
DECISION OF HEARINGS OFFICER

Case File: T2-04-031

Permit: Planning Director's Determination

Location: 15201 NW Cornelius Pass Road
TL 100, Sec 25, T2N, R2W, W.M.
Tax Account # R97225-0320

Zoning: Commercial Forest Use – 2 (CFU-2)
With Significant Environmental Concern
Overlay for Wildlife Habitat

Owners: David W. Smith and Teresa Gonzalez
15201 NW Cornelius Pass Road
Portland, OR 97231

Appellants: David W. Smith

James B. Pohlman
74711 Dillon Road, S-539
Desert Hot Springs, CA
92241

Applicant: David W. Smith

Summary: Appeal of a Planning Director's determination that the subject, 7.60-acre property is not a lot of record, eligible for development pursuant to the Multnomah County Code.

Decision: The Planning Director's Decision is reversed. The Hearings Officer finds that the subject property is a legal lot of record in the CFU-2 zoning district.

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, Oregon. 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 33.0005(L)(13) Definitions - Lot of Record

MCC 33.2275 Lot of Record

Chapter 37, specifically MCC 37.0530(B) Type II Decisions

MCC 33.00550 Initiation of Action

MCC 33.0560 Code Compliance and Applications

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 appellants, their attorneys, county staff, or any other person who communicated facts about or support or opposition to this appeal.
- B. **No conflicting personal or family interest.** The Hearings Officer has no financial interest in the outcome of this proceeding. The Hearings Officer has no familial or financial relationship with the applicant or any other participant in this proceeding that would cause bias or prevent the Hearings Officer from making a fair decision based upon the evidence in the record and the applicable criteria.
- C. **No objection.** 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 8, 2005. No participant requested that the record be held open or the hearing continued.
- B. **Testimony.** The following persons testified at the public hearing: Multnomah County Planner Lisa Estrin gave the staff report, testified on behalf of the county, and submitted written materials for the record. Attorney John Pinkstaff testified on behalf of appellant Pohlman and submitted written materials for the record. Attorney Paul Norr testified on behalf of appellant Smith and also submitted written materials for the record.

3. Notes on Findings Related to Criteria for Decision

- A. **Scope of review.** The decision concludes 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 for the record that is relevant to the criteria governing the decision. The only matter at issue was the question of whether the county must recognize the subject property as a legal lot of record.

- B. Adoption of director's findings.** This decision does not address every criterion that governs the appeal; where it is silent, and to the extent that they support this decision, the provisions of the Planning Director's Decision issued September 20, 2004 are adopted and incorporated herein. Where there are inconsistencies between this decision and the Planning Director's Decision, the provisions of this Hearings Officer's Decision shall control.

4. Analysis and Findings Relating to Criteria Governing Lot of Record Determination

The subject property in this appeal comprises 7.60 acres designated Tax Lot 100, Section 25, Township: 2 North, Range 2 West (TL 100), within the Multnomah County West Hills Rural Plan Area. It is zoned for Commercial Forest Use - 2 (CFU-2), and is improved with a single family dwelling. Reference to TL 100 in Multnomah County records was first made in 1971, when it was owned by James and Shige Pohlman. Assessor's records indicate that David Smith and Teresa Gonzalez currently own TL 100, and have since the Pohlman's conveyed it to them in 1992. Smith and Gonzalez were the applicants for a Planning Director's Determination that TL 100 is a Lot of Record pursuant to the Multnomah County Code (MCC).

Relying upon MCC 33.0005(L)(13), MCC 33.2275, the Planning Director determined that TL 100 is not a Lot of Record. Smith and Gonzalez have appealed that determination, as has James Pohlman.

MCC 33.0005(L)(13) provides in relevant part as follows:

"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."

The Director found that the 1992 Warranty Deed from the Pohlman to Smith and Gonzalez "is the first deed to describe, record and transfer the 7.60 acre property, but it did not establish a lawfully created parcel in compliance with all applicable zoning and land division laws." Because TL 100 was not created by a subdivision process, or by a partitioning process after October 19, 1978, and it was not created or transferred by a recorded or recordable deed or sales contract dated prior to October 19, 1978, the Director found that TL 100 is not a Lot of Record.

