

BEFORE THE LAND USE BOARD OF APPEALS
OF THE STATE OF OREGON

PATRICK MAHER,
Petitioner,

vs.

MULTNOMAH COUNTY,
Respondent.

LUBA No. 2021-121

FINAL OPINION
AND ORDER

Appeal from Multnomah County.

Ty K. Wyman filed the petition for review and argued on behalf of petitioner. Also on the brief was Dunn Carney, LLP.

Katherine Thomas filed the response brief and argued on behalf of respondent. Also on the brief was Jenny M. Madkour.

RYAN, Board Member; ZAMUDIO, Board Chair; RUDD, Board Member, participated in the decision.

AFFIRMED

04/08/2022

You are entitled to judicial review of this Order. Judicial review is governed by the provisions of ORS 197.850.

NATURE OF THE DECISION

Petitioner appeals a lot of record verification decision by the county.

FACTS

Petitioner applied to the county to verify the legal lot status of two adjacent units of land zoned Exclusive Farm Use (EFU).¹ The decision, the parties, and we refer to those units of land as “Tax Lot 1100” and “Tax Lot 1200.”² The areas of land designated Tax Lot 1100 and Tax Lot 1200 were created by deed in 1968. At that time, the units of land were zoned Agriculture, Grazing, Horticulture, and Timber Growing (F-2), and the F-2 zone required a minimum parcel size of two acres.

Multnomah County Code (MCC) 39.3005 provides, in part:

“(A) An area of land is a ‘Lot of Record’ if it meets the standards in Subsection (B) of this Section and *meets the standards set forth in this Part for the Zoning District in which the area of land is located.*”

¹ Petitioner initially applied to verify the legal lot status of Tax Lot 1100 but subsequently amended the application to include Tax Lot 1200. Record 4.

² Tax lots are created by the local assessor’s office, and the fact that a unit of land is a tax lot does not necessarily mean that it is a lawfully created lot or a lot of record. *Beaumont-Wilshire Neighbors v. City of Portland*, 68 Or LUBA 393, 402 n 5 (2013); *Resseger v. Clackamas County*, 7 Or LUBA 152, 156 (1983) (“Tax lots mean nothing as far as land use planning is concerned. They are but lines of convenience for owners and assessor’s office use.” (Citing *Thede v. Polk County*, 3 Or LUBA 335, 340 (1981).)).

1 “(B) A Lot of Record is a parcel, lot, or a group thereof that, when
2 created or reconfigured, either *satisfied all applicable zoning*
3 *laws* and satisfied all applicable land division laws, or
4 complies with the criteria for the creation of new lots or
5 parcels described in MCC 39.9700. Those laws shall include
6 all required zoning and land division review procedures,
7 decisions, and conditions of approval.” (Emphases added.)

8 For property zoned EFU, MCC 39.3070 further provides, in part:

9 “(A) In addition to the standards in MCC 39.3005, for the purposes
10 of the EFU district a Lot of Record is either:

11 “(1) A parcel or lot which was not contiguous to any other
12 parcel or lot under the same ownership on February 20,
13 1990, or

14 “(2) A group of contiguous parcels or lots:

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

17 “(b) Which, individually or when considered in
18 combination, *shall be aggregated* to comply
19 with a minimum lot size of 19 acres, without
20 creating any new lot line.” (Emphasis added.)

21 Tax Lot 1100 is approximately 20.05 acres and includes a dwelling and
22 outbuildings. Tax Lot 1200 is vacant. The exact size of Tax Lot 1200 is disputed,
23 with petitioner having argued during the proceedings below that it was either 3.52
24 acres or 4.11 acres when it was created in 1968 and the hearing officer having

1 concluded that was less than the two-acre minimum parcel size in the F-2 zone
2 when it was created in 1968.³ Record 9, 20, 50.

3 The hearings officer approved the lot of record verification request on the
4 condition that, prior to the county planning department issuing any building or
5 development permits or other decisions for either unit of land, the owner of the
6 property must apply to consolidate Tax Lot 1100 and Tax Lot 1200 into a single
7 lot of record pursuant to the procedure in MCC 39.9200.

