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May 8, 2019

Via Email

Senate Committee on Environment and Natural Resources  
900 Court Street NE  
Salem, OR 97301  
[senr.exhibits@oregonlegislature.gov](mailto:senr.exhibits@oregonlegislature.gov)

Re: Testimony in Opposition to HB 3024

Chair Dembrow, Vice-Chair Olsen, and Members of the Senate Committee on Environment and Natural Resources,

On behalf of LandWatch Lane County, Robert Emmons, Nena Lovinger, Chris Berner, Karen Farmer, William Dunham, Jim Babson, Carol Van Strum, Sara Duemling, Zena Forest Products, Max Wilbert, and Julie Hulme, I am writing in opposition to HB 3024 for the reasons set forth below.

I. HB 3024 needlessly muddies the statutory language that was recently clarified by the Supreme Court

As you are likely aware, the Oregon Supreme Court issued its opinion in *LandWatch Lane County v. Lane County*, 364 Or 724 (2019), just two weeks ago, upholding LUBA's and LandWatch's interpretation the temporary replacement dwelling provisions at Oregon Laws 2013, chapter 462 (the 2013 Act). This bill would needless complicate the 2013 Act and would be contrary to the legislature's intent in passing the 2013 Act. I was the attorney for LandWatch Lane County before the Hearings Official, County Board, LUBA, the Court of Appeals, and the Supreme Court, and, therefore, I am very familiar with the 2013 Act.

In their opinion, the Supreme Court clarified the role of the taxation requirement in the 2013 Act, but HB 3024 will muddy what the Supreme Court made clear. This will

open up new avenues of litigation where they do not currently exist in light of the Supreme Court decision. Not only is there no need for the statute but the text of the statute raises further ambiguities that will have to be worked out in the courts. Moreover, to interfere with the Supreme Court’s decision – and introduce further issues that will have to be litigated – would not respect the separation of powers.

As indicated above, HB 3024 contains internal inconsistencies and the staff measure does not accurately describe the effect HB 3024, according to its plain text. In fact, the staff summary is diametrically opposed to the text of HB 3024. These internal inconsistencies will inevitably lead to further litigation. Again, there is simply no need to muddy what the Supreme Court has made clear. Any complexity or uncertainty in the 2013 Act has been ironed out by the Supreme Court. The Supreme Court opinion provides certainty for applicants and HB 3024 would cast the matter back into uncertainty. The legislature should promote certainty, not unnecessary and ambiguous amendments.

## II. HB 3024 is contrary to the intent expressed just six years ago for the 2013 Act

As analyzed throughout the Supreme Court decision (attached), the legislature’s intent with the 2013 Act was to provide a balanced compromise for farmers in specific situations, not a blank check to residential development on farmland:

“The bill was repeatedly described as dealing with a small number of farmers, ‘tweaking’ existing requirements, and a small fix. As Hunnicutt stated, ‘[t]he goal of this is to clean up the replacement dwelling statutes and allow farmers *in a few circumstances* to replace dwellings that are *already* on the property, but for lack of a better term, dilapidated. (364 at 746) (emphasis added).

...

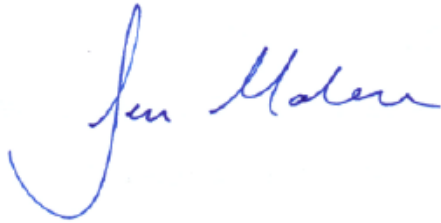
“Additionally, *none* of the legislatively cited examples – either actual examples or dilapidated dwellings owned by farmers who testified or hypothetical examples raised in the hearings – of the kind of dwellings that would come within paragraph (2)(b) were dwellings that had been demolished or destroyed 20 years earlier. And no witness contradicted Hunnicutt’s statement that a dwelling removed more than five years earlier would not come within the ‘unless’ clauses.” (*id.* at 746-47) (emphasis added).

As worded in the staff summary, HB 3024 would do something very different than what is described above – *it would allow anyone that ever had a dwelling on farmland to resurrect that dwelling, despite how long it has been gone. That is a remarkable*

*proposition for Oregon's farmland*<sup>1</sup>, especially when landowners of farmland have options available to them to site a dwelling, as noted in the Supreme Court's decision. *See* ORS 215.213(1)(f); ORS 215.213(1)(d). Again, the text of the bill does something entirely different, but the staff summary of the bill is, at the very least, just the opposite of the what the Supreme Court found the legislature intended with the 2013 Act.

For the reasons above, I am opposed to HB 3024 because it will unnecessarily complicate what was made clear by the Supreme Court just two weeks ago and it is contrary to the legislature's intent in promulgating the 2013 Act.

Sincerely,



Sean T. Malone  
Attorney at Law

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<sup>1</sup> Indeed, such an intent would be contrary to the legislative policy for farmland. *See* ORS 215.243(1); *id.* at (2) (“The preservation of a maximum amount of the limited supply of agricultural land is necessary to the conservation of the state’s economic resources and the preservation of such land in large blocks is necessary in maintaining the agricultural economy of the state and for the assurance of adequate, healthful and nutritious food for the people of this state and nation.”).

IN THE SUPREME COURT OF THE  
STATE OF OREGON

LANDWATCH LANE COUNTY,  
*Petitioner on Review,*

*v.*

LANE COUNTY,  
*Respondent on Review,*  
*and*

Kay KING,  
*Respondent on Review.*

(LUBA 2017-056) (CA A166333) (SC S065917)

On review from the Court of Appeals.\*

Argued and submitted November 5, 2018.

Sean Malone, Eugene, argued the cause and filed the brief for petitioner on review.

Michael J. Gelardi, Hershner Hunter, LLP, Eugene, argued the cause and filed the brief for respondent on review Kay King.

No appearance on behalf of Lane County.

David J. Hunnicutt, Tigard, filed the brief for *amicus curiae* Oregonians in Action.

Brian R. Talcott, Dunn Carney Allen Higgins & Tongue LLP, Portland, and Mary Anne Cooper, Oregon Farm Bureau, Salem, filed the brief for *amicus curiae* Oregon Farm Bureau Federation.

