



MARION COUNTY BOARD OF COMMISSIONERS

**Board Session Agenda Review Form**

Meeting date: February 21, 2024

Department: Public Works

Title: Receive Hearings Officer decision on Administrative Review Case 23-033/Prohar & Evdokia Bodunov

Management Update/Work Session Date: N/A Audio/Visual aids ☐

Time Required: 0 min Contact: Austin Barnes Phone: 503-566-4174

Requested Action: Receive Hearings Officer decision on Administrative Review Case 23-033/Prohar & Evdokia Bodunov.

Issue, Description & Background: The Marion County Hearings Officer issued a decision on February 8, 2024, determining the number of legal lots on a total of 26.65 acres for Administrative Review Case 23-033/Prohar & Evdokia Bodunov. As part of the land use process, the Marion County Board of Commissioners must officially receive notice of the decision.

Financial Impacts: None

Impacts to Department & External Agencies: None

List of attachments: Hearings Officer Decision

Presenter: Austin Barnes

Department Head Signature: 

BEFORE THE MARION COUNTY HEARINGS OFFICER

In the Matter of the Application of: ) Case No. AR 23-033  
Prohar and Evdokia Bodunov )  
ADMINISTRATIVE REVIEW

**ORDER**

**I. Nature of the Application**

This matter came before the Marion County Hearings Officer on the Application of Prohar and Evdokia Bodunov for an administrative review to determine the number of legal lots on a tract of approximately 26.65-acres in an TC (Timber Conservation) zone located in the 21000 block of Abiqua Rd NE (T7S; R1E; Section 13D, Tax lots 300 & 500).

**II. Relevant Criteria**

The standards and criteria relevant to this application are found in the Marion County Code, Chapter 17, particularly MCC 17.110 and MCC 17.115.

**III. Hearing**

A public hearing was held on the application on January 4, 2024. At the hearing the Planning Division file was made a part of the record. The following persons appeared and provided testimony:

- |    |                  |                                  |
|----|------------------|----------------------------------|
| 1. | Nicole Inman     | Marion County Planning Division  |
| 2. | Donald E. Kelley | Attorney for Applicants          |
| 3. | Austin Barnes    | Marion County Planning Division. |

No objections were raised to notice, jurisdiction, conflict of interest, exhibits, evidence or testimony presented at the hearing. Additional submissions were included in the record and marked as Exhibit 1:

Exhibit 1: Index of Deeds and Copies of Deeds. The deeds submitted as Exhibit 1 are already in the record, but the copies of the deeds presented as Exhibit 1 are more legible than the copies of the deeds included in the Planning file.

**IV. Executive Summary**

Applicants request administrative review to determine the number of legal lots on a tract of approximately 26.65-acres in a Timber Conservation zone located in the 21000 block of Abiqua Rd. NE.

The Applicants state that the two parcels (Tax Lots 300 and 500) were considered separate lots of record in a 1964 Deed. The two parcels were described in metes and bounds and were recorded. On this basis, Applicants argues that Tax Lot 300 and 500 are separate lots of record.

Marion County Planning states that a 1975 Deed combined the two previous lots into a consolidated parcel. The 1975 deed referenced a recorded Contract of Sale for its legal description. The metes and bounds legal description in both a 1972 deed and a 1975 deed match the current legal description in the current vesting deed. Marion County's position is that there cannot be multiple lots of record, and only the one consolidated lot of record has been used and recorded since land use regulations.

Applicants respond that the fact that the two parcels have been recorded as a single lot of record in 1974 does not strip the parcels of their status as lots of record. Marion County responds that the Applicants' interpretation would result in the existence of multiple lots of record.

Because Tax Lot 300 and Tax Lot 500 have been described in metes and bounds as a single parcel and the single parcel has been recorded in contracts, assignments, and deeds, it is determined that Tax Lots 300 and 500 constitute a single legal lot of record.

