EL PASO COUNTY

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PLANNING AND COMMUNITY DEVELOPMENT DEPARTMENT
CRAIG DOSSEY, EXECUTIVE DIRECTOR

BOARD OF ADJUSTMENT

MEETING RESULTS (UNOFFICIAL RESULTS)

(Audio and audio/video copies of the meeting are available at the Office of the Clerk/ Recorder)

Board of Adjustment (BOA) Meeting
Wednesday, December 9, 2020 -- 9:00 a.m.
Continued to Wednesday, December 21, 2020 – 9:00 a.m.
El Paso County Planning and Community Development
200 S. Cascade Avenue
Colorado Springs, Colorado

BOA MEMBERS PRESENT AND VOTING: KEVIN CURRY, JAY CARLSON, LORELLE DAVIES (VIA REMOTE ACCESS), ALLAN CREELY, AND PAM PALONE (same for both hearings)

BOA MEMBERS PRESENT AND NOT VOTING: KEITH WOOD (VIA REMOTE ACCESS)

STAFF PRESENT: CRAIG DOSSEY, MARK GEBHART, NINA RUIZ, LINDSAY DARDEN, AND EL PASO COUNTY ATTORNEY LORI SEAGO

OTHERS ATTENDING: CELINA ALONGI, EDITH DISLER, BARBARA FAULKENBERRY, JOHN LUMAN, TIM SHIMSHACK, TOMMY QUERY, BRIAN MURPHY

BOA MEMBERS ABSENT: CHAD THURBER

1. Pledge of Allegiance

2. Report Items – Mr. Dossey

a. The next BOA hearing is January 13, 2021.

b. **Public Input for Items Not Listed on the Agenda - None**

3. Adoption of the Minutes of the Regular Meetings held June 10, 2020

<u>BOA ACTION:</u> WITH NO CHANGES, THE MINUTES WERE APPROVED AS PRESENTED BY UNANIMOUS CONSENT.

4. BOA-20-003 DARDEN

VARIANCE
7822 HIRSHORN

A request by Celina Alongi for approval of a variance for a rear yard setback of six (6) feet where ten (10) feet is required. The 3,195 square foot property is zoned PUD (Planned Unit Development) and is located approximately 0.2 miles northwest of the intersection of the Woodmen Frontage Road and Quandary Road and within Section 1, Township 13 South, Range 65 West of the 6th P.M. (Parcel No. 53014-01-004) (Commissioner District No. 2)

Ms. Darden gave a brief overview and **Ms. Seago** went over the review criteria for a dimensional variance.

Ms. Celina Alongi, the applicant, gave her presentation.

Mr. Carlson – The pergola is on the north side of the property? And is it in the sun all the time? Who was the contractor? **Ms. Alongi** – North and yes it's in the sun. Mr. Silva was my contractor.

Ms. Darden gave her presentation.

Mr. Carlson – Where is the definition of the encroachment? Is it to the end of the overhang? It does not appear that they are too far into the setback. **Ms. Darden** – It's to the edge of the overhang. One of the conditions we've proposed is that the applicant provide proof that the encroachment is acceptable to the utility easement holders.

Ms. Palone – Who built the original slab? **Ms. Darden** – The 6x6 stoop was there when the home was constructed, the applicant enlarged the concrete to accommodate the pergola.

Mr. Curry – The package indicates that when a patio is uncovered, as long as it is uncovered, there are no setback requirements, but because the pergola is covering, doesn't that make it not in compliance? **Ms. Darden** – The pergola is attached to the house, so we would consider it attached. **Ms. Seago** – If a pergola goes out the same as the concrete, then if the BOA approves the request they are both now legal and conforming.

IN FAVOR: NONE

IN OPPOSITION: NONE

DISCUSSION:
Mr. Creely – I think there is a fair number of things to consider. It appears the improvements are to the interior of the lots. It doesn't affect anyone to the rear. I don't see there is any harm in approving this.

Mr. Curry – Generally we are skeptical in providing forgiveness. However, it is my opinion that the applicant did do their due diligence. There is a lack of impact to the neighbors.

