

Notice of Hearings Officer Decision

Attached please find notice of the Hearings Officer's decision in the matter of **T2-2022-15537** mailed September 20, 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
www.oregon.gov/LUBA

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

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

DECISION OF THE HEARINGS OFFICER

An appeal of the Administrative Decision finding that the evidence in the record does not sufficiently demonstrate that the subject property is a Lot of Record as defined in MCC 39.2000.

Case File: T2-2022-15537

Applicant: Nick Rossi

Property Owner(s): CS Reeder LLC

Base Zone: EFU

Overlay None

Site Size: 8.3 Acres

Public Hearing: The hearing was opened at 9:00 a.m. on August 12, 2022. The hearing was held virtually. The record was kept open until August 24, 2022, for additional submittals and August 31, 2022, for any rebuttal and finally for September 9, 2022 for applicants final arguments. The record was closed September 9, 2022

Testified at the Hearing: Lisa Estrin, County planner
Nick Rossi, applicant
Andrew Stamp, Applicant's attorney

Summary: The applicant is appealing the Administrative Decision finding that the evidence in the record does not sufficiently demonstrate that the subject property is a Lot of Record as defined in MCC 39.2000.

Applicable Approval Criteria: Multnomah County Code (MCC): 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

DECISION: The appeal from the Administrative Decision finding that the evidence in the record does not sufficiently demonstrate that the subject property is a Lot of Record as defined in MCC 39.2000 is hereby **denied**. On February 20, 1990, the subject property was owned by Richard W & Evelyn S Vetsch. Richard W Vetsch owned tax lot R971030130 which is immediately adjacent to the subject property to the east. Tax lot R971030130 is 157.68 +/-acres. Neither of the two tax lots were created by a partition or subdivision plat. Both tax lots are zoned Exclusive Farm Use (EFU). Based upon MCC 39.3070(A)(2)(b)2, the hearings officer finds that these two taxes lots are aggregated by the Lot of Record provisions.

Applicant argues that the County should permit the use of the barn as an outright farm use. Unfortunately, that issue is not before the hearings officer as the application was for a lot of record determination.

The hearings officer's decision is supported by the following findings.

Dated this 18th day of September 2022

Alan A Rappleyea

Alan A. Rappleyea
Multnomah County Land Use Hearings Officer

This Decision is final when mailed. Appeals may be filed with the Oregon Land Use Board of Appeals within the time frames allowed by State law.

A. HEARING AND RECORD HIGHLIGHTS

1. Multnomah County Land Use Hearings Officer Alan Rappleyea received testimony at the duly noticed public hearing about this application on August 12, 2022. At the hearing, the hearings officer reviewed the electronic record maintained by the Department of Community Services Land Use and Transportation Planning Program regarding the application. The hearings officer made the declarations required by ORS 197.763. The hearings officer disclaimed any *ex parte* contacts and any bias or conflicts of interest.
2. County planner Lisa Estrin summarized the Staff Report and the applicable approval criteria. Ms. Estrin stated that the applicant had failed to meet the lot of record criteria because the of the lot of record provision in the County’s EFU zone which provided that the lots became aggregated when owned in common.
3. Andrew Stamp, attorney, represented Nick Rossi applicant. He argued that the application should be for a farm use which are permitted outright. He argued that the lots did not become consolidated because of differing ownership. Nick Rossi also testified that the property was to be used as an agricultural use for a barn.
4. After hearing all oral testimony, the hearings officer kept the record open as described above under “public hearing”.

B. FINDINGS OF FACT

FINDINGS: Written are contained herein. The Multnomah County Code (MCC) criteria and Comprehensive Plan Policies are in **bold** font. Staff analysis and comments are identified as ‘**Staff:**’ and address the applicable criteria. Staff comments may include a conclusory statement in *italic*. Additional findings written by the hearings officer are preceded by the words “**Hearings Officer:**”

1.00 Project Description:

Staff: The applicant requests a Lot of Record Verification for the property identified as 2N1W0400900 (subject property). The application does not propose any new development at this time.

