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Via email: lup-hearings@multco.us and lup-submittals@multco.us

Multnomah County Land Use Hearings Officer
c/o Land Use Planning Division
1600 SE 190th Avenue
Portland, OR 97233-5910

Re: Lot of Record Verification, 16900 NW Sauvie Island Road
County Case File No.: T2-2022-15447
Our File No.: MAH16.4

Dear Hearings Officer:

We represent the applicant, Patrick Maher, in the referenced matter. As I noted at hearing, we appreciate your engagement on the issues raised by staff's August 29th decision (the Staff Decision) and my September 12th appeal of the same.

All participants seem to agree that MCC 39.3070.A.2.b governs the applicant's request to have Lot 1100 deemed a lot of record. Otherwise stated, the Staff Decision concluded (at p. 5) that Lot 1100 "complied with general Lot of Record requirements," so was lawfully created, denying this request based solely on its application of the cited code provision. The hearing generated robust discussion of context surrounding that provision. I discuss below some of that context, but start by returning to my first basis of appeal.

MCC 39.3070.A.2 raises the following question: does Lot 1100 constitute "[a] group of contiguous parcels or lots: . . . (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"? Applying maxims of statutory construction, I find the answer to be "no."

I assume that Lot 1100 constitutes a "lot" or "parcel" as defined by county code, so begin analysis with the phrase "which, individually or when considered in combination, shall be aggregated to comply with a minimum lot size of 19 acres." This clause is capable of multiple interpretations. *I.e.*, it could mean that an applicant must aggregate an individual unit of land with an adjoining unit only as necessary to meet the 19-acre minimum size. If we assume that the purpose of the aggregation requirement is to meet this minimum size, then this interpretation is reasonable. Because Lot 1100 does not need aggregation to meet that standard, MCC 39.3070.A.2.b would be inapplicable.

Staff asserts that the examples depicted at MCC 39.3070.A clarify the code-writers' contrary intent, which is to aggregate adjacent parcels even if only one of them is less than 19

acres. If we assume for purposes of argument that to be correct, MCC 39.3070.A.2 remains inapplicable to the present case.

A basic rule of statutory construction is to "if possible, . . . give effect to all [terms]." ORS 174.010. The County approved, in Case File No. T2-2021-14361, lot of record status for the unit of land described as Lots 1100 and 1200 combined, conditioned on subsequent approval of a Lot Consolidation. County staff subsequently informed the applicant that a necessary precondition to Lot Consolidation is evidence that "[t]he subject parcels are in the same ownership." See the first enclosure herewith, Aug. 18, 2022 "Notes in PF-2022-15912," at p. 2.

No participant in this process disputes the fact that Lot 1100 and Lot 1200 are in different ownerships. Accordingly, even if we assume that County staff correctly deems MCC 39.3070.A.2 otherwise applicable, that provision could be given effect only if those units of land remain in the same ownership.

To be clear, the foregoing analysis of the code text suffices for the Hearings Officer to conclude that the Staff Decision denied the application in error because it misconstrued MCC 39.3070.A.2.b. That said, staff tendered at hearing many assertions about the code provision. Because they bear out its errant decision, I quote those assertions and comment on them below.

> Hearings Officer: "What are the hurdles in getting 1200 and 1100 consolidated. I mean they're in different ownership now. It could only happen if there is cooperation among the two owners. I mean, if there isn't, then there's no way out of this box?"
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> Estrin: "Excuse me, Hearings Officer, staff planner Lisa Estrin. It was represented to the County in the last case and it was stated earlier in this case that Mr. Robideau is the grandson of Mabel Dubley. And, Mr. Robideau represented to us in the last case that he was the trustee of the Estate of Mabel Dudley. So, it seems like it is feasible for 1200 to be placed into Mr. Robideau's ownership, so that it can be consolidated."

Staff's assertion that it is feasible to complete the consolidation of Tax Lots 1100 and 1200 is neither relevant to the Hearings Officer's decision nor proven as a factual matter. As such, the assertion provides no guidance.

