BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

BEVERLY MACKENZIE and HILARY MACKENZIE,
Petitioners,

vs.

MULTNOMAH COUNTY,
Respondent,

and

BERNARD NNOLI and AMY NNOLI,
Intervenors-Respondents.

LUBA No. 2013-045

FINAL OPINION
AND ORDER

Appeal from Multnomah County.

Daniel Kearns, Portland, filed the petition for review and argued on behalf of petitioners. With him on the brief was Reeves Kearns PC.

Jed Tomkins, County Counsel, Portland, filed a response brief and argued on behalf of respondent. With him on the briefs was Courtney Lords.

Jennifer M. Bragar, Portland, filed a response brief and argued on behalf of intervenors-respondents. With her on the brief were John Junkin and Garvey Schubert Barer.

RYAN, Board Member; HOLSTUN, Board Chair; BASSHAM, Board Member, participated in the decision.

AFFIRMED 11/12/2013

You are entitled to judicial review of this Order. Judicial review is governed by the provisions of ORS 197.850.

Opinion by Ryan.

NATURE OF THE DECISION

Petitioners appeal a decision by the county approving a significant environmental concern permit and hillside development permit to construct a dwelling on land zoned Rural Residential.

FACTS

Intervenors, Nnoli, applied to build a dwelling on Lot 8 of Tulamette Acres, an undeveloped lot located off of NW Skyline Boulevard between NW Hampson Avenue and NW Lambert Street. The Tulamette Acres subdivision was platted in 1911, when no zoning laws had been enacted by the county. Lot 8 is 1.69 acres. Lot 9 is located to the west of Lot 8 and is 4.18 acres, and Lot 10 is located to the west of Lot 9 and is 4.46 acres. Lots 8, 9, and 10 are owned by Tindall, who acquired the lots in 1987. Lot 10 contains an existing dwelling approved in 1991.

Lots 8, 9, and 10 have been zoned Rural Residential (RR) since 1983. Prior to being rezoned to RR in 1983, the lots were zoned Multiple/Mixed Use Forest (MUF)-19.

The county planning director approved the applications and one of the petitioners appealed the planning director's decision. The hearings officer held a hearing on the appeal and approved the applications. This appeal followed.

ASSIGNMENT OF ERROR

As relevant here, Multnomah County Code (MCC) 33.3120(C) allows in the RR zone "[r]esidential use consisting of a single family dwelling constructed on a Lot of Record." The single issue presented in this appeal is whether Lot 8 is a "Lot of Record" as described in MCC 33.0005.

MCC 33.005 defines "Lot of Record" as follows:

> "**Lot of Record** – Subject to additional provisions within each Zoning District, a Lot of Record is a parcel, lot, or a group thereof that, when created or reconfigured, (a) satisfied all applicable zoning laws and (b) satisfied all

applicable land division laws, or (c) complies with the criteria for the creation of new lots or parcels described in MCC 33.7785. 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.) * * *" (Emphasis in original.)

MCC 33.3170 sets out the dates of zoning changes in the RR zoning district. [1]

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[1] MCC 33.3170 provides:

"(A) In addition to the Lot of Record definition standards in MCC 33.0005, for the purposes of this district the significant dates and ordinances for verifying zoning compliance may include, but are not limited to, the following:

"(1) July 10, 1958, SR zone applied;

During the proceedings below, petitioners contended that Lot 8 is not a Lot of Record because it has become aggregated, or consolidated, with Lots 9 and 10. Petitioners provided several theories to support their contention. The hearings officer determined that Lot 8 is a Lot of Record as described in MCC 33.0005 because it was created by plat in 1911 and has remained in its current configuration since 1911. Record 28.

In their single assignment of error, petitioners argue that the hearings officer's decision improperly construes the applicable law and is not supported by substantial evidence in the record. Petitioners also argue that the hearings officer's findings are inadequate to

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"(2) July 10, 1958, F-2 zone applied;

"(3) December 9, 1975, F-2 minimum lot size increased, Ord. 115 & 116;

"(4) October 6, 1977, RR zone applied, Ord. 148 & 149;

"(5) October 13, 1983, zone change from MUF-19 to RR for some properties, Ord. 395;

"(6) October 4, 2000, Oregon Administrative Rules Chapter 660 Division 004, 20 acre minimum lot size for properties within one mile of Urban Growth Boundary;

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

"(B) A Lot of Record which has less than the minimum lot size for new parcels or lots, less than the front lot line minimums required, or which does not meet the access requirement of MCC 33.3185, may be occupied by any allowed use, review use or conditional use when in compliance with the other requirements of this district.