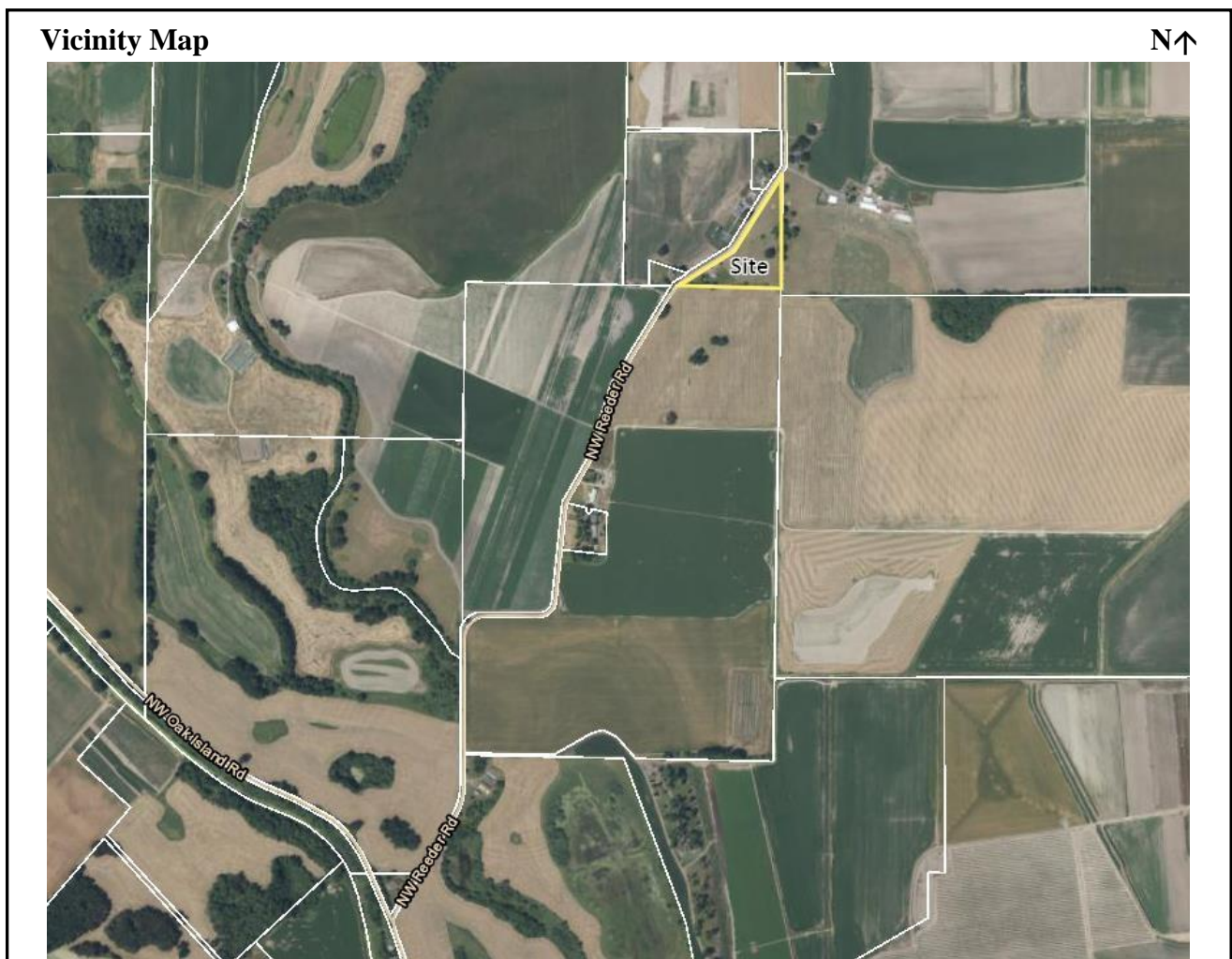
Through the Lot of Record Verification process, the County reviews the creation or reconfiguration of each parcel, lot, or unit of land involved in the request. The County then verifies that the creation or reconfiguration of the parcel, lot, or unit of land satisfied all applicable zoning laws and all applicable land division laws in effect on the date of its creation or reconfiguration. In the EFU zone, the County also considers adjacent ownership on February 20, 1990 in determining whether a parcel, lot, or unit of land is a Lot of Record on its own. If the parcel, lot, or unit of land met all applicable zoning laws, applicable land division laws and meets the aggregation requirements, it may be determined to be a Lot of Record.

