BEFORE THE LAND USE HEARINGS OFFICER
FOR MULTNOMAH COUNTY, OREGON

In the Matter of an appeal of a Director's Type II Decision denying a Lot of Record request for two adjacent parcels zoned Exclusive Farm Use (EFU) in unincorporated Multnomah County, Oregon	**FINAL ORDER** **Maher Lot of Record** **(applicant's appeal)** **T2-2021-14361**

I. Summary:

This Order is the decision of the Multnomah County Land Use Hearings Officer denying the appeal and affirming the Director's August 6, 2021 Decision conditionally approving the lot of record request that determined TLs 1100 and 1200 were not separate legal lots of record, but would constitute a single legal lot if consolidated.

II. Introduction to the underlying application and the Director's decision:

Applicant/Appellant.....Patrick Maher
5431 SE 72nd Avenue
Portland, OR 97206

Representative.....Ty K. Wyman
Dunn Carney LLP
851 SW Sixth Ave., Suite 1500
Portland, OR 97204

Owner.....Michael Robideau and Mabel Estate
16900 NW Sauvie Island Rd.
Portland, OR 97231

Property.....Legal Description: Tax Lots 1100 and 1200 in Section 21, Township 2 North, Range 1 West of the Willamette Meridian, Alternative tax acct: R971210140 & R971210150, Property IDs: R325150 & R325151.

Applicable Laws.....Multnomah County Code (MCC) 39.1515 (Code Compliance and Applications), MCC 39.2000 (Definitions), MCC 39.3005 (Lot of Record – Generally), MCC 39.3070 (Lot of Record – EFU)

The two parcels involved in this matter are adjacent to one another and abut the Multnomah Channel, straddling Sauvie Island Road in unincorporated Multnomah County (Ex. H.1). The application initially involved only TL 1100 (Ex. A.1) but was subsequently amended to include TL 1200 (Ex. A.6). TL 1100 is ~20.05 acres (Ex. B.3), and TL 1200 is ~0.8 acres (Ex. B.7). Evidence in the record shows that the two parcels were separately and individually described for the first time in a 1968 Bargain and Sale Deed (A.3), recorded without benefit of any particular process or governmental approval.

Zoning at that time was F-2 (Exs. H.7 & H.8), which required a 2-acre minimum lot size that TL 1200 (Parcel 1 described on the 1968 deed) did not meet. TL 1100 is developed with a dwelling and a few outbuildings; whereas, TL 1200 is undeveloped.

The desire to make certain improvements apparently triggered the need for legal lot verification for TL 1100 and this case because MCC 39.1515 precludes land use or permit approval for any parcel that is not in full compliance with all applicable land use requirements. Thus, the applicant's focus on TL 1100 and the desire for certain development and improvements to TL 1100 was the reason the initial inquiry was limited to that parcel. Staff apparently noted that TLs 1100 and 1200 had both been under common ownership in the recent past and advised the applicant to amend the legal lot verification request to also include TL 1200. The applicant took the position at the time, which he maintains through the appeal, that both TL 1100 and TL 1200 were and remain separate legal lots of record under the County's requirements, both of which are independently developable.

Because TL 1200 does not meet the current area requirement for a new lot in the EFU zone (i.e., 19 acres) and it was in common ownership with TL 1100 in 1990, the basic requirements for verifying a legal lot of record (MCC 39.3005) require credible evidence that the parcels "when created or reconfigured, either satisfied all applicable zoning laws and satisfied all applicable land division laws, or complies with the criteria for the creation of new lots or parcels described in MCC 39.9700. …" In this context, "satisfied all applicable zoning laws" means that the parcel "was created … in full compliance with all zoning minimum lot size, dimensional standards, and access requirements." "Satisfied all applicable land division laws" means, among other things, that the parcel was created by a deed dated, signed and recorded prior to October 19, 1978.

The application was first filed on February 17, 2021 (Ex. A.1), seeking legal lot verification for just TL 1100 but at staff's urging was expanded to also include TL 1200 (Ex. A.6). The County followed a Type II process, and once the application was complete on March 19, 2021 (Ex. C.1), issued notice of the proposal and solicited comments from property owners within the notice range (Ex. C.2). No comments were received on the proposal. The Director issued a February 7, 2020 decision approving the legal lot verification request (Ex. C.3), subject to a condition that required the consolidation of TL 1100 with 1200. In short, the Director concluded that TLs 1100 and 1200, if consolidated would qualify as a single legal lot of record. This conclusion is based on MCC 39.3070(A) and the fact that TL 1200 is smaller than the current minimum lot size, is contiguous with TL 1100, and both parcels were under common ownership on February 20, 1990, neither qualifies as a separate legal lot of record, but would if consolidated. The necessary implication of the Director's decision is that, no building or land use permits can issue for improvements on TL 1100 (or TL 1200) unless the consolidation condition is fulfilled.

