBA No. 2017-096 on February 6, 2018, by mailing to said parties or their attorney a true copy thereof contained in a sealed envelope with postage prepaid addressed to said parties or their attorney as follows:

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Dated this 6th day of February, 2018.

Kelly Burgess
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