Hearings Officer: I believe staff was trying to have the applicant apply for an application for a lot of record which would allow the applicant to do what they wanted with the property, a barn. Neither staff nor the applicant was aware of the legal arguments raised in this appeal about outright farm use permitting. Applicant’s representative argued that the application was for purposes of an outright farm use for an agricultural building. Exhibit D.1. The representative argues that the applicant was

dissuaded by staff from making such an application. The applicant can still file for such an application, but the record is clear that the application before the hearings officer is for a lot of record (LOR) determination. Exhibit A.1. As such, the Hearings Officer is precluded from ruling on an issue that is not before him. The Hearing Officer is also dissuaded from offering an advisory opinion on this matter as the record was not developed for this issue and that advisory opinion could be seen as a separately appealable land use decision. Staff suggestion is that the applicant apply for a Type II request for an interpretation. The Hearings Officer concurs.

2.00 Property Description & History:

Staff: The subject property is located in unincorporated west Multnomah County in the area known as Sauvie Island. The property is zoned Exclusive Farm Use (EFU) and is located outside of Metro’s Urban Growth Boundary (UGB). Assessment & Taxation records indicate that the subject property is occupied by a single-family dwelling and carport. County aerials show at least four outbuildings.



3.00 Public Comment

Staff: Staff mailed a notice of application and invitation to comment on the proposed application to the required parties per MCC 39.1105 as Exhibited in C.2. Staff did not receive any public comments during the 14-day comment period.

Hearing Officer: The Hearings Officer did not receive any public comments at the hearing other than the applicant and staff testimony.

4.0 Code Compliance and Applications Criteria:

4.1 § 39.1515 CODE COMPLIANCE AND APPLICATIONS.

Except as provided in subsection (A), the County shall not make a land use decision approving development, including land divisions and property line adjustments, or issue a building permit for any property that is not in full compliance with all applicable provisions of the Multnomah County Zoning Code and/or any permit approvals previously issued by the County.

(A) A permit or other approval, including building permit applications, may be authorized if:

- (1) It results in the property coming into full compliance with all applicable provisions of the Multnomah County Zoning Code. This includes sequencing of permits or other approvals as part of a voluntary compliance agreement; or**
- (2) It is necessary to protect public safety; or**
- (3) It is for work related to and within a valid easement over, on or under an affected property.**

(B) For the purposes of this section, Public Safety means the actions authorized by the permit would cause abatement of conditions found to exist on the property that endanger the life, health, personal property, or safety of the residents or public. Examples of that situation include but are not limited to issuance of permits to replace faulty electrical wiring; repair or install furnace equipment; roof repairs; replace or repair compromised utility infrastructure for water, sewer, fuel, or power; and actions necessary to stop earth slope failures.

Staff: As noted in Section 1.0 above, this application is a request for a Lot of Record Verification, which does not require the County to approve development, a land division, a property line adjustment, or a building permit. *Therefore, this standard is not applicable.*

Hearings Officer finds that this standard is not applicable..

5.0 Lot of Record Criteria:

5.1 MCC 39.3005 - LOT OF RECORD – GENERALLY.

(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.

(B) A Lot of Record is 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.

