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

Multnomah County

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Notice of Hearings Officer Decision

Attached please find notice of the Hearings Officer's decision in the matter of **T2-2022-15447**, issued and mailed **11/25/2022**. This notice is being mailed to those persons entitled to receive notice under MCC 39.1170(D).

The Hearings Officer's Decision is the County's final decision and may be appealed to the State of Oregon Land Use Board of Appeals (LUBA) by any person or organization that appeared and testified at the hearing, or by those who submitted written testimony into the record.

Appeal instructions and forms are available from:

Land Use Board of Appeals
775 Summer Street NE, Suite 330
Salem, Oregon 97301

503-373-1265
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For further information call the Multnomah County Land Use Planning Division at: 503-988-3043.

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 a parcel zoned Exclusive Farm Use (EFU) in unincorporated Multnomah County, Oregon	**FINAL ORDER** **Maher Lot of Record** **(applicant's appeal)** **T2-2022-15447**

I. Summary:

This Order is the decision of the Multnomah County Land Use Hearings Officer denying the appeal and affirming the Director's August 29, 2022 Decision denying the applicant's request for legal lot of record verification for a ~20-acre parcel (TL 1100) zoned Exclusive Farm Use. TL 1100 would and could be deemed a lot of record if it were aggregated with the adjacent ~.81-acre parcel (TL 1200).

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
16900 NW Sauvie Island Rd.
Portland, OR 97231

Property.....Legal Description: Tax Lot 1100 in Section 21, Township 2 North, Range 1 West of the Willamette Meridian, Alternative tax acct: R971210140, Property ID: R325150.

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)

A single parcel is involved in this lot of record request abutting Sauvie Island Road in unincorporated Multnomah County (Ex. B.6). This the second time this case has been through the County process for lot of record review. The first time the request involved TL 1100 and 1200 (T2-2021-14361); this time the application involves only TL 1100, but the analysis remains the same. Both parcels were under common ownership on February 20, 1990 and apparently are still under common ownership. According to MCC 39.3070(A), all contiguous parcels that were under common ownership on February 20,

1990 "shall be aggregated" to be deemed a lot of record. The first time I approved the lot of record request with 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.

My first decision, which involved both TLs 1100 and 1200, was appealed to LUBA, which affirmed my conditional approval of the Lot of Record request. *See Maher v. Multnomah County*, LUBA No. 2021-121 (slip op April 8, 2022). LUBA's decision was not appealed further, but instead, the applicant returned to the County with a new application that included only TL 1100.

Some of the relevant background facts were not apparent in the record in the first proceeding but are included in this record, and I describe them here. TL 1100 is ~20.05 acres, and TL 1200 is ~0.8 acres. 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 and has at least until recently been actively farmed; whereas, TL 1200 is undeveloped.

The operator desires to change the crop to cannabis and requires a license from OLCC to establish a cannabis production facility. OLCC requires a Land Use Compatibility Statement (LUCS) before it will issue a license. Multnomah County, however, appears to have a policy that requires LUCS requestors to first obtain the necessary local land use approvals before the County will sign the LUCS. In this case, MCC 39.1515 precludes the County from issuing a land use or permit approval for any parcel that is not in full compliance with all applicable land use requirements. I conclude from this record that the County considers a LUCS a local land use approval that triggers MCC 39.1515. The LUCS, however, is not before me in this land use proceeding, and the status of the applicant's LUCS request is not clear from this record.

While this application does not include TL 1200 and the record of this proceeding does not include much about TL 1200, there is enough in this record to show that TLs 1100 and 1200 were both under common ownership on February 20, 1990 and at least until recently if not now. TL 1200 is 0.8 acres, well below the required minimum of 19 acres, and TL 1100 is slightly above it at 20.05 acres. The applicant, however, asserts that both TL 1100 and TL 1200 were and remain separate legal lots of record under the County's requirements. The presumptive implication of that position is that both are independently developable; however, TL 1200 is not part of this application.