"(C) Except as otherwise provided by MCC 33.3160, 33.3175, and 33.4300 through 33.4360, no sale or conveyance of any portion of a lot other than for a public purpose shall leave a structure on the remainder of the lot with less than minimum lot or yard requirements or result in a lot with less than the area or width requirements of this district.

"(D) The following shall not be deemed to be 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) An area of land created by court decree."

explain why she concluded that Lot 8 is a Lot of Record, because the findings fail to address some of petitioners' arguments and to explain why the hearings officer chose not to rely on evidence introduced by petitioners. We address petitioners' arguments below.

A. Aggregation of Lots 8, 9, and 10

During the proceedings below, petitioners argued that after Lots 8, 9, and 10 were platted as separate lots in 1911, they were subsequently "aggregated" together, either by operation of law or by affirmative action of the county and Tindall. We address each of petitioners' legal theories to support their argument that the lots were aggregated after 1911 below.

1. MCC Definition of "Lot"

Since at least 1964 and at the time the application was filed, MCC 33.0005(L)(3) defined a "Lot" as "[a] plot, parcel or area of land owned by or under the lawful control and in the lawful possession of one distinct ownership."[2] In their first subassignment of error, petitioners argue that the hearings officer's findings are inadequate because they fail to explain why she rejected petitioners' theory that the definition of "Lot" and the common ownership of Lots 8, 9 and 10 by Tindall and Tindall's predecessor in interest operated by law to aggregate or consolidate Lots 8, 9, and 10. Petitioners also argue that the hearings officer's findings are inadequate to explain why the hearings officer rejected the evidence of the depiction of Lots 8, 9, and 10 on prior versions of the county's official zoning maps, and deeds, that petitioners introduced to support their argument. Petition for Review 8.

ORS 197.763(1) requires that:

> "An issue which may be the basis for an appeal to the Land Use Board of Appeals shall be raised not later than the close of the record at or following the final evidentiary hearing on the proposal before the local government. Such issues shall be raised and accompanied by statements or evidence

[2] 2012 revisions to the MCC revised the definition of Lot. That revised definition is not an issue in this appeal.

> sufficient to afford the governing body, planning commission, hearings body or hearings officer, and the parties an adequate opportunity to respond to each issue."

ORS 197.835(3) similarly provides that the issues that may be raised in a LUBA appeal challenging a quasi-judicial land use decision "shall be limited to those raised by any participant before the local hearings body as provided by ORS * * * 197.763[.]"

Intervenor argues that petitioners failed to raise the issue that is raised in the first subassignment of error (at petition for review 7-8) —that the MCC definition of "Lot" and the common ownership of Lots 8, 9 and 10 aggregated the lots by operation of law—with sufficient specificity to afford the hearings officer and the parties an adequate opportunity to respond. Therefore, intervenor argues, petitioners are precluded from raising the issue for the first time at LUBA. *Boldt v. Clackamas County*, 107 Or App 619, 623, 813 P2d 1078 (1991) (the purpose of the "raise it or waive it" requirement at ORS 197.763(1) is to provide "fair notice" of the issue to the decision maker and other parties, so they have an adequate opportunity to respond and address the issue).

In response, at oral argument petitioners argued that aggregation pursuant to the MCC definition of "lot" was raised as part of approximately 130 record pages submitted by petitioners, including Record 56, which is the first page of a three-page March 21, 2013 letter from petitioners to the hearings officer.[3]

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[3] In the first paragraph of the March 21, 2013 letter, petitioners argued to the hearings officer:

> "Lot 8 of Tulamette Acres is part of the contiguous ownership that includes lots 9 and 10. Lots 8, 9 and 10 were aggregated on October 10, 1977 or earlier. There is no record of Lots 8, 9 and 10 being partitioned as lots of exception. Nor were they ever partitioned as a mortgage lot. The aggregation still stands. Since the beginning of zoning restrictions on this property the County Code has defined a lot as '*a plot parcel or area of land owned by or under the lawful control and in the lawful possession of one distinct ownership*.' * * * Record 56 (emphasis in original).

