



MULTNOMAH COUNTY OREGON
LAND USE AND TRANSPORTATION PROGRAM
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DECISION OF MULTNOMAH COUNTY LAND USE HEARINGS OFFICER

Case File: T2-03-077

Permit: Planning Director's Determination

Location: A property east of 1140 SE 282nd Avenue
TL 300, Sec 18, T 1S, R 4E, W.M.
Tax Account #R99418-0540

Applicant: Thomas Masson

Owner: Thomas & Pamela Masson
28505 SE Lusted Road
Gresham, OR 97080

Summary: Appeal of a Planning Director's determination that the subject 3.63 acre property is not a Lot of Record pursuant to the Multnomah County Code.

Decision: The subject property, designated as 1S4E18BB-00300, was not created in compliance with the applicable zoning and land division regulations on its date of creation, and is not a Lot of Record in the MUA-20 zone. The appeal is **DENIED**.

Notice to the Mortgagee, Lien Holder, Vendor, or Seller:

ORS Chapter 215 requires that if you receive this notice it must be promptly forwarded to the purchaser.

Opportunity to Appeal: This decision is a final land use decision of Multnomah County. The decision may be appealed to the Oregon Land Use Board of Appeals within 21 days of the date the decision is final. Please refer to state law to determine your appeal rights and deadlines. See Notice of Hearings Officer Decision, attached.

Applicable Approval Criteria: Multnomah County Code (MCC):
MCC 36.0005(L)(13) Definitions - Lot of Record
MCC 36.2870 Lot of Record (Multiple Use Agriculture - 20 district)
MCC Chapter 37

Findings of Fact and Conclusions of Law

1. Impartiality of Hearings Officer

- A. No ex parte contacts. The Hearings Officer did not make a site visit. The Hearings Officer had no *ex parte* contacts regarding this matter with the applicant or any other person who supported or opposed this application.
- B. No conflicting personal or family interest. The Hearings Officer has no financial interest in the outcome of this proceedings. The Hearings Officer has no familial or financial relationship with the applicant or any participant in this proceeding that would cause bias or prevent the Hearings Officer from making a fair decision based upon the applicable criteria.
- C. No objections. No person has rebutted the Hearings Officer's assertion of impartiality made at the public hearing, and no person has objected to the Hearings Officer's capacity as the decision maker in this proceeding.

2. Public Hearing Proceedings.

- A. Schedule. A public hearing was held on this matter on April 16, 2004. Subsequently, the record was held open until May 28, 2004, at request of the applicant-appellant, made on the record at the hearing.
- B. Question on Conflict of Interest. Multnomah County Commissioner Lonnie Roberts attended a portion of the public hearing on April 16, and inquired on the record whether his attendance would be construed as a conflict of interest. The Hearings Office ruled that no conflict of interest would arise by virtue of Commissioner Roberts' attendance at a hearing that was open to the public. No person objected to that decision.
- C. Testimony. The following persons testified at the public hearing: Multnomah County Planner Lisa Estrin, and Sandra Duffy of the Multnomah County Attorney's Office testified on behalf of the county. Applicant-appellant Thomas Masson testified on his own behalf. Robert Price, land use consultant, and Holly Humphrey Stevenson, realtor, testified on behalf of the Massons. John Hayden, April Steward, Scott Copeland and

Frank Oliver, all current or former neighbors of the Massons, testified in support of the Masson appeal. In the open record period that followed the hearing, John Pinkstaff submitted written argument on the Massons' behalf, as their attorney. The Hearings Officer has considered the written and oral testimony, and graphic materials submitted by each of these persons.

3. **Notes on Findings Related to Criteria for Decision.**

- A. **Adoption of Director's Findings.** Except as expressly noted or modified herein, the Hearings Officer adopts and incorporates within this decision the findings, analysis, and legal conclusions of the Planning Director's Decision, issued and signed on March 12, 2004 by Lisa Estrin, Multnomah County Planner for Karen Schilling, Planning Director, and set forth below.
- B. **Scope of Review.** This is a *de novo* review of a decision of the Planning Director made without a public hearing. Any person was entitled to raise any issue and present any evidence relevant to the criteria governing the decision. The only matter at issue was the ultimate question of whether the subject property met the county's definition of a legal lot of record. No issues were raised other than those that had been considered in the Planning Director's decision.
- C. **Format of Findings.** Written findings are contained herein. The Multnomah County Code criteria and Comprehensive Plan Policies are in **bold** font. The applicant's statements are identified below as "**Applicant:**". Staff comments and analysis are identified as "**Staff:**" and address the applicable criteria. Staff comments may include a conclusionary statement in *italic*. The analysis and conclusions of the Hearings Officer are identified as "**Hearings Officer.**"

3. **Analysis and Findings Relating to Satisfaction of Governing Criteria.**

1.00

Administration and Procedures

1.01 **Applicant's Narrative:**

Thomas and Pamela Masson are owners of a parcel of land designated as Tax#R994181460 with a state ID #1S4E18BB0300. It is also designated as Tax Lot#54. As owners of the land we are requested a determination as a "Lot of Record" from the Mult. Co. Land Use and Planning Division.

The Masson purchased this parcel of land in 1996 through a routine real estate transaction. The Massons were first contacted by their former neighbor, John Hayden,

who told them that he had intended to purchase the parcel, but due to an impending divorce, he was unable to go through with the transaction. He said that this would be an opportunity for us to purchase the lot for the same price that he was going to buy it for. One of the considerations that was mentioned by Hayden and the Realtor was the ability to insure our privacy for as long as we owned the parcel. We would have use of the land and not be concerned about someone building on the site. There was also the practical advantage of making a capital gain on the purchase of a parcel of land when we sell it in the future.

The Massons contacted Holly Humphrey from Barbara Sue Seal Properties to represent them in the sale. By coincidence, the parcel was listed by Randy Pollard, who also worked for the same Realtor. Prior to the sale Humphrey contacted the City of Gresham to verify the ability to secure building permits from the City of Gresham. Although the parcel is located in the county, the City is the agency that issues the building permits and provides the building inspections. The sale was completed and a Title was issued through Ticor Title. The amount of money paid for the parcel was market value for a 3.63 acre lot with a building site. The lot does not have street frontage but a legal easement was recorded at the time of the sale. After the sale the Massons received their tax bill from Multnomah County. The parcel was assessed as a buildable lot, and has been taxed at that rate since the Massons purchased the property.

