

MEMORANDUM OF LAW

TO: Delton L. Walker, Washington County Prosecuting Attorney

FROM: Christopher H. Meyer 

RE: Analysis of Washington County Code provisions dealing with the division and residential development of A1-zoned land

DATE: August 27, 2021

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EXECUTIVE SUMMARY

This memorandum is provided in response to your request for my legal opinion and analysis of the provisions in the Washington County Code (“WCC”) dealing with the division and residential development of A1-zoned land.

Specifically, you inquired whether WCC §§ 5-4-1(B)(1) and 5-4-1(B)(3) allow a landowner to divide A1-zoned agricultural property into an unlimited number of 20-acre lots, which may contain one single-family residence per approved lot. I conclude that this is not permissible under the County’s zoning ordinance.

This is because the referenced provisions must be read in conjunction with WCC § 5-1-2(C)(8) (which allows the creation of no more than four lots on an “original parcel” existing as of 1979) and WCC § 5-4-1(B)(2) (which bars “residential subdivisions” and hence prohibits any new dwellings on divided A1 land. The only exception is WCC § 5-4-1(C), which allows A1 lots to be divided into up to four lots, each of which may contain one dwelling.

DISCUSSION

I. THE A1 ZONE IS ONE OF SEVEN ZONES.

Section 5-4-1 of the Zoning Ordinance addresses the “A1” agricultural zone. Most of unincorporated Washington County is zoned A1. The only other zones are “A2” (Agriculture Transition Zone), “C1” and “C2” (Commercial Zones), “D1” and “D2” (Industrial Zones), and “R” (Recreation Zone). There is no designated residential zone (although residences are allowed to some extent within some zones).

A1 land may be rezoned to another use if it can be shown that the land is not prime agricultural land. WCC § 5-4-1(H).¹

II. THERE ARE THREE WAYS TO DIVIDE PROPERTY FOR SALE OR DEVELOPMENT.

Washington County provides for three ways that property may be divided for purposes of sale or development.

Subsection B of Title 5 (the zoning ordinance) provides two ways of dividing land. The WCC does not assign a name to them, but I use the labels “dwelling splits” and

¹ The ordinance does not define “prime agricultural land.” Instead, the ordinance lists six factors to be weighed by the County Commissioners in considering whether A1 land can be rezoned. WCC §§ 5-4-1(H)(1)(a) through (e) and 5-4-1(H)(2). Subsection H is not the focus of this memorandum. That subsection may be addressed in another memorandum, if you so direct.

“non-dwelling splits” to distinguish them. The third is under Title 6. (Non-dwelling splits are also sometimes referred to as administrative splits.)

A. Non-dwelling splits under WCC § 5-1-2(C)(8)

I use the term “non-dwelling splits” for those authorized under WCC § 5-1-2(C)(8), which allows an original parcel or lot to be divided into up to 4 parts without going through the subdivision process set out in Title 6. These lots are subject to the prohibition on “residential subdivisions” in WCC § 5-4-1(B)(2). Hence new dwellings may not be placed on these lots. This is why I refer to these as non-dwelling splits.

B. Dwelling splits under WCC § 5-4-1(C).

I use the term “dwelling splits” for those authorized under section 5-4-1(C). They are also limited to 4 lots, but new dwellings may be placed on them. In a nutshell, subsection C allows, as a matter of right, the division of A1 zoned property into up to four lots, three of which are one-acre² and the fourth is whatever is left of the original lot.

C. Subdivision under Title 6

A third form of land division is “subdivision” under Title 6. Subdivision is a formal process that entails considerable up-front planning as well as extensive coordination and oversight by the County. It is typically used for larger scale developments. But residential subdivisions are not allowed in the A1 zone (WCC § 5-4-1(B)(2)). Thus, subdivision is not an option for A1 land (except for a non-residential subdivision such as the dedication of a road or cemetery).

