

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

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<http://www.multco.us/landuse>

NOTICE OF DECISION

This notice concerns a Decision of a Multnomah County Hearings Officer on the land use case cited and described below.

Case File: T2-2012-2531

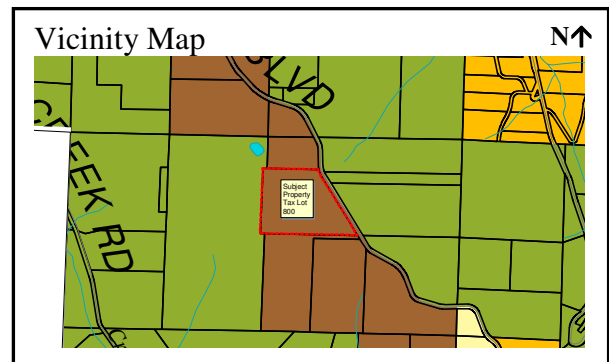
Permit: Category 4 Land Division

Location: 13225 NW Skyline Blvd.
Tax Lot 800, Section 36,
Township 2 North, Range 2 West, W.M.
Tax Account #R972360010

Applicant: Lloyd Pollard

Owner: Philip Volker

Base Zone: Exclusive Farm Use (EFU)



Summary: Create a Parcel under the 'Creation Of Lots And Parcels That Were Unlawfully Divided' provisions in MCC 33.7785

Decision: Denied; property was not unlawfully divided.

Issued by:

By: _____
Liz Fancher, Hearings Officer

Date: April 4, 2013

Opportunity to Appeal: This decision may be appealed to the Oregon Land Use Board of Appeals within 21 days of the date it is final. An appeal must be perfected in the manner required by Oregon law and LUBA's administrative rules. This decision is final when mailed.

Applicable Approval Criteria: Multnomah County Code (MCC): 33.7785, Creation Of Lots And Parcels That Were Unlawfully Divided; MCC 33.7780, Category 4 Land Division; MCC Chapter 37, Administration And Procedures.

Multnomah County Road Rules (MCRR): 4.000, Access to County Roads.

Copies of the referenced Multnomah County Code (MCC) and Multnomah County Road Rules (MCRR) 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> or <http://web.multco.us/transportation-planning>.

Findings of Fact

FINDINGS: Written findings are contained herein. The Multnomah County Code (MCC) criteria and Comprehensive Plan Policies are in **bold** font. The findings and legal conclusions of the Hearings Officer, based on findings prepared by staff in the appealed decision, are identified as '**Hearings Officer:**' and address the applicable criteria.

1.00 Applicant's Proposal:

The applicant applied to legalize the property through the 'Creation of Lots and Parcels That Were Unlawfully Divided' provisions in Multnomah County Code (MCC) 33.7785, which is processed as a Category 4 Land Division (MCC 33.7780); the scope of this decision is limited to the above code provisions. The applicant's request was granted. The applicant appealed the County's decision requesting that the Hearings Officer find that his property is a lot of record as defined by MCC 33.0005.

2.00 Property Description:

The subject property located at 13225 NW Skyline Blvd. is described as Tax Lot 800 of Section 36, of Township 2 North, Range 2 West in Multnomah County. The property contains a dwelling, which was constructed in approximately 1918 according to County Department of Assessment, Recording, and Taxation (DART). The property zoned Exclusive Farm Use (EFU) by Multnomah County and is also located in the Significant Environmental Concern for Wildlife Habitat (SEC-h) zoning overlay.

3.00 Lot of Record:

3.01 MCC 33.0005 Definitions

Subject to additional provisions within each Zoning District, a Lot of Record is a parcel, lot, or a group thereof that, when created or reconfigured, (a) satisfied all applicable zoning laws and (b) satisfied all applicable land division laws, or (c) complies with the criteria for the creation of new lots or parcels described in MCC 33.7785. 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: The subject property was created by the following conveyances:

- (1)** On August 15, 1965, Caroline Krueger created the parent parcel of the Pollard property when she conveyed the following property to R.E. and Marie A. Walsh by warranty deed recorded in Book 367, Page 123 of the Multnomah County Deed Records (Exhibit D.2): The East half of the Northwest quarter and the part of the North half of the Northwest quarter lying Westerly of Skyline Boulevard, Section 36, Township 2 North, Range 2 West of the Willamette Meridian in Multnomah County, Oregon.
- (2)** A Memorandum of Land-Sale Contract recorded on June 1, 1978 in Book 1271, Page 1158 through Page 1160 of the Multnomah County Deed Records (Exhibit A.25) provides evidence that a Land Sale Contract was executed between Robert E. and Marie A. Walsh and Blanche Miller on May 23, 1978. The contract conveyed a parcel that was about 103 acres in size to Ms. Miller. Mr. and Mrs. Walsh retained ownership of what is now the Pollard property. The Memorandum described the Pollard property as two tracts: Tract A and B. Tract A was 7.727 acres and Tract B was 12.273 acres. Together, Tracts A and B are 20 acres size.