In 1999 the Massons put the property up for sale. There was a potential sale at one point, but the sale fell through because the buyer was not being relocated to the area as he thought. The Massons took the parcel off of the market. In the fall of 2002 they were going to put it back on the market. Before they listed the property they contacted the County to ask about the feasibility of a property line adjustment with the intent of keeping a portion of the property to add to their adjacent property and selling TL#54 as a smaller parcel. When county planner Lisa Estrin looked at the property she said that it appeared that the parcel was an illegal lot.

After the question about the legality of the lot was raised the Massons contacted the City of Gresham. The City told them that the lot was legal. The Massons then contacted Metro. Tim Burton from that agency stated that the lot appeared to be legal. The Massons then contacted the tax assessor, who also said that the lot was legal. The Massons continued to pursue the question of the legality of the property by various means. As of the present time, the Massons have not been able to persuade the county to change its position on the lot and are now requesting a formal determination from the county.

To resolve this issue the Massons researched the history of the property. Records indicate that Walter and Jane Stamper purchased a parcel of land in 1973. It was a 5.45 acre parcel of land. County records showed that it was originally part of TL #11 that was divided into various other parcels. The first point that the applicant would make as to the legality of the lot is that all of the other Tax Lots recorded in the county records from TL #11 have

been deemed legal up to this point. All available copies of the history of the parcel are included in the application.

After the Stampers purchased the parcel the City of Gresham annexed a large area of property. A portion of the Stampers land was included in the annexation. It was implemented by Order 618 from the Portland Metropolitan Area Local Government Boundary Commission. Records show that 1.82 acres were excepted out of Stampers original parcel in 1974, and that parcel was annexed into the city of Gresham. The parcel was recorded as TL #129. Evidence indicates that the City determined where their boundary lines were placed not the homeowners. The applicant has included affidavits from the Stampers and another homeowner, Gerald Hensley, who both state that the City decided where it wanted to go and they had no say in the determination of the boundary lines. The applicant asserts by the fact that the two agencies that determine legal lots, created and recorded a new parcel, TL 129, which was now in the City of Gresham. By the very nature of having divided one parcel into two within two different jurisdictions, they effectively created two legal parcels.

In 1979 an Urban Growth Boundary was created by Metro. The planners followed the city limit line of Gresham and bisected the parcel, following the common lines between TL 54 and 129. The applicant asserts that all of the information available now was available at the time the Urban Growth Boundary drew their lines. By that line through Stampers property they affirmed the legal status of the two lots by recognizing the common boundary and placing two parcels into different zoning classifications. If the Commission did not recognize the lots as legal, they should have drawn the lines around the east and north property line of TL 54. The actions of the UGB even further solidified the legal status as two distinct parcels.

In 1996 the Stampers filed an application with the City of Gresham to partition TL #129. At the same time they placed TL #54 on the market as a separate parcel. The City of Gresham processed the partition and ultimately approved it. The City viewed TL #129 as a legal lot. The applicant has included a letter from the City of Gresham supporting their determination that the partition was legal. The applicant asserts that if TL #129 is viewed as a legal lot, then TL #54 must also be a legal lot. As part of the process of partitioning the land, a notification of a land use proposal was sent to Multnomah County. The County did not respond to the notification and, in fact, the partition was signed off by the County Surveyor. The applicant asserts that if there was a problem with the partition or the legality of the parcels involved in the process, that was the appropriate time for the county land use and planning office to respond. The applicant asserts that a lack of a response by the County amounts to an affirmation to the legal status of the properties involved. The applicant asserts that this implicit support of the partition effectively documented the legal status of TL #129, and therefore TL #54. The county offers a number of excuses for their lack of a response, however, the county was notified and the partition was processed. In addition, the sale of TL #54 was recorded and subsequently assessed by the county. If Multnomah County has such a lack of internal communication

and a lack of an interagency agreement with other agencies, that is their problem. The legal owner of a parcel of land should not suffer the effects of their negligence or ineptness. The applicant asserts that the county gave legal status to TL #54 in 1996. If the County believes that the two parcels are not legal lots of record, then what will they and the City of Gresham do to resolve the legal status of the both tax lots involved, or what will become of the lots that have already been partitioned. If those lots are left alone because what is done is done, then the applicant wants fair and equal treatment. Tax lot 300 is consistent with the property in the surrounding area, it has been treated like a legal parcel since its inception in 1973, and has been perceived as a legal lot by all parties, including Multnomah Counties own tax assessor. It should be granted status as a legal lot and left alone as those lots in Gresham that were a result of the partition.

If the county still finds that the arguments are not compelling, then the applicant would request that the lot be approved under ORS 92.177 which states that:

Where application is made to the governing body of a city or county for approval of the creation of lots or parcels which were improperly formed without the approval of the governing body, the governing body of a city or county or its designate shall consider and may approve an application for the creation of lots or parcels notwithstanding that less than all of the owners of the existing legal lot or parcel have applied for the approval. [1993 c.436 §2; 1995 c.595 §14]

Based on the history of the parcel and the actions or, lack of, taken by the governing agencies, the applicant is requesting that Tax Lot 300 be given status as a lot of record.

Staff Note: The applicant in his first sentence references the following alternate tax account number Tax#R994181460. This tax account number is for the applicant's other parcel located on Lusted Road. The correct alternate tax account number for the subject property is R994180540.

1.02 Proof of Ownership

MCC 37.0550 Initiation of Action

Except as provided in MCC 37.0760, Type I – IV applications may only be initiated by written consent of the owner of record or contract purchaser. PC (legislative) actions may only be initiated by the Board of Commissioners, Planning Commission, or Planning Director.

Staff: The subject property is located on Tax Lot 300, Section 18BB, Township: 1 South, Range: 4 East (R994180540). Assessment & Taxation records (Exhibit B.27) show that the land is owned by Thomas & Pamela Masson. Thomas Masson has been

designated the applicant in this case and has signed the General Application Form (Exhibit A.1).

