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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 write again to address letters in support and clarify and emphasize several other issues in HB 3858. I have been out of town with family during the brief time in which I have become aware of HB 3858, and, therefore, was not able to appear in person at the hearing.

The very serious problems associated with this bill are (1) that the bill does not solve any new problem created by recent changes in law or new interpretations; (2) that the bill's important terms are undefined; (3) that the bill purports to address "pre-land use law carve outs" but would also expressly apply to "post-land use law partitions/subdivisions"; (4) that the bill perpetuates a misinterpretation of how partitions/subdivisions operate; and (5) that the bill expands the definition of "lawfully established unit of land" to the point of rendering the term meaningless.

First, HB 3858 does not represent a "fix" to any recent legislative change or new interpretation. ORS 92.010(3)'s definition has been in place for almost 20 years and "lawful creation" has been a part of land use parlance in ORS 92 for at least 40 years, since ORS 92.017 was promulgated in 1985. *See* ORS 92.017 (1985) ("A lot or parcel lawfully created shall remain a discrete lot or parcel, unless the lot or parcel lines are changed or vacated or the lot or parcel is further divided, as provided by law."). That a

unit of land be discrete and described in a deed or a conveyance is not controversial. LUBA's decision in *Carroll* is also not premised upon some purported interpretation but rather the long-accepted and fundamental notion that unit of land must be described, which is inherent in the plain language of ORS 92.010(3), which requires that the unit of land be created "[b]y deed or land sales contract, if there were no applicable planning, zoning or subdivision or partition ordinances or regulations." (emphasis added). A description of land is inherently tied to its creation or lawful establishment. Indeed, 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: "even if the remainder is not separately described in a deed or land sales contract." The term "lawfully established unit of land" 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 or seriously complicated. This bill is not narrowly tailored but rather an attempt to create exceptions that will swallow the rule. Simply put, it is a fundamental component of land use and real estate law that a unit of land be *described* in a deed or conveyance instrument for it to be considered lawful.

Second, the bill's important terms are not defined. There is no well-accepted definition of "remainder." The term "remainder" is most properly understood in estate planning, but that is clearly not the context in which it is used in HB 3858. As noted in prior testimony, before its use in three separate provisions in ORS Chapter 215[1], the term "remainder" was not a part of land use parlance.[2] The uses of the term in ORS Chapter 215 appear purely as an attempt to identify a resulting parcel from a partition that

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[1] *See* ORS 215.263(4)(a)(D) and (5)(a)(D) and 215.780(2)(c)(E).

[2] LUBA opined that:

> "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 'partition' at ORS 92.010(5) and (6)."

Hartman v. Washington County, __ Or LUBA __ (LUBA No. 98-172, July 16, 1999). The Kloos letter discounts *Hartman* but that case is clearly applicable given the limited use of the term "remainder" and that it only occurs in ORS Chapter 215 and not at all in ORS Chapter 92. Since *Hartman*, there has been a slow creep to include the term "remainder" in statute, and, as noted elsewhere, those instances misconstrue the basic operation of a partition/subdivision.

contained a dwelling or similar identification.[3] Importantly, even in that context, the resulting parcel would be described in a deed, but the bill would complicate such a requirement by obviating the need for a lawful unit of land to be described.

Third, HB 3858 expressly applies to both units of land created before land use laws and units of land created in compliance with applicable land use laws. For example, the plain language of HB 3858 points to "subparagraph (B) of this paragraph," which refers to units of land created in compliance with land use laws and those created before land use laws:

> "(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). If the legislation was aimed only at "remainders" prior to land use laws, then the legislation would be restricted to "subparagraph (B)(ii) of this paragraph." The bill, however, broadly points to all of subparagraph (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) (also, known as *Doughty*, where 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.") Notably, the *Carroll* decision relied upon *Doughty,* as well as *Atkins v. Deschutes County,* 102 Or App 208, 210-211, 793 P2d 345 (1990).[4] The proponents of the bill are clearly asking for a greater cut than they admit, and such a practice should not be rewarded.

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[3] Again, the use of the term "remainder" in ORS Chapter 215 misconstrues the basic nature of a partition/subdivision because when a partition/subdivision is created, the underlying units of land are vacated and new units of land are created in their place. Nothing remains, and, therefore, there are no remainders.

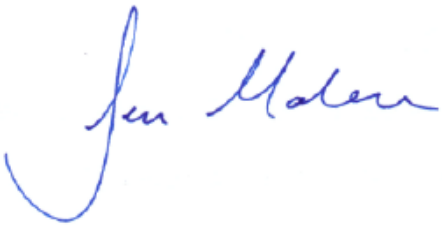
[4] The Kloos letter also erroneously discounts *Doughty* and fails to understand that *Doughty* was relied upon by LUBA in *Carroll.* The Kloos letter also points to *Grimstad v. Deschutes County* (LUBA No. 2016-035, Sept. 29, 2016), by alleging that "[a] conveyance that does not comply with existing state and local land division regulations does not create any legal lots." However, the failure to distinguish between pre-land use law divisions and post-land use law divisions in the bill ensures that *Doughty* and other such cases will be overturned by HB 3858.

Fourth, the term "remainder" and "subtraction" are very problematic because they misconstrue and are inconsistent with basic notions of how land division, including partition and subdivision, operate. 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), partitions/subdivisions (i.e., divisions of land) vacate underlying properties and create new properties. *See also* ORS 92.017(1). Nothing remains after a partition or subdivision, and, therefore, the use of the term "remainder" makes little sense, especially when undefined. It would be problematic, to say the least, to continue a misinterpretation of basic land use concepts in Oregon law.

Finally, HB 3858 would expand the definition of "lawfully established unit of land" to the point of rendering that term meaningless. Lawful creation of units of land have 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 misinterprets core land use concepts and the elimination of the term "lawfully established unit of land."

For these reasons and those presented by the opponents of the bill, I respectfully urge the committee to oppose HB 3858.

Sincerely,



Sean T. Malone
Attorney for LandWatch Lane County

Cc:
Client