MCC 33.2275, applicable in the CFU-2 zone, provides in relevant part:

"Lot of Record

"(A) In addition to the *Lot of Record* definitions standards in MCC 33.0005, for the purposes of this district a Lot of Record is either:

"(1) A parcel or lot which was not contiguous to any other parcel or lot under the same ownership on February 20, 1990, or

"(2) A group of contiguous parcels or lots:

"(a) Which were held under the same ownership on February 20, 1990; and

"(b) Which, individually or when considered in combination, shall be aggregated to comply with a minimum lot size of 19 acres, without creating any new lot line.

"(4) Exceptions to the standards of (A)(2) above:

"(a) where two contiguous parcels or lots are each developed with a

lawfully established habitable dwelling, the parcels or lots shall be Lots of Record that remain separately transferable, even if they were held in the same ownership on February 20, 1990.”

Lot of Record analysis is thus historical and based upon facts that are demonstrated by substantial evidence in the record. It is complicated by the facts of changing requirements over the years for valid land divisions, changing vocabulary by which the requirements are described, and changing lenses of subsequent law through which prior land divisions are analyzed. The position of the Director is that even if TL 100 could have been viewed as a Lot of Record, it must be aggregated with TL 300, pursuant to MCC 33.2275(A)(2).

Exhibit H-1 is a set of maps showing various lots and parcels that were carved from a common, 40-acre parent property, beginning in 1964. In that year, the parents of appellant Pohlman transferred to Pohlman and his wife the parent property, approximately 30 acres in size

In 1971, the first depiction of the 7.6 acres now known as TL 100, as distinct from TL 300, appeared in the county records. The Planning Director’s Decision discusses the recorded promissory note and mortgage dated October 26, 1971, by the Pohlmans as mortgagors to the Oregon Veterans Affairs Office, that described TL 100. The Director’s Decision concludes that the note and mortgage did not create a legal parcel, and therefore do not provide evidence that TL 100 is a Lot of Record. MCC 33.2275(D). Appellant Pohlman states briefly that in 1971, Oregon land division statutes did not exclude from the definition of “partition land” the creation of a parcel by a mortgage deed. That may be so, but neither the county nor the appellants address that argument fully, and the answer to that question is not the basis of this decision.

On June 16, 1971, the county issued Pohlman a building permit to construct a house on TL 100. Pohlman Hearing Memo and Exhibit 1 thereto. Subsequently, Pohlman then owned both TL 100 and the remainder parcel, TL 300, on which a house built in 1916 house still sat. Attached to the June 16, 1971 building permit is a “plot plan” that accurately shows the dimensions of TL 100 and the setbacks from the boundaries of TL 100 to the permitted structure. The permit form bears signatures, presumably by county officials, indicating approval by the county health department, general approval of the building plans, and issuance of the permit on June 16, 1971. The plot plan is stamped and numbered by the Multnomah County Building Department. TL 100 has maintained that configuration since that date.

The zoning of the Pohlman property in 1971 was F-2. The minimum lot size in that zone was 2 acres. The 7.60 acre plot was well above the minimum, and satisfied the applicable zoning laws in effect in 1971, as required by MCC 33.0005(L)(13). The 1968 code provisions regarding land use permits show that the county had also found compliance with any applicable land division ordinances then in effect.