Each conveyance was necessary to create the Pollard property. As a result, in order for the Pollard property to be lawfully created, both deeds must have satisfied all applicable zoning and land division laws. Each conveyance is addressed separately, below.

1965 Warranty Deed

The 1965 deed created one parcel with the legal description provided above. According to the relevant zoning maps from the era, the property was approximately 107.59 acres in size. Twenty acres of this parcel became the Pollard property in 1978.

The 1965 deed satisfied all applicable land division laws. It was created by a warranty deed that was properly recorded prior to October 19, 1978.

The 1965 deed created a lot that satisfied all applicable zoning laws as it complied with all applicable zoning minimum lot size, dimensional standards, and access requirements. At the time,

the subject property was zoned F2. The F2 zone imposed a minimum lot size of two acres. That appears to have been the only applicable criterion. The property had access to a public road.

1978 Land Sale Contract

Compliance with County Lot of Record Requirements

The applicant has not submitted the 1978 Walsh-Miller land sale contract to Multnomah County for review. The applicant has, however, submitted a copy of a memorandum of land sale contract. The contract is signed by Mr. and Mrs. Walsh. It states that a land sale contract was entered into by Mr. and Mrs. Walsh and Ms. Miller on May 23, 1978. In addition, a deed was recorded that conveyed the property described in the land sale contract to Ms. Miller in 1989.

The memorandum of contract does not, alone, meet the requirements of the County's lot of record definition because: (a) it was not signed by Ms. Miller, a party to the contract; and (b) it is not, itself, a sales contract – the document the law requires to be recorded or in recordable form. The Hearings Officer finds, however, that there is adequate circumstantial evidence in the record to find that the required signed land sale contract existed in recordable form prior to October 19, 1978. This is true for the following reasons:

1. Mr. and Mrs. Walsh recorded the Memorandum of Land-Sale Contract in the chain of title to their property prior to October 19, 1978 to show they were bound by the contract; and
2. The Memorandum states that the underlying contract imposed payment obligations on Ms. Miller. The only legal way for Ms. Miller to have incurred said obligations was to have signed the land sale contract.
3. The Memorandum of Land-Sale Contract was recordable and was recorded. The recording of the memorandum acted to put the world on notice that the contract existed and was in effect. This is the same function that would have been served by recording the entire document. In addition, a review of Oregon case law indicates that Oregon courts treat a Memorandum of Contract as a part of the contract between the parties. Essentially, the two documents together constitute a single contract between the parties. When viewed together, the documents meet the requirements of the County's code.

Legal Effect of 1978 Land Sale Contract

The legal effect of the 1978 land sale contract was to convey one property and to create two properties. The property conveyed was comprised of Tax Lots 900 and 1000 on Exhibit A.14, a 2011 tax map. According to Exhibit A.14, Tax Lots 900 and 1000, together, are 83.47 acres in size. The contract created two parcels because the contract sellers, the Walshes, retained 20-acres of the property they acquired in 1965. The memorandum of land sale contract describes the 20 acre parcels as two tracts - Tracts A and B. The Memorandum of Land-Sale Contract contained legal descriptions for Tracts A and B but it not did convey Tracts A and B. It, therefore, did not create each tract as a separate unit of land. Instead, the tract numbers were used to describe the part of the parent parcel that was not being conveyed and that would be retained by the owner.

The tract numbers were shown on a survey. The survey did not, however, have the legal effect of creating new tracts or parcels. A survey, also, is not listed as a method of lot creation in the

County's lot of record ordinance. *See also, Atkins v. Deschutes County*, 102 Or App 208, 793 P2d 345 (1990)(survey not recorded as plat did not create legal lots of record).

The MUF-20 zone in effect in 1978 imposed a minimum lot size of 20 acres. As the remainder parcel was 20 acres, it complied with the minimum lot size of the zone. The dimensional standards and access requirements of the MUA-20 zone in effect in 1978 required a 50' minimum front lot line length, 30' deep front yard, 10' deep side yards and 30' rear yard. The home located on the 20-acre tract complied with these requirements as shown by Exhibit A.2, p.20. Even if the County had required a dedication of land for road right-of-way similar to the one required as a condition of approval of this application, the parcel continues to provide the required front yard to the structure that is closest to the road. The 20-acre parcel complied with the only applicable access requirement – a requirement that the parcel abut a street.

The 83.47-acre parcel conveyed to Ms. Miller also complied with the size, dimension and access requirements. It had abutted a street. It was, as a single unit, over 20 acres in size. It was large enough to allow any structures constructed on the property to comply with the minimum setback standards in effect at the time.

