MEMO

To: **Jeff Watson**
From: **Neil A. Caulkins**
Re: **Plum Creek Segregations**
Date: **December 20, 2010**

Legal Issue #1
Should, or even can, the County recognize platting from territorial times or the early 1900's?

Short Answer
The County is without authority to recognize such divisions of land. All divisions of land must be reviewed under modern land use law.

Legal Analysis

A government lot is something created for survey purposes. After the initial survey of the west into townships, subsequent surveys noticed errors that resulted in adjacent townships to not actually meet each other. This was a product of errors in the initial survey or limitations of the technology used. When adjacent townships do not meet (or along bodies of water) the subsequent surveys created these fractional pieces, called government lots, to fill in the gaps caused by previous errors. These typically occurred along the north and western boundaries of townships. Again, they are a device used to fix errors and describe land that would otherwise be between townships (or incorrectly described, or undescribed, along a river or stream).

The lands in question in this matter, as I understand it, have never been developed and all remain as a single large tract of forest land. These lands currently have just a few parcel numbers, but the applicant is desiring the creation of 30-40 lots where currently our system shows there being only three or four.

A brief history of platting will be helpful. Initially lands were platted under an act passed by the territorial legislature in 1857 that was eventually codified in Ch 58.08 RCW. There was no requirement that plats be reviewed or approved by the County. In 1937, the Legislature radically changed the law by passing a modern platting statute (Ch 58.16 RCW) that provided for such review and prohibited auditors and assessors from accepting for filing any plat not properly approved. RCW 58.16.100. That act was modified somewhat and replaced in 1969 with our current regulation-Ch 58.17 RCW which has similar provisions. RCW 58.17.190.

The question of how counties were to treat undeveloped plats from territorial days (anything pre-1937 for that matter) has been asked and clearly answered by the Attorney General's Office in several AGO's. In AGO 1996 No. 5 the question was "Do the requirements of chapter 58.17 RCW, relating to platting and subdivision, apply to land platted under chapter 58.08 RCW, before the enactment of chapter 58.17 RCW or its

predecessor, chapter 58.16 RCW?" The AGO went on to conclude "[W]e conclude […] that land platted before enactment of the 1937 platting and subdivision act (chapter 58.16 RCW) is still subject to the requirements of current law (now chapter 58.17 RCW), at least to the extent that such land has not already been developed….Since land platted before 1937 under the territorial platting statute does not meet the requirements of current subdivision law, a county or city lacks authority to accept such plats without conducting at least some review under current law.[…] [T]he 1857 platting statute was essentially an aid to land conveyancing, in that it allowed property owners to file maps and surveys and to refer to lot and block numbers instead of describing property by metes and bounds. This was a convenience to the parties and probably served, through mapping and surveying, to reduce boundary disputes, but was in no sense a 'land use' law. By contrast, the 1969 statute specifically grants local governments a wide measure of control over the way land was subdivided, sold, and developed. […] AGLO 1974 No. 7 concerned open-land, never developed and still owned by one party. In such a case, property owners can claim no serious prejudice if, before actually selling or developing such land, they are required to comply with the 1969 act and any ordinances and rules enacted under it. […] Plats recorded before 1937 have never borne the scrutiny of any city or county, and have never been evaluated for their consistency with any land use policies. To accept such plats and allow their development without any review for consistency with current land use regulations would result in non-uniform application of the current laws." This same result was reached in AGLO 1974 No. 7 and AGO 1998 No. 4. In short, land platted before 1937 that has never been developed must be subjected to review under current land use regulations and auditors and assessors are prohibited from accepting the filing or recordation of plats that have not had such review.

Plum Creek's reliance upon Greenblum v. Gregory, 160 Wash. 42 (1930) is misplaced. The case (1) is not on point, (2) has been superseded by statute, and (3) is no longer good law. The case concerns the question of what a county, in 1930, is allowed to sell under a federal statute providing for the support of schools, and concludes that, without replatting or resurveying the land, the county government cannot use the sale to create and transfer something different in size to what previously existed and is authorized by the statute. The statute provided for the sale of not more than 160 acres, yet the commissioners sold 258 acres. *Id.* at 45, 46. This was at a time when the county apparently had no legal authority to resurvey or replat land. *Id.* at 48. The court's finding, in 1930, that the sale did not comport with the then-current statute or that the county, at that time, was powerless to alter legal boundaries, is not relevant to our question of what, if any, significance does an undeveloped pre-1937 plat have in the light of modern subdivision law. The idea that, because the county apparently had no means of platting or plat amendment at that time, the territorial platting statute was the only game in town in 1930 and so those boundaries did have meaning, is not really in question. Of course that had meaning, all statutes presumably have some affect. The question in this matter is rather, what lasting effect does a 100-year-old survey have in the light of modern land use law as articulated by the Legislature, first in 1937, and then most recently in 1969? The above-sited AGO's clearly answer this as "none" or at least "very little." These undeveloped old plats must be subjected to review of modern land use law and the auditor and assessor are without authority to recognize subdivisions that have not had such review.

Greenblum v. Gregory does not deal with the question of the significance (or lack thereof) of platting that was done pre1937 to undeveloped land now that the legislature has radically changed the regulation of platting (twice actually-1937 and then again in 1969). The case could not deal with the central question before us-what is the status of pre-1937 platting that is still undeveloped in the light of modern land use regulation-because the opinion was issued seven years before the first of these monumental changes took place. Hence, because the landscape of subdivision has so radically changed (twice), nobody ever sites to this case because it is no longer relevant. Because it is no longer sited to, it cannot be over-ruled, but that does not mean it is still good law. There are many cases like this, where the statutory scheme has changed and left them on the sideline of history. Hence, even though the case has not been over-ruled, it is no longer good law.

Regardless of what the applicant is actually seeking, it appears the result is denial. KCC 17.04.020(1) states that the provisions of the zoning code control other code provisions. Hence, other processes cannot create lots too small for the zone. If the applicant is actually seeking an administrative segregation, then the request must be denied because they seek to create several lots that are too small for the zoning. If the applicant is seeking that the County recognize lots created pre-1937 that have never been developed, and currently are lumped under just a few parcel numbers, then, pursuant to the above sited AGO, the county must subject that request to review under modern land use law and the assessor and auditor are prohibited from recording or filing anything that has not been subject to such review. Once such review is made, the violation of KCC 17.04.020(1) because they seek to create lots too small for the zone, again, compels denial.