Before Walters, Chief Justice, and Balmer, Nakamoto, Flynn, Duncan, and Nelson, Justices.\*\*

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\* On judicial review from the Land Use Board of Appeals. 291 Or App 41, 420 P3d 37 (2018).

\*\* Kistler, J., retired December 31, 2018, and did not participate in the decision of this case. Garrett, J., did not participate in the consideration or decision of this case.

BALMER, J.

The decision of the Court of Appeals is reversed. The final order of the Land Use Board of Appeals is affirmed, and the case is remanded to the Board for further proceedings.

**BALMER, J.**

This land use case requires us to interpret a 2013 statute, Oregon Laws 2013, chapter 462, section 2, that allows landowners to replace certain dwellings on land that is zoned for exclusive farm use (EFU). Kay King owns EFU-zoned land in Lane County and received county approval to replace three dwellings on the property that had been demolished in 1997. The issue is whether the 2013 statute authorizes the construction of replacements for the three dwellings. After the county approved the construction permits, LandWatch Lane County (LandWatch) appealed to the Land Use Board of Appeals (LUBA), which reversed the county’s approval, holding that the statute did not permit construction of the replacement buildings. *LandWatch Lane County v. Lane County*, 76 Or LUBA 350 (2017). King petitioned for judicial review of the LUBA decision, and the Court of Appeals reversed. *LandWatch Lane County v. Lane County*, 291 Or App 41, 420 P3d 37 (2018). We allowed LandWatch’s petition for review, and, for the reasons set out below, we reverse the decision of the Court of Appeals and remand to LUBA for further proceedings.

**I. BACKGROUND**

We take the facts from the record of the proceedings below. King, hereafter referred to as “landowner,” owns a farm of approximately 100 acres in rural Lane County, near the City of Florence. In 1997, landowner obtained permits to demolish three lawfully-established dwellings on the property—one built in the early 1900s, one in the 1940s, and one in the 1950s. Landowner demolished those buildings pursuant to the permits. In 2016, landowner applied for special use permits to construct three replacement dwellings, and the county granted the permits in 2017. The county concluded that the applications met the requirements of the 2013 statute for the construction of replacement dwellings on EFU-zoned land. We discuss that statute in detail below.

LandWatch appealed the county’s issuance of the permits to LUBA, raising various arguments, including that the 2013 statute was not intended to allow the general “replacement” of dwellings that landowners had demolished long before the statute was enacted. LUBA agreed and held

that the statutory provision on which landowner had relied was intended to allow replacement of only dwellings on EFU-zoned land that had been assessed as dwellings for property tax purposes within the five years immediately preceding the permit application. Landowner filed a petition for judicial review of the LUBA decision to the Court of Appeals, which reversed, holding that “the statute exempts destroyed or demolished buildings from the [previous five-year assessment] finding otherwise required.” *LandWatch Lane County*, 291 Or App at 52. We allowed LandWatch’s subsequent petition for review.

## II. ANALYSIS

### A. *Introduction*

The challenge that LUBA and the Court of Appeals faced—and that we now confront—is the scope of a particularly opaque statute, Oregon Laws 2013, chapter 462, section 2. The parties agree that through that statute, the 2013 Legislative Assembly undertook to modify and to expand the circumstances under which a dwelling could be built on EFU-zoned land.<sup>1</sup> They further agree that the changes that the legislature adopted were not intended to permit the construction of dwellings where no dwelling had ever existed previously. The dispute, rather, is over the scope of the 2013 statute and, in particular, the circumstances under which an existing or former dwelling can be replaced.<sup>2</sup> The parties reprise the arguments that they made to LUBA and to the Court of Appeals, with LandWatch arguing that the disputed provision of the statute generally permits the replacement of only buildings that were assessed as dwellings during some part of a five year period preceding the permit application, and landowner arguing that that provision permits the replacement of buildings that had at one time been

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<sup>1</sup> That expansion is only temporary. Section 2 of the 2013 statute will be automatically repealed on January 2, 2024. Or Laws 2013, ch 462, § 11.

<sup>2</sup> There are other statutes that permit dwellings to be constructed or maintained on EFU land in specific circumstances or for certain uses. *See, e.g.*, ORS 215.213(1)(f) (“primary or accessory dwellings customarily provided in conjunction with farm use”); ORS 215.213(1)(d) (dwelling occupied by “relative of the farm operator or the farm operator’s spouse” who is needed to assist in farm management and dwelling is on same lot as dwelling of farm operator). The only statute at issue in this case, however, is Oregon Laws 2013, chapter 462, section 2.

assessed as dwellings, even if they were demolished more than five years before the owner applied for a permit to construct a replacement dwelling.<sup>3</sup>

The parties' dispute requires us to construe the 2013 statute, which modified earlier laws regarding the replacement of dwellings on EFU-zoned land. In doing so, we employ our usual methodology to determine the legislature's intention in enacting the statute by looking at the text of the statute in context, along with any useful legislative history. *State v. Gaines*, 346 Or 160, 171-72, 206 P3d 1042 (2009).

Section 2 of 2013 Oregon Laws, chapter 462 provides:

“(1) A lawfully established dwelling may be altered, restored or replaced \*\*\* in the manner provided by either subsection (2) or (3) of this section.

“(2) The dwelling may be altered, restored or replaced if, when an application for a permit is submitted, the permitting authority:

“(a) Finds to the satisfaction of the permitting authority that the dwelling to be altered, restored or replaced has, or formerly had:

“(A) Intact exterior walls and roof structure;

“(B) Indoor plumbing consisting of a kitchen sink, toilet and bathing facilities connected to a sanitary waste disposal system;

“(C) Interior wiring for interior lights; and

“(D) A heating system; and

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<sup>3</sup> The statutes at issue here, and related land use statutes, use multiple words to describe the removal of an existing dwelling, such as “demolition” and “destruction,” and the construction of a new dwelling, such as “replacement” and “restoration.” The distinctions between those statutory terms are relevant in some circumstances, but not to the issue that we decide here, and we use some of the terms interchangeably. It is undisputed that petitioner in 1997 intentionally and lawfully removed the dwellings at issue here by demolition and sought county approval of replacement permits to construct new dwellings in 2016. Before LUBA, LandWatch made an argument that does involve the definition of “restoration” in the 2013 statute, and petitioner responds to that argument in its brief in this court. However, neither LUBA or the Court of Appeals addressed that issue, and we express no opinion regarding it.