In 1978, the 83.47-acre parcel was split-zoned MUA-20 and MUF-20. At the time, each zoning district imposed a minimum lot size of 20 acres. The part of the parcel zoned MUF-20 exceeded the 20-acre minimum lot size. The MUA-20 part of the 83.45-acre parcel was 6.48 acres and less than the minimum lot size of 20 acres. County staff advised the hearings officer that this fact, however, would not be viewed by the County as a violation of the minimum lot size of the MUA-20 zone as the entire split-zoned property was over 20 acres in size. In 1992, the 6.48-acre property was illegally divided from the MUF-20-zoned part of the 83.47-acre property. That parcel is now a legal lot of record as it obtained approval of a one lot partition in 2009 utilizing the lot legalization process that governs approval of the applicant's request.

In 1978, the applicable law said that separate lots of record in the MUA-10 zone "shall be deemed created when [a] street or zoning boundary intersects a parcel of land." (Exhibit A.8, p.23) If this law was self-executing it would have divided the 83.47-acre parcel into two lots of record: a 26.47-acre MUA-20 zoned property and a 79+ acre MUF-20 zoned property. The legal effect of the 1978 contract sale would have been to divide the 26.47-acre MUA-20 part of the property into a 20-acre parcel and a 6.47-acre parcel. This division would have violated the minimum lot size requirements of the MUA-20 zoning district because the 6.47-acre parcel is smaller than 20 acres.

The Hearings Officer finds, however, that the lot of record law in effect in 1978 was not self-executing. Instead, a property owner needed to seek approval of a partition to divide split-zoned property along the zoning boundary or, at a minimum, needed to seek a legal lot of record determination that recognized the division of the property by the zoning boundary. This conclusion is supported by the language of the current version of MCC 33.7785(A)(1)(c). It describes the law in effect in 1978 as *allowing a land division*. It does not say that the law acted to divide the land without action by the landowner. Under this interpretation of the zoning boundary law, the property owner who acquired the 83.47-acre parcel had the legal right to divide the 6.48-acre MUA-20 property from the 83.47-acre parcel. As the owner did not seek to divide the property, the 6.48-acre parcel was not created until 1991 when it was illegally divided from the 83.47-acre property. This interpretation is consistent with the County's decision of T2-09-007 (Exhibit H.2.b) that found that the 6.48-acre parcel was illegally divided from the rest of the 83.47-acre parent parcel by a 1991 deed not by the 1978 land sale contract and zoning law. As a result, the 1978 land sale contract satisfied all applicable zoning laws.

2012 Land Use Application

The current application seeks approval of a one-lot partition for the 20-acre subject property under the provisions of MCC 33.7785. The Hearings Officer has addressed the requirements for approval of that request, below, because that is the application the applicant filed with the County and is the application the Hearings Officer is required by law to address.

4.00 Creation Of Lots And Parcels That Were Unlawfully Divided:

4.01 MCC 33.7785 Creation of Lots and Parcels That Were Unlawfully Divided

This Code section provides the mechanism to review and, based upon findings of compliance with specific approval criteria, to approve certain unlawfully divided lots or parcels. The review mechanism to correct an unlawfully divided unit of land differs according to the date the unlawful lot or parcel was divided as provided in (A) and (B) below, or under (C) if a land use permit was issued for a primary use. For the purposes of this section, an “unlawfully divided” lot or parcel means a lot or parcel that, when divided, did not satisfy all applicable zoning and land division laws.

(A) An application to create a legal lot or parcel from an unlawfully divided unit of land divided before January 27, 1994 (eff. date of Mult. Co. Ord. 781) shall be a Category 4 Land Division and be reviewed as a Type II process. In addition to the applicable Category 4 Land Division requirements, the application shall satisfy the following approval criteria:

Hearings Officer: The application is for a Category 4 Land Division, which is processed under the Type II application process. The Category 4 Land Division criteria are addressed in Section 5 of this decision. The applicant does not qualify for approval of a land division under the provisions of MCC 33.7785 because the property was not unlawfully divided. It was, instead, divided in compliance with applicable law and is a legal lot of record.

6.00 Conclusion:

Based on the findings and other information provided above, the applicant has demonstrated that his property is not eligible for approval of a Category 4 Land Division to legalize the subject property in the EFU zone. As a result, approval of the application is **denied**.

7.00 Exhibits:

- ‘A’ Applicant’s Exhibits
- ‘B’ Staff Exhibits
- ‘C’ Procedural Exhibits

Exhibits are available for review in Case File T2-2012-2531 at the Land Use Planning office.