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 filed on March 16, 2022 (Ex. A.1), seeking legal lot verification for just TL 1100. Following a Type II process, the County required the applicant to provide additional information before it would deem the application complete (Ex. C.1). Eventually, the applicant refused and requested the County to deem the application complete pursuant to ORS 215.427(2)(b) (Ex. A.8). The application was deemed complete as of May 11, 2022 (Ex. C.2). After that, the County issued notice of the proposal and solicited comments from property owners within the notice range (Ex. C.3). The only comment received on the proposal came from Metro and did not pertain to any of the applicable approval criteria (Ex. D.1).

The Director issued an August 29, 2022 decision denying the legal lot verification request for TL 1100 (Ex. C.4a). Unlike the first application, that included TL 1200, the Director this time did not fashion a condition approval but instead denied the legal lot verification for TL 1100, based on the following reference to the prior proceeding:

> The subject property, 2N1W21-01100 is not a Lot of Record in its current configuration because it has not been consolidated with 2N1W21-01200 as required by the Hearings Officer in T2-2021-14361 (Exhibit B.2) and as affirmed by the Land Use Board of Appeals (LUBA) (Exhibit B.3). (Ex. C.4a)

In short, the Director concluded that TLs 1100 and 1200, if consolidated would qualify as a single legal lot of record, consistent with the decision in the first proceeding. 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 collectively, they constitute a legal lot of record if aggregated. 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, and that appears to include the County's execution of the applicant's requested LUCS for his OLCC license to allow cannabis production.

III. Summary of the local proceeding and Record:

The applicant timely appealed the Director's decision (Ex. E.1), challenging the denial. The County issued notice of a September 23, 2022 public hearing (Ex. C.4b), but the applicant requested a continuance (Ex. E.2), and the hearing was held October 7, 2022. The October 7, 2022 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, I 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 my ability to decide the matter impartially, or otherwise challenged my jurisdiction. The applicant requested that the record be left open after the hearing for the submission of further legal argument.

At the hearing, Lisa Estrin, Land Use Planner for the County, provided a verbal summary of the Director's August 29th decision. The applicant/appellant appeared personally and through his attorney Ty Wyman, who requested that the record remain open following the hearing and agreed to toll the 150-day clock. No one else requested the opportunity to testify, and no new written comments were received into the record. At the hearing's conclusion, I 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, the applicant's attorney provided a memo summarizing his legal arguments as to why and how TL 1100 could be deemed a legal lot of record without actually consolidating it with TL 1200 (Ex. I.1). Basically, the applicant asserts that the only objective of MCC 39.3070(A) is to attain the minimum lot size of 19 acres, which TL 1100 meets. Because the addition of TL 1200 is not needed to achieve the minimum lot size, aggregation is not needed in this case. Alternatively, MCC 39.3070(A) establishes that the two parcels in this case are deemed aggregated by operation of law to constitute a single lot of record, and there is no need or requirement for the property owner to actually consolidate the two tax lots into one. From this, the applicant concludes that "construing [MCC 39.3070(A)] in a manner to deny lot of record status to Lot 1100 is unnecessary to advance that policy."

The applicant also states that "[n]o participant in this process disputes the fact that Lot 1100 and Lot 1200 are in different ownerships," with the implication that lot consolidation is not legally possible, and no such condition would be lawful. The applicant disputes staff's suggestion that the applicant simply needs to consolidate the two parcels to obtain approval, and points to staff's statement at the hearing that, in staff's view, the two parcels are already aggregated. To the applicant's way of thinking, if the two lots are already deemed aggregated by operation of law, there should be no further requirement that the owner(s) pursue a lot consolidation process to cement the aggregation, especially if they are under different ownership.