“(b) Finds that the dwelling was assessed as a dwelling for purposes of ad valorem taxation for *the lesser of*:

“(A) The previous five property tax years *unless* the value of the dwelling was eliminated as a result of the destruction, or demolition in the case of restoration, of the dwelling; or

“(B) From the time when the dwelling was erected upon or affixed to the land and became subject to assessment as described in ORS 307.010 *unless* the value of the dwelling was eliminated as a result of the destruction, or demolition in the case of restoration, of the dwelling.

“(3) The dwelling may be altered, restored or replaced if, when an application for a permit is submitted, the dwelling meets the requirements of subsection (2)(a) of this section, the dwelling does not meet the requirement of subsection (2)(b) of this section, and the applicant establishes to the satisfaction of the permitting authority that the dwelling was improperly removed from the tax roll by a person other than the current owner.”

(Emphasis added.)<sup>4</sup> Now, put a finger on that statutory text—or pull it up in another browser window, as the case may be—because we will refer to it repeatedly in the remainder of the opinion.

## B. *Textual Analysis of Section 2*

We begin with what is readily apparent from the text of the statute, before addressing its ambiguities. First, subsection (1) makes clear that a dwelling may be “replaced” only if it was “lawfully established” in the first place. LandWatch does not dispute that the dwellings that formerly existed on landowner’s property were “lawfully established.” Second, the replacement (or restoration or alteration) of a dwelling on EFU-zoned land also must meet

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<sup>4</sup> Oregon Laws 2013, chapter 462, section 2, was not codified into the Oregon Revised Statutes, and for that reason we cite the statute as it appears in the session laws. That law amended two statutes that set out permissible uses of EFU land—ORS 215.213, which applies to uses of EFU land in Lane and Washington counties, and ORS 215.283, which applies to such uses in all other counties. As amended, ORS 215.213(1)(q) and ORS 213.283(1)(p) incorporate that provision by cross-reference to allow, as a permitted use on EFU land, “[s]ubject to section 2, chapter 462, Oregon Laws 2013, alteration, restoration or replacement of a lawfully established dwelling.” ORS 215.213(1)(q); ORS 215.283(1)(p); *see also* Or Laws 2013, ch 462, §§ 4, 5.

the requirements of either subsection (2) or subsection (3) of section 2.

We focus first on subsection (2) because landowner argues only that her proposed replacement dwellings come within that provision.<sup>5</sup> Subsection (2) has two requirements. The first, paragraph (2)(a), identifies structural features that the dwelling to be replaced “has, or formerly had,” including indoor plumbing, interior wiring for interior lights, and a heating system. Thus, a farm building, such as a stable or barn, that lacks one or more of the listed features is not considered a dwelling for purposes of the statute, even if it is inhabited from time to time, and, therefore, no permit can be issued to replace such a structure with a dwelling. Significantly, however, as the “has, or formerly had” wording indicates, those elements need not exist at the time of an application for a permit to replace such a dwelling: if the landowner can demonstrate that the dwelling had intact exterior walls or a heating system at some earlier time, it can meet the requirements of subparagraphs (2)(a)(A) and (2)(a)(D). Thus, a currently dilapidated dwelling can meet that requirement. Moreover, that wording is sufficiently broad, at least facially, to encompass not only an existing dwelling that “has, or had” those elements, but also a dwelling that at one time possessed those elements but that has been demolished or destroyed.

But possessing (or formerly possessing) the structural elements is not sufficient. The central dispute in this case is over paragraph (2)(b), which brings into play the tax assessment history of the dwelling to be replaced. That provision requires a finding that, at the time of submission of the application for a permit to replace or restore the dwelling, “the dwelling was assessed as a dwelling for purposes of ad valorem taxation for the lesser of” two different time periods. That reference to “assess[ment] as a dwelling” reinforces two aspects of the requirements for a replacement dwelling: that the structure currently or formerly served as a dwelling, and that it is or was assessed and on the tax rolls as a dwelling. The statute then describes how to calculate

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<sup>5</sup> We discuss subsection (3) below, because the parties rely on it as context for interpreting subsection (2).

the time periods described in subparagraphs (2)(b)(A) and (2)(b)(B), so as to determine which is “lesser.”

Putting to one side for a moment the key disagreement between the parties—the meaning of the clause following the word “unless” in those subparagraphs—subparagraph (2)(b)(A) allows a replacement dwelling if the structure was assessed as a dwelling for “the previous five property tax years,” thus providing a fixed numerical value for one time period (five years) to be used for comparison with the numerical value in subparagraph (2)(b)(B) to determine which time period is “lesser.” In addition, because the time period in subparagraph (2)(b)(A) is five years, and the statute requires use of the “lesser” period during which the building was assessed as a dwelling, the net effect is to establish a maximum five-year “look back” during which the structure was assessed as a dwelling, unless some exception applies.

The numerical value of the comparison time period in subparagraph (2)(b)(B)—again putting to one side the clause following “unless”—depends on when the dwelling was “erected upon or affixed to the land and became subject to assessment” as real property. That number could be less than five if, for example, the dwelling was constructed and assessed three years before application for the replacement permit. Considering only the initial clauses of subparagraphs (2)(b)(A) and (B), then, a landowner would be permitted to replace a dwelling that has or formerly had the structural elements required by paragraph (2)(a) *if* the landowner can show that, as of the time when the permit was sought, the building was assessed as a dwelling for the lesser of (1) the previous five property tax years, and (2) the time when the dwelling was built and became subject to assessment.

