

**MULTNOMAH COUNTY****LAND USE AND TRANSPORTATION PROGRAM**1600 SE 190<sup>TH</sup> Avenue Portland, OR 97233

PH: 503-988-3043 FAX: 503-988-3389

<http://www.co.multnomah.or.us/landuse>

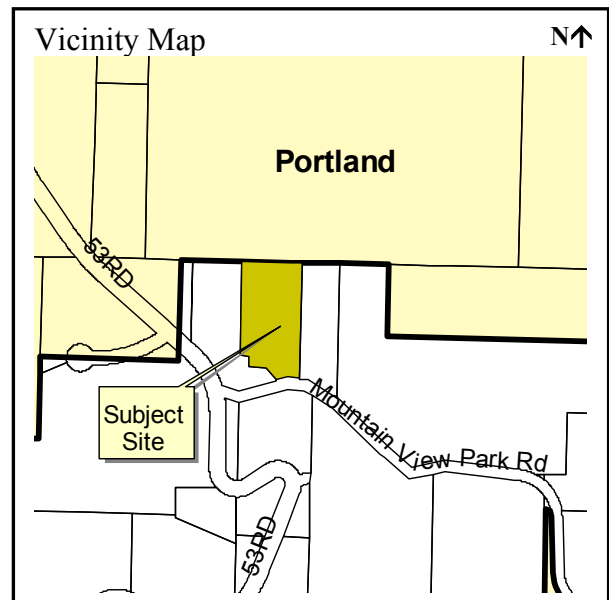
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## NOTICE OF DECISION

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This notice concerns a Planning Director Decision on the land use case(s) cited and described below.

**Case File:** T2-06-047  
**Permit:** Lot of Record Determination  
**Location:** 1414 NW 53<sup>rd</sup> Drive  
TL 200, Sec. 31AB, T 1N, R 1E, W.M.  
Tax Account #R590300670  
**Applicant:** Timothy Persse & Wendy Comstock  
**Owner:** Timothy Persse & Wendy Comstock  
2248 NW Hoyt Street  
Portland, OR 97210  
**Base Zone:** Commercial Forest Use – 2  
**Overlay Zones:** Significant Environmental Concern for  
wildlife habitat (SEC-h)



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**Summary:** Applicant is requesting a Planning Director's Determination that Tax Lot 200 is a Lot of Record in the CFU-2 zoning district.

**Determination:** Tax Lot 200, 1N1E31AB is a Lot of Record pursuant to MCC 33.2270.

Unless appealed, this decision is effective Tuesday, May 16, 2006, at 4:30 PM.

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Issued by:

By: \_\_\_\_\_  
Lisa Estrin, Planner

For: Karen Schilling- Planning Director

Date: Tuesday, May 2, 2006

**Opportunity to Review the Record:** A copy of the Planning Director Decision, and all evidence submitted associated with this application, is available for inspection, at no cost, at the Land Use Planning office during normal business hours. Copies of all documents may be purchased at the rate of 30-cents per page. The Planning Director's Decision contains the findings and conclusions upon which the decision is based, along with any conditions of approval. For further information on this case, contact Lisa Estrin, Staff Planner at 503-988-3043 x22597.

**Opportunity to Appeal:** This decision may be appealed within 14 days of the date it was rendered, pursuant to the provisions of MCC 37.0640. An appeal requires a \$250.00 fee and must state the specific legal grounds on which it is based. To obtain appeal forms or information on the procedure, contact the Land Use Planning offices at 1600 SE 190th Avenue (Phone: 503-988-3043). This decision cannot be appealed to the Land Use Board of Appeals until all local appeals are exhausted.

**This decision is final at the close of the appeal period, unless appealed. The deadline for filing an appeal is Tuesday, May 16, 2006 at 4:30 pm.**

**Applicable Approval Criteria:** Multnomah County Code (MCC): MCC 33.2275 CFU-2 Lot of Record, MCC 33.0005(L)(13) Definitions – Lot of Record and Chapter 37 – Administration and Procedures.

Copies of the referenced Multnomah County Code sections can be obtained by contacting our office at 503-988-3043 or by visiting our website at <http://www.co.multnomah.or.us/landuse>.

### **Scope of Approval**

1. Approval of this land use permit is based on the submitted written narrative(s) and plan(s). No work shall occur under this permit other than that which is specified within these documents. It shall be the responsibility of the property owner(s) to comply with these documents and the limitations of approval described herein.
2. **This land use permit expires two years from the date the decision is final if; (a) development action has not been initiated; (b) building permits have not been issued; or (c) final survey, plat, or other documents have not been recorded, as required. The property owner may request to extend the timeframe within which this permit is valid, as provided under MCC 37.0690 or 37.0700, as applicable. A request for permit extension may be required to be granted prior to the expiration date of the permit.**

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| <b>Notice to Mortgagee, Lien Holder, Vendor, or Seller:</b> |
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| ORS Chapter 215 requires that if you receive this notice it must be promptly forwarded to the purchaser. |
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***Finding of Facts:*** Written findings are contained herein. The Multnomah County Code criteria are in **bold** font. Staff comments and analysis are identified as **Staff:** and follow Applicant comments identified as **Applicant:** to the applicable criteria. Staff comments include a conclusionary statement in *italic*.