The assertion is irrelevant because nothing in the text of MCC 39.3070.A suggests that aggregation depends on feasibility. Indeed, that code provision does not direct an applicant to do or refrain from doing any particular thing. Rather, it simply describes circumstances that may or may not exist. In suggesting that it mandates aggregation of adjoining lots only if feasible, staff adds words to the code that the policy-makers did not.

Then, even if we assume for purposes of argument that the feasibility of consolidation is relevant to this application, staff does not establish such feasibility exists in this instance. I describe this more below in response to other staff assertions.

> Hearings Officer: "So, . . . since I've got you on the line here, what if 1100 is declared a legal lot of record ? What does that do to 1200? Does that change its status? Does that make it developable?"
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> Estrin: "No."
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> Hearings Officer: "What would you expect to be its status?"
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> Estrin: "It would remain a piece of land that was not lawfully created and is not a lot of record."
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> Hearings Officer: "So, it would be undevelopable?"
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> Estrin: "Yes."
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> Hearings Officer: "I guess we call that a remnant. Assume it's undeveloped, 1200."
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> Estrin: "Correct."
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> Hearings Officer: "But, recognizing 1100 as a legal lot would not change 1200's status and wouldn't make it easier to get that declared as a legal lot, is that right?"
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> Estrin: "Excuse me, I didn't follow that."
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> Hearings Officer: "So, I guess the county would probably have a policy interest in not letting 1200 be deemed a legal lot, because it could potentially be deemed developable. The County does not want to see 1200 declared a legal lot in itself."
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> Johnson: "Mr. Hearings Officer, I would just say the County has no position about the future status of Tax Lot 1200. We have no interest in directing any outcome regarding Tax Lot 1200."
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> Hearings Officer: "Well, my question goes to a decision on 1100; does it have any other effects on lots it is supposed to be consolidated with? So, I think it's sort of a relevant question. If it's declared, as the applicant seeks, a legal lot and isn't consolidated, what's the status of this remnant, with which it was supposed to be consolidated?"

> Johnson: "And Ms. Estrin responded to that question. Basically, it remains a parcel of land that was unlawfully created and therefore has no development status."
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> Hearings Officer: "Okay, so that wouldn't change."

I tender two observations on the foregoing colloquy. First, Ms. Johnson's assertion that the County takes no position about the status of Tax Lot 1200 appears to directly contradict comments made later in the hearing by Ms. Estrin, *i.e.*, that the legal status of 1200 drives decision in this case.

Second, I take the Hearings Officer's comments to mean that County policy guides interpretation of code provisions. If I understand the comments correctly, then I do not contest them. To the extent one can discern policy behind MCC 39.3070.A, it is to prevent increased use/development of substandard units of land. As noted in the Staff Decision, Lot 1100 was lawfully created and exceeds the 19-acre minimum size set forth at MCC 39.3070.A.2.b. Accordingly, construing that code section in a manner to deny lot of record status to Lot 1100 is unnecessary to advance that policy.

> Estrin: "The lot of record criteria have been in place since the 1980's. I am sure that there are instances where people have had to purchase or work together with other property owners to place two pieces of land into common ownership to achieve a lot of record. So, it is feasible under the lot of record code under the same ownership to take the Estate of Mabel Dudley and Mr. Robideau and do a same ownership with the two units of land presently to achieve a lot of record by doing a percentage ownership. So, it could be such as the Estate of Mabel Dudley owns 12% of the consolidated parcel and Mr. Robideau owns the rest would achieve same ownership, with the estate owning say a certain percentage and Mr. Robideau owning the rest under same ownership. The other way would be a corporation, where the Estate of Mabel Dudley would own a certain percentage of stock in a corporation and Mr. Robideau would own the other. We've seen that. There's various ways to achieve this in ownership and we have seen various people work out things versus court cases."

As noted above, I find any evidence that it is feasible to consolidate Lots 1100 and 1200 irrelevant to application of MCC 39.3070.A; that text can be given effect only where the two units of land are presently in common ownership.