#### **V. Findings of Fact**

The Hearings Officer, after careful consideration of the testimony and evidence in the record, issues the following findings of fact:

1. The subject property is designated Forest in the Marion County Comprehensive Plan and is correspondingly zoned TC (Timber Conservation). The primary intent of both this designation and zone is to conserve forest lands by maintaining the forest land base and to protect the forest economy.
2. The subject property includes Tax Lots 300 and and Tax Lot 500 and is located approximately 1.25 miles south from the intersection of Abiqua Spring Ln NE and Abiqua Rd NE. Abiqua Rd NE runs through the parcels.
3. Both Tax Lot 300 and Tax Lot 500 are both bare land and have not been the subject of any land use actions.
4. Surrounding properties are also zoned TC with the majority being medium to large sized, undeveloped parcels. There are a few small parcels to the south/southeast and several homesites throughout the area.
5. Marion County Planning stated that although Tax Lots 300 and 500 may have been individual parcels in a 1964 deed, property owners took actions through contracts, assignments, and deeds to combine the parcels into one legal lot that has been used as the legal description for Tax Lots 300 and 500 as a single legal lot.

6. Donald Kelley, attorney for Prohar and Evdokia Bodenov, presented the Applicants' position. Mr. Kelley stated that the parcels were split and were two separate lots in 1964 (lots that also included additional real property). Mr. Kelley argues on behalf of the Applicants that a "lot of record" cannot lose its status as a legal lot by being combined in a deed or land sale contract absent a clear intention to vacate the status of the lots. Applicants' argue that their position is supported by state law which provides that a lawfully created lot or parcel remains a discrete lot or parcel unless the lot or parcel lines are vacated or the lot or parcel is further divided as provided by law. ORS 92.017(1).
7. The Planning Division posits that there cannot be multiple lots of record, and in this case, only one has been used since land use regulations.
8. The Planning Division requested comments from various governmental agencies. All contacted agencies either failed to comment or stated no concern with/objection to the proposal.

#### **VI. Additional Finding of Fact and Conclusions of Law**

1. Applicants have the burden of proving by a preponderance of the evidence that all applicable standards and criteria are met as explained in *Riley Hill General Contractor, Inc. v. Tandy Corporation*, 303 Or 390, 394-395(1987).

"Preponderance of the evidence" means the greater weight of evidence. It is such evidence that when weighed with that opposed to it, has more convincing force and is more probably true and accurate. If, upon any question in the case, the evidence appears to be equally balanced, or if you cannot say upon which side it weighs heavier, you must resolve that question against the party upon whom the burden of proof rests. (Citation omitted).

Applicants must prove, by substantial evidence in the record, it is more likely than not that each criterion is met. If the evidence for any criterion is equal or less, Applicants have not met their burden and the application must be denied. If the evidence for every criterion there's a hair or breath in Applicants' favor the burden of proof is met and the application is approved.

2. Pursuant to MCC 17.115.010, the Planning Director is authorized to issue determinations or administrative reviews regarding conformance of existing or proposed uses on a particular lot or parcel within the requirements of this title, including determinations or administrative review relating to non-conforming uses as provided in Chapter 17.110 MCC, subject to the requirements of this chapter.
3. An administrative review is a written determination that requires an interpretation or the exercise of factual, policy, or legal judgment, and is considered a land use decision and is issued as a land use decision.

