

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)
Commission's Denial of a Request to Replat Lots)
26 and 27 of the Woodland Heights Subdivision) Board Order 19-160
into Residential Parcels of Approximately 2.5, 2.5)
2.5 and 3.75 acres in the VLDR-5 Zone Using)
Parcel Size Averaging; Planning Docket R-02-18)

THE BOARD OF COMMISSIONERS OF YAMHILL COUNTY, OREGON (the Board) sat for the transaction of county business on May 23, 2019, Commissioners, Richard L. "Rick" Olson, Mary Starrett and Casey Kulla being present.

IT APPEARING TO THE BOARD as follows:

A. On March 7, 2019, the Planning Commission held a hearing on an application by Becks Landing LLC to replat Lots 26 and 27 in the Woodland Heights Subdivision (zoned Very Low Density Residential, five-acre minimum lot size) into four parcels of approximately 2.5, 2.5, 2.5 and 3.74 acres using parcel size averaging (YCZO 502.06(A)(1)(c)). Following the close of oral testimony and at the request of a party, the record remained open for the receipt of written testimony and evidence until March 14; for rebuttal until March 21; and for the applicant's 'final word' until March 28, 2019. The hearing was continued on April 4, 2019, at the point of staff recommendation. At the close of the hearing, the Planning Commission deliberated and voted 4-2 to deny the application.

B. The Planning Commission's decision was appealed to the Board by the applicant. The Board held a public hearing regarding the application and appeal on May 16, 2019. Following the close of the hearing, the Board deliberated and voted 2-0 (Commissioner Olson excused) to uphold the Planning Commission's decision, deny the appeal, and deny the application; NOW THEREFORE,

IT IS HEREBY ORDERED BY THE BOARD AS FOLLOWS:

Section 1. The Planning Commission's decision to deny Docket R-02-18 is hereby upheld, the appeal filed in this matter is denied, and the application is denied.

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

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DONE this 23rd day of May, 2019 at McMinnville, Oregon.

ATTEST:

YAMHILL COUNTY BOARD OF COMMISSIONERS



BRIAN VAN BERGEN
County Clerk

Chair

Abstained

RICHARD L. "RICK" OLSON

By: *Carolina Rook*
Deputy Carolina Rook

Commissioner

MARY STARRETT

FORM APPROVED BY:

Commissioner

Casey Kulla
CASEY KULLA

T. Sadlo
Timothy S. Sadlo
Senior Assistant County Counsel

Exhibit A
Board Order 19-160

Findings in Support of Denial of
Docket No. R-02-18

FINDINGS OF FACT:

A. Background Facts

- DOCKET NO.: R-02-18
- REQUEST: To replat Lots 26 and 27 of the Woodland Heights Subdivision into residential parcels of approximately 2.77, 3.18, 2.71 and 2.52 acres. The request involves the use of parcel size averaging.
- APPLICANT: Beck's Landing LLC
- APPELLANT: Beck's Landing LLC
- TAX LOTS: 5414-800 and 5414-900
- LOCATION: The parcels are located on SE Woodland Heights Road approximately ½ mile southeast of the intersection with SE Starr Quarry Road, Amity.
- ZONE: VLDR-5, Very Low Density Residential
- CRITERIA: Sections 502 of the Yamhill County Zoning Ordinance, ORS Chapter 92, and the Yamhill County Land Division Ordinance
1. *Lot Size:* Tax Lot 5414-800 is approximately 5.17 acres and Tax Lot 5414-900 is approximately 6.07 acres.
 2. *Access:* Starr Quarry Road and Woodland Heights Road
 3. *On-site Land Use and Zoning:* The tract is currently a cherry orchard and open farm land with one small agricultural building
 4. *Surrounding Land Use and Zoning:* The area to the north of the subject tract comprises the Woodland Heights Subdivision which is a 65-lot subdivision created in 1970 and is zoned VLDR-5 (Very Low Density Residential – five-acre minimum lot size). Many of these parcels contain single-family dwellings. [Note: “Lot” and “parcel” are synonymous under the county’s zoning and land division ordinances.] Property to the south is zoned AF-10, Agriculture/Forestry Small Holding.

5. *Water:* The application indicates that water would be supplied by a well or wells. The property is within a Ground Water Restricted Area as designated by the Water Resources Department.
6. *Sewage Disposal:* Septic systems are the only option in this area.
7. *Fire Protection:* McMinnville Rural Fire Protection District
8. *Soils:* The Yamhill County Soil Survey shows the tract is made up of Jory soils.
9. *Overlay Zones:* The property is not identified as being on any county adopted fish and wildlife habitat plan and no floodplain or wetlands are mapped on the property. The property is within one mile of a Mineral Resource zone.