Even if we assume that it is relevant, the record does not bear out the foregoing comments by staff. In short, staff's assertion that common ownership is feasible assumes that the purpose of the Estate is to benefit Mr. Robideau alone. Staff references no evidence to that effect.

> Estrin: "We've recently had another lot of record decision by a Hearings Officer on a lot of record determination where a person bought a piece of land that was aggregated with a much larger piece. In that, the Hearings Officer upheld our determination that the smaller piece was not a lot of record."
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> Hearings Officer: "What about a situation where the smaller piece was not part of the application, because I think everyone here would agree that 1200 is not a lot of record."

With this comment, I believe the Hearings Officer recognizes the distinction between the present application and that referenced by staff. I agree that the cases are distinct and describe further below how.

> Staff: "Well, the code doesn't say that just because you've excluded it from the application that we don't look at it. We still have to look at the surrounding properties to see if on Feb. 20, 1990 something was under joint ownership. And, under the recent decision made by another Hearings Officer, the . . . it was in a similar situation. One parcel applied for a lot of record. The other parcel did not. We looked at the surrounding property ownership, and it was determined that they were aggregated together because on Feb. 20, 1990 the same property owners owned it."

MCC 39.1130.A undermines staff's assertion that the Hearings Officer is to "look" at surrounding properties. That provision lists the submittal requirements of a land use application, and starts with the following: "[a]n accurate legal description, tax account number(s), map and location of all properties that are the subject of the application." The applicant could have listed Lot 1200 as part of this application, but did not.

Neither does MCC 39.3070.A[1] suggest that this application empowers the County to mandate aggregation. Rather, it simply describes two circumstances – (1) noncontiguity with a parcel in common ownership on Feb. 20, 1990 or (2) contiguity and the ability to aggregate. All participants agree that the first circumstance does not pertain, *i.e.*, that 1100 and 1200 were in common ownership on that date.

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[1] "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 [a] group of contiguous parcels or lots . . .."

The second circumstance has two parts - contiguity with a parcel in common ownership on Feb. 20, 1990 and aggregation. As described above, applying principles of statutory interpretation, the "shall be aggregated" text can be given effect only where abutting units of land are presently under the same ownership. Staff's contrary application of that code provision in this case adds words to the code that simply do not exist.

> Hearings Officer: "So, that case, the Hearings Officer concluded they had already been aggregated by operation of law?"
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> Staff: "Yes."
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> Hearings Officer: "But that's not what you're suggesting here, that the legal status of these lots is that they are aggregated right now."
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> Staff: "Well, they are aggregated. That's what's causing the problem that they are not a lot of record. Because the aggregation has been broken, they need to be put back into the aggregation. And then, the problem becomes that 1200 does not comply with the first part of the lot of record code requirements of 39.3005; it's not lawfully created. And then, that's where the consolidation is needed to happen. Because 1200 doesn't meet 39.3005, it affects the lot of record of 1100."

More than any other comment made at hearing, the assertion that 1100 and 1200 are already aggregated by operation of law lays bare the errant manner of staff's administration of MCC 39.3070 to this owner.

First, in asserting that 1100 and 1200 are already aggregated by operation of law, staff contradicts directly assertions that it made in Case File No. T2-2021-14361. I enclose herewith staff's Aug. 6, 2021 decision on that application (to deem Lot 1100 and 1200 combined a lot of record). It concludes (at p. 6) that "[t]he two tax lots would aggregate into one Lot of Record if they were both lawfully established parcels." A necessary premise to this conclusion was that the units of land were <u>not</u> already aggregated.

Second, the context by which the applicant submitted either of the two lot of record verification applications contradicts staff's assertion at hearing that 1100 and 1200 are already aggregated by operation of law. As described in the Oct. 21, 2022 letter from Kevin Jacoby, the applicant has sought such verification simply because staff refuses to sign a LUCS to the effect that the code allows replacement of an existing garlic crop with cannabis (a position that, given the EFU zoning of the land, is clearly preposterous). Were the lots already aggregated, then staff would have had no reason to require lot of record verification.