BOA ACTION: CARLSON MADE A MOTION, SECONDED BY CREELY TO APPROVE BOA-20-003, A DIMENSIONAL VARIANCE FOR 7822 HIRSHORN DUE TO IT WOULD BE A HARDSHIP TO THE APPLICANT AND CONSIDERATION GIVEN TO THE NARROWNESS OF THE PROPERTY, APPROVED WITH THREE (3) CONDITIONS AND TWO (2) NOTATIONS. THE MOTION PASSED (5-0).

Item APP-20-003 was continued on December 9, 2020 to a date certain of December 21, 2020 and was heard at the December 21, 2020 hearing.

5. APP-20-003 RUIZ

APPEAL
DISLER APPEAL REQUEST

A request by Edith Disler to appeal the determination by the Planning and Community Development Department Executive Director that specific remainder parcel(s) be considered legal nonconforming within the Black Forest Park Subdivision. The parcels are located approximately one-half (1/2) mile northeast of the Roller Coaster Road and Evergreen Road intersection and within Section 28, Township 11 South, Range 66 West of the 6th P.M. (Parcel Nos. 61284-02-039, 61284-02-038, 61284-02-034, and 61284-02-035) (Commissioner District 1)

Ms. Ruiz gave a brief introduction and went over the applicable LDC requirements and how the Director came to the administrative determination.

Ms. Seago – In an appeal, it is solely the appellant's burden to provide sufficient evidence that there was an error made by the Executive Director for Planning and Community Development when he made the decision being appealed.

Mr. Carlson -- My understanding is that originally it was a 5-acre parcel. When did it get divided into five lots? **Ms. Ruiz** – The lots in question have never been

5 acre lots. The area was platted in 1926 as the Black Forest Park Subdivision creating the small approximately 1/3 of an acre lots in place today. The area was then zoned in 1955 when zoning was implemented for this portion of the County.

The meeting was adjourned at 10:00 a.m. due to conflict in hearing room schedule. The hearing was continued on Monday, December 21, 2020 at 9:00 a.m.

A MOTION FROM CREELY TO CONTINUE DATE CERTAIN, SECONDED BY PALONE TO ADJOURN TODAY'S HEARING AND CONTINUE THE MEETING TO DECEMBER 21, 2020 AT 9:00 A.M. TO CONTINUE ITEM APP-20-003. THE MOTION PASSED UNANIMOUSLY. (5-0)

MR. CARLSON – It is disappointing that this hearing had to be continued. It affects staff and the appellant. We apologize to everyone and hope we can avoid this happening in the future.

The hearing was resumed on December 21, 2020. The following are the notes from the continued hearing.

A quorum was established. Voting members are **Ms. Palone, Mr. Carlson, Mr. Creely, Ms. Davies, and Mr. Curry**

Ms. Ruiz gave a brief overview of the request and introduced the applicant **Dr. Edith Disler** to give her presentation. Her presentation is on permanent file.

Mr. Carlson – Was the lot you purchased made up of several little parcels or one as it is depicted there? **Dr. Disler** – It was as it is depicted here.

Mr. Carlson – When that first home was built, how was the property divided? **Dr. Disler** – in 2015, the owner asked for the merger by contiguity to build the one home. **Mr. Carlson** – Did **Mr. Pickett** occupy the home? **Dr. Disler** – I believe he did.

Mr. Carlson – In order to build and sell these homes, he had to divide it up. **Dr. Disler** – That is what I'm appealing.

Mr. Carlson – I understand today we are looking at the merger by contiguity, but at some point he had to divide up the other lots. **Dr. Disler** – The house on the left is lots 9 and 10, the middle is 11 and 12 and the house to the right is 13 and 14. Below those is lot

20. **Mr. Pickett** submitted in January 2018. Lots 9 and 10 (southernmost) were created in May 2015. In February 2020, he applied for the final merger.

Mr. Carlson – He built the first house on 4 acres, then he got the northern parcels combined, and then after starting construction, he combined the southern parcels. The northern home was built when? **Dr. Disler** – In 2018. The middle house was built in 2015; in 2018 he built the northern home.