This criterion has been met.

Staff Note: Since 1996 the County has changed its system of tax lot identification to a State Mandated system. This change oftentimes confuses parties not involved on a daily basis when working with records that may be in the old system (Alternate Account #) and State Mandated system (Map, Tax Lot). Most of the historical records for this property utilize the Alternate Account number system, so staff is going to limit itself after this finding to that system (if possible). The following is a conversion chart to assist any party in referencing various documents:

Map, Tax Lot	Alternate Account #	Staff Identifier
1S4E 18BB - 00300	R994180540	TL 54
Not Applicable	R994181290*	TL 129
1S4E18BB - 00500	R994180110	TL 11

*R994181290 has been partitioned by Partition Plat 1996-158 into R64976-6290; -6300 & -6310 by the City of Gresham.

- 1.03 **Multnomah County Code (MCC) section MCC 37.0740 authorizes the Planning Director to decide all questions of interpretation or applicability of any provision of the comprehensive framework plan, rural area plan, or other land use code, to specific properties. This Lot of Record Determination is authorized under this provision and has been processed as a Type II application as required therein.**
- 1.04 **TYPE II CASE PROCEDURES**

MCC 37.0530(B): ...Upon receipt of a complete application, notice of application and an invitation to comment is mailed to the applicant, recognized neighborhood associations and property owners within 750 feet of the subject tract. The Planning Director accepts comments for 14 days after the notice of application is mailed and renders a decision...

Staff: The application was submitted and was deemed complete as of January 16, 2004 (Exhibit C.1). An "Opportunity to Comment" notice (Exhibit C.2) was mailed on January 26, 2004 to all properties within 750 feet of the subject properties in compliance with MCC 37.0530. No written comments were received.

Hearings Officer: The Planning Director's Decision was rendered March 12, 2004, and this appeal followed. See **"2. Public Hearing Proceedings,"** above.

2.00 **General Provisions**

2.01 **MCC 36.0005(L)(13) Definitions – Lot of Record**

(13) Lot of Record - Subject to additional provisions within each Zoning District, a Lot of Record is a parcel, lot, or a group thereof which when created and when reconfigured (a) satisfied all applicable zoning laws and (b) satisfied all applicable land division laws. Those laws shall include all required zoning and land division review procedures, decisions, and conditions of approval.

(a) "Satisfied all applicable zoning laws" shall mean: the parcel, lot, or group thereof was created and, if applicable, reconfigured in full compliance with all zoning minimum lot size, dimensional standards, and access requirements.

(b) "Satisfied all applicable land division laws" shall mean the parcel or lot was created:

1. By a subdivision plat under the applicable subdivision requirements in effect at the time; or

2. By a deed, or a sales contract dated and signed by the parties to the transaction, that was recorded with the Recording Section of the public office responsible for public records prior to October 19, 1978; or

3. By a deed, or a sales contract dated and signed by the parties to the transaction, that was in recordable form prior to October 19, 1978; or

4. By partitioning land under the applicable land partitioning requirements in effect on or after October 19, 1978; and

5. "Satisfied all applicable land division laws" shall also mean that any subsequent boundary reconfiguration completed on or after December 28, 1993 was approved under the property line adjustment provisions of the land division code. (See Date of Creation and Existence for the effect of property line

adjustments on qualifying a Lot of Record for the siting of a dwelling in the EFU and CFU districts.)

(c) Separate Lots of Record shall be recognized and may be partitioned congruent with an "acknowledged unincorporated community" boundary which intersects a Lot of Record.

1. Partitioning of the Lot of Record along the boundary shall require review and approval under the provisions of the land division part of this Chapter, but not be subject to the minimum area and access requirements of this district.

2. An "acknowledged unincorporated community boundary" is one that has been established pursuant to OAR Chapter 660, Division 22.

Hearings Officer: If the area of land that is the subject of this decision was lawfully created by any of the methods described in MCC 36.0005(L)(13), it is a legal lot of record. The Hearings Officer therefore disagrees with the Planning Director's conclusion that the "partition" by Gresham of the portion of Tax Lot 54 that was within that city is "irrelevant" to the question presented in this appeal. If Gresham's action thereby created a new legal lot or parcel of the land in unincorporated Multnomah County, then a legal lot of record would exist there now. The Hearings Officer does concur with the Planning Director that the 1996 Gresham land division did not create a legal lot or parcel outside of Gresham that Multnomah County must now recognize.

Staff: The following shows the historical zoning for the subject property for the portion located in Multnomah County's jurisdiction:

Time Period	Zoning District
July 1958 to 1973	SR
1974 to Oct. 5, 1977	R-10
Oct. 6, 1977 to Present	MUA-20
October 19, 1978	Partitioning Regulations

The following recorded documents have been identified as modifying or transferring ownership of the subject property:

Recorded Documents	Exhibit #	Recordable Form	Zoning/ Min Lot Size	Lot Size
Contract of Sale for TL 54 in Entirety	A.16	7/31/1973	SR/ variable	5.45 ac.
Special Warranty Deed for TL 54 in Entirety (Satisfies Contract) Parent	A.17	12/4/1985	MUA-20	5.45 ac.
Agreement for Easement for Ingress/Egress for 3.63 Acre TL 54	A.18	7/16/1996	MUA-20	N/A
Warranty Deed Selling 3.63 Acre TL 54	A.19	7/16/1996	MUA-20	3.63 ac.
Bargain & Sale Deed for Easement to Maintain/ Repair Existing SFD on Parcel 1 of Partition Plat 1996-158	B.24	9/26/1996	MUA-20	N/A
Partition Plat 1996-158	A.15	9/26/1996	MUA-20	1.85

In November 1953, 5.45 acres were broken out of Tax Lot (TL) 11 (Exhibit A.12) to form TL 54 (Exhibit A.3). At the time, no minimum lot size, partition regulations or zoning had been established by Multnomah County in this area. In July, 1958 zoning was applied to this and other areas in the eastern part of the County.