(a) “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:

1. By a subdivision plat under the applicable subdivision requirements in effect at the time; or

2. By a deed, or a sales contract dated and signed by the parties to the transaction, that was recorded with the Recording Section of the public office responsible for public records prior to October 19, 1978; or

3. By a deed, or a sales contract dated and signed by the parties to the transaction, that was in recordable form prior to October 19, 1978; or

4. By partitioning land under the applicable land partitioning requirements in effect on or after October 19, 1978; and

5. “Satisfied all applicable land division laws” shall also mean that any subsequent boundary reconfiguration completed on or after December 28, 1993 was approved under the property line adjustment provisions of the land division code. (See Date of Creation and Existence for the effect of property line adjustments on qualifying a Lot of Record for the siting of a dwelling in the EFU and CFU districts.)

(c) Separate Lots of Record shall be recognized and may be partitioned congruent with an “acknowledged unincorporated community” boundary which intersects a Lot of Record.

1. Partitioning of the Lot of Record along the boundary shall require review and approval under the provisions of the land division part of this Chapter, but not be subject to the minimum area and access requirements of this district.

2. An “acknowledged unincorporated community boundary” is one that has been established pursuant to OAR Chapter 660, Division 22.

Staff: To qualify as a Lot of Record, the subject property, when created or reconfigured, must meet MCC 39.3005(B) of this section and meet the Lot of Record standards set forth in the Exclusive Farm Use (EFU) zoning district. More specifically, section (B) above requires demonstration that the subject property (a) satisfied all applicable zoning laws and (b) satisfied all applicable land division laws. The Lot of Record standards set forth in the EFU district establish additional requirements unique to the district, which are evaluated in Sections 5.2 of this decision. The findings below analyze whether the Lot of Record provisions in section (B) have been met.

The applicant provided two (2) deed(s) (Exhibit A.2 & A.3) to support the Lot of Record request. The earliest deed provided was recorded on May 16, 1966 and contains a legal description matching the current configuration of the subject property (Exhibit A.2 & A.3). In 1966, the subject property was zoned Suburban Residential (SR) per historical County zoning maps (Exhibit B.5 & B.6).

The SR zone had a minimum lot size requirement ranging from 10,000 to 40,000 square feet depending on the services in the area. It also required a minimum average lot width of 70 feet, a minimum average lot depth of 100 feet, and a requirement of public road frontage or other access deemed safe and convenient. To establish a lot that is (a) 40,000 sq. ft. or more, (b) between 40,000 to 20,000 sq. ft., or (c) between 20,000 sq. ft. to 10,000 sq. ft., the property would need to have the following characteristics:

Lot Area	Minimum Standards
40,000 sq. ft.	<ul style="list-style-type: none"> • Approved public or private water supply • Approved individual sewage disposal system • Approved public access
20,000 sq. ft.	<ul style="list-style-type: none"> • Approved public water supply • Approved individual sewage disposal system • Approved public access
10,000 sq. ft.	<ul style="list-style-type: none"> • Approved public water supply • Approved public sewer or State approved cesspool • Approved public access

The subject property is 8.30+/- acres (7.68 acres without 20 ft r.o.w.), abuts NW Reeder Rd (a public road), has a front lot line length of 1,350+/- feet and an average lot width of approximately 677 feet and average lot depth of 205+/- feet (Exhibit B.2). The applicant provided the current deed for the subject property (Exhibit A.2) that contains a legal description that matches the recorded 1966 legal description (Exhibit A.3).

The subject property complied with all applicable zoning laws at the time of its creation or reconfiguration.

In 1966, the process to created or divide a parcel required a deed or sales contract dated and signed by the parties to the transaction. The document needed to be in recordable form or recorded with the County Recorder prior to October 19, 1978. As evidenced by the 1966 deed (Exhibit A.3), the applicable land division laws were satisfied.