Staff provided written response rebutting the applicant's arguments (Ex. J.1), along with multiple background documents:

- Preapplication notes for the present application (Ex. I.2)
- Copy of the Director's first Maher decision (Ex. I.3)
- Copy of the Hearings Officer's decision in another lot of record case – Rossi, Case No. T2-2022-15527 (Ex. I.4)
- Letter from the applicant's cannabis law firm explaining the OLCC permitting background and how the OLCC rules suggest that execution of the LUCS was appropriate (Ex. I.5)

The applicant provided final written rebuttal (Ex. K.1) on November 11, 2022, 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. I find those criteria to be met, even though they are not specifically addressed in these findings. I also adopt 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.

Even though TL 1200 is not part of this application, I cannot ignore its existence and lotting history in conjunction with TL 1100. The record shows 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.4). From this, I conclude 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, TL 1100 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. <u>How big is TL 1100</u>? 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. B.10) at the time of creation in 1968. Evidence in the record shows that TL 1100 is 20.05 acres (Ex. B.1), and that TL 1200 is 0.81 acres (Ex. B.4). 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 (Exs. B.16 & B.17) when it was "created" in 1968. 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. TL 1200 is part of this inquiry because it was in common ownership with TL 1100 when the lots were "created" in 1968.

C. <u>How big was/is TL 1200</u>? Even though TL 1200 is not part of the application, the record contains evidence that it is currently approximately 0.8 acres, and even if the Sauvie Island Road right-of-way is included, it appears never to have been any larger than 1.39 acres. Thus, TL 1200 has never met the 2-acre lot size required in the F-2 zone in 1968 when this parcel was first created.

D. <u>Effect and meaning of MCC 39.3070</u>. Because I conclude 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 and 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) (emphasis added).

This is an additional set of requirements for legal lots in the County's EFU zone that was the basis for my decision in the first proceeding (T2-2021-14361). 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. A.4), which brings this provision into play. In the first proceeding, I concluded that TL 1100 could only be deemed a legal lot of record if it were aggregated with TL 1200 (Ex. B.2).[2] LUBA affirmed that conclusion, and the applicant did not appeal the decision further.[3]

If this were a remand of the prior proceeding, the outcome would be controlled by "law of the case" because a decision based on MCC 39.3070(A) with regard to these lots has already been rendered. *Beck v. Tillamook County*, 313 Or 148, 153, 831 P2d 678 (1992). However, when the local decision is in response to a new application, even if that application is similar to the application that led to the decision remanded by the Board, the law of the case doctrine does not apply. *Davenport v. City of Tigard*, 27 Or LUBA 243, 246 (1994). Because this case involves a new application, the law of the case doctrine does not preclude me from reconsidering the issue of MCC 39.3070(A), what it means and what it requires in this case. *Durig v. Washington County*, 40 Or. LUBA 1, 8 (2001).

The applicant argues that to construe MCC 39.3070(A) to require aggregation of TLs 1100 and 1200 is contrary to ORS 92.017, which provides that: "A lot or parcel lawfully created shall remain a discrete lot or parcel, unless the lot or parcel lines are changed or vacated or the lot or parcel is further divided, as provided by law." The County asserts, however, that nothing about ORS 92.017 precludes a local government from imposing restrictions on what is required for a lot to be deemed developable under the local code, which is the focus of this lot of record inquiry. LUBA addressed the question of whether mandatory aggregation requirements are lawful and concluded they

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[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."

[2] The condition of the prior decision required that:

> 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. B.2.

[3] *Maher v. Multnomah County*, LUBA No. 2021-121 (slip op. April 8, 2022).

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.

This case, therefore, turns on the proper interpretation of what MCC 39.3070(A) means and what it requires from a lot of record applicant to gain approval. My task in determining the meaning of the applicable code language is governed by the familiar three-step process described in *PGE v. Bureau of Labor and Industries*, 317 Or 606,610-12,859 P2d 1143 (1993), *as modified by State v. Gaines*, 346 Or 160, 171-72,206 P3d 1042 (2009). The overriding objective of statutory construction is to determine the intent of the legislature. ORS 174.020(1)(a). The first step under *PGE* and *Gaines* is to examine the text and context of the statute, which are considered the best evidence of legislative intent. The second step is to examine relevant legislative history. *Gaines*, 345 Or at 171-72. If analysis of text, context and legislative history fails to resolve the statutory ambiguity, courts may resort to applicable canons of statutory construction. *PGE*, 317 Or at 612.