It appears that Mr. and Mrs. Stamper purchased the 5.45 acre TL 54 through a contract in July 1973 (Exhibit A.15). In March 1974, the Portland Metropolitan Area Local Government Boundary Commission (Boundary Commission) issued a Final Order allowing the annexation of territory to the City of Gresham (Exhibit A.7). Based upon this order, the levy codes (tax rates) changed and the Multnomah County Tax Assessor created two separate tax lots from the 5.45 acre TL 54 due to the new levy code boundary.

The County for taxation purposes only created TL 129 (1.82 acres) and reduced TL 54 to 3.63 acres. This is documented on the Tax Lot Description cards for TL 54 and TL 129 (Exhibits A.3 & A.12). The County's modification did not divide the property as **ORS 308.142 'Property' and 'property tax account' defined states: "(2) 'Property tax account' means the administrative division of property for purposes of listing on the assessment roll under ORS 308.215 for the tax year for which maximum assessed value is being determined or, in the case of a private railcar company, the administrative division provided under ORS**

308.640.” While many individuals believe that tax lot maps show the boundaries of their properties, it is actually the legal description on their deed which actually establishes the parcel.

In December 1985, it appears that the Stampers fulfilled their contract responsibilities and a Special Warranty Deed transferring the 5.45 acre site was recorded (Exhibit A.16). The legal description contained in this deed is a metes and bounds description which includes the area contained in the 3.63 acre TL 54 and the 1.82 acre TL 129 as one property. From December 1985 until July 1996, no deed changes or partitions were approved or recorded.

In March 1996, Mr. Stamper's representative submitted to the City of Gresham a partition request to create 3 lots from TL 129 (Exhibit B.1 & B.2). The tentative plan map (Exhibit B.3) showed only the area contained in TL 129. The planner with the City of Gresham then sent on April 23, 1996 a Development Permit Application Comments sheet to various departments and government agencies including John Dorst with Multnomah County's Transportation Division seeking comments about the application (Exhibit B.9). This cover letter specified that only TL 129 was involved in the land division. On April 29, 1996 a Notice of Application for a Land Use Development Permit was sent to the surrounding property owners (Exhibit B.10, B.11 & B.12) and indicated that TL 129 would be divided into 3 parcels. No notice was sent to Multnomah County per the mailing labels (Exhibit B.12). On May 20, 1996, the City of Gresham approved the partition of TL 129 in a land use decision (Exhibit B.18, B.19, B.20, B.21 & B.22). On July 2, 1996 after the decision was made by the City of Gresham, John Dorst with Multnomah County Transportation Division provided written comments regarding dedications and improvements required for the partition (Exhibit B.23).

On July 16, 1996, the Stampers sold the 3.63 acre TL 54 to Thomas and Pamela Masson (Exhibit A.17 & A.18). This is the first time that the 3.63 acre TL 54 is divided from its parent parcel in a deed. After the Stampers sold off the 3.63 acre TL 54, they recorded Partition Plat No. 1996-158 on September 26, 1996. Partition Plat 1996-158 specifies in its narrative that the purpose is to locate the boundaries of the property and divide it into parcels. The private surveyor determined the property boundaries by using the specified vesting deed contained in the narrative for the plat. In other words, the vesting deed is the description of the parent parcel which is being divided. The vesting deed used to locate the boundaries of the property for the partition plat is listed on the plat as the deed recorded in Book 1868, Page 1954 on 12/4/1985 (Exhibit B.25 & A.16). This vesting deed describes the entire 5.45 acre TL 54 (Exhibit A.16) and not just the 1.82 acres contained in TL 129. So instead of creating 3 parcels with Partition Plat 1996-158, four lots were created which is actually a subdivision under ORS 92.010. Based upon the evidence in the record, it appears:

- In 1996, the portion of the property in Multnomah County's jurisdiction was zoned Multiple Use Agriculture – 20 and required all lots/parcels to abut a street or have other access determined by the approval authority to be safe and convenient for pedestrians and for passenger and emergency vehicles (MCC

11.15.2148). No evidence of this approval has been submitted to the record or found by staff (Exhibit B.29).

Hearings Officer: Although evidence of an easement for access has been submitted to the record, staff is correct that the county has not approved the easement as required by MCC 11.15.2148, in effect in 1996. Without this sort of access, the subject land is presently landlocked, as it does not abut a street. That was also the case in 1996, and has not changed since then. Consequently, the subject property did not satisfy all applicable zoning laws in 1996, if that year was the year of its creation, and does not now satisfy MCC 36.0005(L)(13)(a).

Staff: ■ The 3.63 acre TL 54 was created by deed in July 1996 and was not in compliance with Multnomah County Land Division Ordinance (Chapter 11.45, 1995 version) which required review and approval of either a partition or subdivision depending on the circumstances prior to its creation.

Hearings Officer: If the deed of July 1996, which transferred the subject property to the applicant-appellant is relied upon as the instrument of creation of a legal lot of record, it fails to achieve that purpose. A deed to land must have either been recorded prior to October 19, 1978, or in recordable form prior to that date, to have satisfied all applicable land division laws as required by MCC 36.0005(L)(13)(b)(1)-(2).

Staff: ■ ORS 92.010 Definitions specifies:

- (7) "Partition land" means to divide land into two or three parcels of land within a calendar year, but does not include:
 - ©) The division of land resulting from the recording of a subdivision or condominium plat;
- (15) "Subdivide land" means to divide land into four or more lots within a calendar year.

If Partition Plat 1996-158 did divide the 5.45 acre property into 4 separate parcels or lots, it is a subdivision under State Law (Exhibit B.32), Multnomah County Code (Exhibit B.30) and the City of Gresham's Zoning/Development Code Definitions (Exhibit B.31). No evidence exists that a subdivision has been recorded creating the 3 lots in Gresham and the 3.63 acre TL 54.

■ Partition Plat 1996-158 does not grant approval for the creation of the 3.63 acre TL 54 based upon its recordation as the City of Gresham did not have authority to grant approval for its creation (See ORS 92.040¹ and 92.042² below) as Multnomah County has had a Land Division Ordinance since October 19, 1978 which dealt with subdivisions and partitions within its jurisdiction.