Two illustrations may be helpful. Again, looking only at the first clauses of subparagraphs (2)(b)(A) and (B), if, in 2018, a landowner sought a permit to replace a dwelling that had been built and subject to assessment in 1970, but that had ceased to be assessed as a dwelling in 1990, the relevant time period under (2)(b)(A) would be the “previous five property tax years,” while the relevant time period under (2)(b)(B) would be 48 years, so five years would be the

lesser time period. Because the structure in that example was *not* assessed as a dwelling for the previous five years, the permit would not be granted. On the other hand, if the dwelling *had* been assessed as a dwelling for the previous five years, the permit would be allowed. Further, if, in 2018, a landowner sought a permit to replace a dwelling built and assessed in 2015, the “lesser” assessment period would be the three years under (2)(b)(B), rather than the “previous five property tax years” under (2)(b)(A), and the permit would be allowed. That structure and the text of paragraph (2)(b) thus indicate that at least one purpose of the statute was to permit replacement of a building that “was assessed as a dwelling for ad valorem taxation” for the “lesser” of two time periods and one of those was “previous five property tax years.” That interpretation suggests that a dwelling’s tax assessment more than five years before a replacement permit was sought is irrelevant.

But paragraph (2)(b) contains additional text, and the parties disagree over the meaning of that text. As noted above, although the requirement for relatively recent tax assessment is the lesser of the five years identified in (2)(b)(A) and the time “when the dwelling was erected upon or affixed to the land and became subject to assessment” in (2)(b)(B), both of those provisions contain an identical exception:

“\*\*\* unless the value of the dwelling was eliminated as a result of the destruction, or demolition in the case of restoration, of the dwelling.”

LandWatch argues that the function of each “unless” clause is to permit an adjustment to the statutory time period calculations, if the building had no value during part of each identified time period due to destruction or demolition. It agrees with LUBA’s holding on that issue:

“[Paragraph (2)(b)] requires that the county find the dwelling was assessed as a dwelling for purposes of ad valorem taxation for *the lesser of* the time periods set out in (A) and (B). As we understand the statute, those time periods are (1) for the previous five tax years, or (2) for the previous five tax years except for those years where the dwelling had no value as a result of destruction or demolition of the

dwelling, or (3) where the dwelling was constructed within the last 5 years, the rest of that 5-year period. Stated differently, [subparagraphs (2)(b)(A) and (B)] work together to specify the default, and longest, assessment look-back possible—five years. That five-year look back may be *shortened* under the exception clauses if either the dwelling has existed for fewer than five years or ‘the value of the dwelling was eliminated as a result of the destruction, or demolition in the case of restoration’ within the last five years. That five-year look back may not be *lengthened* to start and end at a time prior to the five-year period.”

*LandWatch Lane County*, 76 Or LUBA at 254 (emphases in original).<sup>6</sup>

Landowner and the Court of Appeals read the “unless” clauses in paragraph (2)(b) differently. In their view, the parallel clauses do much more than provide a potential shortening of the five-year period (or shorter period if the dwelling was constructed within five years), if a dwelling was demolished or destroyed during that period. Rather, they argue, the “unless” clauses create a broad exemption that takes the demolished or destroyed dwelling out of the otherwise applicable requirements of paragraph (2)(b) altogether. Thus, landowner argues, if the value of the dwelling was eliminated as a result of demolition or destruction—whether that occurred three or 10 or 75 years ago—the owner is not required to show that the dwelling was subject to property tax assessment in the previous five years at all. The Court of Appeals reasoned accordingly and stated, “[I]t is logical to conclude that the legislature intended to excuse demolished dwellings from the taxation requirement altogether.” *LandWatch Lane County*, 291 Or App at 49.

We turn to a closer examination of the competing arguments. The parties agree that, prior to the enactment of the 2013 statute, a dwelling on EFU land could be replaced only if it met certain structural requirements for a habitable dwelling *at the time of the permit application*. The statute thus precluded the replacement of seriously

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<sup>6</sup> Although we quote from and ultimately agree with LUBA’s holding regarding subsection (2) of Oregon Laws 2013, chapter 462, section 2, the LUBA decision also discusses subsection (3). The interpretation of that provision is not before us, and we express no opinion as to whether LUBA’s interpretation is correct.

dilapidated dwellings that no longer met the structural requirements and also of dwellings that had been demolished or destroyed. See ORS 215.213(1)(q) (2011) (permitting replacement of dwelling on EFU land only if dwelling “has” specified structural elements).<sup>7</sup> And the parties agree that House Bill (HB) 2746 (2013), the bill that became the statute at issue here, was intended to address what some owners of EFU-zoned land felt were unreasonable limitations on their ability to construct replacement dwellings, including, in particular, dilapidated buildings. But the question is how far the legislature intended to go in loosening the requirements to replacing dwellings on EFU-zoned land.

Returning to the text of the disputed provisions of Oregon Laws 2013, chapter 462, section 2, as noted, LandWatch argues that the Court of Appeals erred in interpreting the “unless” clauses in subparagraphs (2)(b)(A) and (B) to *exempt* demolished or destroyed dwellings from paragraph (2)(b) and its ad valorem tax assessment requirement altogether. LandWatch’s argument has substantial textual support.

The textual focus of paragraph (2)(b) is the requirement of a finding “that the dwelling [to be replaced] was assessed as a dwelling for purposes of ad valorem taxation” for a specific time period. The text of that paragraph also plainly provides that a replacement dwelling permit cannot be issued unless the “permitting authority \*\*\* finds that the dwelling was assessed as a dwelling for purposes of ad valorem taxation” under the “lesser” of subparagraph (2)(b)(A) and subparagraph (2)(b)(B). Paragraph (2)(b) thus appears to require that one of the two time periods must apply, and not to contemplate that there might be an exception from the assessment period altogether. Assessment as a dwelling, for whichever is the “lesser” time period, is the controlling requirement of paragraph (2)(b).