Moreover, there are previous interpretations of the provision. I interpreted MCC 39.3070(A) previously in the first Maher decision (Ex. I.3), affirmed by LUBA in *Maher v. Multnomah County*, LUBA No. 2021-121 (slip op. April 8, 2022), and it has been construed by other Multnomah County hearings officers. *See e.g.*, *Campbell v. Multnomah County*, *supra*, and the Rossi lot of record decision in T2-2022-15537 (Ex. I.4). In all of these cases, MCC 39.3070(A) was interpreted as a limitation on development of EFU-zoned parcels that required aggregation of parcels when there was a "group of contiguous parcels or lots" that were "held under the same ownership on February 20, 1990," and which "individually or when considered in combination," were required to "be aggregated to comply with a minimum lot size of 19 acres."

The text of MCC 39.3070(A) requires me to consider, not just TL 1100 which is the sole subject of this application, but any/all parcels that were held under the same ownership as TL 1100 on February 20, 1990. That part of this code requirement necessarily implicates TL 1200, even though it is not part of the applicant's request. In practical effect, MCC 39.3070(A) may require TL 1100 to be aggregated before it allows TL 1100 to be deemed a legal lot of record. In turn, MCC 39.1515 requires all such

potential illegal situations to be remedied before the County will issue any discretionary permits or approvals for TL 1100, this appears to include execution of a LUCS.

The applicant argued convincingly that the policy objective of MCC 39.3070(A) was the preservation of intact farm parcels of at least 19 acres, which TL 1100 meets. However, this record shows that TL 1200 does not meet this minimum lot size, and the text and context of MCC 39.3070(A) requires me to consider whether these lots individually or in combination meet the minimum lot size. When considered individually, TL 1200 does not meet this current minimum lot size. If it did, the policy objective of MCC 39.3070(A) would be met and there would be no reason to require consolidation of TLs 1100 and 1200. If both parcels met the current 19-acre minimum lot size, it is doubtful that MCC 39.3070(A) would require aggregation at all. However, because the record shows a parcel that was in common ownership with TL 1100 on February 20, 1990 and is below the 19-acre threshold, the plain language of MCC 39.3070(A) provides that the parcels "shall be aggregated to comply with a minimum lot size of 19 acres." (emphasis added). Put differently, when TL 1100 is evaluated for legal lot status under MCC 39.3070(A), and the record reveals that it was in common ownership with another parcel that is currently smaller than 19 acres, the two parcels "shall be aggregated" for either of them, individually or in combination, to be deemed a legal lot of record. Presumably this is the language that compelled aggregation in the previously mentioned lot of record cases, and it compels aggregation here. In truth, given the lotting history reflected in this record, the two parcels only qualify as a legal lot of record when they are aggregated.

At least in the EFU zone, if either of two contiguous parcels were under common ownership on February 20, 1990 is smaller than 19 acres, then they must be consolidated before either can qualify as a 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, neither can be approved for any permits or development. In other words, the owner must affirmatively consolidate the two contiguous parcels to obtain a legal Lot of Record status for either lot or the consolidated parcel.

To be clear, nothing in the Multnomah County Code that has been raised in this proceeding requires aggregation of TL 1100 with TL 1200 or aggregates them by operation of law. Nothing in the text or context of MCC 39.3070 suggests that. Instead, the Director concluded that TL 1100, if consolidated with TL 1200, would qualify as a single legal Lot of Record under MCC 39.3070(A). That was the gist of my decision in the first Maher application (T1-2021-15537). Consolidation would then qualify the combined property for land use approvals, building permits and apparently execution of a LUCS. Absent the applicant consolidating the two parcels pursuant to MCC 39.9200, MCC 39.1515 precludes the County from approving any development or building permits for either TL 1100 or TL 1200.