Mr. Curry – We are being asked to make a determination of one appeal, for lots 13 and 14, not the middle or southern lots. **Dr. Disler** – That is correct.

Ms. Palone – When the middle house was sold, was it sold as one unit to them? It sounds like they bought the property and afterwards the two lots were brought together. **Dr. Disler** – That is a really good question, the Hartley's purchased the house, but I don't know if it was on 1.3 acres or whether they bought 3 acres. I can't answer that.

Ms. Palone – You indicate that he had it listed for sale for $120,000. Did he build the house or someone else? **Dr. Disler** – I'm not certain. In our opinion, he had two options; he could sell it to me or sell it to the neighbor.

Dr. Disler – The assessor's information shows they purchased a house on 1.3 acres in September 2016.

Mr. Creely – If the appeal goes through for you, what do you foresee happening? **Dr. Disler** – In the Code, the County is relieved of the responsibility, but if it is shown they made the error, the onus is on the operator. I would have the latitude to take legal action against Mr. Pickett. I know the County has actions they can take against the serious allegations. It may be that the County wants to take legal action.

Ms. Seago – I want to provide clarity to the record. It would be easy to infer from the testimony that the decision came from the County Attorney's Office. The Executive Director made that decision. I provide legal advice to the Executive Director. I did have a conversation with **Dr. Disler** earlier this year. I explained the process and why the decision was made the way it was. This was not my decision, is not my decision. My role is to provide legal advice to the Executive Director.

Mr. Carlson – With regard to the Black Forest Preservation Plan, does that have any bearing on the decision? **Ms. Seago** –The Black Forest Preservation Plan has been mentioned by Dr. Disler, but it is an advisory document only, and is not an applicable review criteria for the administrative determination being appealed.

Ms. Palone – Is there an HOA associated with the property? **Ms. Seago** – I do not have that information.

Ms. Ruiz gave her full presentation to the BOA. Her presentation is on permanent record.

Mr. Carlson – The creation of the lot or parcel was in conformance with all applicable regulations at the time of its creation. Did the owner own all 7 lots? **Ms. Ruiz** – We disagree with **Dr. Disler** on the actions being taken constituting a subdivision. The legal description includes, and always has included, platted lots, it is not considered parcels. If we interpreted the regulations the way Dr. Disler has stated, we would have illegal subdivisions throughout the County. For example, it is customary when a new subdivision is created, one builder purchases 100+ lots under a single deed. If we interpreted the regulations the way Dr. Disler has then as homes were built on those individual lots and sold to new owners, each one of those individual sales would be considered an illegal division of land. It would undo the entire purpose and intent of the subdivision action.

Mr. Curry – How did those two lots come to be two isolated lots separated from the other? **Ms. Ruiz** – By deed. **Mr. Pickett** once owned all of these lots, then he built in the middle and sold off other properties.

Mr. Curry – Were the lots merged by contiguity? **Ms. Ruiz** – Yes, they were.

Mr. Carlson – So, we've established that the lots created in 1926 are legal lots and are combined by merger by contiguity. You said you don't have to get rid of lot lines to combine. How do the lots lines affect buildability? Normally, you wouldn't be able to build across lot lines? **Ms. Ruiz** – The merged lots shall be considered one zoning lot and shall only have boundaries on the exterior of the lots. If you want to build across a lot line, you may do so.

Mr. Carlson – How is the RR-5 zone applied to the existing lots like this? It seems like they split the 4-acre lot, but they aren't in compliance with the RR-5 zone. **Ms. Ruiz** – We are limited to the language included in the Land Development Code and merger by contiguity states that at least one acre is required but does not necessarily require more than that. There is no variability to the Code. It depends on how a lot or parcel was created as to whether they can divide the property. The RR-5 zone does not have any bearing on the lot size requirement when it comes to the merger by contiguity provisions.

Mr. Carlson – In order to go by merger by contiguity, you have to try to merge as many lots as you can. **Ms. Ruiz** – Not quite. It doesn't state you have to merge all the lots under one ownership. It doesn't say you will come into conformity. It just states you have to merge lots to get to at least one acre. **Dr. Disler** referred it to the Building Code, but it is actually the Land Development Code.