The location and words of the “unless” clauses provide support for that view. The clauses are not set out as a

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<sup>7</sup> As noted in footnote 4, ORS 215.213 is the statute regarding permissible uses of EFU land in Lane County and Washington County. A parallel statute, ORS 215.283, applies to all other counties, although the replacement dwelling provisions are identical. Because the land at issue here is located in Lane County, we cite to ORS 215.213.

single, separate subparagraph of paragraph (2)(b), as one would expect if the legislature intended to carve out a general exemption from the assessment requirement for all destroyed or demolished dwellings. Instead, each “unless” clause is placed in the text directly following each of the two “time period” descriptions in subparagraphs (2)(a)(A) and (B). Those clauses therefore appear to be intended to apply to the determination of those time periods, rather than to create a complete exemption from the overarching assessment requirement set out at the beginning of paragraph (2)(b). The words used also reflect that understanding. Subparagraph (2)(a)(A) describes a period of the “previous five property tax years” and then sets out the “unless” clause. Subparagraph (2)(b)(B) also is phrased to lead to the calculation of a time period: “*From the time when the dwelling was erected \*\*\**,” followed by its own “unless” clause. (Emphases added.) Thus, both of the “unless” clauses that follow those time period descriptions appear to allow the time periods to be adjusted if the conditions in each “unless” exception are met—that the dwelling had no value during part of the otherwise applicable time period because it was demolished or destroyed—but not to *exempt* such a dwelling from the ad valorem tax assessment requirement itself.

The Court of Appeals reached the contrary conclusion in part because it thought that LUBA’s and LandWatch’s position would require that the word “unless” in subparagraphs (2)(a)(A) and (B) be replaced by “until” or “until such time as,” and that such a deviation from the statutory text was impermissible. *LandWatch Lane County*, 291 Or App at 48-49. It is true that the legislature could have used a more felicitous word than “unless” to indicate the circumstances in which the specified time period could be shortened. But given the context of the “unless” clauses and their placement directly after the description of the two comparison time periods, LandWatch appears to have the better textual argument in asserting that the clauses “simply mean that the applicant need not have paid ad valorem taxes for the entire previous five years in the event of demolition or destruction within that five-year period, and, if so, the applicant would have to have paid taxes within the five-year

period for the years during which the dwelling had taxable value.”

But landowner’s textual argument is not implausible. As the Court of Appeals noted, “unless” can mean “except on the condition that” (among similar constructions), and the inclusion of that clause in subparagraphs (2)(b)(A) and (2)(b)(B) could establish a potentially expansive exception that would allow replacement of any dwelling, if the value of the dwelling had been “eliminated as a result of the destruction, or demolition in the case of restoration, of the dwelling.” Landowner asserts, and the Court of Appeals ultimately agreed, that the plain meaning of the statutory text excuses demolished former dwellings from the “lesser of” requirement altogether. *LandWatch Lane County*, 291 Or App at 48.

That would be a far-reaching conclusion. Under that reading, the “unless” clauses would completely exempt any demolished or destroyed dwelling—whether demolished three or 10 or 75 years ago—from the tax assessment requirement of paragraph (2)(b).<sup>8</sup> Under landowner’s interpretation, *any* dwelling that *ever* existed on EFU land, but no longer does, can be replaced, as long as the building at some point had the structural elements listed in paragraph (2)(a). That would appear to permit a potentially substantial number of replacement dwellings across the state, which would be a surprising result, based on the concerns that led to the 2013 amendment, as discussed below. As noted, however, although words in the “unless” clauses, standing alone, could encompass landowner’s interpretation, we think that the structure of paragraph (2)(b) and the placement of the words the legislature used point more plausibly in the other direction, and that LandWatch and LUBA therefore have the better textual argument. We turn to the other arguments raised by the parties to see whether they support or undercut that tentative conclusion.

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<sup>8</sup> Indeed, under petitioner’s reading, it appears that any landowner who wanted to replace any *existing* dwelling on EFU-zoned land could avoid the requirements of subsection (2)(b) altogether by simply destroying or demolishing the dwelling. That circumstance is not present here, since the dwellings at issue were demolished many years ago, and we express no conclusion as to whether or not such actions would be permissible under subsection (2)(b) or other statutes or rules.



### C. *Context*

The parties also assert that various aspects of the context of paragraph (2)(b) of Oregon Laws 2013, chapter 462, section 2, support their respective positions. In particular, the parties discuss subsection (3), which as noted above, provides an alternative to subsection (2) for a landowner to construct a replacement dwelling, although it is not the provision upon which landowner relies here. Subsection (3) allows the replacement of a dwelling that meets the structural element requirements of paragraph (2)(a), does *not* meet the required time period for the property to be taxed as a dwelling under paragraph (2)(b), but was “improperly removed from the tax roll by a person other than the current owner.” Key to the operation of subsection 2(3) is the statutory (and somewhat counterintuitive) definition of “improperly removed.” That definition is as follows:

“As used in this section, ‘improperly removed’ means, with respect to a dwelling removed from the tax roll, that:

(a) The dwelling has taxable value in its present state, *or* had taxable value when the dwelling:

(A) Was first removed from the tax roll; *or*

(B) Was destroyed by fire or other act of God; *and*

(b) The county stopped assessing the dwelling even though the current owner did not request removal of the dwelling from the tax roll.”

Or Laws 2013, ch 462, § 2(8) (emphases added).

Subsection (3), using the statutory definition of “improperly removed,” allows a current owner to avoid the requirements in paragraph (2)(b) regarding a dwelling’s recent tax assessment history and also to construct a replacement dwelling even if the dwelling to be replaced is no longer on the tax rolls—including because it has been demolished—but only in certain circumstances: The landowner must establish that (1) “the county stopped assessing the dwelling even though the current owner did not request removal of the dwelling from the tax roll,” Or Laws 2013, ch 462, § 2(8)(b), and (2) the dwelling, although removed from the tax rolls, “has taxable value in its present state,”

or had taxable value when it was “first removed from the tax roll” or “was destroyed by fire or other act of God,” *id.* at § 2(8)(a).<sup>9</sup>

LandWatch argues that subsection (3) of section 2 was intended by the legislature to describe the circumstances in which demolished dwellings generally could be replaced. LandWatch then points out that the effect of the Court of Appeals decision—by essentially eliminating the tax assessment requirement of subsection (2)(b) for demolished dwellings—is to render subsection (3) meaningless, or at least superfluous, because virtually all destroyed or demolished dwellings could be replaced under subsection (2). Because we generally interpret statutes to give effect to all their provisions, *see* ORS 174.010,<sup>10</sup> LandWatch argues that the context provided by subsection (3) significantly undermines the Court of Appeals’ construction of the statute.

