Appeal to the El Paso County Board of Adjustment Regarding Violations of RR-5 Zoning in the Black Forest Park Subdivision of Unincorporated El Paso County

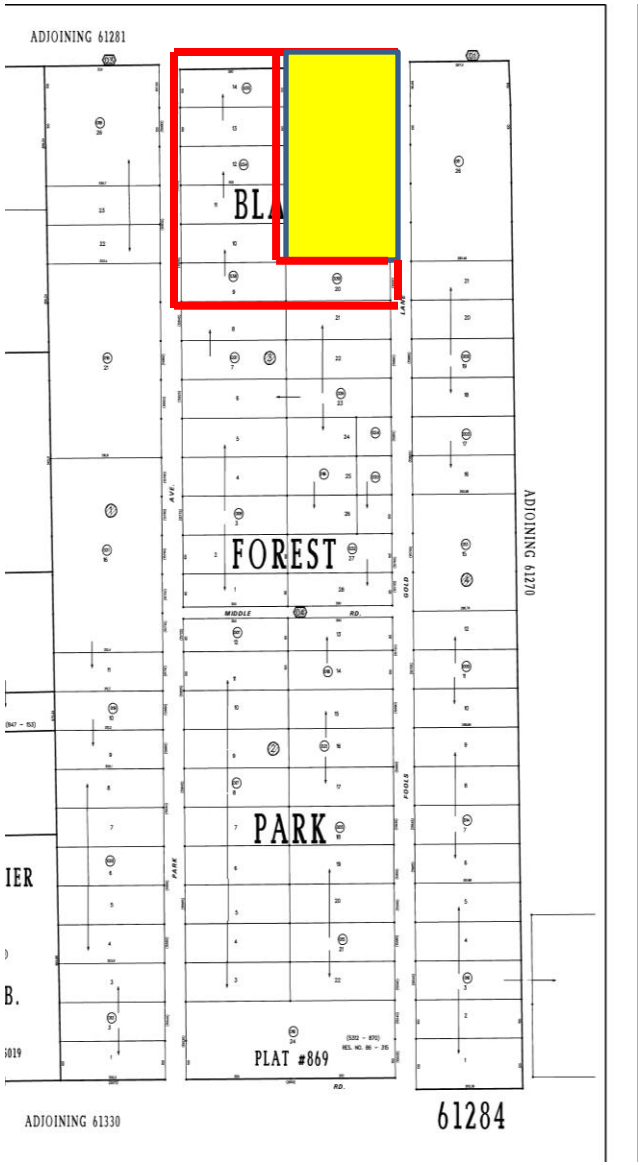
Appeal Brought by Edith A. Disler, PhD, Lt Col (Ret) USAF

Against Mr. Matthew Pickett

Black Forest Park was platted in 1926 according to the ¾ acre lots shown. It was zoned RR-5 – 5 acre minimum -- in 1972, with many lots nonconforming.

In the plat to the right, my lot is depicted in yellow. I bought it in 1993 and built my home on it in 2005, expecting a quiet retirement in the Black Forest in 2022.

In 2015, Mr. Pickett, a developer, purchased the parcel outlined in red. Now referred to as “Master parcel 61284-02-028”



Subdivision of the Master Parcel

- Subsequently, Mr. Pickett, without the proper BOA variance, subdivided the lot into 4 parcels, specifically parcel numbers:
  - 61284-02-033
  - 61284-02-034
  - 61284-02-035
  - 61284-02-036
- The BLC defines “subdivision” as the division of one parcel into “two or more parcels” which is, according to the county’s own language above, what was done: the “master parcel” became four lots, listed according to “parcel number.”
- Pickett did not submit this subdivision of the lot he purchased for variance or with appropriate site planning, therefore neighbors had no notification of variance. Trees started falling, houses started going up, and appeals to the county were flippantly brushed aside with misinterpretation and ignorance of the full code.

Now There are Three Houses Where There Should Be One. Does This Look Like RR-5?

COA Argues “Merger by Contiguity”

- The Planning Division and the County Attorney argue that Mr. Pickett did not subdivide, rather he used “Merger by Contiguity” to merge 2 lots at a time, to enlarge the 3/4 acre lots into 1.25 and 1.3 acre lots. Further, they argue that the 1.3 acre mergers constitute “zoning lots.” They are incorrect.
- In the following slides are 8 reasons the “Merger by Contiguity” argument does not “hold water” and the subdivision/mergers creating 1.3 acre lots do not override the RR-5 Zoning. There are more reasons, but I have kept it to these 8.