The only question that remains is whether MCC 39.3070(A) aggregates TL 1100 with TL 1200 by operation of law, or whether the applicant/owner must affirmatively do

that through a county process. In the first Maher proceeding, I concluded that the applicant must affirmatively apply to consolidate TL 1100 with TL 1200. A close reading of MCC 39.3070(A) reveals there is no requirement to consolidate separate legal lots under common ownership; only if the applicant wants legal lot status for TL 1100 or TL 1200 must they be aggregated. 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, in turn, prohibits the County from approving development or building permits for parcels that are not legal Lots of Record, and the County presumably takes the position that it will not issue a LUCS for any parcel that is not verified as a legal lot of record. Contrary to staff's statement at the hearing, nothing in the County's Code consolidates contiguous lots by operation of law. As reflected in the Director's decision, the County simply takes the position that if the owner/applicant wants to develop either TL 1100 or TL 1200, the owner must first aggregate them. The lot consolidation does not happen by operation of law under the Code; consolidation only happens as a voluntary, affirmative act of the owner/applicant.

Based on the foregoing, I see nothing unlawful in the challenged decision. The most that can be said is that the Director could have but chose not to include alternative findings for approval that imposed a condition requiring the applicant to consolidate TL 1100 with TL 1200. That does not amount to legal error, nor do I perceive any factual or legal error in the Director's decision. None of the applicant's arguments overcome the language of the code provision – MCC 39.3070(A) – that precludes legal lot of record status for TL 1100 unless it is consolidated (aggregated) with TL 1200. For this conclusion, it is immaterial that TL 1200 is not included in this application.

E. <u>Other legal arguments raised in the appeal – Unlawful Takings</u>. In his final memo (Ex. I.1), the applicant's attorney makes two arguments based on federal Takings law. First, he asserts that, by interpreting MCC 39.3070(A) to require aggregation of TLs 1100 and 1200 before either can be deemed a legal lot of record, the county has deprived the owner of all economically beneficial use of the property similar to the situation found to be a Takings in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992).

Testimony at the October 7th hearing revealed that the applicant/appellant is a farmer who raises garlic on TL 1100. The genesis of this case is his desire to convert to cannabis, which requires a license from the Oregon Liquor and Cannabis Commission. Before the OLCC will issue the applicant/appellant a license, the County must execute a land use compatibility statement (LUCS), and the County required the applicant to obtain a legal lot verification before it would execute the LUCS. Despite the Cannabis plan, however, the full range of crops other than cannabis is available to the applicant/appellant, which collectively and individually qualify as economically beneficial uses. Consequently, the record clearly shows that cannabis is not his only option.

Under both Oregon and federal Takings jurisprudence, a Takings claimant, such as the applicant/appellant here, cannot base a Takings claim on a single instance of a local denial, but must instead pursue alternative uses for the property to find one that is :