4. The Applicants seek a determination of how many legal lots exist within the bounds of tax lots 300 and 500. Per Marion County Code 17.115, a proposed use, structure, or the legality of a lot or parcel may be reviewed as an administrative review when it requires an interpretation or the exercise of factual, policy, or legal judgment. This decision is issued as a land use decision.
5. MCC 17.115.110 provides that when a determination about a proposed use, structure or the legality of a parcel cannot be made without interpretation or the exercise of factual, policy or legal judgment, the proposed use, structure, or the legality of a lot or parcel may be reviewed as an administrative review subject to submitted of an application as provided in MCC17.119.020 and 17.119.025.
6. MCC 17.115.110 (A) states:  
*"The decision shall be made on the basis of the comprehensive plan and applicable standards and criteria in this title. The director or designee may attach any conditions of approval deemed necessary to ensure conformance of the use, structure, lot or parcel or to the standards or criteria. Administrative review applications may be filed and shall be signed as required in MCC 17.119.020 and 17.119.025. Notwithstanding any other provisions of this title, the director or designee may forward any land use permit or application to the planning commission or hearings officer for a public hearing and initial decision."*
7. In its Notice of Decision issued on November 17, 2023, the Director determined that Tax Lots 300 and 500 constitute a single legal lot.
8. MCC 17.115.110(C) allows an application to file a request for hearing to the planning division within 15 days of the date the decision was received.
9. On November 27, 2023, within 15 days of the date the decision was received, submitted an Appeal of the Planning Division decision. The Applicants' appeal is timely.
10. On request for a hearing, the hearings officer shall hold a hearing on the matter in accordance with MCC 17.111. The hearings officer may hold a hearing and issue a determination on this matter.

#### Lot, Lot of Record, and Parcel

11. MCC 17.110.315 defines a "Lot" as a unit of land created by a subdivision as defined in ORS 92.010 in compliance with all applicable zoning and subdivision ordinances; or created by deed or land sale contract prior to September 1, 1977, exclusive of units of land created solely to establish a separate tax account.

12. MCC 17.110.360 defines a “lot of record” as a lot which is part of a subdivision or a lot or parcel described by metes and bounds which has been recorded in the office of the county recorder and which complied with all applicable laws at the time of its recording.
13. MCC 17.114.040 defines a “nonconforming lot of record” as any lot created by deed, plat or subdivision prior to September 1, 1977, is considered legally created for the purposes of applying the land use code.
14. Marion County Code 17.110.427 defines a legal parcel as:

*“Parcel” means a unit of land created by a partitioning as defined in ORS 92.010 in compliance with all applicable zoning and partitioning code provisions contained in Chapter 17.172 MCC, or created by deed or land sales contract prior to September 1, 1977, excluding units of land created solely to establish a separate tax account.*
15. Based upon MCC 17.110.427, Marion County Planning looks to the deed closest in time, but prior to September 1, 1977. Planning reviews the legal description in the deed that is closest to but prior to September 1, 1977 to determine the original legal lot. Planning then reviews for any changes that occurred between the date of the deed and present day (by deed or land use action). Based upon this information, Marion County Planning ascertains the current legal lots.
16. Applicants state that MCC 17.110.360 defines a lot of record and that Tax Lot 300 and Tax Lot 500 satisfy that definition because Tax Lots 300 and 500 were described in metes and bounds, which were recorded in the office of the county recorder, and complied with the applicable laws at the time of recording. Applicants argues that the mere fact that a recorded contract later described the Tax Lot 300 and Tax Lot 500 with a single legal description does not alter their status as a “lot of record.” Applicants argue that state law allows a lawfully created lot to remain a discrete lot or parcel unless the lot or parcel lines are vacated or the lot or parcel is further divided as provided by law. ORS 92.017(1) provides that a lawfully created lot or parcel remains a discrete lot or parcel unless the lot or parcel lines are vacated or the lot or parcel is further divided as provided by law. Marion County Code does not include an analogous provision.
17. Applicants provided historical and recent deeds and contracts for review with the Application. Exhibit 1 also includes the deeds and contracts with more legible copies of the documents. The documents considered are:

April 27, 1964 Deed: Warranty Deed recorded at Volume 585, Page 269:

The legal description in the warranty deed included Parcel 1 and Parcel 2 with separate and individual metes and bounds. Parcel 1 included Tax Lot 200, 300, and a portion of Tax Lot 400. Parcel 2 included Tax Lots 500, 600, 700, and 800. The “save and except”

for Parcel 2 incorrectly describes a portion of Tax Lot 400 and should have been attached to Parcel 1.

The 1964 Warranty Deed does describe Tax Lots 300 and 500 as portions of separate legal lots.

Tax Lots 300 and 500 were considered separate legal lots in 1964.