- The Partition Plat and the Surveyor's sign-off on the Plat Map are irrelevant to the Masson application. The illegal act that created the illegal lot was the sale of 3.63 acre TL 54 to the Masson's by Stamper without going through a partition process. Even if the Partition Plat had been recorded prior to the sale to Masson, it would not make a difference. That action did not legally divide the property either and the Surveyor's signoff did not bind the County (it does not estop the County from determining that TL 54 is not a legal lot).

ORS 92.040, which is the statute that talks about binding a city or county, is set in the context of approval of a tentative plan. Once a tentative plan is approved, the city or county can only require changes in the partition plat that are necessary for compliance with the terms of the tentative plan. When the statute refers to "City" or "County" it is referring to the jurisdiction which is processing the application. So Gresham is bound by its tentative plan approval, not the County.

The County did have jurisdiction over the portion of the application in its jurisdiction, but unfortunately, Gresham didn't require our inclusion.

Hearings Officer: Whether the 1996 action by the City of Gresham created a legal lot or parcel from the subject property outside the city is a major issue of contention between the Massons and the county. The Hearings Officer finds that:

1. Tax Lot 54 was a legally created parcel, of 5.45 acres, in 1973, by virtue of a contract of sale for that property that was in recordable form on July 31, 1973.

2. That same 5.45 parcel remained a single lot for purposes of the land division laws when the City of Gresham annexed a portion of it in 1974. ORS 92.017 provides that "a lot or parcel lawfully created shall remain a discrete lot or parcel, unless the lot or parcel lines are vacated or the lot or parcel is further divided, as provided by law." Although this statute was enacted in 1977, it was consistent with appellate precedent of long standing in Oregon. *See State v. Emmich*, 34 Or App 945, 949, 580 P2d 570 (1978) (a parcel of land does not lose its unitary character simply by the happenstance of an intersecting boundary line, street, or road), and cases cited therein. The order of the Portland Metropolitan Area Local Government Boundary Commission regarding the annexation boundary likewise did not divide the 5.45 acre parcel. Likewise, the 1979 location of the Urban Growth Boundary along the Gresham city limits, although bisecting the 5.45 acre parcel, did not legally divide that parcel. ORS 92.012 provides that "no land may be subdivided or partitioned except in accordance with ORS 92.010 to 92.190."

4. Creation of a tax lot for assessment purposes does not create a legal lot or parcel in accordance with applicable requirements of zoning or land division law. ORS 215.010(1)(b). A "tax lot" is not necessarily a "lot of record." *Id.*, ORS 308.142; MCC 36.0005(L)(13); MCC 36, 2870(D)(1).

5. The Planning Director correctly concluded that Partition Plat 1996-158, (Exhibit A-14) approved by the City of Gresham, and recorded in September 1996, described the entire existing 5.45 acre parcel as being divided by virtue of its reference to the vesting deed as the 1973 deed shown on Exhibit A-15. Even if the Partition Plat had referred to the property being divided as only that within the City, the actual parent parcel was the entire 5.45 parcel, because prior to September 1996, the parcel had not been lawfully divided. Hence, the City of Gresham's action was to divide the 5.45 acre parcel into 4 lots; it was a subdivision, not a partition. ORS 92.010(7), (15); ORS 227.095.

6. Mr. Pinkstaff contends that the city only divided land within its boundaries, as a lawful partition, and did not divide county land. The city purported to divide county land from city land, however, and Mr. Pinkstaff does not contend that the city complied with the applicable subdivision requirements in effect at the time. The Hearings Officer rejects the argument that the city's decision that placed new boundaries around four newly-mapped areas of land within the 5.45-acre parcel had nothing to do with the portion of that parcel within the county.

7. The other contention offered on behalf of the applicant is that the Planning Director's decision is an impermissible collateral attack on the city's 1996 land division. This argument loses sight of the nature of the application in this matter. The applicant asked the county to determine whether the subject property is defined by MCC 36.0005(L)(13), an acknowledged provision of the Multnomah County ordinance, as a "Lot of Record." In making this determination, it is necessary to address the city's 1996 decision, but it must be done in the context of this application and appeal, and not of some other hypothetical proceeding.

None of the decisions cited by Mr. Pinkstaff concerns facts sufficiently analogous to those at issue in this matter to be of much relevance in determining whether the county must now agree that the 1996 separation of Tax Lot 54 into 4 parts was a *lawful land division according to the county's ordinances*. Some of the cited decisions merely exemplify fact that split-zoned and split-jurisdiction lots or parcels can be found, and that cities and counties have made decisions with respect to the portions of those properties within their own jurisdictions, or with respect to the criteria governing the portion of the property at issue. *E.g., Van Dyke v. Yamhill County*, 35 Or LUBA 676 (1999) (decided on a ruling concerning waiver, with no ruling on the merits regarding the challenged land division). Others illustrate the general rule prohibiting collateral attack of an earlier decision; but these cases do not concern the application of criteria like those in the definitions of "Lot of Record." *Sahagian v. Columbia County*, 27 Or LUBA 341 (1994) (challenged action restated earlier county land use decision on redesignation of park, and only changed incorrect citation; appeal dismissed because it did not challenge a land use decision);

None appear to address the question here, of whether the county must now find some provision in MCC 36.0005(L)(13) that correctly describes the city's 1996 action regarding the 5.45 acre parcel. The time is past for the county to appeal the city's action to the Land Use Board of Appeals, but that was not the subject of the application, and is not the subject of this appeal. In contrast, *Hammer v. Clackamas County*, 190 Or App 473, 79 P3d 394 (2003)

addressed the issue of whether a partition decision could be appealed to LUBA more than 21 days after it was final, and whether recordation of the decision could be appealed.

Viewed from the perspective of this application, as it must be, the applicant-appellant's arguments appear to collaterally attack the validity of MCC 36.0005(L)(13), and the other ordinances governing this application. The lot of record ordinances may be unique in that they require the county to look back to the validity of decisions that may have occurred in the distant past, that may not have been made by the county itself, and that the county may not have challenged when made. By their plain language, however, that is precisely what the ordinances require. The lot of record ordinances would serve little purpose in establishing that an area of land had been designated as a lot or parcel in compliance with the law at the time it was so designated, if the ordinances only authorized the county to look at past land divisions that (A) were still subject to LUBA appeal because they had been made fewer than 21 days in the past, or (B) had already been determined by appellate proceedings to have been lawful.