III. THE 20-ACRE MINIMUM LOT SIZE APPLIES ONLY TO LOTS THAT WILL HAVE DWELLINGS; NON-DWELLING SPLITS MAY BE SMALLER.

Many Idaho county ordinances establish a minimum lot size for land zoned for agricultural use. Forty acres is common. In contrast, section 5-4-1 does not establish an across-the-board minimum lot size for A1 land. The closest it comes to doing so is subsection 5-4-1(B)(1), which provides that “no dwelling shall be sold, transferred or built with less than twenty (20) acres of lot area.”³

² The one-acre size limit for a dwelling split could be increased through a special use permit. WCC § 5-4-1(G).

³ Section 5-4-1(B)(1) speaks in terms of selling, transferring, or building a dwelling. This should be understood to refer to selling or transferring land containing a dwelling or land on

In other words, if a landowner wishes to convey A1 land that has or will have a dwelling,⁴ the lot must be at least 20 acres. But an original parcel or lot⁵ in the A1 zone may be divided into as many as four parts⁶ and conveyed in any lot size (as small as an acre) if it does not and will not contain a dwelling.

This provision is subject to an exception: “except as provided in subsection C of this section.” WCC § 5-4-1(B)(1). (Subsection C is one authorizing up to three one-acre “splits,” which I discuss below.) Thus, the minimum 20-acre lot size does not apply to subsection C splits, even if a new dwelling will be placed on them.

This is a sensible distinction. By way of example, it would allow Farmer Jones to sell three acres of his 40-acre farm to neighboring Farmer Smith who can add it to her 40-acre parcel and farm it more efficiently than Farmer Jones can. But if Farmer Smith later seeks a building permit on the 3-acre lot, the permit will be denied. In other words, the Zoning Ordinance says landowners are free to divide an original lot in zone A1 up to three times so long as no new home is constructed on any of the resulting lots. Indeed, this may be done under the existing ordinance without any notice to or approval by the County.

IV. RESIDENTIAL SUBDIVISIONS ARE PROHIBITED, EXCEPT FOR DWELLING SPLITS UNDER WCC § 5-4-1(C).

Subsection 5-4-1(B)(2) prohibits any and all “residential subdivisions” within zone A1. The term “residential subdivision” is defined broadly.⁷ It applies to any

which a dwelling will be built. Except for condominiums and mobile homes, one does not ordinarily sell just the dwelling itself.

⁴ Dwelling is a defined term. “DWELLING: Any building or portion thereof which is used as a private residence or sleeping place of one or more human beings, but not including hotels, motels, tourist courts, resort cabins, clubs, hospitals or similar uses.” WCC § 5-2-1.

⁵ An original parcel or lot is defined as one in existence on April 9, 1979. WCC § 5-2-1. An original parcel or lot may be divided into up to four parts without going through the subdivision process set out in Title 6. WCC § 5-1-2(C)(8).

⁶ The limit of three divisions into four parts is found in WCC § 5-1-2(C)(8).

⁷ “Residential subdivision” is a defined term: “RESIDENTIAL SUBDIVISION: Any division or subdivision of real property with a residence or residential use attached to, or associated with, any of the resulting parcels.” WCC § 5-2-1. There is ambiguity as to how this applies to the division of a parcel containing an existing residence. A very strict reading would be that it prohibits any division of a parcel with an existing residence (because one of the resulting parcels will contain that residence). That is not a reasonable interpretation, because it would render unlawful virtually all divisions of A1 land (other than under subsection C). I

division (into two or more parcels⁸) of land in which the resulting parcels will be used for a new residence.⁹ For example, if someone owned 1,000 acres of A1 land and divided it into two 500-acre parcels, a new residence could not be built on either of the resulting parcels. This is because doing so would constitute a “residential subdivision.”

This reads as an absolute prohibition with no exceptions. However, WCC § 5-4-1(C) must be read to operate as an exception to the prohibition on residential subdivisions. This is for two reasons. First, if new dwellings were not allowed on subsection C splits, subsection C would be a nullity. It would add nothing to the authority already available to divide land into four non-dwelling lots under WCC § 5-1-2(C)(8). Second, there is an express exception in WCC § 5-4-1(B)(1) allowing dwellings to be placed on one-acre lots created under WCC § 5-4-1(C).