### ***Applicant's Introduction:***

The applicants, Timothy Persse and Wendy Comstock, own the property commonly known as 1414 NW 53<sup>rd</sup> Dr., Portland, Oregon (Tax Lot 200 T1N R1E Section 31AB).<sup>1</sup> See Exhibit 1, Tigor Title Status of Record Title Report. Because staff has told prospective buyers of the property that the property may be combined with a neighboring lot for purposes of development, the applicants seek a planning director determination that Tax Lot 200 is a "lot of record" within the meaning of the Multnomah County Code. MCC 33.0005(L)(13); MCC 33.2275.

Wendy Comstock and Timothy Persse purchased the property in November 9, 2004 for \$670,000. Exhibit 3. The price and investment was based on the expectation that the home and lot were legal and were transferable for development purposes separate from the neighboring lot and dwelling. The expectation was quite reasonable given the county's prior approval for exactly that expectation.<sup>2</sup> Without the land use approval to convey the property separate from TL 300, the property cannot be sold for residential dwelling purposes. The property was marketed as having a conditional use approval for a legal lot and nonresource dwelling as decided by the Multnomah County Planning Commission in CU 13-87 and its value reflects the residential development rights to a house and separate legal lot. See Exhibit 7.

The applicants purchased the property on November 9, 2004, from Stephen M. Lockwood. Exhibit 3. When the applicants purchased the property, it was subject to a final decision, CU 13-87, for a non-resource dwelling. See Exhibit 7. Finding 1 in the Conclusion determined the property is a "Lot of Record." In early December, 2005, the applicants entered into an earnest money to sell the property for \$689,000. See Exhibit 30. After the buyers' due diligence on the zoning issues, the sale fell through.

The applicants attended a pre-application conference on February 9, 2006 (PF-06-025) to find out from the county what they needed to do to resolve the zoning problems. See Exhibit 5, PF-06-025; Exhibit 9 (Electronic Mail Multnomah County to David Morgan). The applicants investigated the ownership of the two parcels as of February 20, 1990 and found Tax Lot 200 was held in the same ownership with Tax Lot 300 because a married couple, Marian O'Reilly and Steven M. Lockwood each owned the contiguous lots. See Exhibit 6. It is the county's position that the applicants must reconfirm the subject lot is a lot of record even though it is subject to a final, binding land use decision on that issue. See Exhibit 7, CU 13-87.

#### **A. CU 13-87 is a final land use decision and not subject to collateral attack.**

As a threshold matter, the planning staff is erroneously requiring TL 200 and 300 to apply for a planning director determination that the two lots are separately transferable. The staff is attempting to apply its lot of record spousal aggregation provision enacted in 1990 to a lot that was determined to be a legal lot of record in 1987, under the then-existing lot of record regulation. The county cannot retroactively apply a regulation that is substantive in nature to a lot of record approval after the dwelling has been built and the approval has been fully implemented. TL 200 received a binding conditional use approval for a nonresource dwelling on a lot of record. See Exhibit 7. TL 300 received a variance, building permit and certificate of occupancy. See Exhibit 14 and 28. These decisions are final. The dwellings have been constructed, all the conditions of approval fulfilled and the approvals are implemented. In a similar case of staff retroactively applying a land use regulation that was substantive in nature to an implemented farm management plan, the Multnomah County Hearings Officer rejected staff's interpretation:

"I do not concur with County staff's interpretation that the farm management plan would have to

be fully implemented to preclude the application of MCC 37.0750.<sup>3</sup> The effect of MCC 37.0750 is substantive in nature, it is not simply a procedural provision. The County may not retroactively apply MCC 37.0750 to the approval for a dwelling which was contingent upon the implementation on the farm management plan, after the farm management plan had in fact been implemented.” See T2-04-089, Multnomah County Hearings Officer Decision, page 11, May 12, 2005.<sup>4</sup>

Although the regulation at issue in this case is the aggregation provision at MCC 33.2275 and 33.0005(L)(13), the law is the same: A fully implemented approval is final and binding. It cannot be relitigated in a new land use proceeding because the county enacted a new law it chooses to apply retroactively to a fully implemented, final land use approval. Requiring the applicants to apply for a second lot of record determination is improper. Instead, the County must amend its Lot of Record map and records to show that TL 200 is separate from TL 300 for residential development purposes and provide the public notice that the two lots re separately transferable lots for residential purposes. See Exhibit 4 (Multnomah County GIS contacts for 1414 and 1422 NW 53<sup>rd</sup> Drive).

Claims and issue preclusion apply to land use reviews. *Lawrence v. Clackamas County*, 180 Or App. 495, 43 P3d 1192 (2002). When the same application, involving the identical issues has been decided in a prior proceeding, the governing body cannot require a second review of the same application on the same issues. Attempting to relitigate the lot of record issue was conclusively resolved in a final discretionary land use decision, or that could have been but were not raised and resolved in that earlier proceedings, cannot be raised to challenge a subsequent application for permits necessary to carry out the earlier final decision.” *Safeway v. City of North Bend*, \_\_\_\_ Or LUBA \_\_\_\_ (LUBA No. 2004-088, 9/21/2004), slip op.at 5. In the present case, the county has already determined TL 200 is a separately transferable Lot of Record in CU 13-87 under the then-existing lot of record provision at MCC 11.15.2182.