B. Findings for Denial

1. The request is to replat two adjacent lots in a subdivision containing more than 60 lots. The Woodland Heights subdivision was platted and recorded in 1970, prior to adoption of state laws governing planned communities (ORS 94.564 *et seq.*). It has no Covenants and Restrictions and no Homeowner's Association that would likely require a vote of property owners to allow the replatting of lots within the subdivision.
2. The applicant filed two applications in this case—R-01-18 and R-02-18. The request in each of these dockets is to divide two adjacent, approximately five-acre parcels into four parcels. In total, approximately 20 acres of the subdivision that is currently platted for four lots would contain eight lots if both requests had been approved.
3. The Yamhill County Land Division Ordinance (LDO) Chapter 6 contains general design standards for subdivisions.
4. Section 6.000 of the LDO requires subdivisions and partitions to conform to the requirements of the Comprehensive Plan and other ordinances. As noted above, the subject property is zoned VLDR-5, Very Low Density Residential, which has a comprehensive plan designation of Very Low Density Residential. The request is to replat Lots 26 and 27 of the Woodland Heights Subdivision into residential parcels of approximately 2.5, 2.5, 2.5 and 3.75 acres, using parcel size averaging.
5. Section 502.06(B)(1)(a) of the Yamhill County Zoning Ordinance (YCZO) states that the minimum size of any newly-created parcels shall be 5-acres, except as follows:
 - i. in the case of parcel-size averaging, the minimum parcel size shall be two and one-half (2 ½) acres; and
 - ii. in the case of a duplex, the minimum parcel shall be ten (10) acres; and

iii. in the case of a residential planned unit development, the minimum parcel size shall be twenty (20) acres.”

6. Section 502.06(A)(1)(a) of the YCZO states the maximum overall dwelling density for any new development shall not exceed one dwelling per five acres in the VLDR-5 District. Subsection (c) of YCZO 502.06(A)(1) states:

“(c) For the division of any contiguous lands under the same ownership, parcel sizes may be averaged provided that the maximum overall density of the applicable VLDR District is not exceeded, and provided that no parcel shall be below the applicable minimum parcel size established by subsection 502.06(B). In the case of parcel-size averaging, the landowner shall record an affidavit with the county clerk specifying the imposed conditions which are applicable to the newly-created parcels, including overall residential density, etc.”

7. The applicant requested that the replat be approved using parcel size averaging, with the smallest lot sizes requested, Lots 2, 3 and 4 of the proposed replat), measuring approximately 2.50 acres each. Lot 1 is proposed to be 3.74 acres; all are 2.5 acres or larger.

8. The use of parcel size averaging in an established subdivision is rare. In the cases that county staff has identified, the approval was by an approval letter but not with a staff report and findings. During the hearing, at least two examples of approvals by the Planning Director were discussed, and the applicant’s attorney stated that there were more. In one of the examples, the applicant for parcel size averaging repeatedly used the parcel size averaging provision to replat land that she owned (there were no other owners). In the other, the applicant did not own all of the lots, but there was only one other owner, and that owner either consented to the replat, or knew of the replat and did not object.

9. No examples of past approvals were submitted into the record in which a property owner was allowed to replat within a subdivision using in the equation the parcel size/density of land owned by others, without the consent of the other owners.

10. Neither the Planning Commission nor the Board has, in the past, been asked to interpret YCZO 502.06(A)(1)(c). There is no existing practice, custom, or interpretation by the county or any of its officials that an applicant can calculate the allowable density using parcels that the applicant does not own, without the consent of the owners of those parcels, to further divide lots in an established subdivision.

11. In this case, the applicant commissioned a surveyor to determine how many acres were within the Woodland Heights Subdivision. The applicant and surveyor then divided that amount by five (the minimum lot size) and determined how much “density” was left over and available for further division. The applicant, in effect, is seeking to use the leftover density (the number of total lots that the subdivision could have contained under VLDR-5 zoning) to maximize the density of the four lots owned by the applicant.

12. The owners of property within the subdivision other than the applicant overwhelmingly objected to the applicant's proposals—R-01-18 and R-02-18. In this case, the applicant does not have the permission of the owners of any of the lots in the Woodland Heights Subdivision to subdivide existing lots within the subdivision into smaller lots.

13. The applicant and the county disagree regarding whether “density” is a property right. Neighbors have stated that the concept of “averaging,” using the property of others in the subdivision to compute the average, is unfair to adjacent property owners and that it transfers development rights and the value of those rights from those property owners to the applicant. The county agrees, although it is not necessary to resolve that disagreement in order for the county to interpret its zoning ordinance. It should be sufficient to note that when a city or county assigns a density to a zoned area, owners of tracts of land within that zone are ‘entitled’ to develop to the density allowed by the local government. Until the zoning is changed, the owners of tracts of land within the zone have an established right to develop their own tracts of land to the density allowed in the district. An owner of a tract of land is not allowed to calculate the overall density or right to develop his or her own tract of land by taking density from neighboring parcels, potentially preventing their owners from increasing the density of their own parcels.

