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VIA E-MAIL

Representative Ken Helm
Representative Mark Owens
Co-Chairs, Oregon House Committee on Agriculture,
Land Use, Natural Resources and Water
900 Court Street NE
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RE: House Bill 3858

Co-Chair Helm, Co-Chair Owens, and members of the committee,

Thank you for the opportunity to provide testimony in support of HB 3858. By way of background, I am a land use attorney practicing in Portland. I have worked on land use matters throughout the state for more than 15 years, both as a planner and lawyer. I respectfully submit the following testimony, which explains the background of HB 3858 and the urgent need for its passage.

HB 3858 is a legislative fix to a technical problem created by a recent decision of the Oregon Land Use Board of Appeals ("LUBA"). The function of HB 3858 is simple: it confirms and restates the law before LUBA's decision, that all units of land created through the sale or transaction of properties which occurred *before* county land use approval would have been required to create such properties, remain "lawfully established units of land."

Oregonians typically own real property in two forms. When purchasing a home, most people receive a deed that describes their land as a subdivision lot or partition parcel. Outside of Oregon's urban lands, ownership is described far more commonly by the "metes and bounds" method, by which a property's boundaries are described using landmarks; that is, their legal description is established by a title instrument (deed or land sale contract) that is recorded with a county, instead of by a subdivision or partition plat map.

In order to be legally sold, such "metes and bounds" parcels must be considered "lawfully established." ORS 92.018. Lots or parcels that have been created in the last 40 years or so obtained their legal status by having been created by subdivision or partition plat, but parcels crated before local governments required subdivision or partition review were often simply created by deed. However, "metes and bounds" parcels generally predate Oregon's modern land use system, which in the late 1970s began protecting rural lands from development under

Oregon's Statewide Planning Goals 3 (Agricultural Lands) and 4 (Forest Lands). Because of the lack of land division standards for such parcels, they were entirely creations of real estate transactions. The Oregon Land Use Board of Appeals ("LUBA") explained this history as follows:

> "Prior to the adoption of partition and subdivision ordinances, a deed was a multi-function instrument, used not only to convey existing units of land, but also to create new units of land, to vacate or consolidate units of land, and also adjust property boundaries of existing units of land, without creating new units of land. Under current regulatory schemes, those functions are accomplished by different mechanisms."

Landwatch Lane County v. Lane County (Ford), __ Or LUBA __ (LUBA No 2020-085, April 29, 2021 (slip op at 8).

So, Oregon law also provides that such "metes and bounds" properties are no less lawful than those created by a subdivision or partition provided they were "created by a deed or land sales contract, if there were no applicable planning, zoning or subdivision or partition ordinances or regulations." ORS 92.010(3)(a)(B)(ii). These parcels remain lawful and discrete until lawfully changed. ORS 92.017. The purpose of these statutes is simple. They protect parcels that were created when Oregon's local governments did not require review of new lots or parcels from the subsequent changes in law that *did* require such review for lots and parcels going forward.

HB 3858 addresses a common method used to describe some of these parcels, which are called "remainder parcels." These are portions of larger parcels from which other, smaller parcels were created long ago, resulting in a "parent" parcel and one or more "child" parcels. Any portion of the parent parcel retained by the grantor became a "remainder" of that owner's original parent parcel.

Like any of its lawfully-established children, a parent parcel has been considered "lawfully established," as defined in ORS 92.010(3)(a)(B)(ii), because it existed *prior* to creation of the child parcel. Thus, a parent parcel is nothing more than a "lawfully established unit of land," for which the configuration has been modified through means that were lawful at the time. There was neither a requirement nor a practical reason for the owner of the parent parcel to re-describe the parcel that resulted from conveying the child parcels because they were governed by conveyancing and recording statutes, not by land use regulations. Until recently, the legality of these remainder parcels were almost universally accepted by local governments and the legal community.

Late last year, LUBA issued an opinion that fundamentally impaired the legality of remainder parcels. *Carroll v. Lane County*, __Or LUBA __, (LUBA No. 2024-054) (Dec. 11, 2024). In *Carroll*, LUBA reasoned that, because a century-old parent parcel was not re-described

in an instrument prior to codified land division standards coming into effect, it was not a "parcel" for purposes of ORS 215.010(1), and thus was not protected by ORS 92.017. In so doing, LUBA rendered an entire class of lawful parcels unlawful—those that were created as remainders of lawful conveyances that occurred before the enactment of county land-division ordinances. In effect, LUBA effectively placed a retroactive burden on mostly long-dead grantors to have anticipated that they must re-describe their property after lawfully conveying portions of it away, which, of course, was not common practice at the time.

The practical implications of LUBA's opinion are much starker than the logical conundrum identified above: LUBA's opinion in *Carroll* potentially eliminates the legal status of thousands of parcels throughout the state and leaves the owners of theses formerly-legal remainder parcels unable to legally convey them, even while the "child" parcels created from the same parent parcel can still be freely conveyed.

A hypothetical example helps illustrate my point. Let us say that a prototypical farming couple, John and Jane Smith, purchased a 100-acre farm in 1940. In 1960, after their children were grown, John and Jane conveyed 10-acre parcels to their son, Jim, and daughter, Jeanne. These conveyances were lawful because, in 1960, the county in which the Smith farm was located had no land division standards or procedural requirements. The Smith's conveyance created three units of land: Jim's 10 acres, Jeanne's 10 acres, and the Smith's remaining 80 acres.

After John and Jane Smith died, Jim and Jeanne inherited the remaining 80 acres, and in turn, after they died, their children inherited the 80 acres. At each inheritance, the 80-acre farm was described in the deed, in essence, as follows: "The Smith's 100 acres, save and except the 10 acres conveyed to John on January 1, 1960 and save and except the 10 acres conveyed to Jane on January 1, 1960."

Until LUBA's decision in *Carroll*, there was no question that the Smith's 80-acre remainder parcel (which was also the "parent" parcel) was legally established for the simple reason that the property lines of the remainder parcel were created through the two legal conveyances to Jim and Jeanne *before* a county partition or subdivision approval would have been required. However, according to *Carroll*, local governments would conclude that the two 10-acre parcels originally conveyed to Jim and Jeanne were "lawfully established," but the 80-acre remainder parcel is not, simply because it was not re-described in a new deed after Jim and Jeanne had been given their properties in 1960. While the Smith's descendants are free to sell Jim and Jeanne's 20 acre parcels, now they may not lawfully convey the 80-acre farm.

HB 3858 is intended to fix such an absurd situation by clarifying and reaffirming Oregon law as it existed before the *Carroll* decision. That is, HB 3858 will reaffirm that both "parent" and "child" parcels are lawful so long as the child parcels were created by deed or land sale contract before land division regulations were in effect.

Representatives Helm and Owens
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Passage of HB 3858 is urgently needed to ensure that property owners can lawfully convey these remainder parcels. Unless and until the legislature acts to resolve this situation, potentially thousands of acres of farmlands, ranchlands, and timberlands cannot be lawfully conveyed and or used for a host of otherwise lawful purposes.

I strongly encourage passage of HB 3858.

Best Regards,

SCHWABE, WILLIAMSON & WYATT, P.C.

Garrett H. Stephenson

GST:jmhi