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

Multnomah County

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

Notice of Hearings Officer Decision

Attached please find notice of the Hearings Officer's decision in the matter of **T2-2022-16204** issued and mailed **5/25/2023**. 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.

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DECISION OF HEARINGS OFFICER

This document is a final decision on appeal of the Planning Director's Decision in the land use case(s) cited and described below.

Case File: T2-2022-16204

Permit: Lot of Record Determination

Location: Property located north of 13220 NW Newberry Road, known as Tax Lot 00600 of Multnomah County Assessor's Map Township 2 North, Range 1 West, Section 33A; Tax Account #R971330150: Prop. ID #R325446 (the "site").

Applicant: James Howsley, Jordan Ramis PC for the property owner, Andrew Lightcap

Base Zone: Commercial Forest Use – 2 (CFU-2)

Summary: The Applicant requests a Lot of Record Verification for the site. A Lot of Record Verification determines if a property was lawfully established in compliance with the zoning and land division laws at the time of its creation or reconfiguration and the County's aggregation requirements.

Decision: The hearings officer finds that the land described as "Parcel 1" in the 1985 deed from Miller to Bernet (Exhibit I.2) was a Lot of Record prior to recording of the Looney partition and the roughly 31.57-acre portion of Parcel 1 remaining after recording of the Looney partition, now known as tax lot 600, remains a Lot of Record.

A. SUMMARY

1. Attorney James Howsley filed an application on behalf of Andrew Lightcap (the "appellant"), for a Lot of Record Verification for the property identified as 2N1W33A-00600 (the "site"). 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 CFU-2 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 and land division laws and meets the aggregation requirements, it may be determined to be a Lot of Record.

2. On February 16, 2023, the planning director (the "director") issued a written decision determining that the site is not a Lot of Record in its current configuration. (Exhibit C.3)

3. The applicant filed a written appeal of the planning director's decision on March 2, 2023.

4. County Hearings Officer Joe Turner (the "hearings officer") conducted a duly noticed public hearing to receive testimony and evidence regarding the appeal. Representatives of the applicant and County staff testified orally and in writing regarding the appeal.

5. Based on the findings provided or incorporated herein, the hearings officer finds:

a. The 31.57 acre site, known as 2N1W33A-00600, was not a Lot of Record prior to approval of the Looney partition, because it did not satisfy all applicable zoning and land division laws in effect when the site was created;

b. The Lightcaps and Looneys owned unequal undivided interests in the unit of land described as "Parcel 1" in the deed from Miller to Bernet (Exhibit I.2);

c. Parcel 1 was a Lot of Record prior to the Looney partition, as it was described in a deed recorded in 1930, prior to the adoption of zoning and land use regulations;

d. Approval of the Looney partition had the effect of separating the Looney and Lightcap ownerships and removing 2.5-acres from Parcel 1, leaving a 31.57 acre remnant of "Parcel 1." The Looneys now own a 2.5-acre Lot of Record, leaving the Lightcaps as the owners of the 31.57-acre remnant Parcel 1.

e. Parcel 1 was a Lot of Record prior to the Looney partition. Therefore, per ORS 92.178(3), Parcel 1 remains unchanged by the partition and the Lightcaps' 31.57-acre remnant of Parcel 1 remains a Lot of Record.

f. To hold otherwise would create a nonsensical result and violate ORS 92.178(3) by changing the legal status of Parcel 1, as the Looneys would be the sole owners of a 2.5 acre Lot of Record and the Lightcaps, who previously held an unequal undivided interest in a 34-acre Lot of Record now own a 31.57-acre unit of land that is not a Lot of Record.

6. Therefore, the hearings officer grants the appeal and finds that the remanent of Parcel 1 owned by the Lightcaps, now known as 2N1W33A-00600, constitutes a Lot of Record.