At the pre-filing conference, staff suggested that if new facts demonstrate that a prior reconfiguration was not lawful, or if the applicants for CU 13-87 misrepresented material facts in the application, the approval could be voided. LUBA and the Court of Appeals have repeatedly determined that whether a local government uses an incorrect process or made a bad decision on the merits is not to be confused with whether a decision is final land use decision. See e.g. *Sauvie Island Agricultural v. GGS (Hawaii), Inc.*, 107 Or Ap 1, 6-7, 810 P2d 856 (1991); *Smith v. Douglas County*, 98 Or App 379, 382, 780 P2d 232, *rev den*, 308 Or 608 (1989); *Doughten v. Douglas County*, 90 OR App 49, 52-53, 750 P2d 1174 (1988). If the county believed that the 1987 decision or lot line adjustment was substantively flawed, it should not have approved CU 13-87. It cannot simply disregard CU 13-87 on the grounds that now it may not meet its spousal aggregation rule which was not adopted when CU 13-87 was approved. The county has no authority to ignore a final land use decision that the applicants, neighboring property owners, real estate agents and prior owners have been specifically relying on for over 19 years.

Despite the unlawful nature of requiring this review, in order to gain the most expeditious zoning confirmation for the property so that it can be sold, the following narrative will demonstrate the criteria of MCC 33.2275(4)(a) has been met so that the two lots at issue remain separately transferable.<sup>5</sup>

<sup>1</sup> The applicants are currently renting the subject property to Carol Anne Gray and Steven Lee Mayes who own the adjacent Tax Lot 300 located at 1422 NW 53<sup>rd</sup> Portland, Oregon. The Mayes submitted a lot of record determination application on March 7, 2006.

<sup>2</sup> The applicants reserved their right to litigate their takings claim in federal court and by making this application specifically do not waive their rights to do so.

<sup>3</sup> MCC 37.0750 provides that all land use decisions authorized prior to January 1, 2001 shall expire on January 1, 2003, unless a different timeframe was specifically included in the decision.

<sup>4</sup>On the facts of T2-04-089, the hearings officer found that the approval was not fully implemented

because the ten year farm management plan was only in its fifth year and it was appropriate for the Planning Director to require a Type II decision process to demonstrate continued compliance with the implementation of the farm management plan. In the present case, there is nothing to implement. All the conditions of approval have been fulfilled. It is not appropriate for the Planning Director to require a Type II decision process to decide if subject properties are aggregated.

**Staff:** The property owners/applicants have requested a Lot of Record determination on the subject property. Pursuant to MCC 37.0530, a Lot of Record Determination shall be processed as a Type II decision. This determination does not seek to modify the findings contained in CU 13-87, but to determine whether Tax Lot 200 is a Lot of Record pursuant to the current criteria listed under MCC 33.2275.

The subject property was adjusted into its current configuration in December 1975 (Exhibit A.18. & A.24). At the time, the County did not have property line adjustment requirements and adjustments only needed to maintain minimum lot sizes in the zone. The property was zoned R-20 at the time. The R-20 zoning district allows the creation of lots and parcels with a minimum lot size of 20,000 square feet. Tax Lot 200 is 1.95 acres in size. The subject property is currently occupied by a single family dwelling and a detached garage. The property was granted a Conditional Use Permit in 1987 for the dwelling's construction. The dwelling was completed in 1990.

### ***Site Characteristics and Vicinity***

**Staff:** The subject property is currently zoned Commercial Forest Use-2 (CFU-2) with a minimum lot size of 80-acres. A Significant Environmental Overlay for Wildlife Habitat (SEC-h) covers the property. The subject property is 1.97 acres in size and is chiefly forested. The only cleared areas are the immediate areas around the existing structures. The property takes access to 53<sup>rd</sup> Drive from a local access road known as Mountain View Park Road. The properties within the County's jurisdiction are located within the CFU-2 zoning district and have the SEC-h overlay. Many of these lots are of a similar size and many have dwellings and are heavily forested. The properties to the north are located in the City of Portland

#### **1.00     *General Provisions***

##### **1.01     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 March 17, 2006 and an "Opportunity to Comment" notice was mailed on April 12, 2006 to all properties within 750 feet of the subject properties in compliance with MCC 37.0530. Comments were received from David & Margie Rikert and Peggy Hennessy of Reeves, Kahn & Hennessy Law Firm who represent adjacent property owner Stephen Lockwood in support of the application.