Staff: ■ The City of Gresham is an acknowledged, incorporated City. Separate Lots of Record are not created between an incorporated City and the County zoning boundary under MCC [36.0005(L)(13)(c)] above, which states that separate Lots of Record shall be recognized and may be partitioned congruent with an "acknowledged unincorporated community" boundary which intersects a Lot of Record. In addition, no partition has been approved by Multnomah County to create the 3.63 acre TL 54.¹

Hearings Officer: The Planning Director's decision correctly concludes that the boundary of the incorporated City of Gresham, although bisecting the 5.45 acre parcel, has not divided the parcel.

3.00 Multiple Use Agriculture – 20

36.2870 LOT OF RECORD.

1

¹ ORS 92.040 Application for approval of subdivision or partition; tentative plan; applicability of local government laws. (1) Before a plat of any subdivision or partition subject to review under ORS 92.044 may be made and recorded, the person proposing the subdivision or partition or authorized agent or representative of the person shall make an application in writing to the county or city having jurisdiction under ORS 92.042 for approval of the proposed subdivision or partition in accordance with procedures established by the applicable ordinance or regulation adopted under ORS 92.044. Each such application shall be accompanied by a tentative plan showing the general design of the proposed subdivision or partition. No plat for any proposed subdivision or partition may be considered for approval by a city or county until the tentative plan for the proposed subdivision or partition has been approved by the city or county. Approval of the tentative plan shall not constitute final acceptance of the plat of the proposed subdivision or partition for recording; however, approval by a city or county of such tentative plan shall be binding upon the city or county for the purposes of the preparation of the subdivision or partition plat, and the city or county may require only such changes in the subdivision or partition plat as are necessary for compliance with the terms of its approval of the tentative plan for the proposed subdivision or partition.

² ORS 92.042 Governing body having jurisdiction to approve plans, maps or plats. (1) Land within six miles outside of the corporate limits of a city is under the jurisdiction of the city for the purpose of giving approval of plans, maps and plats of subdivisions and partitions under ORS 92.040 and 227.110. However, unless otherwise provided in an urban growth area management agreement jointly adopted by a city and county to establish procedures for regulating land use outside the city limits and within an urban growth boundary acknowledged under ORS 197.251, when the governing body of a county has adopted ordinances or regulations for subdivision and partition control as required by ORS 92.044, land in the county within the six-mile limit shall be under the jurisdiction of the county for those purposes

(A) In addition to the Lot of Record definition standards in MCC 36.0005, for the purposes of this district the significant dates and ordinances for verifying zoning compliance may include, but are not limited to, the following:

- (1) July 10, 1958, SR zone applied;**
- (2) July 10, 1958, F-2 zone applied;**
- (3) December 9, 1975, F-2 minimum lot size increased, Ord. 115 & 116;**
- (4) October 6, 1977, MUA-20 zone applied, Ord. 148 & 149;**
- (5) October 13, 1983, zone change from EFU to MUA-20 for some properties, Ord. 395;**
- (6) May 16, 2002, Lot of Record section amended, Ord. 982.**

(B) A Lot of Record which has less than the minimum lot size for new parcels or lots, less than the front lot line minimums required, or which does not meet the access requirement of MCC 36.2885, may be occupied by any allowed use, review use or conditional use when in compliance with the other requirements of this district.

(C) Except as otherwise provided by MCC 36.2860, 36.2875, and 36.4300 through 36.4360, no sale or conveyance of any portion of a lot, other than for a public purpose, shall leave a structure on the remainder of the lot with less than minimum lot or yard requirements or result in a lot with less than the area or width requirements of this district.

(D) The following shall not be deemed to be a lot of record:

- (1) An area of land described as a tax lot solely for assessment and taxation purposes;**
- (2) An area of land created by the foreclosure of a security interest.**
- (3) An area of land created by court decree.**

Staff: The 5.45 acre TL 54 was created by the tax assessor in 1953 prior to zoning being applied to the area. The first description of the 5.45 acre TL 54 is in a recorded contract in 1973 (Exhibit A.15). When the County created the 3.63 acre TL 54 in 1974, it was for assessment and taxation purposes only because of a change in a levy code due to the annexation of a portion of the property into the City of Gresham. The deed descriptions were not modified at that time. It was the 1996 transfer of land to the Massons that divided the 5.45 acre property. When the 1996

division occurred, it did not comply with the County's Land Division ordinance or the 1996 version of the MUA-20 zoning district as the property does not abut a Street and it did not have its other access determined to be safe and convenient by a hearings officer. See additional findings above under MCC 36.0005(L)(13).

Hearings Officer: The decision is correct in concluding that the subject property is not a Lot of Record pursuant to MCC 36.2870.

4.00 **ORS 92.177**

Creation of lot or parcel following improper formation. Where application is made to the governing body of a city or county for approval of the creation of lots or parcels which were improperly formed without the approval of the governing body, the governing body of a city or county or its designate shall consider and may approve an application for the creation of lots or parcels notwithstanding that less than all of the owners of the existing legal lot or parcel have applied for approval.

Staff: In the applicant's 2nd to the last paragraph of his narrative he states that if the County does not find his arguments compelling that we should approve the lot under ORS 92.177.

ORS 92.177 states that the County shall consider and may approve the creation of a lot or parcel, there is nothing stating in that section that all other zoning regulations or State Goals, Laws or Administrative Rules do not apply. The Masson property is 3.63 acres in size. MCC 36.2855(A) states that in the MUA-20 zoning district the minimum lot size shall be 20 acres except as provided under MCC 36.2860, 36.2870, 36.2875 and 36.4300 through 36.4360. MCC 36.2870 was discussed above and it was found that the 3.63 acre TL 54 is not a Lot of Record. Staff discusses each of these options, except 36.2870 below. Based upon those code sections and findings, the County's minimum lot size to create a new parcel at this location is 20 acres. In addition to Multnomah County's Code, the County must consider OAR 660-04-0040 as the subject property is adjacent to the Urban Growth Boundary of the Portland Metropolitan Area (PMA).