A few paragraphs later, petitioners argued:

> "On October 6, 1977 the zoning on the subject property changed to MUF-20 with a 20-acre minimum lot size. The zoning maps of 1977 reflect the impact of the new MUF-20 zone on

Although it is a close question, we agree with petitioners that the issue presented in the first subassignment of error was raised below with enough specificity to give the hearings officer and the parties "fair notice" of the issue. Petitioners argue that the hearings officer's findings are inadequate to address the issue. The hearings officer explained:

> "At the appeal hearing and in written submittals to the Planning Department, the Appellant contended that Lot 8 of Tulamette Acres is part of the contiguous ownership that includes lots 9 and 10. She also argues that Lots 8, 9 and 10 were aggregated on October 10, 1977 or earlier. I see no evidence in the record or in her submittals that would support a finding that lots 8, 9 and 10 were *ever* aggregated." Record 27 (emphasis added.)

The hearings officer's findings are likely as brief as they are because the issue was not raised with the focus and detail with which it is raised in the petition for review. However, even if the findings are not adequate to address the issue, that does not provide a basis for reversal or remand of the decision. Under ORS 197.829(2), LUBA is authorized to interpret county land use regulations in the first instance, in cases where the local government has failed to do so.[4] We conclude that the MCC 33.0005 definition of "lot" does not have the

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> the subject property. Map 1977-10-05 (prior to the enactment of Ordinance 149) shows lots 8, 9 and 10 as distinct tax lots. Map 1977-10-06 after adoption of Ordinance 149 shows the lots aggregated into one lot. While there was no specific aggregation requirement under the MUF-20 zone, 'lot' was defined as a common ownership. There was a provision for creating lots of exception. There was a provision allowing development of a lot of record. There was a prohibition on sale of parcels that were less than the minimum lot size of 20 acres. * * * Lot 8 did not meet the standards of a lot of record or lot of exception under this code as all the tax lots were under common ownership. Tax Lots 8, 9, and 10 were aggregated into one lot. All three lots combined met the definition of lot of record as they were less than the minimum lot size of 20 acres, but they were divided from other parcels in Tulamette Acres by a recorded deed prior to enactment of Ordinance 148."

The next paragraph refers to previous versions of the county's official zoning map. The following paragraphs quote and refer to provisions of a 1982 version of the MCC that applied to properties zoned MUF-19, that we discuss in more detail in our resolution of petitioners' fourth subassignment of error. As noted, included in some of the 130 record pages that are attached to the March 21, 2013 letter are copies of previous versions of the county's official Zoning Map, as well as the 1987 deed to Tindall that conveys "Lots 8, 9, and 10, Tulamette Acres" to the grantees. Record 91, 99, 110, 128, 129,140, 148, 152.

[4] ORS 197.829(2) provides:

legal effect that petitioners argue it does. The county's definition of "lot" merely provides that a "lot" is a separately-owned area of land. That definition does not preclude adjacent separately owned areas of land that happen to be owned by the same person. Under petitioners' theory, the moment that a subdivision plat is recorded, usually by a single owner of land, the lots would be created and "aggregated" in one fell swoop, which would effectively preclude subdivision of land into lots. Moreover, the county has, for some zoning districts, adopted a specific aggregation requirement for contiguous lots in the same ownership for land use permitting purposes, one of which we discuss in the next section. That demonstrates that the county knows how to require aggregation of lots in common ownership without relying on the definition of "lot."

In sum, the definition of "lot" did not serve to aggregate Lots 8, 9, and 10 merely because the lots are owned by the same parties.

The first subassignment of error is denied.