> We reject petitioner's takings challenge, where it is based on the single instance of the city's denial, on an evidentiary basis, of petitioner's applications for conditional uses on the property and where there is no evidence in the record to support petitioner's allegation that the city's decision to deny its conditional use applications deprives petitioner of all economically viable use of its property. In *Reeves v. City of Tualatin*, we explained that:
>
> > "[T]n 'regulatory takings' cases, a single denial at the local level cannot determine whether all economically viable use of the property has been 'taken,' because other options could be available which would provide economically viable uses of the property. Until the other options are explored by an applicant, a review would be premature." 31 Or LUBA 11, 16 (1996).
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> We cited and relied on *Nelson v. City of Lake Oswego*, in which the Court of Appeals explained:
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> > "The tests for regulatory takings under the state and federal constitutions are whether the owner is deprived of *all* substantial beneficial or economically viable use of property. *See Lardy v. Washington County*, 122 Or App 361, 363, 857 P2d 885, *rev den* 318 Or 246 (1993). The reason why the exhaustion/ripeness analysis makes sense in that context is that, with rare exceptions, no *particular* denial of an application for a use can demonstrate the loss of *all* economic use. That is so for two reasons. First, the fact that one use is impermissible under the regulations does not necessarily mean that other economically productive uses are also precluded; and second, until alternative uses are applied for or alternative means of obtaining permission for the first use are attempted, there can be no conclusive authoritative determination of what is legally permitted by the regulations. Therefore, the courts cannot perform their adjudicative function on a claim predicated on a single denial, because something more must be decided by the local or other regulatory authority before there can be a demonstrable loss of all use and, therefore, a taking. *See Suess Builders v. City of Beaverton*, 294 Or [254], 261-62, [656 P2d 306 (1982)]." 126 Or App 416, 422, 869 P2d 350 (1994) (emphases in original).
>
> *See also Joyce v. Multnomah County*, 114 Or App 244, 247, 835 P2d 127 (1992) (holding that federal constitutional takings claims are not ripe where the petitioner "ha[d] pursued no alternative approaches to achieve permission for that or any other use"); *Dority v. Clackamas County*, 115 Or App 449, 452, 838 P2d 1103 (1992), *rev den*, 315 Or 311, 846 P2d 1160

(1993) (holding that state constitutional claims were not ripe where a comprehensive plan amendment and zone change were not pursued).

Botts Marsh LLC v. City of Wheeler, LUBA Nos. 2022-063/064 (slip op. Nov. 9, 2022).

This line of cases controverts the applicant/appellant's first Taking argument because the record clearly shows that other crops are available for use on this property, and the applicant must pursue other alternative land use approvals before a Takings claim will be ripe.

Second, the applicant's attorney equates the Director's decision and interpretation of MCC 39.3070(A) in this legal lot verification application to a physical occupation of the property akin to the situation the Supreme Court rejected in *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982). This argument is premised on something, in fact, County staff did not say or do, *viz*. the County did not say that no crop could be grown on TL 1100. The Director's decision only states that, to make TL 1100 a legal lot of record for purposes of subsequently issuing a LUCS for the property, the applicant must consolidate TL 1100 with TL 1200. The Director's decision says nothing about what can be grown on the property and does not deny the applicant the opportunity to farm it. In fact, the property can be, and has been used, to raise multiple farm crops over the years. This tends to undercut the applicant's assertion that the County has denied all beneficial use of the property. The County is also not the governmental entity that is requiring a license to raise cannabis; it the OLCC that is requiring a LUCS as a prerequisite for the OLCC license. I disagree that this requirement constitutes or is analogous to a physical occupation of the applicant's property by the government.

IV. CONCLUSION AND DECISION:

Based on the foregoing, I deny the applicant's appeal and affirm the Director's August 29, 2022 decision (Ex. C.4a). I conclude that TL 1100 can only be a legal lot of record if it is aggregated with TL 1200 – something the applicant can chose to do or not. This conclusion could have been the basis for a different decision by the Director – one that matched the outcome of the first Maher proceeding. As things stand, however, the Director correctly determined what MCC 39.3070(A) requires for TL 1100 to be deemed a legal lot of record.

Date of Decision: November 25, 2022.