Based upon the above, the subject property satisfied all applicable zoning and land division laws when it was created or reconfigured in 1966.

Hearings Officer finds that the subject property complied with all applicable zoning laws and land division laws when it was created or reconfigured in 1966.

5.2 MCC 39.3070 LOT OF RECORD – EXCLUSIVE FARM USE (EFU).

(A) 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.**
 - 1. Each Lot of Record proposed to be segregated from the contiguous group of parcels or lots shall be a minimum of 19 acres in area 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. See Examples 1 and 2 in this subsection.**
 - 2. There shall be an exception to the 19 acre minimum lot size requirement when the entire same ownership grouping of parcels or lots was less than 19 acres in area on February 20, 1990, and then the entire grouping shall be one Lot of Record. See Example 3 in this subsection.**
 - 3. Three examples of how parcels and lots shall be aggregated are shown in Figure 1 below with the solid thick line outlining individual Lots of Record:**
 - 4. The requirement to aggregate contiguous parcels or lots shall not apply to lots or parcels within exception or urban zones (e.g., MUA-20, RR, RC, SRC, BRC, R-10), but shall apply to contiguous parcels and lots within all farm and forest resource zones (i.e. EFU and CFU), or**
- (3) A parcel or lot lawfully created by a partition or a subdivision plat after February 20, 1990.**
- (4) Exception to the standards of (A)(2) above:**
 - (a) Where approval for a “Lot of Exception” or a parcel smaller than 19 acres under the “Lot size for Conditional Uses” provisions has been given by the Hearing Authority and the parcel was subsequently lawfully created, then the parcel shall be a Lot of Record that remains separately transferable, even if the parcel was contiguous to another parcel held in the same ownership on February 20, 1990.**

Staff: The subject property is 8.30 acres in size (7.68 acres plus 20-feet of adjacent right of way). Planning staff reviewed the surrounding tax lots to see if any were held by the same property owner(s) as the subject property in 1990. On February 20, 1990, the subject property was owned by Richard W & Evelyn S Vetsch (Exhibit B.4). Richard W Vetsch owned tax lot R971030130 which is immediately adjacent to the subject property to the east. Tax lot R971030130 is 157.68 +/-acres. No other adjacent tax lot was owned by either Evelyn S or Richard W Vetsch at the time that can be used to create a separate Lot of Record from tax lot R971030130 (Exhibit B.4). Neither of the two tax lots were created by a partition or subdivision plat. Both tax lots are zoned Exclusive Farm Use (EFU). Based upon MCC 39.3070(A)(2)(b)2. It would appear that these two tax lots are aggregated by the Lot of Record provisions. At present they are in separate ownership (Exhibit B.1 & B.8). *Criterion not met.*

Hearings Officer: This criteria is the crux of the appeal. Staff concludes that the lots were aggregated by operation of the Multnomah County Zoning Code. MCC 39.3070(A)(2)(b)2. This aggregation is demonstrated in Figure 1 referenced above in the Code. The Hearings Officer finds that the subject parcel is contiguous to another parcel or lot under the same ownership on February 20, 1990. The Hearings Officer finds that on February 15, 1990 the subject property was owned by husband Richard W and wife Evelyn S. Vetsch. On that date, husband and wife transferred the subject property to wife. Exhibit B.3. Husband Richard owned the immediately adjacent property to the east. Exhibit B.4. Although it is perhaps an odd coincidence or intentional, the fact of the transfer occurred 5 days before the February 20, 1990 cut off date in the code does not affect the underlying principle: the two adjacent properties were under the “same ownership” on February 20, 1990.