B. HEARING AND RECORD HIGHLIGHTS

1. The hearings officer received testimony at the duly noticed public hearing about this appeal on April 14, 2023.[1] All exhibits and records of testimony have been filed with the Multnomah County Department of Community Services, Land Use Planning Division. The hearings officer opened the hearing by making the statements required by ORS 197.763. The hearings officer disclaimed any *ex parte* contacts, bias or conflicts of interest. The following is a summary by the hearings officer of selected relevant testimony.

2. County planner Chris Liu identified the applicable approval standards and responded to the appeal.

a. He noted that the site and abutting properties were the subject of prior land use actions and approvals by the County. However, those approvals were not completed and are now void.

b. The director's decision only considered the criteria for approval of a Lot of Record. This application does not involve a request for approval of a dwelling.

c. Section 7 of the director's decision addresses the Looney parcel. MCC § 39.9700, which authorizes the County to legalize an unlawfully divided parcel, is a separate process, different from the property line adjustment process. The applicant did not request approval of a partition or other process to legalize the site.

d. He requested the hearings officer hold the record open for one week to allow the County to submit additional argument.

[1] The hearing was originally scheduled for March 31, 2023, but was continued to April 14, 2023. No testimony was offered at the initial hearing on March 31, 2023.

3. Attorney Jamie Howsley and property owner Andrew Lightcap testified in support of the appeal.

a. Mr. Howsley summarized his hearing memorandum, Exhibit H.1.

i. He noted that the "Looneys" own the property abutting the northwest boundary of the site. (See Exhibit B.5). In 1992 the County approved a lot line adjustment between the site and the Looney property. The parties filed a survey and recorded deeds implementing that adjustment. However, that adjustment was never properly completed as required by the conditions of the 1992 approval. Therefore, that approval is now void.

ii. In January 2019 the County approved a one parcel partition confirming the Looney property as a separate lot of record. That approval cited to the boundary between the site and the Looney property that was identified in the 1993 deed and the five boundary markers along that common boundary. That decision is now final as the Looney's recorded a final partition plat and complied with all other conditions of approval.

(A) The County's 2019 approval must have legalized the boundary between the site and the Looney parcel. The lots share the same boundary. However, the director's decision concluded that approval of the Looney partition had no effect on the site. As a result, the County now recognizes one side of the common boundary as being legally established but refuses to recognize the other side of the same boundary as legally established. This is a violation of the equal protection clause of the U.S. Constitution.

(B) The County's decision also violates the "needed housing" standards of ORS 197.307(4)(b), which prohibits standards, conditions and procedures that have the effect of discouraging needed housing through unreasonable cost or delay.

iii. He extended the 150-day clock to May 26, 2023.

b. Mr. Lightcap summarized the history of the site and various attempts to legalize the site. He argued that the County has denied him the ability to construct a home on the site for the past 13 years.

4. At the end of the public hearing, the hearings officer ordered the record held open for three weeks, subject to the following schedule:

a. For one week, until April 21, 2023, to allow all parties an opportunity to submit new argument and evidence;

b. For a second week, until April 28, 2023, to allow all parties an opportunity to respond to the evidence submitted during the first open record period; and

c. For a third week, until May 5, 2023, to allow the appellant/applicant an opportunity to submit a final written argument, without any new evidence. The record in this case closed at 12:00 p.m. May 5, 2023.

C. DISCUSSION

1. MCC § 37.0330.B authorizes the hearings officer to hear appeals of Planning Director decisions. Pursuant to ORS 215.416(11)(a), appeals of administrative decisions must be reviewed as a *de novo* matter. The hearings officer is required to conduct an independent review of the record. He is not bound by the prior decision of the Planning Director and does not defer to that decision in any way. New evidence may be introduced in an appeal, and new issues may be raised. The hearings officer must decide whether the appellant carried the burden of proof that the application complies with all applicable approval criteria in light of all relevant substantial evidence in the whole record, including any new evidence submitted during the appeal process.

2. The hearings officer finds that the "Needed housing" provisions of ORS 197.307(4) do not apply to this lot of record application. By its terms this provision requires that local governments "[a]pply only clear and objective standards, conditions and procedures regulating the development of housing…" However, this is an application for recognition of a Lot of Record. The fact that the applicant in this case intends to use the site to construct a residence does not change the application to one for "housing" that is subject to ORS 197.307.

