

BEFORE THE BOARD OF COMMISSIONERS OF THE STATE OF OREGON

FOR THE COUNTY OF YAMHILL

SITTING FOR THE TRANSACTION OF COUNTY BUSINESS

In the Matter of Upholding the Planning Director's)
Approval of Planning Docket L-47-15, Applicant)
Michael Hintermeyer; Lot Line Adjustment) Board Order 16-159
to Parcels Approved Through Docket P-18-15,)
and Denying an Appeal by the Oregon Department)
of Land Conservation and Development)

THE BOARD OF COMMISSIONERS OF YAMHILL COUNTY, OREGON (the Board) sat for the transaction of county business on April 28, 2016, Commissioners Mary Starrett, Stan Primozych, and Allen Springer being present.

IT APPEARING TO THE BOARD as follows:

- A. By application dated October 27, 2015, Michael W. Hintermeyer requested permission to adjust the lot lines of two parcels created through Planning Docket No. P-18-15, pursuant to Ballot Measure 49, for Tax Lot 2512-401. The proposed adjustment, of the lot lines of a two-acre parcel and a 78-acre parcel, would result in two parcels of 40 acres each;
- B. The Yamhill County Planning Director, Mike Brandt, approved the application on December 18, 2015;
- C. On December 30, 2015, the Oregon Department of Land Conservation and Development (DLCD) appealed the Planning Director's approval of Docket L-47-15;
- D. The appeal was heard by the Board on March 10, 2016. The record remained open until April 8, 2016 for receipt of additional written testimony; and
- E. On April 14, 2016, the hearing was reconvened at the point of staff deliberation, and the Board members present voted 2-0 to uphold the Planning Director's decision, with staff directed to prepare written findings for adoption on April 28, 2016; NOW, THEREFORE,

IT IS HEREBY ORDERED BY THE BOARD AS FOLLOWS:

Section 1. The Planning Director's decision to approve Docket L-47-15 is hereby upheld, and the appeal filed by DLCD is denied.

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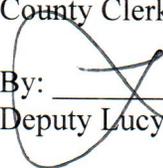
Section 2. The findings and conditions attached as Exhibit "A" and incorporated herein by reference are hereby adopted in support of this Order.

DONE this 28th day of April, 2016 at McMinnville, Oregon.

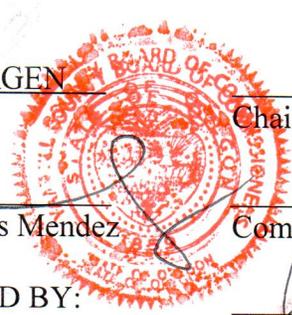
ATTEST: YAMHILL COUNTY BOARD OF COMMISSIONERS

BRIAN VAN BERGEN

County Clerk

By: 

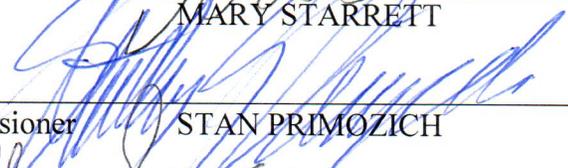
Deputy Lucy Flores Mendez



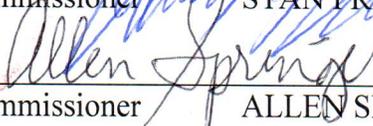
Chair


MARY STARRETT

Commissioner


STAN PRIMOZICH

FORM APPROVED BY:


Commissioner

ALLEN SPRINGER


Timothy S. Sadlo

Senior Assistant County Counsel

**Exhibit A – Board Order 16-159
Findings in Support of Decision to
Uphold the Planning Director’s Approval
Of Docket No. L-47-15
And Conditions of Approval**

DOCKET NO.: L-47-15

REQUEST: An appeal of an approval of a property line adjustment to reconfigure the parcels approved through Docket P-18-15, transferring 38 acres from Parcel 1 to Parcel 2 and resulting in two lots of 40 acres each.