##### **1.01     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:** Multnomah County Assessment and Taxation records shows Timothy Persse and Wendy Comstock as the owners of the subject property. Both property owners have signed the

General Application Form (Exhibit A.1), thus giving authorization for the application. Both property owners are designated as the applicant. *This criterion has been met.*

1.02 **MCC 37.0560 Code Compliance And Applications.**

**The County shall not approve any application for a permit or other approval, including building permit applications, for any property that is not in full compliance with all applicable provisions of the Multnomah County Land Use Code and/or any permit approvals previously issued by the County. A permit or other approval, including building permit applications, may be authorized if it results in the parcel coming into full compliance with all applicable provisions of the Multnomah County Code**

**Staff:** At this time, there are no known violations on the subject property.

2.00 ***Lot of Record Provisions***

2.01 **MCC 33.0005(L)(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.)**

**Applicant:** This approval criteria requires an applicant to demonstrate that the lot or parcel at issue satisfied all applicable zoning laws and all applicable land division laws at the time of the lot’s creation and at the time it was reconfigured. Tax Lot 200 was deemed a Lot of Record in CU 13-87. See Exhibit 7. A final land use decision is binding on the county, even if later determined to be wrong. See *Rochlin v. Multnomah County*, 37 OR LUBA 237 (1999). Because the county has already determined TL 200 is a separate lot of record, the substantive correctness of that decision cannot be challenged in this proceeding, even if the staff claims to have found “new facts.”

Notwithstanding the fact the county cannot disturb its 1987 lot of record decision, the applicants offer the following chain of title information to show Tax Lot 200 and 300 were lawful when created and when subsequently reconfigured in 1972 as demonstrated below.

Creation: The two lots at issue were originally created as Lots 14, 15, and a portion of Lot 13 of the Mountain View Park Subdivision. (See Exhibit 2, Copy of Original Plat Map, Book 1, Page 100, 101, Records of Deeds for Multnomah County, August 3, 1882). There was no zoning or land use regulations in 1892, so the platted subdivision lots were legally created. See Exhibit 12: General Laws of Oregon, Ch. LVI, at 925 (Deady, 1866)

The property was initially zoned R-20 (residential with a 20,000 square foot minimum lot size) as shown on the attached historical zoning maps. See Exhibit 2. The R-20 zoning designation remained in effect until 1977 when it was rezoned Multiple Use Forest, 20-Acre Minimum Lot Size ("MUF-20"). See Exhibit 11 (Ordinance 149). In 1993, the property was rezoned from MUF-19 to Commercial Forest Use-2 ("CFU-2") which has an 80-acre minimum lot size. See Exhibit 2.

Divisions: After the initial platting in 1882, the property was transferred a number of times. William Brent purchased both properties in 1969 in a single deed. Exhibit 13, Book No. 677, Page 1830. At the time of Brent conveyance, there were no aggregation or lot of record provisions.<sup>6</sup> In any event, Tax Lots 200 and 300 exceeded the 20,000 square foot minimum lot size of the R-20 zone. Brent constructed a dwelling on TL 300 (Lot 15) and received a variance from the planning commission. See Exhibit 14.

Brent sold the house and both parcels to Donald Gary Helmick and Ann M. Helmick (husband and wife) in 1972 via two separate transactions. See Exhibit 15. The sale of TL 300 included a portion of TL 200, in the vicinity of the access to TL 300. See Exhibit 15. The correction deed separates out Tax Lot 300 into two tracts, one of which is the original Lot 15 of Mountain View Subdivision (Tract 1); the other being a triangularly-shaped tract of land which was originally part of Lot 14 of Mountain View Subdivision. Therefore, there is a deed, signed by the parties to the transaction that was in *recordable form* prior to October 19, 1978. See Exhibit 15.

On December 14, 1974, a survey of the two properties was recorded with the county. The lots are shown in their current configuration, which reflects a boundary line adjustment in the vicinity of the driveway and water well serving TL 300. See Exhibit 16. There were no zoning code provisions regulating lot line adjustments during that time period and the recorded survey was the county's acknowledge of approving this adjustment. See Exhibit 17 (Lot Line Adjustment Code Provision, Amended 1990, Ord. 642 §2). CU 13-87 recognized the legal lot line adjustment by pronouncing TL 200 a legal lot of record. See Exhibit 7, Conclusion 1.

The Helmicks retained TL 300 (Lot 15) and sold TL 200 (Lot 14 and a portion of 13) to Helen B. Hewitt (formerly Helen B. Ross). See Exhibit 20, Book 961, Page 180. On June 4, 1975, Helmicks sold Tax Lot 300 to Marian O'Reilly. See Exhibit 21 (Warranty Deed recorded at Book 1107, page 1745). The legal description in the deed reflects the newly adjusted lot line boundary. On December 22, 1975, Ross sold TL 200 back to Helmick on December 22, 1975. See Exhibit 22. In 1979, Helmick sold TL 200 back to Helen B. Hewitt (Ross). See Exhibit 23. An additional correction deed in 1980 from Helmick to Ross conveyed the remainder portion of Lot 13 and 14 that was not conveyed for access to Lot 15. See Exhibit 23.

The county adopted its first aggregation provision in Ordinance No. 300 on March 23, 1982. The lot aggregation provision applicable to the MUF-19 zone was codified at MCC 11.15.2182 (1982). See Exhibit 19. The new provision provided that "Parcels of land which are contiguous and which greater than possessory interests are held by the same person,

partnership, or business entity shall be aggregated to comply as nearly as possible with a minimum lot size of ten acres, without creating any new lot line, and with the front lot line minimums of this district.”