8 This appeal followed.

9 **FIRST ASSIGNMENT OF ERROR**

10 The central issue in the first assignment of error is whether the hearings
11 officer correctly concluded that Tax Lot 1200 was less than two acres in size
12 when it was created in 1968, which turns on the location of the western boundary
13 of Tax Lot 1200. The 1968 deed described Tax Lot 1200 as follows:

14 “The northerly one-third of the following described real property: A
15 tract of land located in Section 21, Township 2 North, Range 1 West,
16 W.M., in the County of Multnomah, State of Oregon, more
17 particularly described as follows:

18 “Beginning at a point at which the easterly boundary of Gillihan
19 Road, Multnomah County Road No. 1438, intersects the northly line
20 of the James F. Bybee [Donation Land Claim (DLC)]; thence
21 southerly along the easterly boundary of said county road to Howell
22 Park County Road No. ____; thence south 69° 24’ west *to the easterly*
23 *boundary of Multnomah Channel (also known as Willamette*

³ The hearings officer concluded that Tax Lot 1200 is approximately one-eighth of an acre.

1 *Slough*); thence northerly along the easterly boundary of Multnomah
2 Channel (also known as Willamette Slough) to a point where said
3 easterly boundary of said Multnomah Channel (also known as
4 Willamette Slough) intersects an extension of the northly line of the
5 James F. Bybee DLC; thence easterly to the point of beginning.”
6 Record 154 (emphasis added).

7 The 1968 deed creating the two units of land described the western
8 boundary of Tax Lot 1200 as “the easterly boundary of Multnomah Channel.”
9 During the proceedings before the hearings officer, petitioner argued that the
10 “easterly boundary of Multnomah Channel” was the “meander line of the
11 Multnomah Channel,” which petitioner argued was also the western boundary of
12 the James F. Bybee DLC, and that Tax Lot 1200 was 3.52 acres.⁴

13 County planning staff communicated with the Department of State Lands
14 (DSL), which confirmed that DSL’s ownership of the bed of the Multnomah
15 Channel begins at the “mean low water” line on each side of the channel. Record
16 29. Petitioner then argued that the “mean low water” line of the channel was
17 located at the western boundary of an area that was leased *to* DSL *by* a previous

⁴ The hearings officer rejected petitioner’s argument and evidence that the “meander line of the Multnomah Channel” was the western boundary of Tax Lot 1200, reasoning that “the meander line is fixed in place by survey and does not move as the water body avulses and accretes.” Record 11. The hearings officer similarly rejected, based on the plain language of the deed that referenced the “easterly boundary of Multnomah Channel,” petitioner’s argument that the western boundary of the James F. Bybee DLC was the western boundary of Tax Lot 1200. Record 11-12. Petitioner does not challenge those findings.

1 owner of Tax Lot 1200 and that, based on that western boundary, Tax Lot 1200
2 totaled 4.11 acres. Record 20.

3 In a portion of their first assignment of error, petitioner argues that the
4 hearings officer's conclusion that Tax Lot 1200 was less than two acres when it
5 was created by deed in 1968 is not supported by substantial evidence in the whole
6 record and that the findings are inadequate to explain why the hearings officer
7 chose not to rely on petitioner's evidence regarding the size of Tax Lot 1200. In
8 the petition for review, petitioner characterizes that evidence as a 1999 lease *from*
9 a prior owner of Tax Lot 1200 *to* DSL of an additional approximately 66,000-
10 square-foot area. Petitioner argues that that evidence demonstrates that Tax Lot
11 1200 is as large as 4.11 acres and that the hearings officer failed to explain why
12 they chose not to rely on that evidence.

13 In the response brief, the county disputes that the documents which are
14 described in the petition for review and at Record 20, and which themselves
15 appear at Record 23 to 26, are a lease *from* a prior owner of Tax Lot 1200 *to* DSL
16 or are a lease at all. Rather, the county explains, the documents at Record 23 to
17 26 evidence that a lumber company applied to DSL to lease submerged land in
18 the Multnomah Channel from DSL and that, as the upland owner, the prior owner
19 of Tax Lot 1200 had a right of first refusal to lease that land from DSL pursuant
20 to ORS 274.040. The document at Record 25 is the prior owner's (the upland
21 owner's) confirmation of their intent to lease the property from DSL and assign
22 their lessee rights to the lumber company. We agree with the county that

1 petitioner's understanding of the documents at Record 23 to 26 is not accurate
2 and that the county's characterization of the documents undercuts petitioner's
3 argument that the evidence in the record supports a conclusion that Tax Lot 1200
4 is 4.11 acres.⁵

5 The hearings officer concluded that petitioner failed to present any
6 evidence regarding the location of the mean low water line of the Multnomah
7 Channel and that the only credible evidence in the record regarding the size of
8 Tax Lot 1200 was the evidence provided by the county's planning staff. As noted,
9 the evidence that petitioner cites to support its argument does not demonstrate
10 that Tax Lot 1200 is more than two acres. Accordingly, petitioner's argument
11 under this portion of the assignment of error provides no basis for reversal or
12 remand of the decision.