LandWatch overstates its case. Even if the Court of Appeals’ construction of paragraph (2)(b) would exempt landowner and others seeking to replace destroyed or demolished dwellings from the tax assessment requirement set out in that paragraph, that would not render subsection (3) superfluous. At the very least, subsection (3) would apply when a previous owner had improperly removed an existing dwelling from the tax roll more than five years before a replacement permit was sought and the dwelling has taxable value in its present state. In those circumstances, the current owner would not be able to meet the tax assessment requirement of paragraph (2)(b), but would meet the alternative requirement in subsection (3). That said, as to destroyed or demolished dwellings, the Court of Appeals’ broad interpretation of the “unless” clauses of subparagraphs (2)(b)(A)

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<sup>9</sup> We interpret subsection (3) only to the extent required to assess the parties’ competing arguments about the context that section provides for their respective interpretations of subsection (2)(b). We do not undertake a comprehensive analysis of how subsection (3) may or may not apply to specific replacement dwelling scenarios.

<sup>10</sup> ORS 174.010 provides:

“In the construction of a statute, the office of the judge is simply to ascertain and declare what is, in terms or in substance, contained therein, not to insert what has been omitted, or to omit what has been inserted; and where there are several provisions or particulars such construction is, if possible, to be adopted as will give effect to all.”

and (B) appears to subsume most, if not all, of the situations in which subsection (3) would apply. That very substantial overlap invites some doubt as to whether the legislature intended such an interpretation.

Landowner also points to subsection (3) as context for interpreting paragraph (2)(b), but draws different conclusions. First, landowner observes, that, because subsection (3) permits the replacement of dwellings that were “improperly removed” from the tax rolls by a previous owner—including by demolition—LandWatch’s claim that the Court of Appeals’ decision opens up EFU land for the replacement of any dwelling that ever existed on the land is misleading. That is true, landowner argues, because, under subsection (3), that opportunity already exists, for the most part, and will continue to exist regardless of the how subsection (2)(b) is interpreted.

Second, and again focusing on the contrast between subsection (2) and subsection (3), landowner argues that LandWatch’s interpretation of subsection (3) results in “complex, arbitrary distinctions among landowners in slightly different circumstances.” She notes that, because she has owned her land continuously since the dwellings were removed, her permit requests cannot fall within subsection (3) because the dwellings were not “improperly removed from the tax roll by a person *other than the current owner.*” (Emphasis added.) However, she continues, if the dwellings had burned down and landowner had then sold the property, the new owner would be eligible for a replacement permit. Similarly, if a *former* owner had improperly removed the dwellings from the tax roll before landowner had purchased the property, and landowner had later demolished the dwellings, she would be eligible for a permit. Landowner claims that there is “no policy justification for this discrepancy.” She concludes that LandWatch’s proposed interpretation is therefore absurd and cannot be what the legislature intended.

Landowner’s contextual arguments are not without merit, but also are not necessarily persuasive evidence of what the legislature did intend. The argument that subsection (3), which incorporates the broad definition of

“improperly removed” from subsection (8), already permits the replacement of most demolished dwellings on EFU land, because it makes new owners eligible for permits, suggests that LandWatch’s “floodgates” concern with replacement dwellings on EFU-zoned land may be exaggerated. But it does not directly address the interpretive challenge with regard to paragraph (2)(b). That provision clearly evinces a legislative concern that existing dwellings have been subject to tax assessment in the years immediately before the application for a replacement dwelling permit. Whether the legislature understood, or had information regarding, the potential extent of new dwelling construction that would be permitted under either subsections (2) or (3) is not clear from the legislative history. But if the legislative history, which we discuss below, makes anything clear, it is that the “unless” clauses added to subparagraphs (2)(b)(A) and (B) were intended to deal with a narrower problem.

As to the claimed “complex” and “arbitrary” distinctions among property owners who are in only slightly different circumstances, it is not difficult to postulate plausible policy reasons for many of the legislature’s choices. It would not be unreasonable, for example, for the legislature to deny a replacement building permit to a landowner who had removed a dwelling from the tax rolls when the building in fact had taxable value—to deter such improper conduct—but to allow a subsequent owner to obtain a permit.

Landowner does point to one possible anomaly: that a dwelling destroyed by “fire, or other act of God” (and therefore “improperly removed” under subsection (8)) could be replaced by a subsequent owner of the land under subsection (3), while if one of landowner’s dwellings had been destroyed by fire, she would not be able to replace it, either under subsection (3) (because she remains the owner), or under LandWatch’s interpretation of subsection (2). But that circumstance—which, of course, is not present here—is too slender a reed to support landowner’s proposed interpretation of paragraph (2)(b). Much legislation—and certainly much land use legislation—is necessarily complex, given the multiple and sometimes competing goals that policymakers

seek to advance and the myriad fact situations to which general legislation will apply. Moreover, many distinctions that legislative choices entail involve line-drawing that can appear “arbitrary.” A statute of limitations, for example, may require that a claim be filed within two years of the date of injury. There is no policy justification for drawing the line at two years rather than two years and one week, and the line is “arbitrary” in that sense, but it is a permissible legislative choice. Similarly, if the legislature imposes more restrictive criteria for a current landowner who demolished a dwelling on his or her own property (or even whose dwelling was destroyed by fire) to be eligible to build a replacement dwelling than for a landowner whose predecessor demolished a dwelling (or whose dwelling was destroyed by fire), landowner points us to nothing in Oregon law that would make that an improper policy choice.

We understand that landowner does not argue that we must interpret paragraph (2)(b) to provide her the same right to construct a replacement dwelling that a subsequent owner of her land would have under subsection (3). Rather, she claims that the arbitrary eligibility distinctions in LandWatch’s proposed interpretation would lead to absurd results, which should weigh against that interpretation if the statutory text is capable of multiple constructions. But the absurd results canon is best applied sparingly—only when the statute is truly ambiguous *and* the result is truly absurd. If we were to do otherwise, “we would be rewriting a clear statute based solely on our conjecture that the legislature could not have intended a particular result.” *State v. Vasquez-Rubio*, 323 Or 275, 283, 917 P2d 494 (1996); *see also id.* at 283 n 4 (expressing doubt that a particular result was as absurd as a party alleged). As we note below, after consulting the legislative history, paragraph (2)(b) is not sufficiently obscure to bring the absurd results canon into play, and the results contemplated by LandWatch’s reading are not so extreme as to make us doubt that the legislature would have tolerated them.