In August 1984, Helen B. Hewitt Ross sold Tax Lot 200 to Mrs. Mary Selden on a contract of sale. See Exhibit 24. The Mays-Gray land use application (Case No. T2-06-026) states that the conveyance to Mary Selden appears to have been a “strawman” transaction, designed to ensure that TL 200 and 300 would not be aggregated as some sort of “marriage” partnership. See Exhibit 25 (Mays-Gray Narrative, Pages 4-5). The applicants do not believe the Selden-Lockwood conveyances are relevant to the approval criteria because at that time the county’s definition of “same ownership” did not include contiguous properties held by spouses.<sup>7</sup> During Mary Selden’s equitable ownership with Helen B. Hewitt Ross, she applied and received the nonresource dwelling approval which established Tax Lot 200 was a lot of record. See Exhibit 7. As the Grays-May narrative explains, Stephen Lockwood took title to the property through a series of conveyances on November 2, 1988. See Exhibit 26.

In 1990, the county enacted an amended lot of record aggregation provision which defined same ownership as property held by “the same person or person, spouse, minor age child, single partnership or business entity.” See Exhibit 27. Because Tax Lot 200 and 300 had each received zoning approval and dwelling occupancy permits, the county cannot retroactively apply MCC 11.15.2182(B) to the properties and find the two lots are combined because they were held in the same ownership (by spouses) on February 20, 1990. See Introduction *supra*.

<sup>6</sup>Multnomah County first adopted a “lot of record” provision to its zoning code in 1978. (See Exhibit 18, MCC 3.14.2, 1978).

<sup>7</sup>The Land Use Board of Appeals (LUBA) and the Court of Appeals have clarified in several cases that while multiple conveyances that effectively qualify a parcel for a dwelling that otherwise would be precluded due to tract aggregation may appear suspect, if the law permits it as an exception, it does not affect a land use approval. *DLCD v. Yamhill County*, 33 Or LUBA, 362,367 (1997) (inter vivos transfer of property between the statutorily specified family members are legal and do not disqualify the new owner from siting a lot-of-record dwelling under the statute). In the case of the Lockwood-Selden conveyances, TL 200 met the Lot of Record criteria because aggregation only applied to a “partnership” not marriage. Therefore, the inter vivos transfer from Selden to Lockwood did not disqualify TL 200 from being a lot of record. See also *Parsons v. Clackamas County*, 32 Or LUBA 147 (1996).

**Staff:** As part of CU 13-87, the subject property was found to be a Lot of Record at that time. Based upon the deed record submitted by the applicant, the configuration of the property has not changed since its adjustment in 1975 (Exhibits A.18, A.23 – A.26, A.28). *This criterion has been met.*

## 2.03 MCC 33.2275 Lot of Record

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

**(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.**

**Applicant:** (A) Because Tax Lot 200 and 300 are contiguous parcels, were held in the same ownership by spouses on February 20, 1990 and do not meet the minimum lot size of 19 acres, it is the county's position that the applicant's must demonstrate that each lot is developed with a lawfully established habitable dwelling to qualify for the exception that the two lots remain separately transferable for residential development. The following applicants' responses below will address the above criteria.

**(L)(3) Lawfully established dwelling – A dwelling that was constructed in compliance with the laws in effect at the time of establishment. The laws in effect shall include zoning, land division and building code requirements. Compliance with Building Code requirements shall mean that all permits necessary to qualify the structure as a dwelling unit were obtained and all qualifying permitted work completed.**

The definition of a lawfully established dwelling is set forth in MCC 33.0005(L)(3) as cited above. The Multnomah County Code requires that in order for a dwelling to be lawfully established, it must have been constructed in compliance with the laws in effect at the time of establishment. The laws to look at are: zoning, land division and building code requirements. The relevant timeframe to review compliance is when the dwelling was initially built, not during the entire timeframe up until the Lot of Record Determination. See T2-04-058, Multnomah County Hearings Officer Decision, January 11, 2005. In this case both dwellings were initially built in compliance with the zoning, land division and building code requirements in effect in 1971 (TL 300) and 1987 (TL 200) as follows:

**TL 200 (1414 NW 53<sup>rd</sup> Drive)**

The dwelling on TL 200 was constructed in 1988-89 under building permit 88-105968. It received a certificate of occupancy on December 14, 1989. See Exhibit 29; Exhibit 7 (Lockwood Dwelling Building Plans). The certificate of occupancy is irrefutable, substantial evidence that all work necessary to qualify the structure as a dwelling were obtained and all qualifying permitted work was completed. As such, the dwellings was lawfully established because all permits necessary to qualify the structure as a dwelling unit were obtained and completed at the time of establishment in 1988-89. As explained earlier, the dwelling was lawful under all zoning laws and was approved in CU 13-87 as a "nonresource dwelling" in the MUF-19 district. The then-owner complied with the two conditions of approval as shown in Exhibit 7 (Conditions and Restrictions, Instrument 2133, Page 1553 and Exhibit 31, Instrument 092414, Book 2158, Page 590.) As explained above in the Lot Creation section, Tax Lot 200 was lawfully created and reconfigured under the applicable zoning and land division laws then in effect.