APPLICANT: Michael Hintermeyer

APPELLANT: Department of Land Conservation and Development

TAX LOT: 2514-401

LOCATION: 13501 NW Ford Road, Gaston, Oregon

ZONE: AF-80 Agriculture/Forestry Use

CRITERIA: Measure 49 approval E133941, Section 403.11(B)(2) of the Yamhill County Zoning Ordinance, the Yamhill County Land Division Ordinance, and ORS 92.192

FINDINGS:

1. YCZO §403.11(B)(2)(a) requires a finding that:

(a) Any parcel principally devoted to farm use subject to alteration in size through a lot-line adjustment shall be shown to be of a size at least as appropriate for the continuation of the existing commercial agricultural enterprise in the area as were the parcels prior to adjustment.”

The subject property contains a mixture of farm and forestry uses, and is principally devoted to farm use. The southern end of the property is forested, and other areas are in use as pasture. Commercial farming operations on neighboring parcels are conducted on 20 or 40 acre parcels, and include growing Christmas trees, small cattle operations, woodlots and hay production. Area farms (neighboring and nearby properties) conduct commercial farming operations on parcels that consists of 20 and 40 acres. The two-acre parcel created by the Measure 49 partition is too small to contain a commercial farm operation. Approval of the request would result in the two-acre parcel being enlarged to 40 acres, a size that is suitable for commercial farming in the area. The requirement in subsection 403.11(B)(2)(a) is that the resulting lot sizes be at least as appropriate for the continuation of the existing commercial agricultural enterprise in the area as

were the parcels prior to the adjustment. In this case, the resulting two forty-acre parcels will continue to be appropriate for commercial agricultural enterprise, and the request therefore meets this standard.

2. YCZO §403.11(B)(2)(b) requires a finding that:

“(b) Any parcel principally devoted to forest use subject to alteration in size through a lot-line adjustment shall be shown to be at least as economically efficient for forest practices, provide for continuous growing and harvesting of forest tree species at least as well as, and conserve other forest values at least as well as did the parcel prior to adjustment.”

The principle use of the subject parcels is, and is intended to remain, farm use. Additionally, the two 40 acre parcels that will be created by the adjustment are as suitable (or more suitable) for the growing and harvesting of forest tree species and to conserve other forest values as a 78-acre parcel and a two-acre parcel. The Board finds that this standard is not applicable, but that if the two parcels were principally devoted to forest use, this standard would be met.

3. YCZO §403.11(B)(2)(c) requires a finding that:

“(c) When one or more parcels subject to a proposed adjustment are larger than the minimum lot size, the same number of parcels shall be as large or larger than the minimum lot size after adjustment. When all parcels subject to the proposed adjustment are as large or larger than the minimum lot size in the zone, no parcel shall be reduced below the applicable minimum lot size.”

In this case, the minimum lot size is 80 acres. The two parcels approved through P-18-15 are two and 78 acres, and both parcels are below the minimum lot size. This section is therefore not applicable.

4. YCZO §403.11(B)(2)(d) requires a finding that:

“(d) The lot line adjustment shall not result in an increase in the potential number of dwellings on the parcels. When an area that contains an existing dwelling will be conveyed from one parcel (Parcel A) to the adjacent parcel (Parcel B) Parcel B must either receive land use approval for the dwelling under the terms of this ordinance, or, in the alternative, a deed affidavit shall be recorded by the owner of Parcel A prohibiting the establishment of any new principal dwellings on the adjusted parcel or parcels.”

The Measure 49 partition allows for a dwelling on the two-acre parcel, and a dwelling already exists on the 78-acre parcel. The proposed lot line adjustment will not increase the potential number of dwellings – two dwellings were allowed prior to this approval, and only two dwellings (one on each parcel) will be allowed following this approval.