13 In another portion of the first assignment of error, petitioner argues that the
14 hearings officer failed to determine whether Tax Lot 1200 is a "lot," as that term
15 is defined in MCC 39.2000. MCC 39.2000 defines "lot" as follows:

16 "A unit of land created by a subdivision of land. Depending upon
17 the context in which the term appears in this Chapter, a Lot may also
18 mean a lot, parcel (result of partitioning), unit of land (lawfully
19 created by deed or land sale contract) or area of land owned by or
20 under the lawful control and in the lawful possession of one distinct
21 ownership."

⁵ At oral argument, petitioner conceded that the county's characterization of the documents and evidence was correct and that petitioner's characterization of the documents as set forth in the petition for review was incorrect.

1 Petitioner’s argument is difficult to follow, but we understand petitioner to argue
2 that determining whether the units of land are “lots of record,” as defined in MCC
3 39.3005, necessarily required a determination of whether the units of land are
4 “lots.”

5 The county responds that petitioner failed to raise that issue prior to the
6 close of the initial evidentiary hearing and may not raise it for the first time at
7 LUBA. ORS 197.797(1); ORS 197.835(3). The county also responds that Tax
8 Lot 1200 meets the definition of “lot” because that definition includes any “area
9 of land owned by or under the lawful control and in the lawful possession of one
10 distinct ownership.” The county points out that there is no dispute that Tax Lot
11 1100 and Tax Lot 1200 are “area[s] of land owned by * * * and in the lawful
12 possession of one distinct ownership.”

13 Petitioner does not identify any place in the record where the issue of
14 whether Tax Lot 1200 is a “lot” was raised, and we agree with the county that
15 petitioner may not raise that issue for the first time here. However, even if the
16 issue was raised, petitioner has not established that Tax Lot 1200 is not a “lot”
17 or, more importantly, why the stand-alone definition of “lot” has any bearing on
18 the determination that the hearings officer made, which is whether the units of
19 land are “lots of record,” a distinct term under MCC 39.3005.

20 The first assignment of error is denied.

1 **SECOND ASSIGNMENT OF ERROR**

2 In their second assignment of error, petitioner challenges the hearings
3 officer's application of MCC 39.3070(A) to require the property owner to apply
4 to consolidate Tax Lot 1100 and Tax Lot 1200. MCC 39.3070(A) requires the
5 aggregation of contiguous lots when a property is under 19 acres and is
6 contiguous to a property that was held in the same ownership on February 20,
7 1990. Aggregated properties can maintain their existing property lines but are
8 treated as a single "lot of record" for development purposes.

9 According to petitioner, the hearings officer's conclusion that Tax Lot
10 1200 was not lawfully created because it failed to meet the two-acre minimum
11 parcel size when it was created by deed in 1968 means that Tax Lot 1200 is not
12 a "lot," as that term is defined in MCC 39.2000; is therefore not a "contiguous
13 * * * lot[]" within the meaning of MCC 39.3070(A)(2); and is therefore not
14 required to be aggregated with Tax Lot 1100. As petitioner explains it, only two
15 or more lawfully created contiguous "lots" may aggregate into a single lot of
16 record for development purposes and, because the hearings officer concluded that
17 Tax Lot 1200 was not lawfully created, no aggregation can be required.

18 The county again responds that petitioner failed to raise any issue during
19 the initial evidentiary proceedings that, if Tax Lot 1200 was not lawfully created
20 because it was below the two-acre minimum parcel size, it was not a "lot," as
21 defined in MCC 39.2000, and not subject to aggregation under MCC 39.3070(A).
22 The county also responds that Tax Lot 1200 qualifies as a "lot," as that term is

1 defined in MCC 39.2000, because there is no dispute that it is an “area of land
2 owned by * * * and in the lawful possession of one distinct ownership.”

3 For the reasons explained by the county, we agree with the county that
4 petitioner’s argument that the hearings officer erred in applying the aggregation
5 requirement of MCC 39.3070(A) provides no basis for reversal or remand
6 because petitioner has not established that Tax Lot 1200 is not a “lot” within the
7 meaning of MCC 39.2000 or MCC 39.3070(A).

8 The second assignment of error is denied.

9 The county’s decision is affirmed.