III. Summary of the local proceeding and Record:

The applicant timely appealed the Director's decision (Ex. D.1), specifically challenging the consolidation condition. The County issued notice of a September 10, 2021 public hearing (Ex. D.2), but apparently failed to issue the notice at least 20 days before the hearing as required by MCC 39.1150 and ORS 197.763(2)(f). The applicant objected, requested a new hearing date (Ex. D.3), and the County obliged by issuing new notice of an October 8, 2021 hearing (Ex. D.4).

The October 8, 2021 hearing was held remotely via a Zoom internet platform, in which everyone participating via video or via telephone audio could testify and could hear everything that everyone said. At the commencement of the hearing, the Hearings Officer made the disclosures and announcements required by ORS 197.763(5) and (6) and 197.796 and disclaimed any *ex parte* contacts, conflict of interest or bias. No one raised any procedural objections or challenged the Hearings Officer's ability to decide the matter impartially, or otherwise challenged the Officer's jurisdiction. No one requested that the record be left open or that the hearing be continued.

At the hearing, Lisa Estrin, Land Use Planner for the County, provided a verbal summary of the Director's August 6th decision. The applicant/appellant appeared through his attorney Ty Wyman, who requested that the record remain open following the hearing and agreed to toll the 150-day clock (Ex. I.1). No one else requested the opportunity to testify, and no new written comments were received into the record. At the hearing's conclusion, the Hearings Officer ordered the following open-record schedule:

- 14 days (Oct 22) any submission on any relevant subject from anyone
- 14 days (Nov 5) written response(s) to documents submitted during first period
- 7 days (Nov 12) applicant/appellant's final rebuttal, no new evidence

During the first post-hearing open-record period, staff provided short memo on how the area of TL 1200 was measured (Ex. I.2) and an e-mail exchange with the Oregon Division of State Lands about the meaning of meander line of the Multnomah Channel versus the bank line, versus the high water line (Ex. I.3). The applicant provided a letter explaining that it would not be possible to obtain the opinion of a Professional Land Surveyor as to the western boundary of TL 1200 before the record closed (Ex. I.4) and a signed declaration of Thomas C. Holmes referencing several documents related to locating the western boundary of TL 1200 and how to calculate its area (Ex. I.5). Eleven supporting documents were attached to the declaration (Exs. I.5.1 through I.5.11).

During the second post-hearing open-record period, the applicant provided a short memo (Ex. J.1) rebutting the substance and implications of staff's earlier submissions from the first open record period. The applicant/appellant provided his written final rebuttal on November 12, 2021 (Ex. K.1), after which the record closed.

III. Findings:

Only issues and approval criteria raised in the course of the application, appeal, during the hearing, or before the close of the record are discussed in this section. All approval criteria or issues not raised by staff, the applicant or a party to the proceeding have been waived as contested issues, and no argument with regard to these issues can be raised in any subsequent appeal. The Hearings Officer finds those criteria to be met, even though they are not specifically addressed in these findings. The Hearings Officer adopts the following findings related to the issues and approval criteria that were preserved during the proceeding while the record was open:

A. The 2-part lot of record test in MCC 39.3005(B). Pertinent to this matter, MCC 39.3005(B) (Lot of Record - Generally) provides a 2-prong test for verification of a legal "lot of record." To be deemed a legal lot of record, the parcel in question, at the time of its creation, must have: (a) satisfied all dimensional requirements of the then-applicable zoning and (b) satisfied the procedural requirements for creation of a lot under the then applicable zoning, *i.e.*, at the time it was created. In particular:

> *"a parcel, lot, or a group thereof that, when created or reconfigured, either satisfied all applicable zoning laws and satisfied all applicable land division laws, or complies with the criteria for the creation of new lots or parcels described in MCC 39.9700. Those laws shall include all required zoning and land division review procedures, decisions, and conditions of approval."*
>
> *"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 … By a deed, or a sales contract dated and signed by the parties to the transaction, that was recorded … prior to October 19, 1978;"*

MCC 39.3005(B), *see also* MCC 39.3070(A), which provides additional requirements for lots of record in the EFU zone.