The definition of “same ownership” is provided in MCC 39.4210 as:

“Same Ownership – Refers to greater than possessory interests held by the same person or persons, spouse, minor age child, same partnership, corporation, trust or other entity, separately, in tenancy in common or by other form of title. Ownership shall be deemed to exist when a person or entity owns or controls ten percent or more of a lot or parcel, whether directly or through ownership or control or an entity having such ownership or control. For the purposes of this subsection, the seller of a property by sales contract shall be considered to not have possessory interest.” (emphasis added)

As demonstrated by the deeds in the record, Exhibit B.3, the parcel was held by Mr. and Mrs. Vetsch as “husband and wife”. As such, the ownership of the property was owned by a “spouse” which qualifies under the definition of “same ownership.” Applicant refers to this same deed in its materials at Exhibit D, page 10 (marked as applicants Exhibit E). Applicant argues that there is a factual error in that staff determined that the parcel at question was held by both the Vetschs on February 20, 1990 and not February 15, 1990 as described in the deeds. As stated above, the Hearings Officer finds this error irrelevant as the two adjacent properties were under the “same ownership” on February 20, 1990 because one was owned by Ms. Vetsch and the other was owned by her spouse Mr. Vetsch. The Hearings Officer concludes that the description of the ownerships in the deeds fits within the definition of “same ownership” in the code and that the two properties have been aggregated. As it was not raised by any party, the Hearing Officer will not consider how ORS 92.017 may apply to this appeal.

(B) In this district, significant dates and ordinances applicable for verifying zoning compliance may include, but are not limited to, the following:

- (1) July 10, 1958, F-2 zone applied;**
- (2) December 9, 1975, RL-C zone applied, F-2 minimum lot size increased, Ord. 115 & 116;**
- (3) October 6, 1977, MUA-20 and EFU-38 zones applied, Ord. 148 & 149;**
- (4) August 14, 1980, zone change from MUA-20 to EFU-38 for some properties, zone change from EFU-38 to EFU-76 for some properties. Ord. 236 & 238;**
- (5) February 20, 1990, lot of record definition amended, Ord. 643;**
- (6) April 5, 1997, EFU zone repealed and replaced with language in compliance with 1993 Oregon Revised Statutes and 1994 Statewide Planning Goal 3 Oregon**

Administrative Rules for farmland, Ord. 876;

(7) May 16, 2002, Lot of Record section amended, Ord. 982, reenacted by Ord. 997;

(C) A Lot of Record which has less than the minimum lot size for new parcels, less than the front lot line minimums required, or which does not meet the access requirements of MCC 39.4260 may be occupied by any allowed use, review use or conditional use when in compliance with the other requirements of this district.

Staff: Section (B) is for information purposes. The subject property has less than the minimum lot size for new parcels or lots in this zone and is subject to (C) above. Provided it is demonstrated that it is a Lot of Record in the future, it may be occupied by any allowed, review or conditional use when in compliance with the other requirements of this district provided it remains a Lot of Record. *Until such time as it is determined to be a Lot of Record, the County may not allow these uses pursuant to MCC 39.4215 Uses.*

Hearings Officer: This is the second crux of the appeal. Staff has determined that as the subject property does not fit the definition of a lot of record. The staff then interprets the language in section (C) above that states that if you have a lot of record, it may be occupied by “any allowed use.” Staff interpretation, although not explicit, infers that if it is not a lawful lot of record that the inverse is true: no “allowed uses” are permitted. The Hearing Officer finds that this is a logical inference. Without making such an inference, the entirety of Section (C) would have no purpose. Lots or records or not lots of record would be able to have “allowed uses.” In order to give meaning to Section (C), if you do not have a lawful lot of record, you are not permitted to have “allowed uses.” This makes sense as demonstrated from the context of the code. The purpose of the code is to aggregate lots and make them lawful lots of record. Although inartfully drafted, the Hearing Officers concurs with staff interpretation of the code.

The staff bolsters this argument referring to MCC 39.4215 which provides:

§ 39.4215 USES. 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.

The Applicant points out that this code section is not grammatically correct. The Hearings Officer agrees that it is difficult to parse. However, the Hearings Officer interprets this section to mean that “no building ...shall be erected....in this base zone...provided such uses occur on a Lot of Record.” The Hearing Officer interprets this to mean that no building is allowed in the zone unless it is on a lot of record. This is consistent with the interpretation above.