In sum, the only provision allowing new dwellings to be placed on divided A1 land is WCC § 5-4-1(C).

V. WCC §§ 5-4-1(B)(1) AND 5-4-1(B)(3) DO NOT AUTHORIZE A LANDOWNER TO DIVIDE A1 LAND INTO 20-ACRE PARCELS AND PLACE A NEW RESIDENCE ON EACH ONE.

Subsection 5-4-1(B)(3) provides: “Only one single-family residence allowed per approved lot.”¹⁰ Some have construed this provision, along with the minimum 20-acre lot provision in WCC § 5-4-1(B)(1), to authorize a landowner to divide A1 land into multiple 20-acre lots, each of which may hold a new residence. This is incorrect, because these subsections must be read in conjunction with the rest of Title 5.

WCC § 5-4-1(B)(1) (which sets a 20-acre minimum lot size for lots that will have dwellings) contains an exception for subsection C. As noted above, this has the effect of implicitly overriding the prohibition on “residential subdivisions” in WCC § 5-4-1(B)(2).

believe it is more reasonable to read this definition as prohibiting any new residence being placed on any of the resulting parcels.

⁸ As shown in footnote 7, the definition of “residential subdivision” refers to “any division or subdivision.” WCC § 5-2-1. If it said only “subdivision,” that would have tied into the definition of “subdivision” and made it applicable only to subdivisions creating five or more parcels. WCC § 6-2-2. But the definition also says “any division.” Thus, the ordinance unambiguously applies to any division no matter the number of parcels.

⁹ The term “residence” is not defined. I understand it to mean the same as “dwelling,” which is a defined term.

¹⁰ The term “lot” is defined (WCC § 5-2-1 and WCC § 6-2-2), but the term “approved lot” is not. I read the provision as simply referring to any lawfully created lot.

Thus, one-acre dwelling splits created under WCC § 5-4-1(C) are allowed to have one single-family residence on each of the resulting four lots. But this exception is limited to WCC § 5-4-1(C) splits.

WCC § 5-4-1(B)(1) and 5-4-1(B)(3) do not allow a landowner to divide his or her property into an unlimited number of 20-acre parcels and then place a house on each one. First, WCC § 5-1-2(C)(8) allows division of an original parcel into no more than 4 lots. Second, there is no exception (outside of subsection C) to the “residential subdivision” prohibition in WCC § 5-4-1(B)(2). Thus, new dwellings may not be placed on the four lots authorized by WCC § 5-1-2(C)(8).

In sum, the “one residence per lot” allowed by WCC § 5-4-1(B)(3) allows a new dwelling to be placed only on (1) an “original parcel” of 20 acres or more that does not already have a dwelling on it, or (2) each lot created under subsection C that does not already have a dwelling on it.

VI. THE DECISION IN *WOODCOCK V. WASHINGTON COUNTY* IS NOT APPLICABLE DUE TO THE 2012 AMENDMENT OF THE COUNTY’S ZONING ORDINANCE.

In the 2008 case *Woodcock v. Washington County*, the district court concluded that the Woodcocks were entitled to subdivide their A1-zoned land into lots of 20 acres or more and that a residence could be placed on each lot. That holding was premised expressly on the fact that, at the time, the County’s zoning ordinance did not define the term “residential subdivision.” *Woodcock* at 6-7. Accordingly, the district court rejected the County’s finding that Woodcocks’ application was barred by the prohibition on residential subdivisions in the A1 zone.

In response to that decision, the County amended its zoning ordinance to add the definition of residential subdivision discussed above. The new definition expressly prohibits any division of A1-zoned property into lots “with a residence or residential use attached to, or associated with, any of the resulting parcels.” WCC § 5-2-1. This amendment renders the *Woodcock* decision obsolete and inapplicable.

The *Woodcock* decision also relied on the statutory definition of subdivision, which is now codified to Idaho Code § 50-1301(17). (The court referred to subsection 15.) Any concern about that definition is mooted by the County’s new definition of residential subdivision. The statute expressly provides: “Cities or counties may adopt their own definition of subdivision in lieu of this definition.” Idaho Code § 50-1301(17).