Reason 1 – Nonconformity Abandoned and Improperly Re-Established

- Mr. Pickett **abandoned the ¾ acre nonconformity and re-established nonconformity** in the form of 1.3 acre lots in an RR-5, which violates this provision in BLC 5.5.1:
- "The County seeks to allow nonconforming uses, structures, and lots to continue to exist and be maintained and put to productive use and to encourage as many aspects of the uses, structures, and lots to be brought into conformance with this Code as is reasonably practical. This Section is intended to recognize the interests of the property owner in continuing the nonconformity but also to preclude the extension, expansion, or change in character of the nonconformity or the **reestablishment of the nonconformity after it has been abandoned**."

Reason 2 – COA Misinterpreted the term “Made Conforming”

- The section of BLC the COA refers to in substantiating 1.3 acre lots – 5.5.7 (B) (1) -- does not apply in this case. COA is applying section “5.5.7 (B) (1) Nonconforming Lots Made Conforming.” This section does not apply, because the only way a lot is “Made Conforming” is if it is, in the case of an RR-5, enlarged to 5 acres, or, with BOA approval, made at least 2.5 acres or greater.

An Interpretation of 5.5.7 (B) (1) That Works

5.5.7 (B) (1) Nonconforming Lots Made Conforming. Where a legal lot does not meet the above requirements to be exempted from the minimum lot size requirements, contiguous legal lots under the same ownership shall be combined through a merger by contiguity process to create a zoning lot and the resulting parcel shall be considered conforming with respect to the minimum lot size requirement where:

- Central water is provided, but not central sewer, and the resulting zoning lot after any required merger is at least 10,000 square feet; or
- No central water or central sewer is provided and the resulting parcel after any required merger is **one acre or more in area.**

THIS is the "Nonconforming Lot Made Conforming"

THIS is the merger by contiguity

= 1.5 acres "merger by contiguity" = "**one acre or more in area**"

Now: "Nonconforming Lot is Made Conforming" by addition of the 1.5 acres created by "Merger by Contiguity" to "Make Conforming" a (3.8+1.5)=5.3 acre lot in the RR-5

Clarification from the Black Forest Preservation Plan

- From page 79 of the plan (85/106 in the online pdf):
  - 3.c In existing small lot subdivisions in designated low density areas, **the consolidation of as many lots as possible should be strongly encouraged in order to attempt to meet current minimum lot size requirements**.
  - 3.d Minimum lot area criteria should be developed for nonconforming subdivisions in cooperation with property owners.
  - 3.e **The granting of lot area variances or the creation of additional small lots in designated low density residential areas should be discouraged except in the clear case of hardship.**
- PCD and COA clearly did not "strongly encourage" consolidation of lots to meet minimum lot size requirements and, clearly, a variance was required.

Clarification from Nearby Castle Pines, CO; A Better Explanation of Merger by Contiguity

- **212.01 Parcels Described By Metes and Bounds**
  - When two or more contiguous, nonconforming parcels come under single ownership and are described in the same deed, after May 5, 1972, these parcels shall be deemed one parcel.
  - The subsequent division of such land into two or more parcels/lots shall be in accordance with the City of Castle Pines Subdivision Ordinance, even if the land is to be divided as previously described or conveyed.
- Castle Pines is one community that has clarity on the disposition of contiguous, nonconforming parcels under single ownership.

Reason 3 – PCD Director Exceeded His Authority

- COA argues that the PCD Director Granted Administrative Relief to Zoning IAW 5.5.7, declaring the 1.3 acre lots as "zoning lots."
- This exceeds the PCD Director's authority IAW 5.4.1 (B) which states "The PCD Director may only grant relief in accordance with the following standards:
  - (1) Reduction in Lot Area, Setbacks, and Lot Width. **A maximum of a 20% reduction in lot area, setbacks and lot width from the amount required in the zoning district** in which the subject property is located may be approved."
- Doing the math, the PCD Director may only grant administrative relief for a lot as small as 4 acres in the RR-5 zoning district – anything smaller, as in this case, requires BOA approval, which Mr. Pickett and the county did not seek.

Reason 4a – Violator Purchased a Parcel Comprised of 7 Contiguous Lots and Divided Them Up Anyway

- Per BLC 5.5.7 (B) (3) (a) : Requirement to Use Merger by Contiguity as Alternative to Variance.
  - (a) No nonconforming lot or parcel due to lot size shall be determined to be eligible for a lot size variance **if a contiguous lot or parcel under the same ownership is available to be merged to the nonconforming lot or parcel**.
- COA will argue no variance was required. COA is incorrect. See next slide:

Reason 4b – Lots Still Nonconforming After A Merger Require A Variance

- Per 5.5.7 (B) (3)
  - (b) Requirement for Variance. A nonconforming lot or parcel or **zoning lot** resulting from a **merger by contiguity** that fails to comply with the minimum lot size requirements to be considered conforming [i.e. > 2.5 acres in an RR-5, see BLC 5.5.7 (B) (1)] **shall be required to obtain a lot size variance from the Board of Adjustment**.