Applicant believes that interpretation of the code violates state law as the County code cannot prohibit farm uses as an outright use, whether it is or is not on a lot of record. The Applicant believes: “(t)his is the most critical issue presented in this case.” Exhibit I.4, page 8. The Hearings Office would agree if the application had been for a barn and not a lot of record determination. As the Hearings Officer does not have that application before him, as stated before, I will not rule on that matter. The Hearing Officer will note that Applicant’s arguments

on this subject is well taken although this is a very complicated area of the law that has engendered numerous legal opinions.

- (D) The following shall not be deemed a Lot of Record:**
- (1) An area of land described as a tax lot solely for assessment and taxation purposes;**
 - (2) An area of land created by the foreclosure of a security interest;**
 - (3) A Mortgage Lot.**
 - (4) An area of land created by court decree.**

Staff: As discussed above under section 5.1, the subject property is not an area of land described as a tax lot solely for assessment and taxation purposes. The subject tracts are not an area of land created by the foreclosure of a security interest or created by court decree. *Criteria met.*

Based on the findings in 5.1 & 5.2, the subject property is a not single Lot of Record.

Hearing Officer. The Hearings Officer finds that the subject property is not a Lot or Record.

6.0 Exhibits

‘A’ Applicant’s Exhibits

‘B’ Staff Exhibits

‘C’ Procedural Exhibits

‘D’ and ‘H’ Appeal Exhibits

‘I’ Post Hearing Exhibits

‘K’ Stamp Final Response

All exhibits are available for review in Case File T2-2022-15537

<https://www.multco.us/landuse/22140-nw-reeder-road-hearing>

Or by contacting case planner, Lisa Estrin at 503-988-0167 or via email at lisa.m.estrin@multco.us.

Exhibit #	# of Pages	Description of Exhibit	Date Received / Submitted
A.1	1	General Application Form	3.1.2022
A.2	3	Warranty Deed recorded on December 10, 2021 at 2021178380	3.1.2022

A.3	1	Warranty Deed recorded on May 16, 1966 at Book 497, Page 5	3.1.2022
'B'	#	Staff Exhibits	Date
B.1	2	Assessment & Taxation Property Information for 2N1W04 -00900 (R971040090/ R324793)	3.1.2022
B.2		Tax Map 2N1W04	3.23.2022
B.3	3	Parcel Record Card for R971040090	3.23.2022
B.4	1	February 20, 1990 Adjacent Property Ownership	5.19.2022
B.5	1	1962 Zoning Map for 2N1W04 (SR Zone)	3.23.2022
B.6	1	12-9-1975 Zoning Map for 2N1W04 (SR Zone)	3.23.2022
B.7	6	Suburban Residential (SR) Zoning Ord adopted 1964	3.23.2022
B.8	2	Assessment & Taxation Property Information for 2N1W03 -00400 (R971030130/ R324782)	6.28.22
'C'	#	Administration & Procedures	Date
C.1	1	Complete letter (day 1)	3.23.2022
C.2	2	Opportunity to Comment and mailing list	3.25.2022
C.3	8	Administrative Decision and mailing list	6.30.2022
D.1		Notice of Appeal: T2-2022-15537-07.14.2022	
D.2-D.5		Appeal Exhibit C-T202022015537-07142022	
H.1		Farm Ag Building Application	
I-J-K		Post Hearing Exhibits	
I.1 - 1		Declaration - Nick Rossi 08.24.202	
I.2		Legislative Record 08.24.2022	
I.3		Enrolled SB588 08.24.2022	
I.4		Supplemental - Andrew Stamp 08.24.2022	

I.5		Barn Article 08.24.2022	
J.1		T2-2022-15537 LUP Memo	
K.1		Stamp Final Response 09.03.2022	