Ms. Palone – You mentioned that it is not a subdivision and if it were it would be applied differently. **Ms. Ruiz** – This is a subdivision. The property was platted and subdivided in 1926. The reason why the specific actions Dr. Disler has discussed do not meet the definition of subdivision, is that subdivision talks about parcels and these are lots. **Mr. Dossey** – There are two actions, there is subdivision which created the lots legally at the time. The second action is the merger action. The standards that you would normally associate with a subdivision do not apply to this property. It cannot be considered a subdivision.

Mr. Wood – The amendments that were made in 2019, was that only for clarification for interpretation, or did the size of the lot change in that revision? **Ms. Ruiz** – it was only for clarification. Minimum lot size is still one acre in regard to the merger by contiguity and nonconforming lots.

Mr. Dossey – I think it was put in place to avoid sterilization of land. At one acre, you can put a septic system. I would encourage her to reach out to the Public Health Department, that is their action, not from our department. You asked if they could be further divided, there have been other mergers in Black Forest Park that average 1-2 acres each. There are a lot of areas of the County that were subdivided years ago that are similar to this property. The creation of lots happened way before a master plan. All of this predates the Black Forest Preservation Plan and the Master Plan. There were property rights created in 1926. The fact that the property owner took advantage of the merger by contiguity action, it's not illegal.

Mr. Carlson – It seems that the merger's intent was to take care of issues that the Land Development Code could not address. **Mr. Dossey** – It's not ideal, but that does not make it wrong. It's important to highlight that I had no other choice than to approve the merger. This is specifically exempted from the Land Development Code.

Mr. Wood – I would urge that if the one acre was arrived at due to septic reasons only, we might reconsider it to be 2.5 acres, so that it doesn't happen in more five-acre areas. **Mr. Dossey** – What you are seeing today is 7 lots of similar sizes, but we usually see 1/10 of an acre that comes nowhere near to that one-acre regulation. We are trying to deal with a broader issue in the County.

Mr. Curry – In Step 3, I think the answer to **Mr. Carlson's** questions, if someone owns smaller multiple lots, they are encouraged to merge those lots. If he owned lots 11 and 12, contiguous lots under same ownership shall be combined. If in fact, he owned lots 11 and 12, I think the language requires that the lot and also 13 and 14 should have been combined together. If he did not own them, then it wouldn't apply. I think that's the provision. **Ms. Ruiz** – The remainder lot or parcel can still be considered conforming. You don't have to merge them all together. The Code specifically allows for a remainder. **Mr. Dossey** – I understand your interpretation, but I disagree because it doesn't say all remaining lots. It says to a minimum of one acre and does not require that all the parcels be included.

Mr. Gebhart – I want to hit a couple of points that **Mr. Carlson** brought up. We mentioned that there are a lot of nonconformities. There are hundreds of lots in the County. The solution is to rezone those properties to a smaller zone. I think that would generate a lot of controversary. The BOA heard all actions prior to 1982 as dimensional variances. There was specific language in the Code regarding the acreage requirements. It was put in place to acknowledge the density. To undo a merger is to do a subdivision. Conditions of approval were sometimes placed to say that a merger would have to take place so to not come back to the BOA. The merger by contiguity triggered the PCD be involved because of a buildable activity. Rural vs. urban determinations come in to play more when it's a subdivision. Water, sewer, road design, paving are all requirements reviewed during subdivision.

Mr. Carlson – Again, when was the merger approved of lots 13 and 14. **Ms. Ruiz** – 1/22/2018.

Mr. Carlson – Those two lots in the middle, lots 11 and 12, when were they merged? **Ms. Ruiz** – They were still owned by **Mr. Pickett**, but the Code does not give the authority to merge all of the lots. The lots south had not been merged and were still owned by **Mr. Pickett**.