Although the initial drawing on the 1971 building permit does not show the 1916 house, that permit was not specifically concerned with either TL 300 or the 1916 house. Its purpose was to obtain authorization to build a new house on the area drawn and titled “plot plan,” which shows TL 100. In 1971, Mr. and Mrs. Pohlman had resided since 1959 in the 1916 house on TL 300. Pohlman has provided for the record photos of a house that appear on a page dated

February 10, 1992, and has stated that the photos show the 1916 house that remained on TL 300 until the mid-1990's, at which time it was destroyed by fire. Pohlman asserts that the 1916 house was habitable until that time, and was rented out. The photos show the house with curtains in the windows and knick-knacks on the windowsills, and next to a parked car that appears to the Hearings Officer be of a more recent vintage than *circa* 1970. County assessor's records indicate that the 1916 house still existed on TL 300 in October 1994, but that it had burned down prior to assessment in 1996. The Hearings Officer finds that the 1916 house was located on the parent property which later became TL 300, until the house was destroyed at some time from 1994 through 1996.

The Pohlman conveyed TL 100 to David Smith and Teresa Gonzalez by deed in 1992. In 1994, Mr. and Mrs. Smith sought and obtained a buildings permit for a significant addition to the 1971 house. Again, their building permit site plan depicted TL 100, and was stamped, dated and signed for "Multnomah County Zoning Approval." Pohlman Hearing Memo, Exhibit 4; Smith Hearing Memo, Attachment 1. MCC (1990) 11.15.8715, "Land Use Permits," then applicable, stated:

"(A) Before any change in the use of land or a structure is made, the owner or owner's agent shall obtain a land use permit from the Department of Environmental Services. Such permit shall be issued only if the proposed use complies with the provisions of this Chapter and any other applicable statute, ordinance, code, regulation or rule.

"(B) In cases where a building permit is required under the Building Code, it shall be deemed to be a Land Use Permit."

In 1994, as in 1971, the county issued a "land use permit" to authorize construction on TL 100. In 1994, as in 1971, issuance of that permit with county approval meant that the permit complied with all applicable provisions of ordinances, codes, and regulations. In 1994, a Lot of Record ordinances defined legal lots eligible for development in the county's resource zones.

MCC 33.0005(L)(13)(b) provides that to have "satisfied all applicable land division laws," a lot must have been created in one of four ways: satisfaction of applicable subdivision requirements in effect at the time; by a deed or sales contract that was recorded prior to October 19, 1978; by a deed or sales contract that was in recordable form prior to October 19, 1978; or by a valid partitioning process in effect after October 19, 1978. The current ordinance does not address a "plot."

Pohlman points out that in 1971, the 1968 Multnomah County Code at 1.34 defined a "lot" as including a "plot." Furthermore, since Pohlman retained ownership of both TL 100 and TL 300, neither a deed nor a contract of sale would have served any purpose to him, and were not needed to create a plot. The division of TL 100 from TL 300 was also not a subdivision. Pohlman argues that a legitimate method of lot creation, applicable in his circumstances in 1971, was by filing a plot plan and obtaining a building permit. He argues that Multnomah County approved this method of creating TL 100 in 1971, as a land use decision, and cannot 34 years later revoke that approval.

MCC (1968) 8.90 "Land Use Permits" provided in part that:

"(a) Before any change in the use of land or structure shall be made, the owner or his agent shall obtain a land use permit, which shall be issued only if the proposed use complies with the provisions of this Ordinance and any other applicable Ordinance, Code or Regulation.

"(c) In cases where a building permit is required under the Multnomah County Building Code, such building permit shall be deemed to be a Land Use Permit."

The 1971 building permit # 54046 is marked as approved, and the county Building Department stamp bearing that approval appears on the plot plan that depicts TL 100. This permit, pursuant to the county code in effect at the time, was a land use permit, which could be issued only if the use complied with the applicable provisions of all ordinances, codes and regulations.

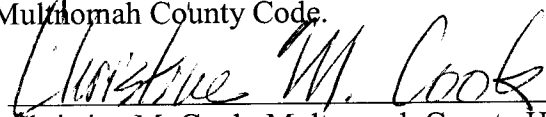
The method of dividing the parent property into two lots by the Pohlmanns in 1971 is not described as "satisfying all applicable land division laws" by the currently effective Lot of Record definition. The Hearings Officer finds that creating TL 100 as a plot, or lot, and obtaining county approval of a building permit for construction on the lot shown by the plot plan, did not violate any land division laws applicable to the Pohlmanns' property in 1971. Although the building permit was neither a deed nor a contract of sale, it identified the property and the owners, and obtained a county approval that was defined as a land use decision. The 1971 land use decision is not now appealable, and should not now be undone by the county. In any event, the land use decision was not to be issued unless it complied with all applicable law, presumably including all applicable zoning and land division laws.