> Hearings Officer: "I'd be interested in seeing that Hearings Officer decision, if it was a comparable fact situation. But, it sounds like you're suggesting that case hinged on the legal assumption that they were aggregated for purposes of considering whether there's a legal lot or not. So, these are considered aggregated now by operation law."
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> Estrin: "Yes, I would say."

The second enclosure herewith constitutes the decision that I understand staff to have referenced (County Case File No. T2-2022-15537). I find it distinguishable on at least two levels. First, it is a lot of record application for what would be analogous to Lot 1200 only in this context. Second, the decision hinged on definition of "same ownership." Again, no participant has asserted here that Lot 1100 and 1200 fall within that definition.

> Hearing Officer: "So, why couldn't the county take that position, that they are aggregated."
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> Staff: "That's the position we are taking, but it's not a Lot of Record because 1200 is not lawfully established and is not in the same ownership."
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> Hearings Officer: "But, it's deemed aggregated."
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> Staff: "Yes, the consolidation, if it was to take place, would fix the problem of the unlawful establishment."

Staff cites no law that puts the legality (or illegality) of establishment of Lot 1200 at issue in this case. The applicant did not designate it as part of the site; County staff cites no law by which it may, on its own authority, incorporate Lot 1200 as part of the subject site.

Staff provides no citation to law that would make the legal status of Lot 1200 relevant to the present application. I find no such law. Neither does staff identify the "problem" of the putative unlawful establishment, much less any authority the county possesses to fix such a problem within this process.

Beyond the simple matter of applying rules of statutory interpretation, the Staff Decision raises a taking issue. The Fifth Amendment prohibits the government from taking land without providing just compensation. My appeal noted that the Staff Decision (that Lot 1100, in and of itself, is not a Lot of Record) would effect such a taking.

The record demonstrates that staff would prohibit the applicant from undertaking a lawful agricultural use on a lawfully established EFU-zoned unit of land, unless the landowner conveys an interest in the land to his neighbor. Such a denial decision would violate the takings clause for three reasons.

First, under a line of cases beginning with *Nollan v. Calif. Coastal Comm'n*, 483 US 825 (1987), the courts have applied the takings clause to mandate that any condition placed on approval of use of land possess a nexus to the public policy purpose that would otherwise compel denial of the application. Staff, in effect, suggests that the Hearings Officer could condition approval of this application on transfer of a portion of the owner's interest therein to a neighbor.

At most, the purpose of MCC 39.3070.A is to limit development on EFU-zoned units of land under 19 acres in size. Requiring the owner to convey its neighbor an ownership interest in Lot 1100 has no apparent nexus to that purpose.

Second, under a line of cases that began with *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), the courts have found land taken where regulation leaves the owner with no economically beneficial use of the land. In denying this application, the County would deem an agricultural use (growing cannabis) unlawful on Lot 1100.[2] If an agricultural use is unlawful, then it is not clear to me what beneficial use the owner may make of this land.

Furthermore, ORS 92.018 prohibits arms-length sale of any unit of land that is deemed not lawfully established. Denial of the present application would render Lot 1100 unmarketable, thus of no value.

Third, in a line of cases that began with *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), the courts have found a taking where government regulation compels a landowner to acquiesce to physical occupation of his/her land. Staff's suggestion – that the code allows growing a farm crop on the land only if the owner transfers a portion of his interest therein to a neighbor – would have the effect of forcing such acquiescence.

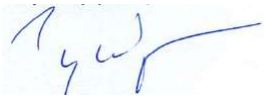
Of course, the Hearings Officer can avoid reaching the taking question by using principles of statutory construction to overturn staff's denial.

[2] The now-withdrawn LUCS states as such explicitly, citing MCC 39.4215, which reads as follows:

> No building, structure or land shall be used and no building or structure shall be hereafter erected, altered or enlarged in this base zone for the uses listed in MCC 39.4220 through 39.4230 when found to comply with MCC 39.4245 through 39.4260 provided such uses occur on a Lot of Record appears to prohibit any use whatsoever if Lot 1100 is determined not to be a lot of record.

The subject application warrants approval without condition. Thank you for your consideration.

Very truly yours,



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TKW:

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