

Department of Community Services
Land Use Planning Division
www.multco.us/landuse



1600 SE 190th Avenue, Portland OR 97233-5910 • PH. (503) 988-3043 • Fax (503) 988-3389

November 4, 2022

To: Hearings Officer, Daniel Kearns

From: Carol Johnson, Planning Director

RE: T2-2022-15447 Lot of Record Verification

The following is offered in response to the written appeal submitted by Ty Wyman on October 21, 2022.

The following terms are abbreviated for this response:

Lot of Record (LOR)

Exclusive Farm Use (EFU)

Date of Aggregation for contiguous lots under the same ownership (2/20/90)

This response is organized by specific points set forth in Mr. Wyman's letter which have been paraphrased in italics.

1. MCC 39.3070.A.2.b [39.3070 – LOR standards specific to EFU] governs LOR. Staff concluded that Lot 1100 “complied with general lot of record requirements,” so was lawfully created.

Appellant has completed just a portion of the LOR analysis by applying only the general LOR standards as set forth in MCC 39.3005. Tax Lot 1100 satisfied applicable zoning laws and applicable land division laws at the time of creation. The general test for verifying LOR status is met. However, the standards specific to EFU must also be applied.

MCC 39.3070.A states that in the EFU zone a parcel or lot must be either (1) NOT be contiguous to any other parcel or lot under the same ownership on 2/20/90, OR (2) a group of contiguous parcels or lots (a) which were held under the same ownership on 2/20/90, AND (b) which, individually or when considered in combination, shall be aggregated to comply with a minimum lot size of 19 acres, without creating a new lot line. MCC 39.3070.A.2.b.1 provides additional clarification by stating that each LOR proposed to be segregated from the contiguous group shall be a minimum of 19 acres using existing legally created lot lines and shall not result in any remainder individual parcel or lot, or remainder of contiguous combination of parcels or lots, with less than 19 acres in area.

T2-2021-14361 found that Tax Lots 1100 and 1200 were under the same ownership on 2/2/90. While Tax Lot 1100 meets the 19 acre minimum lot size, it cannot be segregated from the contiguous group comprised of Tax Lots 1100 and 1200, because Tax Lot 1200 is less than 19 acres and this would violate MCC 39.3070.A.2.b.1.

The Code is clear that the intent is to group contiguous lots or parcels under the same ownership on 2/20/90, regardless of minimum lot size. Segregation of the group is only possible when each parcel in the group meets the minimum lot size of 19 acres.

2. Assumption that Lot 1100 is a lot or parcel as defined by County code

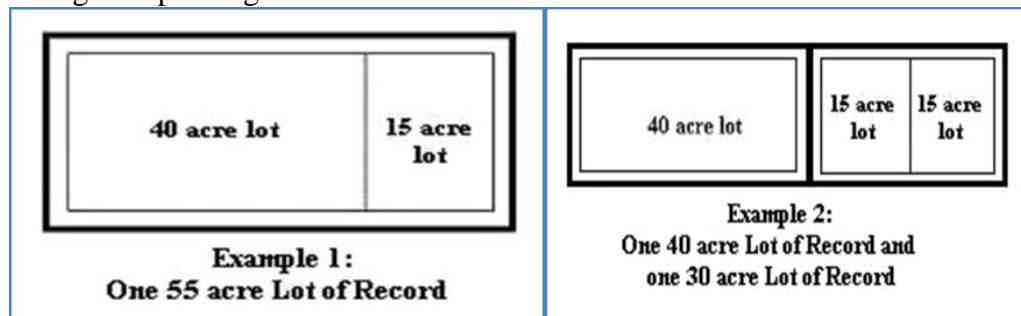
Per MCC 39.2000-Definitions -

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

Parcel – A unit of land created by a partitioning of land. Depending upon the context in which the term appears in this Chapter, Parcel and Lot may at times be used interchangeably. The term, Parcel, also includes a unit of land (lawfully created by deed or land sale contract).

3. Examples do not support staff's interpretation that aggregation is applied if only one of them is less than 19 acres.

MCC 39.3070.A.2.3 refers to Figure 1 which provides three examples of LORs based on various groups of contiguous parcels. MCC 39.3070.A.2.b.1 refers to examples 1 and 2 in Figure 1. In particular, Example 1 clarifies that when any individual lot or parcel is less than 19 acres, it is aggregated with a contiguous parcel greater than 19 acres which would otherwise be able to meet the minimum lot size.



MCC 39.3070.A.2.b.2 grants an exception to the 19 acre minimum lot size for a LOR if all contiguous parcels under the same ownership on 2/2/90 were under 19 acres.

4. Argues that Lots 1100 and 1200 are under different ownership

The amended general land use application for T2-2021-14361 specifically included both Tax Lots 1100 and 1200 was signed by Mr. Robideau as the property owner for both.

5. Argues feasibility of consolidation condition from prior decision

The feasibility of a condition of approval from a previous land use decision is not the subject of this land use application, and is not eligible for consideration as part of this appeal.

6. MCC 39.1130 [Complete application requirements] undermines staff's assertion that surrounding properties must be looked at.

This is a list of submittal requirements that when provided constitute a “complete” application. It does not limit the information that staff may examine when evaluating an application. In order to evaluate the

LOR requirements specific to EFU, property ownership for contiguous parcels on 2/2/90 must be reviewed.

7. Ability rather than mandate to aggregate

The aggregation requirement for parcels zoned EFU was initially imposed in 1975 and had the effect of aggregated contiguous lots or parcels whenever they came under the same ownership. In 2002 per Ordinance 982, the County established the operative date of 2/2/90 for determining same ownership which allowed contiguous properties that came under the same ownership after that date to remain segregated. The Code does not say that contiguous lots under the same ownership on 2/2/90 COULD be aggregated if some other conditions are present. It states that contiguous lots under the same ownership on 2/2/90 SHALL be aggregated. Because the Code says "shall," we interpret that to mean aggregation must occur and there are no other options.

LUBA has addressed the question of whether mandatory aggregation requirements are lawful and concluded they violate ORS 92.017 if the local code requires consolidation of two otherwise separate legal 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 or lots, 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.”

The County's Lot of Record provisions comply with ORS 92.017. Properties that are aggregated remain discrete lots or parcels. A property owner may transfer a lawfully established lot or parcel that is part of an aggregated group to a different individual breaking the same ownership requirement. Unfortunately, this disrupts the Lot of Record and limit the development potential until the Lot of Record is restored.

In T2-2021-14361, the Hearings Officer and LUBA found that Tax lot 1200 was not a legally established unit of land. To resolve this issue, the property owner will need to rectify the situation. One option would be for Tax lot 1200 to be consolidated into Tax lot 1100 through the County's Lot Consolidation provisions. Other options may exist as well, but those potential future decisions are solely for the land owner to consider and not at issue in the matter to be decided here.