3. The hearings officer has no authority to address the applicant/appellant's equal protection arguments.

4. The hearings officer has no jurisdiction to consider Mr. Lightcap's assertions that the County is trying to prevent him from constructing a home on the site or that is attempting to cover up a prior error. If true, Mr. Lightcap may have a cause of action against the County for damages. But the hearings officer has no authority to make that determination in this proceeding and expresses no opinion about those allegations. Mr. Howsley can advise Mr. Lightcap as to how he can bring a cause of action against the County in a separate civil proceeding in District Court to prove his allegations.

5. The following is a summary of the site history:

a. W. J. Miller conveyed a parcel of land to his son Cecil J. Miller by deed dated February 11, 1930. (Exhibit A.4 at 10-11). The legal description of the parcel conveyed in 1930 coincides with the legal description of the unit of land described as "Parcel 1" in the October 30, 1985, deed from the estate of Alberta E. Miller to Fred Bernet. (Exhibit I-2).

b. On October 30, 1985 the estate of Alberta E. Miller sold to Fred Bernet land described as "Parcels 1, 2, and 3" in the deed attached to Exhibit I.2 and illustrated in Map 2 of Exhibit I.2. Parcel 1 coincides with current Tax Lots 15 and 33. Parcel 2 coincides with current "Tax Lot 17," and Parcel 3 coincides with current "Tax Lot 62."

b. On November 5, 1985, Mr. Bernet, purported to sell to the Looneys 2.5 acres of the property described as Parcel 1 in the deed from Miller to Bernet (separating current Tax Lot 33 from "Parcel 1") along with a 1.31 acre parcel consisting of Parcels 2 and 3 (Tax Lots 17 and 62). On March 30, 1989, Mr. Bernet purported to sell Brian and Christine Lightcap the 31.57 remainder of Parcel 1/Tax Lot 15. Bernet made the sales purporting to divide Parcel 1 without County approval of a land division.

c. In an attempt to legalize the sales of the properties referenced above, Mr. Bernet applied for a "Land Division and Lot of Exception approval to create a 3.82 acre parcel and a 31.57 acre parcel out of this 35.39 [sic] acre Lot of Record." (Exhibit C.3 at 3). The County approved that application, but due to the applicant's failure to submit a final partition map, the approval expired and the Land Division and Lot of Exception were not perfected.

d. In 1992, the County received an application for a Lot of Exception (Case LE 14-92) and a Land Division (Case LD 49-92) to legalize the sales of the properties referenced above. The Lot of Exception process was the County's methodology for approving a "property line adjustment" because the zoning code did not include a provision for property line adjustments at that time and the adjustment of one of the properties, which was below the minimum lot size of 19 acres, required an exception. On November 5, 1993, the County approved the three property line adjustment legal descriptions. Survey No. 53807 (Exhibit B.5) depicts the resulting configurations of the adjusted properties.

e. On March 13, 2018, the County received a Director's Interpretation asking the Planning Director find that LE 14-92 and LD 49-92 be found void. The hearings officer determined that LE 14-92 and LD 49-92 were void due to the failure to consolidate 'Tax Lots 33, 17, and 62' prior to December 31, 1993.

f. Therefore, the 31.57 acre site, known as 2N1W33A-00600 was not a Lot of Record, because it did not satisfy all applicable zoning and land division laws in effect when the site was created.

6. Based on the above, the hearings officer finds that the Lightcaps and the Looneys owned an undivided and unequal interest in the roughly 34-acre unit of land

described as "Parcel 1" in the 1985 deed from the Miller estate to Bernet, Exhibit I.2 at 6-7 ("Parcel 1").[2]

7. The hearings officer finds that the 34-acre Parcel 1 was a Lot of Record.

a. Parcel 1 was created by a deed "[d]ated 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." MCC § 39.3005(B)(2)(b). Parcel 1 is described as a separate unit of land in the recorded deed from W. J. Miller to Cecil J. Miller dated February 11, 1930. (Exhibit A.4 at 10-11).

b. Parcel 1 also complied with the additional lot of record standards of MCC § 39.3030, based on the findings in the director's decision.