November 3, 1967 Contract: Land Sale Contract recorded at Volume 638, Page 731:

The legal description for the property conveyed pursuant to the Land Sale Contract included single metes and bounds encompassing Tax Lots 200, 700, and 800.

June 13, 1972 Contract: Land Sale Contract recorded at Volume 728, Page 450:

The legal description for the property being conveyed included single metes and bounds encompassing Tax Lots 300, 500, 600, and a portion of Tax Lot 400, save and except a portion of Tax Lot 400.

August 15, 1972: Assignment of Contract references Volume 728, Page 450:

The assignment assigned the land sale contract for Tax Lots 300, 500, and 600.

October 2, 1973: Contract for the Sale of Property recorded at Volume 762, Page 113:

The legal description for the property was a single metes and bounds description for Tax Lot 600. Tax Lot 600 was conveyed by the contract for sale, and therefore, Tax Lot 300 and Tax Lot 500 are the remnant parcel. Tax Lot 600 was conveyed out of the larger parcel, separately described, and Tax Lots 300 and 500 were one parcel.

This contract sale was for tax lot 600. Therefore, Tax Lots 300 and 500 are the remnant parcel, as tax lot 600 was conveyed out of the larger parcel and described separately prior to Reel 10 Page 694 being recorded.

June 20, 1974: Land Sale Contract recorded at Volume 780, Page 741:

The legal description for the property conveyed pursuant to the Land Sale Contract included a single mete and bounds description that included Tax Lots 300, 500, and 600, and a portion of Tax Lot 400, save and except a portion of Tax Lot 400 and save and except Tax Lot 600.

The 1974 Land Sale Contract created a unit of land by land sale contract prior to September 1, 1977.

March 11, 1975: Assignment of Contract recorded at Reel 10, Page 694:

The assignment assigned the Land Sale Contract for Tax Lots 300 and 500. Reel 10 Page 694, recorded March 11, 1975, was the deed that Staff found closest, but prior to, September 1, 1977. It references a legal description used in a contract sale from Vol. 728 Page 450. This legal description was of one parcel that encompassed Tax Lots 300 and 500.

August 24, 2021: Warranty Deed recorded at Reel 4530, Page 473:

The Warranty Deed conveyed Tax Lots 300 and 500 with a legal description consisting of a single mete and bounds description that included Tax Lot 300 and Tax Lot 500, along with Tax Lot 600 and a portion of Tax Lot 400, and save and except Tax Lot 600 and the portion of Tax Lot 400.

This legal description is the same as the legal description provided in the Contract Sale recorded on June 20, 1974 at Volume 780, Page 741.

The last legal description in a recorded document prior to September 1, 1977 describes Tax Lot 300 and Tax Lot 500 as a single legal lot. The most recent recording also describes Tax Lot 300 and Tax Lot 500 as a single legal lot. Since land use regulation in Marion County, the two tax lots have been conveyed as one lot. Pursuant to Marion County Code 17.110.427, Tax Lots 300 and 500 are a single legal lot because it was defined as such by deed and land sales contract prior to September 1, 1977, and remains as a single lot through the last recorded deed in 2021.