As a starting point, the record shows and County staff and the applicant/appellant agree that the first time TLs 1100 and 1200 were separately described by deed was in a bargain and sale deed dated March 25, 1968 (Ex. A.3). Based on this uncontested, credible evidence, the Hearings Officer concludes that March 25, 1968 is the date the lots in question were "created." The 2-prong test in MCC 39.3005(B), therefore, is applied to TLs 1100 and 1200 as of 1968 and requires that, to have a chance of being deemed a legal lot today, a parcel must have complied with the then-applicable procedural requirements for lot creation and the dimensional requirements for lots in the applicable zone at the time the lot was created. Staff reports, and the applicant/appellant does not dispute, that in 1968, creation of a new lot through recordation of a deed as happened here was an acceptable and lawful process. For land zoned EFU in 1968, no formal

county process or approval was required, which meets the procedural (first) prong of the 2-part lot of record test.

B. How big is TL 1100? As for the substantive prong of the test, the land at issue here was zoned F-2 with a 2-acre minimum lot size (Ex. H.7) at the time of creation (1968). Evidence in the record shows that TL 1100 is 20.05 acres (Exs. B.1 & B.3), and that TL 1200 is 0.81 acres (Exs. B.6 & B.7). While TL 1100 does not meet the current 80-acre minimum lot size for new lots in the County's EFU zone, required by MCC 39.4245, it met the 2-acre minimum lot size then-applicable in the F-2 zone (Ex. H.7) when it was "created" in 1968 (Ex. A.3). Thus, as a general matter, TL 1100 is able to satisfy the lot size (second) prong of the lot of record test, but that does not resolve the question of TL 1200's legal status today because there is evidence in the record that TL 1200 was less than the then-applicable 2-acre minimum lot size required for new lots in the F-2 zone. This evidentiary issue, however, is contested, and the applicant disputes staff's conclusion about the size of TL 1200. Additionally, MCC 39.3070(A) comes into play to require substandard sized parcels adjacent to other parcels under common ownership as of February 20, 1990 to be aggregated for purposes of a lot of record determination.

C. How big was/is TL 1200? The Hearings Officer agrees with the appellant (Ex. K.1) that the central point of dispute in this appeal relates to the size of TL 1200 when it was created in 1968 and today. The legal status of TL 1200 is tied to the legal status of TL 1100 because of the additional requirement for EFU zoned parcels in MCC 39.3070(A), which provides:

> *"In addition to the standards in MCC 39.3005, for the purposes of the EFU 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."*

MCC 39.3070(A).

Both parcels are contiguous,[1] and the record shows that both TL 1100 and TL 1200, in fact, were in common ownership on February 20, 1990 (Ex. B.7), which brings this provision into play. Because at least some of the evidence in the record shows that

[1] Even though TLs 1100 and 1200 are currently separated by the Sauvie Island Road right-of-way, MCC 39.4210 defines "contiguous" in this context as "parcels or lots which have any common boundary, excepting a single point, and shall include but not be limited to, parcels or lots separated only by an alley, street or other right-of-way."

TL 1200 was and remains smaller than 2 acres, this provision suggests that TL 1100 and TL 1200 can only be viewed as a single legal lot when consolidated with one another, and not individual legal lots in isolation; in other words, the Director concluded that, if combined, TL1100 and 1200 would constitute a single legal lot of record (Ex. C.3).

Size matters in land use, and legal lot determinations are no exception. Some evidence in the record shows that TL 1200 is 0.81 acres (Ex. B.6 & B.7, H.14), and staff reports that, when the NW Sauvie Island Road right-of-way is included, TL 1200 has an area of 1.39 acres (Exs. C.3, H.10 & I.2). At the hearing, the applicant/appellant disputed staff's determination that TL 1200 was and remains smaller than 2 acres, based on the applicant's interpretation of the original property description for TL 1200 from the 1968 deed, which reads:

> A tract of land located in Section 21, Township 2 North, Range 1 West, W.M., in the County of Multnomah, State of Oregon , more particularly described as follows:
>
> Beginning at a point at which the easterly boundary of Gillihan Road, Multnomah County Road No. 1438, intersects the northly line of the James F. Bybee DLC; thence southerly along the easterly boundary of said county road to Howell Park County Road No. _____; thence south 69° 24' west to the easterly boundary of Multnomah Channel (also known as Willamette Slough); thence northerly along the easterly boundary of Multnomah Channel (also known as Willamette Slough) to a point where said easterly boundary of said Multnomah Channel (also known as Willamette Slough) intersects with an extension of the northly line of the James F. Bybee DLC; thence easterly to the point of beginning.