Exhibit #	# of Pages	Description of Exhibit	Date Received/ Submitted
‘A’	#	Applicant’s Exhibits	Date

A.1	1	General Application Form	09/20/2012
A.2	25	Applicant's Narrative	09/20/2012
A.3	1	1965 Deed: Book 967, Page 123 of the Multnomah County Deed Records [Applicant's Exhibit A]	09/20/2012
A.4	2	Survey # 42180 (1978 Survey) [Applicant's Exhibit B]	09/20/2012
A.5	1	1978 Sectional Zoning Map [Applicant's Exhibit C]	09/20/2012
A.6	1	1980 Sectional Zoning Map [Applicant's Exhibit D]	09/20/2012
A.7	1	1989 Deed for adjacent property [Applicant's Exhibit E]	09/20/2012
A.8	6	MUA-20 Zoning Code in affect on June 30, 1978 [Applicant's Exhibit F]	09/20/2012
A.9	11	Declaration of Philip Volker and accompanying attachments [Applicant's Exhibit G]	09/20/2012
A.10	6	Declaration of David Jossi [Applicant's Exhibit H]	09/20/2012
A.11	3	Portland Maps Property Report [Applicant's Exhibit I]	09/20/2012
A.12	1	Aerial Photograph [Applicant's Exhibit J]	09/20/2012
A.13	9	Photographic evidence of dwelling in support of 'Habitable Dwelling' [Applicant's Exhibit K]	09/20/2012
A.14	1	Annotated Assessor's Map showing ownership of property and adjacent properties on Feb. 20, 1990 [Applicant's Exhibit L]	09/20/2012
A.15	2	Deed recorded as Book 888, Page 139 of the Multnomah County Deed Records	09/20/2012
A.16	3	Deed recorded as Book 1110, Page 290 of the Multnomah County Deed Records	09/20/2012
A.17	4	Deed recorded as Book 2264, Page 2551 of the Multnomah County Deed Records	09/20/2012
A.18	12	Deed recorded as Book 2186, Page 277 of the Multnomah County Deed Records	09/20/2012
A.19	2	Fire Service Agency Review [Applicant's Exhibit M]	09/20/2012
A.20	4	Septic System Permits [Applicant's Exhibit N]	09/20/2012
A.21	2	Well Log [Applicant's Exhibit O]	09/20/2012
A.22	4	Signed Certification of On Site Sewage Disposal and attachments [Applicant's Exhibit P]	09/20/2012
A.23	6	Supplemental Narrative addressing Category 4 Land Division Criteria	10/26/2012
A.24	1	Site Map	10/26/2012
A.25	1	Contract of Sale recorded as Book 1271, Page 1158 - 1160 of the Multnomah County Deed Records.	12/17/2012

'B'	#	Staff Exhibits	Date
B.1	2	A&T Property Information	09/20/2012
B.2	1	Zoning Map with Property Highlighted	11/07/2012
B.3	1	Email from Alan Young, Multnomah County Right of Way Specialist, indicating there are no access permits for the property are on file (dated October 2, 2012)	10/02/2012
B.4	1	Email from Joanna Valencia, Multnomah County Senior Transportation Planner, indicating transportation, right-of-way, and dedication requirements (dated October 5, 2012)	10/05/2012
B.5	10	1982-3-23 EFU Zoning Code MCC Chpt. 11.15	12/12/2012
B.6	28	Chapter 11.45 (Land Divisions) in Effect in 1989	12/12/2012
B.7	3	Email request from applicant to place application on hold. Received December 12, 2012 at 2:07 p.m.	12/12/2012
'C'	#	Administration & Procedures	Date
C.1	1	Incomplete Letter	10/19/2012
C.2	1	Complete Letter	10/31/2012
C.3	2	Opportunity to Comment and mailing list	11/07/2012
'H'	#	Hearing Exhibits	Date
H.1.a	1	Handwritten message to Appellant from Adam Barber, Senior Planner	03/08/2013
H.1.b	1	County Ordinance effective dates list	03/08/2013
H.2.a	3	Appellant's argument via email March 8, 2013	03/08/2013
H.2.b	10	County Staff Decision T2-09-007 submitted as attachment to email referenced in H.2.a	03/08/2013
H.3.a	1	County staff memo	03/12/2013
H.3.b	17	County Ordinance 148 – applicable in 1978	03/12/2013
H.3.c	28	County Subdivision Ordinance –applicable in 1978	03/12/2013
H.4.a	3	Appellant's Final Argument	03/20/2103
H.4.b	1	1978 County Zoning Map submitted as attachment to email referenced in H.4.b	3/20/2013
H.5	17	Email exchange between Hearings Officer and Staff and between Staff and Appellant regarding location of historical zoning information as it relates to the subject property's parent parcel.	04/02/2013 through 04/03/2013