Daniel Kearns

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 T2-2022-15447

Exhibit #	Description	Date
A.1	General Application Form	3/16/22
A.2	Deed recorded 4/12/62 in Book 2111, Page 178	4/29/22
A.3	Deed recorded 3/12/68 in Book 608, Page 1086	4/29/22
A.4	Bargain & Sale Deed recorded 4/1/68 in Book 611, Page 1616	4/29/22
A.5	Bargain & Sale Deed recorded on 4/24/85 in Book 1818, p. 2267	4/29/22
A.6	Transfer on Death Deed recorded on 12/10/18 in Book 2018-126304	4/29/22
A.7	Resubmittal Email from Tom C. Holmes at Dunn Carey	4/29/22
A.8	Letter from Ty Wyman, Dunn Carney regarding T2-2022-15447 regarding the requested information in the Incomplete Letter.	4/29/22
A.9	Tom Holmes Email adding Title Plant Report to Record	5/11/22
A.10	Ticor Title's Title Plant Records Report dated August 13, 2021	5/11/22
B	**Staff Exhibits**	**Date**
B.1	Assessment and Taxation Property Information for 2N1W21-01100 (Alt Acct#R971210140 / R325150)	3/16/22
B.2	T2-2021-14361 Hearings Officer Decision - Maher Lot of Record	5/11/22
B.3	Patrick Maher vs Multnomah County LUBA Decision	5/11/22
B.4	A&T Property Information for R971210150 (2N1W21-01200)	5/11/22
B.5	Death Certificate for Mabel Dudley dated October 8, 2019	8/20/22
B.6	Current Tax Map 2N1W21	8/20/22
B.7	Parcel Record Card for tax lot 2N1W21-01200	8/20/22

B.8	1955 Subdivision Regulations	8/20/22
B.9	Probate Dept Order of Distribution dated September 14, 1967	8/20/22
B.10	1962 Zoning Map for 2N1W21	8/20/22
B.11	December 9, 1975 Zoning Map for 2N1W21b	8/20/22
B.12	October 5, 1977 Zoning Map for 2N1W21b	8/20/22
B.13	October 6, 1977 Zoning Map for 2N1W21b	8/20/22
B.14	1999 zoning Map for 2N1W21	8/20/22
B.15	Current Zoning for Subject Property and Adjacent tax lots	8/20/22
B.16	1964 Zoning District Lot Sizes	8/20/22
B.17	1964 F-2 Zoning Regulations	8/20/22
B.18	1974 Zoning District Lot Sizes	8/20/22
B.19	1974 F-2 Zoning Regulations	8/20/22
B.20	1975 Zoning Ord Changes	8/20/22
B.21	1977 EFU Regulations	8/20/22
B.22	February 20, 1990 Property Ownership	8/20/22
C	**Administration & Procedures**	**Date**
C.1	Incomplete letter	4/13/2022
C.2	Complete letter (day 1 – May 11, 2022)	5/12/2022
C.3	Opportunity to Comment	5/18/2022
C.4	Administrative Decision	8/29/2022
C.5	Mailing Lists	8/26/2022
C.6	Various Documentation Emails	8/22/2022
D	**Agency Comments**	**Date**
D.1	Metro Letter dated May 31, 2022	5/31/2022
E	**Post-Decision Documents**	**Date**
E.1	Ex E.1 Notice of Appeal dated 09.	9/12/2022
E.2	Exhibit E.2 Continuance Toll Letter	9/21/2022
E.3	Exhibit E.3 Continuance Recording	9/23/2022
H	**Documents Submitted at Hearing**	**Date**

H.1	Exhibit H.1 - PF-2022-15912 Notes	10/7/2022
H.2	Exhibit H.2 - LCC LUCS 16900 NW Sauvie Island Road	10/7/2022
I	**Documents Submitted First Post-Hearing Period**	**Date**
I.1	Exhibit I.1 - Wyman Letter to Hearings Officer	10/21/2022
I.2	Exhibit I.2 - PF-2022-15912 Notes_FINAL_Revised	10/21/2022
I.3	Exhibit I.3 - Maher Decision	10/21/2022
I.4	Exhibit I.4 - MAH16 - Rossi LOR Decision	10/21/2022
I.5	Exhibit I.5 - Jacoby Letter to Hearings Officer	10/21/2022
J	**Documents Submitted Second Post-Hearing Period**	**Date**
J.1	Exhibit J.1 - T2-2022-15447 County Response	11/4/2022
K	**Documents Submitted Post-Hearing**	**Date**
K.1	Exhibit K.1 - Applicants final rebuttal	11/11/2022