2. 1982 MCC Multiple Use Forest (MUF) District Lot of Record Provisions

As explained above, Lots 8, 9 and 10 were zoned MUF-19 in 1980, and were rezoned to RR in 1983. During the time the lots were zoned MUF-19, MCC 11.15.2182 (1982 version) provided in relevant part:

"11.15.2182 Lot of Record

> "(B) A Lot of Record which has less than the area or front lot line minimums required may be occupied by any permitted or approved use when in compliance with the other requirements of this district.
>
> > "(1) Parcels of land which are contiguous and in which greater than possessory interests are held by the same person, partnership or business entity shall be aggregated to comply as nearly as possible with a minimum lot size of ten acres, without creating

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"If a local government fails to interpret a provision of its comprehensive plan or land use regulations, or if such interpretation is inadequate for review, the board may make its own determination of whether the local government decision is correct."

> any new lot line, and with the front lot line minimums of this district. The word 'contiguous' shall refer to parcels of land which have any common boundary and shall include, but not be limited to, parcels separated only by an alley, street or other right-of-way, except as provided in subpart (2) of this subsection. Nothing in this subsection shall be deemed to alter or amend the other provisions of this Chapter."

During the proceedings below, petitioners argued that when the property was zoned MUF-19 in 1982, 1982 MCC 11.15.2182 operated by law to aggregate Lots 8, 9, and 10 into a single Lot of Record because the lots were (1) less than the 19-acre minimum lot size, (2) contiguous, and (3) held by the same persons. The hearings officer rejected petitioners' theory and found:

> "The Applicants' attorney * * * discusses the aggregation issue in her post hearing submittal.
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> > "'The appellant appears to contend that the aggregation standard in subpart (1) applied directly to the subject property because Tulamette Acres Lots 8, 9 and 10 are all in and were in common ownership at the time. However, this interpretation ignores the prefatory language of [1982] MCC 11.15.2182(B) that is the context for the aggregation. As stated in subsection B, the standard only applied to property when an applicant sought to develop the property with any permitted or approved use. At the time [MUF] zoning applied to the subject property, no development was ever proposed and the County had no grounds to and did not apply the aggregation requirement.'
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> " * * * * *
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> "As explained by County Staff at the March 22, 2013 hearing, the aggregation standards did not automatically apply to all [MUF] zoned contiguous lots in the County if those lots were later zoned Rural Residential.
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> "Lots 8, 9 and 10 are not aggregated. As Staff found: 'The subject property was determined to be a Lot of Record in case T2-06-111 as it is an intact lot from the Tulamette Acres subdivision platted in 1911. The configuration has not changed since that time and therefore the property is still a Lot of Record." Record 28.

In their fourth subassignment of error, petitioners argue that the hearings officer's findings are inadequate to explain why she concluded that 1982 MCC 11.15.2182 did not

automatically aggregate Lots 8, 9 and 10, and that her interpretation of the effect of 1982 MCC 11.15.2182 is incorrect.

We review the hearings officer's interpretation of the applicable MCC provisions to determine whether it is correct. *McCoy v. Linn County*, 90 Or App 271, 275, 752 P2d 323 (1988). The county and intervenor (respondents) respond, and we agree, that the hearings officer correctly concluded that 1982 MCC 11.15.2182 does not apply to her determination under MCC 33.0005 of whether Lot 8 is a Lot of Record, because the 1982 MCC 11.15.3182 requirement to aggregate lots was not self-effecting. The findings are adequate to explain that the hearings officer concluded that the aggregation requirement was triggered only if a person sought to develop a lot within the MUF-19 zone with a permitted or conditional ("allowed") use during the time it was zoned MUF-19. Because no development was proposed or completed during the three year period when the property was zoned MUF-19, the aggregation requirement in the 1982 MCC did not have the effect of aggregating the lots. When the property was rezoned to RR in 1983, 1982 MCC 11.15.2182 no longer applied to the property.

The fourth subassignment of error is denied.

3. 1991 Dwelling Approval for Lot 10 ("HDP 3-92a")

As explained above, Lot 10 contains an existing dwelling that was approved in 1991. During the proceedings below, petitioners argued that the 1991 dwelling approval (HDP 3-92a) had the legal effect of consolidating Lots 8, 9 and 10. Petitioners submitted a copy of the official zoning map from the county's file for the 1991 dwelling application and approval. Petitioners argued that a hand written note on the map that reads "Note donations to Multnomah County by the Tindalls (in red) Lots 8, 9 & 10 are now one big tax lot" provided substantial evidence that the lots were consolidated into a single lot. Record 255.