18. Marion County Code does not include a provision that requires a lot or parcel line be affirmatively vacated to remain a discrete lot or parcel as ORS 92.017(1) requires.
19. In *Thomas v. Wasco County* (LUBA 2008-206), the Board considered a Wasco County Zoning Ordinance that consolidated certain nonconforming contiguous legal lots and parcels for development purposes. The Board referenced that in *Kishpaugh v. Clackamas County* (24 LUBA 164 (1992)), the Board held that a county land use regulation that for development purposes required combination of substandard lots under the same ownership was not inconsistent with ORS 92.017. In *Kishpaugh*, the Board concluded that nothing in either the text of ORS 92.017 or its legislative history suggests that all lawfully created lots and parcels must be recognized by local governments as being separately developable. ORS 92.017 is intended to preserve discrete lots and prevent local governments from refusing to recognize lawful divisions of land such that lots and parcels could not be sold to third parties. The Board also referenced *Campbell v. Multnomah County*, 25 LUBA 479 (1993) which held that ORS 92.017 does not preclude a local government from imposing zoning or other restrictions with directly or indirectly require that two or more lawfully created lots be combined for purposes of development.
20. In this case, a land sale contract and subsequent deeds treat the two tax lots as one legal parcel. The last legal description for the subject property in a recorded document prior to September 1, 1977 describes Tax Lot 300 and Tax Lot 500 as a single legal lot. The most recent recording also describes Tax Lot 300 and Tax Lot 500 as a single legal lot. Since land use regulation in Marion County, the two tax lots have been conveyed as one lot.
21. Pursuant to Marion County Code 17.110.427, Tax Lots 300 and 500 are a single legal lot because it was defined as such by deed and land sales contract prior to September 1, 1977, and remains as a single lot through the last recorded deed in 2021. No changes have been made to the parcel since Reel 10 Page 694. Nothing in ORS 92.017 prohibits the lots from being consolidated by Deed under the Marion County Code.



## VII. Order

Because Tax Lot 300 and Tax Lot 500 have been described in metes and bounds as a single parcel and the single parcel has been recorded in contracts, assignments, and deeds, it is determined that Tax Lots 300 and 500 constitute a single legal lot of record.

It is hereby determined that Tax Lots 300 and 500 represent one parcel of land that was lawfully established in Marion County.

## VIII. Appeal Rights

An appeal of this decision may be taken by anyone aggrieved or affected by this Order. An appeal must be filed with the Marion County Clerk (555 Court St. NE, Suite 2130, Salem, Oregon) by 5:00 p.m. on the \_\_\_\_\_ day of February, 2024 (15 days after the date of the Order). The appeal must be in writing, must be filed in duplicate, must be accompanied by a payment of \$500, and must state wherein this order fails to conform to the provisions of the applicable ordinance. If the Board denies the appeal, \$300 of the appeal fee will be returned.

DATED at Salem, Oregon this 8th day of February, 2024.



Jill F. Foster

Marion County Hearings Officer

## CERTIFICATE OF MAILING

I hereby certify that I served the foregoing order on the following persons:

Prohar Bodunov  
29865 S. Jackson Rd.  
Canby, OR 97013

Surveyor's Office (via email)  
KInman@co.marion.or.us

Don Kelley  
110 N 2<sup>nd</sup> Street  
Silverton, OR 97381

Fire District:  
Silverton Fire District (via email)  
billmiles@silvertonfire.com

Area Advisory Committee #7:

Dawn Olson  
15056 Quall Rd  
Silverton, OR 97381  
James Sinn (via email)  
ijsinn@gmail.com

Planning Division (via email)  
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Roger Kaye  
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Building Inspection (via email)  
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Kaldrich@co.marion.or.us  
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Building Inspection Septic  
*(via email: abammes@co.marion.or.us)*  
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Pudding River Watershed Council  
*(via email)*  
anna@puddingriverwatershed.org  
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Public Works LDEP Section (via email)  
jrasmussen@co.marion.or.us  
mcldep@co.marion.or.us  
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**County Agencies Notified:**

Assessor's Office (via email)  
assessor@co.marion.or.us

School District:  
Silver Falls (via email)  
Nielsen steve@silverfalls.K12.or.us

Tax Collector (via email)  
Rweisner@co.marion.or.us  
NMcVey@co.marion.or.us  
ADhillon@co.marion.or.us


Code Enforcement (via email)  
CGoffin@co.marion.or.us  
JTaylor@co.marion.or.us  
ccaballero@co.marion.or.us

**State Agencies Notified:**

DLCD (*via email*)

hilary.foote@state.or.us

By mailing to them copies thereof. I further certify that said copies were placed in sealed envelopes addressed as noted above, that said copies were deposited in the United States Post Office at Salem, Oregon, on the 27th day of February, 2024 and that the postage thereon was prepaid.

  
\_\_\_\_\_  
Administrative Assistant to the  
Hearings Officer