IN FAVOR:
Ms. Barb Faulkenberry – I live just east of **Dr. Disler**. I bought my property in 1981. I built my home in 1989. I happen to have the property at the end of Benet Lane. **Mr. Pickett** is responsible for at least of 6 of the 40 properties that have been built. The way I understand it, **Mr. Pickett** bought a 4.7 acre lot in 2015. It's RR-5, and yes in 1926 it had those breakouts. 4.7 acres in 2015, then subdivided in 2018. Now we are at 1.3, 1.3, 1.3, and .7 acres. He took out many trees and leveled that area. I'm not sure why the LDC doesn't apply. Why does it state to get to 5 acres if it doesn't apply? My point

is when you buy property at 4.7 acres and its zoned 5 acres, why do you get to split it up to one acre lots. Thank you for taking the time to consider this.

Mr. John Luman – Why wasn't this made into one lot? I've had to run this guy off my property and fence it off to make him understand my two lots are not available. We end up with a ¾ acre lot nonconforming piece of land. When I bought this lot, I can't just go and make my two lots and build a giant mansion that my neighbors hate. Part of allowing him to split this up is access. Fire trucks will not get in there. These are all privately maintained roads. Was that taken into account? Now by allowing four more homes, I've never seen a road agreement as to how our roads will be maintained. Most of us moved into this neighborhood with genuine intent to live there. I assume that anyone would come in and look at zoning and acknowledge that. This is about right or wrong. I hate to hear because we've always done it that way. When I look at this, what was the intent? He found a loophole and the County backed him.

Mr. Tim Shimshack – Roughly 3 years ago we saw the first effects of these lots being split up. He came in and clear cut all the trees. **Mr. Pickett** tends to do stuff and not consult any of the neighbors. We purchased these homes and now it seems the goal posts were moved. The subdividing of these lots seemed like the intent was to combine them to make a viable building area and then use a loophole to not have to subdivide. We maintain our own roads, plow our own roads. We take care of County roads that the County doesn't take care of, mainly because of access. Everything dead ends off Roller Coaster. There are certain areas that you have to pull over to let someone pass. And now there are over 40 homes in the area that the County takes no responsibility for. When the first house built on Fool's Gold, the Fire Chief said he wanted to see roads improved and widened. No hearing happened. **Mr. Pickett** was just allowed to do what he did. Interpretation is one thing, and he found a loophole. Legally he did what he could do, but it was not morally right. It's a very unique community.

Mr. Tommy Query – The issue is the when I bought my property, I was told that I had to have 3.5 acres there to build, so I bought more property to be able to do that. In 1990 there were 14 homes, one entrance/exit. We do our own maintenance of the roads. The County needs to step it up with regard to road maintenance. There needs to be a moratorium until roads are upgraded. If the building department has the capacity to go and inspect, then a building inspector can go inspect a lot before its built on.

IN OPPOSITION:

Mr. Brian Murphy – **Mr. Pickett's** legal representative – I don't feel the need to reiterate what the staff has already gone over, but I do want to make a couple of comments. **Mr. Pickett** went through the County and took the proper measures. The planning Director

made a decision and he got the permits as required. He has met all the requirements and is in compliance with everything. You don't give someone permission to develop and then take it away when he's done everything that was asked of him. My client is a property owner and neighbor. The opposition all seem to be quick to assume his intentions while no one reached out to my client. The assumption that a neighboring property wasn't going to be developed was wrong.

Dr. Disler had an opportunity for a rebuttal. This process has been remarkably trying for everyone. We never had the chance to hear from Mr. Pickett in his plans to develop. Six of the 14 mergers are Mr. Pickett's that were spoken about, so they are using his own mergers to support their argument. **Mr. Pickett's** attorney said he is a developer. Development requires a development plan, a site plan, all in the LDC. The County has not addressed my argument. The language "made conforming" has not been explained. The County's entire argument rests on one acre. It makes no sense to have zoning. Nothing applies because they misapplied this paragraph. There are real lives involved here. Zoning staff says there is nothing sacred about zoning. I wish I would have known that before. I believe an honest mistake was made, that one paragraph was misinterpreted. The merger of contiguity fails to meet the requirements. A violation of our trust has happened. It's a special way of life and we take care of each other. I can always call upon a neighbor to help out. The community got an invader who thought he had a way to a quick buck and we take exception to this. The Code does not uphold the spirit and intent of what should be in place. I ask that you undo the finding.