**TL 300 (1422 NW 53<sup>rd</sup> Drive)**

The home of TL 300 was constructed in 1970-71, when the lot was zoned R-20. In the R-20 district, a single family dwelling on a minimum lot size of 20,000 square feet was an outright permitted use and no zoning approval was necessary. However, the then-owner, Mr. Brent, received a height variance from the planning commission to construct the dwelling which shows the dwelling was lawfully created under all zoning regulations.<sup>8</sup> See Exhibit 14, Board of Adjustment Height Variance. The dwelling received a building permit and certificate of occupancy on March 31, 1971. See Exhibit 28 (Building Permit No. 50817). The submitted

dwelling plans for the Brent dwelling were submitted and approved by the City of Portland. See Exhibit 8. The certificate of occupancy is irrefutable, substantial evidence that all work necessary to qualify the structure as a dwelling were obtained and all qualifying permitted work was completed. As such, the dwelling was lawfully established because all permits necessary to qualify the structure as a dwelling unit were obtained and completed. As explained above in the Lot Creation section, Tax Lot 300 was lawfully created and reconfigured under the applicable zoning and land division laws in effect at the time of establishment.

As demonstrated with substantial evidence in the record, the two dwellings were lawfully established as that term is defined in MCC 33.0005(L)(3).

**(H)(1) Habitable dwelling – An existing dwelling that:**

**(a) Has intact exterior walls and roof structure;**

**(b) Has indoor plumbing consisting of a kitchen sink, toilet and bathing facilities connected to a sanitary waste disposal system;**

**(c) Has interior wiring for interior lights; and**

**(d) Has a heating system.**

Tax lots 200 and 300 are each developed with a *habitable dwelling*. A dwelling is defined in the Multnomah County Code as “a single unity providing complete, independent living facilities for one or more persons, including permanent provisions for living, sleeping, eating, cooking and sanitation.” MCC 33.0005(D)(6). A dwelling is considered “habitable” for purposes of Chapter 33 if it is “existing” and contains the following amenities: (a) intact exterior walls and roof structure; (b) indoor plumbing consisting of a kitchen sink, toilet and bathing facilities connected to a sanitary waste disposal system; (c) interior wiring for interior lights; and (d) a heating system. MCC 33.0005(H)(1). The standard requires the dwelling to be “existing” and “habitable” as to present date. See T2-04-058, Multnomah County Hearings Officer Decision, January 11, 2005. In other words, if at some point in the dwelling’s history it became inhabitable but was subsequently made habitable to the present time, it would meet MCC 33.0005(D)(6). T2-04-058, page 5.<sup>9</sup>

**Tax Lot 200 (1414 NW 53<sup>rd</sup> Drive)**

The dwelling was established in 1989 and remains to this day, and is therefore “existing” within the meaning of the code. See Exhibit 29; Exhibit 35 (Portland Maps Printout Data Sheet). The dwelling is temperature controlled with both baseboard heating systems and a propane heater. See Exhibit 36 (Photographs showing heating system).<sup>10</sup> The dwelling contains permanent provisions for living, sleeping, eating, cooking and sanitation (bathroom and shower facilities). Exhibit 36. (Photographs of home). The home is wired for, and is capable of being served with electricity. Exhibit 36 (Photograph showing J Box). The dwelling home receives water from an onsite domestic-exempt well. Exhibit 37 (Well House on Existing Well Permit 00-144218-000-00-ET). The dwelling has an on-site septic system. See Exhibit 30 (Seller’s Representations/Sale Agreement No. 1655541).

**Tax Lot 300 (1422 NW 53<sup>rd</sup> Drive)**

The dwelling was established in 1971 and remains to this day, and is therefore “existing” within the meaning of the code. See Exhibit 14; Exhibit 32 (Multnomah County Property Information). The dwelling is temperature controlled with both baseboard heating systems and a propane heater. See Exhibit 34 (Photographs showing heating system)<sup>11</sup> The dwelling contains permanent provisions for living, sleeping, eating, cooking and sanitation (bathroom

and shower facilities). Exhibit 34 (Photographs of home). The home is wired for, and is capable of being served with electricity. See Exhibit 34 (Photograph showing J Box) and Exhibit 45 of Casefile No. T2-06-026 (recent electrical bill). The dwelling home receives water from an onsite domestic-exempt well and has an on-site septic system. See Exhibit 46 of Casefile No. T2-06-026.

(C) The nonresource dwelling located on TL 200 is an approved, conditional use. See Exhibit 7, CU 13-87.

(D) The dwellings on TL 200 and 300 are “existing” as shown in Exhibits 32 and 33.

<sup>8</sup>The Variance Approval indicates the address for the property as 1414 NW 53<sup>rd</sup>. At some point, TL 300 was given the address of “1422” and TL 200 was given the address of “1414.” The Certificate of Occupancy for TL 200 indicates its address was formerly 5225 NW 53<sup>rd</sup>. See Exhibit 30.

<sup>9</sup>In the cited case, a building permit had been issued in 1964 but there was no evidence a septic system for the dwelling was originally granted. In 1999, the septic system was inspected by the local sanitation division and found to meet present requirements. The Hearings Officer found that the dwelling had appropriate indoor plumbing, even though it may have been added many years after the initial establishment of the dwelling.

<sup>10</sup>The photographs were taken in February, 2006 by Tim Persse and Carol Gray.

<sup>11</sup>The photographs were taken in February, 2006 by Tim Persse and Carol Gray.