As in the case of the subject property of the Director's Decision in T2-04-088, dated February 28, 2005, "it is reasonable to assume that Multnomah County reviewed the requirements in place at the time and believed the property met them in order to issue [a] permit[]" for the house on TL 100. The Hearings Officer concludes that TL 100 is a Lot of Record in the CFU-2 zone.

Finally, the Hearings Officer finds that as of February 20, 1990, although TL 100 and TL 300 were both in the same ownership, each was developed with a lawfully established habitable dwelling. Pursuant to MCC 33.2275(A)(4)(a) TL 100 and TL 300 are not subject to aggregation with each other.

5. Conclusion.

The Planning Director's determination regarding TL 100 is reversed. Tax Lot 100, located in Section 25, 2N 2W, is a Lot of Record, not subject to aggregation, and eligible for development pursuant to the Multnomah County Code.


Christine M. Cook, Multnomah County Hearings Officer

Dated: May 5, 2005.

T2-04-031 Exhibit List
Public Hearing: April 8, 2005
Day 101 of 150

Exhibit #	# of Pages	Applicant's Exhibits	Date Received
A.1	1	Parcel Record – Cartographic Unit for Tax Lot 100, 2N2W25	4/16/04
A.2	1	Bargain & Sale Deed Recorded in 1964, Describing the Parent Parcel TL 300 minus TL 400 (Book 38, Page 98)	4/16/04
A.3		Bargain & Sale Deed Recorded in 1964, Describing Tax Lot 1500 (Book 38, Page 99)	4/16/04
A.4		Warranty Deed Recorded in 1978 Describing Tax Lot 200 (Book 1293, Page 2392 & 2393)	4/16/04
A.5	2	Warranty Deed Recorded in August, 1992 from James and Shige Pohlman transferring Tax Lot 200 2N2W25 to David Smith & Teresa Gonzalez (Book 2580, Page 2450 & 2451)	4/16/04
A.6	1	Description of Tax Lot 200, 2N2W25 Dated 7/21/1992	4/16/04
A.7	1	Site Plan	4/16/04
A.8	6	Deed of Trust between David Smith & Teresa Gonzales and Cross Land Mortgage Corp for Tax Lot 100, 2N2W25	4/16/04
A.9	2	Note and Mortgage Recorded October 27, 1971 With Tax Lot 200, 2N2W25 Metes and Bounds Description (Book 820, Page 1427 & 1428)	6/4/04
A.10	1	General Application Form	8/4/04
A.11	2	Request to Convert SEC to Lot of Record Determination	8/4/04
'B'	# of Pages	Staff Exhibits	Date of Document
B.1	1	1958 - 1962 Zoning Map	7/10/1958
B.2	1	10.5.1977 Zoning Map	10/5/1977
B.3	1	10.6.1977 Zoning Map	10/6/1977
B.4		MUF-20 Zoning Code	10/6/1977
B.5		MUF-19 Zoning Code	8/14/1980
B.6		1980 Zoning Map	8/14/1980
B.7		1993 Zoning Map	1/7/1993
B.8	1	Site Plan for an Addition to the Existing Single Family Dwelling	9/8/1994
B.9		Tax Lot Description Card for Tax Lot 300, 2N2W25 (R97225-0270)	10/20/03

EXHIBIT LIST
T2-04-031

- J.1** Sign-In Sheet
- J.2** Binder of Hearing memo and Exhibits from the applicant's attorney
- J.3** 10 page letter with attachments from Paul Knorr dated 4/8/05
- J.4** Binder of Lot of Record Legislative History