DISCUSSION:

Ms. Seago – Things that would not be appropriate to consider is the intent of **Mr. Pickett** in purchasing these lots, merging them and building homes on them. Whether or not throughout this process he's behaved appropriately or even courteously. Whether or not the Code provisions as they are written adequately protect the zone district, or whether or not you personally agree. Your job is to determine if the Director made an error in his decision. Section 1.6.2 of the LDC is something I'd like you to consider, **Dr. Disler** referred to the heading of this section that the Executive Director applied in making the conforming parcel finding. Section 5.6.7.b.2 is where you'll find the Executive Director's provision. I want to point out that as a matter of interpreting the Code, that in the case, the text shall control and not the heading. Focus on the text of Section 5.6.7.b.2. The final issue is the issue of subdivision. Much discussion has gone on as to whether subdivision has occurred and what the implications could be. This is my legal opinion. **Mr. Pickett** acquired through a single deed seven lots in the Black Forest Park subdivision. A deed is a legal instrument that conveys an interest in property. A deed is not an instrument that vacates lot lines or otherwise changes the legal description of property. He acquired seven lots; he owned seven lots. At no time before he applied

for merger, were those lots ever joined. A tax schedule by the Assessor does not eliminate lot lines and does not prove contiguity. That does not eliminate lot lines or change legal descriptions. To say that Mr. Pickett engaged in subdivision by taking those seven lots that he owned and taking them in pairs to do mergers by contiguity does not make that a subdivision. The merger by contiguity form is on page 18 of your packet and is what he completed and was approved for lots 13 and 14. At the bottom, the merger agreement states the merger does not eliminate lot lines or any easements associated with property. So that is why even after this merger was granted and found to be conforming, it is known as lot 13 and 14 of the Black Forest Park subdivision. Merger does prevent the current property owner from splitting them apart again. In the middle of that form, it says no portion of this merged property shall be sold or conveyed away individually or separately unless the following two criteria are met. To be clear, no subdivision has occurred throughout this process.

Mr. Carlson – In the LDC, Section 5.5.7.B.3 it seems like that applies specifically to this situation. **Ms. Seago** -- The correct citation is 5.6.7.B.3. The provisions here act as a decision tree. The Director applied paragraph 2 to make his decision. If it cannot be considered conforming, in paragraph 2, then you'd have to go to the BOA to get a variance in order to get a building permit.

Mr. Carlson – In Section 2, where it says to be exempted from the minimum lot size requirements, contiguous legal lots under the same ownership shall be combined through merger of contiguity. Does that mean just the lots they choose to combine or all of them? **Ms. Seago** -- I understand that it reads a bit ambiguous. My opinion is that it does not require that all lots be combined. It just has to get to an acre or more. I do not read it to require that all lots under the same ownership must be combined.

Ms. Palone – I think the big thing is the one-acre lot. It says must be combined through a merger by contiguity. Then if you go over to step 4, the more closely approximates the zoning district. The zoning district is 2.5 acres, where one acre is the exception. I feel like he was obligated to combine lots to get to 2.5 acres or go to the BOA. **Ms. Seago** – The statement is used for purpose, not necessarily for standard. To read it the way you are reading it would completely negate paragraph 2 unless you are in specific zone districts. It provides for creating a lot that is considered conforming regardless of zone district.

Ms. Palone – He sold the middle lot and it's not part of this. So it does meet it for lots 13 and 14 because he no longer owned 2.5 acres. However, I'm not sure if in the past it met the requirement. If he had it, it needed to go up to 2.5 acres. **Ms. Seago** – That comes from paragraph 1 and it didn't meet the requirement for merger by contiguity. If

the lot is less than 2.5 acres and you own adjoining property than you can under paragraph 2. The requirement was met at paragraph 2 and there was no need to go to the BOA.

Mr. Carlson – When we go through the process and going into step 4, the merger for contiguity, the PCD Director in approving the merger by contiguity shall find (#4) the merger is necessary to achieve compliance with the non-conforming lot. I thought we got off the hook today because we had to just deal with these two lots, but then we found out that lots 11 and 12 were not joined until after this time. It doesn't seem it is necessary to achieve compliance. **Ms. Seago** – I think you're asking in an existential way whether anyone who owns two adjoining lots is required to merge them, the answer is no, they are not required. However, if you want to obtain non-conforming lot status, part of the process of building on your substandard sized lot, then the merger is necessary to achieve compliance with the non-conforming lot provisions of the Code.