**Staff:** The subject property (Tax Lot 200) was held under the same ownership with Tax Lot 300 on February 20, 1990. Both Tax Lot 200 and 300 are currently occupied by a single family dwelling. The dwelling on Tax Lot 200 was established through a conditional use permit that was issued in 1987. The applicant has submitted documentation that the dwelling obtained the required building permits and was constructed in compliance with the applicable regulations at that time (Exhibit A.31). In addition, the applicant has supplied current photographs of the dwelling demonstrating that it contains the necessary features to qualify as a habitable dwelling (Exhibit A.38).

The dwelling on Tax Lot 300 was constructed in 1971. The R-20 zoning district allowed out right a single family dwelling on a lot. Building permits were issued for the construction of the dwelling in April 1970 (Exhibit B.3). In addition, the applicant has supplied current photographs of the existing dwelling demonstrating it is habitable (Exhibit A.36).

Since both properties are occupied by lawfully established habitable dwellings, MCC 33.2275(A)(4) grants an exception from the aggregation requirement of MCC 33.2275(A)(2). Based upon the information supplied by the applicant, Tax Lot 200, 1N1E31AB is currently a *Lot of Record*.

### 3.00 ***Conclusion***

Based on the findings and other information provided above, the Planning Director determines the property known as 1414 NW 53<sup>rd</sup> Drive (1N1E31AB, Tax Lot 200) was legally created and is currently a Lot of Record.

#### 4.00 ***Exhibits***

‘A’ Applicant’s Exhibits

‘B’ Staff Exhibits

‘C’ Procedural Exhibits

| Exhibit # | # of Pages | Description of Exhibit   | Date Received/ Submitted |
|-----------|------------|--|--------------------------|
| A.1       | 1          | General Application Form   | 3/17/06                  |
| A.2       | 12         | Narrative  | 3/17/06                  |
| A.3       | 5          | Exhibit 1 – Ticor Title Insurance Co.<br>a. Status of Record Title Report Supplement 1<br>b. Legal Description for Tax Lot 200<br>c. Copy of Original Plat Map, Book 1, Page 100, 101, Records of Deeds for Multnomah County, August 3, 1882 | 3/17/06                  |
| A.4       | 5          | Exhibit 2 - Multnomah County Historical Zoning Maps<br>a. 1962<br>b. 1977<br>c. 1980<br>d. 1993<br>e. 1998   | 3/17/06                  |
| A.5       | 2          | Exhibit 3 - <b>Warranty Deed</b> from Stephen Lockwood to Persse-Comstock [2004-207143] – 11/16/04   | 3/17/06                  |
| A.6       | 14         | Exhibit 4 - Multnomah County GIS contact for 1414 & 1422 NW 53 <sup>rd</sup> Drive   | 3/17/06                  |
| A.7       | 4          | Exhibit 5 - PF 06-025  | 3/17/06                  |
| A.8       | 1          | Exhibit 6 - State of Oregon Marriage Records   | 3/17/06                  |
| A.9       | 25         | Exhibit 7 - CU 13-87 Final Decision & Building Plans   | 3/17/06                  |
| A.10      | 11         | Exhibit 8 - Building Permits 50817 & 50818 and Dwelling Plans (Dwelling on TL 300)   | 3/17/06                  |
| A.11      | 2          | Exhibit 9 - Multnomah County Electronic Mail to David Morgan   | 3/17/06                  |
| A.12      | 2          | Exhibit 10 - Mountain View Park Subdivision Plat Book 1, Page 100 & 101  | 3/17/06                  |
| A.13      | 2          | Exhibit 11 - Ordinance 149 1N1E31AB Zoning Map   | 3/17/06                  |
| A.14      | 6          | Exhibit 12 - General Laws of Oregon, Ch LVI, at  | 3/17/06                  |

|      |   |   |         |
|------|---|---|---------|
|      |   | 925 (Deady, 1866).  |         |
| A.15 | 1 | Exhibit 13 - Warranty Deed from Mark & Alice Sumida to William Brent , Book No. 677, Page 1830  | 3/17/06 |
| A.16 | 1 | Exhibit 14 - Variance Approval BA 280-69  | 3/17/06 |
| A.17 | 9 | Exhibit 15 <ul style="list-style-type: none"> <li>a. <b>Warranty Deed</b> from William Brent to Ann &amp; Donald Helmick [Book 889, Page 1462/3] – 10/12/1972 (TL 200)</li> <li>b. <b>Warranty Deed</b> from William Brent to Ann &amp; Donald Helmick [Book 882, Page 1979/80] -9/11/1972 (TL 300)</li> <li>c. <b>Warranty Deed</b> from William Brent to Ann &amp; Donald Helmick [Book 889, Page 1460/61] - 10/26/1972 (Deed Correction for P.1980)</li> </ul> | 3/17/06 |
| A.18 | 1 | Exhibit 16 - Property Line Survey No. 37837 for TL 200 and 300  | 3/17/06 |
| A.19 | 2 | Exhibit 17 - Lot Line Adjustment Code Provision, Amended 1990, Ord. 642 §2)   | 3/17/06 |
| A.20 | 1 | Exhibit 18 - MUF-20 Lot of Record Provision – MCC 3.144.2   | 3/17/06 |
| A.21 | 3 | Exhibit 19 - Ordinance No. 300 – MCC 11.15.2182 (1982)  | 3/17/06 |
| A.22 | 2 | Exhibit 20 - <b>Warranty Deed</b> from Donald Gary Helmick and Ann M. Helmick to Helen B. Hewitt, [Book 961, Page 180 & 181] – 11/29/1973   | 3/17/06 |
| A.23 | 2 | Exhibit 21 <ul style="list-style-type: none"> <li>a. <b>Warranty Deed</b> from Donald &amp; Ann Helmick to Marian O'Reilly [Book 1107, Page 1745] – 6/4/1976 (Current Configuration of TL 300)</li> <li>b. Survey 37837</li> </ul>  | 3/17/06 |
| A.24 | 2 | Exhibit 22 - <b>Warranty Deed</b> from Helen B. Hewitt to Donald Gary Helmick [Book 1082, Page 397 & 398] – 1/12/1976   | 3/17/06 |
| A.25 | 3 | Exhibit 23 - Correction Deed for Helmick Deed for TL 200 to Helen B. Hewitt (Ross) <ul style="list-style-type: none"> <li>a. <b>Warranty Deed</b> Book 1405, Page 2021 (Recorded 12/13/19790)</li> <li>b. <b>Bargain &amp; Sale Deed</b> Book 1450, Page 763</li> </ul>   | 3/17/06 |