14. “Density” generally refers to the ratio of dwellings over area. Density in this way can be synonymous with intensity. In this case, applicable zoning allows a density of one home for every five acres in the VLDR zone. The applicant has stated that the subdivision consists of 387.23 acres, and that the maximum density allowed in the subdivision is 77 lots. (The county calculation in the staff report stated that there are 387.23 acres, and with the 15.73 acres removed for existing roads, there are 371.5 acres remaining. With a five-acre average lot size that would allow a maximum of 74 lots.) Since the subdivision contains only 65 lots, according to the applicant, there are 12 additional lots available under parcel size averaging. The applicant is proposing to ‘harvest’ four of those lots for its own benefit, without the consent of the persons who own the property from which the lots are being harvested. The applicant has claimed that, if the applicant is allowed to develop four new lots, an additional eight lots can be created, “in theory.”

15. The applicant is proposing to use the “leftover” density from when the subdivision was initially platted. As explained in the application, the subdivision was surveyed and there are 387.23 acres as originally platted. The originally platted subdivision included 65 lots and to date none of these originally platted lots have been further divided, indicating the original density still remains. The replat application proposes to create 2 additional lots, combined with the proposed replat of Lots 26 and 27 (Docket R-02-18) submitted simultaneously with this application, which proposes to create 2 additional lots, that brings the total to 69 lots. This creates an average lot size density of 5.385 acres for the entire subdivision. (This, according to the staff report. These calculations are for illustration of what the county believes the applicant has proposed.)

16. The applicant in this case believes that the zoning ordinance allows an applicant to ‘take’ or ‘harvest’ from the other owners in the subdivision, a right (that the applicant believes exists) to increase the density of subdivision lots, in order to increase the density of the applicant's subdivision lots. The county disagrees with the applicant.

17. The issue in this case is the meaning of the phrase: “For the division of any contiguous lands under the same ownership parcel sizes may be averaged * * *.” The applicant appears to interpret this phrase, along with the phrase following (“provided that the maximum overall density of the applicable VLDR District is not exceeded”), as meaning that as long as the applicant owns two contiguous parcels, the applicant may use those two parcels and 63 other parcels that the applicant does not own, in the averaging calculation.

18. A reasonable argument can be made that the above phrase in YCZO 502.06(A)(1)(c) is ambiguous. The applicant apparently believes that its proposal is allowed under subsection (c) because each set of two lots contains two lots that are “contiguous” and “under the same ownership,” and because the proposed division (according to the applicant) will not cause the overall density of the VLDR zone to be exceeded.

19. The Board disagrees with the applicant’s parsing of YCZO 502.06(A)(1)(c). Subsection (c) allows the division of contiguous lands under the same ownership through parcel size averaging. It does not allow an applicant to ‘average’ parcels that are not under the “same ownership.” It does not allow the applicant to harvest the density of lands that are not under the same ownership in order to increase the density of land that the applicant owns.

20. In the VLDR-5 zone, an applicant is allowed to establish one lot for every five acres. If all 65 lots in the subdivision were under the same ownership, that owner could replat, under parcel size averaging, and establish 12 additional lots (under calculations provided by the applicant). Under YCZO 502.06(A)(1)(c), the applicant can replat its two contiguous lots so that one of the parcels is 2.5 acres, and the remaining acreage is part of the other lot. Under the county’s interpretation of YCZO 502.06(A)(1)(c), the applicant cannot divide Lots 26 and 27 of the Woodland Heights Subdivision as proposed in Planning Docket R-02-18.

21. The applicant has claimed that the county is changing its rules during quasi-judicial proceedings when it should be making those changes in a legislative process. The county disagrees. It is possible that a prior Planning Director or Directors approved lot size averaging in circumstances under which the applicant did not own all of the contiguous land used to justify approval, as long as the applicant had the consent of the other owners, or the other owners did not object. No such decision was ever appealed, and the Board is not changing an applicable standard—it is interpreting an existing standard for the first time in these proceedings.

22. Allowing lot size averaging in situations where the applicant did not own all of the land used in the averaging calculation, as long as the applicant had the consent of the owners of that land, is not the situation at hand. In this case, the applicant does not have the consent of the property owners whose land he seeks to average its own density with. Many of those owners appeared before the Planning Commission and Board and objected to the proposal. The parcels the applicant is seeking to average are not under the same ownership, which is not allowed under YCZO 502.06(A)(1)(c).

C. Conclusion

For the reasons stated in these findings, Planning Docket R-02-18 is denied.