5. Section 7.020 of the Yamhill County Land Division Ordinance (YCLDO) contains standards for approval of property line adjustments. Section 7.020(1) states:

“(1) All parcel sizes, property-line setbacks, and other dimensional attributes resulting from a lot-line adjustment shall conform to the provisions of this ordinance and the Zoning Ordinance. Conditions that existed legally prior to the application that do not conform to the ordinance provisions shall be allowed to continue.”

Other than the existing dwelling, the property is undeveloped. There are no setback issues, and neither existing parcel is above the minimum lot size. This requirement is met.

6. Section 7.020(2) states:

“(2) Lot-line adjustments shall conform to the Comprehensive Plan and Official map, any criteria of the Zoning Ordinance, and any state requirements of Oregon Revised Statutes chapters 92, 197, and 215.

The official zoning map identifies the property as AF-80 Agriculture/Forestry. The minimum lot size for this property is 80 acres. Since neither of the parcels is above the minimum lot size, neither must remain above the 80-acre minimum lot size after the adjustment. Compliance with the zoning ordinance is addressed elsewhere in these findings.

7. Section 7.020(3) states:

“(3) A lot-line adjustment shall not result in the creation of a new lot or a replat of an existing subdivision or partition.”

This approval will not result in the creation of an additional parcel or replat any recorded development.

8. Section 7.020(4) states:

“(4) All lots resulting from a lot-line adjustment shall have legal access to a public road pursuant to Sections 6.010 and 6.020.”

The adjusted lots will be required to either abut Ford Road or have access via a 30-foot wide easement connecting with the dedicated public right-of-way. This condition ensures that YCLDO §7.020(4) is met. The applicant has indicated that the northern 40-acre parcel with the existing dwelling will retain access directly to Ford Road, while the southern 40-acre parcel will access Ford Road via an existing recorded easement across neighboring property owned by Schmit and Tavera.

9. With regard to arguments made by the parties concerning Ballot Measure 49 and ORS 92.192: The county has considered the arguments of the DLCD, Friends of Yamhill County, and the applicant regarding the meaning of Section 11(3)(a) of Measure 49; OAR 660-041-0180; and ORS 92.192 as it existed in December, 2015, when the applicant requested the lot line

adjustment that is the subject of this appeal. The county agrees with the applicant, and finds that nothing in the language of Section 11(3)(a) of Measure 49 or OAR 660-041-0180 prohibits the applicant from utilizing the provisions of ORS 92.192 (as it read on the date of application) to adjust the lot lines between the two-acre parcel and the 78-acre parcel created by the Measure 49 partition, which was approved and not appealed.

10. The language of Section 11(3)(a) of Measure 49 and OAR 660-041-0180 is clear and unambiguous. Both sections prohibit the “creation” of a new lot or parcel on property zoned for farm use, forest use, or mixed farm/forest use that exceeds either two or five acres, depending upon whether the parcel is composed of “high value farm or forest land,” as that term is defined in Measure 49. The subject property in this appeal is zoned for farm and forest use, and is predominantly composed of soils that fall within the definition of “high value farmland” under Measure 49. Thus, any new parcel created by the applicant pursuant to his approved Measure 49 Final Order could not exceed two acres.

11. The applicant, pursuant to his approved Measure 49 Final Order, applied for and received approval to partition the subject property to create a new Measure 49 parcel. The new parcel was two acres. The applicant’s partition application met all state and county standards, and was approved by the county Planning Director pursuant to applicable provisions of the county’s Zoning Ordinance and Land Division Ordinance. That decision was not appealed, and is now final.

12. Subsequent to the creation of the new parcel by the applicant, the applicant submitted the application for lot line adjustment that is on appeal in this case. The applicant could not have submitted an application for a lot line adjustment until after the subject property was partitioned, as allowed by the Measure 49 Final Order, and after the new lot was created by the approved partition.