8. In January 2019 the County approved a one-parcel partition for the Looney's parcel pursuant to (former) MCC 33.7785 "Creation of Lots and Parcels that were unlawfully divided." (Exhibit B.9). The Looney's recorded a final partition plat for their parcel on February 21, 2109. (Exhibit B.4). The Looney parcel is now a lot of record.

9. The hearings officer finds that the recording of the Looney partition separated the Lightcap and Looney ownerships and left the Lightcaps as the sole owners of the 31.57-acre remnant of Parcel 1 after the Looney parcel was partitioned.

10. The hearings officer finds that the 31.57-acre remnant of Parcel 1 owned by the Lightcaps remains a Lot of Record.

a. Prior to the Looney partition, Tax lot 600 parcel was not a Lot of Record, because it was never legally created as a separate parcel.

b. Parcel 1 was a Lot of Record, because it was created in 1930, prior to the adoption of zoning and land use regulations. The Looneys and the Lightcaps owned unequal and undivided interests in Parcel 1.

c. Approval of the Looney partition had the effect of separating the Looney and Lightcap ownerships and removing 2.5-acres from Parcel 1, leaving a 31.57 acre remnant of Parcel 1. The Looneys now own a 2.5-acre Lot of Record, leaving the Lightcaps as the owners of the 31.57-acre remnant Parcel 1.

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[2] As noted above, Mr. Bernet purported to sell 2.5-acres of Parcel 1 to the Looneys and the remaining 31.57-acres to the Lightcaps. Therefore, Parcel 1 consisted of 2.5 acres + 31.57 acres =34.07 acres. Mr. Bernet, purported to sell to the Looneys 2.5 acres of the property described as Parcel 1 in the deed from Miller to Bernet (creating Tax Lot 33 as a separate parcel) along with a 1.31 acre parcel consisting of Parcels 2 and 3 (Tax Lots 17 and 62). On March 30, 1989, Mr. Bernet purported to sell Brian and Christine Lightcap the 31.57 acre remnant of Parcel 1.

d. Parcel 1 was a Lot of Record prior to the Looney partition. As staff note, "The County's Lot Legalization process aligns with requirements of ORS 92.176 - 92.178. ORS 92.178(3) states that "Approval of an application under this section *does not affect the legal status of land that is not the subject of the application*" (emphasis added)." (Exhibit I.1 at 2). Therefore, per ORS 92.178(3), the legal status of Parcel 1 remains unchanged by the partition and the Lightcaps' 31.57-acre remnant of Parcel 1 remains a Lot of Record.

e. To hold otherwise would create a nonsensical result, where the Looneys are the sole owners of a 2.5 acre Lot of Record and the Lightcaps, who previously held an unequal undivided interest in a 34-acre Lot of Record now own a 31.57-acre unit of land that is not a Lot of Record.

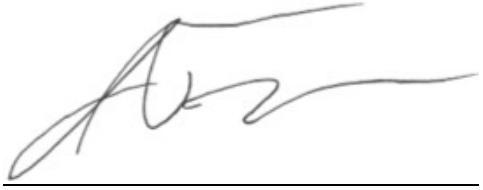
D. CONCLUSION

Based on the above findings the hearings officer concludes that the land described as "Parcel 1" in the 1985 deed from Miller to Bernet (Exhibit I.2) was a Lot of Record prior to recording of the Looney partition and the roughly 31.57-acre portion of Parcel 1 remaining after recording of the Looney partition, now known as tax lot 600, remains a Lot of Record.

E. DECISION

Based on the findings, discussion, and conclusions provided or incorporated herein and the public record in this case, the hearings officer grants the appeal, finds that the remanent of Parcel 1 owned by the Lightcaps constitutes a Lot of Record, and approves Case File T2-2019-12608.

DATED this 25th day of May 2023.



Joe Turner, Esq., AICP
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.