Ex. A.3.

TL 1200 is currently illustrated on Ex. H.1 and described in Ex. B.8. At the time TL 1200 was created in 1968, Howell Park County Road did not have a County Road Number. It is now known as County Road No. 3189 and has been renamed NW Sauvie Island Road. Also, at the time of creation, TL 1200 included the right-of-way for Howell Park County Road, which it no longer appears to include (Ex. B.8). At the time of creation (1968) and now, the western boundary of TL 1200 was/is "the easterly boundary of Multnomah Channel (also known as Willamette Slough)." Thus, evidence in the record indicates that, at the time of creation, TL 1200 was 1.39 acres (Ex. I.2), and after the right-of-way for NW Sauvie Island Road was removed, what remains is 0.81 acres in size (Exs. B.6 & H.14).

At the hearing, the applicant's attorney suggested that the western boundary of TL 1200 is, or should be interpreted to be, the "Meander Line" for the Multnomah Channel, which is depicted on the current tax lot map (Ex. H.1). The applicant's attorney argued that such an interpretation was made in a March 27, 2020 lot of record decision regarding a near-by parcel that also fronts along the Multnomah Channel – the Miller/Poehler decision (Ex. H.13). Thus, the applicant argues that the reference in the TL 1200 legal description to the "easterly boundary of Multnomah Channel" should be interpreted to

mean the "Meander Line of the Willamette Slough." According to the applicant's argument, when the submerged area between the easterly boundary of Multnomah Channel and the Meander Line of the Willamette Slough is added to the area of TL 1200, the parcel's size is purported to increase "putting it well over the two-acre minimum lot size" (Ex. K.1) and is approximately 270' x 660' in size (Ex. H.15).

The question of how large TL 1200 was at the time of creation or now is an evidentiary question, not a legal one. The issue boils down to, when documents in the record are contradictory or conflict with one another, what evidence or documents are the most credible or probative of the parcel's actual size? The starting point must be the above-quoted legal description of TL 1200 in the bargain and sale deed that created the parcel and evidence in the record about how the County has reconned the parcel's size over the years. The applicant argues that the TL 1200 legal description must be interpreted in light of the County's lot of record decision for the Miller/Poehler property, and asserts that if the same interpretation is used, TL 1200 will be deemed larger than 2 acres.

A close examination of the Miller/Poehler decision (Ex. H.13), however, reveals that the size of the parcel in that case turned not on an interpretation of the legal description for that parcel, but rather the exact wording of the legal description, which expressly calls-out the "Meander Line of the Willamette Slough" as the parcel's western boundary. The deed in the Miller/Poehler case did not describe the west property line as the "the easterly boundary of Multnomah Channel," as the TL 1200 legal description does. Thus, the two legal descriptions for the two parcels call-out a different western boundary for these parcels. The two different western boundaries appear to refer to two different lines, and reliance on the Miller/Poehler decision does not appear to assist the appellant in this case.

While the Hearings Officer may lack the ability or authority to interpret deeds and legal descriptions, the text of these two legal descriptions reveals no ambiguity or opportunity for interpretation, at least as to the west boundary of the parcel. The legal description for the Miller/Poehler parcel in Case No. T2-2019-12723 describes the parcel's west boundary as the "Meander Line of the Willamette Slough." In contrast, the legal description from the 1968 deed describes the west boundary of TL 1200 as the "easterly boundary of Multnomah Channel." The plain text of these two legal descriptions for the west boundary of the two parcels they describe is different. The Slough's "easterly boundary" is different than its "Meander Line," and the two lines are located in different places. No interpretation is required to reach this conclusion, and the applicant has provided no persuasive argument as to why the two lines might or should be considered the same or interchangeable.

In post-hearing submissions, the applicant provided several deeds related to the John L. Bybee DLC and parcels abutting the Multnomah Channel (Exs. I.5 1-11) that provide context for understanding the difference between a meander line and some other edge or boundary of a water body. For example, the Bureau of Land Management Manual of Survey Instructions (2009) says the following about meander lines:

> Numerous decisions in the United States Supreme Court assert the principle that, in original surveys, meander lines are run, not as boundaries of the parcel, but (1) for the purposes of ascertaining the quantity of land remaining after segregation of the bed of the water body from the adjoining upland, (2) for defining the sinuosities of the water body for platting purposes, and (3) for closing the survey to allow for acreage calculations. The ordinary high water mark (OHWM), or line of mean high tide (line of MHT) of the stream, or other body of water, and not the meander line as actually run on the ground, is the actual boundary.
>
> The general rule is that when the Federal Government conveys title to a lot fronting on a navigable body of water, it conveys title to the water's edge, meaning the OHWM or line of MHT. Such riparian boundaries are ambulatory, not fixed in position. When an exception to the general rule is shown, the consequence is that the meander line becomes fixed and can become a fixed and limiting property boundary. Meander lines may be held fixed because of (1) an avulsive change, (2) gross error or fraud, (3) substantial accretion after survey but before entry, or (4) where the facts and circumstances disclose an intention to limit a grant or conveyance to the actual traverse lines. But the mere fact that an irregular or sinuous line must be run, as in the case of a reservation boundary, does not entitle it to be called a meander line except where it closely follows the bank of a stream, lake or tidewater.

Ex. I.5.1, pp 2-3 (emphasis added).

Two things are apparent from this discussion of meander lines from the BLM's Manual of Survey Instructions. First, the meander line is different than the Ordinary High Water Mark (OHWM) or the Mean High Tide (MHT) line. The meander line is fixed in place by survey and does not move as the water body avulses and accretes. This comports with the fixed meander line shown on the property tax maps of TL 1200 (Exs. H.1 & H.15). By contrast, the OHWM and MHT are lines that move over time, which complicates the calculation of property areas. Second, the BLM's Manual of Survey Instructions explicitly state that the OHWM or MHT line, not the meander line, is used as the parcel boundary. While it may require expert testimony to determine if the "eastern boundary" of the Slough equates to the OHWM or the MHT – evidence that is not found in this record – it is clear from a plain reading of the BLM's Manual of Survey Instructions and the property descriptions in question that the "eastern boundary" is different than a water body's Meander Line.

The other documents submitted by the applicant after the hearing relate to the John L. Bybee DLC offer little support for the primary issue in this appeal. The tax lot and other maps (Exs. I.5 2-4) depict the boundary of the John L. Bybee DLC – a boundary that is also referred to in the 1968 TL 1200 legal description (Ex. A.3) and current tax lot maps (Ex. H.1). However, those depictions of and references to the westerly boundary of the John L. Bybee DLC do not undercut the plain language of the parcel's legal description which references the "easterly boundary of Multnomah

Channel." Similarly, other post-hearing exhibits (Exs. I.5 5-11) are deeds purporting to describe and convey various portions of the John L. Bybee DLC, but not TL 1200, which also references the John L. Bybee DLC, but does not rely upon the John L. Bybee DLC to define the western boundary of TL 1200.

The boundary in question in this case is the dividing line between the applicant's private ownership of TL 1200 and DSL's ownership of the bed of the Multnomah Channel. County staff communicated with DSL about how the state reckons its ownership of the bed of the Multnomah Channel in this area (Ex. I.3). DSL responded in pertinent part that its "ownership fronting [TL 1200] is the bed of the Multnomah Channel up to mean low water" and that "the state automatically granted the tideland to the riparian owner. The state retained the bed of the Multnomah Channel up to the mean low water fronting this tax lot." The DSL official who responded speculated that "[i]t is more than likely that the State owns to Mean High Water, but I'd have to submit to our Ownership Specialist if you need a firm determination." As for the meaning of "easterly boundary" and "meander line," this DSL official responded that "the questions you seem to be asking refer to other boundaries which DSL does not manage or track." From this evidence, the Hearings Officer concludes that, while the operative boundary for TL 1200 may be equivalent to the MHW line, it clearly is not the meander line as the appellant suggests.

The legal description (Ex. B.8) and tax lot map (Ex. H.1) provide further evidence as to why the western boundary of TL 1200 is the "easterly boundary of Multnomah Channel" and not the Slough's meander line. The tax lot map for TL 1200 shows the NW corner of the James F. Bybee DLC as being located at the intersection of the northerly line of the James F. Bybee DLC and the meander line of the Willamette Slough (Ex. H.1). The legal description for TL 1200 states that the north boundary of TL 1200 is the northerly line of the James F. Bybee DLC extending westward to the "easterly boundary of Multnomah Channel" – not to the NW corner of the James F. Bybee DLC and not to the meander line. Thus, the plain text of TL 1200's legal description (Ex. B.8) as depicted on the tax lot map (Ex. H.1) undermines the applicant's argument that the "easterly boundary of Multnomah Channel" should be interpreted to mean the meander line.

