Sean T. Malone

Attorney at Law

PO Box 1499 Tel. (303) 859-0403

Eugene, OR 97440 seanmalone8@hotmail.com

March 25, 2025

Via Electronic Mail
Hon. Ken Helm
Hon. Mark Owens
Members of the Agricultural, Land Use, Natural Resources, and Water Committee
Oregon State Capitol
900 Court St. NE
Salem OR 97301

Re: Testimony in Opposition to HB 3858

Dear Co-Chair Helm, Co-Chair Owen, and Members of the Committee,

On behalf of LandWatch Lane County, as well as myself as a land use practitioner that believes that the land use system is best served by consistency, I respectfully urge you to oppose HB 3858.

HB 3858 is deeply flawed and would expand the definition of Űawfully established unit of landű to the point of rendering that term meaningless. Lawful creation of units of land has been a bedrock principle as to the developability of a unit of land for decades. *See Yamhill County v. Ludwick,* 294 Or 778, 663 P2d 398 (1983); *Maxwell v. Lane County*, 178 Or App 210, 35 P3d 1128 (2001); *Reeves v. Yamhill County*, 53 Or LUBA 4 (2006); *Friends of Yamhill County v. Yamhill County*, 229 Or App 188, 211 P3d 297, 302 (2009); *Landwatch Lane County v. Lane County,* 80 Or LUBA 415, 419 (2019). The bill, however, abandons controlling caselaw and uses imprecise, undefined language that will result in the basic elimination of the term Űawfully established unit of landű and the misconstruction of the basic process entailed in a partition in present day land use parlance.

It is argued by a proponent of the bill that: ŰThe bill clearly articulates a fundamental principle: lots or parcels created by deeds or land sales contracts prior to the existence of land use regulations are lawful.ű That principal, however, already exists in Oregon law at ORS 92.010(3)(a)(B)(ii), which provides that a lawfully established unit of land is a unit

of land created Ű[b]y deed or land sales contract, if there were no applicable planning, zoning or subdivision or partition ordinances or regulations.ű HB 3858 expands the definition of Ű'lawfully established unit of landű to include an ambiguous and undefined Ű'remainderű and even units of land *not otherwise described*, which is contrary to basic land use and real estate principles that underpin decades of case law.

The billŰs language is hopelessly flawed by its use of the terms Ű'remainderű and Ű'subtraction.ű LUBA previously found that the term Ű'remainderű has no basis in land use parlance, despite some practitionersŰ use of the term:

> "Particularly where partitions carve smaller parcels from a larger one, or where one of the parcels retains an existing dwelling or farm operation, it is convenient to conceive of partitions as leaving a 'remainder' parcel rather than creating each of the resulting parcels. However, that conception has no basis in ORS chapter 92 or other authority of which we are aware, and is inconsistent with the definitions of 'parcel' and 't'partitionŰ at ORS 92.010(5) and (6)."

Hartman v. Washington County, __ Or LUBA __ (LUBA No. 98-172, July 16, 1999). In subsequent years, the legislature amended the ORS 215 to include the term Ű'remainderű at ORS 215 but only to describe a parcel that either contains a dwelling or does not qualify for particular uses after a partition. *See* ORS 215.263(4)(a)(D) and (5)(a)(D) and 215.780(2)(c)(E). Those uses of the term Ű'remainderű are problematic in their own right because they are inconsistent with the basic notions of a partition. As explained by the Court of Appeals in *WREDCO v. Polk County*, 246 Or App 548, 267 P3d 855 (2011) and *Leckie v. Lane County,* 338 Or App 742 (2025) (also referred to as *Doughty*), partitions vacate underlying properties and create new properties. Nothing remains, and, therefore, the use of the term Ű'remainderű makes little sense. Regardless, the proponentsŰ proposal to use the imprecise term Ű'remainderű for pre-land use bills would only create further confusion and mischief before local governments, LUBA, and the courts.

The use of the term Ű'subtractionű is also misleading, and it expressly would not apply only to units of land created *before land use laws* because it points to Ű'subparagraph (B) of this paragraph,ű which refers to units of land created in compliance with land use laws and those created before land use laws:

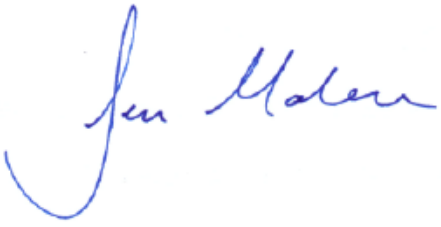
> Ű(B) Another unit of land created:
>
> (i) In compliance with all applicable planning, zoning and subdivision or partition ordinances and regulations; or
>
> (ii) By deed or land sales contract, if there were no applicable planning, zoning or subdivision or partition ordinances or regulations."

ORS 92.010(3)(a)(B). The proponents are expressly asking for something more than what they allege, and the proposed bill will result in the reversal of many other cases, including *Landwatch Lane County v. Lane County,* 80 Or LUBA 415, 419 (2019) (LUBA explained that a lawful lot or parcel may be created "through a deed or land sales contract describing the area of land as a unit before planning, zoning or subdivision or partition ordinances or regulations became applicable.ű) and others cited *supra*.

Finally, it is a fundamental component of land use and real estate law that a unit of land must be *described* in a deed or conveyance. If a unit of land has not been described, then how can the legislature assign rights to it? It would be confounding to allow units of land to be lawfully established if they were never otherwise described. HB 3858 completely erases the basic requirement to describe a unit of land by adding the following language: Ű"even if the remainder is not separately described in a deed or land sales contract.ű The term Ű"lawfully established unit of landű would be completely undone by that language. The legislature and land use practitioners have relied upon that definition for decades, and the amount of case law that has relied upon that definition in ORS 92 and ORS 215 is significant, all of which would be overturned. Again, it is difficult to foresee how much mischief and problems would occur by this expansive bill, and I urge the legislature to decline the invitation to create chaos in the land use system. Simply put, this is not some narrowly tailored bill but rather an attempt to create exceptions that will swallow the rule.

In conclusion, the expansive proposed bill uses imprecise, undefined, and erroneous terms that will result in further litigation and the misconstruction of the basic operation of a partition, as well as the rollback of decades of case law. As such, the legislature should retain consistency, predictability, and common sense in the land use system by opposing HB 3858.

Sincerely,



Sean T. Malone
Attorney for LandWatch Lane County

Cc:
Client