#### D. *Legislative History*

Much of the legislative history to which the parties refer is sufficiently general that it can support both

interpretations of paragraph (2)(b). There is no doubt, as the Court of Appeals noted, that “[t]he sponsors and supporters of HB 2746 stated that the purpose of the bill was to expand the availability of replacement-dwelling permits.” *LandWatch Lane County*, 291 Or App at 50. But that overall purpose is consistent with both parties’ positions and gives no hint as to the scope of the expansion that the legislature intended or the controlling interpretive issue in this case, which is the meaning of the “unless” clauses in subparagraphs (2)(b)(A) and (B). Nevertheless, the path that led to the 2013 passage of HB 2746, as well as the testimony of its sponsors and supporters, makes clear that the legislature did not intend paragraph (2)(b) to authorize replacement of dwellings that had been destroyed or demolished many years earlier.

As noted, before the passage of HB 2746, a replacement permit for a dwelling located on EFU land could be granted only if the dwelling to be replaced “has” the structural elements listed in the statute, including a sink, toilet, interior wiring, and so on. *See* ORS 215.213(1)(q) (2011). As introduced, HB 2746 would have allowed replacement permits if the dwelling “has or had” those elements, *or* the applicant “establishes that the dwelling *is*, for purposes of ad valorem taxation, assessed as a dwelling.” Bill File, HB 2746, Feb 6, 2013 (introduced bill) (emphasis added). That initial version would have allowed replacement of any existing or demolished dwelling that met or formerly met the structural requirements, *and* any existing dwelling that was currently assessed as a dwelling.

During hearings in February 2013 and in statements and documents submitted to the House Committee on Land Use at that time, the bill’s sponsors and supporters explained that its purpose was to address the problem of dwellings that were ineligible for replacement because they did not presently meet the structural requirements. Both actual and hypothetical examples of such dwellings were discussed, including former dwellings where “a wood stove has been removed or the roof has caved in,” Audio Recording, House Committee on Land Use, Feb 21, 2013, at 10:16 (statement of Katie Fast) <https://olis.leg.state.or.us> (accessed Apr 17, 2019);

a building that was “deteriorating” and “completely uninhabitable,” from which vandals had taken “all the wiring, the plumbing,” *id.* at 14:11 (statement of Dave Vanasche); and an “abandoned house \*\*\* that is beyond repair (uninhabitable),” Exhibit 6, House Committee on Land Use, HB 2746, Feb 21, 2013 (statement of Mark Unger).

In the House, the provisions of paragraph (2)(b) were tightened by requiring findings that the dwelling “has, or formerly had” the listed structural elements *and* “is assessed as a dwelling for purposes of ad valorem taxation and has been for the previous five property tax years.” Bill File, HB 2746, Apr 26, 2013 (A-Engrossed). That version also introduced the “improperly removed” provision, subsection (3), and the statutory definition of that term, which remained in the bill when it eventually was enacted into law, as subsection (8), although the definition of “improperly removed” was further modified during the legislative process.

The “unless” clauses at issue in this case were drafted in response to the five-year assessment period set out in HB 2746 (A-Engrossed). David Hunnicutt of Oregonians in Action and other proponents of the bill were concerned that the blanket “five year” tax assessment period in the A-Engrossed bill would not permit the replacement of buildings that had not been on the tax roll as dwellings for five years because they had been both constructed and destroyed within the past five years:

“[T]he problem is in \*\*\* section 2(2)(b), \*\*\* one of the changes that have been made to the replacement dwelling statutes with this bill is that \*\*\* in order to replace it, the dwelling has to have been assessed for property tax purposes for at least the last five years. The problem becomes, what happens if the dwelling was built four years ago and it burns down, or three years ago or two years ago or whatever, it burns down, it’s destroyed by floods, something of that nature. The way the bill’s currently written, if that were the fact pattern, the property owner, who just basically has a *new or relatively new dwelling*, would not be able to replace it. Currently they would be able to replace it, but if this bill passed with this language they wouldn’t be able to replace that. So we needed to add language \*\*\* to deal

with the situation where a dwelling was less than five years old and \*\*\* to make sure that property owners of those types of dwellings, if the dwelling needed to be replaced, that they could benefit and use the provisions of this statute as they could under current law.”

Audio Recording, Senate Rural Communities and Economic Development Committee, May 16, 2013, at 28:17 (statement of David Hunnicutt), <https://olis.leg.state.or.us> (accessed Apr 17, 2019) (emphasis added).

At a subsequent hearing, the Senate committee considered responsive amendments, which introduced the “unless” clauses discussed above, along with some other changes not pertinent here. At that hearing, Hunnicutt again described HB 2746 as necessary to “address the issue that was raised and brought forward \*\*\* about the dilapidated dwellings and their ability to replace them.” Audio Recording, Senate Rural Communities and Economic Development Committee, May 30, 2013, at 14:33 (statement of David Hunnicutt), <https://olis.leg.state.or.us> (accessed Apr 17, 2019). He again described the problems that the amendments solved, in somewhat greater detail, and described the effect of the amendments to subparagraph (2)(b)(B):

“We amended House Bill 2746 to address a problem created by the language of section 2(2)(b), which currently requires a property owner to demonstrate that their dwelling is assessed as a dwelling and has been assessed for the last five tax years. There are two problems with this language. First, a dwelling that is less than five years old would not qualify to be replaced under this subsection even if it had been taxed as a dwelling since it had first been occupied. Second, a dwelling that was destroyed or otherwise demolished by the owner for replacement or rebuilding *during the five-year period* wouldn’t qualify to be replaced under this subsection, even if it would have been taxed as a dwelling during this five-year period, except for the fact that the \*\*\* value of the dwelling was eliminated because it was destroyed or demolished by the owner for replacement or rebuilding.