|      |   |   |         |
|------|---|---|---------|
|      |   | (Recorded 10/29/1980)   |         |
| A.26 | 2 | Exhibit 24 -Real Estate Contract from Helen B. Hewitt Ross to Mary Selden   | 3/17/06 |
| A.27 | 2 | Exhibit 25 - Pages 4& 5 of Applicant's Submittal from Case file No. T2-06-026   | 3/17/06 |
| A.28 | 8 | Exhibit 26 - Lockwood Deed to TL 200 <ul style="list-style-type: none"> <li>a. <b>Assignment of Contract</b> from Hewitt-Ross &amp; Selden Contract (B.1776 P.1067) to Steve Lockwood [B.2050 P.2177] - 10/15/1987</li> <li>b. <b>Warranty Deed</b> [B.2134 P.1065] Fulfillment of Contract between H.B. Hewitt-Ross to M. Selden - 8/30/1984</li> <li>c. <b>Warranty Deed</b> [B.2152 P.1340] From H.B. Hewitt-Ross &amp; H.K Helmick to Steve Lockwood - 11/2/1988</li> <li>d. <b>Quitclaim Deed</b> [B.2152 P.1338] From M. Selden to Steven Lockwood - 11/2/1988</li> </ul> | 3/17/06 |
| A.29 | 2 | Exhibit 27 - Lot of Record Provision – MCC 11.15.2182 (1990)  | 3/17/06 |
| A.30 | 4 | Exhibit 28 - William D. Brent Building Permit No. 50817 & 50818 [Bldg Permit for Dwelling on TL 300]  | 3/17/06 |
| A.31 | 2 | Exhibit 29 - TL 200 Certificate of Occupancy  | 3/17/06 |
| A.32 | 9 | Exhibit 30 - Sale Agreement 1655541 (Persse-Comstock to David Morgan)   | 3/17/06 |
| A.33 | 4 | Exhibit 31 - Declaration of Deed Restrictions for CU 13-87  | 3/17/06 |
| A.34 | 3 | Exhibit 32 - 1422 NW 53 <sup>rd</sup> Dr. Portland Maps Printout Sheet  | 3/17/06 |
| A.35 | 1 | Exhibit 33 - 1422 NW 53 <sup>rd</sup> Dr. Septic Certification  | 3/17/06 |
| A.36 | 4 | Exhibit 34 - Photographs of 1422 NW 53 <sup>rd</sup> Dr.  | 3/17/06 |
| A.37 | 3 | Exhibit 35 - 1414 NW 53 <sup>rd</sup> Portland Maps Printout Sheet  | 3/17/06 |
| A.38 | 5 | Exhibit 36 - Photographs of 1414 NW 53 <sup>rd</sup> Dr.  | 3/17/06 |
| A.39 | 1 | Exhibit 37 - 1414 NW 53 <sup>rd</sup> Dr. for Well House Electricity  | 3/17/06 |
| A.40 | 1 | Email from Dorothy Cofield Clarifying Property Involved in Application  | 4/11/06 |
|      |   |   |         |
| 'B'  |   | Staff Exhibits  | Date    |

|            |    |   |             |
|------------|----|---|-------------|
| B.1        |    | A&T Property Information for 1N1E31AB - 00200     |             |
|            |    |   |             |
| <b>‘C’</b> |    | <b>Administration &amp; Procedures</b>            | <b>Date</b> |
| C.1        | 1  | Complete Letter – Complete March 17, 2005 (Day 1) | 4/7/06      |
| C.2        | 2  | 14 Day Opportunity to Comment                     | 4/12/06     |
| C.3        | 15 | Administrative Decision – Day 47                  | 5/2/06      |
|            |    |   |             |
| <b>‘D’</b> |    | <b>Comments Received During O.T.C.</b>            | <b>Date</b> |
| D.1        | 1  | Letter in Support from David & Margie Rikert      | 4/17/06     |
| D.2        | 2  | Letter in Support from Reeves, Kahn & Hennessy    | 4/26/06     |