OAR 660-04-0040 Section 8: Protection for the Urban Fringe

- (e) Notwithstanding the provisions of Section 7, if any part of a lot or parcel to be divided is less than one mile from the urban growth boundary for the Portland metropolitan area and is in a rural residential area, and if the Portland metropolitan area does not have an urban reserve area that contains at least a twenty-year reserve of land and that has been acknowledged to comply with OAR 660, Division 021, the minimum area of any new lot or parcel there shall be twenty acres. If the lot or parcel to be divided also lies within the area governed by the Columbia River Gorge National Scenic Area Act, the division shall be done in accordance with the provisions of that act.**

Since the 3.63 acre TL 54 is within one mile (Exhibit B.33) of the PMA's UGB and it has not designated an Urban Reserve Area with a 20 year supply, Multnomah County is unable to approve the creation of a parcel, less than 20 acres in size without violating Goal 14 and Oregon Administrative Rules.

In addition, ORS 92.177 specifies that the County shall consider and may approve an application for the creation of lots or parcels notwithstanding that less than all of the other owners of the existing legal lot or parcel have applied for approval. The legal lot as discussed above is the combined TL 54 and TL 129 (5.45 acres). The way that lots or parcels are created is through either a subdivision or partition application and plat as specified under ORS Chapter 92. No tentative plan map has been submitted by the applicant, nor has it been demonstrated that the 3.63 acre TL 54 complies with applicable Multnomah County Codes or State Law.

Hearings Officer: By its terms, ORS 92.177 cannot itself legalize a lot or parcel that does not comply with applicable law. The applicant-appellant is mistaken in asserting that the statute can have that effect.

Staff and Hearings Officer: *The applicable code section of Multnomah County Code and OAR's have not been met.*

4.01 **MCC 36.2860(A) Lots of Exception** states “An exception to permit the creation of a parcel of less than 20 acres, out of a Lot of Record, may be authorized when in compliance with the requirements of MCC 36.2855(C) through (E). Any exception shall be based upon the following findings:

(1) The Lot of Record to be divided has two or more permanent habitable dwellings;

(2) The permanent habitable dwellings were lawfully established on the Lot of Record before October 4, 2000

(3) Each new parcel created by the partition will have at least one of the habitable dwellings; and

(4) The partition will not create any vacant parcels on which a new dwelling could be established.”

Staff: The 3.63 acres TL 54 is currently vacant. As such, each of the new parcels created does not have at least one of the habitable dwellings and the partition will create a vacant parcel on which a new dwelling could be established.

Staff and Hearings Officer: *The criteria for a Lot of Exception can not be met.*

4.03 **MCC 36.2875 Lot Sizes for Conditional Uses.**

The minimum lot size for a Conditional Use permitted pursuant to MCC 36.2830, except subpart (C)(1) thereof, shall be based upon the requirements below. Parcels created to support a conditional use shall not be less than two acres in size, and the remainder parcel shall be not less than five acres....

Staff: No application for a conditional use has been requested by the applicant. This section is not applicable at this time.

4.04 MCC 36.4300 through 36.4360 Planned Development

Staff: No application for a Planned Development has been requested by the applicant. This section is not applicable at this time.

5.00 Staff Conclusion


Based on the findings and other information provided above, the subject property is not a Lot of Record pursuant to MCC 36.0005(L)(13) and 36.2870 and may not be approved pursuant to ORS 92.177 as it is less than 20 acres in size.

Hearings Officer Conclusion:

I concur with the conclusion above.

It is important to note that the good faith of the Massons is neither challenged nor relevant in this proceeding. Various neighbors testified that they supported the Massons' application and appeal; that testimony is also irrelevant. Prior failings by the City of Gresham and Multnomah County, if any, are irrelevant as well, except that the Lot of Record ordinances would be unnecessary if all prior land divisions had been lawful and valid. The question before the Hearings Officer is narrow: does the 3.63-acre area of land in unincorporated Multnomah County that is the subject of the Massons' application and appeal meet the definition of a Lot of Record pursuant to the acknowledged provisions of Multnomah County's Ordinance. In answering that question, the decision-maker must apply the ordinance provisions as written, and not create exceptions for good citizens of good faith who invested in land that might not have been developable when they purchased it, and which still might not be developable.

The 3.63-acre subject property, designated as 1S4E18BB-0030, and also referred to as Tax Lot 54, was not created as a lot or parcel in compliance with the applicable zoning and land division regulations on the date of its creation, and is not a Lot of Record in the MUA-20 zone. The appeal is DENIED. The Planning Director's decision is affirmed.



Christine M. Cook, Multnomah County
Land Use Hearings Officer

Date: June 11, 2004

4. Exhibits

- 'A' Applicant's Exhibits
- 'B' Staff Exhibits
- 'C' Procedural Exhibits
- '*' Exhibits Included As Part of the Planning Director's Decision
- 'D' Exhibits Received Prior to Public Hearing
- 'H' Exhibits Submitted for Record at Public Hearing
- 'I' Exhibit Submitted During Open Record Period

Exhibit #	# of Pages	Description of Exhibit	Date Received/ Submitted
'A' Applicant's Exhibits			
A.1	1	General Application Form	12/18/03
A.2	3	Narrative Discussion from Applicant	12/18/03
A.3	1	Tax Lot Description Card for Tax Lot 54, Sec. 18, T.1S R.4E	12/18/03
A.4	1	Letter Regarding Annexation from Gerald Hensley – Dated November 13, 2003	12/18/03
A.5	1	Screen Print from Ableterm Regarding Property Data – Dated February 3, 2003	12/18/03
A.6	1	Development Permit Application Comments from Fire – Gresham Received May 15, 1996	12/18/03
A.7	7	Portland Metropolitan Area Local Government Boundary Commission Final Order – Dated 3/23/1974	12/18/03
A.8	1	Letter from Walter & Jane Stamper regarding the creation of 2 tax lots in 1984 – Dated November 17, 2003	12/18/03
A.9	1	Letter to Tom and Pam Masson from D. Krogh, City of Gresham Regarding Partition Application MP 96-1930 (filed by Stamper) – Dated April 24, 2003	12/18/03 & 1/23/04
A.10	1	Parcel Record – Cartographic Unit for Tax Lot '300' 1S4E18BB (TL '54')	12/18/03
A.11	1	Exhibit 'A' from Ticor Title Insurance	12/18/03
A.12	2	Tax Lot Description 129 Sec. 18, T.1S, R.4E with attached information for Tax Lot 11 Sec. 18, T.1S, R.4E	12/18/03
A.13	1	A portion of a Tax Map with new Tax Lot Numbers	12/18/03
A.14*	1	Partition Plat No. 1996-158 (Reduced) – Dated 9/26/96	12/18/03