Mr. Carlson – On item G, completed action. It says these actions shall be completed and in effect when filed with the Clerk and Recorder. I'm assuming this has happened. **Ms. Seago** – Yes, on page 18 of your packet, you see the indication that it was recorded 14 days after its action.

Mr. Carlson – **Mr. Pickett** should be able to rely on the decisions that the County has made. **Ms. Seago** – The fact that a document is recorded does not make it invalid or unchallengeable.

Ms. Davies – I see it identified as 2.5 lot zoning. In order for him to get building permits, wouldn't he have had to go through the BOA to get that variance? I don't see history of that, so I'm not sure how that happened after the fact. **Ms. Seago** – The process for addressing legal lots that don't meet the minimum lot size of the zone district has changed over time. Page 4 of your packet shows the history and prior to 1992 it required BOA approval. The Code has evolved over time to give property owners options and to address the sub sized lots to be considered conforming. At the time that **Mr. Pickett** sought a building permit, the provisions that are applied are what was in effect. In 2006, the Code was amended to show one acre and not the 2.5 acres.

Mr. Wood – Had the applicant combined her lot with the other one, then could she have done a merger of the two?
Ms. Seago – This lot that was created when lots 13 and 14 were merged, so if they wanted to further subdivide, they would have to go through subdivision process. If she wanted to combine, then she would have had to vacate lot lines.

Mr. Wood – I think it would be in the best interest of the neighbors that own multiple lots to protect the integrity of the intent of the RR-5, but I believe **Mr. Pickett** has been within his rights.

Ms. Davies – I still think that to make this much more transparent and for future projects, I feel like there's some ambiguity with this project.

Ms. Palone – I would hope that moving forward is that you set something up in your community to make sure it doesn't happen again. There are other lots that are similar. Black Forest hates HOA's but it might be something that protects your community. There's so much interpretation, but I do agree that **Mr. Pickett** was within his rights whether we like it or not.

Mr. Creely – With the Planning Commission, we look differently at the rules. Some of those rules were advisory and not regulatory. You could look at the spirit and the intent, but here I am very much in favor for **Dr. Disler**, but it's in empathy, but also for the Director. When the rules make it to where there is no latitude, why even have a Director involved. He was just following what was before him and made an informed decision. I tried to look at every possible way, but we leave in a world of competing participants. Someone will inevitably be unhappy. That forces me to say that I can approve this as a member of this Board.

Ms. Seago – I believe Ms. Ruiz has draft resolutions for you to consider for approval of the appeal or disapproval.

Mr. Curry – In my opinion this comes down to one phrase, contiguous lots under the same ownership shall be combined. The purpose of these mergers is to get something as close to the zoning as possible. In this case, people will always find a way to be creative. Had the contiguous lots (11 and 12) been under separate ownership, I would have deemed this proper. Because they were contiguous and under the same ownership it is my interpretation from the LDC, that the text would require that those contiguous lots be combined to come as close as possible to RR-5. Only two lots were merged. I will be in favor of the appeal because of the language regarding the contiguity of the lots.

BOA ACTION: CREELY MADE A MOTION TO DENY THE APPEAL, SECONDED BY CARLSON. PALONE NAY, DAVIES NAY, CURRY NAY. THE MOTION FAILED. CREELY MOVED TO APPROVE THE APPEAL, SECONDED BY PALONE. CREELY AYE, CARLSON NAY, PALONE, AYE; DAVIES, AYE, CURRY AYE. THE MOTION WAS APPROVED 4-1.

Mr. Carlson – I don't like the fact that the loophole exists. My reason for the nay vote is that I don't think the Director acted erroneously.

Mr. Curry – Ms. Freeland has served with us for a year, and she has decided not to reappoint. We thank her for her service.

Adjourn

The minutes were approved as presented at the February 10, 2021 hearing.