Reason 5 – Public Health

- According to the Building and Land Code 8.4.3 (C) (3) (f) (f) (i), lots requiring septic fields require 2.5 acres minimum and 2 septic field locations.
- The lots in question are in a zone which the BFPP describes as having "Severe Constraints" for septic suitability.
- Due to Mr. Pickett's zoning violations, there are now 3 septic fields on less than 4 acres adjacent to my western property line. Because of the soils, they may all 3 need to be doubled, as has happened with my septic field and my neighbor's. That is essentially 6 septic fields on 4 acres, all within 100 yards of my home.
- COA argues this parameter does not apply, because it is in Chapter 8, which governs "Subdivision."
  - A) As shown on slide 3, Mr. Pickett did, by the County's own terminology, engage in "Subdivision"
  - B) The COA's argument is silly on its face as it implies that we get to pick and choose what we shall comply with in the BLC

Reason 6 – Violation of Rural Density

- There is no dispute that the lots/parcels in question are zoned RR-5, or Rural Residential – 5, which is defined in Table 5-4 as having a minimum lot size of 5 acres; 200 foot minimum width at front setback; minimum front, rear, and side setbacks of 25 feet; and 25% maximum lot coverage
- Further, Rural Residential zoning, per BLC definition, consists of lots of 2.5 acres or greater; anything less than that density is Urban Residential density

THIS, is Rural Density in Black Forest Park – the Home Due East of Mine

Does This Look Like Rural Density?

Reason 7 – Merged ≠ Buildable

- The fact of a merger by contiguity does not equate to the right for an owner to build if other considerations of the zoning are not met. This is stated quite clearly on the very Merger by Contiguity Forms to which Mr. Pickett legally affixed his signature on three separate occasions.
- See for example, document 218009340 which says, **"NOTE: Merger does not relieve the property of compliance with regulations or criteria of other agencies or departments or of other applicable sections of the Land Development Code, except as otherwise expressly provided for in subsection K…Merger does <u>not guarantee</u>** [emphasis on the form] **that the affected parcel will be considered as a 'buildable parcel.'"**

Reason 8 – Public Safety

- The roads in the subdivision are all narrow, dead end, dirt roads and are not county maintained. The roads are therefore not the appropriate width for emergency vehicles including EMS vehicles, fire trucks, and tenders which have no place to turn around on the dead end street on which Mr. Pickett has increased density to 3 houses per 4 acres. This thoughtlessly endangers the lives of the residents of these homes, the lives of first responders, and the lives of other residents in Black Forest Park and other areas served by the Wescott Fire District.

Additional Concerns

- This area is defined as Timberland. Mr. Pickett removed over 3 acres of timber for all of this construction, including nearly ¾ acres of timber at 15910 Fools Gold for which there is no record of him having a driveway permit, a clearing permit, or a grading permit, and on an unbuildable site.
- Mr. Pickett cleared this 3/4 acre lot and leveled it for no reason at all and without permits to do so. Even though it is unbuildable, he listed it for sale for $120,000.00. The 30 year old, and older, Ponderosa Pines he removed are irreplaceable.

¾ Acre Lot on Fools Gold Pickett Cleared and Graded without Permits – Mature Ponderosa Pines Destroyed; View, Drainage and Topography Severely Affected

Additional Concerns (cont'd)

- I filed a Code Violation complaint regarding the violation of the 2.5 acre minimum lot requirement for OWTS. The code violation complaint was refused and remains uninvestigated.
  - It turns out that the same people who approved Mr. Pickett's code violations are the ones who inspect code violations. This is a severe conflict of interest the county must address.

What I Seek

- The Board of Adjustment has many options, including the latitude to require Mr. Pickett to restore the master parcel to its original condition and, per state statute, fines and jail time for every day that these zoning violations have persisted. I will not pretend to have your experience and expertise in terms of mitigation and restoration, but I beg that you exercise them to the fullest.
- I ask that my rights be protected as the aggrieved citizen. In 1993 I purchased a lot in 5-acre zoning, trusting that the forest and privacy and quiet would be there upon my retirement. I was wrong.
- We in Black Forest Park have watched the county put a developer's interests ahead of the individual property owners'. We have lost trust and confidence in El Paso County's ability to guard our rights, health, safety, and property value. You can begin to restore a modicum of confidence by doing the right thing at this juncture.
- In my lifetime, I will never again see the forest I loved to my west or my south. It has been destroyed. But structures can be removed, and trees replanted so that perhaps one of my children can see, well after I am gone, what I loved about my homesite for so long, before Mr. Pickett destroyed it.