“So we made amendments to section 2(2)(b) to resolve this problem. For a dwelling that is more than five years



old, the amendments allow the dwelling to satisfy this subsection if the dwelling is taxed as a dwelling for the past five years, or if the dwelling would have been taxed as a dwelling for the past five years but stopped being taxed as a dwelling because it was destroyed or demolished by the owner for replacement or rebuilding.

“For a dwelling that is less than five years old, the amendments allow the dwelling to satisfy this subsection if the dwelling has been taxed as a dwelling since it was first occupied or if the dwelling would have been taxed as a dwelling since it was first occupied but stopped being taxed as a dwelling because it was destroyed or demolished by the owner for replacement or rebuilding.

*“If a former dwelling has not been taxed as a dwelling during the last five years, it does not meet the criteria in section 2(2)(b) and must meet the standards in section 2(3).”*

*Id.* at 15:11 (emphases added).

That explanation of the limited purpose of the amendments and of how they would apply to dwellings demolished more than five years ago clearly favors LandWatch’s interpretation of subparagraph (2)(b)(B). We have recognized that legislative history consisting of statements by nonlegislators “sometimes provides limited assistance in determining the legislature’s intent.” *Kohring v. Ballard*, 355 Or 297, 311, 325 P3d 717 (2014) (emphasis in original). In this case, however, it is appropriate to rely on Hunnicutt’s statements as evidence of the legislature’s intent in enacting the “unless” clauses. Hunnicutt’s explanation of the purpose and effect of the amendments was the only such explanation that the Senate committee received before it adopted the amendments—which it did without objection immediately following Hunnicutt’s statement. *See id.* at 311-12 (“In some cases, however, it is appropriate to give greater weight to such legislative history, as when the nonlegislators were the drafters and principal proponents of a bill, and it is clear that the legislature relied on their explanations.”). Because Hunnicutt played an important role in the legislative process, both in identifying the problems that the amendments addressed and in developing the text of the amendments, it seems likely that the legislature relied upon his explanation.

Moreover, Hunnicutt’s explanation of why paragraph (2)(b) needed to be amended and how the amended paragraph (2)(b) would function was in line with the statements of other legislators and witnesses concerning the overall purpose of HB 2746 of making it easier to replace dilapidated or run-down dwellings on farmland. As Representative Unger, who sponsored the bill, and whose family owned land that included a dilapidated dwelling, stated at the May 16, 2013, Senate hearing:

“Some farmers who will testify later today to their specific situations who have had trouble taking a house that was clearly a house where people used to live and getting the permits they need to replace the dwelling. So, this bill brought before you here is to address this group of people who have a house that has all the characteristics of a house but don’t quite meet all the current guidelines for getting a new permit, tweaking them a little bit so that we can replace those dwellings where appropriate while respecting the land use laws that I think are important to respect out in these agricultural areas.”

Audio Recording, Senate Committee on Rural Communities and Economic Development, HB 2746, May 16, 2013, at 23:52 (statement of Rep. Benjamin Unger), <https://olis.leg.state.or.us> (accessed Apr 17, 2019). The bill was repeatedly described as dealing with a small number of farmers, “tweaking” existing requirements, and a small fix. As Hunnicutt stated, “[t]he goal of this is to clean up the replacement dwelling statutes and allow farmers *in a few circumstances* to replace dwellings that are *already* on the property, but for lack of a better term, dilapidated.” Audio Recording, Senate Committee on Rural Community and Economic Development, HB 2746, May 16, 2013, at 27:00, <https://olis.leg.state.or.us> (accessed Apr 17, 2019) (emphases added).

Additionally, *none* of the legislatively cited examples—either actual examples of dilapidated dwellings owned by farmers who testified or hypothetical examples raised in the hearings—of the kind of dwellings that would come within paragraph (2)(b) were dwellings that had been demolished or destroyed 20 years earlier. And no witness contradicted

Hunnicutt's statement that a dwelling removed more than five years earlier would not come within the "unless" clauses.

### III. CONCLUSION

To summarize, the text of paragraph (2)(b) of Oregon Laws 2013, chapter 462, section 2, is ambiguous. Under subsection (2), the legislature created a five-year "look back" period, modified for new dwellings, to implement that requirement. The legislature included the "unless" clauses to allow adjustment of the tax assessment period if the dwelling's value had been eliminated due to the destruction or demolition of the dwelling. Although landowner's argument that the "unless" clauses were intended to exempt *all* destroyed or demolished dwellings from the tax assessment period may not be inconsistent with the wording of those clauses, it is a strained reading of paragraph (2)(b) as a whole. That provision imposes a tax assessment requirement and sets out two time periods, the lesser of which must be applied, and one of which, because it is a fixed period—five years—is the maximum period. That structure indicates the primacy of the tax assessment requirement and, together with the placement of each "unless" clause directly after each time period, suggests that the "unless" clauses are more properly seen as describing circumstances under which the five-year "look-back" can be modified, rather than circumstances under which the tax assessment requirement does not apply at all.

With respect to landowner's contextual arguments, while we acknowledge that it is not entirely clear how subsections (2) and (3) relate to one another, the anomalies that landowner criticizes in LandWatch's proposed interpretation are hardly outside the realm of other applications of general statutes to specific circumstances. In any event, the legislative history supports LandWatch's argument that the "unless" clauses in subparagraphs (2)(b)(A) and (B) were meant to address the limited problem of dwellings that had been demolished or destroyed within the past five years, and, conversely, were not meant to apply outside of those circumstances. In our view the more persuasive interpretation of the words that the legislature used—and the interpretation that better implements the legislature's intent in using

those words—is that the paragraph (2)(b) does not authorize replacement dwelling permits for dwellings that were destroyed or demolished more than five years before the permit application was filed. Because landowner’s replacement dwelling applications were filed more than five years after the dwellings on her property were demolished, LUBA correctly ruled that she cannot obtain replacement permits under paragraph (2)(b) of Oregon Laws 2013, chapter 462, section 2.

The decision of the Court of Appeals is reversed. The final order of the Land Use Board of Appeals is affirmed, and the case is remanded to the Board.