13. The applicant has complied with the requirements of Section 11(3)(a) of Measure 49 and OAR 660-041-0180. The applicant applied for and received approval for the “creation” of a two-acre parcel resulting from the Measure 49 Final Order. The parcel created by the applicant did not exceed two acres. The applicant met the requirements of Section 11(3)(a) of Measure 49 and OAR 660-041-0180, and the parcels created complied with the provisions of Measure 49 and the LCDC rule. Any party, including the DLCD and Friends of Yamhill County (FOYC), could have raised the issue they raise in this appeal and could have challenged the failure by the county to add a condition of approval to applicant’s partition approval prohibiting the applicant from adjusting the lot line of the Measure 49 created parcel in a manner that increased the size of the parcel beyond the two-acre maximum allowed by Section 11(3)(a) of Measure 49 and OAR 660-041-0180. Neither the DLCD nor FOYC made such a challenge, however, and the challenge now raised by both parties is untimely, as it could have and should have been raised as part of the applicant’s partition application, at the time of the “creation” of the subject parcels. DLCD in particular should have known that, once created, the configuration and size of the parcels could be changed under ORS 92.192 as it existed at the time of approval of Docket P-18-15.

14. In the alternative, even if the arguments raised by the DLCD and FOYC are timely and proper in this appeal, they are rejected in this proceeding as an incorrect interpretation of Section

11(3)(a) of Measure 49 and OAR 660-041-0180. Both provisions refer to the “creation” of a lot or parcel under Measure 49. Neither section contains a requirement that a lot or parcel “created” by partition authorized by a Measure 49 Final Order can never be adjusted and increased in size beyond the two-acre maximum parcel size. In essence, both the DLCD and FOYC proffer arguments that the language of Section 11(3)(a) of Measure 49 and OAR 660-041-0180 create a permanent deed restriction on parcels created by a partition authorized by a Measure 49 Final Order. If the legislature (and the voters) intended such a limitation on parcels created by a Measure 49 Final Order, they would have said so in the language of Section 11(3)(a) of Measure 49 and that language would have been carried over into OAR 660-041-0180. The language does not contain this requirement, however, and there is no basis for the conclusion that the legislature and/or the voters (impliedly) intended the limitation proffered by the DLCD and FOYC.

15. Additionally, both the DLCD and FOYC misconstrue ORS 92.192 (HB 3629) as adopted by the 2008 Oregon legislature. ORS 92.192 (2008) allowed a property owner owning contiguous parcels in a farm, forest, or mixed farm/forest zone to adjust the lot lines between two parcels, provided both parcels are smaller than the minimum parcel size for the zone in which the property is located. In this case, the subject property is zoned AF-80. Under the county’s Zoning Ordinance, the minimum parcel size in the AF-80 zone is 80 acres. At the time the applicant submitted his application that is the subject of this appeal, the two existing parcels were 78 acres and 2 acres in size. Each parcel was smaller than the minimum lot size in the AF-80 zone. ORS 92.192, as it applied to the application in question, (and which is controlling in this case pursuant to ORS 215.427(3)(a)) stated that if two parcels are both smaller than the minimum parcel size for the zone, the parcels can be adjusted by way of a lot line adjustment without limitation as to size. That is what the applicant has proposed. The applicant has met the requirement for a lot line adjustment under county ordinances and as allowed by ORS 92.192 prior to its amendment in 2015 and with an effective date of January 1, 2016.

16. ORS 92.192 (HB 3629) was enacted by the 2008 Oregon legislature, after Measure 49 was referred to Oregon voters by the 2007 Oregon legislature and approved by Oregon voters in November, 2007. The Oregon legislature is presumed to be aware of the law in existence when they pass a bill to create a new law. The presumption should hold in this case, considering that the same 90 legislators who were responsible for putting Ballot Measure 49 on the ballot in 2007, also passed HB 3629 to allow lot line adjustments for previously-created substandard lots. HB 3629 allowed for the lot line adjustment of any two parcels that are smaller than the minimum parcel size in the subject zone, and did not exclude parcels created by a Measure 49 Final Order (as ORS 92.192 now does). If the 2008 Oregon legislature intended to exclude parcels created by Measure 49 Final Orders from the provisions of ORS 92.192, it should have done so expressly, and did not do so expressly until 2015, with an effective date of January 1, 2016. Without inserting additional words, (not permitted in statutory interpretation) ORS 92.192 (as it read on the date of the application) expressly authorized the applicant to adjust the lot lines between his two parcels.