While the applicant/appellant's post-hearing submissions include information about how state and federal agencies recon their ownership of the bed and banks under and near water bodies, historic maps, current tax lot maps, and deeds related to the James F. Bybee DLC, none of this information serves to expand the size of TL 1200. None of the appellant's post-hearing submissions, as a matter of law, are legally sufficient to expand upon what was originally conveyed in the 1968 bargain and sale deed (Ex. A.3). While TL 1200 could possibly be enlarged through a quiet title or some other Circuit Court action, the record does not include any such documents. To the extent that TL 1200 could under common law be expanded beyond the legal description in the 1968 bargain and sale deed (Ex. A.3), again, there is no evidence or argument that TL 1200 has been enlarged under common law. The most that can be concluded from the record in this case is that the grantors in 1968 could possibly have claimed a right to a larger area

than what is described in the bargain and sale deed, had they chosen to do so. As things stand, however, the grantors only conveyed up to the "easterly boundary of Multnomah Channel" and not to the west boundary of the James F. Bybee DLC. Consequently, the area of TL 1200 then and now is defined by the legal description for Parcel I in the 1968 bargain and sale deed, and nothing the applicant/appellant has provided is legally sufficient to enlarge upon that legal description.

One additional legal argument merits discussion. The applicant's attorney argued in the appeal (Ex. D.1) that "the [Director's] Decision fails to account for any permits that the County has issued for use and/or improvement of either Lot 1100 or Lot 1200 … such permit issuance generally estops the County from disclaiming the legal lot status of the underlying unit of land." Ex. D.1, citing *Gansen v. Lane County*, __Or LUBA__ (slip op. Feb 22, 2021, LUBA No. 2020-074). Presumably this argument refers to building permits the County previously been granted for construction of buildings and other improvements on TL 1100 (TL 1200 is undeveloped).

There are several problems with this argument. First, the hearings officer's decision at issue in *Gansen* ignored the legal lot determination that was rendered by Lane County as part of the building permit process. Lane County apparently did not have a formal legal lot verification process, and legal lot verification occurred in Lane County as part of building permit review. By contrast, Multnomah County's building permit process does not include a legal lot verification function. Instead, the present proceeding is the formal legal lot verification process that was lacking in Lane County.

Second, the record of this proceeding does not include any building or other permits upon which the applicant bases his estoppel argument. Consequently, there is no evidentiary basis for concluding that prior building and other permits confirmed the legal lot of record status of TL 1100. That is not surprising because the parcel is zoned EFU, where agricultural-exempt structures do not generally require building permits. From this, the Hearings Officer concludes there is no basis for an estoppel argument from any prior permits the County may have issued in the past for TL 1100.

In conclusion, no credible evidence supports the applicant's argument that the area of TL 1200 is larger than what is described in the 1968 bargain and sale deed (Ex. A.3). The meander line depicted on the County's property tax maps (Exs. H.1 & H.15) does not equate to the "easterly boundary of Multnomah Channel" as that term is used in the legal description for TL 1200 (Exs. A.3 & B.8). Nor is there any credible evidence that TL 1200 has ever been larger than 1.39 acres. The only evidence in the record shows that, at the time of creation, TL 1200 was ~1.39 acres (Ex. A.3 & I.2) and, with the removal of the NW Sauvie Island Road right-of-way, is now 0.81 acres (Exs. B.6 & H.14). From this credible and compelling evidence, the Hearings Officer concludes that at the time of its creation (1968) and today, TL 1200 is smaller than 2 acres and did not (and does not) qualify as a stand-alone legal lot of record under MCC 39.3005(B).

D. Effect of MCC 39.3070. Because the Hearings Officer concludes that TL 1200 was and remains smaller than the 2-acre minimum required for lots in the F-2 zone, MCC

39.3070(A) comes into play. This is an additional set of requirements for legal lots in the County's EFU zone and was the basis for the condition that the applicant challenges in this appeal. In particular, the condition requires:

> 1. Prior to Land Use Planning approving any development, building permit, zoning review, T1, T2 or T3 permit, the units of land contained in tax lots 2N1W21-01100 and 2N1W21-01200 shall be consolidated into a single parcel. The property owner or their representative shall apply for a Lot Consolidation pursuant to MCC 39.9200 before consolidating these two units of land. Once the two units of land are consolidated into a legal parcel, the parcel will be a Lot of Record.

Ex. C.3, p. 2.