A.15	2	Contract Describing as One Parcel the Area contained in the 5.45 Acre TL 54 (Tax Lot 300, 1100, 1300 & 1400). Recorded Book 940, Page 1569 & 1570 – Dated July 31, 1973	12/18/03
A.16	2	Special Warranty Deed Transferring the Area of Land Contained in Contract – Recorded December 4, 1985	12/18/03
A.17	4	Agreement for Easement Granting an Easement for Egress and Ingress – Recorded July 17, 1996	12/18/03
A.18	2	Warranty Deed Transferring the Area of Tax Lot 300 ('54') from Walter Stamper to Thomas Masson – Recorded July 17, 1996	12/18/03
A.19*	1	1962 Zoning Map Showing Tax Lot 54 is zoned SR and its Shape and Acreage	12/18/03
A.20*	1	1974 Zoning Map Showing Gresham's Boundary and the Property Zoned R-10	12/18/03

'B'		Staff Exhibits	Date of Document
B.1	1	Letter to City of Gresham from Dale Holm discussing purpose of application is to partition an existing 1.82 acre parcel into 3 lots	3/18/1996
B.2	1	Development Permit Application – Received by City of Gresham March 19, 1996	3/19/1996
B.3	1	Tentative Plan (B2)	No Date
B.4	1	Existing San. Sewer Lines (B3)	No Date
B.5	1	Existing Water Mains (B4)	No Date
B.6	1	Future Division Plan (B5)	No Date
B.7	1	Future Street Plan (B6)	No Date
B.8	1	Vicinity Plan (B7) – Dated March 13, 1996	3/13/96
B.9	1	Development Permit Application Comments	4/23/1996
B.10	1	Affidavit of Mailing MP 96-1930	4/29/1996
B.11	6	Notice of Application for a Land Use Development Permit MP/FS 96-1930	4/30/1996
B.12	2	Mailing Labels for Notice of Application MP 96-1930	No Date
B.13	2	Instructions for Posting Notice & Affidavit of Posting	4/30/1996 & 5/3/1996
B.14	1	Interoffice Memorandum to Mike Mabrey from George Ashton, Community Development Regarding Private Access Easement	5/2/1996
B.15	1	Interoffice Memorandum to David Krogh from Mike Mabrey, Community Development Regarding Minimum Street Frontage	5/2/1996
B.16	1	Interoffice Memorandum to George Ashton from Mike Mabrey, Community Development Regarding Street Requirements	5/3/1996

B.17	3	Memorandum from City of Gresham Development Engineering to D. Krogh, Community Planner	5/10/1996
B.18	1	Letter to Walter Stamper from D. Krogh, City of Gresham Regarding Approval of Application	5/20/1996
B.19	1	MP 96-1930 Type II Development Permit Findings and Decisions	5/20/1996
B.20	3	MP 96-1930 Development Permit Conditions of Approval	5/20/1996
B.21	13	MP 96-1930 Type II Staff Report Minor Partition	5/15/1996
B.22	1	MP 96-1930 Vicinity Map (Exhibit A)	No Date
B.23	2	Memorandum from Multnomah County Transportation to City of Gresham regarding dedications and improvements required for MP 96-1930	7/2/1996
B.24	4	Bargain & Sale Deed for Easement	9/26/1996
B.25	1	Partition Plat No. 1996-158	9/26/1996
B.26	1	Assessment & Taxation Map Showing Tax Lots '129' and '54' without update	1/1/1997
B.27	1	Assessment & Taxation Property Record for TL 300 (54), Sec. 18BB 1S4E	1/16/2003
B.28	2	Letter in Support from T. Vanderkooy, City of Gresham with attached letter from D. Krogh, City of Gresham	2/6/04
B.29	4	1996 Multiple Use Agriculture - 20 Zoning Regulations	1996
B.30	25	1995 Version Land Division Ordinance	1995
B.31	3	City of Gresham Article III Definitions – Subdivision & Partition Land	
B.32	2	ORS 92.010 Definitions for Subdivisions and Partitions	1993, 1997 & 2001
B.33	1	Portland Metropolitan Urban Growth Boundary Location in Relation to Parcel	3/1/04
'C'		Administration & Procedures	Date
C.1	1	Complete Letter – Day 1	1/16/04
C.2	11	Opportunity to Comment	1/26/04
C.3		Administrative Decision	3/12/04
'D'		Exhibits Received Prior to Public Hearing	
D.1		Notice of Appeal	3/19/04
D.2		Letter from Terry A. Vanderkooy, New Communities Manager, City of Gresham, Regarding Staff Report Findings of Fact	4/15/04

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‘H’**Exhibits Submitted at Public Hearing on 4/16/04**

- H-1 Sign In Sheet
- H-2 Map Collage
- H-3 MCC Code 11.15.8005, 11.15.8105 and Administration and Procedures
- H-4 Survey notes on Partition Plat (map and Notes)
- H-5 8x11 Color Ariel view GIS photo showing property & adjacent parcels
- H-6 8x11 color view of street and mail box from west end of parcel
- H-7 8x11 color view looking east down driveway
- H-8 8x11 color view of front side of 282nd Ave.
- H-9 8x11 color view of property toward housing on south side of parcel
- H-10 8x11 color view looking southeasterly, showing Masson residence and adjacent resident property
- H-11 8x11 color view of commercial business which is a nursing home facility
- H-12 8x11 color view at top of hill in southwest direction of dense housing within 700’

‘I’**Exhibit Submitted During Open Record Period**

- I.1 Memorandum in Support of Appeal of Planning Director’s Decision, dated May 14, 2004, by John C. Pinkstaff of Ramis Crew Corrigan & Bachrach, LLP, Attorneys for Applicant-Appellant Thomas Masson