The hearings officer rejected petitioners' argument, relying on the staff's analysis of petitioner's argument:

> "In her email, Ms. Mackenzie indicates that the subject lot of the current application was supposed to be consolidated into other adjacent lots owned by the same property owner to form one large property in 1991. Ms. Mackenzie uses the notes on the bottom of the site plan from HDP 3-92a [the Lot 10 1991 homesite approval] as justification along with [pages from land use hearing notices for a different property]. However, the two documents come from separate cases and applications for different properties.
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> "The * * * site plan included with the email is * * * from [Lot 10] while [pages from other land use approvals for different property] is for property at 7547 NW Skyline. Permit HDP 3-92a did not involve the subject property. The subject property is zoned Rural Residential, a zone which does not have aggregation or consolidation requirements. The handwritten notes on the site plan from HDP 3-92a regarding consolidation of Lots 8, 9 and 10 is for the creation of one tax lot – not one Lot or Parcel as defined by ORS 92. A tax lot is used solely for assessment of taxes – not to describe deeded property. The code language included in Page 4 from the hearing notice of CU 3-98/SEC 12-98 for property that was zoned Commercial Forest Use, which does require aggregation in some circumstances, but does not apply to the subject property.
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> "**Hearings Officer**. I concur with the staff analysis. The notes on Exhibit C6 state: 'Lots 8, 9 & 10 are now one big tax lot.' The notes refer to the individual lots by their individual lot designations. A tax lot consolidation for assessment purposes is not an aggregation of lots. The tax lot consolidation did not change the character of the lots from 3 individual lots to one larger parcel. * * *" Record 24-25.

In their third subassignment of error, petitioners argue that the hearings officer misconstrued the applicable law and made a decision not supported by substantial evidence in the record when she concluded that the 1991 dwelling approval for Lot 10 did not provide evidentiary support for petitioners' argument that Lots 8, 9 and 10 were aggregated either prior to the time of the 1991 dwelling approval or by the 1991 approval.

Respondents respond, and we agree, that the hearings officer correctly concluded that the 1991 dwelling approval for Lot 10 did not aggregate Lots 8, 9 and 10. Respondents first point out that Lot 10 was zoned RR in 1991, and nothing in the MCC criteria that applied to the 1991 dwelling approval required aggregation in order to obtain a development permit for RR zoned property. Respondents next point out that nothing in the 1991 dwelling approval required aggregation as a condition of approval of the dwelling. Absent any requirement

either by operation of law that applied to the application for dwelling approval in 1991, or in the 1991 dwelling approval for aggregation of the lots, the hearings officer correctly concluded that the 1991 dwelling approval did not provide substantial evidence that the lots had been aggregated prior to its issuance or through issuance of the 1991 dwelling approval. The hearings officer also correctly rejected petitioners' argument that the handwritten note on a copy of a map in the file that referred to Lots 8, 9, and 10 as a single tax lot provides either evidence of or actual aggregation of the lots.

The third subassignment of error is denied.

B. The County's Decision in T2-06-111

The hearings officer found that Lot 8 is a "lot of Record" as described in MCC 33.0005. In relevant part, the findings provide:

> "Lots 8, 9, and 10 are not aggregated. As Staff found: 'The subject property was determined to be a Lot of Record in case T2-06-111 as it is an intact lot from the Tulamette Acres subdivision platted in 1911. The configuration has not changed since that time and therefore the property is still a Lot of Record.'
>
> "Lot 8 is a Lot of Record." Record 28.

In their second subassignment of error, petitioners argue that the hearings officer made a decision that is not supported by substantial evidence in the record when she relied on a previous county decision, T2-06-111, to conclude that Lot 8 is a Lot of Record and the decision is not included in the record of the current proceeding.

Respondents respond, and we agree, that the hearings officer did not base her decision that Lot 8 is a Lot of Record on the county's previous decision, but rather was simply pointing out that her conclusion that Lot 8 qualifies as Lot of Record is consistent with a previous county decision. The hearings officer adopted two pages of findings that appear prior to the finding that petitioners fault that explain her conclusion that Lot 8 is a Lot of Record. The hearings officer did not err in concluding that her independent decision on the application before her is consistent with a previous decision.

The second subassignment of error is denied.

The county's decision is affirmed.