The condition is based on MCC 39.3070(A) which adds a definitional requirement for a parcel to be deemed a legal Lot of Record in the EFU zone. In particular, if two contiguous parcels are individually smaller than 19 acres, and were under common ownership on February 20, 1990, then they must be consolidated to qualify as a single legal lot of record. The necessary implication of MCC 39.3070(A) is that, if the contiguous parcels are not consolidated, then they do not collectively or individually qualify as legal Lots of Record, and pursuant to MCC 39.1515, cannot be approved for any development. In other words, the owner would have to affirmatively consolidate the two contiguous parcels to obtain a legal Lot of Record status for the consolidated parcel.

To be clear, nothing in the Multnomah County Code that has been raised in this proceeding requires the aggregation of TL 1100 with TL 1200 or aggregates them by operation of law. Instead, based on the foregoing code provisions, the Director concluded that TL 1100 and TL 1200, if consolidated by the owner, would qualify as a single legal Lot of Record under MCC 39.3070(A). Consolidation would then qualify the combined property for land use approvals and building permits. Absent the applicant consolidating the two parcels pursuant to MCC 39.9200, the implication of the condition is that the County would not approve any development or building permits for either TL 1100 or TL 1200.

LUBA has addressed the question of whether mandatory aggregation requirements are lawful and concluded they violate ORS 92.017 if the local code requires aggregation of two otherwise separate lots. *See Kishpaugh v. Clackamas County*, 24 Or LUBA 164, 172 (1992). However, in the same line of cases, LUBA recognized that nothing in ORS 92.017 precludes or preempts local ordinances that, while acknowledging separately created parcels, limits their development potential. As LUBA put it:

> …a local government's obligation to recognize lawfully created lots as separately transferrable units of land does not mean a local government must also allow each such lawfully created lot to be developed separately. To the contrary, ORS 92.017 does not preclude a local government from imposing zoning or other restrictions which directly or indirectly require that two or more lawfully created lots be combined for purposes of development.

Campbell v. Multnomah County, 25 Or. LUBA 479, 482 (1993), *citing Kishpaugh v. Clackamas County*, 24 Or LUBA at 172-73.

A close reading of MCC 39.3070(A) reveals there is no requirement to consolidate separate legal lots under common ownership. The provision only affects contiguous parcels under common ownership as of February 20, 1990 where one or both of the parcels is substandard (less than 19 acres) and precludes their being deemed legal Lots of Record unless they are consolidated. MCC 39.1515 simply prohibits the County from approving development or building permits for parcels that are not legal Lots of Record. Again, nothing in the County's Code consolidates contiguous lots as a matter of law. As reflected in the challenged condition, the County simply takes the position that if the owner/applicant wants to develop either or both TL 1100 and 1200, the owner would first have to aggregate them. The lot consolidation does not happen by operation of law under the Code; consolidation would be a voluntary act by the owner/applicant.

Based on the foregoing, the Hearings Officer sees nothing unlawful in the challenged condition, nor does he perceive any factual or legal error in the Director's decision, with one inconsequential exception. The Director concluded that TL 1200 was created by Circuit Court decree as part of the probate of Rose Howell Estate in 1967. That 1967 order (Ex. B.9), however, did not convey or create any parcels of land. As previously explained, TL 1100 was created at the same time as TL 1200 when the 1968 bargain and sale deed (Ex. A.3) was executed and recorded with the separate legal descriptions for what are now TLs 1100 and 1200.

Based on this legal error, the Director concluded that TL 1200 was disqualified from being a legal lot of record under MCC 39.3070(D)(4) as "an area of land created by court decree." As previously explained, the reason TL 1200 is disqualified from being a separate stand-alone legal Lot of Record is the fact that it was under 2 acres at the time of its creation in 1968. In any event, there is nothing inherently unlawful about the challenged condition, and it reflects the substance of MCC 39.3070(A). Even though the Director's legal basis for concluding that TL 1200 was not a legal Lot of Record was erroneous, the conclusion was correct, but for a different reason.

IV. CONCLUSION AND DECISION:

Based on the foregoing, the Hearings Officer denies the appeal and affirms the Director's August 6, 2021 decision (Ex. C.3) that finds TL 1100 and 1200, if combined, would constitute a single legal lot of record. This conclusion compels approval of the application with a condition that, before TLs 1100 and 1200 can be deemed a single legal Lot of Record and therefore eligible for building or development permits, they have to be consolidated. This conclusion is reflected in the following condition:

1. Prior to Land Use Planning approving any development, building permit, zoning review, T1, T2 or T3 permit, the units of land contained in tax lots 2N1W21-01100 and 2N1W21-01200 shall be consolidated into a single

parcel. The property owner or their representative shall apply for a Lot Consolidation pursuant to MCC 39.9200 before consolidating these two units of land. Once the two units of land are consolidated into a legal parcel, the parcel will be a Lot of Record.