17. ORS 92.192 does not conflict with Section 11(3)(a) of Measure 49 and OAR 660-041-0180, and is consistent with those provisions. Section 11(3)(a) of Measure 49 and OAR 660-041-0180 apply to the “creation” of a parcel pursuant to a Measure 49 Final Order, whereas ORS 92.192 applies to the lot line adjustment of a parcel that has already been created and is in

existence. In other words, ORS 92.192 applies at a different point than Section 11(3)(a) of Measure 49 and OAR 660-041-0180. The interpretation of ORS 92.192, Section 11(3)(a) of Measure 49 and OAR 660-041-0180 followed in these findings gives meaning to each provision, allowing each provision to be applied completely. The interpretation of ORS 92.192 proffered by the DLCDC and FOYC would place limitations on lot line adjustments allowed by ORS 92.192 that did not exist on the date of the application.

18. Enactment of HB 3629 and the amendments to ORS 92.192 reflect an understanding by the 2008 Oregon legislature that parcels that are already smaller than the minimum parcel size in a farm, forest, or mixed farm forest zone are less capable of being put to productive farm or forest use. This argument is supported by the email from Jim Johnson of the Oregon Department of Agriculture to Sid Friedman of FOYC which is included in the record of this appeal. From a farm or forest productivity standpoint, there is less reason to prohibit lot line adjustments for parcels that are already smaller than the minimum parcel size in farm or forest zones. The minimum parcel sizes were created to ensure the continuation of large parcels of land, which are conducive to farm and forest uses. Once the parcels are smaller than the minimum parcel sizes, there is less reason to prohibit lot line adjustments, which is why ORS 92.192 allows the adjustments. It is not reasonable to conclude that the 2008 Oregon legislature did not care about the impact to farm and forest uses resulting from a lot line adjustment between two small parcels that were not created by Measure 49, but were concerned about the same impact of a lot line adjustment involving a parcel created by Measure 49.

Conditions of Approval

The request in Docket L-47-15 for a lot-line adjustment to reconfigure the parcels approved through Docket P-18-15, transferring 38 acres from Parcel 1 to Parcel 2 of Tax Lot 2512-401 resulting in two parcels of approximately 40 acres each, is hereby approved, subject to the following conditions:

1. The adjusted property lines shall be reflected on the final plat for Docket P-18-15.
2. No additional lots or parcels shall be created from this property line adjustment.
3. The adjusted property line shall be established in a location that ensures that any existing structures comply with the setback requirements of Section 403.11(C) the Agriculture/Forestry Zoning District.
4. A 30-foot wide (minimum) nonexclusive easement for ingress and egress shall be assigned to provide access to Parcel 2, surveyed, and shown on the face of the final plat. This easement shall be granted at the time of conveyance of any of the lots.
5. The road providing access to Parcel 2 shall be constructed to county specifications and inspected by a private engineer, or a road construction agreement shall be completed and recorded, prior to final plat approval.

6. Either domestic water shall be provided to each lot by a community water system or an on-site well or wells, with the location of the well(s) indicated on a separate map submitted to the file, or the following disclosure shall be placed on the plat:

No municipal, public utility, community water supply or private system will be provided to the purchaser of those lots noted hereon.

Each lot not provided with a well or community service shall be so identified.

7. Unless an extension is granted, the applicant has one year from the date of this Board Order, or from the date that all appeals have been resolved, without further appeal, to complete these requirements and to record the instrument of conveyance with the County Clerk. Otherwise, this approval shall become null and void.