Date of Decision: November 23, 2021.

By: _____
Daniel Kearns,
Land Use Hearings Officer

Notice of Appeal Rights

This is the County's final decision on this application and appeal. Anyone with standing may appeal any aspect of the Hearings Officer's decision, to the Oregon Land Use Board of Appeals within 21 days of the date of this decision pursuant to ORS Chapter 197.

Exhibit List for T2-2021-14361

Exhibit #	Description	Date
A.1	General Application form	02.17.2021
A.2	Title Records Report from Ticor Title	02.17.2021
A.3	Bargain and Sale Deed, recorded April 11, 1968 in Book 611 pages 1616 and 1617	02.17.2021
A.4	Transfer on Death Deed, recorded September 10, 2018, 2018-126304	02.17.2021
A.5	Toll Form	07.02.2021
A.6	Amended General Application form to include map tax-lot (2N1W21-01200)	07.02.2021
A.7	Permission Letter from Mabel Dudley Estate for Lot of Record Verification review (tax-lot #1200)	07.06.2021
B	**Staff Exhibits**	**Date**
B.1	Assessment and Taxation Property Information for 2N1W21-01100 (Alt Acct#R971210140)	02.17.2021
B.2	1962 Zoning Map for 2N1W21-01100	06.04.2021

B.3	Parcel Record Card tax-lot (2N1W21-01100)	03.23.2021
B.4	Deed recorded April 12, 1962 in Book 2111, Pages 178 and 179	03.23.2021
B.5	Deed recorded March 12, 1968 in Book 608, Pages 1086 and 1087	03.23.2021
B.6	Assessment and Taxation Property Information for 2N1W21-01200 (Alt Acct#R971210150)	07.01.2021
B.7	Parcel Record Card tax-lot (2N1W21-01200)	07.01.2021
B.8	Deed description for tax-lot (2N1W21-01200)	07.01.2021
B.9	Probate Department, Order Distribution Book 1251, Page 615	07.27.2021
B.10	Map showing contiguous property ownerships for tax lots adjacent to 2N1W21 – 01100.	07.27.2021
C	**Administration & Procedures**	**Date**
C.1	Complete Letter	03.19.2021
C.2	Opportunity to Comment and mailing list	04.02.2021
C.3	Administrative decision and mailing list	08.06.2021
D	**Documents submitted Pre-Hearing**	**Date**
D.1	Notice of Appeal form and supporting documents	08.19.2021
D.2	Notice of Public Hearing	08.19.2021
D.3	Appellant Letter to Hearings Officer regarding Public Hearing Notice	09.02.21
D.4	Notice of Public Hearing	09.13.2021
H	**Documents submitted at Hearing**	**Date**
H.1	2N1W21 Tax Map	10.08.21
H.2	Certificate of Death recorded at 2019-13046	10.08.21
H.3	1966 Tax Map used as October 5, 1977 Zoning Map for 2N1W21B	10.08.21
H.4	1978 Tax Map for 2N1W15, 16, 21, 22	10.08.21
H.5	October 6, 1977 Zoning Map for 2N1W21B	10.08.21
H.6	EFU Zoning Regulations w/Lot of Record Requirements	10.08.21

H.7	Zoning Ord Lot Sizes 1964-6-18	10.08.21
H.8	Zoning Ord Lot Sizes 1968-5-212	10.08.21
H.9	Probate Department, Order Distribution Book 1251, Page 615 and Agreement	10.08.21
H.10	T2-2021-14361 Staff Memorandum	10.08.21
H.11	1964 Zoning Districts from Applicable Zoning Code	10.08.21
H.12	Bybee DLC Information	10.08.21
H.13	T2-2019-12723 Miller Poehler Decision	10.08.21
H.14	Mult Co Map 2N1W21	10.08.21
H.15	Lot 1200 Area Map	10.08.21
I	**Documents submitted Post-Hearing**	**Date**
I.1	Appellant Letter to the Hearings Office	10.14.21
I.2	T2-2021-14361 Staff Memorandum	10.22.21
I.3	Email Discussion between DSL & LUP	10.22.21
I.4	Appellant Letter to the Hearings Officer	10.22.21
I.5	T2-2021-14361 Appellant Declaration with Exhibits 1-11	10.08.21
J	**Documents submitted Post-Hearing Response**	**Date**
J.1	Appellant Letter to the Hearings Office	11.5.21
K	**Documents submitted Post-Hearing Rebuttal**	**Date**
K.1	Appellant Final Argument	11.12.21